

INTERNATIONAL COURT OF JUSTICE

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

**COUNTER-MEMORIAL
OF
THE REPUBLIC OF NAMIBIA**

VOLUME I

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28 NOVEMBER 1997

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Counter-Memorial of the Republic of Namibia

Introduction

1. This Counter-Memorial of Namibia is submitted pursuant to the Order of the Court of 24 June 1996, fixing 28 November 1997 as the date for filing by each of the parties of a Counter-Memorial.

2. 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.

3. Namibia's position is that the issue of treaty interpretation is to be decided on the basis of objective considerations of a scientific character, and that the scientific determinant of the main channel is the channel that carries the largest proportion of the annual flow of the river. Botswana accepts this test.¹ Namibia has shown conclusively through the expert testimony of Professor W.J.R. Alexander in the Alexander Report² that almost all of the flow of the Chobe River goes through the southern channel and virtually none through the northern channel. Botswana's Memorial does not join issue on this point. Its expert's report³ is devoted almost entirely to arguing the uncontested proposition that the river in the vicinity of Kasikili Island has not changed its general shape and configuration since 1890. Botswana has presented no scientific evidence that the northern channel carries any part of the flow or current of the river.

4. Despite its acknowledgement of the decisive character of scientific criteria and evidence, Botswana devotes its Memorial primarily to two wholly different propositions: first, that the main channel is to be identified on the basis of navigability;⁴ and second, that under a contemporaneous rule of general international law, the main channel is defined by the *thalweg*, that is to say the deepest channel.⁵

5. On the question of navigability, Namibia maintains that it is unreasonable and therefore incorrect to apply the criterion of navigability to a river boundary over 300 kilometres in length, nine-tenths of which is clearly not navigable. Botswana resolutely confines its attention only to the last 50 kilometres of the Chobe River from the confluence with the Zambezi River. But the river boundary established by the 1890 Treaty also runs along the Chobe River westward to its juncture with the 18th parallel of south latitude, an additional distance of over 250 kilometres. Over all of this stretch, the Chobe River is dry for much of

the year and in many places for years on end. The criterion of navigability is simply irrelevant to the river as a whole.

6. Even if navigability were to be considered the touchstone for determining the main channel, navigability is to be judged - as Botswana itself admits - 'in relation to the needs of the regional economy.'⁶ The foundation of the regional economy around Kasikili Island is tourism. The water traffic in the Chobe River in this area consists of flat-bottomed boats carrying tourists to view the game on the Island and on the south bank of the river further west. The overwhelming bulk of this traffic is in the southern channel. Only occasionally and incidentally do any of these boats go through the northern channel. Thus by Botswana's own criterion, the southern channel is the navigable channel in relation to the needs of the regional economy and, therefore, is the main channel.

7. On the question of the *thalweg*, Namibia shows that, contrary to Botswana's contention, at the time of the Treaty there was no rule of general international law establishing the *thalweg* as the boundary between riverine states. An examination of the writings of publicists and the practice of states, especially in Africa, as evidenced by the treaties they concluded during the period, shows that, although the *thalweg* was frequently said or used to indicate the boundary, this usage was by no means of the generality, uniformity and consistency necessary to establish a rule of international law capable of controlling the meaning of the words 'the centre of the main channel.' Again, however, even if the *thalweg* concept is thought to be relevant, Namibia shows that the core element of this concept was the connection of the *thalweg* with the flow or current of the river. The factor of depth was derivative and secondary. Moreover, the *thalweg* concept was designed to provide each of the riparians access to the navigational benefits of the river, and, as noted above, these benefits pertain exclusively to the southern channel. Thus, even if the *thalweg* determines the main channel, in the case of the Chobe River around Kasikili Island the *thalweg* is in the southern channel.

8. As to the second basis of Namibia's title, Botswana contends that under the terms of the question submitted by the parties the Court is confined to interpreting the Anglo-German Treaty of 1890 and cannot consider the issues of prescription, recognition and acquiescence.⁷ The argument falls of its own weight. A simple inspection of the submission shows that the Court is asked to decide 'on the basis of the Anglo-German Treaty of 1st July 1890 and the rules and principles of international law.'⁸ (emphasis added) Moreover, the Court is asked to determine not only the boundary around Kasikili Island, but also 'the legal status of the island.'⁹ Such a determination can not be confined solely to the examination and interpretation of the Treaty.

9. Botswana cites the Eason Report, the Trollope-Dickinson arrangement and the 1985 joint survey (all fully discussed in Namibian Memorial, Part Two, Chapter II) as claims of right or public assertions of Botswana's title. On analysis, none of them bear that construction. These incidents do not constitute interruptions or protests sufficient to defeat Namibia's continuous occupation, use and exercise of jurisdiction over Kasikili Island.

10. Before responding in detail to Botswana's Memorial, Namibia wishes to call the Court's attention once again to the peculiar characteristics of the Chobe River, as described in Chapter I of Namibia's Memorial, *The Geography of the Disputed Section of the Boundary*. These unusual characteristics have a direct bearing on the resolution of the issues before the Court.

The Chobe River is not a watercourse carrying water more or less continuously from its catchment area downstream to its mouth or the junction with another river. Unlike the major European rivers and others that spring readily to mind, the Chobe River is an ephemeral river that is dry over most of its length for much of the year. In the area of specific concern in this case, it is part of a complex system closely associated with the Zambezi River to the north that, in the high flow season, carries the flood waters of the Zambezi back into that river below the Mambova Rapids. Botswana has disregarded these decisive peculiarities of the Chobe River. It has confined its attention to the last 50 of the more than 300 kilometres over which the Chobe River constitutes the border. And it relies almost exclusively on visual evidence (such as maps and aerial photographs) and documentation (like the 1985 joint survey) that reflect the situation in the dry season of the year. During that period, the Chobe River in the vicinity of Kasikili Island looks much like a normal river, flowing through well-defined channels in a readily visible direction. As shown in Part One, Chapter I of Namibia's Memorial and in Chapter II(A) of this Counter-Memorial, that appearance is profoundly misleading. In reality during the dry season, there is no flow in the Chobe River at all above the Mambova Rapids, including both of the channels around Kasikili Island. The Chobe River flows only when the Zambezi is in flood. Then, Kasikili Island, including the northern channel, is inundated,¹⁰ and, as is shown in para. 30, *infra*, substantially all of the flow of the river passes through the southern channel. These features of the geography and hydrogeomorphology of the region, which are not apparent from the evidence relied on by Botswana, dominate the problem of the identification of the main channel of the Chobe River

11. The organisation of this Counter-Memorial is as follows:

Chapter I establishes that the question submitted to the Court comprehends Namibia's claim based on prescription, acquiescence and recognition.

Chapter II analyses the question of treaty interpretation on the basis of the scientific evidence (Section A) and also (assuming but not admitting that they are relevant) from the perspectives of navigability (Section B) and the *thalweg* concept (Section C).

Chapter III discusses the subsequent conduct of the parties in the period since the Treaty and refutes the contention that the sovereignty of Botswana was claimed or recognised.

Chapter IV discusses the map evidence and demonstrates, contrary to Botswana's contention, that there is a remarkable general consistency among the official maps of Namibia produced by Germany, Great Britain, South Africa and the United Nations, the four entities that exercised political power in the area from 1890 to 1984, showing the boundary as being in the southern channel and Kasikili Island as being in Namibia.

Chapter I

THE SCOPE OF THE QUESTION SUBMITTED TO THE COURT

12. This Chapter responds to Chapter I of the Botswana Memorial, entitled 'The Nature of the Dispute.'

13. By the Special Agreement between the Republic of Botswana and the Republic of Namibia dated 15 February 1996, the Court is asked

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.¹¹

Namibia bases its claim to Kasikili Island on two distinct grounds: first, that the Treaty of 1890, when properly interpreted, attributes Kasikili Island to Namibia (see Part One of Namibia's Memorial); and second, that the rules and principles of international law concerning acquiescence, recognition and prescription establish a title to the Island for Namibia entirely independent of the Treaty (see Part Two of Namibia's Memorial). Botswana asserts, however, that the question is to be limited to the interpretation of the Treaty. The clause referring to 'the rules and principles of international law' is dismissed as 'pleonastic' by which Botswana evidently means that the clause adds nothing to the Treaty.¹² Such a limitation on the Court's jurisdiction under the Special Agreement is unsustainable. It is gainsaid by the plain meaning of the words, by elementary principles of treaty interpretation and by the manifest intention of the parties to settle the entire dispute between them.

14. Botswana bases its argument for restricting the scope of the question as defined in the Special Agreement on an entirely different document, the Memorandum of Understanding, containing the Terms of Reference of the Joint Team of Technical Experts (JTTE) established by the parties in 1992 to seek a negotiated resolution of the dispute.¹³ Indeed, the Botswana Memorial quotes these Terms of Reference verbatim, and some of them do seem to support an inference that the JTTE's task was strictly, if impracticably, limited to treaty interpretation.¹⁴

15. Whether or not the Terms of Reference of the JTTE are properly construed as thus limited, however, any such limitations cannot be imported into the Special Agreement. The important point for the present case is that none of the restrictive language in the JTTE Terms of Reference appears in the question submitted to the Court. The parties have asked the Court to decide 'on the basis of the Anglo-German Treaty of 1st July 1890 and the rules and principles of international law.'¹⁵ (emphasis added) There is no warrant whatever for giving all the weight to one branch of this formula and none to the other. If anything, the omission of the restrictive language in the JTTE Terms of Reference from the question submitted to the Court gives rise to the reverse inference that no such limitation was intended. The plain language of the question requires the Court to consider any evidence or submissions of the parties grounded in general rules and principles of international law equally with submissions based on the 1890 Treaty.

16. Botswana's attempt to treat the reference to the 'rules and principles of international law' as if it were not included in the Special Agreement contravenes fundamental rules of treaty interpretation. The Botswana Memorial suggests that the phrase refers only to the rules and principles concerning treaty interpretation.¹⁶ But Botswana itself acknowledges that international law rules concerning treaty interpretation are comprehended in the first clause of the question referring to the Treaty of 1890.¹⁷ Well-known principles of interpretation, however, forbid treating particular language in the text as redundant or repetitive when the words can be given an independent meaning - as they can in the present case without

difficulty. To cite only one prominent authority, *Oppenheim's International Law Ninth Edition* states:

The parties are assumed to intend the provisions of a treaty to have a certain effect, and not to be meaningless. . . . Therefore, an interpretation is not admissible which would make a provision meaningless, or ineffective.¹⁸

As the Court said in construing the Question Submitted in the *Case Concerning the Continental Shelf*, 'The Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent.'¹⁹ Similarly, in the *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court said, 'Any other interpretation would encounter serious difficulties: it would deprive the phrase of its effect and could well, moreover, lead to an unreasonable result.'²⁰

17. The Court readily disposed of substantially the identical question in interpreting the Special Agreement between Great Britain and Albania submitting the *Corfu Channel* case for adjudication.²¹ The question was:

Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters . . . and is there any duty to pay compensation?²²

Great Britain asked the Court to determine the amount of compensation owed, but Albania argued that under the Special Agreement the Court was limited to determining whether any duty to pay compensation existed, rather than the quantum of such duty. The Albanian position would have rendered the disputed phrase - 'is there any duty to pay compensation' - 'pleonastic',²³ since, as the Court pointed out, the duty to pay compensation followed ineluctably from a determination that Albania was responsible under international law for the explosions. Thus, to have adopted the Albanian position would have been to read the relevant language out of the treaty. It would have been given no independent significance. This the Court refused to do. It interpreted the Special Agreement to require it to determine the amount of the compensation owed, even though the question submitted did not explicitly mention amounts. In this case, however, the language of the question is clear. The Court is to decide 'on the basis of the Anglo-German Treaty of 1st July 1890 and the rules and principles of international law.' (emphasis added) It is hard to imagine words more apt to express the intention of the parties that in addition to the interpretation of the Treaty itself, the Court is to consider all the applicable rules and principles of international law in coming to its decision.

18. Moreover, the Court is asked to determine not only the location of the boundary between Namibia and Botswana at Kasikili Island, but also 'the legal status of the island.' In this respect, the wording of the question here is to be contrasted with the language of the question submitted in the *Minquiers and Ecrehos* case, which requested the Court 'to determine whether the sovereignty over the islets and rocks . . . belongs to the United Kingdom or the French Republic'²⁴ without more. In the present case, the question, by asking generally for a determination of 'the legal status of the island,' permits the Court to declare any legal rights in the Island, whether or not treaty-based, as they may emerge from the evidence in the light of the submissions of the parties.

19. The parties did not intend to confine the Court to a merely technical exercise in treaty interpretation. It was their purpose to settle the entire dispute between them concerning the status of Kasikili Island. This purpose should not be frustrated by placing artificial limitations on the jurisdiction of the Court that contradict the ordinary meaning of the language of the Special Agreement.

Chapter II

THE DETERMINATION OF THE MAIN CHANNEL OF THE CHOBE RIVER WITHIN THE MEANING OF THE ANGLO-GERMAN TREATY OF 1890

20. This chapter replies to Botswana's contentions with respect to the interpretation of the 1890 Treaty, contained primarily in Chapters V(b) and VII of the Botswana Memorial, entitled respectively 'The Interpretation of the Anglo-German Agreement of 1890' and 'The Issue of Fact: The Main Channel is to the North and West of Kasikili/Sedudu Island.'

21. Both parties are agreed that on the question of treaty interpretation, the task of the Court is to determine whether the northern or the southern channel of the Chobe River around Kasikili Island is the 'main channel.' Both are also agreed that this is a question of scientific fact to be resolved on the basis of expertise in hydrology, geology and hydrogeomorphology.

22. In this chapter, Namibia demonstrates that, contrary to Botswana's contentions:

- first, there is no warrant in fact or law for saying that the main channel must be equated with the navigable or deepest channel. On the contrary, as a factual and scientific matter, the 'main channel' is the one that carries the largest proportion of the flow of the river; and
- second, there is no warrant as a matter of fact for saying that the northern channel is navigable and the southern channel is not.

23. Section A of this Chapter demonstrates that on the basis of scientific evidence, the southern channel is the main channel, because it carries substantially all of the flow of the Chobe River. Despite its recognition that the question is one of scientific fact, Botswana adduces virtually no scientific evidence relating to the hydrology and hydrogeomorphology of the river, the very factors its own expert says are decisive. Its argument is chiefly based on (i) the comparative navigability of the two channels and (ii) a supposed contemporaneous rule of general international law that for navigable rivers the deepest channel or *thalweg* marks the boundary between riparian states. Although Namibia maintains that these considerations are not relevant to determining the main channel of the Chobe River, it addresses them in this Chapter of its Counter-Memorial.

24. Section B shows that navigability is to be judged 'in relation to the needs of the regional economy,' which in this case is based almost exclusively on tourism. Substantially all of the tourist traffic plies the southern channel, and practically none goes along the northern channel. Thus, in terms of navigability, the southern channel is the main channel.

25. Section C examines the legal materials roughly contemporaneous with the 1890 Treaty and demonstrates that no rule of general international law indicates, much less requires, that

the northern channel be designated as the main channel. On the contrary, the clear understanding of the *thalweg* concept at that time was that it corresponds to the deepest channel with the strongest flow, in this case the southern channel.

A. The Scientific Evidence Establishes Unequivocally that the Southern Channel is the Main Channel

26. A comparison of the two Memorials reveals that both parties are in agreement as to the basic nature of the interpretative task before the Court. The Botswana Memorial begins its concluding summary of its case as follows:

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.²⁵

The Namibian Memorial endorsed this approach, quoting with approval a passage from Botswana's submission to the JTTE that is identical to the one cited above and adducing decisional authority to support the position.²⁶

27. The parties are also in close accord on the criteria to be applied to resolve this 'question of scientific fact.' Dr. F.T.K. Sefe, Botswana's expert, states them as follows:

The word 'main' has both hydrological and geomorphological connotations relating to the velocity of flow, hence the discharge. So it connotes the ability of the river to transport debris in terms of particle size (i.e. its competence[Mackin, 1948]), and the maximum load (sediment of particular grain size) a stream can carry (i.e. its capacity as defined by Gilbert [1914]). Both the competence and capacity of a river are functions of the energy of the river. As energy in a river reach is proportional to the product of the mass (i.e. size) and the bedslope, 'main' is synonymous with size. Thus of two tributaries of the same river, the larger is considered the main channel.²⁷

This formulation is the substantial equivalent of the criterion set forth in NM, Alexander Report, para. 2.8: "The **main channel** of a river is the channel that conveys the largest proportion of the annual flow of the river." (emphasis in original) In his Supplementary Report, included in this Counter-Memorial as Vol. III, Professor Alexander repeats: "The **basic premise** is that the main channel of a river is the channel that carries the largest proportion of the annual flow in the river." (Supp. Rep., para. 2.1) (emphasis in original)²⁸

28. It will be noted that Dr. Sefe does not say that the main channel is the deepest channel. The Botswana Memorial, however, states that 'the primary, and perhaps the only, criterion would be relative depth . . .'.²⁹ This proposition is not supported by Dr. Sefe's scientific analysis and is not consistent with the scientific criteria he advances. Dr. Sefe says that "'main' is synonymous with size' and that 'of two tributaries of the same river, the larger is considered the main channel.' He does not say, nor does it follow, that 'size' or 'largeness' of a channel is to be measured by depth. On the contrary, in the context of the full passage from

Dr. Sefe quoted above, it is clear that size is to be measured by 'the ability of the river to transport debris' and 'the maximum [sediment] load it can carry.' In fact, as Professor Alexander emphasises, width and depth are inappropriate measures of the main channel in an ephemeral river like the Chobe River because these dimensions are irregular and change rapidly from place to place along the river and from one period in time to another. (NM, Alexander Report, para. 4.4)³⁰

29. The Alexander Report, analysed at length in Namibia's Memorial, establishes conclusively that the southern channel carries by far 'the largest proportion of the annual flow of the river.'³¹ Therefore, according to the scientific criterion advanced by both experts, the southern channel is the main channel. Professor Alexander's analysis is expanded and further elaborated in his Supplementary Report with particular reference to the contentions in the Botswana Memorial. Namibia urges that this Supplementary Report, like the original Alexander Report, should be studied in full.³²

30. Professor Alexander demonstrates that the flow in the lower reaches of the Chobe River is not 'a result of the runoff from the catchment area of the system,' as Botswana asserts.³³ Instead, the flow comes in two stages from the floods of the Zambezi River which occur annually between the end of December and June. (Supp. Rep., paras. 5.6-5.9) At the beginning of the period, the rapidly rising waters of the Zambezi back up behind the Mambova Rapids, and as a result, the movement of the water is upstream (from east to west) in the Chobe River. (Supp. Rep., paras. 5.7, 5.9(a))³⁴ In the second phase, when the Zambezi overflows its banks along the reach between Katima Mulilo and the Mambova Rapids, the waters advance across the floodplain, inundating almost the entire triangle bounded by Katima Mulilo, Ngoma and the Mambova Rapids, until they reach the Chobe Ridge on the south bank of the Chobe River. There, along the broad front from Ngoma to the Rapids, they are turned into the channel of the Chobe River, where they flow in a south-west to north-east direction passing through the southern channel around Kasikili Island and ultimately over the Mambova Rapids to the confluence with the Zambezi River. (Supp. Rep., para. 5.8; NM, Atlas, Map XIII) Substantially the entire flow of the river during this period thus goes through the southern channel. (Supp. Rep., para. 5.15) This movement is determined by the geomorphology of the floodplain, which slopes gently south-eastward until interrupted by the Chobe Ridge (and further west, the Linyandi Ridge), which marks the south bank of the Chobe River and forces the water to make a right angle turn to the north-east. (NM, Alexander Report, para. 5.9) Although some of the Zambezi flood waters flow through two anabranch channels in the floodplain into the northern channel east of Kasika, virtually no waters flow longitudinally through the northern channel from the bifurcation of the river west of Kasikili Island around the Island to the convergence of the two channels to the east of the Island. (Supp. Rep., sec. 5)

31. The rest of the year, from the end of June through November, is the dry season and during that period the river in the vicinity of Kasikili Island assumes the characteristic shape that appears on maps and aerial photographs and that was observed by the inspection parties upon whose conclusions the Botswana Memorial relies.³⁵ But despite the appearance of a river that flows from west to east along its channel, parting at Kasikili Island to pass to the north and south of the Island, during this period there is virtually no flow at all in the Chobe River, including the portions around the Island. (NM, Alexander Report, paras. 1.6, 10.15) For most

of the more than 300 kilometres over which it defines the boundary between Botswana and Namibia, the river is dry during this period except for intermittent pools fed by groundwater. (Supp. Rep., sec. 7) Below Serondela, in the last 20 kilometres before the Mambova Rapids, the water appears on the maps and photographs to be a continuous stream, but it is actually essentially stagnant, dammed behind the Rapids and receiving no replenishment from the catchment area upstream. Thus, there is substantially no flow through the northern channel in either season of the year.

