

DISSENTING OPINION OF JUDGE PARRA-ARANGUREN

The Anglo-German Agreement of 1890 — The Parties' differing interpretations of the 1890 Treaty — Subsequent practice as a rule of treaty interpretation — Subsequent practice of the Parties in the application of the 1890 Agreement — The Mandate for South West Africa (Namibia) — Relevant evidence submitted to the Court — Captain H. V. Eason's Report (1912) — Joint Report of 1948 (Trollope-Redman) and Exchange of Letters between 1948 and 1951 — Mr. R. R. Renew's Report (1965) — Witnesses called by Namibia — Evidence presented by Botswana — Maps — Aerial photographs and satellite images — Peaceful and public use of Kasikilil/Sedudu Island by Masubia Tribesmen from Eastern Caprivi — Conclusion.

I. THE ANGLO-GERMAN AGREEMENT OF 1890

1. In 1884 Germany proclaimed a Protectorate over the coast south of the Cape Colony's enclave at Walvis Bay and some years later, before 1890, expanded its territorial claims in South West Africa, without systematically establishing an effective administration on the ground. The United Kingdom decided to accept Germany's territorial claims in South West Africa, even though it regarded this territory as lying within Britain's natural sphere of influence.

2. The only area in dispute was Ngamiland, north of British Bechuanaland, a territory assigned to neither power and extending from the 20th to the 24th degree of longitude. Discussions began in 1886 but it was only in 1890 after the resignation of the German Chancellor Otto von Bismarck that the new Chancellor, General Georg Leo Von Caprivi and his Foreign Minister, Baron Marschall, accelerated diplomatic discussions with Britain over Africa.

3. The *Anglo-German Agreement relating to Africa and Heligoland* was signed in Berlin, in English and in German, on 1 June 1890 by 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 Leo Von Caprivi, and the Privy Councillor in the German Foreign Office, Dr. Friedrich Richard Krauel. The signature of the Treaty coincided with the declaration of British jurisdiction over Northern Botswana by Order-in-Council of 30 June 1890.

4. Excluding the question of the Island of Heligoland, the British interest in this part of Africa was in controlling the area between Lake Ngami, some 350 kilometres to the south and west of Kasikili Island and the Victoria Falls, in order to protect the main trade routes from South Africa to the centre of the continent from encroachments by the Germans and Portuguese; while the Germans wanted to obtain the recognition of a German sphere of influence extending eastward, providing them access to the Zambezi. However, as Lord Salisbury informed Sir Edwin B. Malet, British Ambassador in Berlin, in his letter of 14 June 1890,

“The character of this country is very imperfectly known, and the very position of Lake Ngami has been the subject of considerable uncertainty.” (Memorial of Botswana, Annexes, Vol. II, Ann. 7, p. 37.)

5. Lord Salisbury, in his speech to the House of Lords on 10 July 1890, referred to German aspirations in Africa, making clear that for Germany the conclusion of the agreement was subject to the condition that

“at the very north of this Damaraland territory they should have a strip of territory going along the Portuguese border, and giving them direct access to the River Zambesi . . . it is the last route in the world by which trade can pass. It is 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.”

6. On the same occasion Lord Salisbury also informed the House of Lords of the British interest in controlling Lake Ngami, even though he made the following comments:

“I think that the constant study of maps is apt to disturb men’s reasoning powers . . . We have had a fierce conflict over the possession of a lake whose name I am afraid I cannot pronounce correctly — I think it is Lake Ngami — our only difficulty being that we do not know where it is. We cannot determine its position within 100 miles, certainly not within 60 miles, and there are great doubts whether it is a lake at all, or only a bed of rushes.” (Memorial of Namibia, Annexes, Vol. IV, Ann. 31, p. 137.)

7. The above-mentioned aims pursued by Germany and Great Britain explain the terms in which Article III of the 1890 Anglo-German Agreement is drawn:

“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 by the 20th degree of east longitude of a line commencing at the mouth of the Orange River, and ascending its north bank], 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.”

Furthermore, Article VI 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.”

Article VII adds:

“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.” (Memorial of Botswana, Annexes, Vol. II, Ann. 12, pp. 206-207, 209-210.)

II. THE PARTIES’ DIFFERING INTERPRETATIONS OF THE 1890 TREATY

8. Namibia interprets the 1890 Anglo-German Agreement as follows:

“— 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”.

Consequently, Namibia concludes:

“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.” (Memorial of Namibia, Vol. I, p. 58, paras. 162-163.)

9. Botswana does not accept the conclusion of Namibia. In its opinion, “the main channel of the Chobe in the vicinity of Kasikili/Sedudu Island is the northern and western channel, the principal criterion on which this assessment is based being that of navigability. In the absence of evidence to the contrary, the presumption must be that this was also the main channel at the time of the conclusion of the Anglo-German Agreement”.

However, as alternative position Botswana accepts

“that, in accordance with the object and purpose of the Agreement, the main channel is constituted by the navigable channel at any given time, and that at present the northern and western channel is the main channel on this basis” (Memorial of Botswana, Vol. I, p. 52, paras. 116-117).

10. Therefore, Botswana and Namibia are not in agreement as to the meaning of Article III, paragraph 2, of the 1890 Anglo-German Treaty. The Treaty itself does not include a definition of the expression “the *centre*

of the main channel (*der Thalweg des Hauptlaufes*) of the Chobe River”, nor do any other of its provisions provide by implication guidelines that might be useful for this purpose. Consequently, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, the Court has to determine the meaning of such expression “in good faith”, taking into account the rules of interpretation provided by the Convention (*Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection, Judgment*, *I.C.J. Reports 1966 (II)*, p. 812, para. 23.)

III. SUBSEQUENT PRACTICE AS A RULE OF TREATY INTERPRETATION

11. As a general rule of interpretation, Article 31, paragraph 3 (*b*), of the 1969 Vienna Convention on the Law of Treaties provides that account shall be taken, together with the context, of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.

