

**INTERNATIONAL COURT OF JUSTICE**

**CASE CONCERNING KASIKILI/SEDUDU ISLAND  
(BOTSWANA/NAMIBIA)**

**MEMORIAL  
OF  
THE REPUBLIC OF NAMIBIA**

**VOLUME I**

**MEMORIAL**

28 February 1997

---

Memorial of the Republic of Namibia

INTRODUCTION

A. Procedural Statement

B. Summary of Argument

Part One

The Interpretation of the ANGLO-GERMAN Treaty of 1890

INTRODUCTION

A. The Issue before the Court

B. The Relevant Rules of Treaty Interpretation

CHAPTER I THE GEOGRAPHY OF THE DISPUTED SECTION OF THE BOUNDARY

## CHAPTER II THE BACKGROUND OF THE 1890 TREATY: CONTEMPORARY KNOWLEDGE OF THE AREA

## CHAPTER III THE OBJECT AND PURPOSE OF THE 1890 TREATY

## CHAPTER IV THE PREPARATORY WORK OF THE 1890 TREATY AND THE CIRCUMSTANCES OF ITS CONCLUSION

### A. In General

### B. The Decision on the Line of the Chobe River

### C. The Creation of the Caprivi Strip

### D. The Introduction of the Concept of 'the Centre of the Main Channel'

### E. The 1889 Map

### F. Conclusions Regarding the Preparatory Work

## CHAPTER V THE WORDS OF THE TREATY: THE MAIN CHANNEL OF THE CHOBE RIVER

### A. Legal Considerations

### B. The Scientific Evidence

#### 1. In general

#### 2. Topography

#### 3. Hydrology and geomorphology

##### a. Sediments

##### b. Erosion

##### c. Existence and characteristics of sediment bars

#### 4. Conclusion as to the scientific evidence

### C. The 'Centre' of the Main Channel

## CONCLUSION TO PART ONE

THE SUBSEQUENT CONDUCT OF THE PARTIES TO THE ANGLO-GERMAN  
TREATY OF 1890 AND THEIR SUCCESSORS IN TITLE WITH RELATION TO  
KASIKILI ISLAND

INTRODUCTION

CHAPTER I THE LEGAL RELEVANCE OF THE SUBSEQUENT CONDUCT OF THE  
PARTIES TO A TREATY

A. Subsequent Practice of the Parties as Evidence of Their Understanding of the Meaning of  
the Treaty

1. The Vienna Convention on the Law of Treaties

2. The case law

3. Inaction as 'conduct' or 'practice'

4. Conclusion as to the relevance of subsequent practice in treaty interpretation

B. Prescription, Acquiescence and Recognition

1. The authorities

2. The conditions for application of the doctrine

3. Conclusion

C. The Operation of the Principle of Uti Possidetis

1. The special relevance of the principle to African states emerging from colonial status

2. The application of the principle

CHAPTER II NAMIBIA'S CONTROL AND USE OF KASIKILI ISLAND

A. Eyewitness Testimony

B. Corroborative Evidence

CHAPTER III THE EXERCISE OF SOVEREIGNTY

A. German Colonial Rule: 1890-1914

B. Administration by the Bechuanaland Protectorate as Delegate of South Africa under the  
League of Nations Mandate

C. South African Rule from 1929 to Namibian Independence

CHAPTER IV ACQUIESCENCE, ACCEPTANCE AND RECOGNITION

A. In General

B. The 1909-1914 Negotiations and the Eason Report

C. The Trollope-Dickinson Arrangement

D. The Period of Botswana Independence

CHAPTER V THE MAPS AS EVIDENCE OF SUBSEQUENT CONDUCT OF THE PARTIES

A. The Legal Significance of Maps in the Interpretation and Application of Boundary Treaties

B. The Relevant Maps

1. The German maps

a. Seiner's map

b. The maps of the German Imperial Residents

Conclusion as to the German maps

2. The British Maps

Conclusion as to the British maps

3. The South African maps

4. After Botswana's Independence

a. Botswana's maps

b. The United Nations maps

5. Botswana's failure to protest

C. Conclusions as to the Map Evidence

CONCLUSION TO PART TWO

SUBMISSIONS

---

**Memorial of the Republic of Namibia**

**INTRODUCTION**

## **A. Procedural Statement**

1. The case comes before the Court, in accordance with Article 36(1) of its Statute, pursuant to an agreement between the Government of the Republic of Botswana and the Government of the Republic of Namibia of 15 February 1996 requesting the Court

to determine, on the basis of the Anglo-German Treaty of 1st 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.<sup>1</sup>

2. The Anglo-German Treaty of 1 July 1890 provides in relevant part:

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 commencing at the above-named point, [the point of intersection between the north bank of the Orange River and the 20th degree of east longitude] 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.<sup>2</sup>

3. Kasikili Island is a small island in the Chobe River, about four square kilometres in area, situated about 15 kilometres west of its junction with the Zambezi River. (See Fig. 5, *infra*, following p. 16) Under the Treaty sovereignty over the Island would be determined by the location of the 'main channel' of that River. If the main channel is the one running to the north of the Island, the Treaty attributes Kasikili Island to Botswana; if it is the channel to the south, the Treaty attributes the Island to Namibia. The rules and principles of international law relating to the acquisition of territory by prescription and the principle of *uti possidetis* are also relevant in determining the legal status of the Island.

4. The steps by which this dispute came before the Court are as follows:

5. In 1991, Botswana deployed a contingent of troops, erected two military observation posts and hoisted its national flag on Kasikili Island, which is the territory of Namibia.<sup>3</sup> These unilateral measures by the Botswana Defence Force brought about dangerous tension in the area around Kasikili and threatened seriously to disrupt relations between the two countries.

6. When diplomatic exchanges between the two countries were unsuccessful in resolving the boundary dispute, Namibia invited His Excellency Robert Mugabe, President of Zimbabwe and Chairman of the Frontline States, to facilitate a dialogue between Namibia and Botswana. President Mugabe accepted Namibia's invitation. Nevertheless, tension in the border area increased, and Namibia once again took the initiative to request the assistance of President Mugabe in arranging a further summit meeting between the Presidents of Namibia and Botswana. These efforts led to a meeting of the three Presidents at Kasane, Botswana on 24

May 1992 where it was decided to submit the question to a Joint Team of Technical Experts (JTTE).

7. The Kasane Communiqué stated:

The three Presidents after a frank discussion, decided that the issue should be resolved peacefully. To this end they agreed that the boundary between Botswana and Namibia around Sedudu/Kasikili Island should be a subject of investigation by a joint team of six (6) technical experts, three from each country to determine where the boundary lies in terms of the Treaty. The team should meet within three (3) to four (4) weeks. The team shall submit its findings to the three Presidents. The Presidents agreed that the findings of [the] team of technical experts shall be final and binding on Botswana and Namibia.<sup>4</sup>

8. Terms of Reference for the JTTE were agreed between the parties on 8 December 1992. Between 28 September 1993 and 21 August 1994, the JTTE, co-chaired by Professor Ian Brownlie, CBE, QC, for Botswana, and Dr. Albert Kawana, Permanent Secretary of the Ministry of Justice, for Namibia, held six rounds of meetings in Windhoek, Gaborone, Kasane and Katima Mulilo. Oral evidence was heard at the fourth round of meetings held at Kasane and Katima Mulilo from 10 to 24 May 1994 and at the fifth round held at Katima Mulilo from 26 to 31 July 1994. Both parties accepted the JTTE's invitation to present written submissions, supplementary written submissions and other documents.

9. The JTTE failed to reach an agreed conclusion on the question put to it. Its final Report, issued on 20 August 1994, stated:

4. CONCLUSIONS

...

with regret, the Joint Team has to report to Your Excellencies that it 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.

5. RECOMMENDATION

Although the Joint team has been unable to make a finding involving the determination of the boundary between Namibia and Botswana around Kasikili/Sedudu Island, the Memorandum of Understanding empowers us to make any recommendations under Article 7(1)(i).

In this regard, the Joint Team would recommend recourse to the peaceful settlement of the dispute on the basis of the applicable rules and principles of international law.<sup>5</sup>

10. On 15 February 1995, the three Presidents met again in Harare, Zimbabwe, to consider the JTTE Report. At this meeting it was decided to submit the dispute to the International Court of Justice for a final and binding determination.

11. Pursuant to the decision taken at the Summit Meeting in Harare, Namibia and Botswana negotiated the Special Agreement submitting the dispute to the Court. The Special Agreement

was signed by the parties at Gaborone on 15 February 1996 and was notified to the Court on 17 May 1996.

12. The present Memorial is submitted pursuant to the order of the Court of 24 June 1996, fixing 28 February 1997 as the date for the submission of the first round of written pleadings.

### **B. Summary of Argument**

13. In the agreement submitting this case for decision, the parties have asked the Court 'to determine the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island.'<sup>6</sup> In Namibia's submission, the boundary is the centre of the southern channel of the Chobe River, and the legal status of the Island is that it is part of the sovereign territory of Namibia.

14. Namibia rests its case for these propositions on three separate grounds:

1. The words of the Anglo-German Treaty of 1890, properly interpreted, attribute Kasikili Island to Namibia because 'the main channel' of the Chobe River in the vicinity of the Island is the southern channel and the boundary is established by the Treaty as the centre of the main channel.

2. Moreover, 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.

3. Since, during the colonial period, both Namibia and Botswana's colonial rulers accepted that the boundary ran in the southern channel and that Namibia's predecessors in interest had the exclusive occupation and use of Kasikili Island, the Island belongs to Namibia by the operation of the doctrine of *uti possidetis*.

The factual and legal basis for these claims is discussed at length in this Memorial. The argument is summarized here by way of introduction.

### **I.**

15. The basic object and purpose of the Anglo-German Treaty of 1890 was to achieve an agreed definition of the spheres of influence of the two powers in Africa.<sup>7</sup> The Treaty was the last lap in the nineteenth century race to dismember and divide Africa among the European colonial powers. It recognized the imperial aspirations of Germany, the latecomer to this race, in East Africa, Central Africa and South West Africa, and at the same time it severely constrained German colonial expansion so that it was not a threat to British ambitions and plans. In terms of boundary delimitation, therefore, the object of the Treaty was to establish firm and stable boundaries between these spheres of influence so as to avoid conflict and friction between the two powers and, perhaps more important, between the competing citizens and business interests of the two countries.

16. The European diplomats who negotiated the Treaty were operating on a continental scale. They were not much concerned with the detailed consequences of the boundary lines they drew on their maps. The region of South West Africa that was dealt with in Article III of the Treaty was little known to them. None had personal acquaintance with the area. Exploration by Europeans began with David Livingstone's expeditions in the 1850s, and a few English hunters and explorers in the 1880s had written accounts of the area with which some of the English participants in the negotiations might have been acquainted. The most striking aspect of the eastern reaches of the Chobe River in these accounts was the annual flood of the Zambezi River which inundated the whole area to the foot of the Chobe Ridge on the south bank of the river for almost half of each year.

17. The negotiators proceeded with the assistance of a map prepared by the Intelligence Division of the British War Office (Atlas, Map II) (hereinafter the '1889 Map').<sup>8</sup> A prominent feature on this map is the line of the Chobe River, cutting sharply across it from south-west to north-east (almost due east in the vicinity of the Island). The map shows a prominent '[s]and belt with large forest coming down to water's edge' on the south bank of the River and the 'swamps' of the Zambezi floodplain to the north. (See Fig. 3, following p. 16, *infra*) Thus this conspicuous geographical feature divided two distinctive patterns of terrain and was an obvious marker for the boundary between the two spheres of influence as well. The British colonial administrators in Bechuanaland, looking to expand the Protectorate northward to protect the north-south trade routes running through Lake Ngami to Victoria Falls, had some years earlier identified the Chobe River as a convenient northern terminus for the expansion. Such an arrangement resulted in the creation of an area to be allocated to Germany between the Chobe River and the Zambezi River, which, with adjacent territory to the west, became known as the Caprivi Strip. It thus had the further advantage of satisfying the German desire for British recognition of its access to the Zambezi, which had already been affirmed by its Portuguese neighbour in Angola to the north. From all this, it appears that a boundary along the foot of the Chobe Ridge, marking the southern channel of the Chobe River, would be more consistent with the object and purpose of the treaty than a boundary along the northern channel, lying within the swampy floodplain. See Part One, Chapter III.

18. As for the preparatory work, the early drafts of the Treaty, both in French and English, specified that the boundary should follow 'the centre of the River Tschobi,'<sup>9</sup> and only in the final days of the negotiation were the words 'main channel' inserted in the English text. It does not appear from the preparatory work that the negotiators paid any particular attention to these refinements of language. In the German text, the phrase 'centre of the main channel' was translated as '*Thalweg des Hauptlaufes*' again without any particular notice by the negotiators. Although the 1889 Map was just large enough in scale to show Kasikili Island, it is clear that the negotiators had no specific purpose with regard to it. See Part One, Chapter IV.

19. Article 31(1) of the Vienna Convention on the Law of Treaties prescribes that a treaty is to be interpreted 'in accordance with the ordinary meaning to be given to . . . [its] terms in their context, and in the light of its object and purpose.' As argued above, a boundary along the Chobe Ridge, which generally marks the southern bank of the Chobe River (and the southern channel in the locality of the Island), would be more consistent with the object and purpose of the Treaty to establish a firm, stable and visible division between the two spheres of influence than a boundary along the northern channel lying within the swampy floodplain that would be difficult to ascertain and would be completely obscured during half the year.



20. The meaning of the term 'main channel' in this case is dominated by the peculiar characteristics of the Chobe River. In this connexion, Namibia earnestly directs the attention of the Court to the Expert Opinion (hereinafter the 'Alexander Report') prepared by Professor W.J.R. Alexander, formerly Chief of the Division of Hydrology and Manager of Scientific Services of the South African Department of Water Affairs and one of the leading experts in the world on the rivers of southern Africa. The Report, which appears as Volume VI of the Memorial, is an integral part of the Memorial and should be read in full to appreciate the scientific and technical foundations of this case.

21. The Alexander Report shows that Kasikili Island lies within the floodplain of the Zambezi River, which covers roughly the entire triangle bounded by lines connecting Katima Mulilo on the north, Ngoma Bridge on the south and the Mambova Rapids on the east. (See Fig. 4, following p. 17, *infra*) This whole floodplain, including Kasikili Island itself as well as the two channels of the Chobe River is under water for five months of every year on the average. Although on the 1889 Map, and indeed on the other maps to be consulted in this case, the Chobe seems to be a river like any other -- flowing into the area from the west, parting at the western end of the Island, joining again in a single stream at the eastern end, and proceeding on to its confluence with the Zambezi -- such an impression is profoundly misleading. All the maps (as well as the aerial photographs of the area) were made in the dry season, and although both channels of the Chobe appear to be full there is actually no flowing water in them at all. Only a few kilometres upstream, the Chobe at these times of year is dry, and there is no water to flow into either the northern or the southern channel. Both are substantially stagnant.

22. Water flows through this sector of the Chobe River only during the season when the Zambezi is in flood. Then it comes into the Chobe not from the upstream reaches to the west, but across the whole width of the Zambezi floodplain, a front of over 60 kilometres, until it is intercepted by the Chobe Ridge, which marks the right (south) bank of the Chobe River. When the floodwaters reach the Ridge they turn into the bed of the Chobe River, flowing through it and, in the vicinity of the Island, through the southern channel to the confluence with the Zambezi.

23. Thus, the northern channel can hardly be considered a channel of the Chobe River at all. In the dry season it is stagnant; in the flood season, it is refilled by the floodwaters of the Zambezi, but no water flows through it downstream in the Chobe in either season. As Professor Alexander says, it is, in effect, a relict channel of the Zambezi floodplain. The southern channel too is stagnant in the dry season. But during the floods, the only time of year when there is a substantial flow of water in the Chobe River, that flow is through the southern channel. It follows that, in the ordinary meaning of the term, the southern channel is the 'main channel' of the Chobe River.

24. These conclusions are fully developed and supported in the Alexander Report on the basis of the topographical, hydrological and geomorphologic characteristics of the Chobe River and analysis of ground, aerial and satellite photography. See Part One, Chapter V(B).

## **II.**

25. The Eastern Caprivi, the triangle between the Chobe and Zambezi Rivers, is inhabited by the Masubia people, consisting of some 10,000 individuals, who have lived there for well over a century. It is a riverine area, remote and inaccessible, and even today most of the population

outside Katima Mulilo and a few towns live in small villages by subsistence farming in river beds and on the islands during the dry season, moving their homes and possessions to the high ground during the annual floods.

26. Namibia produced over 60 residents of the area as witnesses before the JTTE. Their evidence is summarized in Part Two, Chapter II, of the Memorial. The evidence shows that Kasikili Island was a valued Masubia territory from before the turn of the century. Until at least the 1950s, there was a well-established Masubia village on the Island, whose members had homes, bore their children, ploughed the fields, died and were buried there. During the flood season, they would gather their possessions and move to the related village of Kasika, on high ground nearby, where they would wait for the floods to subside so that they could return to their homes on Kasikili Island. The chief of the Masubia lived on the Island at times and held his court there. By the late 1950s, encroachments of wild animals from Botswana in the area now known as the Chobe National Park across the Chobe River put an end to full-time farming, but the Island and its environs continued to be part of the daily lives of the Masubia. During all this time, the possession and use of the Island by the Masubia was exclusive. As many of the witnesses testified, nobody from Bechuanaland south of the River, either private individuals or officials, used the Island or made any claim to it. See Part Two, Chapter II(A).

27. The German government first established an administrative presence in the Eastern Caprivi in 1909. In February of that year Hauptmann Kurt Streitwolf, the first German Imperial Resident, founded the town of Schuckmannsburg on the Zambezi and set up his headquarters there. Thereafter, until the outbreak of World War I, German officials exercised authority throughout the Caprivi Strip, including Kasikili Island. Both Streitwolf and the last German Imperial Resident, Viktor von Frankenberg, included the Island by name on maps they drew of the area for which they were responsible.

28. As with many other African colonies of European empires, German authority was implemented through the mode of 'indirect rule.' That is, rather than exercising direct control through German officials, the Imperial Resident acted through the political structure and institutions of the people of the area. Thus, Streitwolf's first act was to install Chikamatondo as the Masubia chief, responsible to him for the governance of the area. Kasikili Island was clearly within Chikamatondo's jurisdiction. According to von Frankenberg's map, his headquarters was at the related village of Kasika. His *induna*, or senior councillor, Sulumbu, lived on the Island and was responsible for its administration. Indeed, for a time Kasikili Island was called Sulumbu's Island. In later years, the Masubia chief himself lived on the Island and held his court there. This method of 'indirect rule' was characteristic of British and later German colonial administrations in Africa and was continued by the governing authorities in the Caprivi after the departure of the Germans. See Part Two, Chapter III.

29. It may be helpful to the Court to summarize here the political entities that have had governing responsibility in the area at various times:

- At all material times, Britain was the power responsible for the administration of Bechuanaland.
- Until the outbreak of World War I in 1914, Germany was the power responsible for the administration of South West Africa including the Caprivi Strip.

- During the war, 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 Mandated Territory of South West Africa under a Mandate from the League of Nations. When the Mandate was terminated by the UN General Assembly on 27 October 1966, South Africa remained in *de facto* control of the territory until Namibia's independence on 21 March 1990.
- From 1 January 1921 to 29 September 1929, the Caprivi Strip was administered under the Mandate by the authorities of the Bechuanaland Protectorate, as delegate of South Africa.
- From 19 May 1967 until 21 March 1990, the United Nations Council for Namibia was the authority formally responsible for the administration of Namibia and was internationally recognized as such.
- Botswana became independent on 30 September 1966.
- Namibia became independent on 21 March 1990.

30. Throughout all these transformations, the basic arrangement for the governance of Kasikili Island as part of the Caprivi Strip continued. Even during the period of British administration in the early years of the League of Nations Mandate, a strict separation was maintained between the affairs of the Caprivi Strip and the Bechuanaland Protectorate. The British authorities did not levy taxes on the inhabitants of the Strip, although they did in Bechuanaland, and they reported on the activities of local chiefs, including Chikamatondo, to the League. When South Africa resumed administrative authority under the Mandate in 1929, there is no doubt that its writ ran on the Island. Finally, towards the end of the 1960s, when the war for Namibian independence began in earnest, the Eastern Caprivi was treated as a war zone by both sides. The South African Defence Forces (SADF) were deployed to the area and patrolled Kasikili Island, arresting Masubia men they found there as sympathizers of the South West Africa People's Organization (SWAPO). South African patrol boats plied the waters of the southern channel. See Part Two, Chapter III.

31. Throughout these many changes, the British officials just across the Chobe River in Bechuanaland, and after 1966 the Botswana authorities, were fully aware that Kasikili Island was continuously and exclusively used by the Masubia people and ruled by the authorities currently in charge of South West Africa. Yet not once, throughout the whole period of British rule in Bechuanaland, did the British authorities raise a formal or explicit challenge, protest or objection to this state of affairs. Even after Botswana's independence, almost two decades elapsed before an exchange of fire with a South African patrol boat in the southern channel finally led Botswana for the first time to challenge the existing status quo on the Island. See Part Two, Chapter IV.

32. This 'subsequent practice' of the parties extending over almost a century is described in detail in Part Two of the Memorial. It fully corroborates the interpretation of the Treaty, reached on the basis of an analysis of its terms, that the boundary runs in the southern channel so that Kasikili Island is in Namibia.

33. This same record also establishes an entirely independent Namibian claim of sovereignty over the Island. Continuous, open and notorious occupation and use of a defined territory over a long period of time, together with exercise of sovereignty in the territory and failure of the other party, having knowledge of these facts, to object, protest or assert its rights is universally recognized in international law as establishing title to the territory by prescription. Among the many apposite authorities, reference may be made to Professor Ian Brownlie, who unequivocally endorses this principle at the outset of his treatise, *African Boundaries: A Legal and Diplomatic Encyclopaedia*:

International law contains principles of recognition and acquiescence by conduct. These technical concepts reflect principles of consistency, finality and stability which find a place at once in statecraft, law and morals. If two neighbours for some years after independence treat the alignment existing at independence as their common boundary there comes a stage at which neither can be heard to say that it is not bound to recognize the alignment as definitive. The evidence of recognition and acquiescence by conduct may take the form of absence of protest or any other reservation of rights, admissions of ministers and law officers, the publication of official maps, reliance for official purposes on maps showing the alignment, and administrative practice in matters of tax collection, customs enforcement and the like.<sup>10</sup> (emphasis in original)

All these forms of conduct evidencing recognition and acquiescence are to be found in this case and are developed in Part Two of the Memorial.

34. The production and use of maps by the parties involved has assumed a special importance in adjudications concerning boundary delimitation. It is a specialized form of 'subsequent practice' and is also an aspect both of the exercise of jurisdiction and the acquiescence in it that matures into prescriptive title. The principal maps in the present case are collected in an Atlas, annexed to this Memorial. (See also Annex 102) Among the many maps included in the Atlas and discussed in the Annex, three are of dominant significance in this case, one map produced by each of the countries responsible for rule over the Caprivi. Each of them shows Kasikili Island as part of Namibia:

· Seiner's map, Karte des Gebiets zwischen Okavango und Sambesi (Caprivi-Zipfel) 1:500,000 Surveyed by Seiner 1905-1906 Berlin, E.S. Mittler & Sohn 1909. (Atlas, Map IV) This map was made by Franz Seiner, a prominent Austrian cartographer, geographer and expert on the German colonies in Africa. It was in general use as the best available map of the Caprivi for four decades. It was the principal large scale map used by German officials in Berlin and the field from its publication until the end of the period of German rule of Namibia. The British authorities used it in the period from 1921 to 1929 when they were administering the Strip as delegate of South Africa under the Mandate.

· Bechuanaland Protectorate Sheet 2 1:500,000 War Office GSGS 3915 1933. (Atlas, Map IX) This was the first British attempt to map the area accurately. It was in general use in Bechuanaland until 1965. The official maps, during the last three decades of British rule in Bechuanaland, exclude Kasikili Island from the territory of the protectorate.

· South Africa 1,250,000 Special Sheet Katima Mulilo TSO 400/558, published by South Africa in 1949. (Atlas, Map X) This is the first 'modern' map of the area, based on new air photography, accurate astronomic ground control, barometric height control, field annotation by surveyors, and a template laydown of photographs. In July 1945, preliminary sunprints were distributed to officials in all the interested countries, including Bechuanaland, for criticism, corrections and additions. Although the Bechuana respondents proposed changes in several locations close to Kasikili Island, they raised no objection to the depiction of the Island as part of Namibia.

35. Seiner's map and TSO 400/558 were drawn to the attention of the contemporary British authorities, who failed to make any objection to the boundary at Kasikili Island, although they raised questions as to other aspects of the maps. GSGS 3915 is a production of official British cartography and thus goes beyond acquiescence or acceptance of Namibian claims. It is a positive admission against interest, to which Botswana is necessarily held.

36. The position is then that during the colonial period all but one of the significant maps of the area, that depict the boundary, of whatever provenance, show it in the southern channel. The one exception, Bechuanaland 1:500,000 DOS 1965 DOS847(Z462) Sheet 2 Edition 1, was the last British map of the Protectorate. Its representation of the boundary in what seems to be the northern channel can be shown to be a cartographic error resulting from a misreading of the aerial photographs on which it was based.

37. Thereafter, in 1985, the United Nations, in its role as custodian of Namibian sovereignty in the period before independence, published a large format map pursuant to a UN General Assembly resolution.<sup>11</sup> (Atlas, Map XV) The territory of Namibia is shown on this map by hypsometric tinting that clearly covers Kasikili Island. Botswana was a member of the UN Council for Namibia, under whose auspices the map was published, but made no objection. See Part Two, Chapter V.

38. The foregoing factual record, which is elaborated in Part Two of the Memorial, amply fulfils the requirements under international law for acquisition of title to territory by prescription.

39. In the case of states emerging from colonial rule, the principle of *uti possidetis* confirms the territorial position existing at the time of independence. Since the judgement of the Chamber of the Court in the *Frontier Dispute* case, the principle has been recognized as a general principle of international law, but, as the Chamber recognized, it is a principle with 'exceptional importance for the African continent.'<sup>12</sup> It is embodied most particularly in the 1964 Cairo Declaration of the heads of state of the Organization of African Unity in which all member states 'solemnly . . . pledge themselves to respect the frontiers existing on their achievement of national independence.'<sup>13</sup>

40. The Chamber succinctly defined the content of the doctrine:

By becoming independent a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. . . . It applies to the state as it is, i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title. . . .<sup>14</sup> (emphasis in original)

41. Botswana became independent on 30 September 1966. A photograph of the territorial situation on that date would show that Kasikili Island was occupied and used by the Masubia of the Caprivi and was being administered by South Africa as the mandatory power, as it had been for almost half a century, with the full knowledge and acquiescence of the British authorities in London and Bechuanaland. It is that territorial title which is frozen by the principle of *uti possidetis*.

### **III.**

42. The remainder of the Memorial is organized in an effort to assist the Court in considering Namibia's separate titles to sovereignty over Kasikili Island -- as a matter of treaty interpretation and as a matter of prescription and the operation of the principle of *uti possidetis*:

Part One deals with the interpretation of the Anglo-German Agreement of 1890 in the light of its object and purpose, its preparatory work and the scientific context in which the terms of the Treaty must be analyzed.

Part Two presents the subsequent conduct of the parties and their successors in interest, both on the ground in the Eastern Caprivi and as embodied in the diplomatic, official and cartographic activities relating to the area. It also explains the legal relevance of this conduct to the interpretation of the Treaty, the operation of the doctrine of prescription and the principle of *uti possidetis*.

#### **Part One**

#### **The Interpretation of the ANGLO-GERMAN Treaty of 1890**

### **INTRODUCTION**

#### **A. The Issue before the Court**

43. The first ground on which Namibia contends that Kasikili Island belongs to it rests on the terms of the 1890 Anglo-German Treaty. The relevant words of the Treaty are those appearing in Article III(2) which describe the course of the boundary in the Chobe River:

[T]he . . . line . . . runs eastward along that parallel [the 18° parallel of south latitude] 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.<sup>15</sup>

44. Article III(2) also states, '[t]he course of the above boundary is traced in general accordance with a Map officially prepared for the British Government in 1889.' The map referred to appears as Atlas, Map II and an extract is at Fig. 3, following p. 16, *infra*.

45. Kasikili is a small island in the Chobe River about 15 kilometres (nine miles) west of its confluence with the Zambezi. The broader area involved -- the floodplain of the Zambezi -- is shown in Fig. 4, following p. 17, *infra*. Its general shape and position is shown in Fig. 5, following p. 18, *infra*.

46. The principal question for the Court is whether the northern channel, running north and west of Kasikili Island, or the southern channel, running to the south and east of the Island, is the 'main channel' of the Chobe River. If the main channel runs south of Kasikili Island, then, in terms of the 1890 Treaty alone, that island belongs to Namibia.

47. Namibia submits that the southern channel is the main channel and, therefore, that Kasikili Island belongs to Namibia.

48. The following are the principal grounds for this position:

- The 1890 Treaty, properly interpreted in the light of the language, the state of knowledge to be imputed to the negotiators, the object and purpose of the agreement, and the course of the negotiations leads to the conclusion that the intention of the Parties was to select the southern channel as the main channel.
- Scientific analysis of the topography, hydrology and geomorphology of the Chobe River and the surrounding area demonstrates that the southern channel is the main channel.

### **B. The Relevant Rules of Treaty Interpretation**

49. The starting point in the process of treaty interpretation must be Articles 31 and 32 of the Vienna Convention on the Law of Treaty which the Court has accepted repeatedly as an expression of the customary international law on the subject.<sup>16</sup>

50. Article 31(1) provides:

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.

In addition, Article 31(3) prescribes that:

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;
- (c) any relevant rules of international law applicable in the relations between the parties.

Article 31(4) adds that:

A special meaning shall be given to a term if it is established that the parties so intended.

51. In addition, Article 32 permits recourse to 'the preparatory work of the treaty and the circumstances of its conclusion' as a supplementary means of interpretation

in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

52. Namibia believes that the Court will be best assisted in performing its task in the present case if the principal points are presented in the following order:

- i. The geography of the disputed section of the boundary (Chapter I);
- ii. The background to the 1890 Treaty: contemporary knowledge of the area (Chapter II);
- iii. The object and purpose of the 1890 Treaty (Chapter III);
- iv. The preparatory work of the 1890 Treaty and the circumstances of its conclusion (Chapter IV);
- v. The words of the 1890 Treaty -- the relevant legal considerations and the scientific evidence (Chapter V).

## **CHAPTER I**

### **THE GEOGRAPHY OF THE DISPUTED SECTION OF THE BOUNDARY**

53. The element of the boundary between Namibia and Botswana of importance in this case is the Chobe River. For the assistance of the Court in identifying the places referred to, Namibia has prepared the foldout map at Fig. 6, following p. 19, *infra*. The pertinent section of that river lies around an island called at various times Sulumbu's Island, Kassikiri Island, Sedudu Island and, by Namibians for most of this century, Kasikili Island. The Island lies in the Chobe River which, having in that location an approximately west-east alignment, divides at the west end of the Island into a northern and southern channel that rejoin at the eastern end.

54. The Chobe is an unusual river hydrologically, not only in the sector involved in the present case, but also over much of its length. This unusual quality has a direct bearing on the identification of its main channel in the vicinity of Kasikili Island.

55. In approaching the question before it, the Court is invited to shed any preconceptions which it may have about rivers in general. When picturing a river, it may have in mind rivers in Europe such as the Rhine, the Seine, the Thames, the Volga and the Danube; in the Americas, the St. Lawrence, the Mississippi, the Amazon and the Plate; in Asia, the Indus, the Yangtze and the Mekong; and in Africa, the Congo, the Niger and the Nile. All of these rivers possess the attributes commonly associated with rivers in popular understanding: they have identifiable sources; they run continuously downstream in an established course between two readily discernible banks; and they carry a significant volume of water all year round. They are, in the technical language of hydrology, perennial rivers.



56. The Chobe is a river of an entirely different kind. Though it is identified as a geographical feature marked on a map, it is in a sense only a quasi-river. It is not a single continuous watercourse steadily carrying water in a downstream direction from its own watershed to its mouth or to its junction with another river. It is, instead, part of a complex river system closely associated with the Zambezi River lying to its north. The Chobe is not a perennial river, but rather an ephemeral one. It carries a significant flow of water only when the Zambezi River is in flood, from about December to July of each year. At other times, the water in the lower reaches of the river is stagnant and does not flow 'downstream' to the Zambezi.

57. What follows is a description of the river in layman's language. It is based on the extensive scientific analysis of Professor W.J.R. Alexander, formerly Chief of the Division of Hydrology and Manager of Scientific Services of the South African Department of Water Affairs and more recently Professor in the Department of Civil Engineering of the University of Pretoria. He is also the author of two major books pertinent to matters involved in this case, *Southern African Flood Hydrology* (1990) and *Flood Risk Reduction Measures* (1993), as well as a number of articles in South African and international scientific journals. Thus he has a lifelong experience of scientific work on the rivers of southern Africa. His Report, along with its Appendix containing maps, photographs, aerial photography and satellite images, is to be deemed an integral part of this Memorial and is annexed as Vol. VI of this Memorial under the title *Identification of the Main Channel of the Chobe River at Kasikili Island*.

58. The Chobe has many different names at various stages along its course. Its source is in the central plateau of Angola where it is called the Rio Cuando. When it crosses the frontier into the Caprivi Strip it becomes the Kwando and then the Mashi, which flows generally in a southerly direction into the Linyandi Swamp. There it comes up against the Linyandi Ridge, which cuts across the southerly course of the river from south-west to north-east and forces the river to make a sharp left turn into a north-easterly course. At this point it is called the Linyandi River until it flows into Liambezi Lake. At the exit from the lake, the river, which from this point on is called the Chobe River on modern maps, begins, first flowing south-east, as determined by the south-easterly tilt of the land, until it strikes the Chobe Ridge, a sharply marked escarpment extending in a south-west-to-north-east direction. At those times when there is water in this part of the river, the Ridge forces it to make a right angle turn in a north-easterly direction.

59. In fact, however, most of the time when the Chobe reaches this turning point there is no more water in it. During its long course from Angola through the swamps along the Mashi and Linyandi Rivers, the flow originating upstream of the Eastern Caprivi is progressively reduced by evaporation loss so that, in the lower reaches of the Linyandi, the river ceases to flow and dries up for long periods, leaving only isolated pools of water which are sustained by local rainfall. (See Alexander Report, para. 5.8) Lake Liambezi, likewise, is dry much of the time, often for many years at a stretch. It is known to have been dry in the 1940s and again since 1986, except for a short period in 1989. Only in periods of very high river flow in the Cuando does enough water reach the lake to fill it and exit through the gap at its eastern edge into the Chobe. Thus, the waters in the Chobe, which appears on the map to be the nominal continuation of the Linyandi River, are hardly ever waters of the Linyandi River at all.

60. Where do the waters of the Chobe come from then, if not from the upstream portions of the river? There are three sources, none of them connected to the Linyandi River. The first is the flood waters of the Zambezi, one of the major rivers in Africa. During the flood season,

water spills over the banks of the Zambezi onto its floodplain lying mainly to the south of the river in the triangular area between the Zambezi and the Chobe Rivers. Most of this water runs off along the south-eastward tilting surface until its flow is blocked by the Chobe Ridge, the escarpment on the south bank of the Chobe River extending south-west/north-east. This escarpment, which runs in parallel with the southern bank of the southern channel of the Chobe in the sector around the Island, thus firmly marks the line of the Chobe in the entire area involved in this case.

61. One consequence of the annual rise in the waters of the Chobe in the Zambezi floodplain is that Kasikili Island itself is inundated for some five months in each year. At such times, the waters spread in an unbroken sheet from the visible right bank of the river, which is fixed against the Chobe Ridge just to the south, northward over Kasikili Island and over the northern channel. At such times it is impossible to discern either the north bank of the southern channel or either bank of the northern channel.<sup>17</sup>

62. The second source of the waters in the Chobe is also the Zambezi, but by a different route. A short distance above the confluence of the Zambezi and the Chobe lie the Mambova Rapids.<sup>18</sup> The rapids operate, in effect, like a weir. In times of flood they restrict the flow of the Zambezi River and force the water back up the Chobe.<sup>19</sup> Thus, during the first part of the flood season, water actually moves from the Zambezi into and up the Chobe from the Mambova Rapids. This occurs in the months from January to March. During that period, the movement of the waters of the Chobe is upstream, i.e., the reverse of what would normally be expected. As the floods begin to subside, this flow reverses, and from April to July the waters flow in the normal direction downstream to its confluence with the Zambezi.

63. The third source of the waters of the Chobe River in this sector is the runoff from the Chobe Ridge -- the escarpment immediately contiguous to the south bank of the river -- during the rainy season.

64. Thus, the waters of the Chobe River for the most part do not come from its sources to the north-west, but from the Zambezi, either across the floodplain or upstream from the Mambova Rapids with the remainder comprising runoff from the Chobe Ridge. In the sector below Ngoma Bridge and above Kazungula, the Chobe is not a river in the standard sense of the word but rather a watercourse which for parts of each year carries the flood waters of the Zambezi floodplain back to the Zambezi River just above Kazungula.

65. By August, however, the levels of water in the Chobe River fall below the height of the rapids at Mambova. From August until December, the water in the two channels in the region around the Island is stagnant. Upstream from Serondella, about 13 kilometres (eight miles) west of the Island, the river is substantially dry during this period.

66. It is of cardinal importance in understanding the issues in this case for the Court to keep in mind that all of the maps and photographs depicting this Island (except for some of the satellite images in the Alexander Report) were made during the dry season when there is no water flowing through the river. The visual images that appear in these representations as the seemingly clearly defined northern and southern channels around the Island are no more than stagnant pools of water caught behind the Mambova Rapids after the annual flood subsides.

## CHAPTER II

### THE BACKGROUND OF THE 1890 TREATY: CONTEMPORARY KNOWLEDGE OF THE AREA

67. It may be helpful to the Court if Namibia now examines the state of contemporary knowledge of the region prevailing when the 1890 Treaty was under negotiation. As will be appreciated, in light of the difficulties of movement in such an area as well as the limitations on the technology of observation in 1890, descriptions of the region were not always fully accurate or consistent with one another. In the late nineteenth century, the prevailing opinion was that the region was unexplored by Europeans. The English explorers, Aurel Schulz and August Hammar, wrote in 1897 of their trip of 1884, 'We were the first Whites to traverse this partly unknown country . . .'<sup>20</sup> However, beginning in the 1850s, several European explorers and hunters began travelling to and offering descriptions of the Chobe River, thus filling in a general picture of the character of the Chobe in the area of the dispute, particularly with regard to the impact upon the river of the Zambezi's seasonal flooding and its consequential effects upon the identification of the Chobe's southern bank and of the channels forming the river.<sup>21</sup>

68. The most famous of the Victorian travellers in the region was Dr. David Livingstone, who is reputed to have been the first non-African to see the Victoria Falls. His books on his African travels were widely read by Victorians. His *Missionary Travels and Researches in South Africa* was accompanied by a map showing the general length and direction of the Chobe.<sup>22</sup> Extracts from the book are provided as Annex 129 to this Memorial, but the quotation of a few sentences will serve to show that the Chobe was seen even then as an unusual river:

*11th of November, 1853.*<sup>23</sup> -- Left the town of Linyanti . . . to embark on the Chobe . . . We crossed five branches of the Chobe before reaching the main stream; this ramification must be the reason why it appeared so small to Mr. Oswell and myself in 1851. When all the departing branches re-enter, it is a large deep river. . . .<sup>24</sup>

. . .

The course of the river we found to be extremely tortuous, -- so much so, indeed, as to carry us to all points of the compass every dozen miles. Some of us walked from a bend at the village of Moremi to another nearly due east of that point, in six hours, while the canoes, going at more than double our speed, took twelve to accomplish the voyage between the same two places. And though the river is from thirteen to fifteen feet in depth at its lowest ebb, and broad enough to allow a steamer to ply upon it, the suddenness of the bendings would prevent navigation; but, should the country ever become civilised, the Chobe would be a convenient natural canal. We spent forty-two and a half hours, paddling at the rate of five miles an hour, in coming from Linyanti to the confluence. . . .<sup>25</sup>

69. A description of the Chobe is also to be found in F.C. Selous's work, *A Hunter's Wanderings in Africa*, published in 1895:

The next day (Sunday), we continued our journey westwards along the southern bank of the Chobe, which here runs nearly due east. As we had been informed, we found that a dense continuous jungle, interspersed with large forest trees, came down in most parts almost to the

water. This jungle-covered land rises in some places abruptly, in others in a gentle slope, leaving along the shore a margin of open ground (from ten to a hundred yards broad), covered with short grass, and formed, no doubt, of alluvial deposit. On the other side of the river, as far as the eye can reach, stretches a wide expanse of flat, marshy country, intersected by numerous deep, well-defined streams, that here form a sort of network between the Chobe and the Zambesi.<sup>26</sup>

...

Where the main channel of the Chobe was, I did not know; as far as we could see to the north and the west, the whole country was a sheet of water, interspersed with islands, and intersected here and there by deep streams.<sup>27</sup>

70. Selous was travelling in July-August 1874 along the southern bank of the river, shortly after the high flood season. He remarked on the rise of the escarpment on that 'shore' and the wide expanse of marshy land stretching as far as the eye could see to the north and west. None of the many streams that traversed the marsh appeared to him to be the main channel.

71. The most focused early description of the Chobe in the immediate vicinity of Kasikili Island appears in a short article by Dr. Benjamin F. Bradshaw, presented at the Royal Geographical Society and published in 1881 in the *Proceedings of the Royal Geographical Society*, entitled 'Notes on the Chobe River, South Central Africa.'<sup>28</sup> Dr. Bradshaw's article was accompanied by a map (Atlas, Map I/2 and Fig. 7, following p. 27, *infra*)<sup>29</sup> that is of importance because of the unique detail in which it shows the stretch of the Chobe relevant to the present case. Bradshaw's map was used by German cartographers for the next 30 years and by the British for even longer. The depiction of Kasikili Island on the 1889 Map is taken directly from Bradshaw's map, although much reduced in scale.<sup>30</sup>

72. The passages in this article to which the attention of the Court is particularly directed are the following:

The course of the river, so far as I have shown, is as nearly as possible east and west; at the mouth, the river appears to be about 200 yards wide, and there is no perceptible current. On the south side the bank is about 12 feet high; for a mile and a half the opposite bank is clothed thickly with reeds, and hippopotami are often to be seen in the water.

