



## Kasikili/Sedudu Island (Botswana/Namibia)

**ARGUED: 19 November 2023**

**DECIDED: 20 November 2023**

1 This dissenting opinion was written and signed by Justice Lercher of Namibia.

2 This Dissenting Opinion does not disagree with the statement of jurisdiction as listed in the Majority Opinion,  
3 and this Justice upholds the Court’s jurisdiction over this case pursuant to the Special Agreement submitted by the  
4 Republic of Namibia and the Republic of Botswana calling upon the Court to resolve the on-going dispute regarding  
5 the border of Kasikili Island.

6 In the case regarding the border of Kasikili Island, I have found my decision pursuant to the following pieces  
7 of legislation and customary international law:

8 Article 31(1) and Article 31(3)(c) of the Vienna Convention on the Law of Treaties;

9 The Anglo-German Treaty of 1890;

10 Frontier Dispute, decided by the Court, in regards to Burkina Faso and the Republic of Mali;

11 The Prescription Doctrine of customary international law

12 In order to determine the permanent border of Kasikili Island and the ownership of Kasikili Island, the  
13 Court must first analyze and determine the decisions outlined in the Anglo-German Treaty of 1890 regarding the  
14 strict separation of the spheres of influence in colonial Africa. In 1890, representatives from Germany and England  
15 met to settle border disputes regarding their colonies in Africa. This Treaty was set forth and applied to colonies  
16 that eventually formed the Republic of Namibia and the Republic of Botswana.

17 Per the agreements laid out in the Anglo-German Treaty of 1890, the border of Kasikili Island, “descends  
18 the thalweg of the main channel until it meets the Zambezi, where it ends.” This Dissent stands firm in the fact that  
19 the border of Kasikili Island is represented by the Southern Channel of the Chobe River, pursuant to the reasoning  
20 laid out in the Dissent presented by Justice Cox of Cyprus. This Dissent agrees that the Northern Channel of the  
21 Chobe River exhibits an inconsistency in width, depth, and navigability that cannot warrant the definition of the  
22 “main channel,” as it is stagnant during the dry season and defined as a channel of the Zambezi floodplain during  
23 the flooding season. This Dissent finds that the Northern Channel cannot and should not be defined as the “main  
24 channel,” whereas the more consistent and substantial channel of the Chobe River, the Southern Channel, should be  
25 recognized as the main channel of the Chobe River and the permanent border of the Republic of Namibia.

26 Pursuant to Article 31(1) of the 1986 Vienna Convention on the Law of Treaties, that states, “in accordance  
27 with the ordinary meaning to be given to... [its] terms in their context, and in light of its object and purpose.”  
28 Based on this subsection of the 1986 Vienna Convention, the Court is called to interpret the Anglo-German Treaty  
29 of 1890 based on its objective and original intent of defining a permanent and fixed border of Kasikili Island. Since  
30 the Anglo-German Treaty of 1890 sought to find a permanent border of Kasikili Island, it would be incoherent to  
31 assume that the northern channel of the Chobe River provided a stable and permanent border to Kasikili Island.  
32 For this reason, it would be reasonable to assume that the original intent of the Anglo-German Treaty of 1890 would  
33 be to define the border as the most permanent and consistent channel, the Southern Channel of the Chobe River.

34 Furthermore, consistent with Article 31(3)(c) of the 1986 Vienna Convention, the Court should view the  
35 Anglo-German Treaty of 1890 in partnership with “any relevant rules of international law applicable in the relations  
36 between the parties .” For this reason, this Justice has found that it is imperative to recognize the doctrine of  
37 *uti possidetis* and the doctrine of prescription regarding international law, as both are crucial in supporting the  
38 originalist perspective of the Anglo-German Treaty of 1890.

39 Consistent with the Frontier Dispute International Court of Justice opinion regarding a dispute between  
40 Burkina Faso and Mali, *uti possidetis* refers to the general principle that colonial states shall maintain their borders  
41 when they emerge as independent states. As Kasikili Island was occupied and held by the Masubian tribes of the  
42 Republic of Namibia, it is reasonable to conclude that the Republic of Namibia was correct to maintain Kasikili  
43 Island as a territory of the Republic of Namibia when they gained independence from Germany in 1990. As there is  
44 no legitimate evidence that the people of the Republic of Botswana inhabited the land of Kasikili Island, the inherent  
45 claim to Kasikili Island is reserved for the Republic of Namibia, according to the doctrine of *uti possidetis*.

46 Moreover, in regard to the doctrine of Prescription, the Republic of Namibia has exclusive sovereignty over  
47 Kasikili Island. The Doctrine of Prescription states that the sovereignty of a territory is reserved for the state  
48 that has prolonged the territory for a long amount of time, without protest or contest from another country. This  
49 dissent believes that the Doctrine of Prescription reserves the right of sovereignty of Kasikili Island to the Republic  
50 of Namibia as there is undeniable evidence that people of the Republic of Namibia have inhabited the land since at  
51 least prior to the signing of the Anglo-German Treaty of 1890, without challenge from the Republic of Botswana.

52 For the reasons stated above, this Justice believes that the Southern Channel shall be recognized as the  
53 permanent border of the Republic of Namibia and the Republic of Botswana, reserving the sovereignty of Kasikili  
54 Island to the Republic of Namibia. This Justice urges the cooperation of the Republic of Namibia and the Republic  
55 of Botswana regarding the inhabitants of Kasikili Island to preserve the peace of the Masubian tribes that live and  
56 work on Kasikili Island. Thus, Justice Lercher of Namibia respectfully dissents.

*Signed By*

*Emma Lercher*

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Justice Emma Lercher