



**SHOULD THE AFRICAN UNION BE GRANTED A PERMANENT SEAT IN THE
UNITED NATIONS SECURITY COUNCIL?**

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To borrow from former President Thabo Mbeki's poetic tribute to Nelson Mandela at his last sitting in parliament as President of South Africa: *isinamva siyabukwa, mhla wasabeli gwijo*, loosely translated as, 'the journey must be looked at on arrival at your destination.' A celebration is a reminder of what has been overcome, and a source of inspiration for what is yet to come.

Today, I breathe a sigh of relief because I have completed the journey not because I have been strong, nor do I possess exceptional brilliance, but because I have – at every step of the journey – an army of supporters, whose strength and encouragement I have leaned on. Among them I count my two supervisors, Prof Kwadwo Appiagyei-Atua and Prof Zozo Dyani-Mhango. Among them I count Hussienatou Manjang, my dearest friend who has borne the brunt of my frustrations and despondence, and endless messages requesting her to find me specific sources I could not access on my own; among them I count my family, to whom I have been markedly distant, yet had them close by as their unending love and support has kept check on my well-being; and among them I count the entire Centre for Human Rights, both for the opportunity to pursue this prestigious degree and for their consideration of the expensive assistance I have required.

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ACRONYMS AND ABBREVIATIONS

AU or simply Africa	African Union
General Assembly	United Nations General Assembly
China	Peoples' Republic of China
Constitutive Act	African Union Constitutive Act
Covenant	Covenant on the League of Nations
G4	Group of Four
NATO	North Atlantic Treaty Organization
OCHA	Office for the Co-ordination of Humanitarian Affairs
UK	United Kingdom
UN	United Nations
UN Charter	Charter of the United Nations
UNSC	United Nations Security Council
US	United States

ABSTRACT

The United Nations Security Council is facing its biggest test for legitimacy. Calls for its reform have grown louder in recent years, becoming a focal point in debates in the United Nations General Assembly. The Africa Union has been at the forefront of the calls for reforms, arguing that the Security Council is undemocratic and under-representative of the developing world. In particular, the African Union has been vocal about the need for the region to have two permanent members with veto power in the Security Council, it being the only continent that is not represented in the permanent category of the Security Council despite being the largest continent by the number of states and home to the bulk of the Security Council's missions. This paper analyzes the intricacies concerning the debate on Security Council reforms, with particular interest to the African Union position, including the prospects of success in reforms and the representative nature of its leading candidates.

1. INTRODUCTION

1.1. Background and context

We don't understand why you have three countries out of five countries on the Security Council as permanent members with veto power coming from Europe. We all know that Europe is no longer such an important part of the world as it was in 1945. And then you look at Africa, 50-plus odd countries and not a single country sits on the United Nations Security Council as a permanent member wielding the veto [power], representing Africa and African interests - Robert Mugabe¹

In recent times, there has been growing discontent over the structure of the United Nations Security Council (UNSC), with heads of states and governments repeatedly calling for reform of the UNSC to make it more representative and reflective of the current world order. The perceptions that the developing world is underrepresented in the current structure of the UNSC and that it reflects a world order that is outdated and irrelevant to the modern era have become widespread, leading to the long debate concerning the creation of a new structure and what it would look like. Voices calling for reform have come from all the regions in the world, with the African Union (AU or simply Africa) perhaps providing the strongest voice due to its size. There is a general consensus around the world that the UNSC needs to be reformed, although the nature and extent of reforms remains a contentious issue with no immediate end in sight. Various proposals for reforms have been made by the different actors, chief among them being the group known as the G4, which features some of the current powerful countries and economies of the modern era - Brazil, India, Germany and Japan - supported strongly by the AU, which is one of the regions with the highest number of votes in the United Nations General Assembly (General Assembly).

Despite the size of the African Union, it is the least represented region in the UNSC, currently allocated three out of 15 seats occupied by Gabon, Ghana and Kenya at the time of writing. This is in contrast to 6 countries from Europe,² which include three permanent members with veto

¹ Former Zimbabwean President, Robert Mugabe, was a staunch proponent of the call for Security Council reforms, repeating the call numerous times at both the United Nations and the African Union.

² United Kingdom, France, Russia, Norway, Ireland and Albania at the time of writing.

power,³ three members from Asia, including one permanent member with veto power,⁴ and three members from the Americas, including one permanent member with veto power.⁵ Under the current structure, Africa is the only region that does not have a member with permanent status and veto power and this appears to be the main grievance from the African Union. The UNSC thus faces a legitimacy crisis, which stems from the need to be more inclusive and representative of the broad membership of the United Nations (the UN).

1.2. Statement of the problem

Africans have a very clear position; we are saying there will be no change without us. The (sic) 70 percent of the issues that go into the Security Council are about us, so it cannot continue without us.

– Maite Nkoana-Mashabane⁶

Africa has the largest number of countries from a single region in the UN (54), representing about a quarter of the total number of member states (193 states) in the UN. However, its limited representation in the UNSC means that its participation in the deliberations and decision-making structures of the UNSC are similarly limited. It is also the only continent that does not have a permanent member with veto power in the UNSC, if we read South and North America as one continent represented by the United States (the U.S). This is despite the fact that the bulk of the missions of the UNSC are focused on Africa.

Because of this, Africa complains about underrepresentation and wants permanent membership with veto power in the UNSC, believing that there is a need for an African state to represent the African voice and African interests. It is apparent that Africa is demanding equity in the UNSC, and it wants to choose the country that will represent it in the permanent category of the UNSC.

³ The permanent members being the United Kingdom, France and Russia. The permanent members enjoy greater privileges in the UNSC, including the power to veto any resolution by the UNSC, which means that whatever proposal is made by the UNSC must first receive the approval of the permanent members – express or tacit - before it can have binding effect.

⁴ While parts of Russia are in Asia, its largest part is in Europe, *de facto* and *de jure* making it a European state. China is the permanent member whose territory is fully in Asia.

⁵ The United States of America is the permanent member with veto power from the Americas.

⁶ Maite Nkoana-Mashabane served as the South African Minister of International Relations at the time she made the statement.

However, the Charter of the United Nations (UN Charter) currently makes provision for only five permanent members, the U.S, the United Kingdom (U.K), France, Russia and the Peoples' Republic of China (China), who were the victors and powerful states after the second world war when the UN came into being. None of these states were chosen by their regional blocs to act as regional representatives in the UNSC. This creates a problem for the AU as its demand for a permanent seat threatens to transform the current world order, and it seeks to choose the member state it will have as a representative, this being a novel and unprecedented demand.

In addition to the fact that the current permanent members of the UNSC were not chosen by their regions, there is scant evidence to suggest that any of them represent the interests of their regions in the UNSC.⁷ Instead, there is evidence suggesting that they represent their national interests and do not consider the views of their regions when exercising their rights and privileges. This casts aspersions on the AU's quest for permanent membership based on regional representative and interests' grounds, more so when it demands to arrogate to itself the right to choose which country will represent it. As things stand, neither of the AU's demands can be accommodated under the current law as set in the UN Charter and its structure.

1.3. Research objective

Considering the problem discussed above, this research aims to examine the debate concerning the reform of the UNSC, with a particular focus on the African perspective. It seeks to assess the merits or lack thereof in the African perspective - that is - the perceived underrepresentation in the UNSC and the demand for permanent membership with veto power. It also aims to look at the representative nature or lack thereof of permanent membership. In other words, it seeks to examine whether the granting of a permanent seat with veto power to the AU would make the UNSC more inclusive of the AU and more representative generally.

Since none of the permanent members were chosen by their regions for permanent seats in the Security Council, this paper aims to examine what, if any, material difference could accrue to the

⁷ Perhaps France is the exception to this individuality and none representative nature of the permanent members of the Security Council, owing to the uniform foreign policy adopted by the European Union, to which it is a member and one of the leading economies. The United Kingdom was also part of the European Union prior to 2020 and could also be said to have been a representative of the interests of the European prior to its exit from the bloc.

AU if it were granted the right to choose its own member to take the permanent seat should it become available, and what criteria the AU could employ to make such a choice. Thus, the paper also seeks to conceptualize possible measures that the AU can employ to make whichever member state it chooses to be truly representative once it ascends to the permanent seat.

Furthermore, various African countries have registered interest in being the African representatives with permanent seats in the UNSC. This paper will attempt to examine their candidature, using the criteria that it proposes to assess their suitability as candidates. Lastly, it will examine what material difference is likely to be made in the deliberations and resolutions of the UNSC if permanent membership is granted to the AU, with due regard to their responsibility to protect and their respective rights to intervene in member states (while the UNSC can intervene in any member state of the UN, the AU can only intervene in its member states in accordance to the African Union Constitutive Act) in order to maintain international and regional peace and security, and prevent war crimes, genocide and crimes against humanity, rights and responsibilities conferred to them by the UN Charter and the African Union Constitutive Act (the Constitutive Act), respectively.

1.4. Research questions

Considering the criticism that has been directed at the UNSC's current structure and the apparent growing doubt over its legitimacy, the primary question to be explored in this paper is whether the UNSC has arrived at a point where it needs to be reformed and whether the AU should have a permanent seat/s in a new structure that is adopted. The questions it seeks to answer can be summarized as follows:

- i. Should the AU be granted a permanent seat with veto power in the UNSC?
- ii. Are the current permanent members of the UNSC regional representatives?
- iii. Does regional representation by means of permanent membership really matter?
- iv. If the permanent seat is granted, how can the AU ensure that the member state it chooses will be truly representative, and what criteria can it use to select the state?
- v. What material difference will permanent membership make to the AU and the UNSC?

1.5. Methodology

This research will use primary sources such as the UN Charter and the Constitutive Act to look at the existing legal structure and impediments in the way of the AU's quest for permanent membership in the UNSC. It will also use resolutions passed by relevant institutions such as the GA and the AU's Ezulwini consensus.

Great reliance will be placed on academic articles and books, as well as other sources on the internet, such as reports from international organizations and newspaper articles. Reference will be made to speeches made on the subject by former and current world leaders. The research shall also draw from the experiences of the UNSC missions in Africa in its assessment of the question regarding the material difference likely to be made by the grant of a permanent seat with veto power to the AU.

1.6. Limitations of the study

The main limitation to this paper is that it will purely rely on secondary data as there is no opportunity to interview relevant persons on the subject. Given its political nature, there is limited legal material that can be used to assess the legal aspects of UNSC reforms and permanent membership, thus giving the paper a strong political character. There is also time constraint as it has to be produced in a relatively short space of time and on a relatively expedited basis. Another issue is that, while there have been many speeches made on the subject, not much has been written on, for instance, the material difference likely to follow the grant of a permanent seat to the AU in the UNSC, thus limiting the availability of resources that can be used.

1.7. Literature review

Freiesleben argues that the UNSC has limited geographical balance and this, combined with the five exclusive permanent seats that have veto power, makes it less representative than desired by many member states, especially emerging "middle" powers that are increasingly calling for the

restructuring of the UNSC.⁸ The *Conference Report*⁹ posits that the current relationship between Africa and the UN is paradoxical in the sense that, while there may be a lot of talk about Africa, there is not so much talk with Africa and even less so of Africa itself and its role in the UN, despite the fact that the continent hosts the bulk of the UNs' peacekeeping missions. He argues further that, for some states, reforming the UNSC is mainly about increasing their own power; and that a seat at the table could potentially translate into greater influence over much of the UNs' system. Since all the members of the AU are characterized as "emerging" states, or the developing world, and the principal complaint by the AU is that it is underrepresented despite its geographical size, these articles will be used to discuss the AU's quest for permanent membership and veto power, with particular interest in the geographic balance of the UNSC as well as substantive representation of the developing world or emerging states.

The AU, through the Ezulwini consensus, adopted a common position regarding UNSC reforms where, among other things, it demands the allocation of two permanent seats in the UNSC to the AU and five non-permanent seats. *Mbara et al* argue that the AU is the most organized region on the subject of reforms because of its common position.¹⁰ *Chakanyuka* argues that it is difficult for other regions to negotiate with the AU since its selected representative for the permanent seats is yet unknown, and its proposal is deemed a hindrance because of its far-reaching implications.¹¹ This paper will use the Ezulwini consensus to delineate the AU's position on reforms and its implications for the broader reform debate.

Hoopes and *Brinkley* argue that the UNSC is the "nerve center" that protects the entire membership of the UN and was never intended to be completely representative.¹² However, *Hosli* and *Dorfler* posit that the UNSC is often deadlocked essentially because a permanent member has cast or threatened to cast a veto on the basis of its domestic interests, and that the veto right of permanent

⁸ J. von Freiesleben. [2008] *Managing Change at the United Nations: Security Council Reform* [Online]. Pg. 1

⁹ Conference Report. [2008]. Tarrytown, New York, *The Relationship Between Africa and the United Nations: From Disenchantment to a More Effective Cooperation*. Available from: <https://library.fes.de/pdf-files/bueros/usa/05713.pdf>

¹⁰ G.C. Mbara, N. Gopal. S. O. Ehiene & H.O. Patrick. [2021] *Re-Evaluating the African Union's Ezulwini Consensus in the reform of the United Nations Security Council* [Online]. Available from: [10.31920/2050-4306/2021/10n1a3](https://doi.org/10.31920/2050-4306/2021/10n1a3)

¹¹ T.L. Chakanyuka. [2020]. *Reforming the United Nations Security Council by the African Union Proposal to Address Inequality: The Limitations*. Available from: [10.47348/ANULJ/v8/i1a6](https://doi.org/10.47348/ANULJ/v8/i1a6)

¹² T. Hoopes & D. Brinkley. [1997]. *FDR and the Creation of the United Nations*. Yale University Press.

members provides them with a huge advantage and far-reaching privileges.¹³ *Hassler* posits that smaller states get the impression that the UNSC is less interested in issues of collective concern and is only galvanized into action when it suits the individual interests of a permanent member and that, by the sheer amount of their output, UNSC permanent members dominate the UNSC and thereby prioritize their national interests.¹⁴ This view is supported by *McDonald* and *Patrick* who posit that the U.S. regularly resorts to the UNSC for political backing and legal authority for multilateral objectives that advance U.S. interests.¹⁵ Other permanent members are equally guilty of using the UNSC to further national interests at the expense of collective security. For example, *Radin* and *Reach* argue that Russia's support for the UN system is largely based on the fact that the UN system is the sole remnant of its superpower status through which it can continue influencing global affairs, following the dissolution of the more powerful Soviet-Union, and it has used the UN system to block resolutions condemning its own behaviour in Crimea.¹⁶ China has likewise selfishly used the UN system to veto resolutions to recognize Taiwan's independence and to further the individual interests of states that enjoy its friendship, such as casting a veto to deny Bangladesh membership in the UN because Pakistan, China's "all weather friend", did not want Bangladesh to be part of the UN following a split of the two countries.¹⁷ These writings will be used to discuss the merits of the AU's representation argument and the questions around the regional representative nature (or lack thereof) of the current permanent members; that is, whether or not they represent the interests of their regions or their national interests in UNSC deliberations and resolutions, including the cast of the veto power.

