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THE CONSTITUTIONALISATION OF SOUTH AFRICA'S FOREIGN POLICY

by

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Supervisor: Prof L Chenwi

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To my mom, Matśeliso Lucia

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DECLARATION

I, the undersigned, SEHLOHO FRANCIS MOLOI declare that this thesis is my own unaided work. It is submitted in fulfilment of the requirements for the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

Signature: 

……..
SEHLOHO FRANCIS MOLOI

Date: October 2020

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Ramaseli has a wicked sense of humour! This thesis is a product of love of my family, especially my wife, Misiwe. I shall never be able to repay the debt I owe her for all the sacrifices she made to allow me time and space to spend countless hours on this research. I thank her, my family, friends, colleagues *le Balimo ba ka* for all their encouragement and support. I acknowledge the financial assistance which was partly provided by the Department of International Relations and Cooperation (the Department), Government of the Republic of South Africa to undertake this research. However, the views expressed in this thesis are mine and should not, unless otherwise indicated, be attributable, directly or indirectly to the Department, its officials or the government of South Africa.

The motivation to undertake this study came largely from my 'wonder-full' experiences of more than two decades in the South African public service, particularly in the Department where I acted in many roles as a diplomat responsible for managing South Africa's relations with the outside world; that 'vast external realm, with its important, complicated, delicate, and manifold problems' (to use the words of Justice Sutherland of the United States Supreme Court in the case of *United States v Curtiss-Wright Export Corporation* 299 US 304 (1936) at 320).

The completion of this thesis would not have been possible had it not been for the sterling guidance I received from my supervisor, Professor Lilian Chenwi. I benefitted a great deal from her views, probing questions, and invaluable advice. Her patience, tenacity and attention to the finest details are incredible. At the end of the day, any shortcomings and inadequacies in this thesis remain mine. *Ke leboha ka tsohle. Ke leboha ho menahane. Le ka moso. Nangomso.*

ABSTRACT

Before 1994, the conduct of foreign policy in South Africa was governed by the old English and Roman-Dutch common law and guided by 'doctrines' such as parliamentary sovereignty, 'act of state', and *stare decisis* under a system of government based on racial discrimination, violation of rights, and disdain of international law (to mention but a few). The cumulative effect of apartheid policies and specifically how government interpreted and applied the common law and these doctrines over *foreign policy* matters led to the total exclusion of the courts from adjudicating foreign affairs. Concomitantly, the exclusion of the courts from foreign affairs and the government's opposition to international law squelched any possibility of importing into the foreign policy domain the application of constitutional norms such as rule of law and political accountability, as well as principles such as self-determination and respect for human rights which had come to characterise the international system in the aftermath of WWII. Thus, the conduct of foreign policy in pre-democratic South Africa was rendered non-justiciable and 'unbound' by constitutional norms. That position changed fundamentally in 1994 when South Africa became a constitutional democracy under the rule of law.

This study argues that, since the advent of constitutional democracy in 1994, South African foreign policy has been 'constitutionalised' ('bound' by constitutional norms) and rendered justiciable, and the courts now play an important role in 'supervising' and/or 'controlling' the exercise of foreign policy powers by the political branches (that is, executive and legislative branches). This current position is a radical departure from, and a clear rejection of, how foreign policy was conducted before 1994. At founding, one of the critical issues that confronted the framers of both the 1993 ('interim') and 1996 ('final') constitutions was how democratic South Africa should relate to the international community and what role, if any, this country should play in global politics and what norms, if any, should guide the conduct of

its foreign policy. This issue required serious and careful consideration on the part of the framers because it was clear that, in addition to addressing the domestic malady of apartheid, the other very pressing and equally important political objective was to remodel the image of South Africa in the eyes of the international community; from a pariah (rogue apartheid) state to a cooperative and responsible member in the family of nations. The focus of this study is, therefore, on the relationship between South African foreign policy and the Constitution and the key question is: how should foreign policy be conducted in South Africa which became (in 1994) a constitutional democracy under the rule of law? To answer this question, the study argues that the adoption of a new constitution with a justiciable Bill of Rights fundamentally transformed the entire gamut of the exercise of public power in South Africa, including the exercise of public power in the realm of foreign policy. It points out that the new democratic order brought with it a plethora of norms, values, standards and principles such as supremacy of the constitution, principle of legality, and political accountability which define and set limits on how public power in general and particularly in foreign affairs, should be exercised. It will be demonstrated that since 1994, South African foreign policy - unlike in the apartheid era - is now required to be consistent with the norms, values, standards and principles enshrined in the Constitution such as supremacy of the constitution, rule of law and human rights, and that foreign policy is subject to constitutional-judicial control.

Since 1994, South African courts have been inundated with applications that sought to challenge the very legitimacy or legality of government's conduct in foreign affairs; something unthinkable in the pre-democratic era. In the course of adjudicating these cases, South African courts are alive to the fact that foreign affairs are indeed not the same as domestic affairs and that the 'prudential characteristics' of the former (for example, that diplomacy is a very specialised, delicate and sensitive area for diplomats in which judges lack competence and skill to make decisions) be taken into account when deciding foreign policy cases. However, and

notwithstanding these ‘prudential characteristics’, South African courts are unambiguous about the kind of norms and principles which must, nonetheless, apply to the exercise of foreign policy powers (for example, that the exercise of discretion by the executive in the conduct of foreign policy be rational). What is clear is that the conduct of foreign policy in South Africa can no longer be treated as ‘ordinary politics’ unbound by constitutional norms. In the end, the study identifies what could, arguably, be considered as nascent principles of South African foreign affairs law under the current constitutional-legal order.

LIST OF ABBREVIATIONS

ACHPR	African Charter of Human and Peoples' Rights
ACHR	American Convention on Human Rights
AIC	Amnesty International (Canada)
ANC	African National Congress
ANSF	Afghan National Security Forces
AU	African Union
BCCLA	British Colombia Civil Liberties Association
BORs	Bill of Rights (South Africa)
CP(s)	Constitutional Principle(s)
CSIS	Canadian Security Intelligence Service
DFAIT	Department of Foreign Affairs and International Trade (Canada)
DIPA	Diplomatic Immunities and Privileges Act (37 of 2001) (South Africa)
DIRCO	Department of International Relations and Cooperation (South Africa)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FBI	Federal Bureau of Investigation (United States)
FCA	Federal Court of Appeal (Canada)
GFCC	German Federal Constitutional Court
HRs	Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law

IHRL	International Human Rights Law
IL	International Law
IMF	International Monetary Fund
IR	International Relations
JR	Judicial Review
LTTE	Liberation Tigers of Tamil Eelam
MK	uMkhonto we Sizwe (military wing of the ANC)
NAM	Non-Aligned Movement
NEPAD	New Partnership for Africa's Development
NSA	National Security Agency (United States)
OAU	Organisation of African Unity
RCMP	Royal Canadian Mounted Police
ROIL	Rule of International Law
ROL	Rule of Law
SADC	Southern African Development Community
SACP	South African Communist Party
SACU	Southern African Customs Union
SAPS	South African Police Service
SCA	Supreme Court of Appeal (South Africa)
SCC	Supreme Court of Canada
SOC	Supremacy of the Constitution
SOP	Separation of Powers
UDHR	Universal Declaration of Human Rights
UK	United Kingdom (of Great Britain)
UN	United Nations
UNCHR	United Nations Committee on Human Rights
UNGA	United Nations General Assembly

UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
US	United States (of America)
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WMD	Weapons of Mass Destruction
WTO	World Trade Organisation
WWII	World War II

CHAPTER ONE

INTRODUCTION AND BACKGROUND

1. Introduction

In 1994, South Africa ended the system of apartheid and became a constitutional democracy under the rule of law. The shift from apartheid to democratic rule was radical and revolutionary. It brought about, among other fundamental and far-reaching changes, a brand new way of how public power was to be exercised under a supreme constitution with a justiciable Bill of Rights (BORs). One of the most important areas of governmental responsibility which underwent radical transformation was the conduct of foreign policy.

During the negotiations for an alternative political dispensation (1990-1993), it was clear that the framers of the 'interim' Constitution[1] were not only focused on addressing the domestic malady of apartheid (racial discrimination, inequality and violation of rights, among others), but they also aimed at remodelling the face of South Africa in the eyes of the international community from a pariah (rogue) state[2] to a cooperative and responsible member in the family of nations.[3] In the context of the latter objective, the manner in which the new democratic

[1] The Constitution of the Republic of South Africa, Act 200 of 1993 ('the interim Constitution' or 'the 1993 Constitution') came into effect on 27 April 1994 (and has been repealed). The Constitution of the Republic of South Africa, 1996 ('the 1996 Constitution') came into effect on 4 February 1997. In this study, the 1993 Constitution will simply be referred to as the 'interim Constitution' while the 1996 Constitution will be referred to as 'the Constitution'. However, in some cases, and for the purposes of clarity, the 'interim Constitution' will specifically be referred to as 'the 1993 Constitution' while 'the Constitution' will specifically be referred to as 'the 1996 Constitution'.

[2] R Pfister 'Studies on South Africa's foreign policy after isolation' in W Carlsnaes & P Nel (eds) *In Full Flight: South African Foreign Policy After Apartheid* (2006) 23, 23 (hereinafter Carlsnaes & Nel (eds)); C Alden & G le Pere 'South Africa's post-apartheid foreign policy' in Carlsnaes & Nel (eds)(note 2 herein) 50, 51; J Dugard 'South Africa and international law: A historical introduction' in J Dugard, M du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law: A South African Perspective 5th ed* (2018) 23, 24 (hereinafter Dugard *et al* (eds)).

[3] *Minister of Justice and Constitutional Development & Others v Southern Africa Litigation Centre & Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA) (*Al Bashir (SCA)*) at para 63.

government was to design, manage and conduct its foreign policy (from 1994 onwards) was expected to be radically different from the way the erstwhile apartheid government designed, managed and conducted its foreign policy during the 'horrendous years'[4] of 1948 to 1990. Specifically, a democratic government was expected to conduct its foreign policy in a manner that portrayed South Africa as a cooperative member of the family of nations and committed to protection and promotion of human rights and respect for the rule of (international) law.

Since the two post-apartheid constitutions came into effect, South African courts have been inundated with applications from various people and organisations seeking to challenge, for the first time in the history of South African constitutional foreign affairs law, the legitimacy or legality of certain foreign policy decisions taken and/or pursued by the South African government. Some of these cases involved, for example, the 'rendition' of a 'terror suspect', Khalfan Khamis Mohamed (accused of masterminding the bombings of the US embassies in Nairobi and Dar-es-Salam in 1998) to the US where he faced the real possibility of a death sentence for capital crimes he was charged with;[5] the 'denial' of an entry visa to the Dalai Lama in the context of the 'sensitive' South Africa-China relations;[6] the decision to set in motion the implementation of the proposed South Africa-Russia nuclear deal without proper public participation in the process;[7] the decision to allow then President Al Bashir (who is wanted by the International Criminal Court (ICC) for war crimes, crimes against humanity and genocide) to enter and leave South Africa and even when ordered by the North Gauteng High Court (South Africa) to arrest him while he was in the country pursuant to the ICC warrants as required under South African and international law, the government deliberately refused to do

[4] The words, 'horrendous years' are used by C Tomuschat 'International law and foreign policy' (2009) 34 *DAJV* 166, 166 when he describes the period when Germany was under Nazi rule (1933-1945).
[5] *Mohamed & Another v President of the Republic of South Africa & Others (Society for the Abolition of the Death Penalty in South Africa & Another)* 2001 (3) SA 893 (CC).
[6] *Buthelezi & Another v Minister of Home Affairs & Others* [2012] ZAWCHC 3; *Buthelezi & Another v Minister of Home Affairs & Others* [2012] ZASCA 174; 2013 (3) SA 325 (SCA).
[7] *Earthlife Africa Johannesburg & Another v Minister of Energy & Others* [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (*Earthlife* or the *South Africa-Russia nuclear deal* case).

so;[8] the decision of government to send a note to the United Nations Secretary-General (UNSG) withdrawing South Africa's membership of the Rome Statute of the ICC without obtaining prior parliamentary approval;[9] and the decision of government (President Zuma) to acquiesce to the disbandment of the Southern African Development Community (SADC) Tribunal at the behest of President Mugabe who was unhappy about an earlier adverse decision of the Tribunal against the government of Zimbabwe.[10]

Before 1994, the possibility of challenging, in the courts of law, the *foreign policy* decisions and conduct of the apartheid government on grounds of, for example, irrationality, unlawfulness and illegality was practically unthinkable. However, under the current constitutional-legal order – and as the foreign policy cases discussed in this study will show – the foreign policy of South Africa is now open to challenge in the courts of law on these and other grounds. This study seeks to demonstrate how this phenomenon came about; that is, how the foreign policy of South Africa since 1994 became 'constitutionalised' ('bound' by constitutional norms such as rule of law (ROL) and political accountability of political leaders) and rendered justiciable.

2. Definition of key concepts

It is important to define two key words – 'foreign policy' and 'constitutionalisation' – used throughout this study (that is, what they mean in the context of the study). The definition of 'foreign policy' will provide the reader with a better appreciation of the area of governmental responsibility which is the subject of focus in this study. Specifically, the definition of 'foreign

[8] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others* [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 2 All SA 505 (GP); 2015 (9) BCLR 1108 (GP)(*Al Bashir (HC)*); See also *Al Bashir (SCA)* note 3.

[9] *Democratic Alliance v Minister of International Relations and Cooperation & Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP).

[10] *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZACC 5; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (*SADC Tribunal case*).

policy' will demarcate that area of governmental responsibility which has been the source of much controversy in foreign affairs law and jurisprudence in relation to the question whether governmental conduct in this realm (foreign affairs) is justiciable and bound by constitutional norms.

The definition of the word 'constitutionalisation' will help the reader understand the kind of 'process' which, arguably, has had a profound and transformative impact on how constitutional norms now discipline foreign policy and how that foreign policy should be conducted in the South African *rechtsstaat* post-apartheid. Understanding the term 'constitutionalisation' in the context of this study is also important in distinguishing it from related concepts such as 'constitutionalism', 'legalisation' and 'juridification'.

2.1 Foreign policy

A classical definition of foreign policy is provided by Carlsnaes who defines it as:

> [t]hose actions which, expressed in the form of explicitly stated goals, commitments and/or directives, and pursued by governmental representatives acting on behalf of their sovereign communities, are directed towards objectives, conditions and actors – both governmental and non-governmental – which they want to affect and which lie beyond their territorial legitimacy.[11]

A much broader, yet succinct definition, but which also incorporates the details of Carlsnaes' definition is provided by Hill, who defines foreign policy as '[t]he sum of official external relations conducted by an independent actor (usually a state) in international relations'.[12] Some scholars define foreign policy in terms of its purpose and 'operation'. For instance, while

[11]W Carlsnaes 'Foreign policy' in W Carlsnaes, T Risse & B A Simmons (eds) *Handbook of International Relations* (2002) 331, 335 quoted by S Smith, A Hadfield & T Dunne, 'Introduction' in S Smith, A Hadfield & T Dunne (eds) *Foreign Policy: Theories, Actors, Cases 2nd ed* (2012) 2 (hereinafter Smith *et al* (eds)). See also M D Irish & E Frank *US Foreign Policy: Context, Conduct, Content* (1975) 1.

[12] C Hill *The Changing Politics of Foreign Policy* (2003) 3; A van Nieuwkerk 'Foreign policy making in South Africa: Context, actors, and process' in Carlsnaes & Nel (eds) note 2, 37.

Needler understands foreign policy as primarily concerned with '[t]he protection and promotion of national interests',[13] Lerche and Said see foreign policy essentially as '[a] standardised technique of translating the value preferences of a society into a workable frame of governmental action [in foreign affairs]'.[14] The 'operational definition' of foreign policy is given by Irish and Frank.[15] Although the latter authors write about foreign policy in the context of the United States (US), their 'operational definition' would apply to foreign policies of other states as well, including South Africa. This is so because, although the foreign policies of countries differ, they are nonetheless aimed at achieving more or less similar beneficial advantages for the countries concerned. In the context of the US, Irish and Frank state that,

> [T]he foreign policy of the United States refers to the *courses of action* which *official U.S. policy makers* determine to take, *beyond the territorial jurisdiction* of the United States, *in order to secure, and to enhance the power and prestige* of the United States in world affairs.[16]

The common thread that runs through the definitions of foreign policy stated above suggests that foreign policy should be understood in terms of governmental conduct, actions, objectives and goals directed at actors (that is, states and other organisations and institutions) beyond the territorial boundaries of the state *outside* the domestic jurisdiction of the acting state. However, to think of foreign policy solely in terms of actions of a state beyond its territorial jurisdiction is inchoate. Although foreign policy[17] refers largely to the state's actions beyond its territorial jurisdiction, there is a very close connection between 'foreign' policy and 'domestic' policy.

[13] M C Needler *Understanding Foreign Policy* (1966) 4.
[14] C O Lerche & A A Said *Concepts of International Politics* (1963) 4. See also R C Macridis 'Introductory remarks' in R C Macridis (ed) *Foreign Policy in World Politics 8th ed* (1992) 5-6.
[15] Irish & Frank note 11, 1.
[16] Ibid. Emphasis added.
[17] The word 'foreign' is derived from the Latin 'foris' meaning 'outside'; Hill note 12.

In fact, the two are inextricably intertwined.[18] According to Barber,[19] foreign policy '[i]s shaped by the interaction and overlapping of "domestic" and "external" concerns'.[20]

For the purposes of this study, foreign policy will not be limited to or understood only in terms of any one specific definition provided by Carlsnaes or Hill or Needler or Lerche and Said, or Irish and Frank. As far as this study is concerned, it could be argued that there is no material difference between and among these definitions that could warrant a commitment to one specific definition that could be employed in this study. In any event, the South African government defines and describes its foreign policy by reference to all the elements contained in the definitions provided by the authors cited above.[21] In the circumstances therefore and for the purposes of this study, the term 'foreign policy' will be understood to refer to all those actions and decisions taken by the South African government at home and/or abroad with the purpose, goal and objective of influencing or affecting actors (governmental and non-

[18] P Bajtay 'Democratic and efficient foreign policy?' (2015) 11 *EUI* (Robert Schuman Centre for Advanced Studies) (Working Papers) 2.

[19] J Barber 'Conceptualising for a democratically based South African foreign policy' in A J Venter (ed) *Foreign Policy Issues in a Democratic South Africa*, Papers from a Conference of Professors World Peace Academy (South Africa) (20-21 March 1992) 6.

[20] See also E J Meehan 'The concept "Foreign Policy"' in W F Hanrieder (ed) *Comparative Foreign Policy: Theoretical Essays* (1971) 284.

[21] For a detailed discussion and definition of South Africa's foreign policy after 1994, see N Mandela 'South Africa's future foreign policy' (1992-93) 72 *Foreign Affairs* 86; E Sidiropoulos (ed) *South Africa's Foreign Policy 1994-2004: Apartheid Past, Renaissance Future* (2004); R Suttner 'South African foreign policy and the promotion of human rights' in G le Pere, A van Nieuwkerk & K Lambrechts (eds) *Through a Glass Darkly? Human Rights Promotion in South Africa's Foreign Policy*, Proceeding of a Workshop convened by the Foundation for Global Dialogue on 13 August 1996 in conjunction with the South African Parliamentary Portfolio Committee on Foreign Affairs, FGD Occasional Paper No. 6, (1993) 16; G Mills 'Leaning all over the place? The not-so-new South Africa's foreign policy' in H Solomon (ed) *Fairy Godmother, Hegemon or Partner? In Search of a South African Foreign Policy* ISS Monograph Series No. 13 (1997) 23; A Johnston 'Democracy and human rights in the principles and practice of South African foreign policy' in J Broderick, G Burford & G Freer (eds) *South Africa's Foreign Policy: Dilemmas of a New Democracy* (2001) 11, 24; R Henwood 'South Africa's foreign policy: Principles and problems' in Solomon (ed) (note 21 herein) 3; J Spence 'South Africa's foreign policy: Vision and reality' in Sidiropoulos (ed) (note 21 herein) 35, 38-39; A Habib & N Selinyane 'South Africa's foreign policy and a realistic vision of an African century' in Sidiropoulos (ed) (note 21 herein) 49, 49-60; A Habib 'South Africa's foreign policy: Hegemonic aspirations, neoliberal orientations and global transformation' (2009) 16 (2) *SAJ Int'l Affairs* 143, 145; P Nel & J van der Westhuizen 'Democracy and "policies beyond the state"' in P Nel & J van der Westhuizen (eds) *Democratising Foreign Policy? Lessons from South Africa* (2004) 1, 8; I Taylor 'The democratisation of South African foreign policy: Critical reflections on an untouchable subject' in Nel & Van der Westhuizen (eds) (note 21 herein) 23, 27; P Nel, J van Wyk & K Johnsen 'Democracy, participation and foreign policy making in South Africa' in Nel & van der Westhuizen (eds) (note 21 herein) 39, 49; A van Nieuwkerk 'South Africa's national interest: Essay' (2004) 13(2) *African Security Review* 89; Van Nieuwkerk note 12, 37-49; and Alden & Le Pere note 2, 50-63.

governmental) situated outside the borders of the state in pursuit of its national interests (however defined) in the context of the conduct of its international relations. The crux of the argument in this study is that it is this area of governmental responsibility (foreign policy) defined above which was, before 1994, non-justiciable and 'unbound' by constitutional norms, but which is now justiciable and 'bound' by these norms under the current constitutional-legal order.

2.2 Constitutionalisation

The concepts of constitutionalism and constitutionalisation are 'rather vague terms'[22] and are often used interchangeably. Although they are closely associated, they carry different meanings. Milewicz opines that, while constitutionalism denotes a 'mindset' and more specifically defined characteristics of modern constitutions comprising both formal and substantive elements, constitutionalisation denotes 'an underlying process' that encompasses 'the emergence, creation, and identification of constitution-like elements' in a system.[23] Reinolds makes a similar distinction between constitutionalism and constitutionalisation by suggesting that, while the former evokes the idea of '[t]aming politics through the force of law'[24] whereby governmental action is specifically disciplined by precise norms and standards (such as accountability and transparency), the latter denotes an 'ongoing struggle [or process] over the allocation of authority, the interpretation of norms, and the balancing of conflicting interests.'[25]

[22] C Mattheis 'The system theory of Niklas Luhman and the constitutionalisation of the world society' (2012) 4(2) *Goettingen J Int'l L* 625, 626.
[23] K Milewicz 'Emerging patterns of constitutionalisation: Towards a conceptual framework' (2009) 16(2) *Indiana J Global Legal Studies* 413, 420. See also Mattheis note 22, 627.
[24] T Reinolds 'Constitutionalisation? Whose constitutionalisation? Africa's ambivalent engagement with the international criminal court' (2012) 10(4) *IJCL* 1076, 1105.
[25] Ibid, 1077.

A much more pointed definition of the term 'constitutionalisation' is provided by Mattheis[26] and Loughlin[27] who both see constitutionalisation as an attempt to subordinate, subject and bind governmental action or conduct - in the context of this study, governmental action or conduct in foreign affairs - to the discipline of constitutional norms, values, principles, structures, processes, standards, and procedures.[28] The broader definition of the concept is provided by Kammerer who argues that constitutionalisation can also be seen as the 'politicisation of the law'[29] or 'juridification of politics'.[30]

It is important however to note that constitutionalisation should not be regarded as synonymous to 'legalisation'.[31] According to Milewicz:

> [A]lthough both concepts refer to the process of creating legal arrangements, they differ with regard to the type of legal process they induce and the scope of legal arrangements they cover. Legalisation refers to the formal practices creating legal arrangements that gain binding force through bureaucratic details, such as precision, the degree of obligation, and the possibility of delegation. Constitutionalisation, on the contrary, covers a much broader process. It not only refers to the formal process, but also political and social practices that establish law-like rules and institutions in the [international system]. Thus, it raises considerably more substantial questions about the systemic and substantive quality of [international] law.[32]

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[26] Mattheis note 22, 627.
[27] M Loughlin 'What is constitutionalisation?' in P Doubner & M Loughlin (eds) *The Twilight of Constitutionalism?* (2010) 47, 47.
[28] See A Kammerer 'Kelsen, Schmitt, Arendt, and the possibilities of constitutionalisation in (international) law: Introduction' (2010) 23 *Leiden J Int'l L* 717, 717.
[29] Ibid, 720.
[30] Ibid. See L C Blichner & A Molander 'What is juridification?' *Arena Centre for European Studies*, Univ Oslo, Working Paper No. 14 (March 2005) 2; C Maas 'An introduction to "juridification"' in C Maas (ed) *Juridification in Europe: The Balance of Power Under Pressure?*, European Legal Forum (2012) 3-7 available at http://www.liberalforum.eul.4; M Bevir 'Juridification and democracy' (2009) 62 *Parliamentary Affairs* 493 at 493 who sees juridification largely as the growth of the judiciary's sphere of influence in recent constitutional history; M C Tolley 'Juridification in the United Kingdom', Paper prepared for delivery at the IPSA World Congress, Madrid, Spain 8-11 July 2012 available at https://www.ipsa.org/resources/conference-proceedings; H W Arthurs & R Kreklewich 'Law, legal institutions, and the legal profession in the new economy' (1996) 34(1) *Osgoode Hall L R* 29.
[31] Milewicz note 23, 421.
[32] Ibid.

For the purposes of this study, the term 'constitutionalisation' will be understood in terms of the key elements of the definitions provided by Mattheis, Laughlin and Milewicz, which are that constitutionalisation involves an attempt to subordinate and 'bind' governmental action and the exercise of all types of public power and in the context of this study, governmental action or exercise of public power in the realm of foreign affairs '[t]o constitutional [norms], structures, [standards], processes, principles and values'.[33]

In this study, the argument that South Africa's foreign policy has been 'constitutionalised' and is justiciable would, under the current constitutional-legal order entail, among other practical considerations, the ideas that South African foreign policy: (a) should be perceived, formulated and conducted within a particular normative framework of constitutional norms, values and principles enshrined in the Constitution and be disciplined by formal procedures;[34] (b) should be consistent with the main tenets of modern liberal-legal constitutionalism such as the principle of legality and transparency and that in the conduct of that foreign policy, government should be more focused, effective and coherent in its foreign policy goals, 'more responsive to its stakeholders, and more accountable to its citizens';[35] (c) should no longer be considered an exclusive domain of the executive and politicians who think of it (foreign policy) simply as 'ordinary politics' untouched by fundamental norms, moral principles and questions of legality; and (d) should be rational and conducted in a manner that does not violate citizens' rights.[36] A constitutionalised foreign policy which is understood in these terms will help South African foreign policy-makers, analysts, diplomats and state functionaries appreciate the fundamental differences between how foreign policy was

[33] Mattheis note 22, 627; Kammerer note 28, 717; Loughlin note 27, 47.
[34] Loughlin note 27, 61.
[35] Ibid, 62.
[36] Ibid.

conducted under apartheid and how it should be conducted today in a constitutional democracy under the ROL.

3. The focus of the study

The central focus of this study is the relationship between South African foreign policy and the Constitution.[37] The question whether there is a 'relationship' between foreign policy on the one hand and the constitution on the other, meaning, whether the former should be justiciable, 'bound' and 'disciplined' by constitutional norms (such as judicial review (JR) and ROL) emanating from the latter, or whether the courts should have a role in 'supervising' or 'adjudicating' the exercise of foreign policy powers is a subject of much controversy and disagreement among legal scholars, judges and politicians.

The core issue to this controversy stems from two important considerations. The first consideration relates to the idea that foreign policy is different from domestic policy and that the two domains, by definition, are located on opposite ends of the territorial jurisdiction of the state; that is, domestic policy lies *within* while foreign policy lies *outside* the borders of the state. Given their different *loci*, some legal scholars[38] argue that foreign policy and domestic policy should be kept separate and should therefore not be 'bound' and 'disciplined' by norms, values, standards and principles contained in the national constitution (the existential tension between *realpolitik* and constitutional-legal norms). The second consideration has to do with the practice in almost all countries where foreign policy is and has, for all intents and purposes, historically and legally, been the province of the political branches, that is, executive and legislative (with the former in the lead). It is for this reason therefore, that the issue of the

[37] Although this study refers from time to time, and for purposes of providing context and background to the 1993 Constitution (now repealed), the focus of the study in relation to the post-apartheid era is on the 1996 Constitution.
[38] J Nzelibe 'The uniqueness of foreign affairs' (2004) 89 *Iowa L R* 941, 941; R H Knowles 'American hegemony and the foreign affairs constitution' (2009) *Ariz L J* 1, 29; G F Kennan 'Morality and foreign policy' (1985-86) 64 *Foreign Affairs* 205, 208; D Abebe & E A Posner 'The flaws of foreign affairs legalism' (2011) 51 *Va J Int'l L* 507, 508.

judiciary (or the courts) having a role in and adjudicating foreign policy matters has been problematic and controversial. There is no uniformity of practice between and among various countries around the world on whether the area of governmental responsibility which lies 'beyond the water's edge'[39] should be bound and disciplined by the same constitutional norms, or whether the courts should play a role in that area of governmental responsibility (foreign affairs).[40]

This study will show that, before 1994, the conduct of foreign policy or the exercise of public power in the realm of foreign affairs in South Africa was not justiciable; was not 'bound by' constitutional norms; and the courts played no role in the adjudication of foreign policy matters. This was so because the conduct of foreign policy was governed by certain 'doctrines' (for example, 'act of state', separation of powers (SOP) and *stare decisis*) the operation/ interpretation/ application of which (by successive apartheid governments) had effectively excluded the courts from adjudicating foreign policy matters. The non-justiciability of foreign policy and the exclusion of courts from this realm of governmental responsibility led to a situation where it was impossible to import into the foreign policy domain the discipline of constitutional norms such as protection of human rights (HRs) and respect for the rule of (international) law (RO(I)L). That position changed radically in 1994.

This study argues that, the advent of a constitutional democracy in South Africa – where, for example, canons of accountability, legal justification, rationality, and respect for the RO(I)L became the new anvil of public power - marked a radical departure from, and a clean break with how foreign policy was conducted in the pre-democratic era.[41] The core of this study

[39] Term used by A Slaughter-Burley 'Are foreign affairs different?' (1993) 106 *Harv L R* 1980, 1981 (reviewing T M Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (1992).
[40] For a comparative overview of this subject (role of courts in foreign policy matters with reference to the UK, US, Germany and Canada), see chapter two, section 3, of this thesis.
[41] In this study, the terms 'pre-democratic' era (referring to the period from 1948 when apartheid became statute law in South Africa to 1990 when negotiations for an alternative political dispensation commenced), 'apartheid' era, and pre-1994 dispensation (1993 being the year in which the interim Constitution was adopted but before it came into effect in 1994) are used interchangeably. All these terms refer to the period before the interim Constitution came into effect.

entails a comparative analysis between the pre-democratic legal order on the one hand and the post-1993 constitutional-legal order on the other and the implications of these two dispensations for the conduct of foreign policy in South Africa. As far as the pre-democratic era is concerned, the study identifies and discusses the various 'doctrines' (for example, 'act of state') and 'principles' (for example, *stare decisis*) which governed the conduct of foreign policy in South Africa before 1994 and more importantly, how their application effectively excluded the courts from adjudicating foreign policy matters; a phenomenon that engendered a foreign policy which was, for all intents and purposes, non-justiciable and untouched (unbound) by constitutional norms. As far as the post-apartheid period is concerned, the study argues that there are now 'new' doctrines (such as supremacy of the constitution (SOC)), values (such as ROL), principles (such as 'principle of legality'), and other standards, processes and procedures which are pervasively entrenched in the Constitution, the cumulative effect of which is to bring that area of governmental responsibility in the field of foreign policy squarely within the reach and discipline of constitutional norms.

4. Research aims

The aim of this study is four-fold. First, it aims to provide an introductory summary of what could be regarded as South African 'foreign affairs law' during the pre-democratic era and what the study would suggest is emerging as a new body of South African foreign affairs law under the post-1993 constitutional-legal order. Second, and in view of the self-professed commitment by the African National Congress (ANC)-led government since 1994 to conduct a foreign policy 'based on' and 'guided by' constitutional norms, this study evaluates whether this government has been faithful to constitutional norms (such as respect for the ROIL) in the conduct of its foreign policy. Third, this study aims to provide a preliminary guide for South

African foreign policy-makers, diplomats and state functionaries on how foreign policy in a constitutional state, that South Africa became in 1994, ought to be conducted. Finally, this study seeks to discuss the implications of a constitutionalised foreign policy and flag a few policy recommendations which should be considered in order to ensure that the conduct of South African foreign policy in the current constitutional-legal order is consistent with the norms, values and principles enshrined in the country's supreme law, the Constitution.

5. Central assumptions and research questions

The central proposition in this study is that the dawn of constitutional democracy in 1994 - with all the trappings of modern liberal-legal constitutionalism such as SOC, separation of powers (SOP), ROL, human rights (HRs), and international law (IL) - marked a radical shift from the old, pre-democratic, common law-based dispensation where foreign policy was not justiciable, to a new dispensation under a supreme constitution where foreign policy, for the first time in South African history, became justiciable and bound by constitutional norms. Put in simple terms, in addition to its role as a legal document that seeks to redress the *domestic* malady of apartheid by, for example, protecting HRs and defining the constitutional limits of the exercise of public power, the South African Constitution is primarily also a *foreign policy document* aimed at regulating the conduct of South Africa in its relations with the *outside* world.

The proposition that South African foreign policy since 1994 has been constitutionalised and is 'bound' and 'disciplined' by constitutional norms is revolutionary and begs a myriad of questions, key of which is: How should foreign policy be conducted in South Africa which has become a constitutional democracy under the rule of law? Linked to this main inquiry are the following questions: Are foreign affairs justiciable? Are there any norms, values, principles and standards in the Constitution that could arguably be regarded as providing the necessary

guidelines that enjoin the South African government to act in accordance with a certain normative order in the conduct of its relations with other countries? If so, what are these norms, values, principles and standards? What are the implications of basing foreign policy on constitutional norms?

This study has chosen five tenets of constitutionalism, namely, SOC, SOP, ROL, HRs, and (respect for the rule of) IL as 'tools of analysis' to demonstrate how they, not only 'guide' but 'bind' the conduct of foreign policy in South Africa. There are many other tenets of constitutionalism enshrined in the Constitution, which also have a bearing on the exercise of public power, including pubic power in the realm of foreign policy. These include: democracy,[42] accountability,[43] openness,[44] transparency,[45] respect for human dignity,[46] advancement of equality,[47] non-discrimination,[48] and public participation in policy-making.[49]

The five tenets of constitutionalism, that is, SOC, SOP, ROL, HRs, and IL have been chosen on the basis of the following two considerations. The first consideration relates to how South African courts have interpreted and applied the five tenets of constitutionalism in particular, to foreign policy matters and how that interpretation has brought about, in clear and unambiguous terms, a completely 'new' way of understanding how public power in foreign affairs should (or ought to) be exercised in a constitutional democracy. The second consideration has to do with the fact that the chosen tenets of constitutionalism (as well as those mentioned above, for example, human dignity) have been incorporated into South African constitutional law for the first time in the history of this country and have revolutionised the exercise of public power, including public power in the realm of foreign affairs after the end

[42] Constitution, s (1)(d).
[43] Ibid, ss 1(d) and 195(1)(f).
[44] Ibid, s 1(d).
[45] Ibid, s 195(1)(g).
[46] Ibid, s 1(a).
[47] Ibid.
[48] Ibid, ss 1(b) and 195(1)(d).
[49] Ibid, s 195(1)(e).

of apartheid. In the respective chapters of this thesis that deal with each of the five tenets, additional and detailed reasons are provided as to why each of these tenets was chosen as a 'tool of analysis' to prove the central assumption and to answer the key questions in this study.

6. Literature review

There is a plethora of writings on South Africa's foreign policy since 1994.[50] However, most of this literature has been restricted largely to the field of political studies called International Relations (IR). In the field of political studies in general or IR, the focus of much research on South Africa's foreign policy post-1993 has been on issues such as: understanding the foundations and objectives of South Africa's foreign policy;[51] South Africa's relations with the world at large; [52] the challenges and weaknesses of South Africa's foreign policy; [53] understanding South Africa's foreign policy in the context of a democratic dispensation;[54] discussions of major foreign policy concerns during various periods of South Africa's history;[55] successes and/or failures of South Africa's foreign policy in the regional context,[56] in the context of Africa[57] and globally.[58] These and many other writers have concentrated their

[50] See Alden & Le Pere note 2, 50-63; M Frost 'New thinking on "sovereignty", and its implications for analysing South African foreign policy' in Carlsnaes & Nel (eds) note 2, 81-92; D Geldenhuys 'South Africa's role as international norm entrepreneur' in Carlsnaes & Nel (eds) note 2, 93-107; P Nel 'The power of ideas: "Ambiguous globalism" and South Africa's foreign policy' in Carlsnaes & Nel (eds) note 2, 108-121; P Bischoff 'Towards a foreign peacekeeping commitment: South African approaches to conflict resolution in Africa' in Carlsnaes & Nel (eds) note 2, 147-163; I Taylor 'When rhetoric isn't enough: Contradictions in South African foreign policy and NEPAD' in Carlsnaes & Nel (eds) note 2, 164-174; and A Habib & N Selinyane 'Constraining the unconstrained: Civil society and South Africa's hegemonic obligations in Africa' in Carlsnaes & Nel (eds) note 2, 175-191.
[51] Mandela note 21; Alden & Le Pere note 2, 50ff.
[52] T Mbeki 'South Africa's international relations: Today and tomorrow' in G Mills (ed) *From Pariah to Participant: South Africa's Evolving Foreign Relations, 1990-1994* (1994) 203ff.
[53] Henwood note 21, 9; E Sidiropoulos & T Hughes 'Between democratic governance and sovereignty: The challenge of South Africa's African foreign policy' in E Sidiropoulos (ed) note 21, 63; A Klotz 'State identity in South African foreign policy' in Carlsnaes & Nel (eds) note 2, 67-80.
[54] Barber note 19; Frost note 50; Geldenhuys note 50.
[55] J Barber & J Barratt *South Africa's Foreign Policy: The Search for Status and Security 1945-1988* (1990); Nel note 50.
[56] Habib note 21, 143-159.
[57] Habib & Selinyane note 21; Habib & Selinyane note 50; J Spence note 21; Bischoff note 50; Taylor note 50.
[58] P Nel, I Taylor & J van der Westhuizen 'Multilateralism in South Africa's foreign policy: The search for a critical rationale' (2000) 6 *Global Governance* 43, 43-60. T Wheeler 'Multilateral diplomacy: South Africa's achievements' in Sidiropoulos (ed) note 21, 86.

research largely on the analysis and study of South Africa's foreign policy with specific reference to South Africa's role in its relations with other countries, intergovernmental organisations (for example, United Nations (UN), Non-Aligned Movement (NAM), Organisation of African Unity (OAU)/African Union (AU)) and multilateral institutions of global governance such as the World Trade Organisation (WTO), the World Bank (WB), and the International Monetary Fund (IMF). None of these writers has focussed their research in a sustained manner from a *constitutional-legal* perspective. Although analysts such as Barber,[59] Sidiropoulos & Hughes,[60] Zondi,[61] Habib,[62] Ngwenya,[63] Nene,[64] Kumalo,[65] and Pahad[66] write about the significance of HRs, democracy and the ROL (as some of the principles which 'guide' South Africa's foreign policy), their subsequent analyses of that foreign policy is however not from a constitutional-legal perspective, but from the perspective of political studies and/or IR. The approach in this study is different from that of political scientists in the sense that it assesses South Africa's foreign policy through the lens of the Constitution and the tenets of constitutionalism to demonstrate how South African foreign policy since 1994 has been constitutionalised and rendered justiciable; in other words, how South African foreign policy is not only 'guided' but 'bound' by constitutional norms. The writings of these political scientists are nonetheless relevant to this study in the sense that they clarify the area of governmental responsibility (foreign policy) which was, in terms of the key proposition in this study, not justiciable before 1994 (but is now) under the current constitutional-legal order.

[59] Note 19.
[60] Note 53.
[61] S Zondi 'The interests-versus-human rights debate in context: An overview' in S Zondi (ed) *Reconciling National Interests and Values: A Dilemma for South Africa's Foreign Policy* (2010) 5, 5-12.
[62] A Habib 'Principled foreign policy and South Africa's multilateral diplomacy' in Zondi (ed) note 61, 19-25; Habib note 21.
[63] N Ngwenya 'The values-interest debate and South Africa's bilateral diplomacy' in Zondi (ed) note 61, 27-31.
[64] G Nene 'Values and interests in South Africa's foreign policy practice: A practitioner's view' in Zondi (ed) note 61, 33-38.
[65] D S Kumalo 'A principled foreign policy and South Africa's multilateral diplomacy: A perspective' in Zondi (ed) note 61, 39-43.
[66] A Pahad 'Reflections: Progressive values in South Africa's foreign policy since 1994' in Zondi (ed) note 61, 45-50.

In the period before 1994, South African *legal scholarship* had also not produced a significant body of literature dedicated exclusively to the study and analysis of South Africa's *foreign policy* from a constitutional-legal perspective.[67] The reason for paucity of literature in this area of legal scholarship is not hard to find. Before the dawn of democracy, the field of public law that straddled the nexus between IL on the one hand and politically sensitive matters of state conduct on the other was highly neglected and was perceived as unpopular by the judiciary, the academia and the legal fraternity.[68] In fact, pre-democratic constitutions did not provide place for IL in the South African legal order;[69] a phenomenon which led to the total negation, neglect and denial of the application of this body of law[70] over state conduct at the domestic level as well as at the international level. Dugard opines that the open hostility of successive apartheid governments towards IL was rooted in the irreconcilable differences between, on the one hand, the norms, values and principles embodied in various IL instruments which came to characterise the international system in the aftermath of World War II (WWII) (such as self-determination, protection of human rights, freedom, and equality) and the

[67] E Y Ako & R F Oppong 'Foreign relations law in the constitutions and courts of Commonwealth African countries' in C A Bradley (ed) *The Oxford Handbook of Comparative Foreign Relations Law* (2019) 583, 584 state that '[f]oreign relations law is an intriguing, yet under researched aspect of the law in Africa in general, and Commonwealth Africa in particular.'

[68] Dugard in Dugard *et al* (eds) note 2, 26-27; J Dugard 'Kaleidoscope: International law and the South African constitution' (1997) 1 *EJIL* 77, 77 (hereinafter Dugard (1997)); S Gutto 'Values, concepts, principles or rules? Constitutionalisation, subject tributaries, linguistic nuances and the meaning of human rights in the context of international law' (1998) *Acta Juridica* 97, 101-102; T Maluwa 'Human rights and foreign policy in post-apartheid South Africa' in D P Forsythe (ed) *Human Rights and Comparative Foreign Policy: Foundations of Peace* (2000) 250, 270; N Botha & M Olivier 'Ten years of international law in the South African courts: Reviewing the past and assessing the future' (2004) 29 *SAYIL* 42, 42; D Moseneke 'The role of comparative and public international law in domestic legal systems: A South African perspective' (2010) *Advocate* 63, 64; B Meyersfeld 'Domesticating international standards: The direction of international human rights law in South Africa' (2013)(5) *Constitutional Court Review* 399, 399; M E Olivier 'International law in South African municipal law: Human rights procedure, policy and practice' Unpublished LLD Thesis, UNISA (2002), 175 (hereinafter Olivier (2002)); N Botha 'The coming of age of public international law in South Africa' (1992-93) 18 *SAYIL* 36, 38.

[69] J Dugard & A Coutsoudis 'The place of international law in South African municipal law' in Dugard *et al* (eds) note 2, 66; Dugard (1997) note 68, 79.

[70] For example, in *S v Adams* and *S v Werner* 1981 (1) SA 187 (A) at 225B, the Appellate Division rejected the possibility of interpreting the apartheid laws regulating residential zoning on racial lines (Group Areas Act) in accordance with the human rights provisions of the UN Charter prohibiting racial discrimination (to which South Africa was a party).

hallmarks of the apartheid system (for example, racial discrimination, oppression, and violation of human rights) on the other.[71]

After 1994, with the Constitution having given such prominence to IL, South African legal scholarship still needs to produce a body of literature or develop a distinct field of study within South Africa (constitutional foreign affairs law) that will be dedicated to analysing in a detailed manner the full implications of the Constitution for the conduct of foreign policy, which field of study is, arguably, still ignored and neglected. The available legal writings which have touched upon foreign policy in relation to the Constitution have done so tangentially and on a case-by-case basis. For instance, writers such as Dugard,[72] Botha,[73] Olivier[74] and Booysen[75] have discussed some of the implications for foreign policy of the importance that the South African Constitution now ascribes to IL and the protection of fundamental rights[76] (for example, that South Africa is obliged to respect its obligations under IL). Other writers such as Booysen,[77] Botha[78] and Carpenter[79] have discussed the concept of prerogative powers in the light of the Constitution and their implications for the justiciability or otherwise of the so-called 'acts of state' in the domain of foreign affairs. In fact, Carpenter has argued – basing his contention on SOP and executive prerogative – that foreign policy is the sole preserve of

[71] Dugard in Dugard *et al* (eds) note 2, 22; Dugard (1997) note 68, 78; J Dugard 'Public International Law' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, & S Woolman (eds) *Constitutional Law of South Africa* (1998)(Revision Service 2)(Chapter 13), 13-1, 13-8 (hereinafter Chaskalson *et al* (eds)); Meyersfeld note 68, 399; D Howell & G Williams 'A tale of two systems: The use of international law in constitutional interpretation in Australia and South Africa' (2005) 29 *Melbourne U L R* 95, 127-128 and footnotes therein; Maluwa (2000) note 68, 270.
[72] Dugard (1997) note 68, 77-92.
[73] N Botha 'International law in South African courts' (1999) 24 *SAYIL* 330, 330-343.
[74] M Olivier 'Interpretation of the constitutional provisions relating to international law' (2003) 6(2) *PER/PELJ* 1, 1-13 (hereinafter Olivier (2003)).
[75] H Booysen 'Has the act of state doctrine survived the 1993 Constitution?' (1995) 20 *SAYIL* 189, 189-196.
[76] See in this context T Maluwa 'International human rights norms and the South African interim constitution 1993' (1993/94) 19 *SAYIL* 14, 14-42; Reinolds note 24, 1105.
[77]Booysen note 75, 189-196.
[78] N Botha 'The foreign affairs prerogative and the 1996 Constitution' (2000) 25 *SAYIL* 265, 265-272.
[79] G Carpenter 'Prerogative powers in South Africa – dead and gone at last?' (1997) 22 *SAYIL* 104, 104-111.

the executive and lies beyond judicial scrutiny.[80] Sanders[81] and Dugard & Coutsoudis[82] have explained how the common law-based 'act of state' doctrine was applied to the conduct of foreign policy in pre-democratic South Africa; specifically, how the application of that doctrine led to a situation where foreign policy was not justiciable (doctrine of the non-justiciability of 'acts of state')[83] and how that position changed fundamentally with the advent of constitutional democracy in 1994.[84] The views of these legal experts are relevant to this study because they provide a glimpse of the background and context within which the intersection between law and foreign policy in South Africa (before and after 1994) could be understood.

The idea that South African foreign policy is no longer immune to judicial scrutiny cannot be taken for granted. While there is general appreciation by some South African legal scholars that foreign policy in South Africa since 1994 lies within the purview of judicial scrutiny, this study makes a unique contribution to this area of legal scholarship in the following respects. First, this study identifies, in a systematic way, doctrines and principles that governed the conduct of foreign policy in pre-democratic South Africa and explains in some detail how foreign policy during that period was rendered non-justiciable and the courts played no role in adjudicating foreign affairs.

Second, this study identifies the constitutional sources of government's power to conduct foreign policy which had hitherto been unclear (to some legal scholars). For instance, this study provides a critique of some of the views of legal experts like Booysen,[85] and Dugard and Coutsoudis,[86] on the sources of foreign affairs power in South Africa (for example, the view

[80] Ibid.
[81] AJGM Sanders 'The justiciability of foreign affairs matters under English and South African common law' (1974) 7 *CILSA* 215, 215ff.
[82] Note 70, 104-125.
[83] Ibid, 105.
[84] Ibid, 106.
[85] Note 75, 191.
[86] Note 69, 102.

that the 'interim' and 1996 constitutions do not – when in fact they do - expressly confer on the executive the power to conduct foreign policy).

Third and flowing from the second point above, this study expands the scope of analysis beyond that of writers such as Botha,[87] and Dugard and Coutsoudis,[88] by pointing out how some pre-democratic common law-based principles of foreign affairs (such as 'one voice' principle) have been constitutionalised and how tenets of constitutionalism such as SOC, SOP, ROL, HRs and IL bind the conduct of foreign policy under the current constitutional-legal order.

Fourth, this study seeks to clear the confusion that still exists among some South African scholars relating to how constitutional norms bind foreign policy. For instance, the study provides a critique of views held by legal experts such as Carpenter who argues, incorrectly so it is submitted, that the SOP principle forms the quintessential basis for the argument that foreign policy is the exclusive domain of the executive with the courts having no role to play in that area of governmental responsibility (foreign affairs). The conflicting views (for example, on the sources of the government's power to conduct foreign policy and the implications of the SOP principle for the conduct of foreign policy) among South African foreign affairs lawyers means that there is a need for greater debate and engagement in this regard in order to clear the confusion that currently exists in some legal, academic, and political circles about the implications of constitutional norms for the conduct of foreign policy in South Africa.

Fifth, by providing a brief comparative overview of the principles of foreign relations laws of the UK, US, Germany and Canada, this study seeks to shed light on how comparative foreign law in this field (foreign relations) could be applicable or not in the South African

[87] Note 78, 272.
[88] Note 69, 105.

context. For instance, this study will show why South African lawyers (especially counsel for the state) may not rely for example on American case law on the question of sovereign immunity - precisely because the sources of foreign policy powers in the two jurisdictions are different - to argue, as the state did in *Engels v Government of the Republic of South Africa & Another*[89] (the *Grace Mugabe* diplomatic immunity case) that the decision to grant diplomatic immunity rests exclusively with the executive and that that decision may not be challenged in a court of law.[90]

Finally, this study also attempts to provide an 'introductory compilation' of what is emerging from the Constitution and case law as principles of South African foreign affairs law under the current democratic-legal order. The above-mentioned areas are gaps in South African legal scholarship on the subject of this thesis which this study seeks to fill.

7. Research methodology

This study is desktop-based and relies on both primary and secondary sources, including books, scholarly articles, reports, resolutions and recommendations of inter-governmental organisations, constitutional texts, statutes and cases from South Africa and abroad. In order to argue the main proposition and to attempt to answer key research questions, this study employs two methodological approaches. The first approach constitutes a 'theoretical analysis' and it borrows from IR theory to explain the relationship, if any, between law and politics in general and between foreign policy and constitutional norms in particular. In this context, the study explains the different and conflicting perspectives held by international lawyers, judges and legal experts on the question of whether (international) law or constitutional norms could/should discipline the conduct of foreign policy. The two IR 'theories' employed in the

[89] [2017] ZAGPPHCC 667.
[90] See the *Grace Mugabe* diplomatic immunity case at paras 25 and 30.

analysis are realism and liberalism.[91] The choice of realism is on the basis that this theory is regarded as 'the foundational school of thought about international politics around which all others are oriented'.[92] It is a school of thought 'arguably most firmly grounded in real foreign policy practice [observation of lived politics] while also most committed to creating highly general theories'.[93] Liberalism, on the other hand, with its emphasis on 'the importance of the freedom of the individual'[94] is regarded as substantively antithetical to realism. Borrowing from the theoretical foundations of these two opposing IR schools, this study attempts to explain the basis of conflicting *legal* views and perspectives on whether foreign affairs are or should be justiciable and bound by constitutional norms such as ROL and political accountability.

The second approach constitutes a 'comparative analysis' at two different levels. The first level of the comparative analysis constitutes a 'comparative overview' on how the question of the relationship between foreign policy on the one hand and constitutional norms on the other is dealt with in four different jurisdictions, namely, the United Kingdom (UK), the United States (US), Germany, and Canada.[95] The detailed reasons for the choice of these jurisdictions are provided in chapter two of this thesis.[96] Suffice to mention here that a close analysis of how these jurisdictions navigate(d) the intersection between foreign policy and constitutional norms will shed light, for example, on how South Africa in the past (before 1994) dealt with this question precisely because South Africa then followed the old English common law[97] on the application of doctrines such as 'act of state' to the conduct of foreign policy.[98] The other

[91] See chapter two, section 2, of this thesis.
[92] W C Wohlforth 'Realism and foreign policy' in Smith *et al* (eds.) note 11, 35.
[93] Ibid, 42.
[94] M W Doyle 'Liberalism and foreign policy' in Smith *et al* (eds.) note 11, 55.
[95] See chapter two, section 3, of this thesis.
[96] See section 1 (introduction).
[97] S J Ellmann 'The struggle for the rule of law in South Africa (Symposium: Twenty years of South African constitutionalism: Constitutional rights, judicial independence and the transition to democracy)' (2016) *NYL Sch L R* 57, 58.
[98] Dugard & Coutsoudis note 69, 104.

consideration relating to the choice of these jurisdictions is based on the fact that South African framers borrowed extensively from the German and Canadian constitutions (and other constitutions from other countries) when they drafted the two post-apartheid constitutions and South African courts relied a great deal on German and Canadian jurisprudence, particularly in matters relating to the interpretation and protection of HRs.[99]

The second level of the comparative analysis – which forms the core of the approach in this thesis – looks at the difference between the pre-democratic (apartheid) legal order and the current constitutional-legal (democratic) order and focuses on how constitutional norms under the two dispensations were/are interpreted and applied in foreign policy matters and what the implications of such interpretations/applications were/are for the conduct of foreign policy. Specifically, this study will analyse how various 'doctrines' (for example, 'act of state') and 'principles' (for example, *stare decisis*) were interpreted and applied in the domain of foreign affairs by the apartheid government and the courts then, and more importantly, how the interpretation and application of those doctrines and principles effectively led to (a) the total exclusion of the courts from participating in foreign policy, and (b) the conduct of foreign policy that was not bound by constitutional norms. The pre-democratic foreign policy regime will be juxtaposed and compared to the current constitutional-legal order (post-apartheid) where the conduct of foreign policy or the exercise of public power in the realm of foreign affairs now takes place in a system where the Constitution is the supreme law of the state and where the canons of accountability, rationality, legal justification, and respect for the RO(I)L (to mention but a few) have become the new anvil of public power in South Africa.

Having said the above, it is important to mention what this study does not seek to do. First, this study does not seek to make a normative choice as to which of the two IR theories

[99] R J Goldstone 'The first years of the South African Constitutional Court' (2008) 42 *Supreme Court L R* 25, 25 and 32; Booysen note 75, 193.

(realism or liberalism) is 'good' or 'bad' and should or should not be preferred in assessing the question whether politics (foreign policy) should or should not be disciplined by law (constitutional norms). Second, and notwithstanding the importance of the many normative considerations that come to bear on the topic of this thesis, this study is not aimed at providing a detailed evaluation of why constitutionalisation of foreign policy *per se* or in the context of South Africa is 'a good thing'. Finally, and related to the preceeding point, this study does not make a case as to which of the four jurisdictions (UK, US, Germany, and Canada) South African courts should or should not follow in dealing with foreign policy controversies brought before them. Further, it is also not the aim of the thesis (or chapter two for that matter) to provide a detailed account of the comparative analysis between, on the one hand, the four jurisdictions (UK, US, Germany and Canada) and South Africa on the other. As chapter two clearly explains, the comparative overview on how the four jurisdictions treat the intersection of constitutional norms and foreign policy seeks only to show (on a more practical as opposed to a more theoretical level) how these countries deal with the question whether foreign affairs are justiciable. However, individual chapters in this study (specifically chapters three to eight) will refer from time to time to the approaches employed by some of the courts in the four jurisdictions in dealing with cases involving foreign policy matters to demonstrate how South African courts have followed (or not followed) these courts in dealing with foreign policy cases.

8. Limitations of the study

This study has a number of limitations. The first limitation relates to paucity of literature and scholarship in South Africa, particularly on how foreign affairs (ought to) interact with constitutional norms. As far as the period before 1994 is concerned, the field of public

(international) law and how that body of law applied to sensitive political questions was an unpopular subject for the South African government, the judiciary, and the academia.[100]

The second limitation of the study, which is essentially the corollary of the first, is based on the fact that, while in some cases the courts were able to clearly articulate how constitutional norms in a democratic South Africa bind foreign policy[101] and thus set a precedent on how future foreign policy cases could/would be decided, the study relies also, to a great extent, on the interpretation by the courts of constitutional norms over cases that had nothing to do with the exercise of foreign policy powers. In this context, what the study does is to simply 'import' the general principles enunciated by the courts in non-foreign policy cases and apply that interpretation to exercises of public power in foreign affairs and argue/conclude that the manner in which the courts interpreted the application of these norms (in non-foreign policy cases) is exactly the way such norms would (or ought to) be applied in foreign policy matters. Whether each and every interpretation proffered by the courts and the application thereof to the exercises of public power in *non-foreign policy matters* would always fit and apply neatly when confronted with other far more politically sensitive matters of state conduct in foreign affairs is a matter on which the jury is still out.

The third limitation of the study relates to the choices of 'theories of analysis' and 'comparative jurisdictions'. As far as choice of 'theories of analysis' is concerned, it is conceded that the simple choice of realism and liberalism as two theories of IR which are employed in this study to explain the relationship (or none) between foreign policy and constitutional norms or the role of the courts, if any, in foreign policy matters is too limiting.

[100] See note 68 and authorities cited there.

[101] The cases of *Mahomed*; *Earthlife*; *Al Bashir (HC); Al Bashir (SCA); Kaunda v President of the Republic of South Africa* [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC); *Buthelezi & Another v Minister of Home Affairs & Others* [2012] ZASCA 174; 2013 (3) SA 325 (SCA) (the *Dalai Lama visa application* case); *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013(5) SA 325 (CC); 2013 (10) BCLR 1103 (CC); *Government of the Republic of South Africa & Others v Von Abo* [2011) ZASCA 65; *Engels v Government of the Republic of South Africa & Another* [2017] ZAGPPHC 667 (Pretoria High Court) (the *Grace Mugabe diplomatic immunity* case); and *SADC Tribunal case* discussed in this thesis are cases in point.

There are many other theories of IR (for example, constructivism, feminism, Marxism, institutionalism, functionalism, post structuralism)[102] which are not considered in this study which could also shed light on the question whether foreign policy is or ought to be justiciable and bound by constitutional norms, and whether the courts have a role to play in this area of public policy. Similarly, the choice of 'comparative jurisdictions' on the question of how the intersection between foreign policy and constitutional norms is dealt with in many countries is far too restricted. The four chosen jurisdictions (that is, UK, US, Germany and Canada) cannot provide a comprehensive and complete picture on how this vexed question in constitutional foreign affairs law is or ought to be dealt with, taking into account the various legal systems of over 190 countries in the world.

[102] For further reading on these and other theories of IR, see T Flockhart 'Constructivism and foreign policy' in Smith *et al* (eds.) note 11, 78-92; L Hansen 'Discourse analysis, post-structuralism, and foreign policy' in Smith *et al* (eds) note 11, 94-108; J G Stein 'Foreign policy decision making: rational, psychological, and neurological models' in Smith *et al* (eds) note 11, 130-145; G Rose 'Neoclassical realism and theories of foreign policy' (1998) 51 *World Politics* 144, 144-172; K N Waltz *Theory of International Politics* (1979); M Finnemore & S J Toope 'Alternatives to "legalisation": Richer views of law and politics' in B A Simmons & R H Steinberg (eds) *International Law and International Relations: An International Organisation Reader* (2007) 188, 188-202 (hereinafter Simmons & Steinberg (eds)); J W Legro 'Which norms matter? Revisiting the "failure" of internationalism' in Simmons & Steinberg (eds) (note 102 herein) 233, 233-258; P F Diehl, C Ku & D Zamora 'The dynamics of international law: The interaction of normative and operating systems' in Simmons & Steinberg (eds) (note 102 herein) 426, 426-454; K Pistor *The Code of Capital: How the Law Creates Wealth and Inequality* (2018); A Slaughter 'International law and international relations theory: A prospectus' in E Benvenisti & M Hirsch (eds) *The Impact of International Law on International Cooperation: Theoretical Perspectives* (2004) 16, 16-49; D Armstrong, T Farrell & H Lambert 'Three lenses: Realism, liberalism, constructivism' in D Armstrong, T Farrell & H Lambert *International Law and International Relations 2nd ed* (2012) 74, 74-114; J Brunnée & S J Toope 'Constructivism and international law' in J L Dunoff & M A Pollack (eds) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013) 119, 119-145 (hereinafter Dunoff & Pollack (eds)); K W Abbott & D Snidal 'Law, legislation, and politics: An agenda for the next generation of IL/IR scholars' in Dunoff & Pollack (eds)(note 102 herein) 33, 33-56; O Jütersonke *Morgenthau, Law and Realism* (2010) 175-191; J L Dunoff & M A Pollack 'Reviewing two decades of IL/IR scholarship: What we've learned, what's next' in Dunoff & Pollack (eds) (note 102 herein) 626, 626-662; R Caplan *Europe and the Recognition of New States in Yugoslavia* (2005) 73-94; R H Steinberg & J M Zasloff 'Power and international law' (2006) 100(1) *American J Int'l L* 64, 64-87; A Slaughter Burley 'International law and international relations theory: A dual agenda' (1993) 87(2) *American J Int'l L* 205, 205-239; J L Dunoff & M A Pollack 'International law and international relations: Introducing an interdisciplinary dialogue' in Dunoff & Pollack (eds) (note102 herein) 3, 3-32.

9. Chapter outline

This study has eight chapters. Although individual chapters (that is, chapters three to seven) discuss specific tenets of constitutionalism which have been chosen as 'tools of analysis' in relation to South African foreign policy, the entire discussion makes one consistent argument/point which runs as a golden thread throughout, which is that, South African foreign policy since 1994 has been constitutionalised, rendered justiciable and bound by constitutional norms.

Chapter one is an introduction and background to the study. It defines the key concepts of 'foreign policy' and 'constitutionalisation' used in the study and explains in brief the central focus of the research, central assumption and research questions to be answered, research methodology, and reviews the literature on the main subject of the study.

Chapter two provides both a 'theoretical' and 'comparative' background to an important question in foreign affairs law,[103] which is whether foreign affairs are justiciable and bound by constitutional norms. This chapter discusses the on-going debate between two diametrically opposed schools of thought (realism and liberalism) on this issue: on the one hand, those scholars and judges that argue that foreign affairs are not bound by constitutional norms, and on the other, those that argue that foreign affairs are or should be bound by constitutional norms. The chapter also provides a comparative overview of the approaches and attitudes of the courts in the UK, US, Germany, and Canada on the justiciability or otherwise of foreign affairs. The discussion of the role of courts in foreign affairs in the UK, US, Germany and

[103] While D Abebe & E A Posner 'The flaws of foreign affairs legalism' (2011) 51 *Va J Int'l L* 507, 508 define foreign affairs law as 'the body of law, mainly constitutional, that governs the foreign affairs of' a country, P J Spiro 'Globalization and the (foreign affairs) constitution' (2002) 63 *Ohio State L J* 649, 673 describes foreign relations law as 'that which governs the intersection of international affairs and the domestic legal regime.' See also C McLachlan QC, P Stephen & G Born in a panel discussion on 'The law of foreign relations: An international perspective' 14 July 2014, 1 available at www.pages05.net/assetdownloadMDEWMTI50TA4MZAX?spMaitingID where McLachlan QC defines foreign relations law as 'the law governing the external exercise of the public power of the state within its domestic polity'; C A Bradley 'What is foreign relations law?' in Bradley (ed) note 67, 3 defines foreign relations law of a country as 'the domestic law of each nation that governs how that nation interacts with the rest of the world.'

Canada does not include the role of South African courts in this field but is aimed only at providing a 'comparative' context and background within which the argument whether foreign policy is justiciable and whether the courts have a role to play in that domain could be understood. The role of the courts in South African foreign policy matters (courtesy of constitutional-JR) is explained/discussed in chapters three to seven of this thesis and also summarised in chapter eight.

Chapter three discusses SOC and South Africa's foreign policy. The argument in the chapter is that the shift (in 1994) away from parliamentary sovereignty to constitutional supremacy has radically transformed the manner in which foreign affairs powers should be exercised and how the conduct of South Africa in the field of foreign relations should be consistent with the supreme law.

Chapter four discusses SOP and the constitutional grant of the power to conduct foreign relations. The chapter argues that, unlike in pre-democratic South Africa - where the power to conduct foreign policy was based on the old English common law and the royal prerogative - the power to conduct foreign policy under the current constitutional-legal order is *derived from the Constitution*. The chapter also argues that the manner in which SOP is provided for in the Constitution and the way South African courts have interpreted the application of that principle to the exercise of public power, including in foreign affairs, the framers intended all three branches of government, including the judiciary (the courts) to participate in foreign policy matters.

Chapter five discusses ROL in South Africa's foreign policy. The chapter demonstrates how the pre-democratic government employed the formal notions of the ROL - characterised essentially as rule *by* law - to conduct a foreign policy unbound by any of the substantive requirements and purposes of the rule *of* law such as political accountability of political leaders and non-arbitrariness in (foreign) policy decision-making. The argument in the chapter is that,

under the current constitutional-legal order, both the formal and substantive requirements and purposes of the ROL now discipline the exercise of public power, including public power in the realm of foreign affairs.

Chapter six focuses on HRs and foreign policy in South Africa. The chapter demonstrates how the pre-democratic era in general and the conduct of foreign policy in particular were characterised by systematic and egregious violations of human rights, and how that situation changed fundamentally when a Constitution with a justiciable BORs came into effect in 1994. The argument in the chapter is that whilst the apartheid government considered itself unbound by HRs norms that had come to define the post-WWII international system, the democratic government (since 1994) is bound by the fundamental HRs and freedoms guaranteed and protected in the South African Constitution, particularly the BORs, and that these have a binding effect on South Africa's foreign policy *inside* as well as *outside* the borders of the state.

Chapter seven discusses IL and South Africa's foreign policy. This penultimate chapter explains the differences between how IL was treated in pre-democratic South Africa and how it is now treated since 1994. The argument in the chapter is that, whilst the apartheid government violated every known tenet of IL and international humanitarian law (IHL) in the conduct of its foreign policy and considered itself not bound by principles of these bodies of law, the entrenchment of the rule of IL (ROIL) and the granting of status to IL in the South African Constitution have radically transformed the manner in which South Africa should conduct its relations with the global community. For instance, the chapter demonstrates how South Africa's foreign policy and national security agenda are constitutionally required to be consistent with international norms such as those contained in article 2(4) of the United Nations (UN) Charter regulating the use of force.[104]

[104] Constitution, s200(2).

Chapter eight concludes the study by providing a summary of research findings. It identifies what could arguably be regarded as ‘emerging foreign affairs laws’ of South Africa which are derived from the Constitution and case law.

CHAPTER TWO

FOREIGN POLICY AND THE LAW: ARE FOREIGN AFFAIRS JUSTICIABLE?

> Law and politics are closely intertwined.[1]

> Having regard to the principle of separation of powers between the executive, legislative and judicial arms of the state, it is in any event clear that this court would not have concerned itself with policy decisions which in their nature fall outside our ambit. As a court we are concerned with the integrity of the rule of law and the administration of justice.[2]

1. Introduction

In the world of international relations (IR), the question whether the conduct of states beyond their territorial jurisdictions is or should be justiciable[3] and bound by constitutional norms has bedevilled legal scholars, political theorists, judges and politicians for many centuries. The answer to this question has varied greatly from one scholar/theorist to another and from one country's legal system to another, with the result that there is no uniformity among countries

[1] R Streinz 'The role of the German Federal Constitutional Court: Law and politics' (2014) 31 *Ritsumeikan L R* 95, 95.

[2] Judge D Mlambo in *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others* [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) at para 33 (*Al-Bashir (HC)*).

[3] The notion of 'justiciability', as Leggatt J noted in the English case of *Serdar Mohammed v Secretary of State for Defence* [2014] EWHC 1369 (QB) at para 377 'is a complex notion.' According to Leggatt J, the decision whether a foreign policy matter is justiciable would require the need to take into account the following considerations, for example (a) the absence of judicially manageable standards in certain questions of policy [in *Buttes Gas & Oil Co v Hammer* [1982] AC 888 at 938]; (b) the recognition of the fact that in a constitutional state institutions have relative competencies and that in the case of foreign policy matters for instance there may be a need to recognise that in some policy issues it would be the executive and not the courts that would have requisite skills and competencies to deal with matters; and (c) that for the purposes of political legitimacy and democratic accountability it is important that the conduct of state policy be left to institutions and state functionaries such as parliament and the executive and not the courts.

and policy-makers on how they treat the intersection of foreign policy on the one hand and constitutional norms on the other.

This chapter seeks to achieve two objectives. The first objective is to provide a brief 'theoretical analysis' in order to explain the background to and origins of the two conflicting *legal* views on the question whether foreign affairs are justiciable and bound by constitutional norms. To achieve this objective, this chapter will borrow from IR theory focusing on two theories, namely 'realism' and 'liberalism'.[4]

The second objective is to provide a 'comparative overview' of the approaches of the courts in the United Kingdom (UK), the United States (US), Germany, and Canada on the vexing question whether foreign affairs are justiciable or whether foreign policy is bound by constitutional norms. The purpose of this comparative overview is to provide the context and background, by reference to these four jurisdictions, within which the central focus and main proposition/argument in this study (which is that South Africa's foreign policy since 1994 has been fully constitutionalised) could be understood.

This chapter is divided into four main parts. The first part is this introduction. The second part focuses on and discusses the conflicting *theoretical* perspectives – by reference to two IR theories, that is, realism and liberalism – in order to understand the conflicting *legal* views and opinions among scholars, legal experts and judges on the question of whether foreign affairs are or should be justiciable. The third part discusses the approaches of courts in the UK, US, Germany and Canada and their role, if any, in foreign policy matters. The idea behind that discussion is to understand how different jurisdictions deal with the question of the intersection between law (constitutional norms) and politics (foreign affairs); specifically, whether under

[4] See discussion on 'research methodology' in chapter 1 of this thesis (and footnotes thereto), specifically the explanation of the reasons for the choice of these two theories in the context of this study. See also the discussion on 'limitations of the study' in chapter 1 (and footnotes thereto), particularly the point that there are many other theories of IR (for example, constructivism, institutionalism, and post-structuralism) which have a bearing on how foreign policy is conducted, but which are not employed for the purposes of this study.

their respective constitutional-legal dispensations foreign affairs are or are not justiciable. Part four is the conclusion and summarises the key issues discussed in this chapter.

