

## Article 46L

*Promoting an Effective Cooperation Regime*

DIRE TLADI

## 1. INTRODUCTION

The success of an international criminal justice mechanism is likely to depend on cooperation with States. It is thus generally expected for statutes of international criminal tribunals to provide some mechanism for cooperation between the tribunal and States.<sup>1</sup> It was thus to be expected that the AU would include some provisions on cooperation in the Statute of the African Court, annexed to the Malabo Protocol.

Yet, experience shows that having provisions on cooperation in a statute does not guarantee cooperation. Obtaining cooperation very often depends on the right legal framework, including absence of conflicting obligations, as well as consistent political interest and potential consequences of non-cooperation. To these, one might add the potential consequences of cooperation if that cooperation requires the arrest of sitting of head of another State. The recent, and much publicized, alleged case of non-cooperation of South Africa in the arrest of the Sudanese President, Al-Bashir, while attending the African Union (AU) Summit in Johannesburg is illustrative of how these factors can lead to cases of non-cooperation.<sup>2</sup> In that case, the presence of a conflict of obligations between the rules of customary international law and the Summit Host Agreement between South Africa and the AU, on the one hand and, on the

<sup>1</sup> See, e.g. Art. 27 and 29 of the Statute of the International Criminal Tribunal for Former Yugoslavia (1993). See also Art. 26 and 28 of the Statute of the International Criminal Tribunal for Rwanda (1994).

<sup>2</sup> See, e.g. J. P. Ongeso, 'Al Bashir: What the Law Says about South Africa's Duties', available online at [www.enca.com/opinion/al-bashir-what-law-says-about-south-africas-duties](http://www.enca.com/opinion/al-bashir-what-law-says-about-south-africas-duties) (last visited on 20 July 2015).

other hand, the duty to cooperate under the Rome Statute,<sup>3</sup> was a significant factor in the eventual non-arrest of Al-Bashir.

Also, significant, however, were the political dynamics. Arresting an African head of State to surrender him to the ICC, at a meeting of heads of the African Union when the latter organization had a policy of non-cooperation with the ICC, and just a few months after xenophobic attacks against nationals from other African States in South Africa was, quite apart from all the legal controversies, politically impossible. Politically, with South Africa keen to shed the label of 'big brother' on the continent, a decision to arrest Al-Bashir could have set South Africa's relations with other African States and the African Union back. South Africa would likely have been sanctioned by the AU, possibly expelled or suspended from the organization. More than likely, potential consequences, both legal and political, could have played a role in the events surrounding Al-Bashir's presence and departure from South Africa.

The stark consequences for South Africa, should it have decided to ignore its political and legal commitments to the AU can be compared with the almost non-existent consequences for the non-arrest of Al-Bashir. From the experience of the previous seven cases of non-cooperation (Kenya, Djibouti, Chad on two occasions, Malawi, Nigeria and the DRC),<sup>4</sup> the consequence of non-arrest was a referral to an apparently disinterested the Security Council and the ICC Assembly of States Parties and nothing else. Politically neither the Security Council nor the Assembly of States has shown any appetite, despite the potential tools at their disposal, for action against non-cooperating States.<sup>5</sup>

<sup>3</sup> See for discussion, D. Tladi, 'The Duty on South Africa to Arrest and Surrender Al Bashir under South African and International Law: A Perspective from International Law', 13 *Journal of International Criminal Justice* (2015) 1027; E. de Wet, 'The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law', 13 *Journal of International Criminal Justice* (2015) 1049; M. J. Ventura, 'Escape from Johannesburg?: The Sudanese President Al-Bashir Visits South Africa and the Implicit Removal of Head of State Immunity by the UN Security Council in Light of *Al-Jedda*', 13 *Journal of International Criminal Justice* (2015) 1025. See also D. Akande, 'The Bashir Case: Has the South African Supreme Court Abolished Immunity for All Heads of States?', 29 March 2016 *European Journal of International Law Talk!*

<sup>4</sup> Since the events in South Africa there have been two further cases of non-cooperation, namely Djibouti and Uganda. See *Decision on the Non-Compliance by the Republic of Uganda with the Request for the Arrest and Surrender of Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute: In the Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), 11 July 2016 (Pre-Trial II); *Decision on the Non-Compliance by the Republic of Djibouti with the Request for the Arrest and Surrender of Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute: In the Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), 11 July 2016 (Pre-Trial II).

