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# The legal dimension of Namibia's foreign relations\*

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## Introduction

Domestic laws of states regulate the relations of citizens *inter se* (horizontally) and with the state (vertically),<sup>1</sup> whereas the relationship of states in their interactions is regulated by international law.<sup>2</sup> Yet there are other activities that take place beyond the national boundaries – social activities (citizens intermarrying), cultural (peoples sharing common backgrounds across frontiers), and economic (trade across borders) – which states seek to regulate out of necessity. While some of the activities are good, there are also bad activities such as crime (drugs, terrorism and arms trade) which states seek to curb. States deal with these extraterritorial or cross-frontier activities individually, bilaterally or through multilateral arrangements.

Namibia, on her own accord, joined the community of nations as an independent country on 23 April 1990,<sup>3</sup> and as such, her interaction with other states is defined by the rules of international law and the policies of state driving interests of a particular state as it interacts with other states, i.e. foreign policy.

McGowan and Nel<sup>4</sup> define the concept of *foreign policy* as –<sup>5</sup>

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\* This work is intended to provoke deeper examination of positions taken and to be taken, as well as premises assumed and utilised in the expectation of interaction with foreign non-governmental organisations (NGOs), international organisations, multinationals, international NGOs, foreign governments and their agents, and the general perception of the region and the world, from a Namibian perspective. Reference to a given set of circumstances involving any given foreign NGO, international organisation, multinational, international NGO, foreign government or its agent does not reflect the position of the Government of the Republic of Namibia or any of its agencies, and along with any errors, are the views of the author in pursuit of that provocative thinking.

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1 See Froneman (2006).

2 See Shearer (1994:3) which reads as follows: "[t]hat body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe".

3 Namibia became a member of the United Nations (UN) on that day. Dr Hage Geingob, then the Prime Minister, led the delegation to the UN buildings to witness the hoisting of the Namibian flag alongside other UN member states' flags.

4 McGowan & Nel (1999, cited in Akwenye 2003:48). The cited authors distinguish between *high* and *low* politics – a recommended read. The definition has elsewhere been ascribed to Hill (2005:6).

5 Prof. André du Pisani (pers. comm., 22 February 2012), makes the point that "foreign policy"

... the sum total of all activities by which international actors act, react and interact with the environment beyond their national borders.

Most of the matters that are the subject of foreign relations/policy are, of course, determined by politics. However, the questions this paper seeks to answer relate to whether the law(s) – national or international – have a role to play in Namibia's foreign relations policy, written or otherwise. If it does, as this paper argues, does such law exclude the influence and operability of ideological and political viewpoints of Namibians and the Namibian state in the interaction with other states?

One might quip that these are rhetorical questions or academic jargon at best, embellished by lexical and syntactic refinement to occupy the elite sophisticated debates of the well-to-do diplomats, lawyers or the odd commentator! Yet, the relevance of law in international relations may not necessarily be presumed, despite it being a necessary medium for the attainment of political and national objectives across the parameters of state territories – amongst other factors that include economic and political interests and political influence.

These questions are partially answered by the Foreword to a publication by Namibia's Ministry of Foreign Affairs, titled *Namibia's foreign policy and diplomacy management*, in the following text:<sup>6</sup>

As the world turns and the seasons change, so do the intentions of nations and the behaviour of world leaders that, in many cases, defy prediction. World politics is about peace, security, ideas, collective actions, alliances, co-operation, development and power. These are the essential elements of international co-operation and international conventions and protocols. Ideally, the objectives of inter-state relations are to promote good order, civilized discourse and mutual support for a better world. The tools for achieving these objectives are international law, conferences, [and] bilateral and multilateral negotiations.

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is a boundary activity. The term *boundary* implies that those making foreign policy straddle two environments: an internal or domestic environment, and an external or global one. *Foreign policy*, in this sense, mediates between these two environments". The time-honoured question that comes to mind is this: is a country's boundary an incidence of its national law or does it come about as a result of international law – or, for that matter, the laws of another state? It seems irrefutable that the Berlin Conference of 1884 had long-lasting international imperialist ramifications that persist to today. Closer to home and albeit of redundant academic interest, one could provokingly ask whether Namibia took over Walvis Bay and the Penguin Islands, or whether South Africa gave them over – since both countries legislated on the subject matter. For Namibia, it was the Walvis Bay and Offshore Islands Act, 1994 (No. 1 of 1994), and for South Africa it was the Transfer of Walvis Bay to Namibia Act, 1993 (No. 203 of 1993).

6 Foreword by Hon. Hidipo Hamutenya, Member of Parliament (MP), then Minister of Foreign Affairs (Republic of Namibia 2004:i). Hon. Hamutenya is now the President of the Rally for Democracy and Progress (RDP), the official opposition as at 2012. The document was adopted by the National Assembly under the tenure of Minister of Foreign Affairs Marco Hausiku, now Deputy Prime Minister.

Therefore, this paper departs from the vantage point that international law and foreign relations are inextricably intertwined, the residue question being centred on the degree of interrelation as regards Namibia as an actor on the international stage.

## A historical setting

Namibia's presence in the international arena cannot be discussed without taking into account the context of its historical setting. Some have casually called it "the last colony in Africa",<sup>7</sup> and that name tag engenders some mystique, which can be clarified.

Apart from occupying *terrae nullus* and forming states after the decolonisation of territories, new states will only come about as a result of the diminution and/or disappearance of existing states.<sup>8</sup> It is important, therefore, to underscore the birth of the Namibian state as one of the United Nations' success stories.<sup>9</sup>

Before 21 March 1990,<sup>10</sup> the determiners of foreign policy for Namibia were those that wielded political control over the country. They determined all and sundry, including matters that related to Namibia's identity in the world. During the period of German rule, for example, which began on 8 September 1884, the country was known as the *German Protectorate of South West Africa* or *German South West Africa*.<sup>11</sup> From 1920 onwards, under the period of South African rule – whether as a Union or as a Republic, what eventually became known as *Namibia* was termed the *Territory of South West Africa* or simply *South West Africa* at the time,<sup>12</sup> in relation to its geographical location. In

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7 See e.g. in an article by Christopher Wren (1989) for the *New York Times*, titled "Last colony in Africa nearing independence with jitters for all".

8 Shaw (2008:198).

9 In an article titled "The United Nations' success story", this was the opinion of Jim van de Water (2005), writing for the *San Diego Union Tribune*.

10 The date on which the Republic of Namibia was founded as an independent country; see e.g. the Territorial Waters Act, 1963 (No. 87 of 1963), which applied over the then South West Africa.

11 See e.g. <http://www.schudak.de/timelines/germansouthwestafrica1844-1920.html>, last accessed 14 September 2011. See also the text of the Council of the League of Nations' Mandate for German South West Africa decision, made at Geneva on 17 December 1920, available as Appendix II to Wellington (1967). *Protectorate* was defined in the Interpretation of Laws Proclamation 37 of 1920 which has since applied in Namibia (and is only now being reviewed) as "the territory of South West Africa lately under the Sovereignty of Germany and at present under the administration of the Government of the Union of South Africa". *Territory* was defined by the same law as "the Mandated Territory of South West Africa". These definitions followed the Treaty of Versailles and the mandatory established under the League of Nations over the territory. The definitions also become relevant later as we investigate the issue of Namibia's borders at independence.

12 See the Treaty of Peace and South West Africa Mandate Act, 1919 (No. 49 of 1919), promulgated by the Parliament of the Union of South Africa.

