

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

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### 1 Introduction

The Peace Palace, seat of the International Court of Justice and the Permanent Court of Arbitration, is a landmark in the city of The Hague. The building, in neo-Renaissance style, was designed by the French architect Louis Cordonnier and was completed in 1913. It symbolises the creation of an international architecture for the peaceful settlement of disputes between states, the legacy of the 1899 and 1907 Hague Peace Conferences, which established the Permanent Court of Arbitration<sup>1</sup> and addressed the conduct of armed conflict.<sup>2</sup> Four decades later, after two devastating world wars, international law developed regimes to outlaw the use of force in international relations, to protect people — especially the weak and vulnerable — and the environment, and to facilitate trade and economic integration.<sup>3</sup>

The protection of human beings by international law gained new impetus after the fall of the Berlin Wall in 1989, when the new international environment provided the space for new concepts of protection, such as human security and the Responsibility to Protect, the latter endorsed by all member states of the United Nations (UN) at the 2005 World Summit. Greater commitment to global governance and multilateralism — aimed at a safer and more stable world by addressing cross-border issues by means of consensus-seeking negotiations — even resulted in a theory of the so-called end of history.<sup>4</sup> All of these issues are reflected in the interaction between states, both in a multilateral and bilateral context.

Against this background, the South African Office of the Chief State Law Advisor (International Law) (the Office), at the Department of International Relations and Cooperation (DIRCO), continues to give effect

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<sup>1</sup> C Giorgetti (ed) *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (2012) 37. For an overview of the factors leading to the peace conferences and the development of the so-called Hague System on dispute settlement and regulation of warfare, see A Eyffinger *The 1907 Hague Peace Conference: The Conscience of the Civilized World* (2007).

<sup>2</sup> LC Green *The Contemporary Law of Armed Conflict* 2 ed (2000) 33.

<sup>3</sup> H Strydom (ed) *International Law* (2015) 17.

<sup>4</sup> F Fukuyama 'The End of History?' (1989) 16 *The National Interest* 3–18.

to its core objective of providing 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. In this paper, the Office provides an overview of its work during yet another challenging year.<sup>5</sup> As in the past, the paper 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 *The African Commission on Human and Peoples' Rights*

The Office is responsible for managing complaints brought against the South African government and before the African Commission on Human and Peoples' Rights (ACHPR). During 2016, the Office was involved in two matters, namely, *Monakali and Others v the Republic of South Africa and Others*<sup>6</sup> and *Prince Seraki Mampuru (on behalf of the Bapedi Mamone Community under the leadership of Kgosi Mampuru II) v the Republic of South Africa*.<sup>7</sup>

The *Monakali* matter was declared admissible by the ACHPR and is currently proceeding to the merits stage.<sup>8</sup> The issues brought before the ACHPR by the complainants in *Monakali* concern the right to access to housing and, more specifically, the alleged failure of a municipality in South Africa to provide alternative housing to a community faced with a court application for their eviction. While the right to access to housing is not expressly included in the 1998 African Charter on Human and Peoples' Rights (African Charter),<sup>9</sup> the ACHPR's soft-law document, entitled 'Principles and Guidelines on the Implementation of Economic,

<sup>5</sup> On the challenges faced by legal advisors of foreign ministries from countries such as South Africa, see D Tladi 'Reflections on Advising the South African Government on International Law' in A Zidar & J-P Gauci (eds) *The Role of Legal Advisers in International Law* (2016) 167.

<sup>6</sup> ACHPR. Communication 377/09 — *Mendukazi Patricia Monakali and Others v Republic of South Africa*.

<sup>7</sup> ACHPR. Communication 609/16 — *Prince Seraki Mampuru (on behalf of the Bapedi Mamone Community under the leadership of Kgosi Mampuru II) v Republic of South Africa*.

