CHAPTER 2

FOREIGN POLICY UNDER THE CONSTITUTION OF SOUTH AFRICA

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1 Introduction

What role does the Constitution play in shaping a South African foreign policy for the 2020s? A string of post-apartheid cases before the South African courts have demonstrated the Constitution's relevance for, engagement in, and application to foreign policy.[1] However, the law extends far beyond the courts.

Taken as supreme law, how must the South African government apply the Constitution in making and implementing foreign policy? As a social compact, how, and to what extent, is the Constitution prescriptive of the country's foreign policy? Does the Constitution have anything to say about the role that South Africa should play in the fast-changing world beyond its territorial borders, in SADC, BRICS, Africa and globally? Across the African continent and the globe, what role should the Constitution play in foreign affairs?[2]

We are interested here in these questions primarily as a matter of policy and with a relatively short time horizon – the next ten years. As do others in this volume, the chapter attempts to explore, outline and give content to a South African foreign policy for the 2020s. This topic is not straightforward. There is little guidance in the way of hard law – cases or statutes – on the matter. Indeed, the proper application of the Constitution

1 Including decided cases concerned with the diplomatic protection of nationals abroad, the necessity of resuscitating the Southern African Tribunal, investigations of credible allegations of torture in the Zimbabwean security services, and access to reports made by South African judges observing foreign elections. See chapter 3 by N Fritz *The Courts and Foreign Relations Powers* in this volume.

2 Henkin L, *Foreign Affairs and the Constitution*. New York: Norton, 1975; Bradley CA, *The Oxford Handbook of Comparative Foreign Relations Law*. Oxford: Oxford University Press, 2019.

is perhaps one of the aspects of foreign policy most in the hands of the national executive.

At least two basic approaches may be adopted in specifying the scope and content of South Africa's foreign policy and the extent to which that policy is compatible with the Constitution. We apply them both in a blended manner.

The first approach highlights the role of values in South Africa's foreign policy and the character of the South African constitution as a societal repository of those values. Here, the values of democracy, reconciliation, access to justice, and human rights might be considered as the prominent planks upon which South Africa's foreign policy must be constructed. Once a particular aspect of current foreign policy is identified, a constitutional perspective can be brought to bear on the foreign policy for the next decade, utilising constitutional prescripts as a critical resource for self-correction.

The second approach would identify various national interests in South Africa's foreign policy. It would juxtapose the Constitution's normative prescripts for a national interest based upon values and the realisation of human rights against the realpolitik of international affairs. These national interests, approached from a realist tradition, would at the least consist of the country's peace and security interests, its economic and developmental interests, its interests in international institutional reform, and the extent of its commitment towards the principles of sovereignty and non-intervention.

Specifying the content and scope of South Africa's foreign policy is a different matter from that of specifying the foreign affairs powers set out in the Constitution. Yet, the extent of the power to conduct foreign affairs and ratify agreements remains an essential foreign policy consideration.

Under customary international law, South Africa has the right to enter relations with other states. As head of state, the president is empowered to determine the country's policies in its foreign affairs. However, under the Constitution, the president's authority to give legal effect to that policy is limited by her ability to muster the political support of parliament and avoid the annulment of her decisions and actions by the courts. It is evident that the authority to determine and implement foreign policy is not unfettered. The Constitution prescribes both substantive and procedural rules which must necessarily guide the executive in its foreign policy choices.

With the purpose of identifying a foreign policy informed by the Constitution for the next decade, this chapter will proceed as follows. First, it will outline the basis and extent to which the Constitution guides South

Africa's foreign policy. Second, it considers the influence of the actors empowered by the Constitution to create and implement foreign policy. It will also briefly employ the lens of contemporary history to survey from a constitutional perspective South Africa's recent foreign policy achievements and challenges, suggesting some foreign policy options for the 2020s.

2 The Constitution and the shaping of South Africa's foreign policy

Public policy may usefully be defined as a relatively stable, purposive course of action followed by a public actor or set of actors in dealing with a problem or matter of concern.[3] Following this, South Africa's foreign policy may be understood as the relatively stable and purposive actions, strategies, and decisions taken by the executive, and other public actors, when dealing with problems or matters of concern within the realm of foreign affairs.

The course of action under this definition consists both of the decisions or actions undertaken to adopt or create rules or standards for South Africa's foreign affairs and the subsequent decisions and actions undertaken to implement them. It consists of the pattern of decisions and actions undertaken by government over time, rather than individual decisions or intended actions.[4] Thus, considering the South African government's historical decisions and actions may be useful in identifying what the current foreign policy is.

In order to form a coherent and effective forward-looking foreign policy, South Africa might articulate a set of enduring norms and values to guide its future actions and decisions. It may prescribe policy choices and recognise the various constitutionally mandated roles of several of its crucial state institutions including the executive and parliament. Such an approach would shape both its decisions and actions in international affairs and its overall foreign policy strategy. This approach would draw significant content from the Constitution as the repository of the country's norms, values, and institutional structure, influencing what its foreign policy ought to be.

We see two modes in which the Constitution directly influences South Africa's foreign policy: substance and process. In the first instance

3 Anderson JE, P*ublic Policymaking: An Introduction*, 6th edition. Boston: Wadsworth/Cengage, 2011.

4 *Ibid*.

(substantive influence), the formulation of foreign policy is subject to norms and values as well as legal obligations and limitations that either inform or constrain foreign policy choices for those empowered to conduct foreign affairs on behalf of the state. In the second instance (procedural influence), identifying the place of the Constitution in foreign policy entails identifying the constitutional actors and processes that shape and implement South Africa's foreign policy and help to determine the national interest.[5]

These modes of influence are not mutually exclusive. The substantive elements of the Constitution inform the national interest and may prevent the formulation of a national interest and foreign policy which offend constitutional values or the law (including international law). At the same time, the Constitution permits constitutional actors to alter its norms, values, and institutional structure provided constitutional processes are followed.

2.1 The Constitution's substantive influence on foreign policy

The line between policy and law is both narrow and fragmented. Policy may be based on law and is generally imbued with authoritative, legally coercive, qualities.[6] Each influences the other, perhaps especially in foreign policy. Resultantly, foreign policy may limit the nature and types of international agreements to which South Africa may bind itself – to those that fall within the law's purview.