1968,<sup>13</sup> members of the United Nations (UN) General Assembly resolved that the name *Namibia*<sup>14</sup> would be the official name of the country, in accordance with the desire of its inhabitants.

South Africa had not only breached its mandate obligations by then (and exposed the systemic failure of the League of Nations arrangement), but also went further to impose its racist policy of apartheid,<sup>15</sup> despite UN General Assembly Resolution 1514 (XV)<sup>16</sup> of 14 December 1960, in which the –<sup>17</sup>

... inalienable right to self-determination, freedom and national independence in an untruncated territory including Walvis Bay, the Penguin Islands and all adjacent offshore islands ...

was reaffirmed, and ultimately, the occupation of South Africa was declared illegal and brutally repressive by the UN General Assembly.

Ultimately, after many UN pronouncements, Resolution 435<sup>18</sup> of the UN Security Council decided that Namibia would become independent through free elections under the supervision and control of a United Nations Transition Assistance Group (UNTAG).<sup>19</sup> By far, this is probably the most important resolution of the UN on the subject matter

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13 Resolution 2372 (XXII) of 12 June 12 1968.

14 Mburumba Kerina is credited with having coined the name in the 1960s. The name is closely related to *Namib*, the name of Namibia's desert to the west.

15 Expert writings on apartheid are obtainable. However, to Namibians, this policy of 'divide and rule' based on race was introduced by the National Party of South Africa under the Government of Prime Minister Dr Hendrik Verwoerd, under which the historical owners of Namibia were subjected to demeaning social, class, economic and other forms of discriminatory treatment. The use of the term in this work, therefore, is with reference to a historical fact through which Namibians have emerged.

16 As well as the numerous subsequent relevant resolutions and decisions of the UN General Assembly and Security Council on the subject.

17 See records of the UN General Assembly Seventh Plenary Meeting of 20 September 1986, on the theme "Question of Namibia", Document A/RES/S-14/1, posted on 18 December 1999 by the UN Department of Economic and Social Affairs; available at file:///Volumes/OFFICE/A:RES:S-14:1%C2%A0%20Question%20of%20Namibia.html, last accessed 14 September 2011. The UN website is flush with records of discussions on the matter of Namibia and, with deeper research, the quantum of time spent by UN diplomats, campaigners and the world community on other deliberations calling for an end to South African imposition over Namibia can be determined.

18 The text of Resolution 435 is available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/368/80/IMG/NR036880.pdf?OpenElement>, last accessed 14 September 2011. Resolution 435 was preceded by Resolutions 385 (1976) of 30 January 1976, and 431 (1978) and 432 (1978) of 27 July 1978 – all equally important decisions to the resolution of the Namibian matter.

19 Para. 3, UN Security Council Resolution 435 of 29 September 1978.

*Namibia:* UNTAG did indeed come to Namibia and oversee the transition, and in doing so, the UN also reaffirmed its legal responsibility over Namibia.

Earlier, the UN had established a Council for South West Africa<sup>20</sup> with powers and functions, *inter alia*, “to be discharged in the Territory”, including —<sup>21</sup>

... to promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage.

The choice and usage of language of the Resolution is important, as *territory* is the basic characteristic of a state.<sup>22</sup> Over its territory, a state exercises sovereignty. How people enter and leave its territory is a subject of state power.

In an opinion of the Legal Counsel of the UN Secretariat, at the request of the Commissioner for South West Africa, the UN reaffirmed that the function of “issuing of travel documents is one of the functions under international law entrusted to national Governments”, ordinarily.<sup>23</sup> However, while using other examples, the Legal Counsel justified the issuance of travel documents by the Council for South West Africa to Namibian citizens who applied for them, as even SWAPO was doing at the time.<sup>24</sup>

Other administrative functions of governance were being administered by South Africa directly, and eventually also indirectly through the institutions of Governor-General, Administrator and Administrator-General, aided by Executive Committees, Cabinets, Advisory Councils, and Assembly, National Assembly, Native Commissioners and other functionaries with varying names depending on the whim of the racist apartheid occupation structures.<sup>25</sup>

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20 On 19 May 1967, the UN General Assembly established the Council and passed Resolution 2248 (S-V).

21 (ibid.:para. II, 1(b)).

22 See Shaw (2008:487). Drawing from Article 1 of the Montevideo Convention of 23 December 1933 on the Rights and Duties of States, Shearer (1994:85) cites the following qualifications for statehood: permanent population, a defined territory, a government, and the capacity to enter into relations with other states.

23 See UN (1967:Ch. VI). Selected legal opinions of the Secretariats of the UN and related intergovernmental organisations are also given (ibid.:309, para. A(1)(5), Ch. VI).

24 (ibid.:311). Hon. Pendukeni Iivula-Ithana, MP since 1990, Minister of Justice until 2012, and incumbent Minister of Home Affairs and Immigration, revealed that there were friendly countries to SWAPO such as Sierra Leone that issued its passports to Namibians in the diaspora (pers. comm., 19 September 2011).

25 See the South West Africa Constitution Act, 1925 (No. 42 of 1925), South West Africa Legislative and Executive Authority Establishment Proclamation R101 of 1985, and other statutes to this effect. With regard to the use of the term *apartheid*, please see Footnote 15 above.

When the South African Defence Act<sup>26</sup> was promulgated in 1957, the definition of *Republic* included the territory of South West Africa. It was not quite clear as to who legally exercised sovereignty over Namibia at the time.<sup>27</sup>

The International Court of Justice (ICJ) eventually rendered an Advisory Opinion as to the “Legal Consequences for States of the Continued Presence of South Africa in Namibia”, confirming that, although that South Africa’s occupation of Namibia was illegal, such illegality did not include acts of registering births, deaths and marriages of Namibians. However, South Africa’s economic and other relations on behalf of or concerning Namibia (which entrenched its authority over Namibia), its diplomatic activity with regard to Namibia, and its treaty relations with other UN member states concerning Namibia (save where humanitarian treaties whose non-performance would affect Namibians) were considered as acts of occupation of the territory without title, illegal and invalid.<sup>28</sup>

The UN, the Frontline States/Southern African Development Co-ordination Conference (SADCC) and other individual states contributed immensely to the international debate, diplomacy and lobbying<sup>29</sup> that raged on through the UN, in the ICJ and throughout academia and other forums, leading to the “settlement of the Namibian situation”.<sup>30</sup>

The Republic of Namibia is as much a product of international diplomacy within and beyond the diplomatic channels of these organisations and bodies as it is a product of bloody battles in southern Angola and northern Namibia with the involvement of the Union of Soviet Socialist Republics (USSR), the Republic of Cuba,<sup>31</sup> the Republic

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26 No. 44 of 1957.

27 See e.g. the views of the International Court of Justice (ICJ) in one of the opinions in the matter, namely *International Status of South West Africa, Advisory Opinion*: ICJ Reports (1950) at 128; available at <http://www.icj-cij.org/docket/files/10/1891.pdf>, last accessed 14 September 2011. There are numerous ICJ opinions and many UN General Assembly Resolutions on the matter.

28 Available at <http://www.icj-cij.org/docket/files/53/5597.pdf>, last accessed 14 September 2011.

29 Lobbying was not limited to state actors: individuals and organisations – particularly Namibian individuals and organisations under the instructions of Chief Hosea Kutako – also played a role.

