HIGHLIGHTS FROM THE OFFICE OF THE CHIEF STATE LAW ADVISOR (INTERNATIONAL LAW)

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1 Introduction

International law scholars will remember December 2017 for two significant events, which, while having their roots in the World War II, will resonate on the continuum of the history of international law for many decades to come. First, the International Criminal Tribunal for the Former Yugoslavia (ICTY) closed its doors in December 2017.[1] Second, the International Criminal Court (ICC) Assembly of States Parties (ASP) resolved to activate the court's jurisdiction over the crime of aggression.[2]

The ICTY was the world's first international criminal tribunal since the Nuremberg and Tokyo tribunals after World War II.[3] Since its establishment in 1995, it has charged 161 persons with the crimes under its jurisdiction, 83 of whom were found guilty and sentenced. Statistics aside, it has made an enormous contribution to reignite and develop international criminal law and international humanitarian law, through its jurisprudence, procedure and practice. Amongst others, it created rules of procedure and evidence, developed definitions and elements of international crimes, and contributed to the definition of international and non-international armed conflicts. Furthermore, it leaves a historical record of the facts relating to the widespread and systematic crimes committed during the conflict in the former Yugoslavia. Its legacy will continue through its influence on other international and mixed criminal tribunals, and in domestic jurisdictions.

Equally significant was the adoption of a resolution for the activation of the crime of aggression by the sixteenth meeting of the ASP to the Rome Statute of the ICC (hereinafter 'Rome Statute) in the early morning hours of 15 December 2017. Already in June 2010 at the Review Conference of the Rome Statute in Kampala, Uganda, amendments to the Rome Statute containing a definition of and providing for the

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1 United Nations Security Council Resolution 2329 (2016) adopted on 19 December 2016 S/RES/2329 (2016).

2 Resolution ICC-ASP/16/L.10 of 14 December 2017.

3 United Nations Security Council Resolution 827 (1993) adopted on 25 May 1993 S/RES/827(1993).

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jurisdiction of the court over the crime of aggression were adopted.[4] The interpretation of the amendments contained in the resolution was adopted only after tortuously slow negotiations in a special facilitation and in plenary session, and provides for a very narrow scope of jurisdiction, based on ratification of the amendments. Nevertheless, it is a significant development that, for the first time since the Nuremberg and Tokyo trials, the crime of aggression has been defined in a treaty and an international criminal tribunal is able to exercise jurisdiction over the crime of aggression, which represents the most fundamental norm of modern international law.[5]

Accountability for human rights abuses and, even under limited conditions, for the waging of aggressive war, was difficult in the period before the end of the Cold War. It is hoped that this development will contribute to the prevention of conflict and the protection of civilians, gradually eroding the hard edges of state sovereignty that used to protect perpetrators. However, a number of counter-currents have become visible over the past year. It appears that the shutters are being pulled down on international cooperation. Not only is there an increasing breakdown of communication – the lifeblood of diplomacy – between major international actors, but there appears to be a return to great-power rivalry. For the first time since the end of the Cold War, there is serious concern about the risk of nuclear and conventional conflict. As the focus shifts from global governance as an instrument for ensuring international security and stability, to a new balance-of-power system, international lawyers in government service used to the comfort provided by cooperation regimes and open communication channels, will be facing new challenges.

Against this background, the South African Office of the Chief State Law Adviser (International Law) (hereinafter the 'Office') at the Department

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4 For an interpretation of these, see D Akande 'The international criminal court gets jurisdiction over the crime of aggression' *EJIL:Talk* 15 December 2017. For a discussion of the South African position and participation in the process to define the crime of aggression and the modalities for the exercise of jurisdiction, see A Stemmet 'South Africa' in K Kress & S Barringa (eds) *The Crime of Aggression: A Commentary* (2017) 1271. See also M du Plessis & C Gevers 'Making amend(ment)s: South Africa and the International Criminal Court from 2009 to 2010' (2009) 34 *South African Yearbook of International Law* 1–27; D Tladi 'Kampala, the International Criminal Court and the adoption of a definition for the crime of aggression: A dream deferred' (2010) 35 *South African Yearbook of International Law* 180–96.

5 This view was expressed by a number of members of the International Law Commission in their explanation of vote after the adoption of draft article 7 on the immunity of state officials from foreign criminal jurisdiction. See eg Tladi (A/CN.4/SR3378) 13; Hmoud (A/CN.4/SR3378) 14; Jalloh (A/CN.4/SR.3378) 14; Murase (A/CN.4/SR3378) 15; Hassouna (A/CN.4/SR3378) 15; Ouazzani Chahdi (A/CN.4/SR.3378) 15; Park (A/CN.4/SR.3378) 15; and Nguyen (A/CN.4/SR.3378).

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of International Relations and Cooperation (DIRCO), strives to provide frank, accurate and policy-sensitive legal advice and to participate in international organisations, institutions and processes in line with South Africa's national interests, values and foreign policy objectives. As in the past, the contribution is structured to reflect the main foreign-policy objectives of the South African government. It traces the particular issues in which the Office was involved, whether through the provision of advice or participation in the international arena.

