CHAPTER 3

THE COURTS AND FOREIGN RELATIONS POWERS

by Nicole Fritz

In December 2018, the Constitutional Court handed down judgment in *Law Society of South Africa v President of the Republic of South Africa* (the SADC Tribunal judgment).[1] In the concluding paragraphs Chief Justice Mogoeng Mogoeng, writing for the majority, made the following observation:

> The correct approach to sound diplomatic relations and international cooperation here is, from a correct South African perspective, fundamentally about the protection and promotion of the essence of our Bill of Rights and of the [SADC] Treaty, namely access to justice, human rights, democracy, the rule of law and the independence and effectiveness of institutions that strengthen good governance. We ought to relate cordially with other nations and not to dictate to them. Similarly, we are never to feel obliged to relinquish our sovereignty and rightful place in the family of nations at the altar of diplomacy, comity and the need for consensus. We thus have to relate with other sister countries with an unshakeable purpose of contributing to the realisation of a more just, equal, peaceful, human rights-oriented, truly democratic order and shared prosperity. This is especially so in a region that has a long and painful history of struggling for the attainment of these good governance, economic development, growth and stability-enhancing goals of universal application.[2]

Long-time observers of South Africa's foreign policy would have been tempted to cheer. Here was a statement from South Africa's highest court that appeared to be a much needed corrective to the disregard, even hostility, with which human rights considerations seem often to be treated by South Africa's foreign policy decision-makers.[3] The Court seemed the

1 *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA 30 (CC).
2 *Ibid.*, para 91.
3 I use both the phrases 'foreign policy' and 'foreign relations', understanding foreign relations to be the result of foreign policy dealings and decisions, and use the phrases interchangeably.

champion of a type of moral governance that the political branches had spurned (true, arguably, even beyond the realm of foreign relations).

In the SADC Tribunal judgment there is no repeated recitation of the judicial caution that needs to be extended the exercise of foreign policy powers – as was the case in *Kaunda v President of the Republic of South Africa*,[4] decided 14 years before. That may be unsurprising. It is hard to think of a more flagrant example of unlawful presidential conduct than that illustrated in the SADC Tribunal case: the president having acted, albeit in concert with other heads of state and government, purportedly to amend the SADC Treaty to deprive citizens of access to justice, in clear violation of the Treaty's stipulated amendment procedures. The assessment of that illegality gets complicated, as we shall see, by questions of whether international or domestic law are appropriately applied. Still, any disinterested observer would understand there to be something fundamentally unlawful in that conduct.

But the ultimate remedies crafted and ordered by the Court – that the president be directed to withdraw his signature from the purported amending document – are so extraordinary and potentially of such severe consequence for the conduct of South Africa's international relations – that it seems somewhat peculiar that the Court would not more rigorously engage with the nature of foreign relations power. For instance, must foreign states now treat with some circumspection signature of an international agreement by South Africa's executive, understanding that South African courts may declare such signature invalid and order its withdrawal? Even if the position at international law is unchanged and foreign states are entitled to rely on that signature, still there is no gainsaying the uncertainty that is introduced – that the executive may be compelled to withdraw signature. Additionally, it is surprising that the concerns which so animated the Court when reviewing foreign relations power in *Kaunda* are not even cursorily rehearsed in *SADC Tribunal.*

In the following chapter, I examine the two cases of *SADC Tribunal* and *Kaunda* – decided more than a decade and a half apart – more closely in order to assess the type of judicial scrutiny the exercise of foreign relations power will attract under South Africa's constitutional dispensation and why the intervening years may have wrought a seemingly variable standard of scrutiny. There are of course other cases that have involved consideration of foreign policy concern, but these involve primarily the exercise of other types of power – for example, powers of investigation and prosecution on the part of South Africa's prosecuting authority;[5] the recognition by our

4 *Kaunda v President of the Republic of South Africa* 2005 (4) SALR 235 (CC).

5 See *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC).

courts of the judgments and decisions of supranational courts[6] – that have repercussions for South Africa's foreign policy. Also to be distinguished are those actions by the executive which have implications for foreign relations/policy but which are specifically regulated by domestic statute or involve the executive failing to comply with the separation of powers doctrine. So, for instance, the series of judgements sparked by the controversial visit of then (now former) president of Sudan, Omar al-Bashir, indicted by the International Criminal Court (ICC) for genocide, crimes against humanity and war crimes – holding that the failure to arrest, detain and surrender Omar al-Bashir to the ICC was unlawful[7] and that the attempted withdrawal from the Rome Statute of the ICC on the part of South Africa's executive was unconstitutional and invalid[8] – were determined within the parameters of a domestic statute[9] and, in the latter case, also involved determination that the executive had entrenched upon powers specifically reserved for the legislature by the Constitution. These types of cases will not be determined by courts any differently from circumstances in which the executive authority has failed to comply with ordinary domestic laws or failed to respect separation of powers in the ordinary domestic context – i.e. they will not draw, even at the rhetorical level, the type of deference foreign relations powers are said to command. They do not involve consideration of the exercise of the executive's foreign relations power 'proper' – i.e. the making of representations within a bilateral or multilateral context.[10] Determination by our courts of the legality of the exercise of foreign relations power 'proper' is still comparatively rare, although *SADC Tribunal* arguably makes this less likely to be true for the future.

