

**INTERNATIONAL COURT OF JUSTICE**

**CASE CONCERNING KASIKILI/SEDUDU ISLAND**

**(BOTSWANA/NAMIBIA)**

**COUNTER-MEMORIAL OF THE**

**REPUBLIC OF BOTSWANA**

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## CHAPTER 1

### The History of the Dispute

#### (A) The Purpose

1. The case proposed by Namibia consists of two interlinked arguments based upon a certain version of the subsequent conduct of the parties and an alleged independent title related to prescription. These two legal arguments are alleged to receive confirmation from the scientific evidence offered on behalf of Namibia.
2. It is thus the arguments based upon subsequent conduct and prescription which are the essence of the Namibian legal case. In this context it is to be appreciated that these two arguments, both taken separately and operating in tandem, are built upon four propositions, as follows:
  3. *First*: Namibia has had the continuous and exclusive occupation and use of Kasikili/Sedudu Island since 1890 or 'from the beginning of the century' (the Namibian Memorial offers different dates).
  4. *Secondly*: this alleged occupation takes the form of the episodic agricultural activities on the Island of peasants from the village of Kasika, which is sited within Namibia.
  5. *Thirdly*: that the village of Kasika was allegedly no more than an associate of a village actually sited on Kasikili/Sedudu Island.
  6. *Fourthly*: that there was no dispute prior to 1984 and, consequently, there was no interruption in an alleged Botswana acquiescence in the putative adverse possession until 1984.
7. The individual legal elements in the Namibian Memorial will be examined in the appropriate chapters. The present purpose is to deal at the very outset with these contentious and misleading assertions which are disseminated throughout the Namibian Memorial.
8. The four propositions on which Namibia relies are intended to mask the realities which can be summarised as follows:
  9. *First*: the Anglo-German Agreement of 1890 was, in so far as it stipulated a river boundary along the Chobe, self-executing. No withdrawal of officials was called for, as it was in the case of Article IV of the Agreement (relating to West Africa).

G1 - Map A; The Chobe District and Eastern Caprivi Strip

10. Secondly: none of the officials concerned in the administration of the Eastern Caprivi (South West Africa) or Chobe District (Bechuanaland Protectorate) in the colonial period regarded the activities of the local population as title-generating. There is no evidence to suggest that either German or, subsequently, South African officials, had authority from central government to carry out activities which had the purpose of modifying the treaty boundary.

11. Thirdly: the available evidence establishes that there was no village on, and no permanent population living on, Kasikili/Sedudu Island.

12. Fourthly: the dispute originated in the exchanges between the British and South African Governments in the period 1948 to 1951 and, consequently, in any event there could be no question of acquiescence from 1948 onward.

13. Fifthly: there was no evidence of British acquiescence at any stage. British officials regarded the boundary as determined by the Anglo-German Agreement and recognised that the northern channel was the 'main channel'. Moreover, since these officials did not regard the agricultural activities of people from the Caprivi on Kasikili/Sedudu Island as title-generating, the question of protest or opposition could not arise. After independence in 1966 Botswana maintained the same legal position.

14. Sixthly: when the use of the island for agricultural purposes was prohibited by the British authorities in 1960, when the Chobe Game Reserve was created, there was no protest from any source in Namibia. Moreover, when, after thirty-two years, a Namibian official, in the course of making proposals for commercial development, made representations at local level, no reference was made to any disruption of the agricultural activities of people from Kasika: see the Report of the District Commissioner at Kasane, Mr. Mayane, dated 7 March 1992 (Annex 43).

### **(B) The Namibian Assertions**

15. Before the evidence is examined further, it is necessary to indicate the precise character of the Namibian assertions concerning the chronology of events and the history of the dispute.

16. The key passages in the Namibian Memorial are as follows.

G5 - 1997 aerial photograph of Kasikili/Sedudu Island

(i) "2. Moreover, by virtue of continuous and exclusive occupation and use of Kasikili Island and exercise of sovereign jurisdiction over it from the beginning of the century, with full knowledge, acceptance and acquiescence by the governing authorities in Bechuanaland and Botswana, Namibia has prescriptive title to the Island." (emphasis supplied) (Namibian Memorial, p.4, para. 14)

(ii) "Throughout these many changes, the British officials just across the Chobe River in Bechuanaland, and after 1966 the Botswana authorities, were fully aware that Kasikili Island was continuously and exclusively used by the Basubia people and ruled by the authorities currently in charge of South West Africa. Yet not once, throughout the whole period of British rule in Bechuanaland, did the British authorities raise a formal or explicit challenge, protest or objection to this state of affairs. Even after Botswana's independence, almost two

decades elapsed before an exchange of fire with a South African patrol boat in the southern channel finally led Botswana for the first time to challenge the existing status quo on the Island." (emphasis supplied). (Namibian Memorial, p.10. para. 31)

(iii) "The control and use of Kasikili Island by the Masubia of Caprivi, the exercise of jurisdiction over the Island by the Namibian governing authorities and the silence by Botswana and its predecessors persisting for almost a century with full knowledge of the facts confirm the conclusion, reached as a matter of analysis of the text of the Treaty, that Kasikili Island is a part of Namibia" (emphasis supplied) (Namibian Memorial, p.60, para. 166).

(iv) "Namibia and its predecessors were in peaceful possession from before the beginning of the century and exercised sovereign power over the Island from the time of the establishment of the first German station in the Caprivi in 1909, all in clear view and with the full knowledge of the Bechuanaland authorities at Kasane, on the south side of the Chobe, only a kilometre or two from the Island. After becoming independent in 1966, Botswana itself was aware of the facts, but remained silent for almost two further decades." (emphasis supplied). (Namibian Memorial, p.69, para. 188).

(v) "The territorial situation existing at the moment of Botswana's independence, 30 September 1966, is defined by the conduct of the colonial powers on the ground up to that moment. The evidence of that conduct is discussed at length in Chapters II, III, IV and V. It demonstrates that Botswana's colonial rulers had recognised, without interruption from at least 1909, that Kasikili Island was a part of Namibian territory." (emphasis supplied). (Namibian Memorial, p.72, para. 193).

(vi) "254. The remainder of this Chapter analyzes the conduct since 1890 of the British authorities (in London and Bechuanaland) and of the government of Botswana since its independence in 1966. The record is one of unbroken silence and inaction, let alone formal protest or objection, persisting for almost a century, despite full and continuous knowledge of the occupation and use of Kasikili Island by Namibia. The legal requirements for acquiescence are amply fulfilled.

"255. During the entire period from 1890 to 1966, when they were responsible for the administration of Bechuanaland, the British authorities, with full knowledge of the facts set forth in the two preceding sections concerning Namibian/Masubia occupation and use of Kasikili Island and German and South African exercise of sovereignty there, failed to protest, object or interfere in any way with the situation as it existed. As is shown in para. 258, *infra*, this unbroken record of silence and passivity contrasted markedly with British conduct in neighbouring areas where it was the colonial power. After Botswana became independent, Botswana maintained its silence for almost two additional decades." (emphasis supplied). (Namibian Memorial, p.102).

(vii) "Submissions ...

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." (emphasis supplied). (Namibian Memorial, p.141)

17. These confident assertions are unfounded both in fact and in law. The evidence will be analysed in detail below. By way of a preamble it is necessary to underline the impressionistic

and cloudy mode of argumentation adopted by Namibia. Even within the corners of the key propositions advanced by Namibia there are substantial inconsistencies. Thus, the key propositions quoted above employ three versions of the beginning of the period of alleged Namibian 'occupation' of the island, as follows:

(i) 'Since 1890' or 'from 1890' (second, sixth and seventh quotations above).

(ii) 'From the beginning of the century' (first quotation above).

(iii) 'From the time of the establishment of the first German station in the Caprivi in 1909' or 'from at least 1909' (fourth and fifth quotations above).

### **(C) Evidence Relating to the Period 1890 to 1914**

18. According to some of the Namibian assertions quoted above, the subsequent practice or conduct of the parties relevant to title by prescription in favour of Namibia begins in 1890 at the time of the conclusion of the Anglo-German Agreement. This is an extravagant scenario. The German administration of the Caprivi Strip did not begin to develop until after 1909 and, indeed, this is recognised by the Namibian Government in its Memorial: see pages 29-30, paras. 77-8; pages 88-93, paras, 222-32. As the Memorial explains:

"Although the Caprivi Strip was allocated to Germany by the Anglo-German Treaty of 1890, formal administration was not established until 1909". (Namibian Memorial, p.88, para. 222).

19. The Namibian Memorial fails to refer to a single act of jurisdiction on behalf of Germany relating to Kasikili/Sedudu Island. But the Namibian Memorial seeks to avoid this considerable difficulty by the argument that the agricultural activities of the Basubia on the island were title-generating:

"It was through Chikamatondo and the Masubia tribal organization that German rule of the Eastern Caprivi was carried out". (Namibian Memorial, p.92, para. 230).

20. This argument is unacceptable for a number of reasons. In the first place, the Namibian Government invites the Court to assume that, because the chiefs of the Basubia derived recognition of their tribal status from the colonial overlord to act in relation to tribal matters, therefore the chiefs had authority to act as agents of the German State in matters involving territorial sovereignty. This is a total non-sequitur. No evidence is offered that such authority existed either in German colonial law or in the general international law of this period.

21. At this point the Court is requested to consider the consequences of the Namibian argument in the context. The context is the conclusion of the Anglo-German Agreement. The Agreement came into force immediately and the provisions of Article III relating to the Chobe River sector were self-executing. Would any diplomat or administrator in the contemporary world have accepted that the partition boundaries were to be alterable by reference to forms of local legitimacy? The Anglo-German Agreement divided the traditional territories of the Basubia. Accordingly, the issue is not one of the rights of the Basubia but whether at the relevant time the island formed part of German South West Africa or British Bechuanaland.

22. In this connection it is helpful to refer to the provisions of Article VII of the Anglo-German Agreement:

"The two Powers engage that neither will interfere with any sphere of influence assigned to the other by Articles I to IV. One Power will not, in the sphere of the other, make acquisitions, conclude treaties, accept sovereign rights or protectorates, nor hinder the extensions of influence of the other."

"It is understood that no Companies nor individuals subject to one Power can exercise sovereign rights in a sphere assigned to the other, except with the assent of the latter."

23. In all the circumstances it is implausible to suggest that the title could be generated by the agricultural activities of the Basubia. As will be seen in due course (Chapter 9, paras. 682-93), local administrators did not hold the view that the activities of the peasants from the Caprivi could modify the alignment created by the Anglo-German Agreement. This view is not to be found in any source prior to the emergence of the dispute in the period 1948-51 (below, paras. 44-50) and was not referred to by either the United Kingdom or South Africa in the course of those exchanges. There is simply no evidence that indirect rule conferred competence upon the Caprivi chiefs to make or unmake international boundaries.

24. This view was not invoked in the transactions of 1984 and 1985 involving Botswana and South Africa and culminating in the Joint Survey Report. Such a competence was not asserted to exist between 1890 and 1994, at which stage it was employed for the first time by Namibia during the proceedings of the JTTE.

25. None of the German maps produced in this period provide conclusive evidence that Kasikili/Sedudu Island was politically a part of the Caprivi Strip (Chapter 8, paras. 568-88).

G4 - Map D: Chobe District and the Eastern Caprivi Strip showing permanent cross-channels between the Zambezi and Chobe Rivers

26. There is no evidence relating to the period 1890 to 1914 to the effect that the German and British Governments were aware of any difficulty concerning the application of the provisions of the Anglo-German Agreement in the vicinity of Kasikili/Sedudu Island. The Namibian Memorial (pages 105-9, paras. 263-73) examines the Anglo-German diplomatic correspondence of the period 1909 to 1914 with reference to the well-known controversy concerning the application of that part of the Anglo-German Agreement which stipulated that Germany should have a corridor not less than twenty miles in width between the 21st meridian and the Chobe.

27. This problem raised issues relating to the western part of the boundary but not the sector of the Chobe which includes Kasikili/Sedudu Island. The Namibian Memorial adopts the view that the correspondence contains no evidence of a dispute relating to the identification of the 'main channel' in the vicinity of the island (Namibian Memorial, p.106, para. 265; p.107, para. 267). The Government of Botswana is of the same opinion.

28. During this period (1909 to 1914) the British Government was concerned in case the issue of the main channel should become part of the process of arbitration with Germany which was under provisional consideration: see the Botswana Memorial, Annex 16; and the Namibian Memorial, Annexes 44 to 46). The Secretary of State, Lord Harcourt, accordingly

commissioned a study of the question (Botswana Memorial, Annex 16), and Captain Eason of the Bechuanaland Protectorate Police was ordered to carry out a reconnaissance of the Chobe River. The Report was acknowledged by Lord Harcourt on 26 October 1912 (Botswana Counter-Memorial, Annex 7).

29. In his Report (Botswana Memorial, Annex 15) Captain Eason states:

"Two miles above the rapids lies Kissikiri Island. Here I consider that undoubtedly the North should be claimed as the main channel. At the western end of the island the north channel at this period of the year is over one hundred feet width and 8 feet deep. The south channel about forty feet width and four feet deep. The south channel is merely a back water, what current there is goes round the North. The natives living at Kasika in German territory are at present growing crops on it." (Botswana Memorial, Vol. III, pp. 234-5).

30. Two points may be emphasized. In the first place, Captain Eason does not regard the cultivation of the island by the residents of Kasika as relevant to the issue of sovereignty. Secondly, he takes the view that, whilst Kasika is in 'German territory', the island of Kasikili/Sedudu was not. It may also be noted that Captain Eason did not record the existence of a village on the island. This was the position when he signed his Report on 5 August 1912. Nor does Captain Eason's map (No. 2 at p.242 of Vol. III of the Botswana Memorial) indicate a village on the island.

G2 - Map B: Relief of Kasikili/Sedudu Island

31. It may also be noted that it did not occur to Captain Eason to regard the Seiner Map, which was the first of the appendices to his Report, as in any way decisive on the question.

32. The Namibian Memorial (page 108, para. 271) refers to Captain Eason's recommendation that 'undoubtedly the North should be claimed as the main channel' (see the quotation above, para. 29), and draws the implication that 'until then, the northern channel had not been claimed as the main channel.' This implication lacks any foundation. In particular, it is based on a misunderstanding of a treaty-related title. The boundary is self-executing and it was ascertainment of the identity of the main channel which was required. The introduction of the concept of 'claim' suits Namibian assumptions about title. Captain Eason, of course, was not employed to prepare a legal analysis, but to confirm the identification of the main channel.

33. The alleged failure 'to follow up on Eason's recommendation' is linked by Namibia to the Temple Case (Namibian Memorial, pp.108-9, paras. 271, 273). Two points arise. First, given the character of the boundary, there was no call for the British Government 'to follow up on' the recommendation. Secondly, the Temple Case involved the use of a map over a period of fifty years (1908 to 1958) in the forum of active diplomacy and negotiations. There is no comparison whatsoever with the function of Eason's internal Report, which was at no point used in negotiations with the German Government.

34. The available evidence indicates that there was no 'subsequent practice' relating to the Anglo-German Agreement in the period 1890 to 1914. The British Government no doubt made arrangements relating to the contingency of an arbitration but that is all. The use of the island by people from the Caprivi was not regarded as decisive of title and tells us nothing as to whether the parties understood the northern or southern channel to be the main channel. Eason's Report on the contrary, when read in relation to other documents, makes it clear that

the British Government already held the view that the northern channel was the main channel. This was the view of the Secretary of State, Lord Harcourt, in 1911:

"I have the honour to acknowledge the receipt of your despatch, Confidential, No. 4 of the 30th November, relative to the boundaries of the Caprivi Zipfel, and to forward, for your information, copies of correspondence with the Foreign Office on this subject, from which you will observe that it is proposed to refer to arbitration the Article III of the Anglo-German Agreement of 1890 which lays down the southern boundary of the territory.

2. I take this opportunity of observing that in the second clause of Article III, of the Anglo-German Agreement of 1890 it is stated that the boundary "descends the centre of the main channel of that river (i.e. the River Chobe) to its junction with the Zambesi". As, in this section of its course, the River Chobe divides into more than one channel which afterwards reunite, the question as to which is the main channel will require consideration. I have to request, with reference to the enclosure to Lord Selborne's despatch, Confidential (2), of the 11th of April, 1910, that I may receive all available information from local sources in support of the view that the north channel is the main channel. Such information should be accompanied by a map and, if possible, by measurements of the streams, and should be in a form which can if necessary, be laid before the arbitrator as part of the case of His Majesty's Government)." (emphasis supplied) (Lord Harcourt to the High Commissioner, 14 January 1911; Botswana Memorial, Annex 16).

35. The British attitude in this period is also evidenced by the Sketch Map of the Bechuanaland Protectorate to Illustrate Military Report, produced by the British authorities in 1906. (Botswana Atlas, Map 6). Both this and a further edition of 1909 show the boundary on the north bank of the Chobe River : see below, Chapter 8, para. 566. German maps produced in the period were inconclusive. Seiner accepted that the boundary followed the thalweg of the Chobe River and the 1912 Map produced under the authority of the German Resident in the Eastern Caprivi, Von Frankenberg, clearly showed the southern channel as the inferior side-tributary, 'the flüss-arm', of the main northern channel.

#### **(D) Evidence Relating to the Period 1915 to 1947**

36. After the defeat of German armed forces in South West Africa in 1915, martial law was enforced in the Caprivi Strip. With effect from 1 January 1921 South West Africa was placed under a League of Nations Mandate, and martial law was ended. From 1922 until 1929 the Governor-General of the Union of South Africa delegated responsibility for the administration of the Caprivi (as part of the Mandated Territory of South West Africa) to the British High Commissioner for South Africa. This responsibility was exercised by the Bechuanaland Protectorate, and accordingly the Caprivi was administered 'as if it were a portion of the Bechuanaland Protectorate': see the Proclamation of 31 March 1922, Botswana Memorial, Annex 19.

37. The period includes a development which provides evidence that the Basubia Chief of this period, Liswaninyana, found it necessary to seek authority from the Resident Magistrate at Kasane for his people to use the island. In a letter dated 26 January 1948, Mr. Redman, the District Commissioner at Kasane (Bechuanaland Protectorate) reported to the Government Secretary (Mafeking) as follows:

"5. Since the attached report was prepared I have received further information from an inhabitant of the Island that in 1924 a Caprivi Chief named Liswaninyana applied to Captain Neale, the Resident Magistrate at Kasane, for permission for his people to plough on the Island and graze cattle there. This was evidently granted verbally as no written agreement is known. At this time Government Oxen were grazing on the Island but they were removed in 1925. Before 1924 the same informant told me that there was one Caprivi family ploughing there but they had no authority to do so.

6. In defence of the Claim to ownership on the grounds of prescription evidence could therefore be produced to show that this Government occupied the Island in 1925. This fact together with the acknowledgement by the people that they applied for permission to use the Island in 1924 should cause any Claim of prescriptive rights to be rejected.

7. In conclusion it must be stated that the surrender of this Island would prevent this Territory from having free use of the Chobe River, which may one day become an extremely important waterway." (Botswana Memorial, Annex 22)

38. This refers to a clear exercise of jurisdiction on behalf of the Bechuanaland Protectorate. The attitude of Captain Eason had been that Kasikili/Sedudu did not form part of the German Caprivi in 1912. It is very unlikely that other British officials would take a different view only twelve years later.

39. The documents available show that in the period 1915 to 1929 there was no dispute concerning the boundary in the vicinity of Kasikili/Sedudu Island. Thus the relevant Government report on administration of the Caprivi Zipfel in the period 1914 to 1922 makes no reference to a boundary problem affecting the relevant sector of the Chobe River: see Namibia Memorial, Annex 52.

40. It is significant that, when the Dominions Office in London canvassed boundary issues arising from the Anglo-German Agreement in the period 1926 to 1932, no reference was made to any problem relating to Kasikili/Sedudu: see Namibia Memorial, Annexes 53-57. In the period 1930 to 1932 the South African Government, in its role as administrator of the Mandate in South West Africa, and the British Government, representing the Governments of Northern Rhodesia and the Bechuanaland Protectorate, were involved in a series of transactions relating to the siting of the western terminal beacon of the northern boundary of the Caprivi Zipfel on the line from Andara to Katima Mulilo. This issue was related to a technical problem encountered in applying the Anglo-German Agreement, once it became clear that Andara was south of the eighteenth parallel. The details are not important for present purposes: see Botswana Counter-Memorial, Annex 15; and the Namibian Memorial, Annexes 53 to 57. It is the absence of any reference to the boundary in the vicinity of Kasikili/Sedudu Island which is significant. It was clearly not on the agenda.

41. In the period 1930 to 1947 there were no developments relating to Kasikili/Sedudu and no evidence of any challenge to the status quo recognised by Lord Harcourt (in 1911), Captain Eason (in 1912) and Captain Neale (in 1924). The absence of any dispute in this period is confirmed by the Magistrate for the Eastern Caprivi, Major Trollope, in his Report on the Administration of the Eastern Caprivi Zipfel, prepared in 1940 (Namibia Memorial, Annex 58). From 1939, the Eastern Caprivi was administered by the Department for Native Affairs, South Africa (Proclamation No. 147 of 1939 (South Africa)), and Major Trollope was the first

official to be appointed by this Department in South Africa's "more energetic administrative effort" (Namibian Memorial, p.96, para. 240) to take control of this region.

42. Major Trollope's conclusion is of particular relevance for present purposes:

"It only remains to add the pleasant statement that relations with surrounding territories and their administrations have been of the happiest. I wish especially to mention the great assistance that has been rendered to me by Mr. Buxton-Wickins, the Provincial Commissioner at Livingstone, and by Mr. Craufurd-Benson, the District Commissioner at Sesheke. Appreciation is also due both to the Bechuanaland Protectorate Government for allowing their Police Officer at Kasane to assist in patrolling portion of the Strip (for which purpose he has been appointed a "Peace Officer") and to Sergeant-Major C.A. Webb personally for the keen and efficient manner in which he has carried out that duty." (Namibia Memorial, Annex 58, pp.32-3).

43. Thus the principal administrator for the Eastern Caprivi makes no reference to any difficulty relating to the boundary. This opinion is of particular significance, in light of the fact that it was Major Trollope who was to make an attempt to challenge the status quo in 1948. This episode will be described below.

#### **(E) The South African Attempt to Challenge the Status Quo and Correspondence between the British and South African Governments in the Period 1948 to 1951**

44. In 1947 Mr. Ker, acting on behalf of the Zambesi Transportation and Trading Company, sought permission to use the northern channel of the Chobe in the vicinity of Kasikili/Sedudu for the purpose of transporting timber by barge from Serondela upriver to Katombora. This involved correspondence with Major Trollope, Chief Magistrate in the Eastern Caprivi, and Noel Redman, then the Acting District Commissioner at Maun.

45. Major Trollope proposed a local investigation and he and Redman prepared a Joint Report, dated 19 January 1948 (Botswana Memorial, Annex 22), which was duly sent to the British and South African Governments. The sequel was a significant exchange of correspondence between the two governments and the emergence of a South African proposal for a modification of the boundary (South African letter dated 14 February 1949; Botswana Memorial, Annex 25).

46. The final outcome was an affirmation of the 'existing legal position' concerning the boundary by the British Government (letter dated 10 May 1951; Botswana Memorial, Annex 30). The entire episode will be examined in detail in Chapter 9. For present purposes it is necessary only to emphasise certain key elements in the correspondence involved. In the first place, South Africa adopted the view that it was necessary to propose a modification of the existing boundary. Secondly, from the outset the South African Government recognised that the main channel was the northern and western channel. Thus, in its letters dated 14 October 1948 the South African Government, in relation to the Joint Report of Trollope and Redman, observed:

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

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

It has been confirmed, as a result of exhaustive enquiries, that there has been no shifting of the main channel of the river from South to North within living memory. The facts, therefore, point to the maps being incorrect." (Botswana, Memorial, Annex 23).

47. On the basis of the maintenance of the legal status quo, the two Governments agreed upon a modus vivendi involving practical arrangements locally: see below, Chapter 3, paras. 167-71. At no stage did any South African official challenge the view that the northern channel constituted the main channel for the purposes of the Anglo-German Agreement. Thus, in its letter dated 10 May 1951 (Botswana Memorial, Annex 30), the British Government stated that 'it is assumed that the free use of the main channel of the Chobe, to the north of the Island, would continue to be assured under the international rules governing waterways that form the common boundary of two States.' (emphasis supplied). This characterisation was not challenged by South Africa.

48. When the agreement reached between the two Governments was referred to the local administrators for action, further correspondence ensued between Major Trollope (in the Eastern Caprivi) and Mr. V.E. Dickinson, Acting District Commissioner (at Kasane). It is relevant to note that during these exchanges Major Trollope emphasised that, prior to the application of Mr. Ker relating to transport of timber, there had been no previous dispute.

49. Thus, in his letter to Dickinson dated 4 August 1951, Trollope observed:

"3. In all the years past there have never been any difficulties - indeed even the question of the use of the "Northern Waterway" was never a real issue. Not a single boat, craft or person was ever hindered in its use. Even the redoubtable W.C. Ker used it the whole time he ran service to Sirondellas without any let or hindrance at all. But that loquacious and tendentious gentleman was never satisfied unless he was raising some tremendous issues, with large reference to Barcelona treaties, international waterways etc. etc. And it was he who quite unnecessarily persuaded Redman to raise the issue." (Counter-Memorial, Annex 24).

50. The general result of the diplomatic exchanges of the period 1948 to 1951 was the preservation of the status quo ante. However, the South African Government and its agents recognised that the main channel was the northern channel and the British Government affirmed its legal position on the application of the Anglo-German Agreement.

## **(F) The Maintenance of the Status Quo, 1951 to 1984**

### **(i) The General Picture**

51. The Namibian Memorial, anxious to present a picture of Botswana's 'acquiescence, acceptance and recognition' of South African exercise of sovereignty over Kasikili/Sedudu, makes the following extravagant assertion:

"During the entire period from 1890 to 1966, when they were responsible for the administration of Bechuanaland, the British authorities, with full knowledge of the facts set forth in the two preceding sections concerning Namibian/Basubia occupation and use of Kasikili Island and German and South African exercise of sovereignty there, failed to protest,

object or interfere in any way with the situation as it existed. .... After Botswana became independent, Botswana maintained its silence for almost two additional decades." (Namibian Memorial, p.102, para. 255).

52. This analysis cannot be relied upon. No credible evidence is offered of the alleged 'Namibian/Basubia occupation' of the island. The matter appears to be dealt with at pages 98 to 100 (paras. 245-49) of the Namibian Memorial, but (in relation to the period 1953 to 1990) no single piece of evidence is offered of activities on the island in this period. (For the general position relating to map evidence, the Court is respectfully referred to Chapter 8 below).

53. More significantly, the analysis ignores the high level correspondence of 1948-1951 (see above) which clearly revealed the existence of a dispute and involved the formal affirmation of the legal position by the British Government in 1951. Against this background the alleged failure to protest is a fantasy. Governments only protest when there is a need. Moreover, in the subsequent years nothing happened which should have provoked a protest. The activities of people from Kasika were not regarded as title-generating by British officials and their Botswana successors and, in any case, there is very little evidence of any such activities after 1958. The evidence in this respect will be examined further in Chapter 9 below.

## **(ii) The Termination of the Mandate over South**

West Africa and the Independence of Botswana in 1966

54. In 1966 Botswana became independent. There is no reason for supposing that this had any effect on the legal position concerning the boundary in the vicinity of Kasikili/Sedudu Island, and Namibia has not made any contrary suggestion.

55. Also in 1966 the League of Nations Mandate in respect of South West Africa was terminated by the United Nations General Assembly (G.A. Res. 2145 (XXI), 27 October 1966, (Botswana Counter-Memorial, Annex 30).

1943 aerial photograph

56. The Namibian Memorial does not suggest that this change had any legal effects on the dispute. Indeed, it assumes a continuity of entitlement on the part of South Africa. This assumption of continuity is evidenced in many ways and it will suffice to give three examples.

(a) After referring to the termination of the Mandate, the Namibian Memorial states: 'Thereafter, the evidence is that the South Africans exercised de facto control over Namibia, including the Island'. (Namibian Memorial, p.99, para. 246).

(b) In the chapter on prescription reference is made to 'German and South African exercise of sovereignty' in respect of the Island. (ibid., p.102, paragraph 255, quoted above).

(c) The Namibian Memorial also relies upon South African military operations against SWAPO forces as evidence that South Africa 'was exercising jurisdiction over the Island ...' (Memorial, p.100, para. 248).

57. The Government of Botswana does not accept that the South African military operations in the vicinity of the Island could play a role either in maintaining or in creating title. On the

more general point of continuity the Government of Botswana observes that during the JTTE proceedings both sides relied upon transactions involving the South African Government in their submissions.

**(iii) The Prohibition of Agricultural Activities as a Result of the Establishment of the Chobe Game Reserve: the Absence of Protest from the South African Authorities in the Period 1960 to 1992**

58. The Namibian case is built upon an alleged 'occupation' of the Island by the Basubia, allegedly on behalf of the South African Government, in the period of the Mandate, and thereafter until Namibia's independence in 1990 (Namibian Memorial, p.100, para. 249). The evidence available indicates that from 1960 onwards all cultivation was prohibited on the island by the authorities of British Bechuanaland and Botswana as a consequence of the establishment of the Chobe Game Reserve (subsequently constituted as the Chobe National Park).

59. If the Namibian allegations of fact had any basis, the exclusion of the Basubia from the Island would have provoked protests from the authorities in South West Africa. In fact no representation was made until March 1992 (Botswana Counter-Memorial, Annex 43). When a representation was made, it related to the proposal from a Namibian entrepreneur to construct a tourist centre on the Island, and had no relation to cultivation.

60. This picture is confirmed by the talks between a 'delegation of Caprivians' and a Botswana delegation in 1981 at Katima Mulilo. The Minutes of the meeting appear in the Botswana Memorial, Annex 29. The meeting was concerned to discuss local problems and yet no single reference was made to Kasikili/Sedudu Island. The Namibian Government accepts this but asserts, without any supporting evidence, that this was because 'both parties were satisfied that Sidudu was part of Caprivi' (Namibian Memorial, p.115, para. 282, quoting a South African document of 1984).

61. The Chobe Game Reserve was established by High Commissioner's Notice No. 65 of 1960 (Botswana Memorial, Annex 32). Both this measure and subsequent legislation provided that the northern boundary of the Game Reserve corresponded with the international boundary of the Bechuanaland Protectorate and of Botswana. The subsequent legislation was as follows:

(i) The Fauna Conservation Proclamation, 1961 (Botswana Memorial, Annex 33). (First Schedule).

(ii) Government Notice No. 86 of 1964 (Botswana Memorial, Annex 34).

(iii) The National Parks Act, 1967 (Botswana Memorial, Annex 37) (Schedule (Section 3)) (and see also Botswana Counter-Memorial, Annex 31).

(iv) The Chobe National Park (Amendment of Boundary) Order, 1980 (Botswana Counter-Memorial, Annex 33).

(v) The National Parks Constitution Order, 1987 (Botswana Counter-Memorial, Annex 38).

62. The use of the international boundary as the northern limit of the Game Reserve necessarily involved the inclusion of Kasikili/Sedudu Island within the Reserve. This was confirmed by the Opinion of Mr. Renew, the Surveyor-General of the Bechuanaland Protectorate, in 1965 (Botswana Memorial, Annex 36).

G6 - Graphic based on Chobe District, TRP 6. 72-1, 1:250,000, 1975, Department of Surveys and Lands, Gaborone (Map 22 in Supplementary Atlas)

63. The fact that the Island formed part of the Chobe Game Reserve and, subsequently, of the Chobe National Park, is confirmed by official documents (in the form of plans) published respectively in 1975 (at page 31), 1980, and 1983. (See the Botswana Counter-Memorial, Supplementary Atlas, Maps 19-24). These plans clearly include the Island with the Chobe National Park. Whilst the earliest available is dated 1975, the presumption of continuity must apply. The plans were prepared to accompany the legal description of the National Park in the relevant statutory instruments and this purpose is expressly indicated on the Plan of 1980. It is also evidenced by the memorandum on the Chobe National Park Boundary, dated April 1983, which refers to Plan BP 179(a) deposited with the Director of Surveys and Lands. (Annex 34)

64. Finally, the status of the Island as part of the Chobe National Park is confirmed in the evidence of former custodians of the National Park. The various Game Wardens and other officials appointed to control poaching in the Game Reserve and based in Kasane, regarded the Island as part of the Game Reserve and subject to their jurisdiction. This was the opinion of successive responsible officials and Game Wardens in the period 1961 to 1979. The Court is respectfully requested to refer to the Affidavits of Brian Egner (District Commissioner in 1961) (Annex 48), Timothy Liversedge (Warden, 1969-70) (Annex 50), Michael Slogrove (Senior Game Warden, 1972-8) (Annex 51), and Dominic Diau (Warden, 1977-9) (Annex 47).

65. The Senior Game Warden, after Egner's Commissionership terminated, was Patrick Hepburn, who held the office from 1962 to 1970. His son, Peter Hepburn, who has lived in the district since 1962, has, in his Affidavit (Annex 49), reported the situation in the period 1962 to 1970 thus:

'(1) I am a male adult Professional Hunter and Trader resident in Kasane. (2) I have lived in Kasane since 1962. (3) The facts deposed to herein are unless otherwise stated, within my personal knowledge, true and correct. (4) My father, Charles Patrick Hepburn, was the first Game Warden of the Chobe National Park from 1962 to 1970. (5) During this time we lived on the bank of the Chobe River opposite the Sedudu Island. (6) I have been involved in the wildlife safari industry in and around Kasane for most of my adult life. (7) I am very familiar with the Chobe river from its entrance into Botswana to where it runs into the Zambezi river at Kasungula. (8) In all my time boating on the river in the Chobe National Park, I have observed the behaviour and changes of behaviour in the wildlife utilising the river and its banks. (9) In this time, I have observed that the hippo population in the river around Sedudu Island has always used the Southern Channel around the Island as their main territory. (10) This has been because the Southern Channel has always been shallow, thus enabling the hippo to sleep and rest in the water. (11) The entrance into the side Channel (Southern Channel) at the Western end of Sedudu Island has always been a very shallow section of the river with sand banks becoming exposed during the low water period and rocks being a hazard for boats. (12) In recent years, with the increase in the buffalo population in the Chobe National Park,

the herds have taken to crossing onto Sedudu Island to feed during the winter months. These buffalo cross the Southern Channel with ease.'

66. The Affidavit of Michael Slogrove is of particular significance. His tenure as Senior Game Warden overlapped with an increase in incidents involving armed poachers. In his opinion the Island formed part of the Chobe National Park. As he observes in his Affidavit:

'I had at all times regarded Sedudu Island as part of the Chobe National Park, and indeed I did confirm with the first President of the Republic of Botswana, Sir Seretse Khama, that the Island was part of the Park. This was during a visit to Kasane by the late President in 1972.'

67. Mr Slogrove describes an episode in 1976 in which he and some assistants confronted two armed poachers on the Island. He also describes the erection of a buoy in the middle of the river, with a signpost to the effect that river traffic was entering Chobe National Park and that permits were required.

68. It is clear from the evidence of these officials that no cultivation took place on the Island in the period 1961 to 1979.

69. Two other sources of evidence confirm the absence of agricultural activities on the Island in this period. In the first place, the Honourable Chief Moraliswani had confirmed, in his evidence to the JTTE that the people of Kasika ceased cultivation on the Island in 1937: Namibian Memorial, Vol. III, Annex 2, p.209. Secondly, the aerial photographs taken in 1943 (at page 27), 1962, May 1972, November 1972, 1981 and 1985, show no signs of settlement or other human activity (see the Attachment to this Counter-Memorial).

#### **(iv) The Hypothesis of Discussions in 1974-5**

70. An internal South African Defence Force memorandum (dated 27 November 1984) contains the following passage:

"6. Kindly note that, already in 1974/75 discussions took place between the RSA and Botswana regarding Sidudu/Kasiua (sic) territory. It is reported that at the time, it was agreed that Sidudu formed part of the Caprivi. Efforts to obtain the minutes of the discussions have thus far been unsuccessful, and it seems unlikely that it would still be found." (Namibian Memorial, Annex 84).

71. The Botswana Government has no record of such a meeting, and the South African authorities admit that they have no record. The passage quoted above constitutes unsubstantiated hearsay and Namibia's reliance upon it should be discounted: see the Namibian Memorial, p.100, para. 248; p.115, para. 282.

#### **(G) The Intergovernmental Agreement of 1984 and the Joint Survey Report of 1985**

72. After an incident involving Botswana and South African Defence Forces in November 1984, the Governments of Botswana and South Africa agreed to constitute a team to carry out a joint survey for the express purpose of determining whether the 'main channel' of the Chobe River was located to the north or to the south of Kasikili/Sedudu Island: see the Botswana Memorial, pages 75-85.

73. The resulting Joint Survey Report of 5 July 1985 (Botswana Memorial, Annex 48) was an official document produced with the joint authority of the Governments of Botswana and South Africa. The Report confirmed that the main channel of the River Chobe lies to the north of Kasikili/Sedudu Island. The Government of Botswana accepted the Joint Survey Report as legally binding and as confirming its view on the question of title.

74. During a high level meeting between the Botswana and South African Governments in Gaborone on 13 October 1986, the Botswana delegation stated their view that there was no need for further negotiations, because the inter- governmental Joint Survey 'had confirmed their view that the island was part of Botswana'. The relevant passage is set forth in paragraph 5 of the 'Summary Minutes' of the meeting produced by the South African Department of Foreign Affairs': Botswana Counter-Memorial, Annex 37. The internal 'Record of Discussions' produced by the Department of External Affairs of Botswana appears in Annex 51 of the Botswana Memorial (see para. 18).

75. In the aftermath of this meeting and in face of the continued prevarication by South African officials, on 22 October 1986 Botswana informed South Africa that it had acted in accordance with the Joint Survey Report and had thus occupied the Island. The Government of Botswana expressed its views as follows:

"Pula has the honour to refer to discussions held on 13 October, 1986 in Gaborone between Foreign Affairs officials of the two sides and, in particular, to the question of Sidudu/Kasikili Island in the Republic of Botswana.

It will be recalled that the Botswana side submitted that Sidudu/Kasikili Island is part of the territory of Botswana, as confirmed by the Botswana/South Africa joint team of experts which reported to the two Governments in July, 1985. Pula wishes to inform Secextern that the Government of Botswana has since occupied Sidudu/Kasikili Island and expects the Government of South Africa to respect the sovereignty and territorial integrity of the Republic of Botswana in respect of the Island." (Botswana Memorial, Annex 52).

76. At this point the South African Government again prevaricated. On 17 November 1986 it responded as follows:

"Secextern has the honour to refer to Pula's telex no 164 of 21 October 1986; with regard to the Chobe River boundary in the vicinity of the Sidudu/Kasikili Island.

Secextern wishes to convey to Pula the following:

- - The Sidudu/Kasikili border issue addresses the international boundary between Botswana and South West Africa/Namibia;

- - 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.

- - Alternatively, the South African Government would be willing to convene a meeting where Botswana, South West Africa/Namibia and South Africa could all be represented and where the relevant issue could be finalised.

Secextern would appreciate the serious contemplation of the abovementioned proposal by the Botswana Government and would prefer to have this long-standing matter settled as soon as possible." (Botswana Memorial, Annex 53).

77. This reasoning has no merit. In the first place, Botswana had carefully consulted with the United Nations Council for Namibia and the South-West African People's Organization (SWAPO) before holding talks with South Africa: see the Botswana Memorial, pp.75-6, paras. 166-71. The approval of the United Nations Commissioner for Namibia was also obtained (Botswana Memorial, Annex 43).

78. Secondly, the South African Government was legally bound by the Pretoria Agreement of 19 December 1984 and the conclusions of the Joint Survey Report (Botswana Memorial, Annex 48). The Government of Botswana continues to rely upon the legal validity of those intergovernmental instruments. It is also worth noting that the South African Government was only making a proposal and that no express challenge to the Joint Survey Report was expressed until the proceedings of the JTTE in 1993-4.

79. There is a further consideration of the first importance. Both during the proceedings of the JTTE, and in its Memorial in the present proceedings, the Government of Namibia has relied upon South African acts, statements and transactions, whenever this has seemed to be convenient. In this respect Namibia cannot be allowed to approbate and reprobate. The principle of good faith requires consistency of dealing.

80. In this context it is to be recalled that the Namibian Memorial asserts that after the termination of the Mandate in 1966 no action South Africa 'might now take could in any way limit or derogate from Namibia's rights'. (Namibian Memorial, p.116, para. 285). This assertion is completely inconsistent with the policy of the Memorial in invoking South African activities as evidence of title in the period ending in 1990: see the Namibian Memorial, p.100, paras. 248-9; and 114-16, paras. 281-5.

81. It is also to be recalled that the Government of Namibia approached the South African Government of the time for assistance. The approach was prompted by the publication of an Aide-Mémoire by the Government of Botswana dated 10 March 1992. (Botswana Counter-Memorial, Annex 44) in which Botswana affirmed its sovereignty in respect of Kasikili/Sedudu. In its letter of 19 March 1992 to the South African Minister, Mr. Botha, the Government of Namibia stated the following:

"Enclosed herewith is an Aide Memoire issued on 10th March 1992 by the Botswana High Commission in Windhoek.

A serious claim is made in the said Aide Memoire that "a team of experts made of surveyors from the Republic of South Africa and Botswana was assembled in 1985 to go and determine the actual boundaries of the disputed island."

The Aide Memoire further claims that those 'surveyors'

'... reported that the island belonged to Botswana territory as determined by the main channel on the north of the Island.'

The Namibian Government is utterly astounded by this and considers it as a matter of grave concern which seriously threatens the sovereignty and territorial integrity of the Republic of Namibia."

"According to the Botswana Aide Memoire, the South African former colonial administration is being implicated in having given encouragement to and acquiesced in Botswana's territorial claim over our country which has now resulted in an unlawful occupation of a part of Namibian national territory by the Botswana Defence Force.

Honourable Minister, I write this letter in the light of the latest alarming revelation in the above-mentioned Aide Memoire to request your Government to clarify its position in this matter and particularly to provide the Namibian Government with a copy of the report of the joint South Africa/Botswana survey team.

I should be most grateful if you personally and your Ministry could be of assistance to my Ministry, bearing in mind the claims made by the Botswana Government." (Botswana Counter-Memorial, Annex 44).

82. The Namibian letter elicited the first formal indication that South Africa had reneged on the Pretoria Agreement and the Joint Survey Report. This took the form of the following Note dated 26 April 1992 from Mr. R.F. Botha to Mr. Theo-Ben Gurirab:

"I refer to your letter of 19 March 1992 and must inform you that the Republic of South Africa has at no time 'given encouragement to and acquiesced in Botswana's' claim to Sidudu Island.

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 South African authorities have therefore suggested to Botswana in a telex dated 17 November 1986 that the matter be taken up with the Government of an independent Namibia. This was not acceptable to Botswana as they considered the joint survey's report to be conclusive and in fact expressed the opinion that "no further discussion of the matter is necessary".

The matter has therefore not been resolved as South Africa has never officially recognised Botswana's claim to Sidudu Island.

I trust that the aforementioned will put matters into perspective and would assist you in your negotiations with the Botswana Government.

Please accept, Mr. Minister, the assurance of my highest consideration." (Namibian Memorial, Annex 88).

83. This unfortunate episode provides a further example of Namibia's reliance upon South African unilateral opinions, in a context in which South African assistance had been actively solicited.

84. In conclusion the Government of Botswana would invite the Court to recall the clear terms in which South Africa had committed itself (at the Pretoria Meeting on 19 December

1984) to a decisive resolution of the issue concerning the identification of the 'main channel'. Thus, in the Minutes prepared by Botswana, the key passage reads:

"10. Mr. Maré from the chair proposed that the boundary at Sidudu/Kasikili be examined by an ad hoc committee, and recommended that this work be extended to include the whole boundary with the cooperation of the two Survey Organisations. This suggestion was discussed.

Mr. Mokama stressed the need for urgency on the Sidudu/Kasikili Island section.

Mr. Fitschen commented on the costs of such a survey.

Mr. Mokama was concerned about his Government's reaction to the involvement of the Armed forces at present in the area.

Brigadier Klopper wanted the Sidudu/Kasikili Island problem sorted out now.

Mr. Steward suggested that Mr. Rautenbach's proposal (9) be expanded.

From the chair Mr. Maré agreed that the term 'urgent' be added for the Sidudu/Kasikili Island section." (Botswana Memorial, Annex 44, p.371)

85. Mr. Maré represented the South African Department of Foreign Affairs.

86. The South African Minutes contain the following passage:

"The Meeting agrees that a joint survey should take place as a matter of urgency to determine whether the main Channel of the Chobe River is located to the north or the south of the Sidudu/Kasikili Island. Officials of the Botswana Department of Surveys and Lands and the South African Directorate of Surveys and Mapping will proceed with arrangements for the survey as soon as practicable." (Botswana Memorial, Annex 46, p.378).

87. In all the circumstances it was natural that Botswana should regard the outcome of the Pretoria Agreement as conclusive, and it was in this context that the Government of Botswana informed the South African Department of External Affairs that it was exercising its sovereignty over the island (above, para.75).

#### **(H) The Implementation of the Intergovernmental Agreement of 1984 and the Joint Survey Report of 1985**

88. In its telex dated 22 October 1986 to the South African Government, the Government of Botswana stated that it had 'occupied Sidudu/Kasikili Island' and that it expected the Government of South Africa 'to respect the territorial sovereignty and territorial integrity of the Republic of Botswana in respect of the Island.' (see above, paragraph 75).

89. The telex of 22 October 1986 was the sequel to the discussions between Foreign Affairs officials of the two States held on 13 October 1986 in Gaborone. During those discussions the Government of Botswana indicated that the Joint Survey Report had confirmed the title of Botswana in respect of the Island. In face of South African prevarication Botswana decided to

take steps to affirm the existence of Botswana's sovereignty and to do so by symbolic means, that is to say, the hoisting of the national flag.

90. It is relevant to note that Namibia first presented a formal protest some years later, in a letter dated 14 February 1996 (Namibia Memorial, Annex 90). The Court is respectfully asked to note that the assertion in the Memorial of Namibia (page 2, para. 5) that the flag hoisting and the erection of military observation posts took place in 1991 lacks any foundation in fact.

91. The practical position calls for careful appreciation. The Island cannot support a population in consequence of the seasonal floods. Since 1960, it has formed part of the Chobe Game Reserve (subsequently the Chobe National Park) established in that year: see above, paras. 58-64. It is common knowledge that poachers, from Namibia and Zambia, frequent the Chobe River. In response to poaching activities on the Island, since 1987 the Botswana Defence Forces have had an intermittent presence on the Island.

92. In this context the hoisting of the Botswana flag and the construction of observation posts by the Botswana Defence Forces reflected both the reaffirmation of title, subsequent to the Joint Survey Report, and the exercise of sovereignty for the practical purpose of protecting the abundant wildlife which frequents the Island.

#### **(i) The Developments in the Period 1987 to 1992**

93. The period 1990 to 1992 involved generally stable relations between Botswana and Namibia. Namibia had finally achieved independence on 21 March 1990. Botswana's President was the first foreign Head of State to visit Namibia after independence. On 26 July 1990 the two neighbours concluded a Protocol of Understanding on Defence and Security (Botswana Counter-Memorial, Annex 41), which established a Joint Commission for Defence and Security.

94. The only persistent problem on the boundary in the Chobe District was that of poaching within the Chobe National Park and Botswana in consequence maintained regular anti-poaching patrols.

95. On 6 March 1992 there was an episode of considerable legal significance. Without due observance of protocol, the Namibian Deputy Minister for Home Affairs, who was present in the Caprivi, requested a meeting with the District Commissioner at Kasane, Mr. S.T. Mayane. No notice of an agenda was given.

96. The contemporary report prepared by Mr. Mayane (Annex 43) reveals that the Namibian Deputy Minister used the occasion to assert that Kasikili/Sedudu Island was Namibian and to complain about the presence of the Botswana flag on the Island. Mr. Mayane explained that he had no authority to discuss such questions, and that 'proper channels of communications should be followed.'

97. As has been pointed out already this representation was the first to be made from the Caprivi side of the Chobe since Major Trollope's initiative in 1948. In spite of the claims of the Namibian Memorial relating to the use of the Island by people from Kasika (in the Caprivi), cultivation on the Island has been prohibited since 1960. Yet no protest had been made and, when the Namibian Deputy Minister made his complaint thirty-two years later, it was, according to the knowledge of Botswana officials, the result of a proposal by a Namibian

entrepreneur to construct a tourist centre on the Island, and had no relation to the alleged interest of people from the Caprivi to cultivate.

98. It may be recalled that the previous diplomatic episodes of 1948 to 1951 and 1984 to 1986 did not involve any issue relating to the use of the Island for agricultural purposes. The first-mentioned concerned an application by the Zambezi Transportation and Trading Company to use the northern channel for transporting timber by barges. The episode of 1984 to 1986 resulted from an incident involving South African Defence Forces and the Botswana Defence Forces completely unrelated to use of the island for agricultural purposes.

99. The result of the informal initiative of the Namibian Deputy Minister on 6 March 1992 appears to have been the sending of the Honourable Dr. Gaositwe Chiepe, the Foreign Minister of Botswana, as a Special Envoy to meet the President of Namibia. The Foreign Minister was introduced by a letter dated 3 April 1992 in which the President of Botswana affirmed the sovereignty of Botswana in respect of Kasikilu/Sedudu Island (Botswana Counter-Memorial, Annex 45). The Court will note that in doing so, the President of Botswana relied upon the Pretoria Agreement of 1984 and the resulting Joint Survey Report. (Botswana Memorial, Annex 48).

100. Eventually the Governments of Botswana and Namibia agreed to accept the mediation of His Excellency Robert G. Mugabe of Zimbabwe and the three Heads of State met at Kasane on 24 May 1992. In the result it was agreed that the boundary question should be submitted for decision by a Joint Team of Technical Experts: see the Official Communique issued at Kasane on 24 May 1992 (Botswana Memorial, Annex 55).

### **(J) Conclusion**

101. From this history the following features emerge:

*First:* there was no dispute in existence before 1948.

*Secondly:* the dispute emerged in the diplomatic correspondence between the British and South African Governments in the period 1948 to 1951 and was identified as a dispute concerning the identification of the main channel of the Chobe River for the purposes of Article III of the Anglo-German Agreement.

*Thirdly:* the outcome of the correspondence in the period 1948 to 1951 was a clear and formal reservation of legal rights by the British Government, a position which, as a matter of general principle, Botswana inherited at the time of independence in 1966.

*Fourthly:* at no stage did Botswana relinquish the title inherited at independence or acquiesce in any competing claim.

*Fifthly:* in 1984 the Governments of South Africa and Botswana entered into a legally binding agreement to settle the dispute by means of a Joint Survey conducted by experts appointed by the two Governments. In this context the dispute was again characterised in terms of the identification of the main channel of the Chobe River for the purposes of the Anglo-German Agreement. As the Report of the Joint Survey states under the heading 'Authority for Survey':

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

Representatives of the two national survey organisations accompanied by co-workers from the Departments of Water Affairs have now been to the area to survey the 'Thalweg' in the vicinity of the island. Specific mention is made to the Thalweg in the 1890 Agreement between England and Germany." (Botswana Memorial, Annex 48).

*Sixthly*: in the event South Africa prevaricated in face of the unanimous conclusions of the Joint Survey Report but avoided any challenge either to the legal validity or to the technical quality of the instrument.

102. The final legal outcome can be summarised as follows:

*First*: the Joint Survey Report remains a valid legal instrument.

*Secondly*: Namibia inherited the benefits and obligations of the transactions of 1984 and 1985 at the time of independence.

*Thirdly*: the purported repudiation of the instruments of 1984 and 1985 by Mr. Botha was without legal effect.

## **CHAPTER 2**

### **The Diplomatic Resurgence of the Boundary Dispute**

#### **(a) History of the Dispute**

103. The history of the boundary dispute is the subject of Chapter 1. The purpose of the present chapter is to trace and portray the dispute at the diplomatic level in more recent times, specifically from 1984 to date, as well as to assess its impact on the relations between Botswana and Namibia.

#### **(B) Apartheid Violence**

104. The period between 1980 and 1988 witnessed the escalation of social conflict in South Africa, generated by the policy of racial segregation, or apartheid. The neighbouring countries were sucked into the vortex of this conflict as the South African regime undertook to defend apartheid even beyond its borders by launching military attacks against these countries. The rationale was that resistance to apartheid was engineered from outside, and that the neighbouring states either promoted or condoned anti-apartheid resistance from their territory.