32. Dr. Sefe concludes that *'the north channel is the main channel of the Chobe River in the true hydrogeomorphic sense . . .'*³⁶ (emphasis in original) But Dr. Sefe does not relate this conclusion to the 'hydrological and geomorphological connotations' he identified earlier, i.e., 'the velocity of the flow,' 'the discharge,' 'the ability of the river to transport debris,' and 'the maximum [sediment] load a stream can carry.' Dr. Sefe makes no comparison between the two channels on the basis of these factors, which are not even discussed anywhere in his report. Indeed, it is hard to determine on what basis Dr. Sefe reached his conclusion. Six of the 12 pages of his report are devoted to showing that the position of the two channels has not changed since 1890, a fact that Namibia does not contest.³⁷ The only apparent foundation for Dr. Sefe's conclusion is his earlier statement that the results of a joint survey by South Africa and Botswana in 1985 'clearly indicate the north channel as the main channel: its mean depth of 5.7m exceeds the mean depth of the south channel by 2.13m.'³⁸ Dr. Sefe seems to rely as well on the conclusion reached by the 1985 survey. The Alexander Report, sec. 11, analyses the 1985 report and demonstrates that the 1985 survey team's methodology was unreliable and its conclusion erroneous. And Dr. Sefe, on the following page, in the passage quoted above, states that the main channel is to be determined not on the basis of depth but of 'the ability of the river to transport debris' and 'the maximum [sediment] load . . . a stream can carry.' Since his conclusion does not meet the criteria for the identification of the main channel that he himself proposes, it should be disregarded by the Court.

33. The Botswana Memorial calls attention to three 'meander loops' in the river west of Kasikili Island.³⁹ It asserts that 'these meanders are uniformly made by the main stream of the river,' that 'Kasikili/Sedudu Island is itself formed by such a meander loop,' and that 'like the other loops the main channel flows to the west and north clockwise, round the island.'⁴⁰ No evidence is given and no references are cited for this series of propositions.

34. Dr. Sefe does not provide the missing evidence. He makes two or three passing references to meander loops on pages 2 and 3 of his report. He lists 'meanders' among the characteristics of 'low energy' rivers.⁴¹ Thereafter, he says, 'Kasikili Island was initially a sand bar deposit, created by methods indicated above . . .'⁴² But since many methods are 'indicated above,' there is no way of telling which he means. Later, after characterising the southern channel as 'the largest of the backwater channels,' he says, 'Many of the backwater channels are associated with abandoned meander loops and lagoons resulting from spit deposition.'⁴³ This does not appear to be a specific reference to Kasikili Island. Neither of these statements supports the propositions in the Botswana Memorial quoted above.

35. Professor Alexander addresses this issue in paragraphs 9.3-9.5 of his Supplementary Report. There he shows that the position of the meander loops Dr. Sefe refers to is controlled

by a sub-parallel fault system and not by the processes described in Dr. Sefe's report. This is apparent from inspection of Map 2 on Sheet 29 of the Alexander Report, which shows that the leading arms of the meanders are parallel to the geological fault line at the Mambova Rapids. It is also apparent from Photographs P11s and P12s (Supp. Rep., Sheet 10s) that the features of the meander loops, including the nature of the soil and the topography and elevation of the land within the loops, are fundamentally different from Kasikili Island, as shown in Photographs P5s-P8s. (Supp. Rep., Sheets 4s-7s) Thus, Professor Alexander says that the conclusion that the northern channel is the main channel based on its superficial similarity with the meander loops is incorrect.

36. The 'question of scientific fact' as to the main channel of the Chobe River around Kasikili Island must be resolved in favour of the southern channel. That channel carries substantially all of the annual flow of the river, and the northern channel carries almost none of it. Since the scientific criterion that defines the main channel is 'the velocity of flow, hence the discharge' (Dr. Sefe) or 'the channel that conveys the largest proportion of the annual flow of the river' (Professor Alexander), it follows that on the basis of the scientific evidence the main channel is the southern channel.

B. In Terms of Navigability 'in relation to the needs of the regional economy,' the Southern Channel (and not the Northern) Qualifies as the Main Channel

37. In paragraph 116 of its Memorial, Botswana states that 'the principal criterion on which [the] . . . assessment [of the main channel] is based . . . [is] that of navigability.' This is completely at odds, of course, with the position stated earlier that 'the central question' involves 'a question of scientific fact, calling for expertise in hydrology, geology and hydrogeomorphology.'⁴⁴

38. In Namibia's view, it would be anomalous to apply a criterion of navigability to a river boundary that is non-navigable for most of its length. Namibia has already spoken of Botswana's myopic view of the subject matter of this case.⁴⁵ For example, the Botswana Memorial confines its attention to 'the Chobe River in the last 50 kilometres (30 miles) prior to its confluence with the Zambezi River.'⁴⁶ Dr. Sefe's report is similarly limited.⁴⁷ But under Article III of the 1890 Treaty, the Chobe River constitutes the boundary between Botswana and Namibia from its intersection with the 18th parallel of south latitude for over 300 kilometres eastward until it joins the Zambezi. For most of these 300 kilometres, the Chobe is clearly not a navigable river, and in fact it is dry for much of the time over much of its length. Above Serondela, a portion of the river boundary from which the Botswana Memorial resolutely averts its gaze, the concept of navigability has no application whatsoever. By contrast, the scientific criterion, 'the channel that conveys the largest proportion of the annual flow,' can be applied consistently over the entire length of the river because every reach of the river has had some flow during at least some parts of some years. However, even under the criterion of navigability rightly understood, the southern channel is the main channel.

39. Botswana argues that the negotiators of the 1890 Treaty were concerned with access to the navigable rivers in the vast areas of Africa they were dividing.⁴⁸ Be that as it may, one of the best known geographical facts at the time about the region of concern in this case was that the upper Zambezi was not navigable because of the presence of the Victoria Falls 80 kilometres south of the confluence with the Chobe River. The Caprivi Strip was created to give Germany

access to the Zambezi River. But it does not follow that navigability rather than land access was what was intended. The Treaty itself states that 'Germany shall have free access from her Protectorate to the Zambesi by a strip of territory . . .'⁴⁹ (emphasis added) Writing to the Foreign Office in 1910 in connection with the discussions of the western sector of the boundary, C.P. Lucas of the British Colonial Office stressed that it was the 'access by land to the Zambesi . . . ' to which the Germans attached importance.⁵⁰ A few years earlier, High Commissioner William Selborne, writing to the Secretary of State also implied that land access to the Zambezi was what had been of primary significance to Germany:

I have always understood that the reason why His Imperial Majesty the German Emperor laid such stress on the possession of the strip, was his desire not to be excluded from the navigation of the Zambesi, about which, at that time, very little was known.⁵¹

40. As for the Chobe River, the Treaty Map⁵² shows it proceeding through swamps for much of the boundary area. As will be recalled, Lord Salisbury, in presenting the Treaty to Parliament, remarked that 'during the last 300 years there has been no very eager or impetuous torrent of trade'⁵³ through the Strip. It is, he added, 'the last route in the world by which trade can pass.'⁵⁴ As Namibia has shown in its Memorial, the Chobe River was suggested as the boundary by the British negotiators, for whom it represented a convenient geographical marker of the northern limit of their territorial ambitions for Bechuanaland, which at the same time satisfied the German desire for a 'strip of territory' providing access to the Zambezi.⁵⁵

41. No evidence has been produced of passage of commercial vessels through the northern channel at any time on a significant scale. It appears that during the 1930s a Mr. Suzman had a timber concession on the Chobe River front, presumably around Serondela. It is not known how fully the concession was exploited and, if it was, by what route the timber was transported to market. The activity apparently lapsed before 1945, however, because it was this concession from which, a few years after World War II, William C. Ker wanted to transport timber - leading to the much discussed Trollope-Dickinson arrangement.⁵⁶ He sought and was granted permission to use the northern channel in connection with this effort, but it is not clear that he exercised it. Nor is it clear to what extent his primary motivation was economic rather than political.⁵⁷ The lumber mill ceased operations in the mid-1950s. This venture remains, so far as Namibia has been able to discover, the only recorded instance of the use of the northern channel for 'ordinary commercial navigation.'⁵⁸ Thus, whatever the negotiators may have hoped, speculated or dreamed, the Chobe River never was and never will be a 'highway[] for commerce'⁵⁹ for the transport of goods.

42. Even if navigability is relevant, however, the issue is not to be determined primarily on the basis of depth, as maintained by Botswana.⁶⁰ As early as 1861, Henry W. Halleck recognised that

the deeper channel may be less suited, or totally unfit, for the purposes of navigation, in which case, the dividing line would be in the middle of the [channel] which is best suited and ordinarily used for that object.⁶¹ (emphasis added)

43. Similarly, the Barcelona Statute on the Régime of Navigable Waterways of International Concern (1921) applies a less mechanical and more practical standard than average depth. A river is navigable

if now used for ordinary commercial navigation, . . . by "ordinary commercial navigation" is to be understood navigation which, in view of the economic condition of the riparian countries, is commercially and normally practicable.⁶²

This coincides with Botswana's own statement that navigability is to be judged 'in relation to the needs of the regional economy.'⁶³

44. Applying this standard, Botswana asserts that 'the northern and western channel of the Chobe River is the sole channel navigable in relation to the needs of the regional economy.'⁶⁴ This statement is flatly wrong. It is another sweeping proposition, central to Botswana's argument, that is not supported by any references or evidence.

45. The primary basis of the regional economy, apart from subsistence agriculture, is and is likely to remain tourism, and it is tourism that generates the commercial activity on the Chobe River in the vicinity of Kasikili Island. (Supp. Rep., sec. 11) Nearly all boat traffic is used to transport tourists to view the game on Kasikili Island or further west on the south bank of the river within the Chobe National Park. (Supp. Rep., para. 11.5) The boat rides are a well-advertised attraction for visitors to the area. (Supp. Rep., Sheet 17s, Photo P25s; Sheet 18s, Photo P26s) The tourist boats use the southern channel almost exclusively, although a few boats returning from Kasane use the northern channel. (Supp. Rep., para. 11.12) On Kasikili Island itself, the game can be more easily seen from the boats in the southern channel where the banks are very low, in contrast to those of the northern channel. (Supp. Rep., paras. 11.9, 11.11) The boats are shallow draught, so that they can be manoeuvred hard up against the banks and into the many shallow creeks and side channels along the river. (Supp. Rep., paras. 11.5, 11.10; Sheet 14s, Photo P19s; Sheet 18s, Photo P26s) There is at present little or no game on the northern side of the river, which is mainly agricultural country.

46. In comparing the navigability of the northern and southern channels, Botswana relies primarily on the greater depth 'on average' of the northern channel.⁶⁵ But average depth is not determinative of navigability. Passage through a channel is controlled by the point of minimum depth, because all craft must clear that point to traverse the channel. On the question of minimum depth, the Botswana Memorial is a good deal less clear. It says that the entry point to the southern channel 'is very shallow, 1.5 to 2.m. in depth.'⁶⁶ And while acknowledging obliquely that there is a 'small sand bar to the north of the National Park Headquarters'⁶⁷ that must be cleared before entering the northern channel, Botswana gives no indication of the depth of the river at that point. Professor Alexander says that in this respect the difference between the two channels is marginal. (NM, Alexander Report, para. 11.6)⁶⁸ At any rate, not only the entry, but the entire length of the southern channel is of ample depth to accommodate the flat bottom boats carrying the tourist traffic at all times of the year. (Supp. Rep., paras. 10.7, 11.10; Sheet 14s, Photo 19s)

47. Botswana's statements that the southern channel is not navigable for these purposes are flatly wrong.

- Contrary to Botswana's repeated statements, the southern channel is not blocked or impaired by 'a well-established and persistent growth of Kariba Weed.'⁶⁹ The Kariba Weed was removed from the southern channel as well as the rest of this reach of the Chobe River by a joint Botswana/South Africa project in the early 1970s, motivated in considerable part by the need to keep the river open for tourist traffic.⁷⁰ There are now no Kariba Weed or any other aquatic plants obstructing the southern channel. (Supp. Rep., paras. 10.5, 10.10-10.12, 10.16) Moreover, South Africa's participation in this joint project with Botswana to clear the Kariba Weed from the Chobe River in order to improve navigation, which even at that time was primarily in the southern channel, is telling evidence that both parties considered that the international boundary lay in the southern channel.
- Contrary to Botswana's claim, the southern channel does not dry out during drought years and periods of low flow.⁷¹ No evidence is provided in support of Botswana's statement. Professor Alexander has analysed the recorded water levels in the Chobe River. His calculations show that during the entire period for which data are available, 1964 to date, neither the northern nor the southern channels were dry during the lowest flow periods. (Supp. Rep., para. 10.7)⁷²
- It is not true, as Botswana states, that 'when the Chobe River is at its lowest in the month of August only the northern and western channel is navigable.'⁷³ No reference is cited for this statement either. The peak tourist season runs from April to October, so August is a major tourist month for the Chobe National Park and for the lodges in the vicinity of Kasikili Island. Boat trips along the southern channel to view the game on the Island operate on a frequent basis during this period. (Supp. Rep., para. 10.8) In preparation for this case, the legal representatives of Namibia visited the area in 22 August 1996 and travelled by boat from one end of the southern channel to the other.⁷⁴ When the JTTE was there on 4 October 1993 the southern channel was full of water.

48. If, as Botswana suggests, a major reason behind the rules about navigability is to ensure that both riparian states have access to the economic benefits of the river⁷⁵ then clearly the southern channel is the navigable channel. Since 1991, when Botswana armed forces unilaterally occupied the Island, boats from the resort lodges in Namibia have been prevented from using the southern channel, which, as shown above, is the optimal channel for tourism. The prohibition has been enforced by armed Botswana boats patrolling in both the northern and the southern channel. As a result the economic prospects of the Namibian lodges have been limited, and the growth of the tourist industry along the northern bank of the river has been seriously inhibited. On the other hand, neither Namibia nor its predecessors has prevented Botswana from using the northern channel. It is Botswana's position that deprives Namibia of access to the benefits of the Chobe 'in relation to the needs of the regional economy,' not the reverse.

49. It follows that, if the criterion of navigability is relevant to the determination of the main channel, on a proper understanding of the criterion, the southern channel is the main channel.

C. Nothing in the Language of the 1890 Treaty or the General Principles of International Law Warrants the Rejection of the Determination that the Main Channel of the Chobe River is the Southern Channel

50. Despite its protestations, the Botswana Memorial gives little more than perfunctory treatment to navigability or to scientific evidence and criteria (except for the point that the general configuration of the Chobe River in the vicinity of Kasikili Island has not changed since the signing of the Treaty, a point that Namibia does not contest). The principal thrust of Botswana's argument is that the main channel is to be identified not on the basis of these considerations, but by the application of general principles of international law. Indeed, Botswana devotes six pages of its Memorial to belabouring the elementary principle - with which Namibia also agrees and of which the Court is surely perfectly well aware - that the Treaty is to be interpreted in good faith in accordance with the ordinary meaning of its terms in the light of its object and purpose.⁷⁶ In this Section, Namibia shows that nothing in the language of the Treaty or in the rules of general international law concerning river boundaries dictates that the northern channel is the main channel.

1. The language of the Anglo-German Treaty of 1890

51. The words of the Treaty that are to be interpreted are 'the centre of the main channel of [the Chobe] river.'⁷⁷ In the German translation, the phrase reads '*im Thalweg des Hauptlaufes dieses Flusses.*'

52. The Botswana Memorial states 'The German text employs the term *Thalweg* as the counterpart to "the main channel" in the English text.'⁷⁸ This is plainly wrong. A simple inspection of the two phrases shows that the counterpart to the English 'main channel' is the German word '*Hauptlaufes.*' The word *Thalweg* is the counterpart of 'the centre' in the English text. As fully explained in the Namibian Memorial, it is evident from the circumstances in which the Treaty was negotiated that the German text was simply a translation of the English-language text.⁷⁹ The use of the word *Thalweg* in the German text is therefore not equivalent to the words 'main channel' in the English, as Botswana maintains. The term *Thalweg* in the German text designates the position of the boundary within *des Hauptlaufes*, just as, in the English text, the words 'the centre' designate the position of the boundary within the 'main channel.' The word *Thalweg* in the German text of the Treaty cannot be used to distinguish the main channel from another channel, any more than can the word 'centre' in the English text.

53. Because English was the original language of the Treaty and the German a mere translation, the interpretation of Article III depends on the English meaning of the words 'centre of the main channel.' There is no basis for the conclusion that these words, in their ordinary English meaning, refer to the centre of the deepest channel or that the reference is linked to navigability of the river as Botswana contends.⁸⁰ Indeed, the word 'centre,' as opposed to '*thalweg*,' would seem to be determined in relation to the width of the channel, rather than its depth. Certainly, the text of the Treaty does not contain or suggest anything that would override the identification of the southern channel as the main channel on the basis of scientific evidence or other applicable criteria.

2. General principles of international law concerning river boundaries contemporaneous with the 1890 Treaty did not embody the *thalweg* doctrine

54. The Botswana Memorial cites 17 authorities (13, if successive editions of books by a single author are disregarded)⁸¹ for the proposition that at the time of the conclusion of the 1890 Treaty 'it was generally recognised that in the case of navigable rivers the middle of the navigable channel (*thalweg*) was the boundary between the riparian States' (without, however, supplying quotations from the cited authors).⁸² Although it is true that many of those authors use some such language, the support is neither so uniform nor unqualified as Botswana implies in its string citation. It is elementary that to establish a rule of general international law it must be shown that the putative rule embodied a widespread, uniform and consistent practice accompanied by *opinio juris*, a sense that action in conformity with the practice is a matter of legal obligation. Namibia has examined 47 authorities who discussed the *thalweg* concept between 1820 and 1930 (the most relevant period for present purposes). Quotations from these authorities are collected in Annex 9. Namibia believes that the list comprises substantially all of the writers of any significance who have addressed the subject in any detail in that period, including all of the publicists cited by Botswana. The quotations advocate a wide range of positions. Some writers argue that the *thalweg* should be the boundary in navigable rivers but not in rivers that are not navigable, where the median line should be used.⁸³ Others endorse the concept for non-navigable as well as navigable rivers, in most cases without indicating how it would be applied to a river that was not navigable.⁸⁴ Still others oppose the asserted *thalweg* rule altogether.⁸⁵ For many of the authors, classification is difficult, either because they do not take a clear position or because careful analysis and discrimination is lacking.⁸⁶ Some even conflate the terms '*thalweg*' and 'median line'.⁸⁷ This hardly adds up to a consensus among scholarly writers of the uniformity and solidity necessary to establish a rule of general international law.

55. Botswana relies heavily on the resolution of the Heidelberg session of the Institut de Droit International in 1887, which provided that 'La frontière des États séparés par le fleuve est marquée par le *thalweg*, c'est-à-dire par la ligne médiane du chenal.'⁸⁸ F. de Martens, who was the Rapporteur for the Institut on this occasion, did not include this provision in his project for the Institut because, as he said in debate, 'ce principe n'est pas généralement reconnu . . .'⁸⁹ The language that was adopted as the second paragraph of Article 3 in the resolution of the Institut came from Edouard Englehardt's project⁹⁰ and was introduced on the floor of the meeting. De Martens would appear to have accepted its inclusion *de lege ferenda*. The resolution therefore provides no support for the assertion that the riverine boundary was the middle of the navigable channel or the *thalweg*. On the contrary, the meeting of the Institut exemplifies the uncertain state of general international law at about the time of the Treaty.⁹¹

56. The treaty practice of the European colonial powers in Africa in the period of the 1890 Treaty reveals, if anything, even less uniformity than the general practice or the scholarly writings. One of the most striking features of these treaties is the variety of language used to describe river boundaries as well as an evident lack of concern with whether the rivers were navigable or non-navigable. This diversity of usage is apparent within the four corners of the 1890 Treaty itself:

- Article I(2):

'a line which . . . follows the course of the River Rovuma . . .'

'it ascends that [the Songwe] river . . .'

'thence it follows the river . . .'

'and thence follows that [the Kilambo] river till it enters Lake Tanganyika.'

- Article III(2) (the provision involved in the present case):

'descends the centre of the main channel of that [the Chobe] river . . .'

- Article IV(1):

'The boundary . . . ascends the mid-channel of that [the Aka] river . . .'

