



PETITION

# CAPRIVI STRIP:

A SACRED TRUST OF CIVILIZATION BETRAYED OR  
FORGOTTEN UN DECOLONIZATION OBLIGATION?

**ADVOCATING UNIVERSAL REALIZATION OF RIGHT TO SELF-DETERMINATION**

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## I. EXECUTIVE SUMMARY

1. The first principal objective of this petition is to scrutinize how exactly Namibia has acquired sovereignty, if any at all, over the Caprivi Zipfel (“Caprivi Strip”)<sup>2</sup> and whether such acquisition is lawful under contemporary customary international law, customary international humanitarian law and customary international human rights law.
2. The second principal objective of this submission is to show that Caprivi Strip is an identifiable and peculiar colonial-type territory which is historically, legally, administratively and ethno-culturally separate and distinct from German Protectorate of South West Africa (“GSWA”) and, further, that there exists not a single legal instrument or document which makes reference to Caprivi Strip as part of the national territory of Namibia! Hence, although the international status of former GSWA has ceased to exist following Namibian independence on March 21 1990, such status continues to exist in respect of Caprivi Strip.
3. The third principal objective of this communication is to demonstrate that, all along, there have been two legally separate and distinct mandated and trust territories in southern Africa. One of these territories or colonies is known as German Protectorate of South West Africa, a German colony, while the other one is “Eastern Caprivi Zipfel”, “Caprivi Zipfel” or just Caprivi Strip, which had been part of a British colony or territory.

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<sup>2</sup>Also formerly known as Eastern Caprivi Zipfel, Caprivi Strip is a disputed pan-handle-like territory situated between the Kavango, Linyanti-Chobe and Zambezi Rivers which also form the natural boundaries between Angola, Botswana, Namibia, Zambia and Zimbabwe

4. The fourth principal objective of this petition is to illustrate that the primary objective of League of Nations (“LoN”) Mandate System (“Mandate System”) and International Trusteeship System (“Trusteeship System”) was exclusively to promote the well-being and development of all those mandated and trust colonies and territories, which as a consequence of [First World War I (“WWI”)] had ceased to be under the sovereignty of the States which had *formerly*<sup>3</sup> governed them and which had been inhabited by *peoples*<sup>4</sup> not yet able to stand by themselves, with the view to finally enable them to attain a full measure of self-government and eventually to become independent countries. Hence, Britain is still under peremptory obligation (i.e. *obligatio erga omnes*<sup>5</sup>) to formally declare whether or not Caprivi Strip and its people have attained a full measure of self-government or independence, as contemplated under *inter alia* the UN Charter (“UN Charter”).<sup>6</sup> Alternatively, as a State responsible for the administration of Caprivi Strip, Britain is under the obligation to voluntarily place Caprivi Strip under the Trusteeship System as envisaged in UN Charter.<sup>7</sup>
  
5. The fifth objective of this submission is to demonstrate that, while GSWA has been a German protectorate or colony, which, as a consequence of WWI, has ceased to be under the sovereignty of Germany pursuant to Article 119 of the Treaty of Versailles of June 28 1919 as well as pursuant to Article 22 common to the said Treaty and the Covenant of the League of Nations, Caprivi Strip, on the other hand, has, as on, at or by June 28 1919 (i.e. the critical date), continued to be under the sovereignty of His Britannic Majesty.

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<sup>3</sup>The term “formerly” is defined as meaning: “in time past” or “in an earlier period or age” or “previously”

<sup>4</sup>vide “Definition of ‘Peoples’” paragraphs 113-118 on pages 52-55 hereof

<sup>5</sup>In his book entitled “Self-determination of Peoples: A Legal Appraisal”, Cambridge University Press 1995 at page 128, Antonio Cassese defines the term *obligatio erga omnes* as: “[O]bligations which (i) are incumbent on a State towards all the other members of the international community, (ii) must be fulfilled regardless of the behavior of other states in the same field, and (iii) give rise to a claim for their execution that accrues to any other member of the international community”.

<sup>6</sup>Articles 73 and 76 of UN Charter

<sup>7</sup>Article 77(1)(c) of UN Charter

6. The sixth objective of this communication is to demonstrate that, while there exists an *ad hoc* treaty or instrument in terms of which an LoN Mandate in respect of GSWA has been conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa, there exists no similar treaty or instrument pursuant to which Caprivi Strip has ceased to be under the sovereignty of His Britannic Majesty as at June 28 1919 or at any other date thereafter.
7. The seventh objective of this petition is to show that, although the UN General Assembly (“UNGA”) has adopted a resolution<sup>8</sup> requesting UN Secretary General Kurt Waldheim to prepare a comprehensive map reflecting the national territory of Namibia, UN does not *ipso facto* confer upon Namibia sovereignty over Caprivi Strip. Moreover, UN is not vested with the authority to *mero motu* delimit any territories, determine any contentious boundary regimes or even cede or confer sovereignty over any *peoples* upon any State, without the express consent of such *peoples*.<sup>9</sup>
8. The eighth objective of this legal document is to demonstrate that Caprivi Strip is inhabited by *a people*<sup>10</sup> as defined under general international law and that all peoples inhabiting mandated and trust territories and colonies (i.e. sacred trusts of civilization) are entitled to be enabled by administering States to freely and without interference from any quarter, whatsoever, to exercise their inalienable and universal right to self-determination, failing which they have the right, including by means of armed struggle, to fight for independence as *a last resort*<sup>11</sup> as envisaged under *inter alia*

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<sup>8</sup>UNGA resolution 31/150 of December 20 1976

<sup>9</sup>vide “Definition of ‘Peoples’” paragraphs 113-118 on pages 52-55 hereof

<sup>10</sup>vide “Definition of ‘Peoples’” paragraphs 113-118 on pages 52-55 hereof

<sup>11</sup>This doctrine is based on the provisions of paragraph 3 of the Preamble to the Universal Declaration of Human Rights, which reads: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”

UNGA resolutions 2105 (XX) of December 20 1965;<sup>12</sup> 3070 (XXVIII) of November 30 1973;<sup>13</sup> 3382 (XXX) of November 10 1975.<sup>14</sup>

9. The ninth principal objective of this petition is to illustrate that Caprivi Strip has in effect legally remained a sacred trust of civilization and an international territory whose people are entitled to the right to self-determination as contemplated in terms of contemporary customary international law, customary international humanitarian law and customary international human rights law and, furthermore, that Namibia's annexation and or occupation of Caprivi Strip is legally null and void *ab initio* and it should *ipso facto* be withdrawn immediately.
  
10. The tenth objective of this report is to inform *inter alia* the UN Special Committee on Decolonization ("C-24 Committee"), and to express grave concern, about the tyranny and oppression, characterized by military occupation, foreign domination and alien subjugation as well as widespread and systematic human rights violations<sup>15</sup>, to which the people of Caprivi Strip have been subjected by Namibian authorities ever since March 21 1990.
  
11. This petition concludes that Caprivi Strip is either a case of a betrayal of a sacred trust of civilization or a forgotten UN decolonization obligation. Hence, Britain still remains under *obligatio erga omnes* to bring the decolonization process for Caprivi Strip to its logical conclusion by *inter alia* formally declaring whether or not the people of Caprivi Strip have attained a full measure of self-government. Alternatively, Britain is still under the same obligation to transmit<sup>16</sup> regularly to the UN Secretary-General, for information purposes, statistical and other information

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<sup>12</sup>Paragraph 10, UNGA resolution 2105 (XX) of December 20 1965

<sup>13</sup>Paragraph 2, UNGA resolution 3070 (XXVIII) of November 30 1973

<sup>14</sup>Paragraph 1, UNGA resolution 3382 (XXX) of November 10 1975

<sup>15</sup>Please also refer to paragraph 125 of this petition

<sup>16</sup>As per Article 73 (e) of UN Charter

of a technical nature relating to civil, cultural, economic, environmental, political and social conditions in Caprivi Strip the administration for which Britain is *de jure* responsible.

## II. INTRODUCTION

12. It has been claimed that Namibia has lawfully acquired sovereignty over Caprivi Strip presumably because the former has “inherited” Caprivi Strip from apartheid South Africa and the latter has received Caprivi Strip from Britain. Others may claim that Namibia has legally acquired sovereignty over Caprivi Strip simply because the latter had been part of the German Protectorate of South West Africa (“GSWA” or also known as “Mandated Territory of South West Africa” or just the “Territory of South West Africa”). There are also those who may argue that Caprivi Strip had been an integral part of GSWA and further that Germany is the “Predecessor State” of Namibia. *Ipsa facto* Namibia has succeeded both former GSWA and Caprivi Strip.
13. Still others may claim that since Caprivi Strip shared common borders with GSWA and further that since both GSWA and Caprivi Strip were German’s spheres of influence, Caprivi Strip is *ipso facto* lawfully part of GSWA. Still others may argue that Namibia has acquired sovereignty over Caprivi Strip in terms of African Union (“AU”) resolution AHG 16 (I) (“Cairo Resolution”) of July 21 1964 and Article 4(b) of AU’s Constitutive Act on the “respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence”, which shall be kept by all successor States in Africa after their attainment of independence. Still others may suggest that Namibia has acquired sovereignty over Caprivi Strip through the doctrine of prescription.

14. However, none of these claims can be legally tenable. This is the case because the objects and purposes of the LoN Mandate System and Trusteeship System strictly prohibit acquisition of sovereignty over all and any mandated or trust territories (i.e. international territories), except through “the freely expressed will of the peoples concerned”.<sup>17</sup>

## A. Methods of Acquiring Sovereignty

15. Firstly, although general international law recognizes nine distinct methods by which States can legally acquire territorial sovereignty over other territories, not a single one of these methods entitles Namibia, South Africa or even Britain to legally acquire sovereignty over Caprivi Strip. These methods are:

9. ***Effective Occupation:*** Effective occupation is the acquisition of sovereignty over a hitherto unoccupied land (i.e. *terra nullius* or *terra incognita*). This type of acquisition is also known as settlement. However, effective settlement occurs only when a particular territory had not previously been occupied by another sovereign state. Again, the occupied territory either may have never belonged to any other sovereign state (i.e. *terra nullius*) or it may have previously been abandoned by a sovereign state. In this case, any other state can establish its sovereignty over such territory by virtue of the principle of effective occupation or effective settlement. The Permanent Court of International Justice (“PCIJ”) under LoN held that, in order for the occupation to be effective, it must have the following two elements: (i) a formally expressed intention to permanently occupy the territory, and (ii) an occupation or effective settlement which is peaceful and continuous. The mere act

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<sup>17</sup>Principle VI of UNGA resolution 1541 (XV) of December 15 1960 and Principle 4 of UNGA resolution 2625 (XXV) of October 24 1970

of discovery of a *terra incognita* or a *terra nullius* by one state is not enough to confer a title in terms of the doctrine of effective occupation.

16. In any event, in its 1975 decision in the Western Sahara case, International Court of Justice (“ICJ”) ruled that “if there is land that in fact no one has ever claimed, such land is called ‘*terra nullius*’ it is opened for grabs. But if any land has had a population on it, that land belonged to that population and is not open for grabs.” This question arose in the de-colonization process of Western Sahara because Morocco attempted to claim that, prior to becoming a colony of Spain, Western Sahara had been “empty” (i.e. *terra nullius*) except for a few nomadic Moroccans. ICJ, however, rejected Morocco’s argument and found Western Saharans to be a distinct people who historically populated that land!

17. **Annexation:** Annexation is a forcible, violent or unilateral seizure and or incorporation of a territory belonging to a sovereign state into the domain of another sovereign country. A good example here is Israel’s seizure and annexation of Syria’s Golan Heights following the 1967 Arab-Israeli war.<sup>18</sup> Moreover, annexation has been strictly rejected and prohibited in terms of American President Woodrow Wilson’s No-Annexation Doctrine soon after WWI.<sup>19</sup> This is why and how Mandate System and Trusteeship System were instituted, in the first place, and formalized in terms of Article 22 of LoN Covenant as well as in terms of Articles 75-85 of UN Charter, respectively.

18. **Accretion:** The acquisition of sovereignty by accretion is accomplished through changes in natural geographic frontiers between states. For instance, part of the current border between Namibia and South Africa is the Orange River. If this river

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<sup>18</sup>Source: Methods of Acquiring Sovereignty, <http://www.taiwandocuments.org/sovereignty.htm>

<sup>19</sup>Nele Matz, “Governing Principles: Non-Annexation and ‘Sacred Trust’, Civilization and the Mandate System under the League of Nations as Origin of Trusteeship, Max Planck UNYB 9 (2005) p. 70



changes course over time, sovereignty over that portion of land affected by the changing river may also be altered.<sup>20</sup>

19. **Cession:** Acquisition of sovereignty by cession takes place when a state voluntarily transfers part of its territory to another state usually by treaty. Cession may be carried out in the form of a gift, sale, exchange or lease of territory. For example, France ceded Louisiana to US in 1803, while US purchased Alaska from Russia in 1867. Cession may also be accomplished by peaceful settlement as a result of war.<sup>21</sup> This is, for example, what has happened when Britain militarily compelled Germany to re-cede Caprivi Strip back to British sovereignty on September 21 1914. This is also what has happened when German colonial forces surrendered GSWA to Union of South African troops on July 9 1915.
20. **Adjudication:** This is a settlement by law of sovereignty over a territory through a recognized international judicial authority, such as ICJ. All States parties to the dispute must first agree to be bound by the decision of the judicial authority before adjudication can occur. However, this method of determining territorial sovereignty is most suitable for settling disputes over uninhabited lands (*terra nullius*).<sup>22</sup> The best known instance of acquisition of territorial sovereignty by reason of adjudication is the Kasikili-Sedudu dispute between Namibia and Botswana in 1999. ICJ handled this dispute.
21. **Conquest:** This is the acquisition of sovereignty over territory by force of arms, exercised by an independent power which reduces the vanquished power to the

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<sup>20</sup>Source: Methods of Acquiring Sovereignty, <http://www.taiwandocuments.org/sovereignty.htm>

<sup>21</sup> Acquisition of Territorial Sovereignty, <http://internationallawu.blogspot.com/2012/11/acquisition-of-territorial-sovereignty.html>

<sup>22</sup>Source: Methods of Acquiring Sovereignty, <http://www.taiwandocuments.org/sovereignty.htm>

And Acquisition of Territorial Sovereignty, <http://internationallawu.blogspot.com/2012/11/acquisition-of-territorial-sovereignty.html>

submission of its territory. Conquest does not, *per se*, give the conquering state *plenum dominium et dominium utile* (meaning “full ownership” and “equitable ownership”), but a temporary right of possession and government. Moreover, conquest is generally unacceptable as a means for acquiring sovereignty under current norms of international relations.<sup>23</sup> The acquisition of territory by force of arms (i.e. aggression or similar violation of international law) has, in any event, been illegal in international law since 1945 after UN Charter came into force.<sup>24</sup>

22. **Prescription:** This is the acquisition by one State of sovereignty or title over a territory or a property which formally belongs to another State: provided that such acquisition meets the requirements of *possessio longa, continua, et pacifica, nec sit legitima interruptio* (meaning “long, continued, peaceable and without lawful interruption”).<sup>25</sup> Therefore the law presumes that the party claiming sovereignty by prescription has had a “long, continued, peaceable and uninterrupted possession” of the territory claimed by prescription.

