

**INTERNATIONAL COURT OF JUSTICE**

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

**REPLY  
OF  
THE REPUBLIC OF NAMIBIA**

**VOLUME I**

**REPLY**

**27 NOVEMBER 1998**

INTERNATIONAL COURT OF JUSTICE

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Part One

INTRODUCTION

**Chapter I**

INTRODUCTION AND SUMMARY

A. Preliminary Remarks

1. This Reply of Namibia is submitted pursuant to the Order of the Court of 27 February 1998.<sup>1</sup>

2. Article 49 of the Court's Rules state that the Reply 'shall not merely repeat the parties' contentions but shall be directed to bringing out the issues that still divide them.' Namibia will, of course, adhere to this prescription. Unfortunately, however, because the errors and misstatements in the BCM are so numerous, it will require a Reply of some length and it will often be necessary to refer to Namibia's earlier arguments to correct the serious distortions of Namibia's position that colour the whole of Botswana's Counter-Memorial.

3. One such distortion, which the BCM has placed at the forefront of its case, is the misrepresentation of the principal focus of Namibia's argument. Botswana alleges that 'the major emphasis in the Namibian Memorial is upon an asserted title by prescription, that is, a title operating independently of the Agreement of 1890.'<sup>2</sup> Botswana opens its Counter-Memorial on this note:

1. The case presented by Namibia consists of two inter-linked arguments based upon a certain version of the subsequent conduct of the parties and an alleged independent title related to prescription. These two legal arguments are alleged to receive confirmation from the scientific evidence offered on behalf of Namibia.

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<sup>1</sup> In this Reply the following abbreviations are used: 'NM' is the Namibian Memorial; 'NCM' is the Namibian Counter-Memorial; 'Reply' is the Namibian Reply; 'Main Report' is Professor W.J.R. Alexander's First Expert Report in Vol. VI of the Namibian Memorial; 'Supp. Rep.' is Professor Alexander's Report in Vol. III of the Namibian Counter-Memorial; 'Second Supp. Rep.' is Professor Alexander's Report in Vol II of the Namibian Reply; and 'Richards Rep.' is the Geomorphological Report of Professor Keith S. Richards in Vol. II of the Namibian Reply. 'BM' is the Botswana Memorial; and 'BCM' is the Botswana Counter-Memorial.

<sup>2</sup> BCM, para. 133.

2. It is thus the arguments based upon subsequent conduct and prescription which are the essence of the Namibian legal case.<sup>3</sup> (emphasis added)

4. These mischaracterisations are a gross distortion of Namibia's case. The Summary of Argument opening Namibia's Memorial states unequivocally the foundation of Namibia's case:

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

2. Moreover, by virtue of continuous and exclusive occupation and use of Kasikili Island and exercise of sovereign jurisdiction over it from the beginning of the century, with full knowledge, acceptance and acquiescence by the governing authorities in Bechuanaland and Botswana, Namibia has prescriptive title to the Island.<sup>4</sup>

The two arguments are clearly phrased as separate and distinct claims of sovereignty.

5. The Table of Contents of Namibia's Memorial likewise leaves no doubt about the prime importance Namibia attaches to the interpretation of the Treaty. Part One is entitled 'The Interpretation of the Anglo-German Treaty of 1890.' It is wholly devoted to detailed argument about the interpretation of the Treaty in all its aspects. Part Two is entitled 'The Subsequent Conduct of the Parties to the Anglo-German Treaty of 1890 and Their Successors in Title with Relation to Kasikili Island.' Part Two begins with the explanation of the relevance of the subsequent conduct of the parties to the case:

In the first place, it corroborates the interpretation of the Treaty developed in Part One. Second, it gives rise to a second and entirely independent basis for Namibia's claim under the doctrines concerning acquisition of territory by prescription, acquiescence and recognition. (emphasis added)<sup>5</sup>

Again, the two claims are separate and distinct.

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<sup>3</sup> BCM, para. 2.

<sup>4</sup> NM, para. 14.

<sup>5</sup> NM, para. 165. The expressions "subsequent practice" and "subsequent conduct" are frequently used interchangeably. For example, the Court, in its judgement of 15 February 1995, in *Qatar v. Bahrain (Jurisdiction and Admissibility)*, *I.C.J. Reports 1995*, p. 6. referred to the 'subsequent conduct' of the parties as an element of treaty interpretation in a context where, presumably, the words 'subsequent practice' could have been technically more accurate. *Id.* pp. 15-16, paras. 26-28. See also the opinion of the Court of Arbitration in the *Beagle Channel* case, *52 International Law Reports* p. 224 and para. 26, *infra*. Namibia would not have thought it important to emphasize the distinction were it not for the fact that Botswana appears to be anxious to generate confusion

6. Namibia's Counter-Memorial begins:

In its Memorial, Namibia based its claim to Kasikili Island on two separate grounds: first, by interpretation of the language of the Anglo-German Treaty of 1890, which establishes that the 'main channel' of the Chobe River around Kasikili Island is the southern channel; and second, on the basis of prescription evidenced by possession, use and exercise of jurisdiction over the Island, uninterrupted for almost a century after 1890 without objection or remonstrance by Botswana.<sup>6</sup> (emphasis in original)

7. In the light of the repeated statements of the true Namibian position, it is difficult to see how Botswana could have believed it was fairly representing Namibia's argument in stating that 'the arguments based upon subsequent conduct and prescription . . . are the essence of the Namibian legal case.'<sup>7</sup> The allegation can have no other purpose than to divert attention from Namibia's compelling argument that the proper interpretation of the 1890 Treaty places Kasikili Island in Namibia.

8. The presentation of the argument on prescription as an alternative basis of title cannot be construed as an acknowledgement by Namibia of any weakness in its argument on the interpretation of the Treaty. Pleading in the alternative is entirely permissible under the Court's (and all other modern) pleading systems. Indeed, in this case, it is required by the terms of the parties' request to the Court

to determine, on the basis of the Anglo-German Treaty of 1st July 1890 and the rules and principles of international law, the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island.<sup>8</sup>

The interpretation of the 1890 Treaty must come first. If Namibia is correct in its view that the Treaty attributes Kasikili Island to it, then, of course, the argument based upon subsequent prescriptive conduct is unnecessary. But if the Court should decide otherwise as to the meaning of the Treaty, it is required by the question submitted to consider the law and evidence of prescription in determining 'the legal status of the island.'

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about the nature of Namibia's argument.

<sup>6</sup> NCM, para. 2.

<sup>7</sup> BCM, para. 2.

<sup>8</sup> Art. 1, Special Agreement Between the Government of the Republic of Botswana and the Government of the Republic of Namibia (hereinafter "Special Agreement"), NM, Annex 3, p. 3.

9. The organisation of this Reply follows this same logical pattern.<sup>9</sup> After this Introduction and Summary, Part Two of the Reply responds to Botswana's arguments on the interpretation of the Anglo-German Treaty of 1890 and the meaning of the critical phrase 'the main channel of the Chobe River.' Separate Chapters address the issues of treaty interpretation that both parties, Namibia no less than Botswana, consider to be central to the case:

- Chapter II exposes the defects in Botswana's presentation of the legal aspects of the interpretation of the 1890 Treaty;<sup>10</sup>
- Chapter III demonstrates the fallacies in Botswana's analysis of the scientific evidence.<sup>11</sup> (In this Chapter, Namibia will also present the results of fresh scientific observations on site, conducted by Professor W.J.R. Alexander in March, April and May of 1998, and a hydro-geomorphologic analysis of the Chobe River by Professor Keith S. Richards, Chair of the Geography Department at Cambridge University);
- Chapter IV counters Botswana's denial that the 'subsequent practice of the parties' established the agreement of their predecessors in title that the main channel of the Chobe River runs to the south of Kasikili Island and that the Island is part of Namibia;<sup>12</sup> and
- Chapter V responds to Botswana's effort to obscure the remarkable concordance of the maps produced by all the governing authorities in the area, showing their substantially uniform understanding that the Treaty places the boundary to the south of the Island.<sup>13</sup>

10. Then, in Part Three, Namibia will take up the wholly distinct issue of prescription, countering Botswana's claim that the conduct by Namibia's predecessors in title with the

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<sup>9</sup> In addition to this Volume I containing the substance of the Reply, Volume II contains two scientific reports, one by Prof. W.J.R. Alexander and another by Prof. Keith S. Richards. Volume III, Annex 1 contains a report on Maps by Colonel Dennis Rushworth and a number of additional documents referred to in this Reply as "Annexes."

<sup>10</sup> BCM, Chapter 4.

<sup>11</sup> BCM, Chapters 5 and 6.

<sup>12</sup> BCM, Chapter 4(H) and 7.

<sup>13</sup> BCM, Chapter 8.

acquiescence (and in some cases the positive action) of Botswana's predecessors in title does not establish prescriptive title to Kasikili Island in favour of Namibia.<sup>14</sup>

11. Part Four takes up two further, but separate, matters. The first is a response to the long discussion in both the BM and the BCM of the foreign policies and diplomatic relations of the two parties.<sup>15</sup> This discussion is largely irrelevant to the present dispute, and Namibia has heretofore refrained from responding to it. But the picture Botswana presents is so partial that Namibia has felt compelled to reply to the allegations. (Chapter VII) The second chapter of Part Four deals with a matter that is neither marginal nor subordinate. Botswana's Counter-Memorial is replete with error, misstatement and misrepresentation, particularly in the two main sections that are central to this case — the scientific material identifying the main channel of the River Chobe and the maps evidencing the views of the parties' predecessors in title. The most important of these errors are dealt with in the course of the relevant Chapters of this Reply. Nonetheless, the misstatements in the Botswana Counter-Memorial are so numerous and serious that they cannot be treated as intermittent and innocent oversight. Rather, their scale is such as to cast grave doubt on the fundamental credibility of Botswana's pleading as a whole. So that the pervasive character of these errors can be more readily seen, Namibia has gathered a number of them together in Chapter VIII under the heading of 'Mistakes and Misconceptions.'

12. Finally, before turning to the substance of its Reply, Namibia is compelled to call to the Court's attention what it regards as serious misconduct of the Botswana Defence Force (BDF) in interfering with Professor Alexander's observations and flow measurements in the Chobe River. On three separate occasions from 10-12 April 1998, armed troops of the BDF approached Professor Alexander's boat in the River near Kasikili Island in a menacing and intimidating manner.<sup>16</sup> Once, a BDF detachment further up the river in Namibian territory fired a flare at his helicopter in flight, with evident danger to all aboard.<sup>17</sup> At one point, Professor Alexander felt obliged to discontinue his observations and had to leave the area without taking a number of important measurements. Notice of Professor Alexander's visit and projected itinerary was given to the Government of Botswana by note of 18 February

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<sup>14</sup> BCM, Chapter 7 and 9.

<sup>15</sup> BM, Chapters III and IV; BCM, Chapter 2.

<sup>16</sup> Second Supp. Rep., paras. 6.32, 6.40, 6.41.

<sup>17</sup> Id., para. 6.38.

1998, which was filed with the Registrar of the Court.<sup>18</sup> In addition, Professor Alexander was accompanied much of the time by H.E. Joshua Hoebeb, the High Commissioner of Namibia to Botswana, as the Government of Botswana well knew. Namibia regards these actions as a most serious violation of the standards that should govern the conduct of litigants before the Court and of the requirements of friendly relations between neighbours.

13. The remainder of this Chapter summarizes the positions of the parties on the main issues in dispute, showing that Botswana has failed to make its case that the northern channel is the main channel and sustaining Namibia's submission that the main channel flows to the south of the island. The 'boundary between Namibia and Botswana around Kasikili/Sedudu Island'<sup>19</sup> is shown to be in the *thalweg* channel of that main channel, which appears in the aerial photographs and maps as the southern channel.<sup>20</sup>

## B. The Text of the Treaty

### 1. The language of Article III(2)

14. Namibia has consistently presented this case as being principally about the interpretation and application of the 1890 Treaty. Article III(2) of the Treaty provides that the boundary 'descends the centre of the main channel of the [Chobe] river' (*'und setzt sich dann im Thalweg des Hauptlaufes dieses Flusses fort'*). In accordance with Article 31(1) of the Vienna Convention on the Law of Treaties, Namibia focuses on 'the ordinary meaning to be given to the terms of the treaty.' The critical words are 'the centre of the main channel,' '*Thalweg des Hauptlaufes*'. It is "the main channel," or "*Hauptlauf*" that must first be identified. Only when it is found, can its "centre," or "*Thalweg*," be sought.

15. Botswana's approach, on the other hand, is marked by complexity and artificiality. It insists that a controlling role should be ascribed to the mere presence of the word "*Thalweg*" in the German version of Article III(2).<sup>21</sup> According to Botswana, this entails that the Treaty

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<sup>18</sup> See Letter in Reply Annex 11.

<sup>19</sup> Art. 1, Special Agreement, NM, Annex 3, p. 3.

<sup>20</sup> For a full elaboration of this argument, see paras. 75-84, *infra*.

<sup>21</sup> At the time of the conclusion of the 1890 Treaty it was the practice (followed in this case) to negotiate the text in French and then for each side to produce a version in its own language. Satow, *Diplomatic Practice* (2<sup>nd</sup> ed., 1922), §91, pp. 70-71. According to Oppenheim, in plurilingual treaties containing no specification of the governing language, where there was a discrepancy between the meanings of the two languages, each party was bound by the text in its own language but could not claim the benefit of the text in the language of the other party. Oppenheim,

incorporate a so-called ‘*thalweg* principle,’ which in turn dictates that the boundary should be drawn in the navigable (or deeper) channel.<sup>22</sup> Botswana is in error on both counts.

16. By focusing exclusively on the one word ‘*Thalweg*,’ Botswana would have the Court ignore the other words, ‘*des Hauptlaufes*,’ that modify it and give it meaning. Indeed, BCM, para. 197 expressly argues that

“*des Hauptlaufes*” in the German text of the agreement was unnecessary as the expression “the centre of the main channel” would have been correctly translated as “*der Thalweg dieses Flusses*.”<sup>23</sup>

The law of treaty interpretation, however, does not permit the tribunal to ignore the words that were actually used in the text and to substitute others that one of the parties to the dispute would prefer.

17. Besides disregarding the actual words of the Treaty, Botswana’s position ignores the preparatory work as well. The first version of the text, drafted in French, made no mention of the ‘*thalweg*.’ Neither did the German version at that stage, which read ‘*längs dem Tschobifluss*,’<sup>24</sup> nor the English, which read ‘the centre of that [the Chobe] river.’<sup>25</sup> The words ‘*Thalweg des Hauptlaufes*’ only appeared in the German text after the words ‘of the main channel’ had been inserted in the English text, undoubtedly to reflect that change.<sup>26</sup> There must have been a reason for the insertion of those words at this late stage in the negotiations, and the reason could only have been a shared intention of the parties to make the text more precise in geographical terms. The words that Botswana suggests should be omitted in order to lead to the conclusion it desires, are the very ones that were specifically

*International Law* (5<sup>th</sup> ed.1937), p. 756. Botswana is the successor of Britain; its language is, therefore, English. Namibia is successor of Germany; its language is, therefore, German. Consequently, it is not for Botswana to hang its case on the German text — *a fortiori*, not on a distorted interpretation thereof.

<sup>22</sup> BCM, para. 196.

<sup>23</sup> This is itself a shift from the position Botswana took in its Memorial, where it argued that the German ‘*Thalweg*’ was the counterpart of the words ‘main channel’ in the English text. BM, para. 115. This position was manifestly untenable, since, as Namibia pointed out in its Memorial, ‘*des Hauptlaufes*’ was obviously the counterpart of ‘main channel’ and ‘*thalweg*’ was equally clearly the counterpart of ‘centre.’ Recognizing its mistake, Botswana has now abandoned its first position and opts for the new, and equally indefensible interpretation asserted in BCM, para. 197.

<sup>24</sup> See NM, para. 109.

<sup>25</sup> See NM, para. 106.

<sup>26</sup> The German text then became: ‘*und setzt sich dann im Thalweg des Hauptlaufes dieses Flusses*

added at the last stage of the negotiations. The Court is therefore particularly obliged to give them meaning and force.

The parties are assumed to intend the provisions of a treaty to have a certain effect, and not to be meaningless . . . [A]n interpretation is not admissible which would make a provision meaningless or ineffective.<sup>27</sup>

18. Not only is the exclusive importance Botswana assigns to the word '*Thalweg*' unwarranted, but the so-called '*thalweg* principle'<sup>28</sup> that Botswana invokes is equally fictitious. Examination of contemporary treaty practice in Africa and elsewhere reveals, first, that a variety of other terms were also used to identify boundaries in rivers, and, second, that '*thalweg*' was used both for navigable and non-navigable rivers.<sup>29</sup> Thus, Botswana cannot show a uniform state practice generating a rule of customary international law that the boundary in a river must be the '*thalweg*.' And what practice there is shows that the use of the word '*thalweg*' was not necessarily associated with navigability.

19. On the one hand is Namibia's straightforward interpretation, of the English text distinguishing between 'the main channel' and its 'centre' (and in the German text between '*Hauptlauf*' and '*Thalweg*') according to the ordinary meaning of the words. On the other hand, there is the complexity and artificiality of the Botswana approach, which pitches everything on the one word '*Thalweg*' in the German text, suppresses the words '*des Hauptlaufes*' and presents a definition of '*Thalweg*' that goes far beyond the meaning it normally carries. Namibia submits that the choice for the Court is simple and can lie only with the Namibian interpretation.

## 2. The question of access to the navigational resources of the Chobe River

20. Botswana has placed much emphasis on the concept of navigability as an element in the identification of the main channel. The Botswana argument as set out in its Memorial was based on the assertion that

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*fort.*' See NM, para. 109.

<sup>27</sup> R. Jennings and A. Watts, *Oppenheim's International Law*, (9<sup>th</sup> ed. 1992) p. 1280. For a recent application by the Court of the principle that a treaty must be interpreted so as to give effect to all its words, see *Qatar v. Bahrain*: 'Any other interpretation . . . would deprive the phrase of its effect.' *ICJ Reports 1995*, pp. 18-19, para 35.

<sup>28</sup> BM, para. 138; BCM, paras. 195-196.

<sup>29</sup> See NCM, paras. 56-58; para. 98, *infra*.



[T]he 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 of rivers.<sup>30</sup>

As noted above, there were no ‘contemporary standards of general international law relating to boundaries of rivers.’ In support of the idea that the purpose of the 1890 Treaty was to affirm the rights of navigation of the parties in the Chobe River, Botswana cites the General Act of the Conference of Berlin (1885) and various items in the correspondence of the parties leading up to the 1890 Treaty.<sup>31</sup> The Conference of Berlin was not concerned specifically with boundary rivers. It affirmed ‘freedom of trade in the basin of the Congo, its embouchures and circumjacent regions.’<sup>32</sup> Thus, it had nothing to do with the Chobe River. Insofar as it involved the Zambezi, it was expressly limited to the reach of the river from the mouth to five miles above its confluence with the Shiré River.<sup>33</sup>

21. The correspondence cited by Botswana reveals a good deal of discussion of navigation rights in the waters of East Africa, especially the region between Lake Nyassa, Lake Tanganyika and Congo State.<sup>34</sup> By contrast, in South West Africa, the area of concern in this case, the references in the correspondence are confined to the British insistence on control of Lake Ngami<sup>35</sup> and the German desire for access to the Zambezi River.<sup>36</sup> Each of these points is expressly covered by an article in the 1890 Treaty. Furthermore, in the draft Articles of Agreement of 21 June 1890, the following sentence appeared at the end of Article III, immediately following the identification of the boundary in the Chobe:

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<sup>30</sup> BM, para. 144.

<sup>31</sup> BM, paras. 131-135.

<sup>32</sup> Conference of Berlin, Ch. I (heading) in BM, Vol. II, Annex 1. p. 5.

<sup>33</sup> *Id.*, para. 3.

<sup>34</sup> BM, Vol. II, Annex 9, Letter No. 47, p. 82; *id.*, No. 48, pp. 82-84. See also *Id.*, Letter No. 84, Inclosure 2, Art. III.

<sup>35</sup> *Id.*, Letters No. 14, 24, 27, 44, 84 Inclosure 1, Art. III, p. 102.

<sup>36</sup> *Id.*, Letter No. 84, Inclosure 1, Art. III. The few mentions of the Chobe River as appear are mostly in proposed drafts of the text of the Treaty and make no reference to navigation,

It is understood that, under this arrangement, Germany shall have free access from her Protectorate to the Zambezi by the Chobe.<sup>37</sup> (emphasis added)

Only ten days later, this statement was replaced in the final draft of the Treaty by the following sentence opening a new paragraph:

It is understood that under this arrangement Germany shall have free access from her Protectorate to the Zambezi by a strip of territory which shall at no point be less than 20 English miles in width. (emphasis added)

The replacement of ‘access . . . by the Chobe’ with ‘access . . . by a strip of territory’ indicates the recognition by the parties that the route of access for Germany was not to be fluvial but rather territorial. Therefore, the correspondence and the preparatory work give no support whatever to the conclusion that the parties were concerned to establish rights of navigation in the Chobe River.

22. Moreover, Botswana’s emphasis on the concept of navigability disregards two other major aspects of the matter. The first is that the Chobe River is dry for much of the time over much of its course and is, therefore, not navigable over most of its length. It hardly seems practicable to apply a criterion of navigability to identify the international boundary in a river that cannot be navigated for most of the distance where it forms the boundary.

23. The second aspect disregarded by Botswana is that the bulk of whatever navigation there is in the vicinity of Kasikili Island takes place in the southern channel. The 19<sup>th</sup> century statesmen and international lawyers who addressed the issue of the navigability of boundary rivers were concerned, as were earlier publicists, with the basic principle of equal access by both riparians to the resources of the river.<sup>38</sup> The principle of equal access remains vibrant today.<sup>39</sup> In the Chobe River at Kasikili Island, the navigational resources of the river are primarily related to the tourist industry. Substantially all the tourist traffic uses the channel to the south of the island, because that is where the game is to be seen. The only evidence Botswana produces of commercial navigation in the northern channel is a photograph of the *Zambezi Queen*. (BCM, p. 133)<sup>40</sup> But the *Zambezi Queen* does not navigate the northern

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<sup>37</sup> See NM, Vol. IV, Annex 26, p. 122.

<sup>38</sup> See Chapter II, paras. 108-110, *infra*.

<sup>39</sup> See *Case Concerning the Gabčíkovo-Nagyamaros Project (Hungary/Slovakia)* I.C.J. Reports 1997, paras. 78, 85; reproduced in 37 *I.L.M.* 162, at pp. 190-191, 1998.

<sup>40</sup> See also BCM, para. 347.

channel. It is permanently moored in the spur channel at the King's Den Lodge where it provides auxiliary hotel accommodation for the guests.<sup>41</sup> Thus, Botswana's insistence on the northern channel as the main channel on the basis of an abstract relation between navigability and the depth of the channel would, as a practical matter, deprive Namibia of access to the actual navigational resources of the Chobe River around Kasikili Island, thereby subverting the principle of equal access.

C. The Subsequent Practice of the Parties Establishing Their Agreement  
as to the Treaty's Interpretation

1. The meaning of 'subsequent practice' under Article 31(3)(b) of the Vienna Convention on the Law of Treaties

24. As noted above, Botswana has sought to obscure the relevance of the subsequent conduct of the parties to the interpretation of the Treaty by pretending that Namibia relies on it only in connection with prescription and acquiescence. The assertion, however, is directly contradicted by Article 31(3)(b) of the Vienna Convention on the Law of Treaties, which expressly provides that, in interpreting a treaty,

‘there shall be taken into account, together with the context:

. . . .

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

25. Namibia has set out the subsequent practice of the parties at length in its Memorial and Counter-Memorial,<sup>42</sup> and there is no need to repeat the content of that argument here. In sum, Namibia's argument establishes the continuous occupation and use of Kasikili Island by the Masubia of the Caprivi from the time of the 1890 Treaty through the 1960s and 1970s, and even into the 1980s. Beginning in 1909, this occupation was under the authority of the German rulers, exercising their sovereignty indirectly through the chiefs and other political bodies of the Masubia. After an interval of occupation by British forces during World War I, governmental authority was exercised in exactly the same way, first by Bechuanaland officials acting for South Africa under the League of Nations Mandate for South West Africa until 1929, and then by South Africa itself, initially as the mandatory power, and *de facto*

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<sup>41</sup> Reply Annex 22, Affidavit of G.J. Visagie.

<sup>42</sup> See NM, Chapters I and II; NCM, Chapter III

thereafter. This practice was well known to the British officials, stationed in Kasane just a few kilometres away on the south bank of the Chobe River, and to their superiors in Cape Town and London. Yet there is no record of a British protest in all the time from the signing of the Treaty in 1890 to the independence of Botswana in 1966, nor by Botswana authorities before 1984. As will be seen below, the maps produced by all the governing authorities, German, British and South African, before Botswana's independence confirm and are a part of this practice.

26. In its Counter-Memorial, however, Botswana asserts that the practice in question does not satisfy the requirements of Article 31(3)(b). It argues that specific agreement of both parties is required before subsequent practice may be taken into account in interpreting the treaty. The argument is plainly untenable. Article 31(3)(a) deals expressly with 'subsequent agreement[s] between the parties regarding the interpretation of the treaty.' If Botswana were correct that under Article 31(3)(b) the agreement of both parties is needed for subsequent practice to be effective, it would render Article 31(3)(b) superfluous, as it would be entirely subsumed under Article 31(3)(a). Article 31(3)(b) must necessarily have intended a measure of understanding or behaviour that falls short of being an agreement on the same level of precision or formality required by Article 31(3)(a). This was the view of the Court of Arbitration in the *Beagle Channel* case:

The Court cannot accept the contention that no subsequent conduct, including acts of jurisdiction, can have probative value as a subsidiary method of interpretation unless representing a formally stated or acknowledged 'agreement' between the Parties. The terms of the Vienna Convention do not specify the ways in which 'agreement' may be manifested. In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent of the terms of the Treaty; nor could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves.<sup>43</sup>

27. Botswana has quoted from a 1957 article by Sir Gerald Fitzmaurice in an attempt to diminish the significance of subsequent practice in the interpretation of treaties.<sup>44</sup> However,

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<sup>43</sup> 52 *I. L. R.*, p. 224.

<sup>44</sup> BCM, para. 235.

when the quoted passage is read with the pages that precede and follow it, it becomes clear that Fitzmaurice is, in fact, a firm exponent of the significance of such practice. Even more to the point is Fitzmaurice's statement of the principle in his first article in the same series devoted to the case law of the Court:

It is a fair inference from the attitude of the Court that, in its view the subsequent practice of the parties in relation to a treaty is not only a legitimate guide to its correct interpretation, but probably a more reliable guide than recourse to travaux préparatoires or the attempt to ascertain the presumed intentions of the original framers.<sup>45</sup>

Moreover, as is well known, it was Fitzmaurice who, as President of the *Beagle Channel* tribunal, was responsible for the passages in that award quoted in the preceding paragraph.

## 2. Botswana's attempts to negate the 'subsequent practice' of the parties

28. Botswana advances three points that it says are inconsistent with the existence of the subsequent practice shown by Namibia:

- That up to 1948 the parties to the Anglo-German Treaty 'were of the opinion that the main channel in the vicinity of Kasikili/Sedudu Island passed to the north of the Island.'<sup>46</sup>
- That in the exchanges culminating in 1951 with the Trollope-Dickinson arrangement it was South Africa that sought to change the existing status quo.<sup>47</sup>
- That the 1984/86 discussions between Botswana and South Africa resulted in an agreement between the parties regarding the application of the Anglo-German Treaty of 1890 that resolved the present boundary dispute in favour of Botswana.<sup>48</sup>

29. None of these assertions is correct. They are dealt with in detail in Chapter IV, below. Some brief comments, however, are warranted at this point.

30. As to the assertion that up to 1948 the parties to the Anglo-German Treaty 'were of the opinion that the main channel in the vicinity of Kasikili/Sedudu Island passed to the north of the island':

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<sup>45</sup> Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. I, p. 61.

<sup>46</sup> BM, para. 165.

<sup>47</sup> BCM, paras. 241, 729, 736, 732.

<sup>48</sup> BCM, para. 246

Botswana's position is directly contradicted in a letter of 6 June 1949 from Sir Evelyn Baring, the High Commissioner of Bechuanaland, to the Secretary of State for Commonwealth Relations. Kasikili Island, he said 'has hitherto been regarded as part of the Caprivi Zipfel, since maps show that the main channel passes to the south of the island.'<sup>49</sup>

31. As to the assertion that in the exchanges culminating in 1951 with the Trollope-Dickinson arrangement South Africa sought to change the existing status quo:

What was the existing status quo is shown in the preceding paragraph. Far from wanting to change it, South Africa sought to formalize the boundary that the parties had already recognised in practice. The British authorities were at first attracted to this notion, but then decided against it, not on substantive grounds, but because of the political and legal complications in the United Nations (UN) regarding South Africa and the mandate. The administrative arrangement suggested by Trollope and embodied in the Trollope-Dickinson arrangement expressly confirmed the status quo ante in which Kasikili Island was part of Namibia.

32. As to the assertion that the 1984/86 discussions between Botswana and South Africa resulted in an agreement that resolved the present boundary dispute in favour of Botswana:

In its Counter-Memorial, Namibia showed in considerable detail the legal impossibility of South Africa concluding an agreement with Botswana in the absence of UN approval.<sup>50</sup> Botswana's attempt to imply that it had the approval of the UN for these negotiations is contradicted by an aide memoire from the UN archives showing that the discussions between Botswana and SWAPO in New York were reported to the Secretary-General purely for informational purposes and that no action of support or approval was sought by Botswana or taken by the UN.<sup>51</sup>

33. In short, Botswana's response, both as to the law and the facts in the present case, cannot obfuscate the effect of the uniform practice of the parties of treating Kasikili Island as part of Namibia within the meaning of the 1890 Treaty.

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<sup>49</sup> NM, Vol. IV, Annex 66.

<sup>50</sup> NCM, Chapter III(B)(3).

<sup>51</sup> See Reply Annex 6.

D. The Evidence of Maps as a Guide to the Proper Interpretation of Article III(2) of the 1890 Treaty

34. Of the 26 maps produced by the authorities with political responsibility in the area, sixteen show the boundary to the south of Kasikili Island, nine do not show the boundary, and only one appears to show it in the northern channel.<sup>52</sup> These maps have been fully described and analyzed in the Namibian Memorial (Chapter V) and Counter-Memorial (Chapter IV), as well as in two detailed annexes prepared by Col. Dennis Rushworth, formerly Director of the Mapping and Charting Establishment of the British Ministry of Defence, in consultation with Mr. Peter Clark, former Keeper of the Royal Geographic Society.

35. Botswana does not dispute the relevance of maps and, indeed, devotes considerable space to them in its Memorial (Chapter VIII) and Counter-Memorial (Chapter 8). However, in light of the weight of map authority adverse to it, Botswana tries to argue that maps should be accorded no more than a subsidiary or corroborative role. That is a matter that hardly needs to be debated further at this point. Namibia has already cited numerous authorities describing how international tribunals, including this Court, have made extensive use of maps tribunals.<sup>53</sup> However one useful reference may be added that emanates from the highest authority, the Court of Arbitration in the *Beagle Channel* case, a court composed entirely of Judges or former Judges of the International Court:

[M]aps published after the conclusion of the Treaty can throw light on what the intentions of the Parties in respect of it were, and, in general, on how it should be interpreted. But the particular value of such maps lies rather in the evidence they may afford as to the view which the one or the other Party took at the time, or subsequently, concerning the settlement resulting from the Treaty, and the degree to which the view now being asserted by that Party as the correct one is consistent with that which it appears formerly to have entertained. Furthermore, the importance of a map might not lie in the map itself, which theoretically might even be inaccurate, but in the attitude towards

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<sup>52</sup> The one apparent exception is South West Africa 1:50,000 Sheet 1725CC With military overprint 1984. This is an overprint of South West Africa 1:50,000, Sheet 1725CC Edition 3, 1982, which did not show the boundary. The 1984 overprint shows a demarcation line in red in the northern channel. On the basis of close analysis of the cartographic and military/political context, Col. Rushworth concludes the overprint is not in fact a depiction of the boundary between the two countries, but of the limits of patrolling agreed to between Namibian and Botswana commanders on the ground after the shooting incident of October 1984. See Reply Annex 1, para. 27.

<sup>53</sup> NM, paras. 287-292; NCM, paras. 138-140.

it manifested – or action in respect of it taken – by the Party concerned or its official representatives.<sup>54</sup>

Obviously the cogency of map evidence will depend upon many factors, including the source, the date, the clarity of the map and the reaction to it (if any) of the other side. In every respect, these factors operate in favour of Namibia's position.

36. In Namibia's submission, the number of crucial maps in this case is small, but their impact is overwhelming. They demonstrate (i) the consistent presentation by Namibia, its predecessors in title, and the United Nations of the boundary in the southern channel and (ii) the absence of any protest, as well indeed as the presence of affirmative acts of concurrence, by Botswana and its predecessors in title.

37. The BCM criticizes Namibia's map evidence in a number of respects. For example, it says a map that depicts neighbouring territories by different colours does not, in so doing, reflect the boundary, a proposition that is implausible on its face.<sup>55</sup> All these criticisms are dealt with in detail in Chapter V, below, and in Annex 1, the study prepared by Col. Rushworth. In short, there is no substance in Botswana's criticisms.

38. What really matters is the positive evidence of six maps, the effect of which is recalled here in summary form and in chronological order. They evidence the uniform view of the relevant political authorities that the boundary runs through the channel to the south of the Island or that Kasikili Island belongs to Namibia:

39. **Seiner's map 1909** (Atlas, Map IV; NM, p. 121 and Figure 10).

This map was produced by the prominent Austrian cartographer, Franz Seiner, who was an expert on German colonies in Africa. It shows the limits of South West Africa by fine red hatching which clearly covers Kasikili Island and places it in that territory. Published in 1909, it was the principal large-scale map used by Germany and later by Great Britain, both before and during the period when British authorities administered the Caprivi Strip from 1919–1929. In 1911 the British Acting Resident Magistrate in Ngamiland, Captain A.G. Stigand, himself the author of an important map of the area,

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<sup>54</sup> 52 *I. L. R.*, pp. 202-203.

<sup>55</sup> See e.g. BCM, paras. 547, 577, 626.



referred to it as ‘a German semi-official map’ and in 1912 described it as ‘that excellent German map of the Caprivi Zipfel.’<sup>56</sup>

40. **Streitwolf’s map 1909** (Atlas, Map VI; NM, p. 122 and Figure 11).

Although this map does not specifically depict the boundary, it is clearly intended to demonstrate the understanding of Captain Streitwolf, the first German Imperial Resident, as to the area under his authority. In this area, he has recorded place names, including ‘Kasikiri,’ while no place names are shown outside it, namely, south of the Chobe River.

41. **Von Frankenberg’s map, 1912** (Atlas, Map VI, NM, p. 122 and Figure 12)

Von Frankenberg was Streitwolf’s successor, and his map, like Streitwolf’s, shows the place names in the area under his jurisdiction, while showing no place names outside that area. Both these maps were known to and made use of by the British authorities.

42. **GSGS Map 3915, 1933** (Atlas, Map IX, NM, p. 125 and Figure 13)

This is the first substantial British map of the area. It is said by a Botswana author to be a milestone in the cartographic history of Botswana.<sup>57</sup> This map marks the boundary along the Chobe River and places Kasikili Island firmly in South West Africa. It constitutes affirmative recognition by the governing British authorities of that attribution. There is clearly enough space at the location of Kasikili Island to have drawn the boundary on the south side of the northern channel if it had been thought that the island belonged to Bechuanaland.

This map was adopted and reproduced on a smaller scale in 1935 by the Bechuanaland authorities themselves.<sup>58</sup> These same authorities used this reduced map in 1957 to show the limits of Crown Lands in Bechuanaland, again in 1959 to show the district boundaries of Bechuanaland,<sup>59</sup> and again as late as 1963 to provide the topographical details for a Water Development Scheme Map of Northern

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<sup>56</sup> See Annex 1, para. 12(e).

<sup>57</sup> Jeffrey C. Stone, ‘The 1933 Maps of “Bechuanaland Protectorate” at 1:500,000: A Milestone in the Mapping of Botswana,’ *27 Botswana Notes and Records*, pp. 71-84 (1986), NCM, Annex 8.

<sup>58</sup> Atlas, Map XI; NM, p. 126 and Figure 14.

<sup>59</sup> Atlas, Map XI; NM, p. 125.

Bechuanaland.<sup>60</sup> Thus the map appears to have been routinely used by the Botswana authorities in carrying out their administrative duties.

**43. South African Map, TSO 400/556 (1945) (Atlas, Map X, NM p. 128, Fig 16)**

This map was prepared by the Union Defence Force in 1945 although it was not published till 1949.<sup>61</sup> It shows the boundary symbol on the Chobe River and very clearly follows the southern channel. A draft of the map was circulated for criticism and comment to the Bechuanaland Resident Commissioner in Mafeking and the District Commissioner in Maun (among others). They made a number of comments, including corrections of place names in the area of the lower Chobe River, but made no objection to the location of the boundary south of Kasikili Island. These exchanges, which took place three years before Trollope wrote to Redman, belie Botswana's claim that the map should be disregarded because it was published after the beginning of the Trollope-Redman correspondence concerning the location of the boundary.

The map was revised in 1967 with the same depiction of the boundary. Botswana – by then independent – made no protest or comment.

**44. UN Map 1985 (Atlas, Map XV; BM, p. 131 and Figure 18)**

This map was published pursuant to GA Res. 35/227 H of 6 March 1981. The legend states that 'this map represents an official United Nations map of Namibia and supersedes any other map of Namibia or South West Africa hitherto published by South Africa.' It contains no disclaimer regarding boundaries and shows the southern channel as the main channel and Kasikili Island as part of the territory of Namibia. Botswana, although it was a member of the UN Council for Namibia under whose auspices the map was produced, has lodged no protest against this map.

45. Botswana has not, and cannot, produce material that can effectively respond to or negate the effect of these maps.

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<sup>60</sup> See NM, para. 309. An extract appears at id., following p. 127.

<sup>61</sup> Reply Annex 1, para. 17.

E. The Scientific Evidence and the Interpretation of the 1890 Treaty

1. The legal standard applicable to the determination of the ‘centre of the main channel’

46. In its Memorial, Botswana stated that:

The central question is the interpretation and application of the words ‘main channel’ of the River Chobe. These words involve a reference to a question of fact and, in so far as may be necessary, a question of scientific fact, calling for expertise in hydrology, geology and hydrogeomorphology.<sup>62</sup>

Namibia maintains the same position. In its Counter-Memorial, Botswana sought to deprecate the significance of scientific evidence as ‘supererogatory.’<sup>63</sup> Citing the reports of Eason, Trollope and Redman and the 1985 joint survey, it says reference to scientific experts would seem ‘unnecessary’<sup>64</sup> and ‘wholly superfluous,’<sup>65</sup> as though reports of so-called ‘observed’ fact should never be questioned on the basis of scientifically established and objectively verified fact.<sup>66</sup> But the two full chapters, Chapters 5 and 6, that the BCM devotes to the scientific evidence belie this pretence.

47. That the scientific evidence is decisive in determining boundaries indicated by a geographical feature is firmly established by the decisions in the *Palena*<sup>67</sup> and *Laguna del Desierto*<sup>68</sup> arbitrations, referred to by Namibia in its Memorial, paras. 123-128. Both cases hold that the location of the boundary is to be determined by the scientific and geographic evidence existing at the time of the award, rather than on the basis of the state of knowledge at the time of the governing instrument.

48. Botswana seeks to distinguish the *Palena* case on the ground that ‘[t]he geographical and political context bore no relation to navigability.’<sup>69</sup> But in the *Palena* case, as in the present case, the question was one of interpreting a text that laid down a river boundary. And in that

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<sup>62</sup> BM, p. 129.

<sup>63</sup> BCM, p. 121 (sub-heading), para. 324.

<sup>64</sup> BCM, para. 323.

<sup>65</sup> BCM, para. 324.

<sup>66</sup> Namibia deals extensively with the three cited reports in NM, paras. 263-286, NCM, paras. 95-136.

<sup>67</sup> 38 *I.L.R.*, p. 10.

<sup>68</sup> 113 *I.L.R.*, p. 1.

<sup>69</sup> BCM, para. 228.

case as in this, the question was to identify ‘the major channel’ of the river. The Court of Arbitration held unequivocally that ‘[t]he question which is the major channel is a geographical question,’ and explained that ‘the major channel can be determined on historical and scientific grounds.’<sup>70</sup> Thus, although the Court took the words of the definition as its starting point, it conducted its examination by reference to developments and knowledge that arose subsequent to the formulation of the definition in the 1902 Award, the instrument under examination. Those who drafted that Award did not know the content of the scientific elements relevant to the identification of the major channel – its length, size of drainage area and volume of discharge. The arbitral tribunal approached the problem entirely in objective terms, as contrasted with any subjective belief that the draftsman of 1902 may have had.

49. Botswana also dismisses the decision in the *Laguna del Desierto* arbitration, stating only that it ‘does not appear to be relevant to the issues presented in the present proceedings.’<sup>71</sup> Why is it not relevant? The case concerned the interpretation of that part of a boundary instrument (again it was the 1902 Award between Argentina and Chile) providing that the boundary would ‘ascend the local water-parting to Mount Fitzroy.’ At the time of that Award the precise location of the water parting was unknown. It was only discovered some 40 years later. The Tribunal found that the words used in 1902 Award required the boundary to follow the water parting whatever its location might be when ultimately established as a matter of scientific fact. To this end, the Tribunal entrusted its Expert Geographer with the task of identifying the local water parting.<sup>72</sup> The Tribunal expressly rejected Chile’s contention that ‘to apply the 1902 Award in light of geographical knowledge acquired subsequently would be equivalent to its revision through the retrospective consideration of new facts.’ The decision says:

The 1902 Award defined in the section with which this Arbitration is concerned, a frontier which follows a natural feature that, as such, does not depend on accurate knowledge of the area but on its true configuration. The ground remains as it has always been. Consequently, the local water-parting between BP62 and Mount Fitzroy existing in 1902 is the same as that which

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<sup>70</sup> 38 *I.L.R.*, pp. 93-94.

<sup>71</sup> BCM, para. 230.

<sup>72</sup> Award, para. 151.

can be drawn at the date of the present Arbitration. Accordingly, this Tribunal is not revising but faithfully applying the provisions of the Award of 1902.<sup>73</sup> (emphasis added)

50. Far from being irrelevant, both of the *Palena* and the *Laguna del Desierto* cases address the same basic legal issue that arises in this case: by what criteria is the Court to determine the location of a geographical feature identified in the Treaty as the boundary between the two litigants? Both awards give the same answer. The determination is to be made on the basis of scientific evidence available at the time the tribunal makes its decision, not on the basis of the suppositions the draftsmen of the instrument may have entertained. Botswana itself recognizes this essential identity of the issues. It cites the *Temple* case<sup>74</sup> for the proposition that the determination of ‘the centre of the main channel . . . is essentially a question of fact.’ The BM continues:

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: see the Judgment in the *Temple* case (Merits) I.C.J. [sic], 1962, p. 6 at p. 15. In such cases the factual criterion is adopted or converted into the legal criterion. But it does not cease to be in essence a question of fact.<sup>75</sup> (emphasis added)

Thus Botswana itself recognizes that the exact nature of the geographical feature is not relevant to the legal standard, which requires the application of current factual and scientific knowledge whether the boundary feature be ‘a crestline, or a watershed line or an escarpment’ – or ‘the centre of the main channel’ of the Chobe River.

## 2. Namibia’s scientific case on the identification of the ‘main channel’ of the Chobe River at Kasikili Island

51. Namibia has maintained from the beginning that the correct scientific test for identifying the main channel is the one that conveys the largest proportion of the annual flow of the river.<sup>76</sup> Botswana appears to share the same view. The BCM says: ‘The main channel is the

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<sup>73</sup> Id., paras. 157, 158.

<sup>74</sup> *I.C.J. Reports 1962*, p. 6. This case, it will be recalled, dealt with a boundary marked by a watershed and was thus factually much more remote from the present case than the *Palena* case which was precisely about the identification of a ‘major channel.’

<sup>75</sup> BM, para. 200.

<sup>76</sup> NM, para 157; id., Vol. VI, paras. 1.8, 2.8; see also NCM, Vol. III, paras. 2.1, 5.1.

channel which carries the greater amount of water.’<sup>77</sup> Moreover, although the BCM frequently refers to the comparative depth or width of the two channels, Botswana’s expert, Dr. F.T.K. Sefe, states categorically that ‘[c]hannel width and depth are not alternatives for determining the main channel of a river.’<sup>78</sup> So the issue between the two sides is clearly joined: where does the largest proportion of the water of the Chobe River flow?

52. In the more than two years since this case was filed with the Court, a great deal has been learned about the Chobe River in general and in the vicinity of Kasikili Island in particular. The chronicle of the annual cycle of the river as described by Professor Alexander in his Main Report is now well established. The Chobe River rises with the annual rains in the Angolan highlands (where it is known as the Rio Cuando) and makes its way southward across the border of the Caprivi Strip, until it peters out in the Linyanti swamps, about 30 kilometres upstream of Lake Liambezi. The dry riverbed continues to the Ngoma Bridge and on, in the dry season, to Serondela, only 15 kilometres west of Kasikili Island. During that period (approximately the latter half of the year) the water in the two narrow channels, made familiar in this case by the many reproductions of maps, aerial photographs and satellite images, remains essentially stagnant since there is no source of water from upstream.

53. This stagnant condition continues until the Zambezi River begins its annual rise, usually in late February or March. The impact is felt first below Kasikili Island in the anabranching channels of the Zambezi River and at the Mambova Rapids. The Rapids, acting as a kind of dam or weir, cause the rising waters to back up in the bed of the river until Kasikili Island is substantially inundated. As the Zambezi River rises further it overflows its banks along the whole reach from Katima Mulilo to the Mambova Rapids. The overbank flow proceeds southeast across the floodplain of the Zambezi River, until, a short time later, it reaches the Chobe Ridge along a considerable front. The influx of these waters causes the flow in the Chobe River to reverse direction and to proceed in a downstream direction past Kasikili Island. This downstream flow continues at gradually decreasing rates for two or three

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<sup>77</sup> BCM, para. 385. Botswana sometimes argues that the northern channel is the main channel because it has greater capacity than the southern channel by reason of its greater width and depth. BCM, para. 350. However, as Botswana itself recognizes in the same paragraph, capacity is not the same thing as flow, which requires in addition, among other things, information as to the velocity in the channel, and of this Botswana has provided no proof.

<sup>78</sup> BCM, Vol. II, App. 4, para. 50. The inappropriateness of depth or width as stand-alone criteria for determining volume of flow is discussed briefly at Chapter III paras. 166-168, *infra*; and at NM, paras. 131, 132, 157; *id.* Vol. VI, para. 4.4; NCM, para. 28.

months, as the rate of flow in the Zambezi River decreases and the upstream source that feeds the Chobe River dries up. By about July or the beginning of August, the river in the vicinity of Kasikili Island reverts to its normal and familiar dry-season state — stagnant to all intents and purposes.

54. It follows that the period for determining the channel that carries the largest proportion of the flow of the river – which both parties agree is the decisive criterion for determining the main channel – is the period when the river is in flow. On this question, Namibia's position has been consistent from the beginning. Professor Alexander depicted the main channel on a reproduction of an aerial photograph on Sheet 17, Diagram 4 in the Appendices to his Main Report<sup>79</sup> and again in the Second Supplementary Report, Figures 16, 17 and 18. (See Fig. 1, following p. 23) This channel clearly flows to the south of the island.<sup>80</sup> The right bank of the main channel is hard against the line of trees at the base of the Chobe Ridge, which is characteristic of the 'banks of non-perennial rivers in a semi-arid region.'<sup>81</sup> It proceeds straight along this tree line beginning upstream of the bifurcation and going on past the Island and on to the Mambova Rapids. The left bank, while perhaps less distinct, is a well-defined line of high ground crossing the southern part of the island in a generally west-east direction.<sup>82</sup> When there is substantial flow in the Chobe River emanating from upstream of Kasikili Island, most of it flows between these two banks. Within this main channel is the southern channel as it appears in most of the aerial photographs, which is in fact the *thalweg* channel of the main channel.

55. Diagram 4 was based on theoretical analysis of the pre-existing geomorphologic and hydrological data. As noted above, since then, Professor Alexander has made extensive personal observations and flow measurements on site, and additional aerial and helicopter photographs have been taken. All of these new data are not only consistent with Professor Alexander's predictions, but triumphantly confirm them.

56. Professor Alexander took flow measurements at points N1 in the northern channel and N2 in the southern channel as located on Figure 8 of the Second Supplementary Report. (See

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<sup>79</sup> NM, Vol. VI, App., Sheet 17.

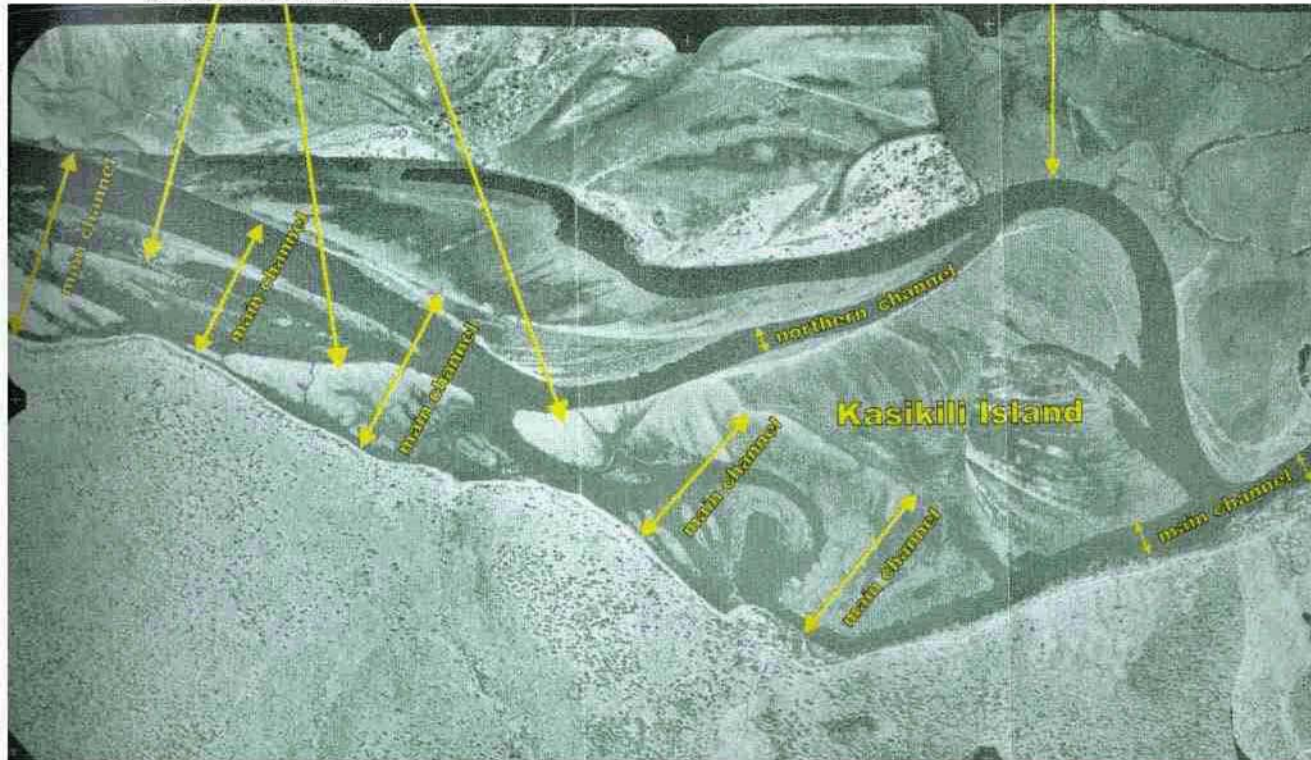
<sup>80</sup> See NM, p. 141, Submissions (1).