30 Terminology introduced in the UN Security Council by way of a letter addressed to the President of the Security Council dated 10 April 1978, from the representatives of Canada, France, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, and the United States of America (Document S/12636 available at [http://www.signonsandiego.com/uniontrib/20050224/news\\_lz1e24water.html](http://www.signonsandiego.com/uniontrib/20050224/news_lz1e24water.html), last accessed 14 September 2011). Also refer to the 1985 address by M Evans of the University of Zimbabwe, titled “The Front-Line [sic] States, South Africa and southern African security: Military prospects and perspectives”, and his views on Frontline States’ role in blunting South African military dominance in the region; available at <http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/Journal%20of%20the%20University%20of%20Zimbabwe/vol12n1/juz012001002.pdf>, last accessed 14 September 2011.

31 The author is indebted to Jorge Risquet, Cuban Internationalist Forces Commander in the 1960s and, later on, an official in the Cuban Government. Mr Risquet took part in, among other things,

of South Africa, SWAPO's military wing – the People's Liberation Army of Namibia (PLAN), and the Republic of Angola.<sup>32</sup>

So far, it is clear that these historical events have impacted the attitude of Namibia and its conduct as it relates with the rest of the world in its individual state capacity and as a member of international and/or regional groupings and organisations. Perhaps there have been recent events that have put to test Lord Palmerton's<sup>33</sup> dictum that "[t]here are no permanent allies, no permanent friends, only permanent interests": we shall broach some of these events and juxtapose others against the legal obligations that are binding on Namibia.

## The Namibian Constitution

As indicated above, at Independence, the Republic of Namibia succeeded the Mandate of South West Africa/Namibia, and in the text of the Namibian Constitution's Preamble, pronounced that, "in association with the nations of the world", it would promote the unity and integrity of the Namibian nation, whose territory was that "recognised by the international community".<sup>34</sup>

The Namibian Constitution, the Supreme Law of the land, not only embraces general international law, it is "international-law-positive"<sup>35</sup> as it made Namibia a monist country, meaning that international law and national law are one, with some provisos.

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the negotiation of Namibia's independence with the South African Government. He shared his insight into the processes that culminated in the decision for Cuba to withdraw from southern Africa (Angola), as well as into other details of the Cold War era during a brief meeting with the author in Havana, Cuba, on Saturday, 22 October 2011. See also Ramonet (2008:345–374); Dreyer (1994:173).

32 It should be underscored that only the Forças Armadas Populares de Libertação de Angola (FAPLA), which was associated with the Movimento Popular de Libertação de Angola (MPLA) sided with SWAPO's PLAN and the Cuban internationalist forces, on the one hand, against the South African Defence Forces (SADF), the South West Africa Territorial Forces (SWATF) and the notorious counterinsurgency unit known as *Koevoet* ("crowbar"), on the other hand. The União Nacional para a Independência Total de Angola (UNITA) of Dr. Jonas Savimbi and the Frente Nacional de Libertação de Angola (FNLA) of Holden Álvaro Roberto are not recorded as being sympathetic to SWAPO's quest for Namibia's independence. It should also be recorded that SWAPO was the only Namibian liberation movement, which consisted of both a political and military effort.

33 An English statesman and Prime Minister during the 19th Century.

34 See Article 1(4) of the Namibian Constitution: "The national territory of Namibia shall consist of the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay, as well as the off-shore islands of Namibia, and its southern boundary shall extend to the middle of the Orange River".

35 Tshosa (2010:3).

This conclusion is derived from Article 144 of the Namibian Constitution, which states the following:<sup>36</sup>

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

With specific reference to foreign relations, the Namibian Constitution, under “Principles of State Policy” contains a similarly titled clause, namely Article 96, which, for the purposes of this paper, ought to be reproduced:

The State shall endeavour to ensure that in its international relations it:

- (a) adopts and maintains a policy of non-alignment;
- (b) promotes international co-operation, peace and security;
- (c) creates and maintains just and mutually beneficial relations among nations;
- (d) fosters respect for international law and treaty obligations;
- (e) encourages the settlement of international disputes by peaceful means.

There may be merit in addressing, albeit briefly, these five pillars of Namibia’s foreign relations, which are repeated in the Mission Statement of the Ministry of Foreign Affairs of the Republic of Namibia, along with the object to —<sup>37</sup>

- promote security domestically, within our own neighbourhood and in the global arena.
- enhance the international standing of our country and advance its socio-economic, cultural, technological and scientific interests, with particular emphasis on economic growth and development.

## **Duty to adopt and maintain a policy of non-alignment**

The duty to adopt and maintain a policy of non-alignment derives its inspiration from SWAPO’s involvement in the Non-aligned Movement established at the Belgrade Conference of 1961 by so-called Third World countries, with a view not to be subsumed into any alignment with or against any bloc or country.<sup>38</sup>

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36 Readers are referred to the work of Yvonne Dausab (2011), who correctly sums up the legal situation in Namibia while taking issue with it. Emphasis however should be placed on the usage of the words “binding upon Namibia” from Article 144. Provocatively, it should be asked whether, for instance, given the other provisions of the Namibian Constitution, the phenomenon practised of late by some powerful members of the international community of pre-emptive strikes should be a principle of law binding on Namibia when that provision is juxtaposed against Article 51 of the Charter of the United Nations (self-defence)? The same can be asked of the newly minted principle of Responsibility to Protect (R2P) emanating from the UN General Assembly 63/308 of 7 October 2009: which interpretation should be applied to scenarios to trigger R2P? Juxtapose the difference of the Arab Spring events as they unfolded in Libya as opposed to the events in Egypt.

37 See the Vision and Mission Statement in *Republic of Namibia* (2004).

38 See the key objectives of the Non-aligned Movement; available at <http://www.nonaligned.org>.

## **Duty to promote international cooperation, peace and security**

The obligation to promote international cooperation, peace and security reflects the stated purpose of the UN as articulated under Article 1(1), (2) and (3) of the UN Charter.

## **Duty to create and maintain just and mutually beneficial relations among nations**

Creating and maintaining just and mutually beneficial relations among nations is a duty that is also reflected under Article 1(2) and (3) of the UN Charter, which binds Namibia as a member of the UN.

## **Duty to foster respect international law and treaty obligations**

The duty to foster respect for international law and treaty obligations seems to underscore the classic international law principle of *pacta sunt servanda*,<sup>39</sup> encapsulated under Article 26 of the Vienna Convention on the Law of Treaties of 1969.

While *treaty*<sup>40</sup> is defined in the latter Convention, there are many other terms used which ought to be considered part of this obligation arising out of *pacta sunt servanda*, such as *Convention*, *Protocol*, *Agreement*, *Arrangement*, *Proces-Verbal*, *Statute*, *Covenant*, *Declaration*, *Modus Vivendi*, *Exchange of Notes* (or of *Letters*), and *Final Act* or *General Act*.<sup>41</sup>

## **Duty to encourage the settlement of international disputes by peaceful means**

The duty to encourage the settlement of international disputes by peaceful means is explicit in its language and talks to Chapter VI of the UN Charter as well as Articles 1(1) and 2(3) thereof.

Namibia's foreign policy is also impacted by Article 99 (Foreign Investments) of the Namibian Constitution, which encourages foreign investments within Namibia,

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org/2010/06/11/key-objectives-of-the-non-aligned-movement/, last accessed 15 September 2011. Many of the diplomatic ties established by SWAPO are retained by the Namibian Government to date, with Cuba being a case in point.

39 The actual text reads as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". This is the accepted meaning of the Roman maxim. There are other Articles in the said Vienna Convention that advance this objective.

