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KASIKILI/SEDUDU ISLAND (BOTSWANA/NAMIBIA)
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International Court of Justice — Merits — Boundary dispute — Dispute between Botswana and Namibia submitted to Court by Special Agreement for final and binding determination — Determination of boundary around Kasikili/Sedudu Island — Determination of legal status of Kasikili/Sedudu Island — Applicable law — Anglo-German Treaty, 1890 — Rules and principles of international law — United Nations Charter — Charter and resolution of Organization of African Unity — Principle of *uti possidetis* — Respect for frontiers existing upon national independence — Anglo-German Treaty, 1890, Article III — Delimitation of spheres of influence in south-west Africa — Boundary line following centre or thalweg of main channel of Chobe River — Whether northern and western channel constituting main channel as asserted by Botswana — Whether southern channel constituting main channel as asserted by Namibia — Boundary between Botswana and Namibia around Island — Whether Island part of territory of Botswana or Namibia — Whether Namibia having prescriptive title to Island

Rivers — Riverain boundary — Chobe River — Main channel of Chobe River — Boundary between Botswana and Namibia around Kasikili/Sedudu Island following main channel of Chobe River — Anglo-German Treaty, 1890, Article III — Location of main channel being main dispute between Parties — Whether northern and western channel constituting main channel as asserted by Botswana — Whether southern channel constituting main channel as asserted by Namibia — Boundary between Botswana and Namibia around Island

Rivers — Chobe River — Kasane communiqué — Undertaking between Parties — Nationals of and vessels flying flags of Botswana and Namibia to enjoy equal national treatment in two channels of Chobe River around Island — Navigation and environmental protection

Treaties — Interpretation — Application — Anglo-German Treaty, 1890 — Vienna Convention on the Law of Treaties, 1969, Article 31 — Article 31 reflecting customary international law — Anglo-German Treaty, 1890, Article III — Delimitation of spheres of influence in south-west Africa — Boundary line following centre or thalweg of main channel of Chobe River — Whether centre and thalweg synonyms — Determination of location of main

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channel — Real dispute between Parties — Whether northern and western channel constituting main channel as asserted by Botswana — Whether southern channel constituting main channel as asserted by Namibia — Ordinary meaning of words “main channel” — Criteria for determination — Relevance and applicability — Depth — Flow — Bed profile configuration — Navigability — Object and purpose of 1890 Treaty — *Travaux préparatoires* to 1890 Treaty — Subsequent practice of parties to 1890 Treaty — Map evidence

Territory — Sovereignty — Kasikili/Sedudu Island — Determination of legal status of Island — Whether Namibia and predecessors having prescriptive title to Island — Whether Special Agreement precluding examination of prescriptive claim — Whether acts of State authority by Namibia on Island

State succession — European colonial powers partitioning Africa — Great Britain and Germany signing treaty delimiting respective spheres of influence in south-west Africa — Botswana gaining independence in 1966 — Namibia gaining independence in 1990 — Delimitation of boundary between Namibia and Botswana around Kasikili/Sedudu Island — Determination of legal status of Island — Anglo-German Treaty, 1890 — Rules and principles of international law — United Nations Charter — Charter and resolution of Organization of African Unity — Principle of *uti possidetis* — Respect for frontiers existing upon national independence

KASIKILI/SEDUDU ISLAND

(BOTSWANA/NAMIBIA)¹

¹ The Republic of Botswana was represented by Mr Abednego Batshani Tafa, Advocate of the High Court and Court of Appeal of Botswana, Deputy Attorney-General, as Agent, Counsel and Advocate; HE Mr S. C. George, Ambassador of the Republic of Botswana to the European Union, Brussels, as Co-Agent; Mr Molosiwa L. Selepeng, Professor Ian Brownlie, CBE, QC, FBA, Lady Fox QC and Dr Stefan Talmon, Rechtsassessor, as Counsel and Advocates; Mr Timothy Daniel, Mr Alan Perry, Mr David Lerer, Mr Christopher Hackford and Mr Robert Paydon, as Counsel; Professor F. T. K. Sefe, Mr Isaac Muzila, Mr Alan Simpkins, Mr Scott B. Edmonds, Mr Robert C. Rizzutti and Mr Justin E. Morrill, as Scientific and Technical Advisers; Mr Bapasi Mphusu, as Information Adviser; and Mrs Coralie Ayad, Mrs Marilyn Beeson and Ms Michelle Burgoine, as Administrators.

