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

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Introduction

It is again a privilege for the Office of the Chief State Law Adviser (International law) at the Department of International Relations and Cooperation to share some of its activities during 2011 with the wider international community. In a year in which the use of force by states – and the legal limits thereof – once again taxed international lawyers the world over, the law advisers of the office were often reminded of the conditions for self-defence set out in beautiful prose in the 1841 letter of the United States Secretary of State, Daniel Webster, to the British Minister in Washington, relating to the destruction of the vessel *The Caroline.* The famous 'Webster formula' listed a number of conditions that must be present for legitimate self-defence against a threat, amongst others that 'no moment for deliberation' must remain.[1]

The year 2011 proved to be one of the busiest in the office's existence. South Africa again served as a non-permanent member of the United Nations Security Council, while also hosting the 17th Conference of the Parties to the United Nations Framework Convention on Climate Change, and the 7th Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol. In addition, a number of developments with legal implications also took place within the context of the Southern Africa Development Community (SADC) and the African Union (AU), while law advisers also participated in events related to a number of other treaty regimes. The scrutinising and certification of all international agreements to which South Africa became party, as well as the regular matters relating to privileges and immunities of diplomatic missions and international organisations, and general questions on international law kept the law advisers desk-bound when not attending international meetings. The increase in work and deadlines forced by the dates

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[1]The other conditions being necessity, and for the threat to be instant, overwhelming and leaving no choice of means.(1840-1841) 29 *British Foreign and State Papers* at 1138.

of international meetings and the dynamic nature of such meetings, often left law advisers when preparing opinions or making inputs and formulating positions at international negotiations, with the little time for the deliberation that Secretary Webster referred to. The nature of the work and the intensity of international interaction[2] demand law advisers who are well-trained, not only academically but also in the practice of negotiation, hence the office's policy of regularly exposing its staff to training opportunities. South Africa's non-permanent membership of the United Nations Security Council also offered valuable opportunities for exposure to the cutting edge of multilateral diplomacy and international law.

One of the outstanding events for the office in 2011 was the election of Dr Dire Tladi, the Counsellor: Legal at the South African Permanent Mission to the United Nations who served in the office as a law adviser before being posted to New York, as a member of the International Law Commission. Dr Tladi will follow in the footsteps of Professor John Dugard, who represented South Africa with distinction for two terms on the Commission.

Consolidation of the African Agenda

African Union

The Transformation of the AU Commission into the AU Authority resulted in the review of a number of legal instruments of the Union. Although the Malabo Summit meeting of Heads of State and Government of July 2011 decided that the mandate of the Authority should be reconsidered, it was determined that three instruments should remain on the agenda for consideration. With respect to a new Protocol on the establishment of an African Monetary Fund, a law adviser participated as part of a South African delegation in two meetings of Financial and Legal Experts in Yaoundé, Cameroon and at the African Union headquarters in Addis Ababa, Ethiopia.

A law adviser also participated, together with officials of the Department of Justice and Constitutional Development, in two meetings at the AU Headquarters in Addis Ababa, on amendments to the Protocol Establishing the Pan African Parliament (PAP) and the Protocol on the Statute African Court of Justice and Human and People's Rights. While only minor amendments of a technical nature were proposed with respect to the PAP Protocol, major amendments were proposed to the Statute of the African Court on Human and People's Rights. A summit decision for the AU Commission to investigate the implications of the possible addition of jurisdiction over international criminal law, resulted in a draft text presented for negotiation that contained major

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[2] Attested to by a former principal Legal Adviser of the Foreign and Commonwealth Office, see Bethlehem *The secret life of international law,* on file at the Office of the Chief State Law Adviser (International law).

amendments to the Protocol. It provided for the addition of an International Criminal Law Section (in addition to the present General Affairs and Human and People's Rights Sections), with Pre-Trial, Trial and Appeals Chambers. As regards the crimes under the jurisdiction of the International Criminal Law Section, the crimes contained in the Rome Statute on the International Criminal Court were included (genocide, war crimes, crimes against humanity and the crime of aggression) while a number of new crimes were also included, the definitions being based on existing AU legal instruments. These are the crimes of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous waste, illicit exploitation of natural resources, and inchoate crimes. The concept of corporate criminal liability was also added. The complicated nature of the definitions and matters such as the relationship between the Chambers and their relationship with domestic jurisdictions and the jurisdictions of other international criminal tribunals, resulted in intense negotiations which were not completed as planned. A further negotiations session will be held in 2012.