<sup>8</sup> ACHPR. Decision of the Commission on Admissibility: Communication 377/09 — *Monakali* (note 6 above), available at [http://www.achpr.org/files/sessions/16th-ao/comunications/377.09/achpreos16\\_377\\_09\\_eng.pdf](http://www.achpr.org/files/sessions/16th-ao/comunications/377.09/achpreos16_377_09_eng.pdf) (accessed 25 August 2017).

<sup>9</sup> Available at <http://achpr.org>.

Social and Cultural Rights in the African Charter on Human and Peoples' Rights',<sup>10</sup> expresses the ACHPR's view that articles 14 (right to property), 16 (right to health) and 18 (protection of the family and vulnerable groups) of the African Charter, read together, provide for the protection of such a right. The declaration of admissibility of the *Monokali* matter by the ACHPR suggests that, in the latter's view, the right to housing is justiciable in terms of the African Charter, even though it is not expressly provided for in the Charter. The next issue, to be determined during the merits phase, is whether, in the circumstances of the particular case, there has been a violation of this right.

*Prince Seraki Mampuru* is a new complaint, brought before the ACHPR during the course of 2016. It relates to the determination of the kingship of the Bapedi Mamone community. The complaint relates to alleged errors made by the Commission on Traditional Leadership Disputes and Claims<sup>11</sup> in determining the leadership of the Bapedi Mamone Community. The parties have submitted their arguments on the jurisdiction of the ACHPR to consider the complaint and on the admissibility of the complaint in this matter. They are currently awaiting the ACHPR's decision in this regard.

## 2.2 *The Meeting of the African Union Specialized Technical Committee on Justice and Legal Affairs*

The African Union's Specialized Technical Committees (STCs) cover a range of thematic areas, including justice and legal affairs.<sup>12</sup> The STCs were established as organs of the African Union (AU), with the purpose of working in collaboration with the various departments of the AU Commission and the Regional Economic Communities (RECs) towards the harmonisation of AU projects. The STCs provide a space for consideration of items at expert and official level before ultimate decisions are taken by the decision-making organs of the AU, such as the Executive Council and the Summit.

During 2016, one meeting of the STC on Justice and Legal Affairs took place in Lomé, Togo. The main focus of the meeting was the negotiation of the draft African Charter on Maritime Safety, Security and Development, also known as the Lomé Charter, which was adopted by the Extraordinary AU Summit on Maritime Safety and Security, in Lomé, Togo

<sup>10</sup> Available at <http://www.achpr.org/instruments/economic-social-cultural/> (accessed 23 June 2017).

<sup>11</sup> This commission was established in terms of the Traditional Leadership and Governance Framework Amendment Act 41 of 2003.

<sup>12</sup> Art 5(g) of the 2000 Constitutive Act of the African Union.

on 15 October 2016.<sup>13</sup> The draft text addressed both safety and security, as well as developmental issues. The provisions on the latter were, however, vaguely drafted in the text, which resembled policy propositions rather than legal obligations. Moreover, a number of definitions were controversial, like that of the 'blue/ocean economy' and the inclusion of 'inland waterways' under the definition of 'sea'. With regard to this latter definition, a number of delegations were in principle opposed to the application of an international regime to areas which fall under the domestic jurisdiction of a state. The South African delegation's proposal that definitions should be aligned, where possible, with the definitions in the United Nations Convention on the Law of the Sea (UNCLOS),<sup>14</sup> was accepted. However, despite the misgivings about the inclusion of 'inland waterways' in the scope of the Lomé Charter, a number of land-locked states argued for its inclusion, in order for them to become party to the Charter.