The Republic of Namibia was represented by Dr Albert Kawana, Permanent Secretary, Ministry of Justice of Namibia, as Agent, Counsel and Advocate; HE Dr Zedekia J. Ngavirue, Ambassador of the Republic of Namibia to the Netherlands, as Deputy-Agent; Professor Abram Chayes, Sir Elihu Lauterpacht, CBE, QC, Mr Jean-Pierre Cot, Professor Dr Jost Delbrück and Professor Dr Julio Faundez, as Counsel and Advocates; Professor W. J. R. Alexander, Professor Keith S. Richards, Colonel

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International Court of Justice. 13 December 1999

(Schwebel, *President*; Weeramantry, *Vice-President*; Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans and Rezek, *Judges*)

SUMMARY:² *The facts*.—The dispute between Botswana and Namibia concerned the legal status of Kasikili/Sedudu Island³ and the boundary between the two States. On 1 July 1890, Great Britain and Germany signed a treaty (“the 1890 Treaty”)⁴ delimiting their respective spheres of influence in south-west Africa and locating the dividing line in the centre (or *thalweg*, in the German text) of the main channel of the Chobe River, with British Bechuanaland to the south and the Caprivi Strip, which formed part of German South-West Africa, to the north.⁵ The Island was located in the Chobe River. Following the First World War, South Africa acquired a mandate from the League of Nations in respect of the former German South-West Africa. Following the termination of the mandate in 1966, South Africa retained *de facto* control over the territory until it became the independent Republic of Namibia in 1990. British Bechuanaland became the independent Republic of Botswana in 1966. Shortly after Namibian independence, differences arose between Botswana and Namibia concerning the location of the boundary around Kasikili/Sedudu Island.

On 29 May 1996, following unsuccessful attempts to resolve the dispute,⁶ Botswana and Namibia concluded a Special Agreement⁷ for the submission of their dispute to the Court. Under Article I of the Special Agreement the Court was 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.

Dennis Rushworth and Dr Lazarus Hangula, as Advocates; Dr Arnold M. Mtopa, Dr Collins Parker, Mr Edward Helgeson and Ms Tonya Putnam, as Counsel and Advisers; Mr Peter Clark, as Technical Adviser; Mr Samson N. Muhapi, Ms Kyllikki M. Shaduka and Ms Mercia G. Louw, as administrative staff; and Mr Peter Denk and Mr Muyenga Muyenga, as Information Advisers.

² Prepared by Ms Karen Lee, Co-Editor.

³ The Island was known as “Kasikili” in Namibia and “Sedudu” in Botswana.

⁴ For the text of Article III of the 1890 Treaty, see para. 21 of the judgment.

⁵ Further details on the Island can be found at paras. 11-12 of the judgment. Sketch-map No 1, illustrating the position of Botswana and Namibia on the continent of Africa, can be found at p. 17. Sketch-map No 2, showing the Caprivi Strip and the Chobe, can be found at p. 18. Sketch-map No 3, showing Kasikili/Sedudu Island, can be found at p. 19.

⁶ In the 1992 Kasane communiqué the determination of the location of the boundary was submitted to a Joint Team of Technical Experts. Unable to determine the boundary on the basis of the 1890 Treaty, the Joint Team recommended recourse to the dispute’s peaceful settlement on the basis of applicable rules and principles of international law. At a 1995 summit meeting it was agreed to submit the dispute to the International Court of Justice for a final and binding determination.

⁷ The Special Agreement was signed at Gaborone by Botswana and Namibia on 15 February 1996 and entered into force on 15 May 1996. The text of the Special Agreement can be found at para. 2 of the judgment.

