

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING KASIKILI/SEDUDU ISLAND

(BOTSWANA/NAMIBIA)

**MEMORIAL OF THE
REPUBLIC OF BOTSWANA**

VOLUME I

28 FEBRUARY 1997

VOLUME I OF THE MEMORIAL

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CHAPTER I

THE NATURE OF THE DISPUTE

(a) The Basis of Botswana's Claim as regards the Boundary between Botswana and Namibia around Kasikili/Sedudu Island

1. In accordance with Article III(2) of the Anglo-German Agreement of 1890 the boundary in the relevant sector descends the River Chobe and is defined as 'the centre of the main channel of that river'. The German text refers to the 'Thalweg des Hauptlaufes dieses Flusses'. There appears to be no inconsistency between the English and German texts.

2. On this basis, as a matter of fact and law, the main channel of the Chobe is the northern and western channel in the vicinity of Kasikili/Sedudu Island and hence the median line in that northern and western channel is the boundary between Botswana and Namibia. This is established by the facts as evaluated by expert opinion (see Chapter VII below). Moreover, the identification of the northern and western channel as the main channel, and hence as the boundary between the two countries, was the subject of an intergovernmental agreement of 1984 and the *Joint Survey Report* of 1985 adopted on the basis of that agreement (see Chapter VI below).

3. At no stage did Botswana or its predecessor in title relinquish sovereignty over the south eastern channel of the Chobe River or in respect of Kasikili/Sedudu Island. On independence Botswana inherited British title in accordance with the principles of State succession. The independence of Botswana on 30 September 1966 generated a continuing title by virtue of its statehood. The title thus inherited was confirmed

by the Declaration of the Assembly of Heads of State and Government at Cairo in 1964 emanating from the First Ordinary Session of the Organisation of African Unity. In this instrument the Assembly:

"Solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence." (Annex 35)

4. This principle, in the Declaration, is explicitly based upon Article 3(3) of the Charter of the Organisation of African Unity, according to which Member States

"solemnly affirm and declare their adherence to the following principles:...

Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence."

5. Both Parties to the Memorandum of Understanding (MOU) dated 23 December 1992 (Annex 57) accepted the principle that on the achievement of independence Botswana and Namibia succeeded respectively to the rights and obligations provided for in the Anglo-German Agreement signed on 1 July 1890. The preamble to the MOU (as set out in paragraph 11 below) states the position in clear terms.

(b) The Determination of the Boundary determines the issue of Sovereignty

6. In the circumstances of the present case the determination of the boundary, in accordance with the provisions of Article III(2) of the Anglo-German Agreement, will logically and inevitably also determine the question of sovereignty in respect of the island.

7. It has at all times been accepted both by Botswana and Namibia, and by their predecessors in title, that the alignments defined in the Anglo-German Agreement constitute an international boundary with the normal concomitants of such a boundary. For present purposes the pertinent characteristic of the boundary is its role in the allocation of sovereignty. This role has equal operational efficacy both in relation to land territory and within a riverine milieu. Indeed, for purposes of legal analysis and the disposition of sovereignty, there is no distinction. What is involved is the territorial ambit of the States concerned, and state territory includes rivers (or part thereof) and islands.

(c) The Centrality of the Anglo-German Agreement of 1890 has been accepted by the Government of Namibia

8. The Government of Botswana would respectfully draw the attention of the Court to the fact that the centrality of the Anglo-German Agreement of 1890 to the determination of the status of the island and river waters surrounding it has been accepted by the Government of Namibia on several occasions.

9. The first occasion on which this occurred was the Heads of State Meeting at Kasane, at which His Excellency President Mugabe of Zimbabwe performed the role of mediator. In the resulting Communiqué of 24 May 1992, the relevant paragraphs are as follows:

"Their Excellencies President Sam Nujoma of Namibia and Sir Ketumile Masire of Botswana met in Kasane, on 24th May, 1992 in the presence of His Excellency President Robert G. Mugabe of Zimbabwe to discuss the boundary between Botswana and Namibia around Sedudu/Kasikili Island. After the arrival of President Mugabe and President Nujoma, the three Presidents went on a tour of the Chobe River and viewed the Sedudu/Kasikili Island,

after which they examined various documents defining the boundary around the Island. These included the 1890 Anglo-German Treaty, the 1892 Anglo-German-Portuguese Treaty¹ and Maps. The two treaties define the Botswana-Namibia boundary along the Chobe River as the middle of the main channel of that river."

"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 team of technical experts shall be final and binding on Botswana and Namibia."

(emphasis supplied).

(Annex 55)

10. As a consequence of the decisions taken at Kasane, the Governments of Botswana and Namibia negotiated the Memorandum of Understanding (MOU) of 23 December 1992 (Annex 57). The first substantive provision in the MOU is Article 2, which provides for the establishment of 'a team of Technical Experts *to determine the boundary between Botswana and Namibia around Kasikili/Sedudu Island in accordance with the Anglo-German Treaty of 1890*' (emphasis supplied).

¹The reference here to the Anglo-German-Portuguese Treaty was due to a misunderstanding. No such instrument exists and the Parties are not divided on this issue.

11. The content of the preamble to the MOU confirms the role of the Anglo-German Agreement. The material paragraphs are as follows:

"WHEREAS a Treaty between Britain and Germany respecting the spheres of influence of the two countries in Africa was signed on 1st July, 1890;

WHEREAS Article III(2) of the said Treaty between Britain and Germany respecting the spheres of influence of the two countries in Africa, signed at Berlin on 1st July 1890, describes the boundary line defining the sphere in which the exercise of influence was reserved to Britain and Germany in the south-west of Africa;

WHEREAS the Territory of the British Bechuanaland Protectorate achieved Independence on 30th September 1966 as the sovereign Republic of Botswana which succeeded to the rights and obligations under the aforementioned Treaty between Britain and Germany;

WHEREAS the Territory of South West Africa achieved Independence on 21st March 1990 as the sovereign Republic of Namibia which succeeded to the rights and obligations under the said Treaty;

WHEREAS a dispute exists relative to the boundary between the Republic of Botswana and the Republic of Namibia as described by Article III(2) of the said Treaty;..."

12. The Memorandum of Understanding defined the terms of reference of the proceedings of the Joint Team of Technical Experts in Article 7 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

²In due course the Joint Team of Experts reported to their Excellencies at a Summit Meeting in Harare that they had failed to reach agreement: see the Communiqué of the Summit Meeting (Annex 59).

13. These provisions make it clear that the task of the Joint Team of Technical Experts is confined to the interpretation and application of the Anglo-German Agreement signed on 1 July 1890. Article 7(1)(a) refers exclusively to the Anglo-German Agreement of 1890 and the (non-existent) Anglo-German-Portuguese Treaty of 1892. Article 7(1)(d) is significant in this regard. This provision mandates the Joint Team of Technical Experts to '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*'. (emphasis supplied).

14. Article 7(1)(f) provides for the taking of oral evidence and includes the proviso 'without prejudice to the 1890 and 1892 Treaties'.

15. Of substantial assistance are the *Minutes of the Meeting on the Terms of Reference of the Joint Team of Experts on the Boundary Between Botswana and Namibia around Kasikili/Sedudu Island, held in Windhoek on 8th December 1992* (Annex 56). These *Minutes* were jointly approved by the delegations. In the *Minutes* it is recorded that the head of the Namibian delegation, Dr. Albert Kawana,

"... pointed out that the Government of South Africa has confirmed that the question of Kasikili was never resolved prior to the Independence of Namibia. *He maintained that the intention of the parties (Britain, Germany and South Africa) to the 1890 Treaty and their subsequent practice before the independence of the two countries are the most important factors to be taken into account in determining the dispute.*" (para. 27). (emphasis supplied).

16. These characterisations of the dispute are reflected in the provisions of the Special Agreement. However, the reported position of the Government of South Africa is of doubtful reliability in the light of the Joint Survey of 1985 (see Chapter VI).

(d) The Character of the Dispute reflected in the Provisions of the Special Agreement

17. The Special Agreement is the natural culmination of the transactions of the year 1992. The first preambular paragraph refers to the Anglo-German Agreement of 1 July 1890. The text of the preamble as a whole refers to no other instrument as being relevant to the determination of the boundary.

18. The request to the Court in Article I is compatible with all that has gone before:

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

19. The provisions of Article I are to be understood in the light of the first two paragraphs of the preamble:

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

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

together with the fourth:

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

20. The preamble of the Special Agreement, the provisions of Article I thereof, and the inter-governmental transactions of 1992 rehearsed above, all point unequivocally to the character of the dispute *as a boundary dispute*.

CHAPTER II

THE GEOGRAPHICAL AND SOCIAL CONTEXT AND THE CHARACTER OF BOTSWANA'S INTEREST

(a) **Description of the Chobe River in the last 50 kilometres (30 miles) prior to its confluence with the Zambezi River**

21. Kasikili/Sedudu Island is a small island about 3.5 Km² (1.5 sq.miles) in area in the Chobe River, located within the area bounded by approximately 25°07' and 25°08'E longitude and 17°47' and 17°05' S.latitude, and is approximately 20km (12.5 miles) from Kazungula where the Chobe joins the Zambezi. The town of Kasane lies on the south bank some 1.5km downstream from Kasikili/Sedudu Island immediately to the north-east, and the river, after continuing a further 2km. in a northerly direction, then flows east, after encountering the rapids (of approximately 9m. drop) at Commissioner's Kop, for some 14 km. (8.75 miles) till it reaches Xahuma Island (Impalera on early maps) and its confluence with the Zambezi at Kazungula.

22. The Chobe River in its lower reaches is confined as to its southern bank by sandy ridges rising to 1000m., along which run cattle tracks and the modern road to Livingstone via the ferry at Kazungula.

23. In the 10km. (6.5 miles) stretch of the river west of Kasikili/Sedudu Island three meander loops are to be observed, all of the characteristic shape of an otter's head facing east; the most western at Kabulabula looping some 4km. north and two more meander loops, one (similar in the size of its area to Kasikili/Sedudu Island) at Serondela 5 km. west of the island. By reason of the sand ridge to the south these meanders are uniformly made by the main stream of the river flowing in a northerly direction, all have backwater lagoons

associated with the outside bends of the meander loops. Kasikili/Sedudu Island is itself formed by such a meander loop originally made round a sand bar and like the other loops the main channel flows to the west and north clockwise, round the island.

24. Immediately south of the island on the south bank is located the Chobe National Park headquarters and from this point up to Kasane and the rapids at Commissioner's Kop a sandy ridge of some 930m. above mean sea level forms the southern bank of the river rising steeply from the water's edge. To the west of the Chobe National Park Headquarters the sandy ridge increases to 1000m. above mean sea level and is separated from the river by a band of swampland about 1km. in width. It is at this point that the sand ridges are cut by a high valley, well wooded, known as Sedudu valley. This valley runs north/south with a stream entering the swampland about 1km. from the Headquarters building.

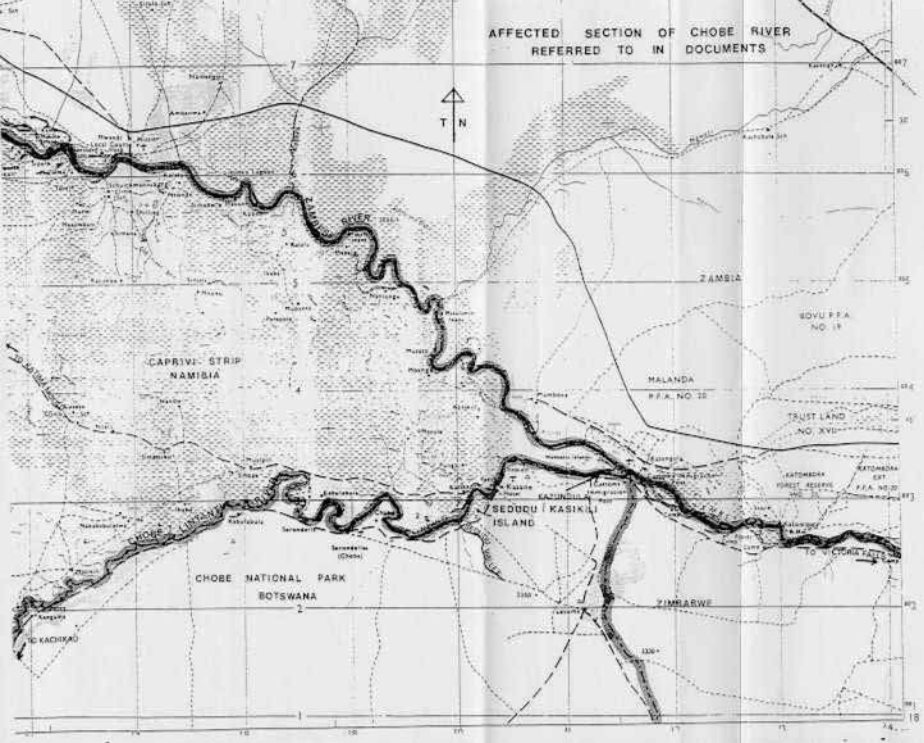
25. The Court is respectfully referred to the map.

(b) Seasonal Flooding in the Flood Plain of which Kasikili/Sedudu Island forms a part

26. The flow along the Chobe (usually known as the Kwando/Linyanti/Chobe) system is normally as a result of the runoff from the catchment area of the system. The catchment is shared with Angola, Botswana, Namibia and Zambia with the larger portion of the area in Angola. The back flow from the Zambezi is another contributor to the flow but this is minimal when the Chobe is in flood from the catchment.

27. The runoff usually follows the pattern of the rainfall regime which occurs over certain seasons of the year. The runoff therefore results in a lateral inflow with a lag of several months. The system has lagoons and flood plains which are filled during the process. The flood plains are of two types.

AFFECTED SECTION OF CHOBE RIVER
REFERRED TO IN DOCUMENTS



The perennial flood plains are always under water and seasonal flood plains only receive water over certain seasons when the water starts to fill. The island is part of the seasonal flood plain which is normally covered with water for a particular season.

28. The highest point on the Kasikili/Sedudu Island is approximately 927m above mean sea level and a gauging station at Kasane has recorded water levels from 922.05m to 927.40m, which means part of the island is subject to seasonal flooding, normally of four months duration: refer to the hydrographs reproduced in Annexes 60 and 61.

29. In this context it is to be emphasised that the availability of the island does not depend exclusively on whether the island is wholly or partially flooded. The surface of the island is very uniform in level and, when there is partial flooding, the whole island becomes intractable swampland.

(c) The Interest of Botswana in Kasikili/Sedudu Island and the Vicinity

30. It will be obvious to the Court that the principal interest of Botswana lies in the stability of its boundaries and the confirmation of the boundary provided for in the Anglo-German Agreement of 1890. In this respect Botswana has a common interest with other African States in the stability and finality of boundary regimes.

31. The clarification of the question of sovereignty is of particular significance in the context of the Chobe district. Trans-border poaching activities and ivory smuggling, involving both Namibian and Zambian territory, have been a problem for at least twenty years. Inevitably, a disputed boundary leads to risks of incidents between units of the respective Defence Forces of Botswana and Namibia, operating on the basis of conflicting maps.

32. The island of Kasikili/Sedudu forms part of the Chobe National Park established in 1967 (Annex 37) and, before that, was part of the Chobe Game Reserve created in 1960 (Annexes 32 and 33). The island is regularly frequented by a variety of wildlife. It is the seasonal home of herds of buffalo. The grazing on the island is excellent and there is a daily elephant migration to the island.

33. It is to be noted that the establishment of the Game Reserve in 1960 did not involve any change in the existing use of the island. The island was not in use for cultivation and this is evidenced by the dossier of aerial photographs (Appendix I of the *Memorial*). This includes photographs for the years 1943, 1962 and 1972.

34. The role of the island as a major wildlife feeding ground readily accessible to safe viewing by tourists has assisted in the development of high volume tourism based upon the Botswana side of the Chobe River.

35. In this context it is necessary to emphasise that the northern and western channel of the Chobe River is the sole channel navigable in relation to the needs of the regional economy. It follows that the boundary between Botswana and Namibia is the centre of the northern and western channel and consequently the title of the Republic of Botswana over Kasikili/Sedudu goes with access to the navigable channel of the Chobe.

36. The southern and eastern channel is substantially impaired by a well-established and persistent growth of Kariba Weed. Moreover, this channel is essentially a backwater lagoon carrying floodwater flowing from the Zambezi part of the year and involving a very low energy flow toward the Zambezi at other times. If this channel were to form the boundary Botswana's access to the main channel of the Chobe as a navigable river would be denied.

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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CHOBE NATIONAL PARK BOUNDARY

BOUNDARY FOLLOWS MIDDLE OF CHOBE RIVER

CHOBE NATIONAL PARK

CHOBE NATIONAL PARK

CHOBE NATIONAL PARK

CHOBE NATIONAL PARK

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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(d) The Relation of the People of the Caprivi to Kasane and its Facilities

37. The geographical and social context of the dispute involves the relation of the people of the neighbouring area of the Caprivi (in Namibia) with the town of Kasane on the Botswana side of the Chobe. The general stability of local conditions, the existence of Basubia families on both sides of the international boundary, the location of the nearest road bridge across the River Chobe to Namibia, Ngoma Bridge, some 60 km (40 miles) to the west and the availability of social amenities and trading stores in Kasane, have conduced to a regular traffic of people and goods between the Caprivi and Kasane.

38. Kasane has a population of approximately seven thousand people. Apart from shops and trading stores, the town has a primary hospital with an outpatients department. There is also a bank and a pharmacy. People from Kasika (in Namibia) enter the territory of Botswana to sell fish and vegetables daily. It is a common occurrence for Caprivians to use health facilities at Kasane, Ngoma, Parakarungu and Satau, all places in the Chobe District. Namibian children form part of the enrolment in the primary school in Kasane. It is well known that, at times of officially declared drought, people from Namibia are the indirect beneficiaries of drought relief.

39. The good relations between the people of the Caprivi and the people of the Chobe District of Botswana are evidenced by the conference held at Katima Mulilo in 1981. This consisted of a meeting between the Executive Committee of the Administration for Caprivians and a delegation from Botswana led by Mr. Gambule, District Commissioner at Kasane. The meeting was chaired by Chief J.M.M. Moraliswani, Chief of the Basubia people living in the Caprivi region. The *Minutes* of the Conference are set forth in Annex 39.

(e) Toponymy

40. For formal purposes within this *Memorial* use has been made of the convention adopted in the Special Agreement to refer to the island involved as 'Kasikili/Sedudu'.

41. The sources available variously describe the island as either 'Kasikili' or 'Sedudu'. The term 'Kasikili' is recognisable as a Basubian locution and in that context the term is not to be associated exclusively with one bank of the Chobe River. Place names of Basubian origin are to be found on both sides of the Chobe River, reflecting the fact that Basubian families live on both sides of the boundary.

42. It is not uncommon for the name 'Sedudu' to be employed in reference to the island. 'Sedudu' may also be a Basubian term. The name is also applied to the valley running up into the plateau to the south of the island. As a matter of general background, it is well known that, in an African context, the same place may have several different names.

CHAPTER III

The Historical Background to the Dispute³

(a) Introduction

43. The peoples of Botswana and Namibia have long been drawn together by common historical circumstance as well as geographic proximity. During the late nineteenth century both territories fell under colonial occupation following brief economic booms based on the export of game products. Throughout much of the twentieth century their peoples have collectively struggled to assert their independent national identities in the face of the expansionist designs of former white ruled South Africa.

³The Government of Botswana has not considered that detailed source references are necessary, given the function of this chapter. For the information of the Court the principal sources relied on are as follows:

1. Livingstone, David, Missionary Travels and Researches in South Africa, London, John Murray, 1857.
2. Schapera, Isaac, The Ethnic Composition of Tswana Tribes, London School of Economics and Political Science, 1952.
3. Robinson, Ronald, Gallagher, John, and Denny, Alice, Africa and the Victorians: The Official Mind of Imperialism, London, Macmillan, 1961.
4. Shamukuni, D.M., "The baSubiya" in Botswana Notes and Records no. 4, Gaborone, Botswana Society, 1972, pp. 161-84.
5. Tlou, Thomas, A History of Ngamiland 1750 to 1906, The Formation of an African State, Gaborone, Macmillan Botswana, 1985.
6. Wilmsen, Edwin N., Land Filled with Flies, a Political Economy of the Kalahari, Chicago & London, University of Chicago Press, 1989.

44. The greater portions of Botswana and Namibia are encompassed by the Kalahari sandveld. Notwithstanding the popular myth of its until recent pristine isolation, for centuries communities living in this vast, semi-arid region have been linked to each other and the outside world through networks of trade and social exchange. Past contact among and between various Khoisan, Shekgalagari, Setswana and Tsiherero speaking communities complemented shared lifestyles based largely on migratory pastoralism, hunting and foraging. For just over a century the colonially defined border between Botswana and Namibia has run roughly North-South. As a result many communities, in particular such Khoisan speakers as the //Ai-khoe (Aukwe, Nharon), Nama, !Xo and Zhu/hoasi (Ju/wasi, Kung), have seen their historic hunting and foraging lands politically divided.

45. Extensive inter-regional contact has also been a long term feature of life in and around the Okavango and Kwando-Linyanti-Chobe river systems of northern Botswana and the adjacent Caprivi Strip. In this unique environment of water and sandy savanna interrelated communities of Hambukushu, !Khu, Shua-Khoe, Bayei and Basubia (also known as Bekuhane) have also been divided by the border, except for the period between 1915 and 1930, when the Caprivi was administratively integrated into the Bechuanaland Protectorate. However, this fact had limited local impact as there were few barriers to the free movement of people, who also continued freely to plant gardens and graze their cattle on opposite sides of the border.

46. The 1885-90 British occupation of Botswana came about largely as a strategic response to the 1884-90 German drive into Namibia. The two countries, however, experienced different decolonization timetables. Botswana peacefully regained its sovereignty from the United Kingdom in 1966. In the same year the Namibians, under the leadership of the South West African People's Organization (SWAPO)

began a protracted war of liberation against South African occupation, whose ultimate success culminated in a United Nations supervised transition to full independence in 1990. In their fight for freedom the Namibians in general, and SWAPO in particular, enjoyed consistent overt support from Botswana's government and people. Political solidarity between the two nations, however, dates back earlier to the mid-nineteenth century when indigenous communities throughout the Kalahari found common ground in their collective efforts to resist and/or adapt to the arrival of European socio-economic and political influence.

(b) Precolonial relations in the Northern Botswana - Caprivi Region

(i) Precolonial contacts

47. Archaeological findings and oral traditions dovetail with early written accounts in showing that the communities of Botswana and Namibia have been in close contact for many centuries. Material evidence, for example, suggests that pastoralism began in southern Africa, c.2000 B.C., among Khoe communities in northern Botswana, from whence it spread into Namibia and other parts of the sub-continent. By the fourth century A.D. iron age technology had been adopted in the region via northern Namibia and north and north eastern Botswana. Material evidence, such as rock paintings and the presence of common patterns of ceramics and metal working, suggests that there was a generally peaceful diffusion of goods and livestock culminating, c1,000 A.D., in the emergence of sophisticated late iron age trade settlements, such as Toutswamogala, and mining complexes, such as at Otjikoto.

48. First hand written evidence of the Kalahari interior begins with the 18th century Dutch journals of Carel Brink, Hendrick Wikar and Willem van Reenan, which

POLITICAL MAP OF SOUTHERN AFRICA



together describe trade routes linking Botswana, Nama and "Samgomamkoa" ("San cattle people") in the southern Kalahari. These and other early European writings and maps also often refer to Batswana as "Briquas" or "Birinas". Among other things the Nama, along with the related Cape Khoikhoi, acquired goats (Nama: "biri") from the Batswana, whom they thus called "goat people".

49. British Captain James Alexander's published account of his pioneering 1836 expedition across the Namib and Kalahari provides additional firsthand detail about the north eastern as well as southeastern Kalahari. He also reports that Batswana regularly crossed the desert to trade with the Nama, exchanging axeheads for cattle. Trans-Kalahari contact increased during the mid-nineteenth century as a result of a boom in exports through Walvis Bay of ivory emanating from northern Botswana and the interior of central Africa. During this period various Batswana, Nama and Ovaherero communities, along with invading groups of mixed Euro-African descent, notably the Rehobother "Basters", and Jonker Afrikaner's "Orlams", were able to establish their local hegemony over neighbouring groups through the acquisition of firearms in exchange for ivory and other game products.

50. During the 1860s a longstanding alliance was forged between Namibia's Ovaherero and the Batawana branch of the Batswana. The Ovaherero ruler Maharero (r.1861-90) and the Batawana ruler Letsholathebe (r.1848-76) concluded a treaty of friendship, sealed through an exchange of cattle, which provided for the right of refuge by members of the two communities in each other's country. This agreement was upheld by Maharero's successor Samuel (Ureani Katjikumua) (r.1890-91) and Sekgoma (r.1891-1906). Ultimately it served as the basis on which large numbers of Ovaherero, including Ovambanderu, were settled in Batawana ruled Ngamiland from the 1890s, more especially during the great 1904-8 war of resistance against the Germans.