A further controversial matter was the inclusion of a provision that would oblige member states to agree on the delimitation of their maritime boundaries. A number of delegations pointed out that the sensitive issue of boundaries is the subject of a separate AU process and should not be addressed in other AU instruments. Eventually, as a compromise, a non-obligatory text was adopted that would encourage states to agree on the delimitation of maritime boundaries. Some delegations were also opposed to a text providing for the compulsory establishment of a maritime security fund. The South African delegation put forward a compromise text providing for the discretionary establishment of such a fund. However, in terms of the text of the Charter that was ultimately forwarded for adoption and signature, parties 'undertake' to establish a maritime security and safety fund.<sup>15</sup>

The STC also considered a number of other issues. First, the Statute of the African Union Mechanism for Police Cooperation was adopted after amendments to the articles dealing with its objectives and functions were agreed upon. While other states had argued for a deferral of the decision, Algeria, who will host the Mechanism, strongly opposed its deferral to a next meeting. Secondly, the STC also adopted the Constitution of the African Civil Aviation Commission. Thirdly, the STC considered the amendment of article 5(1) of the 1998 Protocol to the African Charter on Human and People's Rights on the Establishment of

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<sup>13</sup> Held in accordance with the decision of the AU Assembly of January 2016, Assembly/AU/Dec.593 (XXVI) available at <https://au.int/en/decisions/assembly> (accessed 25 August 2017).

<sup>14</sup> 1982 United Nations Convention on the Law of the Sea.

<sup>15</sup> Art 11.

the African Court on Human and People's Rights.<sup>16</sup> Article 5(1) provides that cases may be submitted to the court by the ACHPR, by member states to the Protocol and by African intergovernmental organisations. During the African Union Summit held from 10 to 18 July 2016 in Kigali, the Executive Council adopted a decision recommending that the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) also be included as an entity that could submit cases to the court and that ACERWC in consultation with ACHPR should prepare an amendment and submit it to the STC for consideration.

However, a number of delegations raised procedural objections against the inclusion of this latter item. They argued that the Protocol, in its article 35, provides for a specific procedure for its amendment. The first objection stated that only states can propose amendments, while this amendment proposal originated from ACERWC. The second objection related to the fact that the item had been placed on the agenda after the period required by the rules of procedure had expired. The third objection concerned a substantive matter: states not party to the Protocol establishing ACERWC were of the view that the amendment will enable ACERWC to now refer cases against such states to the court. The meeting resolved that the proposed amendment be referred back to the ACHPR for further consideration from both a procedural and a legal perspective, in order to ensure not only compliance with the amendment procedure of the Protocol, but also legal coherence.

### 3 Global System of Governance

#### 3.1 *The Sixth Committee*

The General Assembly, comprising all member states of the United Nations (UN), is the main deliberative, policy-making and representative organ of the UN and, therefore, the chief multilateral forum to discuss issues of concern to the international community. In terms of article 13 of the 1945 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 by the General Assembly's Sixth Committee.<sup>17</sup>

<sup>16</sup> The Protocol is available at <http://www.achpr.org/instruments/court-establishment/> (accessed 23 June 2017).

<sup>17</sup> For a more detailed description, see AN Pronto 'The Work of the Sixth Committee of the United Nations General Assembly in 2014 and 2015' (2015) 40 *South African Yearbook of International Law* 223.

The Sixth Committee met from 3 October to 13 December 2016 at the UN Headquarters in New York. It addressed, among others, diplomatic protection, the report of the International Law Commission (ILC) and the United Nations Commission on International Trade Law.

### *3.1.1 Diplomatic Protection*

In 2006 the ILC completed the second reading on the topic of diplomatic protection and recommended to the General Assembly the elaboration of a convention on the basis of the draft articles.<sup>18</sup> The General Assembly expressed its appreciation for the finalisation of the second reading.<sup>19</sup> While some members supported the ILC's recommendation for a convention, other members did not. Since the General Assembly traditionally takes decisions by consensus, it was at the time decided to postpone the matter to a later date.