SADC

The SADC Summit's meeting held in Windhoek, Namibia in August 2010 decided that a study should be conducted into the role, responsibilities and terms of reference of the SADC Tribunal. This decision resulted from a position taken by Zimbabwe that the Protocol on the SADC Tribunal had not entered into force and that the SADC Tribunal was therefore not legally constituted. A firm of consultants was appointed and on the basis of inputs from SADC member states, prepared a report titled 'Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal'. The report found that the Tribunal was properly constituted but recommended a number of amendments to the Protocol establishing the Tribunal to improve its functioning. The recommendations and proposed amendments were discussed during a meeting in Swakopmund, Namibia, between SADC legal experts and a South African delegation consisting of a law adviser from the office and officials of the Department of Justice and Constitutional Development. This was followed by a meeting of Ministers of Justice/Attorneys-General of SADC. The report of this meeting was forwarded to the Extraordinary SADC Summit held in Windhoek in May 2011. The report contained a number of concerns raised by member states relating to the role, responsibilities and terms of reference of the Tribunal. Summit then decided to place a moratorium on the hearing of cases and on the acceptance of new cases by the Tribunal. It was also resolved that, until the SADC Tribunal Protocol has been reviewed and approved, there will be no judicial appointments to fill vacancies created by judges whose terms of office expire. During a meeting of senior legal officials followed by a meeting of Ministers of Justice/Attorneys-General held in July in Walvis Bay, a process of negotiations on amendments to the SADC Tribunal started. This is ongoing.

African-Asian Legal Consultative Committee

The South African delegation to the 50th Session of the Asian-Legal Consultative Organization was led by the office. Apart from the consideration of items on organisational matters, the following substantive items were considered: Deportation of Palestinians and other Israeli Practices among them the Massive Immigration and Settlement of Jews in all Occupied Territories in Violation of International Law, particularly the Fourth Geneva Convention of 1949; the Law of the Sea; Expressions of Folklore and its International Protection; Environment and Sustainable Development; the Report on Matters relating to the Work of the International Law Commission at its Sixty-Second Session; and the Report of the UNCITRAL and Other International Organizations in the Field of International Trade Law. There were also two special meetings on the Trafficking of Women and Children/Migrant Workers and Protection of Children, and International Commercial Arbitration.

African Commission on Human and People's Rights

The office submitted written inputs on the *Merits of Communication 335/2007 – Dabalorivhuwa Patriotic Front and Makhale Tshifhiwa Samuel/Republic of South Africa*. The applicants in this matter, former civil servants of the administration of the territory that was known as Venda, alleged that various rights provided for in the African Charter on Human and People's Rights had been violated when their pension benefits were transferred from the Venda administration to private pension funds, and that the calculation and payment of benefits constituted discrimination between different classes of public servant.

African Tax Administration Forum

The office provided legal advice to the South African Revenue Service on aspects relating to the establishment of the African Tax Administration Forum (ATAF) and an agreement formally to establish it as an international organisation. ATAF was conditionally established by a formal resolution of the International Conference of Taxation, State Building and Capacity Development in Africa, held in Pretoria from 28-29 August 2008, and had to be formally established as an international organisation in terms of a constituent instrument.

Southern African Customs Union

A law adviser participated in a SACU Legal Experts Meeting which considered the Draft Annex on the SACU Tribunal, the Draft Annex on the Permanent Arrangement on Management of the Common Revenue Pool, the Draft Annex on the Common Negotiating Mechanism, and the Draft Amendments to Institutionalize the Summit and the Draft Rules of Procedure for the Summit, Ratification of Annex E on Mutual Administrative Assistance. The process of considering these instruments is ongoing.

Global system of governance

United Nations Security Council

In January 2011, as part of the 'Arab Spring', conflict broke out in Libya. The Security Council adopted two resolutions, Resolution 1970 and Resolution 1973. Both these resolutions – and their implementation – raised several legal questions.

Resolution 1970, adopted less than twenty-four hours after its circulation – a near miracle for a Security Council resolution with such far reaching consequences – had three elements, namely whether the resolution would be adopted specifically under article 41 or more broadly under Chapter VII; whether the Council would refer the situation to the International Criminal Court (ICC) in terms of article 13(b) of the Rome Statute; and finally, the type of sanctions that would be imposed. The latter issue was the least controversial and little time was spent on it. The first two issues, which were the contested ones, were both legal in nature.