Before turning to consider the scrutiny afforded the exercise of foreign relations power in the judgments of *SADC Tribunal* and *Kaunda,* I make some general observations about courts and foreign relations powers. The next section of this chapter involves examination of *SADC Tribunal* and *Kaunda,* indicating that courts will resolve challenges to the exercise of foreign relations power in much the same way they do challenges to exercise of any other type of public power – by reviewing for: a) compliance with the rights contained in the Bill of Rights;[11]

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6 See *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC).

7 See *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA).

8 See *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP).

9 Specifically, the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

10 Section 231(1) of the Constitution provides that '[t]he negotiating and signing of all international agreements is the responsibility of the national executive'.

11 Government conduct may not infringe the rights contained in the Bill of Rights.

b) for legality;[12] and c) for rationality.[13] But where review is mandated for compliance with the Bill of Rights, scope afforded the judiciary to extend deference to the executive runs out. This is the clear message of *SADC Tribunal*. And if the hallmark of judicial review of foreign relations power – deference to the executive – is ultimately inapposite, does it make sense to understand justiciability of foreign relations power any differently from justiciability of the exercise of any other power.

Thereafter, I argue that even if South Africa's constitutional scheme does not permit that foreign relations powers be treated distinctly from the exercise of other types of public power, still appreciation of the character and manner in which foreign relations power is exercised means justiciability is not without potential costs. An exercise of foreign relations power subjected to judicial adjudication is removed from the transactional field of foreign relations conduct and the leveraging and trade-offs that might be obtained in order to ensure maximum promotion and advancement of human rights overall.

1 Courts and foreign relations powers

Foreign policy – its formulation and application – is typically thought to be the competence of the executive. In many traditionally Westphalian jurisdictions, courts tend to extend generous deference to the executive when legal issues involving foreign policy considerations are put to them. In the United States, for example, the political-question doctrine – a manifestation of separation of powers concerns – seeks to distinguish fundamentally political issues from those that are essentially legal. If a US court finds that a question raised by a case before it is fundamentally political, it will generally refuse to hear the case, and claim that the courts do not have jurisdiction, leaving the issue to the political process to settle. Issues involving foreign policy are often held out as the archetypal political questions.

In South Africa in the constitutional era, courts have shown no inclination to craft a similar doctrine.[14] From the outset, South Africa's

12 All government conduct must be sourced in law – either in the Constitution or in legislation. See Helen Suzman Foundation, 'The Helen Suzman Memorial Lecture 2011', https://hsf.org.za/publications/lectures/hsf-memorial-lecture-2011 (accessed 12 November 2019).

13 There must be some link or nexus between the purpose sought to be achieved by governmental conduct and the actual conduct.

14 If development of the 'political question' doctrine in the US has come about largely to manage potential conflict between the executive and judicial branches, in the absence of similar doctrine and so unable to avoid deciding cases that potentially bring the Constitutional Court into direct confrontation with the political branches, the

courts have insisted that all public power is subject to constitutional control. Accordingly, government conduct is to be tested for compliance with the Bill of Rights, for whether it is sourced in legal authority and for whether it accords with the principle of rationality. This last standard – rationality – is one which the courts have applied variably: maintaining that different types of public power are appropriately scrutinised with differing levels of intensity. In other words, if all public power is subject to constitutional control, some forms are to be more tightly controlled. How to determine the appropriate level of scrutiny for the particular type of governmental power under review is a subject of much judicial and scholarly analysis and debate. Determination is generally thought to be made by the courts with reference to the separation of powers principle involving respect and recognition of the constitutionally demarcated roles and powers afforded the executive and legislative branches and recognition that these branches are often better placed to perform certain roles and exercise particular functions in that they have expertise and capacities that the judicial branch does not.[15] Theunis Roux has suggested that judges will also take into account 'pragmatic considerations' such as the need to shore up and protect the institutional security and independence of the judiciary in determining the appropriate level of scrutiny.[16]

Considered engagement with this debate is beyond the scope of this chapter. It is enough to observe that the constitutional scheme envisages that conduct understood to be 'administrative action' is subject to a higher level of scrutiny than other types of public power and that foreign policy power has been understood, at least in one previous instance, to be among a category attracting less rigorous level of scrutiny. As Justice Khampepe observed in *Minister of Defence and Military Veterans v Motau*:

> It may be that this level of scrutiny is not appropriate given that the power bears on particularly sensitive subject matter or policy matters for which courts should show the Executive a greater level of deference. Thus, this Court has found that administrative-law review is not appropriate when the power under consideration: is legislative in nature and influenced by political considerations for which public officials are accountable to the electorate; *is based on considerations of comity and reciprocity between South Africa and foreign states, involving policy considerations regarding foreign affairs*; is closely related to the special relationship between the President and the Director-General of

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Constitutional Court has had 'to work with the political context and the legal materials to ensure that the decision it took did not impact negatively on its institutional security'. Roux T, 'Principle and pragmatism on the Constitutional Court of South Africa', *International Journal of Constitutional Law*, 7, 1, 2009, p. 47.

15 Kohn L, 'The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?', *South African Law Journal*, 130, 810, 2013, p. 823.

