

SMALL STATES AND THE UNDERCURRENTS OF COMPLIANCE WITH
INTERNATIONAL LAW: THE CASE OF NAMIBIA

BY PEYA MUSHELENGA

SUBMITTED IN FULFILMENT OF THE REQUIREMENTS OF THE

DEGREE OF MASTER OF LAWS (LLM)

IN THE SUBJECT

INTERNATIONAL LAW

AT THE

UNIVERSITY OF NAMIBIA

STUDENT NO: 9323236

SUPERVISOR: DR A. JORGE

SEPTEMBER 2017

DEDICATION

I dedicate this study to the memories of my uncle, Aaron Shihepo, who passed away on 6 September 2016, for the role he played in the negotiations for Namibia's independence at the United Nations and other international platforms thereby contributing to international peace and security in general, and international legislation on Namibia, in particular, which impacted on the shaping of Namibia's embracing of international law.

DECLARATION

I, Peya Mushelenga, hereby declare that:

- This study is a true reflection of my own research, and that this work, or part thereof has not been submitted for a degree in any other institution of higher education.
- No part of this thesis/dissertation may be reproduced, stored in any retrieval system, or transmitted in any form, or by means (e.g. electronic, mechanical, photocopying, recording or otherwise) without the prior permission of the author, or The University of Namibia in that behalf.

I, Peya Mushelenga, further

- grant The University of Namibia the right to reproduce this thesis in whole or in part, in any manner or format, which The University of Namibia may deem fit, for any person or institution requiring it for study and research; providing that The University of Namibia shall waive this right if the whole thesis has been or is being published in a manner satisfactory to the University.

.....

Date.....

Peya Mushelenga

9323236

ACKNOWLEDGEMENTS

First I would like to thank my dear wife, Eunike for being a pillar of support in my life, our son, Panduleni and daughter Pamwenatse, who provided a sense of humour, s necessary to smoothen the stress of studies.

I am indebted to all persons who made time from their busy schedules to grant me interviews, as part of my primary data collection. I am indebted to my supervisor, Dr Aimite Jorge who made comments to the research proposal provided a critique on the draft thesis. I am further indebted to Prof Wanda who made comments to the draft research proposal.

I am grateful to my secretary, Ellen Swartz, for facilitating my appointment with the interviewees and my driver-cum-protection officer, Warrant Officer Tonata Moongo, who took me to my interview appointments. I further express gratitude to the staff at the National Assembly Library and National Library who provided me with assistance in accessing secondary resources during my data collection.

TABLE OF CONTENTS	Page
Dedication	i
Declarations	ii
Acknowledgements	iii
Abstract	x
List of acronyms and abbreviations	xi
Chapter One	
Introduction	1
1.1 Introduction	1
1.1.1 Orientation of the study	1
1.1.2 Objectives of the study	5
1.1.3 Statement of the research problem	5
1.1.4 Hypothesis	5
1.1.5 Importance of the study	6
1.1.6 Scope and limitation of the study	6
1.2 Literature survey	7
1.3 Emerging trends in international law: selective justice approach of small African states	19
1.4 Research methodology	20
1.5 Research ethics	23
1.6 Conceptual clarification	23
1.6.1 Small states	23
1.6.2 Victor's justice	24
1.6.3 Soft laws	24
1.7 Chapters outline	25
Chapter Two	
Small states in international law within the context of rigorous adherence to international law: comparisons with large states	27
2.1 Introduction	27

2.2	Defining small states	28
2.3	Middle powers and large states	29
2.4	A framework of compliance with international law	30
2.5	Support for and compliance with the international law	31
2.6	Capacity to influence international law	36
2.7	Consciousness of smallness	42
2.8	International law and municipal laws of small states	43
2.9	Vulnerability to ramifications	44
2.10	Attitude of large states	45
2.11	Inequality in international law	47
2.12	Atypical small states behaviour and international law	50
2.13	Conclusion	53

Chapter Three

Namibia and rigorous upholding of international law: The effect of constitutional principles **55**

3.1	Introduction	55
3.2	Namibia as a product of international law, a historiography	55
3.2.1	The International Court of Justice and pre-independent Namibia's cases	57
3.2.2	Pre-independence UN-legislated international law on Namibia	57
3.3	The constitutional principles on international law and their origin	60
3.4	Namibian municipal laws vs international law	61
3.5	The case of Kasikili Island dispute with Botswana	63
3.5.1	Background to the Kasikili / Sedudu Island dispute	64
3.5.2	The parties	65
3.5.3	Legal arguments and the Court's consideration	69
3.5.4	Compliance with the International Court of Justice's ruling	72
3.6	Internal stakeholders' coordination on international law	73
3.7	Challenges	75
3.7.1	Compliance with international laws	75
3.7.2	Lack of expertise	76
3.7.3	Lack of inter-ministerial coordination	77

3.8	Assessment	79
3.10	Conclusion	80

Chapter Four

Selective justice, inconsistencies and controversies in international law: the case of the international criminal court	82
--	-----------

4.1	Introduction	82
4.2	Namibia's initial stance towards the International Criminal Court	83
4.3	Namibia's changing posture towards contemporary international criminal law	84
4.3.1	Namibia's policy shift towards the International Criminal Court	84
4.3.2	Background to the case of Kenyan leaders at the International Criminal Court	86
4.3.3	An assessment of Namibia's shifting approach to the International Criminal Court and the question of rigorous adherence to international law	90
4.3.4	The controversy of inequality in the application of international criminal law	104
4.4.	Conclusion	106

Chapter Five

Specific United Nations Security Council resolutions as international law impacting on Namibia and the question of compliance	107
--	------------

5.1	Introduction	107
5.2	Methods of enforcing international law	107
5.3	The impact of United Nations Security Council resolutions 1929 of 2010 and 2094 of 2013 on Namibia	108
5.3.1	United Nations Security Council Resolutions 1929 of 2010 on Iran	110
5.3.2	United Nations Security Council Resolution 2094 of 2013 on the Democratic People's Republic of Korea	112
5.3.3	Namibia's compliance with the UN Security Council resolutions on the Democratic People's Republic of Korea	114
5.4	Inequalities in the application of international law to small states, vs large states	115
5.5	Selectivity and the juxtaposition of politics and law affecting compliance with international law	119

5.6	An assessment of the application of international law to large and small states	123
5.7	Conclusion	126
Chapter Six		
6.1	Conclusion	128
6.2	Recommendations	131
7.	Bibliography	133
Annex 1		150
A sample of interview questions used in the study		
Annex 2		151
List of interviewees		

LIST OF TABLES**Page**

Table 1: Judges of the ICJ and their nationality, 1946 – 2015	39
Table 2: The Namibian Legal Team	66
Table 3: The Botswana Legal Team	67
Table 4: African cases before the ICC	93

LIST OF FIGURES

Fig. 1: Namibia-Botswana borders around the Kasikili Island area	64
--	----

Abstract

This study examines small states' compliance with international law, with a specific focus on Namibia.

The study is based on the questions whether small states rigorously adhere to international law and whether they are different from large powerful states and what are the consequences for small states' non-compliance with international law. The study establishes that there are instances of non-compliance with international law by both small and large states, with some large states non-compliance occurring more often compared to small states. It further concludes that measures taken against for non-compliance with international law, like economic sanctions, affect small states more compared to the impact on large states.

The study adopted qualitative research methodology using both primary and secondary data collection techniques. Information gathered was analysed and assessed using legal arguments.

The study found that Namibia has generally embraced international law as an integral part of its legal system and strictly adheres to it, as illustrated by the Kasikili / Sedudu Island dispute between Namibia and Botswana at the International Court of Justice (ICJ).

The study however found that there was a paradigm shift in Namibia's approach towards international law, in respect of international criminal law. This is illustrated by her stance on the International Criminal Court (ICC) when she espoused selective justice approach manifesting failure and omissions to advocate compliance with international law by leaders indicted by the Court.

With regard to the UN enacted laws, the study concludes that where there is non-compliance with international law by both small and large states, large states could violate international law with minimal or no consequences, while small states would face consequences, unless small states that are aligned to large states. Meanwhile, the study found that, as a small state, Namibia cannot afford the consequences of non-compliance with international law and has, therefore, endeavoured to be compliant.

LIST OF ABBREVIATIONS AND ACRONYMS

ACP	African, Caribbean and Pacific Group
AU	African Union
CARICOM	Caribbean Community
CIA	Central Intelligence Agency
CIL	Customary International Law
COMESA	Common Market for Eastern and Southern Africa
DPRK	Democratic Republic of Korea
ECJ	European Court of Justice
EPAs	Economic Partnership Agreements
ESAAMLG	Eastern and Southern African Anti-money Laundering Group
EU	European Union
G 77	Group of 77
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labour Organisation
IMF	International Monetary Fund
IMT	International Military Tribunal
IOI	International Ombudsman Institute
JCPOA	Joint Comprehensive Plan of Action
LAC	Legal Assistance Centre
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NTC	National Transitional Council
NSHR	National Society Human Rights
PICJ	Permanent International Court of Justice
SADF	South African Defence Force
SCCAM	The Swiss Chamber's Court of Arbitration and Mediation
SME	Small and Medium Enterprise
UN	United Nations
UNHRC	United Nations Human Rights Commissions
UNCLOS	United Nations Convention on the Law of the Sea
US	United States
USSR	Union of Soviet Socialist Republic
WCG	Western Contact Group
WWI	First World War
WWII	Second World War
WTO	World Trade Organisation
ITLOS	International Tribunal of the Law of the Sea
SCCE	Conference on Security and Cooperation in Europe

CHAPTER ONE

INTRODUCTION

1.1 Introduction

1.1.1 Orientation of the study

This study discusses the compliance with international law by small states. The study looks at the role of power in international law application and further seeks to identify the challenges of small states in international law in relation to compliance, compared to their larger counterparts. The study also looks at the aspect of selective justice in international law within the context of how small states in Africa approach the *International Criminal Court* (ICC). African states were selected because of their recent pronouncements on withdrawing from the ICC.

The study focuses on small states in international law within the framework of the sources of international law. The Statute of the ICJ stipulates that international law is sourced from international treaties, customs, general principles of law, judicial decisions and writings of eminent academics.¹

The legal status of the treaties are that they create rights and obligations only to the parties to the treaties.² Further the legal status of the treaties and general principles of international laws was articulated in the *Lotus Case*.³ It was held that the rules of law binding upon states arises from their free will. As for the general principles of international law, their legal status emanates from the fact that these principles are fundamental to legal system and therefore significant to the co-existence of states.⁴ The legal status of judicial decisions emanates for the *stares decisis* doctrine in law, while writings of academics are generally used by tribunals with the ICJ refraining from adopting them into its judgements.⁵

¹ United Nations, 1945, *Statute of the International Court of Justice*, article 38.

² Malanczuk P., 1997, *Akehurst's modern introduction to law*, 7th ed., London: Routledge, p 38.

³ *Lotus Case*, PCIJ, Series a, No. 10, (1927), 18.

⁴ Panezi M., 2007, "Sources of law in transition, revisiting general principles of international law", in *Ancilla Iuris*, 66 – 79, p 70.

⁵ Malanczuk (1997: 51 - 52).

Over the years, the UN General Assembly and Security Council Resolutions, too, became secondary sources of international law.⁶ This is illustrated by the ICJ judgment in the case of *Military and Paramilitary activities in and against Nicaragua (Nicaragua v the United States of America), Merits*,⁷ where the Court stated that in determining matters before it, the Court can consider resolutions adopted by international organisations *meru moto*. The Court has thereby ruled on the relevance of the UN General Assembly and Security Council resolutions in the development of international law. It should, however, be noted that General Assembly resolutions have no binding effect, especially on matters related to international peace and security, unlike the Security Council resolutions. Öberg⁸, surmises that:

[Security Council] decisions have an overriding normative power capable of pre-empting obligations flowing from traditional sources of international law. Recognizing such overriding binding force would give a secondary source of UN law (decisions) a greater normative value than many primary sources of international law (treaties).

International law emanating from the Security Council resolutions covers largely the field of international peace and security.

The study predominantly looks at the following sources: international treaties and general principles of law as embodied in the United Nations (UN)-enacted law. It examines how international treaties and agreements affect small states and how states comply with the general principles of law. Since the Statute of the ICJ where these sources of international law are cited was adopted in 1945, and modern States were established in post Second World War (WWII), the period of focus for this study stretches from 1945 to 2016. It should, however, be noted that the general principle of international law itself covers a period earlier than 1945, e.g. principles of international customary law and those laid down by the Permanent International Court of Justice (PICJ), the predecessor of the ICJ established in 1920 by the Covenant of the League of Nations – the precursor to the UN.

A substantial amount of literature on small states in international relations has been written which discusses how states behave in the international political and economic systems. But little has been written about small states in international law. Any literature on small states in

⁶ Kerwin J. K., 1983, “The role of United Nations General Assembly Resolutions in determining principles of international law in United States Courts”, in *Duke Law Journal*, 1984 (4): 876 – 899, pp 880, 883 – 884; Öberg M. D., 2006, “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ”, in *The European Journal of International Law*, 16 (5): 879 – 906, p 880.

⁷ [1986] ICJ Repots, p 14, at p 44, para. 72.

⁸ Öberg (2006: 884).

international law will, therefore, add to a number of literature on small states and international law. The main questions of this study specifically focus on: (i) whether both small and large states adopt international law rigorously and (ii) whether international law is applied equally to all states and (iii) whether there is consistency in the application of the principle of sovereign equality of states.

In international law, the elements that constitute a state are defined by article 2 of the Montevideo Convention on the Rights and Duties of States of 1933, signed by the United States of America and 15 states of Latin America.⁹ These elements are (i) a permanent population; (ii) a defined territory; (iii) government; and (iv) capacity to enter into relations with other states.

There is no prescribed minimum number of persons that should constitute the population of a state. Thus, Tuvalu with a population of 9 876 and China with a population 1 357 380 000 are equal sovereign states in terms of international law.¹⁰ Namibia was chosen as a case study (of small states) because she is a small state with a population of 2.1 million, and she falls within the definition of small states by the Commonwealth¹¹ which is adopted in this study (see definition of small states in Chapter Two). Namibia was further chosen because of a specific inclusion in her constitution of an article directly embracing international law. Article 144 of the Namibian constitution reads as follows:

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.¹²

In terms of the above-mentioned article, international law is an integral part of the Namibian law and it is imperative that the courts apply the appropriate international law in the event of a violation when settling a matter.¹³ This means that Namibia has a monist¹⁴ approach to international law versus municipal laws.

⁹ *Convention on the rights and duties of states of 1933*, article 2.

¹⁰ World Bank, 2016a, *Population statistics for 2013*, available online at http://data.worldbank.org/indicator/SP.POP.TOTL?order=wbapi_data_value_2013+wbapi_data_value+wbapi_data_value-last&sort=asc, last accessed on 1 September 2016.

¹¹ Commonwealth and World Bank, 2000, *Small States, meeting the challenges in the global economy: Report of the Commonwealth Secretariat / World Bank Joint Task Force on Small States*. Washington: Commonwealth and World Bank.

¹² *Constitution of the Republic of Namibia*, Act No. 1 of 1990, article 144.

¹³ Dausab Y., 2010, "International law vis-à-vis municipal law: An appraisal of article 144 of the Namibian Constitution from a human rights perspective", in *Constitutional Democracy in Namibia – A critical*

Further, article 96 of the Namibian Constitution states that Namibia shall endeavour to foster the respect of international law and treaty obligations.¹⁵ This provision corresponds to the assertion of Neuman and Gstöhl¹⁶ that small states attach great importance to international law. It is propounded that small states like Liechtenstein, Singapore and New Zealand, among others, attach great importance to international law.¹⁷

Given the resources at their disposal, great powers are in a position to enforce compliance with international law, unlike small powers. It is contended that the restriction on the use of force against other states provided in articles 2 (4), 42 and 51 of the UN Charter in practice only apply to small and medium powers. Accordingly, great powers continue to behave in a manner as if the provisions of the UN Charter are not applicable to them. In this respect, the US-led invasion of Kosovo in 1999, outside the mandate of the UN Security Council as provided in the UN Charter is an example.¹⁸ Similarly, another large state, India, violated international law by delaying the handover of the Pakistani prisoners of war, from 1971 to 1974, against the provisions of article 188 of the Third Geneva Convention of 1949.¹⁹

Meanwhile, when the US Department of Justice advised the US administration in 1989 that the US President can order an arrest of foreign nationals who are fugitive from US laws, even if such order violates international law, the result was the invasion of Panama to apprehend her President, Manuel Noriega, who had been charged with drug-trafficking in Florida, USA.

Analysis after two Decades, edited by A. Bösl, N. Horn and A. Du Pisani, Windhoek: Macmillan, pp (261 - 285), p 270.

¹⁴ The terms monist and dualist are used to refer to international law versus municipal laws. This is in respect of when there are substantive differences in the aspects of the two laws and one of them should take precedence over the other in application. Monism is a legal system where states adopts international law without a need to enact a legislation domesticating such laws.¹⁴ In a monist system, international law is regarded as an integral part of municipal laws. International law assumes importance over national laws, when it comes to human rights issues, such as the protection of citizens. In a dualist legal system, domestic and international law are maintained as distinct legal systems.

¹⁵ *Constitution of the Republic of Namibia*, 1990, article 96.

¹⁶ Neumann I. B and Gstöhl S., 2004, "Lilliputians in Gulliver's World? Small States in International Relations", in *Working Paper*, 1, Reykjavik: Centre for Small State Studies, Institute for International Affairs, p 2.

¹⁷ International Business Publications, 2013, *Liechtenstein: country study guide*, Washington DC: International Business Publications, p 117; Ly-Ru D. T., 2000, "Singapore and international law", in *Singapore Journal of International and Comparative Law*, Vol. 4, pp 530 –554, pp 543, 550 – 551.

¹⁸ Simpson G., 2004, *Great Powers and outlaw states, unequal sovereigns in the international legal order*, Cambridge: Cambridge University Press, p 332; Wippman D., 2001, "Kosovo and the limits of international law", in *Fordham International Law Journal*, 25 (1), pp 129 – 150, at p 131.

¹⁹ Levie H., 1985, "The Falkland Crisis and Law of Wars", in Coll A. R and Arend A.C. (eds), *The Falkland Wars*, Boston, 203 – 213, p 209.

The US further vetoed the UN Security Council resolution that sought to condemn the invasion. This demonstrates how large states protect themselves from the arm of international law.²⁰ The UN General Assembly by Resolution 44/240 asserted that the US's invasion of Panama constituted a "flagrant violation of international law".²¹

1.1.2 Objectives of the study

The principles of international law suppose that all states are equal before the law, but powerful states control the UN Security Council as an institution that enacts international law. Thus, the laws enacted by this structure are strictly enforced upon small states. The objectives of this study are to:

- examine small states and their regard for international law,
- Compare and contrast small states' regard for international law with that of large states.

1.1.3 Statement of the research problem

The principles of international law suppose that all states, large or small are equal before the law, notwithstanding the fact that some states have been at the centre stage of formulating international law, compared to others. Accordingly, it follows that all states have equal obligations towards international law, to which they should comply. The main questions concerning this study are: (a) Do small states comply with international law rigorously and what are the factors that influence compliance with international law? (b) In this respect are they different from large powerful states? (c) What are the consequences for small states' non-compliance with international law?

1.1.4 Hypothesis

The hypothesis of this study is that although international law underscores the equality of states and this principle should be applied equally in all spheres of international law, the reality appears to differ from the stated principle. Unequal application of international law

²⁰ Wells D.A., 2005, *The United Nations, states vs international law*, New York: Algora Publishing, p. 80.

²¹ United Nations, 1989, *Resolution 44/240 of the UN General Assembly*, adopted on 29 December 1989.

between large and small states is caused by, among others, unequal distribution of power among states, given the fact that international law reflects the interests of powerful states.²² Therefore, this apparent departure from the principle brings chaos in international law. Further, states consider other interests when faced with the issue of upholding the principles of international law and do not, therefore, always adhere to those principles. There are times when customary international law in particular illustrates the interest-centred behaviours of states.²³

1.1.5 Importance of the study

The study will point out whether the size of the state matters in international law and how this factor impacts on the essentials of international law among states of the world. The study notes a juxtaposition between international law and international politics as it discusses whether powerful states behave differently, as compared to small states in the international legal system.

1.1.6 Scope and limitations of the study

The scope of the study is modern international law from 1945 to 2016. The study largely focuses on international peace and security and international criminal law, although in some instances reference will be made to international law in general.

Large states that have been selected are permanent members of the United Nations Security Council as they play a special role in international legislation enactment. These include China, France, Russia, UK and US. Small states were selected considering their regard for the values of rule of law and maintenance of international peace and security when faced with a special international crisis or situation as well as geographic representation of continents. These are: Singapore (Asia), Estonia (Europe), Switzerland (Europe), El Salvador (America), Nicaragua (America), Botswana (Africa) and obviously Namibia (Africa), which is the object of the study.

²² Rao N., 2011, "Public choice and international law compliance: The executive branch is a 'they' and not an 'it'", in *Minnesota Law Review*, 96, 194 – 276, at p 205.

²³ Goldsmith J. L. and Posner E. A., 2005, *The limits of international law*, Oxford: Oxford University Press, p 225.

There are limitations in conducting the study with regard to data collection from primary sources. The study makes use of selected interviewees as primary sources on Namibia. The interviewees have served in senior positions in the Namibian legal system. A sample of interviews is annexed to this study as Annex 1. The rationale for selecting this method of research is because the interviewees have been involved in the process of aligning Namibia to international law. However, not all persons who played a role in Namibia in international law were available for interviews. Their input would have provided vital information regarding the fundamentals of Namibia's embracing international law.

Pre-independence Namibia was not an actor in the international legal system, as her sovereignty was not yet established. She was only a subject of international law when the international community discussed Namibia's illegal occupation by South Africa. Her contribution to international law as an actor therefore only covers a period from 1990 to 2016; Namibia was an object of discussion prior to 1990.

1.2 Literature survey

Academic publications on Namibia in international law are somewhat limited to few publications by Akweenda (1997) titled *International law and the protection of Namibia's territorial integrity, boundary and territorial claims*, and by Dausab (2010), a chapter in a book edited by A. Bösl, N. Horn and A. Du Pisani, titled *Constitutional Democracy in Namibia – A critical Analysis after two Decades*.

The Namibian Constitution provides guidelines for Namibia's relation to international law. It states that Namibia shall endeavour to ensure that in its international relations it, *inter alia*:

- Fosters the respect of international law and treaty obligations.
- Encourages the settlement of disputes by peaceful means.²⁴

Small states generally uphold international law as they uphold legal principles and policies that ensure adherence to international law.²⁵ At international platforms, small states invoke

²⁴ Constitution of the Republic of Namibia, 1990, article 96 (d) and (e).

²⁵ Lavdas A.K., 2010, "Normative evolution in Europe: Small states and republican peace", in *The London School of Economics and Political Science (LSE) Europe in Question Discussion Paper Series*, No. 17, January, p 18.

international law as they cannot resort to the use of force in addressing international issues. For example, when Nicaragua, a small state, had border disputes with Colombia and felt that Colombia was violating her sovereignty, Nicaragua invoked international law and brought the matter before the ICJ for adjudication.²⁶ Nicaragua further turned to international law when she was faced with aggression by the US.²⁷ But when, for example, Russia was faced with similar situations with Georgia, with the Abkhazia and South Ossetia issues, it simply used force against Georgia, instead of solving the problem at ICJ. A similar situation occurs today in Moldova where effectively there is an independent territory within the Republic of Moldova, “Transnistria” (officially the Pridnestrovian Moldavian Republic) where its citizens who should *de facto* be only Moldovans, hold Russian and Ukrainian citizenship.²⁸ While holding a dual citizenship is not a problem, in these circumstances the problem is that these citizens have an effective independent state within another state. So, too, the situation in Transnistria, Nagorno-Karabakh, Abkhazia and South Ossetia, which are post-soviet “frozen conflict” zones, represent other examples of uneven application of international law between small and large states. These four partially recognised states maintain friendly relations with each other and form the “Community for Democracy and Rights of Nations”. In reality they are only so because Russia effectively maintains and protects them within other smaller states (Georgia and Moldova). They are effectively Russian enclaves within other states. This is exactly the same situation Russia intends to create in the so called “Donetsk People’s Republic” and “Lugansk People’s Republic” in eastern Ukraine.

In addition to their inherent revenue of international law, a high level of compliance with international law by among small states compared to large states further comes from the fact that enforcement for compliance is largely determined by large states. Bradford and Ben-Shahar²⁹ state that the US uses sanctions more than any other country in the world, and at times she uses military force. They attribute this tool to ineffective enforcement of international law by a supranational institution. They further state that the US, Russia and China use bait of rewards in international law, with the US using that during the Gulf War, as

²⁶ *Territorial and Maritime Dispute, Nicaragua v Colombia*, ICJ GL No 124, ICGJ 436 (ICJ 2012).

²⁷ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)*, Provisional Measures [1984] ICJ Rep 169.

²⁸ K uchler F, 2008. *The Role of the European Union in the Moldova’s transnistria conflict*, Stuttgart: Ibidem Verlag, pp 28 – 29. Souleimanov E, 2013, *Understanding ethnopolitical conflict: Karabakh; South Ossetia and Abkhazia wars reconsidered*, New York: Palgrave MacMillan, pp13 – 15.

²⁹ Bradford A. and Ben Shahar O., 2012, “Efficient enforcement in international law”, in *Chicago Journal of International Law*, Vol. 12, No. 2, pp 375 – 431, at pp 380 – 383.

stated below. Meanwhile, China uses bait to protect herself in the Human Right Commission, when resolutions against her are sponsored, while Russia uses this influence during the UN Security Council voting.

Large states use all avenues at their disposal to influence other states, both large and small, in sanctioning their actions that may be controversial in terms of international law principles. When Iraq invaded Kuwait in 1990, the US sponsored the UN Security Council resolution 678 of 1990, seeking to authorise member-states cooperating with Kuwait to use all necessary force to restore peace and security. China stated that she will vote against the resolution. This resulted in the US changing the language from “necessary force” to “necessary means”.³⁰ The US further persuaded UN Security Council members to support the resolution, using a bait of foreign aid to China, Russia and Yemen; debt write-off to Egypt, Israel and Zaire; and military-related assistance to Colombia and Saudi Arabia. China still abstained in the vote as there was still ambiguity on what the US meant by “all necessary means”, while Yemen voted against the resolution. Consequently, China and Yemen lost US foreign aid.

By using bait and threats of sanctions against both large and small states as illustrated above, the US wanted to ensure that there was international legislation authorising her military invasion against Iraq.

Generally, the effects of sanctions imposed on states to comply with international law differ. When the US imposed economic sanctions against the Union of Soviet Socialist Republics (USSR) from 1980 – 1981, following the latter’s occupation of Afghanistan, USSR only had to pay an extra US\$ 225 to obtain grain from other sources. The sanctions were more felt by the US as she lost US 2.3 billion from exports to the USSR. This is because the USSR is a large trade partner, given the size of her geography, population and economy.³¹

Subsequent to the adoption of the UN Security Council Resolution 678 of 1990, the US invaded Iraq. Wells³² states that US invasion of Iraq amounts to a violation of international law, given the fact that article 27 (3) requires concurring votes of Permanent Members of the

³⁰ Wells (2005: 88 - 89); United Nations, 1990, *Resolution 678/1990 of the UN Security Council*, adopted on 29 November.

³¹ Bradford & Ben Shahr (2012: 386).

³² Wells (2005: 89).

UN Security Council. With China's abstention, including her expressed objection to the use of force in the earlier draft of the Resolution, the US' pre-emptive war against Iraq was outside the framework of international law.

Similarly in respect of the invasion of Iraq by the US and UK in 2002, it is contended that such invasion constitute non-compliance with international law by the US and UK.³³ When the UN Security Council passed Resolution 1444 of 2002³⁴ recalling its warning on Iraq that she will face necessary consequences for failure to comply with international law on weapons of mass destruction, protagonists of military action against Iraq alleged that these wordings authorises a military action against Iraq, if she fail to comply with international law. But, in the case of *Campaign for Nuclear Disarmament v Prime Minister*,³⁵ filed in the UK, the applicants aver that the UN Security Council Resolution 1441 of 2002, does not authorise military action against Iraq, in the event of non-compliance with the Resolution, because the prohibition on the unlawful use of force is a peremptory norm of customary international law. The Court did not, however, considered the substance of the arguments, as it dismissed the case on the basis that it had no jurisdiction to hear the matter. Nevertheless, Justice Brown acknowledged that the arguments were correct, and that they have been put forth skilfully and resourcefully.³⁶

The ICJ avers that in international law, countries may not use force or threat of force in their relations with other states.³⁷ However, many large states and their allies have resorted to the use of force, invoking article 51 of the UN Charter, like when US attacked Libya in 1986, following Libya's attack on a disco in West Berlin, which the US contended was frequented by US citizens and were therefore targets of the Libyan attack.³⁸

Strict adhering to international law by small states is illustrated by the small states of the Caribbean Community (CARICOM). These states have regarded international law as a

³³ Bagot E., 2009, "US Ambivalence and the Russo-Chechen Wars: Behind the Silence", in *Stanford Journal of International Relations*, XI (1), pp 32 – 37, at p 36;

³⁴ *Resolution 1441/2002 of the UN Security Council*, adopted on 08 November.

³⁵ [2002] EWHC 2777, para 17.

³⁶ *ibid*, para 23.

³⁷ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)* [1984] ICJ Rep 169, at para 8.

³⁸ Cassese A., 2001, *International Law*, Oxford: Oxford University Press, p 306.

necessary regime which they should uphold. They regard international law as being able to guarantee their sovereignty which is threatened by large neighbours.³⁹

Literature on small states emphasises that small states support and advocate adherence to international law. For example, Stringer⁴⁰ states that Liechtenstein owes her survival in the international system to adherence to international law. It thus promotes the respect of international law in the international community, and reiterates this position at the UN platform. Similarly, Ly-Ru⁴¹ writes that Singapore, as a small state, espouses the respect of international law and settlement of disputes peacefully. In her relations with other states and her existence in the international system, Singapore recognises the importance of international law and believes in the primary competence of the International Court of Justice (ICJ) to interpret international law, in case of ambiguity.

There are instances when small states, too, have reportedly been non-compliant with international law. Honduras and El Salvador took their border dispute to the ICJ. While both parties expressed commitments to the verdict of the court, El Salvador has reportedly been defying the ruling, an allegation that she denied.⁴²

Belgium, a small state, violated international law when it issued a warrant of arrest against the Minister of Foreign Affairs of the Democratic Republic of Congo (DRC), resulting in the ICJ ruling that Belgium's action:

Constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law.⁴³

Malawi, a small state, appeared before the ICC for non-compliance with a warrant of arrest for Omar Hassan Ahmad A-Bashir, President of Sudan who was issued with warrants of

³⁹ Braveboy-Wagner J. A., 2008, *Small states in global affairs, the foreign policy of Caribbean Community (CARICOM)*, New York: Palgrave Macmillan, p 157.

⁴⁰ Stringer K., 2011, "Honorary Consuls in small states diplomacy: through Liechtenstein lens", in *Discussion Papers in Diplomacy*, The Hague: Netherlands Institute of International Relations, pp 5; 17; Ministry of Foreign Affairs (Liechtenstein), [S.a], *Priorities of Liechtenstein Foreign Policy*, Vaduz: Ministry of Foreign Affairs, pp 21; 78.

⁴¹ Ly-Ru (2000: 543, 550 – 551).

⁴² Jones H. L. 2012, Why Comply? An analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua, in *Chicago-Kent Journal of International and Comparative Law*, 12, pp 57 – 98, at p 63; Lamzon (2007: 287 – 288).

⁴³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p 33, para 78 (2).

arrest by the ICC in 2009, followed by a supplementary request for State Parties to the Rome Statute to cooperate in the arrest and surrender of Bashir, in terms of Rome Statute articles 89(1) and 91.⁴⁴ Bashir visited Malawi attending the Summit of the Common Market for Eastern and Southern Africa (COMESA). During the Summit, the Prosecutor sent a *Note Verbale* to Malawi, reminding her of the obligation under Rome Statute to co-operate in the arrest of Bashir. Malawi did not reply to the *Note Verbale*. In the Pre-Trial Chamber I, the Court held that:

[I]n accordance with article 87(7) of the Statute that the Republic of Malawi has failed to comply with the Cooperation Requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under this Statute. The Chamber decides to refer the matter both to the United Nations Security Council and to the Assembly of States Parties.⁴⁵

More recent cases of non-compliance by small states with the request to arrest and surrender Al-Bashir occurred in 2016. In May 2016, Al-Bashir travelled to Djibouti to attend the inauguration of President Ismail Omer Gaili. The Court invited Djibouti to provide its observations in accordance with regulation 109 of the Regulations of the Court in order for the Court to determine the course of action in relation to Djibouti's non-compliance with her obligation to arrest and surrender to the Court Omar Al-Bashir. Furthermore, Djibouti submitted that she lacked the national procedures under her national laws to arrest and surrender of suspects to the Court, and further that in terms of article 98 (1) of the Rome Statute, since Al-Bashir was entitled to immunity as a serving Head of State not to be arrested and surrendered to the Court. The Court however held that in terms of article 87 (7) of the Statute that the Republic of Djibouti had indeed failed to comply with the request for arrest and surrender of Omar Al-Bashir to the Court.⁴⁶

A similar case of non-compliance with the Security Council decision to arrest Al-Bashir was committed by Uganda, where Al-Bashir attended the inauguration of President Yoweri Museveni in May 2016. Uganda did not reply to the *Note Verbale* from the ICC reminding her of the obligations to cooperate in the arrest and surrender. At the Pre Trial Chamber, Uganda pleaded that she cannot cooperate because Al-Bashir enjoys immunity from arrest as

⁴⁴ *Situation in Darfur, Sudan the Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-139, para 4 – 6.

⁴⁵ *Ibid*, para 47.

⁴⁶ *Situation in Darfur, Sudan the Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute*, ICC-02/05-01/09-266, para 4, 5, 6 and 17.

the Head of State, and the AU Assembly Head of State has requested member-states not to cooperate with the request to arrest him. However, the Court held that the immunity could be lifted and there were therefore no grounds for non-compliance with the Security Council and ICC decisions requesting State Parties to cooperate in Al-Bashir's arrest.⁴⁷

Non-compliance with international law by a small state is further illustrated by Albania's dragging its feet in compensating Britain as resolved by the ICJ. This followed the destruction of two British ships by landmines in Albanian waters, in October 1946, resulting in the injuries and death of 44 persons and personal injuries of 42 persons. It was stated in the court papers that the mines were laid with the connivance of the Albanian Government. The Court held that Albania was responsible under international law for the explosions which occurred in Albanian waters, on 22 October 1946, and for the loss of human lives and damages resulting from the explosions.⁴⁸ The Court awarded damages of £844,000 to Britain, and Albania did not comply with the Court order, until 1992 when a settlement was reached.⁴⁹

When Zimbabwe refused to comply with international law, following a ruling by the SADC Tribunal, in the case of *Mike Campbell and Others v Government of Zimbabwe*, resulting in SADC member states agreeing to suspend the Tribunal, and the SADC Heads of State Summit resolving to suspend the activities of the Tribunal and review its Protocol, such a decision left matters before the Tribunal hanging.⁵⁰ This raises questions about the commitment of small states to compliance with international law, and whether they differ from large states in this respect.

Iran, a middle power, violated international law, refusing to comply with ICJ judgements and UN Security Council resolution on the hostage of American diplomatic and consular personnel in Tehran, from 1979 to 1981. The case originated from the forceful entry into the US embassy compound by approximately 3000 Iranian demonstrators on 04 November 1979,

⁴⁷ *Situation in Darfur, Sudan the Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, ICC-02/05-01/09-267, at para 4, 5, 7 and 17.

⁴⁸ *Corfu Channel case, Judgment of April 9th*, 1949, *ICJ Reports* 1949, p. 4, at p 36.

⁴⁹ Posner E. A., and de Figueiredo M. F. P., 2005, Is the International Court of Justice Biased?, In *The Journal of Legal Studies*, 34 (2), pp 599 – 630, at p 605.

⁵⁰ Cowell F., 2013, "The death of the Southern Africa Development Community Tribunal's Human Rights Jurisdiction", in *Human Rights Law Review*, 13: 153 – 165.

following the admission of the former Iranian Shah into the US for medical treatment, amidst protest by the Iranian government that wanted the former Shan handed over to Iran. All diplomatic and consular personnel were detained and other personnel and one US private citizen who were elsewhere in Tehran were also seized and brought to the embassy compound. The next day, the US consulates in Tarbiz and Shiraz were attacked. There were no personnel at the premises. The Iranian Government made no attempt to rescue the personnel from the demonstrators' hostage, or persuade the demonstrators to stop their action.⁵¹

On 25 November 1979, the UN Secretary General wrote a letter to the President the UN Security Council requesting for an urgent meeting of the Security Council to find a peaceful solution to the seizure of the US embassy staff in Tehran. The UN Security Council met adopted Resolution 457 of 1979, which, *inter alia*, reads as follows:

*[The UN Security Council] urgently calls upon the Government of Iran to release immediately the personnel of the Embassy of the United States of America being held at Tehran to provide them with protection and to allow them to leave the country.*⁵²

On 29 November 1979, the US instituted proceedings at the ICJ and on 15 December the Court ordered that:

- The Government of the Islamic Republic of Iran should immediately ensure that the premises of the United States Embassy, Chancery and Consulates be restored to the possession of the United States authorities under their exclusive control, and should ensure their inviolability and effective protection as provided for by the treaties in force between the two States, and by general international law;
- The Government of the Islamic Republic of Iran should ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or have been held as hostages elsewhere, and afford full protection to all such persons, in accordance with the treaties in force between the two States, and with general international law;
- The Government of the Islamic Republic of Iran should, as from that moment, afford to all the diplomatic and consular personnel of the United States the full protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran.⁵³

The Iranian government did not comply with the ICJ order, prompting the UN Security Council to adopt another resolution on Iran's hostage of US diplomatic and consular

⁵¹ *United States Diplomatic and Consular Staff in Tehran, Judgment*, ICJ. Reports 1980, p 3, para 15 -18.

⁵² United Nations, 1979, *Resolution 457 of the Security Council*, adopted on 4 December 1979.