<sup>5</sup> D. Tladi, 'When Elephants Collide It Is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic', 7 *African Journal of Legal Studies* (2014) 381.

On the other hand, the legal consequences of acting inconsistently with the customary international law and Host Agreement obligations would have meant the suspension of South Africa from the AU.

The role of competing obligations as a factor determining cooperation is not only limited to the political. As a matter of international law, any breach of a rule, whether customary international law rules on immunity, the AU Host Country Agreement or the duty to cooperate under the Rome Statute implies the responsibility of a State. Yet when these obligations pull in opposite directions, their impact on a decision to cooperate or not is significantly diminished since any decision taken would, in any event, implicate that State's responsibility – a case of 'damned if you do, damned if you don't'. All of these considerations that affect the will to cooperate should play some role in the development of a system of cooperation with the African Court. In particular, to the extent possible, avoiding conflict with other legal regimes is a key ingredient to enhancing cooperation.

In the light of the issues highlighted above, this chapter addresses the provisions on cooperation in the Malabo Protocol. I begin, in the next section, by addressing some issues of context, including the importance of cooperation for the success of an international criminal justice system. I then provide a descriptive analysis of the provision on cooperation in the Malabo Protocol. Finally, I evaluate the prospects for the success of the cooperation regime before offering some concluding remarks. The Malabo Protocol follows other international criminal tribunals with track records of successes and challenges. The experience of the ICC, a Court established by treaty like the AU Court, provides a particularly useful vantage point from which to evaluate the provision on cooperation in the Malabo Protocol.

## 2. CONTEXT: THE IMPORTANCE OF COOPERATION

The importance of cooperation for the success of international criminal courts and tribunals cannot be overemphasized.<sup>6</sup> The importance of cooperation in the Rome Statute system is reflected in the elaborate framework for

<sup>6</sup> See for discussion B. Swart, 'General Problems' in A. Cassese, P. Gaeta and J.R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary (Volume II)* (2002), at 1598, who describes the ICC, for example, as a 'giant without arms and legs who needs artificial limbs to walk and work'. See also A. Ciampi, 'The Obligation to Cooperate' in A. Cassese, P. Gaeta and J.R.W.D. Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary (Volume II)* (2002), at 1607. See especially Bert Swart 'Arrest and Surrender' in Antonia Cassese, Paola Gaeta and John RWD Jones (Eds.) *The Rome Statute of the International Criminal Court: A Commentary (Volume II)* (2002), at 1640.

cooperation in Part Nine of the Rome Statute<sup>7</sup> as well as the constant reaffirmation of the duty to cooperate by the Assembly of State Parties.<sup>8</sup> As with the ICC, the effectiveness of the African court in the execution of its criminal jurisdiction, would be greatly diminished without cooperation. Like other international criminal courts and tribunals, the African Court and its criminal chamber will not have a police force at its disposal to arrest persons with outstanding arrest warrants nor will it be able to freeze assets, or provide prisons for holding convicted persons. The African Court will, without the cooperation of States, find it difficult to secure witnesses, obtain documents and other evidence. Only States, which exercise sovereignty over territory, can perform these functions unhindered.

While cooperation is central to the success of international criminal courts and tribunals, recent experience with the ICC shows that when difficulties and conflicts between various interests and obligations arise it is very often cooperation that suffers.<sup>9</sup> In the wake of political (and legal) tensions between the AU and the ICC, the AU decided that African States were not to cooperate with the ICC in the case of the ICC against Al-Bashir.<sup>10</sup> In a sense, the AU decided to 'hit' the ICC where it would hurt the most – in the area of State cooperation. Similarly, when African states have been faced with political and legal dilemmas involving cooperation, it has been cooperation that has received the short end of the stick. To date, in addition to the most recent case of South

<sup>7</sup> Part 9 of the Rome Statute contains a general obligation to cooperate in Art. 86 ('States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigations and prosecution of crimes within jurisdiction of the Court.'). Art. 87, for example, provides general provisions on requests for cooperation, Art. 89 to 92 relates to various aspects of the duty to arrest and surrender, while Art. 93 contains a list of other forms of cooperation and assistance.