16 Roux T, *op. cit*.

> a security agency or involves the balancing of complex factors and sensitive subject matter relating to judicial independence. [my emphasis]

While the Constitutional Court has avoided simple doctrinal categorisation – and identification of a matter as involving foreign policy powers will not trigger an automatic overlay of a generic template for judicial scrutiny – preferring to be guided by the specific context and circumstances of a case, it bears noting that the Constitutional Court has indicated that it believes that the executive's engagement of policy considerations involving foreign affairs is owed deference.

It also needs to be recognised that while the Constitution allocates different roles to the executive and legislature that implicate considerations of foreign policy – so, for instance, section 231 of the Constitution provides that the signing and negotiation of all international agreements is the responsibility of the national executive but that ratification requires approval of the National Assembly and National Council of Provinces – other institutions of government may exercise powers that also have repercussions for foreign policy. In *National Commissioner of the South African Police Service v Southern Africa Human Rights Litigation Centre,*[17] the Constitutional Court was asked to review the failure on the part of the National Prosecuting Authority to investigate with a view to prosecuting perpetrators of grave international crimes and it was the potential exercise of these powers (or failure thereof) that gave rise to foreign policy considerations. Similarly, in *Government of Zimbabwe v Fick and Others,*[18] a case which might seem to concern only the rather technical and politically uncontroversial issue of the enforcement of costs orders, it was the recognition by the judicial branch of the legitimacy of the SADC Tribunal and of its orders that gave rise to foreign policy implications. In these types of cases what is likely to be determinative of the intensity of judicial review is not that the cases generate or involve foreign policy considerations but what type of power is exercised and by whom.

Constitutional control of all public power means that foreign policy powers are subject to judicial review for legality, rationality and compliance with the Bill of Rights. Those review enquiries – and in particular the standard of rationality – will be informed by a certain deference to the executive, respecting the democratic principle and its institutional competence. What level of deference and accordingly what level of scrutiny is to be afforded the foreign relations power cannot be predicted with any degree of confidence. The particular

17 *National Commissioner of the South African Police Service v Southern Africa Human Rights Litigation Centre* 2014 (5) SA 69 (CC).

18 *Government of the Republic of Zimbabwe v Fick and Others, op. cit*.

circumstances and context of the case will be the primary concern of the courts. Moreover, it may be institutions other than the executive that exercise the foreign policy power subject to review. All these variables mean that it may seem to make little sense to say of courts and foreign policy power anything other than that foreign policy power as a species of public power is susceptible to judicial review. And yet in the following section I want to compare the cases decided a decade and a half apart of *Kaunda* and *SADC Tribunal*.

2 *SADC Tribunal* and *Kaunda*: A comparison

As already indicated, South Africa's courts including its highest court on constitutional matters, the Constitutional Court, have had several opportunities to consider matters that implicate foreign policy considerations. But the cases of *Law Society of South Africa v The President and Others (SADC Tribunal)* and *Kaunda v President of the Republic of South Africa* bear particular comparison in that they frame consideration of the constitutional constraints incurred by the exercise of the executive's foreign relations powers 'proper' – the making of representations at the international level within a bilateral or multilateral context.

In *SADC Tribunal,* majority and minority opinion agree the foreign relations powers are to be examined for their compliance with the Bill of Rights. This agreement is not heralded with any fanfare or flourish and so there is little indication that it is in any way significant. And yet, as we shall see, when examining *Kaunda,* that determination represents a sea-change in judicial review of foreign relations power because once it is conceded that foreign relations powers must be exercised consistently with the Bill of Rights, there can be no sensible talk of judicial deference to the executive.

2.1 The *SADC Tribunal* case

The *SADC Tribunal* case is an illustration that courts in South Africa, under our current constitutional order, do not understand the executive's power to conduct foreign relations as a species of power different in any real way from the exercise of any other public power, and that it is equally as susceptible to judicial review.

The case came about as a result of South Africa's participation in the dissolution of the Southern Africa Development Community (SADC) Tribunal. The Tribunal had been established by SADC in 2001, mandated to adjudicate disputes between SADC states and between individuals and

those states. Few disputes were ever actually heard by the Tribunal before it was seized with the politically controversial issue of Zimbabwe's land reform process.

Zimbabwe's land reform process entailed amendment of the Constitution to allow for expropriation without compensation and ousted the jurisdiction of the domestic courts of Zimbabwe to adjudicate disputes relating to expropriation without compensation. Aggrieved petitioners then approached the SADC Tribunal seeking determination of the lawfulness of the Zimbabwean government's actions. In a series of rulings, the SADC Tribunal held that Zimbabwe had acted both contrary to its obligations in terms of the SADC Treaty and that its refusal to comply with the ruling should be referred to the SADC Council of Ministers for appropriate action.

No action was taken by the Council of Ministers or the Summit to condition compliance, in violation of the requirement that SADC member states support and promote the Tribunal. Quite the opposite, the SADC Summit, with the participation of South Africa in the person of the president, resolved to suspend the operations of the Tribunal by choosing not to renew the appointments of existing judges or appointing new judges, so denying the Tribunal quorum to hear matters. SADC member states, including South Africa, also agreed to and signed the 2014 Protocol on the Tribunal in the SADC (Protocol) that seeks to limit the Tribunal's jurisdiction in respect of the interpretation of the SADC Treaty and Protocols to 'disputes between states'.