It is important to point out – as chapter one clearly stated - that the decision to employ the two IR theories (realism and liberalism) as 'tools of analysis' and to choose the four jurisdictions (UK, US, Germany and Canada) is not to make a normative call as to which theory is 'good or bad', or which jurisdiction South African courts should or should not follow. The idea behind the choice of these theories and jurisdictions is simply to demonstrate the conflicting views among legal scholars (based on their theoretical perspectives) and the differences in approaches between and among courts in various countries on how they deal with the question whether foreign affairs are justiciable.

In this chapter, as stated in chapter one of this thesis,[5] the role of South African courts in foreign policy will not be discussed, but is incorporated in chapters 3-7 of this thesis, where each of the chosen tenets of constitutionalism/'tools of analysis' are discussed. For instance, while in some chapters (for example, chapter four, section 6) the role of South African courts in foreign policy matters will be discussed in general terms, specifically by reference to the exercise of the courts' power of constitutional-judicial review, in other chapters their role in (foreign) policy matters will be discussed in more specific terms (for example, chapter three, section 3.6 discussing the specific powers of the courts (particularly the Constitutional Court) to enforce the supremacy of the Constitution)).

2. Constitutional norms and (non)justiciability of foreign affairs: Conflicting theoretical perspectives

There is a fierce debate among scholars of foreign affairs law about whether international politics could/should be disciplined by constitutional norms and other tenets of modern liberal-

[5] See chapter one, section 9, of this thesis.

legal constitutionalism such as judicial review (JR) and rule of law (ROL).[6] In order to appreciate the various and conflicting *legal* perspectives on this subject, it is helpful to first start by looking at the theoretical foundations of these opposing legal positions from the vantage point of IR theory, because, as Slaughter Burley correctly suggests, 'much current foreign affairs law is implicitly informed by a particular school of international relations theory.'[7]

There are two dominant schools of IR theory (realism and liberalism) which have had a bearing on how international lawyers perceive the relationship between IR and politics on the one hand and (international) law and constitutional norms on the other. These are discussed in turn.

2.1 Realism, foreign policy and the law

Slaughter Burley summarises realism − also referred to as political realism[8] − and its perspective on the role (or more accurately, irrelevance) of (international) law in ordering IR and politics in the following words:

> [p]olitical realism [is] an approach best known among international lawyers for its disdain of legal norms in international relations. Political realists accept a model of states as unitary actors whose external behaviour is unrelated to internal structure and purpose. Regardless of domestic, political, economic, or social configuration, states' relations with one another revolve around the

[6] T M Franck *Political Questions/ Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (1992) 3-4; A Slaughter Burley 'Are foreign affairs different?' (1993) 106 *Harv L R* 1980, 1981 (in her review of Franck (note 6 herein)).
[7] Slaughter Burley note 6, 1999.
[8] The discussion of realism in this study does not go into the sub-approaches of realism (such as classical realism and neorealism) but focuses only on realism or political realism in general.

> struggle for power. When translated into law, realism argues for a radical break between domestic and foreign affairs.[9]

As far as realists are concerned, and because the international system is by definition 'anarchic',[10] courts face a major challenge in defining in precise terms the meaning of foreign relations law and this shortcoming hamstrings their capacity and calls into question their legitimacy in this area of governmental responsibility (foreign affairs).[11] Taking their theoretical analysis to its logical conclusion, realists posit, among other views, that: (a) in the realm of international politics (*realpolitik*) states do whatever is necessary to protect themselves;[12] (b) the structure of the international system and the law undergirding it is reflective of power politics and favour the ever shifting interests of great powers;[13] (c) as a result of the anarchic nature of the international system that is also in constant flux, states should be at liberty to breach their international agreements and violate international law (IL) if/when doing so is in their national interest (however defined);[14] (d) government's conduct and actions outside the territorial jurisdiction of the state are perfectly legitimate even when the same conduct and actions would be repugnant at home under domestic law;[15] (e) states should not be unduly restrained by IL if the precepts of IL conflict with their (states') interests';[16] and (f) since in the international system it is not possible to establish common

[9] Slaughter Burley note 6, 1999-2000. See also R H Knowles 'American hegemony and the foreign affairs constitution' (2009) *Ariz St L J* 1, 27-28.
[10] W C Wohlforth 'Realism and foreign policy' in S Smith, A Hadfield, and T Dunne *Foreign Policy: Theories, Actors, Cases 2nd ed* (2012) 35, 41 (hereinafter Smith *et al* (eds)).
[11] Knowles note 9, 19 and footnotes therein; J Nzelibe 'The uniqueness of foreign affairs' (2004) 89 *Iowa L R* 941, 941.
[12] Knowles note 9, 4; Wohlforth in Smith *et al* (eds) note 10, 43.
[13] Knowles note 9, 6; Wohlforth in Smith *et al* (eds) note 10, 43.
[14] Knowles note 9, 29; Wohlforth in Smith *et al* (eds) note 10, 43.
[15] Knowles note 9, 29; Wohlforth in Smith *et al* (eds) note 10, 43 says that in the realist world, 'Universal moral principals (sic) do not apply to states.'
[16] Knowles note 9, 29; Wohlforth in Smith *et al* (eds) note 10, 43 opines that one of the commonly accepted tenets of realism is that this theory harbours deep '[S]cepticism toward international law and institutions.'

standards on notions such as democracy, morality and the ROL (all these are relative), states cannot commit to comply with some monolithic standard of state conduct and behaviour.[17]

According to realists therefore, foreign policy matters such as national security, use of force, declarations of war and peace, deployment of defence systems and armed forces, recognition of foreign governments, covert operations, rendition of 'terror suspects', imposition of no-fly zones, and humanitarian intervention – to mention but a few – are not subject to constitutional-legal review and the courts should play no role in these matters. From a realist perspective, foreign affairs are the exclusive province of the political branches of government (that is, executive and legislative, with the former in the lead). In the case of the US for example, Abebe and Posner opine that the approach the courts adopt in foreign policy matters is to defer to the executive and give that branch of government the necessary space to exercise its discretion in this area of governmental responsibility.[18]

The arguments in support of the idea that the judiciary should have no role in foreign affairs are based on the realist notion that the rule of (international) law is irrelevant in ordering interstate relations and in guiding (international) politics.[19] A myriad of reasons and justifications – propounded by the courts and legal scholars of realist persuasion – have been advanced to support the claim that, since foreign affairs are not the same as domestic affairs, the former should not be disciplined by law in general and the respective tenets of constitutionalism such as JR, in particular.[20] For instance, lawyers and judges of realist stripe

[17] G F Kennan 'Morality and foreign policy' (1985-86) 64 *Foreign Affairs* 205, 208. Wohlforth in Smith *et al* (eds) note 10, 43 suggests that one of the propositions commonly seen as definitive assumptions of realism is that 'Politics [is] not a function of ethics [and that] reasons of state trump ethics.' For further reading on realist perspectives on foreign policy and law, see A Johnston 'Democracy and human rights in the principles and practice of South African foreign policy' in J Broderick, G Burford & G Freer (eds) *South Africa's Foreign Policy: Dilemmas of a New Democracy* (2001) 11, 23 (hereinafter Broderick *et al* (eds)); B C Schmidt 'The primacy of national security' in Smith *et al* (eds) note 10, 188-202; C T Oliver 'International law and national interest: Comments for a new journal' (1986) 1 *Am U J Int'l L & Pol* 57, 57-65; J L Goldsmith & E Posner *The limits of International Law* (2005); H Morgenthau *In Defence of the National Interest* (1951).

[18] D Abebe & E A Posner 'The flaws of foreign affairs legalism' (2011) 51 *Va J Int'l L* 507, 508 footnote 1.

[19] Knowles note 9, 6 and 29; Wohlforth in Smith *et al* (eds) note 10, 43; Kennan note 17, 208.

[20] Slaughter Burley note 6, 1999-2000; Knowles note 9, 27-28.

maintain that there are certain 'prudential concerns'[21] that warrant the exclusion of the courts and the application of constitutional-legal norms from foreign policy matters. These include: (a) the difficulty of obtaining evidence in foreign affairs cases;[22] (b) 'lack of judicially manageable standards to resolve [foreign] policy issues';[23] (c) lack of competence and skill on the part of judges to decide foreign policy cases and matters of national security;[24] and (d) the potential to undermine government when judicial decisions in foreign policy cases cannot be complied with.[25]

2.2 Liberalism, foreign policy and the law

The liberal theory of IR - grounded on domestic political theory[26] - sees international relations through the lens not of states, but of individuals and groups as determinants and important actors in domestic and transnational civil society.[27] Liberalism

> contributes to the understanding of foreign policy by highlighting how individuals and the ideas and ideals they espouse (such as human rights, liberty, and democracy), social forces (capitalism, markets), and political institutions (democracy, representation) can have direct effect on foreign relations.[28]

This theory

[21] Franck note 6, 45-59; Slaughter Burley note 6, 1985.
[22] Franck note 6, 46-48; Slaughter Burley note 6, 1985.
[23] Franck note 6, 48-50; Slaughter Burley note 6, 1985.
[24] Franck note 6, 50-58; Slaughter Burley note 6, 1985.
[25] Franck note 6, 58-60; Slaughter Burley note 6, 1985. See also I M Rautenbach 'Policy and judicial review – political questions, margins of appreciation and the South African Constitution' (2012) 1 *TSAR* 20, 24.
[26] Slaughter Burley note 6, 2001.
[27] Ibid.
[28] M W Doyle 'Liberalism and foreign policy' in Smith *et al* (eds) note 10, 54.

> emphasises the representativeness of governments as a key variable in determining state interests; and focuses less on power than on the nature and strength of those interests in international bargaining.[29]

For international lawyers of liberal persuasion, the processes of globalisation and liberalisation characterised by opening up of global markets and the growing interaction and cooperation among nations and their citizens through non-governmental organisation (NGO) networks and other international and intergovernmental organisations such as the World Trade Organisation (WTO)[30] have engendered a world where IL is playing a key role in ordering inter-state and inter-institutional relations.[31] As far as Slaughter Burley is concerned, the close relations and cooperation between and among liberal states in the areas of defence and political affairs have blurred the lines between foreign and domestic matters.[32] Since liberalism makes no differentiation between foreign and domestic affairs, both domains can and must be disciplined by the same legal norms and standards such as JR and principle of legality.[33] In the circumstances therefore, international lawyers of liberal persuasion suggest that the courts have an important constitutional function (to restrain political power)[34] in foreign policy matters and that constitutional norms play a key role in guiding the conduct of states in IR.

The realist argument that foreign policy cannot and should not be disciplined by constitutional norms has not gone unchallenged. Scholars from the liberal point of view have relied, among other arguments, on the historical rationale for the adoption of JR, some court

[29] Slaughter Burley note 6, 2001. See also Doyle note 28, 68.
[30] Knowles note 9, 19 footnote 99.
[31] Abebe & Posner note 18, 508 argue that 'foreign affairs legalists' base their erroneous arguments in support of a greater role for the courts in foreign policy matters on two premises, namely (a) the judicial and legislative branches have the means and responsibility to control the executive branch and (b) that when the courts and Congress do restrain the executive, they (the former two) do so with the aim of advancing international law.
[32] Slaughter Burley note 6, 1980.
[33] Knowles note 9, 30.
[34] See Abebe & Posner note 18, 508 who argue that this liberal notion that courts should play a more supervisory and binding role over the executive is one of the fundamental flaws of what they regard as 'foreign affairs legalism'.

dicta, case law, democratic theory, and constitutionalism to demonstrate how (in a constitutional democracy) governmental action in the realm of foreign relations can and should be disciplined by constitutional norms. For instance, these scholars employ democratic theory to argue that JR is an indispensable constitutional tool necessary to discipline governmental action, including the exercise of foreign affairs powers. They posit that when judges decide cases before them, even those cases that have major political consequences, they (judges) do not make their own choices about rights, but are enforcing the will of the people embodied in the BORs which is an integral part of the constitution.[35] The important point being made here is that, when judges decide cases that go against the majoritarian grain (either invalidating legislation promulgated by the representatives of the people), they do so under the authority of the supreme law as they understand it in the context of the facts before them.[36] The fact that a particular decision goes against the majority and/or popular view does not *ipso facto* make the judges that exercise the power of JR 'illegitimate', 'irresponsible', 'unaccountable' and 'antidemocratic'.[37] On the contrary, so the liberal argument goes, when judges act under the authority of the constitution, independently, without fear or favour and armed with the power of JR, they fulfil an important obligation of a constitutional state, which is, to ensure that 'law prevails over power and standing' (the ROL principle)[38] and that government is constrained by the provisions of the constitution and not only by the wishes of the majority or those who hold the levers of power.[39]

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[35] J Waldron 'The core of the case against judicial review' (2006) *The Yale L J* 1346, 1393.
[36] In the words of Marshall CJ (of the US Supreme Court) in *Marbury v Madison* 5 US (Cranch) 137, 177 (1803), that it is 'the province and duty of the judicial department to say what the law is.' See J L Entin 'War powers, foreign affairs, and the courts: Some institutional considerations' (2012) 45 *Case Western J Int'l L* 443, 443.
[37] Waldron note 35, 1395.
[38] H Dippel, 'Modern constitutionalism: An introduction to a history in need of writing' (2000) 73 *Tijdschrift voor Rechtsgeschiedenis* 153, 156; M Loughlin 'What is constitutionalisation?' in P Doubner & M Loughlin (eds) *The Twilight of Constitutionalism* (2010) 55.
[39] C M Fombad 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from southern Africa' (2007) 55 *Am J Comp L* 1, 6; K Stern, 'The genesis and evolution of European-American constitutionalism: Some comments on fundamental aspects' (1985) 18 *Comp & Int'l L J S. Afri* 187, 188 makes the point that one of the main goals of constitutionalism or a

From the preceding discussion, it is evident that according to the liberal school of foreign affairs law, governmental behaviour, action and conduct in the realm of foreign policy can and should be disciplined by tenets of modern liberal-legal constitutionalism, including JR. Liberals see the role of the courts, even in important areas of foreign and security policy as an indispensable part and parcel of democratic ethos in constitutional democracies. As far as liberals are concerned, the realm of foreign policy cannot be left exclusively in the hands of the political branches (executive and legislative), but that the courts should also play an important *constitutional* role of interpreting the law and restraining executive and legislative powers, inter alia, by bringing constitutional norms such as the power of JR, ROL and 'principle of legality' to bear over foreign and security policy matters.

3. The judiciary, constitutional norms and foreign relations in comparative perspective: UK, US, Germany and Canada

The question whether foreign affairs are justiciable and bound by constitutional norms is treated differently in many countries. This section discusses how the courts in the UK, US, Germany and Canada have wrestled with the existential 'tension' between foreign and security policy on the one hand and constitutional-legal norms and tenets of constitutionalism on the other.

It is important to explain the reasons for the choice of these jurisdictions and their relevance, if any, to the core argument in this study. As regards the UK, before 1994, the conduct of South Africa's foreign policy was largely governed by the Crown prerogative powers derived from the old English common law.[40] What this means – and this is important

constitutional state is/was to ensure that '[T]he *imperium absolutum* was to be superseded by the *imperium limitatum*.'[Emphasis in the original].

[40] AJGM Sanders 'The justiciability of foreign policy matters under English and South African law' (1974) 7 *Comp & Int'l L J S. Afr (CILSA)* 215, 215; J Dugard & A Coutsoudis 'The place of international law in South African municipal law' in J Dugard, M du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law: A South African Perspective 5th ed* (2018), 104 (hereinafter Dugard *et al* (eds)); J Dugard *International Law: A South*

in the context of this study - is that in order to understand how South African courts before 1994 treated foreign policy, the reader needs to understand how English courts treat(ed) that area of governmental responsibility (foreign affairs), particularly with regard to the key question of whether foreign affairs are justiciable or bound by constitutional norms. The Crown prerogative powers in English law (such as the power to recognise a foreign sovereign) are still extant and are part of South African common law provided they are not inconsistent with the Constitution or an Act of Parliament.[41] It should be expected therefore that in the absence of any statutory or constitutional provision to the contrary, South African courts – exercising their inherent power to develop the common law[42] – may refer to the old English common law when confronted with cases involving the exercise of executive power in the realm of foreign affairs.[43] Further, in cases involving interpretation and protection of human rights in the context of the exercise of public power in the realm of foreign affairs, South African courts could, in terms of section 39(1)(c) of the Constitution, refer to English (common) law to resolve the controversy before them.[44] The discussion of the approach of the UK courts, which approach was followed by South African courts before 1994, will shed light on understanding how that approach was radically altered when South Africa became a constitutional democracy.

African Perspective 4th ed (2011) 71 (hereinafter Dugard (2011); N Botha 'The foreign affairs prerogatives and the 1996 Constitution' (2000) 25 *SAYIL* 265, 272; G Carpenter 'Prerogative powers in South Africa – dead and gone at last?' (1997) 22 *SAYIL* 104, 105. For earlier South African cases which followed the English common law on the Crown prerogative powers and acts of states in foreign policy matters, see *Van Deventer v Hancke & Mossop* 1903 TPD 401 (discussed briefly in chapter three, section 3, of this thesis); *Ex parte Belli* 1914 CPD 742; *Verein fur Schultzgebietsanleihen EV v Conradie NO* 1937 AD 113; *Haak v Minister of External Affairs* 1942 AD 318; and *Vereeniging Municipality v Vereeniging Estates Ltd* 1919 TPD 159.

[41] Carpenter note 40, 111. See also Constitution, s232.

[42] Constitution, s 173.

[43] For instance, in *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T), the Court employed the act of state doctrine and international comity rules to come to the conclusion that it (the Court) should exercise judicial restraint and not pass judgement over matters involving relations between sovereign governments (at 334D-E). In *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA), the Supreme Court of Appeal (SCA) considered the *ratio* of the Court in *Swissborough* to conclude that '[c]ourts should act with restraint when dealing with allegations of unlawful conduct ascribed to foreign States' (at para 5).

[44] Ibid, s 39(1)(c): 'When interpreting the Bill of Rights, a court *may consider foreign law*.' (Emphasis added).

In the case of the US, it is a constitutional state with one of the earliest written constitutions in the modern world and has a well-developed body of legal opinion from the US Supreme Court on foreign policy and security matters starting from the very beginnings of the American Republic.[45] The jurisprudence of the US Supreme Court on foreign and security affairs has influenced many legal opinions in other jurisdictions such as Canada and the UK, as a comparative source of reference on foreign affairs law. Given the 'venerable tradition of dealing with foreign policy'[46] which has persisted for over two and a quarter centuries, it is not unfathomable that a South African court – like other courts in other jurisdictions – faced with an issue relating to the exercise of public power in the field of foreign relations may consider how the US courts have dealt with similar cases.[47]

Regarding Germany, it is trite that in the drafting of both the 1993 and 1996 constitutions, South African framers largely followed the German Constitution (Grundgesetz).[48] In the first years of South Africa's Constitutional Court, the judges of the Court conferred closely with their German counterparts given some similarities on the respective content, structure and rationale of their constitutional systems and institutions.[49] For instance, one of the intriguing similarities between the German and South African constitutional courts is that they were both established for similar reasons[50] with the responsibility to preside over constitutional systems

[45] C Tomuschat 'International law and foreign policy' (2009) 34 *DAJV Newsletter* 166, 166.
[46] Ibid.
[47] R J Goldstone 'The first years of the South African Constitutional Court' (2008) 42 *Supreme Court L R (2d)* 25, 32 states that in the first years of the South African Constitutional Court, the latter '[f]ound valuable guidance in the jurisprudence of other democracies including the US'. But see how Vally J in *Engels v Government of the Republic of South Africa & Another* [2017] ZAGPPHCC 667 (*Grace Mugabe diplomatic immunity* case) distinguished the application of US law (*Kline v Kaneko* 141 Misc. 2d 787 (1988)) on sovereign immunity from South African law on immunities and privileges (at paras 25 and 30). *Grace Mugabe diplomatic immunity* case is discussed briefly in chapter eight, subsection 3.6 of this thesis.
[48] H Booysen 'Has the act of state doctrine survived the 1993 interim Constitution?' (1995) 20 *SAYIL* 189, 193. See also Goldstone note 47, 25.
[49] Goldstone note 47, 28 mentions that the first time the eleven judges of the new Constitutional Court of South Africa met was not in South Africa but in Germany. He says that the new Constitutional Court judges were invited to Germany by the President of the German Federal Constitutional Court at the suggestion of the Ambassador of Germany in South Africa at the time 'to a joint seminar with the members of the German Constitutional Court on issues that might be useful for [South African Constitutional Court judges]'.
[50] Ibid.

that emerged from the ashes of totalitarianism - Nazism in Germany and apartheid in South Africa – and brutal foreign policy regimes[51] and flagrant disregard for fundamental human rights. In light of similarities between the South African and German constitutional models, it is not inconceivable that the jurisprudence of the German Federal Constitutional Court (the GFCC) (*Bundesverfassungsgericht*) would have influence on the South African judiciary in many respects, including in the important areas of foreign affairs law and protection of human rights.[52]

With regard to Canada, one of the newer constitutions that had great influence on the South African drafters during the negotiations for a new political dispensation is the Canadian Constitution (1982), particularly the Charter of Rights and Freedoms (the Charter).[53] Justice Goldstone mentions that, in addition to the role played by 'leading Canadian constitutional lawyers [who] assisted with the drafting process for [the] Interim Constitution and especially the Bill of Rights',[54] the South African Constitutional Court relied heavily on Canadian jurisprudence on the interpretation of constitutional principles such as equality and limitation of rights.[55]

3.1 The UK, constitutional norms and the role of courts in foreign affairs

For many years, the courts in the UK have held the view (and still do) that foreign affairs are the sole responsibility of the Crown (now the executive) and that, as a general rule, the courts

[51] In the case of Germany, see H W Maull 'Germany and the use of force: Still a civilian power?' (1999) 2 *Trier Arbeitspapiere zur Internationalen Politik*, Lehrstuhl für Außenpolitik und Internationale Beziehungen, Universität Trier, 1. In the case of South Africa, see preamble to the 1996 Constitution.
[52] In *Kaunda & Others v President of the Republic of South Africa & Others* 2004 (10) BCLR 1009 (CC) at para 74, Chaskalson CJ applied with approval the *ratio* of the GFCC in the German case of *Rudolf Hess* (BVerfGE 55, 396, 90 *ILR* 386) in considering the question whether the South African government is under a legal obligation to provide diplomatic protection to its citizens abroad.
[53] Goldstone note 47, 30.
[54] Ibid.
[55] There are prominent provisions in the 1993 and 1996 constitutions as well as in the nascent jurisprudence of the South African Constitutional Court that bear the hallmarks of Canadian constitutional law and jurisprudence. For example, the ineluctable leitmotif in the 1996 Constitution to 'what is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' which has its roots in s 1 of the Canadian Charter.

have no role to play in these matters.[56] The idea that in the UK the courts have no role in foreign affairs is based on the operation of a number of 'exclusionary doctrines'[57] such as (a) the 'act of state' doctrine, (b) the 'one voice' principle, (c) the common law prerogative powers, (d) 'prudential reasons'; (e) separation of powers (SOP) principle; (f) international comity rules and sovereign equality of nations; (g) the principle of state immunity; and (h) 'principles' governing the 'war on terror' campaign. In a nutshell, the common thread that runs through all these 'exclusionary doctrines' maintains, among other notions: (a) that public law is concerned only with domestic matters while foreign affairs lie beyond the control of domestic law;[58] (b) that international agreements are an executive act and have no effect on domestic law;[59] (c) that 'territoriality of jurisdiction in public law' should be strictly maintained;[60] (d) that foreign affairs are not subject to judicial scrutiny and the idea that the state should speak with one voice on foreign policy matters should be respected;[61] and (e) that the conduct of other states cannot be subjected to domestic judicial purview.[62] The doctrines are discussed briefly below.

[56] *Kuwait Airways Corp. v Iraqi Airways Co.* (Nos. 4 and 5) [2002] 2 AC 883 at para 135 (per Lord Hope); *Buttes Gas and Oil Co. v Hammer (Nos. 2 and 3)* [1982] AC 888; [1981] All ER 616 at 938ff; *Belhaj & Another (Respondents) v Straw & Others (Appellants); Rahmatullah (No. 1)(Respondent) v Ministry of Defence & Another (Appellants)* (*Belhaj* (2017))[2017] UKSC 3; [2017] 2 WLR 456; [2017] WLR (D) 51 at paras 123, 144 and 145; *Lysongo v Foreign & Commonwealth Office & Another* [2018] EWHC 2955 (QB) at para 33; *Shergill v Khaira* [2015] AC 357 at para 42; C McLachlan QC (in a panel discussion with P Stephan and G Born) 'The law of foreign relations: An international perspective', 14 July 2014, 1 (hereinafter McLachlan (2014)) available at www.pages05.net/assetdownlaod/MDEWMTI50TA4MZAx?spmaitingID suggests that the UK and the US 'have incorporated John Locke's idea of the centralization of foreign relations in the executive.'

[57] The terminology used by McLachlan (2014) note 56, 2.

[58] Ibid.

[59] Ibid.

[60] Ibid.

[61] Ibid.

[62] Ibid. McLachlan (2014) states (at 2) that the idea that in English law the conduct of foreign states is excluded from the domestic purview 'was the legacy of the United Kingdom's long held adherence to the absolute doctrine of state immunity, which persisted until the late 1970s, and a broad notion of non-enforcement of foreign penal, revenue and public laws.'

3.1.1 The UK courts and the 'act of state' doctrine in foreign affairs

In the UK, the expression 'act of state' – a doctrine which originated in England[63] - is used to define certain governmental conduct under prescribed contexts and circumstances.[64] Some of the contexts in which that expression has been used refer to (a) acts of foreign states[65] performed by government (executive) and parliament (legislative) within their own territory;[66] (b) the application of foreign municipal law within a state's own territory over matters relating to, but not exclusively limited to expropriation of property;[67] as well as (c) acts of state performed in the realm of foreign affairs.[68] In terms of established English law therefore, the acts of foreign states within their own jurisdictions and the acts of governments (in this case, the British government) in the field of foreign relations are beyond judicial scrutiny (the doctrine of the 'non-justiciability of acts of state').[69] However, in *Yukos Capital Sarl v OJSC Rosneft Oil Co. (No. 2),*[70] the Court identified five 'limitations' of or instances where it would be inappropriate to apply the act of state doctrine, including 'foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights.'[71] In *Kuwait*

[63] LJ Jones MR in *Belhaj & Ano v Straw & Others* [2014] EWCA Civ 1394 (*Belhaj* (2014)) at para 52 referred to the following cases as authority for this submission: *Blad's Case* (1673) 3 Swan. 603 (PC); *Blad v Bamfield* (1674) 3 Swan. 604; and *Duke of Brunswick v King of Hanover* (1844) 6 Beav. 1; (1848) 2 HLC 1.
[64] *Belhaj* (2014) at para 51. See also Dugard (2011) note 40, 71.
[65] *Belhaj* (2014) at para 51. See Dugard (2011) note 40, 71.
[66] *Belhaj* (2014) at para 52; *Belhaj* (2017) at paras 35, 38, 41, 43 and 118.
[67] Lord Wilberforce in *Buttes Gas & Oil v Hammer (No. 2 and 3)* [1982] AC 888 at p. 931 A-B.
[68] *Yukos Capital Sarl v OJSC Rosneft Oil Co. (No. 2)* [2014] QB 458 at para 66.
[69] Dugard & Coutsoudis note 40, 105; Dugard (2011) note 40, 71; Slaughter Burley note 6, 2002; Sanders note 40, 216-218; D A Katz 'Foreign affairs cases: The need for a mandatory certification procedure' (1980) 68(6) *Ca L R* 1186, 1189-1190; C Sim 'Non-justiciability in Australian private international law: A lack of "judicial restraint"' (2009) *Melbourne J Int'l L* 1, 10. The following English authorities are cases in point: *Nissan v Attorney General* [1970] AC 179, 231 and 237; *Buttes Gas* at 931 G-H and 932 A-B; *Kuwait Airways at p*ara 135; *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB)(hereinafter *Serdar Mohammed* (2014)) at para 373; *Al-Jedda v Secretary of State for Defence* [2009] EWHC 397 (QB) and [2011] QB 773 (Court of Appeal) at para 197; *Yukos Capital a*t para 66.
[70] [2014] QB 458
[71] [2014] QB 458 at para 69. See also *Belhaj* (2017) at paras 37, 153, 154 and 160.

Airways, the House of Lords recognised an important exception to the doctrine of non-justiciability of acts of state. In that case, the House of Lords held that:

> [a] legislative act by a foreign state [through which Iraq essentially dissolved the state of Kuwait and annexed it] which is in flagrant breach of clearly established rules of international law ought not to be recognised by [English courts] as forming part of the *lex situs* of that state.[72]

According to English case law, the rationale for the 'act of state' doctrine – and the concomitant exclusion of the courts in foreign policy matters - is premised on the following considerations, including (a) the need to avoid the potential disruption of international relations;[73] (b) preservation of the principle of SOP, particularly in foreign policy cases where the issue in controversy is not amenable to judicial resolution and is outside the competence of the courts;[74] (c) the need to uphold the equality and independence of sovereign states;[75] and (d) observance of and respect for international comity rules.[76]

3.1.2 The UK courts and the 'one voice' principle in foreign affairs

One of the grounds on which the courts in the UK have declined to adjudicate foreign policy matters is the so-called 'one voice' principle.[77] The idea that in foreign affairs government must 'speak with one voice' comes from the old English case of *Government of the Republic of Spain*

[72] *Kuwait Airways Corpn. v Iraqi Airways Co. (Nos 4 and 5)* at para 149. L Collins 'Foreign relations and the judiciary' (2002) 51 *Int'l & Comp L Q* 485, 508 opines that the *Kuwait Airways* decision '[i]s of considerable importance because it is the first decision clearly to decide that the acts of a foreign state within its territory and which would otherwise be applicable according to accepted principles of private international law may be refused recognition because they are contrary to public international law.'
[73] *Yukos Capital* at paras 41 and 65.
[74] *Shergill v Khaira* [2014] UKSC 33; [2014] 3 WLR 1 at para 41.
[75] *Belhaj* (2014) at para 66.
[76] *Belhaj* (2014) at para 67.
[77] See also N Botha, 'International law in the South African courts' (1999) 24 *SAYIL* 330, 331; L Collins, 'Foreign relations and the judiciary' (2002) 51 *Int'l & Comp L Q* 485, 487; C McLachlan '*Agora*: Reflections on *Zivotofsky v Kerry*: Speaking with one voice on the recognition of states' (2015) 109 *AJIL UNBOUND* 61, 62-63 (hereinafter McLachlan (2015).

v SS 'Arantzazu Mendi'[78] where the Appeal Court (per Lord Atkin) held that 'our state cannot speak with two voices on such a matter [recognition of a foreign sovereign state], the judiciary saying one thing, the executive another'.[79] The 'one voice' principle in English foreign affairs law was reiterated by the courts in *Al-Jedda,*[80] *Serdar Mohammed* (2014),[81] and *British Airways Board v Laker Airways Ltd*.[82]

On a more practical level, the requirement that in foreign affairs a state should speak with 'one voice' to the global partners ensures that only one branch (executive) articulates the position of government in foreign affairs as opposed to multiple voices from different branches (judiciary and legislative) on the same issue; a phenomenon that could result in embarrassment as a consequence of inconsistent pronouncements.[83] According to Abebe, the imperative to speak with 'one voice' in foreign affairs is important because failure to do so could dent the credibility of the state and hamper its ability to achieve its foreign policy goals, and bring it in conflict with other global partners.[84]

3.1.3 The UK courts and the common law prerogative powers in foreign affairs

Prerogative powers are essentially non-statutory discretionary powers derived from English common law.[85] These are powers that constitute the '[r]esidue of discretionary or arbitrary authority which at any time is legally in the hands of the Crown'[86] and are exercised without

[78] 1939 AC 256
[79] *SS Arantzazu Mendi* at 264; Dugard & Coutsoudis note 40, 100.
[80] *Al-Jedda* at para 212.
[81] (per Leggatt J) at paras 392 and 393.
[82] [1994] 1 QB 142, 193.
[83] D Abebe, 'One voice or many? The political question doctrine and acoustic dissonance in foreign affairs' (2013) *Univ Chicago Public Law & Legal Theory Working Paper (No. 441)* 233, 233 available at https://www.chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1445&context=public_law_and_legal_theory
[84] Ibid.
[85] *Serdar Mohammed* (2014) at para 375.
[86] This definition is attributed to the prominent British constitutional theorist A V Dicey, as quoted by A Carroll *Constitutional and Administrative Law 4th ed* (2007), 246. See also G L X Woo 'The Omar Khadr case: How the Supreme Court of Canada undermined the Convention on the Rights of the Child' 2010 (2) *Law, Social Justice &*

the authority of an Act of Parliament.[87] Some of the prerogative powers include (a) the power to conduct foreign relations; (b) to recognise foreign governments; (c) to appoint ambassadors; and (d) to conclude international treaties.[88]

In English common law, the acts of state done under the exercise of the Crown prerogative power are immune to judicial scrutiny.[89] In *Serdar Mohammed* (2014), Leggatt J stated that it is a long-standing principle in English law that whereas statutory powers could be subject to JR, the exercise of Crown prerogative powers is not.[90] Leggatt J pointed out however that since the 1985 case of *Council of Civil Service Unions v Minister for Civil Service*,[91] the House of Lords has rejected the unqualified assertion that prerogative powers are absolute and not amenable to review by the courts.[92] However, in *Council of Civil Service Unions*, the House of Lords conceded nevertheless that there are certain areas of executive power which insulate their exercise from judicial scrutiny[93] and that one of the areas where JR would be inappropriate is over the exercise of prerogative powers concerned with national security and foreign policy.[94]

3.1.4 Prudential reasons in English foreign affairs law

In *Serdar Mohammed* (2014), Leggatt J identified some of the factors that should be considered to determine whether executive decisions in foreign policy matters are justiciable. These include: (a) the absence of judicially manageable standards in certain questions of policy;[95] (b) a recognition that in foreign policy matters, the executive (and not the courts) is better placed

Global Development J 1, 11 available at http://www.qo.warwick.ac.uk/eli/lqd/2010_2/woo; also available at Lawyers' Rights Watch Canada, at www.lrwc.org; lrwc@pportal.ca.

[87] Carroll note 86, 246.
[88] F A Mann *Foreign Affairs in English Courts* (1986) 4-5.
[89] Booysen note 48, 190; Botha note 40, 272; Carpenter note 40, 111.
[90] At para 375.
[91] [1985] AC 374
[92] *Serdar Mohammed* (2014) at para 375.
[93] Ibid.
[94] Ibid.
[95] Ibid at para 377.

to make decisions and has requisite expertise;[96] and (c) the need to respect SOP and to safeguard the political legitimacy of representative and participatory democracy.[97] Leggatt J emphasised that '[s]uch considerations of justiciability preclude, or at least severely restrict, judicial review of what may be called matters of high policy'.[98]

3.1.5 Separation of powers in English foreign affairs law

One of the defining characteristics of British constitutional law is the principle of SOP (or more accurately separation of functions)[99] among the legislature, executive, and the judiciary. As far as foreign affairs are concerned, the long-held view in the UK has always been that, that area is the exclusive province of the executive.[100] In the circumstances therefore, the UK courts have declined to adjudicate foreign policy matters on the grounds, among others, that under the principle of SOP they lack the necessary 'constitutional' mandate to adjudicate foreign policy matters.

In *Buttes Gas & Oil Co v Hammer*,[101] one of the reasons why the court found the issue before it to be non-justiciable was because the matters to be decided were riddled with 'political issues'. For instance, in that case, Occidental (the respondent) sought an order declaring that the settlement between Buttes Gas and Occidental was based on an unlawful conspiracy. In applying the *ratio* of *Buttes Gas* in *Belhaj & Another v Straw & Others*[102] (*Belhaj* (2014)), LJ Jones MR remarked that had the court in *Buttes Gas* entertained Occidental's claim, that would have entailed an assessment of the decisions and acts of foreign sovereigns concerning claims connected, inter alia, with maritime delimitation proclamations between the Rulers of Sharjar

[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] Lord Scarman in *Duport Steel Ltd v Sirs* [1980] 1 All ER 529 at 551G-H.
[100] *Buttes Gas* at 931G-H and 932A-B; *Kuwait Airways* at para 135; *Belhaj* (2014) at para 57.
[101] [1982] AC 888
[102] [2014] EWCA Civ 1394

and Umm al Qaiwai (two Emirates that are part of the United Arab Emirates (UAE)) whose relations were not governed by law but by considerations of power and influence.[103] In the circumstances therefore, the issue before the *Buttes Gas* court laid beyond the reach of judicial scrutiny because it had to do with the executive's responsibility in foreign relations.[104]

3.1.6 The UK courts, international comity and sovereign equality of nations

In England, there are '[m]any judicial statements of high authority'[105] which suggest that courts may be excluded from adjudicating acts of foreign sovereigns, particularly in the field of foreign affairs; and these 'exclusionary grounds' include international comity and the principle of sovereign equality of nations.[106]

In early English foreign affairs law, the act of state doctrine was founded on the principle of sovereign equality of states.[107] In its modern iteration, the act of state doctrine *as justified on the grounds of international comity* found its strong support in the US Supreme Court and was accepted with approval by English courts in a number of cases.[108] In *Oetjen v Central Leather Co.*,[109] the US Supreme Court (per Clarke J) stated that to allow domestic courts of one country to pass judgment over acts of another government in its own territory would '[i]mperil the amicable relations between governments and vex the peace of nations'.[110]

The importance of respecting the rules of international comity in interstate relations, as articulated by Clarke J in *Oetjen*, was underscored by Lord Wilberforce in *Buttes Gas*[111] and by the Court of Appeal (Civil Division) in *R (Khan) v Secretary of State for Foreign and*

[103] *Belhaj* (2014) at para 57.
[104] Ibid. See also *Lysongo v Foreign & Commonwealth Office & Another* (note 56) at para 33.
[105] To use LJ Jones MR's words in *Belhaj* (2014) at para 64.
[106] *Belhaj* (2014) at paras 64 and 67.
[107] Ibid at para 64.
[108] Ibid at para 66.
[109] 246 US 297 (1918)
[110] *Oetjen* at 304. See also LJ Jones MR in *Belhaj* (2014) at para 60.
[111] At 933.

Commonwealth Affairs[112] as well as in *Yukos Capital*.[113] In *Yukos Capital* for instance, the court acknowledged that one of the important reasons for the existence of the act of state doctrine was to avoid the disruption of international comity.[114]

3.1.7 The UK courts and the principle of state immunity

The role of UK courts in foreign affairs can also be explained by reference to the principle of state/sovereign immunity, which, before the passing of the State Immunity Act 1978 was governed by the common law.[115] In *Compania Naviera Vascongado v SS Cristina (The Cristina)*,[116] Lord Atkin stated that in English common law, (absolute) state immunity provided that the courts of a country will not compel a foreign sovereign to appear before them and that the courts of a country will not seize or detain property which belongs to a foreign sovereign or is in possession or control of that foreign sovereign.[117]

At common law therefore, English courts had no jurisdiction to adjudicate matters where immunity was pleaded when a state was directly named as a party in proceedings.[118] However, since 1978, the law on state immunity in the UK is governed by statute, the State Immunity Act 1978 (the Act). In terms of section 1(2) of the Act, 'a court shall give effect to the immunity conferred by this section even though the state does not appear in the proceedings in question'. In *Belhaj* (2014), LJ Jones MR mentioned that there are other instances where immunities will attach to a foreign sovereign, which immunities do not specifically appear in the Act but emanate from case law.[119] He stated that those instances include immunity enjoyed by servants or agents of a foreign state where the latter would be entitled to claim immunity.[120]

[112] [2014] EWCA Civ 24; [2014] 1 WLR 872 at paras 25-28.
[113] At paras 41 and 65.
[114] LJ Jones MR in *Belhaj* (2014) at para 66.
[115] *Belhaj* (2014) at para 33.
[116] [1938] AC 485
[117] *The Cristina* at 490.
[118] *Belhaj* (2014) at para 35.
[119] *Belhaj* (2014) at para 36.
[120] Ibid and authorities cited therein.

3.1.8 The UK courts, the 'war on terror' and protection of (fundamental) rights

One of the key foreign policy areas where English courts have defined their role is in the context of the 'war on terror' campaign in the aftermath of the 9/11 US attacks.[121] Following the declaration of this 'war' (by US President George W Bush), the courts in various jurisdictions, including UK, US, Germany, and Canada found themselves confronted with cases involving detention, torture, extraordinary rendition of 'terror suspects' and allegations of human rights abuses made by those individuals who were at the receiving end of that 'war'.[122] The cases that came before the courts in these jurisdictions touched on important political questions and essentially challenged the foreign and security policies of countries participating in the 'war on terror' in complaints involving victims of torture,[123] unlawful detention,[124] extraordinary rendition,[125] and gross violations of human rights and violations of international law.[126]

In *Al-Jedda v Secretary of State for Defence*,[127] involving a British citizen who was detained in Iraq by UK armed forces which were part of the Multinational Force (MNF) deployed there pursuant to resolution 1546 (2004) of the UN Security Council (UNSC).[128] In dismissing Al-

[121] *Serdar Mohammed & Others v Secretary of State for Defence* [2015] EWCA Civ 843 at para 29 (per Lord Thomas CJ))(hereinafter *Serdar Mohammed* (2015)). The UK became the leading ally of the US in that 'war'.

[122] For example, see the following cases: (in the case of the UK) *Belhaj* (2014), *Serdar Mohamed*, and *Al-Jedda* (discussed in sections 3.1.1, 3.1.2, 3.1.3, 3.1.4, above and 3.1.8; (in the case of the US) *Rasul v Bush* 542 US 466 (2004), *Hamdan v Rumsfeld* 548 US 557 (2006), *El Masri*, *Al-Aulaqi*, *Boumedine*, *Guantanamo Detainee* cases (discussed in sections 3.2.7 and 3.2.8 below); and (in the case of Canada) *Canada (Minister of Justice) v Khadr* [2008] 2 SCR 125 (SCC) (*Khadr I*); *Canada (Prime Minister) v Khadr* [2010] 1 SCR 44 (SCC) *(Khadr II)* and *Afghan Detainee* cases (discussed in section 3.4.5 below).

[123] See *Belhaj* (2014), *Al-Jedda*, *Serdar Mohammed* cases in the UK.

[124] For example, Guantanamo detainees held by the US at its naval base at Guantanamo Bay in Cuba. See cases of *Hamdan* (note 121); *Rasul* (note 121); *Khadr I* (note 121); *Khadr II* (note 121).

[125] *Belhaj* (2014) in the UK; *Khadr, Rasul, Hamdan* and other Guantanamo detainees in the US; and *Mohamed* note 5 in South Africa (Khalfan Khamis Mohamed was 'renditioned' to the US albeit before the 'war on terror' campaign was even conceived).

[126] The US Supreme Court in *Rasul* found that the declaration of Guantanamo detainees as 'unlawful combatants' with no right of access to court, not protected under the Geneva Conventions and no right to *habeas corpus* actually violated the Geneva Conventions.

[127] [2009] EWHC 397 (QB) (hereinafter *Al-Jedda* (2009)).

[128] UNSC Resolution 1546 (S/RES/1546 (2004)) was adopted unanimously on 8 June 2004. It endorsed the formation of the Iraqi Interim Government and called for elections by January 2005. It also welcomed the end of occupation by the US and its allies and agreed on the status of the multinational force and its relationship with the Iraqi Government, as well as the role of the UN in the political transition of Iraq.

Jedda's contention that his detention was unlawful, the Court (per Underhill J) held that applicant's detention was a lawful 'act of state' which constituted 'quintessentially a policy decision in the field of foreign affairs'[129] and was therefore not justiciable in English courts. On appeal,[130] Arden LJ (in her dissenting speech but nonetheless concurring in the conclusion of the court *a quo*), reasoned that the lawfulness of Al-Jedda's detention was justified by the UK's international obligations under the UN Charter[131] to detain persons where this was necessary to bring stability and security in Iraq, and that such detention therefore qualified as unreviewable 'acts of state'.[132] Arden LJ found further justification for the detention of Mr Al-Jedda on the grounds that:

> if courts hold states liable to damages when they comply with resolutions of the UN designed to secure international peace and security, the likelihood is that states will be less ready to assist the UN achieve its role in this regard, and this would be detrimental to the long-term interests of states.[133]

In arriving at this decision, it would appear that one of the key foreign policy considerations which Arden LJ and other members of the Court took into account was the fact that UNSC resolution 1546 was adopted unanimously with the full support of the UK government, which is a member of the so-called P5 (the five permanent members of the UNSC namely, US, UK, France, Russia and China) with a veto power. It would have been awkward for the court in *Al-Jedda* to hold the UK government liable in that case because that would have meant that the

[129] Underhill J in *Al-Jedda* (2009) at para 76. See also *Serdar Mohammed* (2014) (per Leggatt J) at para 367 and *Serdar Mohammed* (2015) (per Lord Thomas CJ) at para 321.
[130] *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758; [2011] QB 773 (hereinafter *Al-Jedda* (2010 Appeal).
[131] Article 103 of the UN Charter: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'
[132] Arden LJ in *Al-Jedda* (2010 Appeal) at para 108; *Serdar Mohammed* (2015) at para 322.
[133] Arden LJ in *Al-Jedda* (2010 Appeal) at para 108. See also *Serdar Mohammed* (2014) at para 369.

court 'overruled' the Crown decision in the UNSC; the Court and the Crown would have come on two opposite ends on the issue of the deployment of UK forces in Iraq.

The position of English courts on the non-justiciability of acts of state involving violations of human rights in the 'war on terror' campaign has been dampened somewhat following the promulgation of the Human Rights Act (HRA or the Act)[134] which was enacted pursuant to UK's obligations under the European Convention on Human Rights (ECHR). This Act has had important implications for Crown acts of state and exercise of prerogative powers in cases involving allegations of human rights abuses.

In *Serdar Mohammed* (2014), the Court held that Mohammed's detention by UK forces in Afghanistan for a period longer than the permitted period of 96 hours violated his right to liberty and security under article 5 of the HRA and was therefore unlawful.[135] As far as the Court was concerned, the HRA could be interpreted as having overridden the common law act of state doctrine particularly in cases involving human rights abuses.[136] In *Belhaj* (2014), the view that the act of state doctrine may not be applied in instances where IL has been violated or fundamental human rights have been infringed[137] was confirmed on appeal by the UK Supreme Court in *Belhaj* (2017).[138]

3.2 The US, constitutional norms and the role of courts in foreign affairs

From the beginning of the American Republic, the judiciary in the US - like in the UK - has developed various techniques and doctrines aimed at avoiding to decide or to adjudicate certain matters, cases and controversies that are considered to be the exclusive province of the executive, particularly those matters in the realm of foreign and security policy. These doctrines

[134] Promulgated in 1998 and came into effect on 2 October 2000.
[135] *Serdar Mohammed* (2014) at para 418.
[136] Ibid, paras 412 and 413.
[137] *Belhaj (2014)* at para 81.
[138] See *Belhaj* (2017) at paras 154 and 160.

and techniques include: (a) the 'political question' doctrine; (b) the 'sole organ' doctrine; (c) the 'one voice' principle; (d) international comity rules; (e) the sovereign immunity doctrine; (f) the 'act of state' doctrine; (g) state secrecy rules;[139] and (h) 'policies' governing the 'war on terror' campaign. All these doctrines, which Katz defines as 'judicial non-intervention doctrines',[140] require that the judiciary not interfere with the decisions of the political branches (that is, executive and legislative) in foreign affairs.[141]

3.2.1 The US Supreme Court and the 'political question' doctrine

In the US, the Supreme Court has used the so-called 'political question' doctrine as justification for refraining from deciding cases and controversies when the issues in question involve matters that are considered to be 'political'.[142] As far as the US Supreme Court is concerned, any controversy which the Court regards as 'political question' is thus non-justiciable, meaning inappropriate for judicial resolution.[143] In cases involving 'political questions', the US Supreme Court prefers instead to defer to the political branches for the resolution of these questions.[144] In *Chicago & S Air Lines, Inc. v Waterman SS Corp.,*[145] the Supreme Court emphasised that for the most part decisions pertaining to foreign policy and national security are assigned to the political branches by the Constitution, and that because the judiciary lacks

[139] D A Katz 'Foreign affairs cases: The need for a mandatory certification procedure' (1980) 68 *Cal L R* 1186, 1186.
[140] Ibid.
[141] Ibid. Katz mentions another American 'judicial non-intervention doctrine' which he regards as '[a] narrow standard of review for decisions concerning immigration and naturalisation.'
[142] Rautenbach note 25, 24; Slaughter Burley note 6, 1984-85; G Casper, 'Constitutional constraints on the conduct of foreign and defense policy: A non-judicial model' (1976) 47 *Univ Chic L R* 463, 471 (hereinafter Casper (1976)); Streinz note 1, 101; E M Ceia 'The applicability of the political question doctrine in the foreign affairs field: Should international treaties be regarded as non-justiciable acts?' Paper presented at the IACL 2007 World Congress, Athens (June 2007) 1, 7; L Champlin & A Schwatz 'Political question doctrine and allocation of the foreign affairs power' (1985) 13(2) *Hofstra L R* 215, 216; C Roth 'Rule of law in the European Union's foreign policy: Limits to judicial review' (2011) *Juridiska Institutionem Examensarbete Höstterminen*, Göteborgs Universiteit, Handelshögskolan, 14-15; D Widen 'Judicial deference to executive foreign policy authority' (1981) 57(1) *Chi-Kent L R* 345, 358.
[143] Streinz note 1, 101; Katz note 139, 1191-1192; Sim note 69, 12.
[144] Streinz note 1, 101; Katz note 139, 1191.
[145] 333 US 103 (1948)

the necessary resources, skill and competence to deal with such matters, then the courts should not intrude in that area of governmental responsibility.[146]

The 'political question' doctrine has been applied mostly in cases relating to the exercise of foreign policy powers.[147] One of the reasons employed by the US courts for declining to hear cases concerning political questions include, the argument (by the courts) that '[t]he constitution does not supply criteria for judicial resolution of the controversy'.[148]

The 'political question' doctrine found its earliest adherent in Chief Justice Marshall in *Marbury v Madison*[149] where he identified certain powers which are exercisable only by the President and are immune to judicial scrutiny.[150] The justification for excluding the courts from foreign policy matters, which are essentially regarded as concerning 'political questions' was further elaborated on by the US courts in later cases, including *Oetjen,*[151] *Coleman v Miller,*[152] *Baker v Carr,*[153] *Goldwater v Carter,*[154] *Miami Nation of Indians v United States Department of Interior,*[155] and *Narenji v Civiletti.*[156]

In *Miami Nation of Indians,* the US court of the 7th Circuit underscored the undesirability of the courts playing a role in foreign policy matters when it identified certain characteristics of foreign policy and diplomacy that are not suitable for judicial resolution. According to the Court, these include:

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[146] *Chicago & S Air Lines* at 111. See H J Powell 'The President's authority over foreign affairs: An executive branch perspective' (1999) 67 *The George Wash L R* 527, 545 footnote 83; P D Carrington 'Political questions: The judicial check on the executive' (1956) 42 *Virginia L R* 175, 176.
[147] Champlin & Schwarz note 142, 217.
[148] Ibid.
[149] 5 US (1 Cranch) 137 (1803)
[150] L Fisher '*The law*: Presidential inherent power: The 'sole organ' doctrine' (2007) *Presidential Studies Quarterly* 139, 143; J P Cole 'The political question doctrine: Justiciability and the separation of powers' *Congressional Research Service* (23 Dec 2014) 3; Carrington note 146, 176.
[151] Note 109 at 302.
[152] 307 US 433 (1939) at 454-55.
[153] 369 US 186 (1962) at 198-199.
[154] 444 US 996 (1979) at 1006.
[155] 255 F. 3d 342 (7th Cir 2001)
[156] 617 F 2d 745 (DC Cir. 1979) at 748.

> the extreme sensitivity of the conduct of foreign affairs, judicial ignorance of those affairs, and the long tradition of regarding their conduct as an executive prerogative because it depends on speed, secrecy, freedom from the restraint of rules and the unjudicial mindset that goes by the name Realpolitik.[157]

3.2.2 The US Supreme Court and the 'sole organ' doctrine

The US Supreme Court has also used the so-called 'sole organ' doctrine to avoid deciding cases that are regarded by the Court as essentially concerned with 'political' issues. In terms of this doctrine, the US President is regarded as possessing 'a plenary, exclusive, and inherent authority … in foreign relations and national security [as well as] authority that overrides conflicting statutes and treaties.'[158] The principle that the US President is the 'sole organ' of the federal government, particularly in matters relating to foreign and security policy was articulated by Sutherland J in *United States v Curtiss-Wright Export Corporation*[159] (*Curtiss-Wright*) when he said that the executive's power in the field of foreign relations is

> a very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress.[160]

The 'sole organ' doctrine is still employed by the US government to 'justify' the actions and conduct of its functionaries particularly in the so-called 'war on terror' campaign. For instance, Fisher refers to a memo written by the Justice Department in 2006 defending the power of the

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[157] At 347.
[158] Fisher note 150, 140. See also H J Powell note 146, 545-546; G Casper 'Responses to Louis Henkin's "A more effective system for foreign relations: The constitutional framework"' (1975) 61 *Va L R* 777, 777 (hereinafter Casper (1975)).
[159] 299 US 304 (1936)
[160] *Curtiss-Wright* at 320. Fisher note 150, 143. For the criticism of Justice Sutherland's views in *Curtiss-Wright* see Fisher note 150, 149ff; M D Ramsey 'The myth of extraconstitutional foreign affairs power' (2000) 42(2) *William & Mary L R* 379, 442ff.

National Security Agency (NSA) to intercept international communications of people suspected of having links with 'terrorist' organisations such as Al Qaeda. The US Justice Department argued, among other reasons, that the executive under the leadership of the President had authority to carry out the interceptions based on the President's power as Commander in Chief and sole organ for the nation in foreign policy matters.[161]

3.2.3 The US Supreme Court and the 'one voice' principle

In the US, like in the UK, the Supreme Court has employed the 'one voice' principle as a mechanism of ousting the jurisdiction of the courts in 'political questions', particularly in foreign and security affairs.[162] The key justification for the 'one voice' principle seems to be founded on the practical consideration that in dealing with the international community, the US must speak with one voice in order to realise its foreign policy objectives and avoid potential conflict with other countries.[163] The US Supreme Court gave its stamp of approval to the 'one voice' principle in a series of cases commencing with the 1936 case of *Curtiss-Wright*[164] where the court held (per Sutherland J): 'In this vast external realm, with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen as a representative of the nation'.[165]

The 'one voice' principle, which now constitutes an important tenet of US foreign affairs law was stated repeatedly by US courts in cases such as *United States v Belmont*,[166] *United States v Pink*,[167] *Baker v Carr*,[168] *Chicago & S Air Lines*,[169] *Zivotofsky v Clinton (Zivotofsky*

[161] Fisher note 150, 139.
[162] S H Cleveland '*Crosby* and the one voice myth in US foreign relations' (2001) 46(5) *Vill L R* 975, 981; D H Moore 'Beyond one voice' (2014) 98 *Minnesota L R* 953, 954; L Henkin *Constitutionalism, Democracy and Foreign Affairs* (1990) 70-71.
[163] Moore note 162, 954; Abebe note 83, 233; Knowles note 9, 44; Cleveland note 162, 979.
[164] Note 159.
[165] *Curtiss-Wright* at 320. See Powell note 146, 188.
[166] 301 US 324 (1937) at 330.
[167] 315 US 203 (1942) at 233 and 235.
[168] 369 US 186 (1962) at 281.
[169] Note 145 at 111-112.

I),[170] and *Zivotofsky v Kerry (Zivotofsky II)*.[171] In *Chicago & S Air Lines*, the US Supreme Court underscored the importance of the courts not interfering in foreign policy matters and the need for the latter institutions to defer to the political branches in such matters when it stated, among other considerations, that foreign policy decisions are: (a) the responsibility of the President as Commander-in-Chief and the nation's sole organ in foreign affairs;[172] (b) matters where the President possesses and works with intelligence reports which ought not be disclosed to the public (the rule of secrecy);[173] (c) not to be reviewed or nullified by the courts for to do so would be 'intolerable';[174] (d) by nature political, not judicial;[175] and (e) sensitive and complex.[176] In *Baker v Carr*, the Court acknowledged that many '[q]uestions touching foreign relations … uniquely demand single-voiced statement of the Government's views'.[177]

3.2.4 The US Supreme Court and international comity rules

The US Supreme Court has used international comity rules as justification for declining to hear a matter that is considered to be within the realm of foreign affairs or within the area of responsibility of another competent branch of government.[178] In the US, the idea that foreign policy decisions are not reviewable by the courts (act of state doctrine) seems to be rooted on a number of considerations, including the notion of 'the equality and independence of sovereign states' (international comity rule).[179] In *Underhill v Hernandez*,[180] Fuller CJ explained the doctrine (act of state based on comity rules) in the following words:

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[170] 132 S Ct 1421 (2012)
[171] 135 S Ct 2076 (2015); 576 US 1059 (2015)
[172] *Chicago & S Air Lines* at 111.
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Ibid.
[177] *Baker v Carr* at 211. For a critique of how US courts have allegedly misused and misapplied the 'one voice' principle, see Cleveland note 162, 984.
[178] *Underhill v Hernandez* 168 US 250 (1897); *Oetjen v Central Leather Co.* 246 US 297 (1918); *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964); *W S Kirkpatrick & Co. Inc v Environmental Tectonics Corporation International* 493 US 400 (1990).
[179] LJ Jones MR in *Belhaj* (2014) at para 59.
[180] 168 US 250 (1897)

> Every sovereign state is bound to respect the independence of every other sovereign state and the courts of one country will not sit in judgment of the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[181]

In the US, the exclusion of courts from adjudicating foreign policy matters has been in the context of the application and interpretation of the Alien Tort Claims Act of 1789 (ACTA)(also known as Alien Tort Statute (ATS)). The ATS allowed foreign nationals/citizens to sue foreign defendants, including foreign governments in US federal courts for claims that arose or crimes committed on foreign soil.[182] In *Sosa v Alvares-Machain*,[183] Souter J (for the majority) raised certain concerns that could have implications for the management of US foreign policy vis-à-vis those governments whose citizens/nationals would have sued the latter governments in US courts. According to Souter J, when US federal courts open the door too wide by further expanding *mero motu* the grounds on which foreign complainants could bring cases in US courts against foreign governments under the ATS, that could imperil America's relations with the defendant governments;[184] a phenomenon that should be avoided. Because of these concerns, Souter J (a) emphasised the need to exercise judicial restraint in recognising new causes of action that could grant foreign plaintiffs rights to bring suits in US courts under the ATS, and (b) suggested that in such cases, there could be a need, on a case-by-case basis to defer to the political branches of government for resolution.[185] In *Sosa*, the Court held that

[181] *Underhill* at 252.
[182] P N Leval 'The long arm of international law: Giving victims of human rights abuses their day in court' (2013) 92 *Foreign Affairs* 16, 16.
[183] 124 S Ct 2739 (2004)
[184] See H G Cohen 'Supremacy and diplomacy: The international law of the US Supreme Court' (2006) *Berkeley J Int'l L* 273, 288-289.
[185] Ibid. In his opinion, Souter J also referred to the apartheid cases – which were pending in US courts at the time – in which certain South African plaintiffs brought suits (under the ATCA) against US corporations for alleged connections to South Africa's apartheid past. In these cases, the South African (Mbeki administration) and US

foreign lawsuits, that is, lawsuits brought by foreign plaintiffs in US courts under the ATS, should guard against 'undermining the very harmony [comity] that was intended to promote.'[186]

3.2.5 The US Supreme Court and the 'sovereign immunity' doctrine

One of the contexts in which US courts are barred from deciding certain cases is in the application of US laws relating to sovereign immunity. In the US, the doctrine of 'sovereign immunity' is codified in the Foreign Sovereign Immunities Act of 1976 (FSIA).[187] In terms of the FSIA, foreign states with 'sovereign' status are granted immunity from certain types of suits in the federal courts.[188] While the FSIA generally provides foreign states sovereign immunity from jurisdiction of US courts, it also provides several exceptions from immunity, including (a) explicit or implied waiver of immunity by the foreign state[189] and (b) where expropriation of property is done in violation of international law.[190] The important point to note however is that the decision whether a sovereign state should be granted sovereign immunities is at the sole discretion of the political branches, whose decision is final[191] and cannot be reviewed by the courts.

Katz opines that one of the objectives of enacting the FSIA was to free the executive from the burden of deciding immunity cases by transferring that responsibility to the courts.[192] In *Republic of Austria v Altman*[193] (*Altman*), Kennedy J, dissenting from the majority decision

(George W Bush administration) governments had opposed the claims on the grounds, inter alia, that they (the cases) interfered with South Africa's Truth and Reconciliation process. Some say that one of the reasons why the South African government opposed these cases is that it was afraid that the litigation and the outcome could be detrimental to South Africa's ability to attract foreign investment (see http://business-humanrights.org/en/apartheid-reparations-lawsuits-re-so-africa

[186] *Sosa* at 2782.
[187] 28 U.S.C. §§ 1602-1611 (1976). See Katz note 128, 1189.
[188] FSIA §§1604.
[189] FSIA §§1605(a)(1).
[190] FSIA §§ 1605(a)(3).
[191] Katz note 139.
[192] Ibid, 1187 footnote 6.
[193] 124 S Ct 2240 (2004); 541 US 677 (2004)

of Stevens J (with whom Scalia and Breyer JJ concurred but for different and nuanced reasons) was at pains to point out the negative implications of allowing US citizens to sue foreign governments in US courts under the FSIA. Kennedy J argued that the majority's decision (to uphold Mrs Altman's claim against the Austrian government for the return of certain paintings (the 'Klimts') which belonged to her family which were allegedly stolen by the Nazis during WWII) had serious negative implications for US foreign policy. He reasoned that the Court's decision '[i]njects great prospective uncertainty into our relations with foreign sovereigns'[194] and would make bilateral cooperation between the US and other countries untenable.

3.2.6 The US Supreme Court and 'act of state' doctrine

Like in the UK, the 'act of state' doctrine has been used by the US Supreme Court as a technique for refraining from deciding matters before it on the grounds that the issues are acts of a sovereign government within its own territory or are acts of the US government in the conduct of foreign relations.[195] In the US, various decisions of the Supreme Court have explained the 'act of state' doctrine by reference to a number of contexts including: (a) the notion of equality and independence of sovereign states;[196] (b) international comity;[197] (c) the principle of SOP;[198] and (d) the 'principle of decision binding on federal and state courts alike'.[199]

One of the key reasons for the development and adoption of the 'act of state' doctrine was to ensure that relations between countries are not put in jeopardy[200] precisely because '[t]he prospect of finding a foreign state's conduct to be invalid almost necessarily pose[s] a risk to

[194] *Altman* at 2275-76.
[195] See Dugard & Coutsoudis note 40, 105; Dugard (2011) note 40, 71; Katz note 139, 1189.
[196] *Underhill* at 252; *Oetjen* at 298 and 303.
[197] *Oetjen* at 298 and 302.
[198] *Chicago & S Air Lines* at 111.
[199] *Kirkpatrick* at para 10.
[200] *Oetjen* at 304.

foreign relations with that state'.[201] In *Oetjen*, Clarke J stated that if courts of other countries were allowed to sit in judgment over the acts of other foreign sovereign governments, that 'would very certainly imperil the amicable relations between governments and vex the peace of nations'.[202] In *Banco Nacionale de Cuba v Sabbatino*,[203] the Supreme Court declined to consider the legality of Cuban expropriation on the grounds that the act of expropriation essentially constituted an act of state (Cuba) over which the US court was precluded from adjudicating.[204]

3.2.7 The US lower courts and 'state secrets privilege'

One of the characteristics of foreign relations that distinguish that field of governmental responsibility from other matters of policy is 'the accepted element of secrecy, both in information gathering and policy implementation'.[205] In the US, the government normally employs the 'state secrets privilege' - an evidentiary rule - in terms of which government is allowed not to comply with court decisions ordering it (government) to disclose information during civil litigation if the disclosure is deemed to be injurious to US national security.[206] State secrets privilege attaches only to the government and as a result, this privilege can only be invoked where the government is sued as a defendant or government intervenes in a civil litigation (for example, in a contract dispute) with the intention of preventing disclosure of state secrets.[207]

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[201] P J Spiro 'Globalization and the (foreign affairs) constitution' (2002) 63 *Ohio State L J* 649, 682.
[202] *Oetjen* at 304.
[203] 376 US 398 (1964)
[204] *Sabbatino* at 432.
[205] Spiro note 201, 679.
[206] T Garvey & E C Liu 'The state secrets privilege: Preventing the disclosure of sensitive national security information during civil litigation' Congressional Research Service (CRS), CRS Report to Congress, August 16, 2013, 1-19 available at https://www.fas.org/sgp/crs/secrecy/R41741.pdf at 1 and footnotes cited therein; L Windsor 'Is the state secrets privilege in the Constitution? The basis of the state secrets privilege in inherent executive powers and why court-implemented safeguards are constitutional and prudent' (2012) 43(3) *Geo J Int'l L* 897, 901.
[207] Ibid.

The US government has invoked the state secrets privilege in a number of cases, including cases concerning: (a) claims against government contractors;[208] (b) 'extraordinary rendition';[209] (c) targeted killing of 'terror suspects';[210] (d) the implementation of the Terrorist Surveillance Program (TSP);[211] (e) the application of the Foreign Intelligence Surveillance Act of 1978 (as amended in 2008); (f) employment disputes with security/intelligence agencies;[212] and (g) the listing of persons on the Terrorist Screening Database (TSD).[213]

In *El-Masri v Tenet*,[214] concerning 'extraordinary rendition' and torture of a German citizen on mistaken identity, the US government argued that the suit be dismissed on the grounds that the issues to be litigated were likely to disclose privileged information.[215] The district court accepted government's claims and dismissed the case holding, among other considerations that:

> unlike other privileges, the state secrets privilege is absolute and therefore once a court is satisfied that the claim is validly asserted, the privilege is not subject to a judicial balancing of the various interests at stake.[216]

On appeal, the 4th Circuit upheld the government's claim stating, among other considerations, that 'a court is obliged to accept the executive branch's claim of privilege without further demand.'[217]

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[208] *General Dynamics Corp. V United States; The Boeing Co. v US* 563 US 478 (2011)
[209] *El-Masri v US* 479 F.3d 296 (4th Cir. 2007)
[210] *Al-Aulaqi v Obama* 727 F. Supp. 2d 1 (D.D.C. 2010)
[211] *Al-Haramain Islamic Foundation v Bush* 507 F.3d 1190 (9th Cir. 2007)
[212] *Sterling v Tenet* 416 F.3d 338 (4th Cir. 2005)
[213] *Rahman v Chertoff* 2008 US Dist. LEXIS 32356 (N.D. III. 2008)
[214] 437 F. Supp. 2d 530 (E.D. Va. 2006) (court of first instance and hereinafter *El-Masri* (2006)). See also *El-Masri v United States* 479 F. 3d 296 (4th Cir. 2007) (on appeal and hereinafter *El-Masri* (2007)).
[215] *El-Masri* (2007) at 301.
[216] *El-Masri* (2006) at 537.
[217] *El-Masri* (2007) at 306. See also *Al-Aulaqi v Obama* 727 F. Supp. 2d. 1 (DDC 2010), the case in which the father of a US-born Yemeni cleric brought a claim against the US federal government challenging the inclusion of his son's name on the target list of the CIA. The US government had alleged that Anwar (the son) had significant ties with terrorist groups and had been involved in certain terror activities. For a detailed discussion of the legal

3.2.8 The US Supreme Court, the 'war on terror; and protection of fundamental rights

In 2001, President George W Bush launched the 'war on terror' campaign in response to the 9/11 US attacks. This campaign was multi-pronged. It included activities such as: (a) putting American and other allied partners' boots on the ground in Iraq and Afghanistan to fight Al Qaeda, the Taliban and other so-called 'Islamist terrorists' and their 'terrorist' organisations; (b) drone attacks against the Taliban in Afghanistan and Pakistan; (c) targeted (extra-judicial) killings of suspected 'terrorists'; (d) surveillance of 'terror' suspects and other citizens; (e) extraordinary 'rendition' of 'terror suspects' and their concomitant torture; and (f) detention of 'terror' suspects and 'enemy combatants' at US-run Guantanamo Bay prison (in Cuba) and other prisons around the world. For detainees at Guantanamo, President Bush had issued orders (for example, Presidential Military Order 66 FR 57833 of 2001) designating Guantanamo detainees unlawful combatants with no right of access to court to challenge the legality of their detention (*habeas corpus*), and not protected under the Geneva Conventions.[218]

The US Supreme Court had had to deal with various cases brought before it by, among others, detainees themselves or their relatives challenging the lawfulness and constitutionality of their detention,[219] inclusion in the list of 'terror' suspects,[220] and protection of their rights.[221] In the Guantanamo detainee cases, it is interesting to note how the US Supreme Court wrestled with legal rights/norms (protection of fundamental rights and the precepts of IL) on the one hand and foreign and security policy (the matters of national security, national interest and fight against terrorism) on the other. What can be observed from these cases is that the US Supreme

questions raised by that case, see L Wexler 'Litigating the long war on terror: The role of *Al-Aulaqi v Obama*' (2011) 9(1) *Loyola U C Int'l L R* 159, 159-176; Windsor note 206, 902.

[218] *Rasul* at 466. See *Canada (Minister of Justice) v Khadr* 2008 SCC 28; [2008] 2 SCR 125 (SCC)(*Khadr I*) at para 6 (discussed below in subsection 3.4.5); Woo note 86, 7.

[219] *Rasul, Hamdan, Boumediene;* O Fiss 'The war against terrorism and the rule of law' (2006) 26(2) *Oxford J Legal Studies* 235, 236.