The soil is more or less sandy, and a short distance from the bank on the south side you get a low ridge of heavy sand, as seen in the map, and coloured yellow. The grass is there very coarse and long. The shallow pan which I have marked, varies much in extent, being often quite dry in October and November; a large sheet of water is formed by the annual inundation, about a mile square.

The river is bounded on the southern side by a high sandy ridge, clothed with forest, more or less thick; the ridge in some parts recedes a mile or more from the edge of the water, but in other parts it comes quite up to it.<sup>31</sup>

73. Having written of the island of Impalera [sic], which is about six kilometres (four miles) downstream from Kasikili Island, Dr. Bradshaw, going upriver, continued with the following description of the sector of the river in the region of Kasikili Island:

The country for about four miles along the river is very rocky, the sandy ridge gradually approaching the banks; it is covered with thick forest, tangled vines, scrubby bush, and long grass, and becomes the feeding-ground of numerous hippopotami at night. Under the ridge is to be seen one portion of the river coming from the north and another from the west; which latter evidently leaves the northern channel, forming an island as shown in the map. This island, as well as all the northern side of the river, as far as the rapids, is under water during the annual inundation. At that time the rivers Zambesi and Chobe are one, the whole country being one vast lake as far as the eye can reach, with here and there a tree or small island appearing above the waste of water; on the south side, the water at the same period comes up to the edge of the forest growing on the sandy ridge (marked yellow in the map). Opposite the marshes is a valley which, winding very much, extends for seven or eight miles in a southerly direction; it is covered with large kameel-thorn trees, and grass from four to eight feet in height.<sup>32</sup>

...

The river rises annually from 15 to 18 feet; commencing in January it is at its full height in March, and falls until January again; it is never turbid; it fills very gradually at first, but the decline is rapid, and goes on more slowly during the winter months. . . .<sup>33</sup>

74. The Court will note that Bradshaw's description corresponds closely to that given in Chapter I, *supra*, and the Alexander Report. Again, the prominent features are the ridge on the south bank and the striking character of the annual flood when 'the rivers Zambesi and Chobe are one, the whole country being one vast lake as far as the eye can reach,' with the southern bank of the river defined by 'the sandy ridge.'<sup>34</sup> Dr. Bradshaw specifically remarked that during the high water season the left bank of the river and the Island are completely inundated.

75. Bradshaw's map is printed in three strips on a single sheet. (Atlas, Map I/2) We are concerned only with the top strip which shows the easternmost (downstream) end of the map. (See Fig. 7, following p. 17, *infra*)

76. The features of the Bradshaw map which call for special notice are the following:

- The map clearly shows an island in the river at the left-hand end of the top strip. This is evidently Kasikili Island. Dr. Bradshaw describes '[t]he country for about four miles along the river' upstream from Impalera.<sup>35</sup> The distance as shown on his map from the western end of Impalera Island to the island at the left hand end of the top strip that has the approximate shape and dimensions of Kasikili Island is just over 6.5 kilometres (four miles). Moreover, Dr. Bradshaw indicates the existence of a north-south valley on the south side of the river just opposite the end of the island. This corresponds exactly with the location on modern maps of the Sedudu Valley through which a stream called the Sedudu flows into the Chobe from the south.<sup>36</sup> (See Atlas, Map XIV or Fig. 4, following p. 17, *supra*)
- The map distinctly shows the northern and southern channels of the Chobe to the north and south of Kasikili Island. Indeed, Dr. Bradshaw expressly mentions that 'there is to be seen one portion of the river coming from the north and another from the west.'<sup>37</sup> The one coming from the west, the

southern channel, is fully drawn, but Dr. Bradshaw indicates, by the lack of colouring in most of the northern channel and by the pecked lines by which he marks it, that he did not traverse the length of the northern channel. He states near the beginning of his article, 'The portions of the river not coloured I have not visited, but I think the supposed course marked to be about the correct one.'<sup>38</sup>

- In the box at the bottom left-hand corner of the map, the description of the symbols used includes symbols for reeds and bushes 'along River-Banks.' The southern channel is clearly marked in this way.

- The area south of the river in the vicinity of Kasikili Island is covered by the legend '[s]and Ridge covered with bush extending many miles to the South.' This is a layman's description of the escarpment described above, against which the flood waters of the Zambezi strike and by which they are channelled into the Chobe. This comment is similar to the legend which appears south of the river on the 1889 Map (Atlas, Map II)<sup>39</sup> -- 'Sand belt with large forest coming down to water's edge' -- and must, therefore, particularly be deemed to have been in the minds of the negotiators who worked from that map.

- In contrast with the sandy ridge or escarpment south of the river, the map shows the areas of grassy flats, marshes and swamps lying along the northern side of the river in time of inundation, especially north of Kasikili Island. In those times, the northern bank of the southern channel would be covered by water as would be both banks of the northern channel. But the southern limit of the southern channel would be visible, whilst every feature of the northern channel would be obscured.

77. German travellers and explorers did not reach the area until the first decade of the present century, after the Treaty had been concluded. Their reports, however, closely echoed those of their English predecessors. Rothe, for example, remarked on the prominence of the ridge on south bank, looking upstream from Kazungula:

[I]mmediately beyond the rapids the rivers are swampy, and the land, especially within German territory, has an alluvial character and is very fertile, one could call it the Zambesi-Delta, according to its similar character to the mouth of the Nile.<sup>40</sup>

On 27 January 1909 Streitwolf travelled along the Chobe River and must have passed Kasikili Island. Particularly interesting are his frequent references to the high southern bank of the Chobe:

[T]he walls of reeds lining the river seldom permitted a glance over the flat, monotonous landscape. Only where the river flowed close to the cliff-edge of Bechuanaland was the scenery more varied. . . . it continued the next morning . . . a river, which except for the occasional small rocky spot was consistently 2 to 3 metres deep, continually broadened, where the German bank began to be forested, and it was idyllically beautiful to float on the water's smooth surface, which was surrounded on both sides by high forest, out of which often a delicate palm tree thrust upward. . . . Towards nine o'clock we arrived at the rapids. Here I had to disembark while the natives brought the canoe about 500 metres through the rapids, a task which took around one hour. I . . . had time to rejoice over the magnificent

landscape. A rocky crag extends from the high cliff-edge of Bechuanaland down and into the river, which pours through a tumble of stones and forms numerous forested islands. At two places the river drops around 1 metre, while the entire drop amounts to about 3 metres. On the southern bank, the rocks partly rise out of the water and the whole picture is framed beautifully by the forest vegetation. . . . Below the rapids the river broadens to approximately 250 metres. Both banks were covered with beautiful forest, the English bank towering over the German.<sup>41</sup>

78. Although it cannot be said that the persons who negotiated the treaty had specific knowledge of these reports and the geographical characteristics they disclose, the English representatives, at least, were very familiar with African affairs and followed developments closely. It is not unlikely that they had become aware of the general import of these explorers' reports by the time the negotiations began. For the German negotiators, however, the situation was different. It was generally acknowledged that they had little knowledge of the area.<sup>42</sup> Alfred Zimmerman, author of various works on German colonial policy, wrote that the German negotiators in 1890 had not consulted geographers in connexion with the delineation of the boundary, but relied completely on imprecise and insufficient English maps.<sup>43</sup>

### **CHAPTER III**

#### **THE OBJECT AND PURPOSE OF THE 1890 TREATY**

79. Namibia will begin the process of treaty interpretation by examining first the object and purpose of the 1890 Treaty, as is prescribed by Article 31 of the Vienna Convention on the Law of Treaties.

80. The 1890 Treaty had a wide objective -- to settle the boundaries of the British and German spheres of influence in Africa. To that end, it established limits to the claims of the parties not only in the region involved in this case, but also in West Africa and in East Africa. In addition, Germany recognized a British protectorate over Zanzibar and territorial dispositions in East Africa largely favourable to Great Britain. The Treaty was, in short, the last act of the 'scramble for Africa' among the European powers in the nineteenth century. Of principal importance to Germany was the one major non-African element in the Treaty -- the British cession to Germany of the island of Heligoland.<sup>44</sup>

81. The objective of the delimitation articles was expressly stated by Sir Percy Anderson, the British negotiator, in a memorandum to the British Ambassador in Berlin two days before the final signing of the Treaty:

In the delimitation Articles our object has been so to define the spheres [of influence] as to endeavour to avert the danger of the revival of 'hinterland' disputes. The immense area reserved to British influence in East Africa is, from its extensive coast-line with its valuable harbours to the western watershed of the Upper Nile, made conterminous with specified territories; no gap is left in the boundaries. The German sphere is equally protected.<sup>45</sup>

82. Sir Percy's comment is equally pertinent to South West Africa, where the negotiators addressed the determination of the boundary between, on the one side, western and northern Bechuanaland and, on the other, German South West Africa. The object was to establish firm

and stable boundaries between the spheres of influence of the two powers so as to avert further friction between them.

83. Neither British nor German policy objectives were affected by the question of whether the boundary would follow the northern or the southern channel of the Chobe around Kasikili Island. So broad were the macro-objectives for the two parties that they can impact on that micro-question in only the most general respects. The negotiators were not concerned with the allocation of small areas, but with a comprehensive 'African transaction.' At the large scale on which they were thinking, the important objective was the identification of a recognizable boundary. This was achieved by the selection where possible of a geographical line that appeared clearly on the available relatively small-scale maps, in the present case, the line of the Chobe.<sup>46</sup> Their common interest was in the stability and certainty of the boundary. In principle, the parties must have wished to agree upon a fixed and readily identifiable boundary, rather than one that for about five months of the year would be invisible or obscure. For this reason, the selection of the line of the northern channel rather than the line of the southern channel would have been inconsistent with the basic object and purpose of the Treaty.

## **CHAPTER IV**

### **THE PREPARATORY WORK OF THE 1890 TREATY AND THE CIRCUMSTANCES OF ITS CONCLUSION**

#### **A. In General**

84. The Treaty was not an agreement negotiated locally on the basis of a visual inspection of the prospective boundary. After a period of discussion beginning in 1886, the Treaty was drafted in the course of intense negotiations in Berlin and London over a relatively short time from the beginning of March through the end of June 1890. The draughtsmen had no first hand acquaintance with the physical features of the area, although they may have had some general familiarity with the works of the explorers and travellers. They worked with the help of the 1889 Map. (Atlas, Map II)<sup>47</sup>

85. The principals on each side were among the greatest of nineteenth century statesmen: Otto von Bismarck for the Germans (although he resigned as Chancellor in March 1890 -- only months before the conclusion of the negotiations -- and was replaced by Baron George von Caprivi) and the Marquis of Salisbury, Prime Minister and Foreign Secretary of Great Britain. Sir Edward Malet was the British Ambassador in Berlin, and Count Hatzfeldt represented Germany in London. The chief negotiator on the British side was Sir Percy Anderson, a highly regarded associate of Salisbury's, who had been responsible for Britain's African colonial policy as head of the African Department in the Foreign Office since its creation in 1883. As such he was intimately acquainted with African affairs and developments and must have been aware of some of the explorers' accounts then being published. It is said that he was 'the man who, for the next decade, would do more than anyone else to see that Britain got her rightful share in the Scramble for Africa.'<sup>48</sup> His German counterpart was Dr. Friedrich Richard Krauel, *Geheimer Legationsrath* in the Foreign Office and Director of the Colonial Department during the main period of the negotiations.



## **B. The Decision on the Line of the Chobe River**

86. In south-west Africa the problem of delimitation was much easier than in other areas, for here the interests of the parties could be more readily accommodated, given the vast territory available. Moreover, the existing commitments on both sides were still modest. The area in contention was 'Ngamiland,' lying north of British Bechuanaland, a territory assigned to neither Power and extending from the 20th to the 24th degree of east longitude. (See Atlas, Maps II, III)<sup>49</sup>

87. The borders of Britain's Bechuanaland Protectorate were the 22nd parallel on the north and the 20th meridian on the west. Beyond the 22nd parallel, the territory was regarded as 'barren, unhealthy, and unfit for European settlement.'<sup>50</sup> Nevertheless, as early as 1886, there were proposals for a northward extension of the Protectorate to the Zambezi to protect the main trade routes from South Africa to the centre of the continent from encroachment by the Germans and the Portuguese. These routes ran through Lake Ngami, some 350 kilometres (220 miles) to the south and west of Kasikili Island to Victoria Falls. German entrepreneurs and colonists were already active in the area, seeking to buy land and establish relationships with local chiefs in the Lake Ngami area.<sup>51</sup>

88. Germany, for its part, had already concluded an agreement with Portugal that the boundary between them would be along the line from Andara to Katima Mulilo on the Zambezi, thus providing it with access to that river.<sup>52</sup> Germany, therefore, had a special interest in obtaining British recognition that the German sphere of influence in South West Africa extended as far east as the Zambezi.

89. Thus the main objectives of the two parties were well defined long in advance of the negotiations: for the British, control of Lake Ngami<sup>53</sup>; for the Germans, recognition of a German sphere of influence extending eastward to the Zambezi. These issues had been under discussion between Britain and Germany since 1886, and they dominated the development of the British position on the border between the two spheres of influence in the area of our concern.

90. The division ultimately embodied in Article III(2) of the Treaty was foreshadowed in a memorandum of 23 May 1886 by Sir Hercules Robinson, then High Commissioner of the Bechuanaland Protectorate, on '[T]he Proposed Extension of the Bechuanaland Protectorate to the Northwards, as far as the Zambesi River.'<sup>54</sup> After rehearsing the need to protect the trade routes and recounting the ominous advances of the Germans in Ngamiland, Sir Hercules put forward his proposed solution:

That the Bechuanaland Protectorate be extended to the Zambesi River. The extension might be bounded on the west by a continuation of the present western boundary (namely, the 20° of E. long.,) until it intersects the 18° of S. lat.; on the north by the 18° of S. lat. until it reaches the Chobe River; thence down the centre of that river till it reaches the Zambesi River; thence down the centre of that river, past the Victoria Falls. . . . <sup>55</sup>

91. It will be seen that this proposal secured the main British objective, Lake Ngami, while incidentally confirming a German sphere of influence to the north that would stretch east to the Zambezi -- the area that came to be known as the Caprivi Strip. With the one exception that the north-south boundary ultimately agreed upon was the 21st rather than the 20th

meridian, Sir Hercules's proposal completely embodied the formula adopted by the negotiators in Berlin four years later.

92. When the negotiations resumed in earnest in the spring of 1890, Sir Percy Anderson set out for the Foreign Secretary a list of 13 points in dispute with Germany over the entire range to be covered by the Treaty, one of which was 'Lake Ngami.'<sup>56</sup> He described the district on the basis of information gathered 'from what trustworthy sources are available' as being roughly bounded by the 24th degree of longitude to the east, the 20th to the west and to the south by the 22nd degree of south latitude. 'The large affluent of the Zambesi, the Chobe, borders on the north [of] the territory, which appears to be swampy and unhealthy.'<sup>57</sup> This suggests that by this time the Chobe River was firmly linked to the Lake Ngami issue, as the likely northern border of the Ngamiland area to be allotted to Great Britain with the 'swampy and unhealthy' area to the north of it consigned to Germany. But the Chobe itself does not seem to have been of much concern to either party, except as a convenient natural feature to mark the boundary.

93. Just over a month later, on 30 April 1890, Sir Percy addressed another memorandum to Lord Salisbury (referring to the earlier memorandum) for the purpose evidently of recording Sir Percy's understanding of the ways in which the points in dispute were to be discussed. With regard to point ten, 'Lake Ngami,' he wrote that this would be dealt with by

extending the German line roughly from the 20th to the 22nd degree of east longitude and running it up to the Chobe River, down which the Germans should have access to the Zambesi.<sup>58</sup>

Lord Salisbury responded, 'Yes, this is all right.'<sup>59</sup>

94. On 15 May 1890, Anderson reported:

As regards Lake Ngami, I anticipate little difficulty. He [Dr. Krauel] has assured me that he personally is prepared to accept the line suggested by the High Commissioner, which runs along the 20th parallel of south latitude to the 22nd degree of east longitude, which it follows to the 18th degree of south latitude, whence it runs eastward to the Choke River, which it follows to its junction with the Zambesi.<sup>60</sup>

95. At length, on 5 June 1890, the German Ambassador in London, Count Hatzfeldt, presented to the British Foreign Office a project of understanding, which, under the item 'Ngami' stated '*L'Allemagne y renounce en supplant la frontière propose par Sir Percy Anderson. . .*'<sup>61</sup> Anderson reported that Count Hatzfeldt having 'discussed with me to-day all the minor African questions . . . was satisfied as regards -- 1. Lake Ngami. . . '<sup>62</sup>

96. The state of the geographic knowledge of the negotiators is illustrated by the exchange on this point between Anderson and Krauel:

He [Dr. Krauel] considers his acceptance will be a concession for which he should receive credit in a general bargain, as, according to most maps, it will leave Lake Ngami in the British sphere; but I have pointed out to him that, as one map places the lake on the 22nd degree of longitude, it is uncertain whether the line does not practically give to the Germans access to its waters.<sup>63</sup>

Lord Salisbury thought it might even be west of the 22nd, and at some point before 21 June, the eastern border of the British sphere, which had been put at the 22nd meridian in Anderson's 15 May discussions, was shifted one degree west to the 21st, in response to these concerns.<sup>64</sup>

97. To eliminate any doubt, the final version of Article III(2) of the Treaty expressly stipulated that the British sphere 'includes Lake Ngami.'

### **C. The Creation of the Caprivi Strip**

98. As noted above, recognition of German access to the Zambezi was implicit in the British proposal for a boundary between the two spheres of influence along the 18th parallel and the Chobe. As with Lake Ngami, however, the negotiators were conscious of the uncertainty of their geographical knowledge of the area. The 18th parallel was thought to be considerably south of Andara, the western terminus of the Katima Mulilo-Andara segment of the border agreed between Germany and Portugal. But it might have been further north, reducing the German access to the Zambezi secured by that agreement to the vanishing point. Thus, ten days before the end of the negotiations, the German negotiators asked for a clause specifying guaranteed access to the Zambezi for Germany through a corridor of no less than 32 kilometres (20 miles) in width.<sup>65</sup> This clause parallels the one securing British jurisdiction over Lake Ngami. It is no surprise that each side made sure its principal objective in the area was protected no matter how the geography on the ground would turn out.<sup>66</sup>

99. The *quid pro quo* for Lake Ngami was not the Caprivi Strip, but concessions to Germany in north-west Africa in return for assured jurisdiction over the lake.<sup>67</sup> The truth is that the British had little interest in the country north of the Chobe River. As already noted, Sir Hercules Robinson thought it 'barren, unhealthy and unsafe for European settlement,'<sup>68</sup> while Sir Percy Anderson said it was 'swampy and unhealthy.'<sup>69</sup> Lord Salisbury himself, in a speech in the House of Lords explicating the Treaty, described it as

at the head of the waters of all the affluents of the Chobe and the Zambesi, over an impracticable country, and leading only into the Portuguese possessions, into which, as far as I know, during the last 300 years there has been no very eager or impetuous torrent of trade.<sup>70</sup>

100. It was no doubt assumed in some German quarters that access to the Zambezi River would in some way enable Germany to navigate by river steamer to its East African colonies on the Indian Ocean.<sup>71</sup> This is understandable given the entrepreneurial interests of the colonists and the limitations of contemporary geographical knowledge. Some of the early English explorers entertained the same idea.<sup>72</sup> But the Germans made no particular point of this in the negotiations. And the sophisticated officials representing the parties surely knew that the presence of the Victoria Falls on the Zambezi, some 50 kilometres (31 miles) to the east of the confluence with the Chobe, clearly excluded the possibility of any continuous navigation along the Chobe and the Zambezi from the west to East Africa. This was evident even by 1857 when Dr. Livingstone published his *Missionary Travels and Researches in South Africa* in which the map at the end of the volume clearly marks the location of Victoria Falls on the Zambezi. Dr. Livingstone notes the advice given to him by the Makololo in relation to a route to the east coast:

[M]y present object being a path admitting of water rather than land carriage, this route [via Lake Tanganyika] did not promise so much as that by way of the Zambesi or Leeambye. The

Makololo knew all the country eastwards as far as the Chafe, from having lived in former times near the confluence of that river with the Zambesi, and they all advised this path in preference to that by the way of Zanzibar. The only difficulty they assured me of was that in the falls of Victoria.<sup>73</sup> (emphasis added)

As was to be expected, many German authors, politicians and newspapers were also dubious about the value of the Caprivi Strip as access to the river.<sup>74</sup>

101. The Caprivi Strip, then, was a natural consequence of the boundary along the 18th parallel and the Chobe River, proposed by the British and accepted without objection by Germany. It achieved at one and the same time the British objective of a northward extension of Bechuanaland, securing control of both Lake Ngami, and the desire of Germany for British recognition of a German sphere of influence east to the Zambezi. It was an ingenious solution, characteristic of the sweeping territorial dispositions of African territory from the lofty perspective of Berlin.

#### **D. The Introduction of the Concept of 'the Centre of the Main Channel'**

102. Thus, by early June 1890, the main outlines of the settlement in south-western Africa were agreed. The northern boundary of the British sphere of influence would be the 18th parallel until it intersected with the Chobe, and after that would be the Chobe River.<sup>75</sup>

103. On 10 June 1890, a minute prepared by Count Hatzfeldt, the German Ambassador in London, and communicated to Lord Salisbury on that day, recorded the first attempt to define the content of the agreement that was in due course to emerge in relation to the Chobe River:

*Dan la conference d'aujourd'hui entre Lord Salisbury et El Commute Hatzfeldt l'Accord general des deuce Governments a été officiellement constant sour less points savants:*

...

*2. La frontière entre El territoires Allemand et El territoires Anglais du sud-ouest de l'Afrique suivra à partir du point qui a été convenu dans des arrangements antérieurs . . . allant de là au nord où de ce degré [21st degree of longitude] touche El 18° degré de latitude sud. De là, la ligne de démarcation se portera à l'est longeant El centre du fleuve Tcholi [sic] jusqu'à son embouchure dans El Zambèse.*<sup>76</sup>

104. On 17 June 1890 Lord Salisbury and Count Hatzfeldt initialled a document recording the general agreement between the two governments on the following points. For reasons that are unexplained in the available materials, the text as agreed on that date was settled in French.<sup>77</sup> In that language the relevant words are:

*De là, la ligne de démarcation se portera à l'est longeant El centre du Fleuve Tschobi jusqu'à son embouchure dans El Zambési.*<sup>78</sup>

· The English translation of the text reads: '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.'<sup>79</sup>

· A translation into German prepared by Count Hatzfeldt and printed in a Special Edition of the 'Official Gazette' of Berlin of 17 June 1890, reads as follows: '*nach Osten längs dem Tschobifluß bis zu dessen Mündung in den Zambesi*.'<sup>80</sup>

· A translation of the German into English was forwarded to the Foreign Office on the next day reading as follows: 'thence eastward along the River Tchobi up to its junction with the Zambesi.'<sup>81</sup>

105. It is to be noted that despite the appearance in the French text of the phrase '*centre du fleuve*' and its reproduction in the English translation as 'centre of the River,' the German translation made no reference to it, but mentioned only the '*Tschobifluß*' -- the Chobe River. It appears that in Count Hatzfeldt's opinion, at least, nothing turned on the expression 'the centre of the river.'

106. The original English formulation was retained as late as 21 June 1890 when Sir Percy Anderson sent to Sir Edward Malet 'a draft of the Articles of Agreement which have been drawn up by Dr. Krauel and myself for submission to our respective Governments,' which was immediately forwarded to Lord Salisbury.<sup>82</sup> The wording in the relevant section was:

[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. <sup>83</sup>

107. On 24 June 1890, the principals on both sides remitted any remaining points of detail arising with respect to the agreement of 17 June to 'be adjusted in a Convention to be drawn up [by] Sir Percy Anderson and Dr. Krauel in Berlin.'<sup>84</sup>

108. Only at this point, on 25 June 1890, a week before the Treaty was signed, did the notion of the 'main channel' appear. The British Foreign Secretary instructed the British Ambassador in Berlin, *inter alia*, to insert in Article III(2) the words 'the main channel of' following the words 'the River Chobe, and descends the centre of,' so that the whole phrase thus assumed its final form: '. . . descends the centre of . . . the main channel of [that river] . . .'<sup>85</sup>

109. It is important to note that the initiative for this addition came from the British side and that the proposal was expressed in English. Only thereafter was the German text altered from Count Hatzfeldt's earlier translation '*. . . längs dem Tschobifluß . . .*' to '*. . . und setzt sich dann in Thalweg des Hauptlaufes dieses Flusses . . .*' Although the English word 'centre' was translated into German as '*Thalweg*,' in other respects, the German formulation follows the English in referring to the '*Hauptlauf*' ('main channel') '*dieses Flusses*' ('of that river').

110. No explanation was given for the introduction of this new element, and it has not as yet been possible to trace in the British Foreign Office papers any prior internal discussion of the change. The 1889 Map used in the negotiations showed the Chobe River as dividing into separate channels at some five locations between the point in the west at which it crossed the German-Portuguese border and the point in the east where it joined the Zambezi. In particular, there was a major division of channels immediately downstream from 'Mai-inis Tn,' marked on the map with the legend '[l]arge island enclosed between two main branches of the Chobe.' It may be relevant also that the explorers remarked on the many streams of the Chobe and the

difficulty of identifying the main channel. **See paras. \_\_\_\_, infra.** Although no one could tell from the map which was the appropriate channel to identify as the border, to the Foreign Office, no doubt it seemed better to refer to the 'main channel' than to disregard the problem altogether.

### **E. The 1889 Map**

111. As noted above, Article III(2) states, 'The course of the above boundary is traced in general accordance with a Map officially prepared for the British government in 1889.' The words were inserted sometime between the French draft of 17 June and the final Treaty text of 1 July. The map referred to is Map of Matabililand, Uncorrected Proof No. 2, 1889. (See Atlas, Map II)<sup>86</sup> No boundary line is drawn on this map. (See Fig. 3, following p. 16, *supra*)

112. A manuscript minute signed by Edward Hertslet<sup>87</sup> and dated 7 July 1890, attached to a later (1890) version of the map which is bound up with the 1890 Treaty in the British Foreign Office archive, records that '[t]his [the 1889] map was not annexed to the Anglo-German Treaty of 1 July 1890; but Sir Percy Anderson told me today that it was the map alluded to in Art. III, para. 2, as the "map officially prepared for the British Government in 1889."<sup>88</sup> Although the scale of the map is small (1:1,584,000), it is just sufficient to show Kasikili Island and the two channels of the Chobe running to the north and south of it, just to the east of the 25th meridian and north of the 18th parallel.

113. In the depiction of that stretch of the river on the 1889 Map, two details are significant. One is that the area immediately to the north of the river and a little way west of Kasikili Island is shown as being swampy. The second is that just south of this stretch of the river there appears the legend: '[s]and belt with large forest coming down to water's edge.' This is in fact the same prominent escarpment described in the Alexander Report and Chapter I, *supra*, and which was the subject of so much comment in the writings of Bradshaw and the other explorers. It can be seen in the modern photograph of the area that appears in the Alexander Report, Appendix, Sheet 20, Photograph 2, taken from the north looking southward across Kasikili Island. It clearly marks the line of the southern bank of the southern channel of the river -- a line that no flooding or movement of the river waters could obscure. By contrast, the indication on the map of the swampy region to the north of the river shows that the line of the northern channel of the river could be hidden in the marshes and by the annual floods described by the early travellers.

114. A further element of importance is that on this map the river divides into two branches just north of the point of its intersection by the 18th parallel. Here the map bears the legend: 'large island enclosed between the two main branches of the Chobe, full of swamps and lagoons.' This is not Kasikili Island, but the way in which it was dealt with has some bearing on the question in this case.<sup>89</sup> Another copy of the same map (Atlas, Map III), also found in the Public Records Office, shows the line following the branch of the Chobe south of this island, thus assigning it to Germany rather than Britain. This choice, which gave the Island to Germany, was in all likelihood influenced by the fact that the large island was 'full of swamps and lagoons' thus rendering the river shore to its north too obscure a feature to serve as a boundary.<sup>90</sup>

### **F. Conclusions Regarding the Preparatory Work**

115. The 1890 Anglo-German Treaty was directed towards the division on a grand scale of the interests of the parties in East, West and South Africa. In relation to the area in question the negotiations were conducted largely on the basis of a relatively small-scale map. There was little detailed negotiation about the specific consequences of boundaries in particular areas. Certainly, there was no negotiation about the precise course of the Chobe River as such.

116. It is, however, possible to derive from a perusal of the available materials a sense of the general philosophy of the Treaty. It was to establish boundaries that would be as clear as possible in the particular circumstances. In choosing the Chobe River, the negotiators selected what they could identify as a major and prominent geographical feature. They were aware, perhaps from prior writings and certainly from the 1889 Map that the character of the terrain changed at the river -- from the floodplain and swamps to the north of it to the sandy ridge and forest that lay to the south of it. It would have made little sense for the negotiators, having regard to this change in the terrain, to have constructed a boundary which left in the British sphere territory that was more naturally a continuation of the terrain to the north. Had they known that Kasikili Island was annually covered for a period of five months by water spilling over from the Zambezi (and that therefore the very existence of the northern channel would be obscured to the point of invisibility, whereas the course of the southern channel could always be identified by its contiguity with the southern bank and the adjacent sand ridge) they could hardly have reached any other conclusion than that use should be made of such a permanently visible natural feature for the purpose of identifying the 'main' channel in which the boundary should be drawn.

117. The preparatory work is also of assistance in construing the expression in Article III(2), 'the centre of the main channel' of the Chobe River. The records show that the formula evolved from the original wording -- 'the centre of the River Chobe' -- to 'the centre of the main channel of the River Chobe.' This evolution attributes a dominant position to 'the main channel' and a subordinate role to 'the centre' of it. 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*.'

## CHAPTER V

### THE WORDS OF THE TREATY: THE MAIN CHANNEL OF THE CHOBE RIVER

118. The words requiring interpretation by the Court are 'the centre of the main channel of [the Chobe] river.' In this case, unlike some others, there can be no doubt about the identification of the Chobe River. The 1889 Map shows a clearly marked river which, in the stretch in the vicinity of the Island, bears the name 'Kuando or Chobe River.' There is no question that this is the river referred to as the boundary in Article III. Likewise, as is noted in paras. 158-159, *infra*, the location of the 'centre' of the main channel has never been in contention between the parties. Thus the crucial term, on the meaning of which the treaty branch of the case turns, is 'the main channel.' Namibia will now address the interpretation of that term.

## A. Legal Considerations

119. The 1890 Treaty contains no definition of the expression 'main channel' of the Chobe River. The range of possibilities covered by the expression is quite wide. As Stephen B. Jones, an acknowledged authority on boundary-making has observed, it could, in theory, refer to the channel that is most used, the widest, the deepest or the one that carries the most water.<sup>91</sup>

120. Nor do the other provisions of the 1890 Treaty provide by implication the contextual guidance that might be helpful. Consideration of the other references to rivers in the definition of boundaries elsewhere in the Treaty yields, with one exception, only a reference to 'the course' of a river or a direction that the boundary 'ascends' or 'follows' the river. The exception relates to the Aka River, mentioned in Article IV(1), where the boundary 'ascends the mid-channel.' But none of this is of any help here, and the regrettable truth is that the negotiators of the Treaty followed no uniform usage in their description of river boundaries.<sup>92</sup>

121. In the absence of any definition in the words of the Treaty, Namibia believes that the approach to be followed is the one Botswana expressed in its Supplementary Written Submissions to the JTTE of 15 April 1994:

The provisions of the Anglo-German Agreement refer to "the centre of the main channel" of the Chobe. There are other examples of treaty provisions referring to factual or geographical criteria such as a crest line, or a watershed line or an escarpment line: see the Judgment in the *Temple* case (Merits), I.C.J. Reports, 1962, p. 6 at p. 15. In such cases the factual criterion is adopted as or converted into the legal criterion. But it does not cease to be in essence a question of fact.<sup>93</sup>

Again, in the Conclusions of these same Submissions of 15 April 1994, Botswana gave a position of first prominence to such considerations:

First: The central question is the interpretation and application of the words 'main channel' of the River Chobe. These words involve a reference to a question of fact and, in so far as may be necessary, a question of scientific fact, calling for expertise in hydrology, geology and hydrogeomorphology.<sup>94</sup>

122. This approach is confirmed by judicial and arbitral precedent. In addition to the *Temple* case referred to by Botswana in the Submissions just cited, mention may also be made of two arbitral awards.

123. The first is the *Palena* arbitration between Argentina and Chile in 1966 in which a central issue was the determination of the 'major' channel of a boundary river.<sup>95</sup> The case involved the interpretation of an arbitral award rendered by King Edward VII in 1902. Though it was an arbitral award and not a treaty that was the subject of interpretation, the principles applied to the one are equally applicable to the interpretation of the other. Indeed, the Court of Arbitration said so in terms:

In the view of the Court two principles must dominate its approach to the problem now before it. The first is the general principle that where an instrument (for example, a treaty or an award) has laid down that a boundary must follow a river, and that river divides into two or



more channels, and nothing is specified in that instrument as to which channel the boundary shall follow, the boundary must normally follow the major channel.<sup>96</sup>

124. The tribunal then proceeded to the identification of the major channel by reference to both 'historical and scientific grounds.'<sup>97</sup>

125. The historical grounds included, first, 'a passage, illustrated by a map, both dated 1907' published by the Argentine Office of International Boundaries in a volume about the demarcation of the boundary, and, second, an extract from an official Memorandum, dated 9 December 1913, from the Argentine Legation in Santiago to the Chilean Ministry of Foreign Affairs, both of which identified the eastern channel as the major channel.<sup>98</sup> (The historical evidence in this case has been discussed in Chapter IV, *supra*; the map evidence is discussed in full in Part Two, Chapter V, *infra*.)

126. The award then stated that 'this recognition of the Eastern Channel as the major channel . . . can be confirmed on scientific grounds.'<sup>99</sup> The Court expressed the opinion that 'the three principal criteria to be applied in a problem of this kind are length, size of drainage area, and discharge, preferably in terms of annual volume, though authorities differ as regards their relative importance.'<sup>100</sup> The Court reached its conclusion '[o]n the basis of the historical and scientific evidence thus reviewed.'<sup>101</sup>

127. This approach to the identification of geographical features was followed in a more recent arbitral award, also rendered between Argentina and Chile in the case of the *Laguna del Desierto* of 1994. One of the principal issues there was the identification in one sector of the boundary determined by the same 1902 award of 'the local water-parting' connecting one location on the boundary to another. The sector in question was not examined by and was poorly known to those who prescribed the boundary. Not until 40 years after the award was the true location of the water-parting discovered, and even then, as it turned out, it was not a 'local' but a 'continental' water-parting. A dispute developed between the parties as to the correct course of the boundary.

128. The Arbitral Tribunal held that the boundary should follow the line of the water-parting discovered in 1942 as being the one best conforming to the words used in the relevant boundary instrument, the 1902 award. As the Tribunal stated:

Neither can the Tribunal accept the argument of Chile according to which the application of the Award of 1902 in the light of geographical knowledge acquired subsequently would be equivalent to its revision through the retrospective appreciation of new facts. The Award of 1902 defined, in the sector which is of interest for this Arbitration, a frontier which follows a natural feature which, as such, does not depend on the actual knowledge of the area but on its true layout; the knowledge of it changed but the terrain existed throughout. <sup>102</sup>

Thus, like the *Palena* case before it, the *Laguna del Desierto* case demonstrates that the identification of a disputed boundary defined by a natural feature is to be determined by the facts as they are known to the tribunal at the time of the decision of the dispute.

129. It is in reliance upon authorities such as these as well as upon the approach hitherto adopted by Botswana that Namibia now approaches the task of identifying scientifically the main channel of the Chobe River.

## **B. The Scientific Evidence**

### **1. In general**

130. It should be understood that 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. (Alexander Report, para. 8.2) The parties are in agreement on this point.<sup>103</sup> There are, of course, changes in the shape of sediment bars at the entrance to and within the southern channel. The significance of these will be discussed more fully below. (See paras. 153-156, *infra*)

131. Professor Alexander defines the 'main channel' as the channel that carries the largest proportion of the annual flow of the river. (Alexander Report, paras. 1.8 and 2.8) As noted above, para. 119, *supra*, authorities suggest other possible criteria. "The "main" or "principal" channel might be the one most used, the widest, the deepest, or the one carrying most water."<sup>104</sup> Professor Alexander shows that the other possible criteria, primarily depth and width, are unsatisfactory because they vary from one point to another along the river and over time from year to year and within each year. In perennial rivers these variations may be within tolerable limits for most practical applications. In the ephemeral rivers of southern Africa, however, the flows vary from zero in the dry season to large floods, and river channel depths and widths are irregular and change rapidly as a result. (Alexander Report, para. 4.4; see also Alexander Report, Appendix, Sheet 3, Photographs c, d; Sheet 10, Photographs a, b) These variations are so large, pervasive and unpredictable that width and depth are inappropriate as criteria for identifying the main channel. Moreover, neither of these characteristics can be determined for either channel of the Chobe River at the times when flow actually takes place because in those periods the Island as well as the two channels around it are submerged by waters emanating from the Zambezi River. If the criteria of depth and width are eliminated, the only remaining indicator is volume of flow. The tribunal in the *Palena* arbitration also stressed the importance of 'discharge, preferably in terms of annual volume . . .'<sup>105</sup>

132. This approach has the further advantage that it can be consistently applied along the entire length of the Chobe River where it forms the boundary between Botswana and Namibia. Any alternative, such as depth or width, is incapable of such consistent application if only because the river is dry most of the year and in most sections.

133. This definition of the main channel implies that to be a candidate for designation as the 'main channel' a channel must be an 'active channel,' that is, some significant portion of the annual flow of the river must actually move along it longitudinally in a downstream direction. The fact of overriding importance for this case, however, is that the northern channel carries substantially no water along its length towards the confluence with the Zambezi. Substantially all of the annual flow of the Chobe River is carried to the confluence with the Zambezi by the southern channel.

134. During the dry season from August to December, both channels are stagnant, and there is no significant flow in either channel because the level of the water has dropped below that of the Mambova Rapids, and the water in the channels cannot proceed over the rapids downstream to the Zambezi. During the flood period, the flood waters of the Zambezi sweep south-eastward across the floodplain until they meet the Chobe Ridge, on the right bank of the Chobe River, which turns the waters into the Chobe River and when they reach Kasikili

Island into the southern channel passing to the south and east. As noted in paras. 60-62, supra, by far the overwhelming proportion of the annual flow of the Chobe comes from the flood waters of the Zambezi and almost none from upstream sources along the Chobe itself. The foregoing facts are unequivocally established by Professor Alexander's analysis of the topography of the Zambezi/Chobe river basins in the area of interest and of the hydrology and geomorphology of the Chobe River itself. 106

## **2. Topography**

135. The Court is asked to keep firmly in mind that all of the aerial photography and all of the maps of Kasikili Island depict it in the dry season (except for the satellite images, which are reproduced for the first time in the Appendix to the Alexander Report). On these maps and photographs, the Chobe appears much like a conventional river, flowing eastward until it reaches the western end of the Island and parting there into two channels, one to the north and the other to the south, that rejoin at the eastern end to continue on their way downstream to their appointed terminus. But this visual appearance is profoundly misleading. At the times when the pictures were taken and the maps were surveyed, no water was flowing in either channel or indeed in the entire stretch of the river visible in the photographs.

136. And there could not be. Upstream from Serondella, a few kilometres west of the Island, the Chobe is dry during this season, save for intermittent pools in the dry river bed that are maintained by local rainfall. (See Alexander Report, Sheet 6, Map 3) The Zambezi is back within its banks and contributes nothing to the Chobe. And in the dry season, there is little rain to drain from the Chobe Ridge. Thus there is no source of water to flow through either channel. Indeed, if water were flowing downstream through the channels at this period, they would soon be empty since there would be no water coming from upstream to replenish them.

137. To understand what happens in the flood season, on the other hand, one must keep in mind the two salient topographical features of the region of the Zambezi floodplain. The first, is the floodplain itself, which is relatively flat, with a gentle slope from north-west to south-east. The second is the Chobe Ridge, a prominent escarpment some 50 metres high, which lies athwart the floodplain at its southern edge, tending from south-west to north-east. This topographical configuration sets up an inevitable sequence during the season of the Zambezi floods from January to July. First, as noted in para. 62, supra, the rising waters are dammed up at the Mambova Rapids and back up along the southern channel of the Chobe past the Island to Ngoma Bridge. During this period, water in the Chobe moves in an upstream direction. As the waters of the Zambezi rise, however, they overflow its banks along the whole reach from Katima Mulilo to Mambova. These flood waters spread slowly south-eastward following the general tilt of the land until they meet the Chobe Ridge. There they are diverted to the north-east at almost a right angle into the bed of the Chobe, the right bank of which follows generally the base of the Ridge. Ultimately the entire floodplain is inundated, roughly the triangle of Ngoma Bridge-Katima Mulilo-Mambova, except for a few high spots.

138. During these periods, the right bank of the Chobe is readily identifiable by the typical characteristics of the banks of ephemeral rivers of southern Africa, including a steep, well-defined bank with a strip of riverine vegetation along it. It can be determined accurately and unambiguously as the river flows along the foot of the Chobe Ridge, including in the reach of the river in the vicinity of Kasikili Island. (See Alexander Report, Appendix, Sheet 21, Photograph 6; Sheet 22, Photograph 7)

139. This sequence is illustrated by the satellite images in Alexander Report, Appendix, Sheet 25, Diagram 7. The black areas on the images show the open water surfaces on the floodplain. Red patches within the flooded areas are the tops of reeds and papyrus projecting above the water surface. The white patches are recently exposed sandbars formed by water flowing at a higher level. Some of the permanently exposed islands have a brownish-white colour.

140. Image 25a was taken when the flow in the Zambezi was low and the water in the channels around Kasikili Island was stagnant. The Island has the characteristic shape that appears on aerial photographs and maps.

141. Image 25b is taken when the peak flow has reached Katima Mulilo, but has not yet arrived at the confluence between the Zambezi and the Chobe. The water is moving upstream in the Chobe from the Mambova Rapids, and Kasikili Island is partially inundated.

142. Image 25c was produced seven days later. The Island is almost completely submerged. Image 25d is made from the same satellite picture but covers the whole floodplain instead of just the area in the immediate vicinity of the Island. Although the channel of the Chobe River was still being filled in an upstream direction (from right to left), the overflow from the Zambezi can be seen advancing across the floodplain on a broad front towards the Chobe Ridge. When it reaches the Chobe River at the foot of the Ridge, it will flow along the channel of the River in a downstream direction (from left to right), thus reversing the course of the River's flow.