As the Constitutional Court observed, the obvious effect and intent of the new Protocol was to 'strip the Tribunal of its jurisdiction over individual disputes' and to strip individual petitioners within SADC of the right to challenge 'what they regard as violations of the Treaty in relation to human rights, democracy and the rule of law'.[19]

The Law Society of South Africa, together with several persons who were land owners in Zimbabwe negatively affected by Zimbabwe's expropriation process and who had sought to access the SADC Tribunal, brought action in South Africa's courts challenging the president's participation in the decision to suspend the Tribunal and sign the Protocol restricting the Tribunal's jurisdiction on the grounds that these were unlawful, irrational and unconstitutional.

19 *Law Society of South Africa v President of the Republic of South Africa, op. cit.*, para 16.

The majority judgment, in reasoning that at times is unnecessarily convoluted,[20] holds that the president's actions in suspending the Tribunal and in appending his signature to the Protocol purporting to limit the Tribunal's jurisdiction are unlawful and procedurally irregular. This is because the SADC Treaty, ratified by South Africa, stipulates a specific procedure for amendment: it may only be amended by a decision of three-quarters of the SADC member states.[21] The means by which the SADC Summit of Heads of State and Government sought to amend the SADC Treaty so as to oust jurisdiction of the Tribunal in respect of disputes relating to individuals and member states was by a Protocol requiring only that it receive the support of ten member states.

> Our Treaty obligations, which militate against the President's impugned decisions and conduct, stand because the Treaty has never been amended so as to repeal its provisions relating to individual access to the Tribunal, human rights, the rule of law and access to justice. This means that when our President decided to be party to the suspension of the Tribunal and to actually sign the Protocol, he was acting in a manner that undermined our international law obligations under the Treaty.[22]

Moreover, the majority held that the president had also acted irrationally in participating in the decisions to suspend the Tribunal and in appending his signature to the Protocol in that the power entrusted member states to amend the Treaty is to be exercised only in extraordinary circumstances with member states fully appreciative of the weight of their obligations and responsibilities in respect of SADC citizens. The provisions for amendment are purposefully designed to 'render it very difficult to fatally amend provisions that relate to the very essence of the Treaty, like the protection of human rights, access to the Tribunal and the rule of law'.[23] By purporting to adopt a different procedure for amendment – one requiring only the support of ten member states – the president's actions also evinced irrationality and thus a further ground for invalidation.

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20 In making findings of unlawfulness and irrationality, the Court reasons on the basis that the president himself acted in violation of the SADC Treaty and assesses the president's conduct for irrationality against the Treaty's stipulated provisions for amendment when, as the minority remarks: '[T]he President cannot in this [capacity as highest office holder in the country] or any other capacity, directly fall foul of the international law of treaties. Only a sovereign State or an international organisation can. Only these creatures of international law have the capacity to become Party to a treaty, and, as a corollary, to breach the provisions of a treaty.' *Ibid.*, para 100.

21 SADC, 'Declaration and Treaty', Article 36, https://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf (accessed 7 April 2019).

22 *Law Society of South Africa v President of the Republic of South Africa, op. cit.*, para 53.

23 *Ibid.*, para 69.

The final section of Chief Justice Mogoeng's judgment holds that the president's actions vis-à-vis the SADC Tribunal would also be invalidated if reference is only made to the Constitution.

> Extensive as the powers of the President rightly are, when negotiating and signing international agreements, purportedly in terms of section 231(1) she must act in a manner that accords with the spirit, purport and objects of the Bill of Rights ... [I]t is constitutionally impermissible , as long as the Constitution and the Treaty remain unchanged, for the President to align herself with and sign a regressive international agreement that seeks to take away the citizen's right of access to justice at SADC level.[24]

The minority judgement, written by Justice Cameron and Justice Fronemen, although agreeing with the conclusion reached by the majority, appears to offer greater simplicity – holding that the irrationality and unlawfulness of the president's conduct 'spring not from any affront the president directly inflicted on international law, but from the infringement of our own Constitution'.[25] It is the Constitution, and in particular the Bill of Rights, that is the source of the president's obligations to ensure that his conduct does not result in a breach of South Africa's international commitments:

> Once we locate the ground for reviewing the President's conduct in the Constitution alone – the failure to "respect, protect, promote and fulfill" South Africa's international law commitments to access to justice for its people, we are spared unnecessary complexity.[26]

2.2 The *Kaunda* case

In this matter, the applicants had been arrested in Zimbabwe on suspicion of being hired mercenaries, en route to stage a military coup in Equatorial Guinea. They maintained that their conditions of detention in Zimbabwe violated their human rights and that their threatened extradition to Equatorial Guinea would leave them vulnerable to even greater violation and the possible imposition of the death penalty. The matter came to the Constitutional Court after their urgent application to the High Court seeking an order that the South African government pursue their release or extradition was dismissed. At issue was whether the South African government was under a duty to intervene to safeguard the applicants

24 *Ibid.*, para 82. Mogoeng CJ further opines that parliament too would be unable to ratify any such protocol 'in terms of section 231(2) as long as the Bill of Rights and international law, in the form of the Treaty that binds it, still contains rights that would be effectively undermined thereby or whose violation would thus be facilitated at a regional level'.

