INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING KASIKILI/SEDUDU ISLAND

(BOTSWANA/NAMIBIA)

JUDGMENT OF 13 DECEMBER 1999

1999

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DE L'ÎLE DE KASIKILI/SEDUDU

(BOTSWANA/NAMIBIE)

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1999
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CASE CONCERNING KASIKILI/SEDUDU ISLAND

(BOTSWANA/NAMIBIA)

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Applicable law — Anglo-German Treaty of 1890 — Rules and principles of international law.

* *

1890 Treaty — Rules of interpretation as expressed in the 1969 Vienna Convention — Consideration of present-day scientific knowledge.

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* *

Status of Kasikili/Sedudu Island — Kasane Communiqué of 1992 — Mutual guarantees for freedom of navigation.

JUDGMENT

Present: *President* SCHWEBEL; *Vice-President* WEERAMANTRY; *Judges* ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Registrar* VALENCIA-OSPINA.

In the case concerning Kasikili/Sedudu Island,

between

the Republic of Botswana,

represented by

Mr. Abednego Batshani Tafa, Advocate of the High Court and Court of Appeal of Botswana, Deputy Attorney-General,

as Agent, Counsel and Advocate;

H.E. Mr. S. C. George, Ambassador of the Republic of Botswana to the European Union, Brussels,

as Co-Agent;

Mr. Molosiwa L. Selepeng, Permanent Secretary for Political Affairs, Office of the President,

Professor Ian Brownlie, C.B.E., Q.C., F.B.A., Chichele Professor of Public International Law, University of Oxford, Member of the International Law Commission, Member of the English Bar, Member of the Institut de droit international,

Lady Fox Q.C., former Director of the British Institute of International and Comparative Law, Member of the English Bar, Associate Member of the Institut de droit international,

Dr. Stefan Talmon, Rechtsassessor, D.Phil. (Oxon), LL.M. (Cantab), Wissenschaftlicher Assistent in the Law Faculty of the University of Tübingen,

as Counsel and Advocates;

Mr. Timothy Daniel, Solicitor of the Supreme Court; Partner, D. J. Freeman (Solicitors) of the City of London,
Mr. Alan Perry, Solicitor of the Supreme Court; Partner, D. J. Freeman (Solicitors) of the City of London,
Mr. David Lerer, Solicitor of the Supreme Court; Assistant, D. J. Freeman (Solicitors) of the City of London,
Mr. Christopher Hackford, Solicitor of the Supreme Court; Assistant, D. J. Freeman (Solicitors) of the City of London,
Mr. Robert Paydon, Solicitor of the Supreme Court; Assistant, D. J. Freeman (Solicitors) of the City of London,

as Counsel;

Professor F. T. K. Sefe, Professor of Hydrology, Department of Environmental Science, University of Botswana, Gaborone,
Mr. Isaac Muzila, B.Sc. Civil Engineering, Principal Hydrological Engineer, Department of Water Affairs, Botswana,
Mr. Alan Simpkins, F.R.I.C.S., Prof. M.I.T.E.S. (S.A.), L.S. (Bots.), Chief Surveyor and Deputy to Director, Department of Surveys and Mapping, Botswana,
Mr. Scott B. Edmonds, Director of Cartographic Operations, GeoSystems Global Corporation, Columbia, Maryland (United States of America),

Mr. Robert C. Rizzutti, Senior Mapping Specialist, GeoSystems Global Corporation, Columbia, Maryland (United States of America),
Mr. Justin E. Morrill, Senior Multimedia Designer, GeoSystems Global Corporation, Columbia, Maryland (United States of America),

as Scientific and Technical Advisers;

Mr. Bapasi Mphusu, Chief Press Officer, Department of Information and Broadcasting, Government of Botswana,

as Information Adviser;

Mrs. Coralie Ayad, D. J. Freeman (Solicitors) of the City of London,

Mrs. Marilyn Beeson, D. J. Freeman (Solicitors) of the City of London,

Ms Michelle Burgoine, D. J. Freeman (Solicitors) of the City of London,

as Administrators,

and

the Republic of Namibia,

represented by:

Dr. Albert Kawana, Permanent Secretary, Ministry of Justice of Namibia,

as Agent, Counsel and Advocate;

H.E. Dr. Zedekia J. Ngavirue, Ambassador of the Republic of Namibia to the Netherlands,

as Deputy-Agent;

Professor Abram Chayes, Felix Frankfurter Professor of Law Emeritus, Harvard Law School,

Sir Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge, Member of the Institut de droit international,
Mr. Jean-Pierre Cot, Professor Emeritus, Université de Paris I (Panthéon-Sorbonne), Member of the Paris and Brussels Bars, Vice-President of the European Parliament,
Professor Dr. Jost Delbrück, Director of Walther-Schücking Institute of International Law, University of Kiel,
Professor Dr. Julio Faundez, Professor of Law, University of Warwick,

as Counsel and Advocates;

Professor W. J. R. Alexander, Emeritus Professor of Hydrology, University of Pretoria,
Professor Keith S. Richards, Department of Geography, University of Cambridge,
Colonel Dennis Rushworth, Former Director of the Mapping and Charting Establishment, Ministry of Defence of the United Kingdom,
Dr. Lazarus Hangula, Director, Multidisciplinary Research Centre, University of Namibia,

as Advocates;

Dr. Arnold M. Mtopa, Chief Legal Officer, Ministry of Justice of Namibia,
Dr. Collins Parker, Chief Legal Officer, Ministry of Justice of Namibia,
Mr. Edward Helgeson, Fellow, Lauterpacht Research Centre for International Law, University of Cambridge,
Ms Tonya Putnam, Harvard Law School,

as Counsel and Advisers;

Mr. Peter Clark, Former Chief Map Research Officer, Ministry of Defence, United Kingdom,

as Technical Adviser;

Mr. Samson N. Muhapi, Special Assistant to the Permanent Secretary, Ministry of Justice of Namibia,
Ms Kyllikki M. Shaduka, Private Secretary, Ministry of Justice of Namibia,

Ms Mercia G. Louw, Private Secretary, Ministry of Justice of Namibia,

as administrative staff,

Mr. Peter Denk, Reporter,
Mr. Muyenga Muyenga, Reporter,

as Information Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. By joint letter dated 17 May 1996, filed in the Registry of the Court on 29 May 1996, the Ministers for Foreign Affairs of the Republic of Botswana (hereinafter called "Botswana") and the Republic of Namibia (hereinafter called "Namibia") transmitted to the Registrar the original text of a Special

Agreement between the two States, signed at Gaborone on 15 February 1996 and entered into force on 15 May 1996, the date of exchange of instruments of ratification.

2. The text of the Special Agreement reads as follows:

"*Whereas* a Treaty between Great Britain and Germany respecting the spheres of influence of the two countries in Africa was signed on 1 July 1890 (the Anglo-German Agreement of 1890);

Whereas a dispute exists between the Republic of Botswana and the Republic of Namibia relative to the boundary around Kasikili/Sedudu Island;

Whereas the two countries are desirous of settling such dispute by peaceful means in accordance with the principles of both the Charter of the United Nations and the Charter of the Organization of African Unity;

Whereas the two countries appointed on 24 May 1992 a Joint Team of Technical Experts on the Boundary between Botswana and Namibia around Kasikili/Sedudu Island 'to determine the boundary between Namibia and Botswana around Kasikili/Sedudu Island' on the basis of the Treaty of 1 July 1890 between Great Britain and Germany respecting the spheres of influence of the two countries in Africa and the applicable principles of international law;

Whereas the Joint Team of Technical Experts was unable to reach a conclusion on the question referred to it and recommended 'recourse to the peaceful settlement of the dispute on the basis of the applicable rules and principles of international law';

Whereas at the Summit Meeting held in Harare, Zimbabwe, on 15 February 1995, and attended by Their Excellencies President Sir Ketumile Masire of Botswana, President Sam Nujoma of Namibia and President Robert Mugabe of Zimbabwe, the Heads of State of the Republic of Botswana and the Republic of Namibia, acting on behalf of their respective Governments, agreed to submit the dispute to the International Court of Justice for a final and binding determination;

Now therefore the Republic of Botswana and the Republic of Namibia have concluded the following Special Agreement:

Article I

The Court is asked to determine, on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law, the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island.

Article II

1. The proceedings shall consist of written pleadings and oral hearings.

2. The written pleadings shall include:

(a) Memorials submitted to the Court by each Party not later than nine months after the notification of the Special Agreement is transmitted

to the Registrar of the Court in accordance with Article VII (2) of this Special Agreement;

(b) Counter-Memorials submitted by each Party to the Court not later than nine months after the date of submission of the Memorials;

(c) such other written pleadings as may be approved by the Court at the request of either of the Parties, or as may be directed by the Court.

3. The written pleadings submitted to the Registrar shall not be communicated to the other Party until the corresponding pleadings of that Party have been received by the Registrar.

Article III

The rules and principles of international law applicable to the dispute shall be those set forth in the provisions of Article 38, paragraph 1, of the Statute of the International Court of Justice.

Article IV

The order of appearance in the oral pleadings shall be as agreed by the Parties with the approval of the Court, or in the absence of agreement, as directed by the Court.

Article V

The order of the written pleadings and oral submissions shall be without prejudice to the burden of proof.

Article VI

The language of the proceedings shall be English.

Article VII

1. This agreement shall enter into force on the date of the exchange of instruments of ratification by the two Governments.

2. It shall be notified to the Court as required by Article 40, paragraph 3, of the Statute of the Court by joint letter of the Parties to the Registrar.

3. If such notification is not effected within two months from the entry into force of this Special Agreement, it may be notified to the Registrar by either of the Parties.

Article VIII

1. Each of the Parties may exercise its right under Article 31, paragraph 3, of the Statute of the Court to choose a person to sit as judge.

2. A Party which chooses to exercise the right referred to in sub-Article 1, above, shall notify the other Party in writing prior to exercising such right.

Article IX

1. The judgment of the Court on the dispute described in Article I shall be final and binding on the Parties.

2. As soon as possible after the delivery of the Court's judgment, the Parties shall take steps necessary to carry out the judgment.

In witness whereof, the undersigned, being duly authorized thereto, have signed this Special Agreement and have affixed thereto their seals."

3. Pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the notification and of the Special Agreement were transmitted by the Registrar to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court.

4. By Order of 24 June 1996, the Court fixed 28 February 1997 as the time-limit for the filing of a Memorial by each Party and 28 November 1997 as the time-limit for the filing by each Party of a Counter-Memorial, having regard to the provisions of Article II, paragraph 2 *(a)* and *(b)*, of the Special Agreement. These pleadings were duly filed within the time-limits so prescribed.

5. By Order of 27 February 1998, the Court fixed 27 November 1998 as the time-limit for the filing of a Reply by each Party, having regard to the provisions of Article II, paragraph 2 *(c)*, of the Special Agreement and taking account of the agreement between the Parties, as expressed in a joint letter from their Agents dated 16 February 1998. The Replies were duly filed within the time-limit so prescribed. As the Parties did not request the submission of other pleadings, and as the Court itself did not consider this necessary, the case was then ready for hearing.

6. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after having ascertained the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

7. New documents were produced by each of the Parties, with the consent of the other, in accordance with Article 56, paragraph 1, of the Rules of Court. In addition, Namibia, availing itself of the right provided for in Article 56, paragraph 3, of the Rules of Court, submitted comments on certain of the new documents produced by Botswana.

8. The Parties having been duly consulted, in accordance with Article 58, paragraph 2, of the Rules of Court, and having informed the Court of their agreement, in accordance with Article IV of the Special Agreement, on the order of speaking, public sittings were held between 15 February and 5 March 1999, during which oral arguments and replies were heard from the following:

For Namibia: Dr. Albert Kawana,
Professor Abram Chayes,
Professor Dr. Jost Delbrück,
Professor W. J. R. Alexander,
Dr. Lazarus Hangula,
Professor Dr. Julio Faundez,
Colonel Dennis Rushworth,
Mr. Jean-Pierre Cot.

For Botswana: Mr. Abednego Batshani Tafa,
Mr. Molosiwa L. Selepeng,
Professor Ian Brownlie,
Lady Fox,
Dr. Stefan Talmon,
Professor F. T. K. Sefe,
Mr. Isaac Muzila.

At the sittings, each of the Parties showed a video cassette, after those cassettes had been exchanged between the Parties through the intermediary of the Registry.

Questions were also put by Members of the Court, to which both Parties replied in writing, within the time-limit fixed for this purpose.

*

9. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of Botswana,

in the Memorial, the Counter-Memorial and the Reply:

"*May it please the Court to adjudge and declare that:*

1. The northern and western channel of the Chobe River in the vicinity of Kasikili/Sedudu Island constitutes the 'main channel' of the Chobe River in accordance with the provisions of Article III (2) of the Anglo-German Agreement of 1890; *and that:*
2. Consequently, sovereignty in respect of Kasikili/Sedudu Island inheres exclusively in the Republic of Botswana."

On behalf of Namibia,

in the Memorial and the Counter-Memorial:

"*May it please the Court, rejecting all claims and submissions to the contrary, to adjudge and declare:*

1. The channel that lies to the south of Kasikili/Sedudu Island is the main channel of the Chobe River.
2. The channel that lies to the north of Kasikili/Sedudu Island is not the main channel of the Chobe River.
3. Namibia and its predecessors have occupied and used Kasikili Island and exercised sovereign jurisdiction over it, with the knowledge and acquiescence of Botswana and its predecessors since at least 1890.
4. The boundary between Namibia and Botswana around Kasikili/Sedudu Island lies in the centre of the southern channel of the Chobe River.
5. The legal status of Kasikili/Sedudu Island is that it is a part of the territory under the sovereignty of Namibia."

in the Reply:

"*May it please the Court, rejecting all claims and submissions to the contrary, to adjudge and declare*

1. The channel that lies to the south of Kasikili/Sedudu Island is the main channel of the Chobe River.
2. The channel that lies to the north of Kasikili/Sedudu Island is not the main channel of the Chobe River.
3. Namibia and its predecessors have occupied and used Kasikili Island and exercised sovereign jurisdiction over it, with the knowledge and acquiescence of Botswana and its predecessors since at least 1890.
4. The boundary between Namibia and Botswana around Kasikili/Sedudu Island lies in the centre (that is to say, the *thalweg*) of the southern channel of the Chobe River.

5. The legal status of Kasikili/Sedudu Island is that it is a part of the territory under the sovereignty of Namibia."

10. In the oral proceedings, the following submissions were presented by the Parties:

On behalf of Botswana,

at the hearing of 5 March 1999:

"*May it please the Court:*

(1) to adjudge and declare:

(a) that the northern and western channel of the Chobe River in the vicinity of Kasikili/Sedudu Island constitutes the 'main channel' of the Chobe River in accordance with the provisions of Article III (2) of the Anglo-German Agreement of 1890; and

(b) consequently, sovereignty in respect of Kasikili/Sedudu Island vests exclusively in the Republic of Botswana; and further

(2) to determine the boundary around Kasikili/Sedudu Island on the basis of the thalweg in the northern and western channel of the Chobe River."

On behalf of Namibia,

at the hearing of 2 March 1999:

The submissions read at the hearing were identical to those presented by Namibia in the Reply.

* * *

11. The Parties, in the terms of the Special Agreement, request the Court, "to determine, on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law, the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island." The Island referred to, which in Namibia is known as "Kasikili", and in Botswana as "Sedudu", is approximately 3.5 square kilometres (1.5 square miles) in area. It is located in the Chobe River, which divides around it to the north and south, in the area bounded approximately by meridians 25° 07′ and 25° 08′ E longitude and parallels 17° 47′ and 17° 50′ S latitude, and is some 20 kilometres (12.5 miles) upstream of Kazungula where the Chobe flows into the Zambezi. The Chobe has its source on the central plateau of Angola, where it is called the Rio Cuando. It undergoes further changes of name at various stages along its course. When it crosses the border into Namibia, it becomes the Kwando and then the Mashi, which flows generally in a southerly direction into the Linyanti (or Linyandi) Swamp. From this point it is called the Linyanti (or Linyandi) River until it reaches Lake Liambezi. At the exit from the lake, the river becomes the Chobe. The Botswana town of Kasane lies on the south bank some 1.5 kilometres downstream from Kasikili/Sedudu Island, and the Namibian village of Kasika is located on the northwestern bank of the Chobe.