<sup>81</sup> NM, Vol. VI, Sheet 10, Photographs a and b (caption).

<sup>82</sup> See Chapter III, para. 182, *infra*.

Emerging sediment bars after the passage of the seasonal flow in the river

Inflow into the northern channel directly from the Zambezi River has already ceased.



NOTE: The flow in the Chobe River at Kasikili Island is seasonal, with no flow taking place in the dry season. During the dry season the water in the northern and southern channels is stagnant. During the wet season as flow commences the sediment bars in the main channel become inundated and flow takes place through the full width of the main channel. After the passage of the annual flow the water level drops, the sediment bars emerge, the flow ceases, and the water within the northern and southern channels becomes stagnant once more.

**Figure 1**  
The location of the main channel of the Chobe River at Kasikili Island.

Date of photography 5 June 1997



Fig. 2, following p. 24) He chose these sites because they aggregate the flow in each channel emanating from upstream of Kasikili Island, while excluding the flow that enters them downstream of the island. Therefore, measurements at these points reflect the flow of the Chobe River around Kasikili Island. The measured flow was 247 m<sup>3</sup>/s in the southern channel and 188 m<sup>3</sup>/s in the northern.<sup>83</sup> Thus, the actual 1998 measurements at the site corroborate that most of the flow (roughly 60 per cent in this case) goes to the south of the island and only about 40 per cent goes to the northern channel.

57. The visual evidence supplied by photographs, particularly Botswana's photomosaic of June 1997 and photographs taken by Namibia in 1997 and 1998, confirms and reinforces this account.<sup>84</sup> These are the only available photographs taken when the Chobe River was in flow around Kasikili Island. On both the 1997 and the 1998 photomosaic, the main channel appears in the exact form predicted by Professor Alexander at the beginning of the pleadings, with the right bank hugging the trees and the left bank defined by the line of higher ground crossing the island in a generally west-east direction. (See Fig. 1, following p. 23, above; Fig. 6, following p. 72).

58. Photographs 51 and 52 taken from a helicopter are particularly instructive.<sup>85</sup> (See Fig. 3, following p. 25) Photograph 51 looks downstream from about the Chobe National Park headquarters, at the point where the Chobe Ridge makes a dogleg to the north, to the Mambova Rapids at the top of the picture. The right bank of the river running along the Chobe Ridge is sharply defined, and the left bank is clearly discernible. Photograph 52 is the reverse direction, looking upstream from the Mambova Rapids past Kasikili Island in the top third of the picture. Again the right bank of the river along the ridge is sharply marked, and in this view, the left bank is also quite distinct. As Professor Alexander says:

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<sup>83</sup> Second Supp. Rep. para. 7.3, Fig. 8. In his Supplementary Report, Professor Alexander hypothesized that there would be substantially no flow in the northern channel even at times of high water, because of the flow into the eastern leg of the northern channel from the unbranched channels and the downstream control exercised by the Mambova Rapids. NCM, Vol. III, paras. 6.1-6.5. However, when peak flows reach the level they did in 1998, overbank flow reaches the northern channel from a variety of sources. In these circumstances, flow into the northern channel at its downstream (eastern) end cannot control the overbank flow, and some of the water from upstream of Kasikili Island goes through the northern channel. See Second Supp. Rep. paras. 6.44, 7.7, 7.8.

<sup>84</sup> BCM, p. 191; Second Supp. Rep., Fig. 17 and Annex 1, p. A1/26, Photographs 51 and 52.

<sup>85</sup> Second Supp. Rep., App. 1, p. A1/26.



Figure 2  
 Measured flows in the northern  
 and southern channels  
 30 April - 2 May 1998  
 Date of photography 19 April 1998

Measured flows  
 Unknown flows

The northern channel enters this straight reach of the Chobe River at right angles in the middle of the two photographs. It is clear that the northern channel is subsidiary to this uninterrupted reach of the Chobe River and that the main channel can not be considered to consist of half of the straight reach and then extend at right angles into the floodplain half way along its length.<sup>86</sup>

The visual appearance and the analysis of the photographs show that the straight reach is the main channel of the Chobe River. The northern channel is not.

59. As suggested by Botswana, Professor Alexander's account of the present-day hydrology of the Chobe River and pattern of flows around Kasikili Island is a practical and pragmatic one.<sup>87</sup> However, Professor Richards, working within a more theoretical geomorphologic framework, reaches the same conclusion that the main channel is the channel to the south of the Island.

60. Using well-established methodology, Professor Richards concludes that the meander loops on the Chobe River upstream of Kasikili Island are too large to have been cut by a river with the capacity of the present Chobe River. Professor Richards posits that they were formed by the Zambezi River itself, when in an earlier geologic era it flowed in a channel further west than it does today. Kasikili Island was a fourth in this series of meander loops.<sup>88</sup> Using the carbon dating data from Dr. Sefe's *Sedimentological Study*, Professor Richards concludes that about a millennium or so ago, the Zambezi River migrated east to its present channel, leaving a fossil channel or paleo-channel that is now occupied by the Chobe River.<sup>89</sup>

Before the Zambezi River moved, however, the Kasikili bend

experienced a cut-off (an avulsion across the meander neck). The southern channel in its current form thus post-dates the northern, not vice versa as argued in para. 353 of the Botswana Counter-Memorial, Volume I. The formation of the southern channel as a meander cut-off is consistent with the evidence of such phenomena over the whole of the Caprivi fan, and with the normal behaviour of high-sinuosity river meanders. It is also consistent with

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<sup>86</sup> Second Supp. Rep., para. 14.25. The pattern displayed in these two photographs is very similar to that in Professor Alexander's photographs on the Linyanti reach of the Chobe River, much further upstream. See Second Supp. Rep., App. 1, p. A1/5, Photographs 9 and 10.

<sup>87</sup> As noted in Chapter III, para 125, Botswana's attack on Professor Alexander's qualifications is mean-spirited in tone and wholly without merit.

<sup>88</sup> Richards Rep., paras. 22-25.

<sup>89</sup> Id., para. 27.

northern channel

southern  
(main)  
channel



Looking down the southern channel towards the Mambova rapids; The northern channel enters the southern channel at right angles from the left.

southern (main)  
channel

northern channel



Looking up the main channel from the Mambova Rapids in the left foreground. The northern channel enters this channel at right angles from the right. [White arrows indicate the direction of flow in the channels.]

**Figure 3**  
**Confluence of the northern**  
**and southern channels**

the characteristics of the large upstream bends at Serondela, which have pronounced chute channels. This cut-off is likely to have occurred very soon after the [Kasikili] bend reached its outer limit, at about 1,000 years ago . . .<sup>90</sup>

61. The northern 'channel' is, thus, a cut-off meander loop. In due course it 'will be blocked at its upstream end, in the same way as the spur channel.'<sup>91</sup> The only reason this will not happen at the downstream end is the influx of water into the eastern leg of the channel from the anabranching channels east of Kasika.

62. 'The southern channel,' says Professor Richards

is the result of an avulsion, occurring well before the 1890 Treaty, in which a chute channel beneath the Chobe Ridge across the neck of the bend was extended fully across the neck by flood flows. Since this cut-off, the southern channel has carried most of the flow in the lower Chobe.<sup>92</sup>

By virtue of this avulsion a thousand years ago, the channel took the form shown in Professor Alexander's Diagram 4 in his Main Report and Figures 16, 17, and 18 of the Second Supplementary Report. This channel, flowing to the south of Kasikili Island, became and remains the main channel of the Chobe River.

### 3. Response to Botswana's 'scientific case'

63. It remains to address the miscellany of propositions and evidence that constitute Botswana's scientific case. At the outset of its scientific discussion, the BCM stakes its position on six propositions. These are discussed immediately below, where it is shown that four are false, one is uncontested, and the remaining one is true but supports Namibia's position. Next, the Reply refutes Botswana's secondary hydrological arguments, and then reviews the evidence from aerial photographs and satellite imagery. Finally, Namibia returns to the question that it reserved in its Memorial: the identification of 'the centre of the main channel' of the River Chobe.

#### (a) The six propositions

64. Under the heading 'Botswana's case relating to the River Chobe based on scientific evidence,' the BCM puts forward six propositions that, it says, support its case.<sup>93</sup> The

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<sup>90</sup> Id., para. 28.

<sup>91</sup> Id., para. 30.

<sup>92</sup> Id., para. 28.

<sup>93</sup> BCM, para. 327 *et seq.*

detailed discussion of these propositions takes up the next 30 pages of the BCM and represents the main substantive discussion of scientific issues. The six propositions are:

- ‘(i) The Chobe is the geographical feature in Article III of the 1890 Agreement’
- ‘(ii) The Chobe is a river independent of the Zambezi River’
- ‘(iii) The Chobe has a stable profile as a perennial mature river’
- ‘(iv) The Chobe is a perennial river with visible and stable banks’
- ‘(v) There is an absence of zones of sedimentation in the northern channel’
- ‘(vi) The Chobe is a river with continuous flow’<sup>94</sup>

The first of these propositions is uncontested. The second, third, fourth and sixth are false. The fifth, although true, confirms that no substantial flow takes place in the northern channel.<sup>95</sup> Namibia will now discuss each of the propositions in turn:

- The Chobe River is not ‘a river independent of the Zambezi River.’

On the basis of a correlation of the river flows at Katima Mulillo and Kasane for over 50 years, Professor Richards concludes that the consistency of the relationship ‘suggests very strongly that the water levels in the lower Chobe are essentially controlled by the flood discharges attained in the Zambezi.’<sup>96</sup>

The 1945 *Report of the Kalahari Reconnaissance* says that ‘in effect the Linyanti [Chobe] below Kachikau is part of the Zambezi River, the land between being really large islands of the Zambezi.’<sup>97</sup>

A Joint Report of the Namibian and Botswana Departments of Water Affairs of 28 June 1992 concludes that ‘under the current circumstances with Lake Liambezi being dry, it was felt more relevant to consider the Chobe River in conjunction with the Zambezi River.’<sup>98</sup>

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<sup>94</sup> The propositions are the headings of BCM, paras. 328-334, respectively.

<sup>95</sup> See Second Supp. Rep., paras. 17.1, 17.2.

<sup>96</sup> Richards Rep., para. 18.

<sup>97</sup> Reply Annex 32, p. 5.

<sup>98</sup> Second Supp. Rep., App. 2, p. A2/4, para. 3.1

- The Chobe does not have ‘a stable profile as a perennial mature river.’

The Chobe is not a perennial river at all. As Botswana’s expert says, ‘a perennial stream never dries up.’<sup>99</sup> Professor Alexander’s three reports contain 16 photographs showing various parts of the dry bed of the Chobe River above Ngoma Bridge.<sup>100</sup>

Professor Alexander testifies that in 1997 and 1998, ‘I flew by helicopter along the whole length of the Chobe River as identified in the 1890 Treaty. I observed and photographed long lengths of the Chobe River where the river was completely dry without visible channels or clearly defined banks.’<sup>101</sup>

In 1985, the Namibia Department of Water Affairs reported that ‘There has been no flow from Lake Liambezi into the Chobe since September 1982.’<sup>102</sup>

In June 1992 the Joint Report of the Hydrology Divisions of the Namibian and Botswana Departments of Water Affairs states ‘With Lake Liambezi having been dry for almost a decade, there has been no contribution to the Chobe River from this source.’<sup>103</sup>

Professor Richards states clearly that the river is not perennial.<sup>104</sup> He adds that ‘[s]ince the Linyandi-Chobe passes through this lake [Liambezi], it is difficult to sustain the argument that the Chobe is a perennial river.’<sup>105</sup>

Professor Richards also shows that similar conditions have occurred cyclically in recent and more remote history, and probably in prehistoric times as well.<sup>106</sup>

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<sup>99</sup> BCM, App. II, para. 9.

<sup>100</sup> See also Chapter III, paras. 131-132, *infra*.

<sup>101</sup> Second Supp. Rep. para. 4.5. See also NCM, Vol. III, para. 7.9 (‘The lower reach of the Linyandi River from Lake Liambezi westwards was completely dry during my inspection and no channels were discernable from the air’).

<sup>102</sup> Reply Annex 24.

<sup>103</sup> Reply Annex 25.

<sup>104</sup> Richards Rep., para. 16.

<sup>105</sup> *Id.* See also Chapter III, paras. 131-132, *infra* and Second Supp. Rep. Photographs 15 and 16.

<sup>106</sup> Richards Rep., paras. 19-21.

A 1990 report from the Lonrho Namibia Caprivi Sugar Project says Lake Liambezi 'can by no means be classified as a perennial lake' and that in the 1940's the bed of the lake was 'largely under cultivation.'<sup>107</sup>

- The Chobe is not 'a perennial river with visible and stable banks.'

As to the non-perennial character of the Chobe River, see the preceding paragraph.

The visibility of the banks of the northern channel during periods of high water is said to be shown on a series of aerial photographs, all but one of which were taken during periods of low water. The single exception was the photograph taken in June 1997, a year when the peak flow in the Zambezi was abnormally low and when, as Botswana admits, the water was already receding.<sup>108</sup>

- As stated above, it is true that 'there is an absence of zones of sedimentation in the northern channel,' but this is an indication not of the presence but of the absence of flow in that channel. Professors Alexander and Richards agree that the absence of zones of sedimentation in this case indicate that the northern channel is a meander loop in the process of being closed off, not an active river channel.<sup>109</sup>
- The Chobe is not a river with continuous flow.

In support of its proposition, the BCM adduces the records of seven gauging stations along the Chobe from Upper Kwando to Kasane. These records are records of water levels and do not contain any data from which flow can be deduced.

It is known from other evidence that there is continuous flow in the Chobe River from the station at Upper Kwando, where it first enters Namibia, and for the next 120 kilometres through to the sixth gauging station at Shaile. It is

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<sup>107</sup> Reply Annex 26, p. 3.

<sup>108</sup> See Second Supp. Rep., paras. 13.7, 13.10-13.13. The other photograph on which Botswana particularly relies is the 'May 1972' photograph, which is misdated. See Chapter III, paras. 187-188, *infra*; Second Supp. Rep., para. 13.6.

<sup>109</sup> See Second Supp. Rep., para. 17.2; Richards Rep., paras. 28-30. See also NCM, Vol. III, Supp. Rep., paras. 5.3-5.5, 5.17; NM, Vol. VI, Main Report, para. 8.7.



equally clear from the photographs, eyewitness testimony and reports cited above that in the dry season the River is completely dry for the next 40 kilometres from Shaile through to Lake Liambezi and beyond to below Ngoma Bridge. Thus, there is no continuous flow through the Chobe River and past Kasikili Island. There are gauging stations in this dry stretch of the River below Shaile, but Botswana fails to include the data from these stations in its tables and diagrams.

Botswana repeatedly asserts that the Chobe River maintains a 'constant level of 925.6 metres' at the Kasane Gauging Station below Kasikili Island.<sup>110</sup> Its assertion that there is continuous flow is pitched largely on this measurement. In the first place, the measurement is incorrect, since it would mean that much of Kasikili Island would be under water most of the time. The correct figure is probably 924.6 masl.<sup>111</sup> More important, however, is that the level at Kasane is maintained in the dry season not by flow through the Chobe River from upstream of Kasikili Island, but by flow through the anabranching channels from the Zambezi that enter the Chobe below the Island. The 'constant level' at Kasane does not, therefore, constitute evidence of continuous flow in the Chobe River at Kasikili Island.

65. Thus, all the substantive propositions on which Botswana bases its scientific case are shown to be utterly unfounded. The scientific case they are said to support must fall with them.

(b) Secondary hydrological arguments

66. Botswana raises a number of subsidiary scientific or quasi-scientific arguments, all of which are dealt with in full in Chapter III. A few of these merit brief comment in this Introduction.

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<sup>110</sup> E.g., BCM, para. 334. See Second Supp. Rep., Section 12. In fact, Botswana's terminology is anything but constant. At various times it refers to the 925.6 metre figure as a 'level' (BCM, para. 284), a 'constant level . . . through all seasons of the year' (id., para. 334), a 'minimum level' (id., para. 336), and a 'constant minimum level' (id., Vol II, App. 2, para. 43).

<sup>111</sup> See Second Supp. Rep., Section 12.

(i) Bedslope

67. Botswana says that the northern channel carries the greater flow of water because it is 'steeper' than the southern channel. To prove this assertion, it produces a graph, plotting the elevations in each channel at the cross-sections measured by the 1985 joint survey. The graph implies that the total drop in elevation in the northern channel is greater than in the southern. The graph ends, however, before the confluence of the two channels at the eastern end of the Island. The undeniable fact is that, since the points of origin and points of confluence of the two channels are identical, the differences between the beginning and end of each channel must also be identical. Thus, the allegation of the greater 'steepness' of the northern channel turns on a deliberately incomplete data set.

(ii) Erosion

68. Ordinarily, river flow causes bank erosion. Botswana attempts to explain away the fact that, despite its claim that the greater flow takes place through the northern channel, the banks of that channel show no signs of erosion. To this end, the BCM, citing Dr. Sefe's *Sedimentological Study*, argues that the banks are stable because they are formed of non-erodible material. Namibia has produced photographs showing the erodible character of the banks of the northern channel.<sup>112</sup> Moreover, what Botswana itself regards as "sedimentary material" appears on the aerial photographs along the right bank of the northern channel. Therefore, the fact that the banks have not been eroded can only be a consequence of the absence of flow of water in the channel.

(iii) Flow measurements

69. Botswana cites flow measurements said to be taken on three dates in March and April 1997 indicating that the flow was larger in the northern than in the southern channel.<sup>113</sup> Elsewhere the BCM refers to minimum flow velocities in the dry season 'on the order of 0.5 metres per second.'<sup>114</sup> No details are given of the points in the river at which the measurements were taken or the methodology employed. In the absence of evidence on these points they can stand as no more than mere assertions to which the Court cannot properly give any weight.

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<sup>112</sup> See Chapter III, para. 155, *infra*.

<sup>113</sup> *Id.*, para. 285.

<sup>114</sup> *Id.*, paras. 275, 283, 368.

70. As will be seen below, Professor Alexander, despite harassment by the BDF, was able to take careful flow measurements in the northern and southern channels on 30 April to 2 May 1998. The sites at which these measurements were taken and the procedures followed are described in detail in Professor Alexander's Second Supplementary Report.<sup>115</sup> Sites N1 in the northern channel and N2 in southern were chosen because all the flow in the Chobe River upstream of Kasikili Island passed one of these two points, while no flow from downstream sources entered either channel before these points. The readings showed a flow of 247 m<sup>3</sup>/s in the southern channel and 188 m<sup>3</sup>/s in the northern channel. Thus, almost 60 per cent of the flow was through the southern channel and only about 40 per cent in the north. (See Fig. 2, following p. 24, and para. 56, above)

(c) The aerial photographs and satellite images

71. Botswana continues to attach great importance to aerial photographs and satellite images. The BCM's analysis is characterized by repetitive statements that the overall configuration of the area has not changed (a matter that is not in dispute) and that the photographs show the northern channel to be wider and deeper than the southern. Chapter III(B) below responds in detail to Botswana's photographic analysis. For the present, it is sufficient to make a few general observations.

72. First, all the photographs, except the one of June 1997, were taken in the dry season, when there is hardly any flow in the Chobe River at Kasikili Island. In the wet season, when there is flow in the river, the water level rises and, as Professor Alexander demonstrates, most of the island is inundated.<sup>116</sup> However, it is evident from an inspection of the photographs that most of Kasikili Island is above water. It follows that these photographs were taken during the dry season. This is only to be expected, since the photographs were taken primarily by reconnaissance, survey and mapping expeditions interested in the terrain and topographic features of the area.<sup>117</sup> Comparisons made when there is little or no flow in either channel can hardly provide the basis for deciding which carries the major portion of the flow.

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<sup>115</sup> Second Supp. Rep., paras. 6.21-6.29.

<sup>116</sup> Second Supp. Rep., para. 13.7 and Table 1, p. 43.

<sup>117</sup> Second Supp. Rep., para. 13.19.

73. Second, in any case, the comparisons of the channels as shown on the photographs provide little information relevant to this case. Inspection of high altitude aerial photographs cannot show whether water is actually flowing in the channels. Likewise, it is impossible to derive from the photographs information, in any relevant detail, about the depth of the channels. The width of the surface of a channel cannot by itself evidence the rate of flow. The case is essentially the same for satellite images.

74. Third, Botswana insists that the aerial photographs reveal no changes in the sediment bars in the southern channel. This is said to prove that the southern channel is not an active channel. Botswana is wrong for two reasons. First, the photographs do in fact reveal changes, and these are acknowledged even by Botswana.<sup>118</sup> Second, the photographs also reveal substantially identical sandbars in the Chobe River above the bifurcation. These are created by sediment deposited in the channel by the flow of the river. Since this is true of the sandbars above the bifurcation, it can be no less true of the sandbars actually within the southern channel and so stands as proof of the activity of the southern channel.

#### 4. Identifying the 'centre' of the main channel

75. In its Memorial, Namibia noted that it was unnecessary at that time to discuss the question of where the boundary lies within the main channel. The principal issue was the identification of the main channel. Thereafter, 'the location of the centre of the main channel would follow largely as a matter of course by reason of its dependence upon the manner in which the principal issue is resolved.'<sup>119</sup> Namibia reserved its right to return to the issue if developments in the case made it appropriate to do so.<sup>120</sup>

76. Botswana, in its Memorial made no express reference to the 'centre' of the main channel, but its argument on the identification of the main channel was that 'the middle of the navigable channel was the boundary.'<sup>121</sup> Presumably, therefore, Botswana equated 'the centre' of the main channel with the middle of the navigable channel. Botswana's Counter-Memorial also conflates its identification of 'the centre' of the main channel with its

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<sup>118</sup> See BCM, para. 377.

<sup>119</sup> NM, para. 159.

<sup>120</sup> NM, para. 160.

<sup>121</sup> BM, para. 137.

definition of the main channel in terms of the *thalweg* of the river.<sup>122</sup>

77. The time to address the question Namibia reserved in its Memorial has now arrived. The main channel of the Chobe River has been identified as shown originally on Diagram 4, Sheet 17 of the Appendices to Professor Alexander's Main Report and in Figures 16, 17, 18 and 19 of his Second Supplementary Report. (See also Fig. 1, following p. 23, above) The next step is to determine where the boundary lies within this main channel.

78. Article III(2) of the 1890 Treaty defines the boundary as descending "the centre of the main channel" of the River Chobe. The German text says "*im Thalweg des Hauptlaufes.*" (emphasis supplied). The correct interpretation of Article III(2) is the one that fully reconciles the English and the German texts. Otherwise, the result would be to disregard either the word 'centre' or the word '*thalweg*' as superfluous, which is forbidden by the rules of treaty interpretation.<sup>123</sup>

79. The interpretation that meets this requirement will construe both words as referring to the *thalweg* of the main channel in its technical and geographical sense as the line of deepest soundings in that channel. The Court does no violence to the language by treating the words '*thalweg*' and 'centre' as synonymous in this context. As noted in Chapter II, below, although the practice was by no means uniform, the use of the English word 'centre' to indicate the *thalweg* of a channel or a river was a perfectly acceptable usage.<sup>124</sup> On the other hand, the German word '*Thalweg*' could not properly be applied to the geometric centre of the river.

80. Thus, the Court will give full effect to all the words of the Treaty by determining,

first, that the 'main channel of the Chobe River' is the channel defined by Professor Alexander, as indicated above, and

second, that the *thalweg* of that channel is the boundary.

This two-step procedure reflects the plain meaning of the text of the Treaty, and Namibia has advocated it from the beginning of its written pleadings.

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<sup>122</sup> BCM, paras. 194-199.

<sup>123</sup> See Chapter II, n. 9 and n. 10, *infra*.

<sup>124</sup> See also NCM, para. 57.

81. Both Professor Alexander and Professor Richards agree that the *thalweg* of the main channel, as defined by Professor Alexander, lies within what has been referred to in this case as the southern channel.<sup>125</sup> They have shown that the appearance of the channel that flows to the south of Kasikili Island differs considerably according to the season of the year and the rate of flow in the River. When the Chobe River is flowing, the bulk of the flow goes through the broad conduit that Professor Alexander has identified as the main channel.<sup>126</sup> Indeed, that is why it is the main channel. During the dry season, however, the river assumes the configuration that is familiar on the maps and most of the aerial photographs presented in this case. The southern channel, in that configuration, is the *thalweg* channel of the main channel. The main channel overlies this *thalweg* channel, so that during the high flow season, when there is flow in the Chobe River at Kasikili Island, the flow in the main channel submerges this *thalweg* channel. In the dry season, when the river assumes the configuration familiar from the maps and aerial photographs, the water that remains in the channel to the south of the Island continues to mark the *thalweg* channel of the main channel.

82. This is a common phenomenon in non-perennial rivers in semi-arid regions of the world, where the river dries up or shrinks to a narrow rivulet during the dry season and swells to bankfull or overbank levels in annual periods of high water. The phenomenon can be seen for the Chobe River at Ngoma Bridge by comparing the dry season photograph looking downstream taken on 20 September 1995<sup>127</sup> with a photograph taken from the same point on 11 April 1998. (See Fig. 4, following p. 35)<sup>128</sup> The first shows a narrow, meandering, even discontinuous *thalweg* channel in the middle of the otherwise dry bed of the Chobe River, which is marked by tree-lined banks on either side at some distance from the *thalweg*. In the second, in the high flow season, the river fills almost the entire area of the main channel between the two lines of trees. The same comparison between the dry season, where a narrow, sinuous channel marks the *thalweg* over which the river flows at bankfull in the high water season, can be seen for the Limpopo and Orange Rivers on Sheet 4 of the Appendices

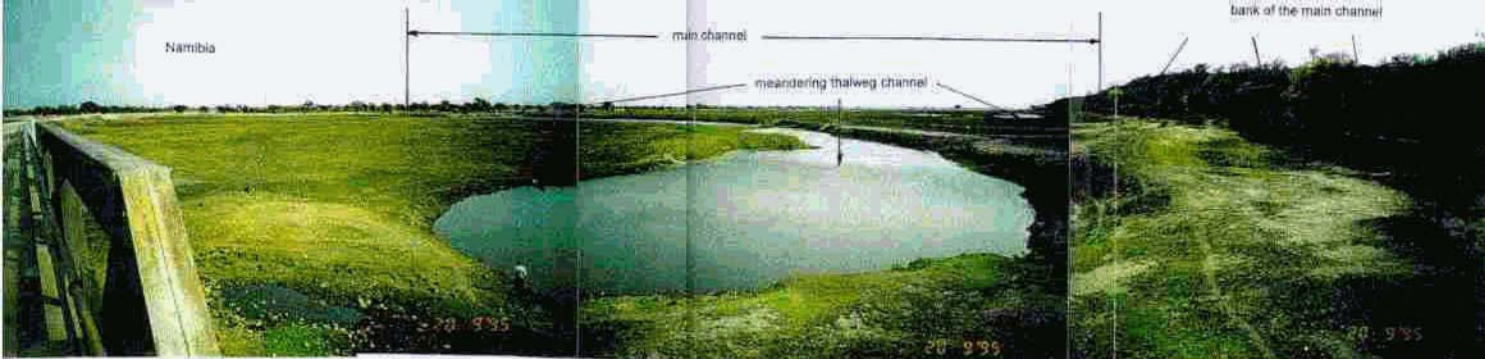
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<sup>125</sup> Second Supp. Rep., paras. 14.14, 14.19; Richards Rep., paras. 3, 4, 34.

<sup>126</sup> Second Supp. Rep., Sec. 7, and Richards Rep., paras. 28, 32, 34, 38. See also NCM, Vol. III, Supp. Rep., para. 5.19; NM, Vol. VI, para. 12.1.

<sup>127</sup> NM, Vol. VI, App., Sheet 11a.

<sup>128</sup> Second. Supp. Rep., Fig. 10.



Chobe River at Ngoma Bridge looking downstream in the dry season when there was no flow in the Chobe River at this point. Photograph taken on 20 September 1995.



Chobe River at Ngoma Bridge looking downstream when flow was taking place. Photograph taken on 11 April 1999.

Figure 4  
Chobe River at Ngoma Bridge

to Professor Alexander's Main Report.<sup>129</sup> This is what occurs at Kasikili Island during the high flow period from March to June.

83. On the interpretation of the Treaty that Namibia proposes here, the boundary would be the line of deepest soundings in the southern channel, that is, the *thalweg*. This would correspond to what is shown as the boundary on almost all the maps of the area since the time of the 1890 Treaty. It would reflect the understanding of Namibia and its predecessors in interest from the time of the Treaty, and that of Botswana's predecessors in interest until at least the time of Botswana's independence. And it would allow both parties full access to the navigational resources of the river for purposes of the tourist industry.<sup>130</sup>

84. In Namibia's submission, this is the interpretation of Article III(2) of the Anglo German Treaty that the Court should adopt.

#### F. Prescription and Acquiescence

85. A substantial portion of Namibia's Memorial is Part Two, entitled 'The Subsequent Conduct of the Parties with relation to Kasikili Island.' This part embraces two parallel strands – the subsequent practice of the Parties as evidence of their understanding of the meaning of the Treaty and their subsequent conduct as constituting prescriptive behaviour in which the predecessors in title of Botswana acquiesced. The account of the maps of the area, discussed in Chapter V, and summarized at paras. 34-45 above, is an integral and entirely consistent part of this subsequent practice and conduct. The post-1890 behaviour of Namibia and its predecessors in title treating the southern channel as the boundary is relevant in two ways. It serves to confirm the interpretation of the 1890 Treaty that favours the identification of the channel to the south of the Island as the boundary. It also serves as the foundation for a prescriptive claim that negates such formal title as Botswana might conceivably have obtained under the 1890 Treaty. As noted at the beginning of this Chapter, there is absolutely no impropriety in the presentation of arguments in support of Namibia's claim to Kasikili Island on the basis both of Treaty interpretation and prescription. Nor is either argument diminished by the development of the other. Each argument uses the same material in a different way.

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<sup>129</sup> NM, Vol. VI, Sheet 4a and 4b (Limpopo), 4c and 4d (Orange). See also Second Supp. Rep., Photograph 62 (Mkuze River), Photograph 63 (Mhlatuze River), p. A1/32.

<sup>130</sup> Namibia has always been willing to allow Botswana to use the northern channel.



86. Once this misconception is out of the way, the argument for prescription is quite straightforward. Chapter VI of this Reply shows, largely through testimony from witnesses Botswana accepts as reliable and other undisputed evidence, that there was peaceful occupation and use of the Island by the Masubia of Caprivi for the greater part of the period under consideration under the authority of their traditional leadership, responsible to the German, British (as administrators of the Mandate for South Africa) and South African authorities. There was no objection, let alone control, by the Bechuanaland authorities. Indeed, Botswana does not seriously contest that this was the situation at least through the 1940s and into the 1950s, the so-called 'critical date' proposed by Botswana. In fact, continuous use and control of the Island by South African authorities continued until 1989, when they finally withdrew from Namibia. Although Botswana argues that there was no exercise of jurisdiction on the Island, it is clear that the Masubia chiefs and Indunas were acting locally as agents of the German and later the South African government.

87. Conversely, there is no evidence of any attempt whatsoever at occupation of Kasikili Island by residents of Bechuanaland or at the exercise of jurisdiction by the Bechuanaland authorities. There was not only acquiescence, there was complete passivity. And it was not only the rules of prescription that obligated the British authorities to take action in defence of their asserted rights. The 1890 Treaty delimited boundaries not between sovereign territories but between the spheres of influence of the parties. According to Jan Verzijl, '[s]uch zones or spheres did not thereby become State territory proper, but as far as they were concerned an inchoate title was vested in the proclaiming or delimiting State(s) that could gradually develop into full sovereignty.'<sup>131</sup> Therefore, some form of positive assertion of jurisdiction or control was necessary if Britain was to perfect its title. Under the assumptions about acquisition of territory prevailing at the end of the 19<sup>th</sup> century, the silence of the British and Bechuanaland authorities is even more significant, both as a matter of subsequent practice for the interpretation of the Treaty and subsequent conduct grounding a claim of prescription.

#### E. Conclusion

88. Botswana proposes a disarmingly simple solution to the question presented in this case: Article III(2) of the 1890 Treaty says the boundary is in the *thalweg* of the river; the *thalweg* is the deepest channel; the northern channel is on average the deeper; ergo, the boundary runs

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<sup>131</sup> J.H.W. Verzijl, *International Law in Historical Perspective*, Vol. III, Leyden, 1970, p. 495.

in the northern channel. But the Chobe is not a simple river, and this is not a simple case. Botswana's formula is not simple, it is simplistic.

- The Treaty does not say 'the *thalweg* of the river;' it says 'the centre of the main channel.'
- Greater depth does not identify the main channel; the larger proportion of the flow in the river does.
- The flow passing through a channel cannot be determined by inspection of aerial photographs taken in the dry season; it requires expert analysis of the hydrology and geomorphology of the Chobe River at Kasikili Island.
- Moreover, Botswana's 'simple solution' would erase the century-long history of occupation, use and jurisdictional control of Kasikili Island by the Masubia people of the Caprivi and by Namibia's predecessors in political authority, all of it recognized and accepted by the British and Botswana governments until 1984.

Professors Alexander and Richards are uniquely qualified to perform the hydrologic and geomorphologic analyses that are called for. They demonstrate convincingly that when water is flowing in the Chobe River at Kasikili Island, the largest proportion of the flow is carried by the channel lying to the south of the Island, identified in Fig. 1, following p. 23, above. This is 'the main channel' within the meaning of the Treaty. The *thalweg* channel of this main channel is the southern channel commonly appearing on the maps and aerial photographs. The *thalweg* — the line of deepest soundings within the *thalweg* channel — is the boundary between Botswana and Namibia at Kasikili Island.

89. This answer to the question submitted to the Court is the only one that fully reconciles the language of the 1890 Treaty, the scientific evidence, the subsequent practice of the parties, the map evidence and the history of the last century. In Namibia's submission, it is the answer the Court should give.

## Part Two

### THE INTERPRETATION OF THE ANGLO-GERMAN TREATY OF 1890

#### **Chapter II**

#### THE TEXT OF THE TREATY IN THE LIGHT OF ITS OBJECT AND PURPOSE

##### A. In General

90. As a preliminary observation, Namibia recalls the BCM's serious distortion of the overall thrust of Namibia's position. Botswana is mistaken in asserting that Namibia 'discounts the significance of the 1890 Agreement' and that 'the major emphasis' in the Namibian Memorial 'is upon title by prescription.'<sup>1</sup> The charge could easily be turned against Botswana. Its Memorial contains considerably less substantive argument on the question of interpretation of the 1890 Treaty than Namibia's. Of the 45 paragraphs (roughly 15 pages) Botswana devotes to the interpretation of the 1890 Treaty, only four (1 1/2 pages) deal with the wording of the Treaty. The rest is a lengthy recapitulation of the general rules of treaty interpretation as to which there is no disagreement at all between the parties to this case. In the Namibian Memorial, on the other hand, the whole of Part One deals with 'The Interpretation of the Anglo-German Treaty of 1890,' and includes a precise analysis of the text of Article III(2), a discussion of the object and purpose of the 1890 Treaty, and a substantial and illuminating account of the history and preparatory work leading to the final text of the Treaty. As Namibia stated at the beginning of that Part, 'The first ground on which Namibia contends that Kasikili Island belongs to it rests on the terms of the 1890 Anglo-German Treaty.'<sup>2</sup> Thus, the charge that Namibia 'discounts the significance of the 1890 Agreement' is totally unfounded.

91. However, because Botswana's Memorial and Counter-Memorial are so replete with inconsistent and erroneous assertions regarding the literal meaning of the relevant passages of the 1890 Treaty and its object and purpose, as well as with regard to the alleged 'self-executing' nature of the 1890 Treaty, Namibia will once again address the question of the

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<sup>1</sup> BCM, para. 133.

<sup>2</sup> NM, para. 43.

correct interpretation of the Treaty. In so doing, Namibia will follow the traditional canons of treaty interpretation as they are reflected in Article 31 of the Vienna Convention on the Law of Treaties. Thus, this Reply addresses, first, the literal interpretation of Article III(2) of the Treaty, and second, the interpretation of the Treaty in the light of its object and purpose.<sup>3</sup> Third, Namibia will respond to Botswana's erroneous contention that the question of the determination of the main channel of the Chobe River is *ipso iure* answered by the alleged self-executing nature of the 1890 Treaty.

#### B. Interpretation of the Words of the Treaty

92. The interpretation of the 1890 Agreement centres around the correct reading and meaning of the relevant words used in Article III(2), which describe the course of the boundary in the Chobe River:

[T]he . . . line . . . runs eastward along that parallel [18<sup>th</sup> parallel of south latitude] till it reaches the River Chobe, and descends the centre of the main channel of that river to its junction with the Zambezi, where it terminates.  
(emphasis added)

93. In the course of the pleadings, Botswana has substantially shifted its position on the interpretation of Article III(2). Initially, in its Memorial, Botswana stated that '[t]he German text employs the term *Thalweg* as the counterpart to "the main channel" in the English text.'<sup>4</sup> This reading is manifestly incompatible with the German text of Article III(2). Recognizing its mistake, Botswana now maintains that the words 'centre of the main channel of the river' have to be read as a single whole. On this analysis, according to Botswana, the German translation of the phrase should have been '*im Thalweg dieses Flusses*' (in the *thalweg* of this river),<sup>5</sup> instead of the actual German translation, which reads '*im Thalweg des Hauptlaufes dieses Flusses*' (in the *thalweg* of the main channel of this river ). (emphasis added) This

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<sup>3</sup> No insight into the meaning of Article III(2) of the 1890 Treaty can be gained from a systematic interpretation (Article 31 paras. 1 and 2 of the Vienna Convention on the Law of Treaties) because the Treaty uses the contested phrase "centre of the main channel" only once. Therefore, there is no room for a systematic or contextual interpretation. It appears that Botswana did not put forward any argument based on the systematic interpretation, for the same reason. The subsequent practice of the parties within the meaning of Article 31(3)(b) of the Vienna Convention is dealt with in Chapter IV, below.

<sup>4</sup> BM, para.115.

<sup>5</sup> BCM, para. 197.

amounts to saying that the words ‘*des Hauptlaufes*’ in the German text are unnecessary and therefore meaningless.<sup>6</sup> On both counts, Botswana is wrong.

94. As pointed out in the NCM, it is plainly wrong to maintain that ‘*Thalweg*’ is the counterpart of the words ‘the main channel.’<sup>7</sup> The English words ‘of the main channel’ obviously correspond to the German ‘*des Hauptlaufes*.’ Botswana apparently became aware of the error of its original approach and now acknowledges that the English text ‘of the main channel’ and the German text ‘*des Hauptlaufes*’ may indeed have distinct meanings from the words ‘centre’ and ‘*thalweg*.’ The parties to the Treaty may have referred to the centre or the *thalweg* of the main channel because contemporary witnesses had observed that there were islands in the Chobe,<sup>8</sup> which meant that there could be more than one channel and, therefore, more than one centre or *thalweg* along which the border could descend. If so, Namibia’s position is correct: in interpreting the Treaty, the task is first, to determine which of the two channels around Kasikili Island is the main channel and then to find the centre or *thalweg* of that channel.

95. In an effort to avoid this straightforward result, Botswana has changed its original position on the meaning of the words in the Treaty. It now maintains that the formula used in Article III(2) has to be read as a whole, and that the words ‘*des Hauptlaufes*’ in the German text must be ignored as unnecessary. Indeed, BCM, para. 197 expressly argues that:

“*des Hauptlaufes*” in the German text of the agreement was unnecessary as the expression “the centre of the main channel” would have been correctly translated as “*der Thalweg dieses Flusses*.”

This approach runs counter to the rules of treaty interpretation, which require that the provisions of a treaty be construed as they stand,<sup>9</sup> giving meaning to every word of the text,

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<sup>6</sup> See *Id.*

<sup>7</sup> See NCM, para. 52.

<sup>8</sup> See, for example, F.C. Selous, *A Hunter’s Wanderings in Africa* (1895), written after extensive travelling in 1874 in the area relevant to the case at hand; see Reply Annex 34. Dr. B.F. Bradshaw’s 1881 article in the Proceedings of the Royal Geographical Society entitled ‘Notes on the Chobe River, South Central Africa’ (cf. NM, Annex 115) and his map showing the Chobe in unique detail. (The map is reproduced in NM, Fig. 7 following p. 27).

<sup>9</sup> As recently as 1994 in the *Libya v. Chad* case the ICJ upheld this rule in stating that ‘interpretation must be based above all upon the text of the treaty.’ *ICJ Reports* 1994, p. 6, at p. 22; see also Sir Robert Jennings and Sir Arthur Watts (eds.) *Oppenheim’s International Law*, 9<sup>th</sup> edition (1992), Vol. I - *Peace*, parts 2-4, p. 1271.

without rewriting it to fit a desired meaning of the provision in question.<sup>10</sup>

96. As a preliminary point, there is a question of how far Botswana is entitled to rely on the word *thalweg* in the German text of the Treaty. According to Oppenheim's fifth edition, which may be thought to reflect pre-World War I treaty practice:

Unless the contrary is expressly provided, if a treaty is concluded in two languages and there is a discrepancy between the meaning of the two different texts, each party is only bound by the text of its own language. Moreover, a party cannot claim the benefit of the text in the language of the other party.<sup>11</sup>

Botswana is the successor of Britain. Its language is, therefore, English. Namibia is successor of Germany; its language is, therefore, German. Consequently, it is not for Botswana to hang its case on the German text — *a fortiori*, not on a distorted interpretation thereof.

97. In its first argument purporting to show that the words "*des Hauptlaufes*" in the German text of the 1890 Treaty are unnecessary, Botswana maintains that the use of the German term "*Thalweg*" alone would have fully met the intentions of the parties. This is because (Botswana claims) the established international practice at the time of the Treaty was to use the term *thalweg* in determining the boundary in navigable rivers. The flaw in this argument is that, contrary to Botswana's assertions, there was no uniform terminology describing river boundaries at the time of the Treaty. The random selection of international boundary treaties relating to Africa discussed in the NCM reveals that a variety of terms are used to describe the course of river boundaries.<sup>12</sup> Even the 1890 Treaty itself uses several different terms.<sup>13</sup>

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<sup>10</sup> See *Polish Postal Service in Danzig* (Advisory Opinion) *P.C.I.J.* 1925, Series B, No.11, p. 39; *Admission of a State to Membership in the United Nations* (Advisory Opinion), *I.C.J. Reports* 1950, p. 8; *Anglo-Iranian Oil Co Case*, *I.C.J. Reports* (1952), p. 105, where the Court emphasized that a treaty should be interpreted in such a way that a reason and meaning can be attributed to every word in the text. See also Rudolf Bernhardt, 'Interpretation in International Law,' in *Encyclopedia of Public International Law*, Vol.II, pp. 1416 *et seq.*, at 1420 (1995). This principle goes back to the writings of Hugo Grotius and particularly to Emérique de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle*, livre II, § 283.

<sup>11</sup> Oppenheim, *International Law* (5<sup>th</sup> Edition 1937), p. 756. See also Hall, *International Law* (8<sup>th</sup> edition 1924), p. 392. At the time of the conclusion of the 1890 Treaty it was the practice (followed in this case) to negotiate the text in French and then for each side to produce a version in its own language. Sir E. Satow, *Diplomatic Practice* 2<sup>nd</sup> Ed.(1922), § 91, pp. 70-71.

<sup>12</sup> NCM, para. 57: the ten treaties cited show at least nine different terms used to describe the course of river boundaries, including the term "*thalweg*".

<sup>13</sup> NCM, para. 56: Articles I, III, IV show four distinct formulae describing river boundaries.

Moreover, although Botswana claims that navigability was the primary concern of the parties, the term *thalweg* in the various treaties is not linked exclusively to the navigability of the relevant rivers; likewise, terms other than *thalweg* are applied in relation to navigable rivers.<sup>14</sup> Of course, the term *thalweg* was more generally used in Europe. However, here also the term was not exclusively linked to navigability. Indeed, in some thirty treaties concluded between European powers during the 19th century, the term was used in relation to non-navigable rivers almost the same number of times as to navigable rivers.<sup>15</sup> Botswana, therefore, cannot substantiate its contention that the words ‘*des Hauptlaufes*’ in the German text were unnecessary by reason of an alleged established usage and unequivocal meaning of the term *thalweg*. On the contrary, the fact that German state practice would not normally add ‘*des Hauptlaufes*’ to the term *thalweg*, but did so in this case, indicates that these words were deliberately inserted into the German text to conform it to the words used in the English text.<sup>16</sup>

98. In a second attempt to support its proposition that the words ‘*des Hauptlaufes*’ in the German text were unnecessary, Botswana introduces two further points of a seemingly linguistic or terminological character. On closer examination these arguments prove to be grounded in an erroneous understanding of the scope and normative reach of the *thalweg* concept. Botswana argues that if the words ‘of the main channel’ or ‘*des Hauptlaufes*’ were given a distinct meaning, the English text would be distorted. Botswana’s explanation of this ‘distortion’ is stunningly confused. It states:

In English, in the context of the 1890 Agreement, the expression “the main channel of” has no meaning of its own but is simply used to express the *thalweg* principle. If one omitted the words “the main channel of” from the expression “the centre of the main channel of the river” it would remain “the

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<sup>14</sup> Thus, for instance, Article III of the treaty between the United Kingdom and France of 1898 describes the boundary as following the median line of the [Niger] river - a river that is clearly navigable. See NCM, para.58; Convention between Great Britain and France for the Delimitation of their respective Possessions to the West of the Niger, and of their respective Possessions East of that River. Signed at Paris 14 June 1898, ratified 13 June 1899. (emphasis added) See Brownlie, *African Boundaries*, p. 619 *et seq.*

<sup>15</sup> See list in Reply Annex 5.

<sup>16</sup> On the last minute insertion of the formula ‘centre of the main channel’ and ‘*im Thalweg des Hauptlaufes dieses Flusses*,’ see NM, para. 102 *et seq.*, Chapter I para. 17, *supra*, and also para. 103, *infra*.

centre of the river”, an expression which in English does not express the *thalweg* principle.<sup>17</sup>

In other words, Botswana would have the Court ignore the English words actually used and impute to the parties a meaning they did not express. It should go without saying that such a procedure is incompatible with the rules of treaty interpretation. The basis of this attempted legerdemain is again Botswana’s unfounded contention that at the time of the conclusion of the 1890 Treaty there was a clearly established state practice with regard to the terminology used in describing the course of river boundaries. As shown in the NCM<sup>18</sup> and in this Reply, state practice at the end of the 19<sup>th</sup> century – including that of the United Kingdom – was not consistent in the choice and content of the terms used for describing river boundaries, as Botswana would have the Court believe. In fact there was no such practice.<sup>19</sup>

99. On closer examination it becomes evident that Botswana’s insistence that, regardless of the language used, Article III(2) should be construed to embody the *thalweg* concept is motivated not by linguistic reasons, but rather because of the normative implications it erroneously attaches to the *thalweg* concept. Botswana’s seemingly linguistic argument is developed in the context of its repeated, erroneous assertion that the *thalweg* concept by itself determines which of two channels of a river is the main one. This assertion, in turn, is based on the false assumption that there can only be one *thalweg* in a river. Thus, the textual claim is inextricably linked to the normative elements of Botswana’s argument. In sum, Botswana is asserting that: (i) Article III(2) in its English version describes the boundary as descending along the *thalweg* of the Chobe River – even though it uses the formula ‘centre of the main channel’; (ii) there can be only one *thalweg* in a river, and (iii) where the *thalweg* runs, there the main channel is to be found. Thus, in Botswana’s view there is no room for any prior determination of which of the two channels around Kasikili Island is the main channel. From this it follows that, from a linguistic point of view, the words ‘of the main channel’ or ‘*des Hauptlaufes*,’ though they appear in the Treaty, cannot be given a distinct meaning of their own and should be ignored.<sup>20</sup>

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<sup>17</sup> BCM, para. 196.

<sup>18</sup> See NCM, paras. 57-58.

<sup>19</sup> In any case, it was surely open to the parties to a treaty to depart from the alleged principle if they wished to do so.

<sup>20</sup> BCM, para. 196.



100. However, although Botswana repeatedly and categorically asserts that ‘A river has only one *thalweg*,’<sup>21</sup> in the end it admits, as it must, that “[i]n a bifurcated stretch of river, such as the Chobe River in the vicinity of Kasikili/Sedudu Island, both channels will have their respective *thalwege*.’<sup>22</sup> By this admission, Botswana has undermined its own argument. If each channel has its own *thalweg*, then the question of which is the main channel must be answered independently of the concept. Not only does Botswana retreat from its earlier contention that there can be only one *thalweg* in a river, but, in another striking about-face, it proceeds to suggest criteria by which the main channel can be determined.<sup>23</sup>

101. For its part, Namibia has consistently held that there are two channels in the Chobe River around Kasikili Island, each possessing its own *thalweg*.<sup>24</sup> Consequently, to apply the treaty it is first necessary to determine the main channel of the Chobe River and then to establish the course of the boundary in that channel. This is the clear import of the words ‘of the main channel’ and ‘*des Hauptlaufes*.’ Thus Namibia’s interpretation adheres to the plain meaning of the English and German texts of Article III(2) of the 1890 Treaty. It does not ask the Court to ignore words clearly written in both texts as unnecessary or meaningless.

102. Finally, support for the view that the words ‘the main channel’ and ‘*des Hauptlaufes*’ have a distinct meaning of their own is also provided by the drafting history of Article III(2) of the 1890 Treaty. As the Namibian Memorial has already pointed out, the words ‘of the main channel and ‘*des Hauptlaufes*’ were inserted into the text of Article III(2) at a very late stage of the negotiations.<sup>25</sup> Until 25 June 1890 the description of the course of the boundary in the draft treaty did not contain any reference to the notion of ‘the main channel.’ Both parties simply referred to the border as being ‘carried to the east along the centre of the River Tschobi’<sup>26</sup> and in the German draft text ‘*[die] Grenze . . . führt . . . von da nach Osten längs*

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<sup>21</sup> BCM, para.199; see also paras. 198, 336.

<sup>22</sup> E.g., BCM, para. 338; see also para. 339.

<sup>23</sup> BCM, para. 347 *et seq.*

<sup>24</sup> NM, Vol. VI, para. 3.9.

<sup>25</sup> NM, paras. 102 *et seq.* Botswana agrees essentially with this account of the drafting history. See BCM, para. 193.

<sup>26</sup> Quoted from Article II of the English translation of the initialled document recording the general agreement between the two governments, see NM, Annex 21, p. 34 (emphasis added); the original French text reads: ‘La frontière . . . se portera à l’est *longeant* le centre du Fleuve Tschobi . . .,’ id. p. 33.

*dem Tschobifluß.*<sup>27</sup> (emphasis added) The later insertion of ‘the main channel’ and ‘*des Hauptlaufes*’ indicates that these words were meant to clarify the original wording, not to replace it with a whole new formula. Botswana’s reading of Article III(2) would have the Court ignore the very words that the parties thus deliberately inserted at the last moment. It is compatible neither with the plain words, nor with the drafting history of that provision.

103. In summary, Namibia reaffirms that there was no established uniform terminology for international river boundaries at the time of the 1890 Treaty. Nothing can be inferred from the terms used in the Treaty to support Botswana’s assertion that the words ‘*des Hauptlaufes*’ in the German text of the Treaty were unnecessary and could therefore be ignored in the interpretation of the Treaty. On the other hand, Namibia’s interpretation of Article III(2), attributing a distinct meaning to the words ‘of the main channel’ or ‘*des Hauptlaufes*,’ is the only one that does justice to both the English and the German texts. Botswana now admits that there are two channels around Kasikili Island, each with its own *thalweg*. It follows that the parties had good reason to express their intention that the boundary should run along the centre or *thalweg* of the main channel of the Chobe River, an intention that is clearly reflected in the language of Article III(2). Namibia, therefore, maintains its position that Article III(2), properly interpreted, requires first, the identification of the main channel and then the determination of the centre or the *thalweg* of that channel.

