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

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Introduction

Writing in 1940 Hans J Morgenthau, whose realist theory saw international politics as a struggle for power, displayed his sceptical view of international law

> All the schemes and devices by which great humanitarians and shrewd politicians endeavoured to reorganize the relations between states on the basis of law, have not stood the trial of history: Instead of asking whether the devices were adequate to the problems which they were supposed to solve, it was the general attitude of the internationalists to take the appropriateness of the devices for granted and to blame the facts for the failure.[1]

At a time when the full horrors of the Second World War were unfolding in Europe and other parts of the world, Morgenthau was of the view that international law was a weak mechanism that could be effective only if pillared upon a system of balance of power.

Morgenthau probably underestimated the post-World War proliferation of international legal regimes and institutions aimed at maintaining international peace and security, enhancing co-operation among states and protecting and promoting human rights. The subsequent history of international law is one characterised by great achievements, but it is no exaggeration to state that international law is presently facing a challenging period.

The 21st century has turned out to be one of increasing disorder and uncertainty, and rules designed in the previous century must now address problems never contemplated at the time. Nothing illustrates this dilemma more clearly than the challenges to the sovereignty of the central building block of the international system, the territorial state: fragmentation and instability following the Arab Spring, the seizure of territory by non-state armed groups, unprecedented flows of refugees

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1 HJ Morgenthau 'Positivism, functionalism and international law' (1940) 34 *American Journal of International Law* 260 264.

and migrants, gross human rights abuses often committed intentionally to gain maximum publicity for the perpetrators, and increasingly contested territorial disputes between states. One is tempted to think that Morgenthau was right: it seems as if the facts and problems indeed will defeat the carefully constructed rules-based international system.

The practitioners of international law in the Office of the Chief State Law Advisor (International Law) (hereinafter the 'Office') function in this increasingly complex intersection between international law, diplomacy and policy and, by this contribution, the Office wishes to give an overview of its work during 2014 and 2015.

Consolidation of the Africa Agenda

African Commission on Human and Peoples' Rights

The portfolio of responding to complaints against South Africa before the African Commission on Human and Peoples' Rights (the 'Commission') falls within the mandate of the Office. During 2014/2015, the Office was involved in three matters: one matter has since been dismissed by the Commission, another awaits deliberation by the Commission and the merits of the third are currently being presented to the Commission.

SADC

A legal advisor attended four meetings of Senior Legal Experts and the Committee of Ministers of Justice/Attorneys-General of SADC. The meetings of experts and ministers act as a clearing house for all legal instruments that are referred to the Summit for approval, and though a number were approved, some instruments were referred back to the relevant technical sectors for further development.

It will be recalled that negotiations on a new draft Protocol on the SADC Tribunal were undertaken since a decision, by the Extraordinary Summit held in Windhoek, Namibia, in May 2011, to suspend the Tribunal pending the re-negotiation of the Tribunal Protocol. In this regard, the Summit directed that the Tribunal's jurisdiction should be limited to interstate disputes. The amended Protocol was considered and approved by the meeting of ministers held in Lilongwe, Malawi in February 2014.

However, issues related to the limiting of the jurisdiction of the Tribunal in the draft Protocol had to be considered by subsequent meetings. The limitation of jurisdiction had the result that disputes between employees and SADC and between SADC and external service providers no longer could be adjudicated by the Tribunal and that no relief therefore was possible for aggrieved parties. The possibility that domestic courts of SADC states under these circumstances may assume jurisdiction over

such disputes raised questions on whether the immunity of SADC as an international organisation will prevail in such litigation.

The meeting held in Kinshasa in August 2014 resolved that a SADC Administrative Tribunal with exclusive jurisdiction over labour disputes should be established, and the meeting held in Harare in November 2014 further considered this matter. The South African delegation, drawing on international precedents including the United Nations Administrative Tribunal, proposed that the Administrative Tribunal should be established in terms of a decision by Summit and not by means of an agreement requiring ratification or accession and, in view of the human resources and financial constraints facing SADC, that it be established on an *ad hoc* basis. These proposals were adopted. With respect to possible alternative mechanisms for resolving cases that were pending before the SADC Tribunal when it was suspended, it was determined that the parties to such cases, both the applicants and SADC member states, in view of the new limited interstate jurisdiction of the SADC Tribunal, were free to pursue such cases in alternative dispute settlement mechanisms.