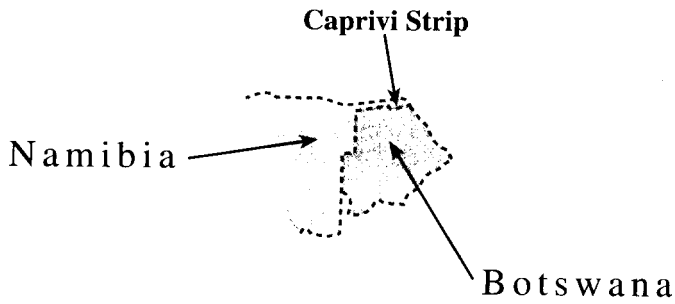
12. Nearly due south of the Island, on the Botswana side, are the

headquarters of the Chobe National Park, a protected reserve with a wide variety of wildlife. This southern bank is characterized by a steep sandy ridge ranging between 900 and 1,000 metres above mean sea level. The area on the Namibian side, to the north of the Island, has no such geographical feature. It forms part of a strip of territory called the "Caprivi Strip", after the German chancellor at the time of the conclusion of the Anglo-German Agreement of 1 July 1890 (hereinafter the "1890 Treaty"). This part of the Caprivi Strip is within the seasonal flood plain of the Zambezi River. The Island, which is 927 metres above mean sea level, forms part of this plain, and is subject to flooding of several months' duration, beginning around March. In order to assist in the reading of this Judgment, the Court has included below three sketch-maps, the first illustrating the position of Botswana and Namibia on the continent of Africa (Sketch-map No. 1, page 1055); the second showing the Caprivi Strip and the Chobe (Sketch-map No. 2, page 1056); and the third showing Kasikili/Sedudu Island (Sketch-map No. 3, page 1057).

13. The dispute between the Parties is set against the background of the nineteenth century race among the European colonial powers for the partition of Africa. In the spring of 1890, Germany and Great Britain entered into negotiations with a view to reaching agreement concerning their trade and their spheres of influence in Africa. In the south-west of the continent, Great Britain sought to protect the south-north trade routes running through Lake Ngami to Victoria Falls, while Germany, which had already laid claim to a large portion of what was called "South West Africa", sought British recognition of its access to the Zambezi. These negotiations culminated in the conclusion of the 1890 Treaty, which concerned several regions of the African continent, namely east Africa, south-west Africa, Togo and Zanzibar, and involved the cession to Germany of the island of Heligoland, in exchange for Zanzibar. The Treaty delimited *inter alia* the spheres of influence of Germany and Great Britain in south-west Africa; that delimitation lies at the heart of the present case.

14. In the ensuing century, the territories involved experienced various mutations in status. The independent Republic of Botswana came into being on 30 September 1966, on the territory of the former British Bechuanaland Protectorate. German administration of South West Africa turned out to be short-lived. Upon the outbreak of the First World War in 1914, the Caprivi Strip was occupied and governed by British forces from Southern Rhodesia. From 1919 until 1966, South Africa was the administering authority of the territory of South West Africa under a mandate from the League of Nations. For part of this period, from 1921 to 1929, South Africa delegated the administration of the Caprivi Strip to the authorities of the British Bechuanaland Protectorate. South Africa's mandate over South West Africa was terminated by the United Nations General Assembly in 1966, following which the Assembly established a

AFRICA

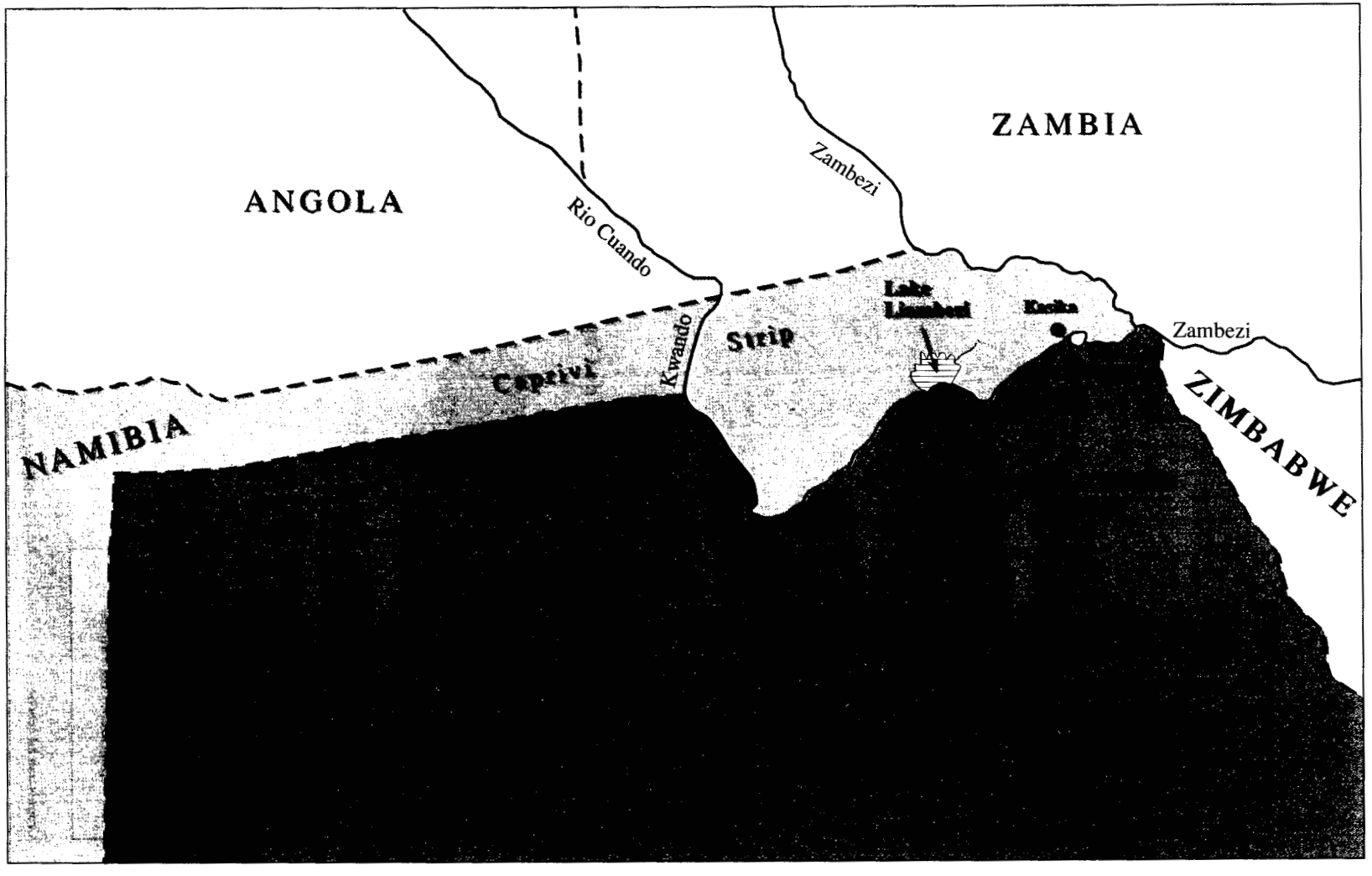


SKETCH-MAP No. 1

Botswana and Namibia

N.B.: This sketch-map has been prepared by the Court for illustrative purposes only

Sketch-map not to scale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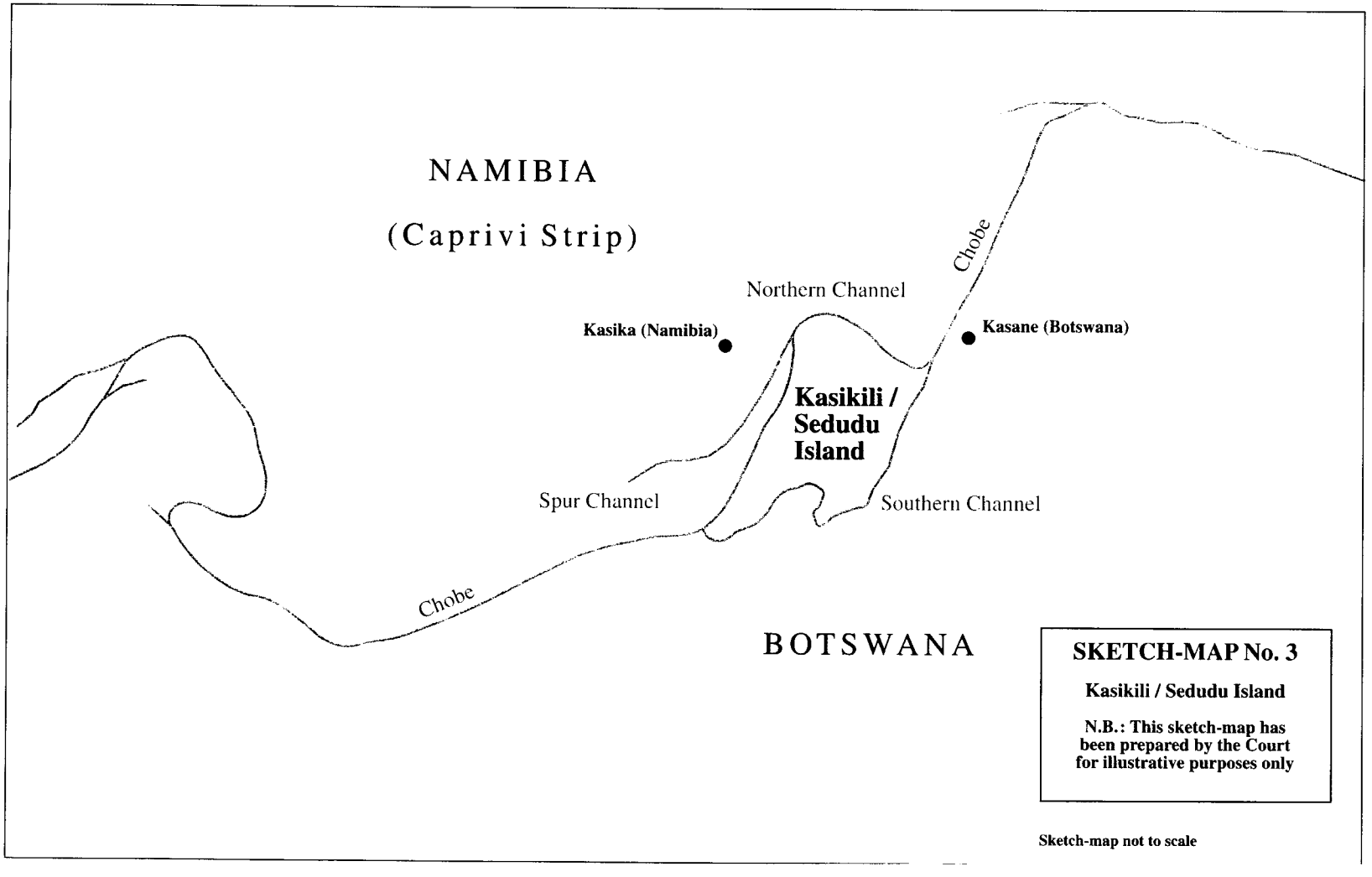


SKETCH-MAP No. 3

Kasikili / Sedudu Island

N.B.: This sketch-map has been prepared by the Court for illustrative purposes only

Sketch-map not to scale

United Nations Council for South West Africa (which subsequently became the United Nations Council for Namibia), which it designated as the authority responsible for the administration of Namibia; but South Africa remained in *de facto* control of the territory, despite United Nations policy to the contrary, until Namibia's independence on 21 March 1990.

15. Shortly after Namibian independence, differences arose between the two States concerning the location of the boundary around Kasikili/Sedudu Island. When the two Parties proved unable to resolve their dispute, they called upon the good offices of the President of Zimbabwe. His efforts led to a meeting of the Presidents of the three countries at Kasane, Botswana, in May 1992, at which they issued a communiqué, declaring that the issue should be resolved peacefully, and recording the Presidents' agreement to submit the determination of the boundary around Kasikili/Sedudu Island to a Joint Team of Technical Experts. Terms of reference for the Joint Team were agreed between the parties in December 1992, and the Joint Team conducted its survey between September 1993 and August 1994. In its final Report, issued on 20 August 1994, the Joint Team announced that it had failed to reach an agreed conclusion on the question put to it, and recommended recourse to the peaceful settlement of the dispute on the basis of the applicable rules and principles of international law.

16. In February 1995, the three Presidents met in Harare, Zimbabwe, to consider the Joint Team Report. At this meeting, it was decided to submit the dispute to the International Court of Justice for a final and binding determination. Pursuant to this decision, Botswana and Namibia, by a Special Agreement signed at Gaborone on 15 February 1996, brought the dispute before the Court.

* * *

17. The Court recalls that according to Article I of the Special Agreement, it:

> "is asked to determine, on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law, the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island".

Accordingly the Court has a dual task: to determine both the boundary between Botswana and Namibia around Kasikili/Sedudu Island and the legal status of the Island. For this purpose, the Court must base itself on the 1890 Treaty and on the rules and principles of international law.

*

18. The law applicable to the present case has its source first of all in the 1890 Treaty, which Botswana and Namibia acknowledge to be binding on them.

As regards the interpretation of that Treaty, the Court notes that neither Botswana nor Namibia are parties to the Vienna Convention on the Law of Treaties of 23 May 1969, but that both of them consider that Article 31 of the Vienna Convention is applicable inasmuch as it reflects customary international law. The Court itself has already had occasion in the past to hold that customary international law found expression in Article 31 of the Vienna Convention (see *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 21, para. 41; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23). Article 4 of the Convention, which provides that it "applies only to treaties which are concluded by States after the entry into force of the . . . Convention with regard to such States" does not, therefore, prevent the Court from interpreting the 1890 Treaty in accordance with the rules reflected in Article 31 of the Convention.

According to Article 31 of the Vienna Convention on the Law of Treaties:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> *(a)* any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> *(b)* any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

19. The Special Agreement also refers, in Article I, to the "rules and principles of international law". Article III of the Special Agreement further states that these rules and principles "shall be those set forth in the provisions of Article 38, paragraph 1, of the Statute of the International Court of Justice". The Court will revert to the issue — in dispute between the parties — of whether this reference in the Special Agreement to the "rules and principles of international law" permits the Court to entertain Namibia's alternative argument founded on the doctrine of prescription (see paragraphs 90-94 below).

The Parties also refer to the principles of both the Charter of the United Nations and the Charter of the Organization of African Unity (OAU), as well as to resolution AHG/Res. 16 (1), adopted in Cairo on 21 July 1964 by the Assembly of Heads of State and Government of the OAU. The latter provides that Member States of the OAU pledge themselves *inter alia* to respect the frontiers existing on their achievement

of national independence (an implementation of the principle of *uti possedetis juris*).

* * *

20. The Court will now proceed to interpret the provisions of the 1890 Treaty by applying the rules of interpretation set forth in the 1969 Vienna Convention. It recalls that

> "a treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty." (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41.)

In order to illuminate the meaning of words agreed upon in 1890, there is nothing that prevents the Court from taking into account the present-day state of scientific knowledge, as reflected in the documentary material submitted to it by the Parties (compare *Controversia sobre el recorrido de la traza del límite entre el Hito 62 y el Monte Fitz Roy (Argentina/Chile) [Dispute concerning the course of the frontier between B.P. 62 and Mount Fitzroy (Argentina/Chile)]*, also known as the *"Laguna del desierto"* case, Arbitral Award of 21 October 1994, *International Law Reports (ILR)*, Vol. 113, p. 76, para. 157; *Revue générale de droit international public (RGDIP)*, Vol. 2, 1996, p. 592, para. 157).

21. The Court will first examine the text of the 1890 Treaty, Article III of which reads as follows:

> "In Southwest Africa the sphere in which the exercise of influence is reserved to Germany is bounded:
>
> 1. To the south by a line commencing at the mouth of the Orange river, and ascending the north bank of that river to the point of its intersection by the 20th degree of east longitude.
>
> 2. To the east by a line commencing at the above-named point, and following the 20th degree of east longitude to the point of its intersection by the 22nd parallel of south latitude; it runs eastward along that parallel to the point of its intersection by the 21st degree of east longitude; thence it follows that degree northward to the point of its intersection by the 18th parallel of south latitude; it runs eastward along that parallel till it reaches the river Chobe, and descends the centre of the main channel of that river to its junction with the Zambesi, where it terminates.
>
> It is understood that under this arrangement Germany shall have free access from her Protectorate to the Zambesi by a strip of territory which shall at no point be less than 20 English miles in width.

> The sphere in which the exercise of influence is reserved to Great Britain is bounded to the west and northwest by the above-mentioned line. It includes Lake Ngami.
>
> The course of the above boundary is traced in general accordance with a map officially prepared for the British Government in 1889."

