DISPUTE RESOLUTION AT THE INTERNATIONAL COURT OF JUSTICE IS A COSTLY ENTERPRISE: WHAT IS THE ALTERNATIVE?

AN ANALYSIS OF THE 1999 ICJ CASE BETWEEN NAMIBIA AND BOTSWANA ON KASIKILI/SEDUDU ISLAND

By

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1. INTRODUCTION

On 13 December 1999, in an 11 to 4 ruling the International Court of Justice (ICJ) delivered its decision concerning the Kasikili/Sedudu Island between Namibia and Botswana, ruling in favour of Botswana.¹ The two countries are members of the Southern African Development Community (SADC).² Kasikili Island is a small 3.5 square kilometer uninhabited stretch of land, located between the Namibian border towns of Kasika and Botswana’s Kasane.³ The Chobe River separates the two countries.⁴ Events that preceded the ICJ Case concerning Kasikili/Sedudu Island between Botswana and Namibia were dominated by speculations about the potential for full-blown conflict between the two neighbors as a result of the dispute.⁵ There have been instances were a confrontation seemed eminent particularly when Botswana deployed troops on the island in 1991.⁶ Botswana asserts claim to the island based on the 1890 Treaty signed between Germany and Great Britain and that thus the island has always belonged to Botswana. Namibia’s claim to the island is largely based on it having been occupied for centuries by the Masubia people of Caprivi region (one of Namibia’s 14 political regions) as well as on the interpretation of the 1890 Treaty’s ‘main channel’ determination.⁷

¹ THE COURT, (1) By eleven votes to four, found that the boundary between the Botswana and Namibia follows the line of deepest soundings in the northern channel of the Chobe River around Kasikili/Sedudu Island; (2) By eleven votes to four, found that Kasikili/Sedudu Island forms part of the territory of Botswana; and (3) Unanimously, found that, in the two channels around Kasikili/Sedudu Island, the nationals of, and vessels flying the flags of, of Botswana and of Namibia shall enjoy equal national treatment. Also see the ICJ Press Release available at http://www.lawsc.d.cornell.edu/library/cijwww/icjwww/presscom/press1999/presscom/9953_iberna_19991213.htm
² Other SADC Member States are Angola, Democratic Republic of Congo, Lesotho, Malawi, Madagascar, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Malawi, Seychelles, United Republic of Tanzania, Zambia and Zimbabwe. The region covers a total area of 9.277 million square kilometres with a combined population of 210 million.
³ See infra Map.
⁴ The river for most of the year has water on the area of Kasikili and Kasika, however for the rest of the river, it is dry and gets water only during rainy seasons.
⁶ Id.
⁷ See Treaty between Germany and Great Britain of 1 July 1890 available at <http://www.icj-ij.org/icjwww/idocket/ibona/ibonaframe.htm>
The two countries after failing to resolve their dispute through mediation and fact finding, jointly agreed to submit it to the ICJ for a final binding resolution. As agreed the parties accepted the decision of ICJ as binding on them. While this conclusion to their dispute is commendable particularly to the region known for confrontations, was the ICJ the only remedy to the Parties for the resolution of their dispute on Kasikili/Sedudu Island?

The exact monetary resources that the Parties dispensed to cover their expenses for the Case may never be publicly made known although it has been speculated to be in the amount of US$64 million. It has been argued that such resources could have been used by the two parties to develop the uninhabited island if the parties could have pursued an alternative and inexpensive mechanism for dispute resolution. This paper analyses the ICJ Ruling in the context of pointing to such mechanisms of dispute resolution which the parties could have explored before approaching the World Court. In addition, the paper aims to analyze the ICJ ruling on Kasikili/Sedudu Island by reviewing and enumerating other remedies of dispute resolutions in international law. The participating parties’ positions will also be examined. The paper will conclude by discussing such alternative remedies available in settling disputes in international law that the Parties could have adopted.