143. Image 25e was made during a major flood on the Zambezi so that a larger area of the floodplain was inundated. It shows that the flood waters have reached the Chobe River at the base of the Ridge along its whole length from Ngoma Bridge to the Mambova Rapids. When the image was made, the flow in the Zambezi and the level of the water on the floodplain were subsiding, thus exposing some of the sediment plumes along the southern part of the floodplain next to the Chobe Ridge. The orientation of these plumes shows that they are the result of a strong eastward flow along the southern edge of the floodplain adjacent to the Chobe Ridge.

144. This pattern means that in the immediate vicinity of Kasikili Island, the flood waters coming down the river from further upstream flow in a narrow band in the southern channel and proceed downstream in that channel until they flow into the Zambezi River below the Mambova Rapids. Substantially none of the water flowing in the river below the Island comes into it through the northern channel.

145. The conclusion is inescapable that the northern channel cannot be the 'main channel' because it is not really an active channel at all. No significant amount of water flows through it at any time of the year. This conclusion can be illustrated by reference to another inactive channel in the immediate vicinity of the Island labelled the Spur channel on the Annotated Aerial Photograph, Alexander Report, Appendix, Sheet 18, Diagram 4. On Sheet 26, Diagram 8(a), which gives a more detailed perspective, the Spur channel can be seen flowing into the northern channel just beside the place-name 'Kabuta Village.' The Spur channel is wider and deeper than either the northern or southern channels. (Alexander Report, para. 11.4) Nevertheless, it cannot be an active channel of the Chobe, let alone the 'main channel,' because its upper end is blocked by sediment and there is no water flowing through it. It is clearly a relict channel, as marked on Sheet 6, Map 3.

146. The same is essentially true of the northern channel. The flow into it from the Chobe to the west is not blocked by a physical deposit of sediment, as is the case with the Spur channel, but the topographical features discussed above make it impossible for any substantial flow to go through it. Like the Spur channel, it cannot be regarded as an active channel of the Chobe River at all. It is in essence a relict floodplain channel of the Zambezi floodplain.

147. By contrast, the southern channel carries substantially the entire flow of the Chobe at those times when there is any flow in the River, which is to say, substantially the entire annual flow. It must therefore be the main channel around Kasikili Island.

### **3. Hydrology and geomorphology**

148. The facts set forth above and the conclusions derived from them are confirmed by analysis of the hydrological and geomorphologic characteristics of the river:

- the nature of the sediments and the character of their deposition;
- bank erosion; and
- the existence and position of sediment bars in the channel.

All of these elements are interconnected, but for analytic purposes they are treated separately below.

#### **a. Sediments**

149. The Chobe Ridge consists of hard but erodable basalt overlain by a layer of Kalahari sand. By contrast, the Zambezi floodplain to the north of the river consists of light coloured sand deposited over a long period by the flood waters emanating from the Zambezi River. Over time, basalt erodes and forms a fine, black fertile soil. This soil is washed down by local rainfall into the Chobe River along the length of the Ridge from Ngoma Bridge to the Mambova Rapids. Along this entire reach of the Chobe, the bed of the river is lined with this black fertile soil of basaltic origin where the people of the area farm during the dry season, as they have from time immemorial. Photographs of the black soil in the Chobe River bed may be seen in Alexander Report, Appendix, Sheet 8, Photograph c and Sheet 9, Photographs a, b.

150. When the River reaches Kasikili Island, the black soil continues to appear in the bed of the southern channel, but not in the northern channel. The material of the bed and banks of the northern channel does not consist of recently deposited sediment from the Chobe River, but rather floodwater deposits emanating from the Zambezi River over a long period of time similar to the material that constitutes other parts of the floodplain. From this it follows that the Chobe River does not flow through the northern channel. If it did, it would have carried with it the basaltic sediments coming from the ridge upstream of the Island some of which would have been deposited in the northern channel.

#### **b. Erosion**

151. Where the banks of a river channel consist of readily erodable material, the outer banks immediately downstream of the bends in the channel are progressively eroded, and the eroded

material is deposited on the opposite side of the channel further downstream. (Alexander Report, para. 3.7)

152. The sandy material making up the banks of the northern channel is readily erodable. Yet the close up ground photographs of these banks show no signs of appreciable bank erosion, sediment deposition or reed growth normally associated with actively flowing river channels in general and which do appear in other actively flowing channels in the Zambezi River floodplain. (See Alexander Report, Appendix, Sheet 5, Photographs a, b, c, d; Sheet 24, Photographs 15, 18) Moreover, the aerial photographs from at least 1943 through 1985 show a tiny piece of land at the confluence of the northern channel and the Spur channel that joins it from the south-west. This small land spit is made up of the same sandy erodable material that constitutes the banks of the northern channel. It is hardly conceivable that this tiny formation could have endured unchanged by erosion throughout a 40-year period if there had been an active flow of water through the northern channel.

### **c. Existence and characteristics of sediment bars**

153. A third characteristic of an active channel in which water is flowing is the creation of sediment bars by the operation of the flowing water. If, as is the case with both channels around Kasikili Island, the banks of the channel consists of readily erodable material, they will be eroded progressively by the flow of the river, and this sediment will be deposited in bars further downstream.

154. Aerial photographs show sandbars in the southern channel, parallel to the foot of the Chobe Ridge, but none in the northern channel. (See Alexander Report, Appendix, Sheet 18, Diagram 5; Sheet 24, Photographs 15, 18; Sheet 27, Diagram 9; Sheet 28, Diagram 10) Photographs a and b in the Appendix at Sheet 9 also show longitudinal sediment bars consisting of soil derived from the weathered basalt, lying parallel to the foot of the Chobe Ridge. These are inundated annually by the floods and are rapidly covered by grasses when the water level subsides. The sediment bars therefore attract large herds of game during the winter months.

155. The existence of these sandbars and the changes in their position and shape over the years, as illustrated by the successive photographs, indicate active river flow. The location of the bars, immediately adjacent to the foot of the Chobe Ridge shows that this is the zone of maximum velocity along which the water and sediment are being transported through the floodplain towards the exit at Mambova Rapids.

156. The existence and behaviour of the sandbars corroborate the evidence from erosion and from the topographic relationships that the maximum flow of the river goes through the channel adjacent to the Chobe Ridge, that is to say the southern channel.

## **4. Conclusion as to the scientific evidence**

157. Namibia submits that the foregoing analysis overwhelmingly supports the following conclusions:

- The main channel of a river is the channel that carries the largest proportion of the annual flow of the river. Alternative criteria, such as the relative depth or width of the channel, are unsatisfactory for ephemeral rivers like the Chobe

because the variation in these dimensions is so large and unpredictable both over time and over the course of the river.

· The southern channel around Kasikili Island carries not only the largest proportion, but substantially all of the annual flow of the river. This conclusion is established by the following:

a) The topographical conditions of the Zambezi floodplain dictate that the flood waters of the Zambezi flow in a south-easterly direction across the floodplain until they meet the Chobe Ridge, which channels them into the Chobe River, the right bank of which in this area hugs the foot of the Ridge.

b) The black basaltic sediments washed down from the Chobe Ridge, marking the bed of the Chobe River along the entire stretch from the Ngoma Bridge to the Mambova Rapids, are to be found only in the southern channel around Kasikili Island, but not the northern channel, indicating that the Chobe River flows through the southern but not the northern channel.

c) The characteristics of the banks of the southern channel are typical of a stable, sinuous channel, where water in the river is conveyed along a broader overlying channel. By contrast, the northern channel has none of the characteristics that would be expected of a river channel actively conveying water through the sandy material in which it is located.

d) Sandbars and sediment bars of eroded material typical of an active river channel are found in the southern channel south of Kasikili Island, but not in the northern channel.

It follows that the southern channel is the main channel of the Chobe River around Kasikili Island.

### **C. The 'Centre' of the Main Channel**

158. Once the southern channel has been identified as the main channel of the Chobe River, the question of title to Kasikili Island is automatically resolved in favour of Namibia. Where the boundary lies within the southern channel is a distinctly subsidiary matter for both parties. The subject was not discussed by either Botswana or Namibia in the proceedings before the JTTE, nor did the parties make any specific reference to the subject in their submissions. It has simply not been an issue between them.

159. In these circumstances, Namibia considers that it is unnecessary to pursue the question of defining the centre of the main channel at this stage of the pleadings. The real issue between the parties has always been the identification of the main channel itself and the consequences of such identification for the determination of the sovereignty over Kasikili Island. The location of the centre of the main channel would follow largely as a matter of course by reason of its dependence upon the manner in which the principal issue is resolved. As a practical matter, the actual boundary would in any case have to be demarcated by agreement between the parties.

160. Namibia of course reserves the right to return to this issue at a later stage, if developments in the case make it appropriate to do so.

## **CONCLUSION TO PART ONE**

161. This Part has addressed the interpretation of the Anglo-German Treaty of 1890. The crucial terms of the Treaty for the purposes of this case are the 'main channel' of the Chobe River. These words, under Article 31 of the Vienna Convention on the Law of Treaties, are to be interpreted in accordance with their ordinary meaning in their context and in the light of the object and purpose of the treaty.

162. The present Part has shown:

- The object and purpose of the Treaty was to divide the spheres of influence of Germany and Great Britain in Africa and to this end to establish, where possible, firm, stable and visible boundaries between them. In the stretch of the Chobe River of concern in this case, the south bank of the River (including the right bank of the southern channel in the vicinity of Kasikili Island), is established by the Chobe Ridge, a stable and clearly visible escarpment some 50 metres high, so depicted on the map used by the negotiators, while the northern channel is in the midst of the floodplain of the Zambezi River and is inundated and invisible for nearly half of each year.
- The ordinary meaning of the 'channel' of a river is a conduit through which the water of the river flows, and the ordinary meaning of the 'main channel' is the channel that carries the major part of the flow of the river.
- The topographic, hydrological and geomorphologic characteristics of the Chobe River and the Zambezi floodplain establish 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.

163. All the elements of interpretation converge on a single result: the southern channel is the main channel of the Chobe River around Kasikili Island. The Treaty therefore attributes the Island to Namibia.

## **Part Two**

### **THE SUBSEQUENT CONDUCT OF THE PARTIES TO THE ANGLO-GERMAN TREATY OF 1890 AND THEIR SUCCESSORS IN TITLE WITH RELATION TO KASIKILI ISLAND**

## **INTRODUCTION**

164. In Part One of this Memorial, Namibia has shown that the channel south of Kasikili Island is the main channel of the Chobe River so that, under the terms of the Anglo-German



Treaty of 1890, the Island is rightfully the territory of Namibia. This conclusion is based on the text of the Treaty, construed in the light of its object and purpose, the communications between the parties in the period leading up to and immediately after the conclusion of the treaty, and the scientific data and hydrologic characteristics of the Chobe River and the Zambezi floodplain. The present Part describes the conduct of the parties and their successors under the Treaty, from the beginning of this century until the independence of Namibia in 1990. After a review of the legal authorities in Chapter I, Part Two continues as follows:

- Chapter II provides eyewitness and corroborative evidence of the control and use of the Island by the Masubia people of the Caprivi beginning at the turn of the century or earlier, with full knowledge of the British authorities of the Bechuanaland Protectorate and in London;
- Chapter III deals with exercise of jurisdiction over the Island, mostly by the method of indirect rule through the Masubia chiefs and their political institutions, until 1914 by Germany, then until 1929 by Britain through the administration of the Bechuanaland Protectorate and thereafter by South Africa up to the independence of Namibia in 1990;
- Chapter IV details the failure of Botswana or its predecessors in interest to make any claim to sovereignty over the Island or to protest or object to the occupation and use of the Island and the exercise of jurisdiction over it by Namibia and its predecessors in title until 1984 almost a century after the conclusion of the Anglo-German Treaty.
- Chapter V discusses the map evidence illustrating Botswana's recognition and acquiescence by conduct to Namibia's exercise of sovereignty over Kasikili Island.

## **CHAPTER I**

### **THE LEGAL RELEVANCE OF THE SUBSEQUENT CONDUCT OF THE PARTIES TO A TREATY**

165. The subsequent conduct of the parties to the Treaty thus set forth is relevant to the present controversy in three distinct ways. In the first place, it corroborates the interpretation of the Treaty developed in Part One. 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, under the principle of *uti possidetis*, the conduct of the parties shows that Namibia was in possession of the Island at the time of termination of colonial rule.

#### **A. Subsequent Practice of the Parties as Evidence of Their Understanding of the Meaning of the Treaty**

166. The 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 confirm the conclusion, reached as a matter of analysis of the text of the Treaty, that Kasikili Island is a part of Namibia. The record of the parties' subsequent conduct cannot be reconciled with the claim that the Island is Botswana's under the Treaty. The unbroken pattern of conduct

-- including the inaction of Botswana -- is positive evidence of the understanding of the parties as to the meaning of Article III of the Anglo-German Treaty that Kasikili Island was to be a part of the Caprivi Strip.

### **1. The Vienna Convention on the Law of Treaties**

167. The proposition that the subsequent conduct of the parties evidences their understanding of the meaning of the language of a treaty is well-established. Article 31 of the Vienna Convention on the Law of Treaties provides:

(3) There shall be taken into account together with the context

...

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

A uniform course of conduct extending over a long period constitutes subsequent conduct within the meaning of Article 31.<sup>107</sup>

168. Sir Humphrey Waldock, as Special Rapporteur for the International Law Commission (ILC) on the Law of Treaties, insisted that

subsequent conduct and practice of the parties in relation to the treaty is permissible, and may be desirable, as affording the best and most reliable evidence, derived from how the treaty has been interpreted in practice, as to what its correct interpretation is.<sup>108</sup> (emphasis in original)

169. Similarly, Sir Gerald Fitzmaurice regarded subsequent practice as superior to other aids to treaty interpretation:

[C]onduct usually forms a more reliable guide to intention and purpose than anything to be found for instance in the preparatory work of the treaty, simply because it has taken concrete and active, and not merely verbal or paper, form. The uncertainties that so frequently attend on the latter case are more likely to be absent in the former, for in the course of preparatory work the parties merely state what their intentions are: in their practice subsequent to the conclusion of the treaty they act upon them. In any event they act, and a consistent practice must come very near to being conclusive as to how the treaty should be interpreted.<sup>109</sup> (emphasis in original)

170. In the evolution of the Convention, the use of subsequent practice was promoted from a 'supplementary means of interpretation' (ultimately codified in Article 32) to one of the four primary methods included in Article 31.<sup>110</sup> Moreover, as the drafters saw it, the use of subsequent practice was to be regarded as on an equal plane with the other methods listed in Article 31. The Chairman of the Drafting Committee stated that:

[A] careful examination of the article would show that [the] Commission was not suggesting that the other elements of interpretation were to have any less weight than those stated in paragraph 1.<sup>111</sup>

The ILC comments on the text further elaborated this thought:

The Commission, by heading the article "General rule of interpretation" in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would be given the legally relevant interpretation. . . . [T]he process of interpretation is a unity and . . . the provisions of the article form a single, closely integrated rule.<sup>112</sup>

## **2. The case law**

171. As the ILC noted in reporting its draft to the UN General Assembly, international tribunals have long recognized subsequent practice as 'objective evidence of the understanding of the parties as to the meaning of the treaty.'<sup>113</sup> In the *Alaskan Boundary Tribunal Award*, long before the creation of a permanent international court, the arbitral tribunal concluded:

It is manifest that the attempt to dispute that possession . . . is met by the practical effective construction of the Treaty presented by the long-continued acquiescence of Great Britain to the construction which gave the territory to Russia and the United States . . .<sup>114</sup>

172. A few years later in the *Chamizal* case, another arbitral tribunal also based its reasoning on the parties' subsequent practice:

On the whole, it appears to be impossible to come to any other conclusion than that the two nations have, by their subsequent treaties and their consistent course of conduct in connection with all cases arising thereunder, put such an authoritative interpretation upon the language of the Treaties of 1848 and 1853 as to preclude them from now contending that the fluvial portion of the boundary created by those treaties is a fixed line boundary.<sup>115</sup>

173. The use of subsequent conduct as a means of treaty interpretation is also well-established in the jurisprudence of this Court and its predecessor, the Permanent Court of International Justice (PCIJ). Early in its life, the PCIJ invoked the subsequent conduct of the parties to interpret the treaty in *Article 3, Paragraph 2, of the Treaty of Lausanne*.<sup>116</sup> In the *Right of Passage* case, the Court rejected India's claim that there was never any agreement between it and Portugal by relying on the subsequent conduct of the former rulers of India in conformity with the provisions of the treaty.<sup>117</sup> Thus, according to Hugh Thirlway, 'the subsequent practice of the parties may be relevant not merely to the interpretation of a treaty, but even to its very existence and validity.'<sup>118</sup>

174. Later in the *Temple of Preah Vihear* case, the Court recognized that

[i]t is a general principle of law, which has been applied in many contexts, that a party's attitude, state of mind or intentions at a later date can be regarded as good evidence -- in relation to the same or a closely connected matter -- of his attitude, state of mind or intentions at an earlier date also; provided of course that there is no direct evidence rebutting the presumption thus raised.<sup>119</sup>

## **3. Inaction as 'conduct' or 'practice'**

175. Nor does 'subsequent conduct' or 'practice' require affirmative action from both parties to the treaty. Particularly in the case of bilateral treaties, silence by one party in response to the conduct of the other can constitute subsequent practice. If the conduct of the opposing party is thought to violate the meaning of the treaty, a party has the responsibility to protest. (See Chapter IV, *infra*) Waldock adduces the *Temple* case in support of his view that 'the practice of one party to a bilateral treaty preclude[s] it from afterwards contesting an interpretation of a particular clause to which it apparently assented.'<sup>120</sup> And I. MacGibbon, in his well-known article on acquiescence recognizes that subsequent acquiescence is a valuable means of treaty interpretation:

Evidence of the subsequent actions of the parties to a treaty may be admissible in order to clarify the meaning of vague or ambiguous terms. Similarly, evidence of the inaction of a party, although not conclusive, may be of considerable probative value. It has been said that "[the] primary value of acquiescence is its value as a means of interpretation." The failure of one party to a treaty to protest against acts of the other party in which a particular interpretation of the terms of the treaty is clearly asserted affords cogent evidence of the understanding of the parties of their respective rights and obligations under the treaty.<sup>121</sup>

176. In the context of a multilateral treaty, the Court has recently relied on the uniform course of inaction of the parties in interpreting the Treaty of Bogota in the *Case Concerning Border and Transborder Armed Actions*. Article XXXI of the Treaty repeated the language of Article 36(2) of the Court's Statute. In holding that the Article by its own force constitutes a submission to the 'optional clause' jurisdiction as among the parties to this Treaty, instead of requiring an independent unilateral declaration, as contended by Honduras, the Court emphasized that

no State, when adhering to or ratifying the Pact had deposited with the United Nations Secretary-General a declaration of acceptance of compulsory jurisdiction under the conditions laid down by the Statute. Moreover, no State party to the Pact (other than Honduras in 1986) saw any need, when renewing or amending its declaration of acceptance of compulsory jurisdiction, to notify the text to the Secretary-General of the OAS, the depository of the Pact, for transmission to the other parties.<sup>122</sup>

Again, the silence of the parties, without objection from Honduras or elsewhere, defined the interpretation of the treaty.

177. Indeed, the penultimate draft of Article 31(3)(b) of the Vienna Convention reads, 'any subsequent practice . . . which establishes the understanding of the parties regarding its interpretation.' (emphasis added) As Waldock explained:

The word "understanding" was chosen by the Commission instead of "agreement" expressly in order to indicate that the assent of a party to the interpretation may be inferred from its reaction or absence of reaction to the practice.<sup>123</sup>

The word 'agreement' was substituted in the final version not to change the meaning of the clause, but only in order to bring the English text into line with the French, Russian and Spanish.<sup>124</sup> While the choice of words may be a result of perfecting the cross-translation of the Convention between the major languages, the intent of the Commission is clear from Waldock's plain statement -- the absence of reaction is a form of subsequent conduct.

#### **4. Conclusion as to the relevance of subsequent practice in treaty interpretation**

178. The authorities are in unanimous agreement on the proposition that the subsequent conduct of the parties is a key to the meaning of the treaty text. It would be supererogatory to multiply quotations. References to some of the leading authorities are given in the note below.<sup>125</sup>

179. The practice and conduct of the parties subsequent to the conclusion of the Anglo-German Treaty of 1890 is of prime importance, as a matter of international law, in determining the meaning of that Treaty. The 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, as detailed in Chapters II, III, IV and V of this Part, confirm the interpretation of the Treaty established in Part One by analysis of the text and the scientific data: Article III of the Treaty attributes Kasikili Island to Namibia.

#### **B. Prescription, Acquiescence and Recognition**

180. The conduct of the parties for the century after 1890 establishes that Namibia is entitled to sovereignty over Kasikili Island by operation of the doctrines of prescription, acquiescence and recognition, entirely independently of its treaty-based claim. Although much scholarly analysis has gone into developing distinctions between these three sets of doctrines, the fundamental elements relevant to all three are the facts that will be established in the succeeding chapters of this Part of the Memorial: (1) continuous, open and notorious occupation and use of the territory in question over a long period of time; (2) exercise of sovereignty in the territory; and (3) failure of the other party, having knowledge of these facts, to object, protest or assert its rights.

##### **1. The authorities**

181. The 1955 edition of Oppenheim's *International Law* defines prescription in what may be taken as an authoritative definition:

[T]he acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.<sup>126</sup>

The current edition, after discussion of the authorities, retains the language of the 1955 text.<sup>127</sup>

182. A more elaborate definition is provided by D.H.N. Johnson in his well-known article 'Acquisitive Prescription in International Law':

"Acquisitive prescription" is the means by which, under international law, legal recognition is given to the right of a state to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in a continuous, uninterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states . . . have acquiesced in this exercise of authority. Such acquiescence is implied in cases where the interested and affected states have failed within a

reasonable time to refer the matter to an appropriate international organization or international tribunal or -- exceptionally in cases where no such action was possible -- have failed to manifest their opposition in a sufficiently positive manner through the instrumentality of diplomatic protests.<sup>128</sup>

183. Professor Ian Brownlie also unequivocally endorses the same principle at the outset of his book *African Boundaries: A Legal and Diplomatic Encyclopaedia*:

International law contains principles of recognition and acquiescence by conduct. These technical concepts reflect principles of consistency, finality and stability which find a place at once in statecraft, law and morals. If two neighbours for some years after independence treat the alignment existing at independence as their common boundary, there comes a stage at which neither can be heard to say that it is not bound to recognize the alignment as definitive. The evidence of recognition and acquiescence by conduct may take the form of absence of protest or any other reservation of rights, admissions of ministers and law officers, the publication of official maps, reliance for official purposes on maps showing the alignment, and administrative practice in matters of tax collection, customs enforcement and the like.<sup>129</sup> (emphasis in original)

All these forms of conduct evidencing recognition and acquiescence are to be found in this case.

184. The *locus classicus* in the case law for the doctrine is the *Island of Palmas* case between the United States and the Netherlands decided in 1928 by the eminent international lawyer, Dr. Max Huber, sitting as sole arbitrator. He held that 'the continuous and peaceful display of territorial sovereignty (peaceful in relation to other states) is as good as a title.'<sup>130</sup> Even more to the point, 'the continuous and peaceful display of authority . . . may prevail even over a prior definitive title put forward by another State.'<sup>131</sup> The opinion was treated as authoritative by the PCIJ in the *Eastern Greenland* case.<sup>132</sup>

## **2. The conditions for application of the doctrine**

185. Johnson summarizes the authorities regarding the conditions necessary for the operation of the doctrine, which, he says, 'have achieved a substantial degree of unanimity.'<sup>133</sup> Adopting an earlier classification of Paul Fauchille, he identifies four requirements that must be fulfilled for possession by a state to mature into a prescriptive title:

1. The possession of the prescribing 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.<sup>134</sup>

186. The Ninth edition of *Oppenheim's International Law* cites as an example of the correct application of the doctrine a case

when an incorrectly drawn boundary line, which wrongly allots to one of the states concerned a tract of territory, has for a long time been regarded as correct, the conviction will prevail

that the present condition of things is in conformity with international order, even if afterwards the wronged state raises a protest and demands that the boundary line should be redrawn.<sup>135</sup>

Thus, even by Botswana's interpretation of the Treaty (which Namibia has shown to be erroneous), the Island belongs to Namibia.

187. The period necessary for prescription is a question of fact, depending on all the circumstances.<sup>136</sup> In the *Fisheries* case, a silence of 60 years in the face of Norwegian use of the disputed waters was enough to preclude the claim of the United Kingdom.<sup>137</sup> And in the *Temple* case, the Court held that

Thailand is now precluded by her conduct from asserting that she did not accept [the map of 1908]. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier.<sup>138</sup>

The same words could be spoken of Botswana in this case, except that here the period of unprotested use and exercise of jurisdiction was almost twice as long.

### **3. Conclusion**

188. As will be shown in this Part, the conditions laid down by the authorities -- continuous peaceful occupation, exercise of sovereignty, public knowledge and duration -- are all met in this case. Namibia and its predecessors were in peaceful possession from before the beginning of the century and exercised sovereign power over the Island from the time of the establishment of the first German station in the Caprivi in 1909 all in full view and with the full knowledge of the Bechuanaland authorities at Kasane, on the south side of the Chobe, only a kilometre or two from the Island. After becoming independent in 1966, Botswana itself was aware of the facts, but remained silent for almost two further decades.

### **C. The Operation of the Principle of *Uti Possidetis***

189. The essence of the principle of *uti possidetis*, said the Chamber of the Court in the *Frontier Dispute* case, 'lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved.'<sup>139</sup> According to Oppenheim, the doctrine 'conflates boundary and territorial questions by assuming as a governing principle that boundaries must be as they were in law at the declaration of independence.'<sup>140</sup>

190. The principal judicial exposition of the doctrine is to be found in the *Frontier Dispute* case:

[T]he principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.<sup>141</sup>

...

There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis*.<sup>142</sup>

Therefore,

[t]he fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope.<sup>143</sup>

### **1. The special relevance of the principle to African states emerging from colonial status**

191. A notable expression of the principle is to be found in the 1964 Cairo Declaration of the heads of state of the Organization of African Unity (OAU), where, after recognizing that 'border problems constitute a grave and permanent factor of dissension' all member states 'solemnly . . . pledge[d] themselves to respect the borders existing on their achievement of national independence.'<sup>144</sup> Even earlier, however, *uti possidetis* was prominently reflected in the debates on Article III, paragraph three of the OAU Charter, under which member states '[s]olemnly affirm and declare their . . . respect for the sovereignty and territorial integrity of each State.'<sup>145</sup> In the present context, the Lusaka Manifesto of 1969 is of special importance. The Lusaka Conference was convoked by the East and Central African states to revitalize the struggle against apartheid and for the independence of the remaining territories under colonial rule. The Manifesto was adopted after the independence of Botswana and before the independence of Namibia. It was targeted at the situation of southern African states that were still under colonial rule, including, specifically, Namibia. The Manifesto affirmed that 'the present boundaries of the States of southern Africa are the boundaries of what will be free and independent African states.'<sup>146</sup>

### **2. The application of the principle**

192. The *Frontier Dispute* case is clear that the principle is applicable as of the date of independence.

By becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. This is part of the ordinary operation of the machinery of State succession. International law -- and consequently the principle of *uti possidetis* -- applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the state as it is, i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands.<sup>147</sup> (emphasis in original)

193. Since the colonial heritage must be assessed at the date of independence, it follows that actions taken after that date are irrelevant to the determination of the territorial boundary. The territorial situation existing at the moment of Botswana's independence, 30 September 1966, is defined by the conduct of the colonial powers on the ground up to that moment. The evidence of that conduct is discussed at length in Chapters II, III, IV and V. It demonstrates that Botswana's colonial rulers had recognized, without interruption from at least 1909, that Kasikili Island was a part of Namibian territory.

194. The 'photograph' of the territorial situation in 1966 shows that Kasikili Island was occupied and used by the Masubia of the Caprivi and was until then administered by South Africa as the mandatory power, a situation that had already persisted for almost half a century.



It is that territorial title which was frozen by the principle of *uti possidetis*. Therefore under the principle of *uti possidetis*, sovereignty over the Island must be awarded to Namibia, regardless of any subsequent actions of the parties.

## CHAPTER II

### Namibia's CONTROL and Use of KASIKILI Island

195. This Chapter is divided into two parts. The first part summarizes the testimony of eyewitnesses before the JTTE concerning their lives and the lives of their forbears and families on Kasikili Island, beginning at a time before the signing of the Anglo-German Treaty. The second part reviews official and academic materials on the same subject with a view to determining whether the eyewitness testimony is corroborated by these sources.

#### A. Eyewitness Testimony

196. The basic pattern of occupation and use of Kasikili Island by the Masubia of the Eastern Caprivi Strip, dating from at least the beginning of the century, was established by abundant testimony before the JTTE in May and July of 1994. The witnesses were sworn, and they were fully apprised of the importance and seriousness of their testimony when they took the witness stand.<sup>148</sup> The Joint Team put a series of agreed questions to each witness at the conclusion of his or her statement.<sup>149</sup> Thereafter, the witness was subject to questioning by both national components of the JTTE.

197. In all, the Namibian side called over 60 witnesses, of whom the majority were over 70 years old. Seventeen witnesses were over 80. Botswana offered 13 witnesses. While the Namibian witnesses were for the most part peasants, farmers and fishermen, they also included the 80 year old Chief Moraliswani, then the current chief,<sup>150</sup> *indunas* (or councillors),<sup>151</sup> and other important members of the Masubia community. They gave a convincingly detailed and consistent account of life on the Island and in its vicinity, especially concerning the first half of the century. Their testimony was punctuated with references to the reigning chiefs and dignitaries, which, as discussed in Section B of this Chapter, are in general conformity with historical and official records. It fully establishes, in the words of Chief Moraliswani, that 'the Masubia of Caprivi used Kasikili Island since time immemorial for, among other things, pasture and water for themselves and their animals and exploitation of other resources found on the Island.'<sup>152</sup>

198. Almost without exception, the witnesses testified to having personally farmed -- usually they said 'ploughed' -- on the Island.<sup>153</sup> There were frequent references to grain silos,<sup>154</sup> and there is testimony that the settlement on the Island was 'a big village.'<sup>155</sup> The Joint Team asked each witness a question regarding ownership of land on the Island. The responses are by no means identical, but a number of names recur frequently -- Jova, Ilundu, Mwendabai, Six, Jeke, Libalamwe and others.<sup>156</sup> There was, of course, no individual ownership in the European sense. Apparently those named were elders or headmen of the village and were assigned plots for themselves and their families by the *induna* acting on behalf of the chief.

199. The reigning chief for much of the early decades of the century, according to the witnesses, was Chief Liswaninyana. He lived on the Island and held court there when he was, as stated in Vol. II of this Memorial, in residence.<sup>157</sup> Chief Moraliswani testified, 'Liswaninyana of my Dynasty had his winter Royal Gardens on the Island.'<sup>158</sup> Some witnesses remembered that for a time, while Chief Liswaninyana was still a boy, Chikamatondo exercised power as regent,<sup>159</sup> and after Liswaninyana's death in 1937, Chikamatondo became chief in his own right.

200. In the early part of this century, Sulumbu was the *induna*, the councillor who was the chief's senior representative on the Island, and for a time the Island was called Sulumbu's Island.<sup>160</sup> This is corroborated by Seiner's map (Atlas, Map IV)<sup>161</sup> and other early maps that designate the place as Sulumbu's Island. The witnesses are unanimous that the name was changed after a peculiar small tree, the *musikili* tree, was found growing there.<sup>162</sup>

201. The Masubia witnesses were in complete agreement that no one from the south bank of the Chobe used the Island for ploughing or indeed for any other purpose.<sup>163</sup> A good deal of the questioning at the hearings concerned the operations of one Susman, a cattle trader, who from about 1936 to 1942 purchased cattle around Maun in Botswana<sup>164</sup> and then drove them through the region, crossing the Zambezi at Kazungula at the confluence of the Chobe and Zambezi into what is now Zambia where they were sold.<sup>165</sup> Some of Botswana's witnesses who participated in these cattle drives or treks testified to having grazed the cattle en route on Sedudu (as Botswana calls Kasikili Island),<sup>166</sup> although Sedudu might also be a valley that opens up into the Chobe from the south just opposite the western end of the Island.<sup>167</sup> However, some Masubia witnesses recall that Susman was only given permission by the Masubia chief to graze his cattle in a valley near Kasika (not Kasikili Island).<sup>168</sup> In any case, none of the Botswana witnesses testified to anything more than an occasional transitory passage across the Island. There was no evidence whatsoever of extended Botswana occupation or use.

202. The Masubia witnesses also were in agreement that they had never sought or obtained permission from the British authorities south of the Chobe to plough on the Island, frequently adding that there was no need to get permission since it was their own land.<sup>169</sup> In fact, many of the Masubia witnesses expressed surprise and bewilderment that Botswana is now claiming ownership of Kasikili Island.<sup>170</sup> The witnesses believed that during the period of the Protectorate, the British authorities were aware of the occupation and use of the Island by Masubia from Caprivi, since the District Commissioner's post at Kasane was only a short distance away on the south bank.<sup>171</sup> According to the testimony of these witnesses, however, the British never made any attempt to stop these activities or interfere with them in any way.<sup>172</sup>

203. During the agricultural season, the villagers, including the chief,<sup>173</sup> built permanent homes<sup>174</sup> on the Island, sometimes with courtyards.<sup>175</sup> In addition, there were a number of references to a school on the Island,<sup>176</sup> apparently a Sabbath or Seventh Day Adventist school.<sup>177</sup> Some witnesses testified to attending the school, often identifying one of two teachers at the school, either Mr. Mubukwani<sup>178</sup> or Mr. Mulyokela.<sup>179</sup> For the Masubia villagers, Kasikili Island was truly their homeland. Many witnesses said they were born on the Island and that their parents, grandparents or neighbours had died there. Nothing evidences the importance of the Island to the Masubia more strongly than the fact that many members of the community were buried on the Island.<sup>180</sup> In this respect, the Island remains today an integral part of the cultural and social heritage of the people of the area.

204. The annual floods of the Zambezi inundated Kasikili Island.<sup>181</sup> During the seasons for planting, cultivating and harvesting the crops, which usually lasted from June-September to February-March, it was above water.<sup>182</sup> Then, when the floods came, the village, including the chief's residence, his court and the school, moved to the nearby high ground at Kasika to await the next planting season.<sup>183</sup>

205. There were some references to a big flood in the late 1930s, around the end of Chief Liswaninyana's life, after which the centre of gravity of the villagers' lives may have shifted to some extent.<sup>184</sup> This flood did not disrupt the villagers' traditional patterns of farming, but it may have caused a transfer of the main settlement to Kasika on the dry land with people going to the Island to carry out their agricultural chores. In fact, the picture that emerges from the testimony is of Kasikili Island/Kasika as a single township with the villagers moving back and forth between the two in response to the vagaries of the climate. Each time they returned to Kasikili Island they rebuilt their houses and stayed for the ploughing season.<sup>185</sup>

206. A number of witnesses spoke of a 'big flood' in 1958 (not always clearly distinguished from the earlier flood) that did not dry up for several years.<sup>186</sup> This recollection is supported by official statistics showing the water levels of the Chobe River each year.<sup>187</sup> This time, when the villagers returned to the Island and attempted to farm, they encountered elephants and other animals that had established themselves since the flood and destroyed their crops when they ripened.<sup>188</sup> Eventually, the villagers seem to have stopped using the Island as a major agricultural area,<sup>189</sup> although hunters hired by the South African government to control the elephant population continued to operate there until at least 1976.<sup>190</sup>

207. During the war for Namibian independence, according to the testimony of a number of witnesses, South African security forces refused to permit the local people to go to the Island. Those who were found there were either arrested or in danger of being killed as SWAPO members or sympathizers.<sup>191</sup> The South African government patrolled and controlled access to Kasikili Island until Namibia's independence.

208. In any course of testimony stretching over more than 300 pages and comprising the recollections of more than 60 witnesses of events sometimes occurring almost a century earlier, a certain amount of inconsistency and confusion may be expected to appear. Yet, overall the evidence of the witnesses provides a clear, consistent and convincing account of the state of affairs in and around Kasikili Island, beginning at the turn of the twentieth century and continuing for many decades thereafter. Since many of the witnesses spoke not only from personal knowledge but also recounted what they had heard from their parents and grandparents, the time horizon goes back even further.<sup>192</sup> Kasikili Island was part of the agricultural lands of the Masubia of the area, inhabited during the dry seasons, with the people moving to Kasika during the annual inundation of the Zambezi flood plain. It was essential to their economic subsistence and a part of their polity. What emerges is a picture of the Island as an accepted and unexceptional component of the territory of the Masubia of the Eastern Caprivi. It was fully integrated into their economic, political and social life, encompassed in the diurnal round of their activities, and indistinguishable in any way from any of their other lands bordering the Chobe in this region. In short, it was, as so many of the Masubia witnesses said, 'their land.'<sup>193</sup>

## **B. Corroborative Evidence**

209. The description of the situation in Kasikili Island given by the witnesses before the JTTE is fully consistent with that appearing in official reports and comments as well as historical and anthropological studies. As early as 1912, British Captain E.V. Eason, reporting on his exploratory trip up the Chobe River, noted that 'The natives living at Kasika in German territory are at present growing crops on it [the Island].' His general comments about the Masubia villages tend to corroborate the testimony of the witnesses about moving back and forth from the Island to Kasika with the seasons to avoid the annual floods: '[T]here is no permanency of these [villages]. Towards the Liambesi [about 50 kilometres west of Kasikili Island] the Basubia do not trouble to build huts but live under reed mats with a few bundles of grass thrown on top[]'.<sup>194</sup>

210. Richard Rothe, a German explorer who travelled in the area in July 1904, wrote that he found Impalera, 'the largest of the islands belonging to German territory . . . uninhabited.' His account continues:

On the islands coming after Mpalera, [sic] although much smaller than Mpalera, there was lively activity; on each island there were approximately 100 Kaffirs with women and children. These islands are extremely fertile, and each is approximately 4 km long and 700 metres wide, in contrast to Mpalera, which is 14 km long and 2 km wide.<sup>195</sup>

Kasikili Island is one of the first of the islands upstream from Impalera (by implication also 'belonging to German territory') and Rothe's description reproduces almost exactly the picture of life at the beginning of the planting season given by the witnesses.

211. One of the most judicious and detailed of the official documents is the 'Report on the Administration of the Eastern Caprivi Zipfel: 1940' from the Magistrate of the Eastern Caprivi District, L.F.W. Trollope, to the Secretary for Native Affairs of the Union of South Africa.<sup>196</sup> Trollope had assumed his post only a year before, and this was his first comprehensive report to his superiors. Speaking generally of the Masubia, he confirms the picture of the subsistence agricultural economy and way of life drawn by the witnesses. The area is fertile, and in terms of the necessities of life the inhabitants sustain themselves by growing 'maize and millet (mainly) with smaller quantities of pumpkins, calabashes, monkey nuts, cassava and beans.'<sup>197</sup> Many live near the rivers, and '[a]nnual inundation takes place of tremendous areas when villages -- which are flimsily constructed of grass [a]nd reeds -- stock and people often have to move.'<sup>198</sup> His report, incidentally, confirms that the rainfall in 1938-1939 and 1939-1940, the general period of the first 'big flood' mentioned by the witnesses, was extraordinarily high. In the 1939-1940 season, the river at Katima Mulilo rose about seven meters (or 23'1").<sup>199</sup> Twenty-three years later, one of Trollope's successors, Magistrate C.E. Kruger, observed that the more fertile land was near the river.<sup>200</sup> The Masubia begin planting at the first sign of rain so that their crops are ready to be harvested just before their land is flooded.<sup>201</sup> A more recent observer gives a similar account:

The flood makes the land completely untenable for several months. . . . So all the villages trek -- a great seasonal move of people, cattle, chickens, grain, personal effects, foodstuffs -- from the flood-land areas to higher ground somewhere. Usually, the movement is to the north-west, although sometimes it is to a local patch of higher ground which always stands as an island above the height of the highest flood. There, on the dry ground, they often maintain another village -- a junior-grade, flood-time counterpart of their floodplain village.<sup>202</sup>

This description of the Masubia's annual migration from floodplain to nearby high ground exactly confirms the testimony of the witnesses to the JTTE.

212. Trollope mentions, also in corroboration of the witness testimony, that in the days of joint administration of the Caprivi and Bechuanaland by Britain a school was conducted at Kasika which operated for a time after South Africa resumed administration of the Mandate in 1929.<sup>203</sup> He records that Chikamatondo was installed as chief by the Germans, when they first established their administrative post in the region in 1909, and that as of the date of the report, he is still chief but is old and blind.<sup>204</sup> In his journal Hauptmann Kurt Streitwolf, the first German Imperial Resident in the Caprivi Strip, provides a vivid description of the installation of Chikamatondo, who was invested with office in the presence of German authorities. See para. 228, *infra*, for a fuller discussion and Fig. 8, p. 90, for a photograph of this event.

213. Another source contains a genealogical account of the Masubia rulers that adheres more closely to the story told by the witnesses:

[His predecessor] had died and Liswaninyana was still young. The baSubiya then appointed a certain Chika-Matondo . . . to act as regent in the place of Liswaninyana. Later Liswaninyana took over from Chika-Matondo. . . . Liswaninyana died in 1937. Following his death, Chika-Matondo continued ruling the baSubiya of Caprivi for some years.<sup>205</sup>

It also states that Liswaninyana 'lived at Kasika in the Caprivi strip'<sup>206</sup> and that Chikamatondo died at Schuckmannsburg in 1945.<sup>207</sup>

214. The traditional and exclusive occupation and use of Kasikili Island by the Caprivi people is also acknowledged by British and South African authorities at both the local and governmental level in the negotiations and correspondence leading to the 1951 agreement between Major Trollope, the South African Magistrate for the Eastern Caprivi District, and V.E. Dickinson, District Commissioner for the Bechuanaland Protectorate.<sup>208</sup> A joint investigation by Trollope and Noel Redman (Dickinson's predecessor) in January 1948 concluded:

5. [W]e 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 the 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.<sup>209</sup>

Trollope and Dickinson agreed 'that Kasikili Island continue to be [used] by Caprivi tribesmen.'<sup>210</sup> (emphasis added) Indeed, the whole point of the arrangement was to continue a status quo that both sides had long recognized.