⁵³ *Case concerning United States diplomatic and consular staff in Tehran (United States of America v. Iran), Request for the indication of provisional measures*, 15 December 1979, 1979 ICJ Reports, p 7, at pp 17 – 18, at para 47 (1) A (i) – (iii).

personnel, Resolution 461 of 1979, in which the Security Council, *inter alia*, reaffirmed its Resolution 457 of 1979 and further;

- *Deplores* the continued detention of the hostages contrary to its resolution 457 (1979) and the Order of the international Court of Justice of 15 December 1979;
- *Urgently calls once again* on the Government of the Islamic Republic of Iran to release immediately all persons of United States nationality being held as hostages in Iran, to provide them with protection and to allow them to leave the country.⁵⁴

The hostages were later released in 1981, after a protracted non-compliance with international law by Iran.

More recently, Russia openly violated international law by the occupation of Crimea and the rest of UN members took no tangible action to reverse the situation.⁵⁵ Similar to the Russian situation on Crimea, Hinnbusch⁵⁶ states that when the US invaded Iraq contrary to provisions of international law, none of the UN member-states sponsored a resolution to condemn the US's behaviour. The situation was however different when Iraq invaded Kuwait. This does not only demonstrate that international law is only relevant to large states when it is congruent to their material interests, but it further demonstrates that small states are not secure under international law as long as there are large states malign international law.

Alter⁵⁷ writes that small states generally adhere to international rules compared to large states. He cited Italy, France, Belgium and Greece as industrialised states in Europe that do not adhere to international rules. These states are not small states according to the definition adopted in this study (see Chapter Two). Further, Warioba⁵⁸ writes that large states often do not accept international adjudications with ease as small states do and it is for this reason that France, for example, withdrew from the adjudication of the ICJ after the case of *Nuclear Test (Australia v France)*, and *Nuclear Test (New Zealand v France)*.⁵⁹ It should be noted that generally, all states accept international law, but both small and large may flout international

⁵⁴ United Nations, 1979, *Resolution 461 of the Security Council*, adopted on 31 December.

⁵⁵ Ituma O. S and Nwogbaga M. E., 2015, "Hegemonism and small states in the contemporary international system: a study of Ukraine", in *IOSR Journal of Humanities and Social Science*, 20 (3), pp 38 – 44, p 42.

⁵⁶ Hinnbusch (2006: 460 – 461).

⁵⁷ Alter K. J., 2003, "Do international courts enhance compliance with international law?", in *Review of Asian and Pacific studies* (25), pp 51 – 78, at p 69.

⁵⁸ Warioba J. S., 2001, "Monitoring compliance with and enforcement of binding decisions of international courts", in Frowein J. A. and Wolfrum R. (eds.), *Max Planck Year Book of United Nations Law*, Vol. 5, pp 41 – 45, at p 45.

⁵⁹ *Nuclear Test (Australia v France)*, ICJ Reports, 1974, 253; *Nuclear Test (New Zealand v France)*, ICJ Reports, 1974, 457.

law depending on the interest that they pursue, like the interest of small African states and the AU in the matter of arrest of President Al-Bashir or large states like the US military activities in Nicaragua discussed below or Russia's occupation of Crimea discussed above.

Similarly, Llamzon⁶⁰ states that the United States (US) refused to appear before the ICJ following Nicaragua filing a case against her, i.e. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)*,⁶¹ [1984] ICJ Rep 169. The US even refused to comply with the judgement and withdrew from the ICJ jurisdiction. A similar behaviour was also demonstrated by other large states as Llamzon⁶² states:

Today, of the five permanent members of the Security Council, only Great Britain has accepted compulsory jurisdiction: France, China, the U.S., and Russia have not .

Another example concerning violation of international law by the United States is the *Avena* case⁶³ when the US arrested, detained, convicted and sentenced 54 Mexican nationals, without affording them consular protection by their Government, as provided in article 36 of the Vienna Convention on Consular Relations of 24 April 1963. The ICJ held that in some cases involving the 54 nationals, the US has failed to act in conformity with article 36 of the Vienna Convention on Consular Relations preventing totally, or for a prolonged period of time, Mexico to exercise her rights granted by the convention to have access to her nationals. These include visiting them in prison and communicating with them. The Court avers that the US was obliged to comply with the provisions of the Convention, as a treaty to which she has subscribed. It further ordered the review and reconsideration of the process, taking into account the violation of the rights of the detained and convicted Mexicans, and the prejudice that such violation has caused.

The literature avers that the reputation of non-compliance with international law does not matter to large states as it does to small states. This is partly because non-compliance by large states is not met with lawful sanctions.⁶⁴ There is a difference in the approach to EU sanctions imposed on Zimbabwe in 2003 following the land invasions and those imposed on

⁶⁰ Llamzon A.P., 2007, "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice", in *The European Journal of International Law*, 18 (5), pp 815 – 852, at pp 820; 851.

⁶¹ [1984] ICJ Rep 169.

⁶² Llamzon (2007: 850).

⁶³ *Avena and Other Mexican Nationals (Mexico v. United States of America, ICJ Reports*, p 12; para 138 – 141, 153 (4) (5) (9) – (11).

⁶⁴ *ibid*, p 554.

Russia in 2014. While there was unanimity on EU sanctions against Zimbabwe, Dolidze⁶⁵ states that EU member-states differed on the sanctions on Russia. Hungarian Prime Minister, Viktor Orban, cautioned that ‘the EU was shooting itself in the foot’. The President of the Slovak Republic, Robert Fico, labelled the Russian sanctions as counterproductive, while Serbian Prime Minister, Aleksandar Vučić, felt that she did not have to entertain sanctions of which she was not properly consulted earlier. Meanwhile, Russia retaliated with the imposition of ban on agricultural imports from the EU for a period of one year.

Large states have been accused of violating the principles of international law through what they conveniently term ‘humanitarian intervention’ in crises. Shen⁶⁶ opines that humanitarian intervention measures are generally employed by large states against small or weak states, whereas small states are not in a position to carry out humanitarian intervention against large states. The very nature of humanitarian interventions is volatile, thereby resulting in losses of lives and destruction of properties. Hurd⁶⁷ surmises that the illegality of humanitarian intervention rests on article 2 (4) of the UN Charters. This article provides that:

- All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.⁶⁸

Hurd⁶⁹ propounds that articles 2 (4) of the UN Charter cited above outlaws the use of force and does not make provisions for the use of force for humanitarian purposes, because the scope of the prohibition is broader. He further states that when Israel raided the Entebbe airport in Uganda, in 1976, to rescue passengers in the hijacked Air France plane, Sweden reacted at the UN Security Council meeting stating that the Charter’s prohibition to the use of force makes no exception, save for self-defence and measures taken by the UN Security Council, acting under Chapter VII of the Charter. Sweden averred that any other exception will be abused particularly by large and powerful states against small states. He further contends that while the UN Charter confers to member-states the obligation to promote

⁶⁵ Dolidze T., 2015, “EU Sanctions Policy towards Russia: The Sanctioner-Sanctionee’s Game of Thrones” in *Centre for European Policy Studies Working Document*, (142), pp 1 – 21.

⁶⁶ Shen J., 2001, “The non-intervention principle and humanitarian interventions under international law”, in *International Legal Theory*, 7 (1), pp 1 – 32, p 23.

⁶⁷ Hurd I., 2012, Is humanitarian intervention legal? The rule of law in an incoherent world, in *Ethics and International Affairs*, 25 (3), pp 293 – 313, at pp 298 – 299.

⁶⁸ *United Nations Charter*, 1945, articles 2(3), 2 (4).

⁶⁹ Hurd (2012: 298).

human rights, this does not create an obligation or endorse armed intervention in pursuit of humanitarian assistance.

Meanwhile, proponents of humanitarian intervention aver, *inter alia*, that humanitarian intervention is permissible when it is carried out to protect lives and further that in any case article 2 (4) of the UN Charter has repeatedly been violated in the name of humanitarian intervention and has, therefore, has lost relevance.⁷⁰ They further advocate that humanitarian intervention should be legalised because states make statements justifying it and arguing for its legalisation. They have, however, not made factual presentations regarding the number of states that argue in favour of humanitarian intervention.

Literature on international law maintains the opposite view that it is not always that large states and middle powers have disregard for international law. For example, Ohlin in Shulman⁷¹ argues that being a powerful state in itself could serve as an incentive to comply with international law. For example, large states and middle powers that are permanent members of the UN Security Council have been compliant with the Nuclear Non-Proliferation Treaty, with the US and Russia cooperating to destroy nuclear weapon materials left from the Cold War. Similarly, Libya, a middle power demolished her undercover nuclear and chemical weapons.⁷²

Panke⁷³ notes that in Europe, large states do not escape the European Court of Justice (ECJ) rulings. It is often small and weak states that will not comply. She further maintains that large states do not influence Court rulings over small states, as it is not the politics and power that matters in international law, but the judicial discourses. The UK, too, though a powerful state, is said to be generally complying with European international law.⁷⁴

⁷⁰ Hurd (2012: 303 – 304); Shaw M. N., 2008, *International Law*, (6th ed.), Cambridge: Cambridge University Press, p1154.

⁷¹ Shulman M. R., 2015, “A review of the assault on international law”, in *Columbia Journal of International Law*, pp 332 – 339, p 338.

⁷² Perkovich *et al.*, 2007, *Universal compliance, a strategy for nuclear security*, Washington: Carnegie Endowment for International Peace.

⁷³ Panke D., 2010, “Why (big) states cannot do what they want. International legalization at work”, in *International Politics*, 47 (2), pp 186 – 209, at 186 – 187.

⁷⁴ Börzel T. A., Dudziak M., Hofmann T., Panke D., Sprungk C., 2007, “Recalcitrance, Inefficiency, and Support for European Integration: Why member states do (not) comply with European Law”, in *Center for European Studies Working Paper Series*, No. 151.

There are instances illustrating a violation of international law by small states, while large states comply. This is largely in matters that are not related to international peace and security. For example, when Switzerland refused to extradite Roman Polanski to the US, arguably against international legal norms on extradition. Polanski, a French national was arrested in the US in 1977 for allegedly sexually assaulting a 13 years old girl. He fled to his home country and when he visited Switzerland in 2009, the US presented the Swiss authority with the warrant of arrest. He was arrested but the extradition request was refused. On the contrary, it was the UK that is not a small state that complied with international treaty on extradition when she extradited the NatWest bankers despite the pressure from business and financiers' executives who were lobbying against extradition.⁷⁵

This study submits that both large and small states are generally compliant with international law, but the degree of compliance is higher among small states, because of the consequences that come with non-compliance. The study further propounds that there are instances of non-compliance, both among large and small states, depending on the interests being affected by compliance. Statistics show that the rate of non-compliance among small states is lower, compared to large states. It is further observed that non-compliance among small states occurs in instances where there are no threats of sanctions.

1.3 Emerging trends in international law: selective justice approach of small African states

Generally, the literature attributes selective justice and victors' justice trends in international law to large states.⁷⁶ Small states, especially in Africa, play victims at the hands of powerful states, which they accuse of not being fully subjected to international law. Ironically, they too subject their nationals to international criminal law, for offences equal to those committed by leaders in power, whom small states defend vigorously.

⁷⁵ Magnuson W., 2012, "The domestic politics of international extradition", in *Virginia Journal of International Law*, 52 (4), 839 – 901, pp 884, 896, 899 – 900.

⁷⁶ Hirsch F., 2008, "The Soviets at Nuremberg", in *American Historical Review*, pp 701 – 730, at p 722; Harwood R., 1978, *Nuremberg and other war crime trials, a new look*, Southam: Historical Review Press, at pp 57 – 58, at p 15.

There is selective justice in the application of international law to the 1994 genocide in Rwanda.⁷⁷ International law had ignored the systematic murders carried out by the Rwandan Patriotic Front army (RPF) against more than 30 000 Hutu civilians, and only focused on the atrocities committed by the Hutus against the Tutsis. Now that the Tutsis are in power in Rwanda, there is silence about their violation of international law. It should be noted that while Rwanda does not currently fall under the definition of small states, as defined in the conceptual clarification and in Chapter Two, she did fall under the classification of small states during the period of establishment of the International Criminal Tribunal for Rwanda (ICTR), as her population was just slightly above 5 million, but below 6 million.⁷⁸

The Croatian government employed a manifested selective justice in the application of international criminal law in respect of the (referrals to) International Criminal Tribunal for the former Yugoslavia (ICTY) trials.⁷⁹ President Franjo Tudjman's government refused to cooperate with the ICTY from 1996, until his death in 1999, to hand over Bosnian Croatian soldiers who committed war crimes. ICTY investigating officers were denied access to key national archives and witnesses that could provide relevant information implicating senior military officers that could implicate senior military officials and political leaders, including President Tudjman.

1.4 Research methodology

Research methodology is a study of how research is conducted, detailing the process and techniques that are employed as means to answer the research problem.⁸⁰ Two main research methodologies applied in academic research are the qualitative and quantitative research methodologies.

⁷⁷ Peskin V., 2005, "Beyond Victor's Justice? The Challenge of Prosecuting the winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda", in *Journal of Human Rights*, 4 (2), pp 213-231, p 216.

⁷⁸ World Bank, 2016b, World Development Indicators, available online at <http://databank.worldbank.org/data//reports.aspx?source=2&country=RWA&series=&period=>, last accessed on 1 September 2016.

⁷⁹ Peskin (2005: 218).

⁸⁰ Kothari R. C., 2004, *Research methodology, methods and techniques* (2nd ed.), New Delhi: New Age International Publishers, p 8.

Creswell⁸¹ states that qualitative researches do not involve experiment through laboratory testing. In qualitative researches, researchers are actively involved in the process that they formulate interview questions and they do not make use of research instruments designed by other researchers. Qualitative researchers closely investigate the problem and use rational thinking to analyse the problem from the information gathered. Their inquiries, therefore, adopt a holistic approach which evaluates various perspectives and ascertains a number of aspects that need to be considered in dissecting the problem.

Quantitative research methodology investigates the variables for individuals or institutions that are being studied. Quantitative researchers use empirical methods where objects are measured and quantified by employing scientific methods of data analysis.⁸² These researchers, therefore, employ statistics extensively. The scientific measurements of the quantitative methodology are expected to produce accurate and precise results. There is a distance between the researcher and the object being researched.⁸³ The process is mostly deductive, as opposed to the inductive process of the qualitative research. The deductive process used in quantitative research generally tests pre-established concepts, constructs and hypotheses that make up a theory.

The techniques employed in the qualitative and quantitative researches both reach valid and reliable results. In the case of qualitative research, the validity and reliability of the results are largely dependent on the skills and rigour of the researcher; while in the case of quantitative research the validity and reliability of the results are generally dependent on the measurement device or instruments used. Both methods include the collection of data through observing behaviours, studying documents and collecting information from primary sources. Observations may be conducted through active participation of the researcher, both as a known or concealed participant or without the active participation. The advantages of these methods are that a researcher will have opportunity to gather information that is generally difficult to obtain through other methods, like interviews. The disadvantages of both methods are that confidential information may be observed and the researcher cannot report on such information. In qualitative research, an interviewee may provide information on institutional strategic planning and operations that are not supposed to be known by competitors. In

⁸¹ Creswell J. W., 2014, *Research design* (4th ed.), London: Sage Publications, pp 185 – 186.

⁸² Creswell (2014: 52).

⁸³ Sarantakos S., 2005, *Social research* (3rd ed.), New York: Palgrave Macmillan, pp 46 – 47.

quantitative research, too, a researcher may obtain information related to figures related to military equipment procurement, for example, that is not supposed to be shared with the public because of security considerations. Further, a researcher may be seen to be intruding into other people's comfort zones.⁸⁴

The qualitative research methodology is the adopted methodology for this study. This is because researchers in the field of law generally adopt the qualitative as opposed to quantitative research methodology. For example, Moravcsik⁸⁵ argues that the subject of compliance with international law is examined within the scope of qualitative research. He further maintains that a high standard of qualitative research is applicable to a number of branches of law as an academic discipline. Lamont and White,⁸⁶ too, observe that law studies are generally qualitative in nature. There are, however, new branches of law studies such as the economic study of law that use predominantly quantitative research. Criminology too uses quantitative research to a large extent.

Some primary source data collection was done through face to face interviews with individuals involved in aspects of Namibia in international law. Open-ended questions were used in the interviews. The list of the interviewees is appended to this study as annex 2. The advantages of this method were that the researcher was in control of the questions to be posed to participants and it was convenient when it was impossible to employ the observation technique. The disadvantages were that interviewees might not be fluent in expressing issues and they could be selective on what information to provide.⁸⁷ Secondary sources included the study of documents including a critical reading of books, journals, newspapers and other policy documents. The advantages were that these documents were accessible to researchers and as written material, they served as evidence that could be verified. The disadvantages were that information, especially from some sources such as newspapers, could not always be accurate and some of the old print materials were hard to find.⁸⁸

⁸⁴ Creswell (2014: 191); Kothari (2004: 121).

⁸⁵ Moravcsik A., 2010, "Active citation: A precondition for replicable qualitative research", in *Political Science and Politics*, 43 (1), pp 29 – 35, pp 29, 33.

⁸⁶ Lamont M. and White P. (Eds.), 2009, *Workshop on Interdisciplinary Standards for Systematic Qualitative Research*, Washington: National Science Foundation, p 16, available online at www.nsf.gov/sbe/ses/soc/ISSQR_workshop_rpt.pdf, last accessed on 2 May 2016.

⁸⁷ Creswell (2014: 191); Sarantakos (2005: 46 – 47).

⁸⁸ Sarantakos (2005: 192).

Data analysis was done according to the steps stated by Taylor-Powell and Renner.⁸⁹ When primary and secondary data was collected, they were analysed to identify problems and to develop applicable concepts. These were connected to examine their relationships, after which the findings were then reported.

1.5 Research ethics

The researcher carried out a research that will contribute positively to the knowledge of international law. The researcher undertook not to unethically conduct disguised research activities. Confidentiality of information that the researcher obtained from the interviewees was maintained. The researcher took due care not to make misrepresentation that may cause harmful consequences to participants including adverse effect on their employment. Further, the researcher undertook not to publish findings that will harm the participants in any way. The principle of ethical neutrality was adhered to; facts were presented without bias. The researcher refrained from plagiarism and from providing falsified findings.

1.6 Conceptual clarifications

1.6.1 Small states

There is no generally agreed definition of small states, as a number of writers differ on the classification. But they all agree in principle on the factors that determine the smallness of states, namely the geography, size of population, economy and self-perception.⁹⁰ There is variation among writers with regard to the size of population that constitutes small states. For example, while the Commonwealth set the benchmark at 1 million, other literature uses the threshold of 10 million and others 15 million.⁹¹ For the purpose of this study, a population

⁸⁹ Taylor-Powell E. and Renner M., 2003, *Analyzing Qualitative Data*, available at <http://learningstore.uwex.edu/pdf/g3658-12.pdf>, last accessed on 6 August 2016.

⁹⁰ Muhindo M. and Calenzo G., 2011, "Neorealism and International Subsystems of Small States: Insights from Sub-Saharan African Countries' Interactions", in *Interdisciplinary Political Studies*, 1 (2), pp 148 – 149; Udovič, B. [Sa]. *Economic security: large and small states in enlarged European Union*. Ljubljana: University of Ljubljana Centre of International Relations, p 12.

⁹¹ Commonwealth and World Bank. 2000. *Small States, meeting the challenges in the global economy: Report of the Commonwealth Secretariat / World Bank Joint Task Force on Small States*. Washington: Commonwealth and World Bank; Cooper A. F. and Momani B., 2011, "Qatar and expanded contours of small state diplomacy", in *The International Spectator: Italian Journal of International Affairs*, pp 113 – 128, p 115; Mosser M.W., 2001, "Engineering Influence: The Subtle Power of Small States in the

threshold of 8.5 million as just above median between the lowest and highest population thresholds has been adopted (see Chapter Two). However, countries that are slightly above 8.5 million, but have other characteristics of small states like small geographic area and population size, will be discussed as small states.

1.6.2 Victor's justice

In international law, the concept of victor's justice is associated with international criminal justice. It refers to the judicial process where impartiality is not applied in considering all circumstances of the crime. Generally, the party that emerged as victorious from the conflict is favoured by law, leaving the defeated party to face the law, in a typical unfair manner of maligning a vanquished opponent. The process lacks elementary fairness and substantial justice. In contemporary law, the term is broadened to include any approach to law in which the powerful party is treated more favourably by law than it should have been treated if such party was not in power or was weak.⁹²

1.6.3 Soft laws

Soft laws are defined as “guidelines of conduct ...which are neither strictly binding norms of law”.⁹³ Abbot and Snidal⁹⁴ state that three factors, namely obligation, precision and delegation of authority are fundamental to determining soft laws and hard laws. When there is weakness in creating an obligation on a part of an international agreement or legislation by international organisation, or when provisions in the guidelines of conduct are vague, that the parties have discretion on how to implement them, it manifests soft law. Meanwhile, when there is clarity on the obligation created by an agreement, and when such obligations are formally binding, it manifests hard law. Further, legally binding obligations that delegate authority for interpretation, implementation, monitoring and enforcement to a third party are hard laws, while those that do not delegate these functions to a third party are soft laws.

CSCE/OSCE”, in Reiter E. and Gartner H (eds.), *Small States and Alliances*, Heidelberg: Physica-Verlag, pp. 53 – 71, p. 54.

⁹² Hull M. M., 2012, “Far from Nuremberg, the United States, war crimes and the International Criminal Court”, in *Inter Agency Journal*, 3 (2), Special Edition: 56 – 65, at 58, Waldorf L., 2011, “A mere pretense of justice, complementarity, sham trials and victor's justice at the Rwanda Tribunal”, in *Fordham International Law Journal*, 33 (3): 1221 – 1277, pp 1273 -1274.

⁹³ Malanczuk (1997: 54).

⁹⁴ Abbot K. and Snidal D., 2000, “Hard and soft law in international governance”, in *International Organization*, 54: 3, pp. 421–456, pp 422 – 423.

States make binding commitments under hard law and these are effectively implemented. Accordingly, there is a cost to non-compliance with these laws.⁹⁵

1.7 Chapters outline

Chapter One is the introduction of the study. This Chapter gives a synopsis of small states in international law and describes the problem statement that the study addressed. The chapter concludes that while in most cases small states have regard for and, therefore adhere to international law, they also violate international law at times, when there is no substantial threat to the interests of large states. Further, the chapter concludes that large states' violation of international law, does not result in similar consequences with small states. It has further been observed that but there are times when they take a lead in observing and adhering to international law.

Chapter Two discusses small states in the international legal system within the framework of the questions of the study, small states' adherence to international law compared to large states, and consequences thereof. The chapter first presents a working framework of compliance and non-compliance with international law. In this chapter the researcher provides a working definition of small states. The chapter concludes that although sovereign equality is a general principle in international law, large states have attitudes that show they do not regard small states as their equals. Small states are vulnerable to ramifications in case of non-compliance, which is not the case with large states. This brings inequality in the application of international law. Despite all the challenges, small states can turn their smallness into strengths and make input on the formulation of international law.

Chapter Three discusses how small states adopt international law, with a focus on the basis of Namibia's upholding international law. It looks at the constitutional principles related to international law and their application thereof, using case studies on the issue of settlement of disputes in international law. The chapter concludes that Namibia has demonstrated strict adherence to the principles of international law, as illustrated by the settlement of the dispute over the Kasikili / Sedudu Island, and the compliance with the ruling of the ICJ thereof.

⁹⁵ Schaffer G. C., and Pollack M. A., 2010, Hard vs. soft law: alternatives, complements, and antagonists in international governance, in *Minnesota Law Review*, 94, p 706 – 799, at pp 712 – 715.

Chapter Four discusses the behaviour of small states in international law within the context of the selective justice problem in international criminal law. The study concludes that there is inequality in the application of international criminal law between small and large states. As part of addressing the problem statement, the chapter examines whether Namibia strictly adheres to the general principles of international law, within the context of her approach to international criminal law. It concludes that the stance that Namibia has taken on cases at the ICC reflects a selective justice approach to international law and failure to advocate compliance with the principles of international law.

Chapter Five discusses the compliance with international law in respect of the UN enacted laws. The chapter concludes that there is inequality in the application of international law, as large states and their allies often violate international law with impunity, while small states face sanctions if they do so.

Chapter Six is the concluding chapter. The chapter summarises the findings of the study, responding to the main questions of the study. The chapter concludes with recommendations that Namibia should strictly maintain adherence to the principles of international law and maintain a coordinated approach within government ministries, offices and agencies to ensure compliance with international law. It further recommends cooperation with non-state actors in pursuing compliance with international law. The chapter further recommends that Namibia should fill vacancies in international tribunals and courts in order to contribute to the jurisprudence of international law.

CHAPTER TWO

SMALL STATES IN INTERNATIONAL LAW WITHIN THE CONTEXT OF RIGOROUS ADHERENCE TO INTERNATIONAL LAW: COMPARISONS WITH LARGE STATES

2.1 Introduction

The literature on small states and international law discusses small states as having constraints and limitations in the realm of international law, in comparison with large states.⁹⁶ This chapter investigates whether international law is equally applied to all states irrespective of their size and whether the principle of sovereign equality for states is consistently applied in practice.

The chapter's main focus is on the capacity of small states to influence international law in different scenarios. It also analyses the consciousness of smallness of such states.

For many years, states were the only entities considered as legal persons in international law.⁹⁷ Later, other entities like private individuals, multinational corporations, non-governmental organisations and international governmental organisations, too, came to be recognised as persons in international law. The creation of individuals' rights in international law brought individuals into the realm of international law, as the rights granted to them further afford them access to international tribunals to enforce such rights. At present, states are regarded as vital legal actors in international law.

Despite the recognition of other entities as persons in international law, states still occupy a primary place in international law.⁹⁸ Therefore, although other actors like NGOs and individuals have emerged in international law, they are not treated as subjects of international law in the same manner that states are treated. The UN, especially the Security Council, propels the state-centrality in international law, reducing other actors to a limited role in international law. Further, the recognition of individuals as having legal personality in

⁹⁶ Shulman (2015: 338).

⁹⁷ Grant T. D., 1999, "Defining statehood: The Montevideo Convention and its discontents", in *Columbia Journal of Transnational Law*, Vol. 37, pp 403 – 457, p. 407; Malanczuk (1997: 101).

⁹⁸ Domingo R., 2009, "The crisis of international law", in *Vanderbilt Journal of Transnational Law*, Vol. 42, pp 1543 – 1593, pp 1547 – 1549; Malanczuk (1997: 100).

international law generates controversy in international law studies, as it is not universally applied, but it is subject to the recognition by states. Western governments are more embracing of the notion of individuals' personality in international law, while Russia has not embraced that idea.

Theoretically, as central subjects of international law states enjoy equal capacity and recognition in international law, but in practice their influence in international affairs depends in part on their size and capacity. Accordingly, large, medium and small states may behave differently in the world legal order.

2.2 Defining small states

Among the criteria set by the Montevideo Convention that defines a state, sovereignty is crucial to statehood. Sovereignty as an element of statehood is manifested through, among others, the power to govern the territory and people, and the absence of control by outsiders in governing the territory.⁹⁹

Meanwhile, other elements like territory, population and economy are relevant in determining the size and capacity of a state to exhibit given behaviours within the international legal system.

Meanwhile, the definition of small states in terms of population size differs from writer to writer. For example, Thorhallsson¹⁰⁰ states that the literature generally puts the threshold between 10 to 15 million, while the Commonwealth's threshold is 1.5 million. Because of their limited institutional capabilities, Jamaica, Lesotho, Namibia and Papua New Guinea are included in this definition, although they have a population above 1.5 million. In other literature like Thapa,¹⁰¹ a population threshold of small states has been set at 5 million.

⁹⁹ Grant (1999: 409); Domingo (2009: 1543 – 1593). See also *Speeches of the President of the Republic of Namibia, 1990 – 1995*, Inaugural speech at independence), where the President of Namibia, Sam Nujoma, stated that “I now move in the name of the people of the Republic of Namibia that Namibia is a free and sovereign state”.

¹⁰⁰ Thorhallsson B., 2012, “Small states in the UN Security Council: Means of influence?”, *The Hague Journal of Diplomacy*, Vol. 7, pp 135-160, p 136.

¹⁰¹ Thapa, P. J. 1997. *Security Challenges for small states in the new world order: options for Nepal*. Pennsylvania: US Army War College, p. 3.

This study amalgamates various definitions of small states and concurs with the afore-said scholars that small territory and size of the economy are factors that determine the smallness of states. With regard to classification on the basis of population size, a population threshold of 8.5 million has been adopted, this being the median of the lowest and highest population threshold in the literature on small states, *i.e.* 1.5 million by the Commonwealth and 15 million by the literature as stated above. Further, countries that are slightly above 8.5 million, but have other characteristics of small states like small geographic area and small economy, were discussed as small states. Similarly, a country like Libya whose population is below 8.5 million, but has a large economy and geographic area was not classified as a small state. Therefore, the classification is not based on population alone, but it considers other criteria as stated.

2.3 Middle powers and large states

Middle power countries range between small and large states, in terms of economic resources, influence in international relations, population and military power.¹⁰² The economic, material resources of middle-powers are above that of small states, but both small and middle powers are inclined to multilateralism.¹⁰³ Wood¹⁰⁴ sets the economic capacity of middle power between US\$ 40 and 400 billion Gross National Product (GNP). Meanwhile, Gilley¹⁰⁵ classified permanent members of the UN Security Council as large states and further added Germany, Japan and India. This definition is the adopted working framework for this study. It follows logic that states that are not in the categories of small states as defined above and the afore-said eight large states fall under the category of middle powers. Middle powers that are referred to in this study, according to the definition and example cited in the literature, include Iran, Libya, Nigeria and the DPRK. They are discussed in relation with non-compliance to international law.

¹⁰² Gilley B., 2015, "Turkey, middle powers and the new humanitarianism", in *Perceptions*, XX (1), pp 37 – 58, at p 50; Wood B., 1986, Middle powers in the international system: a preliminary assessment of potential, A paper delivered by the Director of the North-South Institute at the meeting on: The role of the middle sized economies in the governance of the World Economic System in Helsinki, Finland.

¹⁰³ Bezglasnyy A., 2010, Middle power theory, change and continuity in the Asia-Pacific, MA Thesis, University of Columbia, p ii.

¹⁰⁴ Wood (1986: 6).

¹⁰⁵ Gilley (2015: 50).

2.4 A framework of compliance with international law

Compliance with international law refers to obedience to the legal principle of international law, where states constrain themselves not to violate such legal parameters.¹⁰⁶ It further refers to acts done to conform with the law and in discharge of obligations to international law.¹⁰⁷ Not acting in accordance with such obligations is a violation of law. Further, in the case of *Phosphates in Morocco*¹⁰⁸ in which the Italian government instituted proceedings against the French government regarding the prospecting and exploitation of phosphates in Morocco, the PICJ ruled that the elements of non-compliance are illustrated by a violation of the rights of another state as protected by law.

In terms of *The Responsibilities for States for Internationally Wrongful Acts* adopted by the International Law Commission and adopted by the UN General Assembly (annexed to the General Assembly Resolution 56/83 of 12 December 2001), when a state commits an act or omission in breach of its obligation to international law, it illustrates non-compliance with international law.¹⁰⁹

Compliance is illustrated by the state's adherence and abiding to international law and complying with adjudication of international court, voluntarily without creating problems.¹¹⁰ Compliance is, therefore, further defined in terms of actors' behavioural conformity to the rules. This is done either to avoid sanctions or out of regard for legal norms.¹¹¹

Jones¹¹² defines compliance in terms of defiance, *i.e.* non-compliance with international law, in respect of judgements of international courts is defined as a rejection of a whole judgement or refusal to comply with it. It is further illustrated by acting contrary to the terms of a

¹⁰⁶ Kent A 2008, 'Compliance v Cooperation: China and International Law', in *Australian International Law Journal*, 13, pp. 19 – 32, at p 21.

¹⁰⁷ *Elettronica Sicula S.P.A. (ELSI)*, Judgment, ICJ Reports 1989, p. 15, at p 51, para 71 72; *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports 1980, p 3, para 67, 95.

¹⁰⁸ *Phosphates in Morocco*, Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 10, at p. 28.

¹⁰⁹ *The Responsibilities for States for Internationally Wrongful Acts*, articles 2 and 12.

¹¹⁰ Beulac, p 219.

¹¹¹ Raustiala K. and Slaughter A., 2002, "International law, international relations and compliance", in *Handbook of international relations*, 4th ed., edited by W. Carlsnaes, T. Risse, and B. Simmons, London: SAGE Publications Ltd, pp 538-559, p 539.

¹¹² Jones (2012: 59 – 60).

judgement, thereby showing disapproval. Non-compliance is further signified by verbal acceptance of a judgement, but acting contrary to such verbal commitment.

2.5 Support for and compliance with the international law

This section seeks to answer the problem statement whether small states strictly adhere to international law by complying with its provisions and whether they are different from large states.

When states do not comply with international law, they are sometimes threatened with negative consequences. Where the benefits of complying with international law outweigh the cost of defying it, states will be keen to comply.¹¹³

Small states in general tend to comply with international law because of the perceived dependence on large states and such compliance protects their interests.¹¹⁴ Malawi, a small state, was under pressure from her donors who are large states not to invite Sudan's Bashir to the AU Summit that she was due to host in 2012, resulting in the cancellation to host the Summit.¹¹⁵ Compliance is the recourse that small states turn to, in order to avoid consequences from large states' actions.

Traditionally, small states advocate for the application of the principles of international law at the United Nations and are supportive of the values and norms enshrined in the UN Charter.¹¹⁶ Lavdas¹¹⁷ supports this proposition when he states that small states have contributed to the spreading of the values and norms of adherence to international law. In cases of international disputes, they tend to invoke international law and procedure and often turn to the UN institutions.

¹¹³ Alter (2003: 53).

¹¹⁴ Stringer (2013: 35).

¹¹⁵ Aljazeera, 2010, *Malawi cancels AU summit over Sudan's Bashir*, (9 July), available at: <http://www.aljazeera.com/news/africa/2012/06/20126974132905285.html>, last accessed on 25 March 2017.

¹¹⁶ Chong A., 2011, *The foreign policy potential of "small state soft power" information strategies*, available online at <http://www.eisa-net.org/be-bruga/eisa/files/events/turin/Chong-ALAN%20CHONG%202007%20The%20Foreign%20Policy%20Potential%20of%20Small%20State%20Soft%20Power.pdf>, last accessed on 4 August 2016.

¹¹⁷ Lavdas (2010: 18).

At the UN, Liechtenstein demonstrates support of human rights issues and the development of international law. This is illustrated by, among others, the facilitation by Christian Wenaweser, then Liechtenstein's Ambassador to the UN (from 2002 to 2008), of the review of the UN Human Rights Council by the General Assembly. Halldórsdóttir¹¹⁸ surmises that during the negotiations for the UN Convention on the Law of the Sea (UNCLOS) many small states showed support for international law. Uruguay, for example clearly stated that international law serves as the only shield, to which small states could turn for protection.

Singapore's foreign policy and diplomatic practices has a strong regard for international law.¹¹⁹ Generally, Singapore advocates settlements of disputes through international arbitration and international adjudication. She adopts a strong outlook for international law, as it protects the interest of small states in the world where the behaviour of large states needs to be limited by law.

Discussing the holding of international law in high regard by small countries, Ly-Rhu¹²⁰ concludes that,

As a small country, Singapore attached tremendous importance to the work of the Court. This was because international law ensures that all actions of states are governed by the same legal rules; under international law, all states are equal and entitled to the same rights and subject to the same obligations, regardless of size, economic wealth or military power. For small countries like Singapore, international law is the main avenue for the maintenance of its sovereignty.

Tan¹²¹ state that a small state, Singapore looked at international law for protection, which helped her to earn reputation at the UN in the conduct of international relations. Former Minister of Foreign Affairs and Minister of Law, Professor S Jayakumar, stated at the Attorney-General's Chambers and the Society of International Law Singapore seminar, held in Singapore 2000 that Singapore was committed to compliance with international law and was interested in the development of international law regimes which regulate the rights and obligations of states and the methods of resolving disputes.¹²²

¹¹⁸ Halldórsdóttir B., 2011, *Small States and International Courts*, a MA thesis submitted at the Reykjavik University, p 37.

¹¹⁹ Koh T., [S.a.], *Law and diplomacy in Singapore*, available online at http://lkyspp.nus.edu.sg/wp-content/uploads/2013/04/pa_tk_Law-and-Diplomacy-in-Singapore_in-Law-Gazette_Oct2007.pdf, last accessed on 4 August 2016.

¹²⁰ Ly-Rhu D. T., 2000, "Singapore and International Law", in *Singapore Journal of International and Comparative Law*, 4, pp 530 –554, p 550.

¹²¹ Tan YLK., 2011, *International Law, History & Policy: Singapore in the Early Years*, in *Monograph* , (1), National University of Singapore Centre for International Law, at pp 95 – 96.

¹²² Ly-Ru (2000: 530).

Compliance with international law is necessary as it guarantees protection of small states, and further ensures their survival and economic prosperity.¹²³ This view is supported by former New Zealand's Attorney-General, Geoffrey Palmer,¹²⁴ who asserts that compliance with international law by small states emanates from the fact that they look at international law as the general setting for their existence. For that reason, New Zealand has a strong regard for international law.

New Zealand's Ambassador and Permanent Representative to the UN, Jim McLay,¹²⁵ states that small states support multilateral institutions with a strong base of international law, because of the imbalances created by power relations. These relations generally disadvantage small states, but international law underscores the principle of equality and this helps small states to bring forth to international negotiations issues of interest to them. Similar sentiments are expressed by Halldórsdóttir¹²⁶ when he states that international courts serve the purpose of levelling the playing field between large and small states' unequal power relations.

In strictly adhering to international law, Namibia did not only focus on her own compliance, but also assisted other small states to comply. Namibia's Ombudsman serves as President of the International Ombudsman Institute (IOI) for the period from 2013 to 2016.¹²⁷ In that position, Namibia has been requested by the Commonwealth on various occasions to assist small states to comply with international human rights law. For example, in 2013 and 2014 Namibia's Ombudsman, John Walters, advised Seychelles about the shortcomings in their national legislations on issues of protection of human rights as provided for in international law. In 2013, Walters advised Barbados and Jamaica regarding their respective legislations' non-compliance with international law, and recommended issues to be included to meet the provisions of the Paris Principles relating to the status of National Institutions.¹²⁸

¹²³ Palmer G. W. R., 1986, "International law in the foreign policy of a small state", in *Victoria University of Wellington Law Review*, 1 – 9, p. 4.