The ICC referral, apart from the policy question of whether to refer, raised questions of the extent of cooperation from non-states parties and the limitation of jurisdiction of the ICC in respect of non-states parties. It will be recalled that in a previous ICC referral resolution – Resolution 1593 in respect of situation in Darfur – the resolution placed an obligation only on the situation states to cooperate, while other states were merely 'urged' to cooperate.[3] The resolution further excluded the jurisdiction of the ICC in respect of nationals of non-state parties for actions 'arising out of or related to operations in Sudan'.[4] Both of these limitations were intended to protect the three permanent members who were not state parties to the ICC and were thus not willing to subject themselves to the obligation to cooperate or to subject their nationals to the jurisdiction of the ICC. Brazil and South Africa saw these provisions as detrimental to the integrity of the ICC and argued for their non-inclusion in Resolution 1970. However, with bloodshed continuing in Libya, and with most delegations apparently willing to accept these concessions to the permanent members, it became politically difficult to sustain what was a legitimate position.

On the policy question of whether to refer the situation at all, South Africa had two conflicting concerns. On the one hand, given the widespread human rights violations taking place in Libya, South Africa supported the referral of the situation to the ICC. On the other hand, South Africa sought to protect the ICC from the fall-out of yet more 'ICC targeting Africa'-critiques. We thus took an approach that any decision by the Council to refer the situation in Libya to the

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[3]See par 2 of Resolution 1593.
[4]Paragraph 6 of Resolution 1593.

ICC must be supported by a legitimising act such as a preliminary report of the independent international commission of inquiry established by the Human Rights Council which was expected in less than a month.[5] However, when, on the day of the negotiations, Libya's permanent mission itself submitted a *note verbale* expressing its support for the ICC referral, South Africa was able freely to support the referral. While, given the political dynamics and the fact that the Libyan mission had already declared their allegiance to the anti-Gaddafi movement, this may have seemed a rather formalistic approach, it would be sufficient to insulate the ICC from any 'anti-Africa' critique.

Even during the negotiations of Resolution 1970, it became apparent that some were contemplating using the resolution as a mandate for the use of force. In the original draft, the Council declared only that it was acting under Chapter VII, without identifying the specific provision in Chapter VII. Read with other parts of the original draft, in particular the provision on humanitarian assistance, it would have been conceivable to interpret Resolution 1970 as authorising the use of force – which no doubt would have led to arguments about the abuse of the resolution. As it turned out, the preamble to Resolution 1970 specified that the measures adopted were adopted under article 41, and operative paragraph 26 on humanitarian assistance excluded the phrase 'all necessary measures'.

Other legal issues that arose from Resolution 1970 and in which South Africa was involved include the processes of securing exemptions from the freezing of assets, the process of unfreezing frozen assets, the call for investigations into possible crimes committed by anti-Gaddafi forces, as well as the question of the obligation on Libya to cooperate with the ICC in respect of the surrender of Said Gadaffi. These were all issues in which law and politics sat uncomfortably side by side.

The primary legal contestation over Resolution 1973 occurred after the adoption of the resolution, the question being whether the authorisation to use force under operative paragraph 4 (for the protection of civilians) and operative paragraph 8 (enforcement of no-fly zone for the purposes of protecting civilians) had been faithfully implemented, or whether 'regime change' could be read into the mandate under resolution. In the light of the lack of a compulsory judicial mechanism to interpret the resolution and adjudicate whether the implementation was faithful to the letter and spirit of the resolution, the contestation is likely to remain unresolved.

The post election conflict in Cote d'Ivoire also posed its fair share of legal questions. A particularly complex question, involving not only international

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[5]The Commission of Enquiry was dispatched under a Human Rights Council resolution A/HRC/RES/S-15/1.

law but the interaction of international law with domestic law, posed particular difficulty. In the aftermath of the elections, three different institutions made declarations about the outcome of the elections. The Independent Electoral Commission (IEC) declared Ouattara to be the winner of the elections, the Constitutional Council – not the Constitutional Court – declared Gbagbo to be the winner, and the Special Representative of Secretary-General (SRSG) also declared that the winner was Ouattara. The Constitution in Cote d'Ivoire provides, unambiguously, that the Constitutional Council settles all disputes pertaining to elections. The Electoral Act, however, empowered the IEC to proclaim provisional results. However, Resolution 1765 of the Security Council, a Chapter VII resolution, empowers the SRSG to certify the election process. The objectively correct legal interpretation depended on a complex set of factors, including construction of the language of the texts (Resolution 1765, the Constitution, and the Electoral Act) as well their interaction.