23. No prescription can, however, be legally sustained, which is not consistent with such presumption. Also, for prescription to apply, the State with title to the territory must acquiesce to the action of the other State because if a State takes over the territory of another State and treats it as its own territory, the other State has an obligation to protest. If it does not, the silence may be considered acquiescence to the prescription. Over time, sovereignty to the territory is therefore considered transferred. There is, however, no specific period time over which

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<sup>23</sup>Source: Methods of Acquiring Sovereignty, <http://www.taiwandocuments.org/sovereignty.htm>

And Acquisition of Territorial Sovereignty, <http://internationallawu.blogspot.com/2012/11/acquisition-of-territorial-sovereignty.html>

<sup>24</sup>vide Articles 2(4) and 2(7) of UN Charter and Article 52 of the 1969 Vienna Convention on the Law of Treaties (“VCLT”)

<sup>25</sup>vide “Feedback: Activity 8.7”, Sovereignty over Territory, Topic 8, p.8.9; and “Acquisition of Territorial Integrity”, International Law, November 24 2012, <http://internationallawu.blogspot.com/2012/11/acquisition-of-territorial-sovereignty.html>

sovereignty is recognized. Nevertheless, at some point, the transfer of sovereignty is accepted.<sup>26</sup>

24. **Self-determination:** This is the deciding by the inhabitants of a territory themselves on the form of government they shall have, without interference, whatsoever, from any quarter, especially from the State to which the territory has been subject.<sup>27</sup> The legal principle of, and the right of all peoples to, self-determination, which have gradually gained acceptance after WWI, are today by far the most acceptable means of establishing sovereignty.<sup>28</sup> This was how in 1989 Namibians freely decided to become a sovereign and independent State following UN-supervised plebiscite.

25. **Secession:** This is “creation of a new State upon a territory previously forming part of, or being a colonial entity of, an existing State”.<sup>29</sup> Secession is closely associated with self-determination. It is generally accepted in international legal discourse that, although the right of self-determination is somehow limited by the principle of territorial integrity of States as contemplated in UN Charter<sup>30</sup> and under Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>31</sup> no State may, nevertheless, avail itself of the principle of territorial integrity if it does not possess a government representing all the inhabitants of its territory and or if it does not respect contemporary customary international law, customary international humanitarian law and customary international human rights law.<sup>32</sup> This

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<sup>26</sup>Source: Methods of Acquiring Sovereignty, <http://www.taiwandocuments.org/sovereignty.htm> and Acquisition of Territorial Sovereignty, <http://internationallawu.blogspot.com/2012/11/acquisition-of-territorial-sovereignty.html>

<sup>27</sup>In 1989 under UN supervision and control the Namibian people freely voted for independence

<sup>28</sup>Source: Methods of Acquiring Sovereignty, <http://www.taiwandocuments.org/sovereignty.htm>

<sup>29</sup>Peter Radan, “Secession Defined”, The Definition of 'Secession', Macquarie Law School, Macquarie Law Working Paper No. 2007-3, August 2007

<sup>30</sup>Articles 2(4) and 2(7) of UN Charter and Article 52 of Vienna Convention on the Law of Treaties of 1969

<sup>31</sup>UNGA resolution 2625 (XXV) of October 24 1970

<sup>32</sup>Article 1(3) of UN Charter and Principle 5 of UNGA resolution 2625 (XXV) of October 24 1970

is in accordance with the doctrine of the primacy of human rights<sup>33</sup> over State sovereignty and further that this human rights doctrine is inextricably linked to the doctrine of humanitarian intervention<sup>34</sup> which equally limits State sovereignty and which has notable support in judicial writings and in contemporary international jurisprudence.

26. There are at least three modes of secession: (1) self-determination for peoples being freed from colonialism;<sup>35</sup> (2) unilateral self-determination as *a last resort* owing to large-scale and persistent violations of basic human rights;<sup>36</sup> and (3) self-determination as an inherent right to equality and nondiscrimination in respect of all peoples who are ethnically or culturally distinct and who aspire to freely associate within their own group on their distinct territory, even if they are in a democratic multiethnic state.<sup>37</sup> This objective can also be achieved through a referendum or plebiscite.
27. Thus, peoples within existing States can secede as a means of the right to self-determination only when they meet at least three basic criteria, *viz*: (1) the existence of a separate and identifiable colonial territory which a people inhabits (*i.e. ratione a separate colonial territory*); (2) a distinct culture (*i.e. ratione distinct cultural and*

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<sup>33</sup>The adoption of UN Universal Declaration of Human Rights and the development of a whole network of human rights instruments and mechanisms ensure the primacy of human rights and confront human rights violations wherever they occur

<sup>34</sup>In simple terms “humanitarian intervention” refers to military action taken against a State in order to prevent or terminate gross violations of human rights that is directed at and is carried out without the consent of such State or sovereign government. This is also known as the Responsibility to Protect (R2P)

<sup>35</sup>Also known as “external self-determination” or “colonial secession”, this is a situation when a people attain full measure of sovereignty and or total independence as a separate State. “Internal self-determination” refers to a situation where a people has a full voice within the legal system of the overall nation state, control over natural resources, the appropriate ways of preserving and protecting their culture and way of life and to be able to be a visible partner or participant with strong powers within the overall national polity

<sup>36</sup>This is often referred to as remedial secession

<sup>37</sup>Joel Day, “Where are We?: Secession and the Courts”, *The Remedial Right of Secession in International Law*, Joel Day, University of Denver, <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lng=en&id=153359>; “The Remedial Right of Secession in International Law”, 2012 Centre for International Policy Studies (CIPS), *Potentia* No 4, Fall 2012, *Potentia* 2012; Marcelo G. Kohen in “Secession: International Law Perspectives”, Cambridge and New York: Cambridge University UNGA resolution 742 (VIII) of November 27 of 1953 and Principles I and II of UNGA resolution 1541 (XV) of December 15 1960

historical identity); and (3) the desire to attain or regain self-determination (i.e. *ratione* desire to attain external self-determination).<sup>38</sup> “[A]dditional elements” of “an administrative, political, juridical, economic or historical nature” may also be taken into consideration in defining a “territory” which is entitled to attain a full measure of self-government or “complete independence.”<sup>39</sup>

28. Yet others identify altogether six criteria for self-determination or secession in the following terms: (1) the existence of a distinct, self-defined group within a state that overwhelmingly supports separatism; (2) a legitimate claim to the territory; (3) a pattern of systematic discrimination or exploitation against a sizable and self-defined minority; (4) the central government's rejection of compromise solutions; (5) the prospect of the territory and people concerned becoming a viable state; and (6) the effect of granting or refusing self-determination on regional and international peace, the effectuation of authoritative governmental processes and respect for human rights.<sup>40</sup> Caprivi Strip perfectly meets all these criteria!

## **B. Identifiable Colonial Territory<sup>41</sup>**

29. Secondly, it is fact that Caprivi Strip is legally a separate colonial-type of territory whose inhabitants are ethnically or culturally distinct from the rest of the people of

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<sup>38</sup>UNGA resolution 742(VIII) of November 27 of 1953 and Principles I and II of UNGA resolution 1541 (XV) of December 15 1960

<sup>39</sup>Principle V of UNGA Resolutions 1541 (XV) of December 15 1960

<sup>40</sup> John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*, <http://www.brill.com/products/book/secession-states-and-their-recognition-wake-kosovo>; and Jennifer P. Harris, “Kosovo: An Application of the Principle of Self-Determination: Second article in a two part series on the Kosovo crisis”; <http://www.wcl.american.edu/hrbrief/v6i3/kosovo.htm>

<sup>41</sup>In this petition, this is separate identity *ratione* separate colonial territory

Namibia.<sup>42</sup> UN sets certain criteria by which all peoples may attain a “full measure of self-government”.<sup>43</sup>

30. It is submitted that GSWA was formally defined, determined, conceived, constituted, proclaimed and established in terms of the Berlin Conference, also known as The Scramble for Africa Conference, held between November 15 1884 and February 26 1885.<sup>44</sup> It must be stressed that the Berlin Conference was, for all intents and purposes, an Africa-colonization-cum-trade meeting and the General Act<sup>45</sup> of the Berlin Conference a colonial-boundary-demarcation treaty. Hence, the current boundaries between modern Botswana and independent Namibia as well as between Namibia and South Africa have also been constituted and determined during the said Conference, although many portions of these boundaries were only confirmed in terms of subsequent bilateral boundary agreements. The current boundaries between Angola and Namibia were declared by Portugal and Germany on December 30 1886. However, such boundaries were only formally confirmed or certified several years after the defeat and subsequent surrender of German colonial forces at Khorab near Otavi, GSWA, on July 9 1915 as well as after the defeat of Oukwanyama nationalist forces led by King Mandume ya Ndemufayo in 1917.<sup>46</sup>
31. Caprivi Strip, on the other hand, only came into the picture as a German sphere of influence (not as a colonial acquisition) in terms of Article III, read in conjunction

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<sup>42</sup>South Africa legislation unambiguously makes reference to two separate identifiable territories, viz. the “Territory of South West Africa”, on the one hand, the “Eastern Caprivi Zipfel”, on the other

<sup>43</sup>UNGA resolution 1514 (XV) of December 14 1960, UNGA resolution 1541 (XV) of December 15 1960 and UNGA resolution 742 (VIII) of November 27 1953

<sup>44</sup><http://www.sahistory.org.za/dated-event/germany-declares-south-west-africa-german-protectorate>

<sup>45</sup>This General Act was signed by the representatives of the United Kingdom, France, Germany, Austria, Belgium, Denmark, Spain, the United States of America, Italy, the Netherlands, Portugal, Russia, Sweden-Norway, and Turkey (Ottoman Empire)

<sup>46</sup>Napandulwe Shiweda, “Abstract”, MANDUME YA NDEMUFAYO’S MEMO RIALS IN NAMIBIA AND ANGOLA, University of Western Cape, November 15 2005 and “King Mandume ya Ndemufayo (1911-1917) of the Oukwanyama area refuses to accept the boundary between Angola and SWA”, <http://www.klausdierks.com/Chronology/74.htm>.

with Articles VI and VII, of the July 1 1890 Heligoland-Zanzibar Treaty ("Anglo-German Treaty"). Therefore it is vehemently stressed that, unlike the General Act of the Berlin Conference, this Treaty has never been a colonial-boundary-demarcation treaty. Nor has it ever been intended to be such. The Anglo-German Treaty was, for all intents and purposes, a sphere-of-influence-agreement as well as a diplomatic conflict resolution exercise exclusively intended to normalize the then very tense bilateral relations that had existed between Germany and Britain at the time. These Anglo-German relations had gone sour over imperial rivalry over colonial ambitions in Africa.<sup>47</sup>

32. The boundaries between Caprivi Strip and Angola were rectified and confirmed in terms of subsequent arbitration and or bilateral agreements between Britain and Portugal on May 30 1905 and or even thereafter.<sup>48</sup> The boundaries between Caprivi Strip and Botswana were perhaps the only ones that were determined in terms of the Anglo-German Treaty in 1890.
33. Furthermore, although the boundaries between Zambia and Caprivi Strip were established only after the arrival of German Captain Kurt Streitwolf in Caprivi Strip on January 25 1909,<sup>49</sup> they were only finalized and rectified through the Exchange of Notes between Union of South Africa Minister of External Affairs and British High Commissioner for Northern Rhodesia (now Zambia) between July 4 1933 and July 25 1933.<sup>50</sup> This is close to 40 years after the conclusion of Anglo-German Treaty! The boundaries between Botswana and Caprivi Strip were also only

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<sup>47</sup>Duane Niler Pyeatt, "Heligoland and the Making of the Anglo-German Colonial Agreement in 1890", Texas Tech University, May 1988, p. 1-94

<sup>48</sup> "Boundary Treaties", International Boundary Study: Angola-Zambia Boundary (Country Codes: AO-ZA, The Geographer, Office of the Geographer, Bureau of Intelligence Research, No. 119-February 14 1972

<sup>49</sup>Maria Fisch, "The Journey from Gobabis to the Caprivi Strip", The Caprivi Strip during the German colonial period 1890 to 1914, p.74-78

<sup>50</sup>"Boundary Treaties", International Boundary Study: Namibia (South-West Africa)-Zambia Boundary (Country Codes: WA-ZA, The Geographer, Office of the Geographer, Bureau of Intelligence Research, No. 123-February 14 1972, p.4-5

established and rectified in 1933. This is also some 40 years after the Anglo-German Treaty.