Thus, in the course of this single treaty, at least four different expressions are used to indicate an international boundary in a river.⁹²

57. A similar diversity, often in a single instrument, is characteristic of other treaties concluded by European powers in Africa in the period of the 1890 Treaty. A sample of the treaties of the period cited in Professor Ian Brownlie's encyclopaedic work on African boundaries,⁹³ shows the following locutions (page numbers refer to that volume, unless otherwise indicated; emphasis added):

- 'up the course of the Limpopo River'; Great Britain/Transvaal, 1884, Art. I (p. 1093).
- 'shall follow the course of the River Kunene'; 'along the course of the [Kubango] river'; Portugal/Germany, 1886, Art. I (p. 1028).
- 'the middle line of the Kunene River, that is to say, the line drawn equidistant from both banks'; Portugal/South Africa, 1926, para. 2 (p. 1029).
- 'the centre of the channel of the [River] Ruo'; 'the centre of the channel of the [Shiré] river'; 'follows the mid-channel of that [Aroangwa] river'; United Kingdom/Portugal, 1891, Art. I(2) (p. 1119).

Art. II (p. 1119): 'the centre of the main channel of the Sabi';

Art. IV (p. 1120): 'the centre of the channel of the Upper Zambesi . . .'

- 'shall follow the centre of the River Ruo up-stream'; 'shall follow the Malosa River up-stream'; United Kingdom/Portugal, 1899, Art. 1 (pp. 1128-1129).
- 'the line of the thalweg of those [the Ruo and Shiré] rivers'; United Kingdom/Portugal, 1911 (p. 1179).
- 'the centre of the main channel of the River Loangwa'; United Kingdom/Portugal, 1911, Annex 1 (p. 1265).

Annex 2 (pp. 1268-1269): 'the centre of the channel of the Inyarumanu stream to its junction with the centre of the main channel of the River Angwa; and thence the thalweg of the River Angwa'; 'the centre of the bed of the Karemwe River; thence follows the thalweg of the

Karemwe River . . . the thalweg of the Kazi River . . . the thalweg of the Msengezi River'; 'follows the thalweg of the Mkumvaru River . . . '

- 'the centre of the channel of the River Gaeresi'; United Kingdom/Portugal, 1912 (p. 1226).
- 'follows the east channel of the Maputo'; Mozambique/South Africa, 1897 (p. 1243).
- 'shall follow the thalweg of this [Black Volta] river'; 'shall then follow the thalweg of the western branch of this river'; 'shall then follow the thalweg of this [Nuhau] river'; United Kingdom/France, 1898, Art. I (pp. 619-620);

Art. III (p. 620): 'shall then follow the median line of the [Niger] river . . . '

58. There seems to be no pattern or principle governing this proliferation of terminology.⁹⁴ The use of 'median' or 'centre' does not correlate with non-navigable rivers, as some of the authors cited by Botswana suggest.⁹⁵ The Niger River, for instance, was clearly navigable, but the relevant treaty stipulates 'the median line.' Some provisions, like Article I of the Niger treaty, explicitly refer to the *thalweg*. But others, like Article III of the same treaty, refer just as clearly to the median line. No inference can be drawn from this assortment of ambiguous terms to the effect that they all refer to 'the navigable channel (*thalweg*),' and no presumption can be derived that in case of doubt that is what was intended.⁹⁶ The conclusion from the African practice is, if anything, stronger than that derived from the scholarly literature: there was no uniformity, and hence there was no rule of general international law. The position is perhaps best characterised by Ernest Nys, who commented in 1901:

Tout ce qu'il est permis de dire c'est que dans les dernières années du XIX^e siècle, le *thalweg* a été fréquemment adopté pour la délimitation et il faut même ajouter que les gouvernements se sont continuellement servis d'une expression vague et, partant, mauvaise.⁹⁷

3. International law sources of the relevant period demonstrate that the *thalweg* was to be identified by reference to the current or flow of the channel and not merely its depth

59. The previous section has established that there was no rule of international law according to which 'the middle of the navigable channel (*thalweg*) was the boundary between theriparian States.'⁹⁸ In this section, Namibia shows that even if the notion of the *thalweg* is regarded as relevant to the identification of the 'main channel,' Botswana is incorrect in saying that the *thalweg* is to be defined as 'the line at the water's surface vertically above the deepest channel of the river bed at low tide.'⁹⁹ On the contrary, as will appear more fully below, the *thalweg* concept has to do fundamentally with the flow or current of the river and is only secondarily related to depth.

60. Doubtless most of the discussions of the *thalweg* of a river channel refer to its relation to the deepest part of the channel.¹⁰⁰ A careful examination of the leading authorities, however, especially in the period leading up to the 1890 Treaty, demonstrates that the concept of *thalweg* is essentially related to the current in the channel - indeed, that the flow or current of the river is at the core of the *thalweg* concept. An important consequence is that the legal criteria converge with the scientific factors that both parties agree are relevant in determining the main channel of a river: 'the velocity of flow,' 'the discharge,' 'the ability of the river to

transport debris,' 'the maximum load (sediment of particular grain size) a stream can carry' or the proportion of the annual flow that it carries.¹⁰¹ As a scientific matter, it is the scouring effect of the current that accounts for the depth of the channel. The correct understanding of the *thalweg* in law - as involving the current or flow of the stream - thus permits a determination of the main channel that satisfies at the same time both the scientific and the legal criteria.

a. Authoritative contemporaneous definitions

61. Since the word *thalweg* is originally German, it is appropriate to refer to German encyclopaedias and dictionaries of the period.

- The connection between depth and current is admirably portrayed in the *Deutsches Wörterbuch*: 'the channel wherein the water flows, the deepest line of the valley floor is called the *thalweg*.'¹⁰² (emphasis added) Again the *thalweg* of the Rhine is defined as 'the strongest and deepest stream-line in the course of the Rhine.'¹⁰³ (emphasis added)
- Brockhaus *Konversationslexikon* contains the entry: "stream-line, *thalweg*," the line that connects the points of greatest surface velocity of flowing water. It usually moves above the deepest channel.¹⁰⁴ (emphasis added)
- A later text, *Der Grosse Herder, Nachschlagewerk für Wissen und Leben*, contains this entry: '*thalweg*: the channel continuously kept open for navigation; also the centre of the navigation channel, the line of the fastest surface current, in case of lack of agreement the border-line between countries.'¹⁰⁵ (emphasis added)

62. Contemporaneous French dictionaries are also in accord.

- Littré's *Dictionnaire de la langue française* offers the clearest definition of the *thalweg*: '[La] [l]igne plus ou moins sinueuse au fond d'une vallée, suivant laquelle se dirigent les eaux courantes. / *Thalweg* d'une vallée, la ligne d'intersection des plans de pente latérale des deux berges de la vallée. / *Thalweg* d'un cours d'eau, la position du filet d'eau qui se meut avec la plus grande vitesse. Le *thalweg* d'un cours d'eau ne correspond pas toujours au *thalweg* de la vallée. . . . Le *thalweg* du Rhin formera la démarcation entre la France et les Etats de l'Allemagne, *Traité de Paris* de 1815, art. 2.'¹⁰⁶ (emphasis added)
- The Larousse *Dictionnaire universel du XIX^e siècle* is not as long, but just as clear in its definition of *thalweg*: 'Geogr. Ligne que décrit le fond d'une vallée et suivant laquelle se dirigent les eaux courantes.'¹⁰⁷

63. The point is made explicitly by many of the publicists cited by Botswana:

- C. Calvo: 'Le *Thalweg* n'est pas, à proprement dire, rigoureusement, le milieu exact, absolu d'un cours d'eau; mais plutôt le milieu du courant du plus gros volume d'eau; la position du filet d'eau qui se meut avec le plus de rapidité . . .'¹⁰⁸ (emphasis added)
- G.F. de Martens: 'c'est le courant du fleuve qu'on a communément en vue, en convenant de prendre le milieu pour limite.'¹⁰⁹ (emphasis added)

- A. Rivier: 'le thalweg d'un cours d'eau: la position du filet d'eau qui se meut avec la plus grande vitesse.¹¹⁰ And again, 'D'après cet usage, la limite est au milieu, non du lit, mais du courant ou fil de l'eau, qu'on appelle aujourd'hui le *thalweg* . . .¹¹¹ (emphasis added)
- F. Despagnet: 'chenal formé par le courant de l'eau . . .¹¹² (emphasis added)
- J.L. Klüber speaks of: 'le chemin (variable) que prennent les bateliers quand ils descendent le fleuve, ou plutôt le milieu de ce chemin,¹¹³ and Bluntschli refers to the *thalweg* in the same sense.¹¹⁴ As will be seen in para. 70, infra, these references to the *thalweg* in relation to downstream navigation are closely connected to the idea of the current as the central element of the *thalweg* concept.

64. Edouard Engelhardt, the chief sponsor of Article 3 of the Heidelberg Resolution, speaks of the *thalweg* formula, 'suivant laquelle la limite respective est placée au milieu du chenal ou du grand courant qui dénote d'ordinaire l'endroit le plus profond.'¹¹⁵ (emphasis added) In a note he adds, 'Le thalweg est la partie la plus basse du lit sur laquelle le courant se meut avec la plus grande vitesse.¹¹⁶ (emphasis added)

65. Other scholars of the period not cited by Botswana are in agreement:¹¹⁷

- J. Westlake: 'the thalweg, a German word meaning literally the "downway," is the course taken by boats going down stream, which again is that of the strongest current . . .¹¹⁸ (emphasis added)
- P. Fiore: '[L]a ligne médiane du fleuve [est la] . . . ligne de *thalweg* . . . Il ne faut pas oublier, toutefois, que sous le nom de ligne médiane du fleuve on n'entend pas celle qui se trouve à égale distance des deux rives, mais celle idéalement tracée au milieu de la partie du lit où les eaux sont les plus profondes et les plus rapides.'¹¹⁹ (emphasis added)
- L.F. von Neumann: 'the line that is taken by ships going downstream, more precisely the center of the downward current.¹²⁰ (emphasis added)
- P. Orban: 'la partie la plus basse du lit sur laquelle le courant se meut avec la plus grande vitesse.¹²¹ (emphasis added)
- H. Bonfils: 'Un fleuve coule-t-il entre deux Etats, c'est le *thalweg*, le milieu du courant principal qui sert de limite.'¹²² (emphasis added)
- A. Chrétien: 'On n'entend pas par là [la ligne dit le thalweg] la ligne se trouvant à égale distance des deux rives, mais "celle idéalement tracée au milieu de la partie" du lit où les eaux sont les plus profondes et les plus "rapides", en d'autres termes, au milieu du chenal navigable.'¹²³ (emphasis added)

66. A compelling example of the state of British thinking at the time is found in Resident Commissioner Panzera's instructions to Captain Eason for his expedition to find the main channel of the Chobe. '[T]he question under consideration [the location of the main channel] could only be solved,' Panzera said, 'by following up the deepest channel in which there is the strongest current?¹²⁴ (emphasis in original) Captain Eason, it will be recalled, reported that

'[t]he South channel is merely a back water, what current there is goes round the North.'¹²⁵
As Professor Alexander has shown, in July, the time of the year when Captain Eason made his observation, there is no significant flow in either channel. (NM, Alexander Report, para. 10.16) Eason's comment is uncertain on this very point. He refers to 'what current there is.' In the light of his instructions, if he had had a full appreciation of the hydrology and geomorphology of the river, he might have been less willing to rely on his already hesitant observation.

b. Origins and evolution of the *thalweg* concept and its relation to navigation

67. From time immemorial, when people travelled on rivers - whether by dugout or birchbark canoe, sail, paddle wheelers or modern steamships - they followed the current when going downstream. The reason is simple efficiency. Whatever the mode of transport, it saved time and energy to let the current do part of the work. The original idea of the *thalweg* as a boundary marker arose because division at the mathematical middle of the river did not assure both riparian states access to the channel - the downstream current.¹²⁶ These origins of the *thalweg* concept are recognised by the principal turn-of-the-century commentators. Westlake states that the *thalweg* is 'a German word meaning literally the "downway," that is the course taken by boats going down stream, which again is that of the strongest current, the slack current being left for the convenience of ascending boats.'¹²⁷ (emphasis added) Charles Cheney Hyde follows Westlake closely:

The *thalweg*, as the derivation of the term indicates, is the downway, or the course followed by vessels of largest tonnage in descending the river. That course frequently, if not commonly, corresponds with the deepest channel. It may, however, for special reasons take a different path. Wheresoever that may be, such a course necessarily indicates the principal artery of commerce, and for that reason is decisive of the *thalweg*.¹²⁸

68. Englehardt makes this connection explicitly and very practically. After noting that '[l]e thalweg est la partie la plus basse du lit sur laquelle le courant se meut avec la plus grande vitesse,' he explains further:

... en pratique on ne détermine point la direction du chenal avec une précision mathématique ... L'on se contente d'ordinaire d'observer *la course* des bateaux de plus fort tonnage, et on l'indique au moyen de signaux fixes ou de bouées.¹²⁹ (emphasis in original)

69. In the present case, although no large freighters ply the Chobe, all the tourist boats travel primarily in the southern channel, as shown in para. 45, supra. In Hyde's words, 'such a course necessarily indicates the principal artery of commerce, and for that reason is decisive of the *thalweg*.'

70. Numerous authorities in the pre-World War I period repeated the portions of these definitions emphasising the link between downstream navigation and the current of the river:

J.L. Klüber: 'le thalweg c'est-à-dire le chemin (variable) que prennent les bateliers quand ils descendent le fleuve, ou plutôt le milieu de ce chemin.'¹³⁰

H. Bonfils: 'Quelques auteurs fixent la limite de la propriété respective des Etats riverains au *thalweg*, le milieu du courant, du chenal suivi par les bateaux descendant le fleuve.'¹³¹

C.G. de Koch and F. Sch_II: '[L]e *thalweg* [est] . . . le milieu du co[u]rant que suivent les bâtimen[t]s en descendant le Rhin . . .'¹³²

G. Kaeckenbeeck: 'An authoritative definition [of *thalweg*] was given in the "Convention de Strasbourg," 1827. *Thalweg* is the proper course taken by boats going down stream at low water; . . .'¹³³

In the light of the showing that the *thalweg* concept was based on the use of the current by downstream shipping, these authorities should be taken to incorporate the element of the current in the channel into the concept of the *thalweg*.¹³⁴

71. By the same token, the frequent statements that the *thalweg* is the 'navigable channel'¹³⁵ cannot be read in isolation from the history and evolution of the *thalweg* doctrine. They should be seen as based on the assumption that this is the channel in which the downstream current flows. Similarly, when some authorities state that where there are two navigable channels, the deepest is to be considered the *thalweg*,¹³⁶ they also must be assuming a choice between two channels in which there is a downstream current. If, as in the case of the Chobe River around Kasikili Island, that assumption does not hold and one of the two is essentially stagnant, it would contradict the basic purpose of the *thalweg* concept - access to the downstream current - to identify the stagnant channel as the *thalweg*.

72. Finally, a few writers take a more mechanistic approach and identify the *thalweg* as the line of the deepest soundings in the channel. The most insistent of these was Ernest Nys, who criticised the concept of the *thalweg* as '. . . une expression vague et, partant, mauvaise.'¹³⁷ The thrust of his criticism was that the downstream current was both too broad and too variant over time to serve the purpose of accurately demarcating a boundary. Nys's solution was to substitute '*axe du thalweg*, qui désignent la ligne déterminée par la suite non interrompue des sondes les plus profondes.'¹³⁸ (emphasis in original) There is no evidence that the problems Nys was addressing caused any difficulties in practice or disturbed anyone but academics. At the same time, it is clear that Nys was using 'the line of the deepest soundings' as a surrogate for the current and not as a contradictory principle.

73. If the *thalweg* doctrine is to have any bearing on this case, which Namibia denies, there is one final consideration that should be determinative by itself. It is universally agreed that the purpose of the doctrine is to ensure both riparian states equal access to the navigational facilities and resources of the boundary river.¹³⁹ The emphasis is on practical considerations and commercial realities, not mechanical measurements. Halleck, for example, says:

As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very unequal parts. But the deeper channel may be less suited, or totally unfit, for the purposes of navigation, in which case, the dividing line would be in the middle of the one which is best suited and ordinarily used for that object.¹⁴⁰

And as noted above, Hyde insisted that:

That course, [followed by vessels of largest tonnage in descending the river] frequently, if not commonly, corresponds with the deepest channel. It may, however, for special reasons take a different path. Wheresoever that may be, such a course necessarily indicates the principal artery of commerce, and for that reason is decisive of the *thalweg*.¹⁴¹

Justice Benjamin Cardozo in *New Jersey v. Delaware*,¹⁴² a case much cited in international law, captured the essence of the position. 'The underlying rationale of the doctrine of the *Thalweg*,' he said, 'is one of equality and justice. . . . Unless prescription or convention has entrenched another rule, we are to utilize the formula that will make equality prevail.'¹⁴³

74. Today, commercial traffic - tourist boats - from the Namibian side are being denied access to the navigational resources of the southern channel by Botswana's military forces. It would be a perverse and arbitrary application of the *thalweg* concept - the object and purpose of which is to secure equal navigation rights to both riparians - to use it to perpetuate that situation because the northern channel is mathematically deeper on the average than the southern channel. The 'rationale of equality and justice' will not prevail unless both parties have access to the southern channel where the actual commercial traffic takes place. 'Wheresoever that may be,' as Hyde says, 'such a course necessarily indicates the principal artery of commerce, and for that reason is decisive of the *thalweg*.'

75. As Professor Alexander has shown, the overwhelming bulk of the water of the Chobe River flows through the southern channel, though this flow is confined to the January-June period. No current flows all the way through the northern channel at any period of the year. (Supp. Rep., sec. 5)¹⁴⁴ In the flood season, the waters of the Zambezi flow across the Island and into the southern channel where they are conveyed downstream. During the dry season, there is no flow in either channel. None of the authorities discussed above have addressed the problem of a choice between two channels, one of greater average depth through which substantially none of the flow of the stream travels and a shallower one carrying substantially all of the stream flow. They assumed as a matter of course that the subject of analysis was a 'channel' in which water was flowing.¹⁴⁵ Engelhardt's formula, 'au milieu du chenal ou du grand courant qui dénote d'ordinaire l'endroit le plus profond,' (emphasis added) suggests that in a case of doubt the criterion of the current would prevail over the factor of depth.¹⁴⁶

76. It is apparent from a study of the history and the authorities that the idea of the 'flow' or 'current' of the river is an essential component of the concept of *thalweg* in the legal sense, just as it is of the scientific definitions of the main channel. Equally, the equitable principles underlying the *thalweg* doctrine require that both riparian states have access to the practical navigation resources of the river. There is no basis for the conclusion that general principles of international law at the turn of the century would have regarded a body of water in which there was almost no current and almost no commercial traffic as the *thalweg* of a river, no matter how deep it was.

D. Conclusions as to the Identification of the Main Channel within the Meaning of the 1890 Treaty

77. Namibia continues to maintain that the identification of the main channel within the meaning of the 1890 Treaty is a question of scientific fact to be resolved on the basis of scientific evidence and criteria. The main distinguishing factor, as the experts of both parties agree, is the volume of the flow of the river that passes through the channel. Since substantially all of the flow of the Chobe River passes through the southern channel, it follows that the southern channel is the main channel.

78. Although Botswana accepts the central importance of scientific analysis, it adduces no evidence relating to the very scientific factors that its own expert says are decisive: hydrology, geology and hydrogeomorphology. Rather, it rests its argument on two other entirely different bases: first, the comparative navigability of the two channels; and second, a supposed contemporaneous rule of general international law that for navigable rivers the deepest channel or *thalweg* marks the boundary between riparian states.

79. The discussion in this Chapter has shown, and indeed Botswana admits, that navigability must be judged 'in relation to the needs of the regional economy.' In the case of the Chobe River in the vicinity of Kasikili Island, the regional economy is based on tourism. Substantially all of the tourist traffic on the river uses the southern channel; only a minor and secondary portion goes around the north. Nor is there any other significant commercial traffic through the northern channel. Thus, on the basis of Botswana's own criterion of navigability in relation to the needs of the regional economy, the southern channel must be chosen as the main channel.

80. As to the asserted rule of international law, it is, in the first place, inappropriate to apply the rules on navigable rivers to a boundary river that is admittedly not navigable for nine-tenths of its length. But in any case, neither the scholarly writings nor the treaty practice at or around the time of the Treaty was consistent or definite enough to give rise to a rule of general international law that the *thalweg* is the boundary. Even if there were such a rule, the concept of the *thalweg* includes the flow or current of the river, not only (and not even necessarily) the depth. The northern channel has no significant current. Almost none of the water of the Chobe River flows longitudinally along the course of and through the northern channel to the Zambezi River. Thus, the *thalweg* of the river within the meaning of the asserted rule cannot lie within the northern channel.

81. All three criteria proffered by Botswana - science, navigation and the rules of international law - lead to the same answer to the question before the Court: the southern channel is the main channel of the Chobe River around Kasikili Island.