40 Per Article 2(1)(a) of the Vienna Convention, it "means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

41 For a discussion of these terms, see Shearer (1994:401–404).

subject to an Investment Code.<sup>42</sup> For Namibia, foreign direct investment is critical in stimulating sectors of its development economy. This provision has motivated Namibia's membership of the Multilateral Investment Guarantee Agency, a member of the World Bank Group, so that the country may attract foreign investors who can have their input secured with cover from non-commercial risks. Namibia has also signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.<sup>43</sup>

## Other duties derived from the Constitution

It is important that Article 101<sup>44</sup> of the Namibian Constitution is not overlooked in this context, however, as it seems to point to the directory rather than obligatory provisions of Chapter 11 therein. Article 101 reads as follows:<sup>45</sup>

The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.

There are further provisions of the Namibian Constitution which impact on Namibia's relations on the international plane. One such important provision is the one that treats existing agreements in the context of state succession. Per Article 143 of the Namibian Constitution, all existing international agreements at Independence, which are binding upon Namibia, are to remain in force until the National Assembly decides otherwise, under Article 63(2)(d).<sup>46</sup> Article 63(2)(d) should be read together with Sub-Article (e),

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42 That code is the Foreign Investment Act, 1990 (No. 27 of 1990), currently under review.

43 Namibia has not ratified the Convention, however, and neither has she acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded on 10 June 1958 (New York Convention). Nonetheless, Namibia has participated in arbitrations held under the auspices of the International Chamber of Commerce and the Permanent Court of Arbitration – admitting, by participation, to abide by its rules.

44 “Application of the Principles contained in this Chapter”, referring to Chapter 11 of the Constitution.

45 Curiously, Dausab (2011) takes issue with this constitutional provision! However, the Namibian Supreme Court, in *Government of the Republic of Namibia & 2 Others v Mwilima & 127 Others* (SC) Case No. SA 29/2001, at 40, in a judgment rendered by then Chief Justice Strydom, it was held that the provisions of the International Covenant on Civil and Political Rights were applicable because, among other things, Namibia had acceded to it and had an obligation to adopt legislative and other measures to give effect to the rights arising from the Covenant. For a comparison, see *The Chairperson of the Immigration Selection Board v Frank & Another* (2001) (NR) 107 (NmSC). Article 101 seems to be Namibia's indispensable ‘escape clause’ in legal parlance.

46 Prof. Lazarus Hangula (2011:195), referring to the Namibian/South African territorial borders along the !Garib/Orange River postulates a serious philosophical query to this principle when he asks, “but can the inhabitants of such an arid area as what was then Namaland and the Namib Desert truly now live without access to the waters of their ancestral river, just because two

as that constitutional provision empowers the National Assembly to either repudiate or confirm international agreements concluded by previous administrations, while the latter empowers the National Assembly to either ratify or accede to international agreements negotiated by the President or his/her delegates.

Treaties that come into life and become binding on Namibia by ratification become part of the law of Namibia when the National Assembly ratifies such by resolution, whereas treaties that become operable by signature are not automatically part of the domestic law of Namibia and require enabling legislation.<sup>47</sup>

Mention of agreements concluded by previous administrations prior to Namibia's Independence on 21 March 1990 invokes consideration of state succession agreements, particularly agreements impacting the territorial boundaries of Namibia, as intimated earlier in the discussion. Article 1(4) of the Namibian Constitution places the southern boundary in the middle of the Orange River, whereas the English-German Boundary Treaty of 1 July 1890, also known as the *Helgoland Treaty*, places the boundary between Namibia and South Africa as –<sup>48</sup>

... a line commencing at the mouth of the Orange River and ascending the north bank of that river to the point of its intersection by 20th degree of east longitude.

It is apt to reproduce Article 1(4) of the Namibian Constitution at this juncture and refer to previous discussions relating to the definitions of *protectorate* and *territory*:

The national territory of Namibia shall consist of the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay, as well as the off-shore islands of Namibia, and its southern boundary shall extend to the middle of the Orange River.

The discerning eye would note that Article 1(4) singles out the southern boundary; the enclave, harbour and port of Walvis Bay; and the off-shore islands of Namibia, when there is no explicit linkage in that respect to the period of the takeover from the Germans by the South Africans during the Mandate System of the League of Nations, as there was never a question as to the contiguous area which Germany, acting under Article 118 of the Versailles Peace Treaty, renounced –

... all rights, titles and privileges whatever in or over territory which belonged to her or to her allies, and all rights, titles and privileges whatever their origin which she held as against the Allied and Associated Powers.

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foreign colonial powers so decided at a time and in the name of a discredited pre-human-rights ideological doctrines [sic] of imperialism and colonialism?"

47 See Tshosa (2010:20); subject, of course, to Article 7 (Full Powers) of the Vienna Convention, and Articles 32(3)(e) and 63(2)(e) of the Namibian Constitution.

48 Herslet (1899).

The UN, through its decisions such as that resulting in Resolution 432 of 27 July 1978, maintained this perspective and declared Walvis Bay an integral part of Namibia.<sup>49</sup>

South Africa, on the other hand, continued unabated and administered/legislated for Walvis Bay as part of the Province of the Cape of Good Hope of South Africa from 1 September 1977<sup>50</sup> as a result of the enabling provisions of the South Africa Constitution Act,<sup>51</sup> which, as of 31 May 1961, defined Walvis Bay and the Penguin Islands to form part thereof. The territory of and sovereignty over Walvis Bay and the Penguin Islands only returned to Namibia in 1994 with both South Africa and Namibia legislating to that effect.<sup>52</sup>

One of the achievements of diplomacy after Namibia's independence which may be cited as a best practice in the region is indeed how Namibia and South Africa resolved the matter of Walvis Bay under the leadership of Presidents Sam Nujoma and Nelson Mandela, when, on 28 February 1994, at midnight, Walvis Bay was reintegrated into Namibia. Notwithstanding their gentlemen's agreement of 1998, the !Garib/Orange River boundary persists hitherto – in keeping with the Helgoland Treaty!<sup>53</sup>

Notwithstanding the Portuguese–German Lisbon Convention of 3 December 1886 concerning the Kunene River, which forms a boundary between Angola and Namibia in the north, the two countries entered into their own present-day agreement of 4 June 2002, which demarcates their territorial waters, and have since been cooperating<sup>54</sup> under the Convention on the Law of the Sea of 1982.

With the matter relating to the Kasikili (Sedudu) Islands, arising from the Anglo–German Agreement of 1 July 1890, in which Namibia and Botswana were able to achieve certainty through litigation at the ICJ, the two countries have laid the matter to rest.<sup>55</sup>

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49 See Footnote 18. See also paragraph 7 of UN General Assembly Resolution 32/9 D of 4 November 1977, in which the Assembly declares Walvis Bay as an integral part of Namibia.

50 Specifically as a result of Walvis Bay Administration Proclamation R202 of 1977.

51 No. 32 of 1961.

52 The South African legislation was the Transfer of Walvis Bay to Namibia Act, 1993 (No. 203 of 1993) assented to by the South African Parliament on 14 January 1994, while the Namibian counterpart legislation was the Walvis Bay and Off-shore Islands Act, 1994 (No. 1 of 1994).

53 Hangula (2011:194).

54 (*ibid.*:192).