The Constitution may be accepted as supreme policy by its enduring, authoritative nature. As such, it provides the conceptual framework that sets out the norms and values that should both shape South Africa's foreign policy and guide its actions and decisions in international affairs. For the

5 The question of what constitutes the 'national interest' is an important one, but this falls outside the scope of this chapter. Suffice to say that the national interest has been viewed as identifying what we have above referred to as the realist or realpolitik interests of foreign policy. Notwithstanding, we use the term 'national interests' more broadly to refer to those domestic – national – interests which should be protected and advanced through foreign policy, but which do not constitute the entirety of South Africa's foreign policy. Our view is shared, to some degree, by DIRCO, which has conceptualised the national interest as those core interests of the state which are inalienable and whose attainment and protection is absolutely vital. DIRCO's conceptualisation has been based upon Joseph Frankel's assertion that the national interest is 'centred upon the welfare of the nation and the preservation of the national way of life'. See Frankel J, *National Interest*. London: Palgrave Macmillan, 1970; Landsberg C, 'The foreign policy of the Zuma government: Pursuing the "national interest"?', *South African Journal of International Affairs*, 17, 3, 2010, pp. 273–293.

6 Anderson JE, *op. cit*.

most part, these norms and values may be identified in the preamble, section 1, and through chapter 2 of the Constitution, the Bill of Rights.[7]

Moreover, it is a political and legal document that embodies the South African social contract. It requires decisions and actions to fall in line with its prescripts by creating obligations and limitations for the state. Any international law or government conduct inconsistent with the Constitution, its norms and values, is invalid and should be set aside by a competent court.[8]

The duty to protect, promote, and fulfil the Bill of Rights is one such obligation, which gives force and effect to constitutional norms and values.[9] On the other hand, the duty on members of the security services deployed abroad to adhere to the Constitution and the law serves as an example of a constraint,[10] preventing any foreign policy option that may require South African troops to act in violation of either its values or the law.

Further, the constitutional text enables the application of international law which serves to limit foreign policy choices.[11] South Africa's policy options in peace and security, for instance, are constrained by a commitment made under the Charter of the United Nations to seek Security Council authorisation before engaging in conflict, even in the case of gross human rights violations by another state.[12]

Much of the interaction of the Constitution and foreign policy occurs in the realm of negotiation. Here, the Constitutional Court has

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7 Constitution of the Republic of South Africa, 1996, Section 1, which reads: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values:
a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
b. Non-racialism and non-sexism.
c. Supremacy of the constitution and the rule of law.
d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'
Section 7 reads:
'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'
Chapter 2 consists of sections 7-39 of the Constitution.

8 Constitution of the Republic of South Africa, *op. cit.*, Section 2, which reads: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

9 *Ibid*., Section 7(2).

10 *Ibid*., Section 199(5). See further below.

11 *Ibid*., sections 199(5); *ibid*., sections 39, 231, 232 and 233.

12 Charter of the United Nations, 1945, Articles 2(4) and 24.

recognised that the Constitution implies a normative standard and obliges those empowered to negotiate on South Africa's behalf to base those negotiations on the Constitution.[13]

2.2 The Constitution's process-based influence on foreign policy

Outside of the constitutional text, global, domestic, and individual inputs influence the decisions and actions which underpin foreign policy.[14] Desiring to influence the national interest and foreign policy, national actors including legislators, public interest groups, and citizens formulate and articulate policy demands or inputs.[15] The gravity assigned to the differing policy preferences of actors and groups through the policy-making process ultimately impacts on the policy output and the national interest to a greater or lesser extent.[16]

It is through the Constitution that the civil and political institutions that participate in the creation and implementation of foreign policy are empowered. By prescribing the process of democratic participation, it also determines the weight assigned to different actors, and the mechanisms through which they might contribute to the formulation of the national interest and South Africa's foreign policy.

2.3 The executive

The national executive is the only organ of state expressly empowered by the Constitution to create and implement foreign policy.[17] The president, as the head of the executive, is also empowered to appoint diplomatic missions upon which she confers powers of foreign policy advancement and implementation.[18] The executive and, by extension, foreign missions are obliged to act in accordance with the Constitution when carrying out their functions.[19] Further, through its constitutional responsibility to

13 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (2018) ZACC 5; *President of the Republic of South Africa v South African Rugby Football Union* (1999) ZACC 11.

14 Kegley CW Jr, 'Foreign policy decision making', in Kegley CW Jr & ER Wittkopf, *World Politics: Trend and Transformation*, 11th edition. Belmont: Thomson Wadsworth, 2007.

15 *Ibid*.

16 Hiscox MJ, 'The domestic sources of foreign economic policies', in Ravenhill J (ed.), *Global Political Economy*. Oxford: Oxford University Press, 2008, pp. 51–83; *ibid*.

17 Constitution of the Republic of South Africa, *op. cit*., Section 231.

18 *Ibid*., Section 84(2)(i).

19 *Ibid*., Section 2.

coordinate the national executive, the presidency has the obligation and the opportunity to institutionalise the integration of foreign policy into domestic policy and the integration of domestic policy into foreign policy.

According to the Constitutional Court, the exercise of the foreign affairs power by the executive must promote, rather than seek to undermine, the Bill of Rights.[20] Whatever the president does must accord with the Constitution and law, including both municipal law and international law (to the extent that is not inconsistent with the Constitution).[21] Still, the Constitutional Court has been hesitant to dictate how the executive should engage in its foreign relations and has made it clear that the Bill of Rights does not have extraterritorial application.[22]

The president's scope of action in the foreign policy realm derives from the interaction of domestic and international law. South Africa has traditionally adopted a mixed approach to the incorporation of international law into municipal law. It applies a dualist approach in respect of treaties and a monist approach in respect of customary international law. Treaties have thus been seen to be separate from the domestic legal system while customary international law has been seen to be part of our law.[23] This approach gives the executive more power in the realm of foreign policy when compared with the other branches of government. The executive can pursue its foreign policy goals through treaties, which are becoming increasingly prevalent and significant in international law. It is also important to acknowledge the growing role of international agreements – international instruments short of the formality of a treaty but which nonetheless can create binding commitments between nations under certain conditions.[24] There is further a growing influence of soft law (i.e. non-binding instruments and texts) by which the executive may also advance South Africa's values and interests.

Section 231(1) empowers the executive to negotiate and sign international agreements (which is to say both treaties and less formal international agreements) on behalf of the state. Once binding, treaties

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20 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (2018) ZACC 5; *President of the Republic of South Africa v South African Rugby Football Union* (1999) ZACC 11.

21 *Ibid*.

