



## Kasikili/Sedudu Island (Botswana/Namibia)

ARGUED: 19 November 2023

DECIDED: 20 November 2023

1 This dissenting opinion was signed and agreed to by Justice Cox of Cyprus.

2 This Justice finds that the Court has jurisdiction over this case as established in Articles 92 and 93 of the  
3 Charter of the United Nations. In this, the integrity of the International Court of Justice is discussed in that “All  
4 Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.”

5 This case specifically falls under the provisions of Article 36, Paragraph 1 of the Statute of the Court that  
6 states “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided  
7 for in the Charter of the United Nations or in treaties and conventions in force.”

8 The Chobe River delineates a portion of the border between the Caprivi Strip, with Namibia to the north  
9 and Botswana to the south. In the river there is a 1.5 square mile island, referred to as Kasikili Island by Namibia  
10 and Sedudu Island by Botswana. Both countries claim ownership over the island. The Chobe River is an ephemeral  
11 river, a river that, during dry spells, holds a build-up of layers of nutrient-rich soil on stream beds. Ephemeral rivers  
12 fluctuate in water depth, flow, and navigability as the seasons change. Specifically, the Chobe has a rainy season  
13 from January to March, in which the flow of the river is drastically shifted. In this season, the channels are also  
14 drastically altered in relation to their overall water depth, longitudinal flow, and navigability. Botswana and Namibia  
15 disagree over the specific criteria and weighing of considerations in determining the main channel, and subsequently  
16 the border.

17 There are multiple international statutes regarding the delineation of the Chobe and land borders surrounding  
18 the river. The Anglo-German Agreement of 1890 was a treaty enacted between the colonizing countries of now-  
19 Botswana and Namibia. The Treaty was concerned with defining the spheres of influence of the colonial Chobe and  
20 English and German control over coastal waters. The Treaty lays out a specific method of border determination  
21 regarding the *Thalweg*, which is the line connecting the lowest points of successive cross-sections along the course of  
22 the river. The treaty states that “*im thalweg des hauptlaufes*,” or that the center runs through the main channel.

23 In addition, the 1969 Vienna Convention on the Law of Treaties (Convention) defines the applicability and  
24 validity of treaties regarding newly-independent, previously-colonized countries. In the Convention, “the consent of  
25 a State to be bound by a treaty is expressed by acceptance or approval” similar to those involved in ratification.  
26 This is expressly extended to newly-independent States involving treaties regarding their newly-sovereign territory.  
27 Thus, two States’ approval to uphold and continue the provisions of any treaty made before their independence is  
28 enough to act as their ratification and acknowledgement of the treaty.

29 Botswana argues that the north channel of the Chobe should be regarded as the main channel, and subse-  
30 quently the border between Botswana and Namibia, following the 1890 Anglo-German Treaty’s categories of river  
31 analysis that are depth, width, the *thalweg* and navigability. Botswana finds that the Northern Channel surpasses  
32 the southern channel with a greater depth, width, *thalweg*, rendering it the correct border between coastal waters.  
33 Botswana specifically focuses on the portion of the year when the southern channel is reduced in water depth and  
34 flow greatly during drought. However, this argument is deficient in that it equates the Chobe river to an ordinary  
35 river. This is a gross misrepresentation of the river, as the Chobe fluctuates in water depth, flow, and navigability  
36 throughout the year. Thus, the correct determination of the depth, width, *thalweg*, and navigability of the Chobe  
37 cannot be determined without attention to fluctuations in the depths and flows of both channels. This determination  
38 changes throughout the year, so Botswana’s determination of greater depth, width, and navigability was established  
39 regarding only one width, depth, *thalweg*, and level of navigability.


