

# Concurrent Jurisdiction of the International Criminal Court and the African Criminal Chamber in the Case of Concurrent Referrals

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## 1. INTRODUCTION

In accordance with article 24(2) of the Charter of the United Nations (Charter), the United Nations Security Council (UNSC) has the primary responsibility for the maintenance of international peace and security.<sup>1</sup> Chapter VII of the Charter further provides the UNSC with extensive powers to take binding decisions for member states to maintain or restore international peace and security. Articles 25 and 103 of the Charter respectively oblige member states to give effect to binding decisions under the Charter and to give precedence to these decisions in cases of conflict with other obligations under international law.<sup>2</sup> In this context, it is important to keep in mind that while the African Union (AU) is not a party to the Charter, all its member states are. This implies that in case of a conflict between a binding UNSC decision and a decision of the AU, member states will have to give precedence to those obligations following from the UNSC decision.<sup>3</sup>

Blur, LLB, LLD (University of the Free State), LLM (Harvard), *Habilitationsschrift* (Zurich); SARChI Professor of International Constitutional Law, Faculty of Law, University of Pretoria (South Africa); Honorary Professor, Faculty of Law, University of Bonn (Germany).

<sup>1</sup> The text of the UN Charter is available online at [www.un.org/en/sections/un-charter/un-charter-full-text/](http://www.un.org/en/sections/un-charter/un-charter-full-text/) (last accessed 10 March 2018). Art. 24(1) determines: 'In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.'

<sup>2</sup> The Charter *supra* note 1, at Art. 103 of the Charter (n 1) states: 'In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

<sup>3</sup> Even though the wording of Art. 103 only refers to treaty obligations, states over time have accepted in practice that the UNSC can also oblige states to deviate from customary international law. A concrete example includes the UNSC resolutions addressing piracy before

The question arises as to whether conflicting AU and UNSC decisions are likely, in light of the fact that the African Union Peace and Security Council for its part is charged with the primary responsibility for the prevention, management and resolution of conflicts in Africa. Article 16 of the African Union Protocol Relating to the Establishment of the Peace and Security Council of the AU of 9 July 2002 (AUPSP) determines that, insofar as the AU's relationship with sub-regional organizations is concerned, the AU has the primary role in relation to the maintenance of peace and security on the continent.<sup>4</sup> One can read this statement as running counter to the primacy conferred upon the UNSC, unless it was intended as an implicit reminder that article 53(1) of the Charter calls on the UNSC to utilize regional arrangements or agencies for enforcement action under Chapter VII of the Charter. This point will be taken up again below, when discussing article 17 of the AUPSP.<sup>5</sup> However, despite the possibility of interpreting article 16 of the AUPSP harmoniously with the Charter, the question arises as to how these two security councils will interact on issues of peace and security.

This contribution focuses in particular on the legal implications where both the UNSC and the AU Peace and Security Council refer the same situation in which international crimes have potentially been committed respectively to the International Criminal Court (ICC) and the yet to be established Criminal Chamber of the African Court of Justice and Human Rights (African Criminal Chamber – ACC), for the purpose of investigation and possible individual prosecution of the perpetrators. The ICC Statute provides for referrals of such

the coast of Somalia and which were adopted under Chapter VII of the Charter. These resolutions *inter alia* permit states to pursue suspected pirates in the territorial waters of Somalia. This is a clear deviation from both treaty and customary norms pertaining to the law of the sea. See e.g. SC Res. 1846, 2 December 2008, at § 10 which has since been regularly extended. See also A. Paulus & J. Leiss, 'Article 103', in B. Simma, D.E. Khan, G. Nolte and A. Paulus (eds), *The Charter of the United Nations. A Commentary*, Vol I (Oxford University Press, 3rd edn, 2012), 2133. *Contra* A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press, 2011), who argues that the UNSC cannot permit states to deviate from customary international law.

<sup>4</sup> The Text of the AUPSP is available at [www.peaceau.org/uploads/psc-protocol-en.pdf](http://www.peaceau.org/uploads/psc-protocol-en.pdf) (last accessed 10 March 2018). The first sentence of Art. 16(1) reads: 'The Regional Mechanisms are part of the overall security architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa.'

<sup>5</sup> It is also possible to interpret Art. 16 of the AUPSP, *supra* note 4, as merely implying that AU decisions take primacy over those of sub-regional organizations such as the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC). See E. de Wet, 'Regional Organizations and Arrangements: Authorization, Ratification or Independent Action', in M. Weller (ed), *The Oxford Handbook on the Use of Force* (Oxford University Press, 2015), 320.

situations in article 13(b) of its Statute.<sup>6</sup> The purpose of this article was to enable the ICC to undertake investigations and prosecutions in states not party to the ICC Statute.<sup>7</sup> In this context, one has to keep in mind that the UNSC has the competence under Chapter VII of the Charter to create international criminal tribunals, such as the International Criminal Tribunals for the Former Yugoslavia<sup>8</sup> and Rwanda as sub-organs of the UNSC,<sup>9</sup> as well as to request a treaty-based international criminal court such as the ICC to investigate whether international crimes have been committed in a particular territory.<sup>10</sup> However, the ICC, for its part, is not obliged to accept such a referral as it is – unlike all its member states – not a party to the Charter and therefore not bound by it. However, through article 13(b) the ICC is vested with the power to receive referrals from the UNSC.<sup>11</sup> Thus far, the UNSC has referred two situations to the ICC, namely, that of Darfur (Sudan)<sup>12</sup> and Libya.<sup>13</sup>

<sup>6</sup> The Rome Statute of the International Criminal Court of 17 July 1998 (ICCSt.) is available at [www.icc-cpi.int/nr/rdonlyres/eag9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/eag9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) (last accessed 10 March 2018). Art. 13(b) determines that the ICC may exercise jurisdiction if 'a situation in which one or more of [the crimes in Art 5.] appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'.