Lai and *Lefler*¹⁸ identify various models of representation – substantive and descriptive representation - which they use to assess a state's representativeness of its region on the basis of

¹³ M.O Hosli & T. Dorfler. [2019]. *Why is Change So Slow? Assessing Prospects for United Nations Security Council Reform*. Available from: [10.1080/17487870.2017.1305903](https://doi.org/10.1080/17487870.2017.1305903)

¹⁴ S. Hassler. [2012]. *Reforming the United Nations Security Council membership: the illusion of representativeness* [e-book]. Available from: [9780415505901](https://doi.org/9780415505901)

¹⁵ K.G McDonald & S.M. Patrick. [2010]. *UN Security Council Enlargement and U.S Interests*. Council on Foreign Relations Press. Available from: 978-0-87609-477-8

¹⁶ A. Radin & C. Reach. [2017]. *Russian Views of the International Order*. [e-book]. Available from: [9780833097279](https://doi.org/9780833097279)

¹⁷ D. Sinha. [2018]. *Legitimacy of Power: The permanence of five in the United Nations Security Council*. [e-book]. Available from: [9789388161046](https://doi.org/9789388161046), pg. 158.

¹⁸ B Lai & V.A Lefler. [2017]. *Examining the role of region and elections on representation in the United Nations Security Council*. [Online]. Available from: [10.1007/s11558-016-9254-z](https://doi.org/10.1007/s11558-016-9254-z)

similarities when one describes the political, cultural and economic outlook and the closeness of their voting patterns with other states in the same region. Since, as *Badza* and *Maeresera* argue, African countries realized that permanent representation in the UNSC is critical in addressing peace and security in the region, but are yet to decide who the permanent representatives will be,¹⁹ this representative model will, jointly with the UN Charter and the Constitutive Act, be used to assess the representativity of the AU's leading states for the UNSC permanent seats. They will be used to propose a criterion that the AU could use to elect its permanent representatives.

In *Responsibility to Protect*,²⁰ *Kuwali* asks: “should action to prevent large scale killing in an African country be beholden to a Security Council that has no permanent membership?”. He proceeds to argue that the High-Level Panel indicated that, in some urgent situations, UNSC authorization may be sought after operations have commenced. Whereas the world summit outcome rejected demands that states or organizations such as the AU should be able to act before gaining UN authorization,²¹ this paper will show that, in practice, there is wide acceptance of AU interventions conducted outside the framework of the UNSC and, in some cases, there was no after-the-fact authorization. It will argue that, to avoid the emergence of an AU use of force system running parallel with but outside of the UNSC, granting the AU a permanent seat in the UNSC would serve to balance the scales as, where differences in the assessment of the need to intervene arise between the AU and UNSC and the latter wishes to condemn the actions of the former, the permanent member of the AU could exercise a veto against such resolution, thus saving the organizations reputational damage.

1.8. Structure

This paper will be made up of four chapters. The first chapter introduces the topic, giving insight into the background of the call for UNSC reforms, an overview of the problem and the research questions it seeks to deal with. It also outlines the research objectives it seeks to achieve and the

¹⁹ I. Badza & S. Maeresera. 2019. *The Ezulwini Consensus and Africa's Quagmire on United Nations Security Council Reform: Unpacking the Dynamics* [Online]. Available from: [10.31920/2075-6534/2019/s1n1a12](https://doi.org/10.31920/2075-6534/2019/s1n1a12)

²⁰ Kuwali. [2010]. *Responsibility to Protect: Implementation of article 4(h) of the African Union Constitutive Act*. [e-book]. Available from: 9789004191716. 9789004215962.

²¹ *United Nations, A More Secure World: Our Shared Responsibility*: Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, and A/59/565/Corr., 6 December 2004, [‘High Level Panel Report’], para. 298a.

methodology that will be used to achieve the intended outcomes. It further gives an overview of the limitations of the study and introduces the reader to the literature that will be part of the subsequent chapters and discussions.

The second chapter will discuss the history of the call for UNSC reforms and the African Union's position in the reform debate, discussing the various points it has advanced. It will consider the Ezulwini consensus which represents the collective view of the AU on the issue. The third chapter will consider the question of whether a permanent seat for the AU in the UNSC will be truly representative of the region's interests, particularly since the current permanent members appear to represent their national interests rather than regional interests. It will also propose measures that the AU can adopt to ensure that whichever member state it selects as a representative will truly represent its interests. To do this, it will briefly assess the candidature of the member states that have expressed interest in assuming the permanent seats.

The fourth chapter will discuss the question of whether an AU permanent representation in the UNSC will make any practical difference to international and regional peace and security. And whether the AU can be more effective in exercising its responsibility to protect human rights in its region and its right to intervene in cases of genocide, war crimes and crimes against humanity, as provided for in its Constitutive Act. It will argue that the permanent membership for the AU in the UNSC can serve to harmonize the two organizations' responsibility to ensure international peace and security in Africa.

2. THE DEVELOPMENT HISTORY OF THE SECURITY COUNCIL

2.1. Introduction

The UNSC was established after the second world war to maintain international peace and security. Between 1943 and 1944, representatives of the now permanent members²² of the UNSC got together to formalize the Declaration by the United Nations, which later became the basis for the UN and led to the creation of the UN Charter.²³ The focal points of discussions were the structure of the UN and the composition of the UNSC, which became the dominant issue.²⁴ It is submitted that the composition and structure of the UNSC became the political battleground between the East²⁵ and the West,²⁶ serving a highly politicized forum.²⁷

The powerful countries²⁸ often attempted to formalize their dominance and the smaller states rejected this attempt as they preferred sovereign equality between states.²⁹ However, the smaller states shifted from their position after the first world war as the need for strong international institutions became stronger, possibly due - in part – to the smaller states fearing invasions and human rights violations by powerful states, and the need for international order and protection to keep the powerful states in check. This shift led to many states compromising on the sovereign equality that characterized negotiations before the war.³⁰ Consequently, the Covenant on the League of Nations (the Covenant) created privileges for the permanent members of the UNSC, which were the most powerful states at the time,³¹ and these privileges were carried into the UN after the dissolution of the League of Nations. The privileged position (permanent membership and power to veto) enjoyed by the permanent members of the UNSC today reflects an extension

²² At the time the United States, Union of Soviet Socialist Republics, the United Kingdom and The Republic of China

²³https://en.wikipedia.org/wiki/United_Nations_Security_Council#:~:text=The%20UN%20officially%20came%20into,%2C%20in%20London%2C%20United%20Kingdom.

²⁴ Ibid.

²⁵ The East refers to the political grouping of countries mainly from central Asia, Eastern Europe, the Mediterranean region and the Arab world or middle east. Easier to say the socialist states led by the then Soviet Union

²⁶ The West refers to the political grouping of states from various regions, primarily made up of the majority of European and north American countries like the United States of America and Canada. Easier to say the capitalist world led by the United States of America

²⁷ Supra note. 8

²⁸ Now the permanent members of the Security Council referred to in note 1 above.

²⁹ N. Frisch, [2006]. *The Security Council and the Great Powers*. [Online]. Oxford University Press.

³⁰ Ibid.

³¹ Ibid; France was the notable absence at this stage of the negotiations.

of privileges initially gained from the League of Nations. The smaller states agreed to this compromise on the understanding that they needed to choose between an organization where the permanent members of the UNSC would enjoy privileges, or have no organization at all. The latter was the choice, although the smaller states often tried to keep the permanent members at an uneasy balance and maintained aspirations of formal equality between states.³²

Thus, the compromise that saw privileges conferred to great powers has always been a controversial measure designed to appease the great powers rather than the ideal position envisaged by the international community. And, during the negotiations for the League of Nations and subsequently the UN, it was a measure influenced by the circumstances of the time, which included the aftermath of World Wars I and II and the desire to put a permanent and immediate end to wars. During this period, the international community was primarily concerned about fostering a new era where human rights are respected and protected. The idea of international institutions with sovereign equality has, therefore, never been abandoned; it remains an aspiration that, admittedly, continues to remain unrealistic and possibly impractical.

Attempts to reform the UNSC have a relatively long history and have so far been largely unsuccessful, save for a few concessions that have been granted over the years. The first attempt to reform the UNSC came in the early 1960s following the admission of new members in the UN, principally from newly independent African countries and others in the developing world. In 1965, a concession saw the non-permanent seats in the UNSC expanded from 6 to 10 in a measure designed to reflect the growth of the UN from its inception.³³ Initially, the UN was made up of mainly countries in the developed world and they were joined by the newly independent states, with many joining immediately after gaining independence from their colonial masters. This means that these newly independent states took no part in the negotiations for the formation of the UN and that of its organs like the UNSC.

As newly independent states that experienced the violence of colonialism and dispossession, it is easy to believe that they likely harbored the same fears borne by the smaller states during the

³² Supra note 8.

³³ Supra n.8

negotiations for the UN and the UNSC, which led to the powerful countries winning permanent membership in the UNSC despite initial objections. The subsequent ratification of the UN and its organs by the newly independent states was arguably necessitated by fears and the desire for protection of their hard-fought independence and to take their place in the world order like other independent states. A radical reform of the UNSC by new members could possibly have risked disturbing the newly established order, built on compromises that followed difficult negotiations in the aftermath of a world war.

As aforementioned, the newly independent states achieved some success in calls for reforms after joining, resulting in the expansion of the UNSC in the non-permanent member category to reflect the enlargement of the UN, although this did little to balance power between the permanent and non-permanent members of the UNSC. As a result, the push for more reforms has continued, led by countries from different regions, including those in the developed world that were part of the negotiations for the creation of the UNSC. The most important and seemingly controversial aspect in this push for reforms concerns the expansion of permanent membership seats and the veto power that comes with it. Chief among the arguments is that the world has changed since the creation of the UNSC in 1945 and it has seen the rise of new powers like Germany, India, Japan and Brazil, all of whom have played important roles in the missions of the UNSC and the UN at large since its coming into operation. In these modern days, so the argument continues, there is hardly a justification for the continuity of the UNSC in its current form.

2.2. The African Union position on reform

The African Union has been one of the frontrunners in calling for the reform of the UNSC, with some commentators of the view that it holds the key to the desired reforms because of its large voting size in the General Assembly,³⁴ which would see a resolution being passed to reform the UNSC³⁵ and put the permanent five members - who are currently not receptive to reform proposals - under pressure.

³⁴ With 54 member states in the United Nations representing the African Union, it holds 42 percent of the 129 votes required to pass a resolution to enlarge the Security Council.

³⁵ Article 108 of the United Nations Charter requires a vote of two-thirds majority of the General Assembly members for amendments.

The AU is said to be the most organized region on the subject of reforms because of its common position that is supported by the majority of AU members.³⁶ AU leaders met in Ezulwini³⁷ in 2005 to discuss and adopt the common position to be presented in the UNSC reform debate, along with other pertinent matters such as the use of force and responsibility to protect. The common position adopted by the AU is a demand for two permanent seats in the UNSC, with all the prerogatives and privileges that come with it, including the veto power.³⁸ While the AU is opposed in principle to the power to veto, it expressed the view that, as a matter of common justice, the power to veto should be extended to all permanent members, so long as it exists.³⁹ It argues that this recommendation will solve the current underrepresentation of the third-world and the newly emerging economic powerhouses. Perhaps more importantly, it argues that, for fairness and equity, the membership of the UNSC must be increased⁴⁰ from the current standing of 15 member states to allow a broader representation of the world.

Various attempts have been made to move the AU from this position as its demand for veto power is viewed as a hindrance to the quest for permanent membership, though it has withstood all attacks and refuses to compromise.⁴¹ The AU says that its goal is to be “fully represented” in all decision-making organs of the UN and it describes full representation as entailing no less than two permanent seats with veto power and five non-permanent member seats, resulting in a total of seven member countries from the region in the expanded UNSC it proposes.⁴² In addition, it demands the right to select Africa’s permanent representatives at the UNSC, using its own criteria, with due regard to the representative nature and capacity of the country it chooses,⁴³ although it has not as yet decided on the criteria it will use to select the representatives and it remains unclear which countries will be selected.

³⁶ G.C. Mbarra et al, *Re-Evaluating the African Union’s Ezulwini Consensus in the reform of the United Nations Security Council* (2021). DOI: <https://doi.org/10.31920/2050-4306/2021/10n1a3>

³⁷ Ezulwini Valley in the Kingdom of eSwatini

³⁸ *The Common Position of the Proposed Reform of the Security Council*. [2005]. Executive Council of the African Union.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ The G4, Germany, India, Brazil and Japan tried to negotiate with the African Union to adopt a position similar to theirs and push for new permanent seats without veto powers in what the G4 saw as “getting one foot into the door”. South Africa and Nigeria similarly tried to negotiate an acceptance of this compromise although it was rejected by the majority of member states in the African Union.

⁴² Supra note. 38

⁴³ Ibid.