Assembly of States Parties Search Committee for a Prosecutor of the International Criminal Court

In December 2011, the ICC Assembly of States Parties (ASP) elected a new chief prosecutor, Fatou Bensouda, to replace Luis Moreno Ocampo – this in itself is not a remarkable event as the ASP also elected a number judges. What was remarkable about the election of Ms Bensouda, was the process used. The Statute provides for the prosecutor to be elected by the ASP in much the same way as judges are elected. However, an earlier resolution called for 'every effort' to be made to find a consensus candidate for the post of prosecutor. Pursuant to this call, the ASP put in place a search committee to identify at least three suitably qualified candidates and submit these to the ASP. The ASP would then be required to find a consensus candidate from amongst those shortlisted. The South African Ambassador to the United Nations, assisted by the Legal Counsellor of the Mission in New York, served as a member of the five person Search Committee. The process, which is currently being evaluated, provided an interesting balance between the need to find the right candidate, on the one hand, and respecting the rights of state parties under the Rome Statute, on the other.

The UN Security Council sanctions regime on the Al Qaida and the Taliban established pursuant to UN Security Council Resolution 1267, had come under severe criticism from various quarters for lack of adherence to due process standards. In particular, issues had been raised about the process of delisting. The review of the regime in 2011 provided an opportunity to address some of the criticism. As early as 2009, the Council had begun to address this by putting in place the Office of the Ombudsperson. During the course of the review in 2011, South Africa took the view that more needed to be done to enhance the due process standards of the regime. The 2011 review resulted in two main shifts. First, the Al Qiada regime was split from the Taliban regime

so that the latter assumed the character of a normal country specific sanctions regime. The second major change, which was designed to respond to the due process criticism, was the institutionalisation of a sunset concept, under which, once the Ombudsperson recommended delisting, an individual would be delisted unless all members of the committee objected to the delisting. While this improvement does have a caveat in the form of the possibility of escalating a question to the Security Council – and thus activating the decision-making procedures of the Council under article 27 of the Charter – it represents a significant improvement on a system under which a single member could block a delisting without providing reasons.

UNGA 66

The Sixth Committee deals with international law issues for which the office is responsible, and as one of its aims is to contribute towards the formulation, codification and progressive development of international law, participation in the meetings of the Sixth Committee is considered an important tool for contributing to the development of international law. Law advisers from head office assisted the Legal Councillor at the SA Permanent Mission to the UN during meetings of the Sixth Committee and also assisted in formulating South Africa's position on the agenda items of Criminal Accountability of UN Officials and Experts on Mission, the Report of UNCITRAL on the work of its 44th Session, the Administration of Justice at the UN, the Scope and Application of the Principle of Universal Jurisdiction, and the UN Programme of Assistance in Teaching, Study, Dissemination and Wider Appreciation of International Law.

UNIDROIT

A law adviser attended the Seminar of the International Institute for the Unification of Private Law (UNIDROIT) Commemorating the 10th Anniversary of the 2001 Convention on International Interests in Mobile Equipment (the 'Cape Town Convention'), held in Rome in November 2011. This convention regulates innovative methods for asset financing of mobile equipment, and provides for a central registry for such equipment. Three Protocols dealing with the leasing of assets in the aircraft, railway and space industries have resulted from this framework convention. In addition, UNIDROIT announced that it has started researching a new protocol on equipment leasing in the agriculture and mining sectors.

The seminar was followed by UNIDROIT's 5th Preparatory Commission regarding the Establishment of the International Registry for Railway Rolling Stock (Luxembourg Protocol). The Luxembourg Protocol envisages an international rail registry with a unique identification mechanism for rail rolling stock. This was again followed by the 69th General Assembly of UNIDROIT. It was reported at the meeting that the draft Netting Instrument

had been finalised, and would be sent to government experts for comments. The draft instrument on Intermediate Securities is ready for a second round of discussions. Work has begun on a draft private law instrument on agricultural financing, which will be an important link between foreign investment and food security. UNIDROIT is looking for funding on a draft instrument on social business, while consultations on the draft Space Protocol have been finalised and a diplomatic convention was arranged for early 2012 in Berlin. Work has also started on a draft Protocol to the Cape Town Convention on Asset Leasing of Equipment in the Agriculture and Mining Industries. Work is proceeding well on the draft instrument on Third-Party Liability for Satellite Activities. Successful colloquia were held on most instruments under consideration by UNIDROIT.

WIPO

The World Intellectual Property Organisation held its 49th General Assembly in Geneva, Switzerland, in September 2011. A law adviser from the office assisted the South African delegation with the deliberations on the agenda points of Governing Bodies and Institutional Issues, Planning, Budget and Finance, Progress Reports on Major Projects, Policy Proposals, and the WIPO Committees (Committee on Development and Intellectual Property, Standing Committee on the Law of Copyright and Related Rights, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Standing Committee on the Law of Patents, Standing Committee on Trademarks, Industrial Designs and Geographical Indications, Committee on WIPO Standards, and the Advisory Committee on Enforcement).

