

# Highlights from the Office of the Chief State Law Adviser (International Law)

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## Abstract

In 2019, the Office of the Chief State Law Adviser (International Law) proceeded to implement its mandate to provide advice on international law to the South African government and to participate in international legal fora, including at the International Court of Justice, the Permanent Court of Arbitration, the African Commission on Human and Peoples' Rights, the United Nations Commission on International Trade Law, the Sixth Committee of the United Nations General Assembly, the Hague Conference on Private International Law, the International Institute for the Unification of Private International Law (UNIDROIT), the Hague International Space Resources Governance Working Group, and the Antarctic Treaty System. The Office also participated in international conferences on marine biological diversity of areas beyond national jurisdiction, and international cooperation in the investigation and prosecution of international atrocity crimes. In addition to an international study tour, the Treaty Section of the Office continued its function as the official custodian of the South African Treaty Collection, as well as national reports that South Africa submits in terms of treaty obligations. The Foreign Service Act 26 of 2019 was passed by Parliament on 19 November 2019.

**Keywords:** foreign service; government legal advice; conference diplomacy; practice of international law

## Introduction

To many commentators, the great watershed moments in the international system occurred in 1789, the year of the French revolution; 1919 when the Covenant of the League of Nations was signed; and 1989, with the fall of the Berlin Wall. While 2019 did not witness any such dramatic events, within the broad sweep of history, it may in time be considered to have been a watershed year in international relations.

It appears that a number of forces are pummelling the system, putting international cooperation and multilateralism under increasing strain. These include the ongoing conflicts in states such as Syria, where chemical weapons were allegedly used against the civilian population; in Yemen, with indications of the deliberate starvation of the civilian population; in South Sudan and Libya; as well as Brexit; the withdrawal by the United States from the Intermediate-Range Nuclear Weapons Treaty with Russia; rising fears of a new nuclear arms race; the US–Chinese trade war; and the rise of nationalism and populism in a number of states. It appears that dialogue, the rock on which diplomacy has been built, is becoming shrill and uncompromising, while theories about shifting economic and political power relations in the world brought *Realpolitik* to the centre stage, also raising questions on how an emerging new world order may impact on the African continent.

Fortunately, countervailing developments resulted in significant achievements in the field of international law. In International Humanitarian Law increasing attention has been directed to the development of rules to govern the application of new technologies in warfare. The 19th session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC) adopted an amendment to Article 8 of the Statute to include the crime of intentional use of starvation of civilians as a method of warfare also when committed in non-international armed conflict, a Swiss initiative which was supported by South Africa. The finding by the International Court of Justice (ICJ) in the Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* reaffirmed the right to self-determination as a customary norm of international law.

The year 2019 also marked twenty-five years since the International Criminal Tribunal for the former Yugoslavia took up its first case and the International Criminal Tribunal for Rwanda was established; developments which introduced the contemporary era of international criminal justice, culminating in the establishment of the ICC as a permanent institution.

Against this background, the Office of the Chief State Law Adviser (International Law) at the Department of International Relations and Cooperation (DIRCO) proceeded with implementing its mandate to provide legal advice on international law to the South African government and to participate in international legal processes in order to give

effect to South Africa's foreign policy objectives, which we wish to share in this contribution.

During 2019, the Treaty Section, the official custodian of the South African Treaty Collection, which consists of 3154 treaties in the South African Treaty Register and 176 in the Provincial Treaties Register, bound 59 international agreements and instruments of ratification and accession (see the separate input on bilateral agreements signed or that entered into force during 2019 in this volume).

The Treaty Section also acts as custodian for all national reports that South Africa must submit in terms of its treaty obligations. It is further responsible for publishing in the Government Gazette on behalf of the Minister of International Relations and Cooperation the immunities and privileges applicable to international conferences hosted by South Africa and missions established in South Africa by international organisations, as provided for in the Diplomatic Immunities and Privileges Act 37 of 2001.

For the Treaty Section to function more effectively as the official custodian of international agreements and providing a legal research and information service, two treaty officials visited the Netherlands and Belgium in 2019. They attended meetings with the Treaties and Agreements Office of the Council of the European Union in Brussels, the Treaties Division of the Dutch Ministry of Foreign Affairs, the Organisation for the Prohibition of Chemical Weapons and its library, as well as the library of the International Residual Mechanism for Criminal Tribunals.