### C. Interpretation of the 1890 Treaty in Light of its Object and Purpose

104. Botswana states that Namibia, in interpreting the 1890 Treaty, did not concern itself with the ‘object and purpose of the Anglo-German Agreement and the significance of the *thalweg* in relation to navigability.’<sup>28</sup> This charge is another reflection of Botswana’s inaccurate reading of Namibia’s Memorial. In it and later in the Counter-Memorial, Namibia clearly based its interpretation of the 1890 Treaty on its object and purpose.<sup>29</sup> The main points of Namibia’s argument on object and purpose are: ‘Great Britain and Germany aimed at a large-scale delimitation of their respective spheres of interest, *inter alia*, in South West

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<sup>27</sup> Quoted from the official German text printed in the ‘Official Gazette’ of Berlin, 17 June 1890; see NM, Annex 22.

<sup>28</sup> BCM, para. 223.

<sup>29</sup> See NM, Chapters III and IV, NCM, paras. 50, 74.

Africa.<sup>30</sup> There, the major British concern was to extend the British sphere of interest to the north in order to secure control of Lake Ngami. The German interest centred on recognition of a sphere of influence extending as far east as the Zambezi River.<sup>31</sup> Given the macro dimension of the whole enterprise of the 1890 Treaty, it is hardly surprising that the preparatory work for the Agreement as well as the actual negotiations show that the parties did not concern themselves with particulars such as whether the main channel of the Chobe River ran to the north or the south of Kasikili Island.<sup>32</sup>

105. For its part, Botswana agrees that what the Parties had in mind 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.’<sup>33</sup> In addition, however, Botswana discovers a ‘connected purpose’ in the diplomatic correspondence ‘to maintain and facilitate access to the principal lakes and rivers of the African continent.’<sup>34</sup> It argues that although Great Britain was specifically interested in access to Lake Ngami, while Germany’s specific interest was in access to the Zambezi,<sup>35</sup> in both cases, the underlying interest was in access to and free navigation on the major African rivers and lakes.<sup>36</sup> Botswana continues by observing that ‘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.’<sup>37</sup> In conclusion, Botswana states that:

[T]he 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

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<sup>30</sup> NM, para. 80.

<sup>31</sup> NM, paras. 88 and 90 *et seq.*; NCM, para. 39.

<sup>32</sup> NM, para. 115.

<sup>33</sup> BM, para. 130.

<sup>34</sup> BM, para. 131.

<sup>35</sup> BM, paras. 133 and 134.

<sup>36</sup> BM, para. 133.

<sup>37</sup> BM, para. 137.

(b) in doing so to apply the contemporary standards of general international law relating to boundaries in navigable rivers.<sup>38</sup>

As noted above, there was no contemporary standard of general international law relating to river boundaries. In support of its invention Botswana cites the General Act of the Conference of Berlin (1885) and various items in the correspondence of the parties leading up to the 1890 Treaty.<sup>39</sup> The Conference of Berlin was not concerned specifically with boundary rivers. It affirmed ‘freedom of trade in the Basin of the Congo, its embouchures and circumjacent regions.’<sup>40</sup> Thus, it had nothing to do with the Chobe River. Insofar as it involved the Zambezi River, it was expressly limited to the reach of the river from the mouth to five miles above its confluence with the Shiré River, in the lower Zambezi River far to the east towards the Indian Ocean.<sup>41</sup>

106. The correspondence cited by Botswana reveals a good deal of discussion of navigation rights in the waters of East Africa, especially the region of Lake Nyassa, Lake Tanganyika and Congo State.<sup>42</sup> By contrast, in South West Africa, the area of concern in this case, the references in the correspondence are confined to the British insistence on control of Lake Ngami<sup>43</sup> and the German desire for access to the Zambezi River.<sup>44</sup> The text of the 1890 Treaty confirms this view of the correspondence. Article IX calls generally for freedom of navigation in lakes, rivers and canals in East Africa ‘in all the portions of their respective spheres within the limits of the free zone created by the Act of Berlin of 1885.’<sup>45</sup> (emphasis added) This formula excludes the area of concern in this case. In South West Africa, British control of Lake Ngami and German access to the Zambezi are each covered by an express

<sup>38</sup> BM, para.144.

<sup>39</sup> BM, paras. 131-135.

<sup>40</sup> Conference of Berlin, Ch. I, Art. 1, BM, Vol. II, Annex 1, p. 4.

<sup>41</sup> Id.

<sup>42</sup> BM, Annex 9, Letter No. 47, p. 82; id. No. 48, pp. 82-84.

<sup>43</sup> E.g. id., No. 84, Inclosure 1, Art. III., p. 102.

<sup>44</sup> Id. The few mentions of the Chobe River that appear are mostly in proposed drafts of the text of the Treaty and make no reference to navigation.

<sup>45</sup> A previous draft of the agreement provided that ‘[t]he two powers engage to apply in their respective spheres in East Africa, within the limits of the free zone, the provisions of the Act of Berlin according to which the navigation of the lakes, rivers, canals . . . is free to both flags.’ BCM, Annex 9, No. 84, Inclosure 2, Article IX, p. 105.

provision in Article III and no mention is made of navigation.<sup>46</sup> Furthermore, in the draft Articles of Agreement of 21 June 1890, the following sentence appeared at the end of Article III, immediately after the identification of the boundary in the Chobe River:

It is understood that, under this arrangement, Germany shall have free access from her Protectorate to the Zambezi by the Chobe.<sup>47</sup> (emphasis added)

Only 10 days later, this was replaced in the Treaty as finally signed by a sentence opening a new paragraph as follows:

It is understood that under this arrangement Germany shall have free access from her Protectorate to the Zambezi by a strip of territory which shall at no point be less than 20 English miles in width. (emphasis added)

The replacement of ‘access . . . by the Chobe’ with ‘access . . . by a strip of territory’ indicates the recognition by the parties that the route of access for Germany was not to be fluvial but rather territorial. The correspondence and the preparatory work therefore give no support whatever to the conclusion that the parties were concerned to establish rights of navigation in the Chobe River.

107. Even if Botswana is correct in this view of object and purpose of the Treaty, however, it is conspicuously silent on the question of the concrete meaning of the general notions of freedom of navigation and equal access to the rivers and lakes of Africa. It finds the embodiment of these notions in the abstract *thalweg* concept, without reference to the practical aspects of freedom of navigation on, and equal access to, the Chobe River in the vicinity of Kasikili Island. It is therefore necessary to enquire into the concrete meaning of the principle of freedom of navigation and equal access in the context of the economic needs of the region, including the vicinity of Kasikili Island.

108. The *thalweg* concept as an approach to drawing river boundaries represents an evolution from earlier methodologies. For centuries riparian states have drawn boundaries along rivers in a manner that would allow them to share equitably in the benefits of the ordinary uses of the particular river.<sup>48</sup> And as recently as 1997 in the *Gabcikovo-Nagymaros*

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<sup>46</sup> The second paragraph of Article III(2) quoted above in the text deals with German access to the Zambezi. The third paragraph says, ‘[i]t [the sphere in which the exercise of influence is reserved to Great Britain] includes Lake Ngami.’

<sup>47</sup> See NM, Vol. IV, Annex 26, p. 122.

<sup>48</sup> For a summary of legal doctrine at the time of the Treaty see N. Kercea, *Die Staatsgrenze in den*

case, this Court, recalling the judgement of the Permanent Court of International Justice in *Territorial Jurisdiction of the International Commission of the River Oder*,<sup>49</sup> strongly emphasized the principle of equitable and reasonable sharing of the resources of the river by the riparian states.<sup>50</sup> The Court held that, even taking into account Hungary's violation of treaty obligations vis-à-vis then Czechoslovakia, the latter's unilateral diversion of the Danube unjustifiably deprived Hungary of its right to an equitable and reasonable share of the natural resources of the Danube.<sup>51</sup>

109. The earlier doctrines included common ownership of the river and, later, partition of the riverbed along a middle line. The *thalweg* concept was introduced into state practice around the end of the 18th century.<sup>52</sup> Aside from the general notion of equality of access, a feature of all these methods of riverine boundary determination was their close link to the economic interests in the uses of the river, and in particular the local needs of the riparian states.<sup>53</sup> With regard to the principle of equitable sharing of the navigational and other resources of a boundary river, the *thalweg* concept is no different from the earlier approaches to drawing river boundaries. In essence, they all aim to secure to the riparian states equal access to the uses of the river.<sup>54</sup>

110. Thus, it becomes necessary to establish what the uses of the Chobe River are in the light of the regional needs. To start with, it is quite clear that, whatever notions the parties to the 1890 Treaty may have had, navigation on the Chobe River has never approximated that on the large waterways in Africa discussed by the great powers at the Berlin Conference of 1885.<sup>55</sup> Therefore, the uses of the Chobe River to which equal access is to be secured must be established in the light of regional needs as they have developed over time. Any other

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*Grenzflüssen* (1916), p. 135; the relevant parts of the book are also reprinted in BCM, Annex 9.

<sup>49</sup> Judgement No. 16, 1929, *P.I.C.J.*, Series A, No.23, p. 27.

<sup>50</sup> *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), paras. 78 and 85; reproduced in 37 I.L.M.162, at 190-191 (1998). See also the cases of *Wilson et al. v. Omaha Indian Tribe et al.*, 442 U.S. 653 (1979), and *Louisiana v. Mississippi et al.*, 466 U.S. 96 (1984) decided by the United States Supreme Court.

<sup>51</sup> *Case Concerning the Gabčíkovo-Nagymaros Project*, para. 85, in 37 I.L.M. 162 at p. 191 (1998).

<sup>52</sup> On the history of the concept see Kercea, p. 113 *et seq.*

<sup>53</sup> See NCM para. 42.

<sup>54</sup> See BCM, para. 224.

<sup>55</sup> BM, para.131.

approach would frustrate the equal access principle that, as Botswana agrees, forms the core element of the object and purpose of the Treaty.<sup>56</sup>

111. There can be no question that the needs of the riparian states with regard to the Chobe River around Kasikili Island – aside from small boat communication – are connected with the tourist industry. In this respect, the NCM has already shown that it is the southern channel of the Chobe River that offers the main opportunities for the tourist business and therefore is the most used channel. Professor Alexander provides additional evidence of this fact in his Second Supplemental Report.<sup>57</sup> It is in this channel that the bulk of boat tours for the tourists are undertaken, departing from the lodges located in the Chobe National Park on the southern bank of the river. There is little boat tourism in the northern channel, because it is from the south that tourists get the best view of the game on the southern bank of the Chobe River and on Kasikili Island.<sup>58</sup>

112. Thus, even on Botswana's view of the object and purpose of the Treaty, the conclusion must be that the channel to the south of the Island is the main channel of the Chobe. By insisting on the northern channel, Botswana is actually betraying the very principle of equal rights and access for both riparian states that it claims embodies the object and purpose of the 1890 Treaty. For, if the boundary were to be redrawn along the northern channel, Namibia would be entirely shut off from the southern channel and thereby denied the use of the Chobe River where it actually serves the needs and interests of both riparian states. This would be incompatible with Botswana's own view of the object and purpose of the 1890 Treaty and with the general principle of equitable and reasonable sharing of a boundary river enunciated by the Court.<sup>59</sup>

113. Finally, Botswana alleges that Namibia's interpretation of Article III(2) would result in a determination of the main channel that would 'seriously reduce the efficacy' of the 1890 Treaty and run counter to its object and purpose of establishing a readily recognizable boundary.<sup>60</sup> This charge cannot be supported. On the contrary, it is Botswana's candidate for

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<sup>56</sup> See BCM, para. 224.

<sup>57</sup> Second Supp. Rep., paras. 8.1-8.2; see also Affidavit of G.J. Visagie, Reply Annex 22.

<sup>58</sup> Second Supp. Rep. para. 8.3.

<sup>59</sup> See the Case *Concerning the Gabčíkovo-Nagymaros Project*, n. 51, *supra*.

<sup>60</sup> BCM, para.147 *et seq.*

the main channel that would result in an obscure boundary line. Botswana's repeated contention that 'both banks of the northern channel are readily discernible, at all seasons of the year, and in particular when the island is inundated in the wet season'<sup>61</sup> is totally at odds with reality. It is based on faulty analysis of aerial photographs, all but one of which were taken in the dry season.<sup>62</sup> The Island, the northern side of which forms the right bank of the northern channel, is covered by water for a good part of the year. Indeed, the satellite pictures of Kasikili Island and Namibia's 1998 aerial photograph show that both banks of the northern channel are under water in times of inundation.<sup>63</sup> In sharp contrast, the main channel, as defined by Professor Alexander, has a stable southern bank under the Chobe Ridge, clearly visible at all seasons of the year.

#### D. The Alleged Self-Executing Character of the Treaty

114. Botswana bases its reading of Article III(2) on an alleged general principle of international law, the *thalweg* principle. The argument is that 'in the period to which the Anglo-German Agreement belonged, it was normal practice to establish boundaries in navigable rivers by reference to the middle of the navigable channel. . . The provisions of the Anglo-German Agreement form part of a pattern.'<sup>64</sup> Namibia has already dealt with this question above, and even more extensively in its Counter-Memorial. It has established that no principle of general international law existed at the time of the Treaty that would mandate or support a particular reading of Article III(2) of the Agreement.<sup>65</sup> However, the BCM introduces one new element in its extended argument that is addressed here.

115. The BCM asserts that Article III(2) of the Agreement, incorporating the *thalweg* principle (as Botswana contends), determines *ipso iure* the main channel, because Article III(2) is a self-executing norm.<sup>66</sup> The term "self-executing" used in relation to a treaty or a

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<sup>61</sup> BCM, para. 331.

<sup>62</sup> See Chapter III, para. 164, *infra*.

<sup>63</sup> See Second Supp. Rep., Fig. 6; NM, Vol. VI, Sheet 25.

<sup>64</sup> BCM, para. 195.

<sup>65</sup> NCM, para. 54 *et seq.*

<sup>66</sup> BCM, para. 9. Later, without using the express term "self-executing" Botswana in essence argues the 'self-executing character of the *thalweg* concept as used in Article III(2) of the 1890 Agreement by saying that a 'river . . . has only one *thalweg* . . . . Thus, where the *thalweg* may be found, the main channel may be found too.' *Id.*, para. 199.



treaty provision is generally understood as indicating that a treaty or one of its provisions is directly applicable in the domestic legal order of the parties without further legislative or other acts.<sup>67</sup> Thus, Botswana's use of the term in the present context is at odds with its ordinary meaning. This misuse of the term represents still another attempt to insinuate that the use of the *thalweg* principle by itself settles the question of where the boundary runs in the Chobe River. In other words, the use of the term self-executing is a *falsa demonstratio* for Botswana's simplistic idea that Article III(2) determines the main channel *ipso iure*. Botswana itself reveals the fallacy of this contention. Contradicting its position on the 'self-executing' character of Article III(2), it puts forward various empirical criteria for determining the main channel: the deepest, the widest and, correctly, that which carries the most water or has the highest surface water velocity, and is, therefore, the main channel.<sup>68</sup> The self-contradiction in Botswana's argument could not be more obvious. Since in this case there are two channels and, therefore, two *thalwegs*, the Treaty provisions cannot be 'self-executing.' The Court must first choose which one is the main channel and then decide where the boundary lies within that channel – as Namibia has contended from the beginning. Botswana has ultimately been driven to take this same position, belying its own peculiar proposition of the self-executing character of Article III(2).

116. The hydrological and geomorphological issues raised by the criteria that Botswana introduced are dealt with in Chapter III, which discusses the scientific aspects of the case and in the scientific reports in Volume II of this Reply. Some interesting conclusions can, however, be drawn from Botswana's discussion of the *thalweg* principle. First, Botswana has failed to show that Namibia's interpretation of Article III(2) of the Agreement contradicts any existing, or allegedly existing, principle of general international law. Second, Botswana has ultimately accepted that the determination of the main channel of the Chobe River is a matter of fact and is not *ipso iure* decided by the use of the word *thalweg* in the Agreement. Since neither the Agreement nor any general principle of international law defines the main channel

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<sup>67</sup> For an authoritative restatement of the concept of self-executing treaties see A. Bleckmann, 'Self-executing treaty provisions,' in R. Bernhardt et al., *Encyclopedia of Public International Law*, installment 7, p. 414 *et seq.* (1984); also H. Neuhold, W. Hummer and Ch. Schreuer (eds.), *Handbook of International Law*, 3rd edition, Part 1, para. 342 *et seq.* (1997). It is significant that a standard work like Jennings/Watt (eds.) *Oppenheim's International Law* does not mention many self-executing treaties at all.

<sup>68</sup> BCM, para. 350; see also BM, Appendix to Chapter VII, *First Opinion* of Professor Sefe, p. 5.

concretely, the location of the main channel must be determined on the basis of the scientific and other factual evidence – a position that Namibia has maintained from the beginning.

### E. Conclusion

117. In this chapter, Namibia has analyzed Article III(2) of the 1890 Treaty in terms of its wording, object and purpose and in the light of an alleged general principle of international law mandating that Article III(2), by its use of the term *thalweg* and its allegedly self-executing character, determines the main channel of the Chobe River *ipso iure*. On none of these issues can Botswana prevail.

118. Botswana has abandoned its earlier assertion that the words ‘the main channel’ in the English text of Article III(2) are the counterpart of the word ‘*Thalweg*’ in the German text of that article. Botswana now contends instead that the words ‘*des Hauptlaufes*’ in the German text are unnecessary because the correct German translation of the English formula ‘centre of the main channel’ would have been ‘*im Thalweg dieses Flusses.*’ This contention runs counter to the rules of treaty interpretation enunciated by this Court and its predecessor, the Permanent Court of International Justice. According to these judicial pronouncements ‘interpretation must be based above all upon the text of the treaty’<sup>69</sup> and must be carried out in such a way that reason and meaning are attributed to every word of the text.<sup>70</sup> Only Namibia’s interpretation, attributing a distinct meaning to the words ‘of the main channel’ in the English text and their counterpart, ‘*des Hauptlaufes,*’ in the German meets this standard.

119. Botswana’s charge that Namibia has ignored the object and purpose of Article III(2) is equally unfounded. In the first place, it cannot be shown that the object and purpose was to ensure the parties’ access to navigable boundary rivers, as Botswana claims. Even if, the term ‘*thalweg*’ was intended ‘to affirm the rights of navigation of the two self-appointed riparian states,’ Namibia has shown that the underlying rationale of the *thalweg* concept was equal access of both riparians to the uses, navigational and otherwise, of the river. Although Botswana itself agrees with this analysis,<sup>71</sup> it insists that the northern channel is the main channel, which would render the equal access principle ineffective for Namibia. As has been

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<sup>69</sup> See n. 9, *supra*.

<sup>70</sup> See note 10, *supra*.

<sup>71</sup> BCM, para. 224.

shown, it is the channel to the south of the Island that is the most used channel and, therefore, the channel of greater importance to the regional economy. If the northern channel were to be accepted as the main channel, Namibia would be denied equal access to the actual uses of the Chobe River.

120. Botswana's third argument, that Article III(2) is 'self-executing' and that the use of the term '*thalweg*' determines the main channel *ipso iure*, is wrong on two counts. First, it alleges that the '*thalweg*' concept was a binding general principle of international law at the time of the conclusion of the 1890 Treaty, from which the position of the main channel around Kasikili Island could be normatively deduced. As Namibia has conclusively shown, there was no such general principle of international law or accepted state practice at the time. Second, Article III(2) is not a self-executing provision. Botswana's use of the term 'self-executing' is at odds with the ordinary meaning of the term, which relates to the direct applicability of a treaty in domestic law. In any case, Botswana does not adhere to its own argument. It espouses a number of factual criteria for determining which of the two channels around Kasikili Island is the main channel, belying its own peculiar proposition about the self-executing character of Article III(2). The Court is thus remitted to an evaluation of the scientific evidence identifying the main channel of the Chobe River.

### Chapter III

#### INTERPRETATION OF ARTICLE III (2) OF THE 1890 TREATY: REBUTTAL TO BOTSWANA'S SCIENTIFIC EVIDENCE

121. The previous exchanges of pleadings reveal a considerable area of agreement between the parties as to the significance of the scientific evidence in this case. Both Namibia and Botswana accept that the question of the interpretation of the words 'the centre of the main channel' in the 1890 Treaty is a question of fact to be resolved on the basis of scientific and empirical evidence. As Botswana stated in the 'Conclusions' to its Memorial,

*First:*

The central question is the interpretation and application of the words 'main channel' of the River Chobe. These words involve a reference to a question of fact and, in so far as may be necessary, a question of scientific fact, calling for expertise in hydrology, geology and hydrogeomorphology.<sup>1</sup>

122. Both parties also accept that the criterion for determining the main channel is a factual one, namely, which channel carries the largest proportion of the flow of the river. The BCM says, 'The main channel is the channel which carries the greater amount of water.'<sup>2</sup> Botswana insists, further, that 'Channel width and depth are not alternatives for determining the main channel of a river.'<sup>3</sup> Namibia has consistently advanced the same criterion. 'The main channel of a river is the channel that conveys the largest proportion of the annual flow of the river.'<sup>4</sup>

123. Botswana would now have the Court believe that the scientific evidence is 'supererogatory,' and 'contrary to common sense,'<sup>5</sup> citing the 'unanimity of view' of prior

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<sup>1</sup> BM, p. 129.

<sup>2</sup> BCM, para. 385; see also BM, Appendix to Chapter VII, p. 5.

<sup>3</sup> BCM, Vol. II, App. 4, para. 50. The inappropriateness of depth or width as stand-alone criteria for determining volume of flow is discussed briefly at para. 167, *infra*, and at NM, paras. 131, 132, 157; *id.*, Main Report, para. 4.4; NCM, para. 28.

<sup>4</sup> NM, para. 157; *id.*, Main Report, paras. 1.8, 2.8; see also NCM, Supp. Rep., paras. 2.1, 5.1.

<sup>5</sup> BCM, paras. 323, 324.

observers and what is said to be plainly visible on the aerial photographs.<sup>6</sup> As the story of Gallileo tells us, this is the usual recourse of those who wish to divert attention from uncomfortable or inconvenient scientific fact. The ‘unanimity of view,’ upon examination, turns out to involve infrequent opinions of a handful of low-level bureaucrats scattered over a period of almost a century. Moreover, these observers were using the criterion of depth – which Botswana admits is inappropriate – to determine the main channel, since they made their inspections during the dry season when the flow in both channels is insignificant. Likewise, the aerial photographs, on which it is said to be obvious that the northern channel is the main channel, were all, except one, taken in the dry season. Therefore, they can hardly provide the basis for conclusions as to which channel carries the greater proportion of the flow.

124. Botswana also tries to deprecate the significance of Namibia’s scientific case by a wholly unwarranted *ad hominem* attack on the qualifications of Professor Alexander.<sup>7</sup> Professor Alexander’s credentials are well known. He is among the most distinguished hydrologists in Southern Africa. As his curriculum vitae shows, he has extensive scientific training in matters relating to hydrology, river hydrology and fluvial geomorphology, the relevant scientific disciplines involved in this litigation. His practical experience includes responsibility in the field or at the headquarters level for most major river projects in South Africa since 1970. The extensiveness of Professor Alexander’s experience is a matter of public record and must have been known to Botswana, many of whose officials in water affairs have taken his courses in hydrology at University of Pretoria and worked with him as a colleague. Namibia calls the Court’s attention to the extended review of his career at Reply Annex 20 and NM, Vol. VI, sec. 17, p. 38. Under the circumstances, Botswana’s effort to denigrate Professor Alexander’s qualifications is ludicrous.

125. In addition, Namibia has asked Professor Keith S. Richards, Chair of the Geography Department at Cambridge University and one of the world’s pre-eminent geomorphologists, to provide an analysis of the geomorphology of the Chobe River around Kasikili Island. Professor Richards’s curriculum vitae appears in Reply Annex 21. As will be seen below, his analysis fully supports Professor Alexander’s identification of the main channel. In addition,

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<sup>6</sup> BCM, Chapter VI (sub-heading), p. 121; para. 323.

<sup>7</sup> BCM, para. 260; *id.*, Vol. II, App. 4, paras. 4, 5.

using the data from Dr. Sefe's sedimentological report, Professor Richards supplies an account of the geomorphologic origins of the main channel that corroborates Professor Alexander's conclusions.

126. In fact, Botswana's pretence that 'the scientific evidence is supererogatory,' is belied by its actions. Its Counter-Memorial devotes Chapters 5 and 6 – over 100 pages or approximately one-third of the total – to discussion of the scientific case. Accordingly, Section A of this Chapter addresses what both parties agree is the central issue: determining which channel carries the largest proportion of the flow in the Chobe River at Kasikili Island. It disproves Botswana's contention that the northern channel is that channel.

127. Section B shows that, contrary to the BCM's contention, analysis of the aerial photographs and satellite images does not support the proposition that the northern channel is the main channel, but on the contrary, confirms Namibia's position.

128. Section C refutes Botswana's assertion that the northern channel is the navigable channel in that it is most used for commercial traffic in the area.<sup>8</sup> Section D returns to the issue of the location of the boundary within the main channel.

#### A. The Proportion of the Flow of the River Passing through the Northern Channel

129. Botswana's arguments in support of its contention that the northern channel carries the largest proportion of the flow of the Chobe River around Kasikili Island can be grouped under three heads:

- The repeated assertions that 'the Chobe is a perennial river, independent of the Zambezi River, with a stable profile, continuous downstream flow and visible stable banks,'<sup>9</sup> and that it 'is an independent perennial river with continuous flow at all seasons . . .'<sup>10</sup> Dr. Sefe adds that '[f]low is continuous in a downstream direction along the entire course.'<sup>11</sup> Indeed, three subchapter titles or subheadings

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<sup>8</sup> BCM, para. 387.

<sup>9</sup> BCM, para. 457(v)(b).

<sup>10</sup> Id., para. 263.

<sup>11</sup> BCM, App. II, para. 49. See also BCM, paras. 272, 331 ('The Chobe is a perennial mature river with stable, non-erodible and readily discernible banks'); para. 363 ('Geomorphological and hydrological evidence show that the Chobe River is an independent mature river with stable and visible banks').

in the BCM contain the assertion that the Chobe is a perennial river.<sup>12</sup>

- Data from the water level gauging stations along the length of the river allegedly demonstrating and recording this continuous downstream flow.<sup>13</sup>
- Miscellaneous hydrological and other indicators allegedly showing that the northern channel is deeper and wider and thus carries the greater portion of the flow.<sup>14</sup>

In this section of its Reply, Namibia demonstrates that these grounds are all without substance.

### 1. The Chobe River is not a perennial river

130. The BCM asserts categorically no less than 13 times that the Chobe is ‘a perennial river.’<sup>15</sup> The definition adopted by Dr. Sefe is that ‘a perennial stream never dries up.’<sup>16</sup> Other commonly accepted definitions are in accord. Wilson and Moore, for example, define a perennial stream as:

(a) A stream or reach of a stream that flows continuously throughout the year and whose upper surface generally stands lower than the water table in the region adjoining the stream..., (b) a stream that flows continuously all year (including wet and dry years) and has a minimum flow of 40 liters per minute (USDOA 1986, p. 17).<sup>17</sup>

Almost all of Botswana’s references to the Chobe as a perennial river also stress the element of continuous flow.<sup>18</sup>

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<sup>12</sup> BCM, Chap. 6, C (iv); G (iii); G (iv)

<sup>13</sup> BCM, pp. 103-104; 143-144; id., paras. 272, 284, 366, 381; id., Vol. II Appendix 2, pp. 29-31.

<sup>14</sup> E.g., BCM, para. 310 and photographs, pp. 117 and 107 (movement of wildlife as indicia of depth of channel); paras. 332, 333, 369, 377 (comments on erosion and sedimentation); paras. 373-375 (sinuosity of southern channel); paras 383, 403 and Photograph p. 153 (reed growth).

<sup>15</sup> BCM, paras. 251, 263, 272, 275, 330, 331, 334, 351, 366, 379, 381. 457(v)(b). See also id., App. II, para. 48.

<sup>16</sup> BCM, App. II, para. 9.

<sup>17</sup> *Glossary of Hydrology*, p. 149, Reply Annex 27. The *Oxford English Dictionary* (1989) Vol. XI, p. 534 specifies that a ‘perennial’ stream ‘flows through all seasons of the year.’

<sup>18</sup> E.g. BCM, paras. 274-275, 334, 379, 381.

131. The ineluctable fact, however, is that great stretches of the Chobe River over the 300 kilometres in which it constitutes the border between Botswana and Namibia are dry for many months of the year. This condition has prevailed for at least the last 15 years and for long periods over the last thousand years.<sup>19</sup> In the dry season, there is virtually no water in the channel of the Chobe River upstream from Serondela, about 15 kilometres west of Kasikili Island. When there is flow in the Chobe, that is to say when there is overbank flow from the Zambezi River, there may be water in the channel as far upstream as Ngoma Bridge, about 50 kilometres west of the Island. Beyond that point the river is dry throughout the year, at least to Lake Liambezi, except for occasional pools. Lake Liambezi, 100 kilometres upstream from the Island, was completely dry this year and every year for at least the last 15 years. Thomas and Shaw, a source relied on by Botswana, refer to Lake Liambezi as ‘an ephemeral lake.’<sup>20</sup> A report by Professor D.C. Midgely on the Lonrho Namibia Caprivi Sugar Project states that ‘it is evident that Liambezi can by no means be classified as a perennial lake.’<sup>21</sup> As Professor Richards remarks, ‘Since the Linyandi-Chobe passes through this lake, it is difficult to sustain the argument that the Chobe is a perennial river.’<sup>22</sup>

132. These facts are amply proven by direct evidence:

- Direct personal observations of Professor Alexander in April 1997 and in 1998.

In April 1997 and again during my three visits in 1998 I flew by helicopter along the whole length of the Chobe River as identified in the 1890 Treaty. I observed and photographed long lengths of the Chobe River where the river was completely dry without visible channels or clearly defined banks.<sup>23</sup>

- Photographs taken by Professor Alexander and annexed to his Main Report, Supplementary Report and Second Supplementary Report. Sheets 9, 10, 11 and 13 of the

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<sup>19</sup> Richards Rep., paras. 14, 20.

<sup>20</sup> D.S.G. Thomas and P.A. Shaw, *The Kalahari Environment*, p. 132; see Reply Annex 29. Dr. Sefe charges that Professor Alexander is ‘ignorant’ of this work (BCM, Vol. II, App. 4, para. 5). But if Dr. Sefe has indeed read it, how can he claim repeatedly that the Chobe is a perennial river?

<sup>21</sup> Reply Annex 26.

<sup>22</sup> Richards Rep., para. 16. See also Second Supp. Rep., App: 1, Photographs 15 and 16.

<sup>23</sup> Second Supp. Rep. para. 4.5. See also NCM, Vol. III, para. 7.9 (‘The lower reach of the Linyandi River from Lake Liambezi westwards, was completely dry during my inspection and no channels were discernable from the air’).



Appendices to the Main Report contain 11 photographs of the dry bed of the Chobe River.<sup>24</sup> These sheets were a part of Namibia's Memorial and were thus in Botswana's possession when it made the repeated assertions cited above about the perennial character and continuous flow of the Chobe River. The BCM contains not a word of comment on, or explanation of, these photographs.

The Supplementary Report also contains a panoramic photograph showing the dry bed of the Linyanti River west of Lake Liambezi and the lakebed itself.<sup>25</sup> Photograph P14s, taken from a helicopter on 30 April 1997, shows the dry bed of the Chobe River in a long stretch of the border above Lake Liambezi.<sup>26</sup>

Photograph 13 in the Second Supplementary Report shows Professor Alexander's helicopter landed in the dry bed of the Chobe River upstream of Lake Liambezi.<sup>27</sup> Photographs 15 and 16 show a person walking on the dry lakebed of Lake Liambezi and the abandoned gauging station that had earlier been used to measure water levels in the lake.<sup>28</sup>

- Records of the Namibian Department of Water Affairs. In 1985, the Department reported that 'There has been no flow from Lake Liambezi into the Chobe since September 1982.'<sup>29</sup> In the early 1990s, there was no water in the river even further to the west. The water supply for the village of Chinchimane, which is dependent on the river, failed and even that of Linyanti village was threatened.<sup>30</sup> A June 1992 Joint Report of the Hydrology Divisions of the Namibian and Botswana Departments of Water Affairs states 'With Lake Liambezi having been dry for almost a decade, there has been no contribution to the Chobe River from this source.'<sup>31</sup> And the Attachment prepared by the Botswana team specifically noted that 'The whole of the Lake Liambezi area was dry at the time of

<sup>24</sup> NM, Main Report, App. Sheet 9a and b; Sheet 10a, b, c, d; Sheet 11a; Sheet 13a, b, c.

<sup>25</sup> NCM, Vol. III, Illustrations, Sheet 11s, P13s, P14s.

<sup>26</sup> Supp. Rep. Sheet 11s.

<sup>27</sup> Second Supp. Rep., para. 3.9. Photograph 13, p. A1/7.

<sup>28</sup> Second Supp. Rep., para. 3.11, and also id., p. A1/8, Photographs 15 and 16.

<sup>29</sup> Reply Annex 24.

<sup>30</sup> The location of these villages is shown in Fig. 5, following p. 66, *infra*, and in Second Supp. Rep., Fig. 2, following p. 9.

<sup>31</sup> Reply Annex 25.

the visit and it would have been very easy to walk/drive straight through to Botswana.<sup>32</sup>

133. The dry riverbed is not a phenomenon of the recent past. L.A. Mackenzie's 1946 *Report on the Kalahari Expedition* states:

The eastern outlet of the Linyanti swamps becomes an insignificant stream not to be compared with the river . . . entering the Caprivi Strip in the north and, during the dry season, becomes quite discontinuous opposite Kachicau. In fact, during the dry season a trader in that area travels by car across the Linyanti to Katima Mulilo on the Zambezi without crossing open water.<sup>33</sup>

The 1985 Annual Report of the Namibian Department of Water Affairs confirms this:

It is immediately apparent that the period from 1910 to 1948 was an extremely dry one when compared to that between 1948 and 1978. It seems possible therefore that the lake witnessed by Du Toit in 1925 was already close to drying up and that by the 1930's the majority of the area could be used for agriculture.

It is known that water entered [Lake Liambezi] from the Zambezi in 1948, probably the first time for a minimum of 30 years.<sup>34</sup>

Professor Richards reports long periods dating back to the end of the 18<sup>th</sup> century in which the middle reaches of the Chobe were dry.<sup>35</sup> He suggests that similar cyclical changes have occurred over many centuries continuing through the present.<sup>36</sup>

134. The BCM seeks to explain these long dry stretches of the river by conjuring up an underground flow that links the pools in the riverbed 'like beads on a string.'<sup>37</sup> It produces no supporting references for this charming fantasy.<sup>38</sup> In fact, as shown in the photographs, for

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<sup>32</sup> Second Supp. Rep., App. 2, p. A2/23.

<sup>33</sup> See Reply Annex 32, p. 5.

<sup>34</sup> Reply Annex. 24.

<sup>35</sup> Richards Rep. para. 21.

<sup>36</sup> Id. para. 13.

<sup>37</sup> BCM, para. 367. See also BCM, App. 2, para. 52.

<sup>38</sup> Maidment, cited in the BCM without a page reference or an extract in the appendices, is a 1200 page text entitled *Handbook of Hydrology*. A search of the book discloses Chapter 8, entitled 'Streamflow,' by Mosley and McKerchar, para. 8.1, which says only that one source of stream flow may be 'baseflow (return flow from groundwater).' The other cited source is Wilson and Moore, which was then unpublished. Again, there was neither an extract nor a page citation.

long stretches of the riverbed there are no ‘pools’; it is bone dry.<sup>39</sup> In 1993, when the river dried up at Chinchimane, two boreholes were drilled to provide water to the village, but they were inadequate and failed to solve the problem.<sup>40</sup>

135. The evidence conclusively shows that the Chobe River is not a perennial river that ‘never dries up’ or where water is ‘present at all seasons.’ The following statements, among many others appearing in the BCM, are thus at odds with the facts (emphasis added):

- The Chobe River is an independent perennial river with continuous flow at all seasons of the year through the northern channel around Kasikili/Sedudu Island, . . .<sup>41</sup>
- Flow through the northern channel is continuous in a downstream direction . . .<sup>42</sup>
- Flow in a downstream direction through the northern and western channel is continuous . . .<sup>43</sup>
- [T]he Chobe River is a mature perennial river with continuous downstream flow at the bifurcation of the island through the northern and western channel, . . .<sup>44</sup>
- Flow in a downstream direction through the northern and western channel is continuous . . .<sup>45</sup>

The true situation is that during the dry season, when the Zambezi River is confined within its banks, no significant amount of water enters the Chobe River below Lake Liambezi and upstream of Kasikili Island. Since little or no water comes in, little or no water flows through either of the two channels. The water in them is as a practical matter stagnant, as Namibia has consistently maintained. The river does not meet Botswana’s or any other generally accepted definition of a perennial river.

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<sup>39</sup> NM, Vol VI, App. Sheet 13, Photographs a, b and c; NCM, Vol III, Sheet 11s, P13s and P14s.

<sup>40</sup> Reply Annex 24.

<sup>41</sup> BCM, para. 263.

<sup>42</sup> Id., para. 272.

<sup>43</sup> Id., para. 334.

<sup>44</sup> Id., para. 351.

<sup>45</sup> Id., para. 381.

136. The significance of this fact is far deeper than a simple matter of nomenclature. All but one of the aerial photographs on which Botswana relies for comparison of the depth, width and rate of flow of the two channels were taken in the dry season.<sup>46</sup> It follows that all those comparisons assertedly showing greater flow in the northern channel are made at times when there is little or no water flowing through the northern (or for that matter the southern) channel.

## 2. The data as to water levels at gauging stations along the Chobe River

137. Table 3 of Dr. Sefe's Second Opinion tabulates the monthly readings at seven water level gauging stations along the Chobe River over the period for which data were available to him, usually from the early 1980s to 1994-1995, but going back to the early 1970s for some stations. Dr. Sefe's discussion of the data at paras. 47-55 of his Second Opinion<sup>47</sup> is recapitulated in BCM para. 366. Botswana argues that these readings support its contention of continuous flow in the Chobe River in two ways: first, because the seven stations registered positive readings in all of the months on record; and second, because the Kasane station had a 'minimum' reading of 925.6 metres throughout the period.<sup>48</sup> These two contentions are discussed separately below. It will be seen that not only does the data fail to support either branch of Botswana's argument, but their significance is seriously misrepresented in Botswana's presentation.

### a. The comparison of the readings at the seven stations

138. Dr. Sefe's report presents the data for each station in tabular form with a final table entitled 'Annual Summary for Each Station.'<sup>49</sup> The monthly means are then plotted on two charts,<sup>50</sup> which are reprinted in the Botswana Counter-Memorial at pp. 143-144. On this basis, the BCM concludes:

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<sup>46</sup> Botswana's analysis of the aerial photographs is discussed further in Part B, below.

<sup>47</sup> BCM, Vol. II, App. 2.

<sup>48</sup> See BCM, para. 366.

<sup>49</sup> BCM, App. 2, p. 26. Apparently the figures in this summary table are the means of the averages for each month in all reported years, but it is hard to say because Dr. Sefe does not tell us whether the figures recorded for each month in the underlying tables are maxima, minima, averages or means. A comparison with Second Supp. Rep. Table 1, p. 43 suggests that they are means.

<sup>50</sup> BCM, App. 2, p. 26, Figure 7(a) and (b), pp. 30, 31.

Even during the persisting droughts in the last 15 years the Chobe River has maintained its characteristics as a perennial river, as evidenced by the data collected by the Department of Water Affairs of the Botswana Government at the seven [sic] \* gauging stations on the Kwando/Linyanti/Chobe River south of the Caprivi Strip at Upper Kwando down to Shaile . . . . [A]t the lower end, the Chobe River maintains a minimum level at Kasane of 925.6 metres; . . .<sup>51</sup>

139. In the first place, it is important to understand just what the figures in Dr. Sefe's tables represent. They record the water level in terms of height above the gauge plate (or zero point) at the gauging station. The tables contain no flow data whatsoever. Nor can the water level readings be converted into flow data without calculations involving numerous other factors. If we were to put gauges in two bathtubs full of water 20 metres apart, both gauges would give positive readings, although there would be no flow at all between the bathtubs. Gauging stations can be and are located in lakes, reservoirs and other static water bodies.

140. The figure shows lines connecting the plotted points for each station, implying that there is continuous flow between the stations. But there is nothing in the water level readings that justifies such a conclusion. In fact, we do know from other evidence that there is continuous flow over the first 120 kilometres from the Upper Kwando station to Shaile, but thereafter it dries up in the Linyanti (also spelled 'Linyanti') Swamps. But we also know from the extrinsic evidence reviewed above that most of the 100 kilometres of the River to the east, between Shaile and Kasane, have been consistently dry over the past many years and for long periods in the more distant past.

141. The Court should also note that in the figures at BCM pp. 143-144, all seven stations are represented as equidistant. This, too, is seriously misleading. The stations are shown on the map at BCM p. 13. It reveals that the first six stations between Upper Kwando and Shaile are located at intervals of roughly 20-30 kilometres over the total distance of 120 kilometres. But the distance between Shaile and Kasane is 100 kilometres in which no gauging stations are shown on the chart.

142. In fact, however, there are gauging stations in this reach of the river, and thus the data provided by Dr. Sefe are seriously incomplete. Figure 2 of Professor Alexander's Second

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\* Actually only six of the stations are between Upper Kwando and Shaile. The seventh station shown on the chart is at Kasane.

<sup>51</sup> BCM, para. 366.

Supplementary Report shows two gauging stations between Shaile and Lake Liambezi, one at Chinchimane and one at Chobe Outflow. (Reproduced as Fig. 5, following p. 66) They must have recorded zero level for all or most of this period. As noted above, the river had dried up at Chinchimane by 1992.<sup>52</sup> Lake Liambezi was dry from 1982 on, so the gauging station at Chobe Outflow must also have registered zero. Photograph 16 in the Second Supplementary Report shows a water level recorder in Lake Liambezi, abandoned and in ruins because there was no water to measure.<sup>53</sup> There is at least one additional gauging station between Shaile and Kasane at Ngoma Bridge.<sup>54</sup> Figure 7c of the Second Supplementary Report plots the readings at that station for March and April 1998. It shows readings of zero from 1 to 12 March, before the overbank flow from the Zambezi River reached the Chobe River. In the next week, the readings at Ngoma Bridge rose sharply to over 2.5 metres by 18 March. As Professor Alexander has shown, this configuration is typical for the Chobe River at Ngoma Bridge. The BCM does not include data from any of these stations, for what reason we cannot say. But if these figures had been shown, they alone would have utterly refuted Botswana's basic position that there is continuous flow along the length of the Chobe River.

b. The gauge readings at the Kasane station.

143. To be precise, the text of BCM para. 366 does not quite say that the gauge station data show continuous flow over the entire distance between Upper Kwando and Kasane, but it has to be read very carefully to discover that. It says that the Chobe 'has maintained its characteristics as a perennial river as evidenced by the data . . . [from] . . . Upper Kwando down to Shaile.' Then, it continues in a separate sentence: 'at the lower end, the Chobe River maintains a minimum level at Kasane of 925.6 metres.'<sup>55</sup> The inference Botswana intends the reader to draw is that the flow continues from Shaile down to Kasane, just as the line linking the stations on the figures at pp. 143-144 continues from Shaile to Kasane. The

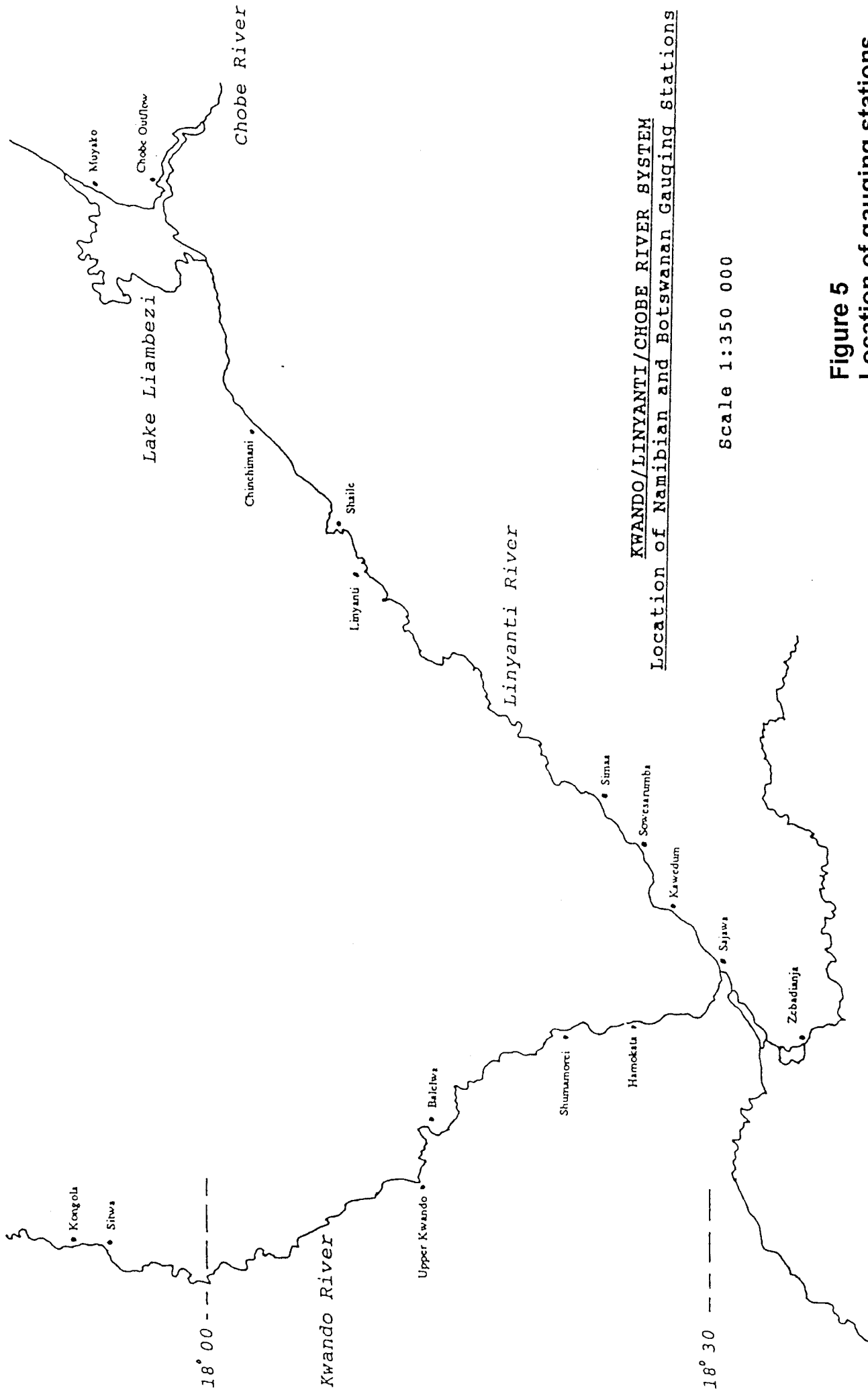
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<sup>52</sup> Para. 132, supra.

<sup>53</sup> See Second Supp. Rep., p. A1/7, Photographs 13 and 14.

<sup>54</sup> A station is also shown at Muyako in Lake Liambezi, but it is not on the course of the Chobe River. It too must have registered zero during this period.

<sup>55</sup> BCM, para. 366. The gauge reading at Kasane has been converted to an elevation above sea level. See also BCM, para. 272; BCM, Vol. II, App. 2 para. 43. The figure 925.6 masl is evidently a mistake, since with the water at that level at Kasane, most of Kasikili Island would be under water. See Second Supp. Rep. Sec. 12. Botswana seems to have miscalculated the figure, which should be a meter less, or 924.6 masl.



**KWANDO/LINYANTI/CHobe RIVER SYSTEM**  
Location of Namibian and Botswanan Gauging Stations

Scale 1:350 000

**Figure 5**  
**Location of gauging stations**  
**in the upper Chobe River**

inference is negated, however, by the evidence set forth above showing that in the dry season there is no, or insignificant, water in the riverbed above Serondela, as far at least as Lake Liambezi.

144. How, then, are the recorded levels at the Kasane station to be explained? Where does the water at Kasane in the dry season come from, if not from flow through the channels around Kasikili Island? There is no great mystery. It comes from the Zambezi River through the anabranching channels, which enter the Chobe River downstream of Kasikili Island, one of them above and one below the gauge station at Kasane. Indeed, BCM, discussing the November 1972 aerial photograph, says:

The curving loops of the Kasai channel are filled with water and clearly channeling flood water from the Zambezi River into the Chobe.<sup>56</sup>

The statement must be qualified in one important respect: there were no floodwaters of the Zambezi River in November 1972. November 1972 was the low water month in the 1972-1973 hydrological year (906 million m<sup>3</sup>/month).<sup>57</sup> The same channel appears on a number of the other aerial photographs, e.g, 1925, 1947, 1981, July 1977, June 1997 and the June 1997 composite photographs. As has already been said, and as will be shown more fully below,<sup>58</sup> all of these photographs (with the possible exception of the June 1997 photographs) were taken during periods of low water when there was little or no flow in the river at Kasikili Island. Not only the November 1972 photograph, but all of these photographs show that 'the curving loops of the Kasai channel are filled with water and are clearly channeling . . . water from the Zambezi River into the Chobe.'<sup>59</sup> The conclusion is that water flows through the anabranching channels throughout the year. It is this source, and not any water coming from above Kasikili Island, that maintains the positive readings at the Kasane gauge station during the dry season. Thus the repeated references to a minimum reading of 925.6 metres at the Kasane station (besides being inaccurate) provide no support whatsoever for Botswana's

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<sup>56</sup> BCM, para. 415. This channel is variously called Kasai, Kassaya, Kassaia.

<sup>57</sup> See Richards Rep., Vol. II, App. 20.

<sup>58</sup> See para. 163 *et seq.*, *infra*.

<sup>59</sup> BCM, para. 415.



proposition that '[f]low in a downstream direction through the northern and western channels is continuous....'<sup>60</sup>

### 3. Other asserted indicators of greater flow in the northern channel

145. Throughout the BCM there are references to depth, width, slope, erosion and deposition of sediment, wildlife and flow measurements all purporting to show that the northern channel carries the larger proportion of the flow in the river. Some are assertedly supported by photographs or measurements. Others, like the flow measurements, do not give any hint as to their provenance or derivation. In this section, Namibia shows that none of this miscellany can alter the conclusion that the northern channel is not the main channel.

#### (a) The 'capacity' of the channels

146. The comparative width and depth of the two channels without more cannot establish which channel carries the greater amount of the water in the river. The BCM itself says that '[f]low in a channel is the product of cross-section area (a product of the width and depth of the channel) and the mean velocity through the cross-section.'<sup>61</sup> Botswana, however, relies on the notion of the 'capacity' of the channel, which does relate to width and depth, as the indicator of the channel that actually carries the larger flow. For example, it says, '[t]he northern channel carries the larger flow because it has greater capacity.'<sup>62</sup> This statement is a complete non sequitur. It amounts to saying that the larger of two pipes must necessarily carry more water. But which will carry more water depends on the amount of water coming in at the entrance to the pipe. If little or none comes in, little or none will pass through, no matter how great the capacity of the pipe.

147. Some of Botswana's evidence of depth borders on the frivolous. Photographs displayed of hippopotami and an elephant in the southern channel are designed to illustrate its inadequate depth.<sup>63</sup> Although it is said that the elephant is standing in the middle of the southern channel,<sup>64</sup> it is obvious in the photograph that the animal is very close to the

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<sup>60</sup> BCM, para. 334. See also quotations from BCM, para. 135, supra.

<sup>61</sup> BCM, para. 350; see also BCM, Vol. II, App. 4, para. 50.

<sup>62</sup> BCM, para. 350. See also BCM, paras. 314, 346, 400, 457(v)(c); BM, App. to Chapter VII p. 5.

<sup>63</sup> See BCM, para. 312; photographs are at BCM, pp. 107, 117.