<sup>7</sup> D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bahir's Immunities', *JICJ* 7 (2009), 340; D. Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Co-operate with the ICC', *JICJ* 10 (2012) 299, 304. This is because the main purpose of allowing UNSC referrals is to extend the jurisdiction of the ICC to situations in which it would otherwise not have jurisdiction, due to the fact that those situations occur in non-states parties.

<sup>8</sup> SC Res. 817, 25 May 1991 (International Criminal Tribunal for the Former Yugoslavia).

<sup>9</sup> SC Res. 955, 8 November 1994 (International Criminal Tribunal for Rwanda/ ICTR).

<sup>10</sup> The ICC is currently the only inter-state treaty-based body that facilitates referrals from the UNSC. The unanimous referral by the UNSC of the situation in Libya to the ICC in SC Res. 1970, 26 February 2011, in accordance with Chapter VII of the Charter suggests that there is acceptance or at least acquiescence by states that the UNSC has the power to make referrals to the ICC under Chapter VI of the Charter.

<sup>11</sup> The cooperation between the UNSC and ICC in matters of referrals is further regulated by the Negotiated Relationship Agreement between the International Criminal Court and the United Nations of 4 October 2004, Art. 17, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202283/II-1272.pdf> (last accessed 10 March 2018). See also Akande (Effects of Security Council Resolutions), *supra* note 7, 308.

<sup>12</sup> In SC Res. 1593, 31 March 2005, the UNSC determined: 'Acting under Chapter VII of the Charter of the United Nations, 1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court; 2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and other international organizations to co-operate fully . . .'

<sup>13</sup> In SC Res. 1970, 26 February 2011, the UNSC determined: 'Acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41 . . . 4. *Decides* to refer

According to the amended article 29(1)(b) of the Protocol on the Statute of the African Court of Justice and Human Rights of 1 July 2008 (Statute of the African Court),<sup>14</sup> the AU Peace and Security Council will for its part also have the competence to refer cases to the African Criminal Chamber. Article 46F(2) further confirms that the ACC will have jurisdiction in instances where the AU Peace and Security Council refers a situation to it, where it appears that crimes have been committed over which the ACC has jurisdiction.<sup>15</sup> The use of ‘case’ in article 29(1)(b) and ‘situation’ in article 46F(2) of the Statute mirrors the terminology used in the ICC Statute, where the term ‘case’ has been interpreted more narrowly than ‘situation’, since it only includes specific individual investigations or prosecutions. If the identical terms used in the Statute of the African Court were given a meaning identical to these terms in the ICC Statute, it would seem that the AU Peace and Security Council would not be able to refer conflict situations in which potential international crimes have been committed. However, since article 46F(2) authorizes the ACC to refer situations referred by the AU Peace and Security Council, one could argue that article 29(1)(b) implicitly also covers ‘situations’ and not merely individual cases.

Furthermore, it is not clear whether the AU Peace and Security Council can refer a situation to the ACC only where it concerns an AU member state that is also a party to the Statute of the African Court, or whether it can in addition refer situations in AU member states that have not yet ratified the Statute of the African Court. The organizational practice has not yet confirmed whether the AU Peace and Security Council’s primary role in matters

the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court; 5. *Decides* that the Libyan authorities shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognising that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and other international organisations to co-operate fully with the Court and the Prosecutor . . .’

<sup>14</sup> The Protocol on the Statute of the African Court of Justice and Human Rights of 1 July 2008 (before amendment) is available at <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights> (last accessed 10 March 2018). It was amended by the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights of 27 June 2014 (Amendment Protocol), available at [www.au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights](http://www.au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights) (last accessed 10 March 2018).

<sup>15</sup> Amendment Protocol, *supra* note 14, at Art. 46F, determines: ‘The Court may exercise its jurisdiction with respect to a crime referred to in article 28A in accordance with the provisions of this Statute if . . . 2. A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Assembly of Heads of State and Government of the African Union or the Peace and Security Council of the African Union.’

of peace and security on the continent implies that it has powers analogous to that of the UNSC under Chapter VII (albeit on a regional level). Either way, the inclusion of these articles in the Statute of the African Court gives rise to the possibility of a conflict between the ICC and the ACC. It is possible that a situation or a case resulting from a referral of a situation from the UNSC to the ICC has also been referred to the ACC by the AU Peace and Security Council. While these are not the only situations in which jurisdictional conflicts between the ICC and ACC can arise,<sup>16</sup> the central role of the UNSC in the maintenance of international peace and security, as personified by article 103 of the Charter, merits an analysis of how conflicts resulting from simultaneous referrals can be resolved and preferably be prevented from happening in the first place.

This contribution will examine these questions. In doing so, it departs from the premise that – despite tensions between the AU and the ICC – Africa remains committed to supporting the prosecution of international crimes committed on the continent, while continuing a cooperative relationship with the ICC.<sup>17</sup> Such a premise may come across as surprising in light of the increasing discontent of African governments with the ICC, which is perceived as biased towards Africa.<sup>18</sup> In fact, a series of events in recent years suggest that the AU and its member states are in practice increasingly rejecting the ICC (and for that matter the UNSC). For example, at the time of writing one of the former 34 African state parties to the ICC has definitely withdrawn from the ICC in accordance with article 127(1) of the ICC Statute.<sup>19</sup> Other acts of

<sup>16</sup> For example, it is possible for the ICC Prosecutor to initiate investigations *proprio motu* in accordance with Art. 15(1) of the ICC Statute (supra note 6), while an investigation is already underway at the ACC.