51. For many generations the Basubia of northern Botswana and the Caprivi were united as a small polity known as Itenge after its founder ruler. However, it is necessary to recall that since 1800 at the latest this region was ruled either by the Malozi from north of the Zambezi or by the Makololo. In 1876 their last paramount ruler Nkonkwena, also known as Liswani II, fled to the Boteti to escape the Malozi. He settled at Rakops where he accepted the overrule of the Bangwato ruler Khama III. According to Basubia accounts, Khama was generous to Nkonkwena, giving him cattle as well as refuge, in gratitude for the role played by Nkonkwena's father, Liswani I, in rescuing Khama's father, Sekgoma I, from captivity among the Bakololo. To this day descendants of Nkonkwena remain at Rakops in central Botswana.

(ii) The process of colonial partition

52. The coming of colonial rule to Botswana and Namibia involved interconnected episodes in the broader late nineteenth century European scramble for Africa. Although European overrule was formally imposed in both territories in 1884-85, prior to 1890 there was little actual colonial control on the ground.

53. In 1884 the Germans caught the British off guard by proclaiming a Protectorate over the Namib coast south of the Cape Colony's enclave at Walvis Bay. This proclamation was preceded by the negotiation in 1883-84 of a number of dubious concessions from minor coastal rulers by a merchant named Albert Luderitz, who used them as a basis for claiming the territory on behalf of his German Colonial Society, whose legal successor was the German Colonial Company of South West Africa or "DKG" (Deutsche Kolonialgesellschaft für Südwestafrika). By the end of 1884 the German Government's protection of claims negotiated by Luderitz had been extended along Namibia's northern coast from Walvis Bay to just north of Cape Frio (18° 24') and some 20 miles inland. This area was

the nucleus of German South West Africa.

54. The German move into Namibia was audacious, given that between 1876 and 1878 the British Special Commissioner, William Palgrave, had signed treaties with a number of Namibian groups, including Maherero's, Ovaherero, Afrikaner's "Orlams", the Rehobothers and Bondelswarts Nama. In the later years Palgrave's efforts had been rewarded with the proclamation of a British protectorate over a large area of central Namibia then labelled Damaraland, as well as the annexation to the Cape Colony of Walvis Bay. To the east Batswana lands up to the Molopo River were also occupied, while moves were then under way to establish imperial authority over Botswana proper. But, in 1880, a change of government in London, accompanied by military reverses vis-à-vis the Transval Boers and Amazulu, resulted in a temporary British pullback throughout the region. While the protectorate over Damaraland lapsed, Namibia was still regarded by officials within Her Majesty's Colonial Office and Cape Colony administration as lying within Britain's natural sphere of influence.

55. Notwithstanding its past commitments, the British Cabinet decided to accept German territorial claims in South-West Africa. This followed communications between the German Chancellor, Otto von Bismarck, and the British Foreign Secretary, Lord Granville, in which the former linked his government's attitude towards the British occupation of Egypt with Britain's stance toward Germany's Namibian expansion. In renouncing its Namibian claims, the British government rejected calls by both the Cape Colony's Parliament and the Ovaherero that the Namibian interior be placed under British rule.

56. Throughout 1885 German agents sought to expand their country's jurisdiction into the Namibian interior. By the end of the year a number of local rulers, including

Maharero, had signed treaties accepting German protection, though others, such as the Nama leader Hendrick Witbooi, refused to recognise Berlin's authority in any way. With the Anglo-German boundary in the Kalahari still undefined north of the 22nd parallel of south latitude, a German scouting party toured parts of northern Botswana but did not conclude any treaties.

57. In the German-Portuguese Declaration of 30 December 1886 (Annex 2), Article I provided as follows:

"The boundary which separates the German from the Portuguese possessions in South West Africa follows the course of the Kunene River from its mouth to those waterfalls which are formed to the south of Humbe where the Kunene breaks through the Serra Canna; thence it runs along the parallel till it reaches the Kubango; thence it follows the course of this river as far as the place Andara which is left in the sphere in which the exercise of influence is reserved for Germany; thence it runs in a straight line to the east till it reaches the cataracts of Catima on the Zambezi."

58. Germany's expansion of its territorial claims in Namibia before 1890 was not matched by the establishment of an effective administration on the ground. At the time Bismarck's government expected the DKG to take the lead in developing the area. But the undercapitalized DKG only initiated a few small scale projects before 1890. For its part the Imperial Government limited its expenditure between 1885 and 1889 to the posting of a mere three officials, including the Governor Heinrich Ernest Goering. Working out of a mission school's classroom in the Ovaherero village of Otjimbingwe, Goering and his subordinates issued a total of six regulations in their first three years, none of which were enforced. When, in late 1888, Maharero nullified his Protection Treaty the Otjimbingwe office was hastily evacuated. The German

officials then fled to British protection at Walvis Bay, advising other Europeans to do the same.

59. Faced with the options of pulling out of Namibia or deepening their commitment, the Germans decided to establish a military presence. On 24 June 1889, 21 men under the command of Captain Curt von Francois landed at Walvis Bay, followed by another 40 man contingent in January 1890. With the permanent departure of Goering in August 1890, Von Francois became the senior German official in the territory. German authority in the interior was limited to Windhoek, where Von Francois established his headquarters in October 1890.

60. Whilst accepting German expansion in south-west Africa, the British Cabinet decided to respond by the occupation of Bechuanaland. At the end of January 1885 Berlin was informed that Bechuanaland had been placed under British protection. In the Proclamation of 30 September 1885 (Annex 3) declaring Bechuanaland and the Kalahari to be British territory, the northern limit was stated to be the 22nd parallel of south latitude.

(iii) The 1890 Anglo-German Agreement

61. The contemporary boundary between Botswana and Namibia was established by Article III of the 1 July 1890 "Agreement between Great Britain and Germany, respecting Zanzibar, Heligoland and the Spheres of Influence of the two countries in Africa". As suggested by its title the agreement was a comprehensive understanding between the two powers that resolved overlapping claims throughout Africa. The agreement was the product of bilateral diplomatic discussions held in Berlin and London, most especially during May and June of 1890.

62. Germany's desire to uphold its claim to access to the Zambezi River for its South West Africa Protectorate had been communicated to Britain's Ambassador in Berlin, Sir Edward Malet, by Bismarck on 24 November 1888. In a subsequent despatch of 2 September 1889 by the Foreign Secretary, the Marquis of Salisbury, to the German Ambassador, Count Hatzfeldt (Annex 4), it was suggested that Lake Ngami be seen as equally under German and British influence "and that Germany shall be secured free access from that lake to the upper waters of the Zambezi". In this respect it is notable that Lake Ngami, which in the late nineteenth as well as twentieth centuries was often dry, is not linked by any permanent water course with the Zambezi.

63. On 30 September 1889 the German Chargé d'Affaires, Count Leyden, proposed to the Foreign Office that Germany acquire rights to Ngamiland west of 24° east longitude and north of 22° south latitude (Annex 5). But, on 9 November 1889, the British Colonial Office, having consulted with its High Commissioner for South Africa, expressed its strong opposition to recognizing any German claims to Ngamiland (Annex 6). This stand was communicated to Malet in Berlin on 17 February 1890. The following day Malet was further informed that Leyden's proposal was being discussed among other colonial matters between Hatzfeldt and Salisbury. During the second half of 1889 there was also considerable conflict over competing claims between Germany and private Cape Colony interests in the former British Damaraland Protectorate.

64. In expressing its opposition to Germany's Ngamiland claims the Colonial Office wished to uphold the interests of concessionaires already active in the area and, in the process, avoid any partition of the territory under the rule of the Batawana King Moremi. By 1890 rival private British claims to the Ngamiland-Chobe region were being put forward by a number of concessionaires. In September 1889 the British South Africa Company (BSACO) of Cecil Rhodes had been

awarded the right in its royal charter to rule the entire area on Her Majesty's behalf. Subsequently, in June 1890, the Company negotiated the Lochner Concession from the Malozi King Lewanika, which consolidated its grip on Bulozhi (Barotseland). Earlier, in August 1888 and 1889, the Batawana King Moremi had granted mineral rights to the Austral African Exploration and Mining Syndicate and Messrs. J. Stronbom, J.A. Nicholls and R.J. Hicks. These Ngamiland-Chobe concessions were later consolidated, becoming the basis of the British West Charterland Company's commercial claims to the area.

65. On 18 March 1890 German Kaiser Wilhelm II accepted Bismarck's resignation following policy differences on a number of issues including German colonial interests in Africa. Thereafter the new Chancellor, General (later Count) Georg Leo Von Caprivi and his Foreign Minister, Baron Marschall, accelerated diplomatic discussions with Britain over Africa. After a conversation with Marschall, Malet on 3 May 1890 communicated Germany's desire to reach a comprehensive settlement sooner rather than later. Africa was the subject of both Von Caprivi and Marschall's inaugural addresses to the newly elected Reichstag. On 14 June 1890 Malet was informed by the Foreign Secretary that:

"The communications which have been in progress between Her Majesty's Government and that of Germany have now reached a point sufficiently advanced to justify me requesting Sir Percy Anderson to return to Berlin for the purpose of discussing the necessary details with Dr. Krauel. The negotiations which he conducted in Berlin during his previous visit, together with the conversations which we have had with the German Ambassador since his return, have enabled the two Governments to draw with sufficient completeness the outline of an arrangement for the adjustment of the matters that are in dispute between them."

.....

"The frontier between Ngamiland and Damaraland is not definitively drawn, and the details of it must be left to the negotiations of Sir Percy Anderson and Dr. Krauel; but it is agreed that in the latitude of Lake Ngami, and up as far as the 18th degree of S. latitude, the German frontier shall coincide with the 21st degree of E. longitude from Greenwich. The character of this country is very imperfectly known, and the very position of Lake Ngami has been the subject of considerable uncertainty. There is, however, little doubt that the 21st degree of longitude will amply clear it, and will enclose Moremi's country within the British Protectorate."

(Annex 7)

66. The outline of the Anglo-German Agreement was published in a semi-official German Gazette in mid-June 1890, receiving favourable press coverage. The Agreement was subsequently signed in Berlin on 1 July 1890 by Von Caprivi, Krauel, Malet and Anderson. Botswana's frontier with Namibia was defined by Article III of the Agreement (see Chapter I).

67. The Anglo-German Agreement coincided with the formal establishment of British jurisdiction over Northern Botswana through the Order-in-Council of 30 June 1890 (Annex 8), which conferred on Her Majesty's High Commissioner for South Africa, in his capacity as Governor of the Bechuanaland Protectorate, the power to:

"provide for giving effect to any power or jurisdiction which Her Majesty, her heirs or successors, may at any time before or after the date of this Order have within the limits of this Order."

The limits of the Order were:

"The parts of South Africa situate north of British Bechuanaland; west of the South African Republic and of Matabeleland; east of the German Protectorate; and south of the River Zambezi and not within the jurisdiction of any civilized Power."

(Annex 8)

In a subsequent Order in Council of 9 May 1891 (Annex 13) the northern limits of the Bechuanaland Protectorate were specifically declared to include the Chobe. The southern limits of Southern Rhodesia were indicated in an Order in Council dated 20 October 1898 (Annex 14).

(iv) Events from 1890 to 1914

68. During the quarter century following the 1890 Anglo-German border agreement the impact of colonial rule on the peoples of the Bechuanaland Protectorate and German South West Africa differed greatly. In the former the loss of political independence was accompanied by economic underdevelopment and the introduction of elements of racial subordination. But, with most of its land reserved for the indigenous population who continued to be ruled through their traditional rulers, the territory remained at peace. While the stationing of significant numbers of paramilitary colonial police, along with threatened military campaigns to crush resistance to colonial administrative measures in 1892 and 1894, had an intimidating effect, British authority ultimately rested on the emergence of an understanding with the Batswana.

69. By the mid-1890s a political consensus had emerged among leading Batswana that imperial rule from London was preferable to the likely alternative of incorporation into the neighbouring white settler dominated states of South

Africa and/or Southern Rhodesia. This consensus was reflected in the popularly supported 1895 petitions to keep the Protectorate free of British South Africa Company (Rhodesian) control, culminating in the 1895 visit to the United Kingdom by Dikgosi Bathoen, Khama, and Sebele, and the 1908-12 petitions and mass agitation to remain outside the Union of South Africa. Thus, at least until the last decade of the colonial era nationalist sentiment within Botswana was ironically equated with the retention rather than rejection of British rule.

(v) Questions over the status of the Caprivi Strip

70. Before 1914 the status of the Caprivi Strip was unique in that de facto British authority existed in spite of German claims within the region. A token German police presence was established in the Eastern Caprivi in April 1909, but remained under British supervision.

71. British administrative intervention within the Caprivi before 1914 was brought about by circumstance. In 1893 Protectorate police were posted in Ngamiland to restore the status quo after the Batawana ruler Sekgoma conquered the western Caprivi. In the Eastern Caprivi jurisdiction continued to be exercised by the Balози King Lewanika, who appointed headmen to rule over local Mafwe and Basubia. By 1905, however, order among the Basubia living on the north bank of the Chobe river was becoming increasingly compromised by the lawless activities of white bandits, many of whom were renegade British subjects, despite occasional police patrols from the Bechuanaland Protectorate and Rhodesias. In addition to incidents of robbery, shootings, and poaching, a number of these local warlords began to establish farms in the region, forcing locals to work for them. Affidavits about undesirable European activities in the territory, including instances of individuals trying to pass themselves off as German officials, were collected by the British District Commissioner at Sesheke. In October 1908 a permanent Bechuanaland police post was

established at Kazungula under Captain Eason, by which time the establishment of a German police presence across the river was anticipated.

(c) The Administration of British Bechuanaland in the Colonial Period

72. With the outbreak of the First World War in August 1914, the British Government made the occupation of German South West Africa an immediate priority. Except for the Caprivi Strip, this operation was carried out by the new Union of South African Defence Force, which invaded the territory under the overall command of the South Africa Prime Minister and Commander-in-Chief General Louis Botha. Among General Botha's victorious multiracial army of some 50,000 was a contingent of 1,325 Protectorate Batswana. The last German troops in Namibia surrendered on 9 July 1915.

73. The Eastern Caprivi was occupied without resistance by paramilitary police from Southern Rhodesia in September 1914, while the western Caprivi was secured with equal ease by Bechuanaland Protectorate police and local Batswana under the direction of the British Resident Magistrate for Ngamiland. In November 1914 the High Commissioner provisionally placed the entire Caprivi under the jurisdiction of the Resident Commissioner of the Bechuanaland Protectorate, in a move designed to forestall potential postwar Rhodesian claims to the area. Until 31 December 1920 the Strip was ruled as a de facto part of the Bechuanaland Protectorate under martial law.

74. Martial law in the Caprivi was ended by the Governor General's Proclamation No. 12 of 1922 and High Commissioner's Proclamation No. 23 of 1922 (Annex 19), which, retroactively from 1 January 1921, placed the Strip under civilian Protectorate authority. Also from 1 January 1921, the whole of South West Africa formally passed under

South African control as a League of Nations Mandate. A notable feature of the South African regime was its unwillingness to allow the general repatriation of Ovaherero and Nama refugees living in the Bechuanaland Protectorate. Until the end of 1929 the Western Caprivi was administered from Maun, while the Eastern Caprivi was administered from Kazungula-Kasane.

75. Caprivi residents, however, were exempted from the Protectorate's Hut Tax during the 1920s. As a result many Basubia shifted their residences from the south to the north bank of the Linyanti-Chobe river, while continuing to plough, graze and hunt inside Bechuanaland. Such activities were generally met with official indifference. An exception occurred in 1924 when the Deputy Magistrate at Kasane, Captain Neale, is reported to have given verbal permission to Kasika residents to plough on Kasikili/Sedudu Island. This intervention apparently occurred due to the fact that Government oxen were already grazing there.

76. The Caprivi was administratively reintegrated into South African administered South West Africa through the Governor-General's Proclamation no. 196 of 1929 (Annex 20) and the High Commissioner's Caprivi Zipfel Proclamation no. 27 of 1930 (Annex 21). This development came about in the context of renewed pressure from Pretoria for the incorporation of the Bechuanaland Protectorate itself, into the Union of South Africa. The new arrangement soon proved inconvenient. In 1937 the authorities in Windhoek asked to be relieved of the burden of administering the Eastern Caprivi. Thus, in August 1939, the territory passed under the direct administration of the Native Affairs Department in Pretoria, which maintained its administrative control until 1980. A Magistrate for Eastern Caprivi was posted at Katima Mulilo. To assist him provision was made by the Governor General's Proclamation no. 38 of 1940, for Bechuanaland Protectorate Police officers to patrol the Eastern Caprivi as "Peace officers".



CHAPTER IV

THE RELATIONS OF BOTSWANA WITH NEIGHBOURING STATES SINCE INDEPENDENCE IN 1966

(a) The Geo-Politics of Botswana at Independence

77. On attaining independence on 30 September 1966, Botswana, besides being a land-locked country, found herself almost completely surrounded by politically hostile neighbours. There was South Africa to the south and to the east, pursuing a policy of apartheid - a form of racism which enforced minority white supremacy over the majority black population; South-West Africa (later Namibia) to the west, which was administered by South Africa, and Rhodesia to the north, in which minority settler-European descendants ruled over a majority indigenous black population. The situation can readily be appreciated by reference to the accompanying map; the reader will recall that, at the relevant time, Zimbabwe was ruled by the regime of Mr. Ian Smith, then designated as Rhodesia.

78. Southern Rhodesia, a British colony, had declared itself independent of Britain (as Rhodesia) on 11 November 1965. Britain had, as a result, sought and got United Nations-backed economic sanctions. Britain had in fact placed a lonely battle-ship along the eastern coast of Mozambique, a Portuguese colony, in order to enforce economic sanctions against Rhodesia. The United Nations sanctions initiated by Britain were intended to end the rebellion by Rhodesia, which was commonly known as the Unilateral Declaration of Independence, or UDI. The efforts of the international community to enforce economic sanctions against Rhodesia were in vain, as the most important country neighbouring Rhodesia, namely South Africa, did not participate in the UN-backed sanctions. On the contrary, South Africa became the

main trading partner of Rhodesia. South Africa was also the transit country of more sophisticated goods from dubious sources overseas destined for Rhodesia. Zambia, a relatively weak and underdeveloped country to the north of Rhodesia, could only watch helplessly.

(b) The Impact of Botswana's Independence on Neighbouring States

79. South Africa, on the other hand, had been excluded from the (British) Commonwealth of Nations, which comprised Britain and all her former colonies, straddling all the five continents. South Africa was progressively becoming a pariah state because of her apartheid policy and her decision to support the Unilateral Declaration of Independence (UDI), by Rhodesia. Both South Africa and Rhodesia were condemned by the rest of the world as outcasts; and were in consequence therefore bound to cooperate in all spheres of human endeavour. The minority regimes of Rhodesia and South Africa had no legitimacy to govern, as they had been elected by minority white electorates. The majority black populations could only watch from the sidelines.

80. The only friendly neighbouring state was Zambia to the north with which Botswana shared a minimal boundary. Despite her military and economic weakness vis-à-vis Rhodesia and South Africa, Zambia accorded Botswana all the necessary political and diplomatic support. Angola and Mozambique were still Portuguese colonies, whilst Lesotho and Swaziland were also emerging countries but completely surrounded by South Africa and economically dependent on her.

81. The birth of Botswana, as a newly sovereign and independent country, was not a welcome development to the regimes in Rhodesia, South Africa and the South African-administered territory of South West Africa. These minority regimes viewed the independence of Botswana as a new threat

to their political stability which was under constant challenge from their respective oppressed majority populations. In fact, the oppressed black population had resorted to the prosecution of the armed struggle, supported by the Organisation of African Unity, the Scandinavian countries and organised groups, such as churches and non-governmental organisations in Europe and the United States. All the liberation movements of Southern Africa, namely the African National Congress (ANC), Pan-Africanist Congress (PAC) and South West Africa People's Organisation (SWAPO) had their headquarters located in Lusaka, Zambia.

82. The independence of Botswana was perceived as an inspiration to the black majority populations of Rhodesia, South Africa and South-West Africa to attain their own independence and self-determination. More importantly, if Botswana could become a successful non-racial democracy, there was no reason why blacks in the neighbouring countries could not assume responsibility in government. The white oligarchies in Rhodesia and South Africa were promoting the fallacy that blacks could not govern responsibly. Botswana's successful policy of a non-racial democracy, surrounded by minority racist regimes, would thus serve as an example to be emulated by the oppressed majority populations, and a rude awakening to the white oligarchies. Rhodesia and South Africa could not tolerate a successful black majority government on their door-step, as it would whet the appetite of their own black populations for majority rule. A successful non-racial Botswana would also belie the propaganda that black people could not hold the reins of government.

(c) The Economic Dependence on South Africa

83. After a period of more than 70 years as a British Protectorate, Botswana had gained independence as a poor undeveloped country bereft of any natural resources. It was an expanse of territory the size of France, with half-a-million

inhabitants. When the country asked for independence from Britain, observers concluded that the inhabitants were either foolhardy or simply naive. There was only one government-built secondary school, supplemented by a few missionary-built and tribally-built schools. There were less than fifty kilometres of all-weather roads and few basic medical facilities. There were no factories or any sources of employment. Botswana was completely dependent on South Africa for all her manufactured goods and for employment opportunities, particularly in the gold mines around Johannesburg. Any serious medical cases had to be attended to either in South Africa to the south or in Rhodesia to the north.

84. It is no exaggeration to state that southern Botswana was an economic appendage of South Africa whilst northern Botswana was an economic dependency of Rhodesia. Thus Botswana at independence was not only politically and militarily weaker than her neighbours; she was also economically dependent on them. In terms of United Nations economic parlance, Botswana was a "least developed country". The very railway line that transited Botswana from South Africa to Rhodesia was owned by Rhodesia. This railway had been built by the British South Africa Company of Cecil John Rhodes, the founder of Rhodesia, who dreamed of joining Cape Town in South Africa, and Cairo in Egypt by a railway line. Botswana, a newly independent African country, that wished to serve as a good example of a non-racial democracy in the midst of minority racist regimes, was virtually a hostage. The countries neighbouring Botswana were not friendly to her, as their forms of government were political anathemas.

(d) Botswana's Political and Economic Relations with Neighbouring States

85. The set of circumstances that prevailed at the time of independence dictated Botswana's foreign policy based on pragmatism and national survival. Botswana's foreign policy

posture had to take into account her geopolitical situation of being landlocked and almost completely surrounded by minority-ruled countries on which she was totally dependent economically. Thus, at independence, Botswana did not enter into any diplomatic relations with South Africa, but maintained trade and commercial links, and intergovernmental technical co-operation, with that country.

86. The other African countries which had imposed economic sanctions on both South Africa and Rhodesia readily understood Botswana's predicament and exempted her from following suit. It would have been an act of suicide for Botswana to attempt to cut off her trade, commercial and communications links with South Africa and Rhodesia. Even if Botswana had tried to impose selective sanctions on her neighbours, it is almost certain that they would have retaliated with full economic sanctions so as to strangle her to death. So, although political relations with her neighbours were deliberately avoided, economic relations had to be maintained out of economic necessity.

87. As a matter of principle, Botswana did not accept any official aid or investment from Rhodesia and South Africa. Private investment, particularly by multi-national companies based in South Africa was welcome, such as investment in mining by the Anglo-American Company. As expected, the minority regimes of Rhodesia and South Africa imposed policies and regulations that discouraged any investment by multi-national companies in Botswana. It would not have been in their interest to have a black majority-ruled country flourish on their door-step.

88. The Anglo-American company which later invested in diamond mining in Botswana gave very little in return until the terms of this investment were revised radically, in 1975, when Botswana increased her shareholding from 15% to 50%. The South African currency was legal tender in

Botswana until 1976 when the country introduced its own currency. The United States and the countries of Western Europe did everything possible to help Botswana survive by providing her with economic and technical assistance. They could not, however, offer any substitute for the cheap and readily available manufactured goods and foods from South Africa and Rhodesia.

89. By asserting its independence, Botswana finally closed the door to the long-standing threat of incorporation into South Africa which was contained in the 1910 Act of Union of South Africa. This clause had left it open for the inhabitants of Botswana to join South Africa. Although, properly interpreted, the clause meant that the will of the inhabitants had to be expressed freely, it is well-known that the Boers in the Transvaal and the settlers in the Cape have at different times tried to coerce Botswana into accepting incorporation.

90. The independence of Botswana in 1966 thus closed the door to the possible option of incorporation into the Union of South Africa, which had become a minority-ruled republic in 1961. South Africa was pursuing the policy of apartheid in which the majority black population had no say in the political and economic life of their otherwise independent and sovereign county. Botswana took to condemning the moral bankruptcy of apartheid as a policy that denied the majority people their human rights, particularly political and economic rights. The black people were not allowed to participate in the politics of their country and could not perform certain jobs which were reserved for white people. Although South Africa was irritated by Botswana's condemnation of the apartheid policy, she could not take any punitive action against her as Botswana was not participating in the economic sanctions imposed by African countries. Besides, South Africa did not wish to deny herself a market for her goods in a world that was increasingly hostile to her. So, Botswana remained an irritant to be tolerated within the Customs Union of 1910, which also

included Lesotho and Swaziland, besides South Africa itself.