MAP OF NAMIBIA AND LOCATION OF KASIKILI ISLAND

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8 In February 1995, Botswana and Namibian presidents met under the auspices of the Zimbabwean President as mediator in Harare, Zimbabwe, to consider the Joint Team Report. At this meeting, it was decided to submit the dispute to the International Court of Justice for a final and binding determination. Pursuant to this decision, Botswana and Namibia, by a Special Agreement signed at Gaborone on 15 February 1996, brought the dispute before the Court.
2. BACKGROUND TO THE DISPUTE

In general, the geographic boundaries of what are now Namibia and Botswana should be understood against the background of the famous ‘Scramble for Africa’ by European powers in the nineteenth century when a Conference in Berlin was set up in 1885 for European and American representatives to discuss dividing up Africa evenly, but Africans were not invited or made privy to their decisions.\(^9\) In 1890, six years after the infamous Berlin Conference of 1884, which scrambled Africa, Germany and Great Britain, entered into negotiations with the aim of reaching an agreement on trade and spheres of influence in Africa.\(^10\) In the south-west of the continent, Great Britain sought to protect the south-north trade routes running through Lake Ngami to Victoria Falls, while Germany, which had already laid claim to a large portion of what was called "South West Africa" (now Namibia), sought British recognition of its access to the Zambezi river. These negotiations culminated in the conclusion of the 1890 Treaty, which concerned several regions of the African


\(^10\) See ICJ Summary of the Judgment of 13 December 1999
continent, namely east Africa, South-West Africa, Togo and Zanzibar. The Treaty delimited *inter alia* the spheres of influence of Germany and Great Britain in South-West Africa; the delimitation treaty of 1890 lies at the heart of the Kasikili/Sedudu case.

In the 1960s, uprisings in the occupied territories led by African liberation movements, began to crack the foundations of colonialism as Africans and their countries began to triumphantly assert their rights to self-determination and eventually regaining independence throughout the continent. Against this backdrop, Botswana regained its independence on 30 September 1966, on the territory of the former British Bechuanaland Protectorate. Upon the outbreak of the First World War in 1914, the Caprivi Strip was occupied and governed by British forces from Southern Rhodesia (now Zimbabwe). Apartheid South Africa administered Namibia, under a mandate from the League of Nations until 1966 when that mandate was terminated by the United Nations General Assembly. However, Apartheid South Africa remained in de facto control of Namibia, despite United Nations policy to the contrary, until Namibia's independence on 21 March 1990.

The dispute on Kasikili Island however largely emerged after Namibia’s independence (1990). The dispute erupted in 1991 when Botswana deployed troops and hoisted its national flag on the Kasikili-Sedudu Island. Though they based their respective claims and contentions of ownership to the Kasikili/Island, on the grounds recognized by international law, Botswana and Namibia have different perception as to when the dispute on the Island began.

2.1 Botswana’s Claims

Botswana’s claim of when the dispute started is based on what it refers to as ‘the March 1992 episode’. This is an incident, according to Botswana, a Namibian Deputy Minister accompanied by “a large contingent of soldiers” crossed Chobe river to the disputed island for a meeting with Botswana’s District Commissioner. According to Botswana the Deputy Minister of Namibia was “beating the drums of war and claiming Botswana territory.” In its proceedings to the ICJ, Botswana described this incident as having been not only reprehensible, but that it exposed a total disregard for established diplomatic protocol of communicating with...
other governments.\textsuperscript{16} Botswana was therefore appearing before the ICJ to “demonstrate, beyond reasonable doubt, that the Northern and Western channel of the Chobe River is the main channel and that the boundary between Botswana and Namibia lies in this channel and, consequently, the title over Kasikili/Sedudu Island is vested exclusively in the Republic of Botswana.”\textsuperscript{17}

2.2 Namibia’s claims

Namibia, on the other hand, claims the genesis of the dispute to have been in 1991 when Botswana dispatched a contingent of Botswana Defence Force (BDF) soldiers to occupy the disputed island and to hoist its national flag over the island.\textsuperscript{18} Accordingly, Namibia claims that its neighbor took such an action without any discussion or consultation with the Namibian government. It alleges further that before 1989\textsuperscript{19} when the South African Defence Force (SADF) was an occupying power in Namibia (including the Kasikili Island) Botswana did not do anything to disturb the status quo. Namibia in turn regarded the Botswana’s action as constituting aggression and a unilateral use of force to change the status quo.\textsuperscript{20} Appearing before the ICJ was “therefore Namibia’s search, by peaceful means, to oust Botswana from Kasikili Island,” adding that it (Namibia) was “before this Court to say one thing, and one thing only, namely that by all accounts Kasikili Island has always been a part of Namibia and accordingly Namibia is entitled to it.”\textsuperscript{21}

2.3 Attempts of Dispute Settlement

Faced by the above conflicting perceptions and positions, the presidents of Botswana and Namibia began a search for a resolution to the dispute. Even here the pleadings of the parties to the ICJ Case reveal yet differences of perception on which president or country made the first move for a peaceful resolution of the dispute. Namibia claims that it was initiated by its government which requested then President of Zimbabwe, Robert Mugabe, to facilitate a dialogue between Namibia and Botswana regarding the Kasikili/Sedudu Island. Botswana on its part rejected the Namibian claims and on the contrary that it was its president (the late Sir Ketumile Masire) who initiated the process of dialogue and negotiation which ultimately led to the setting up of the JTTE. Namibia, on the other hand, claimed that it was its government’s initiative (through its then President Sam Nujoma) resulted in the two countries setting up a Joint Team of Technical Experts (JTTE), composed of three members from each country to determine where the boundary lies in terms of the 1890 Anglo-German Treaty.