#### **(C) Non-Aggression Pacts**

105. The South African regime therefore sought to create a buffer of pliant states in the fight against liberation forces operating from outside. This was to be achieved through a series of non-aggression security pacts, or outright military attacks combined with economic strangulation. Those neighbouring states which were unwilling to address South Africa's concerns were not only attacked but were also occupied, as in the case of the occupation of southern Angola from 1982 to 1988.

#### **(D) Peaceful Co-existence**

106. Against this background, Botswana took a policy position of peaceful co-existence towards South Africa. She was only too aware of her lack of military capacity and of her economic dependence on her big neighbour. As a signatory to the 1951 Geneva Convention relating to the Status of Refugees, Botswana had to give refuge and succour to all those who fled from political oppression and social injustice in their countries. However, the implementation of this policy had to be pragmatic, in order for Botswana to strike the correct balance between honouring her obligations under international law and assuring South Africa and Rhodesia that Botswana territory was not being used by the liberation movements to launch attacks against them. It should be noted, in this context, that Botswana did not establish an army until 1977 when Rhodesia began to attack the border villages lying in the north-east of the country, under the pretext of conducting hot-pursuit operations. Hitherto, Botswana's stability had reduced the need for the establishment of a defence force.

107. It will be recalled that by April 1984, South Africa, apart from being the de facto power in Namibia, was occupying southern Angola. South Africa had imposed the so-called non-aggression pacts on Mozambique and Swaziland, and had established trade missions in all the neighbouring countries, except Botswana and Zambia. South Africa therefore exerted all forms of pressure on Botswana, in order to force her to sign a non-aggression pact and to agree to the establishment of a quasi-diplomatic office similar to those obtaining in other countries of Southern Africa: see Botswana Counter-Memorial, Annex 40.

#### **(E) Pressures on Botswana**

108. Botswana experienced the full range of pressures exerted by South Africa, which used such instruments of foreign policy as propaganda, economic and political pressure, as well as military power. Botswana was labelled as the main infiltration route for the liberation movement. This was a convenient accusation because Botswana shared the longest border with South Africa. The pressure point was that a non-aggression pact would, among other things, facilitate the exchange of intelligence and joint patrols of the border against guerrilla infiltration. When Botswana refused, she was accused of being an accomplice. Government agencies and officials were accused of collusion with the liberation movement in its fight against the apartheid regime. In Botswana's view, the cause of violence in South Africa was the policy of apartheid itself, which needed to be eradicated, if peace and stability were to be achieved.

109. Other forms of pressure included sustained vilification, as a bad and uncooperative neighbour and, therefore, unworthy of western support. A border slowdown was also introduced at the end of 1987, in order to disrupt cross-border trade and services. Subtle economic pressures, such as spreading stories that Botswana was unsafe for tourism and investment, were imposed. Military raids were launched against Botswana under the pretext of flushing out guerrilla bases hidden in the urban areas. The most sustained of such raids was

launched against Gaborone, the capital city, on June 14, 1985, which resulted in the killing of twelve innocent people and the destruction of property.

110. As a result of this unprovoked military raid, the United Nations Security Council adopted Resolution No. 568 (1985) (Botswana Memorial, Annex 49) which condemned the unprovoked attack against Botswana as an act of aggression, and a violation of its territorial integrity and national sovereignty. The Resolution also reaffirmed Botswana's right to receive and give sanctuary to the victims of apartheid in accordance with its traditional practice, humanitarian principles and international obligations.

111. Again, on 19 May, 1986 helicopters of the South African Air Force attacked the suburbs of Gaborone, the capital city, killing a school teacher and a footballer in his sleep. They also attacked the Botswana Defence Force Barracks and injured an unarmed soldier. Similar raids were launched against Zambia and Zimbabwe on the same day. As a result of this raid, the Commonwealth Eminent Persons' Group had to cut short its mission to South Africa, which was intended to facilitate dialogue amongst South African political antagonists.

112. On 14 June 1986, a young woman was shot and killed by two hooded gunmen believed to be South Africans and, on 1 January 1987, a 72-year old woman was also killed in the border town of Ramotswa, some 40 kilometres south of Gaborone. The footprints of the attackers were followed into South Africa. These two incidents left no doubt in the minds of the people of Botswana as to the military intentions of South Africa.

113. Incidents of military pressure against the people of Botswana continued unabated. On 28 March 1988, three women and a South African refugee were killed in their sleep by a unit of the South African army. On 20 June 1988 a South African army detachment fired on a Botswana Police patrol team, injuring three of them 10 kilometres inside Botswana territory. The South African government initially said their soldiers had exchanged fire in self-defence along the border, but later admitted that they had been on a reconnaissance patrol inside Botswana. The Government of Botswana rejected the claim that South Africa had the right to send patrols into its territory and her position was upheld by the international community through condemnatory statements, including the Statement issued by the President of the United Nations Security Council on 24 June 1988: see Botswana Counter-Memorial, Annex 39.

114. One particularly serious incident occurred in October 1984 when a South African Defence Force gunboat ventured into Botswana territory through the southern channel of the Chobe River around Kasikili/Sedudu Island. The incident was witnessed by the Botswana Defence Force anti-poaching patrol team, which is responsible for protecting wildlife against poachers in the area. When the intruders were warned against violating Botswana territory, they opened fire. The Botswana side fired back in self-defence, thus forcing the South Africans to back off. A strong diplomatic protest was communicated immediately by telephone to the South African Government (Botswana Counter-Memorial, Annex 35).

115. The October 1984 incident epitomised the critical juncture of the dispute. It was as a result of this incident that a meeting of 19 December 1984 was held in Pretoria, between the delegations of Botswana and South Africa. The Pretoria meeting produced an Agreement to establish a Joint Survey Team of Experts to determine the boundary around Kasikili/Sedudu Island by identifying the major channel between the southern and the northern channel: see Botswana Memorial, Annex 44.

## **(F) Boundary Pressures**

116. Throughout the length of the Botswana-South African border, particularly the northern border along the Chobe River and the eastern border along the Limpopo River, South Africa exerted pressure on Botswana by violating her sovereignty and territorial integrity. It was quite common for the South African army commandos to cross into Botswana territory, both in the Chobe District and elsewhere, to harass villagers and farmers, under the pretext that they were looking for guerrillas intent upon springing attacks into South Africa. Violation of Botswana territory was also conducted in the air, where South African Airforce planes often entered Botswana airspace unchallenged, along the Chobe River and elsewhere, presumably to spot some imaginary guerrilla formations moving through Botswana territory.

## **(G) Boundary Dispute**

117. Botswana knew only too well that unless the matter was resolved quickly, South Africa would create a climate conducive to outright military confrontation and occupation. However, before Botswana could hold talks with the South African authorities on the shooting incident, Botswana sent a high-powered delegation to New York in November, to brief the United Nations, which was the de jure authority for Namibia as well as the representatives of the South West Africa People's Organisation, (SWAPO) (Botswana Memorial, Annexes 41-43). It should be noted that, on issues affecting the international territory of Namibia, Botswana had adopted a policy of briefing the United Nations and SWAPO before taking them up with the South African authorities. Both the UN and SWAPO empathised with Botswana over the shooting incident and gave their blessing for her to proceed to discuss with South Africa the boundary dispute around Kasikili/Sedudu Island. The South Africans had claimed that their patrol boat had been shot at while navigating on the Namibian side of the common boundary. Botswana and South Africa then agreed to hold discussions on the boundary dispute on 19 December 1984 in Pretoria, South Africa (Botswana Memorial, Annex 44).

118. At that meeting, it emerged that the maps used by the South African side indicated the small southern channel as the boundary, whilst those used by Botswana showed the northern channel as the boundary. It was because of these differing perceptions of the boundary that it was agreed to set up a joint team of technical experts to establish which of the two channels was the main channel and, therefore, the boundary around Kasikili/Sedudu Island. Although the agreement to send the joint team of technical experts to the Chobe River was finalised in December 1984, it was not until July 1985 that the South Africans despatched their component of the team, a delay of 9 months. In the intervening period, Botswana had to send repeated reminders to the South African side in order to have the joint team assemble at the Chobe River. The Joint Survey Report (Botswana Memorial, Annex 48) was produced in the same month of July and it confirmed that the northern channel was indeed the main channel and was, therefore, the boundary between Botswana and Namibia around Kasikili/Sedudu Island.

119. On 4 November 1985 following the publication of the Joint Survey Report, the Department of External Affairs of Botswana sent a diplomatic note to the Department of Foreign Affairs of South Africa, asking them to acknowledge and to implement the Report (see Botswana Memorial, Annex 50). The South African Government chose to ignore the Botswana communication on the subject. There was complete silence over the matter until October the following year when the two sides met at the official level in Gaborone,

Botswana. The intervening period was punctuated by incidents involving South African violation of Botswana territory and outright military attacks against the civilian population.

120. It was not until the meeting of officials held in Gaborone on 13 October 1986 that the South African side took the opportunity to respond, formally, to the proposal made by Botswana in November the previous year. The meeting discussed mostly cross-border security issues in which South Africa accused Botswana of allowing guerrillas to launch attacks from her territory. It was towards the end of the meeting that the South African side suggested that the status quo be maintained on the question of Kasikili/Sedudu Island, till political circumstances permitted direct negotiations. The Botswana side saw no scope for negotiations because a joint Botswana-South African team of experts had confirmed that the island belonged to Botswana. Botswana's view is that the issue would never have arisen, if it had not been for the shooting incident around the island between the two countries the previous year. The South African delegation responded that they would look at the question once again: see Botswana Memorial, Annex 51.

121. Seeing that the South Africans were not fulfilling their promise of looking at the question again, the Botswana side decided, on 22 October 1986, to communicate with South African Foreign Affairs (see Botswana Memorial, Annex 52). This communication recalled the meeting of 13 October 1986 at which the Botswana side had stated that "there was no room for negotiations because a joint team of experts had confirmed that the island belonged to Botswana": see Botswana Memorial, Annex 51. The communication further informed the South African Government that Botswana had since occupied Kasikili/Sedudu Island, and expected South Africa to respect the sovereignty and territorial integrity of the Republic of Botswana.

122. The context of this communication was that the South African Government was acting in bad faith, following the publication, in July 1985, of the Joint Survey Report which confirmed the northern channel as the boundary. It was clear from Botswana's point of view that South Africa had decided to back-pedal when it realised that the Joint Report had found that the northern channel was the boundary. The South African Government had ignored a proposal made by Botswana Government in November 1985 for South Africa to acknowledge and implement the Joint Survey Report of July 1985.

123. The meeting of 13 October 1986 had provided an opportunity for South Africa to pronounce itself unequivocally on the Joint Report. But again, the South African side prevaricated, and suggested that the issue be deferred till such time that political circumstances permitted direct negotiations between Botswana and Namibian authorities. This was unacceptable, because the Joint Team of Experts had established the northern channel as the major channel. Besides, Botswana could not negotiate with an unrepresentative government in Namibia, a creation of the apartheid regime in South Africa.

124. The *raison d'être* of the communication of 22 October 1986 was that, since it had become clear that South Africa was prevaricating on the proposal to acknowledge and implement the Report, Botswana could not stand idly by. In any event, South Africa's apparent reluctance to implement the Report could not prevent Botswana from reiterating the correct legal position. Recognising her lack of military capacity, Botswana resorted to diplomatic language and skill. The rendering "that Botswana had since occupied Kasikili/Sedudu Island and expects the Government of South Africa to respect the sovereignty and territorial integrity of the Republic of Botswana," was the strongest language Botswana could afford to use in telling South

Africa not to violate her territory again, in the area around Kasikili/Sedudu Island. If Botswana was militarily capable, the communication could have simply stated that, following the finding of the Joint Team that the northern channel was the boundary, South Africa should henceforth keep off the southern channel, as it was in Botswana territory.

125. It took the South Africans more than three weeks to respond on 17 November 1986 (Botswana Memorial, Annex 53). Their response confirmed Botswana's suspicion that South Africa wanted to use the incident to force Botswana into recognising the illegitimate government created by South Africa in Namibia. Their response suggested that since the border issue addresses the international boundary issue between Botswana and Namibia, "the Cabinet of South West Africa/Namibia should be approached by the Botswana Government for a proper resolution of the matter". Alternatively, the South African Government would be willing to convene a tripartite meeting where Botswana, South West Africa/Namibia and South Africa could all be represented and where the issue could be finalised.

126. Botswana saw through South Africa's stratagem and rejected the idea of holding talks with South Africa's puppet regime in Namibia. This was even more objectionable as the issue had been resolved by the Joint Team which established the northern channel as the boundary. Botswana responded within five days, stating that "The Joint Botswana/South Africa Team of Experts were never asked to demarcate an international boundary but 'to determine whether the main channel of the Chobe River is located North or South of Sedudu Island'": Botswana Memorial, Annex 54. The Joint Team confirmed what had always been the fact, namely, that the main channel is located to the north of the island, and that is where the boundary is. It is therefore clear that adequate clarification of the matter had been made to satisfy normal requirements and no further discussion of the matter was necessary.

127. The boundary dispute between Botswana and South Africa around Kasikili/Sedudu Island thus ended on the diplomatic front. In practical terms, South Africa never again challenged Botswana's sovereignty over the Island. No South African boat patrol ventured again into the southern channel. The South Africans respected Botswana's sovereignty by patrolling only in the northern channel. Meanwhile, the combination of civil war at home and fighting wars in Namibia and Angola proved too much for South Africa. The New York Agreements were thus signed at the end of 1988, and triggered the implementation of the UN Resolution 435 (1978) which brought about the independence of Namibia. (Botswana Memorial, Annex 38).

128. Botswana thought the issue was dead and buried until 6 March 1992 when a Namibian Deputy Minister for Home Affairs summoned the Botswana District Commissioner based in Kasane to Kasika in the Caprivi Strip (Botswana Memorial, Annexes 41 and 42). The Minister pressed the case for Namibia's claim of Kasikili/Sedudu Island and repeated his demands on Namibian Television. It will be observed that the channels of communication which the Minister chose to deploy were unfortunate and out of character with the existing good relations between Botswana and Namibia. No attempt was made to take up the issue through diplomatic channels until Namibian public opinion had been turned against Botswana and until Zimbabwe had indicated that Namibia was accusing Botswana of grabbing its territory. Given the cordial relations between Botswana and Namibia, the logical expectation was for Namibia to address its grievances directly to Botswana. But this was not to be.

### **(H) The Kasane Summit**

129. The Presidents of Botswana and Namibia then met as a result of the intercession of the President of Zimbabwe, at Kasane, in Botswana on 24 May 1992 and agreed to establish a Joint Team of Technical Experts to determine where the boundary lies, in terms of the Anglo-German Agreement of 1890 (see Botswana Memorial, Annex 55). The Joint Team's finding was to be final and binding on Botswana and Namibia. From the very outset, it became clear that the outcome would be inconclusive, as the Namibia component of the Joint Team had, from the outset, adopted an adversarial attitude. It was owing to the inconclusive nature of the Joint Team's Report (Botswana Memorial, Annex 58), that Botswana took the position that the International Court of Justice was the only forum for resolving the boundary dispute definitively.

### **(I) The Legacy of Apartheid**

130. It is a sad commentary that, today, Botswana and Namibia find themselves at loggerheads over a boundary dispute inherited from the days of apartheid South Africa, which was the de facto power in Namibia until 21 March 1990. It is not beyond the capacity of apartheid South Africa that, when anticipating its own demise, it should decide to bequeath its own legacy of instability to haunt independent African countries long after it had been eradicated as an unworkable and unsustainable system of government.

## **CHAPTER 3**

### **The Substantial Flaws in the Namibian Memorial**

#### **(A) Introduction**

131. The Namibian Memorial deploys a mass of factual assertions, frequently unsupported by evidence, together with an eccentric articulation of mutually contradictory legal arguments. With this background, the Government of Botswana has decided to provide, at an early stage, a convenient guide to the principal eccentricities and evasions on which the Namibian case is built.

#### **(B) The Strategy of Namibia: The Discounting of the Anglo-German Agreement**

##### **(i) The Strategy of Namibia**

132. In its Memorial (paras. 8-16) the Government of Botswana explained the centrality of the Anglo-German Agreement of 1890 to the dispute now before the Court. It was pointed out that this centrality has been accepted by Namibia and is reflected in the provisions of the Special Agreement (Memorial, paras. 17-20).

133. The strategy of Namibia is to discount the significance of the 1890 Agreement and this is pursued in three ways:

*First:* the major emphasis in the Namibian Memorial is upon an asserted title by prescription, that is, a title operating independently of the Agreement of 1890.

*Secondly:* the Namibian Government relies upon a scientific criterion for the determination of the main channel which is eccentric in the extreme and which, more significantly, could not have been present to the minds of the statesmen concerned in the negotiation of the 1890 Agreement.

Thirdly: the Namibian Government offers the Court a theory which would seriously erode the function of the 1890 Agreement in constituting a boundary and which provides the basis for submissions which are incompatible with the Special Agreement.

### **(ii) The Major Emphasis is upon Title by Prescription**

134. The Memorial of Namibia devotes less than five pages to the actual text of the Agreement of 1890 (pp.45-9). The major proportion of the pleading is devoted to the development of a case based upon prescription (pp.59-139). The relevant section of the Namibian Memorial, Part Two, is entitled: 'The Subsequent Conduct of the Parties to the Anglo-German Treaty of 1890 and Their Successors in Title with Relation to Kasikili Island' (p.59). However, this heading does not reflect the real substance of the argument pursued in Part Two of the Namibian Memorial.

135. The text is in fact entirely frank about the direction to be taken. Thus the introduction to Chapter 1 of Part Two sets the tone:

"The subsequent conduct of the parties to the Treaty set forth below is relevant to the present controversy in three distinct ways. In the first place, it corroborates the interpretation of the Treaty developed in Part One. Second, it gives rise to a second and entirely independent basis for Namibia's claim under the doctrines concerning acquisition of territory by prescription, acquiescence and recognition. Finally, the conduct of the parties shows that Namibia was in possession of the Island at the time of termination of colonial rule, a fact that is pertinent to the application of the principle of *uti possidetis*". (emphasis supplied). (Memorial, p.60, para. 165).

136. The introduction to the second section of this chapter is no less emphatic:

"The conduct of the parties for the century after 1890 establishes that Namibia is entitled to sovereignty over Kasikili Island by operation of the doctrines of prescription, acquiescence and recognition, entirely independently of its treaty-based claim. Although much scholarly analysis has gone into developing distinctions between these three sets of doctrines, the fundamental elements relevant to all three are the facts that will be established in the succeeding chapters of this Part of the Memorial: (1) continuous, open and notorious occupation and use of the territory in question over a long period of time; (2) exercise of sovereignty in the territory; and (3) failure of the other party, having knowledge of these facts, to object, protest or assert its rights." (emphasis supplied). (Memorial, p.66, para. 180).

137. The opening passages of Chapter IV of the Memorial provide further illumination:

"251. As noted in Chapter I of this Part, acquiescence is an essential element - some would say the essential element - in the acquisition of prescriptive title. As Johnson says, 'the essence of prescription is the acquiescence, express or implied, of the one state in the adverse possession of the other.' Indeed, Brownlie seems to conclude that all of the other requirements are subsumed under that of acquiescence.

252. MacGibbon has defined acquiescence as 'the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights. He goes on to say, 'it is not intended to connote the forms in which a State may signify its consent or approval in a positive fashion. Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection.' All the authorities agree that absence of protest is sufficient to establish acquiescence if it continues over a sufficiently long period of time .....". (emphasis supplied) (Memorial, p.101; footnotes omitted).

138. These passages expressly invoke a title based upon prescription and its congeners and it is invoked as an 'entirely independent basis for Namibia's claim' (see para. 135 above; together with para. 136). This method of pleading reveals certain unattractive tensions and contradictions in the Namibian argument. The most obvious contradiction lies in the need for major legal reinsurance in the form of an argument based upon prescription. The prescription argument is offered independently of the 1890 Agreement, and could only become relevant to Namibia's concerns if the Namibian interpretation of the Agreement is unsustainable.

139. In this form the alleged evidence of prescriptive title cannot be accepted as 'subsequent practice', because in such a hypothesis the working assumption is precisely the existence of a title of Botswana (or its predecessor) which allegedly is displaced by the operation of prescription. The prescription argument must assume that the original (treaty-based) title of Botswana has been displaced by a process having no connection with the 1890 Agreement. 'Subsequent practice' cannot claim its status if the material adduced is ab initio antithetical to the concept of 'subsequent practice'.

140. The reliance on prescriptive title must assume a prior state of affairs which is presumed to be lawful and based upon the application of the 1890 Agreement. Moreover, as a title operating independently of the Agreement, as the Namibian Memorial insists, the alleged possession could not be *à titre de souverain* in terms of the 1890 Agreement. Such a conception of the subsequent legitimation of an alleged possession is antithetical to the concept of 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation', according to the provisions of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. In this connection it is remarkable that Namibia is unwilling to attach any significance to the occasion in 1984 when the South African and Botswana Governments did agree expressly on the application of the 1890 Agreement: see the Botswana Memorial, Chapter IV, and below, paras. 241-46.

141. The preponderance of the prescription argument provides the clearest possible indication that Namibia has limited confidence in its treaty-based title and the scientific evidence offered in support of that title.

142. The evidence offered by Namibia in support of the alleged prescriptive title will be examined in Chapter 9.

**(iii) The Criterion for the Application of the 1890 Agreement adopted by Namibia is incompatible with the Intention of the Negotiators**

143. The Namibian Memorial adopts the definition of the 'main channel' of the Chobe fabricated by Professor Alexander as follows:

"The dispute concerns the reach of the Chobe River at Kasikili Island. The length of this reach of the river is only four kilometres compared with a total boundary length of more than 300 kilometres. Logic requires that the method used for determining the location of the boundary at Kasikili Island must be capable of being consistently and successfully applied to the whole length of the boundary along the Chobe River as identified in the 1890 Treaty. The only definition of the main channel of the Chobe River, including reaches of the river that have ephemeral, seasonal, or permanent islands in them, is the channel which conveys the largest proportion of the annual flow of the river. The southern channel meets this requirement while the northern channel does not." (Memorial, Vol. VI, Part 1, Expert Report, p.4, para. 1.8).

144. Namibia makes no attempt to explain in what way this highly esoteric and opportunistic definition could have been present to the minds of the negotiators of the 1890 Agreement. Indeed, the Namibian Memorial (pp.33-44) in examining the preparatory work of the Agreement, does not seek to establish that the negotiators referred to such a concept.

145. The Namibian Memorial also ignores the fact that, in contemporary international law and diplomacy, there was a recognition of the link between reference to the thalweg and the concept of navigability.

146. The question of the interpretation of the 1890 Agreement will be pursued elsewhere (Chapter 4). For the present, it will be sufficient to underline that the Alexander thesis, with its exclusive focus upon seasonal flow and non-directional flood flow, pushes aside the criteria of both configuration (that is to say, bed slope) and depth. In these conditions there can be no centre of the main channel, because the criterion used by Namibia does not involve a fixed location either of the river as a whole or a fixed location of the centre of the main channel. The criterion involves only the identification of the arm of the river which carries a particular volume of water over a year. The negotiators of the 1890 Agreement, like the reader of the Namibian Memorial, would be surprised to learn that the identification of 'main channel' has become so refined that it matters not that the water flow only lasts five months or that in this period the water is flowing upstream, consisting of flood water backing up from the Zambezi (see the Expert Report, p.4, para. 1.8; p.5, para. 2.8; pp.9-10, para. 4.4).

**(iv) The Namibian Thesis of the 'Main Channel' would seriously reduce the Efficacy of the 1890 Agreement**

147. The scientific evidence will be examined in due course. For present purposes it is necessary only to relate the consequence of the Namibian theory of the 'main channel' for the effective application of the provisions of Article III of the 1890 Agreement.

148. The Memorial itself is reticent about the definition of 'the centre of the main channel' beyond the identification of the 'main channel itself': Memorial, p.57, para. 159. The reader must refer to the Expert Report to understand the logical consequences of the theory presented by Professor Alexander. The key passages in the Report are as follows:

"12.6 Morphology of the southern channel. In contrast to the northern channel, the southern channel is highly sinuous, has an irregular width, and very low, saw-tooth shaped banks that are only a few centimetres high in places (Photographs on Sheets 21, 22 and 23). Where the right bank of the southern channel is adjacent to the Chobe Ridge, the bank consists of rock and consolidated soil protected from erosion by riverine vegetation (Photographs 6 and 7 on Sheets 21 and 22). The characteristics of the two banks of the southern channel are typical

characteristics of a stable, sinuous channel, where water in the river is conveyed along a broader, overlying channel. Examples of this type of channel can be seen in Photograph 3a of the Mfolosi River and Photograph 11b of the Chobe River at Ngoma Bridge.

12.7 Striation pattern on Kasikili Island. A study of the 1925 to 1985 aerial photographs on Sheets 14, 15 and 16 shows a distinctive striation pattern on the surface of Kasikili Island that has not changed over this period. This pattern is notably absent along a broad band that has a lighter and smoother surface on the aerial photographs. The southern channel is located within this band that identifies the southern channel as being the path along which the bulk of the water in the Chobe River is conveyed. The right bank of the overlying channel is the foot of the Chobe Ridge, and the opposite edge of the channel is indicated on Diagram 4 on Sheet 17." (emphasis supplied). (Namibian Memorial, Vol. VI, Part 1, Expert Report, pp.34-5).

149. The Court is respectfully requested to study Diagram 4 on Sheet 17 in relation to these passages from Professor Alexander's Report. As a preliminary matter, it may be noted that the Namibian Memorial states that the Report 'is an integral part of the Memorial and should be read in full to appreciate the scientific and technical foundations of this case' (Namibian Memorial, p.6, para. 20).

150. At the outset it must be emphasized that Diagram 4 is a construct of the Namibian Government. What it reveals is a River Chobe not seen on any of the forty-one maps referred to in the Rushworth Report (Namibian Memorial, Vol. V, Annex 102). The reason for this is the need of the Namibian Government and its advisers to marginalise the western and northern channel of the River Chobe. The actual main channel of the Chobe in this sector has been replaced by Zone (d) which the Report identifies 'as being the bed of the currently active channel of the Chobe River' (p.22, para. 8.11). Zone (d) is equated (in paragraphs 12.6 and 12.7, quoted above) with the southern channel of the Chobe. From Diagram 4 on Sheet 17 it should be appreciated that this 'Southern Channel' is superimposed on the western third of the area which all the maps and aerial photographs show as an island.

151. The result is that, according to this construct, Kasikili/Sedudu Island has been reduced in size and a 'main channel' is indicated on Diagram 4 which overlaps with a significant portion of the Island. The result is not one which would commend itself to the negotiators of the 1890 Agreement. Apart from the many objections which can be made to this approach on scientific grounds, the Namibian thesis would in practice produce a frontier zone (based on wholly factitious elements) rather than a boundary. Such an outcome would seriously reduce the efficacy of the provisions of the 1890 Agreement, which was not intended to produce boundary zones but boundaries.

152. In Chapter 10 of this Counter-Memorial the implications of the Namibian Submissions will be examined and the Government of Botswana finds it necessary to express its concern that the Namibian requests to the Court do not allow effective compliance with the Special Agreement. Article 1 thereof asks the Court 'to determine ... the boundary between Namibia and Botswana...'. The provisions of the Special Agreement do not, of course, accommodate the concept of Professor Alexander, which produces a new version of the southern channel. It is, after all, pointless to seek to identify an alignment in a southern channel which has become, normatively speaking, peripatetic, and corresponds to no cartographic representation of the Chobe River.

### **(C) The Namibian Memorial ignores the Pretoria Agreement of 1984**

### **(i) The Intergovernmental Agreement of 19 December 1984**

153. In December 1984 the Governments of Botswana and South Africa agreed that a joint survey should be carried out in order to determine the location of the 'main channel' of the River Chobe. The evidence of this agreement is as follows:

1. Minutes of the Meeting prepared by the Government of Botswana (Botswana Memorial, Annex 44).

2. A 'transcript in summary form' prepared by the Government of South Africa and communicated to Botswana (Botswana Memorial, Annexes 45 and 46).

3. The text of the Joint Survey Report of July 1985. The Report includes the following passage under the heading 'Authority for Survey':

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

Representatives of the two national survey organisations accompanied by co-workers from the Departments of Water Affairs have now been to the area to survey the 'Thalweg' in the vicinity of the island. Specific mention is made to the Thalweg in the 1890 Agreement between England and Germany." (Botswana Memorial, Annex 48).

154. The binding character of these transactions emerges from the analysis provided in the Botswana Memorial: pages 75-85. The resulting Joint Survey Report was legally binding upon South Africa. It concluded that:

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

### **(ii) The Reticence of the Namibian Memorial in relation to the Pretoria Agreement and the Joint Survey Report**

155. The Namibian Government displays a remarkable degree of reticence in face of these transactions. It is true that the Namibian Memorial refers to the meeting in Pretoria in terms of 'high level discussions' (page 116, para. 284), but no transcript is adduced. Moreover, the Joint Survey Report is omitted from the Annexes to the Namibian Memorial. This omission provides an impressive example of reticent pleading.

156. The omission of the text of the Joint Survey Report is the more surprising in light of the fact that, in his Expert Report (Namibian Memorial, Vol. VI, Part 1), Professor Alexander devotes three pages (pp.30-32) to an analysis of the Report. The substance of Professor Alexander's commentary will be examined in Chapter 5 below.

### **(iii) The Adoption of South African Transactions by the Government of Namibia**

157. It is the case that Namibia has at all times adopted the transactions of 1984 and 1985 involving South Africa. This is clear from the following passages in the Namibian Memorial: p.115 (para. 282); pp.116-17 (paras. 284-6). The fact that in further exchanges of 1986 South

Africa chose to prevaricate can make no legal difference; see the South African telex dated 17 November 1986 (Botswana Memorial, Annex 53).

158. In this context it is relevant to recall the response of Botswana to the South African telex. Botswana responded on 25 November 1986 as follows:

"Compliments,

Pula has the honour to acknowledge Secextern's telex no. 5142 file 1/160/3/1 dated 17 November, 1986 concerning Sidudu Island and to state that the latter's position remains as communicated in its telex no. 164 EA.6/4 81 dated 22 October, 1986.

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

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

Highest consideration." (Botswana Memorial, Annex 54).

159. It is necessary to recall that the Namibian Government invoked the Joint Survey Report, so far as it seemed convenient to do so, in its Memorandum Submitted to the Joint Team of Technical Experts on the Boundary Dispute between Namibia and Botswana around Kasikili Island, pp.34-5. The relevant passage is as follows:

"Almost all the facts established as conclusive by the 1948 Joint Report such as boundary location on British, German, and South African official maps, effective occupation and control of the Kasikili Island by the German and later South African Authorities, and utilisation of the Island by the inhabitants of the Caprivi were all confirmed by the 1985 Joint Survey.

A new and legally interesting fact was added by the 1985 Joint Survey, namely that "the main channel of the Chobe River NOW [emphasis added] passes Sidudu/Kasikili Island to the west and to the north of it" (see p.3 of the conclusions ANNEXURE 11). The Joint Survey further stated that the main channel had been to the west and north "at least, since 1912" i.e., about 22 years since the 1890 treaty came into force..."

160. Here, as elsewhere, the Government of Namibia omits to refer to the fact that the Joint Survey was the result of the Pretoria Agreement of 19 December 1984. The Court will, no doubt, note that Namibia relies upon the Joint Survey Report when this appears to be useful. In any event, the consequence of the Pretoria Agreement was that South Africa was placed under a legal duty to accept the outcome of the Joint Survey.

**(D) The Incorrect Namibian Assertion that in 1951 the British Government Acquiesced in an alleged South African exercise of sovereignty in respect of Kasikili/Sedudu Island**

**(i) The Context**

161. Earlier in the present chapter the Government of Botswana pointed to the fact that the main thrust of the Namibian case is founded upon prescription. The detailed aspects of the Namibian argument will be reviewed subsequently in Chapter 9. The present purpose is to provide early warning to the Court of the insubstantial character of the Namibian argument and its alleged factual underpinnings.

162. The extraordinary dimension accorded to the prescription argument appears in the following passage in the Namibian Memorial:

"During the entire period from 1890 to 1966, when they were responsible for the administration of Bechuanaland, the British authorities, with full knowledge of the facts set forth in the two preceding sections concerning Namibian/Masubia occupation and use of Kasikili Island and South African exercise of sovereignty there, failed to protest, object or interfere in any way with the situation as it existed ...." (p.102, para. 255).

163. This is optimistic indeed. There is no evidence offered of German and South African 'exercise of sovereignty'. Moreover, there was no dispute in evidence until the period 1948 to 1951: see above, Chapter 1, paras. 18-50.

164. There is no doubt that people from the Caprivi used the island at times for cultivation and pasturage, but then so did people living on the other side of the River Chobe. A striking defect of the Namibian Memorial is the absence of any reference to the social history of the Chobe district. The areas on both sides of the Chobe were, and are, inhabited by Basubia (a people common to both sides of the boundary) and movement between the Caprivi and the Bechuanaland Protectorate side of the River has always been relatively uncontrolled. (The Court is respectfully referred to the Botswana Memorial, p.15). In these circumstances the use of the island by Basubia and other local residents cannot provide an inference as to the 'exercise of sovereignty'.

165. In any case the only evidence available suggests that use of the island by people from the Caprivian village of Kasika was dependent upon permission given by the District Commissioner based in Kasane in the Bechuanaland Protectorate.

166. In this connection the report of Mr. Redman, District Commissioner at Kasane in 1948, is highly relevant. Redman reported to the Government Secretary at Mafeking as follows:

"5. Since the attached report was prepared I have received further information from an inhabitant of the Island that in 1924 a Caprivi Chief named Liswaninyana applied to Captain Neale, the Resident Magistrate at Kasane, for permission for his people to plough on the Island and graze cattle there. This was evidently granted verbally as no written agreement is known. At this time Government Oxen were grazing on the Island but they were removed in 1925. Before 1924 the same informant told me that there was only one Caprivi family ploughing there but they had no authority to do so." (Botswana Memorial, Annex 22).

Note: In the original Captain Neale's name is spelt 'Nellie'.

**(ii) The Documents show that in 1951 the United Kingdom expressly rejected the South African proposal for an adjustment of the Boundary**

167. The correspondence of the period 1947 to 1951 will be examined in detail in Chapter 9. For present purposes it is sufficient to indicate the wholly misleading interpretation of the documents offered by the Namibian Memorial (pp.109-14). The outcome of the correspondence was unequivocal. The South African proposal to change the status quo was rejected. In his letter dated 29 May 1951 Mr. Forsyth, for South Africa, recognises this (Botswana Memorial, Annex 31).

168. The Forsyth letter was a response to the High Commissioner's letter dated 10 May 1951 (Annex 30) in which the British instructions to the relevant official (dated 4 November 1948) at Kasane were maintained. The instructions were as follows:

"With reference to your letter No. P.M. 1/18/11 of the 14th October about the boundary between the Bechuanaland Protectorate and the Eastern Caprivi Zipfel, I am directed by the High Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland to inform you that the Resident Commissioner of the Bechuanaland Protectorate has directed the Assistant District Commissioner, Kasane, that tribesmen of the Caprivi Zipfel should be allowed to cultivate land on Kasikili Island, if they wish to do so, under an annual renewable permit.

2. The High Commissioner trusts that this arrangement will prove satisfactory to the authorities in the Union." (Annex 24).

169. In these exchanges, the British Government was making a political concession and was doing so in its role as the title holder in respect of Kasikili/Sedudu. That is why it is the British official at Kasane who is the recipient of instructions to provide permits.

170. The implementation of the political concession in favour of the Caprivians thus involved the use of administrative action emanating from the Bechuanaland Protectorate. This is further confirmed by the following British document, which also relates to the same process, and consists of instructions from the Government Secretary (Mafeking) to the District Commissioner at Kasane:

"Subject: Boundary between the Protectorate and the Eastern Caprivi Zipfel

Reference: Your minute No. X/5 of the 24th September, 1951.

I am directed to inform you that the position as set out by Major Trollope in paragraph 5 of his letter No. 17/15/2-5 of the 13th September, 1951 correctly reflects the attitude towards the Kasikili Island boundary dispute taken by this Government. The Native Commissioner Eastern Caprivi Zipfel may therefore be informed that his recommendation is accepted.

2. It is understood that the only Africans in the Protectorate interested in the cultivation of the Island are Government employees living at Kasane and I am to say that they should be instructed that they will not be permitted to plough on the Island." (Namibian Memorial, Annex 76).

171. The Namibian Memorial in fact accepts that the British officials 'were not going to give away legal points ...' (p.113, para. 278). At the same time, by a process of mere assertion, it conjures up a fictitious status quo based upon a supposititious South African title, which, it is suggested, the British failed to protest (pp.113-114, para. 278). In fact, as will be

demonstrated in Chapter 9, the legal advisers of the South African Government decided that the only basis of claim (for South Africa) was prescription. In brief, it was South Africa which had the role of supplicant and which was proposing a change in the status quo in her favour.

**(E) When the British and Botswana Authorities prohibited use of the island in 1960 there were no protests from Namibian sources**

**(i) The Context**

172. The main emphasis of the Namibian argument is upon title by prescription. This argument consists of two planks: first, an alleged German/South African/Namibian possession of the island and, secondly, a failure to protest on the part of the British/Botswana authorities. The relevant passage in the Namibian Memorial is as follows:

"During the entire period from 1890 to 1966, when they were responsible for the administration of Bechuanaland, the British authorities, with full knowledge of the facts set forth in the two preceding sections concerning Namibian/Masubia occupation and use of Kasikili Island and German and South African exercise of sovereignty there, failed to protest, object or interfere in any way with the situation as it existed. As is shown in para. 258, *infra*, this unbroken record of silence and passivity contrasted markedly with British conduct in neighbouring areas where it was the colonial power. After Botswana became independent, Botswana maintained its silence for almost two additional decades." (Namibian Memorial, p.102, para. 255).

173. This passage rests upon assertions which are unfounded both in fact and in law and which will be examined further in Chapter 9. According to Namibia the relevant period is 1890 to 1986. However, the key period is in reality 1960 to 1992.

**(ii) The Prohibition of Use of the Island for Agricultural Purposes**

174. As will be demonstrated in Chapter 9, the British authorities considered that Kasikili/Sedudu Island formed part of the Bechuanaland Protectorate. Accordingly, they gave permission for use of the island by people from the Caprivi and during the relevant period they thus had no reason to protest the use of the Island by villagers from Kasika: see also above, Chapter 1, para.37; and above, paras. 167-71.

175. In any event there is cogent evidence to the effect that it was in 1937 that the people of Kasika stopped ploughing on Kasikili/Sedudu Island. This was the evidence of the relevant Caprivi Chief, Munitenge Moraliswani II, during the JTTE hearings (Namibian Memorial, Vol. III, Annex 2, p.209). The relevant part of the Transcript reads:

"Botswana Component: Right, thank you. Could he help us with the date when people stopped ploughing Kasikili Island?"

Honourable Chief: That was in 1937 when now a lot of elephants were now entering Caprivi and then when people were ploughing it was found that those elephants were destroying their fields, it's when they decided to move and come on the other side here in Caprivi.

Botswana Component: And could he help us by telling us whether that occurred before Chief Liswaninyana died or just afterwards?"

Honourable Chief: People moved out from Kasikili Island when Liswaninyana died, after he died.

Co-Chairman (Botswana): Thank you Mr. Chairman. I thank the Honourable Chief for his co-operation." (Namibian Memorial, Vol.III, Annex 2, p.209)

176. It is generally accepted that Chief Liswaninyana died in 1937. Thus, according to Chief Moraliswani, cultivation stopped in 1937. This is significant because some of his subjects asserted in their oral testimony that it was in 1958 when people from Kasika stopped using the island: see below, Chapter 7, paras. 465-70.

177. The witnesses produced by Namibia in front of the JTTE gave different chronologies relating to use of the island by people from Kasika. However, the latest date proposed was always 1958.

178. The present purpose is to make a demonstration based on the assumption that the Kasika villagers continued to use the island until 1958 or thereabouts. In 1960 the island became part of the Chobe Game Reserve: see Botswana Memorial, Annexes 32, 33, 34 and 37. The relevant legislation employs the international boundary as the northern limit of the Game Reserve, and the plan annexed to the legislation includes Kasikili/Sedudu Island within that boundary. That the island formed part of the Chobe Game Reserve is confirmed by the affidavit of Mr. Slogrove, Game Warden at the material time (Botswana Counter-Memorial, Annex 51). Moreover, it was in his capacity as Game Warden that Mr. Slogrove arrested poachers on Kasikili/Sedudu in 1976.

179. It is a striking coincidence that the Namibian Memorial contains no proof that the island was used for cultivation by Caprivians in the period 1960 onward. The reason for this was that as of 1960 all cultivation on the island had been prohibited by the authorities of Bechuanaland. The co-incident reason was that cultivation had stopped many years earlier.

**(iii) In face of the Prohibition there was no Protest from Namibian sources until 1992**

180. It is the submission of the Government of Botswana that in 1960 and subsequent years all agricultural use of the island was forbidden and that the regime of the Game Reserve was enforced on the island by Botswana officials, including Mr. Slogrove. This state of affairs has to be assessed in the light of the position adopted in the Namibian Memorial to the effect that there was a German/Namibian/Masubia occupation of the island from 1890 onward.

181. As the Namibian Government expresses the matter:

"During the entire period from 1890 to 1966, when they were responsible for the administration of Bechuanaland, the British authorities, with full knowledge of the facts set forth in the two preceding sections concerning Namibian/Masubia occupation and use of Kasikili Island and German and South African exercise of sovereignty there, failed to protest, object or interfere in any way with the situation as it existed. As is shown in para. 258, *infra*, this unbroken record of silence and passivity contrasted markedly with British conduct in neighbouring areas where it was the colonial power. After Botswana became independent, Botswana maintained its silence for almost two additional decades." (Namibian Memorial, p.102, para. 255).

182. The cardboard character of the Namibian case is apparent when it becomes clear that no protest, either at the local level or at the diplomatic level, appeared from South African or Namibian sources until 1992. (The exchanges of 1992 will be examined in Chapter 9). The crucial point is the incompatibility of the Namibian assertions of Masubia 'occupation' from 1890 to 1966 and thereafter (see above, paragraph 51) and the absence of any protest, from Chiefs or other sources, in face of exclusion from the island over a period of thirty-two years.

183. For the sake of clarity, it is to be emphasised that Botswana does not accept that the use of the island by people from Kasika was à titre de souverain, and does not accept that it was continuous or in any sense exclusive. Residents from the Bechuanaland side of the River Chobe also used the island (see Chapter 7 below) and at all times use of the island was regulated, so far as this was necessary, by the authorities at Kasane.

184. The hollowness of the Namibian factual assertions is further confirmed by the fact that, when incidents occurred, these did not result from attempts by Caprivians to use the island for agricultural purposes, but from the anti-poaching activities of the Botswana Defence Forces.

**(F) Cultivation by the Basubia is unrelated to any question of Sovereignty: the Basubia are a people common to both sides of the boundary**

185. Statistics available indicate that twelve thousand members of the Basubia people currently live in Botswana and nearly six thousand in Namibia. The Basubia people are concentrated in northern Botswana and in the Eastern Caprivi district of Namibia. In the colonial period there were few obstacles to the free movement of people and the Basubia planted their gardens and grazed their cattle on both sides of the international boundary.

186. Against this background it was, and remains, normal for Basubia residents in Botswana to own plots of land in the Eastern Caprivi and for Basubia residents to own land on the Botswana side of the Chobe River. The ownership of land by Basubia of Botswana citizenship in the Caprivi is a matter of local knowledge. During the proceedings of the JTTE, Julius Mundia, a resident of Kasane, gave evidence that his father cultivated land on the Namibian side of the boundary: see the Final Report of the Joint Team of Technical Experts, Transcript of Hearings, Vol. I, Kasane (Fourth Round), p.54.

187. The reality of the life of the Basubia as a people common to both sides of the boundary is completely hidden in the Namibian Memorial. Thus no reference is made to the Basubia living in the Bechuanaland Protectorate and now in Botswana. No reference is made to the divided chiefdom, in spite of the fact that this is referred to in the evidence of Chief Moraliswani before the JTTE: Namibian Memorial, Vol. III, Annex 2, final two pages (not numbered).

188. In a number of passages the Namibian Memorial goes so far as to present the Basubia as the predecessor in title (during the colonial period) of Namibia, in effect as a separate political entity. Thus in one passage, Namibia refers to 'Namibian/Masubia occupation and use of Kasikili Island and German and South African exercise of sovereignty there...' (Namibian Memorial, p.102, para. 255). This passage contains a quite remarkable number of solecisms and an elision of different historical phases. The elision of the Basubia and the German Empire is eccentric enough. Even more eccentric is the suggestion of Namibia that one section of the Basubia enjoyed a corporate identity and a monopoly of Basubian interests in the area. The assumption that the Basubia had the capacity to change the international

boundary is, in any case, a legal solecism not only in respect of 1890 but at all subsequent periods.

189. It is indeed a paradox that the country whose title to the whole of the Caprivi Strip derives solely from a colonial arrangement, made without regard to tribal lands, between Great Britain and Germany to grant the latter a twenty mile wide strip of territory to afford it access to the Zambezi River, should now seek to buttress its demarcation by invoking alleged historic use of one small island by local people whose lands spanned both sides of the river.

## **CHAPTER 4**

### **The Interpretation of the Anglo-German Agreement of 1890**

#### **(A) The Position of Botswana is reaffirmed**

190. In its Memorial the Government of Botswana has presented an interpretation of the Anglo-German Agreement which reflects at the same time the content of the negotiations, the principles of public international law contemporary with the conclusion of the Agreement, and common sense. The Government of Botswana reaffirms the considerations advanced in its Memorial (Chapter V).

191. The understanding both of diplomats and lawyers in 1890 was that the resort to the thalweg involved both a technique of boundary-making and a reference to equality of the riparians in terms of access to the navigable channel. The choice of thalweg instead of median line could only have one purpose, that is, the sharing of the quality of navigability which the Chobe River was clearly assumed to have.

#### **(B) The Role of the Chobe River in the Negotiations of 1890**

192. According to the German documents the River Chobe was first proposed as a boundary by Sir Percy Anderson on 20 May 1890 (Botswana Counter-Memorial, Annex 1). Germany was content to leave Lake Ngami to England and the Chobe boundary ceased to play any further role in the negotiations.

193. In a letter dated 11 June 1890, the German Ambassador in London, Count Hatzfeldt, reported that Sir Percy Anderson had agreed that the boundary follow 'the course of the Chobe River until its junction with the Zambesi.' (Annex 1). A report of Dr Krauel for the Undersecretary of State, Freiherr Marschall von Bieberstein, dated (Berlin) 28 June 1890, contains a draft agreement and an explanation of the alterations made since the last report. Art. III of the draft agreement speaks of 'the centre of the main channel of that river [Chobe]'. (Annex 1).

#### **(C) 'The Centre of the Main Channel of' the River Chobe**

194. The preparatory work of the Anglo-German Agreement does not provide much assistance to the Court. In any event the English text, 'the centre of the main channel' has the counterpart in German: 'im Thalweg des Hauptlaufes dieses Flusses'.

### G3 - Map C: Rivers of South Central Africa

195. As has been demonstrated in the Memorial of Botswana, in the period to which the Anglo-German Agreement belongs it was the normal practice to establish boundaries in navigable rivers by reference to the middle of the navigable channel: see the Memorial, Chapter 5, pages 52-64. The provisions of the Anglo-German Agreement form part of a pattern. In this context the fact that, in the vicinity of Kasikili/Sedudu Island, the Chobe bifurcates, appears to present a two-stage problem. First of all, there is a preliminary selection of the main channel qua the bifurcation, and then, subsequently, there is the determination of the 'centre of the main channel' of the channel first selected. This method of structuring the issues creates a false problem and is incompatible with the thalweg principle.

196. Writers on the thalweg principle do not distinguish between the main channel and branches of the river with respect to islands existing within a navigable boundary river if the boundary is to be formed by the thalweg. See, e.g., Kercea, Nicole, *Die Staatsgrenze in den Grenzflüssen* (1916), 161-3 (Annex 9); Hyde, 'Notes on Rivers as Boundaries', *AJIL*, 6 (1912), 901-9 at 906-7) (Annex 8). In English, in the context of the 1890 Agreement, the expression 'the main channel of' has no meaning of its own but is simply used to express the thalweg principle. If one omitted the words 'the main channel of' from the expression 'the centre of the main channel of the river' it would remain 'the centre of the river', an expression which in English does not express the thalweg principle.

197. It is therefore suggested that the literal translation of 'the main channel of' with 'des Hauptlaufes' in the German text of the agreement was unnecessary, as the expression 'the centre of the main channel' would have been correctly translated as 'der Thalweg dieses Flusses'. This is also evidenced by the fact that if one omitted, both in the English and the German version, the words 'the main channel of' and 'des Hauptlaufes', respectively, in the German version, the boundary would still be determined by the thalweg whereas in the English version the boundary would be determined by 'the centre of the river' a concept different from the thalweg concept. In this connection it should be recalled that the thalweg need not necessarily be in the centre or middle of the river. It is also of interest to note that the German Government on 30 April 1910 addressed a note to the British Government with respect to the eastern boundary of the Caprivi Strip which reads in part as follows:

'The agreement of July 1st, 1890, contains no definite provision as to the eastern boundary of the German Zambezi territory. The Imperial Government presumes that the Government of Great Britain will agree to the eastern boundary of the German territory being formed by a line... following the thalweg of the Zambezi upstream to the point where the river meets the Katima-Mulilo Rapids.'

198. The draft of this letter, dated 25 April 1910, said in the relevant part: 'The German Government shares the opinion that the boundary of the territory is formed by a line which from the Thalweg of the Chobe turns into the Zambezi and follows the Thalweg of the Zambezi up to its junction with the Katima-Mulilo Rapids.' (Botswana Counter-Memorial, Annex 5)

199. In its Memorial Namibia argues (p.44) that 'the "main channel" must be found first; the "centre" can necessarily only be found afterward' and 'the "hauptlauf" cannot be identified by first seeking to find the "thalweg"'. This is not correct. Rather, the main channel is the one in which the thalweg is situated. If Namibia's argument that 'in the same way as with the English text, the search must first be for the "hauptlauf" and for the "thalweg" only after the "hauptlauf" has been found' was correct there could be two or more thalwege, one in the main channel and others in the various branches of the river as Namibia's argument, by implication, is based on the assumption that a thalweg may be found in each channel. A river, however, has only one thalweg, i.e. one deepest channel in which vessels of largest tonnage descend the river. Thus, where the thalweg may be found, the main channel may be found too. Namibia makes the mistake of dividing the English expression 'the centre of the main channel' in two parts, i.e., 'the centre of' and 'the main channel of', thereby overlooking that only the expression as a whole has the meaning of thalweg. The term 'the centre' on its own does not equate with 'thalweg' and is more reminiscent of the median line principle than of the thalweg principle.

#### **(D) The Opinion of Officials Involved in Application of the Anglo-German Agreement**

200. It is in no way surprising that officials concerned in deciding which was the 'main channel', at various stages in the historical record, all relied upon criteria relevant to navigability.

201. This is true of the officials who presided over the preliminary stages of the important diplomatic episode of the period 1947 to 1951, which was prompted precisely by an application by Mr Ker in connection with the transport of timber by barge.

202. In the first place Mr. Ker himself applied to use the northern channel, a most practical acknowledgement of its navigability. Secondly, neither the District Commissioner at Kasane nor the Chief Magistrate of the Eastern Caprivi Zipfel had any doubts on the subject.

203. The former official, Mr. Redman, expressed the following opinion in his covering letter to the Joint Report, which the two officials had prepared:

"I have the honour to attach a joint report by the Native Commissioner, Eastern Caprivi Strip and myself concerning a dispute which has arisen over the ownership of the island shown on the enclosed sketch map.

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

3. The only claim which the Caprivi can have to this Island is through Prescription as according to the Treaty of 1890 between Great Britain and Germany it is clear that the boundary must run along the Northern Channel since this is undoubtedly the main Channel of the Chobe River. It must be stated that the map, which shows the boundary to follow the Southern Channel, is therefore inaccurate and was probably drawn by some-one who had not examined the river to determine the main Channel." (26 January 1948; Botswana Memorial, Annex 22).

204. In the Joint Report itself the two officials stated:

"4. We express the opinion that the "main channel" lies in the waterway which would include the island in question in the Bechuanaland Protectorate". (Botswana Memorial, Annex 22).

205. A compelling feature of the diplomatic exchanges of the period 1948 to 1951 between South Africa and the United Kingdom is the unvaried assumption by all concerned that the 'main channel' was the northern channel. This assumption lies behind the South African decision to ask the British Government to adjust the existing alignment (see High Commissioner to Commonwealth Relations Office, 6 June 1949; Annex 26).

206. The assumption that the northern channel was the 'main channel' was, of course, made in relation to a debate precipitated by Mr. Ker's application for permission to use the northern channel for navigation. Key elements in the correspondence are as follows.