<sup>8</sup> See, e.g. 2014 Assembly of States Parties Resolution on Cooperation (ICC-ASP/12/Res. 13) which stresses, in the preamble, the 'importance of effective and comprehensive cooperation and judicial assistance . . . to enable the Court to fulfil its mandate.' Paragraph 2 of the same resolution emphasizes 'the importance of the timely and effective cooperation and assistance from States Parties' Particularly in the context of the non-execution of arrest warrants, paragraph 2 of the resolution continues to stress 'that the protracted non-execution of Court requests has a negative impact on the ability [of the ICC] to execute its mandate, in particular when it concerns the arrest and surrender of individuals subject to arrest warrants.'

<sup>9</sup> See generally, Tladi *supra* note 5.

<sup>10</sup> See, e.g. § 4 of the Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.245 (XIII), 3 July 2009; § 5 of the Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting of the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.296(XV), 27 July 2010; § 5 of the Decision on the Implementation of the Decisions on the International Criminal Court (ICC), Assembly/AU/Dec.336(XVIII), 1 July 2011.

Africa, there have been cases of non-cooperation in the arrest and surrender of Al-Bashir, namely Kenya, Malawi, Chad (on two occasions), Nigeria, the Democratic Republic of the Congo, the Central African Republic and Djibouti (on two occasions) and Uganda. The Kingdom of Jordan has also been found guilty of non-cooperation in the arrest and surrender of Al Bashir.

It should be stated that it is not only the AU that has contributed to non-cooperation. Several decisions of non-cooperation have been transmitted to the Assembly of States Parties and the Security Council in accordance with Article 87(7) of the Rome Statute.<sup>11</sup> In 2011, the Assembly of States Parties adopted a set of procedures for addressing cases of non-cooperation (hereinafter the ‘Assembly Procedures’) to promote compliance with the duty to cooperate.<sup>12</sup> The Assembly Procedures makes provision for, *inter alia*, the appointment of ‘a dedicated facilitator to consult on a draft resolution containing concrete recommendations’ concerning the State that is guilty of non-cooperation.<sup>13</sup> Yet in all the cases of non-cooperation referred to the Assembly of States, there has not been a single dedicated facilitator or a resolution with concrete recommendations. While it is possible to speculate on the reasons why the Assembly of States has never acted on non-cooperation cases referred to it, this inaction, at best, shows a lack of commitment to act in the face of non-cooperation and, at worst, a sacrifice of cooperation at the political altar. It might also be just a reflection of the fact that it is difficult to conceive of real sanctions. The only real sanction is probably suspension, but this is politically not possible when the ICC is trying to achieve universality.

<sup>11</sup> Art. 87(7) of the Rome Statute provides that where “a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.” See, e.g. *Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir’s Recent Visit to Djibouti, Situation in Darfur, Sudan: The Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, ICC-02/05–01/09 (12 May 2011); *Decision Pursuant to Art. 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Situation in Darfur, Sudan: The Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, ICC-02/05–01/09 (12 December 2011); *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, Situation in Darfur, Sudan: The Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, ICC-02/05–01/09 (9 April 2014).

<sup>12</sup> Assembly Procedures Relating to Non-Cooperation contained in the Annex to the 2011 Assembly of States Parties Resolution on Strengthening the International Criminal Court and the Assembly of States Parties (ICC-ASP/10/Res.5).

<sup>13</sup> See *Ibid.*, at § 14(f).