During informal consultations of the Standing Committee on the Law of Copyright and Related Rights of WIPO on the Protection of Broadcasting Organisations draft treaty, the law adviser supported the South African delegation with these negotiations.

Environment, science and technology

Climate change: The changing climate of multilateral decision making

The 17th Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) and the 7th Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (COP17/CMP7), held in Durban from 28 November to 9 December 2011, represented a watershed in more ways than one. Parties agreed to a package of decisions that include a second commitment period under the Kyoto Protocol (KP), the establishment of the Green Climate Fund (GCF), and a set of outcomes under the Ad hoc Working Group on Long-term Cooperative Action (AWG-LCA). It also produced a landmark decision to launch a process, known

as the Durban Platform, which provides for a roadmap for enhanced action by means of working towards the adoption of a protocol, another legal instrument, or an agreed outcome with legal force applicable to all parties.[6] Looking back at the history of the UNFCCC process, the Durban Platform can be likened to the 1995 Berlin Mandate that led to the adoption in 1997 of the Kyoto Protocol.

As the Kyoto Protocol only covers the emissions of industrialised countries, the Durban Platform represents a significant step towards creating a regime that will ensure environmental integrity, given that the adoption of a legal instrument with legal force applicable to all parties will cast the net much wider in terms of global emissions that will be subject to an international legal regime.

It also introduced a creative consensus-building mechanism necessary to overcome the major obstacles in order to achieve an outcome. At least since COP15/CMP5 in Copenhagen in 2009, public perception of the international climate change negotiations has been rather pessimistic and skeptical with regard to the willingness of parties to commit to real action. Although the Danish COP/CMP presidency brought together the largest gathering of heads of state and government outside of the United Nations headquarters in New York, the conference failed to deliver on its mandate by agreeing on a second commitment period under the Kyoto Protocol[7] and completing the work of the Bali Action Plan under the Convention.[8] During the last hours of the conference in Denmark, a small number of heads of state and government agreed to a text called the Copenhagen Accord, which contained an agreement to limit the increase in global temperature rise to below 2 degrees Celsius, provided parties with formats in which to submit their economy-wide emissions targets, as well as a commitment by developed countries to provide financing for climate action in the order of USD30 billion from 2010 to 2012 and to jointly mobilise USD100 billion a year by 2020.[9]

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[6]UNFCCC decision 1/CP.17.

[7]In 2005, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) at its first meeting in Montreal, by its decision 1/CMP.1, established the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP). The aim of the AWG-KP is to discuss future commitments for industrialised countries under the Kyoto Protocol.

[8]The 13th Conference of the Parties to the UNFCCC in Bali agreed in its decision 1/CP.13 (The Bali Action Plan) "to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012".

[9]While the Copenhagen Accord was not formally adopted, the Conference of the Parties took note of the accord in Decision 1/CP.15. In the subsequent months, Parties were encouraged by varying degrees of diplomatic pressure to associate themselves with the accord and to submit pledges.

In light of the near universal disappointment about the Copenhagen outcome and the fragile state in which the UNFCCC process was left, expectations for COP16/CMP6 held in Cancún, Mexico in 2010, were modest, not least because of the cautious approach by the Mexican COP/CMP presidency. While the Cancún outcome also failed to fulfill the Montreal and Bali mandates, it did produce a set of decisions that gave further content to the Copenhagen Accord. The multilateral system which nearly collapsed in Copenhagen was not in a very good state by the end of the Cancún meeting.

Although Durban only succeeded in partially fulfilling the Montreal and Bali mandates, it has gone further than any of the previous three COPs. Can the success of Durban be understood merely as the culmination of incremental progress that has been made in preceding years or be attributable to a sufficient level of maturity of the negotiations, ie that the issues faced by negotiators in Durban were somehow ready for decisions to be taken on them? If the success of Durban is to be explained in terms of renewed political will, why did the Copenhagen conference fail when reportedly more than one hundred heads of state and government were present and when the global financial crisis was not so heavily present and deeply felt in multilateral negotiations?

While these questions deserve further attention from researchers, this contribution will try to offer some ideas on the role of the South African COP/CMP presidency and the introduction of the so-called Indaba process as a confidence and consensus building mechanism, as well as the management of the conference process as an explanation of the success of the Durban outcome.