As far as the region covered by the present case is concerned, this provision locates the dividing line between the spheres of influence of the contracting parties in the "main channel" of the River Chobe; however, neither this, nor any other provision of the Treaty, furnishes criteria enabling that "main channel" to be identified. It must also be noted that the English version refers to the "centre" of the main channel, while the German version uses the term "thalweg" of that channel *(Thalweg des Hauptlaufes)*.

22. Throughout the proceedings, the Parties have expressed differing opinions regarding the method to be applied for the purpose of interpreting these expressions. Botswana contends that:

> "[i]n a bifurcated stretch of river, such as the Chobe River in the vicinity of Kasikili/Sedudu Island, both channels will have their respective *thalwege*. However, the *thalweg* of the main channel will be at a lower elevation than the *thalweg* of the other channel. Only the *thalweg* of the main channel can be logically connected to the *thalweg* of the channel upstream of the point of bifurcation and downstream of the point of reunion."

Botswana maintains that, in order to establish the line of the boundary around Kasikili/Sedudu Island, it is sufficient to determine the *thalweg* of the Chobe; it is that which identifies the main channel of the river. For Botswana, the words *"des Hauptlaufes"* therefore add nothing to the text.

23. For Namibia, however, the task of the Court is first to identify the main channel of the Chobe around Kasikili/Sedudu Island, and then to determine where the centre of this channel lies:

> "The 'main channel' must be found first; the 'centre' can necessarily only be found afterward. This point is equally pertinent to the German translation of the formula '. . . *im Thalweg des Hauptlaufes* . . .' In the same way as with the English text, the search must first be for the *'Hauptlauf'* and for the *'Thalweg'* only after the *'Hauptlauf'* has been found. The *'Hauptlauf'* cannot be identified by first seeking to find the *'Thalweg'*."

24. The Court notes that various definitions of the term "thalweg" are found in treaties delimiting boundaries and that the concepts of the thalweg of a watercourse and the centre of a watercourse are not equivalent. The word "thalweg" has variously been taken to mean "the most suitable channel for navigation" on the river, the line "determined by the line of

deepest soundings", or "the median line of the main channel followed by boatmen travelling downstream". Treaties or conventions which define boundaries in watercourses nowadays usually refer to the thalweg as the boundary when the watercourse is navigable and to the median line between the two banks when it is not, although it cannot be said that practice has been fully consistent.

25. The Court further notes that at the time of the conclusion of the 1890 Treaty, it may be that the terms "centre of the [main] channel" and *"Thalweg"des Hauptlaufes* were used interchangeably. In this respect, it is of interest to note that, some three years before the conclusion of the 1890 Treaty, the Institut de droit international stated the following in Article 3, paragraph 2, of the "Draft concerning the international regulation of fluvial navigation", adopted at Heidelberg on 9 September 1887: "The boundary of States separated by a river is indicated by the thalweg, that is to say, the median line of the channel" (*Annuaire de l'Institut de droit international*, 1887-1888, p. 182), the term "channel" being understood to refer to the passage open to navigation in the bed of the river, as is clear from the title of the draft. Indeed, the parties to the 1890 Treaty themselves used the terms "centre of the channel" and "thalweg" as synonyms, one being understood as the translation of the other (see paragraph 46 below).

The Court observes, moreover, that in the course of the proceedings, Botswana and Namibia did not themselves express any real difference of opinion on this subject. The Court will accordingly treat the words "centre of the main channel" in Article III, paragraph 2, of the 1890 Treaty as having the same meaning as the words "Thalweg des Hauptlaufes" (cf. 1969 Vienna Convention on the Law of Treaties, Article 33, paragraph 3, under which "the terms of the treaty are presumed to have the same meaning in each authentic text").

26. The Court adds that, in this case, the Parties to the dispute have used the term "channel" to refer to each of the two branches of the Chobe that ring Kasikili/Sedudu Island, and have not confined the term "channel" to the stricter usage meaning the navigable passage of a river or of one of its branches. In view of this fact, the Court itself in this Judgment will likewise employ the term "channel" in a broad sense.

27. In the Court's opinion, the real dispute between the Parties concerns the location of the main channel where the boundary lies. In Botswana's view, it is to be found "on the basis of the thalwegs in the northern and western channel of the Chobe", whereas in Namibia's view, it "lies in the centre (that is to say thalweg) of the southern channel of the Chobe River".

While Botswana thought it sufficient for the Court to locate the line of deepest soundings in this section of the Chobe, which in its view leads to the centre of the northern channel as the boundary, the Court notes that this was not the only test it relied on. Moreover, the Court observes that by introducing the term "main channel" into the draft treaty, the con-

tracting parties must be assumed to have intended that a precise meaning be given to it. For these reasons, the Court will therefore proceed first to determine the main channel. In so doing, it will seek to determine the ordinary meaning of the words "main channel" by reference to the most commonly used criteria in international law and practice, to which the Parties have referred.

* *

28. Before entering into an examination of these criteria, the Court observes that the Parties' experts have submitted to it extensive, often contradictory, information on the distinguishing features of the Chobe.

For Botswana, the Chobe "is a perennial river independent of the Zambezi River, with a stable profile, continuous downstream flow and visible and stable banks".

Namibia, for its part, claims that the Chobe cannot be regarded as a perennial river, and that in reality it is an ephemeral watercourse. Namibia points out that the Chobe is very often dry over a substantial section of its course, so that it is not navigable over most of its length.

The Court does not find itself charged with making findings on the distinguishing features of the Chobe River. It will take these into account only in so far as they affect the sector of Kasikili/Sedudu Island. The Court's task is in fact limited to settling the dispute between Botswana and Namibia by determining the boundary between these two States around the Island as well as the legal status of the Island.

29. The Parties to the dispute agree on many of the criteria for identifying the "main channel", but disagree on the relevance and applicability of several of those criteria.

For Botswana, the relevant criteria are as follows: greatest depth and width; bed profile configuration; navigability; greater flow of water. Botswana also lays stress, in the following terms, on the importance, from the standpoint of identification of the main channel, of "channel capacity", "flow velocity"and "volume of flow":

> "*channel capacity* — This is determined by width and depth of the channel and in the discharge equation it is represented by cross-sectional area. From the cross-section survey and the analysis of satellite imagery, it is clear that the northern channel is deeper than the southern channel. . . .
>
> *flow velocity* — Flow velocity is a function of bed slope, hydraulic radius and roughness coefficient. . . . the northern channel has a steeper bed slope; both of its banks are smooth (compared to the southern channel), therefore velocity will be higher in that channel.
>
> *volume of flow* — Volume of flow in a channel is computed as the

> product of channel capacity (cross-section area) and mean velocity through the cross-section."

Namibia acknowledges that

> "[p]ossible criteria for identifying the main channel in a river with more than one channel are the channel with the greatest width, or the greatest depth, or the channel that carries the largest proportion of the annual flow of the river. In many cases the main channel will have all three of these characteristics."

It adds, however, referring to the sharp variations in the level of the Chobe's waters, that: "neither width nor depth are suitable criteria for determining which channel is the main channel." Namibia nevertheless further states the following:

> "Various criteria may be employed; these include width, depth, velocity, discharge, and sediment transport capacity. Since discharge is the product of width, mean depth and mean velocity, and is a determinant of transport capacity, it is the most straightforward and general criterion."

Among the possible criteria, Namibia therefore attaches the greatest weight to the amount of flow: according to Namibia, the main channel is the one "that carries the largest proportion of the annual flow of the river". Namibia also emphasized that another key task was to identify the channel that is "most used for river traffic".

30. The Court finds that it cannot rely on one single criterion in order to identify the main channel of the Chobe around Kasikili/Sedudu Island, because the natural features of a river may vary markedly along its course and from one case to another. The scientific works which define the concept of "main channel" frequently refer to various criteria: thus, in the *Dictionnaire français d'hydrologie de surface avec équivalents en anglais, espagnol, allemand* (Masson, 1986), the "main channel" is "the widest, deepest channel, in particular the one which carries the greatest flow of water" (p. 66); according to the *Water and Wastewater Control Engineering Glossary* (Joint Editorial Board Representing the American Public Health Association, American Society of Civil Engineers, American Water Works Association and Water Pollution Control Federation, 1969), the "main channel" is "the middle, deepest or most navigable channel" (p. 197). Similarly, in the *Rio Palena* Arbitration, the arbitral tribunal appointed by the Queen of England applied several criteria in determining the major channel of a boundary river (*Argentina-Chile Frontier Case* (1966), United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XVI, pp. 177-180; *International Law Reports (ILR)*, Vol. 38, pp. 94-98). The Court notes that the Parties have expressed their views on one or another aspect of the criteria mentioned in paragraph 29 above, distinguishing between them or placing emphasis

on their complementarity and their relationship with other criteria. It will take into account all of these criteria.

31. Before coming to a conclusion on the respective role and significance of the various criteria thus chosen, the Court notes, on the basis of the information supplied by both Parties concerning the hydrological situation of Kasikili/Sedudu Island, that there are compelling reasons for assuming that this situation has seen no radical change over the last hundred years. The aerial photographs taken in 1925, 1943, 1947, 1962, 1972, 1977, 1981 and 1985 show no major mutation in the channels of the Chobe and indicate that the channels surrounding the Island remained relatively stable throughout that period of time. Moreover, the Parties are in agreement on this point. Namibia states on this count:

> "Namibia's position does not depend on any changes in the general configuration of the Island and the surrounding area since the Treaty was signed. Thus, Namibia accepts that there have been no significant changes in the location of the northern and southern channels since 1890."

Similarly, Botswana affirms that there

> "is a complete absence of any evidence of radical change in the course of the Chobe. Large scale maps both before and after the 1890 Anglo-German Agreement, prepared by those who had actually surveyed this stretch of the Chobe River, show an unchanged course."

In short, the present hydrological situation of the Chobe around Kasikili/Sedudu Island may be presumed to be essentially the same as that which existed when the 1890 Treaty was concluded.

32. The Court will first examine the criterion of depth. According to Botswana's experts, the mean depth of the northern channel is 5.70 metres, clearly exceeding the mean depth of the southern channel by 2.13 metres. As for the shallowest points, the depth is said to be 1.5 to 2 metres at the entry to the southern channel, i.e., a much shallower depth than in the northern channel.

Although Namibia agrees that the northern channel has the greater mean depth, it disputes that this conclusion is of any importance whatsoever for determining the main channel. It maintains that what is important in this respect is not mean depth but draught at the shallowest point of the channel; and it asserts that any differences between the shallowest points in the northern and southern channels are minute. For Namibia, the results of the 1985 Joint Survey (see paragraph 64 below) in respect of the minimum depth of the two channels (see Reply of Namibia, Vol. II, *Second supplementary report to the expert report on the identification of the main channel of the Chobe River at Kasikili Island, Fig. 14*) are incon-

clusive, in so far as "the minimum thalweg depths of the two channels within the bifurcation zone were not determined" Namibia also introduced photographs showing a herd of elephants crossing the two channels of the Chobe, but produced no figures to show that the minimum depth of the southern channel was greater than that of the northern channel.

Notwithstanding all the difficulties involved in sounding the depth of the channels and interpreting the results, the Court concludes that the northern channel is deeper than the southern one as regards mean depth, and even as regards minimum depth.

33. The Court will now consider the criterion of width. The width of a river may increase or decrease in line with the variable level of its waters. In order to deal with this phenomenon, the width has often been determined on the basis of the low water mark (see, e.g., Article IX of the Boundary Convention between Baden and France of 30 January 1827 (De Clerq, *Recueil des Traités de la France*, Vol. III, pp. 429 *et seq.*); see also the judgment of the United States Supreme Court of 19 May 1933 in the case *Vermont* v. *New Hampshire, United States Reports*, Vol. 289, p. 619 (1933)) or the mean water level (see, e.g., the Arbitral Award rendered on 23 January 1933 by the Special Boundary Tribunal constituted by the Treaty of Arbitration between Guatemala and Honduras (*League of Nations Treaty Series*, Vol. 137, p. 259; United Nations *Reports of International Arbitral Awards (RIAA)*, Vol. II, p. 1365)), which offer an acceptable basis for defining the characteristic features of a watercourse (channels, centre, flow, etc.).

As early as 1912, Captain Eason, of the Bechuanaland Police, after having visited the area, described the northern channel as being twice the width of the southern channel (see paragraph 53 below). The aerial photographs of the area concerned taken between 1925 and 1985 show a northern channel that is wider than the southern one. The satellite pictures taken in June 1975, then in March 1995 and June 1996 — i.e., in both the dry and rainy seasons — show the northern channel as being wider than the southern channel. The Court concludes that apart from the season of flooding that is indeed the situation.

34. The Parties both agree that the flow, i.e., the volume of water carried, plays an important role, and for Namibia even a decisive role, in determining the main channel — although they do not reach the same conclusion.

According to the data submitted by Botswana,

> "the northern channel conveys about twice as much flow as the southern channel. The mean discharge at Site II in the northern channel is 78.865 m^3/s compared to 41.823 m^3/s at Site I in the southern channel. . . . Notice that the ratio of roughly 1:2 between

the mean discharges of the southern and northern channels also applies to the median and maximum discharges."

Namibia criticizes this choice of gauging points, as well as the methods used, and disputes the accuracy of the figures provided by Botswana. For its part, it contends that

"the southern channel carries not only the major portion, but substantially all of the flow of the River in the vicinity of Kasikili Island, while the northern channel has almost no longitudinal flow and is little more than a relict channel of the Zambezi floodplain".

Namibia provides the following figures for the volume of flow during the period from 30 April to 2 May 1998:

"In the main channel to the south of the Island, the flow was 247 m^3/s, i.e., almost 60% of the total. In the northern channel it was 188 m^3/s."

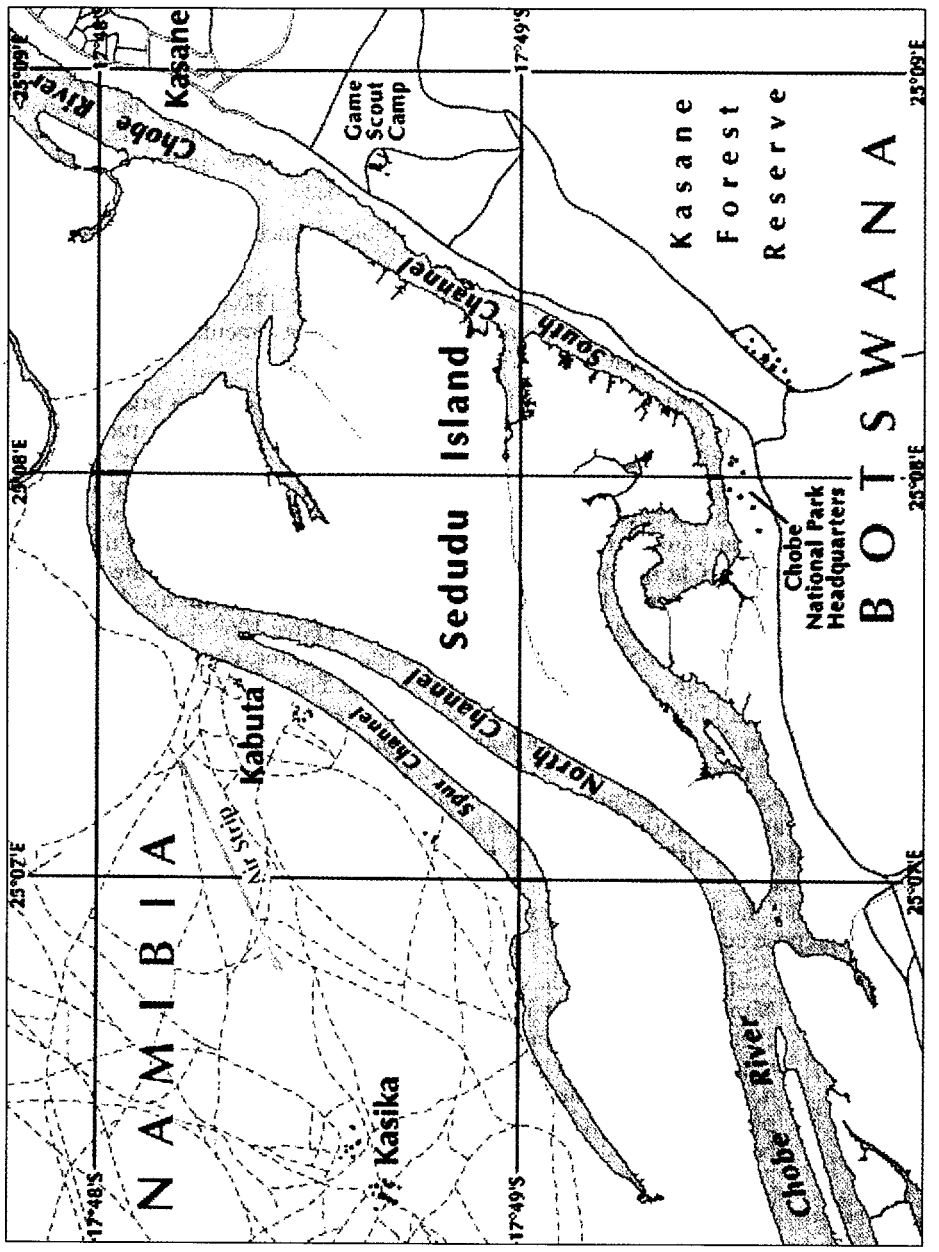
35. The Court is not in a position to reconcile the figures submitted by the Parties, who take a totally different approach to the definition of the channels concerned. In Botswana's presentation, the two channels around Kasikili/Sedudu Island are those visible on the map (reproduced on page 1068 of this Judgment). For its part, Namibia argues, placing particular reliance on certain maps and images, in support of the existence of a major channel of the Chobe, of which the southern channel — visible throughout the year except when the river is in flood — merely constitutes the thalweg (see the aerial photograph reproduced on page 1069 of this Judgment). According to Namibia, "the left bank [of this large channel] is marked by the line of high ground crossing the Island in a west-east direction". This is the channel said to carry "the largest proportion of the annual flow of the river" and therefore to constitute the main channel of the Chobe in the sector of Kasikili/Sedudu Island. On a number of the photographs and maps submitted by Namibia (including the photograph reproduced on page 1069 of this Judgment), the banks of this channel, described as the main channel, are shown by means of arrows or by a continuous line.