During the meeting held in Harare in July 2014 a proposal by the South African delegation, that the mandate of the Committee of Ministers of Justice/Attorneys-General be broadened to enhance closer cross-border co-operation between SADC member states in cross-border civil and criminal matters, was adopted. Areas of closer co-operation that may be considered include extradition, enforcement of foreign judgments, cross-border insolvency, cybercrime and private international law.

A state law advisor attended a SADC Meeting of Ministers responsible for Infrastructure as part of the South African delegation, which was held in Harare in June 2014.

African Union

A law advisor attended a meeting of Legal Experts and Ministers of Justice/Attorneys-General of the African Union in Addis Ababa in May 2014, during which a number of legal instruments were approved and forwarded to Summit for adoption. A contested issue was the amendment of the Protocol on the Pan African Parliament (hereinafter the 'PAP'), reflecting divergent views among delegations on the exact scope of legislative powers to be given to the PAP. The eventual compromise was to provide for the authority to draft model laws.

The draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights was finalised in 2012 by the meeting of Legal Experts and Ministers of Justice and Attorneys-General. However, one paragraph in the definition of the crime of unconstitutional change of government, contained in article

28E of the Statute of the Court, remained outstanding. Following the Arab Spring uprisings some North African states proposed that text be included specifically to exclude from the scope of the crime popular uprisings by populations exercising their right to sovereignty. However, other states were of the view that all uprisings against a government should be criminalised. A compromise, similar to the provision in the Rome Statute of the International Criminal Court, that the court shall exercise jurisdiction over the crime of aggression once it has been defined, was adopted by the meeting of legal experts, but the meeting of the Ministers of Justice/Attorneys-General decided to delete the text on popular uprisings from the Protocol and include a paragraph in the report on the meeting that the Peace and Security Council must provide a clear definition of 'popular uprisings'. The text of the Protocol eventually adopted by the African Union Summit in Malabo in June 2014 does not include any 'popular uprising' exception.

A further amendment concerning immunities was proposed by the Commission and adopted by the meeting of Ministers/Attorneys-General prior to the Malabo Summit. The provision, which was finally adopted as article 46A*bis* of the Statute, provides that no charges shall be commenced or continued before the court against any serving AU head of state or government or anybody acting or entitled to act in such capacity or other senior state officials, based on their functions, during their tenure of office.

A meeting of legal experts followed by a meeting of the Special Technical Committee on Justice and Legal Affairs (as the Committee of Ministers is now known) was held in Addis Ababa in October 2015. It was attended by the Counsellor: Legal of the South African Permanent Mission to the African Union. A number of legal instruments and rules of procedure for AU institutions were discussed and adopted.

Global system of governance

UNIDROIT

For more than 40 years South Africa has been a member of the International Institute for the Unification of Private Law (hereinafter 'UNIDROIT'), which has a total of 64 member governments. UNIDROIT is an independent intergovernmental organisation with its seat in Rome, Italy, and with the statutory purpose to study needs and methods for modernising, harmonising and co-ordinating private and commercial law between states and groups of states and to formulate uniform law instruments, principles and rules.

UNIDROIT's General Assembly is the ultimate decision-making organ of UNIDROIT: it annually approves the Institute's budget, approves the

Work Programme every three years and elects the Governing Council every five years. It is made up of one representative from each Member Government.

The Governing Council of UNIDROIT supervises all policy aspects by which the Institute's statutory objectives are to be attained and, in particular, the way in which the Secretariat carries out the Work Programme drawn up by the Council. The Governing Council is made up of one *ex officio* member, the President of the Institute, and 25 elected members, mostly eminent judges, practitioners, academics and civil servants from its member states.