12. The International Law Commission has acknowledged that “[t]he probative value of subsequent practice is well recognized”, because it shows how the intention of the parties has been put into effect. Moreover, the interpretation of treaties by reference to subsequent practice is well established in the jurisprudence of international tribunals and, more especially, of the World Court (*Yearbook of the International Law Commission*, 1964, Vol. II, p. 59).

13. Thus the Permanent Court of International Justice, in its Opinion on the *Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, stated:

“If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty.” (*1922, P.C.I.J., Series B, No. 2*, p. 39.)

14. Similarly, this Court, in the *Corfu Channel* case found that:

“The subsequent attitude of the Parties shows that it was not their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation.” (*I.C.J. Reports 1949*, p. 25.)

15. Later pronouncements of this Court have confirmed the importance of subsequent practice for the interpretation of a Treaty, as is indicated in paragraph 50 of the Judgment.

16. Subsequent practice can be relevant either as a means of establishing the parties’ agreement to the Treaty’s interpretation or in order to shed light on their original intentions. It is possible that the conduct of

the parties may have been at variance with the provisions of the Treaty, showing disregard for the natural and ordinary meaning of its terms. In such cases, "there may be a blurring of the line between the *interpretation* and the *amendment* of a treaty by subsequent practice", even though these two processes are legally quite distinct. In the opinion of the International Law Commission this was exactly what happened in the *Temple of Preah Vihear* case, where the line of action taken by the parties was not reconcilable with the natural and ordinary meaning of the terms of the Treaty. The Commission therefore concluded that the effect of subsequent practice on that occasion was to amend the Treaty (*Yearbook of the International Law Commission*, 1964, Vol. II, p. 60).

17. The practice of an individual State may have special cogency when it relates to the performance of an obligation which particularly concerns that State, as was stated by the Court in its Opinion on the *International Status of South West Africa* (*I.C.J. Reports 1950*, pp. 135-136). However, subsequent practice as a means of interpretation of bilateral treaties requires the agreement of both parties. Such agreement may be expressed through their joint or parallel positive activity, but it may also be ascertained from the activity of only one of the parties, where there is assent or lack of objection by the other party. As is remarked by the International Law Commission, it is sufficient that the other party accepts that practice (*United Nations Conference on the Law of Treaties - First and Second Sessions: Documents of the Conference (1968-1969)*, p. 42, para. 15).

18. The importance of the silence of one party in determining the subsequent practice of the parties to a bilateral treaty was admitted very recently in the *Beagle Channel* arbitration case, where it was stated:

"the Court cannot accept the contention that no subsequent conduct, including acts of jurisdiction, can have probative value as a subsidiary method of interpretation unless representing a formally stated or acknowledged 'agreement' between the Parties. The terms of the Vienna Convention do not specify the ways in which 'agreement' may be manifested. In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent to the terms of the Treaty; nor could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves." (*International Law Reports*, Vol. 52, p. 224, para. 169.)

IV. SUBSEQUENT PRACTICE OF THE PARTIES IN THE APPLICATION OF THE
1890 ANGLO-GERMAN AGREEMENT

19. Namibia maintains that the subsequent conduct of the parties to the 1890 Anglo-German Agreement demonstrates that Kasikili Island is part of Namibia. It bases its contention upon

“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.” (Memorial of Namibia, Vol. I. p. 60, para. 166.)

20. During the oral pleadings Namibia insisted on “continued presence of the Masubia on the ground under colonial rule plus the acceptance of the situation by Botswana’s predecessors” (CR 99/10, p. 27, para. 21 (Chayes)). In its opinion, the Masubia people of the Eastern Caprivi occupied the Island from 1890 to at least until the mid-1960s. Then, from the time the German officials first arrived in 1909, they and their successors incorporated the local institutions of the Masubia into the structure of colonial governance, using them as instruments for implementing their suzerainty; and the activities carried on by them were under the rule of the indigenous Masubia authorities — the chief, his *kuta* and the *indunas*, or local representatives. All these facts were well known to the Bechuanaland authorities just across the river in Kasane, but they made no objection or protest, at least until 1948. From this interactive pattern, Namibia concludes, it can be seen that the parties were in agreement that the Treaty, properly interpreted, attributed Kasikili Island to Namibia (CR 99/11, p. 41, para. 6 (Chayes)).

21. In this respect Botswana observes that

“The Namibian argument based upon subsequent conduct of the parties rests upon extraordinarily weak foundations, both in conceptual and in factual terms. The conceptual foundations are weak because in truth, the ‘subsequent conduct’ argument of Namibia is an argument grounded in acquisitive prescription. Thus, subsequent conduct, which relates to an existing legal instrument, is opposed to prescription, the purpose of which is to destroy and to supplant a pre-existing title.” (Reply of Botswana, Vol. I, p. 55, para. 157.)

22. However, Namibia states very clearly in its Memorial that the subsequent conduct of the parties to the 1890 Anglo-German Agreement

“is relevant to the present controversy in three distinct ways. In the first place, it corroborates the interpretation of the Treaty . . . Second, it gives rise to a second and entirely independent basis for Namibia’s claim under the doctrines concerning acquisition of terri-

tory by prescription, acquiescence and recognition. Finally, the conduct of the parties shows that Namibia was in possession of the Island at the time of termination of colonial rule, a fact that is pertinent to the application of the principle of *uti possidetis*.” (Memorial of Namibia, Vol. I, p. 60, para. 165.)

23. Furthermore, in its oral pleadings Namibia stressed that “its primary claim is that its title is treaty based”; that its claim “of prescription is asserted in the alternative”; and that

“the very meaning of the ability to plead in the alternative is that each claim is to be considered in its own right, and no inference is to be taken against one claim because an inconsistent claim has been pleaded” (CR 99/10, p. 24, para. 10 (Chayes)).

24. Consequently, the Court has to examine in the first place the primary claim presented by Namibia, i.e., subsequent practice as a means of interpretation of the 1890 Anglo-German Agreement; and only if Namibia’s primary claim fails will the Court have to examine the alternative claims, based upon prescription, acquiescence and recognition, presented by Namibia to demonstrate its ownership of Kasikili Island.