It is clear that the African Union wants to undo the underrepresentation it currently experiences and wants to be placed on a comparable footing to other regions in the UNSC. In furtherance of its position, it contends that most of Africa was not represented during the negotiations for the creation of the UNSC in 1945 and that it was not in a particularly strong position when the first reforms took place in 1963.⁴⁴ This appears to challenge the legitimacy of the UNSC or perhaps the UN as a whole, in that they were created at a time when a significant number of the current members played no part in its formation. The initial membership of the UN was 55 countries at inception and it now stands at 193 countries, meaning that only about 28% of the current membership was represented when the negotiations for their creation took place. This feeds into the general agreement that the international community is vastly different today from what it was when the UN was founded.⁴⁵

Thus, Africa's position that it lacked representation during the negotiations for the creation of the UN and the UNSC cannot be gainsaid as it was largely still under colonialism, with African states being an extension of their colonial masters and incapable of voicing an independent opinion. This means that, when they eventually joined the UN following independence, they joined a fully formed body and conformed to the structures that were in place, unrepresentative of Africa's geographic outlook as they were. Thus, the aspirations of Africa are premised on equitable representation of the developing world in the UNSC.⁴⁶

2.3. The challenges to the quest for permanent membership

The AU faces numerous substantive and procedural challenges in its quest for permanent membership with veto power. At the forefront is the onerous task associated with amending the UN Charter since there is a clear difference in the selection of the permanent and non-permanent members.⁴⁷ In the non-permanent members category, the criteria that is considered for selection is

⁴⁴ In vii of the Ezulwini Consensus, it states "recalling that, in 1945, when the United Nations was being formed, most of Africa was not represented and in 1963, when the first reform took place, Africa was represented but was not in a particularly strong position.

⁴⁵ Supra note.15

⁴⁶ Ibid.

⁴⁷ Article 23 of the UN Charter provides that the General Assembly shall elect six members of the UN to be non-permanent members in the UNSC, with due regard being paid, in the first instance, to the contributions of members

contribution to the objectives of the UN and geographical location. The first leg clearly gives preference to member states that are active in the activities of the UN, arguably in an effort to get them more involved in the deliberations and decision-making procedures of the UNSC and not simply carry out objectives determined without their input. The second leg clearly shows that the UNSC seeks a geographical representation of the regions that make up the global community in the non-permanent category, in what appears to be an effort to “get everyone involved” and legitimize the UNSC through reflecting the global nature of the UN.

The obvious difference between the permanent and non-permanent categories is that there is no requirement for geographical representation in the permanent category, and this presents a difficult challenge to the AU position which seeks permanent membership on the basis of equitable geographical distribution, which the UN Charter only provides for in the non-permanent category. This means that, if the AU is to have a permanent seat on the basis of equitable geographical distribution as it proposes, the UN Charter will have to be amended so that it reflects geographical distribution as a factor to be considered for both permanent and non-permanent categories. There is support for the contention that the UNSC is the “nerve-center” that protects the entire membership of the UN and was never intended to be completely representative since the permanent seats were composed of the meritocratic core of the allied forces,⁴⁸ although this argument is cogently countered by the assertion that the circumstances that led to the creation of the permanent seats with veto power made sense at the time they were created, but those circumstances no longer exist.⁴⁹

While amendment to the UN Charter may sound unproblematic, attaining the threshold for the required votes is a mammoth task. Article 108 of the UN Charter provides that amendments come into force upon adoption by a vote of two-thirds of the members of the General Assembly and ratification in accordance with their respective constitutional processes, including all the permanent members of the UNSC. This means that support for the AU position will need to garner

in the UN to the maintenance of international peace and security and other purposes of the organization, and also to equitable geographical representation.

⁴⁸ T. Hoopes & D. Brinkley. *FDR and the Creation of the United Nations* (1997) doi:10.2307/2997976

⁴⁹ T.L. Chakanyuka, *Reforming the United Nations Security Council by the African Union Proposal to Address Inequality: The Limitations* (2020)

129 votes from the General Assembly, including all the votes of the permanent members and their willingness to effect domestic processes in their respective constitutions to reflect a new reality, before it can be adopted. So far, the AU has not received the two-thirds majority votes required.⁵⁰ In addition, it is extremely unlikely to receive the support of the permanent five as they have selfishly continued to push their national interests at the expense of global democracy, peace and security, leading to the perception that ‘the deadlock in the reform process is, to a large extent, a result of the positions of the permanent five members;’⁵¹ they are unwilling to agree to the addition of new permanent members with veto power.

However, there is support for the demand for more permanent seats in the UNSC, mainly from contemporary powers like the Group of Four (G4), made up of Germany, Brazil, India and Japan, who are also aspirants for permanent seats, though the demand for the veto power that traditionally accompanies permanent seats has not enjoyed similar support. This demand is largely seen as the spoiler in the quest for permanent membership as other aspirants have accepted the reluctance of the permanent five to extend the veto to new members. The G4 has similarly been disappointed by the position of the AU since its support is crucial to realizing the aspirations for permanent seats, owing to its large voting power in the General Assembly.⁵² As a way of compromise, Nigeria and South Africa, two of the most powerful states in the AU and leading candidates for the permanent seats, reached an agreement with the G4 to waive the demand for the veto, and expressed frustration over the AU’s refusal to negotiate from its agreed terms as set in the Ezulwini Consensus⁵³ after failing to persuade member states to waive the demand for the veto. This led them to accuse the AU of being “unreasonable and obstructionist” to the reform process,⁵⁴ with South Africa expressing the view that it believes that the maximalist African position is driven by a group of spoilers with fewer chances of getting a permanent seat and willing to prevent anyone else from getting it.⁵⁵ This reveals diplomatic discordance within the AU and that the adopted position on reform does not enjoy undivided support.

⁵⁰ Above n.2 at 147

⁵¹ Supra note. 15

⁵² *ibid*

⁵³ *Ibid*.

⁵⁴ E Charalampos. [2016]. *South Africa’s reform diplomacy and the legitimacy of the United Nations Security Council*. [Online]. Available from: doi-org.uplib.idm.oclc.org/10.1080/02589346.2016.1212560

⁵⁵ P Fabricius. [2014]. ‘*South Africa to challenge the African spoilers of UN Security Council reform*’ *Institute for Security Studies*. [Institute for Security Studies]

This discordance within the AU is further exacerbated by South Africa's opinion concerning the nature of the permanent seats. It pointed out that the permanent seats in the UNSC do not serve as regional seats but are reserved for specific countries,⁵⁶ thus contradicting the view of the AU which sees the seats as representative of regions. Moreover, when South Africa and Nigeria served as non-permanent members in the UNSC in 2011-2012 and 2014-2015 respectively, observers thought it was unclear whether they were both working towards an African agenda or working in separate and different political directions in the UNSC.⁵⁷ However, South Africa's most recent term (2019-2020) as a non-permanent member is perceived as having been representative of the AU and pushing an Africa agenda, with widespread consultations done with member states on pressing UNSC matters.⁵⁸

The internal discordance has also sparked divisions within the AU's regional economic communities whose interest is to ensure that they are represented in the UNSC,⁵⁹ a reflection of the fundamental differences in international policies and divergent interests that member countries may have. This presents further challenges and raises questions as to how exactly the two permanent seats will be distributed considering Africa's diversity, made up of six Arab north African member states, six island nations and 42 sub-Saharan Africa member states, which are largely divided as Anglophone and Francophone.⁶⁰ This presents yet another impediment as it is difficult for groups to negotiate for the permanent seats without knowing who Africa's representatives are,⁶¹ with many countries like the U.S refusing to endorse a proposal without knowing the identity of the countries that will take the permanent seats.⁶² The US also pointed out that it would 'only accept new permanent UNSC members after consideration of their ability and

⁵⁶ Supra note.15 at p.61

⁵⁷ J.O Maseng. [2013]. *Integrating Africa and the Politics of Inclusion and Exclusion in the Process of Security Council Reforms*. [Online]. Available from: 7211517623

⁵⁸ G. de Carvalho & P. Singh. [2021]. *Lessons from South Africa's term to the United Nations Security Council*. Available from: <https://www.wilsoncenter.org/blog-post/lessons-south-africas-term-un-security-council>.

⁵⁹ Ibid

⁶⁰ T. L. Chakanyuka, *Reforming the United Nations Security Council by the African Union Proposal to Address Inequality: The Limitations*, (2020) pg. 147-148; there are only a few countries in sub-Saharan Africa that fall outside the Anglophone and Francophone group, the other considerable group being the four former Portuguese colonies of Angola, Mozambique, Cape Verde Islands and Guinea-Bissau.

⁶¹ Ibid.

⁶² Ibid

willingness to contribute to the maintenance of international peace and security and other purposes of the UN,⁶³ presenting a further dilemma to the AU's demand to choose its representatives using its own criteria.

Thus, while the AU presents a united front with the ultimate goal of attaining a permanent seat in the UNSC, there are realistic threats of power politics and different national interests surfacing, thus weakening the fight for permanent membership.

2.4. Conclusion

The UN was created shortly after the second world war that caused the deaths of millions of people. The negotiations for the creation of the UNSC were the focal point of discussion and a political battleground between the smaller states and the powerful states. The smaller states wished to attain sovereign equality between states without the recognition of super powers, although the super powers refused to compromise and wanted to codify their dominance and to enjoy a privileged position in the functioning of global order through the UNSC. It is in these circumstances that a compromise was reached to grant the powerful states some rights and privileges not enjoyed by other countries; it was a way of compromise so that a global institution can be created to protect the weaker states against abuse by the powerful states.

The AU was still under colonialism throughout the period for the creation of the UNSC, with the result that it lacked representation during the negotiations. It subsequently attained independence and joined the UN, thus ratifying the UN Charter and agreeing to be bound by the rules it signed up to. However, discontent over the structure of the UNSC, perceived as under-representative of the AU despite the large number of countries in the bloc, led to calls from the AU and other regional bodies to reform the UNSC so that it can reflect modern realities, which are vastly different from the time it was created in the 1940s.

The AU adopted a common position through the Ezulwini consensus, which has proven to be difficult for numerous reasons, chief among them being that it fails to attract support from other regions because of its demand for veto power, which the current members appear unwilling to

⁶³ Ibid.

extend to other states. This has led to internal discordance within the AU as some of its member states appear to be drifting away from the agreed position and willing to compromise on the demand for veto power in order to obtain permanent seats. The discordance is also caused by regional economic blocs within the AU which want to occupy the proposed permanent seats on a regional basis, although Africa is diverse and has more regions than the number of permanent seats proposed. As a result, Africa is not as united in reality as it appears to be to the outside world.

3. CHAPTER 3: REPRESENTATIVITY IN THE UNSC

3.1. Introduction

This chapter looks at representation in the UNSC. It begins by an assessment of whether the current permanent members are representative of their regions and the UN more generally. It then proceeds to discuss representation by its nature and the difficulties presented by the UN Charter's non-recognition of regional interests in the UN. It argues that such non-recognition of regional interests in the language of the UN Charter is not insurmountable due to established practices that are not truly faithful to the wording in the UN Charter and the fact that treaties are subject to evolving interpretations. It then feigns a criterion of assessing representatives that it proposes the AU should adopt to find the country[s] that are most likely to represent its interests and objectives. Finally, it assesses 3 of the strongest candidates that have expressed intentions to assume the permanent seats on behalf of the AU if the push for reforms succeeds.

3.2. The UN representative nature of the permanent members

The Preamble of the Charter states that armed force shall not be used, save in the common interest. That is the Preamble that we agreed to and signed, and we joined the United Nations because we wanted the Charter to reflect that. It says that armed force shall only be used in the common interest of all nations, but what has happened since then? Sixty-five wars have broken out since the establishment of the United Nations and the Security Council — 65 since their creation, with millions more victims than in the Second World War. Are those wars, and the aggression and force that were used in those 65 wars, in the common interest of us all? No, they were in the interest of one or three or four countries, but not of all nations. – Muammar Gaddafi.⁶⁴

The question around the representative nature of the UNSC's permanent seats and the permanent members is paradoxical. During the negotiations for the UN Charter, the permanent members of the UNSC pushed to attain their status on the promise of efficient functioning and provision of security to all members of the UN,⁶⁵ and it would then be unnecessary for all member countries of the UN to be part of the UNSC. This promise was codified in article 24 of the UN Charter, which provides that members of the UN confer on the UNSC the primary responsibility for the

⁶⁴ United Nations General Assembly, 64th Session. 2009.

⁶⁵ Supra n. 17

maintenance of international peace and security, and agree that, in carrying out its duties under this responsibility, it acts on their behalf. Thus, the UN Charter as presently worded sees the permanent and non-permanent seats of the UNSC as positions to be occupied by member countries that will represent the collective interests of the members of the UN as a whole. It does not envisage regional interests that differ from those of the UN and makes no provision for regional differences.

The regional representation referred to under article 23(1) of the UN Charter is applicable only insofar as composition of the UNSC is concerned, but not to the outcome; nowhere does equitable distribution of seats make provision for regional views or interests. *Lai and Lefler*⁶⁶ believe that the concept of representation as it applies to the UN is ill defined, and it remains a question of whether “equitable geographical distribution” of non-permanent *Security Council* members also composes a group that acts on behalf of the UN membership. To put it bluntly, a member state ascends to the UNSC to act on behalf of the interests of all members, not regional interests; the allocation of regional seats is intended to ensure geographical equity in terms of participation in the UNSC, not equitability in the substantive outcomes.

However, there is strong evidence to suggest that members of the UNSC do not in fact represent the collective interests of the UN.⁶⁷ On the contrary, evidence suggests that members, especially the permanent members who wield the veto and to whom the collective security of all members is perpetually entrusted, largely represent and perform their functions in accordance with their national interests, most often at the expense of the collective interests of the UN.⁶⁸ The less powerful states get the impression that the UNSC is disinterested in matters of collective concern and interest and is only galvanized into action when it suits an individual permanent member’s

⁶⁶ *Supra* n. 18 at pg. 586.

⁶⁷ For example, the U.S has used the veto to protect Israel’s apartheid state, which goes directly against the principles and interests of the UN which has classified apartheid a crime against humanity. Russia used the veto to block condemnation of its illegal annexation of Crimea, while China has used the veto to punish countries that recognize Taiwan’s independence, such as blocking Guatemala’s efforts to get a UN monitoring group to oversee an agreement with an insurgent group following armed dispute.