The main event of the 72nd General Assembly of UNIDROIT was the election of Governing Council members for the period 2014–2018. On 5 December 2013 Professor Jan Neels from the University of Johannesburg was elected to the UNIDROIT Governing Council for the period 2014–2018. Professor Neels was nominated by the Minister of Justice & Constitutional Development and his candidature was managed by DIRCO's Candidatures Committee via the South African Mission in Rome and the Office. Professor Neels participated as a fully-fledged member at the UNIDROIT Governing Council meeting in May 2014 and a state law advisor attended as an observer: immediately after this meeting they participated in an international colloquium titled '20 Years of UNIDROIT Principles of International Commercial Contracts: Experiences and Prospects'.

A Space Preparatory Commission was established pursuant to Resolution 1 of the diplomatic conference for the adoption of the draft UNIDROIT Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets.[2] A state law advisor was invited to participate in the Preparatory Committee of the Space Assets Protocol and attended all four meetings held in May 2013, January 2014, September 2014, and December 2015, in Rome, Italy. In this context

[2] UNIDROIT started in the late 1980s to develop innovative asset lease financing tools especially for emerging states. The framework Cape Town Convention on Mobile Interests was adopted in 2001 and regulates methods for asset financing of mobile equipment by providing a central registry for such equipment. This development was followed by the Aircraft Protocol which caters for aircraft and related equipment (to which South Africa is a party), the Railway Protocol which caters for railway rolling stock, and finally the Space Protocol which caters for space assets such as satellites and payload. This so-called Cape Town Convention system has become one of the most successful treaty regimes regulating international commerce for high-value mobile assets that frequently cross borders and thus legal jurisdictions. The Governing Council of UNIDROIT is currently investigating the possibility for a further Protocol on Mining and Agricultural Equipment.

South Africa also participated in the development of regulations for the International Registry, which were finalised in December 2015.

A state law advisor attended the 7th Session of the Preparatory Commission for the Establishment of the International Registry under the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, which took place directly after the 73rd General Assembly of UNIDROIT on 11 December 2014 in Rome, Italy. As part of this process, South Africa provided input to the draft Regulations for an International Rail Registry and the draft contracts to create such.

WIPO

The World Intellectual Property Organisation (WIPO) was established in 1970 with a mandate from its member states to promote the protection of Intellectual Property (IP) throughout the world through co-operation among states and in collaboration with other international organisations. WIPO organises the work via specialised committees: the Committee on Development and Intellectual Property (CDIP), the Standing Committee on the Law of Copyright and Related Rights (SCCR), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), the Standing Committee on the Law of Patents (SCP), the Standing Committee on Trademarks, Industrial Designs and Geographical Indications (SCT), the Committee on WIPO Standards (CWS) and the Advisory Committee on Enforcement (ACE). WIPO also provides certain IP-related services which are intended to simplify application for IP titles in all signatory countries in which protection is sought: the Patent Cooperation Treaty System, the Madrid System for Trademarks, the Hague System for the International Registration of Industrial Designs and the Lisbon System for the International Registration of Appellations of Origin. The World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, which came into force in 1995, brought with it a new era in the multilateral protection and enforcement of IP rights. Assistance continues to be provided in many developing countries, with a special focus on the Least Developed Countries.

A state law advisor participated in the 22nd Session of the Standing Committee on the Law of Patents in Geneva, Switzerland, in July 2015 and the World Conference of the Fédération Internationale des Conseils en Propriété Intellectuelle[3] in April 2015 in Cape Town.

[3] FICPI, an umbrella organisation for patent attorneys globally.

A senior state law advisor formed part of the delegation that participated in the 31st Session of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications held in Geneva, Switzerland, in May 2014. The meeting was held in preparation for a diplomatic conference to adopt a Design Law Treaty. However, the meeting could not resolve differences between developing countries, which favoured the inclusion of an article on technical assistance in such a treaty, and developed countries, which sought to provide for technical assistance in only a resolution and not in the treaty.

Space Law

The United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) is a subsidiary body of the General Assembly of the United Nations and the focal point for international co-operation in civilian space activities. The task of COPUOS is to review the scope of international co-operation in peaceful uses of outer space, to devise programmes in this field which would be undertaken under the auspices of the United Nations, to encourage research, to disseminate information on research and to study legal problems arising from the exploration of outer space. South Africa is a party to the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space; the 1972 Convention on International Liability for Damages Caused by Space Objects and the 1975 Convention on Registration of Objects Launched into Outer Space. South Africa is not yet a party to the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies.