2 Consolidation of the African Agenda

2.1 Protocol on Free Movement of Persons

In 2017, the African Union began negotiations on the Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment. The Protocol is aimed at facilitating the free movement of persons in Africa, as well as the right of African citizens to the right of establishment and right of residence anywhere on the continent. It also introduces the African Passport. The right of entry provides for a right of African citizens to travel without visas across the continent (Art 6). The right of establishment includes the right of any African citizen to set up a business or be employed in any African country (Art 17) and the right of residence includes the right to become a resident in any African country (Art 16).

Negotiations on the Protocol was mandated by the African Union Assembly in July 2016 in Kigali, Rwanda.[6] This mandate, 'to put in place an implementation roadmap for the development of a Protocol on Free Movement of Persons in Africa by January 2018, which should come into effect immediately in member states upon its adoption' is interpreted by the Office of the Legal Counsel of the African Union to mean that the Protocol should enter into force upon adoption by the Assembly. Since, under South African law, an international agreement of this nature would require ratification,[7] South Africa has taken the position that the Assembly decision must be interpreted to mean merely that the African Union Commission is mandated to put in place a roadmap for the development of the Protocol and not that the Protocol itself would be adopted and take immediate effect. Other member states agreed that since the Protocol contains onerous obligations that would in many cases require legislation at the national level, as well as budgetary resources for its

6 Assembly of the African Union Decision Assembly/AU/Dec.607(XXVII) 'Decision on the Free Movement of Persons and the African Passport' adopted on 18 July 2016.

7 Section 231(2) of the Constitution of the Republic of South Africa, 1996.

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implementation, entry into force upon by adoption would be impractical for most member states.

The option of the Protocol entering into force upon adoption was rejected by the Specialised Technical Committee on Justice and Legal Affairs[8] at their meeting held from 14 to 15 November 2017 on the basis that the principles of international law should be complied with and that ratification is required by the constitutional procedures of most countries. Although finally the Protocol is subject to ratification by member states, article 33 of the Protocol now provides the option for member states to make a declaration that they will provisionally apply the provisions of the Protocol pending its entry into force.[9] Had the Protocol not provided for the option of ratification or accession as a condition of entry into force, the majority of member states, including South Africa, would have had to enter reservations.

During the negotiations South Africa highlighted the importance that certain preconditions need to be met before the Protocol can be implemented. These include: (1) the existence of peace, security and stability in the continent; (2) convergence among countries with a view to reduce economic imbalances between member states; (3) adopting a phased approach to free movement; (4) effective civil registration systems; (5) reliable movement control systems; (6) machine readable passports compliant with international standards; (7) bilateral return agreements; (8) African Union legal instruments on Extradition and Mutual Legal Assistance; and (9) an African Union framework on the African Passport and its relationship with free movement of persons.

The Protocol was adopted in January 2018 and will be open for signature from March 2018.

8 In terms of art 5(g) of the 2000 Constitutive Act of the African Union, the Specialised Technical Committees (STCs) cover a range of thematic areas, including justice and legal affairs. The STCs were established as organs of the AU with the purpose of working in collaboration with the various departments of the AU Commission and the Regional Economic Communities towards the harmonisation of AU projects. The STCs provide a medium for consideration of items at expert and official level before ultimate decisions are taken by the decision-making organs of the AU, including the Executive Council and the Summit.

9 Article 33(2).

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2.2 African Union Maritime Policy

The rapid creation of African Union instruments applicable in the maritime domain is unfortunately not accompanied by equally rapid implementation or the establishment of the capacity to implement in the near future. In 2017, this background saw South Africa grappling with the interfaces and relative status of the African Charter on Maritime Security and Safety and Development in Africa (hereinafter the 'Lomé Charter') and the Revised African Maritime Transport Charter (hereinafter the 'RAMTC'). Whereas the RAMTC could be generally regarded to focus on the development of African maritime transport, and incidentally on safety, security and environmental issues, the Lomé Charter could be seen to do the opposite, namely to focus on maritime safety and security, with developmental and environmental issues incidental thereto also receiving attention.

The Lomé Charter dates from 2016, and it was not signed by South Africa for reasons related to its shortcomings on key definitions and the prescriptive nature of the instrument that is not suitable for states such as South Africa with developed and operational maritime structures and instruments at domestic level. The AU already adopted the 2050 African Integrated Maritime Strategy (2050 AIMS), while the African Maritime Transport Charter adopted in 1993 is intended to be replaced by the AMTC of 2010. The South African Cabinet also recently approved the national 'Comprehensive Maritime Transport Policy' (CMTP),[10] and South Africa was required, as part of AU processes, to comment and provide inputs on draft Annexes to the Lomé Charter. The lack of integration and compatibility between the various instruments makes it difficult to assess compliance and alignment.