\textsuperscript{16} Id.
\textsuperscript{17} See Botswana’s Oral Pleadings CR/99/6
\textsuperscript{18} See Namibia’s Oral Pleadings CR/99/6
\textsuperscript{19} Based on UN Resolution 435 for the independence of Namibia, Apartheid South Africa had to withdraw from all parts of Namibia in 1989.
\textsuperscript{20} According to Namibian agent before the ICJ, the country regards Botswana dispatching of soldiers to occupy Kasikili Island and hoisting of its national flag over the disputed Island in 1991 as in contravention of international law, the United Nations Charter, the 1964 OAU resolution on colonial boundaries, established diplomatic procedures, and Botswana’s own professed foreign policy objectives, however, Botswana, while not denying sending troops on the Island, it justifies it as a deterrent to prospective poachers. For detail on this point see Botswana’s Written Pleadings CR/99/01.
\textsuperscript{21} See Namibia’s Oral Readings CR/99/01
Claims and counter-claims aside, a JTTE was formed and conducted its work for 11 months and half but reached a deadlock and recommended, however, that the parties resolve the dispute by peaceful means in accordance with the principles of international law. Botswana blamed the JTTE deadlock on what it called the ‘adversarial attitudes’ of the Namibians during the fact-finding process. The Namibians denied the claims and fell short of blaming it on Botswana. The ‘finger-pointing’ finally ended when the Joint Team Report was presented to the two countries heads of government. In the presence of the Zimbabwean president, who was acting as a mediator, the two heads of states announced that the JTTE ‘had failed to reach an agreed conclusion on the question put to it’. The two parties agreed, therefore, to submit the dispute to the International Court of Justice for a final and binding determination.23

3. CASE BEFORE THE COURT

3.1 Parties Submissions

In their final submissions to the ICJ, following more than three weeks of intense pleadings, the two parties were as far apart as they had been throughout the Court proceedings. The dispute between the Parties mainly concerned the location and determination of the main channel, Botswana contending that it is the channel running north of Kasikili/Sedudu Island and Namibia the channel running south of the island.

Respectively, Botswana maintained its position on the basis that

“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 consequently, sovereignty in respect of Kasikili/Sedudu Island vests exclusively in the Republic of Botswana. And that the Court should determine the boundary around Kasikili/Sedudu Island on the basis of the thalweg in the northern and western channel of the Chobe River."24

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22 According to the terms of reference of the JTTE, it had the 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.' See Annex 11, Art. 7(1)(f).

23 See, infra Section 3. Case Before the Court

24 See Botswana’s Oral Pleadings CR/99/01
And Namibia, on the other hand, rejecting Botswana’s claims to the contrary, submitted that:

“the channel that lies to the south of Kasikili/Sedudu Island is the main channel of the Chobe River; the channel that lies to the north of Kasikili/Sedudu Island is not the main channel of the Chobe River; 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; The boundary between Namibia and Botswana around Kasikili/Sedudu Island lies in the centre (that is to say, the thalweg) of the southern channel of the Chobe River; The legal status of Kasikili/Sedudu Island is that it is a part of the territory under the sovereignty of Namibia.”

It was in view of these divergent opinions of the JTTE members that led the two countries to sign a Special Agreement in 1996 and submitted it to the ICJ. In the Agreement, the parties asked the ICJ “to determine, on the basis of the Anglo-German Treaty of 1 July 1890 [an agreement between Great Britain and Germany respecting the spheres of influence of the two countries in Africa] 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.”

3.2 The Court’s Ruling

As requested by the Parties, the Court began to deliberate the ruling by observing that the 1890 Treaty is the applicable law to the Kasikili/Sedudu Island, the view acknowledged by both Botswana and Namibia in their Special Agreement above. The 1890 treaty, the Court observed, is not a boundary treaty proper but a treaty delimiting spheres of influence, the Parties nonetheless accepted it as the treaty determining the boundary between their territories. The Court, therefore, proceeded to interpret the Treaty according to Article 31 of the Vienna Convention.

