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Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

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Ms N Ngcaba
The Director – General
Department: Science and Technology
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Pretoria
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For Attention: Mr Steve Mohapi

Dear Ms Ngcaba

**CONVENTION ESTABLISHING THE SQUARE KILOMETRE ARRAY
OBSERVATORY: YOUR UNNUMBERED E-MAIL DATED 28 SEPTEMBER 2018**

1. BACKGROUND

1.1 The Department of Science and Technology (the "Department") informs us that the Republic of South Africa is the host of the international Square Kilometre Array ("SKA") global radio telescope. The project is currently in its pre-construction and design phase. It is an international project, which involves several international partners. The partnership is currently being implemented through a company incorporated in the United Kingdom. The participating governments have, however, decided that for the construction and operational phases of the project, it would be appropriate to establish an inter-governmental organisation, under international law, for the governance of the project. For this purpose, the Department, supported by the Department of International Relations and Cooperation's State Law Advisors (International Law), have participated in an international effort, led by the Government of Italy, with the other partner governments to develop the draft *Convention Establishing the Square Kilometre Array Observatory* ("Convention"),

which would establish the new intergovernmental organisation, to be called the "SKA Observatory".

1.2 The Department now requests our opinion and input on the text of the draft Convention and the two Protocols thereto.

2. **DISCUSSION**

2.1 We have scrutinised the text of the draft Convention and the two Protocols thereto pursuant to Chapter 5 of the *Constitutional Handbook for Members of the Executive* ["Handbook"], Chapter 5 of the *Manual on Executive Acts of the President of the Republic of South Africa*¹ and the Constitution of the Republic of South Africa, 1996 ["the Constitution"] and we have indicated certain suggested amendments directly on the text thereof.

2.2 The provisions of the draft Convention and the two Protocols thereto can be briefly summarised as follows:

3. ***Ad Preamble***

The Parties note that the SKA will be a next generation radio telescope facility that has a discovery potential far greater than any previous instrument and they recognise that the scale and ambition of the SKA demand a global effort with long-term investment. The Parties acknowledge the preparatory work done by the Square Kilometre Array Organisation in the establishment of the Square Kilometre Array Observatory ("SKAO").

4. ***Ad Article 1***

This Article defines certain words and expressions which appear in the draft Convention and Protocols.

5. ***Ad Article 2***

This Article establishes the SKAO as an international organisation with legal personality. The SKAO shall have such capacities as may be necessary for the exercise of its functions and fulfilment of its purposes, including—

¹ Par. 5.20(a) requires that all international agreements submitted to the President for approval must have been scrutinised by the Office of the Chief State Law Adviser for consistency with domestic law and appropriate legal drafting.

- (a) to contract;
- (b) to acquire and dispose of immovable and movable property; and
- (c) to institute and be a party to legal proceedings.

The SKAO's Headquarters Country shall be the United Kingdom of Great Britain and Northern Ireland, and the SKAO global headquarters shall be at Jodrell Bank.

6. *Ad Article 3*

The purpose of the SKAO shall be to facilitate and promote a global collaboration in radio astronomy with a view to the delivery of transformational science. The first objective of the global collaboration shall be the implementation of the SKA Project (the "SKA Project").²

7. *Ad Article 4*

This Article provides that all international organisations or States that are a Party to the Convention shall grant the privileges and immunities as set out in the Protocol on Privileges and Immunities of the SKAO, (Annex A), which forms an integral part of the Convention.

8. *Ad Article 5*

The SKA Project shall be designed to be capable of the delivery of transformational science, with a combination of sensitivity, angular resolution, and survey speed far surpassing current state-of-the-art instruments at relevant radio frequencies. The SKA Project shall be delivered in phases, beginning with SKA-1,³ with the active intent to proceed to subsequent phases.

9. *Ad Article 6*

In terms of this Article, the Parties to the Convention shall be the Members of the SKAO and membership shall be open to all States and international organisations.

² According to Article 1 of the Convention, "SKA Project" means "the global effort to build, maintain, operate and ultimately decommission the SKA".