34. That is to say, Caprivi Strip could hardly have been part of the German Protectorate of South West Africa by December 17 1920 (i.e. critical date) when the Mandate for German South West Africa came into force! Therefore, this means that the exact boundaries of Caprivi Strip had been uncertain, ill-defined, not factually established or they have undergone fundamental changes since December 17 1920. Moreover, since Anglo-German Treaty has lapsed: (1) in respect of Caprivi Strip on September 21 1914;<sup>51</sup> (2) in respect of former GSWA on July 9 1915;<sup>52</sup> and (3) in respect of the whole world on June 28 1919,<sup>53</sup> German's authority, if any at all, over Caprivi Strip and any other spheres of influence worldwide has *ipso facto* also legally lapsed.<sup>54</sup>
35. Hence, AU's Cairo Resolution on preserving the colonial boundaries would offer no favorable solution for Namibia's cause in this case. Nor would the legal principle of *uti possidetis juris* ("UPJ doctrine") favor Namibia's claim of sovereignty over Caprivi Strip, *inter alia*, because Caprivi Strip has never been a part of the colonial territory of GSWA. Moreover, UPJ doctrine 'encompasses the idea that the frontiers of newly independent States are only to follow the frontiers of the old colonial territories from which they emerged and, importantly, that these frontiers cannot be altered by unilateral actions'.<sup>55</sup> (My italics and underlining)

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<sup>51</sup>On this date the two German officials who manned a German police precinct at Schuckmannsburg peacefully surrendered to British paramilitary forces

<sup>52</sup>On this date German military forces in GSWA peacefully surrendered to British-controlled Union of South Africa forces at Khorab near Otavi and GSWA *ipso facto* ceased to be a German possession or colony

<sup>53</sup>On this date Germany was formally stripped of all her colonial possessions in terms of Article 119 of Treaty of Versailles

<sup>54</sup>Germany's overseas' possessions, protectorates and spheres of influence legally also came to an end in terms of Article 119 of the Treaty of Versailles of June 28 1919

<sup>55</sup>vide "Application of the right of self-determination-Resolving the conflict with *Uti Possidetis*", TOPIC 8-Sovereignty over Territory, p.8.19; Dixon M, Textbook on International Law, 4<sup>th</sup> Ed, Blackstone Press Limited, London, 2000, note 2, p.153; and see also Frontier Dispute Case (Burkina Faso v Mali) of ICJ of December 22 1986



36. Before becoming a German's sphere of influence, the eastern part of Caprivi Strip had been part of British-controlled Protectorate of Barotseland (a British colony established on January 8 1889).<sup>56</sup> The western part of Caprivi Strip had been lawfully part of the British Protectorate of Bechuanaland (also a British colonial possession established on March 31 1885).<sup>57</sup> This explains the reason why and how, after Anglo-German Treaty, Caprivi Strip became known, not as GSWA, but, rather, as "German Barotseland", "German Zambezi Region", "German Bechuanaland" or just "Caprivi Zipfel". This also explains the reason why and how in terms of the said Treaty, Britain was the one that had to 'grant Germany free access from its colony of GSWA to the Zambezi River'. As the Latin maxim goes: *Nemo Dat Quod Non Habet* or *Nemo Plus Transferre Potest Quam Ipse Habet* (meaning: 'One cannot give more than he or she has')!
37. After all, by being a "sphere of influence"<sup>58</sup> *in se* or *per se* does not at all confer any territorial rights of a legal nature upon any state.<sup>59</sup> A sphere of influence was merely 'a promise on the side of each of the parties' to Anglo-German Treaty to refrain from doing anything that might lead to the acquisition of sovereign rights within the sphere of influence allocated to each other.<sup>60</sup> *Ipsa facto*, a German 'sphere of influence' over Caprivi Strip has not at all vested in Germany any sovereignty over

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<sup>56</sup>Before British colonialism, Caprivi Strip had been ruled by the Lozi Empire of Barotzeland and immediately prior to that by the Kololo Empire of Bechuanaland

<sup>57</sup>"Brief History: Bechuanaland", <http://www.britishempire.co.uk/maproom/bechuanaland.htm>

<sup>58</sup>A "sphere of influence" is defined as: a country or area in which another country (such as Germany) has power to affect developments though it has no formal authority or sovereignty. The term is also applied to an area over which an outside power (such as Germany) claims hegemony with the intention of subsequently gaining more definite control, as in [colonization](#), or with the intention of securing an economic monopoly over the territory without assuming political control. The expression came into common use with the colonial expansion of European powers in Africa during the late 19th century. Theoretically, the [sovereignty](#) of a nation (such as Britain) was not impaired by the establishment of a sphere of influence within its borders; in actuality, the interested power (such as Germany) was able to exercise great authority in the territory it dominated, and if disorders occurred it was in a position to seize control. Thus the creation of spheres of influence was frequently the prelude to colonization or to the establishment of a protectorate. The term in this sense is no longer recognized in international law, however. See also: <http://encyclopedia2.thefreedictionary.com/Sphere+of+Influence>

<sup>59</sup>Sackey Akweenda, "The legal effect of 'Sphere of Influence'", *International Law and the Protection of Namibia Territorial Integrity Boundaries and Territorial Claims* p.19-20

<sup>60</sup>Article VII of Anglo-German Treaty

that territory, the determining factor having been the principle of effective occupation.<sup>61</sup>In any event, the Anglo-German Treaty *inter alia* reads:

*“The two powers agree that they shall not interfere in the sphere of influence assigned the other by Article I to IV. They shall not, in the other’s sphere of influence, make acquisitions, sign treaties, accept sovereign rights or protectorates, or prevent the other from expanding its influence”.*<sup>62</sup> (My underlining)

38. It is quite clear from the wording of Article VII, above, that, in the absence of an additional *ad hoc* bilateral agreement, Anglo-German Treaty precludes both Germany and Britain from accepting sovereignty over any of the contentious spheres of influence in Africa. Moreover, Article VI of Anglo-German Treaty reads:

*“All the lines of demarcation traced in Articles I to IV shall be subject to rectification by agreement between the two Powers, in accordance with local requirements.”*

39. The 1969 Vienna Convention on the Law of Treaties (“VCLT”) provides that treaties must be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of such treaty in its context and in the light of its object and purpose.<sup>63</sup> Hence, between July 1 1890 and September 21 1914 and even thereafter, Britain has always maintained effective occupation of both western and eastern parts of Caprivi Strip.<sup>64</sup> The Republic of Botswana (“Botswana”) also recognizes the fact that, *ab initio*, Germany had no effective occupation of Caprivi Strip because “a token German police presence”, which was established in the Eastern Caprivi on February 7 1909, has “remained under effective British

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<sup>61</sup>Sackeus Akweenda, “The legal effect of ‘Sphere of Influence’”, *International Law and the Protection of Namibia Territorial Integrity Boundaries and Territorial Claims*, p.19-20

<sup>62</sup>Article VII of Anglo-German Treaty

<sup>63</sup>Article 31(I) of the Vienna Convention on the Law of Treaties of 1969

<sup>64</sup>International Court of Justice, “The Administration of British Bechuanaland in the Colonial Period”, *Case Concerning Kasikili/Sedudu Island: Memorial of the Republic of Botswana*, Volume I, February 28 1997, paragraphs 70-73

supervision.”<sup>65</sup>Botswana also recognizes the fact that between September 21 1914 and December 31 1920, Britain had full power of administration and legislation over Caprivi Strip as a part of its Bechuanaland Protectorate up until August 14 1929 when Caprivi Strip was “administered as a part of the Mandated Territory of South West Africa.”<sup>66</sup>

40. It must be stressed that the object and purpose of the Anglo-German Treaty, in so far as Caprivi Strip was concerned, were exclusively in order for Britain to “[grant Germany] free access from its [GSWA] protectorate to the [Zambezi River] by means of a strip of land not less than 20 twenty English miles wide at any point.”<sup>67</sup>As the legal maxim goes: *In Convention, Contrabentium Voluntas Potius Quam Verba Spectari Placutt* (i.e. “In contracts, it is the rule to regard the intention of the parties rather than the actual words”). Hence, the objective of the Anglo-German Treaty was by no means to incorporate Caprivi Strip into GSWA either! This then also means that the Mandate System for former GSWA, which was “conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa”, concerned exclusively former GSWA, without Caprivi Strip. Moreover, according the Mandate for German South West Africa treaty:

*“The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.”<sup>68</sup> (My underlining)*

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<sup>65</sup>“Questions over the status of the Caprivi Strip”, Case Concerning Kasikili/Sedudu Island: Memorial of the Republic of Botswana, Volume I, February 28 1997, paragraph 70

<sup>66</sup>“Caprivi Zipfel to be Administered as a Part of the Territory of South West Africa”, Governor-General of the Union of South Africa Proclamation 1929 (No.169 of 1929)

<sup>67</sup>Article III (2) of Anglo-German Treaty

<sup>68</sup>Article I of Mandate for German South-West Africa Treaty of December 17 1920

41. From the above text, it is clear that the Mandate for German South West Africa applied only to that “territory which formerly constituted the German Protectorate of South-West Africa”. As indicated above, Caprivi Strip has never previously been part of German Protectorate of South-West Africa! Rather, before Anglo-German Treaty, Caprivi Strip has previously either been part of the British colony of Barotseland or the British Protectorate of Bechuanaland or both. Again, this is why and how after Anglo-German Treaty Caprivi Strip has been called either “German Barotseland”, “German Zambezi Region”, “German Bechuanaland” or just “Eastern Caprivi Zipfel”. Although, in the unlikely event, former GSWA and Caprivi Strip have been placed under Mandate System in terms of Article 22 of LoN’s Covenant,<sup>69</sup> this does not, in any event, mean that Caprivi Strip is *ipso facto* part of the colonial territory of GSWA or *vice versa*. Therefore, it must also be understood that Caprivi Strip has been placed under Mandate System exclusively because it had been part of German sphere of influence, not because Caprivi Strip had been part of the territory of GSWA!
42. It must also be stressed that the present-day separate States of Burundi and Rwanda (which were formerly one German colony known as Ruanda-Urundi) were simultaneously Germany’s sphere of influence and they also shared common borders like GSWA and Caprivi Strip. Like GSWA, Ruanda-Urundi was formally defined, determined, conceived, constituted, proclaimed and established during the aforementioned Berlin Conference. However, it is never being claimed today that Burundi is part of Rwanda or *vice versa*!
43. Similarly, Eritrea and Ethiopia have been colonies of Italy. Moreover, between the 11<sup>th</sup> and 19<sup>th</sup> Centuries, Eritrea became a peripheral part of Ethiopia. This was well before Italy occupied Eritrea between 1885 and 1889 and subsequently turned into

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<sup>69</sup>Although it was adopted on April 29 1919, the LoN Covenant only came into force on January 10 1920

an Italian colony pursuant to the 1889 Treaty of Ucciali between Italy and Ethiopia. In terms of this Treaty, Ethiopia agreed to Italy's acquisition of sovereignty over Eritrea. Thus, Eritrea so became a colonial unit of Italy and when Italian colonial rule came to an end, Great Britain administered Eritrea under UN trusteeship until 1952. In 1949 UNGA adopted a resolution<sup>70</sup> in terms of which a Commission was set up to ascertain the wishes of the peoples of Eritrea in the absence of a referendum or plebiscite. That Commission assessed "the political wishes of the parties and people" by collecting the views of "the principal political parties and associations" and "holding hearings of the local population".<sup>71</sup> Thus, it was falsely concluded that the majority of Eritreans favored political association with Ethiopia.

44. Consequently, UNGA decided "Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown" and the British administration of Eritrea also ended in 1952 at the same time the Federation was established. However, the Federation was short-lived, after the Eritrean Assembly "voted" in the same year for the incorporation of Eritrea into Ethiopia. Eritrea thus became a province of Ethiopia. However, the people of Eritrea finally succeeded in their claims for independence for these reasons: (1) their liberation movements took over control of the Eritrean territory; and (2) that their right to self-determination was not implemented because of UN's fault in creating the Federation. So, in this case, the claim of territorial integrity had to yield in favor of the right to self-determination of Eritrea.

45. The other example is the Federation of Rhodesia and Nyasaland, also called Central African Federation, which embraced the British settler-dominated colony of

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<sup>70</sup>UNGA Resolution 269 (IV) of November 21 1949

<sup>71</sup>UN report of the United Nations Commission for Eritrea, 1950 (UN DOC. A/1285, 17 ff., at par. 106-31)

Southern Rhodesia (now Zimbabwe) and the territories of Northern Rhodesia (now Zambia) and Nyasaland (now Malawi). Although this Federation was one unit under the control of one British Colonial Office between 1953 and 1963, today this is no longer the case. Yet no claim is made, for example, that Zimbabwe is part of Zambia, or Malawi or *vice versa*!

46. Moreover, by the time Union of South Africa received former GSWA as a LoN Mandated Territory on behalf of His Britannic Majesty, Caprivi Strip had been administered separately by His Britannic Majesty as an integral part of British Bechuanaland Protectorate effectively since September 21 1914.<sup>72</sup> After all, it would be *ab absurdo* to argue that the Treaty of Versailles (i.e. Treaty of Peace between the Allied and Associated Powers and Germany) (“Treaty of Versailles”) of June 28 1919, which saw the establishment of LoN and to which His Britannic Majesty was not only a principal party, but also a critical guarantor, could, again, confer any additional powers upon His Britannic Majesty in respect of Caprivi Strip. This was irrelevant because Caprivi Strip had already been under effective British control and occupation, first, as part of British Protectorate of Barotseland and as part of British Bechuanaland Protectorate and, secondly, as part of British Protectorate of Bechuanaland!

47. The Union of South Africa’s Peace and South-West Africa Mandate Act 1919 (Act 49 of 1919), in terms of which the British Governor-General of Union of South Africa gives effect to Article 22 of Treaty of Versailles, makes no reference, whatsoever, to Caprivi Strip. And, although the British High Commissioner for South Africa Proclamation 1922 (No 23 of 1922) referred to Caprivi Strip as “that part of the territory of South West Africa east of longitude 21 degree East

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<sup>72</sup>Former GSWA became a League of Nations Mandated Territory only on December 17 1920 and never before that date

known as Caprivi Zipfel”, this does not, in any event, mean that Britain had *ipso facto* ceded Caprivi Strip to GSWA.