⁶⁸ For example, the U.S regularly threatens to or actually withholds funding to the UN when it does not get its way. The George W. Bush administration withheld funding after not getting its way in the UN budget. When China vetoed a resolution to send a peacekeeping mission to Guatemala on the ground that Guatemala recognized Taiwan’s independence, one representative from Costa Rica expressed deep regret that a permanent member vetoed an opportunity for the UN to play a more crucial role in the peace process in Central America for reasons that had little to do with the problems in the region. And that the veto would cause damage to the UN (SC/6311. 10 Jan. 1997)

agenda.⁶⁹ This lack of interest sometimes prevents situations from being put on the Security Council's agenda and thus going unattended.⁷⁰ By the sheer amount of their input, the permanent members tend to dominate the UNSC's output, thereby prioritizing their national interests rather than collective interests, against the prescripts of article 24 of the UN Charter.⁷¹

As such, there are many examples where the UNSC's hesitation to act in accordance with its own mandate has proven to be a result of certain political interests that are usually linked to permanent members and the exercise of the right to veto.⁷² For example, Russian leaders criticized the failure to pass a resolution preceding the U.S intervention in Iraq and the US actions in Libya for exceeding the UN mandate.⁷³ Interestingly, the U.S' attitude towards the UNSC is summed up by former President George W. Bush, who wrote in his memoir that he viewed the UNSC and other UN procedures as bureaucratic, cumbersome and inefficient, hence his administration acted outside the UN structures in their invasion of Iraq in the early 2000s.⁷⁴ This gives impetus to the concern that the permanent members do not necessarily act on behalf of the UN since they regularly act unilaterally and without discussions and authorization on new mandates; there is insurmountable evidence that suggests that permanent members use the UNSC in pursuit of their national interests.

The UN regularly resorts to the UNSC to gain political backing and legal authority for multilateral initiatives that advance U.S objectives.⁷⁵ Over the past several years, the U.S has sought and obtained sanctions resolutions against Iran for violations of its Nuclear Proliferations Treaty obligations, as well as to isolate North Korea's regime of Kim Jong-II.⁷⁶ It has relied on the UNSC

⁶⁹ S. Hassler. [2013]. *Reforming the United Nations Security Council membership: the illusion of representativeness* (2013) [e-book]. Available from: [9780415505901](https://www.un.org/press/docs/2013/20130415505901.html)

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Mr Abdelaziz (Egypt), A/61/PV.72 (11 December 2006) pg. 21

⁷³ A. Radin & C. Reach. [2017]. *Russian views on the international order*. [e-book]. Available from: 988870793; Vladimir Putin, then Prime Minister of Russia, said, "the coalition is destroying Gaddafi who is not their goal, then why bomb his palaces? Now some officials claim eliminating him was in fact their goal. Who gave them that right? Returning to the no-fly-zone, the bombing is destroying the country's entire infrastructure." Available at: <https://www.pulse.com.gh/filla/who-gave-nato-the-right-to-kill-gadhafi-angry-putin-asked-10-years-ago-video/q6kfjj9>

⁷⁴ George W. Bush. [2011]. *Decision Points*. pg. 336 [Book]. Available from: [978-0-307-59061-9](https://www.amazon.com/Decision-Points-George-W-Bush/dp/978-0-307-59061-9)

⁷⁵ K.G McDonald & S.M. Patrick, *UN Security Council Enlargement and U.S Interests* (2010).

⁷⁶ Ibid.

to authorize or renew missions in Afghanistan and Iraq, to strengthen control on the illicit spread of weapons, and to sanction organizations it deems to be terrorist.⁷⁷ It has also turned to the UNSC to share the burdens, risks and responsibilities of intervening in conflicts in which U.S interests warrant a response, but in which competing priorities, lack of resources or political circumstances, militate against high profile or direct U.S involvement.⁷⁸

Thus, Weiss⁷⁹ argues that the UN serves American interests, arguing that “pundits too often overlook how the UN system serves American interests and gives Washington cause to proceed with international acquiescence, if not jubilant support”.⁸⁰ This view is solidified by Wadsworth, the U.S ambassador to the UN in the period 1960-61 who, in response to U.S commentators’ concerns that the UN was giving orders to the U.S, responded by asserting that “there is nothing in the United Nations Charter that can compel the United States to do one single thing she considers to be against her best interests. The idea, however still widely held, that the United Nations has power to force U.S obedience is utterly without foundation.”⁸¹ When the U.S was frequently outvoted in the General Assembly on issues such as Israel, apartheid South Africa and the UN budget, it withheld its financial contributions and called for “reforms” on the budget and accused the UN of becoming obsolete and dominated by small states that did not share the ideals of the organization or U.S principles.⁸² They accused countries of opposing American interests and principles and started analyzing votes of countries in the General Assembly and putting them under pressure individually.⁸³ This was not an endorsement of multilateralism, but an indication that the UNSC has been reduced to a convenient tool for U.S (and permanent 5) foreign policy.⁸⁴

However, the U.S has not been alone in using the UNSC in pursuit of national interests, other permanent members have been equally guilty, though less influential. Russia and the Soviet Union

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Thomas G Weiss is a distinguished scholar of international relations with special expertise in the politics of the UN.

⁸⁰ T.G. Weiss. [2016]. *What's Wrong with the United Nations and How to Fix it*. [book]. Available from: 978-1-509-50747-4. Pg. 5

⁸¹ J. Wadsworth. [1980]. *The Silver Spoon: An Autobiography*. Pg. 162; Wadsworth was the deputy representative to the UN until September 1960; thereafter representative of the U.S to the UN.

⁸² Supra n. 17 at pg. 152.

⁸³ Ibid.

⁸⁴ Supra n. 17 at pg. 154

– its predecessor to the UNSC’s permanent seat - have traditionally used the UN, directly or indirectly, as a means of pursuing and achieving foreign policy goals. This was evident during the Cold War when Russia used its power to “block the ‘western coalition’” by putting a veto on a resolution to recognize Kosovo’s independence, and it blocked a resolution condemning its own behaviour in Crimea.⁸⁵ At the height of the cold war, the Soviet Union’s use of the veto was driven by its isolation and lack of natural allies to whom it would count for support in the UNSC, and it used the veto to prevent resolutions it deemed contrary to its national interests.⁸⁶ Evidently, the Soviet Union was characterized by a cynical indifference towards the UN and the purposes for which it was intended, while simultaneously making use of the veto afforded by permanent membership on the UNSC, which has been perceived as the real instrument of power politics.⁸⁷ As successor to the Soviet Union in the UNSC, Russia has been similarly concerned with its national interests rather than the collective interests of the UN. Its behaviour within the UN is often in opposition to the U.S over concerns of the latter’s growing influence in world affairs and Russia’s own diminishing status following the disbanding of the Soviet Union and loss of super power status.⁸⁸ It is believed that Russia’s supports for the UN system stems mainly from the fact that its permanent membership with veto power in the UNSC is the last remnant of its super power status and means through which it can continue to exert global influence.⁸⁹ The veto gives Russia the ability to limit western influence in its own region and prevent a UN response to its own interventions, such as in Crimea.

With regards to China, its policy has kept changing since it assumed permanent membership in the UNSC, although there is evidence that it has also pursued national interests at the expense of UN interests. For example, it exercised a veto to block Taiwan’s international recognition as an independent state.⁹⁰ It also vetoed a resolution appointing a UN monitoring mission after two warring factions in Guatemala agreed to a ceasefire and a UN monitoring mission. Although the resolution was supported by all other members of the UNSC, China vetoed it because the

⁸⁵ Supra n.16 at 39

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid

⁸⁹ A. Radin & C. Reach, *Russian Views of the International Order*. (2017)

⁹⁰ UN General Assembly Resolution 2758. 25 October 1971. This resolution recognized China as “the only legitimate representative of China to the UN” and removed “the representatives of Chiang Kai-shek (referring to Taiwan) from the UN.”

Guatemalan government had invited Taiwan to the signing ceremony of the peace agreement.⁹¹ The Chinese ambassador to the UN charged that the invitation of Taiwan to the signing ceremony was aimed at splitting China at the UN and “giving Taiwan a venue for secessionist activities against China”, disregarding the “solemn warnings of the Chinese government”.⁹²

It has also used its powers against UN resolutions in favour of its relationships with individual member states. In 1972, it vetoed a resolution to recognize Bangladesh as a member of the UN in order to please its “all-weather friend”, Pakistan, which did not want Bangladesh to become a member of the UN since it had broken away from Pakistan to form an independent state.⁹³ Thus, though reluctant to be alone, China does not hesitate to act selfishly on issues it considers to be of vital national interest.

The other permanent members, France and Britain, participated in the adoption of a common security and foreign policy under the banner of the European Union.⁹⁴ The European Union adopted a policy distinct from but complementary to the UN and the North Atlantic Treaty Organization (NATO) and, although Britain and France continue to retain their permanent seats in the Security Council, they oscillate between their international responsibility and federating units within the European Union. Neither of the two have exercised the veto since the cold war⁹⁵ and largely vote with and follow the lead of the U.S in the UNSC, with the U.K especially preserving a “special relationship” with the U.S.⁹⁶ A classic instance of the U.K kowtowing to the U.S is when

⁹¹ S/6311. The Chinese government’s spokesperson, Shen Guofang, said “Guatemala cannot expect, one the one hand, to do something that harms the sovereignty and territorial integrity of China while, on the other hand, requesting China to cooperate in peacekeeping. No country’s peace process should be at the expense of another country’s sovereignty and territorial integrity”. Also available from <https://www.nytimes.com/1997/01/12/world/china-asserts-taiwan-s-ties-to-guatemala-led-to-veto.html>.

⁹² Ibid.

⁹³ S/10768. Speaking for China, Huang Hua, Chief Representative to the UN, said “Soviet socialist imperialism was playing a most insidious role in South Asia. The sole purpose of Soviet imperialism was to further control India and Bangladesh to expand the spheres of her influence and to bully Pakistan at will”. Available from <https://www.nytimes.com/1972/08/26/archives/chinas-first-un-veto-bars-bangladesh-soviet-union-and-india-are.html>

⁹⁴ France is part of the European Union and one of the leading states in the bloc. The United Kingdom was also part of the European Union until its exit in 2016, although its exit has not seen a significant departure from the European Union’s foreign policy.

⁹⁵ Supra n.16 at 159

⁹⁶ Ibid

it joined the US' unauthorized invasion of Iraq in 2003 despite having earlier claimed that authorization from the UNSC would be needed before any action is taken.⁹⁷

Therefore, it is clear that, although the permanent members claimed their status under the banner of providing security to all and representing the UN and its values and purposes, they lack substantive representation and there is a disjuncture between them and other members of the UN, which is owed to their national interests.⁹⁸ It is equally clear that they are not representative of their geographical regions, at least not in substance. In this context, the UNSC is not regarded as an honest broker owing to its one-sided decisions⁹⁹ and selective intervention while ignoring human rights violations of equal or greater magnitude elsewhere.¹⁰⁰ Therefore, the permanent members have shown a tendency to dominate the UNSC rather than act on its behalf.

3.3. Feigning representation

The question that arises is whether, in light of the practice of the permanent members, there is any possibility that the AU can nonetheless achieve the regional representation it seeks. It remains unclear, however, whether it seeks representation in the composition of the permanent membership or in substantive outcomes of the UNSC. The reference to “African interests”¹⁰¹ gives one the impression that the representation sought is in substantive outcomes rather than mere composition, although the “geographical distribution” argument, which is also advanced by the AU,¹⁰² militates in favour of representation in the composition. The latter is attenuated by the fact that the AU's insistence on choosing a permanent member using its own criteria would be undermined if the selected country were to form part of the permanent membership category only to geographically represent the AU without a substantive outcome that reflects African interests or views. The intuition from the reform debate also supports the idea of regional interests in the assertion that

⁹⁷ Ibid.

⁹⁸ Supra n. 18 at 3.

⁹⁹ Ibid.

¹⁰⁰ Supra n.14.

¹⁰¹ Per General Assembly speeches like the one quoted from President Robert Mugabe of Zimbabwe.

¹⁰² South Africa President, Jacob Zuma, in his address to the 66th session of the General Assembly, stated that the membership of the Security Council must be consistent with the principle of equitable geographical distribution and, in this regard, the African Union must be represented in the permanent category of the Security Council.

non-permanent members of the UNSC improve its representativeness when they reflect the *political preferences* of those whom they act on behalf of - their regional groupings.¹⁰³

Although this “political preferences” assertion refers to the non-permanent members category of the UNSC, it is equally relevant to the permanent membership category as they both serve in the UNSC towards the common purpose of ensuring international peace and security. Therefore, group interests may exist by region because these groupings generally follow geographic boundaries and act as important political structures in the UN, thus creating an expectation that the UN’s regional groupings are salient member states’ interests.¹⁰⁴ Thus, the recognition of regional political preferences lends support to the notion that Africa’s demand for representation in the permanent category is not based on mere geographical distribution, but the substantive outcomes of the UNSC.

The obvious difficulty presented by the demand for substantive representation of regional interests lies in the fact alluded to above: that the UN Charter confers on the UNSC, permanent and non-permanent members alike, the primary responsibility for the maintenance of international peace and security, without mentioning regional interests that may be distinct to those of the UN, even as these regional interests appear to be recognized in the evolving practice.¹⁰⁵ Like any other treaty, the UN Charter is not a fossilized parchment; it is a living instrument, continuously enriched by interpretation and practice.¹⁰⁶ Judge Jessup put it aptly in the South West Africa case, that “treaties – especially multipartite treaties of a constitutional or legislative character – cannot have an absolutely immutable character”.¹⁰⁷ Therefore, since the practice of the UNSC has not strictly complied with the provisions of the UN Charter, the challenge presented by the non-recognition of regional interests in article 24(1) does not appear to be insurmountable, particularly as the current permanent members’ commitment to the UN Charter and the collective interests and principles of the UN are questionable.

¹⁰³ Supra n.18 at 588

¹⁰⁴ Supra n.18 at 589

¹⁰⁵ Scholars such as Lai and Lesler also recognize “political preferences” of regional groups. They are not recognized in article 24 of the Charter of the United Nations which continues to state that members of the Security Council act on behalf of all members and in accordance with the purposes and principles of the United Nations.

