

DISSENTING OPINION OF JUDGE FLEISCHHAUER

Interpretation of the term “main channel”/“Hauptlauf” in Article III of the 1890 Treaty — The applicable law — The ordinary meaning of the term — Object and purpose of the 1890 Treaty — The context in which the term is used — The error of the Parties to the 1890 Treaty in the appreciation of the possible uses of the Chobe River — The third paragraph of the dispositif of the Judgment — Final remark on the role of prescription in the case.

I have voted against paragraphs 1 and 2 of the *dispositif* of the Court’s Judgment. For the reasons which I will explain below, I dissent from the Court’s interpretation of the term the “main channel of that river”/“Hauptlauf dieses Flusses”¹ in Article III (2) of the 1890 Treaty as meaning the northern rather than the southern channel of the Chobe around Kasikili/Sedudu Island. As for the rest of the Judgment, I agree with almost all its other parts, including the conclusion that the rules reflected in Article 31 of the Vienna Convention are applicable to the interpretation of the 1890 Treaty and the finding that the boundary established by Article III (2) of that Treaty follows the *thalweg* rather than the median line of the main channel. As the Court does not accept Namibia’s argument on acquisitive prescription, the territorial status of the Island depends entirely on the course of the boundary. My dissent on the interpretation of the term “main channel of that river”/“Hauptlauf dieses Flusses” therefore affects not only my view on the location of the boundary, but also my view on the status of the Island. This explains why I voted not only against the first but also against the second paragraph of the *dispositif*. For considerations which I will also explain below, I voted, however, in favour of the third paragraph.

Among the many parts of the Judgment with which I agree, is the Court’s conclusion that Namibia has no title to the Island based on prescription, as

“Namibia has not established with the necessary degree of precision and certainty that acts of State authority capable of providing alternative justification for prescriptive title, in accordance with the conditions set out by Namibia, were carried out by its predecessors or by itself with regard to Kasikili/Sedudu Island” (Judgment, para. 99).

¹ In Article III (2) of the 1890 Treaty the term is used in the genitive. That makes it read in German *des Hauptlaufes dieses Flusses*. For reasons of convenience, I quote the term in German in the nominative *Hauptlauf dieses Flusses*.

But, in my view, the Court should also have found that Namibia's immediate predecessor in the Caprivi Strip, South Africa, could not have acquired prescriptive title over the Island.

My reasoning is as follows:

I. THE INTERPRETATION OF THE TERM "MAIN CHANNEL"/"HAUPTLAUF"
IN ARTICLE III (2) OF THE
1890 TREATY

The Applicable Law

1. The Judgment correctly starts from the fact that although

"neither Botswana nor Namibia are parties to the Vienna Convention on the Law of Treaties of 23 May 1969, . . . both of them consider that Article 31 of the Vienna Convention is applicable inasmuch as it reflects customary international law" (Judgment, para. 18).

The Judgment goes on to say that "[t]he Court itself has already had occasion in the past to hold that customary international law found expression in Article 31 of the Vienna Convention" (*ibid.*); it further says

"Article 4 of the Convention, which provides that it 'applies only to treaties which are concluded by States after the entry into force of the . . . Convention . . .' does not, therefore, prevent the Court from interpreting the 1890 Treaty in accordance with the rules reflected in Article 31 of the Convention." (*Ibid.*)

2. The Vienna Convention on the Law of Treaties establishes in its Articles 31-33 a system of treaty interpretation. Article 31, paragraph 1, provides that, based on the principle of good faith, the ordinary meaning of the term to be interpreted has to be explored in the light of the object and purpose of the treaty in which the term finds itself and the context in which it is used. While upholding that the parties are to be presumed to have that intention, which appears from the terms used by them, the Vienna Convention thus does not force the Court to find the abstract meaning of contested terms and to proceed on that basis; what the Court is asked is rather to explore the intention of the Parties, the reason why they used the particular term, and to proceed on that more nuanced basis.

