SEPARATE OPINION OF JUDGE ODA

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I. Introductory Remarks

1. I voted in favour of the Court's Judgment, as I support its determination that the northern channel of the Chobe River constitutes the boundary between Botswana and Namibia, and that Kasikili/Sedudu Island forms part of the territory of Botswana.

2. Although I voted in favour of subparagraph (3) of the operative part, I felt that this matter, which was not in fact presented to the Court in the *compromis* and was not indicated in the submissions of either Party, need not be dealt with in the operative part of the Judgment, since it had already been sufficiently discussed in the prior sections of the Judgment devoted to the reasoning (paras. 102 and 103).

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3. I must say, to my great regret, that I fail to understand properly the sequence of logic followed by the Court in this Judgment. The reasoning which led the Court to its decision does not necessarily reflect my own understanding of the case as a whole. I could even say that I am totally lost when reading the Judgment and I quote an illustration below:

> "41. For the foregoing reasons [in the part above, the Court mentions the natural physical conditions of the channel], 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."
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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."
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> "80. . . . 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)."
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> "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."

4. It is most important to note that this case is *not* brought by unilateral application by one of the Parties to this dispute in order to seek clarification of international law governing the boundary between the two States in question and the legal status of Kasikili/Sedudu Island by applying the 1969 Vienna Convention on the Law of Treaties. This is a case brought by means of a *compromis*, by which the Parties seek to have the Court determine the boundary and the legal status of the Island *on the basis of the criteria* which the Parties jointly wish to be applied.

It appears to me that the Judgment places excessive reliance upon the Vienna Convention on the Law of Treaties for the purpose of the Court's interpretation of the 1890 Anglo-German Treaty. The Parties to this case certainly agreed that the Court should be asked to determine the boundary *on the basis* of the 1890 Treaty — and it should again be pointed out quite categorically that Botswana and Namibia are not parties to that Treaty — but the Court has *not* been asked to interpret the 1890 Treaty itself. The Judgment quotes Article 31 (General rule of interpretation) of the 1969 Vienna Convention on the Law of Treaties almost in its entirety. Reference is made in the Judgment to this provision of the Vienna Convention at least eleven times. Although I am fully aware that the Vienna Convention reflects customary international law, it should, however, be noted, as the Judgment correctly points out in its paragraph 18, that this Convention "applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States" (Art. 4). In fact, the Convention came into force in 1980. This case does not appear to me to be one related to the application of the Vienna Convention.

5. I gain the impression that the Parties to this case, Botswana and Namibia, as well as the Court have devoted much time and energy to interpreting the German term *"Thalweg"*, which, as the Judgment itself admits, was simply a translation of the English word "centre" (Judgment, para. 46). The Court was requested to determine where — whether in the northern or the southern channel of the Chobe River — the "main channel", as referred to in Article III (2) of the 1890 Treaty, and hence the boundary between Botswana and Namibia, should be considered to lie. In this respect, I fail to understand why the operative part of the Judgment states that the boundary follows "the line of deepest soundings" in the northern channel of the Chobe River (Judgment, para. 104 (1)). As proposed by the Parties during the oral hearings, the Court has employed the phrase "the line of deepest soundings" as a substitute for the word *"Thalweg"* (Judgment, para. 89). It would, in my view, have been sufficient for the Court to state simply — and nothing more — which of the two channels, the northern or the southern, constitutes the "main channel", namely the boundary in the Chobe River separating Botswana and Namibia.

6. It seems to be very important to make a distinction between, on the

one hand, the criteria to be employed in order to determine the "main" channel in general terms and, on the other, a decision applying those criteria to a specific geographical situation. The criteria for determining the "main" channel may well be settled by law, with the assistance of scientific knowledge, but the determination of the "main channel" as a boundary by employing the said criteria, in any specific geographical situation, is far from being a legal function. I would recall that, at the time of the meeting in Kasane of the Presidents of Botswana and Namibia in May 1992, the two States tried to settle the matter as a *technical* problem that could be solved by the expertise of *technical* experts (see paragraphs 13 and 14 of this opinion). The Judgment deals with these two matters in its paragraphs 20 to 40 and attempts to rule on them, relying only on the information given in the written and oral pleadings by the respective Parties, but without the benefit of objective scientific knowledge, which it could have obtained itself but chose not to.

7. The Judgment refers to various acts or conduct relating to the Chobe River and to certain survey reports concerning the River produced by various authorities. I accept that these facts and the survey reports are extremely important for the Court's consideration of the matter. However, I am unable to accept the Court's position that such facts and reports could be considered only as possible evidence of "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" or "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties, to be taken into account when interpreting the 1890 Anglo-German Treaty. The Court, after a lengthy analysis (paras. 47 to 70), comes to the conclusion that the facts and documents in question *cannot* be regarded as constituting "any subsequent agreement" or "any subsequent practice" to be used for the interpretation of the 1890 Treaty, although the Court ultimately found that these facts "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" (para. 80). I would rather suggest that these facts and documents should be considered at their face value, as historical background to the present case but without having any bearing on the provisions of the Vienna Convention, in order to assist the Court in determining the boundary.

8. As my position in regard to this case differs somewhat from the views that have led the Court to its Judgment, I feel that I should sketch out the view that I take of it.

II. The Case Presented to the Court by Means of a *Compromis*

(1) Lack of Clarity in the Compromis

9. I first ask myself what is the subject-matter of the "case" presented by the *compromis* between Botswana and Namibia pursuant to Article 36, paragraph 1, of the Statute.

In the second paragraph of the Preamble to the *compromis*, Botswana and Namibia both state that "a *dispute* exists between [Botswana] and [Namibia] relative to the *boundary* around Kasikili/Sedudu Island" (emphasis added), but in Article I they request the Court to determine not only "the *boundary* between Namibia and Botswana around Kasikili/Sedudu Island" (emphasis added) but also "the *legal status* of the island" (emphasis added). It might be contended that the determination of the *legal status* of Kasikili/Sedudu Island would in fact have the same effect as the determination of the *boundary* between Botswana and Namibia in the area around Kasikili/Sedudu Island. It would seem that both States had originally thought that the determination of the *boundary* in the Chobe River would automatically determine the *legal status* of Kasikili/Sedudu Island.

The determination of the *boundary* in the Chobe River would indeed result in the determination of the *legal status* of Kasikili/Sedudu Island. Conversely, a determination of the *legal status* of Kasikili/Sedudu Island would also result in the determination of the *boundary*. However, the solutions to these two issues may not necessarily be the same. It appears that the two States, whether intentionally or unintentionally, have radically changed their approach, in that an issue relating to the river *boundary* in the Chobe River has now become an issue also over the *legal status* of Kasikili/Sedudu Island.

