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Title:

*A democratic deficiency. The role of the public in South Africa's
Foreign Policy Decision Making Architecture.*



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Declaration:

I, Mduduzi Kennedy Ntshingila, declare that this dissertation is my own work. It is being submitted for a master's degree in International Relations at the University of the Witwatersrand, Johannesburg, South Africa. I confirm that the work has not been submitted before for any degree or examination at this or any other University.

Signature.....

Date.....

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Chapter 1:

'To demand to participate is...to demand to play a recognized role in a joint human activity'

(Baybrooke, 1975:58)

Introduction:

South Africa locates its 'Soft Power'¹ in the international system from a very particular aspect informing the language of its foreign policy, democracy (Nye,2005:5). A 'comprehensive' and 'holistic' adherence to democratic principles in post-apartheid South Africa allows the country sway, mobility and a greater level of agency in the international system. The country arguably sits on a democratic moral high ground. Mandela (1993:88) articulated that this places the country at the "forefront of global efforts to promote and foster democratic *systems* of government". Taking Mandela's words seriously has particular characteristic and behavioural implications for the country. Moreover, positioning the country at the 'forefront' globally, suggesting a leadership role, creates the need for the internal 'democratic systems of government' to have a *modus operandi* that rationalizes this positioning. In other words, the way the democratic system operates need to reflect what is a central condition for the country's international prominence².

South Africa's foreign policy decision making architecture (hereon FPDMA) is a feature within its democratic system of government. Its form and the way it functions should reflect the value commitments that flow naturally from this system of governance. Values such as those expounded by president Thabo Mbeki when speaking of governance 'by the people', stating that government must "work to activate the masses of the people more directly to participate in our system of governance" (Mbeki, 2002). More recently the Minister of the Department of International Relations and Cooperation (hereon DIRCO), Maite Nkoana Mashabane articulated that as part of the country's foreign policy it is envisioned that the role for South Africa in the 'region, continent and the world' (international system) is to 'promote

¹ Defined By Nye as power emanating through its culture, its political values and the legitimacy of its foreign policy, it is 'the ability to get what you want through attraction rather than coercion or payment and rests on the ability to shape the preferences of others'. This paper is concerned largely with the ideological aspect of soft power, the political value of 'liberal democratic ideals'.

² More recently it is clear that from an external point of view the country's democracy is deemed healthy compared to its neighbours (Pillay,2018:1). South Africa scores 78 out of 100 in the 2018 *Freedom World Report* which is the highest in comparison to every neighbour ("Namibia [77], Botswana [72], Lesotho [64], Mozambique [52], Zimbabwe [30], Swaziland [16]). Similarly the *Ibrahim Index for African governance's* 2017 report gave the country 70.1/100 for overall governance and ranked the country 6/54 African states.

enduring values that define our nation, namely *democracy* human rights and good governance’ (Mashabane, 2017).

Throughout the post-apartheid administrations (Mandela, Mbeki, Zuma) there has been consistency on a *declaratory level* concerning the level of adherence to democratic systems of governance. The declaration extends in that the country allots itself a status derived from what we declare, we have declared ourselves a “leader”. As a leader it is of importance that South Africa is exemplary in terms of our democratic systems of governance. There ought to be a natural expectation that we would reflect the values we expound. This is what one would expect at face value. In the production of knowledge we are called to look deeply and interrogate. We are effectively obliged to take things as a whole and not, for instance, separate the claims made from power relations and interests within society.

Thoughtful and reflexive interrogation requires that one take the democratic system as a whole and locate points at which South Africa may be failing to reflect the values it expounds in the international system (Taylor,2004:25). The ideas, theoretical and systematic positions expounded must also be linked to the broader social environment in order that this thoughtful and reflexive exercise may genuinely occur.

Research Question:

- How is South Africa’s foreign policy decision making shaped by the public’s participation?

This question denotes an analysis of the ‘conjectured relationship’ between the public and foreign policy decision making (Van Evra,1997:9).

Subsidiary questions:

- Where can the public be placed in the foreign policy decision making process in accordance with theoretical decision making suppositions (positional concern)
- How can we characterize the role of the public? (Are the public to be seen as agents or subjects of foreign policy decision making)
- What are the implications-if any- of public exclusion or inclusion?

Aim:

The aim of this research is to try unpack South Africa's foreign policy decision making architecture from both a theoretical and practical point of view. By doing this one will be able to make an assessment of the role that the public has, locating where and how it fits, its function in the greater scheme and its importance to the outcomes of decisions.

Chapter 2: Building the framework

'Democracies have failed to expand the space in which decisions are made democratically'
(Warren,2002)

Introduction:

Democracy is a highly disputed subject and difficult to consolidate into a single definition, Taylor states that democracy itself is an essentially contested subject (Taylor,31). This means there are an array of definitions ascribed to democracy that coexist. As indicated above one ought to focus on what is ascribed to democracy. Scholars broadly acknowledge that defining democracy is in itself a political act, each definition according to Taylor provides a different interpretation of 'reality'. In international relations it is important to interrogate the type of democracy being advanced by a particular state, the question to ask on the journey towards clarity is what kind of democracy is being instituted through the state's foreign policy (Neufeld,1998:17).

This research is concerned with democracy in a substantive way. The procedural mechanisms that allow a state to be considered a democracy are important but alone cannot provide the tools for good discernment to be made about democratic participation in foreign policy decision making. Procedural mechanisms here include aspects such as the holding of free and fair elections, a progressive constitution, party system and the separation of powers. These alone cannot be considered what creates democracy or democratic conditions. Taylor (2004) suggests that factors such as the 'socioeconomic system, state form and the substantive content of the state policies are what makes democracy'. When going beyond merely procedural considerations one is going on a project of asking 'about the prospect for more robust democracy within established liberal democracies' (Warren, 2002:678). Concerns centred on democratic participation are inherently substantive as this is a site where the depth and breadth of the established procedural facets of a democracy may be tested.

Any enquiry about democracy should make reference to Robert Dahl (1998). Dahl states that democracy is a term that is used in a 'staggering number of ways', he too acknowledges the inherent convolution that is woven into the definitional fabric of the term. Dahl nonetheless attempts to flesh out an answer to the question, '*What is Democracy?*' (1998:35). The goal that democracy is attempting to achieve is political equality. This goal, according to the author is achieved through adherence to five particular standards namely; Effective participation (*my emphasis*), voting equality, enlightened understanding, control of the

agenda and the inclusion of adults. These are some of the virtues that democracy provides the opportunity for. *Effective participation* means that members in a populace have both ‘equal and effective opportunities’ for their views on policy decisions and other matters to be known. *Voting equality* denotes equality when it comes to decision about policy that is to be made. In this regard, all must be able to vote and additionally be counted as equal in the process. *An enlightened understanding* speaks to the fact that knowledge of alternative options must be known to the members of the democracy so as to cultivate an environment where an enlightened and considerate decision may be reached. *Control of the agenda* is; an openness for issues to be changed as well as the space for opportunities to decide what matters are included or excluded on the agenda. *Inclusion of adults* requires that all adults should have full rights emanating from their citizenship in the demos (Dahl,2008:38). Each feature is required so as to ensure that the members of the democracy are politically equal (Dahl,2008:38). The author articulates that ‘political equality assumes that the members are all equally well qualified to participate in decision making provided they have adequate opportunities to learn about the matters before them by inquiry, discussion and deliberation’ (this will be expanded upon later).

Dahl acknowledges the likelihood that not all states considering themselves democratic will neatly meet the criteria *verbatim*, but that it provides a way to measure both achievements and possibilities of democratic governance (1998:42). Moreover, the author considers the criteria stated useful, articulating that they are ‘as useful as ideal standards can ever be’. This criteria is indeed useful to an extent in making assessments about the quality, depth and breadth of a democracy. As with any criteria one has to look deeper than the surface to uncover intricate particulars that are crucial to its genesis. One needs to look for instance at where the criteria comes from, an epistemological question. Additionally one should consider history and the culture of the state to which it is being applied, a fundamentally anthropological question. By doing this, one can come to critical conclusions that are cognizant of a broader range of causal factors explaining why a criteria may or may not be useful to a particular situation.

Koelble & Lipuma (2008) are rightly concerned with what they call ‘EuroAmerican’ definitions of democracy. This conception of democracy is used in various international indexes that tests the depth of democracy or the extent to which a state may be considered ‘democratic’. The authors reckon that these methods are a-historical and a-cultural, refusing to acknowledge the fact that very specific histories and cultures give birth to different kinds

of democracy. This is specifically in the post-colonies and post-apartheid state of South Africa where the conditions for the genesis of democratic government are different. Forms of democracy for the authors thus lie squarely in history. To them the 'real measure of democracy is the extent to which governance conforms to the vision of democracy worked out by the governed' (Koelble, 2008:3). The suggested result of history and culture being brought back in to the understanding of what a democracy is, is important to note for the project at hand; "their democratic project involves a great deal more than the adoption of certain kinds of institutions (parliament, independent judicial systems) and practices (such as free and fair elections, broad participation, and genuine contestation). It involves the remaking of the social, a transformation in the character of their cultures, the creation of a new political history of governance, in order for such institutions and practices to even begin to make sense" (Koelble, 2008:3). This project is concerned with the conditions of how democracy is made in South Africa and whether or not the democracy declared reflects the situation at hand.

The Public:

The subjects under consideration in the democracy are sometimes referred to as the demos; "the populace of a democracy as a political unit". In this paper I will be referring to this political unit as 'the public', it is thus of relevance to define and therefore set the parameters of what one means when speaking of the public as this political unit. Understanding this provides clarity as to why they should be participating in the decision made within their democracy. An important theory/ approach that can be used when considering the role of the public is pluralism; one of the main focuses of pluralism according to Alden (2017) is on electoral democracies and the role of sub-state and non-state actors. Those under consideration in this paper include interest groups and civil society, public opinion, the media and importantly parliament in their capacity as representatives of the public. Additionally, one may add the legislature, in the context of this paper they ensure parliament is indeed consulted by the executive, this will be important for the case study in the body of this project.

Interest groups and civil society according to Le Pere & Vickers (2004) are the 'critical agency for creating public accountability and participatory government. Siko (2014) calls this group the 'attentive public, these groups collect themselves in an effort to persuade the government to peruse particular policies (2014:47). Siko, writing specifically about South

African foreign policy (as is this study) articulates that public opinion refers to the South African electorate's view on foreign affair. Additionally, the role of public opinion is located in the gap between elections and the extent to which foreign policy has been a concern in within the time that this space constitutes. Moreover this study is concerned with the extent to which the government takes the views of the electorate seriously at the instance of decision making in foreign policy (Siko, 2014:47). The media is one of the most central vehicles driving public opinion as well as the attitudes that decision-makers have on foreign policy issues. It is Important to note that the relationship government has with the media is highly complicated, to a large extent there is antagonism between them, even with this condition they simultaneously rely heavily on one another. The media is an instrument that government can use to spread their policies to the median voters and the media generates much of its content through government action. The legislature, according to Siko, can be broken down three ways in terms of policy processes; policy makers, policy-influencers and those with minimal or no impact.