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Botswana argued that the boundary around the Island should be determined on the basis of the centre of the northern and western channel of the Chobe River, which constituted its main channel, and that it had exclusive sovereignty over the Island. Namibia contended that the boundary lay in the centre of the southern channel as the main channel and that the Island was part of its territory. In the alternative, Namibia argued that it, and its predecessors, had prescriptive title to the Island by virtue of its exercise of sovereign jurisdiction with Botswana's full knowledge and acceptance.

Held:—(A) (by eleven votes to four, Vice-President Weeramantry and Judges Fleischhauer, Parra-Aranguren and Rezek dissenting) The boundary between Botswana and Namibia followed the line of the deepest soundings in the northern channel of the Chobe River around Kasikili/Sedudu Island.

(1) The applicable law was, first, the 1890 Treaty, which the Parties acknowledged to be binding upon them. The 1890 Treaty was to be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties, 1969 (“the Vienna Convention”).⁸ Although neither Botswana nor Namibia was a party to the Vienna Convention, Article 31 reflected customary international law. According to the Special Agreement, the Court had also to apply rules and principles of international law in accordance with Article 38(1) of the Statute of the International Court of Justice. The Parties also referred to the principles of the Charters of the United Nations and Organization of African Unity (“OAU”) as well as to the 1964 OAU resolution in which its Member States pledged to respect the frontiers existing upon national independence (paras. 17-19).

(2) In interpreting the 1890 Treaty in accordance with the Vienna Convention, the Court was not prevented from taking into account current scientific knowledge to illuminate the meaning of the agreed words. While locating the dividing line between the spheres of influence of the contracting parties in the centre (or *thalweg*) of the “main channel” of the Chobe River, the 1890 Treaty did not provide criteria for the identification of that channel. In accordance with Article 33(3) of the Vienna Convention, the terms “centre” (used in the English text of the Treaty) and “*thalweg*” (used in the German text) were to be treated as having the same meaning. Although not equivalent concepts, they were used as synonyms by the parties to the 1890 Treaty. “Channel” was to be used in a broad sense as intended by the Parties. The real dispute between the Parties concerned the location of the main channel where the boundary lay. As such, it was necessary to determine which was the main channel. The ordinary meaning of the words “main channel” was to be determined by reference to the most commonly used criteria in international law and practice (paras. 20-7).

(3) In accordance with the ordinary meaning of the terms in Article III of the 1890 Treaty, the northern channel of the Chobe River around the Island

⁸ For the text of Article 31 of the Vienna Convention on the Law of Treaties, 1969, see para. 18 of the judgment.

was its main channel. This was supported by the results of various on-site investigations as reported.

(a) More than one single criterion was needed to identify the main channel of the Chobe around the Island because the natural features of a river might vary markedly along its course and from one case to another. Scientific works frequently referred to various criteria. The Parties agreed on many criteria but disagreed on several of them as to relevance and applicability. The hydrological situation of the Island could be presumed to be essentially the same as in 1890 (paras. 28-31).

(b) The northern channel was deeper than the southern one as regarded mean, and even minimum, depth. Apart from the flooding season, the northern channel was wider than the southern channel. The main channel with respect to flow, that is the volume of the water, determined according to the low water baseline and not the floodline, was the northern channel. With respect to bed profile configuration, the northern channel did not contain any of the meanders typical of the secondary branches of watercourses. With respect to navigability, limited by the shallowness of the two channels, the main channel was the northern channel since it offered more favourable conditions for navigation (paras. 32-42).

(4) The Parties accepted that the 1890 Treaty determined the boundary between their territories although it was not a boundary treaty proper. Each sought to separate and protect its sphere of influence⁹ even if a river had more than one channel, while possessing only rudimentary information about the Chobe. Both colonial powers sought access to the Zambezi River, assuming that its southern boundary, the Chobe, was navigable. In choosing the wording “the centre of the main channel” they sought both to secure freedom of navigation and to ensure that there was a well-defined, recognizable boundary delimiting their spheres of influence. This reasoning was supported by the *travaux préparatoires* of the Treaty concerning south-west Africa and the Caprivi Strip in particular (paras. 43-6).