The question whether or not to elaborate a convention on the basis of the ILC's draft articles, was again considered in 2016. To address this question, the Sixth Committee decided to establish a Working Group on Diplomatic Protection. Mr Thembile Joyini, until 2016 the legal counsellor at the Permanent Mission of South Africa to the UN in New York, chairs this group. He was also elected to co-ordinate the negotiations on the resolution on diplomatic protection. The Working Group considered the possibility of negotiating a convention on diplomatic protection in the light of written comments received from various governments and of views expressed in the debates held during previous sessions of the General Assembly.<sup>20</sup>

While some member states supported a convention on diplomatic protection as a means to enhance the protection of human rights, others were concerned that the delicate balance between the rights of states and the rights of individuals needs to be carefully considered, particularly since a convention on state responsibility — a closely related issue — had not yet been concluded. Member states also did not agree on the question whether a convention should merely codify existing customary international law or whether, instead, international law in this area needs to be developed.

Although South Africa supported the work of the ILC on diplomatic protection, it had some concerns regarding the scope of some of the draft articles, specifically insofar as they would purport to place a general obligation on states to provide diplomatic protection — or could, at any

<sup>18</sup> ILC 'Report on the Work of the Fifty-eighth Session' A/61/10 (2006) available at <http://legal.un.org/ilc/reports/2006/> (accessed 25 August 2017).

<sup>19</sup> UN A/RES/61/34 (4 December 2006) para 2(a).

<sup>20</sup> A/RES/68/113 (16 December 2013) para 2.

rate, be interpreted as establishing such a right. This question has previously been addressed by the South African courts in the matters of *Von Abo v the Government of the Republic of South Africa and Others*,<sup>21</sup> *Kaunda and Others v President of the Republic of South Africa*<sup>22</sup> and *Van Zyl and Others v Government of the Republic of South Africa*.<sup>23</sup> For this reason, South Africa has supported the development of a convention in order to clarify the position *de lege lata* concerning the existence, or not, of a duty to provide diplomatic protection.

Since consensus could not be reached, the Sixth Committee decided to revisit the matter in a future session.<sup>24</sup> It is apposite to point out that these discussions are recurring and also took place in respect of the ILC's draft articles on state responsibility.

### 3.1.2 *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 ILC.<sup>25</sup> The consideration of the ILC coincides with what is commonly referred to as 'Law Week' — during which the heads of the legal advisors of foreign ministries, judges of international courts and tribunals and other international law experts descend on New York and 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 annually deliver their respective annual reports to the General Assembly. In 2016, the period also coincided with the election for the ILC at which the South African candidate, Prof Dire Tladi, was re-elected for a second term.

The Sixth Committee considered the report of the ILC, which covered the following topics: protection of persons in the event of disasters; identification of customary international law; subsequent agreements and practice with regard to the interpretation of treaties; crimes against humanity; protection of the atmosphere; *jus cogens*; protection of the environment in relation to armed conflicts; immunity of state officials from foreign criminal jurisdiction; and provisional application of treaties. Of these topics, protection of persons in the event of disasters was

<sup>21</sup> 2010 (3) SA 269 (GNP).

<sup>22</sup> 2005 (4) SA 235 (CC).

<sup>23</sup> 2008 (3) SA 294 (SCA).

<sup>24</sup> A/RES/71/142 (13 December 2016) para 2.

<sup>25</sup> For full details on the report of the ILC, see, in the current volume, D Tladi 'Progressively Developing and Codifying International Law: The Work of the International Law Commission in its 68<sup>th</sup> Session' (2016) 41 *South African Yearbook of International Law* 165.



completed, while the first readings of both subsequent agreement and practice, as well as identification of customary international law were completed.

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, while highlighting the domestic practice of states.

On the topic of crimes against humanity, South Africa welcomed the focus on prevention, complementarity and co-operation. In particular, it welcomed the endeavours to assist states in adopting national legislation to criminalise, investigate, prosecute and punish crimes against humanity and to co-operate with other states in investigations and extraditions. 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 (Rome Statute) and that the obligation to prevent and punish crimes against humanity should apply in both peace time and during international (non-international) armed conflicts, as is now accepted in law.