Democratic Participation:

'Democratic participation' is of importance to consider prior to engagement on its applicability or relation to foreign policy decision making. Barach (1975) defines democratic participation as "A process in which persons formulate, discuss and decide public issues that are important to them and directly affect their lives. It is a process that is more or less continuous, conducted on a face to face basis in which participants have roughly and equal say in all stages, from formulation of issues to the determination of policies". Simply stated, participation is deemed to be democratic to the extent that those who are affected by decisions are afforded the opportunity to affect those decision (Warren, 2002:693). The principle of globality entails that foreign policy decisions affect the local populace directly if one traces them carefully. The population thus should have a vested interest in being a part of these decisions at some stage along the continuum leading up to when they are made. The process that democratic participation is based on is *diffusion* and the faculty under consideration (being diffused) is *power*. The result that is hoped for through the process of 'diffusion of power' is *decentralization*, in this instance, specifically the decentralization of foreign policy decision making. The effect on the populace is that they feel a level of agency that allows them to have power to participate in the decisions that affect them. Democratic participation in this sense is viewed as the 'equal chance to influence collective judgements' (Warren, 2002:678).

Participatory Governance:

It is of value to consider the type of domestic governance environment required for democratic participation to exist and flourish, in my view the environment ought to be one of 'participatory governance'. Concern with the governance environment is largely left out of international relations scholars' ambit, here it will be fleshed out briefly. Participatory governance is 'a regulatory framework in which the task of running public affairs is not solely entrusted to government and public administration, but involves co-operation between state institutions and civil society groups' (Friedman,2005:4). The intention here is that government include citizens in various forms and capacities within the making of policy as well as its implementation. The logic behind including this concern in this paper is that on a primary level this environment needs to exist if we are to extend towards democratic participation in foreign policy. A participatory culture ought to exist in the domestic governance environment in order that democratic participation in foreign policy decisions can be a reality. The existence of this form of participation is a higher level of participation that is able to be a means by which the depth of a democracy can be tested and evaluated.

There are two rationales for participatory government that Friedman (2005) stipulates. In the first place there is a recognition of the importance that the organized private constituencies within the public are in agreement with decisions made. Their involvement in decisions is likely to facilitate active support for the objectives propounded by government. It is assumed that one is more inclined to agree with decisions to which they were party to, this is because of the discursive and collective manner in which the decisions are arrived at. This is a means by which dissent can be diffused and cooperation and partnership facilitated on a broader level. The author calls this kind of engagement 'corporatism' (Friedman, 2005:4). In the second instance the rationale for participatory governance is that it is a machine through which to deepen and broaden democracy. How this happens is that it expands 'the range of citizens engaged in making or influencing governments decisions' (Friedman,2005:4). This notion extends from the rationale that democracy is a way in which 'popular sovereignty' is expressed, it is the vehicle that drives 'governance by the people' and is an environment where one is able to constitute as well as shape the decisions that affect them. The action occurring here is an extension of the more substantive concerns from democracy articulated above. Friedman (2005:5) further states that it is the way that democracies fulfil their broader obligation of 'maximizing opportunities for participation *between* elections'. It is important to note that there is crosspollination that occurs between the two distinctions and they are not

necessarily 'watertight' or mutually exclusive. The distinction is important nonetheless. The way that participatory governance is tested is through its ability to give a voice to those who are otherwise voiceless. Overall, Friedman suggests that the rationale behind participatory governance should be two-fold it should 'bind organised constituencies to agreed policy outcomes or offer a voice to the voiceless'.

Foreign Policy Decision Making:

A country's foreign policy according to, Breuning (2007:5) is best defined as 'the totality of a country's policies toward and interactions with the environment beyond its borders'. The way in which foreign policy decisions are taken and the process undergone by decision makers is a vital aspect to consider should one wish to answer the main and sub questions posed above. On a broader level locating the role of the public in South Africa's foreign policy decision making architecture requires that one to start by elaborating on this sphere of international relations.

International relations authors continually suggest that the line between the domestic and the international is becoming increasingly blurred, articulating notion like the 'boundaries between foreign policy and domestic policy are becoming more and more watered down' (Nganje,2014:90). With this line undergoing a characteristic change from a solid, rigid and clear line to one characterised as blurry, diluted or flexible, the domestic's (public) role in the way a country engages in the international system becomes very interesting. Alden (2016) articulates an interesting view of decision makers in international diplomacy. This is the view that it is important to recognise that they are in fact operating in two separate decisional environments; the domestic and the international. The result is that they each have 'distinctive set of logics that structure choice accordingly' (Alden, 2016:22).

In democracies there is an inclination to bring domestic issues to the conscious in the process of developing particular positions on international issues. The international as well as the domestic system usually have a propensity to conflate one another as they work concurrently and overlap. For many scholars the best result is achieved when 'the outcomes reflects the shared interest of all the relevant actors and is in tune with the imperatives of the domestic environment' (Alden,2016:22). Democratic participation calls us to an even higher threshold of assessment in that it is required that there be direct or indirect involvement of the subjects within the domestic environment in the outcome expressed through the decision.

The site of focus within this study will be less on personal factors influencing foreign policy decision making contained in foreign policy decision making approaches. Psychological factors such as perception and cognition are not dealt with here (Alden,2016,30). Importance will however be placed upon the levels of analysis that are additional to the individual level, particularly the *operational environment*. Within this sphere there is more focus placed upon things like ‘bureaucratic constraints, *domestic influence* and the external environment (Alden, 2016,31).

Poliheuristic theory of Foreign policy decision making:

Foreign policy decisions are a force used by states to negotiate their space within the international system. By taking a careful look at this force and the factors responsible for the ways in which it manifests, one is better able to understand a country’s character, position and posture within what is often a complex web. Looking at the foreign policy decision making process unlocks the complexities of a state’s behaviour. Scholars use the tool of foreign policy analysis (FPA) to go about unwinding the various processes inherent in a particular decision. FPA is composed of a wealth of theories all comprised of explanations for why countries make particular foreign policy decisions. They all-as with every theory- are in a race to stretch explanatory reach of decisions.

Some theories within the field of foreign policy analysis include bureaucratic politics model, rational choice theory, game theory or prospect theory, behavioural analysis and the cognitive approach (Alden,2014:). Before delving into the theory chosen as part of this research I will be briefly explicating the above theories for contextual purposes. Prospect theory looks at the ways decision makers choose between probable alternatives, the energy of the theory is anticipatory where the likelihood of a set of occurrences is considered. The probable alternatives involve risk and the likely outcomes are known. The theory hypothesizes that actors make choices on the basis of losses and gains and not outcomes, it is similar to a process of evaluation (Alden,2014). Game theory is heavily focused on investigating strategies, it deals with competitive situations. The factors determining the outcome for game theorists are the actions and reactions of all who are involved. The theory is said to lack in that it does not deal with the *how* and *why* particular decisions are made. Rational choice theory is traditionally one of the more prominent vehicles used to analyse decisions. The assumption in this theory places an inherent rationality and unity on decision makers. The theory posits that there is a preciseness and uniformity about the way in which foreign policy

is executed. Cognitive and behavioural theory looks at how and why actors make choices and emphasizes that actors set out to achieve particular goals and how this is the thrust of motivation used to take actions. The bureaucratic politics model is said to be reliant on the ways that various departments compete when a decision is to be made. What this theory claims to be able to do is to isolate the 'how' in an effort to explain *why* a decision was made.

Poliheuristic theory combines cognitive and behavioural features with the rational choice tenants, this allows it to have greater explanatory reach, a key feature of a good theory (Vijayalakshmi, 2017:199). It sets out a two stage process of decision making. The first is where the decision maker 'employs a no compensatory decision rule to eliminate politically unacceptable alternatives' in an effort to avoid major domestic political loss. The second is where they 'employ more traditional procedures to select from the remaining set of *acceptable alternatives*' rather than *maximizing* alternatives (Dacey, 2004). The reason for this is to allow for the likelihood that not all features will all be considered before a decision is made. The aim of this two staged approach is to clarify how and why a decision is arrived at, in addition it provides a blueprint for future decisions of the same nature providing insight as to whether the same outcome can be expected (Vijayalakshmi, 2017:199). An example given of the actors in the decision making matrix included within this theory are the *decision maker* (president), *expert advisor* (secretary of defence) as well as the *median voter* (which we can surmise alludes to the public). Poliheuristic theory views the domestic environment as the 'essence of decision'. Vijayalakshmi (2017) articulates that the 'the political costs arising from the actions of domestic audiences becomes a vital part of foreign policy formulation' (2017:202). This situation is much more evidently the case within democratic states. In essence what the theory does is that it takes the environment (domestic context) that the decision maker is operating in as well as the cognitive factors that would be responsible for the decision arrived at.

Democratising foreign policy, the issues.

To democratise foreign policy according to Le Pere (2004) means to 'allow a plurality of civil society voices open access to communicating with concerned officials in government responsible for policy implementation' (73). The case against the democratisation of foreign policy has typically been made by realist scholars. Realists have traditionally conceptualised the international system as well as the politics within it as a game through which power is exercised. The rules of engagement in this game (various foreign policy postures) are set,

according to realists, independently of the dynamics occurring within state borders. An example can be made with a realist's interpretation of public opinion's role in the process of democratising foreign policy. The realists believe that 'the rational requirement of good foreign policy cannot from the outset count on the public's opinion whose preferences are emotional rather than rational' (Morgenthau, 1978:588). It is widely recognised that realists argue two risks that they consider fundamental when one subjects their foreign policy to public opinion and scrutiny. A foreign policy that is sensitive to the public is said to run the risk of either being 'disrupted from below' or 'derailed from above' (Nganje, 2014:91). These two fairly sinister outlooks are worthy of explanation. Derailment from below occurs as a result of a realist's view of the characteristics of the public in terms of foreign policy. That they are, according to realists, are ignorant and understand very little about the complexities of foreign policy. If they are allowed to interfere in foreign policy decision making then it risks 'derailment'. The second view, derailment from above is focused on the decision makers and the possibility of their decisions being guided according to what will win them favour in their domestic electoral base. The fear is that decisions made in this way do not meet the high rationality threshold needed for sound foreign policy decision making. Realists are thus of the view that foreign policy making should be left to professional diplomats, this situation is ideal as they are isolated from the influence that the public may have on the decisions they make (Nel, 2005:51).