At all events, the Court should not have overlooked the contradiction between these two different theses: on the one hand, the definition of the *dispute*, including only matters relating to a *boundary* as defined in the Preamble to the *compromis*, and on the other hand, the request contained in Article 1 of the *compromis* concerning the *boundary* in the Chobe River and the *legal status* of Kasikili/Sedudu Island.

10. The Court is requested "to determine . . . on the basis of the [1890] Anglo-German Treaty . . . and the rules and principles of international law" (*compromis*, Art. I). The words "rules and principles of international law" are understood by the Parties to mean "those [as] set forth in the provisions of Article 38, paragraph 1, of the Statute of the International Court of Justice" (*compromis*, Art. III), namely, "the general principles of law recognized by civilized nations" (Statute, Art. 38, para. 1).

In my view these two bases on which to proceed may be mutually contradictory, or even mutually exclusive. If the Court takes the 1890 Anglo-German Treaty as its basis, it cannot at the same time take into account "the rules and principles of international law", which the Parties

interpret as being "the general principles of law recognized by civilized nations".

If we confine ourselves to the first question, relating to the *boundary* in the Chobe River between Botswana and Namibia in the area of Kasikili/Sedudu Island, the 1890 Anglo-German Treaty can be used as a basis for the Court's determination. If, however, we deal with the second question, namely the determination of the *legal status* of Kasikili/Sedudu Island, the "rules and principles of international law" in general may be thought to apply. In sum, the two bases to be applied by the Court cannot be considered as supplementary or harmonious, for they are mutually contradictory.

I assume that both countries thought a *boundary* could be drawn on the basis of the 1890 Anglo-German Treaty, and that for this purpose the determination of the "main channel" of the Chobe River provided for in the 1890 Treaty would be the cornerstone of the case. However, given that the two States changed their positions on the matter, making the *legal status* of Kasikili/Sedudu Island one of the two main issues of the "case", a conclusion cannot be reached simply from an interpretation of what constitutes the "main channel" of the Chobe River but must also involve application of "the rules and principles of international law" (interpreted by the Parties as being the general principles of law recognized by civilized nations).

This change in the Parties' approach to the issues can be seen from the account of the background to events that I give in the next section.

(2) The Background to the Filing of the Case at the Court

11. The Court is faced with a "case" between Botswana (which gained independence from the former British Protectorate Bechuanaland in 1966) and Namibia (which had been under the administration of the United Nations Council for Namibia until 1990) concerning the geography of Kasikili/Sedudu Island in the Chobe River and the surrounding area. Let me examine how this "case", submitted under Article 36, paragraph 1, of the Statute, has arisen between these two States.

On gaining its independence in 1966, Botswana took over the area, which since 1886 had been under the authority of the British Protectorate of Bechuanaland (Judgment, para. 14). On independence in 1990, the territory of Namibia remained identical to that of South West Africa — the 1881 German sphere of influence *(ibid.)*. Upon the outbreak of the First World War, the area under German influence, known today as the territory of Namibia, was occupied and governed by British forces from Southern Rhodesia. This area was then transferred to the mandatory territory under the Union of South Africa in the League of Nations system in 1919 and was, from 1967, placed under the administration of the United Nations Council for Namibia, though *de facto* control by the Republic of South Africa continued until 1990. There has

been no difference of views between Botswana and Namibia on these facts.

12. If there was any territorial issue between the two States, Botswana and Namibia, concerning this area in the region of the Chobe River, it originated from the fact that Namibia, after its independence in 1990, sent armed forces to Kasikili/Sedudu Island in 1991 and that, also in 1991, Botswana raised its national flag over the Island.

It would appear from these two incidents that in 1991 each of the two States, Botswana and Namibia, thought that Kasikili/Sedudu Island formed part of its sovereign territory. However, neither State expressed the view that there had been any violation of sovereignty by the other State. If any immediate negotiation did take place between the two countries on this issue, it was not reported.

13. It was as a result of the above incidents that the two States' difference of views regarding the territoriality of Kasikili/Sedudu Island came to light.

The Presidents of Botswana and Namibia met on 24 May 1992 at Kasane, thanks to the good offices of the President of Zimbabwe, in order to "discuss the *boundary* between Botswana and Namibia around Sedudu/Kasikili Island" (emphasis added). After touring the Chobe River and viewing Kasikili/Sedudu Island, the three Presidents examined various documents, in particular the 1890 Anglo-German Treaty, which defined the German sphere of influence as being bounded by "the centre of the main channel of [the Chobe] river" (1890 Treaty, Art. III (2)). The three Presidents "decided that the *issue* should be resolved peacefully" (emphasis added) and

> "[t]o this end they agreed that the boundary . . . should be a subject of investigation by a joint team of six . . . *technical* experts . . . to determine where the boundary lies in the terms of the [1890] Treaty . . . The Presidents agreed that the findings of [the] team . . . shall be final and binding on Botswana and Namibia" (emphasis added) (Memorial of Namibia, IV, Ann. 10, p. 71; Memorial of Botswana, III, Ann. 55, p. 412).

There was no disagreement between Botswana and Namibia that they should rely on the 1890 Treaty, which determined the line of separation of the sphere of influence between Germany and Great Britain as the centre of the "main channel" of the Chobe River. It would thus seem that their intention was *not* to settle an existing *dispute*, if one existed at all, but rather to determine the *hitherto uncertain boundary* with the assistance of the *technical* experts who would be able to identify the "main channel" of the Chobe River.

14. The Presidents of Botswana and Namibia were in agreement that

the *boundary* should be determined as the "main channel" of the Chobe River as provided for in the 1890 Anglo-German Treaty. It would appear that, in their view, the issue of the *legal status* of Kasikili/Sedudu Island would not be taken up as such. The territoriality of the Island did *not*, of itself, constitute an issue.

It should also be noted that the expression "dispute" was not used in the joint Communiqué issued by the three Presidents. It can be said that, up to and including the time of the meeting of the three Presidents, neither Namibia nor Botswana considered that there had been a *dispute*. The two States wanted to have the Court determine the actual course of the boundary in terms of the "main channel" as stated in the 1890 Treaty, with the assistance of the joint team of *technical experts*, who, by their investigations, would determine which — either the northern or the southern channel — was the "main channel". The territoriality of Kasikili/ Sedudu Island would have been automatically settled by drawing such a delimitation line.