Chapter III

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

82. This Chapter responds principally to Chapters V and VI of Botswana's Memorial, entitled respectively 'The Interpretation of the Anglo-German Agreement of 1890' and 'The Pretoria Agreement of 1984 and the Joint Survey of 1985.'

83. Namibia demonstrated in its Memorial that the Masubia of Caprivi had occupied and cultivated Kasikili Island from before the conclusion of the 1890 Treaty until well into the second half of the present century and that Namibia's predecessors in title had continuously exercised jurisdiction over the area with the full knowledge of Botswana and its predecessors and without any official objection or protest from them until 1984. In Namibia's view, this record not only confirms the interpretation of the Treaty as locating the boundary in the southern channel of the Chobe River at Kasikili Island, but also constitutes an independent title to sovereignty over the Island by operation of the doctrines of acquiescence, recognition and prescription.¹⁴⁷

84. Botswana's Memorial does not systematically address these matters. It does contain a lengthy history of the wanderings of the peoples of the area in pre-colonial times and a lengthy description of Botswana's role in the struggle against apartheid and for the independence of Namibia.¹⁴⁸ (The account does not mention, however, that Botswana took advantage of South Africa's withdrawal after Namibia's independence to occupy the Island unilaterally by armed force in 1991.) None of this historical material contradicts in any substantial way the account given in Part Two of Namibia's Memorial concerning the occupation and use of the Island and exercise of jurisdiction over it by Namibia, nor does it have any other bearing on the issues before the Court.

85. A few points that may seem to have relevance may readily be disposed of:

- Botswana implies that the British Order-in-Council of 30 June 1890 establishing the boundaries of the Bechuanaland Protectorate, as supplemented by Orders-in-Council of 9 May 1891 and 20 October 1898, somehow includes Kasikili Island within those boundaries.¹⁴⁹ The exact language of the Order, which might easily have been quoted by Botswana to avoid any misinterpretation, refutes this implication:

The limits of this Order are: the parts of South Africa bounded by British Bechuanaland, the German Protectorate, the Rivers Chobe and Zambezi . . .¹⁵⁰

There is no indication where the boundary lies within the Chobe River.

- Botswana states that the Caprivi Strip was de facto a part of the Bechuanaland Protectorate during the period from 1921 to 1929 when Great Britain administered the area as the delegate of South Africa, the mandatory power. The statement is incorrect or at least seriously incomplete. The Namibian Memorial, paras. 233-237, describes in detail how the British administration took care to keep the two territories legally separate. The differences were more than formal. The tax systems in the two territories were different; the poll tax imposed on the inhabitants of Bechuanaland was not imposed on Caprivians. The Protectorate kept separate accounts and was reimbursed for its expenditures in the Caprivi. Furthermore, since the British authorities ruled in the Caprivi by delegation from the mandatory power, they were subject to the supervisory jurisdiction of the Council of the League of Nations. The relationship imposed significant constraints on British freedom of action in the territory, as reflected in the annual reports to the Council.
- Botswana states that in 1924 the authorities at Kasane were 'reported to have given verbal permission to Kasika residents to plough on Kasikili/Sedudu Island.'¹⁵¹ No

supporting authority or references are given. Many of the witnesses at the JTTE hearings held in May 1994 were asked specifically whether the Masubia had sought or been required to seek permission to farm on the Island. They uniformly and vigorously denied that they had.¹⁵²

- Botswana incorrectly states, 'The island of Kasikili/Sedudu forms part of the Chobe National Park established in 1967 and, before that, was part of the Chobe Game Reserve created in 1960.'¹⁵³ The notice proclaiming the Chobe National Park copied in relevant respects the notice proclaiming the Game Reserve,¹⁵⁴ which states that the reserve boundary follows the 'northern boundary of the Bechuanaland Protectorate.'¹⁵⁵ No map was attached to either notice or referred to in them. In 1960, when the Game Reserve notice was issued, the maps in current use, and indeed the only maps available of the whole reserve, were the Bechuanaland Protectorate 1:500,000 Map of 1933 and the derived version at 1:1,250,000, 1935. On these maps the boundary is shown in the southern channel. Moreover, the copy of the 1935 map, specially prepared in 1959 to show the borders of the Crown Reserve lands, clearly excludes Kasikili Island from the Reserve.¹⁵⁶ Since it was this Crown Reserve that was converted to the Game Reserve a year later, the boundaries must have been identical.

86. The remainder of this Chapter deals first with materials showing that the exercise of jurisdiction by South Africa over the Island was recognised and indeed affirmed by Botswana. Then it addresses the three instances of asserted deviation from the consistent history of Botswana's acquiescence and recognition of Namibia's title.

A. Exercise of Jurisdiction over Kasikili Island by South Africa in the 1970s

87. Evidence from the 1970s shows unequivocally that South Africa vigorously asserted and defended its jurisdiction over Kasikili Island and Botswana officially recognised it.

88. In 1972, six years after Botswana's independence and five years after the establishment of the Chobe National Park, a Botswana magistrate recognised in a criminal proceeding that Kasikili Island was Namibian territory and that Botswana had no jurisdiction over it. On 28 September, three Caprivians were arrested on Kasikili Island by game wardens from the Chobe National Park and were detained in Kasane for five days before being brought before the magistrate. According to contemporaneous affidavits made by two of the men, the magistrate dismissed the case because they were arrested outside Botswana's jurisdiction. According to one of the affidavits:

We were kept in custody at the Kasane police Station and appeared before the Magistrate of Kasane after five days. After the interrogation and after the defence closed its case the Magistrate found us not guilty and said that the island was part of the Caprivi and that we had been arrested illegally.¹⁵⁷

The other said the magistrate 'acquitted us when giving judgement and said that we had been arrested illegally and criticised the game warden for arresting us on Caprivi territory.'¹⁵⁸

89. Recognition of Namibian jurisdiction and disavowal of Botswana jurisdiction over Kasikili Island by a judicial officer of the newly independent Botswana Government, residing in the neighbourhood and having personal knowledge of the situation, is the strongest kind of evidence of the understanding of the parties as to the location of the boundary under the Treaty and in practice.

90. Even though the magistrate had recognised Namibian jurisdiction, South Africa was not content to let the matter rest there. The local authorities reported the matter to Pretoria, and the Department of Foreign Affairs immediately initiated vigorous diplomatic representations to Botswana. In its protest note to the President of Botswana, South Africa said:

As Kasikili Island lies within Eastern Caprivi territory, and as both the South African authorities and the Executive Council of Eastern Caprivi view the matter with concern, the Department would be pleased to receive the comments of the Office of the President on the allegations made in the affidavits, with particular reference to the entry of armed Botswana officials to Eastern Caprivi territory and also to the capacity in which the officials acted when making the arrests.¹⁵⁹

The note also called Botswana's attention to the disposition of the case by the magistrate. When Botswana did not reply to this communication, South Africa sent a follow-up inquiry,¹⁶⁰ again without a response, as far as Namibia has been able to discover in the South African archives. If there was any situation that called for a prompt and energetic protest from a state claiming sovereignty over the Island, this was it. Botswana's failure to respond to this pointed and repeated assertion of jurisdiction by South Africa must be taken as recognition of and acquiescence in it, especially in the light of the prior determination by Botswana's own judicial authorities.

91. The report of this event to the Secretary for Bantu Administration and Development in Pretoria¹⁶¹ also contains the information that 'the Caprivians have continued to cultivate crops and hunt on the island since 1953 [shortly after the Trollope-Dickinson arrangement] and the Botswanas have done nothing prejudicial to the Caprivian rights.'¹⁶²

B. Alleged Interruptions in the Unbroken Record of Recognition and Acquiescence by Botswana

92. In its Memorial, Botswana claims that three incidents evidence non-recognition of Namibian sovereignty by Botswana and its predecessors: the Eason Report in 1912, the Trollope-Dickinson arrangement of 1951 and the follow-on of the shooting incident in 1984. Namibia analysed these three episodes in NM, paras. 262-286, demonstrating that they in no way contradicted or interrupted the continuous record of Botswana recognition of and acquiescence in Namibian jurisdiction until 1984.

93. In this connection, it must be emphasised that the report of Captain Eason, the Trollope-Redman report and the 1985 joint survey are merely conclusions drawn from such facts as may have been available. Whatever other significance these conclusions may have, they cannot override the facts themselves. If subsequent observation, properly recorded and analysed, contradicts the factual basis for conclusions drawn by earlier observers from the

facts as they then appeared, it is the subsequent factual observations that must be given controlling weight.

94. Namibia submits that an analysis of Botswana's arguments with respect to these episodes leaves its position unchanged: the subsequent practice of the parties confirms that the proper interpretation of the Treaty places the boundary in the southern channel, and that until 1984 this was recognised and accepted without protest by Botswana and its predecessors in title.

1. The Eason Report

95. There is nothing in Botswana's discussion of the Eason Report to contradict Namibia's basic position. Eason went on an expedition in July 1912 to explore 'the various channels of the Chobe, or Linyante, River, with a view to determining which can be legitimately claimed as the "main channel."¹⁶³ His mission was not confined to or focused on Kasikili Island, but comprehended the whole length of the river boundary.

96. In his report Eason stated with respect to 'Kissikiri island':

Here I consider that undoubtedly the North should be claimed as the main channel. At the western end of the island the North channel at this period of the year is over one hundred feet wide & 8 feet deep, the South channel about forty feet wide & four feet deep. The South channel is merely a back water, what current there is goes round the North.¹⁶⁴

97. This is a recommendation in an internal report that a claim should be made - no more. But the claim was not made. As Namibia stated in its Memorial, the expression 'should be claimed' implies that it was not then being claimed. The report elicited no response from Eason's superiors. Britain not only made no claim, it took no action of any kind, even of an internal nature, based on the report. Captain Eason's conclusion certainly was not made known to Germany. The situation thus remained in *status quo*. Britain was not claiming that the northern channel was the main channel, even though one of its junior officials said it ought to.

98. One or two additional points of detail lend support to Namibia's position. Eason's instructions from Lt. Col. F.W. Panzera, the Bechuanaland Resident Commissioner at Mafeking, laid down the criteria to be used: 'The width of channel[s] would have little to do with it, & the question under consideration could only be solved by following up the deepest channel in which there is the strongest current?¹⁶⁵ (emphasis in original) As noted above, the instruction coincides with Professor Alexander's criterion that the channel that conveys the largest proportion of the annual flow in the river is the main channel. (Supp. Rep., para. 2.1)

99. Eason was travelling in July, the dry season, and at the end of an 'exceptional drought during the last twelve months.'¹⁶⁶ We now know that in the dry season there is no perceptible flow in either channel at Kasikili Island. (NM, Alexander Report, para. 1.6) Eason does not quite say that. He says 'what current there is goes round the north.' But given the difficulty in observing the current noted in his report and given what is now known scientifically about the flow of the Chobe River at this point, his conclusion must be disregarded. If Eason had known the facts revealed by the Alexander Report that substantially all of the annual flow of the Chobe goes east to the Zambezi through the southern channel, he would surely have regarded

it as the main channel.¹⁶⁷ Indeed, under his instructions from Panzera he would have been obliged to do so.

100. Eason was unable to complete his mission

owing to the lowness of the river. . . . The result was that the main channel of the Linyanti, where it runs through the vast reed swamps which form the junction of the . . . Sunta with the Linyanti was merely a succession of comparatively deep pools with mud & sand banks in between. - There are no river banks to walk on so that when I was near the old town of Linyanti I was compelled to abandon the work for this season.¹⁶⁸

101. Botswana, therefore, cannot rely on the Eason Report either as a claim to Kasikili Island by Great Britain or as a protest or objection to German occupation and control. It cannot be cited as evidence of official British opinion at the time since as far as Namibia has been able to determine it was shared by no one, not even Panzera who was seeking to determine the main channel. Its force as an expert opinion is vitiated by the erroneous factual observation on which it was based.

2. The Trollope-Dickinson arrangement

102. There is no need to repeat the extensive discussion of this incident in Namibia's Memorial. Again, the Botswana Memorial provides little to contradict Namibia's position. A 'joint report' by L.F.W. Trollope, the South African Magistrate for the Eastern Caprivi, and Noel V. Redman, the District Commissioner of the Bechuanaland Protectorate, expressed the opinion that "'the main Channel" [of the Chobe River] lies in the waterway which would include the island in question in the Bechuanaland Protectorate.'¹⁶⁹ Equally, they 'particularly record[ed] that we have neither arrived at, nor expressed any joint opinion on the effect of those facts on the ownership of the Island.'¹⁷⁰ The report was forwarded to high political officials of both governments for action.

103. An inconclusive exchange of correspondence at the official level ensued, after which the issue was remitted to the local administrative officials for adjustment. The result was the arrangement of 3 September 1951, under which the two officials 'agree[d] to differ on the legal aspect regarding Kasikili Island' and that 'the position revert to what it was de facto before the whole question was made an issue in 1947 - i.e. that Kasikili Island continue to be used by Caprivi tribesmen and that the Northern Waterway continue to be used as a "free for all" thoroughfare.'¹⁷¹

104. For his part, Trollope maintained the position that the Island was part of the Caprivi Strip, by virtue of use and occupation if nothing else.¹⁷² Within the British Government and among the officials of the Bechuanaland Protectorate, much of the discussion proceeded on the assumption that officially accepting South Africa's position would involve a 'slight adjustment' of the boundary, implying that the Island was really in the Bechuanaland Protectorate. That view, however, was not uniformly held. The Legal Advisers of the Commonwealth Relations Office stated, 'If the Island has never been treated as part of the Bechuanaland Protectorate it would seem best to say [in an appropriate Order in Council] that the Island shall be deemed not to be included, and never to have been included, in the

Protectorate.¹⁷³ Commenting on this suggestion, Mr. G.H. Baxter of the Commonwealth Relations Office stated that the Order might be drafted

in the form of a declaration of an existing state of affairs, "for the removal of doubts" if it can truthfully be said that there are any; with appropriate recitals explaining the position and, in particular, the fact that the Island has never been administered as part of the Protectorate - assuming that to be the case. In other words, the Order would show what for practical purposes is the true position - that it would not amount to cession at all but to confirmation for legal purposes of existing facts.¹⁷⁴

105. Botswana seems to attach considerable significance to what it calls 'The Opinion of the Surveyor-General of Bechuanaland, 18 October 1965.'¹⁷⁵ On examination, however, it appears that the document referred to is not an 'opinion' but an internal memorandum to the Permanent Secretary of the Ministry of Home Affairs. The memorandum consists primarily of a summary of the internal and external correspondence concerning the Trollope-Dickinson arrangement, some of which is quoted in BM, para. 160. The portion quoted by Botswana fails to include the conclusion of the memorandum:

13. It appears, therefore, that if we now wish to use the island we have no alternative but to re-open the matter with a view to either

(a) coming to a new administrative arrangement which would allow us the use of the island without necessarily settling the question of ownership, or

(b) once and for all settling the matter of ownership, as one feels, admittedly after the event, ought perhaps to have been done in 1947.¹⁷⁶

Thus, the memorandum adds nothing to Trollope-Dickinson documentation. Indeed, it concedes that, as of the date of the memorandum, Britain was not the sovereign. The document was never drawn to the attention of the South African Government nor was it made public in any other way. It therefore has no status as a claim of right by Botswana.

106. Whatever internal debates may have taken place within the British colonial bureaucracy, the conclusion in NM, para. 278, remains undisturbed:

[The British authorities] never considered a direct protest or objection to the South African government as regards the existing situation and never thought of putting it on notice of a formal claim in any other way. Indeed, . . . the communications from the British side seem to have been drafted with some care to avoid making such a claim.

3. The 1984-1986 discussions between Botswana and South Africa

107. On 24 October 1984, Botswana troops opened fire on a South African patrol in the channel south of Kasikili Island. The incident led to a serious and extended discussion between the two countries. Botswana asserts that these talks eventuated in an 'intergovernmental agreement' that 'constitutes "an agreement between the parties regarding . . . the application" of the provisions of the Anglo-German Agreement' within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties.¹⁷⁷

108. The short answer to this contention is that there was no such agreement, and if there had been it would have been void *ab initio* and without any consequence under international law.

a. Neither South Africa nor Botswana had legal power to enter into an agreement concerning the boundary between Namibia and Botswana

i. South Africa

109. In 1984, South Africa had no legal authority to make boundary agreements in respect of Namibia, especially agreements adverse to Namibia. The United Nations General Assembly, on 27 October 1966, terminated the mandate under which South Africa had ruled the territory since 1921 on the ground that South Africa had failed and refused to carry out its obligations thereunder.¹⁷⁸ Thereafter, the General Assembly assumed direct responsibility for the territory of Namibia and established the United Nations Council for Namibia to administer the territory until independence.

110. The action of the General Assembly was confirmed by the United Nations Security Council in a series of resolutions culminating in Security Council Resolution 276 (1970), which declared 'the continued presence of the South African authorities in Namibia . . . illegal' and called upon all states 'to refrain from any dealings with the Government of South Africa' that would imply recognition of South Africa's presence in Namibia.¹⁷⁹

111. The Court in its 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* confirmed the actions of the political organs of the United Nations and the illegality of South Africa's continued presence in Namibia. The Court analysed the resolutions and decisions taken by the General Assembly and the Security Council regarding Namibia and, in particular, the legal effect of paras. 2 and 5 of Security Council Resolution 276 (1970). It concluded 'that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory; . . .'¹⁸⁰

112. Both the General Assembly and Security Council resolutions affirm that 'South Africa has no further right to administer the Territory,' and para. 2 of Security Council Resolution 276 expressly provides that 'all acts taken by South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid.' The newly formed UN Council for Namibia was alone empowered to conduct the international relations of Namibia and specifically to 'replace South Africa as the party representing Namibia in all relevant bilateral and multilateral treaties.'¹⁸¹ South Africa therefore had no power to make international agreements with respect to Namibia.

ii. Botswana

113. Botswana was equally without power to conclude any agreements with South Africa respecting Namibia. After affirming that 'all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid,' the Security Council called upon 'all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which

are inconsistent with paragraph 2 of the present resolution.¹⁸² In interpreting this provision, the Court in its 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* said specifically that

member States of the United Nations are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation.¹⁸³ (emphasis added)

114. The Security Council responded promptly to the Court's opinion. Resolution 301 (1971) called upon all states:

(a) To abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia;

(b) To abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation.¹⁸⁴

Under the express provisions of the opinion of the Court and the implementing resolution of the Security Council, Botswana was under an obligation not to conclude any new international agreements with South Africa on matters relating to Namibia. *A fortiori* it is precluded from invoking any purported agreement before the principal judicial organ of the United Nations.¹⁸⁵

115. Botswana makes much of discussions it held in New York in November 1984 with certain officials of the UN Council for Namibia and the South West African People's Organisation (SWAPO).¹⁸⁶ But these officials did not purport to authorise Botswana to enter into negotiations with South Africa, nor were they empowered to do so, still less to authorise Botswana to conclude a treaty with South Africa affecting Namibia's boundaries.

116. So far as we know, the Botswana delegation held three meetings in New York, in each of which it described the shooting incident and outlined its plans for discussions with South Africa. The first, on 27 November 1984, was with Paul Lusaka, President of the UN Council for Namibia. After describing the situation, the head of the Botswana delegation, Attorney General M.D. Mokama, said, 'Before meeting with the South Africans Botswana wished to consult with the U.N. Council for Namibia which is the legal authority in Namibia.'¹⁸⁷ After suitable diplomatic comments Mr. Lusaka said that he would 'consult with members of the Council before giving a reply.'¹⁸⁸ There is no record of any reply being given.

117. Later that day, the Botswana delegation met with Andimba Toivo Ja Toivo, SWAPO Secretary General, and other high ranking SWAPO officials. The parties again exchanged information about the shooting incident and the proposed talks with South Africa. 'Mr. Toivo observed that SWAPO as a political party and a liberation movement did not have jurisdiction

over the border issue.' He also commented that he was new to his post and not well-informed on such matters.¹⁸⁹

118. The next day, the Botswana delegation met with Mr. Mishra, UN Commissioner for Namibia. Mr. Mishra 'confirmed that the Council for Namibia could not object to the proposed talks.'¹⁹⁰ He proposed, however, that the UN Secretary-General should be brought into the picture. Because the Botswana delegation had to leave New York immediately, it was left that Ambassador Legwaila, Botswana's Permanent Representative to the United Nations, would brief the Secretary-General. There is no record of any such conversation having taken place.¹⁹¹

119. None of the three interlocutors with whom Botswana talked purported to authorise anything approaching treaty negotiations or the conclusion of a treaty with South Africa. Indeed, all expressly disclaim their authority to do so. Mr. Lusaka said he would have to consult other members of the UN Council for Namibia. Mr. Toivo opened by denying that SWAPO had jurisdiction over boundary matters. Although Mr. Mishra said that the Council could not object to the proposed talks, it is not clear on what basis he made the statement, and, in any case, he thought the matter should be referred to the Secretary-General, which was not done. If, as Botswana's Memorial states, 'SWAPO thus gave its blessing to Botswana so that she could discuss with South Africa the dispute over the boundary, . . .'¹⁹² the benediction was without legal relevance.