The liberal school of thought directly challenges the above assumptions. Liberals criticise the realist notions that essentially infantilize the public, the idea that the public's nature is inherently "irrational and chaotic" is refuted (Nganje, 2014:91). The first dimension is a concept called, collective deliberation; this idea is creative in that it is based on studies that have found that the public is in fact *not* as irrational as is assumed by realists. The findings are that the public has the capacity to engage in issues of international importance, furthermore the concept is honest in that it acknowledges those spheres of the public that may well be as unaware as the realists propose. The solution to this is collective deliberation which is a process whereby "the public is able to aggregate and form collective opinion which is more than the sum of its parts and negates individual ignorance and irrationality" (Nganje, 2014:91). The second refutation is essentially a critique of the false dichotomy between being well informed and holding a reasonable view on a particular set of subject matter. This, Nganje (2014) argues is a response to the realist claim that if public knowledge is present it is limited. The intention behind democratising foreign policy is to subject it to

the same standards occurring in terms of internal decision making processes. What I mean here is that the values such as participation, transparency, responsiveness and accountability ought to be mirrored within the foreign policy process.

Chapter 3: Democratic Contextualization

The foreign policies of democratic states:

This section of the paper is concerned broadly with the way that democratic states conduct their foreign policy. The aim here is to make some general pronouncements about behavioural patterns that we can ascribe to democratic states, the central concern, in line with the aim of this paper, is to tease out the making process; both what the process is as well as what it ought to be will be uncovered. One ought to acknowledge from the onset that the same facts *complicating* the definition of democracy makes it increasingly difficult to make ‘textbook’ pronouncements on how democratic states conduct their foreign policy because their conduct is just as variable as the definition of democracy.

Alexander Johnston (2001) provides reasons as to why democratic states should ideally embody democratic principles in their foreign policy. The first reason relates to the fact that good practice in the international system underwrites the integrity of the democratic dispensation. Good practice for democratic states essentially qualifies the kind of democracy that is practiced at home. This is a way that the quality of domestic democratic principles can be assessed. Secondly, democracy is highly important within the global system, states that are undemocratic or antidemocratic are unhelpful in terms of positioning a state for influence in multilateral organisations. The third reason relates to international security, democratic foreign policy principles encourage international security. This reason relates to the fact that democracies are conventionally liberal states and one of the primary objectives of liberalism in the international system is to create an international zone of peace. An instance of this kind of foreign policy is the peace and security element of South Africa’s foreign policy which sees the deployment of soldiers of the South African National Defence Force in areas of conflict all across the continent of Africa in an effort to maintain and restore peace³. The author acknowledges however that these alone are unable to assist in bringing clarity to how democracies conduct their foreign policy.

There are some essential models of democratic foreign policy. The first model is that of a liberal/good citizen model of democratic foreign policy; The emphasis here is on the fact that

³ In detailing priorities for the financial year of 2017/18 general Solly choke, Chief of the SANDF articulated that “notwithstanding the challenges it faces with persistent budget cuts and ageing equipment the SANDF will still be involved in, amongst others, peace support operations on the African continent...” showing the country’s commitment to maintaining the African continent as a zone of peace(SANDF Annual Performance plan,2017:VI)

states bear individual rights and freedoms, specifically as owners of property and individuals that accumulate wealth. The liberal citizen model is accepting of the fact that the international system is unequal but simultaneously emphasises the rights and obligations that states have. Examples here include the “respect for the rights of other states and their equality before the law; the promotion of democracy within states; the practice of civility in relations with other states (negotiation and peaceful resolution of disputes, support for multilateral organisations); intervention on human rights and order keeping grounds in multilateral organisations (like the responsibility to protect) (Johnston, 2001:15).

Another model views democratic foreign policy in terms of its ability to transform the collection of states into a democratic society in a deeper sense. One of the key aspects of this model is a programme of reforming international institutions to make them more representative, something similar to South Africa’s foreign policy goal of reforming the Security Council to include a permanent seat for an African country. The country, for instance, even has a “permanent mission of South Africa to the United Nations”, in 2015 president Jacob Zuma stated that “South Africa will use its participation in the 70th session of the United Nations to continue our relentless work to achieve the reform of the UN, especially of the security council which has a key role to play in promoting world peace and security”⁴.

The third model is concerned primarily with procedural democracy within the domestic democratic dispensation; the political system as well as the domestic commitments according to this view, should be prioritized over international commitments. This model is of great importance to this research paper. The reason for this is that this view articulates that ‘ a democratic foreign policy (whatever its content) is one which emerges from accountable processes of foreign policy making’ (Johnston,2001:16). In a country like South Africa with a history of deep divides along racial lines and the exclusion of the majority (as will be extrapolated later) this model is of great importance. Here a proper conception of democratic foreign policy is one in which foreign relations take a very low priority in the allocation of resources compared to the demands of distributive justice in the domestic setting.

One needs to make a distinction between two missions of democratic foreign policy, this is the distinction between a radical democratic foreign policy and a liberal democratic foreign

⁴ International Relations Peace and Security Briefing to Heads of Missions and Media by President Zuma, Sefako Makgatho Presidential Guest House, Pretoria, 15 September 2015.

policy. A liberal democratic foreign policy is on a mission for the international democratisation of states, this is a priority. The opposite, a radical democratic foreign policy is interested in the democratisation of international society, a broader concern. The result according to this view is that a democratic transition of international society will produce the conditions for the democratisation of states.

The three models as well as the two missions in my view are not mutually exclusive and can all be woven into the fabric of a country's foreign policy. In South Africa for instance one can identify all of the above within the country's foreign policy fabric. This is why Johnston states that 'the best case for a democratic foreign policy can be made by a synthesis of all three models'. This kind of synthesis is valuable in that it is able to keep potential contradictions in check while resolving the tensions contained within. In the next section-a focus on South African foreign policy- these tensions and contradictions will be made clear through examples such as the "China question" in Nelson Mandela's presidency, the "Zimbabwe question" faced by Thabo Mbeki as well as the case of Omar Al-Bashir during the presidency of Jacob Zuma.

Some of the important difficulties in developing principles of a democratic foreign policy arise from the balance of human rights and democracy. These difficulties are the constructive engagement rational and cultural relativism. Constructive engagement states that 'human rights abusers are more likely to reform if they are treated with a mixture of contact and limited sanction, rather than a blanket boycott or embargo'(Johnston, 2001:21). This can be illustrated by the increasing nuclear 'crisis' in North Korea in 2017, the deep isolation in the form of sanctions and United Nation's resolutions has not militated against the crisis increasing. A typical democratic foreign policy approach would demand that there be a boycott of human rights abusers by democratic states. This however is impossible showing that constructive engagement is an 'inescapable principle'. It is articulated that constructive engagement is much easier between countries that have a similar cultural understanding of human rights for instance, this is cultural relativism. South Africa is interesting when it comes to cultural relativism in human rights, the reason here is that the constitution is based firmly on the values of liberalism and has a Western foreign policy orientation; despite this orientation the country treads carefully to not appear as a bastion of Western ideals in international relations.

Democratic foreign policies are based on a state's liberal value systems. Political liberalists state that the nature of liberal societies is that they carry a fact of reasonable pluralism. This means; 'reasonable persons living in such societies will subscribe to a variety of different philosophical, moral and religious "comprehensive doctrines" in order to accommodate the fact of reasonable pluralism'.

South African Foreign Policy:

South Africa's foreign policy perspective needs to be understood against the backdrop of its history. It is largely a result of the country's history that its post 1994 foreign policy posture, perspective and attitude takes its shape. The main historical fact creating the current structure of the country's foreign policy, at least on a declaratory level, is apartheid.

The backdrop of Apartheid:

South Africa's foreign policy from 1948 was characterised by the then National Party's (NP) fervent aversion to majority rule. Frankel (1963) observed that "South Africa's policy abroad is to seek to maintain apartheid at home". Every detail of the country's foreign policy decision making character was made with this specific goal in mind, to maintain white minority rule. The approach was multi-layered in that the NP used political, economic as well as military means to secure and maintain this obscure state of affairs (Siko,2014:17). One of the most consistent stances was the anti-communist sentiments held by the NP, this was largely because the ANC was backed by the Soviet Union. This importantly assisted the country to secure support from those in the west that were deeply opposed to communism in the formative years of apartheid. In his deeply detailed account John Siko (2014) highlights four periods of apartheid and the foreign policy postures therein. Each of these periods is instrumental in the post-apartheid foreign policy value system and will I will thus briefly unpack them.

The formative years of apartheid have been identified as the years where foreign policy may be characterised as a 'balancing act'. The prime ministers of this era were DF Malan who was in office from 1948 until 1954 as well as Hans Strijdom in office from 1954-1948. In these years there was a maintenance of relations with the west, the country actively participated in Cold War battles such as sending assistance for the Korean war. The two prime ministers were adamant on staying in the Commonwealth and had a more open policy towards it. On the continent there was a willingness to maintain relations with countries that were in the process of achieving independence from colonialism.

Hendrik Verwoerd's take over in 1958 is a time in which South Africa changed its foreign policy tone significantly, here the country can be said to have adopted a more isolationist policy, what Siko calls "a 'go it alone' mentality" (Siko,2014:18). This attitude was signalled by foreign policy moves such as South Africa withdrawing from the commonwealth and refusal to grant accreditation to diplomats from newly-independent African states. Ties between the country and the United Nations (UN) worsened; the atrocity of the Sharpeville massacre as well as the rapid increase of independent African states in 1960 further aggravated the situation. At this stage the UN general assembly called for a trade and diplomatic boycott of South Africa.

John Voster served as prime minister from 1966-78. His government came under increasing pressure from a variety of angles, the most significant coming from the UN and the political left of the west. Voster is widely known as a pragmatist whose solution to mounting pressure was to have a more outward foreign policy than his predecessor, a more internationally integrated approach. This policy has two central aims, the first was to *build relationships on the continent*. The most poignant way he was able to do this was to offer 'carrots' in the form of maintaining economic dependence on South Africa on the African continent. Voster's relations on the continent were surprisingly amicable; Siko (2014) notes, for instance, that Malawi established formal diplomatic relations with Pretoria, that Francophone countries such as 'the Ivory coast, Senegal, Gabon, Madagascar as well as Anglophone countries like Kenya, Liberia and Ghana' showed a willingness to cooperate with the Apartheid state, much of the diplomacy that allowed this precarious state of affairs took place in utmost secrecy. The second aim was to maintain strong ties with the west, in the 1960's and 1970's the relationship was sustained. South Africa established itself as a useful defensive wall against communism and maintained sophisticated lobbying and propaganda efforts. There was a steady deterioration that occurred in the mid 70's where for instance the UN general assembly suspended South Africa, this coupled with the 1976 Soweto uprisings and the killing of black consciousness leader Steven Bantu Biko in police custody. This is said to have had the effect of 'galvanizing global opinion against South Africa', at this point the international isolation of the country began to intensify.