³ According to Article 1 of the Convention, "SKA-1" means "the initial phase of the SKA Project".

10. **Ad Article 7**

According to this Article, the SKAO shall consist of the Council⁴ and a Director-General assisted by staff.

11. **Ad Article 8**

Article 8 provides that the Council shall be the governing body of the SKAO. Each Member shall be represented on the Council by up to two representatives, one of whom shall be the voting representative who shall be authorised to act and vote on its behalf. Representatives may be assisted by advisers. The Council shall be responsible for the overall strategic and scientific direction of the SKAO, its good governance, and the attainment of its purposes. It shall have all necessary and proper authority to discharge effectively its responsibilities.

12. **Ad Article 9**

In terms of Article 9, the Council shall appoint a Director-General for a fixed period and may terminate the appointment at any time in accordance with Staff Regulations to be approved, by decision, by the Council. The Director-General shall act as the chief executive officer of the SKAO and shall be duly authorised as its legal representative. The functions of the Director-General are also set out in this Article.

13. **Ad Article 10**

13.1 This Article provides that Members and Associate Members shall make financial contributions in accordance with Funding Schedules⁵ that are approved by the Council in accordance with the Financial Protocol of the SKAO, (Annex B), which forms an integral part of the Convention. Members and Associate Members shall have shares in the SKA Project proportional to their cumulative committed financial contributions to the SKA Project.

13.2 With regard to provisions that will have financial implications for the Republic of South Africa, we bring the Department's attention to the Public Finance Management Act, 1999 (Act No. 1 of 1999), which, *inter alia*, regulates financial management in the national government and was passed in order to ensure that all revenue, expenditure, assets and liability of government are managed efficiently and

⁴ According to Article 1 of the Convention, "Council" means "the governing body of the SKAO, which consists of up to two representatives of each Member".

⁵ According to Article 1 of the Convention, "Funding Schedule" means "a schedule that prescribes financial contributions, and terms and conditions, of Members and Associate Members for the construction and operation of the SKAO".

effectively, and to provide for the responsibilities of persons entrusted with financial management of the government. Section 38 thereof specifically provides for the general responsibilities of the accounting officers, and the relevant provisions thereof read as follows:

- "38. (1) The accounting officer for a department, trading entity or constitutional institution—**
(a) ...
(b) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;"

It is therefore clear that the accounting officer of the Department will be responsible and accountable for any funds paid out in terms of the Convention. We assume that such funds have been or will be provided for within the Departmental budget

14. Ad Article 11

The SKAO shall have an Intellectual Property Policy ("Policy"), approved by the Council by unanimous vote, The Policy shall ensure that intellectual property is managed to minimise intellectual property-related risk and cost to the SKAO. The Council may decide to grant access to foreground intellectual property through the grant of non-exclusive, worldwide, royalty-free, perpetual, and irrevocable sub-licences to SKA contributors, under which they will be permitted to use those innovation and work products, subject to obtaining appropriate licences under existing background intellectual property rights and third party intellectual property rights, for SKA Project purposes and other non-commercial research and education purposes, provided that such sub-licences should not cover activities undertaken by sub-licensees in competition with the owner of the foreground intellectual property.

15. Ad Article 12

A Procurement Policy shall be approved by the Council by unanimous vote and any amendment by the Council of the Procurement Policy shall require a two-thirds majority, except for those provisions that have been identified in the policy as requiring unanimity to be amended. Procurement shall be implemented based on principles of Fair Work Return⁶, equity, transparency and competitiveness.

16. Ad Article 13

This Article provides that the SKAO shall conduct its operations in accordance with

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The expression "Fair Work Return" is defined in Article 1 of the Convention.

the Operations Policy, as approved by the Council by unanimous vote. Any amendment by the Council of the Operations Policy shall require a two-thirds majority, except for those provisions that have been identified in the policy as requiring unanimity to be amended.

17. Ad Article 14

This Article provides for the settlement of disputes.