207. On 14 October 1948 the South African Secretary to the Prime Minister and for External Affairs wrote as follows to the British High Commissioner;

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

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

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

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

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

The Union Government is anxious to preserve the rights of the Caprivi Zipfel tribesmen on the Island and it is understood that the Bechuanaland authorities desire the use of the Northern channel for navigation purposes. As there would appear to be no conflict of interests it should be possible to come to an arrangement which is mutually satisfactory. Your views in the matter would be appreciated." (emphasis supplied) (Botswana Memorial, Annex 23)

208. At a later stage in this correspondence the British High Commissioner expressed his views in a letter to the South African Government dated 10 May 1951:

"I must apologise for not having written to you earlier in connection with the Island of Kasikili in the Chobe River, the correspondence about which rests with your letter No. P.M. 1/10/11 of the 24th January, 1951.

2. I have, however, taken the opportunity since receipt of your letter of the 14th October, 1948, to visit the Island myself. As you remark the Island has been cultivated by Caprivi tribesmen for many years without dispute though there has been no actual occupation. The Island is always flooded between March and May so that habitation is in effect impossible.

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

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

5. The instruction to the Assistant District Commissioner, Kasane, of which you were informed in Mr. Priestman's letter No. 9625 of the 4th November, 1948 would be maintained, and it is assumed that the free use of the main channel of the Chobe, to the north of the Island, would continue to be assured under the international rules governing waterways that form the common boundary of two states." (emphasis supplied) (Botswana Memorial, Annex 30).

209. At no point in this correspondence did South Africa object to this characterisation of the northern channel as the main channel.

210. In 1985 the appropriate officials of Botswana and South Africa signed the Joint Survey Report which had been commissioned by the Pretoria Agreement of 19 December 1984. (Botswana Memorial, Annex 48). In this Report the two official delegations concluded that:

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

211. The Report was communicated to the Government of Botswana under cover of a letter dated 1 August 1985. The Report was signed on 5 July 1985. In the aftermath the South African Government temporised: see the Record of Discussions of 13 October 1986, Botswana Memorial, Annex 51, p.405, para. 17; and the South African telex dated 17 November 1986, *ibid.*, Annex 53. However, at no point did the South African Government deny the validity of the Joint Survey Report or contradict its characterisation of the main channel of the Chobe until its letter dated 26 April 1992 to the Government of Namibia (Namibian Memorial, Annex 88).

212. The documentation available establishes that South Africa first recognised that the northern channel of the River Chobe was the main channel in 1948: see the letter of 14 October 1948, set forth above, para. 207. After the conclusion of the Joint Survey Report in 1985 the South Africa Government waited another seven years before seeking to repudiate it.

213. Thus the South African letter dated 26 April 1992 involved a change in position after nearly 44 years. The text is as follows:

"I refer to your letter of 19 March 1992 and must inform you that the Republic of South Africa has at no time "given encouragement to and acquiesced in Botswana's claim to Sidudu island.

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 South African authorities have therefore suggested to Botswana in a telex dated 17 November 1986 that the matter be taken up with the Government of an independent Namibia. This was not acceptable to Botswana as they considered the joint survey's report to be conclusive and in fact expressed the opinion that 'no further discussion of the matter is necessary'.

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

I trust that the aforementioned will put matters into perspective and would assist you in your negotiations with the Botswana Government." (Mr. R.F. Botha to Mr. Theo-Ben Gurirab, Namibian Memorial, Annex 88).

214. This document is less than frank about a number of matters. It fails to do justice to the historical record and it ignores the existence of the Pretoria Agreement of 19 December 1984.

#### **(E) The Namibian View of the Object and Purpose of the Anglo-German Agreement**

215. The Namibian Memorial (pp.31-2) examines the object and purpose of the Anglo-German Agreement and concludes:

"The negotiators were not concerned with the allocation of small areas, but with a comprehensive 'African transaction'. At the large scale on which they were thinking, the important objective was the identification of a recognizable boundary. This was achieved by the selection where possible of a geographical line that appeared clearly on the available relatively small-scale maps, in the present case, the line of the Chobe. Their common interest was in the stability and certainty of the boundary. In principle, the parties must have wished to agree upon a fixed and readily identifiable boundary, rather than one that for about five months of the year would be invisible or obscure. For this reason, the selection of the line of the northern channel rather than the line of the southern channel would have been inconsistent with the basic object and purpose of the Treaty."

216. The Government of Botswana agrees that 'the important objective was the identification of a recognizable boundary', and also that the parties to such an agreement have a 'common interest in the stability and certainty of the boundary.' It is not at all persuaded that in diplomatic practice, or in terms of public international law, it is accepted that the prospect of seasonal flooding would be recognised as the justification for departing from the definition of the boundary as provided in the text of the agreement.

217. It is surely eccentric to seek a 'recognizable' or 'readily identifiable' boundary in the vagaries of flood zones and 'overlying channels'. The strange result of this approach can be

seen in the Diagram 4 of Sheet 17 of the Appendices to the Expert Report which forms part of the Namibian Memorial (Volume VI, Part 2). And, of course, it should not be forgotten that, until 1992 and the proceedings of the Joint Team of Technical Experts, no Government had recognised the southern channel as 'a recognizable boundary'.

#### **(F) The Namibian View of the Preparatory Work of the Anglo-German Agreement**

218. The Namibian Memorial (pp.33-44) provides an examination of the preparatory work of the Anglo-German Agreement which is useful but deliberately inconclusive. In particular, the relationship between navigability and reference to the thalweg in treaty drafting is studiously ignored. The background of contemporary international law is also ignored.

219. The Namibian Memorial (p.44, para. 115) recognises that 'there was no negotiation about the precise course of the Chobe River as such'. Having said that, the Namibian pleading then produces an essay in pure speculation:

"In choosing the Chobe River, the negotiators selected what they could identify as a major and prominent geographical feature. They were aware, perhaps from prior writings and certainly from the 1889 Map that the character of the terrain changed at the river - from the floodplains and swamps to the north of it to the sandy ridge and forest that lay to the south of it. It would have made little sense for the negotiators, having regard to this change in the terrain, to have constructed a boundary which left in the British sphere territory that was more naturally a continuation of the terrain to the north. Had they known that Kasikili Island was annually covered for a period of five months by water spilling over from the Zambezi (and that therefore the very existence of the northern channel would be obscured to the point of invisibility, whereas the course of the southern channel could always be identified by its contiguity with the southern bank and the adjacent sand ridge) they could hardly have reached any other conclusion than that use should be made of such a permanently visible natural feature for the purpose of identifying the 'main' channel in which the boundary should be drawn." (emphasis supplied) (Namibian Memorial, p.44, para. 116).

220. The parts of this passage italicised indicate that the Namibian Government admits that none of this was present to the minds of the negotiators. Consequently, it is irrelevant. The text of the Agreement refers to the Chobe River and not to an adjacent ridge. The Anglo-German Agreement was addressing a river boundary and not a land boundary.

221. The passage from the Namibian Memorial reproduced above is to be compared with the insistence elsewhere (pp.31-2) on a 'readily identifiable' boundary. The reference to the sandy ridge must also be related to the essay in boundary-making as it appears on Diagram 4 of Sheet 17 in the Appendices to the Expert Report. Here it becomes apparent that the process of identification is very complex, involving a redefinition of Kasikili/Sedudu Island, and the construction of a channel the configuration of which appears on no map or sketch-map other than that produced by Professor Alexander.

#### **(G) The Namibian View of the Text of the Anglo-German Agreement**

222. In Chapter V (of Part One) the Namibian Memorial purports to examine 'the words of the Treaty', that is to say 'the centre of the main channel of the Chobe River'. The Namibian treatment consists essentially of four elements.

223. The first of these is an absence of reference to the object and purpose of the Anglo-German Agreement and the significance of the incorporation of the concept of the thalweg in relation to navigability.

224. The second element involves the acceptance of the position adopted by the Government of Botswana in the proceedings of the JTTE, that the identification of the 'main channel' of the Chobe is 'in essence a question of fact' (Namibian Memorial, pp.46-7, paras. 121-22). This position is, of course, based on the assumption that the assessment of the facts must necessarily be based upon criteria which are compatible with the language of the Agreement and with its object and purpose, that is to say, to produce an effective boundary allowing both riparians equal access to the navigable channel: see the Botswana Memorial, pp.50-64, paras. 113-44.

225. The third element contained in the Namibian Memorial consists of reference to the Awards in the Palena arbitration between Argentina and Chile in 1966 and the Laguna del Desierto arbitration of 1994. Interesting though this jurisprudence may be, it appears to be wholly irrelevant for present purposes. Both awards involved the interpretation of language of a substantially different character, and in both cases the object and purpose of the instrument the subject of interpretation did not relate to navigability.

226. In the Palena arbitration the task prescribed by the Special Agreement involved the identification of the River Encuentro. The context was the duty of the Tribunal to answer the question:

"To the extent, if any, that the course of the boundary between the territories of the parties in the Sector between boundary posts 16 and 17 has remained unsettled since the 1902 Award, what, on the proper interpretation and fulfilment of that Award, is the course of the boundary in that Sector?" (Report of the Court of Arbitration, International Law Reports, Vol. 38, p.20 at p.23).

227. In the process of identification of the Encuentro, the Tribunal referred first of all to historical evidence. Subsequently, and by way of confirmation, it referred to 'scientific grounds'. The relevant passage is as follows:

"That this recognition of the Eastern Channel as the major channel was correct can be confirmed on scientific grounds. In the Court's opinion the three principal criteria to be applied in a problem of this kind are length, size of drainage area, and discharge, preferably in terms of annual volume, though authorities differ as regards their relative importance (M. Roche, *Hydrologie de surface*, Paris, 1963, p.152; Stephen B. Jones, *Boundary-Making*, Washington, 1945, pp.129-130. These factors are moreover basic to the two American methods of designating stream order; the Horton method applied by Chile, and the Strahler method applied by Argentina. According to the Horton method, stream order is related to number of streams, channel length and drainage area by simple geometrical relationships. As regards the Strahler method, which Argentina considers the only objective method of determining the order of importance of a river, Strahler states:

'Usefulness of the stream order system depends on the premise that, on the average, if a sufficiently large sample is treated, order number is directly proportional to size of contributing water-shed, to channel dimensions, and to stream discharge in that place in the

system" ("Quantitative Geomorphology of Drainage Basins and Channel Networks", in Ven Te Cho, Handbook of Applied Hydrology, 1964, section 4-43).' " (ibid., p.95).

228. When the passage quoted above is studied in relation to the geographical context of the Palena case, it can be seen that the issues are remote from those currently facing the Court. In the Palena case the issue arose in the context of affluents of a complex river system situated on mountain slopes near the continental divide. In making its selection between the streams the Tribunal employed criteria of length, size of drainage area, and discharge. The geographical and political context bore no relation to navigability.

229. This approach is irrelevant to the situation of 'the boundary around Kasikili/Sedudu Island' in terms of the Special Agreement. The criterion of length (for example) is obviously inapplicable to the geographical circumstances of Kasikili/Sedudu. Moreover, the purpose of the Tribunal in Palena was to remake a viable boundary in the light of the errors which had vitiated the Award of 1902. Neither the original Award of 1902, nor the remedial exercise of 1965-66, were in any way concerned with navigability.

230. The decision of the Tribunal in the case of Laguna del Desierto of 1994 does not appear to be relevant to the issues presented in the present proceedings in the context of the Special Agreement.

231. The fourth element involves the presentation of scientific evidence which adopts an approach wholly incompatible with the object and purpose of the Anglo-German Agreement: the problems generated by this approach have been examined in Chapter 3 above. The approach is also incompatible with the Special Agreement and has induced the Namibian Government to allege 'that it is unnecessary to pursue the question of defining the centre of the main channel at this stage of the proceedings' (Namibian Memorial, p.57, para.159).

232. The Namibian approach to the scientific evidence in the Memorial is wholly inconsistent with that presented in the Submissions of Namibia to the JTTE. Those Submissions alleged that the main channel in 1890 was the southern and eastern channel and that the northern and western channel had become the main channel subsequently.

233. The scientific evidence as such will be reviewed in Chapters 5 and 6 of the present Counter-Memorial.

## **(H) The Namibian View of the Subsequent Conduct of the Parties**

### **(i) The Legal Relevance of the Subsequent Conduct of the Parties**

234. The Namibian Memorial (pp.60-65, paras. 166-79) provides a helpful general account of the relevance of the subsequent practice of the parties in determining the meaning of the Anglo-German Agreement. The Government of Botswana shares the views of Namibia on the general issue of legal principle, as is apparent from its Memorial (p.64, para. 145).

235. At the same time the Government of Botswana would wish to emphasise that subsequent conduct must establish 'the agreement of the parties regarding its interpretation', according to Article 31 of the Vienna Convention on the Law of Treaties (emphasis supplied). Moreover, Sir Gerald Fitzmaurice, whose views are given prominence in the Namibian Memorial (p.61,

para. 169) went on to refer to the subordinate character of the principle of subsequent practice. In his words:

"Status of the principle. .... the principle of subsequent practice may, from one point of view, be regarded as part of the principle of confirmation already considered (above, 'Miscellaneous Points', (f)(iii), and in that aspect it must, like the principle of effectiveness, be regarded as being, in general, subordinate to the principle of the textual and natural meaning - that is to say, *prima facie*, it may serve to confirm that meaning if clear, or may afford an extraneous means of elucidating it, if obscure or ambiguous; but not to change or add to it if no obscurity or ambiguity exists and the sense is clear according to the natural and ordinary meaning. Subsequent practice is (on this basis) primarily one of the extraneous means (like recourse to travaux préparatoires, or consideration of the circumstances existing previous to or when the treaty was drawn up) of interpreting a text not clear in itself; and, considered as such, it is chiefly its superior reliability as an indication of the real meaning and effect of a text that justifies its treatment as an independent major principle of interpretation". (emphasis supplied). (British Year Book of International Law, Vol. 33 (1957), p.224).

236. This proviso is important in face of the tendency of the Namibian Memorial to confuse subsequent conduct as a principle of treaty interpretation with prescription and acquiescence.

237. Before leaving the issues of principle, it is necessary to indicate that the Memorial of Namibia seeks to establish that subsequent practice may be constituted exclusively by the 'silence' or 'inaction' of the parties: see pages 64-5, paragraphs 175-7. And in this context, it is pointed out that the penultimate draft of Article 31(3)(b) of the Vienna Convention refers to 'any subsequent practice...which establishes the understanding of the parties regarding its interpretation' (emphasis added) (*ibid.*, page 65, paragraph 177).

238. The Court should be cautious in face of this suggestion that the text of Article 30(3)(b), which, in its final form, requires practice which 'establishes the agreement of the parties', should be watered down. The Memorial of Namibia states that the substitution of 'agreement' in the final version was purely an exercise of the Drafting Committee to ensure uniformity with the French, Russian and Spanish texts.

239. The reality was that, in the Committee of the Whole of the Vienna Conference, both the United States and Australia had introduced amendments to insert the word 'common' before 'understanding': see U.N. Conference on the Law of Treaties, Official Records, Documents, pages 149 and 150. The Australian amendment was before the Drafting Committee when the final text was adopted of what, at that stage, was Article 27: *ibid.*, pp. 150-1. Against this background it becomes apparent that the term 'agreement' in the final text was not a drafting synonym but a point of substance. This is confirmed by the speech of the Australian delegate in the Committee as a Whole on 19 April 1968. In his words:

'The Australian drafting amendment to sub-paragraph 3(b) had been prompted by the statement in paragraph (15) of the commentary that the Commission had had the common understanding of the parties in mind. The idea was clearly expressed in the French and Spanish texts, and the amendment therefore affected the English text only.' (U.N. Conference on the Law of Treaties, Official Records, Summary Records, p. 169, para. 60)

240. This episode in the interpretation of the Vienna Convention provides a further illustration of the Namibian tendency to move away from the text of the Anglo-German Agreement.

Thus, even in the context of subsequent practice, there is an effort to reduce the role of agreement as such.

**(ii) The Subsequent Conduct of the Parties Confirms that the Main Channel of the River Chobe is the Northern Channel**

241. The subsequent practice of the parties to the Anglo-German Agreement and their successors has been set forth in the Botswana Memorial (pp.64-74, paras. 145-65). The evidence relating to the period 1948 to 1951 is of particular relevance. The outcome of the exchanges between the United Kingdom and South Africa was an acceptance by South Africa of the status quo, that is, the adherence of Kasikili/Sedudu Island to Bechuanaland Protectorate.

242. The implementation of the political concession in favour of South Africa involved British officials based in Bechuanaland (see above, Chapter 3, paras. 167-71). The South African Government accepted this outcome and did not seek to deny that the main channel was the northern channel.

243. After 1960, when agriculture on the island was prohibited by the British authorities, no protest ensued, either from diplomatic sources or local sources in the Caprivi, until 1992 (see above, Chapter 1, paras. 93-100), a period of 32 years.

244. When in 1985 a Joint Survey was carried out, on the basis of an intergovernmental agreement of 1984, it was not until 1992 that the South African Government sought to repudiate the Joint Survey Report of 1985 and the Pretoria Agreement which had authorised the Joint Survey.

245. The subsequent conduct of the parties from 1948 until 1992 provides clear evidence of agreement on the proposition that the main channel of the River Chobe was the northern channel. In this context the attention of the Court is respectfully drawn to the series of official admissions by the South African Government in the period 1948 to 1949 (Botswana Memorial, pp.67-70, paras. 153-6). From the time of these admissions until 1992 both parties by their conduct evinced agreement on the identification of the main channel.

246. Given the enthusiasm apparent in the Namibian Memorial for the principle of subsequent practice, the tendency of the Namibian Government to marginalise the Joint Survey Report of 1985 is inconsistent, to say the least. The Pretoria Agreement of 19 December 1984 and the Joint Survey Report constitute not so much a form of subsequent conduct but a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'. As Article 31 of the Vienna Convention provides (in material part):

"3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties, regarding the interpretation of the treaty or the application of its provisions;

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

(c) any relevant rules of international law applicable in the relations between the parties."  
(emphasis supplied)

**(iii) The Argument of Namibia based upon Prescription is incompatible with the Principle of Subsequent Conduct**

247. By way of conclusion on the topic of subsequent conduct, the Government of Botswana would respectfully draw the attention of the Court to the remarkable inconsistency in the modalities adopted in the Namibian treatment of subsequent conduct (Part Two, Chapter 1 of the Namibian Memorial).

248. The Namibian Government deliberately places subsequent conduct, as an aspect of treaty interpretation, in the same framework as prescription, acquiescence and recognition, as independent forms of acquisition of territory (Namibian Memorial, p.60, para. 165). The distinct subjects are placed together in a Chapter with the heading: 'The legal relevance of the subsequent conduct of the parties to a treaty'.

249. The difficulty which arises is that subsequent conduct is a facet of a lawful status quo: a boundary created by the provisions of a treaty. In contrast, prescription, as pleaded by Namibia, involves an adverse possession which displaces the lawful status quo. To seek to combine these elements in the same vehicle must involve a high degree of optimism. The question of prescriptive title will be examined further in Chapter 9 of this Counter-Memorial.

## **CHAPTER 5**

### **The Scientific Evidence Presented on Behalf of Namibia**

#### **(A) Botswana's Case**

250. The approach of Botswana to the issue before the Court can be summarised in short answers to three questions:-

(i) What is the geographical feature referred to in Article III of the Anglo-German Agreement of 1890?

Answer: The Chobe River.

(ii) Which is the main channel?

Answer: the northern and western channel around Kasikili/ Sedudu Island.

(iii) Why?

Answer: Its greater depth, width and its bed profile configuration, and all the geomorphological and hydrological evidence, indicate that it is the navigable channel capable of and carrying the greater flow of water. (For a fuller account of the approach of Botswana

by reference to the facts on the ground and the scientific evidence, the Court is respectfully referred to Chapter 6 of this Counter-Memorial).

### **(B) Namibia's Case**

251. In contrast to this straightforward approach, the Namibian Memorial deploys its scientific expert and evidence in a manner which obfuscates the task of the Court. The Chobe River is a well-recognised and long established perennial river and the task of the Court is to determine the main channel in that recognised river along which, in accordance with Article 3 of the Anglo-German Agreement of 1890, the boundary line 'descends'. Indeed, since the facts on the ground and every official, surveyor or hydrologist prior to Namibia's scientific expert has, on consideration of the question, and, on inspection, pronounced that the northern channel is the main channel, Botswana submits that recourse to scientific evidence is superfluous, or at most supplementary.

252. The Namibian Memorial, however, far from referring to scientific evidence to supplement the facts on the ground, displays a mass of unsupported and unscientific assertions to advance a highly esoteric and opportunistic definition of the main channel.

253. The Namibian Memorial adopts the definition of 'main channel' of the Chobe on the basis of a thesis advanced by Professor Alexander as follows:-

"The dispute concerns the reach of the Chobe River at Kasikili Island. The length of this reach of the river is only four kilometres compared with a total boundary length of more than 300 kilometres. Logic requires that the method used for determining the location of the boundary at Kasikili Island must be capable of being consistently and successfully applied to the whole length of the boundary along the Chobe river as identified in the 1890 Treaty. The only definition of the main channel of the Chobe River that can be successfully applied to the whole length of the Chobe River, including reaches of the river that have ephemeral, seasonal, or permanent islands in them, is the channel which conveys the largest proportion of the annual flow of the river. The southern channel meets the requirement while the northern channel does not." (Memorial, Vol. VI, Part 1, Expert Report, p.4, para. 1.8).

254. The Namibian identification of the main channel is entirely dependent on a thesis put forward by Professor W.J.R. Alexander (formerly Chief of the Division of Hydrology and Manager of Scientific Services of the South African Department of Water Affairs)<sup>1</sup>, whose Report in Vol. VI of the Namibian Memorial is made an integral part of the Memorial and "provides the technical and scientific foundations" of the Namibian case. (Namibian Memorial, p.6, para.20).

[1. The South African Department of Water Affairs supplied two experts, Mr. J.B. Botha and Mr.G.R.van der Merwe, who participated in the Joint Chobe River Boundary Survey of 1985 which identified the northern channel as the main channel,- "the main channel of the Chobe River now passes Sidudu/Kasikili Island to the west and north of it." Botswana Memorial, Volume III, Annex 48, p.384 at 387-8.]

255. A startling aspect of that thesis is Professor Alexander's identification of the course of the southern channel, not as shown on all aerial photographs, maps and even satellite imageries, but as "a broader overlying channel", superimposed over the western third of the present Kasikili/Sedudu Island. The presence of this 'Alexandrine channel' is identified as Zone d in Diagram 4, Sheet 17, Namibian Memorial, Vol.VI, Expert Report, part 2.

256. The key passages in his Report are as follows:-

"12.6 Morphology of the southern channel. In contrast to the northern channel, the southern channel is highly sinuous, has an irregular width, and very low saw-tooth shaped banks that are only a few centimetres high in places (Photographs on Sheets 21, 22 and 23). Where the right bank of the southern channel is adjacent to the Chobe Ridge the bank consists of rock and consolidated soil protected from erosion by riverine vegetation (Photographs 6 and 7 on Sheets 21 and 22). The characteristics of the two banks of the southern channel are typical characteristics of a stable, sinuous channel, where water in the river is conveyed along a broader overlying channel. Examples of this type of channel can be seen in Photograph 3a of the Mfolosi River and Photograph 11b of the Chobe River at Ngoma Bridge.

12.7. Striation pattern on Kasikili Island. A study of the 1925 to 1985 aerial photographs on Sheets 14,15 and 16 shows a distinctive striation pattern on the surface of Kasikili Island that has not changed over this period. This pattern is notably absent along a broad band that has a lighter and smoother surface on the aerial photographs. The southern channel is located within this band that identifies the southern channel as being the path along which the bulk of the water in the Chobe River is conveyed. The right bank of the overlying channel is the foot of the Chobe Ridge, and the opposite edge of the channel is indicated on Diagram 4 on Sheet 17." (emphasis supplied) (Namibian Memorial, Vol. VI, Part 1, Expert Report, pp.34-5).

257. The Court is respectfully requested to study Diagram 4 on Sheet 17 (Namibian Memorial, Vol.VI,Part 2), in relation to these passages from Professor Alexander's Report. At the outset it must be emphasised that Diagram 4 is a construct of the Namibian Government. What it reveals is a Chobe River not seen on any of the forty-one maps referred to in the Rushworth Report (Namibian Memorial, Vol.V,p.31, Annex 102). The reason for this is the need of the Namibian Government and its advisers to marginalise the northern and western channel of the River Chobe. The actual main channel of the Chobe in this sector has been replaced by Zone d, Diagram 4, which the Report identifies 'as being the bed of the currently active channel of the Chobe River' (p.22, Para.8.11). Zone d is equated (in Paragraphs 12.6 and 12.7, quoted above), with the southern channel. From Diagram 4 on Sheet 17 it should be appreciated that the "southern" or "Alexandrine" channel is superimposed on an area which all the maps and aerial photographs show as an island,and further superimposed on the western third of that island where some of the highest elevations are located. (Second Opinion of Professor Sefe, Appendix 2).

### **(C) The Major Distortions and Errors of Professor Alexander's thesis**

258. To establish the candidature of the southern channel to qualify as the main channel, Professor Alexander is driven in his thesis to:-

(i). distort and misrepresent the geomorphology of the region, making the Chobe River part of the flood plain of another river;

(ii). select a restricted time for application of the treaty definition, focusing solely on a season of the year, high flood, when both the northern and southern channels and the Island are obliterated. He thereby totally ignores the consistent configuration and the presence of two channels, with the northern as the wider and deeper, which all the maps and aerial photographs, made at different seasons, have given to the bifurcation of the Chobe River around Kasikili/Sedudu Island;

(iii). apply a criterion for the main channel of annual flow which indiscriminately includes upstream and flood non-directional flow, in total disregard of the use of the words in Article III of "descends" and "channel" which clearly indicates continuous downstream flow in an established course;

(iv). apply a criterion which is dependent on the extent of the floods which the Hydrographs (at Annexes 60 and 61 of the Botswana Memorial, Vol.III, pp.466,468), show to vary from year to year. Floods by nature vary in magnitude and the area flooded depends on the magnitude of the flood. Furthermore, a floodplain occupies a zone and in no way can assist in the determination of a boundary which is a linear feature. The criterion proposed by the Namibian Government is therefore totally dependent on the indeterminate and variable magnitude of the annual flood ;

(v). adopt the maximum spread of water in flood as a definition of "channel" thereby confusing floodpath with directional flow down the gradient of the riverbed in a definite channel;

(vi). abandon in entirety the previous position advanced by Namibia in relation to the scientific evidence up to the signing of the Special Agreement in 1996. Namibia's Memorandum submitted to the Joint Team of Technical Experts asserted that "Major floods which occurred and frequent movement of sand by the tributaries of the Chobe River have caused the southern channel to silt up", (Kasikili Island: The Government of the Republic of Namibia's Position. Memorandum submitted to the Joint Team of Technical Experts, p.37).<sup>2</sup>

[2. It is not denied that such changes took place, but they occurred many thousands of years before the Anglo-German Agreement. For the geomorphological history of the region the Court is respectfully referred to the Second Opinion of Professor Sefe [Appendix 2] and Appendix 3 thereto.

vii). misinterpret the evidence relating to deposition of sediment, absence of erosion and sediment bars.

259. The rest of this chapter will deal in greater detail with the major inaccuracies, inconsistencies and contradictions involved in the 'Alexandrine' thesis. An Analysis of Professor Alexander's Expert Report, carried out by Professor F.K.Sefe, exposes paragraph by paragraph the misconceptions and misrepresentations contained in that report. The Court is respectfully referred to that Analysis, which appears as Appendix 4 in Vol. II of the Counter-Memorial, for the detailed examination of the 'Alexandrine' thesis.

#### **(D) The limited expertise of Professor Alexander**

260. It should be noted that Professor Alexander does not put himself forward as an expert in the geomorphology or hydrology of the Chobe River. His experience and approach, as stated in his curriculum vitae, indicates that he is a co-ordinator of information, assembled by officials of the Water Affairs Department, relating to the ephemeral rivers located in the Union of South Africa, which he then is required to apply to achieve solutions of immediate problems. His publications, South African Flood Hydrology (1990) and Flood Risk Reduction Measures (1993), and his reliance in his Report on Brink's Engineering Geology and a work on laboratory experimentation with stream tables, clearly indicate this focus on solving immediate problems of flood. He has carried out no field work, or hydrographic projects relating to the Chobe River. His Report is described as being based on six personal visits and satellite imageries, Namibian Memorial, Vol.VI,Part 1, Expert Report, p.1. His generalist and

partisan approach is characterised by glaring errors, omissions, and misrepresentations, and a summary of these are to be found in Professor Sefe's Second Opinion (Appendix 2) and his more detailed analysis of Alexander's Report (Appendix 4 to this Counter-Memorial).

**(E) The three fundamental misconceptions in the Namibian case relating to the scientific evidence**

261. The extreme thesis which the Namibian Memorial advances in support of the southern channel as the main channel is built upon three fundamental misconceptions:-

**(i) The misconception that the Chobe is not a River**

262. The Namibian Memorial invites the Court " to shed any preconception which it may have about rivers in general" and postulates

"The Chobe is a river of an entirely different kind...It is not a single continuous watercourse steadily carrying water in a downstream direction from its own watershed to its mouth or to its junction with another river. It is, instead, part of a complex river system closely associated with the Zambezi River lying to its north. The Chobe is not a perennial river, but an ephemeral one." (Namibian Memorial, p.119.para.56.)

263. This is an extraordinary distortion of the geography of the region. The Glossary of Hydrology produced by the American Geological Institute defines a river as "a general term for a natural freshwater surface stream of considerable volume and a permanent or seasonal flow moving in a definite channel towards a sea, lake or another river." The Chobe River conforms to this definition as discussed in the Second Opinion of Professor Sefe (as he now is), which is set out in Appendix 2 to this Counter-Memorial, at p.3, para. 7. It has a defined catchment area extending into the Angolan Highlands. The Chobe River is an independent perennial river with continuous flow at all seasons of the year through the northern channel around Kasikili/Sedudu Island, that channel having stable and visible banks, as illustrated by the aerial photographs and satellite imageries and as more specifically set out in Chapter 6, paras. 390 to 456.

264. The Chobe River may properly be classified as a tributary of the Zambezi River but this association between the two rivers does not negate the existence of the Chobe River as a separate geomorphological and hydrological entity: see Map C (opposite paragraph 195). To maintain otherwise is to run counter to the opinion of Namibia's own expert, Professor Alexander, who speaks of the Cuando(Chobe) as "one of the three major rivers in south-central Africa", which "..originate in the high rainfall regions of sub-equatorial Africa and then follow parallel paths in a south-easterly direction across featureless terrain until their courses are obstructed by a series of low ridges across their paths." (Namibian Memorial, Vol.VI, Part 1, Expert Report, p.11, para. 5.2.)

265. All accounts of European explorers on whose knowledge and maps the treaty-makers relied in 1890 clearly identify the Chobe as an independent perennial river (as more particularly set out in Chapter 6 of this Counter-Memorial, paras. 358 to 362).

**(ii) The misconception that the Chobe River is part of the flood plain of the Zambezi River**

## G8 - Definition of floodplain and bankfull flow

266. Continuing its misinterpretation of the facts, the Namibian Memorial states

"Kasikili Island lies within the flood plain of the Zambezi River which covers roughly the entire triangle bounded by lines connecting Katima Mulilo on the north, Ngoma Bridge on the south and the Mambova Rapids on the east (See Fig.4, following page 17 infra.). This whole flood plain, including Kasikili Island itself as well as the two channels of the Chobe river is under water five months of the year on the average." (emphasis supplied). (Namibian Memorial, p.7, para.21).

267. This totally misrepresents the true position. In scientific terms a flood plain is distinct from the river channel itself, being " the surface adjacent to the channel, separated from the channel by banks, and built of materials deposited in the present regime of the river".(Professor Sefe's Second Opinion, p.6, para.12, citing Baker et al, 1988, at page 95 showing the definition of floodplain and bankfull flow). The course of the Kwando-Linyanti-Chobe River is largely determined by the numerous faults in the area (Professor Sefe's Second Opinion, Appendix 4, Thomas and Shaw 1991).

268. The pronounced channels of the Chobe River can only have been cut by water flowing in a downstream direction. Floods do not obliterate channels; they are simply submerged, but continue their draining function as the deepest parts of the flooded zone. The continued presence and greater depth of the northern channel is to be observed on the satellite imageries, in particular, the classified figures 15, 21 and 25, in Professor Sefe's Second Opinion. Figure 15 is reproduced at page 99, and Figures 21 and 25 are reproduced at pages 197 and 199 (Chapter 6, para 455, below).

### **(iii) The misconception that there is no downstream flow through the northern channel throughout the year**

269. The Namibian Memorial develops Professor Alexander's thesis in the following passage:

"It is of cardinal importance in understanding the issues in this case for the Court to keep in mind that all of the maps and photographs depicting this Island (except for some of the satellite images in the Alexander Report) were made during the dry season when there is no water flowing through the river. The visual images that appear in these representations as the seemingly clearly defined northern and southern channels around the island are no more than stagnant pools of water caught behind the Mambova Rapids after the annual flood subsides".(Namibian Memorial, p.22,para.66).

270. This passage produces a direct conflict with the map evidence produced by Namibia's cartographic expert, Mr. R.W.Rushworth (See Chapter 8 of this Counter-Memorial).

### **I. IT IS NOT CORRECT IN SO FAR AS IT RELATES TO THE NORTHERN CHANNEL**

271. Article III of the 1890 Agreement speaks of a line which "runs eastward..till it reaches the River Chobe : and descends the centre of the main channel of that river to its junction of the Zambezi, where it terminates." The term "descends" in Article III stresses the significance of gradient in the treaty-makers' adoption of a river as a geographical feature by which to locate the boundary line. Similarly, gradient is envisaged in the use of "ascends" in relation to

the River Rovuma in Article I(2) and to the River Aka in Article IV (i) of the 1890 Agreement.

272. The northern channel in the vicinity of Kasikili/Sedudu Island satisfies the treaty makers' requirement of a 'main channel' through which the Chobe River 'descends' to its confluence with the Zambezi. Flow through the northern channel is continuous in a downstream direction with a constant level of 925.6 metres, South African Mean Sea Level, measured at the Kasane Gauging Station through all seasons of the year. (Mean monthly water levels at the Kasane Gauging Station are shown on Table 3 in Professor Sefe's Second Opinion, pp.28-35 (in Appendix 2 of this Counter-Memorial).

273. This flow is demonstrated in the hydrological surveys and gaugings carried out by the Department of Water Affairs (Botswana) at seven stations along the Kwando-Linyanti-Chobe system south of the Caprivi Strip from the Upper Kwando down to Shaile, as shown on the Map D opposite page 13 of this Counter-Memorial.

G9 - Satellite Image, Classified Image (Landsat MSS Bands 4,5,6,7, June 1975)

274. The Chobe River shows higher levels of flow in its lower reaches as it approaches the confluence with the Zambezi. The summary at the end of Table 3 was used to draw Figures 6 and 7 in Professor Sefe's Second Opinion reproduced at page 104. This Figure 6 shows the spatial variation of flow in a downstream direction along the Kwando-Linyanti-Chobe River system. It demonstrates the augmentation of flow as the catchment area increases, which is a characteristic of perennial rivers, and this is plainly visible at the up-stream stations of Upper Kwando (GS No. 6115) and Bates Camp (GS No. 6125). At Sajawa Gauging Station No. 6414, where the river begins to emerge from the Linyanti Swamps, the attenuating effect of the swamp on water levels becomes obvious. From this point onwards water levels rise again as the catchment area increases. Highest water levels are recorded on the Chobe River at Kasane (GS No. 6624).

275. Like all perennial rivers that depend upon seasonal rainfall, the Chobe River has high and low flow seasons. The data in Table 3 show that the Kwando-Linyanti-Chobe River system experiences seasonal as well as year to year fluctuations. Minimum flow velocities during the low season are of the order of 0.5 metres per second. Thus the river is never stagnant except for a two or three-day transition between the backflow and normal downstream flow.

## II. EVIDENCE OF CURRENT IN THE NORTHERN CHANNEL

276. A reference to cross-sections 5 and 6 in the attachment to the Botswana Memorial (which were plotted by the Joint Survey Team of 1985) reveals that at the outside of the curve between the Spur channel at Kabuta and the northern channel, the channel falls vertically down against the north bank to 9 and 7 metres respectively. This drop in depth can only be explained by current sweeping round the outside of the curve. This effect could not happen in "stagnant" water. The same effect can be observed at cross-sections 9 and 10 where the southern channel sweeps left out into the main channel immediately south of Kasane where the depths of 13.5 metres and 7.5 metres are recorded against the outside of this curve.

277. This effect, however, is not apparent in the southern channel at cross-sections 18, 18A, 18B, and 19, which are the cross-sections around the outside of the curve around the north

side of the sediment spit in the southern channel. This indicates that there is much greater current and volume of water passing through the northern and western channel.

G10 - Mean monthly water levels at Kasane Gauging Station, compiled from Table 3, Sefe 2nd Opinion

G12 - Seasonal water level fluctuation along the Kwando-Linyanti-Chobe systems

278. At the eastern bifurcation it is clear that the zone of maximum velocity is in the middle of the river and flows in a straight line into the western section of the northern channel, rather than suddenly turning at right angles into the southern channel, the mouth of which is protected by a sand bank only 1.5 metres under the surface as shown in the Joint Survey of 1985. Were it otherwise, the entire southern end of the island would have been eroded away by the action of this current.

### III. IT IS CORRECT TO DESCRIBE THE SOUTHERN CHANNEL AS A STAGNANT POOL OF WATER

279. The southern channel is a backwater, not a live river. It is the first to dry out when the water level drops below the very shallow thresholds of 1.5 to 2 metres depth at its entry point to the west of the island, and at the south eastern end of the 'lagoon' sector at cross-sections 14 and 13, where depths of 3 metres are shown on the 1985 Joint Survey. The shallowness of the southern channel is illustrated by the photograph, taken in September 1997, of an elephant standing in mid-channel of the southern channel in the proximity of the 'lagoon' sector: see photograph at page 107. In the absence of any through downflow the backflow resulting from the Kasai channel fills the southern channel, a phenomenon which was noted a decade or so after the 1890 Agreement was concluded and which was entered on the von Frankenberg map of 1912 as "flüss-arm".

#### **(F) The other serious Misrepresentations upon which the 'Alexandrine' Channel is based**

280. In consequence and in support of the above three fundamental misconceptions the Namibian Memorial, in advancing the "Alexandrine" channel as the main channel, makes many other serious misrepresentations. These include:-

##### **(i) The misrepresentation that flow only occurs in time of flood**

281. The Namibian Memorial restricts the time of flow:-

"Water flows through this sector of the Chobe River only during the season when the Zambezi is in flood. Then it comes into the Chobe not from the upstream reaches to the west, but across the whole width of the Zambezi floodplain, a front of over 60 kilometres, until intercepted by the Chobe Ridge, which marks the right (south) bank of the Chobe River. When the floodwaters reach the Ridge they turn into the bed of the Chobe River flowing through it and, in the vicinity of the Island, through the southern channel to the confluence with the Zambezi." (Namibian Memorial, p.7, para.22).

G13 - Photograph of elephant

282. This statement is somewhat contradicted later by Namibia in its Memorial where it admits to normal flow in the months of April to July and describes a more complicated flow pattern:

"Thus, during the first part of the flood season, water actually moves from the Zambezi into and up the Chobe from the Mambova Rapids. This occurs in the months from January to March. During that period the movement of the waters of the Chobe is upstream, i.e. the reverse of what would normally be expected. As the floods begin to subside, this flow reverses, and from April to July the waters flow in the normal direction downstream to its confluence with the Zambezi." (Namibian Memorial, p.22, para.62).

"By August, however, the levels of water in the Chobe River fall below the height of the rapids at Mambova. From August until December, the water in the two channels in the region around the island is stagnant. (Namibian Memorial, p.22,para.65).

283. This misrepresents the flow along the Chobe. As stated in the Memorial of Botswana, (paragraphs 26 to 29), flow along the Chobe is a result of the runoff from the catchment area of the system and follows the pattern of the rainfall regime which occurs over certain seasons of the year. The Chobe is a mature river; it maintains a flow independent of the Zambezi except in floods. Minimum velocity during the dry season is in the order of 0.5 metre per second.

284. In October rains falling in the Angolan Highlands begin to fill the upper reaches of the river and water levels rise through the following months until they reach their maximum in the months of April/May. Thereafter they decline until August. At the lower end of the Chobe a minimum flow is maintained, with a level of 925.6 metres being recorded at the Kasane Gauging Station. In the dry season in the months of August and September, the base flow is maintained by flow from the cross-channels linking the Chobe with the Zambezi River, and equals any losses artificial or natural, such as evaporation (see below, paragraph 295).

285. Recent discharge figures taken in the vicinity of Kasikili/Sedudu Island show volumes of 15.660 to 21.790 cubic metres per second over the months of March and April 1997 in the northern channel, compared to volumes of 3.127 to 5.478 cubic metres per second in the southern channel (Counter-Memorial, Appendix 2, Second Opinion of Professor Sefe, p.80, para.103, Table 7).

286. In the dry season the flow from the Kasai channel can result in some upstream flow. Its effect in the northern channel is to retain rather than cause to flow upstream the normal down gradient flow. The longterm flow over the whole Chobe system is not overridden by the local and temporary back flow caused by the Kasai channel.

287. Professor Alexander relies on back flow to support the southern channel as the channel with the larger volume and flow of water and to challenge the classification of the Chobe as a river. Movement against the gradient cannot make the channel experiencing such temporary reversal of flow a river flowing in that direction. Reversal of flow happens in rivers as well as estuaries at times of high tide. The temporary reversal of the hydraulic gradient does not affect the river bed gradient; channels experiencing this reversal of hydraulic gradient become temporary storage channels, soon to resume down slope flow when the hydraulic gradient returns to normal.

**(ii) The misrepresentation that the 'Alexandrine' channel is the sole channel to carry substantial flow, and that such flow comes from the floodwaters of the Zambezi**

288. The 'Alexandrine channel' is an invention of Professor Alexander and set out in his Report:-

"Photographs 3, 4 and 5 show that the left bank of the southern channel along this reach of the southern channel is only a few centimetres above the stagnant water level in the channel. The shape and characteristics of the bank show that flow takes place across the island (italics added) and into the southern channel along this reach of the channel." (Namibian Memorial, Vol.VI, Part 1, Expert Report, p.24,para.9.4).

289. When the Zambezi is in flood, flow is:-

"along a broad band on the Island (Zone d in Diagram 4,Sheet 17) that has a lighter and smoother surface on the aerial photographs. The southern channel is located within this band that identifies the southern channel as being the path along which the bulk of the water in the Chobe River is conveyed". (Namibian Memorial, Vol.VI, Part 1, Expert Report, p.35, para. 12.7).

290. This is a gross misrepresentation of the topography and hydrology. It totally contradicts the observable facts on the ground. Photograph 2, Sheet 20 and Photo 4, Sheet 21 of the Expert Report, (Namibian Memorial, Vol.VI Part 2) show the extent of the island covered by this broad band. No left bank is visible but a line drawn in a north-easterly direction across the Island is labelled in Photo 2, in what seems a total disregard of the discernible facts, as the "centre of the main channel". In fact the line across the island to which Professor Alexander refers, far from being a bank of a river, is an extension of the inlet at the eastern end of the southern channel, and is a low lying sub-channel, dividing the western higher part of the island from the lower eastern sector. Reference to the August 1947 aerial photograph reveals a string of pools/damp areas in the mid-section of this sub-channel. The presence of pools of water in the low-lying parts of the island is confirmed by the Landsat (Satellite) imagery of June 1975, particularly the false colour composite in Figure 14 (Professor Sefe's Second Opinion, page 56, para. 75).

291. Contrary, therefore to his general requirement of visible banks, the left bank of this 'southern channel' has no visible bank. In his Report Professor Alexander attempts somewhat mystifyingly to explain this absence:-

"..the course of the Chobe River can be readily and unambiguously determined along the whole length of the river from Point (8) on Map 2 on Sheet 29 right through to the confluence of the Chobe River and the Zambezi River at Point (12) on the map. Along those reaches of the Chobe River where the left bank of the river is not visible, the left edge of the main channel has to be determined by other means bearing in mind that it is the edge of the zone along which the largest proportion of the annual flow in the river is conveyed." (Namibian Memorial, Vol.VI, Part 1, Expert Report, p.19. para.7.14.)

This is an example of his introduction of deliberate confusion as to the significance of banks.

292. A further point to note is that, on Alexander's thesis, even assuming the major source of flow is floodwater, the closer location of the northern channel to the Zambezi and its flood

plain and its greater depth must result in the northern channel filling and draining off the floodwater first before the floodwaters reach the shallower more distant southern channel.

**(iii) The misrepresentation that the direction of flow is attributable to the floodplain of the Zambezi tilting towards the Chobe Ridge**

293. The Namibian Memorial misrepresents the topography of the region in stating:-

"To understand what happens in the flood season, on the other hand, one must keep in mind the two salient topographical features of the region of the Zambezi floodplain. The first, is the floodplain itself, which is relatively flat, with a gentle slope from north-west to south-east. The second is the Chobe Ridge, a prominent escarpment some 50 metres high, which lies athwart the floodplain at its southern edge, tending from south-west to north-east." (Namibian Memorial, p.51, para.137).

294. This statement is inaccurate. The Zambezi escarpment in Zambia and the Chobe Ridge in the south define the limits of the ancient flood plain within which the present rivers operate. As set out in Shaw and Thomas' geomorphological paper on the Kalahari:

"The Eastern Caprivi lies in what is known as the Gwembe Trough, a tectonically active zone characterised by extensive alluviation, in which both the Zambezi and the Kwando Rivers are confined by fault-controlled escarpments which delimit the trough. The rivers themselves are controlled by a series of NW-SE and SW-NE faults, which give a strongly rectilinear drainage pattern. This is particularly noticeable in the Cuando, which pursues a dog-leg course along the Linyanti, Liambezi and Chobe faults, with swamps along the first of these faults, and an ephemeral lake along the second. The Chobe has its confluence with the Zambezi at the Mambova Falls at 926 m. (Figure 1), a massive Karoo basalt ridge along a N-S fault, which impedes the flow of the rivers, and, during the annual flood peak on the Zambezi, causes backflooding of the Chobe some 20 km. upstream". Thomas D.S.G. and Shaw P.A., (1991) The Kalahari Environment, at p.132 in Appendix 4 to Professor Sefe's Second Opinion, Appendix 2 to this Counter-Memorial.

295. Any tilt of the Zambezi towards the Chobe is minimal and allows water to flow in either direction depending on which system has more water and higher levels of water. Any actual and effective flow from the Zambezi is through the well-defined and well-confined cross-channels which do not depend on the tilt. The Map D (at page 13) and Diagram 5(b) in Professor Sefe's Second Opinion indicate the cross-channels linking the Chobe with the Zambezi from Lake Liambesi down to the Mambova Rapids at Commissioner's Kop.

296. The course of the Chobe River does not flow at the foot of the Chobe ridge; at Kabulabula and Nanyaba game scout camp the main channel flows over a kilometre away from the foot of the ridge and at the sediment spit to the north of Serondela airstrip (on Map at page 3) the main channel leaves the foot of the ridge and swings out into the flood plain.

**(iv) The misrepresentation that substantially all the annual flow is carried by the southern channel**

297. The Namibian Memorial asserts:-

"Substantially all of the annual flow of the Chobe River is carried to the confluence with the Zambezi by the southern channel." (Namibian Memorial, p.50, para.133.)

298. This constitutes a serious distortion of the facts. The southern channel is a backwater for the greater part of the year: see paragraph 279 above. Article III of the Anglo-German Agreement of 1890 speaks of a boundary line which "descends" the centre of the main channel of the Chobe, and hence envisages downstream flow. Even if, as is accepted, some backflow from the Chobe occurs by the action of the Kasai cross-channel, it is incorrect therefore to refer to upstream flow, or non-directional flow, in ascertaining the main channel.

**(v) The misrepresentation that the northern channel does not exist as a channel of the Chobe River**

299. Again the Namibian Memorial asserts:-

"Thus, the northern channel can hardly be considered a channel of the Chobe River at all. In the dry season it is stagnant, in the flood season it is refilled by the floodwaters of the Zambezi, but no water flows through it downstream in the Chobe in either season. As Professor Alexander says, it is, in effect, a relict channel of the Zambezi floodplain." (Namibian Memorial, p.7,para.23.)

300. This is not correct. The longitudinal slope of the bed is steeper in the northern channel than the southern. The depths surveyed in the 1985 Joint Survey were used together with distances along the middle of the channels surveyed to plot the bed profiles of the two branches of the Chobe River in the vicinity of Kasikili/Sedudu Island (Figure 9 in Professor Sefe's Second Opinion, reproduced at page 129). It can be seen that the bed profile of the northern channel is steeper and more irregular over a comparable distance. Velocity is bound to be higher in the northern channel than the southern. Given that the northern channel is deeper and wider on the average, flow will be higher than in the southern channel.

**(vi) The misrepresentation that black soil in the southern channel is indicative of flow**

301. The Namibian Memorial phrases this argument as follows:-

"When the River reaches Kasikili Island, the black soil continues to appear in the bed of the southern channel, but not in the northern channel. The material of the bed and banks of the northern channel does not consist of recently deposited sediment from the Chobe River, but rather floodwater deposits emanating from the Zambezi River over a long period of time similar to the material that constitutes other parts of the floodplain." (Namibian Memorial, p.54,para.150.)

302. This misrepresents the position both as to the distribution of black soil and its relevance to determination of flow levels. As both the Second Opinion of Professor Sefe [Appendix 2] and the Sedimentological Report (Appendix 3 of the Botswana Counter-Memorial) show, black soil of basaltic origin is found throughout the Island and supports the view that there is no great difference in distribution of basaltic deposits in the northern and southern channel, such deposits being widely distributed.

**(vii) The misrepresentation that to qualify as the main channel the northern channel must show evidence of erosion**

303. The Namibian Memorial exhibits confusion and misunderstanding relating to the erosion processes of rivers. It states:-

"The sandy material making up the banks of the northern channel is readily erodable. Yet the close up ground photographs of these banks show no sign of appreciable bank erosion, sediment deposition, or reed growth normally associated with actively flowing river channels in general." (Namibian Memorial, p.55, para.152).

304. This presents a wholly misleading account of the sedimentation process in a mature river. The Sedimentological Report provides the history of the pattern of sedimentation on the Island. From this it is apparent that the top layer of 1.5 metres in depth constitutes, and has done for thousands of years, material for stable non-erodible banks. These are plainly visible and indicate the stability and maturity of the Chobe system in the vicinity of the Island. The presence of trees on the right hand (island) bank of the northern channel also indicates an established stable channel. There are no erosion scars or slump cracks on the edge of the island that can be attributed to water action. Dating techniques applied in the course of the Sedimentological Study of the Island show that material along the island bank of the northern channel is more recent than the deposits in the southern channel: see Chapter 6, paras. 368-71.

305. Stable and non-erodible banks are a characteristic of perennial, not ephemeral rivers. To determine, as does Professor Alexander, a main channel by the absence of erosive features along its banks, suggests a poor understanding of river processes and the impact of climate on geomorphic processes.

**(viii) The misrepresentation that the sand bars in the Chobe River indicate flow**

306. The Namibian Memorial advances the following theory on sand bars:-

"The existence of these sandbars and the changes in their position over the years, as illustrated by the successive photographs, indicate active river flow. The location of the bars, immediately adjacent to the foot of the Chobe Ridge shows that this is the zone of maximum velocity along which the water and sediment are being transported through the floodplain towards the exit at Mambova Rapids". (Namibian Memorial, p.56, para.155).

307. This is not correct. Sediment bars located at the bifurcation point of the northern and southern channel and on the right of the southern channel in the big meander loop are permanent features of a low energy river. They are relict bars of earlier downstream flowing channels, not active zones of sedimentation. Absence of any such bars in the northern channel indicates strength of flow.

308. The Spur channel immediately south of Kabuta serves as a flood relieving channel for the northern channel. It is indeed a relict channel and its greater depth is explained in terms of palaeo-hydrological conditions. The northern channel actually joins the original channel of which the Spur channel was part. It may be noted that at cross-section 5 of the 1985 Joint Survey Report the depth is at 9.2 metres.

309. Vegetation along the banks of rivers may indicate flow or lack of flow but care in identifying species is required. There is an association of placidity of water and weed growth and proliferation of weed growth within a given decade may indicate sluggishness of flow. Hence the paler area plainly visible in the western section and the 'lagoon' sector of the

southern channel in the aerial photograph of May 1972 (Botswana Counter-Memorial, Attachment).