55 The two countries requested the ICJ to “determine, on the basis of the Anglo–German Treaty of 1 July 1890 and the rules and principles of international law, the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island”. The Island referred to is known as *Kasikili* in Namibia, and as *Sedudu* in Botswana. See <http://www.icj-cij.org/docket/files/98/7577.pdf>, at 1053, last accessed 25 September 2013. This has displayed Namibia's commitment to its constitutional foreign policy object to promote, among other things, international peace and security and the settlement of disputes by peaceful means as required under Article 96 of the Namibian Constitution and other international instruments. The

Again, this is another exemplary resolution of a territorial dispute. Both governments and citizens committed to peace, resolved their dispute peacefully, and continue to interact peacefully.

Hence, there is a need to resolve the Helgoland Treaty disaster as a matter of urgency as this impacts on the territorial integrity of Namibia, not to mention the interests of commerce of the citizens of the two countries.<sup>56</sup> It is, after all, Article 1(4) of the Namibian Constitution which expressly states “the middle of the Orange River”.

## Facets of Namibia's multilateral and bilateral activity

Sometimes, Namibia acts only under the aegis of a collective, i.e. multilaterally; yet sometimes, she acts directly with other nations on her own accord (bilaterally) or with international institutions. With membership of the UN,<sup>57</sup> the African Union (AU), the Southern African Development Community (SADC), the Southern African Customs Union (SACU) and other multilateral bodies, Namibia commits to act with a collective objective in mind. These institutions are mostly set up by treaties,<sup>58</sup> and under them, a plethora of protocols<sup>59</sup> address specific areas of cooperation.

Signing up has implications for the ability of a country to act contrary to the terms of the treaty in question.<sup>60</sup> There may be limitations imposed on a state by virtue of such membership to international instruments. Once signed up, a country cannot invoke national law as an excuse for its inability to carry out its obligations under international law – even if its government is in compliance with a decision of a judicial organ at national level.<sup>61</sup>

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case is officially cited as *Kasikili/Sedudu Island (Botswana/Namibia) Judgment*, ICJ Report 1999, at 1045.

56 A grape grower on the Namibian side may experience nuisance from diamond mining operations on the South African side, which literally ends on the banks of the river on the Namibian side, and vice versa.

57 The UN system opens up membership to organs such as the United Nations Food Agricultural Organisation (FAO); the United Nations Development Programme (UNDP); the United Nations Educational, Scientific and Cultural Organisation (UNESCO); and the International Telecommunication Union (ITU), to mention but a few in which Namibia actively participates.

58 For instance, the Consolidated Text of the Southern African Development Community (SADC) Treaty as Amended, of 17 August 1992.

59 There are approximately 24 Protocols negotiated under SADC alone; see <http://www.sadc.int/english/key-documents/protocols/>, last accessed 16 November 2011.

60 See Articles 18 and 27 of the Vienna Convention on the Law of Treaties of 1969.

61 See Article 4(1) of the International Labour Commission's 2001 *Articles on the Responsibility of States for Internationally Wrongful Acts*. It states as follows: “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government

An example of limitations applicable to Namibia and others are the Preferential Trade Agreements under SACU. A SACU member state cannot conclude such an agreement without the consent and approval of its fellow SACU members,<sup>62</sup> whilst most-favoured-nation agreements may be concluded without such approval. However, sometimes, even when having acted in consort with others, Namibia has withdrawn from organisations – as it did from the Common Market for Eastern and Southern Africa (COMESA) in 2004, because it juxtaposes its cost–benefit returns from its memberships.

AU members who are also signatories to the Rome Statute of the International Criminal Court have recently posed the question of conflicting loyalties for themselves on the subject of international criminal jurisdiction: should they go with the AU or the International Criminal Court?<sup>63</sup> Namibia is a signatory to the Rome Statute – one of 33 out of the 54 AU member states.<sup>64</sup> Ongoing discussions about the jurisdiction of the SADC Tribunal place Namibia alongside some fellow SADC member states and on the opposite side to other fellow SADC member states on the critical question – should citizens of SADC member states have *locus standi* before the SADC Tribunal or not?<sup>65</sup> Namibia is a member of SADC and in fact, the Tribunal is housed in a historic building in Windhoek.

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or of a territorial unit of the State”; available at <http://www1.umn.edu/humanrts/instate/WrongfulActs.html>, last accessed 14 September 2013.

62 See Article 31(3) of the 2002 SACU Agreement: “No Member States shall negotiate and enter into new preferential trade agreements with third parties or amend existing agreements without the consent of other Member States”.

63 See Akande et al. (2010:6), where the authors refer to the AU Summits of July 2009 and 2010 held in Libya and Uganda, respectively, which meetings expressed sentiments on the International Criminal Court (ICC) and on international criminal justice in general. An interesting must-read, however, is the work of Tladi (2009:57ff) on the universality of the values of intolerance of impunity for crimes under international law of the ICC Statute. The indictment of President Omar Hassan Al Bashir of Sudan (*The Prosecutor v Omar Hassan Al Bashir* ICC-02/05-01/09), for example, saw the AU Summit of February 2009 call on the UN Security Council under Article 16 of the Rome Statute establishing the ICC to defer the process initiated by the ICC against President Al Bashir. Some AU members, such as Kenya (through the conduct of its High Court during August 2011), issued a warrant of arrest pursuant to the ICC indictment, given that Kenya is a signatory to the ICC’s Rome Statute. Malawi refused to host the AU Summit of Heads of State and Government. In 2012 if the Sudanese President Al Bashir was to attend; as a result, Addis Ababa, Ethiopia, the seat of the AU, had to host the Summit.

64 Namibia deposited her instrument of ratification on 25 June 2002.

65 In the case of *Campbell*, SADC (T) Case No. 2/2007 [2007] SADCT 1, 13 Dec 2007, affected persons by the Republic of Zimbabwe’s laws on the question of land restitution were able to receive favourable judgment. The matter has since been overtaken by SADC Summit of Heads of State and Government decisions to suspend the SADC Tribunal in its current legal status while the Ministers of Justice/Attorneys-General conduct a study on the Tribunal’s jurisdiction for determination by Summit of SADC during August 2012. Subsequently, the SADC Summit resolved that a new SADC Tribunal Protocol be negotiated, with the specific instruction that the jurisdiction over natural persons be excluded. This is the status as at the time of printing.

It should be noted that some of Namibia's membership to international organisations or commitments are inherited from the apartheid regime.<sup>66</sup> For instance, membership to the International Telecommunications Union (ITU) is listed as having commenced on January 25, 1984. SACU membership, *albeit* widely accepted as having commenced on March 21, 1990, can arguably be determined to have actually began on December 11, 1969 whilst the *Territory* was still a Mandate of the United Nations Trusteeship Council.

Some other commitments come as a by-product of membership to some international bodies. A case in point is the ICJ. All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice.<sup>67</sup> For some agreements and activities, such as the management of the water resources in the Kunene River Basin, there is a purely bilateral existence, exercised by the Namibian and Angolan governments under the Permanent Joint Technical Commission. Thus, the obligations under the Third Water Use Agreement establishing such Commission, concluded on 21 January 1969 by and between the Republic of South Africa and the Republic of Portugal, continue to the present day due to state succession.<sup>68</sup> It may surprise the inquisitive mind that Namibia is recorded as having acceded to the International Covenant on Civil and Political Rights (ICCPR) on 28 November 1994, even though its provisions comprise customary international law – which, by virtue of Article 144 of the Namibian Constitution, forms part of the law of Namibia.

Perhaps the best visible sign of Namibia's international interactions is the posting of the men and women of its diplomatic corps at embassies and high commissions around the world. The Diplomatic Privileges Act, 1951 (No. 71 of 1951) from the days of South African rule still applies. However, it should be read in conjunction with the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1992 SADC Protocol on Immunities and Privileges and, indeed, the Namibian Constitution, as discussed earlier.