V. THE MANDATE FOR SOUTH WEST AFRICA (NAMIBIA)

25. Following the outbreak of the First World War, the Eastern Caprivi was occupied in September 1914 without resistance by paramilitary police from Southern Rhodesia. Captain Eason was appointed Special Commissioner for the Caprivi Zipfel on 6 November 1914 and took up his duties at Schuckmannsburg on 20 November. As stated in the Resident Commissioner’s Report on the Administration of the Caprivi Zipfel during the period 1914 to 31 March 1922, “It was not desired that authority should be asserted to a greater extent or over a wider area than was absolutely essential.” (Memorial of Namibia, Ann. 52, p. 203.)

26. By Article 119 of the Treaty of Peace signed at Versailles on 28 June 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her overseas possessions, including therein German South West Africa.

27. Article 22, paragraph 1, of the League of Nations Covenant provided that:

“To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the

modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.”

28. Paragraph 2 of the same Article 22 added that:

“The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.”

29. Article 22, paragraph 6, of the League of Nations Covenant supplemented the mandate’s system by providing that

“territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population”.

30. Furthermore, Article 22 provided that the Mandatory shall render to the Council of the League of Nations an annual report in reference to the territory committed to its charge (para. 7); that a permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates (para. 9); and that

“The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.” (Para. 8.)

31. The Principal Allied and Associated Powers agreed that a Mandate over the territory which formerly constituted the German Protectorate of South West Africa should be conferred upon His Britannic Majesty, to be exercised on his behalf by the Government of the Union of South Africa. His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, agreed to accept the Mandate and undertook to exercise it on behalf of the League of Nations in accordance with the terms defined by its Council on 17 December 1920, which confirmed a prior decision taken on 7 May 1919.

32. According to the terms of South West Africa’s mandate, the consent of the League of Nations was required for the modification of its provisions (Art. 7, para. 1); and the authority of the Union of South Africa was defined by Article 2 as follows:

“The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.” (*League of Nations, Official Journal, January-February 1921*, p. 89.)

33. Until 31 December 1920 the Strip was ruled as a *de facto* part of the Bechuanaland Protectorate under martial law. Martial law in the Eastern Caprivi was ended by the Governor General’s Proclamation No. 12 of 1922 and High Commissioner’s Proclamation No. 23 of 1922, which placed the Strip under civilian Protectorate authority retroactively from 1 January 1922 (Memorial of Botswana, Annexes, Vol. III, Ann. 19, p. 257.)

34. The Mandate of the Union of South Africa over South West Africa continued after the dissolution of the League of Nations, even though it was expected that the mandated territories, which had not become independent, should be placed under the trusteeship system of the United Nations. Notwithstanding, among the mandatory powers, only the Union of South Africa refused to do this in respect to the territory of South West Africa, because in its opinion the mandate had lapsed. As a result, the Union of South Africa not only refused to comply with its obligations under the Covenant and the Mandate but also invoked the special position of the mandated territory as a reason for making it a part of its territory. For this reason the General Assembly of the United Nations decided to request an Advisory Opinion from the Court on the matter.

35. The Court stated in its Advisory Opinion of 11 June 1950 that the creation of the Mandate:

“did not involve any cession of territory or transfer of sovereignty to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants.” (*I.C.J. Reports 1950*, p. 132.)

36. Furthermore, the Court added that

- (a) “the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa” (*ibid.*, p. 143);
- (b) “the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League

of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it" (*I.C.J. Reports 1950*, p. 137);

- (c) "It is clear that the Union has no competence to modify unilaterally the international status of the Territory or any of these international rules", as "is shown by Article 7 of the Mandate, which expressly provides that the consent of the Council of the League of Nations is required for any modification of the terms of the Mandate" (*ibid.*, p. 141);

and

- (d) "that the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa, and that the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations" (*ibid.*, p. 144).

37. The Union of South Africa's mandate over South West Africa was terminated by United Nations General Assembly resolution 2145 (XXI) of 1966; and its resolution 2248 (S-V) of 1967 entrusted the administration of South West Africa, with the new name of Namibia, to the Security Council. Furthermore, due to its refusal to withdraw from the territory, Security Council resolution 176 of 1970 declared South Africa's presence in Namibia (South West Africa) illegal; that illegality was confirmed by the Court in its Advisory Opinion of 26 January 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* (*I.C.J. Reports 1971*, p. 58, para. 113) (see para. 69 of the Judgment).

38. The legal position of the Union of South Africa did not change during the existence of its mandate over South West Africa. The powers of the Union of South Africa over the territory of South West Africa were only administrative and legislative; they had to be exercised to "promote to the utmost the material and moral well-being and the social progress of the inhabitants". Acts of disposition of the territory of the mandate were outside the powers conferred on the Mandatory. Therefore, the Union of South Africa could not undertake such acts.

39. The British authorities acknowledged this legal situation in 1949, when examining the possibility of entering into an agreement with the Union of South Africa, as Mandatory Power for South West Africa, regarding Kasikili Island. Mr. G. H. Baxter, Commonwealth Relations Office, examined the proposal made by the Union of South West Africa to set the boundary in the southern channel of the Chobe River, guaranteeing the use of the northern channel for navigation by the inhabitants

and authorities of the Bechuanaland Protectorate (Letter of 14 October 1948 to the High Commissioner's Office in Pretoria, Memorial of Namibia, Vol. IV, Ann. 63, p. 280; Memorial of Botswana, Annexes, Vol. III, Ann. 23).