<sup>17</sup> It is worth noting that African states have supported the creation of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, while the AU is supporting the Extraordinary African Chambers within the courts of Senegal for the trying of international crimes during the Habré regime in Chad. The Rwandan courts have also engaged in domestic prosecutions of international crimes subsequent to the genocide in 1994, while several African states that are party to the ICC have undertaken self-referrals to the ICC (i.e. Central African Republic, the Democratic Republic of the Congo and Uganda).

<sup>18</sup> See *inter alia* H.G. van der Wilt, 'Universal Jurisdiction under Attack. An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States', *JICJ* 9 (2011), 1043, 1043 ff; H.G. van der Wilt, 'Complementarity Jurisdiction (Article 46H)', in G. Werle & M. Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (TMC Asser Press, 2017), 187 ff. 2; L. Oette, 'Peace and Justice, or Neither? The Repercussions of the Al-Bashir Case for International Criminal Justice in Africa and Beyond', *JICJ* 8 (2010) 345, 345 ff.

<sup>19</sup> ICCSt. supra note 6, Art 127(1) determines: 'A state party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification

rebellion included the refusal by Chad, Malawi, the Democratic Republic of the Congo and South Africa to surrender President Bashir of Sudan to the ICC when he visited these countries,<sup>20</sup> as well as the decision by the AU that its member states do not cooperate with the ICC in relation to the surrender of sitting heads of state.<sup>21</sup> Similarly, the creation of the ACC at first sight comes across as an act of rebellion, since the Statute of the African Court remains silent on the relationship between the ACC and the ICC, despite the fact that 33 African AU member states are parties to the ICC Statute.<sup>22</sup>

However, the author is of the opinion that, while many AU member states may indeed, at the time of writing, have little political enthusiasm for cooperation with the ICC, the creation of the ACC does not legally prevent them from doing so, neither does it release them from their obligations under the Charter or the ICC statute, as long as they remain parties to these treaties. The potential for cooperation between the AU Peace and Security Council and the UNSC is acknowledged by the Charter as well as the AUPSP. Part VIII of the Charter, notably article 53(1), allows the UNSC to delegate enforcement

specifies a later date.' On 27 October 2017 Burundi's withdrawal from the ICC Statute took effect. See AFP, 'Burundi becomes first nation to leave international criminal court', *The Guardian* (28 October 2017), available at [www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court](http://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court) (last accessed 15 January 2018).

<sup>20</sup> In two decisions of 12 and 13 December 2011, Pre-Trial Chamber I rebuked Malawi and Chad for failing to comply with the cooperation requests issued by the ICC to arrest and surrender Omar Al-Bashir during his visits to their territories (ICC-02/05-01/09-139; and ICC-02/05-01/09-1). Pre-Trial Chamber II also issued a second decision on non-compliance in relation to Chad on 26 March 2013 (ICC-02/05-01/09). See also Decision on the Co-operation of the Democratic Republic of the Congo regarding Omar Al-Bashir's Arrest and Surrender to the Court, *The Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-195), Pre-Trial Chamber II, 9 April 2014, § 29 (*Al Bashir (DRC)* decision); Decision following the Prosecutor's Request for an Order further clarifying that the Republic of South Africa is under the Obligation to Immediately Arrest and Surrender Omar Al Bashir, *The Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 13 June 2015 (*Al Bashir (South Africa)* decision), and Request by the Court for the Arrest and Surrender of Omar Al-Bashir, *The Prosecutor v Omar Hassan Ahmad Al-Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 6 July 2017 (*Al Bashir (South Africa II)* decision).

<sup>21</sup> Assembly of the African Union, Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec/1, 12 October 2013, § .2.3, available at [www.iccnw.org/documents/Ext\\_Assembly\\_AU\\_Dec\\_Decl\\_12Oct2013.pdf](http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf) (last accessed 10 March 2018). In January 2018 the Assembly also expressed its support for requesting the UNGA to request and advisory opinion from the ICJ 'on the question of immunities of a Head of State and Government and other Senior Officials as it relates to the relationship between Articles 27 and 98 and the obligations of States Parties under International Law'. See Assembly of the African Union, Decision on the International Criminal Court, Assembly/AU/Dec.672(XXX), 28-29 January 2017, paras 5(ii), available at <https://au.int/en/decisions/decisions-declarations-and-resolution-assembly-union-thirtieth-ordinary-session> (last accessed 10 March 2018).

<sup>22</sup> Van der Wilt (Complementarity), *supra* note 18, at 190.

measures to regional organizations such as the AU.<sup>23</sup> Article 17 of the AUPSP for its part acknowledges the primacy of the UNSC in the maintenance of international peace and security and pledges close cooperation with the UNSC in promoting and maintaining peace, security and stability in Africa and in keeping with Chapter VIII of the UN Charter. This commitment to cooperation with the United Nations is further affirmed in article 3(e) of the Constitutive Act of the AU, which ‘takes due account’ of the Charter and the Universal Declaration of Human Rights.<sup>24</sup> These references in the Charter, the AU Constitutive Act and the AUPSP support the development of a symbiotic, cooperative relationship between the AU (including its Peace and Security Council) and the UN (including the UNSC) in matters of peace and security. This would include cooperation in relation to the prosecution of international crimes as a mechanism for restoring international peace and security in situations where an international (including regional) threat to peace exists.