18. Ad Article 15

This Article provides for the amendment to the Convention.

19. Ad Article 16

Ten years after the date that the Convention enters into force, any Member may at any time withdraw from the Convention, by giving written notice of its withdrawal to the depositary. Withdrawal shall be allowed on the condition that the withdrawing Member has fulfilled its obligations, unless the Council decides to waive such obligations. A withdrawing Member shall have no claim on the assets of the SKAO or on the amount of the financial contributions it has already made.

20. Ad Article 17

The Council may decide, by a unanimous vote, to terminate the Convention at any time. Upon termination, the SKAO shall be dissolved and cease to exist as an International Organisation. Any assets shall be liquidated and any proceeds distributed among Members *pro rata* to the contributions they have made since becoming Members.

21. Ad Article 18

This Article provides that when the Council decides that a Member has failed to fulfil its obligations arising out of the Convention, including the payment of financial contributions, it shall be called upon by the Council to rectify the failure. If the said Member does not respond to the Council's request in the time imparted to it, the Council voting rights of that Member shall be automatically suspended.

22. **Ad Article 19**

22.1 This Article deals with the signature, ratification, acceptance, approval, association and entry into force of the Convention. In this regard, we wish to draw the Department's attention to section 231 of the Constitution which provides as follows:

"(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

22.2 We now turn to the relevant provisions of section 231 of the Constitution, which we have quoted in full above. The Department's attention is drawn specifically to section 231(3) of the Constitution which deals with international agreements of a technical, administrative or executive nature. According to Chapter 5 (par 5 on page 44) of the Handbook, technical, administrative and executive agreements are agreements which—

- (a) are departmental specific;
- (b) are of no major political or other significance;
- (c) have no financial consequences; and
- (d) do not affect domestic law.

22.3 These agreements flow from the everyday activities of government departments and are often drafted in a simplified form. Dugard, J⁷ acknowledges that there may be disputes regarding the precise meaning of the terms "technical", "administrative" or "executive", in the context of treaty law, but he indicates that, ultimately, it is a **question of intention**. He states that "[w]here parties intend that an

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In his book, *"International Law: A South African Perspective"*, Third edition (2005), at page 60.

agreement is to come in force immediately, without ratification, at the international level, it would be ridiculous for the South African Parliament to insist on parliamentary approval". Dugard⁸ further confirms the approach that "these terms refer to agreements of a routine nature, flowing from the daily activities of government departments". This was further confirmed by the court in *Earthlife Africa Johannesburg and Another v Minister of Energy and Others (19529/2015) [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC)*, at paragraph 114, where the court described international agreements of a technical, administrative or executive nature as "...run of the mill agreements (or as Professor Dugard puts it, agreements 'of a routine nature, flowing from the daily activities of government departments'...), which would not generally engage or warrant the focused attention or interest of Parliament...".

22.4 Paragraph 2 of Article 19 of the Convention provides as follows:

"This Convention shall be subject to **ratification**, acceptance or approval by the States listed in paragraph 1 in accordance with their domestic requirements. It shall enter into force thirty days after the date on which instruments of **ratification**, acceptance or approval have been deposited by Australia, the Republic of South Africa, United Kingdom of Great Britain and Northern Ireland and two other signatories.". (Our emphasis)

22.5 Article 19 of the Convention, in our opinion, implies that the relevant States have agreed that the Convention must be ratified (or formally accepted or approved) by the States. Section 231(3) of the Constitution specifically excludes agreements that require ratification. In this regard, we draw the Department's attention to paragraphs 5.6 to 5.8 of the *Manual on Executive Acts of the President of the Republic of South Africa*, which read as follows:

"Departments should not lightly determine that such agreements requiring ratification or accession are 'technical, administrative or executive'. Failure to allow Parliament to ratify an agreement might result in a defect in the conclusion of agreement.

Although there is no rule as to which types of agreement require ratification or accession, **this requirement is generally stated in the text of the agreement. As a general guideline this applies normally to multiparty agreements,**⁹ although in some cases such procedure could also be required for bilateral agreements.