(e) The Influx of Refugees to Botswana from South Africa and Rhodesia

91. On assuming independence, Botswana signed the 1951 Geneva Convention Relating to the Status of Refugees. Even before Botswana's independence, refugees from South Africa had already settled in or passed through to safer independent African countries to the north. In order to circumvent the logical role of Botswana as a country of first asylum for refugees from the neighbouring countries, South Africa, in particular, decided not to give any effect, either direct or indirect, to the 1951 Geneva Convention. Those South Africans who sought and were granted refugee status in Botswana were regarded as enemies who simply used Botswana as a springboard from which to attack South Africa. Botswana protested vigorously that only refugees were allowed to settle, and that those who pursued the armed struggle to liberate South Africa by force of arms were resettled in other countries, such as Zambia and Tanzania. If freedom fighters were found bearing arms in Botswana territory, they were arrested and charged with illegal possession of arms. The laws of Botswana forbade anyone to carry arms without a permit. As far as South Africa was concerned, and to some extent also Rhodesia, refugees in Botswana were potential enemies.

92. In order to safeguard her security, South Africa operated a clandestine security and surveillance network within Botswana, even amongst refugees themselves. Some security agents from South Africa simply infiltrated the refugee population, posing as birds of the same feather. At the height of the refugee crisis in Southern Africa, Botswana hosted no less than 30,000 refugees, when her own people numbered only half-a-million. In recognition of her services to the refugee cause, the then President of Botswana, the late Sir Seretse Khama, was awarded the Nansen Medal in 1978. Throughout

the turbulent years of Southern Africa, Botswana continued to host refugees from South Africa, Rhodesia, South West Africa, Angola, Mozambique and from other distant countries to the north. The international community and non-governmental organisations in Europe and America supported Botswana financially and morally in her chosen cause to host and assist refugees. It was inevitable that Botswana's decision to host refugees from South Africa would precipitate a confrontation with South Africa and Rhodesia.

(f) The Confrontation with South Africa

93. On attaining independence in 1966, Botswana adopted a policy of non-aggression against all the neighbouring states, including South Africa. This policy rested on the principle of international law that a state may not permit on its territory activities for the purpose of carrying out acts of violence on the territory of another state. Prior to, and after independence, Botswana pursued and administered this policy to the letter. In the case of refugees admitted into Botswana under the 1951 Geneva Convention Relating to the Status of Refugees, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and under Botswana's own Refugees (Recognition and Control) Act, offenders were charged, prosecuted and sentenced or resettled in other African countries to the north, but never returned to their countries of origin. To the extent that South Africa was not a signatory to the 1951 Geneva Convention, she tried in vain to force Botswana to return refugees to South Africa. When this strategy failed, South African agents simply abducted some refugees from Botswana or sent them parcel bombs, which exploded and killed them as they opened mail seemingly sent by relatives at home. On 2 February 1974, Onkgopotse Abram Tiro, a South African refugee school teacher at Saint Joseph's College, was killed by a parcel bomb. Again on 14 May 1985 another South African refugee was killed by a powerful bomb explosion at Flat No. 2602 in Gaborone.

(g) The Frontline States and the Southern African Development Community (SADC)

94. It will be noted that whilst Zambia served as the headquarters for the liberation movements of Southern Africa, Tanzania provided training bases. The advantage of Tanzania was her safe distance from possible military attacks by South Africa. Botswana, Tanzania and Zambia held informal consultations throughout the mid-1970s in an effort to promote a negotiated settlement of the Rhodesian constitutional problem. These informal consultations crystallised into what became known as the Frontline States forum. The agenda of the Frontline States was simply to promote the independence and sovereignty of those territories that were still under colonialism, such as Angola, Mozambique, Namibia and Rhodesia, as well as to eradicate apartheid in South Africa. Botswana, Tanzania and Zambia were later joined by Angola and Mozambique when these two Portuguese territories achieved independence in 1975.

95. South Africa was apprehensive of the activities of the Frontline States. Botswana became increasingly vocal at the OAU and UN advocating the independence of Namibia and Rhodesia, as well as the eradication of apartheid in South Africa. By 1979, the Frontline States, then numbering six, decided to set up an economic arm to promote the economic liberation of Southern Africa. In April 1980, in Lusaka, Zambia, the six Frontline States of Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe were joined by Malawi, Lesotho and Swaziland in establishing a formal organisation called the Southern African Development Community, or SADC for short. Botswana became its first chairman and led the organisation till August, 1996, when South Africa was elected as the new Chairman. The twin aims of SADC were to reduce the economic dependence of Southern African states on South Africa and to co-ordinate economic development amongst the member states.

96. Again, Botswana's role as leader of an organisation which sought to reduce the economic dependence of Southern African states on South Africa did not go down well with the latter. Southern African states had reached the conclusion that political independence without the concomitant economic independence was hollow. Botswana sought and got the support of the European countries and institutions, as co-operating partners, for the objectives of SADC. Through SADC activities and its Programme of Action, roads, railways, port facilities and telecommunications were rehabilitated to inter-connect all the Southern African states. The efforts of the frontline states to promote political liberation and the efforts of SADC to promote economic liberation, were being rewarded. South Africa was not amused.

(h) Further South African Pressure on the Frontline States

97. In April 1984 South Africa had pressured Mozambique into signing a non-aggression pact at a border town called Nkomati, from which the Accord took its name. In effect, the pact forbade Mozambique from giving any form of assistance to the South African liberation movements and, in return, South Africa would terminate support for the Mozambican rebel movement called RENAMO. South Africa then pressured Botswana to sign a similar non-aggression pact and, at the same time, revealed that a similar pact had been signed secretly with the Kingdom of Swaziland in 1982. The strategy was to clinch a series of non-aggression pacts along the northern border in order to deny the liberation movements access to the territory of South Africa. As could be expected, Botswana refused to sign any pact on the ground that there were no guerilla bases in her territory, and that she had no intention or the capacity to threaten the security of South Africa.

(i) Acts of Aggression by South Africa against Botswana

98. Like a wounded buffalo, South Africa began to pursue what she herself described as a policy of total onslaught against her neighbours. The policy was predicated on the premise that all the neighbouring states had combined against her through the activities of the Frontline States and SADC, and were harbouring guerillas to attack South Africa, which was already enduring economic sanctions and an arms embargo imposed by the international community. South Africa began to launch military attacks against the neighbouring states as well as to destroy their economic infrastructure. The military attacks were justified as pre-emptive strikes against guerillas coming from the neighbouring states. The destruction of economic infrastructure, such as bridges, was clearly meant to perpetuate the economic dependence of Southern African states on South Africa.

99. In 1985, South Africa resorted to open acts of aggression as an instrument of policy to force Botswana to agree to enter into a non-aggression pact. From time to time, car bombs exploded in the city of Gaborone, targeted on South African refugees. On 14 June 1985 a lightning military attack on the capital city left twelve people, including a six-year old child, killed. On 19 May 1986 helicopters of the South African Airforce fired at the Botswana Defence Force Barracks in Gaborone, to distract the attention of the Defence Force from a simultaneous attack on a civilian housing complex in the neighbourhood. A civilian was killed and three others were injured. On 8 April, 1987, three Botswana nationals were killed in their sleep when a powerful bomb detonated and destroyed a vehicle parked nearby. It is significant to note that these acts of unprovoked aggression were perpetuated without any prior complaint or warning through diplomatic channels, or otherwise, to indicate any perceived threat to the security of South Africa.

(j) UN Security Council Resolution 568 (1985)

100. The United Nations Security Council Resolution 568 (1985) (Annex 49) strongly condemned the unprovoked and unwarranted military attack on the capital of Botswana by South Africa as an act of aggression against that country, and a gross violation of its territorial integrity and national sovereignty. It further condemned all acts of aggression, provocation and harassment, including murder, blackmail, kidnapping and destruction of property committed by the racist regime of South Africa against Botswana. The Resolution also demanded full and adequate compensation by South Africa to Botswana for the damage to life and property resulting from such acts of aggression. It also reaffirmed Botswana's right to receive and give sanctuary to the victims of apartheid in accordance with its traditional practice, humanitarian principles and international obligations. Needless to say that South Africa chose to disregard the Resolution.

101. Confrontation between Botswana and South Africa endured till 1990 when the racist regime took concrete steps to negotiate a new constitutional dispensation. The regime allowed political activity and released Nelson Mandela from prison after 27 years of incarceration. South African acts of aggression against Botswana were put on hold from 1988 when South Africa began to withdraw its troops from southern Angola, which it had occupied since 1975/76. The process of constitutional negotiations in South Africa, begun in earnest in 1990, was clearly incompatible with continued acts of aggression against Botswana and other neighbouring states.

(k) Developments in Namibia

102. Namibia was a German colony till the end of the First World War when it became a League of Nations mandated territory administered by Britain. Britain in turn delegated that responsibility to its own colony, South Africa.

With the demise of the League of Nations, South Africa systematically treated Namibia as its fifth province and resisted the efforts of the successor authority, namely the United Nations, to re-assert its mandate over Namibia. As early as 1903-4, the inhabitants of Namibia had been fleeing into Botswana to seek refuge from colonial persecution at home. Another influx occurred in 1913, and became a constant feature during the war of liberation, which raged from 1966 to 1990, when the territory finally gained independence.

103. Thus, when Botswana gained independence, in 1966, a large number of refugees from Namibia had already been integrated as citizens. In 1967, the United Nations established the Council for Namibia as the legal authority for the administration of the territory. The Council remained a de jure authority whilst South Africa continued to exercise de facto authority until independence, in 1990. Botswana spared no efforts to press for the independence of Namibia whilst hosting quite a sizeable population of refugees and settlers from that territory. Naturally, Botswana became a member of the UN Council for Namibia.

104. In 1978, Botswana, together with the other Frontline States, negotiated UN Resolution 435(1978) (Annex 38) which established the independence plan for Namibia. Meanwhile, South Africa had been trying without success to promote an internal settlement with its client parties, excluding SWAPO. The war in southern Angola became unpopular in South Africa, as the casualties mounted. The implementation of UN Security Council Resolution 435 was triggered off only in 1988 when a three-cornered Agreement was signed in New York. The Agreement called for the withdrawal of South African troops from Angola, the departure of Cuban troops from Angola, and for the implementation of Resolution 435.

105. The implementation of Resolution 435 was not without incident. For some inexplicable reasons, SWAPO poured troops into Namibia from Angola on the eve of the implementation of the UN Resolution in April 1989, with heavy losses. The UN Secretary-General's Special Representative, Marti Ahtisaari, the current President of Finland, clearly needed assistance to tackle the South African Administrator-General, with whom he was expected to co-operate in implementing the UN Resolution. Botswana's Permanent Representative to the United Nations was appointed Deputy Special Representative in Namibia. The Resolution was then implemented successfully and launched Namibia as a sovereign and independent country on 21 March 1990. Throughout the implementation of Resolution 435 (1978) (Annex 38), Botswana, together with the six other Frontline States, had maintained Observer Missions in Namibia, in order to monitor and assist the process of decolonisation.

106. Meanwhile, the UN had decreed that in the run-up to elections in Namibia all political parties should be treated equally without any partiality. But it was an open secret that South Africa channelled millions of dollars for election campaigns by internal client parties, to the exclusion of SWAPO. The OAU decided at its Summit in Addis Ababa, in 1989, to set up an OAU Fund for Namibia for the purpose of assisting SWAPO during the election campaign. There is no record of the Fund being honoured, as individual OAU states preferred to assist SWAPO directly. Botswana was no exception. Botswana delivered twenty 4-wheel drive vehicles which could traverse the desert territory without difficulty. SWAPO won the elections handsomely, and expressed gratitude to Botswana. The President of Botswana became the first Head of State ever to pay a state visit to Namibia and did so only four months after its independence. A general pattern of peaceful relations and co-operation between Botswana and Namibia was born.

(l) The General Pattern of Peaceful Relations

107. Throughout the years of Namibia's occupation by South Africa, Botswana was a strong advocate of that territory's independence and self-determination. Botswana also provided refuge and succour to those fleeing persecution in the territory. During the visit of the President of Botswana to Namibia in July 1990, three co-operation agreements were signed. These related to co-operation in defence and security issues, including anti-poaching; economic co-operation and cultural co-operation. Botswana and Namibia have managed to forge close links between their respective armed forces, police and immigration authorities. Namibians were attached to Government Departments for on-the-job training in Botswana and there is still a stream of visiting Ministers and officials from Namibia, to this day, to learn from Botswana's experience in development. The two countries continue to co-operate within the Southern African Development Community, which Botswana led as Chairman from April 1980 to August 1996.

108. The President of Namibia also paid a return visit to Botswana in September 1990, during which Botswana of Namibian origin, who wished to return to their ancestral country, were allowed to do so. The voluntary return of the descendants of Namibian refugees was to be conducted en masse, which involved a waiver of the rules of emigration and immigration. This was indeed a true reflection of the good relations between the two countries. The voluntary repatriation was carried out from 1993 until completion in 1996. The exercise included the movement of people who wanted to return to Namibia, together with their livestock. Under normal circumstances, such an exercise would not have been allowed, as it represented the depletion of another country's resources. It was a true expression of mutual goodwill.

(m) The Boundary Dispute

109. Botswana and Namibia found themselves at loggerheads in March 1992 when a boundary dispute was recognised to exist around Kasikili/Sedudu Island along the Chobe River. The boundary between Botswana and Namibia is based on the Anglo-German Agreement of 1890 which defines the boundary as the centre of the main channel of the River. Again, as two friendly countries, Botswana and Namibia have decided to resolve the dispute by peaceful means and have referred the matter to this Court.

CHAPTER V

The Interpretation of the Anglo-German Agreement of 1890

(a) The Agreement of 1890 Constitutes the Applicable Law

110. In Chapter 1 of the present *Memorial* the nature of the dispute was examined and the conclusion reached was that the dispute concerns the interpretation and application of Article III(2) of the Anglo-German Agreement of 1890. Thus, in the provisions of Article II of the Special Agreement, the Court is asked to determine the boundary 'on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law.'

111. The relevance of the Anglo-German Agreement is also confirmed by the Kasane Communique of 24 May 1992. The relevant paragraphs are as follows:

"Their Excellencies President Sam Nujoma of Namibia and Sir Ketumile Masire of Botswana met in Kasane, on 24th May, 1992 in the presence of His Excellency President Robert G. Mugabe of Zimbabwe to discuss the boundary between Botswana and Namibia around Sedudu/Kasikili Island. After the arrival of President Mugabe and President Nujoma, the three Presidents went on a tour of the Chobe River and viewed the Sedudu/Kasikili Island, *after which they examined various documents defining the boundary around the Island*. These included the 1890 Anglo-German Treaty, the 1892 Anglo-German-Portuguese Treaty⁴ and Maps. *The two treaties define the Botswana-Namibia*

⁴The reference here to the Anglo-German-Portuguese Treaty was due to a misunderstanding.

boundary along the Chobe River as the middle of the main channel of that river."

"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 team of technical experts shall be final and binding on Botswana and Namibia." (emphasis supplied).

(Annex 55)

112. It must follow that the provisions of the Anglo-German Agreement constitute the applicable law for the purposes of the determination of the present dispute. The additional reference to 'the rules and principles of international law' is pleonastic, in light of the fact that an international agreement is normally interpreted taking into account 'any relevant rules of international law applicable in the relations between the parties' (Vienna Convention on the Law of Treaties, Article 31(3)(c)).

(b) The Interpretation of the Anglo-German Agreement of 1890

(i) The Text

113. The text of the Anglo-German Agreement is reproduced in the annexes from two official sources, one German and one British. The German source is *Die deutsche Kolonial-Gesetzgebung*, Part 1 (Berlin, 1892) (see Annex 11). The British source is the *British and Foreign State Papers*, Vol. 82 (see Annex 12). The text appears also in Hertslet, *The Map*

of Africa by Treaty, 3rd ed., 1909, Vol. III, p.899 (the English text). The Treaty entered into force immediately upon signature: see *An Index of British Treaties 1101-1968*, Parry and Hopkins, London, H.M.S.O., 1970, Vol. 2, p.428.

114. The material part of the text (in English) is as follows:-

"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 Zambezi*, where it terminates."

(emphasis supplied)

115. The German text employs the term *Thalweg* as the counterpart to 'the main channel' in the English text. In due course the connection between these terms and the purpose of such a provision (to permit access by both riparian States to the navigable channel) will be elaborated.

(ii) The Position of Botswana

116. The position of the Government of Botswana is that 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.

117. The alternative position adopted by the Government of Botswana is 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.

(iii) Interpretation in accordance with the object and purpose of the Agreement of 1890

118. The Vienna Convention on the Law of Treaties provides as follows in Article 31:-

"General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

119. As the Report of the International Law Commission to the General Assembly indicated, the successive paragraphs were not to be taken as laying down a hierarchical order for the application of the various elements of interpretation in the article (*Yearbook of the International Law Commission*, 1966, II, pp.219-20 (paragraph 8)). Moreover, 'the Commission desired to emphasise that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.' (ibid).

120. Neither Botswana nor Namibia is a party to the Vienna Convention on the Law of Treaties. However, it is generally accepted that the principles set forth in Articles 31 and 32 of the Convention are declaratory of general international law. This view has been adopted by the

jurisprudence of international tribunals.

121. In the *Case Concerning the Arbitral Award* of 31 July 1989 the Court referred to certain principles of interpretation and then observed:

"These principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point."

(I.C.J. Reports, 1991, p.53 at pp.69-70 (para. 48)).

122. In the *ELSI* Case Judge Schwebel approached the question of interpretation on the following premises:

"In its pleadings, Italy relied upon the rules of treaty interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties, as reflective of customary international law, a position which was not questioned by the United States. Article 31 provides that, "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 purposes." It provides that "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, ... its preamble ..." It specifies that there shall be taken into account, together with the context, "any subsequent agreement between the parties, regarding the interpretation of the treaty or the application of its provisions". And it provides in Article 32 that:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, 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."

In the current case, the Parties attached radically different interpretations to the provisions of the Treaty and its Supplementary Agreement which were at issue between them. It is undeniable that, when their conflicting arguments are matched together, the meaning of some of the Treaty's provisions are ambiguous or obscure; indeed, each of the Parties maintained that the opposing interpretation led to results which, if not manifestly absurd, were unreasonable. Thus, according to the Vienna Convention, this is a case in which recourse to the preparatory work and circumstances of the Treaty's conclusions was eminently in order."

(Dissenting Opinion of Judge Schwebel, *Case Concerning Electronica Sicula S.p.A (ELSI)*, I.C.J. Reports, 1989, p.97)

123. Other international tribunals have adopted the same view of Articles 31 and 32, as in the following examples:

- (a) The Inter-American Court of Human Rights in *Restrictions of the Death Penalty*, Advisory Opinion of 8 September 1993, *International Law Reports*, Vol. 70, p.449 at pp.465-6 (paras. 48-49).
- (b) The European Court of Human Rights in *Lithgow and Others*, *International Law Reports*, Vol. 75, p.439 at p.483 (para. 114).

- (c) The Iran-United States Claims Tribunal in *Case No. A/18; International Law Reports Vol. 75*, p.176 at pp.187-8.

124. In any event the principle adopted in paragraph 3(c) of Article 31, that account should be taken of 'any relevant rules of international law applicable in the relations between the parties', has been generally recognised as a principle of general international law both before and after the conclusion of the Vienna Convention.

125. In his examination of the problems of treaty interpretation Judge Hudson states the following (under the rubric 'legal background'):

"Any international instrument must be interpreted in the light of the prevailing international law, by which the parties must be taken to have charted their course."

(*The Permanent Court of International Justice 1920-1942*, New York, 1943, p.655 (para. 573)).

126. The Judgment of the International Court in the *Right of Passage Case (Preliminary Objections)* contains the following affirmation: 'It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it'. (I.C.J. Reports, 1957, p.125 at p.142).

127. The passage just quoted was prefigured by one of the 'rules of interpretation' set forth in the eighth edition of Oppenheim, edited by Sir Hersch Lauterpacht. The third rule is as follows:

"(3) It is taken for granted that the contracting parties intend something reasonable and something not inconsistent

with generally recognised principles of International Law, nor with previous treaty obligations towards third States. If, therefore, the meaning of a provision is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable, the consistent meaning to the meaning inconsistent with generally recognised principles of International Law and with previous treaty obligations towards third States."

(*Oppenheim's International Law*, Vol. 1 *Peace*, 8th ed., London, 1955, pp.952-3).

128. The same principle is reformulated by Sir Hersch in *The Development of International Law by the International Court of Justice* (London, 1958):-

"In fact, it would be a mistake to assume that the function of interpretation of treaties, consisting as it does in ascertaining what was the intention of the parties, is a process divorced from the application and development of customary international law. The eliciting of the intention of the parties is not normally a task which can be performed exclusively by means of logical or grammatical interpretation. As a rule, the established canons of construction - which themselves partake of the nature of customary law - must be supplemented by the principle that when the intention of the parties is not clear it must be assumed that they intended a result which is in conformity with general international law. Undoubtedly, conventional international law may derogate from customary international law, but it is no less true that the former must be interpreted by reference to international custom. In many a case of treaty interpretation the effect of the treaty will depend on our view as to the position of customary international law on the question."

(pp.27-28)

129. The outcome is that there is a presumption that the parties to an agreement intended a result which was in conformity with general international law. In relation to the relevant provisions of the 1890 Agreement (Article III (2)) *the pertinent principles of general international law are those relating to the determination of boundaries in navigable waterways*. But before this aspect of the question is pursued, it is necessary to address the question: what was the object and purpose of the Agreement of 1890 overall?

130. The object and purpose was in essence a partition of several important regions of Africa into spheres of influence of Germany and Great Britain respectively, with some territorial 'compensation' for Germany elsewhere.

131. The relevant diplomatic documents also indicate a connected purpose, which was to maintain and facilitate access to the principal lakes and rivers of the African continent. This significant aspect of the exercise in territorial division and boundary-making consists of two distinct but related elements. The first of these consisted in the general interest which the European powers had in 'free navigation' in major African rivers. This interest was manifested in the General Act of the Conference of Berlin, signed on 26 February 1885 (Annex 1). This instrument included an Act of Navigation for the Congo and an Act of Navigation for the Niger. The importance of freedom of navigation to the European powers was evident in the proceedings of the conference and the theme was contained in Bismarck's opening speech: see Geoffrey de Courcel, in Förster, Mommsen and Robinson (editors), *Bismarck, Europe, and Africa*, The German Historical Institute London, Oxford University Press, 1988, pp.252-4.

132. The interest in access to African rivers and lakes is evident in the contents of the collections of documents which constitute the main elements in the *travaux préparatoires* of the Anglo-German Agreement of 1890. The principal collection is

the *Correspondence respecting the Negotiations between Great Britain and Germany relating to Africa, April to December 1890* (set forth in *extenso* in Annex 9).

133. In this collection of correspondence relating to the negotiations of the Anglo-German Agreement there are many references to the issue of access to and free navigation on the major African rivers and lakes. One particular theme was access to Lake Ngami: see the *Correspondence* (Annex 9) at pages 2 (No. 2), 18 (Inclosure 1 in No. 27), 27-28 (No. 41, para. 2), 29 (No. 43), 29-30 (No. 44), 32-33 (No. 48, para. II), 52 (Inclosure 1 in No. 84, Article III), and 53-54 (Inclosure 2 in No. 84, Article III).

134. A concomitant theme was that of German access to the Zambezi, and the outcome was the acquisition by Germany of the Caprivi strip as a part of her sphere of influence. The theme of German access appears in the *Correspondence* (Annex 9) at pages 27-28 (No. 41, para. 2), 32-33 (No. 48, para. II), 52 (Inclosure No.1 in No. 84, Article III), and 53-54 (Inclosure 2 in No. 84, Article III).

135. The theme of free access by Germany to the upper waters of the Zambezi had first appeared in the exchange of proposals which had taken place in September 1889: see the Marquis of Salisbury to Count Hatzfeldt on 2 September 1889 (Annex 4), and Count Leyden to the Marquis of Salisbury, 30 September 1889 (Annex 5).

136. It is of interest that the successive drafts referred to 'the centre of that river' (i.e. the Chobe) until the Marquis of Salisbury proposed the inclusion of the words 'the main channel of' in a telegram to Sir E. Malet on 25 June 1890: *Correspondence* (Annex 9) (at page. 63). This proposal appears to have been accepted by the German side without any opposition or expression of doubt. In this way Article III(2) of the Treaty emerged in its final form.

137. The reference to the Chobe in Article III(2) occurs in close association with the Zambezi and it is clear that access to waterways and the general question of navigation was a matter of major concern. The Zambezi and its major affluents were considered to be navigable, and it is in this context that the principles of contemporary general international law are of great importance. They establish that in the case of navigable rivers the middle of the navigable channel was the boundary. Indeed, the contemporary legal sources reveal the background of the drafting of the relevant part of Article III(2).

138. Both before and after the conclusion of the 1890 Agreement it was generally recognised that in the case of navigable rivers the middle of the navigable channel (*thalweg*) was the boundary between the riparian States.