A considerable amount of time and effort – not to mention funds – is placed in Namibia's direct interaction with other states and organisations via ministers, diplomats and negotiators in the pursuance of the country's international law obligations.<sup>69</sup> The

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66 Article 143 of the Namibian Constitution states that “[a]ll existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under Article 63(2)(d) hereof otherwise decides”.

67 See Article 93 of the UN Charter. However, Article 95 therein permits the resolution of matters between members of the UN by other tribunals by agreement of those members involved.

68 See Article 143 of the Namibian Constitution as well as provisions of the 1978 Vienna Convention on Succession of States in respect of Treaties.

69 Namibia maintains diplomatic missions in Angola, Austria, Belgium and the EU, Botswana, Brazil, China, Cuba, the Democratic Republic of the Congo, Egypt, Ethiopia and the AU, France, Germany, India, Japan, Malaysia, Nigeria, the Russian Federation, South Africa, Sweden, Switzerland, Tanzania, the United Kingdom, the UN, the United States of America,

cornerstone for such interaction remains premised in international law, even if political or policy considerations are central to the positions taken.

In neighbouring South Africa, courts have been able to test how far diplomatic privileges and immunities may be contrasted with what nationals expect of their governments. In the case of *Samuel Kaunda & Others v The President of the Republic of South Africa & Others*,<sup>70</sup> heard in the Constitutional Court of South Africa, the court elaborated rather extensively on the relationship at an international level between that country and foreign states in regard to the nature and extent of its obligations towards South Africa citizens beyond its borders, i.e. the extraterritorial protection of citizens and the extension of diplomatic protection to them. In a nutshell, the court expressed the view that, in essence, it was the function of the Executive arm of the state to determine foreign policy and grant any protection.<sup>71</sup> However, in the following words it also opined that that, in itself, could not be considered an ouster of the courts to have jurisdiction to deal with issues concerned with diplomatic protection:<sup>72</sup>

The exercise of all public power is subject to constitutional control. Thus even decisions by the President to grant a pardon or to appoint a commission of inquiry are justiciable. This also applies to an allegation that government has failed to respond appropriately to a request for diplomatic protection.

By so doing, the court has expressed an opinion that seeks to alter the concept of *foreign policy* somehow: can a country, in its foreign policy, maintain diplomatic relations with a country that holds a contrary position to its constitutional position? The death penalty comes to mind. Of course, the ICCPR does not make capital punishment impermissible under international law, and neither is it outlawed by the African Charter on Human and Peoples' Rights. So should Namibia cut ties with its neighbour to the East<sup>73</sup> because they maintain the capital punishment on their statute books?

The answer is "Not at all", because the very essence of international comity is the difference of opinions of nations and their governments, and how they treat different subjects differently – even within a country. One might strongly argue that the Namibian courts are likely to follow the line of argument assumed by the Constitutional Court of South Africa on the issue of the right to diplomatic protection. The Supreme Court of South Africa used clearer language in the case of *The Government of the Republic of*

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Zambia and Zimbabwe; see <http://www.mfa.gov.na/>; last accessed 4 June 2012.

70 Case CCT 23/04 decided on 4 August 2004 in a judgment written by Chaskalson CJ.

71 In Namibia, this role falls to the National Assembly as per Article 63(2)(d) and (e) of the Namibian Constitution in relation to international agreements.

72 (ibid.:36, para. 78).

73 Article 4(1) of the Constitution of the Republic of Botswana provides that "[n]o person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted".

*South Africa & Others v Crawford Lindsay von Abo*,<sup>74</sup> when it expressed the following view:

It is therefore a completely foreign concept that one state would attract liability in terms of its municipal law (because that is the only law that the respondent could enforce against the appellants) viz-a-viz [sic] its own national for the wrongs of another state, committed by the state in another country viz-a-viz [sic] the same individual.

It is, however, an entirely different argument under domestic law as compared with that between a national and his/her state – i.e. when a national seeks the enforcement of international law provisions in his/her country's courts.<sup>75</sup> Should a national be an employee of a UN agency, for example, would that national be entitled to the immunity enjoyed by (foreign) staff members of the particular UN body?

The Namibian High Court had opportunity to examine this question in the case of *Hannu Shipena v The Government of the Republic of Namibia & Another*,<sup>76</sup> and the court ruled in favour of the national, namely that he, too, was subject to the exemption for as long as he was in the employ of that UN body which was subject to the terms of the Convention on the Privileges and Immunities of the United Nations.<sup>77</sup>

However, what about when a Namibian national seeks to enforce judgment against a foreign government in Namibia?<sup>78</sup> Would it be possible for the High Court of Namibia to attach the property of the embassy or high commission of the government in question?

The South African case of *Republic of Zimbabwe v Sheriff Wynberg North & Others*<sup>79</sup> was an opportunity for the courts to deal with such a situation. Relying on the provisions of the Foreign States Immunities Act, 1981 (No. 87 of 1981), the court was able to rule that the properties of the Embassy of the Government of the Republic of Zimbabwe were immune from the jurisdiction of the courts unless they were being put to commercial use or the government had issued its written consent to such jurisdiction.

By merely construing the provisions of the 1961 Vienna Convention on Diplomatic Relations, in particular Article 22(3), it is almost guaranteed that a Namibian court may

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74 Case No. 283/10, para. 31, at 16, delivered 4 April 2011.

75 See Footnote 45 above for a discussion of the *Mwilima* case.

76 Case No. A 79/2004, delivered 8 October 2008.

77 Adopted by the UN General Assembly on 13 February 1946.

78 Under Article 15 of the Protocol on Tribunal in the Southern African Development Community, now suspended, if a citizen of a SADC member state (or perhaps a natural person in SADC) has a dispute with a SADC member state, the Tribunal has jurisdiction to adjudicate such matters until or unless such jurisdiction (personal jurisdiction) has been recrafted under the Protocol. See e.g. Bartels (2011:27–30).

79 South Gauteng High Court, Case No. 2009/34015, delivered 22 November 2010. The case is marked “Not reportable”.

also rule similarly and protect the properties of a diplomatic mission.<sup>80</sup> As discussed earlier, the outcome will be imputed upon the state in the definition of its foreign relations or otherwise.

Cardinally, foreign relations will require that the territory of another state is respected and should not be violated.<sup>81</sup> *Sovereignty* has been defined to include exclusive control over the airspace above a territory.<sup>82</sup> Intra-African international air services were negotiated under the Yamoussoukro Declaration.<sup>83</sup> The conclusion of bilateral air service