⁸ Dugard *op cit.* at page 61.

⁹ See also Dugard *op.cit.* at page 408 where the author remarks that "[f]ormal agreements, particularly multilateral agreements, normally require ratification in addition to signature."

The procedure for remitting such agreements to Parliament for its approval has been established in accordance with the analogous provisions of the Interim Constitution. There is no reason to depart from the procedure followed in respect thereof. ... In accordance therewith, the department responsible for the processing of the international agreement will submit such agreement by way of a cabinet memorandum to the Cabinet, for its consent to the submission of the agreement to Parliament, for the purpose of ratification or accession."(Our emphasis)

22.6 In view of the aforesaid, we are of the opinion that the Convention must be ratified in terms of section 231(2) of the Constitution.

23. *Ad Article 20*

In terms of this Article, the Government of the United Kingdom of Great Britain and Northern Ireland shall be the depository for the Convention.

24. *Ad Annex A-Protocol on Privileges and Immunities of the Square Kilometre Array Observatory*

This Annex consists of the *Protocol on Privileges and Immunities of the Square Kilometre Array Observatory*. We will briefly deal with the relevant provisions of this Protocol:

25. *Ad Article 1 of the Protocol*

This Article defines words and expressions which appear in the Protocol.

26. *Ad Article 2 of the Protocol*

Within the scope of its official activities, the SKAO shall have immunity from legal process¹⁰ except in certain listed circumstances.

27. *Ad Article 3 of the Protocol*

The Premises¹¹ of the SKAO shall be inviolable and any person having the authority to enter any place under any legal provision shall not exercise that authority in respect of the Premises unless permission to do so is given by the Director-General or by the head of the Premises designated by the Director-General and acting on the Director-General's behalf.

¹⁰ The expression "Immunity from legal process" is defined in Article 1 of the Protocol.
¹¹ The word "Premises" is defined in Article 1 of the Protocol.

28. ***Ad Article 4 of the Protocol***

This Article provides that, within the scope of its official activities, the SKAO, its assets, property, income, gains, operations and transactions shall be exempt from all direct taxes, with the exception of the proportion which represents a charge for specific services rendered.

29. ***Ad Article 5 of the Protocol***

The SKAO shall be exempted from value added tax in respect of goods and services (including publications, information material and motor vehicles), which are of substantial value and necessary for official activities. Furthermore, the SKAO shall be exempted from duties (whether for customs or excise) and taxes on the importation of goods, including publications, which are of substantial value, imported by it for its official use. With regard to the exemption of duties and taxes insofar as it relates to South Africa, we assume that the Department has consulted the South African Revenue Service.

30. ***Ad Article 6 of the Protocol***

This Article provides that goods which are acquired or imported under Article 5 of the Protocol shall not be sold, given away, hired out or otherwise disposed of in the territory of a Member State unless that Member State is informed beforehand and any relevant duties and taxes are paid and any conditions agreed with that Member State are complied with.

31. ***Ad Article 7 of the Protocol***

31.1 This Article deals with the privileges and immunities to be enjoyed by the staff and the Director-General of SKAO. Insofar as this relates to the Republic of South Africa, we wish to draw the Department's attention to section 5(3) of the Diplomatic Privileges and Immunities Act, 2001 (Act No.37 of 2001) ["DPI Act"] which provides that "[a]ny **organisation** recognised by the Minister¹² for the purposes of this section and any official of such **organisation** enjoy such privileges and immunities **as may be provided for in any agreement** entered into with such **organisation** or as may be conferred on them by virtue of section 7 (2)." Section 7 of the DPI Act provides as follows:

¹² Since the DPI Act is silent on the manner in which the Minister must recognise the organisation, we suggest that this be done by way of a notice in the *Gazette* prior to the commencement of the Convention.

"7. Conferment of immunities and privileges

(1) Any agreement whereby immunities and privileges are conferred to any person or organisation in terms of this Act must be published by notice in the *Gazette*.