40. Mr. Baxter's Report of 20 October 1949 to Sir Evelyn Baring, High Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland, commented on the international aspect of the matter in the following terms:

"This is governed largely by the question whether the mandate is still regarded as effective. It is understood that the view of the Union Government is that the mandate has expired. [Mr. Baxter's Report was prepared in 1950 before the Court gave its Advisory Opinion on the matter.] This view, however, is not universally shared by other Governments and the position under International Law seems to be obscure. The mandate is limited, by the preamble and Article I, to the territory which formerly constituted the German Protectorate of South West Africa. By Article III of an Agreement made in 1900 with Germany, the boundary at this point was fixed at the centre of the main channel of the river and if, as now appears to be the case, the main channel was at all material times on the north side of the island in question, the mandated territory did not include the island. Under Article 7 of the Mandate no modification could be made without the consent of the Council of the League of Nations. In so far as the mandate is still operative, this might be interpreted as referring to some organ of the United Nations or as making any adjustment impossible. No doubt it is unlikely that anyone would raise any objection in the United Nations, especially as the proposal is to add to the territory and not in any way to reduce its area, but the possibility cannot be entirely ignored." (Memorial of Botswana, Vol. III, Annexes, Ann. 28, p. 288.)

Furthermore Mr. G. H. Baxter added the following observations:

"Article VI of the Agreement of 1900 provides that '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 might be argued that this now operates to permit the boundary to be varied, for the purposes of both international and municipal law, by agreement between the United Kingdom Government and the Government of the Union as successor of the German Government. It is, however, doubtful whether the argument would be sound, since rectification would alter what is in fact, the boundary of the former German Protectorate. As between these two Governments, Article VI is probably still effective, but we are

here concerned with a document (the Mandate) in which others are interested.” (Memorial of Botswana, Vol. III, Annexes, Ann. 28, pp. 290-291.)

41. Taking into account these considerations, the High Commissioner’s Office, Pretoria, concluded that “it would seem desirable to let sleeping dogs lie” (19 November 1949 Letter of High Commissioner, Pretoria, to V. F. Ellenberger, Memorial of Botswana, Annexes, Vol. III, Ann. 29, p. 296). Therefore, the High Commissioner, Sir Evelyn Baring, took the decision not to enter into a formal agreement, and his letter of 10 May 1951 explained to Mr. Forsyth of the South African Department of External Affairs, that the matter was “beset by legal complications of an international nature, the solution of which would entail difficulties disproportionate to the importance of the matter at issue” (Memorial of Namibia, Vol. IV, Ann. 69, p. 294; Memorial of Botswana, Annexes, Vol. III, Ann. 30, p. 298; CR 99/7, p. 12 (Brownlie)).

42. Consequently, after the confirmation of the creation of the mandate by the Council of the League of Nations in 1920, the Union of South Africa could not dispose by its own actions of the territory of South West Africa, as it had been determined by the subsequent practice of the parties to the 1890 Anglo-German Agreement.

43. For this reason, 1914 is the latest date to be taken into account for the determination of the subsequent practice of the parties, Germany and Great Britain, in regard to the interpretation of Article III of the 1890 Anglo-German Agreement. In fact, no subsequent practice could exist on the part of Germany after September 1914 when the Eastern Caprivi was occupied by Southern Rhodesia. During the existence of the mandate the Union of South Africa had no competence either to enter into any express agreement to delimit the international boundary of South West Africa or to modify the prevailing subsequent practice with regard to the interpretation of Article III of the 1890 Anglo-German Agreement. Consequently, in my opinion, the subsequent practice of the parties for the purpose of interpreting the Anglo-German Agreement should be determined on the basis of the situation existing up to September 1914.

VI. RELEVANT EVIDENCE SUBMITTED TO THE COURT

44. The Court stated in its Judgment of 26 November 1984 that “it is the litigant seeking to establish a fact who bears the burden of proving it” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1984*, p. 437, para. 101; cf. also *Frontier Dispute (Burkina Faso/Republic of Mali)*, *I.C.J. Reports 1986*, p. 587, para. 65).

45. For this reason the Court has to examine in the present case the evidence presented by Namibia to support its contention that the subse-

quent practice of the parties to the 1890 Anglo-German Agreement demonstrates that they considered the southern channel of the Chobe River as the “main channel” referred to in Article III of that Agreement; and that, therefore Kasikili Island was part of Namibia. Thus the facts indicative of the subsequent practice of the parties alleged by Namibia are:

“(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” (Memorial of Namibia, Vol. I, p. 66, para. 180).

46. The evidence to be examined is the following:

A. Captain H. V. Eason’s Report (1912)

47. An exchange of communications took place between Great Britain and Germany at the beginning of the century, dealing with the western half of the southern boundary line established by the 1890 Anglo-German Treaty. On 14 January 1911 Lord Harcourt, the Secretary of State of the Colonial Office, instructed the High Commissioner of the Bechuanaland Protectorate to gather “all available information from local sources in support of the view that the north channel is the main channel” of the Chobe river around Kasikili Island (Memorial of Namibia, Vol. IV, Ann. 44, p. 170).

48. This despatch led to Captain H. V. Eason’s Report, dated 5 August 1912, where he states:

“Two miles above the rapids lies Kissikiri Island. Here I consider that undoubtedly the North should be claimed as the main channel. At the Western end of the island the North Channel at this period of the year is over one hundred feet wide and eight feet deep, the South Channel about forty feet wide and four feet deep. The South Channel is merely a back water, what current there is goes round the North. The natives living at Kasika in German territory are at present growing crops on it.” (Memorial of Namibia, Vol. IV, Ann. 47, p. 177.)

49. Even though Captain Eason stated that the northern channel “should be claimed as the main channel”, he acknowledged that “the natives living at Kasika in German territory are at present growing crops on it”, meaning Kasikili Island.

B. Joint Report of 1948 (Trollope-Redman) and Exchange of Letters between 1948 and 1951

50. The 1948 Joint Report prepared by L. F. W. Trollope and Noel W. Redman, as well as its antecedents and the correspondence that followed between 1948 and 1951, are comprehensively reviewed in paragraphs 56 to 61 of the Judgment. The relevant extracts need not therefore be reproduced here. In my opinion those documents demonstrate:

- (a) that the Masubia of the Eastern Caprivi were the only tribesmen who used the Island for cultivation not only until 1914, i.e., the critical date for the purpose of interpreting the 1890 Anglo-German Agreement, but also until 1947 when the border dispute arose between the Parties;
- (b) that during the same period neither the Bechuanaland tribesmen nor the Bechuanaland Protectorate authorities ever complained about that use;
- (c) that the Bechuanaland Protectorate tribesmen had never used the Island either for cultivation or for other purposes; and
- (d) that the Bechuanaland tribesmen and Bechuanaland Protectorate authorities enjoyed undisputed use of the northern channel of the Chobe River around Kasikili Island.