The Ordinary Meaning of the Term "the Main Channel of That River"/"Hauptlauf dieses Flusses"

3. Looking at the term as used in Article III (2) of the 1890 Treaty, I note that in its ordinary meaning it does not give an even approximately precise indication of the channel of the Chobe River in which the delimi-

tation between the British and the German spheres of interest is to be placed. It seems that the negotiating parties had, through reports of travellers and explorers and early maps prepared by them, a superficial knowledge of the topography they were dealing with (see Benjamin Bradshaw, "Notes on the Chobe River, South Central Africa", *Proceedings of the Royal Geographic Society* (1881), pp. 208 ff., Memorial of Namibia, Vol. V, Ann. 115, pp. 117 ff.; Map 1/2, *ibid.*, Vol. VII, p. 4). The reference to the "main channel of that river"/"*Hauptlauf dieses Flusses*" indicates that they knew that the Chobe has, at different locations at least, several channels, and that they wanted to place the line of delimitation into the principal one of these channels. But there the matter ends. There is neither in English nor in German a common understanding of the term which would apply in a general fashion to the determination, in case of doubt, which among several channels of a river is the main one. There is — as the discussion about the role of navigability in the determination of the main channel of the Chobe shows — not even agreement on all of the criteria which play a role for that evaluation and disagreement on the meaning or weight to be given to some of them. And the same is true for the German word "*Hauptlauf*".

Nor is there an ordinary meaning of the term "main channel of that river"/"*Hauptlauf dieses Flusses*" in a hydrological sense. The intense hydrological debate which has taken place for years between the Parties and during these proceedings before the Court, was about, *inter alia*, the annual flow of water that goes through either of the two channels and in this context about what precisely constitutes the southern channel, the comparative visibility of the two channels during the flow seasons and during the dry parts of the year and the bed profile configuration of the channels. The Parties did not only disagree in substance on these matters, but also on their relevance and applicability in the determination of the main channel of the Chobe at Kasikili/Sedudu Island.

4. The Judgment lays much weight on the ordinary meaning of the term "main channel of that river"/"*Hauptlauf dieses Flusses*". In order to define that meaning, the Court bases itself on "the most commonly used criteria in international law and practice, to which the Parties have referred" (Judgment, para. 27).

Accordingly, the Court addresses the criteria relied on by the Parties and analyses their views on each of them before formulating brief conclusions of its own (Judgment, paras. 29-41). As a result, the Court is no more successful in establishing the ordinary meaning of "main channel of that river"/"*Hauptlauf dieses Flusses*" than the Parties are in their parallel efforts. A number of the conclusions arrived at by the Court are not arbitrary as they are based on presentations by the Parties, but nevertheless subjective in nature and without a clear justification. In the end the Court's conclusion that

“in accordance with the ordinary meaning of the terms that appear in the pertinent provision of the 1890 Treaty, the northern channel of the River Chobe around Kasikili/Sedudu Island must be regarded as its main channel” (Judgment, para. 41)

remains unconvincing.

Apparently recognizing the shortcomings of its efforts, the Court repeatedly refers to the findings of Captain Eason in 1912, Messrs. Trollope and Redman in 1948, and the Joint Survey of 1985, all of which are to the effect that, at Kasikili/Sedudu Island, the northern channel of the Chobe has to be regarded as the “main channel of that river”/“*Hauptlauf dieses Flusses*” (Judgment para. 33, para. 42, and para. 80). The Judgment correctly states that those findings do not constitute subsequent agreements or subsequent practice in the sense of Article 31, paragraph 3, but refers to them as giving support to its own conclusion on the northern channel as the main channel of the Chobe around Kasikili/Sedudu Island:

“The Court finds that these facts, while not constituting subsequent practice by the parties in the interpretation of the 1890 Treaty, nevertheless support the conclusions which it has reached by interpreting Article III, paragraph 2, of the 1890 Treaty in accordance with the ordinary meaning to be given to its terms . . .” (Judgment, para. 80.)

In making this statement however, the Court does not take account of the fact that neither Eason nor Trollope and Redman were hydrological experts and that the Court has not been informed of the basis on which they reached their conclusions; moreover, the report on the Joint Survey, according to South Africa, did not prove conclusively that the Island belongs to Botswana.