¹²⁴ *ibid.*, pp 1 – 9, at pp 3 – 4.

¹²⁵ McLay J., 2011, *Making a Difference: The Role of a Small State at the United Nations*, unpublished address made to Juniata College, Pennsylvania.

¹²⁶ Halldórsdóttir (2011: 20).

¹²⁷ Walters J., 2015, *interview*, 31 August, Windhoek.

¹²⁸ *ibid.*

The Paris Principles are international standards that call on member-states of the United Nations Human Rights Commission (UNHRC) to encourage national institutions responsible for human rights promotion to ensure the combating of human rights violations as provided in international law and align national legislations to international human rights instruments, to which member-states are parties.¹²⁹ The Principles are annexed to the UN General Assembly Resolution 48/134 of 1993.

Meanwhile, some writers maintain that large states mostly support and contribute to the development of international law, generally only when it serves their interests.¹³⁰ Posner and Yoo¹³¹ maintain that large states can afford to violate international law as it happens in respect of human rights issues. There have been passive reactions as large states are too powerful to be provoked and, accordingly, small states have no capacity to direct large states to obey international law.

Large states formulate and re-invent international law, that instead of operating within the framework of international law, they operate within their own laws.¹³² Large states dismiss international law, which emanates from declarations of UN organs other than the UN Security Council. The US' military manual has not recognised international law, emanating from The Hague or Geneva declarations. Weapons in the banned UN list are, therefore, allowed in the US, demonstrating the underplaying of international law by large states.¹³³ This state of affairs borders on anarchy in international law, where some states are left to unilaterally disdain international law.¹³⁴

Large states have even failed to implement decisions of the ICJ. In the case of *Nicaragua vs the United States of America*,¹³⁵ when the court decided in the case of Nicaragua and the US remained reluctant to abide by the decision of the Court, Nicaragua sought the assistance of the UN Security Council to enforce the decision of the Court, resulting in the US vetoing the

¹²⁹ United Nations, 2010, *National Human Rights Institutions, History, Principles, Roles and Responsibilities*, United Nations: Geneva, pp 30 -32; 164 – 166.

¹³⁰ Pulkowski (2006: 516).

¹³¹ Posner, E. A. and Yoo, J., 2006, International Law and the rise of China, in *China Journal of International Law*, 7 (1), pp 1 – 15, p 11.

¹³² Simpson (2004: x).

¹³³ Wells (2005: 7)

¹³⁴ *ibid*, p 47.

¹³⁵ [1986] ICJ Rep 14.pakista

request.¹³⁶ The US is not the only permanent member of the UN Security Council that frustrates international law enactment by vetoing resolutions. Goh¹³⁷ states that there is concern regarding all permanent members of the UN Security Council not rigorously upholding international law, and further that they are treated more favourably by international law than other states, because they veto any request to enforce a ruling by the ICJ that is not favouring them.

In this respect, size matters in compliance with international law. Small states do not have the same capacity as large states to live with the consequences of defying international law. Accordingly, they do not have choices not to comply. Krisch¹³⁸ states that the UK, for example, have even avoided being subjected to international law, whenever she wants to preserve her interests. She has means to discourage other states from taking her to international adjudication. The result is that international adjudication is only for small and weak states, while large states are not bound to go to international adjudication.

Large states may violate international law with apparent impunity. Compliance with international law does not matter to them in the same manner as small states do. For large states, their interests come first, *i.e.* they respond to their domestic pressures and subsequently behave in disregard of what international law prescribes.¹³⁹ Kirsch¹⁴⁰ writes that a large states like the US, Russia, China, India, etc, decline to join some international treaties, because they not want to be constrained by international law, thereby existing like lawless hegemonies.

Cogan¹⁴¹ avers that the US has demonstrated a great disobedience to international law as she engages in “unauthorised enforcement of law” with her controversial attitude to the rule of law in the international community. He cites former President of the ICC, Gilbert Guillaume, who advocated that in fighting terrorism, states should still operate within the parameters of international law. He refers to violation of international law by powerful states under the

¹³⁶ United Nations, 1986a, *draft resolution, S 18428*, tabled on 28 October 1986; UN 1986b, *Provisional Verbatim Record, Document No. S/PV 2718*.

¹³⁷ Goh G.M., 2007, *Dispute settlement in international space law, a multi-door courthouse for outer space*, Martinus Nijhof Publishers: Boston, p 127.

¹³⁸ Kirsch (2005: 383).

¹³⁹ Alter (2003: 28).

¹⁴⁰ Kirsch (2005: 370, 385).

¹⁴¹ Cogan J. K, 2006, “Non-compliance and the international rule of law”, in *The Yale Journal of International Law*, 31: 189 – 210, pp 192, 196, 197, 200.

guise of bringing others in the fold of international law obedience as ‘operational non-compliance’ with international law. These powerful states find justification of their actions by misinterpreting the existing law, in order to carry out activities, which in most cases merely serve their interests, as it happened with the invasion of Iraq by the US and the annexation of Crimea by Russia. Further, they claim that they act in the absence of any centralised institution that can enforce international law. For example, in 2002, after the US failed to win support of the UN Security Council, she unilaterally decided to invade Iraq.

The US, being a large state violated principles of the Geneva Protocol I, when she attacked retreating Iraq soldiers who were withdrawing from Kuwait in compliance with the UN Security Council Resolution 678 of 1978. The US further violated principles of international law laid in the Geneva Protocol III, regarding prisoners of war, as President Bush maintained that he could act as if Protocol I was not in existence. Even Legal Counsels in the US Department of Justice propounded that international law on the prisoners of war has no binding effect on the President and the US military establishment. This contradicts the US War Crime Act of 1996 which obliges the US to comply with the provisions of the Geneva III Protocol on prisoners of war.¹⁴²

Scott¹⁴³ avers that there ought to be not only legal obligations towards international law, but that there also exists political duty to observe international law. The US has failed in all these regards, as her behaviour in the Iraqi situation is damaging to preserving international law.

2.6 Capacity to influence international law

The question whether the principle of sovereign equality applies to all states, irrespective of their size could be determined by looking at whether all sovereign states have equal opportunity to contribute to the evolution of international law jurisprudence. International law jurisprudence develops through the decisions of international courts and tribunals, among

¹⁴² Wells (2005: 59; 69); also see International Committee of the Red Cross, 1949, *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)*, of 8 June 1977, article 41.

¹⁴³ Scott S. V., 2005, “Identifying the source and nature of a state’s political obligation towards International Law”, in *Journal of International Law and International Relations*, 1 (1 – 2), pp 49 – 60, p 51.

others.¹⁴⁴ Accordingly, the relevance attached to international courts by judges and scholars of international law shapes modern international law. For example, the ICTY followed the Nuremberg jurisprudence.¹⁴⁵ It is important to note that the Nuremberg jurisprudence that influences modern public international law was conceived without the participation of small states, and many other large states who were not victors in the war.

After the defeat of the Axis Powers comprising Germany, Italy and Japan, by the Allied Powers comprising the British Commonwealth (Australia, Canada, New Zealand, Newfoundland and South Africa), France, Poland, the UK, US and Russia, trials were instituted by the established International Military Tribunal (IMT), comprising of two judges from each of the Allied Powers. The trials were held at Nuremberg, Germany and, hence, the reference as Nuremberg Trials. These trials were a show by the victors against the defeated powers and the jurisprudence applied was, thus, based on punishing the vanquished. Contextualising this to the problem statement, this does not represent adherence to sovereign equality of states in international law.

McDougal, Lasswell and Reissman¹⁴⁶ assert that the development of the law of nations reflects the hegemony of great power. Meanwhile, citing Karol Wolfke, Claridge¹⁴⁷ states that customary international law was developed mostly with considerations of the interests of large powers. This fact raises questions about the place and treatment of small states in customary international law.

There are assertions made in the literature on small states that they do not stand on equal footing with large states in terms of influencing international law. For example, Domingo¹⁴⁸ maintains that,

[T]he legal equality of states required by international law is only *de jure*, not *de facto*. Does a country the size of Andorra have as much power in the international arena as one as large as Brazil? ... one cannot make the comparison work, even by means of a legal fiction ... The highly touted equality

¹⁴⁴ Kovacs P., 2014, Developments and limits in international jurisprudence, in *Denver Journal of International Law and Policy*, 31 (3), pp 101 – 128, p 101.

¹⁴⁵ Kovacs (2014: 112).

¹⁴⁶ McDougal M. S., Lasswell H. D., and Reissman W. M., 1968, Theories about international law: Prologue to a configurative jurisprudence, in *Virginia Journal of International Law*, 8 (2), pp 188 – 299, p 254.

¹⁴⁷ Claridge E. M., 2013, Marrying Lon Fuller to Customary International Law: Is Customary International Law, a form of Law? An exploration focusing on the status and desirability of Customary International Law with a focus of Lon Fuller's legal principles, a Master degree thesis, Uppsala University.

¹⁴⁸ Domingo R., "The crisis of international law", in *Vanderbilt Journal of Transnational Law*, Vol. 42: 1543 – 1593, p. 1554.

among states is effectively conditioned on a given society's economic capacity, material power, importance on the world stage, and soft power.

There are, however, other inherent weaknesses of small states that do not result from external factors like the application of the principle of sovereign equality or the application of international law to small and large states. Jones, Birkbeck and Woods¹⁴⁹ state that small states are constrained by institutional capacity to influence the formulation of international law. This view is corroborated by Jacovides,¹⁵⁰ who avers that small states are constrained in contribution to international law because they have limited resources to participate in relevant activities of multilateral institutions, often failing to be elected to international tribunals. Sitaraman,¹⁵¹ too, states that a number of small states does not participate proficiently in international treaty regimes. This is largely because of the limited financial resources.

While international courts serve the purpose of addressing inequalities, small states have nevertheless made little use of the ICJ's adjudication. For example, Halldórsdóttir¹⁵² states that by 2011, 566 cases had been brought before three international courts; the ICJ, WTO Dispute Settlement, and the International Tribunal of the Law of the Sea (ITLOS) since their respective establishments. Of these cases, small states were only parties to 18 cases, where nine cases were before the ICJ, six before ITLOS and three before the WTO Dispute Settlement. Meanwhile, the cost of litigation in international law could be relatively high for small and weak economies, which need to engage foreign experts to argue their cases successfully. Although there are provisions for support for the parties, the availability of such funds are subjected to rigorous conditions.

It is stated that the US, for example, has been active in the development of modern international law, especially during the bipolar power system period – which stretches over the cold war period from 1945 to 1990. At present, the US's active involvement in the development of international law focuses on trade, but since the international system has

¹⁴⁹ Jones E. Birkbeck C. D. and Woods N., 2011, *Manoeuvring at the Margins: Constraints Faced By Small States in International Trade Negotiations*, Global Economic Governance Briefing Paper Oxford: Oxford University Press, pp 1 – 2.

¹⁵⁰ Jacovides A., 2011, *International law and diplomacy, selected writings by Ambassador Andrew Jacovides*, Leiden: Martinus Nijhoff Publishers, p 127.

¹⁵¹ Sitaraman S., 2009, *State Resistance and Participation in Treaty Regimes: A Macro-Assessment*, Surrey: Ashgate, p 273.

¹⁵² *ibid*, pp 56, 58 – 59, 63. Although Halldórsdóttir stated only three cases, the number of cases brought before the WTO is high and many are resolved before adjudication by the Dispute Settlement Body in Geneva.

become unipolar, the US has adopted a different stance towards embracing international law.¹⁵³ This aspect will be discussed further in the next sections.

The UN Security Council is one of the institutions involved in the formulation of international law, through the passing of binding resolutions. In this respect, Domingo¹⁵⁴ avers that the role of small states in formulating international law diminishes, as power is concentrated in the five permanent members, with other members of the Security Council, who serve for a two year period, being used to provide legitimacy to international legislation.

Posner and Figueiredo¹⁵⁵ contend that small states have little or no representation on international courts. At the ICJ, large powers like France, Russia, UK, and US are mostly continuously represented on the bench, whereas representation from other states rotates. Table 1 below shows statistics of ICJ judges and their nationalities.

Table 1: Judges of the ICJ and their nationality, 1946 – 2015

Country	No of Judges	Country	No of Judges
Algeria	1	Norway	1
Argentina	2	Pakistan	1
Australia	2	Panama	1
Belgium	1	Peru	1
Benin	1	Philippines	1
Brazil	5	Poland	2
Canada	1	Senegal	2
Chile	1	Sierra Leone	1
China	5	Slovakia	1
Egypt	3	Somalia	1
Italy	1	Spain	1
India	1	Sri Lanka	1
Jamaica	1	Sweden	1
Japan	2	Syria	2
Jordan	1	Uruguay	2
Lebanon	1	Uganda	1
Madagascar	1	UK	7
Mexico	4	US	7
Morocco	1	USSR / Russian Federation	5 / 4 (9)
New Zealand	1	Venezuela	2
Netherlands	1	Yugoslavia	1
Nigeria	3		

Source: *International Court of Justice, 2015*¹⁵⁶

¹⁵³ Kirsch (2005: 384).

¹⁵⁴ Domingo (2009: 1543 – 1593).

¹⁵⁵ Posner E. A., and de Figueiredo M. F. P., 2005, “Is the International Court of Justice Biased?”, in *The Journal of Legal Studies*, 34 (2), pp 599 – 630, p 603.

¹⁵⁶ International Court of Justice, 2015, *Judges of the International Court of Justice, 1945 – 2015*, available online at <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1>, last accessed on 4 May 2016.

The allocation of judges on the 15-member bench is distributed according to regions as follows:

Africa, three judges

Asia, three judges

Latin America, two judges

Western Europe and Others states (Canada, US, Australia and New Zealand) five judges,

Eastern Europe (including the Russian Federation) two judges

Information from table 1 reveals that large states have been dominating the ICJ bench to the exclusion of small states. In terms of the definition adopted by this study, out of 41 states that had their nationals serving on the ICJ bench, only ten small states had representation on the bench, namely Benin, Jamaica, Jordan, Lebanon, Norway, Sierra Leone, Slovakia and Uruguay. All these countries had only one national each having served on the bench. As no two judges from the same state served on the bench at the same time, the continuous representation of large states on the bench stated earlier is evident from the table above. The Russian Federation with its predecessor, the USSR has, has had a combined representation of nine judges on the bench, while the UK and US each had seven nationals having served on the bench. There is thus minimal representation of small states on the ICJ bench compared to large states.

There is an imbalance in the application of international law as small states have minimal representation in the international courts, compared to large states. The current composition of the ICJ bench, for example, is arguably dominated by large states. Out of 15 judges, only four judges come from countries that are small states (most of them from Third World countries), namely Jamaica, Slovak, Somalia and Uganda.¹⁵⁷ While one may argue that the court reflects a world representation as each country can only have one judge on the bench, it is equally arguable that the world does not comprise of large and small states at the ratio of 11:4, which is the ratio for the representation of these states on the ICJ bench.

The process of the election of judges is also politically driven, resulting in the credibility of the Court being at stake, as *ad hoc* judges that are appointed by parties to disputes generally

¹⁵⁷ International Court of Justice, 2016, *The Court, current members*, available online at www.icj-cij.org, last accessed on 28 April 2016.

rule in favour of their respective countries.¹⁵⁸ The overwhelming domination of the bench by judges from powerful states is caused by the fact that the representation on the Court is not based on the principle of proportionality and where small states nominated *ad hoc* judges in cases before the ICJ, in most cases these were nationals of other countries. It is not explained why they have not exercised the option to choose their own nationals, but given limited skills among small states, this could be among the reasons.¹⁵⁹

A balanced representation of all regions is important because Posner and Figueiredo¹⁶⁰ aver that judges at the ICJ are largely influenced by their national jurisprudence. As their decisions in return influence the jurisprudence of international law, it is arguable that international law will reflect the jurisprudence of large states, where judges mostly come from. They further maintain that the voting patterns at the ICJ bench reflect bias in favour of the judges' nationalities. Statistics show that 90% of the times when ICJ judges had to adjudicate on matters, they voted in favour of their home countries and countries that maintain friendly relations with their home countries.

While the ITLOS and its structure were influenced by small states, because its statutes reflect geographic representation, in practice, such representation is monopolised by large states¹⁶¹ Out of 40 members that have served on the bench since 1996, small states' nationals came from only seven states, namely Belize, Cape Verde, Croatia, Grenade, Iceland, Lebanon and Malta.¹⁶² Nationals from SADC member-states came from South Africa and Tanzania, which are not small states. Namibia as a small state with limited human resources has had no legal professionals who have served on the bench of international courts. No nationals from the same country serve on the bench at the same time, but some countries including Tanzania had more than one national serving on the bench at different times, since 1996.

The capacity to influence international law was further illustrated when small states made representations to the ICJ that the use of nuclear weapons was illegal. Until 1995, large states were opposed to the banning of nuclear weapons. When the General Assembly took the

¹⁵⁸ Warioba (2001: 46).

¹⁵⁹ Halldórsdóttir (2011: 60).

¹⁶⁰ Posner and de Figueiredo (2005: 608, 624 – 625).

¹⁶¹ Halldórsdóttir (2011: 37).

¹⁶² International Tribunal of the Law of the Sea, 2016, *Members of the Tribunal since 1996*, available at <https://www.itlos.org/the-tribunal/members-of-the-tribunal-since-1996/>, last accessed on 1 August 2016).

matter to the ICJ in 1995, Italy, Germany, the US and Russia were among states that made representation to the court opposing the outlawing of nuclear weapons. The only small state that joined them was Finland.¹⁶³ But in a typical demonstration of inequality of states, with time when the issue of nuclear weapons became part of the interests of large states in the international agenda, large states elevated it to the Security Council agenda, and this will be discussed fully in Chapter Four.

2.7 Consciousness of smallness

Small states are conscious of their smallness. Writing about Singapore's non-permanent membership of the UN Security Council, Ly-Ru¹⁶⁴ states that this did not take away the fact that Singapore has limitations of a small state and she had consciously made her contribution to the Security Council from the perspective of a small state or that of her region. Accordingly, Singapore embraces the ICJ as the institution which guarantees its sovereignty and ensures her equality with other states before law.

Former Singaporean Ambassador to the UN, Vanu Gopala Menon,¹⁶⁵ contends that at the United Nations, where international legislations and, therefore, contributions to the principles of international law are made, small states are said to be lacking self-confidence on their ability to make input in setting the international agenda. As a result, they just follow the dictates of large states. This self-perception of small states led them to be excluded from important international legislation-making processes. For example, at the 60th anniversary of the UN, they were left out of negotiations for the Outcome Document of High-Level Summit, that people like Ambassador Christopher Hackett from Barbados was included in the negotiations in his personal capacity as an expert and not as a representative of a small state. It is suggested that small states should demonstrate an ability to initiate and play an important role in international law.

¹⁶³ Wells (2005: 69).

¹⁶⁴ Ly-Ru (2000: 547 – 548).

¹⁶⁵ Menon V. G., 2009, "Challenges facing small states at the UN", in *The academic council on the United Nations system informational memorandum* (79) Summer 2009, 1 – 3, at p 2.

2.8 International law and municipal laws of small states

Malanczuk¹⁶⁶ surmises that when it comes to the attitude of municipal laws to international law, states tend to assert their sovereignty and do not adopt the supremacy of international laws over municipal laws. But when it comes to the attitude of the international law to municipal laws, international law prescribes that states cannot rely on invoking their internal law as a means to avoid fulfilling their obligations towards international law.

There are instances when large states too, adhere to international law and apply it to domestic laws. For example, Andrew Jacovides (former Ambassador of Cyprus to the US) states that there is a trend to bring national legal systems closer to international law.¹⁶⁷ He argues that in the case of *Autocephalous Greek Orthodox Church of Cyprus v Goldberg*¹⁶⁸, the US court which decided on the matter applied international law and this was to the benefit of the plaintiffs, the Cypriot church and the government. He propounds that the settlement reached through international law benefits small states in their disputes with large states, as they are not disadvantaged towards large states, unlike when their matter is to be decided in the court applying domestic laws.

Frommelt and Gstöhl¹⁶⁹ aver that Liechtenstein has been a policy taker when it comes to international law. She adopts a monist approach, thereby creating a smooth compliance with international law. They state that:

The judicial system of Liechtenstein is regarded as “friendly” to international law and follows a monistic approach. The large majority of experts does not doubt the direct applicability and precedence of EEA law in Liechtenstein’s judicial system.

Furthermore, not all small states adopt monism. Singapore, a small state follows a dualist approach to law. In the case of *Public Prosecutor v Tan Cheng Yew and another*¹⁷⁰ it was held that international law only creates obligations in a domestic context when such law is imported into municipal law through legislation.

¹⁶⁶ Malanczuk (1997: 65).

¹⁶⁷ Jacovides (2011: 130 – 131).

¹⁶⁸ 717 F. Supp. 1374 (SD Ind. 1989).

¹⁶⁹ Frommelt C. and Gstöhl S, 2011, *Liechtenstein and the EEA: the Europeanization of a (very) small state*, Oslo: Europautredningen, p 9.

¹⁷⁰ [2012] SGHC 241, at para 56.

2.9 Vulnerability to ramifications

Small states will be subject to the negative consequences of international legal rulings when they operate outside the framework of international law. While large states can withstand the negative consequences of non-compliance with international law, including sanctions,¹⁷¹ this will not be applicable to small states. In this respect, it is arguable that international law is not equally applied to large and small states and the principle of sovereign equality is not applied to all states.

Small states are vulnerable to ramifications of consequences when they do not comply with international law, as opposed to large states' non-compliance with international law. Alter¹⁷² surmises that small states may be unable to comply with international law because of lack of capacity to comply. However, the capacity not to comply does not exonerate states from ramifications of international law when they do not adhere to obligations under international law. When the UN passed resolution 1929 of 2010 on Iran, Namibia, with her limitations in terms of capacity was expected to comply with the resolution and the government had to take measures to avert the ramifications of not complying with international law (see Chapter Four).

Goldsmith and Posner¹⁷³ state that among the theories of Customary International Law (CIL), is the coercion perspective which states that large states unleash threats against small states if the latter engage in certain activities. However, given their limited capacity, small states are unable to equally threaten large states. Jones et al.¹⁷⁴ state that large states tend to threaten small states when they feel that the latter differs with their interests in the formulation of international trade law. Literature on small states in international law shows that small states do not work in accordance with the preferences of large states because they are obliging to international law, but rather because of the calculation of the consequences that they will face. For them, the respect of international law is not as a matter of choice, but it is done to avoid ramifications from large states.¹⁷⁵

¹⁷¹ Bradford & Ben Shaha (2012: 386).

¹⁷² Alter (2003: 68).

¹⁷³ Goldsmith, J. L. and Posner, E. A., 1999, "A theory of customary international law", in *University of Chicago Law Review*, 66, pp 1113 – 1177, p 1123.

¹⁷⁴ Jones et al. (2011: 1).

¹⁷⁵ Goldsmith and Posner (1999: 1123); Pulkowski (2006: 516).

Notwithstanding the principle of equality of states in international law,¹⁷⁶ in practice, the application of international law does not impose similar ramifications on large states when they do not comply with international law. Accordingly, Alter¹⁷⁷ maintains that the United States does not bother with the consequences of international court rulings in the manner that small states will do. This is illustrated by her Supreme Court when it declared in the case of *Avena and Other Mexican nationals (Mex v US)*¹⁷⁸ that the international treaty and decisions of the ICJ are not binding on domestic law. The US further withdrew from the Optional Protocol to the Vienna Convention when the ICJ ruled that she should reconsider the sentencing of two Mexican nationals who received a death sentence in the state of Texas. This is because the convicts had not been advised about their rights to contact the Mexican consulate, as provided for in the Vienna Convention.¹⁷⁹ Further, it is stated that in the aftermath of the terrorist attack on 11 September 2001, in New York, the US does not accept obligations to international law imposing control over her, placing obligations upon her or limiting the scope of her international courses of action.¹⁸⁰

2.10 Attitude of large states

Following the formation of the League of Nations in 1920, Liechtenstein applied for membership, but she was offered limited membership without voting rights. She withdrew her application, prompting other small states, San Marino and Monaco to put their application in abeyance. In 1949, when Liechtenstein applied for membership of the ICJ, the matter was discussed in the UN Security Council, where some delegates questioned Liechtenstein's status as a state, given her small size.¹⁸¹ This state of affairs illustrates a hegemonic-inclined attitude on the part of large states to small states and it renders the principle of sovereign equality to be applied to states depending on their size.

¹⁷⁶ *United Nations Charter*, article 2.

¹⁷⁷ Alter (2003: 69).

¹⁷⁸ 2013, I. C. J., 12 (Feb. 3).

¹⁷⁹ Jones (2012: 80).

¹⁸⁰ Domingo (2009: 1585).

¹⁸¹ Halldórsdótti (2011: 5).

Held¹⁸² avers that a large country like the US has conservative personalities who are averse to international influences on their foreign policy, a trend that small states cannot afford to adopt. This is illustrated by, among others, the protest by the US Supreme Court Judge, Antonin Scalia, of the US court's decisions to be influenced by foreign perspectives. And when Justice Sonia Sotomayor was to be appointed to the US Supreme Court, efforts were made in the Senate Judiciary Committee to block her appointment because she had earlier acknowledged the importance of foreign law in the interpretation of American law.

Hope-Thompson¹⁸³ observes the manifestations of the attitude of large states on small states' contribution to international law in respect of Malta's contribution to the development of the UN Convention on the Law of the Sea. When the Maltese Ambassador to the UN, Arvid Prado, addressed the UN General Assembly in 1967, proposing an international regime governing the use of sea resources, despite the fact that Prado's speech drew praises from the world over the USSR and France were hesitant towards his proposals. Illustrating large states' insolence to stances taken by small states in international law, the USSR responded advocating that the international community should reject any rapidity to conclude an international legal principle governing the use of marine resources. France advocated the continuation of the customary international law principle of the freedom of the seas, where the seas were open for use by all states for exploration, navigation, trade and scientific studies, with continental states only having a jurisdiction over an adjacent narrow offshore area.

In a typical attitude of large states towards small states, the US has been frustrating efforts of small states to develop international laws governing the seas. Hope-Thompson¹⁸⁴ states that Senator Daniel Patrick Moynihan, who previously served as the US Ambassador to the UN cautioned developed countries that by entering into negotiations for the formulation of the Law of the Sea, they were giving up the rights that they had all the years to exploit minerals from deep oceans, having the advantage of technological advancement. The US Congress even passed the Deep Seabed Hard Mineral Resources Bill empowering her citizens to

¹⁸² Held, V., 2011, "Morality, care, and international law", in *Ethics and Global Politics* Vol. 4, No. 3, pp 173 – 194, p 175.

¹⁸³ Hope-Thompson M., 1980, "The Third World and the Law of the Sea: The Attitude of the Group of 77 Toward the Continental Shelf", in *Boston College Third World Law Journal*, 1 (1), pp 37 – 70, pp 46 - 47.

¹⁸⁴ *ibid.*, pp 49 – 50.

exploit sea minerals in the interim until the US accedes to the Law of the Sea Convention, a move that was criticised by the Group of 77 (G 77) as “unlawful and violating well-established and imperative rules of international law”.¹⁸⁵

The attitudes of France, the US and USSR correspond to the proposition by Kirsch¹⁸⁶ that large states tend to maintain the status quo in international law, especially when it is beneficial to them. Accordingly, they do not want to embrace change in the existing international law which may place some constraints on them. One of the reasons is that Customary international law has been vague in some instances, that states have a wider leeway on how to apply international legal principles. The development of modern law that brought some restrictions therefore tempts states to withdraw from international law.

The attitude of large states has a bearing on small states’ behaviour towards large states in the international legal system. While small states rigorously uphold international law, they are equally cautious towards upsetting other states in the international legal system and would fail to call on others to uphold international law. Accordingly, small states of the CARICOM have been cautious and abstained at the UN, when there are votes on resolutions condemning situations outside their region.¹⁸⁷

2.11 Inequality in international law

The notion of the equality of states dates back to the mid-17th century.¹⁸⁸ McDougal, Lasswell and Reissman¹⁸⁹ state that international law embraces the doctrine of equality of sovereignty, where both large and small states are supposedly equal before law. In terms of this doctrine, while small states recognise political pre-eminence of large powers, this does not translate into legal pre-eminence. However, despite the doctrine of equality of states in international law, the inequality of states is preserved by the notion of great powers, with its legal significance in international legislative institutions like the UN Security Council. Inequality in international law is created when great powers impose upon small powers the

¹⁸⁵ Hope-Thompson (1980: 49).

¹⁸⁶ Kirsch (2005: 375).

¹⁸⁷ Braveboy-Wagner (2008: 157).

¹⁸⁸ Warioba (2001: 50).

¹⁸⁹ McDougal, Lasswell and Reissman (1968: 254).

principles and values of international legal order, which large states themselves do not strictly uphold.¹⁹⁰

Although the UN Charter underscores the principles of equality, Kingsbury¹⁹¹ avers that the Nuremberg Trials held after the adoption of the Charter do not reflect the principle of equality and they have a bearing on the international law that was applied in Europe. At the Nuremberg trials it was only offences by the Axis Powers that were tried, while similar offences from the Allied Powers were not prosecuted. For example, while Axis Power states were charged with conspiracy to wage war, Allied Powers were not, despite the fact that this charge is applicable to the Anglo-French's planned invasion of Norway. Axis Powers were further charged with crimes against peace, a charge that was equally applicable to Russia's invasion of Poland and Finland. Further, the crime against humanity that the Axis Powers were charged for should have applied to the Allied Powers' concentration camps for American-Japanese nationals and the bombing of civilian targets by the UK and the US. Prosecutors from the victor states, the Allied Powers, agreed not to allow any reference to breach of law by nationals from the Allied Powers.¹⁹² Kingsbury¹⁹³ further reveals that some international law scholars justify the notion of states' inequality by agreeing to the special rights of great powers. For example, the Washington Naval Treaty disregards the principle of equality in international law.

The principle of equality has been eroded by the design of modern international law, especially the weighed voting system at the IMF and the World Bank.¹⁹⁴ Meanwhile, with regard to issues of international peace and security and international criminal law, large states that are permanent members of the UN Security Council illustrate inequality of sovereignty of states with their right of veto.

¹⁹⁰ Preuß U. K., 2008, "Equality of states, its meaning in a constitutionalised global order", *Hertie School of Governance Working Papers*, (15); Simpson (2004: 66).

¹⁹¹ Kingsbury B., 1998, "Sovereignty and Inequality", in *European Journal of International Law*, 9, 599 – 625, p 604.

¹⁹² Harwood (1978: 57 – 58); Hirsch (2008: 722), Simpson (2004: xiv, 6).

¹⁹³ Kingsbury (1998: 604).

¹⁹⁴ Blum G., 2013, "The crime and punishment of states", in *The Yale Journal of International Law*, pp 57 – 122, p. 105.

Although the UN Security Council's primary aim was to address issues of peace and security, it is contended that the organisation now functions as the *de facto* jury of the UN.¹⁹⁵ Being one of the Permanent Members of the Security Council, the US has refused issues that involve the use of force to be considered by the ICJ. She wants them to remain under the auspices of the Security Council, which employ both factual and legal considerations when considering measures to be taken under Chapter VII of the UN Charter. Through such processes, modern international jurisprudence is developed by large states through the UN Security Council. This approach brings political inclination in the realm of the international law-making process.

The principle of sovereign equality is largely advocated by small states as they resist the imposition of large states on the international law-making process. For example, Mosser¹⁹⁶ states that small states of Europe embraced sovereign equality as a fundamental principle in international law when they convened at the Conference on Security and Cooperation in Europe (SCCE) in Prague, Czechoslovakia and Helsinki, Finland. Finland, in particular, promoted this principle.

Inequality in the application of international law further results from the fact that different states have different attitudes towards international law.¹⁹⁷ Of the states that are treated preferentially in international law, some act outside its scope as outlaws, while others are great powers with legalised hegemony. The fact that France, Russia and the US are not subjected to firm restrictions in international law with regards to the use of force says a lot about the inequality in international law between large and small states.

The preferential treatment of large states has also been observed in the ICTY. Following a refusal by the ICTY Prosecutor, there was no prosecution of NATO members by the ICTY when they attacked Kosovo.¹⁹⁸ However, Bosnian Serb leaders Radovan Karadzic and Ratko Mladic were indicted for the murder of 20 and wounding of 50 civilians during the bombing of Sarajevo. This illustrates that international law is not applied equally to all states.

¹⁹⁵ Blum (2013: 109).

¹⁹⁶ Mosser (2001: 56).

¹⁹⁷ Simpson (2004: xiv, 6).

¹⁹⁸ *ibid.*, at p 644 – 645.

2.12 Atypical small states' behaviour and international law: contribution to international law

During the formative years of modern international law, a number of small states, especially in Africa were under foreign occupation and since they had not attained sovereign rule, they were not party to the formulation of modern international law. Many African states only became members of the UN from the 1960s.¹⁹⁹

However, some small states go beyond the traditionally perceived capacity of small states to influence international law, thereby asserting that sovereign equality to states should be adhered to in international legislations. For example, Stringer²⁰⁰ states that Liechtenstein is credited for having played a role in the creation of international law applied to the International Criminal Court (ICC). This is because the Princeton University-based Liechtenstein Institute for Peace, which is directly linked to the Liechtenstein Permanent Mission to the UN, have hosted a number of intersessional negotiations for a period of five years, between 2004 and 2009, culminating in the stipulation of the ICC jurisdictional framework.

Other significant contributions by small states to the making of international law include the role played by Malta, Singapore and New Zealand in the drafting of the UNCLOS and Norway's active contribution to the adoption of the UN Convention on the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines.²⁰¹ Furthermore, Charles²⁰² adds that Cyprus played a role in the adoption of the dogmatic norms of international law that are embodied in the Law of Treaties, while Trinidad and Tobago was instrumental in the adoption of the norms of the International Criminal Court (ICC).

Malta's contribution to the development of the UN Convention of the Law of the Sea as narrated by Hope-Thompson²⁰³ started in 1967 when her Ambassador to the UN, Arvid Prado, proposed to the UN General Assembly the creation of an international regime

¹⁹⁹ Malanczuk (1997: 29).

²⁰⁰ Stringer (2013: 35).

²⁰¹ McLay (2011).

²⁰² Charles E.M., 1997, *A future for small states, overcoming vulnerability*, London: Commonwealth Secretariat, p 140.

²⁰³ Hope-Thompson (1980: 46 – 47).

governing the use of sea resources beyond national jurisdictions to avoid exploitation by advanced economies with the necessary technology to the exclusion of poor states. Subsequently, the UN set up an *ad hoc Committee* to review the proposal and this resulted in the establishment of a Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (The Sea-Bed Committee). The Sea Bed Committee was tasked to study the operations of an international structure that will regulate and control all activities related to the sea bed resources exploration and exploitation to the benefit of all people of the world.

Cyprus's contribution to the negotiations for the establishment of the UNCLOS manifested itself when her representative, Andrew Jacovides, asserted that as a small and weak state, his country sees the necessity of an impartial and effectively administered international law that will safeguard its rights and interests.²⁰⁴ He cautioned that when the UNCLOS is adopted without a compulsory third party settlement procedure and a binding nature of dispute settlement could cause injustice to smaller states, as large states will be acting with impunity when they are not subjected to third party settlement.

While it was stated that the jurisprudence of the international courts largely follows that of large states, Baudenbacher²⁰⁵ stated that in arbitrations, the jurisprudence of Switzerland is central to procedures that are followed. He further states that Swiss arbitrators are largely selected over arbitrators from London and Germany, for example. Swiss arbitrators have therefore presided over important arbitrations. For example, Professor Max Huber served as a sole arbitrator in the case of *British claims in the Spanish Zone of Morocco arbitration and the Island of Palma arbitration*, while Professor Pierre Lalive served as a sole arbitrator in the case of *Dalmia Dairy Industries Arbitration*. The Swiss Chamber's Court of Arbitration and Mediation (SCCAM) established by the Swiss Chambers of Commerce served as the administrative and monitoring body for the international arbitrations. These arbitrations are conducted under the Swiss Rules of International Arbitration.

Namibia, too, has contributed to international law, thereby asserting her sovereign equality in shaping international law. Namibia's contribution to international law is reflected by her

²⁰⁴ Halldórsdóttir (2011, pp 37 – 38).

²⁰⁵ Baudenbacher C., 2012, "Swiss economic law facing the challenges of international and European law", *Report to the Swiss Jurists Day 2012*, ZSR 2012 II, pp 419-673, pp 652 – 654.

sponsoring or co-sponsoring of resolutions at the session of the UN General Assembly, Security Council or Human Rights Council. Having joined the UN in April 1990, by December she co-sponsored 29 resolutions, and these resolutions are related to both international human rights law and general principles of international law. From 1990 to 2015 at the time of writing (April 2017), Namibia had co-sponsored 1008 resolutions.²⁰⁶

Other small states in the region like Botswana, for example, have co-sponsored 1108 Resolutions since 1976, whereas Swaziland co-sponsored 843 Resolutions over the same period. Comparatively Namibia co-sponsored more resolutions than her neighbours. Similarly, Namibia served as a non-permanent member of the UN Security Council within less than 10 years of her independence, thereby enabling her to effectively contribute to international law legislation as it will be discussed below. Other small states that joined the UN early like Botswana in 1966 only came to serve as a non-permanent member of the UNSC after 19 years, while other small states like Lesotho, Malawi, Mozambique and Swaziland who joined the UN in 1966, 1964, 1975 and 1968, respectively, have never served as non-permanent members of the UNSC.

During her membership of the UN Security Council, Namibia sponsored resolution 1325 of the UN Security Council. This resolution calls for the protection of women and children in armed conflict situations, and it was adopted on 31 October 2000. The resolution notes the Namibia Plan of action on Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations and calls for, *inter alia*:

- An increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict.
- An expanded role and contribution of women in United Nations field-based operations, and especially among military observers, civilian police, human rights and humanitarian personnel.
- Full respect by parties to armed conflict of international law applicable to the rights and protection of women and girls, especially as civilians.
- Taking of special measures by all parties to armed conflict to take special measures to protect women and girls from gender-based violence, especially forms of sexual abuse, including rape, and all other forms of violence in situations of armed conflict.