## Consolidation of the African Agenda

### **Advisory Opinion by the International Court of Justice on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965***

It will be recalled that in 2018 South Africa submitted written and oral statements in support of Mauritius to the ICJ during the Advisory Proceedings on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. South Africa submitted that the detachment of the Chagos Archipelago from Mauritius, and its inclusion in an entity called the British Indian Ocean Territory, resulted in the process of Mauritian independence being incomplete, that the right to self-determination of the territory has not been achieved and, consequently, that the forcible removal of the population of the Chagos Archipelago, was in contravention of international human rights obligations. On 25 February 2019, the Court delivered its Advisory Opinion, finding that the Chagos Archipelago was unlawfully detached from Mauritius and that the latter's decolonisation was therefore not legally completed when Mauritius became independent in 1968, reaffirming the right to self-determination as a customary norm of international law.

## **African Commission on Human and Peoples' Rights**

The Legal Counsellor at the South African Permanent Mission to the African Union participated as part of the South African delegation in the 64th Ordinary Session (Sharm El Sheikh, Egypt, 24 April–14 May 2019) and the 65th Ordinary Session of the African Commission on Human and Peoples' Rights (The Gambia, 21 October–10 November 2019). The year 2019 was declared the *Year of Refugees, Returnees and Internally Displaced Persons: Towards Durable Solutions to Forced Displacement in Africa*. The sessions provided the opportunity for opening statements by the United Nations High Commissioner for Human Rights, national statements and statements by national implementation authorities and civil society organisations. Against the thematic background of the year 2019, much of the statements focused on refugees, xenophobia and statelessness. During the 64th session, panel discussions were held on the African Union Transitional Justice Policy, the abolition of the death penalty, human rights defenders, the monitoring of prisons by civil society organisations, the combatting of racism, racial discrimination, xenophobia and other related intolerances, state action against torture and ill-treatment in Africa and the negative impact of the non-repatriation of illicit funds on the enjoyment of human rights.

## **Global System of Governance**

### **Mutual Legal Assistance and Extradition**

Bilateral and multilateral agreements on extradition and mutual legal assistance have facilitated the investigation of crimes and consequent prosecution of perpetrators thereof for a long time. However, the absence of provisions on mutual legal assistance and extradition in the 1948 Genocide Convention and in the 1949 Geneva Conventions, and the fact that efforts to negotiate a convention on crimes against humanity are still ongoing, clearly represent a gap in the international architecture aimed at ensuring accountability for and the prevention of these atrocity crimes.

Such a modern inter-state procedural framework for mutual legal assistance and extradition aimed at the prosecution of these crimes in domestic courts could serve as a mechanism for states to strengthen their domestic laws and allow for cooperation with other states. Consequently, a number of states, the so-called 'core group', consisting of the Argentine Republic, the Kingdom of Belgium, Mongolia, the Kingdom of the Netherlands, the Republic of Senegal and the Republic of Slovenia, has taken the initiative to ascertain the extent of interest in the development of a multilateral convention to provide for mutual legal assistance and extradition for the domestic prosecution of the crime of genocide, crimes against humanity and war crimes. The

support for such a multilateral convention has grown to seventy-two supporting states.<sup>1</sup> In 2013, South Africa joined the group of supporting states.

Since 2017, South Africa has participated in a number of informal meetings through its embassy in The Hague, as well as in two Preparatory Conferences in the Netherlands to prepare a draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes.

The first Preparatory Conference, held in Doorn in 2018, was intended to develop the contours of the Convention. It focused on three areas: the crimes that would be included, the provisions regarding mutual legal assistance and extradition, and the forum in which the treaty would be negotiated.

Significant headway was made, and the second Preparatory Conference was held in Noordwijk in 2019. A draft text developed after the Doorn Preparatory Conference served as a basis for preliminary discussions. These discussions were fruitful, and it appeared that the majority of participants held mostly similar views. There is, however, some divergence on the manner in which the crimes to be included should be referred to, namely whether they should be defined or merely listed. There appears to be stronger support for the inclusion of the definitions of crimes as contained in the unamended 1998 Rome Statute of the International Criminal Court (Rome Statute), together with an obligation upon states parties to criminalise such offences. This is in line with South Africa's view that the crimes are the same as those already criminalised under South African domestic law by virtue of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. However, to accommodate those states seeking wider application of the Convention, an innovative approach was followed to include additional crimes in annexes. Therefore, states can extend the application of the treaty beyond the definitions contained in the 1998 version of the Rome Statute, and include additional crimes, such as enforced disappearances.