80 The exact text of Article 22(3) states the following: “The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution”. It is in fact possible that the Foreign States Immunities Act, 1981 still applies in Namibia, because its definition of *Republic* was contained in the Territorial Waters Act, 1963 (No. 87 of 1963), which, by virtue of its section 8, applied to South West Africa (SWA). In SWA, the Administrator-General promulgated Proclamation AG32 of 1979, which was repealed by the Territorial Sea and Exclusive Economic Zone of Namibia Act, 1990 (No. 3 of 1990). All matters of SWA with relation to the rest of the world remained with the Government of the Republic of South Africa during those years. It is common cause that the definition of *Republic* since 1957 in the Defence Act, 1957 (No. 44 of 1957) always included the “territory of South-West Africa”. Even if the Administrator-General promulgated the Transfer Proclamations Executive Powers Transfer [General Provisions] Proclamation 1977 [AG7/1977]), the South African Supreme Court judgment in *James Hamupanda Kauluma & Others v The Cabinet for the Interim Government of South West Africa & Others* (Appellate Division) delivered on 8 November 1988 and written by Joubert JA, at 16, confirms that, although there have been three legislative authorities for SWA (South African Parliament, the President and the Administrator-General), the South African Parliament as supreme legislative authority never ceased being the supreme legislative authority. I think the Supreme Court may then inadvertently have omitted to refer to the Legislative Assembly of South West Africa as a fourth lawmaking body. For a discussion on the subject of the attachability of assets of the Government of the Republic of Namibia, see *Minister of Home Affairs, Minister Jerry Ekandjo v Johannes Jurie Jacobus Van Der Berg*, Namibian Supreme Court Case No. 19/2004. The case of *Nyathi v Member of the Executive Council for the Department of Health, Gauteng & Another*, Case CCT 19/07 [2008] ZACC 8, determined the matter in South Africa – section 3 of the State Liabilities Act, 1957 (No. 20 of 1957) – being unconstitutional. See also the case of *Gondo* (Case No. SADC (T) 05/2008, 9 December 2010). *Quaere*: Is it perhaps time for reform in Namibia of the surviving and corresponding provisions of section 3 of the Repeal of the Laws of the National Assembly, the Cabinet and the Constitutional Council Proclamation, 1989 (AG16 of 1989)?

81 See Article 2(4) of the UN Charter.

82 See Article 1 of the Convention on International Civil Aviation, 7 December 1944; also known as the *Chicago Convention*.

83 The purpose of the Yamoussoukrou Decision (YD) is to achieve “the liberalization of intra-Africa scheduled and non-scheduled air transport services, and its provisions prevail over incompatible provisions in existing or future bilateral or multilateral air transport agreements between States Parties to the YD”. The first five Freedoms of the Air are (1) the right of an airline of a member state to overflight without landing; (2) the right to the airline of a member state to overflight and conduct a technical stop (e.g. refuel); (3) the right of an airline of one member state to carry traffic to another member state; (4) similar to the right under Freedom

agreements among SADC member states ensures the accessibility of markets as well as the movement of people and goods, whilst respecting the principle of sovereignty. When people trade in the markets of the countries to which they have access by virtue of such agreements, they are liable to tax; in the absence of double taxation agreements, either they are worse off or the state coffers suffer.<sup>84</sup>

Furthermore, bilateral investment protection agreements are concluded for the purposes of protecting the investments of nationals in the jurisdiction of other countries. An example for Namibia was Ramatex, a textile industry. In a 1994 agreement, Namibia and Singapore concluded a Reciprocal Promotion and Protection of Investments Agreement protecting the physical and other assets of the investor (*in casu* Ramatex) in either of the party countries (*in casu* Namibia) to the Agreement.

When the citizens of a country conduct themselves in a manner that is injurious to a citizen of another country, or are condemned in the courts of another country, it is necessary for judicial cooperation either in the form of mutual legal assistance agreements,<sup>85</sup> the enforcement of foreign civil<sup>86</sup> or criminal judgments,<sup>87</sup> or agreements and extradition<sup>88</sup> agreements to be concluded to facilitate the necessary interaction between the states in the enforcement of citizens' rights. Namibia has entered into a number of these agreements with other countries to underpin her interactions with them as they relate to the citizens of those countries in Namibia, or to Namibian citizens there. Globalisation will only ensure that these interactions continue.

In terms of monetary and finance issues, Namibia's membership of the World Bank and the International Monetary Fund since 25 September 1990 recognises the need to interact with others to ensure global monetary stability in a modern world where

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(3) above but back from another SADC state (inbound traffic); (5) the right of an airline of one member state (A) on a service to another member state (C) to set down or uplift traffic at an intermediate point (in yet another member state [B]) (this is intermediate 5th- Freedom traffic) and/or to carry traffic from/to that other member state (C) destined for/coming from a third State (D), located beyond that other member state (C) (whether or not within the SADC region). See Haanappel & Razafy (2009:9, 23).

84 The said agreements seek to ensure that a jurisdiction "grants a credit for the taxes of the other country to reduce the taxes of a resident of the country" otherwise the resident may be taxed by both countries for the same income.

85 These are necessary for the obtaining of restraint, search and seizure as well as confiscation orders at the request of foreign states.

86 See the Enforcement of Foreign Civil Judgments Act, 1994 (No. 28 of 1994). See also the Reciprocal Service of Civil Process Act, 1994 (No. 27 of 1994), the Foreign Courts Evidence Act, 1995 (No. 2 of 1995) and the Reciprocal Enforcement of Maintenance Orders Act, 1995 (No. 3 of 1995).

87 See the International Co-operation in Criminal Matters Act, 2000 (No. 9 of 2000).

88 These agreements are necessary for the surrender of persons who are wanted for prosecution or imposition or enforcement of a sentence in the requesting state for an extraditable offence.

products – including financial products – are not limited by state boundaries. In this regard, the African Development Bank interacts directly with its member countries, but also indirectly through the collective of the regional blocs. In the AU system, these regional structures are known as *regional economic communities*. SADC is the relevant one for Namibia.

Within SADC, Lesotho, Namibia, South Africa and Swaziland form what is known as the *Common Monetary Area*, a form of currency and monetary union in which the South African Rand is legal tender.

Also within SADC is the Kavango–Zambezi Transfrontier Conservation Area, enjoining Angola, Botswana, Namibia, Zambia and Zimbabwe to harmonise their policies, strategies and practices to manage the shared natural resources straddling their international borders and creating a super-transnational park. The first transfrontier park in which Namibia was involved was the 2001 |Ai-|Ais-Richtersveld Transfrontier Park with South Africa. For the purposes of this discussion, environmental protection is both a legal and policy objective of the Republic of Namibia if regard is had to Article 95(1), wherein the following is stated:

The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following: ...

- (1) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste<sup>89</sup> on Namibian territory. [Footnote added]

The Atomic Energy and Radiation Protection Act, 2005 (No. 5 of 2005) underscores this constitutional objective, yet beyond the national laws, there are international instruments that have a bearing on all matters uranium. Notably, however, the Safeguards Agreement,<sup>90</sup> entered into between Namibia and the International Atomic Energy Agency for the application of safeguards in connection with the Treaty on the Non-proliferation of Nuclear Weapons, plays a crucial role in determining activities in this sector.

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89 Whilst this political position may have been noble in 1990, it is since being discussed as a viable commercial activity. The recycling of nuclear waste seems to be possible, if not to be encouraged. The following was posted on the World Wide Web: “Nuclear waste is recyclable. Once Uranium fuel is used in a reactor, it can be treated and put into another reactor as fuel. This cycle can be repeated several times. Once all the energy is finally extracted from the fuel, the waste that is left over decays to harmlessness within a few hundred years, rather than a million years as with standard nuclear waste”; see <http://www.whatisnuclear.com/articles/recycling.html>; last accessed 4 July 2012.

90 The agreement was signed in Vienna on 19 March 1998.

The mention of weapons bears on the subject of defence, armed conflicts and peacekeeping. Beginning with peacekeeping, Namibia has participated in UN missions in Angola (United Nations Angola Verification Mission III, UNAVEM III), Cambodia (United Nations Transitional Authority in Cambodia, UNTAC), East Timor (United Nations Mission of Support in East Timor, UNMISET), Sierra Leone (United Nations Observer Mission in Sierra Leone, UNOMSIL), and Sudan<sup>91</sup> (United Nations Hybrid Operation in Darfur, UNAMID). In so doing, Namibia can be said to have acted in terms of Article 2(5) of the UN Charter by giving assistance to the UN.