(2) The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the *Gazette*."

31.2 On a proper reading of section 7(2) of the DPI Act, it should be evident that since an agreement as contemplated in section 7(1) will indeed be entered into, section 7(2) is not applicable. However, the provisions of section 7(2) of the DPI Act, insofar as it relates to the conferment of immunities on a spouse of a head of state, were considered in *Democratic Alliance v Minister of International Relations and Co-operation and Others*.¹³ In this decision the Court *inter alia* held that the spouse of a head of state does not automatically qualify for immunity from prosecution by virtue of her status as a spouse of a head of state in terms of customary law. This decision will therefore only be relevant where the spouse of a head of a Member State of the SKAO should visit the Republic of South Africa.

31.3 In terms of section 1 of the DPI Act, the word "organisation", where it appears in sections 59(3) and 7 of the DPI Act, means "an intergovernmental organisation of which two or more states or governments are members and which the Minister has recognised for the purposes of this Act". As pointed out in paragraph 1.1 above, the SKA Observatory is an intergovernmental organisation¹⁴ established under the Convention. The Department's attention is further drawn to section 7(1) of the DPI Act which provides that "[a]ny agreement [*in casu* the Convention] whereby immunities and privileges are conferred to any person or **organisation** in terms of this Act **must be published by notice in the Gazette**."

32. Ad Article 8 of the Protocol

32.1 This Article deals with privileges and immunities of representatives of Member States. The matter of the *Democratic Alliance v Minister of International Relations and Co-operation and Others* is relevant to the implementation of Article 8. Following an alleged assault by Dr Mugabe, the Embassy of Zimbabwe communicated with the

¹³ 58755/17 [2018] ZAGPPHC 534.

¹⁴ See also Article 2 of the Convention which deals with the status of the Convention.

Department of International Relations and Cooperation that the Embassy wishes to invoke diplomatic immunity for Dr Mugabe on the basis that she had travelled to South Africa as part of an official Zimbabwean delegation to attend a SADC summit. The Minister for International Relations and Cooperation ("Minister"), advanced two reasons for conferring or recognising diplomatic immunity on Dr Mugabe, namely:

- (a) Dr Mugabe automatically qualified for immunity from prosecution by virtue of her status as the spouse of a head of state in terms of customary international law; and
- (b) it was in the national interests of South Africa that such immunity be conferred upon Dr Mugabe in terms of section 7(2)¹⁵ of the DPI Act.

32.2 Two issues emerged in the matter. Firstly, whether it is a principle of customary international law that a spouse of a head of state enjoys immunity. Secondly, if a spouse of a head of state does not enjoy immunity, was the decision of the Minister to confer immunity to Dr Mugabe constitutional and lawful.

32.3 Government, relying on foreign judgments, concluded that immunity is extended to the spouse of a head of state. According to the Court the pronouncements by the Swiss Federal Tribunal in 1989¹⁶ provide that heads of state enjoy personal immunity at all times, which is absolute and a customary norm. The Court explained that while great reliance was placed on this judgment by Government two other authorities from the United States of America were also relied upon, namely *Kline v Kaneko*¹⁷ and *Kilroy v Windsor (Prince Charles, the Prince of Wales) and Others*¹⁸ in order to support the conclusion that immunity is extended to the spouse of a head of state.

32.4 The High Court observed that in the United States judgment it was found that "[u]nder general principles of international law, heads of State and immediate members of their families are immune from suit. The United States follows that rule and implements it by the filing of a suggestion of immunity". This pronouncement,

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7. Conferment of immunities and privileges.

- (1) Any agreement whereby immunities and privileges are conferred to any person or organisation in terms of this Act must be published by notice in the *Gazette*.
- (2) The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the *Gazette*.

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Marcos and Marcos v Federal Department of Police 102 ILR 198 Federal Tribunal (Switzerland, 1989) at 201.

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141 Misc. 2d 787 (1988) at 788.