### **(G) Wildlife**

310. The utilisation of the Chobe River and its banks by wild life provides further evidence of the shallow stagnant condition of the southern channel. Hippopotamus are known to frequent the southern channel by reason of its shallow and calm waters; they are absent from the northern channel. Buffalo in recent years cross onto the island by means of the southern and not the northern channel to feed during the winter; the shallowness of the southern channel allows them to cross without too much difficulty. Since the establishment of the Game Reserve in 1960 game wardens and wildlife specialists have recorded the presence of hippos in the southern channel, but not in the northern. Mr. Peter Gordon Hepburn, son of Mr. Patrick Hepburn, first Game Warden of the Chobe National Park from 1962 to 1970, lived with his father on the bank of the Chobe River opposite Kasikili/Sedudu Island. Now aged 44, and engaged in the wildlife safari industry, he has spent most of his adult life in and around Kasane. He reports:-

"In all my time boating on the river in the Chobe National Park I have observed...that the hippo population in the river around Sedudu Island has always used the Southern channel around the island as their main territory. This has been because the southern channel has always been shallow, thus enabling the hippo to sleep and rest in the water." (Botswana Counter-Memorial, Annex 49)

311. Mr. Timothy Liversedge, Game Warden in the Chobe National Park in 1969 and 1970, who conducted a mammal survey in Botswana for the Smithsonian Institution of Washington DC in 1966 and 1967, reports that:-

"I observed during my stay in Kasane that hippos tended to prefer the Southern channel along Sedudu. This is because the waters there are shallower and slower flowing as compared to the Northern side thus enabling the hippos to rest during the day more easily. (Botswana Counter-Memorial, Annex 50)

312. The photograph taken in September 1997 of hippopotamus standing in the southern channel indicates the shallowness of the waters in the southern channel. (The photograph at page 117).

### **(H) Conclusion: Summary of the deficiencies of Namibia's case relating to the scientific evidence**

G14 - Photograph of hippos

313. In deploying its scientific evidence Namibia has two insuperable obstacles to overcome: the first, the configuration of the northern channel, which identifies it as the main stream of the Chobe River in the vicinity of Kasikili/Sedudu Island, and second, the features of the southern channel with its shallow sinuosities leading to a backwater lagoon.

314. As to the first obstacle, the scientific evidence produced in no way challenges the facts that the northern channel has the greater width, depth, deeper bed profile, straighter course and greater capacity to carry flow. Instead, with the aid of scientific evidence Namibia seeks

to sidestep these inconvenient facts, facts which the aerial photographs and relevant maps so clearly substantiate.

315. The Namibian Government first attempted to overcome its difficulties by acknowledging that the northern channel was the present main channel but on the supposition that a change of circumstances from the present silted up condition of the southern channel to a time approximate to the making of the 1890 Agreement when it operated as the main channel. This scenario, however, proved unsustainable in the light of the extensively researched geomorphology of the region which establishes the Chobe River in its present system as a mature system enduring from two thousand years ago or more.

316. Accordingly, and in particular taking into account the record of aerial photographs from 1925 to the present date showing the unchanged configuration of the channels, the 'change of circumstances' thesis was abandoned, and the Namibian Government asked Professor Alexander to provide an alternative scientific explanation in support of the southern channel. This he has most ingeniously done, with a fine display of diagrams, sketch maps, and coloured photographs (most of which are irrelevant).

317. Unfortunately, the 'Alexandrine' thesis is equally unsatisfactory; it contradicts the evidence of official surveys (the Eason, Trollope and Redman, and the Joint Survey of 1985). It contradicts all the relevant map evidence, evidence on which Namibia had hoped to place great reliance. Confronted with the 'Alexandrine' thesis Namibia's other expert and cartographer, Mr. Rushworth, is reduced lamely to apologising:-

"Of course, all the maps have been made in the dry season when access for surveyors is easy and skies are clear for air photography". (Namibian Memorial, Vol. V, Annex 102 at p.52.)

318. Even more fundamentally, the 'Alexandrine' thesis gives no support to the southern channel as the main channel but constructs a wholly hypothetical flood zone of dimensions fluctuating with the magnitude of the yearly flood, drawn in a north/south direction across the island. This zone does not follow the well-defined sinuosities of the southern channel and is sited somewhat extraordinarily on the highest part of the Island (see Professor Sefe's Analysis of Alexander's Report p.15, para.37 at Appendix 4). With no visible banks or margins, the Court is asked to undertake the impossible task of locating a boundary in the centre of this uncharted shifting zone.

319. As demonstrated in the preceding paragraphs of this Chapter, this novel 'Alexandrine' thesis is based on the fundamental misconceptions that the Chobe is not a river, has no continuous downstream flow, and is merely part of the Zambezi flood plain. He grossly misrepresents the geomorphology and hydrology of the region, ignores the measurements of bed profiles of the two channels, and the flow statistics. He misrepresents the nature of the southern channel; without any supporting evidence and in total disregard of comparative depth, current, and continuity of line with the river, asserting that substantially all the annual flow is carried in this channel. He misunderstands the processes of sedimentation and erosion as applied to the mature river system of the Chobe and misinterprets evidence concerning the presence of black soil and sand bars.

320. The Sedimentological Report carried out by Professor Sefe and Mr.Muzila's assistance demolishes any credence in Professor Alexander's assertions that the southern channel alone

evidences the operation of erosive processes. The use of the southern channel by hippopotamus further supports its tranquil backwater character.

321. Taking into account all the matters set out in this Chapter, the Court is respectfully requested to reject the case put forward by Namibia on the basis of Professor Alexander's Report as irrelevant, lacking scientific foundation and contrary to the observable facts and official surveys. Botswana requests the Court to rule in its favour that the main channel is the northern channel and submits that the two Opinions of Professor Sefe and the Sedimentological Report provide incontrovertible scientific evidence in support of that ruling.

## **CHAPTER 6**

### **The Scientific Evidence Presented on Behalf of Botswana**

#### **(A) Botswana's case is based on the observable facts and the conclusions of official surveys**

322. Botswana's case is that the northern and western channel of the River Chobe in the vicinity of Kasikili/Sedudu Island is the main channel and hence the northern channel is the channel in the centre of which the boundary is to be drawn.

323. That case is supported by the facts on the ground. Every official, surveyor or hydrologist prior to Professor Alexander has on a consideration of the question and, on inspection, pronounced that the northern channel is the main channel. Captain H. V. Eason did so in his survey of 1912, Trollope and Redman in their Joint Report of January 1948 were of that view, as was the Surveyor-General of Bechuanaland in his Opinion of 18 October, 1965, and so concluded the Joint Survey Report of 1985. In the light of such unanimity of view, reference to scientific experts would seem supererogatory and unnecessary. Examination of the remarkable series of aerial photographs beginning in 1925 to the present day (Attachment to the Botswana Counter-Memorial, Professor Sefe's Second Opinion, Appendix 2 in Vol. II, and see paragraphs 390 to 441 below) supports the same conclusion, namely that the northern channel manifests itself, consistently over the period of seventy years, as the broader and deeper channel, without the sinuosities of the southern channel, and hence is the main channel. The satellite imageries taken in June 1975, March 1995 and June 1996, provide further evidence in support, (paragraphs 442 to 456 below and see Satellite imagery opposite page 99 of this Counter-Memorial, and in the Attachment). Such of the maps as accurately portray the topography of the Island and its channels also demonstrate that the northern channel is possessed of the characteristics required for the main channel.

#### **(B) Scientific evidence is supererogatory**

324. When the facts on the ground and all observers of those facts speak with such unanimity, recourse to scientific evidence seems wholly superfluous, and contrary to common sense. Namibia, in an attempt to divert the Court's attention from the facts and the strength of Botswana's case, produces Professor Alexander as a scientific expert and adopts his idiosyncratic definition of the main channel. It is to rebut these unscientific assertions and his

unsubstantiated thesis that Botswana now adduces scientific evidence and refers to the considerable published writings on the geomorphology and hydrology of the Chobe and Upper Zambezi Rivers.

325. The Court is respectfully referred to the scientific evidence based on geomorphology and hydrology and substantiated by fieldwork contained in the First Opinion of Professor F.T.K. Sefe, University of Botswana, in the Appendix to Chapter VII of the Memorial of Botswana for a general description of the geomorphology of the region, to his Second Opinion relating more specifically to the hydrology of the Chobe River and the Island, and to the Sedimentological Study of Professor Sefe, made with the assistance of Mr. I.M. Muzila, B.Sc. (C. Engineering), Principal Hydrological Engineer, Department of Water Affairs, Ministry of Mineral Resources and Water Affairs, Government of Botswana. Mr. Muzila by training and by reason of his professional duties, has unrivalled knowledge and experience of the hydrology of the Chobe River. This Second Opinion and Sedimentological Study and the Analysis of Professor Alexander's Expert Report, also carried out by Professor Sefe, are all contained in Volume 2 of this Counter-Memorial, and form an integral part of Botswana's case.

326. The population and habits of the wildlife provide evidence that the southern channel constitutes no barrier for transit to the island, and its shallow tranquil waters are used by hippopotamus as a resting place, undisturbed by river flow or navigation of craft.

### **(C) Botswana's case relating to the River Chobe based on scientific evidence**

327. Botswana's case is supported by the following propositions relating to the Chobe River; each of these are dealt with in greater detail below at the passages as indicated.

#### **(i) The Chobe is the geographical feature in Article III of the 1890 Agreement**

328. Article III of the Anglo-German Agreement of 1890 identifies the Chobe River as the geographical feature along which the boundary "descends" to its junction with Zambezi, (paras.355 to 362 below).

#### **(ii) The Chobe is a river independent of the Zambezi River**

329. The Chobe River is a river independent of the Zambezi River. It flows downstream from its source in the Angolan Highlands to its junction with the Zambezi at Kazungula (paras.363 to 364 below).

#### **(iii) The Chobe has a stable profile as a perennial mature river**

330. Scientific evidence based on geomorphology and hydrology and substantiated by field work and analysis demonstrates the independent function of the Chobe River as a perennial mature river, the existence over many thousand years of the present alignment of the northern channel, and the stability of the present configuration of the island with visible and non-erodible banks in the northern channel (paragraphs 363 to 364).

#### **(iv) The Chobe is a perennial river with visible and stable banks**

331. The Chobe is a perennial mature river with stable, non-erodible and readily discernible banks. In the vicinity of Kasikili/Sedudu Island both banks of the northern channel are readily discernible, at all seasons of the year, and in particular when the island is inundated in the wet season (paragraphs 365 to 367 below): see the aerial photographs May 1972 and May 1997, photographs taken in May and August 1997, and the satellite imageries of June 1975, March 1995 and June 1996. The aerial photography in the preparation of the South African JARIC map was used as the basis for the July 1977 image (at page 125). (See also para.69 of Professor Sefe's Second Opinion).

**(v) There is an absence of zones of sedimentation in the northern channel**

332. The absence of zones of sedimentation and the absence of any evidence of erosion again support the stable profile of the northern channel as the main channel (paragraphs 368 to 375 below).

333. Sediment bars located at the bifurcation point in the northern and southern channel and on the right of the southern channel in the big meander loop are permanent features of a low energy river. They are relict bars of earlier downstream flowing channels, not active zones of sedimentation. The absence of any such bars in the northern channel indicates strength of flow (paragraphs 377 to 378 below).

**(vi) The Chobe is a river with continuous flow**

334. Flow in a downstream direction through the northern and western channel is continuous with a constant level of 925.6 metres, South African Mean Sea Level, measured at the Kasane Gauging Station through all seasons of the year (paragraphs 378 to 381 below).

**(D) It is irrelevant to the determination of the northern channel as the main channel whether one or two channels exist in the Chobe River**

G15 - July 1997 image (The JARIC aerial photograph), Figure 13, Sefe, 2nd Opinion

335. Regardless of the existence of one or two channels, there can be no question that the northern channel is the sole, and hence the main, channel of the Chobe River.

336. In fact according to the German version of Article III of the Anglo-German Agreement of 1890 which refers to the Thalweg des Hauptlaufes, it is immaterial whether the river flows through a single or multiple channels because the application of the thalweg will always indicate a single channel. The Namibian Memorial is clearly very much aware that the determination of the thalweg will totally defeat its arguments in favour of the southern channel. Hence it exhorts the Court to search first for 'the Hauptlauf'<sup>3</sup>.

[3. Namibia exhorts the Court as follows: "The main channel must be found first. The centre can necessarily only be found afterward. This point is equally pertinent, to the German translation of the formula ... in Thalweg des Hauptlaufes ... In the same way as with the English text, the search must be for the 'Hauptlauf' and for the 'Thalweg' only after the 'Hauptlauf' has been found. The 'Hauptlauf' cannot be identified by first seeking to find the 'Thalweg' (emphasis added). (Namibian Memorial, p.44, para. 117).]

337. The thalweg is defined as 'the line of maximum depth along a river channel'.

(Goudie. ed.; The Encyclopaedic Dictionary of Physical Geography, (1990) p.428; Leopold, Wolman and Miller, Fluvial Processes in Geomorphology, (1964), p.281, in Appendices 2 and 7 in Professor Sefe's Second Opinion, (Appendix 2 of the present Counter-Memorial).

338. In a bifurcated stretch of river, such as the Chobe River in the vicinity of Kasikili/Sedudu Island, both channels will have their respective thalwege. However, the thalweg of the main channel will be at a lower elevation than the thalweg of the other channel. Only the thalweg of the main channel can be logically connected to the thalweg of the channel upstream of the point of bifurcation and downstream of the point of reunion. (Professor Sefe's Second Opinion, page 9, para.22; Professor Sefe's Analysis of the Expert Report of Professor Alexander, page 4, para. 9, Appendix 4 of the present Counter-Memorial).

339. The 1985 Joint Survey Report (see paragraphs 345 and 348 below), established the following depths at the points of bifurcation:-

<b>Location of Sounding</b>	<b>Cross-section</b>	<b>Depth in metres</b>
Upstream of bifurcation	1	4.05
Immediately below bifurcation		
Northern channel	2	2.65
" " "	2A	5.60
Southern channel	20A	2.10
" " "	20	1.50
Immediately above reunion with river		
Northern channel	7A	6.00
" " "	8	8.20
Southern channel	11	4.70
" " "	10	6.30
Downstream in river below reunion	9	14.00

Figure 9 in Professor Sefe's *Second Opinion* (at page 129) illustrates the comparative thalwegs of the two channels and how the continuous thalweg of the river runs from upstream into the deeper northern channel and continues at the deeper level until it rejoins the river below the Island.

340. Accordingly, the thalweg of the Chobe River, which is the line along which Article III provides the boundary shall run, is located in the northern channel.

341. This interpretation of Article III is confirmed as the official German view of the location of the boundary. A letter drafted in the German Foreign Office, dated (Berlin) 25 April 1910, contains the following message:-

"Das Abkommen vom 1 Juli 1890 enthält keine genauen Bestimmungen über die Grenze des deutschen Zambese-Gebietes. Die deutsche Regierung folgt der Ansicht, daß die Grenze des deutschen Gebietes durch eine Linie gebildet wird, die vom Thalweg des Tschobe in den des Zambese einbiegt und dem Thalweg des Zambese stromaufwärts bis zu dem Punkt folgt, wo dieser die Katima-Molilo-Schnellen trifft.'

[The Agreement of 1 July 1890 contains no specific rules on the boundary of the German Zambezi territory. The German Government shares the opinion that the boundary of the territory is formed by a line which from the Thalweg of the Chobe turns into the Zambezi and follows the Thalweg of the Zambezi up the river to its conjunction with the Katima-Molilo rapids.] *Acten betreffend Erforschung des Okavangogebiets und des Caprivizipfels* [*Documents concerning exploration of the Okavango and Caprivi regions*] Vol.1: 6 April 1902 - 1 June 1910 (Nr. des Aktenbandes [file no.]: 1784), pp.155-159. (Botswana Counter-Memorial, Annex 5)

G16 - Comparative bed profiles of the northern and southern channels of the Chobe River at Kasikili/Sedudu Island

342. Franz Seiner, who surveyed the map published in 1909 upon which Namibia places great reliance (Namibian Memorial, p.139,para. 334), writing in 1908, refines the concept of thalweg and speaks of the 'Stromstrich' line as the line defining the boundary in the Chobe River according to the 1890 Agreement.

343. In a standard German authority Stromstrich is defined as 'the line connecting the points of all sectional views of the river with the highest speed of the water at the surface. The Stromstrich usually is above the deepest channel of the river bed, the Thalweg'. (definition in *Der Grosse Brockhaus (Encyclopaedia)* (1934), p.272) (Botswana Counter-Memorial, Annex 16).

344. Seiner writes:

"The northern border of the Caprivi was created by the Treaty with Portugal of 30 December 1886, the north-eastern and southern border was created by the famous Zanzibar Treaty of 1 July 1890. These boundary lines are described in the treaties only partly in such a specific way that all misinterpretation would be excluded. Of the northern border only the straight line from the Island of Andara in the Okavango valley to the Katima-Molilo rapids on the Zambezi is determined without doubt, the same with the southeastern border, which is formed by the Stromstrich line of the Linyanti."

Franz Seiner, 'Die wirtschaftsgeographischen und politischen Verhältnisse des Caprivizipfels [The economic-geographical and political situation of the Caprivi]', *Zeitschrift für Kolonialpolitik, Kolonialrecht und Kolonialwirtschaft*, 11 (1908), pp.417-465, at 418. (Botswana Counter-Memorial, Annex 14)

345. The Joint Survey Team also identified the main channel with the thalweg. The experts from South Africa and Botswana who carried out the Joint Survey in 1985 recognised that their task in locating the boundary in accordance with the terms of the 1890 Anglo-German Agreement required them to plot the thalweg of the Chobe River. The text of the Joint Survey Report of July 1985 reads:-

"Representatives of the two national survey organisations accompanied by co-workers from the Department of Water Affairs have now been to the area to survey the 'Thalweg' in the vicinity of the island. Specific mention is made to the Thalweg in the 1890 Agreement between England and Germany". (Botswana Memorial, Annex 48).

**(E) The Criteria to determine the main channel in the case of bifurcation**

346. The concept of thalweg includes within it the criteria of navigability and the capacity to carry the greater flow, which also are employed to determine the main channel. Both depend on the depth of the channel.

**(i) Depth is the criterion of navigability**

347. The deepest channel determines the navigable channel of the river (see paragraphs 383 and 384). It is to be noted that the one sizeable ship at present navigating this section of the Chobe River can only use the northern channel. The Zambezi Queen, 42 metres in length and three storeys high, is operated as a tourist ship and solely uses the northern channel. (See Photograph opposite page).

**(ii) The northern channel is the deeper channel**

348. The 1985 Joint Survey carried out by senior qualified hydrologists appointed jointly by South Africa<sup>4</sup> and Botswana, in taking 27 cross-sections, established that the northern channel is the deeper channel, "its mean depth of 5.7m. exceeds the depth of the south channel by 2.13 m." (Botswana Memorial, Chapter VII, Professor Sefe's First Opinion, p.4). These cross-sections were shown on a plan with a linear scale accompanying the Joint Survey Report.

4. It is interesting to note that two experts, Mr. J.B. Botha and Mr. G.R. van der Merwe, were supplied by the South African Department of Water Affairs, the very Department in which Professor Alexander himself served as Chief of the Division of Hydrology and Manager of Scientific Services until he retired in November 1984.

Pic of Queen Boat on river

349. This finding is not challenged in the Report of Namibia's Expert, Professor Alexander, who admits "that the depth measurement at the selected cross-sections in the vicinity of the bifurcation show that the minimum recorded depth of the south channel was marginally less than that of the north channel". His assertion that "these measurements do not give any indication of the long-term average depths which vary from season to season and from year to year", is unsupported by measurement, and in any event gives no basis for maintaining that the relative depth of the channels compared to each other alters. (Namibian Memorial, Vol. VI, Part 1, Expert Report, p.32, para.11.6). The aerial photographs, which range from 1925 to the present day, support the findings of the Joint Survey Report by showing the same unaltered configuration of the two channels. Analysis of the satellite imageries of 1975, 1995 and 1996 also establishes the greater depth of the northern channel.

**(iii) The criterion of capacity to carry larger flow**

Pic of Queen Boat on river

350. The northern channel carries the larger flow because it has greater capacity (see paragraphs 385 and 386). Flow in a channel is a product of cross-section area (a product of the width and depth of the channel) and mean velocity through the cross-section. As Professor Sefe explains:-

"The word "main" has both hydrological and geomorphological connotations relating to the velocity of flow, hence 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). As energy in a river is proportional to the product of the mass (i.e. size and the bed-slope), the larger of two tributaries is considered the main channel."5 (Botswana Memorial, Appendix to Chapter VII, First Opinion of Professor Sefe, page 5).

[5. Note that capacity as used by Gilbert refers only to its geomorphic usage. However, as a stream derives its energy from the volume of flow in the channel, a hydrological connotation is also implied in Gilbert's usage. Thus, hydrologically speaking, 'capacity' refers to volume of flow which is the product of depth, width and velocity of flow.]

351. To sum up, on the basis of the six propositions and criteria set out above, the Chobe River is a mature perennial river with continuous downstream flow at the bifurcation of the island through the northern and western channel, that flow being measured by navigability and competence to carry flow. As the thalweg, the shipping channel and the one through which the greater flow takes place, the northern and western channel is clearly the main channel within the meaning of Article III of the Anglo-German Agreement of 1890.

#### **(F) The Report of the Sedimentological Study of Kasikili/Sedudu Island**

352. A Sedimentological Study of Kasikili/Sedudu Island was carried out in December 1996 by Professor F.T.K. Sefe of the University of Botswana with the assistance of Mr I.M. Muzila B.Sc. (C. Engineering), Principal Hydrological Engineer, Government of Botswana. The results and analysis are set out in the Report in Appendix 3, Volume II, of this Counter-Memorial and show the location, composition, category, size and date of particles in the extraction of cores from 13 bore-holes on Kasikili/Sedudu Island. The position of the bore-holes is shown on the attached plan and at Table 1 (Coordinates of the Sample Sites).

353. The Study provides evidence in support of the following propositions:-

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

(ii) the two layer profile suggests two distinct processes;

(iii) deposition of sand, clay and mud to a depth of 1.50 metres, would require a very low energy environment with very low flow velocity with flow being laminar;

(iv) the complete absence of sand in this top layer suggests that the deposition process was never interrupted in any major way and indicates that the low energy environment, and the present alignment of the Chobe River with the north channel carrying the major flow of water, occurred thousand of years ago;

(v) The mud-peat deposits in the area of the island adjacent to the northern channel are of later date, ranging in age 1,400 years to 1,890 years, while the older materials are to be found along the centre of the island and the southern channel. This suggests that they were laid down later than the rest of the island. The one exception is Bore Hole 9 immediately south of the lagoon in the southern channel, where the sample was also of relatively younger materials.

(vi) the lower layer of sand indicates a higher energy period of fluvial erosion and deposition of sediments;

(vii) in the lower layer of sand there is a predominance of angular and sub-angular particles. This indicates that the sediments have not undergone rounding by abrasion in transport and hence were found in situ;

(viii) the evidence indicates that these sands are of local origin. A method sensitive enough for discriminating between different processes of sediment deposition, known as the sorting measure or the inclusive standard deviation, applied to the samples, supports their originating from the local area; the standard deviation values do not accord with values for river sands;

(ix) the local source is the sand in the ridges to the south of the Chobe River;

(x) these sands were brought by bank erosion into an ancient river approximately occupying the position of the current southern channel;

(xi) the increased sediment load vis-à-vis the available energy silted up the southern channel, necessitating a change in alignment of the river to its present form along the northern channel;

(xii) the processes described above are "recent" only in geological terms, occurring between 10,000 and 3,000 years ago;

(xiii) the existence of the present environment in the Chobe River for many thousands of years is supported by the Sedimentological Report's analysis as to type and size of the particles of the lower layer sampled from the 13 bore-holes. That analysis indicates a predominance of saltating population in the particles and of medium to fine sand categories. The predominance of both indicates a depositional environment in which flow velocities are moderate. Saltating particles are those transported in a hopping fashion, being too large to remain buoyant for long and too small to be transported as bedload by rolling. They are mobilised by moderate flow velocities. The mean grain size in a deposit is largely a function of the energy of the processes controlling transport and deposition. Medium to fine sand particles suggest an energy-limited environment, where reworking of sediments or the importation of sediments from outside the locality is restricted;

(xiv) there is a very limited presence of rolling and coarse particles in the samples at any of the depths cored and, where they do occur, their location is likely to be indicative of overbank flow during floods. Rolling population requires a larger energy to mobilise than sediments in the saltating and suspension categories. Overbank flow during floods is likely to mobilise rolling sediments, but, equally, when flow slackens towards the end of the flood, these large sediments are the first to be deposited. Consistent with such high flow, some 10,000 years ago or more, is the presence in limited quantity of rolling particles at 1.50 to 2.00 metres depth at Bore-holes Nos.12 and 1 at the western and eastern bifurcation points of the Island, at Boreholes Nos. 3 in the northern channel and at Borehole 8 in the southern channel. At the

lower depths of 3.00 to 3.50 metres and 4.50. to 5.00 metres the presence of a limited quantity of rolling particles along the northern channel at Bore-holes Nos.11 and 12 and along the southern channel at Bore-holes Nos. 8 and 9 is consistent with such overbank flow at even earlier periods. Similarly, a limited presence at Bore-hole No.7 on the Island at the greater depth suggests that at some point well prior to 10,000 years ago high flows resulted in deposition at that point.

### **(G) Further Scientific Evidence in support of Botswana's Case**

354. Paragraphs 355 to 381 of this Chapter elaborate the six propositions supporting the Botswana case. Paragraphs 383 to 389 provide further support for the criterion for determination of the main channel. An analysis of the aerial photographs is provided at paragraphs 390 to 441, followed by an analysis of the satellite imageries.

#### **(i) The Chobe River as the geographical feature in Article III of the 1890 Agreement**

355. Article III(2) of the Anglo-German Agreement of 1890 provides that the boundary in the relevant sector "descends" the Chobe River. The treaty-makers intended the line drawn on the 1889 Map labelled "Kuando or Chobe R." to be the boundary, not an indeterminate flood zone of the Zambezi River. They identified the Chobe River as "the prominent geographical feature", not the Zambezi floodplain. The use of the word "descends" is particularly significant in that it indicates gradient and the directional flow of a river and can have no application to a ridge which neither ascends nor descends. Similarly gradient, but in an upstream direction, was in the minds of the treaty-makers when drafting Article I(2) of the 1890 Agreement which describes the German sphere of influence in East Africa by a line "till it reaches and ascends that river", and again in the section of the boundary between the German Protectorate of Togo and the British Gold Coast where Article IV states that the line "...runs along that parallel westwards till it reaches the left bank of the River Aka; it ascends the mid-channel of that river to the 6\_20' parallel of north latitude...".

356. The Namibian Memorial invites the Court "to shed any preconceptions which it may have about rivers in general". (Namibian Memorial, p.19,para.55). Although it admits that on all the aerial photographs and maps the Chobe appears much like "a conventional river", it admonishes the Court that "this visual appearance is profoundly misleading" (Namibian Memorial, p.51, para.135).

357. This advice is all the more extraordinary when set against the Namibian Memorial's own admission that "in choosing the Chobe River the negotiators selected what they could identify as a major and prominent geographical feature" (Namibian Memorial, p.44, para.116).

358. That the Chobe River was so considered at the time of negotiation of the 1890 Anglo-German Agreement is apparent from the various accounts of European explorers which the Namibian Memorial itself cites. Thus James Chapman writes of "the banks of the Chobe...and the continuous flow of the stream running at 3 knots per hour". Dr. David Livingstone speaks of "crossing the five branches of the Chobe before arriving at the main stream" which "should the country ever become civilised would be a convenient natural canal". Emil Holub tells of "the valley of the Chobe river near its mouth one half to three English miles broad", and finds "the Chobe most attractive at and above the rapids". Frederick Selous speaks of the Chobe "which here runs nearly due east" and Bradshaw writes of "the course of the river". (Namibian Memorial, p.26, para.72)6.

[6. Selous' more contemporary account of his explorations is to be found in *Journeys in the interior of South Central Africa*, in Volume III of the *Proceedings of the Royal Geographical Society* (1881) where he states at pages 171-173:

## "2. The River Chobe

I now take the liberty to send you an account of the rise of the Chobe and other rivers in the interior which has been observed to occur during the dry season, and quite independently of the rainfall which regulates the rise and fall of the Zambezi and all the rivers to the eastward of the Victoria Falls...According to the latest maps the sources of the Chobe must be very nearly in the same latitude as those of the Zambezi, yet the waters of the Zambezi fall steadily, after the rainy season is over, during the whole winter, until the following rainy season, whilst the Chobe commences to overflow and flood the flat, marshy country through which it runs, soon after the rainy season is over, and is at its highest towards the end of the dry season, at which time of year the weather is intensely hot....The overflow of the Chobe seems to be growing less year by year. In 1874 an immense extent of country was under water during the months of July, August and September, which was dry land in the same months in 1877 and 1879."

See also F.S. Arnot, *Journey from Natal to Bihe and Benguella, and thence across the Central Plains of Africa to the Sources of the Zambezi and Congo* in Volume XI of the *Proceedings of the Royal Geographical Society* (1889), p.65 where he writes:-

"..On 23rd of May we crossed a very long range of hills, and came upon the northern feeders of the Kwando (or Chobe) river, crossing a small stream almost every half hour. Although the dry season was well advanced, and we were evidently intercepting these streams at points near their source, yet the abundance of water was most remarkable. The natives say that the hills around are porous and only yield their waters to the rivers towards the end of the latter rains" (pp.68-9). If this is so, it no doubts accounts for the mysterious overflow of the Kwando or Chobe during the dry season, a matter already brought before the Society by Mr. Selous (*Proceedings of the Royal Geographical Society* (1881), Vol.III, p.171.)

359. These accounts may also be supplemented by a letter from Dr. David Livingstone written at Linyanti on the River Chobe, dated October 16, 1856:

"Viewing the basin from this (Linyanti) northwards, we behold an immense flat, intersected by rivers in every direction, and these are not the South-African mud, sand, or stone rivers either, but deep never-failing streams, fit to form invaluable bulwarks against enemies who can neither swim nor manage canoes. They have also numerous departing and re-entering branches, with lagoons and marshes adjacent, so that it is scarcely possible to travel along their banks without the assistance of canoes." (*Journal of the Royal Geographic Society*, Vol.27 (1857), p.349 at p.353).

360. Andrew A.Anderson, Civil Engineer, in his *Notes on the Geography of South Central Africa*, in explanation of a New map of the Region, describes the Kalahari Desert:-

"...There are only two more rivers to describe which rise or flow through the region, viz. the Chobe and the Cubango. The Chobe rises much beyond the point surveyed, viz. in S.lat. 16'35".E.long. 21\_31', where another branch enters it; from this point the Chobe takes a winding course through a level and swampy country, full of jungle, past a Kaffir kraal, Matambaya, to within 70 miles to the west of Linyanti, past that chief's kraal, in an easterly and north-easterly direction; it enters the Zambezi 37 miles above the Victoria falls. The Chobe is a large and broad river with several rapids." (*Proceedings of the Royal Geographical Society*, Vol.VI,(1884), p.19 at p.27).

361. In his annual address in 1881 to the Royal Geographic Society, the President, Lord Aberdare, reviewing the "apparently illimitable field of African exploration", noted that

"steady progress had been made in filling up many minor blanks in our maps" and referred to an interesting journey performed by another English traveller, F.C. Selous, in 1878:-

"He has also explored the Chobe river, one of the chief tributaries of the Zambezi, recently shown by Major Serpa Pinto to be the lower course of the Cuando which descends from the Benguelan highlands. The same river is the subject of a paper communicated by Dr. Benjamin Bradshaw to the Society. Still further west an addition has been made to our knowledge of Ovampo-land and the basin of the Okavango river, by Pere Duparquet of the Catholic Mission." Proceedings of the Royal Geographic Society, Vol.VII (1881), p.385 at p.391).7

362. All the descriptions cited above refer without hesitation to the Chobe as a well-established river and they particularise its attributes as those, which, in the words of the Namibian Memorial, "are commonly associated with rivers in popular understanding ... they have identifiable sources, they run continuously downstream in an established course between two readily discernible banks and they carry a significant volume of water all the year round"(Namibian Memorial, p.19, para.55).

**(ii) The River Chobe is a river independent of the River Zambezi.**

**(iii) The Chobe has a stable profile as a perennial mature river**

363. Geomorphological and hydrological evidence show that the Chobe River is an independent mature river with stable and visible banks. In his Opinion annexed to Chapter VII of the Botswana Memorial Professor Sefe stated:-

"..the Chobe River..is one of three parallel linked rivers which rise in the Angolan Highlands. On reaching the southwest north east fault zones of the Gwembe Trough and the Okavango Grabben..the Chobe follows a rectilinear fault-controlled course north-eastwards to join the Zambezi river at Kasane...The low energy status of the river at present which is reflected in the existence of meanders, sand bars, and subsequent braiding(subdivision of the channel into two or more branches flowing in the same direction) would be the result not only of low bed slopes, but also drastic reductions in flow volumes as a result of past climatic changes...Sidudu/Kasikili Island was initially a sand bar deposit..It is likely that at the time of the establishment of the present Zambezi course about 26,000 to 40,000 years ago (Coates et al, 1979, Thomas and Shaw, 1992) the south channel was the main channel..It was later abandoned as a result of erosion of the sand ridges which delivered an excessive high sediment load, and also as a result of downthrows along the Zambezi axis( about 10,000 to 26,000 years ago)which changed slope configuration.... Since the establishment of the north channel, the south channel has become the largest of the backwater channels, although it still carries some flow towards the Zambezi River.... While it is probable that further shifts will occur in the geological future, it is certain that the present alignment of the Chobe River represents a mature low energy system that is graded in the classic sense of the concept of grade as described by Mackin (Schumm 1972)." (Botswana Memorial, Appendix to Chapter VII,p.109 at pp.2-3)

364. The Chobe River originates from the Angola Highlands, and forms part of the Angola-Zambia boundary. It is divided into different segments with different names depending on the riparian countries; the name Rio Cuando being the Portuguese for River Cuando which appears on most maps as the name of the river as it enters the Caprivi Strip where the name changes to Linyanti to form the Namibia/Botswana boundary as defined by the Anglo-

German Agreement of 1890. The Cuando/Linyanti/ Chobe River is independent of the Zambezi basin except during persistent droughts when some flow from the Zambezi reaches the Chobe by defined and well confined channels such as the Bokalo, Mokama, and Kasai channels. See the Map D opposite page 13 of this Counter-Memorial).

**(iv) The Chobe is a perennial River**

365. The Encyclopaedia Britannica characterises the Chobe as a 'source of permanent surface water':-

"The Kalahari is largely semidesert with grass and acacia thorn scrub, and only in the southwest, where there are sand dunes, do true desert conditions prevail. The only sources of permanent surface water are the Chobe River with a drainage basin of 56,000 square miles (145,000 square km.) which marks Botswana's boundary with Namibia; in the northwest, the Okavango River with a basin of 53,000 square miles (77,700 square km.), which marks Botswana's boundary with South Africa in the southeast. Most of southern Botswana is without surface drainage." (The New Encyclopaedia Britannica, 15th edn. 1992, Vol. 2, p.412 under the entry "Botswana").

366. The Glossary of Hydrology, published by the American Geological Institute, defines an ephemeral stream as "A stream or reach of a stream that flows briefly only in direct response to precipitation in the immediate locality and whose channel is at all times above the water table", Professor Sefe's Second Opinion, p.25, para. 47). This cannot be said of the Chobe River. Even during the persisting droughts in the last 15 years the Chobe River has maintained its characteristics as a perennial river, as evidenced by the data collected by the Department of Water Affairs of the Botswana Government at the seven gauging stations on the Kwando/Linyanti/Chobe River south of the Caprivi Strip at Upper Kwando down to Shaile. This data is summarised in Table 3 in Professor Sefe's Second Opinion and illustrated in Figures 7(a) and (b), reproduced at pages 143 and 144. Thus, at the lower end, the Chobe River maintains a minimum level at Kasane of 925.6 metres; during the dry season in the months of August and September the base flow from the Kasai and other channels is equal to the losses, artificial or natural, such as evaporation.

G18 - Mean monthly water levels in the Kwando-Linyanti-Chobe systems: (a) October-March

G19 - Mean monthly water levels in the Kwando-Linyanti-Chobe systems: (b) April-September

367. The Namibian Memorial misquotes Professor Alexander, stating:

"in the lower reaches of the Linyandi, the river ceases to flow and dries up for long periods, leaving only isolated pools which are sustained by local rainfall (See the Alexander Report. para.5.7)." (Namibian Memorial, p.20, para.59).

In fact paragraph 5.7 of the Alexander Report adds "ground water contributions". (Namibian Memorial, Vol.VI, Part 1, p.12). This a serious omission from the Namibia Memorial; by inclusion of "ground water contributions", Professor Alexander himself acknowledges the intermittent, rather than ephemeral, nature of the Chobe River. Rivers that experience ground water contributions cannot be ephemeral rivers. Such rivers may lose surface expression in part of their courses and continue to flow underground (Maidment (1992), Moore and Wilson

(1995)). Thus pools may look isolated on the surface but they are in fact linked, rather like beads on a string.

**(v) There is an Absence of Zones of Sedimentation in the Northern Channel**

368. For erosion to take place a river must have sufficient energy, and there must be present material to be eroded. It is accepted that in a section of the Zambezi, which is a higher energy river than the Chobe, some erosion may take place; the erodible bank cliffs selectively shown in the photographs of the Zambezi in the Expert Report, Part 2, Sheet 5, (Namibian Memorial, Vol.VI, Part 2), illustrate such erosion. This, however, has no relevance in respect of the Chobe River, where flows less than 0.5 metres make the likelihood of major change due to scouring minimal. Further the Kalahari sands harden up when water comes over them and form a water-proof layer which prevents high seepages. Channels may convey water without deposition. The type of erosion to which Professor Alexander refers occurs in ephemeral rivers where there are shifts of bedload by rolling; such sands are shown by the Sedimentological Report not to be present on the Island.

369. The Sedimentological Report provides the history of the pattern of sedimentation on the Island. From this it is apparent that the top layer of 1.5 metres in depth constitutes, and has done for thousands of years, material, a peaty admixture of silt clay and mud, for stable non-erodible banks. These are plainly visible and indicate the stability and maturity of the Chobe system in the vicinity of the Island. See photographs taken in September 1997 in the Southern Channel looking towards Kasika (at page 147). The presence of trees on the right hand (island) bank of the northern channel also indicates an established stable channel. There are no erosion scars or slump cracks on the edge of the island that can be attributed to water action. The western sector of the northern channel runs almost straight between high well-defined banks, as illustrated in Photographs oo. Professor Alexander himself demonstrates these characteristics in the Photographs numbered 15,16,17, and 18, of Sheet 24, of Vol. VI, part 2 of the Namibian Memorial.

370. He himself acknowledges that the northern channel, as the wider and deeper channel, is "hydraulically more efficient and consequently sediment is transported through (it) without deposition" (Caption at the top right of Diagram 5, Sheet 18, Vol.VI,Part 2). The pattern of sedimentation in the vicinity of the island is illustrated by-

I. the sinuosity of the southern channel;

II. the location of the black soil and

III. the presence of relict sand bars in the vicinity of the southern channel.

371. The Sedimentological Report further confirms the absence of any fresh deposition of sediment on the western area of the island. This totally contradicts Professor Alexander's identification in Diagram 4, Sheet 17 of Area d on the island (Namibian Memorial, Vol.VI, Part 2), as the "main channel" of the southern channel and hence a zone of active sedimentation.

*I. The Sinuosity of the Southern Channel*

372. The shape of the southern channel with the big meander loop at the eastern end is proof of the absence of active erosion. Erosion would have taken place on the outside of this bend of the meander which would have been cut through, yet the sequence of aerial photographs from 1925 to 1985s shows the unaltered shape of this big meander loop in the southern channel.

373. The meandering nature of the western sector of the southern channel is to be contrasted with the broad straight course of the western and northern sectors of the northern channel. The frequent necessity for changes of course of a boat navigating the southern channel was plotted in the course of a circumnavigation of Kasikili/Sedudu Island made on 28 April 1997. The circumnavigation of Kasikili/Sedudu Island was made on 28 April 1997, proceeding in a clockwise direction from the westerly bifurcation point, by a 40 foot double-decker tourist game-viewing boat. The boat proceeded at a uniform speed and, at 45 second intervals, being spaced at a regular distance of approximately 100 m. apart; bearings with GPS(Global Positioning System) were taken and visual descriptions recorded.

G20 - Photograph across Kasikili/Sedudu Island towards Kasika

374. In the space of 20 minutes, over an approximate distance of 2600 metres, travelling through the western sector of the southern channel, with a reading of 255 W 285 300, the boat swung at 45 second intervals from west (240 255 W 285 300), north-west, (285 300 Nw 030 ), north (345 N 015 030 ), north-east (015 030 N 060 ); and then shifted back to north (345 N 015 030), north-west, (300 NW 330 345, 285 300 NW 330), west (255 W 285 300), south-west, (SW 240 255 W, 210 SW 240 255), south, (S 195 210 SW). Continuing through another loop in the southern channel the boat swung at approximately 90 second intervals south-west (SW 240 255 W, 210 SW 240 255,) west, (240 255 W 285), south-west, (SW 240 255 W), and finally north-west, (100 NW 330 345 N) to its entry-point to the Chobe River and the main channel of the northern channel.

375. In the northern channel over roughly the same period of time (18 minutes,) and distance (approximately 2600 metres) the boat, proceeding at the same speed maintained, through the western sector of the northern channel, an unaltered course in a north easterly direction, (015 030 NE 060, with minimal variations to 045 030 NE 0, and N 145 NE 030 NE). Arriving at the northern sector, after turning east-south-east, for some further nine minutes the boat proceeded on an unaltered south-easterly tack (E 105 120 SE 150, E 105 120 SE 150), before turning into the southern channel in a south-south-west direction, (S 195 210 SW 240 255).

## *II. The Location of Black Soil*

376. The presence of black soil of basaltic origin is shown by the Sedimentological Report to be distributed throughout the island and supports the wide distribution of such black soil with no difference between the northern and southern channel. Ground photographs 1 and 2, on Sheet 20 of Namibian Memorial, Vol.VI, part 2, show that both the Caprivi side of the river and Kasikili/Sedudu itself contain dense black soil. Photographs should be treated with caution as they do not necessarily enable the viewer to determine with any accuracy the composition of the soil pictured. Basalts are widely spread throughout this part of Africa; they form the Victoria Falls and the Mambova Rapids. When they decompose they form clays and clay deposition favours a low energy lagoon environment. The turbulence that results from water in motion quickly strips away any clay deposits. It is therefore difficult to see how the occurrence of black clayey soil can be an indicator of flow in the southern channel. In any

event, runoff from the Sedudu Valley and the Chobe Ridge is minimal, the water courses being short in length.

### *III. The Presence of Relict Sand Bars*

377. The existence of sand bars in the Chobe is evidence of its mature characteristics. Sediment bars located at the bifurcation point of the northern and southern channel and on the right of the southern channel in the big meander loop are permanent features of a mature river. They are relict bars of earlier downstream flowing channels. not active zones of sedimentation. As such, they are visible almost without change on all the aerial photographs from 1925 onwards. Any difference in shape is caused purely by the depth of water, and thus the water is visibly higher on the 1981, 1985 and 1997 photographs, which has the effect of changing the appearance of the sand bars in the area of bifurcation. Absence of any such bars in the northern channel indicates strength of flow.

#### **(vi) The Chobe is a river with continuous flow**

378. The flow of water through a channel or channels in a down stream direction is a characteristic of a river by reason of the down slope or gradient of the river bed. The water flow in a river is directional through a channel, not in a wave form on a 60 kilometre front as Professor Alexander claims:

"Water flows through this sector of the Chobe River only during the season when the Zambezi is in flood. Then it comes into the Chobe not from upstream reaches to the west but across the whole width of the Zambezi floodplain, a front of over 60 kilometres, until it is intercepted by the Chobe Ridge..." (Namibian Memorial, p.7, para.22).

379. Flow is continuous in the northern channel, even in the low flow season when on occasion the southern channel dries out entirely; monthly mean levels at the Kasane Gauging Station are shown on Table 3 in Professor Sefe's Second Opinion (Appendix 2). The data in Table 3 show that the Kwando-Linyanti-Chobe River system experiences seasonal as well as year to year fluctuations.

380. The aerial photograph taken in May 1972 shows the southern channel dry for half its length. Accordingly, even in flood time, the shallower southern channel receives flow at a later stage than the deeper northern channel. When both channels are filled to bank-full stage during high flows, the southern channel carries only a small proportion of the flow of the northern channel. At other times of the year as the water level falls below 3.5 metres, the flow in the southern channel is zero. It becomes a lagoon between Cross-section 17 and 15 as located in the Joint Survey Report of 1985. The presence of wildlife, particularly hippopotamus, evidences the shallow and tranquil nature of the southern channel.

381. Flow in a downstream direction through the northern and western channel is continuous, with a minimum level of 925.6 metres measured at the Kasane Gauging Station through all seasons of the year. The flow along the Chobe is described in Chapter 5 and the Court is respectfully referred to paragraphs 280 to 292 of that Chapter.

#### **(H) Further exposition of the criteria to determine the main channel in the case of bifurcation**

382. When a river channel bifurcates, the "main" channel will attain a local grade profile that will enable it to convey its share of the bifurcated flow, which is larger than the portion of the flow in any other channel which is part of the bifurcation.

**(i) Depth is the criterion of navigability**

383. As reported in the Botswana Memorial, the 1985 Joint Survey established the greater depth of the northern channel: "Once the river has cleared the small sand bar to the north of the National Park HQ, the cross-sections show a steady depth of 5 to 7 metres, deepening to 10m. after the entry of the backwater stream at Kabuta, and to 13 m. at the juncture of the eastern section into the main stream" (Botswana Memorial, p.94, para. 221). Whereas "as regards the south channel, whilst there is a depth of some 4 m. average of water in the eastern section of this channel, both the eastern and western entrances to the southern section of this channel are barely more than 2.5 m. in depth with a thick growth of reeds extending from each side, with a deeper 'lagoon' area of 6 m. in the centre of this southern section" (para.220). The growth of reeds across the western entrance of the southern channel is reflected in the photograph taken in September 1997 (at page 153).

384. The Joint Survey Team included three senior Hydrologists from the respective Water Affairs Departments of South Africa and Botswana, as well as a Surveyor-General, a Director of Surveys and Lands, a Deputy Director-General of Surveys and an Assistant Director of Surveys and Lands. The positions were therefore plotted by highly qualified and experienced land-surveyors and evaluated by eminently qualified hydrologists. No calculations were necessary as the team was using modern self-recording depth gauges which gave a real-time print-out of the cross-sections with depth plotted graphically against a horizontal scale.

**(ii) The criterion of capacity to carry larger flow**

385. The main channel is the channel which carries the greater amount of water. The discharge of any conduit is proportional to the water velocity and the cross-sectional area, being the product of the width and area of the channel. Whether the flow is high or low the velocity will be determined by depth, width, slope and hydraulic radius (see the diagrammatic illustration of a channel cross-section at page 154). It is not correct that a greater flow in time of flood will increase the velocity. The gradient of the river contributes to the velocity of the channel since it causes and accelerates the flow.

386. The main channel will have its width, depth, and velocity compensatorily adjusted to conveying its share of the bedload-flow and sediments. This compensatory adjustment arises out of the relationship that width, depth and velocity have to discharge. As stated in Leopold, Wolman and Miller (1964) p.215, "With increasing discharge at a given cross-section, the width, mean depth, and mean velocity each increase as power functions..." (see Professor Sefe's Second Opinion, Appendix 5). Thus identification of the main channel of the Chobe River can only be properly done by considering all the hydraulic parameters as well as the volume of flow.

387. To sum up as regards criteria to establish the main channel, it has been shown from the 1985 Joint Survey Report and the measurement of flow at the Chobe Gauging Stations that the northern channel satisfies both the criteria of greater depth and greater flow. From the analysis of the aerial photographs and satellite imageries clear evidence of the greater width and depth of the northern channel compared to the southern is provided. The itinerary of the

Zambezi Queen and the tourist boats from the Safari Lodges supports that the northern channel is the navigable channel 'the most used' channel. (see the photograph of the Zambezi Queen moored in the northern channel near the junction to the Spar channel: at page 133).

388. All these criteria are ones which the Namibian Memorial itself accepts as relevant to determine the main channel. It admits:

"The 1890 Treaty contains no definition of the expression 'main channel' of the Chobe River. The range of possibilities covered by the expression is quite wide. As Stephen B. Jones, an acknowledged authority on boundary making has observed, it could, in theory, refer to the channel that is the most used, the widest, the deepest, or the one that carries the most water." (footnote omitted). (Namibian Memorial, p.45, para.119).

But later the Namibian Memorial states that Professor Alexander rejects these criteria of depth and width because he classifies the Chobe River as an ephemeral river where 'these variations are so large, pervasive and unpredictable that width and depth are inappropriate as criteria for identifying the main channel.' (Namibian Memorial, p.50,para.131).

G 21 - Diagrammatic illustration of a channel cross-section

G22 - September 1997 photograph showing sand banks in entry to southern channel

389. The Court is respectfully referred to the series of aerial photographs and the satellite imageries which show plainly that there are no such large variations. The configuration of the island and the two channels remains as it was in 1925 when the first air photograph was taken, and the northern channel is consistently the wider and deeper. The Namibian Memorial is silent as to any refutation of the northern channel as "the most used". It, therefore, is reduced to accepting 'volume of flow', but contrary to the facts as set out at (vi), para.380 above, identifies flow with floodwater.

## **(I) Aerial Photographs**

### **(i) Introduction**

390. This remarkable series of air photographs taken in 1925, 1943, 1962, May 1972, November 1972, 1977, 1981, 1985 and at the present day, June 1997, represents a visual history of Kasikili/Sedudu Island and its immediate environs covering a period of over seventy years. (Botswana Counter-Memorial, Attachment). Examination and interpretation of these photographs provides accurate information about the Island's physical attributes over the greater part of the period of time since the 1890 Agreement. The 1925 aerial photograph was taken by the Kalahari Reconnaissance; the later items by commercial firms commissioned by the Government, such as Hunting Air Surveys Ltd., who took the 1962 photograph, and Swede Survey, who took the 1997 photograph. The June 1977 aerial photograph, which was not included in the Attachment to the Botswana Memorial, was part of a series flown by the South African Defence Forces in preparation of the JARIC map of 1977, which shows the boundary in the northern channel. All photographs have been enlarged to an approximate scale of 1:10,000 except for the 1977 photograph. Annotated copies of the photographs are set out at Attachment Photograph A to L.8

[8. List of Air-Photographs reviewed: 1. Photo 'A' 1925; 2. Photo 'B' 1943; 3. Photo 'C' 1947; 4. Photo 'D' 1962; 5. Photo 'E' May 1972; 6. Photo 'F' Nov 1972; 7. Photo 'G' 1981; 8. Photo 'H' Aug 1985; 9. Photo 'J' July 1977; 10. Photo 'K' June 1997; 11. Photo 'L' June 1997 Montage of 8 photos from Mambova to Sedudu.]

**(ii) Certain common features are observable in all the aerial photographs:-**

*I. There has been no change over seventy years*

391. Comparison of each of the photographic images over this period reveals that there is virtually no discernible change in the size or shape of the Island and its surroundings. This striking absence of change was noted in the Joint Survey Report of 1985 which stated :-

"Air photographs showing the channels of the river in the vicinity of the island are available in the archives of the two national survey organisations. They were taken in 1925, 1943, 1962, 1972, 1981, and 1982. No substantial change in the position of the channels is evident from the photographs." (Botswana Memorial, Annex 48.)

Shoreline and visible surface features are practically identical on all photographs in the series, as illustrated by the small stand of well established hardwood trees clearly visible on the northern spit of the island on the 1925 mosaic, Photograph A, marked big trees, which are also clearly visible on the 1985 photograph, Photograph arrow. (Attachment to the Counter-Memorial). This uniformity throughout the series of air photography indicates the inherent stability of the riverine system in the locality of Kasikili/Sedudu Island.

*II. Similarly there are no signs of erosion*

392. The size and shape of the southern channel and the features lying within it have remained unaltered, indicating that very little current passes through this channel. The photograph taken in September 1997 (at page 157) shows submerged trees in the southern channel lining its stable non-erodible banks. If the southern channel was the main channel and carried the greater volume of water and current, it would be expected that the western side of the sediment spit (marked A) would have eroded to some extent as the current swept along the western bank. The unchanged shape of the sediment spit indicates the absence of any such current and of any erosion.