(5) The subsequent practice of the parties to the 1890 Treaty did not result in any agreement between the parties regarding the Treaty’s interpretation or application, or in any practice in the application of the Treaty which established the agreement of the parties regarding its interpretation.

(a) The three sets of documents relied upon by Botswana in support of its interpretation of Article III(2) of the 1890 Treaty did not constitute an interpretative agreement or subsequent practice under Article 31(3) of the Vienna Convention. The 1912 Eason Report, an internal document, and its surrounding circumstances did not represent subsequent practice. With respect to the 1948 Trollope–Redman Joint Report and related correspondence, since events occurring between 1947 and 1951¹⁰ did not give rise to subsequent practice, there was no agreement between South Africa and Bechuanaland in regard to the boundary around the Island and its status. In agreeing to conduct

⁹ For the text of Article VII of the 1890 Treaty, see para. 43 of the judgment.

¹⁰ For details on the Report and events, see paras. 56-62 of the judgment.

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a joint survey of the Chobe in 1984, South Africa and Botswana had not agreed to be legally bound by its results with respect to the application of the 1890 Treaty (paras. 47-70).

(b) Namibia could not rely on the peaceful and public use of the Island, over many years, by Masubia tribesmen from the Eastern Caprivi as subsequent practice in the application of the 1890 Treaty within the meaning of Article 31(3)(b) of the Vienna Convention. Their presence was neither linked to territorial claims by the authorities in the Caprivi Strip, nor connected with the interpretation of the 1890 Treaty. Neither did the additional facts and incidents cited by the Parties constitute subsequent practice (paras. 71-9).

(c) Factual findings in 1912, 1948 and 1985 identifying the northern and western channel as the main channel, while not constituting subsequent practice, supported the conclusions reached by interpreting Article III(2) of the 1890 Treaty in accordance with the ordinary meaning of its terms (para. 80).

(6) The map evidence was inconclusive. There was no map officially reflecting the intentions of the parties to the 1890 Treaty and no express or tacit agreement concerning the validity of the boundary depicted in a map. The submitted cartographic material was uncertain and inconsistent (paras. 81-9).

(7) Namibia had no claim of title to the Island on the basis of the doctrine of prescription. The Special Agreement did not preclude the examination of that claim; the applicable rules and principles of international law were not confined to treaty interpretation. It had not been established that the Masubia occupied the Island *à titre de souverain*; they used it intermittently, according to seasons and needs, for exclusively agricultural purposes. Namibia had not established with sufficient precision and certainty that it or its predecessors had carried out acts of State authority (paras. 90-9).

(B) (by eleven votes to four, Vice-President Weeramantry and Judges Fleischhauer, Parra-Aranguren and Rezek dissenting) Kasikili/Sedudu Island thus formed part of the territory of Botswana (paras. 100-1).

(C) (unanimously) In the two channels around Kasikili/Sedudu Island, the nationals of, and vessels flying the flags of, Botswana and Namibia should enjoy equal national treatment. In the Kasane communiqué the Parties had undertaken that there was to be unimpeded navigation for craft of their nationals and flags in the channels of the Island. They were to be subject to the same conditions as regarded navigation and environmental protection (paras. 102-3).

Declaration of Judge Ranjeva: (1) The Island formed part of the territory of Botswana since the choice of the northern channel as the main channel was the least improbable solution given its effect in terms of allocation of territory (p. 72).

(2) The Kasane communiqué created legal obligations for the Parties; nationals of both had navigation and fishing rights in the channel and a right of free access to surrounding waters and the Island (pp. 72-3).

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Declaration of Judge Koroma: (1) The Parties' decision to bring the matter to the Court demonstrated the importance they attached to the disputed territory and their mutual relations (p. 73).

(2) The Court chose one interpretation of the 1890 Treaty as representing the Parties' shared intention in the light of available material, while also applying the principle of *uti possidetis* whereby boundaries followed those inherited at independence, an important principle in the African legal order. The determination of the boundary and the Island's status were thus invested with the necessary legal validity (pp. 73–4).

(3) The finding as to equal treatment in the waters of the other State had a solid basis in international law and the Court's jurisprudence. The judgment laid down terms that contributed to peace and stability as well as determining the boundary (p. 74).