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15. It would seem that, a few months after the meeting at Kasane, the understanding reached by the Presidents of Botswana and Namibia was completely rejected at governmental level. The issue was termed a *dispute* at the meeting at Windhoek starting on 8 December 1992 (Memorial of Botswana, III, Ann. 56, p. 416), which had been convened in order to decide the terms of reference of the Joint Team of Technical Experts on Boundary (hereinafter "JTTE") that was to be established. The "Memorandum of Understanding" between Botswana and Namibia was drafted on 23 December 1992 (Memorial of Namibia, IV, Ann. 11, p. 73; Memorial of Botswana, III, Ann. 57, p. 428) following this preliminary meeting.

The "Memorandum of Understanding" states in its Preamble that a *dispute* exists relative to the *boundary* between Botswana and Namibia, and also refers to the desire of both countries to "settl[e] such *dispute* by peaceful means in accordance with the principles of both the Charter of the United Nations and the Charter of the Organisation of African Unity" (emphasis added). The "Memorandum of Understanding" sets up a JTTE, consisting of three *technical* experts from each country "to determine the *boundary* between Botswana and Namibia around Kasikili/ Sedudu Island in accordance with the [1890] Anglo-German Treaty" (emphasis added); in other words to find whether the northern or the southern channel should be regarded as the "main channel".

The form of words "a *dispute* exists relative to the *boundary* between . . . Botswana and . . . Namibia" (emphasis added) first appeared in this "Memorandum of Understanding" of 23 December 1992 and was later employed in the *compromis* of 29 May 1996 by which the present case

was brought to the Court. The function of the JTTE should have been limited to the *technical* recognition of what constitutes the "main channel" of the Chobe River under the terms of the 1890 Anglo-German Treaty. However, this was not the case. The "rules governing the proceedings" in the "Memorandum of Understanding" of 23 December 1992 state that "the Team shall be guided by the *general principles of international law regarding the peaceful settlement of international disputes* and any relevant international law principles for the delimitation of river boundaries" (Memorandum of Understanding, Art. 8, emphasis added).

I would emphasize that this concept does not accord with what the Presidents of the two States would appear to have had in mind a few months beforehand; indeed it differs greatly.

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16. On 20 August 1994, after six rounds of meetings, the JTTE completed its work, producing its Final Report, which states that "it emerged that the Joint Team was unable to agree on issues of substance" (Memorial of Botswana, III, Ann. 58, p. 440; Memorial of Namibia, V, Ann. 113, p. 88). The Final Report goes on to state that "[the JTTE] was unable to make a finding determining the boundary between Botswana and Namibia in the area of Kasikili/Sedudu Island in accordance with the provisions of the Memorandum of Understanding." Thus, the JTTE was unable to determine the boundary in accordance with the terms used in the 1890 Anglo-German Treaty.

It would appear that the failure of the JTTE was due to the fact that they did not conduct their work using the mandate, originally agreed at Kasane in May 1992 by the Presidents of Botswana and Namibia, to define where the "main channel" of the Chobe River lay in the eyes of the technical experts.

17. Although the JTTE failed to determine the *boundary*, it did, however, make a recommendation:

> "[T]he Joint Team would recommend recourse to the peaceful settlement of the *dispute* on the basis of the *applicable rules and principles of international law*." (Emphasis added.)

This represents a crucial change, in that the JTTE recommends that the "dispute" should be settled on the basis of the "applicable rules and principles of international law" and *not* by a technical interpretation of the "main channel of the river" as stated in the 1890 Treaty.

I very much doubt that the power to make this recommendation fell strictly within the JTTE's original mandate. It must be recognized that the JTTE did not remain simply a group of *technical experts*, dealing

with technical matters concerning the determination of the "main channel", but turned into a body for *diplomatic negotiation* between the two States. In fact, the six members of the JTTE were not necessarily even technical experts, and the team from Botswana was led by an eminent professor of international law. This clearly demonstrates that the JTTE's purpose changed from the technical or scientific matter of determining the "main channel" of the Chobe River to discussing the more general legal dispute on territorial issues.

Upon receipt of the JTTE's final report and recommendation, the Presidents of Botswana and Namibia, together with the President of Zimbabwe, decided at the Summit Meeting held at Harare on 15 February 1995, after deliberating on the JTTE's report, that "the *matter* should be referred to the International Court of Justice" for determination (Memorial of Botswana, III, Ann. 59, p. 463, emphasis added).

The *compromis*, as fully quoted in paragraph 2 of the Judgment, was then, one year later, concluded by Botswana and Namibia on 15 February 1996.

(3) Further Comments on the Lack of Clarity in the Compromis

18. Having examined the process which led up to the conclusion of the *compromis*, it seems to me quite clear that the position of both countries towards the whole issue was in essence changed somewhat. The original issue, in which neither State gave much weight to the *legal status* of Kasikili/Sedudu Island, but rather considered that the *legal status* of the Island would be dependent upon the determination of the *boundary*, became an issue of the *legal status* of Kasikili/Sedudu Island.

19. While it was agreed that the *boundary* should be determined as the centre of the "main channel" of the Chobe River, which separated the spheres of influence under the terms of the 1890 Anglo-German Treaty, no agreement could be reached as to which channel — north or south — constituted the "main channel", a factor which could prove decisive in determining which territory Kasikili/Sedudu Island would fall into.

The issue between the two States could be solved by a scientific investigation or survey concerning the "main channel" of the Chobe River. However, the issue, originally considered to be simply a question of drawing a *boundary* between the two States, in either the northern channel or the southern channel of the Chobe River (whichever was deemed to be the main channel), has now explicitly been turned into a territorial issue involving sovereignty over Kasikili/Sedudu Island — a change

which occurred in 1995 at the stage of preparation of the JTTE's Report.

As already mentioned in paragraph 9 above, the second paragraph of the Preamble to the *compromis* refers only to a "*dispute* . . . relative to the *boundary*" (emphasis added), but Article I asks the Court to determine not only the *boundary* in the Chobe River but also "the *legal status* of [Kasikili/Sedudu] island" (emphasis added). The 1890 Anglo-German Treaty and the "rules and principles of international law" (and once more I point out that this, according to the *compromis*, is equivalent to "the general principles of law [as] recognized by civilized nations") being used as the basis for the settlement of the dispute are from the outset mutually contradictory. How can the Court deal with such a contradiction in this case?

It is my belief that the *compromis* prepared by both States was not drafted in a proper manner.

20. I return to the original question, namely, (i) whether the Court is requested to determine a boundary, on the basis of the 1890 Anglo-German Treaty, which provides for the "main channel" of the Chobe River as a *boundary* or (ii) whether the Court is to give a final verdict on the territorial issue of Kasikili/Sedudu Island in accordance with the "rules and principles of international law", interpreted as "general principles of law recognized by civilized nations". The real intention of the Parties and the manner in which they have brought this "case" to the Court is unclear. These points have not been clarified by either State in their written documents or during the oral pleadings and the Court's present Judgment also does not address these points.