120. Furthermore, there is no indication in the minutes recording Botswana's presentation at the three meetings that it was proposing any kind of binding international agreement with South Africa, which, as noted above and undoubtedly understood by all the participants, would have been inherently illegal. What seemed to be projected were political talks to clear up a serious boundary incident involving the use of force.

121. The evidence as to what occurred at these meetings comes entirely from minutes kept by the Botswana delegation. Namibia has made a diligent but fruitless search of the UN archives for information on these meetings or any other interaction between Botswana and the United Nations concerning the boundary at Kasikili Island. It hardly seems possible that the United Nations would have authorised treaty discussions without some official record of the action being made.

iii. No agreement affecting the boundaries of Namibia could have been concluded without UN General Assembly approval

122. Even if Botswana and South Africa had purported to conclude an agreement with respect to the boundary, their acts would have been legally ineffective. A boundary agreement affecting the territory of Namibia would have required the approval of the UN General Assembly.

123. During the period when the Mandate was in force, South Africa had treaty-making power for the mandated territory, subject to the important exception that treaties affecting boundaries required prior approval by the Council of the League of Nations before coming into force. This was because, as the mandatory power, it did not have sovereignty over the mandated territory. The requirement of prior approval by the Council derived from Article 7

of the Mandate, which provided: 'The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.'¹⁹³ In turn, Article 1 defined the territorial extent of the Mandate as comprising 'the territory which formerly constituted the German Protectorate of South-West Africa.'¹⁹⁴ Thus any agreement affecting the location of the boundary would be a modification of the terms of the Mandate, requiring Council consent.

124. With the demise of the League of Nations in 1945, most mandates were transformed into trusteeships under the supervision of the UN Trusteeship Council. South Africa, however, refused to enter into a trusteeship relationship with respect to Namibia. In these circumstances the Court held that the Mandate continued in effect, with the powers and responsibilities formerly vested in the Council of the League of Nations to be exercised by the General Assembly.¹⁹⁵ With the termination of the Mandate in 1966, therefore, the legal responsibility for administration of Namibia was assumed directly by the United Nations and exercised by the General Assembly.¹⁹⁶ As noted above, from 1967 on administrative authority was vested in the UN Council for Namibia, subject to the supervision of the General Assembly. Thus the safeguard with respect to boundary treaties contained in the Mandate remained in force, and any such agreement affecting the boundary would have required prior approval by the General Assembly, the supervisory UN body.

125. In short, in 1984-1985, neither South Africa nor Botswana had any power to enter into any bilateral international agreement whatever respecting Namibia. Moreover a bilateral agreement affecting the boundary between Namibia and Botswana would have required the approval of the UN General Assembly. Thus, any such agreement concluded between them could not be recognised for any legal purpose by the United Nations or any of its organs (including the Court) or by any member State. It would have been null and void and without any effect either under the provisions of the Vienna Convention or for any other purpose under international law.

b. The exchanges between the two countries did not purport to establish and did not in fact eventuate in a bilateral agreement concerning the location of the boundary at Kasikili Island

126. On 19 December 1984, representatives of Botswana and South Africa met in Pretoria to discuss the problems raised by the shooting incident and in the course of their discussions decided that a joint survey should be conducted by the technical departments of the two governments to determine the location of the main channel of the Chobe River around Kasikili Island. The survey was conducted by officials of the Botswana Department of Surveys and Lands and the South African Directorate of Surveys and Mapping on 2 July 1985 and concluded that '[t]he main channel of the Chobe River now passes Sidudu/Kasikili Island to the west and to the north of it.'¹⁹⁷

127. Botswana implies, however, that the parties went further and agreed that the findings of the survey would be binding as to the location of the boundary between the two countries. Botswana's Memorial does not make this claim in so many words. The closest it comes is its remark that 'the Pretoria Meeting was a binding intergovernmental agreement relating to a legal subject matter and concluded with senior lawyers in attendance. The parties clearly intended to achieve an effective and therefore binding outcome to their deliberations.'¹⁹⁸

Botswana admits that it can point to no document or oral expression embodying the terms of this asserted agreement.¹⁹⁹ Instead it is fabricated from a tissue of 'a whole series of documents and inferences to be drawn from the circumstances.'²⁰⁰ An examination of the documents recording the 19 December discussions and the subsequent conduct of the parties, however, provides no support for Botswana's contention. Botswana's minutes of the meeting show that much of the discussion was devoted to security issues along the border in general, which the parties agreed to handle by 'a workable agreement on the ground, between the two Defence Forces' and 'closer liaison at a low (platoon) level . . .'²⁰¹ This was not the conversation of people who were in the process of concluding a major international boundary agreement. The decision to conduct a survey of the main channel was simply a determination as to the next step to be taken in an ongoing diplomatic effort to resolve the problem of recurring border incidents between the armed forces of the two countries.

i. The legal capacity of the two delegations

128. In the first place, the delegations present did not represent their states 'for the purpose . . . of expressing the consent of the State to be bound by a treaty' within the meaning of Article 7 of the Vienna Convention on the Law of Treaties. Neither delegation exhibited full powers (see Article 7(1)), and neither included officials who under Article 7(2) may have had authority to express consent to be bound.²⁰² The absence of such powers or officials on both sides makes it clear that there was no intention to make a binding treaty or international agreement.

ii. The content of the discussions

129. But in any case, Botswana does not and cannot point to any language in the minutes of the meeting, either in the Botswana or the South African version, that imports any agreement as to the consequences to be attributed to the survey. It is highly unlikely, moreover, that either side was prepared to entrust the location of the boundary in a dangerous and disputed area to the outcome of what all regarded as a 'technical' survey. This was clearly so with respect to South Africa, whose delegation was under peremptory orders from the Chief of the South African Defence Force (SADF) to 'confirm that the border lies south of Sidudu.'²⁰³ Even under normal circumstances, a Ministry of Foreign Affairs cannot simply ignore such a letter from the Chief of its Armed Forces. But the situation in the area at the time was anything but normal. The SADF was waging a vicious war against the Namibian people led by SWAPO in which the Caprivi area and Kasikili Island itself had special strategic importance. In the light of these instructions, the middle level officials at the Ministry of Foreign Affairs representing South Africa at the Pretoria meeting clearly could not agree to any other location of the border without consulting the SADF.

iii. The subsequent conduct of the parties

130. Contrary to Botswana's contention, the subsequent conduct of the parties belies the conclusion that any agreement was reached as to the binding character of the survey.²⁰⁴ Botswana's first official reaction to the joint survey report was a note dated 4 November 1985, enclosing a copy of the report and inquiring 'whether or not the South African sides [sic] wishes to have a meeting called to adopt the report formally. Alternatively the South African

side could simply signify its acceptance of the conclusions of the report by means of a Diplomatic Note.²⁰⁵ Thus, Botswana explicitly recognised that further political action was necessary before the 'technical' work of the survey team could have any effect. South Africa made no reply to this note.

131. It was not until nearly a year later that Botswana changed its position. At a meeting between officials of the two countries on 13 October 1986 to discuss security issues, Botswana's Secretary for External Affairs stated that 'there was no more room for negotiation because a joint Botswana-South African team of experts had confirmed that the Island belonged to Botswana.'²⁰⁶ Botswana confirmed this position in a telex to the South African Ministry of Foreign Affairs nine days later.²⁰⁷

132. South Africa, however, did not agree with Botswana's position in the 13 October meeting. There is a difference of nuance between the minutes taken by the two sides of the meeting, but both agree that the brief discussion of the status of the Island was initiated by the South African representative, the Deputy Minister of External Affairs. According to the Botswana minutes he 'suggested the maintenance of the status quo till political circumstances could permit direct negotiations between Botswana and independent Namibia.'²⁰⁸ When Botswana made its submission as to the effect of the joint survey report, the South African representative '[d]ecided to go back to look at this question once again.'²⁰⁹ In the South African version, Mr. Van Heerden, the South African representative, says that 'this finding [that the Island was part of Botswana], if accepted, was tantamount to changing an international border and that this could not be done without the transitional Government in Windhoek.'²¹⁰

133. When the follow-up telex arrived, South Africa rejected it, stating:

According to International Law, such cases should be discussed between the two countries concerned. It is therefore suggested that the Cabinet of South West Africa/Namibia should be approached by the Botswana Government for a proper resolution of the matter under consideration.²¹¹

134. South Africa has maintained this position at least until the outbreak of the present dispute. In response to Namibia's letter of inquiry in 1992, the South African Minister of Foreign Affairs wrote:

The joint survey you refer to in your letter, a copy of which I attach, did come to certain conclusions, but according to legal opinion in South Africa at that time, did not prove conclusively that Sidudu island belongs to Botswana.

...

The matter has therefore not been resolved as South Africa has never officially recognized Botswana's claim to Sidudu island.²¹²

135. In summary, Botswana first took the position that further action by the foreign offices of the two countries was necessary but later changed its mind and asserted that the joint survey report was self-executing. South Africa, however, refused to accept Botswana's claim and consistently maintained that further action at the political level was necessary to resolve the dispute.

c. The joint survey report is entitled to no weight as an expert opinion

136. Botswana is finally reduced to the claim that the joint survey report constitutes expert opinion as to the main channel of the Chobe River in the vicinity of Kasikili/Sedudu Island.²¹³ Like all expert opinions, however, this is to be examined in light of the factual observations on which it was based. The report contains no analysis or reasoning in support of its bald conclusion that '[t]he main channel of the Chobe River now passes Sidudu/Kasikili Island to the west and to the north of it.'²¹⁴ Since the principal activity of the survey team was to take depth soundings at various cross-sections of the river, it would appear that they regarded the comparative average depth of the channels as the principal applicable criterion. The Alexander Report shows that depth is not the proper scientific basis on which to determine the main channel of the river. (NM, Alexander Report, para. 4.4) Even on the question of depth, the measurements taken do not permit an accurate comparison of the two channels. They show only the depth at particular cross-sections, but there is no effort to determine the shallowest point along the length of either channel, which in both cases occurs close to the western bifurcation and is the dimension that controls navigability. Moreover, the survey was taken in July, the low water period, as also appears from the sketch map attached to the Report. (NM, Alexander Report, Sheet 26, Diagram 8a) At that time, as the Alexander Report shows, the water in both channels is stagnant, and there is no flow through either of them.²¹⁵ The methodology of the joint survey report was faulty and the scientific basis of its conclusion was incorrect. It is therefore entitled to no weight as expert opinion.

C. Conclusion as to the Subsequent Conduct of the Parties

137. The foregoing review of the materials relating to the subsequent conduct of the parties in Botswana's Memorial serves only to confirm the position that Namibia and its predecessors in title were in possession of Kasikili Island from 1890 to 1991. During all that time it exercised jurisdiction over Kasikili Island. All this occurred with the knowledge and acceptance of the Botswana authorities and without protest from them until 1984. This record on the one hand confirms the interpretation of the Treaty placing the boundary in the southern channel and, on the other, establishes Namibia's right to the Island by operation of the doctrines of acquiescence, recognition and prescription.

Chapter IV

MAPS AS EVIDENCE OF SUBSEQUENT CONDUCT OF THE PARTIES

138. This Chapter replies to Chapter VIII of the Botswana Memorial, entitled 'The Relevance of Map Evidence.'

A. General Considerations as to the Map Evidence in this Case

139. In its Memorial, Namibia presented a comprehensive view of the cartographic history of the region in dispute, discussing every map it had been able to find that had been produced by the parties to the dispute or their predecessors in interest and that was large enough in scale and adequate in detail to show the boundary at Kasikili Island.²¹⁶ What emerged from this review was a remarkable consonance as to the location of the boundary in the southern channel of the Chobe River at Kasikili Island. Every map, with but two exceptions (both of which can be shown to be the result of cartographers' errors) and maps produced by Botswana itself after 1974, agrees in this placement of the border. The Botswana Memorial seeks to obfuscate this substantial unanimity by a mélange of inaccuracies, irrelevancies and innuendoes. It deprecates the general significance of map evidence in boundary cases. It erroneously implies that the maps available to assist the Court are mostly of too small scale to show the area around Kasikili Island and the location of the boundary in adequate detail. And it seems to suggest, again erroneously, that the principal maps are not 'official' and thus not entitled to significant consideration by the Court. This Chapter first addresses these three general points and then analyses in detail Botswana's comments on specific maps of interest in the present case.

1. The relevance and weight of cartographic evidence

140. At the very outset of its discussion of the subject, the Botswana Memorial seeks to disparage the general significance of map evidence in boundary cases.²¹⁷ The fact remains, however, that Professor Ian Brownlie, in his justly renowned book on African boundaries, states at the beginning that maps are important sources of evidence and provide

material for the purpose of determining the existence of an alignment and its status in terms of acceptance and recognition by the states concerned . . .²¹⁸

A few pages later he continues:

The evidence of recognition and acquiescence by conduct may take the form of . . . the publication of official maps, [and] reliance for official purposes on maps showing the alignment . . .²¹⁹

In his most recent pronouncement on the issue he reiterates that 'maps have been accepted as admissions against interest and evidence of acquiescence when they were made public and given official approval. . . .'²²⁰ And in general,

tribunals concerned with disputes as to sovereignty over territory have commonly accepted the evidence of maps with an official provenance as evidence of the views of Governments and of political figures and officials with special knowledge as to political matters of fact.²²¹

In the view of the authorities, map evidence is subject to no special vulnerability. Like all other evidence, a map is to be weighed by the tribunal for its probative value, based on its provenance and history, the care with which it was produced and the quality of the information it contains.²²² In this regard, Mr. W. Dennis Rushworth, former Director of the Mapping and Charting Establishment of the British Ministry of Defence, who prepared the comprehensive report on the cartographic history of the Caprivi Strip included in the

Namibian Memorial as Annex 102, has provided a similar technical analysis of the maps discussed in Chapter VIII of the Botswana Memorial, which is appended as Annex 1 to this Counter-Memorial. Paragraph 22 of Annex 1 contains a list of misstatements of fact concerning maps to be found in the Botswana Memorial.

2. The scale of the relevant maps

141. The Botswana Memorial, para. 257, states that the scale of the maps relating to the Caprivi Strip 'is usually so small as to present no indication of the riverine topography.'²²³ On the contrary, of the 16 maps included in Namibia's Atlas, 12 are of large enough scale to show Kasikili Island, and all ten of those produced after the Treaty clearly show the boundary in the southern channel. Indeed, it is only the Botswana Memorial that seeks to rely on maps of a scale so small as not to show the Island or the boundary around it.²²⁴ As such, those maps are, by Botswana's own admission, irrelevant to the issue before the Court.

142. The Botswana Memorial seems to make a point that on some of these maps the boundary is marked on the north bank of the river. Thus, BM, paras. 270-273, discusses four 'Sketch Maps of the Bechuanaland Protectorate' published in a series of annual reports on the Protectorate issued by the British Colonial Office from 1912 to 1915. The scale of these maps is not given, but it is actually 1:4,600,000, far too small to show Kasikili Island. Botswana notes that the first three of these Sketch Maps show the boundary to the south of the Chobe, but the fourth 'indicates a boundary, very clearly, *to the north of the Chobe*.'²²⁵ (emphasis in original) The Botswana Memorial seems to imply by the emphasised phrase that the change has some special significance. The fact is, however, that the series of annual Bechuanaland Protectorate reports continued until 1965 just before the end of British colonial rule.²²⁶ Nineteen of these reports included maps at the same or similar scales. Fifteen of these show the boundary on the south side of the Chobe and four on the north side. Namibia draws no inference from this statistic as to the position of the boundary at Kasikili Island. But it is equally clear that the change from the south side of the river in the 1913-1914 Report to the north side in the 1914-1915 Report has no evidentiary significance on the issue, no matter how heavily it may be emphasised in the Botswana text. The variation in treatment results because on small-scale monochrome maps with riverine boundaries, like those in the Colonial Report series, the cartographic practice is to put the boundary symbol alongside the symbol for the river to indicate that the boundary follows the centre of the river. The side of the river on which the boundary symbol appears, however, is entirely at the draughtsman's convenience, usually in regard to clearer presentation of features of interest near the frontier.²²⁷ For example, the legend of GSGS 2681 of 1913 states 'where [boundaries] follow a road or the main channel of a river, they have been shown to one side, to prevent confusion.'²²⁸

3. Official as opposed to 'private' or non-official maps

143. The Botswana Memorial, paras. 261-262, calls attention to the distinction made between official and unofficial maps, citing authorities to the effect that official maps are generally more reliable than those produced and published under other auspices. Whatever the accuracy of this proposition as a matter of law, it has no applicability to the present case, since, without exception, the maps relied on by Namibia are official maps.²²⁹ The Seiner map of 1909 was

published by a private publisher in Berlin, but it was sponsored by the German Government and used by it during the entire time it exercised authority in the Caprivi. Streitwolf's map, which was printed on the official presses of the *Landesvermessung* (Cadastral Survey), and von Frankenberg's map were both produced by German Imperial Residents in the Caprivi on the ground in the course of their official duties and for the purpose of assisting them in the performance of those duties. The British maps discussed in both Memorials are the products of government departments, in most cases of the official map-making offices, as are the maps from South Africa and Botswana. The UN maps are self-evidently official.

144. Where the scale of these maps is large enough to show the details of the boundary in the area of concern, the mode of indicating the international boundary is, with the exception of the *Kriegskarte*, relied on by Botswana and discussed more fully below, anything but 'impressionistic'.²³⁰ The depiction of international boundaries on official maps published by well-endowed governments is a matter of painstaking care, performed according to well-established standard operating procedures and subject to careful vetting by political officials in cases of doubt. That does not mean, of course, that they are necessarily free from error, and indeed Namibia has shown that some of the official maps contain egregious mistakes. It does mean, however, that Botswana's characterisation of the boundary placement as 'impressionistic' is wholly inapposite.

B. Analysis of the Maps Relied on by Botswana

145. The Botswana Memorial, like that of Namibia, groups the maps to be discussed in accordance with the country of origin, and that organisation is followed here.

German maps

a. 'Kriegskarte von Deutsch-Sudwestafrika [sic] 1904' (BM, paras. 266-267)

146. After careful study in the preparation of its Memorial, Namibia came to the conclusion that this map was simply too confusing and contained too many obvious errors to be relied on for any purpose and therefore omitted it from the Atlas of maps Namibia presented to the Court.²³¹ The reasons for this decision will sufficiently appear from the following discussion.

147. In the first place, Botswana Maps 4 and 5, discussed respectively in BM, paras. 266 and 267, are not two separate sheets of the *Kriegskarte*, the Andara and the Linjanti sheets, as the Botswana Memorial states.²³² They are two different extracts of the same map, the Linjanti sheet, one in monochrome and the other in colour. Neither provides the marginal information necessary for interpretation, and neither contains all the detail of the original map, which is to be found in the British Public Records Office and was consulted by Mr. Rushworth in preparing his technical analysis in Annex 1, para. 12.

148. The *Kriegskarte* was produced in Berlin from existing maps in the short period of five weeks.²³³ An extract appears at Fig. 1, following p. 66. It was intended for military use in the German-Herero wars. For the area of the lower Chobe River the main source was the Schulz and Hammar map.²³⁴ The label 'Sulumbu's I' appears north of the river, but it is not clear what feature on the map the label refers to. This part of the river is represented on the map by an area of blue colour bounded by black lines of varying thickness. The Botswana Memorial

asserts that the map 'appears to show the northern channel by a thick black line and the southern channel is barely visible except as the edge to the shaded area which represents the island.'²³⁵ There is no basis for these assertions. The black lines enclose a 'shaded area' on Map 4, but Map 5 reveals this to be a dark blue coloured area, which elsewhere on the map and by the usual cartographic convention indicates a body of water, not an island at all. In that case the lines do not represent channels of the river, but the banks.

149. There is no reference to boundaries in the map legend, but boundaries are shown by a chain-dot line in some areas, such as the Western Caprivi. Along the rivers, however, there is no such boundary symbol. The boundary is backed intermittently on the Namibian side by a faint band of pink colour that sometimes continues along the rivers, but the pink disappears beneath the dark blue colour of the water bodies, so that it is of no help in determining the location of the boundary within them. In short, the map provides no warrant whatever for the conclusion that Kasikili Island is in Botswana.