¹⁸

1978 ILR, Vol 81, p 605-607.

according to our Court is wide ranging and covers everyone that is part of the family of a head of state.

32.5 However, the High Court found that while this judgment was invoked on behalf of a spouse of a head of state, a factor that must be kept in mind is that this judgment fell within the jurisdiction of the United States where courts tend to show extensive if not absolute deference to decisions of the executive to grant immunity to the official or the spouse. The Court further found that the *Kline* judgment cannot be said to be based on a customary norm, the same is applicable to the other cases from the United States of America as relied upon by Government. According to the High Court the decision taken whether to grant or refuse state immunity is not taken solely on the basis of following a rule of customary international law, but instead reflects domestic choices made for policy reasons. The Court concluded that the judicial precedents indicate that the decision of the executive to grant or refuse immunity illustrates that the courts treat this matter as a matter which falls exclusively within the executive arm of state. This is not the law in South Africa; in South Africa the executive is constrained by the Constitution and national legislation enacted in accordance with the Constitution.

32.6 The High Court held that in terms of the Constitution, the executive can only grant personal immunity to an official from a foreign state if such immunity is derived from a customary norm, the prescripts of an international treaty and national legislation, all of which must be constitutionally compliant. A decision to grant personal immunity which does not fall into these listed categories will not, withstand the test of legality, reasonableness or rationality.

32.7 According to the High Court, the evidence does not support a finding that personal immunity is extended to the family members of a head of a foreign state. Where such immunity was granted, it was on the basis of international comity rather than a principle of customary international law and there is no customary norm to the effect that a spouse of a head of state enjoys immunity from prosecution. Further, even if Dr Mugabe had personal immunity, our law has parted ways with customary international law as allowed by section 232¹⁹ of the Constitution. This departure,

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232. Customary international law

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

according to the Court, is illustrated by the Foreign States Immunities Act, 1981 (Act No. 87 of 1981) ("Foreign States Immunities Act").

32.8 The High Court noted that it is the customary international law which provided the contextual background for the enactment of the Foreign States Immunities Act, in that the legislature must have understood to have had knowledge of the existing customary international law when the Foreign States Immunities Act was enacted. The Court reasoned that the object of the Foreign States Immunities Act is "[t]o 'determine the extent of the immunity of foreign states from the jurisdiction of the courts of the Republic...' and to give effect and some meaning to international customary law."²⁰

32.9 The High Court observed that section 2(1) of the Foreign States Immunities Act provides a broad injunction in terms whereof a foreign state is immune from the jurisdiction of the courts of South Africa except as provided for by Foreign States Immunities Act. One such exception is found in section 6(a) of the Foreign States Immunities Act.

32.10 Section 6²¹ of the Foreign States Immunities Act provides for exceptions where a foreign state²² will not be immune from the jurisdiction of South African courts. In terms of section 6 the head of a foreign state, the government of that foreign state and any department of that government is not immune from the jurisdiction of the courts of South Africa in proceedings relating to the death or injury of any person or damage to or loss of tangible property which was caused by an act or omission in South Africa.

32.11 The High Court found that in terms of section 6(a) of the Foreign States Immunities Act, former President Mugabe would not have enjoyed personal immunity had he been accused of committing an alleged assault as the immunity which could

²⁰ Paragraph 38 of judgment.

²¹ **6. Personal injuries and damage to property**

A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to
 (a) the death or injury of any person; or
 (b) damage to or loss of tangible property,
 caused by an act or omission in the Republic.

²² 1(2) Any reference in this Act to a foreign state shall in relation to any particular foreign state be construed as including a reference to—

(a) the head of state of that foreign state, in his capacity as such head of state;
 (b) the government of that foreign state; and
 (c) any department of that government,
 but not as including a reference to
 (i) any entity which is distinct from the executive organs of the government of that foreign state and capable of suing or being sued; or
 (ii) any territory forming a constituent part of a federal foreign state.

have been afforded to former President Mugabe would have been withdrawn by section 6(a) of the Foreign States Immunities Act. Our law has parted ways with customary international law which section 232 of the Constitution allows for. Therefore, even if it was correct that customary international law is accorded to Dr Mugabe the conclusion that this immunity has been extended in our law is incorrect; this error according to the Court lies in the failure to take note of the Foreign States Immunities Act, which in terms of section 6(a) makes it clear that because former President Mugabe would not have enjoyed immunity his spouse could not have “derived” immunity either.