The same cases of non-cooperation referred to the Assembly of States have also been referred to the Security Council under Article 87(7). Like the Assembly of States Parties, the Security Council has not, in any of those cases, taken action in response to address these cases of non-cooperation.<sup>14</sup> Indeed the lack of seriousness with which the Security Council takes cooperation is also reflected in the resolutions adopted by the Security Council referring situations to the ICC. In both resolutions, Resolution 1593 and Resolution 1970, the Security Council places a duty on the situation country to cooperate with the ICC, but does not place a similar duty on other States to cooperate with the ICC.<sup>15</sup> Of course, States Parties would be obliged under the Rome Statute but this obligation would not be underpinned by the supremacy of Security Council resolutions.<sup>16</sup> If the Council valued cooperation above other interests, a duty to cooperate would be placed on all States in the resolution, to avoid a conflict of legal obligations.<sup>17</sup>

While cooperation is central to the success of international courts and tribunals, it appears that all too often it is sacrificed in favour of other interests. To promote the success of the African Court, in particular with respect to its criminal mandate, it is important that the framework for cooperation takes into account the factors that might undermine cooperation.

### 3. COOPERATION IN THE AMENDMENT PROTOCOL

While the Malabo Protocol does not provide as comprehensive a framework as that provided for in the Rome Statute, Article 46L does contain important elements of cooperation. It contains a general obligation for States Parties to 'cooperate with the Court in the investigation and prosecution' of crimes

<sup>14</sup> See in addition to the cases referred to, see also *Decision on the Non-Compliance by Libya with a Request for Cooperation by the Court and Referring the matter to the United Nations Security Council, In the Case of the Prosecutor v Saif Al-Islam Gaddafi*, Pre-Trial Chamber I, ICC-01/11-01/11 (10 December 2014).

<sup>15</sup> See § 2 of United Nations Security Council Resolution 1593 (2005) and § 5 of United Nations Security Council Resolution 1970 (2011) which both state as follows: 'Decides that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate 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 cooperate fully'.

<sup>16</sup> On the implications of this AU-ICC tensions, and the immunities debate, see Dire Tladi 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Non-Cooperation' (2013) 11 *Journal of International Criminal Justice*, 199, at 208.

<sup>17</sup> On the possible reasons for the Security Council's minimalist approach to cooperation in referral to the ICC, see Tladi, *supra* note 16, at 393 *et seq.*

under the Statute of the Court.<sup>18</sup> The cooperation provision also contains a non-exhaustive list of the forms of cooperation.<sup>19</sup> The list contains many of the forms of cooperation that are also found in the Rome Statute, including the ‘identification and location of persons’,<sup>20</sup> ‘taking of testimony’,<sup>21</sup> ‘service of documents’,<sup>22</sup> and ‘identification, tracing and freezing or seizure of proceeds’<sup>23</sup> of crimes under the jurisdiction. The amended Statute also provides for the enforcement of sentences ‘in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.’<sup>24</sup> As with similar provisions in statutes of other tribunals, this provision does not lay down an obligation to accept prisoners except in cases where a subsequent agreement to that effect has been included.<sup>25</sup> Finally, as a general point, like the Rome Statute, the Malabo Protocol provides the possibility for cooperation with other ‘regional or international court, non-State Parties’ and other partners.<sup>26</sup> While such cooperation may be ad hoc, i.e. without any prior agreement, the Protocol recognizes that conclusion of agreements would facilitate cooperation with other entities.<sup>27</sup>

Unlike the Rome Statute, arrest and surrender in the African Court Statute is provided for in the list of forms of cooperation and assistance, and not in a separate and more detailed provisions.<sup>28</sup> Article 46L(2)(e) provides for States Parties to cooperate with the Court in the ‘arrest, detention or extradition’ of persons while Article 46L(2)(f) provides for the ‘surrender or the transfer of the accused to the Court.’ In the context of cooperation with the Court, it is not clear what the difference is between ‘surrender or transfer’, on the one hand and, on the other hand, ‘extradition’. Extradition normally refers to the transfer of persons to another State while surrender and/or transfer is normally reserved for transfer to international courts. However, Article 46L is concerned with

<sup>18</sup> Art. 46L (1) of the Statute of the Court.