Following the established procedures of the Court, the Parties accordingly presented their positions supported by scientific evidence. The Court summarized all the arguments advanced by each party, and by terms of the Joint Agreement between the two States, concluded that Kasikili/Sedudu Island forms part of the territory of Botswana.

25 See Namibia’s Oral Pleadings CR/99/01
26 This Special Agreement has also become to be widely known as the Kasane Communiqué, named after the border town in which it was signed.
27 The Court held the view that the contracting powers, Germany and Britain, by opting for the words “centre of the main channel”, intended to establish a boundary separating their spheres of influence even in the case of a river having more than one channel. Namibia and Botswana did not express themselves on the Treaty not being a boundary treaty, the reasons are not immediately apparent.
28 Botswana and Namibia are both not parties to the Vienna Convention on the Law of Treaties of 23 May 1969, but they considered that Article 31 of the Vienna Convention is applicable inasmuch as it reflects customary international law.
4. ALTERNATIVE REMEDIES

According to some commentators a dispute can be defined as a “specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another”. This particular definition fits the conflicting perceptions of Botswana and Namibia rather appropriately. What was at issue in the Kasikili/Sedudu case was a boundary dispute involving rival claims to an island. The Kasikili/Sedudu Island dispute emerged because no visible boundary had been delimited between the two countries either by the 1890 Anglo-German treaty or otherwise. Disputes of this nature, like all other between states, neighbors, or brothers and sisters, can be said to be part of human relations, and the most important problem they all face is what to do to resolve them.

Further it can be argued that the emergence of international law in the past centuries did not seem to bring with it modalities for forming a world government or mechanisms of how to renounce the use of force by states. It was not until 1945, during the formation of the United Nations, which its founder members agreed in Article 2(3) of the Charter to settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered. A General Assembly Resolution of 1970 summarizes the peaceful means of Article 2(3) as follows:

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.

This provision which is based on Article 33(1) of the UN Charter does not in the strictest sense set out order of priority of how parties can utilize these various methods of peaceful settlement. The methods for settling disputes in international law stated above can be divided into two groups: diplomatic and legal. Under diplomatic means fall negotiation, mediation, inquiry and conciliation. The parties for the most part retain control of the dispute and may accept or reject a proposed settlement as they see fit. Legal means, under which arbitration and judicial settlement falls, occurs when what the parties want, is a binding decision, often, on the basis of international law. Institutionally, judicial settlement occurs when parties agree to refer their dispute to the ICJ or some other standing tribunal.

30 Id. Merrils makes the following classification of disputes: the first category is where a dispute arises because no boundary is determined. The second category involves a dispute arising from when an existing boundary’s legitimacy is challenged; the third category is when parties rely on different instruments to establish the delimitation; and fourth category involves a situation when a formula for delimitation has been agreed, but parties’ views differ on the meaning on the ground. The Kasikili/Sedudu Island falls in therefore falls in the first category.
These analysis and steps are illustrated below:

**Dispute Resolution: Steps in General**
- Negotiation
- Inquiry
- Mediation
- Conciliation

**Dispute Resolution: Botswana and Namibia Steps**
- Negotiation
- Inquiry
- Mediation
- ?

Source: This diagram is based on the UN Article 2(3)

**Negotiation and Inquiry**

As is evident from the diagram above, Namibia and Botswana whilst committed to the peaceful settlement of their dispute, they did not consider other steps such as conciliation and arbitration for the ICJ. It can be argued that the JTTE was a form of fact-finding equivalent to conciliation, which will be discussed later. As has been made apparent earlier in this paper, the parties deadlocked on the application of the outcome of the JTTE Report. The JTTE as an institutional arrangement therefore could have been made to serve as a welcome preference to arbitration or other techniques, because the parties desired to have their dispute independently investigated. Even though with limited success, in recent years, there have been elaborate provisions of various treaties and a General Assembly resolution urging parties to disputes to use fact-finding procedures.