While the Convention deals with the same crimes as those covered by the Rome Statute, it is not linked to the ICC. It aims to ensure cooperation in the investigation and prosecution of offences on the domestic level before situations would reach the ICC, in this way giving effect to the principle of complementarity.

This initiative overlaps to an extent with the work of the ILC in relation to its Draft Articles on Crimes against Humanity, an initiative also supported by South Africa. In response to concerns of potential fragmentation, the core group remains in close

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1 CIR, 'MLA Initiative' <<https://www.centruminternationaalrecht.nl/mla-initiative>> accessed 15 June 2020.

consultation with the ILC's Special Rapporteur for Crimes against Humanity, so as to ensure that the two processes are mutually reinforcing.

Unfortunately, a diplomatic conference to finally negotiate and adopt a Convention, scheduled to take place in Ljubljana, Slovenia in June 2020, had to be postponed due to the COVID-19 pandemic.

The Office was requested to advise on a number of competing extradition requests relating to persons present in South Africa, emanating from different countries. This involves the interpretation of applicable international law and of bilateral and multilateral treaties to be able to accede to requests in cases where a conflict may exist between competing international obligations. The proliferation of extradition agreements (whether global, regional or bilateral) and the rising incidence of competing extradition requests point toward the need for increased awareness and careful drafting on the part of government officials engaged in negotiating extradition agreements.

### **Bilateral Investment Treaties**

In accordance with South Africa's policy decision to withdraw from a number of bilateral investment treaties, the implementation of withdrawal processes is continuing, led by the Department of Trade, Industry and Competition (DTIC). This involves the careful consideration of technical matters such as the status of the treaty concerned and the consequential process that is required for withdrawal. The Office continues to support DTIC in this process.

### **Status of Forces Agreements**

The Office, through membership of the inter-departmental Criminal Jurisdiction Task Team, continued to support the Departments of Defence and of Justice and Constitutional Development in the drafting and negotiation of status of forces provisions in defence cooperation agreements. In 2019, this work included active participation in negotiations with representatives from several other states and the formulation of standard policy options for inclusion in such agreements. Making provision for, and negotiating provisions relating to, criminal jurisdiction over visiting members of foreign armed forces require a delicate balance between the national interest and the constitutional rights of South Africans, and the views and interests of the negotiating counterpart. Different legal systems, punishments for crimes (including the death penalty) and differing views on the desirability of ensuring accountability in terms of the host states' domestic law for crimes committed by members of visiting armed forces, may stand in the way of consensus.

## **United Nations Commission on International Trade Law**

The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly in 1966. In establishing the Commission, the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade, and it considered UNCITRAL as the vehicle through which the UN could play a more active role in reducing or removing these obstacles.

During the 50th session of the Commission in 2017, it was decided that Working Group III of UNCITRAL should consider the topic of investor-state dispute settlement (ISDS) reform. The mandate for the topic was divided into three parts: exploring the issues that states experience in relation to ISDS; whether these issues necessitate reforms; and what reforms should be considered.

At its 38th session held in Vienna in October 2019, Working Group III first focused on developing a project schedule on reform options. It also considered reform options on a multilateral advisory centre and related capacity-building activities, a code of conduct and third-party funding.

Working Group V, mandated to consider the topic of insolvency law, held its 56th session in Vienna from 2 to 6 December 2019 and continued its work by deliberating on the draft text of a Model Law on a simplified insolvency regime for small and medium-sized enterprises (SMEs).

The draft text for a simplified insolvency regime aims to create a framework to encourage SMEs to address financial distress at an early stage. The focus of the Model Law is to provide faster, simpler, accessible, and affordable insolvency proceedings. It also addresses aspects of informal debt-restructuring negotiations and provides for measures that may be put in place to support SMEs with holding such negotiations and implementing their outcomes.