<sup>19</sup> The list in Art. 46L(2) is qualified by the phrase ‘including but not limited to’. It also contains the catch-all phrase ‘or any other type of assistance’ in Art. 46L(2)(g) of the Statute of the Court.

<sup>20</sup> Art. 46L(2)(a) of the Statute of the Court.

<sup>21</sup> Art. 46L(2)(b) of the Statute of the Court.

<sup>22</sup> Art. 46L(2)(c) of the Statute of the Court.

<sup>23</sup> Art. 46L(2)(f) of the Statute of the Court. See also Art. 46*Jbis* of the Statute of the Court.

<sup>24</sup> Art. 46J of the Statute of the Court.

<sup>25</sup> See, similarly, Art. 103 of the Rome Statute. See also Art. 27 of the Statute of the International Criminal Tribunal for Former Yugoslavia (1993) and Art. 26 of the Statute of the International Criminal Tribunal for Rwanda (1994).

<sup>26</sup> Art. 46L(3) of the Statute of the Court.

<sup>27</sup> *Id.* (‘The Court . . . may conclude Agreements for such purpose’).

<sup>28</sup> Art. 46L(2)(e) and (f) of the Statute of the Court. In the Rome Statute, arrest and surrender is provided for in Art. 89, which contains 4 paragraphs, Art. 90, which has 8 paragraphs, Art. 91, which 4 paragraphs and Art. 92, which has 4 paragraphs.

cooperation *with the Court* and, in that context, the distinction between transfer to an international court and extradition to another state does not seem particularly meaningful.

There are some forms of cooperation in the Rome Statute that are not mentioned in Article 46L (2) of the Statute, such as the questioning of persons,<sup>29</sup> 'examination of places or sites'<sup>30</sup> and the 'provision of records and documents'.<sup>31</sup> However, all of these can be covered, either by other related forms of cooperation, the catch-all 'or any other type of assistance' or by the fact that the list is described as a non-exhaustive list. While it true that the Statute of the Court does not go into any detail, as is the case with the Rome Statute,<sup>32</sup> on the modalities for cooperation this is not necessarily a weakness in the cooperation framework. These more administrative or bureaucratic details are rarely ever the cause of non-cooperation and can often be worked out in the practice of the Court, in its interaction with States parties.

Notable by its absence in the African Court Statute is an exception to cooperate similar to Article 98 of the Rome Statute. Such a provision may have been seen as unnecessary since the exercise of jurisdiction over officials with immunity is excluded by Article 46A *bis* of the Statute of the African Court.<sup>33</sup> However, it should be recalled that the phrase 'officials' in the Statute remains to be interpreted by the Court, and it may be that in the future Article 46 A *bis* could be interpreted by the Court as not applying to all officials entitled to immunity under international law.<sup>34</sup> Moreover, depending on the interpretation of the phrase 'during their tenure in office', immunity under Article 46 *Abis* may cease after a person leaves office even for acts performed in an official capacity while in office. This would mean the Court would be entitled to exercise jurisdiction over some individuals who are no longer officials in respect of acts for which they retain immunity under customary international law. At any rate, it may well be that it is necessary to provide an exception from the duty to cooperate for other reasons, such as national security. While the Rome Statute does contain an elaborate regime in Article 72 for dealing with materials that could prejudice national security, Article

<sup>29</sup> See Art. 93(1)(c) of the Rome Statute.

<sup>30</sup> See Art. 93(1)(g) of the Rome Statute.

<sup>31</sup> See Art. 93(1)(i) of the Rome Statute.

<sup>32</sup> The Rome Statute, for example, specifies what must be contained in a request for arrest in surrender, Art. 91, which has four sub-Art.s, two of which have a further seven sub-paragraphs between them. See also Art. 96 of the Rome Statute which describes, in some detail, the content of a request for forms of assistance.

<sup>33</sup> See Chapter 29 in this volume.

<sup>34</sup> *Ibid.*



93(4) makes it plain that a State may deny a request to provide information or documents if the provision of such information or documents would prejudice national security.