40 Because the Chobe is an ephemeral river, it is imperative that the determination of the main channel is made  
41 in regard to the definition laid out in the 1890 Anglo-German Agreement and reaffirmed in the Vienna Convention  
42 on the Law of Treaties. The explicit text of the Treaty asserts that the *thalweg* runs through the main channel. Thus,  
43 the correct determination of the border near Kasikili Island has to consider which of the north and south channels  
44 constitutes the main channel before any consideration of the *thalweg*, or the line connecting the two lowest points in  
45 the river. It is crucial to interpret this Treaty as it was written. As a treaty expressly concerned with the spheres  
46 of influence of colonial German and Britain, the Treaty should be interpreted as stating that the main channel is an  
47 independent component that the *thalweg* is dependent upon. Thus, I argue that the factors of the depth, width, and  
48 navigability must be taken into consideration before the *thalweg* may be defined.

49 The Majority mischaracterizes navigability as the most pressing and important consideration in determining  
50 the main channel of the Chobe. They argue that the greater depth and width of the Northern Channel for the  
51 majority of the year qualifies the channel as the main channel. Because the width and depth fluctuate so often, the  
52 most accurate determination of the main channel is the longitudinal flow of the river. Because the southern channel  
53 holds the greatest proportion of longitudinal flow throughout the year, it should constitute the main channel of the  
54 Chobe, which would comprise the *thalweg* described in the 1890 Anglo-German Agreement. The Majority argues  
55 that the heavier flow and more inconsistent manner of the southern channel is superseded by a more consistent flow  
56 in the Northern Channel. However, the Treaty outlines no considerations of the consistency of the flow of water,  
57 only that the flow be measured. Thus, I find that the overall longitudinal flow of a river is more determinant and  
58 more clearly aligned with the 1890 definition of flow than the mean flow of a river over time, especially when the  
59 Northern Channel is flooded for a large portion of the year.

60 The Dissenting Opinion signed by President Patel of Mexico, Vice President Kalla of the Netherlands,  
61 Justice Farooqi of Qatar, and Justice Jimenez of India argues that Botswana's and Namibia's decolonization is  
62 a crucial determinant in assessing whether the contents of the 1890 Anglo-German Agreement still apply to the  
63 decolonized, sovereign States. They argue that the Vienna Convention on the Law of Treaties ensures the right of  
64 newly-independent States to have the option to adopt or ratify treaties made by their colonizers. Subsequently, they  
65 assert that the customary international law regarding newly-colonized territories under the principle of *uti possidetis*.  
66 They argue that this principle of "as you possess, so shall you possess" renders the land of Kasikili Island the inherent  
67 property right of the ethnic Namibian people that have colonized the land seasonally for almost a century. However,  
68 I find that the application of this principle of international law is unfounded in this case, as both countries agreed to  
69 adopt the tenets of the 1890 Anglo-German Agreement upon their independence. Because the two countries agreed to  
70 adopt these tenets, they have agreed to interpret and apply the Treaty. Thus, the determination of the main  
71 channel, the Northern, is what must guide our decision in determining the true border on the Chobe River

72 As a body tasked with applying and interpreting international law, it is crucial to apply the tenants of the  
73 1890 Anglo-German Agreement that lay out the steps to find the main channel of the Chobe River. Despite possible  
74 moral and ethical concerns with the oppressive history of colonizers on Kasikili island, it is important to interpret the  
75 laws as they are agreed upon, not as they may seem most ethically and morally admirable. Thus, the longitudinal  
76 flow of the river should be the determinant factor in defining a main channel. Because the southern channel includes  
77 the greatest longitudinal flow and the width and depth of the river are two varying to measure at a particular point  
78 in the year, the southern channel constitutes the main channel. Furthermore, Kasikili island should be declared the  
79 rightful property of the country of Namibia.

*Signed By*

A handwritten signature in dark ink, appearing to read "Jadon Cox". The signature is written in a cursive, somewhat stylized font. The first name "Jadon" is written with a large, looping 'J' and a small 'a'. The last name "Cox" is written with a large, looping 'C' and a small 'x'.

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Justice Jadon Cox