A state law advisor participated in the 2014 Session of the Legal Sub-Committee of COPUOS in Vienna as part of the South African delegation. The Legal Sub-Committee discussed and debated international space law issues.

Telecommunications

The Office provided support to the South African delegation to the International Telecommunications Union Plenipotentiary Conference held in October 2014 in Busan, the Republic of Korea. The Plenipotentiary Conference is the principal policy-making conference of the ITU and is held every four years: it adopts the ITU's general policies, adopts the four-year strategic and financial plans and elects the senior management team of the organisation and the members of Council.

Trade law

The Office was involved in a number of international trade law-related matters during the course of 2014 and 2015. Two particular activities are worth mentioning.

The Office formed part of the delegation tasked with finalising the text of the new SADC-EU Economic Partnership Agreement. The Office was involved in the legal preparation (referred to as 'legal scrubbing') of the Agreement, which aims to ensure that the intention of the Parties is accurately reflected in the final legal text.

The Office further formed part of the task team working on the review of the Promotion and Protection of Investments Bill, advising on international law aspects of the Bill. As part of its involvement in this topic, the Office also formed part of the delegation to some international meetings regarding new trends in international investment law and policy.

UNCITRAL

During 2015 the Office identified the work of Working Group II of the United Nations Committee on International Trade Law ('UNCITRAL') as an area in which it can enhance its contribution. The Working Group focuses on mediation and arbitration issues and during the course of the 2015 calendar year focused on the UNCITRAL Notes on Organizing Arbitral Proceedings ('Notes'), as well as on a new project relating to the enforcement of settlement agreements resulting from international commercial mediation/conciliation.

Since the work on the Notes is at an advanced phase, it is foreseen that Working Group II will focus almost exclusively on the enforcement of settlement agreements resulting from international commercial mediation/conciliation. The aim of this project is to facilitate the enforcement of international commercial mediation and conciliation settlement agreements across borders, with an aim to facilitate trade in the international community.

International Criminal Court

A law advisor and the Counsellor: Legal at the South African Embassy in The Hague attended the 14th Session of the Assembly of States Parties (ASP) to the Rome Statute of the International Criminal Court held in The Hague in November 2015. This was the first ASP session since the visit by President Al-Bashir of Sudan to South Africa in June 2015 to attend the African Union Summit of Heads of State and Government. Two warrants for the arrest of President Al-Bashir have been issued by the ICC for alleged war crimes, crimes against humanity and genocide

allegedly committed in the Darfur region of Sudan, after the United Nations Security Council referred the situation in Darfur to the court in terms of its peace and security mandate as provided for in article 13(b) of the Statute.

President Al-Bashir's visit resulted in an urgent application in the High Court (Gauteng Division, Pretoria) to compel the South African government to arrest President Al-Bashir and surrender him to the court (*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others* 2015 (5) SA 1 (GP)). Despite an interim order of 14 June 2015 prohibiting President Al-Bashir from leaving South Africa and for the government to prevent him from leaving, he left the country. The court subsequently found that the government did not comply with the earlier order and that this action was unconstitutional and in violation of the provisions of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act 27 of 2002). (The government is seeking leave to appeal this finding.) In the preparation of the government's submission to the court, counsel was briefed by the Office on the applicable international law and on the procedures followed to accord immunity to visiting heads of state and government.

The Office also drafted a background document to guide the Ambassador and the Counsellor: Legal in The Hague when they met with the court prior to the visit by President Al-Bashir to conduct consultations in terms of article 97 of the Rome Statute. Article 97 provides, where a State Party receives a request for co-operation from the court in relation to which it identifies problems which may impede or prevent the execution thereof, that state shall consult with the court to resolve the matter.

This provision resulted in the Office of the Prosecutor bringing an urgent request for an order clarifying whether the article 97 consultations with South Africa had ended and that South Africa was under an obligation to arrest President Al-Bashir and surrender him to the court. This order was granted by Pre-Trial Chamber II on 13 June 2015. The Pre-Trial Chamber subsequently requested South Africa to submit its observations on the attendance at the Summit by President Al-Bashir by 5 October 2014. The Office drafted a submission to the Pre-Trial Chamber requesting an extension of this date until such time as the domestic legal process had been completed as the result may have informed the government's submission. The extension was granted on condition that the government should report to the Chamber on developments in the domestic proceedings, which is being done by the Office.