The relevant authorities will be rehearsed in chronological order as follows.

- (a) G.F. de Martens, *Précis du Droit des Gens moderne de l'Europe*, edited by Ch. Vergé, Paris, 1864, Tome I, pp.135-6.
- (b) J.-L. Klüber, *Droit des Gens moderne de l'Europe*, revised by M.A. Ott, second edition, Paris, 1874, pp.187-90 (para. 133) (see, in particular, pp.188-9).
- (c) J.C. Bluntschli, *Le Droit International Codifié*, translated from the German, second edition, Paris, 1874, pp.181-2 (para. 298).
- (d) J.C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten*, Nördlingen, 1878, p.180 (para.298).

- (e) F. de Martens, *Traité de Droit International* translated from the Russian, Paris, 1883, p.456.
- (f) Sir Travers Twiss, *The Law of Nations considered as Independent Political Communities*, second edition, Oxford, 1884, pp.249-50 (para. 153).
- (g) William Edward Hall, *A Treatise on International Law*, second edition, Oxford, 1884, pp.114-15 (para.38).
- (h) Charles Calvo, *Dictionnaire du Droit International Public et Privé*, Berlin, 1885, Tome II, pp.256-7.
- (i) Quaritsch, *Compendium des Europäischen Völkerrechts*, Berlin, 1885, p.27.
- (j) Franz von Holtzendorff, *Handbuch des Völkerrechts. Auf der Grundlage Europäischer Staatenpraxis*, vol. II, Hamburg, 1887, p.303 and p.304, n.6.
- (k) Peter Resch, *Das Völkerrecht der heutigen Staatenwelt Europäischer Gesittung*, second edition, Graz & Leipzig, 1890, p.70 (para.65).
- (l) William Edward Hall, op. cit., third edition, Oxford, 1890, p.125 (para.38).
- (m) William Edward Hall, op.cit., fourth edition, Oxford, 1895, p.127 (para.38).
- (n) Alphonse Rivier, *Principes du Droit des Gens*, Paris, 1896, Tome I, p.168.

- (o) Frantz Despagnet, *Cours de Droit International Public*, second edition, Paris, 1899, p.407.
- (p) William Edward Hall, op.cit., fifth edition by J.B. Atlay, Oxford, 1904, pp.122-3.
- (q) Franz von Liszt, *Le Droit International*, French translation of the ninth German edition of 1913 (by Gilbert Gidel), Paris, 1928, p.86.

139. Only two years prior to the conclusion of the Anglo-German Agreement the Institute of International Law had adopted a resolution at its Heidelberg session concerning the regulation of fluvial navigation. The first three articles were as follows:-

"ARTICLE PREMIER - Les Etats riverains d'un fleuve navigable sont obligés, dans l'intérêt général, de régler d'un commun accord tout ce qui a rapport à la navigation de ce fleuve.

ART. 2 - Les affluents navigables des fleuves internationaux sont, à tous égards, soumis au même régime que les fleuves dont ils sont tributaires, conformément à l'accord établi entre les Etats riverains et au présent règlement.

ART. 3 - La navigation dans tout le parcours des fleuves internationaux, du point où chacun d'eux devient navigable jusque dans la mer, est entièrement libre et ne peut, sous le rapport du commerce, être interdite à aucun pavillon.

La frontière des Etats séparés par le fleuve est marquée par le thalweg, ce'est-à-dire par la ligne médiane du chenal."

(*Annuaire de l'Institut*, 1887-88, p.182).

140. The membership of the Institute at this period included persons closely associated with the actual practice of diplomacy. It may be recalled that since 1876 and particularly in the years 1884 to 1890 the question of free navigation on the Zambezi and other major African rivers had been the subject of considerable diplomatic controversy: see Clive Parry (editor), *A British Digest of International Law, Phase 1*, Vol. 2b, London, 1967, pp.176-90.

141. Consequently, in the period in which the Anglo-German Treaty was concluded, the reference to the centre of the deepest channel was very clearly linked to the navigability of the river concerned and the interests of the riparian States in navigation. This connection between the *Thalweg* and navigation continued to be recognised in the doctrine of the law in subsequent decades, as the following sources indicate: G.H. Hackworth, *Digest of International Law*, U.S.G.P.O., Washington, Vol. I, 1940, pp.570-5; *Oppenheim's International Law*, Vol. I, *Peace*, eighth edition by Hersch Lauterpacht, London, 1955, p.532.

142. Reference may also be made to the *Award of the King of Italy with regard to the Boundary between the Colony of British Guiana and the United States of Brazil*, given at Rome, 6 June 1904, where the Award states:-

"The frontier along the Ireng (Mahu) and Tukutu is fixed at the "thalweg" and the said rivers shall be open to the free navigation of both conterminous States". (*British and Foreign State Papers*, Vol. 99, p.930 at p.932).

143. This connection between the *Thalweg* concept and navigation is indicated by a leading French treatise: see Rousseau, *Droit international public*, III, Paris, 1977, pp.255-6, where the extensive treaty practice is set forth, including some of the practice relating to Africa.

144. The conclusion is thus that the object and purpose of the provisions of Article III(2) of the Agreement was two-fold:

- (a) To affirm the rights of navigation of the two self-appointed riparian States in respect of the Chobe; and
 - (b) in doing so to apply the contemporary standards of general international law relating to boundaries in navigable rivers.
- (c) **The Subsequent Conduct of the Parties as Confirmatory Evidence**

(i) **The Principle**

145. The conduct of the parties to a treaty may have probative value as a subsidiary method of interpretation. As the Court will recall, such evidence of conduct may be considered as confirmatory or corroborative evidence of the parties to the treaty at the time of its conclusion : see the Report of the Court of Arbitration, *Beagle Channel Arbitration*, 1977, *International Law Reports*, Vol. 52, pp.220-26, paras.164-75; Fitzmaurice, *British Year Book of International Law*, Vol.33 (1957), pp.223-5; Thirlway, *ibid.*, Vol.62 (1991), pp.48-57.

(ii) **Captain H.V. Eason's Survey, 1912**

146. In 1911 Captain H. V. Eason of the Bechuanaland Protectorate Police was ordered to carry out a reconnaissance of the River Chobe and to report on the main channel. His report, dated 5 August 1912, is entitled 'Report on the Main Channel of the Linyanti (or Chobe) River'. In the Report 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 8 feet deep, the South Channel about forty feet wide and four feet deep. The South Channel is merely a back water, what current there is goes round the North'.

(Annex 15)

147. The Eason Report was commissioned at the highest level and originated in a despatch dated 14 January 1911 from Lord Harcourt to the High Commissioner (Annex 16). The Report was accompanied by a series of maps (Annex 15). The Report was forwarded to the Secretary of State in a despatch dated 23 September 1912. (see Annex 18 for the reference).

148. The Eason Report remained in the Archives in Gaborone and is quoted in the Boundary Survey of July 1985, the status and significance of which are considered later in Chapter VI of this *Memorial*. The reliability of the Eason Report has at no time been questioned internally and the reference in the Report of the Survey of 1985 confirms the reliability of Eason's work and places it on the public record.

(iii) The Joint Report by Trollope and Redman, 19 January 1948

149. The Botswana *Archives* contain a copy of a 'Joint Report' by Messrs. L.F.W. Trollope and N.V. Redman, respectively Magistrate of the Eastern Caprivi Zipfel, and District Commissioner at Kasane, Bechuanaland Protectorate'. (Annex 22). The key paragraphs of the *Joint Report*, which was signed on 19 January 1948, are as follows:-

‘2. We attach hereto a sketch map (not drawn to scale) of the Kasikili Island in the Chobe River and the waterways relative thereto.

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

4. We express the opinion that the "main channel" lies in the waterway which include the island in question in the Bechuanaland Protectorate.’

150. The *Report* concludes with the following proviso:

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

151. It is reasonable to assume that the preparation of the *Joint Report* resulted from a mandate from the two Governments, but no document to this effect has been seen. At any rate, when the *Report* was sent to Pretoria, the South African Government did not seek to repudiate it: see below, paragraphs 153 to 156.

152. The *Joint Report* is of particular significance because it resulted from a practical question concerning the commercial importance of navigability. As Mr Redman reported (Letter dated 26 January 1948):-

‘I have the honour to attach a joint report by the Native Commissioner, Eastern Caprivi Strip and myself concerning a dispute which has arisen over the ownership

of the island shown on the enclosed sketch map.

2. The question has arisen as a result of an application by Mr Ker to transport timber by barge from Serondela to Katombora, which necessitates the use of the channel running to the North of Kasikili Island since the Southern Channel is not navigable by his Barges when the river is not in flood, and it is even difficult for small craft to navigate it.'

(Annex 22)

(iv) Official Admissions by the South African Government, 1948-49

153. The appearance of the Trollope-Redman *Joint Report* led to a correspondence between the British High Commissioner's Office and the South African Government in the course of which the latter conceded the principle that the main channel of the Chobe was the northern channel. Moreover, this concession was made in the particular context of the needs of river transport and navigability.

154. On the 14 October 1948 a letter was addressed on behalf of the South African Government to the High Commissioner's Office in Pretoria as follows:-

'I have the honour to enclose a copy of a Joint Report by the Magistrate of the Eastern Caprivi Zipfel and the District Commissioner at Kasane, Bechuanaland Protectorate, regarding the boundary between the Protectorate and the Eastern Caprivi Zipfel.

It is understood that the necessity for consideration of the matter arises from the fact that a certain river transport venture, which proposes to transport timber down the river from a sawmill in Bechuanaland has raised the question of the correct boundary both in representations to the

Magistrate, Eastern Caprivi Zipfel, and to the Bechuanaland authorities.

The Report discloses that while the main channel of the Chobe River is shown on maps as passing to the South of Kasikili Island it in fact passes to the North of that Island.

It has been confirmed, as a result of exhaustive enquiries, that there has been no shifting of the main channel of the river from South to North within living memory. The facts, therefore, point to the maps being incorrect.

As against the foregoing there is evidence that the Island has been cultivated by Caprivi Tribesmen since at least 1907 and that their right to the occupation of the Island has at no time been disputed.

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

(Annex 23)

The Government of Botswana reserves its position in relation to the final two paragraphs of this document.

155. A further South African letter dated 14 February 1949 underlines Pretoria's acceptance of the view that the northern channel of the Chobe is the channel which is significant for navigation purposes. The full text is as follows:-

'I have the honour to refer to your letter No. 9628 of the 4th November, 1948 (Annex 24), regarding the boundary between the Bechuanaland Protectorate and the Eastern Caprivi Zipfel.

While noting that your Administration is prepared to authorise Caprivi Zipfel tribesmen to cultivate land on Kasikili Island on an annual renewable permit, I am to state that this is not what the Union Government had in mind.

From the available information it is clear that Caprivi Tribesmen have made use of the Island for a considerable number of years and that their right to do so has at no time been disputed either by Bechuanaland Tribesmen or the Bechuanaland authorities.

It was further understood that the interests of the Bechuanaland authorities centred in the use of the Northern Channel of the Chobe for navigation purposes.

My object in writing to you was therefore to ascertain whether agreement could not be reached on the basis of your Administration recognising the Union's claim to Kasikili Island subject to it issuing a general permit for the use of the Northern waterway for navigation purposes.'

(Annex 25)

156. The outcome was a South African proposal reported in a letter from the High Commissioner dated 6 June 1949 (see Annex 26) that the boundary be moved to the South channel on the basis that Bechuanaland be guaranteed the use of the northern channel for navigation. In fact the proposal was not proceeded with in the light of the advice of the Commonwealth Relations Office (see letters dated 24 August 1949 (Annex 27), 20 October 1949 (Annex 28), 19 November 1949 (Annex 29) and 10 May 1951 (Annex 30)). The

Government of Botswana relies upon this document exclusively in relation to its assumption that it is the Northern channel which is significant for navigation.

(v) The British High Commissioner's Affirmation of the Legal Status Quo, 10 May 1951

157. The letter dated 10 May 1951 (Annex 30) represents the considered official British reaction (in the light of legal considerations) to the South African proposal for a modification of the boundary. In material part the letter states:-

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

4. The Bechuanaland Protectorate Government might possibly wish to arrange for some land on the Island at some time to be cultivated by the few African public servants at Kasane. Apart from this minor matter, I venture to suggest that it is unlikely that any development in the foreseeable future will damage the interests of the Caprivi tribesmen, who have in the past used the Island. It should, I think, be possible to adjust by administrative action any difficulty arising in connection with the Island and the adjacent waterway without an alteration of the existing legal position.

5. The instruction to the Assistant District Commissioner, Kasane, of which you were informed in Mr

Priestman's letter No. 9628 of the 4th November, 1948 would be maintained, and it is assumed that the free use of the main channel of the Chobe, to the north of the Island, would continue to be assured under the international rules governing waterways that form the common boundary of two states.'

158. Paragraphs 4 and 5 of this important document are concerned to affirm the 'existing legal position' concerning the common boundary. Paragraph 5, in particular, affirms the status of the northern channel as the main channel for legal purposes. The letter was addressed to Mr Forsyth at the South African Department of External Affairs by the High Commissioner, Sir Evelyn Baring. The South African response on 29 May 1951 was as follows:-

'Thank you for your letter No. 9628 of the 10th May 1951, regarding Kasikili Island in the Chobe River.

I note that there are difficulties in the way of recognising the Union's claim to the island and will inform the appropriate authorities accordingly.'

(Annex 31)

159. This sequence of exchanges is to be understood on the basis that it was the South African side which was proposing a modification of the legal status quo. The exchanges of the period 1948-51 also involve South African acceptance of the principle that the main channel lies to the north of Kasikili/Sedudu.

(vi) The Opinion of the Surveyor-General of Bechuanaland, 18 October 1965

160. The question of the boundary in the vicinity of Kasikili/Sedudu Island was raised again within the administration of Bechuanaland, apparently in relation to the

establishment of the boundaries of the Chobe Game Reserve. In this connection the Surveyor-General of the Protectorate, Mr R R Renew, was consulted and the most material part of his response to the Permanent Secretary, Ministry of Home Affairs, reads thus:-

'I have gone into the record thoroughly and have summarised the history of the island. If further action is contemplated in regard to the use of this island it might be advisable for you to see the file.

2. 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.

3. At that time, the factual position accepted by both Governments, and embodied in a report submitted jointly by the District Commissioner, Kasane and the Native Commissioner of the eastern Caprivi Strip, Major Trollope, was as follows:

a) The boundary between Bechuanaland and the relevant portion of the Caprivi Strip was the centre of the main channel or Thalweg of the Chobe River, and this main channel ran to the north of the island. This therefore placed Kasikili Island on the Bechuanaland side of the international boundary.

b) Since the assumption of German administration of the Caprivi Strip in 1907, Caprivi tribesmen have cultivated lands and generally had the undisputed use of the island.

c) There was no evidence of the island having been made use of, or claimed, by Bechuanaland tribesmen.

4. When the dispute arose Government logically asserted ownership by virtue of paragraph 3(a), whereas the South African Government based its claim to the island on prescription in terms of paragraph 3(b).'

(Annex 36)

161. The Surveyor-General's Opinion is accompanied by a map of the relevant sector of the Chobe on which is the inscription: 'Main Channel coloured BLUE' (this accompanies Annex 36) (see Appendix II of the *Memorial*, Map 18). The Government of Botswana relies upon this document but reserves its position in relation to paragraph 3(b) and (c).

(vii) The Botswana-South African Agreement Concluded at Pretoria on 19 December 1984 and the Joint Survey of 1985

162. The subsequent conduct of the Parties, and their successors, must include the significant transactions of 1984 and 1985 in which the Republic of Botswana and the Union of South Africa agreed to conduct a Joint Survey, the results of which were approved by the Governments. The survey confirmed that:

"The main channel of the Chobe River now passes Sidudu/Kasikili Island to the west and to the north of it. (See annexed Map C).

The evidence available seems to point to the fact that this has been the case, at least, since 1912."

(Annex 48)

163. The legal significance of these inter-governmental transactions will be explored further in the following chapter of the *Memorial*.

(d) Conclusion

164. In the light of the continuity of the boundary in accordance with the principles of State succession and *uti possidetis*, the subsequent conduct of the British and South African Governments, as predecessors (subject to the obligations arising from the Mandate for South-west Africa) to the present riparian states, has evident significance.

165. Both the British and South African Governments were of the opinion that the main channel in the vicinity of Kasikili/Sedudu passed to the north of the island. It was against this background that in 1949 (see Annex 26) South Africa proposed a *modification* of the boundary on the basis that Bechuanaland be guaranteed the use of the northern channel for navigation.

CHAPTER VI

The Pretoria Agreement of 1984 and the Joint Survey of 1985

(a) The Background

166. In October 1984 the Botswana Defence Force opened fire on South African soldiers who were travelling by boat on a small channel of the Chobe River which runs south of the Kasikili/Sedudu Island. Three South African Defence Force soldiers were injured and South Africa claimed that their soldiers had been shot at on the South-West Africa side of the border.

167. Before Botswana could hold talks with the South African authorities on the shooting incident, a Botswana delegation was sent to New York to consult with the United Nations which was the de jure legal authority for Namibia (Annex 43). They met the President of the United Nations Council for Namibia, Mr. Paul Lusaka, on 27 November 1984. (The *Minutes* of the meeting are set forth in Annex 42). The Botswana delegation consisted of Mr. M.D. Mokama, Attorney General, Mr. G.G. Garebamono, Secretary for External Affairs and Mr. L.J.M.J. Legwaila, Permanent Representative to the United Nations. Mr. Mokama recalled that Botswana had in the past avoided talking to the South Africans on Namibia before consulting with the United Nations Council for Namibia.

168. In reply Mr. Lusaka thanked the Botswana delegation for involving the United Nations Council for Namibia on matters affecting Namibia. He said that the Council was sympathetic to Botswana but that he would first of all consult with members of the Council before giving reply. The Botswana delegation left both the South African and Botswana maps with Mr. Lusaka for ease of reference.

169. They also met with South-West African People's Organization (SWAPO) officials. The *Minutes* of the meeting appear in Annex 41. The SWAPO delegation consisted of Andimba Toivo Ja Toivo, Secretary-General, Peter Mueshihange, Secretary for External Affairs and Theo-Ben Gurirab, Permanent Observer at the United Nations. Mr. Garebamono reported that during the Organization of African Unity Summit in Addis Ababa on 12-15 November, 1984, the Minister for External Affairs, Dr. Chiepe, had met with Mr. Sam Nujoma, the SWAPO President, and had informed him about the dispute between Botswana and South Africa on the Botswana-Namibia boundary. She had explained that a Botswana delegation would pay a visit to New York to consult with SWAPO and the Council for Namibia before meeting the South Africans to discuss the boundary problem.

170. Mr. Nujoma had observed that it is the "main channel" of a river which is regarded internationally as the boundary. Mr. Toivo observed that SWAPO as a party and a liberation movement did not have jurisdiction over the border issue. He enquired if the President of the United Nations Council for Namibia had been consulted on the matter. Mr. Mokama confirmed that this had been done. He therefore agreed that Botswana could hold talks with the South Africans on the boundary issue. The meeting further discussed other issues not related to the boundary. Lastly, the Botswana and South African maps concerned were handed over to the SWAPO delegation for their information and records.

171. At its Tenth Summit in 1973 the Organization of African Unity granted some National Liberation Movements representation status and SWAPO was granted such a status. The position of SWAPO vis-à-vis South-West Africa was therefore that SWAPO was recognised as being delegated by the South-West Africa People to fight for the right to self-determination on their behalf. SWAPO thus gave its blessing to Botswana so that she could discuss with South Africa the

dispute over the boundary around the Kasikili/Sedudu Island. The approval of the United Nations Commissioner for Namibia was also obtained (Annex 43).

(b) The Meeting in Pretoria on 19 December 1984

172. A meeting was thereafter convened by the Botswana delegation and the South African delegation, which meeting was held in Pretoria on 19 December 1984. The Botswana delegation was composed of Mr. M.D. Mokama, Attorney-General, Mr. G.G. Garebamono, Secretary for External Affairs, Colonel Rankhudu, Botswana Defence Force, and Mr. J.A Raffle of the Department of Surveys and Lands. The South African delegation included Mr. A.S. Mare, Foreign Affairs (Chairman), Mr. W. Hugo, Foreign Affairs, Mr. D.W. Steward, Foreign Affairs, Mr. J. Rautenbach, Legal Department, Mr. J.F. Kirsten, Foreign Affairs, Mr. E. Fitschen, Public Works and Lands Affairs, Brigadier J.A. Klopper, South African Defence Force, Brigadier G. Nel, South African Defence Force, Brigadier A.N. Heuer, South African Police, and Lieutenant Colonel G.J. Richter of the South African Police.

173. The Botswana National *Archives* contain a set of *Minutes* of the meeting prepared by the Botswana side (Annex 44). In addition, there is available a 'transcript' submitted to Botswana by the South African side (Annex 46). In response the Government of Botswana stated:

"The Department of External Affairs wishes to advise that the transcript is basically correct but that because of its brevity it left out certain essential details such as a reference to the maps and air photographs brought to the meeting by the Botswana delegation which were used in the discussions."

(Annex 47).

174. At the meeting it was discovered that maps used by the South Africans had showed Kasikili/Sedudu Island to be on the South-West Africa side of the boundary because they were assuming that the small southern channel of the River was the boundary. On the maps used by Botswana the main channel was indicated as the boundary.

175. Mr. Mokama stated that there was no wish on the part of Botswana to expand Botswana; and that the historical background to the boundary was well documented and was based on the Anglo-German Agreement of 1890. He went on further to state that the question of the thalweg, navigation and the original idea of Count Von Caprivi that the river would give access to the Indian Ocean, had to be considered. Mr. Mokama stated that the "main channel" ran to the north of Kasikili/Sedudu Island.

176. Mr. Fitschen said that his Directorate had worked closely with the Department of Surveys and Lands in Botswana on common boundary matters and that an excellent working relationship had been built up due to the high professional standards on both sides. He went on further to state that river boundaries could change and that these presented problems of a technical nature.

177. Mr. Rautenbach suggested that the Island problem should first be investigated and that instructions be issued for the survey to be extended at a later date. Mr. Raffle, ably assisted by Mr. Kirsten, displayed the relevant Botswana 1:50,000 map sheet together with aerial photographs of the Island dated 1925, 1972 and 1981. A proposal to inspect the maps in order to appreciate the problem on hand was made by Mr. Garebamono. The meeting broke up to inspect the exhibits. As a result delegates from South Africa appeared to have understood what the real situation on this matter was.

178. The meeting agreed that a joint survey should take place as a matter of urgency to determine whether the "main channel" of the Chobe River was located to the north or to the south of Kasikili/Sedudu Island. It was further agreed that officials of the Botswana Department of Surveys and Lands and the South African Directorate of Surveys and Mapping would proceed with arrangements for the survey as soon as practicable.

179. In Note No. 18 EA6/4 VII (94)A (Annex 47) the Department of External Affairs of the Republic of Botswana indicated to the Department of Foreign Affairs of the Republic of South Africa acknowledgement of the latter's Note No. 87/5: 1/160/3/1, dated 28 January 1985 (Annex 45), under which cover was sent a transcript in summary form of the proceedings of the meeting held between the representatives of the Botswana Government and of those of the South African Government on 19 December 1984 in Pretoria to discuss the boundary in the Chobe area. The Department of External Affairs of Botswana advised that the transcript was basically correct but that because of its brevity it left out certain essential details such as a reference to the maps and aerial photographs brought to the meeting by the Botswana delegation which were used in the discussion.

180. The experts finally produced their *Joint Report* on 15 July 1985 (Annex 48). They confirmed that the main channel passes on the northern part of Kasikili/Sedudu and therefore the Island lies on the Botswana side of the border.

(c) The Intergovernmental Agreement of 1984

181. The Vienna Convention on the Law of Treaties, Article 31(3)(a), provides as follows under the rubric 'General rule of interpretation':-

"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;..."

182. In the opinion of the Government of Botswana the intergovernmental agreement concluded at Pretoria constitutes 'an agreement between the parties regarding ... the application' of the provisions of the Anglo-German Agreement. The principles of general international law do not require any particular formality for the conclusion of an international agreement. The only criterion is the intention of the parties to conclude a binding agreement and this can be inferred from the circumstances.

183. The legal background to informal international instruments is examined by Anthony Aust in his article in the *International and Comparative Law Quarterly*, Vol. 35 (1986), pp.787-812. Mr. Aust points out that the International Court saw important legal implications in informal *unilateral* acts in the *Nuclear Tests Case (Australia v France)*. I.C.J. Reports, 1974, pp.267-9. Aust observes: 'The position may be that much stronger when a declaration is contained in a bilateral or multilateral instrument and there is, in effect, an *exchange of declarations*'. (*op.cit. supra*, p.809). Certainly, the practice of states includes many examples of intergovernmental binding decisions. A recent example was the decision concerning Denmark in relation to the Maastricht Treaty taken in Edinburgh in 1992 (view of the British Government, H.C. Debates, Vol. 216, WA, col. 822; 15 January 1993).