²⁰⁶ United Nations, 2016, *UN Security Council Resolutions on Namibia* (from 1945 to 2016).

- Where feasible, the exclusion of crimes related to, among others violence against women and girls, from amnesty provisions and states to prosecute perpetrators thereof.
- The respect by parties to armed conflict of the civilian and humanitarian character of refugee camps and settlements, and to take into account the particular needs of women and girls.
- The consideration by all those involved in the planning for disarmament, demobilization and reintegration of the different needs of female and male ex-combatants and to take into account the needs of their dependants.²⁰⁷

Namibia has thereby made the issue of women security and welfare in conflict situation a subject of international law.

2.13 Conclusion

In this study small states are those with a population of 8.5 million or slightly over, and who have two other characteristics of small states like a small geographical size, economy and self-perception. These characteristics impact on small states' contribution to international law. The definition adopted here further includes their vulnerability amidst large states' control over international law.

Small states in general adhere more rigorously to international law than their larger counterparts. Apart from being law-compliant, they further regard international law as their source of protection, and also because of the sanctions that they may face from large states, in case of non-compliance with international law. Although the violation of international law is associated with large states, there are times when these states adhere to international law.

While there are trends of unequal application of the principle of sovereign equality and the application of international law to small and large states in general, some inherent limitations of small states, resulting from their limited capacity contribute to their inability to influence international law.

Generally, small states stick together in international law-making processes to enable them to influence the enactment of laws pertaining to their needs. While the ICJ generally adopts the jurisprudence of large members, given their dominance at the Court, the jurisprudence of small states like Switzerland have found their dominance in international arbitration.

²⁰⁷ United Nations, 2000, *Resolution 1325/2000 of the UN Security Council*, adopted on 31 October 2000.

Furthermore, some small states impact on international law beyond their traditionally perceived capacity, like when they spearheaded the formulation of the Law of the Sea, thereby turning their smallness into opportunity.

Small states are often constrained by international legal norms, but this is not so for large states who can afford to evade them without facing similar consequences or feeling the impact of such consequences thereof. Sometimes large states sometimes use measures contrary to international law in the course of fighting defiance to comply with international law by other states, especially small states, but small states do not have the capacity to use similar measures. With this perceived behaviour of small states as contrasted to the behaviour of large states, inequality becomes a practice, *albeit* not a principle in international law. This has a bearing on the degree of compliance with international law, as states are bound to consider what will be the consequences of their behaviour within the framework of international law requirements.

CHAPTER THREE

NAMIBIA AND RIGOROUS UPHOLDING OF INTERNATIONAL LAW: THE EFFECT OF THE CONSTITUTIONAL PRINCIPLES

3.1 Introduction

Namibia as a small state existing in the international legal system is bound to adopt international laws and norms both in bilateral relations and multilateral associations. In this respect, the Namibian Constitution serves as a framework for Namibia's existence in international law. In light of this view therefore, this chapter discusses Namibia in the context of the first part of the problem statement which is hinged on whether all states adhere to international law rigorously and how is Namibia's behaviour towards international law. This will be done by looking at the constitutional principles that have a bearing on how Namibia upholds international law, and a comparative analysis will be made with other states' upholding of international law. Discussing this problem sets the ground for discussing the second part of the problem statement, *i.e.* whether international law is equally applied to all states, in the subsequent chapter.

The chapter gives a background on Namibia as product of international law and then discusses the constitutional principles on international law and their origin; Namibia's adherence to international law in the practical example of the Kasikili Island dispute with Botswana; Namibia's contribution to international law; and the challenges of Namibia within the international legal system.

The factors that determine states' adoption of international law include the characteristics of the states (like territorial size and economy, among others) and those of the leaders.²⁰⁸ States consider the environment in which they exist, including their neighbours and the broader international community. States further want to create the reputation by which they are known. Namibia is a member of the international community. Multilateral organisations to which she is a member include the UN, Commonwealth, African Union (AU) and SADC.

²⁰⁸ Stilles K., 2015, *State responses to international law*, New York: Routledge.

In 1990, Namibia adopted a constitution that has been hailed as a good example of democracy.²⁰⁹ It is important that a newly independent state maintains the reputation of accolades attributed to its constitutional principles. Writing about Namibia's constitution within the framework of international relations and international law, ten years after independence, Gerhard Erasmus²¹⁰ avers that:

During the first ten years of independence, Namibia has done quite well as far as its international reputation is concerned. The constitution's content and the manner in which Government generally respects it are cited in support of this positive evaluation.

Namibia's adoption of constitutional principles with a monism approach and, therefore, strong support of international law should be understood within the context of pre-independent Namibia being a subject of international law, a factor which gave rise to an independent Namibia. A synoptic background in this respect will be provided in the section before discussing the substantive question of Namibia's rigorous upholding of international law.

3.2 Namibia as a product of international law, a historiography

Following the partition of Africa at the Berlin Conference, the territory under the present day Namibia, then inhabited by various Bantu and Khoisan communities, was given to Germany as a colony and it became German South West Africa. Following the defeat of Germany in the First World War (WWI), her territories were given to the victorious Axis Powers. German South West Africa was given to Britain to be administered as a C-Mandate territory. C-Mandates were to be administered as integral parts of the colonial powers until the inhabitants of such territories were able to govern themselves. Britain placed the administration of South West Africa under South Africa, which was then a British colony. Subsequently, South Africa passed the *South West Africa Mandate Act* No. 49 of 1919 to realise the mandate of South West Africa and it developed an attitude against the placement of the territory under the League of Nations mandate system.²¹¹ This marked the beginning of Namibia's immersion with international law.

²⁰⁹ Erasmus G., 2010, "The Constitution, its impact on Namibian statehood and politics", in *State, society and democracy: a reader in Namibian politics*, edited by C. Keulder. Windhoek: Gamsberg Macmillan: 77 – 107, p 79.

²¹⁰ *ibid.*, p 101.

²¹¹ Geingob H., 2004, *State formation in Namibia: promoting democracy and good governance*, a PhD thesis submitted at the University of Leeds, pp 36 - 39; Matz N., 2005, "Civilization and the mandate system under the League of Nations as origin of Trusteeship", in *Max Planck Yearbook of United Nations Law*,

3.2.1 The International Court of Justice and pre-independent Namibia's cases

Following the outbreak of the Second World War (WWII), the League of Nations collapsed. At the end of the Second World War the United Nations (UN) was formed as a successor organisation to the League of Nations. Accordingly, it instituted the trusteeship system inheriting the administration of territories under the League of Nations mandate.

South Africa refused to recognise the authority of the UN over South West Africa, contending that the authority of the international community over the territory ceased with the collapse of the League of Nations. As former members of the League of Nations, Ethiopia and Liberia took South Africa to the ICJ in 1960, charging that she violated the terms of the mandate system. The Court took five years to finalise the case. Although the ICJ heard presentations by witnesses for the respondent between March and November 1965, it did not hear any representation by the applicants, including Namibian petitioners to the UN. The Court failed to decide on the merits of the matter and when it delivered its judgement in July 1966, it argued that Liberia and Ethiopia had no legal interest in the matter. The decision was taken following an equal number of votes by the bench, with the Judge President, Sir Percy Spender of Australia casting a determining vote in favour of South Africa.²¹²

In 1971, Namibia's case was again brought before the ICJ, which ruled against South Africa's continued occupation of Namibia and held that South Africa had been in material breach of the UN mandate and that her occupation of Namibia was illegal, as it was against resolution 276/1970 of the UN Security Council.

3.2.2 Pre-independence UN-legislated international law on Namibia

With regards to part of the problem statement of this study, it is arguable that the implementation of international legislation pertaining to a small state, Namibia, has not been rigorously adhered to by some large and powerful states in international law and international

Volume 9, edited by A. von Bogdandy and R. Wolfram, Leiden: Koninklijke Brill, pp 47 – 95, p 73; Mbuende K., 1986, *Namibia, the broken shield: anatomy of imperialism and revolution*, Malmö: Liber Förlag.

²¹² Katjavivi P., 1988, *A history of resistance in Namibia*, Paris: UNESCO, pp 56 – 57.

relations because of the cordial relations that they enjoyed with South Africa. Furthermore, some of the international legislation pertaining to Namibia have been relegated to soft laws of the General Assembly. But, even when they were elevated to hard laws at the UN Security Council, such laws were not effectively implemented. As stated in the definitions, soft laws alternate between politics and laws and, given the Cold War divisions, the international legislation on Namibia was frustrated by large states that are on the opposite side of the Cold War divide. The following paragraphs present an account of the international legislation pertaining to pre-independent Namibia, which had not been rigorously implemented and upheld by some countries.

The UN General Assembly by resolution 2145 (XXI) of the UN General Assembly adopted on 27 October 1966 terminated the mandate of South Africa over South West Africa and placed the responsibility of the territory under the UN.

The UN General Assembly's Special General Assembly session held on 19 May 1967 passed Resolution S-V 2248, which established the UN Council for South West Africa (later UN Council for Namibia), whose powers and functions include, among others, the administration of the territory of South West Africa and the promulgation of laws, decrees and regulations necessary for the administration of the territory.²¹³

On 16 December 1967, the UN General Assembly adopted Resolution 2314 (XX II). The resolution, among others, calls for South Africa to withdraw from South West African territory, unconditionally and without delay and further called upon the Security Council to take effective measures to enable the UN to fulfil its responsibilities regarding Namibia.²¹⁴

In the following year, on 25 January 1968, the UN Security Council passed Resolution 245, calling on South Africa to immediately discontinue the trial of 37 persons from South West Africa who were tried under the *Terrorism Act* No. 83 of 1967, which the South African Parliament passed to have retrospective effect to 1966, being the date on which they were arrested. The arrests and trials were regarded as a violation of the UN General Assembly Resolution 2145 of 1966.²¹⁵

²¹³ United Nations, 1967, *Resolution S-V 2248 of the UN General Assembly*, adopted on 16 December.

²¹⁴ United Nations, 1968, *Resolution 2324 (XXII) of the UN General Assembly*, adopted on 16 December.

²¹⁵ United Nations, 1968, *Resolution 245/1968 of the UN General Assembly*, adopted on 14 March.

On 14 March 1968, the UN General Assembly passed Resolution 246, in which it censured South Africa for defying its preceding Resolution (245) and demanded South Africa's immediate withdrawal from the territory of South West Africa. It further called on member-states to assist the Security Council to enforce South Africa's compliance with the resolution.²¹⁶ From 1968 until Namibia's independence in 1990, the UN Security Council had passed 35 resolutions concerning Namibia.²¹⁷

The UN Security Council adopted Resolution 276 on 30 January 1970, which demanded South Africa to immediately end occupation and withdraw its administration from Namibia. It further obliged UN member-states to recognise South Africa's illegal occupation in Namibia and not to enter into acts that imply the legitimacy of South African occupation.²¹⁸

The UN Security Council passed resolution 385, adopted on 30 January 1978, in which it condemned the illegal occupation of South Africa in Namibia and reiterated South Africa's immediate withdrawal of her administration from Namibia. It further called on South Africa to transfer power to the Namibian people with the assistance of the UN.²¹⁹

The UN Security Council further adopted Resolution 435 on 29 September 1978, in which it reiterated the withdrawal of South Africa's illegal administration from Namibia and the transfer of power to the people of Namibia with the assistance of the United Nations, in accordance with the Security Council resolution 385 (1976). The Resolution further called upon South Africa to forthwith co-operate with the Secretary-General in the implementation of the resolution.²²⁰

The fact that it took many years before the UN resolutions were implemented illustrates inequality in the application of international law. South Africa as an ally of the large and powerful states of the west who dominated the UN Security council, could be tolerated to drag her feet on the implementation of the resolutions.

²¹⁶ United Nations, 1968, *Resolution 246/1968 of the UN General Assembly*, adopted on 14 March.

²¹⁷ United Nations, 2016, *UN Security Council Resolutions on Namibia*, adopted since 1945.

²¹⁸ United Nations, 1970, *Resolution 276/1970 of the UN Security Council*, adopted on 30 January.

²¹⁹ United Nations, 1976, *Resolution 385/1976 of the UN Security Council*, adopted on 30 January.

²²⁰ United Nations, 1978, *Resolution 435 of the Security Council*, adopted on 29 September.

3.3 The constitutional principles on international law and their origin

Article 96 of the Namibian Constitution states that Namibia will resolve international disputes by peaceful means and further that she will strive to respect international law and treaty obligations.²²¹ This serves as the basis of Namibia's rigorous adherence to international laws. When the Namibian government does not uphold these principles, it does not only translate into violating the constitution, but also into deviation from the principles of international law.

The Namibian Constitution directly embraces international law as an integral part of the Namibian laws. The inclination to follow international law should be understood in the context of the origin of the Namibian Constitution, which is rooted in international law against the background of Namibia's immersion with international law following her placement under the League of Nations mandate system.

Horn²²² states that the Namibian Constitution has its origin in the adoption of the United Nations Resolution 435 of 1978 stated above. Following the adoption of the said resolution, five countries that were serving as members of the Security Council at the time, Canada, the Federal Republic of Germany (West Germany), France, UK, and US constituted the Western Contact Group (WCG) and in 1981 they initiated the constitutional framework for an independent Namibia, with the first draft of the Constitutional Principles released in October 1981. In the following year, the Representatives of the WCG sent a letter to the UN Secretary-General, submitting the Principles concerning the Constituent Assembly and the Constitution for an independent Namibia.

The constitutional principles provide that the Namibian Constitution will include the fundamental rights that correspond to the Universal Declaration of Human Rights.²²³ The Declaration highlights the importance of peace in the world²²⁴ and it is no surprise that the

²²¹ *Constitution of the Republic of Namibia*, 1990, article 96.

²²² Horn N., 2010, "The forerunners of the Namibian Constitution", in *Constitutional Democracy in Namibia: A Critical Analysis after Two Decades*, edited by Bösl A., Horn N., and Du Pisani A., Windhoek: Macmillan Education Namibia, pp 63 82, p 65.

²²³ Cliffe L. et al., 1994, *The transition to independence in Namibia*, Boulder: Lynne Rienner Publishers, pp 244 – 246.

²²⁴ United Nations, 1948, *Universal Declaration of Human Rights*, New York: United Nations, Preamble and article 25.

Namibian Constitution embodies the principle of settlement of international disputes by peaceful means.²²⁵ Horn²²⁶ states that the constitutional principles assumed the status of international law, when the document S/155287 of 1982 transmitting them became part of the UN Security Council 78/1978.

3.4 Namibian municipal laws versus international law

Article 144 of the Namibian Constitution, which makes international law applicable to Namibia, renders the Namibian legal system to be a monist legal system, where there is no distinction between customary international law and the Namibian law. In this monist legal system, international law has been integrated into Namibian laws, such that there is no need for domesticated legislation.²²⁷ For international treaties, however, they only become part of the Namibian laws once ratified, because most of them prescribe that the national legislature ratify them in order to be in force.²²⁸ When an international treaty is ratified, there is no need for a legislation to be enacted to enforce the treaty. This is, therefore, a departure from a dualist system, where even after a treaty is ratified, the legislature should first enact a law giving effect to the treaty.²²⁹

The international law's validity in comparison with domestic laws is determined when a particular law or treaty has met the following requirements:

- It is internationally valid and there is no other overriding international law.
- It should be binding on the state.
- It should be a valid part of domestic laws. This depends on the constitutional provisions regarding the application of international law to domestic laws.
- It should prevail over other colliding norms of national laws (In the case of Namibia, it should be in conformity with the fundamental rights enshrined in the Constitution, which are inherently derived from the general principles of international law).
- It should be certain and concrete to be applied.²³⁰

²²⁵ *Constitution of the Republic of Namibia*, 1990, article 96.

²²⁶ Horn (2010: 66).

²²⁷ Walters J., 2015, *interview*, 31 August, Windhoek.

²²⁸ Skeffers I., 2010, A critical examination of Namibia's international legal obligations in terms of the United Nations Convention Against Corruption in comparison with the French Legal System, a Master degree thesis submitted at the University of Namibia, pp 16 – 17.

²²⁹ Dausab (2010: 265 – 266).

²³⁰ Vallikivi H., 2002, "Domestic applicability of customary international law in Estonia", in *Juridica International*, Vol. 2, pp 28 – 38, pp 29 – 30.

The requirements stated above show that for a specific international law or treaty to be adopted into national law, it should conform to valid legal norms, thereby ensuring that states continue to maintain and uphold general principles of international law.

Namibia's monist approach to international law was confirmed in the judgement of *Government of the Republic of Namibia and Others v Mwilima and all other accused in the Caprivi Treason Trial*.²³¹ In this case 128 applicants who were all accused in the Caprivi Treason Trial challenged the constitutionality of sections 4 and 5 of the Legal Aid Amendment Act 17 of 2000, following their application for legal aid, which had both been responded to. The state argued that there was nothing unconstitutional about the Act when it provides that the granting of legal aid is subject to the availability of resources and that the granting was subject to the discretion of the Directorate of Legal Aid in the Ministry of Justice.

Meanwhile, the International Covenant on Civil and Political Rights²³² provides that persons charged with criminal offences shall be provided with legal assistance as required by the interests of justice, when they do not have adequate means to pay for their cases. Accordingly, Chief Justice Strydom rejected the state counsel's contention that the Covenant should be ignored and averred that article 144 of the Namibian Constitution does not only provide that international laws should form part of the domestic laws, but that such provisions should be given effect. The learned judge averred that,

The State not only has an obligation to foster respect for international law and treaties as laid down by art 96(d) of the Constitution but it is also clear that the International Covenant on Civil and Political Rights is binding upon the State and forms part of the law of Namibia by virtue of art 144 of the Constitution.²³³

The Court thereby asserted the monist approach of the Namibian legal system that international law is an integral part of Namibian laws.

Namibia is further precluded from invoking municipal laws against international law by virtue of the Vienna Convention, which by virtue of the monist legal system is part of the Namibian laws. Article 27 of the Vienna Convention states that,

A party may not invoke provisions of its own internal law as justification for failure to carry out an international agreement.²³⁴

²³¹ 2002 NR 235, p 260.

²³² *International Covenant on Civil and Political Rights*, article 14(3) (d).

²³³ *Government of the Republic of Namibia and Others v Mwilima and all other accused in the Caprivi Treason Trial* 2002 NR 235, pp 259 – 260.

Another small state, Estonia also adopts a monist approach, where international law becomes part of domestic laws. However, such laws need to be ratified. The Constitution further states that the general principle of international law are an integral part of the laws of Estonia, a provision that has long been the case in Estonian constitutions, both the versions of 1920, 1937 and 1992. Accordingly, as long as a provision of international law remains valid in international law, it also remains validly applicable to domestic law, unless otherwise terminated in international law.²³⁵

The Estonian constitution states that in the event that her laws conflict with international treaties that have been ratified by the Estonian Parliament, *Riigikogu*, the provisions of the treaty take precedence over the constitution. However, the provision similar to the one in the Namibian Constitution is that prior to ratifying an international agreement, the condition is that such agreements should not be in conflict with the provisions of the Estonian Constitution.²³⁶

Meanwhile, another small state, Switzerland, though it recognises international law, she does not include a monist provision in her constitution, making international law an integral part of her laws in the manner that Namibia and Estonia have done. Although Switzerland adopts international law in her domestic laws in practice, this has not been specified in the Swiss constitution.²³⁷ But if a customary law involves *ius cogens*, such law generally automatically prevails upon Swiss laws. In cases where the constitution does not explicitly state the adoption of international laws into domestic laws, the Courts make a pronouncement on the status of such laws.²³⁸

3.5 The case of Kasikili Island dispute with Botswana

Namibia's adherence to her constitutional framework on international law is illustrated by the way in which Namibia started the process of negotiations over the ownership of the Kasikili Island with Botswana. Botswana calls the disputed territory Sedudu Island.

²³⁴ *Vienna Convention on the Laws of Treaties of 1969*, article 27.

²³⁵ Vallikivi (2002: 31).

²³⁶ *Constitution of Estonia*, 1992, section 123.

²³⁷ Vallikivi (2002: 30).

²³⁸ *ibid.*, p 34.

3.5.1 Background to the Kasikili / Sedudu Island dispute

In terms of the Anglo-Germany Treaty concluded on 1 July 1890, the border of Namibia with Botswana is found where Kasikili island lies at the main channel of the Chobe River. The agreement states:

In South-West Africa the sphere in which the exercise of influence is reserved to Germany is bounded... To the east ...it runs eastward along that parallel till it reaches the river Chobe, and descends the centre of the main channel of that river to its junction with the Zambesi, where it terminates.²³⁹

Figure 1 below shows the Namibian-Botswana borders around the Kasikili/Sedudu Island area.

Fig. 1: Namibia-Botswana borders around the Kasikili Island area



Source: Africa Wild [s.a.]

²³⁹ International Court of Justice, 1997, *Memorial of the Republic of Namibia*, para 2 (2).

The Kasikili Island has been inhabited by the Masubia community from Namibia for almost a century. In 1991, the Botswana hoisted her national flag and deployed the Botswana Defence Force on the island.

Because of the dispute on Kasikili, the Namibian Cabinet appointed a Technical Team chaired by Dr Albert Kawana, Permanent Secretary in the Ministry of Justice, to negotiate with officials from Botswana in order to find a solution regarding ownership of the Kasikili Island. Other members of the team included Dr Collins Parker, an official in the Ministry of Justice, Dr Lazarus Hangula, a researcher at the University of Namibia and Guenther Reuter, the Surveyor-General. The Technical Teams reached a stalemate. The mandate of the Technical Team was to find a solution and the matter was referred to a Summit of Heads of States of Botswana, Namibia and Zimbabwe, held in Harare in Zimbabwe in February 1995. Zimbabwe convened the Summit in her capacity as the chair of the SADC Organ on Politics, Defence and Security.²⁴⁰

Parker²⁴¹ states that at the Summit, when President Mugabe put a question on what should be the way forward, President Masire proposed that Namibia and Botswana should take the dispute to the ICJ. The Summit took a break, for the respective delegations to have consultations. When the Namibian delegation at the Summit came together for a consultation, the Minister of Foreign Affairs, Theo-Ben Gurirab, advised that Namibia should agree to the proposal of Botswana. Having been associated with the United Nations for more than 30 years, first as SWAPO Associate Representative, Permanent Observer to the UN, SWAPO Secretary of Foreign Affairs and Namibia's Minister of Foreign Affairs, Minister Gurirab expressed confidence in the adjudication process under a UN structure, the ICJ. It is, thus, not surprising that Namibia chose to abide by the international law principles of peaceful settlement of disputes.

3.5.2 The parties

It is important to give an overview about the parties and their legal teams, to see how small states' capacity impacts on their performance in international law disputes. Namibia and

²⁴⁰ Parker C., 2015, *Interview*, 16 September, Windhoek.

²⁴¹ *ibid.*

Botswana constituted their teams to argue their respective positions at the ICJ. Tables 2 and 3 below reflect the composition of the respective Namibian and Botswana teams:

Table 2: The Namibian Legal Team

Name	Role	Occupation / Profession
1. Dr Albert Kawana	Agent	Permanent Secretary, Ministry of Justice,, Namibia
2. Dr Zedekia Ngavirue	Deputy-Agent	Ambassador (non-resident) to The Netherlands (resident in Belgium) and the European Union
3. Prof. Abraham Chayes	Counsel and Advocate	Felix Frankfurter Professor of Law Emeritus, Harvard Law School
4. Prof. Sir Elihu Lauterpatch	Counsel and Advocate	Honorary Professor of International Law, University of Cambridge and Member of the <i>Institut de Droit International</i> (institute of International Law
5. Mr Jean-Pierre Cot	Counsel and Advocate	Professor Emeritus, Université de Paris I (Panthéon-Sorbonne), Member of the Paris and Brussels Bars
6. Prof. Jost Delbrück	Counsel and Advocate	Director of Walther-Schücking Institute of International Law, University of Kiel
7. Prof. Julio Faundez	Counsel and Advocate	Professor of Law, University of Warwick
8. Prof. William J. R. Alexander	Advocate	Emeritus Professor of Hydrology, University of Pretoria
9. Prof. Keith S. Richards	Advocate	Professor, Department of Geography, University of Cambridge
10. Col. Denis Rushworth	Advocate	Former Director of the Mapping and Charting Establishment, Ministry of Defence, United Kingdom
11. Dr Lazarus Hangula	Advocate	Director, Multidisciplinary Research Centre, University of Namibia
12. Dr Arnold M. Mtopa	Advocate	Chief Legal Officer, Ministry of Justice, Namibia
13. Dr Collins Parker	Advocate	Chief Legal Officer, Ministry of Justice, Namibia
14. Mr Edward Helgeson	Counsel and Adviser	Fellow, Lauterpacht Research Centre for International Law, University of Cambridge
15. Ms Tinya Putnam	Counsel and Adviser	Harvard Law School
16. Mr Peter Clark	Technical Adviser	Former Chief Map Research Officer, Ministry of Defence, United Kingdom

Source: International Court of Justice (1999)

The Namibian team further had the following administrative staff and media personnel: Samson N. Muhapi, Kyllikkki M. Shaduka, Mercia G. Louw, Peter Denk and Muyenga Muyenga.

Table 3: The Botswana Legal Team

Name	Role	Occupation / Profession
1. Mr Abednego Batsgani Tafa	Agent, Counsel and Advocate	Deputy Attorney-General, Advocate of the High Court and Court of Appeal of Botswana
2. Mr S C George	Co-Agent	Ambassador of the Republic of Botswana to the European Union
3. Mr Molosiwa L. Selepeng	Counsel and Advocate	Permanent Secretary for Political Affairs, Office of the President
4. Prof. Ian Brownlie	Counsel and Advocate	Chichele Professor of Public International Law, University of Oxford, Member of the International Law Commission, Member of the English Bar and Member of the Institut de Droit International
5. Lady Fox	Counsel and Advocate	Former Director of the British Institute of International and Comparative Law, Member of the English Bar, Associate Member of the Institut de droit international
6. Dr Stefan Talmon	Counsel and Advocate	<i>Wissen-schaftlicher Assistent</i> (Research Assistant) in the Law Faculty of the University of Tübingen
7. Mr Timothy Daniel	Counsel	Solicitor of the Supreme Court, Partner, D. J. Freeman (Solicitors) of the City of London
8. Mr Alan Perry	Counsel	Solicitor of the Supreme Court, Partner, D. J. Freeman (Solicitors) of the City of London
9. Mr David Lerer	Counsel	Solicitor of the Supreme Court, Assistant, D. J. Freeman (Solicitors) of the City of London
10. Mr Christopher Hackford	Counsel	Solicitor of the Supreme Court, Assistant, D. J. Freeman (Solicitors) of the City of London
11. Mr Robert Paydon	Counsel	Solicitor of the Supreme Court, Assistant, D. J. Freeman (Solicitors) of the City of London
12. Prof. F. T. K. Sefe	Scientific and Technical Adviser	Professor of Hydrology, University of Botswana
13. Mr Isaack Muzila	Scientific and Technical Adviser	Principal Hydrological Engineer, Department of Water Affairs, Botswana
14. Mr Alan Simpkins	Scientific and Technical Adviser	Chief Surveyor and Deputy Director, Department of Surveys and Mapping, Botswana
15. Mr Scott B Edmonds	Scientific and Technical Adviser	Director of Cartographic Operations, GeoSystems Global Corporation, Colombia
16. Mr Ropbert C Rizzutti	Scientific and Technical Adviser	Senior Mapping Specialist, GeoSystems Global Corporation, Colombia
17. Mr Justin E. Morrill	Scientific and Technical Adviser	Senior Multimedia Designer, GeoSystems Global Corporation, Colombia

Source: International Court of Justice (1999)

The Botswana team further had the following administrative staff and media personnel: Bapasi Mphusu, Coralie Ayad, Marillyn Beeson, and Michelle Bourgeoine. The administrative staff came from the law firm, D. J. Freeman (Solicitors) of the City of London.

The composition of the Namibian and Botswana teams at the ICJ illustrates that small states had limitations in terms of human resources. None of the two states had expert litigants in international law and courts. This compelled them to source expertise from elsewhere. The

Namibian team included nine lawyers, all of whom were foreign nationals. Meanwhile the Botswana team included 10 lawyers, one of whom was from Botswana. Furthermore, both teams included hydrologists and surveyors. Hydrologists were important for presenting evidence on the borders of the Chobe River, whose main channel determines the border between Namibia and Botswana and, thus, ownership of the island. Namibia's hydrological expert was a retired professor from South Africa, whereas Botswana's hydrological expert was her own national, who, too, is a professor.

Parker²⁴² states that it is not just enough for parties to the dispute to have lawyers, but to have lawyers who are experienced in international court proceedings. He further states that it is not necessary that the agent and deputy agent should be lawyers by profession and this was the case for the Namibian team. The key persons were lead counsels. Thus, Namibia chose Prof Hayes who had experience of 40 years of litigation in international courts. Not only that, both Professors Hayes and Brownlie who were members of the Namibia and Botswana teams respectively, are experts in international court litigations, but also noteworthy is that the two lawyers had previously worked as members of the same team in some cases at the ICJ.

Namibia further included in her team Dr Lazarus Hangula, a researcher from the University of Namibia, because of his knowledge of the German language, having studied his master and doctorate degrees at the Johannes Gutenberg University, Mainz, Germany. His background was significant as the original versions of most of the materials used in the case were in the German language. This further explains the inclusion of Prof Delbrück. Meanwhile, proceedings at the ICJ are conducted in both English and French, since civil law is predominantly French and the secretariat operates overwhelmingly in French. Arguably, this could have been the consideration for the inclusion of a French lawyer, Jean-Pierre Cot.²⁴³

The fact that both parties are small states with human resources limitations put them on equal footing in making preparations of their cases, including engaging the services of international law experts. The situation could possibly be different when a dispute is between a small state with such limitations and a large state with experts at their disposal such that it does not have

²⁴² Parker C., 2015, *Interview*, 16 September, Windhoek.
²⁴³ *ibid.*

to spend resources on engaging international law experts. International law is costly²⁴⁴ and even when there is a relatively equal application of law to large and small states, the limitation in affording litigation works to the disadvantage of small and poor states. It is, therefore, arguable that indirectly, there could be inequality in the application of international law, if it is affordable to some and not affordable to others.

3.5.3 Legal arguments and the Court's consideration

Both the Namibian and Botswana teams had their respective legal arguments, which they advanced before the court, each endeavouring to convince the court to agree to its reasoning. Prior to taking the matter to court, Botswana and Namibia had concluded a Special Agreement, which served as the basis of the Court's consideration. The agreement requested the Court to determine two issues, namely (i) The boundary between Namibia and Botswana around Kasikili/Sedudu, and (ii) the legal status of the island. The basis of the court's consideration should be (i) the Anglo-German Treaty of 1 July 1890, and (ii) the rules and principles of international law.²⁴⁵

Namibia's argument was that the court should look at the use of and practice of the island over many years. She argued that the Masubia of the Eastern Caprivi were the only tribesmen that occupied the island until 1914, during which time they enjoyed the use of the island. It was argued that Botswana's silence during the period that the Masubia occupied the island for almost a century affirms Namibia's ownership of the island.²⁴⁶

With regards to considering the research question whether states rigorously pursue and uphold international law, both Namibia and Botswana in their arguments tried to demonstrate that they uphold the principles adopted in international law. Namibia's arguments are based on article 31 of the Vienna Convention on the Law of the Treaties, which provides that in the interpretation of the treaties, regard should be made to the subsequent practice of the parties to an agreement, whereupon an unvarying conduct for a long period is deemed to be the subsequent practice preferred by the parties. Namibia further relied on case law, like the

²⁴⁴ Halldórsdóttir (2011: 20).

²⁴⁵ *Kasikili/Sedudu Island (Botswana/Namibia), Judgement, I. C. J. Reports, 1999*, p. 1045.

²⁴⁶ International Court of Justice, 1997, *Memorial of the Republic of Namibia*, at para 255.

Alaskan Boundary Tribunal Award,²⁴⁷ whereby acquiescence by one party was deemed to have affirmed ownership of the disputed territory to the other party. A longstanding practice gives effect to a Treaty between the two parties when there is acquiescence by one party, notwithstanding the intention expressed on paper stipulating different provisions.

Meanwhile, Botswana asked the court to interpret the Anglo-German Treaty of 1890, citing article VII which states that no party shall exercise sovereign rights in a sphere assigned to the other, except when the other party has assented to such possession. Accordingly, possession of the island cannot be generated from the agricultural activities of the Masubia people. Botswana further argued that the Masubia community live in both the Caprivi area and Botswana. Botswana maintained in her counter-memorials that Namibian arguments are filled with misrepresentations, errors and omissions. For example, Namibia did not prove the use of the island by the Masubia from 1960 onwards. Botswana averred that during this period, the British, who had colonised Botswana, had prohibited any agricultural activities on the island and this continued until 1992, without the Masubia from Caprivi or the South African colonial regime in Namibia raising any protest.²⁴⁸

Botswana's acquiescence to the use of the island by the Masubia community of Namibia was rebutted, because the Masubia Chiefs sought permission from the Magistrate of Kasane in Botswana when they wanted to use the island in 1924. Botswana further averred that from 1922 to 1929, Caprivi was administered as part of the Bechuanaland Protectorate (which became Botswana at independence in 1966). This followed when the then Governor-General of the Union of South Africa delegated responsibility for the administration of the Caprivi (then as part of the League of Nations' Mandated Territory of South West Africa) to the British High Commissioner for South Africa, a responsibility that was exercised by the Bechuanaland Protectorate.

The Court held that Namibia could not rely on the doctrine of prescription as the Masubia people of Caprivi only used the island for agricultural purposes, according to seasons and need and did not occupy the island *a titre de souverain*, and Namibia has not exercised state

²⁴⁷ United Nations, 2006a, *Reports of the International Tribunal Award, Alaska Boundary Case (Great Britain, United States)*, 20 October 1903, Vol. ix: pp 481 – 540.

²⁴⁸ International Court of Justice, 1999, *Botswana counter-memorials*, para 179 – 182.

authority on the island.²⁴⁹ The Court maintained that the patrol of the island by the South African Defence Force (SADF) in 1984 was not a ratification of individual activities by the Masubia people on the island, but rather a counter of guerrilla activities by liberation movements. The Court further underscored the importance of the principle of *uti possidetis*, which affirms that independent states should maintain the borders that they had when they were colonial states.

The Court held by eleven votes against four, that the disputed island belongs to Botswana. The Court averred that scientific evidence proves that the channel of the Chobe River that lies on the north and western part of the disputed island forms the main channel and, therefore, the border. Accordingly, this is fundamental in interpreting article III (2) of the Anglo-German Treaty of 1890. The Treaty stipulates that the boundary is at the centre of the main channel of the Chobe River. The River has two channels, and if the main channel is the one that runs on the north of the River, then the island belongs to Botswana. If the main channel is on the south of the River, then the island belongs to Namibia.

Parker²⁵⁰ stated that in considering the case, the British judge said, the Court should not be interested in scientific explanations and geological formations of the boundaries, but it should rather use a stander-by test, *i.e.* what would an ordinary person think as to where the border lies. However, it is arguable that the reason why courts call for expert witnesses is because they attach importance to scientific evidence.

The manner in which the parties carried themselves in their pleadings shows their adherence to international law. In as much as they asked the court different questions, both called on the court to make a ruling on the basis of international law principles. The parties responded to the problem statement that they rigorously adhere to international law.

The Court's decision is based on the merit of the case as it considered arguments by the parties in conjunction with their agreements. It has answered what the parties asked for. It, therefore, adhered to the principle of equality in the application of international law and upheld sovereign equality in this case of small states disputes.

²⁴⁹ *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgement, I.C.J., Reports, p 1045, pp 1105 – 1106, at para 98 – 99.

²⁵⁰ Parker C., 2015, *Interview*, 16 September, Windhoek.

3.5.4 Compliance with the International Court of Justice's ruling

After the Court's decision, Namibia's President, Sam Nujoma, assured the international community that Namibia would abide by the court's decision.²⁵¹ This illustrates her commitment to rigorously adhering to international law.

However, a contrast is observed in a similar case involving a middle power, Nigeria, in the case of *Cameroon v Nigeria: Equatorial Guinea intervening (Land and Maritime Boundary between Cameroon and Nigeria)*.²⁵² The two states had a dispute over the ownership of the Bakassi peninsula. After the matter was brought before the ICJ, the Court ruled in favour of Cameroon, resulting in Nigeria refusing to agree to the verdict of the Court. It took efforts of other large states, France, the UK and the US, to persuade Nigeria to comply with the decision of the Court. It further required the UN to set up a commission to look at the implications of the verdict and provide a solution.²⁵³ Similarly, when the ICJ ruled in favour of Chad in the case of *Territorial dispute (Libya/Chad)*,²⁵⁴ Libya openly criticised the Court decision and she only agreed to comply later.

China and The Philippines had disputes over the territory in the South China Sea. China claimed the Nansha Islands in the waters, laying a claim over a territory covering 90 percent of the South China Sea. The Philippines took the matter to the Permanent International Tribunal in The Hague. The Tribunal ruled in favour of The Philippines, resulting in China stating that she will not respect the decision of the Tribunal.²⁵⁵

Comparing the behaviour of Namibia after losing the *Kasikili/Sedudu Island* dispute to Botswana with the behaviour of Nigeria after losing the *Cameroon v Nigeria* case related to the Bakassi peninsula ownership dispute, and to the behaviour of Libya after losing the *Territorial dispute* case to Chad, and China after losing the Nansha Island to The Philippines, Namibia has demonstrated small states' rigorous adherence to international law. Examples of other small states that adopted a similar approach are Qatar and Bahrain who too, had border

²⁵¹ Maletsky C., Kasikili KO, in *The Namibian*, 14 December 1999, 8 (238), p 1 – 2.

²⁵² *Cameroon v Nigeria: Equatorial Guinea intervening (Land and Maritime Boundary between Cameroon and Nigeria)*, 2002, ICJ Reports, 303.

²⁵³ *ibid.*, pp 61 – 63.

²⁵⁴ 1994, ICJ Reports, 6.