36. Botswana vigorously disputes the existence of this channel. It states the following:

"[Firstly], the surmised Namibian waterway across the Island occupies one sixth to one fifth of the northern channel. Secondly, it traverses the high elevations of the Island. Thirdly, the proposed line of its left bank, on examination of the aerial photographs and satellite images, is not a bank but a narrow sub-channel. Fourthly, that line is not tree-lined; and fifthly, the lower eastern areas of the Island, on the evidence, are the more probable path of overflow of Zambezi floods."

MAP SHOWING THE TWO CHANNELS AROUND KASIKILI/SEDUDU ISLAND ACCORDING TO BOTSWANA

(*Source* : Botswana Judges' Folder — Section 4)



Emerging sediment bars after the passage of the seasonal flow in the river

Inflow into the northern channel directly from the Zambezi River has already ceased

NOTE: The flow in the Chobe River at Kasikili Island is seasonal, with no flow taking place in the dry season. During the dry season the water in the northern and southern channels is stagnant. During the wet season as flow commences the sediment bars in the main channel become inundated and flow takes place through the full width of the main channel. After the passage of the annual flow the water level drops, the sediment bars emerge, the flow ceases, and the water within the northern and southern channels becomes stagnant once more.

No 1.4

Figure 18
The location of the main channel of the Chobe River at Kasikili Island.
Date of photography 5 June 1997

In short, Botswana states, there is

> "no independent evidence to support the existence of a 'channel', let alone a 'main' one across the Island in the terms of Article III of the Anglo-German Agreement of 1890".

37. The Court is of the opinion that the determination of the main channel must be made according to the low water baseline and not the floodline (see in this regard the practice referred to in paragraph 33 above). The evidence shows that when the river is in flood, the Island is submerged by flood water and the entire region takes on the appearance of an enormous lake. Since the two channels are then no longer distinguishable, it is not possible to determine the main channel in relation to the other channel. As for the channel described by Namibia as the main channel, the Court finds that the largest part of its bed remains dry for the greater part of the year. High sand bars which are among the highest points of the Island (927 metres above sea-level) are found there, but it must also be noted that it was in this bed that cultivation took place, according to the evidence of a 1943 aerial photograph submitted by both Parties. It is difficult to accept that this bed, generally dry, and which would occupy the south-western part of the Island, can be the bed of the main channel. The Court therefore is not persuaded by Namibia's argument concerning the existence of this major "main" channel whose visible southern channel would merely constitute the thalweg.

38. Namibia emphasizes the importance of the Chobe Ridge in the area in question as a "stable and clearly visible escarpment some 50 metres high"; it uses this as an argument for determining the main channel, by maintaining that the right bank of the southern channel, which follows the Chobe Ridge, has certain characteristics ("a steep, well-defined bank with a strip of riverine vegetation along it") that make it readily identifiable. The Court would observe that, even if one part of the right bank of this channel is easily identifiable from a distance, other parts of this bank are not, and neither is the left bank. The Court is therefore unable to conclude that, in terms of visibility — or of general physical appearance — the southern channel is to be preferred to the northern channel.

39. The Court turns now to the criteria put forward by Botswana concerning "bed profile configuration". The Court finds that the northern channel of the Chobe, around Kasikili/Sedudu Island, does not contain any of the meanders that are so typical of the secondary branches of watercourses. The southern channel, however, does show such meanders. Namibia indeed acknowledges the curved nature of the southern channel but, in light of the sediment deposition, draws contrary conclusions with regard to the importance of this channel. Having examined the arguments, maps and photographs put forward by the Parties, the Court is unable to conclude that, from its bed configuration, the southern channel constitutes the principal and natural prolongation of the course of the Chobe before the bifurcation.

40. The navigability of a watercourse is the combined result of its depth, its width and the volume of water it carries, taking account of natural obstacles such as waterfalls, rapids, shallow points, etc., along its course. The Parties to the dispute do not accord equal importance to navigability in the determination of the main channel of the Chobe. Botswana maintains that "in the period at which the [1890] Treaty was concluded . . . navigability and access to navigable waters were primary considerations in the minds of the negotiators". In Namibia's view, on the other hand, "it would be anomalous to apply a criterion of navigability to a river boundary that is non-navigable for most of its length"; Namibia attaches no less importance to the actual use of the southern channel of the Chobe around Kasikili/Sedudu Island for the purpose of navigation by tourist vessels.

The Court notes that the navigability of watercourses varies greatly, depending on prevailing natural conditions. Those conditions can prevent the use of the watercourse in question by large vessels carrying substantial cargoes, but permit light flat-bottomed vessels to navigate. In the present case, the data furnished by the Parties tend to prove that the navigability of the two channels around Kasikili/Sedudu Island is limited by their shallowness. This situation inclines the Court to the view that, in this respect, the "main channel" in this part of the Chobe is that of the two which offers more favourable conditions for navigation. In the Court's view, it is the northern channel which meets this criterion.

In 1947, Mr. W. Ker, the proprietor of the Zambezi Transport & Trading Company, sought permission to transport timber by barge via the northern channel of the Chobe from Serondella (upstream) to Katambora (downstream), the southern channel being unusable for that purpose (see paragraph 56 below). The Court has no information regarding the volume of timber carried, the duration of this undertaking or its success; nor has it been informed of other attempts which may have been made to utilize the Chobe for navigational purposes. This absence of data enables the Court to conclude that the economic importance of navigation, even in the northern channel, has remained slight. However, it follows from the Trollope-Redman correspondence of 1948 — which correspondence the Court will consider later (see paragraph 58 below) — that the northern channel of the Chobe was regarded as a "stretch of water . . . navigable and giv[ing] access to the higher reaches of the Chobe — [unlike] the southern channel". This correspondence also indicates that "the Southern Channel [was] not navigable by [timber] barges when the river [was] not in flood".

Moreover, the use of the southern channel by flat-bottomed tourist boats does not in itself prove that the latter offers more favourable conditions for navigation than the northern channel. In the view of the Court, the presence of these tourist boats in the southern channel is attributable to the spectacle of large wild animals and the wealth of fauna

on the banks of the southern channel. The economic importance of tourism in the southern channel does not alter its conditions of navigability. The Court cannot therefore regard the amount of tourist craft in the southern channel as a reason for modifying the conclusion that it has reached above.

41. For the foregoing reasons, the Court concludes that, in accordance with the ordinary meaning of the terms that appear in the pertinent provision of the 1890 Treaty, the northern channel of the River Chobe around Kasikili/Sedudu Island must be regarded as its main channel.

42. This conclusion is supported by the results of various on-site investigations, as recorded in the reports drawn up on those occasions. The Court will revert in greater detail to these reports when it considers their legal significance in the course of its examination of the conduct of the Parties subsequent to the 1890 Treaty (see paragraphs 52-70 below). At this stage it would nonetheless note the following points:

(1) in 1912, Captain H. E. Eason, of the Bechuanaland Police, travelled through the area in question and concluded as follows in his reconnaissance report:

> "Here [i.e., around Kissikiri (Kasikili) Island], I consider that undoubtedly the north should be claimed as the main channel. At the western end of the island the north channel at this period of the year is over one hundred feet wide and 8 feet deep, the south channel about forty feet wide and four feet deep. The south channel is merely a back water, what current there is goes round the North"

(2) a joint report drawn up on 19 January 1948 by Messrs. L. F. W. Trollope and N. V. Redman, respectively Magistrate of the Eastern Caprivi Strip and District Commissioner at Kasane (Bechuanaland), contains the following conclusions on this point:

> "We express the opinion that the 'main Channel' lies in the waterway which would include the island in question in the Bechuanaland Protectorate";

(3) the joint report drawn up on 15 July 1985 by a joint team of experts from South Africa and Botswana resulted in the following conclusion: "The main channel of the Chobe River now passes Sidudu/Kasikili Island to the west and to the north of it."

Thus, the three on-site surveys carried out at different times concluded that the main channel of the River Chobe was the northern channel.

*

43. The Court will now consider how and to what extent the object and purpose of the treaty can clarify the meaning to be given to its terms.

While the treaty in question is not a boundary treaty proper but a treaty delimiting spheres of influence, the Parties nonetheless accept it as the treaty determining the boundary between their territories. The major concern of each contracting party was to protect its sphere of influence against any intervention by the other party and to obviate any risk of future disputes. Article VII of the 1890 Treaty is worded as follows:

> "The two Powers engage that neither will interfere with any sphere of influence assigned to the other by Articles I to IV. One Power will not in the sphere of the other make acquisitions, conclude Treaties, accept sovereign rights or Protectorates, nor hinder the extension of influence of the other.
>
> It is understood that no Companies nor individuals subject to one Power can exercise sovereign rights in a sphere assigned to the other, except with the assent of the latter."

The contracting powers, by opting for the words "centre of the main channel", intended to establish a boundary separating their spheres of influence even in the case of a river having more than one channel. They possessed only rudimentary information about the Chobe's channels. If they knew that such channels existed, their number, features, navigability, etc., and their relative importance remained unknown to them. This situation explains the method adopted to define the southern boundary of the Caprivi Strip.

The Court stated in the *Temple of Preah Vihear (Merits)* case:

> "There are boundary treaties which do no more than refer to a watershed line, or to a crest line, and which make no provision for any delimitation in addition." (*I.C.J. Reports 1962*, p. 34.)

In that Judgment the Court added that this was "an obvious and convenient way of describing a frontier line objectively, though in general terms" (*ibid.*, p. 35). In the present case, the contracting parties employed a similar approach.

44. The Court notes that navigation appears to have been a factor in the choice of the contracting powers in delimiting their spheres of influence. The great rivers of Africa traditionally offered the colonial powers a highway penetrating deep into the African continent. It was to gain access to the Zambezi that Germany sought "a strip of territory which shall at no point be less than 20 English miles in width" — terms which were eventually included in the provisions of Article III, paragraph 2, of the Treaty. Admittedly, this strip of territory did provide access to the Zambezi, but its southern boundary was formed by the Chobe River, which was apparently assumed to be navigable, as suggested by the use of

the word "thalweg" in the text of the German version of the Treaty. The difficulties of the land route owing to regular flooding, and the obstacles to navigation on the Chobe, were, in all probability, little known at the time.

45. The fact that the words "centre of the main channel" were included in the draft Treaty on the initiative of the British Government suggests that Great Britain no less than Germany sought to have access to the Zambezi. In order to mark the separation of their spheres of influence, the contracting parties chose "the centre of the main channel" of the Chobe, thus ensuring that there was a well-defined, recognizable boundary, in a watercourse that was assumed to be navigable. There are grounds for thinking that one of the reasons underlying their decision was navigation, but the Court does not consider that navigation was the sole objective of the provisions of Article III, paragraph 2, of the Treaty. In referring to the main channel of the Chobe, the parties sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence.

* *

46. The *travaux préparatoires* of the Treaty concerning south-west Africa and the Caprivi Strip in particular support this reasoning.

Initial attempts to record the parties' agreement described the boundary simply as following the course of the Chobe, without reference to any channel. Article II of the provisional agreement initialled by Lord Salisbury and Count Hatzfeldt on 17 June 1890 stipulated:

> "The frontier between the German territory and the English territory in the south-west of Africa shall follow, from the point which has been agreed upon in previous arrangements, the 22nd degree of south latitude (leaving Lake Ngami to England), to the east up to the 21st degree of longitude; from thence to the north to where that degree touches the 18th degree of south latitude. Thence, the line of demarcation shall be carried to the east along the centre of the River Tschobi, up to the point where it flows into the Zambesi."

The text subsequently prepared by the British and German negotiators, and transmitted to the British Foreign Office on 21 June 1890, as "a draft of the Articles of Agreement" was worded:

> "[The boundary] runs eastward along that parallel till it reaches the River Chobe, and descends the centre of that river to its junction with the Zambesi, where it terminates. It is understood that, under this arrangement, Germany shall have free access from her Protectorate to the Zambesi by the Chobe."

On 25 June 1890, the British side proposed the following wording: "In

paragraph 2 of Article III, after the words 'the River Chobe, and descends the centre of', the words 'the main channel of' should be inserted."

The proposal was accepted by the German side and translated as *"in der Thal-Linie des Hauptlaufes dieses Flusses"*. In the end the word *Thal-Linie* was replaced by the word *Thalweg*. The German text is therefore a word-for-word translation of the British proposal and follows the English text. Therefore, it may reasonably be supposed that these terms are synonymous and that the English text, like the German text, correctly and accurately expresses the will of the contracting parties.

* *

47. In the course of the proceedings, Botswana and Namibia made abundant reference to the subsequent practice of the parties to the 1890 Treaty — and of their successors — as an element in the interpretation of that Treaty.

48. Article 31, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties, which, as stated earlier, reflects customary law (see paragraph 18 above), provides as follows:

> *"Article 31*
> *General Rule of Interpretation*
>
> . . . . . .
>
> 3. There shall be taken into account, together with the context:
>
> *(a)* any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> *(b)* any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> . . . . . ."

49. In relation to "subsequent agreement" as referred to in subparagraph *(a)* of this provision, the International Law Commission, in its commentary on what was then Article 27 of the draft Convention, stated the following:

> "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation" (*Yearbook of the International Law Commission,* 1966, Vol. II, p. 221, para. 14).

As regards the "subsequent practice" referred to in subparagraph *(b)* of the above provision, the Commission, in that same commentary, indicated its particular importance in the following terms:

> "The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the

meaning of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals." (*Op. cit.*, p. 241, para. 15.)

50. Indeed in the past, when called upon to interpret the provisions of a treaty, the Court has itself frequently examined the subsequent practice of the parties in the application of that treaty (see, for example, *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 25; *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, pp. 206-207; *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, pp. 33-35; *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 157, 160-161 and 172-175; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 408-413, paras. 36-47; *Territorial Dispute (Libyan Arab Jamahiriyal Chad), Judgment, I.C.J. Reports 1994*, pp. 34-37, paras. 66-71; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 75, para. 19).

51. While the Parties to the present proceedings both accept that interpretative agreements and subsequent practice do constitute elements of treaty interpretation under international law, they disagree on the consequences to be drawn from the facts in this case for purposes of the interpretation of the 1890 Treaty.

*

52. In support of its interpretation of Article III, paragraph 2, of the 1890 Treaty, Botswana relies principally on three sets of documents: a report on a reconnaissance of the Chobe produced in August 1912 by an officer of the Bechuanaland Protectorate Police, Captain Eason; an arrangement arrived at in August 1951 between Major Trollope, Magistrate for the Eastern Caprivi, and Mr. Dickinson, a District Commissioner in the Bechuanaland Protectorate, together with the correspondence that preceded and followed that arrangement; and an agreement concluded in December 1984 between the authorities of Botswana and South Africa for the conduct of a Joint Survey of the Chobe, together with the resultant Survey Report.