150. Other serious anomalies cast doubt on the overall reliability of the map. For example, it shows a road going on a direct line east from Ngoma across the Chobe River to Sebuba-Fälle. No such road is shown on any other map of the area from the explorers' maps before the Treaty to the present. The depiction of the large areas covered by water is also mysterious. No map has ever shown a permanent body of water of the size and configuration that appears on the *Kriegskarte* in the area well to the west of the general location of Kasikili Island. Neither can these large blue patches be explained as a representation of the river in flood. It will be recalled that the floodplain of the Zambezi is inundated annually from east to west, beginning at the Mambova Rapids and gradually filling the triangle between the two rivers, normally as far as Ngoma. When the flood season ends, the waters recede from west to east, leaving the western reaches of the floodplain exposed while much of the eastern portion is still flooded.²³⁶ This same pattern was confirmed by the early travellers and by Streitwolf in 1909, only five years after the publication of the *Kriegskarte*.²³⁷ There is no record ever of a time when the western portion of the area remained under water while the eastern reaches of the river were in something like their usual dry season condition, as appears on the map.

151. For these and similar reasons, Namibia decided that the map was too unreliable to present to the Court. As stated by Dr. Huber, the arbitrator in the *Isle of Palmas* case:

Any maps which do not precisely indicate the political distribution of territories, and in particular the Island of Palmas (Miangas) clearly marked as such, must be rejected forthwith, unless they contribute - supposing that they are accurate - to the location of geographical names. Moreover, indications of such a nature are only of value when there is reason to think that the cartographer has not merely referred to already existing maps - as seems very often to be the case - but that he has based his decision on information carefully collected for the purpose.²³⁸

The language is quoted in the Botswana Memorial at para. 262. But, without changing a word except to substitute 'Kasikili' for 'Palmas,' it tells why the *Kriegskarte* can be of no assistance to the Court in this case.

b. 'Von Frankenberg, Karte des Caprivi Zipfels, Blatt I, 1912' (BM, para. 268)

152. Botswana asserts that this map identifies 'the northern and western channel as the main channel.'²³⁹ The only basis for this assertion is that the southern channel is marked '*Kassikiri Flussarm*,' which, according to Botswana, translates as 'branch or tributary of a main river.'²⁴⁰ The only support for this assertion, in turn, is an 'annexure' to the map. On closer examination, the annexure appears to be a translation prepared in 1994 for the purposes of Botswana's submission to the JTTE.²⁴¹ It seems to be pasted on the map in Botswana's atlas.²⁴² The signature on the translation is illegible, and the author's credentials are not given. It says that 'the translation also appears in standard works of reference,' but none are cited.

153. In fact, the annexure mistranslates the word *Flussarm*. This appears from the legend on von Frankenberg's map itself. Towards the left margin of the map, apparently in von Frankenberg's own hand, appears the note:

Die politischen Grenzen sind durch den Zambesi und den Linyanti gegeben. Bei der Mongonda Insel ist der nördliche Flussarm zwar breiter, jedoch flacher als der südliche, so dass er während der Trockenzeit grosstenteils austrocknet.

This note translates as follows:

The political boundaries are defined by the Zambezi and the Linyanti. At Mangonda Island [in the Zambezi], the northern arm of the river is broader, but it is shallower than the southern, and during the dry season therefore it is generally dried up.²⁴³

Thus, von Frankenberg himself used the word *Flussarm* to mean simply a branch of a river, with absolutely no inference that it was 'a tributary to the main river,' as asserted by Botswana. This is the standard definition given in many other lexicographic and hydrographic sources.²⁴⁴

154. As shown in NM, paras. 298-299, the true conclusion to be drawn from von Frankenberg's map is the opposite: the southern channel is the boundary. Although Botswana is correct that 'there is no boundary marked as such on the map,' von Frankenberg obviously knew, as he said in the note, that the Linyanti River formed the political boundary between German and British territory. Places on the north or German side of the river are named in German. On the south side of the river, no place names are to be found.²⁴⁵ '*Insel Kassikiri Flussarm*' appears as a place name in German designating the Island. The inference is inescapable that von Frankenberg thought that Kasikili Island was within his area of responsibility.²⁴⁶

c. The German maps that Botswana does *not* mention

155. The most important map of the German period was Seiner's map, discussed at NM, paras. 293-295. It was the principal large scale map used by the German Government in Berlin and in the field during the entire period of its rule in South West Africa. It was sent by Germany to the British Foreign Office to indicate Germany's position on the southern boundary of the Caprivi during the negotiations over the western portion of the boundary

between 1909 and 1914.²⁴⁷ This map is relegated to a footnote in the Botswana Memorial which acknowledges that it is 'an impressive map.'²⁴⁸ The footnote says, however, that 'the boundary is not shown' on the map. This is simply wrong. As can be clearly seen in the extract in NM, following p. 121, Seiner's map shows the boundary along the Chobe River by a fine red hatching on the Namibian side. The hatching is drawn very precisely to cover Kasikili Island, thus placing it unequivocally in Namibia.

156. Streitwolf's map is not even mentioned in the Botswana Memorial, although it was much more widely known than von Frankenberg's and was relied on by Captain Eason on his exploration of the Chobe River. Like von Frankenberg's map, discussed above, Streitwolf indicated that Kasikili was within German South West Africa by naming it, while places lying outside his domain in English territory are not named on the map.²⁴⁹

2. British maps

157. As has already been discussed, and as the Botswana Memorial admits, the sketch maps included in the annual Colonial Reports on the Bechuanaland Protectorate are too small in scale to show Kasikili Island.²⁵⁰ Moreover, the side of the river on which the boundary appears on these maps is a matter of the cartographer's convenience and discretion and has no significance as to the location of the boundary within the river. The same is true of the Sketch Map of Bechuanaland Protectorate (1906), discussed in BM, para. 269, and Bechuanaland Protectorate, D.O.S. [Misc.] 282, 1960, Directorate of Overseas Surveys, discussed in BM, para. 276. These maps are therefore irrelevant to the issue for which Botswana cites them. They can be of no assistance to the Court in resolving the issues before it. That leaves only two British maps referenced in the Botswana Memorial with any bearing on the case. They are discussed immediately below.

a. 'British War Office Map of Protectorate, 1933; Geographical Section, General Staff, No.3915' (BM, paras. 274-275)²⁵¹

158. This map was the official British map used in London and by all Bechuanaland administrative agencies for the entire period from 1933 to 1965, one year before independence. As Botswana must and does acknowledge, it clearly shows Kasikili Island in Namibia. The map is analysed at length in NM, paras. 305-309 and Annex 102, paras. 23-24, establishing that this was the first British attempt to produce an accurate large scale map of the area.²⁵² It has recently been characterised as 'a significant milestone in the cartographic history of Botswana.'²⁵³ Botswana adduces four grounds for contending that '[t]he evidential value of this indication of the boundary is substantially reduced . . .'²⁵⁴ All four are without merit.

(i) Botswana states, "The boundary is shown as an "intercolonial" not as an "international" boundary.'²⁵⁵

Why this is supposed to be significant is not revealed. Whether 'intercolonial' or 'international,' the boundary marked the line between two territories under different sovereignties. Even more to the point, the Court expressly held in the *Frontier Dispute* case

that under the principle of *uti possidetis*, intercolonial and even intracolonial administrative boundaries are to be recognised as the international boundary between successor independent states.⁰

(ii) Botswana states, '[T]he map is a compiled map produced by technical experts from previous maps in the absence of reference to legal questions.'¹

This statement is erroneous. The detail in the Chobe River area on GSGS 3915 was new, based not on previous maps but on aerial photography taken in 1925 by the Kalahari Reconnaissance. The boundary, of course, can only be added in the drawing office, and as noted above, in the case of official maps like this one produced by major survey offices, boundary placement is done by highly skilled professionals in accordance with well-developed standard operating procedures subject to close technical and political supervision.²

In this particular case, the production of the map was initiated by the Bechuanaland Protectorate in order to meet its administrative needs, and the form and content were specified by senior officers of the Protectorate acting in their official capacity. Much of the material for the map was supplied by the Resident Commissioner, Sir Charles Rey, and his staff.³ The High Commissioner, the Earl of Athlone, took a strong interest in the project and was particularly concerned that the boundaries should be correctly depicted. The enterprise consumed five years. The original compilation material has been destroyed, and therefore it is not possible to identify the precise person who decided where the boundary symbol should be placed, but it was very probably one of the officers of the Protectorate. In any case, the boundary would have appeared on the proof copy of the map, which was reviewed in Mafeking and returned to London in November 1932 with comments, but without objection as to the location of the boundary. Thus the boundary designation was known to and accepted by both the London and Protectorate authorities.

(iii) Botswana states, '[T]he fact that the *entire* alignment of the boundary along the Chobe is indicated *south* of the river establishes that the map maker had no interest in a precise representation of a boundary following *the main channel of the river*.'⁴ (emphasis in original)

The Chobe River in the relevant area of this map is shown by a double line which separates into two double lines at Kasikili Island, one for each channel. The double lines are too close together to put the boundary marker in the middle of the river (or of either channel when the river separates). But there is plenty of room between the two channels to accommodate a boundary marker to the south of the northern channel. Instead, as shown in NM, Fig. 13, following p. 125, the draughtsman deliberately chose to attach the indicator to the southern channel.

Moreover, once published, GSGS 3915 (and its derivative⁵), became the basis for many operational, planning and research activities of the Bechuanaland Protectorate. The Namibian Memorial cites two maps illustrating this practice. One, which was the subject of very careful vetting, showed the boundaries of the Crown Reserve lands in Botswana,⁶ and the other dealt with water development schemes.⁷ Both place Kasikili Island deliberately and unmistakably outside of Botswana. Two additional examples of the use of GSGS 3915 by administrative

agencies of the Protectorate illustrate the same understanding as to the boundary at Kasikili Island. One, issued by the Veterinary Administration and showing zones for various animal diseases, depicts 'Boundaries of Vet Areas' with a grey broken line. One such boundary follows the southern channel at Kasikili indicating clearly that the Island was not within the Veterinary Administration's jurisdiction. (See Fig. 2, following p. 73) The other, annotated with geological information, shows potential coal bearing beds by cross-hatching in red ink. Again the cross-hatched area stops at the southern channel of the Chobe, indicating that Kasikili Island was not thought to be within the responsibility of the resource department using the map. (See Fig. 3, following p. 74)

(iv) Botswana states, 'In the period 1915 to 1929 the Caprivi had been administered as part of [the] Bechuanaland Protectorate and the maps relied on in the production of the 1933 map relate predominantly to this period. In a period when the United Kingdom was in *functional terms* the sovereign administrator on both sides of the Chobe it would be unlikely that the precise depiction of the boundary on a map drawn on a scale of 1:500,000 would be a matter of particular concern.'⁸ (emphasis in original)

The proposition is a complete non sequitur. If anything, in 1933, having recently returned control of the Caprivi to South Africa, the authorities in London and the Bechuanaland Protectorate would have been particularly concerned to have an accurate depiction of the boundary, which now divided territory administered by two different sovereigns. In any case, as fully demonstrated in NM, paras. 233-237, during the period when the area was administered by Great Britain as delegate of South Africa, the colonial officials were scrupulous in maintaining the legal formalities of the separate existence of the two territories under common control.

Moreover, the source maps listed in the margin of GSGS 3915 covering the Chobe area do not fit the Botswana Memorial's description. Von Frankenberg's map was not a product of the period of British administration. Although, as we saw, it does not show the boundary as such, it indicates that Kasikili Island is within German territory. Two other source maps, the Sketch map by Stigand and the Kalahari Reconnaissance map do not show the boundary at Kasikili and thus could not have been the source of the boundary information. The sketch map by Forster Towne, who was on the staff of the Resident Commissioner for the Bechuanaland Protectorate, was a manuscript specifically prepared as an input to GSGS 3915 and was the most likely vehicle for depicting the Protectorate's view on the position of the boundary. It is recorded as destroyed by the War Office along with the other compilation material.⁹

159. Botswana's attempt to denigrate the significance of GSGS 3915 is without substance. The map remains the most important and substantial British mapping effort of the area in the entire period of its administration. GS 3915 was reduced in scale to 1:1,250,000 and reissued in 1935,¹⁰ and a second edition of the original map was published in 1964.¹¹ In 1984, almost two decades after Botswana's independence, the Surveyor General of Botswana recognised the significance of this map by reprinting the 1:1,250,000 version as a historic document. The provenance of GSGS 3915, its methodology and the uses to which it was subsequently put leave no doubt that it reflected the British understanding and embodied the official British position as to the location of the boundary at Kasikili Island.

b. 'Bechuanaland, 1965: Directorate of Overseas Surveys (D.O.S. 847) (Z 462)' (BM, para. 277)

160. The Botswana Memorial says that the 'boundary . . . clearly follows the northern and western channel in the vicinity of Kasikili/Sedudu.'¹² This statement is not strictly true. This map shows only one channel, not two channels in the vicinity of Kasikili Island. Thus it does not show Kasikili Island at all. The river as depicted in that reach looks like the northern channel on other maps, but there could have been no choice by the mapmaker of the northern over the southern channel for the boundary, since no southern channel appears on the map. The reasons for the obvious mistake in depicting this portion of the river are discussed at length in NM, para. 310 and Annex 102, para. 30. The error is so egregious, however, that it renders the map useless for the purposes of this case.

c. 'Africa 1:2,000,000 War Office GSGS 2871 Sheet Rhodesia'

161. One additional map was produced by the British War Office and published in several editions during the period 1919 to 1958. It is a map that is part of an Anglo-French series covering the whole of Africa, developed for military and subsequently aeronautical use. It is a carefully drawn map, showing portions of Botswana and Namibia, including the boundary between them in the Eastern Caprivi, in considerable detail.¹³ The 1933, 1940, 1942 and 1958 editions of this map show clear depictions of Kasikili Island, slightly exaggerated in size, with the boundary marked by a symbol along the southern side of the southern channel. In the first three, the depiction of the Island is identical, except that on the 1942 edition, a purple stipple band is added, internal to Botswana, the edge of which follows the southern channel. (See Fig. 4, following p. 75) The 1958 edition has been redrawn, but Kasikili Island appears on it too with the boundary as before, in this case emphasised by a red stipple band. (See id.) This map was produced and published by the British War Office in London. Thus, at regular intervals during the period of British colonial rule, the British colonial authorities issued official maps reaffirming that Kasikili Island is in Namibia. The last of these, it should be noted, was issued ten years after the Trollope-Redman joint inspection of the area and seven years after the conclusion of the Trollope-Dickinson arrangement.

3. South African maps

a. 'South African Official Map 1:250,000, 1949' (BM, paras. 278-282)

162. As stated in NM, para. 312, this official South African map is the first modern map of the area. At Kasikili Island the boundary is shown in the river between the two banks of the southern channel. It was the principal map used by South Africa until Namibian independence. It was reissued in 1967. A new 1:250,000 map was published in 1982, with the same depiction of the boundary, that is still current and in use in Namibia. The Botswana Memorial gives three grounds for disregarding the powerful evidence of this map. None can be sustained.

163. First, Botswana claims, 'The evidence available indicates that this map reproduces, without any further or independent verification, the boundary indicated on the War Office map of 1933.'¹⁴ This statement is wrong in almost all aspects. The operational order for the production of the map shows that the map was the result of a thorough new photographic and ground survey and did not rely on detail compiled from earlier maps.¹⁵ NM, Annex 106, which is a circular letter from the producer of the map to users, states, 'In the area covered by Air Survey only information supplied by the field parties has been used.' The authorities

quoted in the map, including the War Office 1933 map, were used only for '[a]dditional locality and village names' around the periphery of the map.¹⁶ Moreover, the boundary line is not 'copied' from the 1933 map, but is depicted differently from the line on the earlier map. It appears between the two banks of the southern channel, rather than to the south of it as in the 1933 map, and it is shown by the symbol of an international rather than an intercolonial boundary.

164. Second, BM, para. 280, states that the map was published in 1949, after the Trollope-Redman interchange in 1948, and thus should be disregarded as *post litam motu*. This is also incorrect. Although the official publication date was 1949, the map was drawn, as Botswana acknowledges,¹⁷ in 1945, three years before the Trollope-Redman correspondence. The 1945 preliminary version shows the boundary in the southern channel exactly like the published map.¹⁸ As discussed in NM, paras. 314-315, 329, sunprints of the map were widely distributed to interested persons for comment. Among these were officials of the Bechuanaland Protectorate. They returned the sunprints with numerous suggested changes, including some in the area near Kasikili Island, but made no objection to the location of the boundary. There is no reason to discount the evidence of this map because of the date of its publication.

165. Third, Botswana asserts, 'The 1949 map is a compiled map and one of the authorities listed is the War Office map of 1933.'¹⁹ As noted above, the War Office map was used only for 'additional locality and village names' around the periphery of the map. The evidence of the map itself shows that the boundary was independently depicted. But, as developed in CM, Annex 1, para. 4a, the fact that a map is compiled does not necessarily derogate from its accuracy or evidential value. Almost all maps are to some extent compiled, since some of the information they show does not come directly from a field survey. In particular, international boundaries are always added to the map on the basis of other source materials, including applicable treaties and agreements, since the boundaries are very rarely marked on the ground and therefore cannot be ascertained by a field survey.

b. 'South African Map Compiled by JARIC, 1:100,000 (c.1974)' (BM, para. 284)

166. The JARIC map, like the British D.O.S. 847, discussed in para. 160, *supra*, shows not two channels in the relevant stretch of the river, but only one. There is no Kasikili Island on the map. Therefore the depiction of the boundary on the map cannot be regarded as a choice between the two channels. Like D.O.S. 847, this fundamental error irretrievably compromises the reliability of the JARIC map for any purpose in this case.

167. The Botswana Memorial suggests that the JARIC map should be given special weight because it was used by the SADF for patrolling.²⁰ Again the factual premise is incorrect, as it appears from the Botswana Memorial itself.²¹ In describing the discussions between South Africa and Botswana following the 1984 clash between the armed forces of the two countries in the vicinity of the Island, Botswana states: 'At the meeting it was discovered that maps used by the South Africans had showed Kasikili/Sedudu Island to be on the South-West Africa side of the boundary . . .'²² Moreover, in their meetings at the United Nations, the Botswana representatives stated that the maps that were carried by the South African forces in the area

showed the boundary in the southern channel.²³ Indeed, it is recorded that 'Mr. Mishra [the UN Commissioner for Namibia] was shown the Botswana and South African maps which differed on where the boundary should run.'²⁴ If that were so, the SADF could not have been using the JARIC map for patrolling.

168. The provenance of this map is obscure. It would have been of little use to the SADF because of its serious inaccuracies, among them the omission of the southern channel, an important terrain feature that the SADF regularly patrolled.

4. Third country maps

169. As Namibia pointed out in its Memorial,²⁵ third country maps are of little value in cases of this kind because they are almost invariably adaptations or copies of maps published by the principal parties in interest. However, Botswana refers to two such maps, one from Zambia and one from Zimbabwe, asserting that they show the boundary in the northern channel.²⁶ Both these maps commit the same error as D.O.S. 847, discussed in para. 160, supra, by omitting the southern channel entirely. Thus, like D.O.S. 847, they cannot be taken to make any statement whatever as between the two channels. The common error suggests that these two maps simply copied the earlier map in this respect.

170. Without making a thorough search, Namibia has found two maps from these same countries that place the boundary symbol in the southern channel, putting Kasikili Island in Namibia.

- Rhodesia and Nyasaland: Livingstone 1:500,000 Director of Federal Surveys, Salisbury, 1958 Sheet SE-35 NW 1st Edition Four colour. No disclaimer.
- Zambia South West 1:750,000 SG Ministry of Lands, Natural Resources and Tourism, 1980 Sheet 2 Coloured. Boundary disclaimer.

Namibia makes no claim on the basis of these maps, except that the practice of these neighbouring states is not uniform and therefore cannot be cited against it. Undoubtedly these countries followed normal cartographic practice and filled the blank space between the boundary of their own country and the edge of the sheet with detail taken from maps produced by the neighbouring country.²⁷

C. Conclusions as to the Map Evidence

171. The map evidence in this case is neither 'contradictory' nor 'confused',²⁸ despite the effort of Botswana to make it so. The maps that are of a scale that is too small to show Kasikili Island can provide no information on the issue before the Court, as Botswana admits, so they cannot 'contradict' anything. Whether the boundary symbol on such maps appears to the north or south of the river is an arbitrary cartographer's decision from which no inference as to the position of the boundary around Kasikili Island can be drawn. These considerations dispose of the contradictions asserted in BM, para. 296, and with respect to the British maps mentioned in BM, para. 298. Whatever 'confusion' may exist on the matter has been introduced by Botswana itself.

172. The Botswana Memorial, para. 291, lists the four maps that, in its view, are large enough in scale to represent accurately the configuration of the Island. It claims that 'all these maps clearly show the northern and western channel as the main channel of the Chobe.'²⁹ That statement is flatly wrong. Three of the four do not show the northern channel as the boundary, and the fourth was produced by Botswana, which is *parti pris* to the litigation.