The Office assisted a multi-departmental committee to make sense of the differences in scope between the Lomé Charter and the RAMTC from an international law perspective. Such legal advice is intended to assist South African representatives to AU meetings to navigate the complexities of these instruments, and to form a clear picture of salient requirements. It also assists South Africa to determine priorities and assess compliance. South Africa still needs to establish a firm and consolidated position toward all these various instruments, and international pressure to accede to further instruments is to be expected. For the Lomé Charter, legal difficulties loom large in that it seeks to prescribe to states on matters of domestic exclusivity, and with its Annexes, it is moving to a

[10] The Presidency of the Republic of South Africa 'Statement on the Cabinet Meeting of 10 May 2017' http://www.thepresidency.gov.za/cabinet-statements/statement-cabinet-meeting-10-may-2017 (accessed 9 March 2018).

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level of prescriptive detail that is not suited to a relatively well developed and regulated maritime sector such as is found in South Africa.

3 Global System of Governance

3.1 The Sixth Committee

The General Assembly is the main deliberative, policy-making and representative organ of the United Nations.[11] It is therefore the chief multilateral forum to discuss issues of concern to the international community. In terms of article 13 of the Charter of the United Nations, the General Assembly is also mandated to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. These tasks are undertaken principally by the General Assembly's Sixth Committee, which is the main forum for the consideration of legal questions in the General Assembly.[12] The 72nd Session of the Sixth Committee convened at the headquarters of the United Nations in New York from 2 October 2017 to 13 December 2017.

3.1.1 The Report of the International Law Commission

One of the highlights of the Sixth Committee session is the annual consideration of the report of the International Law Commission (ILC).[13] The consideration of the ILC coincides with what is commonly referred to as the 'International Law Week' – during which the heads of the offices of legal affairs of foreign ministries, judges of international courts and tribunals and other international law experts engage in exchanges on various issues of international law. It is also during this week that the Presidents of the International Court of Justice and the International Criminal Court deliver their respective annual reports to the General Assembly.

The debates of the Sixth Committee on the report of the ILC provide guidance to the ILC on how to approach its work and on the interpretation of the topics. It is also an opportunity for states to expound on their domestic

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11 E Missoni & D Alesani *Management of International Institutions and NGOs – Frameworks, Practices and Challenges* (2014) 18–19.

12 For a more detailed description see AN Pronto 'The work of the Sixth Committee of the United Nations General in 2016 and 2017' (2017) 42 *South African Yearbook of International Law* (this issue).

13 This section only provides an account of South Africa's view of the work of the International Law Commission. For an account of the work of the ILC itself, see in this volume D Tladi 'Immunities, crimes against humanity and other topics in the sixty-ninth session of the International Law Commission' (2017) 42 *South African Yearbook of International Law* (this issue).

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legal practice. The South African delegation delivered statements on the topics of crimes against humanity; immunity of state officials from foreign criminal jurisdiction; protection of the atmosphere; peremptory norms of general international law *(jus cogens*); and succession of states in respect of state responsibility.

On the topic of crimes against humanity, South Africa reiterated the importance of the focus on prevention, complementarity and cooperation. In particular, the endeavours to assist states in adopting national legislation to criminalise, investigate, prosecute and punish crimes against humanity and to cooperate with other states in investigations and extraditions were emphasised. South Africa took the view that any definition of crimes against humanity should be consistent with the definition in article 7 of the 1998 Rome Statute of the International Criminal Court and that the obligation to prevent and punish crimes against humanity should apply in both peace time and during international and non-international armed conflicts. The ILC's draft articles require states to criminalise crimes against humanity under national laws. South Africa has indeed done so through its Implementation of the Rome Statute of the International Criminal Court Act,[14] which criminalised crimes against humanity, as well as war crimes and the crime of genocide.

With regard to the topic of immunity of state officials from foreign criminal jurisdiction, the ILC adopted a draft article providing for exceptions to immunity *ratione materiae* in respect of crimes of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearances from the ambit of immunity. South Africa took the view that the provision could be a good starting point in balancing the need to protect the well-established norm of immunity of representatives of states from the jurisdiction of foreign states, while preventing impunity for serious crimes.

With respect to the topic of the protection of the atmosphere, South Africa reiterated the importance of adhering to all established rules and principles that have been developed through treaty-making in this field. This includes the precautionary principle, the polluter-pays principle, the principle of common but differentiated responsibility and respective capabilities, as well as the need to consider relevant principles from the body of international law on state responsibility. In particular, South Africa expressed concern about the exclusion of the common but differentiated responsibility principle, which is a cornerstone of international law relating to the protection of the atmosphere.

14 27 of 2002.

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On the topic of *jus cogens*, the Special Rapporteur's second report covered inter alia investigating the rules on the identification of the norms of *jus cogens,* including sources and the relationship between *jus cogens* and non-derogation clauses in international law. Taking as his point of departure article 53 of the 1969 Vienna Convention on the Law of Treaties, the Special Rapporteur aims to ensure that the ILC's work remains in the realm of treaty law and widely accepted customary international law. The ILC made substantial progress in putting forward a framework for the acceptance and recognition of peremptory norms. The ILC's recognition of the general nature of peremptory norms, contained within the current Draft Conclusion 3, accurately captures the foundational ideas inherent in the doctrine of peremptory norms, namely that they reflect and protect fundamental values, that they are hierarchically superior, and that they are universally applicable.