These conclusions are accepted in the Judgment, where it is stated:

“From the various administrative and diplomatic documents referred to above, the Court, for its part, observes the following: (1) prior to 1947 no differences had arisen between Bechuanaland and the power administering the Caprivi Strip with regard to the boundary in the area of Kasikili/Sedudu Island; (2) it appears that, on the basis of the maps available at the time, the boundary had until then been supposed to be located in the southern channel of the Chobe . . .” (Para. 62.)

C. Mr. R. R. Renew's Report (1965)

51. In response to a request for information about Kasikili Island from the Department of Public Works, Mr. R. R. Renew, Surveyor-General of the Bechuanaland Protectorate, prepared his report of 10 October 1965. In the first place Mr. Renew recalled:

“Kasikili island became the subject of a dispute in 1947 when the Native Commissioner of the eastern Caprivi Strip was alleged to have challenged Bechuanaland's right to the use of the main channel of the Chobe River along the north side of the island, as a waterway.” (Memorial of Botswana, Annexes, Vol. III, Ann. 36, p. 321.)

Then, after reviewing the Trollope-Dickinson exchange of letters (1948-1951), Mr. Renew concluded that "It appears, therefore, that if we now wish to use the island we have no alternative but to re-open the matter". Furthermore he added:

"I think that the South African case for possession of this island is very weak. The fact that we did not use it, and allowed the Caprivi tribesmen to use it, does not amount to prescription so much as tolerating its use by the Caprivi people while it was inconvenient for us to use it." (Memorial of Botswana, Annexes, Vol. III, Ann. 36, p. 325.)

52. Thus, the facts stated by Mr. R. R. Renew in his Report coincide with the conclusions already reached in this opinion (see para. 50 above).

D. Witnesses called by Namibia

53. The statements in May and June 1994 by Namibia's witnesses before the Joint Technical Team of Experts confirm that only the Masubia of the Eastern Caprivi used Kasikili Island for ploughing; that no one from the Bechuanaland Protectorate had ever used the Island; that permission to use the Island was only ever sought or obtained from the Masubia authorities; and that these activities were known at the time to the British authorities.

54. Botswana maintains that those statements cannot be accepted because of the contradictions that emerged when the witnesses were cross-examined. In particular it stresses that Chief Moraliswani, when asked about the date people stopped ploughing on Kasikili Island, answered:

"That was in 1937 when now a lot of elephants were now entering Caprivi and then when people were ploughing it was found that those elephants were destroying their fields, it's when they decided to move and come to the other side here in Caprivi." (Memorial of Namibia, Annexes, Vol. III, Ann. 2, p. 209.)

Therefore Botswana concludes that the cultivation of the Island ceased in 1937 (Counter-Memorial of Botswana, Vol. I. p. 205, para. 468).

55. However, as stated before, the subsequent practice of the parties for purposes of interpreting the 1890 Anglo-German Agreement has to be examined only until 1914 (see Section V of this opinion). Therefore, Botswana's contention that cultivation of Kasikili Island took place only until 1937 is irrelevant. Besides, even though Namibia's witnesses sometimes contradict themselves in details, the bulk of their statements is consistent and for this reason, in my opinion, the statements should be

accepted as valid evidence. Consequently, this objection by Botswana cannot be upheld.

56. Additionally, Botswana contends that extraneous oral evidence would only be relevant if it were intended to shed some light on either the actual intentions of the parties to the 1890 Anglo-German Agreement or on the ordinary meaning at the material time (1890) of the phrase “the centre of the main channel of [the] river” included in its Article III. Consequently, in Botswana’s view extraneous oral evidence of alleged activities on the Island as evidence of subsequent practice is of no legal relevance for purposes of determining the boundary between Namibia and Botswana on the basis of the Anglo-German Agreement of 1890 (Counter-Memorial of Botswana, p. 203, para. 461; CR 99/12, pp. 10-11 (Tafa)).

57. The Joint Team of Technical Experts was created as a consequence of the Communiqué issued on 24 May 1992 by the President of Botswana, the President of Namibia and the President of Zimbabwe (Memorial of Botswana, Vol. III, Annexes, Ann. 55, pp. 413-415); and the Memorandum of Understanding regarding its terms of reference, signed by Namibia and Botswana on 23 December 1992, expressly permits the taking of oral evidence. Thus, Article 7, paragraph 1, of the Memorandum of Understanding provides that

“In the execution of its functions, the Team shall have authority to:

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- (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.” (Memorial of Botswana, Annexes, Vol. III, Ann. 57, pp. 433-434.)

58. Consequently the 1992 terms of reference did not restrict witness testimony to the demonstration of the actual intentions of parties to the 1890 Anglo-German Agreement, or of the ordinary meaning of the words “the centre of the main channel of the river” at the material time (1890), as Botswana claims. Witness evidence was declared admissible in general terms, whenever appropriate, to demonstrate facts relevant to the boundary dispute over Kasikili/Sedudu Island. Therefore Namibia called witnesses to demonstrate the subsequent conduct of the parties as a means of interpretation of the 1890 Anglo-German Agreement. For the same reason Botswana presented and relied upon the statements of its witnesses as good evidence to contradict the subsequent practice asserted by Namibia and to prove that the Masubia from the Eastern Caprivi Zipfel were not the only persons who used Kasikili Island. Consequently, in my opinion, this objection of Botswana cannot be upheld.