The Office, through the Embassy in The Hague, approached the court with a request for the inclusion of a special item on ASP 14's agenda in terms of the applicable provisions. South Africa wished to raise two concerns with respect to provisions in the Statute: first, that there

are no procedures guiding article 97 consultations between the court and States Parties; and, second, that there appears to be an inherent tension between article 27 of the Statute, which excludes immunities enjoyed by heads of state and government in proceedings before the court and article 98, which provides for an exception to the duty to co-operate on the basis of immunities contained in customary international law and treaties. The proceedings of ASP 14 (ICC-ASP/14/L.1) noted the willingness of States Parties to consider proposals to develop procedures for the implementation of article 97 and that the issue of the relationship between articles 27 and 98 could be referred to the Bureau for consideration.

Permanent Court of Arbitration and Hague Conference on Private International Law

The Mission in The Hague continued to play an active role in both the Permanent Court of Arbitration (PCA) and the Hague Conference on Private International Law (HCCH).

Since 2014 the PCA had concluded ten host country agreements with various member states (including Argentina, Chile, Vietnam, PRC and Austria). These agreements allow the organisation to host arbitrations on their territories (a similar agreement was entered into between the PCA and South Africa in 2007, but no arbitrations have taken place in South Africa as yet), which has contributed to the furthering of the global footprint of the organisation and the enhancement of the language abilities of the PCA's staff. It was decided that the PCA would provide administrative support to the PRIME Finance (Panel of Recognized International Market Experts in Finance) Disputes Centre (based in The Hague). South Africa formed part of an open-ended working group on the election procedure of the organisation's Financial Committee, whose mandate is to determine how the rotational system for the regional groups would work to ensure equitable geographic representation in the Financial Committee.

With regard to the Hague Conference the organisation approved the Principles on Choice of Law in International Commercial Contracts in March 2015 in accordance with a procedure established by the Council on General Affairs and Policy of the Conference. Endorsement of the Principles will be sought from UNCITRAL. The organisation is currently undertaking a number of projects relating to private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements, recognition and enforcement of foreign civil protection orders, use of video-link and other modern

technologies in the taking of evidence abroad and co-operation in respect of protection of tourists and visitors abroad.

International humanitarian law

The 31st International Conference of the Red Cross and Red Crescent Societies resolved that greater compliance with international humanitarian law (IHL) is an indispensable prerequisite for improving the situation of victims of armed conflict. It mandated the International Committee of the Red Cross to pursue an initiative in co-operation with states to identify and propose possible means to enhance and ensure the effectiveness of IHL compliance mechanisms and to report to the 32nd International Conference in 2015. The ICRC and Switzerland then undertook a joint initiative to facilitate the implementation of the resolution that included regional consultations and four meetings of states. A law advisor participated in the Third and Fourth Meetings of States held in Geneva in June 2014 and April 2015.

One track of the initiative focused on an implementation mechanism. There was general agreement that an implementing mechanism should be anchored in a regular Meeting of States that would undertake thematic discussions on IHL matters and receive reports from states on IHL implementation on a voluntary basis. (The 1949 Geneva Conventions, unlike other regime-creating conventions, do not provide for such a mechanism.) The second track focused on persons deprived of their liberty in non-international armed conflicts, identifying four areas of humanitarian concern during detention, namely, conditions of detention, vulnerable categories of detainees, grounds and procedures for internment and the transfer of detainees from one authority to another.

Negotiations continued during the 32nd International Conference held in Geneva in December 2015, but final agreement could not be reached on either of the two tracks and the process therefore will continue.

A law advisor was the facilitator for a session on strengthening compliance with IHL during the 15th Annual Regional Seminar on International Humanitarian Law held in Pretoria in August 2015 and hosted jointly by the ICRC and the Department of International Relations and Cooperation.