As discussed above, experience with the ICC's referral of cases of non-cooperation to political bodies does not reveal a promising pattern. Nonetheless, there is a value of such referral, even if it does lead to any concrete results of sanction. It serves, in the first place, to place the issue on the agenda and to afford States the opportunity to discuss the matter. Whether States take the opportunity or not is an altogether different matter. Second, whatever the consequences (or lack thereof), States generally do not like to be shown in bad light in reports before international organizations. Finally, while empirically political bodies have not acted on cases of referral of non-cooperation, that does not mean this will always be the case. Providing for referral of non-cooperation creates the possibility, even if remote, of some action. The Malabo Protocol could, therefore, have made provision for a referral of cases of non-cooperation.

There are other aspects of cooperation that could have been addressed in Statute. For one thing, the Statute does not address the potential for conflicting requests of cooperation, particularly in relation to arrest and surrender.<sup>35</sup> The nature of the crimes covered in the Statute, namely international and transnational crimes, creates the potential for multiple claims of jurisdiction, with the potential for multiple requests for surrender or extradition. A provision on how a requested State is to priorities these requests could be useful to avoid conflict between States *inter se*, and States and the Court. The Statute could also have provided for a consultation mechanism, for those cases where a States have difficulty cooperating with the Court.<sup>36</sup> Finally, in the light of the complementary jurisdiction of the Court, a provision promoting, if not obliging, interstate cooperation to foster domestic investigations and prosecution would have been advisable. Such a provision is also lacking in

<sup>35</sup> See for comparison Art. 90 of the Rome Statute which addresses the issue of competing requests for surrender and extradition.

<sup>36</sup> See for comparison Art. 97 of the Rome Statute. The only use of Art. 97 of the Rome Statute, so far, in the case of South Africa, probably didn't have the desired results. In that case, the ICC was dissatisfied because South Africa proceeded to permit Al Bashir's entry into South Africa and did not arrest him. South Africa, for its part, was dissatisfied because what was seen as a political process of dialogue was, from its perspective, abused when, subsequent to the consultations the ICC issued a 'decision' confirming the duty of South Africa to arrest and surrender without a proper judicial hearing. See *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, Situation in Darfur: Prosecutor v Omar Hassan Al Ahmad Al Bashir*, Pre-Trial Chamber II, ICC-02/05-01/09 (13 June 2015).

the Rome Statute and there have been efforts to address this gap.<sup>37</sup> The gap is particularly acute given the Malabo Protocol establishes jurisdiction over transnational crimes which are ordinarily prosecuted in domestic courts.

While there are certainly provisions that could have been included, for example exception from the duty to cooperate and provisions on interstate cooperation, on the whole the legal framework for cooperation under the Statute is sufficiently comprehensive to facilitate cooperation with the Court. Experience from the early years of the ICC, however, shows that a sufficient legal framework does not always translate to full cooperation. Moreover, adequacy of the international framework is also often insufficient. A strong domestic framework to implement the international law framework is very often crucial. Indeed, in South Africa, the Supreme Court of Appeal found that there was a duty to arrest Al-Bashir based almost entirely on domestic law.<sup>38</sup> I turn now to address potential challenges and opportunities for effective cooperation.

#### 4. PROSPECT FOR FULL AND EFFECTIVE COOPERATION

As a general rule, States cooperate with international criminal courts and tribunals in accordance with their obligations. It is mainly when there are conflicts in obligations and/or when national interests are negatively implicated that obligations to cooperate are likely not to be complied with. This includes national interests relating to political relationships with States and international organizations, as is the case in relation to the request for the arrest and surrender of Al-Bashir which would affect not only an African State Parties' relations with the Sudan but also with the AU. Arresting a sitting foreign head of State (or maybe even a former head of State who still has the respect of his State) is, quite apart from the issue of immunities, politically more risky or undesirable than arresting and surrendering a person from another State who does not hold high office. In this sense, the inclusion of Article 46 *A bis* on the respect of immunities will not only reduce the possibility of a conflict in legal obligations, but will also reduce the potential for the conflict between political interests and the duty to cooperate.