393. Similarly the size and shape of the sediment fans at the exit of the Sedudu Valley in the bifurcation zone remain unchanged from the earliest 1925 photograph. Storms or floods in the subsequent years have, therefore, had no effect whatsoever on the silt deposits in the southern channel.

G24 - Photograph of Kasikili/Sedudu Island and sunken trees

G25 - September 1997 photograph of sand banks in western entry to southern channel

*III. The configuration of the Island remains the same throughout the period*

394. No support is provided for the flood zone referred to in the Expert Report in the Namibian Memorial. The surface texture of the island is uniform across the island. A line is visible on the photographs running from the inlet on the western side of the southern channel diagonally across the island south west to the western channel. This line is not the boundary line of zone d which Professor Alexander proposes in Diagram 4 of Sheet 17 (Namibian

Memorial, Vol.6,part 2) but merely a sub-channel into which flood waters flow when backing upstream.

*IV. The width of the northern channel is consistently greater than the southern channel*

395. Comparison of the width of the northern channel, which is never less than 140 metres and on average is 200 metres or so in the northern sector, compared with that of the southern channel 60 to 80 metres at its western entry, widening in the lagoon sector to 200 metres and at its eastern exit, but averaging 50 metres or less overall, indicates the difference. Even at its widest the southern channel never exceeds the width of the northern channel, even at times of high water which is visible on the June 1997 photograph at page 187.

*V. Greater depth of water is indicated in the northern channel*

396. This is true in respect of all the photographs and in the May 1972 photograph the southern channel is dry for half its length.

*VI. Deposit of sediment*

397. The deposit of sediment in the western sector of the northern channel at the point marked B indicates the zone of highest current velocity.

**(iii) Detailed examination and interpretation of the photographs**

398. Each aerial photograph will now be examined and interpreted. To give an indication of the extent of any floods, the average annual mean flows in the Zambezi River at Victoria Falls are set out for each hydrological year before and after the October of the year given as the date on which the photograph was taken. The average flow between the years 1907 and 1993 is 1056 cubic metres per second, the highest 2328 in 1957 and the lowest 449 in 1914.

**The 1925 Photograph** (Scale 1:10,000). Average mean flows 1018 m<sup>3</sup> (1924); 1136 m<sup>3</sup> (1925). Reproduced with labels at page 161.

399. This photograph was taken by the Du Toit expedition of 1925 (the Kalahari Reconnaissance) and must surely rank as amongst the oldest air photography ever taken in Africa. The photograph is a composite mosaic composed of several photographs which have been cut out and then fitted to the complete image of the Island and its immediate surroundings. Although, as is to be expected, image quality and contrast is poor and variable, a good deal of information can be obtained from careful examination.

400. All the common features, particularly IV and V (greater width of channel and deposit of sediment) are clearly demonstrated. At no point, except in the lagoon and at its eastern exit, does the width of the southern channel equal that of the northern channel which throughout measures almost double the width. This is a clear indication that a larger volume of water is flowing through the western and northern channel, and hence is the main channel.

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

402. The marked stand of big hardwood trees on the northern spit of the Island shows that even in 1925 the trees were already well established. Although dark, it is possible to see that Sedudu Valley, which enters the southern channel at the bifurcation zone marked B, is covered by a dense stand of bush and large trees. This dense tree cover would have the effect of stabilising the soil and minimising erosion during stormwater run-off. There is no permanent stream in this valley which serves only as a conduit for rainwater run-off.

**The 1943 photograph** (Scale 1:10,000 approx.) Average mean flows 714 m<sup>3</sup> (1942); 956 m<sup>3</sup> (1943). Reproduced with labels at page 163.

403. The bright reflexion along the western and northern channels is caused by the sun angle at the moment of exposure and is a common feature of air photography. The outline of the channels, physical features and relative sizes are almost identical to the previous photograph. Reed beds are clearly visible above the water level almost blocking the southern channel at its narrowest point to the left of C. This indicates that the water at this point is very shallow. Reeds are also evident to the left of the bifurcation zone at B growing on sand banks just under the water surface. Cross-sections 19 and 19A of the 1985 Joint Survey established depths at this point of less than half a metre. The sediment spit at A remains unchanged, proving the absence of current in the southern channel. Similarly the spit on the south side of the entrance to the southern channel at B remains; it has not been eroded nor has the entrance to the channel widened. The presence of reeds and sandbanks across the western entrance to the southern channel is clearly visible in the photographs taken in September 1997 (photograph opposite page 153).

G26 - 1925 aerial photograph with labels

404. The 'boundary' line referred to by Professor Alexander (para 388 above) is observable. It is clearly evident from this photograph that it is a subchannel dividing the higher western half from the lower eastern sector of the island and linked to the pronounced inlet in the eastern sector of the southern channel. The surface texture is no different on either side of this line.

**The 1947 Photograph** (Scale approx. 1:10,000) Average mean flows 1261 m<sup>3</sup> (1946); 1712 m<sup>3</sup> (1947). Reproduced opposite page 167.

405. The image on this photograph, when compared with the image on the 1925 and 1943 photographs, shows no detectable changes in shape, indicating that no erosion or deposition of silt has taken place in the twenty-two year period covering the photography. There is no sign of erosion on the western bank of the sediment spit at A, again indicating that current along this section of the channel is minimal.

406. The four sediment bars are clearly visible in the same size, shape and position as shown by Professor Alexander in the 1981 photograph at diagram 5 on Sheet 18 of Volume VI, Part 2, of the Namibian Memorial. This clearly disproves his claim that they shift and provide evidence that the southern is the active channel.

407. Whilst the northern channel in both its sectors maintains a constant size on the photographs, the size of the southern channel varies considerably over the seasons, indicating that the northern channel is the least affected by seasonal variations in water-levels. At the point marked D the southern channel is effectively closed by silt indicating that at times of low water it is not always navigable throughout its full length. At times of low water the

cruise boats from the Safari Lodges can only go around the northern and western channels as the southern channel is too shallow and does not rejoin the western channel at all.

408. The sub-channel is visible with residual water lying in it in the centre of the Island confirming that its bed is at a lower elevation than the surrounding ground. As in the 1943 photograph, the surface texture south of this sub-channel shows no difference to the texture to the north of it.

**The June/July 1962 Photograph** (Scale 1:10,000 approximately). Average mean flow 1746 m<sup>3</sup> (1961); 2122 m<sup>3</sup> (1962). Reproduced with labels at page 169.

409. This is a very poor photograph with bad granularity giving poor contrast and poor resolution, particularly in the bifurcation marked B. The shiny effect on the southern end of the Spur channel is caused by reflected sunlight due to the angle of the sun at exposure.

410. Although this photograph was taken fifteen years after the 1947 photograph, the images on both are virtually indistinguishable, with the northern channel clearly visible as wider than the southern. Although this photograph was taken only four years after the great flood in 1958 (hydrological year beginning October 1957, average mean flow - 2328 cubic metres) being the peak of the floods, which inundated the island for two years, this has had no effect on the characteristics of the Island. Were the southern channel the main channel, it would be reasonable to expect that changes would have occurred by erosion and deposition along its sinuous shape but this has not occurred.

**The May 1972 Photograph** (Scale 1:10,000 approx.) Average mean flow 839 m<sup>3</sup>. (1971); 640 m<sup>3</sup> (1972). Reproduced with labels at page 173.

411. This photograph, and that taken in November of the same year, are highly significant, providing an invaluable contrast between the island at low water and at a time when the Zambezi is in flood. In the May 1972 photograph, the southern channel is dry for half its length from the bifurcation zone marked B to a point north of the Chobe National Park Headquarters. A long isolated pool immediately adjacent to the Headquarters appears on the photograph and is entirely consistent with the findings of the Joint Survey of 1985. (Depths Recorded in the 1985 Joint Survey; Sefe, Second Opinion, Table 4). The Court is respectfully referred to this Table and the Figure 2 in Professor Sefe's First Opinion, Botswana Memorial, App. to Chapter VII, which illustrates this point. This shows a shallow sounding at cross-section 14 of 3.4 metres followed by two deeper soundings of 4.2 metres at cross-sections 15 and of 5.7 metres at cross-section 16. The next cross-section at 17 shows that the water decreases in depth to 3.0 metres, thus as the water levels drop, a pool as shown on this photograph would be left between cross-sections 15 and 17. Thus, this first photograph, taken at a time when water levels were low, certainly supports Namibia's statement that the southern channel is a stagnant pool (Namibian Memorial, p.22, para.66).

412. However, this May 1972 photograph entirely disproves the Namibian Memorial's contention that the northern channel is also a stagnant pool except in time of flood. (Namibian Memorial, p.22, para.66). The western and northern sectors of the northern channel, although lower than in the other photographs, are still open and flowing, proving that these channels must be deeper and are indeed the main channel of the Chobe River clearly navigable even at low water<sup>9</sup>.

G28 - 1947 aerial photograph with labels

G29 - 1962 aerial photograph with labels

[9. Attention should, however, be drawn to a possible alternative interpretation of the May 1972 photograph namely that the southern channel is choked by a mat of *Salvinia Molesta* (Kariba weed). The Chobe/Linyanti system was known to have localised infestations of *Salvinia* at this time. However, it is not thought to have existed in the southern channel in May 1972 for the following reasons:-

(i) *Salvinia* is a total infestation taking the form of an all-covering densely packed mat, which when established, can support a secondary growth of shrubs, grasses and other plants on its surface. The large open pool just opposite the Headquarters of the Chobe National Park is therefore completely uncharacteristic of a typical *Salvinia* infestation.

(ii) *Salvinia* infestation is a very long lasting problem and can subsist for many years, yet in the November 1972 photograph discussed below, which was taken only a few months later, there is no sign of the mat at all.

(iii) The flow chart for the Zambezi given as table 1 on page 15 of the Expert Report, (Namibian Memorial, Vol.VI, part 1), shows that in 1972, the average flow of the Zambezi was at 640 cubic metres per second, the lowest flow since 1948 and also the 6th lowest since 1900. It is obvious that the volume of flow in the Zambezi was too low to push through the Kasai channel and back up the Chobe River as is normal when the average flow is around 1500 cubic metres per second.

For the foregoing reasons, it is submitted that the correct interpretation of the May 1972 photograph is that it shows the southern channel to be dry for half its length.

In any event, the Botswana case would still be assisted by this photograph, as *Salvinia* is normally associated with backwaters, very slow moving streams and inlets. As the northern and western channels are completely clear, it follows that the current running through these channels has prevented the spread of the weed, unlike the southern channel.]

413. Most of the southern section of the Spur channel is also dried out indicating a very low water level. This photograph provides strong confirmation that the southern channel is only a seasonal backwater of the Chobe River, reduced to a trickle or drying out in a dry season.

**The November 1972 Photograph** (Scale 1:10,000 approx.) Average mean flow 640m<sup>3</sup>. (1972). Reproduced with labels at page 175.

414. This photograph is particularly valuable as a record of the actual manner in which the flood waters of the Zambezi enter the Chobe system. Contrary to Professor Alexander's assertions, there is no flood path across the flood plain but a channelled back flow through the cross-channels linking the Chobe with the Zambezi River. In the five months between the May and November photographs, the rising waters in the river north of the Island, caused by flood-water run-off from the Zambezi, have pushed upstream into the southern channel to link up with the western sector of the northern channel at the bifurcation zone marked B. However, the channel is barely visible on the north-west side of the sediment spit marked A and is obviously very shallow as grass is still visible in the channel around the spit. Water has also pushed up the Spur channel past Kabuta.

G30 - May 1972 aerial photograph with labels

G31 - November 1972 aerial photograph with labels

415. The curving loops of the Kasai channel are filled with water and clearly channelling flood water from the Zambezi River into the lower Chobe. There is no sign of general flooding. The shine on the northern sections of the channels and the Kasai channel is caused by reflection off the water surface due to the angle of the sun at the moment of exposure.

**The 1981 Photograph** (Scale 1;16,000) Annual mean flow 1186 m<sup>3</sup> (1980) 647 m<sup>3</sup> (1981). Reproduced with labels at page 179.

416. Although the precise date is not known of this photograph, it is obvious that it was taken at a time of high water which is usually from March to May. This conclusion is based on the relative increase in the width of the channels and the extent of the penetration of the inlets marked C,D, E and the Spur channel. The entrance to the southern channel in the bifurcation zone is also much wider than in the earlier photographs.

417. Despite the high level of water in the southern channel, both sectors of the northern channel are visibly much larger along their whole length than the southern channel. In this and the two 1972 photographs the overall configuration of the Island remains the same and there is no sign of human occupation.

418. Professor Alexander states that "the visual characteristics of Zone d" (Diagram 4 of sheet 17 of Namibian Memorial, Volume VI, part 2), "are appreciably different from those of all the other deposits on the photograph" (Namibian Memorial, Vol.VI, Part 1, p.22, para. 8.11). His proposition, which forms the bedrock of his theory regarding the 'pseudo-Chobe River', is based solely on this 1981 photograph which was badly developed, resulting in an over-stated contrast to the image. That image should be compared to the June 1977 aerial photograph taken by JARIC where the tone and texture of the visible surface features is uniform throughout the whole of the island.

**The August 1985 Photograph** (Scale 1;10,000) Average mean flow 776 m<sup>3</sup> (1984); 785 m<sup>3</sup> (1985). Reproduced with labels at page 181.

419. The water level in this photograph is relatively high, as evidenced by the width of the entrance to the southern channel at the bifurcation zone marked B and the presence of small channels across the sediment spit marked A. Residual water is also visible in the centre of the Island and opposite the Chobe National Park Headquarters. Despite the high level of water in the southern channel, it is still visibly smaller than the northern and western sectors of the northern channel and is restricted by the narrow section at the north-west tip of the sediment spit marked A.

#### Additional Aerial Photographs

G32 - 1981 aerial photograph with labels

G33 - August 1985 aerial photograph with labels

420. In addition to the series of aerial photographs contained in the Attachment to the Botswana Memorial further aerial photographs are now available, as follows.

**The July 1977 Photograph** (Scale 1: 150,000) Average mean flow 1171 m<sup>3</sup> (1976) Photo J). Reproduced at page 185.

421. This photograph is part of a series flown by the South African Defence Authorities in June 1977, in accordance with a survey plan, copy of which has been obtained from the Directorate of General Surveys, South Africa, and appears in the Botswana Supplementary Atlas to this Counter-Memorial. to be used in the production of the 1978 Joint Air Reconnaissance Intelligence Centre map (The JARIC map) (See the Botswana Atlas, Map 22).

422. As the photography was required for reconnaissance mapping, the scale of the original series was very small; (1:150,000 or 1 cm = 1.5 kms.).

423. Even at this scale it is quite evident that the eastern and southern channel is very much smaller than the western and northern channel, almost disappearing near the Headquarters of the Chobe National Park and around the Sediment Spit marked 'A'. It is probably for this reason that the military cartographers showed the southern channel as an inlet on the JARIC map and not as a through channel.

424. This 1977 JARIC aerial photograph is shown in Figure 13 of the Second Opinion of Professor Sefe, Appendix 2 to the Counter-Memorial, p.53. It was scanned at high resolution and false colour applied to the resulting image. The contrast between the northern and southern channel is revealing, showing the southern channel to be shallower than the northern channel. The southern channel between the 'lagoon' sector and its confluence with the northern channel and in the bend of the meander loop has the same colour tone as the Kasai channel, indicating that both are of shallower depth than the northern channel.

**The June 1997 Photographs** (Scale 1:20,000 and 1:17,000) taken on 5 June 1997 (Photo K). Reproduced with labels at page 187.

425. This photography was undertaken as the high-flood waters were receding to illustrate the present-day situation around Kasikili/Sedudu Island and is the first official air-photograph taken in this area since 1985. The surface of the island is still partially covered by shallow water as is the central sections of the sediment spit marked 'B' in the southern channel.

G92 - July 1997 aerial photograph

G35 - June 1997 aerial photograph with labels

426. The Namibian Memorial refers to "the existence of ..sandbars and the changes in their position and shape over the years" as indicative of active river flow (Namibian Memorial, p.56,para.155) and Professor Alexander purports to identify such sandbars on Diagram 5 of sheet 18 (Namibian Memorial, Vol.VI,Part 2, and see also Part 1, p.23, para.8.13) and cites this as evidence that the southern channel is active and is therefore the main channel.

427. Reference to this photograph at the points marked 'B' and 'C', clearly reveals these same sediment bars in essentially the same size, shape and location, as on the 1925 photograph (photo 'A') and indeed on all the intervening photographs in the series.

428. This is visual proof that these features are permanent surface features over a period of 72 years and are in no way 'active'. This fact therefore completely contradicts the Professor Alexander's theory that they are proof of an active channel.

429. It is apparent that even at times of very high water levels that the western and northern channel is clearly the major channel in terms of size.

430. It can be seen that there is far more surface water visible on the island to the north of the sub-channel than to the south of it. It is also apparent that the south-western corner of the island is dry sandy soil of the same texture as the mainland. This indicates that this area, which falls right across Professor Alexander's "Zone d" (bed of the pseudo-Chobe River), has already drained and therefore is higher than the rest of the island.

431. This is in clear contradiction of Professor Alexander's assertion that zone d (see Namibian Memorial, Vol.VI, part 2, diagram 4, sheet 17) is the bed of the main channel (Namibian Memorial, Vol.VI, part 1, p.22, Para.8.11). If this were the case, then it could be expected that this zone would be covered by water long after the area to the north had drained as the floods receded. This is clearly not the case on this photograph.

432. The Zambezi Queen can be seen moored to the western bank of the Spur channel. This is the 42 metre cruise vessel referred to in this Chapter at paras. 347 and 387.

### **The June 1997 Photo-mosaic of Chobe River from Mambova Rapids to Kasikili/Sedudu Island (Photo 'L')**

433. This is a photo montage of 8 photographs taken at high-water in June 1997 covering the stretch of the Chobe River from Mambova Rapids in the east to a point to the west of the Island. The montage is introduced to give the overall picture of the area. The original contact scale of the photography was 1:17,000, which has been reduced to approximately 1:30,000 for this montage.

434. To the east of the montage, the massive basaltic outcrop of the Mambova Rapids is visible. This feature is constantly referred to throughout both the Botswana and Namibian Memorials. The outcrop continues northwards forming the Mambova Rapids of the Zambezi.

435. The Mambova Rapids are a continuation of the upthrust Chobe Ridge along which the Chobe River runs for some 100 kilometres from Kachikau in the west. This ridge represents the southern limit of the Zambezi floodplain, the northern limit of which is the Zambezi escarpment in Zambia.

436. The photography was taken in June as the backed up floodwaters of the Zambezi were starting to recede. However, the damming effect of the Mambova Rapids on the Chobe River is still clearly visible.

437. The main cross-drainage channels between the Zambezi and the Chobe, namely the Kassaya (Kasai) Channel and the Makoma Channel, mentioned above at paragraph 364 are visible across the river from Kasane.

438. The four sediment bars, claimed by the Namibian Memorial to be sediment bars indicative of active flow (para. 426 above), are clearly visible at the base of the sediment spit in the southern channel. They are the same size and shape and in the same position as on the 1925 photograph taken 72 years earlier. They do not, therefore, by reason of " the changes in their position and shape over the years ... indicate active river flow ..." as asserted in the

Nambian Memorial (p.56,paragraph 155). This is conclusive proof that these bars are permanent features.

439. All the residual flood water on the island lies on the eastern side and there is no sign of water lying along the western side. This is a clear indication that the western channel is contained between high stable banks whereas, as Alexander admits, "The banks of the southern channel are only a few centimetres high in places". This is clear proof that the main channel of the Chobe is the western and northern channel. This fact is clearly visible on the photograph where the western channel is visible as a clean sweeping line, as opposed to the ill-defined and flooded banks of the southern channel. The long-standing growth of hardwood trees on the northern spit is confirmation of the stability of the banks of the northern channel.

440. Even at this time of high water levels, it is quite clear that the northern and western channel is very much bigger than the southern channel, which even now is only a few metres wide at the entrance to the 'lagoon' sector from the sediment spit.

#### **(iv) Conclusions relating to the aerial photographs**

G36 - June 1997 aerial photograph mosaic of Chobe River with labels

441. After careful examination of all the photographs in the series from 1925 to 1997, it must be concluded that the northern channel is the main channel of the Chobe River in the vicinity of Kasikili/Sedudu Island for the following reasons:-

1. On all the photographs the western and northern sectors of the northern channel are clearly visible as being much wider than the southern channel, which in some places narrows down to just a few metres wide, particularly at the north-eastern tip of the sedimentary spit marked A on the photographs.

2. The photograph taken in May 1972 clearly shows that at time of low water, the southern channel dries up and reverts to a backwater of the Chobe River. On other photographs in the series, notably the 1947 and November 1972 photographs, the southern channel has almost disappeared in some places. It is clearly evident that at times of low water the southern channel would not be navigable along its full length, whereas at all times the northern channel is fully open with little variation in size between high and low water.

3. Examination of the first photograph (1925) compared with the 1985 or the 1997 photograph shows virtually no change at all in the size and shape of the Island and associated channels. There are no signs at all of major erosion or accretion of sediment deposits. This indicates a very stable slow moving river system.

#### **(J) Satellite Imageries**

442. The interpretation of satellite images is a highly technical science, and Professor Sefe, with the assistance of experts at the University of Botswana, explains in Section (g) Study of Satellite Imagery of Sedudu Island of his Second Opinion (Appendix 2 of the Botswana Counter-Memorial) the two sensor systems, LANDSAT MSS (Multispectral Scanner) and the newer system LANDSAT TM (Thematic Map), the band widths and methods of detecting depth in water and vegetation cover from false colour composites, classified and single band images.

443. Both sensor systems are carried on board the LANDSAT series of satellites which are in polar orbit around 700 kilometres above the earth's surface. The spatial resolution (pixel size) on the newer LANDSAT TM SYSTEM is 30 metres (meaning that the smallest feature resolved is at 30 metres x 30 metres square); it is particularly appropriate for depiction of features on the Island since mapping scales can be rendered to 1:50,000 before blurring takes place.

444. Satellite imagery of June 1975, March 1995, and June 1996 were subjected to analysis, the results of which are set out in the Second Opinion. All three imageries indicate the greater width and depth of the northern channel compared to the southern.

#### **(i) LANDSAT MSS Imageries June 1975**

445. Three bands are normally of interest when using LANDSAT MSS data: bands 4,5 and 7. Bands 4 and 5 are two parts of the visible spectrum. MSS 4 is the reflective green electromagnetic energy, while MSS 5 is reflective red of the chlorophyll absorption band which is effective in depicting mainly darkened (i.e. non-actively growing) vegetation cover (Ringrose et al, 1989). MSS 7 is the near infra-red band which includes the reflective peak for green, actively growing, vegetation.

##### *I. Classified image*

446. Thus in the Classified image (Figure 15 copied and set out opposite page 99), the contrast between swamp or floodplain vegetation and higher ground vegetation is brought out. Open water mainly appears as blue. As far as channels are concerned, the firmer the blue the deeper the channel. Thus it can be seen that while the northern channel in the vicinity of Kasikili/Sedudu Island appears as a bold blue line, the trace is rather tenuous in the southern channel which appears considerably smaller. The false composite can be similarly analysed.

##### *II Single Band Image MSS 4*

447. Again Figure 16, reproduced at para. 77 of Professor Sefe's Second Opinion, shows a single band image using MSS 4. As band 4 has deep water penetration capabilities, channels should appear in proportion to their relative size. Notice again on Figure 16 that the southern channel of the Chobe River hardly appears in some sections, especially the meander loop and the section immediately downstream of it. By contrast the northern channel is visible throughout its course. This provides a further indication that the northern channel is the deeper and wider of the two channels.

##### *III Single Band Image MSS 7*

448. As already stated, MSS 7 is the peak of the near infra red reflection and so is effective depicting actively growing green vegetation. However, band 7 is also the trough for water absorption and so water and wet soil appear as black. This band is ideal for showing land-water contrast. Figure 17 reproduced at para. 79 of Professor Sefe's Second Opinion, shows a single MSS 7 image. It can be seen that even on the floodplain and between channels there is considerably dry land (the white patches). The southern channel of the Chobe River again appears relatively small compared to the northern channel.

#### **(ii) Thematic Mapper TM Imageries March 1995 and June 1996**

449. Three bands were chosen for the March 1995 imageries, the red band TM3 designed to sense chlorophyll absorption and hence vegetation discrimination and soil boundary delineation (Jensen 1986), the near infrared (NIR) band 4 for delineation of the demarcation between water bodies and adjacent dryland areas (Mulders and Epema, 1986; Lillesand and Kiefer, 1987), and the mid infra red (MIR) band (5) useful for discriminating between different soil zones in terms of relative soil moisture.

450. For the period June 1996 Thematic mapper (TM) bands 1 to 7 were available. In addition to TM3, TM4 and TM5, (the uses of which are stated above), the blue band (1) is used to sense water depth, the green band (2) is used to determine vegetation types, the thermal infrared (TIR) band (6) is used to discriminate between land and water bodies, which have a markedly thermal emittance, and the mid-infrared (MIR) band (7) is used in a similar way to TM5 to discriminate between different soil zones, particularly in terms of relative soil moisture. A number of single band and composite products were derived from the March 1995 and June 1996 data.

### *I. TM3 Single Band Black and White Image*

451. The TM3 band, the chlorophyll absorption band, shows the water features very clearly depicting areas of high soil moisture and standing water in the floodplain. In the March 1995 image (Figure 18, para. 82 of Professor Sefe's Second Opinion) the northern channel appears to be much wider and carrying more flow of the Chobe system than the subsidiary channel to the south, which shows a tenuous and meandering channel pattern.

452. The June 1996 image (Figure 22, para. 88 of Professor Sefe's Second Opinion) depicts less extensive areas of high soil moisture and standing water on the floodplain but shows in similar manner to the March 1995 image the greater width of the northern channel carrying more flow and the tenuous meandering pattern of the southern channel.

### *II. The TM4 Single Band Black and White Image*

453. Similarly, in both the March 1995 (Figure 19, para. 83 of Professor Sefe's Second Opinion) and the June 1996 (Figure 23, para. 89 of Professor Sefe's Second Opinion) images, the same characteristics differentiating the deeper fuller northern channel from the meandering southern channel are depicted in the TM4 infrared reflectance band which shows the delineation of land/water feature contrasts minimising areas of high soil moisture because of vegetative growth on the floodplain and the Island.

### *III. False Colour Composite Image*

454. False colour composites made up to TM 3, TM 4 and TM 5 in relation to the March 1995 data (Figure 20, paras. 84 and 90) and of TM 7, TM 4 and TM 1 in respect of the June 1996 data (Figure 24) are also shown and analysed in Professor Sefe's Second Opinion. Both composites of 1995 and 1996 show water bodies dark black (due to their high radiative absorbance in all the depicted wavebands), and the northern channel of the Chobe River appears wider and therefore is likely deeper than the more southerly channel, even in June when there is some back flow in the system due to high flow in the Zambezi.

### *IV. The Classified Image Thematic Map*

455. The classified image (Figures 21 and 25, reproduced at pages 197 and 199) attempts to show an interpretation of all the major features as derived from the available bands, being TM 3, TM 4 and TM 5 as regards the March 1995 data, and the seven bands in respect of the June 1996 data. The classified image is self-explanatory by reason of the legend which indicates what each colour represents. Particular attention was given to the delineation of water bodies such that all areas of standing/flowing water would be shown on the map. The water bodies appear as blue. Here again in both the 1995 and 1996 images the northern channel of the Chobe River appears wider for the most part than the more southerly channel which appears rather tenuous, especially downstream of the lagoon and in the meander loop leading into the lagoon.

### **(iii) Conclusion on the Satellite Imagery of Kasikili/Sedudu Island**

456. All the images shown provide clear evidence to support the position of the northern channel as the wider and deeper channel as compared to the southern.

### **(K) General Conclusions as to the Scientific Evidence presented by Botswana**

G37 - Satellite image: Classified image (Landsat TM Bands 3,4,5, March 1995) Figure 21, Sefe, 2nd Opinion

G38 - Satellite image: Classified image (Landsat TM June 1996) Figure 25, Sefe, 2nd Opinion

457. (i) The northern channel by reason of the greater depth width and its bed profile is the navigable channel capable of carrying the greater flow of water and hence is the main channel of the Chobe River in the vicinity of Kasikili/Sedudu Island;

(ii) These characteristics of the northern channel are readily observable, as evidenced in the unanimous conclusion of all official surveys carried out on the spot. Recourse to scientific evidence is confirmatory, and cannot be used, as Professor Alexander seeks to do, to construct some fanciful flood zone;

(iii) The scientific evidence based on geomorphology, hydrology and fieldwork supports these findings;

(iv) Further support for the stable configuration of the channels and the Island, and the greater depth, width and continuous flow of the northern channel, is found in the seventy year series of aerial photographs taken between 1925 and 1997 and the satellite imageries of 1975, 1995 and 1996;

(v) The scientific evidence establishes that

(a) The Chobe is the geographical feature in Article III of the 1890 Agreement as the down-flowing river, down which the boundary 'descends'.

(b) That the Chobe is a perennial river independent of the Zambezi River, with a stable profile, continuous downstream flow and visible and stable banks.

- (c) That there is flow at all seasons of the year and of greater capacity and velocity in the northern channel compared to the southern.
- (d) That the northern channel, unlike the meander loop and the shallow entrance point of the southern channel, exhibits no zones of sedimentation.
- (e) That the Sedimentological Study provides evidence of the composition of the Island and the age, size and location of deposits which supports the greater flow and depth in the northern channel.
- (f) That at times of back flow or flood the cross-channels linking the Zambezi with the Chobe produce greater levels of water and higher flows in the northern as compared to the southern channel.
- (g) That the Chobe system is a mature system with no change over the last 2000 years approximately.
- (h) That the western section of the Island is higher than the eastern section in accordance with the general gradient down towards the confluence of the Zambezi.
- (i) Wildlife abounds on the Island which is reached by the shallow passage of the southern channel. Hippopotamus are found in the southern but not the northern channel by reason of the former's shallow and more tranquil waters.

## **CHAPTER 7**

### **The Oral Evidence**

#### **(A) Legal Relevance**

458. In terms of Article 1 of the Special Agreement signed by the parties to the present dispute, "the Court is asked to determine, on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of International Law, the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island." In accordance with Article III (2) of the Anglo-German Agreement of 1890 the boundary in the relevant sector descends the Chobe River and is defined as 'the centre of the main channel of the river.'

459. Consequently, as a matter of fact and law, the main channel of the Chobe is the northern and western channel in the vicinity of Kasikili/Sedudu Island and hence the median line in that northern and western channel is the boundary between Botswana and Namibia. (See Chapters VI and VII of the Memorial of the Republic of Botswana).

460. By the Memorandum of Understanding of 23 December 1992 (Botswana Memorial, Annex 57) Botswana and Namibia agreed terms of reference for the Joint Team of Technical Experts to determine the boundary between Botswana and Namibia around Kasikili/Sedudu Island in accordance with the Anglo-German Agreement of 1890. Six rounds of meetings were held between 28 September 1993 and 21 August 1994 at Windhoek, Gaborone, Kasane and Katima Mulilo and Minutes of these meetings were prepared and agreed. Article 7(1)(f)

of the Memorandum of Understanding (M.O.U.) provides that the Joint Team of Technical Experts (J.T.T.E.) shall have authority to:

"Hear, without prejudice to the 1890 and 1892 Treaties, any oral evidence from any competent person in Botswana and Namibia or from any other country which the Team may consider necessary to enable it to arrive at a decision on the Kasikili/Sedudu Island dispute ..."

461. At the meeting of the Joint Team of Technical Experts on 1 October 1993 it was agreed that oral evidence should be taken. The Botswana Component agreed to this procedure to preclude the necessary use of a veto (in the absence of consensus) and this was also done in the spirit of co-operation. The Botswana component stated that it was reserving its position on the weight and relevance of this type of evidence: (See Minutes of Meetings of the Joint Team of Technical Experts dated 1 October 1993). The Republic of Botswana re-affirms this reservation and reiterates that in its view oral evidence of alleged activities on the Island as evidence of subsequent practice is of no legal relevance for purposes of determining, on the basis of the Anglo-German Agreement of 1890, the boundary between Namibia and Botswana.

462. The Republic of Botswana submits that the present dispute essentially revolves around the proper interpretation to be given to Article III (2) of the Anglo-German Agreement of 1890. In this regard, it is submitted that for a long time the controversy has been in relation to the identification of the 'main channel of the river' as stipulated in the provision in question.

463. It is submitted that oral evidence would be only relevant if it were intended to shed some light on either the actual intentions of the parties in 1890 or the ordinary meaning of the words "the centre of the main channel of the river" at the material time (1890).

464. The general principle of international law and indeed of municipal law is that an instrument must be interpreted as it stands. Consequently, a court will not have regard either to preparatory work which has preceded a written instrument or to the subsequent conduct of the parties if a text is clear. Only where there is obscurity may the court have regard to extrinsic evidence which may assist in determining the intention of the parties and, in such a case, it will have regard to the preparatory work as well as to the subsequent conduct of the parties. It is trite law that where the provision to be interpreted is clear and unambiguous, then the Court does not have to take account of the conduct of the parties subsequent to the conclusion of the treaty. At any rate subsequent conduct may only provide a criterion of interpretation when the text is obscure and even then it is necessary to consider whether that conduct itself permits of only one inference.

## **(B) The Witnesses Presented by Namibia**

### **(i) Background**

465. It is worth noting that, as far back as 1948, there was no dispute as to which of the two channels of the Chobe River around Kasikili/Sedudu Island was the main one. It was recognised then that the main channel was the northern and western channel, and further, that the Island properly fell under the jurisdiction of Botswana. (See Annex 22 of the Memorial of the Republic of Botswana). There can be no question therefore of Botswana having acquiesced in the use of the Island by Caprivians as from that date.

466. It is clear that, even if the Island was, at some time before 1937, used for subsistence cultivation by a number of Caprivi tribesmen, there had been no actual occupation. As a matter of fact settlement on the Island was in effect impossible owing to the fact that the Island is always flooded between March and May (see Annex 30 of the Memorial of the Republic of Botswana). The nearest permanent settlement was at Kasika, which is incontrovertibly in the Caprivi Strip.

467. None of the witnesses presented by Namibia was able to shed any light on the question of the period when inhabitants of Namibia started using the Island for subsistence agriculture.

468. The majority of the witnesses were, however, agreed that the Island had not been used by Caprivians after 1958, although Chief Moraliswani was emphatic that the Caprivi inhabitants had not used the island since the death of Liswaninyana in 1937. This is what the Chief says in response to the following question from the Botswana component of the JTTE:

"Right, thank you. Could he help us with the date when people stopped ploughing Kasikili Island?"

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

469. It must be emphasised here that the position of the Government of Botswana is that, whatever agricultural activities the Namibian tribesmen might have carried out on the island at one stage or another, such activities could not be held to have been title generating. They were carried out by individual subsistence farmers and not by the State.

470. It is worth noting also that whatever the date when ploughing by the Caprivians ceased, whether it was 1958 or 1937, neither the Namibians nor their predecessors in title ever complained to the Botswana authorities about their (the Caprivians) inability to make use of the island as a result either of the presence of elephants or public officials on the Botswana side until 1992.

### **(ii) Defects in the Oral Evidence Presented by Namibia**

471. No attempt was made to separate spent witnesses from those waiting to give evidence. This created ample opportunity for collusion. That there was collusion can be gathered from the uniformity of evidence given by the witnesses in their evidence in chief. This uniformity was, however, immediately broken when the witnesses were subjected to cross-examination by the Botswana Component of the Joint Team only minutes after examination-in-chief.

### **(iii) Inconsistencies and Contradictions**

472. A number of Namibian witnesses claimed in examination-in-chief that they were born at Kasikili but in cross-examination by the Botswana Component of the Joint Team of Technical Experts it turned out that they had in fact been born at Kasika.

473. Ntwala Siyomondi, a 74 year old small scale farmer, says (at page 130 line 17 of the Memorial of the Republic of Namibia Volume 11 Annex 1):

"Until now it's when we hear the issue of Kasikili, people are claiming it. It's where I know we were born."

474. In cross-examination by the Botswana Component of the Joint Team, she says

"I was born at Kasika." (ibid., p.134).

475. Christopher Liswani Matondo, who was 73 years old at the time of giving evidence in 1994, says (at page 136, Memorial of the Republic of Namibia, Volume II, Annex 1):

"Me, in Kasikili it's where I was born. My father Matondo it's where he had built his house, I even know the grave of the Chief of Kasikili and others. Even Chief Moraliswani when he was born. It was in Kasikili. It is where Chief Liswaninyana died and was buried."

Of course, it cannot be true that Chief Liswaninyana was buried at Kasikili (see the evidence of Chief Moraliswani below.)

476. Asked if his family had a house in Kasika, he says:

"It's where our parents were staying in Kasika and it's where we were born in Kasika." (ibid., p.139)

477. The witness Elias Shamwazi Lilungwe, who was 65 years old at the time of giving evidence in 1994, says:

"I say that the Island of Kasikili/Sedudu belongs to Bekuhane, it's where I was born. It's where my grandfather was buried and where my father was ploughing. It's where I grew up and got married." (ibid., p.174)

478. In cross-examination, he has this to say:

"My house is in Kasika. Up to now it's where I am staying. Starting from where I was born, it's where I am staying. I got married at Kasika. I was born at Kasika." (ibid., pages 179, 180).

479. Maimbolwa Anna Siiyinda, 65 years old at the time of giving evidence, says:

"I am not talking lies. At Kasikili it's where we were born. All of us, it's where we were ploughing....After our Chief died ... after that three years we went back and ploughed ... then came the elephants ... It is at Kasika that our Chief was buried. After our old people have died, then we stayed at Kasika. We found that there is nowhere we could go now because even if we tried to plough there, the Botswana Authorities told us that we should not plough on Kasikili." (ibid., pp.205-6).

480. In cross-examination, she was asked if she lived in Kasika and she said,

"If there was an aeroplane, I could go and show you where we are left, me and my kids and my family - where we are staying at Kasika." (ibid., p.208).

481. Asked if that was the house she has lived in all her life she says:

"Yes, because when you build a house, a mud house. It falls down and then you build a new one where we are staying there - on one place." (ibid.)

482. Asked where she was born, she says:

"I was born at Kasika." (ibid., p.210).

483. All these witnesses were determined to give the impression that Kasikili/Sedudu was a big village - bigger than Kasika. They made it appear as if Kasikili/Sedudu was the headquarters of the Caprivi. As it turned out later more particularly in the evidence of Chief Moraliswani (see ibid., pages 194-211) Kasikili/Sedudu was used only for ploughing in some seasons and nothing else. The last time it was used according to this witness, who incidentally appears to have been the only one who had not been programmed, was in 1937 after the death of Liswaninyana.

484. Chief Moraliswani gave a clear account of the various chiefs who ruled before him. He related their respective headquarters and burial places and Kasikili/Sedudu was not one of them. His evidence was impressive and he clearly contradicted some of his subjects who claimed that some of their late chiefs had been buried on the Island.

485. This is what he says:

*Botswana Component:* "Would the Honourable Chief tell us where his father Sinvula Maiba had his headquarters?"

*Honourable Chief:* "Kabbe"

*Botswana Component -* Can he tell us please where Chikamatondo, when he was Regent, had his headquarters?

*Honourable Chief -* "His headquarters was at Schuckmannsburg. They told him that he must leave his common village there, he must come at Schuckmannsburg."

*Botswana Component:* Would the Honourable Chief please tell us where Liswaninyana had his headquarters?

*Honourable Chief -* That is Kasika Kasikili

*Botswana Component:* Could he please tell us where the Chiefs in the time are buried, where they were buried?

*Honourable Chief -* "Do you ask me to give you history starting from the Chiefs of the Bekuhane coming to the present time?"

*Botswana Component:* No, the Honourable Chief would help if he could tell us quite literally in which place, in which village his father was buried, Sinvula Maiba?

*Honourable Chief -* "At Mahundu, that was his common village."

*Botswana Component:* And where was Chief Liswaninyana buried please?

*Honourable Chief* - "He was buried at Kasika"

(Namibian Memorial, Vol.III, Annex 2, p.208).

486. The evidence of the Chief contradicts the evidence of Christopher Liswani Matondo who says:

"Me, in Kasikili it's where I was born. My father Matondo it's where he had built his house, I even know the grave of the Chief of Kasikili and others. Even Chief Moraliswani when he was born it was in Kasikili. It's where Chief Liswaninyana died and was buried." (Namibian Memorial, Vol. II, Annex 1, p.136).

487. He was asked if his family had a house in Kasika and he said:

"It's where our parents were staying in Kasika and it's where we were born in Kasika." (ibid., p.139).

488. We know from the evidence of Chief Moraliswani that Chief Liswaninyana was buried at Kasika and indeed, according to tradition, he had to be buried there because it was his headquarters as Chief.

489. That the evidence of Chief Moraliswani is by far more credible than that of Matondo is fully supported by the deposition of Maimbolwa Anna Siyanda who says:

"... We decided to go back to Kasika and started ploughing there - it is at Kasika that our chief is buried." (Namibian Memorial, Vol. II, Annex 1, p.205)

490. This witness had earlier on claimed to have been born at Kasikili but a few minutes later in cross examination she said she was born at Kasika (ibid., p.210).

#### **(iv) Summary**

491. Indeed there could not have been any burial sites on the Island owing to the fact that it is sometimes submerged. It was found during coring that the saturated zone lies only about 1.5m below the surface. The sand layer was very highly saturated, making it extremely difficult to carry out burials under such conditions.

492. Professor Sefe in his Sedimentological Study of Sedudu Island (Appendix 3) says (at pages 9 and 10, paragraph 8.1.).

"There are references in the Namibian Memorial regarding use of the island for agricultural purposes. However, during the coring exercise on the island, no evidence in the form of artefacts, charcoal or bones was found. The coring contractor was specifically instructed to look out for such objects. Despite a close matrix of 13 holes on an island of less than 4 square km no such object was found. Neither was evidence of a once cultivated area found on the island. Furthermore, the surficial materials on the island being an admixture of clay, mud and silt would be easily water-logged and so difficult to cultivate. Thus if any cultivation ever took place on the island it would have been on a very limited and rudimentary scale and would have occurred a very long time ago."

493. On the possibility of burial on the Island, Professor Sefe says:

"During the coring, as mentioned above, it was found that saturated zone lies only about 1.5m below the surface. The sand layer was very highly saturated. It would have been difficult to bury under such conditions. No wonder no graves were found on the island." (ibid., page 10, para. 8.2)

494. This report clearly contradicts the claims by some of the witnesses that people were buried on the Island.

### **(C) Evidence of Botswana Witnesses**

41. For its part, the Botswana Government called a total of twelve witnesses to give evidence before the Joint Team of Technical Experts. In contrast to the Namibian witnesses, these witnesses gave their evidence in a calm and non confrontational manner. They did not seek to attribute sovereignty over the Island to either Botswana or Namibia, unless they were specifically asked to do so by the Namibian Component of the Joint Team.

495. Since these witnesses were twelve only in number, it is convenient to summarise their testimony hereunder

496. The Rev. Leonard Mowaneng (Final Report of the Joint Team of the Technical Experts, Vol. 1, Kasane (Fourth Round), p.3) who was 70 years in May 1994.

497. He worked in the District Commissioner's Office in the Caprivi Strip.

498. When he was working in the District Commissioner's Office he knew Sedudu to be an Island within Botswana. (ibid., p.4)

499. The Suzman brothers who were cutting timber in Botswana grazed their cattle in the Island (ibid., page 4).

500. When he was working in the District Commissioner's Office in Katima Mulilo, he did not come across any information indicating or even suggesting that Kasikili/Sedudu Island was part of Namibian territory. (ibid., page 4)

501. Isang Phutimpe, 72 years old in 1994. He trekked cattle for the Deaconos brothers from Maun to Kazungula. They would set up camp in the Island to rest and graze the cattle (ibid., page 14).

502. Thakayakgosi Modisaemang, who was 73 in 1994, testified that he used to trek cattle from Maun to Kazungula. (ibid., page 18). They stopped over on Kasikili/Sedudu Island where they grazed their cattle. From there they drove the cattle in smaller numbers to the crossing point at Kazungula. (ibid., page 18). He was trekking cattle between the years 1943 to 1950.

503. Maseni Samunzala, who was 80 years old in 1994, testified that he lived on Kasikili/Sedudu Island in 1933. At that time Kasikili/Sedudu Island was grazing land for Government cattle. (ibid., page 21).

504. At the time when he was living on the Island, there were Basubia on both sides of the river. (ibid., page 25). He used to plough on the Island. (ibid., page 26). He moved out of the Island in 1941. (ibid., page 27).

505. Kopani Ketshegile, who was 83 years old in 1994, testified that he was herding the District Commissioner's cattle on the Island in 1928. During this time the Southern Channel was dry (ibid., page 29). Cattle being trekked from Maun to Kazungula used to be grazed on the Island. (ibid., page 30). The Samunzala family were living by the river whilst their cattle were grazing on the Island.

506. The Samunzala family moved onto the Island after the witness' departure (ibid., page 32).

507. Daniel Sabuta, who was 64 years old in 1994, testified that he first came to know the Island in 1942. He was living in Chobe West. He used to accompany his brother to Chobe East (Kazungula) to sell maize. On the way to Kazungula, they stopped at the Island to rest and graze their oxen for a day before proceeding to Kazungula (ibid., page 35).

508. In 1953, he joined the then Bechuanaland Police Force where he worked for 36 years until he retired in 1989. During this period, he always knew Kasikili/Sedudu Island to be part of Botswana (ibid., page 36).

509. The witness remembers very well that when he visited the Island for the first time, there were people called Batoka who were residents of the then Bechuanaland Protectorate. These people used to cultivate land on the Island. The witness remembers this fact because he had been warned beforehand to be careful not to allow his oxen to destroy those people's fields on the Island as he grazed them (cattle) (ibid., page 37)

510. Asked on what ground he believed the island to be part of Bechuanaland, the witness stated that:

"my grounds are that at that time when I first visited the Sedudu Island, it was Bechuanaland because those people who were staying there they were people who were in Bechuanaland and not in the Caprivi". (ibid., page 38).

511. In response to a question by the Namibian Component of the Joint Team, the witness states that at the time when he used to live in the Chobe, the southern bank of the Chobe river was occupied by Tswana and Subia speaking people (ibid., page 39).

512. Ntshwabi Dimbo, who was 76 years old in 1994, testified that he worked along the Chobe River herding cattle for the Suzman Brothers from 1939 to 1940. (ibid., page 44).

513. He used to herd these cattle which he grazed on the Island. The kraals were overland in the valley (ibid., page 47).

514. The Greeks also used the Island for grazing their cattle. They were commonly referred to as Liwanika (ibid., page 47).

515. Julius Mundia gave evidence to the effect that from 1951 to 1958 he knew of a Mr Duncan Mlazie who had a ploughing field on Sedudu Island (ibid., page 54). The said Mr Duncan Mlazie was a resident of Bechuanaland Protectorate as it then was.

516. At about the same time his father who was in Botswana had ploughing fields that he cultivated on an island on the Namibian side of the border and it was common practice for people from one side of the border to cross to the other side without going through immigration formalities.

517. A certain Mr Situmbeko and other hunters used to hunt on the Island. They were hunting on behalf of civil servants. These hunters were in Botswana (ibid., page 55).

518. The significance of this witness's testimony is that during the 1940's and 1950's it was not uncommon for subsistence farmers from one side of the border to plough across the border in another country. These activities cannot be held to be title generating.

519. Kgosi Lopang Kadimo, who was 72 years old in 1994, used to rest and graze the family oxen on the Island on his way to Kazungula with his parents. The Greeks also grazed their cattle there (ibid., page 67).

520. Mwampole Ndana, who was 70 years old in 1994, used to trek cattle to Livingstone. These cattle belonged to a Greek family. These cattle were rested and grazed on the Island (ibid., page 72). The cattle were being driven from Kachikau in Botswana to Livingstone in Zambia. This was in 1941.

521. Keorapetse Mokhiwa, who was 70 years old in 1994, testified that he was employed to trek cattle for the Suzman Brothers and later for the Greeks. They rested these cattle on Kasikili/Sedudu Island (ibid., page 18).

522. The witness further testified to the presence of people referred to as Matoka on the Island. They ploughed on the Island. This was before 1941 (ibid., page 81).

523. The witness used to graze cattle on one side of the Island whilst Matoka people ploughed on the other (ibid., page 81).

### **Summary of Evidence of Botswana Witnesses**

524. The sum total of the testimony of the witnesses called by the Botswana Government is that Kasikili/Sedudu Island was used at one time or other by people on the Botswana side of the border for both ploughing and grazing. These witnesses were clear as to the period involved, unlike the Namibian witnesses who always pleaded lack of education whenever they were pressed to be more specific in terms of time frames.

525. In addition to the evidence adduced during the hearings at Kasane, Botswana wishes to refer to the affidavits of Michael Slogrove (Annex 52), Dominic Diau (Annex 48) and Timothy Neville Liversedge (Annex 51) who were Game Wardens in Kasane for the period between 1969 and 1979.

526. It is clear from these affidavits that Kasikili/Sedudu Island was considered as part of the Chobe National Park. These witnesses patrolled the Island to guard against poachers. It is

very clear from their evidence that they were never challenged by the Namibian authorities or their predecessors in their exercise of jurisdiction over the Island.

#### **(D) Aerial Photographs**

527. There is a remarkable series of aerial photographs taken in 1925, 1943, 1947, 1962, May 1972, November 1972, 1977, 1981, 1985 and June 1997, which represents a visual history of Kasikili/Sedudu Island and its immediate environs covering a period of over seventy years (see the Attachment to the Botswana Counter-Memorial). All photographs were taken at an appropriate height of 3,500 to 4,000 metres (10,000 to 12,000 feet). There has been no change over seventy years. All these photographs are presented at an approximate scale of 1:10,000 except for the 1977 photograph and the 1997 strip montage.

528. Comparison of each of the photographic images over this period reveals that there is virtually no discernible change in size or shape of the Island and its surroundings.

529. There is an absence of visible signs of settlement, agriculture or other human occupation on the Island. The absence of evidence of human occupation is borne out by the Report of the Sedimentological Study of Kasikili/Sedudu Island. During the coring exercise no evidence in the form of artefacts, charcoal or bones was found. Nor was evidence of a once cultivated area found on the Island. During the coring, it was found that the saturated zone lies only about 1.5 metres below the surface, making cultivation difficult. The sand layer was very highly saturated. It would be difficult to bury human bodies under such conditions.

#### **(E) Absence of Signs of Human Occupation**

530. Kasika is clearly defined and visible as a thriving settlement to the west of the Spur Channel. A succession of witnesses called by Namibia gave evidence at Katima Mulilo on 26 to 31 July 1994 to the effect that there was a large community on the Island. Thus Ntwala Lwizi Mutwa aged 87, who would have been 15 in 1925, said:

"At Kasikili it's where we were staying, it's where we were ploughing. Our Chief, Liswaniyana, all of us and his induna Silumbu are the people who took us there and some of his indunas Mr Jova, Mr Six, Mr Libalamwe, all of us were staying there, we were ploughing there. It was our field area. It's where we were ploughing. We didn't see anybody coming from another place and ploughing there".

"When we were ploughing there, there is a time when we used to harvest and then we get our, what we have harvested we build great silos, we put them there and then sometime used to come a flood and then when that flood comes, that's the time we used to leave the island, we go now into the forest".

"That is at Kasika and when it was dry we used to go back. Then we found that our mud houses have been destroyed and then we rebuild them and we start ploughing again and we went on like that".

"Then the thing which used to trouble us was the flood and then there is other thing which brought that we should also move and those were the elephants which came and destroyed our grain silos and our fields and that's when the chief said so, this thing is now too much, we better move to another place. And there was a school there and the teacher for the chief was

Mubukwani and then only the boys used to go to school. We ladies were hindered to go to school." Namibian Memorial, Vol.III, Annex 2. p.16.

531. Although resolution of the 1925 photograph is poor, minute examination reveals no sign of any structures which bear any similarity to the appearance of Kasika on this photograph. There are no signs of agricultural working or grain silos. Ploughed fields are invariably of a regular square or rectangular shape; the photograph was taken at low water and shortly after any crops would have been harvested yet there is no sign of ploughed soil which would show up clearly against the generally dark background of the Island's surface.

532. There is no truth in the allegation that there was a school on the Island. The only school in the area was established at Kasika and this was set up with the assistance of the British authorities in the period 1927 to 1929 when the Caprivi Strip was under their administration. The presence of a school at Kasika (and not on the Island) is established by the following evidence:

(i) Lists of schools in the Reports of the Government of South Africa on South-West Africa, for the years 1927, 1928 and 1929, to the Council of the League of Nations (see Report for 1927, p.122; Report for 1928, p.107; and Report for 1929, p.67 (Botswana Counter-Memorial, Annexes 11-13). These refer only to a school at Kasika.