[220] *Al-Aulaqi.*

[221] *Hamdan*; *Rasul*.

Court has been highly divided with the majority (in most cases) leaning more in favour of upholding constitutional rights of detainees under US and IL against the minority opinion that still believed that the US courts should not interfere in foreign and security matters, especially in matters relating to the prosecution of the 'war on terror'.

In *Rasul v Bush*, detainees held at Guantanamo, captured during the war in Afghanistan, applied to US courts for *habeas corpus*. That case essentially challenged the core policy of the US government's 'war on terror' and specifically 'the Bush administration's interpretation of the laws of war and its obligations under the Geneva Conventions'.[222] Cohen opines that *Rasul* presented a direct challenge to President Bush's international policy and the manner in which the 'war on terror' campaign was being prosecuted.[223] In granting *habeas corpus*, the Court held that President Bush acted illegally when he issued orders declaring Guantanamo detainees unlawful combatants and thereby denying them due process and violating their rights under international (humanitarian) law (the Geneva Conventions).[224] In his blistering dissent, Scalia J lambasted the majority for what he regarded as the Court's total disregard for the political, security and military concerns raised by the Executive in that case.[225] As far as he was concerned, the decision of the Court effectively endangered the US and its allies and hamstrung the US from conducting the 'war on terror'.[226] Scalia J would have preferred the Court to leave foreign and security policy matters in the hands of the Executive.[227] *In re Guantanamo Detainee Cases*,[228] the Supreme Court found that the Combatant Status Review Tribunal under

[222] Cohen note 184, 303.
[223] Ibid.
[224] *Rasul* at paras 483, 485, 488. Woo note 86, 7. The writ of *habeas corpus*, as Fiss note 219, 235 states, is 'the historic means of testing the legality of detention.'
[225] See Scalia J's scathing attack on the majority's decision in *Rasul* at 489, 493, 497, 498, 500; Cohen note 222, 306.
[226] Scalia J in *Rasul* at 499.
[227] Ibid at 489. In *Rasul*, the Court of Appeals (below) had dismissed the *habeas* applications, holding, among other considerations, that it (the Court) did not have jurisdiction to hear the prisoners' petition. (Fiss note 219, 247).
[228] (2005) 355 F. Supp. 2d. 443 (US)

which Guantanamo detainees were classified as 'enemy combatants' effectively denied these detainees due process.[229]

In *Hamdan v Rumsfeld*,[230] the Supreme Court held that the US violated international law by denying detainees access to regular courts.[231] In that case, the Court held further that, military commissions which were set up by the Bush Administration under which Guantanamo detainees were to be tried violated international law[232] and therefore they (military commissions) lacked the power to proceed.[233] In *Boumediene v Bush*,[234] the Supreme Court held that the US federal courts had jurisdiction to hear *habeas* petitions and that that jurisdiction extended to the US military facility at Guantanamo.[235] In that case, the Supreme Court dismissed the Bush administration's attempt to argue that constitutional rights (*habeas*) did not extent to aliens as a result of governmental action taken beyond the borders of the US.[236]

3.3 Germany, constitutional norms and the role of the courts in foreign affairs

In German constitutional law, the responsibility to conduct foreign relations rests with the federal government.[237] The position of the German Federal Constitutional Court (GFCC) (*Bundesverfassungsrericht*) at the apex of the German judicial system with jurisdiction on all constitutional matters[238] has implications for how foreign policy in Germany is designed,

[229] At 445; Woo note 86, 7.
[230] 548 US 557 (2006)
[231] At 613. See Also Woo note 86, 7.
[232] D Abebe & E A Posner 'The flaws of foreign affairs legalism' (2011) 51 *Va J Int'l L* 507, 532.
[233] *Hamdan* at 613.
[234] 553 US 723 (2008); 47 ILM 647 (2008)
[235] *Boumediene* at 649; Abebe & Posner note 232, 532.
[236] J Lobel 'Fundamental norms, international law, and the extraterritorial constitution' (2011) 36 *The Yale J Intl L* 307, 308.
[237] S Kadelbach 'International treaties and the German Constitution' in C A Bradley (ed) *The Oxford Handbook of Comparative Foreign Relations Law* (2019) 173, 174. Article 32(1) of the German Basic Law (The German Constitution) (*Grundgesetz*) provides: '[R]elations with foreign states shall be conducted by the Federation.'
[238] H G Rupp 'The Federal Constitutional Court in Germany: Scope of its jurisdiction and procedure' (1969) 44 *Notre Dame L R* 548, 548; R Streinz note 1, 96; Goldstone note 47, 25. Article 92 of the German Basic Law (The German Constitution)(Grundgesetz): '[T]he judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the *Länder*.' In this chapter, the terms, 'German Basic Law', 'The German Constitution', and *Grundgesetz* will be used interchangeably.

managed and conducted and what the role of German courts is in that regard. Unlike the US Supreme Court which historically declined jurisdiction to deal with controversies that are regarded as 'political questions', the GFCC, by law, has no power to refuse to decide a case on the grounds that the issue to be decided has or bears 'political' consequences.[239] What this means is that the American style 'political question' doctrine does not apply in German constitutional law.[240] However, the GFCC is aware that some of the decisions of the Court have 'political' consequences, particularly those decisions impacting on Germany's relations with the European Union (EU), especially in the context of European integration, and Germany's relations with the rest of the world.[241]

When dealing with matters that have 'political' consequences (as in matters relating to foreign relations), the GFCC takes into account the potential implications of its decisions as well as the area of governmental policy impacted by such decisions.[242] Taking into account the uniqueness of foreign affairs, the GFCC – like courts in the UK and US - has developed certain principles, approaches and techniques of dealing with controversies before it, particularly those matters where European and international affairs are involved.[243] These principles, approaches and techniques include: (a) judicial self-restraint;[244] (b) openness (or 'friendliness') towards European Law (*Europarechtsfreundlichkeit*); [245] (c) openness (or 'friendliness') towards international law (*Völkerrechtsfreundlichkeit*); [246] (d) the so-called 'theory of approximation';[247] and (e) the 'margin of appreciation' doctrine.[248]

[239] Streinz note 1, 101.
[240] Ibid.; Ceia note 142, 15.
[241] Streinz note 1, 101.
[242] Ibid.
[243] Ibid.
[244] Ibid, 109.
[245] Ibid, 101. See also Ceia note 142, 19.
[246] Streinz note 1, 101; Ceia note 142, 19.
[247] Ceia note 142, 26; U Kischel 'The state as a non-unitary actor: The role of the judicial branch in international negotiations' (2000) Arbeitspapiere (Working papers) – *Mannheimer Zentrum für Europäische Sozialforschung (No 23)* 8ff.
[248] Kischel note 247, 14.

As the apex court on all constitutional matters, the GFCC has the responsibility of ensuring that all branches of government comply with the constitutional order of the Basic Law.[249] The GFCC has competence to review statutes passed by parliament,[250] and to adjudicate both domestic disputes (for example, settle disputes between various bodies/agents of the federal government),[251] and external affairs (for example, control German bodies acting outside the borders of the state in the conduct of Germany's foreign relations).[252]

3.3.1 The GFCC and judicial self-restraint in foreign affairs

In German constitutional law, any controversy brought to court which raises constitutional issues/questions, the GFCC has no discretion/power to decline jurisdiction, it must decide the matter.[253] However, Streinz opines that there is a concomitant responsibility on the part of the Court not to go beyond its mandate and must exercise self-restraint.[254] According to Streinz, the essence of the doctrine of judicial self-restraint in German constitutional law and jurisprudence lies in the notion that the GFCC would refrain from deciding matters particularly in those areas where the Constitution clearly spells out which branch of government should deal with such matters.[255] In other words, the principle of judicial self-restraint is meant to guarantee and protect the space of other branches to act in accordance with their respective constitutional powers and mandate.[256]

In Germany, judicial self-restraint in foreign affairs has been evident in the manner in which the GFCC has (a) applied the rules of treaty interpretation as well as (b) interpreted

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[249] Steinz note 1, 95-96. See articles 93 para (1), 97 para (1), 100 para (2), and 20 para (3) of the Basic Law.
[250] Article 92 of the Basic Law. See also article 100 of the Basic Law which provides for judicial review.
[251] See article 93 para (1) clause 4 of the Basic Law.
[252] Streinz note 1, 95-96; M Borowski 'The beginnings of Germany's Federal Constitutional Court' (2003) 16(2) *Ratio Juris* 155, 155-156. See articles 100 para (2), 23 para (1), and 24 paras (1) and (2) of the Basic Law.
[253] Streinz note 1, 109; E L Barnstedt 'Judicial activism in the practice of the German Federal Constitutional Court: Is the GFCC an activist court?' (2007) 13 *Juridica Int'l L R* 38, 38.
[254] Streinz note 1, 109.
[255] Ibid.
[256] BVerfGE 36, 1 2 BvF 1/73 Grundlagenvertrag-decision East-West Basic Treaty (31 July 1973) para 2 of Headnotes available at https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=589

Germany's obligations under IL. In Germany, it is possible to – and the GFCC does – review the acts of the German government in international relations[257] (for example, constitutionality of treaties and German Armed Forces' missions abroad) since the American-style 'political question' doctrine does not apply.[258] In dealing with foreign relations matters, the GFCC is constantly aware and does take into account the specific constitutional challenges connected with international relations.[259] For instance, in the negotiation and conclusion of international treaties, the GFCC would take into account the fact that these negotiations take place in multilateral fora involving many parties and delegations, where 'horse-trading', bargaining, compromises, 'give-and-take', and package deals[260] are the order of business; and that these delegations from different countries are not under the jurisdiction of the *Grundgesetz*.[261] In reviewing the constitutionality of treaties emanating from such a multilateral negotiating process, the GFCC would ordinarily incline towards a treaty interpretation that allows 'sufficient leeway for policy-making'[262] by other branches and organs of state. Möllers suggests that in the early days of the GFCC's jurisprudence, the Court adopted this approach to statutory interpretation 'out of respect for the legislature whose decisions the Court did not want to strike down if possible.'[263] In German constitutional law and jurisprudence therefore, when the GFCC is faced with an issue about the constitutionality of an international treaty, the Court would adopt an approach to treaty interpretation that requires that the reading of the

[257] Barnstedt note 253, 40. J A Frowein 'Legal advice for foreign policy in Germany' (2005) 23(1) *Wisc Int'l L J* 25, 35 says that in Germany, many cases have been brought before the GFCC challenging the constitutionality of various foreign policy decisions and conduct (of the German government). Some of these decisions include: (a) the decision of the German government to allow Pershing missiles on German soil pursuant to NATO decisions; (b) the deployment of German armed forces outside Germany pursuant to UN resolutions; and (c) the NATO strategy of 1999.
[258] Barnstedt note 253, 41.
[259] Streinz note 1, 109.
[260] Kischel note 247, 8.
[261] Ceia note 142, 16; Kischel note 247, 23.
[262] Barnstedt note 253, 42; Streinz note 1, 110. C Möllers 'Scope and legitimacy of judicial review in German constitutional law' in H Pünder & C Waldhoff (eds) *Debates in German Public Law* (2014) 3, 9 says that this technique is referred to as '*Verfassungskonforme Auslegung*', the constitution-conforming interpretation.
[263] Möllers note 262, 9.

treaty be compatible with the *Grundgesetz*.[264] In the *East-West Basic Treaty* case,[265] the GFCC held that when the Court (GFCC) applies its power of constitutional-JR of a treaty, it would choose that interpretation 'through which the Treaty can stand up to the Basic Law'.[266] The Court was clear about what judicial self-restraint means in these contexts, stating:

> The principle of judicial self-restraint that the Federal Constitutional Court imposes upon itself does not mean a curtailment or weakening of its powers as just set out, but refraining from "playing politics", that is, intervening in the area of free policy-making set up and demarcated by the constitution.[267]

3.3.2 The GFCC and 'openness' to European law

Article 23(1) of the German Constitution provides in essence that Germany shall participate in European integration in order to realise a united Europe and a continent 'that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by [the German Constitution]'. Article 23(1) provides further that in order to achieve the

[264] This approach to constitutional interpretation is what is referred to in constitutional law literature as a weak form of judicial review. See M Tushnet 'Weak-form judicial review and 'core' civil liberties' (2006) 41 *Harv Civil Rights-Civil Liberties L R* 1, 2; W S Armstrong 'Weak and strong judicial review' (2003) *Law and Philosophy* 381, 381; M V Tushnet 'New forms of judicial review and the persistence of rights-and democracy-based worries' (2003) 38 *Wake Forest L R* 813, 821 suggests that an 'interpretive requirement' (in a weak judicial review provision) requires, in essence, that the court should interpret legislation whenever possible in a manner that brings the legislation in question in line with the Constitution without giving the courts the power to displace that legislation (at 820). Weak form of judicial review in South African constitutional law is provided for in s233 of the Constitution.

[265] BVerfGE 36, 1 2 BvF 1/73 *Grundlagenvertrag*-decision *East-West Basic Treaty* (31 July 1973) – the case involving a treaty between the Federal Republic of Germany and the German Democratic Republic (for good neighbourly relations) available at http://www.law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=589

[266] BVerfGE 36, 2 BvF 1/73. Barnstedt note 253, 42.

[267] BVerfGE 36, 1-37, 14; Barnstedt note 253, 42. For another example of how judicial restraint was exercised by the GFCC in the context of NATO decision to deploy Pershing II cruise missiles equipped with nuclear warheads in several Western European countries, including Germany, see the *Pershing Missiles* case BVerfGE Dec 18, 1984, 68 BVerfGE 1, 1985; see Frowein note 257, 38.

integration and developmental objectives of the EU, Germany may, with the consent of the Senate (*Bundesrat*), transfer sovereign powers to the supranational authority of the EU.

As can be seen, article 23(1) imposes an obligation on Germany to participate in the political affairs of the EU, and there is no choice not to.[268] It should not be surprising therefore that the Court in Karlsruhe, in its constitutional function of treaty interpretation for instance, would be somewhat 'obliged' to maintain a posture that is 'open' and 'friendly' towards EU law. In fact, in the *Lisbon Treaty* case,[269] the GFCC emphasised that the obligation to pursue the unity of Europe as enjoined by article 23(1) Basic Law,

> means in particular for the German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration. The Basic Law wants European integration and an international peaceful order.[270]

Streinz suggests that, the GFCC's approach to treaty interpretation in the *Lisbon Treaty* case was consistent with established jurisprudence of the Court[271] in earlier cases in which the Court adopted what is regarded in German constitutional law and jurisprudence as the 'principle of the Basic Law's openness [or 'friendliness'] towards European law' (*Europarechtsfreundlichkeit*)).[272] Streinz suggests further that this principle of 'openness to European law' is similar to another principle (derived from the GFCC's *Lisbon* decision) which

[268] Streinz note 1, 110.
[269] BVerfGE, 2 BvE 2/08 vom 30.6.2009. For a discussion of the *Lisbon Treaty* case, see P Kiiver 'The Lisbon judgment of the German Constitutional Court: A court-ordered strengthening of the national legislature in the EU' (2010) 16(5) *European L J* 578, 580; A Wonka 'Accountability without politics? The contribution of parliaments to the democratic control of EU politics in the German Constitutional Court's Lisbon ruling' in A Fischer-Lescano, C Joerges & A Wonka (eds) (hereinafter Fischer-Lescano *et al* (eds)) *The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives*, Centre of European Law & Politics, Universität Bremen, ZERP Discussion Paper 1/2010 at 55.
[270] Judgment (BVerfGE, 2 BvE 2/08). See Streinz note 1, 110 and footnotes therein; R U Krämer 'Looking through different glasses at the Lisbon Treaty: The German Constitutional Court and the Czech Constitutional Court' in Fischer-Lescano *et al* (eds) note 269, 19.
[271] Streinz note 1, 110 footnote 112.
[272] Streinz note 1, 110; Ceia note 142, 19.

is now well-established in German constitutional law termed 'openness' or 'friendliness' towards IL (*Völkerrechtsfreundlichkeit*).[273]

3.3.3 The GFCC and 'openness' to international law

Article 25 of the Basic Law gives primacy to IL in German constitutional law and legal architecture. It provides that 'The general rules of international law shall be an integral part of federal law [and] shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory'. Germany's commitment to the maintenance of international peace is clearly articulated in the provisions of articles 24 and 26 of the Basic Law. Article 24(2) states:

> With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.

Article 26(1) provides:

> Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be criminalised.

Tomuschat opines that Germany's quest to give primacy to IL and commitment to secure international peace is based on Germany's desire to extricate itself from the experiences of the 'horrendous years' (1933-1945) of Nazi dictatorship.[274] He suggests that, in 1949, when the

[273] Streinz note 1, 110-111 and footnote 113 therein.
[274] C Tomuschat 'International law and foreign policy' (2009) 34 *DAJV* 166, 166. See also Barnstedt note 237, 41.

framers of the Basic Law sat to draft a new constitution, they also wanted to refashion the face of Germany in the eyes of the international community from a pariah (rogue Nazi) state to a democratic constitutional state and 'a truly cooperative member of the international community'[275] which was committed to conduct itself, not only at home but abroad in the field of foreign relations, in accordance with the law, including IL.[276] As far as Tomuschat is concerned, article 25 is 'a provision that encapsulates Germany's confidence in the beneficial character of international law',[277] and was based on the conviction on the part of the German framers that 'international law rules, as they are shaped by the nations of the globe in a common effort, can never be unjust'.[278] Tomuschat suggests that the wording of article 25 has created 'an insurmountable preventive wall against any attempts by the [German] legislature to adopt laws conflicting with a general rule of international law'.[279]

The foreign policy cases which the GFCC has decided in the last seven decades are indicative of a strong inclination on the part of the GFCC to ensure that Germany complies with its obligations under the rules of (international) law.[280] For instance, some of these cases relate to the decisions of the German government to (a) allow the stationing of Pershing missiles on German soil in the early 1980s;[281] (b) use German armed forces (*Bundeswehr*) under UN mandate;[282] (c) adopt the NATO strategy of 1999; and (d) deploy the *Bundeswehr*

[275] Tomuschat note 274, 167.
[276] Ibid, 166; Kadelbach note 237, 185.
[277] Tomuschat note 274, 167.
[278] Ibid.
[279] Ibid.; Barnstedt note 253, 41.
[280] Tomuschat note 274, 166.
[281] BVerf GE 66, 39 2 BVR 1150/83 *et al* (16 December 1983) (The *Pershing Missiles* case).
[282] For further reading on how German armed forces have been reformed and the role they now play in peace efforts around the world, see F Brewer ' Between ambitions and financial constraints: The reform of the German armed forces' (2006) 15(2) *German Politics* 206, 206-220.

in Afghanistan (in the aftermath of 9/11 US attacks), Bosnia & Herzegovina,[283] and Somalia[284] in the early 1990s. In all these cases where German citizens challenged the constitutionality/ legality of these foreign policy decisions, the GFCC found in favour of the Federal government.[285]

3.3.4 The GFCC and the 'theory of approximation'

In German foreign affairs law, especially in cases involving the negotiation, conclusion and control of bilateral and multilateral treaties, the GFCC pays due regard to special international circumstances under which these treaties are negotiated.[286] In such negotiations, it is not always possible that the interests of Germany or of any other country for that matter will be satisfied, precisely because multilateral bargaining of that nature entails compromises and 'package deals'. Notwithstanding the complexities involved in multilateral treaty negotiations, the fundamental rights that are guaranteed by the *Grundgesetz* should not be bargained away.[287] In resolving a constitutional issue that stems from Germany's obligations under an international treaty, the GFCC tries to balance the obviously conflicting interests – fundamental rights on the one hand and international obligations on the other – by applying what has become known in German constitutional law and jurisprudence as the theory of approximation (*Annäherungstheorie*).[288] According to this theory,

[283] The UN Protection Force in Ex-Yugoslavia (UNPROFOR) had mandate, inter alia to perform airlifts to Sarajevo, control the embargo in the Mediterranean, AWACS mission to enforce the 'no-fly-zone' over Bosnia-Herzegovina. (see K H Börner 'Germany's Constitutional Court and future German combat operations outside of Europe' *Air & Space Power J: Cronicles Online J a*vailable at http://www.airpower.maxwell.af.mil/aircronicle/cc/borner.html (24 June 2010) 15 endnote 3).
[284] UN Operations in Somalia (UNOSOM II) had mandate to carry airlift operations to deliver humanitarian aid, including food supplies to the people of Somalia and logistic support for a brigade (Börner Ibid.)
[285] See Frowein note 257, 35.
[286] Ceia note 142, 16.; Kischel note 247, 8.
[287] Ceia note 142, 16.; Kischel note 247, 8.
[288] Ceia note 142, 16.; Kischel note 247, 8.

> the German government is allowed to negotiate and conclude an international treaty, even if its provisions are not compatible with the Constitution [*Grundgesetz*], if, according to constitutional standards, the situation is worse without than with the conclusion of the new international treaty.[289]

The theory of approximation was first enunciated by the GFCC in a case concerning the constitutionality of the Saar Statute following the agreements between the Federal Republic of Germany (West Germany) and France in 1954.[290] After WWII, the Saar protectorate (originally part of West Germany) was separated from Germany and became part of the French occupation zone. The Saar Regional Government enjoyed political autonomy but under French rule represented by the French High Commissioner (Gilbert Grandval). West Germany (under the leadership of Chancellor Konrad Adenauer) called for France to relinquish its hold on the Saar and for the reunification of the territory with the rest of West Germany. After many rounds of negotiations between West Germany and France, the two parties reached a compromise and signed the Paris Agreements (on 23 October 1954) which ended the occupation of West Germany and also agreed on how the Saar issue was to be resolved. The Saar Statute was subjected to a referendum (23 October 1955) and 66.7 per cent of the electorate in the Saar (who were still not content with the presence of France in the territory) rejected the European territory status proposed in the Paris Agreements.

In the *Saar-Urteil* case, 174 members of the *Bundestag* (German parliament) challenged the Franco-German treaty (Paris Agreements) arguing that the law (the Saar Statute) (the Act)[291] passed by the West German parliament to give effect to the Paris Agreements was

[289] Ceia note 142, 16.; Kischel note 247, 9.
[290] *Saar-Urteil*, BVerfGE 4, 157 ff. Also BVerfGE No. 7E 4 157 1 BvF 1/55 "Saar Statute" in https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=600 (English translation).
[291] The Federal President had executed the Act and promulgated it in the Federal Law Gazette under the date of 24 March 1955.

inconsistent with the Basic Law.[292] Although the GFCC held that the petition was admissible,[293] the Court nonetheless dismissed the petition stating that the political context and circumstances in which the treaty regulating West Germany's foreign relations should be taken into account when the constitutionality of that treaty is challenged on review.[294] One of the critical considerations in this case was the fact that one of the parties to the Paris Agreements was France which had a special prerogative as a foreign occupying power and was also not bound by the *Grundgesetz*. The critical question before the GFCC therefore was whether the constitutional principle that the exercise of all public power in West Germany is bound by the Basic Law could be applied to treaties concluded in the context and circumstances of the Paris Agreements.[295]

In reviewing the constitutionality of the treaty, the GFCC avoided what Kischel calls 'constitutional rigourism'[296] but chose instead an approach that sought to view the treaty as showing 'an inherent tendency to come closer to the full constitutional status'.[297] As far as Kischel is concerned, the GFCC in *Saars Statute* took the view that

> the infringements of constitutional norms can be accepted if they have a direct link with the provisions showing such a tendency of approximation towards full compliance with the constitution, and as long as some core contents of constitutional provisions are observed.[298]

[292] See BVerfGE No. 7E 4 157 1 BvF 1/55 "Saar Statute" in https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=600 (English translation).
[293] See Headnotes part C in BVerfGE No. 7E 4 157 1 BvF 1/55 "Saar Statute" in https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=600 (English translation).
[294] See also BVerfGE No. 7E 4 157 1 BvF 1/55 "Saar Statute" in https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=600 (English translation) part 4 subpara (a) and part 5.
[295] Ceia note 142, 17.
[296] Kischel note 247, 8. Also Ceia note 142, 17.
[297] Ceia note 142, 17.
[298] Kischel note 247, 9. See Ceia note 142, 17 footnote 39. For a further discussion of the theory of approximation, see Kischel note 247, 7-13.

3.3.5 The GFCC and the 'margin of appreciation' doctrine

Kischel points out that when the GFCC applies the theory of approximation (discussed above) in treaty or statutory interpretation, the obvious question that arises (and the 'dilemma' that the Court faces) is: who makes the final decision as to whether in negotiating and concluding the treaty in question the government 'has come as close to the fully constitutional status as is politically attainable?'[299] Faced with this 'dilemma', it is clear that the GFCC would ordinarily not be sufficiently steeped in all the nitty-gritty details of the facts, the politics, the nuances, and other relevant information that went into the negotiation and conclusion of a treaty. Under these circumstances, the GFCC 'gives a wide margin of appreciation to the executive in its determinations and prognoses' in the course of the negotiation and conclusion of international agreements in the conduct of Germany's foreign relations.[300] When interpreting a treaty therefore, the GFCC takes into account some of the 'prudential characteristics' of foreign affairs as far as they relate to treaty negotiation and conclusion, such as: (a) the negotiation and conclusion of international treaties is the responsibility of the executive and this branch of government has the necessary knowledge and expertise in these matters;[301] (b) lack of 'judicially manageable standards' by which to 'adjudicate' the treaty;[302] and (c) the GFCC will not substitute its own legal evaluations for those of the executive which has a political mandate in such matters (treaty-making).[303] In the application of the margin of appreciation doctrine in treaty interpretation therefore, it is clear that the GFCC would adopt an approach which seeks to defer to the executive and the Court will not impose its own preferences but will rely on the executive's account.[304]

[299] Kischel note 247, 13.
[300] Ibid, 14.
[301] Ibid.
[302] Ibid.
[303] Ibid.
[304] Ibid.

3.4 Canada, constitutional norms and the role of the courts in foreign affairs

Like the courts in the UK, US and Germany, the Canadian courts have had a fair share of cases and controversies that pitted the judiciary against the political branches (the executive to be precise) in matters relating to the intersection of constitutional law on the one hand and foreign and security policy on the other. The Supreme Court of Canada (SCC), like its counterparts in the UK, US and Germany, employs certain criteria, principles and doctrines in terms of which it (the SCC) defines the role (or none?) of Canadian courts in foreign and security policy matters. The role of Canadian courts in foreign and security matters has been clearly defined in the context of controversies dealing with: (a) 'political questions' (á la US-style 'political question' doctrine); (b) the extra-territorial application of the Canadian Charter of Rights and Freedoms (the Charter); (c) international comity rules; (d) immigration rules and protection of human rights; and (e) executive prerogative and 'war on terror'.

It is worth-noting upfront that, while Canadian constitutional law and jurisprudence recognise the 'act of state' doctrine, the Crown (executive) prerogative powers, and international comity rules in the prosecution of Canada's foreign relations, Canadian courts have not followed the position of the UK and US courts on the implications of these 'doctrines' for the role of the courts and the applicability or otherwise of constitutional norms in foreign and security policy matters.

In the UK and US, the conclusion that a particular executive act or decision constitutes an 'act of state' or an exercise of prerogative power (or a 'political question' in the case of the US) precludes the court from deciding that matter (that is, the matter becomes 'non-justiciable'). In Canada on the other hand, when courts are faced with cases that have or are deemed to have political consequences or involve acts of state or exercise of prerogative

powers, they (Canadian courts), like German courts, will not decline jurisdiction purely on the consideration that the decision will have political consequences.[305]

The approach taken by Canadian courts in foreign policy cases appears to be analogous to the approach taken by German courts in similar cases. The courts in both jurisdictions (the SCC and the GFCC) do review the exercises of all public power but have developed certain rules and techniques in an attempt to balance foreign policy commitments and national obligations under IL on the one hand and the imperatives (for example, protection of fundamental rights) of a constitutional state under the ROL on the other. In the case of Canada, Sim suggests that Canadian courts have adopted a 'merits-based approach'[306] - following the decision of the SCC in *Operation Dismantle v The Queen*[307] - to navigate the intersection between constitutional law on the one hand and foreign and security policy on the other.

In deciding foreign policy cases or cases with implications for Canada's relations with other countries, the SCC has rejected the American style 'political question' doctrine in favour of an approach that subjects the exercises of all public power to judicial scrutiny but deal with each case on its own merits. The SCC has also underscored the role of Canadian courts in foreign affairs in the context of defining the application of the Charter beyond the territorial jurisdiction of Canada (the 'extraterritorial application' of the Charter). While remaining faithful to the rejection of the political question doctrine, the SCC has however shown an inclination to give considerable weight to the Crown prerogative powers and the notion of international comity as a means of deferring to the executive in cases dealing with foreign affairs, particularly in those cases prosecuted pursuant to the 'war on terror'.

[305] Comment of Justice M Fish (of Canada) in R A Posner, 'Judicial review, a comparative perspective: Israel, Canada, and the United States' (2010) 30 *Cardoso L R* 2393, 2420.
[306] Sim note 69, 17 ff.
[307] [1985] 1 SCR 441 (SCC) (discussed below).

3.4.1 The SCC and the 'political question' doctrine

In *Operation Dismantle,* the SCC rejected the American style 'political question' doctrine that would have made the review of the executive decision (to allow US to test unarmed cruise missiles inside the Canadian airspace) immune from Charter adjudication.[308] In that case, applicants sought to challenge cabinet's decision and stop these tests on the grounds, inter alia, that they (nuclear tests) violated the rights of Canadian citizens to life and security of person protected by section 7 of the Charter.[309] In her concurring judgment (but for different reasons),[310] Wilson J rejected government's argument, inter alia, that cabinet's decision to allow nuclear tests constituted an exercise of crown/executive prerogative power and was therefore unreviewable because it raised a non-justiciable 'political question'.[311] Wilson J was emphatic when she held that the courts should not be too quick to denude themselves of the power of JR on the grounds that the case to be decided involves 'a weighty matter of state',[312] or that the issue to be decided 'is inherently non-justiciable or that it raises a so-called "political question"'.[313] As far as Wilson J was concerned, the tenets of constitutionalism such as SOP, responsible government and the ROL – which are some of the hallmarks of a constitutional state – run counter to the notion that courts may abdicate their constitutional responsibility of JR even in cases involving political and security matters.[314]

Notwithstanding the fact that the SCC in *Operation Dismantle* rejected the American style political question doctrine and held that the decision to allow cruise missile tests was reviewable, the Court nevertheless held that it was inappropriate, in the circumstances and

[308] Sim note 69, 17. See also comments of Justice Fish in Posner note 305, 2420.
[309] *Operation Dismantle* at 460.
[310] In *Operation Dismantle,* the decision of the Court was delivered by Dickson J (for the majority with Wilson J concurring, but for different reasons).
[311] *Operation Dismantle* at para 472.
[312] Ibid, 471.
[313] Ibid, 472.
[314] *Operation Dismantle* at 491. See also K Roach '"The Supreme Court at the bar of politics": The Afghan detainee and Omar Khadr cases' (2010) 28 *Nat'l J Constitutional L (NJCL)* 115, 121.

based on the merits of that case to grant appellants' declaratory relief and prohibit the missile tests. The Court (per Dickson J for the majority) dismissed the application and cited, inter alia, the following reasons as important factors to take into consideration: (a) the appellants would have difficulty proving the direct connection between the government's decision to allow the missile tests on the one hand and the increased likelihood of nuclear war on the other[315] or the increased threat or violation of citizens' Charter rights;[316] and (b) because of the unpredictable nature of the foreign policy of sovereign nations, the suggestion that Canada could be a target of nuclear attack (by the Soviet Union at the time) based solely on cabinet's decision to allow the tests could only be 'speculative'.[317]

What is clear from *Operation Dismantle* - particularly from the reasoning of Wilson J - is that, in Canadian constitutional and foreign affairs law, section 24(1) of the Charter which gives anyone the right to enforce rights and freedoms guaranteed in the Charter necessarily brings the exercise of all public power, including the exercise of public power in foreign affairs within the reach of JR.[318] Similarly, section 32(1), which provides essentially that the Canadian Charter applies to all levels and spheres of government, also means that the exercise of the royal prerogative (by the Crown/executive) is within the purview of judicial scrutiny.[319]

3.4.2 The SCC and the 'extraterritorial application' of the Canadian Charter

The SCC has brought the acts of the Canadian government in the field of foreign and security policy within the reach of judicial scrutiny through the principle that the provisions of the

[315] *Operation Dismantle* at 452.
[316] Ibid.
[317] Ibid. See also Roach note 314, 122; Sim note 69, 18.
[318] *Operation Dismantle* at 491.
[319] In *Operation Dismantle*, Dickson J held that the decisions of the Canadian government, including the decision to allow the cruise missile tests 'fall under s32(1)(a) of the Charter and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution' (at 443); Roach note 314, 121.

Charter applied beyond the territorial jurisdiction of Canada. In *R v Cook*,[320] Deltonia Cook was arrested by US police in Louisiana at the request of the Royal Canadian Mounted Police (RCMP) for murder committed in Canada. When he was later interrogated by Canadian police in the US, Canadian police did not inform him about his rights to retain and instruct counsel as guaranteed under section 10(b) of the Charter.[321] The question before the Court therefore was whether the actions of the RCMP in the US are subject to the Charter;[322] in other words, whether the Charter applied beyond the territorial jurisdiction of Canada. Cook argued that, in terms of the plain meaning of section 32(1) of the Charter,[323] it was clear that conduct of Canadian authorities were bound by the Charter 'wherever they happen to be carrying out their duties.'[324] During the trial, the Crown sought to admit as evidence parts of Cook's statements made in the interrogation.[325] Cook challenged the evidence arguing that during the interrogation, the Canadian police violated his section 10(b) Charter rights.[326]

In upholding Cook's challenge, the SCC held that when Canadian police interrogated him in the US, the former were still subject to section 32(1) of the Charter as employees of the Canadian government, and that the application of the Charter in the circumstances of that case did not violate international comity rules (in that case, the sovereignty of the US), and thereby render the Charter inapplicable to the conduct of those police officials.[327]

[320] [1998] 2 SCR 597 (SCC)
[321] S10(b) of the Charter: 'Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right'.
[322] *Cook* at 615- 616.
[323] S 32(1) of the Charter reads: 'This Charter applies (a) to the Parliament of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.'
[324] *Cook* at 616.
[325] Ibid at 610.
[326] Ibid at 598.
[327] Ibid at 616. Roach note 314, 124.

3.4.3 The SCC and international comity rules

In light of the decision of the SCC in *Cook*, it is clear that in Canadian constitutional foreign affairs law, the Charter applies beyond the territorial jurisdiction of Canada provided its application does not infringe international comity rules and the principle of sovereign equality of states.[328] However, in a later case of *R v Hape*,[329] the SCC appeared to modify somewhat the unqualified acceptance of the extra-territorial application of the Charter enunciated earlier in *Cook*. *Hape* involved a cross-border crime in which an investment banker had been convicted of money laundering. In that case, the investigation by the RCMP involved the search of Mr Hape's property in Turks and Caicos (a British Overseas Territory) by the local police. In court, Mr Hape challenged the search arguing that his section 8 Charter rights[330] were violated and that the evidence thus obtained should not be admissible under section 24(2) of the Charter.[331]

In a surprising move, a divided Supreme Court took the view that ostensibly appeared to overrule *Cook*.[332] In *Hape*, the SCC narrowed the extraterritorial application of the Charter when LeBel J (for the majority) suggested a general principle that the Charter would not apply to the actions of the RCMP beyond the territorial borders of Canada without the consent of the foreign state.[333] LeBel J reasoned that, while section 32 of the Charter 'does not expressly impose any territorial limits on the application of the Charter',[334] where the application of section 32 implicates issues of extraterritoriality and interstate relations, the section ought to

[328] *Cook* at 617.
[329] [2007] 2 SCR 292 (SCC)
[330] S8 of the Charter: reads 'Everyone has the right to be secure against unreasonable search and seizure.'
[331] S24(2) of the Charter reads: 'Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.'
[332] Roach note 314, 124.
[333] *Hape* at 340.
[334] Ibid at 312.

be interpreted taking into account international comity rules and the obligations binding on Canada under IL.[335]

In *Hape,* LeBel J effectively held that *Cook* conflicted with Canada's international legal obligations. According to LeBel J, the principles of international comity such as sovereign equality of states and non-interference in the domestic affairs of other countries would bar the extra-territorial application of the Charter in the absence of consent by the foreign state.

3.4.4 The SCC, immigration rules and protection of human rights

Suresh v Canada (Minister of Citizenship and Immigration)[336] concerned a deportation order (to Sri Lanka) issued against Suresh (a Convention refugee from Sri Lanka alleged to be a fundraiser for the proscribed 'terrorist organisation', the Liberation Tigers of Tamil Eelam (LTTE)) on the basis that he was a security risk to Canada. Suresh challenged the order arguing essentially that if he was deported to Sri Lanka, he faced the real possibility of torture or extra-judicial killing at the hands of the state. Suresh argued, among other considerations, that the Canadian Immigration Act, pursuant to which the deportation order was issued, infringed sections 7,[337] 2(b)[338] and 2(d)[339] of the Charter.

Notwithstanding all the political issues and ramifications the case raised (for example, implications for Sri Lanka-Canada relations of the activities of the LTTE supporters in Canada), the SCC was clear on the role of the courts in controlling executive discretion conferred by an Act of Parliament (the Canadian Immigration Act) when it held that such

[335] Ibid at 313.
[336] [2002] 1 SCR 3 (SCC)
[337] S 7 of the Charter reads: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'
[338] S 2(b) of the Charter reads: 'Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication'.
[339] S 2(d) of the Charter guarantees freedom of association.

discretion should be exercised in accordance with the Constitution and 'must conform to the principles of fundamental justice under s7 of the Charter.'[340]

In upholding Suresh's challenge and holding that 'deportation to face torture is generally unconstitutional',[341] the SCC confirmed that IL prohibiting torture was part and parcel of Canadian law.[342] This was so because by adopting the Charter in 1982 and proscribing cruel and unusual treatment or punishment (in section 12), Canada wanted to send a strong message to the international community to the effect that Canada and its citizens are opposed to government-sponsored torture.[343] The SCC further held that under Canadian and IL, torture is perceived as abhorrent and could never be justified even in the interest of national security.[344] What this means is that, under Canadian constitutional foreign affairs law, the need to protect national security will not be outweighed by a violation of a Charter right constituting deportation to face torture. As the Court suggested, 'states must find some other way of ensuring national security.'[345]

3.4.5 The SCC, the executive prerogative and the 'war on terror'

One of the key areas in Canadian constitutional law that have played out the tension between executive prerogative on the one hand and constitutional-legal obligations on the other has been in the 'war on terror' cases in the aftermath of the 9/11 US attacks. When it decided the 'war on terror' cases, the SCC appeared to have leaned more in favour of the Crown/executive prerogative as opposed to the rights of the individual and Canada's obligations under IL.[346] Some commentators[347] have even questioned whether the SCC has not allowed the American

[340] *Suresh* at para 77. See Woo note 86, 11.
[341] *Suresh* at para 1.
[342] Ibid at paras 50 and 76.
[343] Ibid at para 51.
[344] Ibid at para 76.
[345] Ibid.
[346] See D Rangavitz 'Dangerous deference: The Supreme Court of Canada in *Canada v Khadr*' (2011) 46 *Harv Civil Rights-Civil Liberties L R* 253, 254. See also Woo note 86, 11.
[347] Roach note 314, 121.

style 'political question' doctrine - which was rejected in *Operation Dismantle* – into the Canadian courtroom through the backdoor.

In *Amnesty International Canada v Canada (Minister of Defence)*[348] (the *Afghan detainee* case), the applicants (Amnesty International Canada (AIC) and British Colombia Civil Liberties Association (BCCLA)) filed the case in the Federal Court against the Canadian military forces seeking to stop the latter's practice of handing over captured detainees (who were non-Canadians) to the Afghan National Security Forces (ANSF) where the detainees allegedly faced serious risk of ill-treatment and torture. The gist of their argument was that the Charter applied to the conduct of Canadian military forces operating abroad (in Afghanistan) and specifically that handing over these detainees to authorities where the high probability of torture or ill-treatment existed violated the Charter and Canada's obligations under international human rights law.[349] In its defence, the Canadian government argued, surprisingly, that the case concerned the exercise of prerogative powers in the conduct of foreign policy, which prerogative powers were non-justiciable.[350]

The Federal Court (per Mactavish J) decided the *Afghan detainee* case on the basis of *Hape* wherein the SCC held that the Canadian Charter does not apply extraterritorially without the consent of the foreign state. Following *Hape*, Mactavish J adopted a restrictive approach and considered the decision in the *Afghan detainee* case to hinge on whether the government of Afghanistan had consented to the application of the Charter over its territory and nationals.[351] While in *Hape* the SCC had 'created' an international human rights exception to the general rule of non-extraterritorial application of the Charter, Mactavish J in the *Afghan detainee* case

[348] 2007 FC 1147
[349] See Desjardins J in the Federal Court of Appeal in *Amnesty International Canada v Chief of Defence Staff & Others* 2008 FCA 401 (the *Afghan Detainee (FCA)*) case at para 16 summarising the gist of applicants' argument in the *Afghan detainee* case (in the court below).
[350] The *Afghan detainee* case at para 121. The government's argument bordered very closely on the American style political question doctrine and Roach note 314, 121 questions that line of argument when in fact the SCC had rejected the political question doctrine in *Operation Dismantle*.
[351] Roach note 314, 127.

explicitly rejected that exception and held that the Charter had no application beyond Canada's territorial jurisdiction.[352] While Desjardins J in the Federal Court of Appeal (FCA) understood the SCC to have stated, in light of *Hape* and *Canada (Minister of Justice) v Khadr*[353] (discussed below) that international comity rules do not apply where there is a violation of IL and fundamental human rights,[354] the FCA nevertheless upheld Mactavish J's decision. The FCA held that the Charter had no application over the conduct of Canadian military forces in Afghanistan on the grounds that (a) Canadian military forces in Afghanistan were not an 'occupying force';[355] (b) these forces did not have 'effective control' of the detention facility in Afghanistan;[356] (c) they were in Afghanistan with the permission of the governing authorities there;[357] and (d) the governing authority in Afghanistan had not consented to the application of Canadian law over its territory and nationals.[358] When applicants applied for leave to appeal, the SCC refused to grant it.

The 'war on terror' cases appear to have muddied the jurisprudential waters in the SCC. A classic example of how Canadian courts have vacillated between established legal principles and constitutional rights on the one hand and the need to safeguard national security and interests on the other is demonstrated by the marathon litigation involving Omar Khadr and the various authorities and functionaries of the Canadian government. Omar Khadr is a Canadian citizen who was arrested, at the age of 15, by US forces in Afghanistan in 2001 on various terrorism charges,[359] including war crimes, and was later transferred and held at Guantanamo Bay in Cuba.

[352] Mactavish J in the *Afghan Detainee* case at para 324. See also Desjardins J in the *Afghan Detainee (FCA)* case at para 18.
[353] [2008] 2 SCR 125
[354] *Afghan Detainee (FCA)* case at para 20.
[355] Ibid at para 26.
[356] Ibid.
[357] Ibid.
[358] Ibid.
[359] See Rangavitz note 346 at 253, 257 and 268.

In 2003 and 2004, the Canadian officers from the Canadian Security Intelligence Service (CSIS) and the Department of Foreign Affairs and International Trade (DFAIT) interviewed Khadr in Guantanamo (in the presence of US officers) without initially informing him of his rights to legal representation. The Canadian officers had interviewed Khadr for the purposes of obtaining intelligence (not to build a case against him). When Khadr's trial commenced in the military commissions set up by the US (under the Military Commissions Act of 2006), the Canadian authorities handed over to the US authorities documents containing information gathered during the interviews conducted with Khadr in 2003 and 2004. During his trial in the military commissions proceedings, Khadr sought unsuccessfully to obtain from US authorities documents and notes from the interviews conducted with him by the CSIS agents. He then applied to the Federal Court of Canada[360] to obtain these documents hoping to use them in his defence during the trial. He lost in the Federal Court but won in the FCA.[361] The Canadian government appealed to the SCC.

In *Canada (Minister of Justice) v Khadr*,[362] (*Khadr I*) the issue before the Court was whether Canadian officials needed to comply with the Charter in an interrogation of the accused at Guantanamo. The SCC held that international comity rules which would ordinarily have precluded the application of the Charter to the conduct of Canadian officials abroad did not apply to the assistance the latter gave to US authorities at Guantanamo Bay[363] since their participation in the US interrogation regime at that detention facility involved the violation of Canada's international human rights obligations.[364] The unanimous Court, referring to the judgment of LeBel J in *Hape*,[365] held that when courts interpret the scope and application of

[360] *Khadr v Canada (Minister of Justice)* 2005 FC 1076
[361] *Khadr v Canada (Minister of Justice)* 2007 FC 182; [2008] 1 FCR 270.
[362] 2008 SCC 28; [2008] 2 SCR 125 (SCC)
[363] *Khadr I* at para 26.
[364] Ibid at paras 24 and 25.
[365] LeBel J in *Hape* at para 52.

the Charter, they should ensure that Canada complies with its obligations binding under IL.[366] The SCC ordered that the documents constituting the record of the interviews of 2003 and 2004 be released to Mr Khadr taking into account the need to balance national security interests and other considerations [367] as required under the confidentiality proceedings in the Federal Court.[368]

During his detention at Guantanamo, Mr Khadr had repeatedly requested the government of Canada to intervene and ask the US to repatriate him to Canada, and in 2008, through his legal counsel, Mr Khadr formally submitted his request. The Prime Minister declined Mr Khadr's request, whereupon Mr Khadr approached the Federal Court for JR of the government's decision and refusal to seek his repatriation.[369] Mr Khadr won in the Federal Court (*Khadr v Canada (Prime Minister)*)[370] (per O'Reilly J), and that decision was confirmed by the FCA in *Canada (Prime Minister) v Khadr*.[371] The government appealed to the SCC.

In *Canada (Prime Minister) v Khadr*[372] (*Khadr II*), the Canadian government (courtesy of the Prime Minister) opposed Mr Khadr's application for an order directing the Canadian government to seek his repatriation (from Guantanamo Bay) to Canada. The Prime Minister argued, among other points, that: (a) Canada (and the international community) had an obligation to fight terrorism;[373] (b) there was no duty on the part of government to protect citizens abroad;[374] (c) under the SOP principle, the area of foreign policy was the exclusive province of the executive and the Canadian Constitution did not grant the courts any power to

[366] *Khadr I* at para 18. See also paras 23-28. It is important to note that *Khadr I* was decided after the US Supreme Court decision in *Hamdan v Rumsfeld*, 542 US 466 (2004) in which the US Supreme Court had decided that the detention at Guantanamo and the concomitant denial of *habeas corpus* under the military commissions regime then in place violated fundamental human rights protected by IL and the Geneva Conventions. (see *Canada (Prime Minister) v Khadr* [2010] 1 SCR 44 (SCC)*(Khadr II)* para 16 (discussed below)).
[367] *Khadr I* at para 37.
[368] See also Roach note 314, 126.
[369] In *Khadr v Canada (Prime Minister)* 2009 FC 405.
[370] Ibid.
[371] 2009 FCA 246
[372] [2010] 1 SCR 44 (SCC)
[373] Woo note 8686, 10.
[374] Ibid.

tell government how to conduct foreign policy;[375] and (d) the decision not to ask the US to repatriate Mr Khadr constituted an exercise of the crown/executive prerogative power to conduct foreign relations, 'including the right to speak freely with a foreign state on all such matters'[376] and to make representations to a foreign government.[377]

The SCC agreed with both the Federal Court and the FCA that Khadr's rights under section 7 of the Charter were violated.[378] However, the SCC upheld the government's contention and concluded that:

> the order made by the lower courts that the government request Mr Khadr's return to Canada is not an appropriate remedy for that breach under section 24(1) of the Charter. Consistent with the separation of powers and *the well-grounded reluctance of the courts to intervene in matters of foreign relations*, the proper remedy is to grant Mr Khadr a declaration that his Charter rights have been infringed, while leaving the government a measure of discretion in deciding how best to respond.[379]

In arriving at this conclusion, the SCC took into consideration and attached importance to some of the 'prudential characteristics' of foreign affairs, including: (a) the conduct of foreign policy is the responsibility of the executive under the common law prerogative power;[380] (b) the executive (and not the courts) is better placed to determine the way and means of exercising its prerogative powers[381] (subject to the duty of the courts to first ascertain whether the prerogative power asserted exists, and secondly, if so, whether its exercise violates the Charter);[382] (c) the

[375] *Khadr II* at para 33.
[376] Ibid.
[377] Ibid at para 35.
[378] Ibid at paras 2 and 26.
[379] *Khadr II* at para 2. Emphasis added.
[380] Ibid at paras 35 and 40.
[381] Ibid at para 37.
[382] Ibid at para 36.

executive must be allowed the flexibility to exercise its discretion on how its duties under the prerogative power should be carried out;[383] (d) due weight should be given to the fact that it is the constitutional responsibility of the executive to conduct foreign relations;[384] (e) foreign affairs are delicate and complex matters which are always in constant flux;[385] and (f) because foreign policy matters are riddled with 'evidentiary uncertainties' and that the court lacks the necessary competence, skill and resources to deal with foreign policy matters, the latter institution should give due consideration to and respect the Crown/executive prerogative power in this field (foreign affairs).[386]

The path that the SCC has traversed in the long line of cases concerning constitutional legal rights on the one hand and the imperatives of foreign and security policy on the other has come full circle. While the SCC had rejected the political question doctrine in *Operation Dismantle*, the Canadian government (the executive branch to be precise), seems to have insisted in later foreign policy cases that the area of foreign and security policy ought to be left solely in the hands of the executive with the courts playing no role in adjudicating those matters. In the face of this pressure (mounted by the executive in the context of fear and hysteria), the Canadian courts have appeared more willing to defer, on 'prudential' grounds, to the executive in cases touching on foreign and security matters (the fight against terrorism and 'Islamic extremism').

[383] Ibid at para 37.
[384] Ibid at para 39.
[385] Ibid.
[386] Ibid at para 46. For a criticism of what Rangavitz calls 'dangerous deference' and how the SCC in *Khadr II* allegedly misapplied the law, precedent and misconstrued its constitutional role, see Rangavitz note 346, 265ff. After ten years of incarceration (eight years at Guantanamo and the remainder of his sentence served in Canada), Omar Khadr was finally released. After his release, he sued the Canadian government for infringing his rights under the Charter. In 2017, that lawsuit was settled with the Prime Minister paying Mr Khadr CA$10.5 million and offering him an apology. https://en.wikipedia.org/wiki/Omar_Khadr

4. Conclusion

This chapter has discussed an important question in foreign affairs law of whether foreign affairs are justiciable and bound by constitutional norms. In an attempt to answer this question, the chapter employed two approaches. In the first instance, it borrowed from IR theory and discussed the conflicting theoretical perspectives on the question from the point of view of 'realism' and 'liberalism'. The former school answered this question in the negative, arguing, among other considerations that, since the global world of *realpolitik* is driven by states that calculate their interests in terms of power in an anarchic international system, then universal moral-legal principles do not apply to the conduct of states in the realm of foreign affairs. Because universal moral-legal principles do not apply to states, as realists have argued, the courts have no role to play at all in adjudicating matters relating to the exercise of public power in the field of foreign and security policy. Liberalism, on the other hand, with its emphasis on individual freedom, has suggested, among other observations, that ideas such as liberty, human rights and democracy, as well as institutions and intergovernmental organisations have engendered a world where IL is playing a key role in ordering inter-state and inter-institutional relations. And because liberalism draws no distinction between domestic and foreign affairs, then both these domains can and should be governed and disciplined by the same legal norms and standards. In the liberal world of global politics, courts should play a role in controlling/restraining the exercise of public power, including public power in the realm of foreign and security policy.

The chapter then provided a comparative overview of the role (or none) that courts play in foreign affairs in the UK, US, Germany, and Canada. Although the judges in all these jurisdictions cannot be neatly pigeon-holed into ideological compartments (realists or liberals) when deciding cases and controversies in the realm of foreign and security policy, there are however clear approaches that courts take in these jurisdictions on foreign affairs matters. Their

approaches are based on various principles, 'doctrines' and 'theories' of foreign affairs law, some of which bear the hallmarks of the underlying normative claims made by realism and liberalism in the context of inter-state relations. For instance, the courts in the UK and US have employed the so-called 'one voice' principle and 'act of state' doctrine to exclude the courts from adjudicating foreign and security affairs on the grounds that these matters are the exclusive responsibility of the political branches of government (with the executive in the lead). On the other hand, and notwithstanding that there are clear differences in the manner in which courts deal with foreign policy matters, courts in the UK, US, Germany, and Canada have considered the important relevance of concepts such as human rights, liberty, and democracy in both the domestic and foreign affairs. The courts in these jurisdictions have also taken cognisance of the critical role played by organisations such as the UN in the maintenance of international peace and the role IL plays in ordering inter-state relations.

Notwithstanding the recognised and pronounced role of the executive in foreign and security affairs in the UK, US, Germany and Canada (in terms of historical practice and by virtue of the entrenched principle of SOP in their respective constitutional systems), there is growing acceptance by the courts in these jurisdictions that it is '[i]mpossible to avoid legal issues that are a result of [the countries' participation and engagement in] foreign relations'.[387] What is clear from the overview of how courts in the four jurisdictions deal with foreign policy matters – and this could certainly be the case in other countries as well – is that, as Slaughter Burley observed, foreign affairs are indeed 'sufficiently different from domestic affairs to justify a different standard of judicial review in foreign affairs cases'.[388]

The UK (for more than 800 years since the 13th century), the US (for more than 200 years since 1787), Germany (for more than 70 years since 1949) and Canada (for more than 40

[387] McLachlan (2014) note 56, 3 (online webpage).
[388] Slaughter Burley note 6, 1998.

years since 1982) have developed clear guidelines (in the form of principles, 'doctrines' and 'theories') that seek to define the role (or none) of the courts in foreign affairs. In defining the constitutionalisation of South Africa's foreign policy since 1994 and the role of the courts in that process, it will be interesting to establish whether and how the approaches of courts in the UK, US, Germany and Canada (or any other jurisdiction for that matter), whose rulings may be consulted by South African courts, have influenced or will influence the latter when deciding foreign policy cases.[389]

Against the background of the two IR theories and comparative approaches examined in this chapter, the next five chapters of this thesis discuss tenets of constitutionalism, that is, supremacy of the constitution (SOC), SOP, ROL, human rights (HRs), and IL – which are pervasively entrenched in the Constitution – to demonstrate how they bind the conduct of South African foreign policy and bring that area of governmental responsibility (foreign affairs) squarely within the discipline of constitutional norms.

[389] For further comparative reading and latest exposé on how the highest courts in the US, South Africa and the European Union (courtesy of the European Court of Justice) deal with foreign policy, see R Eksteen *The Role of the Highest Courts of the United States of America, South Africa, and the European Court of Justice in Foreign Affairs* (2019). See also C Reus-Smit (ed) *The Politics of International Law* (2004) for further reading on the relationship between international relations (foreign policy) and law.

CHAPTER THREE

SOUTH AFRICA'S FOREIGN POLICY UNDER A SUPREME CONSTITUTION

> Thus, in place of a living monarch, we have enthroned a set of principles contained in the Constitution. In such a system, loyalty to principles which, viewed as a whole, are legally sovereign or supreme, must rise above all other ties such as those of kinship, class, creed, or community.[1]

> There is nothing in our Constitution that suggests that, in so far as it relates to the powers afforded and the obligations imposed by the Constitution upon the executive, the supremacy of the Constitution stops at the borders of South Africa.[2]

1. Introduction

One of the defining features of the fundamental change that took place in the political life of South Africa after the fall of apartheid was the decision to move away from a system of government based on parliamentary sovereignty to one based on constitutional supremacy. A move away from parliamentary sovereignty to constitutional supremacy meant that parliament ceased to be the sovereign authority whose laws could not be reviewed and set aside for constitutionality, but that the Constitution became 'the supreme law of the Republic'.[3] 'Supremacy of the constitution' (SOC) under the latter system meant that law or conduct that

[1] M H Beg (former Chief Justice of India) 'The supremacy of the Constitution' in R Dhavan & A Jacob (eds) *Indian Constitution: Trends and Issues* (1978) 113, 113.
[2] O'Regan J (dissenting) in *Kaunda v President of the Republic of South Africa* 2004 (5) SA 235 (CC); 2004 (10) BCLR 1009 (CC) at para 228.
[3] S J Ellmann 'The struggle for the rule of law in South Africa (Symposium: Twenty years of South African constitutionalism: Constitutional rights, judicial independence and the transition to democracy)' (2015-2016) 60 *NYL Sch L R* 57, 66; Mahomed CJ in *Speaker of the National Assembly v De Lille* [1999] ZASCA 50; [1999] 4 All SA 241 (A) at para 14.

was inconsistent with the Constitution was invalid and that 'the obligations imposed by it must be fulfilled'.[4] This fundamental change had huge implications for foreign policy. As far as the exercise of foreign affairs powers was concerned, constitutional supremacy meant that all foreign affairs law, decisions and conduct became subject to a supreme Constitution and required to be consistent with its provisions and bound by its terms. This chapter seeks to demonstrate how SOC – as one of the key 'founding values' of the South African *rechtsstaat* and a direct antithesis of parliamentary sovereignty - now binds South African foreign policy and renders it justiciable.

There are three main reasons for the choice of SOC as one of the 'tools of analysis' in this study to demonstrate how that tenet of modern liberal-legal constitutionalism – which is pervasively entrenched in the Constitution – has rendered foreign policy in post-apartheid South Africa justiciable and bound by constitutional norms. The first reason has to do with how South African courts after 1994 have interpreted and applied the principle of SOC over the entire gamut of the exercise of public power, and how that interpretation has brought the previously excluded terrain of foreign policy under the sway of a supreme Constitution. A careful reading of the interpretation and application of the SOC principle by the courts clearly demonstrates (as it will be argued in this chapter) how the consequences of parliamentary sovereignty (that is, a sovereign parliament untrammelled by constitutional norms and exclusion of the courts from foreign policy matters) no longer apply in the current constitutional-legal order where the Constitution (and not parliament) is supreme.[5]

The second reason for the choice of the SOC principle – which is essentially the corollary of the first reason – is that the principle of SOC was introduced for the first time in South African constitutional law history in 1994 and with it, a whole new dispensation of policy-

[4] 1996 Constitution, s 2.
[5] *De Lille* note 3 at para 14.

making and –implementation and exercise of public power. What is clear is that SOC came to stand in stark opposition to the consequences and implications of parliamentary sovereignty as far as the exercise of public power is concerned, including in the realm of foreign affairs.

The third reason for choosing SOC is to respond to the criticism by some politicians and bigwigs in the governing African National Congress (ANC) levelled against the very legitimacy of the Constitution and the courts in the light of court decisions in some highly politically 'sensitive' cases which left the latter leaders hot under the collar.[6] The point there would be that it is important for politicians and state functionaries to realise that, unlike in pre-democratic (parliamentary sovereignty) era, the SOC principle under the current constitutional-legal order has brought the entire gamut of the exercise of public power under the sway of a supreme Constitution where canons of political accountability, transparency, legal justification and rationality (to mention but a few) are supposed to imbue all governmental conduct, including governmental conduct in foreign affairs.

This chapter is divided into six parts. The first part is this introduction. The second part provides a brief historical background to the principle of SOC as one of the key tenets of modern liberal-legal constitutionalism, which came to define how the exercise of (public) power was to be 'controlled' in constitutional democracies. The third part explains the system of parliamentary sovereignty and its implications for foreign policy in pre-democratic South Africa with the aim of demonstrating how the realm of foreign policy under that system then

[6] For example, in the aftermath of the Al Bashir saga in 2015, specifically following the decision of the North Gauteng High Court (*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others* [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP)(the *Al Bashir (HC)* case)) ordering government not to permit then President Al Bashir to leave the country in order to allow the processes under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act) to be completed (to arrest President Al Bashir and hand him over to the ICC), Gwede Mantashe, Secretary General of the ANC retorted in anger and dismay at the court saying, among other things: 'There is a drive in sections of the judiciary to create chaos for governance; that's our view… We know if it doesn't happen in the Western Cape High Court, it will happen in the Northern Gauteng – those are the two benches where you always see that the narrative is totally negative and create[sic] a contradiction.' Susan Comrie, Gwede Mantashe singles out 'problematic courts', News24 (22 June 2015) available at http://www.news24.com/SouthAfrica/news/Gwede-Mantashe-singles-out-problematic-courts-20150622

was not justiciable and bound by constitutional norms. The fourth part of this chapter discusses various provisions in the 1996 Constitution, which have entrenched SOC in the nook and cranny of South Africa's constitutional-legal order ('the supremacy provisions') and their controlling relevance to the exercise of foreign policy powers. The fifth part considers the implications of SOC for the conduct of foreign policy. The last part is the conclusion and summarises the key points made in this chapter.

2. Supremacy of the constitution: A brief historical background

SOC is one of the key tenets of liberal-legal constitutionalism which has its modern roots in the French and American revolutions in the latter part of the 18th century.[7] Together with the other tenets of modern liberal-legal constitutionalism such as judicial review (JR), rule of law (ROL), and separation of powers (SOP), SOC governs how the constitution should function according to the goals and objectives of modern constitutionalism.[8] As a direct outcome of a revolutionary process – which wrestled power from the hands of monarchies and aristocrats[9] – SOC became one of the key concepts through which political power (monarchy) could be subjected to law and create a system of government based on the ROL.[10]

In its 'mature form', SOC 'is a product of American constitutional legal thinking',[11] which goes back to the founding of the US Constitution at the end of the 18th century.[12] However,

[7] H Dippel 'Modern constitutionalism: An introduction to a history in need of writing' (2000) 73 *Tijdschrift voor Rechtsgeschiedenis* 153, 153-154; K Milewicz, 'Emerging patterns of global constitutionalisation: Towards a conceptual framework' (2009) 16(2) *Indiana J Global Legal Studies* 413, 419; M Loughlin, 'What is constitutionalisation?' in P Doubner & M Loughlin (eds) *The Twilight of Constitutionalism?* (2010) 48; J Limbach, 'The concept of supremacy of the constitution' (2001) 64(1) *The Modern L R* 1, 2.
[8] Dippel note 7, 155.
[9] Ibid, 153-154.
[10] Milewicz note 7, 419.
[11] Limbach note 7, 2.
[12] Dippel note 7, 153-154.

Arnold[13] suggests that the origins of the American doctrine of SOC are manifold[14] and could be traced as far back as ancient Greece and Rome (in the latter case, with special reference to Cicero's notion of *summa lex* (highest law)) and the development of the doctrine of fundamental law in Europe during the 17th and 18th centuries.[15]

The aftermath of WWII engendered a radical rethinking about the role of law in society and

> how unchecked legislative power and, in particular, unchecked delegation in Nazi Germany, Fascist Italy and Vichy France had undermined "both the democratic deliberative function of legislatures and emergent conceptions of constitutionally protected rights of individuals."[16]

In response to the carnage and barbarism of WWII, many post-war constitutions – for example, Germany (1949), France (1946 and 1958) and India (1949) – put human rights at the centre of political discourse and created strict legal mechanisms that would put constraints on the legislatures, by drawing clear lines beyond which even the most representative of legislatures could not go;[17] a phenomenon that entrenched the normative supremacy of the constitution. In addition to the entrenchment of a supreme constitution, many post-war democracies created

[13] J I Arnold 'Historic roots of the supremacy of the constitution' (1927) 11 *The Constitutional Review* 151, 151-160.
[14] In fact, Arnold ibid, 151ff suggests that there are twelve different sources of the principle of supremacy of the constitution.
[15] Ibid, 152. For further reading on the historical development of the concept of supremacy of the constitution see: M B Rosenberry 'The supremacy of the law: Law vs discretion ' (1938) 23(1) *Marquette L R* 1; T H Lee 'Theorising the foreign affairs constitution' (2012) Fordham Law Legal Studies Research Paper No. 1996734 available at http://papers.ssrn.com/sol3/papers.cfm?abstractid=1996734 or http://dx.doi.org/10.2139/ssrn.1996734 1-32, 5 (of printed webpage); L Dragne 'Supremacy of the constitution' (2013) (4) *AGORA Int'l J Juridical Sciences* 38, 38 available at www.juridicaljournal.univarora.ro
[16] D Moseneke (DCJ retired) 'The balance between robust constitutionalism and the democratic process' Univ of Melbourne Law School, Seabrook Chambers Public Lecture, 16 June 2016 (hereinafter Moseneke (2016)) available at https://law.unimelb.edu.au> data>assets>pdf file>Seabrook-Chambers-Lecture-2016-Justice-Moseneke.pdf 8. See also Limbach note 7, 5.
[17] P L Lindseth 'The paradox of parliamentary supremacy: Delegation, democracy, and dictatorship in Germany and France, 1920s-1950s' (2004) 113 *Yale L J* 1341, 1348. Moseneke (2016) note 16, 8-9 and footnotes therein; Dragne note 15, 39.

special courts outside the legislature – for example, the Federal Constitutional Court in West Germany and the Constitutional Council in France – with the exclusive responsibility 'to enforce delegation constraints *against the legislature itself*'.[18] This phenomenon manifested a clear intention on the part of these countries to move away from a system of parliamentary supremacy which had been a dominant system of government during WWII. The introduction of constitutional jurisdiction in many post-WWII constitutions was aimed at rejecting the authoritarian and totalitarian forms of government and to introduce an independent court that would have the power of constitutional-JR to 'control'/'supervise' the exercise of (public) power.[19]

3. Pre-democratic South Africa and foreign policy under parliamentary sovereignty

In pre-democratic South Africa, the conduct of foreign policy was governed by a number of 'doctrines' and 'principles' which were based, largely, on the old English and Roman-Dutch law.[20] One of the doctrines which implicated the conduct of foreign policy was the *doctrine of parliamentary sovereignty* which was modelled on the British (Westminster) style of parliamentary democracy and politics.[21] From the operation of the doctrine of parliamentary sovereignty flew two important considerations which had important consequences for how

[18] Moseneke (2016) note 16, 8-9 and footnotes therein (Emphasis in the original); Lindseth note 17, 1349. The creation of the Constitutional Court in South Africa as the apex court with power to decide only constitutional matters followed the German model (see Constitution, s167(3)(b) before that section was amended by s167(3)(b)(ii) of the Constitution of the Republic of South Africa Seventeenth Amendment Act 72 of 2012).
[19] Limbach note 7, 5; R A Miller 'Balancing security and liberty in Germany' (2010) 4 *J Nat'l Sec L & Pol'y* 369, 372; C A Bradley & J L Goldsmith *Foreign Relations Law: Cases and Materials* (2003) 39.
[20] For example, 'act of state' is a doctrine which originated in England (LJ Jones MR in *Belhaj & Another v Straw & Others* [2014] EWCA Civ 1394 at para 52). The so-called 'one voice' principle (the idea that in foreign affairs government must speak with 'one voice') comes from the old English case of *Government of the Republic of Spain v SS 'Arantzazu Mendi'* 1939 AC 256 at 264. These and other doctrines and principles are discussed in some detail in this and subsequent chapters with the aim of demonstrating how they implicated the conduct of foreign policy in pre-democratic South Africa. As indicated in chapter one, the rationale behind discussing these doctrines and principles is to help the reader understand the legal framework and context within which foreign policy was conducted in South Africa before 1994 and how that framework and context were radically altered after 1994 when a new constitutional-legal order under a supreme Constitution came into existence.
[21] Ellmann note 3, 57; J Kriegler 'The Constitutional Court of South Africa' (2002) 36 *Cornell Int'l L J* 361, 361; J Dugard 'A bill of rights for South Africa' (1990) 23(3) *Cornell Int'l L J* 441, 442 (hereinafter Dugard (1990)).

foreign policy was conducted. The first important consideration related to the position and power of parliament as an institution of government in the overall administration and distribution of the sum total of national power. Under that doctrine, parliament (the legislative arm of government) had absolute sovereignty and was above the other two branches (that is, the executive and the judiciary)[22] as well as all other institutions and organs of government. What that meant was that, all laws, including foreign affairs laws and conduct of the South African government pursuant to them could not be interfered with by the executive and/or the judiciary. As a result, parliament could (and in fact did) pass laws 'authorising' certain conduct (for example, cross-border raids, abductions and assassinations of political opponents) even when such conduct violated IL.[23] The fact that parliament could legislate at will, including passing laws that were clearly in violation of international law[24] necessarily meant that the executive pretty much had a free hand in conducting foreign policy and was untrammelled by constitutional norms such as respect for HRs and the rule of (international) law (RO(I)L), which norms had come to define the world of global politics and interstate relations in the aftermath of WWII.

The second important consideration that flew from the operation of the doctrine of parliamentary sovereignty as far as the design, management and conduct of foreign policy was concerned related to the role (or more aptly, the exclusion) of the judiciary and the courts from

[22] R Malherbe & M Van Eck 'The state's failure to comply with its constitutional duties and its impact on democracy' (2009) 2 *TSAR* 209, 209; Dugard (1990) note 21, 442.

[23] For example, s2(a) of the Terrorism Act 83 of 1967 defined acts of terrorism as including, 'intention to endanger the maintenance of law and order in the Republic or any portion thereof, in the Republic or elsewhere' outside the borders of the Republic. It was under such laws that South African security forces could, for example, assassinate the opponents of apartheid, like Ms Ruth First (the wife of Joe Slovo), on foreign soil (Mozambique in her case) and abduct combatants of uMkhonto we Sizwe (MK)(the military wing of the ANC from neighbouring states such as Botswana and Swaziland in flagrant violation of the sovereignty and territorial integrity of these states. See the cases of: *S v Ramotse* (TPD decision of 14 September 1970 unreported) (accused abducted from Botswana); *S v Ebrahim* [1991] ZASCA 3; 1991 (2) SA 553 (A); [1991] 4 All SA 356 (AD)(accused abducted from Swaziland); and *S v Tuhadeleni* 1969 (1) SA 153 (A)(accused challenging the validity of the application of the Terrorism Act 83 of 1967 in South-West Africa (Namibia) on the ground that the mandate of South Africa over that country had been lawfully revoked by the UN General Assembly).