¹⁰⁶ A. Pellet. [2003]. *The Charter of the United Nations: A commentary of Bruno Simma’s commentary*. Available from: 8091315649. Pg. 138

¹⁰⁷ South West Africa 1966 I.C.J 4, 439. (July 18) (Jessup. J. dissenting)

Lai and Lefler¹⁰⁸ have identified and developed different models of representation, the most relevant of which are the descriptive and substantive models, which they use to measure how representative countries in the UNSC are of their national and regional interests. Substantive representation is defined by how well a representative's votes or actions align with their constituents' policy preferences,¹⁰⁹ with the preferences closest to each other resulting in a substantive representation. This is the classic model of representation. Yet, representatives have different roles, including mirroring the characteristics, experiences and backgrounds of their constituents, thus creating the descriptive model of representation.¹¹⁰ This descriptive and substantive representation framework assumes that shared preferences will translate into joint advocacy because, when representatives and constituents share a politically important identity, they attempt to influence policy to align with that constituents' interests out of a sense of duty and similar preferences.¹¹¹ Geographical regions are especially likely to develop collective identity because closer proximity facilitates their cooperation, socialization and a contagion of ideas.¹¹² States in geographical regions often share languages, historical influences, political regimes and economic systems which, taken together, produce a unique set of interests.¹¹³ Thus, descriptive representation may produce substantive representation.¹¹⁴

Therefore, there is an implicit assumption that states within regions will have more in common than states in different regions.¹¹⁵ This means that states in West Africa, for example, will likely have more political similarities and preferences than states in Southern Africa because regional groups have higher levels of similarities, indicating a political salience and greater understanding.¹¹⁶ It is therefore reasonable to narrow the scope of selecting representatives to regions, avoiding the candidature of a multitude of representatives from the same region in order to ensure diversity and greater participation.

¹⁰⁸ B Lai & V.A Lefler, *Examining the role of region and elections on representation in the United Nations Security Council* (2016).

¹⁰⁹ *Supra* n.18

¹¹⁰ *Ibid.*

¹¹¹ *Supra* n.18 at 588-9

¹¹² *Ibid.*

¹¹³ *ibid*

¹¹⁴ *Ibid*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

Other state-level factors like regime type and level of economic development may also influence state's preferences,¹¹⁷ meaning that democratic countries in Africa are likely to have more voting preferences and similar views on issues than dictatorships. Thus, there is a reason why an elected representative would represent the interests of their region once they ascend to the UNSC; there is a strong probability of them sharing the preferences of the member states in the region they are from."¹¹⁸

Although Lai and Lesler used this criterion of representativeness in the non-permanent category of the UNSC, their findings are relevant to the debate concerning reform of the UNSC as a whole, including the permanent seats. There is no practical difference in the representative nature of the permanent and non-permanent members, particularly in view of the permanent members' unfaithfulness to the UN Charter.

3.4. The similarities and differences between African countries

Given the representativity theory - that is, substantive and descriptive theory – it is apposite to assess the representativity of the AU's strongest candidates for the permanent seats, who coincidentally come from different regions: Egypt from North Africa and the Arab states, Nigeria from West Africa, and South Africa from Southern Africa.¹¹⁹ And, in this representativity assessment, the regional descriptive and substantive representations, as well as representation of the values espoused by the AU and the UN - which is ultimately the body where the selected representative will act and whose principles and values it will be expected to uphold after approval by the General Assembly - are considered.

For coherence, it is important to first lay down the values espoused by the AU and the UN. The Constitutive Act¹²⁰ is the principal framework of the AU through which it lays down the ideals of the AU and the manner in which relations between states in the AU and outside are to be

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ While each of Africa's five regions has a country that could be considered a subregional powerhouse, no country in East Africa and Central Africa has expressed intention of assuming permanent membership.

¹²⁰ Act of 2000, signed in July 2000 and entered into force on 26 May 2001.

conducted. It sets out various objectives, which this paper proposes should be used as the criterion for selection of the AU representative[s] to assume the permanent membership seats in the UNSC if the push for reforms succeeds.

The Constitutive Act provides that member states must promote and defend African common positions on issues of interest to the continent and its peoples.¹²¹ This means that a position which has been adopted by the AU must be respected and carried out by states, and representatives would bear an instrumental role in ensuring that the AU's common interests are promoted.

The Constitutive Act also enjoins states to promote peace, security and stability¹²² as well as democratic principles and institutions, popular participation and good governance,¹²³ a position that is echoed in a separate article¹²⁴ which requires the promotion of respect and democratic principles, human rights, rule of law and good governance. The promotion and protection of human rights and democracy is also one of the fundamental principles upon which the New Partnership for Africa's Development (NEPAD)¹²⁵ – itself a program of the AU – is based.¹²⁶ Human rights promotion and protection must be done in accordance with the African Charter on Human and Peoples' Rights,¹²⁷ and states must coordinate and harmonize policies between existing and future regional economic communities for the gradual attainment of the AU's objectives.¹²⁸

For its part, the UN requires states to protect and maintain international peace and security, and to take effective collective measures for the prevention and removal of threats to the peace and suppression of aggression and other breaches of peace.¹²⁹ It also enjoins states to take appropriate

¹²¹ Article 3(d)

¹²² Article 3(f) of the AU Constitutive Act

¹²³ Article 3(g) of the AU Constitutive Act

¹²⁴ Article 4(m) of the AU Constitutive Act

¹²⁵ The New Partnership for Africa's Development is a comprehensive and integrated strategic framework for the socio-economic development of Africa, which articulates a comprehensive vision for the development of Africa, with a program of action that embraces initiatives on peace and security, democracy and governance.

¹²⁶ T. Maluwa. [2003]. *The Constitutive Act of the African Union and institution building in postcolonial Africa*. [Online]. Available from:

file:///C:/Users/Admin/Desktop/Dissertation/CHAPTER%204/Sources/Constitutive%20Act%20and%20Institution%20building.pdf

¹²⁷ Article 3(h) of the AU Constitutive Act

¹²⁸ Article 1(i) of the AU Constitutive Act

¹²⁹ Article 1(1) of the UN Charter

measures to strengthen universal peace¹³⁰ and to promote and encourage respect for human rights and fundamental freedoms without distinction as to sex, race, language or religion,¹³¹ and to be the center for harmonizing the actions of states for the attainment of these ideals.¹³²

3.5. Egypt's representative character

Egypt is one of 7 countries recognized by the UN as forming part of the subregion of north Africa, joined by Morocco, Tunisia, Libya, Algeria, Sudan and Western Sahara,¹³³ making the region the smallest in Africa by the number of states. These countries also form part of the League of Arab States, with Western Sahara the only exception due to its non-recognition as an independent state by Morocco and certain countries. The League of Arab States currently has 22 members, with some of its members being from outside Africa. In addition to the 7 north African countries, Comoros, Djibouti, Somalia and Mauritania are members of the Arab league, taking the total number of African countries in the League to 11. This represents 20% of the total number of countries in the 55 member AU.¹³⁴

Egypt is noticeably not a member of the official north African subregional group, the Arab Maghreb Union, recognized by the AU. This is despite Egypt being the most populated state and the economic powerhouse in north Africa. The only distinct grouping and commonality it shares with the north African states is their membership in the League of Arab States, whose purpose is to strengthen and coordinate the political, cultural, economic and social programs of its members and to mediate disputes among and between them and third parties.¹³⁵ The Pact¹³⁶ to which they are party makes no mention of defense against external attack, coordination of military resources,

¹³⁰ Article 1(2) of the UN Charter

¹³¹ Article 1(3) of the UN Charter

¹³² Article 1(4) of the UN Charter

¹³³ Western Sahara is still fighting for international recognition and independence from Morocco, which continues to view Western Sahara as Moroccan territory.

¹³⁴ The African Union is made up of North Africa, with its subregional organization being the Arab Maghreb Union; West Africa, represented by the Economic Organization of West African States; Central Africa, represented by the Economic Community of Central African States; East Africa, represented by the East Africa Community; and Southern Africa, represented by the Southern African Development Community. The African diaspora is counted as a 6th region, although it does not have a physical geographical location and is made up of African people who migrated to different parts of the world.

¹³⁵ Article 2 of the Pact of the League of Arab States.

¹³⁶ The Pact of the League of Arab States.

or uniformity of public policy,¹³⁷ although these are provided for separately under the Treaty of the Joint Defense and Economic Co-operation of the League of Arab States (Joint Defense Treaty). The language of the Pact leaves little doubt that the League is to be regarded as no more than a device to coordinate the activities of its members and to keep them from quarreling among each other, and prospects of political unity among its members are forsworn by the emphasis it has placed on sovereignty and independence.¹³⁸

The League, however, is cross continental and made up of many states from outside Africa. It is not recognized as one of the AU's subregional organizations. Egypt's regional role in the League can therefore not be ascertained with reference to its representativity of the AU's member states. However, it is perhaps not inconceivable to say that Egypt satisfies the descriptive representation element of the north African members of the AU due to the similarity of culture, language, religion and shared Arab interests concerning collective defense as seen from their membership in the Joint Defense Treaty, although its substantive representation capability does not look particularly strong, especially with its notable absence from Arab Maghreb Union.

3.5.1. Representation of African Union and UN values

Egypt does not have a long history of leadership in the AU as it assumed presidency of the AU for the first time in 2019,¹³⁹ making it difficult to make conclusions concerning its ability and willingness to defend common African positions in the international realm, although its first leadership of the AU in 2019 showed goodwill and clear intention of investing its resources for the benefit of the continent to attain its goals. It has, among other things, invested heavily in infrastructure in the continent in an effort to push trade within the region, playing a key role in opening a logistics center in Kenya to facilitate trade between itself and east Africa; signing the continental free trade agreement;¹⁴⁰ and, in 2018, launched a program to enhance its exports to the region.¹⁴¹ These are in line with the AU's goal of coordinating and harmonizing policies between

¹³⁷ R.W McDonald. [2015]. *The League of the Arab States: A Study in Dynamics of Regional Organization*. [e-book]. Available from: 927296595 Pg. 43

¹³⁸ Ibid.

¹³⁹ *How successful was Egypt's leadership of the African Union?* (18 Feb 2020). Available from: <https://www.egypttoday.com/Article/1/81780/How-successful-was-Egypt-s-leadership-of-the-African-Union>

¹⁴⁰ African Continental Free Trade Area Agreement

¹⁴¹ <https://www.egypttoday.com/Article/1/81780/How-successful-was-Egypt-s-leadership-of-the-African-Union>

regional economic communities with a view to developing the continent. It has also contributed to finding solutions for terrorism in the continent and played a key role in mediating the disagreement between Somalia and Kenya.¹⁴²

However, it has an unenviable, if not shameful, human rights record which has been severely criticized by the United Nations Human Rights Council (Human Rights Council) and has never presented itself as a democracy, two key objectives of the AU and the UN. Human Rights Watch¹⁴³ reports several human rights abuses. It reports that police and security forces have arbitrarily arrested and detained hundreds of people for peaceful protest, engaged in forced disappearances of activists, failed to investigate reported incidents of torture and cruel treatment of detainees and even intimidated and harassed families of dissidents who live abroad. Many detainees are reported to have died in custody due to poor prison conditions, torture and deprivation of access to adequate health care.

It is ranked as the third worst in numbers of executions worldwide, with a high number of executions carried out regularly, half of which involve cases instituted against political dissidents and mass trials that lack due process. As recently as June 2022, the Court of Cassation, Egypt's highest appellate court, upheld the execution of 12 political leaders and long-term prison sentences for hundreds of people convicted in a mass trial involving more than 700 political dissidents, including 22 children.¹⁴⁴ Egypt also reinstated Emergency State Security Courts, which had been abolished since 2007 and whose decisions cannot be appealed, and uses them to prosecute political dissidents.¹⁴⁵

The report also finds that the Egyptian government has embarked on attacks on human rights defenders; clamped down on freedom of expression by arresting and detaining without trial several journalists and reporters who expressed critical views of the president; clamped down on religious freedom and belief by closing down more than 3000 Christian churches and refusing to issue

¹⁴² The two countries have been locked in a long battle regarding territorial boundaries in the Indian ocean, where they share a border.

¹⁴³ Human Rights Watch world report 2022, detailing events of 2021 in Egypt.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

licenses for the building of new churches, except in remote districts outside the cities; arrested and sentenced several women for posting “immoral” videos on social media; and detained several witnesses to reported rape cases. As such, it not only goes directly against core values of the AU, but also against the shared values of the UN.¹⁴⁶

3.6. Nigeria’s representative character

Nigeria is by far the most populated country in Africa and has the largest economy in the continent, as measured by the Gross Domestic Product. It forms part of Africa’s second largest region by the number of countries - the Economic Organization of West African States (ECOWAS) - an organization in which it played an instrumental role and put significant resources for its establishment. It also assumed the responsibility of hosting the organization’s headquarters.¹⁴⁷

West Africa is perhaps the more diverse region by description, owing to its colonialization by a broad spectrum of countries. Nigeria was colonized by Britain, while the majority (8 out of 15) of ECOWAS member states were colonized by France, with two (Guinea-Bissau and Carbo Verde) colonized by Portugal, 4 by Britain (The Gambia, Ghana, Nigeria and Sierra Leone) and one (Liberia) remaining independent but under strong U.S influence, which used it to transfer freed slaves and Africans who were born as “free men”. This is a comparatively diverse group of countries in the same region, making it difficult to establish strong descriptive similarities, more especially with the perceived continuance of French influence over its former colonies. On paper, the region is democratic, although practice is characterized by regular military takeovers, with the most recent takeover having occurred in September 2022 in Burkina Faso, which was preceded by an earlier military takeover in the same country, in February 2022. Senegal, Ghana, and Nigeria appear to be the only relatively stable democracies in the region, although the latter two have also experienced unlawful military takeovers in the past.

¹⁴⁶ For example, article 1(3) of the United Nations Charter enjoins states to promote and encourage respect for human rights and fundamental freedoms without distinction to race, sex, language or religion; and 1(4) enjoins member states to be the center for harmonizing the actions of nations for the attainment of these common ends.

¹⁴⁷ J. Warner & T. Shaw, *African foreign policies in international institutions* (2018). (book); C. Obi, *Nigeria’s foreign policy in relation to the Economic Organization of West African States* (chapter in the book).

Despite this diverse political history, Nigeria has emerged as a regional leader, investing heavily in good neighborliness, including bankrolling peace interventions in several war-torn countries in the region, sometimes at the expense of its own domestic priorities.¹⁴⁸ For example, when civil war broke out in Liberia in 1989, Nigeria led the mediation to end the war and spearheaded a ceasefire monitoring group, largely composed of its own troops and heavily funded by Nigeria itself.¹⁴⁹ Its strategy and investment have been geared at helping the region to develop “home-grown” solutions to its problems; it has effectively taken the mantle of leadership in the region upon its shoulders. The sitting president, Muhammadu Buhari, put it aptly when he said; *“Our neighbors in the sub-region and our African brethren should rest assured that Nigeria, under our administration, will be ready to play any leadership role that Africa expects of it.”*¹⁵⁰

Successive administrations in Nigeria have maintained the same policy towards the region, rising to be the regional leader as and when needed. It is therefore easy to conclude that Nigeria satisfies the substantive representation element of the west African states’ security interests, although it can be said to lack descriptive representation due to the vast differences in the region.