22 *Kaunda and Others v President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5.

23 Hopkins K & H Strydom, 'International agreements', in Woolman S (ed.), *Constitutional Law of South Africa*, 2nd revised & enlarged edition. Kenwyn: Juta Legal and Academic Publishers, 2002, pp. 30–27 to 30–31.

24 One recent example of the domestic and international significance of international agreements was the dispute over Russia–South Africa cooperation agreements in the field of nuclear energy. *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* (19529/2015) [2017] ZAWCHC 50.

and other binding international agreements will go on to influence future foreign policy and may limit the foreign policy options available to future governments. Consequently, the Constitution has put in place checks and balances on the executive's treaty-making powers which primarily lie with the legislature.

2.4 The legislature

Written on the cusp of the 21st century, the Constitution sets out relatively clear rules for the approval of international agreements.[25] Prior to the promulgation of the Interim Constitution, the negotiation, signature, ratification, and accession to treaties fell within the exclusive competence of the executive. The legislature played no part in the treaty-making process, and treaties did not become part of municipal law unless they were incorporated through legislation. This is no longer the case.

In terms of Section 231, although treaties are still negotiated and signed by the executive, a treaty only becomes binding on the South African state at the national level if approved by a resolution of both houses of the national legislature: the National Assembly and the National Council of Provinces. Ratification by parliament is, therefore, a necessary component of the treaty-making process under the final constitution. Consistent with the traditionally dualist approach to the incorporation of treaties, a further enactment by the national legislature is required to make the treaty part of domestic law. By dividing the treaty-making process between two organs of state, the Constitution envisages the legislature as an essential check and balance over the executive's treaty-making powers.

However, parliament's oversight role extends beyond the ratification of treaties and its incorporation into domestic law. Under the Constitution, parliament must oversee and scrutinise executive action, provide a national

25 See Constitution of the Republic of South Africa, *op. cit*., Section 231, which provides: '231. (1) The negotiating and signing of all international agreements is the responsibility of the national executive. (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.'

platform for public consideration of issues which may include public consultation, and only ratify international treaties that are consistent with the Constitution.[26] This more substantial oversight power includes scrutiny and accountability over binding and non-binding international agreements concluded by the executive.

The executive is thus answerable to parliament for its actions on the international stage through questions posed from the parliamentary floor, parliamentary committees may scrutinise its foreign policy and international agreements in publicly accessible proceedings. The Portfolio Committee on International Relations and Cooperation may hold hearings to ensure that the Department of International Relations and Cooperation (DIRCO) has spent taxpayers' money appropriately.[27] More directly, parliament may show its approval or disapproval of specific foreign policy choices by voting for or against a budget which allocates funds to a particular foreign policy agenda.[28] Finally, parliament serves as an essential vehicle for consolidating and enlisting the participation of civil society organisations (both non-profit and profit) in the articulation and implementation of South African foreign policy.[29]

2.5 Cities, Chapter Nines and other new domestic actors in the foreign policy realm

One important development arguably facilitated by the Constitution is the recent rise of cities and other sub-national governmental and other non-state actors as global actors. On the whole, this is the case in South Africa, at least with the large metropolitan cities such as Cape Town and Johannesburg. This trend has become more apparent in the past decade than in the immediate post-apartheid decade and is likely to continue to grow into the 2020s. Significantly, cities or provinces have taken foreign stances at times at variance with that of the national sphere of government. This has perhaps mainly been the case with the Western Cape and with the City of Cape Town. These sub-national actors have taken some symbolic action at the city level. While she was Mayor, Patricia de Lille announced that she had recommended that former US President Barack Obama and Michelle Obama be granted the Freedom of the City. This is the highest honour awarded by the City. Each Obama would thus be known as an "Honorary Freeman of the City" and would join persons

26 Constitution of the Republic of South Africa, *op. cit.*, sections 55(2), 59, 72, 74, 231(2) and 2.
27 *Ibid.*, Section 56.
28 *Ibid.*, Section 77.
29 *Ibid.*, Section 59.

including Desmond Tutu, Nelson Mandela, and Ahmed Kathrada.[30] Another example – albeit one without formal legal or policy effect – might be the declaration by the Khoi-San King that the Cape of Good Hope has seceded from the rest of the country in July 2018.[31] The interesting interplay between the Constitution and sub-national actors remains fluid and presents an opportunity for national influence and direction. In any case, the constitutional structure allowing for some foreign policy interests in non-national spheres of government is more general than the current relationship of the Western Cape to the rest of the nation. Cities outside the Western Cape also have policies on dealing with dissidents or attracting foreign investment, both matters within the country's foreign policy.

In light of the rise of sub-national governments as global actors, it is appropriate to ask to what extent the Constitution enables or inhibits such a trend. Arguably, the South African Constitution may and should be interpreted to channel and largely limit the foreign policy energies of cities (and provinces) and their officials with global ambitions primarily to attend to matters of economic development. Rather than pursuing their own interpretations of South Africa's interests in the areas of human rights, institutional reform, or peace and security, such sub-national actors may contribute most fruitfully in the foreign policy realm through a globally aware and linked role in promoting sustainable and inclusive economic development.

Second only to the growing foreign policy role of sub-national government is the influence in this field of the Chapter Nine's (as the State Institutions Supporting Constitutional Democracy in chapter 9 of the Constitution have become known). Most prominent is the South African Human Rights Commission (the SAHRC). Beginning in the 1990s with involvement in refugee affairs, the SAHRC now has an acknowledged role in foreign policy, often working with civil society organisations (usually non-profit ones). The SAHRC currently holds observer status in the UN Human Rights Council and is, for instance, supporting the implementation processes of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Other Chapter Nine's participate in international networks of similar institutions, such as the Public Protector's participation in the African Ombudsman and Mediators Association (AOMA). Some activities of these networks such as staff training are DIRCO-funded through

30 Portfolio Collection, 'Obamas to be given Freedom of the City of Cape Town', Travel Blog, https://www.portfoliocollection.com/travel-blog/obamas-to-be-given-freedom-of-the-city-of-cape-town (accessed 15 October 2018).

31 Cilliers C, 'Khoi-San king declares that the Cape has seceded from SA', *The Citizen*, 17July2018,https://citizen.co.za/news/south-africa/1982550/khoi-san-king-declares-that-the-cape-has-seceded-from-sa/ (accessed 13 October 2018).

institutions such as the African Ombudsman Research Centre (AORC) established in 2011.

