DISSENTING OPINION OF JUDGE REZEK

[Translation]

Identification of the main channel of the Chobe in the Kasikili/Sedudu region — Ambiguous nature of local geography — Criticism of the arguments relating to navigability, visibility and natural prolongation — Interpretation of the 1890 Anglo-German Treaty in the light of history — Conduct of the Parties — Equitable sharing of watercourse resources — Cartography — Effective occupation of the Island — Preponderance of evidence in favour of the finding that the boundary lies in the southern channel and that Namibia has sovereignty over Kasikili/Sedudu.

1. I am sorry to find myself in complete disagreement with the majority. A particular source of regret is the gulf between the position taken by the Judgment and my own views concerning the principle of *uti possidetis* in the context of a colonial situation and the accession of peoples to independence. Over the course of my years of service on the Supreme Court of my own country, I learned that the majority is always right, and time has effaced any vestiges of doubt I entertained early on about the validity of that maxim. What follows, therefore, is not a plea in support of the losing side, particularly since both Parties had the benefit of impeccable representation in these proceedings, and their cases were argued thoroughly and tenaciously by their respective counsel. I could set out at length my support for the case put by Namibia, while paying tribute to the opinion of the majority of the Court's Members. However, I shall confine myself to indicating as succinctly as possible the substance of my dissent.

2. The Court correctly understood, in the light of Article III of the 1890 Anglo-German Treaty, that its task was not simply to determine the thalweg of the Chobe, but rather first of all to identify the point at which the main channel of the river bifurcates, and then to determine the thalweg of this channel — *"im Thalweg des Hauptlaufes"* — on the basis of the German version, which makes it clear, to readers of the English version, what is meant by the term "centre".

3. In identifying the main channel, where the two branches of the Chobe separate in order to encircle Kasikili/Sedudu Island, the Judgment appears to seek to attach more importance to geographical considerations, despite the attendant ambiguities. The northern channel has a greater mean depth and is therefore said to be more easily navigable than the southern channel, when the Chobe carries sufficient water to permit navigation at all. However, navigability is referred to in the abstract, since it is clear that, as far as actual traffic is concerned, the southern channel has always been more heavily used. It is there, moreover, that most of the Chobe's water resources are found, which should be

accessible to both Parties equally, in accordance with a basic principle of international law relating to river boundaries.

4. The northern channel is also said to have greater "visibility" in terms of its contours and banks, and is thus regarded, despite the lingering uncertainty about comparative volumes of water, as the more substantial of the two branches of the Chobe surrounding Kasikili/Sedudu. I ask myself whether this could have had any significance whatsoever to the colonial powers who negotiated the 1890 Treaty, or to their agents in the disputed region or to the indigenous communities over subsequent decades. This "visibility" is evidenced only by aerial photography, and was therefore non-existent at the time when the bilateral agreement was concluded and implemented.

5. I am unable to understand why the northern channel is considered to constitute the "natural prolongation" of the course of the Chobe when it reaches Kasikili/Sedudu Island. We are dealing here not with a railway or a road, but with a natural watercourse, which does not necessarily follow the most direct route. However, were I to accept that such morphological considerations should be taken into account, it would be difficult for me to say why the upstream prolongation should be given more importance than the downstream prolongation: indeed, when the two channels come together again, it is in fact the southern channel which appears to determine the orientation of the reunited watercourse.

6. The variability of the geographical aspect highlights the importance of the historical factor, when it comes to interpreting the 1890 Treaty correctly. It is likely that the parties used the conventional formulas for determination of the boundary line when it follows a watercourse on which islands are located, without according any particular attention to the features specific to the Kasikili/Sedudu area. There is no doubt, however, that the two powers became aware, with the passage of time, of the need to arrive at a proper interpretation of the Treaty in regard to the determination of the boundary at that precise location. Rather than seek to ascertain what the parties concerned meant by the words "main channel", since they probably had nothing special in mind, it fell to the Court to determine, with specific reference to the disputed area, what they read into those words during the decades following the conclusion of the 1890 Treaty.

7. All the same, it seems to me proven that access by river to the Zambezi was not the key objective for the parties to the 1890 Treaty, particularly for Germany. I accept that the main aim in the treaty negotiation was to delimit spheres of influence between the two powers. That aim was to be attained in the light of certain principles governing river boundaries, foremost among which is that of equality of access to the resources of a watercourse. An examination of the object and purpose of the 1890 Treaty also results in the identification of the southern channel as the main channel:

> "For, if the boundary were to be redrawn along the northern channel, Namibia would be entirely shut off from the southern channel — as it is, indeed, today because of the illegal military occupation of the Island. It would thereby be denied the use of the Chobe River where it actually serves the needs and interests of both riparian States. To continue this state of affairs by redrawing the boundary according to Botswana's claims would be incompatible with the object and purpose of the 1890 Treaty. It would also subvert the general principle of equitable and reasonable sharing of the resources of a boundary river enunciated by this Court in the case concerning the *Gabčíkovo-Nagymaros Project*." (CR 99/1, p. 66 (Delbrück, for Namibia)).