E. Evidence presented by Botswana

59. (1) Botswana presented affidavits by the following persons: (a) Dominic Diau (dated 6 October 1997); Brian Egner (dated 19 September 1997); Peter Gordon Hepburn (dated 6 August 1997); Timothy Neville Liversedge (dated 30 October 1997); and Michael Slogrove (dated 8 July 1997) (Counter-Memorial of Botswana, Anns. 47-51); and (b) Botseletse Kingsley Sebele (dated 14 August 1998); Michael Slogrove (dated 24 August 1998); and Simon Adolph Hirschfield (dated 25 August 1998) (Reply of Botswana, Vol. I, Anns. 20-22).

60. The statements embodied in the above-mentioned affidavits limit themselves to facts that took place between 1977 and 1979; 1959 and 1962; 1962 and 1970; 1969 and 1970 and 1972 and 1978, respectively (Counter-Memorial of Botswana, Anns. 47-51); and between October 1971 and April 1975; 1972 and 1978 and 1971 and 1995 (Reply of Botswana, Anns. 20-22). Therefore, in my opinion, they are not relevant to the subsequent practice of the parties to the 1890 Anglo-German Agreement in 1914, which is the critical date; nor even in 1947 when the dispute arose for the first time between the Parties (see Section V of this opinion).

61. (2) Mr. Noel Redman, the District Commissioner at Kasane, in the cover letter of 26 January 1948 (para. 5), attaching his and Mr. Trollope's Joint Report, reported to the Government Secretary (Maefeking) the following:

“Since the attached report was prepared I have received further information from an inhabitant of the Island that in 1924 a Caprivi Chief named Liswaninyana applied to Captain Neale (*sic* Nellie), the Resident Magistrate at Kasane, for permission for his people to plough on the Island and graze cattle there. This was evidently granted verbally and no written agreement is known. At this time Government Oxen were grazing on the Island but they were removed in 1925. Before 1924 the same informant told me that there was one Caprivi family ploughing there but they had no authority to do so.” (Memorial of Botswana, Annexes, Vol. III, Ann. 22, p. 265; CR 99/7, pp. 23-24 (Brownlie).)

62. However, the additional information reported by Mr. Redman refers to acts which occurred after 1914, the critical date for determining the subsequent practice of the parties in order to interpret the 1890 Anglo-German Agreement. Moreover, the witness testimony reported by Mr. Redman was merely hearsay. Furthermore, as Namibia observes,

“in 1924 Captain Neale had a dual role. He was both District Commissioner for Kasane in the Bechuanaland Protectorate and admin-

istrator of the Eastern Caprivi under the League of Nations Mandate for South-West Africa. Thus, even if he had authorized Liswaninyana to cultivate on the Island, this action would not necessarily prove that the Protectorate exercised control over the Island. Given Captain's Neale's dual functions, his alleged authorization to use Kasikili Island cannot be properly assessed without first determining whether he was acting as administrator of the Eastern Caprivi or as administrator of the Bechuanaland Protectorate's District of Kasane." (Reply of Namibia, p. 108, para. 244.)

63. (3) Botswana relies on the fact that it was not until 6 March 1992 that Namibia made any representation complaining about its people being unable to use Kasikili Island, notwithstanding that they ceased to do so in 1937, according to the statements made by Chief Moraliswani, or in 1958 as some of Namibia's witnesses testified (CR 99/7, p. 25 (Brownlie)). However, 1914 is the critical date for determining the subsequent practice of the Parties. Therefore these facts, which took place afterwards are irrelevant because of the existence of the mandate over South West Africa.

64. (4) According to Botswana, no group had exclusive use of the Island for farming purposes because in the 1940s seven families of Barotse migrants lived in the Sedudu area, the term Batoka being the local Chobe name for people coming from what is now part of Zambia, and worked fields on the Island. Botswana maintains that this fact is evidenced by the Chobe annual reports attached to Botswana's Reply (Anns. 7 and 8). (Reply of Botswana, p. 45, para. 125; Annexes, Anns. 7 and 8, pp. 14-20, 21-22; CR 99/7, p. 25 (Brownlie)). Furthermore, Botswana stresses that one of the witnesses, Keorapetse Mokhiwa, a 70 year-old peasant, said "fields were very small because people used to plough with hand, these hand ploughs" (CR 99/8, p. 13, para. 4.5 (Fox)).

65. However, this contention is not relevant *per se*, because it refers to facts which occurred after 1914, the critical date for the determination of the subsequent practice of the Parties for the purpose of interpreting Article III of the 1890 Anglo-German Agreement. Furthermore, Sedudu is a name identifying not only Kasikili Island but also Sedudu Valley on the Botswana side of the River Chobe. Therefore, even admitting that those families were living and working in "Sedudu", it has not been demonstrated that "Sedudu" in this specific case meant Kasikili Island.

66. (5) In its oral pleadings Botswana stressed that the exchange of letters between Messrs. Trollope and Dickinson (1948-1951) maintained the *status quo ante*. However, in my opinion, the *status quo ante* favours Namibia's position as to the subsequent practice of the Parties (see para. 50 above).

67. (6) Botswana recalls the establishment by the British authorities of the Chobe Game Reserve in 1960, its northern delimitation corresponding with the international boundary between the Bechuanaland Protectorate and South West Africa. For this reason, in the opinion of Botswana, no cultivation has taken place on the Island since 1960 and, of course, in fact it had almost certainly ceased many years before (CR 99/7, p. 27 (Brownlie)). However, this argument is not relevant because 1914 is the critical date for determining the subsequent practice of the parties to the 1890 Anglo-German Agreement. Besides, as pointed out by Namibia, the Act creating the Chobe Game Reserve in 1960 refers to the 1933 British War Office GSGS 3915 Map, which indicates the southern channel as the international boundary (CR 99/1, p. 40, para. 64 (Chayes)).

68. (7) Botswana points out that, on the occasion of the planned visit of the President of Botswana to the vicinity of the Island in 1972, Mr. Slogrove stated:

“The landing on this Island of a fully armed squad of the Botswana P.M.U. in August, 1972, during the Presidents visit for the purpose of searching it as a security measure strengthened my conviction that this Island was regarded as Botswana Territory.” (Reply of Botswana, Annexes, Ann. 10, p. 25; CR 99/7, p. 28 (Brownlie)).