[24] Kriegler note 21, 361.

participating in foreign policy matters. This was so precisely because under that system, the courts lacked the power to review and strike down parliamentary statutes[25] and acts of the South African government, including statutes and acts in the realm of foreign affairs. The exclusion of the courts from foreign policy matters effectively meant that in pre-democratic South Africa, the possibility of the courts subjecting the conduct of foreign policy to the rigours of constitutional norms was unthinkable. This phenomenon engendered a situation where the foreign policy of pre-democratic governments was non-justiciable and unbound by constitutional norms, values, standards and principles such as respect for the RO(I)L, political accountability, and transparency in foreign policy-making and -implementation.

4. Democratic South Africa and the birth of a supreme constitution

When negotiations for an alternative political dispensation commenced in 1990, it was clear that the framers of the new constitution were determined to radically transform South Africa in all respects.[26] Some of the key objectives of the new constitutional project included: (a) the need to move away from a system of parliamentary sovereignty where parliament 'enjoyed supremacy and no constitution or bill of rights provided any fetter on its legislative powers';[27] (b) the need to redefine the role of the courts as the guardians of the new constitutional order;[28] (c) the need to put in place clear constraints on legislative and executive powers in order to, among other objectives, foster political accountability of political leaders and elected representatives of the people and to squelch arbitrariness and promote transparency, openness and public participation in policy- and decision-making; and (d) the need to remodel the face of South Africa in the eyes of the world community from a pariah (rogue apartheid) state to a

[25] Ibid.
[26] F Venter 'South Africa: A Diceyan Rechtsstaat?' (2012) 57 *McGill L J* 721, 725 (hereinafter Venter (2012)); Kriegler note 21, 361.
[27] Moseneke (2016) note 16, 11; Venter (2012) note 26, 723 and 727.
[28] Moseneke (2016) note 16, 11; Kriegler note 21, 362.

responsible member of the family of nations destined to play a constructive role in global affairs.[29] In order to achieve these objectives, the framers committed to a new legal order based on key tenets of modern liberal-legal constitutionalism including, SOC, SOP, JR, RO(I)L, and protection of fundamental rights.[30]

The adoption of SOC as one of the defining characteristics of a post-apartheid constitutional-legal order would implicate in a radical and profound manner how public power is exercised, not only in the domestic context but also in the international context in the conduct of South Africa's foreign relations. The next discussion focuses on various 'supremacy provisions' in the Constitution and explains their controlling relevance to the conduct of foreign policy.

4.1 The preamble's commitment to supremacy of the constitution and its significance to foreign policy

The preamble to the 1996 Constitution provides in part that, one of the key reasons the people of South Africa, through their freely elected representatives (parliament) adopted the (1996) Constitution *as the supreme law of the Republic* is to '[b]uild a united and democratic South Africa able to take its rightful place as a *sovereign* [and responsible] state in the family of nations.'[31] A close and careful reading of the preamble shows that the Constitution is defined *qua* supreme law as the basis of South Africa's engagement 'as a sovereign state' with the international community. As Lee suggested in the case of the US Constitution at its founding,[32] the South African framers, by making the Constitution the supreme law of the country, they also wanted to convey a clear and unambiguous message to its neighbours and the international

[29] Venter (2012) note 26, 732. See also preamble to the 1996 Constitution; *Minister of Justice and Constitutional Development & Others v Southern Africa Litigation Centre & Others* [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (*Al Bashir (SCA))* at para 63.
[30] Venter (2012) note 26, 724.
[31] Constitution, preamble. Emphasis added.
[32] Lee note 15, 5.

community as a whole that the Constitution of democratic South Africa shall be a key instrument that would guide the foreign policy of the post-apartheid state and define the norms and parameters of its engagement with the community of nations.

It is worth noting that, South Africa's foreign policy before 1994 was 'highly legalistic'[33] with 'little principled substance'.[34] Successive apartheid governments relied heavily on the old law of state sovereignty and non-interference in the internal affairs of other states (article 2(7) of the UN Charter) to fend off criticism levelled against their racial policies.[35] The framers of the new Constitution sought to change all that and undo the fundamentals of pre-democratic South African foreign policy by specifically clothing the new Constitution with the mantle of supremacy and by asserting that the supreme Constitution will form the basis and foundation of South Africa's foreign policy after the fall of apartheid. The framers were keen to commit the country to play a constructive and responsible role in global politics and to respect and abide by the rule of international law (ROIL)). This position was in stark contrast to the pre-democratic legal order of apartheid where a sovereign parliament had relied on majoritarian politics and rule *by* law to undergird impunity in the conduct of South Africa's international relations. The need for South Africa to abide by its constitutional commitments and IL norms has been underscored by the Constitutional Courts in a number of cases. In *Minister of Justice and Constitutional Development & Others v Southern Africa Litigation Centre & Others*[36] (*Al Bashir (SCA))*, concerning the decision of the South African government to allow then President of Sudan, Omar Al Bashir, who is wanted by the International Criminal Court (ICC) for war crimes, crimes against humanity and genocide, to enter and leave South Africa and

[33] J Dugard 'Kaleidoscope: International law and the South African Constitution' (1997) 1 *EJIL* 77 (hereinafter Dugard (1997)), 77; Kriegler note 21, 361.
[34] Venter (2012) note 26, 732.
[35] J Dugard *International Law: A South African Perspective 4th ed* (2011) 20 (hereinafter Dugard (2011)); J Dugard 'South Africa and international law: A historical introduction' in J Dugard, M du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law: A South African Perspective 5th ed* (2018) 23-24 (hereinafter Dugard *et al* (eds)).
[36] [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA)

even when ordered by the court to arrest him while he was in the country pursuant to the ICC arrest warrants as required under South African and IL, deliberately refused to do so, the Supreme Court of Appeal (SCA) stated the following in connection with the role of IL in South Africa and implications for South Africa's relations with the world:

> The Constitution incorporated these provisions [recognising and respecting IL] pursuant to the goal stated in the Preamble that its purpose is to '[b]uild a united and democratic South Africa able to take its rightful place as a sovereign [and responsible] state in the family of nations.' From being a pariah South Africa has sought in our democratic state to play a full role as an accepted member of the international community. As part of this aim it enacted the Implementation Act, the preamble to which records that South Africa has become 'an integral and accepted member of the community of nations.[37]

South Africa's role as a sovereign and responsible member in the family of nations and what this implies was also emphasised in *Kaunda & Others v President of the Republic of South Africa & Others*[38] concerning whether there is a duty on the South African government to provide diplomatic protection to its citizens abroad, where O'Regan J (dissenting) stated that

> our Constitution recognises and asserts that after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law.[39]

[37] *Al Bashir (SCA)* at para 63.
[38] 2005 (10) BCLR 1009 (CC); 2005 (4) 235 (CC)
[39] *Kaunda* at para 222.

The important point that the Constitutional Court in *Kaunda* and the SCA in *Al Bashir (SCA)* underscored is that the conduct of foreign policy in South Africa is bound by and subject to the aims, objectives, commitments and standards enshrined in the Constitution.

4.2 Section 1(c): Supremacy of the Constitution as a 'founding value'

Section 1 of the Constitution enumerates key values on which South Africa, as 'one, sovereign and democratic state' is founded. In section 1(c), SOC is listed as one of these 'founding values'. Section 1 is one of the most entrenched provisions of the Constitution in the sense that it requires special parliamentary majorities to amend it.[40] The important question to ask therefore is: what role do founding values, especially SOC, play in constitutional adjudication and (foreign) policy making and implementation? In *United Democratic Movement (UDM) v President of the Republic of South Africa,*[41] concerning the constitutionality of the 'floor crossing' legislation and its compatibility with the founding value of democracy, the Constitutional Court held that the founding values play an important role in South Africa's constitutional system in that (a) they 'inform the interpretation of the Constitution and other law' and (b) they 'set positive standards with which *all* law must comply in order to be valid'.[42]

In *Economic Freedom Fighters (EFF) & Another v Speaker of the National Assembly & Others,*[43] concerning the binding powers of the public protector's remedial action unless reviewed and set aside, the Constitutional Court (per Mogoeng CJ) underscored the importance of founding values to the sustenance of South Africa's constitutional democracy in general,

[40] It requires 75 per cent of the members of the National Assembly and a supporting vote of at least six provinces in the National Council of Provinces (NCOP); Constitution, s 74(1)(a) and (b).
[41] 2002 (11) BCLR 1179 (CC); [2002] ZACC 21; 2003 (1) SA 495 (CC)
[42] *UDM* at para 19. Emphasis added. See also *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC); [2004] ZACC 10; 2005 (3) SA 280 at para 21 (a case concerning the constitutionality of the amended provisions of the Electoral Act 73 of 1998 which prohibited convicted prisoners serving sentences of imprisonment without the option of a fine from voting during their incarceration; whether that law was consistent with the right to vote. In terms of s 1(d) of the Constitution, universal adult suffrage is mentioned as one of the 'founding values' of South Africa's constitutional democracy.
[43] [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC)

and exercise of public power in particular. He stated that one of the fundamental reasons for the adoption of founding values (of accountability, SOC and ROL) was to stop egregious abuse of power and national resources which was prevalent under apartheid.[44] Mogoeng CJ warned that when public officials disregard their constitutional obligations, they do so 'at their peril'[45] precisely because 'constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck'.[46] In *EFF*, Mogoeng CJ cited with approval *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another*,[47] where Madala J had stated that founding values are 'pillar stones' of South Africa's democracy and 'must be observed scrupulously'.[48] In *Nyathi*, Madala J had warned that if founding values are disregarded and their requirements not carried out scrupulously, this would rattle the very foundations of South Africa's constitutional democracy.[49] Madala J placed founding values at the centre of South Africa's constitutional democracy and political life when he emphasised that in a constitutional state based on the ROL, there is a moral obligation on everyone 'to ensure the continued survival of our democracy'.[50]

From the courts' interpretation of the role and importance of founding values to constitutional adjudication, law-making and policy-formulation and implementation, it could be concluded that, that area of governmental responsibility in the field of foreign affairs has also been brought under the full discipline of the same constitutional norms, values and principles that bind the exercise of public power. By providing that a united, sovereign, and democratic South Africa is founded on SOC and the ROL[51] among other 'founding values', the

[44] *EFF* at para 1.
[45] Ibid.
[46] Ibid.
[47] [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) (footnote 2).
[48] *Nyathi* at para 80.
[49] Ibid.
[50] Ibid.
[51] Constitution, s 1(c).

framers sought to achieve certain foreign policy objectives, including: (a) that South Africa's conduct in the course of exercising its sovereign foreign affairs powers will be guided by fundamental principles and the ROL; and (b) that South Africa will never again hide behind the perverted notion of state sovereignty to justify unlawfulness,[52] but that its conduct and actions will now be guided by the dictates of law, including IL and morality.

As can be seen, SOC *qua* 'founding value' has important consequences for how South Africa's foreign policy should be conducted. For instance, since the Constitution limits absolute power by establishing procedures, obligations and parameters within which government must act and exercise public power, it should be self-evident that the conduct of South Africa's foreign policy must now comply with certain constitutional-legal norms and standards in order to be valid, including the criteria that (foreign policy) law or conduct (a) must be rational;[53] (b) must be legitimate;[54] and (c) must have been passed by procedure authorised by the Constitution.[55]

4.3 Section 2: The supremacy clause

Section 2 of the Constitution (the supremacy clause) provides that the Constitution is 'the supreme law of the Republic [and that] law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' The crystal clear language of section 2 and its peremptory terms manifest the resolve by the framers to severe ties with the pre-1994 system of parliamentary sovereignty and all its bitter consequences. In a ringing rejection of everything that was unacceptable about apartheid, the Constitutional Assembly – which drafted the 1996

[52] See Dugard (1997) note 33, 77.
[53] *Kaunda* at paras 79 and 80; *Pharmaceutical Manufacturers Association Assoc. of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC)(concerning the question whether the court has the power to review and set aside a decision by the President to bring an Act of Parliament into force) at para 90.
[54] *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC)(*SADC Tribunal case*) at paras 48, 49 and 56.
[55] Moseneke (2016) note 16, 7. See also Chaskalson CJ in *Pharmaceutical Manufacturers Assoc* at paras 19 and 20.

Constitution - 'sought to bring to life a democratic state under the sway of a supreme constitution that entrenches fundamental protections and a binding normative scheme'.[56]

In the eyes of the framers therefore, the new Constitution was perceived as paramount,[57] a law at the pinnacle of all laws,[58] a source of all legal regulations,[59] and which stands above the whole of government as the supreme authority in the land.[60] For the framers, a supreme constitution was 'fundamental law' which is superior to all other laws and regulations, precisely because it 'expresses more directly the will of the people'.[61] In a constitutional state like South Africa, where the constitution is supreme, that legal document was seen as 'the foundational juridical order and supreme legal norm of the state'.[62] The idea of SOC thus put the Constitution at the pinnacle of a legal system[63] and engendered a governmental structure '[w]here there [was] deliberate *lower ranking* of statute' and the concomitant '*lower ranking* of the legislator'.[64]

The supremacy clause has important practical consequences for how public power, including public power in the realm of foreign policy – whether through statutory pronouncements or executive conduct – should be exercised in pursuance of South Africa's foreign policy goals and objectives. For instance, some of the principles that should guide and bind the conduct of South Africa's foreign policy under the sway of a supreme Constitution include the following: (a) all foreign affairs powers exercised by the political branches must be derived from the Constitution and government can only exercise those powers given to it by

[56] Moseneke (2016) note 16, 13; O'Regan J in *Kaunda* at para 218.
[57] Limbach note 7, 2.
[58] Dragne note 15, 39; *De Lille* at para 14; *EFF* at para 26.
[59] Dragne note 15, 39; See also R R Ludwikowski 'Supreme law or basic law? The decline of the concept of constitutional supremacy' (2001) 9 *Cardoso J Int'l & Comp L* 253, 269; *De Lille* at para 14.
[60] *De Lille* at para 14.
[61] Dragne note 15, 39.
[62] Venter (2012) note 26, 726.
[63] Limbach note 7, 1.
[64] Ibid. Emphasis in the original.

the Constitution and the law;[65] (b) any law, conduct or policy contrary to the Constitution is invalid and of no force or effect[66] and the principle of legality becomes the 'umbrella requirement' and measuring stick for total compliance on the part of government with constitutional norms, values and principles in the making of laws and execution of (foreign) policy;[67] (c) the constraints imposed by the supreme Constitution are aimed at eradicating the possibility of arbitrary government and at the same time limiting what the political branches can do;[68] (d) the exercise of all public power (in this case, foreign affairs power) under a supreme constitution should be consistent with the law;[69] and (e) the will of the majority as expressed by parliament through law-making and the executive through policy-making and -implementation is subject to the supreme Constitution 'and the norms embodied in it'.[70]

In the field of foreign policy, the executive is allowed ample scope to exercise its discretion on how to conduct foreign policy.[71] However, it is important for South African foreign policy-makers and implementers to always bear in mind that the exercise of discretion in foreign policy matters is also subject to the controlling influence of the supremacy clause.[72] The state functionaries should be aware that under the supreme Constitution, discretionary foreign affairs powers are subject to the norms, values and principles enshrined in the supreme

[65] *EFF* at para 75; *Kaunda* at paras 79, 178, 193 and 245; *Pharmaceutical Manufacturers Assoc.* at paras 17 and 90; Rosenberry note 15, 2.
[66] Constitution, s 2; Moseneke (2016) note 16, 14; Dragne note 15, 39.
[67] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metroplitan Council & Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58; *President of the Republic of South Africa & Others v South African Rugby Football Union & Others (SARFU)* 1999 (10) BCLR 1059 at para 148; Dragne note 15, 40; Venter (2012), note 26, 726.
[68] Moseneke (2016) note 16, 8 and 14. See also Ngcobo J in *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 16 (the case concerned the obligation on the part of government to comply with its constitutional duty to facilitate public participation in the law-making process); *EFF* at para 1.
[69] Ackerman J in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 156.
[70] L W H Ackermann 'The obligations on government and society in our constitutional state to respect and support independent constitutional structures' (2000) 3 *PER*/*PELJ* 1, 1.
[71] Chaskalson CJ in *Kaunda* at paras 73, 74, 81, 132, and 144; Ngcobo J in *Kaunda* at paras 172, 178, and 191; and O'Regan J in *Kaunda* at paras 243, 244, and 247.
[72] Chaskalson CJ in *Kaunda* at paras 78 and 79; Ngcobo J in *Kaunda* at paras 159, 172 and 193.

law[73] in order to ensure that 'excessive and unquestionable powers are not easily conferred upon executive officers or authorities in a way which invites lawless abuse against citizens'.[74]

The supremacy clause imposes a duty on the state to fulfil the obligations imposed by the Constitution. The imperative to fulfil the obligations imposed by the supreme law is further underscored by section 237 which provides that: 'All constitutional obligations must be performed diligently and without delay.' In other words, section 2, read with section 237 gives the entire Constitution binding force over all branches of government and organs of state charged with constitutional responsibilities in their respective areas of competence. In the case of foreign policy, this would mean that the President, cabinet ministers, and officials responsible for designing and implementing South Africa's foreign policy are bound by all those obligations imposed by the Constitution that may have a bearing on foreign affairs. Practically, the supremacy clause will require of state functionaries: (a) that the means they employ to achieve foreign policy goals and objectives must be consistent with the Constitution in terms of their form and substance and manner in which the means are pursued taking into account that failure to comply with these requirements could render their conduct invalid, unlawful and irrational;[75] (b) that failure to consult interested parties in the implementation of any foreign policy law and/or decision could result in violation of 'constitutional legality';[76] and (c) that failure to make a determination public (to inform the public on time or inordinate delay[77] in informing the public) renders the decision irrational and unlawful and violates some

[73] Chaskalson CJ in *Kaunda* at paras 80 and 144; Ngcobo J in *Kaunda* at para 172.
[74] Beg note 1, 115. See also Mohamed CJ in *De Lille* at para 14.
[75] Ngcobo J in *Doctors for Life* at para 208 and footnotes therein.
[76] Bozalek J in *Earthlife Africa – Johannesburg and Another v Minister of Energy and Others* [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (*Earthlife* or *South Africa-Russia nuclear deal* case) (the case concerned the implementation of the South Africa-Russia nuclear deal without proper public engagement and consultation in the process) at para 47.
[77] *Buthelezi & Another v Minister of Home Affairs & Others* [2012] ZASCA 174; 2013 (3) SA 325 (SCA) (the *Dalai Lama* case) at paras 17, 18 and 19.

of the key tenets of a supreme constitution such as openness, transparency and accountable government.[78]

It is worth-noting that in contemporary times, one of the burning issues in the discussion of the principle of SOC is whether this principle - and the concomitant role of the judiciary in controlling the exercise of public power - is compatible with democratic ethos. Some legal experts such as Graglia[79] argue that the power given to the courts to ensure compliance with a supreme constitution is anti-democratic and should therefore be expunged from the way the Constitution is applied and interpreted, particularly in policy and legislative matters such as foreign relations, which are regarded as the exclusive domain of the elected political branches. This argument has found traction and fervent support in the highest office in the land (the Presidency)[80] as well as in the highest ranking officials of the governing ANC who have expressed grave concern about what they perceive as 'judicial dictatorship'[81] and unwarranted interference by the judiciary in policy matters which are supposed to be the exclusive responsibility of parliament and the executive under the strict doctrine of SOP. Moseneke observes that this argument (that is, the unwarranted interference by the judiciary in government policy matters) has been stretched further to encompass attacks on the very legitimacy of the Constitution itself, on the grounds that: (a) the South African Constitution 'is an awful bargain shaped by inapt concessions' made by the liberation movement during the

[78] *Earthlife* at para 58.
[79] L A Graglia 'Constitutional law without the Constitution: The Supreme Court's remaking of America' in R H Bork (ed) *A Country I Do Not Recognize: The Legal Assault on American Values* (2005) 1, 1-55.
[80] Then President Zuma had repeatedly argued, with some indignation, that separation of powers principle must be observed by all branches of government, including the judiciary. In his view, 'The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote.' (President Zuma in Parliament, 1 November 2011, available at http://www.thepresidency.gov.za/speeches/address-president-jacob-zuma%2C-occasion-bidding-farewell-chief-justice-sandile-ngcobo)
[81] Gwede Mantashe, then Secretary General of the ANC in one interview is reported as having said: '[T]he judiciary is actually consolidating opposition to government, and that there is a great deal of hostility that comes through from the judiciary towards the Executive and Parliament' and that judges were 'reversing the gains of transformation through precedents.' (available at http://www.sowetanlive.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambasts-judges

negotiations (1990-1996) for an alternative dispensation;[82] (b) 'the will of the people [which is supposed to be reflected by elected representatives] does not find full voice within [existing] constitutional arrangements';[83] and (c) ability of government to address concerns relating, among others, to social equity and 'transformation' is hamstrung by a myriad of constitutional constraints over the exercise of public power.[84]

According to Moseneke, the fundamental essence of the argument propounded by some in government and the ANC against the legitimacy of the Constitution is that 'the will of the people on the project of transforming society is frustrated by the supremacy of the constitution and the role courts fulfil in policing its compliance'.[85] Such attacks on the legitimacy of the Constitution and the role of the courts in interpreting and applying it have been loudest in those highly 'sensitive' and politically-charged foreign policy cases involving, among others, the decisions of the courts against government conduct. The cases include: (a) *Buthelezi & Another v Minister of Home Affairs & Others*[86] (the 'refusal' by the South African government to issue a visa to the Dalai Lama to enter South Africa for fear of upsetting South Africa-China relations); (b) *Mohamed v President of the Republic of South Africa and Others*[87] (South Africa's cooperation in the 'rendition' of a terror suspect to the US in flagrant violation of the suspect's constitutional rights); (c) *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development (Al Bashir (HC))*[88]; (d) *Al Bashir (SCA)* (failure of the South African government to abide by a court order to arrest then President Omar Al Bashir of Sudan wanted by the ICC when he was in the country in June 2015); (e) *Democratic Alliance v Minister of International Relations and Others*[89] (South Africa's decision to withdraw from the

[82] Moseneke (2016) note 16, 2-3.
[83] Ibid, 3.
[84] Ibid.
[85] Ibid.
[86] [2012] ZASCA 174; 2013 (3) SA 325 (SCA).
[87] 2001 (3) SA 893 (CC); [2001] ZACC 18; 2001 (7) BCLR 685 (CC).
[88] [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP).
[89] 2017 (3) SA 212 (GP); [2017]2 All SA 123 (GP); 2017 (1) SACR 623 (GP).

Rome Statute of the ICC without obtaining prior parliamentary approval); and (f) *Earthlife Africa-Johannesburg and Another v Minister of Energy and Others*[90] (*Earthlife* or *South Africa-Russia nuclear deal*) the review and setting aside of government's decision to table the agreements on nuclear energy cooperation between South Africa and Russia, South Africa and US and South Africa and South Korea, and the setting aside of the implementation of the South Africa-Russia nuclear deal for failure to engage the public in the process). In the circumstances therefore, some members of the Executive, including then President Zuma himself and other leading figures in the ANC raised concerns to the effect that the Constitution of South Africa needs to be 'reviewed' as it, allegedly, hamstrings the ability of the South African government to implement (foreign) policy and to achieve certain policy objectives.[91]

4.4 Section 83(b): Upholding, defending and respecting the supremacy of the Constitution

Section 83(b) of the Constitution provides that: 'The President … must uphold, defend and respect the Constitution *as the supreme law of the Republic*'.[92] It is worth noting that out of all state functionaries, the obligation to 'uphold, defend and respect the Constitution *as the supreme law of the Republic*' is imposed only on the President; not the Deputy President or any of the other cabinet members.[93] In *EFF*, Mogoeng CJ explained the rationale behind the imposition of the section 83(b) obligation on the President by reference to the latter's position, powers, duties and responsibilities in the context of the entire structure and set-up of South Africa's constitutional system of democratic government in the following words:

[90] [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC).
[91] Ellmann note 3, 98.
[92] Emphasis added.
[93] Mogoeng CJ in *EFF* at para 20. The other state functionaries are however also required to take the oath of office or solemn affirmation (differently worded) upon resumption of public office as prescribed in schedule 2 to the Constitution.

> An obligation is expressly imposed on the President to uphold, defend and respect the Constitution as the law that is above all other laws in the Republic. As the Head of State and the Head of the national Executive, the President is uniquely positioned, empowered and resourced to do much more than what other public office-bearers can do. [footnote 37: *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 65 states: "Ultimately the President, as the supreme upholder and protector of the Constitution, is its servant. Like all other organs of state, the President is obliged to obey each and every one of its commands."] It is, no doubt, for this reason that section 83(b) of the Constitutions singles him out to uphold, defend and respect the Constitution. Also, to unite the nation, obviously with particular regard to the painful divisions of the past. This requires the President to do all he can do to ensure that our constitutional democracy thrives. He must provide support to all institutions or measures designed to strengthen our constitutional democracy. More directly, he is to ensure that the Constitution is known, treated and related to, as the supreme law of the Republic. It thus ill-behoves him to act in any manner inconsistent with what the Constitution requires him to do under all circumstances. The President is expected to endure graciously and admirably and fulfil all obligations imposed on him, however unpleasant.[94]

Therefore, the obligation to uphold, defend and respect the Constitution as the supreme law of the state has important consequences for how the President conducts her/himself in the fulfilment of her/his constitutional obligations in the various roles (s)he acts as Head of State and Head of the national executive, and Commander-in-Chief of the defence force. For instance, the President: (a) must not act contrary to the obligations and duties imposed on her/him by the Constitution under all circumstances;[95] (b) may not disregard 'any decision grounded on the Constitution without due process of law';[96] and (c) may not disregard willy-

[94] Mogoeng CJ in *EFF* at para 26.
[95] Ibid.
[96] Ibid at para 74.

nilly but must comply with or act upon any 'binding and constitutionally or statutorily sourced decision'.[97]

The President is the face of South Africa in its relations with the rest of the world.[98] In the grand scheme of the exercise of public power in foreign affairs, the President has the over-arching responsibility to conduct South Africa's relations with other nations[99] in the different roles (s)he plays as Head of State and head of the national executive[100] and Commander-in-Chief of the defence force.[101] In exercising all these constitutional grants of power, the President 'must uphold, defend and respect the Constitution *as the supreme law of the Republic*'.[102] What this means is that, in the exercise of her/his foreign affairs powers (for example, when the President authorises the employment of the defence force in defence of the Republic[103] or in fulfilment of an international obligation[104] for peace-keeping operations), the President is enjoined to act in accordance with the Constitution and in accordance with all norms, values, and principles enshrined in the supreme law.[105] In the circumstances therefore, a foreign policy constitutionalised in this manner will preclude any considerations and decisions based on, for example, individual personal whim, personal aggrandisement, irrationality, arbitrariness, and political party interest and ideology as a basis for deciding foreign policy matters.

4.5 Constitutional provisions requiring conduct 'in accordance with the Constitution'

In addition to the preamble, section 1(c), section 2, and section 83(b), the Constitution is replete with 'supremacy provisions' that enjoin government and its state functionaries to 'act in

[97] Ibid.
[98] Ibid at para 21.
[99] Ibid.
[100] 1996 Constitution, s 83(a) and s 85(1).
[101] Ibid, s 202(1).
[102] Ibid, s 83(b). Emphasis added.
[103] Ibid, s 201(2)(b).
[104] Ibid s 201(2)(c).
[105] *EFF* at paras 26, 31, 53.

accordance with the Constitution' in the exercise of powers conferred on them by the Constitution and/or the law. Some of these provisions include the following: (a) President must act only in terms of 'the powers *entrusted by the Constitution* and legislation';[106] (b) cabinet members 'must … *act in accordance with the Constitution*';[107] (c) the courts must function independently and '*subject only to the Constitution* and the law';[108] (d) 'Public administration must be governed by the democratic values and *principles enshrined in the Constitution*';[109] (e) principles governing national security,[110] including participation in armed conflict[111] should be pursued and implemented in compliance with the Constitution and the law; (f) the national security services must conduct themselves 'in accordance with the Constitution'[112] and the law; and (g) the defence force must provide national security 'in accordance with the Constitution.'[113]

A careful reading of the entire text of the Constitution, particularly the provisions obligating the state and its functionaries to 'act in accordance with the Constitution and/or the law' shows that the entire gamut of governmental action, conduct, and exercise of public power is required to be consistent with the provisions of the supreme law.[114] Given the pervasive entrenchment of the concept of SOC, it would be difficult to argue convincingly that there is that large area of governmental responsibility in the realm of foreign relations that lies beyond the reach of judicial scrutiny and which is not justiciable and bound by constitutional norms and obligations emanating from the supreme law.

[106] Constitution, s 84(1). Emphasis added.
[107] Ibid, s 92(3)(a) Emphasis added.
[108] Ibid, s 165(2) Emphasis added.
[109] Ibid, s 195(1) Emphasis added.
[110] Ibid, s198(c).
[111] Ibid, s198(b).
[112] Ibid, s 199(5).
[113] Ibid, s 200(2) Emphasis added.
[114] *Pharmaceutical Manufacturers Association* at para 19; *EFF* at para 20; *Earthlife* at paras 47 and 58; *Kaunda* at paras 79, 193 and 227.

The requirement that South Africa's conduct, including in its relations with other countries be consistent with the Constitution has been underscored by the Constitutional Court in several cases, including *Kaunda* (diplomatic protection), *Mohamed* (illegal 'rendition'); *Government of the Republic of Zimbabwe v Fick*[115] (concerning the failure, neglect or refusal by the government of Zimbabwe to abide by the decision of the SADC Tribunal in a case regarding expropriation by the government of Zimbabwe of Fick's farmlands without compensation and the obligation on South African courts to enforce the judgement of the Tribunal against the government of Zimbabwe); *Law Society of South Africa & Others v President of the Republic of South Africa & Others*[116] (*SADC Tribunal case*) concerning the acquiescence of then President Zuma and government of South Africa to disband the Southern African Development Community (SADC) Tribunal; the *Al-Bashir* cases; and *Democratic Alliance*.

In *Kaunda*, Ngcobo J (in a separate but concurring judgement) reasoned that the government's conduct in the area of foreign relations (in that case, in a matter regarding the responsibility of the South African government to provide diplomatic protection) must be measured against the Constitution, particularly the provisions of the BORs.[117] Ngcobo J went further to state that in some cases, including foreign policy matters, the Court may order the government to give due consideration (to a request for diplomatic protection), and that if by giving that directive the Court would seem to be intruding in foreign policy matters, then that 'intrusion' would be 'mandated by the Constitution itself'.[118] In *SADC Tribunal case*, Mogoeng CJ (for the majority)(with Cameron and Froneman JJ concurring but for different reasons) stated that the exercise of all presidential or executive powers 'must always' be

[115] [2013] ZACC 22; 2013(5) SA 325 (CC); 2013 (10) BCLR 1103 (CC)
[116] [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC)
[117] *Kaunda* at para 155.
[118] *Kaunda* at para 193.

consistent with the Constitution and its scheme.[119] Cameron J reasoned that the obligation resting on the President to ensure that his conduct (in treaty-making) does not result in the breach of South Africa's international obligations flows from the Constitution itself.[120] In *Democratic Alliance*, the Pretoria High Court (per Mojapelo DJP, for the unanimous court) stated that the exercise of all public power, including the conduct and management of South Africa's international relations, 'must accord with the Constitution.'[121]

4.6 Powers of the Constitutional Court to enforce supremacy of the Constitution

In the South African constitutional-legal order, SOC is further enforced by provisions in the Constitution that created a special court at the apex of the judicial system (the Constitutional Court) and granting that Court special and exclusive powers, such as power to 'decide that Parliament or the President has failed to fulfil a constitutional obligation'.[122] The granting of 'exclusive' jurisdiction to the Constitutional Court in some constitutional matters and the special role the Court plays at the apex of the judicial system[123] as the 'ultimate guardian of the Constitution and its values'[124] have important implications for observance of the principle of SOC.

In *EFF*, Mogoeng CJ suggested that the reason why the Constitutional Court was granted exclusive jurisdiction, for example, to decide that Parliament or the President (political branches of government) has failed to fulfil a constitutional obligation, was to ensure that the highest court in the land is the one that has the final word in respect of issues which would

[119] *SADC Tribunal case* at paras 3, 49 and 89.
[120] Ibid at para 98.
[121] *Democratic Alliance* at para 44.
[122] Constitution, s167(4)(e).
[123] Ibid, s 167(3)(a), as amended by s167(3)(b)(ii) of the Constitution of the Republic of South Africa Seventeenth Amendment Act 72 of 2012.
[124] *EFF* at para 19; See also *President of the Republic of South Africa & Others v South African Rugby Football Union (SARFU) & Others (SARFU II)* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1997 (7) BCLR 725 (CC) at para 72.

invariably have major political implications for the country as a whole.[125] Mogoeng CJ underscored the fact that, in terms of the overall structure of the South African Constitution, a conscious decision was made by the Constitutional Assembly that 'disputes that have crucial and sensitive political implications' should be dealt with by the highest court in the land.[126] Mogoeng CJ explained that the rationale for granting the Constitutional Court the responsibility to deal with matters of that nature was 'to preserve the comity' between the judiciary and the other two political branches, that is, executive and legislative[127] given the special roles that the three arms of the State play in the architecture of South Africa's constitutional democracy. In *Doctors for Life*, Ngcobo J stated that the rationale for granting the Constitutional Court such powers and responsibility was to ensure that 'only the highest court in constitutional matters intrudes into the domain of the other branches of government'.[128] According to Ngcobo J, the grant of exclusive jurisdiction to the Constitutional Court to ensure that Parliament and the President fulfil their constitutional obligations, including constitutional obligations in the realm of foreign policy gives practical meaning to the principle of SOC and the requirement that the obligations the Constitution imposes on the executive and legislative authorities must be fulfilled.[129]

4.7 Oaths of office or solemn affirmations to enforce supremacy of the Constitution

The controlling influence of the Constitution over the entire machinery of state authority and the exercise of all public power is warranted by the oaths of office and/or solemn affirmations that the President, Deputy President, and other state functionaries must take/make upon assumption of office or duty. All these officials and state functionaries are required, upon

[125] *EFF* at para 19; *SARFU II* at para 73. See also Ngcobo J in *Doctors for Life* at paras 22, 23 and 24.
[126] *EFF* at para 19.
[127] Ibid.
[128] *Doctor for Life* at para 23.
[129] Ibid at para 38.

assumption of public office or duty, to swear/affirm, among other things, that they: 'will obey, observe, uphold and maintain the Constitution and all other law of the Republic';[130] and 'will uphold and protect the Constitution and the human rights enshrined in it, and will administer justice … in accordance with the Constitution and the law'.[131]

In *EFF*, Mogoeng CJ underscored the importance of the President's oath of office in the execution of her/his duties and responsibilities, including the responsibility to uphold, defend and respect the Constitution as the supreme law of the Republic.[132] Mogoeng CJ stated that the President must be held accountable for the fulfilment of the promises made to the populace through the Constitution in accordance with the oath she/he took before assuming the office of President.[133]

In *United Democratic Movement (UDM) v Speaker of the National Assembly & Others*,[134] concerning the question whether a motion of no confidence in the President could be carried out through a secret ballot, Mogoeng CJ explained that since public officials and state functionaries (office bearers) carry out their responsibilities and exercise public power (not their personal power) allotted to them under the supreme Constitution, they must take the oath of office (obey the Constitution) before they commence in their portfolios.[135] Mogoeng CJ reasoned that the aspirations and interests of all South African people (including their interests in the context of their country's relations with the rest of the world) can only be successfully pursued by public servants and state functionaries committed to the values (for example, accountability, responsiveness and openness) enshrined in the supreme law.[136]

[130] President or Acting President and Deputy President in terms of Items 1 and 2, respectively of schedule 2 to the 1996 Constitution.
[131] Judges in terms of Item 6(1) of schedule 2 to the 1996 Constitution.
[132] *EFF* at paras 20 and 21.
[133] Ibid at para 22.
[134] [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC)
[135] *UDM* at para 3.
[136] Ibid.

5. Implications of supremacy of the Constitution for South Africa's foreign policy

The concept of SOP has important implications for the conduct of foreign policy. First, the exercise of foreign affairs powers, as part of the overall exercise of public power, is now subject to judicial scrutiny and constitutional control.[137] What this means is that political branches responsible for law-making (Parliament) and (foreign) policy formulation and implementation (the Executive headed by the President) are now required to act and fulfil their constitutional obligations in accordance with the Constitution and within its limits[138] and are bound by the canons of, for example, accountability,[139] non-arbitrariness in decision-making,[140] as well as the requirement that decisions must be 'rationally related to the purpose for which the power was given'.[141]

Second and flowing from the point immediately above, it should be self-evident that the Executive and Parliament can no longer treat foreign policy as 'ordinary politics' untouched by fundamental norms with the courts having no role to 'supervise' or 'control' the exercise of foreign policy powers. In *Kaunda*, Ngcobo J stated that whilst the responsibility to conduct foreign policy is the province of the executive and that states need to comply with the rules of international comity (for example, respect for the sovereignty and territorial integrity of other states), that did not mean that the judiciary plays no part in foreign policy matters.[142]

Third, and related to the second point above, there is a pressing need on the part of South Africa's foreign policy-makers and political elites (and indeed the populace as a whole) to begin to appreciate the import of the migration from parliamentary sovereignty to constitutional supremacy and what that migration means for how South Africa should view democratic form

[137] *Pharmaceutical Manufacturers Assoc* at paras 20, 33, 40 and 45.
[138] Ibid at paras 19.
[139] Ibid at para 18.
[140] *EFF* at paras 20, 21, 22, 26 and 31.
[141] *Pharmaceutical Manufacturers Assoc* at paras 85.
[142] Ngcobo J in *Kaunda* at para 172.

of government and social organisation. Moseneke seems to suggest[143] that the caustic attacks on the judiciary and the courts – on charges that these institutions are 'undemocratic', 'untransformed' and 'unaccountable', particularly in the wake of some court decisions which the 'ruling elites' found unpalatable – were based on a particular understanding of majoritarian politics rooted in the erstwhile dispensation where parliament was sovereign and the 'representatives of the people' were seen as the guarantors of democratic ethos. Moseneke suggests however, that, in South Africa (post-apartheid), while 'the democratic ethos and practice are indispensable and constitutive of our constitutional state',[144] there is a pressing need to appreciate that democracy should not be simply equated with majority rule expressed through the laws and decisions made by the parliamentary majorities of elected representatives.[145] He emphasises instead that democracy in post-apartheid South Africa should be understood in terms of the principle of SOC, which demands, necessarily, that majoritarian politics (important as they are to democratic form of government) should be subjected to the provisions of the supreme law of the Republic.[146]

Lastly, in the context of foreign policy therefore, it is important for the South African government, going forward, to recalibrate its foreign policy and ensure that its conduct is brought squarely within the four corners of the supreme law of the Republic. A foreign policy that is faithful to the norms, values and principles of the supreme Constitution - little 'discomfort' here and there notwithstanding - should be able to form eddies of profound significance to achieve the following: (a) eliminate what appears, currently, as arbitrariness and irrationality in foreign policy decision-making[147] and complete disregard of binding legal obligations in foreign policy-related matters;[148] (b) reduce the tension between the political

[143] Moseneke (2016) note 16, 17.
[144] Ibid, 7.
[145] Ibid, 17.
[146] Ngcobo J in *Kaunda* at para 193.
[147] See the cases of *Mohamed* note 87, *Earthlife* note 90, and *Democratic Alliance*(note 89.
[148] *Al Bashir (HC)* note 88 and *Al Bashir (SCA)* note 36 .

branches on the one hand and the judiciary and the courts on the other, where the former see the latter as an obstacle in the way of the design and implementation of government policy in general and foreign policy in particular; and (c) create an environment where South Africa's foreign policy is seen to be conducted on the basis of sound principles, is consistent, coherent and legitimate.

6. Conclusion

This chapter set out to demonstrate how the principle of SOC has constitutionalised South Africa's foreign policy. From a historical perspective, it made the point that the pervasive entrenchment of the principle of SOC in the entire gamut of South Africa's constitutional-legal order was informed and inspired by the same concerns that occupied the minds of earlier constitutionalists in revolutionary France and US towards the end of the 18th century and later constitutionalists, particularly in the aftermath of WWII: the commitment to subject power to the discipline of a supreme constitution and to create a government of laws.

When negotiations for an alternative political dispensation commenced at Kempton Park in 1990, it was very clear from the onset that the framers of the new constitution aimed to make a decisive break and a radical departure from the old system of parliamentary sovereignty (where parliament was sovereign and its laws could not be reviewed by the courts) and install a new system of constitutional supremacy (where the exercise of all public power would be subject to constitutional control and be bound by certain norms, values and principles enshrined in the supreme law of the land). The framers were also clear in their minds, that the new constitution – which would be the supreme law of the Republic – would not only bind all three branches of government and all organs of state domestically, but that it (the new constitution) would be an important tool of foreign policy which will guide and bind the manner in which South Africa conducts its foreign policy.

This chapter also considered various provisions of the 1996 Constitution entrenching SOC with the aim of demonstrating their implications for South Africa's foreign policy, specifically, to show how the principle of SOC has subjected foreign policy to binding norms such as accountability, lawfulness, legal justification, and non-arbitrariness. For instance, the chapter made the point that one of the key objectives (according to the preamble to the 1996 Constitution) of basing South Africa's relations with the community of nations on the SOC was to assure that community that South Africa's foreign relations post-apartheid will be guided by a supreme Constitution that has given priority and special treatment to respect for the ROIL, including the law of the United Nations. When the entire exercise of public power in the realm of foreign policy is seen through the lens of the SOC, it becomes crystal clear that the foreign policy of South Africa is now bound by the dictates of the Constitution and the normative values it embodies. The next chapter discusses separation of powers and how that tenet of constitutionalism binds South Africa's foreign policy.

CHAPTER FOUR

SEPARATION OF POWERS IN THE CONDUCT OF SOUTH AFRICA'S FOREIGN POLICY

> I always recall how one of the first judgments in the Constitutional Court was around a matter in which I was involved as President of the country, and the President of the Constitutional Court, regardless of the fact that he was once my lawyer, ruled against me. It was then clear to me that South Africa was in safe hands with that Court standing and operating at the apex of our democracy.[1]

> In our view, the principle of separation of powers means that we should discourage the encroachment of one arm of the state on the terrain of another, and there must be no bias in this regard. … The Executive must be allowed to conduct its administration and policy making work as freely as it possibly can. The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote.[2]

1. Introduction

In pre-democratic South Africa – and in addition to the doctrine of parliamentary sovereignty discussed in chapter three – the conduct of foreign policy was also governed by the principle/doctrine of separation of powers (SOP). This chapter aims to show how the SOP principle, under the current constitutional-legal order, has shifted South African foreign policy conduct from the pre-democratic era - where foreign policy was an exclusive responsibility of

[1] N Mandela 'Address at the dinner to celebrate the official opening of the Constitutional Court Building' Johannesburg, 19 March 2004 available at http://mandela.org.za/mandela_speeches/2004/040319_constitution

[2] Then President Jacob Zuma in his address on the occasion of bidding farewell to former Chief Justice Sandile Ngcobo, and welcoming Chief Justice Mogoeng Mogoeng, National Assembly, Cape Town, 1 November 2011 available at http://www.thepresidency.gov.za/speeches/address-president-jacob-zuma%2C-occasion-bidding-farewell-chief-justice-sandile-ngcobo

the executive and the courts had no role to play - to a new dispensation (post-apartheid) where the realm of foreign policy is now the responsibility of all three co-equal branches of government (including the judiciary) and is disciplined by constitutional norms such as political accountability and the principle of legality.

In addition to the reasons mentioned in chapter one for the choice of SOP (as one of the 'tools of analysis') to argue the main proposition in this study, the other important reason for that choice is the following: some South African legal experts,[3] politicians[4] and legal practitioners[5] almost invariably raise the SOP principle - based on 'democratic theory' - as a quintessential justification for excluding the judiciary from the area of governmental responsibility that is considered to be purely a function of policy-making (in this case, foreign policy), which is regarded as an exclusive responsibility of the executive. That view is based on a 'strong form' (for a lack of a better word) of the concept of SOP which entails the idea that there are fundamental differences between the functions and powers of the three branches of government (executive, legislative, and judicial) 'which must be maintained as separate and distinct, each sovereign in its own area, none to operate in the realm assigned to another.'[6]

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[3] See G Carpenter 'Prerogative powers in South Africa – dead and gone at last?' (1997) 22 *SAYIL* 104, 111; H Booysen 'Has the act of state doctrine survived the 1993 interim Constitution?' (1995) 20 *SAYIL* 189, 191.

[4] In the aftermath of the Al Bashir saga in 2015, Dr Blade Nzimande, General Secretary of the South African Communist Party (SACP) and Minister of Higher Education in the Zuma administration weighed in and added his voice to those in the political establishment , including then President Zuma, Gwede Mantashe (then Secretary General of the ANC), and Ngoako Ramatlhodi (Member of the ANC's National Executive Committee (NEC)) who lambasted the courts (and the judges) for 'unwarranted interference' with executive functions. Dr Nzimande is reported as having said, among other utterances, that 'sections of the judiciary tend to somehow overreach into areas that one would expect even in a constitutional state to tread very, very carefully.' (Charl du Plessis *et al*, 'ANC tells judges to back off', News24 (21 June 2016), available at http://www.news24.com/SouthAfrica/News/ANC-tells-judges-to-back-off-20150621

[5] In *Minister of Health & Others v Treatment Action Campaign* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC), the state (through Counsel) had argued in essence that under the SOP principle, the courts could not make orders instructing the executive to pursue a particular policy since the area of policy-making is the responsibility of the executive (at para 97). In *Democratic Alliance v Minister of International Relations and Cooperation & Others (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP); [2017]2 All SA 123 (GP); 2017 (1) SACR 623 (GP) (concerning government's decision to withdraw from the Rome Statute of the ICC without prior parliamentary approval), Counsel for the state argued that any intervention by the courts to stop government from proceeding with the decision to withdraw from the Rome Statute and where parliament was already ceased with the matter would violate the SOP principle (at para 13).

[6] P B Kurland 'The rise and fall of the doctrine of separation of powers' (1986) 85 *Mich L R* 592, 593.

The chapter is divided into eight parts. The first part is this introduction. The second part recounts briefly the history, background, and rationale behind the adoption of the principle of SOP by earlier democracies in the 18th century (France and US) as well as by later democracies such as Germany after WWII. The idea behind that background discussion is to trace some of the fundamental considerations which inspired and prompted the framers of the two post-apartheid constitutions to engrave SOP as one of the pillars of South Africa's constitutional democracy in general and a binding principle in the conduct of foreign policy in particular. The third part provides a brief explanation of how the SOP principle was understood, interpreted and applied in the realm of foreign policy in pre-democratic South Africa. The fourth part enumerates and discusses the specific foreign affairs powers granted by the 1996 Constitution to the political branches of government (that is, legislative and executive). The foreign policy powers which are granted to the courts (courtesy of the power of constitutional-judicial review) are discussed in part six of this chapter. The fifth part focuses on the legal debate (in South Africa) and criticism of the views of some South African foreign affairs lawyers on whether foreign policy under the current constitutional-legal order is still governed by the old English common law prerogative; specifically, whether foreign policy is still an exclusive terrain of the executive with the judiciary playing no role in that area of governmental responsibility. The sixth part looks at South African case law to see how the courts have dealt with and defined the principle of SOP and what the consequences of that interpretation are for the role of the judiciary in foreign and security affairs. The seventh part discusses the implications of SOP for the conduct of foreign policy in South Africa. The last part is the conclusion and summarises the key points made in this chapter.

2. Separation of powers: A brief historical background

2.1 The origins of the principle of separation of powers

One of the key tenets of modern liberal-legal constitutionalism is the doctrine of SOP (or functions)[7] in terms of which the sum total of national power is divided among the three branches of government, that is, the legislative, the executive and the judiciary.[8] Like other tenets of modern constitutionalism such as judicial review (JR), rule of law (ROL), and representative government, SOP in its modern iteration is largely a product of earlier constitutional theorists such as John Locke (1632-1704), Charles-Louis de Secondat Montesquieu (1689-1755), James Madison (1751-1836) and other leaders and supporters of the 18th century French and American revolutions against systems of government, particularly monarchies and aristocracies,[9] that had concentrated and locked political power in the hands of those who erroneously believed they had God-given authority to rule over others.[10] The doctrine became one of the key principles that governed how the constitution should function according to the goals and objectives of modern constitutionalism. Inspired by his liberal notions of the freedom of the individual, Locke is credited with being the first to provide a theoretical basis for challenging the ideological foundations on which the absolutism of the

[7] Lord Scarman in *Duport Steel Ltd v Sirs* [1980] 1 All ER 529 at 551G-H.
[8] L Henkin 'Constitutionalism, democracy and foreign affairs' (1992) 67 *Indiana L J* 879, 879-886; P Mojapelo 'The doctrine of separation of powers: A South African perspective' (2013) *Advocate* 37, 37; A I Burns & S J Markman 'Understanding separation of powers' (1987) 7*(3) Pace L R* 575, 579; J Rabkin 'The success of the separation of powers and its contemporary failings' (1987) *Brigham Young Univ L R* 1003, 1004; P Gewirtz 'Realism in separation of powers thinking' (1988-89) 30 *William & Mary L R* 343, 343; G Casper 'Constitutional constraints on the conduct of foreign and defense policy: A nonjudicial model' (1976) 47 *Univ Chic L R* 463, 490 (hereinafter Casper (1976)).
[9] H Dippel 'Modern constitutionalism: An introduction to a history in need of writing' (2000) 73 *Tijdschrift voor Rechtsgeschiedenis* 153, 153-154; K Milewicz 'Emerging patterns of global constitutionalisation: Towards a conceptual framework' (2009) 16(2) *Indiana J Global Legal Studies* 413, 419; M Loughlin 'What is constitutionalisation?' in P Doubner & M Loughlin eds *The Twilight of Constitutionalism?* (2010) 48; Kurland note 6, 593.
[10] Sachs J in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at paras 389-390. E Chaney 'Separation of powers and the medieval roots of institutional divergence between Europe and the Islamic Middle East' available at http://scholar.harvard.edu/files/chaney/files/separationiea.pdf?m=1360042908

monarchy was based in 17th and 18th century England.[11] Similar views about the need to separate governmental power were articulated by Montesquieu when he reasoned, inter alia, that absence of SOP would result in lack of freedom and liberty and would lead to arbitrary rule.[12]

The importance of the principle of SOP in a (British) parliamentary system was underscored by political thinkers and leaders such as Lord Acton (1834-1902) who propounded the view that liberty consisted in the division of power while absolutism, in the concentration thereof.[13] The warning against the dangers of too much power concentrated in one body or person was immortalised in Lord Acton's now well-known saying: 'Power tends to corrupt, and absolute power corrupts absolutely'.[14]

The liberal notions of liberty and the freedom of the individual as popularised by Locke,[15] Montesquieu, [16] and other leading political and constitutional-legal theorists of the Enlightenment (1650-1800)[17] played a key role in the nascent development of the idea of government of limited and separated powers.[18] Montesquieu's views influenced the French and American revolutions and the drafting of two historical legal documents on both sides of the Atlantic, namely, the American Constitution of 1787 and the French Declaration of the Rights

[11] See D L Doernberg '"We the people": John Locke, collective constitutional rights, and standing to challenge government action' (1985) 73(1) *Cal L R* 52, 59ff; J Waldron 'The separation of powers in thought and practice' (2013) 54(2) *BC L R* 433, 445-446; C J Nnaemeka & U Theophilus 'Separation of powers in John Locke: A critique' (2018) 7(2) *Int'l J Innovative Research & Dev* 95, 103.

[12] K O'Regan 'Checks and balances: Reflections on the development of the doctrine of separation of powers under the South African Constitution' (2005) 8(1) *PER/PELJ* 120, 122 referring to Montesquieu *The Spirit of the Laws* 163 (Montesquieu C de S *The Spirit of the Laws* (translated from the original French by T Nugent) Rev ed Vol 1 (1902)).

[13] See M Byrne 'What is the separation of powers' available at http://lawswot.com/question/what-is-the-separation-of-powers/ (nd) at p. 2 of 4.

[14] G Himmelfarb 'Introduction' in J E E Dalberg-Acton, *Essays on Freedom and Power*, Selected with an Introduction by G Himmelfarb (1949) xv.

[15] John Locke himself was influenced by political theorists and philosophers like Aristotle, Plato, Thomas Hobbes and René Descartes. See Kurland note 6, 596.

[16] Montesquieu's thinking was influenced by political theorists such as John Locke, Thomas Hobbes, Adam Smith, Aristotle, Cicero and René Descartes. See Kurland note 6, 595.

[17] The thinkers of the Enlightenment include, Denis Diderot (1713-1784), Benjamin Franklin (1706-1790), Hugo Grotius (1583-1645), David Hume (1711-1776), Thomas Jefferson (1743-1826), Immanuel Kant (1724-1804), Thomas Paine (1737-1809), Jean-Jacques Rousseau (1712-1778), and Voltaire (1694-1778).

[18] See S G Calabresi, M E Berghausen & S Albertson 'The rise and fall of separation of powers' (2012) 106(2) *Northwestern Univ L R* 527, 533 (hereinafter Calabresi *et al*).

of Man of 1789.[19] Montesquieu was convinced that SOP among the legislature, the executive and the judiciary held the key to liberty of the individual and a safeguard against tyranny, violence and oppression.[20] When the American framers provided for SOP among the three co-equal branches of the federal government in their Constitution, they sought 'to rule out a tyrannical concentration of power' in any one branch and to foster accountability on the part of those exercising public power[21] and to ensure that 'governmental power will be exercised only through a system of defined procedures and limits'.[22]

2.2 Rationale for separation of powers in a constitutional democracy

From the brief historical account of the origins of the doctrine of SOP, it is clear that the driving force behind the idea of separated powers or functions in a constitutional democracy included the following considerations/objectives: (a) to avoid despotic rule and guarantee the freedom and liberties of individuals; (b) to limit power; (c) to de-concentrate state power; (d) to guarantee individual freedom; (e) to control power; (f) to prevent governmental abuse of power;[23] (g) to avoid tyranny and arbitrariness;[24] (h) to promote accountability; and (i) to prevent undue interference by branches of government into the area of responsibility of other branches.[25]

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[19] O'Regan note 12, 122. At footnote 6, O'Regan quotes Article 16 of the Rights of Man: "Any society in which the safeguarding of rights is not assured, and the separation of powers is not observed, has no constitution."
[20] Ibid, 123; Kurland note 6, 595; A J Telman 'The foreign affairs power: Does the constitution matter?' (2006) Bepress Legal Series, Paper 1567 at 13 available at http://law.bepress.com/expresso/eps/1567 Berkeley Electronic Press; Calabresi *et al* note 18, 533; Byrne note 13, p.2 of 4 stating a similar rationale for incorporation of SOP in the Irish Constitution.
[21] Dippel note 9, 155-156; Milewicz note 9, 419; E Cameron 'Rights, constitutionalism and the rule of law' (1997) 114 *SALJ* 504, 506 (The Alan Paton Memorial Address delivered on 6 June 1997.)
[22] Cameron note 21, 506; Mojapelo note 8, 38; T Reinold 'Constitutionalisation? Whose constitutionalisation? Africa's ambivalent engagement with the International Criminal Court' (2012) 10(4) *IJCL* 1076, 1080; Loughlin note 9, 55; N Haysom 'Democracy, constitutionalism and the ANC's Bill of Rights for a new South Africa' (1991) 7 *SAJHR* 102, 108; R Albert 'The cult of constitutionalism' (2011-2012) 39 *Fla St Univ L R* 373, 390; C Fombad 'Challenges to constitutionalism and constitutional rights and the enabling role of political parties: Lessons and perspectives from southern Africa' (2007) 55 *Am J Comp L* 1, 7-8.
[23] Mojapelo note 8, 38.
[24] Ibid.
[25] Ibid. P Gerangelos *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (2009) 10ff.

In the context of this chapter and in relation to the key question posed in this study, the following question is warranted: how should foreign policy be conducted in the South African *rechtsstaat*, which has separated state foreign affairs power and distributed it among the three co-equal branches of the national government? Specifically, to what extent, if at all, does the principle of SOP under the current constitutional-legal order bind the conduct of foreign policy and bring that area of governmental responsibility (foreign affairs) within the discipline of constitutional norms?

3. Separation of powers and foreign policy in pre-democratic South Africa

As stated above, one of the principles/doctrines that governed the conduct of foreign policy in pre-democratic South Africa is SOP.[26] In this regard, it is important to note that the manner in which the SOP principle was conceived and applied by the South African government then produced two outcomes or consequences which are crucial to understanding how foreign policy was conducted before 1994. The first outcome meant that the responsibility to conduct foreign relations vested exclusively in the hands of the executive and the judiciary/courts played no role in 'controlling' or 'supervising' the exercise of foreign policy powers (a very narrow and restrictive application of the SOP principle). The second outcome meant that South Africa's foreign policy before 1994 was not bound by constitutional norms (such as political accountability) since the very tenets of apartheid and racial discrimination stood in stark opposition to the substantive purposes of SOP principle (such as limited power, non-arbitrariness in decision-making and non-tyrannical exercise of power). In fact, Kriegler argues that the very essence of government based on apartheid laws meant that there was effectively

[26] Carpenter note 3, 111.

'no separation of powers' in pre-democratic South Africa because there was 'no real brake on executive action.'[27]

In pre-democratic South Africa, the courts followed the old English common law (for example, the 'act of state doctrine' and Crown prerogative powers) as it was applied to the conduct of foreign relations.[28] For instance, in *Van Deventer v Hancke & Mossop*,[29] concerning the question whether the British government's annexation (in 1990 during the Anglo-Boer War (1899-1902)) of the old 'boer' Republic of the Transvaal was complete under international law (IL), Innes CJ held that, since the issue to be decided constituted the Crown act of state, the Court (Transvaal Supreme Court) lacked power and jurisdiction to inquire into the legality of the matter.[30] Dugard & Coutsoudis say that in subsequent decisions, South African courts followed a similar approach.[31]

According to the SOP principle as it was applied in English law over foreign affairs, the realm of foreign policy was reserved exclusively for the political branches (the executive and legislative) with the executive shouldering the lion's share of responsibilities in that field.[32] Like in the UK, foreign policy in pre-democratic South Africa was viewed as falling within the area of governmental responsibility which was not amenable to judicial scrutiny since foreign

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[27] J Kriegler 'The Constitutional Court of South Africa' (2002) 36 *Cornell Int'l L J* 361, 361.

[28] AJGM Sanders 'The justiciability of foreign policy matters under English and South African law' (1974) 7 *Comp & Int'l L J S Afr (CILSA)* 215, 215; J Dugard & A Coutsoudis 'The place of international law in South African municipal law' in J Duagrd, M du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law: A South African Perspective 5th ed* (2018) 104 (hereinafter Dugard *et al* (eds)); J Dugard *International Law: A South African Perspective 4th ed* (2011) 71; N Botha 'The foreign affairs prerogatives and the 1996 Constitution' (2000) 25 *SAYIL* 265, 272; Carpenter note 3, 105. For a detailed discussion of various doctrines (such as 'act of state', Crown prerogative powers, and 'one voice' principle) in English law and how they entrenched separation of powers in foreign policy matters, see chapter two, sub-sections 3.1.1 to 3.1.8 of this thesis.

[29] 1903 TS 401

[30] *Van Deventer* at 419.

[31] Dugard & Coutsoudis note 28, 105 footnote 253. These cases are: *Ex parte Belli* 1914 CPD 742 at 747; *Vereeniging Municipality v Vereeniging Estates Ltd* 1919 TPD 159 at 163; *Verein fur Schutzgebietsanleihen EV v Conradie NO* 1937 AD 113 at 146-7; and *Haak v Minister of External Affairs* 1942 AD 318 at 326.

[32] Carpenter note 3, 111. See the English cases of *Buttes Gas & Oil v Hammer (No. 2 and 3)* [1982] AC 888 at 931G-H and 932A-B; *Kuwait Airways Corp. v Iraqi Airways Co.* (Nos. 4 and 5) [2002] 2 AC 883 at para 135; *Belhaj & Another v Straw & Others* [2014] EWCA Civ 1394 at para 57.

policy was subject to power politics of inter-state relations and was preoccupied with concerns of national interest (realpolitik).[33] Before 1994 therefore, the SOP principle provided one of the quintessential legal justifications for the exclusion of the courts (the judiciary) from participating in foreign and security policy matters. What this implied is that, in pre-democratic South Africa, the conduct of foreign policy was not subject to judicial scrutiny and the courts lacked the power and the necessary 'constitutional mandate' to supervise/control the exercise of public power in foreign affairs.[34] In the circumstances therefore, it should be self-evident that, before 1994, there was essentially no possibility whatsoever of imagining South African foreign policy 'bound' and 'disciplined' by constitutional norms such as political accountability since what the executive did and decided in the conduct of foreign relations was final even when such conduct violated IL or fundamental rights.[35]

It is interesting to note that, even in contemporary times under the current constitutional-legal order post-apartheid, there are some legal experts in South Africa[36] as well as some in the political establishment[37] who maintain that the doctrine of SOP provides the constitutional basis for the exclusion of the judiciary from foreign policy matters. In the political establishment for example (and following decisions of courts in some 'politically sensitive matters'),[38] Ngoako Ramatlhodi (ANC NEC member), like President Zuma, has lamented the fact(sic) that, under the principle of SOP, where the legislature and executive should have real

[33] *Belhaj* at para 57; *Van Deventer* at 419.
[34] Kriegler note 27, 361. See also *Belhaj* at para 57.
[35] Kriegler note 27, 361.
[36] For example, Booysen note 3; and Carpenter note 3.
[37] Some leading figures in the governing African National Congress (ANC), for example, then President Jacob Zuma; Dr Blade Nzimande, Secretary General of the SACP; Gwede Mantashe, then Secretary General of the ANC; and Ngoako Ramatlhodi, Member of the National Executive Committee (NEC) of the ANC have expressed strong views against what they perceived as unwarranted interference by the judiciary in policy matters that should be the exclusive province of the executive. See S J Ellmann 'The struggle for the rule of law in South Africa (Symposium: Twenty years of South African constitutionalism: Constitutional rights, judicial independence and the transition to democracy)' (2015-2016) 60 *NYL Sch L R* 57, 100-101; http://www.news24.com/SouthAfrica/news/Gwede-Mantashe-singles-out-problematic-courts-20150622
[38] For example, *Southern Africa Litigation Centre v Minister of International Relations & Others* [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 2 All SA 505 (GP); 2015 (9) BCLR 1108 (GP)(24 June 2015) (*Al Bashir (HC)*).

political power, the judiciary is seen as having usurped the powers that do not belong to that branch of government. In his letter, 'ANC's fatal concessions' to *The Times* (1 September 2011), Ramatlhodi has also charged, inter alia, that: (a) the legislature and executive have been denuded of political power which has now been given to the judiciary; (b) the black majority enjoys empty political power while 'forces against change' (which 'forces against change' allegedly include the judiciary) have all the power; and (c) the judiciary frustrates the 'transformation agenda' and encroaches on the terrain of other branches of government.[39]

These lawyers and politicians argue that the exercise of foreign affairs powers has always – historically and legally – been the province of the political branches under the leadership and guidance of the executive. Consequently, so they argue, the realm of foreign and security policy should not be bound by or subjected to the discipline of constitutional norms or court processes, but that in the event of any foreign policy or security matters finding themselves as part of a court proceeding, the courts should always defer to the executive for the resolution of those controversies.[40]

The argument in this chapter is that, under the current constitutional-legal order, there is no longer any basis for the ANC politicians and some legal experts to cling to the old pre-democratic argument that foreign policy is the exclusive province of the executive and that the judiciary in particular has no role to play in that field. On the contrary, under the SOP doctrine as enshrined in the Constitution - and notwithstanding the clear *constitutional* allocation of certain specific foreign affairs powers to the political branches - the courts have a controlling *constitutional* duty to participate in foreign policy matters. In fact, a close reading of the Constitution shows that there are very clear *foreign affairs* powers that are allocated to the

[39] Available at www.school.r2k.org.za/wp-contents/uploads/2015/03Ramatlhodi-2011.pdf.
[40] President Zuma note 2.

judiciary through the mechanism of constitutional-JR; a phenomenon which, unlike in pre-democratic South Africa, brings the role of the judiciary squarely into the foreign policy arena.

4. Separation of powers and foreign policy in democratic South Africa

It is important to underscore the point – as it will be argued later in this chapter - that, like in the pre-democratic era, the SOP principle continues to govern the conduct of foreign policy in democratic South Africa since that principle is entrenched in the Constitution. However, the manner in which the SOP principle is understood and applied to foreign policy (since 1994) will show how the current constitutional-legal order (post-apartheid) is different from the pre-democratic one in terms of (a) which branch(es) bear(s) responsibility in foreign policy matters and (b) what constitutional norms now bind that area of governmental responsibility (foreign affairs). This section will enumerate briefly some of the foreign policy powers assigned by the Constitution to the legislative and executive branches of government. Section 6 of this chapter will discuss the role of courts in foreign policy matters with reference to case law; specifically, how South African courts have interpreted and defined the SOP principle and how that interpretation opens the door for the courts to enter and participate in that area of governmental responsibility (foreign affairs).

The drafters of the interim Constitution - in the grand scheme of fashioning a new society under the ROL and a government with limited powers - embedded the doctrine of SOP into the constitutional fabric of South Africa with the objective of ensuring that power is controlled, arbitrariness is squelched and accountability is fostered. Constitutional Principle (CP) VI of schedule 4 to the interim Constitution provided that the Constitutional Assembly drafting the 1996 Constitution shall ensure that 'there shall be a *separation of powers* between the

legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'.[41]

Although 'separation of powers' is not expressly mentioned in the 1996 Constitution, the principle is implicitly retained in the Constitution. In *Ex Parte Chairperson of the Constitutional Assembly: Re Certification of the Constitution of the Republic of South Africa, 1996*[42] (the *First Certification Judgment*), the Constitutional Court found that the provisions of the draft 1996 constitutional text complied fully with CP VI.[43] The Court stated that:

> We find in the [new text] checks and balances that evidence a concern for both the over-concentration of power and the requirement of an energetic and effective, yet answerable executive.[44]

4.1 Foreign affairs powers and legislative authority

Parliament is one of the two political branches (the other is the executive) which have traditionally played a key role in foreign policy matters. The Constitution allocates certain foreign affairs powers to parliament, which include: (a) power to pass legislation in connection with foreign policy and security matters (for example, approving an international treaty[45] and incorporating it into domestic legislation);[46] (b) power to approve withdrawal from an international treaty;[47] (c) power to call on the executive organs of the state to account to it;[48]

[41] Emphasis added.
[42] 1996 (4) SA 744 (CC)
[43] *First Certification Judgment* paras 106-113.
[44] Ibid at para 112. See also *South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC) at para 22.
[45] Constitution, s 231(2).
[46] Ibid, s 231(4).
[47] *Democratic Alliance* note 5 at paras 52 and 53.
[48] Constitution, s 55(2)(a).

(d) responsibility to maintain oversight of the exercise of national executive authority;[49] and (e) responsibility to debate foreign policy matters.[50] Parliamentary oversight of executive foreign affairs powers means that the conduct of South African foreign policy is subject to constitutional norms requiring political accountability, responsiveness and openness in this area of governmental responsibility (foreign affairs). What is more, since the exercise of all public power, including parliamentary power to pass foreign policy legislation is subject to constitutional control,[51] the courts will play a role in defining the limits of parliamentary powers and authority in that regard.[52]

4.2 Foreign affairs powers and executive authority

The Constitution assigns specific foreign affairs powers and responsibilities to the executive/President. These include: (a) power to negotiate and sign international agreements;[53] (b) responsibility to receive and recognise foreign diplomatic and consular representatives;[54] (c) power to appoint ambassadors, plenipotentiaries, diplomatic and consular representatives;[55] (d) power to perform the functions of Head of State;[56] and (e) together with Parliament, power to manage national security matters.[57]

It is worth-noting that, although powers to conduct foreign affairs are enumerated and specific – and hence constitutionally limited – the executive enjoys ample discretion in the

[49] Ibid, s 55(2)(b)(i); See also s 42(3).
[50] Ibid, s 42(3).
[51] *Kaunda* at para 144; *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* [2000] ZACC 1; 2002 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 20 and 33.
[52] *Democratic Alliance* at paras 15 and 16. See also *Engels v Government of the Republic of South Africa & Another* [2017] ZAGPPHCC 667 (the *Grace Mugabe* diplomatic immunity case) at para 30.
[53] 1996 Constitution, s 231(1).
[54] Ibid, s 84(h).
[55] Ibid, s 84(2)(i).
[56] Ibid, s 84(1).
[57] Ibid, s 198(d).

conduct of foreign affairs.[58] However, it is important to bear in mind that, in terms of the principles of SOC and ROL, these powers and concomitant discretion to conduct foreign affairs are not unlimited. For instance, the ROL 'principle of legality' requires, among other limitations, that the exercise of power and discretion not be arbitrary;[59] that the decision of a functionary be 'objectively rational';[60] and that the power and discretion be exercised properly and on the basis of true facts.[61] South African courts have thus explained the meaning of SOP in the entire gamut of the exercise of public power, particularly in the realm of foreign policy, as discussed in section 6 below.

5. Separation of powers and foreign policy: The South African debate

There are conflicting views among South African legal scholars on (a) whether the general power to conduct foreign relations is still derived from the (English) common law prerogative or the Constitution, and (b) whether the SOP principle operates in such a manner that it still vests the power to conduct foreign affairs *exclusively* in the hands of the executive (as it was at common law pre-1994) and thus, simultaneously, excludes the courts from participating in foreign affairs.