## 2. CONFLICTING OBLIGATIONS PERTAINING TO STATE COOPERATION WITH THE ICC AND THE ACC

Before elaborating on the conflicts that may result from concurrent jurisdiction of the ICC and the ACC,<sup>25</sup> it is necessary to briefly outline the extent to which there can be overlaps in substantive, personal and temporal jurisdiction between the two courts. It is only when there is a simultaneous overlap in relation to all three areas of jurisdiction that a jurisdictional conflict can arise. While the ACC has much broader substantive jurisdiction than the ICC, both have jurisdiction in relation to genocide, crimes against humanity, war crimes and the crime of aggression.<sup>26</sup> The personal jurisdiction over natural persons

<sup>23</sup> According to the first sentence of Art. 53(1) of the Charter, *supra* note 1: ‘The Security Council shall, where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority.’

<sup>24</sup> The Constitutive Act of the African Union of 11 July 2000 is available at <https://au.int/en/treaties/constitutive-act-african-union> (last accessed 10 March 2018). According to Art. 3(e), one of the objectives of the AU is to ‘encourage international co-operation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights . . .’ Similarly, AUPSP, *supra* note 4, at Art. 7(1)(k) promotes the development of a ‘a strong “partnership for peace and security” between the Union and the United Nations and its agencies . . .’

<sup>25</sup> Concurrent jurisdiction exists when more than one court has the legal competence to entertain the same case. See *Legal Dictionary*, available at <http://legaldictionary.net/concurrent-jurisdiction/> (last accessed 10 March 2018).

<sup>26</sup> ICCSt, *supra* note 6, at Art. 5; Statute of the African Court (as amended), *supra* note 14 at Art. 28A(1).

of the ICC and ACC is limited to individuals who were over the age of 18 at the time the crime was committed.<sup>27</sup> Both courts can exercise jurisdiction over crimes that occurred on the territory of state parties and crimes that are committed by nationals of a state party, while the ACC also provides for jurisdiction where the victim of the crime is a national of a member state, as well as in relation to extraterritorial acts by non-nationals that threaten a vital interest of a member state.<sup>28</sup>

The statutes of both the ICC and the ACC limit the overall temporal jurisdiction in respect of crimes committed after the entry into force of the respective treaties.<sup>29</sup> In the case of the ICC this was 1 July 2002, while in the case of the ACC it will be 30 days after the Amendment Protocol had entered into force.<sup>30</sup> In addition, both the ICC and the ACC have only temporal jurisdiction over crimes committed in the member state in question after its ratification of the respective Statute.<sup>31</sup> As the Amendment Protocol has not yet entered into force,<sup>32</sup> any jurisdictional conflict between the ICC and ACC for the time being remains hypothetical. Even so, future conflicts cannot be excluded once the Amendment Protocol enters into force.

In the context of this contribution, it is the potential overlap in substantive, personal and temporal jurisdiction resulting from simultaneous referrals by the UNSC and the ACC that is of interest. In cases of such overlap, member states of these respective courts may find themselves confronted with conflicting obligations to cooperate in relation to investigations and prosecutions. As mentioned above, a UNSC referral combined with article 13(b) of the ICC Statute enables the ICC to undertake investigations and prosecutions in states

<sup>27</sup> ICCSt., supra note 6, at Art. 26; Statute of the African Court (as amended), supra note 14, at Art. 46D. While Art. 25(1) ICCSt. limits the personal jurisdiction of the ICC to natural persons, the ACC has jurisdiction over natural persons and legal persons (with the exception of states), in accordance with Art. 46B(1) and Art. 46C (1) of the Statute of the African Court (as amended).

<sup>28</sup> ICCSt., supra note 6, at Arts. 12(2)(a) & (b); Statute of the African Court (as amended), supra note 14, at Art. 46E(2).

<sup>29</sup> ICCSt., supra note 6, at Art. 11(1); Statute of the African Court (as amended), supra note 14, at Art. 46E(1).

<sup>30</sup> Statute of the African Court (as amended), supra note 14, at Art. 11.

<sup>31</sup> ICCSt., supra note 6, at Art. 11(2) ICC; Statute of the African Court (as amended), supra note 14, Art. 46E(2). States that have acceded to the ICCSt, after its entry into force can extend the ICC's jurisdiction retroactively until 1 July 2002. This is possible when a state party makes a declaration to that effect under Art. 11(2) of ICCSt. in conjunction with Art. 12(3).

<sup>32</sup> While the Statute of the African Court (supra note 14) has only been ratified by six states, the Amendment Protocol, supra note 14, has not been yet been ratified by any state. Both treaties require 15 ratifications for entry into force. Ratification information is available at [www.au.int/en/treaties](http://www.au.int/en/treaties) (last accessed 10 March 2018).



not party to the ICC Statute. Once a situation in a non-state party is brought within the jurisdiction of the ICC by means of a UNSC referral, the ICC statutory framework determines the way in which investigations, prosecutions and cooperation by member states are to take place.<sup>33</sup> For example, in accordance with article 86 of the ICC Statute, state parties will have to fully cooperate with the ICC in its investigation and prosecution of crimes within the ICC's jurisdiction.<sup>34</sup> In addition, they will have to comply with requests for arrest and surrender in accordance with the ICC Statute.<sup>35</sup>

