

## ICC capitulated on SA waywardness

The International Criminal Court (ICC) judgment regarding South Africa's failure to arrest Sudanese President Omar al-Bashir caught nobody by surprise, suggests lawyer Nicole Fritz in an analysis on the [Daily Maverick](#) site. The ICC didn't even pretend it could do anything about that non-compliance. It failed to refer South Africa to the UN Security Council or Assembly of State Parties for enforcement action. In so doing, says Fritz, it was caught between two contradictory impulses. On the one hand, it was shamed by its powerlessness and sought to explain it away. On the other, it squared up to its harsh reality, recognising that any referral would be futile. In trying to save face, it pointed to South Africa's consultations with the court at the time it failed to arrest al-Bashir. It also stressed that South Africa had sought a final legal determination from the court as to the legality of its actions and that its own domestic courts had pronounced on the matter. Fritz argues the court's tone was that of an exasperated if indulgent parent: as if acknowledgement of the child's lacklustre efforts might have the effect of inspiring more diligence. But this was all sham, for in implying that enforcement action was unnecessary on its part because South Africa's domestic courts had themselves pronounced on the matter and so would secure compliance in place of referral, **the ICC conveniently ignored that the matter came before the ICC in large part because a High Court order forbidding the departure of al-Bashir from the country had been flagrantly flouted.** In looking to substitute South Africa's embattled judicial enforcement systems for its own non-existent ones, it also appeared to treat seriously the threat levelled at the court in South Africa's submissions to it – when it said that any referral would only serve to cast the country in a bad light and would lessen any incentive for co-operation, notes Fritz. It was, in essence, an almost complete capitulation to the wayward child, she writes.

*The case against al-Bashir has highlighted the truth that without the co-operation of states, the ICC cannot do its job.* The judgment on South Africa is a reminder that the two bodies the ICC relies on for its effectiveness – the ICC's Assembly of States Parties (ASP) and the UN Security Council (UNSC) – have done little to improve co-operation from states in the past. 'This is a serious problem,' says the Institute for Security Studies' Allan Ngari, in an analysis on the [Polity](#) site. Explaining why South Africa was wrong not to arrest al-Bashir, the ICC judges said that the customary international law provision of immunity that South Africa relied on has been superseded by UNSC Resolution 1593 (2005) that referred Darfur to the ICC. This resolution effectively places Sudan in the same legal position as a state party to the Rome Statute. And **because sitting heads of states can – under the Rome Statute – be held responsible for crimes in their individual capacity al-Bashir can be arrested and tried at the ICC.** Furthermore, the ICC judges said a referral to the UNSC was not necessary as a measure to obtain co-operation because South Africa's own courts had ruled that police should have arrested al-Bashir. 'The assumption then is that SA will in future be clear that there are no competing obligations, and will co-operate with the ICC,' he says. However, he warns that this is unlikely, as the recent African National Congress policy conference resolved that South Africa still intends to withdraw from the Rome Statute. 'This resolution, reached a day before the ICC finding of non-compliance, will guide SA's policy on the ICC. The ICC judges' decision will no doubt fuel the withdrawal agenda.' He adds that attention is needed on fixing the legal and procedural provisions in the Rome Statute and UNSC to make sure the ICC is properly supported.