Declaration of Judge Higgins: (1) There were no commonly used criteria in international law for understanding the term "main channel". No ordinary meaning of the term existed. The Court was applying a general term decided upon in 1890 to a geographic and hydrographic situation now much better understood. It was not a generic term. Contemporary knowledge and scientific data could be used to ascertain its meaning. Effect was to be given to the general idea that the Parties had in mind (paras. 1–4).

(2) General knowledge of the time suggested that Britain and Germany sought a clear delimitation of their spheres of interest so as to allow each possible riverine access to the Zambezi. Little account should be taken of navigability since the 1890 Treaty would not have been concluded had the Chobe River's non-navigability been known (paras. 5–6).

(3) The main channel, in the generalized sense intended by the parties, lay in the north. Emphasis was to be given to the desire of the parties to choose the channel most clearly marking the limits of their interests. As such the visible physical distinctions between the two channels were important. Year round the north appeared in aerial photography and satellite imagery to be the broader and more important channel, and the Chobe Ridge marked a clearly visible frontier. No reliance was to be given to facts said to be found by Eason, Trollope and Redman or the Joint Team of Experts (paras. 7–10).

Separate Opinion of Judge Oda: (1) The judgment placed excessive reliance on the Vienna Convention for the interpretation of the 1890 Treaty. Botswana and Namibia were not parties to the Vienna Convention and had not requested the interpretation of the 1890 Treaty. It was not necessary to refer to "the line of deepest soundings". Objective scientific knowledge would have been beneficial in determining the main channel as a boundary (paras. 1–8).

(2) The Court could not properly ascertain the Parties' real intention in submitting the case since the *compromis* filed in the Registry was not clearly drafted. The subject of the dispute required clarification since the

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determination of the boundary and the Island's legal status could be contradictory issues. The Court should have requested clarification (paras. 9-21).

(3) The 1890 Treaty did not fix national territorial boundaries between Germany and Great Britain. The Court should have used an independent hydrological specialist in determining the main channel (paras. 22-32).

(4) The past practices—the geographical surveys and correspondence between northern and southern bank authorities—were the most important and decisive element for determining that the boundary was located in the northern channel and that the Island thus fell within the territory of Botswana (paras. 33-63).

Separate Opinion of Judge Kooijmans: (1) The conclusion with regard to the legal status of the Island should not have been based simultaneously on the unacceptability of Namibia's claim to title which had been insufficiently established (paras. 1-5).

(2) The Special Agreement precluded the Court from applying the rules and principles of international law independently of the 1890 Treaty. Without interpreting and applying the 1890 Treaty, determination of the boundary and the legal status of the Island was not possible. Namibia's alternative claim should have been declared inadmissible (paras. 6-20).

(3) In the Kasane communiqué the Parties had implicitly recognized that the Chobe River around the Island was part of a unitary whole irrespective of the boundary's location. The principle of equitable and reasonable utilization of shared water resources had been widely accepted both for navigational and non-navigational uses of international watercourses (paras. 21-38).

Dissenting Opinion of Vice-President Weeramantry: (1) The southern channel was the main channel constituting the international boundary. The Island was thus part of Namibian territory.

(a) This case turned upon the interpretation of the 1890 Treaty. The terms "centre" and "thalweg" were intended as synonyms. Aids to interpretation were necessary since the terms did not point definitively to one channel. Since the correct interpretation was not clear from their ordinary or technical meaning, how the document was understood at the time was a powerful aid (paras. 1-18).

(b) Colonial administrations were especially sensitive to territorial incursions. Botswana did not object to the long-continued Masubian use and occupation of the Island. In accordance with Article 31(3)(b) of the Vienna Convention, the Parties' subsequent practice evidenced an understanding that they regarded the southern boundary as the main channel. This was supported by the cartographic evidence. The other criteria were inconclusive. Equitable use of the river was best achieved by considering the southern channel, most suited to navigation and tourist vessels, as the main channel (paras. 19-79).