The Court will examine each of these three sets of documents in turn, in order to determine what conclusions may be drawn from them in the light of the rules set out in Article 31, paragraph 3, of the Vienna Convention.

53. About the year 1910, negotiations took place between Germany and Great Britain concerning the boundary between their respective possessions in the area of the Caprivi Strip west of the intersection of the 18th parallel with the River Chobe, and arbitration of the matter was considered.

Anticipating a possible extension of the discussions to include the boundary east of that point, the British Secretary of State for the Colonies, in a letter dated 14 July 1911 to the High Commissioner responsible for Bechuanaland, expressed himself in the following terms:

> "I take this opportunity of observing that in the second clause of Article III of the Anglo-German Agreement of 1890 it is stated that the boundary 'descends the centre of the *main* channel of that river (*i.e.*, the River Chobe) to its junction with the Zambesi'. As, in this section of its course, the River Chobe divides into more than one channel which afterwards reunite, the question as to which is the main channel will require consideration. I have to request . . . that I may receive all available information from local sources in support of the view that the north channel is the main channel. Such information should be accompanied by a map and, if possible, by measurements of the streams, and should be in a form which can, if necessary, be laid before the arbitrator as part of the case of His Majesty's Government."

This was the context in which Captain Eason was instructed to prepare a "Report on the main channel of the Linyanti (or Chobe) river". That Report, which bears the date 5 August 1912, contains, *inter alia*, the following passage:

> "Two miles above the rapids lies Kissikiri Island. [H]ere I consider that undoubtedly the North should be claimed as the main channel. At the Western end of the island the North channel at this period of the year is over one hundred feet wide and eight feet deep, the South channel about forty feet wide and four feet deep. The South channel is merely a back water, what current there is goes round the North. The natives living at Kasika in German territory are at present growing crops on it."

It is not disputed that Kissikiri Island is the island later known as Kasikili/Sedudu.

54. In its Memorial, Botswana claimed that the Eason Report represented practice in the application of the 1890 Treaty. Namibia disputed this, pointing out *inter alia* that Great Britain had not made any claim on this basis, even though its exchanges with Germany concerning the rest of the southern boundary continued until the outbreak of the First World War. However, in the final version of its argument, Botswana, while continuing to rely on the Eason Report for other purposes, accepted that it could not be regarded as evidence of subsequent practice relating to the application of the 1890 Treaty.

55. The Court shares the view that the Eason Report and its surround-

ing circumstances cannot be regarded as representing "subsequent practice in the application of the treaty" of 1890, within the meaning of Article 31, paragraph 3 *(b)*, of the Vienna Convention. It notes that the Report appears never to have been made known to Germany and to have remained at all times an internal document. The Court observes, moreover, that the British Government itself never took the Report any further, whether immediately afterwards (the anticipated arbitration not having taken place) or later on (for example when the Caprivi Strip was occupied by British troops during the First World War, or when it was administered by the British authorities on behalf of South Africa between 1921 and 1929).

56. In 1947, Mr. Ker, who was operating a transport business in Bechuanaland, planned to bring timber down the Chobe using the northern channel. He obtained the necessary permission from the competent official in the Caprivi Strip, Major Trollope, but also raised the matter with the Bechuanaland authorities. Correspondence then ensued between Major Trollope and the Assistant District Commissioner at Maun (Bechuanaland), Mr. Redman. In a letter dated 18 December 1947, Mr. Redman wrote to Major Trollope as follows:

> "1. I have the honour to inform you that I have received a letter from the Zambesi Transport & Trading Company stating that they wish to recommence the transport of timber by river from Serondella but they have been informed by you that the channel between Kasane and Serondella which they intend to use, is in the Caprivi Strip.
>
> 2. At low water I understand that this channel is the only water connection between Kasane and Serondella and I suggest that if this channel does happen to run into the Caprivi Strip from the Chobe river along which our boundary runs it will be in both our interests and a matter of convenience if we can come to an arbitrary agreement that half this channel is included in this Territory for the purpose of the transport of the timber by the Zambesi Transport & Trading Company.
>
> 3. If however the channel referred to is part of the Chobe river and not a branch off from it then it seems probable that the actual boundary is formed by the deep water channel in the river, which would mean that they would not be entering your Territory.
>
> 4. I would be glad to have your views on this matter."

In his reply of 3 January 1948 Major Trollope informed Mr. Redman that he was prepared to renew indefinitely the permission originally given to Mr. Ker for a period of six months; and he added:

> "4. In regard to the larger question raised by you (i.e. as to whether the stretch of water in question is actually within the East-

ern Caprivi Zipfel, — or whether it in fact forms the boundary), I freely admit that the matter is not without difficulty. I further agree that it *is* a matter affecting our two administrations and is not merely a matter between this office and Mr. Ker.

5. I suggest, in this connection, that I and your Assistant at Kasane, should hold a joint informal investigation thereafter submitting reports (joint if we are able to reach unanimity) to our respective administrations in order to resolve the matter finally and officially."

57. On 19 January 1948, Major Trollope and Mr. Redman (at the time District Commissioner at Kasane, Bechuanaland) produced a Joint Report entitled "Boundary between the Bechuanaland Protectorate and the Eastern Caprivi Zipfel: Kasikili Island", in which, after citing the provisions of Article III, paragraph 2, of the 1890 Treaty, they stated the following:

"3. We find after separate examination of the terrain and the examination of an aerial photograph that the 'main Channel' does not follow the waterway which is usually shown on maps as the boundary between the two Territories.

4. We express the opinion that the 'main Channel' lies in the waterway which would include the island in question in the Bechuanaland Protectorate.

5. On the other hand we are satisfied, after enquiry that since at least 1907, use has been made of the Island by Eastern Caprivi Zipfel tribesmen and that that position still continues.

6. We know of no evidence of the Island having been made use of, or claimed, by Bechuanaland Tribesmen or Authorities or of any objection to the use thereof by Caprivi Tribesmen being made.

7. We record, however, the fact that the country on the Bechuanaland side of the boundary is for all practical purposes not tribally occupied by Africans.

8. We record the foregoing as facts particularly recording that we have neither arrived at, nor expressed any joint opinion on the effect of these facts on the ownership of the Island."

58. Major Trollope sent a copy of the Report to the Secretary of Native Affairs at Pretoria under cover of a letter of 21 January 1948, in which he stated *inter alia* the following:

"[T]he terms of the Treaty are very definitive and, as I have already pointed out, favour the Bechuanaland contention. It is not without point, however, that we are — by occupation — in the position of the possessor and the onus would appear to lie on the Protectorate to prove their case in order to disturb our possession."

He proposed various solutions, after first pointing out that "[t]he Bechuanaland authorities are anxious to have the northern channel recognised as the boundary because that stretch of water is navigable and gives access to the higher reaches of the Chobe — which is not the case in respect of the southern channel".

For his part, Mr. Redman forwarded a copy of the Joint Report to the Government Secretary at Mafeking, under cover of a letter of 26 January 1948, in which he stated *inter alia* that: "the Southern Channel [was] not navigable by [Mr. Ker's] Barges when the river [was] not in flood" and that it was "even difficult for small craft to navigate it"; that "the map, which show[ed] the boundary to follow the Southern Channel, [was] . . . inaccurate and [had] probably [been] drawn by some-one who had not examined the river to determine the main Channel"; that according to "further information from an inhabitant of the Island . . . in 1924 a Caprivi Chief . . . [had] applied to . . . the Resident Magistrate at Kasane, for permission for his people to plough on the Island"; and that "surrender of this Island would prevent this Territory from having free use of the Chobe River, which [might] one day become an extremely important waterway".

59. After Major Trollope and Mr. Redman forwarded the Joint Report of 19 January 1948 to their respective authorities, there ensued an extended correspondence between those authorities.

On 14 October 1948 the Secretary to the South African Prime Minister with responsibility for External Affairs wrote to the Administrative Secretary to the High Commissioner for Bechuanaland in Pretoria, stating that, while he noted the findings of the Trollope-Redman Report with regard to the identification of the "main channel" around Kasikili Island, he wished to propose an arrangement in the following terms:

> "The Union Government is anxious to preserve the rights of the Caprivi Zipfel tribesmen on the Island and it is understood that the Bechuanaland authorities desire the use of the Northern channel for navigation purposes. As there would appear to be no conflict of interests it should be possible to come to an arrangement which is mutually satisfactory. Your views in the matter would be appreciated."

The Administrative Secretary replied on 4 November 1948 that

> "the Resident Commissioner of the Bechuanaland Protectorate has directed the Assistant District Commissioner, Kasane, that tribesmen of the Caprivi Zipfel should be allowed to cultivate land on Kasikili Island, if they wish to do so, under an annual renewable permit".

This reply did not appear to satisfy the Secretary for External Affairs of South Africa, who wrote back to the Administrative Secretary on 14 February 1949 in the following terms:

> "While noting that your Administration is prepared to authorise

> Caprivi Zipfel tribesmen to cultivate land on Kasikile Island on an annual renewable permit, I am to state that this is not what the Union Government had in mind.
>
> From the available information it is clear that Caprivi Tribesmen have made use of the Island for a considerable number of years and that their right to do so has at no time been disputed either by Bechuanaland Tribesmen or the Bechuanaland authorities.
>
> It was further understood that the interests of the Bechuanaland authorities centred in the use of the Northern Channel of the Chobe for navigation purposes.
>
> My object in writing to you was therefore to ascertain whether agreement could not be reached on the basis of your Administration recognising the Union's claim to Kasikile Island subject to it issuing a general permit for the use of the Northern waterway for navigation purposes."

On 6 June 1949 the High Commissioner for Bechuanaland wrote to the Secretary of State for Commonwealth Relations in London informing him of the South African proposal. In his letter the High Commissioner stated that the Union Government had "proposed a slight adjustment of the northern boundary of the Bechuanaland Protectorate"; he explained that Kasikili Island had "hitherto been regarded as part of the Caprivi Zipfel, since maps show[ed] that the main channel pass[ed] to the south of the island"; with reference to the Joint Report of 19 January 1948, which he enclosed with his letter, he stated that

> "[t]he question of the correct boundary was raised by a firm which intends to transport timber down the river, and the Union Government, having examined the question, find that the main channel is to the north of the island, and that there has been no change in the course of the channel within living memory";

and he concluded:

> "4. The Resident Commissioner of the Bechuanaland Protectorate considers that the Union proposal to set the boundary in the southern channel need not be resisted, if the use of the northern channel for navigation is guaranteed for the inhabitants and Government of the Bechuanaland Protectorate. This guarantee the Union Government are prepared to give.
>
> 5. I consider in the circumstances that the proposal of the Union Government is acceptable, and would be glad to have your approval of it."

Ultimately, following consultations with the Commonwealth Relations Office, Bechuanaland declined to accept the South African proposal. This reaction appears to have been motivated, in particular, by difficulties in

connection with the Mandate over South West Africa. Thus, in a letter dated 24 August 1949, the Chief Secretary to the High Commissioner for Bechuanaland explained to the Secretary to the South African Prime Minister, that "while the slight alteration proposed [by the South African Government] seem[ed] of little intrinsic importance, an examination of the legal and political aspects ha[d] revealed that certain difficulties [might] ensue both from the standpoint of international law and as regards possible uncertainty of jurisdiction". These points were explained as follows in a long letter dated 20 October 1949 from the Commonwealth Relations Office in London to the High Commissioner for Bechuanaland:

> "we agree that this very slight alteration is of no intrinsic importance in itself and seems in substance unobjectionable. There are, however, certain legal and political complications which it seems necessary to bring to your notice . . . First, there is the international aspect . . . Under Article 7 of the Mandate no modification could be made without the consent of the Council of the League of Nations. In so far as the mandate is still operative, this might be interpreted as referring to some organ of the United Nations or as making any adjustment impossible. No doubt it is unlikely that anyone would raise any objection in the United Nations, especially as the proposal is to add to the territory and not in any way to reduce its area, but the possibility cannot be entirely ignored. Secondly, it is necessary to consider the effect of the adjustment from the point of view of Municipal Law. This is more difficult. The island is apparently inhabited and no doubt offences are sometimes committed and civil disputes might occur. . . . The matter being thus dependent on an agreement between the United Kingdom and Germany, at first sight there is no reason why an adjustment, fully effective for the purposes of Municipal Law, should not be made by a further agreement between the United Kingdom and the Union of South Africa. Unfortunately, however, the International Law on the subject affects the Municipal Law, for the mandate creates a technical difficulty . . . The issue of an Order in Council involving a cession of territory, however small or nominal, to South West Africa is open to some objection since the publicity involved might arouse curiosity and subsequent criticism on the part of those who dislike the Union Government's refusal to place South West Africa under trusteeship."

On 10 May 1951 the High Commissioner wrote in similar terms to the Secretary to the South African Prime Minister, stating that:

> "The possibility of making a declaration on behalf of the Government of the Bechuanaland Protectorate to the effect that the Island is not claimed as lying within the boundaries of the Protectorate has been examined by the Legal Advisers to the Secretary of State for Commonwealth Relations. I am afraid that they have found this proposal to be beset by legal complications of an international nature, the solution of which would entail difficulties disproportionate to the importance of the matter at issue";

and adding:

> "The Bechuanaland Protectorate Government might possibly wish to arrange for some land on the Island at some time to be cultivated by the few African public servants at Kasane. Apart from this minor matter, I venture to suggest that it is unlikely that any development in the foreseeable future will damage the interests of the Caprivi tribesmen who have in the past used the Island. It should, I think, be possible to adjust by administrative action any difficulty arising in connection with the Island and the adjacent waterway without an alteration of the existing legal position . . . and it is assumed that the free use of the main channel of the Chobe, to the north of the Island, would continue to be assured under the international rules governing waterways that form the common boundary of two states."

60. It was in very similar terms that Mr. Dickinson, who had in the meantime succeeded Mr. Redman as District Commissioner at Kasane (Bechuanaland) wrote on 5 July 1951 to Major Trollope "in regard to Kasikili Island". After explaining that "the legal complications which are of an international nature, and beset the question of excorporating Kasikili Island from the Bechuanaland Protectorate, will involve difficulties disproportionate to the matter at issue", he concluded as follows:

> "Might I therefore say that the position as at the moment, allowing the full use of the Island to your tribesmen, for grazing and cultivation and our undisputed use of the Northern Waterway, under the international laws, governing the Waterways forming the common boundaries of two states, would appear entirely satisfactory, to the B.P. Government, and I trust also to yours."

In his reply of 4 August 1951 Major Trollope agreed that "the 'stink' [was] quite disproportionate to the importance of the matter at issue", adding that they should "let the whole matter lapse into the decent obscurity from which it should never have been allowed to emerge". However, he disagreed with certain of the language used in Mr. Dickinson's letter, observing:

"I find it, however, somewhat embarrassing to agree formally that we should be 'allowed' the use of the Island and should recognise the 'undisputed use of the Northern Waterway under the international laws governing the waterways forming the common boundary of two states'. Such an agreement might quite possibly be arguably used in support of a submission that we occupy by licence and permission — which we do not, of course, admit."

Major Trollope accordingly proposed the following "gentlemen's agreement":

"*(a)* That we agree to differ on the legal aspect regarding Kasikili Island, and the concomitant question of the Northern Waterway;

(b) That the administrative arrangements which we hereafter make are entirely without prejudice to the rights of the Protectorate and the Strip to pursue the legal question mentioned in *(a)* should it at any time seem desirable to do so and will not be used as an argument that either territory has made any admissions or abandoned any claims; and

(c) That, having regard to the foregoing, the position revert to what it was de facto before the whole question was made an issue in 1947 — i.e. that Kasikili Island continue to be used by Caprivi tribesmen and that the Northern Waterway continue to be used as a 'free for all' thoroughfare."

Major Trollope made it clear that:

"this 'gentlemen's agreement' could only purport to affect arrangements as between our two Administrations. I have my gravest doubts as to the wisdom of making the ambit larger for that would bring in all sorts of extraneous questions of international law and such like imponderables which I think we might usefully leave for consideration when we come to that bridge."

In a letter of 11 August 1951 Mr. Dickinson stated that the three-point agreement proposed by Major Trollope seemed to him "the most reasonable solution" and that he "agree[d] entirely with [it]". He suggested, however, that a paragraph *(d)* be added, stating "that nothing in the previous three sections should be read as preventing the [Bechuanaland Protectorate] Tribesmen using the Island for ploughing purposes".

On 23 August 1951 Major Trollope replied as follows:

"1. I'm afraid that the point you raise rather throws a spanner in the works.

2. I appreciated the position as that we both wished to restore the

factual position to what it was before Ker raised the hornet's nest, and to leave the *legal* position 'in the air' to be freely raised in the future by either side should that become necessary or desirable.