The two affidavits by Mr. Slogrove have already been examined and considered irrelevant because they refer to facts posterior to 1914, which is the critical date for determining the subsequent practice of the parties as a means of interpretation of the 1890 Anglo-German Agreement.

69. (8) For the same reason, the meeting of delegations of the Parties at Katima Mulilo in 1981, the eventual Pretoria Agreement of 1984 and the Botswana Note to South Africa dated 22 October 1986, referred to by Botswana (CR 99/7, p. 28 (Brownlie)), are irrelevant for the purpose of demonstrating the subsequent practice of the parties to the 1890 Anglo-German Agreement.

70. (9) Botswana also recalls that some ten of its witnesses gave evidence that they had been engaged in trekking cattle from Maun to the ferry at Kazungula in the 1930s and 1940s; and that they grazed cattle on Kasikili Island (CR 99/8, p. 26 (Fox)). However, those activities are also irrelevant to a determination of the subsequent practice of the Parties in 1914, which is the critical date for that purpose.

F. Maps

71. Since the critical date is 1914, all maps prepared afterwards are irrelevant to an interpretation of the 1890 Anglo-German Agreement by

reference to the subsequent practice of the parties. Therefore the only maps that need to be examined are the following.

72. (1) The ID 776 Map (1889) made by the British War Office, referred to in the 1890 Anglo-German Agreement, and the Map of Southern Zambezia (1891). However, neither is of any use because no boundary symbol appears along the Chobe River.

73. (2) The *Kriegskarte* 1:800,000 (1904) has a label indicating "Sulumbu's Island". However, as Namibia remarks, "the reproductions of this map in the Botswana Atlas (maps 4 and 5), on which Botswana seems to rely for analysis, are extremely poor and are not two maps but two copies of one map" (CR 99/4, p. 56 (Rushworth)). Botswana accepted those criticisms and acknowledged that "[t]he map depicts some features which are now not in conformity with the known geographical features" (Reply of Botswana, p. 71, para. 206). The map was not even mentioned by Botswana in its oral pleadings (CR 99/14, p. 27 (Fox)). Therefore, in my opinion, it is irrelevant.

74. *Seiner's Map* 1:500,000 (1909) shows Kasikili Island, even though labelled "Sulumbu's Island". However, as Namibia acknowledges, the key to the map "does not say how international boundaries are portrayed" (CR 99/4, p. 43 (Rushworth)). Therefore it is irrelevant for the purpose of determining the boundary line at Kasikili Island.

75. *Streitwolf's Map* 1:200,000 (1910) depicts Kasikili Island under the name "Kassikiri". However, it is irrelevant since no boundaries are shown, as Namibia points out (CR 99/4, p. 44 (Rushworth)).

76. *Von Frankenberg's Map* 1:100,000 (1912) shows Kasikili Island, again under the name "Kassikiri". The German word "*Flussarm*" appears above the southern channel and because of that Botswana concludes that the southern channel is not the "main channel" but a "side branch" of the Chobe River. Notwithstanding, Botswana has maintained that its case "is not based on maps, by reason of their lack of accurate information and their inconsistency" (Reply of Botswana, p. 99, para. 258). Moreover, the map does not show the international boundaries between the two countries. For this reason, in my opinion, it is irrelevant.

77. Hence none of the relevant maps which were submitted to the Court can serve to demonstrate the subsequent practice of the Parties for the purpose of interpreting the 1890 Anglo-German Agreement, bearing in mind that 1914 is the critical date for such demonstration. Consequently, in my opinion, it is not necessary to consider any questions relating to the cartographic principles governing the preparation of maps or the conditions which maps must satisfy in order to produce legal consequences, or their importance in the resolution of legal disputes.

G. Aerial Photographs and Satellite Images

78. The aerial photographs and satellite images submitted to the Court do not contain any indication which would enable it to determine the boundary between the Parties at Kasikili Island, even though they may have relevance in relation to the question whether Kasikili Island was occupied or cultivated. However, they are irrelevant because they were taken after 1914, the critical date as regards the subsequent practice of the Parties for purposes of interpreting the 1890 Anglo-German Agreement. Moreover, aerial photographs or satellite images cannot determine whether any occupation of Kasikili Island was carried out by Masubia people of the Eastern Caprivi or by natives or authorities of the Bechuanaland Protectorate.

H. Peaceful and Public Use of Kasikili/Sedudu Island by Masubia Tribesmen from Eastern Caprivi

79. The German Government first established an administrative presence in the Eastern Caprivi in February 1909. As Namibia acknowledged, "Until then, from the European colonial perspective, the Eastern Caprivi was 'a no-man's land', essentially outside the law" (Memorial of Namibia, Vol. I, p. 88, para. 222).

80. The German Governor in Windhoek, Bruno von Schuckmann, issued an ordinance on 16 October 1908 closing the territory to all Europeans without an official permit, "thus laying the legal basis for the exercise of administrative authority in the region". At the same time he appointed Hauptmann Kurt Streitwolf as Imperial Resident of the Caprivi who, at the head of a contingent of four German military officers and 14 African policemen, entered the Strip on 25 January 1909. Some days later, on 3 February, Hauptmann Streitwolf reached the southern bank of the Zambezi, opposite Sesheke, and established a new town, named Schuckmannsburg, where he set up his headquarters.

81. Namibia adds that on 4 May 1909 Hauptmann Streitwolf installed Chikamatondo at Schuckmannsburg "as the Masubia Chief, responsible to him for the governance of the area", Kasikili Island being "clearly within his jurisdiction". Thus Germany established the method of "indirect rule" and the native chiefs were constituted as an integral part of the machinery of the German administration. For this reason, Namibia concludes, the German rule of the Eastern Caprivi was carried out through Chikamatondo and the Masubia tribal organization (Memorial of Namibia, pp. 88-93, paras. 222-232).