PW Botha's foreign policy was largely focused on consolidating and promoting South Africa's hard power. He did this through regional military interventions, development of nuclear weapons and covert action. This he called his 'total strategy'. The military and defence played a prominent role in foreign policy throughout the duration of his tenure,

Botha's premiership can be seen as a reversion back to the isolationism seen in the premiership of Verwoed. His foreign policy was unsuitable and encouraged the international community to increase sanctions, withdraw investments and refuse to rollover loans. The economy was on the brink of collapse as he did this whilst simultaneously increasing his military spending. Botha tried to hold African states to economic ransom but these efforts were quickly thwarted by those states. His famous Rubicon speech in which he was expected to announce the release of Nelson Mandela as well as the unbanning of the ANC created further isolation from the international community and catalysed economic downturn for the country.

The dawn of Democracy: A fresh Foreign policy value system

Values are the bedrock of a country's foreign policy; they are the point from which the foundation of the foreign policy is built as well as its eventual framework. To me, there are three distinct advantages with understanding the values of a country's foreign policy; firstly, they are a "code" through which a state's foreign policy decision on particular issues can be forecasted to a large degree. Secondly, values have the ability to assist us in understanding and appreciating a foreign policy decision, a sort of sense-making characteristic, and thirdly values are assistive in assessing the congruence of particular decisions. In essence, is a decision made in harmony with what they country stands for? A reflective characteristic.

The overarching values/principles that are instrumental to South Africa's post-apartheid foreign policy are a product of the above stated past in which the primary objective was to maintain an inhumane domestic state of affairs. This period in the country's history was characterised by gross human rights violations and deeply entrenched exclusion of the majority through severely undemocratic practices. The international community had denounced apartheid and characterised it as a crime against humanity identifying the country as a pariah state. De Grunchy states that this was the case because 'it made personal identities and differences absolute, thereby denying common humanity and, in the process, degrading the identity people had; in short dehumanising them' (De Grunchy, 2006:48).

The immediate task was to recast South Africa's foreign policy identity, the first and third principles of Mandela's six principles of South Africa's foreign policy shed light on the character of the construction and reconstruction of South Africa's foreign policy (Grant, 2017:13). The first is that "issues of human rights are central to international relations and understanding that they extend beyond the political, embracing the economic social and

environmental”; and the third that “considerations of justice and respect for international law should guide relations between nations” (Mandela,1993:87). A decision such as the one to join the ICC, ratify the Rome statute and implement it is consistent with these principles⁵.

South Africa’s governing party, the African National Congress (ANC) has-since winning the first democratic elections in 1994-held the perception that the country’s foreign policy is based on democratic principles/values as well as democratic practices (Van Wyk, 2012:79). Additionally, the party articulated a foreign policy that promoted multilateralism, human rights, peace; international law and African interests (Mandela, 1993).These, according to Qobo were to form the lifeblood of the new administration. Barber states that the ‘core concern’ is the *pursuit of human rights* which can be interpreted as including four spheres; economic, social, environmental as well as political. For the ANC there is a direct link between these core concerns and promoting democracy, the belief is that lasting solutions to the plethora of international problems can only be achieved through the active promotion of democracy.

One of the central by-products of this perception has been the desire to place the ‘people first’ or ‘batho-pele’, Mzukisi Qobo (2016) articulates that this notion exists in an effort to emphasise the position that the government exists primarily to ‘*discharge* its responsibilities to the people’(2016:423). This value is of central importance to the current project⁶. The future governing party in their discussion document of 1993 stipulated that foreign policy ‘belongs to the South African People’. In the principles section of this document it is articulated that they hold “A belief that our foreign relations must mirror our deep commitment to the consolidation of a democratic South Africa” .One of the most important values that encapsulates much of the above for the ANC is *Ubuntu* defined as; ‘a value-set that views the existence of an individual as deeply woven into a social structure founded on humanism and collective ways of being that are mostly associated with African social systems (Qobo,2016:424). On a declaratory level South Africa stipulates a foreign policy that places emphasis on the values of Ubuntu, this is said to be expressed ‘in terms of a liberal-democratic-egalitarian framework’. The value of Ubuntu is deeply entrenched in the country’s foreign policy posture. In the 2011 white papers the country’s diplomatic posture is

⁵ see the implementation of the Rome statute of the International Criminal Court Act 27 OF 2002

⁶ See Foreign policy in a New Democratic South Africa,
Special report back to the nation document integrated democratic Governance: a restructured presidency at work,
Department of International relations and cooperation strategic plan 2013-2018
Department of international Relations and Cooperation, revised strategic plan 2015-2020

described as the ‘diplomacy of Ubuntu’, Ubuntu it says is a ‘way of defining who we are (domestic) and how we relate to others (international)’

Other values articulated in the most recent strategic plan of DIRCO (2015-2020) include patriotism, loyalty, dedication, Ubuntu and Constitutional values (section 10). Much of the motivation behind South Africa’s foreign policy is to ‘actively promote and contribute to sustainable development, *democracy*, rule of law, human rights as well as peace and security, these in their essence are values. An example may be the pseudo-coup or as some writers have articulated a “non-coup-coup”, occurring in Zimbabwe in November 2017 (Specter, 2017). The response to this by the president of South Africa (a foreign policy decision) to send an envoy is motivated and informed by these values, the actions taken are an effort to ensure that democratic principles are upheld, that the rule-of law is what pervades in the situation, that human rights are respected across the board especially for the lives of civilians and an effort to ensure peace and security is maintained.

Chapter 4: An analysis of foreign policy decision making behaviour in South Africa through case studies.

A foreign policy decision in the midst of “Madiba Magic”:

This section aims to look at instances where the complications of democratic foreign policy decision making displayed themselves in post-apartheid South Africa. The objective is for the examples used to align themselves with fulfilling the aim of the current project. The focus in the examples is the extent to which the public weighed in or added weight to the eventual foreign policy decisions.

South Africa's first major post-apartheid foreign policy decision has been called the ‘two Chinas’ dilemma, the Chinese Dilemma (Breytenbach,1994) or South Africa's ‘Chinese puzzle’(Alden,2001). The essence of this decision was a debate as to whether or not to diplomatically recognise the Republic of China (ROC), in Taiwan seated in Taipei; or the People's Republic of China (PRC), located on the mainland, seated in Beijing.

Breytenbach (1994:50) assists in giving clarity to the perspectives of the two parties concerned. The problem lay in the fact that the PRC government claimed to represent the whole of China. They regarded Taiwan as merely a province with the ROC government being the local authority there, the PRC wanted unification on their own terms and Taiwan was to be treated in the manner of Hong Kong, as an administrative region. This boils down to the fact that, in their view, the ROC was a none-state.

The ROC regarded China as separated between two Chinese entities. From their point of view they had been independent since 1912 and were forced out during the communist take-over in 1949. Their view was that ultimately the two entities should be unified peacefully, for the time being they were of the notion that they should both be able to exist in the international community as separate entities. Breytenbach states that this view was much less ‘dogmatic than that of the PRC’ (Breytenbach, 1995:50).

The significance of this decision lies more in the *way* the decision was made than what was the final conclusion; the decision making process to a large extent brought out the elements of the new regime's democratic character. As Alden (2001) states, it ‘shed light into the policy decision making process in South Africa’.

The new democratic dispensation meant that the foreign policy decision making process opened up. The result being that there was an unprecedented amount of public debate as well

as an array of factions in society weighing in on the matter. The plethora of opinions on the decision making table led to the recognition question being highly divisive. There are a few issues which the question revolved around, these are as follows. ‘the degree to which human rights should determine a nation’s foreign policy, the degree to which trade promotion and local development needs should determine a nation’s foreign policy, the relative importance accorded to traditional allies during the liberation/pariah era, the relative importance that financial support for political parties should have in influencing a nation’s foreign policy’ (Alden,2001:124). The issues here would often conflate with one another during the debate, which issue to prioritize also proved difficult to consolidate. Juxtaposing China’s human rights record with the potential consumer market for instance was of difficulty to bring to bear. As stated above, Foreign policy decision making theory recognises that there are two environments in which the decision makers operate, the domestic and the international (Alden,2016:22). As will be shown this reality was even more apparent in terms of this decision, bringing the theoretical presuppositions to life.

Of particular interest, especially in terms of this project is the role of interest groups in influencing foreign policy, in this case their role was major. Academic and foreign policy institutions such as the South African Institute of International Affairs (SAIIA) and the Institute for Global Dialogue (IGD) made use of the open environment in order to contribute to the decision to a degree that had been unheard of. Other groups such as labour and business also weighed in on the debate, unions such as the Congress of South African Trade Unions (COSATU), although siding with their alliance partner the ANC did voice concerns regarding competition with the cheaper labour of China, showing that even within the decision making circle there were rifts. The business community also formed a channel through which to develop their own opinion. Alden states that trade with Taiwan was indeed a factor for some businesses but the larger market provided by China made it a considerably more attractive option. The general consensus was that the market options provided by China exceeded those of Taiwan (Alden, 2001:126). Other authors echo this sentiment stating that the PRC provided vast trade opportunities and would become an economic superpower in the next century (Breytenbach,1994:56). In addition to these actors there is what is termed the ‘activist position’, this was assumed by foreign actors. Taiwan made use of chequebook diplomacy in order to persuade influential individuals. The media was also drawn in, it is said that they were treated to visits to the ROC in order that coverage of the Taiwanese experience

received visibility in the country's news outlets. The academic as well as research community were drawn in through sponsorship of conferences, publications as well as trips to Taiwan.

What Alden (2001) calls 'the anatomy of the decision', which is essentially the way in which the decision was structured is divided into three phases. The first phase of the decision saw a particular move being made, from the decision being merely a formality to one where the bulk of opinion was that the status quo should be maintained. This period spans from 1994 to December 1995. There is a particular change that must be noted; this change can be noted in the movement from statements that saw it as inevitable that China would be recognised to a more rigid criteria that would determine the shape of the relationship with China. This period culminated in President Nelson Mandela stating that the country does not draw a distinction between the two Chinas and that South Africa would not cancel any diplomatic relations unless one of the countries had done something that warrants this kind of a move. At this point it was stated that the country would not cancel diplomatic relations with the ROC.