However, even with the preservation of immunity under the Statute, there remains the possibility for non-cooperation with requests from the Court. As mentioned above, for example, there remains the possibility of a restricted

<sup>37</sup> See for discussion D. Tladi, 'A Horizontal Treaty on Cooperation in International Criminal Matters: The Next Step in the Evolution of a Comprehensive International Criminal Justice System?', 29 *Southern African Public Law* (2014) 368.

<sup>38</sup> *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA).

interpretation of Article 46 A *bis* by the Court, potentially re-establishing the immunity-cooperation conflict. At any rate, when it comes to prosecutions of certain offences in the material jurisdiction of the African Court, it is unlikely that a government that has successfully taken over power through unconstitutional change of government would cooperate with the Court in proceedings related to the crime of unconstitutional change in government. Other reasons for non-cooperation may include, for example, an appeal to national security where requested documents or materials are deemed classified. Whatever the reason, there remains the possibility for non-cooperation with the requests of the Court.

The possibility brings into sharp focus the question of consequences for non-cooperation. Leaving aside the debate on the correct interpretation of the Rome Statute and its Article 98, part of the reason for the continued non-cooperation with the ICC is the impotence of the enforcement mechanisms for non-cooperation with Rome Statute obligations, namely the Security Council and the Assembly of States Parties. Thus, when faced with competing obligations and interests, States Parties to the Rome Statute are likely to choose other obligations over those under the Rome Statute since violations of the latter do not carry any real consequences.

A mechanism that could prove useful in facilitating cooperation with the obligations under the Statute may be the powers of the African Union's Assembly of Heads of State to sanction non-compliance with AU decisions under Article 23 of the AU Constitutive Act. As discussed, however, this would require the power to refer cases of non-cooperation to the Assembly. At any rate, whether this will be applied will be dependent on the political will of the Assembly which, like the Security Council, is a political body that takes into account political considerations in its decisions to exercise the powers to sanction. Political pressure from other States Parties to the African Court, including through exertion of economic pressure, on a non-complying state, might be yet another option for ensuring compliance. It is widely reported, for example, that the decision of Malawi to withdraw from hosting the AU Summit in 2012 was the threat of withdrawal of aid by mainly European States Parties to the Rome Statute.<sup>39</sup> However, whether powerful African States

<sup>39</sup> See 'Malawi Withdraws from Hosting the AU Summit' available at [www.nyasatimes.com/2012/06/08/malawi-withdraws-from-hosting-the-au-summit/](http://www.nyasatimes.com/2012/06/08/malawi-withdraws-from-hosting-the-au-summit/) (last accessed 25 July 2015). See also 'Ethiopia to Host African Union Summit After Omar Al-Bashir-Row' available at [www.bbc.com/news/world-africa-18407396](http://www.bbc.com/news/world-africa-18407396) (last accessed 25 July 2015) where former President is reported to have said that 'welcoming Mr. Bashir to Malawi risked damaging relations with donors' and where it is reported further that 'Malawi recognizes the ICC and is keen to restore foreign aid flows'.

would be willing to exert that kind of pressure, and risk damaging relations with other States for the sake of the African Court is also unlikely.

## 5. CONCLUSION

The Statute establishes a strong and coherent legal framework for cooperation with the Court. While there are certainly other provisions that could have been included, this framework, based on comparable frameworks in the statutes of other international criminal tribunals, is comprehensive and addresses all necessary elements. This framework contains the provisions necessary to facilitate cooperation. Moreover, the inclusion of a provision respecting the immunity of officials, will significantly reduce incidences likely to lead to non-cooperation. Cooperation, however, is not dependent only on the legal framework. Where cooperation conflicts with political interests of States Parties there may, however, still be cases of non-cooperation.

In cases of potential non-cooperation from States Parties, the most important indicator of whether cooperation will take place will be the political will of other States Parties of the African Court, whether individually through influence, including economic pressure, or collectively through, for example, the power of the Assembly of Heads of State of the African Union to sanction members for non-compliance with the AU decisions. The experience of the ICC, however, does not paint a picture of promise. Whether AU Member States, given their relative homogeneity, will lead to different results remains to be seen.