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as a means of settlement.\textsuperscript{35} The JTTE could have evolved into a commission of inquiry modeled on the 1899 Hague Convention\textsuperscript{36} compromised to involve disputes of the nature agreed by participating parties.\textsuperscript{37}

Given the claims and counter-claims of why the JTTE failed, it would seem that had the composition of JTTE been replaced by nationals of other countries to conduct an impartial investigation of the facts and circumstances of the Kasikili/Sedudu Island based on a given Terms of Reference the outcome would have inevitably been different.\textsuperscript{38} To this end, when the mediation of Zimbabwe failed, the two countries should have considered collective mediation where several states act as mediators.\textsuperscript{39} Therefore the opportunity for successful application of fact-finding (inquiry) was lost merely on the disagreements of the respective countries’ members in the JTTE.

\textbf{Mediation}

When the mediation efforts failed, the two countries should have considered conciliation as a means of dispute resolution. In this particular context, conciliation is understood as a “method of settling international disputes of any nature by way of a commission set up by the Parties, either on a permanent basis or an \textit{ad hoc} basis to deal with a given dispute. Such a commission typically would do an impartial examination of the dispute and in so doing attempts to define the terms of a settlement susceptible of being accepted by the parties while not necessarily binding on them as an aid they have requested.”\textsuperscript{40} In this respect, while mediation can be described as an extension of negotiation, what conciliation provides parties to a dispute is the putting of third-party intervention on a formal legal footing and in essence institutionalizes it in such a way comparable, but not identical, to enquiry or arbitration.

\textsuperscript{35} Globally, the four inquiry between 1905 and 1922 were followed by a forty-year gap until the \textit{Red Crusader}, which itself can be described as a near ‘arbitration inquiry’. In other words, there have been a tendency to move from strictly resolving disputes on the basis of inquiry to near arbitration or full-blown arbitration.
\textsuperscript{36} At the Hague Peace Conference of 1899, following an explosion, which killed 259 people, on the United States battleship \textit{Maine} on 15 February 1898 at anchor in Havana harbour, the United States suspected that Spain was responsible for the blast. The two countries appointed separate national commissions of enquiry, all of which proved unsatisfactorily to resolve the dispute. The focus of the 1899 conference was a proposal from Russia that the national commissions of enquiry be replaced by international commissions for the impartial investigation of the facts and circumstances of international disputes. For details of the 1898 \textit{Maine} incident see \textit{Annual Register}, 1898, pp.362-3.
\textsuperscript{37} See \textit{Hague Convention for the Pacific Settlement of Disputes}, 1899, Articles 9-14
\textsuperscript{38} For example, in the \textit{Dogger Bank} incident of 9 October 1904, in which a squadron of Russian warships mistook an English Fishing fleet for Japanese torpedo boats about to attack them, the Russians opened fire and causing considerable damage to the fishing fleet. France which desired to avoid deterioration of Anglo-Russian relations, persuaded the two states to establish a commission of inquiry in accordance with the Hague Convention. The Commission which was set up in November 1904 was composed of an admiral from each of the parties, together with one from France, Austro-Hungary and the United States. For a detailed account of the incident and the subsequent fate of the Russian admiral see R. Hough, \textit{The Fleet that had to Die}, London, 1975.
\textsuperscript{39} For example, the protracted war between Bolivia and Paraguay was brought to a conclusion largely owing to the joint mediation of Argentina, Brazil, Chile, the United States, Peru and Uruguay between 1935 and 1937.
\textsuperscript{40} The quotation is from Article 1 of the Regulations on the Procedure of International Conciliation adopted by the Institute of International Law in 1961. See (1961) 49 (ii) \textit{Annuaire} pp. 385-91.
Conciliation

Conciliation as a method of dispute resolution in international law largely emerged in the early 1920s. For example in 1921 in a treaty between Germany and Switzerland\textsuperscript{41}, conciliation and arbitration were laid down as alternative means of dispute settlement. In this sense, conciliation retains a place among the procedures adopted by states to resolve international disputes. One of its advantages is that it may be applicable to a variety of needs particularly the opportunity of offering a structured involvement of impartial outsiders to the settlement of a dispute. On the Kasikili/Sedudu Island, the two countries could have engaged apart from the President of Zimbabwe, other outsiders to the dispute including the good offices of the United Nations and/or former colonial powers, whose nationals were used to represent the parties at the ICJ. There is increasing evidence to support this approach. For example, in the case of the long dispute between Holland and the Republic of Indonesia, the Security Council, in August 1947, resolved to tender its good offices to the parties for the pacific settlement of the dispute. In November of the same year it appointed a committee of Good offices, consisting of representatives of Belgium, Australia, and the United States, to act on its behalf. \textsuperscript{42}