25 *Ibid.*, para 98.

26 *Ibid.*, para 104.

from the violations, ongoing and threatened, under the international law principle of diplomatic protection or under South African constitutional law.

The then Chief Justice Chaskalson, writing for the majority, dismissed the applicants' appeal. He found that there was no right to diplomatic protection under international law and that no such right could be sourced domestically as the Bill of Rights has no extraterritorial effect – it cannot avail those situated beyond South Africa's borders.

It is worth stopping at this point and reflecting on what is a fairly remarkable conclusion given the Court's understanding of the requirement that it engage in interpretation of the Constitution and particularly the Bill of Rights in a generous and purposive manner. Before making so far-reaching a conclusion, Chaskalson makes no attempt to weigh the other obvious alternative interpretation: that the rights and protections contained within the Bill of Rights are not dependent on random geographical facts of whether persons in whom such rights vest are located inside or outside South Africa, but rather constrain those within South Africa's jurisdiction exercising power who may negatively impact these rights.

Chaskalson does however concede that section 3 of the Constitution bestowing on all citizens equally the 'rights, privileges and benefits of citizenship', and located in the 'Founding Provisions' chapter and outside the 'Bill of Rights', confers on citizens the right to request diplomatic protection but that the corollary duty for government is to do no more than to consider the request.

> A decision as to whether, and if so, what protection should be given, is an aspect of foreign policy which is essentially the function of the executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which the courts are ill equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.[27]

If government were to refuse to consider a legitimate request or were to deal with it in bad faith or irrationally, then Chaskalson maintains, 'a court could require government to deal with the matter properly. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision'.[28] In examining the specific claims made by the applicants – that government be directed to seek their extradition

27 *Kaunda v President of the Republic of South Africa, op. cit.*, para 77.
28 *Ibid.*, para 80.

from Zimbabwe, to secure their conditions of detention and their release from detention in Zimbabwe, to secure their fair trial rights in Equatorial Guinea – Chaskalson found that nothing in government's conduct thus far approached the review threshold of irrationality.

2.3 The inter-relationship of spheres of competence, deference and review for rationality

Woven like a thread through the Chaskalson judgement in *Kaunda* and compelling its conclusion is a particular appreciation for the foreign relations powers being subject to scrutiny.

> The situation that presently exists calls for skilled diplomacy, the outcome of which could be harmed by any order that this Court might make. In such circumstances the government is better placed than a court to determine the most expedient course to follow. If the situation on the ground changes, the government may have to adapt its approach to address the developments that take place. In the circumstances, it must be left to government, aware of its responsibilities, to decide what can best be done.[29]

Here then is explicit recognition of the executive's 'comparative institutional competence'[30] that arguably, in the realm of foreign policy particularly, has compelled especial deference. Diplomatic representations – the exercise of foreign relations power – need to be of the moment: nimble, tactical, dexterous, seeking potentially to persuade, or coerce, or both. Timing, form, type of diplomatic representations made are best calculated by those who have experience and expertise in making such representations and who have knowledge and experience of those to whom they will make the representations. Courts do not have such experience or expertise and interruption of such representations so that Courts may engage in consideration, even if ultimately eschewing adjudicatory power, will make for a brittle structure when what is required for those making and gauging the representations is deftness and agility.

It is this appreciation for the specialised competence of the executive in exercising foreign relations powers that conditions deference and a review for rationality that is 'light' in its scrutiny. This is to be contrasted with the approach of the Court in *SADC Tribunal*. There, in reaching its conclusion of irrationality, the majority engaged in no discussion as to whether deference should be extended the executive and the level of scrutiny under which it fell. This is probably so in that such an exploration would have been superfluous: it is impossible to see how any standard –

29 *Ibid.*, para 132.
30 Kohn L, *op. cit.*, p. 824.

however light and undemanding – could have produced a conclusion that the decision to suspend and amend the Tribunal's jurisdiction was rational in respect of any legitimate purpose.

And yet, given the far-reaching implications of *SADC Tribunal* and the ultimate remedy crafted and ordered by the Court – that the president be directed to withdraw his signature from the purported amending document – it seems odd that the Court does not attempt an engagement, even if only for rhetorical purpose, with the nature of foreign relations power and the executive's specialised competence in relation thereto.

2.4 Bill of Rights compliance: Where deference runs out

Thus far, reference has only been made to Chaskalson's judgment in *Kaunda* but the minority judgment of Justice O'Regan also bears examination. Unlike Chaskalson, she is not convinced that only when physically present within South Africa may persons avail themselves of the rights protected in South Africa's Bill of Rights.