(ii) The South African official Report: Major Trollope, Report on the Administration of the eastern Caprivi, 1940 (Namibian Memorial, Annex 58, at page 25). This refers only to the school at Kasika.

(iii) Documents in the Botswana National Archives refer to the school established at Kasika with support from the British authorities; see the Resident-Commissioner's Report, dated 29 April 1929 (Botswana Counter-Memorial, Annex 14).

### **(F) General Conclusions**

533. The general conclusions on the oral evidence are as follows:

I. Oral evidence is of little, if any, assistance in the present case because it is vague, inaccurate and, above all, irrelevant.

II. It does not assist the Court in the interpretation of Article III of the Anglo-German Agreement of 1890.

III. In the circumstances, the Court, in determining the main channel, has to construe the meaning of the text of the 1890 Anglo-German Agreement on its own.

IV. The evidence of the Namibian witnesses, in particular, is unhelpful as to the exact period in time the Island was used by their ancestors for subsistence agricultural activities.

V. The evidence of the Namibian witnesses who sought to give the impression that the Island was used consistently and extensively by their ancestors in the Caprivi flies in the face of the truth especially when their evidence is read in conjunction with Professor Sefe's Report on the Sedimentological Study of Kasikili/Sedudu Island (Appendix 3 of this Counter-Memorial) according to which:

(a) No evidence in the form of artefacts, charcoal or bones was found during the coring exercise that was carried out on the Island.

(b) The lithology of the island (an admixture of clay, silt and mud which forms a layer 1.5 m thick lying on top of highly saturated sand). This lithology would make burial impossible.

(c) The surface layer referred to above would be easily waterlogged severely limiting agricultural potential. Therefore any cultivation on the Island would have been on a very limited scale.

VI. Finally, the evidence of the Namibian witnesses showed considerable confusion as to the geographical location for their claims. Under the circumstances, the Court would find it extremely difficult to find any value from their evidence that would assist it in deciding the matter before it.

## **CHAPTER 8**

### **THE MAP EVIDENCE**

#### **(A) Namibia's Position**

534. Namibia places considerable weight on the map evidence, which is not surprising considering its difficulty in the construction of Article III. The plain meaning of that Article when applied to the facts on the ground, and in the light of the official reports, the Eason Survey of 1912, the Trollope/Redman Joint Report of 1948, the Joint Survey 1985, is that the northern channel is the main channel. Namibia bases its map evidence on a Report and list of Maps prepared by its cartographic expert, Mr.W.D. Rushworth B.Sc.,(Eng), FRACAS, Director of the Mapping and Charting Establishment of the British Ministry of Defence, assisted by Mr.P.Clark, formerly Keeper of the Royal Geographic Society. That Report and list (the Rushworth Report) is set out at Annex 102 to the Namibian Memorial and is examined in detail in Appendix 1 to this Counter-Memorial.

535. The Rushworth Report, when read with the Report of Namibia's other expert, Professor Alexander, produces an insoluble conflict of experts. No doubt when confronted with Professor Alexander's iconoclastic thesis that the southern channel is wrongly shown on all the maps and in fact is Zone d overlaying Kasikili/Sedudu Island, Mr. Rushworth at the end of his Report is driven ruefully to apologise:-

"Of course, all the maps have been made in the dry season when access for surveyors is easy and skies are clear for air photography." (Namibian Memorial, Vol.V,Annex 102,p.31 at 52).

Thus, Mr. Rushworth, in one sentence, demolishes the whole case advanced by Namibia on the basis of map evidence.

536. This places Namibia in an inescapable quandary.<sup>1</sup> Should it advance its case on the basis of its scientific expert or of its cartographic expert? Either reliance is to be placed on the

scientific evidence, in which case the maps and aerial photographs provide no support for, and indeed directly contradict Professor Alexander's thesis that the southern channel is located in a flood zone overlaying the western part of Kasikili/ Sedudu Island, or, basing its case on the map evidence which depicts a southern channel, it must jettison Professor Alexander's thesis, and all its fallacious scientific assertions.

[1 A quandary which the Namibian Memorial itself finds difficulty in resolving, see paragraph 66.]

### **(B) The map evidence is solely corroborative**

537. In developing its case on map evidence, Namibia has sought to rely on selective citation of writings of Professor Brownlie. It has not, however, drawn the Court's attention to his recommendation to use of map evidence solely as corroboration:-

#### **"(i) Map Evidence**

The general approach of international tribunals is to restrict the role of map evidence to that of the corroboration of a conclusion reached on the basis of other evidence. This was the view adopted in the following cases: the Beagle Channel Arbitration; the case concerning the Frontier Dispute (Burkina Faso/Republic of Mali); and the case concerning the Land Island and Maritime Frontier Dispute." (footnotes omitted)

(I. Brownlie, "International law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law" in Académie du Droit International, Recueil des Cours (1995) p.159, reproduced in the Namibian Counter-Memorial, Annex 116, p.126).

### **(C) The critical date in relation to map evidence is 1948 in the present case**

538. In assessing the admissibility and weight of maps as evidence, it is necessary to bear in mind the state of knowledge of the parties as to the dispute at the time of their making. This is particularly so where the map is published officially by one of the parties or a predecessor state. It is a general principle of law that declarations as to public or general rights must have been made before a dispute has arisen over the right in question, (Botswana Memorial, Para.280 and the authorities there cited). The evidentiary notion of a critical date which prevents window-dressing also works against the admission of self-serving statements made after the date of crystallization of the dispute:-

"the critical moment is, normally, not the date when the dispute was born, but that on which it crystallized into a concrete issue....one object of the critical date is to prevent one of the parties from unilaterally improving its position by means of some step taken after the issue has been definitely joined...." (Sir Gerald Fitzmaurice in his argument to the International Court in The Minquiers and Ecrehos Case, ICJ Pleadings, Oral Arguments, Documents, Vol. II, pp. 68,69.)

539. The point is well put by Professor Brownlie in the work already cited:-

"The critical date is a concept linked to the admissibility and weight of evidence. The critical date is the point at which the dispute has crystallized and is apparent to the parties. Evidence emanating from the parties after this date is presumed to be self-serving and unreliable.

However, subsequent actions may evidence consistency, and inconsistent conduct and admissions against interest will be taken into account". (I. Brownlie, *op.cit.*, Annex 46 2).

[2 The excerpt in the Namibian Memorial, Annex 116, does not include page 156 where this passage appears.]

540. The critical date in the present case is 1948 when the correspondence between the British and South African Governments arising out of the Trollope/Redman Report of January 1948 took place. Until 1948 there had been no dispute, with the northern channel being regarded as the main channel. Official maps up to 1948 showed no consistency; and of the early German maps, the unpublished Streitwolf Map of 1909 omitted the southern channel and the Von Frankenberg Map of 1912 showed it to be a tributary of the main stream. In 1948 South Africa issued a challenge requesting the modification of the legal status quo. The British Government upheld the principle that the northern and western channel constituted the 'main channel' for the purposes of the Anglo-German Agreement. For a full account the Court is respectfully referred to Chapter 9.

541. In the course of this correspondence, and in disregard of the specific exchanges in 1946 between the Bechuanaland High Commissioner and the Survey Directorate, South Africa, relating to Bechuanaland's northern boundary (as set out in paragraphs 605-11 below), South Africa published its 1949 1:250,000 Map, showing a boundary in the southern channel.

542. In terms of admissibility and by reference to the critical date, this 1949 Map is self-serving, having been produced post litem motam. At the date of its publication the South African Government was well aware of the dispute relating to the boundary by reason of the above high-level correspondence. It should, therefore, be treated as inadmissible and without evidentiary value.

#### **(D) Botswana's Position**

543. Botswana's case relating to maps, as stated in its Memorial, is that the evidence of the available official maps shows no consistency. The maps, therefore, do not evidence any 'agreement between the parties' regarding the interpretation of the Anglo-German Agreement in accordance with Article 31 (3) (a) of the Vienna Convention, nor any 'subsequent practice' which establishes any such agreement of the parties, in accordance with Article 31 (3) (b) of the Vienna Convention.

544. Notwithstanding the general status of official maps indicated in this conclusion, individual maps may have evidential value, such maps including the Von Frankenberg map of 1912 and the South African military map compiled by JARIC (for which a firm date of 1978 can now be given), and other maps which have now come to hand. These include an unpublished 1909 map of Captain Streitwolf showing the northern channel as the sole navigable channel along which he descended in January 1909, the British Joint Operations Graphic Ground and Air Maps of 1968, and the 1984 South African Military Intelligence Map, all of which show the international boundary in the northern channel.

545. The official series of maps published by Botswana after gaining its independence in 1966, plans of the Chobe Game Park showing its limits, (subsequently revised from time to time, after its establishment in 1960), and a series of tourist maps produced by the Wildlife Department, Gaborone, all demonstrate a consistent position that the boundary ran along the northern channel.

546. Even if these maps and plans were published after the dispute had surfaced, their existence makes plain the absence of any subsequent practice (with reference to maps) establishing an 'agreement of the parties' regarding the interpretation of the Anglo-German Agreement in accordance with Article 31 (3) (b) of the Vienna Convention on the Law of Treaties. The maps and plans published in Botswana also establish the absence of any acquiescence by Botswana in the South African cartographic representations. All the above maps are further described in the chronological account of the relevant maps which will be found at paragraphs 564 to 628 and below. A fuller analysis, including an examination of the individual maps described in the Rushworth Report, is provided in Appendix 1 to this Counter-Memorial

### **(E) Namibia's case relating to Maps**

547. Namibia's case relating to maps falls into two parts, the section in Chapter IV of its Memorial entitled The 1889 Map, and Chapter V in Part 2, Maps as Evidence of Subsequent Conduct of Parties. Its Memorial cites Oppenheim's International Law and a number of decisions concerning boundary disputes to produce a twofold classification of the use of maps, 'maps accompanying the treaty or referred to in the text', and maps as 'specialised forms of subsequent conduct' of the parties". A more accurate classification, it is suggested, might be:-

(i) maps accompanying the treaty;

(ii) maps as evidence of an 'agreement between the parties' as to the interpretation of the Anglo-German Agreement in accordance with Article 31 (3) (a) of the Vienna Convention on the Law of Treaties;

(iii) maps published but having no relevance to the case.

#### **(i) Maps accompanying the treaty**

548. The first part of Namibia's case on maps which it seeks to place under this heading is shortly disposed of. Whichever version of the map prepared by the Intelligence Division of the War Office was used by the negotiators of the 1890 Anglo-German Agreement, and whatever its status<sup>3</sup>, its scale, 1:1,584,000 was far too small to depict any relevant information concerning Kasikili/Sedudu Island and its surrounding channels, or to locate the boundary midstream of the Chobe River. In the "improved version of serial 4", the War Office Map of 18914, which Rushworth states was "the map...thought to be the Treaty map", the boundary is shown with broad red hatchings spreading a mile or so in width along both north and south banks of the Chobe River.

[3 To assert that the 1889 Map is part of the 1890 Agreement is clearly contrary to the facts. The Namibian Memorial seeks to endow the 1889 Map with a special legal status:-

"289. Obviously, in determining the intention of the parties, special significance is accorded to maps accompanying the treaty or referred to in the treaty text. In the present case there is such a map. the 1889 Map ( Atlas, Map II )."

The text of the treaty makes it plain that no map was annexed or formed part of the agreement. The wording at the end of Article III makes this plain:

The course of the above boundary is traced in general accordance with a Map officially prepared for the British Government." (emphasis added).

The manuscript minute signed by Edward Hertslet and dated 7 July 1890, attached to a later version of the map which is bound up with the 1890 Treaty in the British Foreign Office archives, confirms and expressly records that

'(t)his (the 1889) map was not annexed to the Anglo-German Treaty of 1 July 1890'. (emphasis added).

The 1889 Map was not annexed to the treaty, and does not form an integral part of it. Accordingly, Namibia's attempt to give the 1889 Map exceptional status must be dismissed out of hand. As to the exception to the general rule which distinguishes the status of maps forming or adopted by the parties as an integral part of a boundary treaty the court is respectfully referred to Appendix 1 to this Counter-Memorial where The Temple Case, ICJ Reports, 1962, p.6 at 22-5, and The Case Concerning a Frontier Dispute, ICJ Reports, 1986, are discussed.

4 ID No.846b (Botswana Atlas, Map 3, Serial 5 in Rushworth's list).]

### **(ii) Maps as evidence of the 'agreement of the parties' in accordance with Article 31(3)(a) of the Vienna Convention on the Law of Treaties**

549. Significantly, Namibia does not put forward any map as evidence of any 'agreement between the parties' in accordance with Article 31(3) (a) of the Vienna Convention. It thereby ignores, as pointed out in Chapter 3, the Sketch Plan, along with the Joint Survey Report of 1985, which constitutes such an agreement (Botswana Memorial, Annex 48 at p.392).

### **(iii) Maps published but of no relevance to the case**

550. Namibia's two-fold classification of maps also overlooks the third class of map referred to by Judge Fitzmaurice in the passage from The Temple of Preah Vihear cited in Oppenheim, namely "a mere published sheet or atlas page in which case it would, in itself have no binding character for the parties". Botswana submits that the majority of maps relied upon in the Namibian Memorial fall into this third class, and consequently are of no assistance to the Court.

### **(F) Namibia's Maps as Subsequent Practice**

551. Namibia summarises the major part of its case relating to maps as follows:-

"..Maps of the area, produced by all the parties in interest, with substantial uniformity portray Kasikili Island as being located in Namibian territory. In particular, the principal maps used by the political entities with governing authority during the colonial period - Seiner's map for the German authorities until 1915 and the British until 1933; Bechuanaland Protectorate GSGS 3915, used by the officials of Bechuanaland until 1965, the South African maps beginning with TSO 400/558 1949: and the UN map of 1985 - clearly place Kasikili Island in Namibian territory, again without any protest from Botswana or its predecessors. Two exceptions during the colonial period are shown to result from cartographers' errors. Only after 1974, did Botswana itself produce a map showing the boundary in the northern channel." (Namibian Memorial, p.139, para. 334).

552. Upon appropriate analysis, it appears that this passage asserts that, of the 41 serial maps referred to by its cartographic expert Mr. D. Rushworth, only four, the Seiner map of 1909, the British map of 1933, the South African map of 1949, and the UN map of 1985, place Kasikili/Sedudu Island in Namibian territory.

553. The Court is respectfully requested to bear in mind four general propositions when appraising the maps upon which Namibia seeks to rely.

**Proposition (i): Only a Line placed in the river itself can indicate the boundary**

554. The core issue, to which, if the map evidence is to be of any service, it must relate, is which of the two channels encircling the Island is the main channel in accordance with Article III of the 1890 Agreement. The location of Kasikili/ Sedudu Island can at best be of indirect relevance. Only, therefore, a boundary drawn on one or other of the channels will be of assistance to the Court in its task of determining the 'main channel' in accordance with Article III. It is misleading, therefore, to assert, as Namibia does, as cited above, that "Maps of the area, produced by all parties in interest, with substantial uniformity, portray Kasikili Island as being located in Namibian territory" (Namibian Memorial, para.334). Namibia phrases its assertion in this cautious manner, so that it may include, in its count of four maps in its favour, those which depict the boundary as running along the bank, rather than the centre of the river. Neither the 1933 nor the 1985 UN map show any boundary along the Chobe River, and as discussed below, it is doubtful whether any boundary in the river is shown in the Seiner map. This leaves the South African 1949 map which, as already stated, was published after the dispute crystallised and is hence of a self-serving nature.

**Proposition (ii): Maps drawn at too small a scale are not relevant**

555. The majority of the available maps are drawn at too small a scale to represent accurately the configuration and size of Kasikili/Sedudu Island and its northern and southern channel.

556. A proper awareness of scale is essential in appraisal and assessment of the relevance of maps as evidence of boundaries. Mr Rushworth, as the cartographic expert employed by Namibia, prefaces his Report with the warning:-

"2. In general maps of smaller scale than 1:1000,000 (sic 5) do not have sufficient detail to affect this case, but some have been included because they have other properties or are part of the developing story of the mapping of the area". (Namibian Memorial, Annex 102, p.31).

[5 Presumably a typographic error. It would seem Mr. Rushworth intended to restrict relevant maps to a scale of 1:100,000 or larger.]

557. The total area in dispute is less than 4 kilometres square. No map of scale smaller than 1:100,000 or 1 centimetre to 1 kilometre can provide an accurate portrayal of the geographical features in relation to international boundaries. This offers a ready method by which to identify the most relevant maps. Applying it, it is to be noted that the four maps, listed in paragraph 551 above, on which Namibia relies, are all of smaller scale than 1:100,000. The Seiner map and the 1933 British map are to a scale of 1:500,000, the UN map to 1:1,000,000. Only the 1949 South African map is of a larger scale, and it is still only 1; 250,000.6

[6 The following maps are all of the required scale or larger:

the Sketch Map of Dr. Benjamin Bradshaw, 1880, drawn to a scale of 1: 125,000 approx., See Chapter VII, paragraph 232 and Map 1 in the Botswana Memorial;

the von Frankenberg map, the Karte des Caprivi Zipfels, of 1912 (1:100,000); Map 7 in the Botswana Memorial.

The Surveyor General's Sketch Map of 1961:125,000; Map 18 in the Botswana Memorial.

The JARIC map prepared by the South African Defence Force in 1978 (1:100,000)

Map 22 in the Botswana Memorial;

the map prepared by the Joint Survey 1985 (approx. 1:15,000); Annex 48 of the Botswana Memorial at p.392 and the series of Botswana maps at a scale of 1:50,000 prepared by the Department of Surveys and Lands, Republic of Botswana from 1974, Botswana Supplementary Atlas and Map 23 in the Botswana Memorial.

All but the first of these maps depict the northern channel as the main channel and hence the boundary.]

### **Proposition (iii): Distortion may result from Enlargement**

558. The Court is respectfully alerted to the distortion and visual fallacy which may result when a photographic enlargement is made of a small scale map. Examples of such enlargement with fallacious consequences are to be found in the Namibian Memorial, with respect to the Seiner map of 1909, the South African Map of 1982 and the Official UN Map of Namibia of 1985. A full account of the distortion and misrepresentations resulting from enlargement of these maps is set out later when they are discussed in the chronological account of relevant maps.

559. To indicate the gross inaccuracy of perception which such enlargement endeavours to achieve, it is sufficient to set out here one aspect of the 'blow-up' treatment of the Official UN Map of 1985.

560. At Figure 18 at page 133 of the Namibian Memorial, the Official 1985 UN map of Namibia to the scale of 1:1000,000 is 'enhanced' by an extract to a scale of 1:250,000. This extract of the course of the Chobe River achieves an exaggeration of contrast in that the whole territory of Namibia is coloured with a pale brown wash including the whole of the Caprivi Strip and islands in the vicinity of Kasika, with surrounding countries shown white with the minimum of detail depicted along the boundary. The implication is that the islands coloured pale brown are within the territory of Namibia. On the complete map at proper scale a black dash-dot line shows the international boundary in the north-western part of Namibia up to its junction with the Chobe River; from that point east to the Chobe's confluence with the Zambezi no similar line or international boundary is shown on the map. Contrary to the impression created by the Extract, the correct conclusion must be, when the map at its correct scale is studied, that the map-makers at United Nations did not depict nor intend to depict any boundary along the length of the Chobe. A brief reference to the reproduction of the UN Map (as Map 16) of the Botswana Supplementary Atlas will demonstrate the points made above.<sup>7</sup>

[7 A further example of "enhancement" which actually unintentionally works to the disadvantage of Namibia is to be seen in Figure 6, described in the Namibian Memorial as follows:" For the assistance of the Court in identifying the places referred to, Namibia has prepared the fold-out map at Fig.6, following page 19."(Namibian Memorial, para.53). Figure 6 has clear place names printed in black but the river between Kasika and Kasane shows no island whatsoever.]

### **Proposition (iv): Boundaries drawn on maps are unreliable**

561. At paragraphs 294 to 296 the Botswana Memorial drew attention to the inaccuracy and distortion resulting from the superimposition on geographical features of the drawing of a line to indicate a boundary. The Sketch Maps of Bechuanaland Protectorate which were used to illustrate the Bechuanaland Reports beginning in 1912 illustrate the unreliability of depiction of international boundaries on maps. The Botswana Atlas sets out copies of the maps for the years 1911-1915 (Maps 8 to 11). Mr. Rushworth very fairly states the position:

"The 1912 version has the boundary on the south side of the Chobe, changing to the north side in 1915 and back to the south side in 1946 (sic). This demonstrates that when, for clarity, a boundary has to be shown alongside a feature, the side it appears is chosen by the draughtsman as a matter of convenience." (Namibian Memorial, Vol.V, Annex 102,p.41).

562. The Sketch Map of Bechuanaland Protectorate 1:2000,000 War Office Printed at OSO 1913 provides a further illustration of the problems which boundaries along rivers present to mapmakers. Rushworth adequately sums up:

"Boundary alongside features at alternating sides. No island in Chobe. Note in key against boundary symbols 'Where these follow a road or the main channel of a river they have been shown to one side to prevent confusion'. (Namibian Memorial, Vol. V. Annex 102,p.42).

563. The continuing perplexity of mapmakers as how to indicate boundaries on rivers is well illustrated by the maps in Group d. in Mr. Rushworth's list of maps. Two methods adopted were either to place the boundary line on one or other bank of the river or to indicate it along the river but omitting any line at a bifurcation. Indeed, by the time of the 1933 British War Office Map of Bechuanaland Protectorate, standard practice as regards intercolonial boundaries along rivers was to place them alongside the river bank, alternating from one side of the river to the other at regular intervals, of 10, 50 or 100 miles, according to the scale of the map.

### **(G) A Chronological Survey of the Available Maps**

564. A general chronological survey of the available maps will now be given. For quick reference, at the end of this Chapter, a complete list is given of the maps in chronological order for which Botswana has provided copies in its Atlas accompanying its Memorial and in its Supplementary Atlas accompanying this Counter-Memorial. For a detailed examination of the additional maps referred to by Botswana in this Chapter and of the 41 serial maps listed by Mr. Rushworth, the Court is respectfully referred to the list of maps appended to this Chapter and to Appendix 1 to this Counter-Memorial.

#### **(i) The period prior to the 1890 Agreement**

565. The maps, as well as the reports of the early explorers of Southern Central Africa, such as Livingstone, Selous, Anderson, Schulz and Hammar, and Reid, all substantiate the existence of the Chobe River as an independent perennial river (See Chapter 6, paras 355-65). The Sketch Map of the Chobe River by Dr. Benjamin Bradshaw (Botswana Atlas, Map 1) provides a valuable early and reasonably accurate depiction of the configuration of the island and the two channels. As Mr. Rushworth comments, the scale and shape of the river is remarkably good and the southern channel is accurately portrayed. In addition to the marked sinuosity of the southern channel, of particular note is the sharp right hand turn which marks the western entry point of the southern channel which is to be contrasted with the continuity

of line and direction of the northern channel with the flow of the main river. Paragraph 71 of the Namibian Memorial usefully points out that the shape of the island and the two channels was copied, though onto a barely recognisable scale, on the 1889 Map, Serial 4. The depiction of these two channels on the 1889 Map provides a much more probable explanation for the choice of alignment and the wording of Article III of the 1890 Agreement than the whimsical fantasy relating to a sand ridge advanced in paragraph 116 of the Namibian Memorial. Navigability of the main channel was in the minds of the treaty-makers, not the avoidance of swampy ground.<sup>8</sup> Bradshaw's map seems the likely source of the 1889 map, and was used on German maps for 30 years and on British maps for 40 years (Namibian Memorial, p.25, para.71). The accuracy of these later maps should therefore constantly be qualified by reference back to Bradshaw's Map.

### **(ii) The British maps 1890 to 1909**

566. The Namibian Memorial makes no mention of the early British maps which indicate the boundary. For example, the War Office map of 1903 and the GOC-in-Chief (South Africa) Map of 1906 which, though they may not add 'much to the mapping of the Chobe' (Rushworth, Namibian Memorial, Vol.V, Annex 102, p.33 at p.38), both show the boundary on the north bank of the Chobe. It was the 1909 version of the GOC-in-Chief (South Africa) Map which the British Foreign Office used as the basis of their negotiations with Germany, as to a possible arbitration relating to the southern boundary of the Caprivi Strip. Two sketch maps authorised by F W Panzera show the boundary in the river but the scale is too small to indicate the relevant channel. District Commissioner Panzera provided the instructions to Captain Eason to survey the Chobe following the request of the Secretary of State, Lord Harcourt to the High Commissioner in 1911 for "all available information from local sources in support of the view that the northern channel is the main channel" (Botswana Memorial, Annex 16).

**The Eason Map of 1912: Map No.2, 1:100,000.** (Botswana Memorial, Annex 15).

567. These instructions were carried out in the survey of the Linyanti River by Captain Eason<sup>9</sup>, coupled with his Report, which concluded that the northern channel was the main channel in accordance with the terms of the Anglo-German Agreement (Botswana Memorial, Chapter V, para. 146. page 64). Two maps, No. 2 'Linyanti River from Kazungula to Ngoma' and number 9, '1:200,000, Tracing of a map of The Linyanti River from Kazungula to Liambesi by Hauptmann Streitwolf, 1909' trace the course of the lower stretch of the Chobe; both show the Island. Map No.2 labels the Island 'Kassikiri' and clearly shows the meander loop in the southern channel, supporting Captain Eason's comment 'that the southern channel is merely a backwater'. The shape of the island in No. 9 is poor, lacking accuracy. Map No.2 stands out as the best depiction up to that date of the geographical configuration and qualification of the northern channel as the main channel. Rushworth confirms this view:

"Eason in fact produced the best depiction of the Chobe available until 1928 and much superior to that appearing on British maps before 1933, but it was never incorporated in to a published map." (Rushworth Report, Namibian Memorial, Annex 102, p.41)

### **(iii) The German Maps up to 1914**

[<sup>8</sup> The 1889 Map is discussed above at paragraph 548. All versions of the map are of too small a scale and the boundary line, when shown, is superimposed over the Chobe River and extends some half mile beyond both north and south bank.]

[9 Captain Eason was not Assistant District Commissioner stationed at Kasane (Namibian Memorial. para. 297) but an officer in the Bechuanaland Police stationed at Kazungula.]

568. The Namibian Memorial asserts that "the most important of the early post-1889 maps was made by Franz Seiner.." (Namibian Memorial, para 293). Rushworth is not quite so partisan, speaking of "a remarkable series of three successive German systematic maps of the area that were produced within a seven year period directly before the start of World War I" (Namibian Memorial, Annex 102, p.38). He thus ranks the Von Frankenberg equal, if not superior to, Seiner's map.

569. In fact three maps during this period were produced as official publications but Seiner's Map was not among them.

**The 1904 Kriegskarte von Deutsch Sudwestafrika, 1:800,000, Andara Sheet (Botswana Atlas, Map 4) and Linjanti Sheet (Botswana Atlas, Map 5), by P. Sprigade and M. Moisel, Dietrich Reimer, Berlin.**

570. This Map was part of 'the first systematic mapping of the area', and was commissioned by the German colonial authorities. The Andara sheet (Botswana Atlas, Map 4) shows the northern channel by a thick black line, and the southern channel is barely visible except as the edge to the shaded area which represents the island. On the Linjanti Sheet (Botswana Atlas, Map 5) a strong black line indicates the thalweg in the river and is drawn to the north of Sulumbu's island, an early name for Kasikili/Sedudu Island,<sup>10</sup> thus placing it within Bechuanaland. No boundary is shown.

[10 If Sulumbu's island designates Kasikili/Sedudu Island this 1904 map clearly gives the northern channel the greater prominence, and thereby identifies it as the main channel. Mr. Rushworth, however, expresses reservations about the reliability of the map (his Report, page 38).]

**The Seiner Map of 1909. 1:500,000 (Botswana Supplementary Atlas, Map 2).**

571. Namibia asserts that the Seiner map of 1909 shows the boundary in the Chobe River but this is contested by Botswana. The Namibian Memorial, drawing on Mr. Rushworth's description, states:-

"Kasikili Island appears under the name of Sulumbu's Island (see Fig.10, following p. 121). The map's scale of 1:500,000 is large enough for a fully recognisable depiction of the Island, which is taken straight from Bradshaw's map (Atlas, Map 12). discussed in paragraph 76. supra. The boundary is shown as a fine red solid line backed on the interior by fine red hatching except on rivers, where the line, but not the hatching, is omitted. The hatching clearly covers Kasikili Island, thus placing it unequivocally in Namibia. (See Figure 10, following p.121) (footnote omitted). (Namibian Memorial, p.122, para. 295).

Thus, the northern boundary of the Caprivi Strip is shown by a straight red line hatched red on the German side.

572. Botswana maintains that the Extract at Figure 10 in the Namibian Memorial is another example of the 'blow-up' technique which misleads as to the information which the mapmaker intended to convey.

573. It is accepted that the Seiner Map shows hatching covering the island, a fact noted by the 1985 Joint Survey Team who appended a black and white enlargement of this section of the Seiner map to their report<sup>11</sup>. Namibia and Mr. Rushworth contend that the red hatching extends to the Chobe River as well as along its northern bank (and presumably to the centre of the river as well as western bank of the Zambezi); this is highly questionable, even after examination of the Extract at Figure 10 at page 122 in the Namibian Memorial, and is certainly not visible on the original map. The key to the map gives no guidance to the use of hatching as a boundary symbol.

[11 The Joint Team somewhat misleadingly stated that "This map showed the boundary to be the channel to the south of Sedudu/Kasikili Island." Botswana Memorial, Annex 40, p.386.]

574. In any event to be in accordance with the 1890 Agreement the hatching should only extend to the centre of the Chobe; it is quite impossible, given the scale, to read such information into the colouring on the map.<sup>12</sup>

[12 Further the map depicts along the northern edge of the Chobe and on the south bank at Serondela and Masokatan's Winterdorf lemon areas on the map interspersed with white patches; the key explains that these are beds, pools, and depressions which after the rainy season quickly dry out in a short time after flooding (nach den Regenzeit rasch aus trocknende Betten, Pfennen, Mulden, nur kurze Zeit uberschwemmte Flächen). Whilst the Extract shows the red hatching covering these areas such hatching is not apparent on the original.]

575. Seiner was not a German official, nor was his map's publication authorised by the German authorities. Seiner did not visit the Chobe area of the Eastern Caprivi and therefore used Bradshaw and other maps, as he acknowledges by the inscription 'Bradshaw 80., Hammar 84. Reid 99.' His depiction of Kasikili/Sedudu Island follows closely Bradshaw's configuration, retaining the pecked line along both banks of the northern channel to indicate that they remained unsurveyed.

576. That Seiner appreciated that the boundary along the Chobe was required to follow the thalweg or 'the Stromstrich line' is apparent from his own writings<sup>13</sup>.

[13 Writing in 1908, the year before the map was published, he stated that the boundary along the Chobe River followed 'the deepest channel'. and used the technical term 'the stromstrich line' to explain its location. For the definition of 'the stromstrich line' and Seiner's application of it in relation to the Chobe, see Chapter 6, paragraph 342, of this Counter-Memorial and Annex 4.]

577. In sum, it would be wholly unjustified to treat the colouring on the Seiner map as any sort of official indication of the whereabouts of the boundary between South West Africa and Bechuanaland Protectorate.

578. The comment that the Seiner map was "in general use for four decades, without remonstrance from British or Bechuanaland authorities" (Namibian Memorial, para.294), and that "from 1914 to 1929 the British authorities administered the Caprivi Strip as the delegate of South Africa and as such during that time used Seiner's map" (Namibian Memorial, para.303) is unsupported by the facts. It cannot seriously be suggested that the British authorities were required by international law to object to every map, including unofficial maps, published which misrepresented the boundary, particularly when, as shown above, the map did not indicate any boundary which reflected the provisions of the Anglo-German Agreement.

579. From the first moment when the British authorities knew of German cartographic activities in the area, they placed on record that they 'would not be in any way bound by the geographical results.' (footnote 31 in paragraph 641 below). When the Seiner map was brought to the attention of the British authorities in 1909 in connection with a possible arbitration of the southern boundary of the Caprivi strip, they were careful to make no use of it, and sent instead to the German Government copies of the 1909 version of the Military Map of 1906 which showed the boundary following the northern bank of the Chobe (Namibian Memorial, Vol.IV, Annexes 36 and 37, at pages 153, and 154). Apart from the 1933 map citing the Seiner map as one of its sources, it would seem that greater reliance was placed on the Streitwolf and Eason maps by the South African and Bechuanaland authorities.<sup>14</sup>

[14 See the 1915 German South West Africa Military Map, prepared by the South African Defence Force (Botswana Atlas, Map 12) and Captain Stigand's Sketch map of 1922, Botswana Supplementary Atlas, Map 6.]

**An Unpublished map of Captain Streitwolf 1909:** 1:200,000, green graph paper (Botswana Supplementary Atlas, Map 4)

580. Three maps are attributed to Captain Streitwolf, who in his book, *Der Caprivi Zipfel*, published by William Susserott, Berlin, 1911, reports that after his arrival in the Caprivi on 25 January 1909, he travelled by boat down the Chobe River in January 1909 (Botswana Counter-Memorial, Annex 6). He makes no mention of an island.

581. The unpublished Map, reproduced as Map 4 in the Botswana Supplementary Atlas, was enclosed in a letter dated (Sesheke) 6 May 1909 to the Imperial Administration, Windhoek<sup>15</sup>. The map shows the course of the river, and the northern channel but no island and no boundary.

[15 Akten Betreffend Vorgänge des Gouvernements Windhuk betreffend Okavangogebiet und den Caprivizipfel (Documents concerning records of the Windhoek Administration concerning the Okavango and Caprivi regions) Vol.I:26 May 1908-11 July 1909 (Nr. des Aktenbandes (file no.) (1787) pp.166-178). This map was referred to in the entry for Captain Streitwolf in Volume III of the *Deutsches Kolonial-Lexikon*, 1920, where it is stated that he drew a 'good map of the Caprivi (not published), Botswana Counter-Memorial, Annex 10.]

582. The Namibian Atlas, Map VI, reproduces a copy of of the Eastern Sheet of the *Karte Von Teilen der Nordgrenze Deutsch-Sudwestafrikas*, surveyed by Streitwolf in 1909 and published in Windhoek in 1910, by the German colonial authorities. Contrary to the unpublished map, the published map shows an island on which the word 'Kassikiri' is written. As Rushworth notes: 'The position of Kasikili Island is correct but the shape is not as good as Seiner' (Namibian Memorial, Annex 102, p.39). Seiner's shape, it will be remembered, was copied from Bradshaw.

583. Map 9 attached to Eason's Report of 1912 appears to be a tracing of the published map, but omitting any name of the island.

584. It must be a matter of speculation why the map published under the auspices of the German colonial authorities included an island when the original map recording Streitwolf's firsthand observations did not do so: those observations, it is to be noted, involved "route surveys ..made by bearing-compass and watch" and "astronomical determinations" (Namibian Memorial, Annex 104). The failure of the published map to replicate accurately the first-hand depiction of its surveyor, and its inclusion of a named island which does not appear on the original map, raises doubts on its reliability.

**The Von Frankenberg Map of 1912, Karte des Caprivi Zipfels, Blatt 1, 1:100,000, issued under the authority of Von Frankenberg, the Imperial District Chief and Resident in the Caprivi (Botswana Supplementary Atlas, Map 5)**

585. This map was produced on the basis of a survey by and with the authority of Von Frankenberg, the District Chief and Resident in the eastern Caprivi. No boundary is shown but the southern channel is clearly indicated as "Kassikiri Fluss-arm"; a term which in the certified translation reads "as branch or tributary of a main river" and is so used in standard works of reference. (Botswana Supplementary Atlas, Map 7 and Figure at page 233 of this Chapter, being a reproduction to original scale of a section of the Von Frankenberg map). The labelling of the southern channel with its own name clearly implies that the River Chobe flows through the northern channel. The significance of the words "Kassikiri Fluss-arm" is not lost on Namibia's advisers. Contrary to Rushworth, who "believes the word "Insel" applies to the Island, while the phrase "Kassikiri Fluss-arm" applies to the southern channel of the river", they argue "that 'Insel Kassikiri' applies to the Island, while the "Fluss-arm" applies to the southern channel of the river". They clearly appreciated that a side stream which has its own name cannot be the main channel of the Chobe.

586. There can be no doubt that the Von Frankenberg map provides strong evidence that, at the time of its making in 1912, the northern channel was regarded as the main channel of the Chobe, if not as the Chobe River itself, a determination confirmed by Captain Eason in his Report of 1912.

587. The Namibian Memorial accepts this map as one "surveyed and drawn by German Imperial Residents in the Strip in their official capacities" (para 296) and as "evidence of the views of officials with special knowledge as to political matters", (Namibian Memorial, p.123, para.300, citing Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations', p.161. Annex 116). This map stands out among the map evidence and provides convincing support for the Botswana case.

**(iv) Conclusion on the German maps**

588. The unofficial Seiner map cannot be said to indicate the location of the boundary in the Chobe River whatever the colour in which it may delineate Sulumbu's Island. Seiner himself stated that the boundary was to be determined in accordance with the thalweg or 'the Stromstrich line'. Official correspondence in 1905 and in the period 1909 to 1914 makes it plain that the British authorities in no way recognised or acquiesced in any representation contained in the Seiner map nor did they subsequently make use of the map, referring more frequently to Streitwolf's or Captain Stigand's maps. The Von Frankenberg map provides overwhelming evidence that the southern channel was a tributary known as the 'Kassikiri Fluss-arm' of the main stream of the Chobe which flowed through the northern channel.

**(v) The British Maps 1914 to 1945**

**Sketch Map of Ngamiland and Ghanzi by A.G. Stigand 1922 1:500,000 War Office (Botswana Supplementary Atlas, Map 6)**

G39 - Extract from Karte des Caprivi Zipfels, Blatt 1, 1:100,000, May 1912 (Map 5 in Supplementary Atlas)

589. This sketch map includes the information: 'being route traverses surveyed with prismatic compass, and tacheometer (on wheel of travelling car) by land, and by boat and canoe by water timed with a stop watch, by Captain A Stigand between February, 1910 and August 1922'. It is significant that Seiner's route of 1905 is but one of many others, (Schulz and Hammar 1884, Reid 1899, A E Freeman 1922), which were referred to and incorporated into the map, with entries referring to Streitwolf (1909) being the most prolific. The map ends at its north eastern edge just after Kavimba on the Linyanti River and in this region no reference to Seiner is entered. Rushworth's comment, (this 'influential map much quoted as a source') (Namibian Memorial, Annex 102, p.42), confirms that it was Stigand's sketch map, and not Seiner which was used by the British authorities. It was begun at the time when the Germans were publishing their maps and includes a wealth of information on water resources, local tribes, languages and place names.

590. Stigand's map is the map referred to in the exchange of correspondence in February/March 1945 between the Deputy Chief of Staff, of the Survey Directorate, Pretoria and the High Commissioner, Bechuanaland Protectorate (see Annex 17). The eastern edge of this sheet is just to the west of Kasikili/Sedudu Island and thus makes quite clear the meaning of paragraph 2 of the Government Secretary's reply to the Survey Directorate, Pretoria on 6 March 1945:-

" 2. There is no official map showing the boundary, but it was agreed that the southern boundary of the Caprivi Strip eastward of a point 20 miles due south of Andara would follow a line running parallel to the northern boundary and that the southern boundary is shown on Captain Stigand's map, a copy of which is enclosed." (Botswana Counter-Memorial, Annex 17).

**The 1933 Bechuanaland Protectorate 1,500,000,GSGS 3915 of 1933 (Botswana Atlas, Map 13)**

591. No original survey or ground verification work was done for this 1933 map and a similar 1935 map, which was also produced by the Ordnance Survey. The boundary, described as "clumsy" by Rushworth, is shown as an intercolonial, not as an international boundary.<sup>16</sup> It runs throughout along the south bank of the Chobe. This reflects standard practice in respect of colonial boundaries along rivers which located the boundary line alongside the river bank alternating from bank to bank at regular intervals of 10, 50, 100 miles according to the scale of the map 17. A boundary so sited, as in this 1933 map, is clearly not located in accordance with the terms of the 1890 Agreement and the placement of the island in South West Africa territory is consequently meaningless.

[16 It is somewhat surprising in view of the later 1960 and 1965 Bechuanaland maps and the 1968 British maps (discussed below), that the Joint Survey Team in 1985 placed any reliance on this 1933 map in determining the boundary. Botswana Memorial, Annex 48, p.386.]

[17 The 1940 South West Africa 1:500,000 Map (Rushworth Report, serial 25, page 44) provides a further example of perplexity on the part of the mapmaker as to where to place the boundary. Improving on the 1933 map, the boundary is placed along the river, but not at the Island, which is not named. A reasonable inference is that the mapmaker did not know of the facts on the ground and wisely decided not to speculate where two channels are shown. The labelling of Shokamontondo for Kasika suggests that some use of Von Frankenberg may have been made.]

## (vi) The British maps 1945 to the present day

**592. Chobe Concessions (Bechuanaland) Ltd.: Approximate delineation of Concession Areas.** (Botswana Atlas, Map 15)

This map was surveyed and drawn by Silby and Horrell, chartered surveyors, Salisbury, Southern Rhodesia, and dated 28 May 1958. Its purpose was to indicate the main agricultural and grazing concession areas and these are listed in an accompanying note. The map is significant in that the Chobe River is depicted flowing through the northern channel, and no southern channel is shown.

**The 1960 Bechuanaland Protectorate Map, 1:1,000,000** Directorate of Overseas Survey (Botswana Atlas, Map 16)

593. This map provides yet another contradiction, along with the military Maps of 1903 and 1909, the Von Frankenberg Map of 1912 and several of the Annual Reports Maps of Bechuanaland, of the supposedly "unbroken concordance in the maps of the two parties depicting Kasikili Island as within Namibia". 'Drawn and photographed by DOS from material supplied by the High Commissioner for Basutoland, the Bechuanaland Protectorate, and Swaziland', the sheet indicates the boundary along the northern and western channel of the Chobe. In view of the scale no detail is visible in the vicinity of the island.

**Bechuanaland Print Laydown 1:125,000 DOS 1964 Sheet 1725C.** From photography by Hunting Air Surveys Ltd. June-July 1962 (original available for inspection if required)

**The 1965 Bechuanaland Map, 1:500,000 DOS 1965** (Botswana Atlas, Map 17)

594. As Rushworth describes it, this map is part of a series at 1:500,000, "covering Botswana, that was intended as a quick compilation, from existing sources, for general use while the planned 1:50,000/1:1,000,000 new mapping cover of the country was completed." It is to be noted that the Botswana series after independence (see para 620 below) showed the boundary in the northern channel and so did the 1965 British Map. It is to be noted that South Africa made no protest to any of these maps. It was compiled from a print laydown (1752C) composed from air photography taken in 1962, which shows a southern channel but this is omitted in the 1965 Map.

595. It is by no means certain and does not follow, as Mr. Rushworth suggests, that a cartographic error caused the placement of the boundary in the northern channel in the printed map. In response to internal departmental enquiries, the Surveyor-General prepared an Opinion of 18th October 1965. That Opinion resulted in a Plan 'traced in the Dept of Surveyor-General from Print Laydown 1725C' which clearly shows the northern channel in blue with the label 'Main channel coloured blue' (Botswana Atlas, Map 18).

596. Thus, as Mr. Rushworth conjectures, it seems Print Laydown 1725C was used in the compilation of the 1965 Bechuanaland map but the depiction of the boundary in the northern channel was not a draughtsman's error but deliberate in execution of the Surveyor-General's Opinion. In accordance with usual practice, the 1965 Map contained a disclaimer: "This map must not be considered an authority on the delimitation of international boundaries".

**The British Joint Operations Graphic Ground Map 12 July 1968** 1:250,000 1968  
Sesheke, Zambia; South West Africa; Botswana; S. Rhodesia Produced by the Directorate of

Military Survey, Ministry of Defence: Compiled by Ordnance Survey Series 1501 SE 35-5 Ed-1-GSGS Information current 12 July 1968. (Botswana Supplementary Atlas, Map 7)

597. The island and the two channels are clearly shown with correct orientation and the international boundary, a red line, with a black pecked line in its centre, is drawn along the northern channel. A note states 'This Graphic is not an authority on international boundaries'. Compiled and published under the auspices of the Ministry of Defence, United Kingdom, this map follows in sequence the 1960 and 1965 Bechuanaland Maps and clearly places the boundary in the northern channel. It provides clear evidence that the British authorities throughout the 1960s considered the boundary around the island to follow the northern channel. The disclaimer note follows the usual practice.

**The British 1968 Joint Operations Graphic Air Map, 1:250,000, 1968, Sesheke, Zambia; South West Africa; Botswana; S. Rhodesia** Produced by the Directorate of Military Survey, Ministry of Defence: Compiled by Ordnance Survey Series 1501 Air SE 35-5 1-GSGS. (Botswana Supplementary Atlas, Map 8)

598. This is an identical map to the 1968 Joint Operations Ground Map except that it has air zones entered and the elevation is marked in feet, instead of metres as in the Ground map.

**The 1968 British Joint Operations Graphic-Ground Map, 1:250,000** Sesheke, Zambia, South West Africa, Botswana, S. Rhodesia. (Botswana Supplementary Atlas, Map 9).

599. This copy of the 1968 Map (reproduced at page 239) is annotated in red to show the limits of the Chobe National Game Park with the boundary running up to the international boundary in the northern channel. The accompanying Kavimba sheet has similarly been annotated.

**The British Joint Operations Graphic-Ground Map, 1:250,000. The 1970 Sheet, Kavimba, Botswana, S. Rhodesia, S.W. Africa.** (Botswana Supplementary Atlas, Map 10).

600. This sheet has been annotated in red with the accompanying Sesheke sheet in red to show the limits of the Chobe National Park along the Chobe River. These are based on the 1968 British Joint Operations Ground Map, and both are annotated in red by the Wildlife Department of the Republic of Botswana to show the limits of the Chobe National Park which coincide with the international northern boundary of Botswana and are drawn so as to follow the centre of the northern channel around Kasikili/Sedudu Island.

#### (vi) South African Maps

601. One map in this period is heavily relied upon by Namibia

**South Africa 1949 Katima Mulilo 1:250,000, (Botswana Atlas, 14)**

602. This map was compiled by military cartographers, 45 Company of the South African Engineers, 'the staff of the Trig Survey Office in uniform,' who in the preliminary compilation copied the boundary line from the 1933 Bechuanaland Protectorate Map, and showed it in the south channel. Despite enquiry of the Bechuanaland authorities who gave no authorisation for its placement in the southern channel, the final printed version of the map in 1949 showed the boundary unaltered in the southern channel. To do so was to disregard the response of the

Bechuanaland authorities to its enquiries, see below, and the active correspondence taking place between London and Pretoria following the Trollope/Redman Report of 1948. The only other construction must be that a deliberate decision was taken to advance the South African claim on behalf of South West Africa, which was under discussion, by the placement of the boundary in the southern channel.

G40 - Extract from Joint Operations Graphic Ground Map. Sestetic, Zambia, SW Africa, Botswana, S. Rhodesia, 1:250,000, 1966, (Botswana Supplementary Atlas, Map 9) annotated in red to show limits of Chobe National Park

603. The Namibian Memorial places great reliance on this map and states:

"The map has a special significance by reason of the publicity that was given to it and the evidence that it was carefully considered by the Bechuanaland authorities while still in draft form". (para. 314)

The paragraph then refers to a request from the South African Survey Directorate to "examine the prints carefully...and supply as much information as possible by way of criticisms, corrections and additions" (Namibian Memorial, Annex 106). Although the reply from the Bechuanaland authorities has not been traced, Namibia concludes by reason of amendments made to the map in the Chobe locality that such a reply was received.

604. In the light of further correspondence which has come to hand from South African archives, Botswana is now in a position to produce to the Court the actual exchanges relating to the treatment of international boundaries on the 1949 Map.

605. On 6 February 1945, the Deputy Chief of Staff, of the Survey Directorate, Pretoria wrote to the High Commissioner, Bechuanaland Protectorate in the following terms:-

"1. As you are perhaps aware, maps at 1/250,000 of the Caprivi Strip are at present being prepared by the Director of Military Survey from an aerial survey recently carried out and using, in addition, all available data of the surrounding terrain.

2. Reliable information is now required regarding the southern boundary of the Caprivi Strip, i.e., the boundary between the Strip and Bechuanaland.

3. Will you please advise me whether you have any plans, Boundary Commission Reports or Agreements, or any other documents bearing on the matter and which would assist in the proper delineation of the boundary on the maps now being compiled.

4. If you have any such plans, reports, etc, would you kindly forward a copy of each to this office for use in the a/m compilation". (Botswana Counter-Memorial, Annex 17)

606 The High Commissioner directed the Resident Commissioner to send any information direct to the Survey Directorate, letter of 13 February 1945 (Annex 17), and on 6 March 1945 the Government Secretary replied to the Survey Directorate as follows:-

"2. There is no official map showing the boundary, but it was agreed that the southern boundary of the Caprivi Strip eastward of a point 20 miles due south of Andara would follow

a line running parallel to the northern boundary and that the southern boundary is shown on Captain Stigand's map, a copy of which is enclosed.

3. It was further agreed that west of the point 20 miles due south of Andara the boundary should follow a parallel of latitude to the 21st meridian of East longitude.

4. Complete information on this subject can be furnished by the Department of External Affairs of your Government."

607. The above notification is highly significant and supports the following conclusions:-

(a) As at 6 March 1945 the British authorities in Bechuanaland were of the view that there was no official map showing the southern boundary of the Caprivi Strip. This in effect disposes of all Namibia's arguments relating to earlier maps as evidence of the location of the boundary as provided in the 1890 Anglo-German Agreement. In particular it disposes of any question of the relevance of the Seiner map of 1909 and the British 1933 map.

608. (b) Enquiry relating to the international boundary of the Caprivi Strip was directed separately and to the High Commissioner, indicating that only the highest level of authority had competence to deal with such inter-state matters and that the need for high level consultation was recognised by both the South African and the British governments. It is noteworthy that the matters referred to in paragraphs 3 and 4 of the above letter were agreed by the Minister of External Affairs, South Africa, and by the Prime Minister in the United Kingdom.

609. (c) The sole information relating to the southern boundary communicated by the Bechuanaland authorities related to the line east and west of Andara, in respect of which there had been an exchange of correspondence between the South African and British Governments in London in the period 1931 to 1932 agreeing to the direction of that line (see Chapter 1). There was no exchange relating to the eastern sectors, the boundary following the River as stipulated in the Anglo-German Agreement of 1890.

610. (d) The dispute relating to the Island had surfaced before the map was checked for accuracy and published. Information on any other aspect of the boundary along the Chobe River was referred back to the Ministry of External Affairs. Prior to the publication of the South African Map in 1949, the Ministry of External Affairs had notice of the Trollope/Redman Report dated 19 January 1948, and at the date of its publication was engaged in correspondence relating to the boundary in Eastern Caprivi with the High Commissioner for Bechuanaland and the Commonwealth Relations Office.

611. All the above considerations point to the self-serving nature of the 1949 Map. No authorization or approval whatsoever had been given by the Bechuanaland High Commissioner to the representation of the boundary in the southern channel. At the time of its publication exchanges were taking place about the proper location of the boundary around Kasikili/Sedudu Island.

612. Namibia states that the map was reissued in 1967 and that a further version of the map appeared in 1982 and comments that neither elicited a protest from Botswana (Namibia Memorial, p.129, para. 316).

It omits however to note that both before and after the independence of Botswana on the 30th September 1966, maps had been published showing the correct location of the boundary in the northern channel. The British authorities had published their own 1960 and 1965 Bechuanaland Protectorate Maps, and the 1968 Joint Operations Ground and Air Maps, and after independence Botswana published the 1:50,000 and 1:1,000,000 series of its territory in several editions. All these maps showed the boundary in the northern channel of the Chobe River.

613. No protest on behalf of South Africa is on record relating to any of these maps.<sup>18</sup> Further, her own Defence Forces over a period of ten years issued two maps which clearly located the boundary in the northern channel. These were the JARIC Map 1978 (Botswana Atlas, Map 22) and the 1984 Military Map: see paragraphs 616 to 619 below.

[18 At page 46 of his Report Mr. Rushworth refers to a map of district boundaries of 1957(serial 27) and a Water development Scheme Map of 1963 (serial 28); the first map was prepared by officials for departmental use only, the second by a Consultancy non-resident in Bechuanaland; both appear to have relied on the 1933 map and therefore repeated its errors; neither the officials nor the Consultancy had authority or competence to deal with international boundaries.]