As far as ICC non-member states are concerned, it is worth recalling that they are all members of the UN and, therefore, bound by UNSC decisions, including the precedence clause in article 103 of the Charter. These states, therefore, are bound to give effect to obligations in the referring UNSC resolutions that are directed at them. Thus far the UNSC, when referring situations to the ICC, has obliged the respective state to fully cooperate with the ICC.<sup>36</sup> This reference to 'full cooperation' in UNSC Resolution 1593 (2005) concerning Darfur, and UNSC Resolution 1970 (2011) concerning Libya established a textual link with the ICC Statute that triggers all articles in the ICC Statute concerning cooperation.<sup>37</sup> Therefore, the states in question (Sudan and Libya) had to take all measures required by international and national law necessary to facilitate investigations and eventual prosecutions by the ICC in relation to those individuals against whom the ICC issued arrest warrants. It further meant that indicted state officials could not invoke immunities to prevent their arrest and surrender.<sup>38</sup>

<sup>33</sup> ICCSt., supra note 6, at Art. 1, determines that the 'jurisdiction and functioning of the Court shall be governed by the provisions of the Statute'. See also Akande, supra note 7, at 340; P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' *JICJ* 7 (2009) 315, 324; G. Sluiter, 'Obtaining Co-operation from Sudan – Where is the Law?' *JICJ* 6 (2008) 871, 381.

<sup>34</sup> ICCSt., supra note 6, at Art. 86(1), determines: 'States Parties shall, in accordance with the provisions of this Statute, co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.'

<sup>35</sup> ICCSt., supra note 6, Art. 89(1), stipulates: 'The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any state on the territory of which that person may be found and shall request the co-operation of that state in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.' See also D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bahir's Immunities', *JICJ* 7 (2009), 334.

<sup>36</sup> See supra notes 12, 13.

<sup>37</sup> See also *Al Bashir (DRC)* decision, supra note 20, at § 29; *Al Bashir (South Africa)* decision, supra note 20, at § 9; *Al Bashir (South Africa II)* decision, supra note 20, at § 87.

<sup>38</sup> *Al Bashir (DRC)* decision, supra note 20, at § 29; *Al Bashir (South Africa)* decision, supra note 20, at §§ 6, 7; *Al Bashir (South Africa II)* decision, supra note 20, at § 89.

Moreover, ICC member states can assume or presume that in response to UNSC Resolutions 1593 (2005) and 1970 (2011), Sudan and Libya respectively have removed any international or domestic legal obligations that prevented their cooperation within the ICC statutory framework – despite the fact that these resolutions did not explicitly state as much. This conclusion is supported by the 1970 *Namibia* advisory opinion of the International Court of Justice (ICJ).<sup>39</sup> The decision concerned the UNSC resolution that declared the South African presence in Namibia illegal,<sup>40</sup> without, however, imposing any explicit obligations on third states. The ICJ gave a purposive interpretation to the resolution and determined that the UNSC resolution required all states to recognize the illegality of South Africa's presence and to refrain from any acts that would imply the recognition of the legality of South Africa's presence.<sup>41</sup> All states thus had to accept the legal situation resulting from the UNSC binding decision and act in accordance with such acceptance, as anything less would undermine the efficacy of the principal organ entrusted with the primary responsibility for international peace and security.<sup>42</sup>

As far as the ACC is concerned, article 46L of the Statute of the African Court provides for a comprehensive cooperation framework with the ACC for state parties to the Statute of the African Court. If the AU Peace and Security Council were to refer situations occurring in parties to the Statute of the African Court to the ACC, clearly the latter's statutory framework would be applicable to investigations and prosecutions. Moreover, if one assumes for the sake of argument that the AU Peace and Security Council can also refer situations in states that are not party to the Statute of the African Court to the ACC, then it is likely that the effect of such a referral would be comparable to that of a UNSC referral to the ICC. The statutory framework of the ACC would become applicable and determine the obligations of member states in relation to the investigations and prosecutions by the ACC in the territory of a non-state party.

In cases of a simultaneous referral by the UNSC to the ICC and the AU Peace and Security Council to the ACC, states will have to give preference to the obligations stemming from the UNSC referral in cases of conflict. In light

<sup>39</sup> Advisory Opinion, *Legal Consequences for States of the Continental Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), ICJ Reports, 16; Akande, *supra* note 7, at 347.

<sup>40</sup> SC Res. 276, 30 January 1970, § 2.

<sup>41</sup> *Namibia* Advisory Opinion, *supra* note 37, at §§ 114–6; Akande, *supra* note 7, at 347.

<sup>42</sup> Akande, *supra* note 7, at 347; N. Boschiero, 'The ICC Judicial Finding on Non-Co-Operation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593', *JICJ* 13 (2015), 646–7.

of article 103 of the Charter, all UN member states (which include all AU member states) will have to give precedence to obligations to cooperate with investigations and prosecutions resulting from a UNSC referral. The overriding effect attached to Chapter VII obligations extends to investigations and prosecutions resulting from a UNSC referral in accordance with Chapter VII of the Charter. In line with the reasoning in the *Namibia* advisory opinion, such an interpretation is necessary to ensure the efficacy of binding UNSC decisions in the interests of international peace and security.