<sup>64</sup> Id., para. 279.

southern bank of the channel. If the Court wishes to see elephants in mid-channel, north and south, it should consult Professor Alexander's photographs in Fig. 13 of the Second Supplementary Report.<sup>65</sup> We are told that hippopotami do not frequent the northern channel because of its excessive depth.<sup>66</sup> But Sheet 16s in Professor Alexander's Supplementary Report is a picture of a hippo happily sunning on the bank of the northern channel. We are told that buffalo cross to the Island by the southern channel because of 'the shallowness of the southern channel.'<sup>67</sup> But since the buffalo are coming from the Chobe National Park, it is hard to see how else they would get to the Island but across the southern channel.

(b) Slope.

148. In connection with its discussion of the *thalweg*, Botswana argues that the northern channel carries the greater flow because the slope of the northern channel is steeper than the southern channel.<sup>68</sup> This portion of the BCM recapitulates the argument in Dr. Sefe's Second Opinion that the bed of the northern channel has 'a steeper gradient' than the 'relatively flat gradient' of the bed of the southern channel.<sup>69</sup> The BCM reprints Dr. Sefe's Figure 9 at BCM p. 129.

149. In the first place, as Professor Alexander shows, the critical slope for determining water velocities is not bedslope, but the water surface slope, that is, the difference in the height of the water surface at the entrance and exit from the channel.<sup>70</sup> Ordinarily, the two figures are in reasonable accord, but this does not hold true for cases where there is downstream control of flow, such as exercised by the Mambova Rapids for the Chobe River around Kasikili Island.<sup>71</sup>

150. More important, the argument, and especially the chart, egregiously misrepresent the comparative slope of the two channels. The points plotted on the chart are the depth measurements taken by the 1985 joint survey at cross sections in the northern and southern

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<sup>65</sup> Second Supp. Rep., following p. 39; see also paras. 11.2-11.3.

<sup>66</sup> BCM, paras. 310, 311.

<sup>67</sup> BCM, para. 310.

<sup>68</sup> BCM, para. 300.

<sup>69</sup> BCM, Vol. II, App. 2, para. 61.

<sup>70</sup> Second Supp. Rep., para. 10.4.

<sup>71</sup> *Id.*; see also Richards. Rep. para. 18.

channels moving in a down stream direction beginning with a common origin at the bifurcation to the west of the Island (cross section #1). The depth measurements taken in the northern channel are plotted along the green line in the chart, and those taken in the southern channel are plotted on the red line. The chart purports to show that the slope of the southern channel is flatter than the northern channel, because the difference in elevation between the beginning and end of the red line (about two metres) is smaller than the difference between the beginning and end of the green line (about four metres). But the chart is incomplete. No depth is plotted for the confluence of the two channels to the east of the Island. Since both channels pass through this point, however, the depths for both will be equal at that point.<sup>72</sup> As must be obvious, since the points of origin and the points of confluence for each channel are identical, the difference in elevation between the beginning and end of each channel is also identical.

151. Finally, the bedslope of a channel, as a factor affecting velocity, depends not merely on the difference in elevation between two points, but on the horizontal distance as well. A set of rapids that drops ten metres over a distance of a few metres has a bedslope greater than a quiet stream that drops the same amount while flowing for 20 kilometres across a plain. Since, as Botswana admits, the length of the two channels is 'comparable'<sup>73</sup> and the difference in elevation is identical, the bedslope of the two channels must be substantially the same.

(c) The sedimentological study

152. The BCM repeatedly remarks on the stability of the banks and absence of erosion in the northern channel and cites this as evidence that it carries the preponderance of the flow.<sup>74</sup> It relies on Dr. Sefe's *Sedimentological Study* for its assertion that the banks of the northern

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<sup>72</sup> A true plot of all the 1985 depth measurements, including cross section #9, just below the confluence, is given in Second Supp. Rep., Fig. 11 following p. 33. See also *id.* Sec. 9.

<sup>73</sup> BCM, para. 300.

<sup>74</sup> BCM, paras. 332 (and subtitle), 305, 307, 333, 368, 369. Para. 369 calls attention to a line of trees in the photograph at p. 147 looking toward Kasika. The trees are said to be 'on the right hand (Island) bank of the northern channel' and thus to illustrate its 'stable non-eroidible' character. The trees are not, however, on the island, but on the left bank of the spur channel in Namibia. All the aerial photographs show this line of trees at Kasika. No photograph from the air or ground has ever shown such a line of trees in this position on the island.

channel are ‘stable’ and ‘non-erodible.’<sup>75</sup> Absence of erosion, of course, cannot prove the existence of flow in the channel. Nor does stability prove the existence of flow. The photographs of the cut-off meanders on the Mashi reach of the Chobe River show highly stable, well-defined channels. But there is little or no flow going through them.<sup>76</sup>

153. The only issue is whether, as Professor Alexander has stated, absence of erosion in the northern channel is evidence of absence of flow. Botswana’s insistence that the banks are stable and non-erodible is designed to refute this claim, for, in logic, if the banks are not in fact erodible, then the absence of erosion would not demonstrate the absence of flow. The issue reduces to a question of fact: are the banks of the northern channel made up of erodible or non-erodible material?

154. The two experts differ on this point. Professor Alexander says that the banks of the northern channel are made up of erodible material.<sup>77</sup> The BCM, citing Dr. Sefe’s *Sedimentological Report*, says that ‘the top layer of 1.5 metres in depth constitutes, and has done for thousands of years, material for stable non-erodible banks. These are plainly visible and indicate the stability and maturity of the Chobe system in the vicinity of the Island.’<sup>78</sup> The study, it says, shows that:

Kasikili/Sedudu Island consists of two layers, a dark top layer consisting of a clay, silt and mud admixture extending to about 1.5 metres in depth, and a bottom layer of sand, sampled from 1.50 to 5.00 metres in depth (Table 2).<sup>79</sup>

The BCM, however, remarks on ‘the complete absence of sand in this top layer.’<sup>80</sup>

155. These assertions are mistaken. The composition of the banks of the northern channel can be readily seen in Photograph 16s of Professor Alexander’s Supplementary Report showing a hippopotamus sunning himself on the sandy right (Island) bank of the northern

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<sup>75</sup> BCM, para. 304; see also id., 369.

<sup>76</sup> See Second Supp. Rep., p. A1/4, Photographs 7 and 8.

<sup>77</sup> NM, Vol. VI, para. 9.9; see also NCM, Vol. III para. 5.3.

<sup>78</sup> BCM, para. 304. See also id. para. 305; BCM, Vol. II, App. III, para. 16.

<sup>79</sup> BCM, para. 353(i).

<sup>80</sup> Id. para. 353(iv). Id. para. 353(iii) refers to a top layer of “sand, clay and mud,” rather than “clay, silt and mud” (emphasis added) as in para. 353(i), just five lines earlier. The later reference seems to be a mistake, since in the next sub-paragraph, 353(iv), the BCM notes “the complete absence of sand in this top layer.”

channel. 'The material in the bank is underlain by readily erodible fine, white sand.'<sup>81</sup> Photograph P10s on Sheet 9s shows water flowing through gaps in the right bank of the northern channel, indicating clearly that the bank is erodible. Photograph 17, Sheet 24 of the Appendix to the Main Report also shows a patch of the sandy soil forming the Island bank of the northern channel. It should be noted that Dr. Sefe took no samples within the river channels themselves. Nor are there any samples from the natural levee along the right bank of the northern channel, where the photographs and Professor Alexander's visual observation show that the material is fine, readily erodible sand.<sup>82</sup>

156. The BCM itself is of two minds on the issue. At this point in its pleading, perhaps for the sake of consistency, the BCM states that '[s]ediment bars located at the bifurcation point of the northern and southern channel . . . are relict bars of earlier downstream flowing channels, not active zones of sedimentation.'<sup>83</sup> But 46 pages later it says, '[t]he deposit of sediment in the western sector of the northern channel marked B indicates the zone of highest current velocity.'<sup>84</sup> And again, 30 pages further on it says 'the south-western corner of the island is a dry sandy soil . . .'<sup>85</sup> The colour version of Botswana's June 1997 photograph testifies to the accuracy of the last two descriptions rather than the first. (See Fig. 6, following p. 72) The southwestern corner of the Island shows up as yellow coloured sand, and the yellow colour persists in a narrower path along the right bank of the northern channel, the levee referred to by Professor Alexander. The same configuration can be seen in the high ground on the contour map, Figure 20 of the Second Supplementary Report.<sup>86</sup> As Professor Alexander stated, there are no bore holes in this high ground, which means that Dr. Sefe took no cores there. Thus, the conclusions of the *Sedimentological Study* do not apply to that area.

157. The visual evidence of the photographs both from the ground and from the air resolves the issue in favour of Professor Alexander's conclusion that the banks of the northern channel

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<sup>81</sup> NCM, Supp. Rep., Sheet 16s.

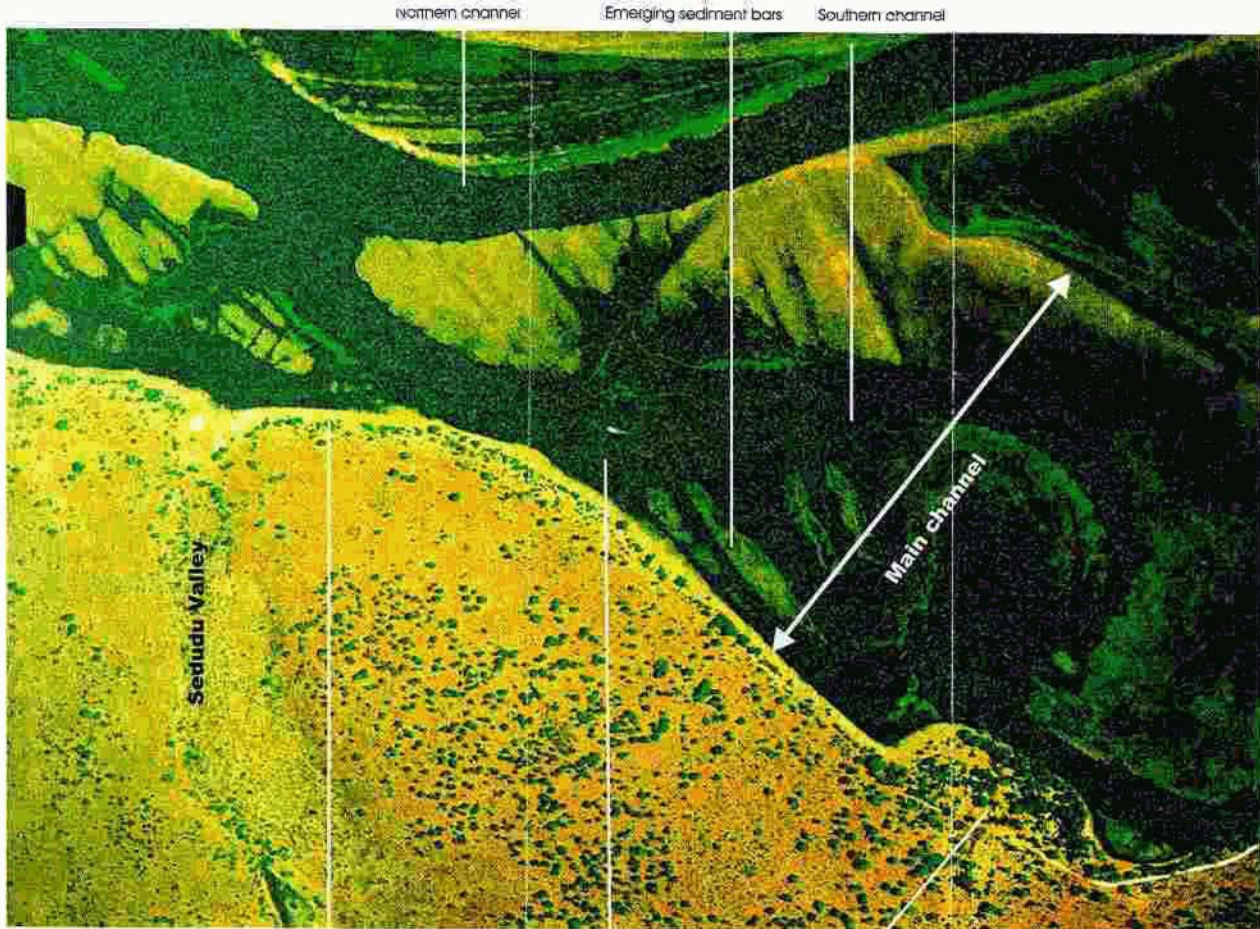
<sup>82</sup> Id., para. 8.5(b).

<sup>83</sup> BCM, para. 307; see also id., para. 377.

<sup>84</sup> Id., para 397.

<sup>85</sup> Id., para. 430.

<sup>86</sup> See Second Supp. Rep., following p. 57.



Northern channel

Emerging sediment bars

Southern channel

Sedudu Valley

Main channel

The water level has dropped below the tree line that identifies the top of the right bank of the Chobe River.

Wake of a boat in the southern channel.

Chobe National Park Headquarters.

**Figure 6**  
**Entrance to the main channel of the Chobe River at Kasikli Island**  
 Based on the 5 June 1997 aerial photograph in the JCM.

are erodible. Therefore, the absence of erosion, which Botswana repeatedly proclaims, attests to the absence of flow in the northern channel.

(d) Asserted flow measurements

158. Dr. Sefe's Second Opinion contains a table of 'recent flow measurements' in which it appears that the flow is larger in the northern than in the southern channel on three dates in March and April 1997.<sup>87</sup> These measurements are repeated at BCM para. 285. The dates of the measurements are given, but not the place on the river where they were taken nor the methods employed. Without such information, the measurements cannot be evaluated.

159. In three different paragraphs, the BCM refers to minimum flow velocities in the dry season 'on the order of 0.5 metres per second.'<sup>88</sup> None of these paragraphs gives any references or explanations whatsoever. Neither Namibia nor the Court can have any idea where, when or how they were arrived at.<sup>89</sup>

160. Until such information is available, these purported flow measurements must be consigned to the growing collection of unsupported assertions by Botswana.

B. Aerial Photography and Satellite Images

161. Botswana attaches extraordinary importance to the aerial photography, and to a lesser extent to satellite imagery, in supporting its contention that the northern channel is the main channel of the Chobe River at Kasikili Island. It devotes 40 pages of its Counter-Memorial to this subject (pp. 155-196). Although Botswana's comments on the photography touch on many of the themes discussed elsewhere in the BCM and in this Chapter, it seems desirable, even at the expense of some repetition, to respond to this section of the BCM as a whole.

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<sup>87</sup> BCM, App. 2, Table 7, p. 65.

<sup>88</sup> BCM, paras. 275, 283, 368.

<sup>89</sup> Professor Richards has made computations using Botswana's figures showing that the two sets of measurements are inconsistent. Applying the average cross-sectional area for the northern channel given by Botswana to the minimum flow in the channel reported by Dr. Sefe gives a minimum flow velocity of .02m<sup>3</sup>/s, more than an order of magnitude less than the 0.5m<sup>3</sup>/s claimed in the BCM. Professor Richards says the computed figure is 'probably near the operational limit of the current metres employed' (Richards Rep., para. 31). That is, slower velocities could not be measured using available equipment. The conclusion is, as Professor Alexander states, that the channels are essentially stagnant during the low flow season, Second Supp. Rep. para. 7.13.

### 1. General comments

162. Much of Botswana's concern seems to be to show that the general configuration of the area has not changed from 1925, when the first photograph was taken, to the present.<sup>90</sup> These repetitive statements reflect the persistence of Botswana's misconception that Namibia's case relies upon a change in the position or functions of the channels since the 1890 Treaty was signed. Although Namibia stated unequivocally in its Memorial that it was making no such claim,<sup>91</sup> the BCM persists in arguing the matter. All of this argument, however, is beside the point, since it is addressed to an issue as to which there is no dispute between the parties.

163. The Court should also note that all of the aerial photographs in the Botswana Memorial and in the BCM (with the possible exception of the June 1997 photograph) were made when no substantial flow was taking place along the Chobe River.<sup>92</sup> Table 1, p. 43 in Professor Alexander's Second Supplementary Report demonstrates from actual water level readings that substantial portions of the Island are under water during the annual high water periods, the only time when substantial flow takes place in the Chobe River.<sup>93</sup> Aerial photographs that do not show significant inundation were not, therefore, taken when there was substantial flow in the Chobe River at Kasikili Island. Thus, inferences from them about the situation when there is substantial flow must be treated with utmost caution.

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<sup>90</sup> The BCM begins its discussion of the photographs with a section entitled '*There has been no change over seventy years.*' BCM, p. 156. For comments about individual photographs stressing the absence of change in the general configuration of the area, see BCM, paras. 391, 392, 393, 403, 405, 406, 417, 427, 441(3). The photographs are listed in BCM, para. 390, n.8. Since the filing of the counter-memorials, Namibia has taken another set of aerial photographs and has also taken photographs from a helicopter. These are discussed at length in Professor Alexander's Second Supp. Rep., Section 6, paras. 14.24 and 14.25. See also Second Supp. Rep. paras. 1.3, 4.5.

<sup>91</sup> NM, para. 130.

<sup>92</sup> This is consistent with the purposes for which these photographs were taken. They were primarily photographs taken by reconnaissance, survey and mapping expeditions that were interested in collecting information about terrain and topographic features that would be invisible when the flood plain is inundated during the high flow season. Second Supp. Rep. para. 13.19.

<sup>93</sup> Namibia has consistently maintained this position. See, e.g., NM, paras. 21, 73 (citing Bradshaw), 131, 142, 220; id., Vol. VI paras. 10.2, 12.4; NCM, paras. 10, 32, 150; id., Vol. III paras. 4.15 and 5.7-5.8; Second Supp. Rep. paras. 13.1, 13.7. Botswana attacks Professor Alexander's identification of the main channel on the basis of the configuration 'as shown on all aerial photographs,' BCM, para. 255. But what is shown on all the photographs is the dry season condition, when there is substantially no flow in either channel.



164. Finally, it is well to remember that the interpretation of aerial photographs is a professional activity requiring expertise, skill and experience in high degree. The BCM cites no such expert authority for its comments on the photographs. The impressions of persons without special training based on an inspection of the photographs is likely to lead to frequent mistakes and misinterpretations.<sup>94</sup> Only a few instances need be given as examples:

- Frequent references to the southern channel as ‘dried out’ or ‘completely dry’ or blocked by reeds are without substance.<sup>95</sup> Professor Alexander’s Supplementary Report demonstrated, on the basis of the recorded water levels at Kasane, that at no time in the past 15 years has the southern channel been dry.<sup>96</sup> This is illustrated in Figure 14 of the Second Supplementary Report (following p. 42), showing that the minimum water level above sea level for the period 1984 to 1996 was always above the altitude of the bed of the southern channel as shown in the 1985 joint survey.
- A particularly flagrant example is the assertion that in the ‘May 1972’ photograph ‘the southern channel is dry for half its length.’<sup>97</sup> This is quite impossible as can be seen by comparing the November 1972 photograph. November was the lowest flow month in the 1971-72 hydrologic year, but the photograph shows plenty of water in the southern channel. In fact, the ‘May 1972’ photograph shows the southern channel blocked by an infestation of Kariba weed.<sup>98</sup> In the early 1970s, the Chobe River and

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<sup>94</sup> See R. H. Arnold, *Interpretation of Airphotos and Remotely Sensed Imagery* (Prentice Hall 1997), Reply Annex 35. See also *Manual of Photographic Interpretation*, American Society of Photogrammetry p. 114, Reply Annex 36. Obtaining reliable measurements and interpretations from aerial photographs and remotely sensed images requires a thorough understanding of optics (including stereoscopy) and the mathematics of optical distortion. Moreover, the American Society of Photogrammetry cautions that a photograph or image is but one piece of information, and reliable interpretation of specific features almost always requires other types of corroboration.

[I]n almost every job of interpretation there will be unknowns or uncertain conclusions which must be checked in the field. The interpreter must accept the responsibility of field checking whenever it is feasible, in order to make sure his work is right, or, if it is wrong, to find out why. . . . The amount of field work which will be necessary varies with the intensiveness and accuracy requirement of the study, the complexity of the area, the quality of the photographs, and the ability of the interpreter’.

<sup>95</sup> BM, paras. 36, 202, 218, 220; BCM, paras. 279, 380, 383, 396, 403, 411, 413.

<sup>96</sup> NCM, Vol. III, paras. 12.5, 12.6.

<sup>97</sup> BCM, para. 411. The ‘May 1972’ photograph is erroneously dated, though not by Botswana. See discussion at paras. 187-188 *infra* and in Second Supp. Rep. paras. 12.3-12.5.

<sup>98</sup> The Court should note, that despite Botswana’s repeated assertions to the contrary (see BCM,

others in the area were beset by this pest, and extermination of these weeds became the object of joint action by the Botswana and South African governments.<sup>99</sup> The success of the program is shown by the fact that the weed growth does not appear on any subsequent photograph.

## 2. Botswana's photographic comparisons

165. Botswana does not pretend that it is possible to directly observe flowing water in a stream in aerial photographs. Instead its argument is based on other features that are visible on the photographs, and that it contends provide the basis for the inference that the largest proportion of the flow goes through the northern channel. There is no need to track the BCM's discussion of the photographs one by one, since the comments are for the most part repetitive and fall into a number of categories, as follows:

- The comparative width of the two channels
- The comparative depth of the two channels
- The sediment bars at the opening of the main channel as defined by Professor Alexander
- Other indicia of the presence or absence of erosion in the two channels
- Striation patterns
- The so-called sub-channel draining the southern portion of the Island

These will be discussed seriatim, followed by comments on certain especially serious errors in the BCM treatment of particular photographs.

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paras. 383, 403 and 412,n.9), this is the only photograph showing the channel blocked by vegetation.

<sup>99</sup> See NCM, Supp Rep. para. 10.5, and id., App. A, B and C. The BCM admits in a footnote that a 'possible alternative interpretation' for the appearance of the southern channel is infestation by Kariba weed. BCM, para. 412, n.9. Its reasons for discarding this explanation are insubstantial. The general question of whether reed growth affects the navigability of the southern channel is discussed at paras. 201-202, infra.

(a) The comparative width of the two channels

166. The BCM repeatedly states that the photographs show the northern channel to be the 'wider' or 'larger' of the two.<sup>100</sup> These judgments are quite subjective and contestable as a matter of fact.<sup>101</sup> But extended discussion of these width comparisons is unnecessary because they are essentially irrelevant. In the first place, the width of a channel without more can provide no information about the flow. Botswana's own expert, Dr. Sefe, admits that channel width and depth are not alternatives for determining the main channel of a river,<sup>102</sup> and the volume of flow through a channel depends on a complicated formula involving many factors other than width.<sup>103</sup> Thus, no matter how many times Botswana repeats it,<sup>104</sup> the fact (if it be a fact) that the northern channel appears to be wider on some of the photographs provides no evidence that the volume of flow in the northern channel is greater.

167. There is a second and more fundamental reason why Botswana's comparisons of the widths of the two channels as they appear in the photographs are irrelevant. In the dry season when the photographs were taken, there is little or no flow proceeding through the channels around Kasikili Island, and both channels are essentially stagnant.<sup>105</sup> It hardly seems plausible that comparisons of the widths of the two channels at a time when they were not flowing would provide much information about which of them carries the most water when they are flowing. If comparative width has any bearing on the issue, the comparison must be made when the river is flowing. The northern channel more or less as it appears in the photographs must be compared with the main channel as identified in Figures 16-19 of Professor Alexander's Second Supplementary Report, which carries the main bulk of the

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<sup>100</sup> BCM, paras. 258(ii), 389, 395, 400, 410, 417, 419, 423, 440, 441.1. See also BCM, paras. 447, 451, 454, 455 and 456 for analogous comments based on the satellite images.

<sup>101</sup> See discussion in Second Supp. Rep., para. 13.9. BCM, para. 395, states that the average width of the northern channel is 200 metres as compared to 50 metres or less for the southern channel. No support or reference is given for these figures, and in the absence of an evidentiary basis they must be disregarded as another Botswana *ipse dixit*.

<sup>102</sup> BCM, Vol. II, App. 4, para. 50.

<sup>103</sup> BCM, App. 2, paras. 25-26. See also *id.* paras. 27-28, discussing the Manning formula. In the case of the Chobe River at Kasikili Island, the problem is complicated even further by a number of other factors, including the downstream control exercised by the Mambova Rapids and the inflow from the anabranching channels below the Island.

<sup>104</sup> BCM, paras. 389, 410, 441(1), 447, 451, 454, 455, 456.

<sup>105</sup> Second Supp. Rep. paras. 4.5, 10.2, 14.5.

flow of the Chobe River. That comparison shows that the main channel is the wider of the two, not just marginally, but by several times.

(b) The comparative depth of the two channels

168. As with channel width, channel depth is not by itself a criterion for distinguishing the main channel and provides no information about which channel carries the larger proportion of the flow.<sup>106</sup> As noted above, Dr. Sefe, Botswana's expert, agrees. The frequent references to photographic or satellite images of water 'flowing' in the northern channel are mistaken.<sup>107</sup> Neither of these media, at the scales used, can distinguish between standing and flowing water. For example, the spur channel looks the same as the others in the photographs, but it does not convey any water, since it is blocked at the upstream end.<sup>108</sup> As to the satellite images, the BCM's principal claim is that the northern channel is 'wider and therefore likely deeper' than the southern,<sup>109</sup> an obvious non-sequitur. (emphasis added) There are many wide and shallow rivers and many narrow and deep ones. The satellite images are at 1:100,000 for the MSS images and 1:50,000 for the TM images. This is far coarser than the image depicted in Figure 1 (following p. 23, above). As the Court will observe, the comparative width of the two channels is strikingly different on this Figure than on the coarser, and less accurate, satellite images in Dr. Sefe's Figures 14 and 15.<sup>110</sup> The BCM says

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<sup>106</sup> As has been frequently noted, Namibia does not accept that depth is an appropriate criterion for determining the main channel, either as a stand-alone dimension or as a surrogate for proportion of the flow. See, for example, NM paras. 131, 132, 157; NM Vol. VI, para. 4.4; and NCM para. 28.

<sup>107</sup> See, e.g., BCM, paras. 400, 411, 451.

<sup>108</sup> There are few direct references to depth of the channels in the BCM's discussion of the photographs. BCM paras. 403 and 411 assert that the southern channel is shallower. The evidence is not the photographs, however, but measurements from the 1985 joint survey. Elsewhere, the BCM derives lack of depth from the asserted presence of reeds in the southern channel, (e.g., BCM, paras. 403, 414). The unreliability of these readings is suggested by Botswana's error in interpreting the 'May 1972' photograph, the one unambiguous depiction of vegetation in the southern channel, as a dry riverbed. (BCM, para. 411; see also para. 164, supra) Moreover, as Professor Alexander points out, much of the reed growth in the vicinity of Kasikili Island is papyrus, which floats on the surface of the water and thus gives no indication of its depth. (Second Supp. Rep., para. 6.12) The difference, of course, cannot be distinguished on the photographs.

<sup>109</sup> BCM, para. 454.

<sup>110</sup> BCM Vol. II, App. 2, pp. 45, 46. The contour map in Professor Alexander's Second Supplementary Report (Fig. 20, following p. 57), which is also much larger in scale and therefore much more accurate than the satellite images, shows the southern channel as distinctly wider than the northern.

the greater depth of the northern channel can be observed on Figure 15 in Dr. Sefe's *Opinion*<sup>111</sup> because it appears in a deeper shade of blue.<sup>112</sup> Namibia has been unable to perceive this difference and invites the Court to try for itself. Like the satellite images, the photographs were all taken at a scale smaller than 1:10,000.<sup>113</sup> The Court will appreciate the difficulty if not impossibility of making accurate interpretations of differences in depth of at most a metre or two on such small-scale depictions.

(c) The sediment bars at the opening of the main channel

169. The BCM states that the June 1997 aerial photograph 'clearly reveals these same sediment bars [at points B and C] in essentially the same size, shape and location, as on the 1925 photograph and indeed on all the intervening photographs in the series.' This is said to be proof that they 'are in no way active' and that the southern channel is not an active channel.<sup>114</sup>

170. The assertion is incorrect. The changes are apparent on the five close-up extracts of the area juxtaposed in Diagram 9, Sheet 27 of the Appendices to Professor Alexander's Main Report. The changes are obvious even to Botswana. In reply, it tries to attribute these changes to differences 'in the depth of water . . . which has the effect of changing the appearance of the sand bars in the area of bifurcation.'<sup>115</sup> But in photographs taken in the dry season, at low water, the variation in the depth of the water can hardly have been significant.<sup>116</sup>

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<sup>111</sup> Id. p. 46.

<sup>112</sup> BCM, para. 446.

<sup>113</sup> BCM para. 390 states that 'All the photographs have been enlarged to an approximate scale of 1:10,000 except for the 1977 photograph.' (emphasis added)

<sup>114</sup> BCM, paras. 427, 428.

<sup>115</sup> BCM, para. 377.

<sup>116</sup> Second Supp. Rep. Table 1, p. 43, shows that the minimum water levels at Kasikili Island between 1983 and 1996 varied by only about one-tenth of a metre. Likewise, an inspection of the tables of daily water levels at Kasane for the same years shows a variation during the dry season of only a few tenths of a metre. Botswana claims that the water is "visibly higher" on the 1981 and 1985 photographs. The 1985 photograph was taken in August, in which the mean daily level at Kasane was 924.75 masl, the fifth lowest of the year, and only .05 metres above the minimum. See Id. The 1981 photograph does not reveal the month in which it was taken, but if anything, the island seems drier than in the 1985 photograph.

171. Moreover, unlike the bars at point B, the sediment bars at point C are not in the southern channel, but some metres upstream in what is clearly the main channel of the Chobe River before it reaches the bifurcation. Furthermore, the aerial photomosaic of June 1997, BCM p. 191, shows another set of similar sediment bars still further up the river in the main channel of the Chobe River at Point D. (See Fig. 7, following p. 80) These bars like the bars at C are unquestionably in the main channel of the Chobe River. As Professor Alexander says, they are:

created by sediment deposited in the river channel by the flow in the river. There can be no doubt about this as they are characteristic of all rivers flowing through unconsolidated material. There is no alternative explanation.<sup>117</sup>

If these sediment bars are the products of the flow of the river, it must also be true that the sediment bars at B, which are similar in every respect, are the product of sediment deposited by the flowing river in the southern channel. ‘There is no alternative explanation.’ Thus, the photographs, far from contradicting Professor Alexander’s theory, in fact provide strong substantiation for his conclusion that the channel to the south of the Island is the ‘active’ channel, and thus the main channel.

(d) Other indicia of the presence or absence of erosion in the two channels

172. The question of erosion in the comparison of the two channels has been discussed above in connection with Dr. Sefe’s *Sedimentological Study*.<sup>118</sup> In relation to the photographs also, the BCM makes frequent reference to erosion or sediment deposition or the lack of it to bolster its argument as to lack of flow in the southern channel. On the one hand, the absence of erosion in the northern channel is cited as evidence that it is the main channel because it is a stable channel.<sup>119</sup> On the other, the BCM often comments on the lack of erosion in the southern channel, particularly on the sediment spit marked A, as evidence of absence of flow in the southern channel.<sup>120</sup>

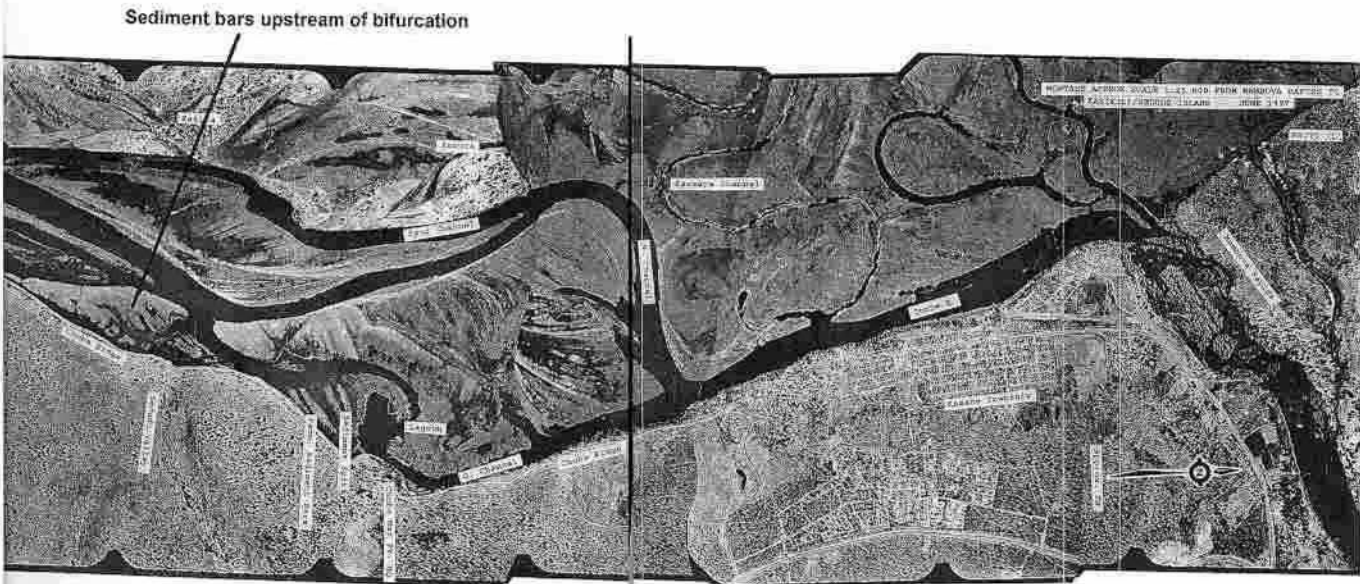
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<sup>117</sup> Second Supp. Rep., para. 13.9.

<sup>118</sup> See paras. 152-157, *supra*.

<sup>119</sup> E.g., BCM, paras. 304, 332, 439.

<sup>120</sup> BCM, paras. 277, 372, 392, 403, 405, 438. See also paras. 410, 441(3). Despite these repeated references to absence of erosion as disqualifying the southern channel as the main channel, the section heading at BCM, p. 114 characterizes the idea that the main channel must show erosion as a ‘misrepresentation.’



**Figure 7**  
June 1997 aerial photograph mosaic of the Chobe River with labels  
(based on the photo-mosaic with the same title on page 191 of the  
Botswana Counter-Memorial)

i. As to the stability of the configuration of the northern channel

173. According to Professor Alexander, 'these characteristics identify it as being a meander loop that is in the process of being cut off.'<sup>121</sup> Photographs 7 and 8 in the Second Supplementary Report show cut-off meanders in the Mashi portion of the Chobe River. In both photographs, the meander loop has much more sharply defined banks and even seems wider than the channel cutting across the base of the ox bow. Yet it is clear that the channel that runs across the neck is the main channel, and not the one that goes around the loop. In his Main Report, Professor Alexander showed that the sediment deposits building up at the entrance to the northern channel are similar to the changes that take place during the development of cut off meander loops.<sup>122</sup> Professor Richards concurs:

In due course, the western reach of the northern channel will be blocked at its upstream end, in the same way as the spur channel. The northern and eastern sections of the "northern channel" receive additional tributary flow from the floodplain channels which carry Zambezi flood waters, to the north-east of Kasika. This extra discharge . . . has maintained the depth of the northern channel, discouraging sedimentation. Without this influence, the cut-off meander bend would have also filled progressively with sediment at its downstream end.<sup>123</sup>

Indeed, as discussed in Chapter I, paras. 60-62, in his view, the southern channel was created when the river broke through the neck of the meander loop that is now the northern channel, a millennium or more ago.<sup>124</sup>

ii. As to the absence of erosion in the southern channel

174. (1) The spit marked A: again Botswana erroneously applies its observation to the stagnant southern channel in the dry season rather than to the main channel as identified by Professor Alexander. During the season when the River is in flow, the main channel, as Professor Alexander and Professor Richards show, flows over the southern channel rather than through it. Erosion that might be expected in a channel looping around the sediment spit would not occur as a result of the main channel flowing over it. The spit marked A is where the sediment bars (discussed in paras. 169-171, above) are located. There, as was shown

<sup>121</sup> Second Supp. Rep., paras. 14.22, 17.2.

<sup>122</sup> NM, Vol. III, Sheet 27.

<sup>123</sup> Richards Rep., para. 30.

<sup>124</sup> Richards Rep., para. 29.



above, the four sediment bars have in fact changed in shape, though not in their general location and orientation, as a result of the flow over and through them of the main channel of the Chobe River.

175. (2) Point B: the Botswana takes contradictory positions as to the situation at the point of bifurcation of the channels. BCM para. 371 states:

The *Sedimentological Report* further confirms the absence of any fresh deposition of sediment on the western area of the island.

This absence of fresh sediment, says Botswana, ‘totally contradicts Professor Alexander’s identification . . . of Area d on the island as the “main channel” of the southern channel and hence a zone of active sedimentation.’<sup>125</sup>

176. Yet only a few pages later in para. 397 the BCM contradicts itself:

The deposit of sediment in the western sector of the northern channel at the point marked B indicates the zone of highest current velocity.<sup>126</sup>

And again in para. 401 it says:

The large deposit of sediment accreted to the left bank of the northern channel at point B indicates the zone of the highest current velocity.

The question as to which statement is correct is settled by Photograph E3 in Figure 13 of the Second Supplementary Report (following p. 39). It shows an elephant in the ‘western area of the island’ and not far from point B dusting itself with the fine sediment that comprises the surface of this area of the Island, across which the Chobe River annually flows.<sup>127</sup>

177. If, as BCM para. 371 maintains, the absence of sedimentation would contradict Professor Alexander’s identification, the presence of sedimentation must confirm it. What the BCM in paras. 397 and 401 correctly calls ‘the zone of highest current velocity’ is squarely in the middle of the main channel as Professor Alexander identifies it.<sup>128</sup> The BCM

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<sup>125</sup> BCM, para. 371.

<sup>126</sup> BCM, para. 397.

<sup>127</sup> The photograph also refutes Dr. Sefe’s statement that the surface of the island consists of mud, clay and silt.

<sup>128</sup> Second Supp. Rep., paras. 16.3-16.5 and Fig. 21; following p. 58.

has thus unwittingly substantiated Professor Alexander's central conclusion as to the location of the main channel.

(e) Striation patterns

178. Botswana professes to be unable to see the patterns of striation or parallel grooves that mark the surface of the northern two-thirds of the Island, in contrast to the smooth surface of the main channel of the Chobe River.<sup>129</sup>

179. Like Professor Alexander, Professor Richards, finds 'the scroll-bar...patterns evident in the air photographs.'<sup>130</sup> (emphasis added) In connection with these scroll bars, he uses the carbon dating developed in Dr. Sefe's *Sedimentological Study* to explain the evolutionary sequence of zones 'a' to 'd' on Diagram 4, Sheet 17 of the Appendices to the Main Alexander Report. The account culminates with the formation of Kasikili Island by the avulsion through the chute channel at the base of the meander about one thousand years ago.<sup>131</sup>

180. No arcane issue of photographic interpretation or geomorphology is involved on this particular issue, however. It requires only an examination of the photographs by someone with ordinary eyesight and perception. Sheets 14, 15 and 16 of the Appendices to the Main Report juxtapose the relevant portions of six photographs from 1925 to 1985. The striations are particularly prominent in the June 1997 photograph, which has become available since then.<sup>132</sup> But they are readily visible on all the others, including the first one in 1925. Namibia invites the Court to see for itself.

(f) The so-called sub-channel draining the southern portion of the Island

181. In his Main Report, Professor Alexander produced a diagram of the main channel showing the left bank running diagonally across the lower third of Kasikili Island in a generally west-east direction.<sup>133</sup> The BCM challenges this identification:

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<sup>129</sup> E.g., BCM, paras. 394, 408, 418. The last two paragraphs deal with the 1947 photograph and the 1981 photograph on both of which the pattern of striation on the northern portion of the island appears quite prominently.

<sup>130</sup> Richards Rep., para. 24.

<sup>131</sup> Id.; see also para. 28.

<sup>132</sup> This photograph is best seen in BCM, Attachment, Aerial Photographs, p. 11 (June 1997).

<sup>133</sup> NM, Vol. VI Part 2, Diagram 4, Sheet 17.

In fact the line across the island to which Professor Alexander refers, far from being a bank of a river, is an extension of the inlet at the eastern end of the southern channel, and is a low lying sub-channel, dividing the western higher part of the island from the lower eastern sector.<sup>134</sup>

Yet the only support in the BCM for this characterization is the suggestion that the August 1947 photograph shows ‘a string of pools/damp areas in the mid-section of this sub-channel,’<sup>135</sup> which are also said to appear on the Landsat images of June 1975.

182. To begin with, it is not quite clear what feature Botswana means to identify as the sub-channel. It is described as a line<sup>136</sup> and in the 1925, 1947, 1981, 1985 and June 1997 photographs the label appears on or just south of a prominent feature, running in practically a straight line across the lower third of the Island.<sup>137</sup> But this feature on the photographs has none of the characteristics of a ‘channel’ or conduit conveying water. On the contrary, it has all the characteristics of what Professor Alexander calls it: the left bank of the main channel. It has the attributes of a somewhat elevated ridge of higher ground, as is most clearly brought out in the colour photograph of June 1997. There the feature appears in the light yellowish colour that marks land showing above the water surface. (See Fig. 6, following p. 72, above; see also BCM Attachment, Photograph 10) Photograph 41, in the Second Supplementary Report, p. A1/20, shows a Botswana Defence Force barracks and watchtower built on this slight ridgeline, presumably because it is the highest ground on the Island. (See Fig. 8, following p. 84) That this feature is indeed a line of higher ground, and not a ‘channel’ is confirmed by the contour map, Second Supplementary Report Figure 20 (following p. 57).

183. Furthermore, seven of the aerial photographs, by Botswana’s own count, show water south of the line in the relatively dry season — that is, within the main channel as defined by Professor Alexander. Where did this water come from? Botswana’s only suggestion is that

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<sup>134</sup> BCM, para. 290. This so-called sub-channel is mentioned in four other paragraphs of the BCM’s commentary on the aerial photographs, BCM, paras. 394, 404, 408 430, and is labeled on the 1925, 1947, ‘May 1972’, 1981, 1985, July 1977 and June 1997 photographs in the BCM. (The labels appear only in the reproductions in the BCM itself (Vol. I) and not in the appended Dossier. On the July 1977 photograph the label is ‘residual pool’ and on the June 1997 photograph it is called a ‘rain channel’).

<sup>135</sup> BCM, para. 290.

<sup>136</sup> BCM, para. 394.

<sup>137</sup> In the ‘May 1972’ photograph (BCM, p. 173) however, the label is comfortably in the centre of the main channel as identified by Professor Alexander.

Barracks

Watchtower



Figure 8

Barracks and watchtower built on the left bank of the main channel of the Chobe River at Kasikili Island

flood waters flow into the sub-channel ‘when backing upstream.’<sup>138</sup> But as Professor Alexander has decisively shown, flood waters back upstream only in the very early stages of the Zambezi’s annual rise, when it first reaches the Chobe through the anabranching channels below Kasikili Island. This upstream flow is reversed within a few days as the overbank flow from the Zambezi reaches the Chobe River along the stretch between Ngoma and Kasikili Island. Thereafter the river flows in a downstream direction through the channel along the Chobe Ridge, with the major part of it going into the main channel to the south of the Island when it reaches Kasikili Island. The damp places, pools, residual pools, etc. that the BCM sees in the photographs are the result of this downstream flow.

184. A second source for this residual water in the bed of the main channel is overbank flow from the Zambezi emanating from the north of the Island, flowing across the northern channel and then across the Island itself, following the gradual southerly slope of the land into the main channel.<sup>139</sup> This is confirmed by Botswana’s labeling on the June 1997 photograph, BCM p. 187. About one-third of the way from the right hand border of the photograph is a label in the form of an inverted ‘Y’. The legend reads ‘flood water’ and the arrows as well as the shape of the label show it coming from the northern channel, across the Island toward the southern channel.

185. Professor Alexander’s thesis about the pattern of flow at Kasikili Island is confirmed, and with it, his identification of the main channel.

### 3. Discussion of particular aerial photographs

186. As noted above, Namibia sees no need to address Botswana’s comments on each photograph individually. A few of these, however, are so seriously in error or reveal such profound misconceptions of the problem that some response is required.

187. The ‘May 1972’ photograph (BCM paras. 411-413) The comment states that this photograph was ‘taken at a time when the water levels were low’ (para. 411); that the photograph depicts a period of ‘low water’ (para. 412); that it ‘indicat[es] a very low water level’ (para. 413); and that it represents the Chobe River ‘in a dry season.’ (Id.) Elsewhere in the BCM, however, the photograph is referred to as illustrating conditions ‘when the island is

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<sup>138</sup> BCM, para. 394.

<sup>139</sup> Second Supp. Rep., para. 6.13.

inundated in the wet season' (para. 331) or 'in flood time' (para. 380). Both of these descriptions cannot be right.<sup>140</sup>

188. Furthermore, the photograph could not have been taken in 'May 1972'. The monthly flow in the Zambezi River at Katima Mulilo in that month was 5,906 million m<sup>3</sup>, the second highest in that hydrologic year, and most of Kasikili Island was under water.<sup>141</sup> The photograph clearly does not show the Island in that condition. It appears from an examination of the records in the Surveyor General's Office in Windhoek that the date of 31 May 1972, which appears on the flight plan, was in error.<sup>142</sup> Thus it is impossible to say what month the photograph was taken in or what flow conditions it represents. Since there is no way of being sure either of what Botswana thinks or of what the actual state of affairs was when the photograph was taken, all the comments on and references to this photograph in the BCM should be disregarded.

189. The November 1972 photograph (BCM paras. 414-415) This photograph is put forward as a 'particularly valuable . . . record of the actual manner in which the flood waters of the Zambezi enter the Chobe system.'<sup>143</sup> The commentary continues:

In the five months between the May and November photographs, the rising waters in the river north of the Island, caused by flood-water run-off from the Zambezi, have pushed upstream into the southern channel to link up with the western sector of the northern channel at the bifurcation zone marked B. . . . Water has also pushed up the Spur Channel past Kabuta.<sup>144</sup>

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<sup>140</sup> The BCM refers to this photograph no less than seven times. BCM, paras. 309, 331, 380, 396, 411, 412 and 441.

<sup>141</sup> See Second Supp. Rep., para. 13.6; Richards Rep., Vol II, App. 20.

<sup>142</sup> Second Supp. Rep., para. 13.6. Professor Alexander verified that the flight plan for the series of photographs that included this one was indeed dated 31 May 1972. However, not only this photograph, but the others in the series were inconsistent with the flow conditions existing on that date, since they show the Zambezi River flowing within its banks, which is not possible with a monthly flow of 5,906 million m<sup>3</sup>. Professor Alexander concluded that the original record is in error.

<sup>143</sup> BCM, para. 414.

<sup>144</sup> Id. There is some confusion of terminology on this location. Botswana refers to the high area on the northern bank of the Spur channel opposite the confluence with the northern channel as "Kabuta" and refers to the village a kilometre or so to the west as "Kasika." Namibia refers to both the high area and the village as "Kasika."

This is again flagrant error. The monthly flows in the Zambezi from May through November 1972 (in million m<sup>3</sup>) were:<sup>145</sup>

May .....	5,906
June .....	3,870
July .....	2,466
August .....	1,358
September.....	1,024
October.....	912
November.....	906

The waters of the Zambezi River were not rising during this period. They were falling, and falling to the lowest point of the year. There was no 'flood-water run-off from the Zambezi' River from July onward. Therefore there could have been no 'rising waters in the river north of the Island' during this period, and no waters that 'have pushed upstream into the southern channel.' This is not a 'record of the actual manner in which the flood waters of the Zambezi enter the Chobe system.' It is pure fantasy. The only accurate statement in the comment is that 'There is no sign of general flooding.'<sup>146</sup>

190. The July 1977 photograph (BCM paras. 421-424) The BCM states: 'This photograph is part of a series flown by the South African Defense authorities in June 1977 . . . to be used in the production of the 1978 Joint Air Reconnaissance Intelligence Centre map (the JARIC map).' Col. Rushworth demonstrates that it was not.<sup>147</sup> Instead, it was taken pursuant to the 'Working Plan' and 'Report' for the production of the 1:50,000 1982 South West Africa mapping. Botswana suggests that certain features on this photograph account for the failure of the JARIC map to show the southern channel.<sup>148</sup> But the southern channel clearly appears in the 1982 map, which was the one that was actually made from this photograph.

191. June 1997 photograph and mosaic (BCM paras. 425-440) This is an important photograph, because it is the only one before the Namibia April 1998 photograph that shows appreciable inundation and gives an idea of the appearance of the Island and the pattern of the

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<sup>145</sup> Richards Rep., Vol. II, App. 20.

<sup>146</sup> BCM, para. 415.

<sup>147</sup> See Reply Annex 1, para. 23.

<sup>148</sup> The reason for this error in the JARIC map is fully explained in NM, para. 317 and NM, Vol. V, Annex 102, para. 32.

waters during the high flow season.<sup>149</sup> In its comment, the BCM asserts:

It is also apparent that the south-western corner of the island is dry sandy soil of the same texture as the mainland. This indicates that this area, which falls right across Professor Alexander's "Zone d" (bed of the pseudo-Chobe River), has already drained and therefore is higher than the rest of the island.<sup>150</sup>

The quotation is doubly inaccurate. In the first place, examination of the colour version of the photomosaic shows that the dry sandy soil on the southwestern corner of the Island is not 'of the same texture as the mainland.'<sup>151</sup> Instead it is identical with the sediment deposits within the Chobe River to the west of the Island. This identity confirms that the channel within which the 'dry sandy soil' lies is the main channel of the Chobe River. It lies dead in the middle of the channel as defined by Professor Alexander. Nor is there any anomaly, as Botswana suggests, in the fact that this area has dried out early.<sup>152</sup> So have the similarly coloured and textured deposits upstream in what is indubitably the main channel of the Chobe. It is well known that in low energy gradient rivers portions of the bed may build up to a level higher than the surrounding area on either side of the river.<sup>153</sup>

192. There is, however, a more fundamental sense in which Botswana's discussion of the June 1997 photograph is wrong. BCM para. 436 states '[t]he photography was taken in June as the backed-up floodwaters of the Zambezi were starting to recede.' (emphasis added) This seems to be a further instance of the fundamental misconception manifested in the BCM comment on the November 1972 photograph (see para. 189, above), namely that the only source of the inundation of Kasikili Island is 'backed up flood waters' emanating downstream of the Island that are 'pushed upstream.'<sup>154</sup> These formulations would exclude any

<sup>149</sup> The BCM commentary (para. 425) begins by stating that '[t]his photography was undertaken as the high flood waters were receding . . .,' which is correct. But it then goes on to say, in apparent contradiction, that the photographs show 'very high water levels' or 'high water levels.' BCM, paras. 429, and 440, respectively. In fact, the peak occurred more than a month earlier, and the 1997 peak was itself abnormally low. Second Supp. Rep., paras. 13.10, 13.13, 13.16.

<sup>150</sup> BCM, para. 430. Note that this contradicts the finding from Dr. Sefe's *Sedimentological Study* that the top layer of the island consists of "clay, silt and mud," not dry sandy soil. BCM, App. 3, para. 35(i).

<sup>151</sup> See Fig. 6. following p. 73 supra. See also Second Supp. Rep., para. 13.14.

<sup>152</sup> BCM, para. 431.

<sup>153</sup> M. Morisawa, p. 131, Reply Annex 30; K.S. Richards (ed.), *River Channels* (1997), p. 372, Reply Annex 31.

