

## **CFCR WELCOMES SUPREME COURT OF APPEAL RULING IN AL-BASHIR APPEAL**

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The Centre for Constitutional Rights (CFCR) welcomes the Supreme Court of Appeal's (SCA) dismissal of the government's appeal in the al-Bashir matter as an important affirmation of the Rule of Law. Section 2 of the Constitution establishes the Supremacy of the Constitution and provides that any law or conduct inconsistent with the Constitution is invalid and further that obligations imposed by the Constitution must be fulfilled. There is no derogation from this obligation.

Further, South Africa is constitutionally bound by the provisions of its *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (the *ICC Act*), which incorporated the country's International Law obligations in terms of the *Rome Statute of the International Criminal Court* (the Rome Statute).

As a result of the investigations by the International Criminal Court (ICC), President al-Bashir stands accused of serious international crimes, including war crimes, crimes against humanity and charges of genocide. The Pre-Trial Chamber of the ICC has issued two warrants for his arrest, which have been forwarded to all countries that are parties to the Rome Statute, including South Africa, with a request that they co-operate under the Rome Statute and cause President al-Bashir to be arrested and surrendered to the ICC.

There are three important considerations that have arisen out of the decision. The first being the unequivocal rejection of immunity being held as a defence. The government argued that President al-Bashir arrived in South Africa to attend the African Union assembly in June 2015 and was immune to arrest. On this, the SCA held that when South Africa passed the *ICC Act*, this was on the understanding that no form of immunity, including head of state immunity, could prevent the prosecution of international crimes in the country. It was also not a bar to South Africa cooperating with the ICC through the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made.

Secondly, it is a cause for concern that it appears as if the North Gauteng High Court in the initial application for an arrest warrant for the detention of President al-Bashir, the Court was deliberately misled. The SCA pointed out that President al-Bashir had been permitted to clandestinely leave the country from the Waterkloof Military Air Base, at the same time that the High Court had received an assurance through the state's legal representative that he was still in the country. There is a long list of case law emanating from South Africa's courts which reinforces the notion that legal representatives, as Officers of the Court, have a duty to act honestly, consciously and openly. They are equally obliged to not mislead the courts and further disclose material information. They also have a duty to act with utmost faith towards the courts. The Court does caution however, that *"either the representatives of Government set out to mislead the Court and misled counsel in giving instructions, or the*



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*representatives and counsel misled the Court*". In any event, the Court concludes that this deliberate misleading of the Court constitutes "disgraceful conduct".

Thirdly, this ultimately means that South Africa has a standing arrest warrant for the Sudanese President, which undoubtedly will have to be taken into consideration by the government in its continued diplomatic relations with Sudan. Importantly, the decision of the SCA sets a binding precedent on the lower courts should a similar matter arise.

The decision brings greater clarity to how international law should be applied in South Africa. In the face of seemingly contradictory provisions on immunity, ranging from customary international law through to jurisprudence from international tribunals, including the International Court of Justice, it was necessary for the SCA to make a pronouncement on whether or not President al-Bashir enjoyed immunity. It decided that because Parliament had incorporated South Africa's obligations in terms of the *Rome Statute of the International Criminal Court* into our domestic law, President al-Bashir did not enjoy immunity. Above all, this is an important affirmation of the Rule of Law.