On the topic of *jus cogens*, South Africa expressed its support for the work of the ILC on this topic as it is important to obtain clarity on various aspects of *jus cogens*. These include the identification of *jus cogens*, the requirements for a norm to reach the status of *jus cogens* and the effect of such norms on other international obligations. With respect to the question of the identification of *jus cogens*, South Africa stressed the need for the ILC to consider the relationship between customary international law and *jus cogens*, as well as the relationship between *jus cogens* norms and non-derogation clauses in international human-rights treaties. South Africa expressed support for the Special Rapporteur's conclusions that *jus cogens* norms are generally accepted international-law norms that are universally binding and hierarchically superior reflective of fundamental values and interests. It expressed surprise that some members of the ILC had questioned this basic statement of law. However, South Africa supported neither the development of an illustrative list of *jus cogens* norms – since its helpfulness is doubtful and may become obsolete in a short period of time – nor the concept of regional *jus cogens*, as this would undermine the universal nature of *jus cogens* and would create uncertainty in cases of conflict with universal norms.

On the topic of the protection of the atmosphere, South Africa stressed the importance of adhering to all established rules and principles that evolved 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. It may be recalled, however, that the ILC had decided to include the topic of the protection of the atmosphere on the express understanding that these important issues would not be covered.<sup>26</sup>

Concerning the topic of immunity of state officials from foreign criminal jurisdiction, South Africa highlighted the importance of a balance between the sovereignty of states and the need to ensure accountability for crimes committed by officials, particularly for those crimes of most concern to the international community. When considering either the codification of customary international law or the progressive development of the law, South Africa stated that it would be important to have procedural safeguards to avoid possible abuse of immunity and the risk of politically motivated or illegitimate exercise of jurisdiction.

### 3.1.3 *The UN Commission on International Trade Law*

The UN Commission on International Trade Law (UNCITRAL) was established by the General Assembly and reports to the General Assembly through the Sixth Committee. The Office leads the negotiations on behalf of South Africa in UNCITRAL's Working Group II regarding an instrument for the enforcement of internationally conciliated settlement agreements. Negotiations on this topic started in 2015 and continued throughout the two meetings of the Working Group in 2016.

South Africa currently does not have domestic legislation regulating mediation or conciliation, although the South African Law Reform Commission has started the process of constituting a committee to consider the need for and the possible drafting of such legislation for South Africa. Though not currently a member state of UNCITRAL, South Africa has been actively participating in negotiations in Working Group II, which works on dispute resolution with a view to contributing to the development of international trade law.

In the negotiations regarding an instrument for the enforcement of internationally mediated settlement agreements, the position of the South African delegation is that an internationally mediated or conciliated settlement agreement constitutes a contract between the parties and should be enforceable in line with the ordinary principles of enforcing commercial contracts.

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<sup>26</sup> For the decision of the ILC in this regard, see 'Report of the International Law Commission Sixty-fifth Session' A/68/10 (6 May–7 June and 8 July–9 August 2013) GA OR 65th Session Supplement no 10 para 168.

## 3.2 Law of the Sea

### 3.2.1 *Marine Biodiversity in Areas beyond National Jurisdiction*

In 2015 the General Assembly decided<sup>27</sup> to develop an international legally binding instrument under the UN Convention on the Law of the Sea (UNCLOS) regarding the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ).<sup>28</sup> The Preparatory Committee (PrepCom) established for this purpose must report to the General Assembly in 2017 and make substantive recommendations on the elements of a draft text of this new legally binding instrument.

The negotiations take place in different working groups on the following areas: (1) scope and guiding approaches; (2) marine genetic resources; (3) area-based management tools, including marine protected areas (MPAs); (4) environmental impact assessments; and (5) capacity-building and technology transfer.<sup>29</sup>

During the two meetings of PrepCom in 2016, the representative of South Africa co-ordinated the Africa Group and argued that BBNJ should be regarded as the common heritage of mankind. Hence, the principle of freedom of the high seas should therefore not apply. Conversely, most developed countries, having greater capacity to access and to exploit resources in areas beyond national jurisdiction, tend to favour the principle of freedom of the high seas with regard to marine genetic resources in areas beyond national jurisdiction.