> It does not follow, however, that when our government acts outside of South Africa it does so untrammelled by the provisions of our Bill of Rights. There is nothing in our Constitution that suggests that, in so far as it relates to the powers afforded and obligations imposed by the Constitution upon the executive, the supremacy of the Constitution stops at the borders of South Africa. Indeed the contrary is the case. The executive is bound by the four corners of our Constitution. It has no power other than those that are acknowledged by or flow from the Constitution. It is accordingly obliged to act consistently with the obligations imposed upon it by the Bill of Rights wherever it may act. It is not necessary to consider in this case whether the provisions of the Bill of Rights bind the government in its relationships outside South Africa with people who have no connection with South Africa.[31]

Justice O'Regan finds that section 3 of the Constitution, setting out the rights and privileges of South African citizenship, together with other provisions of the Constitution required of the South African government that it take appropriate steps to provide diplomatic protection to those citizens 'who are threatened with or who have experienced egregious violations of international human rights norms by a foreign state upon whom the international rights norms are binding'.[32] But while Justice O'Regan would have the Court issue declaratory relief for the petitioners, she stops short of calling for mandatory relief in that government 'is best placed to determine what steps should be taken to provide appropriate

31 *Kaunda v President of the Republic of South Africa, op. cit.*, para 228.
32 *Ibid.*, para 259.

protection to the applicants in the circumstances'.[33] If less heavily than in the majority's judgment, the comparative institutional competence of the executive as it pertains to the exercise of foreign policy powers nonetheless figures in O'Regan's judicial reasoning.

More importantly however, for the purposes of the arguments advanced in this chapter, is the insight provided by legal scholar, Theunis Roux as to O'Regan's decision-making: for O'Regan, where the issue for decision falls squarely within the Court's competence, as it must being an issue involving the interpretation of the Bill of Rights, the separation of powers doctrine, and the imperatives it generates such as respect for comparative institutional competence, has little relevance: 'At most, it requires the Court to be conscious of the possible impact of its decision on the political branches' ability to perform their constitutional functions. The doctrine can never be used, however, as a justification for compromising on principle.'[34]

That ultimately is the conclusion underscored by the *SADC Tribunal* judgement and what must be understood to be the definitive approach of South African courts when examining the exercise by the executive of its foreign relations powers 'proper'. That approach is this: South African courts will generally view the exercise of foreign relations power by the executive as within the executive's competence and so in any review for legality/irrationality will tread lightly – or at least courts will have the space to tread lightly. They can maintain that review for procedural fairness, public participation, etc is inappropriate in that it would be too intense a level of scrutiny. But if the review being sought is not for legality/irrationality of the power exercised but for compliance with the Bill of Rights, then courts have no such flexibility as to the standard of review. Either there has been a breach of the right concerned or there has not been.

Justice Chaskalson managed to avoid the conclusion in *Kaunda* by maintaining that the Bill of Rights has no extraterritorial effect and so is inapplicable in the matter. But that view does not appear to have been maintained by the courts (and O'Regan disputes it in her dissent), and certainly in the recent *SADC Tribunal* case, the Constitutional Court appears to be operating on the view (if not explicit) that the Bill of Rights avails not only South African citizens located beyond South Africa's borders, but also potentially of those persons who are not citizens of South Africa.[35]

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33 *Ibid.*, para 269.

34 Roux T, *op. cit.*, p. 47.

35 Chief Justice Mogoeng, in the *SADC Tribunal* case, holds that: 'Our President lacks the authority to negotiate and sign away our fundamental and treaty right of access to

Thus, if there is review of the exercise of foreign policy powers for legality/rationality and for Bill of Rights compliance, the courts may be able to extend some deference to the executive in terms of legality/rationality review but will be unable to do so for Bill of Rights compliance. In any case where the exercise of foreign policy powers is to be tested only for compliance with the Bill of Rights, there can be no talk of deference to the executive when determining whether violation has occurred. Here then is the paradox of the separation of powers doctrine starkly amplified in the context of the justiciability of foreign relations power. As Roux explains:

> According to the separation of powers doctrine, a court should not intrude into areas reserved for the political branches unless such intrusion is necessarily entailed by the court's duty to interpret and enforce the Constitution. Since any case, however, involving an alleged violation of the Constitution is a case the requires the court to interpret and, if necessary, enforce the Constitution, this rational provides no principled restraint on the court's decision-making powers.[36]

Deference by the judicial branch to the executive when exercising foreign relations power is an obvious extension of the separation of powers doctrine. It makes sense to speak of greater or less deference – or varying levels of scrutiny – in the context of rationality enquiries. One can be more or less rational; more or less reasonable. It does not make sense to speak of deference in the context of determination for compliance with rights contained in the Bill of Rights: judicial review does not yield determinations of partial compliance or non-compliance. Consequently deference for the executive's competence in the sphere of foreign relation provides no principled restraint on the court's decision-making powers in respect of compliance with the Bill of Rights.

Both O'Regan in *Kaunda* and the Court in *SADC Tribunal* reach the conclusion that review for compliance with the Bill of Rights constrains the exercise of foreign relations power and that there is no deference or less demanding level of scrutiny to extend when undertaking such review. And yet O'Regan recognises the place of deference in crafting remedy, observing that: 'it would not, however, be appropriate for mandatory relief to be ordered at this stage, as government is already taking steps to protect the applicants, and it is best placed to determine what steps should be taken to provide appropriate protection to the applicants in the circumstances.' This is not so for the Court in *SADC Tribunal* which orders the president to withdraw his signature.