48. The customary international law doctrine of *clausula rebus sic stantibus*<sup>73</sup> dictates that ‘treaty obligations hold only as long as the fundamental conditions and expectations that existed at the time of their creation hold’ and or that ‘any party to a treaty may unilaterally terminate or suspend the operation of the treaty by virtue of the fact that there has been a fundamental change of circumstances from those that had existed at the time the treaty was concluded’.<sup>74</sup>

49. It is common cause that the circumstances of peace and fundamental conditions and expectations that had existed between Britain and Germany at the conclusion of the Anglo-Germany Treaty had ceased to exist. This is so because German sphere of influence over Caprivi Strip had ended after British military forces coming from Northern Rhodesia (now Zambia) captured the only German police precinct at Schuckmannsburg and peacefully arrested the only two German officials (i.e. Captain Viktor von Frankenberg and Sergeant Fischer) in Caprivi Strip on September 21 1914.<sup>75</sup> The North Sea island of Heligoland has, in any event, resorted back under German sovereignty since March 7 1952.<sup>76</sup> This is where it originally and naturally belonged in the first place.

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<sup>73</sup>*Clausula rebus sic stantibus* (meaning “as things stand”) is a clause in international conventions (international agreements or treaties) that provides for the unenforceability of a treaty due to fundamentally changed circumstances.

<sup>74</sup>Article 62(3) of Vienna Convention on the Law of Treaties

<sup>75</sup>Maria Fisch, “The end of the German period in Caprivi”, *The Caprivi Strip during the German colonial period 1890 to 1914*, p.137-144

<sup>76</sup> “Germans reclaim Heligoland from the United Kingdom, 1951”, Global Nonviolent Action Database, <http://nvdatabase.swarthmore.edu/content/germans-reclaim-heligoland-united-kingdom-1951>

## C. Two Territories and Separate Administrations<sup>77</sup>

50. Thirdly, it must again be stressed that, in effect, there existed two historically, legally and geographically separate mandated and trust territories in southern Africa. Each one of these territories had its separate Administrator who exercised the authority delegated to him by the Mandatory Power (i.e. British-controlled Union of South Africa acting on behalf of His Britannic Majesty). One of these mandated territories was the Mandated Territory of South West Africa, “with the exclusion of the Caprivi Zipfel”, and the second one was the Caprivi Zipfel, without the Mandated Territory of South West Africa. In both cases, the supreme authority was in the hands of the Governor-General of British-controlled Union of South Africa on whose instructions the Administrators of the two mandated territories acted.<sup>78</sup>

51. The above legal fact was explained to LoN’s Permanent Mandates Commission (“PMC”) by the Mandatory Power in respect of former GSWA in an *ad hoc* Memorandum dated November 20 1925.<sup>79</sup> It has therefore been also demonstrated, to the satisfaction of PMC, that the primary objective of the transfer of the Administration of Caprivi Strip from the Mandated Territory of South West Africa to direct South African rule was to “achieve more effective administration and to serve the best interests of the inhabitants of the area subject to the terms of the Mandate”,<sup>80</sup> with the ultimate objective of the “advancement of the peoples of [Caprivi Strip] towards political maturity and the exercise of possible self-determination.”<sup>81</sup>

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<sup>77</sup>For the purposes of this petition, this is called separation *ratione* a distinct historical and cultural identity

<sup>78</sup>“Pleadings, Oral Arguments, Documents”, South West Africa Cases (Ethiopia vs. South Africa; Liberia v. South Africa), Volume IV, 1966, International of Justice, paragraphs 9-10

<sup>79</sup>LoN Doc. C.717, 1925, VI

<sup>80</sup>“Pleadings, Oral Arguments, Documents”, South West Africa Cases (Ethiopia vs. South Africa; Liberia v. South Africa), Volume IV, 1966, International of Justice, paragraph 23; and Article 2(2) of the Mandate for German South West Africa

<sup>81</sup>“Pleadings, Oral Arguments, Documents”, South West Africa Cases (Ethiopia vs. South Africa; Liberia v. South Africa), Volume IV, 1966, International of Justice, paragraphs 27-28 and 37



52. It is therefore fact that between September 1 1929 and August 1 1939 and in terms of the Eastern Caprivi Zipfel Administration Proclamation 1929 (No.196 of 1929) of August 14 1929 (“Proclamation 1929 (No. 196 of 1929”), the entire administration of Caprivi Strip was transferred from British Protectorate of Bechuanaland authorities to British-controlled Union of South Africa authorities in Mandated Territory of South West Africa. Such transfer was presumably made at the suggestion of LoN’s PMC.<sup>82</sup> However, PMC has denied that it had ever “insisted” on the transfer of the administration of Caprivi Strip from British Protectorate of Bechuanaland to Mandated Territory South West Africa.<sup>83</sup> Nonetheless, it is also fact that, ten years later, the British-controlled Union of South Africa’s Administrator for Mandated Territory of South West Africa requested the British-controlled Union of South Africa “to be relieved of the burden of administering [Caprivi Strip]”.<sup>84</sup> Such relief<sup>85</sup> was therefore formalized on July 21 1939 in terms of Eastern Caprivi Zipfel Administration Proclamation 1939 (No.147 of 1939) (“Proclamation 1939 (No.147 of 1939”), which came into force on August 1 1939.

53. Again, LoN, which was duly consulted about Proclamation 1939 (No 147 of 1939), has in any event consented<sup>86</sup> to the transfer of the administration of Caprivi Strip from Mandated Territory of South West Africa to direct Union of South Africa rule. Moreover, LoN has expressed the hope that, by such transfer, “the [Union of

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<sup>82</sup>“Pleading, Oral Arguments, Documents”, Administrative Separation of the Eastern Caprivi Zipfel : South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) Volume IV, International Court of Justice, 1966, paras. 13-15, p.109-110

<sup>83</sup>“The period 1929 to 1939”, Pleadings, Oral Arguments, Documents: South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa”, Volume IV, International Court of Justice, 1966, p. 109-110, para. 14

<sup>84</sup>“Pleading, Oral Arguments, Documents”, Administrative Separation of the Eastern Caprivi Zipfel : South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) Volume IV, International Court of Justice, 1966, para. 15, p. 110

<sup>85</sup>“Transfer of the Administration of the Eastern Caprivi Zipfel to the Department of Native Affairs”, Government Gazette no.2664, Pretoria, July 28 1939

<sup>86</sup>For any modification of the terms of the Mandate consent of Council of the League of Nations is required as provided for in terms of Articles 2(1) and 7(1) of the Mandate for German South West Africa

South Government] will be able to comply more fully with the terms of the Mandate by devoting more attention to welfare of the Native population” of Caprivi Strip.<sup>87</sup>In direct reference to Proclamation 1939 (No 147 of 1939), PMC has made *inter alia* this observation:

“[PMC] holds the view that the administrative arrangement contemplated calls for no observations on its part provided all the provisions of the mandate are properly applied in the eastern portion of the Caprivi Zipfel.”<sup>88</sup>

54. In terms of Proclamation 1939 (No 147 of 1939), Caprivi Strip has since been administered separately (i.e. no longer as part of Mandated Territory of South West Africa) by Union of South Africa’s Minister of Native Affairs as an integral part of Union of South Africa and subsequently as an integral part of Republic of South Africa. This has been the case effectively up until after Namibian independence on March 21 1990. Moreover, Proclamation 1939 (No.147 of 1939) *inter alia* reads:

“[T]he Caprivi Zipfel Proclamation, 1929 (Proclamation No.26 of 1929), issued by the Administrator of the said Mandated Territory and dated the twenty-third day of August, 1929, shall cease to apply to the Eastern Caprivi Zipfel”.<sup>89</sup>

55. It is also significant to submit that, more than 23 years after Namibian independence from the Republic of South Africa and more than 52 years after South African independence from Britain on May 31 1961, Proclamation 1939 (No.147 of 1939) remained in force, as it has never been repealed or amended! Thus, it is also significant to argue that Proclamation 1939 (No.147 of 1939)

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<sup>87</sup>“The period 1929 to 1939”, Pleadings, Oral Arguments, Documents: South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa”, Volume IV, International Court of Justice, 1966, p. 110-111, para. 17

<sup>88</sup>“The period 1929 to 1939”, Pleadings, Oral Arguments, Documents: South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa”, Volume IV, International Court of Justice, 1966, p. 111, para. 18

<sup>89</sup>Section 5 of Proclamation 1939 (No.147 of 1939)

remain in force in South Africa, not only in terms of *inter alia* the new South African Constitution and in terms of Section 3 of the Recognition of the Independence of Namibia Act 1990 (Act 34 of 1990), but also, by implication, in Namibia, in terms of Articles 25(I)(b), 66(I) and 140(I) of the Namibian Constitution!

56. The fact that former GSWA and Caprivi Strip have been two separate and mutually exclusive territories is also demonstrated by the express reference to “the territory of South West Africa” and “Eastern Caprivi Zipfel”, respectively, in terms of *inter alia* the South West Africa Affairs Amendment Act 1951 (Act 55 of 1951)<sup>90</sup> and the South West Africa Constitution Act 1968 (Act of 39 1968).<sup>91</sup> It is also critical to submit that both the South West Africa Constitution Act 1968 (Act of 39 1968) and the South West Africa Legislative and Executive Authority Establishment Proclamation 1985 (No. R 101, 1985) precluded the Administrator (General) of the Territory of South West Africa, the Legislative Assembly of the Territory of South West Africa and the National Assembly of the Transitional Government of the Territory of South West Africa from *inter alia* amending or repealing Section 38(5) of the South West Africa Constitution Act 1968 (Act 39 of 1968) which *inter alia* read:

*“no Act of the Parliament of the Republic of South Africa and no Ordinance of the Legislative Assembly of the then Territory of South-West Africa passed on or after the first day of November 1951 would apply in that part of the said Territory that was demarcated and known as the Eastern Caprivi Zipfel, unless it was expressly declared so to apply”.*

57. In addition demonstrating that there have always been two separate and mutually exclusive territories in the context of in southern Africa, whose peoples are equally entitled to be enabled to “attain a full measure of self-determination”, it is also

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<sup>90</sup>Sections 2(I) and 3(I), respectively, of the South West Africa Affairs Amendment Act 1951 (Act 55 of 1951)

<sup>91</sup>Sections 37 and 38, respectively, of the South West Africa Constitution Act 1968 (Act 39 of 1968)

significant to note that the South West Africa Legislative and Executive Authority Establishment Proclamation (No.R 101, 1985) makes no reference, whatsoever, to Caprivi Strip. It is furthermore significant to stress that the South West Africa Constitution Act 1968 (Act 39 of 1968) in terms of which the South African President and by implication also the Namibian President was vested with the powers to legislate over Caprivi Strip has been abolished in Namibia in terms of Article 147 (i.e. Schedule 8) of the Namibian Constitution.

58. The above constitutional state of affairs then means that both the Namibian President and the National Assembly cannot invoke any of the provisions of the South West Africa Constitution Act 1968 (Act 39 of 1968) as basis to make any Namibian laws applicable in Caprivi Strip. Accordingly, the Application of Laws to the Eastern Caprivi Act 1999 (Act 10 of the 1999)<sup>92</sup> cannot be made applicable in Caprivi Strip in terms of any of the provisions of the South West Africa Constitution Act 1968 (Act 39 of 1968) because the South West Africa Constitution Act 1968 (Act 39 of 1968) had been repealed by the Namibian Constitution! The legal principle of *Lex Posterior Generalis Non Derogat Legi Priori Speciali* (i.e. 'A later general law does not repeal (or re-enact) a prior special law') will have reference.

#### **D. Territorial Integrity of Namibia**

59. Fourthly, although UNGA has adopted a resolution<sup>93</sup> requesting UN Secretary General Kurt Waldheim to "urgently undertake, in consultation with the United Nations Council for Namibia, the preparation of a comprehensive United Nations

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<sup>92</sup>However, Section 1(1) of the Application of Laws to the Eastern Caprivi Act 1999 (Act 10 of the 1999) reads: "A Minister responsible for any Ministry in which any law is administered which is not applicable, by virtue of section 38(5) of the South West Africa Constitution Act 1968 (Act 39 of 1968) as repealed by Article 147 of the Namibian Constitution, in that part of Namibia which was known as the Eastern Caprivi Zipfel, with effect from the date specified in such notice"

<sup>93</sup>UNGA resolution 31/150 of December 20 1976

map of Namibia reflecting therein the territorial integrity of the Territory of Namibia”,<sup>94</sup> UN is not vested with the authority to *mero motu* cede or confer sovereignty upon any State, without the express consent of concerned States or peoples.