In its effort to establish an ordinary meaning of the term to be interpreted, on which the Court could proceed, the Judgment is not fully consonant with the system of interpretation provided for by the Vienna Convention. It discusses only certain aspects of the object and purpose of the 1890 Treaty and does not deal at all with the context in which the term “main channel of that river”/“*Hauptlauf dieses Flusses*” is used in that Treaty (Judgment, paras. 43-45). Object and purpose of the Treaty in which the term to be interpreted finds itself and the context in which the term has been used, are important elements of treaty interpretation as they throw light on the intentions of the Parties which are a key factor for treaty interpretation as foreseen by the Vienna Convention. An interpretation of the term “main channel of that river”/“*Hauptlauf dieses Flusses*”, which properly takes into account the object and purpose of the Treaty and the context in which this term is used in Article III (2), leads to a result that is different from the one reached by the Court in its Judgment.

Object and Purpose of the 1890 Treaty

5. As to object and purpose of the 1890 Treaty, I would like to first observe that the 1890 Treaty is a bilateral treaty and that, as is often the case with bilateral treaties, object and purpose pursued with the Treaty by its parties follow fairly clearly from its text. The object of the 1890 Treaty were the spheres of influence of the two contracting parties in Africa and the purpose was their agreed delimitation (Arts. I-IV of the Treaty) in order to secure the respect by each of the parties of the sphere of the other (Art. VII). Although the delimitations provided for in the Treaty have evolved to become existing boundaries between African States, including the boundary between Namibia and Botswana, the Treaty has not to be regarded as a boundary treaty in the technical sense; the Treaty was meant to keep the political relations between the two contracting States undisturbed by rivalry in Africa. This cannot be overlooked in its interpretation; the Treaty must not be understood as meaning a comprehensive settlement of all questions regarding the actual course of the delimitations it establishes. It seems quite compatible with the Treaty's object and purpose that, in certain places, it sets forth only in broad lines where the delimitation of the spheres of interests runs but leaves the fixation of its course in detail to the future application of the Treaty.

What has just been said on the object and purpose of the 1890 Treaty means what follows for the determination of the meaning of the term "main channel of that river" in Article III (2) of that Treaty.

6. The object and purpose of the 1890 Treaty were that the parties wanted to establish an easily definable delimitation of their zones of influence in the north-eastern corner of South West Africa as well as elsewhere in Africa. Once they had given up the reference to parallels of latitude and longitude in the drawing of the line of delimitation, the next best method from the point of view of clarity would have been to fix, in the area of Kasikili/Sedudu Island, the line of delimitation on the crest of the Chobe Ridge. The Chobe Ridge runs on the south bank of the Chobe River, which is the right bank, and was known at the time of the negotiation of the Treaty (see B. F. Bradshaw, "Notes on the Chobe River, South Central Africa", *Proceedings of the Royal Geographic Society* (1881), pp. 208 ff.). The Ridge is clearly visible and does not disappear under water in the flood season. However, for reasons which have to do with the supposition of the parties that the Chobe is navigable and gives access to the Zambezi by river, the parties to the 1890 Treaty specified that the line of delimitation had to be in the "main channel of that river"/"*Hauptlauf dieses Flusses*", meaning the Chobe.

This now makes the southern channel the "main channel"/"*Hauptlauf*" in the sense of Article III (2). This is so because in the entire area of Kasikili/Sedudu Island the southern channel runs along the Chobe Ridge. The Chobe Ridge acts like a dam along which the waters of the Chobe run upstream in the beginning of the flood season when they are backed

up by the Mambova Rapids and downstream at the end of that season. The Ridge also backs up the overflow waters that come down from the Zambezi and directs them to flow off through the southern channel. Consequently the yearly flow of water in the southern channel is such that the Parties disagree whether the northern or the southern channel has the greater flow. The Chobe Ridge also identifies the location of the southern channel and thereby a boundary located in that channel; even in times of high water, when the left bank of the southern channel is under water, the exact location of the *thalweg* can be established from the Ridge, once the necessary measurements have been taken during the dry season. This could not be easily done in the northern channel, both banks of which are under water in the flood season.

Object and purpose of the 1890 Treaty therefore show that the "main channel"/"Hauptlauf" of the Chobe in which the boundary is meant to run is the southern channel.