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justice and to *potentially prejudice citizens* of other SADC countries in that manner' [my emphasis]. *Law Society of South Africa v President of the Republic of South Africa, op. cit.*, para 85.

36 Roux T, *op. cit.*, p. 24.

The types of possible remedies implicated by these two cases are of such different natures that it would be senseless to make comparison. In *Kaunda,* various types and multiple representations may have been called for – from formal diplomatic notes passed between the respective countries' diplomatic representatives, to more informal approaches by the president directly or other influential figures who might have leverage. In *SADC Tribunal,* there was only one possible remedy – that the president withdraw his signature. It was not possible that the president correct his part in the suspension of the SADC Tribunal. That there was only one obvious remedy available in *SADC Tribunal* may have mitigated any discomfort felt by the Court in pronouncing so definitively on remedy and ordering mandatory relief.

Ultimately however this is conjecture. Viewed in its entirety, the *SADC Tribunal* judgment evinces little concern on the part of the Court, unlike in the *Kaunda* judgment, for criticism that it is impermissibly trespassing in the sphere of executive competence and expertise. Why that is so, why the Court demonstrates so different an approach – whether in the intervening decade and a half the Court has come to believe itself to have greater institutional security,[37] whether political developments in South Africa have conditioned an attitude in the Court more circumspect in respect of the executive, and that *SADC Tribunal* is but one in a line of cases defining a more suspicious relationship between Court and executive, or whether this is only a function of different facts, unsympathetic would-be mercenaries eliciting less concern from the Court than dispossessed persons prevented from seeking legal redress – only permits of speculation.

3 Repercussions for the exercise of foreign relations powers

The Court in *Kaunda* – both majority and minority – was particularly attentive, at least in certain aspects, to the nature of foreign policy power. It recognised that in order to be effective, the exercise of such power would need to be calibrated specifically to the context, and perhaps recalibrated multiple times in order to secure effective outcomes and that those exercising the power had to act with agility and often, of the moment. It also recognised that such attributes would be compromised, if not made impossible, by court intervention. A similar appreciation for the peculiar

37 I use 'institutional security' here, as per Roux in 'Principle and pragmatism on the Constitutional Court of South Africa'. He employs it to mean the Constitutional Court's 'capacity to survive attacks on its independence by the political branches'. Roux T, *op. cit.*, p. 8.

nature of foreign policy power was absent from both the majority and the minority in *SADC Tribunal.*

This may be because of the peculiar circumstances of each case: that the Court in *Kaunda* essentially concludes that the executive may more effectively secure the relief that the Court is being asked to direct – the protection of the applicants' rights in Zimbabwe and Equatorial Guinea –without being so ordered and that this specific relief has not been foreclosed and is still within reach. That is not obviously the case in *SADC Tribunal*: the executive presents no realistic prospect of securing the essential substantive relief that the petitioners seek – continued operation of the SADC Tribunal – as the executive, in the person of the president has in fact acted to ensure against such an outcome.

But both judgments seem to pay no heed to another dimension of foreign relations power – its transactional, inter-related nature. That is true whether exercised in a bilateral context – i.e. state-to-state, as in *Kaunda* where it was understood that South Africa would need to interact with Zimbabwe and Equatorial Guinea or in a multilateral context as in the *SADC Tribunal* case where South Africa was interacting within SADC structures. However, it is arguable that an implicit appreciation – made almost explicit by Justice Sachs in his concurring opinion – runs through the *Kaunda* judgment. As Judge Sachs observes, government is under a duty to act resolutely to combat mercenary activities, 'the more so if they are hatched on South African soil'. Any diplomatic representations made by South Africa seeking the protection of the applicants would need to be made in a context in which South Africa would also be concerned not to give the impression that it has supported or encouraged in any way those planning the military coup – that any such impression would not only endanger South Africa's relationship and weaken its influence with those particular states but with other states too. And that concern is not of constitutional insignificance – as Sachs underlines in pointing to the constitutional injunctions prohibiting mercenarism.[38]

The transactional, inter-related nature of the exercise of foreign relations power is arguably amplified in a multilateral context such as SADC. South Africa might go along with certain positions, even if not its preference – as some South African diplomatic representatives indicated was true of the SADC Tribunal matter – knowing that it will not be able to command the majority and secure its preferred outcome, in order to garner support for positions it believes it can win. Court intervention requiring that South Africa take a particular position may not result in any different multilateral outcome and may expunge any trade-off support

38 *Kaunda v President of the Republic of South Africa, op. cit.*, para 272.

South Africa is able to win for other potentially significant foreign relations developments. That is the case with the SADC Tribunal – withdrawal of the president's signature will not secure restoration of the Tribunal's powers to adjudicate disputes between individuals and states.

Those concerned for constitutional observance may insist that human rights norms may not be traded off for preferential trade policies or investment options. But what if South Africa were to acquiesce in a regional protocol providing that capital punishment is not subject to the prohibition on cruel, unusual and degrading punishment – a protocol it might not be able to prevent even if signalling its opposition – in order to win support for a protocol ensuring the criminalisation of marital rape. Of course that hypothetical may seem to distort what was in issue in the *SADC Tribunal* case. By stripping away pre-existing rights of access to justice that the Tribunal secured for South Africans and inhabitants of the SADC region, the president's conduct endangered the full spectrum of rights.