32.12 With regard to section 7(2) of the DPI Act, which allows for the Minister to confer immunity if it will be in the interest of South Africa, the High Court attempted to ascertain whether immunity was granted to Dr Mugabe in terms of customary international law or on the basis of section 7(2) of the DPI Act. Counsel for Government however submitted that immunity was “recognised” thereby disavowing any reliance on section 7(2) of the DPI Act. In other words, immunity was recognised (in terms of customary international law) on the basis that Dr Mugabe enjoyed automatic immunity by virtue of her status as the spouse of a head of state. The Court found that the facts illustrate that immunity was “conferred” as opposed to “recognised”. According to the Court, the Minister has the power to confer immunity in terms of section 7(2) of the DPI Act. The Court found that counsel for Government not only disavowed any reliance on the decision to confer the immunity but contended that the Minister did no more than recognise the immunity. Counsel further chose not to defend the decision and conceded that the decision to confer immunity on Dr Mugabe does not withstand the scrutiny of lawfulness. The High Court thus declared that the decision in terms of section 7(2) of the DPI Act to recognise Dr Mugabe’s immunity and privileges as published is inconsistent with the Constitution and is reviewed and set aside.

32.13 The most notable implication of the judgment discussed above is that the Court did not discuss nor pronounce on a situation where immunity is lawfully recognised and granted and its impact upon the application of the Foreign States Immunities Act. Thus, our jurisprudence has not been developed in relation to a scenario where immunity is lawfully granted or recognised by the DPI Act and whether the immunity granted will prevail when section 6 of the Foreign States Immunities Act is applied to the same set of facts.

32.14 The facts and to some degree the law relevant to the above is distinguishable to the matter at hand. However, we hold the view that the effect and implications of the judgment has an important bearing on the meaning and implementation of this international agreement.

32.15 In terms of section 3 of the DPI Act, the Vienna Convention on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations, 1963 apply to all diplomatic missions and consular posts and all members of such posts in the Republic. The Conventions, which have been incorporated fully into our domestic law, go on to provide that the “person of a diplomatic agent shall be inviolable”. It provides further that such person “shall not be liable to any form of arrest or detention.” In respect of consular officers, the relevant Vienna Convention states that consular officers “shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority”.

32.16 The issue which arises in respect of the persons referred to in the Agreement is whether the immunity enjoyed as a result of the application of the Vienna Conventions will trump the application of the Foreign States Immunities Act.

32.17 Sections 1(2) and 6 of the Foreign States Immunities Act provide as follows:

“Any reference in this Act to a foreign state shall in relation to any particular foreign state be construed as including a reference to—

(a) the head of state of that foreign state, in his capacity as such head of state;

(b) the government of that foreign state; and

(c) any department of that government,

but not as including a reference to—

(i) any entity which is distinct from the executive organs of the government of that foreign state and capable of suing or being sued; or

(ii) any territory forming a constituent part of a federal foreign state.

...

6. Personal injuries and damage to property.—A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to—

(a) the death or injury of any person; or

(b) damage to or loss of tangible property, caused by an act or omission in the Republic.

32.18 One is able to argue that under the Convention, South Africa would in respect of persons referred to in Article 8 of the Convention, recognise and grant immunity. The extent of the immunity may differ. One is further able to argue that persons referred to in Article 8 fall within the ambit of the definition of “foreign state” as

defined in the Foreign States Immunities Act. When considered against the provision of Article 8 a determination of the meaning of Article 8 and how will it be applied is imperative. Will the provisions of the DPI Act prevail or will the provisions of the Foreign States Immunities Act prevail in the instant where an alleged act or omission is caused in South Africa which results in the death or injury of a person or damage to or loss of tangible property.