As the mouthpiece of voters in parliament, political parties hold a more direct influence over South Africa's foreign policy and are an obvious voice for issues of national concern. A party-list proportional representation system and the indirect election of the president place significant power in the hands of parties who nominate and direct the views of both MPs and the executive.[32] Through this system, the will of the majority party has significant sway over the views of both parliament and the executive, and several analysts have alluded to the African National Congress' (ANC) weighty role in the formulation of South Africa's foreign policy.[33]

The Constitution's procedural influence over foreign policy primarily requires opposition parties to participate in foreign policy formulation and monitoring through their MPs' participation in the ordinary law making and monitoring mechanisms of parliament. To the extent that these systems are limited in their ability to offer opposition parties significant room for making a substantive contribution to government's foreign policy choices, opposition parties have initiated several matters before the courts and taken action outside of parliamentary law making or oversight processes.[34] The Democratic Alliance (DA) has, for example, approached the International Criminal Court (ICC) and UN Human Rights Council to seek action against Zimbabwe where it is dissatisfied with South Africa's policy towards its northern neighbour.[35] These actions cannot be viewed as forming part of South Africa's foreign policy, but certainly raise political awareness around issues and call into question government's failures to address matters such as human rights abuses abroad that may

32 Constitution of the Republic of South Africa, *op. cit.*, sections 86 and 89, which give effect to a parliamentary system of democratic governance under which the president is elected by parliament and remains accountable to parliament.

33 See, for example, Sidiropoulos E, 'South African foreign policy in the post-Mbeki period', *South African Journal of International Affairs*, 15, 2, 2008, pp. 107–120; Alden C & G Le Pere, 'South Africa's post-apartheid foreign policy: From reconciliation to ambiguity?', *Review of African Political Economy*, 31, 100, 2004, pp. 283–297; Habib A, 'South Africa's foreign policy: Hegemonic aspirations, neoliberal orientations and global transformation', *South African Journal of International Affairs*, 16, 2, 2009, pp. 143–153; Landsberg C, *op. cit.* Also see chapter 4 by A Muresan & F Kornegay *Overcoming Bureaucratic and Institutional Challenges in SA Foreign Policy Making* in this volume.

34 As a result of their relatively lower representation in the house and on parliamentary committees – compared to the majority party whose foreign policy preferences are likely aligned to those of an executive elected from the same party as a consequence of the parliamentary system.

35 DA (Democratic Alliance), 'DA approaches the UN, ICC, and South African Parliament over Zimbabwe crisis', Press Statement, 28 January 2019, https://www.da.org.za/2019/01/da-approaches-the-un-icc-and-south-african-parliament-over-zimbabwe-crisis (accessed 13 August 2019).

affect the county's national interests such as border security and economic development.

3 The national interest in human rights

Traditional approaches to the use of international law to promote human rights have both identified the content of those rights with international human rights treaties and employed either an idealist or a realist approach in pursuing the impact of these treaties. Both planks of this approach might be challenged by a robust South African approach to the human rights area of national interest. One might be tempted to identify the human rights topic area with a values-based approach to foreign policy. However, while there is some overlap, the values-based approach to identifying South Africa's foreign policy both misses some human rights matters, and includes some matters not included in the human rights subject matter.

A vote by South Africa as a non-permanent member of the UN Security Council in 2019 highlights the important role of constitutional values in South Africa's foreign policy, but also demonstrates that human rights may not form part of those values. South Africa was one of three countries, including China and Russia, which voted against a draft resolution initiated by the US calling for free, fair and credible presidential elections with international observers in Venezuela. The draft resolution sought to recognise elected National Assembly leader, Juan Guaido, as Venezuela's interim president until fresh elections were held. The draft resolution was proposed in response to the 2019 Venezuelan presidential crisis which began after the National Electoral Council (NEC) announced that Nicolas Maduro was elected president in a widely boycotted general election.[36]

The South African government justified its vote on the basis that the US resolution 'reflected a serious bias and partiality which goes against South Africa's Constitution and foreign policy'. While the reference to South Africa's Constitution serves as a positive indicator of its important role in influencing the actions and decisions of the executive, the values

36 The 2019 Venezuelan presidential crisis is the latest of a number of political and economic crises in Venezuela, including the 2017 Venezuelan constitutional crisis, which saw the Supreme Tribunal of Justice operate in exile, the formation of a Constitutional Assembly convened by Presidential Decree that functions *de facto* in parallel with an opposition controlled National Assembly, and the appointment of members of the NEC by the courts (believed to be friendly to Maduro's government) rather than the opposition-controlled National Assembly in terms of the country's 1999 Constitution. The current crisis is marked by mass displacement of people, chronic food shortages, hyperinflation, and rising hunger, disease and crime.

used to justify the decision exclude human rights. South Africa began by recognising a 'serious humanitarian situation' in Venezuela, but it relied on the separation of powers, legitimacy of the presidential election by reference to its endorsement by the NEC, and the partisan and biased exclusion of a certain sector of the Venezuelan population in the resolution which referenced the need to ensure the security of the National Assembly and opposition.[37] South Africa's stance ultimately favours sovereignty – also a constitutionally protected value – without deeper consideration of whether the NEC was in fact partial or biased, whether Venezuelan elections were indeed free and fair, and thus whether the value of democracy was assigned its proper meaning and effect. South Africa also failed to address the cause of the humanitarian situation or to assign blame to the Venezuelan government, although it should be noted that the US-sponsored resolution did not specifically raise the issue of human rights violations.

The Venezuela vote appears to mimic South Africa's prior voting record as a member of the Security Council in 2007, which had led to the disappointment of several human rights activists and scholars. It calls into question the place of human rights advancement in South Africa's foreign policy and underscores the ongoing conflict in South Africa's foreign policy between human rights and realist concerns. Among those concerns are peace and security, economic development, and international institutional reform (discussed further below), which have been used to justify South Africa's previous voting record.[38]

An important question is whether the realisation of human rights may form part of the national interest. The realist approach to international affairs analysis tends to ignore the importance of human rights, considering only the more traditional concerns of the national interest. On the other hand, a values-based approach may ignore the hard policy choices necessary for the government to realise its foreign policy objectives.

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37 DIRCO (Department of International Relations and Cooperation), 'South Africa reaffirms support for inclusive, political dialogue in Venezuela at the UN Security Council', Media Statement, 28 February 2019, http://www.dirco.gov.za/docs/2019/unsc0301.htm (accessed 9 March 2020). South Africa voted instead for a Russian sponsored resolution which it claims was based on 'a reaffirmation of the principles of the Charter of the United Nations on the peaceful settlements of international disputes, as well as the principles of humanity, neutrality, impartiality and independence for the provision of humanitarian assistance'.