60. Nor does UN have the legal capacity to delimit any territories or to be party to contentious boundary cases before ICJ.<sup>95</sup> Such capacity vests exclusively in States. Again, the legal principle of *Nemo Dat Quod Non Habet* or *Nemo Plus Transfere Potest Quam Ipse Habet* applies to UN as well. Moreover, in recognition of this fact, the said UN map of Namibia contains a disclaimer which clearly states that:

*“[T]he delineation of the boundaries between Namibia and neighboring countries and the names shown on this map do not imply official endorsement or acceptance by the United Nations as they are to be determined by the independent government of Namibia.”*<sup>96</sup>

61. Such disclaimer is deliberately intended to avoid claims that UN Member nations bordering Namibia are bound by such map, which was admittedly only prepared for the purpose of the ‘dissemination of information’.<sup>97</sup>

62. It is critical at this juncture to also submit that all and any other UN resolutions relating or referring to Namibia’s territorial integrity make no reference, whatsoever, to Caprivi Strip as part of the national territory of Namibia.<sup>98</sup> Moreover, both UNGA<sup>99</sup> and UNSC<sup>100</sup> resolutions relating to the territorial integrity of Namibia

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<sup>94</sup>paragraph 7, UNGA resolution 31/150 of December 20 1976

<sup>95</sup>“Contentious Cases”, How the Court Works, <http://www.icj-cij.org/court/index.php?pI=1&p2=6>

<sup>96</sup>Sackey Akweenda, “The Legal Significance of the Map”, *International Law and the Protection of Namibia Territorial Integrity Boundaries and Territorial Claims*, The Hague: Kluwar Law International, 1997, p.292

<sup>97</sup>Sackey Akweenda, “The Legal Significance of a Disclaimer on a Map, *International Law and the Protection of Namibia Territorial Integrity Boundaries and Territorial Claims*, The Hague: Kluwar Law International, 1997, p.226

<sup>98</sup>This includes *inter alia* UN Security Council (“UNSC”) resolutions 301 of October 20 1971, 385 (1976) of January 30 1976 and 431 (1978) of July 27 1978 which make no reference to Caprivi Strip as part of the colonial territory of Namibia or otherwise

<sup>99</sup>UNGA resolution 32/9D of November 4 1977, Preamble and paragraphs 6-8

<sup>100</sup>UNSC resolutions 385 (1976) of January 30 1976; 431 (1978) and 432 (1978) of July 27 1978

only make specific reference to Walvis Bay and sometimes also the off-shore islands as parts of the national territory of Namibia. Not surprisingly, those provisions in the Namibian Constitution, which make reference to “the national territory of Namibia”, also exclude Caprivi Strip and they only stipulate that:

*“The national territory of Namibia shall consist of the whole of the territory recognized by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay, as well as the off-shore islands of Namibia, and its southern boundary shall extent to the middle of the Orange River”.*<sup>101</sup>

63. As the common law maxim goes: *Expressio Unius Est Exclusion Alterius* (meaning: “The express mention of one thing excludes all others”)! In any event, South Africa disputes Namibia’s claims, above, that “[Namibia’s] southern boundary shall extent to the middle of the Orange River”.<sup>102</sup>

## **E. Independence and No-Annexation Doctrine**

64. Fifthly, it is significant to emphasize that the primary objective of Mandate System<sup>103</sup> was to promote the “well-being and development” of all “those colonies and territories which as a consequence of [WWI] have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves”<sup>104</sup>with the view to finally enable them to attain “political independence and territorial integrity”.<sup>105</sup> Hence, primarily two

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<sup>101</sup>Article I(4) of the Namibian Constitution

<sup>102</sup>Absalom Shigwedha, “Oranger River Boundary Dispute Continues”, *The Namibian*, January 30 2013 and Moses Kamundu, “THE ORANGE RIVER BOUNDARY DISPUTE BETWEEN NAMIBIA AND SOUTH AFRICA: TERRITORIAL AND LEGAL POSITION”, University of Namibia, October 201; [http://digital.unam.na/bitstream/handle/11070.1/959/kamundu\\_orange\\_2011.pdf?sequence=1](http://digital.unam.na/bitstream/handle/11070.1/959/kamundu_orange_2011.pdf?sequence=1)

<sup>103</sup>Mandate System applied only to the German African and Far Eastern holdings and the non-Turkish parts of the former Ottoman Empire

<sup>104</sup>Article 22 (I) of the Covenant of the League of Nations

<sup>105</sup>This is in accordance with Point 14 of Woodrow Wilson’s Fourteen Points Doctrine of 1918

elements formed the core mission of Mandate System: (I) the doctrine of no-annexation<sup>106</sup> of mandated territories; and (2) the administration of every mandated territory as a “sacred trust of civilization”.<sup>107</sup>

65. The fact that, in the case of Class C-Mandates, each mandated territory was to be “best administered under the laws of the Mandatory as integral portions of its territory, subject to such local modifications as circumstances may require,”<sup>108</sup> does not at all mean that Mandatory Powers have *ipso facto* acquired sovereignty over such territories. As a matter of fact, by agreeing to Mandate System, means that the Mandatory Powers, which hitherto had sovereignty over mandated territories, have *ipso facto* renounced their sovereignty over such territories. It is also submitted that LoN had no capacity to *suo motu* confer sovereignty over any territory upon any independent state or upon another mandated territory, for that matter!
66. Since mandated territories or peoples had not yet achieved statehood, which is a pre-condition of acquiring sovereignty, in the first place, they could hardly exercise any sovereignty over their own territories, let alone exercising sovereignty over all and any other mandated territories or peoples. Thus, reference has therefore been made to “dormant” or “abeyance” sovereignty, which at all times laid with the peoples in mandated territories or peoples and which is activated only when a mandated territory becomes an independent state.<sup>109</sup> There is no doubt that, in terms of Mandate System, both GSWA and Caprivi Strip had ceased to be under the sovereignty any one of those States which had formerly governed them before the conclusion of Treaty of Versailles on June 28 1919.

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<sup>106</sup>Nele Matz, “Governing Principles: No-Annexation and ‘Sacred Trust’”, Civilization and the Mandate System under the League of Nations as Origin of Trusteeship, Max Planck UNTYP 9 (2005), p.70-71

<sup>107</sup>Nele Matz, “Governing Principles: Non-Annexation and ‘Sacred Trust’”, Civilization and the Mandate System under the League of Nations as Origin of Trusteeship, Max Planck UNTYP 9 (2005), p.70-71

<sup>108</sup>Article 22 (6) of the Covenant of the League of Nations

<sup>109</sup>Nele Matz, “Governing Principles: Non-Annexation and ‘Sacred Trust’”, Civilization and the Mandate System under the League of Nations as Origin of Trusteeship, Max Planck UNTYP 9 (2005), p.70-71

67. Similarly, objectives of the Trusteeship System<sup>110</sup> were to: (1) to promote the political, economic, social, and educational advancement of the inhabitants of all the trust territories towards the attainment of a full measure of self-government or total independence; and (2) to encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>111</sup> Contemporary general international law also guarantees the inalienable right of all peoples to “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>112</sup> UNGA directs that:

*“[I]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom”.*<sup>113</sup>

68. There exists no legal instrument in terms of which sovereignty over Caprivi Strip has been transferred from Britain to [Union of] South Africa or from [Union of] South Africa to former GSWA and subsequently to independent Namibia! Moreover, inasmuch as Union of South Africa was prohibited<sup>114</sup> to annex or incorporate former GSWA, by the same measure, Union of South Africa would have also been strictly prohibited to cede Caprivi Strip to former GSWA for that matter. Again, it cannot *ipso facto* be reasonably said that Namibia has “inherited” Caprivi Strip from Britain, Republic South Africa or Germany. Again, this is owing to the

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<sup>110</sup>The Trusteeship System, which replaced the LoN’s Mandate System, resorted under the UN General Assembly

<sup>111</sup>Article 76 of UN Charter

<sup>112</sup>UNGA Resolution 1514 (XV) of December 14 1960, para.2

<sup>113</sup>UNGA 1514 (XV) of December 14 1960, para 5

<sup>114</sup>This was accomplished in terms of UNGA resolutions 65(I) of December 14 1945, 141 (II) of November 1 1947, 227 (III) of November 26 1948, 337 (IV) of December 6 1949 and 449 (V) of December 13 1950 as wells and Article 75 and 77 of UN Charter



legal principle of *Nemo Dat Quad Non Habet* or *Nemo Plus Transferre Potest Quam Ipse Habet!* In any event, it would also be absurd to believe that UN would make provision for the right to self-determination for the people of former GSWA, while at the same time UN is denying the same right to the people of Caprivi Strip.

69. That is to imply that Britain or South Africa (and not necessarily Namibia) is still under international obligation (i.e. *obligatio erga omnes*) to formally declare whether or not Caprivi Strip and its people have attained a full measure of self-government or independence as contemplated under UN Charter<sup>115</sup> and UNGA resolutions 742 (VIII) of November 27 1953; 1514 (XV) of December 14 1960; 1541 (XV) of December 15 1960; and 2625 (XXV) of October 24 1970.

## F. Self-Determination for Colonized Peoples<sup>116</sup>

70. Sixthly, there has been and there continues to be a clear and strong desire on the part of the people of Caprivi Strip to exercise their inalienable and equal right to self-determination. This explains the rationale behind the formation in 1962 of the Caprivi African National Union (“CANU”) and subsequent establishment of the now-banned United Democratic Party (“UDP”).<sup>117</sup> The principle of, and the right of all peoples to, self-determination have become firmly embodied as a norms of *jus cogens*<sup>118</sup> and an *obligatio erga omnes*<sup>119</sup> in terms of contemporary customary international law, customary international humanitarian law and customary international human rights law.

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<sup>115</sup>Articles 73 and 76 of UN Charter

<sup>116</sup>The *ratione* desire of independence has been the primary reasons for the establishments of SWAPO and Caprivi African National Union (CANU) to secure independence for Namibia and Caprivi Strip, respectively

<sup>117</sup>Maria Fisch, “Mishake Muyongo’s Political Career”, *The Secessionist Movement in the Caprivi: A Historical Perspective*, Namibia Scientific Society, 1999, p.17-23; and “What do Caprivians want?”, *Caprivi Zipfel: The Controversial Strip Part III*; <http://www.caprivifreedom.com/history.i?cmd=view&hid=24>

<sup>118</sup>Hector Gros Espiell, “The Right to Self-determination”, UN Doc E/CN.4./Sub.2/405/Rev.1, at p.12

<sup>119</sup>Karen Parker, *Understanding Self-Determination: The Basics: Definition of Self-Determination*, footnote 7, <http://www.guidetoaction.org/parker/selfdet.html>

71. The right of all peoples, large and small, to self-determination, as a foundation for a new international legal order, finds its genesis towards the end of WWI in 1919. This right is closely associated with its chief proponent US President Woodrow Wilson's No-Annexation Doctrine. Wilson *inter alia* proposed that: "[T]he settlement of every question, whether of territory, of sovereignty, of economic arrangement, or of political relationship [is to be based] upon the free acceptance of that settlement by the people immediately concerned and not upon the basis of the material interest or advantage of any other nation or people which may desire settlement for sake of its own exterior influence or mastery".<sup>120</sup>

72. The right of all peoples to self-determination as a foundation of a new international legal order has found its second international recognition in the aftermath of WWII, with its express embodiment in several UN and other international and regional legal texts. These texts include UN Charter, UNSC resolutions, UNGA resolutions and declarations and treaties as well as *opinio juris* and judicial decisions, all of which recognize the right of all peoples to self-determination as a *conditio sine qua non* for the enjoyment of other human rights and fundamental freedoms.

## UN Charter

73. UN Charter explicitly provides that one of the Purposes and Principles of UN is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace, with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations"<sup>121</sup> and to "promote universal respect for, and observance of, human

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<sup>120</sup>Tomis Kapitan, "Self-determination and International Order", *The Monist* 89, pp.356-370

<sup>121</sup>Article I (2) of UN Charter

rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion.”<sup>122</sup> UN Charter describes Trust and Non-Self-Governing Territories (“TNSGTs”) as “territories whose peoples have not yet attained a full measure of self-government.”<sup>123</sup> All UN Member States have committed themselves “to take joint and separate action in cooperation with [UN] for the achievement of the purposes set forth in UN Charter”.<sup>124</sup>

## UN General Assembly

74. UNGA has since the early 1950s adopted several authoritative resolutions and declarations codifying the right of all peoples to self-determination. On February 5 1952, UNGA resolved that the right of all peoples to self-determination should be included in “the International Covenants on Human Rights”. Specifically, UNGA resolved that:

*“All peoples shall have the right to self-determination, and that all States, including those having responsibility for the administration of Non- Self-Governing Territories, should promote the realization of that right, in conformity with the Purposes and Principles of the United Nations, and that States having responsibility for the administration of Non-Self-Governing Territories should promote the realization of that right in relation to the peoples of such Territories.”*<sup>125</sup>

75. In another resolution, on December 16 1952, UNGA reaffirmed its commitment to the implementation of the right of all peoples to self-determination and declared that the promotion and realization of this right in TNSGTs is a prerequisite to the realization of all fundamental human rights. In the same resolution UNGA also

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<sup>122</sup>Article 55(c) of UN Charter

<sup>123</sup>Article 73 and Chap. XI of UN Charter

<sup>124</sup>Article 56 of UN Charter

<sup>125</sup>UNGA Resolution 545 (VI) of February 5 1952 para. 1

urged “States Members of the UN [to] uphold the principle of self-determination of all peoples and nations”.<sup>126</sup>

76. One of the first UNGA resolutions affirming the right of all peoples in TNSGTs to self-determination was adopted in 1953. In terms of that resolution, UNGA urges administering states to promote the right of all peoples to self-determination within the said territories.<sup>127</sup> On November 27 1953, UNGA adopted another resolution which lists three sets of factors in terms of which the international community can determine whether or not a TNSGT is or is not a territory “whose peoples have or have not yet attained the full measure of self-government”.<sup>128</sup>

77. This resolution, and taking into account the right of all peoples to self-determination, provides that a territory can: (1) attain total independence;<sup>129</sup> (2) attain semi-independent status;<sup>130</sup> or (3) freely choose to become part of the national territory of its former colonizer or of an entirely different independent country.<sup>131</sup> Before adopting two important resolutions in 1960 one of which provides criteria of “territories whose peoples have not yet attained a full measure of self-government”, UNGA continued to debate the issue and passed numerous other resolutions which articulated its evolving views on the right of peoples to self-determination.<sup>132</sup>

78. On December 14 1960 UNGA passed another crucial resolution in terms of which UN requires “immediate steps [to] be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to

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<sup>126</sup>UNGA Resolution 637 A-C (VII) of December 16 1952

<sup>127</sup>UNGA resolution 742 (VIII) of November 27 1953

<sup>128</sup>Article 73 of UN Charter and UNGA resolution 742 (VIII) of November 27 1953

<sup>129</sup>Namibia and most other former mandated territories fall under this category

<sup>130</sup>This includes Puerto Rico (US), Cook Islands (New Zealand) and Pacific Islands (US)

<sup>131</sup>This is the case in respect of Greenland (Denmark) and Northern Mariana Islands (US)