215. That this historic use was to the exclusion of any other group is expressly brought out in the correspondence leading up to the agreement. The Bechuana side sought to include a

stipulation that nothing in it 'should be read as preventing the B.P. Tribesmen [from] using the Island for ploughing purposes.'211 Trollope strongly resisted this attempt:

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. . . .212 (emphasis in original)

District Commissioner Dickinson accepted this position and dropped the proposed reservation in a letter of 3 September 1951.213 The final agreement was embodied in Trollope's letter of 13 September 1951.214 In informing the District Commissioner that this letter 'correctly reflects the attitude towards the Kasikili Island boundary dispute taken by this Government,' the Bechuanaland Protectorate Secretariat noted that:

It is understood that the only Africans in the Protectorate interested in the cultivation of the Island are Government employees living at Kasahe [sic] and I am to say that they should be instructed that they will not be permitted to plough on the Island.215

216. The intervening correspondence, both within and between the two governments, abundantly evidences the common understanding as to the traditional use and occupation of the Island by the Caprivi people. On the South African side, the Secretary to the Prime Minister of South Africa for External Affairs wrote the Bechuanaland High Commissioner that:

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.216

Later, Sir Evelyn Baring, High Commissioner for the Bechuanaland Protectorate, recounted that he had visited the Island and found that 'the Island has been cultivated by Caprivi tribesmen for many years without dispute. . . .'217 Numerous similar references can be adduced.218

217. In short, the official documents, particularly those generated by the 1948-1951 negotiations of the Trollope/Dickinson agreement, paint a picture that is fully consonant with the witness testimony heard by the JTTE and goes far to corroborate the general tenor of that testimony. What they reveal is 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. Their occupation was continuous and uninterrupted, insofar as the physical conditions of the Island allowed. That is, the villagers planted, tilled and harvested each year, leaving the Island only with the arrival of the floodwaters. Kasikili Island/Kasika 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.

## CHAPTER III

### The Exercise of Sovereignty

218. Through the testimony of witnesses as well as official documents from Germany, Great Britain, South Africa and the Bechuanaland Protectorate, Chapter II of this Part has shown the continuous use and control of Kasikili Island by the Masubia from the Eastern Caprivi even before 1909, the date of the first German administrative post in the region. But in order to establish sovereignty by operation of prescription, acquiescence and recognition, the claimant must show more than the use of the disputed territory by private individuals for their private ends.<sup>219</sup> It requires, according to the arbitrator's opinion in the *Island of Palmas* case, 'the continuous and peaceful display of territorial sovereignty.'<sup>220</sup> And Johnson says, adapting from Fauchille, '[T]he possession of the prescribing state must be exercised *à titre de souverain*. . . .'<sup>221</sup> This Chapter demonstrates the 'continuous and peaceful display of the functions of state'<sup>222</sup> in respect to Kasikili Island by Namibia's predecessors in title -- first Germany and then South Africa.

219. The *Island of Palmas* case recognized that '[m]anifestations of territorial sovereignty assume . . . different forms, according to conditions of time and place.'<sup>223</sup>

[I]n the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly unsubdued.<sup>224</sup>

In the end, taking into account that 'the manifestations of sovereignty over a small and distant island cannot be expected to be frequent,' the arbitrator held for the Netherlands, although

[t]he acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the eighteenth and early nineteenth centuries are not numerous, and there are considerable gaps in the evidence of continuous display.<sup>225</sup>

Later in the *Eastern Greenland* case, the PCIJ pointed out:

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 of sovereignty over areas in thinly populated or unsettled countries.<sup>226</sup>

The exercise of sovereignty manifested in the present case amply meets the requirements thus established.

220. Kasikili Island is a tiny dot of land, less than four square kilometres in area, under water part of every year, located in a sparsely populated area,<sup>227</sup> inaccessible and all but unknown to outsiders. During colonial times it was the furthestmost point of German South West Africa. Thereafter it was at the extremity of South African jurisdiction, as it is today of Namibia's. In these circumstances, it would be unreasonable to expect frequent activity by officials of the ruling authorities on the Island itself. But within the limits imposed by these conditions, the record shows the regular and uninterrupted exercise of political authority by Namibia's predecessors in title, back to the beginning of the century. Even the original name of the

Island has a political aspect: it was called Sulumbu's Island after the *induna* who administered it, as mentioned in Vol. II of this Memorial, for the reigning Masubia chief. (See Atlas, Map IV)<sup>228</sup>

221. This Chapter examines the exercise of jurisdiction over Kasikili Island under the three foreign rulers of Namibia between 1890 and its independence a century later: (1) the period of German colonial rule from the 1890 Treaty until the outbreak of World War I; (2) the period of administration by the High Commissioner of the Bechuanaland Protectorate as delegate of South Africa under the League of Nations Mandate, between 1 January 1921 and 29 September 1929; and (3) the period of South African dominance from 1929 to 1990, during the time of the League of Nations Mandate and *de facto* after 1966.

### **A. German Colonial Rule: 1890-1914**

222. Although the Caprivi Strip was allocated to Germany by the Anglo-German Treaty of 1890, formal administration was not established until 1909. Until then, from the European colonial perspective, the Eastern Caprivi was a 'no-man's land,' essentially outside the law.<sup>229</sup> The white population consisted of criminals who had escaped from the Livingstone jail, freebooters and pothunters (*Aasjäger*) who were engaged in uncontrolled hunting for elephant, giraffe, elands and other big game that was protected by law in the Bechuanaland Protectorate and elsewhere in southern Africa.<sup>230</sup> These conditions were the subject of increasing consternation among the British authorities in Bechuanaland. The correspondence of Lord Selborne, the British High Commissioner, gives vivid descriptions of the situation and demands that game laws similar to those in the British Protectorate be adopted and enforced by the German authorities.<sup>231</sup>

223. Reacting to these complaints, the Imperial Colonial Office in Berlin appropriated funds for the administration of the Strip, and on 16 October 1908 the German governor in Windhoek, Bruno von Schuckmann, issued an ordinance closing the territory to all Europeans without an official permit, thus laying the legal basis for the exercise of administrative authority in the region.<sup>232</sup> At the same time, he appointed Hauptmann Kurt Streitwolf, then the district head at Gobabis, as Imperial Resident of the Caprivi. Streitwolf, at the head of a contingent of four German military officers and 14 African policemen, entered the Strip on 25 January 1909.<sup>233</sup> Travelling mostly along the southern bank of the Chobe, he crossed it shortly before it joined the Zambezi and on 3 February reached the southern bank of the Zambezi opposite Sesheke in what was then North Western Rhodesia. There he established a new town, which he named Schuckmannsburg, and set up his headquarters.<sup>234</sup>

224. With such a small staff, Streitwolf had no alternative but to exercise his authority by means of indirect administration.<sup>235</sup> That is, he relied on the indigenous political and social organization to maintain law and order in the first instance and to carry out his wishes. The concept of 'indirect rule' was most fully developed in the British colonial service and ultimately became the orthodox British approach to colonial administration.<sup>236</sup> Its origins have been traced to the activity of British colonial administrator Frederick D. Lugard in Northern Nigeria a few years before Streitwolf arrived in the Eastern Caprivi.<sup>237</sup> However,

[r]uling indirectly, that is to say, utilizing the traditional authorities in a region to carry out the orders of an alien administration established by conquest, was neither new nor particularly British. It was the natural result of an attempt to acquire great tracts of inhabited territory quickly and to rule them "on the cheap" with badly strained resources and a handful of men.



Such a situation was hardly unique to Northern Nigeria, as a comparison with German experience [in South West Africa] makes clear.<sup>238</sup>

In sum, the method of indirect rule reflected a policy of retaining, strengthening if necessary, and supporting

[w]herever possible, the form of government natural to the tribe or community concerned, whether it [was] the rule of a Chief, of a Council of Elders, or of a popular assembly. . . . [A] constant effort [was] made to seek out and to develop the best in the natural institutions of the peoples themselves . . . [and] to guide by influence and advice [rather] than to rule by direct command.<sup>239</sup>

This approach was well adapted to the close-knit and relatively peaceful community of the Masubia.

225. The formal delegation of jurisdiction over their tribes to the chiefs made them *pro tanto* officials of the colonial governments.

The essential feature of the [indirect rule] system (as [Lugard] wrote at the time of its inauguration) is that the native chiefs are constituted "as an integral part of the machinery of the administration. There are not two sets of rulers -- British and native -- working either separately or in co-operation, but a single Government in which the native chiefs have well-defined duties and an acknowledged status equally with British officials. . . . [T]he chief himself must understand that he has no right to place and power unless he renders his proper services to the State."<sup>240</sup>

226. The *Island of Palmas* case involved a similar division of authority between the Dutch East India Company, acting on behalf of the Netherlands government, and native princes or chiefs. The arbitrator gave full weight to the exercise of governmental functions by the native leaders, holding that:

It is the sum-total of functions thus allotted either to the native authorities or to those of the colonial Power which decides the question whether at any certain period the conditions required for the existence of sovereignty are fulfilled.<sup>241</sup>

227. Streitwolf had been impressed by the British policies of indirect rule in Bechuanaland on his journey to the Caprivi.<sup>242</sup> But in addition to the constraint of limited resources of men and money, Streitwolf had another important motivation for adopting the method of indirect rule. The heavy-handed, centralized German administration in Windhoek had culminated in the disastrous repression of the Hereros and Namas in the central and southern part of the country resulting in the slaughter of tens of thousands of those peoples. The reputation of the Germans preceded them, and when it became known that they were preparing to establish an outpost in the Eastern Caprivi most of the inhabitants fled. The Barotse, who had been the dominant people in the area, crossed the Zambezi to North Western Rhodesia, the core of their traditional empire, taking their cattle with them as well as those of the Masubia, who had until then occupied a status of semi-serfdom. Many of the Masubia also left, crossing the Chobe to the south. Streitwolf was content to let the Barotse go, and the British to the north co-operated with him to eliminate their continuing influence.<sup>243</sup> But he needed to induce the Masubia to return because his domain was underpopulated without them.

228. The end of Barotse suzerainty left a power vacuum that Streitwolf moved quickly to fill. Indirect rule by Germany in the Eastern Caprivi began when, early in May 1909, Streitwolf called a meeting of the Masubia *indunas* at Schuckmannsburg. Streitwolf addressed the meeting 'as the authorized agent of the German government to establish peace and the rule of law in the country' and asked them to elect a new chief with whom 'I could discuss everything and [who would] then pass on my words to [you].'<sup>244</sup> After some deliberation, the assembly chose a Masubia notable, Chikamatondo, apparently because Liswaninyana, the only available member of the traditional royal family, was thought to be too young.<sup>245</sup> Streitwolf confirmed their choice. On 4 May 1909, Chikamatondo was installed at Schuckmannsburg with as much pomp and circumstance as Streitwolf could muster in a ceremony deliberately designed to impress his subjects.

The native police lined up, I wore my dress uniform -- as far as I had the necessary pieces available -- ; [sic] and a police officer stood behind me with the German flag fastened to a spear as flagstaff; next to me stood Djika Matondo whom I presented to his new people as their prince.<sup>246</sup> (See Fig. 8)

But they were left in no doubt as to the real authority in the area. 'I told them again that they should have no fear anymore of the Germans and that they should turn to me together with Djika Matondo if they had any complaints to raise. I would then help them, provided that I would find them to be right.'<sup>247</sup>

229. Streitwolf was succeeded by Lieutenant Hans Kaufmann, who continued the policy of indirect rule, interfering as little as possible with the internal affairs of the Masubia.<sup>248</sup> As Kaufmann wrote, 'I resort to the stand-still policy that Hauptmann Streitwolf recommended to me and [have] "governed" as little as possible.'<sup>249</sup> Kaufmann retained the basic administrative structures Streitwolf had developed. When the administration of the Strip was transferred subsequently from the German military to civilian auspices,<sup>250</sup> this change did not substantially affect the existing administrative structures and arrangements.

230. It was through Chikamatondo and the Masubia tribal organization that German rule of the Eastern Caprivi was carried out. And, as is abundantly clear from the testimony, the chiefs, and indeed all the Masubia, regarded Kasikili Island as part of their traditional territory.<sup>251</sup> Indeed, the map of the area drawn by Lieutenant Viktor von Frankenberg, the last German Imperial Resident, shows 'Schikamatondo's kraal' at the location of Kasika, the village from which many of the witnesses who farmed on Kasikili Island came and to which the villagers on the Island repaired in the rainy season. (See Atlas, Map VII)<sup>252</sup>

231. The political and legal organization of the Masubia was fairly typical among Africans at the time. Kaire Mbuende describes it as follows:

The chief was regarded as head of his people, preserver of peace and order, and the protector of the needy. The chief was assisted by a council known as *Kuta*. The *Kuta* consisted of councillors known as *indunas* of which each represented a particular area, and was presided over by a *Ngambela* or chief councillor who did not represent a particular area. The *Ngambela* was appointed by the chief from candidates suggested by the people at a general meeting. The *Ngambela* could dispose of minor matters in consultation with the *indunas*.

The people of the Caprivi lived in small villages, each consisting of 30 or more habitations. The senior man in the village was regarded as its head so that people who [wanted] . . . to

settle in the village sought his permission. When a new village was to be established one had to obtain the permission of the chief. Thereafter, the *induna* under whose jurisdiction the area fell demarcated a stretch of land for the purpose. The village head then divided the land among the villagers.<sup>253</sup>

In the exercise of this authority, Sulumbu, the *induna* who administered the area in which Kasikili Island is located, was responsible for the allocation of land on the Island.<sup>254</sup>

232. Village heads were responsible for local disputes in their small communities, with larger cases going to the *induna* for settlement and then to chief's court. Appeal from these decisions in certain classes of cases went to the authorities at Schuckmannsburg. Major criminal offences, of which there do not seem to have been any on Kasikili Island in this period, were tried before the colonial authorities.<sup>255</sup> As noted above, witnesses testified that Liswaninyana's court was held on the Island.<sup>0</sup> Major L.F.W. Trollope, the first Resident Commissioner for the Eastern Caprivi, stated that this form of administration continued until the outbreak of World War I when Southern Rhodesian police captured Schuckmannsburg without bloodshed.<sup>1</sup>

### **B. Administration by the Bechuanaland Protectorate as Delegate of South Africa under the League of Nations Mandate**

233. Although the rest of South West Africa was conquered by South Africa and ruled under martial law by South African authorities during World War I, the Eastern Caprivi was governed as occupied territory by the District Commissioner of the Bechuanaland Protectorate in Kasane. Nevertheless, the laws applicable in the Caprivi were the laws of South West Africa, and the courts in South West Africa had jurisdiction over serious offences. By operation of the Treaty of Versailles, South Africa in 1919 became the administering power for the whole of present-day Namibia under the League of Nations Mandate.<sup>2</sup> In 1922, the Governor-General of the Union of South Africa delegated responsibility for the Caprivi to the High Commissioner for South Africa with effect from 1 January 1921.<sup>3</sup> The High Commissioner exercised his authority through the Bechuanaland administration.

234. The British authorities continued to operate their standard form of indirect rule. To avoid any action that would involve the imperial government in difficulties, the Special Commissioners were instructed to assert their authority only if it was absolutely necessary.<sup>4</sup> Throughout this period, the Caprivi, though administered by the Bechuanaland Protectorate, was still a part of the mandated territory of South West Africa. The recognition by the Bechuanaland authorities that the Caprivi was part of the Mandate was no mere formality. The existence of the Mandate, combined with the supervisory powers of the Permanent Mandates Commission, was seen by British officials as a real obstacle to a change of status of the territory. Earlier hopes of annexing the Strip in exchange for a piece of Bechuanaland were abandoned. Although on several occasions the local officials recommended the imposition of a tax on the people of the Caprivi, these recommendations were rejected, and throughout the period of British administration, from 1914 to 1929, the people of the Caprivi, unlike their neighbours in Bechuanaland, were not subject to any form of taxation.

235. Evidencing the continued practice of indirect rule, every report to the Council of the League of Nations on the administration of the Caprivi during this period names the chiefs of the main tribes, including Chikamatondo.<sup>5</sup> The reports also describe the relationship between the formal legal system of the colonial administrator and the Masubia legal structures. Chiefs

and *indunas* continued to exercise judicial authority with appeals from their judgements to the Assistant Commissioner and then the Resident Commissioner. Fines imposed became the property of the chief.<sup>6</sup> The chiefs also were relied on for the performance of administrative functions, as for example in instructing their people on specific measures to be taken to contain an outbreak of the plague that had occurred in the Caprivi.<sup>7</sup> Although issues arose as to other parts of the border between the Caprivi and the Protectorate,<sup>8</sup> the eastern portion of the southern boundary along the Chobe did not pose a problem to the British authorities, either in London or Bechuanaland.

236. Because of the Caprivi's status as a League of Nations mandated territory, the Bechuanaland authorities were scrupulous in maintaining the legal niceties of separate administrations for the two territories under their control. Indeed, South Africa reimbursed the Protectorate for expenses incurred in the administration of the Caprivi.<sup>9</sup> There is no record of any attempt to alter *de jure* or *de facto* the territorial situation as it existed under German rule, in which Kasikili Island was considered a part of German South West Africa.

237. Trollope, looking back on the period, states that:

[E]ven during the period 1915-1929 when the Caprivi was administered by the Bechuanaland Administration on behalf of the Union Government, this positio[n] continued and no objection was raised to cultivation of the island by Caprivi tribesmen.<sup>10</sup>

The British authorities exercised jurisdiction over the Eastern Caprivi, including Kasikili Island, during this period, not in their own name or that of Bechuanaland, but strictly as an agent and delegate of the mandatory power.

### **C. South African Rule from 1929 to Namibian Independence**

238. When members of the League of Nations Permanent Mandates Commission expressed concern at the delegation of control over the Caprivi to Great Britain, South Africa resumed responsibility on 1 September 1929 for administration of the whole Mandate.<sup>11</sup> For the first decade, the Strip was administered from Windhoek under a system that provided extensive governing authority to the chiefs and indigenous institutions in the territories along the northern border.<sup>12</sup> During this period, according to Trollope:

The staffing of the Eastern Caprivi Zipfel consisted, for a short time, of a superintendent, a European trooper and a few Native constable - labourers. The trooper resigned and was not replaced and the superintendent proceeded to carry on alone. He had the powers of a Special Justice of the Peace and gradually attained a position of considerable authority among the Natives.<sup>13</sup>

239. The method of indirect administration continued out of necessity. A tribal levy of five shillings per year per adult male was imposed, although there were many remissions and exceptions.<sup>14</sup> It was applied mainly for the payment of an annual stipend to the two chiefs in the area.<sup>15</sup> This was a capitation tax and did not relate to any particular location or activity.<sup>16</sup> But witnesses who testified to living and farming on Kasikili Island recalled going to Schuckmannsburg to pay it.<sup>17</sup>

240. Major L.F.W. Trollope became the Native Commissioner and Magistrate for the Eastern Caprivi in late 1939. His appointment coincided with the transfer of responsibility for the

Eastern Caprivi within the South African establishment from the South West African Administration to the Secretary of Native Affairs of the Union Government and the beginning of a more energetic administrative effort.<sup>18</sup> When Trollope arrived, the district headquarters had already been moved to Katima Mulilo.<sup>19</sup> He had one assistant, the native police staff was increased, and a number of cattle guards were appointed.<sup>20</sup>

241. In 1940, the Caprivi was brought within the reserve system that had been established by South Africa in 1922.<sup>21</sup> Chiefs were empowered to deal with matters arising in their territory in accordance with native law and custom, and on the whole 'government [was] left entirely to the Natives,' subject to administrative veto of laws that were 'not in keeping with just rule and which retarded progress.'<sup>22</sup> The Minister of Bantu Administration and Development, speaking in 1968 in the South African Assembly on a bill for the Development of Self-Government for Native Nations in South-West Africa, stated:

In the Northern Sector, South Africa, therefore, established a system of indirect control whereby the groups governed themselves in accordance with their own systems, known to and valued by them, under the guidance and with the assistance of officials. . . .

[This] system of indirect administration through the peoples' own systems has proved its worth over the last 50 years.<sup>23</sup>

242. There can be little doubt that Trollope considered the Island to be within his sphere of authority and responsibility. For example, witnesses testified that when elephants destroyed their crops on Kasikili Island, the Commissioner hired hunters to control the number of animals in the area.<sup>24</sup> Some witnesses recalled Commissioner Trollope patrolling the Kasikili Island area and marking the boundary next to Kasane with a big drum.<sup>25</sup> Trollope himself said he would be failing in his duty to the tribesmen were he to accept the northern channel as the boundary, in view of their long and undisturbed use of the Island.<sup>26</sup>

243. The episode leading to the Trollope/Dickinson agreement discussed in Chapter IV, Section C, *infra*, is a striking instance of the assertion of South African jurisdiction over the Island and illustrates the presuppositions of both the South African and Bechuanaland administrations and the usage that underlay them. In that case, the director of the Zambezi Transport and Trading Company applied as a matter of course to Trollope, as Resident Magistrate and Native Commissioner of South Africa in Eastern Caprivi, for permission to use the northern channel around Kasikili Island to transport timber from Serondellas, west of the Island, to the Zambezi River. Permission was granted for six months with the prospect of indefinite renewal 'subject to cancellation for good reason.'<sup>27</sup>

244. The Trollope/Dickinson agreement provided for free navigation, although without the requirement of official permission. It also recognized the status quo on the Island: free use of the area by the Caprivi people, subject to the continued supervision and control of the South African authorities at Katima Mulilo.<sup>28</sup>

245. Trollope was succeeded by A.B. Colenbrander in 1953. The status of the Island continued without interruption during his tenure. Writing in 1963, Ruth First described the role of the chiefs in the administration of the reserves as follows:

The Chiefs are entrusted by the Administration with the unpleasant tasks of collecting taxes, conveying the orders of the Commissioner, and enforcing the law in times of trouble; they

cushion the government from the demands and anger of their subjects. . . . [T]he Chief is an employee of the government and no longer answerable to his tribe, but to a higher, intruding authority. Chiefs and senior headmen on the government payroll who fail to prove themselves sufficiently cooperative receive the treatment that any disobedient Civil Servant would get -- the sack.<sup>29</sup>

In a report of the same year, C.E. Kruger, a later Resident Commissioner, remarked, 'To-day, of course, the appointment of a chief is ultimately by the government but it can be accepted that the tribe's wishes are respected unless there is some very special reason for not doing so.'<sup>30</sup>

246. On 30 September 1966, Botswana became independent, and in the same year the United Nations terminated South Africa's mandate for Namibia.<sup>31</sup> Thereafter, the evidence is that the South Africans exercised *de facto* control over Namibia, including the Island. Continuing the pattern of indirect rule, Proclamation R. 320, 1970 conferred jurisdiction to chiefs, *ngambelas*, *kuta* members and headmen in the Eastern Caprivi Zipfel over civil and criminal cases between natives (with a few exceptions) 'in accordance with native law and custom.'<sup>32</sup>

247. The area became a major battlefield in the war for Namibian independence.<sup>33</sup> Direct documentary information concerning this period is difficult to obtain since most of it remains classified. The South African parliamentary debates, however, contain frequent references to acts of 'terrorism' in the northern regions.<sup>34</sup> Although the principal engagements during the liberation war seem to have been further west, the Caprivi was involved as well.<sup>35</sup> Even before the termination of the Mandate, South Africa had established a military training centre in the Strip.<sup>36</sup> By 1975, South African Police and Defence Force units were sent to the area.<sup>37</sup> According to SWAPO, the organization deployed its fighters in Eastern Caprivi when it launched its campaign against the South African Defence Force in 1966.<sup>38</sup> SWAPO reports that its forces seized a South African base in Eastern Caprivi on 9 April 1975,<sup>39</sup> and that South African and tribal troops broke up a SWAPO meeting in Katima Mulilo with 'tear-gas and live bullets' on 4-5 February 1978.<sup>40</sup>

248. The Island itself was within this military orbit. Witnesses testified to incidents of arrest and punishment of Caprivi men caught on the Island.<sup>41</sup> According to Annex 84, discussions were held between the Republic of South Africa and Botswana in 1974-75, in which it was agreed that the Island forms part of the Caprivi. At a second session between the two governments on border matters at Katima Mulilo in 1984, Botswana did not raise the issue, indicating that it was prepared to acquiesce to the existing situation.<sup>42</sup> The shooting incident discussed in para. 284, *infra*, between a patrol boat of the South African Defence Force and a unit of the Botswana Defence Force in October 1984, indicates that South Africa was exercising jurisdiction over the Island by conducting military patrols in the southern channel.

249. The record shows 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 termination 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.

250. The facts thus more than fulfil the test of the *Island of Palmas* case for the continuous and open exercise of jurisdiction necessary to establish sovereignty by prescription and acquiescence.

## CHAPTER IV

### Acquiescence, Acceptance and Recognition

251. As noted in Chapter I of this Part, acquiescence is an essential element -- some would say the essential element -- in the acquisition of prescriptive title. As Johnson says, 'the essence of prescription is the acquiescence, express or implied, of the one state in the adverse possession of the other.'<sup>43</sup> Indeed, Brownlie seems to conclude that all of the other requirements are subsumed under that of acquiescence.<sup>44</sup>

252. Acquiescence has been defined as 'the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights.'<sup>45</sup> The author goes on to say, 'it is not intended to connote the forms in which a State may signify its consent or approval in a positive fashion. Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection.'<sup>46</sup> All the authorities agree that absence of protest is sufficient to establish acquiescence if it continues over a sufficiently long period of time. Indeed, Johnson thought that, after the establishment of the PCIJ and the League of Nations, protest alone was not enough. Some effort to bring the issue before a competent international body was necessary.<sup>47</sup> Not many authorities go this far, but all stress the absence of protest with knowledge of the facts as conclusive evidence of acquiescence.<sup>48</sup> Judge Lauterpacht argued that the absence of protest may itself become a source of legal right, and that this result 'is in accordance with equity.'<sup>49</sup> And Brownlie states categorically, 'Acquiescence . . . arises from conduct, the absence of protest when this might reasonably be expected.'<sup>50</sup>

253. There is no specific prescriptive time period for which acquiescence must persist in order to give rise to rights in the other party. MacGibbon says that the duration required 'will depend on the intensity with which the claim is manifested; on the publicity surrounding its promulgation or enforcement; on the nature of the right claimed; on the position and condition of the territory affected; and so on.'<sup>51</sup> In short, it depends on the facts of the case.<sup>52</sup> As noted in para. 187, supra, 50 years was sufficient in the *Temple* case and 60 years in the *Fisheries* case.

254. The remainder of this Chapter analyzes the conduct since 1890 of the British authorities (in London and Bechuanaland) and of the government of Botswana since its independence in 1966. The record is one of unbroken silence and inaction, let alone formal protest or objection, persisting for almost a century, despite full and continuous knowledge of the occupation and use of Kasikili Island by Namibia. The legal requirements for acquiescence are amply fulfilled.

#### A. In General

255. During the entire period from 1890 to 1966, when they were responsible for the administration of Bechuanaland, the British authorities, with full knowledge of the facts set forth in the two preceding sections concerning Namibian/Masubia occupation and use of Kasikili Island and German and South African exercise of sovereignty there, failed to protest, object or interfere in any way with the situation as it existed. As will be shown in para. 258, *infra*, this unbroken record of silence and passivity contrasted markedly with British conduct in neighbouring areas where it was the colonial power. After Botswana became independent, Botswana maintained its silence for almost two additional decades.

256. That the British authorities were fully aware of the occupation and use of the Island by Masubia farmers and made no effort to stop them was affirmed repeatedly by the witnesses at the hearings before the JTTE.<sup>53</sup> As Trollope pointed out in a memorandum to the Secretary for Native Affairs in Pretoria:

[T]here has, apparently since 1915 or thereabouts, been either a District Commissioner's Office or a Police Post within a mile or two of the Island who could not fail to have been aware that the Island [was] being used by Caprivi tribesmen. . . .<sup>54</sup>

Indeed, as discussed at length in paras. 214-216, *supra*, the British and Bechuanaland authorities repeatedly acknowledged the facts of continuous occupation and use of the Island by Eastern Caprivi people.

257. Trollope, in 1948, remarked that

even during the period 1915-1929 when the Caprivi was administered by the Bechuanaland Administration on behalf of the Union Government, this positio[n] continued and no objection was raised to cultivation of the island by Caprivi tribesmen.<sup>55</sup>

His observation is fully borne out by the discussion in Chapter II, *supra*.

258. This is in contrast to the British practice during this same period with regard to transborder cultivation, grazing, fishing and wood cutting by the Barotse of Northern Rhodesia in the Caprivi Strip. The evidence shows that limited permission was granted annually to certain Barotse for these purposes at the request of their chief from 1917, soon after the British took over the administration of the Strip, through 1929 when they ultimately left.<sup>56</sup> Similar formality was observed in extending privileges to missionaries and others to cultivate in the area. With Portugal, the British Government concluded a formal treaty regulating transboundary cultivation across the border of Angola and Northern Rhodesia.<sup>57</sup> If the Barotse had to obtain British permission to come across the boundary to exercise traditional cultivation rights in Caprivi, it is hard to see why, if the British regarded Kasikili Island as part of Bechuanaland, they failed to require similar authorization for the Masubia of Caprivi to farm there. Indeed, as discussed in para. 276, *infra*, during the Trollope/Dickinson negotiations the Bechuanaland Protectorate (perhaps in an effort to bolster its position) did, for a short time, issue instructions to the Assistant District Commissioner at Kasane that the Caprivi people should be given permission to farm on the island on an annual basis.<sup>58</sup> South Africa objected strenuously, and the instructions were withdrawn without ever being implemented.

259. In 1957, six years after the Trollope/Dickinson arrangement, there was an important exchange between the Directorate of Colonial Surveys in England and the Director of Public



Works of the Bechuanaland Protectorate in Mafeking. The Directorate of Colonial Surveys noted, 'some difficulty is being experienced in our mapping of parts of eastern Bechuanaland.'

Boundaries of the Crown Lands, . . . as shown on the maps held in our library are not clearly distinguishable. . . . In order that no errors are made it would be greatly appreciated if you could send us a map showing all these boundaries clearly so that we may show them correctly on our maps.<sup>59</sup>

260. A month later the Director of Public Works replied personally attaching the requested map, which is to be found as Atlas, Map XI.<sup>60</sup> The boundaries of the Crown Lands (as well as other areas about which the Directorate of Colonial Surveys had inquired) are plainly shown in reddish-brown. The Crown Lands in the northeastern corner of the map about the Chobe. The reddish-brown marking along that portion of the boundary clearly excludes Kasikili Island, placing it unmistakably in Namibia. (See Fig. 14, and paras. 307-308, *infra*)

261. This correspondence between the two offices that were directly responsible for the conduct of survey and mapping operations in Bechuanaland and for the accuracy of the official maps is extraordinarily significant. The Director of Public Works at Mafeking, the officer in charge of these matters for the Bechuanaland Protectorate, with full knowledge that he was responding to a query about the location of Crown Land boundaries from what was in effect a superior office (the overall Directorate of Colonial Surveys, an agency of the Colonial Office), was in no doubt himself, and left no doubt for his interlocutor, that the Crown Lands, which in that area extended to the borders of the Protectorate, did not include Kasikili Island. In 1960, the first proclamation of Chobe National Park followed the same boundary, thus excluding Kasikili Island from its ambit.<sup>61</sup> Under the circumstances, these actions go well beyond acquiescence in Namibia's claims. They represent a positive admission by Bechuanaland that Kasikili Island is not part of Botswana.

262. There are three episodes that warrant further analysis in connexion with the foregoing account of unbroken acquiescence by Botswana and its predecessors: (1) the inconclusive negotiations over the Caprivi-Bechuana border between 1909 and the outbreak of World War I; (2) the discussions between 1948 and 1952 leading to the arrangement between Resident Magistrate Trollope and District Commissioner Dickinson to preserve the status quo in and around the Island; and (3) the discussions in 1984 between Botswana and South Africa after the shooting incident in the southern channel. Upon consideration, however, it is apparent that Botswana cannot rely on any of them to defeat Namibia's prescriptive claim.

## **B. The 1909-1914 Negotiations and the Eason Report**

263. The southern boundary of the Caprivi, as defined in Article III of the 1890 Treaty, runs along the 18th parallel of south latitude from 21° east to its intersection with the Chobe River and descends along the main channel of the Chobe to its junction with the Zambezi, subject to the stipulation that Germany should have a corridor not less than 32 kilometres (20 miles) in width between the 21st meridian and the Chobe. The northern boundary (between Caprivi and Angola) had been established by the German-Portuguese Treaty of 1886 as running from Andara to Katima Mulilo, also on the Zambezi.<sup>62</sup> As it turned out, the geographical information available to the negotiators in Berlin was faulty. With further exploration and survey, it was discovered that Andara was south of the 18th parallel. Thus the alignment prescribed by Article III of the 1890 Treaty could not be carried out. (See Fig. 9) This

situation was obviously appropriate for settlement by negotiation between the parties as called for by Article VI of the Treaty.

264. The British colonial authorities were concerned about the boundary as early as 1902.<sup>63</sup> Acceptance of a boundary to the south of the 18th parallel was especially problematic as it would infringe on the Batawana Reserve, which had been established as the area enclosed by the 21st and 24th meridians east and the 18th and 21st south parallels. In 1905, an arbitral award by the King of Italy confirmed the southwestern boundary of the Barotse kingdom in terms that coincided with the German-Portuguese Treaty.<sup>64</sup> At that point the question of the southern boundary of the Caprivi became a matter of some urgency within the British government.

265. At no time in the course of the exchanges with Germany that ensued did the British representatives raise with the Germans any question concerning the eastern sector of the southern boundary in which Kasikili Island is found. Until 1908, the dominant policy option under consideration was to seek to obtain all of the Caprivi in exchange for a piece of territory elsewhere in the Bechuanaland Protectorate. A formal proposal to this effect was made in July 1908 and promptly rejected by Germany.<sup>65</sup>

266. Thereafter, the discussions between the two countries focused on the western half of the southern boundary line. The German Foreign Office sent the British Colonial Office a copy of Seiner's map of 1909 (Atlas, Map IV),<sup>66</sup> showing the boundary in this area running on a parallel of latitude beginning at a point 32 kilometres (20 miles) due south of Andara.<sup>67</sup> The Colonial Office responded with a British map, Bechuanaland GSGS 2460 (Atlas, Map V),<sup>68</sup> reflecting the British position on this sector of the boundary, an oblique line parallel to the northern boundary and 32 kilometres (20 miles) to the south.<sup>69</sup> Since the issue could not be resolved by negotiation, the parties agreed that the matter should be submitted to arbitration.<sup>70</sup> The question of the nature of the tribunal was left open.<sup>71</sup> This proposed arbitration, however, became entangled inside both governments with another boundary question, the southern boundary of South West Africa along the Orange River, which Germany also offered to submit to arbitration. This led to arcane tactical debates within the British government and ultimately to a decision not to press Germany on the Caprivi arbitration lest Germany should take the occasion to reopen the Orange River boundary question.<sup>72</sup>

267. It has sometimes been assumed that the agreement in principle to arbitrate covered not only the western portion of the southern boundary, but also the question of the main channel of the Chobe.<sup>73</sup> It is true that some of the internal documents on the British side mention the main channel. At no time, however, did the British raise this issue with the German government in the correspondence relating to the arbitration, nor did they make any other form of reservation as to the eastern sector of the boundary. The dispute that the two governments agreed to submit to arbitration was whether the southern boundary of the Caprivi from the 21st meridian to the Chobe should be formed by a parallel of latitude beginning 20 miles south of Andara or a line parallel to and 32 kilometres (20 miles) south of the northern border from Andara to Katima Mulilo. The correspondence between Germany and Britain on this matter consistently restricted the issue to be arbitrated only in these terms.<sup>74</sup>

268. There seem to be two sources of the confusion. One is a letter from F.W. Panzera, the Resident Commissioner of the Bechuanaland Protectorate, responding to a question as to how

the Batawana would react to the demarcation of the southern boundary. In the letter he states his view that they would probably not object since their reserve was ample, but that they

would bitterly feel the loss of . . . the island in the north-east corner, the retention of the major portion of which within the reserve depends upon the decision of a Commission as to whether the north or south stream is the main channel of the Chobe (or Linyanti) River.<sup>75</sup>

269. Panzera's description of this island superficially resembles Kasikili Island, but he is actually referring to an island at the northeast corner of the Batawana Reserve, while Kasikili Island is 170 kilometres to the east. Panzera does not name the island, but a Colonial Office official, C.P. Lucas, identifies it as 'Swampy Island,'<sup>76</sup> which appears at the right place, the northeast corner of the Batawana Reserve, on Bechuanaland GSGS 2460 (Atlas, Map V),<sup>77</sup> the map that the British Foreign Office was using and sent to the Germans at the beginning of the negotiation. (Incidentally, Lucas concluded that the Bechuanaland Protectorate could not claim 'Swampy Island' because the main channel was clearly to the south of it.)

270. The second potential source of confusion is that the Secretary of State of the Colonial Office at one point did seem to think that the problem of the channel of the Chobe might be submitted to arbitration and, thus, directed the High Commissioner of the Bechuanaland Protectorate to gather information on the question from local sources.<sup>78</sup> It was this despatch that led to Captain Eason's exploration up the Chobe. As it turned out, the Foreign Office and Colonial Office subsequently agreed to postpone consideration of the Chobe issue, which they regarded as 'subsidiary.'<sup>79</sup>

271. Captain Eason's recommendation after his expedition in 1912 that 'undoubtedly the [n]orth[ern channel] should be claimed as the main channel' is of special import in this context.<sup>80</sup> His vigorous appeal, supported by personal observation and well-drawn maps, was made at the very time the issue of the southern boundary of the Caprivi was under close analysis in both the Foreign and the Colonial Office. See para. 327, *infra*. But the Eason report was ignored, and no claim such as he proposed was ever made. To paraphrase the judgement of the Court in the *Temple* case, 'it is precisely the fact that [the British] had raised these other questions, but not that of [Kasikili Island] which requires explanation.'<sup>81</sup>

272. It has been suggested that the reason for the failure to follow up on Eason's recommendation at the time was that it was planned to submit the entire matter of the southern boundary of the Caprivi Strip to arbitration.<sup>82</sup> However it is clear from the correspondence discussed above that the area of interest for the arbitration and the area of difficulty raised by the 1890 Treaty was not Kasikili Island but the western sector of the boundary.<sup>83</sup>

273. The western sector of the southern boundary was finally agreed on in 1932 by an exchange of despatches between Great Britain and the Union of South Africa.<sup>84</sup> The negotiations, in the aspect here relevant, was a reprise of the 1909-1914 negotiations between Germany and Great Britain. They addressed in detail the situation of the sector of the border west of the intersection of the 18th parallel and the Chobe. But at no time did the British representatives indicate any concern about the situation in the eastern sector, including Kasikili Island, although they were well aware of the situation on the ground because they had only recently ended their administration of the Strip as the delegate of South Africa. Thus, the observation in the *Temple* case is equally applicable here: express concern with one portion of

the border juxtaposed with silence as to another sector, unless satisfactorily explained, gives rise to a presumption of acquiescence and recognition of the alignment in the second sector.<sup>85</sup>

### **C. The Trollope-Dickinson Arrangement**

274. On 4 August 1951, the Magistrate for Eastern Caprivi, L.F.W. Trollope, and the District Commissioner at Kasane in Bechuanaland, V.E. Dickinson, entered into an arrangement confirming the status quo on Kasikili Island whereby the Masubia of Caprivi would continue to use the Island and the northern channel would remain a "'free for all" [t]horoughfare.'<sup>86</sup> A careful analysis of the documentation surrounding this arrangement shows that, although the two officials agreed that the northern channel was the main channel, even at this point neither the Commonwealth Relations Office in London nor the Bechuanaland authorities asserted a formal claim that the Island was within the Bechuanaland Protectorate.

275. The episode began when the Zambezi Transport and Trading Company applied to Trollope for permission to transport lumber from its installation at Serondellas, a few miles west of Kasikili Island, through the northern channel around the Island to the Zambezi. Trollope granted permission, but thereafter William Ker, the company's director, wrote Noel Redman, the District Commissioner at Kasane, disputing the idea that the northern channel was in the Caprivi. An exchange of correspondence between Redman and Trollope led to an agreement for a joint investigation of the area, which took place in early January 1948.<sup>87</sup> The Trollope/Redman report, summarizing the results of the investigation, contains three main findings: first, that the main channel of the Chobe is the northern channel;<sup>88</sup> second, 'that since at least since 1907, use has been made of the Island by [the] Eastern Caprivi Zipfel tribesmen';<sup>89</sup> and third, and most important for the present discussion of acquiescence, that there was 'no evidence of . . . [Kasikili] Island having been made use of, or claimed, by the Bechuanaland Tribesmen or Authorities' nor had they made any objection to the use of the Island by the Caprivi people. <sup>90</sup>

276. Trollope forwarded the report to his superior, the Secretary for Native Affairs in Pretoria, recommending that despite the purported location of the main channel, the Union should assert sovereignty over the Island on the basis of prescription.<sup>91</sup> The matter was referred to the Justice Department of the Union, which concluded that the case for prescriptive rights was strong and recommended that additional evidence should be gathered as to the occupation and use of the Island.<sup>92</sup> An exchange followed between the Union government and the High Commissioner for the Bechuanaland Protectorate.

· The correspondence began with a letter of 14 October 1948 from the South African Foreign Office to the High Commissioner, transmitting the Trollope/Redman report and suggesting a 'mutually satisfactory' arrangement.<sup>93</sup>

· On 4 November 1948, the High Commissioner replied, informing Pretoria that he had '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.' Although this action had to have been premised on Bechuanaland jurisdiction over the Island, the High Commissioner made no explicit claim to this effect.<sup>94</sup> The letter simply informed South Africa that the instruction had been issued.

· In any case, on 14 February 1949, the Union Foreign Office replied rejecting the action of the Bechuanaland Protectorate and proposed a solution 'on the basis of your Administration

recognising the Union's claim to Kasikile [sic] Island, subject to it issuing a general permit for the use of the Northern waterway for navigation purposes.<sup>95</sup> (emphasis added) Thereafter, apparently the British authorities withdrew the instructions to the District Commissioner without any attempt to implement them having been made. No similar instructions or regulations were ever again put forward.