3. Whatever the *legal* position (i.e. whether your tribesmen have any rights) is, the *factual* position is that not in all the years past — not in German times, nor when the Strip was administered by the B.P., nor in the S.W. African days nor during my administration (Union) — have B.P. tribesmen ever cultivated the Island or asserted a right to do so; while Caprivi tribesmen have always done so (see *paras. five* and *six* of the Joint Report of 19/1/1948 by Redman and myself). For me to agree therefore that there is nothing to prevent B.P. tribesmen from cultivating the Island does not seem to me to restore the *Status quo* . . ."

To this, Mr. Dickinson responded on 3 September 1951 as follows:

"I must concede your point rather than allow the 'spanner' to 'bust' the works.

Your paragraphs *(a),(b),* & *(c)* will then meet the points in question. In other words we revert to the position as it was prior to this disturbance.

I feel I must make one point clear to you. Although accepting the position and being prepared to honour it, in any discussion or controversy on this Island in future, our Government will be adamant in its attitude that the Island is B.P. — and any attitude in regard to our 'Administrative Settlements' will of course be based on that fact."

Finally, on 13 September 1951, Major Trollope wrote as follows to the new District Commissioner at Kasane, Mr. McLaren:

"2. I really feel that the possibility of future 'discussion or controversy' regarding Kasikili is extremely remote. After all the present factual position, to which happily we now return, has existed for generations without any conflict — indeed, in my opinion, even the recent contretemps was unnecessary.

3. However, if circumstances again make it necessary for controversy to rear its head, the fact of Dickinson's caveat is now on record. Perhaps it would not be inappropriate were I likewise formally to record that in any future controversy over this Island, the Caprivi will be equally insistent on asserting the legality of the factual possession and use it has enjoyed for so many years.

. . . . . .

5. I propose now, if you agree, advising my Department that there is no necessity for pursuit of the matter at high levels as a suitable administrative arrangement, without any prejudice whatever to either side, has been concluded between my office and yours . . .

P.S. It occurs to me that the most likely way in which, unwittingly and not designedly, the controversy might be re-opened is by a B.P. tribesman 'trespassing' (as it would be regarded by us, although not legally by you) on Kasikili. I hereby undertake that should any such occasion arise I will not deal with the matter without prior reference to your office to ascertain whether you wish the large question raised. May I tentatively suggest that you advise your tribesmen to avoid any such action — unless, of course, it is deliberately done as an assertion of right to test the position."

This resulted in the despatch of a letter dated 20 November 1951 from the Government Secretary at Mafeking to the District Commissioner at Kasane, which included the following passage:

"The Native Commissioner Eastern Caprivi Zipfel may therefore be informed that his recommendation is accepted.

2. It is understood that the only Africans in the Protectorate interested in the cultivation of the Island are Government employees living at Kasane and I am to say that they should be instructed that they will not be permitted to plough on the Island."

61. Each of the Parties to the present proceedings relies on the Trollope-Redman Joint Report and the correspondence relating thereto in support of its position. The consequences that they draw from them, however, differ significantly. According to Botswana, these documents show that the boundary around Kasikili/Sedudu Island follows the northern channel; Namibia disputes this, claiming that those same documents demonstrate that the Island forms part of the Caprivi Strip.

62. From the various administrative and diplomatic documents referred to above, the Court, for its part, observes the following: (1) prior to 1947 no differences had arisen between Bechuanaland and the power administering the Caprivi Strip with regard to the boundary in the area of Kasikili/Sedudu Island; (2) it appears that, on the basis of the maps available at the time, the boundary had until then been supposed to be located in the southern channel of the Chobe; (3) in 1948 a local official from the Caprivi and a local official from Bechuanaland came to the joint conclusion, "[a]fter separate examination of the terrain and the examination of an aerial photograph", that the "main channel" around Kasikili/Sedudu Island was the northern one (without specifying what criteria they had employed); at the same time they noted that since at least 1907

use had been made of the Island by Caprivi tribesmen without objection by the Bechuanaland authorities and that that situation still continued; and they recorded that they had "neither arrived at, nor expressed any joint opinion on the effect of these facts on the ownership of the Island"; (4) the higher authorities in Bechuanaland subsequently took the view that the boundary around the Island was located in the northern channel of the Chobe, and that South Africa's claims to the Island itself were unfounded under the 1890 Treaty; nevertheless, they were initially inclined to accept those claims, on condition that they retained access to the northern channel, but later, after consulting London, they abandoned that idea, fearing that this would result in a modification of the boundary that, in view of the mandate over South West Africa, would give rise to a variety of complications; (5) the higher authorities in South Africa, while not disputing the possibility of the "main channel" around Kasikili/Sedudu Island being the northern one and at the same time demonstrating a flexible attitude with regard to access to that channel, clearly asserted their claims to the Island; (6) the local officials in the Caprivi Strip and in Bechuanaland, aware of the positions of their respective superior authorities but keen to remain on neighbourly terms, agreed to shelve their legal differences and to maintain, until further notice, the *status quo ante* (use of Kasikili/Sedudu Island by Caprivi tribesmen and open access to the northern channel of the Chobe); (7) the local official in the Caprivi Strip described the question of the "Northern Waterway" as "concomitant" with that of the "legal aspect regarding Kasikili Island", and his counterpart in Bechuanaland did not challenge this; (8) the issue of access to the Island by Bechuanaland tribesmen was not pursued further.

63. From all of the foregoing, the Court concludes that the above-mentioned events, which occurred between 1947 and 1951, demonstrate the absence of agreement between South Africa and Bechuanaland with regard to the location of the boundary around Kasikili/Sedudu Island and the status of the Island. Those events cannot therefore constitute "subsequent practice in the application of the treaty [of 1890] which establishes the agreement of the parties regarding its interpretation" (1969 Vienna Convention on the Law of Treaties, Art. 31, para. 3 *(b)*). *A fortiori*, they cannot have given rise to an "agreement between the parties regarding the interpretation of the treaty or the application of its provisions" (*ibid.*, Art. 31, para. 3 *(a)*).

64. In October 1984 an incident during which shots were fired took place between members of the Botswana Defence Force and South African soldiers who were travelling by boat in the Chobe's southern channel. At a meeting held in Pretoria on 19 December 1984 between representatives of various South African and Botswanan ministries, it emerged that the incident had arisen out of differences of interpretation as to the precise location of the boundary around Kasikili/Sedudu Island. At this meeting, reference was made to the terms of the 1890 Treaty and it was

agreed "that a joint survey should take place as a matter of urgency to determine whether the main Channel of the Chobe River is located to the north or the south of the Sidudu/Kasikili Island".

The joint survey was carried out at the beginning of July 1985. The "survey report", drawn up on 15 July 1985, was preceded by an analysis of the available maps stating that, while those prior to 1975 located the boundary in the southern channel, Botswana had in 1975 published a map which placed the boundary to the north and west of the Island: it was concluded from this that "[t]he disparity in the depiction of the boundary between South African maps and those of Botswana ha[d] probably been a contributory factor in the recent border incident near Kasane". Furthermore, the report was also preceded by a paragraph entitled "Authority for Survey", which stated:

> "At an intergovernmental meeting held in Pretoria on 19 December 1984 it was decided that a joint survey should be undertaken to determine whether the main channel of the Chobe River is located to the north or the south of Sidudu/Kasikili Island.
>
> Representatives of the two national survey organisations accompanied by co-workers from the Departments of Water Affairs have now been to the area to survey the 'Thalweg' in the vicinity of the island. Specific mention is made to the Thalweg in the 1890 Agreement between England and Germany."

The report itself gave details of the cross-sections and depth soundings taken and the equipment used; it contained *inter alia* the following passage:

> "Livestock from Caprivi are swum across the river when grazing on the Caprivi side is poor. The impression was gained that visits to the Island had, in recent years, become infrequent. Benson Mafwila [an elderly inhabitant of Kabuta village] recounted that Tax had been paid at Kasane in the Nineteen-twenties. He was referring, no doubt, to the period 1922-1929 when the Caprivi Strip was administered on behalf of South Africa by the Protectorate Government. The name by which the Island is known to Caprivians is Kasikili. This is also the Caprivian name for the arm of the river which flows around the island to the west and north. The name Sidudu Island is a later name coming from the Botswana side. There is a Sidudu valley in the immediate vicinity to the south."

The conclusions of the survey report were as follows:

> "The main channel of the Chobe River now passes Sidudu/Kasikili Island to the west and to the north of it. (See annexed Map C.)
>
> The evidence available seems to point to the fact that this has been the case, at least, since 1912.

It was not possible to ascertain whether a particularly heavy flood changed the course of the river between 1890 and 1912. Capt Eason of the Bechuanaland Protectorate Police states, on page 4 of Part I of the report which has been referred to earlier, that floods occurred in 1899 and in June and July of 1909.

If the main channel of the river was ever situated to the south of the island, it is probable that erosion in the Sidudu Valley, the location of which can be seen in the annexed Map C, has caused the partial silting up of the southern channel.

Air photographs showing the channels of the river in the vicinity of the island are available in the archives of the two national survey organisations. They were taken in 1925, 1943, 1972, 1977, 1981 and 1982. No substantial change in the position of the channels is evident from the photographs."

65. The Department of External Affairs of Botswana officially forwarded a copy of this joint survey to South Africa's Department of Foreign Affairs under cover of a Note dated 4 November 1985 which included the following passage:

"The Department of Foreign Affairs will recall that one of the decisions taken at the meeting on 19 December was to send a joint team of technical experts to the Chobe to determine the boundary between Botswana and Namibia in the Sidudu/Kasikili Island area. The Department of External Affairs is pleased to attach to this Note copy of the report produced by the joint team of experts together with its annexures and would be grateful to know whether or not the South African sides wishes to have a meeting called to adopt the report formally. Alternatively the South African side could simply signify its acceptance of the conclusions of the report by means of a Diplomatic Note."

66. It would appear that South Africa never responded to this Note. On 13 October 1986 officials of the ministries of foreign affairs of Botswana and South Africa held a meeting at which the matter of Kasikili/Sedudu Island was briefly discussed. According to the record of this meeting drawn up by the Botswana side, the head of the South African delegation "suggested the maintenance of the status quo till political circumstances could permit direct negotiations between Botswana and independent Namibia"; the head of the Botswana delegation replied "that there was no more room for negotiations because a joint Botswana-South Africa team of experts had confirmed that the Island belonged to Botswana"; and the South African representative "[d]ecided to go back to look at this question once again".

On 22 October 1986 the Botswana authorities sent a telex to Pretoria in which they referred to the discussions of 13 October and went on to say:

"It will be recalled that the Botswana side submitted that Sidudu/Kasikili Island is part of the territory of Botswana, as confirmed by the Botswana/South Africa Joint Team of Experts which reported to the two Governments in July, 1985. [We] wish to inform [you] that the Government of Botswana has since occupied Sidudu/Kasikili Island and expects the Government of South Africa to respect the sovereignty and territorial integrity of the Republic of Botswana in respect of the Island."

The South African authorities replied in the following terms:

"— The Sidudu/Kasikili border issue addresses the international boundary between Botswana and South West Africa/Namibia.

— According to International Law, such cases should be discussed between the two countries concerned. It is therefore suggested that the Cabinet of South West Africa/Namibia should be approached by the Botswana Government for a proper resolution of the matter under consideration.
— Alternatively, the South African Government would be willing to convene a meeting where Botswana, South West Africa/Namibia and South Africa could all be represented and where the relevant issue could be finalised."

The exchange ended with a telex from the Botswana authorities dated 25 November 1986, which read as follows:

"The joint Botswana/South Africa team of experts were never asked to demarcate an international boundary but 'to determine whether the main channel of the Chobe River is located to the north or south of Sidudu Island'. The Joint Team confirmed what had always been the fact, namely that the main channel is located to the north of the island, and that is where the boundary is.

It is therefore clear that adequate clarification of the matter has been made to satisfy normal requirements and no further discussion of the matter is necessary."

67. In these proceedings, Botswana contends that the decision taken in December 1984 to carry out a joint survey, and all the documents relating to that decision — including the survey of July 1985 itself — constitute an "intergovernmental agreement . . . between the parties regarding . . . the application" of the 1890 Treaty, which confirmed that the boundary around Kasikili/Sedudu Island was located in the northern channel of the Chobe. Botswana points out *inter alia* that "general international law do[es] not require any particular formality for the conclusion of an international agreement" and that "[t]he only criterion is the intention of the parties to conclude a binding agreement and this can be inferred from the circumstances".

Namibia categorically denies that the discussions conducted between the Botswana and South African authorities in 1984-1985 led to an agreement on the boundary; it stresses in this connection that the July 1985 joint survey was not "self-executing" and was devoid of any legally binding status unless the parties concerned took the appropriate measures to confer such status upon it. Namibia points out that, once the United Nations General Assembly had terminated South Africa's mandate over South West Africa in 1966, neither South Africa nor Botswana could in any case conclude any kind of agreement on the boundaries of this territory.

68. Having examined the documents referred to above, the Court cannot conclude therefrom that in 1984-1985 South Africa and Botswana had agreed on anything more than the despatch of the joint team of experts. In particular, the Court cannot conclude that the two States agreed in some fashion or other to recognize themselves as legally bound by the results of the joint survey carried out in July 1985. Neither the record of the meeting held in Pretoria on 19 December 1984 nor the experts' terms of reference serve to establish that any such agreement was reached. Moreover, the subsequent correspondence between the South African and Botswana authorities appears to deny the existence of any such agreement: in its Note of 4 November 1985 (see paragraph 65 above), Botswana called upon South Africa to accept the survey conclusions; not only did South Africa fail to accept them but on several occasions it emphasized the need for Botswana to negotiate and agree on the question of the boundary with the relevant authorities of South West Africa/Namibia, or indeed of the future independent Namibia.

69. The Court has reached the conclusion that there was no agreement between South Africa and Botswana "regarding the . . . application of the [1890 Treaty]". This is in itself sufficient to dispose of the matter. It is unnecessary to add that in 1984 and 1985 the two States had no competence to conclude such an agreement, since at that time the United Nations General Assembly had already terminated South Africa's Mandate over South West Africa by resolution 2145 (XXI) of 27 October 1966, and the Security Council had approved that measure by resolution 276 (1970) of 30 January 1970. The Court itself, in its Advisory Opinion of 21 June 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, stated the following in this regard:

> "(1) . . . the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;
>
> . . . . . .
>
> (2) . . . States Members of the United Nations are under obligation

> to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of . . . such presence and administration" (*I.C.J. Reports 1971*, p. 58, para. 133).

Furthermore, the evidence indicates that the Botswana Government's preliminary contacts with the President of the United Nations Council for Namibia and the United Nations Commissioner for Namibia with a view to obtaining their approval prior to the Pretoria meeting of 19 December 1984 were not pursued further, and did not have the result sought by Botswana.

70. Nor does the Court need to examine any further Botswana's alternative argument that, even if the 1984-1985 "agreement" was invalid, it had been "adopted" by Namibia, first before the Joint Team of Technical Experts in 1994, then before the Court itself. The Court need only observe that no such "adoption" by Namibia has been established.

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71. In the proceedings Namibia, too, invoked in support of its arguments the subsequent practice of the parties to the 1890 Treaty. In its Memorial it contended that this conduct

> "is relevant to the present controversy in three distinct ways. In the first place, it corroborates the interpretation of the Treaty . . . Second, it gives rise to a second and entirely independent basis for Namibia's claim under the doctrines concerning acquisition of territory by prescription, acquiescence and recognition. Finally, the conduct of the parties shows that Namibia was in possession of the Island at the time of termination of colonial rule, a fact that is pertinent to the application of the principle of *uti possidetis*."

At the hearings Namibia stressed that "its primary claim is that its title is treaty-based", the claim "of prescription [being] asserted in the alternative"; and it argued in this regard that

> "the very meaning of the ability to plead in the alternative is that each claim is to be considered in its own right, and no inference is to be taken against one claim because an inconsistent claim has been pleaded".

The subsequent practice relied on by Namibia consists of

> "[t]he control and use of Kasikili Island by the Masubia of Caprivi, the exercise of jurisdiction over the Island by the Namibian governing authorities, and the silence by Botswana and its predecessors persisting for almost a century with full knowledge of the facts . . ."