The simplified insolvency regime for SMEs allows policymakers of a state to determine whether its insolvency regime serves the needs of SMEs. States may consider including a simplified insolvency regime in their legal framework, either by adjusting some features of the standard business insolvency law or establishing a separate simplified insolvency regime.

The South African insolvency regime does not, at present, cater for financially distressed small businesses. South Africa is engaged in a project to revise its insolvency laws by amalgamating all laws governing sequestration and liquidation into one piece of legislation and may consider incorporating the simplified insolvency regime for SMEs into its insolvency laws.

## **Sixth Committee of the United Nations General Assembly**

The General Assembly is the main deliberative, policy-making and representative organ of the UN and therefore the chief multilateral forum for considering issues of concern to the international community. The Sixth Committee of the General Assembly also carries out the mandate in Article 13 of the Charter of the United Nations to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification.

The Sixth Committee met from 7 October to 20 November 2019. South Africa made statements on the following topics:

- Criminal accountability of United Nations officials and experts on missions.
- The rule of law at the national and international levels.
- Responsibility of states for internationally wrongful acts.
- Diplomatic protection.
- The scope and application of the principle of universal jurisdiction.
- Measures to eliminate international terrorism.

The statements were drafted by the Office in cooperation with the Legal Adviser to the South African Permanent Mission to the UN, and when required, with input from relevant business units in the Department, notably the Chief Directorate: UN Political, Peace and Security.

## **Permanent Court of Arbitration**

South Africa acceded to the 1907 Convention for the Pacific Settlement of International Disputes in 1998. The 1907 Convention amended the 1899 Hague Convention on the Pacific Settlement of Disputes that established the Permanent Court of Arbitration. This was the first permanent international organisation providing a forum for the resolution of international disputes through arbitration and other peaceful means, such as conciliation, mediation and fact-finding. These services are available to states, state entities, intergovernmental organisations and private parties. The South African Ambassador to the Kingdom of the Netherlands was elected to serve as the chair of the Budget Committee in 2018, and served in this position for the largest part of 2019 while a successor was sought.



## **Environment, Science and Technology**

### *Marine Biological Diversity in Areas Beyond National Jurisdiction*

In resolution 72/249 of 24 December 2017, the General Assembly decided to convene an Intergovernmental Conference on an international legally-binding instrument under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. While UNCLOS regulates all aspects of ocean governance, the content of the rules established by UNCLOS in relation to the conservation and sustainable use of marine biological diversity, in particular marine genetic resources in areas beyond national jurisdiction, remains contested. Consequently, there is a need for an additional international legally binding instrument to give effect to and implement these principles of UNCLOS.

With respect to environmental protection, UNCLOS provides for a general duty to preserve and conserve the marine environment, but does not provide details about how this duty is to be implemented beyond self-regulation or agreement between states. For example, while marine protected areas are clearly envisioned by UNCLOS, though not explicitly provided for, they cannot be effectively established and implemented given the notion of unfettered freedom of the high seas. The principle of the freedom of the high seas, coupled with the lack of globally accepted criteria, standards and processes for the establishment of marine protected areas, has the result that the establishment of globally accepted and respected marine protected areas is not possible. Similarly, while UNCLOS provides for environmental impact assessments, there is no governance system to ensure the application of impact assessment requirements.

The third session of the UN General Assembly's Intergovernmental Conference (IGC3) on an international legally binding instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ), was held from 19 to 30 August 2019, at the UN Headquarters in New York. Delegates at the IGC3 delved, for the first time, into textual negotiations based on a 'zero draft' containing treaty text. The document's structure addressed general provisions and cross-cutting issues, as well as the four elements of the package identified in 2011:

- marine genetic resources (MGRs), including questions on the sharing of benefits;
- measures such as area-based management tools (ABMTs), including marine protected areas (MPAs);
- environmental impact assessments (EIAs); and
- capacity-building and the transfer of marine technology (CB&TT).

Deliberations were productive and the spirit of cooperation during the meeting was highlighted by delegates and observers alike. It was agreed that a revised draft for the next session would be developed based on discussions and submissions made during the meeting.