· After much internal consideration on the British side, the High Commissioner replied on 24 August 1949 citing legal and political difficulties then under examination that interfered with accepting the Union proposal, presumably referring to the status of South West Africa in relation to the UN trusteeship system.<sup>96</sup>

· There was no definitive reply for almost two years until 10 May 1951 when the High Commissioner informed Pretoria that '[t]he 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' is beset by insurmountable 'legal complications of an international nature.'<sup>97</sup> The letter concluded that any difficulties about the Island and its adjacent waterways can be adjusted by administrative action, on the assumption '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.'<sup>98</sup> The letter seemed to have been carefully drafted to avoid a direct assertion of a claim of sovereignty. The Commissioner does not speak of surrendering a pre-existing Bechuana claim, but simply of asserting that Bechuanaland had no claim. He does not assert that the northern channel is the international boundary, but only that navigation will be governed by rules regarding waterways that form a common boundary. The ground on which he declined to make the statement was not that Bechuanaland has a good claim that it is prepared to surrender, but that there was a possibility of political embarrassment in the appearance of conceding something to South Africa while it was attempting to terminate the mandate.<sup>99</sup>

277. The negotiations were then remitted to the officials on the ground, Trollope and Dickinson (who had succeeded Redman). Dickinson opened on 5 July 1951 with the same formula as to boundary waterways that the High Commissioner had used in his letter of 10 May.<sup>100</sup> Trollope replied promptly on 4 August 1951 rejecting this proposal on the ground that it 'might quite possibly be arguably used in support of a submission that we occupy by license and permission -- which we do not, of course, admit.'<sup>101</sup> Trollope's letter proposed as an alternative 'a gentlemen's agreement' on the status quo in the terms that were finally agreed upon. Dickinson receded from his position on 11 August 1951 and agreed to Trollope's formulation as 'having obviously received more forethought than I have given to the matter.'<sup>102</sup> But he also proposed a reservation that nothing in the agreement 'should be read as [p]reventing the B.P. Tribesmen using the Island for ploughing purposes.'<sup>103</sup> Again Trollope objected on the ground that this would not reflect the status quo,<sup>104</sup> and again Dickinson receded -- '[i]n other words we revert to the [earlier] position. . .'<sup>105</sup> The final agreement was embodied in Trollope's letter of 4 August 1951:

(a) That we agree to differ on the legal aspect regarding Kasikili Island, and the concomitant question of the Norther[n] 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" [t]horoughfare.<sup>106</sup>

278. Fundamentally, British officialdom had no interest in the Island. Far from claiming it, they would have been glad to settle the boundary question once and for all in favour of the South African position were it not for the 'complications' arising in connexion with the UN trusteeship. This fully appears from the internal correspondence on the British side. Indeed a 24 August 1949 letter from the Chief Secretary of the High Commissioner to the South African Prime Minister stated that the 'slight alteration proposed seems of little intrinsic importance,'<sup>107</sup> and the Commonwealth Relations Office writing to the High Commissioner on 20 October 1949 uses the same language.<sup>108</sup> Of course, these officials spoke of 'a slight adjustment of the northern boundary of the Bechuanaland Protectorate.'<sup>109</sup> They were not going to give away legal points, as the exchanges discussed previously make clear. But it is also clear that they never considered a direct protest or objection to the South African government as regards the existing situation and never thought of putting it on notice of a formal claim in any other way. Indeed, as suggested above, the communications from the British side seem to have been drafted with some care to avoid making such a claim. The veiled ambiguities that appear in the correspondence are a far cry from the explicit, vigorous and repeated protests that saved Mexico's claim in the *Chamizal* case.<sup>110</sup>

279. After the conclusion of the Trollope/Dickinson agreement, the situation continued in status quo for the remaining 15 years of British administration, without further remark from that quarter.

#### **D. The Period of Botswana Independence**

280. The evidence of practice and acquiescence recited to this point establishes the boundary between the Caprivi and Bechuanaland recognized by the ruling powers in the period before independence. As noted in Chapter I(C), *supra*, the doctrine of *uti possidetis* establishes this colonial boundary as the border between the newly independent states. Nothing that happens subsequent to the date of independence, other than by agreement of the parties, can alter that situation.

281. But, on the assumption that *uti possidetis* is not dispositive, the period since 30 September 1966 has a special significance for the issue of acquiescence and recognition. On that date Botswana became an independent nation. As such, it was responsible for the maintenance of its own borders, the protection of its own territorial integrity and the conduct of its own foreign policy. It no longer had to rely on the colonial authorities to assert its rights. Yet almost two decades passed before Botswana registered any formal protest or entered any formal claim with respect to Kasikili Island. The silence during this period is especially pregnant, because, as noted in paras. 247-248, *supra*, at this time the whole of the Caprivi Strip was a war zone under the control of the enemy, South Africa, in the struggle for Namibian independence. Botswana, like most other countries of southern Africa, was a strong sympathizer of Namibia and a supporter of its independence.<sup>111</sup> South African security forces sought to exercise firm control over the border area to prevent incursions by the

People's Liberation Army of Namibia (PLAN). Any derogation from South Africa's *de facto* authority over the area, even if only in the form of a legal claim to jurisdiction, like that made for all of Namibia by the UN Council for Namibia, would have been a victory in the struggle, if only a symbolic one. Yet Botswana remained silent. It made no diplomatic overture or demarche, public or private, on the subject of the boundary at Kasikili Island until October 1984.

282. South African records show, however, that in 1974-1975 discussions concerning the Sedudu/Kasikili Island territory were held at the governmental level between the Republic of South Africa and Botswana. A minute from the head of the South African Defence Force (SADF) to the Director General of the South African Department of Foreign Affairs on 27 November 1984 states: 'It is reported that at the time, it was agreed that Sidudu formed part of the Caprivi. Efforts to obtain the minutes of the discussions have thus far been unsuccessful, and it seems unlikely that it would still be found.'<sup>112</sup> The minute continues:

On 24 November 1984, discussions were once again held at Katima Mulilo between the RSA and Botswana's representatives regarding border questions. During these discussions the question of Sidudu Island was not raised. If the allegations about the 74/75 discussions are correct, it may be assumed that both parties were satisfied that Sidudu was part of Caprivi.<sup>113</sup>

283. Thus, on two separate occasions after independence, Botswana discussed Caprivi boundary matters with South Africa, and at neither time did it claim ownership of Kasikili Island. The first time in 1974/75, it apparently agreed that Kasikili Island was part of the Caprivi Strip. The second time, it did not even raise the issue. This rare general review of boundary problems between the two countries, held in the Caprivi only a few miles from the Island, was an occasion that cried out for Botswana to assert its claim to Kasikili Island, if it had one. It failed to speak when silence could only be interpreted -- as South Africa in fact did interpret it -- as an indication that Botswana had no claim to Kasikili Island. Botswana should be held to the normal consequences of such a failure to protest at times when protest was called for and when it had especially apt opportunities to do so.

284. The cited minute, Annex 84, was prepared in anticipation of additional high level discussions between the two governments held after an incident of 25 October 1984, when a Botswana detachment fired on a South African patrol boat in the southern channel of the Chobe around Kasikili Island. The importance of the situation to the South African security authorities is reflected in the peremptory tone the SADF took with the Foreign Office:

It is therefore requested that you immediately liaise with the Botswana Government through diplomatic channels in order to:

- a. confirm that the border lies south of Sidudu.
- b. clarify any other differences in interpretation between the RSA and Botswana regarding the Caprivi border.
- c. [c]learly indicate to the Botswana Government that the SADF would not hesitate to retaliate aggressively with counter-actions against actions such as those of the BDF on 25 October 1984.<sup>114</sup>

Thus, it is clear that the South African government considered control over Kasikili Island a national security matter.<sup>115</sup>

285. The discussions took place in Pretoria on 19 December 1984 and mark the first clear-cut episode of non-acquiescence by Botswana or any of its predecessors in title. As a result, a joint investigation was conducted by the two parties concluding that the northern channel around the Island was the main channel of the Chobe.<sup>116</sup> Botswana thereafter asserted that this conclusion represented a joint decision about the location of the international boundary.<sup>117</sup> As noted in para. 246, supra,<sup>118</sup> the UN General Assembly had terminated the mandate under which South Africa had previously governed the territory, so that no action it might now take could in any way limit or derogate from Namibia's rights. But South Africa did not accede to Botswana's position. Instead, it firmly rejected Botswana's claim:

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.<sup>119</sup>

286. In 1992, when Namibia inquired about these events in preparation for its discussions with Botswana, which led ultimately to the submission of this case to the Court, South Africa replied:

The joint survey you refer to in your letter . . . did come to certain conclusions, but according to [the] legal opinion in South Africa at that time, did not prove conclusively that Sidudu island belongs to Botswana. The South African authorities have therefore suggested to Botswana in a telex dated 17 November 1986 that the matter be taken up with the Government of an independent Namibia. This was not acceptable to Botswana as they considered the joint survey's report to be conclusive and in fact expressed the opinion that "no further discussion of the matter is necessary."

The matter has therefore not been resolved as South Africa has never officially recognized Botswana's claim to Sidudu island.<sup>120</sup> (emphasis added)

In any case, the Botswana assertion, coming two decades after Botswana's independence and almost a century after the Anglo-German Treaty, is far too late to vitiate Namibia's prescriptive claim.

## CHAPTER V

### THE MAPS AS EVIDENCE OF SUBSEQUENT CONDUCT OF THE PARTIES

#### A. The Legal Significance of Maps in the Interpretation and Application of Boundary Treaties

287. It is now generally accepted that maps are to be viewed like other forms of evidence, with their relevance, weight and probative value to be determined in each case from the



provenance of the map in question, the circumstances of its creation and its relationship to the issues in controversy. Therefore, in most recent boundary litigations, the discussion and analysis of the map evidence has loomed very large indeed.<sup>121</sup> Brownlie states in his comprehensive work on African boundaries that maps are sources of evidence and provide

material for the purpose of determining the existence of an alignment and its status in terms of acceptance and recognition by the states concerned . . .<sup>122</sup>

...

The evidence of recognition and acquiescence by conduct may take the form of . . . the publication of official maps, [and] reliance for official purposes on maps showing the alignment . . .<sup>123</sup>

288. The general position on map evidence in international law is conveniently stated in the Ninth edition of Oppenheim's *International Law*:

**§ 228 Boundary maps** Either stage, delimitation or demarcation, may or may not be accompanied by a map. It used sometimes to be said [footnote omitted] that, if there be a map, the text should prevail in the case of discrepancy; but there is no rule to that effect and it would be unreasonable if there were, for words are as susceptible to error as maps. The true position was stated by Judge Fitzmaurice in the *Temple of Preah Vihear* case, [ICJ Rep. (1962), at 65; rest of footnote omitted] when faced with the converse proposition that the map should prevail:

"There is of course no general rule whatever requiring that a conflict of this kind should be resolved in favour of the map line and there have been plenty of cases . . . where it has not been, even though the map was one of the instruments forming part of the whole treaty settlement (as here) and not a mere published sheet or atlas page -- in which case it would in itself, have no binding character for the parties. The question is one that must always depend on the interpretation of the treaty settlement, considered as a whole, in the light of the circumstances in which it was arrived at."

General maps, not part of, or illustrating the delimitation or demarcation process may, of course, be used as evidence of an interpretation of a boundary settlement. In this case, their weight as evidence will depend in each case on their relevance and merit. <sup>124</sup>

289. Obviously, in determining the intention of the parties, special significance is accorded to maps accompanying the treaty or referred to in the treaty text.<sup>125</sup> In the present case, there is such a map, the 1889 Map (Atlas, Map II). As noted, para. 111, supra, no boundary is marked on this map, but it can be of some assistance in resolving the question before the Court, because it indicates the knowledge and appreciation of the negotiators as to the terrain and physical characteristics of the area. These matters are discussed para. 112-114, supra. Similarly, maps prepared by the early explorers in the 1880s before the conclusion of the Treaty can have little relevance on the question of the location of the boundary, but also contribute to our understanding of the information about the characteristics of the area that was available to those negotiating the Treaty. (Atlas, Maps I/1, I/2 and I/3) It will be recalled that Dr. Bradshaw's map (Atlas, Map I/2) has special significance, because its depiction was used on the 1889 Map, German maps for the next 30 years and British maps even longer.

290. Other maps are simply specialized forms of 'subsequent conduct' of the parties, reflecting their understanding of the meaning of the terms of the treaty and the alignment established by it.<sup>126</sup> Moreover, 'maps have been accepted as admissions against interest and evidence of acquiescence when they were made public and given official approval. . . .'<sup>127</sup> And in general,

tribunals concerned with disputes as to sovereignty over territory have commonly accepted the evidence of maps with an official provenance as evidence of the views of Governments and of political figures and officials with special knowledge as to political matters of fact.<sup>128</sup>

The map evidence is therefore relevant to all of the claims made in this Chapter: (1) the subsequent conduct of the parties, as exhibited by their production and use of maps, confirms the conclusion reached by interpretation of the treaty text that the southern channel is the 'main channel' of the Chobe River around Kasikili Island; and (2) in any event, Namibia has sovereignty over the Island by operation of the doctrines of prescription, acquiescence and recognition.

291. In the present case, numerous maps have been produced and used by all the parties in interest since the Anglo-German Treaty of 1890. The most important of these, in Namibia's submission, are to be found in the Atlas appended to this Memorial, assembled by Mr. W. Dennis Rushworth, former Director of the Mapping and Charting Establishment of the British Ministry of Defence, assisted by Mr. Peter Clark, Keeper at the Royal Geographical Society. Mr. Rushworth has also prepared a comprehensive report on the cartographical history of the Caprivi Strip, reviewing the provenance and history of all the Atlas maps as well as all other maps of the area that Namibia has been able to discover. This report is found as Annex 102. Detailed *curricula vitae* of Messrs. Rushworth and Clark are attached thereto.

292. The analysis of these maps in the present Chapter is organized according to the country producing the maps, which coincides roughly with the chronological order in which they were published. It shows that all of the significant map evidence until 1974, when Botswana published its first official map of the area, place Kasikili Island within Namibia and thus support Namibia's submissions in this case. In this connexion it is important to recall the various political authorities that held governing responsibility in the area at different times since the adoption of the Treaty, as summarized in para. 29, *supra*.

## **B. The Relevant Maps**

### **1. The German maps**

#### **a. Seiner's map**

293. The most important of the early post-1889 maps was made by Franz Seiner, a prominent Austrian traveller, cartographer, geographer and expert on the German colonies in Africa. (Atlas, Map IV)<sup>129</sup> The survey work was carried out in 1905-1906, relatively soon after the Treaty was concluded, and the map was published in Berlin in 1909, the year the first German Imperial Resident, Hauptmann Kurt Streitwolf, was sent to the Caprivi. Although it was not published by the German government, it was widely distributed and was in use as the best readily available, general purpose map of the Caprivi until the publication of South Africa 1:250,000 TSO 400/558 of 1949. (Atlas, Map X)<sup>130</sup> Many libraries still have copies of

Seiner's map today. According to the map, Kasikili Island is within Namibian territory. (See Fig. 10)

294. Seiner's map was the principal large scale map used by German officials in Berlin and the field from its publication until the end of the period of German rule of Namibia. The map was explicitly drawn to the attention of the British authorities. At least three copies are to be found in the Public Records Office among pre-World War I Foreign Office and Colonial Office documents.<sup>131</sup> The British authorities used it in the period from 1921 to 1929 when they were administering the Strip as delegate of South Africa under the Mandate.<sup>132</sup> Moreover, the map was in general use for four decades, without remonstrance from British or Bechuanaland authorities. Thus, this map is especially weighty evidence of the understanding of both the British and German authorities as to the meaning of Article III(2) of the Treaty, recorded in the period shortly after it was concluded and when memories on both sides were fresh.

295. Kasikili Island appears under the name of Sulumbu's Island. (See Fig. 10) The map's scale of 1:500,000 is large enough for a fully recognizable depiction of the Island, which is taken straight from Bradshaw's map (Atlas, Map I/2)<sup>133</sup> discussed in para. 71, *supra*. The boundary is shown as a fine red solid line backed on the interior by fine red hatching, except on rivers, where the line, but not the hatching, is omitted. The hatching clearly covers Kasikili Island, thus placing it unequivocally in Namibia. (See Fig. 10)

#### **b. The maps of the German Imperial Residents**

296. Also dating from the early decades of the twentieth century are two other maps of great interest. Both were surveyed and drawn by German Imperial Residents in the Strip in their official capacities. The first, by Hauptmann Kurt Streitwolf, the first German Imperial Resident, was completed in 1909, the year he took office. (Atlas, Map VI)<sup>134</sup> The second was made by his successor, Viktor von Frankenberg in 1912. (Atlas, Map VII)<sup>135</sup> Like Seiner's map, both were made within a relatively short time after the conclusion of the Treaty by men on the ground who were thoroughly familiar with the territory and responsible for its government.

297. Both maps are on a larger scale than Seiner's map and represent some cartographic improvement on it.<sup>136</sup> Captain Eason, the British Assistant District Commissioner stationed at Kasane who explored the Chobe River in 1912, knew Streitwolf's map and thought well of it. He traced it to show the course of the river from Kazungula to Lake Liambesi as Map #9 to accompany his report.<sup>137</sup>

298. Kasikili Island appears clearly on both maps, marked 'Kassikiri' on the Streitwolf map (see Fig. 11) and with the designation '*Insel Kassikiri Fluss arm*'<sup>138</sup> on von Frankenberg's map. (See Fig. 12) The relict channel lying to the west of the island is easily seen on both maps, and is called 'Tonga Pool' on von Frankenberg's. This is the Spur channel discussed at para. 145, *supra*. Kasika, the village just northwest of the Island where many of the witnesses testified to living in the flood seasons, is designated 'Schickamatondo's kraal' by von Frankenberg, who called villages and other inhabited places by the name of the local headman.

299. Neither map shows the boundary line. However, the attribution of the Island to Germany is to be implied from the fact that on both maps it is specifically named, while the localities on

the Bechuanaland side of the border and across the Zambezi in Northern Rhodesia are not. Even Kasane, which was close to the border and an important British administrative post with which the German Imperial Residents had frequent dealing, is not identified.

300. These two maps can therefore be accepted at the very least 'as evidence of the views of . . . officials with special knowledge as to political matters of fact'<sup>139</sup> as to the attribution of Kasikili Island to German South West Africa by the Treaty. More likely, however, since the draughtsmen were the senior representatives of the German Empire in the Strip, the maps represent their understanding as to the scope of their official responsibilities, rather than mere 'opinion.' The Streitwolf map was copied by the South African government in its first attempt at mapping the Caprivi in 1915, thus indicating its adoption of his views.<sup>140</sup>

301. The same conclusion can be derived from the passages in Streitwolf's book on the Caprivi Strip describing the clear distinction between the 'walls of reeds' and 'flat monotonous landscape' on the left bank, the German bank, and the 'cliff-edge of Bechuanaland.'<sup>141</sup> These designations could not apply if Streitwolf had thought the northern channel was the Treaty boundary.

### **Conclusion as to the German maps**

302. It thus appears that maps made and used by German officialdom during the entire period of German rule in the Caprivi included Kasikili Island within the territory of German South West Africa.<sup>142</sup> Moreover, the British authorities knew of and used these maps for their own purposes. This official use by both parties to the 1890 Treaty is powerful confirmation that the meaning of 'main channel' in Article III(2) is the southern channel.

## **2. The British Maps**

303. It will be recalled that it was Great Britain that produced the 1889 Map from which the negotiators worked. From 1914 to 1929, Britain administered the Caprivi Strip as the delegate of South Africa, and during that time used Seiner's map, which placed Kasikili Island in Namibia. After handing the administration of the Caprivi back to South Africa in 1929, and with full knowledge of the area, Britain published a number of official maps of the Bechuanaland Protectorate all placing Kasikili Island in Namibia.

304. In the early years of the century, a number of British officials produced sketch maps of Bechuanaland that included the area of the Chobe of concern in this case. These were all too small in scale and doubtful in accuracy to have much value for the Court. None of them shows the boundary in the vicinity of Kasikili Island on a scale large enough to be of assistance. (See, e.g., Atlas, Maps V, VIII)<sup>143</sup> One of them, Atlas, Map V, is of some interest. Although on too small a scale to show Kasikili Island, it prominently describes the ridge which lies south of the Chobe in the area near Kasikili Island as an 'Outcrop of Quartz Porphyry forming ridge 100-200' high.'<sup>144</sup>

305. The first serious British attempt to map this area came in 1933 with Bechuanaland Protectorate GSGS 3915. (Atlas, Map IX)<sup>145</sup> Although it was compiled from existing sources, it was a new map, and the detail for the Chobe River area was based on aerial photography taken in 1925 by the Kalahari Reconnaissance, one of the first major aerial photography efforts in southern Africa.<sup>146</sup> This map was in general use in Bechuanaland

until 1965, when Bechuanaland DOS 847(Z462) 1965 was introduced.<sup>147</sup> A second edition was produced in 1966 without change except for the addition of a military grid.<sup>148</sup>

306. On the Bechuanaland Protectorate GSGS 3915 map, Kasikili Island is shown clearly. The boundary symbol on the southern side of the Chobe unequivocally puts Kasikili Island in Namibia. (See Fig. 13) A copy of this map at a reduced scale of 1:1,250,000, with detail unchanged was published in 1935 by the Bechuanaland Survey Department.<sup>149</sup> Again, the boundary symbol on the south side of the river clearly follows the southern channel. Thus during the last three decades of British rule in Bechuanaland, the official maps excluded Kasikili Island from the territory of the Protectorate.

307. A most significant example, showing conclusively that the Bechuana authorities did not consider Kasikili Island within the Protectorate, is seen in a paper copy of this reduced scale map 'Annotated with District Boundaries' in 1959. (Atlas, Map XI)<sup>150</sup> (See also para. 259-261, supra) The annotation was prepared by the Bechuanaland Director of Public Works in Mafeking in response to a request from the Colonial Office. The letter of request from the Records Officer of the Colonial Office stated:

Some difficulty is being experienced in our mapping of parts of eastern Bechuanaland and it would be appreciated if you could let us have an early reply on the following points.

Boundaries of the Crown Lands . . . In order that no errors are made it would be greatly appreciated if you could send us a map showing all these boundaries clearly so that we may show them correctly on our maps.<sup>151</sup>

The reply on 7 June 1957 enclosed Atlas, Map IX, 'a map showing boundaries of Crown Lands Reserves . . .'<sup>152</sup>

308. Tracts of Crown Lands covered much of the northeastern corner of the Protectorate along the Chobe River. The borders of the Crown Lands are shown in a very carefully hand drawn band of reddish crayon along the inside of the international boundary. At Kasikili Island, the band of reddish crayon follows the southern channel and does not cover Kasikili Island. (See Fig. 14) Although the border marked on the map is that of the Crown Lands and not of the Protectorate itself, it is inconceivable that Kasikili Island should have been within the international boundary but not within the Crown Lands Reserve. The position is then that in response to an official request from his superiors in the Colonial Office, made explicitly for the purpose of ensuring that the boundaries were shown correctly on the maps, the Bechuanaland Director of Public Works transmitted a map, asserting in the most explicit terms possible that Kasikili Island was not within the Protectorate.

309. A second almost equally significant example of the use of GSGS 3915 for official purposes is a Water Development Scheme Map of Northern Bechuanaland 1:500,000 B&A Lund & Ptnrs for Bechuanaland PWD 1963 Ref BP2/22.<sup>153</sup> This is a specially drawn map which states that the topographical detail is derived from GSGS 3915. The clearly marked boundary in the southern channel (see Fig. 15) shows that shortly before independence, the Bechuanaland Public Works Department, in planning water development schemes (an area of administration of special relevance in the present context), proceeded on the basis that the southern and not the northern channel was the boundary.

310. The unbroken concordance in the maps of the two parties to the 1890 Treaty depicting Kasikili Island as within Namibia (and later including South Africa, see Section 3, *infra*) lasted for more than 70 years, until the publication in 1965, the last year of British rule, of the last British map of the Protectorate, Bechuanaland 1:500,000 DOS 1965 DOS847(Z462) Sheet 2 Edition 1,154. The depiction of the boundary around the Island on that map, however, seems to have been cartographic error. In the first place, although the boundary is shown as running to the north of what we know to be Kasikili Island and along a waterway with the shape of the northern channel, in fact no island is shown on the map, because it does not depict any southern channel at all. Mr. Rushworth has traced the source of the error in Annex 102, pp. 17-18, para. 30. In brief, it appears that this portion of the map was drawn from a 'print laydown' (PLD) of recently conducted aerial photography of the area. PLDs are cheap, rapidly produced documents derived from aerial photography, designed to assist surveyors and cartographers when a map is not available. Their potential inaccuracies are well known, and users are warned to take precautions against them. The PLD almost certainly used in the production of this map is described in Annex 102, p. 16, para. 29. The well known errors and inaccuracies of PLDs were compounded in this case because Kasikili Island lay across the join of two flight paths. The northern strip is well printed and the channels of the Chobe appear clearly. The southern strip is underexposed or overdeveloped so that it is difficult to distinguish the channels. Mr. Rushworth concludes that 'This is no doubt why the draughtsman made the mistake of showing only the northern channel.'<sup>155</sup> Thus this map cannot be seriously advanced as showing Kasikili in Botswana.

### **Conclusion as to the British maps**

311. With the one readily explicable exception of DOS847(Z462), discussed in the immediately preceding paragraph, the record of British and Bechuanaland mapping since 1890 is a reprise of the German mapping of the Caprivi. The official maps of the Bechuanaland Protectorate, used for all government purposes as well as by the general public, clearly exclude Kasikili Island from the territory of the Protectorate and assign it to Namibia. Thus the maps of both parties to the Treaty reveal the identical understanding of its terms with respect to Kasikili Island and must be taken as reflecting the intention of the parties to the agreement. Under the circumstances, the actions of the British government and the Bechuanaland authorities in producing, disseminating and using these maps goes beyond mere passive acquiescence in Namibia's claims. GSGS 3915 and its progeny discussed in paras. 305-309, *supra*, must therefore be taken as admissions against interest.<sup>156</sup> In the *Minquiers and Ecrehos* case, the Court refused to permit France to escape the consequences of an admission in a note sent by it that the islands were 'possédés par l'Angleterre.' This admission was 'a statement of facts transmitted to the Foreign Office by the French Ambassador, who did not express any reservation in respect thereof.'<sup>157</sup> Likewise in this case, the promulgation of GSGS 3915 (and its progeny) was a statement of fact made to all the world without any reservation in respect thereof. Botswana cannot escape the consequences of this admission.

### **3. The South African maps**

312. As already noted, South Africa's first map of the area was made during World War I, when South Africa was ruling most of German South West Africa, though not the Caprivi Strip, as an occupying power. (See para. 300, *supra*) The map is basically a copy of Streitwolf's map, which, like his, did not show the boundary, but shows Kasikili as a place name, with none in Bechuanaland or other neighbouring countries. A 1940 map shows

Kasikili Island, but with no name. There is no boundary symbol in the immediate area of the Island, so there is no indication of which channel was followed.<sup>158</sup>

313. The first 'modern' map of the area, TSO 400/558, on a scale of 1:250,000, was compiled and drawn by the South African Defence Force in 1945 and printed by the Government Printer in Pretoria in 1949. (Atlas, Map X)<sup>159</sup> The boundary symbol is in the Chobe River and follows the southern channel, so that Kasikili Island is in Namibia. (See Fig. 16)

314. The map has a special significance by reason of the publicity that was given to it and the evidence that it was carefully considered by the Bechuanaland authorities while still in draft form. In July 1945, the South African Survey Directorate distributed sunprints of all six sheets of the map to all interested countries. (Atlas, Map X/2) Copies were specifically sent to the Bechuanaland Resident Commissioner in Mafeking and the District Commissioner in Maun.<sup>160</sup> The addressees were requested to 'examine[] the prints carefully and suppl[y] as much information as possible by way of criticism, corrections and additions.' Although the 'Schedule of Queries' that was attached to the sheets does not mention boundaries, all but one of the queries on the Katima Mulilo sheet, which covers Kasikili Island, relate to places south of the Chobe River in Bechuanaland or north of the Zambezi River in Northern Rhodesia. Many of these places lie close to the border so that anyone examining the sheet could not fail to see that it showed Kasikili Island in South West Africa. (For a fuller discussion see paras. 329, *infra*).

315. Although it has not been possible to locate the Bechuanaland responses to these queries, it is evident from a comparison of the sunprints and the final version of the map that replies had been received and incorporated on the map, including changes in the immediate vicinity of the Island. (Compare Fig. 16 with Fig. 17) Thus, although the responsible Bechuanaland authorities must have scrutinized the map closely, they appear to have found no reason to question the identification of the boundary in the region of Kasikili Island.

316. The map was reissued in 1967, about a year after Botswana's independence, in a completely new format as part of a national series of 1:250,000 mapping. (Atlas, Map XII)<sup>161</sup> All the detail on the map, including the boundary south of Kasikili Island is unchanged. Although the new Botswana government might have been expected to be particularly sensitive to any derogation of its territorial sovereignty, the new edition elicited no protest or comment. A further version of this map appeared in 1982 and is still current. (See Atlas, Map XIV, Fig. 4)<sup>162</sup> This is called Edition 2 of the 1967 issue, but is in fact a completely new map on revised sheet lines, derived from the recently published South West Africa 1:50,000 series. (Atlas, Map XIII, Fig. 5)<sup>163</sup> The boundary continues to be shown south of Kasikili Island. Publication came only a year after the round of discussions between Botswana and South Africa on boundary issues on 24 November 1981, discussed in para. 282, *supra*. The failure of Botswana to protest this second edition in any way tends to corroborate the conclusion of the South African representatives at these discussions that Botswana accepted that Kasikili Island forms part of the Caprivi.<sup>164</sup>

317. The anomaly among the South African maps is the map produced by the Joint Air Reconnaissance Intelligence Centre (JARIC).<sup>165</sup> Like the last British map of Bechuanaland, DOS847(Z462), discussed para. 310, *supra*, it shows no southern channel and no island, and the border consequently runs along a portion of the river shaped like the northern channel. Again, the error seems to be due to poor use of air photographs. This appears to be a map produced in-house for the use of intelligence agencies.

318. The story for South Africa is thus the same as for Germany and Great Britain. Beginning in 1915, only 25 years after the signing of the Treaty, official maps published by the South African government consistently showed the boundary between South West Africa and Bechuanaland running in the southern channel around Kasikili Island. The one exception, the JARIC map discussed in the previous paragraph, is clearly the result of an error and in any case was not intended or available for general official or public use. It follows that South Africa's understanding of the terms of the 1890 Treaty coincides with that of the other two countries involved.

#### **4. After Botswana's Independence**

##### **a. Botswana's maps**

319. Botswana obtained its independence on 30 September 1966. Not until eight years later did the new nation publish a map of the area.<sup>166</sup> The boundary is shown in the northern channel, so that 84 years after the Treaty, this is the first accurate official map of the area to show Kasikili Island in Botswana. In 1985 it published a second map at 1:350,000, which, like DOS847(Z462) discussed in para. 310, *supra*, shows no southern channel at all.<sup>167</sup>

##### **b. The United Nations maps**

320. Also in 1966, the United Nations terminated the mandate over South West Africa,<sup>168</sup> and in 1967 the UN denounced South African rule as illegal and assumed *de jure* government of Namibia through a newly established United Nations Council for Namibia,<sup>169</sup> of which Botswana was a member. Although there was little the Council could do as a practical matter to assert its authority, it did engage in a fairly extensive mapmaking exercise. In 1977 the UN published Map No. 2947 of Namibia pursuant to a resolution of the UN General Assembly requesting 'the Secretary-General urgently to undertake, in consultation with the United Nations Council for Namibia, the preparation of a comprehensive United Nations map of Namibia reflecting therein the territorial integrity of the Territory of Namibia.'<sup>170</sup> This map, at a scale of 1:4,000,000, was too small for Kasikili Island to appear.<sup>171</sup> Another map at the same scale was published in 1984.<sup>172</sup>

321. Then, in 1985, a large format map was published pursuant to a resolution of the UN General Assembly requesting 'the Secretary-General urgently to undertake in consultation with the United Nations Council for Namibia, the preparation of a comprehensive economic map of Namibia.'<sup>173</sup> (Atlas, Map XV)<sup>174</sup> The UN announcement of its publication states that:

Over 450 separate topographic maps, bathymetric charts, road maps and thematic material were examined and used. The final product was combined with a mosaic of satellite imagery prepared by the Remote Sensing Centre of the Food and Agriculture Organization.<sup>175</sup>

322. The territory of Namibia is shown by hypsometric tinting that clearly covers Kasikili Island. (See Fig. 18)<sup>176</sup> The legend states 'this map represents an official United Nations map of Namibia and supersedes any other map on Namibia or South West Africa hitherto published by South Africa.'<sup>177</sup> It was circulated in an edition of 1,000 copies and was given maximum publicity, so it is highly unlikely that it did not come to the attention of Botswana officials. In fact, given the popularity of this map, the UN Cartographic section is currently considering a second print run.



323. Dr. Sakeus Akweenda, in his article 'The Legal Significance of Maps in Boundary Questions: A Reappraisal with particular Emphasis on Namibia' states that '[t]he official UN map of Namibia contains a very interesting disclaimer concerning the international boundaries depicted on that map.'<sup>178</sup> No citation is given as to which map Dr. Akweenda is referring to. UN Map No. 3228 Rev. 1, discussed in para. 320, *supra*, contains a disclaimer in the language quoted by Dr. Akweenda later in his article: 'the delineation of the boundaries between Namibia and neighbouring countries and the names shown on this map do not imply official endorsement or acceptance by the United Nations as they are to be determined by the independent government of Namibia.'<sup>179</sup> Its predecessor, UN Map. No. 2947 contains a similar disclaimer, although in slightly different words. (See Fig. 19) Indeed, such disclaimers are common on maps produced by the United Nations. As noted above, however, both of these UN maps are at a scale of 1:4,000,000, far too small to show Kasikili. But this standard language of reservation does not appear on UN Map No. 3158, which, at a scale of 1:1,000,000, does show Kasikili Island distinctly in Namibia. The omission of this disclaimer, which is standard for most UN maps, may even be said to create a reverse inference as to the boundaries in a map designed to 'reflect[] . . . the territorial integrity of the Republic of Namibia.'

324. Namibia has not made an extended search of maps published by third parties with respect to the Caprivi Strip as such may simply be adaptations or copies of the maps discussed above. However, it may not be inappropriate to end this cartographic discussion with a suggestion of what may be in store for the Court in the future. The Encarta Atlas of the World, produced by Microsoft in 1996, gives the equivalent on CD-ROM of 1:500,000 mapping world-wide and includes a gazetteer of place names with their country and location. Sedudu Island is stated to be in Namibia.<sup>180</sup>

### **5. Botswana's failure to protest**

325. To this point, the present Chapter has disclosed a substantially uniform pattern of cartographic practice by Germany and South Africa, the two countries that might be thought opposed in interest to Botswana, beginning shortly after the conclusion of the Treaty and extending to the present, whereby the boundary around Kasikili Island was drawn in the southern channel and the Island was represented as within Namibia. The practice continued throughout this period without any objection, protest or reservation from Botswana, and its predecessors in interest, the British government and the Bechuanaland authorities. On the contrary, from 1906 to 1933 they actually used the German maps for their own official and governmental purposes, and thereafter, until 1965, produced maps of their own with the same attributions. As Professor Brownlie has observed:

The *Temple* case (Merits) is a good example of the significance of recognition. In that case the regular use of a map showing the area to be in Cambodia over a long period (1908 to 1958) was regarded by the International Court as recognition or adoption by Thailand of the alignment depicted on the map.<sup>181</sup>

In the present case, there is not only the fact of adoption or recognition for a period of 60 years, but the admission against interest implicit in the British production and use of maps accepting what in Namibia's submission is the correct alignment. Even after Botswana's independence, Botswana did not enter any reservation, although South Africa produced and published new maps in 1967 and twice in 1982.

326. Although Botswana and its predecessors did not protest against any of the maps that clearly place Kasikili Island within Namibia, this silence is especially significant with respect to three of the maps discussed, where the issues were specifically brought to the attention of Botswana or its predecessors under circumstances in which the duty to speak out was even more pointed. The three maps are Seiner's map, the South African UDF map of 1949 TSO 400/558 and the UN Map No. 3158 -- one from each of the three entities that had governing responsibility for Namibia before it became independent.

327. As to Seiner's map (Atlas, Map IV), the German Foreign Office sent a copy to the British Foreign Office which transmitted it to the Colonial Office for comment in anticipation of possible negotiations on the boundary between the Caprivi and Bechuanaland, discussed in para. 266, supra. The ensuing correspondence shows that the Colonial Office reviewed the map carefully, with particular attention to the southern boundary of the Strip. It noted that the western portion of the boundary was inconsistent with the British position and that

[i]f the matter should come before a Court of Arbitration the present map might be quoted by the German Government in support of their case, especially if a copy had been communicated to His Majesty's Government and received by them without remark.182

To obviate this result, the Colonial Office suggested that

it would be advisable to communicate to the German Government copies of the enclosed map of the Bechuanaland Protectorate, which has been prepared by the Director of Military Operations, and which indicates the view which His Majesty's Government have held with regard to the proper position of the boundary.183

The map in question was the Bechuanaland GSGS 2460 of April 1909 (Atlas, Map V).184 Its scale of 1:2,000,000 was perfectly adequate to indicate the British position as to the western portion of the boundary, but too small for Kasikili Island even to appear.

328. Thus, the very British officials responsible for dealing with Germany in relation to the southern boundary of the Caprivi had Seiner's map before them and fully understood the significance of a failure to respond to the German government as to any differences of view on the boundaries as shown. Yet, although they were careful to indicate Britain's non-acquiescence as to the western portion of the boundary, they gave no indication of dissatisfaction with the clear depiction of the boundary on Seiner's map to the south of Kasikili Island. Where, as here, the claiming party has challenged parts of a boundary shown on a map, the presumption of acquiescence and recognition is especially strong as to other portions of the boundary on the same map as to which no issue has been raised.185 As T.S. Murty comments, 'Failure of an adversely affected [s]tate to seek clarification at least, if not protest against . . . incorrect maps, can be taken as acquiescence or acceptance of the boundary. . .'.186

329. As to the South African UDF map of 1949, TSO 400/558 (Atlas, Map X), it will be recalled that in July 1945, four years before the publication of the map, the Survey Directorate of the Union Defence Forces circulated sunprints of a preliminary version to a wide range of interested recipients requesting addressees to examine the prints carefully and return corrections and comments. In particular, the letter of inquiry was sent to the Resident Commissioner of the Bechuanaland Protectorate in Mafeking and the District Commissioner in Maun. The Resident Commissioner had overall responsibility for the affairs of the

Protectorate and must have been fully aware of the political significance of the boundaries on the map. The District Commissioner was the man in authority on the spot and would have been familiar with the details of the boundary along the Chobe. Although Namibia has been unable to locate the responses to the query from these two officials, it is evident from comparing the sunprint with the final map, published in 1949, that replies were in fact received from Bechuanaland and incorporated into the map. Out of 14 specific queries relating to Bechuanaland, only four remained unchanged between the preliminary and final versions of the map. Four were omitted, three were changed from village to locality names, two had spelling changes, one was moved eight kilometres, and one place name was separated into two names. Apart from the specific queries put by South Africa, there were other extensive changes in the vicinity of Kasikili Island, including the addition of Serondellas as a locality name and New Kazungula as a village name. The spelling of Kasane, only two kilometres from Kasikili Island on the south bank of the River, was corrected from 'Kasana' as it appeared in the sunprint. (Compare Fig. 18 with Fig. 19) But no changes were made in the adjacent boundary showing Kasikili Island in Namibia, from which it may be inferred that there were no adverse comments.<sup>187</sup> To summarize, responsible Bechuanaland officials, having had their attention specifically drawn to the map and having been requested to identify necessary corrections, failed to enter any objection to the boundary at Kasikili Island, although they pointed to other mistakes in the near vicinity. As with Seiner's map, the presumption laid down in the *Temple of Preah Vihear* case applies: where the claiming party has objected to certain parts of a map, the presumption of acquiescence and recognition is especially strong as to other depictions on the same map as to which no issue has been raised.<sup>188</sup>

330. As to UN Map No. 3158 (Atlas, Map XV), Botswana was a member of the UN Council for Namibia, the sponsoring organization of the map. The map was part of the UN effort to achieve the liberation of Namibia, of which Botswana was a strong supporter.<sup>189</sup> Botswana must have been well aware of the political significance of the map. Moreover, the map was published in 1985, after the two sets of conversations on border questions between Botswana and South Africa (discussed in para. 282, supra), one in 1974, addressing specifically the Kasikili Island issue, and another in 1981. Botswana therefore had recently reviewed internally the whole range of issues concerning the boundary with the Caprivi, including the Kasikili Island question.

331. The map was intended, in the words of General Assembly Resolution 31/150, to reflect 'the territorial integrity of the Territory of Namibia.'<sup>190</sup> Given the importance of the Namibian issue in the UN at the time, there was a heavy burden on Botswana to challenge any portion of the map that it thought was inconsistent with its own claims.

### **C. Conclusions as to the Map Evidence**

332. Namibia has shown that the official maps of the Caprivi and neighbouring Bechuanaland and Botswana from the beginning of the century have overwhelmingly portrayed Kasikili Island as part of Namibia. The only significant exceptions are the two maps published by Botswana itself and the British DOS847(Z462), which was shown to be a mapmaker's error.<sup>191</sup> 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*.

333. This practice continued throughout the period of British rule not only without objection, but with the concurrence of the British authorities in Bechuanaland and London. In the end, this silence and absence of protest is not surprising. It reflects in the first place the settled understanding of British officialdom as to the meaning of the terms of the 1890 Treaty, and in a broader sense, it reflects Britain's basic interests in the area. After the heady days of 'the scramble' were over, Britain was established behind the rampart of the Chobe Ridge. Its principal concerns in the area were the maintenance of the welfare of the Batawana and ultimately preparing them for independence, and the preservation of the natural environment, including the fauna and flora of the area. They simply had no interest in the 'swampy and unhealthy'<sup>192</sup> country to the north that was both politically and geographically disjunctive from the Protectorate. They were wholly satisfied with the existing state of affairs and took no steps to disturb it. By their conduct they may be held to have accepted that the main channel of the Chobe River around Kasikili Island is the southern channel and that Kasikili Island is part of the territory of Namibia.