82. Namibia maintains that the same method of "indirect rule" persisted after the creation of the mandate over the territory of South West

Africa. The Governor-General of the Union of South Africa delegated responsibility for the Caprivi to the British High Commissioner for South Africa, with effect from 1 January 1921 (Memorial of Namibia, Vol. V, Ann. 93, pp. 5-8), who exercised his authority through the Bechuanaland Protectorate (Memorial of Botswana, Annexes, Vol. III, Ann. 19, p. 257).

83. The British Administration lasted until 1929, when it was taken over directly by the Union of South Africa (Memorial of Namibia, Vol. V, Ann. 94, pp. 9-11; Memorial of Botswana, Annexes, Vol. III, Ann. 20, pp. 259-260.) During that period, British colonial officers also relied on the traditional authorities of the Masubia to carry out important governmental functions, such as administration of justice. This fact is evidenced by the reports written by Bechuanaland officials, acting as delegates of South Africa. Thus, all their Reports for the years 1927, 1928 and 1929 include the following paragraph:

“Each village has its Induna or Headman who has authority to adjudicate according to Native Law and Custom amongst his followers. He is generally assisted by the older men. If they do not agree or if the plaintiff or defendant is not satisfied, then the case is taken to the Chief’s Kgotla.

The Chief’s Kgotla or Court is the principal one and its judgments are final except that provision is made under Proclamation No. 1 of 1919 for appeals against the judgments of native chiefs in the Bechuanaland Protectorate, in the first instance to a Court composed of the Assistant Commissioner or Magistrate of the district and of the chief, and in the event of their disagreeing, then the Resident Commissioner decides the matter in dispute. When members of a tribe are punished by their own courts the penalty is usually one or more head of cattle. The fines become the sole property of the chief, although he may give some of the cattle to his councillors.” (*Report of the Government of the Union of South Africa on South-West Africa for the Year 1927*, Counter-Memorial of Botswana, Ann. 11, p. 123; *Report of the Government of the Union of South Africa on South-West Africa for the Year 1928*, Counter-Memorial of Botswana, Ann. 12, p. 108; *Report of the Government of the Union of South Africa on South-West Africa for the Year 1929*, paras. 458-459, Counter-Memorial of Botswana, Ann. 13, p. 69, paras. 459-460.)

84. Botswana maintains that “it is implausible to suggest that the title could be generated by the agricultural activities of the Basubia”; that “there is simply no evidence that indirect rule conferred competence upon the Caprivi chiefs to make or unmake international boundaries”; and that Article VII of the 1890 Anglo-German Agreement provides that:

“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 extensions 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.”

Therefore Botswana concludes that occupation of Kasikili Island by the Masubia of the Eastern Caprivi cannot create any Namibian title to Kasikili Island (Counter-Memorial of Botswana, Vol. 1, p. 12, para. 23.)

85. Nevertheless, Botswana admits:

“The Government of Botswana is willing to accept that, both in German-controlled territory and in Bechuanaland Protectorate, the authority of the traditional chiefs was subjected to a process of colonial approval. The chiefs thus became *in a certain sense* agents of the colonial administration on both sides of the River Chobe. But there is no evidence, and no evidence is offered, to the effect *that the chiefs had authority to engage in title-generating activities*. Both legally and historically this would be eccentric.” (Counter-Memorial of Botswana, p. 278, para. 685.)

86. However, Namibia does not claim that Germany was engaged in title-creating activities on Kasikili Island through the Masubia tribal organization. In the opinion of Namibia the title remained the same, the 1890 Anglo-German Agreement. However, the boundary delimitation made by its Article III was not clear and needed interpretation. Therefore, Namibia relies on the subsequent practice of the Parties in order to interpret the existing title, i.e., the 1890 Anglo-German Agreement; no new title was created, the existing title was confirmed and interpreted by subsequent practice.

87. The evidence presented by Namibia demonstrates that Germany administered the Eastern Caprivi Zipfel through the Masubia Chiefs and their tribal organization. They exercised judicial functions and had authority to render judgments. Their positive acts of exercise of jurisdiction over Kasikili Island were frequent enough, taking into account that they were undertaken in areas sparsely populated and very remote from the centres of civilization, as the territory of South West Africa was described in Article 22, paragraph 6, of the League of Nations Covenant

(see para. 27 above). The Bechuanaland authorities never challenged such jurisdictional acts. For this reason, in my opinion, the Chiefs were agents of the colonial administration and their acts represent the subsequent practice of the Parties for purposes of the interpretation of the 1890 Anglo-German Agreement.

VII. CONCLUSION

88. The considerations set out in the foregoing sections lead to the conclusion that the Masubia of the Eastern Caprivi were the only tribesmen who occupied Kasikili/Sedudu Island, at least until 1914; that their occupation of Kasikili/Sedudu Island was peaceful and public; and that even Botswana acknowledged that their chiefs “became *in a certain sense* agents of the colonial administration” (see para. 85 above). Therefore, in my opinion, the subsequent practice of Germany and Great Britain reflected their understanding that Kasikili/Sedudu Island formed part of German South West Africa and that the southern channel of the Chobe River was the “main channel” referred to in Article III, paragraph 2, of the 1890 Anglo-German Agreement. No subsequent practice of the parties to the Treaty was possible during the First World War when British troops exercised *de facto* control over South West Africa. In 1920 the League of Nations confirmed the establishment of the Mandate over South West Africa. During the existence of the Mandate over South West Africa (Namibia) neither of the Parties to the 1890 Anglo-German Agreement had competence to recognize, either by express agreement or by subsequent practice, that the aforementioned “main channel” of the Chobe River was the northern channel and not the southern channel, since this new interpretation would have represented a modification of the territory submitted to the Mandate. Consequently, the original understanding was maintained and for this reason, in my opinion, Kasikili/Sedudu Island forms part of Namibia and the southern channel of the Chobe River is the “main channel” referred to in Article III, paragraph 2, of the 1890 Anglo-German Agreement.

(Signed) Gonzalo PARRA-ARANGUREN.