²⁵⁵ Wei W., 2016, "South China Sea arbitration: a "three no" product", in *New Era*, 21: (466), p 9.

disputes. When the ICJ ruled on the dispute, both countries were committed to comply with the verdict of the court.²⁵⁶

Namibia further adhered to her constitutional principle of respecting international law and treaty obligations. Prior to taking the dispute to the ICJ, she had concluded an agreement with Botswana where she had undertaken to abide by the court's decision. Other small states, Honduras and El Salvador, also demonstrated adherence to international law. They had territorial disputes that were resolved by the ICJ, whereupon they both agreed to bind themselves to the ruling of the Court. Although Honduras had reported to the UN that El Salvador was not complying, El Salvador responded to the UN Security Council denying allegations. Both countries, therefore, have to a larger extent committed themselves to upholding international law.²⁵⁷

3.6 Internal stakeholders' coordination on international law

The rigorous adherence to international law is partly determined by the manner in which the government internally coordinates matters pertaining to international law. In respect of matters pertaining to international human rights law, the Ministry of Justice is the coordinating agency for the government's engagement with international law through the Inter-Ministerial Committee on State Reporting, chaired by the Permanent Secretary.²⁵⁸

Iivula-Ithana²⁵⁹ states that, generally, coordination is necessitated by the negotiations on agreements and treaties that have international law dimensions. Accordingly, the Ministry of Justice coordinates matters related to line Ministries that deal with international organisations like the Ministry of Industrialisation, Trade and SME Development, in respect of the World Trade Organisation (WTO), the Ministry of Labour, in respect of the International Labour Organisation (ILO) and the Ministry of International Relations and Cooperation, in respect of a number of UN and UN agencies' conventions. During the negotiation processes, the Ministry of Justice or Office of the Attorney-General provides an official to be part of the negotiation team to ensure compliance with international laws and the applicability to

²⁵⁶ Jones (2012: 70).

²⁵⁷ Lamzon (2007: 829 – 829).

²⁵⁸ Walters J., 2015, *interview*, 31 August, Windhoek.

²⁵⁹ Iivula-Ithana P., 2015, *interview*, 2 September, Windhoek.

municipal laws. This means that these officials help in ensuring the rigorous adherence of Namibia to international law. Before international agreements are signed or acceded to, it is required that the Attorney-General scrutinises them and gives concurrence. The Attorney-General provides opinions which guide accession or non-accession to international agreements and treaties. When necessary, the matter is taken to Cabinet for deliberations. When a treaty has been acceded to, it will be brought to Parliament for ratification during which legislators will debate the pros and cons of ratifying a given treaty.

The process of coordination when Namibia is to accede to international treaties starts with respective line ministries. A line ministry takes a lead and liaises with the Office of the Attorney-General to verify compliance with international law.²⁶⁰

Shinguadja²⁶¹ states that there is coordination between the Ministry of Labour and the Office of the Attorney-General as the Ministry consults the latter for advice before Namibia accedes to related international conventions. He further states that the Ministry of Labour and the Ministry of Justice consult each other when they compile reports on human rights issues related to labour law. There is, however, no permanent structure where international law affecting these line Ministries and other government institutions are discussed, unlike as it is the case with reports on international human rights law discussed above.

Meanwhile, the Government has not properly coordinated its approach to the Kasikili case. While the matter falls under the constitutional responsibility of the Attorney-General, the Ministry of Justice coordinates the matter and information was not shared or coordinated with the staff of the Attorney-General. Iivula-Ithana²⁶² states that there were no clear demarcations of responsibilities after independence, especially because the Permanent Secretary of the Ministry of Justice served as an accounting officer of both the Ministry of Justice and the Office of the Attorney-General. This led to the non-participation of the staff from the Office of the Attorney-General on the Kasikili matter. Meanwhile, the Botswana team was led by the Deputy Attorney-General. Rukoro²⁶³ maintains that although later the Attorney-General and staff were called to the meetings at the Ministry of Justice, there was little that they could

²⁶⁰ Mbandeka F., 2015, *interview*, 23 October, Windhoek; Nghaamwa C., 2015, *interview*, 22 October, Windhoek.

²⁶¹ Shinguadja B.M., 2015, *interview*, 19 October, Windhoek.

²⁶² Iivula-Ithana P., 2015, *interview*, 2 September, Windhoek.

²⁶³ Rukoro V., 2015, *interview*, 17 September, Windhoek.

do to participate in the discussions as the die was cast on how the Ministry will constitute the Namibian team.

Constitutionally, the Attorney-General has a specific role of a legal advisor to the Government, to interpret international law and ensure that government officials are aware of Namibia's obligations to specific international laws. When officials appreciate international law obligations, they are able to pro-actively attend to Namibia's commitment to comply with international law as envisaged by the principles in the Namibian Constitution. When a government adopts a habit of poor coordination among internal stakeholders, leaving out relevant institutions, it can arguably lead to failure to adhere to international law.

3.7 Challenges

There are challenges that Namibia has in rigorously adhering to international law, which include non-compliance with international law, lack of expertise and poor inter-ministerial coordination.

3.7.1 Compliance with international laws

The Special Advisor to the Minister of Labour, Vicky Ya Toivo²⁶⁴ states that compliance with international law is measured when there are violations of a specific international law. One such example is the *Mwilima*²⁶⁵ case discussed above. With regards to compliance, Chief Justice Strydom reminded the state that state parties to the convention are under obligation to adopt the necessary legislative measures giving effect to the rights recognised in the Covenant. He held that the amendments in the Legal Aid Act mentioned above in this chapter did not provide for the rights as envisaged in the Covenant on Civil and Political Rights.²⁶⁶ After the judgement, the Government complied with the international law providing for the rights of the accused.

Meanwhile, large states continue to violate international law, even after court decisions, especially those of the ICJ. When Nicaragua brought a case against the US in 1984 for

²⁶⁴ Ya Toivo V., 2015, *interview*, 29 September, Windhoek.

²⁶⁵ 2002 NR 235.

²⁶⁶ *International Covenant on Civil and Political Rights*, article 14(3) (d).

planting mines in the Managua harbour and assisting in the overthrow of an elected government, the Court ruled that the US was guilty and ordered the payment of a fine of US\$ 400 million.²⁶⁷ The US ignored the Court order and averred that she has already terminated an agreement binding her to the decisions of the court. Similarly, Russia refused to abide by the Court decision to pay for her share of peace-keeping operations, while Iran, a middle power, refused to comply with the court order in the case of American hostages.²⁶⁸

3.7.2 Lack of expertise

Rukoro²⁶⁹ admits that Namibia has challenges of expertise in international law. She lacks experts who can be deployed to the Ministries involved in matters related to international law. His views were echoed by former Permanent Secretary in the Office of the Attorney-General and later Special Advisor to the Minister of Labour, Vicky Ya Toivo,²⁷⁰ who states that there is limited capacity among government officers, and that affects Namibia's reporting to the International Labour Organisation (ILO). This further leads to some bilateral agreements not being ratified.

Lack of international law expertise in Namibia was evident during the Kasikili / Sedudu case discussed above such that both Namibia and Botswana governments had to enlist the services of legal experts in public international law and as well as hydrological experts from other countries, given the absence of experts within their respective countries. But, unlike Namibia, Botswana had at least one national among each of this category of experts.

The limitations on legal experts for small states are known in international law, as it was demonstrated during the negotiations for the Law of the Sea in the 1970s. This trend continues up to the present day. Large states, however, have their own experts in the field of international law and they are not hampered by lack of skilful human resources in this field.²⁷¹ The differences between large and small states' human resources capacity would, arguably, translate into their ability to pursue and argue their cases in international law. The

²⁶⁷ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)*, Provisional Measures [1984] ICJ Rep 169.

²⁶⁸ Wells (2005: 27 – 28).

²⁶⁹ Rukoro V., 2015, *interview*, 17 October, Windhoek.

²⁷⁰ Ya Toivo, 2015, *interview*, 29 September, Windhoek.

²⁷¹ Braveboy-Wagner (2008: 217 – 218).

result is that international law will be favourable to states that have the capacity to deal with it.

3.7.3 Lack of inter-ministerial coordination

The lack of coordination on international law legislation impacts on a country's rigorous adherence to international law. This has been observed during Namibia's accession to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines. Non-state actors like the International Red Cross and Red Crescent Movement have campaigned vigorously against the use of these destructive devices, leading to countries to adopt the said convention in 1997. The then Minister of Foreign Affairs, Theo-Ben Gurirab, stated in the Parliament that Namibia had joined the campaign against land-mines and supported the immediate ban of these destructive devices, affirming that:

Namibia encourages all other ongoing initiatives aimed at banning anti-personnel land mines as well as continuing de-mining both at home and abroad... Namibia has, or is going to sign all the Treaties, Conventions and Protocols in this and other related fields.²⁷²

Giving a different view in the Parliament was the Minister of Defence, Phillemon Malima, who stated that although in principle the Convention was to be supported, Namibia should not have acceded to it immediately. Malima contended that:

Until now, however only 53 member-states have unilaterally supported a global ban on the use and production of anti-personnel mines... Given the sensitivity of this issue, I would like to state here that... Namibia should not be rushed into signing and ratifying the UN Convention on land mines and anti-personnel mines.²⁷³

The intimation that the support of the Convention by 53 states was unilateral is illustrated by Minister Malima's disinclination towards the Convention. That the two Ministers publicly expressed different opinions towards international law-making in respect of the Convention manifests poor coordination of the government's position on the international law concerned. It further raised questions on how Namibia's approach to international law was coordinated in Cabinet by then. Nevertheless, Namibia acceded to the Convention in December 1997 at the adoption ceremony held in Ottawa, Canada.

²⁷² National Assembly, 1997a, *Debates of the National Assembly*, 15, p 365.

²⁷³ National Assembly, 1997b, *Debates of the National Assembly*, 17, 12.

It has been stated above that officials from the Office of the Attorney-General were not fully involved in the matter of Kasikili island dispute, with the matter handled politically as a policy issue rather than as a legal issue. The challenge of not working with line officials in legal matters was further manifested when Namibia attended the ICC's 12th Assembly of State Parties in 2013, which amended Rule 68 of the Rules of Procedure and Evidence to provide for the admission of "prior recorded testimony" as evidence. This means that when a witness who previously gave a testimony is absent from court proceedings and cannot be found, or where the witness is deceased or influenced against giving testimony, such witness' previous evidence so provided will be admissible. The delegation comprised largely politicians. It was led by the Attorney-General; it included three members of Parliament, a Permanent Secretary of the Ministry of Justice, diplomats and no professional lawyers. Delegations from other small countries, like Malawi and Netherlands, for example, included legal advisers who are vested with knowledge in legal matters.²⁷⁴

A question arises as to why Namibia chose to take politicians without legal knowledge to attend international law-making conferences at the expense of legal professionals. The Attorney-General should have included in his delegation his own officials who deal with legal advice to the government.

Ya Toivo²⁷⁵ contends that there is a challenge of lack of a centralised coordination unit within the government. She concluded that there is a need to have a centralised monitoring unit that monitors government compliance with international law, rather than leaving this function to individual line ministries. Ideally, the function of inter-ministerial coordination should be vested in a specific custodian ministry, like the Ministry of Justice for example, which deals regularly with international law.

²⁷⁴ International Criminal Court, 2014, *Delegations to the Twelfth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, available at https://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-INF.1-ENG-FRA-SPA.pdf, last accessed on 31 March 2016.

²⁷⁵ Ya Toivo V., 2015, *interview*, 29 September, Windhoek.

3.8 Assessment

Namibia's decision to agree to the ICJ adjudication of the dispute fulfils the aspirations of her constitutional principle of settling international disputes by peaceful means.²⁷⁶ Rukoro²⁷⁷ maintains that when diplomatic efforts failed, as a UN member-state, Namibia was committed to the dispute resolution under international law. Arguably, if Namibia had not agreed to the proposal by Botswana, such a stance would have made a mockery of the constitutional principle of settling disputes by peaceful means.

Namibia did not invoke the principle of self-defence, in the name of her sovereignty which was infringed upon by Botswana when she deployed troops at the Kasikili Island, during the time when Namibia, too, felt that the island was part of her territorial integrity. This attests to her adherence to the principles of international law of settling disputes by peaceful means. Meanwhile, large states and their allies abuse the principle of self-defence, as illustrated by, among others, the UK's military actions against Argentina, following Argentina's invasion of the disputed Falklands/Malvinas islands.²⁷⁸

Namibia further demonstrated that she upholds her constitutional principle of fostering respect of international law and treaty obligations, when she readily accepted the verdict of the ICJ in the Kasikili island dispute, unlike Nigeria who only accepted the ICJ verdict after a round of diplomatic interventions, or Libya who initially criticised the Court's verdict. Thus Namibia illustrates the proposition in the literature on small states in international law that says small states generally comply with international law.²⁷⁹ On the question of the problem statement whether states rigorously adopt international law, Namibia has demonstrated that she does, through the approach that she adopted in the Kasikili island dispute.

Typical of a small and young state, Namibia lacked experts from among her own nationals in her team for the Kasikili dispute at the ICJ. In comparison with Botswana, Namibia's legal and scientific experts were all foreigners, whereas Botswana had experts both in the field of law and hydrology. During the hearing, Botswana's counter-memorials focused on

²⁷⁶ *Constitution of the Republic of Namibia*, 1990, article 96.

²⁷⁷ Rukoro V., 2015, *interview*, Windhoek, 17 October.

²⁷⁸ Cassese A., 2001, *International Law*, Oxford: Oxford University Press, p 306.

²⁷⁹ Alter (2003: 53).

discrediting Namibia's evidence, pointing out at deficiencies in expert witnesses' evidence. For example, Prof William Alexander, a Professor of Hydrology who served as an advocate in the Namibian team, concluded that the Southern channel of the Kasikili Island carries the largest share of the annual flow of the river. This proposition was criticised by Botswana for ignoring the depths and configurations of the channel.²⁸⁰

Lack of coordination between the Ministry of Justice and the Office of the Attorney-General on the issue of Kasikili was evident when even Namibia's experts on international law, like Dr Sakeus Akweenda, who has authored a publication *International law and the protection of Namibia' territorial integrity, boundary and territorial claims* was not included in the delegation. Akweenda was at the time working in the Office of the Attorney-General. While it is understandable that the issue of Kasikili first started as a policy rather than as a judicial process, when the matter became a judicial process, it should have been allocated to the Office of the Attorney-General.

The lack of expertise for small states therefore impacts on how they fare in international law, compared to large states. This has a further bearing on how they prepare their cases. It is not only the size, but experience, too, that matters. The inexperience in legal matters resulting from Namibia being a small and young state had a further negative impact on her coordination of the Kasikili issue. Whilst on the other hand, large states coordinate their matters in better organised arrangements.

3.9 Conclusion

Having come about as a result of international law, Namibia adopts international law monism in her constitution, as the Courts refer to that legal system when addressing matters pertaining to the application of international law to domestic laws. The trend of monism is common to other small states. Namibia rigorously pursued the principles of international law, adhering to provisions in her constitution. Namibia also manifested adherence to her constitutional principles and those of international law when she agreed to Botswana's proposal to take the dispute over ownership of Kasikili Island to the ICJ.

²⁸⁰ International Court of Justice, 1999, *Botswana Memorials*, para 143, 146.

Namibia immediately accepted the ruling, unlike the case of large states like Nigeria and Libya, for example that had problems to immediately accept the verdict of the ICJ. Namibia's compliance with international law was realised at the time when she was a young republic, without experience.

CHAPTER FOUR
SELECTIVE JUSTICE, INCONSISTENCIES AND CONTROVERSIES
REGARDING COMPLIANCE WITH INTERNATIONAL LAW: THE CASE OF THE
INTERNATIONAL CRIMINAL COURT AND NAMIBIA'S STANCE

4.1 Introduction

This chapter discusses elements of selective justice and the inconsistent adoption of the principles of international law in the area of international criminal law. The chapter investigates the extent to which Namibia supports the principles of international criminal law and makes an analysis of what is illustrated by the changing patterns in supporting compliance with international law principles. It further discusses large states' double standards in supporting compliance with the principles international criminal law.

While the scope of international law historically focused on states, modern international law has expanded to include other key players in international relations, like international organisations, non-governmental organisations, individuals, specific groups and all other entities that are affected by aspects of international law.²⁸¹ In this category of non-state entities, selective justice is applicable to individuals.

With regards to the question of whether all states rigorously uphold international law, this should be considered within the context of states' approach to supporting compliance with the principles of international criminal law. Both large and small states tend to adopt the victor's justice approach to international criminal law, which in essence contradicts general principles of international law, like equality and equity, and the fundamental values that are embodied in the constitutions of democratic states.

With regards to the question of equality in the application of international law, this should be considered within the context of large states' approach towards international criminal law, especially the ICC. While it is acknowledged that not all large states are part of the ICC, their

²⁸¹ Dugard J., 2005, *International law: a South African perspective*, 7th ed., Cape Town: Juta, p 1; Malanczuk (1997: 1). Individuals have particularly become subjects of international criminal law, where they are brought before international tribunals and courts for violations of international criminal law.

involvement in the ICC through the referral of cases by the UN Security Council brings a dimension of the unequal application of international criminal law to states.

In order to consider whether all states are fully committed to and/or support the principles of international law, this Chapter discusses Namibia's approach to supporting compliance with the principles of international criminal law, in respect of her stance on the ICC, following the indictment of President Uhuru Kenyatta and Vice President William Ruto of Kenya. The chapter further discusses controversies surrounding large states' approach towards the ICC, which renders inequality in the application of international criminal law.

4.2 Namibia's initial stance towards the International Criminal Court

Namibia acceded to the Rome Statute on 27 October 1998. Parliament ratified accession to the Convention in June 2002.²⁸²

Namibia's Minister of Justice during the time of acceding to the Rome Statute, Ngarikutuke Tjiiriange informed the Parliament that Namibia convened a meeting of Attorney-Generals in April 1998 to formulate a common SADC position, resulting in the adoption of a regional position on, *inter alia*, the independence of the prosecutor and the inherent jurisdiction of the ICC on the core crime.²⁸³

In a bid to convince Parliament, Minister Tjiiriange praised the ICC as an institution that will eliminate the culture of impunity. He further notified Parliament that during the time when the ICC became operational in July 2002, of the six of the 14 African countries that had ratified the Rome Statute by then, five were from the SADC region, representing more than one third of the African states that were State Parties to the Rome Statute. Minister Tjiiriange thus urged the Namibian Parliament to ratify the Rome Statute 'without delay'.²⁸⁴ Only two members of Parliament from the opposition benches participated in the debate. Nora Schimming Chase of the Congress of Democrats (CoD) underscored the importance of Namibia associating with the ICC; especially that it will address the crime of genocide, given the genocide in the Namibian history. She further called on Namibia to pay attention to the

²⁸² National Assembly, 2002, *Debates of the National Assembly*, 59, p 185.

²⁸³ *ibid.*, pp 182 – 183.

²⁸⁴ *ibid.*, p 184.

crimes against women and children in war situations. She then called for the immediate ratification of the Rome Statute. Johan De Waal of the Democratic Turnhalle Alliance (DTA) made a brief contribution of four sentences, where he just expressed support for the ratification of the Rome Statute.²⁸⁵

Namibia's ratification of the Rome Statute demonstrates her commitment to the principles of justice, which is a general principle of international law. This principle is further enshrined in the Namibian Constitution.²⁸⁶ She has thereby manifested strong support for compliance with international law.

In addition to Minister Tjiriange, Pendukeni Iivula-Ithana, who later became the Minister of Justice stated at the Conference of State Parties on the ICC in 2010 that Namibia was committed to supporting the ICC and she already cooperates with the Court.²⁸⁷

4.3 Namibia's changing posture towards contemporary international criminal law

Namibia's support to the ICC and to a certain extent complying with the principles of international criminal law, reached a paradigm shift when African states started complaining about vilifications by the Court. New pronouncements on the Court were made by Government leaders as it will be discussed below. This takes us to the problem statement on whether all states rigorously adhere to the principles of international law.

4.3.1 Namibia's policy shift towards the International Criminal Court

Following the indictment of President Uhuru Kenyatta and Vice President William Ruto of Kenya, at the Extra-Ordinary Meeting of the AU Assembly held in October 2013, the Assembly adopted a decision on the relationship between Africa and the ICC, resolving, *inter alia*:

- That to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office;

²⁸⁵ National Assembly, 2002, *Debates of the National Assembly*, 59, pp 184 – 185.

²⁸⁶ *Constitution of the Republic of Namibia*, 1990, Preamble.

²⁸⁷ Iivula-Ithana P., 2010, *Speech by the Minister of Justice at the first review conference on the ICC*, The Hague: ICC.

- (ii) That the trials of President Uhuru Kenyatta and Deputy President William Sammit Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office;
- (iii) To set up a Contact Group of the Executive Council to be led by the Chairperson of the Council, composed of five (5) Members (one (1) per region) to undertake consultations with the Members of the United Nations Security Council (UNSC), in particular, its five (5) Permanent Members with a view to engaging with the UNSC on all concerns of the AU on its relationship with the ICC, including the deferral of the Kenyan and the Sudan cases in order to obtain their feedback before the beginning of the trial on 12 November, 2013.²⁸⁸

The reasons given are that putting the President and Vice President on trial will disrupt the operations of the government. Once, they complete their terms of office, they could then be brought to the trial. Namibia, appear to have shifted completely from her earlier stance towards the ICC, as illustrated by the statement of Namibia's President, Dr Hage Geingob, which was circulated to delegates, to the AU Assembly Heads of State held in Pretoria, in June 2015, in which he called on the ICC to stay out of Kenya's domestic affairs. Geingob asserted that,

In Kenya, the people also exercised their democratic right by electing Mr. Uhuru Kenyatta and Mr. William Ruto as their President and Deputy President respectively. The Kenyan people went to the polls as a sovereign people and sat in judgement of these two gentlemen about whom much was being said. The highest court of Kenya, the people have spoken. Therefore the case is *res judicata*.²⁸⁹

Geingob further maintained that even if the ICC was created by Africans, if an asset that was created becomes an abomination, there is a right to quit, as that asset no longer serves its intended purpose.

The assertion of interference into domestic affairs was challenged by the Legal Assistance Centre (LAC), a legal organisation with a strong emphasis on human rights law, which argued that human rights law cannot be classified as domestic affairs. Human rights issues are part of international law and they are, therefore, subject to scrutiny in the international legal system.²⁹⁰ They were further challenged by Namibia's Prosecutor-General, Martha Imalwa,²⁹¹ who averred that Namibia ought to have carried out a study of what happened in Kenya before leaders started making pronouncements of interfering with Kenyan domestic

²⁸⁸ African Union, 2013, *Decision Ext/Assembly/AU/Dec.1* of the Assembly of Heads of State, adopted by on 12 October.

²⁸⁹ Geingob H., 2015, *Unpublished statement by the President of the Republic of Namibia at the AU Assembly of Heads of State*, held in Johannesburg South Africa, 14 June 2015.

²⁹⁰ Muraranganda E., 2015, "LAC saddened by ICC withdrawal", in *The Namibian Sun*, Thursday, 26 November, p 2.

²⁹¹ Imalwa M., 2015, *interview*, Windhoek, 3 December.

affairs. This study submits that the above-quoted decision of the AU Summit, on which Namibia based her stance on the ICC cases of Kenyatta and Ruto raises questions whether crimes committed by serving government leaders do not count in international law.

In November 2015, Namibia's Minister of Information and Technology, Tjekero Tweya, informed the media that the Cabinet had approved a recommendation by the SWAPO Party for Namibia to withdraw from the ICC.²⁹² Technicalities of effecting withdrawal were to be worked out. Tweya further confirmed that President Geingob lobbied his Tanzanian counterpart, President Jakaya Kikwete, during his visit to Tanzania in October 2015. Withdrawals from the afore-said international Convention is provided for in the Convention. But when a withdrawal from an international convention is motivated by failure to comply with international law (either by the party withdrawing or in sympathy with other parties), it is propounded that this illustrates manoeuvre not to comply with international law.²⁹³

Following the announcement of Namibia's possible withdraw from the ICC, the LAC expressed concern over Namibia's decision to withdraw from the ICC, stating that in order to make meaningful change to the ICC perceptions, Namibia should remain a state party to the Rome Statute and suggest changes, while continuing to fight impunity.²⁹⁴ In order to fully understand the dynamics of international criminal law in respect of the case of President Kenyatta and Vice President Ruto, the following section discusses the background to their indictment.

4.3.2 Background to the case of Kenyan leaders at the International Criminal Court

Following the announcement of the Kenyan presidential elections held in 2007, violence erupted for the period of December 2007 to January 2008. Subsequent to that, the African Union appointed the Panel of Eminent African Personalities to mediate in the conflict. The mediators, led by former United Nations Secretary-General, Kofi Annan, included Benjamin Mkapa, former President of Tanzania and Graca Machel, former First Lady of Mozambique and of South Africa, then a Member of the African Peer Review Mechanism responsible for

²⁹² Shinoovene I., 2015, "Cabinet affirms ICC withdrawal", in *The Namibian*, Tuesday, 24 November, pp 1 – 2.

²⁹³ Koplou D.A., 2013, "Indisputable violation, what happens when the United States unambiguously breaches a treaty? ", in *The Fletcher Forum of World Affairs*, 37 (1), pp 53 – 74, at p 63.

²⁹⁴ Muraranganda (2015: 2).

Kenya. The process of Kenya National Dialogue and Reconciliation (KNDR) ensued, where the Panel engaged the parties to the violence resulting in an agreement with stakeholders to end violence. In terms of the agreement, a Commission of Inquiry into Post-Election Violence (CIPEV) was instituted, headed by Justice Phillip Waki from the Kenyan Judiciary. Other members were, Gavin MacFayden, a security service expert from Australia and Pascale Kambale, a human rights specialist from Congo. Justice Waki was considered acceptable to both the AU and the main stakeholders in the KNDR process, the Orange Democratic Movement (ODM) and the Party of National Unity (PNU). The Executive Director of the Kenyan Section of the International Commission of Jurists, George Kogoro, served as the secretary of CIPEV.²⁹⁵

Having read documented cases of violence compiled by academics and various institutions, including the United Nations High Commission for Human Rights (UNHCHR), and having compiled evidence from victims and witnesses through both open and closed hearings, CIPEV recommended the establishment of a Special Tribunal to try persons that were believed to have been involved in the organisation and execution of violence, failure to which the matter should be brought before the ICC. CIPEV handed the full report and the envelope containing the names of persons that were deemed responsible for post-election violence to the AU Panel of Experts and a report to the Kenyan government without the envelope of the responsible perpetrators. In 2009, the Government sought to legislate the creation of the Special Tribunal, but a draft Bill to establish the Special Tribunal was voted down in the Parliament, as it was opposed by parliamentarians from both PNU and ODM, amidst beliefs that the local judicial establishment could not be trusted to be impartial. Parliament was aware of the alternative remedy, the ICC.²⁹⁶

Bassiouni²⁹⁷ contends that individuals, national or international commissions appointed to collect evidence, or conduct enquiries provide the basis for prosecution and documenting non-compliance with international law. Accordingly, defeating a legislation which came as a result of collecting evidence on post-election violence, which included violation of

²⁹⁵ Wanyeki L. M., 2012, “The International Criminal Court’s cases in Kenya, origin and impact”, in *Institute for Security Studies* (237), pp 4 – 7.

²⁹⁶ Wanyeki (2002: 8 – 9).

²⁹⁷ Bassiouni, at p 399.

international law, has a negative impact on the effectiveness of international law application and compliance thereof.

The failure of Kenya to establish the Special Tribunal triggered Kofi Annan to pass the names of the prime suspects for fuelling violence to the ICC, in July 2009, for investigation. Subsequently, the ICC Prosecutor announced in November 2009 that he would seek permission from the pre-trial chamber to open an investigation and this was granted. The Office of the ICC Prosecutor (OTP) engaged the Kenyan government which sent delegations to The Hague and later the OTP visited Kenya and held talks with the President and the Prime Minister. The Kenyan government gave assurance that it would cooperate with the ICC in pursuing criminal accountability.²⁹⁸

President Uhuru Kenyatta and Deputy President William Ruto were indicted for crimes against humanity such as murder, forcible transfer of populations, rape, persecution and other inhumane acts.²⁹⁹ It was alleged that there were attacks primarily targeting the non-Kalenjin community especially from the Kikuyu, Kisii and Luhya ethnic communities who were predominantly supporters of PNU. This was followed by retaliatory attacks against the non-Kikuyu communities from the Kalenjin, Luo and Luhya ethnic groups.³⁰⁰

It is further alleged that from the end of December 2007 to the end of January 2008, Ruto, then a Member of Parliament, together with other leaders of the Orange Democratic Movement committed or contributed to the commission of crimes against humanity by way of murders, deportation or forcible transfer of population in the areas including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya, acts which violates articles 7(1)(a) and 25(3)(a) of the Rome Statute. They further contributed to the targeted civilians who were not politically affiliated to their political party.³⁰¹

²⁹⁸ Wanyeki (2002: 10).

²⁹⁹ *ibid.*, p 6; Human Rights Watch, 2003, *The ICC's trial of Kenya's Deputy President*, available online at <http://www.hrw.org/news/2013/09/09/kenya-deputy-president-s-trial-icc>, last accessed on 16 March 2017, p 1.

³⁰⁰ *Situation in the Republic of Kenya*, International Criminal Court, CC-01/09, at para 111 – 113.

³⁰¹ *Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, No. ICC-01/09-01/11, at pp 10 – 12, para 22.

Ruto was charged together with Joshua Arap Sang, a radio host on the Eldoret-based, Kass FM, who allegedly helped to coordinate attacks by disseminating coded messages through his broadcasts.³⁰²

The ICC Prosecutor submitted to the Pre Trial II Chamber that there were organised crimes organised and instigated by leaders of PNU and ODM, with PNU leaders using government institutions to carry our crimes.³⁰³

It was further alleged that President Kenyatta, then an opposition parliamentarian, with other leaders of the Kenya African National Union (KANU) had committed or contributed to the commission of crimes against humanity, including the deportation and forcible removal, murder of civilian supporters of the ODM in the areas covering Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province). Such acts are not in compliance with international law as provided in articles 7(1)(a) and 25(3)(a) of the Rome Statute. Further crimes that they contributed to include rape and other forms of sexual violence, inflicting sufferings and injuries to ODM supporters in the aforesaid areas.³⁰⁴

At the hearing on the above-cases, Justice Trendafilova held that there was substantial ground to believe that Kenyatta and Ruto were criminally responsible for the crimes alleged.³⁰⁵ Accordingly, he committed them to a trial. The case was finally closed with the acquittal of the accused, amidst complains by the ICC Prosecutor of intimidations of witnesses, and Kenyan government's lack of cooperation with the ICC, illustrated by, among others, failure to provide important records pertaining to the case.³⁰⁶ By then Uhuru Kenyatta was the President of Kenya, while William Ruto was the Vice President.

³⁰² Human Rights Watch, 2003, *The ICC's trial of Kenya's Deputy President*, available online at <http://www.hrw.org/news/2013/09/09/kenya-deputy-president-s-trial-icc>, last accessed on 16 March 2017, p 1.

³⁰³ *Situation in the Republic of Kenya*, International Criminal Court, CC-01/09, at para 116, 119, 124.

³⁰⁴ *Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, at pp 11 – 14, para 21.

³⁰⁵ *Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, No. ICC-01/09-01/11, at pp 136, para 366; *Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, at p 152, para 428.

³⁰⁶ International Criminal Court, 2014, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the status of the Government of Kenya's cooperation with the Prosecution's investigations in the Kenyatta case*, 04 December, The Hague: International Criminal Court.

4.3.3 An assessment of Namibia's shifting approach to the International Criminal Court and the question of supporting principles of international law

The aforementioned statement by President Geingob and a decision by the Namibian government to withdraw from the ICC, however, reflect a sharp contrast to Namibia's position stated earlier. There is, thus, an element of inconsistency in Namibia's stance the ICC, which manifests manoeuvres in compliance with international law.³⁰⁷

From the above statement of President Geingob, questions of promoting and adhering to the values enshrined in the Namibian Constitution about the rule of law, and the principle of fighting impunity that was underscored when Namibia ratified the Rome Statute in 2002 arise. It is further peculiar that President Geingob lobbied President Kikwete for Tanzania's withdrawal from the ICC at the end of his presidential tenure (President Kikwete), when he was left with a period of less than a month in the office.

Meanwhile, peer discussions reveal that critics of the Namibian government decision to withdraw from the ICC find it interesting that Namibia is at the fore front of championing the cause of Kenya in international criminal law, the same country that opposes Namibia in international economic law, with regard to the sale of the ivory stock. Kenya has been at the forefront of lobbying for the imposition of the 20 year moratorium for the sale of ivory at the meetings of the State Parties to the Convention on International Trade of Endangered Species (CITES). Namibia, together with her neighbours, Botswana and South Africa have applied at several Conferences of State Parties to the CITES to be allowed a once-off sale of her stock.³⁰⁸

Namibia's inconsistency on the approach to international law in respect of the ICC is similar to that of a large state, South Africa. In June 2015, South Africa hosted the AU's Assembly of Heads of States that was attended by the President of Sudan Al-Bashir, whom the ICC issued with a warrant of arrest. South African civil society lodged an application with the South African High Court seeking a ruling that would give an effect to the warrant. The

³⁰⁷ Keppler E., 2011, "Managing setbacks for the International Criminal Court in Africa", in *Journal of African Law*: 1 – 14, p 8.

³⁰⁸ Shigwedha A., 2007, "Africa divided on resumption of ivory trade", in *The Namibian*, 5 March 2007.

Court held for the applicants. Meanwhile, the South African government allowed a safe passage to President Al-Bashir to leave South Africa, prior to the Court delivering its judgement. Subsequently, South Africa stated that it was considering withdrawing from the ICC.³⁰⁹ However, in 2010, the African National Congress (ANC), South Africa's ruling party stated that it supports the South African government position pronounced in 2009, that it will cooperate with the ICC to arrest Al-Bashir. Similarly, when President Al-Bashir was invited to attend the inauguration of President Jacob Zuma in 2009, the question of South Africa's obligation to international law arose, in particular whether Al-Bashir would be arrested. The South African Government stated that it was under obligation to uphold international law, resulting in Al-Bashir not attending the inauguration. The U-turn that the South African government made in 2015 thus reflects an inconsistent approach on the issue.

It is important to note that while large states opted out of the ICC, they did not spearhead its establishment to malign small states. It was actually small states, especially Trinidad and Tobago that pushed for the creation of the ICC, popularising the notion within the UN.³¹⁰ Given small states' inclination to support international law, they were possibly of a view that the establishment of a permanent international criminal tribunal would save them from the impunity of leaders of large states. This is further confirmed by Engle,³¹¹ when she stated that the creation of international criminal courts was necessitated by the failure of states to deal with human rights abuses. Accordingly, it was felt that human rights are effectively protected when there is an international judicial institution to hold perpetrators accountable.

Further, contrary to general remarks by some African leaders that the ICC was established to try Africans, Africans supported the process of establishing the ICC, with Senegal being the first country in the world to ratify the Rome Statute.³¹² In addition, SADC member-states, too, played an important role in the creation of the ICC, adopting a common statement that was the basis of the negotiations of the Rome Statute. Their position was the SADC principles that they adopted in 1993, stipulating, among others that:

- The court should have jurisdiction over crimes of genocide, crimes against humanity and war crimes.

³⁰⁹ Runsewe O., 2015, "South Africa's withdrawal from the ICC: what it means for other African countries", in *Venture Africa*, 13 October.

³¹⁰ Braveboy-Wagner (2008: 157).

³¹¹ Engle K., 2015, "Anti-impunity and the turn to criminal law in human rights", in *Cornell Law Review*, Vol. 100, pp 1069 – 1128, pp 1070; 1079.

³¹² Du Plessis M., 2010, *The International Criminal Court that Africa wants*, Pretoria: Institute for Security Studies, p 11.

- The Prosecutor should be independent and be able to initiate prosecutions *proprio motu*.
- There should be cooperation with the court by all states during all states of proceedings.
- Sufficient funds should be provided to the Court and states should be proscribed from making reservations to the statute.³¹³

Minister Tjiriange underscored in Parliament that SADC played a significant role at the Rome Conference that resulted in the adoption of the Rome Statute. He stated that when countries divided among themselves the responsibilities of coordination of regional positions on the ICC, in Africa, the coordination was done by four SADC member-states. In Minister Tjiriange's words, the ICC represents significant progress in criminal justice and it will bring to an end the culture of impunity.³¹⁴

SADC remained quiet on their initial role in the establishment of the ICC vis-à-vis the current AU position on the ICC. Furthermore, it contributed to the current controversies of inequality, when it recommended that no reservation should be entered, thereby leaving most of the states tied in the ICC jurisdiction, whereas this jurisdiction is not applicable to large states as stated above. It was not large states that made these recommendations and this defeats accusations of a court established against Africans and its small states. Reservations allow states, both large and small a choice of being tied under a jurisdiction. An example is Rwanda's reservation to the Convention on Genocide that when the Democratic Republic of Congo (DRC) instituted proceedings against Rwanda for the violation of human rights, citing provisions of article six of the Convention, Rwanda's defence was that it had entered a reservation in its instruments of accession.³¹⁵

It is further important to note that most of the ICC cases involving Africans were referred to the Court by African governments. Table 4 on the next page shows the referral of eight cases involving Africans that have been referred to the ICC.

³¹³ Du Plessis (2010: 7).

³¹⁴ National Assembly, 2002, *Debates of the National Assembly*, 59, pp 182 183.

³¹⁵ Eckart C., 2012, *Promises of states under international law*, Portland: Hart Publishing: at p 169.