3.6.1. Representation of AU and UN values

Nigeria, under president Olusegun Obasanjo, made multilateral diplomacy in Africa its cardinal objective and regional policy.¹⁵¹ It has proven to be ready to promote and defend the common positions on issues of interest to the AU, as evidenced by its commitment to reform of the African Peace and Security architecture, whose adoption ensured that African dictator presidents would no longer hide behind state sovereignty for abusing the human rights of their citizens.¹⁵² It has heavily invested in the maintenance of peace and security in the continent, particularly in west Africa, at times unilaterally funding peacekeeping missions at the expense of its own national interests due to the high financial and human resources cost of peacekeeping missions.¹⁵³

¹⁴⁸ J. Warner & T.M. Shaw. [2018]. African foreign policies in international institutions. [e-book]. Available from: [10.1057/978-1-137-57574-6](https://doi.org/10.1057/978-1-137-57574-6). C. Obi, *Nigeria’s foreign policy in relation to the Economic Organization of West African States*. Pg. 322-3

¹⁴⁹ Ibid.

¹⁵⁰ 7th and 15th President of the Republic of Nigeria, in office for a second stint since 29 May 2015.

¹⁵¹ S. Oshewolo. [2019]. *Rhetoric and Praxis: Nigeria’s Africa Diplomacy and the Shaping of the African Union*. [Online]. Available from: [10.1080/00358533.2019.1565343](https://doi.org/10.1080/00358533.2019.1565343). Pg 54

¹⁵² Ibid. at 56

¹⁵³ Nigeria spent more than 12 billion US dollars on peacekeeping operations in Liberia and Sierra Leone at a time when Nigeria needed the resources to realize its own developmental aspirations.

The Protocol Establishing the Peace and Security Council of the African Union is said to have emanated from the Nigerian embassy in Addis Ababa as the country sought to replicate and expand its success in west Africa to other regions in the continent.¹⁵⁴ Moreover, its presidency of the AU was characterized by ‘a proactive response to conflict management in order to prevent them from erupting into ravaging wars, which was achieved through consultation with members of the Bureau as well as members of the Peace and Security Council at the highest level.’¹⁵⁵ Nigeria has also been a major contributor to the finances of the AU which are used to carry out the joint resolutions and has undertaken solo responsibilities on behalf of the AU at its own cost.¹⁵⁶

However, like Egypt, it does not boast a strong human rights record. The Department of State¹⁵⁷ reports repeated and persistent human rights abuses in the country, including unlawful and arbitrary killings by government actors; forced disappearances; degrading treatment; arbitrary arrests and detention as well as harsh and life-threatening prison conditions.¹⁵⁸ The killings, assaults, and harassment by the Special Anti-Robbery Squad (SARS), a unit of the Nigerian police with a long record of human rights abuses, has led to repeated mass protests in recent years, with protestors calling for it to be disbanded. It is also characterized by arbitrary and unlawful interference with privacy, serious restrictions on freedom of expression and freedom of the media, including violence or threats of violence against journalists.¹⁵⁹

While it can be characterized as a democracy due to regular elections and relatively peaceful transfers of power since it moved from military to civilian rule, there are still misgivings concerning judicial independence as the judiciary appears to function as a political agent of the government, in direct contrast to the Constitutive Act’s and the UN’s objective of promoting democratic principles and institutions, human rights, rule of law and good governance.

¹⁵⁴ Supra n. 145 at pg. 57

¹⁵⁵ Ibid.

¹⁵⁶ For example, it sponsored major humanitarian summits such as those on HIV/Aids, tuberculosis and malaria, and responding to African Union demands for an ad hoc or impromptu contributions to address disasters on the across continent.

¹⁵⁷ United States Department of States. It does reports on human rights practices across the world.

¹⁵⁸ Council on Foreign Relations. <https://www.cfr.org/blog/state-department-report-highlights-magnitude-human-rights-challenge-nigeria#:~:text=In%20arguably%20its%20most%20pointed,torture%20and%20cases%20of%20cruel%20>

¹⁵⁹ Ibid.

3.7. South Africa's representative character

South Africa is the economic hub of the Southern African Development Community (SADC) and the most populated country in the region.¹⁶⁰ Unlike its counterparts - Nigeria and Egypt - it formally joined most international organizations at a much later stage after transitioning to democratic rule from the apartheid era, which had it suspended from international organizations. It joined the Organization of African Unity (now AU) and SADC late in 1994, shortly after its first democratic elections. It quickly emerged to be perceived as a “big brother” by both the AU and SADC.¹⁶¹ By virtue of its economic size, democratic stability and adherence to the rule of law, some people see it as a regional hegemon.¹⁶²

Its policy in SADC has been characterized by three aims: first, the desire to strengthen the regional body and take a proactive role in its political leadership and financial backing; second, although it initially opposed the inclusion of the Democratic Republic of Congo (DRC) in the regional body, it subsequently accepted its membership in view of trying to create a better context for the resolution of longstanding conflicts engulfing the DRC, which can be evidenced by its success in brokering peace between two warring factions in the country between 2002 and 2004; and third, by projecting itself as a regional peacemaker, promoting peace and security in the region and the wider African continent.¹⁶³ In virtually all security threats in the region, South Africa has assumed a key role in finding solutions. It led a tripartite force with Zimbabwe and Botswana to contain disruptive opposition protests in Lesotho and led regional efforts to resolve a political impasse in the same country in 2015.¹⁶⁴

It was also central to SADC's efforts to resolve the political impasse between Robert Mugabe's ZANU PF and the opposition Movement for Democratic Change in 2008, which followed disputed

¹⁶⁰ The Democratic Republic of Congo is the largest and most populated country in the Southern African Development Community, although it is geographically based in central Africa and is concurrently a member of the Economic Organization of Central African States and the East Africa Community as well as SADC. It is discounted here on the basis of geography rather than political ties.

¹⁶¹ Supra note 142. J. Akokpari, *Consistency in inconsistency: South Africa's foreign policies in international organizations*. Pg. 248

¹⁶² Ibid.

¹⁶³ Ibid. at 249

¹⁶⁴ Ibid.

elections and widespread violations of human rights. It succeeded in creating a joint government made up of representatives from the two warring political parties.¹⁶⁵ Commendably, it has been heavily involved in peace and security issues outside SADC as well. It led the AU mission in Burundi between 2003 and 2005 and provided the bulk of that mission's finances; played a key role in the independence of South Sudan in 2011; led conflict resolutions in Cote D'ivoire (2001-2002) and Central African Republic; and it has been a central part of the AU's Peace and Security Council architecture.¹⁶⁶ Given its incredible record of peacekeeping and carrying out of both SADC and AU missions, it is easy to conclude that South Africa has been substantively representative of SADC and AU. It also meets the descriptive representation test in the SADC, with all but two mainland countries (Angola and Mozambique, who were under Portuguese colonialism) having been under British colonialism and relatively stable democracies,¹⁶⁷ thus sharing a political history in addition to the cultural, linguistic, economic and political similarities in the SADC, with eSwatini being the exception as it is a kingdom and not a democracy, although it shares strong economic, linguistic and cultural ties with South Africa, whose native Swazi population continues to have the king of eSwatini as the ultimate traditional authority.

3.7.1. Representation of the AU and UN values

South Africa, like Nigeria, played an instrumental role in the formation of the AU and has been one of the key players in the organization, providing a significant portion of the funding. It has an impressive record of promoting and defending African common positions on issues of interest to the continent and its people in international organizations, as can be seen from its work as a non-permanent member of the UNSC.

It used that opportunity to foster issues on the UNSC agenda that would benefit the continent as a whole, focusing on resolving the root causes of African conflicts, creating conditions for peaceful resolution of conflicts and preventing new conflicts from emerging. It also advanced the interests of the AU by enhancing the relationship between the UNSC and regional organizations.¹⁶⁸ In this

¹⁶⁵ Ibid. at 254

¹⁶⁶ Ibid.

¹⁶⁷ Zimbabwe and eSwatini are the only notable exceptions, with the former having struggled with human rights violations, including torture of opposition leaders, journalists and activists, and the latter is a kingdom under a system of absolute monarch.

¹⁶⁸ Dirco 2009. 10-15

regard, it forged cooperation between the UNSC and the AU Peace and Security Council in order for the AU to retain control of peace and security operations in its region.¹⁶⁹

It also appeared to have been successful in convincing the UNSC to authorize and implement the Secretary General's report¹⁷⁰ which outlined the options for sharing peacekeeping responsibilities and achieved a milestone by institutionalizing, for the first time in history, a working relationship between the UN and AU on a common peace and security mission.¹⁷¹ It also responded to the financial challenges faced by the AU by pushing for the endorsement of a report by the Secretary General which would be responsible for assessing how peacekeeping missions mandated by the AU could be supported to make financing of regional organizations predictable, flexible and sustainable.¹⁷²

South Africa also organized and hosted a meeting between 21 African countries and the UNSC, UN Secretariat and African Union Commission (AU Commission), availing the countries the opportunity to share their experiences of UN peacekeeping operations.¹⁷³ This allowed the AU to gain capacity building and operational support and advance issues of concern to Africa, and this culminated in the formalization of annual visits between the UN and the AU Peace and Security Council, with meetings held in Addis Ababa and New York on a rotational basis.¹⁷⁴ Its work was put aptly by its former minister of international relations, Dr. Dlamini-Zuma, in these words; *“During our tenure, we contributed to better clarification and articulation of the relationship between the Security Council and regional organizations as mandated by African Union leaders in January 2007.”*¹⁷⁵

Then chairperson of the African Commission, Alpha Konaré, thanked South Africa for *“its leadership on African issues and for listening to the African peoples and African leaders”*.¹⁷⁶ The

¹⁶⁹ G.K. Moerane. [2019]. *A Critical analysis of South Africa's pursuit of an African agenda at the United Nations Security Council 2007/2008 and 2011/2012*. [Thesis]. Available from: Pg. 57

¹⁷⁰ S/PV.5868/2008

¹⁷¹ S/RES/1809

¹⁷² Supra n. 163 UN/1809

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Dr. Nkosazana Dlamini-Zuma S/PV.5649/2007.

¹⁷⁶ S/PV.5868, 2008: 34

country's biggest blunder came in 2011 when it voted in favour of a no-fly zone in Libya while a non-permanent member of the UNSC despite the AU's opposition to same.

South Africa also has a decent human rights and democratic record and promotes popular participation and rule of law. It is based on a multiparty system of democracy where constitutional power is shared between the executive, the judiciary and the legislature, all of which are independent. It has seen peaceful transfers of power since the emergence of democracy in 1994, never experiencing serious election irregularities or disputes, a show of the independence granted to and exercised by its electoral commission. Its constitution is largely celebrated across the world as the most progressive constitution due to its entrenchment of fundamental human rights in its bill of rights, encoded in chapter II.¹⁷⁷ Its human rights record has, however, been tainted by xenophobic attacks, although they were not state sponsored and were committed by private actors. The government's response to these attacks has been criticized as being sluggish despite having prosecuted some perpetrators.¹⁷⁸ Despite its shortcomings, South Africa emerges as the leading and most suitable candidate for the permanent seat due to its substantive representation character, capacity, and strong democratic and human rights record.

3.8. The AU's ideal regional representation model

Considering the practice by the permanent members of the UNSC, the AU's acquisition of a permanent seat would not automatically guarantee the substantive representation it seeks, although its proposal to choose its own representative using its own criteria suggests that it intends to exert control or influence over its representative, who will be selected to represent African interests rather than simply adding geographical parity in the UNSC. The AU's proposal to assess the representative nature and capacity of its representatives is a novel requirement that, if successful, will change the UNSC's *modus operandi*. This is because, as aforementioned, none of the

¹⁷⁷ The Bill of Rights is encoded in chapter 2 of the South African constitution. It is an extensive provision and protection of human rights in South Africa, imposing both a positive obligation on the state to fulfil human rights and a negative obligation to respect human rights.

¹⁷⁸ A. Marindze. [2010]. *Diplomatic Protection and xenophobic violence in South Africa: the case for reparations to Mozambican victims*. [dissertation- Makerere University]. Available from: https://repository.up.ac.za/bitstream/handle/2263/16757/Diplomatic_Marindze%282010%29.PDF?sequence=1&isAllowed=y

permanent members were chosen by their regions nor elevated to permanent membership on the basis of their regional grouping, nor do they represent regional interests. The AU, therefore, seeks to change the *modus operandi*, at least insofar as its permanent representative is concerned. This can be seen in South Africa's non-permanent membership strategy in the UNSC which it used to foster issues that would benefit the continent as a whole.¹⁷⁹ It focused on advancing the interests of the AU by strengthening the relationship between the UNSC and AU's regional organizations;¹⁸⁰ and challenged conventions around structural power within the UNSC and global politics in general, which was partly to counter the neocolonial practice of the permanent members by setting the agenda for African problems and providing mechanisms 'to solve such problems' with Africa's involvement and influence.¹⁸¹ It looked for a consolidated and cooperative approach to African problems in the UNSC's processes and procedures, as aptly put by South Africa's representative '[w]e managed to change the continuation of 'business as usual' within the Security Council, particularly on African issues, whether the former colonial masters were the authority on former territories.'¹⁸²

South Africa consistently took its policy direction from the mandate of the AU and ensured that it voted in consensus with the AU on all 68 resolutions on peace and security in the African continent.¹⁸³ A practical example of the South Africa's reflection of the AU agenda during its term can be gleaned in the Sudanese and Zimbabwean cases. Sudan featured prominently on the UNSC's agenda and a resolution was passed to send a peacekeeping mission to Sudan, which was led jointly by the AU and the UN at the request of South Africa. The UNSC sought to insert economic sanctions as part of the resolution, which was opposed by South Africa on the ground that the Sudanese government had shown willingness to cooperate and sanctions would reverse

¹⁷⁹ A critical analysis of SA's pursuit

¹⁸⁰ (Dirco, 2009: 10-15).