38 Habib A, *op. cit.*, who points to 'South Africa's refusal to support resolutions in the Security Council condemning and imposing sanction on Iran, Myanmar, Sudan, and Zimbabwe'. The author argues that in all four cases, South Africa's decisions were 'motivated on the grounds that the United States and European countries were either violating existing structure of the UN system by tabling issues in inappropriate structures, or were selectively targeting countries they were hostile to'.

From a constitutional perspective, government is certainly required to take actions and decisions in line with the Bill of Rights, but strictly speaking only to the extent that human rights apply to people within South Africa.[39] Such a view is supported by the Constitutional Court's hesitancy to rule on matters which involve foreign policy. The substantive influence of the Constitution therefore implies that the promotion, protection, and fulfilment of the rights contained in the Bill of Rights must form part of foreign policy to the extent that those rights apply within the country's territorial borders, providing impetus to an argument that the realisation of human rights is within the national interest. However, the Constitution does not determine whether the realisation of rights abroad, in sovereign states, is within South Africa's national interest, and ultimately that determination is left to the executive with oversight from the legislature.

Nonetheless, the legislative and the executive branches have both enacted and pursued policies related to traditional national interest concerns that are best understood as fitting within the human rights policy field.

For instance, the legislature has enacted legislation regarding the regulation of arms and of military assistance, with both domestic and extraterritorial effects. Examples of such legislation in particular sectors include the National Conventional Arms Control Act and the Foreign Military Assistance Act.[40] These laws seem best explained at least in part by reference to human rights doctrines.

Proposals have also long been made for general legislation specifically considering human rights, state action that would involve parliament.[41] In UN circles, the national executive has latterly pursued the drafting of a binding treaty in the area of business and human rights. Likewise, the executive has recently enacted and pursued UN action in the form of convening the Nelson Mandela Peace Summit, intending to mobilise global support towards ending conflict in the world and in Africa in particular. The executive has also engaged with and accepted responsibility for continued

39 See discussion above. Beyond South Africa's borders, the Bill of Rights does not directly apply, as the Constitutional Court has repeatedly held that human rights under the South African Constitution do not have direct extra-territorial effect. *Kaunda and Others v President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5.

40 National Conventional Arms Control Act 41 of 2002, and Foreign Military Assistance Act 15 of 1998. Schoeman M, 'South Africa as an emerging middle power', *African Security Review*, 9, 3, 2000, pp. 47–58.

41 Klaaren J, 'Human rights legislation for a new South Africa's foreign policy', *South African Journal on Human Rights*, 10, 2, 1994, pp. 260–75.

engagement with the process of the Sustainable Development Goals, a key development in the pursuit of human rights at the international level.[42]

Certainly, in the area of municipal socio-economic rights and effective enforcement, South Africa has pushed the hitherto-existing conceptual boundaries, providing the executive with substantial persuasive leverage at the diplomatic level.

As a final suggestion, we propose that, in ensuring the impact of international treaties and the impact of various human rights instruments in a world of diverse states and rapidly changing configurations of power, South Africa would do well to consider and, in particular instances, adopt enforcement approaches of acculturation, what might be thought of as blending both realism and idealism.[43]

4 The national interest in peace and security

As one senior commentator on the South African Constitution has aptly written:

> It may seem strange to inquire into the nature of war powers under South Africa's Constitution – for surely South Africa is not a nation that considers itself embarked on a policy of war. The topic is important, nonetheless. As a matter of principle, there are few greater destroyers of rights, or creators of utter and arbitrary inequality, than war. It demands that soldiers kill, it sacrifices others, and war potentially rips apart the fabric of civil society. The power to make war is the power to protect and to destroy perhaps the most fundamental right of all: the right to live in an ordered society. A state that leaves this power loosely governed is a state where rights are not entirely secure, no matter how extensively that state protects rights in situations short of war. It is also extremely hard to govern constitutionally. The pressures of military necessity drive the meaning of constitutional language in ways that only experience may fully reveal. [Post-apartheid] South Africa so far has, happily, had little occasion to encounter these questions in its own governance. But war is a great danger, even in a country that takes pride in its commitments to peace.[44]

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42 Piccone T, 'Breaking the human rights gridlock by embracing the Sustainable Development Goals', OpenGlobalRights (blog), September 2018, https://www.openglobalrights.org/Breaking-the-human-rights-gridlock-by-embracing-the-Sustainable-Development-Goals/ (accessed 10 August 2019).

43 Goodman R & D Jinks, 'How to influence states: Socialization and international human rights law', *Duke Law Journal*, 54, 3, 2004, pp. 621–703.

44 Ellmann S, 'War powers', in Woolman S (ed.), *op. cit.*, 23C – 1 to 23C.

At least three general principles of South African constitutional law are particularly important in the implementation of South Africa's powers to make war and engage in military actions.[45]

First, the power of South Africa to make war is subject to the rights of the Bill of Rights and judicial review. At least in respect of nationals, some protections of the Constitution may also flow through the section on citizenship.[46]

Second, exercises of military power undertaken by the nation are subject both to the Constitution and to law. This is specifically provided for in section 199(5), which provides: 'The security services must act, and must teach and require their members to act, in accordance with the Constitution and law, including customary international law and international agreements binding on the Republic.'

Third, the Constitution makes it clear that parliament plays a role in war-making; war is not exclusively within the authority of the national executive. Section 198(d) specifies as a governing principle for the security services that '[n]ational security is subject to the authority of parliament and the national executive'.

In addition to these general principles, there are several specific provisions of the Constitution that are directly relevant to the pursuit of the national interest in the area of peace and security. These are enunciated in relation to three significant areas of foreign affairs: declaring a state of national defence,[47] engaging in military actions without a declaration of a state of national defence and, at least generally, beyond the territory of the Republic, and the purpose and extent of the power of parliament over public finance, particularly in relation to and as a form of accountability over the exercise of foreign affairs power by the national executive.

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45 *Ibid.*, 26C – 3.