The second phase of the decision making process was a period in which the South African government attempted to push for 'dual recognition'. The aim of this was to have concurrent diplomatic representation of both China and Taiwan. This period lasted until August of 1996. The idea was that Mandela's unique prestige and prowess would allow the country to do something that had not been done before, recognise the China's simultaneously. Many other countries had previously failed in attempts at dual recognition, "Grenada in 1989, Nicaragua in 1990, South Korea in 1992 and Burkina Faso in 1994 (Breytenbach,1994:57).The PRC was averse to this decision and maintained the line of a 'one China' policy whilst the ROC was more concerned purely with maintenance of diplomatic relations whether or not this meant concurrent recognition or singular recognition. In the third phase of the decision making process there was certainty on the part of the South African foreign policy community in terms of the position on recognition. At this stage there were two sides to the debate on recognition. The one side was a cluster of relevant parties which included the department of foreign affairs, the departments of trade and industry as well as the parliamentary portfolio committee on foreign affairs, the other side was President Mandela who maintained his unequivocal position of maintaining the status quo.

The decision to officially recognise China was taken without the knowledge of the foreign policy cluster or the Minister of Foreign Affairs. In his statement the president stated that to maintain relations with Taiwan was something that was inconsistent with the foreign policy

goal of increasing activism in international organisations. South Africa would therefore formally recognise China. A standard through which to assess the democratic quality of the decision making process is whether 'the outcomes reflects the shared interest of all the relevant actors and is in tune with the imperatives of the domestic environment' (Alden,2016). The process seems to have reflected the shared interests of all the relevant actors but the nature of the way the decision was finally made seems to a large extent to ignore the openness and plurality of the process. It is plain to see that even and although the framework of the decision is characteristic of democratic foreign policy making in the sense of how inclusive it was, the final decision seems to a large extent to have contradicted the path towards it.

Quiet diplomacy: An approach towards Zimbabwe

The most pervasive foreign policy issue in the tenure of Thabo Mbeki was that of Zimbabwe and the foreign policy approach adopted of 'quiet diplomacy' (the Zimbabwe issue). This issue is relevant to briefly unpack as it is essentially a site where the fibre of South Africa's democratic foreign policy character was tested. The values underlying the country's foreign policy were put through a 'quality check' of sort through the Zimbabwe issue. The central issue here was a clear inability to make progress towards solving the political and economic crisis in Zimbabwe.

The political issue began in the 1990's where an anti-government coalition which included labour, civil society, urbanites as well as white business interests banded together and formed the Movement for Democratic Change (MDC), this was an opposition party to the ruling Zimbabwe African National Patriotic Front (ZANU-PF). There are a few politically significant occurrences worthy of mention; In February of 2000 the MDC movement managed to oppose and defeat a draft constitution that was to consolidate power in the office of the presidency, following this, the MDC managed to secure 57 out of 120 seats in parliament, this had a drastic effect on the power of Robert Mugabe's ZANU-PF. The reaction on the part of government to these losses was unprecedented, the government set off on a violent rampage targeting supporters of the MDC . Many died in the subsequent eight years as a result (Siko,2014:43). The political effect then spilled over into the economy, Harare adopted a policy of violently expropriating land from the white commercial farmers without compensation. This move-from Mugabe's version- was based on the fact that Britain did not fulfil their commitment to fund land distribution in Zimbabwe because they did not

want to dispossess their own 'kith and kin' (the white farmers) (Givisser,2007:440). The truth was that Britain had already given the country 44 million pounds for distribution but ceased a second flow of 36 million pounds because they believed it was going into the pockets of the Mugabe kleptocracy, they would not fund the project further until sufficient controls were put in place.

Mbeki disapproved of the violent manner in which the land was being appropriated but supported Mugabe. Mbeki's belief was that the only reason white South Africa and the West had a negative approach towards Mugabe was that the victims were white farmers and not nameless black masses⁷. The country makes a lot of its revenue on agricultural exports and was thus affected badly by this move, internally food insecurity rose.

According to Hank (2010) this pushed the country over the edge into economic collapse. Siko articulates that 'the International Monetary Fund (IMF) estimated that the country's economy contracted by 40 percent between 2000 and 2007'. The tax based withered as many skilled workers left the country and foreign investment thinned drastically. The country's collapse affected South Africa in a more complicated way, on the one hand there were companies like Eskom and Sasol suffering as a result of unpaid bills from Zimbabwe. Additionally there was also a crisis in terms border regulation as a result of the increase in refugees from Zimbabwe. On the other hand there was an influx of skilled workers as well as an R8 Billion increase in export goods to Zimbabwe. The collapse of Zimbabwe was to a large extent beneficial to the South African economy.

The South African public as well as the international community placed a significant amount of pressure on the government because of the approach it took towards the debilitating situation in Zimbabwe. There was a cluster of society which included political oppositions like the Democratic Alliance, churches, the press, labour and civil society that condemned the approach of quiet diplomacy. Pretoria had made a foreign policy 'mistake' in their approach towards human rights abuses in Nigeria in 1995 and thus decided to approach the situation in Zimbabwe differently. This is why Hamill (2009:375) articulates that the 'the country's foreign policy makers felt that they had been exposed and even humbled in their previous attempts at intervention in Africa under Mandela'. If South Africa acted unilaterally and

⁷ Mbeki is quoted in an interview as having said "A million people die in Rwanda and do white South Africans Care? Not a bit. You talk to them about the disaster in Angola, to which the apartheid regime contributed, and they're not interested. Let's talk about Zimbabwe. Does anyone want to talk about the big disaster in Mozambique, from which they are still recovering? No. Let's talk about Zimbabwe. You say to them look what is happening in the Congo. No, no, no let's talk about Zimbabwe. Why? Its because 12 white people died.

forcibly it would be a confirmation of the suspicions that the rest of the continent had that the country had hegemonic ambitions and additionally that the country was an agent of the West on the continent (Hamill, 2009:377). Mbeki opted out of making overt, aggressive and confrontational remarks on the Zimbabwe issue. What he chose instead was an approach characterized as ‘quiet diplomacy’. This is essentially what Siko calls a ‘behind the scenes process’. Pretoria would not act in isolation on the African continent again. One of the primary reasons that this approach was adopted was the character of foreign policy decisions during Mbeki’s presidency, many authors have articulated that foreign policy was isolated in the office of the presidency. Leaders of the alliance partners also reiterated this state of affairs⁸. Mark Gevisser drives this point home in saying that “it is true that Mandela had run a small decentralised outfit which Mbeki increased dramatically, establishing a newly rebranded ‘Presidency’ as the central node of all policy formulation and co-ordination (especially foreign policy)...” (2007:714).

With policy-making taking on this character, the Zimbabwe situation was in a very real and genuine sense the prerogative of the president. Gevisser in conversation with Mbeki locates what he calls ‘Subterranean currents at work’ that lay at the foundation of the president’s quiet diplomacy. It seems clear that there was a strong influence of notion of kith and kin. What the author means here is that “if whites reviled Mugabe solely because of what he had done to their kith and kin, then Mbeki himself seemed to be driven by an atavistic loyalty to Mugabe, a ‘father’-even if exasperating, even if dangerous within the family of freedom fighters’ (Givisser,2007:441).This is what Hoffman calls the ‘National Liberator Narrative’ .The leader of the MDC, Morgan Tsvangarai was treated as outside of this family, having no ‘struggle credentials’. Mbeki additionally believed that any heavy handed intervention in Zimbabwe would lead to a raise in tension between the Shona and Ndebele.

Hamill and Hoffman flesh out an interesting paradox that quiet diplomacy created. At the time there was a heavy sway towards liberal governance and the entrenchment of liberal values in Africa, these were evidently prioritised in the multilateral organs such as the African Union (AU), the Southern African Development Community (SADC) as well as the New Partnership for African Development (NEPAD).These values were championed by Mbeki in these organisations, through his African renaissance foreign policy philosophy but-

⁸ The leader of COSATU, Zwelinzima Vavi stated that under Mbeki both the ANC and South Africa were drifting towards a dictatorship. General Secretary of the SACP Blade Nzimande stated that the presidency is overly powerful and concentrated and further stated that our ‘our democracy is excessively presidential’

as evidenced in his quit diplomatic approach towards Zimbabwe- were difficult to translate into practice. The paradox lies in these values existing against the backdrop of a situation of ‘political repression, economic disintegration and social collapse (Hamill,2009:)’.

As previously mentioned, the country’s foreign policy is said to be based on democratic principles, values and practices, the extent to which this declaration translates into reality is of central importance to this study. Many authors articulate that the governments since the dawn of democracy in 1994 have espoused a foreign policy characterised as state-centric, rather than one characterised as more democratic, open and plural. Van Wyk states that ‘on a declaratory level, the demos, or people are referred to, but they are not included in the practice of foreign policy’. This state of affairs stems from the nature of democracy in South Africa; the new democracy of the country has not been able to make the participatory gains that it had hoped for. Reasons for this are multifaceted. Scholars articulate that the nature of South African democracy can be described as involving a ‘mixture of competitive elitist democracy’ with a heavy emphasis on clientelism and corporatism as mentioned above.

Reflections:

The foreign policy decision regarding the “two China’s” in Mandela’s presidency illustrates the above notions to a certain degree. One can surmise that this important foreign policy issue was opened up to the public for contemplation within the process of decision making. Many levels of society were allowed space to weigh in on the matter and make their perspectives part of the structure of the decision. In my view- and something that is not necessarily clearly articulated in the literature- one needs to be highly cognisant of the time of this particular decision. The decision was contemplated within what the phase subsequent to the birth of South Africa’s new democracy, its infancy. Additionally the ruling ANC and its leader had recently clearly articulated a foreign policy decision making behaviour that needed to live up to itself.

The process leading up to the decision proved to be difficult to consolidate in as open a manner as had been professed in the foreign policy documents of the preceding years. Alden states for instance that ‘the difficulties experienced by the South African government in managing interest groups was primarily a reflection of its unfamiliarity with the complex terrain of democratic decision-making as well as an acute uncertainty stemming from the teething pains (a by-product product of infancy) of the transformation. Opening the previously closed process of foreign policy making to the wider public was not as easy as

anticipated. The government did their best to place a new FPDM character within the democratic society but ultimately seemed to have opened up the process merely to dress the fox in sheep's skin. Ultimately as stated above the president made the final clarion call and so catalysed a foreign policy decision making culture that excludes the public from the stage in the practice of FPDM.

The foreign policy posture towards Zimbabwe during the Mbeki presidency is much more illustrative of the extent to which foreign policy declarations- that the policy decision is made democratically and such- does not necessarily translate into reality in a South African context. The reality of foreign policy decisions being 'isolated in the office of the presidency' or that decisions are made executively is starkly illustrated by the manner in which this decision transpired.

It is worth noting that although public opinion was strong from various corners of society- one could say they weighed in- on the decided approach of quiet diplomacy towards Zimbabwe but the reality is that the public added no *weight*. The Mbeki presidency was characterised by a personalisation of foreign policy decisions and some of the reasons as articulated by Givisser concerning this are indicative of this attribute. Furthermore, one sees a particularly strong enforcement of 'people first'/'batho pele' during this presidency, this is the case against the backdrop of what was really a more selfish, single minded behaviour when it came to foreign policy decisions.