When the United Nations was established in 1945 there were fifty-one founding members. In contrast, 192 sovereign states and one regional organisation participated in the Durban Conference as parties to the UNFCCC. Hosting an international conference sixty-six years after the establishment of the United Nations has become an enormous logistical undertaking with few cities in the world that have conference facilities large enough to accommodate the delegations[10] representing the Parties. The decision-making process under most multilateral environmental agreements is consensus-based with few making provision for voting when efforts to reach consensus fail. The draft rules of procedure of the UNFCCC, for example, are applied although not formally adopted by the COP due to the lack of consensus on voting rules.

Furthermore, the climate change process itself is very complex, involving two separate tracks of negotiation for further commitments under the Kyoto

[10] Attendance figures for Copenhangen were 27 294, for Mexico 11 848 and for Durban 13 389 participants.

Protocol, and long-term cooperative action under the Convention, respectively. Each track then further consists of a multitude of negotiating streams on specific technical issues, eg mitigation, adaptation, finance, technology, capacity building, legal form, emissions accounting, forests, etcetera. Many of these negotiating streams are inter-linked, making it difficult, if not impossible, to take decisions on different issues in isolation, eg a decision on mitigation action is dependent on a decision on how such action will be measured. At times fifty-five different streams of work held meetings, increasing to sixty, which had to be monitored to obtain a sense of the progress in negotiations and where difficulties were being experienced.

The climate change negotiations are also highly politicised. The objective of the Convention is to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system within a time frame sufficient to enable economic development to proceed in a sustainable manner.[11] The political interests of parties are rooted in various factors, including vulnerability of populations and ecosystems, demand for energy for development, economies dependent on fossil fuel production, trade and protectionist agendas, as well as ideology.

The fact that countries have such divergent interests and compete in the climate change negotiations for access to energy, economic development, and moral leadership, means that mutual trust is often lacking. The sense of injustice and inequality and the string of broken commitments that litter the path of climate negotiations, are also not helpful.

Although rhetoric about the urgency of the climate change challenge is frequently expressed by parties to domestic and international audiences, and repeated with regularity in the negotiations, the public's perception of the slow pace of the negotiations is justified. Looking at the two COPs that preceded Durban, much of the reason for their failure can be explained with reference to process.

Negotiations leading up to and during COP15/CMP5 in Copenhagen failed to deliver on the Montreal and Bali mandates. The Danish COP presidency invited heads of state and government to Copenhagen in the hope that world leaders would summon the necessary political will and make the deal that negotiators could not. They did not hide the fact that they had no faith in the negotiations reaching an agreement on the issues. The failure of Copenhagen can be attributed to at least two process weaknesses: lack of trust in the Danish COP presidency, and lack of inclusivity and transparency in the process followed.

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[11]UNFCCC art 2.

The Danish Minister for Climate and Energy Ms Hedegaard was replaced as COP president just two days before the end of the conference, when Danish Prime Minister, Lars Løkke Rasmussen, took over the presidency's responsibilities, ostensibly as it would have been more appropriate for him to chair negotiations between heads of state and government. This step was widely regarded as having been unwise as Ms Hedegaard was well known and respected in the process. Mr Rasmussen was perceived to lack understanding of the unique character of the climate negotiations. In the final hours of the conference Mr Rasmussen finally assembled a small number of heads of state and government, from the more than 100 who were present at the conference on his invitation, to work out the deal that came to be known as the Copenhagen Accord. When presented to the conference, the accord was rejected, most vocally by the Bolivarian Alliance for the Peoples of Our America (ALBA group), who had been excluded from the smaller group of heads of state and government.

A year later in Cancún, Mexico, it was also Bolivia, a member of the Bolivarian Alliance holding a strong eco-ethical position, that objected to the outcome of the conference, gavelled by COP president, Patricia Espinosa Cantellano, despite their formal objection. Although the Cancún COP delivered a relatively comprehensive, albeit incomplete, set of decisions known as the Cancún Agreements, it once again deferred the completion of the Montreal and Bali mandates. Given the background of Copenhagen, the Mexican COP presidency faced the challenge of finding a way to identify common ground and harvest consensus reached within the multitude of negotiating streams in which 193 parties are represented. The Mexican COP presidency chose to depart from traditional multilateral practice of line by line negotiation by playing an active role as conference chair in identifying compromises and trade-offs in particular texts under negotiation, and finally presenting a chair's text to plenary as a take it or leave it outcome. Save for Bolivia's objection, the parties to the UNFCCC adopted the outcome by acclamation.