If option (i) is chosen, the Court will be confined to determining the "main channel" of the Chobe River in either the northern channel or the southern channel as the boundary between the two States. If option (ii) is chosen, the Court must interpret the "rules and principles of international law" relating to territorial sovereignty as applied to Kasikili/Sedudu Island. This confusion of the issues brought jointly by Botswana and Namibia to the Court puts the latter in an extremely difficult situation in the handling of this "case"; in particular, because the "case" is not based on a unilateral application but submitted by the agreement of both Parties.

21. In this jointly submitted case, the substance of the *dispute* and the basis on which the Court is asked to rule seem to me to be extremely unclear. In my view, the Court should have asked the Parties to clarify their positions. I wonder if it would not have been possible for the Court to have handed this jointly submitted case back to the Parties with the request that they clarify their common intention and original understanding in coming to the Court, and that they state whether they wish to have the *boundary* determined *or* whether they would prefer to treat the determination of the *legal status* of Kasikili/Sedudu Island as a separate issue and not simply as a result of the determination of the boundary.

III. "On the Basis of the 1890 Anglo-German Treaty"

(1) Introduction

22. As I have already stated in paragraph 3 above, this is a case brought by means of a *compromis*, by which the Parties seek to have the Court determine the boundary and the legal status of the Island on the basis of the criteria which the Parties jointly wish to rely on. The original intention of the Parties was to rely on the 1890 Anglo-German Treaty to assist in the *drawing* of a boundary along the Chobe River in the area of Kasikili/Sedudu Island. I shall now proceed to an analysis of the 1890 Anglo-German Treaty.

(2) The Significance of the 1890 Anglo-German Treaty

23. There is no difference of views between Botswana and Namibia with respect to the fact that the 1890 Treaty should be regarded as constituting a basic document to determine the *boundary* between these two States. Let me begin with an examination of that Treaty.

24. Germany, which had had little interest in Africa before the latter part of the nineteenth century, emerged as a colonial State under the leadership of Bismarck and joined other European nations in the partition of Africa. In order to settle the issues relating to Africa, including the determination of the legal doctrine of occupation, the Berlin Conference was convened at the initiative of Bismarck. The General Act of the Conference of Berlin was adopted in 1885 (Memorial of Botswana, II, Ann. 1, p. 1).

In 1884 Germany put South-West Africa under its protectorate and in 1885 Great Britain, by Proclamation of the High Commissioner for South Africa, declared Bechuanaland a British Protectorate (Memorial of Botswana, II, Ann. 3, p. 24). In 1889 negotiations took place between Great Britain and Germany, in which Germany wished to be secured free access from Lake Ngami to the upper waters of the Zambezi River as a part of its sphere of influence (Memorial of Botswana, II, Ann. 4, p. 27; Ann. 5, p. 29).

25. The Anglo-German Treaty of 1 July 1890 determined the separation of the spheres of influence of the two States. The Treaty reads in part:

> "The undersigned
>
> . . . . . .
>
> Have, after discussion of various questions affecting the Colonial interests of Germany and Great Britain, come to the following Agreement on behalf of their respective Governments:
>
> . . . . . .
>
> In South-West Africa the sphere in which the exercise of influence is reserved to Germany is bounded:
>
> . . . . . .

2. To the east by a line . . . [which] runs eastward along [the 22nd parallel of south latitude] 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.

. . . . . .

The course of the above boundary is traced in general accordance with a Map officially prepared for the British Government in 1889." (Anglo-German Treaty, Art. III, para. 2.) (Memorial of Botswana, II, Ann. 11, p. 185; Memorial of Namibia, IV, Ann. 4, p. 6.)

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26. The 1890 Treaty is an instrument which determined the respective spheres of influence of the Parties in this region of Africa but which certainly did *not* fix national boundaries there between the territories of Germany and Great Britain. The limit of the German sphere of influence was fixed as the "centre of the main channel of the Chobe River", but in that Treaty no concrete *boundary line* was indicated in this geographically complex area. The determination of the *boundary*, which would certainly have had the effect of determining the *legal status* of Kasikili/Sedudu Island, was at that time a matter far removed from the actual purpose of the Treaty.

27. The 1889 map that purports to illustrate Article III of the 1890 Anglo-German Treaty (Memorial of Botswana, Appendix II, Map 3) is, in my view, too reduced in scale to be of great assistance. The course of the Chobe River on this map is taken directly from the map prepared in 1881 by Dr. B. F. Bradshaw for the Royal Geographical Society. The Bradshaw map indicates certain geographical features of the area and shows the northern and southern channels of the Chobe River but, naturally, did not define any boundary (Memorial of Namibia, V, Ann. 102, p. 35; Memorial of Namibia, VI, Atlas I/2) (Memorial of Botswana, Appendix II, Map 1) and has no significance for the determination of the boundary in this area.

(3) The Meaning of "Main Channel" in the 1890 Treaty

28. A great many explanations have been given by both Parties concerning the phrase "the centre of the main channel of [the Chobe River]" in Article III of the 1890 Anglo-German Treaty. In particular, both Parties have devoted a great deal of attention, especially during the oral hearings, to the purported difference between this concept and that used

in the other authentic text, the German one, which reads: *"Thalweg des Hauptlaufes dieses Flusses"*.

The concept expressed by the German language text and that expressed by the English language text may not be identical. The English word "centre" is simply an expression used in geometry while the German word *"Thalweg"* has some legal connotation. The fixing of the "centre" of the main channel of the river is a matter to be determined by a geographer or a surveyor. In my view, however, the German delegation at the negotiation of the 1890 Treaty does not seem to have used the German expression *"Thalweg"* in order to give a meaning different from the English expression "centre" or in order to give the word a legal sense.

As stated in the Judgment (para. 46), the original provision of this part of the 1890 Treaty, initialled by Lord Salisbury and by Count Hatzfeldt, and transmitted to the British Foreign Office as "Draft Articles of Agreement" read:

> "[The boundary] runs eastward . . . till it reaches the River Chobe, and descends the *centre of that river* to its junction with the Zambesi, where it terminates." (Memorial of Namibia, IV, Ann. 26, p. 121, emphasis added.)

Afterwards the British side proposed the insertion of the words "the main channel of" so that the sentence read "the centre of the main channel of that river". That proposal was accepted by the German side and translated first as *"in der Thal-Linie des Hauptlaufes dieses Flusses"* and, in the end, the word *"Thal-Linie"* was replaced with the word *"Thalweg"*. I would like to point out that the Judgment clearly, and in my view quite properly, states that "[t]he German text is therefore a word-for-word translation of the British proposal and follows the English text" (Judgment, para. 46).