Chapter 5: South Africa's relationship with the International Criminal Court: a foreign policy quandary.

The preceding chapters of this paper were essentially the various organs forming part of the body of this assignment. The foundational organs built in the first and second chapter created channels through which the suppositions in the third chapter could flow. What has preceded this chapter tried to create a platform on which the full body of this paper could be established. It is to the crux of this dissertation that I now turn.

The International Criminal Court and South Africa:

The ICC was established on the 17th of July 1998. Hunt (2004) states that this court was established close to a century after it had initially been raised for discussion and is characterised as the fourth major step in the international justice system. The first being the Nuremberg trials, the second is the establishment of the *United Nations International Tribunal For the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia*⁹. The third crucial move for the vehicle of international criminal justice was when in Arusha Tanzania there was a criminal tribunal created by the UN for the crimes against humanity committed in the Rwandan Genocide of 1994 (Hunt, 2004:57). The fourth and most comprehensive step for the vehicle of international criminal justice was the establishment of the ICC, the founding document of the court is called the Rome Statute and was adopted by 120 states, the statute was then ratified by 60 states including South Africa on the 1st of July 2002. It is important to note that the court does not have retroactive jurisdiction and can thus only deal with crimes committed after this date.

The ICC functions as a body tasked with investigating and putting to trial individuals that have been charged with the gravest and most severe crimes affecting humanity. These crimes include war crimes, genocide, crimes against humanity as well as crimes of aggression. The court describes its participation in the global fight to end impunity stating that it aims to function as an institution that helps the above mentioned crimes to never happen again through prosecution of perpetrators. The ICC is a court of *last resort* and functions to *complete* national courts. The court is designed to be a support to domestic justice systems, the preamble of the Rome statute describes the relationship between it and domestic courts as

⁹ As the name suggest the mandate of this tribunal, according to UN resolution 827 (1993), was to prosecute and punish persons responsible for serious violations of international humanitarian law committed in the then continuing war in Yugoslavia

complimentary. This principle is fundamental to understand as it denotes that national courts should function as the court of first instance, this in my opinion, allows that states cultivate values in their societies in which the above mentioned crimes are intolerable (Du Plessis, 2008:1).

It is upon this value that the reason the court was important to South Africa becomes interesting. Again one needs to look at the *time* and *foreign policy context* in which the ICC was established, the court took form in the infancy of South Africa's democracy as well as in a foreign policy context that was intensely focused on international justice and human rights (as elucidated above). The country being a forerunner in the establishment of the court came as no surprise, Garth Le Pere (2010:29) states that at the heart of the country's foreign policy since the birth of the democracy has been an avowed commitment to multilateralism and global governance. Furthermore the author articulates that this is both a normative precept and a diplomatic practice, something that is both said and done. South Africa's leadership role aligned itself squarely within the country's foreign policy ambitions. Ratifying the Rome statute was an obvious way in which to further entrench the country's global human rights role and display a vested interest in conflict resolution on the African continent. South Africa's global governance agenda can be divided into various categories according to Le Pere, the most relevant in the context of the current discussion is the third category which "sets out South Africa's involvement in *global security issues* with regard to combating terrorism, promoting disarmament and non-proliferation and playing a catalytic role in *resolving conflict*" (Le Pere, 2010:29). South Africa displayed a vibrant energy towards international peace and justice from the onset, examples include the leading role that the country played in the extension of the Nuclear-Non Proliferation Treaty and the 1997 Ottawa process to ban land mines (Le Pere, 2010:31).

On the 17th of July 1998 South Africa signed and ratified the Rome statute, a climax in the efforts articulated above, the country was the 23rd state party to do so. Later the country would domesticate the obligations it had towards the Rome statute; parliament drafted the implementation of the *Rome Statute of the International Criminal Court Act 27 of 2002* (the ICC Act). This Act was incorporated into law in terms of s 231 (4) of the Constitution of the Republic of South Africa by enacting the Implementation of the Rome Statute of the International Criminal court Act 27 of 2002 on the 16th of August.

The historical significance of the Act cannot be underestimated. Before it was instituted there was no domestic legislation on the above mentioned crimes, considering the country's apartheid past, as spoken of above, it is important that there be clear legislation on crimes against humanity. This, according to Grant (2016:21) was a 'legal lacuna'. The ICC act was created in an effort to allow the national prosecution of the crimes in the Rome Statute. For the sake of this project it is significant to note that the preamble of the Act speaks of South African Court's obligation to bring 'persons who commit such atrocities to justice. In a court of law where possible'¹⁰. Du Plessis (2008:2) states that "the preamble records that South Africa has an international obligation under the Rome Statute, to bring perpetrators of crimes against humanity to justice, in a South African court under our domestic law where possible", prosecution by domestic courts is very clearly favoured by the Act. This principle entrenched in the Act became a site of tension in later years when the president of Sudan Omar Al-Bashir, a war criminal, came into the country's jurisdiction and will be expanded upon later.

The aims of the ICC Act are threefold. Firstly, in accordance with section 3(a) of the ICC Act the aim is the creation of a structure in which the Rome statute may function effectively in South Africa, that it function in a genuine sense. Secondly, Section 3 (b) of the Act is an alignment aim. This section ensures that what is done with regard to the ICC Act conforms to the country's obligations with the Rome statute. Thirdly, Section 3 (d) is one of the most important as it is the site of action, this section allows the National Prosecuting Authority (NPA) to prosecute as well as the high courts to adjudicate (as was the case with president Omar Al-Bashir) showing that it includes both those inside and outside the borders of the country (Du Plessis, 2008:2). These aims are significant in this project because in reality they have caused societal tension.

The formative years of South Africa's commitment to the ICC:

The energy of South Africa's early commitment to the ICC has been characterised as 'resilient' (Grant,2016:21). A strong example of this resilience was when the USA requested that a number of countries-Including South Africa- sign their 'bilateral non-surrender agreements'. The essence of this agreement was a promise not to surrender Americans or US employees to the ICC. In true American style they added that should a country fail to sign

¹⁰ Section 3 of the Act states that of the objects of enabling is as far as possible and in accordance with the principle of complementarity ..national prosecuting authority of the republic of prosecute and the high courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the republic and beyond the borders of the republic in certain circumstances.

this agreement they would stop the transfer of various resources ranging from aid to military assistance. This diplomatic bullying tactic worked for some countries and caused 16 African countries which had ratified the Rome statute to buckle to the pressure. There were only four African countries that refused this request including South Africa. These countries were the ‘African refusers’ and it is said that South Africa suffered the greatest loss. The loss suffered by South Africa amounted to \$8.1 million between 2004 and 2005. Relations between the two countries were also frustrated by this decision. In ‘hard’ terms (materially) the loss was significant however in more ‘soft’ terms there was something to be gained by a stance of this nature. This resolve according to Grant “served as an example of how such resolve could further enhance its image as a progressive, rights-promoting state on the international stage. The country held a clear view that the agreement amounted to ‘intimidation and diplomatic arm twisting’. The courage of a country to stand up to a global hegemon like the USA in this manner shows resilience and an avowed commitment to foreign policy principles, this decision, I believe, displays strong character. One could argue that South Africa, much like other European countries that refused to sign these bilateral agreements had the resources which allowed them to not be severely affected by this strong arming tactic. In the case of European countries for instance it was a morally dubious act to sign these agreements. Judith Kelley (2007:586) articulates that the states that did trusted the administration of justice in their own borders and had ‘no doubts concerning the exertion of the rule of law within their borders’.

South Africa and Omar Al-Bashir: A diplomatic conundrum.

The ICC extends its jurisdiction to those, who after committing a particular crime are subsequently present in South Africa. South Africa faced this troubling situation with the arrival of Sudanese president Omar Al-Bashir for the 25th ordinary session of the African Union on 14 and 15 June 2015. This created a diplomatic conundrum that is of relevance to unpack as it weighs heavy on the decision forming the crux of this project. This was the point at which South Africa’s commitment to the ICC began to soften. The facts around President Al- Bashir are as such: On the 31st of March 2005 the United Nations Security Council (UNSC) adopted Resolution 1593 regarding the situation occurring in Darfur. The UNSC took note of the report issued by international commission of inquiry on violations of the international humanitarian law and human rights law in Darfur, this was subsequently referred to the prosecutor of the ICC. The ICC had issued two arrest warrants for president Al –Bashir for three simultaneous transgressions namely, war crimes, crimes against humanity

and genocide that had been committed in Darfur. Interestingly he is the first sitting president to be wanted by the court as well as the first person to be charged with the crime of genocide (Ramjathan-Keogh,2017:1).

I call this a conundrum because the South African government, which is a frontline signatory to the Rome Statute took no steps to arrest the Sudanese president. The stance of the government as articulated by learned Judge Wallis JA in the case of *The minister of Justice and Constitutional Development v The South African Litigation Centre (SALC)*¹¹ was that it was not obliged to arrest the president because he enjoyed immunity from such arrest. The argument had different aspects worthy of mention, the government contended that they had entered into an agreement with the commission of the AU called the 'hosting agreement'. On the basis of this agreement the president had been invited to attend by the AU and not by South Africa. Contained within the agreement was an article that specifically referred to 'privileges and immunities'¹². Section 5 (3) of the Diplomatic Immunities Act was also used by the minister of DIRCO in a ministerial notice published in the government Gazette. This notice recognised the hosting agreement for the purpose of granting the immunities and privileges contained therein. The issue related to both of the above, it was "whether a cabinet resolution coupled with a ministerial notice are capable of suspending the country's duty to arrest a head of state against whom the ICC has issued arrest warrants for war crimes, crimes against humanity and genocide'.

The argument on the part of the SALC was obviously the obligations that South Africa had with regard to the Rome Statute as well as the Implementation Act. It was their contention that as a result of both of these factors the country was under a duty to give effect to the request of the ICC to enforce the warrants that had been issued for the arrest of the Sudanese president in respect of the crimes mentioned above. The SALC attached to its argument the findings that had been made by the pre-trial chambers of the ICC on the 13 of June 2015, it stated that the declaration made therein was that South Africa was indeed under duty to arrest president Al-Bashir.

¹¹ (2016) ZASCA 17. Para 4

¹² importantly it read "The government shall afford the members of the commission and staff members, delegates and other representatives of intergovernmental organisations attending the meeting s the privileges and immunities set forth in section C and D, Article V and VI of the general convention of the privileges and immunities of the OAU

The arguments that were made by the South African government were dealt with decisively by the learned judge. His concise and clear articulations on this particular matter are of interest to note, the judge stated that:

“when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made. I accept, in the light of the earlier discussion of head of state immunity that in doing so South Africa was taking a step that many other nations have not yet taken. If that puts this country in the vanguard of attempts to prevent international crimes and, when they occur, cause the perpetrators to be prosecuted, that seems to me a matter for national pride rather than concern”.