## **Antarctica**

December 2019 marked the sixtieth anniversary of the signing of the Antarctic Treaty in 1959. In commemoration thereof, the Antarctic Treaty Consultative Meeting (ATCM), at its 42nd meeting held in July 2019 in Prague, Czech Republic, adopted a declaration, wherein the consultative parties reaffirmed their deep commitment to the objectives, purposes and principles of the Antarctic Treaty and all instruments of the Antarctic Treaty System.<sup>2</sup>

Antarctica is an area with much potential, in particular in relation to the strengthening of scientific research. South Africa is one of five gateway countries to Antarctica and maintains an active role in relation to the continent by engaging in research in various sciences. In consultation with a number of stakeholders, the Department of Environment, Forestry and Fisheries (DEFF) is preparing a national strategy on Antarctica to bring greater cohesion to South Africa's Antarctic activities.

At the 42nd ATCM, South Africa submitted four papers. One was an information paper, jointly submitted with Portugal, Spain and the United Kingdom entitled: 'Projected Distribution of Southern Ocean Seabirds and Fisheries due to Climate Change.' The other papers were background papers, two of which related to steps taken by the South African Government in relation to recommendations made following inspections of the South African National Antarctic Programme (SANAP) Summer Station and the South African National Antarctic Expedition (SANAE) IV Station (which supports scientific research and provides logistical support to scientific personnel) carried out in February 2018 and submitted to the ATCM and the Committee for Environmental Protection in 2018. A further background paper was submitted in relation to SANAP Science Highlights for the period 2018 to 2019. One of the main highlights was the SANAP Symposium, which was jointly hosted by the then Department of Science and Technology (DST) and the National Research Foundation in August 2018.<sup>3</sup>

Antarctica has played a tremendously important role in the realm of science since the Treaty was adopted. Indeed, the Scientific Committee on Antarctic Research (SCAR) highlighted some of the significant benefits that scientific investigation in Antarctica over the past sixty years has delivered, ranging from the discovery of the hole in the

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2 *Final Report of the Forty-second Antarctic Treaty Consultative Meeting*, held in Prague, Czechia from 1 to 11 July 2019 Vol I (Secretariat of the Antarctic Treaty 2019) Appendix I, 209 <[https://documents.ats.aq/ATCM42/fr/ATCM42\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM42/fr/ATCM42_fr001_e.pdf)>.

3 *ibid*, paras 46, 243, 305 and 334.

ozone layer to the analysis of ice cores from the Antarctic to understand the climate history of the planet.<sup>4</sup>

It is unsurprising that Antarctic terrestrial and marine environments continue to face threats from climate change and increased tourism. However, these are not the only challenges, and the 42nd ATCM agreed to conduct informal consultations to identify relevant issues and trends that impact on the protection and conservation of Antarctica.<sup>5</sup>

While the continent has faced and will continue to face numerous challenges, the Antarctic Treaty System has proven itself capable of weathering the storm, having successfully done so for sixty years.

### Hague International Space Resources Governance Working Group

The Chief State Law Adviser (International Law) has been participating in the work of The Hague International Space Resources Governance Working Group, and the Legal Counsellor at the Embassy in The Hague attended the final two meetings, held in Leiden in May 2019 and in Luxembourg in November 2019 on her behalf.

While discussions on the development of an international framework for governing the utilisation of space resources have taken place within the UN in its Committee on the Peaceful Uses of Outer Space (COPUOS), and while Belgium and Greece have proposed the establishment of a focused working group within COPUOS, progress was blocked by some states. The Government of the Netherlands then took the initiative to establish the multi-stakeholder working group, consisting of representatives from states (with representatives from both foreign ministries and space agencies), industry, civil society and academia. The aim was to develop, within such a smaller and more focused group, possible building blocks for the international regulation of the utilisation of space resources, and also to assist states in developing their domestic regulation regimes.

The Institute of Air and Space Law at Leiden University provided the secretarial services to the working group. The Luxembourg meeting adopted the Building Blocks for the Development of an International Framework on Space Resource Activities by consensus, which is to be accompanied by a commentary to provide the background to the discussions and serve as *travaux préparatoires* to the finally adopted text. The understanding is that the Building Blocks would not have legal status as such, but would serve as a norm-creating document that could form the basis for and inspire national policies and legislation, while it may also in future form the basis for the development of an international regulatory framework. Some of the main space-law principles dealt with in the Building Blocks include the prohibition of harmful interference, the obligation on states to exercise jurisdiction and control over space-made products used

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4 SCAR, 'WP037: Sixty Years of Treaty-Supported Antarctic Science' ATCM XLII - CEP XXII (2019).