¹⁸¹ Supra n. 163 at 60.

¹⁸² Ibid.

¹⁸³ Such S/RES/2020(2011) on acts of piracy and robbery against vessels in the waters off the coast of Somalia, where the AU signed a deal to boost security hoping to shore up development by tackling maritime crimes like piracy and smuggling. Available at: <https://www.refworld.org/docid/4ee8a6135.html> [accessed 8 November 2022]. And S/RES/2493 on Women, Peace and Security, which forms part of the AU Agenda 2063 and on which the AU and UN jointly published a commemorative book to celebrate the contribution of women in achieving Aspiration 4 of Agenda 2063 and as part of the activities for the 20th anniversary of UNSC resolution 1325 on women, peace and security. Available from: <https://au.int/en/articles/reflection-contributions-african-women-peace-and-security-agenda-continent>

progress already made, a reflection of the AU's position which had similarly opposed the imposition of sanctions.¹⁸⁴ South Africa also opposed a resolution to impose sanctions on Zimbabwe and was criticized by the international community as being complacent in human rights abuses and for approaching China and Russia to persuade them to veto the resolution. However, its position reflected the one adopted by the AU, which opposed economic sanctions on Zimbabwe.¹⁸⁵

McGurk observed that South Africa wanted to fulfil a “desire to be seen as a voice of the African continent and the global South which trumped the desire to be seen as a ‘global citizen’ or bastion of human rights and democracy’.¹⁸⁶ South Africa believed that it had to be at the forefront of efforts to champion African positions on peace and security issues in order to change the image of Africa, perceived by the international community as a conflict-ridden continent;¹⁸⁷ and it earned praise from its African counterparts for its inclusiveness and willingness to listen to African leaders.¹⁸⁸ Clearly, the AU has the goal of speaking through its representative in the UNSC, which representative will vote on the basis of African positions, thus creating a substantive representation of the region. South Africa's boast of “changing business as usual” in the UNSC speaks of the substantive changes the AU has pursued through its representatives. It is therefore clear that whichever representative the AU elects to be a permanent member shall follow the African positions in its business in the UNSC, otherwise the goal of ‘representing African interests’ would be a mirage. It is equally clear that the AU's proposal seeks to alter the existing practice of the permanent members - from voting according to national interests and without consultation to voting in accordance with regional interests.

This is particularly important since the AU has expressed concern over the historical lack of consistency between its adopted positions and those taken by its non-permanent members in the

¹⁸⁴ S/RES/1769. South Africa's ambassador to the UN at the time, Dumisani Kumalo, urged for patience and questioned the strategy involving economic sanctions. He stated, “right now, the surprising thing was that we were thinking the government of Sudan was now beginning to take the right actions and agree to what we were going to do. It's not clear which way we are going [now].” Available from: <https://www.reuters.com/article/us-sudan-darfur-un-reaction-idUSN2932336520070529>

¹⁸⁵ Ibid.

¹⁸⁶ 2013:38

¹⁸⁷ Ibid.

¹⁸⁸ Supra n. 170

UNSC.¹⁸⁹ It has been said that non-permanent members receive higher levels of aid and preferential treatment from international organizations, making them susceptible to the influence of larger and economically powerful states, who use aid and/or threats to remove aid to pressurize the smaller states to vote with them.¹⁹⁰ Thus, a combination of the interests of the current permanent members and the high cost of UNSC seats has historically made non-permanent members less representative of their regions, although the AU's proposal to choose its own representative for the permanent seats based on representativity and *capacity* puts this concern to rest since the elected member must have capacity. If it does not, the AU should consider financial assistance to its permanent representative for the maintenance of the permanent seat and related expenses. It is, after all, Africa's representative, through whom the AU intends to speak.

3.9. Conclusion

The UN Charter envisages that members of the UNSC exercise the powers entrusted on them to maintain international peace and security on behalf of all members of the UN. It does not envisage the existence of regional interests and the Charter makes no provision for them. However, this challenge to the AU's quest for permanent membership is not insurmountable as evidence suggests that there is no strict compliance with the UN Charter in practice. In particular, the permanent members of the UNSC use it as a vehicle for their national foreign policy objectives in total disregard of the values and interests of the UN.

A system of representation has been developed by Lai and Lefler, who use a descriptive and substantive representation theory to measure how representative a state is of other states in its region. This theory finds that members from the same region are most likely to have common interests and thus be more representative of each other. Using this model, Africa's candidates for the permanent seats - Egypt, Nigeria and South Africa – appear to be representative of their regions, although they lack substantive representativeness of the values and objectives espoused by the AU due to poor human rights records, with South Africa being the notable exception. South Africa's tenure as a non-permanent member in the UNSC appears to embody the representation

¹⁸⁹ C. Stewart & L.H. Andersen. [2018]. *Partnering for peace: United Nations and African Union Cooperation in peace and security*. [Online]. Available from: [10.1057/978-1-137-57574-6_11](https://doi.org/10.1057/978-1-137-57574-6_11). Pg. 175

¹⁹⁰ *Supra* n. 18

ideals of the AU as it showed zeal in advancing AU positions in its voting pattern and activities in the UNSC. These characteristics make South Africa the strongest candidate for the permanent seat.

4. AFRICAN UNION'S PERMANENT SEAT AS A FIX FOR UN CHARTER AND AU CONSTITUTIVE ACT DISHARMONY

4.1. Introduction

If, in those dark days and hours leading up to the genocide, a coalition of states had been prepared to act in defense of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold? – Kofi Annan¹⁹¹

Africa's transition from the Organization of African Unity to the AU marked a departure from the former's inaction and unwavering deference to state sovereignty to one in which respect for state sovereignty would be subject to that state's willingness and ability to protect its own citizens. This change was a reflection of the continent's frustration with its inability to intervene in grave circumstances and a perception that the UN focused its attention on other parts of the world at the expense of more urgent and critical matters in Africa.¹⁹² African leaders felt incapacitated as decision concerning Africa's peace and security were taken by a body in which the continent is underrepresented and they did not want to relinquish their ability to intervene to such a body.¹⁹³ This was motivated, in large part, by the 1994 genocide in Rwanda where the UNSC failed to exercise its core functions.¹⁹⁴ A report from the Office for the Co-ordination of Humanitarian Affairs (OCHA) stated that 'the lesson of Rwanda for African leaders was that they "should no longer wait for action by the international community or the UNSC"' as the reputational harm to the UNSC led to distrust in its ability to act and galvanized African leaders to be more involved in the maintenance of peace and security in their region.¹⁹⁵

In this transition from non-interference to non-indifference, the Constitutive Act adopted article 4(h) which provides that the AU shall have a right of intervention in situations where war crimes,

¹⁹¹ A/54/PV.4, Statement of the Secretary-General, presenting his annual report to the General Assembly, 20 September 1999.

¹⁹² B Kioko. [2003]. *The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention*. [Online]. Available from: [10.1017/S0035336100179948](https://doi.org/10.1017/S0035336100179948). 85 IRRC 807-826. Pg. 821

¹⁹³ G. Amvane. [2015]. *Intervention pursuant to article 4(h) of the African Union Constitutive Act without United Nations Security Council authorization* pg. [Online]. Available from: [10.17159/1996-2096/2015/v15n2a3](https://doi.org/10.17159/1996-2096/2015/v15n2a3) 295

¹⁹⁴ Supra n.123 at 168

¹⁹⁵ D O'Brien. [200]. *The search for subsidiarity: The UN, African regional organisations and humanitarian action*. 7 International Peacekeeping. Pg. 63

genocide and crimes against humanity are committed. This gave rise to the concept of responsibility to protect, which was endorsed at the 2005 world summit by the General Assembly.¹⁹⁶ This responsibility to protect must still be exercised within the structures of the UN. In other words, UNSC authorization to use force in a member state is still required and the AU is still subject to the UNSC if it needs to use force in a member state.¹⁹⁷

This right of intervention in article 4(h) of the Constitutive Act entails the right of the AU to use force in member states pursuant to a decision of the Assembly of AU Heads of States, although the Constitutive Act does not indicate whether the intervention shall be restricted to the use of force or be viewed broadly to include mediation, peacekeeping or sanctions;¹⁹⁸ although it was adopted with the purpose of enabling the AU to resolve conflicts more effectively without having to sit back and do nothing.¹⁹⁹ This means that the AU has arrogated to itself similar powers to those held by the UNSC to intervene in member states using force or military action pursuant to a decision of its own organ – the Assembly of Heads of States – rather than the UNSC, a position that has caused some controversy among scholars who view this as a potential violation of the UN Charter.²⁰⁰

The UN is the only international organization with the right to decide on enforcement action²⁰¹ and the UN Charter allows the UNSC to take enforcement action when there is threat to peace or actual breach of peace.²⁰² A pertinent question that arises is whether the UNSC has a legal obligation rather than a mere right to authorize force to stop mass atrocities. Some scholars argue

¹⁹⁶ United Nations, 2005 World Summit Outcome, UN Doc. A/60/L.1/2005, 15 September 2005, paras. 138–139.

¹⁹⁷ The African Union has acknowledged the primacy of the Security Council and even emphasized it in making a case for its subsidiary role, though the African Union's Peace and Security Protocol is silent on how to proceed with article 4(h) intervention when endorsement to intervene from the Security Council is not forthcoming; Stewart *ibid.* at 177.

¹⁹⁸ T. Maluwa [2003] *The Constitutive Act of the African Union and institution building in postcolonial Africa*. (Online). Pg.40. Available from: <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/constitutive-act-of-the-african-union-and-institutionbuilding-in-postcolonial-africa/E205D403EB457C7E31A1DE10A11E977D>

¹⁹⁹ B. Kioko. [2003]. *The right of intervention under the African Union Constitutive Act: from non-interference to non-indifference*. Pg. 817. Available from: https://www.icrc.org/en/doc/assets/files/other/irrc_852_kioko.pdf

²⁰⁰ A number of commentators have questioned the right of the AU to intervene in accordance with the Constitutive Act to decide on intervention outside the UN and have raised the issue of what would be the role of the UN in such interventions. Available from: https://www.icrc.org/en/doc/assets/files/other/irrc_852_kioko.pdf

²⁰¹ T. Maluwa. [2002]. *Reimagining African Unity: some preliminary reflections on the Constitutive Act of the African Union*. Pg. 38.

²⁰² *Supra* n.199

that the UNSC has the right to authorize force, but not a legal obligation,²⁰³ while others believe that the UN is duty-bound by its role to maintain peace and security, especially to deal with those crises that have been referred to it by the Secretariat as urgent.²⁰⁴ The UN Charter's reference to "duties" and not simply "powers" seems to support the view that the UNSC has legal obligations.²⁰⁵ However, even if one accepts that the UNSC has a legal duty, it has a long history of failure to exercise it, notably during the 1994 genocide in Rwanda when the UNSC clearly ought to have authorized the use of force to protect the Tutsi population; its selective use of force in Rwanda – for the sole purpose of evacuating foreign nationals – speaks of its inability to exercise its duties judiciously.²⁰⁶ It is thus unrealistic for the AU to continue exclusive reliance on the UNSC to maintain peace and security in Africa and to wait for UNSC authorization to use force even when it reasonably believes that the use of force is urgently needed. It is in this context that the AU adopted the right of intervention under article 4(h) of the Constitutive Act: to prevent itself from folding its arms in circumstances where atrocities are committed and the UNSC response is slow.

The requirement for UNSC authorization is viewed as an obstruction to the efficient protection of human rights by some scholars who propose alternative avenues for use of force,²⁰⁷ a position that is supported by the AU through its proposal that UNSC authorization must be given after the fact in appropriate circumstances.²⁰⁸ And indeed, the AU has intervened in member states – like Burundi in 2003 - without prior UNSC authorization,²⁰⁹ although this did not cause any problems

²⁰³ Vienna Convention on the Law of Treaties, Article 26, 23 May 1969, 1155 UNTS 331 ['VCLT']; see S. D. Murphy, *Principles of International Law*, St. Paul: Thomson/West, 2006, p. 11. 8 See Article 53 of the VCLT, *ibid.* 9 Murphy, *supra* note 7, p. 13-21; see also H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, New York: Frederick A. Praeger 1950) p. 789.

²⁰⁴ M. Banda. [2007]. '*The Responsibility to Protect: Moving the Agenda Forward*', [United Nations Association in Canada]. pg. 37.

²⁰⁵ Article 24(2) makes reference to "the specific 'powers' granted to the Security Council for the discharge of these 'duties'".

²⁰⁶ D. Maritz. [2012]. *Rwanda Genocide: Failure of the International Community?* [Online]. Available from: <https://www.e-ir.info/2012/04/07/rwandan-genocide-failure-of-the-international-community>

²⁰⁷ *Supra* n.20 at 351

²⁰⁸ *Supra* n.38.

²⁰⁹ One of the first interventions occurred in May 2003 when South Africa, Ethiopia and Mozambique deployed troops to Burundi without Security Council authorization. See Res 1545, S=Res=1545 (2004), 21 May 2004. See VK Holt and MK Shanahan *African Capacity-Building for Peace Operations: UN Collaboration with the African Union and ECOWAS* (2005, Stimson Center) at 49.

as, in 2004, the UNSC praised the AU's contribution, without ratifying its intervention.²¹⁰ The AU's other interventions also caused no issues and ECOWAS has regularly intervened without prior UNSC authorization and there has not been a negative reaction from the UN.²¹¹

However, despite this apparent harmony, it is not improbable for a situation where the AU exercises its right to intervene and then fails to get after-the-fact authorization from the UNSC owing to, for instance, differing views on the necessity of the intervention. A failure by the AU to obtain after-the-fact authorization would effectively mean the action was illegal and lead to condemnation by the UN. Such an action would tip the two organizations against each other and risk disharmony, thus compromising the effectiveness of their response to threats or breaches of peace. A balance needs to be found to harmonize the roles of both organizations in accordance with article 1(4) of the UN Charter:²¹² the UNSC's role as the primary organization for the maintenance of international peace and security and the AU's responsibility to protect human rights in its region, and its right to intervene.