29. At all events, the German words *"Thalweg des Hauptlaufes"* have the same meaning as the English words "centre of the main channel". The different interpretation of the German words that was given at the oral pleadings does not convince me and I fail to understand why the Parties have given so much weight in their respective pleadings to a discussion of the word *"Thalweg"* and why the Court, in a similar way, shows so much concern with the use of and definition of this particular word so extensively in so many parts of its Judgment (Judgment, paras. 21-27, 46, and 89). The word *"Thalweg"* appears more than 20 times in the Judgment. I reiterate, the German expression is simply a translation of the English original text. The "centre of the main channel" is the original expression and reflects the idea of the negotiators of the 1890 Anglo-German Treaty. In the latter part of the Judgment, the expression *"Thalweg"* is replaced by "line of deepest soundings" — which follows the suggestions of the Parties during the oral hearing — and this concept appears in subparagraph (1) of the Judgment's operative part. I think that the Court should have said in its operative part simply that the

boundary between Botswana and Namibia "follows the centre of the northern channel" rather than "follows the line of deepest soundings in the northern channel".

*

30. It is clear to me that there was nothing in the minds of the officials who negotiated the 1890 Treaty that could indicate that they had decided that the separation line between their respective spheres of influence should be anything other than the centre of the "main channel" of the Chobe River. The concept of "channel" is a strictly scientific issue. However, what constitutes "the main" channel is subject to a degree to interpretation. The concept of the "main channel" may well be defined by various criteria such as the breadth of the river, the depth of the water, the volume of waterflow, bed profile configuration, and so forth, as suggested in certain scientific works of reference (Judgment, paras. 29 and 30). The Judgment properly states that there is "[not] one single criterion in order to identify the main channel of the Chobe" (para. 30).

31. I submit that the fact that the original English text, namely the term "centre of the river", was replaced by the term "centre of the main channel of the river" and, in the German text, the word *"Thalweg"* was used to mean the "centre" of the main channel, might be interpreted as reflecting an interest on the part of the parties to the 1890 Treaty, in their choice of the Chobe River as the boundary, in the navigation potential of that River, thus gaining access to the Zambezi River. It should, however, be noted that it was not known at that time whether navigation through the Chobe River was feasible. It was merely of potential interest to each side. This is properly noted in the Judgment (paras. 40 and 44). Since there existed no immediate interest in navigating the Chobe River, and given that the hydrological condition of the river was unknown, the parties to the 1890 Treaty — without thereby seeking to delimit the boundary — employed the phrase "centre of the main channel" with a view to the *navigability* of the river, but in purely theoretical terms.

Subject to some minor exceptions, the Chobe River has to date not been navigated for transportation purposes. If the "main channel" should be considered in terms of navigability, then the Court would have difficulty in choosing between the northern and the southern channel as a boundary, since neither of those two channels has in the past or at the present time satisfied the conditions of navigability in a substantive or commercial sense.

32. If, however, the Court is to decide the boundary in terms of the "main channel" of the river, in whatever manner the words in the 1890 Treaty might have been interpreted at that time, then it can proceed to find the whereabouts of the main channel in the general sense. For this purpose the Court needs the assistance of a hydrological expert and

should have sought the help of a specialist in this subject, either as a witness or as an expert to be called by the Court, who could, first, inform the Court what criteria were most suitable for the definition of the main channel in this particular geographical situation and, second, which of the two channels would in reality meet those criteria.

Instead the Court has, in one way or another, dealt with the views expressed by scientists or specialist members of the opposing teams of the Parties. The views of these scientists or specialists are at times contradictory. The Court has, in fact, determined the northern channel as the "main channel" without the benefit of an expert opinion obtained from an independent person. It has relied upon its own interpretation of the geographical and scientific criteria, and has come to its own conclusion 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" (Judgment, para. 41). Although, in my view, the Court has not dealt correctly with this matter, which involves scientific, hydrographic, potamological or topographical issues, I am, however, not in a position to state that the Court's decision is incorrect.

(4) How Has the "Main Channel" been Recognized on Various Occasions in the Past?

33. In order to determine at present the boundary between Botswana and Namibia it is extremely important to ascertain how this main channel of the Chobe River, as referred to in Article III (2) of the 1890 Treaty, has been recognized in the past. I will devote a separate part of this opinion to a discussion of this matter. These past practices are extensively referred to in the Judgment but from a totally different aspect.

IV. "On the Basis of the Rules and Principles of International Law"

34. The Court is requested to make a determination "on the basis of" not only the 1890 Treaty but also "the rules and principles of international law" (*compromis*, Art. I). As I stated above, these words are interpreted in the *compromis* as meaning the "general principles of law recognized by civilized nations", as provided in Article III of the *compromis*. It may be noted that this interpretation, stated in Article III of the *compromis*, was quite new and was not mentioned in the work of the JTTE which constituted the basis of the *compromis*. I have to ask myself whether the Parties to the *compromis* really intended to limit the interpretation of the wording in Article I to the meaning stated in Article III.

35. If, as the *compromis* suggests, one takes the words "the rules and principles of international law" to mean the "general principles of law recognized by civilized nations", then the argument as to whether "prescriptive title" was acquired, on whatever basis, in connection with the legal status of Kasikili/Sedudu Island, would be relevant. The Court is quite justified in taking up the issue of the doctrine of prescription in this regard (Judgment, paras. 94-99). The Court concludes, however, that cultivation by the Masubia people or the occasional exercise of authority in one way or another over the Island would not have constituted a basis for acquisitive prescription and reaches a negative conclusion on this point (Judgment, para. 99). I fully agree with the Court's conclusion on this point.

36. What other "general principles of law recognized by civilized nations" could then have been suggested as a basis for the Court's determination of the matter? I see no reference in the arguments of the Parties to this element. I find no reason to take "the rules and principles of international law" as a basis for the Court's determination, as distinct from the 1890 Anglo-German Treaty.

V. How the "Main Channel" of the Chobe River Was Recognized in Past Practice and How That Would Assist the Court to Determine the Boundary along the Chobe River

(1) Introduction

37. As I have stated in paragraph 33 above, it is necessary to examine how the boundary of the Chobe River and the status of Kasikili/Sedudu Island have been viewed at varying times in the past by the respective authorities in the area in the maps, in certain relevant documents or even in certain practices.