184. The evidence of the legal character of the Pretoria Agreement derives from a whole series of documents and inferences to be drawn from the circumstances.

185. (i) Whilst there is no single instrument embodying the intergovernmental agreement it clearly resulted from a series of dealings including the meeting in Pretoria on 19 December 1984. The *Minutes* of the meeting are available in two versions, one prepared in Botswana, the other in Pretoria. The *Minutes* do not constitute an agreement as such but *provide evidence* that an intergovernmental agreement was concluded. Both versions of the *Minutes* provide unequivocal evidence of an agreement to carry out a joint survey in order to identify the main channel of the River Chobe.

186. (ii) The meeting took place at the Department of Foreign Affairs and involved two high level delegations. The delegations both included a senior legal component, a fact of great significance for present purposes. The Botswana delegation included the Attorney-General of the Republic.

187. (iii) As the *Minutes* reveal, the focus of the meeting in Pretoria was the question of the main channel of the Chobe. Mr. Mare, in his opening address, stated that the question of the course of the main channel of the Linyanti River 'had now to be discussed'. In response Mr. Mokama for Botswana addressed the same issue, that is, the identification of the main channel in the vicinity of Kasikili/Sedudu.

188. (iv) The text of the *Report* of the Joint Survey contains the following passage under the heading 'Authority for Survey':

"At an intergovernmental meeting held in Pretoria on 19 December 1984 it was decided that a joint survey should be undertaken to determine whether the main channel of the Chobe River is located to the north or the south of Sedudu/Kasikili Island.

Representatives of the two national survey organizations accompanied by co-workers from the Departments of

Water Affairs have now been to the area to survey the 'Thalweg' in the vicinity of the island. Specific mention is made to the Thalweg in 1890 Agreement between England and Germany".

189. This passage affirms the existence of an intergovernmental meeting at which 'it was decided' that a joint survey should be undertaken with a purpose directly linked to the application of the provisions of the Anglo-German Agreement of 1890.

190. (v) In the aftermath of the shooting incident which gave rise to the Pretoria Meeting, the Government of Botswana immediately adopted a correct legal perspective. The issue involved a boundary question and accordingly it was necessary to consult both the United Nations Commissioner for Namibia and SWAPO 'before we can approach the South African authorities' (see Telex dated 8 November 1984, Annex 40).

191. The result was a high level meeting in New York between a Botswana delegation and a SWAPO delegation which included Mr. Gurirab, the Permanent Observer to the United Nations. The *Minutes* of this meeting, which involved the Attorney-General of Botswana, reveal the legal character of the problems being discussed.

192. During the same period the Botswana delegation also consulted the President of the United Nations Council for Namibia and Mr. Mishra, the United Nations Commissioner for Namibia. The *Minutes* of these two meetings are presented in Annexes 42 and 43.

193. These various considerations leave no room for doubt that the result of the Pretoria Meeting was a binding intergovernmental agreement relating to a legal subject matter and concluded with senior lawyers in attendance. The parties

clearly intended to achieve an effective and therefore binding outcome to their deliberations. In the result the agreement was implemented: the Joint Survey was carried out. Moreover, consistently with the binding character of these transactions, neither Botswana nor South Africa sought to challenge the validity of the *Joint Survey Report*.

(d) The Joint Survey Report of 5 July 1985

194. The *Joint Survey Report* was finalised on 5 July 1985. At no time subsequently has the South African Government challenged the validity of the *Report*. The exchange of telexes between Botswana and South Africa in 1986 (see Annexes 50-54) is of considerable importance in this respect. The Government of Botswana affirms the validity and finality of the Joint Survey. The South African Government proposes that the 'border issue' should be discussed between Botswana and Namibia. However, beyond this procedural proposal no attempt is made to impugn the validity of the intergovernmental transactions of 1984-85.

195. It must be emphasised, finally, that the *Joint Survey Report* is itself an intergovernmental instrument. It was signed by Fitschen 'for Chief Director of Surveys and Mapping, Republic of South Africa', and by Raffle 'for Director of Surveys and Lands, Republic of Botswana'. The two survey teams were carrying out the duties delegated to them by the Pretoria Agreement of 19 December 1984. The two national elements in the survey teams were headed by surveyors holding official rank equal to that of Deputy Permanent Secretary. As the Note from Botswana dated 4 November 1985 (Annex 50) makes clear, the Government of Botswana regarded the *Joint Survey Report* as binding on South Africa.

196. In conclusion it may be recalled that the *Joint Survey Report* has a legal significance quite apart from its status

as an intergovernmental instrument resulting from the Pretoria Agreement. It constitutes expert opinion evidence on the key question of law and fact, that is, the identification of the main channel of the Chobe in the vicinity of Kasikili/Sedudu Island.

(e) The Government of Botswana regarded the Joint Survey Report as a confirmation of title

197. In 1986, during discussions of common problems with South African officials in Gaborone (for the Record of Discussions see Annex 51), the Government of Botswana expressed the unqualified position that the issue of the boundary in the vicinity of Kasikili/Sedudu Island had been settled as a consequence of the *Joint Survey Report*. As Mr. Mpuchane, Secretary of External Affairs, Botswana, observed in the discussion:

".... there was no more room for negotiations because a joint Botswana-South Africa team of experts had confirmed that the Island belonged to Botswana. DSEA added that Botswana's ownership of the Island would never have arisen if it had not been for the shooting incident between the armies of the countries around the Island the previous year."

198. There followed an exchange of Notes (Annexes 52 to 54). In its second Note of 25 November 1986 the Government of Botswana reaffirmed its position:

"Pula has the honour to acknowledge Secextern's telex no. 5142 file 1/160/3/1 dated 17 November, 1986 concerning Sidudu Island and to state that the latter's position remains as communicated in its telex no. 164 EA. 6/4 B1 dated 22 October, 1986.

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

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

(Annex 54)

199. In the result the Government of South Africa did not seek to deny the legal validity of either the original intergovernmental agreement of 1984 or the *Joint Survey Report*.

CHAPTER VII

The Issue of Fact: The Main Channel is to the North and West of Kasikili/Sedudu Island

(a) The Legal Context

200. The provisions of the Anglo-German Agreement refer to "the centre of the main channel" of the Chobe. The Court's task is to identify the main channel of the Chobe River in the vicinity of Kasikili/Sedudu Island in accordance with the 1890 Agreement. This is essentially a question of fact. 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. 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.

(b) Criteria by which to identify the main channel of the Chobe River

(i) Sole channel

201. Article III of the Anglo-German Agreement of 1890 draws the line of the British and German spheres of interest by reference to parallels of longitude and latitude "till it reaches the River Chobe, and descends the centre of the main channel ("thalweg" in German) of that river to its junction with the Zambesi where it terminates".

202. Where the river flows in only one channel, that channel will clearly be the "main" channel for the purposes of Article III of the 1890 Agreement. As set out in Chapter II(b), the flows along the Chobe (usually known as the Kwando, Linyanti, Chobe) system vary with the run-off in the catchment

area. During drought years and the low flow regime of the Zambezi the southern channel dries out. The variation of the water levels determines in effect whether an island exists or not. In very dry seasons the southern section of the channel, in particular at cross-sections 15 and 20 A as more particularly described in paragraph 218 below, dries out. On these occasions there can be no question that the northern and western channel, as the sole course through which the Chobe River passes, is the main channel.

(ii) More than one channel

203. However, where there is more than one channel, the assessment of the facts necessarily requires a reference to criteria by which to determine the main channel; it will then not be exclusively a question of fact because the criteria by which the facts are assessed should logically reflect the object and purpose of the relevant provisions of the Anglo-German Agreement as assessed in the context of the principles of general international law.

(iii) Navigability

204. The examination of these principles in the period at which the treaty was concluded (see Chapter V, paragraphs 129 to 144) indicates very clearly that navigability and access to navigable water were primary considerations in the minds of the negotiators.

(iv) Thalweg

205. This term is used to mean "the line at the water's surface vertically above the deepest channel of the river bed at low tide".

"The thalweg is the channel most favourable to the movement of vessels proceeding downstream when the water is at its lowest. It is subject to natural alterations, whereby the boundary suffers corresponding displacement."

(Hatschek, *Outline of International Law*, Trans. by Manning, 1930, p.130.)

206. On the facts, when the Chobe River is at its lowest in the month of August only the northern and western channel is navigable. At other seasons, as the soundings of the 1985 Joint Survey show, the northern and western channel provides an average depth of 5.7m. which is the more favourable to vessels than the 2.23m. average depth of the south channel.

(v) Deepest channel

207. In the context of navigability the primary, and perhaps the only, criterion would be relative depth, although width of the channel would also be relevant to ease of navigation. In the survey undertaken in 1912, District Commissioner Panzera in a letter to Captain Eason of 25 July 1911 set out his terms of reference for surveying the Chobe River:-

"It is desired to obtain a reliable report with sketches of the various channels of the Chobe or Linyanti River, with a view to determine which can be legitimately determined as the "main channel" ... The width of the channel would have little to do with it, and the question under consideration could only be solved by following up the deepest channel in which there is the strongest current? The most reliable map should be used as a guide and upon this should be based a prismatic compass rough survey of the various streams ..."

(Annex 17)

208. Following these instructions and writing on 5 August 1912 Captain Eason reported:

"Two miles above the rapids lies Kassikiri (Kasikili/Sedudu)⁵ 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 8 feet deep, the south channel is in a backwater, what current there is goes round the North."

(Annex 15, pp.125-63).

Thus depth, strength of current, and width of the river were all criteria applied by Captain Eason and all clearly indicated the northern and western channel as the main channel.

209. The Trollope and Redman Report of 1948 makes no reference to criteria as such. (Annex 22). However, their report refers to "the examination of an aerial photograph", which would indicate the relevance of width. The Joint Survey of 1985 refers exclusively to depth (Annex 48).

210. A hydrological definition of the main channel is given by Dr. Sefe in his Opinion, annexed to this Chapter at Appendix 1, which is set out below at paragraph 216 and combines in scientific terms the four criteria of depth, strength of current, composition of the load and width of the channel.

211. There are occasional references in legal sources to criteria for the determination of the main channel in the context of complex stream and drainage systems. Such references appear to involve qualitatively hydrological contexts and substantially different legal problems: see the *Argentine-Chile Frontier Case*. Report of the Court of Arbitration, 24 November 1966; *UN Reports of International Arbitral Awards*,

⁵Parenthesis inserted.

(c) The Evidence

212. The facts on the ground and the scientific evidence relating to the hydro-morphology of the Chobe River, as evaluated by expert opinion establish the following propositions:-

- I. The northern and western channel around Kasikili/Sedudu Island is the present main channel;
- II. All available evidence suggests that the northern and western channel has been the main channel since the present profile of the Chobe as a mature low energy river system was established about 10,000 to 26,000 years ago. It, thus, has been a mature system for a very long time;
- III. Direct observation, historical evidence, aerial photography and sedimentary and dating techniques establish that the main channel at the time of the Anglo-German Agreement in 1890 was the same, namely the northern and western channel as it is today.

(i) The hydro-morphological evidence relating to the main channel of the Chobe around Kasikili/Sedudu Island

213. Dr.F.T.K.Sefe, BA., Hons., PhD, Lecturer in Hydrology, University of Botswana, describes the hydro-morphological basis for the identification of the northern and western channel as the main channel of the Chobe in the vicinity of Kasikili/Sedudu Island. His Opinion is set out at the end of this Chapter at Appendix 1.

214. Dr. Sefe's report confirms the three propositions set out in paragraph 212 above. Each of these propositions is well supported.

Proposition I. The northern and western channel around Kasikili/Sedudu Island is the present main channel

215. In his report Dr. Sefe refers to the 1985 Joint Survey in which 27 cross-sections around the island were taken. He states:-

"The results clearly show the north channel as the main channel: its mean depth of 5.7m. exceeds the mean depth of the south channel by 2.13m. *The conclusion from this survey is that the north channel is the main channel of the Chobe River.*" (Appendix 1, pp.3-4)

216. Dr. Sefe explains that the description "main" in hydrological and geomorphological terms relates to the energy of the river and is defined in functional terms by reference to the "competence" of the river to transport debris and its capacity measured by the maximum load (sediment of a particular grain size) it can carry.

"As energy in a river is proportional to the product of mass (i.e. size) and the bedslope, "main" is synonymous with size. Thus of two tributaries in the same river, the larger is considered the main channel" (Appendix 1,p.5).

217. The Joint Survey of 1985 (the Fitschen/Raffle report) took depth soundings at 27 cross-sections around Kasikili/Sedudu Island in a clockwise direction beginning at the Chobe National Park HQ. Annex 48, Plan D.

218. From these soundings it is possible to draw a profile of the river bed in the north-western channel (Profile I) and the south channel (Profile II) around Kasikili/Sedudu island

and these are shown in two diagrams at Annex 62. Diagram 1 shows the Longitudinal Profiles around Kasikili/Sedudu Island, extracted from the soundings recorded by the 1985 Joint Survey, beginning at the most easterly point of each channel and ending at the most westerly point. Cross-section 1 from which both Profiles are drawn is used as a common datum or bench mark as the starting point. The profile of the bed of the Chobe River, as there indicated, can, thus, be described, as follows:-

North-Western Channel. Beginning with cross-section 1, and proceeding in a clockwise direction, after clearing the sand bar downstream from the small island, the north-western channel deepens from 3 m. to 6 m. As the river rounds the island the depth reduces to 3.5 m. but again deepens to 6-7 m. at the juncture of the back-stream at Kabuta. From cross-section 5 at the most northern point of the island, to cross-section 9, being the point where upstream from Kasane the south-eastern channel joins and merges into the main river, the channel exceeds 9 m. in depth; it is never less than 6 m., the shallowest part being at the exit of a small back-stream from Kasikili/Sedudu Island itself.

South Channel. Proceeding in an anti-clockwise direction the entry point to the south section of this channel is very shallow, 1.5 to 2.m. in depth, and obstructed by reeds. Apart from a depth of 5.5 m. found to the north of Chobe National Park HQ at cross-section 16, the channel remains shallow until cross-sections 14 and 13 where depths of 3.5 m. are shown. Reeds again at this point obstruct the channel. Thereafter, in the eastern section of the south channel to cross-section 10 at a depth of 6 m., which is located at a point shortly before the south channel joins the main river, the channel deepens but never exceeds 5 m.

219. Diagram 2 in Annex 62 provides a Comparison of the Longitudinal Profiles of the north-western and south channels, based on these longitudinal cross-sections. In summary, it is apparent that as regards *the south channel*, whilst there is a depth of some 4 m. average of water in the eastern section, both the east and west entrances to the southern section of this channel are barely more *than 3 m.* in depth with thick growth of reeds extending from each side, with a deeper "lagoon" area of 6 m. in the centre of this southern section. Navigation is thus severely impeded, if not impossible, at the entrances to the southern section of the south channel.

As regards *the northern and western channel*, once the river has cleared the small sand bar to the north of the National Park Headquarters, the cross-sections show a steady depth of 5 to 7 m. with a noticeable deepening to 10 m. after the entry of the backwater stream at Kabuta, and to 13 m. at the juncture of the eastern section into the main stream. A navigable channel of 5 to 7 m. therefore exists in the northern and western main channel throughout.

220. In summary, it is thus apparent that as regards *the south channel*, whilst there is a depth of some 4m. average of water in the eastern section, both the east and west entrances to the southern section of this channel are barely more than 2.5m. in depth with a thick growth of reeds extending from each side, with a deeper "lagoon" area of 6m. in the centre of this southern section. Navigation is thus severely impeded, if not impossible, at the entrances to the southern section of the south channel.

221. As regards *the northern and western channel*, once the river has cleared the small sand bar to the north of the National Park HQ., the cross-sections show a steady depth of 5 to 7m. with a noticeable deepening to 10m. after the entry of the backwater stream at Kabuta, and to 13m. at the juncture of the eastern section into the main stream. A navigable channel

of 5 to 7m. therefore exists in the northern and western main channel throughout.

(ii) Evidence supporting as a matter of fact the northern and western channel as the main channel

222. All the observers accept, that, as a matter of fact, the northern and western channel is the "main" channel in the vicinity of Kasikili/Sedudu. On 14 October 1948 in a letter addressed on behalf of the South African Government to the High Commissioner's Office in Pretoria, the South African Government clearly accepted that, as a question of fact, it was the northern and western channel which was the main channel. Referring to the *Joint Report* of Trollope and Redman the letter continued:-

"The Report discloses that while the main channel of the Chobe River is shown on maps as passing to the south of Kasikili Island it in fact passes to the north of that island.

It has been confirmed, as a result of exhaustive enquiries, that there has been no shifting of the main channel of the river from South to North within living memory. The facts, therefore point to the maps being incorrect."

(See further, Chapter V, para 154).

223. The *Joint Report* of Trollope and Redman signed on 19 January 1948 accepts that the main channel lies to the north and west (para.4) (Annex 22). Moreover, Trollope's personal opinion was to the same effect. His covering letter to the *Joint Report*, dated 21 January 1948, contains two passages in which he clearly accepts that it is the northern channel which is the boundary in accordance with the Anglo-German Agreement (See Annex 22, paras.3 and 11). Indeed, it expressly refers to the northern and western channel as "the geographical and treaty" position (*ibid.*, para.11).

224. That this was the settled view of the British authorities is evidenced by a sketch map of the lower Chobe of Scale 1:125,000 or 2 miles = 1 inch, dated 18 October 1965, traced from the Dept. of Surveyor-General from Print Laydown Sheet 1725C, Mafeking, Oct., 1965, attached to the opinion of Mr. R.R. Renew, the Surveyor General of the Bechuanaland Protectorate. The northern and western channel around the island is coloured blue and a superscription explains "main channel coloured blue". See Chapter V, para 161, Annex 36, Map 18.

225. The evidence provided by aerial photographs covering the period 1925 to 1985 is particularly impressive. The photographs confirm the significance of the northern and western channel and show that no substantial change has taken place in the period of sixty years covered by the photographs. The evidence is presented below at paragraphs 229 to 232 and in Appendix I to the *Memorial*.

226. Of particular importance is the *Report* of the Joint Survey conducted in 1985 (Annex 48). The principal conclusion of the Joint Survey was that:

"The main channel of the Chobe River now passes Sedudu/Kasikili Island to the west and north of it."

227. The legal significance of the Joint Survey is examined in greater depth in the *Memorial*, Chapter VI. For the present purpose it is adopted as expert evidence, the professional reliability of which has not been challenged by either Botswana or Namibia.

Proposition II. All available evidence suggests that the northern and western channel has been the main channel since the profile of the Chobe as a mature low energy river system was established, and thus has been a mature system for a very long time.

228. Dr.Sefe records the following features of the morphology of the Chobe River:-

- (i) the geomorphology of the Chobe river system has been influenced by the hydrology of two major prehistoric lakes, Makgadikgadi, which extended into the alluvial flats surrounding the Chobe and Zambezi rivers, and the Maklane, reaching the Chobe via the Savuti channel immediately to the west of the Magikwe Ridge. The topographic elevations of these lakes, 910 to 940m. and 963m. respectively were significant in regulating the overflow of water in the Chobe and Zambezi rivers, and together with tectonism caused down-warping and deformation at the Chobe-Zambezi confluence. Carbon 14 dates from shells at the 940-945m. level suggest an age for this activity of c.40,000 to 35,000 B.P.(Appendix 1 of this Chapter, pp.5-6);
- (ii) the eventual drying up of these lakes occurring over 10,000 years ago caused a significant change in the hydrology of the area (p.3);
- (iii) the broad north easterly direction of the Chobe River is determined by tectonic action occurring some 26,000 to 40,000 years ago, channelling the river into a "rectilinear fault-controlled course" north eastward to join the Zambezi River (p.2).

There has been no tectonic activity in recent centuries, as demonstrated by the current low energy status of the river (p.7);

- (iv) the south channel, as in the case of other backwater channels, shows the same lineations as the regular channel systems. It is, therefore likely that at the time of the establishment of the present Zambezi course, about 26,000 to 40,000 years ago (p.2), the south channel was the main channel. It was later abandoned as a result of erosion of the sand ridges which delivered an excessive high sediment load, and also as a result of downthrows along the Zambezi's axis (about 10,000 - 26,000 years ago) which changed slope configuration.

229. Dr.Sefe's report continues:-

- (v) the present morphology of the Chobe could not have been altered from the commencement about 2000 years ago of the current stable dry phase of the climate, leading to drastic reductions in flow volumes (Appendix 1 of this Chapter, p.7);
- (vi) the present features of the Chobe -
the meander loops, the numerous backwater lagoons, associated with the outside bends of the meander loops, Sedudu/Kasikili and Xakuma islands and smaller sand bars elsewhere in the river, the rapids in the vicinity of Commissioner's Kop, - indicate a river with a low bedslope, with an imbalance between energy and sediment load and which has also been subject to tectonism (ibid., p.2.);
- (vii) the landscape suggests a river system which has shifted many times across the floodplain, continually aggrading and degrading its channels in maintaining the local base level, namely the top of the Victoria Falls (ibid.,p.2);

- (viii) the south channel shows that it was stopped from shifting further southwards by the sandridges which generally rise steeply from 930m. to 1000m., there being no evidence of recent erosion by the Chobe River along these ridges (ibid.,p.2);
- (ix) the stratigraphy of Kasikili/Sedudu Island suggests that it was initially a sand bar deposit that later became stabilised by vegetation; its soil depth was thickened with layers of clay and silt deposited as successive floodwaters swept over and was subsequently trapped by colonising vegetation cover (ibid. p.2);
- (x) erosion and sedimentation in rivers are necessary for rivers to adjust to base level but the processes are slow. Under ideal conditions it would take thousands of years to build a silt and clay deposit in excess of 2m. Fieldwork around Kasikili/Sedudu Island indicates that silt and clay deposits exceed about 10m.(ibid., p.8).

Proposition III. Direct observation, historical evidence, aerial photography and sedimentary and dating techniques establish that the main channel in 1890 was the same, namely the northern and western channel as it is today

(iii) Direct observation

230. As set out in paragraph 228, (ix) and (x), fieldwork directly observing the present stratigraphy of Kasikili/Sedudu Island indicates that its formation has taken hundreds of years and that in the last hundred years its present shape remains unchanged.

(iv) Historical evidence

231. The historical data (set out at paragraphs 222 to 227 above), clearly supports the Botswana position that the main channel has at all relevant times been the northern and western channel of the Chobe. In the years prior to and shortly after 1890 a number of maps and sketches were prepared by explorers of southern central Africa, including David Livingstone, Emil Holub, F.C.Selous, Benjamin F.Bradshaw and A.Schulz and A.Hammer. Most are too sketchy, or small scale, to be of value.

232. Of these sketch maps that of Bradshaw's is the most relevant; it relates to a sketch map of the Chobe River drawn in 1880 by Dr. Benjamin F. Bradshaw to a scale of 1.1cm to 1 mile. It can be found in Volume III of the *Proceedings* of the Royal Geographical Society for the year 1881, at p.256 accompanying Bradshaw "Notes on the Chobe River, South Central Africa" and is Map 1 (Appendix II of the *Memorial*).

233. This is a large scale sketch map which clearly shows Kasikili/Sedudu Island in a formation similar to that as shown by Captain Eason in 1912. Bradshaw's sketch was used by Seiner in his map of 1909 in which he specifically refers to "Bradshaw 080". Bradshaw shows the northern and western channel clearly broader than the eastern, and the entry to the southern channel is at a sharp angle suggesting that the northwest is the main flow of the river.

234. The available maps and sketches indicate that from the time the Chobe was surveyed with any particularity by European explorers from the 1860s onwards a north channel around Kasikili/Sedudu Island was known and regularly depicted. Dr.Benjamin F. Bradshaw's map of 1880 (Map 1), the Frankenberg map of 1912 (Map 7), and Captain Eason's map of 1912 (Annex 15), clearly indicate the presence of the

northern and western channel closely similar to its present configuration.⁶

235. More recent historical evidence is to be found in a map dated 25 May 1953 showing agricultural and grazing areas of North Bechuanaland showing Kasikili/Sedudu Island as a peninsula with no southern channel. This map entitled "1953 Approximate delineation of concession Areas, 1/HT/1", was drawn by Silby Horrell, chartered surveyor, Salisbury, S.Rhodesia, to a scale of 1:125,000 (Map 15). A note is attached to the map entitled "Note of agricultural and grazing areas to be read in conjunction with Map 1/HT/1" and the legend of the map identifies timber and cattle concessions, grazing areas and the location of water holes and pits, and river proximity. No grazing area is shown on the Kasikili/Sedudu peninsula.

(v) **Aerial photographs**

236. Aerial photographs are available dating back to 1925 and the *Joint Survey Report* of 1985 noted that:

"Air photographs showing the channels of the river in the vicinity of the island are available in the archives of the two national survey organisations. They were taken in 1925, 1943, 1962, 1972, 1977, 1981, and 1982. No substantial change in the position of the channels is evident from the photographs".

All these photographs resulted from aerial surveys commissioned on a professional basis, and with the exception of the photograph apparently taken in 1977, appear at Appendix

⁶A similar configuration is shown on a map prepared by the Topographical section of the Union Defence forces, South Africa, **1915 Africa Sheets 7 and 8 Caprivi Zipfel**, No.115, July 1915; Scale 1 inch = 10.1km or 6.3 miles, see Map 12.