<sup>132</sup>These included Resolution 334 (IV) of December 2 1949; UNGA resolution 567 (VI) of January 18 1952; and UNGA resolution 648 (VII) December 10 1952

transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom”.<sup>133</sup> In terms of this far-reaching and authoritative resolution, UNGA also declares that “the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation”.<sup>134</sup> Also known as Declaration on the Granting of independence to Colonial Countries and Peoples, the resolution “solemnly proclaims the necessity of bringing to speedy and unconditional end colonialism in all its manifestations” and UN recognizes that “the peoples of the world ardently desire the end of colonialism in all its manifestations”.<sup>135</sup>

79. On December 15 1960 UNGA, again, instituted another resolution<sup>136</sup> containing a set of principles<sup>137</sup> in terms of which a “colony” is defined as well as in terms of which it can be determined whether or not a colonial people has attained “a full measure of self-government.” In terms of this resolution, a colony, a TNSGT or just a trust territory can be said to have reached “a full measure of self-government” only by: (a) its emergence as a sovereign and independent State; (b) its free association with an independent State; or (c) its free integration with another independent State.<sup>138</sup>

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<sup>133</sup>Paragraph 5, UNGA resolution 1514 (XV) of December 14 1960

<sup>134</sup>Paragraph 1, UNGA resolution 1514 (XV) of December 14 1960

<sup>135</sup>Paragraphs 6 and 12, UNGA Resolution 1514 (1960), UN GAOR Supp. (No.16) at 66-67, UN Doc A/4664(1960)

<sup>136</sup>UNGA resolution 1541 (XV) of December 15 1960

<sup>137</sup>These are known as ‘Principles Which Should Guide Members in Determining Whether Or Not An Obligation Exists To Transmit The Information Called For Under Article 73e Of The Charter’

<sup>138</sup>Principles VI-IX Resolution 1541 (XV) of December 15 1960

80. By stating that “the authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type”, UNGA leaves little doubt, if any, as to where self-determination should be applied. Thus, UNGA equated colonies as referred to under Chapter XI of UN Charter with TNSGTs and then proceeded to conclude that, *prima facie*, a TNSGT is any territory which is “geographically separate and which is ethnically and or culturally distinct from the country administering it.”<sup>139</sup> Once this *prima facie* case has been established, other elements of an “administrative, political, juridical, economic, or historical nature” can be considered too.<sup>140</sup>

81. On October 24 1970 UNGA unanimously adopted yet another authoritative declaration<sup>141</sup> in terms of which the right of all peoples to self-determination has not only been confirmed as an independent right, but also in terms of which certain relevant provisions in UN Charter have been interpreted as well as in terms of which the doctrine of self-determination has achieved the status of a peremptory norm of *jus cogens* and of an *obligatio erga omnes*.<sup>142</sup>

82. This declaration provides that, (1) to be an independent state; (2) to form a federation with an existing State or freely to integrate into an existing State as an autonomous region; or (3) “any other political status freely determined by a people concerned”, constitute modes for implementing external self-determination by that people.<sup>143</sup> Clearly, this declaration also links the right of peoples to self-determination within existing States to the State’s own duty to promote respect for,

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<sup>139</sup>Principle IV, Resolution 1541 (XV) of December 15 1960

<sup>140</sup>Principle V, Resolution 1541 (XV) of December 15 1960

<sup>141</sup>This is Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (UNGA resolution 2625 (XXV) of October 24 1970 and U.N. Doc. A/RES/2625(XXV))

<sup>142</sup>“Self-determination of peoples”, A Right to Remedial Secession?: The Case of Kosovo and its Implication for International Law, University of Oslo, Norway, April 26 2010, p.9-11

<sup>143</sup>Principle 4, UNGA resolution 2625 (XXV) of October 24 1970 or U.N. Doc A/RES/2625(XXV)

and observance of, human rights and fundamental freedoms for all and, further, that if peoples within existing States are treated in a grossly discriminatory fashion by an unrepresentative government, then they could claim from that State total independence as *a last resort* notwithstanding the principle of territorial integrity or political unity of sovereign and independent States.<sup>144</sup> Thus, if a people is blocked from the meaningful exercise of its right to self-determination internally, such people is entitled to attain external self-determination (by means of remedial secession) by using all available means at its disposal to liberate itself.<sup>145</sup>

83. Furthermore, on November 30 1970 UNGA adopted another “resolution on the importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights.”<sup>146</sup> Moreover, in the post-Cold War Era (“CWE”), UNGA has adopted even more resolutions<sup>147</sup> codifying the universal realization of the right of all peoples to self-determination as the most effective way the global community can guarantee protection of fundamental freedoms.

84. *Opinio juris* agrees that UNGA resolutions are part of general international law.<sup>148</sup>

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<sup>144</sup>This is in terms of Principle 7 of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations commonly also known as “safeguard clause” of UNGA resolution 2625 (XXV) of October 24 1970

<sup>145</sup>paragraph 2, UNGA resolution 37/43 of December 3 1982 and, paragraph 2, UNGA resolution 40/25 of November 29 1985

<sup>146</sup>UNGA resolution 2649 (XXV) of November 30 1970

<sup>147</sup>UNGA resolutions 41/100 of December 4 1986; 42/94 of December 7 1987; 43/105 of December 8 1988; 44/80 of December 8 1989, 45/131 of December 14 1990; and, 46/88 of December 16 1991, 47/83 of December 16 1992, 48/93 of December 20 1993, 49/148 of December 23 1994, 50/139 of December 21 1995 and 51/84 of December 12 1996; UNGA resolution 52/113 of February 18 1998; UNGA resolution 62/144 of February 28 2008; UNGA resolution 65/201 of December 21 2010; UNGA resolution 66/145 of December 19 2011; UNGA resolution 67/157 of December 20 2012

<sup>148</sup>J Castaneda, “Legal Effect of the United Nations Resolutions 11 (1969), at 105-106; R. Higgins, “The David Davies Memorial Institute of International Studies, 1972, at 5; Umozurike, “Self-Determination in International law”, at 189-190 (1972); H. Bokor-Szeco, “The Role of the United Nations in International Legislation”, at 33-40 (1978); and Joyner, “UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation”, 11 Cal. W. International Law Journal 445, 457-459 (1981)

## Human Rights Council

85. UN Human Rights Council has also adopted numerous resolutions effectively recognizing and codifying the universality of the right of peoples of self-determination and condemning “the violation of the right of peoples to self-determination and other human rights as a result of foreign military intervention, aggression and occupation.”<sup>149</sup>

## Covenants on Human Rights

86. UN has also adopted several legal texts and has enacted several treaties codifying the principle and the right of all peoples to self-determination as a general principle of international law and as a peremptory norm of *jus cogens*.<sup>150</sup> The best known of such treaties are the two International Covenants on Human Rights, which contain a common provision on the right of all peoples to self-determination. This

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<sup>149</sup>vide Official Records of the Economic and Social Council, 1980, Supplement No. 3 and corrigendum (E/1980/13 and Corr.I), chap. XXVI, sect. A. thirty-seventh, Ibid., 1981, Supplement No. 5 and corrigendum (E/1981/25 and Corr.I), chap. XXVIII, sect. A. thirty-eighth, Ibid., 1982, Supplement No. 2 and corrigendum (E/1982/12 and Corr.I), chap. XXVI, sect. A. thirty-ninth, Ibid., 1983, Supplement No. 3 and corrigendum (E/1983/13 and Corr.I), chap. XXVII, sect. A. fortieth, Ibid., 1984, Supplement No. 4 and corrigendum (E/1984/14 and Corr.I), chap. II, sect. A. forty-first, Ibid., 1985, Supplement No. 2 (E/1985/22), chap. II, sect. A. forty-second, Ibid., 1986, Supplement No. 2 (E/1986/22), chap. II, sect. A. forty-third, Ibid., 1987, Supplement No. 5 and corrigenda (E/1987/18 and Corr.I and 2), chap. II, sect. A. forty-fourth, Ibid., 1988, Supplement No. 2 and corrigendum (E/1988/12 and Corr.I), chap. II, sect. A. forty-fifth, Ibid., 1989, Supplement No. 2 (E/1989/20), chap. II, sect. A. forty-sixth, Ibid., 1990, Supplement No. 2 and corrigendum (E/1990/22 and Corr.I), chap. II, sect. A. forty-seventh, Ibid., 1991, Supplement No. 2 (E/1991/22), chap. II, sect. A. forty-eighth, Ibid., 1992, Supplement No. 2 (E/1992/22), chap. II, sect. A. forty-ninth, Ibid., 1993, Supplement No. 3 (E/1993/23), chap. II, sect. A. fiftieth, Ibid., 1994, Supplement No. 4 and corrigendum (E/1994/24 and Corr.I), chap. II, sect. A. fifty-first, Ibid., 1995, Supplement No. 3 and corrigenda (E/1995/23 and Corr.I and 2), chap. II, sect. A. fifty-second Ibid., 1996, Supplement No. 3 (E/1996/23), chap. II, sect. A. and fifty-third Ibid., 1997, Supplement No. 3 (E/1997/23), chap. II, sect. A. sessions

<sup>150</sup>UN Special Rapporteur Hector Gros Espiell, Implementation of United Nations Resolutions relating to the Right of peoples under Colonial and Alien Domination to Self-determination, Human Rights Council, United Nations doc. E/CN.4/Sub.2/405 (vol.I) June 20 1978; Matthew Saul, “The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?”; Maya Abdullah, The right to self-determination in international law: Scrutinizing the colonial aspect of the right to self-determination, School of Economics and Commercial Law, University of Goteborg, Department of Law, May 2006; Karen Parker, Definition of Self-determination”, Understanding Self-determination: The Basics, Right to Self-termination, Presentation of First International Conference on the Right to Self-determination, United Nations, Geneva, August 2000



provision, which is phrased with exactly the same wording in both Covenants, recognizes the right to self-determination in the following terms:

*“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations”.*<sup>151</sup>

87. Thus, the adoption of the texts of the two UN Covenants on Human Rights marked the next phase of legal development of the concept of self-determination from a legal obligation in the decolonization area, to self-determination as a basic human right. The drafters of the two Covenants imposed on contracting States the duty to implement the above obligations in ‘conformity with the Charter’. The Covenants also define self-determination as an inalienable right of all peoples, which imposes corresponding obligations and affirms that “the rights and ... obligations concerning its implementation are interrelated with other provisions and rules of international law”.<sup>152</sup>

88. International jurist Antonio Cassese's view is that (the) general spirit and context of Article I common to the two Covenants combined with the preparatory work, lead to the conclusion that Article I applies to: (I) entire populations living in

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<sup>151</sup>Article I (1-3) common to International Covenants on Human Rights

<sup>152</sup>Paragraph 2 of General Comment No. 12: The right to self-determination of peoples (Art. 1): 03/13/1984. CCPR General Comment No. 12 (General Comments)

independent and sovereign states, (2) entire populations of territories that have yet to attain independence, and (3) populations living under foreign military occupation.<sup>153</sup>

### **Human Rights Committee**

89. In its general comments UN Human Rights Committee (“HRC”) also recognizes the right of all peoples to self-determination is a universal human right that serves as a prerequisite for the fulfillment of the whole range of human rights stipulated in the two Covenants. In terms of its General Comment on Article I common to the present Covenants, HRC also advises that the right of peoples to self-determination reaches beyond the colonial situation and “imposes specific obligations on State Parties, not only in relation to their own peoples but also *vis-à-vis* all peoples, which have not been able to exercise or have been deprived of the possibility of their right to self-determination.”<sup>154</sup>

### **CERD Committee**

90. Through its own legal texts regarding the right of all peoples to self-determination, UN Committee on the Elimination of Racial Discrimination (“CERD”) comes precisely to the same conclusions as HRC above.<sup>155</sup>

### **Third Committee**<sup>156</sup>

91. During its 10<sup>th</sup> Session in 1955, UNGA’s Third Committee also affirms that, in addition to the right to self-determination, every people or nation is free to

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<sup>153</sup>See also Footnote 5, paragraph 4 on page 3 of this submission

<sup>154</sup>CCPR General Comment 12 (Twenty-first Session 1984) Article I: Right to Self-determination of Peoples, UN DOC. A/39/40 (1984), at paras. 1-8

<sup>155</sup> CERD General Recommendation XXI (Forty-eighth session 1996): Right to Self-determination, A/51/18 (1996) 125 at paras. 6-11 and CERD General Recommendation 21, n UN DOC. CCPR/C/21/Add.3

<sup>156</sup>Also known as the Social, Humanitarian Cultural Committee, the Third Committee deals with all UNGA agenda items relating to a whole range of social, humanitarian affairs and human rights issues affecting people worldwide

establish its own political institutions, to develop its own economic resources, and to direct its own social and cultural evolution, without the interference of other peoples or nations. The present Committee also affirms that a people or nation that could not freely determine its political status could hardly determine its economic, social and cultural rights and *vice versa*.<sup>157</sup> Hence, Third Committee confirms the doctrine of the universality, indivisibility, interrelatedness and interdependence of all civil and political rights, on the one hand, and, economic, social and cultural rights, on the other.<sup>158</sup>

### **Regional Treaties**

92. Several regional treaties and other legal texts also give express recognition to the right of all peoples to self-determination or remedial secession. The 1981 African Charter on Human and Peoples' Rights ("African Charter") embodies altogether five provisions which explicitly and entirely recognize the right of peoples to self-determination.<sup>159</sup>

93. Although both the Inter-American Convention on Human Rights ("IACHR")<sup>160</sup> and the Charter of the Organization of American States ("American Charter")<sup>161</sup> do not explicitly recognize the right of peoples to self-determination, they expressly seek to protect the right of peoples to have sovereignty over their natural wealth resources.