These documents and practices are referred to extensively in the Judgment, but rather from the standpoint of whether they constitute "any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty" and/or "any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" as provided for in the Vienna Convention on the Law of Treaties (Art. 31, para. 2 *(a),(b)*), for purposes of interpretation of the 1890 Anglo-German Treaty (Judgment, paras. 47-70, 75 and 78). The Judgment makes many references to the Vienna Convention and concludes generally that the practices to which it refers extensively, and which I quote later in this section, constitute *neither* "subsequent agreement" *nor* "subsequent practice" in terms of that Convention (Judgment, para. 79).

38. On this point, I am afraid that I cannot share the view taken in the Judgment that these practices, maps and documents are relevant purely for the purpose of interpretation of the 1890 Treaty. In my view, the rele-

vant facts and activities may usefully be considered by the Court as an aid to determining the boundary of the Chobe River and the legal status of the Island, but not for the purpose of the Court's interpretation (with regard to the Vienna Convention on the Law of Treaties) of the 1890 Treaty. In my view, these past practices themselves constitute a decisive factor enabling the Court to determine the boundary between Botswana and Namibia along the northern channel of the Chobe River.

In the part of my opinion that follows, I refer to several incidents and quote from the early documents. Those references are, to a great extent, the same as those cited in the Judgment but I include them nevertheless as, from my standpoint, they are of great importance.

(2) Treatment of Maps

39. I should like to add a few words on the significance in this particular case of a number of maps of the region produced since 1890 and presented to the Court by the Parties. I count as many as 52. I have grave doubts as to whether the existence of so many maps in this case will be of help in finding a solution to this matter. Some of the maps indicate the width of the northern channel and of the southern channel around Kasikili/Sedudu Island, and are thus useful in providing some geographical details of the region. However, some of the cartographers have gone so far as to indicate on their maps a "boundary", which could be interpreted as being a political boundary between the northern and southern banks of the Chobe River.

40. The Judgment develops the view of the Court regarding the various maps of this area submitted to it and the Court properly considers that it is "itself unable to draw conclusions from the map evidence produced in this case" (Judgment, para. 87). I share the Court's view in this regard. I should, however, like to make some general comments on these maps, as follows.

First, some maps were simply reproduced from a previous edition without any additional survey having taken place.

Secondly, the Chobe River region had, before 1890, been explored by certain individuals, amongst them Selous and Livingstone, but obviously the maps they produced did not show any political boundary. A map produced by a relevant government body may sometimes indicate the government's position concerning the territoriality or sovereignty of a particular area or island. However, that fact alone is not determinative of the legal status of the area or island in question. The boundary line on such maps may be interpreted as representing the maximum claim of the country concerned, but does not necessarily justify that claim.

Thirdly, a claim to territory can only be made with the clear indication

of a government's intention, which may be reflected in maps. A map on its own, with no other supporting evidence, cannot justify a political claim. In this particular case, despite the existence of so many maps and despite the considerable discussion by both Parties on the subject of their interpretation, in the final analysis, all of this is in my view utterly irrelevant.

41. To my mind, the drawing of a political boundary is not a task for a cartographer unless he has been given a clear indication of its placement. No great weight should be given to any *boundary* depicted by such maps.

The Parties included in their oral presentation a list indicating which, of the large number of maps, placed the boundary either to the north or to the south. This, in my view, was at best an exercise in futility and at worst absurd.

(3) The Geographical Conditions of the Area Surrounding Kasikili/Sedudu Island and the Political and Social Situation of the Island up to the Middle of This Century

42. This area was essentially unknown before the conclusion in 1890 of the Anglo-German Treaty, except for the report of Livingstone's expedition, "Missionary Travels and Researches in South Africa" (Memorial of Namibia, V, Ann. 129, p. 197; Memorial of Namibia, I, p. 23), the report of the explorer Selous in 1874 (referred to, but not fully quoted, in Memorial of Namibia, V, Ann. 138, p. 229), and the Schulz-Hammar report of 1884, "The New Africa — A Journey up the Chobe and down the Okovanga Rivers" (referred to, but not fully quoted, in Memorial of Namibia, V, Ann. 137, p. 227). As far as I can tell, none of these reports refers to the existence of an island now known as Kasikili/Sedudu Island.

43. Whether at that time Kasikili/Sedudu Island was submerged during the rainy season or whether there was any continuous flow of water throughout the year is not known. Some explanation has been given by the scientists engaged by the Parties to this case but their explanations differed, nor was it altogether clear whether they were talking about the situation a hundred years ago or at the present time. At any rate, the facts they presented were not explained to the Court by a witness or by an expert who had made the required solemn declaration. The fact appears to be that there existed no reliable topographical description of this area at that time. It is extremely difficult to ascertain from any existing available information the geographical situation of this region, namely, Kasikili/Sedudu Island and the surrounding area of the Chobe River.

44. It appears to me that, in the oral and written pleadings in this case, the Parties have, in the main, concentrated on the interpretation of the terms contained in the 1890 Treaty (such as the "centre of the main channel of the river") but have not greatly discussed the political and social status or situation of the north and south banks of the Chobe River.

45. Germany, which in 1884 placed South West Africa under its Protectorate, was greatly concerned about access from the direction of the Ngami Lake to the east towards the Zambezi River and had not even the slightest interest in exercising control over a small island in the Chobe River. Great Britain, on the other hand, had in 1885 placed Bechuanaland under its Protectorate and put the region under the control of the Governor of British Bechuanaland.

Germany made no territorial claim, not even over the Eastern Caprivi Strip to the north of the Chobe River, and the first presence of a German administration in this region was in 1909 after the establishment of the office of the German Governor in South West Africa in 1908 at Windhoek. The *de facto* authority of Great Britain existed in Caprivi until 1914. It is assumed that, at that time, Great Britain's control of the region extended northwards beyond the Chobe River.

46. During the First World War, Eastern Caprivi, which had been under German administration, was occupied by the British Army mobilized from South Rhodesia and was placed under the authority of the District Commissioner of the Bechuanaland Protectorate in Kasane (Memorial of Namibia, I, p. 93). In 1919, after the First World War, the Union of South Africa became the administering power for the whole of present-day Namibia under the mandate of the League of Nations — which means, if I may say so, that the Union of South Africa was under British influence, albeit indirectly. In the period 1915-1929 Caprivi was administered by the Bechuanaland administration on behalf of the Government of the Union of South Africa. No objection was raised to the cultivation of Kasikili/Sedudu Island by Caprivi tribesmen.

The difference in status between the area to the north and the area to the south of the Chobe River did not actually cause any practical difficulties in this post-war period; these arose only after the Second World War. It is reported that the British Police patrolled both the northern and southern banks as peace officers.