<sup>154</sup> See also BCM, para. 394, where the so-called sub-channel is described as one 'into which flood



contribution from the overbank flow of the Zambezi across the floodplain reaching the Chobe River upstream of Kasikili Island. This proposition, which seems to be a central premise of Botswana's argument, flies in the face of reality. The flow across the flood plain to the Chobe River upstream of Kasikili Island is manifest on the satellite images appended to Professor Alexander's Main Report and in the illustrations in Figures 5 and 6 (following p. 20) of the Second Supplementary Report. As Professor Alexander shows, this overbank flow from the Zambezi upstream of Kasikili Island 'is the dominant source of flow in the Chobe River at Kasikili Island.'<sup>155</sup>

#### 4. Conclusions as to aerial photographs

193. The BCM treatment of the aerial photographs contains a truly extraordinary collection of mistakes, errors, misunderstandings, misconceptions, contradictions and inconsistencies. They are so pervasive as to undermine the credibility and reliability of Botswana's entire argument on this branch of the case.<sup>156</sup>

#### C. Navigability

194. Namibia's position is that navigability is not a criterion for identifying the main channel in this case, first, because this is 'a question of scientific fact, calling for expertise in hydrology, geology and hydrogeomorphology'<sup>157</sup> and, second, because the Chobe is not a navigable river over much of its length where it constitutes the border between Namibia and Botswana. It is dry for over half of this distance and swampy (and therefore difficult or impossible to navigate) for much of the rest. If the criterion of navigability is to be used, however, it cannot be as an abstract concept, but must be judged as a practical matter — 'in relation to the needs of the regional economy' — as Botswana says.<sup>158</sup> Namibia has

waters flow when backing upstream.'; para. 364 ('the Chobe River is independent of the Zambezi Basin except during persistent droughts when some flow from the Zambezi reaches the Chobe by defined and well confined channels such as the Bokalo, Mokama, and Kasai channels.')

<sup>155</sup> Second Supp. Rep. para. 1.9. It is true, of course, that at the beginning of the high water season there is a period when the inundation proceeds upstream, from east to west. But the flow reverses direction within a few days and the bulk of the water flooding the island comes from the west and the north. See NM, paras. 137-143; Second Supp. Rep. paras. 6.17-6.18.

<sup>156</sup> These deficiencies are not confined to the BCM discussion of aerial photographs. A more comprehensive listing is found in Chapter VIII.

<sup>157</sup> BM, p. 129 (First Conclusion).

<sup>158</sup> BM, para. 35.

developed these points at length in its Memorial and Counter-Memorial and there is no need to repeat that analysis.<sup>159</sup> Nevertheless, a number of times in the discussion of its scientific case, the BCM introduces the issue of navigability. In fact, two separate sub-sections of Chapter 6 — E(i) and H(i) — are entitled ‘[d]epth is the criterion of navigability.’ These matters are addressed in this Reply.

195. Namibia has already demonstrated that the depth of a channel cannot serve as a stand-alone measure of navigability.<sup>160</sup> It has also shown that if depth is relevant, the determinative value would not be average depth, but minimum depth, since it is the shallowest part of the channel that must be cleared by boats navigating in it. The soundings of the 1985 joint survey, upon which Botswana places such emphasis, show that the minimum depths in the two channels differ only marginally, if at all.<sup>161</sup> In his Second Supplementary Report, Professor Alexander produces evidence that the southern channel is, in fact, deeper at its shallowest point than the northern.<sup>162</sup> He took a series of photographs showing a herd of elephants crossing from the Botswana side of the river across the southern channel to Kasikili Island and thence across the northern channel to the Namibian side. The elephants are in deeper water in the southern than in the northern channel, and there is good reason to think that they instinctively follow the shallowest route on both legs of the journey.<sup>163</sup>

196. Professor Richards shows, using the soundings taken by the 1985 joint survey, that the western limb of the northern channel, from the bifurcation to the confluence with the Spur channel, has a mean depth of only 2.55 metres, as compared with 2.44 in the whole of the southern channel. He shows that the deeper section of the northern channel beyond this reach is in reality ‘a continuation of the spur channel.’ The western limb of the northern channel, he continues:

is now being slowly closed at its upstream end by sedimentation, and by the encroachment of the left-bank lateral bar . . . This encourages the flood flows to follow the channel to the south of the Island.<sup>164</sup>

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<sup>159</sup> See, e.g., NM, paras. 208, 211; NCM, paras. 6, 24, 43, 44, 45, 48, 79; see particularly NCM, Vol III, Section 11 (paras. 11.1-11.18).

<sup>160</sup> NM, paras. 131, 132, 157; id. Vol. VI para. 4.4; NCM, para. 28.

<sup>161</sup> NM, Vol. VI, para. 11.6; NCM, para. 46.

<sup>162</sup> Second Supp. Rep., Section 11.

<sup>163</sup> Id., para. 11.3. See also Main, Reply Annex 33, p. 120.

<sup>164</sup> Richards Rep., para. 30.

197. In any case, as Botswana stated in its Memorial, navigability must be judged 'in relation to the needs of the regional economy.'<sup>165</sup> The BCM also seems to accept that the correct test is the 'most used' channel.<sup>166</sup> Despite the BCM's protestations to the contrary,<sup>167</sup> there can be no doubt that the southern channel is the most used and the most closely associated with the needs of the regional economy. Like the photograph on Sheet 18s in the appendices to Professor Alexander's Supplementary Report, Photographs 46, 47 and 48 in the Second Supplementary Report show numerous boats in the southern channel. There are five tourist boats in Photograph 46 alone, and two each in Photograph 47 and 48.<sup>168</sup> The brochures from Chobe tourist resorts likewise evidence continuous use of the southern channel.<sup>169</sup>

198. These tourist boats have no difficulty in navigating the shallowest parts of the southern channel. Photograph 19s and 26s appended to Professor Alexander's Supplementary Report show the boats hard up against the bank of the southern channel in what appears to be hardly more than a metre or so of water.<sup>170</sup> The second photograph was taken on 22 September 1995 when water level in the river was the lowest on record to that time. On Photograph 10 of the BCM Attachment, the wake of a tourist boat can be made out in the southern channel fairly close to the bifurcation. It gives an indication of the relative size of the boats and the channel and shows that there is plenty of room for the tourist boats to navigate.

199. Mr. Girt Jehdus Visagie, the owner of the King's Den lodge at Kasika in Namibia, in an affidavit annexed to this Reply, swears that almost all the tourist boats go through the southern channel, and very few, except, obviously, those originating in Namibia, go through the northern. In fact, he says, lack of access to the southern channel seriously impairs his ability to serve the tourists and thus harms his business prospects.<sup>171</sup>

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<sup>165</sup> BM, para. 35.

<sup>166</sup> BCM, paras. 387, 389.

<sup>167</sup> Id., para. 387.

<sup>168</sup> Second Supp. Rep., pp. A1/23, A1/24.

<sup>169</sup> NCM, Vol. III, Illustrations, Sheet 17s.

<sup>170</sup> NCM, Vol. III, Illustrations, Sheet 14s, 18s.

<sup>171</sup> Reply Annex 22, Affidavit of G.J. Visagie. There is nothing mysterious about this preference for the southern channel. The tourists come to the Chobe primarily to see game, and the game is on the Botswana side of the river. When animals cross to the island, they are visible primarily from the southern channel because of the lower banks there.

200. The only evidence Botswana presents of commercial activity in the northern channel is a photograph of the *Zambezi Queen*.<sup>172</sup> The BCM states:

It is to be noted that the one sizeable ship at present navigating this section of the Chobe River can only use the northern channel. The *Zambezi Queen*, 42 metres in length and three storeys high, is operated as a tourist ship and solely uses the northern channel.<sup>173</sup>

The only accurate statement in this quotation is that the photograph depicts the *Zambezi Queen*. For the rest, this account is another figment of Botswana's imagination. The *Zambezi Queen* does not 'navigate' the Chobe River, nor is it 'operated as a tourist ship.' It was brought to its present location four years ago, down the Zambezi River from Katima Mulilo and through the anabranching channel at high water. It went through a short stretch of the eastern branch of the northern channel at this time before tying up at its present position, shown in the photograph, on the northern bank of the spur channel close to its confluence with the northern channel. For the last four years, it has been permanently moored at the King's Den lodge, where it supplies auxiliary accommodations for guests at the King's Den.<sup>174</sup> Mr. Visagie, the owner of the boat, testifies that he has no intention of moving the boat. If he did, he would have to take it back to Katima Mulilo, because it is too big to operate in the northern channel.<sup>175</sup>

201. The BCM is replete with references to reeds that choke the southern channel and make it unfit for navigation. Again, it deploys a photograph (BCM, p. 153), which, it says, shows 'the growth of reeds across the western entrance of the southern channel.'<sup>176</sup> Namibia has studied this photograph with care, and invites the Court to do so as well. It is at a loss to discover any reed growth that would prevent navigation. In fact, the photograph seems to show a broad and rather open waterway. Nor are there any signs of reeds obstructing the western entrance to the southern channel in the aerial photograph of June 1997, taken only three months earlier.

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<sup>172</sup> BCM, p. 133.

<sup>173</sup> *Id.* para. 347.

<sup>174</sup> Reply Annex 22, Affidavit of G.J. Visagie. See also brochures for the *Zambezi Queen* and the King's Den Lodge, Reply Annex 23.

<sup>175</sup> *Id.*

<sup>176</sup> BCM, para. 383.

202. It is true that the southern channel has not been free of aquatic vegetation at all times in the past. The misdated ‘May 1972’ aerial photograph<sup>177</sup> shows the channel clogged with Kariba weeds from the bifurcation past the first large loop to the east. As mentioned in NCM, the problem of Kariba weeds in the Chobe and other rivers of tourist interest was a matter of concern to both Botswana and South Africa in the mid-1970s. They undertook a joint and largely successful programme to eradicate the weeds, and they do not appear in later aerial photographs of the Island.<sup>178</sup>

203. Upon examination, the argument on navigability, like so much else in Botswana’s scientific case, turns out to be a good deal of ‘sound and fury signifying nothing.’

D. The Determination of the ‘Boundary between Namibia and Botswana around Kasikili Island’ within the Meaning of Article III(2) of the 1890 Treaty

204. As noted in Chapter I, Namibia’s Memorial reserved for later consideration the question of the exact location of the boundary within the main channel of the Chobe River.<sup>179</sup> Namibia foresaw at that time that ‘the location of the centre of the main channel would follow largely as a matter of course by reason of its dependence upon the manner in which the principal issue is resolved.’<sup>180</sup> That has indeed proven to be true, and now, at the conclusion of the examination of the scientific aspects of the case, it is appropriate to recapitulate the analysis that establishes the location of the boundary.

205. The scientific evidence has identified the main channel of the Chobe River as depicted originally on Diagram 4, Sheet 17 of the Appendices to Professor Alexander’s Main Report and as shown in Figures 16, 17, 18 and 19 of the Second Supplementary Report. The next step is to determine where the boundary lies within this main channel. This two-step procedure reflects the plain meaning of the text of the Treaty, and Namibia has advocated it from the beginning of its written pleadings.

206. To determine the boundary, the Court must reconcile the English and German versions of Article III (2) of the 1890 Treaty. The English text defines the boundary as ‘the centre of

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<sup>177</sup> See para. 164, *supra*.

<sup>178</sup> See *id.*, and n. 99, *supra*.

<sup>179</sup> NM, para. 160.

<sup>180</sup> NM, para. 159.

the main channel' of the River Chobe. The German text says '*im Thalweg des Hauptlaufes.*' (emphasis supplied) In Namibia's submission, the Court should construe both words as referring to the *thalweg* of the main channel, in its technical and geographical sense as the line of deepest soundings in that channel. The Court does no violence to the language by treating the words '*thalweg*' and 'centre' as synonymous in this context. Although the practice was by no means uniform, the use of the English word 'centre' to indicate the *thalweg* of a channel or a river was a perfectly acceptable usage.<sup>181</sup> Indeed, Article 3 of the Heidelberg Resolution of the Institute of International Law, upon which Botswana heavily relies,<sup>182</sup> provided

La frontière des Etats séparés par le fleuve est marquée par le thalweg, c'est à dire la ligne médiane du chenal.<sup>183</sup>

207. As the scientific analysis has shown, the appearance of the channel that flows to the south of Kasikili Island differs considerably according to the season of the year. When the Chobe River is flowing, the bulk of the flow goes through the broad conduit that Professor Alexander has identified as the main channel.<sup>184</sup> That is why it is the main channel. During the dry season, however, the river assumes the configuration that is familiar on the maps and most of the aerial photographs presented in this case. Both Professor Alexander and Professor Richards agree that the southern channel, in that configuration, is the *thalweg* channel of the main channel.<sup>185</sup> The main channel overlies this *thalweg* channel, so that during the high flow season, when there is flow in the Chobe River at Kasikili Island, the flow in the main channel submerges the *thalweg* channel. In the dry season, when the river assumes the configuration familiar from the maps and aerial photographs, the water that remains in the channel to the south of the Island continues to mark the *thalweg* channel of the main channel.

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<sup>181</sup> See NCM, paras. 54-58.

<sup>182</sup> BM, paras. 139-140.

<sup>183</sup> *Annuaire de l'Institut*, 1887-1888, p. 182. (emphasis added)

<sup>184</sup> Second Supp. Rep., Sec. 7, and Richards Rep., paras. 28, 29, 30, 31, 33, 35, 36. See also NCM, Vol. III, Supp. Rep., para. 5.19; NM, Vol. VI, para. 12.1.

<sup>185</sup> Second Supp. Rep., paras. 14.14, 14.19; Richards Rep., paras. 3, 4, 34.

208. This phenomenon is by no means unique to the Chobe River at Kasikili Island. It is characteristic of non-perennial rivers in arid regions. Namibia's pleadings illustrate a number of examples:

- the Chobe River at Ngoma Bridge (see Fig. 4, following p. 35, comparing the dry season photograph looking downstream taken on 20 September 1995 in the dry season with a photograph taken from the same point on 11 April 1998 in the high flow season).
- the Orange River (see Sheet 4 of the Appendices to Professor Alexander's Main Report).
- the Limpopo River (see *id.*, comparing dry season photograph taken on 26 September 1995 with high flow photograph taken 11 July 1996).
- the Mkuze River (see Second Supp. Rep., Photograph 62, p. A1/32, showing *thalweg* channel).
- the Mhlatusze River (see Second Supp. Rep., Photograph 63, p. A1/32, showing *thalweg* channel).

The same transformation occurs at Kasikili Island between the dry season and the season of high flow in the Chobe River.

209. The only alternative to the construction proposed by Namibia would be to accept the geometric middle line of the main channel as the 'centre.' But this would have the effect of disregarding entirely the word '*thalweg*' in the German text.

210. The interpretation of the Treaty that Namibia proposes, placing the boundary in the *thalweg* of the main channel, would mean that the boundary followed the line of deepest soundings in the southern channel. This would correspond to what is shown as the boundary on almost all the maps of the area since the time of the 1890 Treaty. And it would allow both parties full access to the navigational resources of the river for purposes of the tourist industry.<sup>186</sup>

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<sup>186</sup> Namibia has always been willing to allow Botswana to use the northern channel.

211. Namibia submits that the Court should answer the question submitted as to the boundary between Namibia and Botswana around Kasikili Island by determining,

first, that the 'main channel of the Chobe River' is the channel to the south of the Island defined by Professor Alexander, as indicated above, and

second, that the *thalweg* of that channel is the boundary.



## Chapter IV

### ‘SUBSEQUENT PRACTICE IN THE APPLICATION OF THE TREATY’ WITHIN THE MEANING OF ARTICLE 31(3)(b) OF THE VIENNA CONVENTION

#### A. Botswana’s Arguments as to the Meaning of Article 31(3)(b)

##### 1. In general

212. The subsequent conduct of the parties has long been acknowledged by the Court and other international tribunals as an important element in treaty interpretation.<sup>1</sup> It is also recognized as such by the general rule of interpretation of the Vienna Convention on the Law of Treaties. Subsequent conduct can be manifested in many ways: by agreement between the parties on particular issues in dispute, by actions of the parties on the ground, by diplomatic and internal correspondence, by statements of officials, by maps produced or used or accepted by the parties, and by silence or failure to respond when response would be called for to maintain a particular construction of the treaty involved.

213. Under the Vienna Convention, the subsequent conduct of the parties relevant to the interpretation of a treaty can take two forms: either (1) an explicit agreement or (2) a practice establishing the agreement of the parties regarding the interpretation of the treaty. The distinction is embodied in Article 31(3)(a) and (b) of the Vienna Convention, which read as follows:

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.

214. As the parties to the Anglo-German Treaty of 1890 have not entered into any agreement regarding its interpretation,<sup>2</sup> the subsequent conduct relevant to the present dispute is the

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<sup>1</sup> NM, paras. 171-174.

<sup>2</sup> Botswana argues that the discussions held with South Africa in 1984/86 resulted in such an

parties' subsequent practice in the application of the treaty as described in Article 31(3)(b). This practice, as Namibia has shown in this and in previous pleadings, clearly 'establishes the agreement of the parties regarding the interpretation of the treaty' in respect of the two main issues before the Court: first, that the boundary is in the channel that lies to the south of Kasikili Island, and, second, that the Island is part of the territory under the sovereignty of Namibia.

## 2. The correct interpretation of Article 31(3)(b) of the Vienna Convention on the Law of Treaties

215. Botswana seeks to persuade the Court that the 'practice' referred to in Article 31(3)(b) of the Vienna Convention as the basis for establishing the parties' agreement on interpretation must be common to, or jointly carried out by the parties.<sup>3</sup> The text of the article does not sustain this interpretation, so Botswana, in characteristic fashion, caricatures Namibia's position and offers a partial and incorrect account of the travaux préparatoires of the Convention. Thus, before responding to Botswana's substantive arguments on subsequent conduct, Namibia will examine its interpretation of Article 31(3)(b) of the Vienna Convention.

216. Botswana describes Namibia's interpretation of Article 31(3)(b) as an attempt to dilute the notion of subsequent practice in order to move away from the 1890 Treaty.<sup>4</sup> Botswana's allegation is based, however, on a mischaracterization of Namibia's position. According to Botswana, Namibia's Memorial 'seeks to establish that subsequent practice may be constituted exclusively by the "silence" or "inaction" of the parties: . . .'<sup>5</sup> (emphasis added) This account misrepresents Namibia's position. Namibia does not deny that Article 31(3)(b) requires affirmative conduct. What it maintains, however, is that the provision does not require affirmative conduct from all the parties to the treaty.<sup>6</sup> Thus, in the case of a bilateral

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agreement. In its Counter-Memorial Namibia demonstrated that there was no such agreement and, even if there had been, it would have been void *ab initio*. New evidence that has become available since the filing of the Counter-Memorial confirms Namibia's interpretation. This evidence is discussed in the final section of this chapter.

<sup>3</sup> BCM, paras. 237-240.

<sup>4</sup> BCM, paras. 238 and 240.

<sup>5</sup> BCM, para. 237.

<sup>6</sup> In its Memorial and Counter-Memorial, Namibia demonstrated that since the conclusion of the

treaty the practice of the parties regarding the interpretation of the treaty may be established through the conduct of one of the parties, provided that the other party does not dissent.<sup>7</sup>

217. Botswana makes much of a minor change introduced into the text of Article 31(3)(b) at the UN Conference that approved the Convention. Namibia's Memorial addressed this point and concluded that this change was merely linguistic and did not contradict its interpretation of the Convention.<sup>8</sup> Since Botswana raised this point in its Counter-Memorial, Namibia will expand on the evidence supporting this conclusion.

218. The clause on subsequent conduct in the *Draft Articles on the Law of Treaties* prepared by the International Law Commission, reads as follows: 'any subsequent practice . . . which establishes the understanding of the parties . . . .'<sup>9</sup> At the UN Conference on the Law of Treaties the word 'agreement' was substituted for the word 'understanding.' The object of this change, as Namibia explained in its Memorial, was to bring the English version of the Convention into line with the French and Spanish versions, which use the words 'accord' and 'acuerdo,' respectively. It was a minor change that did not alter the meaning of the clause, since the words 'understanding' and 'agreement' are synonymous, in the sense of identifying a matter on which the parties share a common view.

219. Botswana, however, argues that the substitution of the word 'agreement' for the word 'understanding' is a point of substance.<sup>10</sup> In support of this contention it invokes an amendment tabled by the Australian delegation which proposed to insert the word 'common' before the word 'understanding.' This amendment, though linked to the decision to substitute the word 'agreement' for the word 'understanding,' was eventually rejected. Botswana, however, relying on this link, concludes that the change in the wording of the subsequent practice clause is of major significance.

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1890 Anglo-German Treaty until well into the second half of this century, Kasikili Island was under the continuous jurisdiction and control of the Masubia of the Caprivi subject to the authority of the ruling power, with full knowledge and no objections from Botswana. Throughout this period there was thus affirmative conduct by Namibia and no dissent by Botswana or any of its predecessors in title.

<sup>7</sup> NM, paras. 175-177.

<sup>8</sup> NM, para. 177.

<sup>9</sup> *United Nations Conference on the Law of Treaties - First and Second Sessions: Documents of the Conference* (1968-1969) p. 37.

<sup>10</sup> BCM, para. 239.

220. An examination of the travaux préparatoires shows that Botswana is wrong. The Australian amendment — as acknowledged in the statement reproduced in Botswana's Counter-Memorial<sup>11</sup> — was prompted by the International Law Commission's commentary on the subsequent practice clause. In the Commentaries, the Commission explains that in an earlier draft the clause referred to 'practice which "establishes the understanding of all the parties."<sup>12</sup> (emphasis added) Eventually, however, the word 'all' was omitted. The Commission considered it redundant, because the phrase 'understanding of the parties' necessarily means understanding of all the parties.<sup>13</sup> The Commentaries also note that the practice to which that clause refers is practice that 'shows the common understanding of the parties.'<sup>14</sup> The reference in the Commentaries to the common understanding of the parties is what prompted Australia to propose that the word 'common' should be inserted before the word 'understanding.' In view of the statement in the Commentaries, however, it is clear that the objective of Australia's amendment was to reinforce the International Law Commission's interpretation of that clause: that the practice must reflect the agreement of both parties as to the meaning of the treaty.

221. Understanding the objective of the Australian amendment also explains its rejection. For after the Drafting Committee decided to substitute the word 'agreement' for the word 'understanding,' the Australian amendment became superfluous. The Chairman of the Drafting Committee made this point succinctly at the Conference when he explained the reason for rejecting the amendment: an agreement is always common and cannot be unilateral.<sup>15</sup> Thus, although the Australian amendment had a bearing on the slight change in the English version of Article 31(3)(b), the objective of the amendment was simply to underscore that the Convention requires the parties to be in agreement. It had nothing to do with the way in which the agreement is manifested.

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<sup>11</sup> BCM, para. 239.

<sup>12</sup> *United Nations Conference on the Law of Treaties - First and Second Sessions: Documents of the Conference* (1968-1969) p. 37.

<sup>13</sup> *Id.*, p. 42

<sup>14</sup> *Id.*

<sup>15</sup> *United Nations Conference on the Law of Treaties - First Session: Summary and Records of the Plenary Meetings and of the Committee of the Whole* (1968) p. 442.

222. The International Law Commission explicitly refers to this point in explaining its decision to omit the word ‘all’ from its earlier draft. It regarded the word ‘all’ as superfluous, but it also concluded that incorporating the word would create confusion. ‘It omitted the word “all” merely to avoid any possible misconception that every party must individually have engaged in the practice when it suffices that it should have accepted that practice.’<sup>16</sup> (emphasis added) This comment confirms Namibia’s position that Article 31(3)(b) does not require affirmative conduct from both parties to the treaty.

223. The decision in the *Beagle Channel Arbitration* also confirms Namibia’s position.<sup>17</sup> In that case, Argentina argued that Chile’s acts of jurisdiction over certain disputed islands did not qualify as subsequent conduct under Article 31(3)(b) because they were unilateral acts and, as such, did not express the common will of the parties. The Court of Arbitration flatly rejected this argument, stressing that Article 31(3)(b) does not specify the way in which the agreement was to be manifested. The Court then examined Chile’s acts of jurisdiction and found that they were public, well known to Argentina and consistent with the Treaty. ‘[U]nder these circumstances,’ the Tribunal concluded, ‘the silence of Argentina permits the inference that the acts tend to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves.’<sup>18</sup> The record of the subsequent conduct in the present dispute points to the same conclusion. Botswana’s silence in the face of Namibia’s public and continuous exercise of jurisdiction over Kasikili Island ‘tend[s] to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves.’

224. In the present case, the silence of the British authorities evidences something beyond mere acquiescence. The 1890 Treaty delimited boundaries not between sovereign territories but between the spheres of influence of the parties. According to Jan Verzijl, ‘[s]uch zones or spheres did not thereby become State territory proper, but as far as they were concerned an

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<sup>16</sup> *United Nations Conference on the Law of Treaties - First and Second Sessions: Documents of the Conference* (1968-1969) p. 42.

<sup>17</sup> *Beagle Channel Arbitration (Argentina v. Chile)* 1977, 52 I.L.R. p. 93.

<sup>18</sup> *Id.*, para.169, p. 224.

inchoate title was vested in the proclaiming or delimiting State(s) that could gradually develop into full sovereignty.’<sup>19</sup> Therefore, some form of positive assertion of jurisdiction or control was necessary if Britain was to perfect its title. The failure of the British authorities to make any such effort, in the face of the occupation and use of the Island by the Masubia of Caprivi, clearly reflects their understanding that the 1890 Treaty assigned Kasikili Island to the German sphere of influence.

225. The conduct of Namibia plus Botswana’s silence constitutes a ‘subsequent practice which establishes the agreement of the parties’ regarding’ the interpretation of the Anglo-German Treaty of 1890: the boundary is in the channel to the south of the Island, and Kasikili Island is in the territory under Namibia’s sovereignty.

#### B. Botswana’s Factual Arguments on Subsequent Conduct

226. Botswana’s argument on subsequent conduct is based on three propositions:

- That up to 1948 the parties to the Anglo-German Treaty ‘were of the opinion that the main channel in the vicinity of Kasikili/Sedudu Island passed to the north of the island.’<sup>20</sup>
- That the exchanges culminating in 1951 with the Trollope-Dickinson arrangement confirmed that the parties recognized the northern channel as the boundary and Kasikili Island as part of the Bechuanaland Protectorate.<sup>21</sup>
- That the 1984/86 discussions between Botswana and South Africa resulted in an agreement between the parties, authorized by the United Nations, regarding the application of the Anglo-German Treaty of 1890 that resolved the present boundary dispute in favour of Botswana.<sup>22</sup>

In this section Namibia shows that all of these propositions are incorrect.

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<sup>19</sup> Verzijl, J.H.W. *International Law in Historical Perspective*, Leyden, 1970, p. 495.

<sup>20</sup> BM, para. 165.

<sup>21</sup> BCM, paras. 241, 736, 732 and 729.

<sup>22</sup> BCM, para. 264.

1. Botswana's contention that until 1948 the parties to the Anglo-German Treaty were of the opinion that the northern channel was the main channel and that Kasikili Island was part of the Bechuanaland Protectorate<sup>23</sup>

227. Before looking at the Botswana's evidence in detail it is well to recall the 1949 statement of Sir Evelyn Baring, the British High Commissioner for the Bechuanaland Protectorate, which directly contradicts Botswana's contention. Kasikili Island, he said, 'has hitherto been regarded as part of the Caprivi Zipfel, since maps show that the main channel passes to the south of the Island.'<sup>24</sup>

228. Botswana presents three items of evidence in support of its contention: (1) a despatch from Lord Harcourt that does not refer to Kasikili Island, (2) a peculiar interpretation of the Eason Report and (3) an alleged permission granted by an official from the Bechuanaland Protectorate allowing the Chief of the Masubia to cultivate on the Island.

(a) Lord Harcourt's Despatch of 14 January 1911

229. Citing a despatch from Lord Harcourt, the British Colonial Secretary, Botswana asserts that in 1911 senior officials from the British Government held the view that the northern channel was the main channel.<sup>25</sup>

230. Lord Harcourt's despatch is addressed to the High Commissioner for South Africa. In it, he forwards correspondence relating to the dispute with Germany over the location of the boundary in the western sector, south of the village of Andara.<sup>26</sup> As he anticipates the possibility that the proposed arbitration with Germany might include the rest of the boundary between the Bechuanaland Protectorate and the Caprivi, he requests the High Commissioner to supply information about the sector of the boundary along the River Chobe.

231. The relevant paragraphs of Lord Harcourt's despatch read as follows:

I have the honour to acknowledge the receipt of your despatch, Confidential, No. 4 of the 30th November, relative to the boundaries of the Caprivi Zipfel, and to forward, for your information, copies of correspondence with the Foreign Office on this subject, from which you will observe that it is proposed

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<sup>23</sup> BM, para. 165; also BCM, paras. 13, 26, 34, 723 and 724.

<sup>24</sup> NM, Annex 66.

<sup>25</sup> BCM, para. 41.

<sup>26</sup> NM, para. 266.

to refer to arbitration the Article III of the Anglo German Agreement of 1890 which lays down the southern boundary of the territory.

I take this opportunity to observe that in the second clause of Article III the Anglo-German Agreement of 1890 it is stated that the boundary “descends the centre of the main channel of that river (i.e. the River Chobe) to its junction with the Zambesi”. As, in this section of its course the river divides into more than one channel which afterwards reunite, the question as to which is the main channel will require consideration. I have to request, with reference to the enclosure to Lord Selborne’s despatch, Confidential (2), of the 11th of April, 1910, that I may receive all available information from local sources in support of the view that the north channel is the main channel. Such information should be accompanied by a map and, if possible, by measurements of the streams, and should be in a form which can, if necessary, be laid before the arbitrator as part of the case of His Majesty’s Government.<sup>27</sup> (emphasis added)

232. It is hard to understand how Botswana can conclude that Lord Harcourt’s despatch reflects a firm view about the location of the main channel around Kasikili Island. It is clear that his purpose was to request information not yet available about the location of the main channel. This is why, shortly thereafter, Captain Eason was instructed to inspect the whole stretch of the boundary along the River Chobe.

233. Botswana would like the Court to believe that Lord Harcourt is referring specifically to the main channel around Kasikili Island.<sup>28</sup> This is obviously not the case. Lord Harcourt does not refer either to the main channel around Kasikili Island or around any particular island. If Lord Harcourt had any island in mind, it would have been Swampy Island on the Chobe River, which superficially resembles Kasikili Island, but is located some 170 kilometres to the west. Swampy Island was an important hunting ground for the Batawana, a tribe from northwestern Botswana.<sup>29</sup> There had been complaints by the Batawana who claimed that the 1890 Treaty had reduced their tribal reserve. The British authorities were thus concerned that the eventual allocation of Swampy Island to the Caprivi would lead to further deterioration of their relations with the Batawana. Hence, the strong representations by Resident Commissioner Panzera about the importance of claiming the Island: ‘What they

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<sup>27</sup> NM, Annex 44.

<sup>28</sup> BCM, paras. 41 and 723.

<sup>29</sup> See NM, Atlas, Map V, ‘Sketch Map of Bechuanaland Protectorate, 1:2,000,000.’ War Office, April 1909 GSGS No. 2460.



[the Batawana] would bitterly feel the loss of would be the island [Swampy Island] in the north-east corner . . . This island forms their most valuable hunting ground, containing elephant, &c.’<sup>30</sup>

(b) Eason’s Report

234. Botswana appears to be aware that, on its face, Lord Harcourt’s despatch does not support its case. So it argues that the despatch should be read in conjunction with the Eason report. The relevant paragraph of Eason’s Report reads as follows:

Two miles above the rapids lies Kissikiri Island. [H]ere I consider that undoubtedly the North should be claimed as the main channel. At the Western end of the island the North channel at this period of the year is over one hundred feet wide and eight feet deep. The South channel 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.<sup>31</sup>

235. According to Botswana, this paragraph, read together with Lord Harcourt’s despatch, make it clear ‘that the British Government already held the view that the northern channel was the main channel.’<sup>32</sup> The irony of this argument is that when these two documents are read together they lead to a conclusion that directly undermines Botswana’s case. For after Eason’s Report of 1912, Lord Harcourt and his colleagues in the British Government could not have been in any doubt that Kasikili Island was occupied by the people from the Caprivi. Britain, however, failed to enter a protest. Moreover, although Eason had suggested that there was a basis for making a claim to the northern channel, Britain did not make such a claim.

236. Eason was not an expert on rivers. His survey of the Chobe River had been commissioned in anticipation of litigation with Germany over the southern boundary of the Caprivi. He was asked, in accordance with Lord Harcourt’s instructions, to collect information ‘in support of the view that the northern channel is the main channel.’<sup>33</sup> (emphasis added) Eason’s report, therefore, reflects the tendentious character of Lord Harcourt’s instructions and cannot be considered as the opinion of an independent observer.

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<sup>30</sup> NM, Annex 39.

<sup>31</sup> NM, Annex 47.

<sup>32</sup> BCM, para. 34.

<sup>33</sup> NM, para. 44.

237. Eason's finding regarding the use of Kasikili Island by the people from the Caprivi is, however, significant. The Island, together with most of the Eastern Caprivi, is inundated for up to six months of the year. Fertile land is a scarce resource carefully husbanded by the Masubia authorities. Arrangements for the use of land were thus subject to strict political controls. The following extract from a report on the Eastern Caprivi by C.E. Kruger, Magistrate for the Eastern Caprivi in 1963 and Trollope's Assistant in the 1940s, briefly explains the land tenure arrangements of the Masubia:

New villages and fields are established with the permission of the chief after the village head and his men have sought out a place and approached the local headman, who in turn introduces the matter to the Kuta. The member having jurisdiction makes an inspection and demarcates if other people already established are in close proximity. Once the area set apart for fields has been fixed all the village inmates go with the head for each to get what he wants. There is no fixed limit and no payment. A newcomer to the village would also have his field allocated by the village head without reference to higher authority, once permission has been given for entry to the headman's area.<sup>34</sup>

238. Kruger's account is confirmed by the eyewitness testimony before the JTTE.<sup>35</sup> The allocation of land between and within villages was subject to strict procedures involving both central and local political structures of the Masubia. Agricultural activities of the Masubia of Kasika were thus a manifestation of the exercise of sovereign jurisdiction by the colonial rulers through the traditional authorities of the Masubia. Contrary to Botswana's distorted interpretation of Namibia's argument,<sup>36</sup> agricultural activities of the Masubia are relevant to the issue of subsequent practice not because they constituted title to Kasikili Island, but because they presupposed it. The political significance of the use of Kasikili Island by the Masubia of Kasika did not escape Eason.

239. Eason submitted his report to Panzera, the Resident Commissioner, who, on 3 September 1912, sent it to the High Commissioner in Pretoria without commenting on its contents.<sup>37</sup> On 23 September 1912, the High Commissioner forwarded Eason's Report to the Colonial Office in London, also without comment.<sup>38</sup> Panzera's silence is especially

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<sup>34</sup> NM, Annex 184.

<sup>35</sup> NM, Annex 1, p. 61.

<sup>36</sup> BCM, paras. 19, 679, 682.

<sup>37</sup> Reply Annex 13.

<sup>38</sup> Reply Annex 14.

significant for he had considerable experience in boundary matters and, as such, could not fail to be aware that land use is of fundamental importance in decisions about the location of boundary lines.<sup>39</sup> He was also a zealous guardian of the Bechuanaland Protectorate's territory, as illustrated by his despatch on Swampy Island.

240. Thus, the Eason report and its treatment by British officialdom does not support Botswana's assertion that the British authorities held the view that the northern channel was the main channel and Kasikili Island part of Botswana.

(c) The alleged permission to cultivate on the Island granted in 1924

241. Botswana argues that in 1924 and 1925 British authorities exercised sovereign jurisdiction over Kasikili Island.<sup>40</sup> The evidence adduced in support of this argument is contained in a 1948 report from Noel Redman, Assistant District Commissioner at Maun, to the Government Secretary of the Bechuanaland Protectorate. In this report, Redman recounts an incident that allegedly had taken place in the 1920s, more than 29 years earlier. The relevant sections of the report read as follows:

Since the attached report was prepared I have received further information from an inhabitant of the Island that in 1924 a Caprivi Chief named Liswaninyana applied to Captain Neale, the Resident Magistrate at Kasane, for permission for his people to plough on the Island and graze cattle there. This was evidently granted verbally as no written agreement is known. At this time Government Oxen were grazing on the Island but they were removed in 1925. Before 1924 the same informant told me that there was one Caprivi family ploughing there but they had no authority to do so.

In defence of the Claim of ownership on the grounds of prescription evidence could therefore be produced to show that this Government occupied the Island in 1925. This fact together with the acknowledgement by the people that they applied for permission to use the Island in 1924 should cause any claim of prescriptive rights to be rejected.<sup>41</sup>

242. Botswana interprets these paragraphs as showing 'a clear exercise of jurisdiction on behalf of the Bechuanaland Protectorate.'<sup>42</sup> This interpretation is patently wrong. In his

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<sup>39</sup> In 1896 Panzera participated in the demarcation of the tribal reserves of the Bechuanaland Protectorate and played a prominent role in the demarcation of the territory assigned to the Batawana. See Reply Annex 8.

<sup>40</sup> BCM, paras. 38, 165, 166.

<sup>41</sup> BM, Vol. III, Annex 22.

<sup>42</sup> BCM, para. 38.

report, Redman does not offer any substantial evidence that the Island had ever been under the control of the Bechuanaland Protectorate. The only evidence he offers is hearsay – indeed, double hearsay.

243. The suggestion that permission was granted ‘verbally’ is also suspect, because it would have been wholly inconsistent with British practice at the time. In other cases where people from one area under British rule wished to cultivate or use land in another, formal written permission was required, approved by higher authority and subject to annual renewal.<sup>43</sup> Similar formality was observed in extending privileges to missionaries and others to cultivate in an area. With Portugal, the British government concluded a formal treaty regulating trans-boundary cultivation across the border between Angola and Northern Rhodesia.<sup>44</sup>

244. Moreover, the BCM fails to recognize that in 1924, Captain Neale had a dual role. He was both District Commissioner for Kasane in the Bechuanaland Protectorate and administrator of the Eastern Caprivi under the League of Nations Mandate for South-West Africa. Thus, even if he had authorized Liswaninyana to cultivate on the Island, this action would not necessarily prove that the Protectorate exercised control over the Island. Given Captain Neale’s dual functions, his alleged authorization to use Kasikili Island cannot be properly assessed without first determining whether he was acting as administrator of the Eastern Caprivi or as administrator of the Bechuanaland Protectorate’s District of Kasane. If he was acting in his capacity as administrator of the Eastern Caprivi, the alleged authorization to use the Island would constitute evidence of Namibia’s control over the Island, not Botswana’s. Since Botswana does not state in what capacity Captain Neale was allegedly acting, the facts recounted in Redman’s report do not prove that British authorities exercised jurisdiction in Kasikili Island.

245. The testimony of eyewitnesses before the JTTE confirms that the Masubia never sought nor obtained permission to plough on the Island:

BOTSWANA COMPONENT: Did Chief Liswaninyana have the permission of the Resident Commissioner at Kasane, permission for his people to plough at the island and graze cattle there?

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<sup>43</sup> See NM, Annexes 50, 51. The matter is also discussed at NM, para. 258.

<sup>44</sup> See NM, Annex 8.

WITNESS: Chief Liswaninyana, that was his land. There's no one who could give him authority or power to go and plough there. We, his sons, we used to go there and plough there and there's no one from Namibia going and plough in Botswana.<sup>45</sup>

246. The JTTE proceedings also confirm that people from Kasane never farmed nor carried out any other activity on Kasikili Island.<sup>46</sup> Indeed, as acknowledged by the High Commissioner in 1951, 'the Island has been cultivated by Caprivi tribesmen for many years without dispute.'<sup>47</sup>

247. The foregoing shows that Botswana's claim that Britain exercised jurisdiction over Kasikili Island during the period 1924/25 lacks any substance.

(d) Conclusion

248. Botswana's contention that up to 1948 the parties to the Anglo-German Treaty of 1890 were of the opinion that the northern channel is the main channel is not sustained by the evidence. The practice of the parties throughout that period can be summarized as follows:

- Kasikili Island was occupied and regularly cultivated by the Masubia from Kasika. The traditional authorities of the Masubia had jurisdiction over Kasikili Island and controlled its use. Under the principles of indirect rule the political and legal control of Kasikili Island by the Masubia constituted an exercise of sovereign jurisdiction by the colonial powers.
- The occupation of Kasikili Island by the Masubia from Kasika was peaceful and well-known to the British authorities in the Bechuanaland Protectorate and in London. They failed, however, either to protest or to make a claim for the Island.

249. This practice, by the late 1940s had established the agreement of the parties that, under the 1890 Treaty, the boundary was located in the channel to the south of the Island and that Kasikili Island belonged to Namibia. This agreement is confirmed by Sir Evelyn Baring's statement that 'Kasikili Island has hitherto been regarded as part of the Caprivi Zipfel.'<sup>48</sup>

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<sup>45</sup> NM, Annex 2, p. 25. See also NM, para. 202, especially n. 63.

<sup>46</sup> NM, Annex 2, p. 25.

<sup>47</sup> NM, Annex 69.

<sup>48</sup> NM, Annex 66.

2. Botswana's contention that the exchanges that culminated in the 1951 Trollope-Dickinson arrangement confirmed that the parties recognized the northern channel as the boundary and Kasikili Island as part of the Bechuanaland Protectorate

250. The BCM restates Botswana's original interpretation that the exchanges culminating in the Trollope-Dickinson arrangement reflect the parties' understanding that the northern channel was the main channel. Its position is based on three related assertions:

- That in 1948 South Africa challenged the status quo and sought to modify the boundary.
- That Britain rejected the challenge and, instead, exercised jurisdiction over Kasikili Island.
- That, in the event, South Africa backed down and both parties recognized the northern channel as the main channel for the purpose of the Anglo German Agreement of 1890.

In this section Namibia shows that all these propositions are without substance.

251. The Namibian Memorial contained an extensive analysis of the Trollope-Dickinson arrangement and the correspondence that preceded it.<sup>49</sup> The Counter-Memorial also responded to Botswana's interpretation of these events.<sup>50</sup> Although it is not necessary to repeat these arguments here, it is useful to re-examine Botswana's interpretation in the light of the version of the facts contained in its Counter-Memorial.

(a) Botswana's allegation that South Africa challenged the status quo and sought to modify the boundary

252. Botswana asserts that during the exchanges of 1948 to 1951, South Africa issued a challenge to the status quo in proposing a modification of the boundary.<sup>51</sup> This assertion is based on a misconception about the status quo and on a distorted interpretation of the diplomatic correspondence that led to the Trollope-Dickinson arrangement. The discussion in Section 1 above shows conclusively what the status quo was as of the end of 1947: Kasikili Island belonged to Namibia and the southern channel formed the boundary between

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<sup>49</sup> NM, paras. 274-279.

<sup>50</sup> NCM, paras. 102-106.

<sup>51</sup> BCM, paras 45, 46, 736.

the two territories. Thus, on the face of it, Botswana's first point is implausible. In this section, Namibia concentrates on Botswana's interpretation of the diplomatic exchanges of the period 1947-1951.

253. South Africa's position during the negotiations is reflected in two letters addressed to the High Commissioner, one of 14 October 1948, and the other of 14 February 1949.<sup>52</sup> These letters show that far from attempting to subvert the status quo, South Africa's proposal to Britain was to formalize it through an explicit agreement. In both letters South Africa highlights the crucial fact that Kasikili Island had been used by the people from the Caprivi since at least 1907, and their presence there had never been disputed. Indeed, South Africa characterizes their occupation of the Island as a right:

From the available information it is clear that the 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 Bechuanaland Authorities.<sup>53</sup>

254. After a brief period of negotiations, the British High Commissioner accepted South Africa's proposal and forwarded it to London recommending its acceptance.<sup>54</sup> Botswana makes much of the fact that in his dispatch to London the High Commissioner referred to South Africa's proposal as 'a slight adjustment of the boundary.' Botswana fails to mention, however, that in the same dispatch the High Commissioner also refers to South Africa's initiative as a proposal 'to set the boundary on the southern channel,' thus fixing or making firm a boundary line that the parties, in their practice, had already recognized. In any event, it is unnecessary to quibble about isolated phrases in an otherwise extensive correspondence. The fact is that the High Commissioner accepted South Africa's proposal because, as he put it, the Island had 'hitherto been regarded as part of the Caprivi Zipfel.'<sup>55</sup> Thus, by endorsing South Africa's proposal, the High Commissioner was reaffirming the status quo.

255. As it turned out, the British Government decided not to enter into a formal agreement, opting instead for an administrative arrangement. Botswana, again misinterpreting the available evidence, claims that this decision shows Britain's determination to resist South

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<sup>52</sup> NM, Annexes 63, 65.

<sup>53</sup> NM, Annex 65.

<sup>54</sup> NM, Annex 66.

<sup>55</sup> Id.

Africa's challenge to the status quo.<sup>56</sup> The reason why the British Government decided not to enter into a formal agreement had nothing to do with the merits of South Africa's proposal. The High Commissioner discloses the British motivation in a letter to the South African Government: 'I am afraid that they [the Commonwealth Relations Office] have found this proposal to be beset by legal complications of an international nature, the solution of which would entail complications disproportionate to the importance of the matter at issue'.<sup>57</sup> The 'legal complications' are explained in a despatch from the Commonwealth Relations Office to the High Commissioner. They arose from South Africa's refusal to recognize the UN as the supervisory body of the Mandate for South-West Africa. Under Article 7 of the Mandate, any decision regarding the boundaries of Namibia – even one confirming the status quo – required approval by the body in charge of the supervision of the Mandate. South Africa's refusal to acknowledge UN jurisdiction generated 'considerable legal and political uncertainty'.<sup>58</sup> It is not surprising, then, that the British Government, though agreeing with the substance of South Africa's proposal, should have opted for a low key administrative arrangement, rather than a formal agreement.

256. Thus, Botswana's contention that South Africa challenged the status quo and proposed a modification of the boundary is unsubstantiated. On the contrary, what South Africa sought during those negotiations was to formalize the status quo through an agreement.

(b) Botswana's allegation that Britain, with South Africa's acquiescence, exercised jurisdiction over Kasikili Island

257. Botswana's allegation that the British Government exercised jurisdiction over Kasikili Island is based solely on the High Commissioner's initial response to the proposal from South Africa to formalize the status quo.<sup>59</sup> In it, the High Commissioner suggests that the matter could be resolved by introducing a system of annual permits to use the Island and states that his officials in the Bechuanaland Protectorate had already instructed the District Commissioner at Kasane to issue such permits.<sup>60</sup> Since South Africa had exercised

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<sup>56</sup> BCM, para. 757.

<sup>57</sup> NM, Annex 69

<sup>58</sup> See paras. 259-262, *infra*.

<sup>59</sup> BCM, paras. 169, 170, 174.

<sup>60</sup> NM, Annex 64.



jurisdiction over the Island from 1929, when it assumed direct responsibility under the Mandate, it vigorously rejected the High Commissioner's suggestion and reiterated its initial proposal. Ultimately, the High Commissioner accepted this proposal. As a result, the instructions mentioned in his letter were never implemented and were eventually withdrawn.<sup>61</sup>

258. The High Commissioner's initial response is not surprising in view of his unfamiliarity with conditions around Kasikili Island. After visiting the area, however, he changed his mind. As he recognizes in his letter of 10 May 1951 addressed to the South African Government, Kasikili Island had been cultivated by the Masubia from the Caprivi 'for many years without dispute.'<sup>62</sup> After acquiring first-hand knowledge of the area, the High Commissioner was able to understand the basis of South Africa's proposal. Accordingly, he accepted it and referred it to London for decision.<sup>63</sup>

259. In his letter of 10 May 1951, the High Commissioner again refers to the permits, stating that the instructions issued to the Assistant District Commissioner would be maintained.<sup>64</sup> A proper interpretation of this statement, along with other ambiguous phrases contained in the letter, must take account of the delicate situation created by South Africa's continuing refusal to accept UN jurisdiction.

260. It may be recalled that South Africa at first sought to enlist UN support for the annexation of Namibia. When this move failed, South Africa declared that it no longer had international obligations with respect to the area, since in its view, the Mandate had lapsed. In response, on 6 December 1949, the General Assembly requested an Advisory Opinion from the Court on the status of the territory of South West Africa.<sup>65</sup>

261. The Court confirmed that South Africa continued to have obligations under the Mandate. On the question whether South Africa could unilaterally modify the status of the

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<sup>61</sup> NCM, Annex 22.

<sup>62</sup> NM, Annex 69.

<sup>63</sup> NM, Annex 66.

<sup>64</sup> When the issue was remitted to the local administrators for resolution, Trollope adamantly refused to countenance the idea that the Masubia should cultivate on the Island by permission of the British authorities. See NM, Vol IV, Annex 69.

<sup>65</sup> *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128

Territory, the unanimous opinion of the Court was negative. According to the Court, ‘the competence to determine and modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations.’<sup>66</sup> (emphasis added) Nevertheless, South Africa continued to defy the authority of the United Nations.

262. The legal and political uncertainty created by South Africa’s dispute with the UN had a direct impact on the ongoing negotiations over the boundary at Kasikili Island. Although the British government had decided, in October 1949, to opt for an administrative arrangement rather than a formal agreement,<sup>67</sup> it did not immediately inform South Africa of this decision. The decision was taken only two months before the General Assembly’s request for an Advisory Opinion, and negotiations over the request were undoubtedly proceeding in New York. As noted above, the Advisory Opinion and South Africa’s response did not resolve the political uncertainty, and Britain continued to postpone its official response to South Africa. It was only on 10 May 1951 — nearly 18 months after the initial British decision and almost a year after the Court’s Advisory Opinion — that Britain finally communicated its decision to South Africa.

263. The delay can be readily explained. Although Britain disagreed with South Africa’s behaviour towards the UN and with its racist policies at home, it could not afford to challenge them openly. South Africa was a founding member of the Commonwealth and played a key economic and strategic role within the British Empire. On the other hand, because of the pressure of domestic and international public opinion, the British government had to proceed with extreme caution so as to avoid giving the impression that it was supporting or adding fuel to South Africa’s contumacious behaviour towards the United Nations.<sup>68</sup> Hence the ambiguous and somewhat elliptical tone of the High Commissioner’s letter of 10 May 1951. The letter accepts South Africa’s proposal to confirm the status quo at Kasikili Island, but it is worded in such a way as to pre-empt possible allegations that Britain and South Africa

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<sup>66</sup> *Id.*, p. 144.

<sup>67</sup> NM, Annex 68; BM, Annex 28.

<sup>68</sup> The General Assembly’s decision to ask the Court for an Advisory Opinion posed a dilemma to Great Britain. As an important colonial power it naturally had an interest in the Court’s Opinion. Accordingly, the Colonial Office proposed that Britain should intervene in the proceedings. The Cabinet, however, decided against it mainly because of the likelihood that such intervention could be construed as implying support of South Africa’s position. (Reply Annex 15) For an outline of Britain’s policy towards South Africa see the Cabinet Memo of 25 September 1950. (*Id.*)

were in any way determining or modifying any part of the territory of Namibia without the consent of the United Nations. The crucial point is, however, that both the officials in London and the High Commissioner agreed to the substance of South Africa's proposal, i.e., to maintain the status quo at Kasikili Island. The ensuing negotiations that culminated in the Trollope-Dickinson administrative arrangement reflected the status quo: 'that Kasikili Island continue to be used by Caprivi tribesmen and that the Northern Waterway continue to be used as a "free for all" thoroughfare.'<sup>69</sup>

(c) The allegation that both parties recognized the northern channel as the main channel for the purpose of the Anglo German Agreement of 1890

264. This allegation consists of two false propositions. The first is that 'British officials had at all stages taken the position that the northern channel was the main channel for the purpose of the Anglo German Agreement of 1890.'<sup>70</sup> The second is that '[A]t no stage did any South African official challenge the view that the northern channel constituted the main channel for the purposes of the Anglo German Agreement.'<sup>71</sup>

265. The inference Botswana would like the Court to draw from these propositions is that the outcome of the negotiations was the recognition of the northern channel as the boundary around Kasikili Island. The available evidence shows, however, that neither Britain nor South Africa regarded the mistaken finding of the Trollope-Redman Report about the northern channel as conclusive.

266. As explained above, Britain refrained from entering into a formal agreement with South Africa because of the political uncertainty regarding the Mandate. In the event, however, the administrative arrangement confirming the status quo, worked out by Trollope and Dickinson, was endorsed by senior political authorities of the Bechuanaland Protectorate.<sup>72</sup> Thus, at no stage during these negotiations did Britain recognize the northern channel as the main channel for the purposes of the 1890 Treaty.