- The northern channel on Bradshaw's map is a conjecture. His notes state that 'The portions of the river not coloured I have not visited . . .'³⁰ The southern channel is coloured and accurately depicted. The northern channel is white and marked by a pecked course that simply joins the two ends that Bradshaw actually explored. Nor is there any indication in terms of size or otherwise leading to the conclusion that either channel is the main channel.
- As to the von Frankenberg map, the only basis for Botswana's assertion is its own mistranslation of the German word *Flussarm*, as explained in para. 153, supra. Von Frankenberg indicated his understanding that Kasikili Island was within his jurisdiction and responsibility - that is within Namibia - by giving its name in German on the map.
- The JARIC map shows only one channel. Its depiction of the area around the Island is therefore fundamentally erroneous. In any case, it cannot be said to show the 'northern' channel as the main channel.
- As to the 1974 Botswana map, its 'evidential significance . . . is removed' because it was a unilateral act and 'self-serving' act.³¹

173. These four maps, however, do not by any means exhaust the array of maps drawn to a large enough scale to illuminate the question of the location of the border at Kasikili Island. There is no threshold defining as a matter of law the scale of a map that can be used as evidence by a tribunal in a boundary delimitation case. The *Taba* case, far from being an authority for any such rigid rule, in fact reflects the true principle that the usefulness of the scale is related to the ground distances involved in the dispute, in that case, of the order of a few metres.³² The test is a practical one. It depends on the care and accuracy with which the map is drawn, as determined by its provenance and by critical examination of the map itself, a task for which the members of the Court are surely competent. In the *Temple* case, for example, the key map was at a scale of 1:200,000, and the Court found no difficulty in using it to define the boundary, although the critical distance was only 500 metres.³³ And in the *Frontier Dispute* case, the Court found two maps particularly useful, one at a scale of 1:500,000 and one at 1:200,000. The second of these, in a version reduced to 1:400,000 was used to define the boundary determined by the Court, quoting distances of 0.1 kilometres and locations to within 30 metres.³⁴ In the present case, the critical distance is about two kilometres, so that maps at much smaller scale than those cited above could be relevant.

174. Nor is there any warrant for the general statement: 'Except in very large scale maps the drawing of a riverine boundary . . . inevitably produces inaccuracy and distortion.'³⁵ Of course, a map is a representation and like all representations does not exactly reproduce the original. Questions of usefulness and accuracy must be resolved in the light of the functions the particular map is intended to serve.³⁶ One of the most important functions of official maps issued by political authorities is to identify the political boundaries between separate

territories. In some cases the information depicted may be ambiguous and sometimes it may even be erroneous, as we have seen in the case of D.O.S. 847 and the JARIC map, both of which omit the Island altogether, showing only a single channel in the river. But there is no basis for the suggestion that in general the boundaries on the maps put forward by Namibia are unreliable.³⁷ Again, the test of the reliability of the map and the weight the Court is entitled to put upon it must be derived from a careful examination of the map itself and the circumstances and history of its publication.

175. By this pragmatic test, examination of the maps put before the Court by the parties, far from demonstrating contradictions and confusion, leads to a remarkably confident conclusion. The most relevant maps - official maps produced and used by Germany, Great Britain, South Africa and the United Nations during the period that they were respectively responsible political authorities in the area³⁸ - all are large enough in scale to show Kasikili Island and the boundary around it, and there is both internal and external evidence that professional care was exercised in the depiction of the boundary. They constitute evidence of an unbroken sequence of maps emanating from all the political authorities in the area (with the exception of Botswana after 1974) showing the boundary in the southern channel of the Chobe River and placing Kasikili Island in Namibia.

Conclusion and Submissions of this Counter-Memorial

Conclusion

176. Consideration and analysis of the evidence and arguments advanced by Botswana show that they are insufficient to defeat the conclusions established by Namibia's Memorial. Kasikili Island belongs to Namibia by virtue of the Anglo-German Treaty of 1890 and by virtue of long-continued use, occupation and exercise of jurisdiction without protest from Botswana until 1984.

Submissions

177. *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 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.

Albert Kawana
Agent of the Republic of Namibia
before the International Court of Justice

1 See Botswana Memorial [hereinafter cited as 'BM'], p. 129. See also BM, Appendix to Chapter VII, p. 5.

2 See Namibian Memorial [hereinafter cited as 'NM'], Vol. VI. All references to NM, Vol. VI are cited hereinafter in the text as 'NM, Alexander Report.'

3 See BM, Appendix to Chapter VII.

4 See BM, paras. 116 and 129-144.

5 See BM, paras. 138-143.

6 BM, para. 35.

7 See BM, Chapter 1.

8 See NM, Annex 3, Art. I.

9 Id.

10 See NM, Alexander Report, Appendix, Sheet 25, Diagram 7, Image 25e.

11 NM, Annex 3, Art. 1.

12 See BM, para. 112.

13 NM, Annex 11.

14 See BM, pp. 5-10. For example:

para. 1(a) of the Terms of Reference requires the JTTE to 'determine where the boundary lies in terms of the said Treaties';

para. 1(d) authorises the Team to 'carry out any act or function necessary and relevant for the determination of the boundary . . . taking into account, and subject to, the provisions of the Treaties referred to in (a) above'; and

paras. 1(e) and 1(f) authorise the JTTE to examine relevant documents, maps, etc. and to hear oral testimony 'without prejudice to the 1890 and 1892 Treaties.' (emphasis added)

Moreover, five of the seven preambular clauses refer to the boundary line as defined in the Treaty.

15 NM, Annex 3, Art. 1.

16 See BM, para. 112.

17 See *id.*

18 R. Jennings and A. Watts, I *Oppenheim's International Law* (9th ed. 1992) p. 1280. In the *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, *Judgment*, *I.C.J. Reports* 1952, p. 105, the Court accepted the principle that a legal text should be interpreted in such a way that a reason and meaning can be given to every word in the text. The rule is an aspect of the broader principle of 'efficacy' or 'effectiveness' in the interpretation of treaties. See also A. McNair, *The Law of Treaties* (1961) pp. 385-386.

19 *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment*, *I.C.J. Reports* 1985, p. 23.

20 *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Judgment*, *I.C.J. Reports* 1995, p. 19.

21 *The Corfu Channel Case*, *Judgment*, *I.C.J. Reports* 1949, p. 4.

22 *Id.*, p. 6.

23 To use Botswana's term. See BM, para. 112.

24 *The Minquiers and Ecrehos Case (United Kingdom/France)*, *I.C.J. Reports* 1953, p. 49.

25 BM, p. 129.

26 See NM, paras. 121-128.

27 BM, Appendix to Chapter VII, p. 5.

28 See also Supp. Rep., para. 5.1: 'The basic premise in both Dr. Sefe's report and my two reports is that the main channel of a river is the channel that carries the largest proportion of the annual flow in the river.'

29 BM, para. 207.

30 See also NM, para. 131.

31 See NM, Alexander Report, paras. 1.6-1.8; NM, paras. 130-157.

32 Because the Alexander Report was reviewed so extensively in the Namibian Memorial, references in this Counter-Memorial are primarily to Professor Alexander's Supplementary Report, Counter-Memorial of Namibia, Vol. III [cited in text as 'Supp. Rep.']."

33 BM, para. 26. See Supp. Rep., para. 5.11: 'the flow in the Chobe River at Kasikili Island emanating from its own catchment area via the Linyandi River is sporadic and minimal.'

34 It is the height of the Mambova Rapids that controls the water gradient of the Chobe and Zambezi rivers within the floodplain of the Zambezi, and thereby their carrying capacity, not Victoria Falls, as asserted by Botswana in BM, para. 229 and Appendix to Chapter VII, p. 2. See Supp. Rep., para. 5.6.

35 See BM, Chapter V(c), discussing, inter alia, the Eason report, the Trollope-Redman inspection and the 1985 survey.

36 BM, Appendix to Chapter VII, p. 12.

37 See NM, para. 130. Table 2 of Dr. Sefe's report lists 'Data available for deciphering the morphology of the Chobe River in the vicinity of Sidudu/Kasikili Island.' The table is placed in the portion of the report arguing the proposition that there has been no change in the shape of the channels, and the data listed in the table seem to relate to that proposition. See BM, Appendix to Chapter VII, pp. 6-8.

38 BM, Appendix to Chapter VII, p. 4.

39 BM, para. 23.

40 Id.

41 BM, Appendix to Chapter VII, p. 2.

42 Id., p. 3.

43 Id.

44 BM, p. 129.

45 See para. 5, supra.

46 BM, p. 11 (section title).

47 See BM, Appendix to Chapter VII, p. 1.

48 See BM, para. 131.

49 NM, Annex 4, Art. III.

50 CM, Annex 20.

51 CM, Annex 19, para. 7.

52 Map of Matabililand and the Adjoining Territories. 1:1,584,000. Intelligence Division War Office. 1889 ID No.776 Uncorrected Proof No.2, NM, Atlas, Map II.

53 NM, Annex 31, p. 1269.

54 Id.

55 See NM, paras. 98-101.

56 See NM, para. 243.

57 See NM, Annex 71, para. 3.

58 The quotation is from Art. 1, Statute on the Régime of Navigable Waterways of International Concern. See CM, Annex 17.

59 The phrase is from *The Montello*, 20 Wall. (87 U.S.) 430, 439 (1874), a decision of the United States Supreme Court that has been very influential in the development of international jurisprudence of navigability.

60 See BM, para. 207.

61 H.W. Halleck, *International Law; or, Rules Regulating the Intercourse of States in Peace and War* (1861) p. 138 [hereinafter cited as 'Halleck, *International Law*']. See also J.B. Moore, I *A Digest of International Law* (1906) p. 617 [hereinafter cited as 'Moore, *Digest of International Law*'].

62 See CM, Annex 17.

63 BM, para. 35.

64 Id.

65 See BM, paras. 219-221.

66 BM, para. 218.

67 BM, para. 219.

68 See generally NM, Alexander Report, sec. 11.

69 BM, para. 36. See also BM, paras. 219, 220.

70 Representatives from both Botswana and South Africa met on 16 October 1972 and agreed to develop a solution to the Kariba Weed problem. Professor Alexander was a member of South Africa's delegation. See Supp. Rep., Appendix A. Following this meeting, Botswana requested an additional meeting with South African officials to agree on a joint effort to eradicate the Kariba Weed. See Supp. Rep., Appendix C.

71 See BM, para. 202.

72 For further analysis, see Supp. Rep., sec. 12.

73 BM, para. 206.

74 In a diplomatic note dated 19 August 1996, Namibia informed Botswana that on 22 August 1996 the legal representatives planned to take a boat from Namibian territory and 'then circle the disputed area and disembark on Namibian territory.' CM, Annex 30.

75 See BM, paras. 129-144.

76 See BM, paras. 118-128; NM, paras. 49-50.

77 See NM, para. 118; BM, para. 114.

78 BM, para. 115.

79 See NM, paras. 104-107. The Parties are agreed that the words 'the main channel of' were introduced into Art III(2) of the Treaty in the final stage of the negotiations. See BM, para. 136; NM, para. 102 et seq. The insertion of these words was proposed by the British Government, in English, and the German Government did not object. The existing German text was then altered accordingly. The relevant part of the earlier draft text described the border as following '*längs dem Tschobefluß*' (along the Chobe River). This phrase with the new British formula added then read '*und setzt sich dann im Thalweg des Hauptlaufes dieses Flusses . . . fort.*' This alteration of the previous German text shows two changes. The first is that in view of the full English phrase 'centre of the main channel of that river,' the German text had to insert a word to refer to the notion of 'centre' which the German text of 17 June 1890 did not do. This reference to the centre was expressed by the term *Thalweg*, which is quite in line with general use of the term in other boundary treaties. A second change was introduced into the German text by adding the words *des Hauptlaufes* to the term *Thalweg* - quite unusual in German state practice. The only plausible reason for adding the words *des Hauptlaufes* is that the German side, in order to follow the English-language text of the British proposal as accurately as possible, came forward with a literal translation.

80 See BM, para. 141.

81 For example, the relevant passages in the 1890, 1895 and 1904 editions of W.E. Hall, *A Treatise on International Law* (1884) repeat verbatim the passage in the original 1884 edition. Similarly, the passage Botswana cites from the 1878 German edition of J.C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten* (1878) pp. 179-180, repeats the passage cited from the 1874 French edition of J.C. Bluntschli, *Le droit international codifié* (2nd ed. 1874) pp. 181-182 [hereinafter cited as 'Bluntschli, *Le droit international*'].

82 BM, para. 138.

83 See, e.g., P. Resch, *Das Völkerrecht der heutigen Staatenwelt europäischer Gesittung* (2nd. Ed. 1890) pp. 70-71; A. Rivier, *I Principes du droit des gens* (1896) p. 168; L. Oppenheim, *1 International Law - Peace* (1905) p. 25.

84 See, e.g., P. Fiore, *Le droit international codifié* (1890) p. 205; T.A. Walker, *A Manual of Public International Law* (1895) Part II, Chap. III, p. 35; F. von Liszt, *Das Völkerrecht systematisch dargestellt* (1898) p. 47.

85 See, e.g., R. Woltmann, *Über das baurechtliche Verfahren bei der Verbesserung der Flüsse. Ein Versuch zum deutschen Fluß-Rechte* (1820) pp. 21-22; E. Nys, 'Rivières et fleuves frontières. - La ligne médiane et le thalweg. Un aperçu historique,' III *Revue de droit international et de législation comparée* 79-80 (1901) [hereinafter cited as 'Nys, "Rivières et fleuves frontières"'].

86 See, e.g., Bluntschli, *Le droit international*, pp. 187-188; E.S. Creasy, *First Platform of International Law* (1876) pp. 222-223.

87 See, e.g., T. Twiss, *The Law of Nations Considered as Independent Political Communities* (1884) p. 249.

88 'Deuxième commission d'études. - Règlement organique pour la navigation des fleuves internationaux,' IX Annuaire de l'institut de droit international 182 (1887-88). See BM, para. 139.

89 'Deuxième commission d'études. - Règlement organique pour la navigation des fleuves internationaux,' IX Annuaire de l'institut de droit international 173 (1887-88).

90 E.P. Engelhardt, *Du régime conventionnel des fleuves internationaux* (1879) p. 75 [hereinafter cited as 'Engelhardt, *Régime conventionnel des fleuves*'].

91 De Martens's general reflections on the state of the international law of river navigation are apposite:

Ces précédents marquent les phases qu'a traversées, dans son développement, depuis 1815, le droit international concernant la navigation fluviale. Il est impossible, en présence des faits cités, de prétendre qu'à présent les principes de droit international sur cette matière soient reconnus et pratiqués *uniformément* sur tous les fleuves internationaux. Au contraire, il faut reconnaître qu'il existe jusqu'à ce jour une divergence assez essentielle parmi les hommes d'État et les jurisconsultes les plus compétents, sur la portée de ces principes et le mode de leur application. Il y a des fleuves à l'égard desquels ils n'ont reçu aucune application; il y en a d'autres qui, étant juridiquement dans les mêmes conditions, sont néanmoins soumis à des régimes essentiellement différents. (emphasis in original)

'Neuvième commission d'études. - Élaborer un projet de règlement organique pour la navigation des fleuves internationaux,' VIII Annuaire de l'institut de droit international 279 (1885-1886).

92 This number does not include clauses in which the boundary is said to follow the bank of a river.

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

94 It is interesting that in these colonial African treaties, admittedly a random sample, the word *thalweg* was first used in the treaty between the United Kingdom and France of 1899. The term did not begin to be used with any frequency in Africa until after 1910.

95 See, e.g., W.E. Hall, *International Law* (1880) p. 104 ('Where [the boundary] follows a river . . . their territories are separated by a line running down the middle, except where the stream is navigable, in which case the centre of the deepest channel, or, as it is usually called, the *Thalweg*, is taken as the boundary'). As mentioned in footnote 57, *supra*, the quotation appears in all four subsequent editions as well.

96 See BM, para. 138.

97 Nys, 'Rivières et fleuves frontières,' pp. 79-80.

98 BM, para. 138.

99 See BM, para. 205.

100 Professor Alexander gives the scientific definition as 'a single continuous trace that identifies the line of deepest water along the length of a river channel,' although he says that it 'has somewhat different legal interpretations when applied to boundaries along rivers.' NM, Alexander Report, para. 2.11.

101 See para. 27, *supra*.

102 CM, Annex 12 ('*die rinne, worinn das wasser flieszt, die tiefste linie der thalsole, heiszt thalweg*').

103 Id. ('*der stärkste und tiefste stromstrich in der bahn des Rheins*').

104 CM, Annex 10 ('*Stromstrich, Thalweg, die Linie, die Punkte größter Oberflächengeschwindigkeit fließenden Wassers verbindet. Sie bewegt sich im allge-meinen über der tiefsten Furche des Bettes, . . .*').

105 CM, Annex 11 (*Talweg: die für die Schifffahrt ständig instandgehaltene Stromrinne; auch die Mitte der Schifffahrtsrinne, die Linie schnellster Oberflächenströmung, bei Fehlen besonderer Abmachungen die Grenzlinie zwischen Ländern*). Under a separate heading for 'Stromstrich' (stream-line), *Der Große Herder* gives the following definition: '(die) Linie größter Oberflächengeschwindigkeit eines Flusses, liegt stets über dem Talweg und ist in Kurven von der Flußmitte nach außen verlagert' ('the surface line formed by the part of the river with the greatest surface velocity, running above the *thalweg* and moving with the curve of the river').

106 E. Littré, 4 *Dictionnaire de la langue française* (1872) p. 2212.

107 P. Larousse, 15 *Dictionnaire universel du XIX^e siècle* (1876) p. 42.

108 C. Calvo, 2 *Dictionnaire de droit international public et privé* (1885) p. 256.

109 G.F. de Martens, II *Précis du droit des gens moderne de l'Europe* (1864) pp. 135-136.

110 A. Rivier, *I Principes du droit des gens* (1896) p. 169.

111 Id., p. 168.

112 F. Despagnet, *Cours de droit international public* (2nd ed. 1899) p. 407.

113 J.L. Klüber, *Droit des gens moderne de l'Europe* (1874) p. 189 [hereinafter cited as 'Klüber, *Droit des gens moderne*'].

114 See Bluntschli, *Le droit international*, p. 187, n.2.

115 Engelhardt, *Régime conventionnel des fleuves*, p. 73.

116 Id., p. 73, n.1.

117 In addition to the authorities cited in the text (all writing before or roughly contemporaneously with the 1890 Treaty) a number of later authors continue to stress the connection between the *thalweg* and the current of the river. See, e.g., V. Adami, *National Frontiers in Relation to International Law* (1927) p. 17 ('the stream line of [the] fastest current' (emphasis added)); C.G. Fenwick, *International Law* (1934) p. 275 ('strongest current down-stream' (emphasis added)); A.S. Hershey, *The Essentials of International Public Law and Organization* (1930) p. 270 ('the strongest current of the midchannel or navigable portion of the stream' (emphasis added)); A. Möller, *1 International Law in Peace and War* (1931) p. 104 ('the strongest current in the channel' (emphasis added)).

118 J. Westlake, *International Law, Part I, Peace* (1904) p. 141 [hereinafter cited as 'Westlake, *International Law*'].

119 P. Fiore, *Le droit international codifié* (1890) p. 205.

120 L.F. von Neumann, *Grundriss des heutigen europäischen Völkerrechts* (3rd ed. 1885) p. 45.

121 P. Orban, *Étude de droit fluvial international* (1896) p. 343.

122 H. Bonfils, *Manuel de droit international public (droit des gens)* (1894) p. 257 [hereinafter cited as 'Bonfils, *Manuel de droit international*'].

123 A. Chrétien, *Principes de droit international public* (1893) p. 108 (internal citation omitted) [hereinafter cited as 'Chrétien, *Principes de droit international*'].