47. A report (the Eason Report) produced by Captain Eason of the police of the Bechuanaland Protectorate (Great Britain) on 5 August 1912, entitled "Report on the main channel of the Linyanti (or Chobe) river" (frequently cited in the Judgment, in paras. 33, 42, and 52-55), gives some geographical description of the area (Memorial of Namibia, IV, Ann. 47, p. 173; Memorial of Botswana, III, Ann. 15, p. 225). This Report states that "[h]ere [Captain Eason] consider[s] that undoubtedly the *North* should be claimed as the main channel" (emphasis added) and, in the sketch-map attached to this report, the *northern channel*

was, from a geographical point of view, taken as being the main channel.

Since that 1912 report, there seems to have been no reliable report of this region until the Trollope-Redman report prepared in the mid-1940s, to which I will refer later.

(4) The Confrontation in the 1940s between the Authorities of the Union of South Africa and the British High Commissioner's Office for the Bechuanaland Protectorate

48. After the Second World War, despite the termination of the mandatory system of the League of Nations, the Union of South Africa did not acquiesce in transforming this mandatory area to the new system of Trusteeship under the United Nations. Thus, the separation or friction between the régimes controlling the territories of the Union of South Africa (which became a Republic and left the Commonwealth in 1961) and the British Protectorate of Bechuanaland became apparent. It is only since that time that the question of the boundary between the two entities mentioned above, including the status of Kasikili/Sedudu Island, emerged.

49. In 1940 Major L. Trollope, the Magistrate for the Eastern Caprivi Zipfel (hereinafter "Strip") (to the north of the Chobe River), surveyed this area with the co-operation of the Bechuanaland Protectorate police in Kasane (to the south of the Chobe River) and submitted his report on the administration of the Eastern Caprivi Strip to the Secretary for Native Affairs in Pretoria (Memorial of Namibia, IV, Ann. 58, p. 229). No mention was made of Kasikili/Sedudu Island in that report.

50. Nearly ten years later, in 1948, an exchange of letters took place between the Office of the Magistrate in Windhoek, Caprivi Strip (to the north of the Chobe River), and the British Authorities in Kasane (to the south of the Chobe River), concerning the international status of this region, including Kasikili/Sedudu Island. Major Trollope (Magistrate for the Eastern Caprivi Strip) addressed a letter on 3 January 1948 to Mr. V. Dickinson (District Commissioner in Maun, Bechuanaland), entitled "Channel between Kasikili Island and Kabuta and Kasika Villages", referring to the application by a Mr. Ker for permission to transport timber through the northern channel (Memorial of Namibia, IV, Ann. 59, p. 262) (see Judgment, paras. 40 and 56).

51. A few weeks later, a report dated 19 January 1948 was jointly prepared by Major Trollope and Mr. N. V. Redman ([Assistant] District Commissioner at Kasane, Bechuanaland Protectorate), entitled "Joint Report on the boundary between the Bechuanaland Protectorate and the

Eastern Caprivi Zipfel: Kasikili Island" (see Judgment, paras. 42 and 57-60) in which it was stated that:

> "3. We find after separate examination of the terrain and the examination of an aerial photograph that the 'main Channel' does not allow the waterway which is usually shown on maps [the southern channel] as the boundary between the two Territories.
>
> 4. We express the opinion that the 'main Channel' lies in the waterway *[the northern channel]* 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." (Memorial of Namibia, IV, Ann. 60, p. 264.)

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52. Major Trollope, in his letter of 21 January 1948 addressed to the Secretary of Native Affairs in Pretoria entitled "Bechuanaland-Eastern Caprivi Zipfel Boundary" (see Judgment, para. 58), seems to have conceded, in paragraph 3, that the boundary should be in the *northern channel* but that the people of Eastern Caprivi should continue to be allowed to cultivate the Island. The letter stated:

> "There is no doubt if the wording of the 1890 Treaty is applied to the geographical facts as they exist today that the true inter-territorial boundary would be the *northern waterway* and would include Kasikili Island in the Protectorate." (Memorial of Namibia, IV, Ann. 61, p. 271, emphasis added.)

53. It is known that, in spite of the suggestion by Major Trollope regarding the northern channel, the Union of South Africa was reluctant to admit that the northern channel was the main channel of the Chobe River; see the letter of 12 June 1948 from the Secretary of Justice of the Union of South Africa to the Secretary for External Affairs in Pretoria entitled "Bechuanaland — Eastern Caprivi Zipfel Boundary":

> "The main channel is *north* of Kasikili Island whereas it is apparently usually shown on maps as being south of the island. The map referred to in the [1890] Treaty is not available to us, but assuming that on that map also the main channel is shown as being south of the island, the question arises whether there was not, before the con-

clusion of the Treaty, a shifting of the main channel from the southern waterway to the northern." (Memorial of Namibia, IV, Ann. 62, p. 277, emphasis added.)

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54. In a letter dated 14 October 1948 from the Secretary to the Prime Minister and for External Affairs of the Union of South Africa (responsible for the area north of the Chobe River), to the Administrative Secretary to the British High Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland (responsible for the area south of the Chobe River), it is stated that, as far as the former remembered, the *boundary* had never been changed from the southern channel to the northern channel. It seems that the issues between the two authorities at that time were concerned with the transport of timber through the northern channel of the Chobe River and the cultivation of Kasikili/Sedudu Island by Caprivi tribesmen. While the Union of South Africa was aware of the application for permission to transport timber by a firm in Bechuanaland, its main concern was the continuation of the cultivation of the Island by the tribesmen of the Eastern Caprivi Strip. This is shown by the following quotation from the letter:

> "It is understood that the necessity for consideration of the matter arises from the fact that a certain river transport venture, which proposes to transport timber down the river from a sawmill in Bechuanaland has raised the question of the correct boundary both in representations to the Magistrate, Eastern Caprivi Zipfel and to the Bechuanaland authorities.
>
> The Report discloses that while the main channel of the Chobe River is shown on maps as passing to the South of Kasikili Island it in fact passes to the North of that Island.
>
> It has been confirmed, as a result of exhaustive enquiries, that there has been no shifting of the main channel of the river from South to North within living memory. The facts, therefore, point to the maps being incorrect.
>
> As against the foregoing there is evidence that the Island has been cultivated by Caprivi Tribesmen since at least 1907 and that their right to the occupation of the Island has at no time been disputed.
>
> 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." (Memorial of Namibia, IV, Ann. 63, p. 280.)

The letter of 4 November 1948 of the Administrative Secretary to the

British High Commissioner addressed to the Secretary of State for External Affairs in the Union of South Africa states that:

> "I am directed by the High Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland to inform you 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." (Memorial of Namibia, IV, Ann. 64, p. 281.)