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<sup>69</sup> NM, Annex 71.

<sup>70</sup> BCM, para. 737.

<sup>71</sup> BCM, para. 47.

<sup>72</sup> NM, Annex 50.

267. South Africa, for its part, also did not regard the findings of the Trollope-Redman Report on the main channel as conclusive. Indeed, its proposal to formalize the status quo<sup>73</sup> shows that for South Africa the decisive factor in determining the boundary was the use of the Island by the Masubia. That this view was firmly held by South Africa is established by its internal correspondence.<sup>74</sup> Botswana relies heavily on a letter from Trollope to his superiors in which he offers his views on the alternatives open to the Government regarding the boundary around Kasikili Island.<sup>75</sup> This letter does not support Botswana's case, however. Trollope's basic point is that a failure of South Africa to retain Kasikili Island within Namibia would amount to a dereliction of duty.<sup>76</sup>

268. Trollope and Redman reported on two matters: their view as to the location of the main channel and the facts as to the use of the Island. On the first, their faulty methodology led them to the wrong conclusion. On the second, they confirmed the long, uninterrupted and undisputed use of the Island by the people of the Caprivi. At the beginning of the century, when Eason was instructed to carry out a survey of the boundary along the River Chobe he also reported on these two matters. Likewise, during the negotiations leading up to the Trollope/Dickinson arrangement, both Britain and South Africa regarded the long uninterrupted use of Kasikili Island as crucial in the determination of the boundary. In doing so they were giving effect to the 1890 Treaty by applying its general terms to a specific area along the River Chobe.

(d) Conclusion

269. It has been demonstrated that Botswana's interpretation of the diplomatic exchanges that led to the Trollope-Dickinson arrangement is wrong. The outcome of these negotiations was a continuation of the status quo that placed Kasikili Island in Namibia. Britain did not, at any time during this period, exercise sovereign jurisdiction over Kasikili Island. Moreover, the exchanges confirm that Britain and South Africa continued to regard the use and occupation of Kasikili Island by the people from the Caprivi as central in the interpretation and application of the 1890 Treaty.

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<sup>73</sup> NM, Annexes 63 and 65.

<sup>74</sup> NM, Annex 62, p. 278.

<sup>75</sup> BCM, para 745.

<sup>76</sup> NM, Annex 61.

3. Botswana's contention that the 1984/86 discussions between Botswana and South Africa resulted in an agreement between the parties regarding the application of the Anglo-German Treaty of 1890 that resolved the present boundary dispute in favour of Botswana

270. Following the shooting incident of 25 October 1984 in the area around Kasikili Island, Botswana and South Africa held a series of discussions aimed at preventing the repetition of such incidents. Based upon a misinterpretation of the rules of international law applicable to the status of Namibia at that time and a distortion of the facts, Botswana contends that these meetings resulted in an international agreement that resolved the boundary issue in favour of Botswana.

271. In its Memorial, Botswana characterized the outcome of these meetings as subsequent conduct of the parties to the 1890 Treaty within the terms of Article 31(3)(a) of the Vienna Convention. Using the wording of the Vienna Convention, it argued that 'the international agreement concluded at Pretoria constitutes "an agreement between the parties regarding . . . the application of the Anglo-German Agreement."' <sup>73</sup> The BCM reaffirms this interpretation of the 1984/86 discussions, asserting that their outcome was legally binding and conclusive. <sup>74</sup>

272. Namibia dealt extensively with this contention in its Counter-Memorial where it demonstrated that the 1984/86 discussions could not have resulted in a binding international agreement. <sup>75</sup> At the time of these discussions neither South Africa nor Botswana had the legal capacity to enter into treaty relations in respect of Namibia. The UN General Assembly had terminated the Mandate for South West Africa in 1966, and, accordingly, South Africa no longer had any right to administer the territory or to enter into treaty obligations on behalf of Namibia. <sup>76</sup> Moreover, the Security Council had determined that South Africa's presence in Namibia was illegal and declared that all actions taken by South Africa on behalf of or concerning Namibia after the termination of the Mandate were illegal and invalid. <sup>77</sup>

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<sup>73</sup> BM, para. 182 and BCM, para. 154.

<sup>74</sup> BCM, paras. 73, 78, 87.

<sup>75</sup> NCM, para. 107-135.

<sup>76</sup> G.A. Res. 2145 (XXI), 27 October, 1966, Official Records of the General Assembly, Twenty-First Session, Supplement No. 16 document A/6316.

<sup>77</sup> S. C. Res. 276, 30 January, 1970.

273. At the same time, Botswana, as a member of the United Nations, had a legal obligation to refrain from dealings with South Africa which would have implied recognition of its illegal occupation of Namibia. In particular, as the Court confirmed in its 1971 Advisory Opinion, Botswana had an obligation to abstain from entering into treaty relations in all cases in which the Government of South Africa purported to act on behalf of or concerning Namibia.<sup>82</sup> In short, neither South Africa nor Botswana had the legal capacity to enter into any bilateral agreement or to apply any pre-existing agreement regarding Namibia. Hence, even if during the 1984/86 discussions Botswana and South Africa had purported to reach an agreement on Namibia's boundaries, such agreement would have been void *ab initio* and without legal effect. In fact, however, as the NCM shows, the two parties had no intention of concluding an international agreement.<sup>83</sup>

274. It will be recalled that following the shooting incident of October 1984, a delegation from Botswana travelled to New York for discussions with UN officials and SWAPO representatives. Botswana, relying on minutes prepared by its own officials, implies that at these meetings the UN authorized it to resolve the boundary dispute at Kasikili Island.<sup>84</sup> Namibia demonstrated in its Counter-Memorial that Botswana neither sought nor obtained authorization from the United Nations to enter into any type of binding agreement with South Africa.<sup>85</sup> After filing the Counter-Memorial, Namibia requested the UN Secretariat to carry out an archival search for any record or document on the shooting incident of October 1984 or on any meeting held by Botswana with United Nations' officials in that time frame. The search covered the period 1984-1990 and included documents maintained by the office of the Secretary-General, the UN Council for Namibia, the Commissioner for Namibia, the General Legal Division and the Office of the Special Representative for Namibia. If there had been any UN authorization or approval of the type suggested by Botswana, it is inconceivable that it would not have been recorded in one or more of these archives. However, this extensive search produced only one document, an *aide memoire* of a meeting between Botswana's

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<sup>82</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 58.

<sup>83</sup> NCM, paras. 126-135.

<sup>84</sup> BM, paras. 181-199; BCM paras. 72-78.

<sup>85</sup> NCM, para. 119.

ambassador to the UN and the Secretary General.<sup>86</sup> This document fully confirms Namibia's interpretation of the New York meeting and the character of the 1984/86 exchanges. It directly contradicts Botswana's attempt to imply that it had the approval of the UN for the negotiations with South Africa. It shows that the New York discussions were reported to the Secretary General purely for informational purposes, and that no action of support or approval was sought by Botswana or taken by the UN. The document also confirms Namibia's analysis of the 1984/86 discussions as essentially political in character and oriented to security matters. Their aim was to prevent the repetition of border incidents along the Chobe River boundary.<sup>87</sup>

275. The evidence thus disproves Botswana's claim that it was assiduous in its consultation with the UN and had obtained its approval to resolve the boundary dispute.<sup>88</sup> Moreover, its repeated assertion that the 'joint survey report of 1985' was 'published'<sup>89</sup> are also false.

276. Botswana is reduced to a transparently erroneous charge of inconsistency and, incredibly, to impugning Namibia's good faith in its opposition to the South African apartheid regime.<sup>90</sup> The charge of inconsistency is based on a willfully distorted interpretation of two passages in Namibia's Memorial. The first states that after the termination of the Mandate, South Africa could not take any action to limit or derogate from Namibia's rights.<sup>91</sup> The second is a transcription of a letter from South Africa's Foreign Minister stating that the South African Government had never recognized Botswana's claim to Kasikili Island.<sup>92</sup> The alleged inconsistency is that Namibia relies on South Africa's letter to reject Botswana's interpretation of the 1984/86 discussions, while invoking the termination of the Mandate to invalidate the so-called agreement of 1984/86.

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<sup>86</sup> Reply Annex 6.

<sup>87</sup> NCM, para. 127.

<sup>88</sup> BCM, para. 77.

<sup>89</sup> BCM, paras. 119, 122.

<sup>90</sup> BCM, para. 79.

<sup>91</sup> NM, para. 255.

<sup>92</sup> NM, para. 256.

277. There is, of course, no inconsistency. The letter quoted in Namibia's Memorial merely states a fact: that South Africa never recognized Botswana's claim to Kasikili Island. This fact, as Namibia has shown, is also established by the rest of the available evidence. Namibia's contention that the 1984/86 discussions could not lead to an international agreement is based on a careful analysis of the law that deprives the parties of any power to conclude such an agreement. Both passages are correct, and nothing in one contradicts anything in the other. Namibia was entitled to seek clarification from the Foreign Minister of South Africa, the *de facto* administering power over Namibia at the relevant time, as to a point raised by Botswana. In so doing, Namibia did not in any way rely on the so-called agreement of 19 December 1984, which it has consistently maintained is void.

278. In the end, Botswana is reduced to an unacceptable attempt to taint Namibia with the legacy of apartheid:

It is a sad commentary that, today, Botswana and Namibia find themselves at loggerheads over a boundary dispute inherited from the days of apartheid South Africa, which was the *de facto* power in Namibia until 21 March 1990. It is not beyond the capacity of apartheid South Africa that, when anticipating its own demise, it should decide to bequeath its own legacy of instability to haunt independent African countries long after it had been eradicated as an unworkable and unsustainable system of government.<sup>93</sup>

279. Botswana's contention that the 1984/86 discussions with South Africa constituted subsequent conduct of the parties to the Anglo-German Treaty of 1890 lacks any substance. No amount of empty rhetoric will hide this fact.

### Conclusion

280. In its Memorial and Counter-Memorial, Namibia showed an unbroken practice, dating from the signing of the 1890 Treaty until at least the independence of Botswana, that 'establishes the agreement of the parties regarding [the] interpretation' of that Treaty, within the meaning of Article 31(3)(b) of the Vienna Convention. According to this practice, which is comprised of continuous acts by Namibia and silence and acceptance by Botswana, Kasikili Island lay within the Caprivi Strip. This chapter has shown that the arguments on which Botswana relies to negate this subsequent practice are not supported by the evidence. The materials analyzed in this Chapter further confirm that Namibia and its predecessors in

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<sup>93</sup> BCM, para. 130.



title exercised exclusive sovereign jurisdiction over Kasikili Island with full knowledge and without objection from Botswana or any of its predecessors in title. The record of the subsequent practice unambiguously establishes the parties' agreement regarding the location of the boundary in the channel to the south of Kasikili Island and the attribution of the Island to Namibia.

## Chapter V

### THE MAP EVIDENCE RELATING TO THE INTERPRETATION OF ARTICLE III(2) OF THE 1890 TREATY

281. Twenty-six maps produced by the predecessors in interest of the parties to this case and showing Kasikili Island have been discussed in the pleadings thus far. Of these, 16 show Kasikili Island in Namibia, nine do not show the boundary and only one apparently shows the boundary in the northern channel.<sup>1</sup> As explained above, Namibia believes that the most important maps in this case are those published by the authorities that had political responsibility for both Namibia and Botswana prior to independence. — Germany, Great Britain, South Africa and the United Nations.<sup>2</sup> All of these show the boundary in the southern channel and must be taken as reflecting their understanding of the meaning of Article III(2) of the 1890 Treaty. Maps published by third parties and Botswana after independence carry little weight. In the face of this unusual uniformity and coherence of the map evidence, the BCM has produced some 50 pages of confusing and obfuscating discussion of the maps themselves, introduced by an effort to denigrate the significance of the evidence of maps in boundary disputes. This Chapter deals first with Botswana's general legal and theoretical arguments aimed at disparaging the significance of map evidence and second with some of the more significant of its comments on specific maps. A comprehensive response in full detail to the BCM's comments on specific maps is given in Annex 1, an expert report by Col. Dennis Rushworth, formerly Director of the Mapping and

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<sup>1</sup> See Annex 1, para. 1(b). The maps are listed in *id.* Part IV, para. 29 and the breakdown is shown on p. 23. The one apparent exception is South West Africa 1:50,000 Sheet 1725CC With military overprint 1984. This is an overprint of South West Africa 1:50,000, Sheet 1725CC Edition 3, 1982, which does not show the boundary. The 1984 overprint shows a demarcation line in red in the northern channel. On the basis of close analysis of the cartographic and military/political context, Col. Rushworth concludes that the overprint is not in fact a depiction of the boundary between the two countries, but of the limits of patrolling agreed to between Namibian and Botswana commanders on the ground after the shooting incident of October 1984. Col. Rushworth did not include in his listing maps published by Botswana after independence because they are the product of one of the parties. Namibia has produced no maps of the area since independence.

<sup>2</sup> See Chapter I, para. 36, *supra*.

Charting Establishment at the British Ministry of Defence and an acknowledged authority in this field.<sup>3</sup> It should be noted that BCM Appendix 1, a memorandum purporting to answer Col. Rushworth's first report, discloses neither the name nor the cartographic credentials of its author. Such comments as it contains must therefore be regarded as suspect.

A. General Legal and Theoretical Considerations as to the Map Evidence  
in this Case

1. The relevance and weight of map evidence in boundary determinations

282. Citing Professor Ian Brownlie, the BCM asserts that map evidence is to be used 'solely as corroboration.'<sup>4</sup> Whatever Professor Brownlie's may think, Botswana's approach does not accord with modern judicial and arbitral practice. The current view of the matter is authoritatively set out in the *Beagle Channel* award:

Historically, map evidence was originally, and until fairly recently, admitted by international tribunals only with a good deal of hesitation: the evidence of a map could certainly never *per se* override an attribution made, or a boundary-line defined, by Treaty, and even where such an attribution or definition was ambiguous or uncertain, map evidence of what it might be was accepted with caution. Latterly, certain decisions of the International Court of Justice have manifested a greater disposition to treat map evidence on its merits. (citing *Minquiers and Ecrehos*, *I.C.J. Reports* 1953, p. 1; *Sovereignty over Certain Frontier Lands*, *I.C.J. Reports* 1959, p. 209; the *Temple of Preah Vihear*, *I.C.J. Reports* 1962, p. 6)<sup>5</sup>

In the *Temple* case, it will be recalled, the Court accepted one particular map as defining the boundary.<sup>6</sup> It reached this conclusion despite a major error of cartography in placing the boundary on the map and a considerable amount of non-cartographic evidence that the boundary should have been elsewhere.

283. The position taken in the *Beagle Channel* case has been continued and confirmed by the Court and other tribunals:

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<sup>3</sup> Col. Rushworth's qualifications are in NM, Vol. IV Annex 102, p. 53.

<sup>4</sup> BCM, para. 537.

<sup>5</sup> *52 International Law Reports*, at p. 202.

<sup>6</sup> *I.C.J. Reports* 1962, p. 6.

- In the *Frontier Case (Burkina Faso/Mali)*, map evidence, along with other evidence, was used to decide how, in general, to allocate the disputed area. One particular French map was the major piece of evidence used by the Court as the basis against which to judge other evidence and as the framework of the actual delimitation in detail.<sup>7</sup>
- In the portion of the *Land, Islands and Maritime Frontier Dispute (El Salvador /Honduras)*<sup>8</sup> dealing with the land boundary, the Birdseye map was the only map evidence of consequence, and from it a proposed watershed definition of the western part of the first sector of the boundary was derived in 1935.<sup>9</sup> The Court accepted this line. Along the remainder of the first sector, and for virtually all of the second, third, fourth and fifth sectors, the main evidence was the records of historic land grant surveys translated on to modern maps by the parties.<sup>10</sup> The cartographic expressions of the land grant surveys were, in all cases, accepted as the basis of the judgement. In the sixth sector, the dispute concerned the main channel of the River Goascoran through its delta at the time of the separation from Spain. Having in principle accepted the course claimed by Honduras, the Court accepted as the delimited line, without any other evidence, the particular detailed channel marked on a map produced by Honduras.<sup>11</sup>
- In the *Taba case (Egypt/Israel)*, the Tribunal accepted a particular British map of 1915 as evidence of the accepted location of the boundary at Taba during the Mandate period (1922-1948), which it had decided was the critical period in determining the dispute.<sup>12</sup>

284. Of course, the function of maps differs depending upon the circumstances. Some maps provide important background information, like Bradshaw's map in the present case, which formed the basis for the depiction of the area around Kasikili Island in some later maps.<sup>13</sup> Maps after the 1890 Treaty may reveal the understanding of one or the other of the parties as

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<sup>7</sup> *I.C.J. Reports* 1986, p. 99.

<sup>8</sup> *I.C.J. Reports*, 1992, p. 351.

<sup>9</sup> *Id.*, pp. 411, 421.

<sup>10</sup> *Id.*, p. 388.

<sup>11</sup> *Id.*, p. 552.

<sup>12</sup> *R.I.A.A.* Vol. 20, pp. 36, 67.

<sup>13</sup> Bradshaw, it will be recalled, fully depicts only the southern channel, while leaving the northern channel speculative. This may be some indication of his view of the comparative importance of the two.

to the meaning of the relevant words of the Treaty. Thus, on the 1909 Bechuanaland map<sup>14</sup> the words 'Main Channel' appear higher up the Chobe, in the vicinity of Swampy Island, in a location where, on the 1889 map used at the time of the conclusion of the 1890 Treaty, the words 'Large island between the two main branches of the Chobe' were written. This change suggests that in the years immediately following the Treaty the expression 'main channel' had nothing to do with navigation or navigability of the river.

285. Likewise, the date of the map's publication may affect the weight it carries or the purposes for which it is used. For example, the closer the time of publication to the time the Treaty was signed, as in the case of the Seiner map of 1909 showing the boundary to the south of the Island, the more it may be thought to reflect the understanding of the parties. Botswana, however, proposes a 'critical date' of 1948, the beginning of the Trollope-Redman correspondence, as the date on which the dispute 'crystallized.' The BCM argues that maps published after that date should be disregarded so as 'to prevent one of the parties from unilaterally improving its position by means of some step taken after the issue has been definitely joined.'<sup>15</sup> This is a transparent attempt to discredit South Africa 1:250,000, TSO 400/556, 1945/49, the first large-scale modern map of the area, which clearly shows Kasikili Island in Namibia. The attempt must fail.<sup>16</sup>

- First, there is no general evidentiary rule precluding the consideration of maps produced after some arbitrary date. As the Court said in the *Minquiers and Ecrehos* case, the critical date should not exclude consideration of subsequent acts of the parties 'unless . . . taken with a view to improving the legal position of the Party concerned.'<sup>17</sup> The latest edition of *Oppenheim's International Law* takes a similarly cautious approach to the matter: 'Courts have . . . been reluctant to accept critical date arguments aimed at hampering their discretion to look at the whole of the evidence before coming to a decision.'<sup>18</sup>

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<sup>14</sup> NM, Atlas, Map V.

<sup>15</sup> BCM, para. 538.

<sup>16</sup> NM, Atlas Map X/1; NM, Annex 102 para. 26; NCM, Annex 1 para. 18; Reply Annex 1 para. 17.

<sup>17</sup> *ICJ Reports 1953*, at pp. 59-60

<sup>18</sup> R. Jennings and A. Watts, *Oppenheim's International Law* (9<sup>th</sup> ed. 1992), Vol. I, p. 711.

- Second, the date of 1948 does not represent the crystallization of any dispute. This issue is fully discussed in Chapter IV at paras. 250-263 above.
- Third, the map, although published in 1949, was completed in 1945, when it was reviewed in draft and commented upon and approved by the Bechuanaland authorities.<sup>19</sup> Therefore, there can be no suggestion at all that the map was compiled for the purpose of advancing Namibia's position in the present case. See also, paras. 303-304 below.

286. In fact, Botswana itself does not adhere to the proposition it advances, as can be seen from its reference to its own maps published after 1966.<sup>20</sup>

## 2. Namibia's alleged 'quandary'

287. Botswana pretends that there is an 'inescapable' opposition between Namibia's hydro-geomorphologic expert, Professor Alexander, and its cartographic expert, Col. Rushworth.<sup>21</sup> The asserted 'insoluble conflict' is said to derive from what Botswana describes as 'Professor Alexander's iconoclastic thesis'<sup>22</sup> that the main channel is located as shown on Diagram 4, Sheet 17 of his Main Report and Col. Rushworth's conclusion on the basis of the map evidence that the boundary is located in the southern channel.

288. The contradiction that Botswana claims to see between these two positions is entirely a fiction of its own construction. It fails to appreciate that Professor Alexander and Col. Rushworth are engaged in two distinct exercises. Professor Alexander's task is to identify the main channel of the Chobe River in scientific terms, i.e. the channel that carries the greater proportion of the annual flow of water in the river. Col. Rushworth's task is to examine the manner in which the situation has been represented in the maps.

289. As to the first task, the identification of the main channel, contrary to Botswana's assertion, Professor Alexander's thesis is not that 'the southern channel is wrongly shown on all the maps.'<sup>23</sup> It is that 'the main channel' is not shown on the maps, because, as Col.

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<sup>19</sup> See NM, paras. 312-316; NCM, paras. 162-165.

<sup>20</sup> BCM, paras. 545-546.

<sup>21</sup> BCM, paras. 536-536.

<sup>22</sup> BCM, para. 535.

<sup>23</sup> Id.

Rushworth observes, ‘all of the maps have been made in the dry season’ when there is no significant flow in either channel.<sup>24</sup> As Namibia has shown and as is confirmed by the additional investigations carried out during the preparation of the present Reply, the main channel – the one that carries the largest proportion of the flow – is the one identified by Professor Alexander, and the northern channel is not. See Chapter I, paras. 51-62, above.

290. A further and separate aspect of the enquiry required by Article III(2) of the Treaty is to determine where within the main channel the boundary lies. As shown in Chapter I, paras. 75-83 above, the southern channel that appears in the aerial photographs and on the maps is the *thalweg* channel of the main channel, and the boundary lies within it. Col. Rushworth shows that those who have prepared maps of the area, almost uniformly agree with this placement of the boundary, and with like concurrence they have regarded the northern channel as not being the main channel. The asserted ‘quandary’ disappears. Not only is there no contradiction between Col. Rushworth and Professor Alexander, but the review of the map evidence confirms the location of the boundary that derives from Professor Alexander’s identification of the main channel on the basis of the scientific evidence.

### 3. Botswana’s four general propositions

291. Botswana advances four ‘general propositions’ that it requests the Court to bear in mind in considering Namibia’s map evidence.<sup>25</sup> These propositions range from the incongruous to the trivial. They are addressed seriatim below.

292. **‘Proposition (i): Only a Line placed in the river itself can indicate the boundary’<sup>26</sup>**

This extraordinary proposition is presented as a bald assertion without a shred of authority, either cartographic or legal, to support it. The proposition is disassembled into two equally unsupported and equally implausible corollaries:

First. that a map showing the extent of the territory of two neighbouring states by different colours without specifically marking the line of the boundary cannot be regarded as

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<sup>24</sup> Id. quoting NM, Annex 102 para. 40g.

<sup>25</sup> See BCM, para. 553.

<sup>26</sup> BCM, p. 223 (heading). For Col. Rushworth’s comment on this proposition, see Reply Annex 1, para. 4.

evidencing the location of the boundary.<sup>27</sup> The evident objective of this argument is to exclude from consideration Seiner's map<sup>28</sup> and the UN map,<sup>29</sup> which show Kasikili Island as being Namibian territory by colour, without specifically marking a boundary in the southern channel. This argument runs counter to common sense. If Kasikili Island is coloured on a map with the same colour as the territory of Namibia, and the territory of Botswana is shown in a different colour, it can only be because the mapmakers took the view that the Island was in Namibia. Accordingly, the boundary with Botswana lay to the south of Kasikili Island and certainly not to the north of it. This is implicit in Botswana's acknowledgement that

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 State concerned, and state territory includes rivers (or parts thereof) and islands.<sup>30</sup> (emphasis added)

The second corollary is that 'only a boundary drawn on one or other of the channels can be of assistance to the Court in its task of determining the "main channel."' <sup>31</sup> Again, this unsupported 'general principle' is obviously constructed in an attempt to dispose of Bechuanaland GSGS 3915 of 1933 and its derivatives.<sup>32</sup> This too is manifestly absurd. If the scale of a map is too small to permit drawing the boundary within the river, but is large enough to show the river parting around Kasikili Island, then the mapmaker's choice to mark the boundary along the channel to the south of the Island is a clear indication that the Island is in Namibia.

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<sup>27</sup> BCM, para. 554.

<sup>28</sup> NM, Atlas Map IV, NM, Annex 102, para. 13; Reply Annex 1 para. 12; para. 39, supra.

<sup>29</sup> Namibia 1:1,000,000, UN Map No. 3158 1985, NM, Atlas Map XV; NM, Annex 102 para. 39; Reply Annex 1, para. 29.

<sup>30</sup> BM, para. 7.

<sup>31</sup> BCM, para. 554.

<sup>32</sup> Bechuanaland Protectorate, 1:500,000 GSGS 3915 Sheet '2 1933, NM, Atlas Map IX; NM, Annex 102, para. 23; NCM, Annex 1, para. 16; Reply Annex 1, para. 16; paras. 300-302, below.



293. **‘Proposition (ii): Maps drawn at too small a scale are not relevant.’**<sup>33</sup>

The statement is a truism. The question is how small is ‘too small?’ Botswana suggests without qualification that “no map of scale smaller than 1:100,000 . . . can provide an accurate portrayal of the geographical features in relation to international boundaries.”<sup>34</sup> Again, this is an outrageously overstated generalisation. If a river is a boundary, then the appearance of that river on a map is a sufficient portrayal of the relevant geographical feature. A problem arises only if the scale of a map is too small to show the division of the river around an island. Kasikili Island, and consequently the division of the River Chobe, appears on many maps of a smaller scale than 1:100,000. And all maps that show Kasikili Island, at whatever scale, are relevant to the argument, because the boundary line on the map can indicate which branch of the divided river the boundary follows. This includes all the maps listed in footnote 4 to the Annex 1 of this Reply. The International Court of Justice and other international tribunals have used maps at smaller scales in similar circumstances.<sup>35</sup>

294. **‘Proposition (iii): Distortion may result from Enlargement.’**<sup>36</sup>

Again, the statement is a truism. The only question in this case is whether, in the particular instances cited by Botswana, the proposition is true. The principal example cited by Botswana is the UN Map. It notes that ‘on the complete map at proper scale a black dash-dot line shows the international boundary in the north-western [sic] part of Namibia up to its junction with the Chobe River; from that point east to the Chobe’s confluence with the Zambezi, no similar line or international boundary is shown on the map.’<sup>37</sup> From which Botswana would have the Court infer ‘that the map-makers at the United Nations did not depict nor intend to depict any boundary along the length of the Chobe.’<sup>38</sup> The reason for the dash-dot line in the north-western part of the boundary is obvious: there no natural feature

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<sup>33</sup> BCM, p. 223 (heading). For Col. Rushworth’s comment on this proposition, see Reply Annex 1, para. 5.

<sup>34</sup> BCM, para. 557.

<sup>35</sup> See NCM, Annex 1, para 6.

<sup>36</sup> BCM, p. 224 (heading). For Col. Rushworth’s comment on this proposition, see Reply Annex 1, para. 6.

<sup>37</sup> Id. The reference to ‘the north-western’ part of Namibia seems to be mistaken. Botswana seems to be referring to the southwestern boundary of the Caprivi Strip.

<sup>38</sup> BCM, para. 560.

marks the border. Further to the east, the border is sufficiently indicated by the Chobe River and the light brown colouring depicting Namibian territory. In any case, the point Botswana seeks to make has nothing to do with enlargement. The other maps Botswana refers to under this proposition are discussed in Annex 1, para. 12 (Seiner's map) and para. 26 (South West Africa 1:50,000 1982). In every case where an enlargement is presented in Namibia's Memorial or Counter-Memorial, the complete map is available for examination in the Map Atlas. Enlargement does nothing more than what a magnifying glass does.

295. **'Proposition (iv): Boundaries drawn on maps are unreliable.'**<sup>39</sup>

Botswana's propositions reach their extreme in the assertion that boundaries on maps are generally unreliable. If it were not so ridiculous on its face, the suggestion would be an offence to the many cartographers all over the world who attach immense importance to the correct delineation of boundaries on maps and exercise great care to achieve it. The maps referred to by the BCM in support of this proposition are irrelevant on the question of the location of the boundary around Kasikili Island, not because they are inaccurate, but because they are all far too small in scale to show it. Moreover, they were introduced into the case not by Namibia, but by Botswana in an effort to obscure the clarity of the map evidence. Col. Rushworth's comments, cited by Botswana, go not to the 'accuracy' of the maps but to the conventions for the representation of boundaries on small-scale maps.

296. It is self-evident that one of the most important purposes of maps is to show the boundaries between territories. Further, Botswana's proposition flies in the face of the extensive arbitral and judicial practice – not least in this Court – in making use of maps as an element in the resolution of boundary disputes.<sup>40</sup> Why would Professor Brownlie in his work on *African Boundaries* take pride in the fact that 'the project involved a great deal of cartographic work,'<sup>41</sup> if he had considered it to be true as a general proposition that boundaries drawn on maps are unreliable? As the same author says in the Introduction to the same volume:

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<sup>39</sup> BCM, p. 225 (heading). For Col. Rushworth's comment on this proposition, see Reply Annex 1, para. 7.

<sup>40</sup> See paras. 282-283, *supra*.

<sup>41</sup> Brownlie, *African Boundaries*, (1974), p. vii.

In matters of evidence, logic and commonsense are the best guides. Thus a map has probative value proportionate to its technical quality. A privately published map may have as much significance as an official map if its technical quality is high.<sup>42</sup>

297. The legal and general propositions in the BCM on the topic of map evidence are a farrago of wild over-generalizations, misstatements and affronts to common sense. They need not detain the Court.

#### B. Comments on Specific Maps

298. It is not possible in a pleading of reasonable compass to reply in detail to all the mistakes of fact, statement and interpretation in Chapter 8, the map chapter, of the BCM. That is reserved for the memorandum 'Observations Concerning Maps Arising from the Counter-Memorial of Botswana' prepared by Col. Rushworth and attached to this Reply as Annex 1. As an acknowledged leader in the field, Col. Rushworth's authority in such matters is not open to question. His memorandum is backed by his considerable experience and expertise, and the Court's attention is earnestly directed to it. In this Chapter, only a few of the most egregious of Botswana's contentions on specific maps are addressed in the order in which they appear in the BCM.

299. **The 1904 German Kriegskarte** (BM Atlas, Maps 4 and 5).<sup>43</sup> This is an inaccurate and confusing map, for reasons detailed in NCM paras. 146-151. These characteristics are sharply illustrated by the BCM's assertion that the map 'shows 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. . . .* [A] strong black line indicates the *thalweg* in the river and is drawn to the north of Sulumbu's Island.' (italics in original) Almost every word of this comment is wrong. The 'shaded area' is shaded blue, and one of the most elementary cartographic conventions is that blue represents water, not land. Thus the 'shaded area' does not 'represent the island' and the 'thick black line' cannot 'show the northern channel.' The 'strong black line' is not the *thalweg*, as can be seen from its erratic course to the west, where it ends after a few kilometres only to resume further upstream and again in the vicinity of 'Linjanti.' There is no notation indicating that this line is the *thalweg*, and, of course, maps,

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<sup>42</sup> Id., p. 5.

<sup>43</sup> BCM, para. 570. See also Reply Annex 1, para. 11.

and certainly not *Kriegskarten*, do not in general depict the *thalweg* of a river. The label ‘Sulumbu’s Island’ does not attach to any topographic entity on the map, and the symbols near the label do not make sense. Namibia’s original conclusion that the map was too unreliable to include in its own Atlas is amply confirmed.

300. **Bechuanaland Protectorate 1933 GSGS 3915** (NM, Atlas, Map IX).<sup>44</sup> The BCM, para. 591, seeks to diminish the importance of this map by asserting that ‘no original survey or general verification work was done for this map.’ This unsupported statement is contradicted by an article entitled ‘The 1933 Maps of Bechuanaland Protectorate at 1:500,000: A Milestone in the Mapping of Botswana,’ by Dr. Jeffrey C. Stone, published in *Botswana Notes and Records* in 1996.<sup>45</sup> This carefully researched article describes the care with which the map was produced. Resident Magistrates were asked for, *inter alia*, details of rivers. The High Commissioner was personally ‘concerned to ensure the accuracy of the Protectorate boundaries.’<sup>46</sup> (emphasis added)

301. The map was widely used by the Bechuanaland authorities for many years. It would have been the main source for the statement of the British High Commissioner for Bechuanaland, Sir Evelyn Baring, in 1949, that ‘This [Kasikili Island] has hitherto been regarded as part of the Caprivi, since maps show the main channel passes to the South of the Island.’<sup>47</sup> The High Commissioner clearly did not regard the depiction of the boundary alongside the southern channel as a mere cartographic convention.

302. The BCM acknowledges that the boundary runs along the southern bank of the Chobe River throughout. It seeks to discount this as reflecting ‘standard practice in respect of colonial boundaries along rivers, which located the boundary line alongside the river bank at regular intervals of 10, 50, 100 miles according to the scale of the map.’ Not an iota of support is adduced for this alleged ‘standard practice.’ The very map under discussion does not follow it, since, as noted above, the boundary appears on the south side of the river throughout, without any variation ‘at regular intervals.’ Nor does Botswana vouchsafe any examples of other maps employing this practice. It is true that when a river is represented by

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<sup>44</sup> BCM, para. 591. See also Reply Annex 1, para. 16.

<sup>45</sup> 27 *Botswana Notes and Records* 71 – 84 (1996), reproduced in NCM, Reply Annex 8.

<sup>46</sup> *Id.* pp. 73-75.

<sup>47</sup> NM, Annex 66.

a single line or closely spaced double-line, on a map and the boundary is in the river, standard cartographic practice is to place the boundary symbol to one side of the river. But when the river divides around an island, the symbol can be placed alongside the branch in which the boundary is. Thus, in this case, the symbol placed alongside the southern channel at Kasikili Island indicates that the boundary is located in that channel.

303. **South Africa 1949 TSO/400/556** (NM Atlas, Map XII).<sup>48</sup> This is the first modern map of the area, the product of a major cartographic enterprise by the post-World War II South African government. The boundary is located in the southern channel, and Kasikili Island is attributed to the Caprivi. The assertion that the boundary was copied from the Bechuanaland 1:500,000 map of 1933 is contrary to the evidence about how the map was made.<sup>49</sup>

304. Botswana first sought to denigrate the importance of this map for this case by pointing out that it was published in 1949, after the so-called ‘critical date’ of the beginning of the Trollope-Redman discussions.<sup>50</sup> The Namibian Memorial showed, however, that the map had been substantially completed in 1945, and a draft had been circulated for comment to the officials in Bechuanaland. They made numerous suggestions, but the Resident Commissioner, to whom responsibility had been delegated, accepted the boundary as depicted in the southern channel at Kasikili Island without objection.<sup>51</sup> In response to this showing, the BCM produced an extensive internal correspondence relating to the map (asserted to be from South African archives, but bearing the stamp of Botswana National Archives), heretofore unavailable to Namibia. According to Botswana, this correspondence demonstrates ‘the self-serving nature of the 1949 map.’<sup>52</sup> The documents are collected in BCM, Vol. III, Annex 17 in a confused and disorganized way, without chronological or other classification, that is mirrored in Botswana’s exposition of the material. Col. Rushworth has produced in Annex 2 a complete chronological listing of the items in BCM Annex 17. The relevant items are highlighted and copies are included in Reply Annex 2. Col. Rushworth reviews this correspondence, letter by letter in Annex 1, para. 17d, and there is no need to

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<sup>48</sup> BCM, paras. 601-613. See also Reply Annex 1, para. 17.

<sup>49</sup> See NCM, para. 163.

<sup>50</sup> BM, para. 280.

<sup>51</sup> NM, para. 315.

<sup>52</sup> BCM, para. 611.

repeat it here. It will suffice to quote his conclusions:

This correspondence confirms the conclusions about this map in the NM:

- (i) that in February 1945 the attention of the High Commissioner for Bechuanaland was drawn to the need to define the boundary with the Caprivi, that he delegated responsibility for doing this to the Resident Commissioner and that later he approved the reply, all contrary to BCM para. 608.
- (ii) that the Resident Commissioner and his staff carefully studied the request and decided that they had no firm information to contribute on the boundary on the Chobe River at Kasikili Island, but that it could most properly be defined by the South African authorities, contrary to BCM para. 611.
- (iii) that four months later the same staff, when faced with the completed map incorporating the boundary that they had just been discussing, examined and corrected the map very carefully but accepted the depiction of the boundary as correct without comment, contrary to BCM para. 610.
- (iv) that the map was completed and accepted in 1945, long before the Trollope-Redman correspondence of 1948,<sup>53</sup> contrary to BCM paras. 542 and 602.

305. **Bechuanaland Protectorate 1960 DOS (Misc.) 282** (BM Atlas, Map 16).<sup>54</sup> This map is advanced by the BCM, para. 593 as ‘yet another contradiction . . . of the supposedly “unbroken concordance in the maps of the two parties depicting Kasikili Island as within Namibia.”’ This map, however, is at a scale of 1:1,750,000 (not of 1:1,000,000 as Botswana asserts, but nearly twice as small), far too small to be of any use. As Botswana admits, ‘No detail is visible in the vicinity of the island.’ Indeed, the scale is too small for the island to appear on the map. In these circumstances, the fact that the boundary is depicted on the north side of the Chobe is no more than an application of the practice by which the cartographer marks the boundary symbol on one or the other side of the river line to show that the boundary is in the river. It does not ‘contradict’ any of the maps Namibia relies on.

306. **Bechuanaland 1:500,000, 1965 DOS 847**, Sheet 2, (BM, Atlas, Map 17).<sup>55</sup> The BCM rejects Col. Rushworth’s view that the depiction of the boundary in the northern channel was

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<sup>53</sup> Annex 1, para. 17e.

<sup>54</sup> BCM, para. 593. See also Reply Annex 1, para. 18.

<sup>55</sup> BCM, para. 594-596. See also Reply Annex 1, para. 19.

a cartographer's error. Instead it asserts that 'the depiction of the boundary in the northern channel . . . was deliberate in execution of the [Bechuanaland] Surveyor-General's Opinion.'<sup>56</sup> The Surveyor General's Opinion, however, was intended for internal consumption in the Bechuanaland government, and there is no evidence that DOS, which produced the map in England, received a copy. The date of the Opinion is 18 October 1965. According to an imprint note on the sheet, the map was printed in September 1965, and was received in its finished form in the DOS on 20 October 1965. It is hardly likely that the map could have reflected the content of an opinion written in Bechuanaland only two days earlier!

307. **Botswana's post-independence maps.**<sup>57</sup> These maps should be discounted as self-serving. In any case, it is incorrect to say that the three maps at 1:1,000,000 show the boundary in the northern channel. They do not show any island where Kasikili should be, and therefore they do not show two channels. They show the boundary on the northern side of a line representing no particular channel of the river. This is in accordance with normal practice to offset the boundary to avoid confusion, indicating only that the boundary is somewhere in the river. These maps are thus incapable of manifesting Botswana's views as to the location of the boundary in any meaningful way.

308. **Third party maps.**<sup>58</sup> The BCM lists four maps in the U.S.-sponsored Joint Operations Graphics Series, produced by the United Kingdom after Botswana's independence. Of the four maps, three are versions of the same map, as the BCM admits, and the fourth does not show Kasikili Island. These are third party maps and for the reasons given in NCM para. 170, should be discounted.

309. **The JARIC Map 1974 (?)** (BM, Atlas No. 22).<sup>59</sup> As shown in NM para. 217 and NCM paras. 166-168, this map depicts only one channel in the relevant stretch of the river. There is no Kasikili Island, therefore no northern channel. The depiction of the boundary cannot be regarded as a choice between two channels. Namibia attributed the error to

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<sup>56</sup> Id. para. 596.

<sup>57</sup> Id. paras. 620-625. See also Reply Annex 1, paras. 21-25.

<sup>58</sup> Id. paras. 597-600. See also Reply Annex 1, para. 20.

<sup>59</sup> BCM, para. 644. See also Reply Annex 1, para. 22.

improper use of aerial photography on which the map was based. The BCM seeks to counter this suggestion by the assertion that the JARIC map was ‘produced by the cartographic unit of the South Africa Defence Force, fully plotted from air photography taken by the South African Air Force in 1977 in accordance with a Working Plan and Report.’ This is incorrect. As Col. Rushworth shows convincingly in Annex 1, para. 23, the Working Plan and Report relate to the South West Africa mapping of 1982 and have no connection with the JARIC map. Namibia’s position that this is a poorly drawn map from an uncontrolled mosaic that erroneously omits Kasikili Island stands unrefuted.

310. **The Military Intelligence Map 1984** (BCM, Supplementary Atlas, Map 15).<sup>60</sup> As explained by Col. Rushworth, this map is an overprint of South West Africa 1:50,000, 1982.<sup>61</sup> The 1982 map does not show a boundary, but on the 1984 overprint, a dividing line is overprinted in red in the northern channel. The BCM claims this indicates ‘that in the eyes of the South African Military authorities, the Island falls wholly within Botswana.’<sup>62</sup>

311. Again Botswana is mistaken. We know from Botswana’s own account of the shooting incident on 24 October 1984 that the South African troops were carrying a map showing the boundary in the southern channel.<sup>63</sup> That map was therefore not the 1984 overprint. It was probably a map that has just been found, South West Africa, 1:100,000 Director of Surveys and Mapping Mowbray, 1982.<sup>64</sup> An extract of this map appears as Fig. 9, following p. 136, and a copy of the complete map has been deposited with the Court. It is a high quality, large-scale line map with the boundary symbol in the southern channel backed by a purple band of stipple. It is an authoritative map that clearly expressed the South African government’s view as to the location of the boundary. Further, the SADF peremptorily instructed the South African representatives in the Pretoria talks in December 1984 to ‘liase with the Botswana Government through diplomatic channels in order to (a) confirm that the border lies south of Sedudu.’<sup>65</sup> Finally, the maps used by the SADF until their departure from Namibia in 1989

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<sup>60</sup> BCM, paras. 616-619. See also Reply Annex 1, para. 27.

<sup>61</sup> Reply Annex 1, para. 26.

<sup>62</sup> BCM, para. 613.

<sup>63</sup> See BM, Annex 40; Minutes of the Meeting, afternote, id. Annex 41.

<sup>64</sup> See Reply Annex 1, para. 27.

<sup>65</sup> NM, Annex 84, para. 9.



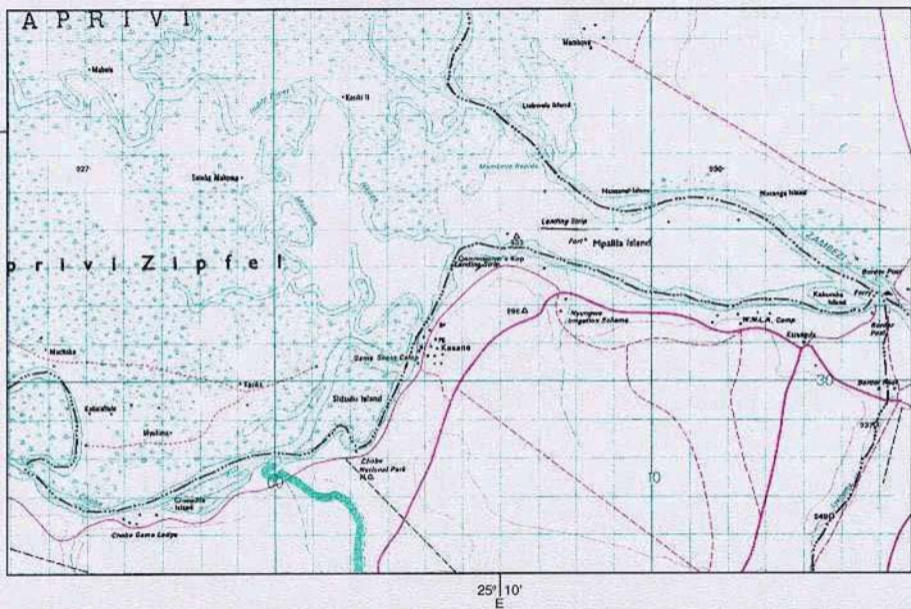


FIG 9: Extract from South West Africa, 1:100,000, 1982, sheet 1725C Kazungula, Edition 1.

are still pinned to the walls of their HQ Briefing Room in Windhoek and also show the boundary in the southern channel.<sup>66</sup> Thus the 1984 overprint cannot represent the view of the 'South African Military authorities' in 1984 as to the location of the boundary.

312. Col. Rushworth suggests that the 1984 overprint was produced in implementation of the agreement reached on 1 November 1984, after the shooting incident, between officers in the field from the two countries.<sup>67</sup> Under the agreement, the SADF was to stay to the north of Kasikili Island and the BDF was to operate only to the south of the Island so as to avoid further clashes between the two armed forces. It is, therefore, reasonable to conclude that the red dividing line was overprinted on the 1982 map and used by the SADF to indicate to the troops the limit of their operations under this agreement.

### C. Botswana's General Conclusions on Map Evidence

313. BCM, paras. 636-646 set out eleven 'general conclusions' as to the map evidence, indicated by Roman numerals. Namibia agrees with none of them. Many of these 'conclusions' have been shown to be erroneous in the preceding paragraphs of this Chapter. In those cases, Namibia refers below to the relevant earlier paragraphs. A few of these 'conclusions' have not been dealt with earlier and are refuted below.

314. Conclusion I, BCM para. 636. Botswana's statement that the map evidence is 'inaccurate' and 'inconsistent' is patently self-serving and, effectively, meaningless. On the contrary, the map evidence is extraordinarily uniform. Of 26 maps produced by Britain, Germany, South Africa and the United Nations, the entities with political responsibility in the area over the period since the 1890 Treaty, 16 show Kasikili Island in Namibia and nine do not show the boundary. The remaining map is the one discussed in paras. 310-312, above. The principal maps produced by each of these entities – the Seiner Map, the Bechuanaland 1:500,000 1933, the South Africa 1:250,000 1945/49, and the UN Map 1985 – all place the boundary clearly and unmistakably to the south of Kasikili Island. Far from being 'of little assistance,' the map evidence resoundingly confirms the analysis based on the words of the Treaty, the subsequent practice of the parties, and the scientific evidence showing that Kasikili Island belongs to Namibia.

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<sup>66</sup> Affidavit of Dennis Rushworth, 23 October 1998, Reply Annex 4.

<sup>67</sup> Minutes of Meeting on 19 December 1984, para. 3(iii), BM, Annex 44.

315. Conclusion II, BCM para. 637. It is no doubt true that the disparity in maps was a contributory factor to the 1984 border incident. Botswana's forces were using the self-serving maps produced by Botswana after independence.

316. Botswana remarks that 'Maps, as the Joint Team found, were of little assistance in the determination of the location of the boundary in the Chobe River.' Botswana sought then, as it does now, to diminish the role of maps and to confuse the overwhelming uniformity of the map evidence. But if its remark is meant to imply that Namibia in some way agreed that maps were of little assistance, there is nothing in the Minutes or the Report of the JTTE that could support such a suggestion, and Namibia categorically rejects it.

317. Conclusion III, BCM para. 638. There is no conflict whatsoever between the scientific evidence presented by Namibia and the map evidence. On the contrary, they are mutually reinforcing. See paras. 287-290, above.

318. Conclusion IV, BCM para. 639. Contrary to Botswana's claim, Article III of the 1890 Treaty itself states that 'The course of the above boundary is traced in general accordance with a map officially prepared for the British Government in 1889.' To be sure, the boundary line is not drawn on that map, but it provides considerable evidence as to the parties' contemporaneous knowledge of the area, and the Court is surely free to consult it for that purpose.

319. Conclusion V, BCM para. 640. Namibia has refuted Botswana's contention that, to establish a 'subsequent practice' within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties, there must be express agreement among the parties. See Chapter IV, Section A, above. Action by one side, as by publishing an official map, will constitute subsequent practice if the other side remains silent. This was what happened in the case of the German, South African and UN maps referred to at length by Namibia in this chapter and in both the Memorial and Counter-Memorial. Moreover, Botswana's predecessors did not merely acquiesce. The Bechuanaland 1:500,000 1933 map, regarded as a milestone in the cartographic history of Botswana, was produced by British authorities and used by them for over 30 years. It is an affirmative recognition by them that the boundary is to the south of Kasikili Island.

320. The alleged agreement between the Parties on the subject of maps relating to the joint survey of 1985 is void *ab initio* and has no legal force. as shown in NCM paras. 109-125.

321. Conclusion VI, BCM para. 641. Botswana alleges that ‘no recognition of or acquiescence in any map placing the boundary in the southern channel was given by either the British, Bechualaland or Botswana authorities.’ The allegation does not accord with the facts. As noted above, the Bechuanaland 1:500,000 1933 map, showing the boundary to the south of Kasikili Island, was not only acquiesced in, but produced by British authorities.

322. The Seiner map, one of the most important maps supporting Namibia’s position, was expressly drawn to the attention of the British authorities by the German government.<sup>68</sup> In response, the British colonial authorities sent the German Foreign Office a copy of a map of the Bechuanaland Protectorate.<sup>69</sup> The BCM interprets this as a ‘repudiation’ of the boundary as set out in the Seiner map. The truth is quite different. Whatever the British Government may have been repudiating, it was not Seiner’s presentation of Kasikili Island. The internal correspondence between the British Colonial Office and the Foreign Office shows that the area of concern for them was the western part of the boundary with the Caprivi. As to that, they said, ‘If the matter should come before a Court of Arbitration the present [Seiner’s] map might be quoted by the German Government in support of their case, especially if a copy had been communicated to His Majesty’s Government and received by them without remark.’<sup>70</sup> Thus, the Colonial Office recognized the risks of not protesting (i.e. of receiving the map ‘without remark’), concluding that ‘for reasons connected with the state of affairs in the Batawana reserve . . . it does not appear desirable at the present moment to enter into a general discussion of the question with the German Government.’ So a decision was taken not to protest, but instead to send ‘the German Government copies of the enclosed map of the Bechuanaland Protectorate, which indicates the view which His Majesty’s Government have held with regard to the proper position of the boundary.’ This ‘enclosed map’ is on a scale of 1:2,000,000, far too small to show Kasikili Island.<sup>71</sup> Thus it could not possibly have served to put the German Government on notice of a British reservation regarding the boundary in that location. All that it did – and evidently was intended at the time to do – was to reiterate

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<sup>68</sup> Three copies have been found in the Public Record Office, two in the Foreign Office and one in the Colonial Office records. See NM, Annex 102, p. 9, para. 13.

<sup>69</sup> NM, Annexes 36 and 37.

<sup>70</sup> Id.

<sup>71</sup> BM, Atlas, Map 6. This is the 1906 predecessor of the 1909 map.

the British view of the location of the western part of the boundary. Far from being a repudiation of Seiner's depiction of the boundary at Kasikili Island, the episode shows with stunning clarity that, whereas the British Government realised the importance generally of protesting unfavourable maps and thought that it would be desirable to react to the manner in which the western part of the Caprivi Strip had been shown, it clearly did not consider that the situation in the neighbourhood of Kasikili Island called for any reaction at all.

323. Conclusion VII, BCM 642. Here, Botswana summarily repeats its criticism of the 1933 Bechuanaland map, which showed the boundary running along the southern bank of the southern channel, thus placing Kasikili Island in Namibia. The matter is dealt with in paras. 300-302, above.

324. Conclusion VIII, BCM para. 643. The provenance of the South Africa 1:250,000 1945/49 map is reviewed once again at paras. 303-304, above, where it is conclusively shown that the Bechuanaland authorities up to the High Commissioner had ample opportunity to examine a proof of the map in 1945 and were asked for suggestions and comments, particularly as to the location of the boundary. They made comments, which were indeed incorporated in the final version of the map, but they left the boundary at Kasikili Island undisturbed in the southern channel.