This finding is supported by the fact that after the conclusion of the 1890 Treaty it was at first generally assumed as quite natural that the delimitation line established by the Treaty lies in the southern channel, an assumption that found its way into early maps.

The Context in Which the Term "Main Channel of That River"/"Hauptlauf dieses Flusses" Is Used in Article III (2) of the 1890 Treaty

7. The context in which the terms of a treaty are used is necessarily connected with the object and purpose of the treaty itself. That does not mean, however, that the context is always identical with, or indistinguishable from, object and purpose of the treaty. The context in which a term is used in a treaty may relate to the overall realization of the object and purpose of the treaty; but the context may as well concern the realization of a particular feature or aspect of the treaty. This is the case with the term "main channel of that river"/"Hauptlauf dieses Flusses" in Article III (2) of the 1890 Treaty.

Article III deals with the spheres of influence of the two contracting parties in South West Africa, and paragraph 2 of this Article in particular with the eastern delimitation of the sphere of influence reserved for Germany. In establishing that delimitation, the two parties intended to meet a particular German request, accepted by Great Britain, namely that "Germany shall have free access from her Protectorate to the Zambesi" (second subparagraph of Article III (2)).

Rivers were regarded at the time as potentially important means for the further exploration and the development of Africa. As the Judgment states: "The great rivers of Africa traditionally offered the colonial

powers a highway penetrating deep into the African continent.” (Judgment, para. 44.) The German interest in access to the Zambezi was motivated by such conceptions. The access of Germany to the Zambezi was to be twofold: by land and by river.

As to the access by land, the second subparagraph of Article III (2) of the 1890 Treaty states that the access of Germany to the Zambezi shall be “by a strip of territory which shall at no point be less than 20 English miles in width”. The access by river was to be through the River Chobe and the delimitation between the British and the German sphere of interest was to run in the “centre of the main channel of that river”/“*Thalweg des Hauptlaufes dieses Flusses*” to “its junction with the Zambesi, where it terminates” (Art. III (2) of the 1890 Treaty), so that both parties had equal access to the Chobe and its uses. Originally there was only the reference to access to the Zambezi by the Chobe. The passage regarding access by land did not yet figure in the text initialled by the British and German negotiators on 17 June 1890, 13 days before the signature of the Treaty. Until then, there was only the following reference to the Chobe:

“The frontier between the German territory and the English territory in the south-west of Africa shall follow, from the point which has been agreed upon in previous arrangements, the 22nd degree of south latitude (leaving Lake Ngami to England), to the east up to the 21st degree of longitude; from thence to the north to where that degree touches the 18th degree of south latitude. *Thence the line of demarcation shall be carried to the east along the centre of the River Tschobi, up to the point where it flows into the Zambesi.*” (Initialled Agreement between the representatives of Germany and Great Britain, 17 June 1890 (PRO, FO 881/6146, No. 48), Memorial of Namibia, Vol. IV, Ann. 21, p. 114; emphasis added.)

The negotiating history of the term “main channel of that river”/“*Hauptlauf dieses Flusses*” in Article III (2) of the 1890 Treaty thus confirms that this term has been used in the context of an effort to give equal access to the Zambezi by the River Chobe. Navigability therefore is an important factor for the interpretation of the meaning of the term.

8. The context in which the term “the main channel”/“*Hauptlauf dieses Flusses*” is used in Article III (2) of the Treaty speaks rather in favour of the northern channel as the main channel. In that channel, conditions for navigation seemingly are better than in the southern channel to the degree that the northern channel is, in the dry periods, deeper and wider than the southern channel. That would speak in favour of interpreting the term main channel of “that river”/“*Hauptlauf dieses Flusses*” as referring to the northern channel.

As a means of interpretation, the context in which the term “main channel of that river”/“*Hauptlauf dieses Flusses*” is used in Article III (2) of the 1890 Treaty, is therefore at cross purposes with interpretation of

the term in accordance with object and purpose of the Treaty which indicates the southern channel as the main channel. This contradiction does not however have to be addressed because the expectations of the parties regarding the navigability of the Chobe were mistaken.