Environment, science and technology

SKA

The Office formed part of the delegation negotiating the legal structure and obligations of the Square Kilometre Array Organisation. In 2012

South Africa was awarded the bid to host 70 per cent of the infrastructure of the Square Kilometre Array ('SKA'). Currently, the governance structure of the Square Kilometre Array Organisation ('SKAO') is being developed, and this is the process of which the Office is part. It is foreseen that the current negotiations will continue during 2016 to establish the SKAO as an international organisation.

Climate change

The Durban Platform for Enhanced Action established in 2011 by the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) mandated Parties 'to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention and applicable to all'. After four years of negotiations, the COP adopted the Paris Agreement on 12 December 2015. After the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) closed without a final outcome after the first week of the conference in Paris, the COP President held several high-level consultations that resulted in a final chair's proposal which Parties adopted, celebrating it as a triumph of multilateralism and a turning point in the global fight against climate change. Many noted that the choice of indaba-style consultations, inspired by their success in Durban, contributed to the success of the conference.

The purpose of the Agreement is to enhance the implementation of the Convention and to strengthen the global response to climate change from 2020 by inter alia holding the increase in global average temperature to well below 2 °C and to pursue efforts to limit the temperature increase to 1,5 °C above pre-industrial levels, as well as to increase the ability of countries to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions-development in a manner that does not threaten food production. In order to realise these objectives, the Agreement sets the goal of making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

The global temperature goal, now enshrined in a treaty, was agreed to by Parties in 2010 in a decision by the COP; the Paris Agreement now establishes a global goal on the adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to the adverse impacts of climate change. This achievement was the result of the call by developing countries that adaptation should be regarded as a global responsibility, despite the fact that adaptation needs always manifest at a local or regional level.

At the heart of the negotiations leading up to the adoption of the Paris Agreement was the question of how to operationalise the principle of common but differentiated responsibilities and respective capabilities (hereinafter 'CBDR&RC'), which is enshrined in article 3 of the Convention. Since the mandate of the ADP was to develop a new agreement both *under the Convention* (i.e. including its principles) and *applicable to all* (i.e. a common legal framework), Parties had to find a way to recognise that developed countries need to continue to take the lead and that developing countries take on their fair share of the global effort while receiving support to implement their commitments: developing countries therefore argued for the continuation of meaningful differentiation between the rights and obligations of developed and developing countries, whereas developed countries called for an end to the Convention's binary approach. Although the Paris Agreement provides for treaty-based commitments for developed countries, the principles of equity and CBDR&RC are reflected only in overarching references in the preamble and the article on the objective. CBDR&RC are nevertheless operationalised in a less explicit and more dynamic way in various parts of the Agreement. Under mitigation, for example, developed countries are required to continue taking the lead by undertaking economy-wide absolute emission reduction targets; developing countries are encouraged to move over time to economy-wide targets in light of their different national circumstances. On adaptation the Agreement provides for the recognition of adaptation actions taken by developing countries as a contribution to the long-term global response to climate change. With regard to the means of implementation, developed countries are obliged to provide financial resources, support for technology development and transfer and for capacity-building support to assist developing countries with mitigation and adaptation. Developing countries, in turn, are encouraged to provide, or continue to provide, financial support on a voluntary basis.

With regard to its legal nature the Paris Agreement can be described as a hybrid agreement: alongside several legally-binding commitments, many key undertakings by Parties are cast in language that is either voluntary or does not commit individual Parties to a specific outcome. Article 4(2), for example, provides that '[each] Party *shall* prepare, communicate and maintain successive nationally determined contributions that it intends to achieve', and article 4(4) provides that '[developed] country Parties *should* continue to take the lead by undertaking economy-wide absolute emission reduction targets' (our emphases). Since addressing climate change requires the widest possible co-operation among countries, it was important that all the major economies sign up to the Agreement. Given the fact that the United States was unable to ratify the Kyoto

Protocol after its adoption in 1997 many feared that the US President would once again fail to secure legislative approval to ratify the Paris Agreement. Although the Agreement is subject to ratification, acceptance, approval or accession by states, and in order to ensure that the world's second-largest emitter of greenhouse gases can join the Agreement, the provisions of the Agreement were carefully drafted in a way that would not trigger the need for legislative approval by the US Congress. If an undertaking in the Agreement was not voluntary, it had to be covered by either an international obligation already in force or existing US domestic law.