While this departure from normal multilateral practice in Cancún was arguably necessary to save a fragile process and at the time acceptable to the international community which was desperate to see the survival and continued relevance of the UNFCCC, the South African COP presidency was well aware that it would not be in a position to replicate the Mexican approach in Durban. While some relaxation of the normal principles of multilateralism could be accepted for the sake of reviving a troubled system, climate negotiators were not ready to accept the Cancún approach as a legitimate precedent.

The diplomacy of ubuntu

The South African presidency in 2011 was therefore faced with the unenviable challenge of finding a way of building consensus on a vastly complex and

interlinked set of issues between parties with radically divergent positions without resorting to short-cut procedures such as the un-inclusive approach followed in Copenhagen, or the Cancún approach of presenting the parties with a take it or leave it chair's text. In addition, the Bali mandate for the work under the convention was already two years overdue and Durban represented the last ditch effort to save the Kyoto Protocol, since the first commitment period comes to an end in 2012 and failure to agree on a second commitment period in Durban would surely have led to a gap in developed country emissions reduction commitments after 2012. While some expressions of impatience with South Africa's passive, listening approach in the run-up to Durban were heard, this was a crucial phase where parties were given the space to articulate their concerns openly and frankly. It was a daunting task that awaited the South African COP/CMP presidency.

Firstly, the Minister of International Relations and Cooperation, appointed as the COP/CMP president, set about meeting this challenge by giving reassurances at each opportunity of its impartiality and commitment to an open, transparent and inclusive process. Consistent messaging in this regard was a necessary, if not sufficient, requirement to gain the trust of parties.

Secondly, numerous opportunities for informal consultations with parties were created. The focus of these consultations, which took place during the formal inter-sessional meetings of the UNFCCC, informal negotiator- and ministerial-level consultations held in South Africa with representative groups of parties and supplemented with strategic bilateral engagements on key cross-cutting political issues on which agreement up to that point had been elusive, were taking place. Although, in the main, established country positions were repeated during consultations, these meetings were extremely valuable in creating familiarity with and trust in the COP/CMP president and her team, as well as between parties. Small steps forward were necessary to proceed to the bigger and more sensitive issues.

With the start of the Durban Conference these informal consensus building processes had to become more focused and structured in order to ensure a concrete outcome. The COP/CMP presidency had to face the fact that the politically difficult cross-cutting political issues, such as the link between the future of the Kyoto Protocol and developing country mitigation actions, had no separate agenda item or dedicated negotiating stream. Further, any semblance of consultations in a small, limited group during the conference would have been met with widespread disapproval which would have been detrimental to the negotiations. The COP/CMP presidency therefore set up a consultation process, consisting of meetings published in the conference programme that was open to all parties. The COP presidency dubbed this process an '*Indaba*', drawing on the South African example of consultative

decision making. Parties were immediately supportive of this initiative and did not challenge its legitimacy. The Indaba created a forum where, for the first time, parties were willing to discuss cross-cutting issues that were previously dealt with in separate fora in a common setting.

The meetings of the *Indaba* process were open to all parties. As it is almost impossible to build consensus with 193 delegations in one room, the various negotiating groups were requested to nominate a proportional number of negotiators to represent the group. These representatives would operate on behalf of their groups, but the meeting would be open to every party. Sessions were also organised where non-governmental organisations could be present and participate. Meetings of the *Indaba* were structured around cross-cutting, politically difficult issues and parties were asked to respond to prompts from the South African COP/CMP presidency team that facilitated discussions. Based on responses from parties noted by the COP/CMP presidency, it eventually became clear where the area for compromise on the key political issues cutting across the negotiations were.

The *Indaba* process continued during the high-level segment and ministers responsible for climate change took over from negotiators. At this stage a non-paper prepared by the COP/CMP presidency team was floated, and further inputs were taken on board. Finally a draft decision text, drafted by the COP presidency and based on the inputs during the *Indaba* process, was circulated. After the first reading, the COP presidency took on board further concerns that parties raised and which could be included in a compromise outcome. In the meantime the COP Presidency held around the clock consultations, bilaterally and with groups, to secure their buy-in and provide further opportunity for input into the draft text. It became clear that once again this decision would only be adopted if it was part of a package of decisions negotiated in the other tracks of the negotiations. The balancing of the outcomes of all the tracks was then crucial.

The draft decision, known as the Durban Platform for Enhanced Action, was presented to the final plenary as part of a package of decisions, consisting of a decision on a second commitment period under the Kyoto Protocol, a set of decisions on long-term cooperative action under the convention, and a decision establishing the Green Climate Fund. The package was presented as a balanced outcome only after extensive last minute consultations with parties and groups. Although no formal objections were raised in the final plenary meeting, some countries made statements pointing out their difficulties with the outcome, but commenting on the success of the *Indaba* process, the inclusiveness and transparency of which ensured that, while they were not wholly satisfied with the outcome, they could accept it.