But it is worth contemplating the impact of increased justiciability of foreign relations powers, as likely foreshadowed by *SADC Tribunal*, in the context of decisions made and negotiated within other multilateral forums. For example, if South Africa's representatives cast votes before the UN Security Council or General Assembly or Human Rights Council, or within African Union or SADC structures, that fail to uphold access to justice or the rights of LBGTI persons or freedom of belief, then these votes could also arguably – on the basis of the precedent set in *SADC Tribunal* – be constitutionally impugned in that in casting such votes South Africa fails to 'respect, protect, promote and fulfill' the rights in the Bill of Rights.

There is no possibility that this type of conduct might be saved from constitutional invalidation in that it could meet the Bill of Rights' limitations test. Section 36 only permits limitation in terms of a law of general application – it is unlikely that any determination not to sign or ratify an international agreement would be made in terms of a law of general application and votes determined on a case-by-case basis would not qualify as such a law.

It is also at least arguable that votes cast in the UN or in other forums such as the African Union's Peace and Security Council that fail to uphold rights contained in South Africa's Bill of Rights would not be immune from constitutional invalidation on the basis that it is inhabitants of other countries – i.e. the vote concerned adopting measures to protect the rights of the Rohingya in Myanmar or democracy protesters in the Sudan – that stood to be prejudicially affected by such a vote.

Section 7(1) of the Constitution provides that the Bill of Rights 'enshrines the rights of all people in our country'. *SADC Tribunal* makes it clear – contrary to Chief Justice Chaskalson's holding in *Kaunda* – that persons determined to be 'people in our country' do not literally have to be located within the borders of South Africa. The applicants included persons who are not South African but are Zimbabwean citizens and not ordinarily resident in South Africa. In the judgment, Chief Justice Mogoeng holds that: '[o]ur President lacks the authority to negotiate and sign away our fundamental and treaty right of access to justice and *to potentially prejudice citizens of other SADC countries in that manner* [my emphasis]', suggesting – although this is not elaborated upon – that the rights at issue in this matter also avail persons who are not South African citizens and are not located within the country. Put differently, the executive in exercising power must be concerned for human rights of persons irrespective of where they may be located. That understanding is given support by the founding provisions contained in chapter 1 of the Constitution. Section 1 provides that; '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.' Putting it at its bare minimum, South Africa's arms of government may not, in terms of the Constitution, disregard the implications of the exercise of its powers for the human rights of persons, not South Africans, located outside of its borders.

4 Conclusion

Kaunda and *SADC Tribunal* represent two different approaches to the judicial determination of foreign relations power. The Court in *Kaunda* is manifestly concerned to show the executive deference, underlining multiple times that it recognises the expertise of the executive in the sphere of foreign relations and that it respects its area of competence. These separation of powers concerns weigh so significantly on the majority of the Court in *Kaunda* that they 'trump arguments of principle relating to the importance of the rights at stake and their place in the constitutional normative order'.[39] *SADC Tribunal*, in contradistinction, makes clear that where the matter concerns review for rights compliance, there is no deference to be extended: 'the fact that the constitutionally required decision may intrude into areas primarily reserved for political branches is simply an inevitable side-effect of the fulfillment by the Court of its constitutional mandate.'[40]

39 Roux T, *op. cit.*, p. 56.
40 *Ibid*.

Following SADC Tribunal, it is to be anticipated that separation of powers concerns will play far less of a determinative role in judicial adjudication of foreign relation powers. The judgment potentially invites far greater numbers of applications to the courts for review of foreign relations-related matters and suggests that matters which had not previously been thought to be justiciable may indeed now be so. Certainly, signature of or agreement to any international instrument or decision on the part of the executive which may impair rights of South Africans, or persons in South Africa, may now potentially be challenged. Given South Africa's participation in any number of multilateral forums and the hundreds of bilateral relationships it conducts, there are now potentially hundreds of acts each year which may attract judicial scrutiny. And given that it is far from clear that South Africa's executive may participate in such decisions impairing rights of persons who are non-citizens living outside South Africa's borders – i.e. the Rohingya in Myanmar – there are potentially even hundreds more.

And while this is a development entirely consistent with the most generous, purposive interpretation of South Africa's Constitution and Bill of Rights and is to be celebrated, still potential applicants and all those concerned to see South Africa's foreign relations powers exercised not only consistently with but also able to actually realise the highest normative standards must be appreciative of potential costs. An exercise of foreign relations power subjected to judicial adjudication is removed from the transactional field of foreign relations conduct. Judicially measured and determined only in terms of its compliance with human rights enshrined in the Bill of Rights, it cannot be traded off or leveraged to obtain maximum promotion and advancement of human rights overall: for example, the forced withdrawal of the president's signature from the Protocol may not in any event secure revival of the SADC Tribunal, but the president's support for the Protocol may have allowed him to win sufficient support for a region-wide Convention mandating reparations for sexual violence.

That of course presupposes that there exists sufficient trust in the executive to be able to believe that it will exercise its foreign relations power with the objective of securing overall maximum human rights promotion and protection. But as any disinterested observer of South Africa's recent record of foreign policy decision-making and conduct could tell you, there is little to suggest that such trust is warranted.