Turning to the topic of succession of states, in respect of state responsibility, although this issue is unlikely to have much practical relevance for South Africa, save in so far as South Africa may play a supporting or mediating role in situations where other states are affected by succession, greater legal certainty around this issue could benefit those states that may face situations of state succession in future. South Africa therefore argued for a practice-based approach being adopted by the ILC that addresses the relevance of different forms of state succession, as well as the question of the legality of succession. Since South Africa emphasises the importance of constructive negotiations aimed at resolving disputes peacefully, the view was expressed that it is important that the principles of sovereignty and state consent be respected and that insofar as the legal norms in this area are developed, they should be subject to any agreement that the states concerned may enter into.

3.1.2 United Nations Commission on International Trade Law

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly and reports to the General Assembly through the Sixth Committee. The Office was involved in two Working Groups of UNCITRAL during the course of 2017, namely Working Group II on Dispute Resolution and Working Group III on the reform of Investor-State Dispute Settlement (hereinafter 'ISDS')

In Working Group II, work on an instrument for the enforcement of international mediated settlement agreements is nearing completion. The Working Group is working on the text of an international treaty for the recognition of international mediated settlement agreements, and is simultaneously working on updating UNCITRAL's Model Law on

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International Commercial Arbitration by including text on the enforcement of international mediated settlement agreements. This process is also mirrored in the work of the South African Law Reform Commission, which has started work on mediation legislation for South Africa. The Office has been included in a group of experts to advise the Commission, specifically because of the Office's involvement with the work of UNCITRAL on this topic.

Working Group III of UNCITRAL started work on a new topic in the second half of 2017. The Working Group has been mandated to work on the reform of Investor-State Dispute Settlement (ISDS), as a mechanism whereby disputes between foreign investors and states are settled. The first meeting on this topic took place in November 2017 and, as the work of the Working Group is still in the initial stages, states discussed their concerns about ISDS as a precursor to discussing areas where reform of the system would be desirable for states. The work of Working Group III is of particular importance for South Africa. A new policy on investment agreements was adopted in 2013, which led to a number of South African international investment agreements being terminated. However, many of the terminated agreements contain so-called 'survival clauses', which makes it possible for already covered investors to bring ISDS claims for another 10 to 20 years, depending on the specific clause. South Africa therefore still faces the possibility of an ISDS claim for a number of years, and has a direct interest in ensuring that the ISDS system accurately reflects the intention of states involved in the process.

3.2 International Institute for the Unification of Private Law (UNIDROIT)

South Africa has been a member of the International Institute for the Unification of Private Law (UNIDROIT) for over 40 years. UNIDROIT is an independent intergovernmental organisation with its seat in Rome with the statutory purpose to study needs and methods for modernising, harmonising and coordinating private and commercial law as between states and groups of states and to formulate uniform law instruments, principles and rules. Through UNIDROIT facilitation, the Convention on International Interests in Mobile Equipment (Cape Town Convention) was signed in Cape Town on 16 November 2001, and a Protocol to the Convention on International Interests in Mobile Equipment on matters specific to Aircraft Equipment (Aircraft Protocol) have proven successful in reducing the cost of financing aircraft acquisition, thereby making it cheaper and easier for air operators to acquire aircraft, and also stimulating economic activity and investment in this sector. Protocols on matters specific to Space Assets (Space Protocol) as well as matters

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specific to Railway Rolling Stock (Luxembourg Protocol) have been concluded, but have not yet entered into force.

UNIDROIT is in the process of preparing a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (the 'MAC Protocol'). UNIDROIT hosted two sessions of a Committee of Governmental Experts for the preparation of the MAC Protocol in Rome, Italy in March and October 2017, and the Office participated in these sessions. The MAC Protocol is expected to create further opportunities for financiers (in particular for banks and other financial institutions) to expand their business, and it appears to also create an opportunity for smaller financiers (including new entrants) to gain market access and further contribute to economic growth. It is also anticipated that the MAC Protocol could significantly benefit South African exporters, manufacturers and other businesses who may lease or sell mining construction and agricultural equipment into foreign countries. States anticipate that the future MAC Protocol will stimulate investment in the mining, agricultural and construction industries by reducing the risk of financing mobile and high value mining, agricultural and construction equipment; reducing the cost of financing such equipment; making it easier for operators of such equipment to acquire the necessary equipment; reducing risk for investors into such industries; and generally stimulating economic growth in these sectors with very little actual government expenditure required.

State participation was broad and substantial, and almost universal support amongst participating states (that included members and non-members of UNIDROIT) was expressed. Acknowledging that the MAC Protocol could hold significant economic benefits for developing states like South Africa, especially for its related industries, the focus of the South African participation was to ensure that appropriate options are retained in the MAC Protocol that would allow South Africa to ratify and implement it with due consideration of ensuring that South Africa's constitutional right to access to courts remains unaffected. The reason for this focus on retaining flexible options is that the South African Constitution guarantees access to courts in section 34, whereas some of the options to be chosen by states when ratifying the MAC Protocol would allow for a measure of 'self-help' by creditors thus allowing them to circumvent courts when dealing with secured assets. South Africa may have to sacrifice some of the potential utility of the MAC Protocol in order to respect the right of access to courts. It is anticipated that the Governing Council may recommend the MAC Protocol for consideration by states at a diplomatic conference in 2018 or 2019 as it has reached an acceptable level of maturity.