### 3. A SYMBIOTIC EXISTENCE THROUGH COMPLEMENTARITY?

An existing avenue for resolving or even preventing conflicts that can result from simultaneous referrals to the ICC and ACC respectively is the complementarity principle provided for in article 17 ICC Statute, as well as article 46H of the Statute of the African Court, as amended. Similarly, the *ne bis in idem* principle in article 20(3) of the ICC Statute and article 46I of the Statute of the African Court can provide a form of complementarity. The principle of complementarity implies that prosecutions should first and foremost be undertaken by the national courts of state parties who have jurisdiction over the crime.<sup>43</sup> As far as article 17 of the ICC Statute is concerned, articles 17(1)(a) and 17(1)(b) respectively determine that a case is inadmissible if it is being investigated or prosecuted by a state which has jurisdiction over it, or where such a state has decided not to prosecute the person concerned, unless the state is genuinely unwilling or unable to carry out the investigation or prosecution.<sup>44</sup> In order for a case to be inadmissible before the ICC in terms of article 17 of the ICC Statute, the same person must be investigated or prosecuted for what is substantially the same conduct by the respective national court.<sup>45</sup> Article 46H of the Statute of the African Court contains a

<sup>43</sup> Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2008).

<sup>44</sup> ICCSt., *supra* note 6, at Art. 17(1), determines: 'Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute; (c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3 . . .'

<sup>45</sup> This has been confirmed by the ICC Appeals Chamber when confronted with challenges to admissibility in accordance with Art. 19 of the ICCSt., *supra* note 6. See Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May

similar clause with one noticeable difference, namely, that it also provides for complementarity in relation to the courts of the African regional economic communities, where those are specifically provided for. This suggests that the Statute of the African Court provides for prosecutions by regional courts as an alternative to its own jurisdiction where member states are unwilling or unable to carry out prosecutions.<sup>46</sup>

The question thus arises whether and to what extent the investigation or prosecution undertaken by an international court created by treaty such as the ACC could qualify as a national investigation or prosecution in terms of articles 17(1)(a) and 17(1)(b) of the ICC Statute, namely, one undertaken by a 'state'. Similarly, the question arises as to whether an investigation or prosecution undertaken by the ICC can qualify as a regional investigation or prosecution in terms of article 46H(1) of the Statute of the African Court. If ACC investigations or prosecutions were to qualify as national investigations or prosecutions, that is, those undertaken by a 'state', they would be covered by the principle of complementarity embodied in articles 17(1)(a) and 17(1)(b) of

2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11 OA), Appeals Chamber, 30 August 2011, §§ 36, 39–40 (*Kenya admissibility judgment*). According to the Appeals Chamber the phrase 'is being investigated' in this context signifies the taking of concrete steps to determine whether a particular suspect is responsible for particular conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses. See also Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', *Gaddafi and Al-Senussi* (CC-01/11-01/11), Appeals Chamber, 21 May 2014 (*Gaddafi Appeal Judgment*), § 72. According to the Appeals Chamber, investigations for 'substantially the same conduct' hinges on the extent of the overlap between the incidents investigated by the state and the ICC respectively. In an earlier judgment the Appeals Chamber concluded that charges for ordinary domestic crimes were not based on 'substantially the same conduct' as charges for crimes against humanity. See Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo', *Simone Gbagbo* (ICC-02/11-01/12 OA) Appeals Chamber, 27 May 2015 (*Gbagbo Appeal Judgment*), §§ 2, 14. See generally K.J. Heller, 'Radical Complementarity', *JICJ* 14 (2016), 637 ff.

<sup>46</sup> Statute of the African Court (as amended), supra note 14, at Art. 46 H reads: '1. The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities'.

2. The Court shall determine that a case is inadmissible where (a) the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable to carry out the investigation or prosecution; (b) the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state to prosecute; (c) the person concerned has already been tried for conduct which is the subject of the complaint . . .'

the ICC Statute – to the extent that they indeed concern the same individuals being investigated for what amounts to substantially the same conduct. Similarly, if ICC investigations or prosecutions (relating to the same person for the same conduct) were to qualify as one undertaken by a regional court, they would be covered by article 46H of the Statute of the African Court.<sup>47</sup>

In such instances, the overriding quality of the obligation on states to cooperate with ICC investigations and prosecutions that resulted from a UNSC referral under Chapter VII would only be triggered if the respective investigations and/or prosecutions by the ACC were tainted by unwillingness and inability as defined in article 17 of the ICC Statute. However, if the ACC were engaging in a genuine investigation or prosecution,<sup>48</sup> there would be no need for the ICC to insist on exercising its jurisdiction in the same case. After all, as already indicated, while a UNSC referral of a situation to the ICC does oblige ICC member states to cooperate with subsequent investigations and prosecutions initiated by the ICC, such cooperation has to take place in accordance with the ICC Statute.<sup>49</sup> This, in turn, implies that it remains up to the ICC to decide which specific investigations and prosecutions to pursue, *inter alia* taking account of article 17 of the ICC Statute.

In accordance with the above reasoning, the ACC for its part would also have a legal basis to refrain from continuing with an investigation or prosecution which is also being undertaken by the ICC, or from initiating such an investigation or prosecution in the first place. The reason for this is that if the ICC were to qualify as a regional court in terms of the Statute of the African Court, article 46H(1) could be read as relating to a prosecution by the ICC as an alternative to the ACC's own jurisdiction where a state is unwilling or

<sup>47</sup> Kenya has proposed to the Working Group on Amendments of the International Criminal Court Assembly of State Parties that the Preamble to the ICC Statute be amended. The words 'and regional' should be added in the sentence pertaining to complementarity to read: 'Emphasising that the International Criminal Court established under this Statute shall be complementary to national *and regional* criminal jurisdictions' (emphasis added). See Report of the Working Group on Amendments, ICC-ASP/13/31 (7 October 2014), at 17; E. de Wet, 'The Relationship Between the International Criminal Court and *Ad Hoc* Criminal Tribunals: Competition or Symbiosis?' *Journal of International Peace and Organisation* 83 (2008), 46–7.