Within the SADC Region, Namibia – along with Angola and Zimbabwe – intervened in the insurrection in the Democratic Republic of the Congo (DRC), which seems to have had support from some of the neighbouring states to the DRC. Angola was obviously interested in the stability of its neighbour, whilst Namibia worried about the continued political stability of its own neighbour, Angola. The relative peace and tranquillity in Namibia misleads the visitor into not thinking of the terror instilled by UNITA elements to the residents of the borderline areas of Namibia with Angola. Therefore, the conduct of the trio – Angola, Namibia and Zimbabwe – can be said to conform to Article 5(1) (c) of the SADC Treaty (as amended). Both the international and regional peacekeeping interventions were also in conformity with section 32(2) of the Defence Act, 2002 (No. 1 of 2002).

## Conclusion

Whether acting as an individual state or in concert with other states, Namibia is bound to abide by the relevant rules of international law as binding on her. There is a definite link between the interaction of Namibia in the international sphere and the attainment of her political, trade or economic interests. The strand that links the two, i.e. the action/interaction internationally with the objects underlying such action/interaction, is the law: international or national. As a constitutional democracy, Namibia's actions internationally ought to be justifiable in law.

But what happens when a citizen is of the view that Namibia has breached its national or international law obligation by act or omission? This discussion was broached by the South African courts in the cases of *Samuel Kaunda & Others v The President of the Republic of South Africa & Others*, *The Government of the Republic of South Africa & Others v Crawford Lindsay von Abo* and *Republic of Zimbabwe v Sheriff Wynberg North & Others*, wherein it was held that “the exercise of all public power is subject to constitutional control”.<sup>92</sup> Arguably, “persons aggrieved”<sup>93</sup> may have to come before courts

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91 Being jointly conducted with the AU.

92 See *Samuel Kaunda and Others v The President of the Republic of South Africa and Others*, Case CCT 23/04 decided on August 4, 2004 in a judgment written by Chaskalson CJ at paragraph 78 on page 36.

93 See Article 18 of the Namibian Constitution on Administrative Justice which states that

to compel the President and/or the Minister of Foreign Affairs to cut off diplomatic ties with an international actor found to have violated human rights.<sup>94</sup> What an interesting judicial excursion that will be!

It is important that Namibia and South Africa resolve the Helgoland predicament concerning the !Garib/Orange River. This matter impacts the territorial sovereignty of the Republic of Namibia recorded under Article 1(4) of the Namibian Constitution, an important aspect to her interactions internationally as she exercises jurisdiction over its natural resources as contemplated under Article 100<sup>95</sup> therein. If the Governments of South Africa and Namibia are unable to or do not solve this matter soon, then it is difficult to perceive better conditions for a basis to set aside colonial agreements. Hopefully, the two countries will adopt the *thalweg*<sup>96</sup> as a principle in the resolution of this matter.

Indeed, state action must be sound in law, domestically and internationally. The interests of socio-political considerations will always interact with the obligation of legality. Sometimes, this interaction may be manifested in a multilateral setting, such as the AU situation with the International Criminal Court, or with SADC in relation to the SADC Tribunal. At other times, such interaction may simply manifest itself bilaterally, as in the case when Namibia participated in the DRC military campaign, although SADC eventually sanctioned the intervention. However, the principle of legality persists.

Namibia is a country founded partly by international solidarity; by and large, the foreign policy pronouncements of Namibia's leaders have mirrored this historical foundation.<sup>97</sup> Namibia's continued position on the situation in Palestine comes to mind. Article 96 succinctly summarises the basis of Namibia's international relations:

- Non-alignment
- International cooperation, peace and security
- Just and mutually beneficial relations among nations

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"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal".

94 For instance, and really with a view to provoke deeper thinking on the theme of human rights, the SADC Tribunal, and State conduct in relation thereto: should Namibia treat Zimbabwe any differently, given the SADC Tribunal decision in the matter of Campbell?

95 The said Article 100 of the Namibian Constitution provides as follows: "Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned".

96 The deepest continuous inline within a valley or watercourse system; see <http://en.wikipedia.org/wiki/Thalweg>, last accessed 25 September 2013.

97 It may be interesting to have conflicting public statements from Cabinet Members on matters affecting foreign policy, and to see how that may define the stance of Namibia.

- Respect for international law and treaty obligations, and
- Peaceful settlement of international disputes.

These five principles for international relations may tend towards defining Namibia as a pacifist state; yet, as discussed above, it is clear that Namibia can act militarily. Having emerged from a war itself, it is encouraging to note that Namibia, despite the size of her population and economy, continues to contribute to international peacekeeping missions.

Since Namibia is a monist country, one wonders whether the newly minted Responsibility to Protect (R2P) principle will be “binding upon Namibia”.<sup>98</sup> It seems that the discussion is yet to be concluded on this issue; however, what is conclusively known is that politics and law will continue to define Namibia’s foreign relations (and that of many other countries) for as long as Addis Ababa, Gaborone, Geneva, New York and Vienna continue to churn out AU-, SADC- and UN-related legal instruments, and politics remain what they are.<sup>99</sup> Nonetheless, whilst Namibia signs these many international agreements, their implementation is difficult to track, as there seems to be no central electronic and hard-copy database accessible to the government or the public to assess and interrogate the text of such international agreements from time to time. This certainly resonates in a world where access to information is being made a right under law. Deeper examination and better preparedness for Namibia’s engagement in international forums may very well produce the exercise of Namibia’s right to enter into reservations – something that has not yet come to the fore; and if it has, as indicated above, it will be difficult to determine without a centralised database.

Lastly, civil society organisations, private enterprises and the citizenry are key barometers when it comes to ensuring that foreign policy indeed serves the interests of their social, trade and economic objectives. With a foreign policy constitutionally tied to law, these entities have the right to take part in the national discussion to shape foreign policy, and more of this discussion should be encouraged.

## Postscript

Still, it should be remembered that “No man is an island, No man stands alone”.<sup>100</sup>

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98 Quite interestingly, a former German *Bundestag* member posed an interesting query in conversation recently: while Namibia’s position on the R2P is not clear, can it be assumed that Namibia will overlook matters of sovereignty and non-interference if a body such as the AU, SADC or UN sanction action is premised on the R2P? In this case, how does that distinguish the intervention in the DRC of the late 1990s?

99 The time has come for Namibia to post lawyers at these missions so as to facilitate Namibia’s interaction internationally at the AU, SADC and UN. Lasswell (1948, cited in William 2008:566) defines *politics* as “who gets what, when, and how”.

100 Line based on prose and later a poem by John Donne from *Meditation XVII*.

Tendencies towards reclusion by individuals cannot be transplanted to foreign policy for a country that came about as a result of solidarity around the world. Also, Namibia should become more activist in the region – not the other way around. The relative<sup>101</sup> peace and stability Namibia has enjoyed for over two decades since Independence may have bred amnesia on the part of the older generation. Also, a young generation born free of political oppression may engage in escapism with respect to problems being experienced in another African country, as they may feel unaffected by that problem. Yet, as long as Namibia remains a member of the international community, it will be affected directly or indirectly by action or inaction on its part or on the part of the international community in relation to any event occurring in any region or country calling into play the law in the interactions of international actors.

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101 The adjective is a necessary inclusion for the purposes of including the Caprivi secessionist attacks of August of 2000 and the UNITA incursions; otherwise, Namibia is a stable, peaceful, democratic country.

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