**The JARIC (Joint Air Reconnaissance Intelligence Centre) Map 1978.** (Botswana Atlas, Map 22).

614. The map forms part of a series primarily of the Eastern Caprivi Strip, and its production clearly reflects the need for accurate maps of this remote region by reason of the intensification of the activities of SWAPO in the Caprivi Strip. It was produced by the cartographic unit of the South African Defence Force, fully plotted from air photography taken by the South African Air Force in 1977 in accordance with a Working Plan (Botswana Supplementary Atlas Map 23, and accompanying Report: Annex 32.) It shows the boundary in the northern channel of the Chobe. An extract of this map is reproduced at page 245, together with an extract from the Flight Plan at page 246.

**Map of South West Africa, 1982, 1:50,000 1982 Sheet No. 1725 CC.**(Namibian Atlas XIII)

615. This map is the civilian version of the 1984 Military Map (see below) and no boundary is shown in the Chobe River. Namibia's use of this map in its Memorial provides a further example of misleading enlargement, whereby the omission of information present on the full scale map gives a false impression.<sup>19</sup>

[19 In the correctly-sized map (Atlas XIII of the Namibian Memorial) the reference shows that international boundaries are indicated by a black dash-dot line, although no boundary is in fact indicated on the map. In the Extract of the same map printed as figure 5 at page 20 of the Namibian Memorial, the reference key is omitted; and no black dash-dot line is shown anywhere dividing SW Africa from Botswana; the viewer's attention instead being drawn to the darker brown colouring that shades the Chobe Ridge and the south bank of the river along and beyond Commissioner's Kop. When read with the text in the Namibian Memorial:-

"Thus this conspicuous geographical feature divided two distinctive patterns of terrain and was an obvious marker for the boundary between the two spheres of interest as well". (Para.17, see also para.116), this Extract seeks to convey the impression that the boundary is depicted at the point where the colouring on the map changes.]

**Military Intelligence Map 1984 1:50,000,** an updated annotation of the 3rd edition in full colour of S Africa 1982 1725 CC map, (Botswana Supplementary Atlas, Map 15)

616. The map is annotated in red ink in Afrikaans "Opdatering gedoen deur 47 Opmetings Eskadron Opdatering Sept 83 - Jan 84" This translates into English as "Updated by the 47th Survey Squadron Sept 83 - Jan 84".

617. The map is a restricted issue and was produced by the South African Military Intelligence during the height of the war against the Swapo Freedom fighters in the Eastern Caprivi. It is heavily annotated with additional information not given on the civilian issue, such as stores, schools, clinics and the names of village headmen.

G41 - Extract from Caprivi, 1:100,000, 1974, Joint Air Reconnaissance Intelligence Centre (JARIC) Map (Map 22 in Botswana Atlas)

G41a - Extract from Flight Plan, 21 July, 1977 for Joint Air Reconnaissance Intelligence Centre (JARIC) Map 1:561,000 approximate, 1978 (Map 26 in Supplementary Atlas)

G42 - Extract from South West Africa, Sheet 1725CC, 1:50,000, updated and annotated in red 1984, 3rd edition, Military Intelligence Map, Director of Surveys and Mapping, South Africa (Map 15 in Supplementary Atlas)

618. This map is a modern fully controlled map produced by the National Mapping Agency as a definitive medium scale map of the Eastern Caprivi. Whereas the civilian version of the map does not show any boundary symbol in the Chobe River, this military edition clearly shows the international boundary passing through the northern and western channels around Kasikili/Sedudu Island. In addition, the boundary symbol is annotated in capital letters as "SWA/Botswana Grens". "Grens" is the Afrikaans word for "Boundary". There is no boundary disclaimer clause on this map and therefore the depiction of the boundary around Kasikili/Sedudu Island indicates that, in the eyes of the South African Military authorities, the Island falls wholly within Botswana. An extract from this map showing the annotations in red appears at page 247.

619. This map and the earlier JARIC map are two military maps prepared at a time when in the words of the Namibian Memorial (p.114, para.281), 'the whole of the Caprivi strip was a war zone under the control of the enemy, South Africa, in the struggle for Namibian independence' and constitute clear 'admissions against interest' that the international boundary lay in the northern channel. Surely, if there was ever a time when South Africa as the de facto power could 'improve upon its previous title was at this time of civil conflict; yet twice over a period of ten years official maps were published placing the boundary in the channel to the north of the island.

#### **(viii) Botswana's Maps published after its independence in 1966.**

620. On all the Botswana maps, the boundary was drawn, as in the 1960 and 1965 maps of the Bechuanaland Protectorate, in the northern channel of the Chobe River in the vicinity of the Island.

**Republic of Botswana 1:50,000, 1974.** Sheet 1752 C3 and Part C4, Edition 1. Compiled and drawn by the Department of Surveys and Lands. Printed by Government printer. Air Photography by Huntings 1972. (Botswana Supplementary Atlas, Map 11).

**Botswana 1:50,000, 1977,** Edition 2, (Botswana Supplementary Atlas, Map 14)

**Botswana 1:50,000, 1984**, Edition 3, (Botswana Atlas, Map 23)

**1974 Botswana 1:1000,000, 1974**, edition 1, Printed Kearland, Johannesburg. (Botswana Supplementary Atlas, Map 12)

**1976, partially revised, Botswana 1:1.000,000**, edition 2 (Botswana Supplementary Atlas, Map 13)

**Botswana North Sheet, 1:1,000,000, 1986** (Botswana Supplementary Atlas, Map 18)

621. These high quality maps were produced after independence by the Surveys and Lands Department, Botswana. South and North Sheets to a scale of 1:1000,000 were also prepared by Surveys and Lands Department. In 1974 Botswana published the first maps of the area to the scale of 1:50,000, and also 1:1,000,000 compiled and drawn by the Department of Lands and Surveys. Both Rushworth and the Namibian Memorial accept the map of 1:50,000 to be of high standard" with full ground and height control and instrumental photogrammetric plotting of detail". Rushworth Report, p.49). The boundary is shown in the northern channel, with the southern channel also visible. There is a boundary disclaimer clause.

622. Publication of these official maps on the part of the Republic of Botswana gave clear notion of its construction of Article III of the Anglo-German Agreement of 1890. These maps constituted a clear position as to the location of the boundary and rebut any charge of silence, acquiescence or absence of protest in respect of South African maps.

623. This and subsequent maps published by Botswana showing the boundary in the northern channel were prepared after the controversy had surfaced, as in the case of the South African official maps. Nonetheless they provide evidence that there was no subsequent practice as to maps supporting 'the agreement of the parties' as to the application of the 1890 Agreement in accordance with the Vienna Convention, Article 31 (3) (b).

624. No protest on behalf of South Africa is on record to either of these two maps.

**Tourist Map of Chobe National Park,1977**, 1:250,000 (Botswana Supplementary Atlas, Map 25)

625. A series of tourist maps were published by the Wildlife Department, Gaborone, and they show the northern boundary of the park in the northern channel of the Chobe River in the vicinity of Kasikili/Sedudu , aligning with the international boundary.

### **(ix) UN Official Maps of Namibia**

**The UN Official Map of 1985** (Botswana Supplementary Atlas, Map 16)

626. A UN map to the scale of 1:1000,000 is 'enhanced' by an extract to a scale of 1:250,000, as Figure 18 at p.133 of the Namibian Memorial. This extract shows the course of the Chobe River and, in the vicinity of Kasika, two blue streams to the north of the main line of the river are shaded in the pale fawnish-yellow colour which covers the rest of the eastern section of the Caprivi Strip. Examination of the map in its original scale reveals exaggeration of effect in that the whole territory of Namibia is coloured with a pale brown wash, including the whole of the Caprivi Strip, with surrounding countries shown white with the minimum of detail

depicted along the boundary. Inexactitude and visual fallacy results from the implication that the two streams depicted represent Kasikili/Sedudu though they in fact depict not one but two Kasikili/Sedudu islands, and are of dissimilar shape to Kasikili/Sedudu.

627. An even more significant error results from the 'blow-up' treatment in relation to the international boundary. Namibia finds great significance in the fact that this map, unlike the UN maps at a scale of 1:4,000,000 from which it was compiled, does not include the standard boundary waiver clause :-

"But this standard language of reservation does not appear on UN Map No.3158, which, at a scale of 1:1000,000, does show Kasikili/Sedudu distinctly in Namibia. The omission of this disclaimer, which is standard for most UN maps, might even be said to create a reverse inference as to boundaries." (Namibian Memorial, pp.132-3. para. 323).

This seems a far-fetched 'reverse inference' to base on the omission of some, but not all of the wording of the standard UN boundary waiver clause,<sup>20</sup> and it is significant the Mr. Rushworth does not invoke it. But it is even more far-fetched when the 1985 UN Map itself is examined to reveal that no boundary is shown along the Chobe (see para. 560 above).

[<sup>20</sup> Namibia UN 1977 I:4000,000 October 1977 Map No.2947 (serial 34 in Rushworth's list) contains two marginal notes:

'On the basis of resolution 31/150 adopted by the General Assembly on 20 December 1976 and the decision taken by the Council of Namibia at its 264th meeting on 5 October 1977, this map represents an official United Nations map of Namibia and supersedes any other map on Namibia or South West Africa hitherto published by South Africa.' and 'The boundaries and names shown on this map do not imply official endorsement or acceptance by the United Nations.'

An improved 1984 version (serial 38 in Rushworth's list) of this map to the same scale, 1:4,000,000 contains two marginal notes, to similar effect but with slightly different wording: '-On the basis of resolution 31/150 adopted by the General Assembly on 20 December 1976 and other Resolutions of the General Assembly, this map represents an official United Nations map of Namibia and supersedes any other map of Namibia or South West Africa hitherto published by South Africa, and

'The delineation of the boundaries between Namibia and neighbouring countries and the names on this map do not imply official endorsement or acceptance by the United Nations as they are to be determined by the independent government of Namibia.'

Namibia 1:1000,000 United Nations 1985 UN Map No.3158, (the map on which Namibia relies), contains a marginal note stating:-

"This map represents an official United Nations map of Namibia and supersedes any other map of Namibia or South West Africa hitherto published by South Africa".

As to the competence of the United Nations to make determinations respecting international boundaries, see S. Akweenda *International Law and the Protection of Namibia's Territorial Integrity: Boundaries and Territorial Claims*, The Hague, 1997, pp.159-60.]

628. Further examples of the use of this 'blow-up' technique are to be found in the treatment of the Seiner map of 1909, see paragraph 572 above and of the 1982 South Africa Map of Namibia, see footnote to paragraph 615 above.

#### **(h) Limits of the Chobe Game Park**

629. The limits of the Chobe Game Reserve were first defined in the High Commissioner's Notice No. 65 of 1960, concerning the Establishment of the Chobe Game Reserve, and repeated almost verbatim in the First Schedule of the Fauna Conservation Proclamation 1961, and included Kasane and the Chobe River Hotel. The statutory limits read:-

"Commencing from a point on the northern boundary of the Bechuanaland Protectorate approximately two miles west of Kazungula, opposite a beacon marked 'Chobe Game Reserve' situated on the southern bank of the Chobe River, thence in a south-westerly direction along the said northern boundary to its point of intersection with the meridian 24\_43' east of Greenwich; thence due south...". (Botswana Memorial, Annex 33)

630. The Chobe Game Reserve Committee established by the Resident Commissioner on 2 January 1962 decided that 'Kasane, Kazungula and the freehold are held by Mr. Trevor on which the hotel and his trading stores is situated should be excluded from the Game Reserve' (Letter of District Commissioner, North, Mr. Clark, to the Member for Local Government, 6 Feb, 1962, Annex 29). The definition was accordingly redrafted to read:-

"Commencing at a point at beacon ? being the south eastern beacon of the Chobe River hotel boundary, thence along the southern and western boundary of the Chobe River Hotel to its intersection with the Chobe River being the northern boundary of the Bechuanaland Protectorate; thence in a south westerly direction along the said northern boundary to its point of intersection with the meridian 24\_43' east of Greenwich..."

(Savingram 8 March 1963 from Divisional Commissioner, North to Member of local Government; Botswana Counter-Memorial, Annex 29).

**Plan: Chobe District 1975 Department of Town and Regional Planning, TRP6, T2-1 1:250.000** (Botswana Supplementary Atlas, Map 19)

**Chobe National Park Plan 1980 BP 179, 1:250,000.** Botswana Supplementary Atlas, Map 20.

**Chobe National Park Plan 1983 BP 179-a. 1:250,000.** Botswana Supplementary Atlas, Map 21.

631. A series of large scale plans in black and white were prepared by the Surveys and Lands Departments to accompany the legal description in the statutory orders made under the National Parks Act 1967 in respect of the Chobe Game Park. The limits of the Park are set out in words with great particularity. The earliest description appears in the Schedule to the National Parks Act 1967 No.48 (Cap.38:03), passed by the National Assembly on 31 August 1967, and brought into force on 8 March 1968 by Government Notice No.64 of 1968.<sup>21</sup>

[21 The schedule to the National Parks Act 1967 (Botswana Memorial, Annex 37) described the Limits of the Chobe National Park as follows:

#### CHOBENATIONAL PARK

The area bounded as follows:-Commencing at a point on the international boundary between the Republic of Botswana and the Caprivi Zipfel, being a point due north-west of Beacon KH 7, situated approximately three hundred and seventy five yards south-west of the Chobe Hotel on the southern bank of the Chobe River; the border runs in a south-westerly direction following the said international boundary between the Republic of

Botswana and the Caprivi Zipfel to a point on the said boundary due north of the beacon situated at Ngoma: ...thence in a westerly and north westerly direction following the southern edge of the said road from Lesuma to Kasane to its point of intersection with the boundary of the freehold property known as the Chobe River Hotel; thence in a southwesterly direction following the said Chobe River Hotel boundary to beacon KH 3 being a beacon on the said boundary; thence in a straight line south-westwards to beacon KH 8 being a beacon situated on the boundary of the leasehold property adjacent to the Chobe River Hotel; thence in a straight line northwestwards to beacon KH 7 being a beacon on the southern bank of the Chobe River situated approximately three hundred and twenty-five yards south west of the Chobe River Hotel; thence in a straight line to the point of commencement....

Note: All bearings are measured on true North. Firebreaks are recorded on Forestry Dept. Map FD 1/9 filed with the Ministry of Agriculture.']

632. The earliest Plan available, No.TP 6-72-1 dated 15 May 1975, prepared by the Department of Regional Planning, shows the land limits of the Park as described in the Schedule joining up with the international boundary along the Chobe River but no points or beacons are marked.

633. The 1967 Schedule was amended by Statutory Instrument No.126 of 1980 (Botswana Counter-Memorial, Annex 33) which did not alter the location of the limit of the Park in the vicinity of the Chobe but particularised it in words and by reference to marked points. Plan BP 179, reproduced at page 255, shows points Y at Ngoma and Z due north in the centre of the Chobe River; both channels around Kasikili/Sedudu are shown with the international boundary drawn in the northern channel; an inset enlargement of Kasane shows point B on the fringes of Kasane and the line delimiting the Park takes an L-shaped route to arrive at point A shown in the centre of the river with the international boundary proceeding northwestwards into the eastern sector of the northern channel.

G43 - Chobe National Park, Plan BP-179, 1:250,000, 1980, Department of Surveys and Lands, Gaborone (Map 23 in Supplementary Atlas

G44 - Chobe National Park, Plan BP-179(a), 1:250,000, 1980, Department of Surveys and Lands, Gaborone (Map 24 in Supplementary Atlas)

634. The limits were again amended in 1983 and Plan BP 179-a, which was a duplication of the 1980 Plan, BP 179, and is reproduced at p.257, shows no change in the river sector. Similarly, in 1987, Statutory Instrument No.9, Plan BP-205, drawn to the smaller scale of 1:350,000, shows a wide black line joining the international boundary as it rounds the Island in the northern channel.'

635. The limits of the Park from the first date of promulgation in 1968 followed the international boundary in the Chobe River and all the Plans make it clear that boundary ran along the northern channel of the river.

### **(I) General conclusions on Map evidence**

636. The general conclusions on the map evidence are as follows:-

I. Map evidence is of little assistance in the present case because it is inaccurate and inconsistent in its placement of the boundary.

637. II. It can fairly be accepted, as did the 1985 Joint Survey Team, that "disparity in the depiction of the boundary between the South African maps and those of Botswana" was probably a contributory factor to the 1984 border dispute. Maps, as that Joint Team found, were of little assistance in the determination of the location of the boundary in the Chobe River in accordance with the terms of Article III of the Anglo-German Agreement.

638. III. There is a direct conflict between the map evidence and the scientific evidence presented by Namibia. According to Professor Alexander the main channel of the Chobe only functions during the five months of the wet season and the period of flood is the relevant time to determine the main channel. Since all the available maps were made in the dry season they are irrelevant. In any event they directly contradict Professor Alexander's thesis by showing two channels and not one located in a 'broad band' across Kasikili/Sedudu.

639. IV. No version of the 1889 map was annexed to the Agreement. The Court has, therefore, in determining the main channel, to construe the text of the 1890 Anglo-German Agreement on its own.

640. V. With one exception, no map subsequent to the 1890 Agreement evidences either an 'agreement of the parties as to its interpretation nor any 'subsequent practice' of the parties as to such an agreement. The one exception is the Plan attached to the Joint Survey of 1985 which constitutes evidence of an agreement between South Africa and Botswana that the boundary lies in the northern channel.

641. VI. No recognition of or acquiescence in any map placing the boundary in the southern channel was given by either the British,<sup>22</sup> Bechuanaland or Botswana authorities. On 20 April 1909 after receipt of a copy of the Seiner map from the German authorities, the British Foreign Office, at the request of the Colonial Office, requested its Ambassador in Berlin to convey to the German Government 'copies of the enclosed map of the Bechuanaland protectorate which has been prepared by the Directorate of Military Operations,' (the 1909 version of the 1906 MOD sketch map); and on 7 May 1909 the Foreign Office confirmed to the Colonial Office that copies of the map had been so communicated to the German Government (Namibian Memorial Annexes 36 and 37). Accordingly, it is clear that the British Government repudiated at once the position as set out in the Seiner map. It is also plain from the correspondence that the negotiations of 1909 to 1914 were conducted by the British throughout on the basis that the boundary followed the northern bank of the Chobe, as shown in the 1909 version of the military map of 1906.

[<sup>22</sup> An exchange of correspondence between Mr. Lyttelton, Colonial Secretary and Lord Selborne, High Commissioner for South Africa concerning the grant of permission to send 'a German officer of the General Staff now at Johannesburg to the point on the Zambesi where German territory touches that river', indicates the British authorities' alertness to boundary problems. In giving permission Mr. Lyttelton stated of course, 'we shall not be bound by the geographical results of this officer's mission when the time comes for delimiting the strip which gives Germany access to the Zambesi under the Agreement of the 1st July, 1890.' Telegram Lord Selborne to Mr. Lyttelton, received Colonial Office June 24, 1905; Mr. Lyttelton to Lord Selborne, 26 June 1905, FCO Print 21879 Nos. 173 and 174A. (Botswana Counter-Memorial, Annex 3)]

642. VII. So far as the 1933 Bechuanaland map is concerned, the crude line running along the southern bank of the Chobe made no 'admission against interest' as to the whereabouts of the boundary in the river and provided no elucidation of the words in the 1890 Agreement 'along the centre of the main channel of the Chobe river'.

643. VIII. As regards the 1949 South African map, the makers of the 1949 map had a reply from the Bechuanaland authorities that there was no agreed international boundary in the vicinity of the Kasikili/Sedudu.

644. IX. The publication of the 1960 and 1965 Bechuanaland maps, the 1968 Joint Operations Ground and Air maps and the Botswana 1974 series of maps, all demonstrate a consistent representation by the responsible authorities that the boundary was located in the northern channel.

645. X. South Africa made no protest against any of these maps, and itself issued the 1978 JARIC map and the 1984 Military Intelligence map, showing the boundary in the northern channel, maps which at this time of civil conflict must amount to 'admissions against interest'.

646. XI. Since the 1985 UN Map shows no boundary in the Chobe River it provides no evidence whatsoever as to recognition of lack of protest on the part of Botswana.

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#### **LIST OF RELEVANT MAPS PRESENTED BY BOTSWANA IN CHRONOLOGICAL ORDER**

1. Central Africa: Sketch Map of the Chobe River by Dr. Benjamin Bradshaw, 1880, 1:125,000. Botswana Memorial, Appendix II, Dossier of Maps, (hereinafter Botswana Atlas), Map 1)
2. Map of Matabililand and Adjoining Territories, compiled by the Intelligence Division, War Office, 1889, ID 776, 1:1,584,000. Botswana Atlas, Map 2.
3. Map to illustrate Article III of the Anglo-German Agreement of 1 July 1890, approx. 1:3,500,000. Botswana Atlas, Map 3.
4. Kriegskarte von Deutsch-Sudwestafrika, 1904, (Andara Sheet), 1:800,000. Botswana Atlas, Map 4.
5. Kriegskarte von Deutsch-Sudwestafrika, 1904, (Linjanti Sheet), 1:800,000, Botswana Atlas, Map 5.
6. Sketch Map of Bechuanaland Protectorate to illustrate Military Report 1906, 1:2,000,000. Botswana Atlas, Map 6.
7. Unpublished map of Capt. Streitwolf, May 1909, 1:200,000. Botswana Supplementary Atlas, Map 4.
8. Karte des Caprivi Zipfels, Blatt 1, issued under the authority of Von Frankenberg, German Imperial District Chief and Resident in the Eastern Caprivi, May 1912, 1:100,000. Botswana Atlas, Map 7; Botswana Supplementary Atlas, Map 4.

9. Survey of the Linyanti River by Captain Eason, August 1912. (Botswana Memorial, Annex 15). Map No.2. Linyanti River from Kazungula to Ngoma, 1;100,000. Map No. 9 Tracing of a Map of the Linyanti River from Kazungula to Liambesi by Hauptmann Streitwolf, 1909, 1:200,000
10. Sketch Maps of Bechuanaland Protectorate to accompany the Annual Reports. 1911-1912 Botswana Atlas, Map 8. 1912-1913 Botswana Atlas, Map 9. 1913-1914 Botswana Atlas, Map 10. 1914-1915 Botswana Atlas, Map 11.
11. German S.W. Africa Sheets 7 and 8, Caprivi Zipfel, Topographical Section of the Union Defence Forces, Pretoria, July 1915 approx. 1:400,000. Botswana Atlas, Map 12.
12. Sketch Map of Ngamiland and Ghanzi by A.G.Stigand, 1922, 1;500,000. Botswana Supplementary Atlas, Map 6.
13. Map of Bechuanaland Protectorate, Geographical Section, General Staff, War Office, 1933, No.3915, 1:500,000. Botswana Atlas, Map 13.
14. Union of South Africa, Katima Mulilo, 1949, 1:250,000. Botswana Atlas, Map 14.
15. Chobe Concessions (Bechuanaland) Ltd., Approximate Delineation of Concession Areas, Silby and Horrell, Chartered Surveyors, Salisbury, 1953. Botswana Atlas, Map 15.
16. Bechuanaland Protectorate, Directorate of Overseas Survey, London, 1960, 1;1,000,000. Botswana Atlas, Map 16.
17. Bechuanaland Print Laydown, Directorate of Overseas Surveys, 1964, Sheet 1725C. 1;125,000 (available on request).
18. Bechuanaland, Directorate of Overseas Surveys, London, 1965, 1:500,000. Botswana Atlas, Map 17.
19. Sketch Map accompanying the Surveyor-General's Opinion, 18 October 1965, approx. 1:125,000. Botswana Atlas, Map 18.
20. South West Africa, Katima Mulilo, Government Printer, Pretoria, 1967, 1:250,000. Botswana Atlas, Map 19.
21. Joint Operations Graphic-Ground Map, Sesheke, Zambia, SW Africa, Botswana, Rhodesia, Directorate of Military Survey, Ministry of Defence, OS, 1968, 1:250,000. Botswana Supplementary Atlas, Map 7.
22. Joint Operations Graphic-Air Map, Sesheke, Zambia, SW Africa, Botswana, Rhodesia, Directorate of Military Survey, Ministry of Defence, OS, 1968, 1:250,000. Botswana Supplementary Atlas, Map 8.
23. Joint Operations Graphic Ground Map, Sesheke, Zambia, SW Africa, Botswana, S. Rhodesia, Directorate of Military Survey, Ministry of Defence, OS, 1968, 1:250,000, as in No. 22 above, annotated in red to show limits of Chobe National Park. Botswana Supplementary Atlas, Map 9.

24. Joint Operations Graphic Ground Map, Kavimba, Botswana, S. Rhodesia, SW Africa, 1970 Sheet, 1:250,000, annotated in red to show limits of Chobe National Park with No. 24 above. Botswana Supplementary Atlas, Map 10.
25. Republic of Zambia, Sesheke, Surveyor-General, Lusaka, 1971, 1:250,000. Botswana Atlas, Map 20.
26. Botswana Sheet 1725 C3 and Part C4, Department of Lands and Surveys, Gaborone, 1974, 1:50,000, Edition 1. Botswana Supplementary Atlas, Map 11.
27. Botswana, Department of Lands and Surveys, Gaborone, 1974, 1:1,000,000. Botswana Supplementary Atlas, Map 12.
28. Limits of the Chobe National Park Plan: Chobe District, Department of Town and Regional Planning, Gaborone, 1975, TRP6, T2-4, 1:250,000. Botswana Supplementary Atlas, Maps 19 and 22. Chobe National Park Plan, 1980, BP 179, 1:250,000. Botswana Supplementary Atlas, Maps 20 and 23. Chobe National Park Plan, 1983, BP179-a, 1:250,000. Botswana Supplementary Atlas, Maps 21 and 24.
29. Botswana, 1976, partially revised Department of Lands and Surveys, Gaborone, 1:1,000,000. Edition 2. Botswana Supplementary Atlas, Map 13.
30. Extract of Botswana, Sheet 1725 C3 and part C4, Department of Lands and Surveys, Gaborone, 1977. Edition 2. Botswana Supplementary Atlas, Map 14.
31. Chobe National Park Tourist Map, 1977, 1:250,000. Botswana Supplementary Atlas, Map 25.
32. Caprivi, compiled by the Joint Air Reconnaissance Intelligence Centre (JARIC), South African Defence Forces, Sheet A, c.1977/8, 1:100,000. Botswana Atlas, Map 22.
33. Zimbabwe, Kazungula, Surveyor-General, Zimbabwe, 1981, 1:250,000. Botswana Atlas, Map 21.
34. South Africa Military Map, 1984, 1:50,000. Botswana Supplementary Atlas, Map 15.
35. Botswana Sheet 1725 C3 and Part C4, Department of Lands and Surveys, Gaborone, 1984, 1:50,000. Edition 3. Botswana Atlas, Map 23.
36. Botswana North Sheet, 1986 edn., Department of Lands and Surveys, Gaborone, printed CTP, 1:1,000,000, Botswana Supplementary Atlas, Map 18.
37. Flight Plan, 21 July 1977 for JARIC Map, No.32. above. Botswana Supplementary Atlas, Map 26 (for Map Co-ordinates see Annex 32).

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## CHAPTER 9

## **Namibia's Alleged Title on the Basis of Prescription,**

### **Acquiescence and Recognition**

#### **(A) The Namibian Argument**

647. The relevant passages in the Namibian Memorial have been quoted earlier (Chapter 3, paragraphs 134 to 137) and it is only necessary to recall an example of the formulations. The introduction to the second part of Chapter 1 of Part Two of the Namibian Memorial reads as follows:

"The conduct of the parties for the century after 1890 establishes that Namibia is entitled to sovereignty over Kasikili Island by operation of the doctrines of prescription, acquiescence and recognition, entirely independently of its treaty-based claim. Although much scholarly analysis has gone into developing distinctions between these three sets of doctrines, the fundamental elements relevant to all three are the facts that will be established in the succeeding chapters of this Part of the Memorial: (1) continuous, open and notorious occupation and use of the territory in question over a long period of time; (2) exercise of sovereignty in the territory, and (3) failure of the other party, having knowledge of these facts, to object, protest or assert its rights." (Namibian Memorial, p.66, para. 180).

648. The Namibian Memorial quotes various standard authorities in the English language. However, it will be helpful to the Court if the Government of Botswana offers some authorities in other languages.

649. The standard French treatise by Charles Rousseau summarises the judicial authority in the following passage:

"3\_ La jurisprudence internationale est portée à faire intervenir la prescription dans deux cas: a) quand il y a discussion sur le point de savoir si le territoire a été abandonné par derelictio et est dès lors redevenu res nullius susceptible d'occupation par un Etat tiers; b) quant la notification a fait défaut lors de l'établissement de l'autorité étatique. Dans ces hypothèses la jurisprudence internationale admet la prescription acquisitive, à la condition qu'il y ait eu d'une part silence du souverain et d'autre part exercice effectif, continu et sans lacune de la souveraineté territoriale (possession paisible). L'exigence de ces deux conditions ressort de la sentence rendue le 23 octobre 1909 par la Cour permanente d'arbitrage dans l'affaire des frontières maritimes de la Suède et de la Norvège ou affaire des Grisbådarna (R.G.D.I.P., 1910, pp.186-187 et note); de la sentence arbitrale rendue le 15 juin 1911 entre les Etats-Unis et le Mexique dans l'affaire de Chamizal (A.J I L, 1911, surtout pp.805-807); et de la sentence arbitrale rendue le 4 avril 1928 par le professeur Max Huber dans l'affaire de l'île de Palmas (R.S.A., vol. II, pp. 850 et 868 et R.G.D.I.P., 1935, pp. 176 in fine, 177 et 198 in fine, 199..."<sup>1</sup> (Droit international public, Tome III, Paris, 1977, p.185).

[1 Translation

"The international case law is inclined to give effect to prescription in two cases:

(a) when there is a discussion as to whether the territory had been abandoned by derelictio and has become res nullius susceptible to occupation by third States;

(b) as regards notification when this not effected at the time State authority was established. In these situations the jurisprudence recognises acquisitive prescription, on the condition that there should have been silence on the part of the sovereign, on the one hand, and, on the other hand, the effective exercise, continuous and uninterrupted, of territorial sovereignty (peaceful possession). The requirement of these two conditions stems from the Award given on 23 October 1909 by the Permanent Court of Arbitration in the case of the Maritime Boundaries between Sweden and Norway, or the Grisbadarna case; from the Arbitral Award given on 15 June 1911 between the United States and Mexico in the Chamizal case (A.J.I.L., 1911, in particular pp.805-807); and from the Arbitral Award given on 4 April 1928 by Professor Max Huber in the Island of Palmas case (R.S.A., Vol. II, pp.850 and 868 and R.G.D.I.P., 1935, pp.176 in fine, 177 and 198 in fine, 199..."]

650. Another standard French authority, Nguyen Quoc Dinh, Daillier and Pellet, describes the legal position thus:

"3\_ La prescription acquisitive ou usucapion permet l'acquisition d'un territoire étranger par un État qui y exerce son autorité de manière continue et pacifique pendant une longue période. L'État qui possédait ce territoire est présumé, du fait de sa passivité face à l'atteinte à sa souveraineté, avoir renoncé à ses droits. Par l'usucapion, la possession acquise de bonne foi se transforme en droit de souveraineté.

Il est souvent contesté que la prescription acquisitive soit reçue en droit international positif, tant l'institution est attentatoire à la souveraineté territoriale et contraire au principe du consensualisme. Il reste qu'elle correspond également à certaines réalités historiques, marquées par un développement progressif de la souveraineté et culminant dans la possession territoriale incontestée. Elle s'est révélée utile surtout pour des possessions territoriales éloignées et à des époques où la densité des actes de puissance publique était moindre qu'aujourd'hui: l'arbitre Max Huber y fait allusion dans l'affaire de l'île de Palmas (R.S.A. vol.II, p.843) et la C.I.J. dans l'affaire du Droit de passage en territoire indien (Rec. 1960, p.39).<sup>2</sup>

[2 Translation:

"3. Acquisitive prescription or usucapion allows the acquisition of foreign territory by a State which exercises its authority over it continuously and peacefully over a long period. The State which possessed the territory is presumed, by the fact of its passivity in face of the threat to its sovereignty, to have renounced its rights. By means of usucapion, the possession acquired in good faith is transformed into sovereignty.

It is often disputed that acquisitive prescription should be accepted as part of positive international law, in as much as the institution poses a threat to territorial sovereignty and is contrary to the principle of consensualism. The fact remains that it corresponds to certain historical realities, characterised by a progressive development of sovereignty and culminating in an undisputed territorial possession. It has been shown to be useful particularly for remote territorial possessions and for epochs in which the density of acts of State authority was less than is the case today: the Arbitrator Max Huber referred to it in the Island of Palmas case (R.S.A. vol. II, p.843) and the I.C.J. in the Right of Passage case (Rec. 1960, p.39).]

651. The Government of Botswana denies the existence of any Namibian title on the basis of prescription and its associated principles. Indeed, as will be demonstrated, there is ipso jure and ab initio no room for the application of the doctrine of prescription. However, it is necessary to indicate the essential elements of prescription for the purposes of developing the argument. They are as follows:

(i) The continuous and public exercise of State authority over the area concerned for a sufficient period of time.

(ii) The existence on the part of the State exercising authority of a genuine belief that it has title (the possession must be a titre de souverain).

652. The basic conditions for the application of the doctrine of prescription set forth in the Namibian Memorial appear to be substantially similar: see, in particular, pages 68-9, paras. 185-7. That being said, the Government of Botswana must make an important reservation. The exposition of the law in the Namibian Memorial is characterised by a certain blandness. The case before the Court is treated as a part of an undifferentiated whole, that is, the law relating to acquisition of territory.

653. In this context, various familiar authorities are invoked, including the Island of Palmas case and the Eastern Greenland Case (Namibian Memorial, pp.67-8, para. 184). As the Court will readily appreciate, these cases involve widely different circumstances, both of political background and legal context. Moreover, such cases did not involve a boundary agreement, and this significant difference is to be borne in mind.

### **(B) The Impropriety of the Namibian Prescription Argument**

654. The position of the Government of Botswana can be conveniently summarised as follows:

First: given the nature and purpose of the definition of the river boundary in the Anglo-German Agreement there is ipso jure no room for the application of the doctrine of prescription.

Secondly: in the alternative, the conditions for the application of the doctrine of prescription have not been fulfilled.

Thirdly: in any event the Namibian Government is bound by the recognition by its predecessors that, in terms of the Anglo-German Agreement, the northern channel constitutes the 'main channel' of the River Chobe.

655. The first objection to the prescription argument must be its impropriety, that is to say, the inapplicability of such an argument to a river boundary expressly defined by treaty as in Article III, paragraph 2, of the Anglo-German Agreement.

656. As a preliminary step, it is appropriate to recall that the whole point of prescription is to give a relative legitimacy to what would otherwise be unlawful. Numerous authorities give emphasis to this role. Thus, writing only six years after the conclusion of the Anglo-German Agreement, Professor Audinet observes that:

"La prescription aurait donc pour but de suppléer au consentement, qui a fait défaut: consentement de l'État, de la population ou de l'un et l'autre". (Revue générale de droit international public, Vol. 3 (1896), p.313, at p.318: the text of the article is reproduced in Annex 2).

657. In his study, *The Acquisition of Territory in International Law*, Professor Jennings (as he then was) refers to 'prescription strictly so-called, where the actual exercise of sovereign rights over a period of time is allowed to cure a defect in title; the case, that is to say, where

the exercise of sovereign rights either rests upon a demonstrably defective title or is even in origin wrongful.' (The Acquisition of Territory in International Law, Manchester, 1963, p.21)

658. The role of prescription in legitimating an ab initio wrongful possession is indicated clearly in the ninth edition of Oppenheim, Volume I, edited by Sir Robert Jennings and Sir Arthur Watts. The relevant passage is as follows:

"... There is no doubt that, in international practice, a state has been considered to be the lawful owner even of those parts of its territory of which originally it took possession wrongfully, provided that the possessor has been in undisturbed possession for so long as to create the general conviction that the present condition of things is in conformity with international order. Prescription in international law was therefore defined in the previous edition of this work as the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order." (Footnote omitted) (Oppenheim's International Law, Vol. 1, The Law of Peace, 9th ed., by Sir Robert Jennings and Sir Arthur Watts, 1992, p.706.

659. It is against this doctrinal background that the Namibian argument is to be assessed. The prescription argument is based upon: 'The conduct of the parties for the century after 1890..' (Namibian Memorial, p.66, para. 180). Moreover, the Namibian Government quotes Johnson for the view that 'the essence of prescription is the acquiescence ... of the one State in the adverse possession of the other'. (ibid., p.101, para. 251).

660. Thus, for Namibia, there could be an 'adverse possession' as from the date of the conclusion of the Anglo-German Agreement. This position runs counter to both legal principle and common sense. In the first place, this position is inimical to the very concepts of public order and stability in international relations which are recognised in the legal literature as justifying the existence of prescription. Prescription is not intended and was not intended in nineteenth century doctrine (see Audinet above), to be employed to subvert the legal status of a boundary expressly created by treaty.

661. There could not, in the circumstances, be an adverse possession by either party. Even when the existence of a difference of view emerged as to the identification of the 'main channel', many years after the conclusion of the treaty, this dispute could not involve any 'adverse possession'. The issue could only give rise to the contingency that, when the dispute was resolved, title to the island would follow the determination of the boundary.

662. The matter can be expressed as follows. If either a third party dispute settlement process, or a procedure agreed between the parties, had resulted in a decision that the main channel was the northern and western channel, and, in spite of that, Botswana had acquiesced in Namibian (or South African) possession, then there would have been room for the application of the principle of acquisitive prescription.

663. This double hypothesis is inapplicable. First of all, there was in fact a procedure agreed between the parties (the Pretoria Agreement of 1984) and there was a resulting decision in the form of the Joint Survey Report of 1985 (see above, Chapter 3). In consequence, South Africa was under an obligation to accept the resolution of the dispute, according to which the 'main channel' was identified by the Joint Survey as the northern and western channel.

664. But the second part of the hypothesis does not apply. There was no South African or Namibian possession subsequent to the Joint Survey Report. Instead, the Government of Botswana, in reliance upon the confirmation of its title in the Joint Survey Report, decided to exercise its sovereignty in 1986 (see above, Chapter 1, paras. 72-77).

665. The outcome of this analysis is as follows:

(i) No form of prescription could be relevant in the period 1890 to 1985.

(ii) After the Joint Survey Report, that is, the bilateral resolution of the dispute in 1985, prescription might have been applicable if certain conditions were fulfilled (but those conditions were not).

666. The point can also be expressed by saying that before the identification of the 'main channel' was effected (in 1985), no possession (by either State) could be 'adverse' for the purpose of acquisitive prescription. The very existence of the Anglo-German Agreement defining the boundary constituted a form of mandatory treaty law excluding prescription subject to the contingency that the 'main channel' was identified by means of an appropriate legally binding procedure.

667. The above analysis is not affected by the fact that eventually South Africa reneged on the Pretoria Agreement of 1984 and the Joint Survey Report of 1985.

668. By way of conclusion, precisely because this is a boundary created by treaty, prescription was, as from 1890, *ab initio* and *ipso jure* inapplicable. Subsequent to the Joint Survey Report of 1985, it became applicable in principle but only if two conditions were fulfilled, that is to say, a binding dispute settlement procedure followed by acquiescence by Botswana in an adverse possession by South Africa/Namibia. In fact the second of these conditions was not fulfilled, that is to say, there was a binding instrument (the Joint Survey Report), identifying the 'main channel' but there was no subsequent adverse possession. Only when the identification was effected could there be any basis for 'adverse' possession.

**(C) In any event the Legal Conditions required for Title by Prescription have not been satisfied either by Namibia or by her predecessors**

669. The position of the Government of Botswana is that the doctrine of prescription is not applicable to the issue concerning the interpretation of the provisions of Article III of the Anglo-German Agreement, for the reasons given above. However, in order to assist the Court and without prejudice to the position of principle, the Namibian argument will be examined on its own terms. Accordingly, the material presented in the Namibian Memorial will be reviewed with reference to the two conditions for the creation of title by prescription: the exercise of State authority over the area concerned and the exercise of such authority *à titre de souverain*.

**(D) There has been no exercise of State authority over Kasikili/Sedudu Island by either Namibia or its predecessors**

**(i) Introduction**

670. The primary legal condition for the creation of title by prescription is the continuous and public exercise of State authority over the area concerned for a sufficient period of time. In the opinion of the Government of Botswana the Government of Namibia and its predecessors have not exercised State authority in respect of Kasikili/Sedudu Island at any time.

### **(ii) The Alleged Namibian Occupation of the Island**

671. The material considered to be relevant by Namibia is presented diffusely both in the section of the Memorial entitled 'Namibia's Control and Use of Kasikili Island' (pp.73-85) and also in the section entitled 'The Exercise of Sovereignty' (pp.86-100). The invocation of the categories of acquiescence and recognition by Namibia will be the subject of separate examination.

672. The presentation of the material supposed to prove Namibia's 'control and use' of the island is characterised by vagueness and by reliance upon large categories which turn out to be fundamentally irrelevant as, for example, the reference to 'German Colonial Rule: 1890-1914'. This section makes good reading but no single reference can be found to an exercise of State authority in respect of Kasikili/Sedudu. There is also a degree of geographical ambiguity and transference. Thus, it is asserted that people who were 'living and farming on Kasikili Island' paid tax at Schuckmannsburg (in the Eastern Caprivi). The difficulty is that the people concerned did not live on the island, which is flooded four months of the year, but at Kasika, a long-established village in the Eastern Caprivi. Consequently, they paid tax as residents of Kasika.

673. The Namibian Memorial presents a version of the facts which involves the assertion that the permanent settlement in the vicinity of Kasikili/Sedudu Island was not at Kasika (in the Eastern Caprivi) but on the Island itself. The relevant passage reads as follows:

"During the agricultural season, the villagers, including the chief, built permanent homes on the Island, sometimes with courtyards. In addition, there were a number of references to a school on the Island, apparently a Sabbath or Seventh Day Adventist school. Some witnesses testified to attending the school, often identifying one of two teachers at the school, either Mr. Mubukwani or Mr. Mulyokela. For the Masubia villagers, Kasikili Island was truly their homeland. Many witnesses said they were born on the Island and that their parents, grandparents or neighbours had died there. Nothing evidences the importance of the Island to the Masubia more strongly than the fact that many members of the community were buried on the Island. In this respect, the Island remains today an integral part of the cultural and social heritage of the people of the area." (emphasis supplied). (Namibian Memorial, pages 77-8, para. 203). (footnotes omitted).

674. The actual facts are that the Island does not contain a village, and never has. No map, of any period, shows a village on the Island. German maps indicate a village on the mainland of the Caprivi Strip, called Kasika (and sometimes Kabuta). The maps designate Kasikili/Sedudu not as a village, but as an island. Scientific evidence available indicates the absence of any burials on the Island and the absence of conditions permitting appropriate burials.

675. The lack of credibility of the factual assertions in the Namibian Memorial can be demonstrated by reference to the assertion that there was a school on the island. The only school in the area was established at Kasika and this was set up with the assistance of the British authorities in the period 1927 to 1929 when the Caprivi Strip was under their

administration. The presence of a school at Kasika (and not on the Island) is established by the following evidence:-

(i) Lists of schools in the Reports of the Government of South Africa on South-West Africa, for the years 1927, 1928 and 1929, to the Council of the League of Nations: see Report for 1927, p.122; Report for 1928, p.107; and Report for 1929, p.67(Botswana Counter-Memorial, Annexes 11-13). These refer only to a school at Kasika.

(ii) The South African official document: Major Trollope, Report on the Administration of the Eastern Caprivi, 1940 (Namibian Memorial, Annex 58), at page 25. This refers to the school at Kasika.

(iii) Documents in the Botswana National Archives refer to the school established at Kasika with support from the British authorities: see the Resident-Commissioner's Report, dated 29 April 1929 (Botswana Counter-Memorial, Annex 14).

676. The Namibian Memorial (pp.73-80) relies upon the testimony before the Joint Team of Technical Experts of Basubia who claimed to have knowledge of agricultural activities on the island at various times. The credibility and other aspects of this evidence is examined in Chapter 7 of the present Counter-Memorial. The evidence of Chief Moraliswani, which the Government of Botswana considers to be reliable, in any event makes it clear that cultivation on the island ceased the year after Chief Liswaninyana died, that is, in 1937.

677. The photographic evidence in the form of the 1925, 1943 and 1947, air-photographs shows no sign of huts or structures of any kind on the island. The same photographs show no signs of cultivated areas, with the exception of the 1943 photograph which shows some small fields on the sector of the island opposite the Sedudu valley. The available evidence establishes that these fields were established by Batoka living in the Sedudu valley in the years up to 1941. During the JTTE witness hearings, several witnesses recalled that Batoka used to stay on the Island: Final Report, JTTE, Transcript of Hearings, Vol. 1 (Fourth Round), pp. 27, 35, 37, 79, 81, 85-87. It is to be noted that the aerial photograph of 1943 contains evidence of recent human activity: see site marked D: Attachment to this Counter-Memorial.

678. During the recent coring exercise on the island, no evidence of settlements or cultivation in the form of artefacts, charcoal or bones of animals, was found. The coring contractor was specifically instructed to be on the look-out for such objects. Despite a close matrix of 13 holes on an island of less than 4 square km, no such object was found.

679. In fact all this evidence is irrelevant. The acts of private persons cannot generate title unless those acts are subsequently ratified by the State. As has been pointed out earlier, it is eccentric to propose that the boundaries established in the Anglo-German Agreement were, as from 1890 onwards, subject to modification as a result of local agricultural activities, whether these were sponsored by the given colonial administration or not.

680. In any event, the Basubia tribe, both in the nineteenth century and to the present day, live on both sides of the boundary.

681. The Namibian Memorial also presents the 'agricultural activities' argument in another form, relying upon the Basubia chiefs as agents of the State for the present purposes. This question calls for separate examination.

### **(iii) The Alleged Authority of the Eastern Caprivi Chiefs**

682. The Namibian Memorial offers an argument consisting of the following combination of elements:

- (i) The appearance of German administration in the Eastern Caprivi (a process beginning in 1909).
- (ii) By virtue of the system of indirect rule, chiefs were elected only with the agreement of the German administration and were therefore essentially agents of the German administration.
- (iii) The chiefs had authority (this is an unargued assumption) to engage in title-generating activities on behalf of the German State, even if this involved the risk of modifying recently concluded boundary treaties.
- (iv) The chief in Kasika carried out such title-generating activities in Kasikili/Sedudu Island either directly or through the agricultural activities of his subjects.

683. These elements call for analysis. Each element will be examined in turn.

684. First element. The appearance of German administration in the Eastern Caprivi is described in the Namibian Memorial and the description is embellished with a photograph of the installation of Chikamatondo as chief of the Masubia (Namibian Memorial, pp.88-93). Not one line, not a single word, relates to Kasikili/Sedudu Island. The entire section consists of prevarication.

685. Second and third elements. The reference to the British policy of indirect rule is totally inconclusive. It is suggested by inference that the German policy in South-West-Africa was modelled on British policy in Nigeria (Namibian Memorial, p.89, para. 224). No single piece of evidence supports the inference. The Government of Botswana is willing to accept that, both in German-controlled territory and in Bechuanaland Protectorate, the authority of the traditional chiefs was subjected to a process of colonial approval. The chiefs thus became in a certain sense agents of the colonial administration on both sides of the River Chobe. But there is no evidence, and no evidence is offered, to the effect that the chiefs had authority to engage in title-generating activities. Both legally and historically this would be eccentric. No instances of such authority are known of anywhere in colonial Africa. The Namibian Memorial provides the inference, but gives no evidence in respect of the situation in the Eastern Caprivi (and no other examples). It is an astonishing proposition that the chiefs could engage in activities which would subvert the results of recent and prolonged negotiations between London and Berlin.

686. Fourth element. As it has been pointed out above, there is no evidence that the Eastern Caprivi chiefs had authority to engage in title-generating activities. It must follow that any activities which were in fact carried out on the island could not create title in favour of Germany or its successors. The evidence relating to the alleged activities and presence of people from the village of Kasika (in the Eastern Caprivi) on the island has been examined in Chapter 7 above. For present purposes it must be emphasized that the use of the island for ploughing did not connote possession as a matter of title on the basis of international law. To this day, Basubia from Botswana own fields in the Eastern Caprivi. Ownership or use of land for private or chiefly purposes has at no stage involved a change of sovereignty.

#### **(iv) Certain Official Reports**

687. The Namibian Memorial (p.81, para. 209) quotes the following passage from the Report of Captain Eason: 'The natives living at Kasika in German territory are at present growing crops on it [the island]'. In fact the meaning depends on the context and the relevant passage reads as follows:

"Two miles above the rapids lies Kissikiri Island. Here I consider that undoubtedly the North should be claimed as the main channel. At the western end of the island the north channel at this period of the year is over one hundred feet width and 8 feet deep. The south channel about forty feet width and four feet deep. The south channel is merely a back water, what current there is goes round the North. The natives living at Kasika in German territory are at present growing crops on it." (emphasis supplied) (Botswana Memorial, Vol. III, pp.234-5).

688. The opinion of Captain Eason is that the main channel is the northern channel and the phrase 'living at Kasika in German territory' must rule out the inference that there was a village on the island. Moreover, there is no basis for thinking that Captain Eason considered that the activities of the people of Kasika might have the effect of making his reconnaissance redundant. And Captain Eason contradicts any suggestion that there was a village on the island. It is the people 'living at Kasika' who were growing crops, not the people 'living on the island'.

689. After an irrelevant allusion to an explorer's account, the Namibian Memorial refers to Major Trollope's 'Report on the Administration of the Eastern Caprivi Zipfel: 1940' (Namibian Memorial, pp.81-3, paras. 211-12). This reference is difficult to understand. Major Trollope does not make a single reference to the island. Moreover, in the conclusion to his substantial Report he states 'that relations with surrounding territories and their administrations have been of the happiest'. (ibid., pp.32-3). This statement is particularly significant in view of the fact that he had received the co-operation of the Bechuanaland Protectorate Government, who had assisted in patrolling a part of the Caprivi Strip.

690. In other respects the Trollope Report confirms the evidence that there was no village on the island. Thus, the author contradicts the witnesses who suggested that the school was on the island (ibid., p.25).

691. This part of the Namibian Memorial (pp.83-5, paras. 214-17) then seeks to rely upon the correspondence between the British and South African authorities in the period 1948 to 1951. This correspondence will be examined in detail below.

#### **(v) The Payment of Tax at Schuckmannsburg**

692. In a very general account of the administration of the Eastern Caprivi in the period 1890 to 1991, the Namibian Government makes one specific assertion:

"The method of indirect administration continued out of necessity. A tribal levy of five shillings per year per adult male was imposed, although there were many remissions and exceptions. It was applied mainly for the payment of an annual stipend to the two chiefs in the area. This was a capitation tax and did not relate to any particular location or activity. But witnesses who testified to living and farming on Kasikili Island recalled going to

Schuckmannsburg to pay it. (footnotes omitted) (emphasis supplied). (Namibian Memorial, p.96, para. 239).

693. The final sentence refers to 'witnesses who testified to living and farming on the island'. The oral evidence has been examined in Chapter 7, but it is necessary in the present context to emphasise the unreliability of the Namibian oral evidence and, in particular, the assertions that there was a village on the island. In any event, the witnesses who reported paying tax paid it as residents of the village of Kasika in the Eastern Caprivi. Kasika was where the Chief had his headquarters and where the school was: see above, paras. 465-90.

#### **(vi) The Period 1966 to 1990: Reliance on South African Military Activities**

694. In a further series of very generalised passages, the Namibian Memorial (pp.98-100, paras. 245-50) skates over the period 1953 to 1990. No alleged evidence of possession of the island appears except in one form. There is a certain focus upon the period of South African 'de facto control over Namibia' from termination of the Mandate (in 1966) until Namibian independence (in 1990). It is in this context that the Namibian Memorial relies upon South African military activities, in the following passage:

"The Island itself was within this military orbit. Witnesses testified to incidents of arrest and punishment of Caprivi men caught on the Island. According to Annex 84, discussions were held between the Republic of South Africa and Botswana in 1974-75, in which it was agreed that the Island forms part of the Caprivi. At a second session between the two governments regarding border matters held at Katima Mulilo in 1984, Botswana did not raise the issue, indicating that it was prepared to acquiesce to the existing situation. The shooting incident discussed in para. 284, *infra*, between a patrol boat of the South African Defence Force and a unit of the Botswana Defence Force in October 1984, indicates that South Africa was exercising jurisdiction over the Island by conducting military patrols in the southern channel." (footnotes omitted) (Namibian Memorial, p.100, para. 248).

695. This passage presents a whole series of eccentric features. It assumes, without argument, that military activities on the part of South Africa qualified as evidence of title to territory. In the historical context this is problematical, to say the least. In the relevant period South Africa launched attacks across the boundaries of neighbouring States whenever it saw fit. Such South African military activities had no connection with issues of title or with international boundaries. With reference to the alleged discussions of 1974 to 1975, the Government of Botswana has no evidence of such discussions.