8. Practice subsequent to the conclusion of the 1890 Treaty indicates as a whole that, as from the first decades after that date, the parties identified the southern channel as the main channel of the Chobe, where the latter reaches Kasikili/Sedudu Island. This is, moreover, acknowledged in the Judgment, which states that prior to 1947 the boundary "had until then been supposed to be located in the southern channel of the Chobe" (para. 62).

9. The agreements between the parties concerning the interpretation of the 1890 Treaty or the application of its rules contain information of varying import. As far as both Captain Eason's opinion and the 1948 Trollope-Redman report are concerned, I consider that Namibia is correct in its assertion that:

> "The question whether the deeper channel is 'the main channel' within the meaning of the Treaty is an inference of law, as to which the officials have no particular expertise. If, as Namibia contends, the criterion of depth is not the correct one for identifying the main channel, then the reports of the officials are of no assistance in determining the main channel." (CR 99/11, p. 56 (Chayes).)

The Trollope-Dickinson agreement of 1951 confirmed the *status quo ante*, particularly as regards occupation of the Island by the Masubia, as well as the designation of the northern channel as "free for all". The parties "reserved their rights". I regarded this "gentlemen's agreement" as primarily indicative of the redundancy of declaring open the southern channel, which was understood to be the international boundary.

10. The map evidence is copious, but admittedly is not totally consistent. However, it is not just a matter of there being a numerical majority of maps on which the boundary at Kasikili/Sedudu is depicted as the southern channel; I was struck by the variety of sources and the temporal continuity displayed by these documents: the 1909 German map; the 1933 British map GSGS 3915; the 1949 South African map TSO 400/558; the United Nations map No. 3158, published in 1985. The most

impressive cartographic materials produced over that lengthy period date from the period of effective occupation of the Island and, in my view, confirm Namibia's rights.

11. There is scope, in principle, for the application in this case of the doctrines of prescription and acquiescence. Such application is fully in keeping with the provisions of the Special Agreement, as readily acknowledged.

These doctrines give expression to customary rules of international law, which are moreover of long standing, based on general principles such as "effectivité" and good faith, as well as on the dictates of reason, such as consideration of the passage of time and of failure to act. The Court has jurisdiction, under the terms of the Special Agreement, to give a ruling "on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law".

12. I consider that the occupation of the Island by the Masubia from the Caprivi side of the Chobe, an indisputable fact, dating back to a point in time close to the entry into force of the 1890 Treaty, and continuing at least until — and perhaps even beyond — a date close to that of Botswana's independence, can be considered to provide justification for acquisitive prescription. However, in my view interpretation of the 1890 Treaty in the light of history, and in a manner at least fully compatible with the hydromorphology of the disputed area, in itself provides sufficient grounds for recognition of the rights of the potential beneficiary of prescription, i.e., Namibia. Even if that were not so — in particular, if the interpretation of the Treaty effectively resulted in placing the main channel of the Chobe to the north of Kasikili/Sedudu — I would find myself able to take the view that the process of acquisitive prescription in favour of Namibia was completed even before the two former colonies became independent: a process involving all the attendant elements of prescription, including acquiescence by the other colonial power.

13. The Judgment does not deny that "links of allegiance may have existed between the Masubia and the Caprivi authorities" (para. 98). It does not, however, consider it "proven that the members of this tribe occupied the Island *à titre de souverain*". To my mind, the *animus* of the occupation, its nature and its effects must be evaluated in the light of the surrounding circumstances and the period. What actions or indicia would have had to mark the presence of the Masubia on Kasikili/Sedudu Island in order for it to be recognized that they were there *à titre de souverain*? In my opinion, to deny that the indigenous occupation of the Island has any legal legitimacy and to take the view that this people lacked the necessary rights to live there *à titre de souverain* is an approach which would only make sense if we were still living in the first half of the century and the boundary dispute was not between the successors of Germany and Great Britain, but between the two powers themselves.

14. The Masubia were "private persons" according to the Judgment. Their allegiance did not, therefore, constitute sufficient title. It would perhaps have required the continued presence of agents of the German State

to justify either acquisitive prescription or the idea of conduct serving to confirm a particular interpretation of the 1890 Treaty. I nevertheless incline to the view that private persons provide perfect evidence of a peaceful occupation which deserves the protection of the law. Private persons — not agents of the State — wrote the history of *uti possidetis* in much of the American continent, where they altered the course of frontiers, frequently in defiance of the claims of the colonial powers.

15. I would readily admit that occupation by private persons would have no such legitimacy if the community in question was there under the authority of the other power or, at the very least, if it lived side by side with agents of the other power. In this case, even the presence on Kasikili/Sedudu Island of private persons bearing allegiance to Great Britain has not been confirmed with a minimum degree of permanency. Hence the relevance of the lesson drawn by the Permanent Court of International Justice in the case concerning the *Legal Status of Eastern Greenland*:

> "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." (Judgment of 5 April 1933, *P.C.I.J., Series A/B, No. 53*, p. 46.)

16. With all due respect and not without regret, I dissociate myself from the majority of the Court. I would have reached the opposite conclusion in this case.

(Signed) Francisco REZEK.