The Error of the Parties to the 1890 Treaty in the Appreciation of the Possible Uses of the Chobe River

9. In placing hopes in the expected navigational use of the Chobe River, the parties were in error; the context in which they perceived the “main channel of that river”/“*Hauptlauf dieses Flusses*” was unreal. We know now, more than hundred years after the conclusion of the Treaty, that the river has not been used, and is not usable, for larger-scale navigation. This is mainly due to the fact that if there was a fully navigable part of the Chobe, it would run from nowhere to nowhere, i.e., from some point upstream from Kasikili/Sedudu Island to the point where — downstream from the Island — the Mambova Rapids block navigation. But also the particular hydrological conditions prevailing in the Chobe in the area around Kasikili/Sedudu Island would not permit full navigational use of the river there. This is supported by the fact that while an attempt at lumber floating was undertaken by Mr. Ker in 1947-1948, the Court has not been informed that this attempt was repeated after Mr. Ker’s first experience. The *Zambezi Queen* is not operated on a regular schedule but is moored in the northern channel as a floating hotel. The only navigational activity which has ever, in a sustained way, been carried out on the River Chobe, is the operation of the tourist flatboats that has taken place, for some time now, mainly in the southern channel, as the Island is becoming known as a major wildlife feeding ground readily accessible to safe viewing by tourists who mainly come from Botswana. The parties to the Treaty were thus in error when they drafted the Treaty in the expectation of larger-scale navigational usability of the Chobe, in particular in giving access to the Zambezi.

The error with which the Court is confronted here is not an error “in a treaty” as dealt with by Article 48 of the Vienna Convention on the Law of Treaties, which one State party to the treaty wishes to invoke “as invalidating its consent to be bound by the treaty”. It is rather an error in motivation which led to the use of the term “main channel of that river”/“*Hauptlauf dieses Flusses*” in Article III (2) of the 1890 Treaty, an error made by both parties to the Treaty. The question that arises does not concern the validity of the consent to be bound by the Treaty; the error rather raises the question whether a mistaken expectation of the parties when they drew up the Treaty can still serve, more than 100 years after the conclusion of the Treaty and a long time after the error has become clear, in the interpretation of the Treaty.

In the circumstances of the present case, the interpretation of the term “main channel”/“*Hauptlauf dieses Flusses*” based on the mistaken expectation of large-scale navigational usability of the Chobe cannot be held against Namibia because that would mean that Namibia alone would be burdened with the consequences of the error. The flatboat navigation connected to the tourist activities that have evolved on and around Kasikili/Sedudu Island is concentrated in the southern channel. Interpretation of the term “the main channel of that river”/“*Hauptlauf dieses Flusses*” in favour of the northern channel would deprive Namibia from having an equitable share in the only navigational use of the Chobe there is to share. That would run directly counter to the intention of the parties to split the river evenly. Therefore the interpretation of the term “main channel of that river”/“*Hauptlauf dieses Flusses*” in favour of the northern channel would not be compatible with the principle of good faith which, according to Article 31, paragraph 1, of the Vienna Convention, governs all treaty interpretation. Interpretation of the term “main channel of that river”/“*Hauptlauf dieses Flusses*” in favour of the southern channel, however, would correspond to what the parties wanted to achieve regarding the River Chobe. It would be a good faith interpretation of the term because it would split evenly between the Parties the only channel that is of some navigational interest.

Since the Court has found — correctly — that Namibia does not have a prescriptive title to Kasikili/Sedudu Island, the finding that the main channel is the northern channel automatically clarifies that Kasikili/Sedudu Island is not part of Namibia, but part of Botswana. To arrive at such an important conclusion from the interpretation of a term of the 1890 Treaty based on a mistaken expectation of the navigational usefulness of the Chobe River is equally not compatible with the requirement of good faith in the interpretation of treaties.

In sum, the context in which the term “main channel of that river”/“*Hauptlauf dieses Flusses*” is used in Article III (2) of the 1890 Treaty does not justify the interpretation of the term in favour of the northern channel.