Table 4: African cases before the ICC

Situation	Referred by and date	Cases
Situation on the Central African Republic	A letter sent on behalf of the government of the Central African Republic on 1 July 2005	(i) <i>The Prosecutor v Jean Pierre Bemba Gombo</i>
Situation in the Democratic Republic of Congo	A letter signed by President Joseph Kabila of the Democratic Republic of Congo, dated 19 April 2004	(i) <i>The Prosecutor vs Thomas Lubanga Dvilo</i> (ii) <i>The Prosecutor vs Bosco Ntaganda</i> (iii) <i>The Prosecutor v Germain Katanga</i> (iv) <i>The Prosecutor v Mathieu Ngudjolo</i> (v) <i>The Prosecutor v Calixte Mbarushimana</i> (vi) <i>The Prosecutor v Sylvestre Mudacumura</i>
Situation in Côte d'Ivoire	Pre-trial Chamber III took decision on 22 February 2012, pursuant to the request by the Prosecutor	(i) <i>The Prosecutor v Simone Gbagbo</i> (ii) <i>The Prosecutor v Laurent Gbagbo and Charles Blé Goudé</i>
Situation in the Republic of Kenya	Pre-trial Chamber II issued its decision on 31 March 2010, authorizing the Prosecutor to commence an investigation into crimes against humanity within the jurisdiction of the Court committed in Kenya between 1 June 2005 and 26 November 2009	(i) <i>The Prosecutor v Uhuru Kenyatta</i> (ii) <i>The Prosecutor v Williams Ruto</i>
Situation in Libya	Referred by Resolution 1970 of 2005 of the UN Security Council, adopted on 26 February 2011	(i) <i>The Prosecutor v. Saif Al-Islam Gaddafi</i>
Situation in Sudan	Referred by Resolution 1593 of 2005 of the UN Security Council, adopted on 1 March 2005	(i) <i>The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")</i> (ii) <i>The Prosecutor v Omar Hassan Ahmad Al Bashir</i> (iii) <i>The Prosecutor v. Bahar Idriss Abu Garda</i> (iv) <i>The Prosecutor v. Abdallah Banda Abakaer Nourain</i> (v) <i>The Prosecutor v. Abdel Raheem Muhammad Hussein</i>
Situation in Mali	Referred by a letter by Malick Coulibay, Minister of Justice of Mali, dated 13 July 2012	<i>The Prosecutor v. Ahmad Al Faqi Al Mahdi</i>
Situation in Uganda	Referred by President Yoweri Museveni of Uganda in December 2003	(i) <i>The Prosecutor v Joseph Kony and Vincent Otti</i> (ii) <i>The Prosecutor v Dominic Ongwen</i>

Sources: ICC (2015)

The information in table 4 largely illustrates Africans referring Africans to the ICC, with only two cases referred to by the UN.

Wanyeki³¹⁶ writes that the post-election violence in Kenya impacted negatively on the victims that some could not return to the Rift Valley in fear of further persecutions. Those that have been displaced lost their means of survival. There is a further question of those that lost lives. Namibia, just like the AU had failed to pronounce herself on the issue of victims. It

³¹⁶ Wanyeki (2012: 16).

is further important for African leaders to pay attention to the plight of fellow Africans whose rights have been violated, rather than defending actions committed by persons whose behaviour clearly contradicts principles enshrined in the respective constitutions of African states, especially with regards to obligations to international law.³¹⁷ It raises a question whether Namibia disregards and therefore supports non-compliance with the international law principle of the right to life, and whether it is only wrong when an ordinary person murders another person while it is right when a leader is responsible for the massacre of many people. It is not being argued that Namibia's stance is anchored in a specific legal principle, but it appears that the matter is grounded in political considerations of solidarity. In essence, this manifests a selective justice approach to international law.

The Namibian Supreme Court has cautioned about the importance of striking a balance between the accused and the victims of crime. In the Case of *Attorney General vs Minister of Justice and Others*,³¹⁸ the Court held that:

[T]he requirements [of fair trial] depend on the circumstances of each particular case, and does not only involve the rights and interests of the accused but also those of the State representing the interests of society in general as well as those of the victims of crime in particular. The public and victims of crime, not accused persons only are also entitled to appreciate that trial proceedings in a court of law are fair, and that their interests are taken into account in the determination of punishment.

Similarly, in the case of *Marguš v Croatia*,³¹⁹ the European Court of Human Rights underscored the importance of investigating and prosecuting perpetrators of crime, for the victims or their relatives to know the truth about what transpired when their rights were violated. Turning a blind eye to this obligation promotes injustice and arbitrariness and, therefore, has no legal effect.

For example, former President of Burundi, Pierre Buyoya, though he criticised the ICC for 'targeting Africans', he at the same time made it clear that leaders should be held accountable for their misdeeds. Buyoya averred that:

We need to make clear that we are against impunity, even impunity of heads of state or people in leadership. If then we give the impression that we are against the ICC because we want to protect ourselves it will be a wrong move.³²⁰

³¹⁷ Rukoro V., 2015, *interview*, 17 September, Windhoek.

³¹⁸ 2013 (3) NR 806 (SC), at p 818 E.

³¹⁹ Application No. 4455/10, 27 May 2014, at para 226.

³²⁰ Beukes J., 2015, ICC 'misled Africa' – Pierre Buyoya, *The Namibian Sun*, p 3.

The sentiments expressed by President Buyoya are not reflected in the sentiments expressed by other African and Namibian leaders. The issue of accountability and the rule of law are very fundamental to the Namibian Constitution. Thus, it is imperative that Namibia's approach to the ICC should underscore these values and make it clear that the country was not condoning the disregard of international law by people in power. Buyoya, on the other hand maintained that non-accountable leaders should be brought under the framework of law, like the former President of Chad, Hissène Habré, who has been tried in the Dakar Special Regional Court.³²¹

Namibia's position towards international criminal law appears to be disregarding the importance of accountability, that leaders in power should be accountable to law. The principle of accountability is underscored in international law. Koskenniemi maintains that:

The universalisation of the Rule of Law calls for the realisation of criminal responsibility in the international as in the domestic sphere...there should be no outside-of-law: everyone regardless of place of activity or formal position, should be accountable for their deeds.³²²

When the rule of law is suspended out of political considerations, it manifests a presumptive departure from the rule of law. It relieves persons who fall within the ambit of law from the sanctions of law. The suspension of law and failure to hold crime perpetrators accountable results in double injustice, namely the injustice of the act that has been committed and the injustice of failure to punish such act of crime.³²³

In the case of *Azanian People's Organisation (AZAPO) and Others v President of the Republic of South Africa*,³²⁴ Justice Mahomed averred that:

Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity.

The learned judge further maintained that it was understandable when applicants call for those who were criminally liable for gross human rights abuses to be held accountable and

³²¹ Beukes (2015: 3).

³²² Koskenniemi M., 2002, "Between impunity and show trials", in Frowein J. A. and Wolfrum R. (eds.), *Max Planck Year Book of United Nations Law*, Vol. 6, pp 1 – 35, at p 2.

³²³ Pensky M., 2008, "Amnesty on trial: impunity, accountability, and the norms of international law", in *Ethics and Global Politics*, Vol. 1, No. 1– 2, pp 1 – 40, at pp 8 – 9.

³²⁴ 1996 (4) SA 671, at p 683, para 17.

why they could not identify themselves with any concession that was to be made in favour of the perpetrators of crime.³²⁵

The AU did not address the merits and demerits of the trial of the Kenyan leaders before the ICC. For example, the Pre-Trial Court considered the questions of whether it should try the persons it received from the Chairperson of the Panel of AU Experts. The Chamber considered the following questions:

- Whether the Court has jurisdiction to try Kenyans.
- Whether the alleged crime was admissible before the ICC, and
- Whether Kenya was able to deal with the matter before her courts (the principle of complementarity provided in the Rome Statute).³²⁶

The Pre-Trial Chamber established that the Court had jurisdiction, as Kenya had ratified the Rome Statute prior to the violence. It also held that the acts had reached the threshold stated in article 7 of the Rome Statute as constituting elements of crime against humanity. The Court further held that the unwillingness of Kenya to prosecute the perpetrators, including failure by the Parliament to pass the bill establishing the Special Tribunal was an indication that Kenya was unable to deal with the matter within her domestic judicial system.

Looking at the process leading to the establishment of the ICC, especially the role played by Namibia and SADC, and the defeat of a legislation that sought to provide for domestic remedy to the crimes against humanity committed in Kenya, it is arguable that assertions that the ICC was established to vilify Africans, manifest a schizophrenic approach to international law. The then Namibian Minister of Justice, Pendukeni Iivula-Ithana cautioned at the First Review Conference of the ICC that ICC perceptions could be avoided when national legislations succeed to locally institute credible legal processes and institutions that will deal with the violation of international criminal law.³²⁷

Further, there are double-standards and a manifestation of selective justice that the same African Union had a different approach to the case of former President of Chad, Hissène

³²⁵ In this case perpetrators of crime were granted amnesty, as the acts that they committed were during a different period in the history of South Africa. Amnesty was needed for implementing reconciliation in a new dispensation. The circumstances under which crimes were committed in South Africa before 1994 democratic elections are different from the act committed in independent and democratic states and hence Justice Mahomed laid a principle stated above.

³²⁶ Wanyeki (2012: 4).

³²⁷ Iivula-Ithana P., 2010, *Speech by the Minister of Justice at the First Review Conference for the ICC*, The Hague: ICC.

Habré. In the year 2011, the AU Assembly Heads of State underscored its commitment to fight impunity, in terms of the principles enshrined in the AU's Constitutive Act in respect of the case of Hissène Habré. It is arguable that these principles appear to have been relaxed when it comes to the issue of Kenya.³²⁸

The assertion by President Geingob that election results serve as the judicial verdict of President Kenyatta and Deputy President Ruto, and the matter is, therefore, *res judicata*, is not a substantive proposition in law.

The doctrine of *res judicata* is a term used to refer to a final adjudication by a judicial body that has competence in the cause.³²⁹ Accordingly, the matter is settled that it cannot be decided on by another judicial body, as the presumption is that the final judgement is correct. The doctrine has been adopted as the prevention of litigation in a matter that has been decided judiciously, as public policy requires that litigations should not be instituted on given causes endlessly.³³⁰ In this case, defendants are protected from defending themselves twice on a matter that has already been decided in a court of law. The purpose of the doctrine is to avoid different decisions for one case. The doctrine of *res judicata* has been adopted in international law. Schaffstein³³¹ cites examples of cases in public international law where the principle of *res judicata* was adopted, namely *Société Commerciale de Belgique (Belgium v Greece)*³³² in the PICJ, *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*,³³³ in the ICJ and *France v Parliament*,³³⁴ in the ECJ.

President Geingob's *res judicata* assertion could only pass the test if there was a judicial enquiry process that was brought to acquittal or conviction, and questions whether crime was committed have been considered,³³⁵ and a decision taken on merit.³³⁶

³²⁸ African Union, 2011, *Decision of the Hissène Habré case*.

³²⁹ Williams E. H., 1950, "Res judicata in recent cases" in *Modern Law Review*, 13 (3), pp 307 – 317.

³³⁰ Harms L. T. C., 2009, *Amler's precedents of pleadings*, (7th ed.), Durban: LexisNexis, p 341.

³³¹ Schaffstein S., 2012, *The doctrine of res judicata in international tribunal awards*, a PhD thesis submitted at the University of Geneva, p 74.

³³² 15 June 1939, Ser. A/B., No. 78.

³³³ 2002, ICJ Reports, 303.

³³⁴ Cases 358/85 and 51/86, 1988 ECR, 4821.

³³⁵ *Marguš v. Croatia*, Application No. 4455/10, 27 May 2014, at para 5, 7 and 102.

³³⁶ Schaffstein (2012: 17).

The issue of popularity and being elected into office should not overshadow accountability to law. Even in Namibia, popularly elected leaders, when they become subjects of criminal law are held accountable, without using their elections as a *res judicata* issue. When popularity becomes a leeway to exoneration from accountability to law, this could possibly result in a situation when people who are guilty of impunity make their headways into politics so that they can be elected to highest offices and escape from accountability to law. It defeats the general principles of international law, of justice and equality before the law. The President's assertion is an immersion of politics into international law and manifest a manoeuvre of compliance with international law, in the branch of international criminal law.

President Geingob's assertion is, arguably, a juxtaposition of politics into law. It raises a question whether anyone who has legal proceedings to face and becomes popularly elected by the people can evade a legal process, as the election results would serve as a verdict. Namibia's approach to international law should be that the law should take its course. This is what happened when the ICC investigated the matter and withdrew charges against President Kenyatta and Deputy President Ruto, because of insufficient evidence, rather than because of them having been elected to the highest offices in Kenya. It is important to note that President Geingob has expressed views on non-culpability of President Kenyatta and Vice President Ruto, while the matter was still *pre judice*.

The International Law Commission's Articles of State Responsibility states that:

The characterisation of an act of a state as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.³³⁷

The afore-said principle, which was further adopted in the International Centre for Settlement of Investment Disputes (ICSID)'s case of *Compania de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie generale des eaux) v. Argentine Republic*,³³⁸ when adopted in respect of the wrongful act committed by individuals in international criminal law will, accordingly, render such wrongful acts not in conformity with international law, when so a court of law so establishes. In this respect, the Namibian President's statements on non-culpability before the ICC had pronounced itself on the case, arguably illustrates condoning of non-compliance with international law.

³³⁷ *Responsibility of States for Internationally Wrongful Acts*, 2012, article 3.

³³⁸ ICSID, *Ad Hoc Committee, Compania de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie generale des eaux) v. Argentine Republic*, Case No. ARB/97/3.

Referring to countries that adopt international domestic amnesties for crimes in international criminal law, Pensky³³⁹ maintains that the unwillingness to prosecute crimes is in itself a violation of the anti-impunity legal norm. It is even a worse violation when some amnesties shield perpetrators from the legal consequences of their actions.

In addressing the unfairness of the ICC, states should focus on the uneven application of international law to weaker states, compared to powerful states and their allies and compliance with international law thereof, rather than curtailing accountability of the perpetrators of crime.³⁴⁰ To have a strong legal basis, Namibia could argue against the Court being used as an instrument of legal retribution, as opposed to accountability to law.³⁴¹ In arguing the case of African leaders before the ICC, Namibia should guard against what is termed as self-serving claims of untouchability in respect of crimes committed by persons in power.³⁴²

In the case of *Marguš v Croatia*,³⁴³ it was averred that in international law, there is not only an obligation on states to prevent human rights violations, but there is further an obligation to prosecute and punish offenders. The Court underscored the *Declaration and Program of Action* of the World Conference on Human Rights held in Vienna in 1993, calling upon states to detract from legislation that favours those who violate human rights.

The UN Commission on Human Rights has recommended that there should be no attempts to exempt perpetrators of crime from their legal responsibility. Such persons should appear before justice. The European Court of Human Rights adopted this principle and held that any move to prevent investigations and punishments of such crimes should be prohibited.³⁴⁴

It could be discerned from the contributions made in the Namibian Parliament during the ratification of the Rome Statute that there was a general consensus on the need to ratify it. However, there is disagreement on the issue of withdrawal from the Rome Statute as

³³⁹ Pensky (2008: 2; 6).

³⁴⁰ Keppler (2011: 7).

³⁴¹ Pensky (2008: 2).

³⁴² *ibid.*, p 11.

³⁴³ Application No. 4455/10, 27 May 2014, at para 189 and 202.

³⁴⁴ *Marguš v Croatia*, Application No. 4455/10, 27 May 2014, at para 189 and 202.

illustrated by the expressions by some leaders cited above. There is further disagreements from other quarters of the Namibian society. For example, The LAC, a legal NGO that has stood for human rights and social justice in pre- and post-independent Namibia was displeased by the Government's decisions to withdraw from the ICC. It argues that when Namibia joined the ICC, it showed her commitment to accountability and stood for the rights of those who suffer human rights abuses from persons entrusted with the responsibility of guaranteeing such rights.³⁴⁵

Iivula-Ithana³⁴⁶ maintains that when Namibia accedes to international agreements, she must respect those agreements. She acknowledges that there are problems with the ICC, but withdrawal means that Namibia goes against her principles which she upheld when she acceded to the ICC. Similarly, Rukoro³⁴⁷ argues that the Government's approach to the ICC should be based on principles, rather than determined by solidarity with countries perceived to be at the receiving end of the ICC. He maintains that Namibia should have long-term considerations and safeguard her reputation in international law. He further acknowledges that there are problems with the ICC procedures, but they do not necessarily warrant withdrawal. He further stated that it is important to note that persons who have been convicted by the ICC were convicted on the basis of law. The absence of arbitrary decisions makes the Court a credible adjudicator of cases.³⁴⁸

Namibia's Prosecutor-General, Martha Imalwa,³⁴⁹ expressed concern whether withdrawing from the jurisdiction of the ICC is a right decision. The reasons advanced by Namibia and the AU at large reflect a position of leaders protecting each other, thereby manifesting a selective justice approach to international law. She maintained that it is common for Africa to adopt such approaches. For example, in South Africa, when the investigations of the Scorpion, a specialised arm of the prosecution authority, included senior leaders, the government disbanded the unit. Similarly, in Zambia, the Director of Public Prosecution was put on suspension when he was about to investigate a leader. The withdrawal from the ICC thus leaves a vacuum in the absence of referral by the UN Security Council, of how people who

³⁴⁵ Asino T., 2015, "LAC saddened by Namibia's withdrawal from ICC", in *New Era*, p 6.

³⁴⁶ Iivula-Ithana P., 2015, *interview*, 2 September, Windhoek.

³⁴⁷ Rukoro V., 2015, *interview*, 17 October, Windhoek.

³⁴⁸ *ibid.*

³⁴⁹ Imalwa M., 2015, *interview*, 3 December, Windhoek.

violate international criminal law will be held accountable by a legal system that is seen as credible by their victims.

Meanwhile, another small state, Botswana, has been consistent in her approach to international law in respect of the ICC. Keppler³⁵⁰ writes that when a decision was taken at the AU's Assembly of Heads of State of July 2010 calling for non-cooperation with the ICC and criticising the conduct of the ICC Prosecutor, Botswana affirmed her adherence to the principle of respecting international law. Botswana maintained that she cannot be a party to decisions that advocate the disregard of her obligations to international law.

Five out of eight cases involving Africans were referred to the ICC by African governments and personalities – like the case of Kenya where the Prosecutor merely acted on the report handed to him by the leader of the Eminent Panel established by the AU.

The sentiments expressed against the ICC by African leaders is similar to the one expressed by the German political and church leaders during the Nuremberg trials that were held after the Second World War (WWII).³⁵¹ They criticised the injustice of the trials. However, the two international judicial bodies are different in the sense that the Nuremberg Court was established by the Allied Powers for the vanquished Central Powers, whereas the ICC was established by the international community, including African states.

It is common for African states, whether large or small to practice victors' justice syndrome. The Governments of the Central African Republic, DRC, Mali and Uganda have referred cases to the ICC, involving persons not in government power but Uganda in particular has become vocal against the indictment of sitting Heads of State.³⁵² The Ugandan government further referred the situation of the Lord's Resistance Army (LRA) to the ICC in December 2003, whereas as a matter of fact, the Ugandan armed forces have been accused of human rights abuses.³⁵³ Namibia has not complained to fellow African governments about the referrals of the cases to the ICC during the time of referral, but currently complains about the

³⁵⁰ Keppler (2011: 1 – 2).

³⁵¹ Koskenniemi (2002: 6).

³⁵² Du Plessis, Maluwa and O'Reilly (2013: 3).

³⁵³ Bagamwabo F. X., 2009, "The implementation of international and regional human rights instruments in the Namibian legal framework", in Horn N. and Bösl A. (Eds.), *Human rights and the rule of law in Namibia*, pp 165 – 186, p 170.

ICC targeting Africans, thereby clouding her stance on international law in this respect, shrouded in contradictions and manifesting a selective justice approach to international law.

A Namibian academic, Joseph Diescho³⁵⁴ argues that withdrawing from the ICC will raise perceptions that Namibia did not apply full consideration before joining the ICC. When Namibia ratified the Rome Statute, it demonstrated commitment to adherence to international law. It is, thus, arguable that calls to withdraw portray an image of inconsistency in Namibia's support of compliance with international law. Walters³⁵⁵ propounds that Namibia should respect the treaties that she signed, as stipulated in the constitutional principle of respect of international law and treaty obligations.³⁵⁶

Namibia's stance on the issue of Kenya manifests selective justice as there are a number of cases involving Africans where she does not comment. Most of the cases involving Africans were referred to the ICC by African governments, thereby making assertions that the Court was created for and only targets Africans rebuttable. Further, former Justice Minister Iivula-Ithana did not agree on the assertions that the Court was targeting Africans. During the First Review Conference for the ICC held in Kampala, Uganda, 2010, she acknowledged that the Court also deals with other cases, and instead advised that the analysis and decisions of the Prosecutor on non-African situations must be made known in order to dispel perceptions of the Court targeting Africans.³⁵⁷

The trend of selectively protecting some persons indicted by the ICC, while leaving others to face the law is inappropriate, not only because of its victor's justice controversy, but also because it goes against the provisions of the Namibian Constitution that all people are equal before the law.³⁵⁸ It further goes against the provisions of the Universal Declaration of Human Rights that: "All are equal before the law and are entitled without any discrimination to equal protection of the law".³⁵⁹ It leaves questions unanswered as to what happened to the principle of no impunity that Minister Tjiriange underscored in Parliament as stated above.

³⁵⁴ Diescho, 2015, *interview*, 31 August, Windhoek.

³⁵⁵ Walters J., 2015, *interview*, 31 August, Windhoek

³⁵⁶ *ibid.*; *Constitution of the Republic of Namibia*, 1990, article 96.

³⁵⁷ Iivula-Ithana P., 2010, *Speech by the Minister of Justice at the First Review Conference for the ICC*, The Hague: ICC.

³⁵⁸ *Constitution of the Republic of Namibia*, 1990, article 7.

³⁵⁹ United Nations, 1948, *Universal Declaration of Human Rights*, New York: United Nations.

Imalwa³⁶⁰ advocates that as a product of international law, Namibia should be at the forefront of promoting international law, rather than being seen undermining it. Therefore, this study propounds that as a country whose constitution is praised for underscoring the rule of law that is important an element of international law, Namibia should be exemplary and demonstrate adherence to her constitutional values and principles of international law. Accordingly, she should remain party to international institutions that enforce international law.

Former Chief Legal Officer in the Office of the Attorney-General, Festus Mbandeka,³⁶¹ maintains that contradictions arise as Namibia has participated fully in the process leading to the adoption of the Rome Statute. Namibia should guard against creating a perception that she supports the violation of international criminal law by leaders in power. The underlying human rights issues covered by cases before the ICC call for the court to show its presence and that of international law in redressing the acts of crime committed. Namibia acceded to the Rome Statute on October 27, 1998 and following ratification by the Parliament, Namibia deposited its instrument of ratification on 25 June 2002.

As a matter of fact, withdrawal from the ICC will not help countries to evade the reach of international criminal law. The Rome Statute provides that cases could be referred by the UN Security Council. This is what happened in the case of President Al-Bashir of Sudan as he was indicted although Sudan has not ratified the Rome Statute. It is further important to note that critics of the ICC resorted to attacking the court, without even making a formal complaint to the Court about its procedures, or appealing against court procedures as provided for in the Rome Statute, thereby manifesting disregard of provisions of international law.³⁶²

Namibia's rigorous adherence to international law which she maintained since her independence thus becomes overshadowed by controversy of ignoring fundamentals of international law related to human rights protection. There is no consideration of humanity

³⁶⁰ Imalwa M., 2015, *interview*, Windhoek, 3 December.

³⁶¹ Mbandeka F., 2015, *interview*, 23 October, Windhoek.

³⁶² *Rome Statute of the International Criminal Court*, 1998, articles 81 and 83.

and ICC critics merely hide behind accusations of the ICC being imperialist and neo-colonialist.³⁶³

4.3.4 The controversy of sovereign inequality in the application of international criminal law and compliance with thereof

Selective justice in the application of international criminal law is further illustrated by the fact that as a permanent member of the UN Security Council, the US has voted in favour of resolutions referring cases to the ICC, but she passed the America Service Members' Protection Act (ASPA), providing for non-cooperation with the ICC if the US has not ratified the Rome Statute. The Act further empowers the US to use all possible means to free any US national held by any state on behalf of the ICC.³⁶⁴ This means that as a large state, the US will flex its muscles to protect her citizens from the applications of international law, thereby rendering its application unequal.

The enactment by the US of a law to protect her citizens from the ICC, when knowing that the jurisdiction of the court covers the UN member-states who may not be state parties to the Rome Statutes, may be assessed in the context of the general principle of international law stated by the PICJ in the *Greco-Bulgarian "Communities"*, *Advisory Opinion*,³⁶⁵ that in a relations between Powers who are contracting parties to a Treaty [in the present case the UN Charter], municipal law provisions should not override that of the Treaty and the Treaty should, thus, prevail. It is, thus, arguably a measure by the US to flout international law.

Similarly, Shaw³⁶⁶ propounds that the state will have no defence by arguing that it has acted appropriately as it followed its municipal laws. States will not be allowed to violate international laws because once that is done; it will lead to many states passing legislations that evade international law.

Other two permanent members of the UN Security Council, Russia and China, who too have taken part in resolutions at the UN that eventually have an effect of referring persons to the

³⁶³ Tladi D., 2009, "The African Union and the International Criminal Court: The battle for the soul of international law", in *South African Year Book of International Law*, 57 – 69.

³⁶⁴ *ibid.*, p 63.

³⁶⁵ *Greco-Bulgarian "Communities"*, *Advisory Opinion*, 1930, *P.C.I.J., Series B, No. 17*, p 32.

³⁶⁶ Shaw (2008: 133 – 134).

ICC have not ratified the Rome Statute. Both are UN Security Council Permanent Members that have not ratified the Rome Statute and those that have ratified it are unlikely to allow their citizens to be subjected to the application of international criminal law through ICC trials, as they will veto any resolution sponsored at the UN Security Council in that respect.

Selective justice in international criminal law, with specific reference to the ICC is not only applicable to Namibia and Africa. It is applicable to large states outside Africa too. Du Plessis, Maluwa and O'Reilly³⁶⁷ state that the North Atlantic Treaty Organisation (NATO) members turned a blind eye on President Al-Bashir's visit to Libya in 2011, as a guest of the National Transitional Council (NTC), when NATO was strongly present in that country. The visit was seen as a goodwill strengthening of ties; especially that President Al-Bashir had assisted the rebels in Benghazi to overthrow the government of Colonel Muammar Gaddafi, in retaliation for Gaddafi's assistance to the forces opposed to the Sudanese Government in the Dafur region. NATO was in a position to effect the arrest of President Al-Bashir. Arguably, it did not want to put in an awkward position the new Libyan government, which it helped to bring to power by overthrowing the government of Colonel Gaddafi.

Selective justice and double-standards in the international community with respect to the ICC is further illustrated by Resolution 1593 of the UN Security Council. The resolution referred the situation in Dafur, from 1 July 2002, to the ICC prosecution, but at the same time it made an exclusion for nationals from non-State Parties to the ICC, when it states that:

[N]ationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;³⁶⁸

Stephan³⁶⁹ states that to avoid the universal application of international law, states decline to join clubs thereby withholding their consent for the norms and standards of such a club, as it happened in the case of the US's refusal to ratify the Rome Statute. He further avers that large states are inclined to impose their own version of international law. However, whether this justifies a withdrawal from the ICC's jurisdiction is another issue.

³⁶⁷ Du Plessis, Maluwa and O'Reilly, 2013, "Africa and the International Criminal Court", in *International Law*, Vol. 1, pp 1 – 13, at p 3.

³⁶⁸ United Nations, 2005, *Resolution 1593 of the UN Security Council*, adopted on 31 March.

³⁶⁹ Stephan (2009: 102, 107).

By adopting a resolution with selective jurisdiction excluding nationals of powerful states that are not party to the ICC, the UN Security Council has been used to undermine the authority of the ICC and manifested double-standards in the application of international criminal law.³⁷⁰ Accordingly African states can validly argue that there is inequality in the application of international law in general when some states are not subjected to the ICC, with or without the UN Security Council referral, than playing victims of international criminal law.

4.4 Conclusion

As a state inclined to supporting international law, Namibia contributed actively to the process leading to the adoption of the Rome Statute. She advocated for respect of fundamental human rights. However, Namibia later changed her posture towards international law and championed the campaign of accusations against the ICC being biased towards Africa. However, with statistics revealing that African cases before the ICC were largely referred by Africans, it makes accusations against the ICC rebuttable.

Namibia became engulfed in the longstanding deficiency in international law, the selective justice approach. While selective justice does not directly render a state to be non-compliant with international law, it reflects failure or omission on a part of a state to promote compliance with international law. While Namibia speaks for those in power to be spared by the procedures adopted by the ICC, Namibia remains silent about those in opposition and, therefore, in a vulnerable position to be referred to the ICC by those in power who are guilty of similar crimes. This is despite the values of equality before the law enshrined in her constitution. She joins states calling for the withdrawal from the ICC, but some of which have not maintained consistency in their approach to international law. In the process, Namibia's stance borders on contradicting her constitutional principles of equality and international law principles of justice.

³⁷⁰ Köchler H., 2005, Double Standards in International Criminal Justice: The Case of Sudan, *Statement by the President of International Progress Organisation*, available online at <http://www.i-p-o.org/Koehler-Sudan-ICC.pdf>, last accessed on 8 July 2016.

CHAPTER FIVE

SPECIFIC UNITED NATIONS SECURITY COUNCIL RESOLUTIONS AS INTERNATIONAL LAW IMPACTING ON NAMIBIA AND THE QUESTION OF COMPLIANCE

5.1 Introduction

The main problem being investigated in this chapter is whether compliance with international law is equally applicable to small and large states, by analysing how international law is applied to Namibia as a small state, and how large states and small states behave towards international law. Special reference will be made to the Security Council resolutions on nuclear proliferation by Iran and the Democratic People's Republic of Korea (DPRK). The resolutions affect Namibia's relations with these countries and, accordingly, she is expected to comply with them. Thus, the focus will be on their specific implication on Namibia's standing in international law.

The chapter looks at the general enforcement of international law including the resolutions on DPRK and Iran thereof, in order to look at whether the principle of sovereign equality is applied equally to all states.

Since the DPRK and Iran have relations with other states, the resolutions on their nuclear non-proliferation affect such relations too. The chapter will look at whether all states are affected in the same manner with regards to their relations with the DPRK and Iran and whether all states rigorously adhere to these resolutions. Against this background, the chapter further investigates whether the application of international law on small states versus large states and their close allies is a matter of pure compliance with international law principles or it is shaped by the dynamics of the nexus between politics and law.

5.2 Methods of enforcing international law

International law is applied through various methods, including sanctions and rewards.³⁷¹ The UN Security Council³⁷² states five types of targeted sanctions, namely diplomatic, travel ban,

³⁷¹ *United Nations Charter*.

asset freeze, arms embargo and commodity intervention. Primarily, the application of international law to states or individuals should serve the purpose of bringing the targeted entity within the parameters of international law in an effective manner.³⁷³

The ICJ only deals with states and therefore sanctions applied in terms of the UN Charter are only applicable to states. Meanwhile, there are also sanctions that apply to individuals.

In respect of terrorism, a list of persons and institutions affected by the sanctions is compiled, and the affected parties could be de-listed upon approaching their states to request the de-listing committee, known as ‘1267’. The US has maintained a list of suspected terrorists and sits in the de-listing committee, where she exerts influence on de-listing. Other countries including Australia, Canada and the UK, too, maintain terrorist lists. These are unilateral lists and not necessarily part of the UN approved list, though there are similarities in the entities listed in these lists and in the UN terrorists list.³⁷⁴ When a person is de-listed from the US list, it paves the way to be de-listed from the UN list as well, as it happened when the Swedish government applied for the delisting of its two nationals Abdirisak Aden and Abdi Abdulaziz Ali who were listed because of their implication with the Somali banking network company, Al-Barakaat, which the US suspected of facilitating the transfer of funds to terrorist groups. Following the application by the Swedish government, the two individuals gave their undertakings not to be involved in peace-threatening activities, resulting in the US treasury de-listing them and a subsequent de-listing from the UN list.³⁷⁵

5.3 The impact of United Nations Security Council resolutions 1929 of 2010 and 2094 of 2013 on Namibia

As stated in Chapter One, in international law, soft laws create obligations that cannot be implemented, due to their lack of specificity. The implementation of soft laws is not

³⁷² United Nations, 2013, *Special research report on UN sanctions*, Report No. 3 p 11.

³⁷³ López-Jacoiste E., 2010, “The UN collective security system and its relations with economic sanctions and human rights, in *Max Plank Year Book of United Nations Law* 14: 274 - 335, p 295.

³⁷⁴ Birkeland Ø, 2014, *The Impact of Terrorist Proscriptions on Peace Processes, Sri Lanka’s 5th Peace Process*, a Master degree thesis submitted at the University of Oslo, p 21; Gross J, 2010, “Talking with terrorists: Terrorist groups and the challenge of legitimization, in *Woodrow Wilson School Journal of Public and International Affairs*, Vol. 21, pp 93 – 114, at p 107 – 108.

³⁷⁵ Birkhäuser N., [S.a], *Sanctions of the Security Council Against Individuals – Some Human Rights Problems*, available at <http://www.esil-sedi.eu/sites/default/files/Birkhauser.PDF>, accessed on 21 September 2016, p 2.

compelling, as there are no sanctions applied in the event of non-compliance with such laws.³⁷⁶ Although soft laws are relevant, because of the nature of the issues that they address, they remain non-binding and sometimes they fluctuate between law and politics.³⁷⁷ International law is classified into hard and soft laws. Hard laws include binding treaties and customs, which if violated attract sanctions. Soft law includes non-binding bilateral and multilateral agreements and treaties.³⁷⁸ Large and small states' behaviour in the international community determines the type of law (hard or soft) to be adopted in a given matter being considered in the international legislation process.

Most of the UN Security Council Resolutions fall under the category of hard laws, whereas most of the General Assembly resolutions fall under soft laws, given the obligations that they create, *i.e.* under soft laws, the obligations placed upon states are not strictly enforced. Furthermore, these laws are not clearly detailed, unlike the hard laws where the UN Security Council for example will put in place mechanisms to explain these to member-states in order to ensure full compliance. Third, the interpretation of hard law, like war crimes, for example, is delegated to the ICC.

The UN Security Council has the responsibility to ensure the maintenance of peace and security³⁷⁹ as stipulated in the UN Charter. It makes decisions that are obligatory on all UN member-states. Therefore, the UN Security Council plays a significant role in the international legal system by creating rights and obligations of member-states and it has widely used this power of interpreting the UN Charter and implementing it according to its interpretation.³⁸⁰ The UN Security Council has over the past years passed resolutions 1929 of 2010 and 2094 of 2013 on Iran and DPRK nuclear programmes. These resolutions have an impact on the relations between Namibia and these two countries, because trade interests of these countries in Namibia are affected by the resolutions. Namibia is expected to comply with the resolutions, as non-compliance will attract adverse consequences in the form of sanctions.

³⁷⁶ Hilgenberg H., 1999, "A fresh look at soft laws", in *European Journal of International Law*, 10: (3), pp 499 – 515, p 500.

³⁷⁷ Skjærseth J. B., Stokke O.S. and Wettstad J., 2008, Soft law, hard law, and effective implementation of international environmental norms, in *Global Environmental Politics*, 6, pp 104 – 120, p 3.

³⁷⁸ Guzman A. T., 2002, "A compliance-based theory of international law", in *California Law Review*, 90: 6: 1823 – 1888, p 1879.

³⁷⁹ Malanczuk (1997: 374).

³⁸⁰ López-Jacoiste (2010: 295).

5.3.1 United Nations Security Council Resolution 1929 of 2010 on Iran

Iran pursued a nuclear programme for a period of more than 50 years.³⁸¹ Her programme had the support of the US until the overthrow of the Shah in 1979, when it was replaced by the Ayatollah Khomeini Islamic regime. In 2002, the exiled Iranian group revealed the existence of two nuclear sites. Subsequently, the International Atomic Energy Agency (IAEA) conducted an investigation which concluded in 2003 that Iran has not complied with the obligations under the Nuclear Non-Proliferation Treaty to report her nuclear programme. Iran maintained that she kept her programme secret, because there was pressure from the US which led to the cancellation of Iranian contracts with foreign governments. She further maintained that her nuclear programme was for peaceful purposes. The IAEA Board of governors reported to the UN Security Council in February 2006.

On 9 June 2010, the UN Security Council adopted Resolution 1929, which states that Iran has failed to comply with previous UN Security Council resolutions to abide by the provisions of the Nuclear Non-Proliferation Treaty. The resolution, among others affirms that Iran has failed to meet the requirements of the Board of Governors of the International Atomic Energy agency (IAEA) and to comply with previous resolutions prohibiting nuclear non-proliferation and further:

- *Decides* that Iran shall without delay comply fully and without qualification with its IAEA Safeguards Agreement.
- *Reaffirms* that, in accordance with Iran's obligations under previous resolutions to suspend all reprocessing, heavy water-related and enrichment-related activities, Iran shall not begin construction on any new uranium-enrichment, reprocessing, or heavy water-related facility and shall discontinue any ongoing construction of any uranium-enrichment, reprocessing, or heavy water-related.
- *Decides* that Iran shall not acquire an interest in any commercial activity in another State involving uranium mining...and *further decides* that all States shall prohibit such investment in territories under their jurisdiction by Iran, its nationals, and entities incorporated in Iran or subject to its jurisdiction, or by persons or entities acting on their behalf or at their direction, or by entities owned or controlled by them.³⁸²

³⁸¹ Klyuchanskaya S., 2010, *Iran's nuclear programme*, a background guide for Tyumen International Model UN for High Schools Session, p 3, available at <http://tmun.utmn.ru/wp-content/uploads/SC.pdf>, last accessed on 3 June 2016.

³⁸² United Nations, 2010, *Resolution 1929 of the Security Council*, adopted on 9 June.

- [D]ecides further that all states shall prevent the provision to Iran of any financial resources or services related to the supply, sale, transfer, provision, maintenance, manufacture and use of arms.

The afore-mentioned Resolution has a bearing on Namibia, because Iran owns 15% in the Rössing Uranium Mine through the Iranian Foreign Investment Company (IFIC), since 1975. Other shareholders are the Namibian Government (3%), Rio Tinto (69%), South Africa's Industrial Development Corporation (IDC) (10%), and individual persons own the rest (3%). By the time that the resolution was passed, Namibia was the fourth largest producer of uranium in the world, after Kazakhstan, Canada and Australia.³⁸³

Paragraph 31 of the Resolution placed an obligation on Namibia to report, by calling on all states to report on the measures that they have taken to comply with paragraphs 7 to 19 and 21 to 24 of the resolution, within 90 days. The Namibian government reported to the UN by 21 October 2010 among others, that subsequent to the adoption of the resolution, Namibia and Iran agreed that Iran will not acquire further shares, in compliance with the Resolution and further that Namibia will only use uranium for peaceful purposes.