46 Klaaren J, 'Constitutional citizenship in South Africa', *International Journal of Constitutional Law*, 8, 1, 2010, pp. 94–110. As it is drafted, the section crystallises the potential to ground national citizenship within a global order. This potential remains apparent in the interpretations of constitutional citizenship offered, thus far, in South Africa's democracy in the doctrinal fields of equality and socioeconomic rights, diplomatic protection, and the right to vote. In each of those fields, the dominant interpretation is that of lawful residence citizenship, while the opposing view is that of republican citizenship. In equality and socioeconomic rights, the Constitutional Court has followed the relatively clear constitutional text and interpreted citizenship, essentially, to include those with permanent residence. In diplomatic protection, the Court has taken as its touchstone international practice but, nonetheless, has moved ahead of that criterion to articulate a doctrine with considerably more power than seen elsewhere. Finally, in a series of right-to-vote cases, with neither a clear text nor external practice on which to base itself, the Court has cautiously tilted in favour of a concept of citizenship consistent with a globalising world.

47 Constitutional language for war.

While it may be the case that South Africa has no constitutional power to wage a war of aggression, it is clearly the case that it may declare a state of national defence in order to defend itself with military force. By virtue of section 203, the president has the authority to declare that state of national defence. This authority is transferable. The South African military intervention into Lesotho in 1998 was authorised by Acting President Mangosuthu Buthelezi, though it was not done pursuant to a declaration of national defence, but rather as military action without such declaration.[48] While prior parliamentary approval is not necessary, concurrent cabinet approval may be. Within seven days, such a declaration must be approved by parliament or the declaration lapses.

During those first seven days and after parliamentary approval, the president would be able to authorise military action ranging from preparation for war to real fighting. In addition to seeking parliament's approval within seven days, section 203 requires the president to report to parliament on the reasons for the declaration, any place where the defence force is being employed, and the number of people involved. The declaration of national defence may require specification of against whom or what the defence is required – for instance defence against a nation-state or defence against a terrorist network. Parliament may have an implied authority to limit the president's freedom of action in a state of national defence, at least at a fairly high level of policy, such as prohibiting the invasion of a particular nation-state (which would be understood as a matter of self-defence in terms of international law) as opposed to prohibiting certain military strategies or tactics (which would be otherwise lawful). The constitutional powers available to the national executive for surveillance may be greater under a state of national defence than otherwise, interacting with the provisions of section 91 of the Defence Act.[49]

Of course, South Africa will wish to engage in many exercises of military power without a specific declaration of a state of national defence – and it has already done so. Such deployments are within the power of section 201(2) which declares that '[o]nly the president, as head of the national executive, may authorize the employment of the defence force – (a) in cooperation with the police service; (b) in defence of the Republic; or (c) in fulfilment of an international obligation'.

One instance covered by 201(2)(c) would be the deployment of the defence force on peacekeeping missions in Africa or elsewhere in the world. It appears that no affirmative parliamentary approval is needed for these

48 See below; Constitution of the Republic of South Africa, *op. cit.*, Section 201(2).
49 Ellmann S, *op. cit.*, 26C – 15 to 26C – 16.

deployments – they are within and taken on the president's authority as head of the national executive. Still, these deployments are constitutionally subject to the reporting requirement of section 201(3) where the president needs to 'inform parliament, promptly, and in appropriate detail' of such deployments. While inaction constitutes acceptance by parliament, it is probably that an affirmative objection or decision by parliament would constrain the president's power.

Apart from these instances where parliament may limit the president's authority, parliament additionally exercises power over the funding for exercise of South Africa's military power. This budgetary power may be important on its own and as a location for countering the president's authority. In theory, this would even entail the proposition that parliament could end a war or other military engagement by refusing to continue to fund it. Probably it would, however, be beyond this parliamentary power to attempt to dictate the tactics or policy to be followed in a military engagement. Still, the national executive (including the Treasury) exercises considerable control over the budget – the likely intra-governmental politics may thus occur between separate departments of the president's cabinet – the Treasury and the Department of Defence.

Finally, the Constitution takes a significant interest in intelligence matters. In particular, Chapter 11 and the governing principles of section 198 bind the actions of South Africa's foreign as well as its domestic intelligences services. In addition, section 210 requires civilian monitoring of the intelligence services and section s 199(8) specifically institutes a high-level multi-party parliamentary monitoring committee over all security services. Both of these institutions require executive support to be effective but both have the potential to expand South Africa's soft power in the realm of foreign policy.

5 National interest in economic development

South Africa's constitution poses an interesting question regarding the transparency of trade negotiations. The prevailing practice of trade discussion worldwide is certainly to favour closed and opaque negotiations. Yet, there are compelling arguments to open up such discussions to wider participation. Trade agreements (and other international agreements) often have profound domestic effects. For instance, a leading economist long arguing for empirically-based scepticism of the benefits of free trade and thus for concern for the effects of such trade on workers and for a robust safety net has been Dani Rodrik. In his recent book, he argues that trade discussions should be public and transparent. He gives the US example where negotiations over the Trans-Pacific Partnership (TPP) were

largely held in secret, potentially shielding corporate influence. Indeed, Rodrik terms the TPP an example of 'corporate capture'.[50] The influence of the Constitution that may be brought to bear through the Promotion of Access to Information Act[51] and section 32 can provide South African constitutional backing for Rodrik's policy arguments. This kind of transparency might be especially relevant for the purposes of ensuring proper oversight by the legislature, civil society, and interested parties. Opening trade discussions would ensure that foreign policy decisions remain congruent with the national interest and the Constitution.

In the area of business and human rights, the vertical and horizontal application of the South African Bill of Rights, which applies to legal persons under section 8(2), could be instructive for the development of a binding human rights treaty for transnational corporations. International law has thus far attempted without success to create a binding legal framework to resolve the issue of violations of human rights by transnational corporations. One potential policy model here is contained within the Protection of Investment Act,[52] which attempts in a balanced manner to both enable and regulate the responsible role of South African business on the African continent.[53]

The South African Constitution recognises that legal persons are capable of violating, and are entitled to, certain rights. An international tribunal to adjudicate human rights claims could only be said to enhance access to justice for its citizens against violations committed abroad. The duty on the state to promote these rights may provide the impetus for a foreign policy which encourages the negotiation of a treaty to govern businesses and human rights. At the 26th session of the UN Human Rights Council, a resolution drafted by Ecuador and South Africa establishing a working group to formulate such a legally binding instrument was adopted.

More directly, the Constitution requires government to realise certain socio-economic rights. Economically, the realisation of socio-economic rights could have the effect of improving the quality of human capital and thus attracting investment for newly industrialising or reindustrialising countries such as South Africa. Human rights have much in common with human capital – an important factor for growth and economic development, and an attractive factor for foreign direct investment.