<sup>48</sup> For an analysis of the term 'genuinely' in ICCSt., *supra* note 6, at Art. 17, and its relationship with 'willing' and 'unable', see Van der Wilt (Complementarity), *supra* note 18, at 192 ff. See also the *Kenya admissibility* judgment, *supra* note 45, at § 40. The Appeals Chamber underscored that the determination of the existence of an investigation must be distinguished from assessing whether the state is 'unwilling or unable genuinely to carry out the investigation or prosecution'. This is a separate, additional consideration when determining the admissibility of a case. Interestingly, the Statute of the African Court, *supra* note 14, at Art. 46H (as amended), does not contain the term 'genuinely'.

<sup>49</sup> See text leading up to note 33.

unable to investigate or prosecute a particular case. Such a formal legal basis is important, since the ACC (or rather the African Court as a whole) is not party to the Charter and, therefore, not legally bound to UNSC decisions under Chapter VII of the Charter. Therefore, even while member states to the ACC will have to give precedence to obligations to cooperate with the ICC where prosecutions result from a UNSC referral under Chapter VII of the Charter, the ACC itself would still need a formal legal basis for coordinating investigations and prosecutions with the ICC. A reading of article 46H of the Statute of the African Court providing for the complementarity principle to apply to investigations and prosecutions by the ICC does give the ACC a formal legal basis for such co-ordination.

As indicated at the outset of this section, the above legal interpretation turns on whether investigations and prosecutions by the ACC can qualify as those undertaken by 'a state' under article 17 of the ICC Statute, as well as whether those undertaken by the ICC can be regarded as the equivalent of investigations and prosecutions undertaken by courts of the regional economic communities in terms of article 46H(1) of the Statute of the African Court. The answer to this question would depend on whether one takes a textual or purposive approach to interpreting these two articles. As to whether the ACC can qualify as a 'state' court for the purpose of articles 17(1)(a) and 17(1)(b) of the ICC Statute, their text clearly refers to national (domestic) jurisdictions. Both mention an investigation and prosecution 'by a state' which has jurisdiction over a case. Similarly, article 17(2) (a) refers to a 'national decision' and article 17(3) to a 'national judicial system'.<sup>50</sup>

This seems to imply that the court in question has to be controlled by a particular state in relation to its creation, status, staff appointments (including judges and prosecutors), applicable law and also financing.<sup>51</sup> For example, the court in question needs to be imbedded in the national judiciary of a state, staffed by a majority of national judges and funded by its own government. Also, the applicable law (including the extent to which the court applies international law) is determined first and foremost by the domestic legal order.<sup>52</sup> However, the fact remains that the statutes of both the African Court and the ICC were created through international treaties. They do not constitute part of the legal system of any state; the appointment of their staff members (notably those who play the most prominent roles in the criminal prosecution, such as the judges and prosecutors) is determined by processes provided for in their respective statutes; their applicable law is also regulated

<sup>50</sup> De Wet, *supra* note 47, at 47.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

by their statutes; while their funding stems from international sources such as the assessed or voluntary contributions by state parties.<sup>53</sup>

A textual interpretation of article 17 of the ICC Statute, therefore, would not support an interpretation according to which the ACC would qualify as the court of a 'state'. Similarly, a textual interpretation of article 46H(1) does not support an interpretation in accordance with which the ICC qualifies as a court of one of the regional economic communities. These concern courts within African sub-regional communities to which the ICC clearly does not belong.<sup>54</sup> Even so, these difficulties in classification resulting from a textual interpretation can perhaps be avoided if one resorts to a teleological (purposive) interpretation of article 17 of the ICC Statute and article 46H(1) of the Statute of the African Court. In accordance with a teleological interpretation, the purpose of both these articles is to ensure that the ICC and the ACC act as residual institutions. They should only intervene where other competent courts have proven to be ineffective in prosecuting international crimes.

If the ACC indeed proves itself to be willing and able to engage in genuine investigations and prosecutions, it is reasonable to conclude that investigations and prosecutions by the ACC would in principle qualify as those undertaken 'by a state' for the purpose of article 17 of the ICC Statute.<sup>55</sup> These investigations and prosecutions, therefore, would be covered by the complementarity principle enshrined in article 17 of the ICC Statute. As a result, the ICC would only have to insist on exercising jurisdiction over cases resulting from UNSC referrals where, in a particular case concerning the same person for substantially the same conduct, the ACC investigation or prosecution did not live up to the standards outlined in article 17.<sup>56</sup> Similarly, a purposive interpretation of article 46H of the Statute of the African Court would provide the ACC with a legal basis to defer certain cases to the ICC. It would allow the ACC to refrain from initiating investigations or prosecutions (of the same person for what amounts to the same conduct), where the ICC has already done so in response to a UNSC referral under Chapter VII. Alternatively, the ACC can defer the case to the ICC where the latter insists on proceeding with a particular investigation or prosecution resulting from a UNSC referral.

<sup>53</sup> De Wet, *supra* note 47, at 35.

<sup>54</sup> See for example the Treaty for the Establishment of the East African Community of 30 November 1999, which established the East African Court of Justice in Art. 9. The text is available at <http://eacj.org/wp-content/uploads/2012/08/EACJ-Treaty.pdf> (last accessed 10 March 2018).