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3.3 Law of the Sea

3.3.1 Marine Biodiversity in Areas beyond National Jurisdiction

In 2015, the General Assembly decided to embark on a process that could lead to the development of an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) regarding the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ).[15] The Preparatory Committee established for this purpose reported to the General Assembly in 2017 and made substantive recommendations on the elements of a draft text of this new legally binding instrument.[16] Although the General Assembly postponed action on the draft text entitled 'International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction', pending a review of its programme budget implications, many delegations, including some of the draft's 133 co-sponsors, voiced support for its provisions, calling for the official launch of negotiations on the legal instrument. The General Assembly finally decided to convene an intergovernmental conference under the auspices of the United Nations, which will commence in 2018 to consider the recommendations of the Preparatory Committee on the elements, and to elaborate the text of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.[17]

The topics to be addressed at the conference would include marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, marine protected areas, environmental impact assessments, capacity-building, and the transfer of marine technology. South Africa has been at the forefront of

15 United Nations General Assembly Resolution 'Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' adopted on 19 June 2015 A/RES/69/292.

16 'Report of the Preparatory Committee established by General Assembly Resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' http://www.un.org/ga/search/view_doc.asp?symbol=A/AC.287/2017/PC.4/2 (accessed 9 March 2018).

17 United Nations General Assembly Resolution 'International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' A/RES/72/249, adopted on 24 December 2017 http://www.un.org/en/ga/72/resolutions.shtml (accessed 22 February 2018).

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this initiative, which has the potential to change the face of international law in drastic ways. Some of the challenges that will face the delegation as they pursue a new treaty will include the tension between the common heritage of mankind and freedom of the high seas.

3.4 International Criminal Court

The year 2017 was by no means quiet on the International Criminal Court (ICC) front for South Africa, both on the domestic and international level.

From a domestic law perspective, the withdrawal by South Africa from the Rome Statute of the ICC was challenged in the North Gauteng High Court.[18] The court delved into somewhat unchartered territory as it investigated the question of the procedure to be followed when withdrawing from a treaty as section 231 of the Constitution of the Republic of South Africa, 1996 only deals with the conclusion of international agreements. The decision of the court was in line with the views that scholars and practitioners have previously posited, namely that the same process followed in concluding a treaty should again be followed when withdrawing from it.[19] Therefore, if parliamentary approval is needed for the treaty to bind the Republic, such approval is similarly needed when withdrawing from a treaty.[20] Such a view is, in our view, in line with the doctrine of separation of powers.[21]

As a result of the decision in the North Gauteng High Court, the government decided to revoke the withdrawal (both internationally and domestically) and to start the process afresh. However, the cabinet decision to withdraw from the Rome Statute was never revoked. Thus, in keeping with the earlier cabinet decision, the Minister of Justice and Correctional Services addressed the Assembly of States Parties in December 2017, at its sixteenth session, and announced that South Africa still intended to withdraw.[22] Shortly thereafter, the Implementation

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18 *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP).

19 Ibid paras 43–53; E de Wet 'South Africa' in D Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (2011) 573.

20 *Democratic Alliance v Minister of International Relations and Cooperation and Others* para 57.

21 Ibid.

22 'Opening Statement by Adv Tshililo Michael Masutha, MP, Minister of Justice and Correctional Services, Republic of South Africa, General Debate, Sixteenth Session of the Assembly of States Parties of the International Criminal Court, New York, 4–14 December 2017' https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-ZA.pdf (accessed 22 February 2018).

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of the Rome Statute of the International Criminal Court Act Repeal Bill,[23] which seeks to repeal the Implementation of the Rome Statute of the International Criminal Court Act[24] and to cover any gap left by the repeal of that Act, was tabled in Parliament. Despite the government never publicly altering its decision to withdraw, representatives of some states seemed surprised by the Minister's statement and many states at the Assembly expressed regret at the decision and a willingness to engage with South Africa to address its concerns.

Although South Africa has indicated that it will withdraw from the Rome Statute, it has restated its commitment to combating impunity and working towards strengthening the ICC. In this regard, already at the 14th session of the Assembly, South Africa proposed the development of procedures to guide the implementation of consultations between states parties and the ICC undertaken in terms of article 97 of the Rome Statute, and, in 2017, continued to participate actively in the development of such guidelines. The engagements on article 97 yielded the 'Understanding with respect to Article 97(c) Consultations', which was adopted at the 17th Session of the ASP.[25] South Africa is also pursuing alternative mechanisms to ensure accountability for the most serious crimes. It holds the view that although the African Union's Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) contains provisions that make it difficult to ratify the Protocol, these issues can be addressed to allow for broader ratification, and thereby pave the way for the criminal component of the African Court to be operationalised. Furthermore, South Africa is actively involved in developing the principle of complementarity to the ICC through the Mutual Legal Assistance initiative, which allows for cooperation between states for the domestic prosecution of perpetrators of the most serious crimes.[26]

Perhaps the most notable ICC-related event that occurred in 2017 for South Africa concerned its appearance before the Pre-Trial Chamber II (PTC) in April 2017 to present its submissions as to why it did not arrest Sudanese President, Mr Omar Al-Bashir, in 2015. South Africa presented compelling arguments, setting out chiefly that United Nations Security

23 23 of 2016 https://www.parliament.gov.za/storage/app/media/Docs/bill/616356_1.pdf (accessed 27 June 2018).