### 3.2.2 *Omnibus Resolution on Oceans and the Law of the Sea*

The General Assembly adopted the annual omnibus resolution on oceans and the law of the sea,<sup>30</sup> co-sponsored by South Africa under the co-ordination of South Africa's legal counsellor. The importance of this annual resolution is underscored by the adoption of the 2030 Agenda for Sustainable Development in 2015, which includes Sustainable Development Goal 14 on the conservation and sustainable use of the ocean, seas and marine resources. The resolution affirms the central importance of UNCLOS and covers a range of issues, including capacity-building; the peaceful settlement of disputes; the work of the International Seabed Authority; maritime safety and security; marine environment and resources; protection of refugees and migrants at sea; and the safety of

<sup>27</sup> A/RES/69/292 (19 June 2015).

<sup>28</sup> Ibid.

<sup>29</sup> Id para 2.

<sup>30</sup> A/RES/71/257 (23 December 2016).

fishers and vessels. Some member states, however, voted against the resolution (Turkey and Venezuela), while others abstained (El Salvador and Colombia), since they objected to the central place afforded to UNCLOS, to which they are not signatories.

### 3.3 *The International Criminal Court*

The ongoing domestic and international cases concerning South Africa and the International Criminal Court (ICC) are addressed elsewhere in this volume and are therefore not discussed here.<sup>31</sup> Against the background of these cases, South Africa participated at the Fifteenth Session of the Assembly of States Parties (ASP) to the ICC held in The Hague, the Netherlands, in November 2016.

Further, the ASP was held against the backdrop of the announcement by three member states (South Africa, Burundi and the Gambia) of their intention to withdraw from the Rome Statute. On 19 October 2016, Cabinet decided that South Africa would withdraw from the Rome Statute by immediately depositing an Instrument of Withdrawal with the Secretary-General of the UN in New York.

The President of the ASP, Mr Sidiki Kaba (Minister of Justice of Senegal), expressed regret at this decision and made a solemn appeal to these three countries to remain members of the court. Most member states, as well as the President of the Court and the Prosecutor, also appealed for a constructive dialogue with the three member states to be undertaken within the ASP.

The issue of the relationship between Africa and the ICC was added to the ASP agenda. The aim of the discussion, chaired by the ASP President, was to enable the ICC ASP to respond to the strains in the relationship between Africa and the ICC, in light of the three abovementioned looming withdrawals from the Rome Statute. There was general agreement that the ASP was the best forum to discuss the concerns expressed by African member states and that this dialogue should be continued in order to enhance the universality of the Rome Statute.

Earlier, the Fourteenth Session of the ASP, held in 2015, had approved that proposals be developed for procedures to guide the implementation of consultations between member states and the court, undertaken in terms of article 97 of the Rome Statute, after the South African delegation requested that a supplementary item on this issue be placed

<sup>31</sup> See, in the current volume, M Swart & C Ramsden 'A Shrewd Awakening: The Mobilisation of South African Civil Society in the *Al Bashir* Matter' 2016 (41) *South African Yearbook of International Law* 215 and HJ Lubbe '*Democratic Alliance v Minister of International Relations and Cooperation* (2017) 3 SA 212 (GP)' (2016) 41 *South African Yearbook of International Law* 242.

on the agenda. In the course of 2016, a formal proposal was made to the Bureau of the ASP via the South African Embassy in The Hague. The Bureau approved that a working group on the implementation of article 97 of the Rome Statute be established, which is chaired by Chile's ambassador to the Netherlands. Article 97 provides for consultations between a member state and the court when the member state receives a co-operation request to identify problems that may impede or prevent the execution of the request. The working group continues to deliberate on procedures necessary to implement article 97.