Conclusion

The Durban outcome was agreed after the conference ran nearly two days over time. This is but one sign of the unwieldy nature of multilateral decision making in the current global order. Most multilateral bodies grapple with the dilemmas faced by the climate change process, ie the necessity to be transparent and inclusive and the practical difficulties of reaching consensus among such a large number of states. Durban succeeded in overcoming this challenge at least partially because of good process management, including the active role of the South African COP/CMP presidency in conducting sustained consultations, giving reassurances of impartiality, transparency and inclusivity, ownership of the final outcome by negotiators, and allowing time for members of a smaller, representative group to consult with their respective negotiating groups to ensure buy-in by the larger body of parties.

Antarctica

The Antarctic Treaty and a number of related agreements, collectively referred to as the Antarctic Treaty System, regulate all international activities relating to the Antarctic. The Antarctic Treaty was opened for signature in 1959 and entered into force in 1961. South Africa was one of the original twelve states that ratified the treaty, which provides for a system of governance for the area south of 60 degrees latitude, and the freedom of scientific activity on the continent. It defines policy and sets out the permitted activities in the Antarctic region for those governments that are members.

The Antarctic Treaty System has annual Consultative Meetings, dealing with all aspects of the implementation of the treaties. The 34th Annual Consultative Meeting was held in Buenos Aires, Argentina, in June 2011. A law adviser formed part of the delegation, consisting of officials of the Departments of Environmental Affairs and of Science and Technology, and participated in the meetings of the Legal and Institutional Working Group and negotiations of a 'Declaration on Antarctic Cooperation' to mark the 50th anniversary of the entry into force of the Antarctic Treaty, and the 20th anniversary of the adoption of the Protocol on Environmental Protection to the Antarctic Treaty in Madrid in 1991.

Space law

The office participated in the 50th Session of the legal sub-Committee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS). The meeting considered, *inter alia,* general views of delegations, the status and applications of the five UN space treaties, the definition and delimitation of outer space and the geostationary orbit, national measures to implement Space Debris Mitigation Guidelines, the use of nuclear power sources in outer space, capacity building in space law, examination and review of UNIDROIT's Draft Protocol on Matters Specific to Space Assets to the Convention on International

Interests in Mobile Equipment (Cape Town Convention), and general exchange of information on national legislation relevant to the peaceful exploration and use of outer space. Part of the 50th Legal Subcommittee meeting was also a conference on 'Soft Law in Outer Space' hosted by the University of Vienna. The South African delegation used the opportunity to hold bilateral meetings with India and Brazil on cooperation in the space industry.

The office also participated in the 54th Session of the United Nations COPUOS held in Vienna, Austria, in June 2011. The 54th Session differed from the previous sessions in that there was a commemorative segment to celebrate the 50th anniversary of human space flight and the 50th anniversary of the first meeting of COPUOS. The Declaration on the Fiftieth Anniversary of Human Space Flight and the Fiftieth Anniversary of the Committee on the Peaceful Uses of Outer Space was only adopted after intense negotiations in the legal subcommittee meeting held in April, and only after the concerns of the G77 and China about the rights of developing nations to space, had been addressed. The COPUOS also discussed and debated the Reports of its Legal- and Scientific and Technical Committees, ways and means of maintaining outer space for peaceful purposes, implementation of the recommendations of UNISPACE III, space and society, space and water, space and climate change, use of space technology in the UN system, spin-off benefits of space technology, future of the COPUOS, and the Report to the General Assembly.

In addition the office was involved with the practical arrangements for the 62nd International Astronautical Congress (IAC) which was held in Cape Town in October, the first IAC held in Africa. The office drafted a host agreement for the United Nations regarding the United Nations/International Astronautical Federation (IAF) Twenty-First Workshop on 'Space for Human and Environmental Security' which was held immediately before the IAC in Cape Town.

Public diplomacy

The office made inputs for a speech by President Zuma at the University of Pretoria on South African foreign policy, as well as to a speech by the Deputy Minister to the University of Venda on South Africa's position with respect to Security Council resolutions relating to the conflict in Libya.

Concluding remarks

The office continued with its practice of sharing its experience and insights in international law through lectures, both in and outside of the department, and by participating in academic fora as speakers and facilitators. A number of articles on international law topics and book reviews were also published by law advisers, illustrating the commitment of the office to contribute to the wider understanding of international law.