24 Act 27 of 2002.

25 'Report of the Chair of the working group of the Bureau on the implementation of art 97 of the Rome Statute of the International Criminal Court' (ICC-ASP/16/29) 22 November 2017 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-29-ENG.pdf (accessed 23 February 2018).

26 The Mutual Legal Assistance initiative is discussed in greater detail below.

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Council Resolution 1593 (2005) could not, and did not waive President Al-Bashir's immunity and, consequently, South Africa had a customary international law obligation to refrain from arresting him.[27] South Africa's arguments were based on the rules of interpretation which, in its view, were applicable to the interpretation of UN Security Council resolutions. Nevertheless, the PTC concluded that South Africa did have an obligation to arrest President Al-Bashir,[28] albeit on grounds different from those it had advanced in previous cases such as the non-cooperation case of the DRC.[29] While in the *DRC* case, the court had decided that resolution 1593 had implicitly waived Al-Bashir's immunity, in the *South Africa* case, the court held that resolution 1593 (2005) triggered the application of the entire Rome Statute vis-à-vis the situation in Darfur and thus article 27 was applicable, rendering head of state immunity irrelevant.[30] The PTC found that the failure to arrest President Al-Bashir constituted a failure by South Africa to comply with its Rome Statute obligations.[31] Nevertheless, the ICC decided not to refer South Africa to the Assembly of States Parties or the United Nations Security Council.[32] Its reasoning was based on the fact that South Africa had engaged extensively with the court in a *bona fide* manner and, in the circumstances, such behaviour did not warrant a referral.[33] While South Africa respects the decision of the PTC, it would be remiss not to point out the repeated inconsistencies in the PTC's ruling. The PTC once again altered its reasoning, this time deviating from its decision in 2014 of the *Democratic Republic of Congo* matter.[34] Moreover, in this case the decision of the majority and minority stand in direct contrast with one another, each regarding the other's reasoning as unconvincing.[35] The PTC thus failed to bring clarity to the complex

27 'Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute (ICC-02/05-01/09-290) 17March2017https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-290 (accessed 22 February 2018).

28 'Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court of the arrest and surrender of Omar Al-Bashir' *The Prosecutor v Omar Hassan Ahmad Al-Bashir* Pre-Trial Chamber II (ICC-02/05-01/09-302) 6 July 2017 https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-302 (accessed 22 February 2018).

29 'Decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court' *The Prosecutor v Omar Hassan Ahmad Al-Bashir* Pre-Trial Chamber II (ICC-02/05-01/09-195) 9 April 2014.

30 (n 28 above).

31 Id para 123.

32 Id para 140.

33 Id paras 128, 129.

34 *DRC* case (n 29 above)

35 *South Africa* case (n 28 above). See for comparison, the minority opinion of Judge Marc Perrin De Brichambaut.

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situation faced by South Africa in relation to its competing obligations to arrest Mr Al-Bashir and its obligations to respect head of state immunity.

South Africa maintains that the concerns surrounding the ICC are valid and shared by many states. The ICC cannot be the only mechanism through which accountability can be achieved, which is why South Africa is committed to exploring all mechanisms to secure accountability and ultimately put an end to impunity. It is worth pointing that Jordan was also found guilty of non-cooperation but has since appealed the decision. Thus, it is anticipated that, for the first time, the Appeals Chamber will address the matter.

3.5 Mutual Legal Assistance Treaty

The initiative for a Multilateral Treaty for Mutual Legal Assistance and Extradition for the Domestic Prosecution of the Most Serious International Crimes has been ongoing for a number of years. This initiative has been led by Belgium, the Netherlands and Slovenia.

In 2013, at the 12th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, a group of 39 states, including South Africa, presented a joint statement expressing their support for an initiative on Mutual Legal Assistance (MLA initiative).[36]

Whilst South Africa is in the process of withdrawing from the ICC, it has consistently reiterated its commitment to ensuring accountability and addressing impunity. It therefore supports the MLA initiative and participated in the Preparatory Conference for the Negotiations on a New Multilateral Treaty on Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes, held in Doorn, The Netherlands from 16 to 19 October 2017. The Preparatory Conference was attended by 103 participants from 41 states, as well as representatives of civil society and academia.

The MLA initiative envisages the establishment of a treaty that will enhance complementarity and is not seen as an alternative to the Rome Statute. While the MLA initiative deals with the same crimes as are contained in the Rome Statute, it is not linked to the ICC and seeks to ensure investigation and prosecution of offences on the domestic level before situations would reach the ICC. It allows for the strengthening of domestic procedures, thus ensuring that states still serve as the first line of defence in relation to the investigation and prosecution of the most serious crimes.