124 BM, Annex 17.

125 NM, Annex 47.

126 See, e.g., C.G. Fenwick, *International Law* (1934) p. 275. It is commonly agreed that the modern development of the *thalweg* concept stems from the Treaty of Lunéville, of 9 February 1801, in relation to the Rhine River boundary between France and the German Empire, although the principle had been agreed upon earlier at the Congress of Rastadt. See Engelhardt, *Régime conventionnel des fleuves*, p. 73; *Traité de paix entre la république*

française et Sa Majesté l'empereur le corps germanique, signé à Luneville, le 9. Février 1801, in G.F. de Martens, VII *Recueil des traités* (1829) p. 298. Article Six of the treaty provided that 'le Thalweg du Rhin soit désormais la limite entre la république française et l'empire germanique . . .' Id. The formula with some variations was extended to other parts of the Rhine by subsequent treaties, but always emphasising the aspect of the access to the downstream current or 'flowing stream' of the river. See, e.g., Art. 1, *Traité entre le Grand-Duché de Bade et le Canton Helvetique d'Aargovie, signé à Aarau le 17 Sept. 1808*, in G.F. de Martens, I *Nouveau recueil des traités de l'Europe* (1817) p. 140 [hereinafter cited as 'de Martens, I *Nouveau recueil des traités*']. Article 9 of the Treaty on the Delimitation between France and the Grand Duchy of Baden, 30 January 1827, provided that 'the thalweg of the Rhine is the path most suitable for shipping during normal low water.' Art. IX, *Traité pour régler les limites entre la France et le grand duché de Bâde, signé à Strasbourg le 30 Janv. 1827 (Extrait)*, in G.F. de Martens, VII *Nouveau recueil des traités de l'Europe* (1829) p. 126. The boundary between Prussia and Westphalia was the *thalweg* of the Elbe, 'c'est à dire le principal courant de l'Elbe . . .' Art. I, *Convention entre S.M. le Roi de Prusse et le Roi de Westphalie sur les limites et les droits de navigation; signée à Berlin le 14 Mai 1811*, in de Martens, I *Nouveau recueil des traités*, p. 383.

127 Westlake, *International Law*, p. 141. He remarks in a note that '*Thal* in the sense of valley enters into *thalweg* only indirectly. The immediate origin of the word lies in the use of *berg* and *thal* to express the upward and downward directions on a stream, like *amont* and *aval* in French.' Id., n.1.

128 C.C. Hyde, 'Notes on Rivers as Boundaries,' 6 *Am. J. Int'l L.* 902-903 (1912) [internal citation omitted] [hereinafter cited as 'Hyde, "Notes on Rivers"']. The passage is included in C.C. Hyde, I *International Law, Chiefly as Interpreted and Applied by the United States* (2nd rev. ed. 1947) pp. 444-445 [hereinafter cited as 'Hyde, *International Law*'].

129 Engelhardt, *Régime conventionnel des fleuves*, pp. 73, n.1, 74.

130 Klüber, *Droit des gens moderne*, pp. 188-89.

131 Bonfils, *Manuel de droit international*, p. 281.

132 C.G. de Koch et F. Schill, V *Histoire abrégée des traités de paix* (5th ed. 1817) p. 362.

133 G. Kaeckenbeeck, *International Rivers* (1918) p. 176.

134 Again, the reference to downstream navigation continues to be found in the writings of more recent authors. See, e.g., P.G. de Lapradelle, *La frontière* (1928) p. 203; K. Strupp, *Grundzüge des positiven Völkerrechts* (1921) p. 69; L.J. Bouchez, 'The Fixing of Boundaries in International Boundary Rivers,' 12 *Int'l & Comp. L.Q.* 793-95 (1963).

135 See, e.g., T.A. Walker, *A Manual of Public International Law* (1895) p. 35; Halleck, *International Law*, p. 138; Chrétien, *Principes de droit international*, p. 108.

136 See, e.g., E.S. Creasy, *First Platform of International Law* (1876) p. 223; E. Nys, I *Le droit international: les principes, les théories, les faits* (1912) pp. 469-70 [hereinafter cited as 'Nys, *Le droit international*']; T. Twiss, I *Le droit des gens ou des nations* (1887) p. 231.

137 Nys, 'Rivières et fleuves frontières,' p. 80.

138 Id. See also Nys, *Le droit international*, pp. 469-70.

139 See, e.g., H. Wheaton, *Elements of International Law* (1836) p. 150 ('Where a navigable river forms the boundary of conterminous states, the middle of the channel, or *Thalweg*, is generally taken as the line of separation between the two states, the presumption of law being that the right of navigation is common to both; . . .'), cited with approval in Halleck, *International Law*, p. 138 ('Where a navigable river forms the boundary of coterminous states, the middle of the channel, - the *filum aquae*, - or *thalweg*, is generally taken at the line of their separation, the presumption of law being, that the right of navigation is common to them both. '); Engelhardt, *Régime conventionnel des fleuves*, p. 73 ('[Q]u'en général la ligne médiane du thalweg est plus stable que la ligne médiane du fleuve, et qu'en suivant le vrai canal, c'est-à-dire la partie la plus navigable, elle semble mieux répondre à l'idée fondamentale que chaque riverain a un endroit égal à l'usage utile du fleuve commun'). (internal citation omitted)

140 Halleck, *International Law*, p. 138, cited with approval in Moore, *Digest of International Law*, p. 617.

141 Hyde, 'Notes on Rivers as Boundaries,' p. 903. The passage is included in Hyde, *International Law*, pp. 444-445.

142 *New Jersey v. Delaware*, 291 U.S. 361 (1934).

143 Id., pp. 380, 383.

144 At certain stages of the Zambezi flood some water comes from the two anabranching channels to the north of Kasikili Island into the final short leg of the northern channel east of Kasika and just before it rejoins the main channel at the confluence to the west of the Island. However, there is no flow throughout the whole length of the northern channel, beginning at the bifurcation to the west of the Island and proceeding through the channel to the confluence to the east.

145 The dictionary definition of 'channel' is 'A channel of running water.' 'The hollow bed of running water.' J.A. Simpson and E.S.C. Weiner (eds.), III *Oxford English Dictionary* (2nd ed. 1989) p. 19. Professor Alexander defines a channel as 'a surface conduit capable of conveying river water . . .' NM, Alexander Report, para. 2.1. (emphasis added)

146 Engelhardt, *Régime conventionnel des fleuves*, p. 73 (internal citation omitted).

147 See NM, Part Two.

148 See BM, Chapters III and IV.

149 See BM, para. 67.

150 BM, Annex 13, para. 1.

151 BM, para. 75.

152 See NM, para. 202.

153 BM, para. 32. (internal citations omitted)

154 See BM, Annex 37.

155 BM, Annexes 32, 33. See also NM, Annex 100 ('[T]he boundary [of the Park] runs . . . along the northern boundary of the Bechuanaland Protectorate to its point of intersection with the eastern boundary of the Batawana Reserve . . .').

156 See NM, paras. 307-308; NM, Atlas, Map XI; and the extract in NM, Fig. 14, following p. 126.

157 CM, Annex 23. Although the men were released, their weapons were not returned.

158 CM, Annex 24.

159 CM, Annex 26.

160 See CM, Annex 27.

161 This was the renamed Department of Native Affairs.

162 CM, Annex 25.

163 BM, Annex 17.

164 BM, Annex 15; NM, Annex 47.

165 BM, Annex 17.

166 BM, Annex 15, para. 2.

167 In relation to Kakumba Island, at the confluence of the Chobe and Zambezi some 14 kilometres east of Kasikili, Eason takes exactly this line. Brushing aside the criteria of width and depth of the two channels, he chooses the southern channel because 'the most important point is that during the greater part of the year the current flows to the West along the Northern channel and to the East along the Southern.' NM, Annex 47. (emphasis added)

168 BM, Annex 15, para. 2.

169 NM, Annex 60, para. 4. The factual basis for this conclusion was not stated. The report states that the finding was made 'after separate examination of the terrain and the examination of an aerial photograph . . .' Id., para. 3. What is meant by 'separate' is not clear. Although the report is dated 19 January 1948, the date of these 'examinations' is not given. Nor does the report state any criterion for determining which was the main channel. In any case, as the Alexander Report demonstrates, the finding was scientifically incorrect. See NM, Alexander Report, sec. 12.

170 NM, Annex 60, para. 8.

171 NM, Annex 71, paras. 7(a), 7(c). At one point, the Bechuanaland Protectorate authorities had issued instructions that the Masubia of Caprivi should in the future be allowed to cultivate the Island under annual permit. See NM, para. 276. The Namibian Memorial speculated that the instruction was never implemented. This is confirmed in an undated letter made available from the Botswana National Archives, which recommends 'giv[ing] way over the issue of a permit . . .' CM, Annex 21, para. 7. The recommendation was approved in a hand-written note bearing the dates 14/11/51 and 19/11/51, but the month must be incorrect, since the arrangement was concluded in September. See CM, Annex 22.

172 See NM, Annex 71, para. 7(c); NM, Annex 73, para. 3.

173 BM, Annex 28, para. 3(b).

174 Id., para. 4.

175 BM, para. 160.

176 BM, Annex 36.

177 BM, para. 182.

178 See G.A. Res. 2145 (XXI), 27 Oct. 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No. 16, doc. A/6316.

179 S.C. Res. 276, 30 Jan. 1970 (1529th meeting).

180 *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.

181 See G.A. Res. 3031 (XXVII), 19 Jan. 1973, Official Records of the General Assembly, Twenty-seventh Session, doc. A/RES/3031. In its capacity as the entity in charge of Namibia's international relations, the UN Council for Namibia entered into bilateral agreements with several countries regarding the recognition of travel documents for Namibians. In addition, the Council also acceded to multilateral conventions on behalf of Namibia and represented Namibia at international conferences and in international organisations. See CM, Annex 31.

182 S.C. Res. 276, 30 Jan. 1970 (1529th meeting).

183 The Court made an exception for certain multilateral treaties, such as those of a humanitarian character the non-performance of which could adversely affect the people of Namibia. The exception is without application in the present context. *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. 55.

184 S.C. Res. 301, 20 Oct. 1971 (1598th meeting).

185 See Charter of the United Nations and Statute of the International Court of Justice, Chapter XIV, Art. 92, p. 48.

186 See BM, paras. 167-169.

187 BM, Annex 42, para. 1.

188 Id., para. 2.

189 See BM, Annex 41, para. 3.

190 BM, Annex 43.

191 See id.

192 BM, para. 171.

193 CM, Annex 18.

194 Id.

195 See *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 137.

196 See G.A. Res. 2145 (XXI), 27 Oct. 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No. 16, doc. A/6316.

197 BM, Annex 48, p. 3.

198 BM, para. 193.

199 See BM, para. 185.

200 BM, para. 184.

201 BM, Annex 44, para. 11(ii).

202 The Botswana group included G.G. Garebamonu, Secretary for External Affairs, but he was a civil servant, not the political head of the Ministry. In the authorities cited by Botswana in BM, para. 183, on the creation of informal international agreements, officials of the highest rank were involved. In the *Nuclear Tests Case*, the declaration was made by the President of the French Republic. *Nuclear Tests Case (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 266. In *Legal Status of Eastern Greenland*, the critical declaration was made by Norway's Minister for Foreign Affairs 'on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province . . .' *Legal Status of Eastern Greenland, Judgment, P.C.I.J. 1933*, p. 71. Botswana's statement that the 'delegations both included a senior legal component' is also something of an exaggeration with regard to South Africa. Although Attorney General M.D. Mokama led the Botswana delegation, the only lawyer listed for South Africa is 'Mr. Rautenbach (Legal Department).'

203 NM, Annex 84, para. 9(a).

204 Again, Botswana's Memorial is not very explicit on this point. The furthest it goes is to say that 'neither Botswana nor South Africa sought to challenge the validity of the *Joint Survey Report*.' BM, para. 193. See also BM, paras. 194, 199.

205 BM, Annex 50.

206 BM, Annex 51, para. 18.

207 See BM, Annex 52. Although the telex stated that Botswana had occupied the Island, there is no evidence that Botswana troops or officials were deployed there until 1991, after Namibia's independence.

208 BM, Annex 51, para. 17.

209 *Id.*, para. 19.

210 CM, Annex 28, para. 5.

211 NM, Annex 86.

212 NM, Annex 88.

213 See BM, para. 196.

214 BM, Annex 48, p. 3.

215 The survey was delayed from December 1984, when the decision was taken to conduct it 'as a matter of urgency,' until July. This delay presumably occurred because between December 1984 and July 1985 the Zambezi floodplain, including the Island and both channels, was under water.

216 See NM, Part Two, Chapter V.

217 See BM, paras. 254-256, 262.

218 Brownlie, *African Boundaries*, p. 5. See also, e.g., T.S. Murty, 'Boundaries and Maps' 4 *Indian J. Int'l L.* 367 et seq. (1964).

219 Brownlie, *African Boundaries*, p. 16.

220 I. Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law,' in Academy of International Law (ed.), *Recueil des cours* (1995) p. 161. For the convenience of the Court, Namibia provided relevant copies of cited pages of this work in NM, Annex 116.

221 *Id.* (internal citation omitted)

222 See, e.g., *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment*, *I.C.J. Reports* 1986, pp. 582-83.

223 Botswana states that 'a map of smaller scale than 1:100,000 . . . is likely to be of little use in representing accurately the configuration and size of the channels and island.' BM, para. 290. To support its point, Botswana cites the *Taba Award (Egypt v. Israel)* (1988). See BM, para. 293. But as appears from the portion of the *Taba* opinion quoted by Botswana, the issues in that case concerned points separated by a few metres where maps of 1:100,000 were clearly too small scale. The dimensions involved in this case are of the order of two kilometres. While it is obvious that the larger the scale of a map the more geographic detail it can provide, it is equally obvious that many of the maps produced in the present case by Botswana and most of the maps produced by Namibia at a smaller scale than 1:100,000 are large enough to provide a clear and unambiguous representation of the boundary. It should be noted that despite Botswana's insistence on the importance of the scale of a map, for the majority of the maps cited in its Memorial and illustrated in BM, Appendix II, Dossier of Maps, no scale is given.

224 See BM, paras. 269-273, 276.

225 BM, para. 273. (internal citation omitted)

226 See CM, Annex 1, pp. 18-19, para. 15.

227 See CM, Annex 1, pp. 9-10, para. 9. See also NM, Annex 110, where the DOS Record Officer states with specific reference to Botswana's boundaries on its maps, '[t]he compilations at present show several boundaries along one side or the other of a single stream when the map material does so, but it seems clear from a study of the available sources that it is the centre of the stream which is meant in such a case . . .'

228 NM, Atlas, Map VIII.

229 The only unofficial maps that have been called to the attention of the Court by either party are the early explorers' maps, produced before the conclusion of the Treaty and therefore of little bearing on the case, except as they may show the contemporary knowledge of the topography and geographical features of the area that was available to the negotiators. See NM, paras. 71-76 ; NM, Atlas, Maps I/1, I/2 and I/3.

230 BM, para. 257.

231 See NM, p. 124, n.285. However, the *Kriegskarte* is treated at some length in NM, Annex 102, para. 8.

232 The Andara sheet, which is printed on the same page as the Linjanti sheet, does not show the area of the Chobe River at all, as might be inferred from its name.

233 See NM, Annex 111, p. i.

234 NM, Atlas, Map I/3.

235 BM, para. 266.

236 See NM, Alexander Report, para. 10.11. See also NM, Alexander Report, Sheet 25, Diagram 7.

237 See NM, Annex 141, pp. 60-61.

238 *Isle of Palmas*, II R.I.A.A. 831, 852 (1928), cited in BM, para. 262.

239 BM, para. 268.

240 Id.

241 See CM, Annex 29.

242 See BM, Appendix II, Map 7 (lower right hand corner).

243 The translation in the text was made by Prof. Dr. Jost Delbrück, and a certificate as to its accuracy has been deposited with the Court. The note was translated by the British War Office in 1923 as follows:

The Zambezi and the Limianty [sic] form political frontiers. The northern arm of the river is broader than the southern at the island of Mangarde [sic], but it is shallower, and is therefore generally dried up during the dry period.

The translation is attached to correspondence between the GSGS and the Surveyor General at Windhoek requesting a copy of the map and covering the transmittal of blueprints. All of the notations on the von Frankenberg map were translated. See CM, Annex 1, pp. 17-18, para. 14d.

244 See, e.g., the authoritative German dictionaries, J. Grimm and W. Grimm, *Deutsches Wörterbuch* (1862), (1984), (1855), which offered the following definition: '*Flusz*, *der Flusz teilt sich in drei Arme*;' ('River, The river divides into three branches;'); R. Klappenbach and W. Steinitz (eds.), *Wörterbuch der deutschen Gegenwartssprache, herausgegeben* (1977) p. 5]: '*Fluß, der*; *der F. nimmt Nebenflüsse auf, teilt sich in mehrere Arme, verzweigt sich*,' ('The river; the river takes in affluents, divides into several branches, branches out,'); and G. Kampcke (ed.), *Handwörterbuch der deutschen Gegenwartssprache, herausgegeben von einem Autorenkollektiv unter* (1984)]: '*fluß/Fluß* -*arm, der, abzweigender Teil eines Flusses*;' ('river -branch, the branching out section of a river;'). See also, e.g., the authoritative German hydrology text, J. Mangelsdorf and K. Scheurmann, *Flußmorphologie* (1980) p. 192 et seq., where the authors use the word *Arme* when they describe the branching out of various rivers and their tributaries (*Haupt- und Nebenflüsse*) such as the Po River in Italy dividing into several branches ('*in mehrere Arme aufgespalten*'). For the convenience of the Court, Namibia has provided relevant copies of all cited pages from these works as Annexes 12, 14, 15 and 16 to this Counter-Memorial.

245 The one exception is an 'Engl. stat.' at Kazungula on the east bank of the Zambezi near the confluence of the two rivers.

246 See NM, paras. 296-300.

247 See NM, Part Two, Chapter IV(B).

248 BM, p. 117, n.8.

249 See NM, paras. 298-299.

250 See, e.g., BM, para. 291.

251 And its derivative Bechuanaland Protectorate 1:1,250,000 Bechuanaland Survey Dept. 1935.

252 For further analysis of the map, see CM, Annex 1, p. 19, para. 16.

253 CM, Annex 8, p. 71.

254 BM, para. 275.

255 BM, para. 275(a).

0 See *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, *I.C.J. Reports* 1986, p. 566. To illustrate its point, the Court cited South America and French West Africa as examples where intracolony boundaries became international boundaries upon independence. See *id.*

1 BM, para. 275(b).

2 See CM, Annex 1, p. 9, para. 8.

3 See CM, Annex 8, pp. 77-78.

4 BM, para. 275(c).

5 Bechuanaland Protectorate 1:1,250,000 Bechuanaland Survey Dept. 1935, a reduction of 2.5 times of GS 3915. See NM, Annex 102, p. 14, para. 24.

6 See CM, Annex 1, p. 21, para. 16e; NM, Annex 102, p. 16, para. 27.

7 See CM, Annex 1, p. 21, para. 16e; NM, Annex 102, p. 16, para. 28.

8 BM, para. 275(d).

9 See CM, Annex 1, p. 20, para. 16c.

10 See NM, Annex 102, p. 14, para. 24.

11 See NM, Annex 102, p. 13, para. 23.

12 BM, para. 277.

13 See CM, Annex 1, p. 23, para. 17.

14 BM, para. 279.

15 See NM, Annex 105.

16 NM, Annex 106, para. 1.

17 See BM, para. 278.

18 See NM, Atlas, Maps X/2, X/1.

19 BM, para. 282.

20 See BM, para. 300.

21 See BM, para. 174.

22 Id.

23 See BM, Annexes 41, 42.

24 BM, Annex 43.

25 See NM, para. 324.

26 See BM, paras. 286, 287.

27 See CM, Annex 1, p. 8, para. 7b.

28 BM, para. 297.

29 BM, para. 292.

30 NM, Annex 115, p. 209.

31 BM, para. 280.

32 See *Taba Award (Egypt v. Israel)* (1988) 80 *I.L.R.*, p. 287 ('The Tribunal does not consider these map-based indications to be conclusive since the scale of the map . . . is too small to demonstrate a location on the ground as exactly as required in these instances where the distances between disputed pillar locations are sometimes only of a few metres').

33 See *Temple of Preah Vihear (Cambodia v. Thailand)*, *Judgment*, *I.C.J. Reports* 1962, pp. 26, 33-34.

34 See *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment*, *I.C.J. Reports* 1986, pp. 584, 648, 649.

35 BM, para. 294.

36 In some of the maps discussed here, Kasikili Island is especially emphasised or made to appear somewhat larger than it is so as to portray it and the boundary in relation to it more clearly. See, e.g., Namibia 1:1,000,000 United Nations 1985 UN Map No. 3158, NM, Atlas, Map XV/4; Africa 1:2,000,000 War Office GSGS 2871 Sheet Rhodesia, Fig. 4, following p. 75.

37 See BM, Chapter VIII(g)(iii).

38 The 24 relevant maps are listed in CM, Annex 1, pp. 33-34, para. 23.

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INTERNATIONAL COURT OF JUSTICE

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

**COUNTER-MEMORIAL
OF
THE REPUBLIC OF NAMIBIA**

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**COUNTER-MEMORIAL
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THE REPUBLIC OF NAMIBIA**

VOLUME III

**SUPPLEMENTARY REPORT
TO THE EXPERT REPORT ON THE**

**IDENTIFICATION OF THE
MAIN CHANNEL OF THE CHOBE RIVER
AT KASIKILI ISLAND**

by Professor W. J. R. Alexander

28 NOVEMBER 1997

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