325. Conclusion IX, BCM para. 644. Each of the maps referred to here is discussed in paras. 305-308 above. The Bechuanaland 1:1,750,000 (not 1:1,000,000 as Botswana says) 1960, is too small to show Kasikili Island. Bechuanaland 1:500,000, 1965, does not show the Island either, because of a cartographic error. The Joint Operations Ground and Air maps were produced by a third party, the British Ministry of Defence. And the maps produced by Botswana itself must be discarded because they are self-interested.

326. Conclusion X, BCM 645. The 1974 JARIC map does not show the boundary in the northern channel since it does not show Kasikili Island at all. It depicts a single unbroken stream in the area of the Island and cannot be regarded as having made any choice as to the boundary. The 1984 Military Intelligence map is discussed in detail in paras. 310-312, above. It is shown that the overprinted line of division was probably drawn in the northern channel to ensure the implementation by South African Defence Force of the November 1984 agreement that they would not patrol south of the northern channel, while the Botswana forces agreed not to patrol north of the southern channel.

327. Conclusion XI, BCM 646. Botswana repeats its assertion that the 1985 UN map shows no boundary in the Chobe River. In fact the boundary is shown by a change of colour and the location of Kasikili Island within Namibia is clearly to be seen.

#### D. Conclusions

328. This consideration of the maps has necessarily been detailed. But the necessity for much of the detail has resulted from Botswana's efforts to cloud and to complicate the Court's task of examining the maps by misleading generalization, confused and confusing presentation and much error. This effort, however cannot obscure

- that an impressive and almost unbroken series of maps clearly shows the boundary in the southern channel or Kasikili Island as falling within Namibia;
- that the British authorities, Botswana's predecessors in title, relied on the Seiner map until they produced their own in 1933 -- both of which are part of this series;
- that there has never been any protest against these maps by the British or Bechuanaland authorities;
- that Botswana cannot show a single map before its independence that depicts the boundary in the northern channel.

The few maps that show the boundary in a river course resembling the northern channel represent carelessness or error on the part of the draftsmen, or have been made in special circumstances not calling for South West African or Namibian protest. In any event they cannot counter-balance the weight and significance of the maps relied on by Namibia.

## Part Three

### PRESCRIPTION AND ACQUIESCENCE AS AN INDEPENDENT TITLE OF SOVEREIGNTY

#### **Chapter VI**

#### PRESCRIPTION AND ACQUIESCENCE

329. Namibia's Memorial set out at length the legal and factual basis for its claim of prescriptive title to Kasikili Island.<sup>1</sup> As already noted, Botswana's Counter-Memorial seriously distorts this argument. It confuses the issue by reasoning based on circular arguments, quite 'eccentric' at times, to use a term recurrent in Botswana's pleadings. Namibia therefore feels it necessary to expose these distortions before restating its case and analyzing the interplay of prescription and acquiescence.

#### A. Botswana's Fallacies.

330. In the first place, as already noted, Botswana considers that Namibia is advancing a contradictory argument by arguing subsequent practice and prescription at the same time. As Botswana puts it:

The prescription argument must assume that the original (treaty-based) title of *Botswana* has been displaced by a process having no connection with the 1890 Agreement. 'Subsequent practice' cannot claim its status if the material adduced is *ab initio* antithetical to the concept of 'subsequent practice'<sup>2</sup> (emphasis in original)

And it concludes:

iii. The Argument of Namibia based upon Prescription is incompatible with the Principle of Subsequent Conduct<sup>3</sup>

331. Botswana here ignores the dual nature of the Namibian argument. From the beginning of the pleadings, Namibia has been crystal clear regarding the relationship of its argument

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<sup>1</sup> See NM, Part Two, Chapter I(B), II, III, IV.

<sup>2</sup> BCM, para. 139.

<sup>3</sup> BCM, p. 86 (heading).

based upon prescription to its argument based upon subsequent conduct. Paragraph 14 of the Namibian Memorial states the two grounds in the alternative: first, that ‘the Anglo-German Treaty of 1890, properly interpreted, attributes Kasikili Island to Namibia . . .’ And, second, that ‘by virtue of continuous and exclusive occupation of Kasikili Island . . . Namibia has prescriptive title to the Island.’<sup>4</sup> Namibia does not accept that it is precluded from presenting both grounds for its claim. All modern legal systems recognize this possibility, and it is commonplace in this Court. As Namibia argues, either the subsequent conduct operates as a ‘practice . . . which establishes the agreement of the parties regarding [the] interpretation’ of the Treaty;<sup>5</sup> or it stands as an independent root of title based on the doctrine of prescription and/or acquiescence.

332. Botswana’s second fallacious argument is related to the doctrine of prescription. Botswana argues that, ‘precisely because this is a boundary created by treaty, prescription was, as from 1890, *ab initio* and *ipso jure* inapplicable.’<sup>6</sup> As the BCM para. 660 states it:

Thus, for Namibia, there could be an ‘adverse possession’ as from the date of the conclusion of the Anglo-German Agreement. This position runs counter to both legal principle and common sense. In the first place, this position is inimical to the very concepts of public order and stability in international relations which are recognised in the legal literature as justifying the existence of prescription. Prescription is not intended and was not intended in nineteenth century doctrine (see Audinet above), to be employed to subvert the legal status of a boundary expressly created by treaty.<sup>7</sup>

333. The proposition that prescription could not affect a title established by treaty is a surprising one, and Botswana supplies no authority for its position. The principle of prescription lies in the contradiction between the initial legal title and a contrary, peaceful occupation, over the years. As Sir Robert Jennings observes:

Prescription . . . comprehends both a possession of which the origin is unclear or disputed, and an adverse possession which is in origin demonstrably unlawful.<sup>8</sup>

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<sup>4</sup> See also NM, para. 14(2) .

<sup>5</sup> Vienna Convention on the Law of Treaties, Art. 31(3)(b).

<sup>6</sup> BCM, para. 668.

<sup>7</sup> BCM, para. 660.

<sup>8</sup> Jennings, *The Acquisition of Territory in International Law* (Manchester, 1963), p. 23.



334. Botswana argues that the doctrine of prescription against a treaty would ‘be inimical to the very concepts of public order and stability in international relations’ and would ‘subvert the legal status of a boundary expressly created by treaty.’<sup>9</sup> This esoteric view of the doctrine of prescription is in total opposition to the principle at work. Prescription is exactly about public order and stability. Far from being ‘subversive,’ the doctrine operates to stabilize the *de facto* situation in the interest of ‘public order and stability.’

335. André Audinet, the author quoted by Botswana, in no way asserts this extravagant position. He sees no subversion of the international legal order by the operation of prescription. He simply considers that ‘La prescription aurait donc pour but de suppléer au consentement qui fait défaut.’<sup>10</sup> In other words, he correctly states that the operation of prescription compensates for the absence of consent of the parties as to the title.

336. The illogical character of the Botswana argument is unmasked in its contrived effort to demonstrate that the doctrine of prescription might be applicable after 1985. It contends that the settlement of the dispute between the two parties that, according to Botswana, occurred in 1985 would open the possibility for an adverse possession that was not possible before the settlement.<sup>11</sup> Stated differently, peaceful and unchallenged occupation could not give rise to prescription over a period of a century, but a confrontational occupation after 1985 could have had such a result.

337. These logical fallacies only serve to confuse the issue. The fact remains: Botswana has no effective and peaceful occupation to show and no evidence of subsequent conduct to present to the Court. Because it cannot present evidence of its own activities with respect to Kasikili Island, it tries to deride any resort to subsequent conduct, whether as an aid to interpretation of the Treaty, or as the basis for the operation of the doctrine of prescription.

## B. Namibia Has Met the Requirements for Establishing Title by Prescription

### 1. General considerations

338. As Namibia has continually argued, the 1890 Treaty is in the present case basic to the resolution of the dispute over title to the territory. The Treaty, properly interpreted, fixes the

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<sup>9</sup> BCM, para. 660.

<sup>10</sup> BCM, para. 656.

<sup>11</sup> BCM, para. 666.

boundary in the centre of the main channel of the Chobe River, that is, the channel to the south of Kasikili Island. But that is not the end of the story.

339. Boundary making is a complex procedure. It calls for delimitation and for demarcation. But delimitation itself may be more or less precise. Some boundary treaties go into great detail as to the exact boundary, fix the positions of boundary pillars, etc. Such is not the case with the 1890 Treaty. Its territorial compass was considerable, delimiting the zones between the two parties in East Africa, Central Africa and South-West Africa, not to mention Heligoland. Drafted by negotiators who only had an approximate knowledge of the geographical facts, it did not purport to be definitive in its conclusions. In fact, it included in Article VI a clause allowing for rectification. For instance, as has been shown, Andara was completely mislocated, which called for an adjustment of the Treaty.

340. The 1890 Treaty gives rather general indications as to the exact boundary line in the Chobe River and calls for a considerable degree of recourse to aid in interpretation. In such a situation, where the interpreter is presented with shades of grey rather than black and white, oversimplification will distort the process of interpretation.

341. Subsequent conduct in such a situation is bound to have relevance to the process of determining the exact boundary. If it amounts to 'practice,' it is taken into account to help determine the attitude and intentions of the parties when they concluded the treaty, as has been demonstrated in Chapter IV of this Reply. Namibia has shown that the peaceful occupation of the Island by the Masubia of Caprivi for almost a century, together with the administration of the Island by the traditional Masubia authorities exercising their power under the authority of the German colonial rulers and of South Africa as the mandatory power, and thereafter de facto, confirms Namibia's interpretation of the Treaty as placing the boundary in the channel to the south of the Island.

342. In the present chapter, the same facts, i.e. peaceful occupation of Kasikili Island by Namibia's predecessors in title, are examined in a different legal perspective. Namibia contends that these facts — peaceful occupation by inhabitants of the Caprivi, duly authorized by the German and South African authorities and without any challenge by the authorities responsible for Bechuanaland — establish an independent title of sovereignty over Kasikili Island on behalf of Namibia through operation of the doctrines of prescription and acquiescence.

343. This record of peaceful and unchallenged occupation by Namibia's predecessors in title is bound to entail legal consequences, sometimes described as 'consolidation.'<sup>12</sup> As the arbitral tribunal said in the *Taba* case:

The tribunal considers that where the States concerned have, over a period of more than fifty years, identified a marker as a boundary pillar and acted upon this basis, it is no longer open to one of the parties or to third States to challenge that long-held assumption.<sup>13</sup>

## 2. Botswana's argument on the 'critical date'

344. Botswana places much emphasis on the alleged importance of the critical date.<sup>14</sup> The BCM states its use of the concept in the following terms:

The point is well put by Professor Brownlie in the work already cited:

The critical date is a concept linked to the admissibility and weight of evidence. The critical date is the point at which the dispute has crystallized and is apparent to the parties. Evidence emanating from the parties after this date is presumed to be self-serving and unreliable. However, subsequent actions may evidence consistency, and inconsistent conduct and admissions against interest will be taken into account. (I. Brownlie, *op. cit.*, BCM Annex 46).<sup>15</sup>

345. Namibia does not consider that the concept of critical date adds anything to the present discussion. In the first place, there are many possible candidates for critical dates. 1948-1951 may be considered as a relevant critical date, but 1966 is certainly another, being the date of Botswana independence that triggered the application of the doctrine of *uti possidetis* to the dispute, as well as the date of General Assembly resolution 2145(XXI) that terminated the Mandate for South West Africa. 1984-85, the point at which the dispute crystallized between Botswana and the South-African authorities, could also be considered the critical date.

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<sup>12</sup> D.H.N. Johnson, "Consolidation as a Root of Title in International Law", *The Cambridge Law Journal* (1955), pp. 223-225; Charles de Visscher, *Problèmes de confins en droit international public* (Paris, Pedone, 1969) p. 128.

<sup>13</sup> *I.L.M.*, 1988, Vol. 27, No. 4, pp. 1489-1490.

<sup>14</sup> JTTE, Botswana Supplementary Submissions, p. 42, para. 95; BM, para. 281; BCM, para. 540.

<sup>15</sup> BCM, para. 539.

346. Moreover, the effect of the critical date is both complex and somewhat uncertain. It focuses on the issue of relative weight of evidence, but does not have a cut-off effect. It may be interesting to have a 'photograph' of the situation in 1948, before the discussions Trollope had with Redman and Dickinson. But Namibia's peaceful use and occupation of the Island continued unchallenged after that date, right through the 1960s and 1970s and even later. The undisputed occupation after 1948 clearly was not motivated by the dispute, but was a continuation of the pre-existing state of affairs. It cannot be ignored in determining Namibia's title on the basis of prescription and acquiescence.

347. But even if 1948-1951 were to be accepted as the critical date, as Botswana argues, Namibia contends that its independent title based on prescription and acquiescence had already been established without doubt by that date.

### 3. Legal aspects of the doctrine of prescription

348. Namibia has extensively analyzed the contemporary international law authorities on the doctrine of prescription in its Memorial,<sup>16</sup> and there is no need to repeat that discussion here. Inevitably, in international law such a doctrine cannot have the same precision as in domestic law. Certain of the requirements of domestic law, such as a fixed period, cannot be incorporated into international law. The version of the principle reflected in state practice, and also largely accepted by courts is a rather more flexible one than that presented by Botswana.

349. In the *Right of Passage* case, the Court stated:

The British did not, as successors of the Marathas, themselves claim sovereignty, nor did they accord express recognition of the Portuguese sovereignty, over them. The exclusive authority of the Portuguese over the villages was never brought in question. Thus Portuguese sovereignty over the villages was recognized by the British in fact and by implication and was subsequently tacitly recognized by India. As a consequence the villages comprised in the Maratha grant acquired the character of Portuguese enclaves within Indian territory.<sup>17</sup>

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<sup>16</sup> NM, paras. 181-184.

<sup>17</sup> *Right of Passage over Indian Territory*, I.C.J. Reports, 1960, p. 39.

350. Namibia believes the present situation is comparable. The 1890 Treaty gives a general indication of the boundary, but a large degree of imprecision remains. The operation of the doctrine of prescription must take into account these characteristics of the situation. International law allows for the necessary flexibility to give effect to the doctrine of prescription in such a case.

351. Namibia considers that the four requirements for prescription stated by Fauchille and reworded by Johnson have been met. The possession of the prescribing State was peaceful and uninterrupted during the relevant period. The possession was public and has been 'à titre de souverain,' as demonstrated in paras. 377-379, below. And the possession endured for the necessary length of time.

(a) The facts: peaceful occupation and use of the Island by Namibia.

352. Botswana does not seriously challenge the fact of occupation of Kasikili Island by Namibia from 1890 onwards. It has tried to discredit the oral evidence of some of the Namibian witnesses before the JTTE. But Botswana itself recognizes the importance of the evidence given by Chief Moraliswani.<sup>18</sup> When the evidence was taken on 30 July 1994, the Honourable Chief Munitenge J Moraliswani, 80 years old, was Chief of the Masubia people residing in Eastern Caprivi. He traced the uninterrupted line of succession of Masubia chiefs back to the period preceding the 1890 Treaty and German rule.<sup>19</sup> He was responsible and accountable to the Resident Magistrate and Native Commissioner, and thus to the authorities of the Republic of South Africa, and after independence to the Government of the Republic of Namibia. Botswana acknowledges that '[h]is evidence was impressive . . . .'<sup>20</sup>

353. Chief Moraliswani's testimony clearly establishes occupation of Kasikili Island by the Masubia of Caprivi and their economic activities on the Island.<sup>21</sup> The witness is very precise in his statement on this point:

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<sup>18</sup> BCM, para. 484.

<sup>19</sup> NM, Vol. II, pp. 207-208.

<sup>20</sup> Id.

<sup>21</sup> NM, Vol. II, pp. 204-205.

JOINT TEAM: Is the Honourable Chief speaking from his own knowledge or on the basis of what others have told him?

HONOURABLE CHIEF: What I will say is that starting from 1916, '17, '18, '19, '20 those are things I saw with my own eyes and then from then, others might be that they happened when I was not born and those things I got them from my great-grandfather and grandfather.

CO-CHAIRMAN (NAMIBIA): (intervening to correct translation) And father.

INTERPRETER: Yes.

JOINT TEAM: Does the Honourable Chief know of anyone who owned land on Kasikili?

HONOURABLE CHIEF: I know them, why can I forget them because I was also ploughing there.<sup>22</sup>

354. Such an activity is exclusive of any activity on the Botswana side during the period. Chief Moraliswani clearly states the situation in response to a question from the Botswana Component:

BOTSWANA COMPONENT: As he was part of the Royal family, does he know whether there were some people ploughing on Kasikili from the Botswana side?

HONOURABLE CHIEF: There was no ploughing there unless those people who were working at Kasane, then he come and ask land from his family who are ploughing there and they give him a place to plough.<sup>23</sup>

The Chief does not suggest the existence of any problems with the Bechuanaland authorities or any protest on their behalf as regards the peaceful occupation and use of the Island by his people.

355. The evidence given by Chief Moraliswani, given special credence by Botswana, is generally consistent with the testimony of the other witnesses presented by Namibia before the JTTE. Botswana erroneously states that 'he clearly contradicted some of his subjects.'<sup>24</sup> There may be slight differences of view, in particular as to occupation of the Island on a

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<sup>22</sup> Id., pp. 203-204.

<sup>23</sup> Id., p. 205.

permanent basis after 1937. Such discrepancies tend at least to prove that, contrary to Botswana's allegation,<sup>25</sup> there was no collusion between the witnesses. But in essence, all witnesses confirm occupation of Kasikili Island by the Masubia of Caprivi, to the exclusion of the inhabitants of Botswana.

356. As to the exact date when the agricultural activities of the Masubia of Caprivi ceased on the Island, the evidence is not clear. Chief Moraliswani himself is contradictory in his statement. He answers the Botswana component's question on the date when people stopped ploughing Kasikili Island:

That was in 1937 when now a lot of elephants were now entering Caprivi and then, when people were ploughing it was found that those elephants were destroying their fields, it's when they decided to move and come to the other side here in Caprivi.<sup>26</sup>

357. But in his written statement, Chief Moraliswani declares:

Subsistence farming and fishing was the main activities practised by the Masubia living around Kasika on this Island. The activities have been stopped because of the shooting and killing of my subjects by the Botswana defence forces.<sup>27</sup>

358. The written statement thus tends to fix a date posterior to Botswana's independence. Chief Moraliswani was certainly impressed by the importance of the 1937 flood and disruption of agricultural activities that ensued. Regular agricultural activities may not have resumed immediately after the flood. That they did resume seems established not only by the other witnesses, but also by the declarations of the local authorities concerned. Although Botswana claims there is no photographic evidence of habitation on the Island,<sup>28</sup> the 1943 photograph in its Counter-Memorial shows a clearly labelled kraal in the center of the Island and fields in the southeastern corner.<sup>29</sup>

359. Namibian peaceful occupation and use of the Island continued into the 1960s and 1970s, and even the 1980's, in particular through hunting, fishing and pasturing activities

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<sup>25</sup> BCM, para. 471.

<sup>26</sup> NM, Vol. III, Annex 2, p. 209.

<sup>27</sup> NM, Vol. III, Annex 2, p. 212.

<sup>28</sup> BCM para. 677.

<sup>29</sup> BCM, p. 163.

controlled by the authorities responsible for Eastern Caprivi. Trollope himself hired hunters to kill elephants that were destroying crops on Kasikili Island.<sup>30</sup> The incident of 28 September 1972, discussed at paras. 388-390, below, clearly confirms South African authority on the Island.<sup>31</sup>

360. Occupation and use of the Island by the Masubia of Caprivi is moreover clearly confirmed by the British authorities during the entire period of colonial rule.

361. Captain Eason reports in 1912 concerning 'Kissikiri Island,' that '[t]he natives living at Kasika in German territory are at present growing crops on it.'<sup>32</sup>

362 The Trollope-Redman report in 1948 recognized 'that since at least 1907, use has been made of the Island by [the] Eastern Caprivi Zipfel tribesmen.'<sup>33</sup> On 4 August 1951, Trollope's letter embodying the arrangement for the Island between him and Dickinson states:

(c) That, having regard to the foregoing, the position revert to what was de facto before the whole question was made an issue in 1947 – *i.e.* that Kasikili Island continue to be [used] by Caprivi tribesmen and that the Northern Waterway continue to be used as a 'free for all' [t]horoughfare.<sup>34</sup>

363. In 1965, R.R. Renew, Surveyor General of Bechuanaland, reviewing the Redman-Trollope arrangement, notes that the factual position accepted by both Governments on the question of occupation of the Island was:

(b) Since the assumption of the German administration of the Caprivi strip in 1907, Caprivi tribesmen have cultivated land 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.<sup>35</sup>

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<sup>30</sup> NM, Annex I, p. 24 (Testimony of S.M. Ntonda), p. 55 (Testimony of F. Mayumbelo).

<sup>31</sup> NCM, paras. 87-91 and Annexes 23, 24, 25, 26 and 27.

<sup>32</sup> BCM, para. 29, quoting BM, Vol. III, pp. 234-235.

<sup>33</sup> NM Annex 60, para. 54.

<sup>34</sup> NM, para. 277.

<sup>35</sup> BM, Vol. III, Annex 36, p. 321.



364. The joint survey report of 5 July 1985 says:

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.<sup>36</sup>

The report thus confirms use and occupation up to the mid-1980s, even if less frequently in the later period.

365. The main conclusions arising from the evidence are indisputable. The testimony established peaceful occupation and use of Kasikili Island by the Masubia of Caprivi for much the greater part of the period under consideration, under the authority of their traditional leadership, responsible to the German and South African authorities, and with no objection or control by the Bechuanaland authorities. Likewise, the documents produced by the Bechuanaland authorities covering the whole period under examination consistently state that the Island was occupied and used by the Masubia of the Caprivi, and not by the people of Bechuanaland.

366. Conversely, there is no evidence of any occupation whatsoever of Kasikili Island by residents of Bechuanaland or allegation of such occupation by the Bechuanaland authorities. Even the evidence offered by the witnesses presented by Botswana to the JTTE is essentially restricted to occasional passage of cattle. It is unsubstantiated by the local authorities. It runs counter to the statement by Chief Moraliswani, who was considered by Botswana as authoritative.

(b) The occupation and use of Kasikili Island was in the exercise of state authority and 'à titre de souverain'.

367. Although Botswana concedes that the Masubia of Caprivi peacefully occupied Kasikili Island, at least until 1951, (i.e. through the alleged 'critical date'), it argues that this occupation could not be taken into consideration in assessing title to sovereignty. The argument is twofold: (1) it asserts that activities carried out by 'individual subsistence farmers' could not be 'title-generating' because they were not carried out by the state;<sup>37</sup> and (2) whatever authority was exercised was not 'à titre de souverain,' which Botswana defines

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<sup>36</sup> BM, Vol. III, Annex 48, p. 387.

<sup>37</sup> BCM, para. 469.

as involving ‘the existence on the part of the state exercising authority of a genuine belief that it has title.’<sup>38</sup> Neither argument can be sustained.

(i) The occupation and use of Kasikili Island discussed above were under the authority and jurisdiction of the powers that exercised sovereign rule over the Caprivi Strip at the time

368. The Namibian Memorial states very clearly its understanding that

in order to establish sovereignty by operation of prescription, acquiescence and recognition, the claimant must show more than the use of the disputed territory by private individuals for their private ends. It requires, according to the arbitrators opinion in the *Island of Palmas* case, “the continuous and peaceful display of territorial sovereignty.”<sup>39</sup>

In the next 15 pages of its Memorial, Namibia established in detail that this condition had been fully met — under German administration, under the British as delegates of the mandatory power, and under South Africa until the time of Namibian independence.<sup>40</sup> The Court is respectfully referred to this extended analysis

369. At the same time, it is well established that what is considered to be the exercise of state authority must correspond to the nature of the territory in dispute. As arbitrator Dr. Max Huber held in the *Palmas* case, ‘manifestations of territorial sovereignty assume different forms, according to conditions of time and place.’<sup>41</sup> One cannot expect the same kind of exercise of authority in remote and rural areas as in densely populated places readily accessible to the seat of government administration. Kasikili Island is very far from the local administrative centres of Schuckmannsberg or Katima Mullilo, and even farther from Windhoek. During the period under consideration, it was even more difficult for the German and South African authorities (or the British acting on South Africa’s behalf) to exercise direct authority over Kasikili Island, given the limited resources and the remoteness of the

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<sup>38</sup> Id. para. 698.

<sup>39</sup> NM, para. 218.

<sup>40</sup> Id. pp. 86-100.

<sup>41</sup> *The Island of Palmas (United States v. The Netherlands)*, *Hague Ct. Rep. 2d* (Scott), p. 93; *Legal Status of Eastern Greenland*, *P.C.I.J. Reports*, Serie A/B, No. 53, p. 46.

place. In fact, Germany ruled Eastern Caprivi with only two German civil servants and a handful of military personnel.<sup>42</sup>

370 The necessity, in the context of the doctrine of prescription, of calibrating the required exercise of state authority to the practical situation of the territory involved was stressed in the *Rann of Kutch* arbitration.<sup>43</sup> As Professor Brownlie comments:

Rann of Kutch case, 1968. The Award in this case remarked that in an agricultural and traditional economy, the distinction between state and private interests was not to be established with the firmness to be expected in a modern industrial economy. In an agricultural economy grazing and other economic activities by private landholders may provide evidence of title.<sup>44</sup> (emphasis added)

371. The opinion of the arbitral tribunal, given by Chairman Lagergren declares:

The rights and duties which by law and custom are inherent in, and characteristic of, sovereignty present considerable variations in different circumstances according to time and place, and in the context of various political systems. The sovereign entities relevant in this case prior to Independence were, on both sides of the Rann, agricultural societies . . . State and private interests coincided and were necessarily so closely assimilated with each other that it would be improper to draw as sharp a distinction between them as is called for in the context of a modern industrial economy.<sup>45</sup>

372. Namibia submits that this is the standard that should be applied to the prescription claim in the present case and that it has been fully met. There can be little doubt that the occupation of Kasikili Island by the Masubia of Caprivi was under the control of their traditional authorities, who were themselves responsible and accountable to the colonial Government.<sup>46</sup> The evidence given by Chief Moraliswani also establishes the essential elements of 'indirect rule' as described in Namibia's Memorial.<sup>47</sup> German occupation in Eastern Caprivi, as we know, was limited initially to two officials. The Imperial Resident, Captain Streitwolf, carefully studied British practice in Bechuanaland and decided upon a similar method of

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<sup>42</sup> NM, para. 223.

<sup>43</sup> *R.I.A.A.*, Vol. XVII, pp. 553-554.

<sup>44</sup> Brownlie, *Principles of Public International Law*, pp. 143-144.

<sup>45</sup> *R.I.A.A.*, Vol. XVII, p. 554. (emphasis added).

<sup>46</sup> NM, para. 86 *et seq.*, para. 218 *et seq.*

<sup>47</sup> NM paras. 224-232.

administration.<sup>48</sup> His successor, Lieutenant Kaufmann, continued the policy of indirect rule.<sup>49</sup> The chiefs were responsible and accountable to the German Imperial Resident. Namibia's Memorial has amply documented the conditions of indirect rule, in particular during the German period.<sup>50</sup>

373. Material recently discovered in the South African archives gives additional details as to the operation of indirect rule in the Eastern Caprivi. For example, on 12 October 1939, at the beginning of Trollope's term as Resident Magistrate and Native Commissioner, the Secretary for Native Affairs in Pretoria gave him instructions as to his relationship with the Masubia authorities.<sup>51</sup> The Chiefs, secretaries and members of the Kutas (or council of *indunas*) were to receive annual salaries from the government.<sup>52</sup> In addition, the South African administration also maintained law and order in the vicinity of Kasikilli Island.<sup>53</sup> The specific attributes of the Island – its size, the fact that it was flooded for part of the year and that its use was limited to agricultural and pastoral activities – obviously did not call for the continuous manifestations of state authority. But whenever necessary, the competent authorities did intervene at a local level, for example, to issue hunting permits.<sup>54</sup>

374. Botswana, after admitting that the Masubia chiefs 'became *in a certain sense* agents of the colonial authorities' adds an extraordinary and singular requirement for prescriptive occupation:

there is no evidence, and no evidence is offered, to the effect *that the chiefs had authority to engage in title generating activities*. Both legally and historically, this would be eccentric. . . It is an astonishing proposition that the chiefs could engage in activities which would subvert the results of recent and prolonged negotiations between London and Berlin.<sup>55</sup>

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<sup>48</sup> K. Streitwolf, *Der Caprivizipfel* (1911), pp. 26-27, NM, para. 65; NM Annex 141, pp. 262-263 and translation of extract pp. 241-243

<sup>49</sup> NM, Vol. IV, Annex 41, p. 3.

<sup>50</sup> NM, paras. 222-232.

<sup>51</sup> Reply Annex 16(a).

<sup>52</sup> See, for example, the Letter from the Secretary for Finance, Pretoria, 18 September 1941, Reply Annex 17(d). See also notes dated 2 June 1939, *id.*, 17(a); 4 March 1940, *id.*, 17(b); 14 October 1941, *id.*, 17(c); 29 May 1943, *id.*, 16(c); 13 March 1962, *id.*, 16(e).

<sup>53</sup> See para. 378, *infra*.

<sup>54</sup> See para. 359, *supra*.

<sup>55</sup> BCM, para. 685. (emphasis in original).

375. The confusion between occupation in a sovereign capacity and in an international capacity is bewildering. All that is required by the *Palmas* and *Rann of Kutch* cases is a peaceful occupation within a framework controlled by a public authority exercising the degree of presence called for under the prevailing circumstances. This degree varies according to the situation. The capacity to commit a state internationally is quite a different thing. Nobody expects a member of government to show up with his plough in order to prove peaceful occupation. But he is supposed to react formally in case of infringement of territorial sovereignty (as Botswana and its predecessors in title consistently failed to do). The Caprivi chiefs certainly had no authority or competence to make or unmake international treaties. But peaceful occupation of territory does not mean occupation by authorities competent to engage in international relations. The Resident Commissioner in Kasane had no more competence to commit Britain or Botswana internationally than Chief Moraliswani had to commit South Africa or Namibia.

376. The point is that, by the authority conferred by indirect rule, the traditional structure of the Masubia of Caprivi — the Chief, Kuta and Indunas — effectively controlled the activities of the population occupying Kasikili Island during the relevant period in accordance with the legal and administrative structure of the time. Whenever necessary, the authorities internationally responsible for Eastern Caprivi, including Kasikili Island, asserted their rights, as has been demonstrated in the Namibian Memorial. But in ordinary times, indirect rule through traditional authority was enough to provide evidence of occupation under the authority of the state. In short, the standards set in the *Palmas* arbitration were met.

(ii) The occupation and use of Kasikili Island by Namibia's predecessors in title was 'a titre de souverain.'

377. The concept of occupation 'à titre de souverain' is ambiguous. The expression is often used to distinguish situations where occupation cannot be title generating, such as military occupation, mandate, trusteeship, etc. Botswana does not use the concept in that sense, but rather as involving a 'genuine belief' as to the exercise of sovereignty by the authority concerned.<sup>56</sup>

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<sup>56</sup> BCM, para. 698 *et seq.*

378. Again, recent documentation from the South African archives fully confirms that the governing authorities in the Caprivi fully understood that they were exercising sovereign authority in the area including Kasikili Island.<sup>57</sup> This is readily apparent in Magistrate Trollope's arrangements for the policing of the area, which was a serious problem because of hippopotamus poachers.<sup>58</sup>

379. Trollope made arrangements with the Bechuanaland authorities in Kasane for the secondment of Sergeant Webb, of the Bechuanaland Protectorate Police, as peace officer for the Union Government, in order to effectively patrol the Impalila and Kasika area.<sup>59</sup> Trollope had stationed a native constable at Kasika, but as he explains in a note of 30 March 1940, 'it is almost certain that a number of the poachers are Europeans. It is impossible for the constable to arrest or take other effective steps to deal with such persons.'<sup>60</sup> The Resident Commissioner in Mafeking agreed to second Sergeant Webb with no extra remuneration. South Africa reimbursed the extra expenditures incurred by the sergeant for these patrols.<sup>61</sup> Given the relationships revealed in the testimony between Kasika and Kasikili Island<sup>62</sup> and the poaching problems on the Island, it is clear that Sergeant Webb's area of jurisdiction included Kasikili Island. It is significant, in this context, that the South African authorities were scrupulous about the formalities of having Sergeant Webb commissioned as a constable for the Union government and of reimbursing his expenses. This makes it clear that in patrolling the area Sergeant Webb was acting in his capacity as a peace officer of the South African government. The exercise of police power in an area is a fundamental attribute of sovereignty, and certainly evidences 'a genuine belief' that the authority being exercised is

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<sup>57</sup> See, for example, Reply Annex 16(a) (Instructions for the administration of Caprivi Zipfel); 16(b) (Proposal for setting aside the Eastern Caprivi Zipfel as a Native Reserve); 16(c) (Request for funds to cover expenses for an official visit of the under-secretary for Native Affairs); 16(d) (Memorandum regarding road repairs).

<sup>58</sup> See the Letter of 30 March 1940, Reply Annex 18(b) and Trollope's Report on poaching of 2 September 1943, id., 18(e). See also the Letters of 3 April 1941, id. 18(d); 31 August 1948, id., 18(h); 5 January 1957, id., 18(i) regarding the purchase of canoes to patrol the sector.

<sup>59</sup> For the relevant legislation, see id., 18(a).

<sup>60</sup> Id., 17(b).

<sup>61</sup> For full documentation see the Letter of 24 June 1940, id., 18(c). See also the Letters 30 March 1940, id., 18(b); 2 September 1943, id., 18(e); 3 April 1941, id., 18(d); 11 January 1944, id., 18(g).

<sup>62</sup> See NM paras. 204-205, 208.

sovereign authority. There is no reason to believe that Trollope's view of his responsibilities was in any way a departure from previous practice under the Germans or the British, when the British were administering the mandate on behalf of South Africa.

### C. Acquiescence.

380. Absence of opposition is an essential component of prescriptive title to territory. In the present case, the authorities responsible for Bechuanaland, and later Botswana, were well aware of peaceful occupation and use of Kasikili Island by Namibia. They did not object. Yet the situation was such that it called for a reaction if they believed the Island was within Botswana territory.

381. Botswana's passive attitude for nearly one hundred years is the more significant in that it may actually compromise its alleged treaty title. The Court will note that the 1890 Treaty was not about sovereignty, but about spheres of influence. Its authors did not purport to draw boundaries, but to delimit spheres. Delimiting spheres did not entail extension of sovereignty, but committed the other party to the Treaty not to intrude upon the conceded sphere. Effective occupation was required to perfect sovereignty in the sphere of influence allocated to a party. According to J.H.W. Verzijl, '[s]uch zones or spheres did not thereby become State territory proper, but as far as they were concerned an inchoate title was vested in the proclaiming or delimiting State(s) that could gradually develop into full sovereignty.'<sup>63</sup> And Lord Salisbury remarked in 1894, '[i]t is not safe these days to establish your title to a large territory . . . and then leave it there without any effort to assert your title in a more practical and effective fashion. The whole doctrine of paper annexation is in a very fluid and uncertain condition.'<sup>64</sup>

382. The British authorities were quick to perfect their title in the area of Bechuanaland. Long before Captain Streitwolf came to Schuckmannsburg, they established a post at Kazungula, later moving it to Kasane, less than five kilometres from Kasikili Island. If the British government believed that Kasikili Island was within its sphere of influence, it would

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<sup>63</sup> J.H.W. Verzijl, *International Law in Historical Perspective*, Vol. III, Leyden, 1970, p. 495.

<sup>64</sup> G.N. Uzoigwe, 'Spheres of Influence and the Doctrine of the Hinterland in the Partition of Africa,' *Journal of African Studies*, Vol. 3 No. 2, 1976 at p. 199 (Reply Annex 9). Cf. *Western Sahara*, *I.C.J. Reports*, 1975, p. 56, para. 126; Curzon of Kedleston, *Frontiers*, Oxford, 1907, pp. 42 *et seq.*; M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law*, London, 1926, pp. 139-147.

certainly have taken some steps to perfect its claim. Yet, as shown in Chapter IV, above, when Captain Eason urged that Britain should claim the Island, his superiors took no action either in London or in Southern Africa. Indeed, the authorities in Bechuanaland and, thereafter, Botswana, never took any step to occupy Kasikili Island until the unilateral military occupation by the BDF in 1991, more than a century later. They never objected to the effective occupation of the Island by the Caprivi Masubia under the authority of their traditional structures, accountable and responsible to the colonial authorities. This silence gains added significance, since, in the light of the then prevailing doctrine concerning spheres of influence, Britain could not, as it well knew, blithely rely on its 'paper title.'

383. Acquiescence is manifested in disputes over territory in many forms, one of which is the failure to protest maps showing adverse attribution of the territory.<sup>65</sup> In the present case, the silence of Botswana and its predecessors in title in the face of official maps showing Kasikili Island as part of Namibia is unbroken. The map evidence has been dealt with at length in Chapter V, above, in relation to the question of the proper interpretation of the 1890 Treaty. And as it bears on acquiescence, the map evidence has been examined at length in NM Part Two, Chapter V and NCM, Chapter IV.<sup>66</sup> Therefore, only a brief comment is necessary at this point.

384. The most important fact is that the principal maps produced and used by the officials responsible for government in the area show the boundary in the channel to the south of the Island. The first of these maps is the Seiner map, produced by the Austrian cartographer in 1909. Col. Rushworth, on the basis of documentation discovered since the Memorials were filed, now shows conclusively that the Seiner map was not only the semi-official map used by the Germans during the colonial period, but that it was relied on and highly regarded by British officials, both before and during the period when they administered the Caprivi Strip as delegate of the mandatory power between 1919 and 1929.<sup>67</sup> South African Map TSO 400/556, was drawn in 1945 although it was not published until 1949. It was circulated in draft for comment to the British Resident Commissioner in Mafeking and the District

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<sup>65</sup> See, e.g., *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, I.C.J. Reports, 1962, pp. 30-31.

<sup>66</sup> See especially NM, paras. 287, 325, 326, 333; and NCM, para. 140.

<sup>67</sup> Reply Annex 1, paras. 12(d) and 12(e).



Commissioner in Maun, among others.<sup>68</sup> Although these officials made a number of suggestions for changes in the vicinity of Kasane, they made no comment or objection with respect to the boundary line shown in the channel to the south of Kasikili Island.<sup>69</sup> The map was revised in 1967, after Botswana's independence. Again, there was no comment by the relevant authorities as to the boundary in the southern channel. The United Nations map was produced in 1985 as part of the UN effort to assert responsibility for Namibia and to preserve its territorial integrity. It shows Kasikili Island in Namibia. Although Botswana was, at the time, a member of the UN Council for Namibia, under whose auspices the map was produced, the map contains no disclaimer as to depiction of boundaries. Nor did Botswana lodge any protest. The absence of reaction or protest from Botswana or its predecessors in title in relation to these three principal maps amounts to acquiescence to the boundary as shown on the maps.

385. The first authoritative British map, GSCS Map 3915 of 1933, also traces the boundary in the southern channel. This map continued to be used throughout most of the remainder of British colonial rule. It was adapted and reproduced on a smaller scale by the Bechuanaland authorities in 1935.<sup>70</sup> They used it to show Crown lands in 1957 and district boundaries as late as 1959, only a few years before Botswana's independence.<sup>71</sup> The British authorities who produced the map were also the ruling authorities in Bechuanaland. Therefore, the map is not merely evidence of acquiescence to the position of the boundary in the southern channel — it constitutes a positive act of recognition by Botswana's predecessor in title that Kasikili Island is within the territory of Namibia.

386. The failure to protest the series of maps showing Kasikili Island in Namibia is only one aspect of the unbroken record of silence from Botswana and its predecessors in title. Namibia mentions here only a few salient occasions on which some reaction or response was urgently called for Botswana to protect any title it may have had.<sup>72</sup> As has been discussed

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<sup>68</sup> Reply Annex 1, para. 17(b); see also NM, Vol. V, Annex 106, and NM, Atlas, Map X/2.

<sup>69</sup> Reply Annex 1, para. 17(d).

<sup>70</sup> NCM, Vol. II, Annex 1, para. 16(e).

<sup>71</sup> NM, paras. 259-261, 307-308; Atlas, Map XI.

<sup>72</sup> In a different field, that of state responsibility, Professor Ago noted, in his Fourth Report to the International Law Commission, that state organs have the obligation to react to certain situations created by individuals. He remarks that 'the action of the individual can be said to act as a catalyst

frequently in the pleadings, as early as 1912, Captain Eason reported to the British authorities that the Masubia from Kasika were cultivating the Island. He urged his superiors to claim the Island on the ground that the northern channel was the main channel. His report was filed without comment or action by the British colonial authorities, either in London or in Bechuanaland. With respect to this 'failure to follow up on Eason's recommendation' Botswana's only answer is that 'there was no call for the British Government to "follow up on" the recommendation.'<sup>73</sup> Why not? Especially in view of the contemporary legal requirements regarding spheres of influence and paper titles, there was every reason for Britain to protest if it wished to assert title.

387. Again in 1948, the Trollope-Redman report concluded that the Masubia of Caprivi had been cultivating the Island since at least 1907 without objection. The response from the British authorities was not to protest and assert their own title. Instead they accepted an administrative arrangement recognizing the status quo, 'i.e. that Kasikili Island would continue to be used by Caprivi tribesmen and that the Northern Waterway continue to be used as a "free for all" [t]horoughfare.'<sup>74</sup>

388. Perhaps the most significant instance of positive acquiescence occurred in 1972 after Botswana's independence, and involved, not its predecessor in title, but Botswana itself. On 28 September of that year, three Caprivians were arrested on Kasikili Island by game wardens from the Chobe National Park and brought to trial before the Botswana magistrate at Kasane. The magistrate dismissed the case on the ground that they were arrested outside Botswana's jurisdiction. Thus, the case marks an official recognition by the judicial authority of Botswana that Kasikili Island was not in its territory.

389. More was to come. The local authorities in the Caprivi reported the incident to Pretoria, and on 22 February 1973, the Department of Foreign Affairs of the Republic of South Africa sent a diplomatic note to the Office of the President of Botswana setting out this violation of

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for the wrongfulness of the conduct of the State organs which have not taken the necessary steps to prevent the occurrence of such an action.' Y.I.L.C., 1972, Vol. II, p. 97, note 120.

<sup>73</sup> BCM, para. 33.

<sup>74</sup> NM Annex 67; see also id. Annex 58.

its territorial integrity and seeking clarification. There was no response from the Botswana government. On 13 June 1973, the Department sent a reminder. Again there was no reply.<sup>75</sup>

390. The incident is comparable to Prince Damrong's visit to the Temple of Preah Vihear. As the Court said,

A clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined. It demanded a reaction. Thailand did nothing. . . . Looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in face of an obvious rival claim. What seems clear is that either Siam did not in fact believe that she had any title--and this would be wholly consistent with her attitude all along, and thereafter, to the Annex I map and line — or else she decided not to assert it, which again means that she accepted the French claim, or accepted the frontier at Preah Vihear as it was drawn on the map.<sup>76</sup>

Namibia submits that, likewise, the failure by Botswana to react to this unambiguous statement by the Ministry of Foreign Affairs of South Africa — a failure that was 'wholly consistent with her attitude all along' — amounted to a tacit recognition of Namibian sovereignty over Kasikili Island.

#### D. Conclusion

391. In this Reply, Namibia has not recapitulated all the evidence and argument in its earlier pleadings relating to prescription and acquiescence. It has limited itself to responding to Botswana's Counter-Memorial, relying, for the most part, on witnesses and authorities quoted by Botswana during the procedure. From this common ground emerges a clear picture of the situation in fact and law: Peaceful occupation and use of Kasikili Island by the Masubia of Caprivi under the control of their traditional authorities and ultimately the authority of the sovereign state (Germany, Great Britain acting for South Africa, and South Africa as the mandatory power) continued from the signature of the treaty in 1890 well into the 1960s and 1970s and even the 1980s. This peaceful occupation and use of the Island has been operative for a period of almost a century, meeting no protest either from the British authorities or from Botswana itself after independence. It was up to the British government, in the name of

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<sup>75</sup> The incident has been discussed and substantiated by the texts of affidavits and diplomatic notes in NCM, paras. 87-91 and NCM, Annexes 23-27.

<sup>76</sup> *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, I.C.J. Reports, 1962, pp. 30-31.

Bechuanaland, and later to the Botswana authorities, to challenge this situation if they believed Kasikili Island was within their sovereign jurisdiction. Again and again they failed to do so. Botswana can show no occupation or assertion of jurisdiction during the whole period under discussion. Indeed, in the case of the GSCS Map 3915 of 1933 and again in the magistrate's dismissal of the case against the Caprivians arrested on the Island, Botswana affirmatively recognized the validity of Namibia's claim.

392. The consequence is that Kasikili Island belongs to Namibia by operation of the doctrines of prescription and acquiescence.

## Part Four

### OTHER MATTERS

#### **Chapter VII**

#### NAMIBIAN FOREIGN POLICY AND ITS APPLICATION TO THE BOUNDARY DISPUTE BETWEEN NAMIBIA AND BOTSWANA

##### A. Introduction

393. The purpose of this Chapter is to respond to Chapter 2 of Botswana's Counter-Memorial entitled the 'Diplomatic Resurgence of the Boundary Dispute' (BCM, paras. 103 to 130). The contents of BCM Chapter 2 are largely a repetition of Chapter IV of the Botswana Memorial. Most of this material is irrelevant to the issues before the Court, and for this reason Namibia did not consider it necessary to respond in its Counter-Memorial. However, so as not to appear to acquiesce in an incorrect interpretation of these events in the face of Botswana's repetition, Namibia takes this opportunity to set the record straight.

394. Before addressing Botswana's general discussion, Namibia wishes to protest one concrete assertion by Botswana. BCM para. 128 alleges that the Namibian Deputy Minister for Home Affairs did not follow diplomatic channels when he summoned the Botswana District Commissioner, based at Kasane, to Kasika (Namibia) to raise the issue of the ownership of Kasikili Island in 1992. Botswana's attacks on the approach adopted by the Namibian Deputy Minister for Home Affairs are misplaced. It was actually the government of Botswana that failed to use established diplomatic channels and to follow the procedure prescribed by international law.

395. The contents of the BCM paras 103-130 should be read against the backdrop of Botswana's militarist posturing in respect of the disputed area as evidenced by Botswana unilaterally and illegally sending Botswana Defence Force (BDF) soldiers to occupy Kasikili/Sedudu Island and hoisting its flag over the Island. Indeed Botswana's present behaviour and conduct should be put in its historical perspective. In this connection, Namibia wishes to bring to the attention of the Court Botswana's long-standing territorial ambitions

against this part of Namibia. On 9 September 1965 according to the *Rand Daily Mail*,<sup>1</sup> Dr Q.K.J. Masire, then Deputy Prime Minister of Bechuanaland Protectorate, made a speech in which he said, ' . . . Bechuanaland wanted the whole of the strategic Caprivi Strip under its jurisdiction. (emphasis added) Dr.Masire was Botswana's President from 1980 to 1998.

396. Botswana's territorial ambitions as explained above should be related to the 1984 incident, Botswana's occupation of the Island in 1991, and subsequent incidents along the border between Namibia and Botswana in the Caprivi Strip. All these incidents occurred during the presidency of H.E. Sir Ketumile Quett Masire. There is no record of such government-sponsored incidents during the presidency of H.E. Sir Seretse Khama, President Masire's predecessor.

397. Unlike the government of newly independent Namibia, in 1990 Botswana was obviously aware that there had been a dispute between Botswana and the government of South Africa over the ownership of Kasikili Island. Botswana knew not only that the South African government had exercised *de facto* control over Kasikili Island (as it did over the whole of Namibia), but also that the Island had been regarded as part of Namibia since the 1890 Anglo-German Agreement. The overwhelming documentary evidence from the colonial period left by the administering colonial authorities of the two countries prior to independence confirms this state of affairs beyond doubt. The documentary evidence is fully corroborated by oral testimony.

398. As long as the South African Defence Force (SADF) was in place, Botswana did nothing to upset the status quo in relation to Kasikili Island. Towards the end of 1989, the SADF withdrew from Namibia (including Kasikili Island) as part of the United Nations – sponsored independence process. In spite of its knowledge of the actual status of Kasikili Island, Botswana dispatched a contingent of BDF soldiers to occupy Kasikili Island and hoisted its national flag over the Island in 1991. Botswana took this action without any discussion or consultation with the government of newly independent Namibia. The action therefore constituted aggression and a unilateral use of force to change the status quo, in contravention of international law, the UN Charter, established diplomatic procedures, and its own claimed foreign policy.

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<sup>1</sup> See *Rand Daily Mail*, South Africa, 9 September 1965, Reply Annex 37.

## B. Namibian Foreign Policy

399. The origins of Namibian foreign policy can be traced back to the days of the SWAPO Party when it was still a liberation movement. It was SWAPO's policy to maintain friendly relations with countries and international organisations opposed to South Africa's occupation of Namibia.

400. Prior to Namibia's independence, foreign relations were considered by SWAPO to be one of the most important policy areas. This status is reflected in Article III of SWAPO's Constitution, which may be summarized as follows:

- To co-operate to the fullest extent with other national liberation movements and governments sympathetic to the rights of the Namibian people to national independence, and with organisations and individuals throughout the world who supported the rights of the Namibian people to self-determination.
- To work in close co-operation with all peace-loving states towards world peace and security.<sup>2</sup>

401. SWAPO realized that foreign relations were an important element in the struggle for Namibia's independence and that the forum of diplomacy could not be ignored. Through diplomacy, the organisation succeeded in mobilizing friends and sensitizing the international community to the justness of its cause — the right of the Namibian people to self-determination. SWAPO established offices in many places such as Dar es Salaam, Algiers, Cairo, Lusaka, Lagos, Harare, Francistown (Botswana), Helsinki, Stockholm, Luanda, Bonn, Paris, Moscow, New Delhi, Melbourne, New York and London. In this early period the organisation was headquartered in Dar es Salaam. Following the resolutions of the Tanga Congress (December 1969 to January 1970), SWAPO established its Department of Foreign Affairs.

402. The main objective of SWAPO's Department of Foreign Affairs was to forge its foreign relations in a systematic and coordinated manner. This task included the setting up of Party

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<sup>2</sup> SWAPO Constitution. Published by the SWAPO Department for Publicity and Information, Provisional Headquarters: P O Box 577, Lusaka, Zambia. Printed by Brouwer Offset, Delft, Holland. 1976; Reply Annex 7.

offices in countries sympathetic to SWAPO and establishing accreditation with friendly international organisations, including the Organisation of African Unity (OAU), the United Nations, the Commonwealth, the Non-Aligned Movement, Southern African Development Community (SADC), and the World Council of Churches.

403. When SWAPO and the then apartheid South Africa agreed to the implementation of the United Nations Security Council Resolution 435 calling for Namibia's independence under UN supervised elections, SWAPO won the elections and a Constituent Assembly was established. A total of seven political parties were represented in the Constituent Assembly (1989–1990), which was given the task of drawing up Namibia's Constitution and fixing its Independence Day. Mr Theo-Ben Gurirab, an Assembly member and Namibia's first Foreign Affairs Minister, in an address to the Assembly, outlined future Namibia's foreign policy:

I look at our own situation. Just last year we were engaged in a war as a people. I do not see, and particularly on this side of the house, anybody engineering, scheming, contemplating war. We experienced it, it is ugly. I don't see my Namibia to be one scheming, spending millions of the taxpayer's money to plan war. I don't see that. But not only here in Namibia. In the whole region of Southern Africa I see us moving away from the destructive politics of confrontation and war. The word now in currency is negotiations, let us talk. This is what our neighbours are trying to do now in South Africa, this is what I see. Internationally also I see the same thing. We are moving away from militarism, from war. I see conflicts being resolved now through negotiations, I see mushrooming of negotiation meetings everywhere in the world. I see super-powers talking to each other, wining and dining each other in their capitals. I don't see war on the world scene. So, let us not be prisoners of the past, let us not be so subjective about the immediate past that we see Namibia being in a position to contemplate war. I don't see that.