5.1 The old dominant view

On the first question whether the general power to conduct foreign relations is still derived from the common law prerogative or the Constitution, Booysen has argued that 'there is no general provision [in the interim Constitution] granting the President power to conduct foreign

[58] Chaskalson CJ in *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (10) BCLR 1009 (CC); 2005 (4) SA 235 (CC) at paras 73, 74, 81, 132, and 144; Ngcobo J in *Kaunda* at paras 172, 178, and 191; and O'Regan J in *Kaunda* at paras 243, 244, and 247.
[59] *Grace Mugabe* at para 5.
[60] *Kaunda* at para 79; *Pharmaceutical Manufacturers Association* at para 90.
[61] *Pepkor Retirement Fund v Financial Services Board* [2003] ZASCA 8; 2003 (6) SA 38 (SCA); [2003] 3 All SA 21 (SCA) at para 47.

relations, nor is the foreign affairs prerogative expressly retained [in that Constitution]'.[62] Dugard & Coutsoudis seem to propound the same view when they state that in other foreign policy cases,

> the executive arguably relies on its non-statutory discretionary common-law powers to conduct foreign relations as *neither the Interim Constitution nor the 1996 Constitution appear to expressly confer powers on the executive* [in such foreign policy matters].[63]

According to Booysen therefore, under the new constitutional dispensation that was ushered in in 1994, the power to conduct foreign affairs is still derived from and based on the old discretionary non-statutory common law prerogative.[64] As far as Booysen is concerned, it must be 'assumed' that the common law prerogative power to conduct foreign affairs was retained in the interim Constitution - and by extension, also in the 1996 Constitution – provided it is not inconsistent with the constitution.[65] Booysen opines that this 'assumption' makes sense because 'If it were not so, the executive, and therefore the state, would have no general power [under the post-1993 constitutions] to conduct foreign affairs'.[66]

On the second question whether the SOP principle under the current constitutional-legal order (post-1993) still vests foreign affairs powers exclusively in the hands of the executive, Carpenter maintains that 'in terms of the doctrine of separation of powers, foreign policy is the sole preserve of the executive and is not open to challenge by the courts'.[67]

On the two questions posed above, Botha takes a rather cautious approach when he says:

[62] Booysen note 3, 191. Following Booysen's logic, it would also imply that the 1996 Constitution would not have general provision granting the President power to conduct foreign affairs(?).
[63] Note 28, 102 and footnotes therein. Emphasis added.
[64] Booysen note 3, 191.
[65] Ibid. See also Carpenter note 3, 111.
[66] Booysen note 3, 191.
[67] Carpenter note 3, 111.

> The general consensus would appear to be that the traditional, British-mould act of state is no longer suited to South African reality. While it would be rash to suggest that South Africa's foreign relations are now fully justiciable, they certainly no longer invoke an absolute prohibition of judicial involvement.[68]

Booysen's and Carpenter's views on the relationship between foreign policy and SOP under the current constitutional-legal order are fundamentally flawed. Their respective views are not borne by the history and background to the negotiations at Kempton Park relating to how South Africa was supposed to conduct its foreign relations after 1993. Their views are also inconsistent with the intention of the framers at founding when the latter allocated, in both the interim and the 1996 constitutions, the sum total of foreign affairs power to all three co-equal branches of the national government.[69] As far as Botha's views are concerned, contrary to his caution, under the current constitutional-legal dispensation in the South African *rechtsstaat*, the exercise of foreign affairs powers are no longer 'non-justiciable', but are fully subject to judicial scrutiny.[70]

In the context of the argument in this chapter, this study suggests that Dugard's & Coutsoudis's view – as opposed to Booysen's and Carpenter's – that the powers of the executive to conduct foreign relations are no longer immune to judicial scrutiny, should be preferred.[71] However, this study goes further than Dugard & Coutsoudis in also suggesting that, while the executive still retains its discretion, all foreign affairs powers which were largely part of the common law prerogative have now been constitutionalised, meaning, these powers can no longer be regarded strictly as 'non-statutory' but that they are 'constitutional'.[72] What

[68] Botha note 28, 272.
[69] See next discussion under sub-section 5.2 of this chapter.
[70] See *Pharmaceutical Manufacturers Association* at para 33.
[71] Dugard & Coutsoudis note 28, 104; Dugard (2011) note 28, 71.
[72] For instance, s 84(1) of the 1996 Constitution provides that the President 'has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State [conduct foreign affairs] and head of national executive.'

is more, this study argues – as the next sub-section clearly demonstrates – that Dugard's & Coutsoudis' view[73] that 'neither the Interim Constitution nor the 1996 Constitution appear to expressly confer powers on the executive [to conduct foreign relations]' is incorrect and inconsistent with the letter and spirit of Constitutional Principle XXI.3 (schedule 4 to the interim Constitution)(discussed below).

5.2 Constitutional moorings of foreign affairs powers

The framers of the interim Constitution concluded a 'solemn pact' which consisted of 34 'constitutional principles' (CPs), which the Constitutional Assembly drafting the 1996 Constitution was compelled to comply with and enshrine in the 'final' text of the Constitution.[74] Constitutional Principle (CP) XXI.3 provided as follows: 'Where there is necessity for South Africa *to speak with one voice*, or *to act as a single entity* – in particular *in relation to other states – power should be allocated to the national government*.'[75] A close and careful reading of the provisions of CP XXI.3 shows that, under South Africa's new constitutional-legal order, the course of foreign policy should be guided by the following considerations: (a) the power to conduct foreign affairs is a constitutional grant, that is, it is derived from the Constitution; (b) the power to conduct foreign affairs is the responsibility of *the national government*;[76] and (c) the rationale for allocating foreign affairs powers to the national government is to enable South Africa to 'act as a single entity' and/or to 'speak with one voice' to the international community. CP XXI.3 therefore provided a clear and unambiguous basis and blueprint for the conduct of foreign relations in a post-apartheid constitutional state. The three 'elements' of CP

[73] Dugard & Coutsoudis note 28, 102.
[74] Interim Constitution, preamble. See also interim Constitution, s 71; Kriegler note 27, 362.
[75] Emphasis added.
[76] It is worth noting that CP XXI.3 does not specify which branch of the national government should be responsible for foreign relations.

XXI.3 and the earlier arguments made by Booysen, Botha, Carpenter, and Dugard & Coutsoudis are discussed in the next sub-sections of this chapter.

5.2.1 Power to conduct foreign affairs is a constitutional grant

CP XXI.3 provided in no uncertain terms that the South African government (at the national level) has general power to conduct foreign relations. This general power to conduct foreign relations is in addition to the other more specific foreign affairs powers allocated to the various branches of government and state functionaries. For instance, in terms of section 82(1)(i) of the interim Constitution, the President had the power to negotiate and sign international agreements while Parliament (section 231(2)) had the power to agree to the ratification of or accession to an international agreement. From the provisions of CP XXI.3 therefore, it is clear that the general power to conduct foreign relations under the new constitutional-legal order is – and contrary to the views of Booysen and Dugard & Coutsoudis - founded in the Constitution and no longer based on the old common law prerogative (as Booysen suggests). Conversely, the old common law prerogative to conduct foreign relations in South Africa has now been fully constitutionalised. The observation that the power to conduct foreign relations in post-apartheid South Africa is no longer based on the old common law prerogative but on the Constitution necessarily implies that there can no longer be any basis for arguing (as Booysen and Carpenter do) that foreign policy in South Africa is non-justiciable. On the contrary, because the power to conduct foreign relations is a 'constitutional matter', then the Constitutional Court had the power to adjudicate the exercise of this aspect of public power in terms of section 98 of the interim Constitution.[77]

[77] S167(3)(a) of the 1996 Constitution provides that the Constitutional Court 'is the highest court in all constitutional matters'. Because the general power to conduct foreign relations is retained in the 1996 Constitution, the exercise of that power is a 'constitutional matter' within the meaning of s 167(3) and the Constitutional Court has jurisdiction to adjudicate the exercise of public power in that domain of governmental responsibility.

It is important to note that the 1996 Constitution does not contain a provision in the same terms as CP XXI.3. The question then becomes: is the general power to conduct foreign relations retained in the 1996 Constitution? The contention of this study is that it is and for the same reasons and rationale as initially stipulated in CP XXI.3. This contention is grounded on the following considerations: First, the interim Constitution is unambiguous about the fact that it was the intention of the framers that the 'final' Constitution complies fully with all 34 CPs in schedule 4 to the interim Constitution, including CP XXI.3.[78] Second and flowing from the first point, in *Ex Parte Chairperson of the Constitutional Assembly: Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*[79] (the *Second Certification Judgment*), the Constitutional Court unanimously held that the whole 'final' constitutional text complied with all 34 CPs.[80]

Taking into account the clear intention of the framers as evidenced by the provisions of the interim Constitution[81] and the decision of the Constitutional Court in the *Second Certification Judgment*, it can be concluded that the 1996 Constitution has retained all the elements of CP XXI.3, including the general power on the part of the South African (national) government to conduct foreign relations. What this means therefore is that under the 1996 Constitution, the power to conduct foreign relations is also not based on the old English common law prerogative, but on the clear and unambiguous terms of the supreme law. In the circumstances therefore, under the current constitutional-legal order, there is no basis for the proposition that foreign policy in South Africa is non-justiciable - by virtue of it being based on the old English common law - when the Constitution makes it clear that the power to conduct foreign relations is a constitutional matter within the meaning of section 167 of the 1996 Constitution.

[78] Interim Constitution, preamble. See also interim Constitution, s71.
[79] 1997 (2) SA 97 (CC)
[80] *Second Certification Judgment* at para 205.
[81] The preamble and s71 in general.

5.2.2 Foreign affairs powers reside with the national government

CP XXI.3 provided that in order to conduct foreign relations, 'power should be allocated to the national government'. The logical question then becomes: why did the framers of the interim Constitution (and by implication, the 1996 Constitution) not provide in clear and uncertain terms as to which branch of the national government should be allocated the general power to conduct foreign relations? Conversely, does the principle of SOP, as understood in the domestic context, matter to the outside world in the conduct of foreign relations?

There are two possible answers to these questions. The first answer could be that, by reference to 'national government' in CP XXI.3, the framers had in mind the executive branch of the national government (the President to be precise). The idea that the executive branch is responsible for conducting foreign relations is based on historical and legal practice in almost all countries.[82] And if indeed this was the intention of the framers when they agreed on the terms of CP XXI.3, then it could be assumed that they (the framers) intended the *status quo ante* to persist, which is that, the conduct of foreign relations post-1993 would remain, like in pre-democratic South Africa, the exclusive domain of the executive branch of the national government. The second answer could be that, by not specifying which branch of the national government should be ultimately responsible for the exercise of foreign affairs powers, the framers intended to pit all three branches against one another on foreign affairs matters, each exercising its own mandate and powers under SOP.

As far as the first answer is concerned, a careful reading of the various provisions of the 1996 Constitution allocating specific foreign affairs powers to the respective branches of the national government (executive, legislative and judiciary) would show that it was never the intention of the framers to retain the realm of foreign policy *exclusively* in the hands of the

[82] *Kaunda* at paras 172, 243; *Democratic Alliance* at para 35.

executive; but that these powers were to be distributed among the three co-equal branches of the national government.[83] As far as the second answer is concerned, it could be argued that it was indeed the intention of the framers to pit all three branches of the national government against one another and to give the judiciary in particular a role in foreign affairs matters given the kind of malady the framers sought to address at founding. In this regard, it is important to bear in mind that one of the objectives of the framers was to redress the pariah (rogue state) image of apartheid South Africa and to define a new role for this country in the international community in a democratic era after 1993. It should not come as a surprise therefore, that the framers would have been conscious of the need to craft in very clear and elaborate terms which branch of the national government will exercise what powers in relation to important matters of national security, national defence, employment of the defence force and the use of force – to mention but a few. Given the images of a bellicose and recalcitrant South Africa[84] which were still fresh in the minds of many around the negotiating table at Kempton Park the framers were keen to change this perception of South Africa in the eyes of its neighbours and the world. Specifically, the framers wanted, among other objectives: (a) to portray the image of a 'new' South Africa which was now under the ROL, not 'securocratic' rule of brute force; and (b) to show that the exercise of public power in important matters such as national security, national defence,[85] and employment of the defence force will be controlled by law. For instance, the

[83] In the case of the judiciary, see the powers of judicial review granted to the courts in matters of national security (s 198(c)), state of emergency (s37(3)), employment of the armed forces (s 200(2)) read with s 201(2)) and the declaration of the state of national defence (s 203) in the 1996 Constitution.

[84] For example: A police state where 'securocrats' reigned supreme; an executive which was literally law unto itself; a 'sovereign parliament' and an executive-minded judiciary that had thrown cavil at international humanitarian law and held in contempt international legal instruments protecting human rights and regulating the use of force; the brutal military occupation of Namibia; the war of attrition in neighbouring Angola; military support to 'rebel movements' such as UNITA (in Angola) and Renamo (in Mozambique); and the brutal attacks on 'soft targets' (abductions and cross border assassinations) in neighbouring Mozambique, Zambia, Swaziland, and Lesotho in flagrant violation of the sovereignty and territorial integrity of these neighbouring states – to mention but a few. See Moseneke DCJ in *Masetlha v President of the Republic of South Africa & Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 33.

[85] It is important to note that the Constitution does not use the word "war" here. The only place where the Constitution uses that word is in s37(1)(a) where it states that one of the grounds on which a state of emergency may be declared is when 'the life of a nation is threatened by war'.

requirement in section 198(c) of the 1996 Constitution that national security be pursued in accordance with the law, including IL, means that the courts will play a role in controlling the exercise of foreign affairs powers in matters of national security through the power of constitutional-JR.

5.2.3 The 'one voice' or 'single entity' principle in South African constitutional foreign affairs law

CP XXI.3 provided in essence that in the conduct of foreign relations, the South African government should 'speak with one voice' or 'act as a single entity'. The idea that the South African government should 'speak with one voice' or 'act as a single entity' when dealing with the international community begs the following questions: (a) what was the intention of the framers when they instructed that South Africa should 'speak with one voice' or 'act as a single entity' in foreign relations; and (b) what are the implications of the 'one voice' and/or 'single entity' principles for the conduct of South Africa's foreign relations?

In considering these two questions, it is important to bear in mind that the 'one voice' principle – which comes from the old English case of *Government of the Republic of Spain v 'SS Arantzazu Mendi'*[86] – is a principle, and as discussed in chapter two of this thesis, which is employed by the courts in the UK[87] and US[88] to achieve two objectives: (a) to ensure that only one branch of government (the executive) speaks on behalf of the country in foreign affairs; and (b) to restrain/exclude the courts from adjudicating foreign policy matters.

The key question to ask here is: what was the intention of the framers of the interim Constitution when they constitutionalised the 'one voice' and 'single entity' principles in South Africa's constitutional foreign affairs laws? Was the intention to retain the *status quo ante*

[86] 1939 AC 256
[87] See discussion in chapter two of this thesis, under sub-section 3.1.2.
[88] See discussion in chapter two of this thesis, under sub-section 3.2.3.

under English common law which is that, in the field of foreign affairs the only branch that is responsible for speaking on behalf of South Africa to the international community is the executive (the President)? Or was the intention also to exclude the courts from adjudicating foreign policy matters as is the case in the UK and US?

Some commentators[89] have argued that, under the doctrine of SOP, foreign policy is/should be the exclusive province of the executive and only that branch should speak on behalf of the nation to the international community. Some of the 'prudential reasons' which have been advanced as justification for this view include: (a) the ideas that 'Foreign relations are largely informal, private, often confidential matters between officials and diplomats';[90] and that (b) in foreign policy matters time is always of the essence and the executive alone has the means and resources to respond and act quickly.[91] As far as the exclusion of the courts from foreign affairs on the basis of the 'one voice' principle is concerned, the same commentators argued that the latter institutions are not competent to be allocated foreign affairs powers precisely because

> Judge-made law … can only serve foreign policy grossly and spasmodically; their attempts to draw lines and make exceptions must be bound in doctrine and justified in reasoned opinions, and they cannot provide flexibility, completeness, and comprehensive coherence.[92]

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[89] See, for example, Carpenter note 3, 111; D Abebe & E A Posner 'The flaws of foreign affairs legalism' (2011) 51 *Va. J Int'l L* 507, 508 footnote 1 say that in the US, the approach the judges take in foreign policy matters is to allow the executive to play its primary role and to defer to the latter branch in these matters.

[90] Henkin note 8, 881.

[91] R H Knowles, 'American hegemony and the foreign affairs constitution' (2009) Ariz St L J 1, 62. See also Casper (1976) note 8, 495 where he quotes Henry Kissinger (in *New York Times*, Jan 25, 1975 at 6, col.4) as having said that '… the legislative process – deliberation, debate and statutory law – is not well-suited to the detailed supervision of the day-to-day conduct of diplomacy'.

[92] Knowles note 91, 13 footnote 52 quoting L Henkin, *Foreign Affairs and the United States Constitution 2nd ed* (1996) 220; Casper (1976) note 8, 495 footnote 114 quoting further Henry Kissinger (in *New York Times*, 25 Jan, 1975 at 6, col.4) who is reported as having said that: 'Legal prescriptions, by their very nature, lose sight of the sense of nuance and the feeling for the interrelationship of issues on which foreign policy success or failure so often depends.'; T K Cribb Jr & R (Dick) Cheney, 'Address: The impact of separation of powers on national security' (1990) 68(3) *Wash Univ L Q* 525, 532 available at http:///open-scholarship.wustl.edu/law_lawreview/vol68/issue3/4 where Cheney (the former Defense Secretary in the first George W Bush administration) is quoted as having said: 'The United States cannot conduct a successful

The argument in this study is that the 'one voice' principle in South African constitutional law, as intended by the framers, is a restatement of the historical practice in foreign affairs law, which is that the executive is the branch of government responsible for day-to-day conduct of foreign relations. However, one should hasten to add that the allocation of foreign affairs powers to the executive for the purposes of 'speaking with one voice' or 'acting as a single entity' does *not ipso facto* imply that it was also the concomitant intention of the framers to exclude the courts from foreign policy matters. On the contrary, the entire structure, content and rationale for the allocation of foreign affairs powers to all three branches of the national government shows that, under South Africa's current constitutional-legal order – and notwithstanding the entrenched principle of SOP – it was the intention of the framers to ensure that foreign policy is not shielded from participation by the courts.

In the *First Certification Judgment*, the Constitutional Court certified that the 1996 Constitution complied with the provisions of CP XXI.3.[93] However, according to the Court, the requirement to 'speak with one voice' or 'act as a single entity' was satisfied by the provisions in the 1996 Constitution which gave the legislature powers to pass legislation to regulate all (domestic) matters, including those matters that might fall within the responsibility of both the national and provincial legislatures as well as matters that might fall within the exclusive competence of provincial legislatures.[94]

Regrettably, in the *First Certification Judgment*, the Constitutional Court did not do justice to the interpretation of how the 'one voice' or 'single entity' principle - as stipulated in

foreign policy if every constitutional disagreement is pressed to a final confrontation.' As far as separation of powers in national security matters is concerned, Cheney opines that: 'The legislature and executive have to agree to disagree, and then work together to govern.'

[93] The *First Certification Judgment* at para 239. See also para 45 item (f).

[94] The Court held that the requirement for South Africa to 'speak with one voice' or 'act as a single entity' was satisfied by reference to four provisions/areas in the 1996 Constitution, namely (a) by the general residual power of the National Assembly which is contained in section 44(1)(a)(ii) of the 1996 Constitution; (b) by the specific powers contained in schedule 4 of the 1996 Constitution; (c) by the grounds on which intervention by the national legislature is justified in terms of section 44(2) of the 1996 Constitution; and (d) by the grounds on which an override is justified in terms of section 146 of the 1996 Constitution.

CP XXI.3 - is applied in the context of the 'debate' about the role (or none) of each of the three branches of government in the field of foreign relations. The Court should have interpreted the meaning of the 'one voice' or 'single entity' principle within the context of how this principle was applied in South Africa (under the common law before 1994) and how that principle is still being applied by other jurisdictions such as the UK and US in the context of *conducting relations with other states*; and juxtapose that interpretation with how the 1996 Constitution complies with this principle where national foreign affairs power has now been distributed among all three co-equal branches of government. Be that as it may and based on the decisions of the Constitutional Court in the *First Certification Judgment* and the *Second Certification Judgment*, the 1996 Constitution nevertheless complies fully with all the requirements of 'conducting foreign relations' stipulated in CP XXI.3.

6. South African case law on separation of powers and foreign policy

O'Regan suggests that the relationship between the executive and the judiciary always generates a lot of controversy, particularly in the area of constitutional jurisprudence/interpretation.[95] She points out that the executive plays an important and powerful role in modern democracies and that one of its key functions is to conduct foreign relations.[96] However and notwithstanding the primacy of the executive in foreign policy matters, O'Regan acknowledges that, in the context of South Africa's constitutional-legal order, there are strong grounds to suggest – unlike in pre-democratic South Africa, the UK and US – that even the area of governmental responsibility which is seen to be wholly an executive function 'is to some extent justiciable'.[97]

[95] O'Regan note 12, 137.
[96] Ibid.
[97] Ibid. She refers to s 172 of the Constitution providing for powers of South African courts in constitutional matters, including the power of judicial review.

In *Democratic Alliance*,[98] government had argued in essence that if and when the court intervened by ordering it to retract the notice of withdrawal from the Rome Statute of the ICC sent to the United Nations Secretary-General (UNSG) in a situation where a parliamentary process to facilitate that withdrawal was still under way, that would 'infringe the doctrine of separation of powers'.[99] Counsel for the state had effectively argued, based on the SOP principle, that the court should not be involved in a process which was still going to be considered by parliament in a matter that was purely the responsibility of the political branches. While the court accepted that the responsibility to conduct foreign relations and to conclude international agreements is an executive (political) function in terms of section 231(1) of the Constitution,[100] the court pointed out however, that, that power (to conduct foreign relations and conclude international agreements) was limited by section 231(2) and (4), which require the national executive to consult parliament,[101] specifically, to obtain prior parliamentary approval before withdrawing from the Rome Statute.

The Court rejected the argument that it had no jurisdiction to deal with the matter.[102] It justified its involvement on the ground that, and precisely because in its view, the executive had already acted unconstitutionally by breaching the SOP principle and proceeding to send a notice of withdrawal to the UNSG without first obtaining requisite parliamentary approval.[103] The Court emphasised that when the executive acts unconstitutionally (as the Court found in that case), then the court is under a constitutional duty to enquire into the conduct of the executive to determine whether such acts are consistent with the Constitution.[104] The Court pointed out further that, even if government would be engaged in diplomatic discussions in the

[98] Note 5.
[99] *Democratic Alliance* at para 13.
[100] Ibid at para 35.
[101] Ibid. See also paras 57, 59, 60.
[102] Ibid at para 16.
[103] Ibid at para 15.
[104] Ibid.

future to try to resolve that matter, the court 'cannot shirk its responsibility [to adjudicate the matter which is properly before it] just because the executive may [in the future] find another solution'.[105]

In *Southern Africa Litigation Centre v Minister of International Relations & Others*[106] (*Al Bashir (HC)*), Mlambo JP (for the unanimous court) stated that, under the SOP principle, matters relating to policies such as preservation of international relations, or relations between AU members are not matters that the court would be concerned with, precisely because these are policy matters which ordinarily rest not in the ambit of the judiciary but the executive.[107] Mlambo JP asserted however, that, even in matters that appear to be in the domain of the executive such as conduct of foreign relations, SOP notwithstanding, the courts will always play their role because their primary concern is to maintain the ROL.[108]

In *Law Society of South Africa & Others v President of the Republic of South Africa & Others*[109] (*SADC Tribunal case*), concerning the constitutionality of the President's role in the decision of SADC leaders to disband the Southern African Development Community (SADC) Tribunal, Mogoeng CJ underscored the need for all branches of government, including the judiciary to observe and respect the SOP principle.[110] However, Mogoeng CJ emphasised that the courts will always intrude into the internal processes of other branches of government under exceptional circumstances such as where there is a need 'to prevent the violation of the Constitution'[111] and there is no other viable alternative to address the people's concerns and grievances.[112]

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[105] Ibid at para 16.
[106] [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 2 All SA 505 (GP); 2015 (9) BCLR 1108 (GP)
[107] *Al Bashir (HC)* at para 27.
[108] Ibid.
[109] [2018] ZACC 51
[110] *SADC Tribunal case* at para 25.
[111] Ibid.
[112] Ibid.

In *Kaunda & Others v President of the Republic of South Africa & Others,*[113] the Constitutional Court had to consider whether government had a duty to provide diplomatic protection to its citizens abroad.[114] In that case, 69 South Africans were arrested and detained in Zimbabwe on several charges, including that they were 'mercenaries' on their way to Equatorial Guinea with plans to overthrow the government of that country. The applicants approached the Court seeking a range of relief, including an order declaring that the South African government was under an obligation to provide them diplomatic protection to prevent their extradition to Equatorial Guinea where, they alleged, they would not receive a fair trial. In that case, the Court explained in some detail the powers and constitutional responsibilities of the executive on the one hand and the judiciary on the other in the distribution of the sum total of national power in the field of foreign affairs. In defining the role of the executive in foreign affairs, the Court highlighted what American[115] and Canadian[116] foreign affairs lawyers call, 'prudential concerns' or 'prudential characteristics' of foreign affairs which necessarily warrant that that area of governmental responsibility be reserved for the executive branch of the national government. These include the following: (a) that foreign affairs is an area reserved for the executive and that the courts should therefore exercise discretion and recognise that the former branch is best placed to deal with foreign policy matters;[117] (b) that matters such as diplomatic protection and how to handle them is an aspect of foreign policy which is the province of the executive;[118] (c) that courts lack the necessary means and resources to deal

[113] 2004 (10) BCLR 1009 (CC); 2005 (4) SA 235 (CC)
[114] O'Regan note 12, 137. See *Kaunda* at para 110.
[115] See A Slaughter Burley 'Are foreign affairs different?' (1993) 106 *Harv L R* 1980, 1981 in her review of T M Franck *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (1992), 1985.
[116] See Wilson J in *Operation Dismantle v The Queen* [1985] 1 SCR 441 (SCC) at 491. See also the Comment of Justice M Fish (of Canada) in R A Posner, 'Judicial review, a comparative perspective: Israel, Canada, and the United States' (2010) 30 *Cardoso L R* 2393, 2420. For further discussion of how American and Canadian courts deal with 'prudential characteristics' of foreign affairs, see chapter two under sub-sections 3.1.1 – 3.1.3 (American) and 3.4.5 (Canada).
[117] Chaskalson CJ in *Kaunda* at para 67.
[118] Ibid para 77. See also Ngcobo J in *Kaunda* at para 172.

adequately with all the nitty-gritties associated with diplomatic representations;[119] (d) that diplomatic negotiations are a very delicate and sensitive area for diplomats who possess requisite skills and competence to make decisions (not the judges);[120] (e) that government (executive) must be allowed ample space to exercise its discretion in the conduct of foreign policy and that the courts must respect that position;[121] and (f) that the conduct of foreign relations requires states to respect and adhere to the rules of international comity, for example, non-interference in the internal affairs of another country.[122] On the issue of international comity, O'Regan J in her dissenting judgment (in *Kaunda*) (in which Mokgoro J concurred) had stated:

> As a general principle, however, our Bill of Rights binds the government even when it acts outside South Africa, subject to the consideration that such application must not constitute an infringement of the sovereignty of another state.[123]

In her reasoning, O'Regan J applied the international comity principle from the Canadian case of *R v Cook*[124] where the Supreme Court of Canada (SCC) held that when Canadian police interrogated Cook (the accused) in the US, the former were still subject to section 32(1) of the Canadian Charter of Rights and Freedoms (the Charter)[125] as employees of the Canadian

[119] Chaskalson CJ in *Kaunda* at para 77. See also Ngcobo J in *Kaunda* at para 172.
[120] Chaskalson CJ in *Kaunda* at para 77.
[121] Ibid at para 81. See also Ngcobo J in *Kaunda* at para 172; O'Regan J in *Kaunda* at para 244; and Sachs J in *Kaunda* at para 275.
[122] Ngcobo J in *Kaunda* at para 172. For examples of other 'prudential characteristics' of foreign affairs articulated by South African courts, see Snyders J in *Government of the Republic of South Africa & Others v Von Abo* [2011) ZASCA 65 at paras 21, 26 and 36; *Al Bashir (HC)* at para 34; *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & Another* [2014] ZACC 30; 2015 (1) SA 315 (CC); 2014 (12) BCLR 1428 (CC) at para 61, 62, 63 and 74.
[123] *Kaunda* at para 229.
[124] [1998] 2 SCR 597 (SCC)(discussed in chapter two, subsection 3.4.2 of this thesis).
[125] S32(1) of the Canadian Charter essentially provides, without making any limitation as to jurisdiction (that is, whether the Charter applies domestically only or whether it also applies 'extraterritorially'), that the Canadian Charter applies to all levels and spheres of government.

government, and that the application of the Charter in the circumstances of that case did not violate the sovereignty of the US.

Notwithstanding the afore-mentioned 'prudential characteristics' of foreign affairs, South African courts have made it crystal clear that even in this 'vast external realm, with its important, complicated delicate, and manifold problems',[126] the exercise of foreign policy powers under the prevailing constitutional-legal order 'is to some extent justiciable'.[127] There are clear principles which have emanated from South African courts - particularly the Constitutional Court - which have become 'justification' for why the domain of foreign policy under the current constitutional-legal order shall always be within the reach of judicial scrutiny, notwithstanding SOP principle and the 'prudential characteristics' of that area of governmental responsibility. These principles include the following: (a) that the control of public power, including foreign affairs powers by the courts through the mechanism of JR is a constitutional matter;[128] (b) that the exercise of all public power, including exercise of foreign affairs powers is subject to constitutional-judicial control;[129] (c) that state functionaries, including those charged with the responsibility of conducting foreign affairs may only exercise those powers and perform those responsibilities granted to them by law;[130] (d) that the prudential characteristics of foreign affairs do not mean that South African courts are barred from adjudicating matters concerned with political issues such as diplomatic protection[131] or the decision of government to withdraw from a binding international treaty;[132] and (e) that if government rejects a legitimate request (for example, diplomatic protection), or deals with it

[126] To use the words of Sutherland J in *United States v Curtiss-Wright Export Corporation* 299 U.S. 304 (1936) at 320. This case is discussed briefly in chapter two, subsections 3.2.2 and 3.2.3 of this thesis. See W J Powell 'Justiciability and foreign affairs – The treaty making power' (1981) 46 *Missouri L R* 164, 188 footnote 171.
[127] O'Regan note 12, 137.
[128] Chaskalson CJ in *Pharmaceutical Manufacturers Association* at para 33.
[129] Chaskalson CJ in *Kaunda* at para 78.
[130] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58.
[131] Chaskalson CJ in *Kaunda* at para 78.
[132] *Democratic Alliance* at paras 15 and 16.

in an arbitrary, irrational and illegal manner, or deals with it *mala fide* and fails to apply its mind properly, or fails to act in accordance with the principle of legality, a court could require government to consider the matter and deal with it properly.[133]

South African courts have also explained the operation and meaning of the SOP principle in *non-foreign policy cases*. In this study, the argument is that the 'general principles' that the courts espouse in non-foreign policy cases relating to the meaning and application of concepts such as SOP in the context of the present discussion, will guide (and bind?) future courts when the latter are confronted with real foreign policy controversies.

In *Minister of Health & Others v Treatment Action Campaign* (*TAC* case),[134] the state had argued in essence that the responsibility to make and implement policy is the sole responsibility of the executive under SOP and that the courts may not order the executive to pursue a particular policy.[135] Then President Zuma had made a similar argument in his address to the 3rd Access to Justice Conference, held in Pretoria in 2011 when he said:

> The Executive, as elected officials, has the sole discretion to decide policies for Government … This means that once government has decided on the appropriate policies, the judiciary cannot, when striking down legislation or parts thereof on the basis of illegality, raise that as an opportunity to change the policies as determined by the Executive area of government ... Encroachment of one arm [of government] on the terrain of another should be frowned upon by others, and there must be no bias in this regard.[136]

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[133] Chaskalson in *Kaunda* at para 80. For further elaboration of the meaning and applicability of SOP principle in South African courts see Ackerman J in *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 66; *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 37.
[134] [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC)
[135] *TAC* case at para 97.
[136] Keynote address by President Jacob Zuma on the occasion of the 3rd Access to Justice Conference, Pretoria (8 July 2011) available at http:///www.thepresidency.gov.za/speeches/keynote-address-president-jacob-zuma-occasion-3rd-access-justice-conference%2C-pretoria

In *TAC* case, the Constitutional Court was not persuaded that it could not intervene and make orders in the (policy) space reserved for the executive. The Court asserted that although all arms of government should bear in mind the SOP principle and respect it, the operation of that principle does not translate into the idea that courts cannot make orders impacting on policy.[137] The Court went further to state:

> Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so.[138]

In *Doctors for Life International v Speaker of the National Assembly*,[139] Ngcobo J (for the majority) underscored the role of the courts in policy matters while observing SOP when he stated, in part, that the judges should avoid interfering in the work of the political branches '*unless to do so is mandated by the Constitution*'.[140] As far as O'Regan is concerned, the courts would always intrude in the domain of other branches particularly when the issue at hand implicates the protection of human rights.[141]

In *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others*,[142] the Constitutional Court held that the exercise of all public power under South Africa's current constitutional-legal order is subject to judicial control.[143] On the important question of SOP between the executive and the judiciary, Chaskalson CJ stated that the requirement that state functionaries act rationally

[137] *TAC* case at para 98.
[138] Ibid at para 99.
[139] 2006 (6) SA 416 (CC)
[140] *Doctors for Life* at para 37. Emphasis added.
[141] O'Regan note 12, 133.
[142] [2000] ZACC 1; 2002 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC)
[143] *Pharmaceutical Manufacturers Association* at para 33.

> does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately.[144]

The interpretation and application of the SOP principle in the above *non-foreign policy* cases will, arguably, be followed by other South African courts when dealing with *real* foreign policy cases to show how governmental responsibility in the realm of foreign affairs is bound by the requirements and purposes of SOP.

7. Implications of separation of powers for South Africa's foreign policy

The principle of SOP has important implications for the conduct of foreign policy in South Africa. First, one of the fundamental objectives of that principle in modern constitutionalism is to control power and prevent its abuse.[145] The system of checks and balances that inheres in SOP is meant to create a healthy friction among the three branches[146] in order to ensure a system of government that is, for example: (a) accountable,[147] representative and legitimate;[148]

[144] Ibid at para 90.
[145] Mojapelo note 8, 38. See also Casper (1976) note 8, 488. E V Rostow, 'The democratic character of judicial review' (1952) 66 *Harv. L R* (No. 2) 193, 199 referred to the words of Justice Brandeis in *Meyers v United States*, 272 US 52, 293 (1926) (in a dissenting opinion) who is reported as having said that when the American founding fathers adopted the SOP principle in 1787 (during the drafting of the US Constitution), they did so with the intention not to promote efficiency but to squelch the exercise of arbitrary power.; Gewirtz note 8, 343; Dippel note 9, 155; Fombad note 22, 7; J Lobel 'The limits of constitutional power: Conflicts between foreign policy and international law' (1985) 71 *Va. L R* 1071, 1115.
[146] Casper (1976) note 8, 490; Lobel note 145, 1166; E V Rostow note 145, 199 referred further to Justice Brandeis in *Meyers* where he stated: 'The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy' (at 293).
[147] Casper (1976) note 8, 464; Dippel note 9, 155; Fombad note 22, 7. See also the *First Certification Judgment* at para 22.
[148] Dippel note 9, 156.

(b) where 'law prevail[s] over power and standing';[149] (c) where power is not exercised arbitrarily or capriciously;[150] and (d) where the liberty of citizens is safeguarded.[151] In terms of the emerging jurisprudence of South African courts in general and the Constitutional Court in particular, the above-mentioned 'principles of legality' and constitutionalism must permeate the exercise of all public power, including the exercise of public power in the realm of foreign affairs.

Second and flowing from the point immediately above, when all relevant considerations with respect to the rationale, goals and objectives of SOP are taken into account, it is self-evident that, under South Africa's current constitutional-legal order, foreign policy can no longer be treated as 'ordinary politics' untouched by some fundamental norms. The makers and implementers of South Africa's foreign policy are now under a constitutional obligation, among others: (a) to account for their conduct; and (b) to 'meaningfully engage' the public in foreign policy-making and implementation.[152]

Lastly, foreign policy in a South African *rechtsstaat* is destined to be a contested terrain and a multivocal marketplace of ideas. When the citizenry raises the tempo on foreign policy matters which impact their lives, government would be under a constitutional obligation to hold its ear close to the ground[153] in order to ensure, among other responsibilities, that: (a) the needs

[149] Ibid.
[150] Fombad note 22, 9. Then President Thabo Mbeki in the address to parliament at the ceremony to mark the retirement of Chief Justice Arthur Chaskalson and the assumption of office of Chief Justice Pius Langa and Deputy Chief Justice Dikgang Moseneke, 10 June 2005 said: 'This ceremony has been designed in such a way that it respects both the separation of powers that is entrenched in our Constitution, relating to the legislature, the executive and the judiciary, as well as cooperation among these centres of state power, without which our body politic would cease to exist. In this latter eventuality, ineluctably, mere anarchy would be loosened upon our world.' available at http://www.dfa.gov.za/docs/speeches/2005/mbek0610.htm
[151] Rabkin note 8, 1006.
[152] As the Constitutional Court ordered the parties to do in *Occupiers of Olivia Road Berea Township v City of Johannesburg & Others* 2008 (3) SA 208 (CC) at paras 5.1, 13, 14, 15, 16, 18, 35, and 38. See also *Doctors for Life* (majority judgment of Ngcobo J) at paras 105, 110, 111, 115, and 121; *Von Abo* at para 39.
[153] In *Kaunda*, Chaskalson CJ reasoned that if citizens have a right to request government to provide them with diplomatic protection (in that case), then government must have a corresponding obligation to consider the request and deal with it consistently with the Constitution. The Chief Justice stated further that '[t]here may even be a duty in extreme cases for the government to act on its own initiative' (at para 67). He emphasised that there is corresponding duty on the part of the government to act/assist its citizens and if government refuses to do so, then

of the people are responded to;[154] and (b) that accountability is the bedrock of foreign policy-making and implementation.[155] When all these norms, values and principles which govern public administration in a South African *rechtsstaat* animate the design and conduct of foreign policy (and any other public policies for that matter), public confidence in the administration would soar, democracy would be strengthened, corruption would be lessened, arbitrary decisions based on ill-considered factors would be eliminated, legitimacy of government policy would be enhanced, and rights would be safeguarded.[156]

8. Conclusion

This chapter discussed the principle of SOP and how it implicates the exercise of the sum total of national foreign affairs power. It demonstrated how, under the SOP principle, the foreign policy of South Africa has been constitutionalised and subjected to the discipline of constitutional norms and brought fully within the purview of constitutional-judicial scrutiny. It also explained why and how SOP principle in the South African *rechtsstaat* can no longer be used as justification for the argument that foreign policy in South Africa is non-justiciable as was the case under common law in pre-democratic South Africa.

The historical origins of and rationale for the adoption of the principle of SOP in modern liberal-legal constitutionalism provide a solid background to understanding how SOP impacts

that 'refusal decision' would be justiciable and government may be ordered to consider its decision and take appropriate action (at para 69).

[154] Constitution, s 195(1)(e).

[155] Ibid, s 195(1)(f).

[156] In *Mohamed*, the Constitutional Court had some strong words to say about the unlawful conduct of the South African authorities of handing over Mohamed to the FBI (illegal rendition) in flagrant violation of his constitutional rights (at paras 68 and 69). In highlighting the importance of the state to uphold the law and lead by example, the Constitutional Court in *Mohamed* quoted with approval 'the celebrated words' of Justice Brandies in *Olmstead et al v United States* 277 US 438 (1928): 'In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously… Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example… If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy' (at 485). See also Snyders JA in *Von Abo* at para 39.

the exercise of public power, including the exercise of public power in the realm of foreign affairs. Some of the objectives of the framers of the interim and 1996 constitutions for engraving the principle of SOP in the fabric of South Africa's constitutional-legal order was to ensure, among other guarantees, that power is controlled, tyranny and arbitrariness are avoided, and that accountability is fostered. Unlike in the old pre-democratic system of common law prerogative powers - where the conduct of foreign affairs was an exclusive responsibility of the executive (buttressed by the doctrine of non-justiciability of acts of state) – the power to conduct foreign policy under the new constitutional-legal order is divided among the three co-equal branches of government (including the judiciary) in accordance with their respective areas of responsibility under SOP principle. In post-apartheid South Africa therefore, the SOP principle cannot be relied upon as justification for insulating the sphere of foreign policy from judicial 'supervision' and 'control'.

South African courts in general, and the Constitutional Court in particular, have clarified the role of the judiciary in foreign policy matters and provided some guidelines on how South Africa's foreign policy should be conducted taking into account the importance of SOP in the grand scheme of South Africa's overall constitutional-legal order. In all foreign policy cases that came before the courts, the judges have been clear about the crucial role the executive plays in foreign affairs and the need to give that branch of government requisite space to fulfil its constitutional obligation as far as the conduct of foreign affairs is concerned. In recognition of the importance of the executive in foreign affairs, the judges have also been very careful not to be seen to be wallowing willy-nilly and untrammelled in the terrain of other branches (that is, the executive and the legislative), emphasising that they too (judges) must be cognisant of the limits placed on their authority by the Constitution. However, the judges have also been unambiguous about the circumstances in which they will be bound to intervene even in foreign

policy matters (such as implementation of bilateral treaties) which are the province of the political branches, particularly the executive.

The principle of SOP has important implications for the conduct of South Africa's foreign policy. Under the prevailing constitutional-legal order, the conduct of South Africa's foreign policy can no longer be treated as 'ordinary politics' untouched by some fundamental norms. The SOP principle, by definition, has transformed the foreign policy domain of South Africa into a contested multi-vocal sphere of public policy. The multi-vocal nature and contestability of South Africa's foreign policy space have brought to the fore inherent tensions between and among all three branches of government as far as foreign policy is concerned; a necessary and healthy element of South Africa's constitutional democracy at work. The next chapter discusses rule of law and how it disciplines the conduct of foreign policy in South Africa.

CHAPTER FIVE

FROM RULE BY LAW TO RULE OF LAW IN SOUTH AFRICA'S FOREIGN POLICY

> One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles. …The concept is suddenly everywhere – a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization.[1]

> 'All right,' says the expert, 'so you say the law comes first, and only through the law can we be free. But you have also said, correctly, that "*the law does not spell out the conditions of its own application*." And still you seek commitment to institutions and legal forms. Why?'[2]

1. Introduction

When multiparty negotiations (1990-1993) concluded at Kempton Park, a new political dispensation emerged in South Africa that bore the hallmarks of a constitutional democracy under the rule of law (ROL) with all the trappings of modern liberal-legal constitutionalism. The adoption of the interim Constitution (and later the 1996 Constitution) - with the latter enshrining ROL as one of the 'founding values' of the South African *rechtsstaat* - was an epoch-defining moment and a 'legal watershed'[3] which defined, in a radical and transformative

[1] T Carothers 'The rule-of-law revival' in T Carothers (ed) *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 3 as quoted by L Pech 'Rule of law as a guiding principle of the European Union's external action' *CLEER*, Working papers 2012/3, 5.
[2] M Koskenniemi 'Constitutionalism as mindset: Reflections on Kantian themes about international law and globalisation' (2007) 8(1) *Theoretical Inq L* 9, 29. Emphasis in the original.
[3] Chaskalson CJ in *Pharmaceutical Manufacturers Association of South Africa In Re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) at para 45.

manner, how public power in all areas of governmental responsibility was to be exercised in a democratic order.

One of the important areas of governmental responsibility that was also implicated by the ethos of the new normative order after the fall of apartheid is foreign policy. It should not be surprising therefore that one of the important questions that foreign policy-makers and judges were confronted with at the dawn of democracy in 1994 was, how should foreign policy be conducted in a state that had become a constitutional democracy under the ROL, and what role, if any, would courts play in 'controlling' and 'supervising' foreign policy powers. This chapter focuses on the concept of the ROL with the objective of demonstrating how the requirements, objects and purposes of the ROL have controlling relevance to the exercise of foreign affairs powers.

In addition to the general reasons mentioned in chapter one as to why ROL and other selected tenets of constitutionalism have been chosen in this study as 'tools of analysis' to demonstrate how South Africa's foreign policy is now justiciable and bound by constitutional norms, the following reason is pertinent to this chapter: in a number of foreign policy cases that came before South African courts – these cases are discussed later in this chapter – judges have employed the concept of ROL, specifically the 'principle of legality' (which is considered as part of ROL)[4] to determine the constitutionality or otherwise of government's conduct in foreign affairs. The way South African courts have interpreted ROL and 'principle of legality' and applied these two concepts to foreign policy cases, has demonstrated in the clearest way possible how the foreign policy of South Africa is now not only 'guided' but is 'bound' and 'disciplined' by constitutional norms such as political accountability, rationality and non-arbitrariness in decision-making and implementation.

[4] *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018[ZACC 51 (*SADC Tribunal case*) at para 83; *Affordable Medicines Trust & Others v Minister of Health & Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at paras 75 and 77 ; *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at paras 49-50.

The chapter is divided into seven parts. The first part is this introduction. The second part is on the definition, requirements, and purposes of the ROL. The aim of this part is not to analyse in detail the competing 'theories' of the ROL, that is, whether ROL should be understood in its 'thinner' or 'thicker' forms or whether it should be limited only to its formal or substantive elements. Its purpose is to identify both the formal and substantive elements of the ROL which are generally accepted as constitutive of the two 'forms' or 'versions' of this concept.[5] The third part discusses the position of 'rule of law' and its implications for foreign policy in pre-democratic South Africa. The fourth part discusses 'ROL provisions' in the post-1993 constitutional texts and their applicability to foreign policy. The fifth part considers assumptions made by South African foreign policy-makers in relation to the ROL. It is important to note that these assumptions form the basis of the justification for why the foreign policy of South Africa is purported to be 'based on' or 'guided by' the ROL and why basing foreign policy on the ROL is perceived to be a 'good thing'. The sixth part discusses the implications of the ROL for the conduct of foreign policy in South Africa. The final part is the conclusion, which summarises the main points discussed in this chapter.

2. Definition, requirements and purposes of the rule of law

The history of the genesis and development of the ROL from ancient Greece to the dawn of the 21st century[6] has been grappling with the desire to reconcile two somewhat conflicting

[5] In parenthesis, the South African Constitutional Court has adopted both the formal and substantive elements of the ROL in its interpretation and application of that principle. See for example, *Masetlha v President of the Republic of South Africa & Ano* [2007] ZACC 20; 2008 (1) SA 566 (CC)' 2008 (1) BCLR 1 (CC) (per Moseneke DCJ) at paras 70, 80, 81, 108, 173, 179 and 186. At para 186, Moseneke DCJ stated that the common law principle of the rule of law is much broader as it encompasses both substantive as well as procedural aspects. See also *Democratic Alliance v President of the Republic of South Africa & Others* [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (the *Simelane* case) at paras 66, 72.

[6] For the history and development of the concept of the rule of law, see: J Kelly, *A Short History of Western Legal Theory* (1992), 1 and 9. But see Innocent C. Onyewuenyi, *African Origin of Greek Philosophy: An Exercise in Afrocentrism* (2005) who argues in essence that what is today popularly known as Greek philosophy from such great thinkers as Socrates, Plato, Aristotle, Pythagorus, and Thales (to mention but a few) has its roots in Africa, particularly Egypt. https://www.amazon.com/African-Origin-Greek-Philosophy-Afrocentrism/dp/1419613057; T

phenomena: the establishment of 'a legal basis for the indispensable authority of the state'[7] on the one hand and the need to 'secure for the citizen a life in freedom in a society governed by the rule of law'[8] on the other. The ROL in its most basic and simple meaning refers to a set-up in society where 'government officials and citizens are bound by and abide by law'.[9] The other simpler definition of the ROL is encapsulated in the idea that society should be ruled 'by law, not men'.[10] Legal scholars interested in the study of the ROL suggest that the obligation to be bound by and abide by law appears in two forms, namely the formal or procedural (or the 'thinner') form and the substantive (or 'thicker') form.[11] In its formal sense, ROL refers to the existence or presence in society of a system of laws or rules set forth in advance and that are stated in general terms.[12] These rules must be generally known and understood and their obligations should not be impossible for the people to follow.[13] The rules of law 'must be applied equally to everyone according to their terms' and 'there must be mechanisms or institutions that enforce the legal rules when they are breached'.[14] The practical implications of the formal version of the ROL include: (a) that 'government action should be subject to

J Angelis & JH Harrison 'History and importance of the rule of law' (2003), White Paper to provide background for the Task Force on American Bar Association (ABA) Goal VIII's Final Report in its Rule of Law Initiative (2003), 4-16 available at https://worldjusticeproject.org/our_work/publications/working-papers/history-and-importance-rule-of-law; W B Harvey 'The rule of law in historical perspective' (1961) 59 *Mich L R* 487, 488; K Stern 'The genesis and evolution of European-American constitutionalism: Some comments on the fundamental aspects' (1985) 18 *CILSA* 187, 188; N Lund 'Judicial review and judicial duty: The original understanding' (2009) 26 *Constitutional Commentary* 169, 169 available at http:///ssrn.com/abstractid=1498754 reviewing P Hamburger *Law and Judicial Duty* (2008).

[7] Stern note 6, 188.

[8] Ibid.

[9] B Z Tamanaha 'The history and elements of the rule of law' (2012) *Singapore J Legal Studies* 232, 233 (hereinafter Tamanaha (2012)); See also B Tamanaha 'A concise guide to the rule of law' Legal Studies Research Paper Series, Paper #07-0082, St John's Univ Sch of Law, September 2007 available at http:///ssrn.com/abstract=1012051 Paper published as a chapter in Palombella G & Walker N (eds) *Relocating the Rule of Law* (2008).

[10] See Angelis & Harrison note 6, 7-8; Tamanaha (2012) note 9, 243; D B Smith 'Promoting the rule of law and respecting the separation of powers: The legitimate role of the American judiciary abroad' (2008) 7 *Ave Maria L R* 1, 1 footnote 3.

[11] Tamanaha (2012) note 9, 233.

[12] Ibid.

[13] Ibid. See also Angelis & Harrison note 6, 6.

[14] Tamanaha (2012) note 9, 233.

regulation by rules and that government officials should not be above the law';[15] (b) that 'legal detriments should only be imposed by law, not on the basis of the personal will or arbitrary decisions of government officials or private actors';[16] and (c) that people should be secure and protected from harm, private violence and coercion.[17]

As can be seen, the formal (or 'thinner') version of the ROL is based on a Lockean notion of the ROL and focuses largely on formalist or procedural aspects of the law and requires essentially that 'laws must merely comply with certain formal rules in order to be valid, irrespective of their content'.[18] The critique of the formal version of the ROL has given birth to another school of thought that focuses on the 'thicker' or more substantive notions of the ROL. This version of the ROL looks at both the formal and procedural aspects of law and highlights the need for recognition of substantive rights.[19] The 'thicker' or substantive version of the ROL perceives that tenet of constitutionalism as constitutive of elements such as substantive justice;[20] moral legitimacy of law;[21] freedom;[22] constitutionalism and independent judiciary;[23] respect for international human rights norms and standards;[24] supremacy of the law/constitution, equality before the law, accountability to the law, public participation in decision-making, democracy;[25] and respect for human rights.[26]

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[15] Angelis & Harrison note 6, 6; D Clark 'The many meanings of the rule of law' in K Jayasuriya (ed) Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions (2006) 24, 25 also available at http://www.lfip.org/lawe506/documents/lawe506davidclark.pdf ; DFID *Policy Approach to Rule of Law* (12 July 2013) available at https://www.gov.uk/government/publications/dfid-policy-approach-to-rule-of-law 4 (hereinafter DFID Report (2013))

[16] Angelis & Harrison note 6, 6; Clark note 15, 25; Smith note 10, 1 footnote 2.

[17] Angelis & Harrison note 6, 6; DFID Report (2013) note 15, 2.

[18] A Street 'Judicial review and the rule of law: Who is in control?' *The Constitution Society* (2013) 1, 13.

[19] Ibid.

[20] Angelis & Harrison note 6, 20; R H Fallon 'The rule of law as a concept in constitutional discourse' (1997) 97 *Colum L R* 1, 22.

[21] Fallon note 20, 23.

[22] Angelis & Harrison note 6, 26.

[23] H H Koh 'A United States human rights policy for the 21st century' (2002) 46 *St Louis U L J* 293, 325-26.

[24] Tamanaha (2012) note 9, 234.

[25] Smith note 10, 1 footnote 1; K Milewicz, 'Emerging patterns of global constitutionalisation: Towards a conceptual framework' (2009) 16(2) *Indiana J Global Legal Studies* 413, 418.

[26] M Ndulo 'Rule of law programs: Judicial reform, development and post-conflict societies' *ANLEP* Working Paper No. 2, Sept 2009 available at https://www.sum.uio.no/research/networks/anlep 10. See also Tamanaha (2012) note 9, 235.

The concept of the ROL has also been defined by reference to other tenets of constitutionalism. According to Milewicz, one of the key meanings of the concept of ROL is the notion that the state and its bodies, officials and functionaries act in accordance with the prescripts of the law, and that law should aim to restrict arbitrariness.[27] Dippel identifies core attributes of the ROL to include: (a) a democratic government which is legitimate and in which abuse of power and corruption are not tolerated;[28] (b) an accountable and responsive government where power is controlled;[29] and (c) an independent judiciary to administer law without fear, favour or prejudice.[30]

This chapter does not aim to discuss in detail the differences between the two 'forms' or 'versions' of the ROL. In any event, the Constitutional Court appears to adopt both versions of the ROL in its jurisprudence and interpretation of the South African Constitution.[31] In the context of this chapter and in light of the key question posed in this study, the pertinent question to ask here is: how should foreign policy be conducted in South Africa where ROL is entrenched in a supreme constitution as one of the 'founding values'[32] and pillar of South Africa's constitutional democracy? Put in simple terms: does the concept of the ROL - understood in its formal and/or substantive manifestations - apply to the conduct of South Africa's foreign policy? In other words, should acts of the South African government in the realm of foreign affairs be subject to the requirements, purposes and objects of the ROL such as accountability, non-arbitrariness, and lawfulness? Further, should the South African government and its officials - particularly those charged with the responsibility of designing, managing and conducting South Africa's foreign policy - be 'bound by' and 'abide by' law,

[27] Milewicz note 25, 418.
[28] H Dippel, 'Modern constitutionalism: An introduction to a history in need of writing' (2000) 73 *Tijdschrift voor Rechtsgeschiedenis* 153, 155.
[29] Ibid, 155-156.
[30] Ibid, 156.
[31] R Krüger 'The South African Constitutional Court and the rule of law: The *Masethla*(sic) judgment; A cause for concern?' (2010) 13(3) *PELJ/PER* 468, 485. See *Masetlha* note 5 at para 186.
[32] Constitution, s 1(c).

and ensure, among other obligations, that foreign policy decisions are not taken without public participation and not on the basis solely of the personal will or preferences of the President, the executive, government officials or the 'ruling party'?

3. 'Rule by law' in pre-democratic South Africa and its impact on foreign policy

Prior to 1994, the South African government - including parliament and the courts - conceived ROL, by and large, in terms of its formal or procedural characteristics, encapsulated in the notion of rule *by* law.[33] In pre-democratic South Africa, legality as part of the ROL was understood in terms of the following requirements, that is, (a) government act only through law;[34] (b) actions of officials and functionaries be *intra vires*;[35] and (c) arbitrariness on the part of officials be prohibited.[36] Under the common law, legality only referred narrowly to constraints on administrative action and did not incorporate the substantive elements of the ROL.[37] Under the pre-1994 dispensation, the law was 'right' by virtue of it having been duly enacted or declared (formal legality) without any consideration for its substantive content.[38]

One of the limitations of understanding ROL only in terms of formal legality is that 'it is compatible with a regime of laws with inequitable or evil content'.[39] For instance, the Nazis were able to perpetuate gross violations of human rights under the rubric that *gegetz ist gegetz*

[33] Krüger note 31, 479 and footnotes therein; S J Ellmann 'The struggle for the rule of law in South Africa (Symposium: Twenty years of South African constitutionalism: Constitutional rights, judicial independence and the transition to democracy)' (2015-2016) 60 *NYL Sch L R* 57, 58; J Kriegler 'The Constitutional Court of South Africa' (2002) 36 *Cornell Int'l L J* 361, 361; G Bizos 'The abrogation and restoration of the rule of law and judicial independence in South Africa' (1998) 11(2) *Revue Québécoise de Droit International* 155, 159-160 available at https://www.sqdi.org/wp-content/uploads/11.2_-bizos.pdf
[34] Krüger note 31, 479.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] D Moseneke (DCJ, retired) 'The balance between robust constitutionalism and the democratic process' University of Melbourne Law School, Seabrook Chambers Public Lecture, 16 June 2016 available at https://www.unimelb.edu.au/_data/assets/word/Justice-Moseneke-MLS-16-06-2016.docx 12; Kriegler note 33, 361.
[39] Tamanaha (2012) note 9, 241.

(law is law).[40] In the case of apartheid, formal legality allowed parliament to enact unjust laws, which unjust laws were implemented by an unrestrained executive and applied by a judiciary that was, by and large, highly politicised and, for all intents and purposes, intrinsically executive-minded.[41] As far as the attitude of the judges towards the enforcement of apartheid laws was concerned, Bizos observes that: 'It did not occur to them [judges] that there is a difference between Rule by Law – just or not – and the Rule of Law.'[42] In the realm of foreign policy, the apartheid leadership could do as it pleased when it authorised violations of the territorial integrity and sovereignty of neighbouring states[43] and carried out abductions,[44] extra-judicial killings,[45] and assassinations[46] of its opponents on foreign soil as part of its broad national security ('counter-terrorism') strategy. In the context of foreign policy, adherence to a concept of rule *by* law translated into a foreign policy that was highly legalistic[47] and unrestrained by fundamental norms contained in international legal instruments relating to IL, international human rights law (IHRL), and international humanitarian law (IHL). For instance, the apartheid government, guided by its notion of the rule by law (formal legality) relied for many years on article 2(7) of the UN Charter to argue that in terms of the provisions of that

[40] Harvey note 6, 499.
[41] Moseneke note 38, 12.
[42] Bizos note 33, 161.
[43] Z Masiza 'A chronology of South Africa's nuclear program' (1993) *The Nonproliferation Review* (Fall) 35, 40. See *Nduli v Minister of Justice* 1978 (1) SA 893 (A) at 984 (accused abducted from Swaziland in violation of Swaziland's territorial sovereignty and integrity).
[44] See for example: *S v Ebrahim* [1991] ZASCA 3; 1991 (2) SA 553 (A); [1991] 4 All SA 356 (AD) (accused abducted from Swaziland by apartheid agents); *S v Ramotse* (TPD decision of 14 September 1970 unreported) (accused abducted from Botswana); *Nduli* (accused abducted from Swaziland).
[45] See for example the assassinations of ANC activists, Ruth First (1982) and Connie September (1988) who were assassinated by apartheid agents in Maputo and Paris, respectively. Another ANC and anti-apartheid activist, Albie Sachs (who was later appointed by President Mandela as one of the first eleven judges of the Constitutional Court in 1994) survived an assassination attempt (car bomb) in Maputo in 1988 (but was left severely injured).
[46] One of the (conspiracy?) 'theories' related to the assassination of Prime Minister Olof Palme (of Sweden) on 28 February 1986 in Stockholm suggests that his assassination was the work of an international conspiracy outfit, which included apartheid agents in the security and intelligence establishment; and the reason was that Prime Minister Palme was a known and outspoken opponent of apartheid and had given support (financial and otherwise) to the ANC. (see I West-Nights 'Who killed the Prime Minister? The unsolved murder that still haunts Sweden' available at https://www.theguardian.com/news/2019/may/16/olof-palme-sweden-prime-minister-unsolved-murder-new-evidence
[47] J Dugard 'Kaleidoscope: International law and the South African Constitution' (1997) 1 *EJIL* 77 (hereinafter Dugard (1997)), 77; Kriegler note 33, 361; Bizos note 33, 161; Ellmann note 33, 58.

article, the international community was barred from criticising the policies of the South African government since doing so was tantamount to prohibited interference in the internal affairs of other UN member states.[48]

Furthermore, it is trite that pre-democratic South Africa stood in stark opposition to every known tenet of the ROL at both the domestic and international levels. At the domestic level, the apartheid parliament passed laws which were palpably and manifestly unjust and which violated the substantive elements, requirements and purposes of the ROL. At the international level, the apartheid government conducted a brutal foreign policy (for example, occupation of Namibia and cross-border raids into Mozambique and Lesotho)[49] unrestrained by the fundamental tenets of the rule of IL. In the case of Namibia, the International Court of Justice (ICJ) issued its advisory opinion, *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970).* The Court held (by 13 votes to 2) that the continued presence of South Africa in Namibia was illegal and that South Africa was under an obligation to withdraw from Namibia forthwith and end its occupation of that country.[50]

4. Rule of law in democratic South Africa and its controlling relevance to foreign policy

It is worth restating the fact that when the framers drafted the interim Constitution and the 1996 Constitution, they intended, not only to address the domestic malady of apartheid, but also to

[48] Dugard (1997)) note 47, 77; J Dugard 'South Africa and international law: A historical introduction' in J Dugard, M du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law: A South African Perspective 5th ed* (2018) 18, 22; See also M E Olivier 'International law in South African municipal law: Human rights procedure, policy and practice' (Unpublished) LLD Thesis (2002) UNISA, 136 (hereinafter Olivier (2002))
[49] Masiza note 43, 40.
[50] *Advisory Opinion on Legal consequences for States of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council resolution 276 (1970)*, International Court of Justice, 21 June 1971 available at https://www.refworld.org/cases,ICJ,4023a2531.html at paras 108ff.

remodel the image of South Africa from a pariah (rogue apartheid) state to a responsible member in the family of nations.[51]

The transition from apartheid to democracy and the centrality of the ROL in the new South Africa was described by Ackerman J as a move away from a system of law based on institutionalised inequality and arbitrariness to a new system in a constitutional state where governmental action must be rational and legally justifiable.[52] What this means is that, from the onset, the framers of South Africa's post-apartheid constitutions aimed to ensure that the conduct of South Africa's domestic and foreign affairs would be subject to and bound by the same norms, values and principles such as social justice, international cooperation and human solidarity, fundamental human rights, and respect for the rule of (international) law (RO(I)L). The next two sub-sections discuss two notions in relation to the ROL, namely, (a) ROL as 'founding value' (section 1(c) of the Constitution) and (b) 'principle of legality' which is regarded as part of the ROL as iterated by South African courts.

4.1 Section 1(c): Rule of law as 'founding value' and its relevance to foreign policy

Section 1(c) of the Constitution provides that South Africa is founded on, among other values, SOC and the ROL. The role that 'founding values' play in constitutional adjudication and policy-making and –implementation was discussed in chapter three (SOC and foreign policy) of this thesis[53] and will not be repeated here. But just to recap, the Constitutional Court has stated, among other purposes, that 'founding values' are important for constitutional

[51] Wallis JA in *Minister of Justice and Constitutional Development & Others v Southern Africa Litigation Centre & Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA)(*Al Bashir (SCA)*) stated that by incorporating the Rome Statute of the ICC into South African domestic law through the enactment of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 South Africa sought to change its image of an erstwhile pariah (under apartheid) into a democratic state willing to play a full role as a sovereign and responsible member of the community of nations (at para 63). See also Mogoeng CJ in *SADC Tribunal case* note 4 at para 4; Ngcobo and O'Regan JJ in *Kaunda* at paras 159 and 222, respectively.
[52] In *Makwanyane* at para 156.
[53] See chapter three, sub-section 3.2.

adjudication and policy-making, including in foreign policy matters because: (a) they 'set positive standards with which *all* law must comply in order to be valid';[54] (b) they provide a guide in the fight against abuse of power and impunity;[55] and (c) they are critical ('pillar stones') for the maintenance and support of South Africa's constitutional democracy (and must therefore be observed scrupulously).[56] In *Kaunda & Others v President of the Republic of South Africa & Others*,[57] Ngcobo J (concurring but for different reasons) stated that 'founding values' play a key role in uniting South Africans and guiding government and its institutions and officials when carrying out their responsibilities at all levels.[58]

From the way the Constitutional Court has explained the importance of founding values in the context of the exercise of power in the South African *rechtsstaat*, it would appear that in the case of South Africa's foreign policy, the design, management and conduct of that policy will also be required to comply with both formal and substantive requirements and purposes of the ROL. What this means in practical terms is that (for example), (a) South Africa's foreign policy-makers should not act arbitrarily when designing, managing and conducting foreign affairs; (b) the executive must take political responsibility/accountability for their decisions; and (c) the South African public must be allowed to participate in foreign policy matters that affect their lives.

The Al Bashir saga of June 2015 is a classic case of foreign policy conduct which is inconsistent with the requirements and purposes of the ROL. In *Southern Africa Litigation Centre v Minister of International Relations & Others*[59] (*Al Bashir (HC)*), it would appear that

[54] *United Democratic Movement v President of the Republic of South Africa* 2002 (11) BCLR 1179 (CC); [2002] ZACC 21; 2003 (1) SA 495 (CC) at para 19. Emphasis added.
[55] *Economic Freedom Fighters (EFF) & Another v Speaker of the National Assembly & Others* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) at para 1.
[56] *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 80.
[57] [2004] ZACC 5; 2004 (10) BCLR 1009 (CC); 2005 (4) SA 235 (CC)
[58] *Kaunda* at para 155.
[59] [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 2 All SA 505 (GP); 2015 (9) BCLR 1108 (GP). See also *Al Bashir (SCA)* note 51.

some of the leading figures in the 'ruling' African National Congress (ANC) as well as in government, including then President Jacob Zuma and Minister Nkoana-Mashabane of International Relations and Cooperation relied more on a view of foreign policy which is underpinned by some realist trappings when faced with hard choices involving South Africa's foreign policy objectives on the one hand and South Africa's obligations under both domestic and international law (ROIL) on the other. In the case of then Sudanese President, Al Bashir, for example, then President Zuma and Minister Nkoana-Mashabane proceeded to invite Al Bashir and allowed him to enter the country even though they (Zuma and Nkoana-Mashabane) were aware that: (a) South Africa is a member of the ICC; (b) had ratified the Rome Statute and incorporated that Statute into domestic law; and (c) government had previously stated that if and when Al Bashir enters South Africa, then South Africa will be obliged to arrest him on the strength of the ICC warrants issued against him. What is more, government went on and deliberately ignored a court order not to permit Al Bashir to exit the country pending the completion of processes aimed at serving the ICC warrants on him. South Africa later 'justified' its 'contempt of court' on political grounds, arguing, inter alia, that if/when it is obliged to arrest a sitting head of state who faces serious charges at the ICC and has warrants issued against him, that would jeopardise and undermine South Africa's peace initiatives in the continent.[60] What is clear from South Africa's view and attitude is that, when faced with hard political and 'sensitive' foreign policy questions on the one hand (as was the case in *Al Bashir (HC)*), and important questions of compliance with the Constitution and binding domestic and international laws on the other, the former will trump the latter.

[60] W Nortje 'South Africa's refusal to arrest Omar Al Bashir' (2017) FICHL Policy Brief Series No. 85, 4 referring to the speech by Mr Michael Masutha, then Minister of Justice and Constitutional Development, South Africa, at the General Debate of the Sixteenth Session of the Assembly of States Parties to the ICC. NY, 4-15 Dec 2017, available at http://www.legal-tools.org/doc/067eee/. In *Buthelezi & Another v Minister of Home Affairs & Others* [2012] ZASCA 174; 2013 93) SA 325 (SCA)(*Dalai Lama* case), South Africa essentially argued that its 'refusal' to issue an entry visa to the Dalai Lama concerned a sensitive matter of not wanting to jeopardise its relations with China (at para 12).

4.2 The 'principle of legality' and its relevance to foreign policy

It is important to recall that the terms 'rule of law' and 'principle of legality' were not explicitly mentioned in the interim Constitution. While the 1996 Constitution (in section 1(c)) does specifically mention the 'rule of law' as one of the 'founding values', it does not mention anywhere the term, 'principle of legality'. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council,*[61] the Constitutional Court held that, notwithstanding the fact that the 'principle of legality' was not written down anywhere, the concept of ROL iterated through the notion of legality was 'necessarily implicit' in the interim Constitution and it binds executive and legislative acts of government.[62] In *Fedsure,* the 'principle of legality' as far as it relates to the exercise of legislative and executive powers was interpreted to mean that these branches of government may not act beyond the powers conferred on them by the law[63] and that the legitimacy of the exercise of public power must be rooted in lawfulness.[64]

In dealing with the concept of ROL under the 1996 Constitution, the Constitutional Court has repeatedly stated that one of the defining incidents of the ROL is 'the principle of legality'. In *Pharmaceutical Manufacturers Association*, the Constitutional Court identified what it regarded as constraints imposed by the Constitution (through the 'principle of legality') on the exercise of all public power. The Court identified one of the tenets of the 'principle of legality' as 'rationality', which the Court described as a 'minimum threshold requirement applicable to

[61] 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC)
[62] Ibid at para 59. See also C Hoexter, 'The principle of legality in South African administrative law' (2004) 4 *Macquarie L J* 165 also cited as [2004] *MqLawJ* 8 available at http://www.austlii.edu.au/au/journals/MqLawL1/2004/8.html at page 9/18 (of pages printed from webpage).
[63] *Fedsure* at para 58. See also A Price 'The evolution of the rule of law' (2013) 130 *SALJ* 649 available at http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Price.pdf 10; E Cameron 'Rights, constitutionalism and the rule of law' (1997) 114 *SALJ* 504, 506 (The Alan Paton Memorial Address, delivered on 6 June 1997).
[64] *Fedsure* at para 56.

the exercise of all public power'.[65] The Court (per Chaskalson P) (as he then was) explained the principle in the following terms:

> It is the requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.[66]

In *SADC Tribunal case*, Mogoeng CJ stated that the 'principle of legality' which is an integral part of the ROL[67] is 'one of the constitutional controls through which the exercise of public power is regulated by the Constitution'.[68] In upholding the order of constitutional invalidity (made by the Pretoria High Court) against the President's conduct, Mogoeng CJ pointed out that then President Zuma violated the principle of legality when he, inter alia, signed the SADC Protocol the effect of which was to deprive South African citizens (and citizens of other SADC Member States) of the right of access to justice under the SADC Treaty to bring cases against their governments before the SADC Tribunal.[69] Mogoeng CJ reasoned that, by signing the SADC Protocol (to disband the Tribunal), the President misconstrued his powers and acted contrary to his constitutional obligations, including the obligation not to violate the Bill of Rights (BORs) and South Africa's international law obligations.[70]

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[65] *Pharmaceutical Manufacturers Association* at para 90.
[66] Ibid at para 85. See also *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) at 100 where the Constitutional Court stated, with reference to earlier judgments, that 'Fundamental to the rule of law is the notion that government acts in a rational than an arbitrary manner'.
[67] Mogoeng CJ in *SADC Tribunal case* at para 83.
[68] Ibid at para 47 quoting with approval *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005(6) BCLR 529 (CC) at para 49.
[69] Ibid at para 83.
[70] Ibid at para 77.