The Agreement is set to enter into force on the 30th day after the date on which at least 55 Parties to the Convention accounting for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession. The choice of this double-threshold entry into force provision, similar to that used in the Kyoto Protocol, is intended to ensure that the Agreement enters into force only once a meaningful group of major greenhouse gas emitters have become party to the Agreement. The unfortunate result in the case of the Kyoto Protocol was that the late ratification by the Russian Federation delayed the entry into force of the Protocol by seven years. The USA, at the time the largest greenhouse gas emitter, did not ratify the Protocol.

It is hoped that the Paris Agreement will enter into force within the next three to four years; the Durban Platform stipulated that the new agreement will be implemented from 2020, which is the start date of Parties' individual 'nationally determined contributions' (hereinafter 'NDCs'), submitted to the UNFCCC secretariat during 2015. The NDCs, which are now to be submitted every five years, make up the substantive obligations of Parties. Nearly all Parties to the Convention submitted their first set of intended NDCs for the period after 2020 before the Paris conference. Acknowledging that individual NDCs do not add up to the level of ambition indicated by climate scientists, the Paris Agreement obliges Parties to take stock periodically of the implementation of the Agreement to assess the collective progress towards achieving the purpose of the Agreement and its long-term goals. The first global stocktake of the implementation of countries' NDCs is due in 2023 and thereafter will take place every five years. The outcome of the global stocktake shall inform Parties in updating and enhancing their actions and support, as well as in enhancing international co-operation for climate action. However there is no obligation to do so.

The Agreement and its accompanying decision contains several mandates for further work to develop rules, modalities and procedures, including on the newly-established mechanism to facilitate implemen-

tation and promotion of compliance. Although the Agreement stipulates that the compliance mechanism shall consist of a committee that is expert-based and facilitative in nature and function, in a manner that is transparent, non-adversarial and non-punitive, many fundamental questions on how it will function remain. While the Kyoto Protocol compliance committee consists of separate facilitative and enforcement branches, it should be kept in mind that the Kyoto Protocol has binding commitments only for developed countries that are party to the Protocol. The Paris Agreement on the other hand has commitments for all Parties. Many developing countries therefore argue that the compliance mechanism must reflect the principle of CBDR&RC, as well as have a broad scope of application, that is to include commitments by developed countries to provide support. This, and many other matters, will require further negotiation under the newly-established Ad Hoc Working Group on the Paris Agreement or the Convention's subsidiary bodies with a view to making recommendations to the first Conference of the Parties serving as the Meeting of the Parties to the Agreement.

Legislation

Foreign Service Bill

The Office was responsible for the development of a Foreign Service Bill for the Republic of South Africa: the Bill is intended to provide for a single Foreign Service system for the Republic of South Africa. To date the management and administration of South Africa's Foreign Service has not been regulated by legislation. The proposed Bill will contribute to the more effective functioning of the Foreign Service. The Bill was tabled in Parliament during November 2015.

Public diplomacy

The Office is often called upon to provide legal input to briefing papers and speaking notes for political principals, for example, on the declaration of the African Union Ministerial retreat, on the 70th anniversary of the United Nations, for a speech by the President on peace and security, the United Nations Charter and their relationship with international law, for the BRICS Summit, on the Palestinian situation before the ICC for the South African-Palestinian Political Consultations and for the President in preparation of participation in a discussion during the World Economic Forum on the changing nature of national sovereignty.

The Office also co-ordinates the international law module for all training courses in the Department and law advisors present some of the

lectures. A law advisor presented a lecture at the University of Pretoria's International Law Short Course in 2014.

Concluding remarks

A large part of the Office's work focuses on the multilateral agenda; it also advises regularly on issues related to bilateral relations between South Africa and other states. It often advises on the entry into force and termination of agreements and participates in the negotiation of agreements. The relationship between domestic and international law is analysed when it has to advise whether the proposed text in agreements can be implemented in terms of South African domestic law. Regular advice is provided on the implementation of diplomatic and state immunity and host agreements with international organisations are often negotiated, both for holding of meetings in South Africa and for the hosting of international organisations on South African territory.