Furthermore, meetings were held between Rössing Uranium Mine's management and the Namibian Government, where Rössing informed the Government that in further complying with provisions of the UN Resolution 1929, IFIC's representative would no longer be attending Board meetings of Rössing Uranium Mine.

Namibia's uranium is a milled uranium oxide, called 'yellow cake', which involves a cumbersome process, when it is to be used in manufacturing explosives. Charbonneau³⁸⁴ states that the mineral should first be processed into uranium hexafluoride and then fed into centrifuges for high-speed purification to transform it into weapon fuel. Nevertheless, the Resolution had placed an obligation upon Namibia not to transfer dividends to Iran; as such proceeds could allegedly be used in the procurement of nuclear arms.

The UN further set up a Committee of Experts to visit member-states to assess compliance with the Resolution. Namibia has taken all necessary measures and reported in a transparent manner to the Committee on her compliance with the Resolution, thereby demonstrating her

³⁸³ Charbonneau L., 2010, 'Iran's shares in Rössing worries Rio Tinto', in *The Namibian*, 20 October 2010, p 1.

³⁸⁴ Charbonneau (2010: 1).

commitment to respecting international law.³⁸⁵ In further compliance with the resolutions, Namibia passed the *Prevention and Combatting of Terrorist and Proliferation Activities Act, 2014*³⁸⁶ and in terms of which the Financial Intelligence Centre situated at the Bank of Namibia issued circulars regarding compliance with UN Security Council resolutions on Iran and the DPRK to the relevant institutions. Circular No. 4 of 2015 contains among others, information on the consolidated list containing the entities and individuals subject to assets freeze and/or travel ban as decided by the Security Council and the Sanctions Committee established pursuant to the relevant UN Security Council Resolutions.³⁸⁷

It is important to state that following diplomatic efforts between China, France, Germany, the Russian Federation, the United Kingdom, the United States, the High Representative of the European Union for Foreign Affairs and Security Policy, and Iran a comprehensive, long-term and proper solution to the Iranian nuclear programme was reached, resulting in the conclusion of the Joint Comprehensive Plan of Action (JCPOA) on 14 July 2015. Subsequent to that, the UN Security Council adopted Resolution 2331 of 2015, providing that once the IAEA has verified that Iran has taken steps to comply with the JCPOA, provisions of the previous resolutions imposing sanctions on Iran will be terminated.³⁸⁸

5.3.2 United Nations Security Council Resolution 2094 of 2013 on the Democratic People's Republic of Korea (DPRK)

Resolution 2094 has its origin in Resolutions 1718 of 2006 and 1874 of 2009. The background to the resolution is that on 9 October 2006, the DPRK conducted a nuclear test. The DPRK also announced her intention to withdraw from the Nuclear Non-Proliferation Treaty (NPT). The following week, on 14 October 2006, the UN Security Council adopted Resolution 1718 of 2006, demanding the DPRK to retract its announcement of withdrawing from the NPT, and comply with the provisions of the Treaty. It further designated a list of items that are deemed to enhance the nuclear programmes of DPRK and urged member states

³⁸⁵ Mushelenga P., 2014, "Principles of foreign policy", in Bösl A. and Du Pisani A (Eds.), 2014, *Namibian Foreign Relations*, Windhoek: Macmillan Education Publishers, pp 59 – 78, p 68.

³⁸⁶ No. 4 of 2014.

³⁸⁷ Financial Intelligence Centre of the Bank of Namibia, 2015, *Circular No. 4 of 2015*.

³⁸⁸ United Nations, 2015, *Resolution 2331 of the Security Council*, adopted on 20 July.

to prevent, *inter alia*, the direct and indirect supply, sale and transfer to the DPRK of those items.³⁸⁹

On 25 May 2009, the DPRK tested nuclear weapons, prompting the UN Security Council to adopt Resolution 1874 of 2009 on 12 June 2009, condemning the DPRK's nuclear test and demanding that the DPRK should comply with Resolution 1718 of 2006. The resolution further extended the application of paragraph 8 of Resolution 1718's paragraph of 2006 to include all arms and related materials, financial transactions, technical training, advice and any assistance or service related to the production, maintenance or use of such arms. These do not include small and light weapons.³⁹⁰

On 12 February 2013, the DPRK conducted a nuclear test, resulting in the UN Security Council adopting Resolution 2094 on 7 March 2013. In the Resolution³⁹¹ the UN Security Council:

- [Reaffirms] that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security,
- Decides that the DPRK shall not conduct any further launches that use ballistic missile technology, nuclear tests or any other provocation;
- Demands further that the DPRK return at an early date to the NPT and International Atomic Energy Agency (IAEA) safeguards, bearing in mind the rights and obligations of States parties to the NPT, and underlines the need for all States parties to the NPT to continue to comply with their Treaty obligations;
- Condemns all the DPRK's ongoing nuclear activities, including its uranium enrichment, notes that all such activities are in violation of [previous UN Security Council] resolutions ...reaffirms its decision that the DPRK shall abandon all nuclear weapons and existing nuclear programmes, in a complete verifiable and irreversible manner and immediately cease all related activities and shall act strictly in accordance with the obligations applicable to parties under the NPT and the terms and conditions of the IAEA Safeguards Agreement;
- Reaffirms its decision that the DPRK shall abandon all other existing weapons of mass destruction and ballistic missile programmes in a complete, verifiable and irreversible manner.

The request for extension of a period required to comply with international law (in this case UN Security Council resolution) illustrates willingness, but inability to comply with law. This does not only happen in respect of small states, but also in respect of large states. For example, by the year 2012 the US and Russia had not complied with the requirements to

³⁸⁹ United Nations, 2006b, *Security Council Resolution 2094* of 2006, adopted on 7 March.

³⁹⁰ United Nations, 2009, *Security Council Resolution 1874 of 2009* adopted on 12 June.

³⁹¹ United Nations, 2013, *Resolution 2094 of the Security Council*, adopted on 7 March.

destroy all their chemical weapons in terms of the Chemical Weapon Convention, with the US indicating that she will only be able to complete destruction by 2023.³⁹²

Among the officials specified in the annexure of the resolution are executives of Korea Mining Development Trading Corporation (KOMID), as it was identified to be the principal dealer for arms and equipment related to conventional weapons and ballistic missiles. The DPRK had two diplomats based in Windhoek who are linked to KOMID and in December 2014, the Namibian government summoned to Windhoek the DPRK's Ambassador to Namibia, who resides in Pretoria, South Africa, to explain Namibia's measures to comply with the UN Resolution 2094. Subsequent to that, the DPRK withdrew her diplomats from Namibia. Earlier in 2013, Ambassador Martin Uden, Coordinator of the UN Experts on the DPRK sanctions paid a visit to Namibia to explain the UN sanctions and their implications.³⁹³

The British High Commission in Namibia alleged that there were activities by DPRK nationals sanctioned by the UN Resolutions. Upon request to provide evidence, the High Commission sent a note to the Ministry of Foreign Affairs providing information on KOMID offices in Namibia. The Mission maintained that the office was used to support its sales to other regions. The mission called on the Namibian government to, among others, cease relations with KOMID and its officials, and to monitor closely the DPRK officials in Namibia to ensure that their actions do not violate the provisions of the relevant UN Security Council Resolutions.³⁹⁴ To avoid possible sanctions, a consultative meeting between the Ministry of Foreign Affairs, Office of the Attorney General and security sector ministries, to assess Namibia's compliance with the UN Security Council resolution.

5.3.3 Namibia's compliance with the UN Security Council resolutions on the Democratic People's Republic of Korea

Despite assertions by a number of critics that Namibia was in violation of international law as a small state, Namibia is aware of the consequences of violating a UN Security Council

³⁹² Koplow D.A., 2013, "Indisputable violation, what happens when the United States unambiguously breaches a treaty?", in *The Fletcher Forum of World Affairs*, 37 (1), pp 53 – 74, at p 57.

³⁹³ Mushelenga P., 2015, *The economic diplomacy of a small state: the case of Namibia*, Doctoral thesis submitted at the University of South Africa, pp 207 – 208.

³⁹⁴ British High Commission in Windhoek, 2015, *Unpublished letter to the Ministry of Foreign Affairs on North Korean activities in Namibia*.

Resolution and cannot afford to be seen to be non-compliant. Namibia had maintained that she upholds international law pertaining to the UN sanctions on the DPRK, as all activities between Namibia and the DPRK that involve military cooperation commenced prior to the UN resolutions.³⁹⁵

Namibia cannot afford to disregard the UN Security Council resolutions, in a manner that states who are allies of the Permanent Members of the UN Security Council, or Permanent Members themselves do. Doing so will invite sanctions that will cripple her small economy. Typical of a small state that does not want to be non-compliant with international law, Namibia sought clarification from the UN on the status of her relations with the DPRK. Namibia had maintained that she upholds international law pertaining to the UN sanctions on the DPRK, as all activities between Namibia and the DPRK that involve military cooperation commenced prior to the UN resolutions. In a Note Verbale dated 31 March 2015,³⁹⁶ Namibia reported to the UN Sanctions Committee on measures that she has taken to implement all relevant resolutions on DPRK nuclear programme, namely Resolutions 1718 (2006), 1874 (2009), 2087 (2013) and 2094 (2013) and pledged to abide by international law

5.4 Inequalities in the application of international law to small states versus large states

The application and implication of the resolutions to large states differs from small states. For example, Gates³⁹⁷ states that although China supported the UN Security Council resolutions on the DPRK, her official reaction to the DPRK's 2009 nuclear test was not strong and she has adopted a conciliatory approach towards the DPRK in public. And when the US and South Korea conducted a military exercise in 2010, Chinese senior officials reacted strongly. While trade between China and the DPRK experienced a slowdown, following the UNSC Resolution 1874 of 2009, it increased again from 2010. Further, China does not comply with the provisions of the aforesaid resolution on the ban of luxury goods to the DPRK. A UN expert team for the compliance with the Security Council resolutions stated that there is a

³⁹⁵ Muraranganda E., 2016, "UN exonerates Namibia over BN-Korea", in *New Era*, Thursday, 28 April, pp 1 – 2.

³⁹⁶ Namibian Permanent Mission to the United Nations, 2015, *Note Verbale to the UN Committee on Sanctions*, dated 31 March.

³⁹⁷ Gates B., 2011, "China's North Korea Politics, assessing and interests and influences", in *United States Institute of Peace Special Report*, pp 2, 7 – 8, available at http://www.usip.org/sites/default/files/China's_North_Korea_Policy.pdf, last accessed on 9 May 2016.

neighbouring country – which analysts believe to be China – that serves a transshipment point for ballistic missiles between North Korea and Iran.³⁹⁸ Further, the US's Central Intelligence Agency (CIA) reported in 2007 that Chinese private enterprises export materials and manufacturing equipment to the DPRK that could be used in ballistic missiles, notwithstanding resolution 1718 of 2006.³⁹⁹

The difference in the application of international law to large and small states is further illustrated by Gates⁴⁰⁰ when he states that Chinese regions of Hong Kong and Macau possibly serve as transit points for goods and financial flows to the DPRK, in direct non-compliance with the UN Security Council resolutions. He recommended the engagement of China by the US with regards to compliance of the UN Security Council resolutions. This scenario differs from Namibia, where the US Ambassador has on several occasions delivered demarches to the Ministry of Foreign Affairs, about her country's list of suspected terrorists from Iran and the DPRK, further reminding the Namibian Government about the relevant UN Security Council Resolution. Given the US' typical large state behaviour towards small states as it happened in the refusal of application of delisting Swiss nationals by the US and by extension, the UN, Namibia's disregarding of the issues raised in the US's demarches could give the US an opportunity to influence Security Council's structures to apply international law to Namibia harshly, like refusing to delist her nationals and institutions, once they are put on the sanctions list.

The International Crisis Group⁴⁰¹ states that although subsequent to the passing of UN Resolution 2094 of 2013, China took some measures, like the closing of the DPRK's foreign trade bank account; compliance with the Resolutions remains far-fetched. China dragged her feet on establishing the list of luxury goods *albeit* she has agreed to ban their export to the DPRK. Furthermore, China did not reduce the supply of fuel to the DPRK which imports 90% of fuel from China. China made it clear that the sanctions should not be used to weaken the DPRK's state institutions and should, therefore, be moderate, aimed at encouraging the DPRK to come to the talks with the international community about its nuclear programme. China further stated that even if the DPRK was to conduct further nuclear tests, she will not

³⁹⁸ (Gates, 2011: 8)

³⁹⁹ *ibid.*

⁴⁰⁰ *ibid.*

⁴⁰¹ International Crisis Group, 2013, "Fire on the city gate: Why China Keeps North Korea close", in *Asia Report* (254), International Crisis Group: Brussels, pp 7 – 10.

cut her ties with the Korean peninsula. It is even propounded that even the closing of the foreign trade bank account was effected largely because the Bank of China operates in the US such that there could be negative financial consequences to the bank and not because the Chinese Government has adopted a policy to cut off financial ties with the DPRK.

In Chapter three above, it was stated that the SADC Tribunal was closed after the ruling in the case of *Mike Campbell v Republic of Zimbabwe*⁴⁰² signifying small states avoidance to comply with international law. Such a decision to close the Tribunal and avoid compliance with international law makes no difference between small states and large states like the US, China and Russia that have enacted laws enabling them to avoid international law. For example, it was stated in Chapter four that the US passed the ASPA, thereby protecting her citizens from the ICC.⁴⁰³

Not only has Namibia been precluded from invoking municipal laws against international laws, but that she has endeavoured to comply with international law, both in terms of decisions by the ICJ and applicable resolutions of the UNSC. An example of inequalities in the application of international law is further illustrated by the oil embargo against Haiti following a coup *d'état* in 1990. The UN Security Council passed Resolution 841 of 1993 preventing the sale or supply of petroleum and petroleum products to any person or institution in Haiti.⁴⁰⁴ When Russia became involved in the protests in Crimea and annexed her from Ukraine in 2014, the EU and US could only apply sanctions on their own and they could not push them through the UN. In March 2014, the UN Security Council sought to pass a resolution affirming Ukraine's sovereignty, independence, unity and territorial integrity and rendering the referendum held in Crimea to break away from Ukraine as invalid. However, Russia vetoed the resolution, illustrating that the application of the UN enacted international law to large states is different from its application to small states. For binding resolutions applicable to the permanent members of the United Nations Security Council, it can only be applied when a member affected so agrees.

But even the sanctions by the EU and US were not effective because EU member-states were divided on the issue and, further, Russia had alternatives. Given the fact that Russia is a large

⁴⁰² SADC (T), Case No. 2/2007.

⁴⁰³ Hull (2012: 63).

⁴⁰⁴ United Nations, 1993, *Resolution 841 of the UN Security Council*, adopted on 16 June.

state with a large economy, some EU members did not play along with the sanctions as they needed Russia. Arguably, this is because some EU members like Hungary and Slovakia had strong economic ties with Russia that are illustrated by the construction of reactors at the Paks nuclear plant and supply of fuel, respectively.⁴⁰⁵ Furthermore, the Czech Republic, Finland, Serbia, Poland and Turkey had interests in Russia in the respective fields of trade and tourism. The violations of sanctions are double-sided. Russia violated them as well as other countries like Argentina, Brazil, Chile, Ecuador and Pakistan as will be discussed below. Russia also retaliated with counter-sanction measures on agricultural imports from the EU, and in the wake of sanctions and counter-sanctions, new exporters of agricultural products to Russia emerged from the countries stated above. The application of sanctions to a large state with a large economy like Russia could, thus, not be similar to the application of sanctions to small states like when the EU imposed sanctions in Zimbabwe from the year 2000. Namibia, as a small state does not have the same leverage as Russia and should, thus, endeavour to comply with the UN resolutions. Furthermore, it is interesting to note that in support of a large state, Russia, a small state, Ecuador violated the sanctions imposed by the US and the EU.

Inequality in the application of international law to small states is not only applicable to the scenario of large states versus small states, but also within the context of the application of international law to some other small states. This is illustrated by the passing of the UN Security Council Resolution 1390 of 2002, calling for member-states to, *inter alia*, freeze assets, economic resources and funds belonging to specified members of the Al Qaeda or persons controlled by them or prevent entry or transit throughout their territories of the said individuals.⁴⁰⁶ Birkhäuser⁴⁰⁷ states that Switzerland has violated this resolution by granting exemption to persons under sanctions to access their funds and enter or transit through her territory, arguing that it is in the interest of Switzerland. Despite the UN Security Council recognising terrorism as a threat to international peace in the Resolution, it has not set up a Committee to oversee the implementation of the Resolution or imposing of sanctions in the event of non-compliance, as it happened with the case of the UN Security Council Resolution 1390 of 2002. Neither has any action been taken against Switzerland.

⁴⁰⁵ Dolidze (2015: 7 – 9).

⁴⁰⁶ United Nations, 2002, *Resolution 1390 of the UN Security Council* adopted on 16 January.

⁴⁰⁷ Birkhäuser ([s.a]: 5 – 6).

5.5 Selectivity and the juxtaposition of politics and law affecting compliance with international law

Modern international law has since 1945 been shaped by the interests of large states competing in the international political system.⁴⁰⁸ The UN Security Council is tainted by power politics that cause permanent members to engage in international violations of law themselves, like launching wars. International law has thus submitted to power politics. Consequently, the legal grounds for their demand of others to abide by the international law are weakened.

Perspectives about the UN Security Council are that their special privileges result in arbitrary action in their international legislation. The Stanley Foundation reports that:

[The Security Council] is criticized as being inconsistent in its treatment of issues and states. While condemnations are issued and enforcement actions ordered against some states, others that violate the same laws and principles are allowed to act with impunity.⁴⁰⁹

It is further argued that the Security Council's selective application of international law on states is not regulation-based, but it is rather anchored in the interests of powerful states.

Illustrating the juxtaposition of politics and law in international law legislation at the UN Security Council is the failure of the UN Security Council to pass a resolution calling for the total withdrawal of Israel from the occupied territory.⁴¹⁰ This is a recipe for encouraging lack of compliance with international law on the part of Israel. At the 7354th meeting of the UN Security Council held on 30 December 2014, Jordan presented a draft resolution calling for Israel to withdraw from Palestinian territory occupied since 1967, within a period of three years, and for the parties to the conflict to find a solution to the conflict within a period of one year. Out of the 15-members, the following eight countries supported the resolution; Argentina, Chad, Chile, China, France, Jordan, Luxembourg and the Russian Federation. The

⁴⁰⁸ Köchler H., 1991, *The Voting Procedure in the United Nations Security Council Examining a Normative Contradiction in the UN Charter and its Consequences on International Relations*, p 10, available online at http://www.i-p-o.org/Koehler-Voting_Procedure-UN_Security_Council.pdf, last accessed on 2 July 2016.

⁴⁰⁹ Stanley Foundation, 1998, *Getting down to cases: enforcing Security Council resolutions*, A report of The Stanley Foundation's Thirty-Third United Nations of the next decade Conference held in Vermont, 7 – 12 June, p 9.

⁴¹⁰ United Nations, 2014, Resolution in Security Council to impose 12-Month Deadline on Negotiated Solution to Israeli-Palestinian Conflict Unable to Secure Nine Votes Needed for Adoption, *Press Release, No. SC/ 11722*, (N.B. This was a draft resolution, which failed to be adopted and, therefore, it has no resolution number).

resolution could not be adopted as that required nine votes. Five countries abstained from the resolution, namely Lithuania, Republic of Korea, Nigeria, Rwanda and the United Kingdom. Meanwhile, Australia and the United States opposed the Resolution.

The opposition and abstentions to the draft resolution raises a question as to whether there is commitment towards compliance with international law, in view of the previous resolutions that have been passed by the UN Security Council. Further international law provides for the right to self-determination and denying them such rights constitutes non-compliance with it. The ICJ avers that the right to self-determination “is one of the *essential principles* of international law”.⁴¹¹ Defeating resolutions aimed at achieving the right to self-determination further raises questions whether it was a question of principle or international politics dynamics which overrode the interests of international law. From 1972 to 2011, the US vetoed 40 resolutions on the situation in the Middle East, in protecting the interests of Israel. Israel has been an ally of the United States for many years, receiving a cumulative military assistance from the US totalling US\$ 121 billion by 2014. In 2014, the assistance was US\$ 3.1 billion and new announcements have been made by the Obama administration for the military assistance to be US\$ 50 billion in the next 10 years.⁴¹² This is in clear disregard of the UN Security Council Resolutions which prohibit any state from providing assistance to Israel that will be used in connection with the occupied territories.⁴¹³ No pressure was put either on the US or Israel to comply with the terms of the UN Security Resolutions as it happened in the case of Namibia. This, arguably, illustrates inconsistency in the application of international law to states, with small states observed microscopically, where political interests of large states matter.

When the UN General Assembly sought an opinion of the ICJ on Israeli’s construction of a wall between Israel and Palestine, the Court held that the construction of a wall in the Palestinian territory was illegal. When the matter was brought before the UN Security

⁴¹¹ *East Timor (Portugal v. Australia), Judgment, I CJ Reports 1995*, p 90, at p 102, para 29.

⁴¹² Lynd A. and Lynd S., 2014, *International Human Rights Law, violations by Israel and the problem of enforcement*, Israel-Palestine Working Group of Historians Against War, available at <http://historiansagainstar.org/resources/InternationalHumanRights.pdf>, last accessed on 4 June 2016; Bassok M, 2016, ‘Israel Deals Itself a Weak Hand in Military Aid Talks With U.S.’ in *Haatez News* (May 11) available at: <http://www.haaretz.com/israel-news/.premium-1.719002>, last accessed on 15 August 2016.

⁴¹³ United Nations, 1980, *Resolutions 465 of the Security Council* adopted on 1 March 1980; UN, 1980, *Resolution 478 of the UN Security Council*, adopted on 29 August.

Council, it failed to adopt a resolution declaring the construction of the wall illegal, in a clear fraternisation of international politics into international legislation.⁴¹⁴

Writing about the crisis of international law, Domingo⁴¹⁵ avers that double-standards in international relations has a spill over to international law, as power seeks to contort law, resulting in the ineffectiveness of law, once dilapidated by power.

In 2011, the UN Security Council passed a Resolution requesting member-states to take due diligence and refrain from doing business and financial transactions involving funds from Eritrea's mining interests that fund activities of armed groups. The resolution further calls on states to deny provisions of financial services including insurance and re-insurance and further prevent entry and transit through their territories by specified Eritrean nationals and institutions, for destabilising the horn of Africa by providing assistance to armed groups.⁴¹⁶ Israel's actions in the Middle East too have destabilised the region, yet her alliance with the US prevents the Security Council from enacting appropriate international law legislation.

It is advanced that lack of compliance with UN Security Council resolutions have been observed, when a particular international legislation is perceived not be in the interest of major powers.⁴¹⁷ When the interests of major powers are at stake, like in the case of the DPRK and Iran's nuclear programme, international law will be applied with enforcement. This renders the application of international law selective.

The juxtaposition of international politics and international law is further illustrated by the position of China towards the UN resolutions on the sanctions against the DPRK, although China voted in favour of the resolution, she stated that she possibly acted so on the basis of her own disapproval of the nuclear programme, than as concurrence with the views of the US.⁴¹⁸ Gates,⁴¹⁹ too, avers that China is interested in the denuclearisation of the Asian region, but at the same time does not want any military role of the US in the region.

⁴¹⁴ Hossain K., 2009, "Legality of Security Council action: Does the Court move to take up the challenge of judicial review", in *Uluslararası Hukuk ve Politika*, 5 (15): 133 – 163, p 142.

⁴¹⁵ Domingo (2009: 1543 – 1593).

⁴¹⁶ United Nations, 2011, *UN Security Council Resolution 2023*, adopted on 5 December 2011.

⁴¹⁷ Stanley Foundation (1998: 3).

⁴¹⁸ International Crisis Group, 2013, "Fire on the city gate: Why China Keeps North Korea close", in *Asia Report* (254), International Crisis Group: Brussels, p 8.

⁴¹⁹ Gates (2011: 4).

China and the DPRK maintained cordial diplomatic relations and ideologically, both belonged to one side of the Cold War divide, the East bloc. Gates,⁴²⁰ adds that China and the DPRK's shared cohesion include their coalition in the Korean War, common background as communist states and shared commonalities as postcolonial countries in the developing world. Furthermore, the Communist Party of China (CPC) and the Workers' Revolutionary Party (WRP) of the DPRK maintain strong ties. Accordingly, during the adoption of the resolutions, the Chinese Ambassador to the UN, Zhang Zesui, fought to ensure that there is no provision for the use of force during the adoption of the UN Security Council Resolution 1874 of 2009. He further cautioned that sanctions should not undermine the development and humanitarian assistance to the DPRK and the sanctions should be reviewed, should the DPRK comply with provisions of the resolution.

Similarly, with respect to Iran, Russia and China have undertaken to veto any proposal to use force against Iran as measures to force her to comply with the relevant UN Security Council Resolution. Russia has also been vociferous against the imposition of sanction, stressing that the Iranian nuclear programme issue should be addressed within the framework of IAEA regulations, than through UN sanctions.⁴²¹ This is so because Russia is a major investor in the Iranian nuclear programme.

Meanwhile, the DPRK and the US as well as Iran and the US are historically ideological opponents as they belonged to the Cold War East and West Blocs, respectively. Namibia, on her part has strong historical links with Iran and the DPRK, as they supplied the South West Africa People's Organisation (SWAPO), Namibia's liberation movement, with financial and material support in furthering the cause of Namibia's independence. SWAPO further had opened a diplomatic mission in Tehran, Iran. While the Iranian shares in Rössing Mine were acquired before independence, Namibia and Iranian economic relations were consolidated by the cordial relations anchored in the history of the two countries. Furthermore, the DPRK's economic relations with Namibia are rooted in the historical ties between the two counties as stated above.

⁴²⁰ Gates (2011: 6).

⁴²¹ Klyuchanskaya (2010: 16).

5.6 An assessment of the application of international law to small states compared to large states

International law is subject to universal and selective application. Under universal application, international law is applied equally to all states, whereas under selective application, it applies selectively to states as there is a difference in approach towards the rights and obligations of states to international law. The trends of selective application of international law have become more prevalent in the last decade.⁴²²

The application of international law differently to entities within the international legal order system erodes the essence of sovereign equality. This reflects what Kingsbury⁴²³ referred to as special treatment of large powers, who advocate special responsibility in international legal order and are, thus, not inclined to a balance between sovereign equality, the primacy of great powers and organisational efficiency. He concludes that issues related to the NTP are among those that reflect inequalities in international law, as they become exceptions to accommodate great powers.

Powerful states are inclined to formulate hard laws, especially when it works in the interests of their political dispensation. They are, therefore, amenable primarily to hard laws whose implementation procedures are not uncertain.⁴²⁴ It is further contended that in the application of law to states, large states have great influence over the compliance with the law by small states, than how those large states themselves abide by it, thereby making the application of law to them relaxed.⁴²⁵

Stephan⁴²⁶ surmises that the application of international law is largely influenced by the structural dimensions in international relations, with a clearly observable selective application of international law. Stephan⁴²⁷ propounds that the selective application of international law by large states to small states has two-edged implications. Not only that they demonstrate the

⁴²² Stephan P. B, 2009, "Symmetry and selectivity: What happens in international law when the world changes" in *Chicago Journal of International Law*, 10 (1): 91 – 123, pp 91 – 92.

⁴²³ Kingsbury (1998: 604 – 605; 610).

⁴²⁴ Abbot and Snidal (2000: 432 – 433).

⁴²⁵ Brilmaayer L. and Tesfalidet I. Y., 2011, "Third states obligations and enforcement of international law", in *International Law and Politics*, 44:1, pp 51 – 52, p 6.

⁴²⁶ Stephan (2009: 102, 107).

⁴²⁷ *ibid.*, p 94.

capacity of a great power to address its interests, but it invites small states to demand a similar treatment by the great power. This happened with regards to Israel, to whom international law has been applied selectively in a protective manner, such that other states want a similar application of international law to them. The question of Israel before the UN symbolises what Stephan⁴²⁸ avers, that where there are interests of large states competing,

[A] great power would prefer to see an issue unresolved rather than have it go in an adversary great power's favor (*sic*), [and] it would block any mechanism that might lead to resolution by a body in which its adversary has a voice.

Accordingly, the US vetoed resolutions at the UN Security Council aimed at imposing sanctions on Israel and prescribing to Israel conditions for the peaceful settlement of the Palestinian questions before the UN. Köchler⁴²⁹ surmises that from 1981 to 1990, the US frequently vetoed resolutions condemning Israel 19 times, of which seven were done within one year from 1989 to 1990.

Şeker⁴³⁰ propounds that international law should not be applied selectively, or used as a propagating tool for ideologies. In multilateralism, it is required that consistency and impartiality and the respect of international law should be observed. He further maintains that the world order which governs the relations of states and institutions should be based on international law. This proposition is not observable in the application of UN Security Council resolutions.

Stephan⁴³¹ states that because of differences in economic and military capacity among others, large states can impose international law obligations upon small states, including seizing their resources. This is illustrated by the imposition of sanctions when states contravene the UN Security Council resolutions. Spearheading the drives for such sanctions are large and powerful states, like the US. These resolutions are typical of the post-Cold War period, of which Stephan⁴³² remarks witness regulations of armed conflict, unlike during the Cold War period when powerful states did not adopt concrete international law applicable to specific armed conflict. The Nuclear Non-Proliferation Treaty adopted in 1968 did not result in a

⁴²⁸ Stephan (2009: 100).

⁴²⁹ Köchler (1991: 10).

⁴³⁰ Şeker A., 1999, "The fallacy of multilateralism, United Nations involvement in the Gulf War and its aftermath", in *Journal of International Affairs*, 4 (2), pp 196 – 213, at p 210.

⁴³¹ Stephan (2009: 91 – 92).

⁴³² *ibid.*, pp 91 – 92.

resolution of the same magnitude at the UN Security Council resolutions 1929 of 2010 and 2094 of 2013. By then Cold War rivals were building up their nuclear capacities.

The UN Security Council requires Namibia to put in place measures that ensure compliance with the relevant UN resolutions. In 2014, the Namibian parliament passed the Prevention and Combating of Terrorist and Proliferation Activities Act, to address issues required by the UN Security Council Resolutions. The Act provides for measures to be followed from the time the UN Security Council designates individuals or groups to be under sanctions in terms of its resolutions. Accordingly, without putting measures in place, these UN Security Council Resolutions on Iran and DPRK had the potential of a negative impact on Namibia, in respect of blacklisting as being non-compliant with international law. Individual Namibians and institutions involved in the transactions with individuals and institutions under sanctions could be affected, as they too could be designated as persons or institutions that are under sanctions. De-listing them from the UN list of sanctions is not an easy exercise. Birkhäuser⁴³³ states that Switzerland has been unsuccessfully trying to apply for the delisting of two of her nationals Mohamed and Zeinab Mansour, who were listed because they were members of the executive board of Al-Taqwa, which the US suspected of being involved in the funding of terrorism, *albeit* there was no evidence to that effect. It could be argued that Switzerland's violation of the UN Security Council Resolution 1390 of 2002 may have some indirect influence in the refusal of the US to delist the Mansours.

Stephan⁴³⁴ states that recurrent problems in the globe result from the relations of large states with small states, which prompt large states to adopt measures that are adopted as obligations under international law. This results in the rest of small states submitting to the standards of international law and the rules of international organisations because of the position that large states take, thereby making submitting to international law a result of the great power factor. Both Iran and the DPRK are not small states in terms of the definition adopted by this study. Accordingly, these states adopt nuclear programmes in direct contrast with the hegemonic interest of the US. Small countries like Namibia, for which UN Security Council resolutions 1929 of 2010 and 2094 of 2013 have implications to, should adhere to international law, as

⁴³³ Birkhäuser ([s.a]: 8).
⁴³⁴ Stephan (2009: 99).

part of their constitutional principles and also because of the consequences that could arise from large states, in the event of contravening those resolutions.

Given selective application of the UN-based international law to small states, this has an impact on small states' behaviour. For example, the Namibian Government was invited to the 60th anniversary of the Korean War armistice in July 2013. The then Prime Minister, Hage Geingob, and Defence Minister, Nahas Angula, had received special invitations, but instead the Deputy Minister of Justice, Tommy Nambahu, represented Namibia, whereas China was represented by the Vice President, Li Yuanchao. China had thereby registered her strong support for the DPRK amidst UN sanctions. While Namibia wanted to reassure the DPRK of her continued friendship, at the same time she was cognisant of the implications of the UN sanctions on the DPRK. Thus, initially Namibia was sending her Ambassador in China, Ringo Abed, to the celebration in Pyongyang but she changed later and decided to send a Deputy Minister, following consultations that included the Deputy Minister of Foreign Affairs. The respective level of representations of China and Namibia at the 60th anniversary of the Korean War armistice illustrates that the UN Security Council resolutions have different implications on large and small states.

5.7 Conclusion

The United Nations makes a significant contribution to international law, through soft and hard laws legislated by its General Assembly and Security Council, respectively. The Security Council laws focus on international politics and the very political structure of the Security Council creates a problem of bias in international law. Large powers use the Security Council for leverage in international politics and further create a nexus between international politics and international law. While international law supposedly serves to protect the interests of small states, the US has used it to preserve her own interests, as illustrated by the ASPA (see Chapter Four). Another large state in the UN Security Council, China, could afford to violate international law in respect of sanctions against the DPRK, knowing that she can use the veto power in the UN Security Council to protect her interests

International law has an implication for Namibia, a member of the international political and legal systems. Namibia's relations with countries that are directly affected by UN Security Council Resolutions, like Iran and the DPRK, subject her to microscopic scrutiny by large

players in international law. The sanctions against the DPRK include the export of luxury goods to that country. Both Iran and the DPRK are affected by arms embargo that they cannot trade on items related to the enrichment of nuclear programmes and conventional weapons, respectively. The travel ban and freeze of assets, too, are applicable to both Iran and the DPRK. Accordingly, at numerous inter-ministerial meetings on the UN resolutions on the DPRK, attended by the researcher of this study as Deputy Minister of International Relations and Cooperation, it was underscored that Namibia should strictly comply with these embargoes provided by the UN Security Council resolutions in order to avoid becoming a target of the sanctions. She enacted domestic legislations that are aligned to international law in order to create her standing as an international law abiding state. In the end, she was certified compliant by the UN Committee on Sanctions.

On the contrary, other states who are close to large players in international law, like Israel, have not been complying with UN resolutions, yet she is not subjected to threats from the international political and legal systems.

CHAPTER SIX

CONCLUSION

6.1 Conclusion

Modern international law of the post WWII era witnessed the adoption of the UN Charter, Universal Declarations of Human Rights, other conventions related to international human rights law, international labour law, and international peace and security, among others. It further witnessed the establishment of international judicial institutions, like the ICJ, ICC, international tribunals and regional courts. Within this context, this study focused on questions of how small states uphold international law looking at compliance and non-compliance with international law. Using Namibia, a small state, as a focal point, the study examined whether she does have a positive disposition towards international law. If she does have a positive disposition, how is her existence in the international legal system contextualised?

In discussing Namibia in international law, though not a comparative study, the study also referred to other small states' compliance or non-compliance with international law, namely: Albania, Botswana, Belgium, Djibouti, Estonia, El Salvador, Malawi, Nicaragua, Singapore, Switzerland and Uganda. It analysed their adherence to international law in specific relevant crisis situations and compared and contrasted these with the adherence to international law of middle powers and large states, namely: China, Iran, Libya, Nigeria, USA, Russia, UK and France in similar situations. Using, among others, the Kasikili / Sedudu Island ownership case that pitched Namibia against Botswana (both small states), as well as the application and implications of UN Resolutions 2094 of 2013 on DPRK and 1929 of 2010 on Iran to Namibia as illustrations, it demonstrated how small states like Namibia have due regard to peaceful resolution of international disputes, and therefore largely adheres to the principles of international law. In contrast, using examples such as the Kosovo war (USA and NATO allies); the Abkhazia and South Ossetia case (Georgia *versus* Russia), the annexation of Crimea (Ukraine) by Russia and the subsequent analysis of EU/US sanctions on Russia, the *Avena* case (Mexico v USA), Warrant Arrest of President Al-Bashir by the ICC, UN Resolution 2094 of 2013 on DPRK by China, among others, as illustrations, it demonstrated that both small and large states have committed violations of international law with large states cases occurring more often compared to small states. The difference between large and small states lies in the consequences for defiance to comply with international law, which

include economic sanctions. Small states are, therefore, particularly cautious towards non-compliance with the UN Security Council resolutions.

The contribution of large states to international law is significant. In respect of international legislation at the UN, large states dominate the process in the UN Security Council. Furthermore, because of their nationals serving in international courts, like the ICJ, large states' jurisprudence is imported into international law on a large scale in comparison with small states, whose representation in those courts does not match that of large states. These include independence and geographical representation. However, large states only show deference to international law when it serves their interests. Meanwhile, small states' confidence in international law results from their belief that it protects them, notwithstanding the fact that their input in international law is limited as a result of insufficient human resources or their limited influence. Their low representation in the ICJ results in minimal contribution to the jurisprudence of international law.

By complying with international law enacted by the UN Security Council, in the examples of UN Resolutions 2094 of 2013 on DPRK and 1929 on Iran, Namibia did not only prove its respect of international law, but also her respect of treaty obligations, as the resolutions are anchored in the principle of the NTP, which Namibia has acceded to. But also as a small state, Namibia cannot afford not to comply with this international law as she might face adverse consequences through sanctions. The sanctions imposed on large states do not have a similar impact like those imposed on small states.

Only large states and strong allies of large states can violate international law with impunity. This is because the application of international law to states is sometimes a juxtaposition of politics and law, and as a result it is not applied equally to large powerful states and small weak states. Accordingly, no military action is taken against large states and their allies when they violate international law. Countries like the US, Russia, UK, France, and China, among others, can afford to violate international law. China is currently violating international law in the South China Sea and on Tibet, and no sanctions are applied to it. France and the UK violated international law when they toppled Libya's president under the pretext of humanitarian law, and nothing happened to them. Russia violated international law with the invasion of Georgia and nothing happened to her.

International law is also tainted with the selective justice problem where law is applied to the weak ones at the hands of the powerful ones. This is especially true in international criminal law. Selective justice, however, is equally applied by small states and large states. Even small states which normally adhere rigorously to international law in other matters, they tend to flout it. When it comes to international criminal law, leaders in power tend to be protected as opposed to those leaders not in power. This also shows an uneven application of international law.