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[36] Joint statement at the Assembly of States Parties to the Rome Statute Twelfth Session, held from 20 to 28 November 2013 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Netherlands-Joint-ENG.pdf (accessed 19 December 2017).

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While the Rome Statute created a vertical cooperation relationship between states parties and the ICC, the MLA initiative serves as a practical tool to enhance states' capacity for investigation and prosecution, on the domestic level, of crimes of genocide, crimes against humanity and war crimes, as well as for all states to transmit or receive a request for mutual legal assistance or extradition on these matters.

In order to successfully prosecute these crimes in domestic courts, a modern inter-state procedural framework for mutual legal assistance and extradition is required, which is currently lacking. In this regard, a multilateral system would be more efficient than bilateral treaties. This MLA initiative is viewed positively by South Africa as it will ensure that the gap which currently exists in relation to cooperation between states for the most serious crimes will be closed. The Preparatory Conference was intended to get a broad idea of what participants would like to see in the envisaged treaty and focused on three aspects: the crimes that would be included; the provisions regarding mutual legal assistance and extradition to be included; and the forum in which the envisaged treaty would be negotiated.

As regards the crimes to be included in the treaty and their definitions, the vast majority of participants favoured including the three core crimes in the treaty, namely war crimes, crimes against humanity and genocide. There seemed to be agreement that the treaty would apply to, at the very least, the crimes as defined in the Rome Statute in 1998 and that the definitions should not be renegotiated. If states wished to allow for broader definitions, the treaty should provide for such a possibility on the basis of reciprocity.

As regards the elements of the treaty, there was support for relying on similar provisions that have already been included in widely accepted treaties dealing with mutual legal assistance and extradition for other international and transnational crimes, like the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. Nevertheless, the provisions would need to be tailored to adequately provide for mutual legal assistance and extradition in relation to the crimes that will be contained in the new treaty.

In relation to the forum, it was widely supported that negotiations take place on a stand-alone basis, while simultaneously exploring ways in which to involve the United Nations to allow for a broader reach. In this regard, the successful negotiation of the treaties to outlaw cluster munitions and anti-personnel mines among like-minded states was mentioned in this regard, as it was considered that consensus could be easier reached in such a forum than in the broader United Nations context.

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The core group of states, consisting of The Netherlands, Argentina, Belgium, Senegal, Slovenia and Mongolia, have since met and plan to have a draft text available for circulation, to allow states to provide inputs and to commence ultimately negotiations on the draft text in 2018. It is anticipated that the treaty could be concluded by 2019. As a final point, it is worth noting that there is some overlap between the discussions and the ILC topic on crimes against humanity.[37]

3.6 International Military Cooperation

For effective international military cooperation to take place, it is essential that the armed forces of friendly states are able to liaise, visit each other, exchange personnel, train together and generally engage in a host of other activities that require the presence of foreign (if friendly) military personnel in the territory of a host state. Such interaction usually requires an international agreement that regulates the interaction, and very importantly provides for the legal status of the visiting military forces while in the territory of the host state.

South Africa and Botswana are both strong partners in the Southern African Development Community (SADC) security architecture, and the African Union regional peacekeeping standby architecture. For years, these two states have been attempting to finalise an agreement that provides for the legal status of visiting forces. Negotiations are frequently difficult as, despite both states having well developed legal systems that uphold the rule of law and human rights, the retention of the death penalty in Botswana limits South Africa's flexibility in negotiating terms for status of forces. In 2017 discussions continued wherein the Office provided direct negotiation and international law support to the South African delegation from the Department of Defence and, while 2017 may have produced the most fruitful discussions to date, the conclusion of an agreement is, however, yet to be achieved.

3.7 Environment, Science and Technology

3.7.1 Square Kilometre Array

During 2017, the Office represented South Africa at the negotiations on the Convention of the Square Kilometre Array Organisation (SKAO), which will establish the SKAO as an international treaty organisation. The so-called Tier 1 documents under negotiation include three documents that will together make up the SKAO Convention, namely the Convention

37 For a comparison of the two processes see D Tladi 'A horizontal treaty on cooperation in international criminal matters: The next step for the evolution of a comprehensive international criminal justice system?' (2014) 29 *Southern African Public Law* 368.

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itself and two protocols that are integral parts of the SKAO Convention – a Protocol on Immunities and Privileges and a Financial Protocol. While on the whole, negotiating parties were largely in agreement on the content of the Tier 1 documents, some issues, including member states' access to intellectual property used or generated by the SKAO and some decision-making mechanisms in relation to financial decision-making were more challenging to finalise.

The negotiating process is nearing completion and the Office also assisted in the drafting of a Final Record of the negotiations, which will serve as a non-binding recordal of the process of negotiations. It will include terms of reference for a Square Kilometre Array Observatory Council Preparatory Task Force made up of representatives of member states that have signed the SKAO Convention and member states that have shown a *bona fide* intent to sign the SKAO Convention. The purpose of the Preparatory Task Force will be to prepare, on a non-legally binding basis, for the establishment of the SKAO as an international organisation and the establishment of the SKAO Council as the highest decision-making body of the SKAO. The Preparatory Task Force will also prepare the texts of key policies to be adopted by the international organisation, once it is established, as well as the texts of the host country agreements with the United Kingdom (being the host of the headquarters of the SKAO), South Africa and Australia. Interestingly, while host country agreements are generally treaties governed by international law, the current intention is that the host country agreements for South Africa and Australia will be contracts governed by the domestic law of each state.