<sup>55</sup> De Wet, *supra* note 47, at 49.

<sup>56</sup> *Ibid.*

As indicated above, the *ne bis in idem* principle may also provide for a form of complementarity. This principle is guaranteed in article 20(3) of the ICC Statute<sup>57</sup> and article 46I of the Statute of the African Court.<sup>58</sup> In both statutes, the principle is articulated in a way which aims at preventing a person from being tried for the same conduct by different courts, unless the trial by the other court was aimed at shielding the accused or was not conducted in accordance with the principles of independence or impartiality under international law. Interestingly, both articles 20(3) of the ICC Statute and 46I of the Statute of the African Court refer to a trial by 'another court' as opposed to one by 'a state'. These articles, therefore, do not specify that the other prosecution has to take place in a domestic court. This in turn implies that article 20(3) of the ICC Statute would allow for the application of the *ne bis in idem* principle to also cover cases where a person has been tried by the ACC for the same conduct, without contradicting the wording of the article (as is the case with article 17 of the ICC Statute). The almost identical provision in article 46I of the Statute of the African Court would further provide the ACC with the legal basis to refrain from prosecution where a person has been tried for the same conduct by the ICC. Stated differently, if either the ICC or the ACC were simply to wait until the other court has tried a case, articles 20(3) of the ICC Statute and 46I of the Statute of the African Court would provide a clear legal basis (or even an obligation) *not* to try the same case. The only exception would be where the proceedings in the other court (whether the ACC or ICC) were fundamentally flawed, so as to satisfy the criteria stipulated in articles 20(3)(a) and (b) of the ICC Statute or articles 46I(a) and (b) of the Statute of the African Court.

<sup>57</sup> ICCSt., supra note 6, at Art. 20(3), determines: 'No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'

<sup>58</sup> Statute of the African Court, supra note 14, at Art. 46I(2), determines: 'Except in exceptional circumstances, no person who has been tried by another court for conduct proscribed under Article 28A of this Statute shall be tried by the Court with respect to the same conduct unless the proceedings in the other Court (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'



#### 4. CONCLUSION

African states do not as yet face the risk of conflicting obligations to cooperate with the ACC and ICC, due to simultaneous or overlapping referrals by the AU Peace and Security Council and the UNSC respectively. However, such conflicts may come into existence in the future if the ACC comes off the ground and there is overlapping substantive, personal and temporal jurisdiction between the ICC and the ACC. The fulfilment of these conditions for jurisdictional overlap will, amongst other things, depend on whether the Amendment Protocol will receive the required 15 ratifications and whether the current 33 African states that are party to the ICC Statute do not withdraw from it. If (more) African states indeed were to withdraw from the ICC, as many in recent times have threatened to do, they will no longer be bound by the duty to cooperate with the ICC under *inter alia* articles 86 and 89 of the ICC Statute. The UNSC of course can still refer situations arising in any state (including those that have withdrawn from the ICC) to the ICC in accordance with its Chapter VII powers, as well as oblige that state (and any other state) to cooperate with the ICC. However, such referrals will remain few and far between, especially while the prospects for cooperation between the AU and the UNSC in matters of ICC referrals remain bleak.

There is also the issue of the financing of the ACC, which is bound to be very expensive and may in practice prevent African states from ratifying the Amendment Protocol. As a result, it is possible, if not likely, that the ACC does not get off the ground for years to come. Therefore, the real concern from the perspective of those who want to prevent impunity for international crimes is not so much jurisdictional conflicts between the ACC and the ICC, as the lack of any (residual) international jurisdiction for the prosecution of international core crimes on the continent. This would be the logical result if there were a mass withdrawal of African states from the ICC, without the ACC being in place.

However, if the current African members of the ICC remained parties to the ICC Statute and the ACC indeed came off the ground, it is possible for the ACC and ICC to develop a cooperative relationship in cases of jurisdictional overlap. The above analysis has attempted to explain how a purposive interpretation of the complementarity principle in articles 17 and 20(3) of the ICC Statute and articles 46H(1) and 46I of the Statute of the African Court could provide a legal basis for such cooperation. Both the ACC and the ICC would have much to gain from such cooperation. The ICC for its part has limited capacity and can only engage in a limited number of investigations

and prosecutions.<sup>59</sup> An effective ACC would relieve the case load of the ICC and result in the availability of more resources for ICC investigations and prosecutions in other regions. Stronger involvement in other regions would strengthen the legitimacy of the ICC, which is currently perceived by many on the African continent as biased towards Africa.

The ACC and the AU Peace and Security Council for its part would also have an interest in preventing a jurisdictional conflict with the ICC, in particular where the conflict concerns investigations and prosecutions resulting from a UNSC referral under Chapter VII of the Charter. Most peace-keeping and peace-enforcement operations in Africa, whether under the auspices of the AU or the UN, are dependent on the financial and logistical support of Western states. This included Western members of the ICC and the permanent Western members of the UNSC. If a jurisdictional conflict between the ACC and ICC were perceived as an attempt to undermine binding treaty obligations *vis-à-vis* the UN and the ICC, this may have a negative impact on the willingness of Western states to support African peace-keeping and peace-enforcement initiatives. A cooperative relationship between the ICC and ACC in matters of jurisdictional overlap could prevent this from happening, while simultaneously carving out a strong role for the ACC in preventing impunity for international crimes on the continent.

<sup>59</sup> Van der Wilt, *supra* note 18, at 198.