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50 Rodrik D, *Straight Talk on Trade: Ideas for a Sane World Economy*. Princeton: Princeton University Press, 2017.

51 Promotion of Access to Information Act 2 of 2000.

52 Protection of Investment Act 22 of 2015.

53 See chapter 8 by L Mondi *South Africa and African Continental Economic Integration in the 2020s* in this volume for further background on South African business engagements in Africa.

Closely related to socio-economic rights are the UN's Sustainable Development Goals (SDGs) which provide measurable standards and goals on an international scale for the realisation of certain rights such as the right of access to housing, education, and water and sanitation. A foreign policy which outwardly promotes the need to realise socio-economic rights could potentially offer South Africa a basis to negotiate better trade and investment arrangements on the basis of its international obligations, under the International Covenant on Economic Social and Cultural Rights and the realisation of the SDGs. For instance, one could postulate that in interpreting the meaning of 'sustainable development' as an objective of the World Trade Organisation, its Dispute Settlement Body could have regard to the SDGs to provide context.[54] An interpretation of the WTO's objectives in this way could allow for more lenient treatment of South Africa's domestic industrial policies, in a manner that supports industrial growth.

These arguments point to the importance of realising socio-economic rights for economic development which fall well within a constitutional foreign policy as well as the constitutional duty not to enter negotiations or agreements that may undermine their realisation.

6 The national interest in international institutional reform

Reforming international institutions is often associated with the reform of the UN and particularly its Security Council. This section proposes two international institutional reforms directly linked to the Constitution – both long part of South Africa's foreign policy agenda – one at UN level and one at African/SADC level.

Since the 2004 High Level Panel on Threats Challenges and Change Report entitled 'A more secure world: Our shared responsibility', the lack of representation in the composition of the UN Security Council has been highlighted at the global level. Various proposals have been put forward to promote equitable representation, efficiency, and effectiveness of the Security Council including the Ezulwini Consensus of the Africa group. This Consensus recommends the addition of 15 non-permanent seats and

54 This raises the issue of how far the WTO's primary enforcement mechanism, the Dispute Settlement Body and its quasi-judicial panels, should go in incorporating international legal instruments beyond the WTO (and Vienna Convention on treaties) into its decision-making. Lang ATF, 'Reflecting on "linkage": Cognitive and institutional change in the international trading system', *The Modern Law Review*, 70, 4, 2007, pp. 523–49.

the expansion of permanent seats from five to eleven. Of those permanent seats, two should be allocated to African states.

After being elected as a non-permanent member to the Security Council in 2018, South Africa used the opportunity to reiterate its call for UN reform along the lines of the Ezulwini Consensus. Given that South Africa has contributed troops to several peacekeeping missions and is in the race for representation as a permanent member, this call is in line with government's foreign policy objective of having South Africa selected as a permanent member by its peers. Being selected a permanent member with a veto right would serve South Africa's national interest by offering it more clout on the global stage.

Still, the pertinent question here is to what extent the Constitution influences the country's foreign policy, giving meaning to the national interest. South Africa has been elected to a place on the Security Council for 2019-2020 and is in a good position to both push for international institutional reform and to demonstrate its continuing long-term value to the community of nations. Does the Constitution have anything to say about South Africa's pursuit of status as a permanent member? The principle of democracy could loosely be used to justify South Africa's pursuit of a more representative Security Council. However, just as the ongoing trade war between China and the US may well render the World Trade Organisation ineffective, the pursuit of greater representation and collective decision-making could resign the Security Council to the same fate.

On the other hand, the Constitution's wider values may enable South Africa to participate with a louder voice. Arguably, because of the relative strength of its democracy and the constitutional emphasis on the principles of rule of law, the achievement of equality and advancement of human rights, and institutional checks on the executive's role in foreign policy, South Africa is best placed to take up a permanent seat instead of its continental competitors such as Nigeria and Egypt.[55] However, South Africa's historical voting record has not always followed this principled

55 Alden C & M Schoeman, 'South Africa in the company of giants: The search for leadership in a transforming global order', *International Affairs*, 89, 1, 2013, pp. 111–29. While a value-based bid provides credibility to South Africa's aspirations, from a realist perspective South Africa's chances of attaining a permanent seat are well challenged by Nigeria and Egypt. In terms of demographics, the populations of both Nigeria and Egypt are much larger than that of South Africa, and they represent distinct population groups. Egypt would likely be the only representative of the Arab region, offering support to its bid for a permanent seat, while Nigeria contributes a greater number of troops to peacekeeping missions than South Africa, and may be seen as more representative of Africa in terms of its development and the composition of its population.

approach, and the country has often used its position to pursue the more realist agenda of preventing global hegemons from violating existing rules of the UN system or selectively targeting smaller countries that they were hostile to.[56] In doing so, the country has often sacrificed its values, and human rights, to attain equity and fairness in the functioning of international organisations.

The argument for institutional reform cannot merely be to ensure more equity and fairness. After all, the permanent members of the Security Council were selected and given veto powers because of their individual military might. Today, one might question whether the WTO should be reformed to allow the most economically powerful states more power relative to the others, or veto powers, to prevent them from dragging the world economy backwards. Equity and fairness in international institutions must be balanced against the need for those institutions to be effective. However, in a world currently plagued by growing inequality, those institutions need to ensure equity and fairness in the treatment of smaller nations and the people that inhabit them.

As a middle power, South Africa is unlikely to make decisions or take actions with widespread effect in matters of international peace and security or the world economy. The country is nonetheless well positioned to use its norms and values to make a meaningful contribution as the voice of those affected by the military and economic disputes of larger nations. This contribution requires a shift in South Africa's approach to institutional reform. It requires reforms that recognise the importance of human rights and values, rather than being primarily concerned with the realpolitik of power.

As the trade war continues, South Africa should be concerned about the stifling of its ability, and the ability of other smaller nations, to realise socio-economic obligations under the Constitution and international agreements. Similarly, as a result of its externalities for South Africa and the planet, the US's withdrawal from the Paris Agreement should be acknowledged as a threat to the right to environmental protection and ecologically sustainable development. The human rights of global citizens should be placed before the narrower interest of power in international institutions, to ensure that institutions operate effectively in delivering peace and security in the interest of those they were designed to protect. This would constitute much needed reform of the decision-making processes of the Security Council which have led to gross violations of human rights in the past where, for example, the Council only authorised

56 Habib A, *op. cit.*

intervention in Rwanda when genocide led to the disruption of cross-border security created by mass internal displacement.