The Final Record will also record negotiating parties' understandings of the obligations contained in the Convention of the SKAO and allow negotiating parties an opportunity to record country statements. It is well understood among negotiating parties that the Final Record will not be a treaty registrable in terms of article 102 of the Charter of the United Nations, but it is hoped that the Final Record will provide clarity to SKAO decision-makers on some aspects of the SKAO Convention that might give rise to divergent interpretations.

Once established as an international organisation, the SKAO can commence with the process to construct the SKA in the host countries of South Africa and Australia.

3.7.2 Climate Change

During 2017, the Office participated in the negotiations under the United Nations Framework Convention on Climate Change on the modalities,

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procedures and guidelines to be applied in the implementation of the Paris Agreement.

Article 15 of Paris Agreement established a mechanism to facilitate implementation and promote compliance. The mechanism will consist of a committee that will be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive, and will take into account parties' national capabilities and circumstances.[38] The decision adopting the Paris Agreement further determined that experts in relevant scientific, technical, socio-economic or legal fields would serve on the committee.[39] Within these set parameters, parties are tasked with developing the modalities and procedures for the effective operation of the committee.[40]

While developing countries argue that the committee should address all provisions of the Paris Agreement, including the commitments of developed country parties to support developing countries through the provision of means of implementation, developed countries see the committee's mandate as limited to 'precise and prescriptive' provisions, which are generally mitigation-centric and consisting mostly of communication and reporting obligations.

Regarding the modalities and procedures of the committee, many developing countries insisted that the work of the committee should only be initiated by parties themselves in respect of their own challenges related to compliance. The objective of any intervention by the committee should then be to assist such parties to achieve full compliance, including through facilitation of access to the institutional mechanisms of the Convention and the Paris Agreement, for example the financial, technology and capacity-building mechanisms. Some developed and developing countries however argue that limiting referral procedures to self-initiation will render the committee ineffective. Instead, consideration should be given at least to some form of process, system or automatic trigger, for example in situations where communications or reports are overdue.

Most of the questions under consideration in the design of the committee are interrelated. For example, most developing country parties would support an automatic trigger if the scope of the committee's work would also include the commitment of developed countries to communicate their indicative support *ex ante*. Since developing countries

38 Article 15(2).

39 Conference of the Parties to the United Nations Framework Convention on Climate Change Decision 1/CP.21 'Adoption of the Paris Agreement' adopted on 12 December 2015 http://unfccc.int/documentation/decisions/items/3597.php (accessed 22 February 2018) para 102.

40 Ibid para 103.

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often experience challenges with submitting reports timeously to the UNFCCC on account of capacity constraints or lack of data, a focus on reporting obligations would result in a situation where mostly developing countries will face scrutiny by the committee. Such an option may only be acceptable to developing countries if the measures recommended by the committee are purely facilitative, as well as effective in assisting parties to access support.

On the issue of linkages between the committee and other processes and institutions under the UNFCCC, some parties are not in favour of creating a link between the transparency framework and the work of the committee. Linkages with funding institutions is also a controversial issue, since many parties argue that such bodies have their own legal mandates and could not legitimately be directed by the committee to assist countries in particular cases. Many parties are also interested in mandating the committee to look at general or systemic issues of compliance, but there are concerns about the capacity and workload of the committee if such a mandate is not carefully circumscribed.

4 South African Bills: The Foreign Service Bill

The Office continued work on the Foreign Service Bill[41] during 2017. The Bill is currently in Parliament and is going through a process of public consultation. The Portfolio Committee on International Relations and Cooperation (hereinafter 'Portfolio Committee') is receiving inputs on the Bill from a number of government departments. In September 2017, the Portfolio Committee embarked on a study tour to Canada as a benchmarking exercise to compare South Africa's practices in relation to the management and administration of the Foreign Service with the practices of the Canadian foreign service. The Office was invited to accompany the Portfolio Committee on the study tour.

The Bill, once enacted, will regulate the management and administration of the Foreign Service with the aim to streamline existing processes and to contribute to the professionalisation of the foreign service. Indications are that the Foreign Service Bill will be finalised during the course of 2018.

5 Conclusion

In addition to the abovementioned activities, the Office also presented several lectures on international law issues to officials of the Department of International Relations and Cooperation, including lectures forming part of the Department's diplomatic training programme.

41 35 of 2015.

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The dynamic nature of the international system and, in particular, the intricate and ever-expanding body of international law continue to demand a great deal of dedication, scholarly curiosity and creativity from the Office's legal advisers. Regularly working as a team on complex issues, the Office has been able to provide invaluable support to the Department and other clients in government consisting of sound and pragmatic legal advice, often within very short timeframes. In this challenging task, the treaty and information section of the Office has been a vital resource.

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