5 Final Report (n 3) paras 124–128.

in space resource activities for which they are responsible, the sharing of benefits arising out of the utilisation of space resources, and the mutual recognition between states of resource rights over minerals and materials extracted from space and products derived therefrom.

The Netherlands and Belgium will introduce the Building Blocks to the legal sub-committee of COPUOS, for consideration and possible submission to COPUOS. The Building Blocks and the commentary have also since been published in book form.<sup>6</sup>

## Private International Law

### **The Hague Conference on Private International Law**

South Africa has been a member of The Hague Conference on Private International Law (HCCH) since 14 November 2002. South Africa is also a party to five of the HCCH Conventions.

In 1992, the HCCH embarked on the ‘Judgments Project’ on the enforcement of foreign judgments. The initial phase of the project resulted in the conclusion of the Convention on Choice of Court Agreements. The second phase of the project led in August 2013 to the decision to develop a new convention on the recognition and enforcement of foreign judgments in civil or commercial matters.

The 22nd Diplomatic Session of The Hague Conference on Private International Law (HCCH) was held in The Hague, the Netherlands from 18 June to 2 July 2019.

The primary objective of the Diplomatic Session was to negotiate and adopt the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (‘2019 Hague Convention on Judgments’). On 2 July 2019, delegates from the HCCH member states signed the Final Act of the Diplomatic Session, adopting the 2019 Hague Convention on Judgments.

The 2019 Hague Convention on Judgments is a private international law instrument on civil and commercial matters. Its objectives are to promote access to justice globally through enhanced judicial cooperation between contracting states in order to reduce the risks and costs associated with cross-border legal relations and dispute resolution. As a result, implementation of the Convention will facilitate international trade, investment and mobility.

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6 Olavo de O. Bittencourt Neto, Mahulena Hofmann, Tanja Masson-Zwaan, Dimitra Stefoudi (eds), *Building Blocks for the Development of an International Framework for the Governance of Space Resource Activities* (Eleven International Publishing 2020).

It will ensure that the judgments to which it applies will be recognised and enforced in all contracting states, thereby enhancing the practical effectiveness of those judgments and ensuring that a successful party can obtain meaningful relief. It will further reduce the need for duplicative proceedings in two or more contracting states. For example, a judgment determining a claim in one contracting state will be effective in other contracting states, without the need to re-litigate the merits of the claim in the courts of the other contracting states. It will reduce the costs and timeframes of obtaining recognition and enforcement of judgments, resulting in faster access to justice at lower cost. It will also improve the predictability of the law. As a result, individuals and businesses in contracting states will be able to ascertain more readily the circumstances in which judgments will circulate among those states. Lastly, the Convention will enable claimants to make informed choices about where to bring proceedings, taking into account their ability to enforce the resulting judgment in other contracting states and the need to ensure fairness to defendants.

South Africa was elected to serve as one of the Vice-Chairs of the Diplomatic Conference. The Legal Counsellor at the South African Embassy in The Hague chaired the second meeting of the Hague Conference Experts' Group on the Protection of Tourists in September 2019. The Experts' Group was established at the initiative of Brazil with a mandate to explore the possibility of a Hague Conference Convention on the cross-boundary protection of tourists. However, the Experts' Group concluded that there was not broad support for the development of a legally binding Convention, as a number of delegations, including from the European Union, considered that adequate measures existed in their domestic law for the protection of tourists and their interests when they may become involved in disputes in foreign jurisdictions. Several delegations therefore expressed a preference for the development of a non-binding instrument. The Experts' Group consequently decided that a consultant should be engaged with a mandate to establish the applicability of existing Hague Conference Conventions and other international instruments to the protection of tourists and map out options for enhancing and operationalising the protection of international tourists. The Chair's conclusions as well as the consultant's report will be presented to the meeting of the Council on General Affairs and Policy for consideration and a mandate on possible further work on the project.

The Legal Counsellor was also a member of the Working Groups on Rules of Procedure to govern proceedings of all the bodies of the HCCH, as well as the Working Group on the selection and appointment of the Secretary-General.