(2) The Chobe Game Park, a single wildlife sanctuary, was within the territory of Botswana and also Namibia, since the Island was within Namibian

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territory. Principles of environmental protection, which were now part of customary international law, could not be ignored in deciding the dispute. The 1890 Treaty demarcated zones of influence rather than boundaries. A special legal regime could be created for the Island. Namibia was obliged to negotiate with Botswana towards a mutually acceptable joint regime to ensure the habitat's integrity (paras. 80-119).

Dissenting Opinion of Judge Fleischhauer: (1) The main channel in Article III(2) of the 1890 Treaty was the southern channel of the Chobe around the Island. Given the location of the boundary, the Island was part of Namibian territory (pp. 155-6).

(a) There was no common understanding, in either English or German, of the term "main channel" which would apply generally. Neither was there agreement on all criteria or their importance. No ordinary meaning of the term in the hydrological sense existed (pp. 157-9).

(b) Had "main channel of that river" been interpreted properly with respect to the 1890 Treaty's object and purpose and its context in Article III(2), a different judgment would have been reached.

(i) The 1890 Treaty was not a boundary treaty; it intended to maintain political relations given rivalry in Africa. The parties wanted to establish an easily definable delimitation of their zones of influence. This would have been the crest of the clearly visible Chobe Ridge, had the Chobe's navigability not been assumed, making the southern channel the main one (pp. 159-61).

(ii) Since the term was used in the context of giving equal access to the Zambezi, navigability was an important factor. Although navigation conditions were better in the northern channel, this contradiction did not have to be addressed since expectations as to navigability were mistaken (pp. 162-3).

(iii) Interpreting the northern channel as the main channel deprived Namibia of an equitable share of the only navigational use of the Chobe when the parties' intention was to divide the river evenly (p. 164).

(2) Namibia had no prescriptive title. Neither could South Africa, Namibia's immediate predecessor in the Caprivi Strip, have acquired prescriptive title over the Island. In order to clarify the law governing mandates or trusteeships, a statement that acquisitive title did not work in favour of a Mandatory would have been desirable (pp. 165-7).

Dissenting Opinion of Judge Parra-Aranguren: (1) Namibia's primary claim, of subsequent practice as a means of interpretation of the 1890 Treaty, had first to be examined. Only if that claim failed could alternative claims based on prescription, acquiescence and recognition be examined (paras. 1-24).

(2) The critical date for determining the subsequent practice of the parties for the interpretation of the 1890 Treaty was 1914. After September 1914

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no practice could exist on the part of Germany since the Eastern Caprivi was occupied by Southern Rhodesia. During the existence of the Mandate, the Union of South Africa had no competence to delimit the international boundary of south-west Africa or to modify prevailing subsequent practice (paras. 25-43).

(3) The evidence submitted by Namibia supported its contention that the subsequent practice of the parties to the 1890 Treaty demonstrated that they considered the southern channel as the main channel referred to in Article III(2) and that the Island was therefore part of Namibia. The Masubia of the Eastern Caprivi were the only tribesmen in occupation of the Island, at least until 1914. Their occupation was peaceful and public; their chiefs were agents of the German colonial administration. Their acts represented the subsequent practice of Germany and Great Britain. This practice thus reflected the parties' understanding that the Island formed part of German South-West Africa (paras. 44-88).

Dissenting Opinion of Judge Rezek: (1) The variability of geographical considerations highlighted the importance of the historical factor in interpreting the 1890 Treaty correctly. The aim of delimiting spheres of influence was to be attained in light of principles governing river boundaries, especially equality of access to the resources of a watercourse. This was achieved by identifying the southern channel as the main channel. The southern channel was also identified in subsequent practice and confirmed by the most impressive cartographic materials (paras. 1-10).

(2) Although the long-standing occupation of the Island by the Masubia from the Caprivi side of the Chobe justified acquisitive prescription, interpreting the 1890 Treaty in light of history and in a manner compatible with the disputed area's hydromorphology provided sufficient grounds for recognizing Namibia's rights (paras. 11-16).

The Judgment of the Court and the Declarations, Separate Opinions and Dissenting Opinions are set out as follows:

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