In *Earthlife Africa-Johannesburg and Another v Minister of Energy and Others*[71] (*Earthlife* or *South Africa-Russia nuclear deal* case), the (Cape Town High) Court articulated the tenets of ROL and 'principle of legality' in the following terms: (a) rational decision-making is part of the ROL;[72] (b) unlawfulness constitutes a breach of the principle of legality;[73] (c) irrational decision-making or decisions based on material errors of law or fact violate the principle of legality;[74] and (d) uncertainty in policy-making and implementation and reliance on conjecture are inconsistent with the ROL.[75]

In *Kaunda*, Ngcobo J enumerated some of the 'principles' of the ROL and 'legality' which government should take into account when considering a request for diplomatic protection. He said:

> The government must *carefully apply its mind* to the request and *respond rationally* to it. This would require, among other things, the government to *follow a fair procedure* in processing the request and it may be required *to furnish reasons* for its decisions. The request for diplomatic protection *cannot be arbitrarily refused*.[76]

Some of the elements of the ROL (iterated through the prism of the 'principle of legality') which the Constitutional Court has identified, which elements, arguably, also have a direct impact on the conduct of foreign policy include the following: (a) Parliament cannot make laws based on caprice or arbitrariness;[77] (b) the law must be accessible and known, must be precise

[71] [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC)
[72] *Earthlife* at para 47.
[73] Ibid at para 59.
[74] Ibid at para 69.
[75] Ibid at para 74.
[76] *Kaunda* at para 192. Emphasis added.
[77] *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC); [1999] ZACC 5; 1999 (5) BCLR 489 (CC) at para 19.

and be generally applicable so that citizens are able to conform their conduct to it;[78] (c) public officials must exercise power properly and 'on the basis of the true facts';[79] and (d) state functionaries must exercise their powers in such a way that they do not infringe rights, must act in good faith and must not misconstrue their powers.[80]

In looking at the concept of the ROL through the lens of the 'principle of legality', the Constitutional Court has taken the view that, while the latter principle is not written down anywhere, the constraints that it places on the exercise of all public power are found 'throughout the Constitution'.[81] According to Hoexter, one of the implications of looking at the concept of the ROL through the lens of the 'principle of legality', as the Constitutional Court has done in the above-cited cases, is that the 'principle of legality' would cover the widest possible area involving the exercise of public power.[82] What this means is that the 'principle of legality' has cast the net so wide and expanded the grounds on which the exercise of all public power could be constrained, including 'grounds relating to authority, delegation, jurisdiction, errors of fact and law, ulterior purpose and motive and "failure to apply the mind", [and] such detailed grounds as having regard to irrelevant considerations and acting under dictation'.[83]

The argument that the ROL binds South Africa's foreign policy is borne by the following considerations: First, the two post-apartheid constitutions manifest a very clear intention on the part of the framers to entrench the principle of the ROL in the constitutional-legal fabric of

[78] See *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 102; *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 47.
[79] *Pepkor Retirement Fund v Financial Services Board* [2003] ZASCA 56; 2003 (6) SA 38 (SCA); [2003] 3 All SA 21 (SCA) at para 47.
[80] *President of the Republic of South Africa & Others v South African Rugby Football Union (SARFU)* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 148. *SADC Tribunal case* at paras 46, 48, 55, 83.
[81] *SARFU* at para 148.
[82] Hoexter note 62, 9/18.
[83] Ibid.

South Africa and thereby impose certain legal and constitutional obligations on the state to act in accordance with the prescripts of the law in order to address, among other ills, what Sachs J described as 'gross abuse of power, institutionalised inhumanity and organised disrespect for life'[84] associated with political systems such as Nazism and apartheid.

Second, the Constitutional Court has stated in various cases that since the responsibility to conduct foreign relations rests with the executive[85] and the latter enjoys ample discretion in that respect, the courts will always afford the executive requisite space to exercise its discretion on how best the duty of conducting foreign policy should be carried out[86] and the courts must be careful not to substitute their own views for those of the executive.[87] Be that as it may, the Constitutional Court has also been unambiguous about how public power in the realm of foreign affairs should be exercised in a constitutional state under the ROL. For instance, in *Kaunda*, Chaskalson CJ reasoned that in a situation where there is a duty on government under IL to provide protection to its citizens against gross violation of their rights by another government and government refuses to grant such assistance where evidence of violations is clear, such refusal decision would be justiciable, and government may be ordered to consider its decision and 'take appropriate action'.[88] In her dissenting judgment, O'Regan J nonetheless reasoned that all exercises of public power, including the executive's power to conduct foreign relations must be exercised in accordance with the law and must be rational.[89]

[84] *S v Makwanyane* 1995 (3) 391 (CC); [1995] ZACC 3; 1995 (6) BCLR 665 (CC); [1996] 2 CHRLD 164; 1995 (2) SACR 1 (CC) at para 390.
[85] See Ngcobo and O'Regan JJ in *Kaunda* at paras 162 and 243, respectively.
[86] O'Regan J in *Kaunda* at para 244. See also Chaskalson CJ in *Kaunda* at paras 74, 81, 130; Ngcobo J in *Kaunda* at para 172.
[87] O'Regan J in *Kaunda* at para 245 and footnotes therein.
[88] Chaskalso CJ in *Kaunda* at para 69.
[89] *Kaunda* at para 245.

5. Rule of law and South African foreign policy assumptions

When South African foreign policy-makers assert that the foreign policy of this country is 'based on' and 'guided by' the ROL, they make certain assumptions about the ROL and its importance for and relevance to the conduct of foreign affairs in general, and management of South Africa's relations with the global community in particular. Some of these assumptions include: (a) that by declaring its commitment to the ROL, South Africa will convey a positive message to the international community to the effect that, unlike the apartheid administration, the new government post-1993 is committed to abide by and consider itself bound by international norms, including the ROIL;[90] (b) that by embracing the ROL, the South African government will create a domestic environment which will be conducive to political and economic certainty, foster security[91] and facilitate economic development;[92] (c) that when the international system of global governance is 'based on' and 'guided by' the ROL, this will help maintain 'a peaceful social order'[93] and promote international cooperation and solidarity;[94] (d) that when ROL is placed at the centre of interstate relations, this will help the community of nations address other pressing challenges facing humanity such as terrorism, health pandemics, and conflicts;[95] and (e) that the promotion of this 'political ideal' (ROL) would almost

[90] 1996 Constitution, preamble.
[91] Tamanaha (2007) note 9, 8; D R Andrews 'International rule of law symposium: Introductory essay' (2007) 25(1) *Berkeley J I L* 1, 1.
[92] Tamanaha (2007) note 9, 11.
[93] Ibid, 10.
[94] Pech note 1, 7.
[95] Andrews note 91, 1; DFID note 15, 7; I Savage 'Democracy, constitutionalism and the rule of law: Beholden to constituent power' Victoria U of Wellington, Faculty of Law (2014) 22. It was on the basis of this and related assumptions and beliefs in the efficacy of the ROL that South Africa, immediately after 1994, began to play a prominent role in peace efforts in countries such as Zaire (later the Democratic Republic of Congo (DRC)), Burundi, Lesotho, Madagascar, Sudan, and Ivory Coast. South Africa was also invited to play a 'mediation role' in other countries plagued by internal conflict such as Israel and Palestine (through the so-called 'Spier process'), Sri Lanka, and Northern Ireland.

axiomatically help promote other values such as human rights, good governance and consolidate gains at home and abroad.[96]

The idea that South Africa's foreign policy is 'guided by' the RO(I)L appears to be no different from similar assertions by foreign policy-makers of other countries. Almost all countries in the world claim that their foreign policies are, to varying degrees, 'guided by' or 'informed by' the RO(I)L.[97] In the discussion of how courts in the UK, US, Germany and Canada[98] deal with the intersection of foreign policy on the one hand and commitment to the rule of (international) law on the other, it was clear that courts in these jurisdictions tend to lean more in favour of upholding the requirements and purposes of the RO(I)L (including respect for HRs and compliance with international norms) even in sensitive cases of national security and 'war on terror'. For instance, the courts in the UK,[99] US,[100] and Canada[101] - which recognise the 'act of state' doctrine in their respective foreign affairs legal regimes – have routinely tended not to give effect to the strict application of that doctrine (and thereby exclude the role of the courts) in cases where there are egregious violations of HRs and IL. It appears therefore that, for many countries around the world, ROL is regarded as an important

[96] T Carothers 'Rule of law temptations' Carnegie Endowment for International Peace, Paper prepared for World Justice Forum, Vienna, July 2-1, 2008 ['Reprinted by permission of Thomas Carothers and the American Bar Association] 1, 2 (hereinafter Carothers (2008)); Pech note 1, 3.

[97] Examples: for the UK, see House of Commons Foreign Relations Committee, 'Global Britain: Human Rights and the Rule of Law' Thirteenth Report Session 2017-2019 (11 September 2018), 13ff available at https://www.parliament.uk ; for Germany, see F Lange 'Between systematization and expertise for foreign policy: The practice-oriented in Germany's international legal scholarship (1920-1980)' (2017) 28(2) *EJIL* 525, 555ff; for the government of Japan, see Ministry of Foreign Affairs of Japan, Diplomatic Bluebook 2018, Japan's foreign policy to promote national and global interests' (chapter 3) available at https:///www.mofa.go.jp/policy/other/bluebook/2018/html/chapter3/c03016.html ; and for Namibia, see Republic of Namibia, Ministry of Foreign Affairs, ' Namibia's foreign policy and diplomacy management' (March 2004), 67ff.

[98] Discussed in chapter two, section 3 of this thesis.

[99] See for example the cases of *Belhaj & Another v Straw & Others* [2014] EWCA Civ 1394; *Belhaj & Another (Respondents) v Straw & Others (Appellants); Rahmatullah (No. 1)(Respondent) v Ministry of Defence & Another (Appellants)* [2017] UKSC 3; [2017] 2 WLR 456; [2017] WLR (D) 51; *Kuwait Airways Corp. v Iraqi Airways Co.* (Nos. 4 and 5) [2002] 2 AC 883 discussed in chapter two, subsection 3.1.1 of this thesis.

[100] See for example the cases of *Rasul v Bush* 542 US 466 (2004); *Hamdan v Rumsfeld* 542 US 507 (2004); *Boumediene v Bush* 553 US 723 (2008) discussed in chapter two, subsection 3.2.8 of this thesis.

[101] See for example the cases of *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 (SCC)(discussed in chapter two, subsection 3.4.4 of this thesis); and *Canada (Minister of Justice) v Khadr* [2008] 2 SCR 125 (SCC) (*Khadr I*); *Canada (Prime Minister) v Khadr* [2010] 1 SCR 44 (SCC) *(Khadr II)* (discussed in chapter two, subsection 3.4.5 of this thesis).

'value'/'principle'/'norm' - a 'good thing to do' that gives a 'feel good factor' - in the design, management and conduct of foreign policy.

Since coming to power in 1994, the ANC-led government has consistently stated that the foreign policy of a democratic South Africa is 'based on' and 'guided by', among other principles, the ROL.[102] To say that South Africa's foreign policy is 'based on' and 'guided by' the ROL is not quite the same as saying that foreign policy is 'bound by' that principle or that South Africa's foreign policy is 'justiciable'. From the foreign policy cases discussed in this study, it appears that there is still a lack of appreciation on the part of state functionaries and officials responsible for foreign policy in South Africa of the difference between these phrases and terminologies. It also appears that there is no proper understanding of how radically different the current foreign policy terrain is (a constitutional democracy under the ROL) from the pre-democratic regime of rule by law and an unrestrained executive, and what the implications are for foreign policy conduct of the shift from apartheid to democracy. This needs to change.

6. Implications of the rule of law for South Africa's foreign policy

The obligations imposed by the Constitution on the acts of the South African government in the realm of foreign relations, which obligations result from the requirements and purposes of the ROL, have major implications for the conduct of South Africa's foreign policy. First, what must now be clear to the makers and implementers of South Africa's foreign policy is that this vast area of governmental responsibility can no longer be treated as 'ordinary politics' situated beyond the reach of legal restraints imposed by the requirements and purposes of the ROL,

[102] See N Mandela 'South Africa's future foreign policy' (1992-93) 72 *Foreign Affairs* 86, 86ff; President Cyril Ramaphosa 'Keynote address at the 38th SADC Summit in Windhoek, Namibia on 17 August 2018' *Foreign Policy Journal: Reflecting on 2018*, Department of International Relations & Cooperation, 24. Also available at http://www.dirco.gov.za/docs/speeches/2018/cram0817a.htm

which requirements and purposes have become the anvil of public power in South Africa.[103] The Constitution of South Africa provides a legal framework which reflects 'accepted institutional criteria, processes and procedures'[104] within which decisions and actions should be taken, including decisions and actions related to the conduct of foreign policy, and where public officials and all branches of government are duty bound to follow the law. It is thus evident that the conduct of foreign policy in South Africa should be carried out within certain legal limits,[105] which reflect the canons of political accountability and a deep-seated culture of legal justification.[106] What this means is that foreign policy-making and implementation in South Africa can no longer be subordinated to the otherwise 'self-interested demands of powerful individuals and groups in society', but that foreign policy should be based on, guided and bound by certain 'dictates of fundamental moral principles'.[107] Even in the world of global politics (*realpolitik*), military security (*machtpolitik*) and diplomacy (*moralpolitik*) where international relations are conducted under the rubric of 'state secrets', 'intelligence' and 'covert operations', the ROL principle in the context of South Africa's constitutional democracy would nonetheless still demand that government actions and decisions in the field of foreign policy be legally justifiable, accountable and that powers granted in that regard be exercised 'lawfully and rationally',[108] and on the basis of true facts.[109]

Second, the requirement of the ROL that the state and all its organs act according to the rules of law and avoid arbitrary exercise of power[110] means that in the conduct of foreign policy, the South African government, its officials and functionaries should avoid taking decisions on matters affecting the interests of the country and its citizens based on conjecture

[103] T Poole, 'Questioning common law constitutionalism' (2005) 25 *Legal Studies* 142, 152.
[104] Ndulo note 26, 9.
[105] Ibid. See also Tamanaha (2012) note 9, 236-37; Harvey note 6, 487.
[106] E Mureinik 'A bridge to where?: Introducing the interim Bill of Rights' (1994) 10(1) *SAJHR* 31, 32.
[107] Poole note 103, 152.
[108] O'Regan J in *Kaunda* at para 245.
[109] *Pepkor* at para 59; J Waldron 'Are sovereigns entitled to the benefit of the international rule of law' (2011) 22(2) *EJIL* 315, 339ff.
[110] Milewicz note 25, 418.

or political expediency or on the basis of 'pressure' from or 'dictation' by other countries and groups outside the borders of South Africa. The 'principle of legality' as enunciated by the Constitutional Court will require that the decisions of the South African government in the realm of foreign affairs be 'rationally related to the purpose for which the power [to conduct foreign affairs] was given'.[111] A foreign policy 'bound by' the ROL would require that every action and decision of the South African government in pursuit of its foreign policy objectives and goals be firmly anchored on legal rules authorising such actions and decisions. South African foreign policy-makers and implementers should understand that in prosecuting South Africa's foreign policy, they may not transgress any standing legal restrictions imposed on them by the Constitution and the law. If and when government does transgress any standing legal restrictions, it must be prepared to be challenged in court where an impartial judiciary 'will make a determination of the legality of the government's action'.[112] The 'principle of legality' in South African constitutional (foreign affairs) law will require South Africa to be faithful to its obligations under various regional and international legal instruments such as the SADC Treaty[113] and the Rome Statute of the ICC,[114] respectively.

Third, the ROL and the 'principle of legality' should drive the point home to foreign policy makers and implementers that, under South Africa's constitutional democracy, failure to 'act in accordance with the law' in the conduct of foreign policy is tantamount to a violation of the supreme law and the founding values enshrined therein. When other nations and people perceive a huge chasm between theory (commitment to constitutional norms, values and principles, including the ROL and the 'principle of legality') and praxis (consistent failure to abide by international legal obligations), their faith and confidence in the ability of South Africa

[111] Chaskalson P (as he then was) in *Pharmaceutical Manufacturers Association* at para 85.
[112] Tamanaha (2012) note 9, 246.
[113] In the case of the SADC Treaty, see *SADC Tribunal case*.
[114] In the case of the Rome Statute of the ICC, *Al Bashir (HC))* note 59 and *Al Bashir (SCA)* note 51 (arrest and surrender) and *Democratic Alliance* (withdrawal from the ICC).

'to take its rightful place as a sovereign [and responsible] state in the family of nations'[115] would ebb; a phenomenon that will certainly impact negatively on South Africa's foreign policy goals and objectives and ability to be listened to and to influence international political discourse.

Fourth, the requirements of accountability, transparency, representativity, and responsiveness (which are embedded in the 'principle of legality' and the ROL) will require greater and more meaningful engagement with and participation by ordinary people, business, labour, NGOs and other interest groups in the making and implementation of South Africa's foreign policy. In *Doctors for Life International v Speaker of the National Assembly & Others,*[116] the Constitutional Court (per Ngcobo J) underscored the importance of public participation in policy-making in South Africa when he reasoned that the right to public participation in policy-making is founded on IL[117] and is engraved in the South African Constitution.[118] Ngcobo J stated that there is an obligation on government to facilitate public participation and to ensure that citizens have necessary information in order to participate meaningfully in policy-making and implementation.[119]

Lastly, in the context of pressing international crises such as 'war on terror' and non-proliferation of weapons of mass destruction (WMD) or sinister campaigns for 'regime change' in which powerful countries increasingly traduce military restraint, a country like South Africa (regarded as a middle power), under the constitutional obligation to act in accordance with the ROL and 'principle of legality' should strive to seek solutions to disputes and compromise positions based on multilateralism, protection of human rights, and respect for the ROIL.[120]

[115] 1996 Constitution, preamble.
[116] 2006 (6) SA 416 (CC)
[117] *Doctors for Life* at para 105.
[118] Ibid at paras 105 and 110.
[119] Ibid at para 105.
[120] P Nel, I Taylor & J van der Westhuizen 'Multilateralism in South Africa's foreign policy: The search for a critical rationale' (2000) 6 *Global Governance* 43, 45-46.

South Africa will be expected to conduct its foreign policy along these lines, and precisely because it is not armed with military rodomontade, its leaders should be aware that it cannot act alone, but could be more effective when it joins forces with other countries through international organisations.[121] In this context, South Africa should not be seen to be standing alone or leading the charge in defiance of international institutions such as the ICC in pursuit of political objectives that are considered to be at variance with its domestic and international obligations.[122]

7. Conclusion

This chapter has discussed the concept of the ROL and demonstrated how it has constitutionalised the conduct of South Africa's foreign policy. As pointed out in the chapter, due to its failure to recognise the substantive content of ROL, the pre-democratic government was able to conduct a brutal foreign policy that stood in stark opposition to every known (substantive) tenet of the RO(I)L. When South Africa became a constitutional democracy and entrenched SOC and the ROL as some of the key 'founding values' of the state, the framers sought to change fundamentally the manner in which the new government exercised public power, including public power in foreign affairs. In order to effect a radical break from and a fundamental rejection of the brutal nature of the apartheid government's foreign policy, the foreign policy-makers of South Africa committed to a new foreign policy that was to be 'based on' and 'guided by' the ROL, and made the promotion of ROL one of its primary objectives.

The assertion that South Africa's foreign policy is 'guided by' or 'based on' the ROL is informed by a number of 'foreign policy assumptions' made by South African foreign policy-makers in relation to the ROL, including the belief that commitment to ROL will enable South

[121] Ibid, 45 footnote 10.
[122] See Mogoeng CJ in *SADC Tribunal case* at paras 72-85.

Africa to speak with one voice with the international community on the importance of the ROL and thereby clothe its conduct in the realm of foreign relations with legitimacy and earn the right to be heard and its voice respected by other international partners.

In a number of cases, the Constitutional Court has underscored the importance of the ROL and the 'principle of legality' for the sustenance of South Africa's constitutional democracy in general and exercise of public power in particular (including exercise of public power in the field of foreign relations). The Court repeated in a number of cases[123] that one of the fundamental reasons for the pervasive entrenchment of the ROL in the fabric of South Africa's constitutional legal order after 1993 was stop abuse of power and resources which was prevalent during the apartheid era.[124]

Looking at the kind of foreign policy cases that South African courts have decided – for example, *Kaunda*, *Earthlife, SADC Tribunal case, Al Bashir* cases, and *Engels v Government of the Republic of South Africa & Another*[125] (the *Grace Mugabe* diplomatic immunity case) – there can be no doubt that the expanded notion of the concept of the ROL – encapsulated in 'the principle of legality' – has spread the net even wider to cover foreign policy and subject that important area of governmental responsibility to the discipline, requirements and purposes of the ROL.

The obligations imposed by the Constitution on the acts of the South African government in the domain of foreign relations, which obligations flow from the requirements and purposes of the ROL have major implications for South Africa's foreign policy. For instance, it should now be clear to South African politicians and foreign policy-makers that, that important area of governmental responsibility in the realm of foreign affairs can no longer be treated as 'ordinary politics' untrammelled by the requirements and purposes of the ROL. The next

[123] For example, *EFF, Democratic Alliance, Kaunda, Masetlha, SADC Tribunal case, Earthlife, Pepkor, SARFU,* and *Pharmaceutical Manufacturers Association.*
[124] Mogoeng CJ in *EFF* at para 1.
[125] [2017] ZAGPPHCC 667

chapter looks at how the foreign policy of South Africa should be conducted under a system that protects and guarantees (fundamental) human rights.

CHAPTER SIX

SOUTH AFRICA'S FOREIGN POLICY AND HUMAN RIGHTS

> Human rights will be the light that guides our foreign affairs.[1]

> [I]nternational law of human rights suggests that foreign ministers no longer have a choice about the inclusion of human rights. They cannot escape the tension between human rights and foreign policy simply by declaring that the former have no place in the latter. They are obliged to pay attention to human rights whether they like it or not.[2]

1. Introduction

One of the defining hallmarks of apartheid, which ultimately led the international community to declare that system of government a crime against humanity[3] was its systematic violations of human rights (HRs)[4] and utter disdain of the 'human rights ethos' which had come to define

[1] N Mandela 'South Africa's future foreign policy' (1992-93) 72 *Foreign Affairs* 86, 88.
[2] RJ Vincent *Human Rights and International Relations* (1986) 130.
[3] J Dugard 'South Africa and international law: A historical introduction' in J Dugard, M du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law: A South African Perspective 5th ed* (2018), 23 (hereinafter Dugard *et al* (eds)); J Dugard, M du Plessis & E Cohen 'Jurisdiction and international crimes' in Dugard *et al* (eds)(note 3 herein) 210, 228-230; J Dugard 'Convention on the Suppression and Punishment of the Crime of Apartheid' (2008) UN Audiovisual Library of International Law www.un.org/law/avl 1 says the United Nations General Assembly (UNGA) under resolution 2202 A (XXI) of 16 December 1966) labelled apartheid a crime against humanity and in 1984 the UN Security Council (UNSC) endorsed this determination (Resolution 556 (1984) of 23 October 1984). Dugard says further that the Convention on the Suppression and Punishment of the Crime of Apartheid (the Apartheid Convention) 'was the ultimate step in the condemnation of apartheid as it not only declared that apartheid was unlawful because it violated the Charter of the United Nations, but in addition it declared apartheid to be criminal'. On 30 November 1973, the UNGA adopted the Apartheid Convention by 91 votes in favour, four against (Portugal, South Africa, United Kingdom and the United States) and 26 abstentions. It came into force on 18 July 1976. Dugard suggests that, although apartheid is dead in South Africa following the installation of a constitutional democracy in 1994, at the moment, apartheid 'lives on as a species of the crime against humanity, under both customary international law and the Rome Statute of the International Criminal Court [ICC]' (2). In 1998, the crime of apartheid was included in the Rome Statute of the ICC as a form of crime against humanity (art 7)(M du Plessis & E Cohen 'International criminal courts, the International Criminal Court, and South Africa's implementation of the Rome Statute' in Dugard *et al* (eds)(note 3 herein) 245, 255).
[4] T Maluwa 'International human rights norms and the South African interim Constitution 1993' (1993-94) *SAYIL* 14, 16 (hereinafter Maluwa (1993-94)).

global politics and interstate relations after the end of World War II (WWII).[5] The absence of any form of protection of rights in the domestic context coupled with an outright rejection of international law (IL) in general and international human rights law (IHRL) in particular[6] brought about a situation where the foreign policy of successive apartheid governments was formalistic[7] and devoid of legality[8] and government felt unbound by norms such as protection of HRs and respect for the rule of (international) law (RO(I)L).[9]

In their quest to bring about a new political dispensation to end apartheid, the framers of the interim Constitution (and later the Constitutional Assembly that drafted the 1996 Constitution) sought to redress the terrible legacy of apartheid and egregious violations of HRs by providing for a justiciable Bill of Rights (BORs), which guaranteed certain fundamental rights and freedoms under a supreme constitution. Their (the framers) other equally important objective was to reshape the image of South Africa in the eyes of the global community from a pariah (rogue) state and notorious violator of HRs to a cooperative and responsible member in the family of nations ready and willing to abide by the rules of IL, including IHRL.[10]

Given the centrality of HRs under the new constitutional-legal order and taking into account South Africa's commitment to play a far more constructive role in international relations after the end of apartheid, the African National Congress (ANC)-led government made it its lodestar principle that the foreign policy of a democratic government would be 'guided' and 'informed' by HRs.[11] Yet, it is precisely in this area – the intersection between

[5] T Maluwa 'Human rights and foreign policy in post-apartheid South Africa' in DP Forsythe ed *Human Rights and Comparative Foreign Policy: Foundations of Peace* (2000) 250, 263 (hereinafter Maluwa (2000)).
[6] Ibid, 263 and 270; J Dugard 'International law and the South African Constitution' (1997) 1 *EJIL* 77, 77 (hereinafter Dugard (1997)).
[7] Dugard in Dugard *et al* (eds) note 3, 24.
[8] Ibid; J Kriegler 'The Constitutional Court of South Africa' (2003) 36 *Cornell Int'l L J* 361, 361; S J Ellmann 'The struggle for the rule of law in South Africa (Symposium: Twenty years of South African constitutionalism: Constitutional rights, judicial independence and the transition to democracy)' (2015-2016) 60 *NYL Sch L R* 57, 58.
[9] Dugard in Dugard *et al* (eds) note 3, 23; J Dugard & J Dugard 'Human rights' in Dugard *et al* (eds) note 3, 496.
[10] Dugard in Dugard *et al* (eds) note 3, 25.
[11] See Mandela note 1.

HRs on the one hand and foreign policy on the other – that a lot of controversy has been generated and tremendous amount of tension experienced between the government's professed commitment to promote, protect and respect fundamental HRs on the one hand and the need to conduct and pursue an effective, coherent and principled foreign policy that advances what the government, state functionaries and political elites have defined as 'national interests' on the other.[12]

In the context of the key question posed in this study, this chapter seeks to address how foreign policy should be conducted in South Africa where HRs are entrenched in a justiciable BORs, which BORs constitutes 'a cornerstone of democracy in South Africa'.[13] The choice of HRs as one of the 'tools of analysis' to argue the main proposition in this study is based on the following considerations. First, pre-democratic South Africa did not have a BORs that guaranteed fundamental rights and freedoms of citizens; a phenomenon that engendered a foreign policy which was unconcerned with morality and HRs ethos. The adoption of a new constitution (in 1993 and 1996) with a justiciable BORs fundamentally changed the policy-making and –implementation terrain in South Africa, including in the area of foreign policy. It is worth exploring therefore how HRs implicate the conduct of foreign policy in a country that has transformed from a notorious rights violator to a 'venerable' rights protector. Second and flowing from the first point above, it is in this area of protection of HRs where South African courts have been unambiguous about how foreign policy should be conducted in a country with a justiciable and entrenched BORs. What is even more interesting is to note that, that 'human rights jurisprudence' from South African courts which clearly draws from jurisdictions such as

[12] See A Habib & N Selinyane 'South Africa's foreign policy and a realistic vision of an African century' in E Sidiropoulos (ed) *South Africa's Foreign Policy 1994-2004: Apartheid Past, Renaissance Future* (2004) 49, 49; A Habib 'South Africa's foreign policy: Hegemonic aspirations, neoliberal orientations and global transformation' (2009) 16 (2) *SAJ of Int Affairs* 143, 145; A Johnston 'Democracy and human rights in the principles and practice of South African foreign policy' in J Broderick, G Burford & G Freer (eds) *South Africa's Foreign Policy: Dilemmas of a New Democracy* (2001) 11, 24.
[13] Constitution, s7(1).

Germany and Canada has contributed to what could, arguably, be regarded as the emerging constitutional foreign affairs law of South Africa as far as the intersection between HRs and foreign policy is concerned.[14] Third, since the ANC-led government has consistently stated that its foreign policy is 'guided' and 'informed' by HRs, it is only proper that an assessment be done to determine to what extent has fidelity to principle (that HRs guide foreign affairs) accorded with South Africa's praxis in the conduct of its foreign policy.[15]

This chapter is divided into six parts. The first part is this introduction. The second part traces the historical development of HRs, traversing the periods before and after the end of WWII and the implications these rights had (during those periods) on international relations in general, and the conduct of states' foreign policies in particular. The third part looks briefly at the foreign policy environment in pre-democratic South Africa and explains some of the 'doctrines' and 'legal perspectives' that informed the kind of foreign policy the apartheid government conducted. The aim of this part is not to provide a detailed account of the atrocities and HRs violations committed during the long years of apartheid misrule.[16] It seeks only to point out in a highly abbreviated form the kind of considerations which informed the conduct of South African foreign policy before 1994 in the context of a regime which systematically violated HRs and IL through the 'legalised' system of racial discrimination and oppression. The fourth part focuses on HRs in the South African Constitution, particularly the BORs, and their controlling relevance to and binding effect on foreign policy. The fifth part discusses the implications of HRs for the conduct of South Africa's foreign policy. The last part is the conclusion and summarises the main issues covered in this chapter.

[14] See discussion in chapter eight, subsections 2.4, 3.4, and 3.7 of this thesis.
[15] See also Maluwa (2000) note 5, 251.
[16] The HRs violations under apartheid are well documented given the global span of the anti-apartheid movement which was led by the international community, not least the UN, and other international and multilateral organisations such as the Organisation of African Unity (OAU), the Non-Aligned Movement (NAM), the Commonwealth, and supported by governments, private and public institutions, NGOs, youth and women's organisations and movements around the world. Some of these apartheid atrocities and violations are now part of the record of the South African Truth and Reconciliation Commission. The UN Committee Against Apartheid has a detailed record of HRs violations in South Africa since its inception in the 1960s.

2. Development of human rights and states' foreign policy responses: A brief historical background

In order to understand contemporary debates about the relevance or irrelevance of HRs in foreign policy-making and -implementation,[17] it is helpful to look down the corridors of history to see how the concept of (human) rights has evolved with the vicissitudes of international relations in various epochs of history. A brief recount of the historical development of HRs will also enable an understanding of the legal norms and principles that informed the conduct of foreign policy in pre-democratic South Africa and how those legal norms and principles have changed dramatically as far as the conduct of foreign policy in post-apartheid South Africa is concerned.

2.1 Pre-1945: State sovereignty and paucity of legal norms

Before 1945, international relations and IL discourses were dominated by strong principles of state sovereignty and territorial integrity,[18] which effectively excluded the application of IL in the municipal context[19] and prohibited all forms of external intervention by other states '[e]ven for noble purposes'.[20] Under that notion of state sovereignty, IL was not too concerned about how states treated individuals and citizens within their own borders.[21] The period before 1945 was characterised by an almost total paucity of significant multilateral HRs instruments that transcended international boundaries.[22]

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[17] For a discussion of conflicting theoretical perspectives on this issue, see chapter two, section 2 of this thesis.
[18] L Henkin 'That "S" word: Sovereignty, and globalization, and human rights, et cetera' (1999) 68(1) *Fordham L R* 1. 3; R E Kapindu 'From the global to the local: The role of international law in the enforcement of socio-economic rights in South Africa' (2009) Socio-Economic Rights Research Series 6, Community Law Centre, UWC, iii, 1; S H Cleveland 'The legacy of Louis Henkin: Human rights in the "age of terror"' (2007) 38 *Columbia Human Rights LR* 499, 501.
[19] Cleveland note 18, 501; Henkin note 18, 10; Maluwa (1993-94) note 4, 19.
[20] Henkin note 18, 10.
[21] Dugard & Dugard in Dugard *et al* (eds) note 9, 454; Cleveland note 18, 501; Henkin note 18, 10.
[22] O Hathaway, E Nielsen, A Nowlan, W Perdue, C Purvis, S Solow & J Spiegel (hereinafter Hathaway *et al*) 'When do human rights treaty obligations apply extraterritorially?'(2011) 43 *Ariz St L J* 389I, 389. At footnote 1, the authors suggest that the only 'multilateral' agreement that appeared to bear some resemblance of a human rights instrument is the Convention to Suppress the Slave Trade and Slavery, League of Nations, Sept., 25, 1926, 60 LNTS 253, available at http:///www.unhcr.org/refworld/docid/3ae6b36fb.html

The pre-1945 system of international relations - where strict principles of state sovereignty and territorial integrity reigned supreme - engendered a phenomenon where the promotion and/or protection of fundamental HRs did not feature at all as one of the possible goals, objectives or principles of the foreign policies of many states.[23] In other words, before 1945, the world of global politics and international relations could not contemplate a situation where HRs could, at the very least, possibly 'guide' foreign policy or at worst, 'bind' and 'discipline' the conduct of states in that realm (foreign affairs). That situation changed somewhat dramatically post-1945 in the aftermath of the barbarism of WWII.

2.2 Post-1945: Emergence of human rights and their impact on foreign policy-making

WWII was characterised by unprecedented loss of human life, destruction of property, and egregious violations of HRs.[24] The contemporary HRs movement emerged as a direct response to the horrors and barbarism of WWII and as a genuine attempt by the community of nations to avoid repeat of such pogroms in the future.[25] To that end, the international community created institutions such as the UN and developed and embraced certain norms, values and standards which came to be 'codified' under the rubric of IL. These norms, values and standards radically transformed the way fundamental HRs were perceived in the aftermath of

[23] Henkin note 18, 10; Dugard & Dugard in Dugard *et al* (eds) note 9, 457; R Gropas 'Is a human rights foreign policy possible? The case of the European Union' Paper presented at the 16th Annual Graduate Student Conference: 'The Changing Face of Europe' at the Institute on Western Europe, Columbia University, March 25-27, (1999) 6 available at https://www.files.ethz.ch/ism/23240/is%20a%Human%20Rights%20Foreign%20Policy%20Possible.pdf 3. At footnote 1, Gropas opines however, that '[T]raditional international law accepted intervention only if a state mistreated its own nationals in a way "so far below international minimum standards as to shock the conscience of mankind."'

[24] D Moseneke (DCJ, retired) 'The balance between robust constitutionalism and the democratic process' University of Melbourne Law School, Seabrook Chambers Public Lecture, 16 June 2016, 8 available at https://www.unimelb.edu.au/_data/assets/word/Justice-Moseneke-MLS-16-06-2016.docx (hereinfater Moseneke (2016))

[25] R R Ludwikowski 'Supreme law or basic law? The decline of the concept of constitutional supremacy' (2001) 9 *Cardoso J Int'l & Comp L* 253, 265; D M Hill 'Human rights and foreign policy: Theoretical foundations' in DM Hill ed *Human Right and Foreign Policy* (1989) 3; Kapindu note 18, 1; Henkin note 18, 7.

WWII and how state conduct is disciplined and brought within the reach of international norms.[26]

2.2.1 The reconceptualisation of the principle of state sovereignty

After WWII, the international community effectively abandoned the pre-1945 impermeable notions of state sovereignty and territorial integrity[27] and decreed, in essence, that the issue of HRs and how states treated individuals and citizens within their borders could no longer be the exclusive business and prerogative of states, but issue of concern to the international community.[28] In this regard, Hathaway *et al* opine that, the new notion of state sovereignty and the accompanying IL 'placed the international community between a sovereign state and its own citizens'.[29] The reconceptualisation of the notion of state sovereignty shifted from the position where, before 1945, focus was on the sovereignty and rights of states and regimes as principal actors in international relations[30] to the situation post-WWII where the focus was placed on society and rights of individuals, who are principal carriers of these rights.[31] The experience of WWII and its concomitant atrocities led the international community to the realisation that protection of HRs was one of the key prerequisites in the quest for peace, global cooperation and development. [32] By penetrating the once impermeable walls of state

[26] Dugard & Dugard in Dugard *et al* (eds) note 9, 497 and footnote therein suggest that in applying international human rights intruments to interpret the BORs, the Constitutional Court in *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) 'characterised international law as a critical standard by which to measure state conduct.'

[27] Kapindu note 18, 2; Ludwikowski note 25, 264; G Persson & L Freivalds 'Human rights in Swedish foreign policy', Government Communication, Ministry of Foreign Affairs (30 October 2003) 1, 4 and 11; Henkin note 18, 3; D Titus 'Human rights in foreign policy and practice: The South African case considered' (2009) *SAIIA* Occasional Paper 52, 9; A Slaughter & W Burke-White 'The future of international law is domestic (or, The European Way of law)' (2006) 47 *Harv Int'l LJ* 327, 327; LH Gelb & JA Rosenthal 'The rise of ethics in foreign policy: Reaching a values consensus' (2003) 82 *Foreign Affairs* 2, 6; VS Vereshchetin 'New constitutions and the old problem of the relationship between international law and national law' (1996) 7(1) *EJIL* 29, 30-31; RG Teitel 'Humanity's law: Rule of law for the new global politics' (2002) 35(2) *Cornell Int'l LJ* 355, 362 and 380.

[28] Kapindu note 18, 2; Henkin note 18, 4. J P Humphrey 'The International Bill of Rights: Scope and implementation' (1976) 17(3) *Wm & Mary L J* 527, 527.

[29] Hathaway *et al* note 22, 389.

[30] I Wouters, C Ryngaert, T Ruys & G de Baere *International Law: A European Perspective* (2019) 6 (hereinafter Wouters *et al*).

[31] Persson & Freivalds note 27, 4.

[32] Ibid, 11.

sovereignty, IL found its way into domestic legal orders and national constitutions[33] where it began 'to regulate the relationship between governments and their own citizens',[34] particularly through a myriad of international HRs instruments and to define the new rules that would guide state conduct outside territorial borders (for example, rules on use of force). What became clear was that national decision-makers could no longer find refuge in the notions of state sovereignty and the concept of superiority of municipal legal system[35] to justify unlawfulness and/or failure to comply with international obligations.[36] Hence, states could no longer act with impunity within their own borders to the total exclusion of the interest of the international community.[37]

2.2.2 Reconceptualisation of human rights

One of the radical developments following the end of WWII was the reconceptualisation of the notion of HRs.[38] The experience of gross violations of HRs perpetrated under the pre-1945 systems that gave primacy to the sovereign rights and powers of states and regimes led to the realisation, among other observations, that: (a) '[h]uman beings possess basic fundamental and inalienable rights';[39] (b) IL protected individuals as single human beings and not as citizens of a given state[40] (as it was the case under the opaque system of domestic jurisdiction); and (c) the behaviour of rulers towards their own population within their own states may be measured against internationally accepted standards.[41] The acceptance of the view (post-WWII) that what goes on within state borders can no longer be shielded from the glare of the international

[33] Vereshchetin note 27, 30-31; Slaughter & Burke-White note 27, 327; G J Sugarman 'Universal Declaration of Human Rights and the policy of apartheid in the Republic of South Africa' (1991) 17(1) *J of Legislation* 69, 82.
[34] Slaughter & Burke-White note 27, 327. See Henkin note 18, 4; Dugard & Dugard in Dugard *et al* (eds) note 9, 459.
[35] Ludwikowski note 25, 264-65.
[36] Henkin note 18, 8.
[37] Hathaway *et al* note 22, 389.
[38] Kapindu note 18, 2.
[39] Ibid, 2 and footnotes therein.
[40] Gropas note 23, 3; Dugard & Dugard in Dugard *et al* (eds) note 9, 454.
[41] Ludwikowski note 25, 264.

community under the cloak of domestic jurisdiction gave rise to ideas that the international community could claim the right to defend HRs wherever they were violated and to intervene in other serious situations such as civil strife and genocide which the international community became aware of.[42] The concept of HRs after 1945 became imbued with strong *moralpolitik*[43] in which the following ideas were given prominence, among others: (a) that HRs of people everywhere (and without discrimination) should be the concern of the international community at large;[44] and (b) that state conduct, particularly the conduct of foreign policy be guided by HRs considerations.[45] Thus, in a very short space of time, the international community shifted from a position (before 1945) where HRs had no distinctive place in international relations to a situation (after 1945) where HRs entered IL and international relations arena and set standards and developed monitoring and reporting mechanisms[46] that would compel states to act in accordance with certain norms and principles that they (states) would consider binding on their conduct.

Henkin[47] and Titus[48] observe, correctly so, that state sovereignty and the principle of non-interference still constitute the basic framework of the international state system. However, they both state that, the post-WWII developments have – through the international HRs movement – eroded somewhat the concept of state sovereignty[49] and brought about an international legal environment where IL had a direct bearing on how states behaved and conducted themselves at home and abroad. For Henkin - and precisely because of the pervasive

[42] Ibid, 266.
[43] Titus note 27, 6 talking about the Universal Declaration of Human Rights (UDHR); Gelb & Rosenthal note 27, 2.
[44] Kapindu note 18, 2, Henkin note 18, 4; Persson & Freivalds note 27, 4.
[45] D Chandler 'Rhetoric, without responsibility: The attraction of "ethical" foreign policy' (2003) 5(3) *British J Politics & IR* 295, 296. See also Gelb & Rosenthal note 27, 2.
[46] Gropas note 23, 1.
[47] Henkin note 18, 5.
[48] Titus note 27, 9.
[49] See Henkin 18, 4; Titus note 27, 10.

nature of IHRL on state conduct - sovereignty (and here he was writing in the context of the US) was to be viewed in a new light. As far as Henkin is concerned, state sovereignty

> should not mean isolationism. It should not mean resistance to cooperation. It should not mean indifference to, or forfeiture of responsibility for, what happens elsewhere. It should not mean refusal to assume obligations. It should not mean failure to comply with obligations we have assumed. Sovereign states, one has to remind governments, can adhere to HRs treaties, and they can do so without reservations. And they can cancel reservations they have entered.[50]

2.2.3 The birth of the UN and growth of international human rights law

The birth of the UN in 1945 is probably the single most important development in international relations of the last century that defined the explosion of IHRL and gave rise to a new way of regulating interstate relations.[51] Chaskalson opines that when the UN Charter was adopted, 'the commitment demanded from member states was *radical*'.[52] This was so, Chaskalson argues, because the UN Charter and the international legal order it ordained represented a radical departure from the pre-1945 international legal order where HRs had not been protected by IL, but by the domestic law of some countries whose domestic legal systems were rights-based.[53] The new international legal dispensation brought about by the UN Charter called for a completely different international legal order[54] which transcended mere affirmation of faith in

[50] Henkin note 18, 12.
[51] Ludwikowski note 25, 265; S Gutto 'Values, concepts, principles or rules? Constitutionalisation, subject tributaries, linguistic nuances and the meaning of human rights in the context of international law' (1998) *Acta Juridica* 97, 97 and 99 and footnotes therein; Kapindu note 18, 2, 8 and 9; A Chaskalson 'Human dignity as a foundational value of our constitutional order' (2000) 16 *SAJHR* 193, 196 (The Third Bram Fischer Memorial Lecture delivered at the Johannesburg Civic Centre, 18 May 2000); W F Buckley Jr 'Human rights and foreign policy: A proposal' (1979-80) 58 *Foreign Affairs* 775, 778; Persson & Freivalds note 27, 4; Gropas note 23, 3; Henkin note 18, 4; Titus note 27, 6.
[52] Chaskalson note 51, 196. Emphasis added.
[53] Ibid, 196.
[54] Ibid, 197.

HRs, but which required member states to take a firm stand to promote "respect for and universal observance of human rights and fundamental freedoms"'.[55]

In order to give effect to the commitments and obligations enshrined in the Charter, the UN played a key role in the development of an elaborate international HRs system in the form of a declaration (Universal Declaration of Human Rights (UDHR)),[56] conventions/covenants (for example International Covenant on Civil and Political Rights (ICCPR))[57] and International Covenant on Economic, Social and Cultural Rights (ICESCR)),[58] and other standard-setting and monitoring bodies (for example, Human Rights Council), the cumulative effective of which was to place HRs firmly 'as a vital item on the international agenda'.[59] The UN assigned specific HRs-related responsibilities to its key organs, the UN General Assembly (UNGA),[60] the Economic and Social Council (ECOSOC)[61] and the International Court of Justice (ICJ).[62] For instance, article 13(1)(b) of the UN Charter mandates the UNGA to initiate studies and make recommendations for the purposes of

> promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of HRs and fundamental freedoms for all without distinction as to race, sex, language, or religion.

[55] Ibid, 197 and footnotes therein, particularly footnote 17 referring to UN Charter, art 55(c).
[56] GA res 217(A)(III). UN Doc A/810 at 71 (1948).
[57] GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 17, entered into force on 23 March 1976. South Africa ratified this Convention on 10 December 1998.
[58] GA res 2200A (XXI), 21 UN GAOR Supp. (No.16) at 49, UN Doc. A/6316 (1966) U.N.T.S. 3, entered into force Jan 3, 1976. South Africa ratified the ICESCR on 12 January 2015.
[59] Kapindu note 18, 8.
[60] Established under art 7 of the Charter.
[61] Established under art 7 of the Charter. Art 62(1) of the UN Charter mandates the ECOSOC to make recommendations 'for the purposes of promoting respect for, and observance of, human rights and fundamental freedoms for all.'
[62] Established under article 7 of the Charter. Art 92 of the UN Charter establishes the International Court of Justice (ICJ) as the 'principal judicial organ of the United Nations' and each Member State is expected to comply with its decisions in any case to which that Member State is a party (art. 94.1). Art 96.1 of the UN Charter provides that the UNGA or the UNSC may request the ICJ to give an advisory opinion on any legal question. See in this regard, ICJ 'Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)'.

Although the UN Security Council (UNSC) does not have a specific HRs-related mandate - its primary responsibility being the maintenance of international peace and security under article 24(1) of the Charter) – that organ of the UN has interpreted its mandate creatively and passed resolutions that have a direct bearing on protection of HRs and prosecution of HRs violations in the context of international crimes through establishment of specialised tribunals to deal with such crimes.[63]

2.2.4 The end of the Cold War and the spread of human rights

During the Cold War, HRs and fundamental freedoms were perceived through the thick glass of 'geopolitics and national security constraints of the bipolar world'[64] characterised by the rivalry between the two superpowers, the erstwhile Soviet Union (and its allies) on the one hand and the US (and its allies) on the other hand. It could be rightly observed that, the hostile geopolitics and national security concerns (that included concerns about mutually assured destruction (MAD) posed by a potential nuclear attack) between the two superpowers gave prominence and currency to the view of international relations at the time dominated by realist thinking and conduct of foreign policy.[65] According to this worldview, ethical and normative considerations such as 'respect for' HRs, political accountability of political leaders, the RO(I)L and other 'internationally accepted standards of morality' could not trump 'the interests of the national society for which government has to concern itself,' which are, 'military security, the integrity of its political life and the wellbeing of its people'.[66] It is not surprising

[63] Kapindu note 18, 8. Examples of specialised tribunals include The International Criminal Tribunal for the Former Yugoslavia (ICTY) and The International Criminal Tribunal for Rwanda (ICTR). Example of a resolution is UNSC Resolution 1593 of 2005 in terms of which the UNSC, acting under Chapter VII of the Charter, referred the allegations of gross violations of human rights, war crimes and crimes against humanity in Darfur, Sudan to the ICC. Following the investigations into the situation in Darfur, the ICC issued two warrants of arrest (in March 2009 and July 2010) against then President Omar Hassan Ahmed Al Bashir of Sudan on charges of war crimes, crimes against humanity and genocide.
[64] Gropas note 23, 1.
[65] GF Kennan 'Morality and foreign policy' (1985-86) 64 *Foreign Affairs* 205, 206.
[66] Ibid, 206 writing in the context of US foreign policy at the height of the Cold War.

therefore, that the Cold War had '[a] chilling effect on the scope for principled and consistent HRs diplomacy'[67] as the issues of national security and military power pushed HRs and political morality on the back banner of foreign policy.[68]

The end of the Cold War and the collapse of the Soviet Union (in the late 1980s) created an opportunity for the international community to provide fresh impetus to the HRs wave that had started rolling forward in the aftermath of WWII. When the international state system was no longer embroiled in the ideological strife of the bipolar world, states found a new platform from which to consider policies that are 'guided' by 'ethical considerations' and principles such as respect for HRs, the RO(I)L, international cooperation and participation in peace efforts.[69]

Some of the most noticeable developments in the world of global politics - after the end of the Cold War and the breakup of the Soviet Union and former eastern European countries – included: (a) the greater role played by the international community though the UN in addressing conflict-related issues in various parts of the world;[70] (b) greater democratisation in the former Soviet-dominated countries of Eastern Europe;[71] (c) freedom and independence of southern African states (for example, the independence of Namibia in 1990 and the end of apartheid in South Africa in 1994); and (c) at the domestic level, greater commitment by states (particularly, the newly independent states) to embrace IL and base their domestic (and foreign)

[67] D Gillies, 'Human rights and foreign policy: An international perspective' in G le Pere, A van Nieuwkerk & K Lambrechts (eds) *Through a Glass Darkly? Human Rights Promotion in South Africa's Foreign Policy* (hereinafter Le Pere *et al* (eds)), Proceedings of a workshop convened by the Foundation for Global Dialogue on 13 August 1996 in conjunction with the South African parliamentary portfolio committee on foreign affairs, FGD Occasional Paper No. 6 Nov 1996, 3.
[68] Ibid. See also Gelb & Rosenthal note 27, 3-4.
[69] See Chandler note 45, 296; Gelb & Rosenthal note 27, 5.
[70] At the international level for instance, the world community considered and actually followed through on the principle of humanitarian intervention in the cases of Bosnia, Somalia, Libya, and Iraq. See Gelb & Rosenthal note 27, 6. As can be seen, the doctrine of humanitarian intervention further rattled the established principle of state sovereignty by authorising the 'invasion' of the sovereign territory of other states to stop egregious violations of human rights, such as genocide and ethnic cleansing.
[71] E Petersmann 'How to constitutionalise international law and foreign policy for the benefit of civil society' (1998-99) 20 *Mich J Int'l L* 1, 1-4; J Limbach 'The concept of the supremacy of the constitution' (2001) 64(1) *The Modern LR* 1, 5; Maluwa (2000) note 15, 252-253; P Bajtay 'Democratic and efficient foreign policy?' (2015) 11 EUI, RSCAS Working Papers, 1.

policies on the tenets of modern liberal-legal constitutionalism such as, respect for fundamental HRs, the RO(I)L, supremacy of the constitution, and democracy.[72]

3. Human rights and their irrelevance to foreign policy in pre-democratic South Africa

The discussion in this section sheds light on the 'legal principles' and considerations that underpinned South Africa's foreign policy in relation to HRs in the pre-democratic era and demonstrates, specifically, how protection/promotion of rights and respect for IHRL were excluded as potential 'guiding light' for foreign policy during that period. The first consideration relates to the 'legalisation' of racial discrimination by the apartheid government. When apartheid became statute law in 1948, South Africa set itself on a collision path with the international community, particularly with regard to its (South Africa) racial policies which were inimical to the law of the UN and the HRs norms that defined the post-WWII period.[73] In the wake of biting criticism and condemnation of its policies, South Africa responded with anger and rejected any criticism levelled against its racial policies and thwarted all attempts aimed at forcing it (South Africa) to comply with the prescripts of IL in general and HRs norms in particular[74] in the treatment of its citizens and/or interaction with the international community.

The second consideration that led to the total exclusion of HRs from South Africa's pre-democratic foreign policy had to do with the hostility of successive National Party governments towards international HRs, which hostility was based on a certain notion of the role of IL and its relationship to municipal law. As stated earlier, before WWII, the international system was

[72] See Gropas note 23, 8; Gillies note 67, 3 and 6; Chandler note 45, 295; Limbach note 71, 5.
[73] Dugard & Dugard in Dugard *et al* (eds) note 9, 457.
[74] Ibid, 458.

characterised by strong notions of state sovereignty and territorial integrity,[75] and these views led to inter-state relations based on ideas, inter alia, that IL was not too concerned about how states treated individuals and citizens within their own borders,[76] and that IL did not apply and international bodies had no power to meddle in the internal affairs of other countries.[77] Because successive apartheid governments adhered to these conceptions of IL and its role, these governments felt unbound (domestically and externally) by the encroaching international HRs norms that came to characterise the international system after WWII.[78] In fact, South Africa adopted a very formalistic approach to international comity rules when, for example, it relied (throughout the entire period 1948- c1990) on the very language of the UN Charter in article 2(7) (non-interference in the domestic affairs of other Member States) to dispel any criticism levelled against its racial policies, arguing that apartheid was a purely internal matter and was therefore not to be discussed or settled under the Charter.[79] South Africa's 'legalistic' reliance on article 2(7), its strong pre-1945 notion of state sovereignty, its disdain of international norms, and domestic violations of HRs under apartheid led the country to abstain from the UNGA vote that adopted the UDHR on 10 December 1948.[80] The UDHR's recognition of 'the inherent dignity and of equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world'[81] was in direct conflict with the very essence of apartheid ideology.

The third consideration which led to the conduct of foreign policy in South Africa (before 1994) which was devoid of HRs relates to the manner in which the doctrine of parliamentary

[75] J Dugard 'Kaleidoscope: International law and the South African Constitution' (1997) 1 *EJIL* 77, 77 (hereinafter Dugard (1997)); J Dugard *International Law: A South African Perspective 4th ed* (2011) 20 footnote 42 (hereinafter Dugard (2011))
[76] Cleveland note 18, 501; S Smith, A Hadfield & T Dunne, 'Introduction' in S Smith, A Hadfield & T Dunne (eds) *Foreign Policy: Theories, Actors, Cases (2nd ed)* (2012) 1, 3.
[77] Henkin note 18, 10; Dugard & Dugard in Dugard *et al* (eds) note 9, 458.
[78] Dugard & Dugard in Dugard *et al* (eds) note 9, 458.
[79] Ibid. Dugard in Dugard *et al* (eds) note 3, 22.
[80] J Dugard 'A bill of rights for South Africa' (1990) 23(3) *Cornell Int'l L J* 441, 446 and footnote 42 (hereinafter Dugard (1990)).
[81] UNGA Res 217A (III), UN Doc A/810 at 71 (1948).

sovereignty enabled pre-democratic parliaments to enact laws which were in direct conflict with some of the most basic HRs norms contained in a number of key international HRs instruments. The fact that parliamentary statutes could not be reviewed by courts of law meant that the pre-democratic government could act with impunity[82] and actually did perpetrate some of the most egregious violations of HRs at home and abroad and was unrestrained by the rules of IL.[83]

4. Human rights and their relevance to foreign policy in democratic South Africa

The preamble to the interim Constitution declared in part, an unwavering resolve to ensure, among other objectives, that 'all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.' [84] Chapter 3 of the interim Constitution contained a chapter on 'Fundamental Rights' (29 sections in all) guaranteeing panoply of political rights (such as equality,[85] life,[86]); civil liberties (such as right to vote[87]); economic rights (such as right to freely engage in economic activity[88]); and social and cultural rights (such as the right to use one's language and participate in the cultural life of one's choice.)[89] Constitutional Principle (CP) II of schedule 4 to the interim Constitution demanded that the 'final' Constitution and the BORs guarantee that:

[82] Dugard (1990) note 80, 442.
[83] Z Masiza 'A chronology of South Africa's nuclear program' (1993) *The Nonproliferation Review* (Fall) 35, 40 lists some of the atrocities committed by apartheid forces in cross-border raids into neighbouring states such as Lesotho, Botswana and Zambia. See also the cases of *Nduli v Minister of Justice* 1978 (1) SA 893 (A) and *S v Ebrahim* [1991] ZASCA 3; 1991 (1) SA 553 (A); [1991] 4 All SA 356 (AD) where the accused were abducted from Swaziland in violation of that country's territorial integrity and sovereignty (to stand trial in South Africa for charges, including terrorism and treason). Some of the apartheid atrocities committed abroad include, the assassinations of ANC activists, for example, Connie September (1988) and Ruth First (1982) in Paris and Maputo, respectively.
[84] Interim Constitution, preamble.
[85] Ibid, s 8.
[86] Ibid, s 9.
[87] Ibid, s 21(2).
[88] Ibid, s 26.
[89] Ibid, s 31.

> Everyone shall enjoy *all universally accepted fundamental rights*, freedoms and civil liberties, which shall be provided for and protected by *entrenched and justiciable* provisions in the Constitution.[90]

Chapter 2 of the 1996 Constitution is the Bill of Rights (BORs) which has incorporated all the rights that were contained in the chapter on 'Fundamental Rights' in the interim Constitution. Section 7 of the BORs places HRs at the centre of South Africa's new constitutional-legal order by asserting in subsection (1) that:

> This Bill of Rights is *a cornerstone of democracy in South Africa* [and it] enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.[91]

Hence, unlike in pre-democratic South Africa whose written constitution was on the same level as ordinary Acts of Parliament and which 'regulated only the institutional framework of South African society, not the basic rights of its citizens',[92] the 1996 Constitution is different in that it guarantees and protects, in an unprecedented manner, all known fundamental rights and freedoms of its citizens contained in major international HRs instruments[93] such as the United Nations (UN) Charter,[94] the ICCPR, the ICESCR, and the African Charter on Human and People's Rights (ACHPR).[95] The UDHR, the ICCPR and the ICESCR are regarded as the

[90] Emphasis added.
[91] Emphasis added.
[92] B Dickson 'Protecting human rights through a Constitutional Court: The case of South Africa' (1997) 66(3) *Fordham L R* 531, 534.
[93] See Ngcobo J in *Kaunda* at para 158.
[94] UN Charter, June 26, 1945, 59 Stat. 1031, TS 993 Bevans 1153, entered into force Oct. 24, 1945. As a founding member, South Africa (courtesy of Field Marshal General J C Smuts) played a key role in the formation of the UN (Dugard (2011)) note 75, 19. It is Gen Smuts who signed the Charter of the UN on behalf of the Union of South Africa on 26 June 1945 and South Africa became a full member of the UN on 7 November 1945.
[95] Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 *International Legal Materials* 58 (1982), entered into force 21 October 1986. South Africa ratified this Charter on 9 July 1996.

'International Bill of Rights'.[96] The next part of this chapter looks at various 'human rights provisions' in the 1996 Constitution - that is, provisions that recognise HRs and/or provisions relevant to human rights enforcement - and the BORs with the aim of demonstrating how they impact on and bind foreign policy.

4.1 The preamble's commitment to human rights and its 'binding' effect on foreign policy

The preamble to the 1996 Constitution declares, in part, that South Africa is a society based on, among other values, fundamental HRs. Further, as explained in chapter three of this thesis,[97] the preamble declares that the people of South Africa adopted the Constitution as the supreme law so as, among other commitments, to '[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'. The message contained in the preamble highlights the following considerations which are relevant for the kind of foreign policy which is 'based on', 'guided' and 'bound by' HRs which the South African government is to conduct after the Constitution came into effect, among others: (a) the people of South Africa pledged to the international community to respect and promote fundamental HRs and freedoms; (b) government will conduct its affairs in accordance with the rule of the supreme law (the Constitution with a justiciable BORs) and no longer by brute force and total disregard for fundamental norms which was characteristic of apartheid; (c) South Africa will be bound by the law of the UN (as opposed to the nearly five decades of total disdain and consistent violations of IL, international HRs and humanitarian law under apartheid); (d) South Africa will be a cooperative member in the family of nations committed to the protection, promotion, and respect for HRS as opposed to the pariah of yesteryears; and (e) never again will South

[96] Humphrey note 28, 528; B Simmons 'Civil rights in international law: Compliance with aspects of the "International Bill of Rights"' (2009) 16(2) *Indian J Global Legal Studies* 437, 437.
[97] See chapter three, section 3.1.

Africa use (or abuse) its sovereignty to hide behind unlawfulness and violation of rights as it was the case under apartheid.

In their interpretation of the binding obligation on government to protect HRs, South African courts have often referred to the 'commitments' made by the people of South Africa as reflected in the preamble to the 1996 Constitution. In *Kaunda & Others v President of the Republic of South Africa & Others*,[98] Ngcobo J stated that the preamble to the Constitution (read with other provisions of the BORs) provides, among other considerations,

> the basic premises upon which all arms of government, and at all levels, are to exercise power; the national ethos that defines and regulates the exercise of that power; and the moral and ethical direction [respecting HRs] which our nation has identified for itself.[99]

O'Regan J in *Kaunda* (dissenting) also suggested that the preamble provides context within which South Africa's obligations to protect HRs and to live by the commitments it made could be understood when it signed and ratified these international HRs conventions, including the ICCPR.[100] In *Law Society of South Africa & Others v President of the Republic of South Africa & Others*[101] (*SADC Tribunal case*), Mogoeng CJ reiterated the role the preamble plays and the important guidance it provides in interpreting the Constitution, particularly the rights in the BORs. He stated among other observations that the values articulated in the preamble (read with other provisions of the Constitution) bind the government and its functionaries and that it is the duty of the citizens and the state 'to protect and promote these values [and the citizens' rights].'[102] In *Minister of Justice and Constitutional Development & Others v Southern Africa*

[98] 2004 (10) BCLR 1009 (CC); 2005 (4) 235 (CC)
[99] Ngcobo J in *Kaunda* at para 155.
[100] O'Regan J in *Kaunda* at para 223.
[101] [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC)
[102] Mogoeng CJ in *SADC Tribunal case* at para 85.

Litigation Centre & Others[103] (*Al Bashir (SCA)*), the Supreme Court of Appeal (SCA), in interpreting South Africa's obligations under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act) suggested that the commitments South Africa made in terms of the Implementation Act (for example, bring persons accused of genocide, war crimes and crimes against humanity to justice) are consistent with this country's own HRs commitment in the preamble to deal with the injustices of a painful past and to build a society and world that respect HRs.[104]

The cases referred to above point to one thing: the HRs commitments South Africa made and the values, standards and morality it has prescribed for itself - as articulated in the preamble - bind this country and its government in every area of governmental responsibility, including in the realm of foreign policy. The attitude of South African courts toward rights-protection appears to be in sync with the resolve of courts in other jurisdictions such as the UK, US, Germany and Canada (discussed in chapter two, section 3, of this thesis) to give effect to rights-protection as provided for in various HRs treaties and protocols they are parties to. The courts in the four jurisdictions have shown an unwavering commitment to protect the rights of individuals accused of serious crimes (for example, terrorism) in situations where the executive arm of government sought to deprive the accused individuals of basic rights provided for in the international HRs and humanitarian treaties and protocols (such as the Geneva Conventions in

[103] [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA)

[104] Wallis J in *Al Bashir (SCA)* at para 91. The SCA decision in *Al Bashir (SCA)* highlighted South Africa's commitment to HRs precisely because, among other considerations (a) the Rome Statute (and hence the Implementation Act) seeks to deter and/or bring to justice those guilty of, among other crimes, crimes against humanity, genocide, war crimes, and apartheid – all various manifestations through which HRs are violated; and (b) the Rome Statute is certainly an emphatic voice on the part of the international community (including South Africa) that the kind of crimes proscribed in that Statute (which resemble the kind of pogroms committed during WWII) will never be tolerated again and that the international community will no longer look the other way (as it did during 1933-1945) but will do something serious about them.

the case of the Guantanamo detainees in the US) under the thin disguise of 'exclusionary rules' (such as 'act of state' doctrine).[105]

4.2 Section 1(a): 'Advancement of human rights' as a foundational value and its binding effect on foreign policy

Section 1(a) of the Constitution provides that South Africa is founded on values such as '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms'. The role of 'foundational values' in constitutional interpretation was discussed in chapter three (SOC and foreign policy)[106] and will not be repeated at length in the present chapter. However, it is important to highlight some of the 'principles' the courts have emphasised in connection with the binding effect of 'foundational values' on the exercise of public power in general and in foreign affairs in particular.

The Constitutional Court has held that 'foundational values' play a key role in: (a) informing the interpretation of the Constitution;[107] (b) setting positive standards to evaluate laws and state conduct;[108] (c) fostering accountability;[109] and (d) sustaining democracy.[110] In the conduct of its foreign policy therefore, the South African government must be informed by HRs and ensure that its conduct is consistent with the norms, values, principles and standards embodied in these rights.[111] Failure to act in accordance with the prescripts of HRs would rattle the very foundations on which South Africa's democracy is based and cast this country in a negative light in the eyes of the world.

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[105] For a detailed discussion of the role of the courts in the UK, US, Germany and Canada in sensitive areas of national security and foreign policy on the one hand and protection of HRs on the other, see chapter two of this thesis, sections 3.1.8, 3.2.8, 3.3.3, and 3.4.5, respectively.
[106] See chapter three, section 3.2, of this thesis.
[107] *United Democratic Movement v President of the Republic of South Africa (No. 2)* 2002 (11) BCLR 1179 (CC); [2002] ZACC 21; 2003 (1) SA 495 (CC) at para 19.
[108] Ibid.
[109] *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) at para 1.
[110] *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another* [2008] ZACC 8; 2008 (5) SA 94 (CC) 2008 (9) BCLR 865 (CC) at para 80.
[111] See Maluwa (2000) note 5, 271.

The idea that the advancement of HRs and freedoms is one of South Africa's foundational values, appears to have led the Constitutional Court to adopt an approach to HRs protection that seeks to bind governmental conduct in the field of foreign relations to the dictates of HRs. For instance, in *Mohamed v President of the Republic of South Africa*,[112] the Constitutional Court followed the decisions of other international HRs courts/tribunals (such as the European Court of Human Rights (ECtHR)) as well as precedent in jurisdictions such as Germany[113] and Canada[114] (which have also abolished the death penalty).[115] In *Mohamed*, the Constitutional Court held, essentially, that, when South Africa cooperates with another country and is requested to extradite a 'terror suspect' – particularly to a country which still practices the death penalty (the US in the case of *Mohamed*) - South Africa must first obtain from the 'requesting state' assurances that if/when convicted, the extradited suspect would not be put to death, or that if the death penalty is the competent sentence, that it would not be carried out.

4.3 Section 7(2): Obligation to respect, protect, promote and fulfil human rights and its binding effect on foreign policy

Section 7(2) of the Constitution places an obligation, in mandatory terms, on the state to 'respect, protect, *promote* and fulfil the rights in the Bill of Rights.'[116] The obligation contained in section 7(2) places no limits on the scope of the state's responsibility in this regard, that is, whether this obligation rests on the state when it acts *within* or when it acts *outside* its borders, particularly in the context of foreign affairs.

In the case of South Africa and in terms of section 7(2), it can be assumed that when the framers imposed the obligation on the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights', they intended the South African government to act in accordance with this

[112] 2001 (3) SA 893 (CC)
[113] *Mohamed* at para 58, 59 and 67.
[114] Ibid at paras 45 and 46. See also the Canadian case of *US v Burns* 2001 SCC 7; [2001] 1 SCR 283.
[115] *Mohamed* at paras 44.
[116] Emphasis added.

obligation at all times, whether in the domestic sphere or the foreign sphere. This assumption is based on the following considerations: First, one of the most important objectives of the framers of South Africa's post-apartheid constitutions was not only to repair the damage that apartheid had inflicted on South Africans themselves (domestically), but also to reshape the image of South Africa in the eyes of its neighbours and the international community at large[117] from pariah status and known violator of HRs[118] to a cooperative and responsible member in the family of nations.[119] In light of this objective, it would be difficult therefore, to imagine that the framers would have intended the BORs *not* to bind the new government in the conduct of its foreign policy in the course of its renewed relations and engagement with the international community after the fall of apartheid.

Second, the post-apartheid government and its foreign policy-makers have consistently asserted that one of the key objectives of South Africa's foreign policy is to *promote* HRs.[120] In light of the corresponding constitutional injunction to promote HRs (in section 7(2)), this foreign policy objective (promotion of HRs) can no longer be offered as makeweight argument or a 'general platitude' and a lofty principle but which cannot be reconciled with the conduct of foreign policy as far as HRs are concerned.[121] That objective must now be pursued as a binding constitutional injunction in the course of conducting foreign policy. In fact, in *Kaunda*, Ngcobo J stated that South Africa's commitment to the promotion and protection of HRs 'must inform its foreign relations policy.'[122]

[117] F Venter 'South Africa: A Diceyan Rechtsstaat?' (2012) 57 *McGill LJ* 721, 725.
[118] Ibid, 728; Maluwa (1993-94) note 4, 16; Maluwa (2000) note 5, 270; Dugard & Dugard in Dugard *et al* (eds) note 7, 457-459.
[119] Venter note 117, 725. See also preamble to the 1996 Constitution.
[120] Mandela note 1, 88.
[121] Maluwa (2000) note 15, 252.
[122] *Kaunda* at para 159.

Lastly, South Africa is, for all intents and purposes, a modern constitutional state under the rule of law[123] and a '[p]olitical community ordered according to a set of fundamental values',[124] including respect for fundamental HRs. What this means is that South Africa would be expected to function and conduct its business at home and abroad in accordance with the imperatives of these fundamental norms and not by considerations based on political expediency, conjecture and/or whim of a political party elite.