### *3.4 The New Development Bank*

In 2014, the BRICS countries signed the Agreement on the New Development Bank. The Bank has a mandate to mobilise resources for infrastructure and sustainable-development projects in BRICS countries, other emerging-market economies and developing countries. These will complement the existing efforts of multilateral and regional financial institutions for global growth and development.<sup>32</sup> While the BRICS countries are the founding members of the bank, membership will be open to all members of the UN. In terms of article 3 of the Agreement and article 4(a) of the Articles of Agreement (annexed to the Agreement), the Bank will have its headquarters in Shanghai, China. Article 4(b) of the Articles of Agreement provides that the Bank may establish offices necessary for the performance of its functions and that the first regional office shall be in Johannesburg. Negotiations between the Bank and South Africa regarding a hosting agreement for the establishment of a regional office (the first of its kind in South Africa) have been ongoing. Despite some obstacles, the negotiations are nearing completion, which will result in the establishment of the African regional centre in Johannesburg.

### *3.5 Environment, Science and Technology*

#### *3.5.1 The Square Kilometre Array*

In 2012, the founding board (now disbanded) of the Square Kilometre Array (SKA) project, comprising nine national governmental and research organisations, decided that a radio telescope (the SKA), with a total collecting area of approximately one square kilometre, will be built in South Africa and Australia. Pending the negotiation of a treaty to establish a permanent international organisation to oversee the project,

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<sup>32</sup> Art 2 of the 2014 Agreement on the New Development Bank between Brazil, Russia, India, China and South Africa, signed in Fortaleza, Brazil.

the project is currently led by the SKA Organisation (SKAO), a not-for-profit company incorporated in the United Kingdom and based at the Jodrell Bank Observatory near Manchester in the United Kingdom. Issues under negotiation include the legal and policy frameworks for financing the project; operations and access to the telescope and its data; immunities and privileges of SKAO and its staff; as well as procurement and intellectual-property rights.

While providing general advice on treaty law to the South African delegation, the Office also participated in the work of the Immunities and Privileges Working Group, which drafted a Protocol on Immunities and Privileges for the SKAO. The role of the Office was to ensure that the immunities and privileges to be accorded to SKAO and its staff are in line with those that South Africa accords to other international organisations currently present in South Africa in terms of its applicable domestic law and diplomatic practice. The Office is also mandated to represent South Africa in the legal review of the agreement and to ensure that the text is in line with international law and, specifically, treaty-law requirements.

It is foreseen that the Convention establishing the permanent body will be signed in 2017 and that the international organisation will be established by 2018.

### 3.5.2 *Climate Change*

The 22nd Conference of the Parties to the UN Framework Convention on Climate Change took place in Marrakesh, Morocco, from 7 to 18 November 2016. As the first conference since the adoption of the Paris Agreement in December 2015, the focus was on action and implementation, particularly the technical work required to develop the various modalities, procedures and guidelines. These will apply under the Paris Agreement and will include the procedures and guidelines for the committee established to facilitate implementation and promote compliance.

Key outcomes were secured with the active participation of the South African delegation. The outcomes included an agreement on a roadmap for completing negotiations on the rule book of modalities by 2018; procedures and guidelines for the implementation of the commitments under the Paris Agreements<sup>33</sup> in time for the 2020

<sup>33</sup> Conference of the Parties to the UN Framework Convention on Climate Change Decision 1/CP.22 'Preparations for the Entry into Force of the Paris Agreement and the First Session of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement' (18 November 2016), available at <http://unfccc.int/documentation/documents/items/3595.php> (accessed 25 August 2017).