## CONCLUSION TO PART TWO

334. Part Two has set forth the practice and conduct of the relevant parties -- Germany, Great Britain, Bechuanaland, South Africa, Botswana and Namibia -- during the century between the conclusion of the Anglo-German Treaty of 1890 and the date of Namibia's independence in 1990. It shows:

- The Masubia of the Caprivi Strip have used and occupied Kasikili Island as a part of their lands and their lives from before the Treaty date and for many decades thereafter. From the mid-1960s, South Africa exercised direct military control over the Island until Namibia's independence.
- During this entire period, the governing authorities for the time being in the Caprivi Strip -- first the Germans, then the British as delegate of the mandatory authority, then South Africa under the Mandate and *de facto* after its termination -- exercised sovereign jurisdiction over Kasikili Island. For the most part, this authority was implemented 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; but on occasion these officials asserted their authority directly, and South Africa was in direct military control of Kasikili Island during the Namibian war of independence.
- The foregoing 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.

· Maps of the area, produced by all the parties in interest, with substantial uniformity portray Kasikili Island as being located in Namibian territory. In particular, the principal maps used by all the political entities with governing authority during the colonial period -- Seiner's map for the German authorities until 1915 and the British, until 1933; Bechuanaland Protectorate GSGS 3915, used by the officials of Bechuanaland until 1965; the South African maps beginning with TSO 400/558 in 1949; and the UN map of 1985 -- clearly place Kasikili Island in Namibian territory, again without any protest from Botswana or its predecessors. Two exceptions during the colonial period are shown to result from cartographers' errors. Only after 1974, did Botswana itself produce two maps showing the boundary in the northern channel.

335. This record of subsequent practice not only confirms the attribution of Kasikili Island to Namibia under the Treaty, as set forth in Part One. It also constitutes an entirely independent basis for Namibian sovereignty over the Island under the rules of acquisitive prescription, and also bearing in mind the operation of the principle of *uti possidetis*.

## SUBMISSIONS

*In view of* the facts and arguments set forth in this Memorial,

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

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.

2 Annex 4.

3 Annex 90.

4 Annex 10.

5 Annex 113, pp. 21-22.

6 Annex 3.

7 By Article XII of the 1890 Anglo-German Treaty, Great Britain ceded Heligoland to Germany. This was the only non-African element of the Treaty, but it was of supreme importance to Germany.

8 No boundary line was drawn on this map by the negotiators. The significance of this map is discussed more fully at paras. 111-114, *infra*.

9 Annex 21, Art. II, p. 34. The German translation of the early French draft was much less precise, describing the boundary as running '*nach Osten längs dem Tschobifluß bis zu dessen Mündung in den Zambesi*' ('along the Chobe River'). See Annex 22. The official texts of the Treaty are in English and German.

10 I. Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopaedia* (1979) p. 16 [hereinafter cited as 'Brownlie, *African Boundaries*'].

11 G.A. Res. 35/227/H, 6 March 1981, Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 48, document A/35/48.

12 *Frontier Dispute, Judgment, I.C.J. Reports* 1986, p. 565.

13 Border Disputes Among African States, OAU AHG/Res. 16(1), 17-21 July 1964, *Organization of African Unity, Assembly of Heads of State and Government: Resolutions and Declarations of Ordinary and Extra-Ordinary Sessions* (1964) p. 31.

14 *Frontier Dispute, Judgment, I.C.J. Reports* 1986, p. 568.

15 The full text of Article III of the 1890 Anglo-German Treaty states:

In South-West 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 north-west 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.

The delimitation of the southern boundary of the British territory of Walfish Bay is reserved for arbitration, unless it shall be settled by the consent of the two Powers within two years from the date of the conclusion of this Agreement. The two Powers agree that, pending such settlement, the passage of the subjects and the transit of goods of both Powers through the territory now in dispute shall be free; and the treatment of their subjects in that territory shall be in all respects equal. No dues shall be levied on goods in transit. Until a settlement shall be effected the territory shall be considered neutral.

Article VI of the 1890 Anglo-German Treaty provides:

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

The full English and German texts of the 1890 Anglo-German Treaty are to be found in Annex 4.

16 See *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *I.C.J. Reports* 1994, p. 21. See also *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Jurisdiction and Admissibility)*, *I.C.J. Reports* 1994, pp. 12, 15 et seq.; Id., Judge Oda, diss. op., p. 7.

17 Hauptmann Kurt Streitwolf, the first German Resident, described one year's flood as follows:

[M]eanwhile, the water of the Zambesi was spreading powerfully and flooding everything. As a rule, flooding does not start until April. This year [1909], however, it began a month earlier as a consequence of the very heavy rainy season. When I was told earlier that the whole area between the Zambesi and the Linyanti [River] [Streitwolf refers to the whole course of the river as the Linyanti] would be more or less flooded I thought that to be an exaggeration. But now seeing the flooding myself I was more than surprised. The flood did not come all of a sudden but rather grew steadily, rising everyday by around 10 centimetres until the plains became lakes out of which barely any grass showed above the water. The only means of traffic and transportation is the boat. Annex 141, p. 85.

18 There are Mambova Rapids on both the Chobe and the Zambezi just above the confluence of the two rivers. Both are caused by an outcrop of basalt on a fault running almost due north and south across both rivers at that point.

19 As Hauptmann Streitwolf reported:

In the evening, I went to a hot well which originates around four kilometres above close to the Linyanti [River] and lies on the same level as that of the river. A few months later, I found it totally flooded by the rising Zambesi whose waters also move naturally upward into the Linyanti [River]. Annex 141, pp. 60-61.

20 Annex 137, p. 1, n.1.

21 When James Chapman arrived at the Chobe in August 1853 upstream of Kasikili, he wrote:

Next day we travelled about 18 miles farther eastward, and reached at last the banks of the Chobé, opposite Moreymi's town. . . . The plains [on both banks of the Chobe River] are periodically flooded, and become inundated for several months in the year, so that instead of the river, which is scarcely more than 200 yards broad, the natives at those times navigate sheets of water many miles in extent, in search of the animals which resort to these mounds. Annex 117, p. 164.

. . .

The river, which washed the base of the mound, seemed to have nowhere less than ten or twelve feet of water, and generally much more, even at the banks, undermined as they were by the continuous flow of the stream, running at the rate of three knots per hour. Id., p. 165.

At the beginning of August 1875, while making his third trip to the interior of South Africa, Emil Holub arrived at the confluence of the Chobe and Zambezi and described the area in detail:

The valley of the Chobe-river is near its mouth one half to three English miles broad, as is also the valley of the Zambesi. . . . With the exception of those places where the rocky heights with their extensions draw immediately close, the banks of both rivers are sandy . . .; the rocky banks, which begin . . . above the merging of both rivers (on the right Chobe-bank some miles further up than on the left Zambesi-bank) are for the most part the descent of a deep sandy plateau. Annex 122, pp. 133-134.

Beyond the rapids upstream, in the region of Kasikili, Holub noted:

I found the Chobe most attractive at and above the rapids, which are approximately six miles above the mouth and three miles above our landing place. Above these rapids, the connecting arms to the Zambesi extend in a marshy region within a genuinely giant forest of reeds, these are broad natural channels with calmly flowing water, which I could follow far with the eyes. Annex 122, p. 136.

22 See Annex 129.

23 This is in the period of the low water in the Chobe River. See Alexander Report, p. 29, Table 3.

24 Annex 129, p. 231.



25 Id., p. 233.

26 Annex 138, pp. 119-120.

27 Id., p. 157.

28 Annex 115.

29 See Annex 102, p. 4, para. 2. Quite remarkably, at the date of writing this Memorial, the Royal Geographical Society still holds in stock a number of the original copies of this map.

30 See Map of Matabililand and the Adjoining Territories 1:1,584,000 Intelligence Division, War Office 1889 ID No. 776; Annex 102, pp. 5-6, para. 4. The portion of the river shown on the Bradshaw map appears on the 1889 Map (Atlas, Map II) from the small circle, to which the words 'Mpalera I. and Town' relate, westward to the island below the name 'Ra Masakatans' -- a length of no more than 22 millimetres, about one-tenth its size on the Bradshaw map.

31 Annex 115, p. 209.

32 Id., pp. 210-211.

33 Id., p. 212.

34 Id., p. 211.

35 Id., p. 210.

36 See Annex 102, p. 20, para. 36. The Sedudu Valley is pictured in the Alexander Report, Appendix, Sheet 8, Photographs c, d; Sheet 9, Photograph a. The Valley was also discussed by the witnesses before the JTTE. See Part Two, Chapter II(A), para. 201, *infra*.

37 Annex 115, p. 211.

38 Id., p. 209. It is a matter of speculation why Dr. Bradshaw did not travel along the whole of the northern channel and instead limited himself to a short probe into that channel from each end. Most likely, he did not actually navigate the river but instead travelled on shore along the only path there marked, indicated as roughly following the southern bank of the river. The presence of the path on that bank, and the absence of any corresponding path along the north bank, also strongly suggests that the southern bank of the Chobe was the firmer and more easily travelled route because it was not subject to annual inundation. The path appears not only on Dr. Bradshaw's own map (Atlas, Map I/2), but also on the map of the route followed by Selous (Atlas, Map I/1), as well as the map showing the route followed by Schulz and Hammar in 1883 and published in 1897 in their book *The New Africa: A Journey up the Chobe and down the Okovango Rivers*. See Atlas, Map I/3.

39 See Annex 102, pp. 5-6, para. 4.

40 Annex 33, pp. 21-22.

41 Annex 141, pp. 57-58.

42 See Annex 136, p. 138 ('the delimitation of the land occurred in a manner that did not testify that our geographic information at that time was splendid'); Annex 125, p. 20 (In 1890, 'hardly anybody knew the area in its geographic conditions. Likewise, one did not know then that the Zambesi was not an uninterrupted watercourse towards the east coast. Only in the recent years the Caprivi strip was explored more closely by the explorer Franz Seiner and Hauptmann Streitwolf').

43 See Annex 144, p. 168.

44 See Annex 135, p. 356 (summarizing the territorial dispositions of the Treaty).

45 Annex 30.

46 In desert areas or elsewhere in the absence of clear and recognizable terrain features, the negotiators resorted to degrees of latitude and longitude to define the boundaries. Although these are not 'visible,' they are fixed, stable and capable of objective determination.

47 See Annex 102, pp. 5-6, para. 4. See also paras. 111-114, *infra*.

48 Annex 135, p. 197.

49 See Annex 102, pp. 5-6, para. 4.

50 Annex 12, p. 1.

51 See *id.*, p. 2.

52 See Annex 5.

53 See Annex 14.

54 See Annex 12.

55 *Id.*, p. 3, para. 8(1).

56 See Annex 13, pp. 1, 4-5.

57 *Id.*, p. 4.

58 Annex 15.

59 *Id.*

60 Annex 16.

61 Annex 18.

62 Annex 17.

63 Annex 16.

64 See Annex 20, p. 2.

65 Annex 24. As it turned out, the 18th parallel is north of Andara, so without the proviso, there would have been no strip at all.

66 The parties made a general provision for all such eventualities in Article VI of the Treaty: 'All the lines of demarcation traced in Articles I to IV shall be subject to rectification by agreement between the two Powers, in accordance with local requirements.'

67 Annex 128.

68 Annex 12, p. 1.

69 Annex 13, p. 4.

70 Annex 31, p. 1269.

71 See, e.g., Annex 114, p. 53; Annex 125, p. 20. Even these writers evidently felt a degree of uncertainty and confusion about the navigability of the Chobe. See, e.g., Annex 127, p. 803:

The Zambesi which is so important for German East Africa touches also German South West Africa its upper part, without however, being of much use to it. . . . For long distances, the Zambesi lacks navigability. . . . [and is] interrupted until beyond the Victoria falls. This last portion also makes it impossible to make use of the navigable river at the border of the colony for reaching the railway which crosses the river north of Wankie. . . .

See also Annex 122, p. 148.

72 See paras. 68-69, *supra*.

73 Annex 129, pp. 506-507.

74 See, e.g., Annex 136, pp. 94-95:

The legend persists that the German negotiators were especially keen to possess this strip . . . in order to create a connection to the navigable Zambesi. This motive is hardly understandable, the more as only a few kilometres below this artificial boundary the Zambesi tosses a few hundred feet into the depth and forms the Victoria falls, which are . . . unsuitable for navigation.

See also Annex 134 ('The new interior frontier of German Damaraland has obtained a new configuration that must challenge a mathematician to solve interesting problems, it offers Germany a wholly imaginary contact with the Zambesi river').

75 Subject to the qualification later inserted that the distance between that boundary and Germany's northern border with Portugal should be at least 32 kilometres (20 miles) in width.

76 Annex 19.

77 There are no French texts after 17 June. The official texts of the Treaty are in English and German.

78 Annex 21, Art. II, p. 33.

79 Id., Art. II, p. 34.

80 Annex 22.

81 Annex 23, para. 2. The English translation from the German, unlike the translation from the French, reflected the absence of reference in the German text to 'the centre of the River.'

82 See Annex 25.

83 Annex 26, Art. III, para. 2, p. 54.

84 Annexes 27, 28.

85 Annex 29.

86 See Map of Matabililand and the Adjoining Territories 1:1,584,000 Intelligence Division War Office 1889 ID No. 776; Annex 102, pp. 5-6, para. 4.

87 Sir Edward Hertslet was the Librarian and Keeper of the Papers of the Foreign Office and its *de facto* legal adviser.

88 See Annex 102, pp. 5-6.

89 This island lies 170 kilometres west of Kasikili Island, with which it should not be confused.

90 Some years later, in internal discussions within the British government in connexion with negotiations with Germany over the western sector of the southern boundary, the Colonial Office rejected a proposal to claim this island for Britain, on the ground that the main channel was to the south. The incident is discussed in paras. 268-269, *infra*.

91 See Annex 124, pp. 114-115:

Both "channel" and "principal channel" are ambiguous terms. Channel sometimes means the entire breadth of flowing water, sometimes only the deeper parts. There may be different channels for upstream and downstream navigation and for small and large vessels. The location of the navigable channel may vary with different water stages. The "main" or "principal" channel might be the one most used, the widest, the deepest, or the one carrying most water. The channel is a belt of some width, and not necessarily of constant width. To determine the median line of the channel may be difficult. Even with a multitude of soundings, the edges of the channel, from which a median must be derived, might not be clearly defined. Moreover, the line of deepest water -- of moment to navigators -- generally does not lie along the median line of the channel but swings outward on curves.

92 The various expressions used in the 1890 Anglo-German Treaty are set out below:

Article I(2):

follows the course of the River Rovuma . . . to the northern bank of the mouth of the River Songwe; it ascends that river to the point of its intersection by the 33rd degree of east longitude; thence it follows the river to . . . the point of confluence of the northern and southern branches of the River Kilambo, and thence follows that river till it enters Lake Tanganyika;

Article I(3)(2):

the north bank of the mouth of the River Juba; thence it ascends that bank of the river . . .

Article III(1):

a line commencing at the mouth of the Orange River, and ascending the north bank of that river . . .

Article IV(1):

till it reaches the left bank of the River Aka; ascends the mid-channel of that river to the 6°20' parallel of north latitude; runs along that parallel westwards to the right bank of the River Dchawe or Shavoe; follows that bank of the river till it reaches . . .

Evidently, where the Parties intended that the river waters should all be within the jurisdiction of one party, they describe the border as following the bank. But the significance to be attached to the variation in wording in the other cases eludes identification. Even if one observes that 'ascends the mid-channel' is verbally different from the other expressions, that does not mean the use of 'the river' *simpliciter* in the latter signifies something other than 'mid-channel.'

93 Annex 89, para. 16.

94 Id., para. 106.

95 *Argentine-Chile Frontier Case (Argentina v. Chile)* (1966), 38 *I.L.R.*, p. 20.

96 Id., p. 93.

97 Id., p. 94.

98 See id.

99 Id., p. 95.

100 Id.

101 Id., p. 97.

102 As yet unpublished in English. A translation will be deposited in the Library of the Court.

103 Before the JTTE, Namibia, on the basis of the facts then available to it, put forward the possibility of a change in the bed of the Chobe River after the conclusion of the 1890 Treaty. The new factual material now available in the Alexander Report negates that possibility beyond any reasonable doubt, and Namibia accepts it as conclusive.

104 Annex 124, p. 115.

105 *Argentine-Chile Frontier Case (Argentina v. Chile)* (1966), 38 *I.L.R.*, p. 95.

106 Namibia wishes to reiterate that the analysis in the following paragraphs is based on the Alexander Report, which is an integral part of this Memorial. (See para. 20, *supra*) As the various sections of the Report are closely interconnected, the Court's attention is respectfully drawn to the Author's Note at the top of page 1 of the Report urging that the Report be read as a whole, straight through, before any particular section is studied in detail.

107 The terms 'subsequent practice' and 'subsequent conduct' are used interchangeably by the authorities, as appears from the quotations in this Section. No attempt has been made here to distinguish between the two terms.

108 H. Waldock, 'Doc. A/CN.4/167/Add.3: Third Report on the Law of Treaties' 2 Y. Int'l L. Com. 55 (1964) (quoting G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' 33 Brit. Y.B. Int'l L. 211-212 (1957)). See also *id.*, p. 59 (subsequent practice has its greatest probative value 'as evidence to be used for confirming the natural and ordinary meaning or for ascertaining the meaning in cases of doubt').

109 G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' 33 Brit. Y.B. Int'l L. 223 (1957). See also D.W. Bowett, 'Estoppel before International Tribunals and Its Relation to Acquiescence' 33 Brit. Y.B. Int'l L. 177 (1957) ('. . . in cases of doubt as to the meaning of an agreement, the subsequent conduct of the parties in carrying out the agreement affords evidence of its meaning'); M.K. Yasseen, 'L'interprétation des traités d'après la convention de Vienne sur le droit des traités' 151 R.C.A.D.I. 47 (1976-III); C. de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963) pp. 121-122; I. Volcu, *De l'interprétation authentique des traités internationaux* (1968) p. 203; J. Charpentier, *La reconnaissance internationale et l'évolution du droit des gens* (1956) p. 78.

110 See the proposed 'Article 71: Application of the general rules' in H. Waldock, 'Doc. A/CN.4/167/Add.3: Third Report on the Law of Treaties' 2 Y. Int'l L. Com. 52 (1964).

111 '883rd Mtg., Law of Treaties' 1 Y. Int'l L. Com. 267 (1966).

112 'Draft Articles on the Law of Treaties with Commentaries, Adopted by the International Law Commission at its Eighteenth Session,' *United Nations Conference on the Law of Treaties: Documents of the Conference* (1969) p. 39.

113 'Report of the Commission to the General Assembly' 2 Y. Int'l L. Com. 203 (1964). See also, e.g., A. McNair, *The Law of Treaties* (1961) pp. 424-431; R. Jennings and A. Watts, 1 *Oppenheim's International Law* (9th ed. 1992) pp. 1274-1275, n.20.

114 *Alaskan Boundary Tribunal Award*, 20 Oct. 1903, Cmd. 1877 (1904), p. 535.

115 'The Chamizal Arbitration Between the United States and Mexico' 5 Am. J. Int'l L. 805 (1911). See I. Sinclair, *Vienna Convention on the Law of Treaties* (1984) p. 137.

116 *Article 3, Paragraph 2, of the Treaty of Lausanne* (1925), *P.C.I.J. Report*, Series B, No. 12, p. 24 (PCIJ looked to the subsequent conduct of the parties after the conclusion of the Treaty of Lausanne to determine their views and intentions regarding the clauses in question).

117 *Right of Passage Case*, *I.C.J. Reports* 1960, p. 37. See H. Thirlway, 'The Law and Procedure of the International Court of Justice' 62 Brit. Y.B. Int'l L. 49 (1991).

118 See H. Thirlway, 'The Law and Procedure of the International Court of Justice' 62 Brit. Y.B. Int'l L. 49 (1991).

119 *Temple of Preah Vihear, Judgment*, *I.C.J. Reports* 1962, p. 61.

120 H. Waldock, 'Doc. A/CN.4/167/Add.3: Third Report on the Law of Treaties' 2 Y. Int'l L. Com. 59 (1964) (internal citation omitted).

121 I. MacGibbon, 'The Scope of Acquiescence in International Law' 31 Brit. Y.B. Int'l L. 146 (1954) [hereinafter cited as 'MacGibbon'].

122 *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility*, *I.C.J. Reports* 1988, p. 87.

123 H. Waldock, 'Doc. A/CN.4/183 and Add. 1-4: Fifth Report on the Law of Treaties' 2 Int'l L. Com. 99 (1966).

124 See 74th Mtg., *United Nations Conference on the Law of Treaties: Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (1968) p. 442 ('In paragraph 3(b), [the Drafting Committee] has brought the English text into line with the French, Russian and Spanish texts by substituting the word "agreement" for the word "understanding"').

125 See, e.g., L. McNair, *The Law of Treaties* (1961) pp. 424-429; G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' 33 Brit. Y.B. Int'l L. 223-225 (1957); H. Waldock, 'Doc. A/CN.4/167/Add.3: Third Report on the Law of Treaties' 2 Y. Int'l L. Com. 55 (1964); I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984) pp. 134-138; R. Jennings and A. Watts (eds.), 1 *Oppenheim's International Law* (9th ed. 1992) p. 1274 [hereinafter cited as '*Oppenheim's International Law*']; J.P. Müller, *Vertrauensschutz im Völkerrecht* (1971) pp. 171-190.

126 H. Lauterpacht (ed.), *L. Oppenheim, International Law: A Treatise* (8th ed. 1955) p. 576.

127 See R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, p. 706.

128 D.H.N. Johnson, 'Acquisitive Prescription in International Law' 27 Brit. Y.B. Int'l L. 353-354 (1950) [hereinafter cited as 'D.H.N. Johnson']. See also A. Verdross, '*Règles générales du*

*droit international de la paix*' 30 *R.C.A.D.I.* 373 (1929-V); J. Basdevant, *Dictionnaire de la terminologie du droit international* (1959) p. 64.

129 I. Brownlie, *African Boundaries*, p. 16. See also F. von Liszt, *Das Völkerrecht, systematisch dargestellt* (1925) pp. 15, 243-244; J. Müller, *Vertrauensschutz im Völkerrecht* (1971) pp. 35-39; A. Verdross and B. Simma, *Universelles Völkerrecht* (3rd ed. 1984) p. 758; K. Ipsen, *Völkerrecht* (3rd ed. 1990) p. 214; J. Barale, 'L'acquiescement dans la jurisprudence internationale' XI *A.F.D.I.* 410-411 (1965).

130 *Island of Palmas Case (United States v. Netherlands)*, Hague Ct. Rep. 2d (Scott), p. 93.

131 *Id.*, p. 101. See also F. Berber, 1 *Lehrbuch des Völkerrechts* (1975) p. 365; G. Dahm et al., 1 *Völkerrecht* (1989) p. 366.

132 *Legal Status of Eastern Greenland (Denmark v. Norway)* (1933), *P.C.I.J.* Series A/B, No. 53, p. 45. See also D.H.N. Johnson, p. 342 ('[t]he opinion [in *Island of Palmas*] . . . has been generally recognized as authoritative . . .').

133 D.H.N. Johnson, p. 344.

134 See *id.*, pp. 344-348. See also J. Müller, *Vertrauensschutz im Völkerrecht* (1971) pp. 54-60; F. Berber, 1 *Lehrbuch des Völkerrechts* (1975) p. 365; G. Dahm et al., 1 *Völkerrecht* (1989) p. 367; K. Ipsen, *Völkerrecht* (3rd ed. 1990) pp. 275-276.

135 R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, p. 707 (internal citation omitted).

136 *Id.*

137 See *Fisheries Case (United Kingdom v. Norway)*, *I.C.J. Reports* 1951, p. 138. See also *id.*, p. 130 ('Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force').

138 *Temple of Preah Vihear*, *I.C.J. Reports* 1962, p. 32.

139 *Frontier Dispute, Judgment*, *I.C.J. Reports* 1986, p. 566.

140 R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, p. 669.

141 *Frontier Dispute Judgment*, *I.C.J. Reports* 1986, p. 565.

142 *Id.*, p. 566. See also *id.*, p. 565; G. Dahm et al., 1 *Völkerrecht* (2nd ed. 1989) p. 381.

143 *Frontier Dispute Judgment*, *I.C.J. Reports* 1986, p. 565. Cf. J. Dugard, 'Walvis Bay: Decolonization and International Law' 85 *Am. J. Int'l L.* 753 (1991) (granting *uti possidetis* 'the status of a regional customary rule extending to all Africa').



144 OAU AHG/Res. 16(1), *Organization of African Unity, Assembly of Heads of State and Government: Resolutions and Declarations of Ordinary and Extra-Ordinary Sessions* (1964) pp. 31-32.

145 General Secretariat Organization of African Unity, 'Charter of the Organization of African Unity,' in *Protocol of the Commission of Mediation, Conciliation and Arbitration, Functions and Regulations of the General Secretariat* (1965) p. 8 (emphasis in original). During the debate over Article III, paragraph three, the Ethiopian prime minister emphasized that African states should accept colonial boundaries 'drawn on the maps, whether they are good or bad . . .' Annex 133, p. 24 (quoting Proceedings of the Summit Conference of Independent African States, Addis Ababa, May 1963). The President of Mali stressed the importance of maintaining the doctrine of *uti possidetis* for maintaining unity and stability in Africa, stating, 'we must take Africa as it is, and we must renounce any territorial claims, if we do not wish to introduce what we might call black imperialism in Africa . . . African unity demands of each one of us complete respect for the legacy that we have received from the colonial system. . . .' Annex 133, p. 24 (quoting Proceedings of the Summit Conference of Independent African States, Addis Ababa, May 1963). In the debate, Morocco and Somalia opposed Article III, para. three. See Annex 133, p. 24.

146 Manifesto on Southern Africa: Approved by the Conference of East African and Central African States at Lusaka, Zambia, 16 Apr. 1969, para. 11, reprinted in Official Records of the General Assembly, Thirty-fourth Session, Annexes II, agenda item 106, document A/7754.

147 *Frontier Dispute, Judgment, I.C.J. Reports* 1986, p. 568.

148 According to the terms of reference of the JTTE, it had the authority to 'hear, without prejudice to the 1890 and 1892 Treaties, any oral evidence from any competent person in Botswana and Namibia or from any other country which the Team may consider necessary to enable it to arrive at a decision on the Kasikili/Sedudu Island dispute.' See Annex 11, Art. 7(1)(f). In addition to taking the oath, the witnesses were admonished to limit their testimony to facts about the history of Kasikili Island that they had experienced personally or heard from parents or relatives.

149 The series of agreed questions included: Was the Kasikili Island known by another name before? Is the witness speaking from her own knowledge or on the basis of what others have told her? Does the witness know of anyone who owned land on Kasikili Island?

150 See Annex 2, p. 194 (Testimony of Chief Munitenge J. Moraliswani). Chief Moraliswani died in August 1996.

151 See, e.g., Annex 1, pp. 19 (Testimony of S.M. Ntonda, Senior *Induna*), 41 (Testimony of D.M. Simonda, *Induna*).

152 Annex 2, *Presentation of Munitenge Moraliswani II*, pp. 1-2.

153 See, e.g., Annex 1, pp. 20 (Testimony of S.M. Ntonda) ('there's no one who's going to tell me about Kasikili because it's where we were ploughing, me and my uncle and our chief'); 36 (Testimony of C.J. Silundika) ('Kasikili is ours. We just to take our cattle there and we used to plough in the Island . . .'); 51 (Testimony of F. Mayumbelo) ('It's we, people from Kasika, we are the one who were ploughing Kasikili'); 67 (Testimony of M.G. Nchindo) ('We were many,

all those people who were ploughing in Kasikili. I mean the whole area. All people from Kasika were ploughing in Kasikili'); 103 (Testimony of M. Masuka) ('Kasikili it's our village where we were staying, where we were ploughing'); 124 (Testimony of M. Sibungu) ('Kasikili is not a land for the Botswana, but that's land for the Namibians. It's where I grew up. It's where we were farming, we used to plough').

154 See, e.g., Annex 1, p. 174 (Testimony of E.S. Lilungwe) ('All their grain silos were built there . . .'); Annex 2, p. 58 (Testimony of A.K. Javanika) (recalling that the tribes' grain silos were located by their fields on Kasikili Island on some small, high places on the Island).

155 See, e.g., Annex 1, pp. 213, 214 (Testimony of S.E. Mate) ('Kasikili is ours . . . it's where we were born . . . it's where we grew up. . . it was a big village').

156 See, e.g., Annex 1, pp. 110 (Testimony of J.S. Sikalya) ('The owners [of land on Kasikili Island] were the Chief Liswaninyana, Chikamatondo, Mr. Libalamwe and Mr. Jova'), 132 (Testimony of N. Siyomundi), 138 (Testimony of C.L. Matondo); Annex 2, pp. 54 (Testimony of A.K. Javanika), 79 (Testimony of R.M. Malumani).

157 See, e.g., Annex 1, pp. 187 (Testimony of T.N. Mate), 193 (Testimony of I. Mate) ('[Kasikili Island] was a big headquarters of the chief, Chief Liswaninyana').

158 Annex 2, *Presentation of Munitenge Moraliswani II*, p. 2.

159 See, e.g., Annex 1, p. 155 (Testimony of M.K. Muuba) ('Chikamatondo got his chieftainship when he was still acting on behalf of Liswaninyana'). See also para. 213, *infra*.

160 See, e.g., Annex 2, pp. 45 (Testimony of S.N. Simasiku), p. 4 (Testimony of K. Liswani) ('[A]n *induna* there was Silumbu. . . Silumbu is the one who used to give lands, a piece of land for the people who were staying [on the Island] so that they should plough there').

161 See Annex 102, p. 9, para. 13.

162 The Joint Team asked each witness about the name of the Island and its derivation. See, e.g., Annex 1, pp. 43 (Testimony of D.M. Simonda) ('The way I know Kasikili is that there was a tree, a big tree called Kasikili'); 46 (B.S. Matomola) ('there was a tree which grew up there and it's a big tree and that's how they named the island Kasikili, from that tree, a Sikili tree'); 58 (Testimony of M. Songa) ('We, when we grew up, we found they call it Kasikili because there was a tree, a Sikili tree, which grew up there'); 148 (Testimony of M.K. Muuba) ('It was called the island of Silumbu . . . that tree grew up there . . . that was a Sikili tree and then they named that island after that tree . . .'); Annex 2, p. 24 (Testimony of A.S. Ngabwe) ('The early name they used to call the island was Silumbu's Island. Now when the tree grew up, it's when they changed and they called the island Kasikili Island'). There is no record of how Kasikili Island also came to be called Sedudu Island. Both Namibian and Botswana witnesses were unsure about the meaning of Sedudu. Sedudu is the name given to a stream and a valley entering the Chobe from the Botswana side at the western end of the Island. See, e.g., Annex 2, pp. 50-51 (Testimony of S.N. Simasiku) (noting that Sedudu is a stream running through a Botswana forest).

163 See, e.g., Annex I, pp. 10 (Testimony of S. Nchabi), 111 (Testimony of J.S. Sikalya), 117 (Testimony of S.D. Nyambe), 125 (Testimony of M. Sibungu); Annex 2, pp. 11 (Testimony

of J.S. Kabuku) (responding to the Botswana Component's question whether people from the Kasane side of the Chobe ploughed on Kasikili Island, Mr. Kabuku said, 'There's no one I know up to now and I've ever seen anyone'), 18 (Testimony of N.L. Mutwa) ('There's no one I saw with my eyes coming from [the Kasane side] . . . on the island').

164 See, e.g., Annex 1 (Botswana Witness), p. 47 (Testimony of Ntshwabi Dimbo); Annex 2 (Namibia Witness), p. 26 (Testimony of A.S. Ngabwe).

165 See, e.g., Annex 2, p. 39 (Testimony of L.I. Samalaza) ('Those cattle used to graze at Itandwe and Namasusa. From there they used to cross Kasaha, from Kasaha then they go to Impalila, from Impalila that's when they cross now going to Zambia, from Kazungula and then they cross going to Zambia'). Annex 1 (Botswana Witnesses), pp. 31 (Testimony of Kopani Ketshegile) ('[T]here used to be some cattle coming from Maun passing to Kazungula'), 75 (Testimony of Mwampole Ndana) ('Some of [the Deaconos'] cattle came from Maun and some of them were bought in Kachikau and [Liswaninyana]').

166 See, e.g., Annex 1 (Botswana Witnesses), pp. 14-15 (Testimony of Isang Phutimpe), 18 (Testimony of Thakayakgosi Modisaemang), 29 (Testimony of Kopani Ketshegile). The Masubia witnesses were equally adamant that no such activity had taken place on the Island, especially since there was not enough room there for farming, grain storage and grazing a herd of cattle. See, e.g., Annex 2, pp. 6 (Testimony of K. Liswani) ('[Susman] used to graze his cattle at a place called Imbuwa, it's a grazing area and there, he didn't bring or graze his cattle on the Kasikili Island because that was a field area. It's where people were ploughing and after grazing his cattle at Imbuwa area then they would go to Impalila, from Impalila there they cross, going to Zambia'), 33 (Testimony of N. Inimwene) ('[Susman] used to graze his cattle at a far place, Imbuwa and on the island it's where people were ploughing. It's where our food was kept. How could he graze his cattle there? Even our cattle didn't graze on the island'), 85 (Testimony of S.S. Kakambi) (testifying that there never was anyone from the Botswana side who crossed to Kasikili Island).

167 See, e.g., Annex 1, (Namibia Witnesses), pp. 79 (Testimony of R.M. Songa) ('The way I know, as I am busy stating that I grew up in Botswana. That's a canal which comes to the Chobe River, that's what they call Sedudu'), (Botswana Witness) 74 (Testimony of Mwampole Ndana) (admitting that valley outside of the island was also known as Sedudu). See Alexander Report, Appendix, Sheet 8, Photograph d; Sheet 9, Photograph a; see also Fig. 5, p. 16.

168 See, e.g., Annex 1, pp. 69 (Testimony of M.G. Nchindo) ('The cattle, cows of Susman didn't graze in the Kasikili Island, but they were grazing in Kasika. There was a valley where they were given, that's where the cattle could graze'), 97 (Testimony of R.M. Malapo) ('The cattle Susman's used to graze, when he buys cattle then he was given a grazing area by the chief inside, not in Kasikili [Island]. They didn't graze in Kasikili [Island] but they're grazing inside at Kasika'), 118 (Testimony of S.D. Nyambe) ('There was a man called Susman . . . Then after buying cattle he asked place where his cattle can graze and he was given a place on this side of us where it's a valley or where there's a bit of water and grass, that his cattle can graze there'). Mr. Nchindo's description of Kasika is particularly useful because it explains some of the contradictions in the testimony of Botswana witnesses who believed that they were grazing on 'Sedudu Island' -- an island that 'is just like a valley. Plain valley.' See Annex 1 (Botswana Witness), p. 82 (Testimony of Keorapetse Mokhiwa).

169 See, e.g., Annex 1, p. 62 (Testimony of M. Songa) (responding to the Botswana Component's question whether his people need the permission of the resident Commissioner of Kasane to plough on the Island, witness stated simply, 'The District didn't have powers to say on the Island.');

Annex 2, p. 25 (Testimony of A.S. Ngabwe) (responding to the question whether Chief Liswaninyana has received permission from the Resident Commissioner at Kasane to plough on the Island, the witness stated, 'Chief Liswaninyana, that was his land. There's no one who could give him authority or power to go and plough there').

170 See, e.g., Annex 1, p. 76 (Testimony of R.M. Songa) ('I told you how old I am and I have never seen the Botswana authorities saying anything about Kasikili [Island], but it's only now when we hear that. What brought this issue?').

171 See, e.g., Annex 2, pp. 7 (Testimony of K. Liswani) (responding to the question whether the Bechuanaland District Office at Kasane was aware of Masubia people ploughing on Kasikili Island, the witness stated unequivocally '[t]hose people were aware that we were ploughing there and they knew that it's our land'), 43 (Testimony of L.I. Samalaza) ('[The authorities in Kasane] saw us, they did nothing to us').

172 See, e.g., Annex 1, p. 54 (Testimony of F. Mayumbelo) ('Those people [the British authorities] saw us . . . but they did nothing to us').

173 See, e.g., Annex 2, p. 67 (Testimony of J.N. Sibungu) (testifying that the chief's house was located on Kasikili Island).

174 See, e.g., Annex 2, p. 73 (Testimony of H.S. Chika) ('There were permanent houses but we used to run away from water, then we go to Kasika').

175 See, e.g., Annex 1, p. 96 (Testimony of R.M. Malapo) (describing the heavy amounts of building that the Masubia did on Kasikili Island during the dry season, 'It was a village, it's where people were staying. They even built houses. There were courtyards.').

176 See, e.g., Annex 1, p. 103 (Testimony of M. Masuka) ('Then we stayed there because [Kasikili Island is] a place where we settled and about the school, when we complained about the school, the chief [put a request to a higher authority] that there should be a school and the teacher was Mabukwani').

177 See, e.g., Annex 1, pp. 85, 86 (Testimony of S.C. Simasiku) (testifying that there was a Sabbath School on Kasikili Island from 1948 to 1954).

178 See, e.g., Annex 2, p. 84 (Testimony of S.S. Kakambi); Annex 1, p. 103 (Testimony of M. Masuka).

179 See, e.g., Annex 1, p. 84 (Testimony of S.C. Simasiku); Annex 2, p. 31 (Testimony of N. Inimwene).

180 See, e.g., Annex 1, p. 54 (Testimony of F. Mayumbelo) (his father is buried on Kasikili Island); Annex 2, pp. 61 (Testimony of J.N. Sibungu) (Kasikili Island was where he was born and where his parents had died), 93 (Testimony of S.J. Malange) (noting that every person who dies on Kasikili Island was buried on the Island), 103 (Testimony of N. Kamwi) (she was born on the Island, had children on the Island and buried all of her children on the Island).

181 See, e.g., Annex 2, p. 92 (Testimony of S.J. Malange).

182 See, e.g., Annex 2, pp. 57 (Testimony of A.K. Javanika), 107 (Testimony of S.W. Sipalosi).

183 See, e.g., Annex 2, pp. 34 (Testimony of N. Inimwene) ('During the flood areas we used to move out from Kasikili, going to Kasika. Then when the water is dry, we go back again there, on the island and that's when we start ploughing there'), 39 (Testimony of L.I. Samalaza) ('Those times we used to plough at Kasikili [Island] and then there came big water, a flood, it's the one which made us to move out from the island and then it's when the chief, Liswaninyana, decided that we should go to the highlands there at Kasika. . . . But when it's dry we used to go back and plough there. . . .'), 47-48 (Testimony of S.N. Simasiku) ('They ploughed there yearly and they used to move when, once there's a flood, then, they move out and go to Kasika. Then when it's dry they go back, just like that it was occurring, timeously like that').

184 See, e.g., Annex 2, p. 64 (Testimony of J.N. Sibungu) ('[Liswaninyana] was the chief in that time when the big flood came and then he decided that my subjects are going to die now, we better move out from here').

185 See, e.g., Annex 2, pp. 55 (Testimony of A.K. Javanika) ('during the ploughing season when they come back they rebuilt those houses again').

186 See, e.g., Annex 1, p. 16 (Testimony of B.S. Lishomwa) ('At Kasikili [Island] it's where we were staying. We used to plough there until 1958 when there came a big flood'); Annex 2, pp. 73 (Testimony of H.S. Chika) (family permanently moved from Kasikili Island to Impalila when there was a big flood in 1958), 156 (Testimony of B.S. Jeke) ('During the olden times Kasikili Island was our village, it's where we were staying. . . . The big flood which chased us that we should find the dry land or the high places at Kasika, it was in 1958'), 178 (Testimony of S.G. Moka) ('I know that there was a big flood, maybe somewhere there in 1958, it's when people moved').

187 See Alexander Report, Table 1, p. 15; id., para. 6.2, p. 14.

188 See, e.g., Annex 1, p. 58 (Testimony of M. Songa) (when the elephants and other animals came in and destroyed their crops people moved away); Annex 2, p. 78 (Testimony of R.M. Malumani) ('But the thing which brought us to move out from there is the animals which were coming from Botswana'). The period is roughly contemporaneous with the creation of the Chobe Game Reserve in 1960, from which animals could easily cross to the Island in times of low water. See generally Annex 100.

189 See, e.g., Annex 2, p. 101 (Testimony of N. Kamwi) ('The last time we moved from Kasikili Island it was this time when the buffalos and the elephants started eating our crops').

190 See, e.g., Annex 1, pp. 20, 24-25 (Testimony of S.M. Ntonda) (testifying that he was one of three hunters hired by the South African government to control the elephant population around and on Kasikili Island from 1955 to 1976).

191 See, e.g., Annex 1, p. 66 (Testimony of M.G. Nchindo) (people on the Island were often arrested for being SWAPO members); Annex 2, pp. 40 (Testimony of L.I. Samalaza)

('[P]eople who had children in SWAPO used to be picked up by helicopters'), 46 (Testimony of S.N. Simasiku) ('[N]ow once [the South African authorities] heard that our sons have gone to SWAPO, now they started troubling on the island. That if they found you ploughing alone there, they can arrest you or take you somewhere').

192 Often witnesses spoke of living with parents, grandparents and even great-grandparents on the Island. The Masubia were not recent or temporary inhabitants of the Island, but had lived and farmed there for generations. See, e.g., Annex 2, p. 89 (Testimony of S.J. Malange) (providing a list of his extended family who lived with him on Kasikili Island).

193 See, e.g., Annex 2, p. 32 (Testimony of N. Inimwene) ('That island [Kasikili Island] belongs to the Masubia').

194 Annex 51, p. 127.

195 Annex 33, pp. 20-21.

196 See Annex 58.

197 *Id.*, p. 13.

198 *Id.*

199 *Id.*, p. 26. Records from the gauging station at Victoria Falls confirm that the floods in these years were extraordinary. They also show, in conformity with the witnesses' testimony, paras. 205-206, *supra*, that the years from 1957 to 1960 were unusually severe flood years and that the floods of the 1957-1958 summer season were the highest on record. See Alexander Report, Table 1, p. 15; para. 6.2, p. 14.

200 See Annex 126, p. 1.

201 Annex 130, p. 151.

202 *Id.*

203 Annex 58, p. 25.

204 *Id.*, pp. 16, 17.

205 Annex 139, pp. 167-168.

206 *Id.*, p. 167.

207 See *id.*, p. 168.

208 These negotiations and the resulting arrangement are discussed in detail in Chapter IV(C), *infra*.

209 Annex 64. The last paragraph seems to indicate that there was no group on the Bechuanaland side that were asserting communal or tribal rights in the property. This is borne

out by the comment of the Bechuanaland Protectorate authorities in 1951 that the only Africans in the Protectorate interested in the cultivation of the Island are Government employees living at Kasane. See Annex 76.