In *Kaunda*, the Constitutional Court had an opportunity to consider whether, in terms of section 7(2), there is a constitutional duty on the South African government to provide diplomatic protection to its citizens abroad. Chaskalson CJ (for the majority), while accepting that section 7(2) imposes a positive obligation on the state to comply with its provisions, reasoned that section 7(2) should not be construed as obligating government to take a positive step to provide diplomatic protection to its citizens abroad[125] precisely because that would be tantamount to demanding that South Africa's BORs be applied beyond the borders of South Africa[126] and bind a foreign state; a phenomenon that would infringe the principle of state sovereignty[127] and violate international comity rules. In arriving at this conclusion and dismissing the applicants' plea for relief, Chaskalson CJ followed with approval the *ratio* of the German Federal Constitutional Court (GFCC) in the case of *Rudolf Hess*[128] where the latter Court, whilst acknowledging that Germany was under a constitutional duty to provide diplomatic protection to its citizens abroad, held that the Federal Government had wide discretion (in foreign policy matters) to decide whether and in what manner to grant protection against foreign states.[129] In *Kaunda,* both Ngcobo J (concurring but for different reasons) and

[123] See preamble to the 1993 interim Constitution. See also *De Lange v Smuts* 1998 (3) SA 785 (CC) at para 31; *Ferreira v Levin* 1996 (1) SA 984 (CC) at para 26; *Carmichelle v Minister of Safety and Security* 2001 (4) SA 938 at para 54.
[124] T Poole 'Questioning common law constitutionalism' (2005) 25 *Legal Studies* 142, 146.
[125] Chaskalson CJ in *Kaunda* at para 32.
[126] Ibid, at paras 36, 38.
[127] Ibid, at paras 44, 54.
[128] BVerfGE 55, 349; 90 ILR 386
[129] *Hess* at 395; See Chaskalson CJ in *Kaunda* at paras 73 and 130.

O'Regan J (dissenting) also acknowledged with approval the reasoning of the GFCC in *Rudolf Hess* on the issue of the scope of the discretion and duty on government to provide diplomatic protection to its citizens abroad.[130] The Constitutional Court in *Kaunda* employed one of the key 'prudential reasons' which the GFCC uses when the latter decides foreign policy controversies,[131] which is that, since the conduct of foreign policy is the responsibility of the executive, that branch of government must be allowed ample scope to use its discretion on how to conduct foreign policy or engage other governments.[132] In *Rudolf Hess*, the GFCC explained that the scope of discretion granted to the Court in foreign policy matters "is based on the fact that the shape of foreign relations and the course of their development are not determined solely by the wishes of the Federal Republic of Germany and are much more dependent upon circumstances beyond its control."[133]

Notwithstanding the fact that the Constitutional Court in *Kaunda* dismissed applicants' plea for relief on prudential grounds, Chaskalson CJ, Ngcobo and O'Regan JJ explained the importance that the Constitution attaches to rights-protection and the kind of obligation that rests on government in that regard. Chaskalson CJ stated that, under section 7(2), government will be obliged to consider a request for diplomatic protection and must deal with it appropriately when South African citizens request such protection,[134] and that if government were to refuse such request, or deal with it in bad faith or irrationally, then a court could step in and order government to deal with the request appropriately.[135] Ngcobo J stated that the commitment in section 7(2) to promote and protect fundamental HRs is an integral part of what defines South Africa as a nation and that commitment must bind government and define its

[130] See Ngcobo and O'Regan JJ in *Kaunda* at paras 190 and 246, respectively.
[131] For further discussion on 'prudential reasons' used by the GFCC when deciding foreign policy cases, see chapter two, subsections 3.3.1, 3.3.4, and 3.3.5 of this thesis.
[132] See Chaskalson CJ, Ngcobo and O'Regan JJ in *Kaunda* at paras 130, 190 and 247, respectively.
[133] O'Regan J in *Kaunda* at para 246, quoting the GFCC in *Hess* at 395-396.
[134] Chaskalson in *Kaunda* at para 63.
[135] Chaskalson CJ in *Kaunda* at para 69.

obligations towards its citizens.[136] While recognising that the provisions of the South African BORs have no extraterritorial effect on foreign governments or courts, O'Regan J nevertheless reasoned that when South Africa acts abroad, it will still be bound by the provisions of the BORs,[137] subject to the international comity rule that such extraterritorial application of the BORs does not violate the sovereignty of another state.[138] It is important to note that the proviso in O'Regan J's explanation (that the external binding effect of the BORs should not infringe the sovereignty of another state) followed the same principle articulated by the Supreme Court of Canada in *R v Cook*[139] discussed in chapter two, sections 3.4.2 and 3.4.3 of this thesis. In *SADC Tribunal case*, Mogoeng CJ appears to have gone further, stating, without qualification that the section 7(2) obligation is not only applicable domestically but that it is also applicable at all times '*regardless of where and with whom*.'[140]

4.4 Section 8(1): Application of the Bill of Rights and its binding effect on foreign policy

Section 8(1) of the Constitution provides that: 'The Bill of Rights applies to *all* law, and *binds* the legislature, the executive, the judiciary and all organs of state.'[141] Section 8(1) is similar to article 1(3) of the German Basic Law which stipulates that the fundamental rights in the German Constitution 'shall bind the legislature, the executive and the judiciary as directly applicable law'.[142] Tomuschat points out that article 1(3) of the Basic Law mentions no territorial restriction as far as the application of fundamental rights are concerned.[143] He states that, the prevailing opinion in German legal doctrine has interpreted article 1(3) to mean that 'all German authorities are *bound* to observe and respect the fundamental rights, irrespective

[136] Ngcobo J in *Kaunda* at para 159.
[137] O'Regan J in *Kaunda* at para 228.
[138] Ibid, at para 229.
[139] [1998] 2 SCR 597 (SCC)
[140] *SADC Tribunal case* at para 78. Emphasis added, footnotes excluded.
[141] Emphasis added.
[142] C Tomuschat 'International law and foreign policy' (2009) 34 *DAJV* 166, 167.
[143] Ibid.

of whether they act inside or *outside* the German territory'.[144] The German Basic Law is one of the key foreign constitutions that the South African framers consulted extensively in the drafting of the two post-apartheid constitutions.[145] Section 8(1) of the 1996 Constitution - like its article 1(3) counterpart in the German Basic Law – mentions no territorial restriction on the application of the South African BORs. By parity of reasoning therefore, and following the doctrinal position in German legal thinking, it could be argued that the better view would be that the South African BORs (in this case, section 8(1)) also binds all South African authorities (the three branches of government and all organs of state) to 'respect, protect, promote and fulfil the rights in the Bill of Rights' (as section 7(2) enjoins) whether they act inside or outside the borders of the state.[146]

Section 8(1) also provides that the BORs applies to all law. It is important to note that the application of the BORs to 'all law' is also stated without any qualification, restriction or limitation, that is, whether the BORs will apply to laws that govern only domestic matters or to laws that also govern 'foreign' matters. Following the logic applied in the discussion about the binding effect of the BORs on the three branches of government and all organs of state, it could also be suggested here that the better view would be that the BORs binds all law in South Africa that governs both domestic and foreign affairs and that the South African government would be enjoined to comply with such law whether it acts at home or abroad.

Limbach suggests that one of the key reasons why the drafters of the German Basic Law (in 1949) casted HRs and freedoms as 'enforceable subjective rights' was to remedy the failure of the Weimar Republic and to respond to the atrocities of the totalitarian Nazi regime.[147] To that end, the drafters allotted fundamental rights a special rank in German constitutional law

[144] Ibid, 167- 168. Emphasis added.
[145] R J Goldstone 'The first years of the South African Constitutional Court' (2008) 42 *Supreme Court L R (2d)* 25, 32; H Booysen 'Has the act of state doctrine survived the 1993 interim Constitution?' (1995) 20 *SAYIL* 189, 193.
[146] See O'Regan J (dissenting) in *Kaunda* at para 228.
[147] Limbach note 71, 3.

by providing explicitly that the basic rights shall have a binding effect 'as directly applicable law' on all three branches of government. According to Grimm, the justification for why the drafters of the German Basic Law decided to give fundamental rights binding force over all branches of government was 'to prevent another failure of representative democracy in Germany and to establish effective safeguards against dictatorship and disregard of human rights'.[148]

The framers of the South African Constitution were guided in many respects by and borrowed extensively from the German Basic Law, not least the protection of fundamental rights.[149] Like Germany after WWII, South African framers had to deal with the terrible legacy of over 300 years of colonialism and almost fifty years of apartheid misrule and concomitant gross violations of HRs and virulent racism. Like their German counterparts, South African framers were unanimous in their resolve to prevent another failure of 'majoritarian politics' represented by a perverted notion of Westminster-like parliamentary democracy that defined apartheid. Following the letter and spirit of article 1(3) of the German Basic Law, South African framers enacted section 8(1) with the specific intention to also establish effective safeguards the potential abuse of majoritarian politics and disregard for HRs.[150] According to Maluwa, a constitutional democracy founded on respect for fundamental HRs (section 7(2)) and in which the BORs has a binding effect on all branches of government and all organs of state (section 8(1)), as South Africa is, should mean that

[148] D Grimm, 'Human rights and judicial review in Germany' in D M Beatty ed. *Human Rights and Judicial Review: A Comparative Perspective* (1994) 267, 270.
[149] See Goldstone note 145, 32; Booysen note 145, 193.
[150] To use Grimm's words note 148, 270. See Moseneke (2016) note 24, 17.

in all its actions – both administrative and legislative – the government is obliged to abide by the human rights standards and norms set out in the Constitution, relevant national legislation, and applicable international human rights instruments.[151]

4.5 The BORs and the binding effect of treaty obligations on South Africa's foreign policy

The BORs 'incorporates'[152] some of the HRs and related norms contained in key international HRs and humanitarian law instruments (the latter relevant to HRs protection in the context of armed conflict) which, it shall be argued hereunder, have a direct and binding effect on South Africa's foreign policy *outside* the national borders of this Republic.

4.5.1 Section 37(4)(b)(i): National security and international law applicable to states of emergency

Section 37(1) of the Constitution provides that a state of emergency may be declared only when: '(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.' Section 37(4)(b)(i) provides that '[a]ny legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that … the legislation … is consistent *with the Republic's obligations* under international law applicable to states of emergency'.[153] International HRs instruments applicable to states of emergency include, the ICCPR,[154] the European Convention for the Protection of Human

[151] Maluwa note 15, 260.
[152] The word 'incorporation' here is used both in a broad and narrow senses. In the broad sense, it simply means 'borrowing from' other international HRs instruments without necessarily incorporating the latter into domestic law. In the narrow sense, 'incorporation' refers to a section 231(4) procedure under the Constitution.
[153] Emphasis added.
[154] Signed in 1966 and came into force in 1976. See C Klein (reviewing Fr J Oraá *Human Rights in States of Emergency in International Law* (1992) 134-37, 134. Available at www.ejil.org.pdfs
See also EM Hafner-Burton, LR Helfer & J Fariss (hereinafter Hafner-Burton *et al*) 'Emergency and escape: Explaining derogations from human rights treaties' (2011) 65(4) *International Organisation* 673, 676.

Rights and Fundamental Freedoms (ECHR),[155] and the American Convention on Human Rights (ACHR).[156]

Hafner-Burton *et al* suggest that when a state faces serious threats that could harm its security and very existence, governments face tremendous pressure to adopt emergency measures, which could include limitation, suspension or restriction of civil and political liberties that are protected and guaranteed in the constitution.[157] The drafters of international treaties applicable to states of emergency were cognisant of the fact that, during times of serious national emergency, governments could find convenient excuses to adopt measures that may give them more powers, to, for example, suppress political dissent and limit the work of democratic institutions.[158] At the same time, drafters of these treaties accepted that governments have a duty to protect their citizens and institutions, particularly when the nation faces serious threats to its security and survival.[159] To strike a balance between these two extremes, the drafters included limitation clauses that authorised restrictions of rights during emergencies but required that such restrictions accord with IL.[160] Some of the justifications for these derogations, include: (a) the need to prevent arbitrary restrictions of rights in times of war;[161] and (b) to avoid a situation where the limitation of rights is placed squarely and exclusively in the hands of the three branches of government, where political branches could authorise limitation of rights (which were now a concern for the international community as a whole)[162] and the courts, in turn, simply defer to the political branches without any further ado.

One of the important implications of section 37(4)(b)(i) is that the South African Constitution (and the BORs to be precise) have imported some of the norms and principles

[155] Signed in 1950 and came into force in 1953. See C Klein note 154, 134.
[156] Signed in 1969 and came into force in 1978. See Klein note 154, 134.
[157] Hafner-Burton *et al* note 154, 676.
[158] Ibid, 676.
[159] Ibid.
[160] Ibid.
[161] Ibid. AWB Simpson *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001) 477.
[162] Hafner-Burton *et al* note 154, 677.

contained in international HRs instruments[163] applicable to states of emergency to regulate derogation from some of the rights guaranteed in the BORs in cases of national emergencies. What section 37(4)(b)(i) requires is that when South Africa is faced with the need to address a national emergency (threat of war, invasion, general insurrection, disorder, national disaster or other public emergency) and to restore peace and order, then the South African government is within its right to derogate from and limit or restrict certain rights in the BORs, provided that the derogation, limitation or restriction is consistent with section 37(5) of the BORs and South Africa's obligations under IL applicable to states of emergency.

It is important to note that South Africa is a party to the ICCPR as well as its First Optional Protocol, having signed and ratified that Covenant.[164] What this means is that, if and when government declares a state of emergency, South Africa will be obliged to act in accordance with section 37(5) of the BORs and its treaty obligations applicable to states of emergency under the ICCPR.[165]

In the case of South Africa's current emergency laws, it is important to remember that the drafting of section 37 was a direct response to the kind of measures and regulations that characterised states of emergency in pre-democratic South Africa where declarations of states of emergency were aimed solely at suppressing political opposition to apartheid.[166] States of emergency under apartheid were accompanied by egregious violations of HRs, including torture, solitary confinement, detentions without trial, unexplained disappearances of political activists, and extra-judicial killings; all under the thin disguise of maintaining 'law and order' and avoiding civil war or other political strife. What is also clear from the provisions of section 37 is that, even in pressing matters which could threaten the very survival of the South African

[163] See Maluwa (2000) note 5, 259.
[164] Ngcobo J in *Kaunda* at para 158.
[165] Ibid.
[166] N Fritz 'States of emergency' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson M, & Bishop M (eds) *Constitutional Law of South Africa 2nd ed* (2014)(Volume 4)(Original Service: 03-07)(Chapter 61) 61-1, 61-3.

state, the government is obliged to employ the full strength of its foreign policy apparatus in accordance with the BORs and its treaty obligations under IL applicable to states of emergency (for example, its obligations under the ICCPR). In *Kaunda*, Ngcobo J stated that by ratifying the ICCPR, South Africa declared to the international community and to South Africans that South Africa will be faithful to the provisions of these international HRs instruments and will act and protect fundamental HRs enshrined in them.[167] He stated further that South Africa's foreign policy should be informed and guided by these instruments.[168]

4.5.2 Section 37(8): National security and protection of human rights during armed conflict

Section 37(8) of the Constitution provides, in essence, that, the limitations, safeguards, notifications and review procedures applicable to persons detained in consequence of a derogation of rights (in sections 37(6) and 37(7)) resulting from a declaration of a state of emergency do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict, for example, prisoners-of-war (POWs). Section 37(8) provides that, in the case of POWs, the South African government 'must comply with the *standards binding on the Republic* under international humanitarian law in respect of the detention of such persons'.[169]

Now, international humanitarian law is largely linked to laws and institutions for the regulation of armed conflict (laws of war).[170] The four Geneva Conventions of 1949 and the two Additional Protocols of 1977 constitute the main pillars of IHL.[171] The legal effect of section 37(8) is that it enjoins the South African government to comply with its treaty

[167] Ngcobo J in *Kaunda* at para 158; See also O'Regan J in *Kaunda* at para 223.
[168] Ngcobo J in *Kaunda* at para 162.
[169] Emphasis added.
[170] Gutto note 51, 103. See also UN *International Legal Protection of Human Rights in Armed Conflict*, UN Human Rights Office of the High Commissioner (2011) HR/PUB/11/01, 22 and footnotes therein (hereinafter UNHRO).
[171] Gutto note 51, 103 and footnotes therein.

obligations under IHL binding on South Africa, specifically in relation to protection of the rights of persons detained in consequence of an international armed conflict. For instance, South Africa will be obliged to treat POWs humanely all the time (article 13 of the Third Geneva Convention) and ensure that they are never used as human shields in the conflict (article 23 of the Third Geneva Convention).[172] South African personnel participating in an international armed conflict, including soldiers, peacekeepers, police, and other senior military officers are also obliged to observe IHL and HRs obligations that are binding on South Africa. South African courts have been firm about the constitutional duty that rests on the South African government to act, in the foreign relations field, in accordance with its international treaty obligations, particularly when the treaty obligations implicate protection of HRs.[173]

5. Implications of human rights for South Africa's foreign policy

There are important implications for South Africa's foreign policy which flow from various HRs norms, values and principles enshrined in the Constitution. Some of these implications include the following: First, the conduct of South Africa's foreign policy in the modern 'age of rights'[174] can no longer be regarded as 'ordinary politics' but 'a real and serious business'.[175] It can no longer be perceived as an 'academic exercise'[176] or a 'hypothetical topic'[177] untouched by fundamental HRs norms, values and principles. The South African government and its functionaries need to accept the fact that the conduct of foreign policy can no longer

[172] See also K Dörman & J Serralvo 'Common article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations' *International Review of the Red Cross* (2015) 707, 708.
[173] See *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at para 59; *SADC Tribunal case* at para 3; *Southern Africa Litigation Centre (SALC) v National Director of Public Prosecutions (NDPP) & Others* 2012 (1) BCLR 1089 (GNP); [2012] ZAGPPHC 61; [2012] 3 All SA 198 (GNP) at para 13.4; *Kaunda* at paras 162, 227, 275.
[174] To use Professor Henkin's terminology in Cleveland note 18, 507.
[175] To use the words of R Cohen 'Integrating human rights in US foreign policy: The history, the challenges, and the criteria for an effective policy', The Brookings Institution, University of Bern, Project on Internal Displacement (2008) 1, 1.
[176] Ibid.
[177] Hathaway *et al* note 22, 392.

just be about considerations of power and influence (*realpolitik*), but that at the core of the exercise of public power in that space (foreign affairs) must be, in this case, an unwavering commitment to protecting and promoting fundamental HRs (*moralpolitik*).[178] The foreign policy of a post-apartheid state must be reflective of a responsible member of a family of nations committed to HRs protection, and that commitment must 'shape the exercise of all public authority, including the exercise of all discretion [and] prerogative powers'[179] in foreign policy matters.

Second, and related to the first point above, it should now be clear and beyond question that the BORs, in peremptory terms, binds the conduct of foreign policy in South Africa. In *Doctors for Life*, Ngcobo J (for the majority) stated that the Constitution binds all branches of government and demands that when branches of government exercise their powers they must do so in accordance with, and within the limits of the Constitution and fulfil the constitutional obligations imposed on them.[180] In the circumstances therefore, South Africans are entitled to expect their government to respect the Constitution and the law at all times, because failure to do so may result in the erosion of the citizens' confidence in public administration in general and the justice system in particular.

Third, foreign policy in South Africa will continue to be a highly contested policy space, particularly in cases relating to protection of HRs. Since 1994, ordinary citizens, NGOs and other civil society groups have challenged government's decisions and conduct on a range of foreign policy-related matters (for example, diplomatic protection,[181] 'rendition' of 'terror

[178] See L Weinreb 'Constitutionalism in the age of rights – A prolegomenon' (2004) 121 *SALJ* 278, 285. See also Chaskalson note 49, 202; Mogoeng CJ in *SADC Tribunal case* at para 3.
[179] Weinreb note 178, 285.
[180] *Doctors for Life* at para 38 and footnotes therein.
[181] *Kaunda* note 94.

suspects', [182] denial of entry visa; [183] withdrawal from international treaties; [184] and implementation of intergovernmental bilateral agreements. [185] This means that the once impermeable terrain of foreign policy has now been thrown wide open to public scrutiny, influence and democratic participation and government is now required (unlike before 1994) to justify and account for its conduct in foreign affairs, particularly when HRs are implicated.[186]

Lastly, South Africa is a beneficiary of international goodwill and solidarity in its struggle against the injustices of apartheid.[187] In 1994, the global anti-apartheid movement and its commitment to justice and fundamental HRs was vindicated when a democratic government under a supreme Constitution came into being in South Africa. In this regard, it should not be an outlandish idea that after 1994, South Africa was expected to lead by example and show unwavering commitment to upholding HRs in the conduct of its foreign policy.[188] According to Habib & Selinyane, this expectation was disappointing, as South Africa began to take decisions and adopt foreign policy positions at home and in international fora that were considered to be inconsistent with its professed commitment to HRs and which were violative of its international (treaty) obligations.[189] Given all these negative perceptions that have arisen as a result of a perceived failure to abide by the letter and spirit of the Constitution, the BORs

[182] *Mohamed* note 107.
[183] *Buthelezi & Another v Minister of Home Affairs & Others* [2012] ZAWCHC 3 and on appeal: *Buthelezi & Another v Minister of Home Affairs & Others* [2012] ZASCA 174; 2013 (3) SA 325 (SCA)(Dalai Lama visa application case).
[184] *Democratic Alliance v Minister of International Relations and Cooperation & Others* 2017 (3) SA 212 (GP); [2017]2 All SA 123 (GP); 2017 (1) SACR 623 (GP)(South Africa's decision to withdraw from the ICC without prior parliamentary approval).
[185] *Earthlife-Africa Johannesburg & Others v Minister of Energy & Others* [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (implementation of the South Africa-Russia nuclear deal without proper public participation).
[186] See Maluwa (2000) note 15, 253.
[187] Mogoeng CJ in *SADC Tribunal case* at para 4; D Moseneke DCJ (retired) 'The role of comparative and public international law in domestic legal systems: A South African perspective' (2010) *Advocate* 63, 64 (hereinafter Moseneke (2010)); Mandela note 1, 88.
[188] N Fritz 'The courts: Lights that guide our foreign affairs?' (2014) *SAIIA* Occasional Paper 203, 5; Habib & Selinyane note 12, 49.
[189] Habib & Selinyane note 12, 49. On failure by the South African government to comply with its reporting requirements under various international HRs instruments, see S Liebenberg 'Human development and human rights: South African country study' (2000) *Human Development Report*, Socio-Economic Rights Project, Community Law Centre, UWC 1, 18; M E Olivier 'Notes and comments: Compliance with reporting obligations under international law: Where does South Africa stand?' (2006) 31 *SAYIL* 179, 182.

and binding IL in the conduct of its foreign policy, South Africa would be pressed to consider changing course that will bring it in line with its HRs creed. One of the key assumptions made about the connection between foreign policy on the one hand and HRs protection on the other, is that nations whose governments and polity respect HRs enjoy respect, legitimacy and good reputation in the eyes of the world.[190] In this regard, South Africa should avoid taking positions in the UN(SC) and other international fora that could be interpreted to be contrary to its long-standing positions, particularly those positions that were championed by the liberation movement during the struggle against apartheid. For instance, Dugard suggests that the position of South Africa that human rights violations in Zimbabwe (during the seizure of 'white' farms in the mid-2000s) and Myanmar do not constitute a threat to international peace – when the ANC itself had previously argued vociferously at the UN and internationally that apartheid constituted a threat to international peace – appears to be an argument shrouded in double speak and should be avoided.[191]

6. Conclusion

This chapter sought to demonstrate how HRs bind the conduct of foreign policy in South Africa. It established that one of the key objectives of the framers of South Africa's post-1993 constitutions was to address not only the domestic legacy of apartheid but to also remodel the image of South Africa in the eyes of the global community - from a pariah and violator of HRs to a responsible member in the family of nations bound by its supreme law and the law of the

[190] See Gropas note23, 1-2 and 6.

[191] J Dugard 'Human rights in South Africa: Past, present and future'(Lecture delivered at the Centre for Human Rights, University of Pretoria on March 2007, 1-7 available at www.chr.up.ac.za/about/news.html#dugard 6. See Tladi's response to Dugard's criticism at D Tladi 'Strict positivism, moral arguments, human rights and the Security Council: South Africa and the Myanmar vote' (2008) 8 *Afr Human Rights L J* 23, 26ff.

UN. In arguing that the foreign policy of democratic South Africa is disciplined and bound by HRs, the chapter highlighted the following considerations, among others:

(a) that the concept of sovereignty in the South African Constitution is no longer rooted in the pre-1945 notion of that concept, but that it is now imbued with norms and obligations that demand a firm commitment to rights-protection and –promotion;

(b) that there is a very clear and unambiguous constitutional obligation on the South African state/government to respect, protect, promote and fulfil the rights in the BORs (section 7(2)), and that this obligation rests with the South African government whether it acts inside or outside the borders of the state;

(c) that since the BORs applies to all law and binds the three branches of government and all organs of state (section 8(1)), then the exercise of foreign affairs powers is bound by and must always be consistent with HRs; and

(d) that the foreign policy of South Africa is disciplined by HRs norms, values and principles contained in various international HRs and humanitarian law instruments which South Africa has acceded to/ratified and, in some cases, incorporated into its domestic law.

What is evident from the discussion in this chapter is that HRs protection and promotion in South Africa can no longer be articulated as high sounding clichés which will be invoked when it is convenient to do so in foreign policy discourse. Rather, they are always binding on government conduct, including conduct in the realm of foreign relations even when compliance with HRs norms in this realm causes government some discomfort and embarrassment.

Unlike in pre-democratic South Africa, HRs under the current constitutional-legal order now have far reaching implications for foreign policy. For instance, this area of governmental responsibility (foreign affairs) can no longer be regarded as an exclusive terrain of the political

branches, in the sense that civil society and the citizenry in general now have a role to play in holding their government and its functionaries accountable by ensuring that government abides by law and its commitments under international HRs and humanitarian law. The next chapter discusses South Africa's foreign policy and IL beyond HRs and humanitarian law.

CHAPTER SEVEN

INTERNATIONAL LAW AND SOUTH AFRICA'S FOREIGN POLICY

> Now, more than ever before foreign policy decision-making occurs in the shadow of the law.[1]

> We recognise that international norms, whilst adaptable, are more likely to serve as a valuable and more timeless dam wall against the narrow, inward looking patriotism which sometimes renders the rule of law vulnerable to domestic populism.[2]

1. Introduction

In 1994, South Africa was welcomed back into the family of nations after almost five decades of isolation because of apartheid.[3] It should be remembered that during the years of apartheid, South Africa stood resolutely against the international community and the norms, values and principles espoused by the latter and embraced by the world of interstate relations after 1945.[4]

It is trite that the international community played one of the defining roles in the fight against and ultimate defeat of apartheid.[5] In recognition of the sterling role the international community played in bringing an end to apartheid, the people of South Africa, in turn,

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[1] RG Teitel 'Humanity's law: Rule of law for the new global politics' (2002) 35(2) *Cornell Int'l LJ* 355, 355.
[2] D Moseneke (DCJ retired) 'The role of comparative and public international law in domestic legal systems: A South African perspective' (2010) *Advocate* 63, 65.
[3] Wallis JA in *Minister of Justice and Constitutional Development & Others v Southern Africa Litigation Centre & Others*[3] (*Al Bashir (SCA*) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) at para 63. See also Mogoeng CJ in *Law Society of South Africa & Others v President of the Republic of South Africa & Others* (*SADC Tribunal case*) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) at para 4.
[4] J Dugard 'South Africa and international law: A historical introduction' in J Dugard, M du Plessis, T Maluwa & D Tladi *Dugard's International Law: A South African Perspective 5th ed* (2018) 22, 23-24 (hereinafter Dugard *et al* (eds)); T Maluwa 'Human rights and foreign policy in post-apartheid South Africa' in D P Forsythe (ed) *Human Rights and Comparative Foreign Policy: Foundations of Peace* (2000) 250, 270 (hereinafter Maluwa (2000)).
[5] Mogoeng CJ in *SADC Tribunal case* at para 4. See also Sachs J in *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) at para 274.

committed themselves and their government to play a constructive role as a cooperative member of the community of nations.[6] By making this commitment, South Africans promised to move their government away from a jingoistic foreign policy which was based on a perverted notion of state sovereignty and disdain of the international community itself to a new way of engagement with the world, which would be guided by the supreme Constitution and the laws of the community of nations (international law (IL)). The latter is the focus of this chapter, in the context of South African foreign policy. Specifically, the chapter seeks to demonstrate how IL binds the conduct of South Africa domestically as well as at the international level and beyond the territorial jurisdiction of the state in the realm of foreign affairs, particularly in relation to those foreign policy matters covered by IL.

The choice of IL – as one of the tenets of modern liberal-legal constitutionalism employed to argue the key proposition in this study - is based on the following considerations (in addition to those mentioned in chapter one of this thesis). First, with the adoption of the interim Constitution (and later the 1996 Constitution), South Africa recognised IL and gave status to that body of law for the first time in the country's legal history; a phenomenon that would radically and profoundly change the manner in which IL was treated before 1994 (total exclusion) and how it would be treated in a democratic dispensation (total acceptance) and what the implications of that change would be for the conduct of foreign policy. Second, successive African National Congress (ANC)-led governments since 1994 have consistently stated that their foreign policy is 'guided by', among other values, respect for the ROIL. It would be interesting, in the context of this study, to assess whether or not government has been faithful to this commitment and, specifically, to what extent, if any, has it lived up to its international legal obligations in the conduct of its foreign policy. Third, the manner in which South African courts - in contradistinction to their counterparts in the pre-democratic era - have

[6] Constitution, preamble. See O'Regan J in *Kaunda* at para 222; Ngcobo J in *Kaunda* at paras 159 and 162.

interpreted and applied IL norms, particularly in foreign policy cases, has proven beyond doubt that, that area of governmental responsibility in the realm of foreign relations is now justiciable, bound and disciplined by constitutional norms such as political accountability, legal justification and respect for the ROIL.

This chapter is divided into five parts. The first part is this introduction. The second part discusses briefly how IL was treated in pre-democratic South Africa and how that treatment of IL translated into a foreign policy that was untouched by IL norms which had come to characterise the international system in the wake of the pogroms of World War II (WWII). The third part discusses IL and foreign policy in democratic South Africa. This third part is divided into two subsections. The first subsection discusses the political and legal reasons for the incorporation and entrenchment of IL into South Africa's constitutional-legal fabric at founding and their relevance to foreign policy. The second subsection under part three discusses the various 'international law provisions' in the 1996 Constitution, for example, sections 198(c),[7] 199(5)[8] and 200(2)[9] and their implications for South Africa's conduct and obligations in relation to, inter alia, management of national security, use of force and participation in peacekeeping and peace enforcement operations. The fourth part discusses the implications of entrenching IL in the Constitution for South Africa's foreign policy. The fifth part is the conclusion and summarises the main issues covered in this chapter.

2. International law, 'exclusionary rules' and foreign policy in pre-democratic South Africa

The discussion in this section focuses on the various doctrines and principles that governed the conduct of foreign policy in pre-democratic South Africa. The aim of this discussion is two-

[7] Principles of international law governing management of national security.
[8] International humanitarian law principles governing the instruction of members of armed forces.
[9] Principles of international law (UN Charter) governing the use of force.

fold. First, it aims to explain how the operation, application and interpretation of these doctrines and principles in foreign policy matters led to the total rejection and exclusion of IL in South Africa's foreign policy pre-1994. Second, this section provides background and context (to the next discussion under section three of this chapter) to understanding why the framers of the post-1993 constitutions recognised IL, entrenched that body of law and gave it status in the constitutional-legal fabric of democratic South Africa and the far-reaching implications of the latter developments for the conduct of foreign policy in South Africa (since 1994).

The introduction of apartheid (in 1948) as statute law flew in the face of international norms, principles and values that defined the international system after 1945,[10] and IL became the big stick with which the international community reacted to apartheid and racial discrimination.[11] During the entire period of apartheid, South Africa adopted a very hostile attitude towards IL and international institutions such as the UN, particularly towards the human rights (HRs) discourse that had placed principles such as self-determination, protection of HRs, and non-discrimination at the centre of international comity.[12] During this time, the conduct of South Africa's foreign policy was governed by certain legal (and non-legal) 'doctrines' and principles which either excluded the application of IL in the domestic sphere or excluded the courts from adjudicating sensitive political cases which warranted the application of IL norms over South Africa's foreign policy conduct. For the purposes of this chapter, the following 'exclusionary rules' are pertinent: (a) impermeable notion of state sovereignty; (b) 'act of state' doctrine; (c) executive prerogative; (d) doctrine of precedent (*stare decisis*); (e) doctrine of parliamentary sovereignty; (f) doctrine of separation of powers (SOP); and 'one voice' principle.

[10] Dugard in Dugard *et al* (eds) note 4, 22; Maluwa (2000) note 4, 253.
[11] Dugard in Dugard *et al* (eds) note 4, 26; J Dugard 'Kaleidoscope: International law and the South African Constitution' (1997) 1 *EJIL* 77, 77 (hereinafter Dugard (1997)).
[12] Dugard (1997) note 11, 77; Dugard in Dugard *et al* (eds) note 4, 27.

It is important to note that the doctrines and principles which the pre-democratic government used to exclude the role of the courts and the possible importation of IL norms into the foreign policy domain of South Africa are pretty much similar to the (common law) doctrines and principles used by the courts in the UK and US (discussed in chapter two of this thesis, sections 3.1 and 3.2, respectively). These 'exclusionary rules' used by the pre-democratic government in the conduct of its foreign policy are explained very briefly in the next sub-sections.

2.1 The impermeable notion of state sovereignty

Successive apartheid governments subscribed to strong Westphalian (pre-1945) principles of state sovereignty and territorial integrity, which principles formed the solid foundation for a 'highly legalistic'[13] foreign policy that emphasised strict observation of international comity rules and demanded no external interference in the domestic affairs of South Africa in accordance with article 2(7) of the UN Charter. South Africa's reliance on the principle of international comity contained in article 2(7) of the UN Charter in the conduct of its foreign policy before 1994 was supported by many Western states.[14] By relying on article 2(7)[15] of the UN Charter to ward off criticism levelled against its racial policies,[16] South Africa was able to resist the application of IL norms (for example, non-discrimination, equality, and self-determination) to its conduct both in the domestic and external spheres. During this period, South Africa followed countries such as the UK and US which employ international comity

[13] Dugard (1997) note 11, 77.
[14] Dugard in Dugard *et al* (eds) note 4, 22.
[15] Dugard in Dugard *et al* (eds) note 4, 22 and 23. Art 2(7) of the UN Charter reads: 'Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'
[16] Dugard (1997) note 11, 77. See also M E Olivier 'International law in South African municipal law: Human rights procedure, policy and practice' Unpublished LLD Thesis (2002) UNISA, 136 (hereinafter Olivier (2002)); J Barber 'Conceptualising for a democratically based South African foreign policy' in A J Venter (ed) *Foreign Policy Issues in a Democratic South Africa,* Papers from a Conference of Professors World Peace Academy (South Africa)(20-21 March 1992) 8.

rules, including non-interference in the domestic affairs of other states as a mechanism of excluding the courts from adjudicating foreign policy matters.[17]

2.2 'Act of state' doctrine

In pre-democratic South Africa, one of the 'doctrines' that governed the conduct of foreign policy was the English (and American) common law doctrine of 'act of state'.[18] In terms of this doctrine, the acts of the South African government in the realm of its prerogative in foreign affairs[19] were not justiciable in the courts of law (the so-called 'doctrine of the non-justiciability of 'acts of state').[20] Lord Sumpton explained the rationale for the doctrine of non-justiciability of 'acts of state' as based on the notion that due to the nature of interstate relations, there are no judicial standards by which to determine the lawfulness of sovereign acts performed by sovereign states in the conduct of their international relations.[21] The application of this doctrine to South Africa's foreign policy meant that, that area of governmental responsibility laid beyond the reach of judicial scrutiny and was therefore shielded from the discipline of constitutional-legal norms such as political accountability and respect for the ROIL.[22] In *Van Deventer v Hancke & Mossop*,[23] concerning whether the British annexation (during the Anglo-Boer War 1899-1903) of the 'boer republic' of the Transvaal was complete under IL, Innes CJ

[17] For a discussion of how courts in the UK and US interpret and apply international comity rules in foreign policy matters, see chapter two of this thesis, subsections 3.1.6 and 3.2.4, respectively.
[18] J Dugard *International Law: A South African Perspective 4th ed* (2011), 71 (hereinafter Dugard (2011)). See also J Dugard & A Coutsoudis 'The place of international law in South African municipal law' in Dugard *et al* (eds) note 4, 60-61 and 104; AJGM Sanders 'The justiciability of foreign affairs matters under English and South African common law' (1974) 7 *CILSA* 215, 216. For a discussion of how this doctrine is applied in foreign policy cases in the English and American courts, see discussion in chapter two of this thesis under subsections 3.1.1 and 3.2.6, respectively.
[19] Dugard (2011) note 18, 71; H Booysen 'Has the act of state doctrine survived the 1993 interim Constitution?' (1995) 20 *SAYIL* 189, 189.
[20] Dugard (2011) note 18, 71; Booysen note 19, 189.
[21] Lord Sumpton 'Foreign affairs in the English courts since 9/11', Lecture at the Department of Government, London School of Economics, 14 May 2012 available at https://www.supremecourt.uk/docs/speech_120514.pdf
[22] T Maluwa 'International human rights norms and the South African interim Constitution 1993' (1993-94) 19 *SAYIL* 14, 32 (hereinafter Maluwa (1993-94)).
[23] 1903 TS 401

stated that the question before the Court constituted the Crown 'act of state' which was, according to English common law, not amenable to judicial inquiry.[24]

2.3 Executive prerogative power

South Africa's foreign policy in the pre-democratic era was also conducted on the basis of the old common law prerogative powers derived from English law.[25] The common law prerogative power essentially constituted the power of the Crown (now the executive government) to act in the public interest, exercising discretionary power which is not regulated by statute law.[26] Some of the prerogative powers relevant to the conduct of foreign affairs included, (a) the power to conduct foreign relations;[27] (b) the defence of the realm; (c) the power to recognise foreign sovereigns; and (d) the power to declare war. Under the common law, 'scrutiny of such 'royal' residual powers was off-limits to the courts';[28] a phenomenon that led to the exclusion of the courts from foreign policy matters and concomitant impossibility of importing IL norms into the conduct of South Africa's pre-democratic foreign policy.

2.4 Doctrine of precedent (stare decisis)

One of the legal mechanisms that played an important role in excluding the role of the courts and hence the potential importation of IL norms into foreign policy matters by way of legal

[24] *Van Deventer* at 410.
[25] Dugard & Coutsoudis in Dugard *et al* (eds) note 4, 104; Dugard (2011) note 18, 71. For a discussion of how English courts apply the crown/executive prerogative power in foreign affairs, see chapter two, subsection 3.1.3 of this thesis. See also how the Canadian government in *Canada (Prime Minister) v Khadr* [2010] 1 SCR 44 (SCC) (*Khadr II*) at para 33 discussed in chapter two, subsection 3.4.5 of this thesis sought to assert the crown/executive prerogative power to stop the Court from ordering the executive to demand (from the US) the repatriation of Mr Omar Khadr (Canadian national) who was detained at Guantanamo Bay (in Cuba) on terrorism charges.
[26] Lord Denning in *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643 at 705B-C; See also Chaskalson CJ in *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 36 (and footnotes therein); G Bartlett & M Everett 'The Royal Prerogative', Briefing Paper No. 03861, (British) House of Commons Library (17 August 2017) 3.
[27] Dugard (2011) note 18, 71.
[28] D Mullan 'Judicial review of the executive – principled exasperation' (2010) 8(2) *New Zealand J of Public & IL* 145, 161; *Van Deventer* at 409-410.

argument and/or judicial interpretation is the doctrine of precedent (*stare decisis*) as it was applied by the courts and the judiciary before 1994.[29] Because the courts were bound by the doctrine of *stare decisis*, they would ordinarily follow their own precedents even in situations where such precedents were at variance with customary international law (CIL).[30]

2.5 Doctrine of parliamentary sovereignty[31]

Before 1994, South Africa followed the British constitutional model where the institution of parliament was sovereign.[32] The doctrine of parliamentary sovereignty essentially implied that legislation emanating from this branch of government enjoyed precedence over common law 'which in terms of Blackstonian doctrine included international law'. [33] Parliamentary sovereignty also implied that courts were barred from reviewing parliamentary statutes for legality and this empowered parliament to enact laws which effectively negated IL.[34] The cumulative effect of a legally hamstrung judiciary meant that the entire area of governmental responsibility in the field of foreign affairs was insulated from any scrutiny and supervision by the courts. Foreign affairs became a terrain where the political branches, particularly the executive, held sway and the courts had no role to play in the supervision of foreign policy.

The perverted doctrine of parliamentary sovereignty was also one of those principles that South African courts employed to qualify the fact that IL/CIL formed part of South African law;[35] a phenomenon which allowed South African courts, following *stare decisis*, to give

[29] Olivier (2002) note 16, 120.
[30] Maluwa (1993-94) note 22, 32; Olivier (2002) note 16, 120.
[31] The doctrine of parliamentary sovereignty and its implications for foreign policy is discussed in detail in chapter four of this thesis.
[32] Olivier (2002) note 16, 132.
[33] Ibid.
[34] Maluwa (2000) note 4, 270.
[35] In pre-democratic South Africa, South African courts had generally accepted that CIL formed part of South African municipal law. *Nduli & Another v Minister of Justice & Others* 1978 (1) SA 893 (A) at 906B-D; *Ex parte Schumann* 1940 NPD 251 at 254; *Inter-Science Research & Development Services (Pty) Ltd v Republica Popular de Mozambique* 1980 (2) SA 111 (T) at 124H; H Strydom 'South African law of immunities' in C A Bradley (ed) *The Oxford Handbook of Comparative Foreign Relations Law* (2019) 665, 665; Maluwa (1993-94) note 22, 32; Olivier (2002) note 16, 127.

effect to acts of state even if those acts of state differed from the rules of CIL.[36] According to the doctrine of parliamentary sovereignty as was applied in pre-democratic South Africa, in the event of conflict between CIL and legislation, the latter trumped the former.[37] The same principle prevailed in the situation of conflict between IL and South African Roman-Dutch law; in the event of conflict between the two legal systems, South African Roman-Dutch common law prevailed over IL.[38]

2.6 Doctrine of sovereign immunity

Before 1994 – like in the UK and US - the conduct of foreign policy in South Africa was also governed by the doctrine of sovereign immunity.[39] However, one of the ways in which pre-democratic governments excluded the application of (customary) IL in foreign policy matters was in the manner in which they treated that body of law in cases relating to sovereign immunity.[40] Dugard suggests that South African courts applied IL without qualms in matters that were not politically sensitive.[41] Outside these limited cases, South African courts before 1994 harboured a hostile attitude towards IL which they perceived as an intrusive legal order.[42] In fact, in those highly sensitive political matters, South African courts appeared ready to jettison the principles of IL relating, in this case, to respect for the sovereign independence and territorial integrity of other states. For instance, in a number of cases involving the cross-border kidnapping of uMkhonto weSizwe (MK, the armed wing of the ANC) combatants and other members of the ANC, which kidnappings were carried out in flagrant violation of the territorial integrity of neighbouring states, South African courts refused to hold the South African

[36] Olivier (2002) note 16, 134.
[37] Maluwa (1993-94) note 22, 32; Olivier (2002) note 16, 132.
[38] Olivier (2002) note 16, 120.
[39] *Liebowitz v Schwartz* 1974 (2) SA 661 (T). For a discussion of this doctrine in the conduct of foreign policy in the UK and US, see chapter two of this thesis, subsections 3.1.7 and 3.2.5, respectively.
[40] Olivier (2002) note 16, 125; see also *Nduli* note 35 at 906B.
[41] Dugard (1997) note 11, 77; Olivier (2002) note 16, 159.
[42] Dugard (1997) note 11, 77; Dugard in Dugard *et al* (eds) note 4, 26.

government responsible for wrongful acts of its agents as required under IL.[43] In these cases, South African courts did not shy away from exercising criminal jurisdiction over the accused.[44]

2.7 Doctrine of separation of powers[45]

Like in the UK,[46] US,[47] Germany[48] and Canada,[49] the conduct of foreign policy in pre-democratic South Africa was further governed by the principle of separation of powers (SOP). In South Africa before 1994, the strict principle of SOP was applied in foreign affairs in such a manner that there were deep and solid lines between the functions and responsibilities of the three branches in this area of governmental responsibility. The way that doctrine was applied, particularly in relation to matters covered by IL (such as conduct of foreign policy) meant that the requisite checks on arbitrary governmental conduct and abuses of power demanded by the doctrine of SOP were very weak.[50] In fact, the doctrine of SOP was applied in such a way that, in the realm of foreign policy, the executive had, for all intents and purposes, a free hand and was untrammelled by common law principles of IL and the courts were impotent in the face of such over-bearing executive foreign affairs powers.

Because of the manner in which these doctrines and principles were applied to foreign policy before 1994, a deep-seated notion took root in South African legal thinking and practice that there is/should be a clear divide between law on the one hand and politics on the other.[51]

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[43] Olivier (2002) note 16, 161.
[44] See the cases of *S v Ramotse* (TPD decision of 14 September 1970 unreported); *Nduli* note 35; *S v Ebrahim* [1991] ZASCA 3; 1991 (3) SA 553 (A); [1991] 4 All SA 356 (A); *S v December* 1995 (1) SACR 438 (A).
[45] For more reading on separation of powers in South Africa's pre-1994 foreign policy, see also discussion in chapter four, section 3, of this thesis.
[46] See discussion in chapter two, subsection 3.1.5 of this thesis.
[47] See discussion in chapter two, subsection 3.2.2 of this thesis (discussing separation of powers under the US 'sole organ' doctrine).
[48] See discussion in chapter two, subsection 3.3.1 of this thesis (discussing 'separation of powers' under the German doctrine of judicial self-restraint).
[49] See discussion in chapter two, subsection 3.4.5 of this thesis (discussing the Canadian use of executive prerogative power in the context of 'war on terror').
[50] Argument adapted from J Lobel 'The limits of constitutional power: Conflicts between foreign policy and international law' (1985) 71 *Va LR* 1071, 1115 (hereinafter Lobel (1995)).
[51] Mullan note 28, 161.

And because this view was embraced without much ado, there was concomitant acceptance of the notion that the courts lacked the legitimacy to engage with the political world.[52] The argument that the courts lacked the legitimacy to engage with the political world was buttressed by 'prudential reasons', including the notion that courts lacked institutional competence and capacity to evaluate the merits of decisions taken in the context of foreign policy-making and implementation.[53]

2.8 'One voice' principle

As stated above,[54] the conduct of foreign policy in pre-democratic South Africa was governed by constitutional rules and prerogative powers based on English common law.[55] One of the principles which governed the exercise of crown prerogative powers in foreign affairs is the so-called 'one voice' principle, which was articulated by Lord Atkin in the old English case of *Government of the Republic of Spain v SS Arantzazu Mendi.*[56] In terms of that principle, the executive and the judiciary (and since they are part of the same state) should speak with one voice on matters concerned with the exercise of prerogative power such as the conduct of foreign affairs.[57] Dugard suggests that the rationale for the one voice principle was based on practical considerations, which is that, the executive and judiciary should speak with one voice on foreign policy matters in order to avoid an embarrassing situation where both these branches of government could come to two conflicting legal positions on the same issue.[58] Because it was undesirable for the two branches to differ on policy matters in the realm of the prerogative (such as foreign policy), South African courts adopted an approach which gave effect to acts

[52] This idea is borrowed from Mullan, ibid who makes the same point about the existence of a notion of a divide between law and politics in the case of Canada.
[53] Ibid.
[54] See discussion above in subsections 2.2, 2.3, 2.5, 2.6, and 2.7 of this chapter.
[55] Dugard & Coutsoudis note 18, 104; Dugard (2011) note 18, 71.
[56] (1939) AC 256 (HC) at 264.
[57] For a discussion of how the UK and US apply the 'one voice' principle in foreign policy matters, see chapter two of this thesis, subsections 3.1.2 and 3.2.3, respectively.
[58] Dugard (2011) note 18, 69.

of state even when the latter acts differed from the rules of CIL.[59] In this way – and buttressed by other principles such as 'act of state', *stare decisis*, and parliamentary sovereignty – South African courts before 1994 could (and in fact did) exclude the possibility of importing into the foreign policy domain any application of international norms, including the rules of CIL.

In the context of the preceding discussion, this chapter subsequently demonstrates how the incorporation and entrenchment of the norms of IL in a supreme constitution have radically transformed how IL is treated in South Africa; but most importantly, how the conduct of foreign policy is now justiciable and bound by constitutional norms (including IL norms). This chapter will also show what the implications of the new status of IL are for the conduct of foreign policy under the current constitutional-legal order.

3. International law and foreign policy in democratic South Africa

3.1 International law and foreign policy at founding

When the negotiations for an alternative constitutional-political dispensation commenced in 1990, it was clear from the onset that the envisioned constitutional project was destined to be thoroughly transformative[60] and fundamentally different from the apartheid legal order and its racial policies. The framers resolved to recognise public IL – for the first time in South African constitutional history[61] – and to give status to that body of law as well as define its role in the new constitutional dispensation. [62] The incorporation of IL into the post-apartheid

[59] Olivier (2002) note 16, 134.
[60] Chaskalson CJ in *Pharmaceutical Manufacturers Association* note 26 at para 45; L Weinrib 'Constitutionalism in the age of rights – A prolegomenon' (2004) 121 *SALJ* 278, 284.
[61] Olivier (2002) note 16, 175; Dugard (2011) note 18, 50; Maluwa (1993-94) note 22, 34.
[62] Olivier (2002) note 16, 175; M Olivier 'Interpretation of the constitutional provisions relating to international law' (2003) 6(2) *PER/PELJ* 1, 1 (hereinafter Olivier (2003)); M E Olivier 'The status of international law in South African municipal law: section 231 of the 1993 Constitution' (1993-94) 19 *SAYIL* 1, 1 (hereinafter Olivier (1993-94).

constitutional-legal order was driven by many factors and was expected to achieve a myriad of socio-economic and political objectives.

First, from an international relations point of view, by incorporating IL into the constitutional-legal fabric of South Africa's constitutional democracy, framers not only wanted to address the domestic legacy of apartheid but also to remodel the face of South Africa in the eyes of the international community – from a pariah to a cooperative and responsible member in the family of nations.[63] The preamble to the 1996 Constitution contemplated a radically different notion of sovereignty, in terms of which South Africa would no longer reject IL but committed to exercise its sovereignty in accordance with the ROIL.[64]

Second, the framers were keen to see the new South Africa readmitted into the international fold after years of isolation. To that end, they were also keen to see South Africa participate in and take advantage of economic and trade opportunities that the global economy offered in order to address the domestic legacy of poverty, inequality, unemployment and lagging economic performance. By embracing the ROIL, the framers sought to send a strong message to the world community that South Africa was open for business and that in the conduct of that business South Africa will play and be bound by international rules governing international economic, social and political relations.[65] The framers thought, correctly so, that when South Africa respects and is seen to be respecting IL, this will enhance South Africa's chances of playing an active, respected and influential role in the international community[66] and influence positively the development of international rules that would protect and enhance the rights and interests of developing countries.[67]

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[63] Moseneke note 2, 64.
[64] Argument adapted from Teitel note 1, 362; D Titus 'Human rights in foreign policy and practice: The South African case considered' (2009) *SAIIA*, Occasional Paper (No. 52) 5, 5 and 10-11.
[65] N Mandela 'South Africa's future foreign policy' (1992-93) 72 *Foreign Affairs* 86, 91 (hereinafter Mandela (1993-93)).
[66] Olivier (1993-94) note 62, 12.
[67] See N Mandela 'Foreword' in E Sidiropoulos (ed) *South Africa's Foreign Policy 1994-2004: Apartheid Past, Renaissance Future* (2004), v (hereinafter Mandela (2004)).

Lastly, like in Germany after the end of Nazism in 1945, there was general consensus among the negotiators at Kempton Park that IL should be given an important role in South African domestic law in order to guard against the repeat of the atrocities of the past.[68] In this regard, one of the fundamental issues that the new constitutional text had to address was a clear statement about the kind of norms, values and principles which should imbue the foreign policy of a post-apartheid South Africa: for example, respect for HRs, respect for the territorial independence and sovereignty of all states, political accountability, and respect for the ROIL.[69]

3.2 'International law provisions' in the 1996 Constitution and their controlling relevance to foreign policy

3.2.1 Section 231: Treaty-making

Section 231(1) assigns the responsibility to negotiate and sign all international agreements to the national executive. Section 231(2) provides that an international agreement binds South Africa at the international level only after Parliament approves it, except if it is '[a]n international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession'. In the case of the latter agreements, they bind South Africa at the international level without parliamentary approval but must be

[68] Olivier (1993-94) note 62, 6; T Mbeki 'South Africa's international relations: Today and tomorrow' in G Mills (ed) *From Pariah to Participant: South Africa's Evolving Foreign Relations 1990-1994* (1994) 201; A Peters 'Supremacy lost: International law meets domestic constitutional law' (2009) 3 *Int'l Const LJ* 170, 173 suggests that many countries, particularly in the Soviet Bloc after the collapse of the Soviet Union and the end of the Cold War pledged fidelity to international law as a way of breaking ties with past totalitarianism and embracing liberal notions of the rule of law and market economies; R A Miller 'Balancing security and liberty in Germany' (2010) 4 *J Nat'l Sec L & Pol'y* 369, 372; V S Vereshchetin 'New constitutions and the old problem of the relationship between international law and national law' (1996) 7 *EJIL* 29, 30 makes the same point (countries embracing international law with the objective of avoiding international isolation).

[69] See C Tomuschat 'International law and foreign policy' (2009) 34 *DAJV* 166, 166; Maluwa (2000) note 4, 259; J Dugard 'Public International Law' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, & S Woolman (eds) *Constitutional Law of South Africa* (1998)(Revision Service 2)(Chapter 13), 13-1, 13-1 (hereinafter Chaskalson *et al* (eds); Dugard (1997) note 11, 77; D Hovell & G Williams 'A tale of two systems: The use of international law in constitutional interpretation in Australia and South Africa' (2005) 29 *Melbourne U L R* 95, 127; O'Regan J in *Kaunda* at para 222; Mandela (1992-93) note 65, 97.

tabled in parliament within a reasonable time.[70] Section 231(4) gives parliament the power to incorporate an international agreement into domestic law (through national legislation) and thereby binds South Africa at the domestic level, since following its incorporation, it also becomes a source of statutory rights and obligations. Section 231(4) provides further that '[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'.

There are three important considerations which must be underscored in relation to section 231 which have a controlling relevance to and binding effect on foreign policy. First, although section 231(4) essentially retains the pre-democratic 'dualist approach' in domesticating international agreements, the thrust of section 231 is a radical departure from how treaty-making powers were assigned and exercised before 1994. Under the pre-democratic treaty-making dispensation, the State President had the power, under the executive prerogative[71] and statute to enter into and ratify international agreements.[72] Under the 1983 Constitution, for example, no parliamentary approval was required for the signing, ratification or accession to a treaty.[73] The doctrine of SOP had no bearing at all on the exercise of foreign affairs powers as far as treaty-making was concerned since the executive pretty much had a free hand in that area of governmental responsibility. Section 231 of the 1996 Constitution sought to change all that by subjecting treaty-making to SOP principles, and thereby bring the necessary checks over executive conduct in this area of governmental responsibility.[74] In *Democratic Alliance v*

[70] Constitution, s 231(2).
[71] For example, s7(4) of Republic of South Africa Constitution Act 32 of 1961 (the 1961 Constitution) provided that: 'The State President shall in addition as head of the State have such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative.' Section s6(4) of the Republic of South Africa Constitution Act 110 of 1983 (the 1983 Constitution) was worded exactly the same as s7(4) of the 1961 Constitution except that the word 'Queen' in the latter was replaced by the word, 'State President' in the former.
[72] 1983 Constitution, s 6(3)(e): 'The State President shall … have the power to enter into and ratify international conventions, treaties and agreements.' S7(3)(g) of the 1961 Constitution had similar wording.
[73] Dugard in Chaskalson *et al* (eds) note 69, 13-2.
[74] In his minority judgment in *Glenister v President of the Republic of South Africa & Others (Glenister II)* [2011] ZACC 6; 2011 (3) SA 347, Ngcobo CJ stated that the constitutional scheme of section 231 bears the hallmarks of the concept of SOP and the need for checks and balances between the political branches (at para 89).

Minister of International Relations & Others (Council for the Advancement of the South African Constitution Intervening),[75] the Court stated that although section 231 contained no provision explicitly granting government the power to withdraw from an international treaty, on the proper construction of that section, and since it is Parliament which possesses the power to approve a treaty (section 231(2)) and to incorporate it into domestic law (section 231(4)), then the executive may not withdraw from a treaty without obtaining prior parliamentary approval.[76]

The second important consideration which must be underscored in relation to section 231 - which also has a controlling relevance to and binding effect on foreign policy – is the concept of 'self-executing' treaties contained in section 231(4). From the explicit terms of section 231(4), it would appear that a self-executing treaty 'is automatically operative upon its creation and has the force and effect of legislation'.[77] It is worth noting that the concept of 'self-executing treaties' was imported into South African constitutional law from the US.[78] In the context of the US, Henkin has criticised how that government has interpreted and applied the concept of 'self-executing' treaties to achieve certain foreign policy objectives, which, he argues, seek to entrench US government's unilateralist approach to international affairs and at the same time shirk its responsibilities under IL.[79] Dugard & Coutsoudis point out that US courts have had great difficulties in interpreting the meaning of self-executing treaties.[80] In the case of South Africa, the courts are yet to pronounce themselves on the meaning and interpretation of self-executing treaties. In *President of the Republic of South Africa & Others v Quagliani,*[81] concerning the validity of the extradition agreement between South Africa and

[75] 2017 (3) SA 212 (GP); [2017]2 All SA 123 (GP); 2017 (1) SACR 623 (GP); [2017] ZAGPPHC 53
[76] *Democratic Alliance* at paras 35 and 53.
[77] L Henkin 'International law and national interest' (1986-87) 25 *Columbia J Transnat'l L* 1, 4.
[78] N Botha 'Treaty-making in South Africa: A reassessment' (2000) 25 *SAYIL* 69, 91. See also Dugard & Coutsoudis in Dugard *et al* (eds) note 20, 82.
[79] Henkin note 77, 4; D B Hollis & C M Vázquez C M 'Treaty self-execution as "foreign" foreign relations law' in Bradley C A (ed) *The Oxford Handbook of Comparative Foreign Relations Law* (2019) 467, 468-469.
[80] Dugard & Coutsoudis note 18, 83; Hollis & Vázquez note 79, 468.
[81] [2009] ZACC 1; 2009 (4) BCLR 345 (CC)

US, the Constitutional Court chose not to define what 'self-executing' treaty means in terms of s231(4) of the Constitution, but found the agreement between South Africa and US enforceable because that agreement was provided for by Extradition Act 76 of 1962.[82] In view of the potential 'abuses' of the application and interpretation of 'self-executing' treaties (by countries such as the US),[83] South Africa should, going forward, be seen to be ready and willing to carry out its international obligations without seeking to 'reinterpret' them, particularly in the face of 'sensitive' and 'politically charged' cases as it (South African government) sought to do in the Al Bashir matter.

The third consideration which must be taken into account in relation to section 231, which has a binding effect on foreign policy relates to section 231(5) which provides that South Africa is bound by international agreements which were binding on it when the Constitution came into effect. Dugard suggests that section 231(5) of the 1996 Constitution was aimed at remedying the 'lapse' in section 231(1) of the interim Constitution, which latter provision had provided in essence that treaties which bound South Africa before the interim Constitution came into effect still bound the state '[u]nless provided otherwise by an Act of Parliament'. Section 231(1) of the interim Constitution, which basically gave parliament the power to terminate treaties unilaterally[84] was criticised as being inconsistent with the provisions of articles 54[85] and 56[86] (procedure for termination of treaties) of the 1969 Vienna Convention on

[82] *Quagliani* at paras 37, 42ff.
[83] See the other examples which Henkin note 77, 4 mentions of how the US is 'misusing' the concept of 'self-executing' treaties for narrow foreign policy objectives.
[84] As the Constitutional Court in *Azapo v President of the Republic of South Africa & Others* 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 27 observed. See Dugard in Chaskalson *et al* (eds) note 69, 13-4 footnote 5.
[85] Article 54 VCLT: Termination of or withdrawal from a treaty under its provisions or by consent of the parties. 'The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all parties after consultation with the other contracting States.'
[86] Article 56 VCLT: Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. "1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. 2. A party shall give no less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.'

the Law of Treaties (VCLT).[87] What section 231(5) of the 1996 Constitution does is to effectively squelch the power of parliament to unilaterally relieve South Africa of its obligations under treaties entered into before 1994. South Africa's rejection of unilateralism in this regard is consistent with its commitment in the current constitutional-legal to be bound by the rules of IL. Should South Africa wish to withdraw from an international treaty, section 231(5) requires, conversely, that South Africa complies with IL rules governing the procedures for termination of treaties prescribed in the VCLT.

3.2.2 Section 232: Customary international law

Olivier points out that in pre-democratic South Africa, the position of CIL[88] and how it related to South African law 'had never been dealt with constitutionally'.[89] During that time, the application of CIL was governed exclusively by Roman-Dutch and English common law.[90] Although South African courts had accepted that CIL formed part of South African law,[91] the application of that body of law was subject to certain qualifications/exceptions, including the doctrines of precedent, parliamentary sovereignty, 'act of state', and prerogative power.[92] The cumulative effect of these exceptions to CIL was that the conduct of South Africa in the realm of foreign affairs was excluded from any form of judicial review and was unbound by some of the most basic principles of (customary) IL.

Section 232 constitutionalises the common law position as it existed in South Africa before 1994[93] by providing that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament' (the 'monist approach' to treaty

[87] Dugard in Chaskalson *et al* (eds) note 69,13-2 footnote 2.
[88] CIL is regarded as the 'common law' of public IL. See Dugard & Coutsoudis note 20, 62; Dugard in Chaskalson *et al* (eds) note 69, 13-6; *Al Bashir (SCA)* at para 74.
[89] Olivier (2002) note 16, 123.
[90] Ibid.
[91] Ibid, 124, 125, and 127; Dugard & Coutsoudis note 18, 62; Dugard in Chaskalson *et al* (eds) note 69, 13-6; Maluwa (1993-94) note 19, 30.
[92] Maluwa (1993-94) note 22, 32.
[93] Dugard & Coutsoudis note 18, 67; Dugard (1997) note 11, 79.

incorporation into municipal law). Notwithstanding the fact that section 232 constitutionalises the common law position as it existed in South Africa before 1994, it (section 232) nonetheless radically transforms the manner in which CIL was previously applied by South African courts.[94] First, in terms of section 232, CIL is no longer subject to subordinate legislation.[95] According to section 232, CIL may only be trumped by a constitutional or legislative provision that is clearly inconsistent with the customary rule in question.[96] However, since there is presumption that parliament will not legislate contrary to CIL,[97] a South African court faced with any legislation purporting to negate CIL would be enjoined to interpret that legislation in accordance with section 233 of the Constitution. Section 233 provides that: 'When interpreting any legislation, every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

Second, the recognition of CIL in section 232 seems to have dealt a blow to 'exclusionary rules' as they were applied by South African courts before 1994. For instance, it would appear that the doctrine of precedent (*stare decisis*) can no longer be invoked to prohibit the application of a new rule of CIL.[98] According to Moseneke,[99] the adoption of CIL as law in South Africa under section 232 signified South Africa's desire to turn its back on 'inward looking jingoism', that is, to stop pursuing a chiefly derogatory extreme patriotism, especially in the form of aggressive foreign policy.[100]

[94] Dugard (1997) note 11, 80.
[95] Ibid, 79; Dugard & Coutsoudis note 18, 67.
[96] Ibid. Moseneke note 2, 65.
[97] See L Wildhaber & S Breitenmoser 'The relationship between customary international law and municipal law in western European countries' (1988) *Abhandlungen*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 163, 166 (citation modified to suit *SALJ*).
[98] Dugard (1997) note 11, 80.
[99] Moseneke note 2, 65.
[100] See A Stevenson & M Waite (eds) *Concise Oxford English Dictionary 12th ed Luxury edition* (2011) for the meaning of the word 'jingoism'.

The next section discusses security matters relating to (a) use of force; (b) peacekeeping; (c) management of national security; (d) conduct of security services; and (e) state of national defence. The aim is to demonstrate how the 'sensitive' issues of national security, military operations, conduct of security services, and declarations of 'war' and peace - which are regarded, in the 'realist' world of global politics, as the mainstay of *realpolitik* - are *constitutionalised* and bound by IL norms under the current constitutional-legal order in South Africa.

3.2.3 Section 200(2): Use of force

In classical realist notions of international relations, the use or projection of military force/power is one of the key tools of foreign policy aimed at achieving national security.[101] In South Africa, security services (section 199), including pursuit of national security (section 198(c)) and use of military force (section 200(2)) are governed by the Constitution. Dugard states that section 200(2) gives recognition to the IL principle of *jus ad bellum*,[102] that is, the law on the legitimacy of the use of force.[103]

A quick glance at the provisions of section 200(2) suggests that the framers of the 1996 Constitution sought to redefine the role of the South African defence force in both the domestic and international contexts away from and in contradistinction to the role this defence force played in pre-democratic South Africa. Section 200(2) therefore is a direct rejection of apartheid's use of brutal military force to suppress the population and violate the principles of IL outlawing the waging of wars of aggression. In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South*

[101] G F Kennan 'Morality and foreign policy' (1985-86) 64 *Foreign Affairs* 205, 208; B C Schmidt 'The primacy of national security' in S Smith, A Hadfield, and T Dunne *Foreign Policy: Theories, Actors, Cases 2nd ed* (eds.) (2012) (hereinafter Smith *et al* (eds.)) 188, 188-202.
[102] Dugard (1997) note 11, 87.
[103] UN *International Legal Protection of Human Rights in Armed Conflict*, UN Human Rights Office of the High Commissioner (2011) HR/PUB/11/01, 5.

Africa, 1996 (the *Second Certification Judgment*),[104] the Constitutional Court held that '[i]nternational law still treats wars of aggression as unlawful.'[105]

Section 200(2) requires that when the South African defence force carries out its primary objective of protecting and defending the national security of its territory and citizens, it must do so in accordance with the Constitution and the principles of IL regulating the use of force. The principles of IL regulating the use of force – which are now part of *jus cogens* – are embodied in article 2(4) of the UN Charter,[106] which imposes an obligation on states to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations'. The exceptions to the general prohibition against the threat or use of force are: (a) self-defence (article 51 of the UN Charter); and (b) authorisation by the UNSC to use force pursuant to a Chapter VII resolution (article 42 of the UN Charter).[107]

Section 200(2) has fully constitutionalised the law of the UN regulating the use of force. In practical terms, section 200(2) requires that in carrying out its primary responsibility, South African defence force is under the legal obligation - which legal obligation derives from the Constitution (domestic law) and IL (article 2(4) of the UN Charter and CIL) – to refrain from threatening or using force against other countries or acting contrary to the purposes of the UN Charter, which are, among others: (a) maintaining international peace and security;[108] (b)

[104] 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC)
[105] The *Second Certification Judgement* at para 43.
[106] The *Second Certification Judgment* at paras 42 and 43; D Tladi & J Dugard 'The use of force by states' in Dugard *et al* (eds)(note 4) 730, 731; Dugard in Chaskalson *et al* (eds) note 69, 13-11; S Knuchel 'State immunity and the promise of jus cogens' (2011) 9(2) *Northwestern J Int'l Hum Rghts* 149, 153; B Simma 'NATO, the UN and the use of force: Legal aspects' (1999) 10 *EJIL* 1, 2-3; W J Fisher 'Force, international law, and American foreign policy' (2007) 19 *Fla J Int'l L* 39, 43; J A Green & F Grimal 'The threat of force as an action in self-defence under international law' (2011) 44 *Vanderbilt J Int'l L* 285, 286; J A Green 'Questioning the peremptory status of the prohibition of the use of force' (2010) 32(2) *Mich J Int'l L* 215, 215; C A Whytock 'From international law and international relations to law and world politics' forthcoming in W Thompson & K E Whittington (eds) *Oxford Research Encyclopaedia of Politics: The Politics of Law and the Judiciary* (2016), 11-12; A S Deeks 'Consent to the use of force and international law supremacy' (2013) 54(1) *Harv Int'l L J* 1, 13.
[107] See Dugard in Chaskalson *et al* (eds) note 69, 13-11.
[108] UN Charter, art 1(1).

developing friendly relations among nations;[109] and (c) achieving international cooperation in solving international problems.[110]

3.2.4 Section 201(2)(c): Peacekeeping and peace enforcement operations

Since the Korean War, South Africa had been denied the right and privilege to participate in peacekeeping and peace enforcement operations/missions.[111] When apartheid ended in the early 1990s, the framers sought to normalise South Africa's relations with the international community, integrate the country into the family of nations and fashion a new role for South Africa in global politics. Pursuant to this objective, the President of South Africa – in her/his capacity as head of the national executive – was given the authority/power to employ the South African defence force, among other responsibilities, 'in fulfilment of an international obligation'.[112] By providing that South Africa's defence force may be employed in fulfilment of an international obligation (for example, peacekeeping and peace enforcement operations), the framers sought to convey a message to South Africa's neighbours and the international community as a whole that, unlike the previous apartheid government which had violated the territorial sovereignty of neighbouring states,[113] the democratic government would ensure that the employment of the South African defence force outside the borders of the state would be controlled by a supreme Constitution and for peaceful purposes in the spirit of promoting international cooperation, peace-making and peace-building. The constitutional power to employ the South African defence force 'in fulfilment of an international obligation' essentially paved the way for South Africa to participate in peacekeeping and peace enforcement missions of the UN and/or the African Union (AU) in countries such as Sudan (Darfur) (under the hybrid

[109] Ibid, art 1(2).
[110] Ibid, art 1(3).
[111] Dugard (1997) note 11, 87. The Korean War was fought between June 15, 1950 – July 27, 1953.
[112] Constitution, s 201(2)(c).
[113] For example, occupation of Namibia, wars of attrition in Angola and Mozambique, and cross-border raids into Mozambique, Lesotho and Zambia.