### **International Institute for the Unification of Private Law**

The Office is the official contact point in South Africa for the International Institute for the Unification of Private Law (UNIDROIT) and performs diplomatic desk-related functions for South Africa's membership of UNIDROIT. As one of only four African

members of UNIDROIT, and as the only state from the Southern African Development Community (SADC), South Africa attempts to give an African voice to UNIDROIT activities in cooperation with Nigeria, Tunisia and Egypt.

### **Cape Town Convention Academic Project**

The Cape Town Convention Academic Project is a joint undertaking between the University of Washington School of Law and the University of Oxford Faculty of Law. Its purpose is to facilitate the academic study and assessment of the Cape Town Convention on International Interests in Mobile Equipment, together with its Protocols, for the benefit of scholars, practising lawyers, courts and governments.<sup>7</sup>

South Africa, as the host state for the Diplomatic Conferences that adopted both the Cape Town Convention in 2001 and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment (MAC Protocol) in 2019, maintains a special relationship with all matters related to the Cape Town Convention.

The eighth annual conference of the Cape Town Convention Academic Project took place in Oxford on 10 and 11 September 2019, and South Africa participated with the generous facilitation of UNIDROIT, Oxford University and the Aviation Working Group. During the first day of the conference eminent scholars and practitioners discussed matters of practical implementation, while on the second day a panel considered issues arising from the various language versions of the Cape Town Convention and its Protocols. The panel discussion highlighted a particularly important issue in multilateral treaty processes, namely where differences in language and legal culture have, or may, result in different interpretations, and consequently applications, of the Convention and its Protocols around the world. This issue is frequently overlooked at diplomatic conferences where the translation into a further text could

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7 University of Oxford Faculty of Law, 'The Cape Town Convention Academic Project'. <<https://www.law.ox.ac.uk/research-subject-groups/cape-town-convention-academic-project>> accessed 15 June 2020. The Convention provides for asset-based financing and leasing of mobile equipment of high value; establishes a legal framework for international interest in such equipment; creates an international registration system for their protection and provides for legal remedies in case of default in financing or leasing agreements. Four protocols deal with specific movable equipment: aircraft equipment (Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment), railway rolling stock (Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Rolling Stock), space assets (Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets), and mining, agricultural and construction equipment (Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment).

easily be viewed as merely a technical exercise, despite the significant impact that differences in translation may have on the interpretation of treaties.

In preparation of the MAC Protocol Diplomatic Conference that was to be held in South Africa in November 2019, two sessions were also hosted on the draft text of the MAC Protocol. South Africa participated in these sessions that proved to be instrumental in identifying remaining points of contention to be dealt with in the period leading up to the hosting of the diplomatic conference.

### **Diplomatic Conference of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment**

The Diplomatic Conference to negotiate and adopt the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment (MAC Protocol) was held in Pretoria, South Africa from 11 to 22 November 2019. In appreciation of South Africa's hosting of the Diplomatic Conference, it was decided that the MAC Protocol is to be known as the Pretoria Protocol. The Pretoria Protocol was the result of fourteen years of work by UNIDROIT. The adopted text was signed at the Diplomatic Conference by the Republic of Congo, the Republic of Gambia, the Republic of Paraguay and the Federal Republic of Nigeria.

Over 150 delegates from forty-three states, one regional economic integration organisation, three intergovernmental organisations, four international non-governmental organisations, and one technical adviser participated in the negotiations. Upon adoption, more than twenty states expressed confidence in the future impact of the Pretoria Protocol on global economic development across the mining, agriculture and construction sectors, and declared that their internal processes for signature were already underway.

For the Office, the adoption of the Pretoria Protocol by seventy-nine states was a singular achievement. Since December 2016, the Office was involved in the negotiation of the Pretoria Protocol through participation in Committees of Governmental Experts in Rome, meetings in Oxford and London, promotion of the draft Protocol in Nairobi, London, Rome, Oxford, New York and Pretoria, and the facilitation of the request from the Secretary-General of UNIDROIT to the Minister of International Relations and Cooperation for South Africa to consider the hosting of the Diplomatic Conference.