210 Annex 71.

211 Annex 72.

212 Annex 73.

213 See Annex 74.

214 See Annex 75.

215 Annex 76.

216 Annex 65.

217 Annex 69.

218 See, e.g., Annexes 62, 70, 72.

219 D.H.N. Johnson, p. 344-345 ('As only a state can have "the intention and the will to act as sovereign," it follows that the acts of authority relied upon must be those of the state as an international person, not those of mere individuals or even of subordinate divisions of the state').

220 *The Island of Palmas (United States v. The Netherlands)*, Hague Ct. Rep. 2d (Scott), p. 93.

221 D.H.N. Johnson, 'Acquisitive Prescription in International Law' 27 Brit. Y.B. Int'l L. 344 (1950).

222 *The Island of Palmas (United States v. The Netherlands)*, Hague Ct. Rep. 2d (Scott), p. 93.

223 *Id.*, p. 94.

224 *Id.*, p. 111.

225 *Id.*, pp. 126-127.

226 *Legal Status of Eastern Greenland* (1933), p. 46.

227 The 1960 South African census reported that the population of the entire Caprivi to be only 15,840. *I.C.J. Pleadings, South West Africa Cases*, Vol. II, p. 314, n.1. See also Annex 141, p. 227 (estimating the population at the end of Streitwolf's tenure at about 11,000); Annex 58, p. 21 (placing the population figure at just over 10,000 in 1939 where the Masubia, living in the easternmost portion of the Caprivi, comprised about half of this total).

228 See also Annex 102, p. 9, para. 13; para. 200, *supra*.

229 See Annex 49, para. 6.

230 See Annex 119, pp. 44-45.

231 See Annex 119, pp. 49, 51-52.

232 See Annex 91. See also Annex 35.

233 See Annex 141, pp. 2-3.

234 See *id.*, pp. 63, 66. See also Annex 58, p. 7.

235 See Annex 58, p. 8.

236 See Annex 123, p. 134; Annex 121, pp. 324-330. See generally Annex 143, pp. 689-699. A similar method of indirect rule had long been practised in British India.

237 See Annex 120, pp. 352-353.

238 *Id.*, p. 352.

239 Annex 123, p. 134.

240 Annex 131, p. 203.

241 *The Island of Palmas (United States v. The Netherlands)*, Hague Ct. Rep. 2d (Scott), p. 116.

242 See Annex 141, pp. 26-27. See also Annex 119, p. 86.

243 See Annex 141, pp. 103-104, 110.

244 *Id.*, p. 111. See also *id.*, pp. 76, 78-79.

245 Some of the sources indicate that Chikamatondo was appointed as regent for Liswaninyana, rather than chief. See, e.g., Annex 139, p. 167; Annex 1, pp. 69 (Testimony of M.G. Nchindo) (testifying that Chikamatondo ruled with Liswaninyana), 140 (Testimony of C.L. Matondo) ('Chikamatondo was acting on behalf of Liswaninyana because Liswaninyana was still a young man'); Annex 2, p. 207 (Testimony of Chief M.J. Moraliswani) (testifying that Chikamatondo was made regent until Liswaninyana was old enough to rule). But there is no doubt that Chikamatondo was the one who exercised *de facto* authority under the German and later the British and South African authorities. See also Annex 58, p. 16; Annex 139, p. 168.

246 Annex 141, p. 112.

247 *Id.*, p. 113. In his own right, Streitwolf enforced the closing of the border and the laws regarding hunting licenses. He successfully represented the Masubia in court proceedings in



Sesheke to recover cattle taken by the Barotse when they removed to Northwestern Rhodesia upon the arrival of the Germans. See *id.*, pp. 93 (closing the borders), 79-80 (issuing hunting licenses), 139-142 (going to court to win back cattle).

248 See Annex 41, p. 3.

249 *Id.* He also enjoined the energetic pursuit of mapping the region. von Frankenberg took this advice to heart, producing a map, containing considerable detail about the villages of the Eastern Caprivi and their headmen. Atlas, Map VII. See *Karte des Caprivi Zipfels Blatt 1: Das Sumpfgebiet Die Wohnsitze der Massubia 1:100,000 Surveyed by Frankenberg May 1912*; Annex 102, p. 10, para. 16.

250 Cf. Annex 119, p. 122.

251 See, e.g., Annex 1, p. 16 (Testimony of B.S. Lishomwa) ('Kasikili [Island] is our land. That's where our chief, Liswaninyana was ploughing and our grandfathers also used to plough there'); Annex 2, *Presentation by Munitenge Moraliswani II*, p. 1 ('The Masubia of Caprivi used Kasikili Island since time immemorial. . . .').

252 See Annex 102, p. 10, para. 16. The map shows another *kraal* for Schikamatondo at Schuckmannsburg, presumably for his official duties. The legend on the map notes that the kraals bear the names of their eldersmen.

253 Annex 132, pp. 27-28 (internal citations omitted). See also Annex 126, pp. 6-7, paras. 23-29; *I.C.J. Pleadings, South West Africa Cases*, Vol. II, p. 316 ('Land was normally used on a communal basis. When it was sought to establish a village, the chief's permission was first obtained. . . . The village headman [or *induna*] then divided up the area so demarcated amongst the villagers'); *I.C.J. Pleadings, South West Africa Cases*, Vol. III, p. 120.

254 See, e.g., Annex 2, p. 4 (Testimony of K. Liswani) ('[A]n *induna* there was Silumbu. . . . Silumbu is the one who used to give lands, a piece of land for the people who were staying [on the island] so that they should [sic] plough there . . . the elders were also there on the island').

255 See Annex 58, p. 18. See also Annex 141, p. 27 (regarding the judicial organization in the German colonial system).

0 See, e.g., Annex 1, pp. 187 (Testimony of T.N. Mate) ('What I know is that there was Chief Liswaninyana, he's the one who was staying there [on Kasikili Island]'), 193 (Testimony of I. Mate) ('[Kasikili Island] was a big headquarters of the chief, Chief Liswaninyana'); Annex 2, pp. 45 (Testimony of S.N. Simasiku) ('Kasikili [Island] is ours because Liswaninyana had built some houses there, it's where he was staying . . .'), 144 (Testimony of J.L. Sitwala) (responding to the question whether the chief used to hold court on Kasikili Island, 'There was a Court there, Tribal Court, because there was a chief').

1 See Annex 58, p. 8.

2 See Annex 92.

3 See Annex 94.

4 See Annex 52, pp. 1-2.

5 See Union of South Africa, 'Report of the Administrator of South West Africa for the Year 1925,' League of Nations Archives: 1919-1927, 1/51603/1347 (R. 12), p. 115; Union of South Africa, 'Report of the Administrator of South West Africa for the Year 1926,' League of Nations Archives: 1919-1927, 1/59586/1347 (R. 13), p. 101; Union of South Africa, 'Report of the Administrator of South West Africa for the Year 1927,' League of Nations Archives: 1919-1927, 6A/4990/443 (R. 2290), p. 123; Union of South Africa, 'Report of the Administrator of South West Africa for the Year 1928,' League of Nations Archives: 1928-1932, 6A/12455/443 (R. 2290), p. 107; Union of South Africa, 'Report Presented by the Union of South Africa to the Council of the League of Nations Concerning the Administration of South West Africa for the Year 1929,' League of Nations Archives: 1928-1932, 6A/20001/443 (R. 2291), p. 68.

6 See Union of South Africa, 'Report of the Administrator of South West Africa for the Year 1925,' League of Nations Archives: 1919-1927, 1/51603/1347 (R. 12), p. 115.

7 See *id.*

8 See generally Annex 53.

9 See Annex 121, p. 209.

10 See Annex 59, para. 5(ii).

11 See Annex 94.

12 See Annex 95.

13 Annex 58, p. 10.

14 See Annexes 97, 99. Under Proclamation No. 27 of 1930, the Administrator was empowered to set up trust funds for tribespeople in the Caprivi Strip, which were the repository of the tax revenues. See *I.C.J. Pleadings, South West Africa Cases*, Vol. III, p. 121.

15 See Annex 58, p. 10.

16 See *id.*, pp. 10, 27-28. Ruth First wrote in 1963, 'In the northern territories the compulsory tribal levy payable by all men over eighteen years, regardless of income, ranges from 10s. to £1 a year.' Annex 118, p. 163.

17 See, e.g., Annex 1, pp. 124 (Testimony of M. Sibungu) ('When I started paying the levy I paid the levy at Schuckmannsburg, I mean tax. I paid the tax at Schuckmannsburg. . . .'), 235 (Testimony of H.S. Kachele) ('When Liswaninyana died there came Chikamatondo and then that time people used to pay their tax at Schuckmannsburg').

18 See Annex 96.

19 See Annex 58, p. 10.

20 See *id.*, p. 11. The South African authorities divided the Caprivi Strip into 15 wards or areas, and stationed a government police guard in each area to help the local authorities. See *I.C.J. Pleadings, South West Africa Cases*, Vol. III, p. 120. Trollope secured the assistance of a Sergeant Major from the Bechuanaland Protectorate, stationed at Kasane, to help patrol part of the Eastern Caprivi. See Annex 58, p. 33. See also Annex 93, para. 3.

21 See Annex 98; Annex 132, p. 74.

22 Annex 118, pp. 125-126.

23 Annex 77, col. 4997. Some time thereafter, the practice was assimilated to South Africa's notorious bantustan policy.

24 See, e.g., Annex 1, pp. 24 (Testimony of S.M. Ntonda), 55 (Testimony of F. Mayumbelo).

25 See, e.g., Annex 1, p. 66 (Testimony of M.G. Nchindo).

26 Annex 59, para. 12.

27 Annex 60.

28 See Annex 71, para. 7(c).

29 Annex 118, pp. 126-127. No Masubia chief was ever given 'the sack.'

30 Annex 126, p. 7, para. 33.

31 See G.A. Res. 2145 (XXI), 27 Oct. 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No. 16, document A/6316. In *South West Africa Advisory Opinion, I.C.J. Reports* 1971, p. 58, this Court affirmed the validity of the General Assembly's action.

32 Annex 101, paras. 1(1)(a)(b), 2.

33 See Annex 132, p. 94. See also Annex 142, pp. 176-178.

34 See, e.g., Annex 78, cols. 7330-1 (mine explosion during police patrol along Caprivi-Zambia border); Annex 79, col. 245; Annex 80, cols. 5754-5755.

35 See, e.g., Annex 81, cols. 5355-5356 (urging that South African Defence Force assume responsibility for the Caprivi where it borders Zambia).

36 See Annex 118, p. 223.

37 See Annex 83, cols. 45-46; see generally Annex 82, col. 2019. According to SWAPO, South Africa maintained four military bases in the Caprivi Strip. See Annex 142, p. 225.

38 See Annex 142, p. 177.

39 See *id.*, p. 221.

40 See *id.*, p. 237.

41 See, e.g., Annex 1, p. 66 (Testimony of M.G. Nchindo) (people still living on the Island were often arrested for being suspected SWAPO members); Annex 2, pp. 40 (Testimony of L.I. Samalaza) ('[P]eople who had children in SWAPO used to be picked [up] by helicopters'), 46 (Testimony of S.N. Simasiku) (after the South African government heard that some young Masubia men joined SWAPO anyone found ploughing alone on the Island was arrested and questioned).

42 See Annex 84, para. 7.

43 D.H.N. Johnson, p. 349. See also *id.*, p. 345 ('Display of authority by the one party, acquiescence in that display by the other party--those are the *sine qua non* of acquisitive prescription').

44 I. Brownlie, *Principles of Public International Law* (4th ed. 1990) p. 159.

45 MacGibbon, p. 143. See also G. Venturini, '*La portée et les effets juridiques des attitudes et des actes unilatéraux des Etats*' 112 *R.C.A.D.I.* 374 (1961-II).

46 MacGibbon, p. 143.

47 See D.H.N. Johnson, p. 346; J. Barale, '*L'acquiescement dans la jurisprudence internationale*' XI *A.F.D.I.* 399 (1965).

48 See, e.g., *id.*, p. 345; MacGibbon, pp. 145, 153, 156-162; I. Brownlie, *Principles of Public International Law* (1990) p. 160; G. Fitzmaurice, 30 *Brit. Y.B. Int'l L.* 27-47 (1953); R. Jennings, *The Acquisition of Territory in International Law* (1963) p. 36; E. Suy, *Les actes juridiques unilatéraux en droit international public* (1962) p. 63; J. Barale, '*L'acquiescement dans la jurisprudence internationale*' XI *A.F.D.I.* 397 et s. (1965).

49 H. Lauterpacht, '*Sovereignty over Submarine Areas*' 27 *Brit. Y.B. Int'l L.* 396 (1950).

50 I. Brownlie, *Principles of Public International Law* (4th ed. 1990) p. 160.

51 MacGibbon, p. 165.

52 See I. Brownlie, *Principles of Public International Law* (4th ed. 1990) p. 158; E. Suy, *Les actes juridiques unilatéraux en droit international public* (1962) p. 63.

53 See, e.g., Annex 1, pp. 54 (Testimony of F. Mayumbelo) ('Those people [in Kasane] saw us, they saw that there were people there, but they did nothing to us'), 70 (Testimony of M.G. Nchindo) ('[The Botswana authorities] saw us and they knew that we were ploughing at Kasikili Island. . . . There's not even one there who saw a person come to us and tell us that we must stop ploughing at Kasikili [Island]'), 76 (Testimony of R.M. Songa) ('I told you how old I am and I have never seen the Botswana authorities saying anything about Kasikili [Island], but it's only now when we hear that'), 79 (Testimony of R.M. Songa) ('[W]e didn't see anyone coming and tell those people that they should move out from Kasikili Island'), 135 (Testimony of N. Siyomundi) ('[The Botswana authorities] saw us when we were ploughing and we were not stealing when we were ploughing but we were ploughing in our fields, we

were ploughing openly'); Annex 2, p. 58 (Testimony of A.K. Javanika) ('[The Botswana Authorities] saw us, they knew of our presence and they did nothing to us').

54 Annex 59, para. 5(i).

55 Id., para. 5(ii).

56 See Annexes 49, 50.

57 See Annex 8.

58 See Annex 63.

59 Annex 107.

60 See Bechuanaland Protectorate 1:1,250,000 1935 Annotated with District Boundaries Director of Public Works, Mafeking 1957; Annex 102, p. 16, para. 27.

61 See, e.g., Annex 100.

62 See Annex 5, Article I. As the Treaty stated:

The borderline that shall in South West Africa divide the German and Portuguese possessions follows the course of the river Kunene from its mouth to those waterfalls that are formed south of Humbe at the break-through of the Kunene in the Sierra Canna. From this point on, the line runs on the parallel up to the Kubango, then in the course of this river until the place Andara, which is left to the German sphere of interest, and from there on in straight eastern direction up to the rapids of Catima on the Zambese.

63 See Annex 32.

64 See Annex 6, pp. 21-30; Annex 112 (quoting text of the King of Italy's Award).

65 See Annex 34.

66 See Annex 102, p. 9, para. 13.

67 See Annex 36.

68 See Sketch Map of Bechuanaland Protectorate 1:2,000,000 April 1909 GSGS No. 2460; Annex 102, p. 8, para. 12.

69 See Annex 37. The difference according to Streitwolf was that Germany would lose 48 kilometres along the Chobe, including the Munembuana Drift, under the British version. See Annex 38.

70 See Annexes 43, 46.

71 The British wanted a strictly judicial tribunal rather than submission to a foreign sovereign, which might have had a more political cast. See generally Annex 46.

72 See Annexes 47, 48. The western sector of the boundary was finally settled by an exchange of despatches between the Bechuanaland Protectorate and the Union of South Africa in 1931. See Annexes 54, 55. The final agreement embodied the British view that the boundary should parallel the northern boundary at a distance of 20 miles. See Annex 57; para. 273, *infra*.

73 See S. Akweenda, 'The Legal Significance of Maps in Boundary Questions: A Reappraisal with Particular Emphasis on Namibia' 60 Brit. Y.B. Int'l L. 245 (1989).

74 See Annexes 40, 43, 46.

75 Annex 39, para. 3.

76 Annex 42.

77 See Annex 102, p. 8, para. 12.

78 See Annex 44.

79 Annex 45.

80 Annex 51, p. 126.

81 *Temple of Preah Vihear, Judgment, I.C.J. Reports* 1962, p. 29.

82 S. Akweenda, 'The Legal Significance of Maps in Boundary Questions: A Reappraisal with Particular Emphasis on Namibia' 60 Brit. Y.B. Int'l L. 245 (1989). See also Annex 43; Annex 46.

83 Captain Eason's expedition did not reach and explore the western sector of the Chobe. Directions were given for another survey to follow up Eason's, but apparently it never was undertaken. Annex 62.

84 See Annex 56.

85 *Temple of Preah Vihear, Judgment, I.C.J. Reports* 1962, p. 29.

86 Annex 71, para. 7(c).

87 See Annex 59.

88 As shown in Part One, Chapter IV, this finding was incorrect.

89 Annex 64, para. 5.

90 *Id.*, para. 6.

91 See Annex 59, paras. 5, 11(II), 13.

92 See Annex 61, p. 272.

93 Annex 62.

94 Annex 63.

95 Annex 65.

96 See Annex 67.

97 Annex 69, para. 3.

98 Id., para. 5.

99 See Annex 68.

100 See Annex 70.

101 Annex 71, para. 6.

102 Annex 72.

103 Id.

104 See Annex 73.

105 Annex 74.

106 Annex 71, para. 7.

107 Annex 67.

108 See Annex 68.

109 Annex 66.

110 See 'The Chamizal Arbitration Between the United States and Mexico' 5 Am. J. Int'l L. 806 (1911) ('[T]he physical possession taken by citizens of the United States and the political control exercised by the local and federal governments, have been constantly challenged and questioned by The Republic of Mexico, through its accredited diplomatic agents'). See also D.H.N. Johnson, p. 340 ; MacGibbon, p. 148, n.7.

See Annexes 43, 46.

111 See, e.g., 'Joint Communiqué Issued on Consultations between the Government of the Republic of Botswana and the Mission of the United Nations Council for Namibia, Gaborone, 1 September 1976,' in Official Records of the General Assembly, Thirty-first Session, Supplement No. 24, document A/31/24 (1976) (reiterating the Government of Botswana's 'full support for the Namibian people under the leadership of their liberation movement, the South West Africa People's Organization (SWAPO)').

112 Annex 84, para. 6.

113 Id., para. 7. Botswana dealt with South Africa as the government in *de facto* control of the area, but of course after the termination of the South West African Mandate by the General Assembly in 1966, South Africa had no legal authority over the territory and certainly no authority to compromise or limit Namibia's rights.

114 Annex 84, para. 9.

115 See id., para. 10.

116 As shown in Part One, Chapter IV, this conclusion was incorrect. See, especially, the Alexander Report, Sec. 11, p. 30.

117 See Annex 85.

118 See n. 181, *supra*.

119 Annex 86.

120 Annex 88.

121 See, e.g., *Temple of Preah Vihear, Judgment, I.C.J. Reports* 1962, p. 29 (failure by Thailand to object to an incorrect map boundary confers to the map a binding character); *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports* 1986, p. 582 (noting that map evidence can be used with other evidence 'to establish or reconstitute the real facts'); *Taba Award (Egypt v. Israel)* (1988), 80 *I.L.R.*, p. 226 (arbitration tribunal relied on map evidence to determine the original border set by the 1906 British-Turkish agreement); *The Indo-Pakistan Western Boundary (Rann of Kutch) Case (India v. Pakistan)* (1965), 50 *I.L.R.*, p. 2 et seq. (based upon maps approved by high British authorities, maps constitute acts which may be interpreted as acquiescence in, or acceptance of, Kutch's claim).

122 I. Brownlie, *African Boundaries*, p. 5. See also, e.g., T.S. Murty, 'Boundaries and Maps,' 4 *Indian J. Int'l L.* 367 et seq. (1964); S. Akweenda, 'The Legal Significance of Maps in Boundary Questions: A Reappraisal with Particular Emphasis on Namibia' 60 *Brit. Y.B. Int'l L.* 207-209 (1989).

123 I. Brownlie, *African Boundaries*, p. 16.

124 R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, pp. 663-664.

125 See, e.g., *Frontier Dispute, Judgment, I.C.J. Reports* 1986, p. 582.

126 See *Alaskan Boundary Tribunal Award*, 20 Oct. 1903, Cmd. 1877 (1904), pp. 532-533.

127 I. Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law,' in *Académie de Droit International* (ed.), *Recueil Des Cours* (1995) p. 161. For the convenience of the Court, Namibia provides relevant copies of pages cited in Annex 116.

128 Id.



129 See Karte des Gebiets zwischen Okavango und Sambesi (Caprivi-Zipfel) 1:500,000 Surveyed by Seiner 1905-1906 Berlin, E.S. Mittler & Sohn 1909; Annex 102, p. 9, para. 13.

130 See South Africa 1:250,000 Special Sheet Katima Mulilo Sheet 17 1/3 24 Compiled and drawn by UDF 1945 Printed by Govt Printer Pretoria 1949 TSO 400/558; Annex 102, pp. 14-15, para. 26.

131 See id., p. 9, para. 13.

132 See id.

133 See Sketch Map of the Chobe River by Dr. B.F. Bradshaw 1:125,000 RGS 1881; Annex 102, p. 4, para. 2.

134 See [Karte von Teilen der Nordgrenze Deutsch-Südwestafrikas] Eastern sheet 1:200,000 Surveyed by Streitwolf 1909 Windhoek, Bureau der Kaiserlichen Landesvermessung 1910; Annex 102, pp. 9-10, para. 14.

135 See Karte des Caprivi Zipfels Blatt 1: Das Sumpfgebiet Die Wohnsitze der Massubia 1:100,000 Surveyed by Frankenberg May 1912; Annex 102, p. 10, para. 16.

136 Indeed, Streitwolf's map was used by the German General Staff as the basis for '*Planheft Afrika*, Berlin, 1942,' a plan to map the former German colonies in Africa. See id., p. 10.

137 See Map No. 9: Tracing of a Map of the Linyanti River from Kazangula to Liambesi by Hauptmann Streitwolf, 1909 Scale: 1:200,000; Annex 102, p. 11, para. 17(b).

138 The precise application of these terms is not clear. It would appear that '*Insel Kassikiri*' designates the Island, while '*Fluss arm*' applies to the southern channel of the river. Rushworth, however, believes the word '*Insel*' applies to the Island, while the phrase '*Kassikiri fluss arm*' applies to the southern channel of the river.

139 I. Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law,' in *Académie de Droit International* (ed.), *Recueil Des Cours* (1995) p. 161.

140 See German SW Africa, Sheets 7 and 8: Caprivizipfel Approx. 1:400,000 Topographical Section Defence, Pretoria Government Printing Works, Pretoria, July 1915 TSGS No. 115; Annex 102, p. 12, para. 20.

141 Annex 141, pp. 57-58 (emphasis in original).

142 One German map is considered too unreliable to warrant discussion in the text. It shows a boundary symbol along much of the river, but not in the vicinity of Kasikili Island, which is named as Sulumbu's Island. See Kriegskarte von Deutsch Südwestafrika by P. Sprigade and M. Moisel 1:800,000 Dietrich Reimer, Berlin 1904; Annex 102, p. 7, para. 8.

143 See Sketch Map of Bechuanaland Protectorate 1:2,000,000 April 1909 GSGS No. 2460; Annex 102, p. 8, para. 12; Sketch Map of Bechuanaland Protectorate 1:2,000,000 [War

Office] Printed at OSO 1913 GSGS 2681; Annex 102, p. 12, para. 19. See also Annex 102, pp. 7-8, para. 7, 9, 10; pp. 11-12, paras. 18, 21.

144 See Annex 102, p. 8, para. 11.

145 See Bechuanaland Protectorate Sheet 2 1:500,000 War Office Printed at OS 1933 GSGS 3915; Annex 102, p. 13, para. 23. Although the map was compiled by the War Office and by the Ordnance Survey, it was produced for the Colonial Office and was intended for general use by the government and the public.

146 See id. See also Annex 102, p. 13, para. 22.

147 See Bechuanaland 1:500,000 DOS 1965 DOS847(Z462) Sheet 2 Edition 1; Annex 102, pp. 17-18, para. 30.

148 See Annex 102, p. 18, para. 30. **DR SAYS WE SHOULD DELETE THIS FN AND THE SENTENCE IT CITES.**

149 See Bechuanaland Protectorate 1:1,250,000 Bechuanaland Survey Dept 1935; Annex 102, p. 14, para. 24.

150 See Bechuanaland Protectorate 1:1,250,000 1935 Annotated with District Boundaries Director of Public Works, Mafeking 1957; Annex 102, p. 16, para. 27.

151 Annex 107.

152 Annex 108.

153 See Annex 102, p. 16, para. 28.

154 See Annex 102, pp. 17-18, para. 30

155 Annex 102, p. 18, para. 30.

156 See I. Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law,' in *Académie de Droit International* (ed.), *Recueil Des Cours* (1995) p. 161.

157 *The Minquiers and Ecrehos Case (United Kingdom/France), Judgment, I.C.J. Reports* 1953, p. 71.

158 See South West Africa Sheet South E-35 1:4 1:500,000 Trig Survey Office Printed by Government Printer, Pretoria 1940; Annex 102, p. 14, para. 25.

159 See Annex 102, pp. 14-15, para. 26.

160 See Annex 106; Annex 102, p. 15.

161 See South West Africa 1:250,000 Katima Mulilo Surveyed and drawn by Trig Svy 1967 Government Printer Sheet 17 1/3 24 TSO 405/3100; Annex 102, p. 18, para. 31. 'Surveyed' seems to be an error since there is no sign of new detail.

162 South West Africa: Katima Mulilo 1:250,000 Surveyor General Windhoek Printed by Government Printer Pretoria 1982 Sheet 1724 Edition 2; Annex 102, p. 20, para. 36.

163 See also Southern Africa 1:500,000 Chief Director of Survey and Mapping, Mowbray 1982 Sheet 1722 Katima Mulilo Edition 1 (another map also showing the boundary in the southern channel); Annex 102, p. 18, para 31.

164 See Annex 84, para. 7.

165 See Caprivi 1:100,000 Compiled by JARIC (Joint Air Reconnaissance Intelligence Centre) Printed by 4 Survey and Printing Regiment. n.d. [1974?] Sheet A; Annex 102, pp. 18-19, para. 32.

166 See Republic of Botswana 1:50,000 Survey and Lands Dept. 1974 Sheet 1725C3 & Part C4 Edition 1; Annex 102, p. 19, para. 33.

167 See Republic of Botswana. 1:350,000 Department of Surveys and Lands 1985 Sheet Chobe; Annex 102, p. 21, para. 40.

168 G.A. Res 2145 (XXI), 27 Oct. 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No. 16, document A/6316.

169 G.A. Res. 2248 (S-V), 19 May 1967, Official Records of the General Assembly, Fifth Special Session, Supplement No. 1, document A/6657.

170 G.A. Res.A/31/150, 20 Dec. 1976, Official Records of the General Assembly, Thirty-first Session, Supplement No. 39, document A/31/39.

171 See Namibia 1:4,000,000 United Nations October 1977 Map No. 2947; Annex 102, p. 19, para. 34.

172 See Namibia 1:4,000,000 United Nations 1984 UN Map No. 3228 Rev. 1; Annex 102, p. 20, para. 38.

173 G.A. Res. 35/227H, 6 March 1981, Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 48, document A/35/48.

174 See Namibia 1:1,000,000 United Nations 1985 UN Map No. 3158; Annex 102, p. 21, para. 39.

175 Annex 87.

176 See Annex 102, p. 21, para. 39.

177 See id. See also G.A. Res. 32/9C, 4 Nov. 1977, Official Records of the General Assembly, Thirty-second Session, Supplement No. 45, document A/32/45.

178 S. Akweenda, 'The Legal Significance of Maps in Boundary Questions: A Reappraisal with Particular Emphasis on Namibia' 60 Brit. Y.B. Int'l L. 212 (1989).

179 Id., p. 251.

180 See Annex 102, p. 22, para. 41.

181 I. Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law,' in *Académie de Droit International* (ed.), *Recueil Des Cours* (1995) p. 158 (internal citations omitted).

182 Annex 36, para. 2.

183 Id.

184 See Sketch Map of Bechuanaland Protectorate 1:2,000,000 April 1909 GSGS No. 2460; Annex 102, p. 8, para. 12.

185 See *Temple of Preah Vihear, Judgment, I.C.J. Reports* 1986, p. 29.

186 T.S. Murty, 'Boundaries and Maps' 4 Indian J. Int'l L. 375 (1964).

187 See Annex 102, pp. 14-15, para. 26.

188 See *Temple of Preah Vihear, Judgment, I.C.J. Reports* 1986, p. 29.

189 See n. 261, *supra*.

190 G.A. Res. 31/150, 20 Dec. 1976, Official Records of the General Assembly, Thirty-first session, Supplement No. 39, document A/31/39.

191 See Annex 102, p. 17, para. 30.

192 Annex 14, p. 4.

**INTERNATIONAL COURT OF JUSTICE**

**CASE CONCERNING KASIKILI/SEDUDU ISLAND  
(BOTSWANA/NAMIBIA)**

**MEMORIAL  
OF  
THE REPUBLIC OF NAMIBIA**

**VOLUME IV**

**ANNEXES 3 - 90**

**28 FEBRUARY 1997**

**VOLUME IV**  
**Annexes 3 to 90**

<b>Annex No.</b>		<b>Pages</b>
<b>A. International Instruments</b>		
3	Botswana-Namibia Special Agreement, 15 February 1996.	1-5
4	Anglo-German Agreement of 1890 (Anglo-German Agreement relating to Africa and Heligoland, 1 July 1890).	6-13
5	Declaration, Portugal-Germany, 30 December 1886.	14-17
6	Exchange of Notes, United Kingdom-Portugal, 3 November 1925.	18-30
7	Agreement, South Africa-Portugal, 22 June 1926.	31-34
8	Agreement, United Kingdom-Portugal, 18 November 1954.	35-45
9	Declaration of the Conference of Heads of State and Governments of Non-Aligned Countries, Cairo, 5-10 October 1964.	46-70
10	Kasane Communiqué, 24 May 1992.	71-72
11	Namibia-Botswana, Memorandum of Understanding, 23 December 1992.	73-83
<b>B. Diplomatic Correspondence and Other Official Materials</b>		
12	Memorandum by Sir H. Robinson, 23 May 1886.	84-87
13	Foreign Office memorandum, 25 March 1890.	88-95
14	Memorandum, Sir B. Anderson to Lord Salisbury, ., , 30 April 1890.	96-97
15	Letter, Sir P. Anderson to Sir E. Malet, 15 May 1890.	98
16	Letter, Sir P. Anderson to Sir E. Malet, 16 May 1890.	99
17	Memorandum by Sir P. Anderson, 5 June 1890.	101

18	Extracts from proposal, 5 June 1890.	102-106
19	Minute by Count Hatzfeldt, 10 June 1890.	107-108
20	Letter, Lord Salisbury to <b>Sir</b> E. Malet, 14 June 1890.	109-111
21	Initialled agreement between the representatives of Germany and Great Britain, 17 June 1899.	112-115
22	Official German version of initialled agreement, 17 June <b>1890</b> .	116
23	Translation of the special edition of the <i>Official Gazette</i> of Berlin, 18 June 1890.	117
24	Letter, Sir P. Anderson to <b>Sir</b> E. Malet, 21 June 1890.	118-119
25	Letter, Sir E. <b>Malet</b> to Lord Salisbury, 21 June 1890.	120
26	Draft Articles of Agreement, 21 June 1890.	121-124
27	Letter, <b>Lord</b> Salisbury to Count Hatzfeldt, 24 June 1890.	125
28	Letter, Count <b>Hatzfeldt</b> to Lord Salisbury, 24 June <b>1890</b> .	126
29	Telegram, Lord Salisbury to <b>Sir</b> E. Malet, 25 June 1890.	127
30	Memorandum, Sir <b>P.</b> Anderson to Sir E. Malet, 28 June <b>1890</b> .	128-130
31	<b>Speech</b> by Lord <b>Salisbury</b> in the House of <b>Lords</b> , 10 July 1890.	131-138
32	Letter, High Commissioner to Colonial Secretary, 22 December 1902.	139-140
33	R. Rothe, <i>Deutsch-Barotseland (Caprivizipfel) und seine wirtschaftliche Bedeutung für die Erschliessung Deutsch-Südwest-Afrikas</i> , May <b>1906</b> , pp. 20-22 and translation of parts thereof.	141-147
34	Letter, Foreign Office to Colonial Office, 18 August <b>1998</b> .	148-149
35	Report on the situation in the Caprivi Zipfel in <b>1908</b> and translation of parts thereof.	150-152

36	Letter, Colonial Office to <b>Foreign Office</b> , 13 March 1909.	153
37	Letter, Foreign Office to Colonial Office, 7 May 1909.	154
38	Extracts from letter, K. Streitwolf to the Governor in Windhoek, 18 November 1909, cited in despatch from Union Government, 23 July 1930.	155-158
39	Letter, Resident Commissioner, Bechuanaland Protectorate to the High Commissioner, 16 March 1910.	159
40	Translation of Note, German Foreign Office to Sir E. Goschen, 30 April 1910.	160-161
41	Extract from Kaufmann, report for period 20 January to 31 March 1910, 11 May 1910 and translation thereof.	162-166
42	Letter, Colonial Office to Foreign Office, 1 September 1910.	167-168
43	<b>Letter</b> , Foreign Office to Colonial <i>Office</i> , 21 December 1910.	169
44	<b>Letter</b> , Secretary of State to the High Commissioner, 14 January 1911.	170
45	Letter, Foreign Office to Colonial Office, 10 March 1911.	171
46	Letter, Foreign Office to Sir E. Goschen, 5 May 1911.	172
47	Captain E. V. Eason, Report on the Main Channel of the Linyanti (or Chobe) River, 5 August 1912.	173-180
48	Letter, Foreign Office to Colonial Office, 21 May 1914.	181
49	Letter, Foreign Office to Colonial Office, 23 June 1914.	182
50	Correspondence relating to the grant of permits to the Barotse to cultivate in the Caprivi Zipfel, 6 June 1917 to 23 July 1917.	183-187
51	Correspondence relating to the grant of permits to the Barotse to cultivate in the Caprivi Zipfel, 30 June 1921 to 12 April 1927.	188-202



52	Resident Commissioner's <b>Report on the Administration of the Caprivi Zipfel during the Period 1914 to 31 March 1922, 31 March 1922.</b>	203-211
53	Letter, Imperial Secretary to Dominions Office, <b>3 December 1926.</b>	212-218
54	Despatch, Dominions Office to Union Government, <b>3 November 1930.</b>	219-222
55	Despatch, Union Government to Dominions Office, <b>6 March 1931.</b>	223
56	Minute, Dominions Office official and comments <b>23 November 1931.</b>	224-227
57	Despatch, Dominions Office to Union Government, <b>26 February 1932.</b>	228
58	L. Trollope, Report on the Administration of <b>the Eastern Caprivi Zipfel 1940.</b>	229-261
59	Letter, L. Trollope to V. Dickinson, <b>3 January 1948.</b>	262-263
60	L. Trollope and N. Redman, joint report on the boundary between the Bechuanaland Protectorate and the Eastern Caprivi Zipfel: <b>Kasikili Island, 19 January 1948.</b>	264-270
61	Letter, L. Trollope to the Secretary for Native Affairs, <b>21 January 1948.</b>	271-276
62	Letter, Secretary for Justice to Secretary for External Affairs, <b>12 June 1948.</b>	277-279
63	Letter, Secretary to the Prime Minister, South Africa, to the Administrative Secretary to the High Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland, Pretoria, <b>14 October 1948.</b>	280
64	Letter, Administrative Secretary to the High Commissioner to Secretary for External Affairs, <b>4 November 1948.</b>	281-282
65	Letter, Secretary to the Prime Minister and for External Affairs to Chief Secretary to the High Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland, <b>14 February 1949.</b>	283

66	Letter, High Commissioner to Secretary of State for Commonwealth Relations, 6 June 1949.	284-285
67	Letter, Chief Secretary to the High Commissioner to Secretary to the Prime Minister, 24 August 1949.	286
68	Letter, Commonwealth Relations Office to Sir E. Baring, 20 October 1949.	287-293A
69	Letter, Sir E. Baring, High Commissioner for Basutoland, Bechuanaland Protectorate and Swaziland, to D. Forsyth, Secretary to the Prime Minister, South Africa, 10 May 1951.	294
70	Letter, V. Dickinson to L. Trollope, 5 July 1951.	295
71	Letter, L. Trollope to V. Dickinson, 4 August 1951.	296-297
72	Letter, V. Dickinson to L. Trollope, 11 August 1951.	298
73	Letter, L. Trollope to V. Dickinson, 23 August 1951.	299
74	Letter, V. Dickinson to L. Trollope, 3 September 1951.	300-301
75	Letter, L. Trollope to the District Commissioner for the Bechuanaland Protectorate, 13 September 1951.	302
76	Letter, Government Secretary, Mafeking, to District Commissioner, Kasane, 20 November 1951.	303
77	Republic of South Africa, House of Assembly Debates, Hansard, Vol. 23, col. 4997, 9 May 1968.	304-307
78	Republic of South Africa, House of Assembly Debates, Hansard, No. 16 (Weekly Edition), cols. 7330-7331, 24 May 1971.	308-310
79	Republic of South Africa, House of Assembly Debates, Hansard, No. 1 (Weekly Edition), col. 245, 2 February 1972.	311-313
80	Republic of South Africa, House of Assembly Debates, Hansard, No. 12 (Weekly Debates), cols. 5754-5756, 25 April 1972.	314-317
81	Republic of South Africa, House of Assembly Debate!, Hansard, Vol. 43, cols. 5355-5356, 30 April 1973.	318-321
82	Republic of South Africa, House of Assembly Debates, Hansard, Vol. 50, col. 2019, 2 September 1974.	322-325

83	Republic of South Africa, House of Assembly Debates, Hansard, Vol. 60, cols. 45-46, 26 January 1976.	326-328
84	Letter, Chief of the South African Defence Force to <b>Director</b> General of Foreign Affairs, South Africa, 27 November 1984 and translation thereof.	329-332
85	<b>Telex</b> , Pula, Gaborone (External) to Secextem, Pretoria, 22 October 1986.	333
86	Telex, Secextem, Pretoria to Pula, Gaborone (External), 17 November 1986.	334
87	United Nations announcement of publication by the United Nations of an <b>official</b> map of Namibia, 1986.	335
88	Letter, Foreign Ministry of South Africa to Foreign Ministry of Namibia, 26 April 1992.	336
89	Botswana's Supplementary Written Submission to the JTTE, 15 April 1994, paras. 16, 106.	337-343
90	Letter, Foreign Minister of Namibia to Foreign Minister of Botswana, 14 February 1996.	344-346

**Annex 4**

Anglo-German Treaty of 1890  
(Anglo-German Agreement relating to  
Africa and Heligoland, 1 July 1890)  
(PRO FO, 881/ 6146, Inclosure in No.161)

Inclosure in No. 161.

*Agreement.*

THE Undersigned,—

Sir Edward Baldwin Malet, Her Britannic Majesty's Ambassador Extraordinary and Plenipotentiary;

Sir Henry Percy Anderson, Chief of the African Department of Her Majesty's Foreign Office;

The Chancellor of the German Empire, General von Caprivi;

The Privy Councillor in the Foreign Office, Dr. Krauel,—

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:—

**ARTICLE I.**

In East Africa the sphere in which the exercise of influence is reserved to Germany is bounded—

1. To the north by a line which, commencing on the coast at the north bank of the mouth of the River Umba, runs direct to Lake Jipé; passes thence along the eastern side and round the northern side of the lake, and crosses the River Lumé; after which it passes midway between the territories of Taveita and Chagga, skirts the northern base of the Kilimanjaro range, and thence is drawn direct to the point on the eastern side of Lake Victoria Nyanza which is intersected by the 1st parallel of south latitude; thence, crossing the lake on that parallel, it follows the parallel to the frontier of the Congo Free State, where it terminates.

It is, however, understood that, on the west side of the lake, the sphere does not comprise Mount Mfumbiro; if that mountain shall prove to lie to the south of the selected parallel, the line shall be deflected so as to exclude it, but shall, nevertheless,

DIE Unterzeichneten,—

Der Ausserordentliche und Bevollmächtigte Botschafter Ihrer britannischen Majestät, Sir Edward Baldwin Malet;

Der Vorsteher der Afrikanischen Abtheilung Ihrer Majestät Auswärtigen Amtes, Sir Henry Percy Anderson;

Der Reichskanzler, General der Infanterie, von Caprivi;

Der Geheime Legationsrath im Auswärtigen Amt, Dr. Krauel,—

Haben, nach Berathung verschiedener die Kolonial Interessen Deutschlands und Grossbritanniens betreffender Fragen Namens Ihrer Regierungen folgendes Abkommen getroffen:—

**ARTIKEL I.**

In Ostafrika wird das Gebiet, welches Deutschland zur Geltendmachung seines Einflusses vorbehalten wird, begrenzt:—

1. Im Norden durch eine Linie welche an der Küste vom Nordufer der Mündung des Umbeflusses ihren Ausgang nimmt und darauf in gerader Richtung zum Jipe-See läuft. Dem Ostufer des Sees entlang und um das Nordufer desselben herumführend, überschreitet die Linie darauf den Fluss Lumé, um die Landschaften Taveita und Dschagga in der Mitte zu durchschneiden und dann, entlang an dem nördlichen Abhang der Bergkette des Kilima-Ndscharo in gerader Linie weitergeführt zu werden bis zu demjenigen Punkte am Ost-Ufer des Victoria-Nianza-See's, welcher von dem ersten Grad südlicher Breite getroffen wird. Von hier den See auf dem genannten Breitengrade überschreitend, folgt sie dem letzteren bis zur Grenze des Kongostaates, wo sie ihr Ende findet.

Es ist indessen Einverständniss darüber vorhanden, dass die Deutsche Interessensphäre auf der Westseite des genannten See's nicht den Mfumbiro-Berg umfasst. Falls sich ergeben sollte, dass dieser Berg südlich des genannten Breitengrades liegt,

return so as to terminate at the above-named point.