I hope that we will not be spending our time when we convert this House into the National Assembly to discuss war. I hope we would be living in peace, and allocating money for housing, for education, for health, for good government.

So, I just don't see the threat of war, I don't see that as being part of our political culture in the future.<sup>3</sup>

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<sup>3</sup> See Namibia Constituent Assembly Debates, 21 November, 1989-31 January 1990, Vol. 1, pp. 318–319, Reply Annex 12.



### C. Namibian Foreign Policy After Independence In 1990

404. After years of isolation, Namibia became a full and active member of the international community. Namibia's international involvement stems from the conviction, gleaned from its own history, that Namibia has a responsibility to promote international cooperation, peace, security and respect for international law and treaty obligations. The cardinal importance of this conviction is reflected in the five principles adopted by post-independence Namibia to govern her foreign relations. These principles are embodied in Article 96 of the Namibian Constitution which states as follows:

The State shall endeavour to ensure that in its international relations it;

- (a) adopts and maintains a policy of non-alignment;
- (b) promotes international co-operation, peace and security;
- (c) creates and maintains just and mutually beneficial relations among nations;
- (d) fosters respect for international law and treaty obligations;
- (e) encourages the settlement of international disputes by peaceful means.

#### 1. Diplomatic relations

405. Since Independence, Namibia has forged diplomatic ties with most of the member states of the UN and operates a number of diplomatic missions in Africa (one of which is in Botswana), Europe, North America (including a mission at the UN), and Asia. A number of foreign missions have been established in Windhoek, the capital of Namibia. Those represented include countries from Latin America, North America, Europe, Middle East, Asia, Australia, Caribbean, and Africa (including Botswana).

#### 2. Membership in African and regional international organisations

406. Namibia is a member of the (OAU) and is party to the Abuja Treaty establishing the Pan-African Economic Community. Namibia plays an active role in promoting regional integration through SADC, where Namibia is responsible for coordinating work on the regional fisheries industry. In addition, Namibia is a member of the Preferential Trade Area (PTA), the Common Monetary Area (CMA) and the African Development Bank.

### 3. Membership in global international organisations

407. On the international front outside Africa, Namibia is, in addition to her membership in the United Nations, a member of a number of UN agencies including the World Bank, the International Monetary Fund, (IMF), the International Labour Organisation (ILO), United Nations Educational, Scientific and Cultural Organisation (UNESCO), the Food and Agriculture Organisation (FAO) and the World Trade Organisation (WTO). Namibia is also a member of the Non-Aligned Movement and the Commonwealth.

#### 4. Namibia's commitment to international peace and security of all nations

408. As pointed out above, Namibia is constitutionally committed to encouraging the settlement of international disputes by peaceful means as well as to ensuring international peace and security. The Namibian government demonstrated this in 1993 by sending a contingent of the Namibia Defence Force (NDF) to Cambodia as part of the UN peacekeeping force, where it played a vital role.

409. Again in 1996 the Namibian Government sent a contingent of the NDF to Angola as part of the UN peacekeeping force. In addition, Namibia was among the countries that contributed financially to relieving the plight of the refugees in Rwanda with the goal of helping to alleviate human suffering and finding a peaceful solution to the problems facing that country.

### D. The Relationship between Namibia and Botswana After Namibia's Independence

#### 1. The origins of Namibia's foreign policy towards Botswana

410. Botswana was among the first group of countries with which SWAPO sought and maintained friendly relations, both before and after the Tanga Congress referred to in para. 401, above. Already in the early 1960's, SWAPO was unofficially represented in the Bechuanaland Protectorate by Maxton Mutongolome, who also served as the Organisation's spokesperson. After Botswana's independence in 1966, Mr Mutongolome worked more closely with the Democratic Party of Botswana and the Botswana government to coordinate the transit of Namibians fleeing South West Africa to SWAPO headquarters in Dar es Salaam, Tanzania. Later, under the leadership of SWAPO representatives Uutanga and Iipumbu, SWAPO established an office in Botswana with its seat in Francistown.

411. It is, therefore, not surprising that the government of newly independent Namibia

sought to further consolidate friendly and good-neighbourly relations with Botswana and to make the maintenance of peace and security between Namibia and Botswana a central objective of its foreign policy. The Namibian Government regards peace and security along the common border of the two countries as a matter of utmost importance.

412. Since achieving its independence in 1990, Namibia has pursued a policy of cooperation with its neighbouring states, including Botswana. In the economic realm, Namibia and Botswana have succeeded in forging cooperation, particularly in the sphere of communications. The two most significant results of this cooperation to date have been the construction of the 1,450 km Trans-Kalahari highway linking Namibia and Botswana and cooperation in bringing electric power from Namibia to the western part of Botswana.

413. In addition to economic cooperation between the two countries, closer cooperation has also been achieved in the social sphere. Namibia's contributions in this regard include providing access to school facilities for children from Botswana living near the Namibian border in regions like Omaheke (e.g., the Ernest Mayer Primary School in the Gobabis area), and Caprivi (e.g., the Divundu Junior Secondary School and Max Makushe Secondary School in the Mukwe district).

## 2. First state visit and the signing of cooperation agreements

414. Soon after the independence of Namibia on 21 March 1990, His Excellency President Sir Ketumile Quett Masire of the Republic of Botswana was the first Head of State to be invited to Namibia to pay a state visit in July 1990. President Masire was also the first dignitary to receive the Freedom of the City of Windhoek in acknowledgement of the friendly and cooperative relations between the two countries.<sup>4</sup>

415. On 26 July 1990 during the State visit of Sir Ketumile Quett Masire, three agreements were signed between Namibia and Botswana: (1) the Protocol of Understanding on Defence and Security, (2) an Agreement to create a Namibia-Botswana Joint Commission of Cooperation, and (3) an Agreement on Cultural and Educational Cooperation.

416. A joint communiqué issued by the two Heads of State at the conclusion of the visit envisioned a comprehensive programme of cooperative relations. Among the areas of

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<sup>4</sup> See Times of Namibia, Tuesday, July 24 1990, Reply Annex 38.

cooperation identified were the development of transportation and communications, including specifically the construction of the Trans-Kalahari and Trans-Caprivi highways to link the two countries; the establishment of direct flights between Gaborone (the capital of Botswana) and Windhoek; the promotion of trade and commercial relations; the development and utilisation of water resources, in particular the Okavango water system as well as common underground water sources; promotion of joint programmes in wildlife and nature conservation and veterinary control; joint development of tourism; co-operation in energy and mineral exploration and development; and collaboration in the fields of culture, education, science and technology, the arts and sport by making available facilities and scholarships to students from each country to study in the institutions of higher learning, vocational centres and research institutions of the other country.

417. President Sam Nujoma of Namibia made a return state visit to the Republic of Botswana in September 1990. During the past seven years, numerous high-level official visits have been exchanged between the two countries with the participation of Cabinet Ministers, members of the Judiciary, and members of each country's National Assembly, including the Honourable Speakers.

3. The Kasikili/Sedudu Island dispute and Namibia's conduct in accordance with the protocol of understanding on defence and security

418. Namibia has emphasized its constitutional commitment to peace and security and the resolution of disputes by peaceful means. The Defence and Security protocol referred to above is a further reflection of this commitment. As such, it is entirely appropriate to discuss the most recent developments in the Kasikili/Sedudu Island dispute with reference to this agreement, to which Botswana is a party.

419. The Protocol of Understanding underscores, *inter alia*, the following three main objectives:

- the need to further strengthen and consolidate the existing excellent relations between the two Republics;
- the need to maintain lasting peace and security between the two countries, especially along their common border; and
- the need to promote effective liaison at all levels in the fields of peace and security.

420. In terms of the provisions contained in the Protocol of Understanding, the two Governments established the Namibia-Botswana Joint Commission on Defence and Security. The Commission held its first meeting in Windhoek on 15 November 1990. The inaugural meeting in Windhoek of the Joint Commission on Defence and Security followed the meeting of the Joint Technical Committee which met during 1 and 2 November 1990 in Kasane, Botswana to discuss means for implementing the terms of the Protocol of Understanding.

421. The Commission, following in-depth discussions, agreed to the following:

- To give special attention to the problem of poaching and to implement an effective joint mechanism aimed at eradicating the menace of these criminal activities along the common border;
- To ensure free access to common rivers insofar as they play a vitally important role in the daily economic and social activities of the inhabitants along the riverine portion of the common border;
- To avoid at all costs cross-border shooting incidents through the swift exchange of information on the activities and the movements of criminals and other persons threatening the stability and security of the two countries;
- To intensify efforts aimed at promoting and protecting the environment and wildlife through an information campaign intended to raise awareness about the importance of conservation issues; and
- To urge nationals of both countries to use the designated border crossing points for all movements between the two countries.

422. The next plenary meeting of the Namibia-Botswana Joint Commission was held on 8-10 November 1991 in Maun, Botswana. By this time, various sub-committees to deal with specialized issues had been established and were fully operational in both countries.

423. Bilateral agreements and conventions have also been concluded within the framework of SADC and various other regional and national institutions with a view to further strengthening and consolidating bilateral and regional co-operation and unity in action. These agreements constitute important building-blocks in the common efforts to uplift the living standards of the citizens of Namibia and Botswana.

424. The Berlin scramble for Africa, which took place in the 1880's left behind as its legacy a horrendous patchwork of divided communities, arbitrary demarcations, potential political time-bombs, and unmitigated threats to political and economic security that plague the border regions of virtually all African states. The Kasikili/Sedudu Island boundary dispute, which, unfortunately, has soured relations between Namibia and Botswana, is part of this legacy.

425. Since its independence, Namibia has had only one significant boundary dispute, namely the dispute with the then apartheid South Africa concerning the Orange River boundary. Negotiations on the issue of the Orange River boundary commenced immediately following Namibia's independence and the matter has since been resolved bilaterally by peaceful and amicable means.

426. Unaware of the possibility of conflict with Botswana over Kasikili Island, the government of Namibia was surprised when a BDF unit occupied the Island in 1991.<sup>5</sup> Prior to these events, no mention of Kasikili Island had been made to Namibia by the Botswana government, in spite of the opportunities provided by the reciprocal state visits referred to above, which had entailed extensive discussion of issues of wide-ranging bilateral significance. Nor did Botswana invoke the machinery of the Joint Commission on Security and Defence.

427. The background is as follows. During contacts in New York with SWAPO representatives on 27 November and with the then U.N. Commissioner for Namibia on 28 November 1984, Kasikili Island was mentioned by Botswana, but primarily in the context of claims regarding South Africa's destabilization of Botswana and other neighbouring states.<sup>6</sup>

428. The government of Botswana claims that the Kasikili Island issue was settled in 1985 by means of a report by a Botswana-South Africa joint survey team. That report has been

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<sup>5</sup> Botswana maintains that it hoisted its national flag and stationed troops on the Kasikili Island 'in early 1989,' a position disputed by Namibia. See the Letter dated 16 February 1996 from Botswana's Minister for Foreign Affairs, the Honourable Mompoti S. Merafhe, to Namibia's Minister of Foreign Affairs, the Honorable Theo-Ben Gurirab, Reply Annex 10, p. 2. Even if Botswana's occupation of the Island took place in 1989, as alleged by Botswana, the fact remains that Botswana did not occupy the Island until after the withdrawal of SADF from the area.

<sup>6</sup> See BM, Vol. III, Annex 41, Minutes of the Meeting held in New York, 27 November 1984 between the Botswana delegation and SWAPO. See also BM, Vol. III, Annex 43, Minutes of the meeting between the UN Commissioner for Namibia, Mr. Mishra, and the Botswana delegation on 28 November 1984 in New York.

fully discussed in Namibia's Memorial (paras 284-286), Counter-Memorial (paras. 167-137) and in this Reply, Chapter IV, paras. 270-279, above. Its findings were inconclusive. Correspondence between the government of Namibia and the Government of South Africa defeats the claim that any settlement was reached. In response to a letter from the Namibian Foreign Minister, The Honourable Theo-Ben Gurirab, the South African Minister of Foreign Affairs, Honourable Roelof (Pik) Botha, clarified the position of the South African government in a letter dated 26 April 1992:

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

The matter has therefore not been resolved as South Africa has never officially recognized Botswana's claim to Sedudu Island.<sup>7</sup>

429. Botswana opted instead for unilateral action. After the departure of the SADF, in contravention of established principles of international law and without prior consultation, Botswana deployed BDF units on Kasikili Island and unilaterally hoisted its national flag over the Island. By contrast, Namibia has adhered to the fundamental principle underlying its foreign policy, namely, its commitment to the peaceful settlement of dispute between nations. Namibia's dedication to this principle has motivated its participation in every effort to resolve this matter non-violently through negotiation.

430. The government of Namibia subscribes to the principle that boundaries are established on the basis of bilateral agreement between two neighbouring countries, and not on the basis of unilateral pronouncements or acts. Moreover, as a general principle of international law, when two countries establish a boundary between themselves, a primary objective is to achieve stability and finality. It is in this spirit that Namibia accepts the OAU Resolution of 1964 on the status of international boundaries in Africa, which requires African States to respect the boundaries inherited from the colonial era.

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<sup>7</sup> NM, Annex 88.

431. Namibia's foreign policy is for peace and against war. Namibia knows well the devastating effects of war, having experienced over a century of anti-colonial struggle, including an armed struggle waged over 23 years against the South African apartheid regime, the most vicious military regime on the African continent. With the welcome demise of the apartheid system in Namibia and South Africa, Namibia hopes that Southern Africa, like the rest of the world, is entering a period of peace and political stability. Peace and stability are necessary preconditions for the commitment of collective resources and energies to the prosperity of all peoples of Southern Africa. It is Namibia's considered opinion that it should not be difficult to live by this covenant. Namibia has upheld, and will continue to uphold, both the letter and the spirit of its Constitution, the OAU Charter, and the Charter of the United Nations.

432. It was with these considerations in mind that in 1992 Namibia took the initiative of asking His Excellency President Robert Mugabe of Zimbabwe, then Chairman of the Frontline States, to facilitate a dialogue between Namibia and Botswana regarding the Kasikili Island boundary dispute. Two early rounds of meetings took place in Gaborone and in Arusha, Tanzania, where Their Excellencies President Sir Ketumile Quett Masire of Botswana and Sam Nujoma of Namibia held consultations in the presence of President Mugabe.

433. Whereas Botswana continued to occupy Kasikili Island and fly its national flag over Namibian territory, Namibia opted not to aggravate the situation in any way by word or by deed. Instead, it once again enlisted the good offices of His Excellency President Robert Mugabe of Zimbabwe to arrange a further face-to-face meeting between President Nujoma and President Masire. The result was the Kasane meeting of 24 May 1992.

434. At the Kasane meeting, Namibia's policy was based on the position that, short of reaching a bilateral negotiated settlement:

- Namibia and Botswana should agree and declare that a border dispute does exist.
- The dispute should be resolved through peaceful methods.
- Acts of hostility should be avoided at all costs.
- Normal communal activities should continue.



- No unilateral decision should be taken or implemented pending the outcome of negotiations.
- Both sides should refrain from making unilateral public pronouncements on the issue.
- Both sides should agree to abide by the result of the settlement.
- Both sides should consult and agree on a mechanism for peaceful settlement of the dispute.

435. After extensive and frank discussions at Kasane, a Communiqué was issued stating the intention to create a Joint Team of Technical Experts (JTTE), three from each country, to determine where the boundary lies in terms of the 1890 Treaty. The JTTE reached a deadlock and recommended that the parties should resolve the boundary dispute ‘by peaceful means in accordance with international law.’<sup>8</sup> It is this recommendation that led the parties to bring the present proceedings before this Court.

#### E. Conclusion

436. Given the good relationship that existed between Namibia and Botswana – a relationship that stems from the days when SWAPO was still a Liberation Movement – it is ironic that the government of Botswana has seen fit to attempt to assert its claim to Kasikili Island through aggression and unilateral action involving BDF troops. Botswana was able to talk to SWAPO about the details of apartheid South Africa's destabilisation policy in the region in general, and against Botswana in particular, as well as a host of other matters. Given the apparent friendliness of this relationship, it remains unclear to Namibia why the government of Botswana failed to raise the issue of the status of Kasikili Island with the post-independence SWAPO-led government in a diplomatic setting.

437. Between and among the citizens of Namibia and Botswana there are very strong ties of friendship, brotherhood and historical bonds capable of withstanding threats from any quarter. The governments of the two countries have a continuing duty and responsibility to secure, maintain and promote peace, security and co-operation between them. It is Namibia's hope that peace and stability between the two countries will be preserved.

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<sup>8</sup> A copy of the Report has been deposited in the Library of the Court by Namibia's Agent.

438. Namibians of many generations past and present know well the horrors of war. At the same time, we can never forget the brave martyrs who paid the ultimate price for Namibia's liberty and nationhood during the war of national liberation. In this context, the Namibian Government has chosen to exercise a maximum of restraint and has consistently sought a peaceful solution to the dispute by means of preventive diplomacy based upon negotiation. In light of the consistency of Namibia's approach and its commitment to a peaceful resolution to the dispute, Namibia considers the fact and nature of Botswana's unilateral actions especially disturbing.

439. Both Namibia and Botswana accept the fact that territorial boundaries mark the limit of state sovereignty. Boundaries are themselves established by their acceptance by states sharing common borders. It follows that an unrecognized unilateral assertion of a territorial claim by force is in conflict with internationally acceptable practice of friendly relations between states, and contrary to established principles of international law.

440. By claiming ownership of Kasikili Island Botswana acted contrary to the 1964 OAU Resolution AGH/RES 16(1), which calls upon all Member States to 'pledge themselves to respect the frontiers existing on their achievement of national independence.' It also violated the UN Charter, Article 2(4), which prohibits the use of force against the territorial integrity of another state. Botswana's unilateral and illegal occupation of Kasikili/Sedudu Island clearly contravenes these fundamental norms.

441. To summarize, Namibia's foreign policy since independence has been based upon the following principles:

- Promoting international co-operation, peace and security;
- Creating and maintaining just and mutually beneficial relations among nations;
- Fostering respect for international law and treaty obligations;
- Encouraging settlement of international disputes by peaceful means.

442. Namibia is fully committed to these principles and practices and will continue to work tirelessly to ensure that these objectives are achieved and maintained in Africa and universally.

## Chapter VIII

### MISSTATEMENTS, LEGAL FALLACIES AND MISREPRESENTATIONS IN THE BOTSWANA COUNTER-MEMORIAL

443. In the course of this Reply, Namibia has refrained from commenting on the general tone and language of Botswana's Counter-Memorial. As the Court will no doubt have noticed, Botswana's tone is frequently arrogant, dismissive and disrespectful. Its language accuses Namibia, expressly and by implication, of deliberate 'misrepresentation,'<sup>1</sup> 'prevarication,'<sup>2</sup> and even suborning perjured testimony of Masubia witnesses.<sup>3</sup> These accusations are wholly unfounded.

444. The tone adopted by Botswana and its accusations of dishonesty go far beyond the bounds of proper advocacy. They are inappropriate for communications between friendly sovereigns and are unseemly and improper in pleadings before this Court. Namibia has not replied in kind, but it feels compelled to record that it takes the most serious exception to the tone of Botswana's pleadings and especially to the accusations of deliberate efforts to mislead the Court.

445. Botswana's tone and accusations are the more remarkable because Botswana's Counter-Memorial itself is tainted by a number of errors and indiscretions. They are particularly notable and numerous in the discussion of the scientific and map evidence. The most important of Botswana's errors have been dealt with in the body of this Reply. Many others, however, although perhaps of less significance to the merits of the case, are illustrative of a general want of care and accuracy in Botswana's pleadings of which the Court should be aware. This Chapter collects 42 of these erroneous statements, by no means a complete list.

446. Botswana's errors and misstatements have been arranged according to their category of defect. Each item begins with a citation to Botswana's Counter-Memorial and is accompanied by an exact quotation of Botswana's Counter-Memorial in bold type.

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<sup>1</sup> See, e.g., BCM, paras. 259-60, 280 (regarding Namibia's scientific argument). See also BCM, para. 558 (regarding Namibia's map argument).

<sup>2</sup> See BCM, para. 684.

<sup>3</sup> See BCM, paras. 471, 483, 533(v).

Namibia's refutation follows in ordinary type. For the convenience of the Court and to illustrate the variety of errors found in Botswana's Counter-Memorial, Namibia provides a table of contents to this chapter:

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#### A. Misstatements of Fact

447. BCM, para. 347 (referring to a photograph of the *Zambezi Queen*, p. 133):

**'It is to be noted that the one sizeable ship at present navigating this section of the Chobe River can only use the northern channel. The Zambezi Queen, 42 metres in length and three storeys high, is operated as a tourist ship and solely uses the northern channel.'**

The *Zambezi Queen* does not 'operate as a tourist ship,' it does not 'navigate this [or any] section of the Chobe River' and it does not 'use the northern channel.' It is permanently moored on the north bank of the spur channel next to the King's Den lodge, where it provides accommodation for guests of the lodge. G.J. Visagie affidavit, Reply Annex. 22.

448. BCM, para. 263:

**‘The Chobe River is an independent perennial river with continuous flow at all seasons of the year through the northern channel around Kasikili/Sedudu Island . . .’**

In over thirteen places in its Counter-Memorial, Botswana asserts that the Chobe River is a perennial river.<sup>4</sup> The Chobe River is not a perennial river with continuous flow at all seasons of the year. The River is dry for much of its length upstream from Serondela, 13 kilometres west of Kasikili Island. It carries a significant flow of water in the vicinity of Kasikili Island only seasonally each year when the Zambezi River overflows its banks.<sup>5</sup>

449. BCM, section heading to para. 279 *et seq.*:

**‘It is correct to describe the southern channel as a stagnant pool of water. The southern channel is a backwater, not a live river.’**

Professor Alexander took water discharge measurements in both channels between 30 April and 2 May 1998. Flow in the northern channel measured 188 m<sup>3</sup>/s, compared with 247 m<sup>3</sup>/s in the southern channel.<sup>6</sup> In BCM, para. 285, Botswana itself cites measurements that show flow in the southern channel.

450. BCM, heading to paras. 266-68:

**‘The misconception that the Chobe River is part of the flood plain of the Zambezi River’**

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<sup>4</sup> See e.g. BCM, para. 251 (‘The Chobe River is a well-recognised . . . perennial river’); heading to para. 330 (‘(iii) The Chobe has a stable profile as a perennial mature river’); heading to para. 331 (‘The Chobe is a perennial river with visible and stable banks’); para. 331 (‘The Chobe is a perennial mature river . . .’); para. 351 (‘the Chobe River is a mature perennial river . . .’); heading to para. 365 (‘(iv) The Chobe is a perennial River.’); para. 366 (‘the Chobe River has maintained its characteristics as a perennial river as evidenced by the data . . . [from] Upper Kwando down to Shaile’); para. 457(v)(b) (‘the Chobe is a perennial river independent of the Zambezi River’); para. 565 (‘the Chobe River [is] an independent perennial river’); Appendix 2, heading to para. 47 (‘The Chobe River has a stable profile as a mature graded perennial river’); Appendix 2, paras. 47-48 (‘The Chobe River is a perennial river with a well defined course and with visible stable banks’).

<sup>5</sup> See e.g. Second Supp. Rep., Photograph 13 (showing Professor Alexander’s helicopter in the dry bed of the Chobe River above Lake Liambezi) and Photograph 15 (showing a person walking on the dry bed of Lake Liambezi).

<sup>6</sup> Second Supplementary Report, Fig. 8.

This statement is contradicted at least four times in the BCM itself -- e.g.:

BCM, para. 435:

‘The Mambova Rapids are a continuation of the upthrust Chobe Ridge along which the Chobe River runs for some 100 kilometres . . . . This ridge represents the southern limit of the Zambezi floodplain, the northern limit of which is the Zambezi escarpment in Zambia.’ (emphasis added)

BM, para. 27:

‘[Kasikili Island] is part of the seasonal floodplain which is normally covered with water for a particular season.’

BM, para. 244:

‘As a result of the floods caused by January/March rains all the land lying between the upper Zambesi and the lower stretches of the Chobe up to the first [Mambova] rapids and beyond forms one vast lake with only here and there a tree or small island appearing above the water level.’

BCM, Appendix 4, para. 44:

‘The Chobe River occupies part of the Zambezi River floodplain which extends from the Zambezi escarpment to the Chobe Ridge.’ (emphasis added)

See also the satellite images, NM, Vol. VI, Sheet 25, and Fig. 5 of Professor Alexander’s Second Supplementary Report, showing water from the Zambezi River flowing across the floodplain into the Chobe River. These overbank flows are the only significant source of flow in the Chobe River emanating from upstream of Kasikili Island.<sup>7</sup>

451. BCM, para. 383 (referring to photograph, p. 153):

**‘The growth of reeds across the southern channel is reflected in the photograph taken in September 1997.’**

There are no reeds in the photograph.

452. BCM, para. 279 (referring to photograph, p. 107):

**‘The shallowness of the southern channel is illustrated by the photograph, taken in September 1997, of an elephant standing in mid-channel of the southern channel . . .’**

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<sup>7</sup> See also, e.g., Reply Annex 32, L.A. McKenzie, *The Kalahari Reconnaissance* (1945) p. 5. (‘[I]n effect the Linyanti River below Kachikau is part of the Zambezi River, the land in between being really large islands of the Zambezi’).

The elephant is standing not in ‘mid-channel,’ but close to the south bank of the southern channel.

453. BCM, para. 290:

**‘[T]he line across the island to which Professor Alexander refers, far from being a bank of a river, is an extension of the inlet at the eastern end of the southern channel, and is a low lying sub-channel, dividing the western higher part of the island from the lower eastern sector.’**

The contour map produced in connection with Dr. Sefe’s *Sedimentological Study* (reproduced as Fig. 20 to the Second Supplementary Report) shows ‘the line across the island’ as higher ground, not as a ‘low-lying sub-channel.’ Even the Botswana Defence Force knows that this line is higher ground because that is where it chose to build its watch tower and barracks as shown in Photograph 41 in the Second Supplementary Report.

454. BCM, para. 466:

**‘As a matter of fact settlement on the Island was in effect impossible owing to the fact that the Island is always flooded between March and May.’**

Botswana’s misstatement of fact is betrayed by its own photographic evidence. The 1943 aerial photograph, BCM, p. 163, Fig. 12, labels a ‘kraal’ in the centre of the Island and ‘fields’ located near the confluence of the two channels. In addition, Masubia witnesses testified that they inhabited Kasikili Island. Both the Eason report in 1912 and the Trollope-Redman report in 1948 record that the Masubia of Caprivi were cultivating the Island from the beginning of the century.<sup>8</sup>

455. BCM, para. 334 (see also BCM, paras. 272, 284, 366, 381):

**‘Flow in a downstream direction through the northern and western channel is continuous with a constant level of 925.6 metres, South African Mean Sea Level, measured at the Kasane Gauging Station through all seasons of the year.’**

Botswana attaches uncommon significance to the figure of 925.6 metres, mentioning it five times in its Counter-Memorial, although in no case does Botswana supply a reference for the

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<sup>8</sup> See NM, Annexes 1, 2, 47 and 60.. For an explanation of how the Masubia maintained communities in low-lying, flood-prone areas, see NM, Annex 130. See also BM, Vol. III, Annex 22.

figure or explain how it is derived. The figure is variously described as a ‘minimum level,’<sup>9</sup> ‘a constant level,’<sup>10</sup> a ‘constant minimum level,’<sup>11</sup> or just ‘a level.’<sup>12</sup> Whatever it is, 925.6 metres cannot be any kind of a ‘minimum,’ for with a water level at Kasane of 925.6 metres above sea level, Kasikili Island would be almost completely inundated. (See Second Supplementary Report, Table 1, Fig. 43) Most likely, Botswana carelessly miscalculated. The lowest level recorded at Kasane between October 1983 and February 1997, as shown in Table 3, p. 25, of Dr. Sefe’s Report, was 2.54 metres above the gauge plate in October 1996. The gauge plate zero is 922.081 metres above sea level. Adding the two gives a total 924.62 metres (round to 924.6), exactly one metre below Botswana’s magic number. That is the lowest recorded level at the Kasane station between those dates in terms of elevation above sea level.

#### B. Manipulations of Evidence

456. BCM, para. 370:

**‘[Alexander] himself acknowledges that the northern channel, as the wider and deeper channel, is “hydraulically more efficient and consequently sediment is transported through (it) without deposition.”’**

This is a deliberate misquotation of Professor Alexander. In reality, Professor Alexander stated:

‘The wider and deeper channels are hydraulically more efficient and consequently sediment is transported through them without deposition.’<sup>13</sup>  
(emphasis added)

The statement appears on a diagram where yellow lines make it clear that Professor Alexander is referring to the parts of both the northern and southern channels where they are becoming wider and deeper due to increased inflow.<sup>14</sup> There is no warrant for converting Professor Alexander’s ‘them,’ referring to both channels, into ‘it’ and eliminating from the quotation the use of the word ‘channels,’ so that Professor Alexander’s observation seems to

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<sup>9</sup> BCM, paras. 366, 381.

<sup>10</sup> BCM, paras. 272, 334.

<sup>11</sup> BCM, App. 2, para. 43.

<sup>12</sup> BCM, para. 284.

<sup>13</sup> NM, Alexander Report, Appendix 2, Sheet 18, Diagram 5.

<sup>14</sup> See id.



refer only to the northern channel.

457. BCM, para. 300 (see also BCM, Appendix 2, para. 61):

**‘The longitudinal slope of the bed is steeper in the northern channel than the southern. . . . Velocity is bound to be higher in the northern channel than the southern.’**

The chart produced in BCM, p. 129, and Dr. Sefe’s Report, Fig. 9, is artificially truncated to eliminate the last measurement taken in each channel at the confluence of the channels. By using the truncated chart, Botswana would like to show a steeper slope in the northern channel than in the southern channel. The omitted measurement, however, is at the confluence of the two channels where the depth is identical for each channel, just as it is at the point of origin at the bifurcation of the two channels. Thus, the longitudinal slope of the bed of each channel is actually the same.

458. BCM, para. 369 (referring to photograph, p. 147, looking toward Kasika):

**‘The presence of trees on the right hand (island) bank of the northern channel also indicates an established stable channel.’**

The trees in the photograph are not on the Island, but at Kasika. All of the aerial photographs show this line of trees at Kasika. No photograph from the air or ground has ever shown such a line of trees on the Island in the area covered by the photograph.

### C. Misrepresentations of Namibia’s Position

459. BCM, para. 2:

**‘It is thus the arguments based upon subsequent conduct and prescription which are the essence of the Namibian legal case.’**

Botswana mischaracterizes Namibia’s argument. As Namibia has stated in its Memorial, Counter-Memorial and Reply, its case rests upon the interpretation and application of the 1890 Treaty. Prescription is a separate and independent title to sovereignty over the Island.

460. BCM, para. 684:

**‘The appearance of German administration in the Eastern Caprivi is described in the Namibian *Memorial* and the description is embellished with a photograph of the installation of Chikamatondo as chief of the Masubia (Namibian *Memorial*, pp. 88-93). Not one line, not a single word, relates to Kasikili/Sedudu Island. The entire section consists of prevarication.’**

The German administration exerted governing authority over the entire Caprivi Strip, including Kasikili Island, by indirect rule through local tribal chiefs, such as Chikamatondo.<sup>15</sup> The photograph is direct evidence that Chikamatondo was installed as chief under the authority of the German administration. Furthermore, many Masubia witnesses testified before the JTTE that Chikamatondo was their chief and ruled over the Masubia who lived and cultivated crops on Kasikili Island.<sup>16</sup> Therefore, through Chikamatondo and his *indunas* (including Sulumbu), the German administration governed Kasikili Island.

461. BCM, para. 255:

**‘Professor Alexander’s identification of the course of the southern channel [is] *not* . . . shown on all aerial photographs, maps and even satellite imageries . . .’** (emphasis in original)

The main channel as identified by Professor Alexander, with the right bank hard against the tree line under the Chobe Ridge and the left bank marked by the higher ground crossing Kasikili Island from west to east, is visible on all of the aerial photographs. A selection of seven of these photographs are juxtaposed for easy comparison in Fig. 22 of the Second Supplementary Report.

462. BCM, para. 378:

**‘[W]ater flow in a river is directional through a channel, *not* in a wave form on a 60 kilometre front as Professor Alexander claims . . .’** (emphasis in original)

In none of his reports does Professor Alexander use the word ‘wave’ or ‘wave form’ or describe the flood water from the Zambezi River as assuming a ‘wave form.’ He says that the flood water ‘crosses the [Zambezi River] floodplain in a southerly direction towards the Chobe Ridge,’<sup>17</sup> a phenomenon that is readily visible on the satellite images at Sheet 25, 7d and 7e, of the Alexander Report and Fig. 5 of the Second Supplementary Report.

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<sup>15</sup> See NM, paras. 222-32.

<sup>16</sup> See NM, Annex 1, pp. 69 (Testimony of M.G. Nchindo), 140 (Testimony of C.L. Matondo); Annex 2, p. 207 (Testimony of Chief M.J. Moraliswani). See also NM, para. 228.

<sup>17</sup> NM, para. 22 uses slightly different language to describe the same phenomenon. It says: ‘[Water] come into the Chobe not from upstream reaches to the west, but across the whole width of the Zambezi floodplain, a front of over 60 kilometres, until it is intercepted by the Chobe Ridge. . . .’ Here again, no reasonable interpretation of this description would indicate the presence of a ‘wave’-like phenomenon.

D. Legal Fallacies

463. BCM, para. 139; BCM, heading to paras. 247-49:

**“Subsequent practice” cannot claim its status if the material adduced is *ab initio* antithetical to the concept of “subsequent practice” . . . . The Argument of Namibia based on Prescription is incompatible with the Principle of Subsequent Practice.’**

Botswana ignores that Namibia’s arguments on treaty interpretation and prescription represent separate and independent claims to sovereignty over the Island. This form of pleading is accepted by all major legal systems. The incompatibility only exists in Botswana’s mind.

464. BCM, para. 660:

**‘Prescription is not intended and was not intended in nineteenth century doctrine, to be employed to subvert the legal status of a boundary expressly created by treaty.’**

Prescription is about public order and stability. It does not intend to ‘subvert’ a legal status, but rather to insure stability. It contradicts the basic idea of prescription to argue that it could not affect a title established by treaty.

465. BCM, para. 685:

In addressing prescription and the activities of the Masubia, Botswana states that **‘there is no evidence, and no evidence offered, to the effect *that the chiefs had authority to engage in title generating activities. Both legally and historically, this would be eccentric.***’ (emphasis in original)

Prescription has never been limited to activities engaged by authorities with the capacity to engage in ‘title generating activities.’ Prescription rests on the fact of occupation and use of the territory in dispute under the authority of the claiming state for a substantial period of time, with the acquiescence of the other party, which are quite different matters.

E. Contradictions

466. BCM, para. 353(i):

**‘Kasikili/Sedudu Island consists of two layers, a dark top layer consisting of a clay, silt and mud admixture extending to about 1.5 metres in depth ...’**

But *compare*:

BCM, para. 353(iii):

**‘deposition of sand, clay and mud to a depth of 1.50 metres.’**

BCM, para. 353(iv): ‘...’

**‘the complete absence of sand in this top layer ...’**

467. The ‘May 1972’ aerial photograph

*Compare*:

BCM, paras. 411-13:

**‘this photograph taken at a time when water levels were low’; ‘at low water’; ‘indicating a very low water level.’ (emphasis added)**

BCM, paras. 331, 380:

**‘when the island is inundated in the wet season . . . : see aerial photographs May 1972 ...’; ‘in flood time.’ (emphasis added)**

Both of these descriptions cannot be right.

F. Unsupported Assertions

468. BCM, para. 387:

**‘The itinerary of the *Zambezi Queen* and the tourist boats from the Safari Lodges ...’**

No such document nor any other evidentiary support for these ‘itineraries’ is produced. For a brochure of the Chobe Safari Lodge, see NCM, Vol. III, Sheet 17s and Reply Annex 23. Furthermore, Botswana is guilty of fabrication evidence when it claims that it has seen the

*Zambezi Queen* itinerary. As stated earlier, the *Zambezi Queen* is permanently moored on the north bank of the spur channel and does not navigate the northern channel.<sup>18</sup>

469. BCM, para. 243 (see also BCM, para. 97):

**‘After 1960, when agriculture on the island was prohibited by the British authorities, no protest ensued, either from diplomatic sources or local sources in the Caprivi, until 1992 . . . a period of 32 years.’**

There was no such prohibition. Botswana provides no official document or any other evidence supporting the statement that British authorities prohibited cultivation on Kasikili Island after 1960. In the absence of such an official action, no protest was called for.<sup>19</sup> In fact, Botswana abstained from making any claim over Kasikili Island when in 1972 South Africa filed an official protest over the arrest of three Caprivians on Kasikili Island.<sup>20</sup> Not only did the local Botswana magistrate dismiss the arrest for lack of jurisdiction over Kasikili Island,<sup>21</sup> but Botswana authorities remained conspicuously silent in response to South Africa’s clear assertion of its authority over Kasikili Island.<sup>22</sup>

## G. Map Errors

### 1. Erroneous Propositions

470. BCM, heading to para. 554:

**‘Proposition (i): Only a Line placed in the river itself can indicate the boundary’**

Conventions of modern cartography deny support for Botswana’s contention, nor can Botswana itself provide any reference or other authority to support this proposition. Thus, Botswana’s related argument — that because some of the maps of the Chobe River near Kasikili Island do not draw the boundary line in the River itself, they are not relevant to this case — is entirely without substance.

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<sup>18</sup> See Affidavit of G.J. Visagie, Reply Annex 22.

<sup>19</sup> See NCM, Annex 25.

<sup>20</sup> See NCM, paras. 88-91.

<sup>21</sup> See NCM, Annex 24.

<sup>22</sup> See NCM, Annex 26.

471. BCM, heading to paras. 558-60:

**‘Proposition (iii): Distortion may result from Enlargement’**

Enlargement will result in distortion if the map is enlarged not in direct proportion to the original. The four map extracts in Namibia’s Memorial are enlarged according to standard cartographic practice. These images are enlarged in direct proportion to the originals and retain all the characteristics of the originals. Enlargement according to well-established, accurate techniques is a common method for presenting details of maps to courts and other bodies having need for such detail.

472. BCM, heading to paras. 561-63:

**‘Proposition (iv): Boundaries drawn on maps are unreliable’**

The depiction of boundaries is a major function of cartography, and the cartographers of official political maps, as a general rule exercise great care in the placement of boundaries. For example, the boundaries shown on maps forming part of ICJ Judgments are anything but unreliable. NCM, Annex 1, paras. 8-9 describe how in the case of maps that show rivers as a single line cartographers sometimes place the boundary symbol on one side of the river and sometimes on the other. This convention does not undermine the reliability of boundaries drawn on maps, nor is it even relevant to maps where a river is not shown as a single line.

2. Misrepresentations of Namibia’s Position on Maps

473. BCM, para. 552:

**‘Upon appropriate analysis, it appears that [NM, para. 334] asserts that, of the 41 serial maps referred to by its cartographic expert Mr. D. Rushworth, only four, the Seiner map of 1909, the British map of 1933, the South African map of 1949, and the UN map of 1985, place Kasikili/Sedudu Island in Namibian territory.’**

In reality, Namibia stated:

‘Maps of the area, produced by all the parties in interest, with substantial uniformity portray Kasikili Island as being located in Namibian territory. In particular, the principal maps used by all the political entities with governing authority during the colonial period — Seiner’s map for the German authorities until 1915 and the British until 1933; Bechuanaland Protectorate GSGS 3915, used by the officials of Bechuanaland until 1965; the South African maps beginning with TSO 400/558 in 1949; and the UN map of 1985 — clearly place Kasikili Island in Namibian territory.’ (emphasis added)

Botswana's interpretation of Namibia's statement is illogical and untrue. So far in the pleadings, both sides have produced 26 maps showing Kasikili Island that were officially published by Germany, Great Britain, South Africa or the UN during the period they were respectively political authorities in the area. Of these maps, 16 show the boundary to be located in the southern channel and nine do not show the boundary at all. One overprints a line of demarcation in the northern channel, but Col. Rushworth believes that this is designed to mark the limit of patrolling agreed by South African and Botswana commanders after the shooting incident of October 1984. See Reply Annex 1, para. 28; id. 29 provides a list of these maps.

474. BCM, para. 556 (quoting Col. Rushworth):

**“In general, maps of smaller scale than 1:1000,000 (sic [footnote]) do not have sufficient detail to affect this case . . .”**

**Botswana Footnote: Presumably a typographical error. It would seem Mr. Rushworth intended to restrict relevant maps to a scale of 1:100,000.’**

Col. Rushworth meant just what he said: in general maps with a scale smaller than 1:1,000,000 do not have enough detail for this case. There is not the slightest warrant for attributing to him the view espoused by Botswana that maps of a scale smaller than 1:100,000 are too small. Namibia's Memorial makes it clear that many maps with scales greater than 1:100,000 are relevant to this case. Botswana's own pleadings claim the relevance of several maps of scale greater than 1:100,000, including Kriegskarte 1:800,000, Streitwolf 1:200,000, DOS (Misc) 282 1:1,750,000, DOS 847 1:500,000, Botswana 1969 1:1,000,000, and Chobe National Park 1980 1:250,000.

475. BCM, para. 574, n. 12:

**‘Whilst the Extract [NM, Fig. 10 (following page 122)] shows the red hatching covering these areas such hatching is not apparent on the original.’**

This accusation is wholly unfounded. The Court is invited to examine the original of the map (NM, Atlas Map IV), which shows the hatching as it appears in NM, Fig. 10.

### 3. Misstatements Concerning Specific Maps

476. War Office Map of 1891. BCM, para. 548:

**‘In . . . the War Office Map of 1891 [ID846b] . . . the boundary is shown with broad red hatchings.’**

Neither this map, nor the boundary it depicts, contain any red hatchings. The red hatching appears on a totally different map, published in 1909 in the third edition of *The Map of Africa by Treaty, Vol. 1* by Sir Edward Hertslet. Moreover, on the Hertslet map, the red hatchings appear only on the British side of the border, while on the German side the hatchings are brown. Thus, the boundary is shown by the joining of the two colours.

477. 1904 *Kriegskarte von Deutsch Südwestafrika*. BCM, para. 570 (see also BCM, Appendix 1, para. 39):

**‘The Andara sheet (Botswana Atlas, Map 4) shows 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. On the Linjanti Sheet (Botswana Atlas, Map 5) a strong black line indicates the *thalweg* of the river and is drawn to the north of Sulumbu’s island . . .’** (emphasis in original)

The Andara sheet does not appear in the Botswana Atlas. It does not cover Kasikili Island and thus cannot show the northern channel. What Botswana mistakenly calls the Andara sheet (Botswana Atlas, Map 4) is actually a monochrome version of the Linyanti sheet (Botswana Atlas, Map 5), an error Botswana also made in its Memorial.<sup>23</sup> The Linjanti sheet covers the Kasikili Island area, but neither version, Map 4 or Map 5, shows the northern or southern channel or attaches the label, Sulumbu’s Island, to any recognizable geographic feature. Furthermore, there is no justification for the assertion that the *thalweg* appears on this map.

478. Von Frankenberg Map of 1912. BCM, para. 585 (see also BCM, paras. 35, 279, 588):

‘[T]he southern channel is clearly indicated as “Kassikiri Fluss-arm”; a term which in the certified translation reads “as branch or tributary of a main river” and is so used in standard works of reference.’ Von Frankenberg himself uses the word *Flussarm* in the legend to his map to mean ‘a branch of a river,’ with no suggestion that it implies a tributary. This accords with the usage defined by the major German dictionaries, which define *Flussarm* as ‘a branch of a

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<sup>23</sup> See BM, paras. 266, 267.



river,' as distinct from a tributary or inferior channel of a river.<sup>24</sup> The 'certified translation' referred to in the quotation appears in an 'annexure' pasted on the copy of the map in Botswana's Atlas. This annexure is not a certified translation. There is no 'certificate,' the signature on the translation is illegible, and the author's qualifications are not given. Nor are any standard reference works cited.

479. 1933 Bechuanaland Protectorate 1,500,000, GSGS 3915. BCM, para. 591:

**'No original survey or ground verification work was done for this 1933 map ...'**

In reality, there was intensive activity on the ground to collect data for this map. Contributors to this map in Bechuanaland included staff of the Resident Commissioner's Office, the Resident Magistrates, and the Inspector of Police and field staff and members of earlier reconnaissance missions, including A.L. Du Toit, Captain B.E.H. Clifford and J.L.S. Jeffares.<sup>25</sup> Stone called it 'a significant milestone in the cartographic history of Botswana.'<sup>26</sup>

480. South African Map 1949 1:250,000 TSO 400/556. BCM, para. 541:

**'in disregard of specific exchanges in 1946 between the Bechuanaland High Commissioner and the Survey Directorate, South Africa relating to Bechuanaland's northern boundary, South Africa published [this map]...'**

First, the exchanges occurred in 1945, not 1946. Second, none referred to the northern boundary in the vicinity of Kasikili Island. Bechuanaland officials approved a print of the map showing the boundary at Kasikili Island in the southern channel, and the map was revised by the Survey Directorate in accordance with the Bechuanaland officials' comments.

481. South African Map 1949 1:250,000 TSO 400/556. BCM, para. 602 (see also BCM, Appendix 1, para. 77; BM, para. 279):

**'This map was compiled by military cartographers, 45 Company of the South African Engineers . . . who . . . copied the boundary line from the 1933 Bechuanaland Protectorate Map . . .'**

Botswana provides no evidence to support this statement. The cartographic record shows that South Africa ordered a thorough, new study using ground surveys and air photography to

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<sup>24</sup> See, e.g., NCM, Annexes 12, 14-16.

<sup>25</sup> See NCM, Annex 8, pp. 77-80.

<sup>26</sup> Id., p. 71.

produce this map. The boundary line on the 1949 map appears between the banks of the southern channel and is drawn with the international boundary symbol, whereas the 1933 map places the boundary to the south of the southern channel and uses an inter-colonial symbol for the boundary.

482. 1960 Bechuanaland Protectorate Map 1:1,000,000 DOS (Misc) 282. BCM, para. 593:

**‘ . . . the sheet indicates the boundary along the northern and western channel of the Chobe.’**

This map (the scale of which is 1:1,750,000, not 1:1,000,000) depicts the boundary along the northern side of a single river symbol that does not show Kasikili Island. As Botswana admits, ‘no detail is visible in the vicinity of the island.’<sup>27</sup> According to cartographic convention, which Botswana accepts,<sup>28</sup> this depiction indicates only that the boundary is in the river.

483. 1965 Bechuanaland Map 1:500,000 DOS 847. BCM, para. 596:

**‘ . . . the depiction of the boundary in the northern channel was not a draughtsman’s error but deliberate in execution of the Surveyor-General’s *Opinion*.’**

The Surveyor-General’s *Opinion* was written on 18 October 1965, whereas the map was printed in September 1965 and copies of it were delivered in Great Britain by 20 October 1965. Moreover, the *Opinion* was never distributed outside the Bechuanaland Government, so the DOS would not have had access to it.<sup>29</sup> Clearly, the Surveyor-General’s *Opinion* was not used in compiling this map.

484. Chobe Game Park Maps. BCM, para. 631:

**‘A series of large scale plans in black and white were prepared by the Surveys and Lands Departments to accompany the legal description in the statutory orders made under the National Parks Act 1967 in respect of the Chobe Game Park.’**

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<sup>27</sup> BCM, para. 593.

<sup>28</sup> See BCM, para. 561.

<sup>29</sup> See Reply Annex 1, para. 16(a).

Botswana does not produce these plans and admits that, ‘The earliest Plan available, No. TP 6-72-1 [was] dated 15 May 1975 . . .’<sup>30</sup> This map was a general purpose map and was not prepared to support the legal definition of the boundary. Indeed, along the Chobe River, it does not show the Park boundary at all. The first map to support the legal definition of the boundary was the Chobe National Park Plan 1:250,000 BP 179, 1980, produced in 1980 in connection with Statutory Instrument No. 126.<sup>31</sup>

485. JARIC Map 1974. BCM, para. 614 (see also BCM, Appendix 1, para. 85; p. 185; para. 421; p. 267; para. 37):

**‘The [JARIC] map [was] plotted from air photography taken by the South African Air Force in 1977 in accordance with a Working Plan (Botswana *Supplementary Atlas* Map 23, and accompanying *Report: Annex 32*).’**

BCM *Supplementary Atlas*, Map 26:

**‘The 21 July 1977 Flight Plan was used to prepare the JARIC Map.’**

Neither the 1977 air photography nor the Working Plan and its accompanying report was used in the preparation of the JARIC Map. Instead, the cartographic record shows that these sources were used for the 1982 1:50,000 South West Africa map, as shown in NR, Annex 1, para. 23.

#### 4. Errors of Scale and Other Technical Descriptors

486. BCM, Appendix 1, heading to para. 64:

**‘Sketch Maps of Bechuanaland Protectorate 1:3801,600.’**

The correct scale of these four maps is 1:4,600,000, not

1:3,801,600, as Botswana asserts.

487. BCM, heading to para. 593 (see also BCM, p. 264, no. 16; Appendix 1, heading to para. 7):

**‘The 1960 Bechuanaland Protectorate Map, 1:1,000,000’**

The scale of this map is actually 1:1,750,000, not 1:1,000,000, as Botswana asserts.

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<sup>30</sup> BCM, para. 632.

<sup>31</sup> See BCM, para. 633.

488. BCM, heading to para. 625 (see also BCM, Appendix 1, heading to para. 20):

**'Tourist Map of Chobe National Park, 1977, 1:250,000.'**

The correct scale of this map is approximately 1:500,000, not 1:250,000 as Botswana asserts.

The map's inset is at a scale of 1:100,000.

489. BCM, Appendix 1, heading 37 to para. 94:

**'Southern Africa 1:50,000 Chief Director of Surveys and Mapping,  
Mowbray, 1982.'**

The correct scale of this map is 1:500,000, not 1:50,000 as stated by Botswana.

## CONCLUSION

490. As noted at the outset, the length of this Reply has been necessitated by the many errors, misstatements and distortions of Namibia's position in the Botswana Counter-Memorial. Nevertheless, Namibia believes that all the elements of the case converge on a single answer to the question submitted to the Court.

- The language of the 1890 Treaty, construed in the light of the object and purpose of the Treaty,
- the subsequent practice of the parties,
- the maps produced by all the predecessors in interest of both parties and
- the scientific evidence,

unite to show that, under Article III(2) of the Treaty, the main channel of the Chobe River flows to the south of Kasikili Island. The southern channel as it appears on the maps and aerial photographs is the *thalweg* channel of the main channel. And the boundary between Namibia and Botswana is the *thalweg* of that channel.

491. In addition, Namibia is also entitled to sovereignty over Kasikili Island by prescription by virtue of

- the uninterrupted use and occupation of the Island by the Masubia of the Caprivi beginning before the signing of the Treaty and continuing thereafter under the authority of Germany and then South Africa (as mandatory and thereafter de facto until 1989, when it withdrew from Namibia),
- the full knowledge and acquiescence of Botswana and its predecessors in title and without objection from them until 1984.

Submissions

492. *In view of* the facts and arguments set forth in Namibia's Memorial and this Counter-Memorial,

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

1. The channel that lies to the south of Kasikili/Sedudu Island is the main channel of the Chobe River.
2. The channel that lies to the north of Kasikili/Sedudu Island is not the main channel of the Chobe River.
3. Namibia and its predecessors have occupied and used Kasikili Island and exercised sovereign jurisdiction over it, with the knowledge and acquiescence of Botswana and its predecessors since at least 1890.
4. The boundary between Namibia and Botswana around Kasikili/Sedudu Island lies in the centre (that is to say, the *thalweg*) of the southern channel of the Chobe River.
5. The legal status of Kasikili/Sedudu Island is that it is a part of the territory under the sovereignty of Namibia.

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ALBERT KAWANA  
Agent of the Republic of Namibia  
before the International Court of Justice

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