

# DISPUTE RESOLUTION ALERT

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### **ADMINISTRATIVE AND PUBLIC LAW: SOUTH AFRICA MUST ARREST PRESIDENTS CHARGED WITH CRIMES AGAINST HUMANITY**

On 6 July 2017 the International Criminal Court handed down its [judgment](#) in the case concerning South Africa's failure to arrest Omar al-Bashir, the current President of Sudan. The dispute has its genesis in President al-Bashir's presence in South Africa in June 2015 to attend the African Union Summit.

### **INSURANCE: TECHNOLOGY: THE NEW FRONTIER FOR THE INSURANCE INDUSTRY**

The insurance industry has been characterised as traditionalist and conservative - an industry that is slow to change with limited consumer reach. Technology innovations can thus be regarded as the new frontier for the insurance industry as these new developments are seen as a move-away from the historical and typical business models used by insurers to conduct their business.

# ADMINISTRATIVE AND PUBLIC LAW: SOUTH AFRICA MUST ARREST PRESIDENTS CHARGED WITH CRIMES AGAINST HUMANITY

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*A states party cannot refuse to comply with a request by the ICC for the arrest and surrender of the head of state of another states party.*



On 6 July 2017 the International Criminal Court (ICC or Court) handed down its [judgment](#) in the case concerning South Africa's failure to arrest Omar al-Bashir, the current President of Sudan. The dispute has its genesis in President al-Bashir's presence in South Africa in June 2015 to attend the African Union (AU) Summit.

The ICC was asked to answer two questions: (1) was South Africa's failure to comply with the request for arrest and surrender of President al-Bashir contrary to the provisions of the Rome Statute of the International Criminal Court (Rome Statute); and (2) if so, does the matter warrant referral to the Assembly of States Parties (Assembly) or the United Nations Security Council (UNSC)?

Previously in this saga, the South African High Court [ruled](#) that South Africa's failure to arrest President al-Bashir was inconsistent with the Constitution, the Rome Statute and South Africa's Implementation of the Rome Statute of the Criminal Court Act, No 27 of 2002. The Supreme Court of Appeal (SCA) subsequently [confirmed](#) this ruling.

Before the ICC, South Africa primarily argued that President al-Bashir enjoys immunity from criminal proceedings under customary international law and, given that such immunity had not been waived by Sudan, the ICC could not request South Africa to arrest and surrender the President. Consequently, South Africa was not obliged to do so.

The ICC found that customary international law prevents a state from exercising criminal jurisdiction against a different head of state. However, article 27(2) of the Rome Statute provides that diplomatic immunity does not bar the ICC

from exercising its jurisdiction over such a person. This in turn means that these heads of state are not immune to arrest. The irrelevance of diplomatic immunity in relation to proceedings before the ICC is thus incorporated in the Rome Statute as a basic principle to which states parties subscribe by voluntarily ratifying the statute. There is, as such, no immunity to be waived.

As a result, a states party cannot refuse to comply with a request by the ICC for the arrest and surrender of the head of state of another states party as any possible immunity *vis-à-vis* the ICC has been rendered inapplicable by the ratification of the Rome Statute.

In this particular case, although Sudan is not a party to the Rome Statute, the referral of the matter to the ICC by the UNSC brings the matter within the ICC's jurisdiction. By triggering the ICC's jurisdiction, the UNSC has imposed an obligation on Sudan to cooperate fully with the Court in terms of the Rome Statute. By imposing this obligation on Sudan, the effect is that in respect of the situation in Darfur, Sudan has rights and duties analogous to those of a states party.

As a consequence, article 27(2) of the Rome Statute applies equally to Sudan which renders any diplomatic immunity belonging to Sudan inapplicable. As such, Sudan cannot claim immunity for

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President al-Bashir as a sitting head of state, nor may President al-Bashir claim it for himself. There is no immunity that needs to be waived before a states party can arrest him.

Therefore, states parties, including South Africa, have an obligation in international law to arrest and surrender President al-Bashir to the ICC.

Turning to the second question of what to do in relation to South Africa's non-compliance, South Africa argued that a referral to the Assembly or the UNSC is not warranted as it would cast South Africa in a bad light and would not encourage future cooperation.

The ICC attributed great weight to South Africa's engagement with it prior to the hearing in an attempt to seek a final legal determination on the obligation to arrest and surrender. This proactive conduct set it apart from previous instances of non-compliance in this matter by other states.

Another important consideration in the exercise of this discretion is whether an external referral would be an effective way of ensuring cooperation in the future. At

this point, the ICC relied on the fact that South Africa appears to have accepted that it has a legal obligation to cooperate with the Court under its domestic legal framework by virtue of it withdrawing its appeal against the previous ruling of the SCA.