A second international institutional reform linked to the Constitution that ought to be high on South Africa's agenda in the 2020s is strengthened African and SADC institutional capacity to pursue developmental regionalism. This vision of a prosperous and trading Africa is more comprehensive than the vision of developmental integration thus far pursued by South Africa. It rests upon four parallel and interconnected pillars: a) cooperation on building mutually beneficial trade integration (fair trade integration); b) cooperation on industrial development and upgrading in regional value chains (transformative industrialisation); c) cooperation on investment in cross-border infrastructure and trade facilitation; and d) cooperation on the building of democracy, good governance and peace and security. As Faizel Ismail has explained, two of the institutional elements required to achieve this vision are 'a strong institutional architecture and capacity to drive the regional integration agenda' in the first place and 'evolving a bond of common regional citizenship and identity necessary for regional human capital mobilisation' in the second.[57] The Constitution facilitates and supports both of these elements through South Africa's mixed set of foreign policy institutions (the legislature and the executive), its capacity to pursue both treaties and executive-implemented international agreements, and its flexible approach to citizenship (in particular consistent with the adopted but not yet in force SADC Protocol on the Facilitation of the Movement of Persons) and the relaxation of visa regimes throughout SADC.[58]

7 Conclusion

As South Africa's supreme law, the Constitution sets out norms and values that must necessarily guide the executive in its exercise of its foreign affairs powers. It places obligations on government to further those norms and values. It also sets out limitations for the policy choices of government. Actions and decisions of government, as well as international law, which are inconsistent with its provisions are invalid. Consequently, by definition, foreign policy which is inconsistent with its terms should not be considered policy at all.

57 Ismail F, 'A "developmental regionalism" approach to the AfCFTA', *In Celebration of the 90th Birthday of Chief Olu Akinkugbe CFR CON*, 2018.

58 Maunganidze OA & J Formica, 'Freedom of movement in Southern Africa: A SADC (pipe)dream?', *Southern African Report*, 17, November 2018, pp. 1–24.

Through its substantive influence, the Constitution asserts its values and provisions as South Africa's national interest – no interests could be more important than those contained in the supreme law. While ideological interpretations of the Constitution have focused on its normative values, particularly in the field of human rights, the text sets out pragmatic legal obligations for foreign policy in matters of realpolitik such as peace and security and compliance with international law. Within the country's territorial borders, the promotion, respect, and protection of human rights contained in the Bill of Rights should be interpreted as the county's foremost goal and ambition, also forming part of the national interest.

Outside of South Africa, the Constitution does not prescribe how foreign states should behave and has not yet been interpreted in a manner which dictates how the executive should act in matters that affect persons or circumstances in other states. This aspect of the Constitution is at the heart of the considerable gap that may well exist between South Africa's normative policy and its national interests. Arguably, this is most evident when foreign human rights matters are considered against domestic peace and security, economic development, and institutional reform interests.

The Constitution imposes on the executive (particularly at national level) the difficult responsibility of orchestrating harmony between its conflicting interests. In one instance, the duty to realise socio-economic rights in South Africa should be considered in both trade negotiations and global economic issues to ensure that government is able to realise what is arguably the most pressing issue in the national interest, inclusive socio-economic development. However, the balance is less clear in the international sphere in decisions such as whether South Africa should condemn human rights violations beyond its borders if such condemnation may offend trade relations or stand in contrast to South Africa's policy on international institutional reform.

In these latter matters, government is not simply absolved of its responsibility to strike a balance between its idealist and realist concerns. Here, the procedural influence of the Constitution plays a key role. Through democracy and civil rights, the Constitution enjoins the voices of ordinary citizens, civil society, and corporate persons to participate in the process of determining both foreign policy and the national interest. It sets up institutions such as the legislature, the courts, the human rights commission, the public protector, and other constitutional actors to represent those voices and ensure that foreign policy remains consistent with constitutional provisions.

South Africa has recognised the Constitution as its guiding text in determining its policies. Beyond mere recognition, what is required

is for the executive to apply the spirit and purport of the constitutional text rather than paying lip service to a select number of values which fit a narrow interest. This is undeniably a difficult task which requires a further balancing of all constitutional values, in matters to which the Constitution may not directly apply. Here, government is helped along by the Constitution's recognition of international law. Agreements such as those against torture, human rights violations, and climate change, and for sustainable development, fair labour practices, and criminal justice, form the legal basis upon which South Africa can honour its constitutional values internationally.

Where government conducts itself in a manner which offends constitutional obligations, it fails to maintain the requisite balance of interests. This conduct is likely to be overturned or opposed, especially where the rights of South Africans or the national interest is affected. However, the Constitution is also the repository of South Africa's norms and values. While not legally binding internationally, they are enduring and authoritative. They form the basis of the Constitution and all its provisions. Through them, the Constitution tells us who we are as a nation and what we stand for.

8 Recommendations

This section provides recommendations that flow directly from the discussion above. Due to space constraints, we do not repeat here the justifications and arguments relating to these recommendations. First, in order to form a coherent and effective forward-looking foreign policy, South Africa should articulate a set of enduring norms and values rooted in the Constitution upon which to guide its future actions and decisions in its foreign affairs. Second, the executive should recognise the legislature's role in foreign affairs, especially in treaty-making and in accountability and oversight. Third, the legislature should play a more active role in holding the executive to account ensuring that foreign policy remains in line with Constitutional norms and values. Fourth, the executive should work with sub-national actors such as cities to take up a globally aware and linked role in promoting sustainable and inclusive economic development and should work with the Chapter Nine institutions more broadly in foreign affairs. Fifth, the advancement of human rights is within South Africa's national interest and should have a significant place in its foreign policy. Sixth, the executive should recognise that the Constitution constrains the country's military actions and intelligence activities, providing a role for parliament in these areas. Seventh, South Africa's foreign policy regarding economic development should promote greater public participation and transparency

regarding trade negotiations and should promote the realisation of socio-economic rights. Finally, South Africa should, given the relative strength of its democracy and the constitutional emphasis on the principles of rule of law, the achievement of equality and advancement of human rights, and institutional checks on the executive's role in foreign policy, continue to argue that it is best placed to take up a permanent seat on the Security Council and should simultaneously promote strengthened African and SADC institutional capacity to pursue developmental regionalism.