1 in the *Memorial*. The photograph relating to 1977 has not been traced, and the reference may be due to an error.

237. A remarkable feature apparent from the study of the photographs is the consistency of the shape of Kasikili/Sedudu Island over a period of nearly six decades. The relevant photographs available in the archives of the Department of Surveys and Lands in Gaborone are as follows:-

- (i) June 1925 Scale 1:16,000 approx. (see Appendix 1)
- (ii) 1943 Scale 1:10,000, (see Appendix 1)
- (iii) 15 August 1947 Scale 1:10,000 (see Appendix 1)
- (iv) 1962 Scale 1:10,000 approx. (see Appendix 1)
- (v) May 1972 Scale 1:10,000 approx. (dry season) (see Appendix 1)
- (vi) November 1972 Scale 1:10,000 approx. (see Appendix 1)
- (vii) 1981 Scale 1:16,000 approx. (see Appendix 1)
- (viii) 3 August 1985 Scale 1:10,000 (see Appendix 1).

238. These photographs call for careful study. Dr. Sefe in his Opinion lists seven of these aerial photographs taken at intervals between the years 1925 and 1985. He conducted an analysis of these photographs which shows that the shape, location and size of Kasikili/Sedudu Island has not changed in the 60 year period between 1925 and 1985. In fact he reports "features are so stable that a small cluster of trees on the water's edge on the northern spit appeared on all the aerial photographs and was easily identified" by Dr. Sefe during the fieldwork of 10 and 11 March 1994. There was no discernible change in topographical levels. These trees are still to be seen there today.

239. The following features remain consistent in the aerial photographs: a) the overall shape of the island; (b) the alignment of the channels in relation to the island; (c) the

comparative dimensions of the northern/western channel of the Chobe and the eastern/southern channel.

(vi) Sedimentary evidence

240. Fieldwork around Kasikili/Sedudu Island indicates that silt and clay deposits exceed about 10m. The depth of these deposits provides evidence to date the age of the original sand bar deposit which forms the island. Its soil depth was thickened with layers of clay and silt deposited as successive flood waters swept over and were subsequently trapped by colonising vegetation cover. Under ideal conditions it would take thousands of years to build a silt and clay deposit in excess of 2m.

(d) Absence of evidence of change

(i) Absence of historical evidence of change

241. Given the strength of evidence that the main channel is the northern and western channel, any opposing thesis must be based upon the hypothesis of a radical change in the course of the Chobe between the present day and 1890. Such a thesis meets a number of substantial difficulties.

242. There is a complete absence of any evidence of radical change in the course of the Chobe. Large scale maps both before and after the 1890 Anglo-German Agreement, prepared by those who had actually surveyed this stretch of the Chobe River, show an unchanged course. Thus the sketch map of Dr. Benjamin F. Bradshaw of 1880 (Map 1), the Frankenberg Map of 1912 (Map 7), and Captain Eason's sketch map of 1912 accompanying his survey (Annex 15), all show the same configuration of the island (with a broader northern and western channel) as that shown in the Joint Survey of 1985 (Annex 48).

243. In this connection the comments of Captain Eason made in his Report of 5 August 1912 are of relevance. Captain Eason supplied his own sketch map of the Chobe in the vicinity of Kasikili/Sedudu Island, at a scale of 1:50,000 (Sheet 2, Annex 15), and attached a tracing of a map by Streitwolf, who was the German Resident in the Caprivi Zipfel prior to Von Frankenberg. In Eason's own words:

"Most maps do not show the river as going to that lake (Liambesi) notably Seiner's Map published by E.S.Mittel and Sohn, Berlin. This is the map at present used by the German authorities in the Caprivi Strip. They do not in conversation attempt to defend its accuracy (or inaccuracy) with regard to the eastern section of the Linyanti and I attach a tracing of a map made by Hauptmann Streitwolf, the First Imperial resident in the Caprivi Strip of the Linyanti River from Kazungula to the Liambesi which though inaccurate in detail is, in essential points similar to mine. I do not believe that either us or the subsequent residents have attempted to map the river west of Liambesi".

(Annex 15).

Earlier Captain Eason reported:-

"It seems to me that most maps have been constructed on the principle of mapping the edges of the swamps and drawing a line down the middle to show where the river may possibly run". (ibid.)

244. The Chobe is subject to floods both in winter by reason of the rains and in summer by the Zambezi floods. These floods, though they vary in volume from year to year, have been a regular feature of the morphology of the river for centuries, probably from about 2000 years ago when the present climatic conditions began. As a result of the floods caused by the January/March rains all the land lying between the upper Zambezi and the lower stretches of the Chobe up to

the first rapids and beyond forms one vast lake with only here and there a tree or small island appearing above the water level.

245. Flood hydrographs of the annual discharges 1924-1958 of the Zambezi River at Kariba indicate the annual variation in flood waters; with high discharges estimated for the years 1925/6, 1931/2, 1938/9, 1943/44; and recorded high flows in the years 1947/8, 1951/2, 1952/3 and 1955/6, with exceptional high flow in the year 1957/8. See the *Hydrological Yearbook 1957-1958*, Southern Rhodesia, Hydrological Branch Division of Irrigation, 1958-9 (Annex 60). These flows are confirmed by flood hydrographs 1937-1947 of the Zambezi River at Livingstone Pump House provided by the Lusaka Office of the SADC, set out at Annex 61.

246. As is apparent from the aerial photographs taken during the period over which these flood hydrographs were compiled, despite the high and exceptional high flows recorded, none was sufficient to change the configuration of the island or the course of the main channel.

247. In his Opinion (Appendix 1) Dr.Sefe states:

"Hydrologically for a single year's floods to cause the level of silting required to block a river of the size under consideration would imply an extremely active river, able to erode, transport, and deposit tons of sediment." (Opinion, p.5).

There is no observable or scientific evidence to support the occurrence of floods of such unusual dimensions from 1890 to the present day.

(ii) The Presumption of Continuity

248. The evidence of the state of affairs relating to the status of the northern and western channel as the main channel which obtained in the period 1890 to 1985 is reinforced by the presumption of continuity recognised by international tribunals. This consists of the common sense assumption that there is a probability that certain conditions or relations continue: see *Halsbury's Laws of England*, 4th Ed., Vol.17, London 1976, p.26, para.34.

249. In the practice of international tribunals the presumption has been applied in the form that later events were evidence of an earlier state of fact. The principle was applied in this form by Judge Basdevant in his distinguished individual opinion in the *Minquiers and Ecrehos* Case, I.C.J. Reports 1953, p.74 at pp.82-3. This aspect of the individual Opinion received the approval of Sir Gerald Fitzmaurice in his well-known commentaries on the jurisprudence of the Court: *British Year Book of International Law*, Vol.30,(1953),pp.55-6; also Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court*, Cambridge, 1986, Vol.I,pp.185-6.

(iii) Absence of scientific evidence of change

250. The Government has sought the advice of scientific experts in examining the hypothesis of a change in the main channel since 1890, and in particular refers to the report of Dr.Sefe at Appendix 1 of this Chapter. Dr.Sefe as an expert in hydrology and geomorphology gives his opinion that:-

- (i) the present status of the various channels of the Chobe was established about 10,000 to 26,000 years ago (see para. 227 above);
- (ii) the present graded profile could not have been altered from the current stable dry phase of the climate about

2000 years ago (see para. 228 above);

- (iii) there is no evidence of tectonic activity affecting the Chobe in recent centuries;
- (iv) the geomorphological characteristics of the Chobe are incompatible with the hypothesis of floods of unusual magnitude;
- (v) the Chobe River has been a system in equilibrium for a long time;
- (vi) the northern and western channel is the main channel of the Chobe River and has been for thousands of years.

251. The results of this expert opinion evidence are very cogent. In particular, the Opinion of Dr. Sefe complements and reinforces the conclusions of the *Joint Survey Report* of 1985. The conclusion must be that, if a change of course since 1890 was scientifically impossible, the conclusion of the Joint Survey was directly relevant to establishing the identity of the main channel in 1890.

(e) General Conclusion

252. The facts set out above relating to the morphology and hydrology of the Chobe River supported by direct observation, historical evidence, aerial photography and scientific measurement of sedimentary deposits, all indicate that the northern and western channel of the Chobe River in the vicinity of Kasikili/Sedudu Island is the main channel. It is the main channel today and has been since 1890, when the Anglo-German Agreement was concluded.

**APPENDIX TO
CHAPTER VII**

**THE HYDROGEOMORPHOLOGICAL BASIS FOR
BOTSWANA'S CLAIM ON THE SIDUDU/KASIKILI
ISLAND**

Opinion prepared by

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March 1994

This Opinion is separately paginated.

1. INTRODUCTION

Sidudu or Sedudu Island (or Kasikili Island to Namibians) is a small island, about 3.8km² (1.5 sq. miles in area, in the Chobe River, located within the area bounded by, approximately, the 25°07' and 25°08'E longitude and the 17°47' and 17°50'S latitude. The island is enveloped within two unequal arms, in terms of size, of the Chobe River.

One of the issues pertinent to the resolution of the border dispute between the Republic of Botswana and the Republic of Namibia in the vicinity of the Sidudu/Kasikili is the determination of which of these two channels is the main channel, the Namibians preferring the south channel, thereby making the Island Namibian territory. This paper presents evidence relative to the significance of the channels, which can help resolve the border dispute.

2. THE PRESENT MORPHOLOGY OF THE CHOBE RIVER

For the purpose of the exercise, the description of the morphology of the Chobe River will be restricted to that portion of the river contained on the Kasane 1:50,000 topographic sheet (Sheet No. 1725 C3 and Part C4; published by the Department of Surveys and Lands, Gaborone 1984 as Edition 3). (See Fig. 1 for extract from this sheet).

'Present' as used in the context of this report follows the normal geomorphological connotation in which 'present' is defined as "that time period over which input and output conditions have remained reasonably constant on average" (Knighton, 1984).

The main present morphological features of the section of the Chobe River of interest here are:

- the meander loops which are generally wide although some are narrow;
- the numerous backwater lagoons, associated with the outside bends of the meander loops;
- Sidudu/Kasikili and Xakuma Islands and smaller sand bars elsewhere in the river;
- the rapids in the vicinity of Commissioner's Kop.

All these features are produced by rivers with an imbalance between energy and sediment load, and which have also been subject to tectonism. Such rivers often shift their courses across the flood plain as they continuously aggrade and degrade their channels in a bid to maintain a profile that is adjusted to at least local base level (in this case, the top of Victoria Falls).

In the particular case of the Chobe River, it is one of three parallel linked rivers which rise in the Angolan Highlands. On reaching the southwest-northeast fault zones of the Gwembe Trough and Okavango Grabben, (features which are thought to represent an incipient arm of the East African Rift system (Scholz, 1975), the Chobe follows a rectilinear fault-controlled course northeastwards to join the Zambezi River at Kasane. The landscape suggests a river system which has shifted many times across the floodplain; but the south channel appears to have been stopped from shifting further southwards by the sand ridges which, generally, rise steeply from 930m to 1000m. All along these ridges, there is no evidence of recent erosion by the Chobe River. Furthermore, the low energy status of the river at present which is reflected by the existence of the meanders, sand bars and subsequent braiding (subdivision of the channel into two or more branches flowing in the same direction) would be the result not only of low bedslopes, but also drastic reductions in flow volumes as a result of past climatic change.

It is worth noting that Sidudu/Kasikili Island was initially a sand bar deposit, created by methods indicated above, that later became stabilised by vegetation. Its soil depth was thickened as layers of clay and silt were deposited as successive flood waters swept over it. Much of the silt and clay became trapped by the colonising vegetation cover. It is likely that at the time of the establishment of the present Zambezi course about 26,000 to 40,000 years ago (Coates *et al*, 1979; Thomas and Shaw, 1992) the south channel was the main channel, its establishment having been aided by the downwarping and downthrows which accompanied the intense tectonic activities at that time. It was later abandoned as a result of the erosion of the sand ridges which delivered an excessively high sediment load, and also as a result of the downthrows along the Zambezi axis (about 10,000-26,000 years ago) which changed slope configurations.

Some of the backwater channels were likely previous channels (tributaries or distributaries) of the Chobe River as some of them show the same lineations as the regular channels systems. Since the establishment of the north channel, the south channel has become the largest of the backwater channels, although it still carries some flow towards the Zambezi River. Many of the backwater channels are associated with abandoned meander loops and lagoons resulting from spit deposition. While it is probable that further shifts will occur in the geologic future, it is certain that the present alignment of the Chobe River represents a mature, low energy system that is graded in the classic sense of the concept of grade as described by Mackin (Schumm, 1972). Considering the fact that the last major climatic perturbation which led to the final desiccation of Palaeo-Lake Makgadikgadi and Lake Ngami occurred over 10,000 years ago (Shaw, 1988), it is most probable that the present graded profile of the Chobe River system was attained at the same time.

3. DECIPHERING CHANNEL CHANGES IN THE CHOBE RIVER SYSTEM

3.1 The 1985 Hydrographic Survey

In 1985, following an intergovernmental meeting held in Pretoria on 19 December 1984, a hydrographic survey was undertaken by a joint team comprising representatives from the Department of Surveys and Mapping and the Department of Water Affairs, both of the Republic of South Africa, on one hand, and representatives from the Department of Surveys and Lands and the Department of Water Affairs of the Republic of Botswana, on the other hand.

In all 27 cross sections were taken as shown in Fig.2. The results clearly indicate the north channel as the main channel: its mean depth of 5.7m exceeds the mean depth of the south channel by 2.13m. *The conclusion from this survey is that the north channel is the main channel of the Chobe River.*

As rivers carry clues to their history, the manner in which the north channel evolved to become the main channel today can be deciphered from the morphology of the river. The methods usually employed for deciphering this history were listed by Knighton (1984). They are listed in Table 1. The available data are summarised in Table 2.

Table 1: Method used in studying river channel changes

Direct observations	-	Instrument records Photographic records Ground survey
Historical records	-	Maps and photographs of different dates Historical documents
Sedimentary evidence-		Surface forms Internal structures
Dating Techniques	- (1)	Relative methods Relative height Organic remains Artifacts
	- (2)	Absolute methods Radioactive isotopes Dendrochronology Thermoluminescence (TL)

The word 'main' has both hydrological and geomorphological connotations relating to the velocity of flow, hence the discharge. So it connotes the ability of the river to transport debris in terms of particle size (i.e. its competence [Mackin, 1948]), and the maximum load (sediment of particular grain size) a stream can carry (i.e. its capacity as defined by Gilbert [1914]). Both the competence and capacity of a river are functions of energy of the river. As energy in a river reach is proportional to the product of the mass (i.e. size) and the bed slope, 'main' is synonymous with size. Thus of two tributaries of the same river, the larger is considered the main channel.

3.2 The hypothesis of floods in 1899

The documents available contain references to the possibility of floods occurring in 1899, nine years after the Anglo-German Treaty that fixed the boundary between the Caprivi Strip and Bechuanaland Protectorate along the main channel of the Chobe River. It is claimed by the Government of Namibia that until these floods, the main channel of the Chobe River was the South Channel.

Significantly, there is no estimate of the magnitude of the alleged floods. However, for such a claim to be sustained, the floods would have to be at such a magnitude and spectacular in inflicting flood damage that it would pass into folklore - perhaps, a flood of the magnitude rivalling the biblical floods during Noah's time! The issue of recollection of these floods will be taken up again later.

Hydrologically, for a single year's floods to cause the level of silting required to block a river of the size under consideration would imply an extremely active river, able to erode, transport and deposit tons of sediment. With a flood season lasting from March to May, the amount of sediment moved in this way would leave an indelible impression on the morphology of the river. There are several reasons why such a scenario, one season's floods silting up a river of the size of the Chobe and causing a shift in its alignment, is *highly implausible*. These are:

- (i) The geomorphology of the Chobe River system was influenced by the hydrology of the two major palaeo lakes of Northern Botswana, namely, Palaeo-Lake Makgadikgadi and Lake Ngami (Shaw, 1988). Of greater relevance here

are the topographic elevations of these lakes - 940 to 945m and 936m respectively. (Fig. 3)

Table 2: Data available for deciphering the morphology of the Chobe River in the vicinity of Sidudu/Kasikili Island

TABLE 1 CATEGORY	NATURE OF DATA	SOURCE
Historical records Documents: Airphotographs of different dates:	Report on survey by Capt. H.V. Eason - 1912 1925 scale - 1:16000 approx (G) 1943 scale - unstated (F) 1962 scale - 1:16000 approx (E) 1972 scale - 1:16000 approx (D) 1972 scale - unstated (C) 1981 scale - 16000 approx (B) 1985 scale - 1:17500(A)	Botswana National Archive. BNA S 9/3/1 Photos included in folder obtained from DWA. Letters in brackets are codes previously assigned.

Direct observation:	Hydrographic survey at 27 cross sections (see Fig. 2)	In Report on Chobe River Boundary Survey Sidudu/Kasikili Island July 1985, Survey undertaken by a joint South Africa and Botswana Team. Report contained in folder obtained from DWA.
Ground survey:	Field visit	Undertaken by author on 10th and 11th March 1994

The 940-945m level of Paleao-Lake Makgadikgadi extended into the alluvial flats surrounding the Chobe and Zambezi rivers. The full extent of this lake would require inflow from local and distant valleys. It is thought that now fossil valleys like the Okwa and Groote Laagte contributed, as did the Zambezi (Bond, 1963). Several authors have suggested that the Zambezi transferred water into the early Makgadikgadi system, with the water level regulated by overflow to the Zambezi Valley at Victoria Falls. Subsequent tectonism then altered the configuration of the system, by downwarping along the Zambezi axis, and/or isolation of the Makgadikgadi by movement of

the lower Okavango Faults. Thomas and Shaw (1988) noted that fossil alluvium is extensive in the Caprivi Strip of Namibia, between the Chobe and Zambezi rivers, reaching 1050m at the Kafue watershed to the north of the Zambezi. However no landforms at the 940-945m level are encountered at the Chobe-Zambezi confluence, suggesting that deformation has been active in this area. Carbon-14 dates from shells at the 940-945m level suggest an age of c.40,000-35,000 B.P. (Cooke and Verstappen, 1984). The history of Palaeo-Lake Makgadikgadi has been one of alternate dry and wet periods which eventually culminated in the last major dry period during which Palaeo-Lake Makgadikgadi dried up.

Later at the 936m level Palaeo-Lake Thamalakane overflows reached the Chobe via the Savuti channel immediately to the west of the Magikwe Ridge. It is thought that Palaeo-Lake Thamalakane, via the Boteti River, was instrumental in the maintenance of standing water at the 920 and 912m levels in Makgadikgadi on numerous occasions in the last 20,000 years. The 936m level lake was controlled by the Mambova Falls where the Chobe and Zambezi converge.

The eventual drying up of these lakes caused a significant change in the hydrology of the entire Okavango System, including the Chobe. The present morphology of the Chobe could have been established about 2,000 years ago coinciding with the start of the current stable dry phase of the climate.

- (ii) Tectonic activity appears not to be in evidence, at any time in recent centuries. If an earthquake had occurred, the most likely response would be fault-controlled channel alignments which would significantly disturb the present meandering and braiding obvious with the Chobe River. The mechanism of braiding, and the accumulation of sand bars has been exhaustively studied in field laboratory experiments by the US Army Corps of Engineers and the US Geological Survey. The topical papers on these research activities have been compiled into a book entitled "River Morphology" (Schumm, 1972). The research clearly shows that erosion and sedimentation in rivers are slow and, often episodic, processes. Channel erosion and sedimentation are essential for a river to adjust to base level.

- (iii) The stratigraphy of such islands, like floodplains, usually consists of several layers of clay and silt, overlying fluvial sands. The deposition of clay and silt occur in layers corresponding to depositional episodes; a single depositional episode would last several years. It would take thousands of years, even under ideal conditions, to build a silt and clay deposit in excess of 2m. Fieldwork around the Sidudu/Kasikili Island indicated that the silt and clay deposits would exceed 10m.

From the geomorphological and hydrological point of view, the conclusion can be drawn that *the present equilibrium profile of the Chobe River predates the assumed 1899 floods by several thousands of years. To claim that these floods caused the present alignment is to turn the established science of geomorphology on its head!*

Further doubt is cast on the alleged floods in 1899 by Captain H.V. Eason of the Bechuanaland Protectorate Police who undertook a survey of the Chobe River in 1912 - that is only some 13 years after the 1899 floods. Captain Eason, in his report, displayed a very keen eye for the landscape. If, indeed, the 1899 floods were cataclysmic, he would have noticed and commented on tell-tale signs on the river landscape. But there is no such comment in his otherwise detailed description of the landscape. Captain Eason unequivocally identified the northern channel as the main channel. He wrote: "Two miles above the rapids lies Kasikili Island. Here I consider that undoubtedly the North should be claimed as the main channel the South Channel is merely a backwater, what current there goes round the North." His report was accompanied by a map which shows the Island accurately [BNA S 35/12].

3.3 Evidence from Airphotographs

If floods in 1899 caused the shift of the main channel of the Chobe River, it could be expected that the river would be very active, in geologic terms, in recent years as it strives to re-establish a new graded profile. In that case, all features in the river, whether depositional or erosional, would be highly unstable. Such instability would apply to size, shape, location, and topographic height of those features. Time series airphotographs would easily record variations in these parameters from one period to the other.

With the above in mind, the airphotographs listed in Table 2 were analysed. The analysis showed that the shape, location and size of Sidudu Island has not changed in the 60-year period between 1925 and 1985. In fact features on the Island are so stable that a small cluster of trees on the water's edge on the northern spit

appeared on all the airphotographs and was easily identified by this author during the fieldwork of 10th and 11th March 1994. There was also no discernible change in topographic levels.

The conclusion is reached that the present Chobe River is a system in equilibrium (graded profile) and has been so for a long time, certainly prior to 1899.

4. CONCLUSION

The only logical conclusion that can be drawn from the scientific data is that *the north channel is the main channel of the Chobe River in the true hydrogeomorphic sense of the word, and has been so for thousands of years.*

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Thomas, D.S.G. and Shaw, P.A. (1992): *The Kalahari Environment*, University Press, Cambridge.

Dr. F.T.K. Sefe

Date 17
March 1994

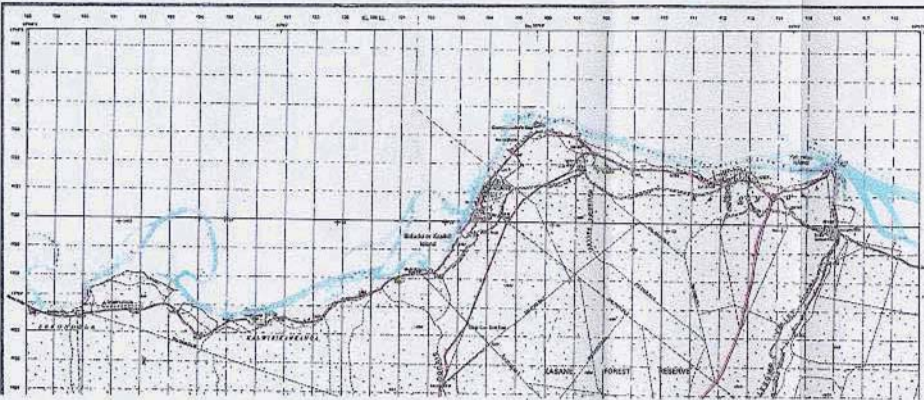


FIG. 1: EXTRACT FROM KASANE SHEET NO. 1725 C3 AND PART C4 SHOWING THE CHOBE RIVER SYSTEM

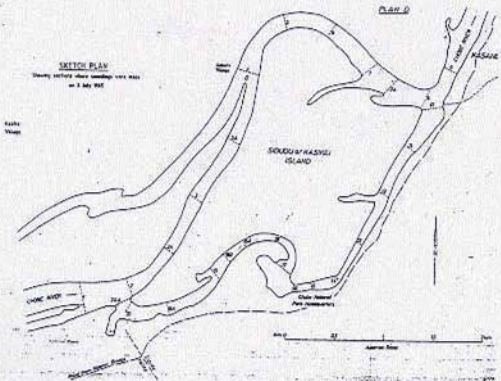


FIG. 2: 1985 HYDROGRAPHIC SURVEY CROSS-SECTIONS

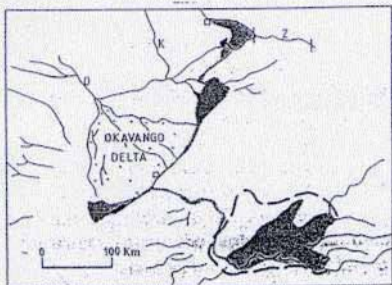
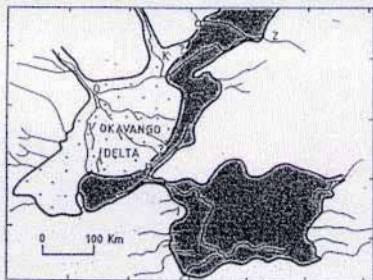


FIG. 3: PALAEO LAKE LEVELS ASSOCIATED WITH THE 940-945 M AND 936 M ELEVATION:

A) 940-945 m level- Lake Palaeo-Makgadikgadi

B) 936 m level - Lake Palaeo Thamalakane

CV OF DR. F.T.K. SEFE

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WORK EXPERIENCE:

1975-1976

Employed by the Architectural and Engineering Services Corporation (Hydrological Division) as Assistant Scientific Officer (Hydrology).