II. THE THIRD PARAGRAPH OF THE *DISPOSITIF* OF THE JUDGMENT

10. The fact that the Court finds in the third paragraph of the *dispositif* of its Judgment that

“in the two channels around Kasikili/Sedudu Island, the nationals of, and vessels flying the flags of, the Republic of Botswana and the Republic of Namibia shall enjoy equal national treatment”

does not fully overcome the shortcomings of interpreting the term “main channel of that river”/“*Hauptlauf dieses Flusses*” in favour of the northern channel. As far as the territorial status of the Island itself is

concerned, the third paragraph of the *dispositif* of the Judgment does not affect the finding in the second paragraph of the *dispositif* that the Island forms part of Botswana. As to the waters around the Island, conceding equal national treatment to the nationals of the other Party and to boats flying the flag of that Party, is not the same as the splitting of the “main channel”/“*Hauptlauf*” of the Chobe around the Island, as originally envisaged by the Parties.

However, the fact that I do not regard the third finding in the *dispositif* of the Judgment as compensating for the erroneous decision in favour of the northern channel, has not prevented me from voting in favour of that finding. I agree with the reasons for the finding which are given in paragraphs 100 and 103 of the Judgment and the attribution, in the channels around Kasikili/Sedudu Island, of equal, national treatment to the nationals of both Parties and the boats flying their flags may be of some help to the Parties and contribute to avoiding or lessening tensions.

I have also come to the conclusion that the Court had jurisdiction to make the finding, as the Court is mandated by Article I of the Special Agreement by virtue of which it was seised with this dispute, “to determine . . . the legal status of the island”; that mandate comprises the determination of the legal status of the waters around Kasikili/Sedudu Island.

III. FINAL REMARK: THE ROLE OF PRESCRIPTION IN THIS CASE

11. As a final remark, I would like to add with regard to the role of prescription in this case, that I agree with the conclusion of the Judgment that acquisitive prescription does not play a role. I also agree with the reasons given for that conclusion. However, there is an additional and quite decisive reason why acquisitive prescription could not come into play in this case.

As the Court states, Botswana and Namibia

“agree between themselves that acquisitive prescription is recognized in international law and they further agree on the conditions under which title to territory may be acquired by prescription, but their views differ on whether those conditions are satisfied in this case” (Judgment, para. 96).

“For present purposes, the Court need not concern itself with the status of acquisitive prescription in international law or with the conditions for acquiring title to territory by prescription. It considers . . . that the conditions cited by Namibia itself are not satisfied in this case and that Namibia’s argument on acquisitive prescription therefore cannot be accepted.” (Judgment, para. 97.)

These conclusions are not objectionable in themselves. The Court should however have gone into the conditions under which title to territory may be acquired by prescription, far enough to state that South Africa could not have acquired title to the Island by prescription. South Africa, whose presence in the Caprivi Strip including the Island lasted longer than the presence there of Germany or Britain, prior to the termination of the Mandate by the General Assembly in 1966 exercised authority there not *à titre de souverain* but *à titre de mandataire*. As mandatory, South Africa certainly was vested by virtue of the Mandate instrument of 17 December 1920 (League of Nations, *Journal Officiel*, 2nd Year, No. 1, p. 89) with the “full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa”; however, as the Court observes in its Advisory Opinion on the *International Status of South West Africa* (*I.C.J. Reports 1950*, p. 128, at p. 132):

“On the other hand, the Mandatory was to observe a number of obligations, and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled.”

And the Court added:

“The terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this new international institution did not involve any cession of territory or transfer of sovereignty to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants.” (*Ibid.*)

This perception of the nature of the Mandate is incompatible with acquisitive prescription working in favour of the Mandatory. After the termination of the Mandate, the continued presence of South Africa in South West Africa (Namibia) was no longer “peaceful”, i.e., uncontested, as is confirmed by Security Council resolution 276 (1970) and by the Court’s Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (*I.C.J. Reports 1971*, p. 16).

I agree that the present case is not a suitable occasion for the Court to concern itself with the status of acquisitive prescription in international law or with the general conditions under which title to territory may be acquired by prescription. Nevertheless, in order to further clarify the law

governing mandates or trusteeships, a statement of the Court that acquisitive prescription does not work in favour of a Mandatory would have been desirable.

(Signed) Carl-August FLEISCHHAUER.