The two South African courts decided that the government had erred in their decision to allow the Sudanese president to leave the country without arresting him. The Judges of the ICC had also decided that South Africa had erred in its decision (Ngari, 2017). The judgement made by the ICC is important-according to Ngari- for two reasons the first is that it raises questions about South Africa’s role in international justice and also that it speaks volumes in terms of the weak state of the ICC’s tools to ensure that states co-operate with their Rome statute obligations. Ideally the ICC should have reported South Africa to the UNSC as they are the ones that referred the situation in Darfur to the ICC for investigation. This course of action was not chosen and thus South Africa faces no consequences (e.g. Sanctions) for going against the court that it signed up to.

The decision not to arrest Al-Bashir was made with the same energy as many other foreign policy decisions in South Africa, executively. Upon reflection, one can sympathize with the government in that this instance is not necessarily one in which the public had *time* to weigh in and add weight to the decision. The issue in my opinion comes however in that public interest was very evidently not even considered. The governments reason for the decision as well as the courts finding that the government erred is proof of this, the judicial system is a cornerstone and pillar of our society and its decisions are an adequate yardstick with which to measure the amount of public interest consideration. Laws are one of the only steady structures of South African society and when the government deviates from the very laws

they enacted such as what happened in terms of the ICC Act one cannot simply be left comfortable. The fact that commitment to international agreements wanes and that the content of an Act was transgressed is worrying. It is in the interest of the public to be led by a law-abiding government. To me there is also something to consider in terms of the impact of this decision from an international/western perspective verses from an African perspective. The former perspective is the one that has been elucidated a lot, this decision impacts negatively on South Africa's credible status as a bastion of international justice and in my view is counter-productive in terms of the foreign policy goal of a permanent seat on the UNSC, the soft power implications of a decision such as this one are deeper than the decision makers realize. From an African perspective, this decision is coherent with African 'solidarity', a move to arrest a sitting African president might have had a negative impact on the country's peace-keeping efforts in Darfur, one cannot ignore that at every time there were South African troops based in Sudan. The possible backlash from the continent is something to consider, one has to imagine what instability it could have caused and the effect that it would have had on the country's peace-keeping ambitions on the continent.

Section 2

South Africa and the decision to leave the ICC:

The final section of this paper deals with South Africa's decision to leave the ICC in 2016. Up to now this decision has not received deep and broad analysis on as wide a scale as other decisions. The aim of this section is to contribute towards the broadening and deepening of the analysis of this decision. The manner in which I plan to complete the above-mentioned exercise is through a focus on the role of the public within the framework of this particular foreign policy decision, by doing so the aim is to fill a knowledge gap and add further substantiation to the perspectives of authors such as Siko (2014), Van Wyk (2012), Givisser (2008), Nel (2004), Nganje (2014) concerning the character of FPDm. The aim is to add more fruit to the tree of knowledge regarding the manner in which foreign policy decisions are made in the country.

What happened?

On the 19th of October 2016, the national executive of the South African government took the decision to withdraw from the Rome Statute, simultaneously the minister of DIRCO took the action of signing a notice of withdrawal to give effect to this decision and sent it to the Secretary-General of the UN. The effect of this was the triggering of the withdrawal process for South Africa¹³. At this stage it is important to acknowledge that the decision was made “without prior announcement by the government, without any public consultation and-most vitally-without debate in South Africa’s parliament” (Du Plessis & Mettraux, 2017:362). This caveat will be returned to later and forms the core of the matter in this analysis.

Regardless of the isolated manner in which the decision was made, the government fleshed out reasons as to why this course of action was taken. The reasons the decision was made happened in the ‘shadow of President Al-Bashir’s visit to South Africa’, this was the backdrop of the decision hence it was of relevance to flesh out that conundrum in the above section. The relevant part of the statement reads:

“In 2015, South Africa found itself in the unenviable position where it was faced with conflicting international law obligations which had to be interpreted within the realm of hard diplomatic realities and overlapping mandates when South Africa hosted the 30th Ordinary Session of the Permanent Representatives Committee, the 27th Ordinary Session of the Executive Council and the 25th Ordinary Session of the Assembly of the African Union (AU summit) from 7 to 15 June 2015. South Africa was faced with the conflicting obligation to arrest president Al- Bashir under the Rome statute, the obligation to the AU to grant immunity in terms of the Host agreement, the general convention of the privileges and Immunities of the Organization of African Unity of 1965 as well as the obligations under customary international law which recognizes the immunity of sitting heads of state

This Act and the Rome Statute of the international Criminal Court compel South Africa to arrest persons who may enjoy diplomatic immunity under customary international law but who are wanted by the ICC for genocide, crimes against humanity and war crimes and to surrender such persons to the ICC. South Africa has to do so, even under circumstances where we are actively involved in promoting peace stability and dialogue in those countries”

¹³ Article 127 (1) of the Rome Statute states that “the withdrawal of a party state from the Rome Statute takes effect 12 months after the depositing notice of that effect”. What this means is that for South Africa this withdrawal would therefore take effect in October of 2017.

Du plessis's assessment of this reasoning is that the government favored impunity over responsibility. The reasoning is that the government was caught in a binding situation, one end of this bind the government had to observe diplomatic immunity for heads of state. They sourced this reasoning from international customary law and backed up by AU pressure. The membership of the ICC, according to the government 'pulled' them in another direction, one requiring of a head of state such as Al-Bashir (Du Plessis,2017:365). Subsequent to the above reasons published by DIRCO the minister of Justice wrote the same letter to the speaker of the National Assembly as well as the chairperson of the National Council of Provinces (NCOP). The minister additionally articulated his intention to table a bill that would repeal the ICC Act, displaying the veracity of this decision. The isolated manner in which the decisions was made prompted concern on the part of civil society. This lead to the high court case of *Democratic Alliance v Minister of International Relations and Cooperation and others*¹⁴. The aim of the Democratic Alliance was to seek an order declaring the notice of withdrawal as well as the underlying cabinet decision to withdraw from the Rome Statute and to deliver the notice to the secretary general of the UN unconstitutional and invalid. They sought an order directing the government to be directed to revoke the notice of withdrawal.

Internationalizing the decision to withdraw from the ICC:

Christopher Isike and Olusola Ogunnubi (2017:173) make it clear that there is essentially a two-pronged implication for the withdrawal, they articulate that the move has 'dialectical implications for South Africa's putative influence, both in Africa and globally'. What the authors articulate here is of great interest and is- in essence- difficult to notice if one looks at the issue from one lens or on the surface, you might miss a crucial side of the coin. The implications of the withdrawal in Africa and globally are completely divergent, the authors provide a more nuanced and balanced perspective of the exit than one focused simply on the west's dissatisfaction with the withdrawal. By doing this the picture is made more whole and clear. The reasons provided by the government are given more weight and one can't help but understand why the decision was made albeit disagreement with the manner in which it was made

From a global perspective, South Africa's decision to leave the ICC had a negative impact on the country's image as champions of human rights and global justice (Isike,2017:173). The decision is inevitably at odds with the foreign policy goal of being a country at the forefront

¹⁴ Case NO: 831 45/2016.

of human rights protection and global justice, this allows room for the credibility of this foreign policy goal to be tested. Many have argued that the move has devastating and negative effects on the country's global norm entrepreneurship, however this argument has often been limited to the dissatisfaction expressed by the west regarding the move. When one looks at the decision from an African perspective the picture is completely recast. The decision to a large extent bolstered South Africa's image as a leader on the continent, one knows this through the wave of countries that followed suit in their withdrawal, the likes of Kenya, Burundi and Gambia, these countries did what is called "bandwagoning". The result here is that within its sphere of influence the country has gained crucial points because the decision displays a substantial representation of Africa's interests globally. Geopolitically South Africa is able to make use of its withdrawal to reaffirm its commitment to Africa and to establishing a functional equivalent of the ICC for the continent. The choice as Isike notes is between building on its international soft power mileage by remaining a member of the ICC or alternatively developing its soft power potential on the continent.

Interestingly the authors project four possible outcomes of South Africa's withdrawal. The first is that the move opens up the country's diplomatic relations. The potential here is for the move to accelerate AU member state's ratification of the ACJHR. The second reason, a by-product of the first, is that it would place the country in good stead to champion the possible expansion of the African court's jurisdiction to include crimes against humanity as well as genocide. The third is the bandwagoning articulated above, if the withdrawal is eventuated then it is likely to stimulate withdrawal *en masse*, prompting even those outside the region to withdraw. The final likely occurrence is that the withdrawal results in the country hosting the establishment of the ACJHR in the country in a similar manner to the way it hosted the Pan African Parliament in 2005 (Isike, 2017:176).

Localising the decision:

Of particular relevance and interest to the project at hand are the domestic dynamics of the decision. There were parties that weighed in on the matter; opposing either the decision itself, the way it was made or both. The parties of this 'opposing camp' included a political party, the Democratic Alliance, civil society organisations namely the Council for the Advancement of the South African Constitution (CASAC), the South African Litigation Centre (SALC), the Centre for Human Rights (CHR) and Amnesty International. Academics such as Professor John Dugard and Professor Guenael Mettraux also had a vested interest in the decisional

matrix. On the other side of the spectrum there are three noteworthy parties to whom the learned judge in the case refers as ‘the government respondents’. These parties include the Minister of DIRCO who signed and delivered the notice for withdrawal, the minister of justice who is responsible for administering the national legislation that domesticated the Rome Statute as well as the president of South Africa who in terms of s 231(1) of the Constitution signs all international agreements¹⁵.

The first and most overarching issue in terms of the decision made relates to the delivery of notice of withdrawal without parliamentary approval. The constitutionality of making a foreign policy decision in this way is a central question in the current investigation, the isolation of the decision in the branch of the executive (through government respondents), without the consultation of parliament who act as representatives of the public is to be fleshed out.

The CASAC was established in order to advance the constitution, the way this is done is through participation in litigation and advocacy in and on behalf of the *public interest*. The for this reason the CASAC is said to have had ‘direct and substantial interest in the subject matter’. The CASAC articulate their mandate as seeking to advance the constitution of the country, the constitution in their view, is a platform upon which democratic politics and the transformation of society takes place. The organisation adopts an attitude of embracing ideas and encouraging debate about how to build a just and equal society where people can live in a secure way and with dignity.