1981-1984

Employed as Lecturer in Hydrology (but also Geomorphology) at the University of Nigeria, Nsuka.

1984-1987

Employed as Lecturer in Hydrology (but also taught Geomorphology

CHAPTER VIII

The Relevance of Map Evidence

(a) The General Context

253. The issue to be addressed is the meaning of the phrase "the main channel" of the River Chobe in Article III of the Anglo-German Agreement of 1890. The position of Botswana is that the main channel of the Chobe in the vicinity of Kasikili/Sedudu Island is the northern and western channel and that the principal criterion of the assessment of the main channel (German "the Thalweg") is navigability.

(b) Role of Maps as evidence

254. Maps provide some assistance in the interpretation and application of the terms of Article III of the Anglo-German Agreement to determine the boundary between Botswana and Namibia in the vicinity of Kasikili/Sedudu Island. However, their relevance is entirely dependent on the circumstances. As the Chamber of the Court stated the matter in the *Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*:

"Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights."

(ICJ Reports 1986, p. 554 at p.582 para. 54.)

255. At best maps provide secondary evidence relating to the facts on the ground at any specific time. As Sandifer has pointed out:

"... Tribunals .. have, however, probably applied severer tests in evaluating maps than almost any other evidence. This is due to the fact that maps are in most instances, at best, secondary evidence, and frequently hearsay in character. Consequently although the best evidence rule is not strictly applied to maps, they constitute one of the best instances of a distinction between primary and secondary evidence and of the consequences attaching to such a distinction".

Evidence before International Tribunals, Revised edition, 1975, p.229.

256. The danger of reliance on maps has been consistently reiterated by international tribunals, arbitrations and municipal courts. Thus, in the *Island of Palmas Arbitration*, Judge Huber observed:

"If the arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be".

Reports of International Arbitral Awards, Vol. II, p.831 at p.853.

(c) Maps available relating to the Caprivi Strip

257. The maps available relating to the Caprivi, whether they come from an official or private source, are, generally speaking, of no relevance to the interpretation and application of the phrase "main channel" of the River Chobe.

This is for two independent but mutually reinforcing reasons. First, the scale of the maps is usually so small as to present no indication of the riverine topography. Secondly, when the maps indicate the political boundary, the mode is very impressionistic, more a general indication of direction than an accurate demarcation by reference to geographical or topographical features. In consequence it is unlikely that the maker of the map will have adverted to the question of the identification of the main channel.

(d) The Main Channel at the present time

258. There can be no dispute that at the present time, that is at the filing on 29 May 1996 with the Court of the parties' Special Agreement, that the location of the main channel in the vicinity of Kasikili/Sedudu Island is the northern and western channel of the River Chobe. The 1:50,000 scale map 3rd edition 1984 (Map 23), prepared by the Department of Surveys and Lands, Republic of Botswana, clearly represents the northern and western channel as the main navigable channel of the Chobe, and, along with the earlier sketch map of the 1985 Joint Survey (Annex 48) can be accepted as good corroborative evidence that the northern and western channel is the present main channel of the Chobe. 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.

259. The alternative position adopted by the Government of Botswana is 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. The maps referred to above in paragraph 6 also support this alternative position.

(e) Evaluation of the Maps available

260. As a practical way forward it is useful to evaluate the maps available. Broadly they are to be distinguished into two types-

those which record the facts in respect of the main channel of the River Chobe in the vicinity of Kasikili/Sedudu Island at the time of the making of the Anglo-German Agreement in 1890; and

those which indicate the views of the maker subsequent to 1890 as to where the boundary in that area should run.

(i) Official and private maps

261. A classification of maps into official and private can at times be of assistance in that a maker of a map published officially by or under the auspices of a State may be in a better position than a private individual to secure all the information on the region available at the time, but "his trustworthiness as a witness must depend upon the impartiality with which he paints his picture": see Hyde, "*Maps as Evidence in International Boundary Disputes*" (1933), *American Journal of International Law*, Vol. 27, p.311 at p.314.

262. The position has been formulated helpfully by Judge Huber in the *Palmas Island Arbitration*:

"A comparison of the information supplied by the two Parties shows that only with the greatest caution can account be taken of maps in deciding a question of sovereignty, at any rate in the case of an island such as Palmas (or Miangas). Any maps which do not precisely indicate the political distribution of territories, and in

particular the Island of Palmas (Miangas) clearly marked as such, must be rejected forthwith, unless they contribute - supposing that they are accurate - to the location of geographical names. Moreover, indications of such a nature are only of value when there is reason to think that the cartographer has not merely referred to already existing maps - as seems very often to be the case -but that he has based his decision on information carefully collected for the purpose. Above all, then, official or semi-official maps seem capable of fulfilling these conditions, and they would be of special interest in cases where they do not assert the sovereignty of the country of which the Government has caused them to be issued."

(Reports of International Arbitral Awards, Vol. II, p.831 at p.852).

(f) Categorisation of the available maps

263. The available maps appear to fall into six categories:

- (i) *Maps contemporary with the Anglo-German Agreement*
- (ii) *Maps published by the German colonial administration*
- (iii) *British official maps*
- (iv) *South African official maps published in 1949 or later*
- (v) *Botswana official maps*
- (vi) *Third State maps.*

The maps available to the Government of Botswana are as follows:-

(i) Maps contemporary with the Anglo-German Agreement

264. *British War Office Map of 1889 (Map 3)*

This map was prepared by the Intelligence Division of the War Office and it is referred to expressly in the provisions of Article III of the Anglo-German Agreement of 1890. The map is reproduced in Hertslet's *Map of Africa by Treaty*, 3rd ed., Vol.III, facing p.902. The boundary along the Chobe is shown by means of a broad red band. The map thus provides no evidence whatsoever of the precise position of the main channel of the Chobe either in the vicinity of Kasikili/Sedudu or elsewhere⁷.

265. *Map of Matibililand and Adjoining Territories of 1889 (Map 2)*

This map was compiled in the Intelligence Division of the War Office in 1889 and appears to have been a predecessor of the map referred to above also dated 1889. However, this map does not relate to the 1890 Agreement as finally concluded. In any event, given its scale, the map conveys no information relating to the identification of the main channel of the Chobe.

⁷A later version of this Map exists in the Botswana National Archives (BP-139), entitled 1891 Intelligence Division No.846b, with a note stating that it was compiled and lithographed in the Intelligence Division by Lt.Col.J.C.Dalton DAAG 1891:Scale 1:1,584,000, 1 inch to 25 miles.

A broken dash dot line follows the Chobe; and Sedudu Island is shown but not named, nor is it clear which side of the island the boundary passes. This is hardly surprising as 1 millimetre on the map equals 1 mile.

(ii) **Maps published by the German Colonial Administration**

266. Kriegskarte von Deutsch-Sudwestafrika 1904 (Andara sheet) (Map 4)

This is on a scale of 1:800,000 and indicates "Solumbu's Island". In doing so it appears to show the northern channel by a thick black line and the southern channel is barely visible except as the edge to the shaded area which represents the island. There can be no doubt that on German maps Kasikili/Sedudu was normally indicated as "Solumbu's Island".

267. The same (Linjanti sheet) 1904 (Map 5)

This sheet in the same series and to the same scale is reproduced in the original colouring. The island indicated as Solumbu's Island is indicated as a part of the Bechuanaland Protectorate.

268. Von Frankenberg, Karte des Caprivi Zipfels, Blatt I, 1912 (Map 7)

This map was produced with the authority of Von Frankenberg, the District Chief and Resident in the Caprivi Zipfel, and is on a scale of 1:100,000. It is dated May 1912, and exists in at least two editions. The map clearly indicates Kasikili/Sedudu and the southern channel bears the legend "Kassikiri Fluss-Arm". This term translates (see annexure to Map 7) as "branch or tributary of a main river". The translation also appears in standard works of reference. There is no boundary marked as such but the map is important in its identification of the northern and western channel as the main channel.⁸

⁸Franz Seiner's Map published in 1909. In 1909 the mapping work carried out by Franz Seiner in 1905-6 was used as the basis of an impressive map of the Okavango and Zambezi regions. The map was produced under the

(iii) **British Official Maps**

269. Sketch Map of Bechuanaland Protectorate, to illustrate Military Report, 1906 (Map 6)

This British official map shows the boundary (by means of a pecked line) on the northern side of the Chobe. It was compiled in the office of the G.O.C. in Chief, South Africa, December 1905 (reference: T.S.F.S. 2199). The island is not visible.

270. Sketch Map of Bechuanaland Protectorate, 1912 (Map 8)

A 'Sketch Map of Bechuanaland Protectorate', on a smaller scale, appears in the Colonial Report series: *Bechuanaland Protectorate: Report for 1911-12* (Cd. 6007-28), London, H.M.S.O., 1912. The map, printed at the Ordnance Survey Office, 1912 shows a boundary to the south of the Chobe.

271. Sketch Map of Bechuanaland Protectorate, 1913 (Map 9)

The same Sketch Map, showing a boundary to the South of Chobe, also appears in the next volume: *Bechuanaland Protectorate: Report 1912-1913* (Cd. 7050-14), London H.M.S.O., 1913.

editorship of Paul Sprigade on a scale of 1:500,000. The names of previous cartographers with dates are written in the map including Schulz and Hammer, 1884, and Reid 1896; "Bradshaw 080" is written along the north bank of the Chobe immediately to the west of Kasikili/Sedudu. The boundary is not shown but Kasikili/Sedudu is marked as Solumbu's Island. It is significant that the configuration of the island is identical to that shown on the 1880 Bradshaw map and similar to the configuration visible on aerial photographs taken in the period 1925 to 1985. See further Chapter VII, paragraphs 237-241 .

272. Sketch Map of Bechuanaland Protectorate, 1913-14 (Map 10)

The same 'Sketch Map', showing a boundary south of the Chobe, also appears in the next volume: *Bechuanaland Protectorate: Report for 1913-1914* (Cd. 7622-6), London H.M.S.O., 1914.

273. Sketch Map of Bechuanaland Protectorate, 1915 (Map 11)

The 'Sketch Map' included in the next volume indicates a boundary, very clearly, *to the north of the Chobe*: see *Bechuanaland Protectorate: Report for 1914-1915* (Cd. 7622-48), London, H.M.S.O., 1915. The map was printed at the Ordnance Survey Office, 1915.

274. British War Office Map of Bechuanaland Protectorate, 1933; Geographical Section, General Staff No.3915. (Map 13)

In 1933 or thereabouts a set of eight sheets covering the Bechuanaland Protectorate was published at a scale of 1:500,000 by the British War Office. Sheet No.2 in the series was published in 1933. The map shows an intercolonial boundary between the Protectorate and the Caprivi south of the River Chobe both in the vicinity of Kasikili/Sedudu and elsewhere along the Chobe.

275. The evidential value of this indication of the boundary is substantially reduced by the following considerations: -

- (a) The boundary is shown as an "intercolonial" not as an "international" boundary;

- (b) the map is a compiled map produced by technical experts from previous maps in the absence of reference to legal questions.
- (c) the fact that the *entire* alignment of the boundary along the Chobe is indicated *south* of the river establishes that the map maker had no interest in a precise representation of a boundary following *the main channel of the river*.
- (d) In the period 1915 to 1929 the Caprivi had been administered as part of Bechuanaland Protectorate and the maps relied on in the production of the 1933 map relate predominantly to this period. In a period when the United Kingdom was in *functional terms* the sovereign administrator on both sides of the Chobe it would be unlikely that the precise depiction of the boundary on a map drawn on a scale of 1:500,000 would be a matter of particular concern.

276. Bechuanaland Protectorate, 1960: Directorate of Overseas Surveys (D.O.S. (Misc.) 282) (Map 16)

This map is stated to have been: "Drawn and photographed by D.O.S. from material supplied by the High Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland". The sheet indicates the boundary along the northern and western channel of the Chobe. In view of the small scale no detail is visible in the vicinity of Kasikili/Sedudu.

277. Bechuanaland, 1965: Directorate of Overseas Surveys (D.O.S. 847) (Z 462)) (Map 17)

This is sheet 2 of a series of sheets at a scale of 1:500,000 published by the D.O.S. in a first edition in 1965. The boundary is marked actually along the Chobe and it clearly follows the northern and western channel in the vicinity of

Kasikili/Sedudu. The sheet carries a disclaimer: "This map must not be considered an authority on the delimitation of international boundaries".

(iv) **South African Official Maps published since 1949**

278. South Africa Official Map 1:250,000, 1949 (Map 14)

In 1949 the first edition of a South African official map on a scale of 1:250,000 was published (in a series of five) with the title 'Katima Mulilo'. The map was compiled and drawn by the Union Defence Forces, Survey Depot (Technical) in 1945 and printed by the Government Printer, Pretoria, in 1949. The boundary in the vicinity of Kasikili/Sedudu follows the southern and eastern channel.

279. The evidence available indicates that this map reproduces, without any further or independent verification, the boundary indicated on the War Office map of 1933 (see above, paragraphs 274 and 275). Thus the authorities listed include the War Office map of 1933.

280. In any case, even if it be assumed that the map of 1949 was published after consultation with External Affairs in Pretoria, the evidential significance of the sheet is removed by the fact that by 1949 the South African Government was well aware of the dispute relating to the boundary as a consequence of the correspondence at a high level resulting from the dispute between Trollope and Redman in 1948: see Chapter V, paragraphs 153 to 159. In terms of the admissibility of evidence this map is self-serving, not having been produced *ante litem motam*, that is, before the parties were aware of the dispute. It is a general principle of the law of evidence that declarations as to public or general rights must have been made before a dispute has arisen over the right in question: see Hoffmann, *The South African Law Of Evidence*, Durham,

1970, p.117; *Halsbury's Laws of England*, 4th ed., Vol 17, 1976, p.59 (para.80); *Phipson on Evidence*, 4th ed. by Howard, Crane and Hochberg, 1990, pp.738-9 (paras. 30-32).

281. The same general principles are to be found in the sources of general international law in the form of the principle that the parties to a dispute cannot by their conduct subsequent to the critical date (when the dispute crystallised) improve their position: see Fitzmaurice, *British Year Book of International Law*, Vol.32 (1955-6), pp.20-44. In the present case it is very probable that the critical date falls within the period 1948-51.

282. The 1949 map is a compiled map and one of the authorities listed is the War Office map of 1933. The alignment indicated therefore results from the factors indicated above in paragraph 275. In particular, the alignment shown is unrelated to the provisions of the Anglo-German Agreement and cannot be taken as an interpretation thereof.

283. South African Official Map, 1:250,000; 1967 (Map 19)

The 1967 edition of the same map does not list the authorities used but it is obviously based upon the 1949 map and therefore shares its deficiencies.

284. South African Map Compiled by JARIC, 1:100,000 (c.1974) (Map 22)

This is an official South African map clearly indicating the boundary along the centre of the northern and western channel of the Chobe. Indeed, Kasikili/Sedudu is not shown as an island and the southern channel is not shown. The provenance of the map is the South African Defence Forces. The map was compiled by a unit known as JARIC (Joint Air Reconnaissance Intelligence Centre) (HLVS is the Afrikaans equivalent). The

map bears no date but all the indications (for example, the table for magnetic variation gives the correction of 1974) suggest that it was produced in 1974 or 1975. The map forms part of a series primarily of the eastern Caprivi Strip.

(v) Botswana Official Maps

285. Republic of Botswana, 1:50,000 (Dept. of Surveys and Lands, 1984) (Map 23)

Maps produced by the Republic of Botswana since independence consistently indicate the boundary as following the northern and western channel. An example is the sheet in the 1:50,000 series of which the third edition was published in 1984 (Sheet 1725 C3 and Part C4). These sheets all carry a disclaimer. No doubt these maps were prepared after the controversy had surfaced, as in the case of the South African official maps, but their existence demonstrates the absence of any subsequent practice (with reference to maps) which establishes the agreement of the parties' regarding the interpretation of the Anglo-German Agreement in accordance with Article 31 (3)(b) of the Vienna Convention on the Law of Treaties.

(vi) Third State Maps

286. Republic of Zambia, 1:250,000 (Sesheke), Surveyor-General, Lusaka, 1971 (Map 20)

This sheet in the series (Sesheke, SE-35-5) shows the boundary along the northern and western channel. The sheet carries a disclaimer concerning international boundaries.

287. Zimbabwe. 1:250,000 (Kazungula),
Surveyor-General, Zimbabwe, 1981 (Map 21)

This sheet in the series (Kazungula, SE-35-5/9) shows the boundary along the northern and western channel. The southern channel of the Chobe is not shown.

(g) General analysis of the available maps

(i) No map as an integral part of the Anglo-German Agreement

288. After setting out the course of the line which should bound the sphere of influence reserved to Germany, Article III of the 1890 Agreement provides:

"The course of the above boundary is traced in general accordance with a map officially prepared for the British Government in 1889".

No map was annexed to the Anglo-German Agreement 1890. Hertslet in his *Map of Africa* attached a map to illustrate the line specified in the Agreement but the scale was too small to indicate its exact demarcation in connection with a channel of the Chobe; the map which it was based on, Map 846b of the Intelligence Division of the War Office, was equally uninformative. It is therefore clear that no map was in any way agreed or accepted by the parties as an integral part of the agreement.

289. As a Chamber of the Court explained the position:

"Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits; it is because such maps fall into the category of physical expressions of the will of

the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used along with other evidence of a circumstantial kind, to establish or reconstitute the real facts."

Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), ICJ Reports, 1986, p.582, para. 54).

(ii) Too small scale of maps

290. The dimensions of the island and the channels of the river are to be kept in mind when assessing the relevance of maps. The greatest width of the river at any point in the vicinity of Kasikili/Sedudu island does not exceed 250m. Having regard to the fact that, at its widest point, the distance north to south across Kasikili/Sedudu Island from the northern bank of the north channel to the south bank of the southern channel is 2.85 km., and the distance east-west across the island from the east bank of the eastern channel to the west bank of the western channel is 2 km., it will readily be appreciated that a map of smaller scale than 1:100,000 or 1 cm to 1km (1' inch to 1 mile) is likely to be of little use in representing accurately the configuration and size of the channels and island.

291. Very few of the maps, sketches and other surveys referred to by the parties, are drawn to such a large scale. They include:-

the sketch map of Dr. Benjamin B. Bradshaw of 1880 drawn to a scale of 1.1cm to 1 mile, See Chapter VII, paragraph 232 and Map 1;
the Frankenberg map, the Karte des Caprivi Zipfels, of

1912 (1 :100,000), Map 7;
the map prepared by the South African Defence Force
in 1974 (the 1974 JARIC map) (1:100,000), Map 22;
the map prepared by the Joint Survey 1985, (approx
1:15,000), Annex 48;
and the series of maps at a scale of 1:50,000 prepared
by the Dept of Surveys and Lands, Republic of
Botswana from 1974, Map 23.

292. It is to be noted that all these maps clearly show
the northern and western channel as the main channel of the
Chobe.

293. In this connection it is useful to bear in mind the
Taba Case, where, confronted with the task of identifying the
exact location of boundary pillars by reference to a map drawn
to the scale of 1:100,000, the Tribunal said:-

"The Tribunal does not consider these map-based
indications to be conclusive since the scale of the map
(1:100,000) is too small to demonstrate a location on the
ground exactly as required in these instances where the
distances between disputed pillar locations are sometimes
only a few metres. By way of illustration it is sufficient to
recall that a map of the scale of 1:100,000 1 millimetre on
the map represents 100 metres on the ground",
*Case concerning the Location of Boundary Markers at
Taba (Egypt/Israel), Reports of International Arbitral
Awards*, Vol. XX, p.4 at p.48, para. 184.

(iii) Unreliability of boundaries drawn on maps

294. Except in very large scale maps the drawing of
a riverine boundary by means of a superimposed line on
geographical features(whether coloured or broken or in some
other way differentiated from the line indicating the course of
the river itself), inevitably produces inaccuracy and distortion.

To achieve visibility and a representation of the general direction of the boundary the superimposed line may first extend across the full width of the river, even in some cases encompassing both banks as well as the river itself, or second, be placed along one or other of the banks of the river.

295. Examples of the first are to be found in the maps of 1889 and 1890 prepared in the Intelligence Division of the War Office which were subsequently used to illustrate the terms of the 1890 Agreement. The line used to indicate the southern boundary of the German and British spheres of interest in the lower reaches of the River Chobe extends well beyond the banks of the river on either side; given the maps' scale of 1 :584,000 or 1 inch to 25 miles, the boundary line of 1/32 of an inch is equivalent to nearly half a mile on the ground.

296. Examples of the second are to be found in the 1905 Sketch Map to illustrate the Military Report, produced by the Office of the General Officer Commanding in South Africa which shows the boundary following the northern bank; and the maps produced by the Ordnance Survey Department for the annual *Colonial Reports* on the British Protectorate presented to the British parliament; the maps attached to the *Colonial Reports* for 1911/12, 1912/13, and 1913/14 (Maps 8 to 10) show a boundary line following the south bank whilst that for 1914/15 (Map 11), shows the line following the north bank of the Chobe.

(h) Conclusion on the Map Evidence

297. The map evidence is contradictory and confused. It is not simply the case that the official maps of Botswana and South Africa (with one important exception) do not constitute subsequent practice 'which establishes the agreement of the parties' regarding interpretation of the Anglo-German Agreement in accordance with Article 31 (3)(b) of the Vienna

Convention on the Law of Treaties. In addition, the different series of official maps are internally inconsistent.

298. The four British maps of 1912 to 1915 contradict each other. Thus the 1915 map shows the boundary on the northern side of the Chobe. The 1933 War Office Map is contradicted by the Sketch Map of 1915 and also by the maps of 1960 and 1965. Likewise the South African maps of 1949 and 1967 are contradicted by the SADF map of circa 1974 (the JARIC Map).

299. In any case the value of the map evidence subsequent to the years 1948-51 is reduced by the fact that the existence of the dispute became known to the parties in that period and the parties are not permitted to improve their positions subsequent to the critical date.

300. In this context the JARIC map is of considerable importance. It was produced whilst South Africa was still illegally in possession of Namibia and it was produced (it may be presumed) for internal use. It thus constitutes the authoritative professional opinion of the South African Defence Forces and this opinion was expressed in a context (patrolling and other military activities) in which the location of the boundary was of great relevance. It is perfectly normal for international tribunals to rely upon military mapping: see the *Frontier Land Case*, I.C.J. Reports, 1959, p.209 at p.227 (reference to Belgian military staff maps). Moreover, in the *Temple Case (Merits)* the International Court referred to a Thai official map of 1937 and observed: 'That this map may have been intended for internal military use does not seem to the Court to make it any less evidence of Thailand's state of mind'. I.C.J. Reports, 1962, p.6 at p.28.

CONCLUSIONS

The Government of Botswana now presents its conclusions in summary form.

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.

Second:

The assessment of the facts should reflect the objects and purposes of the Anglo-German Agreement. For present purposes the relevant object and purpose was that the riparian States should have access to waterways and, in particular, to the navigable parts of the major boundary rivers in the region. It must follow that in case of any doubt the channel which qualifies as the 'main channel' is that which is navigable by comparison with any other candidate channel.

Third:

The scientific evidence available shows that there is no possibility that the river system has undergone any modification since 1890 of a kind which would change the status of the channels in the vicinity of Kasikili/Sedudu Island.

Fourth:

It follows that the evidence available as to the location of the main channel in the period 1912 to 1985 is relevant to the issue of the location of the main channel in July 1890. The evidence includes the following:-

- (a) The two maps produced under the authority of Von Frankenberg, the German District Chief in the Caprivi,

in May 1912, showing the southern channel as the 'fluss-arm' that is, the branch or tributary of the Chobe.

- (b) The assessment by Captain Eason in his Report dated 5 August 1912.
- (c) A remarkable series of aerial photographs for the years 1925, 1943, 1947, 1962, 1972, 1981 and 1985.
- (d) The conclusions of the Joint Survey carried out in 1985.

All the evidence available indicates unequivocally that in 1890 the northern and western channel was the 'main channel' of the Chobe.

Fifth:

There is a complete absence of evidence to the effect that in 1890, or thereabouts, the southern channel was identifiable as the main channel.

Sixth:

The Pretoria Agreement of 1984 is an intergovernmental agreement which constitutes 'an agreement between the parties regarding ... the application' of the provisions of the Anglo-German Agreement. This agreement was duly implemented by means of the Joint Survey and the resulting *Joint Survey Report*, which is itself an intergovernmental instrument deriving from the Pretoria Agreement and having a legally binding character.

Seventh:

Independently of its status as a binding intergovernmental instrument the *Joint Survey Report* constitutes expert opinion evidence on the key question, the identification of the 'main channel' of the Chobe.