The Pretoria Protocol provides for an international legal framework for the financing of mining, agriculture and construction equipment, which will increase the global investment and productivity in these sectors. The Cape Town Convention has already successfully established an international legal regime for the creation, enforcement, registration and priority of security interests in categories of high-value, and uniquely

identifiable mobile equipment. The Pretoria Protocol applies to mining, agriculture and construction equipment accounting for a value of approximately USD115 billion a year in international trade. It is anticipated that the Pretoria Protocol will have a positive effect on the annual global GDP of more than USD30 billion.<sup>8</sup>

### **Rail Protocol to the Cape Town Convention**

Interest in the Cape Town Convention on International Interests in Mobile Equipment and in particular, its Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (the Rail Protocol), continues to grow. Implementation of the Rail Protocol is expected to result in significant economic benefits for South Africa and Africa.<sup>9</sup> The Office remained involved in the assessment and consideration of the Rail Protocol. The Departments of Transport (DOT) and of Public Enterprises (DPE) oversee policy matters on rail operations in South Africa, and a number of meetings were held between international rail industry representatives, the financing industry and government in order to assist government in making critical decisions relating to South Africa's signature and ratification of the Rail Protocol.

## **South African Bills**

### **The Foreign Service Bill**

The Office continued work on the Foreign Service Bill which was finally passed by the National Assembly in its plenary sitting on 19 November 2019.

The Foreign Service Act 26 of 2019 provides for a single foreign service system for the country and is intended to address the fragmented and inconsistent management of officials who serve various government departments at South African diplomatic missions abroad.

To address such concerns, the Act provides for the management, administration, accountability and functioning of a professional foreign service. It also provides for the operational requirements that are suitable and supportive of the operations of the foreign service in a global environment.

Under the Act, the foreign service system will be managed and regulated in a consolidated and coherent manner by the Department of International Relations and Cooperation. The Act will function within the existing constitutional and legislative

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8 UNIDROIT, 'Economic Benefits' <<https://macprotocol.info/economic-benefits/>> accessed 15 June 2020.

9 Oxera, 'Luxembourg Rail Protocol to Save South Africa €1.3bn' (July 2018) <<https://www.oxera.com/publications/luxembourg-rail-protocol-to-save-south-africa-e1-3bn/>> accessed 15 June 2020.



framework governing the public service sector and the security services in the country. The Act is presently awaiting assent by the President.

## References

- Centrum voor Internationaal Recht (CIR), 'MLA Initiative'  
<<https://www.centruminternationaalrecht.nl/mla-initiative>> accessed 15 June 2020.
- Final Report of the Forty-second Antarctic Treaty Consultative Meeting*, held in Prague, Czech Republic from 1 to 11 July 2019 Vol I (Secretariat of the Antarctic Treaty 2019)  
<[https://documents.ats.aq/ATCM42/fr/ATCM42\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM42/fr/ATCM42_fr001_e.pdf)> accessed 15 June 2020.
- Scientific Committee on Antarctic Research (SCAR), 'WP037: Sixty Years of Treaty-Supported Antarctic Science' ATCM XLII - CEP XXII (2019).
- Olavo de O. Bittencourt Neto, Mahulena Hofmann, Tanja Masson-Zwaan, Dimitra Stefoudi (eds), *Building Blocks for the Development of an International Framework for the Governance of Space Resource Activities* (Eleven International Publishing 2020)
- University of Oxford Faculty of Law, 'The Cape Town Convention Academic Project'  
<<https://www.law.ox.ac.uk/research-subject-groups/cape-town-convention-academic-project>> accessed 15 June 2020.
- UNIDROIT, 'Economic Benefits' <<https://macprotocol.info/economic-benefits/>> accessed 15 June 2020.
- Oxera, 'Luxembourg Rail Protocol to Save South Africa €1.3bn' (July 2018)  
<<https://www.oxera.com/publications/luxembourg-rail-protocol-to-save-south-africa-e1-3bn/>> accessed 15 June 2020.

## Legislation

- Constitution of the Republic of South Africa, 1996.
- Foreign Service Act 26 of 2019.
- Rome Statute of the International Criminal Court Act 27 of 2002.

## Cases

- Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (ICJ Advisory Opinion*, 25 February 2019).

## Treaties, Conventions and Protocols

- Antarctic Treaty.
- Convention on International Interests in Mobile Equipment.

Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment.

Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment.

Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Rail Rolling Stock.

Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets.

United Nations Convention on the Law of the Sea (UNCLOS).