Namibia became part of those that adopt the selective justice approach to international law with her selective support of African leaders in power so as not to subject them to procedures at the ICC, during their tenure of office, thereby failing to promote compliance with international law on the part of the leaders concerned. Meanwhile Namibia is silent about the subjecting of opposition leaders to the same legal procedures and system. Furthermore, Namibia's call for withdrawal from the ICC does not encourage accountability to law and therefore compliance with it.

This study therefore concludes that,

- During the formative years of independence, Namibia adhered to the values of international law.
- Typical of small states' behaviour, Namibia supports the international legal system, which small states deem as a source of protection.
- Though a small state, Namibia made her contribution to international law, assisting some other small states to comply with international law.
- Small states have inherent limitations to influence international law, which results from shortage of human resources and expertise in various aspects of international law. For Namibia, this shortage of expertise sometimes results from the lack of coordination on approaching international disputes affecting the country.
- With regards to international criminal law, Namibia failed to address issues of impunity and adopted a selective justice approach, thereby committing omission to advocate compliance with the principles of international law.

- Namibia exists in the international political and legal systems characterised by the nexus between international politics and law. The international law formulated against the background of selective justice, through targeting only some countries that violate international law, like Iran and the DPRK, has implications on Namibia in international law because of her economic relations with the afore-said countries. Selective justice results in the principle of sovereign equality not being applied in some instances.
- Generally, both small and large states have records of failure to comply with international law, with small states non-compliance with international law more in matters pertaining to international criminal law, whereas large states' violation of international law covers matters of international peace and security.
- In the event of small states' non-compliance with international law, there are consequences that follow, which is not necessarily the case with regard to large states' violation of international law.

6.2 Recommendations

This study therefore, recommends that:

- Namibia should consistently and persistently adhere to the principles of international law.
- Namibia should avoid an immersion of politics into law in her stance on matters and further avoid to fail or commit omissions in advocating compliance with international law in general, and international criminal law, in particular.
- Namibia should invest in developing capacity in her human resources and increase expertise in various areas of international law in order to maintain a coordinated approach within the government to ensure compliance with international law.
- Being a sovereign state like other states, Namibia should not only contribute to international law enactment, but should further make her presence felt in the

international legal system by filling positions in international tribunals and courts in order to contribute to the jurisprudence of international law.

- Namibia should involve both state and non-state actors in pursuing compliance with international law. NGOs in particular have keen interest in following states' compliance with international law. Government, through the Office of the Ombudsman can create a forum of exchanging ideas with NGOs on matters pertaining to compliance with international law.

7. Bibliography

Books

- Braveboy-Wagner J. A., 2008, *Small states in global affairs, the foreign policy of Caribbean Community (CARICOM)*, New York: Palgrave Macmillan.
- Charles E.M., 1997, *a future for small states, overcoming vulnerability*, London: Commonwealth Secretariat.
- Cassese A., 2001, *International Law*, Oxford: Oxford University Press.
- Cliffe L. et al, 1994, *The transition to independence in Namibia*, Boulder: Lynne Rienner Publishers.
- Creswell J. W., 2014, *Research design* (4th ed.), London: Sage Publications.
- Dore I. I., 2007, *The epistemological foundations of law, readings and commentary*, Durham: Carolina Academic Press.
- Dugard J., 2005, *International law: a South African perspective*, 7th ed., Cape Town: Juta.
- Du Plessis M., 2010, *The International Criminal Court that Africa wants*, Pretoria: Institute for Security Studies.
- Eckart C., 2012, *Promises of states under international law*, Portland: Hart Publishing.
- Goldsmith, J. L. and Posner, E. A., 2005, *The limits of international law*, Oxford: Oxford University Press.
- International Business Publications, 2013, *Liechtenstein: country study guide*, Washington DC: International Business Publications.
- Frommelt C. and Gstöhl S., 2011, *Liechtenstein and the EEA: the Europeanization of a (very) small state*, Oslo: Europautredningen.
- Goh G.M., 2007, *Dispute settlement in international space law, a multi-door courthouse for outer space*, Boston: Martinus Nijhoff Publishers.
- Jacovides A., 2011, *International law and diplomacy, selected writings by Ambassador Andrew Jacovides*, Leiden: Martinus Nijhoff Publishers.
- Jones E. Birkbeck C. D. and Woods N., 2011, *Manoeuvring at the Margins: Constraints Faced By Small States in International Trade Negotiations*, Oxford: Oxford University.
- Katjavivi P., 1988, *A history of resistance in Namibia*, Paris: UNESCO.
- Kothari R. C., 2004, *Research methodology, methods and techniques* (2nd ed.), New Delhi: New Age International Publishers.

- Küchler F., 2008. *The Role of the European Union in the Moldova's transnistria conflict*, Stuttgart: Ibsiden Verlang, pp 28 – 29.
- Malanczuk P., 1997, *Akehurst's modern introduction to law*, 7th ed., London: Routledge.
- Mbuende K., 1986, *Namibia, the broken shield: anatomy of imperialism and revolution*, Malmö: Liber Förlag.
- Perkovich G., Mathews J. T., Cirincione J., Gottemoelle R., Wolfsthal J. B., 2007, *Universal compliance, a strategy for nuclear security*, Washington: Carnegie Endowment for International Peace.
- Sarantakos S., 2005, *Social research* (3rd ed.), New York: Palgrave Macmillan.
- Shaw M. N., 2008, *International Law*, (6th ed.), Cambridge: Cambridge University Press.
- Simpson G., 2004, *Great Powers and outlaw states, unequal sovereigns in the international legal order*, Cambridge: Cambridge University Press.
- Sitaraman S., 2009, *State Resistance and Participation in Treaty Regimes: A Macro-Assessment*, Surrey: Ashgate.
- Stilles K., 2015, *State responses to international law*, New York: Routledge.
- Souleimanov E., 2013, *Understanding ethnopolitical conflict: Karabakh; South Ossetia and Abkhazia wars reconsidered*, New York: Palgrave MacMillan, pp13 – 15.
- Udovič, B., [Sa], *Economic security: large and small states in enlarged European Union*, Ljubljana: University of Ljubljana Centre of International Relations.
- United Nations, 2010, *National Human Rights Institutions, History, Principles, Roles and Responsibilities*, United Nations: Geneva.
- Wells D.A., 2005, *The United Nations, states vs international law*, New York: Algora Publishing.

Chapters in books

- Bagamwabo F. X., 2009, “The implementation of international and regional human rights instruments in the Namibian legal framework”, in *Human rights and the rule of law in Namibia*, edited by N. Horn and A Bösl, pp 165 – 186.
- Dausab Y., 2010, International law vis-à-vis municipal law: An appraisal of Article 144 of the Namibian Constitution from a human rights perspective, in *Constitutional Democracy in Namibia – A critical Analysis after two Decades*, edited by A. Bösl, N. Horn and A. Du Pisani, Windhoek: Macmillan, pp (261 – 285).

- Erasmus G., 2010, “The Constitution, its impact on Namibian statehood and politics”, in *State, society and democracy: a reader in Namibian politics*, edited by C. Keulder. Windhoek: Gamsberg Macmillan, pp 77 – 107.
- Horn N., 2010, “The forerunners of the Namibian Constitution”, in *Constitutional Democracy in Namibia: A Critical Analysis after Two Decades*, edited by A. Bösl, N. Horn, and A. Du Pisani, Windhoek: Macmillan Education Namibia, pp 63 – 82.
- Koskenniemi M., 2002, “Between impunity and show trials”, in Frowein J. A. and Wolfrum R., *Max Planck Year Book of United Nations Law*, Vol. 6, pp 1 – 35.
- Levie H., 1985, “The Falkland Crisis and Law of Wars”, in Coll A. R and Arend A.C. (eds), *The Falkland Wars*, Boston, pp 203 – 213.
- Matz N., 2005. “Civilization and the mandate system under the League of Nations as origin of Trusteeship”, in *Max Planck Yearbook of United Nations Law, Volume 9*, edited by A. von Bogdandy and R. Wolfram, Leiden: Koninklijke Brill, pp 47 – 95.
- Mosser M.W., 2001, 'Engineering Influence: The Subtle Power of Small States in the CSCE/OSCE', in Reiter E. and Gartner H (eds.), *Small States and Alliances*, Heidelberg: Physica-Verlag, pp. 53 – 71.
- Mushelenga P., 2014, “Principles of foreign policy”, in Bösl A. and Du Pisani A (Eds.), 2014, *Namibian Foreign Relations*, Windhoek: Macmillan Education Publishers, pp 59 – 78.
- Raustiala K. and Slaughter A., 2002, “International law, international relations and compliance”, in *Handbook of international relations*, 4th ed., edited by W. Carlsnaes, T. Risse, and B. Simmons, London: SAGE Publications Ltd: 538 – 559.

Journals

- Abbot K., and Snidal D., 2000, “Hard and Soft Law in International Governance”, in *International Organization*, 54: 3, pp. 421–456.
- Alter K. J., 2003, “Do international courts enhance compliance with international law?”, in *Review of Asian and Pacific studies* (25), pp, 51 – 78.
- Bagot E., 2009, “US ambivalence and the Russo-Chechen Wars: Behind the silence”, in *Stanford Journal of International Relations*, XI (1), pp 32 – 37.
- Baudenbacher C., 2012, “Swiss economic law facing the challenges of international and European law”, in *Report to the Swiss Jurists Day 2012*, ZSR 2012 II, pp 419-673.
- Blum G., 2013, “The crime and punishment of states”, in *The Yale Journal of International Law*, pp 57 – 122.

- Bradford A. and Ben Shahr O., 2012, "Efficient enforcement in international law", in *Chicago Journal of International Law*, Vol. 12, No. 2, pp 375 – 431.
- Brilmaayer L. and Tesfalidet I. Y., 2011, "Third states obligations and enforcement of international law", in *International Law and Politics*, 44:1, pp 51 – 52.
- Cogan J. K., 2006, "Non-compliance and the International Rule of Law", in *The Yale Journal of International Law*, 31: 189 – 210.
- Cooper A. F. and Momani B., 2011, "Qatar and expanded contours of small state diplomacy", in *The International Spectator: Italian Journal of International Affairs*, pp 113 – 128.
- Cowell F., 2013, "The death of the Southern Africa Development Community Tribunal's Human Rights Jurisdiction", in *Human Rights Law Review*, 13: 153 – 165.
- Domingo R., 2009, "The Crisis of International Law", in *Vanderbilt Journal of Transnational Law*, Vol. 42, pp 1543 – 1593.
- Du Plessis M., Maluwa T. and O'Reilly A., 2013, "Africa and the International Criminal Court", in *International Law*, Vol. 1. pp 1 – 13.
- Engle K., 2015, Anti-impunity and the turn to criminal law in human rights, in *Cornell Law Review*, Vol. 100, pp 1069 – 1128.
- Gross J., 2010, "Talking with terrorists: Terrorist groups and the challenge of legitimization", in *Woodrow Wilson School Journal of Public and International Affairs*, Vol. 21, pp 93 – 114, at p 107 – 108.
- Hilgenberg H., 1999, *A fresh look at soft laws*, in *European Journal of International Law*, 10: 3, pp 499 – 515.
- Hinnesbusch R., 2006, "The Iraq war and international relation: implications for small states", in *Cambridge Review of International Affairs*, Vol. 13, No. 3, 451 – 463.
- Hope-Thompson M., 1980, "The Third World and the Law of the Sea: The Attitude of the Group of 77 towards the continental shelf", in *Boston College Third World Law Journal*, 1 (1), pp 37 – 70.
- Hossain K., 2009, "Legality of Security Council action: Does the Court move to take up the challenge of judicial review", in *Uluslararası Hukuk ve Politika*, 5 (15): 133 – 163.
- Hull M. M., 2012, "Far from Nuremberg, the United States, war crimes and the International Criminal Court", in *Inter Agency Journal*, 3 (2): 56 – 65.
- Gilley B., 2015, "Turkey, middle powers and the new humanitarianism", in *Perceptions*, XX (1), pp 37 – 58.
- Goldsmith, J. L. and Posner, E. A., 1999, "A theory of customary international law", in *University of Chicago Law Review*, 66, pp 1113 – 1177.

- Grant T. D., 1999, Defining Statehood: The Montevideo Convention and its Discontents, *Columbia Journal of Transnational Law*, Vol. 37, pp 403 – 457.
- Guzman A. T., 2002, A compliance-based theory of international law, in *California Law Review*, 90 (6), pp 1823 – 1888.
- Harms L. T. C., 2009, *Amler's precedents of pleadings*, (7th ed.), Durban: LexisNexis.
- Harwood R., 1978, *Nuremberg and other war crime trials, a new look*, Southam: Historical Review Press.
- Hirsch F., 2008, "The Soviets at Nuremberg, in *American Historical Review*, pp 701 – 730.
- Hurd I., 2012, Is humanitarian intervention legal? The rule of law in an incoherent world, in *Ethics and International Affairs*, 25 (3), pp 293 – 313.
- Ituma O. S. and Nwogbaga M. E., 2015, "Hegemonism and small states in the contemporary international system: a study of Ukraine", in *IOSR Journal of Humanities and Social Science*, 20 (3), pp 38 – 44.
- Jones H. L. 2012, Why Comply? An analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua, in *Chicago-Kent Journal of International and Comparative Law*, 12, pp 57 – 98.
- Kent A 2008, 'Compliance v Cooperation: China and International Law', in *Australian International Law Journal*, 13, pp. 19 – 32, at p 21.
- Keppler E., 2011, "Managing setbacks for the International Criminal Court in Africa", in *Journal of African Law*, pp 1 – 14.
- Kerwin J. K., 1983, "The role of United Nations General Assembly Resolutions in determining principles of international law in United States Courts", in *Duke Law Journal*, 1984 (4): 876 – 899.
- Kingsbury B., 1998, "Sovereignty and Inequality", in *European Journal of International Law*, 9, 599 – 625.
- Kirsch N., 2005, "International law in times of hegemony: unequal power and the shaping of the international legal order", in *European Journal of International Law*, 16 (3): 369 – 408.
- Kovacs P., 2014, Developments and limits in international jurisprudence, in *Denver Journal of International Law and Policy*, 31 (3), pp 101 – 128.
- Llamzon A.P., 2007, "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice", in *The European Journal of International Law*, 18 (5), pp 815 – 852.

- López-Jacoiste E., 2010, “The UN collective security system and its relations with economic sanctions and human rights, in *Max Plank Year Book of United Nations Law* 14: 274 – 335.
- Ly-Ru D. T., 2000, “Singapore and international law”, in *Singapore Journal of International and Comparative Law*, Vol. 4, pp 530 –554.
- Magnuson W., 2012, The domestic politics of international extradition, in *Virginia Journal of International Law*, 52 (4), 839 – 901.
- McDougal M. S., Lasswell H. D., and Reissman W. M., 1968, “Theories about International Law: Prologue to a Configurative Jurisprudence”, in *Virginia Journal of International Law*, 8 (2): 188 – 299.
- Menon V. G., 2009, “Challenges Facing Small States at the UN”, in *The academic council on the United Nations system informational memorandum* (79) Summer, pp 1 – 3.
- Moravcsik A., 2010, “Active citation: A precondition for replicable qualitative research”, in *Political Science and Politics*, 43 (1).
- Muhindo M. and Calenzo G., 2011, Neorealism and International Subsystems of Small States: Insights from Sub-Saharan African Countries’ Interactions, in *Interdisciplinary Political Studies*, 1 (2).
- Öberg M. D., 2006, “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ”, in *The European Journal of International Law*, 16 (5): 879 – 906.
- Palmer G. W. R., 1986, “International law in the foreign policy of a small state”, in *Victoria University of Wellington Law Research*, pp 1 – 9.
- Panezi M., 2007, “Sources of law in transition, revisiting general principles of international law”, in *Ancilla Iuris*, 66 – 79.
- Panke D., 2010, Why (big) states cannot do what they want. International legalization at work, in *International Politics*, 47 (2), pp 186 – 209.
- Pensky M., 2008, Amnesty on trial: impunity, accountability, and the norms of international law, in *Ethics and Global Politics*, Vol. 1, No. 1– 2, pp 1 – 40.
- Peskin V., 2005, “Beyond Victor's Justice? The Challenge of Prosecuting the winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda”, in *Journal of Human Rights*, 4 (2), pp 213 – 231.
- Posner E. A., and de Figueiredo M. F. P., 2005, Is the International Court of Justice Biased?, in *The Journal of Legal Studies*, 34 (2), pp 599 – 630.
- Posner, E. A. and Yoo, J., 2006, International Law and the rise of China, in *China Journal of International Law*, 7 (1), pp 1 – 15.

- Pulkowski D., 2006, "Testing compliance theories: Towards US obedience of international law in the Avena case", in *Leiden Journal of International Law*, 19: 511 – 554.
- Rao, N., 2011, Public choice and international law compliance: The executive branch is a "they and not an "it", in *Minnesota Law Review*, 96, 194 – 276.
- Schaffer G. C., and Pollack M. A., 2010, Hard vs. soft law: alternatives, complements, and antagonists in international governance, in *Minnesota Law Review*, 94, p 706 – 799, at pp 712 – 715.
- Scott S. V., 2005, Identifying the source and nature of a state's political obligation towards International Law, in *Journal of International Law and International Relations*, 1 (1 – 2), pp 49 – 60.
- Şeker A., 1999, "The fallacy of multilateralism, United Nations involvement in the Gulf war and its aftermath", in *Journal of International Affairs*, 4 (2), pp 196 – 213.
- Shen J., 2001, "The non-intervention principle and humanitarian interventions under international law", in *International Legal Theory*, 7 (1), pp 1 – 32.
- Shulman M. R., 2015, A review of the assault on international law, in *Columbia Journal of International Law*, pp 332 – 339.
- Skjærseth J. B., Stokke O.S. and Wettestad J., 2008, Soft law, hard law, and effective implementation of international environmental norms, in *Global Environmental Politics*, 6, pp 104 – 120.
- Warioba J. S., 2001, Monitoring compliance with and enforcement of binding decisions of international courts, in Frowein J. A. and Wolfrum R., *Max Planck Year Book of United Nations Law*, Vol 5, pp 41 – 52.
- Stephan P. B., 2009, "Symmetry and Selectivity: What Happens in International Law When the World Changes" in *Chicago Journal of International Law*, 10 (1): 91 – 123.
- Thorhallsson B., 2012, Small states in the UN Security Council: Means of influence?, *The Hague Journal of Diplomacy*, Vol. 7, pp 135 – 160.
- Tladi D., 2009, The African Union and the International Criminal Court: The battle for the soul of international law, in *South African Year Book of International Law*, 57 – 69.
- Vallikivi H., 2002, "Domestic applicability of customary international law in Estonia", in *Juridica International*, Vol. 2, pp 28 – 38.
- Waldorf L., 2011, A mere pretense of justice, complementarity, sham trials and victor's justice at the Rwanda Tribunal, *Fordham International Law Journal*, 33 (3): 1221 – 1277.
- Williams E. H., 1950, "Res judicata in recent cases" in *Modern Law Review*, 13 (3): 307 – 317.

Wippman D., 2001, “Kosovo and the limits of international law”, in *Fordham International Law Journal*, 25 (1), pp 129 – 150.

Dissertations / Theses

Bezglasnyy A., 2010, Middle power theory, change and continuity in the Asia-Pacific, MA Thesis submitted at the University of Columbia.

Birkeland Ø, 2014, *The Impact of Terrorist Proscriptions on Peace Processes, Sri Lanka's 5th Peace Process*, a Master degree thesis submitted at the University of Oslo.

Claridge E. M., 2013, Marrying Lon Fuller to Customary International Law: Is Customary International Law, a form of Law? An exploration focusing on the status and desirability of Customary International Law with a focus of Lon Fuller's legal principles, a Master degree thesis submitted at the Uppsala University.

Halldórsdóttir B., 2011, Small states and international courts, a MA thesis submitted at the Reykjavik University.

Geingob H., 2004, State formation in Namibia: promoting democracy and good governance, a PhD thesis submitted at the University of Leeds.

Mushelenga P., 2015, The economic diplomacy of a small state: the case of Namibia, a PhD thesis submitted at the University of South Africa.

Mushelenga SAP, 2008, Foreign policy-making in Namibia, the dynamics of the smallness of a state, a MA thesis submitted at the University of South Africa.

Skeffers I., 2010, A critical examination of Namibia's international legal obligations in terms of the United Nations Convention Against Corruption in comparison with the French Legal System, a LLM thesis submitted at the University of Namibia.

Corporate documents and publications

British High Commission in Windhoek, 2015, *Unpublished letter to the Ministry of Foreign Affairs on North Korean activities in Namibia*.

Financial Intelligence Centre of the Bank of Namibia, 2015, *Circular No. 4 of 2015*, Windhoek: Bank of Namibia.

International Court of Justice, 2016, *Judges of the International Court of Justice, 1945 – 2016*.

- 2016, *The Court, current members*.

Ministry of Foreign Affairs, 2015, unpublished briefing notes on Namibia's financial action task force on International Cooperation Review Group's onsite assessment of Namibia.

Ministry of Foreign Affairs (Liechtenstein), [S.a], *Priorities of Liechtenstein Foreign Policy*, Vaduz: Ministry of Foreign Affairs.

National Assembly, 1997a, *Debates of the National Assembly*, 15: 365.

- 1997b, *Debates of the National Assembly*, 17: 12.

- 2002, *Debates of the National Assembly*, 59.

Office of the President, 1999a, *Speeches of the President of the Republic of Namibia 1990 – 1995*, Windhoek: Ministry of Information and Broadcasting.

Legal documents and publications

International Court of Justice, 1997, *Memorial of the Republic of Namibia*, for the case of *Kasikili/Sedudu Island (Botswana/Namibia)*.

- 1999, *Botswana counter-memorials*, for the case of *Kasikili/Sedudu Island (Botswana/Namibia)*.

International Court of Justice, 1971, *Legal Consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.

International Tribunal of the Law of the Sea, 2016, *Members of the Tribunal since 1996*, available at <https://www.itlos.org/the-tribunal/members-of-the-tribunal-since-1996/>, last accessed on 1 August 2016.

United Nations, 2006, *Reports of the International Tribunal Award, Alaska Boundary Case (Great Britain, United States)*, 20 October 1903, Vol. ix: pp 481 – 540.

Newspapers and magazines

Asino T., 2015, “LAC saddened by Namibia’s withdrawal from ICC”, in *New Era*, Thursday, 26 November 2015.

Beukes J., 2015, ICC ‘mised Africa’ – Pierre Buyoya, *The Namibian Sun*, Thursday 22 October.

Charbonneau L., 2010, ‘Iran’s shares in Rössing worries Rio Tinto’, in *The Namibian*, 20 October 2010.

Maletsky C., Kasikili KO, in *The Namibian*, 14 December 1999, 8 (238).

Muraranganda E., 2015, “LAC saddened by ICC withdrawal”, in *The Namibian Sun*, Thursday, 26 November.

- 2016, “UN exonerates Namibia over BN-Korea”, in *New Era*, Thursday, 28 April.

Runsewe O., 2015, South Africa’s withdrawal from the ICC: what it means for other African countries in *Venture Africa*, 13 October.

Shigwedha A., 2007, “Africa divided on resumption of ivory trade”, in *The Namibian*, 5 March 2007.

Shinoovene I., 2015, “Cabinet affirms ICC withdrawal”, in *The Namibian*, Tuesday, 24 November 2015.

Wei W., 2016, South China Sea arbitration: a “three no” product, in *New Era*, 21: (466).

Conference papers and proceedings

Iivula-Ithana P., 2010, *Speech by the Minister of Justice at the First Review Conference for the ICC*, The Hague: ICC.

International Court of Justice, 2014, *Delegations to the Twelfth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court*.

International Criminal Court, 2014, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the status of the Government of Kenya’s cooperation with the Prosecution’s investigations in the Kenyatta case*, 04 December, The Hague: International Criminal Court.

Geingob H., 2015, *Unpublished statement by the President of the Republic of Namibia at the AU Assembly of Heads of State*, held in Johannesburg South Africa, 14 June 2015.

McLay J., 2011, *Making a Difference: The Role of a Small State at the United Nations* unpublished address made to Juniata College, Pennsylvania.

Stanley Foundation, 1998, *Getting down to cases: enforcing Security Council resolutions*, A report of The Stanley Foundation’s Thirty-Third United Nations of the next decade Conference held in Vermont, 7 – 12 June.

Wood B., 1986, *Middle powers in the international system: a preliminary assessment of potential*, A paper delivered by the Director of the North-South Institute at the meeting on: The role of the middle sized economies in the governance of the World Economic System in Helsinki, Finland.

Other publications

Börzel T. A., Dudziak M., Hofmann T., Panke D., Sprungk C., 2007, “Recalcitrance, Inefficiency, and Support for European Integration: Why member states do (not) comply with European Law”, in *Centre for European Studies Working Paper Series*, No. 151.

Dolidze T., 2015, "EU Sanctions Policy towards Russia: The Sanctioner-Sanctionee's Game of Thrones" in *Centre for European Policy Studies Working Document*, (142), pp 1 – 21.

International Crisis Group, 2013, "Fire on the city gate: Why China Keeps North Korea close", in *Asia Report* (254), International Crisis Group: Brussels.

Lavdas A.K., 2010, "Normative evolution in Europe: Small states and republican peace", in *The London School of Economics and Political Science (LSE) Europe in Question Discussion Paper Series*, No. 17, January, p 18.

Neumann I. B and Gstöhl S., Lilliputians in Gulliver's World? Small States in International Relations, in *Working Paper*, 1, Sturlugata: Centre for Small State Studies, Institute for International Affairs.

Preuß U. K., 2008, "Equality of states, its meaning in a constitutionalised global order", *Hertie School of Governance Working Papers*, (15).

Stringer K., 2011, Honorary Consuls in small states diplomacy: through Liechtenstein lens, in *Discussion papers in diplomacy*, The Hague: Netherlands Institute of International Relations.

Thapa, P. J. 1997. *Security Challenges for small states in the new world order: options for Nepal*. Pennsylvania: US Army War College.

United Nations, 2013, *Special research report on UN sanctions*, No. 3.

- 2014, *Resolution in Security Council to impose 12-Month Deadline on Negotiated Solution to Israeli-Palestinian Conflict Unable to Secure Nine Votes Needed for Adoption*, Press release No. SC/11722.

Wanyeki L. M 2012, "The International Criminal Court's cases in Kenya, origin and impact", in *Institute for Security Studies Papers* (237).

African Union Resolutions

African Union, 2011, *Decision Assembly/AU/Dec.371(XVII)* of the Assembly of Heads of State, *adopted on 1 July*.

African Union, 2013, *Decision Ext/Assembly/AU/Dec.1* of the Assembly of Heads of State, *adopted by on 12 October*.

United Nations Resolutions

United Nations, 1967, *Resolution S-V 2248 of the UN General Assembly*, *adopted on 16 December*.

- 1968, *Resolution 2324 (XXII) of the UN General Assembly*, adopted on 16 December.
- 1968, *Resolution 245/1968 of the UN General Assembly*, adopted on 14 March.
- 1968, *Resolution 246/1968 of the UN General Assembly*, adopted on 14 March.
- 1970, *Resolution 276/1970 of the UN Security Council*, adopted on 30 January.
- 1976, *Resolution 385/1976 of the UN Security Council*, adopted on 30 January.
- 1978, *Resolution 435 of the UN Security Council*, adopted on 29 September.
- 1979, *Resolution 457 of the Security Council*, adopted on 4 December.
- 1980, *Resolutions 465 of the Security Council* adopted on 1 March 1980.
- 1980, *Resolution 478 of the UN Security Council*, adopted on 20 August.
- 1986a, *draft resolution, S 18428 of the UN Security Council*, tabled on 28 October.
- 1986b, *Provisional Verbatim Record, Document No. S/PV 2718*.
- 1990, *Resolution 678/1990 of the UN Security Council*, adopted on 29 November.
- 1993, *Resolution 841 of the UN Security Council*, adopted on 16 June.
- 2000, *Resolution 1325/2000 of the UN Security Council*, adopted on 31 October.
- 2002, *Resolution 1390 of the UN Security Council* adopted on 16 January.
- 2002, *Resolution 1441/2002 of the UN Security Council*, adopted on 08 November.
- 2006, *Security Council Resolution 2094 of 2006*, adopted on 7 March.
- 2009, *Security Council Resolution 1874 of 2009*, adopted on 12 June.
- 2010, *Resolution 1929 of the Security Council* adopted on 9 June.
- 2011, *UN Security Council Resolution 2023* adopted on 5 December.
- 2016, *UN Security Council Resolutions on Namibia*, adopted since 1945.

Interviews

Diescho J., 2015, *interview*, 31 August, Windhoek.

Iivula-Ithana P., 2015, *interview*, 2 September, Windhoek.

Imalwa M., 2015, *interview*, Windhoek, 3 December.

Mbandeka F., 2015, *interview*, 23 October, Windhoek.

Nghaamwa C., 2015, *interview*, 22 October, Windhoek.

Parker C., 2015, *Interview*, 16 September, Windhoek.

Rukoro V., 2015, *interview*, 17 September, Windhoek.

Shinguadja B.M., 2015, *interview*, 19 October, Windhoek.

Walters J., 2015, *interview*, 31 August Windhoek.

Ya Toivo V., 2015, *interview*, 29 September, Windhoek.

Statutes

Constitution of the Republic of Estonia, 1992.

Constitution of the Republic of Namibia, Act No. 1 of 1990.

Conventions

International Committee of the Red Cross, 1949, *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)*, of 8 June 1977.

Convention on the rights and duties of states of 1933.

International Covenant on Civil and Political Rights.

Responsibility of States for Internationally Wrongful Acts, 2012.

Rome Statute of the International Criminal Court, 1998.

Statutes of the International Court of Justice, 1945.

United Nations Charter, 1945.

Universal Declaration of Human Rights, 1948.

Vienna Convention on the Laws of Treaties, 1969.

Case Law

Advisory Opinion of 9 July 2004 - Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ICJ Report, 2004, p 136.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, p 3.

Attorney General vs Minister of Justice and Others 2013 (3) NR 806 (SC), at p 818 E.

Autocephalous Greek Orthodox Church of Cyprus v Goldberg 717 F. Supp. 1374 (SD Ind. 1989).

Avena and Other Mexican Nationals (Mexico v. United States of America, ICJ Reports, p 12;

Azanian People's Organisation (AZAPO) and Others v President of the Republic of South Africa, 1996 (4) SA 671 (CC).

Cameroon v Nigeria: Equatorial Guinea intervening (Land and Maritime Boundary between Cameroon and Nigeria), 2002, ICJ Reports, 303.

Campaign for Nuclear Disarmament v Prime Minister [2002] EWHC 2777.

Case concerning United States diplomatic and consular staff in Tehran (United States of America v. Iran), Request for the indication of provisional measures, 15 December 1979, 1979 ICJ Reports, p 7

Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, 2 December 1963, 1963 ICJ Reports, p 15.

Compania de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie generale des eaux) v. Argentine Republic, ICSID, Ad Hoc Committee, Case No. ARB/97/3.

Corfu Channel case, Judgment of April 9th, 1949, ICJ Reports 1949, p. 4

East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, p 90.

Elettronica Sicula S.P.A. (ELSI), Judgment, ICJ Reports 1989, p 15.

Fick and Others v Republic of Zimbabwe [2010] SADCT 01/2010.

France v Parliament, Cases 358/85 and 51/86, 1988 ECR, 4821.

Government of the Republic of Namibia and Others v Mwilima and all other accused in the Caprivi Treason Trial 2002 NR 235.

Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I. C. J. Reports, 1999.

Lotus Case, PCIJ, Series a, No. 10, (1927), 18.

Marguš v. Croatia, 4455/10, 27 May 2014.

Mike Campbell and Others v The Republic of Zimbabwe [2010] SADCT 01/2010.

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US), Provisional Measures [1984] ICJ Rep 169.

Nicaragua v the United States of America [1986] ICJ Reports, 14.

Nuclear Test (Australia v France), ICJ Reports, 1974, ICJ Reports, 253;

Nuclear Test (New Zealand v France), ICJ Reports, 1974, ICJ Reports, 457.

Phosphates in Morocco, Judgment, 1938, PCIJ, Series A/B, No. 74, p 10.

United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, p 3.

Prevention and Combatting of Terrorist and Proliferation Activities Act No. 4 of 2014.

Situation in the Republic of Kenya, International Criminal Court, ICC-01/09.

Situation in Darfur, Sudan the Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139.

Situation in Darfur, Sudan the Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, ICC-02/05-01/09-266.

Situation in Darfur, Sudan the Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, ICC-02/05-01/09-267.

Société Commerciale de Belgique (Belgium v Greece), 15 June 1939, Ser. A/B., No. 78.

Territorial dispute (Libya/Chad) 1994 I.C.J. 6 (Feb. 3).

Territorial and Maritime Dispute, Nicaragua v Colombia, ICJ GL No 124, ICGJ 436 (ICJ 2012).

Online sources

Africa Wild, available at <http://sagr.co.za/forum/viewtopic.php?f=97&t=3017&start=20>, last accessed on 23 April 2016.

- Aljazeera, 2010, *Malawi cancels AU summit over Sudan's Bashir*, (9 July), available at: <http://www.aljazeera.com/news/africa/2012/06/20126974132905285.html>, last accessed on 25 March 2017.
- Bassok M, 2016, 'Israel deals itself a weak hand in military aid talks with U.S.' in *Haaretz News* (May 11) available at: <http://www.haaretz.com/israel-news/.premium-1.719002>, last accessed on 15 August 2016.
- Birkhäuser N., [S.a], *Sanctions of the Security Council Against Individuals – Some Human Rights Problems*, available at <http://www.esil-sedi.eu/sites/default/files/Birkhauser.PDF>, last accessed on 21 May 2016.
- Chong A., 2011, *The foreign policy potential of "small state soft power" information strategies*, available online at <http://www.eisa-net.org/be-bruga/eisa/files/events/turin/Chong-ALAN%20CHONG%202007%20The%20Foreign%20Policy%20Potential%20of%20Small%20State%20Soft%20Power.pdf>, last accessed on 4 August 2016.
- Gates B., 2011, "China's North Korea Politics, assessing and interests and influences", in *United States Institute of Peace special Report*, available at http://www.usip.org/sites/default/files/China's_North_Korea_Policy.pdf, last accessed on 9 May 2016.
- Human Rights Watch, 2003, *The ICC's trial of Kenya's Deputy President*, available online at <http://www.hrw.org/news/2013/09/09/kenya-deputy-president-s-trial-icc>, last accessed on 16 June 2016.
- Klyuchanskaya S., 2010, *Iran's nuclear programme*, a background guide for Tyumen International Model UN for High Schools Session, available at <http://tmun.utmn.ru/wp-content/uploads/SC.pdf>, last accessed on 3 June 2016.
- Köchler H., 1991, *The Voting Procedure in the United Nations Security Council Examining a Normative Contradiction in the UN Charter and its Consequences on International Relations*, 1991, 10., available at http://www.i-p-o.org/Koechler-Voting_Procedure-UN_Security_Council.pdf, accessed on 2 July 2016.
- 2005, *Double Standards in International Criminal Justice: The Case of Sudan, Statement by the President of International Progress Organisation*, available online at <http://www.i-p-o.org/Koechler-Sudan-ICC.pdf>, last accessed on 8 July 2016.
- Koh T., [S.a], *Law and diplomacy in Singapore*, available online at http://lkyspp.nus.edu.sg/wp-content/uploads/2013/04/pa_tk_Law-and-Diplomacy-in-Singapore_in-Law-Gazette_Oct2007.pdf, last accessed on 4 August 2016.
- Lamont M. and White P., *Workshop on Interdisciplinary Standards for Systematic Qualitative Research*, a report, available online at www.nsf.gov/sbe/ses/soc/ISSQR_workshop_rpt.pdf, last accessed on 2 May 2016.
- Lynd A. and Lynd S., 2014, *International Human Rights Law, violations by Israel and the problem of enforcement*, Israel-Palestine Working Group of Historians Against War,

available at <http://historiansagainstwar.org/resources/InternationalHumanRights.pdf>, last accessed on 4 June 2016.

Taylor-Powell E. and Renner M., 2003, *Analyzing Qualitative Data*, available at <http://learningstore.uwex.edu/assets/pdfs/g3658-12.pdf>, last accessed on 6 August 2016.

World Bank, 2016a, *Population statistics for 2013*, available online at http://data.worldbank.org/indicator/SP.POP.TOTL?order=wbapi_data_value_2013+wbapi_data_value+wbapi_data_value-last&sort=asc, last accessed on 1 September 2016.

- 2016b, World Development Indicators, available online at <http://databank.worldbank.org/data//reports.aspx?source=2&country=RWA&series=&period=>, last accessed on 1 September 2016.

ANNEX 1

A SAMPLE OF INTERVIEW QUESTIONS USED IN THE STUDY

1. What has been Namibia's influence on international law during the tenure of your office?
2. How are international law issues pertaining to Namibia coordinated among government agencies?
3. What role does your office / institution play in ensuring Namibia's compliance with international law?
4. What are the challenges or setbacks of Namibia's compliance with international law?
5. Recently, there have been statements from the Namibian government leaders suggesting the withdrawal from the jurisdiction of the International Criminal Court (ICC). What are the implications on compliance with international law and adhering to the principles of international law?
6. What are other issues that you would like to state regarding Namibia in the international legal system in general and the application of international law to states?

ANNEX 2**LIST OF INTERVIEWEES FOR THE STUDY**

- Joseph Diescho, Namibian Academic, in the field of international relations
- Pendukeni Iivula-Ithana, Former Minister of Justice and Attorney-General
- Martha Imalwa, Prosecutor-General
- Festus Mbandeka, former Chief Legal Officer, Ministry of Justice
- Chris Nghaamwa, Chief Legal Officer, Office of the Attorney-General
- Collins Parker (Dr), Judge of the High Court, former Chief Legal Officer of Justice
- Vekuii Rukoro. Former Deputy Minister of Justice; former Attorney-General
- Bro-Mathew Shinguadja, Permanent Secretary, Ministry of Labour and Industrial Relations; former Labour Commissioner
- John Walters, Ombudsman
- Vicky Ya Toivo, Special advisor to the Minister of Labour; former Permanent Secretary in the Office of the Attorney-General.