

Pretoria backtracks on ICC withdrawal threat

In what appears to be an extraordinary about-turn, International Relations Minister Lindiwe Sisulu last week hinted that the government might reconsider the controversial decision to withdraw from the International Criminal Court (ICC). **Legalbrief** reports that SA's threat to dismantle its own international criminal justice framework over the Omar al-Bashir debacle, sent shockwaves across the continent. **Sisulu did not mention former President Jacob Zuma by name, but said the ICC withdrawal decision was taken 'under the previous administration'.** She said it was back on Cabinet's agenda. Sisulu said there have been 'other views' that SA could do more to change the skewed bias against Africa in the ICC if it remained a party to the Rome Statute than if it withdrew, she noted, adding: 'Perhaps we might be married to staying in there if only to make sure that our voices are heard in the ICC. ... we are reopening the debate, we are still discussing, and when the debate is closed, it will be taken to Parliament.' A report on the **News24** site notes that AU member states resolved to withdraw from the ICC as a bloc in January last year, but Kenya, which led this campaign after its President Uhuru Kenyatta and his deputy, William Ruto, were charged by the court, subsequently became lukewarm on the issue.

The head of ANC elections Fikile Mbalula subsequently said Cabinet will have to consult the party before reconsidering the decision to withdraw from the ICC. A **News24** report notes that Mbalula said the decision to withdraw was an ANC decision. It was later confirmed at the December elective conference in Nasrec, Johannesburg. 'We are not micromanaging government, but **we must understand that government can express itself at any given point in time.** (However), Ministers have the responsibility to ensure that their position resonates with the ANC and is guided and given a mandate by the ANC, as the ruling party that has won the election,' Mbalula said.

SA's reasons for withdrawal have ranged from allegations that the ICC is targeting Africa, to statements about how the country, in exercising its international relations with heads of state of foreign countries is hindered by the implementation of the Rome Statute of the International Criminal Court Act, 2002. A **Daily Maverick** analysis notes that to date, **al-Bashir is the only head of state who is wanted by the ICC.** 'South Africa's withdrawal will not affect its obligations to co-operate with the ICC with regard to "proceedings in relation to which the withdrawing State had a duty to co-operate and which were commenced prior to the date on which the withdrawal became effective." Given that South Africa has had a duty to arrest Bashir since his first indictment in 2009, that duty will survive withdrawal from the ICC system. Burundi finds itself in the same position, despite its withdrawal coming into effect on 27 October 2017. It remains bound to co-operate with the ICC's ongoing investigation. The subsistence of this duty is also spelled out in the International Crimes Bill as it too acknowledges in section 36 (2), that "any co-operation" with the ICC related to criminal investigation and proceedings that South Africa had a duty to co-operate prior to withdrawal, must still be handled in terms of the provisions of the existing ICC Act. Needless to say, the ICC Act is very clear on South Africa's duty to co-operate with the ICC, hence why proponents for withdrawal are anxious to have it repealed.'

In other matters relating to the ICC, its pre-trial chamber last week issued a second warrant of arrest for the commander of Al-Saiqa Force's frontlines Mahmoud Al-Werfalli for war crimes in the context of the non-international armed conflict in Libya. **Al-Werfalli escaped hours before the warrant was issued from his detention in Rajma** in eastern Libya and he arrived later in Benghazi escorted by his loyalists. A report on the **Libya Observer** site notes that the ICC said it found that there were reasonable grounds to believe that Al-Werfalli directly committed murder as a war crime in the context of an eighth incident which took place on 24 January, when he allegedly shot dead 10 persons in front of the Biyaat Al-Radwan Mosque in Benghazi, Libya.