Arbitration

Another remedy that the two countries should have considered is arbitration which requires that the parties themselves set up the machinery to handle a dispute, or solve disputes that may arise between them\textsuperscript{43} in the future possibly through the operationalisation of the SADC Tribunal, which incidentally is now in place and headquartered in Namibia’s capital Windhoek. The first step that the parties could have taken is determining arbitration as a remedy for the Kasikili/Sedudu Island is for them to have mutually decided on the kind of tribunal to be appointed. One possibility is to set up a commission consisting of equal number of national arbitrators, appointed by the parties, a neutral member to whom cases are referred if the national members cannot agree, as has been the case with JTTE. Another form of arbitration could be by referring a particular dispute to a foreign head of state or government for a decision, this is similar in advantages to mediation. If none of the above forms are considered inappropriate, another possibility is for the parties to refer the dispute to specially qualified individual for a decision. For example, the 1899 Hague referred to earlier established a list of arbitrators, styled, inappropriately, ‘the Permanent Court of Arbitration (PCA),’ and it created a bureau with premises, library staff, which still exists to facilitate arbitration and other forms of peaceful settlement.\textsuperscript{44}

\textsuperscript{41} See Merrils, supra note 25
\textsuperscript{42} See Security Council, Official Records, Second Year, No. 103
\textsuperscript{43} In Oster v. Domino case for example, instead of Canada and USA taking their dispute to the ICJ they used arbitration to establish Lake Ontario Arbitration Tribunal as means for any future dispute resolution. The Iran-US Claims Tribunal, created in 1981 as part of the settlement of the Hostages crisis, belongs to this category.
\textsuperscript{44} After a period of neglect the role of the PCA has recently been given renewed attention; see J.L. Bleich, ‘A new direction for the PCA: The work of the expert group’, in Muller and Mijs, The Flame Rekindled, p. 17 and W.E. Butler, ‘The Hague Permanent Court of Arbitration’, in Janis, International Courts, p. 43.
Condominium

There appears to be no dispute about the fact that the Masubia people who live in both countries had used Kasikili/Sedudu Island since time immemorial. With this in mind, Namibia and Botswana in resolving their dispute could have considered the possibility of joint sovereignty over the island that historically had been home to the Masubia people in their respective countries. In this regard, the final remedy that could have been considered by the parties is the regime of condominum. In fact, international law does recognize divisible sovereignty or condominum a case where sovereignty is jointly exercised by two or more states on a basis of equality. For example, Great Britain and Egypt had condominum over the Sudan between 1898 and 1956. While a particular regime of condominum will depend on facts of each situation, in most cases this arrangement is instituted by means of a treaty or agreement. Furthermore, National legislation and jurisdiction usually do not automatically extend to territory under the special regime of condominum. In cases of land-locked lakes and bays bounded by the territory of two or more states, the riparian states have often had condominum over the area by the operation of law. However, in relation to the Gulf of Fonseca, a Chamber of the International Court has held that its waters, other than the three-mile maritime belts, ‘are historic waters and subject to a joint sovereignty of the three coastal states’.

5. CONCLUSIONS

The Kasikili/Sedudu Island case has been resolved peacefully and the parties especially the loser, Namibia, accepted the decision of the ICJ as binding. As demonstrated by the diagram in this paper, the choice and therefore path taken by Namibia and Botswana to resolve their dispute is by far one that is expensive and whose decision is beyond the influence and control of the Parties.

This paper maintains that it was within the reach of the two countries to have exhausted all local remedies at their disposal before approaching the International Court of Justice. Conciliation, Arbitration, and Condominium are among the remedies the parties could have thoroughly explored and exhausted. Examples of how these procedures have been applied across the world are abound including the Oster vs. Domino case in which Canada and USA decided to set up Lake Ontario Arbitration Tribunal as a means for settling their dispute instead of taking it to the ICJ. Conciliation using fact-finding could have equally produced a satisfactorily and inexpensive resolution had it been followed properly and with the possibility of third party participation.

Condominium, this paper believes, would have proved best among the possibilities thus far considered in that the historic reality of the area particularly the historic rights of the Masubia people to the area adds weight to joint sovereignty of the disputed island. ‘All is well which end well’ is a tempting phrase to want to refer to this case, but both Namibia and Botswana have borders born out of the era of the scramble for Africa, would

46 Case Concerning the Land, Island and Maritime Frontier Dispute, ICJ Reports, 1992, p. 601, para. 404.
this case be the end or a precedent to yet more border disputes to come? This clearly is not a question to be answered now, but time will tell.

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