UN and AU Mission in Darfur) (UNAMID),[114] the Democratic Republic of Congo (DRC) (MONUSCO),[115] and Burundi (ONUB).[116]

Some of the international obligations that flow from South Africa's participation in peacekeeping and peace enforcement missions include the following: (a) in the event of the need to use force, South African peacekeepers would be bound by the South African Constitution (wherever they may be employed outside the borders of the state) and the relevant UN law applicable in these circumstances; (b) the use of force in peacekeeping operations should strictly be within the mandate of the mission, that is, use of force should be justifiable on the basis of the authorisation by the UNSC pursuant to a Chapter VII resolution; and (c) South African peacekeepers would be obligated to observe international humanitarian law (IHL) and other human rights obligations at all times during their participation in these operations.[117]

[114] The UNAMID peacekeeping mission was established under resolution 1769 of 31 July 2007 by the UN Security Council, acting under Chapter VII of the Charter. This was after the UNSC had determined in resolution 1769, among other considerations, that 'the situation in Darfur, Sudan continues to constitute a threat to international peace and security'.

[115] The United Nations Organisation Stabilization Mission in the Democratic Republic of the Congo or MONUSCO, an acronym based on its French name ie Mission de l'Organisation des Nations Unie pour la stabilisation en République démocratique du Congo, is a UN peacekeeping force in the DRC which was established by the UNSC in resolutions 1279 (1999) and 1291 (2000) to monitor the peace process of the Second Congo war and other conflicts in the various parts of the DRC (Ituri, Kivu and Dongo). The mission was known as the United Nations Mission in the DRC or MONUC, an acronym of its French name ie Mission l'Organisation de Nations Unies en République démocratique du Congo until 2010.

[116] The United Nations Operation in Burundi (ONUB) was established by the UNSC in May 2004 under UNSC resolution 1545 (2004) to ensure the implementation of the Arusha Peace and Reconciliation Agreement signed on 28 August 2000.

[117] See UN *International Legal Protection of Human Rights in Armed Conflict*, UN Human Rights Office of the High Commissioner (2011) HR/PUB/11/01, 28 [hereinafter UN Report (2011)]. See also art 20 of the Convention on the Safety of United Nations and Associated Personnel, adopted by the UN General Assembly in 1994 which provides that '[n]othing in this Convention shall affect: (a) [t]he applicability of international humanitarian law and universally recognised standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards' (as quoted by the UN Report (2011), 28). The UN Report (2011) at 5 describes IHL as '[a] set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects people who are not or are no longer participating in the hostilities, and restricts the means and methods of warfare.'

3.2.5 Sections 198, 199 and 203: National security

One of the key goals of any country's foreign policy is to achieve national security.[118] The framers of both the 1993 and 1996 constitutions sought to change fundamentally the manner in which the apartheid government managed and pursued national security. The 1996 Constitution imports certain IL norms into the national security equation and thereby places important constitutional-legal obligations and restrictions on the South African government in national security matters relating to the following matters: (a) principles governing national security;[119] (b) the establishment, structuring and conduct of security services;[120] and (d) declaration of a state of national defence.[121] These are discussed in turn in the subsequent subsections.

3.2.6 Section 198: Principles governing national security

Section 198 enumerates some of the key principles governing national security in South Africa. They include: (a) the preclusion of 'any South African citizen from participating in armed conflict', at home or abroad without legal authorisation;[122] (b) pursuit of national security must be in compliance with the law, including IL;[123] and (c) national security is the responsibility of parliament and the executive.[124]

The objective of prohibiting any South African citizen from participating in armed conflict at home or abroad (section 198(b)) without legal and/or constitutional authorisation was aimed at precluding South Africans from participating in unlawful mercenary activities.

[118] See Schmidt in Smith *et al* (eds) note 101, 189 (and for a summary of the various interpretations of the concept of national security); See also Tomuschat note 69, 168.
[119] Constitution, s 198.
[120] Ibid, s 199.
[121] Ibid, s 203.
[122] Ibid, s 198(b).
[123] Ibid, s 198(c).
[124] Ibid, s 198(d).

Pursuant to this constitutional objective in section 198(b), parliament enacted the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act (Act No 27 of 2006) (the Mercenary Act). The Mercenary Act seeks, among other objectives, (a) to prohibit mercenary activity;[125] and (b) to grant South African courts extra-territorial jurisdiction with regard to certain offences.[126] In *Kaunda*, Sachs J (concurring) stated that mercenary activities aimed at overthrowing governments through military coups violate the constitutional principle in section 198(b) 'in a most profound way.'[127] He stated further that the South African government is under an obligation to combat mercenary activities and ensure that its territory is not used to plot these acts.[128]

Section 198(c) requires in essence that pursuit of national security, or conversely, the measures and approaches the South African government adopts to achieve national security must be consistent with legal prescripts, including IL. What this means is that when South Africa deals with or addresses issues that impact on its national security, whether these 'threats' emanate from within its borders (domestically) or from outside (internationally), South Africa should be guided and bound by law, including IL relating to, inter alia, protection of human rights, IHL, and use of force.

Section 198(d) allocates the power to manage national security to the political branches, that is, executive and legislative. By subjecting national security to the authority of parliament and the national executive, section 198(d) factors into the national security equation some of the principles of separation of powers which require, among other considerations: (a) that the executive be accountable; (b) that there must be public participation, transparency, and

[125] Mercenary Act, s 2.
[126] Ibid, s11.
[127] At para 272.
[128] Ibid.

openness in (foreign) policy-making; and (c) that the conduct and decisions of government in this important area of foreign policy (national security) be legally justifiable.

3.2.7 Section 199: Management and conduct of security services

Section 199(5) provides that: 'The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.' Section 199(6) requires that: 'No member of any security service may obey a manifestly illegal order.' Section 199(5) essentially constitutionalised the provisions of all four Geneva Conventions (of 1949) and the two Additional Protocols (of 1977), which oblige all states parties to disseminate the texts of the conventions and the protocols as widely as possible,[129] particularly to political leaders, the armed forces, and the civilian population so that all these sections of the population would be familiar with the international rules governing the conduct of security services at all times.[130] As far as the armed forces are concerned, states parties are under an obligation to ensure that they (armed forces) are familiarised, through programmes of instruction ('integration into doctrine') that will define their rights, duties and responsibilities under IL in peace and war. The primary aim of these programmes of instruction is not only for information dissemination but to develop awareness on the part of the armed forces of what is right and what is wrong under IL in situations of armed conflict, so that they (armed forces) should bring their conduct in line with this awareness in every situation.[131]

Section 199(6) also constitutionalised one of the key rules of the law of armed conflict, which is that superiors should only issue and subordinates should only follow orders which are

[129] See Article 47 of the first Geneva Convention; Article 48 of the second Geneva Convention; Article 127 of the third Geneva Convention; Article 144 of the fourth Geneva Convention; Article 83 para 1 of the first Additional Protocol; and Article 19 of the second Additional Protocol.
[130] A J Carswell (ed) *Handbook on International Rules Governing Military Operations*, ICRC (2013), 23 and 25.
[131] Ibid, 31ff.

in conformity with IL. Article 86 of Additional Protocol I (1977) to the Geneva Conventions (1949) provides in essence that a superior who issues an order contrary to IL exposes not only her/himself but also the subordinate obeying to the risk of being prosecuted.[132] It is important to note that 'the obligation to respect the law of armed conflict applies to members of the armed forces and to all other persons, whether military or civilian'.[133] States parties are obligated to pass laws which will provide effective penal sanctions[134] for persons committing, or ordering others to commit any of the grave breaches of IHL.[135]

South Africa is party to the Hague Regulations of 1907[136] and to the 1949 Geneva Conventions (GCs)[137] and the 1977 Additional Protocols.[138] South Africa incorporated all four GCs and the two additional Protocols into domestic law in terms of section 231(4) of the Constitution when it enacted the Implementation of the Geneva Conventions Act No. 8 of 2012 (the GC Act). The objectives of the GC Act are: (a) to enact the GCs into law so that they have binding effect domestically;[139] (b) to ensure South Africa's compliance with the Conventions (which now form part of CIL);[140] and (c) to prevent and punish breaches of the Conventions.[141]

3.2.8 Section 203: State of national defence

Section 203 gives President (as head of the national executive) power to declare a state of national defence. It is important to note that, unlike the position in pre-democratic South Africa

[132] *Al Bashir (SCA)* at para 59.
[133] Carswell Ibid Note 130, 286; J Henckaerts & L Doswald-Beek (eds) *Customary International Humanitarian Law (Study)*, ICRC, Vol 1: Rules (2009) identified Rule 154 (of the rules or laws of armed conflict) as providing that: '[E]very combatant has a duty to disobey a manifestly unlawful order' (at 563).
[134] First Geneva Convention, art 49.
[135] For grave breaches of IHL see First Geneva Convention, art 50; Second Geneva Convention, art 51; Third Geneva Convention, art 130; Fourth Geneva Convention, art 147; and Additional Protocol I, art 85.
[136] Dugard (1997) note 11, 86. Ratified on 10 March 1978 (International Committee of the Red Cross (ICRC))
[137] C Gevers, A Wallis & M du Plessis 'Sixty years in the making, better late than never? The implementation of the Geneva Conventions Act' (2012) *African Yearbook on Int'l Humanitarian L* 185, 185 (hereinafter Gevers *et al*). Ratified on 31 March 1952.
[138] Dugard (1997) note 11, 86. Both Additional Protocols I and II of 1977 ratified on 21 November 1995 (ICRC).
[139] GC Act, ss 2(a) and 4(1).
[140] Ibid, s 2(b); Gevers *et al* note 137, 188-189.
[141] Ibid, s 2(c).

(see for example, 1961 Constitution[142]), the 1996 Constitution does not give the President the power to declare war.[143] In the *Second Certification Judgment*, the Constitutional Court held that section 203(1) was consistent with South Africa's obligations under IL, specifically articles 2(4) (prohibition against the threat or use of force) and 51 (the right of self-defence) of the UN Charter.[144] The Constitutional Court reasoned that since IL confers a power on the state to defend itself through the use of force,[145] but not to declare war,[146] section 203(1) legitimately confers a power on the President to declare not war but a state of national defence.[147]

Since a declaration of a state of national defence by definition has or could have serious consequences for the nation as a whole (for example, deciding to pour national resources into a 'war effort' of 'self-defence' against a hostile enemy exposes citizens to risks and threats of war, destruction of property or loss of territory, and death), parliament (the representatives of the people) is called upon to play its oversight role in this regard by bringing the principles of accountability, transparency and openness to bear on the President's power to declare a state of national defence.[148] In this regard, section 203(1) imposes an obligation on the President, in the event of a declaration of a state of national defence, to inform parliament promptly and provide details on such issues as: (a) the reasons for the declaration;[149] (b) the place where the troops are deployed;[150] and (c) the number of people involved.[151] Section 203(3) essentially

[142] 1961 Constitution, s 7(3)(i).
[143] The *Second Certification Judgment* at para 44.
[144] Ibid.
[145] As per UN Charter, art 51.
[146] Ibid, art 2(4) prohibits this.
[147] It is interesting to note that similar terminology is used in the German Basic Law (art 115a-e), the Namibian Constitution (art 26), and the 1993 interim Constitution (s 225) (See the *Second Certification Judgment* at para 44 and footnotes therein.)
[148] Tomuschat note 69, 169 explains the rationale in Germany of subjecting the President's power to declare a state of national defence to parliamentary scrutiny thus: 'Military operations … unavoidably affect the nation as a whole. Therefore, it was salutary if any such operation had the full backing from its democratically elected representatives.' In the case of the US, see also J Lobel & G Loewenstein 'Emote control: The substitution of symbol for substance in foreign policy and international law' (2005) 80 *Chic-Kent L R* 1045, 1059.
[149] 1996 Constitution, s 203(1)(a).
[150] Ibid, s 203(1)(b).
[151] Ibid, s 203(1)(c).

gives parliament the ultimate power to approve a declaration of a state of national defence, and if and when parliament does not approve, the declaration lapses.

4. Implications of international law for South Africa's foreign policy

The pervasive entrenchment of IL in the 1996 Constitution has important implications for South Africa's foreign policy. First, the body of IL, particularly international human rights law (IHRL) and IHL, which developed in the aftermath of WWII - part of which was a direct response of the international community to apartheid[152] - was aimed primarily at restricting the sovereign powers of states, which powers were once thought to be absolute.[153] At first glance therefore, the current constitutional framework of South Africa recognises basic limitations on the conduct of the South African government, not only domestically, but also in the international context in the realm of foreign affairs. For instance, in *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others* (*Al Bashir (HC)*),[154] the Court stated that the principles of supremacy of the constitution[155] and the rule of law[156] trumped any foreign policy consideration that is inconsistent with the Constitution and South Africa's international obligations, particularly those obligations that arise from ratified international legal instruments.[157]

Second, and related to the preceding point above, by embracing IL and thereby subjecting itself to the rules and procedures of various international bodies – for example, reporting

[152] See R Slye 'International law, human rights beneficiaries, and South Africa: Some thoughts on the utility of international human rights law' (2001) 2(1) *Chic J Int'l L* 59, 61; Olivier (2002) note 16, 135ff; Dugard in Dugard *et al* (eds) note 4, 23.
[153] See Lobel (1985) note 50, 1135; A Slaughter & W Burke-White 'The future of international law is domestic (or, The European way of law)' (2006) 47 *Harv Int'l L J* 327, 327; Teitel note 1, 372; J Lobel 'Fundamental norms, international law, and the extraterritorial Constitution' (2011) *The Yale J Int'l L* 307, 335. (hereinafter Lobel (2011)).
[154] [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) (24 June 2015).
[155] 1996 Constitution, ss 1(c) and 2.
[156] Ibid, s 1(c).
[157] *Al Bashir (HC)* at para 37.1; See also *Al Bashir (SCA)* at paras 61, 64, 65 and 86.

requirements of the various UN bodies such as the Human Rights Committee – South African policy makers should now be aware that governmental decision making, in this case, in the realm of foreign affairs will increasingly occur beyond the (domestic) structures of the South African government.[158] In this regard, it is clear that some of the foreign affairs powers will be exercised 'by supranational bodies of regional and global reach'[159] and that 'governmental policy-making [will] regularly [be] formulated through transnational arrangements'.[160] The practical implication of this phenomenon is that South Africa will be precluded from 'picking and choosing' obligations, including those international obligations it has ratified and incorporated into domestic law, depending on its convenience or expediency.[161]

Third, public IL (PIL) has now been accorded its rightful place/status and role in South African constitutional law.[162] Under the current constitutional-legal order therefore, IL is no longer of pure academic interest to South African international lawyers,[163] as the 'South African government [is now] constitutionally accountable for the exercise of its powers within the parameters of international law'.[164] To this end, South African foreign policy-makers should realise that the obligation to observe and to be bound by a ROIL cannot be reduced to a mere choice between legal obligation on the one hand and national interest on the other,[165] as

[158] M Loughlin 'What is constitutionalisation?' in P Dobner & M Loughlin eds *The Twilight of Constitutionalism?* (2010) 47, 63.
[159] Ibid. See also T Cottier & M Hertig 'The prospects of 20th century constitutionalism' in A von Bogdandy & R Wolfrum (eds) (2007) 7 *Max Planck Yearbook of UN L* 261, 310. For example, the 2002 Southern African Customs Union (SACU) Agreement (among South Africa, Botswana, Namibia, Lesotho and Eswatini) prohibits any member of SACU from entering into trade agreements with third countries without the concurrence of the other members.
[160] Loughlin note 158, 63; Slaughter & Burke-White note 153, 328; E V Rostow 'American foreign policy and international law' (1956-57) *Louisiana L R* 552, 552. For example, the targets set by the international community to reduce emissions of greenhouse gases under the current climate change 'agreements' has compelled South African policy makers to enact legislation (for example, Carbon Tax Act No. 15 of 2019) and design policies (taxation) aimed at compelling citizens and companies to avoid activities and practices that contribute to greenhouse gas emissions.
[161] *Democratic Alliance* at para 15; *SADC Tribunal case* at paras 90 and 91.
[162] Dugard in Chaskalson *et al* (eds) note 69, 13-1; M Olivier 'Interpretation of the constitutional provisions relating to international law; (2003) 6(2) *PER/PELJ* 26, 26 (hereinafter Olivier (2003b)).
[163] Olivier (1993-94) note 62, 12.
[164] Ibid. *Glenister v President of the Republic of South Africa & Others (Glenister II)* [2011] ZACC 6; 2011 (3) SA 347 at para 97; *Al Bashir (SCA)* at para 61.
[165] Henkin note 77, 6.

the South African government sought to do in the case, for example, of Al Bashir where the government argued, interestingly enough, that compliance with the provisions of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 and the Rome Statute of the International Criminal Court (ICC) (that is, to arrest sitting heads of state who are wanted by the ICC for genocide, war crimes, and crimes against humanity) would harm South Africa's relations with other AU member countries[166] and hamper the ability of the South African government to play a constructive role in peace-making and peace-building on the African continent.[167]

Lastly, notwithstanding the proliferation of IL post-WWII and South Africa's 'incorporation' (in a broader sense) of some of the fundamental principles, norms and values of PIL into its constitutional fabric, this country is/will be expected to conduct its foreign policy (guided and bound by *moralpolitik* of IL) in a world which is still dominated by power politics and where issues of power, national security and national interest loom large and hold sway (*realpolitik*). This is as a result of factors that continue to hamper global attempts to extent the ROL to the international level, identified by Ferreira & Ferréira-Snyman,[168] with reference to the work of Tamanaha.[169] These factors include: (a) '[t]he influence of power and politics on international law'; (b) '[t]he piecemeal creation of international law through treaties'; and (c) '[t]he primary aim of international law to keep peace between sovereign nations, which is more advanced by compromise than by strict adherence to international legal rules'. When South Africa interacts with foreign powers whose foreign policies are backed by tools of persuasion based on sheer military and/or economic power, South Africa is likely to find itself caught

[166] *Al Bashir (HC)* at para 33.
[167] See the submissions of South Africa in the Pre-trial Chamber II, Situation in Darfur, Sudan: *The Prosecutor v Omar Hassan Ahmed Al-Bashir* (Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir) ICC-02/05-01/09, 6 July 2017 at para 40.
[168] G Ferreira & A Ferréira-Snyman 'The constitutionalisation of public international law and the creation of an international rule of law: Taking stock' (2008) 33 *SAYIL* 147, 161.
[169] B Tamanaha *On the Rule of Law: History, Politics, Theory* (2004) 132-133.

between a rock and a hard place, where its (South Africa) *moralpolitik* (persuasion based on 'soft' power and appeal to legal norms and principles) would be brought face to face with *realpolitik* (persuasion based on 'hard' power) of its stronger partners.[170] This phenomenon may lead to unpalatable situations where South Africa may be compelled to sacrifice constitutional-legal obligations at the altar of political expediency in the interest of the stronger power.[171] When South Africa's foreign policy – which is supposed to be guided and bound by principles of IL – is seen to be malleable in the face of 'hard politics', the 'ethical' foundations and legitimacy of that foreign policy will be called into serious doubt.

5. Conclusion

In the aftermath of WWII, the development of IL has engendered a phenomenon where this body of law has had a 'controlling relevance' on how foreign policy in many countries, including South Africa is conducted. While before 1945, foreign policy in many countries was untouched by IL norms – given the strong notions of state sovereignty and territorial integrity which permeated global politics and international relations at the time – after the end of WWII and the Cold War, IL has found new currency and is increasingly impacting on foreign policy and relations between and among nations.

[170] A good example of this was South Africa's 'denial' of an entry visa to the Dalai Lama in 2009 at the behest of China: *Buthelezi & Another v Minister of Home Affairs & Others* [2012] ZAWCHC 3 and on appeal: *Buthelezi & Another v Minister of Home Affairs & Others* [2012] ZASCA 174; 2013 (3) SA 325 (SCA). In its papers in both the Cape High Court and the SCA, the South African government had argued, inter alia, that one of the reasons for 'refusing' entry to His Holiness the Dalai Lama (notwithstanding that he had been granted entry visa on previous occasions) was ostensibly because of 'pressure' from China and the fear that if the Dalai Lama was granted permission to enter, that would anger Beijing and put the economic relations between South Africa and China in great jeopardy (SCA judgment at para 12).

[171] The matters of the Dalai Lama; the 'rendition' of a 'terror' suspect (Khalfan Khamis Mohamed) to the US (a country with a death penalty) (*Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening*) 2001 (3) SA 893 (CC); failure/refusal to arrest President Al Bashir who is wanted by the ICC (*Al Bashir (HC)* and *Al Bashir (SCA)*); decision to withdraw from the Rome Statute of the ICC (*Democratic Alliance*); and the decision to disband the SADC Tribunal (*SADC Tribunal case*), are cases in point.

In an attempt to demonstrate how IL has constitutionalised South Africa's foreign policy, this chapter discussed how doctrines and principles such as 'act of state', *stare decisis*, and 'one voice' principle had, in pre-democratic South Africa, placed foreign policy beyond the reach of constitutional-legal norms such as political accountability and respect for the ROIL. However, by recognising and giving status to and defining the role of IL in South Africa's constitutional-legal architecture after 1993, the South African Constitution has effectively brought the conduct of foreign policy within the discipline of IL norms and other tenets of constitutionalism (such as accountability, rationality, justification, and transparency). In this regard, South African courts have repeatedly stated that one of the important obligations that flow from South Africa's acceptance of IL is that this country is obliged, at all times, at home and abroad, to respect and abide by its commitments under various international legal instruments and treaties, particularly those it has ratified and incorporated into domestic law. Failure to do so would, as Mogoeng CJ cautioned in *SADC Tribunal case*, undermine the rule of law, the principles of justice and sound diplomatic relations.[172]

The pervasive entrenchment of IL in the Constitution has far-reaching implications for the conduct of South Africa's foreign policy. For instance, the conduct of foreign policy, particularly in those matters covered by IL can no longer be regarded as 'ordinary politics' in the world of *realpolitik*. The principles of PIL which form part of South African constitutional law now place basic limitations on the exercise of foreign affairs powers relating to, for example, the ability of the executive to implement a bilateral treaty (for example, the South Africa-Russia nuclear deal[173]) and the ability of the executive to withdraw from a binding international treaty at the behest of foreign interests (for example, the Rome Statute of the

[172] *SADC Tribunal case* at para 90.
[173] *Earthlife Africa-Johannesburg & Others v Minister of Energy & Others* [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC)

ICC[174] and the SADC Treaty[175]). It is also important to note that by virtue of its membership to various international bodies, decision-making in the realm of foreign policy will increasingly occur beyond the structures of the South African government. The next (last) chapter looks back at the preceding seven chapters and identifies what could, arguably, be regarded as emerging principles of South African foreign affairs law under the current constitutional-legal order.

[174] *Democratic Alliance.*
[175] *SADC Tribunal case.*

CHAPTER EIGHT

CONCLUSION

1. Overview and research findings

The advent of a constitutional democracy under the rule of law in South Africa in 1994 was a 'legal watershed'.[1] With the conclusion of multiparty talks and the adoption of the interim Constitution, South Africa moved away from a system of law and administration based on parliamentary sovereignty to one based on constitutional supremacy where, in the latter system, the canons of political accountability, transparency, legality, rationality, and non-arbitrariness in decision-making (to mention but a few) became the leitmotif of the exercise of all public power.

The central proposition put forward in this study was that, the advent of constitutional democracy - with all the trappings of modern liberal-legal constitutionalism such as supremacy of the constitution (SOC), separation of powers (SOP), judicial review (JR), rule of law (ROL), human rights (HRs), and international law (IL) - marked a radical shift from the old, pre-democratic, common law-based dispensation where foreign policy was not justiciable, to a new dispensation under a supreme constitution where foreign policy, for the first time in South African history, became subject to and disciplined by constitutional norms. In light of this proposition, the key question posed in this study was: How should foreign policy be conducted in South Africa which has become a constitutional democracy under the rule of law? Linked to this main inquiry were the following questions: Are foreign affairs justiciable? Are there any norms, values, principles and standards in the Constitution that could arguably be regarded as

[1] Chaskalson CJ in *Pharmaceutical Manufacturers Association of South Africa In Re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) at para 45.

providing the necessary guidelines which enjoin the South African government to act in accordance with a certain normative order in the conduct of its relations with other countries? If so, what are these norms, values, principles and standards? What are the implications of basing foreign policy on constitutional norms?

In answering all these questions, the key argument - and the only argument - this study makes is simply this: South Africa's foreign policy since 1994 is justiciable and bound by constitutional norms. In an attempt to prove the validity of this proposition, the study chose five (there are many others) tenets of South Africa's constitutional democracy, that is, SOC, SOP, ROL, HRs, and (respect for the rule of) IL, and used them as 'tools of analysis' to demonstrate how these 'principles' – under the current constitutional-legal order – now bind the exercise of public power in the realm of foreign affairs. The approach the study took entailed, essentially, a 'comparative analysis' of how foreign policy was conducted in the pre-democratic era and how it is (or ought to be) conducted under the current constitutional-legal order after the end of apartheid. Specifically, the study examined how principles such as 'act of state', parliamentary sovereignty, *stare decisis*, and executive prerogative were interpreted and applied to foreign policy matters (before 1994) and how that interpretation and application had effectively excluded the courts from adjudicating foreign policy controversies. And because the courts were excluded from foreign affairs in the context of a system of government based on racial discrimination (and other violations of HRs and IL), the conduct of foreign policy in pre-democratic South Africa was insulated from the discipline of constitutional norms such as political accountability, legality and respect for the rule of IL (ROIL). The study has demonstrated how the conduct of foreign policy was radically altered when South Africa became a constitutional democracy under the rule of law. Specifically, the study showed how principles such as SOC, ROL, JR, and respect for the ROIL have brought the entire gamut of the exercise of public power, including public power in the field of foreign relations under the

discipline of constitutional norms such as political accountability, transparency and legal justification. The study has also demonstrated how foreign policy is now open to participation by the courts and the important role these institutions play in 'supervising' and/or 'controlling' the exercise of foreign policy powers by the political branches.

When the interim Constitution (and later the 1996 Constitution) was adopted, South African courts experienced the explosion of litigation and were confronted with matters that had everything to do with how the South African government designed, managed and conducted its foreign policy. In these cases, applicants approached the courts essentially challenging the very legitimacy of foreign policy decisions taken by government. The fact that after 1994 South African courts could review the foreign policy decisions of government was novel and revolutionary. From 1994, when South African courts were constitutionally empowered - or more aptly, when the power of constitutional-judicial review was 'imposed' on them[2] - to adjudicate the exercise of all public power, including public power in foreign policy matters, they did so in the context where no precedent existed in South African legal history[3] suggesting that this area of governmental responsibility (foreign affairs) was ever amenable to judicial scrutiny.[4] In adjudicating foreign policy cases, the courts have had to rely, in most instances, on the guidance provided by IL and comparative foreign law.[5] Some of the matters that were brought to court, where applicants challenged the legality of the South African government's decisions and conduct, include controversies in the following areas: (a) *immigration*: the decision to 'deny' the Dalai Lama an entry visa in the context of the 'sensitive'

[2] See Constitution, ss 165, 167(4)(e), 167(5), 172(2)(a).
[3] R J Goldstone 'The first years of the South African Constitutional Court' (2008) 42 *Supreme Court L R (2d)* 25, 30; J Kriegler 'The Constitutional Court of South Africa' (2003) 36 *Cornell Int'l L J* 361, 363.
[4] See *Van Deventer v Hancke & Mossop* 1903 TS 401 at 410; *Ex parte Belli* 1914 CPD 742 at 747; *Vereeniging Municipality v Vereeniging Estates Ltd* 1919 TPD 159 at 163; *Verein fur Schutzgebietsanleihen EV v Conradie NO* 1937 AD 113 at 146-7; and *Haak v Minister of External Affairs* 1942 AD 318 at 326.
[5] See *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 35 (per Chaskalson P)(as he then was); Goldstone note 3, 30; J Dugard 'The influence of the Universal Declaration as law' (2009) 24(1) *Maryland J Int'l L* 85, 88.

South Africa-China relations;[6] (b) *international security and global efforts to fight 'terrorism'*: the decision to 'rendition' a 'terror suspect' (Khalfan Khamis Mohamed (a Tanzanian national)) to the US where he faced the real possibility of a death sentence for capital crimes he was charged with;[7] (c) *humanitarian intervention and prosecution of international crimes*: the decision to allow then President Al Bashir (of Sudan) to leave the country when the court had in fact ordered that he not be allowed to exit pending the service of the International Criminal Court (ICC) warrants on him;[8] (d) *treaty-making*: the decision to withdraw from the ICC without obtaining prior parliamentary approval;[9] (e) *diplomatic protection*: the 'refusal decision' to provide diplomatic protection to South African citizens accused of mercenary activities and faced the real potential of an unfair trial and possible capital punishment in a foreign country;[10] (f) *expropriation of land without compensation in a foreign country*: neglect to provide diplomatic protection and assistance to a South African national in Zimbabwe whose assets (including farms) were forcefully expropriated and without compensation; [11] (g) *immunities and privileges*: the decision to grant Mrs Grace Mugabe (the spouse of then President Robert Mugabe of Zimbabwe) immunity (from prosecution) in the context where she was accused of having committed a crime in South Africa; [12] (h) *diplomatic relations,*

[6] *Buthelezi & Another v Minister of Home Affairs & Others* [2012] ZAWCHC 3 and on appeal: *Buthelezi & Another v Minister of Home Affairs & Others* (the *Dalai Lama* case) [2012] ZASCA 174; 2013 (3) SA 325 (SCA).
[7] *Mohamed v President of the Republic of South Africa & Others* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC); *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & Another* [2014] ZACC 30; 2015 (1) SA315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC).
[8] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others* (*Al Bashir (HC)*) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP)(24 June 2015); *Minister of Justice and Constitutional Development & Others v Southern Africa Litigation Centre & Others* [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (*Al Bashir (SCA)*).
[9] *Democratic Alliance v Minister of International Relations and Cooperation (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 63; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP).
[10] *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC).
[11] *The Government of the Republic of South Africa & Others v Von Abo* [2011] ZASCA 65; *Government of the Republic of Zimbabwe v Fick & Others* [2013] ZACC 22; 2013 (5) SA 325 (CC).
[12] *Engels v Government of the Republic of South Africa & Another* [2017] ZAGPPHC 667 (the *Grace Mugabe* case).

cooperation and implementation of bilateral treaties: the decision to set in motion the implementation of the proposed South Africa-Russia nuclear deal without proper public consultation;[13] (i) *tabling of international treaties before parliament*: the decision to table before parliament the South Africa-US and the South Africa-South Korea cooperation agreements in the field of nuclear energy;[14] and (j) *regional integration and cooperation*: the decision to acquiesce in the disbandment of the Southern African Development Community (SADC) Tribunal at the behest of then President Mugabe who was unhappy about the Tribunal's decision against the government of Zimbabwe.[15]

The controversies in the abovementioned cases would never have seen the light of day in pre-democratic South Africa, precisely because they would have been characterised as matters relating to the conduct of foreign policy, an exclusive terrain of the executive and forbidden territory for the courts. However, in the post-apartheid constitutional-legal order, South African courts have not shied away from exercising jurisdiction over these foreign policy controversies. In fact, in some of these cases, the conduct of the South African government was severely criticised by the courts and declared, among other findings: (a) 'unlawful';[16] (b) 'simply risible' and 'disgraceful conduct';[17] (c) unacceptable behaviour;[18] (d) 'error of law';[19] (e) 'unconstitutional and unlawful';[20] (f) inconsistent with the underlying values, norms and principles of the Constitution;[21] (g) inconsistent with the government's obligation to protect

[13] *Earthlife Africa-Johannesburg & Others v Minister of Energy & Others* [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (*Earthlife* or *South Africa-Russia nuclear deal* case).
[14] *Earthlife.*
[15] *Law Society of South Africa & Others v President of the Republic of South Africa & Others* (*SADC Tribunal case*) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC); *Fick* (note 11).
[16] *Dalai Lama* at paras 19 and 20; *Earthlife* at paras 58 and 59.
[17] *Al Bashir (SCA)* at para 8.
[18] *Von Abo* at para 39.
[19] *Grace Mugabe* at para 42.
[20] Ibid at para 43.
[21] *Mohamed* at para 58.

HRs;[22] (h) procedurally unfair and in breach of the law;[23] (i) 'irrational';[24] (j) unconstitutional and in violation of the principle of legality;[25] and (k) 'violated [constitutional norms] of open, transparent and accountable government'.[26] In *Mohamed* for example, and responding to government's violation of Mohamed's constitutional rights, the Constitutional Court stated that the basic fundamentals of South Africa's constitutional order are undermined rather than reinforced when government acts contrary to the law[27] and that by breaking the law, government breeds contempt for the law and invites anarchy.[28] In other foreign policy cases, the courts underscored the need for the South African government to observe scrupulously its obligations under the Constitution and the law. For instance, South African courts have stated that in the design, management and conduct of its foreign policy, the South African government: (a) is bound by its obligations under IL;[29] (b) must respect HRs and act in accordance therewith;[30] (c) must act lawfully at all times;[31] (d) is under a constitutional obligation to act in accordance with its international agreements particularly in the face of potential violations of the rights protected in those agreements;[32] (e) must protect HRs;[33] (f) must abide by its treaty obligations and ensure a 'public administration that abides by its national and international obligations';[34] (f) was duty-bound to act in accordance with its

[22] Ibid.
[23] *Earthlife* at para 46.
[24] Ibid at paras 47 and 50.
[25] Ibid at para 59.
[26] Ibid at para 58.
[27] *Mohamed* at para 68.
[28] Ibid at para 69 quoting the words of Brandeis J in the US case of *Olmstead et al v US* 277 US 438 (1928) at 485.
[29] *Al Bashir (SCA)* case at para 61.
[30] *Von Abo* at para 39; *Mohamed* at paras 48 and 58.
[31] *Mohamed* at para 68.
[32] *Fick* at para 59.
[33] *Mohamed* at paras 58 and 61.
[34] *Southern Africa Litigation Centre v National Director of Public Prosecutions & Others* 2012 (10) BCLR 1089 (GNP) at para 13.4.

obligations under the SADC Treaty;[35] and (g) must do everything possible to protect the integrity of regional institutions (such as SADC Tribunal).[36]

Notwithstanding the fact that South African courts have pronounced themselves in the manner they did in the abovementioned foreign policy cases, it is important to note that the courts have also been alive to the fact that foreign policy matters are significantly different from domestic matters and that there are indeed certain 'prudential characteristics' of foreign affairs which should always be taken into account when courts are called upon to decide controversies in the realm of foreign policy. Some of the 'prudential characteristics' of foreign affairs which South African courts have identified and which must be taken into account include the following: (a) that foreign affairs is an area of governmental responsibility in which courts must exercise discretion and allow the executive to lead, precisely because the latter branch is better placed to deal with foreign policy matters than the courts;[37] (b) that foreign policy matters are essentially the function of the Executive;[38] (c) that courts are not well-equipped to deal with the day-to-day nitty-gritties of foreign policy decision-making processes;[39] (d) that diplomatic negotiations are a very complex, delicate and sensitive area in which diplomats, and not judges, have the means and resources to make decisions;[40] (e) that the courts must respect the broad discretion government has in foreign policy matters;[41] and (f) that in the conduct of foreign policy, states are required to respect and adhere to the rules of international comity such as non-interference in the internal affairs of other states.[42] It is important to note in relation to how South African courts have dealt with 'prudential

[35] *Fick* at para 34.
[36] Ibid at para 59.
[37] Chaskalson CJ in *Kaunda* at para 67.
[38] Ibid at para 77; Ngcobo J *Kaunda* at para 172.
[39] Chaskalson CJ in *Kaunda* at para 77; Ngcobo J in *Kaunda* at para 172.
[40] Chaskalson CJ in *Kaunda* at para 77.
[41] Ibid at para 81; Ngcobo J in *Kaunda* at para 172; Sachs J in *Kaunda* at para 275.
[42] Ngcobo J in *Kaunda* at para 172; O'Regan J in *Kaunda* at para 229; *National Commissioner of the South African Police Service (NCOSAPS) v Southern African Human Rights Litigation Centre & Another* [2014] ZACC 30 at para 61. For examples of other 'prudential characteristics' of foreign affairs see Snyders J in *Von Abo* at paras 21, 26 and 36; *Al Bashir (HC)* at para 34; *NCOSAPS* at paras 61, 62, 63 and 74.

characteristics' of foreign affairs that, unlike their counterparts in the UK[43] and US,[44] South African courts do not employ these characteristics of foreign affairs - important as they are - as justification for declining jurisdiction to hear cases implicating the conduct of foreign policy.[45]

However, and notwithstanding the 'prudential characteristics' of foreign affairs, South African courts have been clear and unambiguous about the norms, values and principles which must nonetheless govern the exercise of all public power, including the exercise of public power in the realm of foreign affairs. They include the following: (a) that judicial control of public power, including foreign affairs powers through JR is a constitutional matter[46] and therefore necessarily 'subject to constitutional control';'[47] (b) that no state functionary, including foreign policy-makers and implementers may act outside the parameters of the Constitution and the law;[48] and (c) that if government declines to deal with a legitimate request, such as diplomatic protection, or deals with it in bad faith or irrationally, a court could intervene and order government to deal with the matter properly.[49]

It is, therefore, fair to suggest that, since 1994, there appears to be emerging, from South African courts, what could, arguably, be regarded as 'principles of South African constitutional foreign affairs law', which principles are beginning to crystallise into some 'established' jurisprudence on how to deal with foreign policy in the South African constitutional state. In addition to the principles from case law, and as contended in this study, there are also principles

[43] See *Shergill v Khaira* [2014] UKSC 33; [2014] 3 WLR 1 at para 41; *Serdar Mohammed & Others v Secretary of State for Defence* [2015] EWCA Civ 843 at para 377.
[44] See *United States v Curtiss-Wright Export Corp.,* 299 US 304 (1936); *Baker v Carr* 369 US 186 (1962); *United States v Pink* 315 US 203 (1942); *United States v Belmont* 301 US 324 (1937); *Underhill v Hernandez* 168 US 250 (1897); *Oetjen v Central Leather Co.* 246 US 297 (1918); *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964); *W S Kirkpatrick & Co. Inc v Environmental Tectonics Corporation International* 493 US 400 (1990).
[45] For a discussion of how 'prudential characteristics' of foreign affairs are applied by UK and US courts in foreign policy cases, see chapter two of this thesis, subsections 3.1.4 and 3.2.4, respectively.
[46] Chaskalson CJ in *Pharmaceutical Manufacturers Association* at para 33.
[47] Ibid at para 78.
[48] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58.
[49] Chaskalson CJ in *Kaunda* at para 80.

of South African foreign affairs law that are derived from the Constitution. The principles from the Constitution and case law are set out in the subsequent parts of this chapter.

2. Principles of South African foreign affairs law derived from the Constitution

2.1 Power to conduct foreign relations is a constitutional grant

The first constitutional principle which governs the conduct of foreign policy in South Africa could be stated as follows: the general power to conduct foreign relations derives from the Constitution, which is the supreme law.[50] In addition to the general power to conduct foreign relations, the Constitution assigns specific foreign affairs powers to various branches of the national government[51] and imposes certain norms, rules and guidelines on how specific foreign policy matters should be dealt with.[52]

The fact that power to conduct foreign relations is derived from the Constitution makes the exercise of that power a 'constitutional matter' within the proper meaning of section 167(3)(a) of the Constitution. And since the exercise of all public power is subject to constitutional-judicial control,[53] this means that the conduct of foreign policy in South Africa is bound to be consistent with the canons of political accountability, rationality, legal justification, and lawfulness (to mention but a few).

[50] For a detailed discussion of this point, see chapter four, subsection 5.2 of this thesis.
[51] For a discussion of specific foreign affairs powers granted by the Constitution to parliament and executive, see chapter four, subsections 4.1 and 4.2 of this thesis, respectively.
[52] For a discussion of the kind of norms that the Constitution imposes on state functionaries and policy-makers and implementers in general (including in the foreign policy area), see chapter three, section 3 of this thesis.
[53] *Pharmaceutical Manufacturers Association* at para 33.

2.2 South Africa should speak with 'one voice' or act as 'single entity' in foreign relations

The second principle of South African foreign affairs law derived from the Constitution requires that in the conduct of foreign relations, the South African government should speak with 'one voice' and/or act as a 'single entity', and that in order to fulfil this responsibility, power to conduct foreign relations is allocated to the national government.[54] It is important to note however that, the 'one voice' or 'single entity' principle in the South African Constitution does not produce the same consequences which this principle produces in jurisdictions such as the UK and US, where, in the latter jurisdictions, this principle is employed by the courts as an 'exclusionary rule' ousting the jurisdiction of the courts in foreign policy matters.[55] In *Democratic Alliance v Minister of International Relations and Cooperation*,[56] while declaring government's decision to withdraw from the Rome Statute of the ICC without first obtaining parliamentary approval as unconstitutional, the Court underscored the need for South Africa to speak with one voice to the international community (in that case, to the UN, the ICC and to member states to the Rome Statute) in order to avoid embarrassment if/when it takes such decisions (as withdrawing from the Rome Statute of the ICC).[57]

2.3 Foreign policy powers are subject to constitutional judicial review

The third principle of South African constitutional foreign affairs law suggests that foreign policy powers are subject to the courts' power of JR. Under the current constitutional-legal order, South African courts play an important role in foreign policy matters (that is, in controlling the exercise of foreign policy powers) in that they (the courts) have the power,

[54] For adetailed discussion of this point, see chapter four, subsection 5.2 of this thesis.
[55] For a discussion of how UK and US courts apply the 'one voice' principle in foreign policy matters, see chapter two of this thesis, subsections 3.1.2 and 3.2.3, respectively.
[56] Note 9.
[57] *Democratic Alliance* at para 70. For a fuller discussion of the constitutional origins of the 'one voice' principle in South African foreign affairs law, see chapter four, subsection 5.2.3 of this thesis.

among others, to strike down executive and legislative acts performed in the realm of foreign policy if/when those acts are found to be unconstitutional,[58] unlawful, irrational, and inconsistent with the principle of legality.[59]

2.4 Foreign policy is bound by 'foundational values'

The fourth principle of South African constitutional foreign affairs law requires that foreign policy be bound by 'foundational values' such as SOC,[60] ROL[61] and HRs.[62] The Constitutional Court has defined 'foundational values' enumerated in section 1 of the Constitution as central to South Africa's constitutional democracy and to the interpretation of the Constitution as a whole,[63] and that these values '[s]et positive standards with which *all* law must comply in order to be valid'.[64]

2.5 Foreign policy is subject to the doctrine of separation of powers

The fifth principle of South African constitutional foreign affairs law subjects foreign policy to the requirements and purposes of the doctrine of SOP. Unlike in pre-democratic South Africa where SOP was used as justification for excluding the courts from participating in foreign policy matters, under the current constitutional-legal order, this principle no longer creates an

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[58] See ss 165; 167(4); 172(1)((a), (b); 172(2)(a), (c), and (d).
[59] For a discussion of how South African courts have explained the implications of SOP and their role in (foreign) policy matters (courtesy of constitutional-JR), see chapter four, section 6, of this thesis. See also chapter three, subsection 3.6 of this thesis discussing the exclusive powers granted by the Constitution to the Constitutional Court to enforce supremacy of the constitution.
[60] 1996 Constitution, s 1(c).
[61] Ibid, s 1(c).
[62] Ibid, s 1(a).
[63] *United Democratic Movement (UDM) v President of the Republic of South Africa* 2002 (11) BCLR 1179 (CC); [2002] ZACC 21; 2003 (1) SA 495 (CC) at para 19; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* [2004] ZACC 10; 2004 (5) BCLR 445 (CC); 2005 (3) SA 280 (CC) at para 21; *Economic Freedom Fighters (EFF) v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) at para 1.
[64] *UDM* at para 19. Emphasis added. See also *NICRO* at para 21. The implications and significance of founding values (s 1 of the Constitution) for the exercise of public power in South Africa is discussed in chapter three (SOC), subsection 3.2; chapter five (ROL), subsection 4.1; and chapter six (HRs), subsection 4.2, of this thesis.

unbridgeable chasm between the political branches on the one hand and the judiciary on the other as far as foreign policy is concerned. In the South African *rechtsstaat*, the manner in which SOP is provided for in the grand scheme of the distribution of the sum total of national power requires that the exercise of all public power, including public power in the realm of foreign policy be imbued with canons of accountability, non-arbitrariness in decision-making, lawfulness, and the culture of justification (to mention but a few). And in order to ensure that the executive is accountable and acts in accordance with the Constitution and the law in the conduct of foreign policy, parliament and the courts play an important role of checking and 'controlling' the exercise of that power.[65]

2.6 Foreign policy is subject to the rule of international law

The sixth principle of South African constitutional foreign affairs law requires South African foreign policy to be consistent with the precepts of IL. In 1994, South Africa recognised public international law (PIL) for the first time in its constitutional law history and gave status to that body of law and defined its role in the new post-apartheid constitutional-legal order.[66] There are many foreign policy areas that are enumerated in the Constitution, which foreign policy areas are governed and bound by the precepts of IL. These include: (a) the interpretation of the Bill of Rights (BORs);[67] (b) the declaration of a state of emergency;[68] (c) the derogation of rights;[69] (d) international armed conflict and treatment of prisoners-of-war;[70] (e) management

[65] Chapter four, section 6 of this thesis discusses how South African courts have explained the meaning and implications of SOP principle and their (the courts) role in (foreign) policy matters under that principle.
[66] J Dugard 'International law and the South African Constitution' (1997) 1 *EJIL* 77, 77; J Dugard 'Public International Law' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, & S Woolman (eds) *Constitutional Law of South Africa* (1998)(Revision Service 2)(Chapter 13), 13-1, 13-1; M E Olivier 'International law in South African municipal law: Human rights procedure, policy and practice' Unpublished LLD Thesis (2002) UNISA , 175; M Olivier 'Interpretation of the constitutional provisions relating to international law' (2003) 6(2) *PER/PELJ* 1, 1; M E Olivier 'The status of international law in South African municipal law: section 231 of the 1993 Constitution' (1993-94) 19 *SAYIL* 1, 1.
[67] 1996 Constitution, s 39(1)(b).
[68] Ibid, s 37(4)(b)(i).
[69] Ibid, s 37(5).
[70] Ibid, s 37(8).

of national security;[71] (f) training and instruction of armed forces;[72] (g) use of force;[73] and (h) incorporation and application of customary international law (CIL).[74] South African foreign policy is also bound by the provisions of all those international agreements which South Africa has signed (in terms of section 231(1) of the Constitution), and which have been approved by parliament (in terms of section 231(2)), and incorporated into domestic law (under section 231(4)).[75]

3. Principles of South African foreign affairs law emerging from case law

It is worth-noting that in a number of foreign policy cases that have come before the courts, counsel (usually for the state) tend(ed) to raise arguments and/or defences which, knowingly or unknowingly, seek/sought to oust the jurisdiction of the courts in these (foreign policy) cases and/or compel the court to defer to the executive for a final decision, basing their arguments on, for example: (a) separation of powers;[76] (b) 'act of state' doctrine and the 'doctrine of the non-justiciability of acts of state';[77] (c) US-style doctrine of sovereign immunity (which precludes the court from telling government what to do since the decision to recognise immunities is regarded as an executive function (SOP));[78] and (d) US-style 'political question'

[71] Ibid, s 198(c).
[72] Ibid, s 199(5).
[73] Ibid, s 200(2).
[74] Ibid, s 232.
[75] For discussion of these topics, see chapter seven, section 3 of this thesis.
[76] In *Democratic Alliance*, counsel for the state argued, inter alia, that the involvement of the court in deciding a matter (withdrawal from the ICC) which is still being considered by parliament and the executive would violate separation of powers (at para 13).
[77] In *South Africa-Russia nuclear deal*, counsel for the state argued that bilateral treaties such as the ones concluded and signed between South Africa and each of the three countries, that is, Russia, US and South Korea on (nuclear) energy cooperation were essentially the product of the acts of the four states (negotiation, bargaining, agreement) and since they were 'international agreements', they were therefore 'not justiciable by a domestic court' (at paras 12 and 101).
[78] In *Grace Mugabe*, counsel for the state sought to rely on American case law (*Kline v Kaneko* 141 Misc. 2d 787 (1988))(which dealt with immunity on behalf of the spouse of the head of state) to argue that, following American law, South African courts were also bound to follow general principles of international law (comity) which required that heads of state and their immediate family members enjoy immunity from legal suits (at para 23). See chapter two, subsection 3.2.5 of this thesis discussing how US courts apply the doctrine of sovereign immunity in foreign affairs.

doctrine (which requires that matters that raise purely political issues should be left in the hands of the executive not the courts).[79]

South African courts have not been persuaded by these arguments. In response to these 'exclusionary' arguments, and in their attempt to grapple with the vicissitudes of the intersection between constitutional law on the one hand and foreign policy on the other, South African courts in general, and the Constitutional Court in particular, have developed (albeit by fits and starts) what could, arguably, be considered as nascent principles of South African foreign affairs law through the cases. While some of these principles are a restatement of existing principles of international relations (IR) (for example, respect for international comity rules), some of them appear to be derived and borrowed from the *ratio* and *dicta* of courts in other foreign jurisdictions. The following could be suggested as principles of South African foreign affairs law emerging from case law:

3.1 The doctrine of judicial self-restraint

South African courts have stated repeatedly that the area of foreign policy is the responsibility of the executive and that this branch of government must therefore be given ample scope to use its discretion in deciding how best to conduct its relations with the world without undue interference by the courts.[80] Some of the 'principles' the courts have enunciated in this regard include: (a) that the courts must refrain from dictating to government how to carry out its diplomatic responsibilities in the protection of its citizens;[81] (b) that the court should decline

[79] *Grace Mugabe* at para 23. In *Kline*, the main principle of American foreign affairs law that was emphasised was that, in the US, where immunity is pleaded, the courts treat that issue as a 'political question' and therefore would require that it (the question) be deferred to the executive (and the latter's view on the issue is conclusive) (at para 30). See chapter two, subsection 3.2.1 of this thesis discussing how the 'political question' doctrine is applied by US courts in foreign policy matters.

[80] *Kaunda* at paras 67, 73, 79, 132, 172, 243, 247, 275; *Von Abo* at paras 21, 26, 28, 36; *SADC Tribunal case* at para 2.

[81] *Kaunda* at paras 73, 79, 243. The same principle was stated by Moseneke DCJ and Cameron J in *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 191.

an invitation to inquire into the substantive merits of government's decision to withdraw from the Rome Statute of the ICC since that decision concerned policy matters which are the province of the national executive;[82] (c) that the courts should be careful not to impose obligations on government which may hamstring the latter's ability to make and execute policy effectively;[83] (d) that the court should respect SOP and exercise judicial restraint by refraining from reviewing the constitutionality of an intergovernmental agreement because that could be tantamount to the court imposing its own interpretation of the international agreement;[84] and (e) that when interpreting a treaty, South African courts should take into account that negotiation of treaties is usually a multilateral process, involving many countries who may not be under the authority of the South African parliament.[85]

In *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*,[86] the Court stated that the doctrine of judicial restraint which is applied by UK and US courts in (foreign) policy matters is also applicable in South Africa.[87] The Supreme Court of Appeal (SCA) in *Van Zyl v Government of the Republic of South Africa*,[88] taking into account the reasoning of the Court in *Swissborough*, held that South African courts should act with restraint when dealing with controversies relating to conduct of states in international affairs.[89] The doctrine of judicial self-restraint is applied by the German Federal Constitutional Court (GFCC) particularly when deciding cases involving treaty interpretation[90] and the conduct of foreign policy and has been adopted by the South African Constitutional Court.[91]

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[82] *Democratic Alliance* at para 77. See also *Earthlife* at para 119.
[83] *SADC Tribunal case* at para 2.
[84] *Earthlife* at para 119.
[85] Mogoeng CJ in *SADC Tribunal case* at para 27.
[86] 1999 (2) SA 279 (T)
[87] *Swissborough* at 334F-H.
[88] 2008 (3) SA 294 (SCA)
[89] *Van Zyl* at para 5.
[90] See R Streinz 'The role of the German Federal Constitutional Court: Law and politics' (2014) 31 *Ritsumeikan L R* 95, 109-110.
[91] For a discussion of how the German Federal Constitutional Court (GFCC) applies the doctrine of judicial restraint in foreign policy matters, see chapter two, subsection 3.3.1 of this thesis. See also chapter two, section 3 of this thesis, particularly the parts outlining the reasons why Germany is included as one of the jurisdictions (for

3.2 Openness/friendliness towards international law

The South African Constitution recognises and grants status to IL and defines the role of this body of law in the entire gamut of the exercise of public power, particularly in those foreign policy matters that are governed by IL. South African courts have shown great deference to IL and relied on this body of law to decide many cases relating to, among others: interpretation of the BORs;[92] obligation on government to fight corruption;[93]and compliance with international obligations in the prosecution of international crimes.[94] In fact, under the South African Constitution, government is constitutionally obligated to act in accordance, and comply, with certain provisions of IL in areas such as protection of HRs, declaration of a state of emergency, derogation of rights, employment of the defence force, management of national security, and use of force. What is more, section 233 of the Constitution requires that when interpreting any legislation, preference should be given to 'any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

Therefore, the South African government does not have discretion to decide whether in these designated matters of foreign policy, particularly those matters covered by IL, it will apply or not apply the rules of IL.[95] The manner in which IL is entrenched in South African constitutional law and the 'enthusiastic' way that the courts have embraced this body of law and applied it in constitutional adjudication suggests that South African courts, like their German counterparts, have adopted what Streinz[96] refers to as a well-established principle in

comparative purposes) to answer the question whether foreign affairs are justiciable, and how South African courts have applied some of the German precedents relating to 'judicial self-restraint'.

[92] *Makwanyane*.

[93] *Glenister*.

[94] *Al Bashir* cases.

[95] For a discussion of how IL is deeply engraved in the constitutional-legal order of South Africa post-apartheid, see chapter seven, section 3 of this thesis. See also chapter six, section 4 of this thesis discussing, in part, how South African courts have applied IL in the context of rights protection.

[96] Streinz note 90, 111 footnote 113.

German constitutional law, that is, the Basic Law's principle of 'openness' or 'friendliness' toward IL (*Völkerrechtsfreundlichkeit).*[97]

3.3 International comity rules

In deciding foreign policy cases, South African courts have underscored the importance of respecting the rules of international comity which govern the conduct of IR. Some of these rules include: sovereign equality of states;[98] non-interference in the domestic affairs of other states;[99] enforcement of judgements of foreign courts;[100] and IL principles of subsidiarity and complementarity.[101] In *Kaunda*, Chaskalson CJ stated that one of the considerations which must guide the conduct of foreign policy in South Africa is that national law should not be applied in such a way that it infringes the sovereignty of another state.[102] In stating that principle, Chaskalson CJ accepted and applied a similar principle articulated by the Supreme Court of Canada in *R v Cook*[103] (read with *R v Hape*).[104] South African courts have also stated that the rules of international comity require, inter alia, that South Africa: (a) must cooperate with other countries and exchange intelligence/information for purposes of combatting military coups,[105] international crime and terrorism;[106] (b) should not interfere in the internal affairs of other countries;[107] and (c) should give effect to judgements of foreign courts and expect that foreign courts would give effect to South African judgments in return (principle of reciprocity).[108] It is important to note however that, unlike their counterparts in the UK and US,

[97] For a discussion of this principle in German constitutional law, see chapter two, subsection 3.3.3 of this thesis.
[98] *Von Abo* at para 26 and 36.
[99] *NCOSAPS* at para 61.
[100] *Fick* at para 55.
[101] *NCOSAPS* at para 61; *Fick* at para 56.
[102] Chaskalson CJ in *Kaunda* at paras 40, 41, 44; O'Regan J (dissenting) stated the same principle in *Kaunda* at paras 225 and 229.
[103] [1998] 2 SCR 597 (SCC). See chapter two, subsection 3.4.2 of this thesis where this case is discussed.
[104] [2007] 2 SCR 292 (SCC). See chapter two, subsection 3.4.3 of this thesis where this case is discussed.
[105] Chaskalson CJ in *Kaunda* at para 125; O'Regan J (dissenting) at para 270; Sachs J in *Kaunda* at para 272.
[106] Chaskalson CJ in *Kaunda* at para 53.
[107] Ngcobo J in *Kaunda* at para 172. Mogoeng CJ in *SADC Tribunal case* at para 91.
[108] Mogoeng CJ in *Fick* at para 56.

South African courts do not employ international comity rules as justification for excluding courts from participating in foreign policy matters.[109]

3.4 South African foreign policy is bound by human rights

In all foreign policy cases implicating the promotion and protection of HRs, South African courts have been emphatic about the duty placed by the Constitution and other relevant IHRL principles on the government and its functionaries to observe HRs.[110]

3.5 South African foreign policy is no longer subject to prerogative powers

Before 1994, the power to conduct foreign relations was derived from prerogative powers exercised under former constitutions by South African Heads of State,[111] and following the old English common law, the exercise of the Crown's Royal Prerogative (now executive government) was not justiciable.[112] The Constitutional Court in *President of the Republic of South Africa & Another v Hugo*,[113] and *Mohamed* held that under the interim Constitution and the 1996 Constitution, respectively, the powers conferred upon the President as Head of State no longer derive from the royal prerogative but that they are limited to those enumerated in section 82(1) of the interim Constitution[114] and section 84(2) of the 1996 Constitution.[115] What this means is that, since 1994, the power to conduct foreign relations (which was derived from

[109] Ngcobo J in *Kaunda* at para 193; O'Regan J in *Kaunda* at para 267; Mogoeng CJ in *SADC Tribunal case* at para 90. For a discussion of how UK and US courts apply international comity rules in foreign policy matters, see chapter two of this thesis, subsections 3.1.6 and 3.2.4, respectively.
[110] For a detailed discussion of this point, see chapter six, section 4 of this thesis.
[111] *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 8.
[112] See chapter two, subsection 3.1.3 of this thesis discussing how UK courts apply the common law prerogative power in foreign policy matters.
[113] Note 109.
[114] See *Hugo* at para 8. See also *Pharmaceutical Manufacturers Assoc.* at paras 41 and 45.
[115] See *Mohamed* at para 31.

the common law prerogative in pre-democratic South Africa) is now derived from the Constitution[116] and is therefore necessarily subject to constitutional scrutiny and constraints.[117]

3.6 State/sovereign immunity is subject to constitutional obligations

In South Africa, immunities and privileges of heads of state, diplomatic missions, special envoys, UN, other international organisations, and any designated person(s) are governed by statute, that is, the Diplomatic Immunities and Privileges Act 37 of 2001 (the DIPA). In jurisdictions such as the UK[118] and US,[119] the principle of state/sovereign immunity is applied in such a manner that it constitutes an 'exclusionary rule' which bars the courts from adjudicating matters where immunity is pleaded. In the US, the decision to grant immunity is the sole responsibility of the political branches and their decision is conclusive and cannot be challenged.[120] The position is different in South Africa. In light of *Al Bashir* cases, any claims of immunity will not shield a person (including a sitting Head of State) from arrest and prosecution when they have committed international crimes and there is, currently, an obligation on South Africa in terms of a binding international treaty and domestic legislation to arrest and surrender such a person. However, since South Africa is still considering withdrawing from the Rome Statute following the Al Bashir saga (of 2015), and if and when such withdrawal follows a constitutionally compliant parliamentary process, this obligation (to arrest sitting Heads of State accused of international crimes) will fall away.

Similarly, and in light of *Grace Mugabe*, the spouse of a head of state will find no refuge in DIPA where the said spouse has committed a crime in South Africa and there is no customary

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[116] *Pharmaceutical Manufacturers Association* at paras 41.
[117] Ibid at paras 20, 33.
[118] *Compania Naviera Vascongado v SS Cristina* (*The Cristina*) [1938] AC 485, at 490; *Lysongo v Foreign & Commonwealth Office & Another* [2018] EWHC 2955 (QB) at para 33; *Belhaj & Ano v Straw & Others* [2014] EWCA Civ 1394 at para 35 (discussed in chapter two, subsections 3.1.1 and 3.1.7 of this thesis.
[119] *Kline v Kaneko* (note 78); *Republic of Austria v Altman* 124 S Ct 2240 (2004) (discussed in chapter two, subsection 3.2.5 of this thesis).
[120] D A Katz 'Foreign affairs cases: The need for a mandatory certification procedure' (1980) 68 *Cal L R* 1186, 1186. See also *Grace Mugabe* at para 25.

norm of IL which confers immunity from prosecution for the kind of offences Mrs Mugabe was accused of.

3.7 Stated foreign policy objectives are dispositive in constitutional adjudication

When adjudicating foreign policy cases, particularly those cases implicating the protection of HRs, South African courts have attached great importance to and taken into account what government has stated as its foreign policy goals, objectives and priorities. These include: (a) foreign policy should be about pursuit of national interest, meaning, for example, that government and its state functionaries may only act in a way that would be beneficial to South Africa and its image in the eyes of the world;[121] (b) political stability and peaceful resolution of conflicts in Africa are important and that is why military coups in Africa are inconsistent with the stated foreign policy objectives, goals and principles of the South African government[122] and should be combatted;[123] (c) commitment to justice and respect for the ROIL;[124] (d) foster Africa's economic development through the promotion of the New Partnership for Africa's Development (NEPAD);[125] (e) 'human rights should be the core concern of international relations';[126] (f) 'human rights will be the light that guides our foreign affairs';[127] (g) promote IR and cooperation to achieve social justice, equality, peace, respect for HRs, democracy and prosperity for all;[128] (h) pursue policies aimed at fostering good

[121] Mogoeng CJ in *SADC Tribunal case* at para 89.
[122] Chaskalson CJ in *Kaunda* at para 125.
[123] Sachs J in *Kaunda* at para 272.
[124] Ibid. See also Majiedt AJ in *NCOSAPS* at para 1.
[125] Chaskalson CJ in *Kaunda* at para 125.
[126] Majiedt AJ in *NCOSAPS* at para 1 (quoting N Mandela "South Africa's Future Foreign Policy: New Pillars for a New World" (1993) 72 *Foreign Affairs* (footnote 1) (hereinafter Mandela (1993)). In *SADC Tribunal case*, Mogoeng CJ stated that by acceding to the disbandment of the SADC Tribunal and thereby denying SADC citizens the right of access to justice, President Zuma sent a wrong message to the effect that 'a commitment to the rule of law and the promotion of human rights would no longer be a paramount feature of our national vision and international relations' (at para 31).
[127] Mandela (1993) note 126, 88. See also Mogoeng CJ in *SADC Tribunal case* at para 91; O'Regan J in *Kaunda* at para 220.
[128] Mogoeng CJ in *SADC Tribunal case* at para 91.

governance, economic development, growth, and political stability;[129] and (i) promotion of regional integration and the renaissance of Africa.[130]

Giving importance to foreign policy objectives and actually importing some of these objectives into the *ratio* for court decisions means that, government, its foreign policy-makers, state functionaries and politicians can no longer treat foreign policy as 'ordinary politics' enswathed by 'lofty clichés' and 'good sounding platitudes' of 'pure academic interest' that simply give a 'feel good factor'. What the South African government announces and adopts as its foreign policy agenda, priorities, goals, objectives, and values will be taken into account by the courts when deciding cases before them, particularly those foreign policy cases implicating protection of HRs or cases concerning matters covered by IL.

4. Concluding remarks

Since the birth of democracy in South Africa, the South African government and its foreign policy-makers have repeatedly stated that South Africa's foreign policy is 'based on' and 'guided by' constitutional norms such as HRs, justice, peaceful resolution of conflicts,[131] democracy and equity,[132] non-discrimination and respect for the rule of (international) law.[133] However and notwithstanding such bold assertions and lofty commitments, the South African foreign policy has come under intense criticism, not only from academics,[134] non-governmental

[129] Ibid.
[130] Mogoeng CJ in *Fick* at para 1.
[131] Mandela (1993) note 126, 86; *NCOSAPS* at para 1.
[132] N Mandela 'Foreword' in E Sidiropoulos (ed) *South Africa's Foreign Policy 1994-2004: Apartheid Past, Renaissance Future* (2004) v-vi (hereinafter Mandela (2004)).
[133] M Nkoana-Mashabane, Minister of International Relations and Cooperation, Republic of South Africa, (2013) 11 *the diplomat*, Newsletter of the Department of International Relations and Cooperation, 1.
[134] N Fritz 'The courts: Lights that guide our foreign affairs?' (2014) *SAIIA* Occasional Paper 203, 5; A Habib & N Selinyane 'South Africa's foreign policy and a realistic vision of an African century' in E Sidiropoulos (ed) *South Africa's Foreign Policy 1994-2004: Apartheid Past, Renaissance Future* (2004) 49, 49.

organisations,[135] and other sections of civil society,[136] but from South African courts in general and the Constitutional Court in particular. The matters of *Mohamed, Fick, NCOSAPS, SADC Tribunal case, Dalai Lama, Von Abo, South Africa-Russia nuclear deal, Al Bashir,* and *Grace Mugabe* are cases in point.

One of the observable outcomes of these decisions is that, it would appear that South African foreign policy makers, state functionaries and politicians have still not fully understood or appreciated the implications (for the conduct of foreign policy) of the shift away from the pre-democratic dispensation to the new post-apartheid constitutional order. Further, it also appears that these foreign policy actors do not comprehend the import of constitutional norms for the exercise of all public power, particularly the exercise of public power in the realm of foreign affairs. It would seem that, in the eyes of South African foreign policy-makers, state functionaries and politicians, the conduct of foreign policy in the current constitutional-legal order is still treated as 'ordinary politics' unbound by constitutional norms, values and principles. This must change, precisely because the record thus far, manifests a foreign policy which, by and large, has been inconsistent with constitutional norms.

In the circumstances therefore, the South African government and its foreign policy makers, going forward, need to re-evaluate the manner in which foreign policy is designed, managed and conducted in order to bring it (foreign policy) in line with the imperatives of the ethos, norms, values, standards and principles enshrined in the Constitution and accentuated in case law. There are many areas in the arsenal of the South African foreign policy which require urgent review in order to realise the objectives, requirements and purposes of a truly constitutionalised foreign policy. Some of the policy recommendations that need to be considered in this regard include: (a) the need to expand the role of parliament in foreign policy

[135] For example: Southern African Litigation Centre in *Al Bashir* and *NCOSAPS* cases; Peace and Justice Initiative and Centre for Applied Legal Studies (as amici curiae) in *NCOSAPS*; Afriforum in *Grace Mugabe*.
[136] Democratic Alliance (political party) in *Democratic Alliance* (the ICC withdrawal case).

matters in order to ensure transparency, openness, political accountability, democracy, and proper public participation and consultation in this important area of governmental responsibility;[137] (b) the need to create a foreign service that will be career-oriented, professional and non-partisan[138] in order to, among other objectives, rid the current system of ambassadorial appointments of grains of corruption, nepotism, favouritism, and discrimination;[139] and (c) the development of new strategies, approaches and techniques on how to conduct a responsible foreign policy while remaining faithful to the tenets of modern liberal-legal constitutionalism enshrined in the Constitution.[140] The details of these policy

[137] Notwithstanding the fact that the South African parliament has specific responsibilities in foreign policy matters such as approving treaties, incorporating treaties into domestic law, declaring a state of emergency, and approving the budgets of state departments, the role of parliament is limited in the sense that this branch of government acts pretty much as a rubber stamp for the decisions taken by the executive in foreign policy matters. In view of the fact that foreign policy decisions and commitments made by the executive (for example, treaty-making) tend to have far-reaching implications for the country and the population as a whole, it is important that all control mechanisms available to parliament relating to foreign policy-making and implementation be fully operationalised and come to bear on that area of governmental responsibility (foreign affairs). These include: (a) 'parliamentary accountability' to ensure that the executive is held responsible for foreign policy decisions and implementation'; (b) 'parliamentary control' to enable parliament to 'assess whether the choices made of actions and policies are "politically appropriate"' (and this 'control' should entail the powers to sanction); (c) 'parliamentary scrutiny' to enable parliament to oversee the foreign policy domain and request information and consultation with the executive on any foreign policy matter(s); and (d) 'parliamentary oversight' to enable parliament to evaluate the implementation of foreign policy decisions. (See P Bajtay 'Democratic and efficient foreign policy?' (2015) 11 *EUI Working Papers*, RSCAS 5.)

[138] The South African government should adhere to the constitutional injunction of fostering 'an efficient, non-partisan, career-oriented public [foreign] service broadly representative of the South African community, functioning on a basis of fairness [and non-discrimination and that should] loyally execute the lawful policies of the government of the day.' (Constitutional Principle XXX, schedule 4 to the interim Constitution. See also 1996 Constitution, s 195(1)(a), (d), (e), (f), and (i)). The current system of appointments at senior management levels in the Department of International Relations and Cooperation as well as at head of mission (ambassadorial) levels, which are grotesquely dominated by card-carrying ANC party-faithful, ex-ANC parliamentarians and politicians is woefully inconsistent with constitutional norms regulating appointment into the foreign service and should be eradicated forthwith. Parliament should have a say in the 'approval' of ambassadorial appointments.

[139] For a full articulation of this recommendation, see S F Moloi, 'Comment on the proposed Foreign Service Bill, 2015', submitted to the Chairperson of the Portfolio Committee on International Relations and Cooperation, Parliament of the Republic of South Africa, 5 February 2017 (on file with author).

[140] Since foreign policy issues tend to cut across various, if not all, government departments, the South African government needs to adopt the whole-of-government-and-state approach and speak with 'one voice' and act as 'single entity' (Constitutional Principle XXI.3, schedule 4 to the interim Constitution) when dealing with these matters, particularly those foreign policy matters that have far-reaching implications for society as a whole. This approach will avoid the kind of problems associated with the current practice where individual government departments (for example, International Relations and Cooperation, Trade and Industry; Home Affairs, Tourism, Energy) with mandates in the foreign policy field all seek to make their voices heard in a foreign policy domain that lacks coherence, consistency, strategic depth, and integration. This 'silo mentality' of running government business is counter-productive and embarrassing at times. For example, in *South Africa-Russia nuclear deal*, the Department of International Relations and Cooperation (courtesy of the State Law Advisor (International Law)) and the Department of Energy (Respondent in that case) held two mutually exclusive legal opinions (on the same matter) of how that cooperation agreement between South Africa and Russia was supposed to be treated under s

recommendations lie outside the scope of this thesis but are issues that necessitate further (comparative) research.

231 of the Constitution. While the former had advised that the agreement should have been tabled before parliament under s231(2), the latter insisted that it should be tabled under s 231(3) (see *Earthlife* at para 115).

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