Namibia contends that the members of the Masubia tribe — a people from the eastern part of the Caprivi Strip — had a "continued presence" on the Island at least between 1890 and the late 1940s. Citing various official documents, explorers' accounts and testimony of witnesses, it states that: "from the beginning of the colonial period at least, and probably a good deal further back than that, Kasikili Island was agricultural land cultivated by the people occupying what is now the Eastern Caprivi"; that "[t]heir occupation was continuous, exclusive and uninterrupted, in so far as the physical conditions of the Island allowed"; and that "Kasikili Island/Kasika [a Caprivi village] was a well organized village community, with a chief and at times with a school — its centre of gravity moving from one pole to the other in accordance with the dictates of the annual flood". According to Namibia, Germany from 1909, then its successors after 1915, incorporated the local institutions of the Masubia into the structure of colonial governance, using them as instruments for exercising their authority. The Masubia thus constituted a key component of the system of "indirect rule" which prevailed in the region. Namibia emphasizes that all these facts were known to the Bechuanaland authorities just across the Chobe, in Kasane, and that they made no objection or protest, at least until the late 1940s. And Namibia concludes that:

> "[t]he continued control and use of Kasikili Island by the people of the Eastern Caprivi, the exercise of jurisdiction over the Island by the governing authorities in the Caprivi Strip, and the continued silence of those on the other side of the Chobe . . . confirm the interpretation of the Treaty . . . [whereby] Article III . . . attributes Kasikili Island to Namibia".

72. Botswana, for its part, observes that

> "[t]he Namibian argument based upon subsequent conduct of the parties rests upon extraordinarily weak foundations, both in conceptual and in factual terms. The conceptual foundations are weak because in truth, the 'subsequent conduct' argument of Namibia is an argument grounded in acquisitive prescription. Thus, subsequent conduct, which relates to an existing legal instrument, is opposed to prescription, the purpose of which is to destroy and to supplant a pre-existing title."

It does not dispute that people from the Caprivi at times used the Island for agricultural purposes, but it stresses the sporadic nature of that use

and claims that the same applied to people living on the other side of the Chobe, in Bechuanaland. At all events, Botswana denies categorically that there was ever a permanent settlement or a village on Kasikili/Sedudu Island. And it concludes that the Eason Report of 1912, the diplomatic transactions of 1948 to 1951, and other pieces of evidence "all . . . establish conclusively that in administrative terms the Island always formed part of Botswana and its predecessor, the Bechuanaland Protectorate".

73. At this point in its Judgment, the Court will not examine Namibia's argument concerning prescription (see in this respect paragraphs 90-99 below). It will merely seek to ascertain whether the long-standing, unopposed, presence of Masubia tribespeople on Kasikili/Sedudu Island constitutes "subsequent practice in the application of the [1890] treaty which establishes the agreement of the parties regarding its interpretation" (1969 Vienna Convention on the Law of Treaties, Art. 31, para. 3 *(b)*).

74. To establish such practice, at least two criteria would have to be satisfied: first, that the occupation of the Island by the Masubia was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the southern channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary.

While it is true that the early maps of the region placed the boundary around Kasikili/Sedudu Island in the southern channel of the Chobe, none of them officially interpreted the 1890 Treaty (see paragraph 84 below), and the evidence would tend rather to suggest that the boundary line was shown as following the southern channel as a result of the intermittent presence on the Island of people from the Caprivi Strip. However, there is nothing that shows, in the opinion of the Court, that this presence was linked to territorial claims by the Caprivi authorities. It is, moreover, not uncommon for the inhabitants of border regions in Africa to traverse such borders for purposes of agriculture and grazing, without raising concern on the part of the authorities on either side of the border.

Furthermore, the Court is mindful that, already in 1912, when Great Britain was concerned with determining the boundary of the Bechuanaland Protectorate in the area in question, Captain Eason of the Bechuanaland police stated that "the North should be claimed as the main channel" of the Chobe around Kasikili/Sedudu Island (which, in view of the terms of the 1890 Treaty, placed the Island in Bechuanaland territory), while at the same time observing — without apparently seeing this as being in any way a problem — that "[t]he natives living at Kasika in German territory [we]re . . . growing crops on it" (see paragraph 53 above). There were similar statements in the Trollope-Redman Report of 19 January 1948, in which the two officials expressed the view that "the 'main channel' lies in the waterway which would include the island in question

in the Bechuanaland Protectorate"; at the same time, they noted that "use ha[d] been made of the Island by Eastern Caprivi Zipfel tribesmen" without objection from Bechuanaland (see paragraph 57 above). Finally, the joint survey report on the Chobe drawn up by South African and Botswanan experts on 15 July 1985 in the context of discussions on the location of the boundary around Kasikili/Sedudu Island noted that "[l]ivestock from Caprivi [we]re swum across the river when grazing on the Caprivi side [wa]s poor"; at the same time it suggested that "visits to the Island had, in recent years, become infrequent" (see paragraph 64 above). It would therefore seem that, as far as Bechuanaland, and subsequently Botswana, were concerned, the intermittent presence of the Masubia on the Island did not trouble anyone and was tolerated, not least because it did not appear to be connected with interpretation of the terms of the 1890 Treaty.

75. The Court concludes from the foregoing that the peaceful and public use of Kasikili/Sedudu Island, over a period of many years, by Masubia tribesmen from the Eastern Caprivi does not constitute "subsequent practice in the application of the [1890] treaty" within the meaning of Article 31, paragraph 3 *(b)*, of the Vienna Convention on the Law of Treaties.

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76. Botswana and Namibia also cite various other facts and incidents from which they seek to derive evidence of subsequent practice by the parties to the 1890 Treaty.

Thus Botswana asserts that Kasikili/Sedudu Island forms part of the Chobe National Park established in 1967 and, before that, was part of the Chobe Game Reserve created in 1960. According to Botswana, the use of the international boundary as the northern limit of the Game Reserve, and subsequently of the National Park, in the documents relating to their establishment necessarily had the effect of including Kasikili/Sedudu Island within them.

Botswana also relies on an affidavit and report by a witness concerning a visit to Kasane in 1972 by the then Botswana Head of State; from this it seeks to imply that he may have visited the Island as well, while at the same time acknowledging that there is no direct evidence that he actually did so.

77. Namibia, for its part, places reliance on an incident occurring during the same period. It states that three or four Caprivians were arrested on the Island by Botswana game wardens for poaching and released by a Botswana magistrate after a five-day detention, on the grounds that they had been arrested outside Botswana's jurisdiction. Namibia regards this as an acknowledgment by a Botswanan official of Namibian sovereignty over the Island.

78. In the Court's view, these additional facts and incidents cited by the Parties cannot be regarded as representing "subsequent practice in the application of the [1890] treaty which establishes the agreement of the parties regarding its interpretation" (1969 Vienna Convention on the Law of Treaties, Art. 31, para. 3 *(b)*).

The documents establishing the Chobe Game Reserve and the Chobe National Park to which Botswana refers are internal documents, which, moreover, contain no express reference to Kasikili/Sedudu Island. Furthermore, Botswana itself recognizes that it has not been established that the Botswana Head of State visited the Island in 1972. As regards the incident cited by Namibia, it appears to be insufficiently proven.

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79. The Court concludes from all of the foregoing that the subsequent practice of the parties to the 1890 Treaty did not result in any "agreement between the parties regarding the interpretation of the treaty or the application of its provisions", within the meaning of Article 31, paragraph 3 *(a)*, of the 1969 Vienna Convention on the Law of Treaties, nor did it result in any "practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", within the meaning of subparagraph *(b)* of that same provision.

80. However, the Court is bound to note that on at least three occasions, at different periods — in 1912, in 1948 and in 1985 — surveys carried out on the ground identified the channel of the Chobe to the north and west as the "main channel" of the river around Kasikili/Sedudu Island. The factual findings that the parties concerned arrived at separately in 1948 were expressed in concurrent terms in a joint report. In addition, the survey made in 1985 was conducted jointly by the parties then concerned. The factual findings made on these occasions were not, as such, disputed at the time. The Court finds that these facts, while not constituting subsequent practice by the parties in the interpretation of the 1890 Treaty, nevertheless support the conclusions which it has reached by interpreting Article III, paragraph 2, of the 1890 Treaty in accordance with the ordinary meaning to be given to its terms (see paragraph 41 above).

* * *

81. Both Parties have submitted in evidence in support of their respective positions a large number of maps, dating back as far as 1880. Most of the early maps are of German origin (in particular, the maps of Seiner (1909), Streitwolf (1910) and Frankenberg (1912)); there are, however, others of British origin (such as the Bradshaw map (1880), the map attached to the Eason Report (1912) and those contained in Colonial

Office Reports published between 1912 and 1915). The more recent maps include some prepared by the British (one of which, a map of Bechuanaland compiled by the War Office in 1933, became the basis for several subsequent maps), some produced by South Africa (including a 1949 map that served as an official map of the territory of South West Africa until Namibian independence), some published by Botswana after independence and one from the United Nations.

82. Namibia points out that the majority of the maps submitted in these proceedings, even those emanating from British colonial sources and intended to show the boundaries of Bechuanaland, tend to place the boundary around Kasikili/Sedudu Island in the southern channel. Namibia relies on this as "a specialized form of 'subsequent practice' and . . . also an aspect both of the exercise of jurisdiction and the acquiescence in it that matures into prescriptive title". Namibia places particular weight in this respect on the 1933 War Office map entitled "Bechuanaland Protectorate Sheet 2 1:500,000 GSGS 3915"; it claims that this map was in general use in Bechuanaland until 1965, and that, like other official maps dating from the last three decades of British rule in Bechuanaland, it excludes the Island from the territory of the Protectorate. Namibia also relies in this regard on the Court's decision in the *Temple of Preah Vihear* case, where it was held that acceptance by the parties to a treaty of a map showing a boundary may constitute an interpretation that departs from the express terms of that treaty (Judgment of 15 June 1962 (Merits), *I.C.J. Reports 1962*, pp. 6 *et seq.*). Namibia then concludes:

> "This substantially unbroken practice by all three of the parties most closely concerned with the boundary between Botswana and Namibia — Germany, Great Britain and South Africa — strongly substantiates Namibia's contention as to the proper interpretation of Article III (2) of the 1890 Treaty. At the same time, it lends significant support to Namibia's claim of sovereignty over the Island by virtue of the doctrine of prescription and the principle of *uti possidetis*."

83. Botswana for its part places less reliance on maps, pointing out, *inter alia*, that most of the early maps show too little detail, or are too small in scale, to be of value in this case. Botswana asserts, however, that the available maps and sketches indicate that, from the time the Chobe was surveyed with any particularity by European explorers from the 1860s onwards, a north channel around the Island was known and regularly depicted. It cites the Bradshaw map of 1880, the Frankenberg map of 1912 and Captain Eason's map of 1912 as clearly indicating the presence of the northern and western channel in a manner closely similar to its present configuration. Botswana does not, however, attempt to

demonstrate that this places the boundary in the northern channel. Rather, its overall position is that the map evidence is far less consistent in placing the boundary in the southern channel than Namibia claims. At the hearings, Botswana argued that, when accuracy, the precise location of the boundary, and the fact of mere copying all are taken into account, one is left with three maps showing the boundary in the northern channel and only two in the southern channel (the 1933 British GSGS 3915 map, and the 1949 South African map). Botswana further asserts that there are technical problems with the latter two. As a consequence, it disputes Namibia's assertion that a preponderance of maps show the boundary to be in the southern channel. In Botswana's view, the Court should look for a map that shows agreement of the Parties — and that is to be found in the map attached to the Joint Survey of 1985 (see paragraph 64 above), which shows the boundary between South Africa and Botswana to lie in the northern channel of the Chobe.

84. The Court will begin by recalling what the Chamber dealing with the *Frontier Dispute (Burkina Faso/Republic of Mali)* case had to say on the evidentiary value of maps:

> "maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts." (*I.C.J. Reports 1986*, p. 582, para. 54.)

As far as the present case is concerned, the Court notes that, according to Article III, paragraph 2, of the 1890 Treaty, "[t]he course of the . . . boundary is traced in general accordance with a Map officially prepared for the British Government in 1889". No boundary line is drawn on this map, and it was not annexed to the 1890 Treaty, although a slightly later version of it was subsequently bound up with this Treaty in the British Foreign Office archive, as being the map alluded to in Article III, paragraph 2. There is also a map entitled "Map to Illustrate Article III of the Anglo-German Agreement of 1st July 1890", published in 1909 in the third edition of Hertslet's *Map of Africa by Treaty*. While the Parties dif-

fer in their view of the precise origin of this map, they apparently agree that it does not depict any relevant information concerning the channels around Kasikili/Sedudu Island or the location of the boundary. The Court notes that there was no map appended to the 1890 Treaty officially expressing the intentions of Germany and Great Britain with regard to the course of the boundary between their respective possessions in the area.

85. Certainly it is true, as the Court has already stated, that maps published subsequently to the 1890 Treaty, in so far as they showed the boundary at all, for a number of years placed it in the channel of the Chobe passing to the south of the Island (this applies particularly to the above-mentioned 1933 Bechuanaland map and 1949 South African map). However, there was no indication that the placement of the boundary in these maps was meant to be in accordance with Article III, paragraph 2, of the 1890 Treaty; rather, its origins may be linked to the use of the Island by the Masubia, which the Court has already rejected as evidence of practice reflecting subsequent interpretation of Article III, paragraph 2, by the parties to the 1890 Treaty (see paragraphs 74 and 75 above).

Moreover, once the issue of the boundary in the area had been raised in 1947-1948, the local Caprivi and Bechuanaland officials agreed that "the 'main Channel' d[id] not follow the waterway . . . usually shown on maps as the boundary between the two Territories" (Trollope/Redman Report, see paragraph 57 above). Those officials duly passed on their views to their respective superiors, and the Court finds it not without relevance in this regard that, in his letter of 26 January 1948 to the Bechuanaland Government Secretary in Mafeking, Mr. Redman stated that according to the 1890 Treaty the boundary must run along the northern channel, and that the map showing the boundary in the southern channel was "inaccurate and . . . probably drawn by some-one who had not examined the river to determine the main Channel" (see paragraph 58 above). It is clear from the subsequent correspondence between the South African and Bechuanaland authorities (see paragraphs 59 and 60 above) that their differing positions on the status of Kasikili Island and the location of the boundary had by 1951 hardened to the point where a local *de facto* arrangement became necessary. The Court considers that, in the light of that disagreement, there cannot be any question of the authorities concerned having accepted the maps then available in a manner capable of constituting "subsequent practice in the application of the [1890] treaty", still less recognition of the boundary shown on those maps. To the contrary, it appears to the Court that the parties largely ignored the maps, which they regarded as either accurate or inaccurate according to their respective positions on the course of the boundary.

86. After Botswana's accession to independence, the relevant cartographic material shows greater variation, with certain maps (for example, the 1974 Botswana 1:50,000 map, the 1978 and 1982 official maps of the South African Ministry of Defence (JARIC) 1:100,000, the 1984 South Africa 1:50,000 map (the military intelligence version used by the South African army, with red overprint) and the 1984 Botswana 1:50,000 map) from then on placing the boundary around Kasikili/Sedudu Island in the Chobe's northern channel.

The Court will recall that this position was noted in the introduction to the 1985 Joint Survey Report and that the Botswana and South African experts concluded in this regard that "[t]he disparity in the depiction of the boundary between South African maps and those of Botswana ha[d] probably been a contributory factor in the recent border incident near Kasane" (see paragraph 64 above). The persistent uncertainty about the course of the boundary in the region — which led to the decision to undertake the 1985 Joint Survey — and the inconsistencies between maps preclude, in the Court's view, the possibility of there having been any kind of agreement, whether by way of interpretation of the 1890 Treaty or on any other basis, concerning the validity of any boundary depicted. The same is true of the subsequent period, when the dispute between Botswana and the newly independent Namibia crystallized.

87. In view of the absence of any map officially reflecting the intentions of the parties to the 1890 Treaty and of any express or tacit agreement between them or their successors concerning the validity of the boundary depicted in a map (cf. *Temple of Preah Vihear, Judgment, Merits, I.C.J. Reports 1962*, pp. 33-35), and in the light of the uncertainty and inconsistency of the cartographic material submitted to it, the Court considers itself unable to draw conclusions from the map evidence produced in this case. That evidence cannot therefore "endors[e] a conclusion at which a court has arrived by other means unconnected with the maps" (*Frontier Dispute (Burkina Faso/Republic of Mali), I.C.J. Reports 1986*, p. 583, para. 56), nor can it alter the results of the Court's textual interpretation of the 1890 Treaty.

* * *

88. The foregoing interpretation of the relevant provisions of the 1890 Treaty leads the Court to conclude that the boundary between Botswana and Namibia around Kasikili/Sedudu Island provided for in this Treaty lies in the northern channel of the Chobe River.