The fundamental issues in the matter at hand are crucial to highlight and are clearly articulated by the learned Judge they are as follows:

- “a) whether prior parliamentary approval and the repeal of the implementation Act were required before a notice of withdrawal was given (the s 231 argument); (*my emphasis- Issue 1*)
- b) whether a process of public participation in parliament should have preceded the logging of the notice of withdrawal (*my emphasis-issue 2*).
- c) whether withdrawal was procedurally rational

¹⁵ “The negotiating and signing of all international agreements is the responsibility of the National Executive”

d) if parliament approval is required for the delivery of the notice of withdrawal, whether such approval may be sought after the notice of withdrawal had been delivered (*my emphasis-issue 3*)

e) whether the process based grounds succeed, the substantive grounds should nevertheless be considered ; if one issue is dispositive of the matter, should other issues be considered

f) whether withdrawal is substantively rational (*my emphasis-issue 4*)

g) whether the state's obligations in terms of s 7 (2) of the constitution precludes the withdrawal of the Rome Statute altogether¹⁶

h)if the application succeeds on any of the grounds, the just and equitable remedy to be granted

i) The costs"¹⁷

An expansion of the relevant issues:

The issues highlighted as points of emphasis will be dealt with, although all issues are relevant, the main focus in terms of the aim of this project are issues relating specifically to the public's-or representatives of the public's-participation in the decision or lack thereof.

Issue number one was a question of whether or not the national executive (specifically the government respondents) were allowed to decide on withdrawal without the prior approval of the legislature, the 'legislative approval' question. Secondly there was the question of whether or not the government could take the action it did without the prior repeal of the ICC Act that domesticated the Rome Statute. s 231 of the Constitution is to be made use of as a foundation upon which to answer the questions above. This section is of great relevance to consider because it stipulates how international agreements are concluded as well as the way that they are made binding on the country and domesticated into our law¹⁸.

The learned judges neatly explains the manner in which the section functions. He states that "from the exposition of s 231, there is no question that the power to conduct international relations and to conclude treaties has been constitutionally conferred upon the national executive in terms of s 231 (1)¹⁹ . But that power is fettered by s 231 (2) and (4)²⁰ which

¹⁶ s 7(2): The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

¹⁷ Para 31.

¹⁸ Para 32.

¹⁹ The negotiating and signing of all international agreements is the responsibility of the national executive

enjoins the national executive to engage parliament”²¹. Although the National Executive has an overarching power, there is an obligation on their part to engage parliament when it comes to taking actions that include international agreements. This caveat to the power of the national executive is to be expected especially in the context of the South African democracy. This I say not only because of the historical exclusion of the public in all governance functions but additionally because this decentralized way of decision making is also deeply entrenched in South Africa’s foreign policy framework.

The constitution makes the treaty making process abundantly clear. The contention rises as a result of the reverse process of leaving a treaty like the Rome Statute. The opposing parties made a strong argument in terms of s 231 (2) of the constitution that since it is parliament that must approve the international agreements it follows logically that it is parliament that must decide whether or not an agreement stops binding the country prior to the executive delivering any notices of withdrawal. To put it in simple terms, the key that got the country in the door of the ICC should be the same key that gets the country out, in this case the locks have not been changed.

The government advanced four key reasons opposing the above view, they saw this ‘reading-in’ as unwarranted. The first reason was essentially that treaty-making was the exclusive competency of the national executive. Secondly and as a by-product of the first reason they argued that parliamentary approval was something that was only needed for a treaty to become binding. The third reason referred to international law that “in international law a notice of withdrawal from an international agreement does not require parliamentary approval”²². The contention here was that to read in the fact that withdrawal carries the same criteria as ascension is inconsistent with international law. The fourth reason advanced was that parliamentary approval is only required for an international agreement. A withdrawal- they contended- is a unilateral act and therefore does not qualify as an international agreement.

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

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

²¹ Para 35.

²² Here counsel for the government made use of article 56v of the Vienna convention on the Law of treaties, 1969 on which article 127 of the Rome Statute is based. This article excludes parliament from those needing to sign a notice of withdrawal.

A proper construction of s 231 dictates that a notice of withdrawal is the equivalent of ratification which, in terms of s 231 (2) requires prior parliamentary approval. There is a difference in the effect in the two actions in terms of international law. Signing a treaty has no direct legal consequences yet withdrawing from one does. It is parliament that keeps the power to determine whether or not to remain bound to an international treaty, accordingly it is “constitutionally untenable that the national executive can unilaterally terminate the agreement”.

The international agreement is a ‘social contract’ with the people of South Africa. This was especially the case considering the domestication part of the agreement. It is stated that approval of the international agreement in terms of s 231 (2) of the constitution creates a social contract between the people of South Africa, through their elected representatives in the legislature and national executive. What comes out of this social contract are certain rights and obligations. It follows that it would be strange and make no logical sense if only a part of the elected representatives of the people (the executive and not the legislature) were to make a decision that effectively has a bearing on the rights and obligations of the people of South Africa. Crucially it is articulated that ‘it is trite that where a constitutional or statutory provision confers a power to do something, that provision necessarily confers the power to undo it as well’. This would be a proper construction of the constitutional obligation and a construction that aligns itself squarely with the democratic foreign policy decision making professed by the government.

Public Participation:

The second important issue of public participation flows well from the first which essentially packages the rights of the public to be represented at all stages of foreign policy decisions by the *full body* of their representatives. The national executive, in the manner that they made the decision, clearly and obviously circumvented public participation in law-making. Public participation in this regard has three highly important effects in a representative democracy. The first is that it provides vitality to the functioning of a representative democracy, it is a means through which the strength and activity of a democracy can be exercised. Secondly it is a way that citizens are encouraged to be involved in public affairs, through it they can come to terms with arms of government setting the boundaries of their lives and learn more about the laws decided upon and created to which they are called to abide. A third and crucial factor is that it enhances and supplements civic dignity for those that decide to participate,

even in a home for instance when ones voice is heard and recognised it fortifies as sense of dignity, place, belonging and importance²³. Public participation in this context is articulated as a parliamentary process in law-making. In my view this definition has two categories, one being a parliamentary process in localised and domestic law-making, confined to laws relating to the parameter of the South Africa's borders. The concern of this paper is with the parliamentary process in law-making that relates to the laws made governing the countries international legal obligation, laws circumscribing our foreign policy decision. It is clear from the manner in which the decision was made that there was something missing in terms of the way the decision was made.

The result of excluding a vital link (public participation) in the decision made is what is termed "procedural irrationality". The notice of withdrawal was procedurally irrational, in order to 'test' whether or not procedural irrationality has occurred one needs to ask a few questions; Is the action of the government connected to a legitimate government purpose? secondarily one ought to ask whether the principle of legality has been followed. The learned judge in the above state case articulates this succinctly in saying that "to determine procedural irrationality is to look at the process as whole and determine whether steps in the process were rationally related to the end sought to be achieved"²⁴. It was therefore found that procedural irrationality lay in the finding that the national executive did not consult parliament. It was obliged to do so prior to delivering the notice of withdrawal.

Of importance to consider in light of this paper are the position that were held by the civil society organisations as they held the position of being key actors in the public domain. The essence of their positions were rightly characterised as substantive. The CASAC advanced an argument that had three arms. The first was that the decision did not align itself with the s 7(2) of the constitution²⁵. The second argument articulated that the obligations that the country is trying to escape by leaving the Rome Statute are provided for in the constitution. The last argument was that the decision amounts to no legitimate government purpose. The SALC regarded the decision as one taken in bad faith, they argued further that there was no substantial consideration of the effect that the decision would have. The CHR aligned itself similarly with what the SALC had stipulated and added that there was no substitute for the ICC. Importantly the CHR argued directly against an above mentioned contention of the

²³ Doctors for life v Speaker of the National Assembly and Others 2006 (6) SA 416 (cc) para 115.

²⁴ Para 64.

²⁵ This section state "that the state must respect protect and promote and fulfil the rights in the Bill of Rights."

government stating that the “African Union Constitutive Act and the African Charter do not contemplate a choice between membership of the Rome Statute and promoting peace and security. They made a valid observation in stating that the two goals are in a very significant sense intertwined, this is because peace and security on the continent does also strongly depend on there being ramifications for those that commit crimes against humanity. The withdrawal in their view is an indictment to the goal of establishing peace and security.

One needs to understand that the court did not disagree entirely but had a more nuanced view that essentially assists the argument of this paper regarding the fault in South Africa’s foreign policy decision making architecture. This nuanced sentiment is worth quoting in its entirety, the learned judge articulated that:

“There is nothing patently unconstitutional, at least at this stage, about the national executive’s policy decision to withdraw from the Rome Statute, because it is *within* its powers and competence to make such a decision. What is unconstitutional and invalid, is the *implementation* of that decision (the delivery of the notice of withdrawal) without prior parliamentary approval. As a result, a declaration of invalidity of the notice of withdrawal, coupled with an order for the withdrawal of such notice, should suffice as a just and equitable remedy”.

Conclusion:

As one evaluates the above mentioned decisions there is a preeminent pattern in terms of the manner in which the public’s participation contributes towards the architecture of the decisions made. There is strong and conclusive evidence of an active and organised representation of the public from the dawn of democratic South Africa until now. This is evidenced by the colourful variety of civil society organisations, their interest in foreign policy matters and the large extent to which they make an effort to involve themselves in decision made. The question that is brought to mind subsequent to reading the above is; what do these characteristics- active, organised and the many others associated with the South African public- count for in terms of the way foreign policy decisions are considered and executed? Is the principle of *batho pele* of value in a genuine and authentic sense in South Africa’s foreign policy decision making architecture?

The result of the decision forming the crux of this paper-the ICC withdrawal-presents an interesting state of affairs and creates a very important precedent. The national executive is both within its powers and competencies to makes the decision it made. Once again we see

the manner in which the decision was made conflating with the democratic principles on which the country's foreign policy is supposedly built. The difference with this decision is that a court of law finally confirmed what theorists had been articulating regarding the nature of FPDM in South Africa, the court sealed the unacceptability of making decisions in an isolated manner in an open democratic society. The realm of FPDM was brought out of the dark corner it had been kept in and into the public light where it should exist in order for the process to be truly deemed to carry a democratic character in the sense articulated by the policymakers. Again, Polyheuristic theory of decision making considers the domestic environment as the essence of the decision. It further states that 'the political costs arising from the actions of domestic audiences becomes a vital part of foreign policy formulation'. This theoretical position is, in essence, the state of affairs that policymakers in a democratic dispensation such as South Africa confess but the extent to which it is a true reflection of occurrence at the point of foreign policy decision is much more ambiguous. This leaves the role of the public in the formation of South Africa's foreign policy decision making architecture tenuous and in dire need of strength. If the government is to maintain democratic integrity abroad and the genuine trust of the demos in terms of foreign policy they will need to re-evaluate the place of the public in their decision making. Should decisions continue to be made in the manner that they often have foreign policy will remain a site at which tension manifests.

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