The letter of 14 February 1949 from the Secretary to the Prime Minister and for External Affairs to the Chief Secretary to the British High Commissioner on Basutoland, the Bechuanaland Protectorate and Swaziland, sounded out the possibility of agreeing that the Island should belong to the northern bank (South West Africa) but that the navigation route should remain as the northern channel:

> "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." (Memorial of Namibia, IV, Ann. 65, p. 283.)

55. In a letter of 6 June 1949 addressed to Lord Noel-Baker (Secretary of State for Commonwealth Relations), the British High Commissioner seems to have been ready to accept the proposal of the Union of South Africa that the southern channel would constitute the boundary, as shown by the following quotation:

> "2. Part of that boundary is formed by the main channel of the Chobe or Linyati River which runs eastwards into the Zambesi, and divides the northern border of the Bechuanaland Protectorate from a narrow strip of territory known as the Caprivi Zipfel. About 10 miles west of its junction with the Zambesi, the Chobe river encloses Kasikile Island, a small strip of land about 1½ square miles in area; this has hitherto been regarded as part of the Caprivi Zipfel, since maps show that the main channel passes to the south of the island.
>
> 3. The 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. I enclose a copy of a note provided by the Union Government which was jointly recorded on the 19th January, 1948, by the Magistrate of the Eastern Caprivi Zipfel and the District Commissioner of Kasane, Bechuanaland Protectorate, together with a copy of the sketch map mentioned therein.

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." (Memorial of Namibia, IV, Ann. 66, p. 284.)

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56. This correspondence as referred to in paragraphs 54 and 55 above, seems to indicate the readiness towards the end of the 1940s of the Bechuanaland Protectorate to concede that the southern channel would constitute the boundary if the transportation of timber could be continued by Mr. Ker through the northern channel. However, that suggestion, addressed to Lord Noel-Baker, did not receive the approval of the British Government.

After the exchange of letters between the Union of South Africa and the Bechuanaland Protectorate, there was no progress at that time on the issue concerning the boundary.

(5) The Occurrence of Incidents in 1984 after Botswana's Independence in 1966, and the Joint Survey Which Followed

57. On 25 October 1984 an incident took place in which a South African patrol boat on the Chobe River was shot at by Botswana Armed Forces (Memorial of Namibia, IV, Ann. 84, p. 329). This can be regarded as the beginning of the territorial dispute between the two entities. At an intergovernmental meeting held in Pretoria on 19 December 1984 (Memorial of Botswana, III, Ann. 50, p. 396) it was decided that a joint survey should be undertaken to determine whether the main channel of the Chobe River was located in the northern or the southern channel (Memorial of Botswana, III, Ann. 48, p. 384).

In fact, the July 1985 report on the "Chobe River Boundary Survey: Sidudu/Kasikili Island" suggested in conclusion: "The main channel of the Chobe River now passes Sidudu/Kasikili Island to the west and to the

north of it" (emphasis added). However no effort was made to find a solution to the political issue, namely, the national boundary between the powers to the north and south of the river.

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58. The telex dated 22 October 1986 from "Pula Gaborne" Botswana (responsible for the area south of the Chobe River) to "Secextern" Pretoria (responsible for the area north of the Chobe River), referring to the discussion held on 13 October 1986, states:

> "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. Pula wishes to inform Secextern 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." (Memorial of Botswana, III, Ann. 52, p. 406.)

The South African authorities suggested that a meeting be convened for the solution of the problem. The exchange of communication 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." (Memorial of Botswana, Ann. 54, p. 410; emphasis added.)

(6) What Does the Past Practice Indicate?

59. After an examination of certain incidents that occurred in the area, as well as the correspondence between the authorities of the northern bank and southern bank and certain surveys conducted in the course of the past hundred years, I conclude that the northern channel of the Chobe River had been regarded, implicitly or explicitly, as the boundary separating the authorities on the northern and southern banks, and that Kasikili/Sedudu Island had been regarded as being under the authority of

the south, despite the occasional use of the Island by tribespeople from the northern side.

The Judgment, however, refers to these same past practices as if they might serve to assist it in interpreting the 1890 Anglo-German Treaty as provided for in the Vienna Convention on the Law of Treaties, and the Court came to the conclusion that those practices were not in fact capable of constituting "subsequent practice" or "subsequent agreement" within the meaning of the Vienna Convention. I would emphasize once more that in my view this case is not one directly related to the application of the provisions of the Vienna Convention on the Law of Treaties to the 1890 Anglo-German Treaty, to which latter Treaty neither Botswana nor Namibia is a party.

I refer above to these past practices, as decisive factors in assisting the Court to determine the course of the boundary in the Chobe River and, hence, to determine the status of Kasikili/Sedudu Island as a part of the territory of Botswana.

VI. Conclusion

60. I suggested at the outset that the *compromis* agreed by Botswana and Namibia on 15 February 1996 and filed in the Registry of the Court on 29 May 1996 was not clearly drafted, with the result that the Court would not be able properly to ascertain the Parties' real intention in submitting the "case" to it. The first thing the Court must do is to ascertain whether the Parties wish it to determine the *boundary* between the two States along the Chobe River *or* the *legal status* of Kasikili/Sedudu Island. These two issues, rather than being complementary, may well be contradictory. I suggested that the Parties might have been asked to clarify their common position on the subject of the dispute.

61. The parties to the 1890 Treaty did not attempt to delineate the boundary in the area of the Chobe River but wanted, by the use of the words the "main channel" of the river, to separate their respective spheres of influence taking into consideration the potential possibility of navigation along the Chobe River in order to have access to the Zambezi River. In fact, the Chobe River has not been in the past and is not at the present time used in any substantial way for the purpose of navigation. Thus the words the "main channel of the Chobe River" may well today be understood in the ordinary sense in hydrological terms. I regret that the Court made no attempt to obtain the opinion of an expert regarding the main channel of the Chobe River and relied instead on the opinions of experts who were members of the Parties' respective teams. I accept, however, that the Court has determined the northern channel as the boundary in accordance with the ordinary meaning to be given to the relevant terms as it understands them and I have no objection to its findings on the matter.

62. I agree with the finding of the Judgment that "the rules and principles of international law", as a basis for determination of the boundary and the legal status of the Island, have no significant role to play in this case.

63. I would rather suggest that the past practices — the geographical surveys and the correspondence between the authorities of the northern and southern bank — which were indicated sufficiently in the Judgment and of which I have also made an extensive analysis, are of themselves the most important and decisive element in assisting the Court to determine that the boundary between Botswana and Namibia is located in the northern channel and that Kasikili/Sedudu Island thus falls within the territory of Botswana.

(Signed) Shigeru ODA.