33. *Ad Article 9 of the Protocol*

This Article provides that Experts²³ shall enjoy inviolability for all their official papers and documents to the extent necessary for the carrying out of their functions on behalf of the SKAO, including during journeys made in carrying out their functions and Member States shall take measures to facilitate the free movement of Experts in the exercise of their functions, in accordance with domestic law.

34. *Ad Article 10 of the Protocol*

Without prejudice to their privileges and immunities, it is the duty of all persons enjoying privileges and immunities under Articles 7, 8 and 9 to respect the laws and regulations of the Member State in whose territory they operate in their official capacity.

35. *Ad Article 11 of the Protocol*

This Article provides that the privileges and immunities provided for in the Protocol are not established for the personal benefit of those persons in whose favour they are accorded. Their purpose is solely to ensure unimpeded functioning of the SKAO and the complete independence of the persons to whom they are accorded.

36. *Ad Annex B-Financial Protocol on the Square Kilometre Array Observatory*

This Annex consists of the *Financial Protocol on the Square Kilometre Array Observatory*. We shall briefly deal with the relevant provisions of this Protocol.

37. *Ad Article 1 of the Protocol*

This Article defines the expressions "Financial Rules" and "Initial Funding Schedule" where they appear in the Protocol.

²³ The word "Expert" is defined in Article 1 of the Protocol.

38. *Ad Article 2 of the Protocol*

According to this Article, the SKAO shall follow the principles of sound financial management, efficiency, transparency and accountability in the planning and management of financial resources.

39. *Ad Article 3 of the Protocol*

Each Funding Schedule²⁴ shall be approved by unanimous vote of the Council and each Member and Associate Member shall contribute in accordance with the relevant Funding Schedule. Furthermore, a payment schedule, for the purposes of describing minimum cash contributions as well as terms and conditions for any other payments to be made by Members and Associate Members over a prescribed period, shall be submitted by the Director-General for approval to the Council.

40. *Ad Article 4 of the Protocol*

The Council may, by unanimous vote, amend a Funding Schedule at any time, but must do so before the expiry date of the relevant Funding Schedule. No review or amendment of a Funding Schedule may result in a change in the financial contributions to be made by any Member or Associate Member, unless agreed by that Member or Associate Member.

41. *Ad Article 5 of the Protocol*

This Article provides that the proportion of financial contributions made by Members and Associate Members to operations, which include the cost for operations, upgrades and decommissioning, shall be equal to the proportion of financial contributions towards construction. Financial contributions that cause the proportional share for construction and operations to be unequal, and the manner in which they are made, shall be allowed only if agreed by the decision of the Council.

42. *Ad Article 6 of the Protocol*

In terms of Article 6, a double majority shall be required for the approval of budgets by the Council. A double majority is defined as when the same decision is approved by both a two-thirds majority according to weighted voting and a two-thirds majority according to the number of Members present and voting.

²⁴

The expression "Funding Schedule" is defined in Article 1 of the Convention.

43. *Ad Article 7 of the Protocol*

Assets and infrastructure made available by a Host Country in accordance with a host agreement entered into between a Host Country and the SKAO, and incorporated into SKA-1 or any subsequent phase of the SKA Project, shall be valued by a methodology agreed to between the Host Country and the SKAO, and approved by decision of the Council.

44. *Ad Article 8 of the Protocol*

The SKAO may, following approval by the decision of the Council, obtain loans and incur debt, within the limits specified by the Financial Rules. No Member or Associate Member will incur any additional financial obligations to the SKAO, as a result of a decision to obtain a loan or incur debt, without its explicit agreement to incur such a responsibility.

45. CONCLUSION

Subject to our comments above, we are of the opinion that the draft Convention and the Protocols thereto are not in conflict with the domestic law of the Republic of South Africa.

Yours sincerely



**FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
J PIENAAR// J NURSE// B MAKHENE-GADINI**