94. The 1975 Helsinki Final Act ("Helsinki Act") also indirectly recognizes the right of peoples to secede as both a function of the right of peoples to self-determination

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<sup>157</sup>Third Committee, 10th Session (1955): UNDOC A/C.3/SR.645, 18 (CS); A/C.3/SR.647,12 (GR))

<sup>158</sup>Part I, para 5, of Vienna Declaration and Program of Action, as adopted by the World Conference on Human Rights in Vienna on June 25 1993

<sup>159</sup>Articles 19-24 of African Charter

<sup>160</sup>Articles 4, 11 and 21 of IACHR

<sup>161</sup>Article 3 of American Charter

and as having achieved the status of *obligatio erga omnes* and *jus cogens*.<sup>162</sup> The Organization on Security and Co-operation in Europe (“OSCE”) has also adopted a legal instrument, which makes explicit reference to internal and external self-determination in the following terms:

*“By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.”*<sup>163</sup>

95. The above OSCE formulation is construed to mean that the right of all peoples to self-determination is a continuing right, not a right exercised, once and for all, at the time of independence. OSCE’s Charter of Paris also reaffirms “the equal rights of peoples and their right to self-determination in conformity with UN Charter and other relevant norms of international law”.<sup>164</sup>

### ICJ Advisory Opinions

96. In a number of Advisory Opinions but mainly within the decolonization context, ICJ has also recognized the principle of, and the right of all peoples to, self-determination. In its Advisory Opinion concerning Namibia, ICJ affirms the right to self-determination as defined by UN and declares that “the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them”.<sup>165</sup>

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<sup>162</sup>Article VIII, Final Helsinki Act of August 1 1975

<sup>163</sup>Principle VIII (2), Declaration on the Principles Concerning Mutual Relations of the Participating States

<sup>164</sup>Paragraph 7, Friendly Relations among Participating States, Charter of Paris for a New Europe of November 21 1990

<sup>165</sup>See ICJ Advisory Opinion Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Report, 1971, 16, at para.31-32 and 31 at para.52

97. In terms of its 1975 Advisory Opinion on Western Sahara, ICJ broadens the existing interpretation and the impact of the right of all peoples to self-determination. The Court refers to the right to self-determination as a right held by people rather than a right held by governments alone.<sup>166</sup> Referring to UNGA Resolution 1514 (XV), the Court holds that the provisions of this resolution and, “in particular paragraph 2 [defining self-determination], requires a free and genuine expression of the will of the peoples concerned”.<sup>167</sup>

98. Hence, ICJ also holds that self-determination always entails “the need to pay regard to the freely expressed will of the peoples and that, exceptionally, this requirement can be and has been dispensed in two instances: (1) when one is not faced with a ‘people’ proper; and (2) when ‘special circumstances’ make a plebiscite or referendum unnecessary.”<sup>168</sup>

## G. Remedial Secession for Oppressed and Other Peoples<sup>169</sup>

99. Seventhly, there is broad international consensus that secession right is an international customary law norm of *jus cogens*.<sup>170</sup> In this regard, contemporary general international law and customary international human rights law recognize the right of all peoples to self-determination, not only: (1) in the context of

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<sup>166</sup>ICJ, Western Sahara Case Report 1975, page 12, at para.31

<sup>167</sup>ICJ Reports 1975, 32, at paragraph 55 and also ICJ Advisory Opinion Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Report, 1971, 16, at para. 31-32

<sup>168</sup>ICJ Reports on Western Sahara Case 1975, 32, at paragraph 55

<sup>169</sup>The domination, oppression as well as socio-economic and political marginalization in Caprivi Strip were cited as the primary reasons for the secessionist attack on Namibian government installations in Caprivi Strip on August 2 1999 followed serious and widespread human rights violations there

<sup>170</sup> Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT) reads: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”, while Article 64 of VCLT reads: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates”

independence from colonial domination; and (2) in the form of remedial or unilateral secession as *a last resort* owing to serious government violations of human rights and other grave injustices within existing independent States, but also, (3) in the context of exercising self-determination as an inherent human right principle of equality and non-discrimination of all peoples.<sup>171</sup> It must, therefore, be stressed, *in passim*, that the principle of, and the right of all peoples to, equality and non-discrimination belong to *jus cogens* and *ipso facto* they attract *erga omnes* obligations on the part of the international community as a whole.<sup>172</sup>

100. This then means that, while contemporary international customary law discourages “any action, which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign independent states which are conducting themselves in compliance with the principle of equal rights and self-determination of peoples”,<sup>173</sup> it also affirms the right of every people to determine its political, economic, social, and cultural status. This then also means that the principle of maintenance of the territorial integrity of existing States and the right of peoples to achieve a full measure of self-determination are interdependent and mutually inclusive. In any event, as celebrated international jurist and former UN Human Rights Council Special Rapporteur John Dugard<sup>174</sup> states, the doctrine of non-impairment or non-dismemberment of the territorial integrity or political unity of sovereign independent states does not prohibit national liberation movements

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<sup>171</sup>B K Sen, “Secession and the Philosophy of International Law”, Burma Lawyers’ Council, *Legal Issues of Burma Journal* no.10, December 2001

<sup>172</sup>“LEGAL STATUS AND RIGHTS OF UNDOCUMENTED MIGRANTS”, ADVISORY OPINION OC-18/03 OF SEPTEMBER 17 2003 [AS] REQUESTED BY THE UNITED MEXICAN STATES, INTER-AMERICAN COURT OF HUMAN RIGHTS, at paras. 101 and 109 [(Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003))

<sup>173</sup>This is also known as the ‘safe guard clause’ or Principle 7 of UNGA Resolution 2625 of October 24 1970

<sup>174</sup>John Dugard, “The Secession of States and Their Recognition in the Wake of Kosovo”, see footnotes 290, 293, 669-673; <http://www.brill.com/products/book/secession-states-and-their-recognition-wake-kosovo>

from resorting to using of force as a *last resort* in their struggles against foreign military occupation, domination and alien subjugation.

101. It is crucial to submit that both UNGA<sup>175</sup> and UNSC<sup>176</sup> have since 1965 passed a series of resolutions on *inter alia* the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>177</sup> as well as on the importance of the universal realization of the right of peoples to self-determination (and remedial secession) and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, in terms of which contemporary customary international law expressly recognizes the inherent right of all oppressed peoples to use all available means including armed force *as a last resort* against colonialism and foreign domination and alien subjugation. Moreover, in terms of the Universal Declaration of Human Rights (“UDHR”):

*“[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”.*<sup>178</sup>

102. Thus, on December 20 1965 UNGA adopted a resolution in terms of which the international community as a whole recognizes “the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence and invites all States to provide material and moral assistance to the national liberation movements in colonial Territories”.<sup>179</sup>

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<sup>175</sup>These UNGA resolutions include 2105 of December 20 1965; 3070 (XXVIII) of December 30 1973; 2955 (XXVII) of December 12 1972; 3103 (XXVIII) of December 12 1973; 3246 (XXIX) of November 29 1974; 32/147 of December 7 1977; 33/24 of November 29 1978; 34/44 of November 23 1979; 35/35 of November 14 1980; 36/9 of October 28 1981; 37/43 of December 3 1982; 40/25 of November 29 1985; and, 40/61 of December 9 1985

<sup>176</sup>UNSC resolutions: 418 (1977) of November 4 1977 and 437 (1978) of October 10 1978

<sup>177</sup>This is UNGA resolution 1514 (XV) of December 14 1960

<sup>178</sup>Paragraph 3 of Preamble, Universal Declaration of Human Rights, UNGA resolution 217 (III)A of December 10 1948

<sup>179</sup>Paragraph 10, UNGA resolution 2105 (XX) of December 20 1965

103. On October 13 1970 UNGA in a far-reaching resolution on the program of action for the full implementation of Declaration on the Granting of Independence to Colonial Countries and Peoples, UN declares that “the further continuation of colonialism in all its forms and manifestations a crime which constitutes a violation of the Charter of the United Nations, the Declaration of on the Granting of Independence to Colonial Countries and Peoples and of the principles of international law”.<sup>180</sup> This UNGA resolution also reaffirms “the inherent right of colonial peoples to struggle by all necessary means at their disposal against colonial Powers which suppress their aspiration for freedom and independence”.<sup>181</sup>

104. It was, however, not until December 12 1973 when UNGA adopted a rare resolution entitled *Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes*. In terms of this document, UN not only reaffirms that the continuation of colonialism in all its forms and manifestations is a crime, but it also reaffirms that colonial peoples have the inherent right to struggle by all means at their disposal against colonial Powers and alien domination “as recognized in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”<sup>182</sup> In terms of the said resolution UNGA also proclaims that:

*“Any attempt to suppress the struggle against colonial and alien domination and racist regimes is incompatible with the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the Universal Declaration of*

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<sup>180</sup>Paragraph 1, UNGA resolution 2621 (XXV) of October 13 1970

<sup>181</sup>Paragraph 2, UNGA resolution 2621 (XXV) of October 13 1970

<sup>182</sup>Paragraph 4 of Preamble, UNGA resolution 3103 (XXVIII) of December 12 1973



*Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples and constitutes a threat to international peace and security”.*<sup>183</sup>

105. UNGA also proclaims in terms of the said resolution that “the combatants struggling against alien domination and racist regimes are to be accorded the status of prisoners of war and their treatment should be in accordance with the provisions of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949”.<sup>184</sup>

106. On November 10 1975 UNGA adopted yet another critical resolution in terms of which UN reaffirms the importance of the universal realization of the right of peoples to self-determination, national sovereignty and territorial integrity and of the speedy granting of independence to colonial countries and peoples as imperatives for the enjoyment of human rights. In terms of this resolution, UN also reaffirms the legitimacy of the peoples’ struggle for independence, territorial integrity and liberation from colonial and foreign domination by all available means, including armed struggle.<sup>185</sup>

107. It is also submitted that in its Advisory Opinion in Western Sahara Case, ICJ holds that the right to self-determination is not only the right of governments but also of peoples.<sup>186</sup> This then means that when a people becomes a victim of assault<sup>187</sup> in its own territory by a tyrannical alien government, any such people has the inherent right to self-defense in terms of Article 51 of UN Charter and in

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<sup>183</sup>Principle 2, UNGA resolution 3103 (XXVIII) of December 12 1973

<sup>184</sup>Principle 4, UNGA resolution 3103 (XXVIII) of December 12 1973

<sup>185</sup>Paragraph 1, UNGA resolution 3382 (XXX) of November 10 1975

<sup>186</sup>ICJ, Western Sahara Case Report 1975, page 12, at para.31

<sup>187</sup>Such an assault may manifests itself in terms of colonialism, foreign domination or occupation or oppression or discrimination and marginalization or any forms of subjugation

conformity with UNGA<sup>188</sup> resolutions, in particular resolution 1514 (XV) of December 14 1960 as well as a couple of UNSC<sup>189</sup> resolutions. This right to self-defense includes a people taking all reasonable and legitimate means at its disposal, including armed struggle, to liberate or extract itself from such assault as *a last resort*.

108. In its landmark ruling of August 20 1998 in the Quebec Secession Case, the Supreme Court of Canada (“SCC”) held that the maintenance of the territorial integrity of existing States is only true when the State in question governs in a manner that is representative of all peoples resident within its territory, equally and without discrimination.<sup>190</sup> In summary, SCC ruled that the international law right to self-determination only generates, at best, a right to external self-determination in situations of: (1) former colonies; (2) where a people is oppressed, as for example under foreign military occupation; or (3) where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.<sup>191</sup> In other words, only when States are fully in compliance with those three requirements would they be considered entitled to the protection under international law of their territorial integrity. Specifically, the Canadian Supreme Court stated:

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<sup>188</sup>These UNGA resolutions include 2105 of December 20 1965; 3070 (XXVIII) of December 30 1973; 2955 (XXVII) of December 12 1972; 3103 (XXVIII) of December 12 1973; 3246 (XXIX) of November 29 1974; 32/147 of December 7 1977; 33/24 of November 29 1978; 34/44 of November 23 1979; 35/35 of November 14 1980; 36/9 of October 28 1981; 37/43 of December 3 1982; 40/25 of November 29 1985; and, 40/61 of December 9 1985

<sup>189</sup>UNSC resolutions: 418 (1977) of November 4 1977 and 437 (1978) of October 10 1978

<sup>190</sup>The fundamental principle of equality and non-discrimination has entered the domain of *jus cogens* and *obligatio erga omnes* for the purposes of Articles 53 and 64 of the 1969 Vienna Convention of the Law of Treaties (VCLT) and as contemplated by Inter-American Court on Human Rights in terms of its “LEGAL STATUS AND RIGHTS OF UNDOCUMENTED MIGRANTS”, ADVISORY OPINION OC-18/03 OF SEPTEMBER 17 2003 [AS] REQUESTED BY THE UNITED MEXICAN STATES, INTER-AMERICAN COURT OF HUMAN RIGHTS, at paras. 101 and 109 (Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003)) ; vide also “Universality, Equality and Non-Discrimination”, International Commission of Jurists (ICJ), <http://www.icj.org/sogi-casebook-introduction/chapter-two-universality-equality-and-non-discrimination/>

<sup>191</sup>Reference Re: Secession of Quebec, Supreme Court of Canada, 1998 (2) SCR 217, at paragraph 138

*[T]he international law right to self-determination generates at best, a right to self-determination [...] where a people is oppressed [...] or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to the right to external self-determination because they have been denied the ability to exert internally their right to self-determination.*<sup>192</sup>

109. It must also be stressed that charges of serious human rights violations cannot be shielded by claims or appeals to the sacrosanctity of the territorial integrity or political unity of sovereign States. The doctrine and practice of humanitarian intervention as exemplified by *inter alia* the 1999 Kosovo and the 2011 Libya interventions by NATO military forces demonstrates that the doctrine of the primacy of human rights prevails over the doctrine of State sovereignty, territorial integrity and political independence as State compliance with human rights norms establishes state legitimacy or lack of it.<sup>193</sup>

110. After affirming ‘the territorial integrity or political unity of sovereign and independent states’, the 1993 Vienna Declaration and Program of Action also emphasizes that the territorial integrity or political unity of sovereign and independent states is conditional upon governments representing all the peoples on their territories without distinction and this includes all the peoples’ right to determine their own political, economic, social and cultural issues.<sup>194</sup>

111. The above legal scheme of things is further solidified by the enactment of the Responsibility to Protect (“R2P”) as contained in UN’s 2005 World Summit

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<sup>192</sup>Supreme Court of Canada, “Reference re Secession of Quebec”. 1998 (2) SCR 217, paragraphs 126 & 138

<sup>193</sup>Chandra Lekha Sriram, Human Rights as a Challenge to the Primacy of the State”, Human Rights Claims vs. The State: Is Sovereignty Really Eroding?, Interdisciplinary Journal of Human Rights Law, Vol.1:2006, p.108

<sup>194</sup>Part I, para 2(2) of Vienna Declaration and Program of Action, as adopted by the World Conference on Human Rights in Vienna on June 25 1993

Outcome.<sup>195</sup>The tri-pillar R2P doctrine holds that the duty to prevent and halt genocide and other mass atrocities lies, first and foremost, with States: provided that (1) the international community as a whole has a role that cannot be blocked by the invocation of sovereignty; (2) that sovereignty no longer exclusively protects States from foreign interference; and, further, (3) that States are accountable for the welfare of all their peoples.<sup>196</sup>

112. The legal principle of, and the right of all peoples to, secession has found even more universal application in the aftermath of the Cold War Era (“CWE”). Typical examples of secession in the post-CWE period include the 1991 dissolution<sup>197</sup> of the Union of Soviet Socialist Republics (“Soviet Union”) and the 1992 disintegration of the Federal Socialist Republic of Yugoslavia (“former Yugoslavia”).