The Court found that any doubt in relation to the issue of South Africa's obligation to arrest President al-Bashir has now been laid to rest by both the ICC and the South African courts. A referral to the Assembly or the UNSC would achieve no further cooperation. Therefore, the Court declined to refer the matter to the Assembly or the UNSC.

The South African courts and the ICC itself have now clarified that South Africa was under an obligation to arrest President al-Bashir in June 2015, and – should he enter South African territory again – South Africa shall remain so obliged. It remains to be seen whether South Africa will appeal the ICC's decision.

*Sarah McGibbon,  
overseen by Lionel Egypt*



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# INSURANCE: TECHNOLOGY: THE NEW FRONTIER FOR THE INSURANCE INDUSTRY

*The use of new technologies can also improve pricing, risk selection and naturally, the overall efficiency of insurers' operations.*

*Extracting data specific to an insured can allow insurers to offer more personalised premiums and expand insurability.*

The insurance industry has been characterised as traditionalist and conservative - an industry that is slow to change with limited consumer reach. Technology innovations can thus be regarded as the new frontier for the insurance industry as these new developments are seen as a move-away from the historical and typical business models used by insurers to conduct their business.

According to [FinTech Developments in the Insurance Industry](#) there are various drivers that are encouraging this change. The internet of things, which relates to the interconnectivity of devices that allows for the collection and exchange of data, has allowed for more information to be collected on consumers. This, in turn, allows insurers to improve their forecast on incumbent risks. As explained in [FinTech Developments in the Insurance Industry](#), technology can expand consumer interaction, and thus improve customer satisfaction. The use of new technologies can also improve pricing, risk selection and naturally, the overall efficiency of insurers' operations. There are a variety of emerging technologies that have the potential to transform the insurance industry and the nature of risks insured. In particular, data technology can provide new ways to capture and analyse data needed by an insurer. Extracting data specific to an insured can allow insurers to offer more personalised premiums and expand insurability. Data technology can also improve transparency and mitigate or decrease underwriting risks. By obtaining real-time and personalised information

on each insured customer, insurers can measure risk more accurately, and thereby provide more customer specific policies - ([source](#)). Innovative technology being introduced into the insurance industry includes:

- **Smart homes and property insurance**

Home monitoring systems can provide insurers with data on and control over household risks. For example, ADT Pulse allows homeowners to remotely monitor their homes, remotely arm and disarm their homes, as well as to monitor water and flood sensors through their tablets or smartphones. The data received can help insurers better manage risk and mitigate losses by providing important information with the ultimate aim of avoiding the occurrence of an insurable event. This, in turn, can result in fewer claims and improved customer satisfaction. "Smart" homes can thereby reduce the severity and frequency of household and property insurance claims - ([source](#)).

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.



# INSURANCE: TECHNOLOGY: THE NEW FRONTIER FOR THE INSURANCE INDUSTRY

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*Insurers who are unwilling to introduce new technologies into their business will likely face low growth and declining profits.*



- **Wearables, and health and life insurance**

Fitbit is a wireless-enabled wearable technology device that measures data such as the number of steps walked, heart rate, quality of sleep, and other personal metrics involved in fitness. The use of wearable biometric sensors, such as Fitbits, can provide insurers with information on the health of an insured. With use of wearable sensors, like the Fitbit, insurers can receive data on an insured's exercise habits, heart rate and blood pressure. This data can assist the insurer in its assessment and underwriting of a health risk - ([source](#)).

- **Telematics and car insurance**

Devices connected to a vehicle can transmit data for the purpose of assessing an insured's risk profile. The information received can assist insurers to make informed underwriting decisions and provide appropriate policies in turn - ([source](#)).

While new technologies can improve insurers' business operations, these changes come with new challenges. As a result of the increased innovation within the industry, insurers will have access to more sensitive information about their customers which will increase operational risks. Insurers' systems used to store sensitive information will therefore need

to be resilient in the face of continued data breaches. Computer programming and data engineering will become an essential component as insurers transition into an increasingly digital and data-based industry. This, in turn, will require insurers to develop adequate technical resources, knowledge and skills needed when using new technologies in their business operations - ([source](#)). Technological advancements in the insurance industry will ultimately lead to changes in the regulatory landscape. As a result, insurers may need to adjust their business models and policies to cater for any additional requirements imposed by legislation.

Emerging technologies and innovations are beginning to transform the insurance industry, and for the better. New technologies are creating novel ways to assess, manage and price risk, reduce costs and ultimately expand insurability. In essence these innovations will reinvent the insurance industry. Going forward, insurers who are unwilling to introduce new technologies into their business will likely face low growth and declining profits as a result of their inability to compete with other more innovative players in the market - ([source](#)).

*Verusha Moodley and  
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### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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