89. According to the English text of the Treaty, this boundary follows the "centre" of the main channel; the German text uses the word "thalweg". The Court has already indicated that the parties to the 1890 Treaty intended these terms to be synonymous and that Botswana and Namibia

had not themselves expressed any real difference of opinion on this subject (see paragraph 25 above).

It is moreover clear from the *travaux préparatoires* of the Treaty (see paragraph 46 above) that there was an expectation of navigation on the Chobe by both contracting parties, and a common intention to exploit this possibility. Although, as has been explained above, the parties in 1890 used the terms "thalweg" and "centre of the channel" interchangeably, the former reflects more accurately the common intention to exploit navigation than does the latter. Accordingly, this is the term that the Court will consider determinative in Article III, paragraph 2.

Inasmuch as Botswana and Namibia agreed, in their replies to a question put by a Member of the Court, that the thalweg was formed by the line of deepest soundings, the Court concludes that the boundary follows that line in the northern channel around Kasikili/Sedudu Island.

* * *

90. Namibia, however, claims title to Kasikili/Sedudu Island, not only on the basis of the 1890 Treaty but also, in the alternative, on the basis of the doctrine of prescription. Namibia argues that

> "by virtue of continuous and exclusive occupation and use of Kasikili Island and exercise of sovereign jurisdiction over it from the beginning of the century, with full knowledge, acceptance and acquiescence by the governing authorities in Bechuanaland and Botswana, Namibia has prescriptive title to the Island".

91. Botswana maintains that the Court cannot take into consideration Namibia's arguments relating to prescription and acquiescence as these are not included in the scope of the question submitted to it under the terms of the Special Agreement. According to Botswana, the purpose of that Agreement was to obtain from the Court determination of the boundary solely on the basis of the 1890 Treaty; invoking prescription would therefore involve adopting a totally different basis for determining the boundary. In support of its argument, Botswana points out in particular that the reference in the Special Agreement to the "rules and principles of international law" is "pleonastic", since an international agreement is normally interpreted taking into account any relevant rules of international law applicable in the relations between the parties. And it adds that:

> "the alleged evidence of prescriptive title cannot be accepted as 'subsequent practice', because in such a hypothesis the working assumption is precisely the existence of *a title of Botswana* (or its predecessor) which allegedly is displaced by the operation of prescription".

92. Namibia disputes this argument. It claims, for its part, that the wording of the question in the Special Agreement is clear and

> "requires the Court to consider any evidence or submissions of the parties grounded in general rules and principles of international law equally with submissions based on the 1890 Treaty"

According to Namibia,

> "Botswana's attempt to treat the reference to the 'rules and principles of international law' as if it were not included in the Special Agreement contravenes fundamental rules of treaty interpretation."

It stresses the contradictory nature of the position taken by Botswana, which, on the one hand, suggests that the expression "rules and principles of international law" covers only the rules and principles concerning treaty interpretation and, on the other, itself acknowledges that international law rules concerning treaty interpretation are comprehended in the first clause of the question referring to the 1890 Treaty. Namibia also reproaches Botswana for ignoring the dual nature of the argument it has put forward that

> "either the subsequent conduct operates as a 'practice . . . which establishes the agreement of the parties regarding [the] interpretation' of the Treaty; or it stands as an independent root of title based on the doctrine of prescription and/or acquiescence".

93. The Court notes that under the terms of Article I of the Special Agreement, it is asked to determine the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the Island "on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law". Even if there had been no reference to the "rules and principles of international law", the Court would in any event have been entitled to apply the general rules of international treaty interpretation for the purposes of interpreting the 1890 Treaty. It can therefore be assumed that the reference expressly made, in this provision, to the "rules and principles of international law", if it is to be meaningful, signifies something else. In fact, the Court observes that the expression in question is very general and, if interpreted in its normal sense, could not refer solely to the rules and principles of treaty interpretation. The restrictive interpretation of this wording espoused by Botswana appears to be even less well-founded, in that Article III of the Special Agreement specifies that "[t]he rules and principles of international law applicable to the dispute shall be those set forth in the provisions of Article 38, paragraph 1, of the Statute of the International Court of Justice". This wording shows that the Parties had no intention of confining the rules and principles of law applicable in this case solely to the rules and principles of international law relating to treaty interpretation.

In the Court's view the Special Agreement, in referring to the "rules and principles of international law", not only authorizes the Court to interpret the 1890 Treaty in the light of those rules and principles but also to apply those rules and principles independently. The Court therefore considers that the Special Agreement does not preclude the Court from examining arguments relating to prescription put forward by Namibia.

94. According to Namibia, four conditions must be fulfilled to enable possession by a State to mature into a prescriptive title:

> "1. The possession of the . . . state must be exercised *à titre de souverain*.
> 2. The possession must be peaceful and uninterrupted.
> 3. The possession must be public.
> 4. The possession must endure for a certain length of time."

Namibia alleges that in the present case Germany was in peaceful possession of the Island from before the beginning of the century and exercised sovereignty over it from the time of the establishment of the first colonial station in the Caprivi in 1909, all in full view and with the full knowledge of the Bechuanaland authorities at Kasane, only a kilometre or two from the Island. It states that this peaceful and public possession of the Island, *à titre de souverain*, was continued without interruption by Germany's successor until accession of the territory to independence. Finally, it notes that, after itself becoming independent in 1966, Botswana, which was aware of the facts, remained silent for almost two further decades.

In support of its allegations, Namibia emphasizes the importance of the presence on the Island of Masubia people from the Eastern Caprivi "from the beginning of the colonial period at least, and probably a good deal further back than that". It asserts that

> "[c]olonial records of German, British and South African authorities and the testimony of members of the Masubia community in the Kasika district before the JTTE [Joint Team of Technical Experts] [in 1994] conclusively show that the Masubia people of Eastern Caprivi have occupied and used Kasikili Island since time immemorial"

and points out that "[t]he Masubia of the Caprivi Strip have used and occupied Kasikili Island as a part of their lands and their lives". Although Namibia admits that, in order to establish sovereignty by operation of prescription, acquiescence and recognition, it must show more than the use of the disputed territory by private individuals for their private ends, it maintains that:

> "Namibia's predecessors exercised continuous authority and jurisdiction over Kasikili Island. From 1909 until the termination of the Mandate in 1966, German, Bechuanaland and South African officials consistently governed the Eastern Caprivi through Masubia chiefs, whose jurisdiction extended to Kasikili Island. After termina-

> tion of the Mandate, South Africa, under pressure from the liberation struggle, increasingly exerted direct power in the area until Namibia's independence on 21 March 1990."

Namibia states that the authority exercised over Kasikili Island by its predecessors was implemented

> "[f]or the most part . . . through the modality of 'indirect rule,' using the chiefs and political institutions of the Masubia to carry out the directives of the ruling power, under the control and supervision of officials of that power"

and that

> "[a]lthough indirect rule was manifested in a variety of ways, its essence was that the acts of administration of the colonial authorities and those of the traditional authorities were acts of a single entity: the colonial government".

According to Namibia, this situation

> "prevailed without any objection, reservation or protest from Botswana or its predecessors in interest for almost a century until 1984, when Botswana first made formal claim to the Island in private meetings with the South African government".

In support of its argument concerning prescription, Namibia also invokes the incident between a patrol boat of the South African Defence Force and a unit of the Botswana Defence Force in October 1984, which, in its view, indicated that South Africa was exercising jurisdiction over the Island by conducting military patrols in the southern channel. It also refers to a number of official maps of the Caprivi portraying the Island as part of Namibia from the beginning of the century, as well as to the concurrence of the British authorities.

95. Although it considers the doctrine of prescription inapplicable in this case for the reasons referred to earlier, Botswana accepts the criteria for acquiring prescriptive title as set out by Namibia; it argues, however, that those criteria have not been satisfied by Namibia and its predecessors. Botswana asserts, in substance, that "there is no credible evidence that either Namibia or its predecessors exercised State authority in respect of Kasikili/Sedudu" and that even if peaceful, public and continuous possession of the Island by the people of Caprivi had been proved, it could not have been *à titre de souverain.*

Botswana does not dispute that people from the Caprivi used Kasikili/Sedudu Island at times for agricultural purposes; but it maintains that so did people living on the other side of the Chobe, in Bechuanaland, and

denies that there was ever any village or permanent settlement on the Island. Botswana emphasizes that in any case "[t]he acts of private persons cannot generate title unless those acts are subsequently ratified by the State"; that no evidence has been offered to the effect that the Masubia chiefs had authority to engage in title-generating activities for the benefit of Germany or its successors; and that evidence is also lacking of any "genuine belief" in the existence of title on the part of Germany and its successors.

With regard to patrolling by South Africa, Botswana asserts that this involved at the very most anti-guerilla operations, which cannot be classified as an exercise of jurisdiction; it claims that the incident of 1984 could not constitute evidence of peaceful possession for the purposes of prescription. Finally, Botswana denies that the map evidence has any value in this case; it maintains that this evidence is contradictory and confused and that the authorities of Bechuanaland and Botswana never recognized or acquiesced in the maps showing the boundary in the southern channel.

96. The Parties agree between themselves that acquisitive prescription is recognized in international law and they further agree on the conditions under which title to territory may be acquired by prescription, but their views differ on whether those conditions are satisfied in this case. Their disagreement relates primarily to the legal inferences which may be drawn from the presence on Kasikili/Sedudu Island of the Masubia of Eastern Caprivi: while Namibia bases its argument primarily on that presence, considered in the light of the concept of "indirect rule", to claim that its predecessors exercised title-generating State authority over the Island, Botswana sees this as simply a "private" activity, without any relevance in the eyes of international law.

97. For present purposes, the Court need not concern itself with the status of acquisitive prescription in international law or with the conditions for acquiring title to territory by prescription. It considers, for the reasons set out below, that the conditions cited by Namibia itself are not satisfied in this case and that Namibia's argument on acquisitive prescription therefore cannot be accepted.

98. The Court has already considered the presence of the Masubia on Kasikili/Sedudu Island when it examined the subsequent practice of the parties to the 1890 Treaty (see paragraphs 71 *et seq.* above).

It follows from this examination that even if links of allegiance may have existed between the Masubia and the Caprivi authorities, it has not been established that the members of this tribe occupied the Island *à titre de souverain*, i.e., that they were exercising functions of State authority there on behalf of those authorities. Indeed, the evidence shows that the Masubia used the Island intermittently, according to the seasons and

their needs, for exclusively agricultural purposes; this use, which began prior to the establishment of any colonial administration in the Caprivi Strip, seems to have subsequently continued without being linked to territorial claims on the part of the Authority administering the Caprivi. Admittedly, when, in 1947-1948, the question of the boundary in the region arose for the first time between the local authorities of Bechuanaland Protectorate and of South Africa, the Chobe's "main channel" around the Island was said to be the northern channel, but the South African authorities relied on the presence of the Masubia on the Island in order to maintain that they had title based on prescription. However, from then on the Bechuanaland authorities took the position that the boundary was located in the northern channel and that the Island was part of the Protectorate; after some hesitation, they declined to satisfy South Africa's claims to the Island, while at the same time recognizing the need to protect the interests of the Caprivi tribes. The Court infers from this, first, that for Bechuanaland, the activities of the Masubia on the Island were an independent issue from that of title to the Island and, second, that, as soon as South Africa officially claimed title, Bechuanaland did not accept that claim, which precluded acquiescence on its part.

99. In the Court's view, Namibia has not established with the necessary degree of precision and certainty that acts of State authority capable of providing alternative justification for prescriptive title, in accordance with the conditions set out by Namibia, were carried out by its predecessors or by itself with regard to Kasikili/Sedudu Island. The Court has already observed above that it is unable to draw conclusions from the map evidence produced in this case (see paragraph 87 above). Nor in its view, can conclusions be drawn from the incident involving Botswana and South African defence forces in the channel to the south of the Island in October 1984.

* * *

100. The Court's interpretation of Article III, paragraph 2, of the 1890 Treaty has led it to conclude that the boundary between Botswana and Namibia around Kasikili/Sedudu Island follows the line of deepest soundings in the northern channel of the Chobe.

101. Since the Court has not accepted Namibia's argument on prescription, it follows for this reason also that Kasikili/Sedudu Island forms part of the territory of Botswana.

102. The Court observes, however, that the Kasane Communiqué of 24 May 1992 records that the Presidents of Namibia and Botswana agreed and resolved that:

> "*(c)* existing social interaction between the people of Namibia and Botswana should continue;
>
> *(d)* the economic activities such as fishing shall continue on the understanding that fishing nets should not be laid across the river;

(e) navigation should remain unimpeded including free movement of tourists".

The Court further observes that in explanation and in pursuance of the foregoing agreement, Botswana stated at the oral hearings:

> "Botswana's policy is to allow free navigation, including unimpeded movement of tourist boats even in the southern channel. This policy applies to boats owned by Namibian tourist operators as well. The only requirement is that all tourist boats should be registered. This requirement is meant solely to prevent the danger of environmental pollution of the Chobe River. Experience has shown that some tourist boat operators tended to transport their boats from Okavango waters, infested with river weeds, down to the Chobe River, without applying for a trans-zonal permit. The Department of Water Affairs, and not the Botswana Defence Force, is responsible for enforcing the policy on anti-pollution of the river waters.
>
> Botswana's policy on free navigation, including the free movement of tourist boats, was set out in paragraph *(e)* of the Kasane Communiqué . . . Since the Kasane Communiqué was agreed in May 1992, there has been no complaint from the Namibian Government that Botswana ever breached paragraph *(e)* of the Communiqué which guarantees unimpeded navigation."

Subsequently, Botswana added that:

> "Botswana also wishes to reiterate that tourist boats from Namibia are free to travel in the southern channel. The only requirement is that all such boats should be registered, in order to control noxious aquatic weeds . . . this requirement is backed by proper legislation, namely, the Laws of Botswana Aquatic Weeds (Control) Act, which commenced in December 1971. The provisions of this Act were later discussed with, and endorsed by the Water Affairs Department of Namibia. Since then, Namibian tourist boat operators have registered as many as 53 boats, to travel in Botswanan waters of the Chobe River. These 53 Namibian boats are permitted to navigate in the southern channel, like any others that have been licensed."

103. The Court, which by the terms of the Joint Agreement between the Parties is empowered to determine the legal status of Kasikili/Sedudu Island concludes, in the light of the above-mentioned provisions of the Kasane Communiqué, and in particular of its subparagraph *(e)* and the interpretation of that subparagraph given before it in this case, that the Parties have undertaken to one another that there shall be unimpeded

navigation for craft of their nationals and flags in the channels of Kasikili/Sedudu Island. As a result, in the southern channel of Kasikili/Sedudu Island, the nationals of Namibia, and vessels flying its flag, are entitled to, and shall enjoy, a treatment equal to that accorded by Botswana to its own nationals and to vessels flying its own flag. Nationals of the two States, and vessels, whether flying the flag of Botswana or of Namibia, shall be subject to the same conditions as regards navigation and environmental protection. In the northern channel, each Party shall likewise accord the nationals of, and vessels flying the flag of, the other, equal national treatment.

* * *

104. For these reasons,

THE COURT,

(1) By eleven votes to four,

Finds that the boundary between the Republic of Botswana and the Republic of Namibia follows the line of deepest soundings in the northern channel of the Chobe River around Kasikili/Sedudu Island;

IN FAVOUR: *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Higgins, Kooijmans;

AGAINST: *Vice-President* Weeramantry; *Judges* Fleischhauer, Parra-Aranguren, Rezek.

(2) By eleven votes to four,

Finds that Kasikili/Sedudu Island forms part of the territory of the Republic of Botswana;

IN FAVOUR: *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Higgins, Kooijmans;

AGAINST: *Vice-President* Weeramantry; *Judges* Fleischhauer, Parra-Aranguren, Rezek.

(3) Unanimously,

Finds that, in the two channels around Kasikili/Sedudu Island, the nationals of, and vessels flying the flags of, the Republic of Botswana and the Republic of Namibia shall enjoy equal national treatment.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirteenth day of December, one thousand nine hundred and ninety-nine, in three copies, one of which

will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Botswana and the Government of the Republic of Namibia, respectively.

(Signed) Stephen M. SCHWEBEL,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judges RANJEVA, KOROMA and HIGGINS append declarations to the Judgment of the Court.

Judges ODA and KOOIJMANS append separate opinions to the Judgment of the Court.

Vice-President WEERAMANTRY, Judges FLEISCHHAUER, PARRA-ARANGUREN and REZEK append dissenting opinions to the Judgment of the Court.

(Initialled) S.M.S.
(Initialled) E.V.O.