implementation of the parties' nationally determined contributions on climate-change mitigation; as well as adaptation and the provision of support to developing countries. The parties also agreed on the Terms of Reference for the Paris Committee on Capacity-building, which is aimed at addressing gaps and needs in implementing capacity-building in developing member states.<sup>34</sup> Finally, agreement was reached on a five-year work programme for the Warsaw International Mechanism on Loss and Damage Associated with Climate Change Impacts, including the enhancement of action and support, such as finance, technology and capacity-building in order to address loss and damage associated with the adverse effects of climate change.<sup>35</sup>

### 3.5.3 *Commission for the Conservation of Antarctic Marine Living Resources*

In October 2016, the 35th Annual Meeting of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) was held in Hobart, Australia. The Meeting approved the establishment of the world's largest marine protected area in the Ross Sea. South Africa, as a supporter of the establishment of marine protected areas, welcomed this historic outcome.

Another important matter for South Africa concerned its proposal, made together with France, to have the boundary between CCAMLR statistical subareas 58,6 and 58,7 — which falls partially within the South African Exclusive Economic Zone (EEZ) around the Prince Edward Islands and the French EEZ at the Crozet Archipelago — repositioned so that it would fall in the high seas between the French and South African EEZs. The repositioning of the boundary will simplify the management and reporting of fisheries data. South Africa and France have been involved in this issue for some time and the proposal had previously been considered at CCAMLR in 2015. South Africa will chair CCAMLR during the 2017 and 2018 annual meetings.

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<sup>34</sup> Conference of the Parties to the UN Framework Convention on Climate Change Decision 2/CP.22 'Paris Committee on Capacity-building' (17 November 2016), available at <http://unfccc.int/documentation/documents/items/3595.php> (accessed 25 August 2017).

<sup>35</sup> Conference of the Parties to the UN Framework Convention on Climate Change Decision 3/CP.22 'Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts' (17 November 2016), available at <http://unfccc.int/documentation/documents/items/3595.php> (accessed 25 August 2017).

## 4 South African Bills

### 4.1 *The Foreign Service Bill*

South Africa is considering a Foreign Service Bill, aimed at streamlining the fragmented South African foreign service. The Bill will provide DIRCO with a legislative mandate to manage and administer the foreign service. Under the Bill, the Foreign Service will include South Africa's foreign missions and the staff (both from national governmental departments and contractual appointments) at those missions.

The Bill was tabled in Parliament at the end of 2015. During the course of 2016, the Office was called on to brief the Portfolio Committee on International Relations on the Bill. The Office was also involved in various consultations with other government departments and organised labour.

The Office will, on behalf of DIRCO, continue to make submissions to the Portfolio Committee on possible amendments to the Bill, based on public hearings and other continuing consultations.

### 4.2 *The International Crimes Bill*

The International Crimes Bill is intended to fill the lacunae that will be created if the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 is repealed as a result of South Africa's withdrawal from the Rome Statute.

The custodian of the Bill is the Department of Justice and Constitutional Development. The Office was approached for advice on the international-law aspects of the Bill. The Office provided advice on, among others, the scope of immunity from criminal prosecution in terms of the Diplomatic Immunities and Privileges Act 37 of 2001 and the need to amend the Prevention of Combating and Torture of Persons Act 13 of 2013 to align it with the International Crimes Bill.

## 5 Conclusion

The challenges faced by the international system, the dynamic and complex nature of modern international law, as well as the ever-expanding content and scope of the field, require from the law advisors of the Office to not only possess considerable intellectual firepower, but also a good dose of pragmatism and experience, not to mention stamina, in order to successfully navigate the rapids of negotiations and international processes. Thorough preparation, ongoing support from the excellent treaty-and-information section of the Office and continued learning are further requirements for the Office to fulfil its ultimate objective, namely the delivery, on an ongoing basis, of quality legal advice and assistance



to the South African government and other clients.

New challenges for the Office are to update and modernise the module on international law that it presents as part of the training programme of the Department of International Relations and Cooperation as well as the sharing of experience and knowledge transfer as its core social objective.