Eighth:

The subsequent practice of the parties (and their successors) can only be taken into account if it establishes the *agreement* of the States concerned regarding the interpretation of the treaty. The only subsequent practice which is legally pertinent in the present case is the *Joint Survey Report* of 1985. However, it is more appropriate to classify the transactions of 1984 leading to the *Joint Survey Report* in 1985 as a 'subsequent agreement between the parties regarding the interpretation of the treaty on the application of its provisions' in accordance with the Vienna Convention on the Law of Treaties.

Ninth:

The evidence of official maps available shows no consistency and therefore does not evidence either 'the agreement between the parties' regarding the interpretation of the Anglo-German Agreement in accordance with Article 31(3)(a) of the Vienna Convention, or a subsequent practice 'which establishes the agreement of the parties' regarding interpretation of the Anglo-German Agreement in accordance with Article 31(3)(b) of the Vienna Convention.

Tenth:

Notwithstanding the *general* status of the *official* maps indicated in the previous conclusion, individual maps have evidential value on their own terms. Individual maps with discrete probative value include the Von Frankenberg map of 1912 and the South African military map compiled by JARIC.

Finally:

The northern and western channel of the Chobe in the vicinity of Kasikili/Sedudu Island is the 'main channel' of the Chobe in accordance with the provisions of Article III(2) of the Anglo-German Agreement and the intergovernmental *Joint Survey Report* of 1985.

SUBMISSIONS

Having regard to the considerations set forth in the *Memorial* presented on behalf of the Republic of Botswana,

May it please the Court to adjudge and declare that:

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

(signed)

Abednego Batshani
Tafa,
Deputy Attorney-
General.

Agent of the Republic of Botswana

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.

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.

EDWARD B. MALET.
H. PERCY ANDERSON.
v. CAPRIVI.
K. KRAUEL.

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 Heligoland 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 Lloyd's inbegriffen.

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.

EDWARD B. MALET.
H. PERCY ANDERSON.
v. CAPRIVI.
K. KRAUEL.

A N N E X 48

**Source: Copy supplied by the Department of
Surveys and Lands Gaborone.**

Note: The Report includes:

Map A: an extract from a German map of 1909.

Map B: an extract from a British map of 1933.

**Map C: an extract from a Botswana map of
1975.**

Plan D: positions of the cross-sections taken.

The depth soundings recorded and also annexed to
the Report are provided in a separate attachment
(with the exception of section 17).



DEPARTMENT OF PUBLIC WORKS AND LAND AFFAIRS

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Enquiries
Your reference
My reference DG 15/1/6

1985-08-01

Dear Les

CHOBÉ RIVER BOUNDARY SURVEY : SIDUDU/KASIKILI ISLAND

I am enclosing two signed copies of our report on the survey and also the relevant annexures.

Andy and I agreed that we should enlarge somewhat on the "Background" and should not completely disregard Captain Eason's 1912 report to the Resident Commissioner of the Bechuanaland Protectorate. We have also enlarged on the reference to the 1905 German map, as the original published copy of it clearly shows the island to be included in the Caprivi.

In the "Conclusion" we have again made reference to Captain Eason's report.

For the rest we have corrected minor errors (eg dates) and have made the report a more readable document.

Many thanks again for the hospitality extended to us during our stay in Gaborone.

Yours sincerely

E Filschen
for/CHIEF DIRECTOR OF SURVEYS AND MAPPING.

CHobe RIVER BOUNDARY SURVEY

SIDUDU/KASIKILI ISLAND

JULY 1985

Background

The earliest published map showing the boundary between the Caprivi and Botswana dates back to 1905. It appears in a publication MITTEILUNGEN AUS DEN DEUTSCHEN SCHUTZGEBIETEN, BAND XXII, 1909. An extract from the map is annexed as Map A. This map shows the boundary to be the channel to the south of Sidudu/Kasikili Island. The island is named Sulumbu's Island, probably, in accordance with Capriviian custom, after a headman.

An interesting report, dated 5 August 1912, made by Capt H I Eason of the Bechuanaland Protectorate Police is filed in the Archives in Gaborone. Capt Eason was stationed at Kazungula and the report describes an expedition he made by boat up the Linyanti (or Chobe) River. On page 3 of Part II of his report he writes :

"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 8 feet deep, the South Channel about forty feet wide and four feet deep. The South Channel is merely a back water, what current there is goes round the North. The natives living at Kasika in German territory are at present growing crops on it."

Capt Eason appears to be prevailing on the Resident Commissioner of the Bechuanaland Protectorate, to whom his report is directed, to have the boundary changed. In 1933, however, the British War Office published a map which still shows the island to be part of the Caprivi. An extract from Sheet 2 of the Bechuanaland Protectorate Map Series is annexed as Map B.

Small scale maps have subsequently been produced in South Africa and these have shown the boundary in a manner consistent with the German and British maps that had been produced before.

In 1975 the Department of Surveys and Lands of Botswana published a map at a scale of 1:50 000 on which the boundary is, for the first time, shown to be to the west and north of the island, thus including it in the territory of the Republic of Botswana. An extract from the map is annexed as Map C.

The disparity in the depiction of the boundary between South African maps and those of Botswana has probably been a contributory factor in the recent border incident near Kasane.

Authority for Survey

At an intergovernmental meeting held in Pretoria on 19 December 1984 it was decided that a joint survey should be undertaken to determine whether the main channel of the Chobe River is located to the north or the south of Sidudu/Kasikili Island.

Representatives of the two national survey organisations accompanied by co-workers from the Departments of Water Affairs have now been to the area to survey the 'Thalweg' in the vicinity of the island. Specific mention is made to the Thalweg in the 1890 Agreement between England and Germany.

2/.....

Survey Report

During the afternoon of 2 July 1985, a reconnaissance was undertaken of the Sidudu/Kasikili Island area on a large boat belonging to the Chobe Game Lodge, the MOSI TUNYA.

On the morning of 3 July 1985, the rubber boat with echo sounding equipment belonging to the Department of Water Affairs and which had been brought from Pretoria, was assembled at the Game Lodge. A support boat was procured from the Game Lodge together with a boatman named Kabansi, as a safety measure if hippo should interfere with the operation and in order to assist with transporting members of the party. They were :

From the Republic of South Africa,
Mr D J Grundlingh, Surveys and Mapping, Mowbray
Mr J H E Fitschen, Surveys and Mapping, Mowbray
Mr J H Botha, Survey Services, Dept of Water Affairs
Mr G R van der Merwe, Survey Services, Dept of Water Affairs
and from the Republic of Botswana
Mr L J Howells, Surveys and Lands, Gaborone
Mr J A Raffle, Surveys and Lands, Gaborone
Mr I L Muzila, Department of Water Affairs

The weather was overcast and cool and the water quite rough in places.

After checking the equipment, the survey was commenced from a place opposite the Chobe National Park Headquarters, at Section 15, and continued around the island in a clockwise direction. The cross sections were, in each case, taken from the left bank of the channel (looking downstream) towards the right bank. Twenty seven cross sections in all were taken. Section 20 had to be broken off half-way through the channel on account of shallow water. Section 14 had to be discontinued in midstream on account of reeds growing in the right hand half of the channel. The positions of the cross sections are shown on the annexed Plan D. Depth soundings recorded during the survey are shown for each of the twenty seven cross sections and are also annexed to this report.

The water level of the Chobe River was measured at the gauge in Kasane as 3,24 metres. Mr I L Muzila ascertained that this represents a levelling height of 925,32 metres above MSL.

During the trip the party landed at Kabuta village to empty the rubber boat which had taken water. The village is annotated on Plan D. The party spoke to an elderly inhabitant of the village, Benson Mafwila, who said that he was born in 1918. Edwin Simataa Ilukena another villager, 31 years old and very well spoken, acted as interpreter. It appears that Kabuta is a terminal for shoppers proceeding to Kasane by dug-out canoe and is also a crossing point to Sidudu/Kasikili Island. Livestock from Caprivi are swum across the river when grazing on the Caprivi side is poor. The impression was gained that visits to the Island had, in recent years, become infrequent. Benson Mafwila recounted that Tax had been paid at Kasane in the Nineteen-twenties. He was referring, no doubt, to the period 1922 - 1929 when the Caprivi Strip was administered on behalf of South Africa by the Protectorate Government. The name by which the Island is known to Caprivians is Kasikili. This is also the Caprivian name for the arm of the river which flows around the island to the west and north. The name Sidudu Island is a later name coming from the Botswana side. There is a Sidudu valley in the immediate vicinity to the south.

The survey party had a break for lunch at the Kasane Hotel and completed its work at 16h00.

3/.....



Conclusions

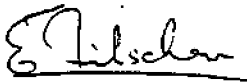
The main channel of the Chobe River now passes Sidudu/Kasikili Island to the west and to the north of it. (See annexed Map C).

The evidence available seems to point to the fact that this has been the case, at least, since 1912.

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

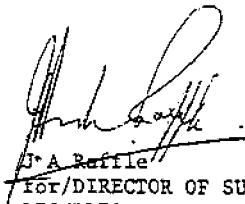
If the main channel of the river was ever situated to the south of the island, it is probable that erosion in the Sidudu Valley, the location of which can be seen in the annexed Map C, has caused the partial silting up of the southern channel.

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



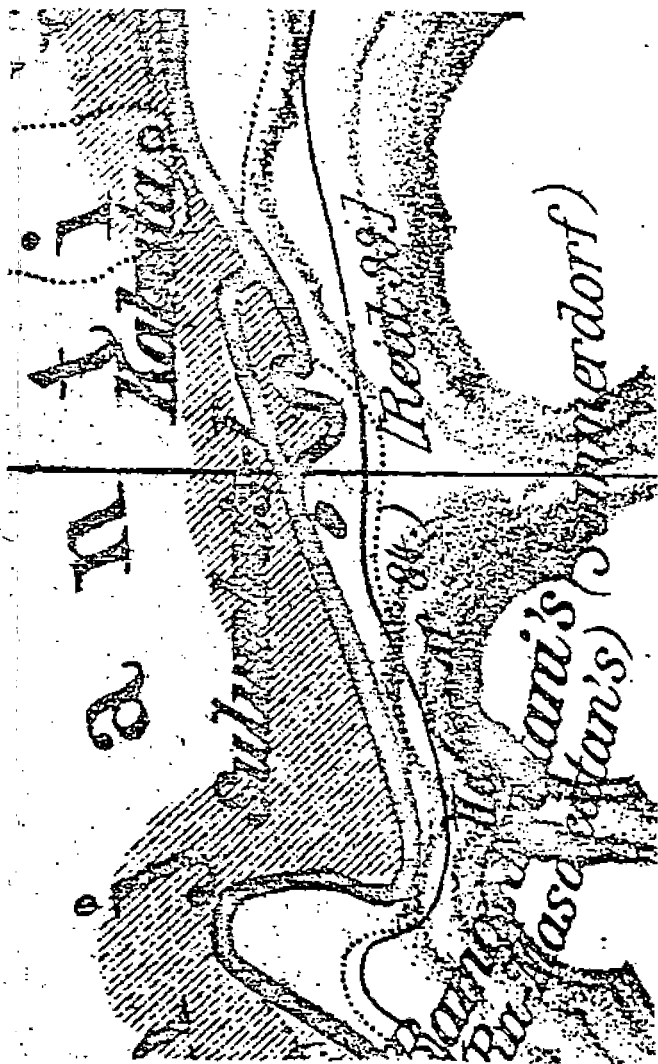
E Fitschen
for/CHIEF DIRECTOR
OF SURVEYS AND MAPPING
REPUBLIC OF SOUTH AFRICA

5 July 1985


J.A. Raffle

for/DIRECTOR OF SURVEYS AND LANDS
REPUBLIC OF BOTSWANA

5 July 1985



EXTRACT FROM 1

Map appearing in MITTEILUNGEN AUS
DEN DEUTSCHEN SCHUTZGEBIETEN,
BAND XXII, 1909
SCALE 1:1500 000

Extract is 5X enlargement of
the original.

Karte des Gebiets zwischen

OKAWANGO UND SAMBESI

(CAPRIVI - ZIPFEL)

nach den Aufnahmen
VON

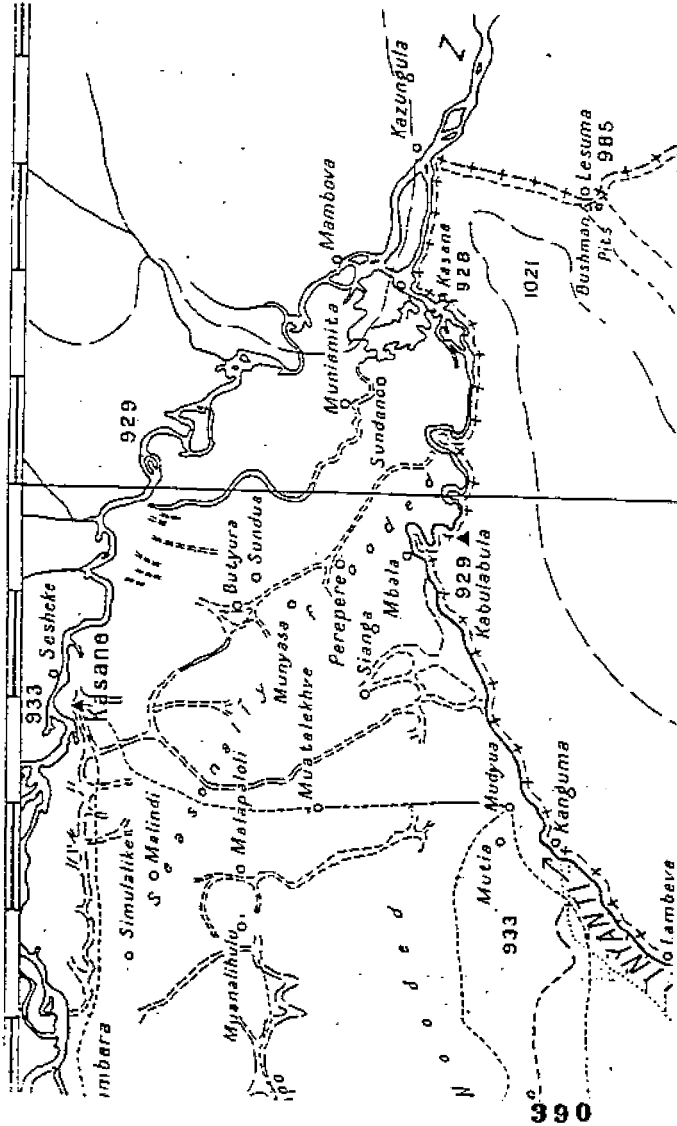
FRANZ SEINER

in den Jahren 1905-1906.

PUBLISHED BY :

Ernst Siegfried Mittler und Sohn
Königliche Hofbuchhandlung
Berlin, 1909

25°



EXTRACT FROM :

Sheet No 2 of 8 sheets of
BECHUANALAND PROTECTORATE
SCALE 1:500 000.

Published in 1933 as indicated below.

AUTHORITIES.

- Sketch Map of Bechuanaland Protectorate, compiled by S. L. Forster-Towne, 1:500,000, 1920.
 Sketch Map of Njemilind and Khamsel by Captain A. G. Stigand, 1:500,000, 1922.
 Malvis Bay Reconnaissance, Geographical Data, by Mr. Jeffries, 1931.
 Kalechel Reconnaissance of the Zembezi-Ngami Region by A. L. Co. Toll, 1:500,000, 1928.
 Survey Department, Northern Rhodesia, 1:250,000, 1928-29.
 Survey Department, Southern Rhodesia, 1:250,000, 1929, and 1:1,000,000, 1930.
 Captivitzipol; von Frankenber, 1:100,000, 1912, Rhodesia, G.S.G.S. 2871, 1:2,000,000, 1922.
 Gobabib-Livingstone, Geometric Altitudes, by Lieut.-Colonel Daniels, 1928.

Geographical Section, General Staff, No 3915.
 Published at the War Office, 1933.
 G.A. 417/100/31.

Agents for the sale of maps published by the Geographical Section, General Staff.

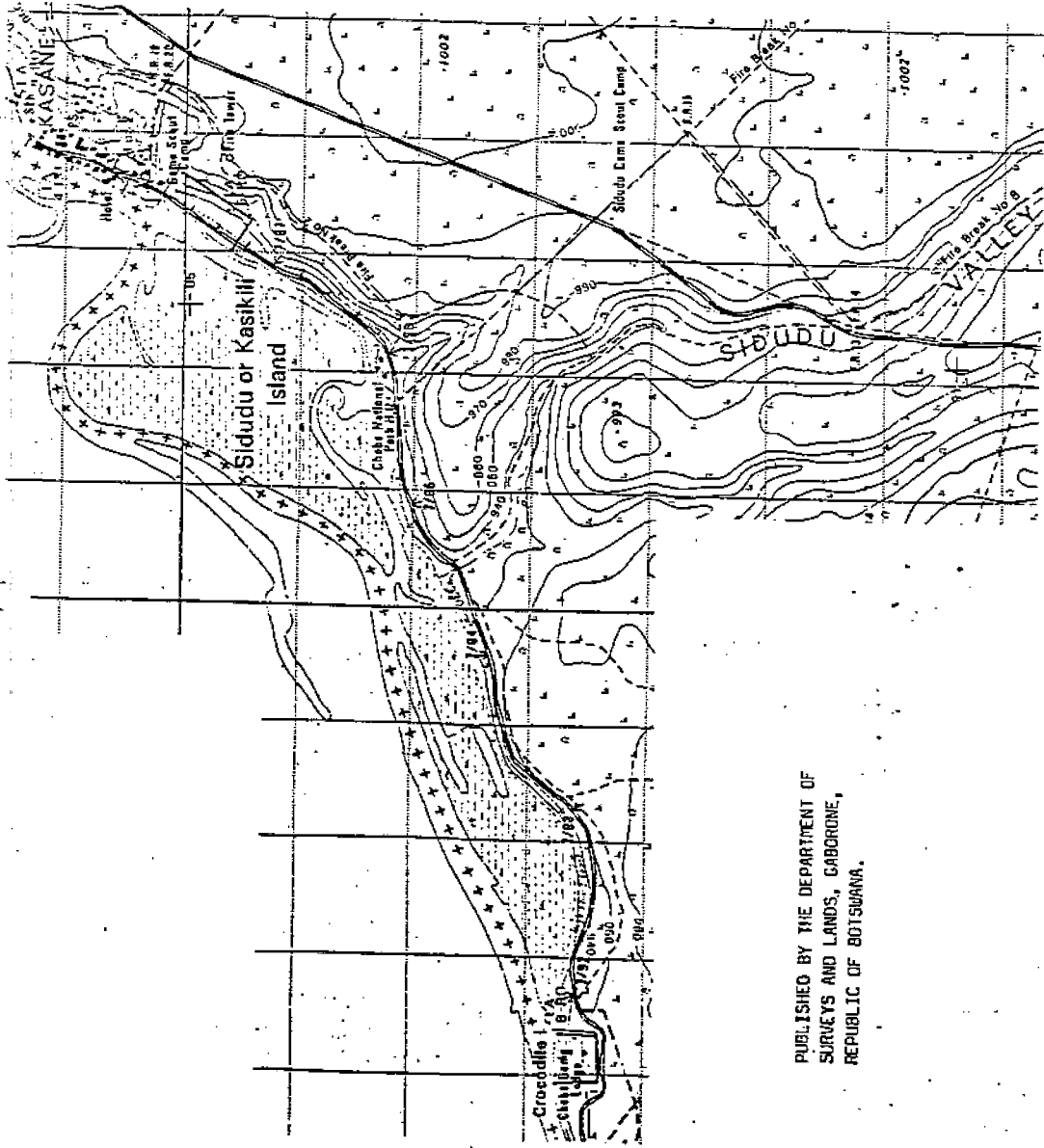
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|---------|-------------------------------------|------------|--|
| LONDON. | E. Staroboo, 11, 22 Long Acre, W.C. | FRANKFURT | W. G. K. Johnson, U. S. Later, 10 |
| | & 43 Whitehall, S.W. | LIVERPOOL. | Phillip, Son & Hennew, 20 Church St. |
| | | LONDON. | W. King, Cannon House, Pilgrim Street, E.C. 4. |

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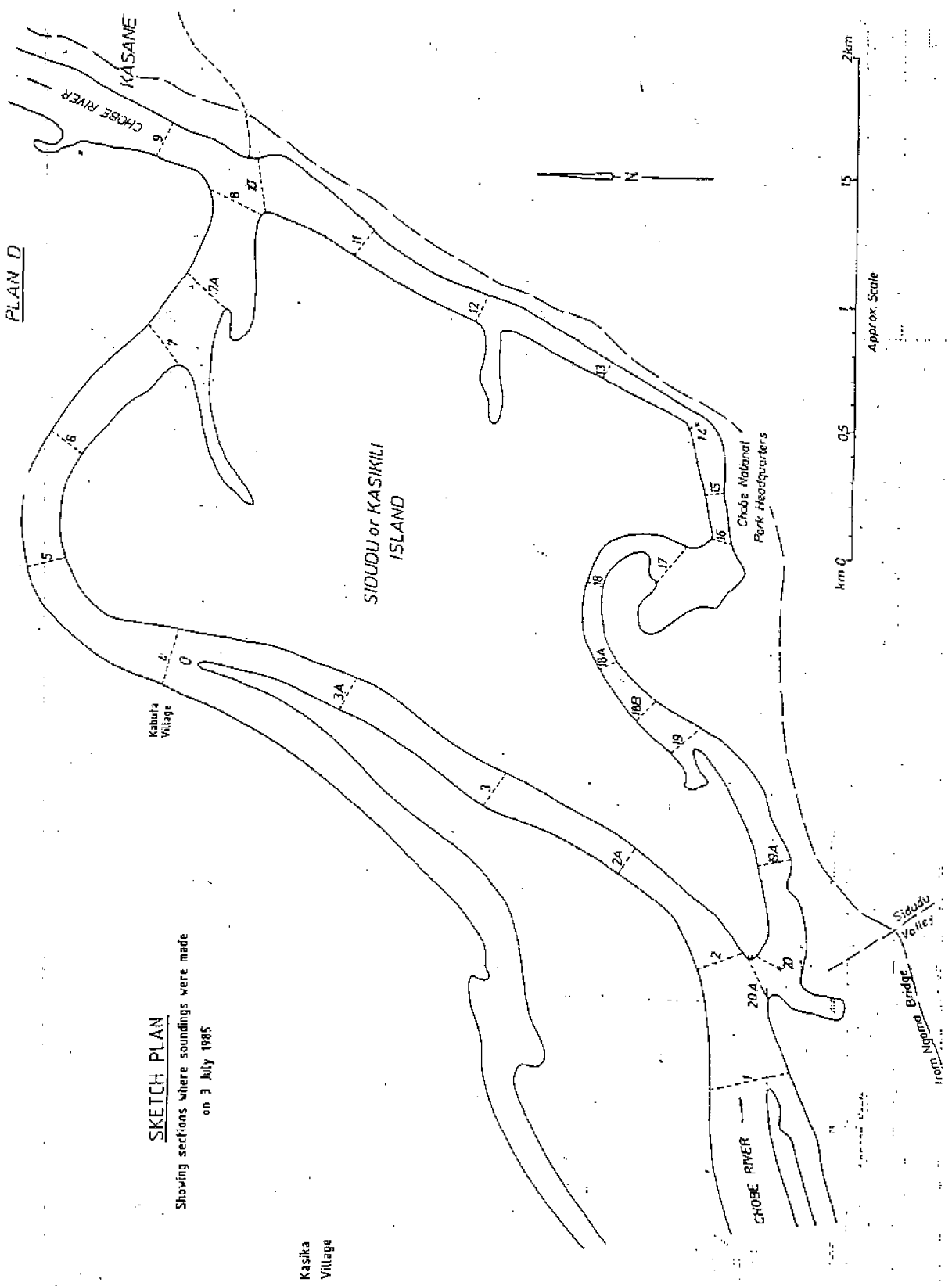


PUBLISHED BY THE DEPARTMENT OF
SURVEYS AND LANDS, GABORONE,
REPUBLIC OF BOTSWANA.

PLAN D

SKETCH PLAN

Showing sections where soundings were made
on 3 July 1985



A N N E X 58

**Source: Copy of original from the Government of
Botswana**

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

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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:

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"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;

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- (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;

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- (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

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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.

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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.

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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)

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- 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.

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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

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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

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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.

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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...

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(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,

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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

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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:

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'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.

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(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

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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.

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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.

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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.

J.B.

A.K.

5. RECOMMENDATION

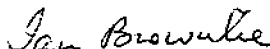
Although the Joint Team has been unable to make a finding involving the determination of the boundary between Namibia and Botswana around Kasikili/Sedudu Island, the Memorandum of Understanding empowers us to make any recommendations under Article 7(1)(i).

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.



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NAMIBIAN TEAM LEADER



Prof. IAN BROWNLIE, CBE, QC
BOTSWANA TEAM LEADER

J.B.

A.K.

INTERNATIONAL COURT OF JUSTICE

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

**MEMORIAL OF THE
REPUBLIC OF BOTSWANA**

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