It is the submission of this paper that stronger representation of the AU through permanent membership in the UNSC would serve as a bridge to harmonize the two organizations in their duties to protect human rights and curb breaches of peace or threats to peace. A stronger representation for the AU gives it greater influence in the UNSC and enhances the possibility of harmony in the actions of the two organizations. In the possible scenario where views concerning a threat to peace differ and the AU fails to obtain after-the-fact authorization, the AU's permanent representative would veto any resolution to condemn the region's approved assessment and action, thus avoiding the perception of illegality of its actions and the reputational risk that could result from condemnation of its approved stance. In like fashion, the risk of the UNSC being undermined as the primary body for the maintenance of international peace and security would be eliminated or reduced by the AU's veto. The veto played a significant role in Russia's failed bid to condemn NATO's intervention in Kosovo, which had occurred without UNSC authorization.²¹³ Africa's use

²¹⁰ Res 1545, S/Res=1545 (2004), 21 May 2004. See VK Holt and MK Shanahan African Capacity-Building for Peace Operations: UN Collaboration with the African Union and ECOWAS (2005, Stimson Center) at 49

²¹¹ Such as in Sierra Leone in 1998 and Cote D'ivoire in 2002.

²¹² Article 1(4) says one of the purposes of the United Nations is to be a center for harmonizing the actions of nations in the attainment of common ends.

²¹³ Supra n.20 at 358

of the same would help minimize the risk of the AU and UNSC running parallel in the international peace and security cluster.

4.2. AU's permanent seat as a cause for UN efficiency

The transformation of the global multilateral system will be to the benefit of all. Hence, we continue to call for the transformation of the international system for a better world and Africa – such transformation will be about making organizations such as the UN more effective and efficient in discharging their roles and responsibilities. As countries of the South, we are advocating against the North wanting to limit the UN reform programmes to administrative matters pertaining to the Secretariat. Our stance is for a reform programme that will ensure relevance, equity and the democratisation of the institution – Nkoana Mashabane²¹⁴

The AU and its members have not only made great strides towards finding “African solutions for African” problems, but have also become major players in international peace and security.²¹⁵ Africa is now the largest regional contributor of troops to UN peace operations and has earned recognition as an invaluable part of the global security architecture.²¹⁶ As aptly put by UN Secretary-General, Boutros-Ghali; African countries “lighten the burden of the Security Council (and contribute to) a deeper sense of participation, consensus and democratization of international affairs”, an affirmation that was repeated by his successor, Ban Ki-moon, who stated that the AU is now “the key regional partner of the UN”.²¹⁷ This is particularly so as conflicts in Africa are different from the type of conflicts the UN was designed to tackle, and are typically more complex and dangerous.²¹⁸ The UN has found itself inadequately “fit for purpose” yet unable to adjust without breaching its core principles and abandoning its *raison-d’etre*.²¹⁹

In contrast, the AU has shown itself able to respond more rapidly to crisis and it brings to bear its African solutions to African problems through troop generation and other measures when there is

²¹⁴ Speech delivered by minister for international relations and cooperation during the ministerial outreach programme at the University of Limpopo, 2009: <https://www.gov.za/speech-delivered-minister-international-relations-and-cooperation-maite-nkoana-mashabane-during>

²¹⁵ Supra n.123 at 169-70

²¹⁶ Ibid.

²¹⁷ Supra n.123 at 165-6

²¹⁸ For example, the UN was designed to maintain inter-state peace and tackle security issues between states. The Charter does not show that it envisaged intra-state conflict such as the Rwanda genocide or Darfur.

²¹⁹ Supra n.204

conflict.²²⁰ As a result of these advantages, the AU and subregional bodies are increasingly looked to as “first responders” for the UN, capable of deploying troops rapidly to stabilize a situation before transitioning to a UN peacekeeping mission, as seen in Burundi, Central African Republic and Mali.²²¹ These advantages benefit the entire UN system, although they continue to pose a risk for the reasons discussed above – the possibility of the AU’s speedy response failing to get after-the-fact authorization from the UNSC.

Thus, a seat for the AU in the permanent category of the UNSC will serve to enrich the UN, particularly its missions in Africa as it would have a permanent member that is able to appreciate the political, cultural and socio-economic consequences of the conflicts or security threats. Africa’s quest for permanent membership must therefore be seen against the changing pattern of threats to peace and security, and the challenges faced by the UN in addressing them. Inevitably, permanent membership will result in greater influence over the direction of the UNSC, and Africa’s unique ability to appreciate the nature of conflicts in its region, which is home to the bulk of UNSC missions, will be an invaluable addition to the UNSC and propel the efficiency of its responses. It will serve to solidify what is already a practical reality – AU’s interventions without UNSC authorization – and guide against the reputational risk that could result from differences in assessments and chosen courses of action. Lastly, it will ensure that Africa’s elected representatives – that is, African governments – have the fate of the African peoples in their hands, able to veto resolutions that are inimical to the interests of the African people and having a greater voice in affairs concerning their security. In this way, the UN objective of ensuring peace and security, respect for human rights and fundamental freedoms for all, and of harmonizing the actions of nations in the attainment of these ends, will be met.

Conclusion

The AU’s adoption of article 4(h) of the Constitutive Act – the right to intervene in member states in cases of genocide, war crimes and crimes against humanity – was a response to its inability to act in past violations of human rights such as the genocide in Rwanda in 1994. The AU thereafter

²²⁰ Supra. 123 at 170-1. For example, ECOWAS quickly mobilized troops from its region in early 2017 after then Gambia president, Yahya Jammeh, refused to hand over power following an election loss. The troops were mobilized within a matter of hours.

²²¹ Supra n.123

decided to play a more active role in peace and security matters in its own region, refusing to fold hands and wait for the UNSC to act in urgent situations. While the AU continues to recognize the UNSC as the primary organization for the maintenance of international peace and security, it has proposed the recognition of after-the-fact authorization in circumstances where it intervenes in a member state without prior UNSC authorization. This has not caused any recorded issues to date as the UNSC has praised AU's interventions in member states without its authorization. However, there is the risky possibility that, in some future event, the UNSC may refuse to provide the AU after-the-fact authorization following its intervention, resulting in the AU breaching the UN Charter.

To avoid the reputational harm and organizational conflict that could result from the UNSC's refusal to provide after-the-fact authorization to the AU, a permanent seat for the AU in the UNSC, which will provide it greater influence and veto power, will serve to harmonize the two organizations. A permanent seat would also ensure that the fate of the peoples of Africa lies in the hands of their elected representatives - the AU members - who would have greater influence over the direction of the UNSC and veto any resolutions that are inimical to the interests of the African people.

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LIST OF REFERENCES

Conference Report. [2008]. Tarrytown, New York, *The Relationship Between Africa and the United Nations: From Disenchantment to a More Effective Cooperation*. Available from: <https://library.fes.de/pdf-files/bueros/usa/05713.pdf>.

G.C. Mbara, N. Gopal. S. O. Ehiene & H.O. Patrick. [2021] *Re-Evaluating the African Union's Ezulwini Consensus in the reform of the United Nations Security Council* [Online]. Available from: [10.31920/2050-4306/2021/10n1a3](https://doi.org/10.31920/2050-4306/2021/10n1a3)

T.L. Chakanyuka. [2020]. *Reforming the United Nations Security Council by the African Union Proposal to Address Inequality: The Limitations*. Available from: [10.47348/ANULJ/v8/i1a6](https://doi.org/10.47348/ANULJ/v8/i1a6)

T. Hoopes & D. Brinkley. [1997]. *FDR and the Creation of the United Nations*. Yale University Press

M.O Hosli & T. Dorfler. [2019]. *Why is Change So Slow? Assessing Prospects for United Nations Security Council Reform*. Available from: [10.1080/17487870.2017.1305903](https://doi.org/10.1080/17487870.2017.1305903)

S. Hassler. [2012]. *Reforming the United Nations Security Council membership: the illusion of representativeness* [e-book]. Available from: [9780415505901](https://doi.org/9780415505901)

K.G McDonald & S.M. Patrick. [2010]. *UN Security Council Enlargement and U.S Interests*. Council on Foreign Relations Press. Available from: [978-0-87609-477-8](https://doi.org/978-0-87609-477-8)

A. Radin & C. Reach. [2017]. *Russian Views of the International Order*. [e-book]. Available from: [9780833097279](https://doi.org/9780833097279)

D. Sinha. [2018]. *Legitimacy of Power: The permanence of five in the United Nations Security Council*. [e-book]. Available from: [9789388161046](https://doi.org/9789388161046).

B Lai & V.A Lefler. [2017]. *Examining the role of region and elections on representation in the United Nations Security Council*. [Online]. Available from: [10.1007/s11558-016-9254-z](https://doi.org/10.1007/s11558-016-9254-z)

I. Badza & S. Maeresera. 2019. *The Ezulwini Consensus and Africa's Quagmire on United Nations Security Council Reform: Unpacking the Dynamics* [Online]. Available from: [10.31920/2075-6534/2019/s1n1a12](https://doi.org/10.31920/2075-6534/2019/s1n1a12)

Kuwali. [2010]. *Responsibility to Protect: Implementation of article 4(h) of the African Union Constitutive Act*. [e-book]. Available from: [9789004191716](https://doi.org/9789004191716). [9789004215962](https://doi.org/9789004215962).

United Nations, A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, and A/59/565/Corr., 6 December 2004, ['High Level Panel Report'], para. 298a.

N. Frisch, [2006]. *The Security Council and the Great Powers*. [Online]. Oxford University Press.

The Common Position of the Proposed Reform of the Security Council. [2005]. Executive Council of the African Union (Ezulwini Consensus)

Hoopes & D. Brinkley. [1997] *FDR and the Creation of the United Nations*. doi:10.2307/2997976

E Charalampos. [2016]. *South Africa's reform diplomacy and the legitimacy of the United Nations Security Council*. [Online]. Available from: [doi-org.uplib.idm.oclc.org/10.1080/02589346.2016.1212560](https://doi.org/uplib.idm.oclc.org/10.1080/02589346.2016.1212560)

P Fabricius, 'South Africa to challenge the African spoilers of UN Security Council reform' *Institute for Security Studies* (6 February 2014). P Fabricius. (Institute for Security Studies)

J.O Maseng. [2013]. *Integrating Africa and the Politics of Inclusion and Exclusion in the Process of Security Council Reforms*. [Online]. Available from: 7211517623.

G. de Carvalho & P. Singh, *Lessons from South Africa's term to the United Nations Security Council* (28 July 2021). <https://www.wilsoncenter.org/blog-post/lessons-south-africas-term-un-security-council>

United Nations General Assembly, 64th Session. 2009.

George W. Bush. [2011]. *Decision Points*. pg. 336 [Book]. Available from: [978-0-307-59061-9](https://www.whitehouse.gov/the-press-office/2010/09/08/decision-points)

K.G McDonald & S.M. Patrick, *UN Security Council Enlargement and U.S Interests* (2010).

T.G. Weiss. [2016]. *What's Wrong with the United Nations and How to Fix it*. [book]. Available from: 978-1-509-50747-4. 2nd ed.

Qin Huasun, Statement at 3730 meeting of UNSC, 10 January 1997, UN Document, S/PV.3982, p. 20.

A. Pellet. [2003]. *The Charter of the United Nations: A commentary of Bruno Simma's commentary*. Available from: 8091315649.

South West Africa 1966 I.C.J 4, 439. (July 18) (Jessup. J. dissenting)

The Pact of the League of Arab States.

R.W McDonald, *The League of the Arab States: A Study in Dynamics of Regional Organization* (2015). Pg. 43

How successful was Egypt's leadership of the African Union? (18 Feb 2020). Available from: <https://www.egypttoday.com/Article/1/81780/How-successful-was-Egypt-s-leadership-of-the-African-Union>

Human Rights Watch world report 2022

J. Warner & T. Shaw, *African foreign policies in international institutions* (2018). [book]; C. Obi, *Nigeria's foreign policy in relation to the Economic Organization of West African States* (chapter in the book).

S. Oshewolo, *Rhetoric and Praxis: Nigeria's Africa Diplomacy and the Shaping of the African Union*. (2019) Pg 54

Council on Foreign Relations. <https://www.cfr.org/blog/state-department-report-highlights-magnitude-human-rights-challenge-nigeria#:~:text=In%20arguably%20its%20most%20pointed,torture%20and%20cases%20of%20cruel%2C>

J. Akokpari, *Consistency in inconsistency: South Africa's foreign policies in international organizations*. Pg. 248

G.K. Moerane, *A Critical analysis of South Africa's pursuit of an African agenda at the United Nations Security Council 2007/2008 and 2011/2012*. Pg. 57

Dr. Nkosazana Dlamini-Zuma S/PV.5649/2007.

A. Marindze, *Diplomatic Protection and xenophobic violence in South Africa: the case for reparations to Mozambican victims*. (2010)

G.K. Moerane. [2019]. *A Critical analysis of South Africa's pursuit of an African agenda at the United Nations Security Council 2007/2008 and 2011/2012* [Unpublished Masters' Thesis]. Pretoria. University of Pretoria.

A/54/PV.4, Statement of the Secretary-General, presenting his annual report to the General Assembly, 20 September 1999.

B Kioko. [2003]. 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention'. [Online]. Available from: [10.1017/S0035336100179948](https://doi.org/10.1017/S0035336100179948). 85 IRRC 807-826. Pg. 821

G. Amvane, *Intervention pursuant to article 4(h) of the African Union Constitutive Act without United Nations Security Council authorization* pg. 295 (2015)

C. Stewart & L.H. Andersen. [2018]. *Partnering for peace: United Nations and African Union Cooperation in peace and security*. [Online]. Available from: [10.1057/978-1-137-57574-6_11](https://doi.org/10.1057/978-1-137-57574-6_11)

D O'Brien 'The search for subsidiarity: The UN, African regional organisations and humanitarian action' (2000) 7 International Peacekeeping. Pg. 63

United Nations, 2005 World Summit Outcome, UN Doc. A/60/L.1/2005, 15 September 2005, paras. 138–139.

Vienna Convention on the Law of Treaties, Article 26, 23 May 1969, 1155 UNTS 331 [‘VCLT’]; see S. D.

M. Banda, ‘The Responsibility to Protect: Moving the Agenda Forward’, United Nations Association in Canada, 2007, p. 37 (2 May 2009).

D. Maritz. [2012]. *Rwanda Genocide: Failure of the International Community?* [Online]. Available from: <https://www.e-ir.info/2012/04/07/rwandan-genocide-failure-of-the-international-community>

Res 1545, S=Res=1545 (2004), 21 May 2004.