## H. Definition of “Peoples”

113. Eighthly, there is no specific international legal definition of “peoples” who are entitled to the right of self-determination or secession. However, there is wide international consensus that the bearers of this right are peoples or groups who share the following characteristics: (1) a common historical tradition; (2) self-identity as a distinctive cultural group; (3) a shared language; (4) a shared religion; and (5) a traditional territorial connection.<sup>198</sup>

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<sup>195</sup>UNGA Resolution 60/I of October 24 2005, paragraphs 138-140 and UNGA Resolution 63/308 of September 14 2009

<sup>196</sup>This principle is enshrined in article I of the Genocide Convention and embodied in the principle of “sovereignty as responsibility” as well as in the concept of the Responsibility to Protect; <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml>.

<sup>197</sup>This has been accomplished in terms of the Minsk Agreement of on Councils of Heads of State and Government of December 8 1991 and the Alma Ata Protocol of to the Minsk Agreement of December 21 1991

<sup>198</sup> Leon Diaz, “Do minorities have the right to self- determination?: Minority Rights: Scope and Status”, [http://www.javier-leon-diaz.com/docs/Minority\\_Status1.htm](http://www.javier-leon-diaz.com/docs/Minority_Status1.htm)

114. In an attempt to interpret the term ‘nation’ and ‘peoples’, the UN Secretariat, in the *travaux préparatoires* of its 1946 Francisco Conference, suggested that the term ‘peoples’ refers to groups of human beings who may, or may not, comprise States or nations.”<sup>199</sup> Similarly, UNESCO concludes that the following characteristics are inherent in the description of a “people” for the purposes of the right of peoples to self-determination: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; and; (g) common economic life.<sup>200</sup>
115. Further attempts to define “people” were made in the course of the preparatory works of the two International Covenants on Human Rights, where self-determination refers to “all people”. To this end, it was suggested that this word means “peoples in all countries and territories, whether independent, trust or non-self-governing”, “large compact groups”, “ethnic, religious or linguistic minorities” or “racial units inhabiting well-defined territories” and so on. However, it was thought that the term ‘peoples’ should be understood in its most general sense and that no definition was necessary.<sup>201</sup>
116. Two important UN studies on the right to self-determination also set out characteristics of a people that give rise to the possession of right to self-determination: (I) a history of independence or self-rule in an identifiable

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<sup>199</sup> “International Meeting of Experts on further Study of the Concept of Rights of Peoples”, Final Report and Recommendations, SHS-89/CONF.602/7, UNESCO, Paris, February 22 1990, paragraphs 22-23

<sup>200</sup> “International Meeting of Experts on further Study of the Concept of Rights of Peoples”, Final Report and Recommendations, SHS-89/CONF.602/7, UNESCO, Paris, February 22 1990, paragraphs 22-23

<sup>201</sup> UN Doc. E/CN.4/SR.253, p.4 (GR); E/CN.4/SR.256, p.7 (YU); E/CN.4/SR.256, p.5 (IND); E/CN.4/SR.257, p.9 (RL); and Bossuyt, M.J., Guide to the ‘*Travaux préparatoires*’ of International Covenant on Civil and Political Rights, 1987, Martinus Nijhoff Publishers, at 32

territory; (2) a distinct culture; and (3) a will and capability to regain self-governance.<sup>202</sup>

117. *Opinio juris* also seeks to merge the various definitions of “peoples” within the term “ethno-national” group, which is a politically self-conscious and sub-national group that asserts plausible historical claims to a particular territory and shares racial, cultural, or historical characteristics that distinguish its members from the dominant population.<sup>203</sup> In short, in order for a group to be entitled to the right to self-determination or remedial secession, it must possess an identity sufficient for it to attain distinctiveness as a people closely connected to a particular territory.<sup>204</sup>

118. In the Case Concerning East Timor, ICJ also reaffirms that having an identifiable territory constitutes an obligation to respect, protect and implement the right of peoples to self-determination, which all states owe to the international community as a whole (meaning *obligatio erga omnes*):<sup>205</sup> ICJ specifically found that:

*“[T]he right of peoples to self-determination, as it evolved from the [UN] Charter and from United Nations practice, has an erga omnes character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the Jurisprudence of the Court [...]. It is one of the essential principles of contemporary international law”.*<sup>206</sup> (My underlining)

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<sup>202</sup>“The Right to Self-determination”, U.N. Doc. E/CN.4/Sub.2/404/Rev. 1, U.N. Sales No. E.80.XIV.3 (1980) and H. Gros Espiell, “The Right to Self-Determination”, U.N. Doc. E/CN.4/Sub.2/405/Rev.1, U.N. Sales No. E.79.XIV.5 (1980)

<sup>203</sup> Leon Diaz, “Do minorities have the right to self-determination?: Minority Rights: Scope and Status”, [http://www.javier-leon-diaz.com/docs/Minority\\_StatusI.htm](http://www.javier-leon-diaz.com/docs/Minority_StatusI.htm)

<sup>204</sup>Third Periodic Report of France to the Human Rights Committee, UN Doc.CCPR/C/76/Add.7, May 15, 1997, at para.6-17; and also Fourth Periodic Report of the Russian Federation to the Human Rights Committee, UN Doc. CCPR/C/84/Add.2, February 22, 1995; Initial report of the United States of America to the Human Rights Committee, UN Doc. CCPR/C/81/Add.4, August 24, 1994, at para. 30

<sup>205</sup>ICJ Reports 1995, 90, at 102

<sup>206</sup>Joel Day, “The Remedial Right to Secession in International Law”, University of Denver, Potentia 2012,p.25

119. The general description of the term “people” as contemplated in paragraphs 113-118 of this petition perfectly suits the people of Caprivi Strip.

### III. CONCLUSIONS

120. Caprivi Strip is an identifiable and peculiar colonial-type international territory which is politically, economically, socially, legally, administratively and ethnoculturally separate and distinct from Namibia and South Africa as contemplated under Chapter XI<sup>207</sup> and Chapter XII<sup>208</sup> of UN Charter. Accordingly, the people of Caprivi Strip is entitled to exercise its inalienable right to self-determination including independence. Moreover, all along, there have been two legally separate and distinct mandated territories and trust colonies in southern Africa. One of these territories is known as German Protectorate of South West Africa, a former German colony, while the other one is known as Caprivi Strip, which has originally been part of a British colony.

121. The primary objective of LoN Mandate and UN Trusteeship Systems was to promote the well-being and development of all those colonies and territories, which as a consequence of [WWI] have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves, with the final view to enable them to attain a full measure of self-government and eventually to become independent states. Hence, Britain is still under international obligation to formally declare whether or not Caprivi Strip and its people have attained a full measure of self-government or independence, as contemplated under Articles 73 and 76 of UN Charter.

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<sup>207</sup>Article 73 of UN Charter

<sup>208</sup>Article 76 of UN Charter

122. There exists no legal instrument in terms of which British sovereignty over Caprivi Strip has been transferred to [Union of] South Africa or from [Union of] South Africa to former GSWA and subsequently to independent Namibia. Moreover, contemporary customary international law, customary international humanitarian law and customary international human rights law strictly prohibits the acquisition of sovereignty in any manner, whatsoever, over any and all LoN mandated and UN trust territories, except through the freely expressed will and consent of the inhabitants of such territories (my emphasis added). UN Charter, UNSC resolutions, UNGA resolutions and declarations and *opinio juris* as well as ICJ advisory opinions unambiguously recognize the right of groups and peoples to self-determination or even remedial secession.<sup>209</sup>
123. The right of *inter alia* the people of Caprivi Strip to self-determination is not only directly binding upon the international community as a whole in terms of Articles 1 and 55 of UN Charter, but also upon Namibia in terms Articles 95(d), 96(d) and 144 of the Namibian Constitution. While Articles 5, 25(1) (a), 24(3) and 131 of the Namibian Constitution have the effect that the right of the people of Caprivi Strip to self-determination is fully guaranteed by the said Constitution.
124. Namibia's occupation and its claims of sovereignty over Caprivi Strip are legally null and void *ab initio inter alia* because of the legal principle of *Quod Ab Initio Non Valet in Tractu Temporis Non Convalescit* (meaning: 'That which was originally void does not by lapse of time become valid'). Therefore, Namibia's formal and violent annexation of Caprivi Strip in terms of *inter alia* its Application of Laws to the Eastern Caprivi Zipfel Act 1999 (Act 10 of 1999) of June 24 1999 is also void *ab initio*, unlawful and unconstitutional as demonstrated under paragraphs 56 to 58 of

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<sup>209</sup> ICJ Advisory Opinion in Case of Kosovo (July 22 2010), <http://www.icj-cij.org/docket/files/141/15987.pdf>; and "Recent International Advisory Opinion", [http://www.harvardlawreview.org/media/pdf/vol124\\_kosovo\\_declaration\\_of\\_independence.pdf](http://www.harvardlawreview.org/media/pdf/vol124_kosovo_declaration_of_independence.pdf)



this petition. As such, it must be treated in terms of legal the principles of *Ex Injuria Jus Non Oritur* (i.e. “A legal Right or Entitlement Cannot Arise from an Unlawful Act or Omission”) and *Ex Turpi Causa Non Oritur Actio* (meaning: “From a Dishonorable Cause an Action Does not Arise”). *Ipsa facto* Namibia is under obligation to immediately withdraw its foreign domination and alien subjugation of Caprivi Strip!

125. Soon after UN-supervised Namibian independence on March 21 1990, the people of Caprivi Strip have been subjected to a situation which reveals a consistent pattern of widespread and systematic violations of human rights characterized by foreign domination and alien subjugation. This situation includes ethnic targeting, summary or arbitrary executions, torture, disappearances, arbitrary and prolonged detention, denial of the right to a fair trial, denial of the right to an effective remedy and systematic discrimination as well as violations of economic, environmental, social and cultural rights. This consistent pattern of human rights violations in Caprivi Strip has given rise to intensified advocacy by the people of Caprivi Strip for *inter alia* remedial secession from Namibia.

126. Hence, the August 2 1999 Caprivi separatist attack on four Namibian Government installations in Caprivi Strip as well as other forms of resistance against foreign domination and alien subjugation of the people of Caprivi of should be seen as a legitimate expression of the universally recognized right to self-determination of: (1) all colonial peoples; (2) all oppressed peoples; and, (3) all discriminated or marginalized peoples as envisaged under *inter alia* UNGA resolutions 2105 (XX) of December 20 1965; 3070 (XXVIII) of December 30 1973; 2955 (XXVII) of December 12 1972; 3103 (XXVIII) of December 12 1973; and 3382 (XXX) of November 10 1975 on the inherent right of all

subjugated and or discriminated peoples to self-defense.<sup>210</sup>This clearly includes using all legitimate means at their disposal, including armed resistance to liberate themselves from such subjugation.

127. Therefore, Caprivi Strip separatists must be viewed in the appropriate context of who they really are: a national liberation movement of freedom fighters waging a war of national liberation, on behalf of the people of Caprivi Strip, against what they view as an established oppressive Namibian government, with the objective to realize their inalienable right to self-determination in accordance with *inter alia* UN Charter. As combatants struggling against colonial occupation and domination and alien subjugation, Caprivi secessionists are entitled to prisoner of war status and to be treated accordingly as contemplated *inter alia* under Principle 4 of UNGA resolution 3103 (XXVIII) of December 12 1973!

128. In any event, the right to self-determination of peoples has a *jus cogens* character and the obligation to implement such right constitutes an *obligatio erga omnes*. As such, this obligation must be respected, protected and implemented by all States worldwide.

129. Since Caprivi Strip is currently not listed by UN among the 17 TNSGTs,<sup>211</sup> and in light of all that has been demonstrated in terms of paragraphs 12 to 119 hereof, this article concludes that Caprivi Strip is either a case of the betrayal of a sacred trust of civilization or a forgotten UN decolonization obligation. Nonetheless, contemporary customary international law, customary international humanitarian law and customary international human rights law strictly criminalize the continuation of colonialism in all its forms and manifestations and oblige all

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<sup>210</sup> "Article 51", Introductory Note: Summary of Practice, United Nations, paragraph 17; [http://legal.un.org/repertory/art51/english/rep\\_supp5\\_vol2-art51\\_e.pdf](http://legal.un.org/repertory/art51/english/rep_supp5_vol2-art51_e.pdf)

<sup>211</sup>Non-Self Governing Territories, <http://www.un.org/en/decolonization/nonselvgovterritories.shtml>

administering States to immediately transfer sovereignty over all and any TNSGTs to their inhabitants. Since *Ex Injuria Jus Non Oritur* and *Quod ab Initio Non Valet in Tractu Temporis Non Convalescit*, Namibia's claim of sovereignty over Caprivi Strip is illegal and, as such, it must be ended preferably by peaceful means and with the assistance of the international community, in general, and UN, in particular, in accordance with *inter alia* UN Charter. END