696. The meeting at Katima Mulilo concerning border matters was held in 1981 and not in 1984: see Botswana Memorial, Annex 39. Botswana's failure 'to raise the issue' can be interpreted as evidence that the question of title was not then in issue. The reference to the shooting incident of October 1984 as evidence of South African jurisdiction is hardly cogent: it is more probable that the SADF patrols were indifferent to the location of the boundary. In any event, this assertion was not made in the discussions during the meeting at Pretoria on 19 December 1984: see Botswana Memorial, Annexes 44-47. Indeed, during the meeting, a member of the South African delegation referred to 'young hot-headed inexperienced troops:' *ibid.*, Annex 44, para 11; Annex 46, p.4.

#### **(vii) Conclusion: no exercise of State authority by Namibia or its predecessors**

697. In the result there is no credible evidence that either Namibia or its predecessors exercised State authority in respect of Kasikili/Sedudu. The Memorial of Namibia is unable to invoke a single act of sovereignty in relation to the island. The absence of such evidence is highlighted by the eccentric reliance by Namibia upon the agricultural activities of the people of Kasika (in certain periods) and upon the activities of South African military patrols in the region.

## **(E) Any Exercise of Authority could not have been à titre de souverain**

### **(i) Introduction**

698. In the previous section the first condition for the existence of title by prescription was examined: the exercise of State authority over the area concerned for a sufficient period of time. The conclusion was that neither Namibia nor its predecessors have exercised state authority in respect of Kasikili/Sedudu Island at any time. This conclusion renders academic any examination of the fulfilment of the second condition for the existence of title by prescription: the existence on the part of the state exercising authority of a genuine belief that it has title (in other words, the possession must be à titre de souverain). Nevertheless, it will be of assistance to the Court to demonstrate that, in any case, no genuine belief in the existence of title could have existed at any time since the conclusion of the Anglo-German Agreement in 1890.

### **(ii) As a preliminary issue; what is the title to which any genuine belief would relate?**

699. The Namibian Memorial in its chapters relating to prescription (Part Two, Chapters II and III) refers in general terms to the display of State sovereignty and repeats the standard formula according to which: "The possession of the prescribing State must be exercised à titre de souverain..." (ibid., pp.86-7, paras. 218-19). In Chapter III (which is apparently intended to deal with the issue of genuine belief) the substance of the exposition relates to purported 'exercise of sovereignty'. No consideration is given to the nature of the title assumed or believed in by the alleged possessor. (See the Namibian Memorial, pp. 86-100 passim).

700. This omission is not very surprising. The 'prescription' scenario is dated back to 1890 in Namibia's argument. The Anglo-German Agreement had just been concluded. In the Eastern Caprivi the German Government had, in a major agreement carefully negotiated with Great Britain, established a river boundary. This fact was not obscure, but very recent and very public. The only possible title in which any German official could have genuine belief would be a title in terms of Article III of the Anglo-German Agreement. Moreover, given that no cession was involved, the title could only be related to the identification of the 'main channel' of the Chobe River.

701. In the historical and legal context the only title which could be believed would be that based upon the river boundary. There is no comparison with the ambiguities of cases such as the Island of Palmas case. And yet the whole point of the Namibian argument is to allege a title over the island 'by operation of the doctrines of prescription, acquiescence and recognition, entirely independently of its treaty-based claim.' (Namibian Memorial, p.66, para. 180). Whilst the doctrines are identified, the title supporting the alleged possession is not. The nearest the Memorial comes to pleading an alternative title is the invocation of traditional title of the Basubia (ibid., p.83, para. 214; and para. 230). Indeed, on occasion, this Basubia title is

invoked on the basis that it pre-dated the Anglo-German Agreement of 1890. This position appears in the concluding paragraph of Chapter III of Part Two of Namibia's Memorial.

"In short, the official documents, particularly those generated by the 1948-1951 negotiations of the Trollope/Dickinson agreement, paint a picture that is fully consonant with the witness testimony heard by the JTTE and goes far to corroborate the general tenor of that testimony. What they reveal is that from the beginning of the colonial period at least and probably a good deal further back than that, Kasikili Island was agricultural land cultivated by the people occupying what is now the Eastern Caprivi. Their occupation was continuous, exclusive and uninterrupted, insofar as the physical conditions of the Island allowed. That is, the villagers planted, tilled and harvested each year, leaving the Island only with the arrival of the floodwaters. Kasikili Island/Kasika was a well organised village community, with a chief and at times with a school - its centre of gravity moving from one pole to the other in accordance with the dictates of the annual flood." (emphasis supplied). (Namibian Memorial, p.85, para. 217).

702. As has been pointed out in Chapter 1, the village was not on the island but at Kasika. However, the major difficulty with this passage is that it relates the task of discovering a basis for a belief in the existence of title not to public international law but to the local customary law prevalent before the process of colonial partition. Thus, not only is the Anglo-German Agreement set aside, but also general international law as the appropriate 'applicable law'. This approach is clearly inconsistent with the provisions of Article III of the Special Agreement.

**(iii) In the period 1890 to 1948 there was no dispute and no suggestion by any German or South African official that the island formed part of South-West Africa**

703. In the period 1890 to 1948 there was no dispute relating to the boundary in the vicinity of Kasikili/Sedudu Island. Indeed, as the Namibian Memorial recognises, the process of establishing German administration in the Eastern Caprivi only began in 1909. In these circumstances there could be no possibility of an adverse possession and, more particularly, no possibility of a possession based upon a belief that the 'main channel' was the southern and eastern channel.

704. In the period 1890 to 1948 no single official on either side of the boundary suggested that the island lay within South-West Africa. The absence of any dispute prior to 1948 is documented in Chapter 1. It was Major Trollope, acting on his own initiative in 1948, who first sought to change the status quo. Moreover, Trollope recognised that there had been no dispute previously: see Chapter 1, paras. 48-9. He also accepted that the northern and western channel constituted the 'main channel': see below, para.745.

**(iv) From 1948 onward South Africa was aware of the existence of a dispute and had accepted that the northern and western channel constituted the 'main channel' in terms of the Anglo-German Agreement**

705. In the period 1948 to 1951 the dispute surfaced as a result of the initiative of Major Trollope, Chief Administrator of the Eastern Caprivi, in support of the claims of Mr. Ker, acting on behalf of the Zambesi Transportation and Trading Company, to use the northern channel of the Chobe River without the permission of the Government of the Bechuanaland Protectorate.

706. The extensive correspondence will be examined below (in relation to the argument based upon acquiescence). For present purposes the important result was the emergence of the dispute and the knowledge of South Africa that the British Government considered Kasikili/Sedudu Island to be part of the Bechuanaland Protectorate. Even if South Africa had possession (which it did not at any stage), the correspondence of the period 1948 to 1951 would have ruled out possession à titre de souverain.

707. Two other elements strengthen this conclusion. First, from the outset the South African Government recognised that the main channel was the northern and western channel. Accordingly, the South African Government adopted the view that it was necessary to propose a modification of the boundary. At no stage did the South African Government challenge the view that the northern channel constituted the main channel for the purposes of the Anglo-German Agreement.

708. The result was an informal *modus vivendi* which was concluded on the basis of the maintenance of the legal status quo: see below, paras. 736-69.

709. In these circumstances, it was impossible for South Africa to qualify as an actor in a prescription scenario. The issue during the correspondence of 1948 to 1951 was not primarily the identification of the main channel, but whether the British Government could be persuaded to modify the existing legal status quo. The South African Government did not plead title on the basis of prescription.

**(v) The Namibian Government has not provided adequate or credible evidence of a genuine belief in the existence of a lawful title**

710. The Namibian Memorial (pp.86-100) purports to present evidence of possession à titre de souverain in Chapter III of Part Two, entitled 'The Exercise of Sovereignty'. This chapter has the following eccentric features:

A. The substance of the chapter is devoted to generalities about the system of administration in the Eastern Caprivi. Specific references to the island in question are very infrequent.

B. The content, in so far as it has a legal orientation, addresses the exercise of sovereignty (the alleged 'exercise of jurisdiction') and not the existence of a genuine belief in the existence of title.

C. No attempt is made to explain how a process of prescription could begin just as the Anglo-German Agreement was concluded in 1890. If the boundary was defined by treaty the only genuine belief relevant would derive from the provisions of the Anglo-German Agreement: and yet the Namibian case is built upon a title stated expressly to be entirely independent of that Agreement (see the Namibian Memorial, p.66, para. 180).

711. The scarcity of reference in this chapter of the Namibian Memorial to specific evidence of genuine belief is not surprising. If the Anglo-German Agreement could not provide the source of such belief, what could the source be? The solutions adopted by Namibia appear to be as follows. First, there is a reliance upon an alleged exercise of jurisdiction and to leave the Court to assume a genuine belief. As a matter of principle this must be insufficient proof, and this the more so when the 'title believed in' is supposed to displace a treaty-based boundary of very recent origin (for the prescription argument is dated back to 1890 or, on occasion, 1909).

712. The second solution is as follows. In reliance upon an eccentric version of the concept of indirect rule, the Namibian Memorial relies upon the authority of the Basubia chiefs in the Eastern Caprivi. Without any proof, it is asserted that the activities of the Chiefs and their subjects could generate title (for Germany in the period 1890 to 1914). This assertion does not, of course, take care of the issue of finding the source of a 'title believed in.' But the Namibian Memorial provides an answer: "... the chiefs, and indeed all the Masubia, regarded Kasikili Island as a part of their traditional territory." (p.92, para. 230). Elsewhere, the Namibian Memorial refers to an alleged 'Namibian/Masubia occupation and use of Kasikili Island' (p.102, para. 255).

713. Thus the only source of a 'title believed in', once the Anglo-German Agreement is set aside, is the traditional title of the Basubia, which (if it existed) antedated the Anglo-German Agreement of 1890. The Namibian Memorial in effect treats the traditional title of the Basubia as a type of jus cogens, which would automatically modify the application of the provisions of Article III of the Anglo-German Agreement in the Chobe district. The Namibian Government makes no attempt to explain how such a reference to traditional title could be compatible with contemporary international law of the period 1890 to 1914.

714. The assumption that a carefully negotiated boundary treaty was subject to locally applied traditional title is one of quite remarkable novelty. However, such an assumption is the inevitable result of seeking to mount a case based upon prescription which involves a setting aside, without any justification, of the provisions of the Anglo-German Agreement.

715. There is thus an absence of proof of any legally valid 'genuine belief' in the existence of title. At this point, it is necessary to remind the Court that there is no proof (in any case) that the Basubia chiefs had authority to change the international boundary or that the island was subject to the jurisdiction of the Caprivi chiefs. Indeed, the available evidence indicates that no one owned land on Kasikili/Sedudu Island either on the basis of customary law title or otherwise.

**(vi) Conclusion: there was no basis at any stage for a genuine belief in the existence of title**

716. In the absence of a belief in the existence of title based upon the Anglo-German Agreement, the Government of Namibia is placed in a very invidious position. The question of title depends upon the definition of a river boundary in an international agreement. The only alternative source of title would be a belief in a waiver of title on the part of Botswana or its predecessors. But a waiver could only operate when a dispute arose and this did not occur until 1948. The result of the correspondence between the British and South African Governments in the period 1948 to 1951 was a firm affirmation of title by the United Kingdom. Moreover, when the issue resurfaced in 1984 the Government of Botswana reaffirmed its title to the island: see the statement of Mr. Mokama, Botswana Memorial, Annex 44, para. 3.

717. In this connection, it may be recalled that the Court has been reluctant to accept that conduct may establish sovereignty in derogation of the provisions of a boundary treaty. This reluctance is evident in the Judgment of the Court in the Frontier Land Case. I.C.J. Reports, 1959, p.209 at pages 217, 227-30.

**(F) The Namibian Argument based upon Acquiescence and Recognition**

### **(i) The Namibian Argument**

718. In Chapter IV of the Namibian Memorial the claim to sovereignty in respect of Kasikili/Sedudu Island is justified (in the rubric) on the basis of 'acquiescence, acceptance and recognition'. The text appears to treat acquiescence as a separate basis of claim although the account of the law stresses that 'acquiescence is an essential element - some would say the essential element - in the acquisition of prescriptive title' (Namibian Memorial, p.101, para. 251). The relevant part of the Namibian Submissions do not distinguish the two bases of claim. Thus the relevant request to the Court is as follows:

"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."

719. The Namibian position relating to acquiescence emerges clearly from the following passages in the Namibian Memorial:

"During the entire period from 1890 to 1966, when they were responsible for the administration of Bechuanaland, the British authorities, with full knowledge of the facts set forth in the two preceding sections concerning Namibian/Masubia occupation and use of Kasikili Island and German and South African exercise of sovereignty there, failed to protest, object or interfere in any way with the situation as it existed. As is shown in para. 258, *infra*, this unbroken record of silence and passivity contrasted markedly with British conduct in neighbouring areas where it was the colonial power. After Botswana became independent, Botswana maintained its silence for almost two additional decades." (Namibian Memorial, p.102, para. 255).

720. Two cases, the Temple Case (Namibian Memorial, pp.1108-9, paras. 271, 173), and *Minquiers and Ecrehos Case* (Namibian Memorial, p.128, para. 311), are relied upon in the Namibian Memorial to support a principle that will not allow a State to escape the consequences of some previous statement or act. In the Temple Case the use of a map over a period of fifty years was the issue, and in the *Minquiers and Ecrehos Case* a clear statement as to title was contained in an official despatch; and both were effected in the forum of active diplomacy and negotiations. These situations are in no way comparable to the alleged failure 'to follow up on Eason's recommendation' or 'the promulgation of GSGS 3915' (the 1933 British map) which used the cartographic device of depicting the boundary along the southern bank of the Chobe River.

721. In the present Chapter the Government of Botswana will examine the merits of the Namibian argument thus formulated. It may be noted that the concepts of 'acceptance' and 'recognition' referred to in the rubric to the relevant chapter are not given separate treatment by Namibia and therefore will be left on one side.

### **(ii) The Weaknesses of the Namibian Argument**

722. The Namibian argument based upon acquiescence contains a whole series of major flaws. The first, in logical sequence, is that it rests upon false premisses. For there to be a legally significant record of 'silence and passivity', the acquiescence must be in response to a situation which is legally prejudicial. The evidence available contradicts the Namibian premiss that the island was 'occupied' by the German authorities or their successors. In

particular, there is no evidence to support the eccentric contention that the agricultural activities of the Caprivi farmers on the island, in so far as these occurred, could generate title and, much less, modify by their activities the provisions of a boundary treaty: see above, paras. 683-99.

723. The evidence shows that officials on both sides were of the opinion that the main channel was the northern and western channel: see above.

724. In these circumstances it is untenable to suggest that the silence of the British authorities had any legal significance. There was no legal need to protest and therefore there was, in a legal sense, no silence or passivity. There was no prejudicial status quo in face of which silence could affect the legal position. It is significant that, when Major Trollope (Chief Magistrate of the Eastern Caprivi) sought to change the status quo in 1948, this provoked correspondence between the United Kingdom and South Africa at a high level.

725. This correspondence will be analysed in due course. The developments in the period 1948 to 1951 are wholly inimical to the Namibian assertion of acquiescence. On the one hand, they confirm that no dispute had existed prior to 1948 and, on the other hand, the events of this period involved notice to the South African Government of the views of the British Government on the point of legal principle: namely, that the northern and western channel constituted the main channel.

### **(iii) The Significance of Permits relating to Trans-boundary Cultivation**

726. The Namibian Memorial seeks to mount an argument based upon two factual premisses. The first is that in the period 1917 to 1929 the British administration issued permits to the Barotse of Northern Rhodesia in respect of cultivation, grazing, fishing and wood cutting in the Caprivi Strip: see the Memorial, pp.103-4, para. 258, and Namibian Annexes 50 and 51. The second is that the British 'failed to require similar authorization for the Masubia of Caprivi to farm there' (Namibian Memorial, p.104, para. 258). The alleged contrast, it is suggested, indicates that the British did not regard Kasikili/Sedudu Island as part of Bechuanaland.

727. The second premiss is unfounded. In 1924 the Chief Liswaninyana of Kasika requested permission from the Resident Magistrate at Kasane for his people to plough on Kasikili/Sedudu Island, and graze cattle there: see Chapter 1, para. 37.

Moreover, the correspondence between the British and South African authorities in the period 1948 to 1951 demonstrates clearly that it was the British side which controlled the Island: see below, paras. 736-69.

728. In any case, the first premiss is false. There is no necessary connection between the requirement of permits and the existence of title. Permission may be given informally. There is no reason to assume a comparability between the two situations. In the case of the Barotse it is clear that large numbers of people were involved and there appear to have been substantial public order and revenue implications: see the Namibian Memorial, Annexes 50 and 51. The circumstances were radically different from those prevailing on the Chobe River, where permission was given without any bureaucratic paraphernalia being required.

729. In general, it is difficult to see any relevance in the episode. The documents certainly assume that the process of cultivation had no legal consequences in the context of title by virtue of public international law.

#### **(iv) The 1909-1914 Negotiations**

730. The Namibian Memorial invokes the Anglo-German negotiations of 1909 to 1914 as the basis for an argument that, because the British Government addressed the Andara question in detail, its silence in relation to the boundary in the Chobe River sector 'gives rise to presumption of acquiescence and recognition of the alignment in the second sector': Namibian Memorial, pp. 105-9, paras. 263-73; at page 109, para. 273.

731. It has been shown earlier (Chapter 1) that the issue of 'main channel' was not the subject of negotiations between the two Governments. Moreover, the internal British opinion was that the northern channel constituted the 'main channel'. And, in any case, there could be no 'acquiescence and recognition of the alignment' unless the British Government believed that Kasikili/Sedudu Island was under German occupation.

732. There was no evidence of German occupation. Captain Eason did not report any German activity. Moreover, Captain Eason, like other British officials over the years, considered that the northern was the main channel.

733. It is also to be recalled that, in the course of the correspondence of 1948 to 1951, the British and South African interlocutors make no reference to the period 1909 to 1914: see below. There is some evidence (Chapter 1) that, if an arbitration had taken place, this might have included the 'main channel' issue: but this evidence is inimical to any theory of British acquiescence of any kind.

#### **(v) Transactions Relating to the Andara Problem, 1930-1932**

734. In the period 1930 to 1932 the British and South African Governments were involved in a series of transactions relating to the siting of the western terminal beacon of the northern boundary of the Caprivi Zipfel on the line from Andara to Katima Mulilo: see above, Chapter 1, para. 40.

735. It is significant that, during this process of resolving residual issues relating to the Anglo-German Agreement, the South African Government made no reference to any problem concerning Kasikili/Sedudu.

#### **(vi) The Correspondence of 1948 to 1951 between the British and South African Governments**

736. The hollowness of the assertions relating to 'acquiescence, acceptance and recognition' in Chapter IV of Part Two of the Namibian Memorial is particularly evident in the context of the correspondence between the British and South African Governments in the period 1948 to 1951. In this correspondence South Africa issued a challenge to the status quo in the form of a request for a modification of the legal status quo. The British Government upheld the standard view that the northern and western channel constituted the 'main channel' for the purposes of the Anglo-German Agreement. The outcome was an exclusively political *modus vivendi*.

737. The episode as a whole provides unequivocal evidence for the following propositions:

*First:* until 1948 there had been no dispute.

*Secondly:* British officials had at all stages taken the position that the northern channel was the main channel for the purposes of the Anglo-German Agreement of 1890.

*Thirdly:* there was no evidence of any British acquiescence as alleged by Namibia.

738. In addition, the relevant documents include official South African admissions that the 'main channel' is the northern and western channel.

739. The Namibian Memorial (pp.109-14, paras. 274-9) produces an analysis of the relevant correspondence which has a number of marked eccentricities. The emphasis (in the rubric, for example) is on 'the Trollope-Dickinson Arrangement', whereas the dealings between the two officials were simply the consequence of exchanges at the inter-governmental level.

740. The second eccentricity involves the acceptance by Namibia that the British Government adopted the position that the northern channel was the main channel for the purposes of the Anglo-German Agreement, accompanied by the statement by Namibia that the British Government did not assert 'a formal claim that the island was within the Bechuanaland Protectorate': Namibian Memorial, pp.109-10, para. 274. As the Court will appreciate, given the nature of the boundary, the assertion that the northern channel was the 'main channel' for the purposes of applying the Anglo-German Agreement necessarily involved a formal claim. This is a good example of the Namibian Government's flawed logic: thus it does not follow that, because the prescription/acquiescence argument is independent of the Anglo-German Agreement, that the existence of the Agreement can be ignored.

741. There are other eccentricities and misreadings of the situation in the relevant section of the Namibian Memorial and it is necessary to look carefully at the entire sequence of documents.

742. The sequence of events begins with the following letter from Mr. Redman, the Assistant District Commissioner at Maun (Bechuanaland Protectorate), to Major Trollope, the Magistrate for the Eastern Caprivi Zipfel (forming part of South-West Africa under the League of Nations Mandate):

I have the honour to inform you that I have received a letter from the Zambezi Transport & Trading Company stating that they wish to recommence the transport of timber by river from Serondellas but that they have been informed by you that the channel between Kasane and Serondela which they intend to use, is in the Caprivi Strip.

2. At low water I understand that this channel is the only water connection between Kasane and Serondellas and I suggest that if this channel does happen to run into the Caprivi Strip from the Chobe river along which our boundary runs, it will be in both our interests and a matter of convenience if we can come to an arbitrary agreement that half this channel is included in this Territory for the purpose of the transport of the timber by the Zambesi Transport and Trading Company.

3. If however the channel referred to is part of the Chobe river and not a branch off from it then it seems probable that the actual boundary is formed by the deep water-channel in the river, which would mean that they would not be entering your Territory.

4. I would be glad to have your views on this matter.

5. From the beginning of the New Year an Assistant District Commissioner will be stationed permanently at Kasane and I have asked him to write to you shortly after his arrival to fix a date when it will be convenient for you to see him and discuss any matters which have recently arisen concerning the Ngamiland and Chobe district.' (Letter dated 18 December 1947; Botswana Counter-Memorial, Annex 18)

743. The response of Major Trollope on 3 January 1948 was to propose the holding of a 'joint informal investigation', followed by reports to the respective governments: see Namibia Memorial, Annex 59. The sequel was the preparation of a Joint Report by Trollope and Redman, signed on 19 January 1948 (Botswana Memorial, Annex 22). The key paragraphs in the Report are as follows:

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

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

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

....

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

744. The *Joint Report* was then sent to the respective Governments. In his covering letter Noel Redman, District Commissioner at Kasane (Bechuanaland Protectorate), made it clear that it was Trollope who had persisted in raising the issue at the higher level:

"4. It is a matter which I feel could have been decided between us but the Native Commissioner concerned will not come to an agreement recognising the Island as belonging to this Territory even if the Caprivi natives were allowed to stay there. He has therefore referred the matter to the Secretary of Native Affairs, Pretoria suggesting that a decision should be reached between the two Governments concerned." (Botswana Memorial, Annex 22).

745. Trollope's letter to the Secretary of Native Affairs, Pretoria, dated 21 January 1948, includes the following revealing observations:

*"3. There is no doubt that if the wording of the 1890 Treaty is applied to the geographical facts as they exist today the true inter-territorial boundary would be the northern waterway and would include Kasikili Island in the Protectorate.*

4. There is just a possibility that since 1890 when the Treaty was made the course of the river has altered - but that proposition could only rest on supposition as there is no direct evidence thereof.

....

12. *The geographical and Treaty position are clearly in favour of Bechuanaland but I feel that I would be failing in my duty to the tribesmen were I to recommend alternative No. I in view of their long and undisturbed use of the island. If the acceptance of the Bechuanaland case is however irresistible, then I would recommend alternative No. II.* (emphasis supplied; Namibia Memorial, Annex 61)

746. Thus Trollope accepts that the main channel is the northern channel. The other considerations (not set forth above) consist of his own amateur suppositions concerning a case based upon prescription. In this context, the suggestion that the Bechuanaland Administration failed to object in face of cultivation of the island by 'Caprivi tribesmen' is based upon the false premiss that such cultivation had legal implications and therefore some objection was called for.

747. Trollope's letter was forwarded to the Secretary for External Affairs (Pretoria) with a request for advice. In his covering letter the Secretary for Native Affairs stated the following:

"I have the honour to forward herewith for your consideration a copy of minute No. 17/15/2-5 of the 21st January, 1948, received from the Magistrate, Eastern Caprivi Zipfel, relating to the ownership of an island known as "Kasikili" in the Chobe River.

I am unable to find anything directly bearing on the point in the records of this office, and there is nothing I could usefully add to the Magistrate's representations.

The position would appear to be:-

(a) that according to Article three of the Agreement between Germany and Great Britain respecting the delimitation of the possessions of the two countries and their respective spheres of influence in South Africa, which was signed at Berlin on the 1st July, 1890, the boundary line between what is now the Eastern Caprivi Zipfel and the Bechuanaland Protectorate 'descends the centre' of the main channel of the Chobe river to its junction with the Zambesi.

(b) that the island in question probably lies on the Bechuanaland Protectorate side of this line;

(c) that the island has been made use of by the Caprivi Zipfel Natives as part of their territory for over 40 years at least and is still being used by them, without any objection on the part of the Bechuanaland and Protectorate authorities.

Will you kindly advise me what the position is?" (Letter dated 9 April 1948; Botswana Counter-Memorial, Annex 19).

748. At this point the South African Government obtained legal advice and the outcome is contained in a letter from the Secretary of Justice to the Secretary for External Affairs, dated 12 June 1948. The conclusions reached were as follows:

"The joint report submitted to us gives valuable evidence to support a claim by the Union, as Mandatory Power, to Kasikili Island on the ground of prescription, if it should be established that the northern waterway of the Chobe River would otherwise have formed the boundary. The evidence would be substantially complete if it could be shown that, under German rule over South-West Africa, administrative acts were performed on the island, and that such acts were continued under the mandatory rule without objection on the part of the Bechuanaland authorities. For instance, do tribesmen on Kasikili Island pay rates in respect of any trust fund established under Proclamation No. 27 of 1930?

The whole question is an appropriate one for negotiation between the Union and Bechuanaland. It may be advisable to appoint a joint inter-territorial commission to investigate further a possible change in the main course of the Chobe River and to gather evidence of the use of sovereign rights over the island. If, of course, it could be ascertained that the main channel of the river was south of the island when the Treaty was concluded, the question of prescription would not arise." (Namibia Memorial, Annex 62)

749. When this letter is read as a whole it is clear that its premiss is that the main channel is the northern channel, and the consequence is a recommendation to develop a claim 'on the ground of prescription'. It may be noted that Namibia has not produced any evidence that anyone on the island paid rates by virtue of Proclamation No. 27 of 1930.

750. In any event at this stage correspondence was initiated by South Africa with the British Government. The Prime Minister's Office in Pretoria wrote to the British High Commissioner (representing the Bechuanaland Protectorate) on 14 October 1948. The Union Government admitted that the northern channel was the main channel and stated that:

"As there would appear to be no conflict of interests it should be possible to come to an arrangement which is mutually satisfactory". (Botswana Memorial, Annex 23).

751. The interim response to this letter, from the High Commissioner's Office, was as follows:

"With reference to your letter No. P.M. 1/18/11 of the 14th October about the boundary between the Bechuanaland Protectorate and the Eastern Caprivi Zipfel, I am directed by the High Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland to inform you that the Resident Commissioner of the Bechuanaland Protectorate has directed the Assistant District Commissioner, Kasane, that tribesmen of the Caprivi Zipfel should be allowed to cultivate land on Kasikili Island, if they wish to do so, under an annual renewable permit.

2. The High Commissioner trusts that this arrangement will prove satisfactory to the authorities in the Union." (Letter dated 4 November 1948; Botswana Memorial, Annex 24).

752. This letter indicates, in very clear terms, the view taken by the British side of the legal status quo. The Memorial of Namibia underlines this when it makes an unconvincing attempt to put a gloss on the document:

"Although this action seemed to imply Bechuanaland jurisdiction over the Island, the High Commissioner's Office made no explicit claim to this effect. The letter simply informed South Africa that the instruction had been issued." (Namibian Memorial, p.111).

But, of course, no claim, explicit or otherwise, was needed. Even South Africa's own officials, like Trollope, knew that the northern channel was the boundary fixed by the Anglo-German Agreement.

753. The reaction of the South African Government was to send a note (dated 10 December 1948) to Trollope asking 'whether you consider this arrangement to be satisfactory'. (Botswana Counter-Memorial, Annex 20). Trollope's response was unfavourable: see his letter dated 15 January 1949, in which he repeats his earlier unfounded assertions of South African 'de facto possession of the island'. (Botswana Counter-Memorial, Annex 21).

754. The next document available consists of a recommendation to the South African Government from the Secretary for Native Affairs (dated 4 February 1949) in the following terms:

"With reference to your minute, No. P.M. 1/18/11 of 18th November, 1948, I have the honour to forward herewith a copy of a report received from the Magistrate, Eastern Caprivi Zipfel.

If it is not the intention of your Department to press a possible claim to the island on the ground of prescription it would seem that the arrangements made by the High Commissioner will be suitable provided that the suggested permit to "cultivate land" on the island can be interpreted to embrace practices customarily connected therewith such as temporary residence during dry spells, the depasturing of cattle, the collection of grass and reeds and fishing and hunting.

Is it intended that one annual renewable permit be granted to the Magistrate in respect of all the Native users of the island generally, or is a separate permit to be issued to each individual? The former alternative would undoubtedly be preferable." (Botswana Counter-Memorial, Annex 22).

755. On 14 February 1949 the South African Government wrote to the British High Commissioner making a claim to Kasikili/Sedudu Island for the first time, and proposing an arrangement 'on the basis of your Administration recognising the Union's claim to Kasikili Island subject to it issuing a general permit for the use of the Northern waterway for navigation purposes': Botswana Memorial, Annex 25.

756. The result of this South African proposal was a letter from the British High Commissioner (dated 6 June 1949) to the British Government recommending acceptance of the proposal: Botswana Memorial, Annex 26.

757. At this point it is clear that the British Government was not prepared to accept the proposal for the 'slight alteration' of the boundary: see the letter of the British High Commissioner to the Prime Minister's Office, Pretoria, dated 24 August 1949: Botswana Memorial, Annex 27. On 20 October 1949 the legal advisers of the Commonwealth Relations Office wrote to the British High Commissioner explaining the legal problems in detail: Botswana Memorial, Annex 28.

758. This interesting opinion includes the following passage:

"By Article III of an Agreement made in 1900 (sic) with Germany, the boundary at this point was fixed at the centre of the main channel of the river and if, as now appears to be the case, the main channel was at all material times on the north side of the island in question, the mandated territory did not include the island. Under Article 7 of the Mandate no modification could be made without the consent of the Council of the League of Nations. In so far as the mandate is still operative, this might be interpreted as referring to some organ of the United Nations or as making any adjustment impossible. No doubt it is unlikely that anyone would raise any objection in the United Nations, especially as the proposal is to add to the territory and not in any way to reduce its area, but the possibility cannot be entirely ignored."

759. In the result on 10 May 1951 the British High Commissioner wrote to the South African Government in the following terms:

"I must apologise for not having written to you earlier in connection with the Island of Kasikili in the Chobe River, the correspondence about which rests with your letter No. P.M.1/18/11 of the 24th January, 1951.

2. I have, however, taken the opportunity since receipt of your letter of the 14th October, 1948, to visit the island myself. As you remark the Island has been cultivated by Caprivi tribesmen for many years without dispute though there has been no actual occupation. The Island is always flooded between March and May so that habitation is in effect impossible.

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

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

5. The instruction to the Assistant District Commissioner, Kasane, of which you were informed in Mr. Priestman's letter No. 9628 of the 4th November, 1948 would be maintained, and it is assumed that the free use of the main channel of the Chobe, to the north of the Island, would continue to be assured under the international rules governing waterways that form the common boundary of two states. (Emphasis supplied) (Botswana Memorial, Annex 30).

760. In response, on 29 May 1951, Mr. Forsyth of the South African Department of External Affairs wrote:

"I note that there are difficulties in the way of recognising the Union's claim to the island and will inform the appropriate authorities accordingly." (Botswana Memorial, Annex 31).

761. This correspondence at the inter-governmental level provides not the slightest indication of British recognition of South African title to Kasikili/Sedudu Island. Nor does the British side accept that there is any 'occupation' of the Island by people from the Caprivi. The absence of British recognition, and the real risk of South African recognition, appears from the following South African letter dated 30 May 1951 from the Secretary to the Prime Minister to the Secretary for Native Affairs:

"With reference to your Minute No. 5/412 of the 4th February, 1949, regarding Kasikili Island in the Chobe River, I enclose for your information a copy of a letter addressed to the Chief Secretary to the High Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland on the 14th February, 1949, and of the reply received from the High Commissioner on the 10th May, 1951.

In view of the High Commissioner's remarks as to the difficulties in the way of recognising the Union's claim to the Island, I shall be glad to learn whether your Department, as the authority responsible for the administration of the Caprivi Zipfel, considers the matter of sufficient importance to warrant the Union pressing its prescriptive claim. If not, it would appear inadvisable to seek a license on behalf of the Caprivi Tribesmen to cultivate land on the island as proposed by the Administrative Secretary to the High Commissioner in his letter of the 4th November, 1948, as this would presumably be tantamount to recognising the right of the Bechuanaland Administration to dispose over the Island.

In either event it would perhaps be advisable to seek legal advice as to the further steps to be taken in the matter". (Botswana Counter-Memorial, Annex 23)

762. As the Government of Botswana has pointed out in its Memorial, the previous correspondence had included several express admissions by the South African Government that the 'main channel' (in accordance with the Anglo-German Agreement) lies to the north of Kasikili/Sedudu: Botswana Memorial, pp.67-71, paras. 153-9.

763. The final phase of the correspondence involved the remission of the issue to the local administrators, Trollope and Dickinson, to give effect to the proposals for an adjustment 'by administrative action' contained in the British High Commissioner's letter dated 10 May 1951 (see above, paragraph 759) 'without an alteration of the existing legal position'.

764. This correspondence appears in Annexes - of the present Counter-Memorial. The final exchanges, leading to a local modus vivendi were as follows:

(i) Trollope to Dickinson, 23 August 1951 (Annex 25).

(ii) Dickinson to Trollope, 3 September 1951 (Annex 26).

(iii) Trollope to McLaren (Dickinson's successor), 13 September 1951 (Annex 27).

(iv) The Government Secretary (Bechuanaland Protectorate) to McLaren, 20 November 1951 (Annex 28).

765. The correspondence calls for careful perusal as a whole, but certain points are clear. The British Government maintained its legal position unequivocally. As Dickinson reported in his letter dated 3 September 1951:

"I feel that I must make one point clear to you. Although accepting the position and being prepared to honour it; in any discussion or controversy on this Island in future, our Government will [be] adamant in its attitude that the Island is B.P. - and any attitude in regard to our "administrative settlements" will of course be based on that fact." (Correction made by inserting [be]; Botswana Counter-Memorial, Annex 26).

766. In the second place Trollope clearly recognised that the local arrangements were without prejudice to the legal position. This is clear from the 'we agree to differ' formula in Trollope's letter of 4 August 1951 (Annex 24) and from his letter dated 23 August 1951 (Annex 25). It is additionally clear from his letter dated 13 September 1951 in which he states that '... the fact of Dickinson's caveat is now on record.'

767. The account given of this correspondence in the Namibia Memorial focuses exclusively on the earlier part of the Trollope-Dickinson exchanges and seeks to give the impression that the British side did not claim the island: Namibia Memorial, p.113, para. 278. The correspondence, and especially Dickinson's letter dated 3 September 1951 (above, para. 112), shows that this is not the case. Moreover, the Dickinson-Trollope exchange must be read in conjunction with the prior inter-governmental exchanges for the true picture to emerge (see above, paras. 742-56).

768. From all this no evidence emerges of British acquiescence in a South African claim. This is in fact accepted in the Memorial of Namibia. There, in paragraph 278, in a passage full of artificial readings of the relevant documents, the reader is surprised to see the following. Referring to the attitudes of British officials, the Namibian Government observes:

"Of course, these officials spoke of a 'slight adjustment of the northern boundary of the Bechuanaland Protectorate'. They were not going to give away legal points, as the exchanges discussed previously make clear,...." (emphasis supplied).

769. The correspondence between British and South African officials at various levels in the period 1948 to 1951 exhibits certain consistent features:

*First*, the exchanges and their outcome were without prejudice to the legal position.

*Secondly*, the British Government maintained its position that the northern channel was the 'main channel' and that therefore Kasikili/Sedudu formed part of Bechuanaland Protectorate.

*Thirdly*, the South African Government held the opinion that any claim to the island must be based upon prescription and the premiss of this position was a recognition that the northern channel was the 'main channel'.

#### **(vii) The Map Evidence**

770. In 1965, shortly before independence, the British authorities had published a map of Bechuanaland at a scale of 1:500,000. This map was subsequently published in new editions after the independence of Botswana: see Chapter 8 above, paras. 620-25. In 1974 Botswana published the first maps of the Chobe district at a scale of 1:50,000: see above. All these maps place the boundary in the northern channel. This consistent post-independence official cartography failed to elicit any reservation on the part of South Africa.

771. Map evidence prior to 1965 is inconclusive. After that date, British, Bechuanaland and Botswana maps clearly showed the boundary to descend the northern channel. However, prior to this date there was no acquiescence by the British or Bechuanaland authorities; the Seiner map did not show a boundary line in the river and was never accepted as authoritative; the depiction of an intercolonial boundary along the southern edge of the Chobe River in the 1933 British map was no more than a cartographic device and not an accurate location of the boundary which 'descends' the river as provided by the 1890 Anglo-German Agreement. The correspondence between the Bechuanaland Resident Commissioner and the mapping authorities of South Africa in 1946 demonstrates that there was no acquiescence in the erroneous depiction of the boundary in the southern channel in the 1949 South African map, which in any event was published at a time when South Africa was seeking in high level correspondence to modify the legal status quo. South African authorities themselves recognised that the correct location of the boundary was in the northern channel in their military maps of 1978 and 1984.

**(viii) The Evidence relating to the Period since the Independence of Botswana in 1966**

772. The Namibian Memorial rounds off the chapter relating to 'acquiescence, acceptance and recognition' with a section covering 'the period of Botswana independence' (pp.114-17, paras. 280-86). The key assertion is simply that, after achieving independence in 1966, 'almost two decades passed before Botswana registered any formal protest or entered any formal claim with respect to Kasikili Island.' (Namibia Memorial, p.114, para. 281).

773. This assertion does not depend upon any evidence but upon a certain surrealist logic. The absence of 'any formal protest' is meaningless in legal terms unless the Botswana authorities believed that the South African Government was exercising sovereignty over the island. But there is no evidence of this. Moreover, the correspondence of the period 1948 to 1951 (see above, paras. 736-69) provides cogent evidence that the British authorities, both in London and in the Bechuanaland Protectorate, considered the northern channel to be the boundary in accordance with the Anglo-German Agreement. After independence Botswana inherited the boundary by operation of law.

774. The principle of inheritance of boundaries (*Uti possidetis*) is recognised by the Government of Namibia (Memorial, page 114, para. 280), but illogically it is not considered applicable in relation to the boundary established by the Anglo-German Agreement.

775. The Namibian Government offers an eccentric medley of evidence supposed to indicate the acquiescence of Botswana in an unproven exercise of sovereignty over the island by South Africa. In the first place, reference is made to South African military activity in respect of 'the border area' and its 'de facto authority over the area' (Namibia Memorial, pp.114-15, para. 281). As the Government of Botswana has pointed out earlier in the present pleading (above, paras. 694-6), it is inappropriate to rely on such military activity as evidence of title. However, the significant point for present purposes is the absence of any evidence that South African patrolling involved possession of the island.

776. In the second place, the Namibian Memorial invokes 'discussions' alleged to have taken place at 'the governmental level' in 1974-1975 (Memorial, page 115, para. 282). There is no record of such a meeting (see Chapter 1, paras. 60-61) and consequently it would be incautious to treat assertions based upon it as evidence.

777. Thirdly, the Namibian Memorial refers to 'discussions ... held at Katima Mulilo' on 24 November 1981 (Memorial, page 115, para. 282), and asserts that at this meeting Botswana did not 'claim ownership of Kasikili Island' (Memorial, page 115, para. 283).

778. These assertions cannot be justified to the slightest extent by reference to the meeting which took place on 24 November 1981. The Minutes of the meeting appear in the Botswana Memorial, Annex 39. The agenda of the meeting was confined to local problems of neighbourhood and no reference was made to Kasikili/Sedudu Island. The Namibian Government asserts that the absence of reference to the island was because 'both parties were satisfied that Sidudu was part of Caprivi' (Namibian Memorial, p.115, para. 282). This is a mere assumption based upon a South African Defence Force minute three years later. The truth emerges clearly from the substantial Minutes of the 1981 Meeting.

779. The logic of this entire section of the Namibian Memorial is that silence is always acquiescence on the part of Botswana. This artificial logic is carried to extraordinary lengths. Thus, when an incident occurred in the southern channel in October 1984, the sequel was the meeting in Pretoria on 19 December 1984 between high level delegations from Botswana and South Africa. Whilst agreeing to a mechanism for peaceful resolution of the issue relating to the boundary, the Botswana delegation firmly maintained its position that Kasikili/Sedudu Island formed part of Botswana (see the Botswana Memorial, p. 77-9). This response is caricatured in the Namibian Memorial (page 116, para. 285) as marking 'the first clear-cut episode of non-acquiescence by Botswana or any of its predecessors in title'.

780. If this were such a change of position on the part of Botswana, and South Africa and its predecessors had been in possession since 1890, why was the South African Government willing to submit the issue to a procedure of peaceful settlement? This fact is particularly striking, given the contrast in military strength between the two neighbours, and, as the Namibian Memorial stresses, the fact 'that the South African Government considered control over Kasikili Island a national security matter' (Namibian Memorial, p.116, para. 284 in fine).

781. The fact that eventually South Africa refused to implement the Joint Survey Report is hardly evidence of acquiescence by Botswana, as the Namibian Memorial appears to suggest (Memorial, pp.116-17, paras. 285-6).

782. In conclusion the statement by Namibia, that the Pretoria discussions of 19 December 1984 marked 'the first clear-cut episode of non-acquiescence by Botswana or of its predecessors in title' (emphasis supplied), is distant from reality in two respects. First of all, Botswana had not 'acquiesced' and there had been no South African occupation or other initiative which would have called for any response. Secondly, the British Government, as predecessor in title, had not 'acquiesced' as the prolonged exchanges of the period 1948 to 1951 unequivocally indicate.

783. The reality, in historical terms, was as follows:

- In the period 1890 to 1948 there had been no dispute relating to the island.

- After the exchanges between the British and South African Governments in the period 1948 to 1951, there could be no legal basis for acquiescence: the United Kingdom had affirmed its title.

- From the time of Botswana's independence in 1966 until the Pretoria Agreement of 1984, there was no evidence of any acquiescence on the part of Botswana.

### **(G) Evidence of South African Acquiescence in the Period 1960 to 1992**

784. As the Government of Botswana has already explained in Chapter 1 of this pleading, from 1960 onward all cultivation on the island was prohibited by the authorities of the Bechuanaland Protectorate and, subsequently, of Botswana: see above, Chapter 1, paras. 58-64. According to the Namibian Memorial, the South African Government exercised authority over the island at this period and such authority had been inherited from the German period.

785. In fact, no representation on the issue was made by the authorities in South-West-Africa until March 1992. This silence is particularly significant because, according to the Namibian case, cultivation by the people of the Caprivi was the form the alleged exercise of authority by South Africa and its predecessor assumed. Moreover, according to the Namibian Government's view of the facts, the island was regularly used for cultivation by people from Kasika and any disruption of this pattern should have provoked an immediate response.

786. The evidence thus shows an acceptance by South Africa of the title of Botswana (and its predecessor) over a period of thirty-two years, from 1960 until 1992. This evidence is reinforced by the failure of South Africa to protest official maps of Botswana showing the boundary in the northern channel in the period after independence.

### **(H) Conclusion: There is no evidence to support the alleged Title of Namibia on the Basis of Prescription or Acquiescence**

787. There is no evidence to support the alleged title of Namibia on the basis of prescription or acquiescence. However, there is a preliminary obstacle to this basis of title, in that it is contrary to principle to accept an adverse possession based upon the subversion of a recently concluded boundary treaty. In any event, there is no evidence that German officials had an intention to rely upon any acts of possession not based upon the Anglo-German Agreement, and, in accordance with the principle of good faith, the presumption must be that no such intention existed.

788. In so far as the conditions for the existence of title by prescription are concerned, the Namibian Government deals with the requirement of a continuous and peaceful exercise of State authority by the frequent reiteration of the assertion that the agricultural activities on the island of Basubia from Kasika were capable of generating title. This view was first expressed by the South African administrator, Trollope, in 1948. It was not a view held by the British Government at any stage.

789. Far from any prescription having occurred, the first tentative formulation of a South African claim was in a South African letter dated 14 February 1949 (Botswana Memorial, Annex 25). Prior to this date there had been no dispute and, when the correspondence of the period 1948 to 1951 developed, it was the South African Government which was seeking to modify the legal status quo, and the contemporary documents show that the South Africa officials were aware of this.

790. In relation to the period from 1951 until 1992 the Namibian case appears even more threadbare. In 1951 British officials had affirmed the title based upon the Anglo-German

Agreement, and thereafter the assertion of acquiescence, or failure to protest becomes even less convincing. The only 'evidence' offered by Namibia is the existence of South African military patrolling in the region: see above, paras 694-6.

791. In the aftermath of the incident of October 1984, the Botswana Government affirmed title over Kasikili/Sedudu Island and its view of the legal position was confirmed by the Joint Survey Report of 1985. Thus, from 1951 onward there was no possibility of any ignorance by South Africa of the entitlement of Botswana and its predecessor in title.

792. In the period from 1960 (if not earlier) until 1992, when the island was administered as part of the Chobe Game Reserve and cultivation on the island was prohibited, no protest or representation was received either from the South African Government or from local administrators in the Eastern Caprivi. This silence is difficult to explain except on the basis that there had at no point been an occupation of the island by the South African Government or persons acting with its authority.

793. There is a final consideration. The prescription scenario invented by Namibia involves a setting aside of the Anglo-German Agreement. The argument is stated to provide an 'entirely independent basis for Namibia's claim': Namibian Memorial, p.60, para. 165. The difficulty is that in relation to an argument based upon prescription and an alleged possession *à titre de souverain*, it is impossible to pursue the legal argument in the absence of reference to the Anglo-German Agreement. In order to demonstrate the existence of possession in good faith, and accompanied by a belief in sovereignty, the law requires either adherence to the boundary established by agreement, or an express waiver of title in face of a claim. In other words, the process of prescription can only apply to a treaty-based boundary if the mode of application reflects important considerations of public order, namely, the stability of boundaries and the principle of *pacta sunt servanda*. In the absence of an express waiver of title, the possession (if it existed) could not be *à titre de souverain*. No German or South African or Namibian official could claim ignorance of the Anglo-German Agreement and its relevance to the determination of sovereignty over the island. No express waiver of title took place on the part of Botswana or its predecessors (and no other form of waiver occurred in any case).

794. Prior to 1948 no dispute had arisen in any event. After that, the South African Government had notice that the British Government claimed title on the basis of the Agreement. After the transactions of 1984 and 1985, the title of Botswana in accordance with the Agreement was confirmed. At no stage, therefore, could any putative possession by South Africa have been, in the legal sense, peaceful and undisturbed.

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## CHAPTER 10

### **The Namibian Submissions and the Task of the Court**

#### **(A) The Special Agreement**

795. The task of the Court in this case is described in the clear terms of Article 1:

"The Court is asked to determine .... the boundary between Namibia and Botswana around Kasikili/Sedudu Island, and the legal status of the island".

796. In the pleadings thus far neither party has found it necessary to propose a precise mode of demarcation. This, it may be presumed, reflects an assumption that the determination of the 'main channel' of the Chobe River is, logically and practically, anterior to the determination of the boundary in detail. At the appropriate juncture the Court may make the necessary dispositions, after appropriate consultation with the parties. In the absence of agreement as to the mode of fixing a precise demarcation consequent upon the Judgment of the Court, the Court may see fit to appoint an expert to carry out the task, in accordance with Article 50 of the Statute and Article 67 of the Rules of Court.

### **(B) The Submissions of the Parties**

797. The Submissions of the Parties are not as such incompatible with the Special Agreement. Namibia asks the Court to declare that the boundary 'lies in the centre of the southern channel of the Chobe River.' Botswana requests the Court to declare that the 'northern and western channel of the River Chobe ... constitutes the main channel...'.

798. These formulations are compatible with the Special Agreement in that there is no derogation from the Court's mandate 'to determine ... the boundary ...' However, there are certain indications in the text of the Namibian Memorial which give rise to concern. In particular, there are suggestions that the process of precise definition of the boundary lies outside the Special Agreement. The relevant passages are as follows:

"158. Once the southern channel has been identified as the main channel of the Chobe River, the question of title to Kasikili Island is automatically resolved in favour of Namibia. Where the boundary lies within the southern channel is a distinctly subsidiary matter for both parties. The subject was not discussed by either Botswana or Namibia in the proceedings before the JTTE, nor did the parties make any specific reference to the subject in their submissions. It has simply not been an issue between them.

159. In these circumstances, Namibia considers that it is unnecessary to pursue the question of defining the centre of the main channel at this stage of the pleadings. The real issue between the parties has always been the identification of the main channel itself and the consequences of such identification for the determination of the sovereignty over Kasikili Island. The location of the centre of the main channel would follow largely as a matter of course by reason of its dependence upon the manner in which the principal issue is resolved. As a practical matter, the actual boundary would in any case have to be demarcated by agreement within the parties.

160. Namibia of course reserves the right to return to this issue at a later stage, if developments in the case make it appropriate to do so." (Namibian Memorial, p.57).

799. With reference to the assertion (in paragraph 158 quoted above) that the precise location of the boundary (within the requisite channel) 'has simply not been an issue' between the parties, the Government of Botswana does not share this view. In its opinion the process of determining 'the boundary', called for in Article 1 of the Special Agreement, encompasses the location of 'the centre of the main channel.'

### **(C) The Legal Status of the Island**

800. The provisions of Article 1 of the Special Agreement also ask the Court 'to determine ... the legal status of the island'. In this context, the Submissions of both parties ask the Court to declare that sovereignty in respect of Kasikili/Sedudu Island inheres, respectively, in Botswana or in Namibia.

801. It is significant that neither party has proposed any alternative application of the phrase 'legal status'. This is not very surprising. It is difficult to conceive of an alternative application of the phrase which would be compatible with the provisions of the Anglo-German Agreement of 1890.

802. In Article 1 of the Special Agreement, the Court is asked to determine the boundary 'on the basis of the Anglo-German Agreement of 1 July 1890 and the rules and principles of international law.' The presumption which this formulation creates is the primacy of the Anglo-German Agreement, which prescribes a boundary with the obvious function of separating two areas subject to British and German sovereignty respectively. Accordingly, both parties in their Submissions have asked the Court to declare the sovereignty of the party concerned in respect of Kasikili/Sedudu Island. In the words of the Namibian Submissions:

"The legal status of Kasikili/Sedudu Island is that it is a part of the territory under the sovereignty of Namibia'. (Namibian Memorial, p.141).

### **(D) Conclusion**

803. In the opinion of the Government of Botswana the task of the Court is clearly defined in the Special Agreement as the determination of the 'the boundary between Namibia and Botswana around Kasikili/Sedudu Island', and includes a determination of the precise location of the boundary and not only the identification of the 'main channel'.

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## **SUBMISSIONS**

*Having regard to the considerations set forth in the Memorial and Counter-Memorial presented on behalf of the Republic of Botswana and maintaining without change the submissions presented in the Memorial,*

*May it please the Court to adjudge and declare that:*

(1) The northern and western channel of the Chobe River in the vicinity of Kasikili/Sedudu Island constitutes the 'main channel' of the Chobe River in accordance with the provisions of Article III(2) of the Anglo-German Agreement of 1890; and that:

(2) Consequently, sovereignty in respect of Kasikili/Sedudu Island vests exclusively in the Republic of Botswana.

(signed) Abednego Batshani Tafa,  
Deputy Attorney-General

Agent of the Republic of Botswana

INTERNATIONAL COURT OF JUSTICE

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CASE CONCERNING KASIKILI/SEDUDU ISLAND  
(BOTSWANA/NAMIBIA)

COUNTER-MEMORIAL OF THE  
REPUBLIC OF BOTSWANA

VOLUME II

APPENDICES

NOVEMBER 1997

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INTERNATIONAL COURT OF JUSTICE

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CASE CONCERNING KASIKILI/SEDUDU ISLAND  
(BOTSWANA/NAMIBIA)

COUNTER-MEMORIAL OF THE  
REPUBLIC OF BOTSWANA

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