2. To the south by a line which, starting on the coast at the northern limit of the Province of Mozambique, follows the course of the River Rovuma to the point of confluence of the Msinje; thence it runs westward along the parallel of that point till it reaches Lake Nyassa; thence striking northward, it follows the eastern, northern, and western shores of the lake to the northern bank of the mouth of the River Songwe; it ascends that river to the point of its intersection by the 33rd degree of east longitude; thence it follows the river to the point where it approaches most nearly the boundary of the geographical Congo Basin defined in the 1st Article of the Act of Berlin, as marked in the Map attached to the 9th Protocol of the Conference.

From that point it strikes direct to the above-named boundary; and follows it to the point of its intersection by the 32nd degree of east longitude; from which point it strikes direct to the point of confluence of the northern and southern branches of the River Kilambo, and thence follows that river till it enters Lake Tanganyika.

The course of the above boundary is traced in general accordance with a Map of the Nyassa-Tanganyika Plateau, officially prepared for the British Government in 1889.

3. To the west by a line which, from the mouth of the River Kilambo to the 1st parallel of south latitude, is continuous with the Congo Free State.

The sphere in which the exercise of influence is reserved to Great Britain is bounded—

1. To the south by the above-mentioned line running from the mouth of the River Umba to the point where the 1st parallel of south latitude reaches the Congo Free State. Mount Mfumbiro is included in the sphere.

2. To the north by a line commencing on the coast at the north bank of the mouth of the River Juba; thence it ascends that bank of the river and is continuous with the territory reserved to the influence of Italy in Gallaland and Abyssinia, as far as the confines of Egypt.

3. To the west by the Congo Free State, and by the western watershed of the basin of the Upper Nile.

so soll die Grenzlinie in der Weise gezogen werden, dass sie den Berg von der Deutschen Interessensphäre ausschliesst, gleichwohl aber zu dem vorher bezeichneten Endpunkte zurückkehrt.

2. Im Süden durch eine Linie welche an der Küste von der Nordgrenze der Provinz Mozambique ausgehend dem Laufe des Flusses Rovuma bis zu dem Punkte folgt, wo der M'sinje in den Rovuma mündet, und von dort nach Westen weiter auf dem Breitenparallel bis zu dem Ufer des Nyassa-See's läuft. Dann sich nordwärts wendend, setzt sie sich längs den Ost-, Nord-, und West-Ufern des See's bis zum nördlichen Ufer der Mündung des Songwe-Flusses fort. Sie geht darauf diesen Fluss bis zu seinem Schnittpunkte mit dem 33° östlicher Länge hinauf und folgt ihm weiter bis zu demjenigen Punkte, wo er der Grenze des in dem ersten Artikel der Berliner Konferenz beschriebenen geographischen Kongobeckens, wie dieselbe auf der dem 9 Protokoll der Konferenz beigefügten Karte gezeichnet ist, am nächsten kommt.

Von hier geht sie in gerader Linie auf die vorher gedachte Grenze zu und führt an derselben entlang bis zu deren Schnittpunkte mit dem 32 Grad östlicher Länge, sie wendet sich dann in gerader Richtung zu dem Vereinigungspunkte des Nord- und Südarmes des Kilamboflusses, welchem sie dann bis zu seiner Mündung in den Tanganyika-See folgt.

Der Lauf der vorgedachten Grenze ist im Allgemeinen nach Massgabe einer Karte des Nyassa-Tanganika Plateaus angegeben, welche im Jahre 1889 amtlich für die britische Regierung angefertigt wurde.

3. Im Westen durch eine Linie welche von der Mündung des Flusses Kilambo bis zum 1° südlicher Breite mit der Grenze des Kongostaates zusammenfällt.

Das Grossbritannien zur Geltendmachung seines Einflusses vorbehaltene Gebiet wird begrenzt—

1. Im Süden durch die vorher erwähnte Linie von der Mündung des Umbeflusses zu dem Punkte der Grenze des Kongofreistaates, welcher von dem ersten Grad südlicher Breite getroffen wird. Der Berg Mfumbiro ist in dieses Gebiet eingeschlossen.

2. Im Norden durch eine Linie, welche an der Küste am Nordufer des Jubafusses beginnt, dem genannten Ufer des Flusses entlang läuft und mit der Grenze desjenigen Gebiets zusammenfällt, welches dem Einflusse Italiens im Gallaland und in Abyssinien bis zu den Grenzen Egyptens vorbehalten ist.

3. Im Westen durch den Kongofreistaat, und durch die westliche Wasserscheide des oberen Nil-Beckens.

## ARTICLE II.

In order to render effective the delimitation recorded in the preceding Article, Germany withdraws in favour of Great Britain her Protectorate over Witu. Great Britain engages to recognize the sovereignty of the Sultan of Witu over the territory extending from Kipini to the point opposite the Island of Kwyboo, fixed as the boundary in 1887.

Germany also withdraws her Protectorate over the adjoining coast up to Kismayu, as well as her claims to all other territories on the mainland, to the north of the River Tana, and to the Islands of Patta and Manda.

## ARTICLE III.

In South-West 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 north-west 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.

The delimitation of the southern boundary of the British territory of Walfish Bay is

## ARTIKEL II.

Um die in dem vorstehenden Artikel bezeichnete Abgrenzung zur Ausführung zu bringen, zieht Deutschland seine Schutzherrschaft über Witu zu Gunsten von Grossbritannien zurück. Grossbritannien verpflichtet sich, die Souveränität des Sultans von Witu über das Gebiet anzuerkennen, welches sich von Kipini bis zu dem im Jahre 1887 als Grenze festgesetzten Punkte gegenüber der Insel von Kweihiu erstreckt.

Deutschland verzichtet ferner auf seine Schutzherrschaft über die an Witu grenzende Küste bis nach Kismaju und auf seine Ansprüche auf Gebiete des Festlandes nördlich vom Tanafusse und auf die Inseln Patta und Manda.

## ARTIKEL III.

In Südwestafrika wird das Gebiet, welches Deutschland zur Geltendmachung seines Einflusses vorbehalten wird begrenzt:

1. Im Süden durch eine Linie, welche an der Mündung des Oranje-Flusses beginnt und an dem Nordufer des Flusses bis zu dem Punkte hinaufgeht, wo derselbe vom 20 Grad östlicher Länge getroffen wird.

2. Im Osten durch eine Linie, welche von dem vorher genannten Punkte ausgeht und dem 20 Grad östlicher Länge bis zu seinem Schnittpunkte mit dem 22 Grad südlicher Breite folgt: die Linie läuft sodann diesem Breitengrade nach Osten entlang bis zu dem Punkte wo er von dem 21 Grad östlicher Länge getroffen wird, sie führt darauf in nördlicher Richtung den genannten Längengrad bis zu seinem Zusammentreffen mit dem 18 Grad südlicher Breite hinauf, läuft dann in östlicher Richtung diesem Breitengrade entlang, bis er den Tschobe-Fluss erreicht und setzt sich dann im Thalweg des Hauptlaufes dieses Flusses bis zu dessen Mündung in den Zambese fort, wo sie ihr Ende findet.

Es ist Einverständniss darüber vorhanden, dass Deutschland durch diese Bestimmung von seinem Schutzgebiete aus freien Zugang zum Zambese mittels eines Landstreifens erhalten soll, welcher an keiner Stelle weniger als 20 englische Meilen breit ist.

Das Grossbritannien zur Geltendmachung seines Einflusses vorbehaltene Gebiet wird im Westen und Nordwesten durch die vorher bezeichnete Linie begrenzt. Der N'Gami See ist in dasselbe eingeschlossen.

Der Lauf der vorgedachten Grenze ist im Allgemeinen nach Massgabe einer Karte wiedergegeben, welche im Jahre 1889 amtlich für die britische Regierung angefertigt wurde.

Die Festsetzung der Südgrenze des britischen Walfischbai-Gebietes wird der

reserved for arbitration, unless it shall be settled by the consent of the two Powers within two years from the date of the conclusion of this Agreement. The two Powers agree that, pending such settlement, the passage of the subjects and the transit of goods of both Powers through the territory now in dispute shall be free; and the treatment of their subjects in that territory shall be in all respects equal. No dues shall be levied on goods in transit. Until a settlement shall be effected the territory shall be considered neutral.

Entscheidung durch einen Schiedsspruch vorbehalten, falls nicht innerhalb zweier Jahre von der Unterzeichnung dieses Uebereinkommens eine Vereinbarung der Mächte über die Grenze getroffen ist. Beide Mächte sind darüber einverstanden, dass, solange die Erledigung der Grenzfrage schwebt, der Durchmarsch und die Durchfuhr von Gütern durch das streitige Gebiet für die beiderseitigen Unterthanen frei und dass die Behandlung der letzteren in dem Gebiete in jeder Hinsicht eine gleiche sein soll. Von Durchgangsgütern wird kein Zoll erhoben und bis zur Ordnung der Angelegenheit soll das Gebiet als neutrales betrachtet werden.

#### ARTICLE IV.

##### In West Africa—

1. The boundary between the German Protectorate of Togo and the British Gold Coast Colony commences on the coast at the marks set up after the negotiations between the Commissioners of the two countries of the 14th and 28th of July, 1886; and proceeds direct northwards to the 6° 10' parallel of north latitude; thence it runs along that parallel westwards till it reaches the left bank of the River Aka; ascends the mid-channel of that river to the 6° 20' parallel of north latitude; runs along that parallel westwards to the right bank of the River Dohawe or Shavoe; follows that bank of the river till it reaches the parallel corresponding with the point of confluence of the River Deine with the Volta; it runs along that parallel westward, till it reaches the Volta; from that point it ascends the left bank of the Volta till it arrives at the neutral zone established by the Agreement of 1888, which commences at the confluence of the River Dakka with the Volta.

Each Power engages to withdraw immediately after the conclusion of this Agreement all its officials and employes from territory which is assigned to the other Power by the above delimitation.

2. It having been proved to the satisfaction of the two Powers that no river exists on the Gulf of Guinea corresponding with that marked on Maps as the Rio del Rey, to which reference was made in the Agreement of 1885, a provisional line of demarcation is adopted between the German sphere in the Cameroons and the adjoining British sphere, which, starting from the head of the Rio del Rey creek, goes direct to

#### ARTIKEL IV.

##### In Westafrika—

1. Die Grenze zwischen dem Deutschen Schutzgebiete von Togo und der britischen Goldküsten Kolonie geht an der Küste von dem bei den Verhandlungen der beiderseitigen Kommissare von 14. und 28. Juli 1886 gesetzten Grenzzeichen aus und erstreckt sich in nördlicher Richtung bis zu dem Parallelkreis 6° 10' nördlicher Breite. Von hier aus geht sie westlich dem genannten Breitengrade entlang bis zum linken Ufer des Aka-Flusses und steigt hierauf den Thalweg des letzteren bis zu dem Breitenparallel 6° 20' nördlicher Breite hinauf. Sie läuft sodann auf diesem Breitengrade in westlicher Richtung weiter bis zu dem rechten Ufer des Dschawe- oder Shavoe-Flusses, folgt diesem Ufer dieses Flusses bis zu dem Breitenparallel, welcher durch den Punkt der Einmündung des Deine-Flusses in den Volta bestimmt wird, um dann nach Westen auf dem gedachten Breitengrade bis zum Volta fortgeführt zu werden. Von diesem Punkte an geht sie am linken Ufer des Volta hinauf, bis sie die in dem Abkommen von 1888 vereinbarte neutrale Zone erreicht, welche bei der Einmündung des Dakkaflusses in den Volta ihren Anfang nimmt.

Jede der beiden Mächte verpflichtet sich, unmittelbar nach dem Abschluss dieses Abkommens alle ihre Beamten und Angestellten aus demjenigen Gebiete zurückzuziehen, welches durch die obige Grenzfestsetzung der anderen Macht zugetheilt ist.

2. Nachdem für beide Regierungen glaubhaft nachgewiesen ist, dass sich am Golfe von Guinea kein Fluss befindet, welcher dem auf den Karten angegebenen und in dem Abkommen von 1885 erwähnten Rio del Rey entspricht, so ist als vorläufige Grenze zwischen dem deutschen Gebiete von Kamerun und dem angrenzenden britischen Gebiete eine Linie vereinbart worden, die von dem oberen Ende des Rio

the point, about  $9^{\circ} 8'$  of east longitude, marked "Rapids" in the British Admiralty Chart.

del Rey Krieks ausgehend in gerader Richtung zu dem etwa  $9^{\circ} 8'$  östlicher Länge gelegenen Punkt läuft, welcher auf der Karte der britischen Admiralität mit "Rapids" bezeichnet ist.

#### ARTICLE V.

It is agreed that no Treaty or Agreement, made by or on behalf of either Power to the north of the River Benué, shall interfere with the free passage of goods of the other Power, without payment of transit dues, to and from the shores of Lake Chad.

All Treaties made in territories intervening between the Benué and Lake Chad shall be notified by one Power to the other.

#### ARTICLE VI.

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

It is specially understood that, as regards the boundaries traced in Article IV, Commissioners shall meet with the least possible delay for the object of such rectification.

#### ARTICLE VII.

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.

#### ARTICLE VIII.

The two Powers engage to apply in all the portions of their respective spheres, within the limits of the free zone defined by the Act of Berlin of 1885, to which the first five Articles of that Act are applicable at the date of the present Agreement, the

#### ARTIKEL V.

Es wird vereinbart dass durch Verträge und Abkommen welche von oder zu Gunsten einer der beiden Mächte in den Gegenden nördlich vom Benue getroffen werden, das Recht der anderen Macht, im freien Durchgangsverkehr und ohne Zahlung von Durchgangszöllen nach und von den Ufern des Tschadsees Handel zu treiben, nicht beeinträchtigt werden soll.

Von allen Verträgen, welche in dem zwischen dem Benue und Tschad-See belegenen Gebiete geschlossen werden, soll die eine Macht der anderen Anzeige erstatten.

#### ARTIKEL VI.

Bei allen in den Artikeln I—IV bezeichneten Abgrenzungs Linien können Berichtigungen welche mit Rücksicht auf örtliche Verhältnisse nothwendig erscheinen, durch Vereinbarung der beiden Mächte getroffen werden.

Insbesondere ist Einverständniss darüber vorhanden, dass bezüglich der in Artikel IV bezeichneten Grenzen sobald als möglich Kommissare behufs Herbeiführung einer solchen Berichtigung zusammentreten sollen.

#### ARTIKEL VII.

Jede der beiden Mächte übernimmt die Verpflichtung, sich jeglicher Einmischung in diejenige Interessensphäre zu enthalten, welche der anderen durch Artikel I bis IV des gegenwärtigen Übereinkommens zuerkannt ist. Keine Macht wird in der Interessensphäre der anderen Erwerbungen machen, Verträge abschliessen, Souveränitätsrechte oder Protectorate übernehmen oder die Ausdehnung des Einflusses der anderen hindern.

Es besteht Einverständniss darüber, dass Gesellschaften oder Privatpersonen, welche der einen Macht angehören, die Ausübung von Souveränitätsrechten innerhalb der Interessensphäre der anderen Macht, ausser mit Zustimmung der letzteren, nicht zu gestatten ist.

#### ARTIKEL VIII.

Die beiden Mächte verpflichten sich, in allen denjenigen Theilen ihrer Gebiete innerhalb der in der Akte der Berliner Konferenz von 1885 bezeichneten Freihandelszone, auf welche die fünf ersten Artikel der genannten Akte am Tage 10



provisions of those Articles according to which trade enjoys complete freedom; the navigation of the lakes, rivers, and canals, and of the ports on those waters is free to both flags; and no differential treatment is permitted as regards transport or coasting trade; goods, of whatever origin, are subject to no dues except those, not differential in their incidence, which may be levied to meet expenditure in the interest of trade; no transit dues are permitted; and no monopoly or favour in matters of trade can be granted.

The subjects of either Power will be at liberty to settle freely in their respective territories situated within the free trade zone.

It is specially understood that, in accordance with these provisions, the passage of goods of both Powers will be free from all hindrances and from all transit dues between Lake Nyassa and the Congo State, between Lakes Nyassa and Tanganyika, on Lake Tanganyika, and between that lake and the northern boundary of the two spheres.

#### ARTICLE IX.

Trading and mineral Concessions, and rights to real property, held by Companies or individuals, subjects of one Power, shall, if their validity is duly established, be recognized in the sphere of the other Power. It is understood that Concessions must be worked in accordance with local laws and regulations.

#### ARTICLE X.

In all territories in Africa belonging to, or under the influence of either Power, missionaries of both countries shall have full protection. Religious toleration and freedom for all forms of divine worship and religious teaching are guaranteed.

#### ARTICLE XI.

Great Britain engages to use all her influence to facilitate a friendly arrangement, by which the Sultan of Zanzibar shall cede absolutely to Germany his possessions on the mainland comprised in existing Concessions to the German East African Company, and their dependencies, as well as the Island of Mafia.

des gegenwärtigen Abkommens anwendbar sind, die Bestimmungen dieser Artikel in Anwendung zu bringen. Hiernach genießt der Handel vollständige Freiheit; die Schifffahrt auf den Seen, Flüssen und Kanälen, und den daran gelegenen Häfen ist frei für beide Flaggen; keine ungleiche Behandlung mit Bezug auf den Transport oder Küstenhandel ist gestattet; Waaren jeder Herkunft sollen keine anderen Abgaben zu entrichten haben als solche, welche unter Ausschluss ungleicher Behandlung, für die zum Nutzen des Handels gemachten Ausgaben erhoben werden mögen; Durchgangszölle dürfen nicht erhoben, und keine Monopole oder Handelsbegünstigungen gewährt werden. Den Angehörigen beider Mächte ist die freie Niederlassung in den beiderseitigen Gebieten, soweit dieselben in der Freihandelszone gelegen sind, gestattet.

Insbesondere herrscht Einverständniss darüber, dass in Gemässheit dieser Bestimmungen von jedem Hemniss und jedem Durchgangszoll frei sein soll der beiderseitige Güterverkehr zwischen dem Nyassa-See und dem Kongostaat, zwischen dem Nyassa- und Tanganika-See, auf dem Tanganika-See und zwischen diesem See und der nördlichen Grenze der beiden Sphären.

#### ARTIKEL IX.

Handels- und Bergwerks- Konzessionen, sowie Rechte an Grund und Boden, welche Gesellschaften oder Privatpersonen der einen Macht innerhalb der Interessenssphäre der anderen Macht erworben haben, sollen von der letzteren anerkannt werden, sofern die Gültigkeit derselben genügend dargethan ist. Es herrscht Einverständniss darüber, dass die Konzessionen in Gemässheit der an Ort und Stelle gültigen Gesetze und Verordnungen ausgeübt werden müssen.

#### ARTIKEL X.

In allen Gebieten Afrika's welche einer der beiden Mächte gehören oder unter ihrem Einfluss stehen, sollen Missionare beider Länder vollen Schutz geniessen, religiöse Duldung und Freiheit für alle Formen des Gottesdienstes und für geistlichen Unterricht werden zugesichert.

#### ARTIKEL XI.

Grossbritannien wird seinen ganzen Einfluss aufbieten, um ein freundschaftliches Uebereinkommen zu erleichtern, wodurch der Sultan von Zanzibar seine auf dem Festland gelegenen und in den vorhandenen Konzessionen der Deutsch-ostafrikanischen Gesellschaft erwähnten Besitzungen nebst Dependenzien sowie der Insel von Mafia an

It is understood that His Highness will, at the same time, receive an equitable indemnity for the loss of revenue resulting from such cession.

Germany engages to recognize a Protectorate of Great Britain over the remaining dominions of the Sultan of Zanzibar, including the Islands of Zanzibar and Pemba, as well as over the dominions of the Sultan of Witu, and the adjacent territory up to Kismayu, from which her Protectorate is withdrawn. It is understood that if the cession of the German coast has not taken place before the assumption by Great Britain of the Protectorate of Zanzibar, Her Majesty's Government will, in assuming the Protectorate, accept the obligation to use all their influence with the Sultan to induce him to make that cession at the earliest possible period in consideration of an equitable indemnity.

## ARTICLE XII.

1. Subject to the assent of the British Parliament, the sovereignty over the Island of Heligoland, together with its dependencies, is ceded by Her Britannic Majesty to His Majesty the Emperor of Germany.

2. The German Government will allow to all persons natives of the territory thus ceded the right of opting for British nationality by means of a declaration to be made by themselves, and, in the case of children under age, by their parents or guardians, which must be sent in before the 1st of January, 1892.

3. All persons natives of the territory thus ceded, and their children born before the date of the signature of the present Agreement, are free from the obligation of service in the military and naval forces of Germany.

4. Native laws and customs now existing will, as far as possible, remain undisturbed.

5. The German Government binds itself not to increase the Customs Tariff at present in force in the territory thus ceded until the 1st January, 1910.

6. All rights to property which private persons or existing Corporations have acquired in Heligoland in connection with the British Government are maintained; obligations resulting from them are transferred to His Majesty the Emperor of Germany. It is understood that the above term, "rights to property," includes the right of signalling now enjoyed by Lloyd's.

[375]

Deutschland ohne Vorbehalt abtritt. Es herrscht Einverständniss darüber, dass Seine Hoheit gleichzeitig für den aus dieser Abtretung entstehenden Verlust an Einnahmen eine billige Entschädigung erhalten soll.

Deutschland verpflichtet sich die Schutzherrschaft Grossbritanniens anzuerkennen über die verbleibenden Besitzungen des Sultans von Zanzibar mit Einschluss der Insel Zanzibar und Pemba, sowie über die Besitzungen des Sultans von Witu und das benachbarte Gebiet bis Kismaju, von wo die deutsche Schutzherrschaft zurückgezogen wird. Es herrscht Einverständniss darüber dass Ihrer Majestät Regierung, falls die Abtretung der Deutschen Küste nicht vor der Uebernahme der Schutzherrschaft über Zanzibar durch Grossbritannien stattgefunden hat, bei der Uebernahme jener Schutzherrschaft die Verpflichtung übernehmen wird, allen ihren Einfluss aufzuwenden, um den Sultan zu veranlassen, jene Abtretung gegen Gewährung einer billigen Entschädigung sobald als möglich vorzunehmen.

## ARTIKEL XII.

1. Vorbehaltlich der Zustimmung des Britischen Parlaments wird die Souveränität über die Insel Helgoland nebst deren Zubehörungen von Ihrer Britischen Majestät an Seine Majestät den Deutschen Kaiser abgetreten.

2. Die Deutsche Regierung wird den aus dem abgetretenen Gebiet herstammenden Personen die Befugnis gewähren, vermöge einer vor dem 1. Januar 1892, von ihnen selbst oder bei minderjährigen Kindern von deren Eltern oder Vormündern abzugebenden Erklärung die britische Staatsangehörigkeit zu wählen.

3. Die aus dem abgetretenen Gebiet herstammenden Personen und ihre vor dem Tage der Unterzeichnung dieser Uebereinkunft geborenen Kinder bleiben von der Erfüllung der Wehrpflicht im Kriegsheer und in der Flotte in Deutschland befreit.

4. Die zur Zeit bestehenden heimischen Gesetze und Gewohnheiten bleiben, soweit es möglich ist, unverändert fortbestehen.

5. Die Deutsche Regierung verpflichtet sich, bis zum 1. Januar 1910, den zur Zeit auf dem abgetretenen Gebiet in Geltung befindlichen Zolltarif nicht zu erhöhen.

6. Alle Vermögensrechte welche Privatpersonen oder bestehende Korporationen der Britischen Regierung gegenüber in Helgoland erworben haben, bleiben aufrecht erhalten; die ihnen entsprechenden Verpflichtungen gehen auf Seine Majestät den Deutschen Kaiser über. Unter dem Ausdruck "Vermögensrechte" ist das Signalrecht des Lloyds inbegriffen.

2 C

Reference:-

FO 881 614C

31255

COPYRIGHT - NOT TO BE REPRODUCED PHOTOGRAPHICALLY WITHOUT PERMISSION

98

7. The rights of British fishermen with regard to anchorage in all weathers, to taking in provisions and water, to making repairs, to transshipment of goods, to the sale of fish, and to the landing and drying of nets, remain undisturbed.

*Berlin, July 1, 1890.*

(Signed) EDWARD B. MALET.  
H. PERCY ANDERSON.  
v. CAPRIVI.  
K. KRAUEL.

7. Die Rechte der Britischen Fischer bei jeder Witterung zu ankern, Lebensmittel und Wasser einzunehmen, Reparaturen zu machen, die Waaren von einem Schiff auf das andere zu laden, Fische zu verkaufen, zu landen und Netze zu trocknen, bleiben unberührt.

*Berlin, den 1 Juli 1890.*

(Gez:) EDWARD B. MALET.  
H. PERCY ANDERSON.  
v. CAPRIVI.  
K. KRAUEL.

#### Annex.

The Undersigned have, in addition, agreed to the following confidential Annex:—

Difficulties which may arise between the two Governments with respect to the enforcement of the provisions of the 6th clause of the XIIth Article shall be submitted to the arbitration of a Dutch lawyer, who shall be nominated by the President of the highest Dutch Court of Justice.

*Berlin, July 1, 1890.*

(Signed) EDWARD B. MALET.  
H. PERCY ANDERSON.  
v. CAPRIVI.  
K. KRAUEL.

DIE Unterzeichneten haben sich über das folgende geheime Zusatzabkommen geeignigt:

Streitigkeiten, welche aus der Ausführung der Bestimmungen in Artikel 12, Ziffer 6, anstehen möchten, sollen dem Schiedspruch eines holländischen Juristen unterworfen werden, dessen Ernennung durch den Präsidenten des obersten niederländischen Gerichtshofs erfolgt.

*Berlin, den 1 Juli, 1890.*

(Gez:) EDWARD B. MALET.  
H. PERCY ANDERSON.  
v. CAPRIVI.  
K. KRAUEL.

**FINAL REPORT OF THE JOINT TEAM  
OF TECHNICAL EXPERTS  
ON THE BOUNDARY BETWEEN BOTSWANA  
AND NAMIBIA AROUND KASIKILI/SEDUDU ISLAND**

**FINAL REPORT OF THE JOINT TEAM  
OF TECHNICAL EXPERTS  
ON THE BOUNDARY BETWEEN BOTSWANA  
AND NAMIBIA AROUND KASIKILI/SEDUDU ISLAND**

FINAL REPORT OF THE JOINT TEAM OF TECHNICAL EXPERTS ON THE  
BOUNDARY BETWEEN BOTSWANA AND NAMIBIA AROUND  
KASIKILI/SEDUDU ISLAND IN ACCORDANCE WITH THE MEMORANDUM OF  
UNDERSTANDING ADOPTED ON 20TH AUGUST 1994

1. INTRODUCTION

1.1 Background

Following a border incident involving Botswana and Namibia in the vicinity of Kasikili/Sedudu Island which had the potential of disturbing the good relations existing between the two sister countries, Their Excellencies, President Sam Nujoma of Namibia, President Sir Ketumile Masire of Botswana and President Robert G. Mugabe of Zimbabwe met at Kasane, Botswana, on 24th May 1992 to defuse the situation.

In a communique which was issued after the Summit Meeting (the Kasane Communique, dated 24th May 1992), Their Excellencies decided that the boundary between Botswana and Namibia around Kasikili/Sedudu Island should be the subject of an investigation by a joint team of six (6) technical experts, three from each country, to determine where the boundary lies in terms of the Anglo-German Agreement of

1890.

## 1.2 Governing Instrument

Pursuant to the Kasane Meeting of 24th May 1992, the Government of Namibia and the Government of Botswana decided to enter into a formal agreement in the form of a memorandum of understanding.

The Memorandum of Understanding between the Government of the Republic of Botswana and the Government of the Republic of Namibia Regarding Terms of Reference of the Joint Team of Technical Experts on the Boundary between Botswana and Namibia around Kasikili/Sedudu Island (hereinafter referred to as the Memorandum of Understanding), dated 23rd December 1992, sets out the terms of reference of a Joint Team of Technical Experts (hereinafter referred to as the Joint Team) whose task was to determine the boundary between Namibia and Botswana around Kasikili/Sedudu Island.

## 1.3 Terms of Reference and Rules Governing the Proceedings

1.3.1 The terms of reference were provided in Article 7 of the Memorandum of Understanding as follows:

"1. In the execution of its functions, the Team shall have authority to:

- (a) examine the Anglo-German Agreement of 1890 and the Anglo-German-Portuguese Treaty of 1892 defining the boundary between Botswana and Namibia around Kasikili/Sedudu Island and any relevant maps and/or other materials relating to the boundary between Botswana and Namibia around Kasikili/Sedudu Island and to determine where the boundary lies in terms of the said Treaties;
- (b) examine, evaluate and compile any documentary evidence relied on by experts from each side, each document properly indexed and certified by the party producing it and acknowledged by the other party;
- (c) examine, evaluate and compile detailed joint surveys made, including plans, graphs and statistics and provide any explanatory notes, clearly demonstrating the results of the said joint surveys;



- (d) do, perform or carry out any act or function necessary and relevant for the determination of the boundary between Botswana and Namibia around Kasikili/Sedudu Island, taking into account, and subject to, the provisions of the Treaties referred to in (a) above;
- (e) secure and examine any relevant documents, charts, maps, plans and diagrams produced before and after 1890 relating to the said boundary;
- (f) hear, without prejudice to the 1890 and 1892 Treaties, any oral evidence from any competent person in Botswana and Namibia or from any other country which the Team may consider necessary to enable it to arrive at a decision on the Kasikili/Sedudu Island dispute;
- (g) request, jointly or severally, historical documents from the archives of Botswana, Namibia or any other country;

- (h) physically inspect the area of Kasikili/Sedudu Island with a view to obtaining first-hand information on the boundary in dispute; and
- (i) submit to Their Excellencies, Presidents Sir Ketumile Masire, S. Nujoma and R.G. Mugabe of the Republics of Botswana, Namibia and Zimbabwe respectively, the finding of their investigations in the form of a report incorporating the conclusions and justifications for those findings and/or any recommendations, including all documentation referred to in paragraphs (b) and (c) above and any other matter or material considered essential by the Team.

2. The official language of the Team shall be English."

1.3.2 The following were to be the rules governing the proceedings of the Joint Team:

- "1. Without prejudice to the 1890 and 1892 Treaties, the rules governing the proceedings of the Team shall be those contained in this Memorandum and those adopted by the

Team, but in matters not expressly provided for in this Memorandum, the Team shall be guided by the general principles of international law regarding peaceful settlement of international disputes and any relevant international law principles for the delimitation of river boundaries.

2. The Team may, if necessary, hire scientific instruments and boats to:
  - (a) determine, or conduct or carry out surveys to assist to determine where the boundary lies in terms of the 1890 Treaty;
  - (b) determine, in terms of the 1890 Treaty, the flow and measure the average width and depth of each channel;
  - (c) produce a detailed report of the surveys and/or measurements including plans, graphs, notes and statistics to clearly demonstrate the results of the survey.

3. If the Team is unable to carry out the functions referred to in terms of sub-article (2) above, it may appoint a mutually acceptable hydrological survey contracting firm to carry out such functions.
4. The costs of hiring any firm referred to in sub-article (3) above and the rentals for any instruments, vehicles or boats, shall be borne equally by the Contracting Parties and liability to pay such costs shall be joint but not several.
5. In order to ensure continuity and the speedy conclusion of the Team's work, neither Contracting Party may withdraw permanently or temporarily or exchange an expert with another before the conclusion of the investigation and the report without consulting the other Party."

1.3.3 In the light of research, the Joint Team established that the Anglo-German-Portuguese Treaty of 1892 (referred to above) did not exist.

#### 1.4 Appointment of Members of the Joint Team

In terms of Article 2 and Article 3 of the Memorandum of Understanding six (6) technical experts were appointed by the two Governments –

##### (a) Government of Namibia

1. Dr. Albert Kawana (Team Leader)
2. Dr. Lazarus Hangula (due to illness substituted by Dr. Collins Parker on 16th August 1994)
3. Mr. Gunther Reuter

##### (b) Government of Botswana

1. Prof. Ian Brownlie, CBE, QC (Team Leader)
2. Mr. Isaac Muzila
3. Mr. John Bate (due to illness replaced by Mr. Alan Simpkins on 26th July 1994)

- 1.5 In the course of its work, the Joint Team realized that it would no longer be possible to complete its work within three months as specified in the Memorandum of Understanding. The Joint Team therefore requested and was granted an extension of time by the Contracting Parties for a period of twelve months from the conclusion of the first three months period (that is, the period terminating on 28th December 1994).

## 2. MEETINGS AND COLLECTION OF EVIDENCE

### 2.1 Meetings

#### (a) Calendar of Meetings

##### First Round

With the assistance of the Contracting Parties the first session of the Joint Team was initiated in Gaborone on 28 September 1993. This session constituted the First Round of Meetings and lasted until the 3rd October 1993.

It was at this session that the long-term agenda was adopted, together with Internal Guidelines Concerning the Taking of Oral Evidence and the Presentation of Witnesses.

### Second Round

The Second Round of Meetings took place in Windhoek from 11th February to 14th February 1994, inclusive.

### Third Round

The Third Round of Meetings took place in Gaborone from 15th March to 18th March 1994, inclusive.

### Fourth Round

The Fourth Round of Meetings was devoted exclusively to the taking of oral evidence at Katima Mulilo and Kasane and lasted from the 10th to the 24th May 1994, inclusive.

### Fifth Round

The Fifth Round of Meetings was also devoted exclusively to the taking of oral evidence at Katima Mulilo from the 26th to the 31st July 1994, inclusive.

### Sixth Round

The Sixth Round of Meetings took place in Windhoek from 14th to the 21st August 1994, inclusive. This session was devoted to the

process of deliberations and the preparation of a Final Report in accordance with the provisions of the Memorandum of Understanding.

(b) Agreement on Long-term Agenda

The long-term agenda of the Joint Team was adopted on 29th September 1993 and appears as Appendix A to the relevant Minutes. For convenience the Agenda is set out here.

APPENDIX A

JOINT TEAM OF TECHNICAL EXPERTS ON KASIKILI/SEDUDU  
ISLAND DISPUTE

AGENDA OUTLINE

1. ARRANGEMENTS FOR SECRETARIAT AND TAKING OF MINUTES
2. CHAIRMANSHIP: ROLE OF TEAM LEADERS
3. DECISION-MAKING
4. SECURING, COMPILATION AND EXAMINATION OF



## DOCUMENTARY EVIDENCE

5. BASIC DOCUMENTS
6. ROLE OF THE JOINT TEAM
7. ROLE OF THE TWO ELEMENTS OF THE JOINT TEAM
8. ROLE OF CONTRACTING PARTIES
9. PHYSICAL INSPECTION OF THE AREA OF THE ISLAND
10. HYDROLOGICAL STUDY
11. THE TAKING OF EVIDENCE FROM WITNESSES
12. PUBLICITY, CONFIDENTIALITY OF PROCEEDINGS, AND  
DEALINGS WITH THE MEDIA
13. LONG-TERM TIMETABLE
14. VENUE OF MEETINGS
15. DELIBERATION
16. THE FINDING
17. PROPOSAL FOR ARBITRATION IN CASE OF DEADLOCK

(c) Minutes of Meetings

During the first session of the Joint Team on 28th September 1993 it was decided, in accordance with Article 5 of the Memorandum of Understanding, that in each case the host country should be responsible for the preparation of the minutes of the meeting.

The Minutes of the sessions other than the sessions devoted to the taking of oral evidence are appended to this Report.

## 2.2 The Collection of Evidence

### (a) Examination of Documentary Evidence

Article 7(1)(b) of the Memorandum of Understanding provides that the Joint Team shall have authority to:

'examine, evaluate and compile any documentary evidence relied on by experts from each side, each document properly indexed and certified by the party producing it and acknowledged by the other party;...'

In the course of its work the Joint Team produced the necessary collection of documents produced by the respective parties and duly acknowledged.

The index of documentary evidence is produced below...

(b) Examination of Joint Surveys

Article 7(1)(c) of the Memorandum of Understanding provides that the Joint Team shall have authority to:

'examine, evaluate and compile detailed joint surveys made, including plans, graphs and statistics and provide any explanatory notes, clearly demonstrating the results of the said joint surveys;...'

In the course of its work the Joint Team considered documents which fell within the scope of this provision. However, in the absence of sufficient agreement on the status of certain documents, it was not possible to produce a compilation.

(c) Examination of any Relevant Documents, Charts, Maps, Plans, and Diagrams

Article 7(1)(e) of the Memorandum of Understanding provides that the Joint Team shall have authority to:

'secure and examine any relevant documents, charts, maps,

plans and diagrams produced before and after 1890 relating to the said boundary;...'

In the course of its work, the Joint Team acted in compliance with the duty specified in this provision.

(d) Oral Evidence

Article 7(1)(f) of the Memorandum of Understanding provides that the Joint Team shall have authority to:

'hear, without prejudice to the 1890 and 1892 Treaties, any oral evidence from any competent person in Botswana and Namibia or from any other country which the Team may consider necessary to enable it to arrive at a decision on the Kasikili/Sedudu Island dispute;...'

At the Meeting on 1st October 1993 it was agreed that oral evidence should be taken. The Botswana component agreed to this procedure to preclude the necessary use of veto (in the absence of consensus) and this was also done in the spirit of co-operation. The Botswana component stated that it was reserving

its position on the weight and relevance of this type of evidence.

On the other hand, the Namibian component considered oral evidence to be useful and necessary in the resolution of the dispute as was discussed during the deliberations.

At the Meeting on 2nd October 1993 the Joint Team adopted the Internal Guidelines Concerning the Taking of Oral Evidence and the Presentation of Witnesses. (Minutes, 2nd October 1993, Appendix B).

In due course the Government of Botswana proposed 13 witnesses and the Government of Namibia proposed 78 witnesses.

The Transcript of the hearings in Katima Mulilo and Kasane is presented as an Appendix to this Report.

(e) Historical Documents

Article 7(1)(e) of the Memorandum of Understanding provides that the Joint Team shall have authority to:

'request, jointly or severally, historical documents from the archives of Botswana, Namibia or any other country;...'

In the course of its work the Joint Team was provided with a considerable quantity of historical documents from several archives and a significant proportion of such documents appear in the Annexes to the various Written Submissions.

(f) Inspection of the Area

Article 7(1)(h) of the Memorandum of Understanding provides that the Joint Team shall have authority to:

'physically inspect the area of Kasikili/Sedudu Island with a view to obtaining first-hand information on the boundary in dispute;...'

The Joint Team agreed at its meeting on 30th September 1993 that such an inspection should take place. With the co-operation of the authorities both in Botswana and in Namibia the physical inspection was made by boat on 4th October 1993.

(g) Hydrological Study

Article 8(2) of the Memorandum of Understanding provides as follows:

'The Team may, if necessary, hire scientific instruments and boats to:

- (a) determine, or conduct or carry out surveys to assist to determine where the boundary lies in terms of the 1890 Treaty;
- (b) determine, in terms of the 1890 Treaty, the flow and measure the average width and depth of each channel;
- (c) produce a detailed report of the surveys and/or measurements including plans, graphs, notes and statistics to clearly demonstrate the results of the survey.'

At the Meeting on 15th March 1994 the Joint Team decided not to

invoke the powers given to it in this respect. The reasons for this decision are set forth in the Minutes of the 30th September 1993 (page 7).

### 3. WRITTEN SUBMISSIONS

#### 3.1 Decision to Invite Written Submissions

At its meeting of 2nd October 1993 held at the Boipuso Convention Centre, Gaborone, the Joint Team decided to invite the Contracting Parties to submit Written Submissions and other documentary evidence to the Joint Team.

Then at its meeting of 11th February 1994 held in the Ministry of Justice, Windhoek, the Joint Team decided to invite the Contracting Parties to submit Supplementary Written Submissions to the Joint Team.

#### 3.2 Examination of main Written Submissions

The Joint Team received Written Submissions from the Contracting Parties as requested by its letter of 2nd October 1993. The Written Submissions are presented as an Appendix to this Report.



The Joint Team examined the Written Submissions during its Second Round of Meetings (11th–14th February 1994, in Windhoek) and Third Round of Meetings (15th–18th March 1994, in Gaborone). The Minutes of the Meetings are presented as an Appendix to this Report.

### 3.3 Examination of Supplementary Written Submissions

The Joint Team received Supplementary Written Submissions from the Contracting Parties as requested by its letter of 15th February 1994. The Supplementary Written Submissions are presented as an Appendix to this Report.

The Joint Team examined the Supplementary Written Submissions during its Sixth Round of Meetings (14th–21st August 1994, in Windhoek). The Minutes of the Meetings are presented as an Appendix to this Report.

#### 4. CONCLUSIONS

The Joint Team exhaustively examined and evaluated all evidence that was put at its disposal with a view to determining the boundary between Botswana and Namibia around Kasikili/Sedudu Island in terms of the Anglo-German Agreement of 1890.

Having completed the procedures of collecting, examining and evaluating evidence in accordance with the provisions of the Memorandum of Understanding, the Joint Team moved on to the process of deliberation and the making of a finding as required by the Memorandum of Understanding.

In the course of the extensive deliberations it emerged that the Joint Team was unable to agree on issues of substance.

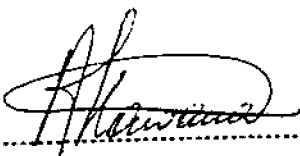
Therefore, with regret, the Joint Team has to report to Your Excellencies that it was unable to make a finding determining the boundary between Botswana and Namibia in the area of Kasikili/Sedudu Island in accordance with the provisions of the Memorandum of Understanding.

## 5. RECOMMENDATION

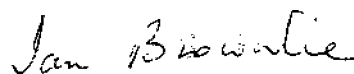
Although the Joint Team has been unable to make a finding involving the determination of the boundary between Namibia and Botswana around Kasikili/Sedudu Island, the Memorandum of Understanding empowers us to make any recommendations under Article 7(1)(i).

In this regard, the Joint Team would recommend recourse to the peaceful settlement of the dispute on the basis of the applicable rules and principles of international law.

The Joint Team does not consider it appropriate to specify the precise modalities, which are more properly matters for the exclusive consideration of the Contracting Parties.



Dr. ALBERT KAWANA  
NAMIBIAN TEAM LEADER



Prof. IAN BROWNLIE, CBE, QC  
BOTSWANA TEAM LEADER

*Dr. Colins Parker*

Dr. COLINS PARKER

(MEMBER OF NAMIBIAN TEAM)

*Mr. Isaac Muzila*

Mr. ISAAC MUZILA

(MEMBER OF BOTSWANA TEAM)

*Deceased*

Mr. GUNTHER REUTER

(MEMBER OF NAMIBIAN TEAM)

*Mr. Alan Simpkins*

Mr. ALAN SIMPKINS

(MEMBER OF BOTSWANA TEAM)