

The constitutionality of Namibia's territorial integrity

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Introduction

As Namibia enters the third decennium of its existence as a nation state, it stands to be congratulated for its tremendous achievements in the area of socioeconomic and infrastructural development as well as for peace and security. By the principle of *Concordia domi, foris pax* – “Harmony at home and peace with neighbours” – alone, Namibia deserves kudos in respect of its relations with neighbouring states.

Indeed, although sporadically interspaced with, and experiencing, vestiges of apartheid as well as the combative rhetoric of yesteryear, Namibia has found its social identity and learned to be at peace with itself, its neighbours and the international community at large, by pursuing an active foreign policy anchored in the basic values of democracy and the Bill of Rights while encompassing the rule of law, tolerance, peace and stability, and border security.¹

Boundaries are established to create certainty and ensure clarity with regard to the exercise of political, civil and economic rights, as well as the exercise of operational and administrative rights of a sovereign state or country.² It is also for these reasons that many countries have their territorial space anchored in their constitutions – and Namibia is no exception.³

Having the status of non-clarity when it comes to a political – or, for that matter, administrative – boundary is often a source of dispute and/or conflict between neighbouring states, administrative entities or even personal entities. Not so long ago, Africa was still experiencing such intestine and interstate conflicts (e.g. those that occurred between Eritrea and Ethiopia, Libya and Chad, Nigeria and Cameroon, and Burkina Faso and Mali).

The *quid iuris* and *quid facti* of Namibia's international boundary

The 195-year history of the chronologically recorded international boundary of Namibia has largely contributed satisfactorily, both conventionally and geodetically, to the creation of its clarity and certainty. In this regard, through dispute resolutions, triangulations and demarcation or beaconing issues related to –

1 Constitution of the Republic of Namibia, Chapters 1, 3, 11.

2 Seidl-Hohenveldern (1992:121–122).

3 Namibian Constitution, Article 1.

- the Kalahari and Ngamiland border
 - the then Neutral Zone in the north of Namibia
 - the Triune Point on the Kwando River
 - the Lozi Privileges, the Islands and the Quadripoint between Botswana, Namibia, Zambia and Zimbabwe in the Zambezi River
 - Kasikili Island, and
 - the issues concerning access to the water and other resources around it, and
 - the alignment of the entire borderline along the Linyanti-Chobe River
- were all satisfactorily resolved and/or clarified by the colonial powers or by the independent sovereign states that succeeded them to treaty and obligation.⁴

However, notwithstanding the above positive developments and despite the definition of Namibia's territorial waters, the creation of an exclusive economic zone (EEZ), and the clarification of the issues concerning the sea-oriented river boundaries in northern Namibia, boundary matters regarding the southern parts of the country have remained dormant for quite some time. Nonetheless, this may not be an issue for much longer because of the ever-growing economic interests in this geographic zone – whether inland, at the coast, or in the sea.

The Kunene River boundary and its projection into the sea

The issue of clarity and certainty of the Angola–Namibia boundary resurfaced a few years ago when a foreign vessel went down in the Atlantic waters off the Angolan–Namibian coast, raising the question “In whose territorial waters did the vessel go down?” Bearing in mind that the international boundary on the Kunene was established by the German–Portuguese Lisbon Convention of 30 December 1886, on 1 July 1993 Angola and Namibia signed a Memorandum of Understanding with the aim of demarcating their common maritime boundary.

However, due to lack of a binding international legal instrument in the form of a Convention or Treaty, the project could not be carried forward. Therefore, on 4 June 2002, the governments of Angola and Namibia signed an agreement to –

... establish, determine and fix the course of the maritime boundary line between their territories and the limits of their territorial waters as well as their specific economic coastal zones ...

in accordance with the United Nations Convention on the Law of the Sea of 1982.

In its Article III, the Angolan–Namibian Treaty of 2002 stipulates the following:

The starting point for the determination and demarcation of Territorial Sea, Exclusive Economic Zone and Continental Shelf between the Republic of Angola and the Republic of Namibia shall be the intersection of the baseline and the parallel of latitude 17°15' south. From this point on the baseline the maritime border will run along the 17°15' latitude S. westwards for a distance of 200 (Two Hundred) nautical miles.

4 Faundez (1989).

Thus, Article III, together with section 22 of Annexure B of the Angolan–Namibian Treaty, also constituted the terms of reference of an envisaged ten-member Joint Commission on the Maritime Boundary. The Joint Commission’s duty would be to determine and demarcate the maritime boundary between the two countries. The Joint Commission was established and conducted its geodetic work from May 2003 to July 2004. The bulk of the work consisted in –

- the triangulation of the Kunene River mouth
- the determination of the baseline and the parallel of latitude 17°15’ S
- the westward extension of the baseline for a distance of 200 nautical miles
- establishing marker beacons on the land, and
- defining the corresponding points of, and laying, the buoys on the sea water.

Through their agreement, Angola and Namibia decided to execute the above steps in order to “exercise full sovereignty over their natural resources”.⁵

With the exception of the cadastral maps that took some time to be finalised due to the nature of the work in and the geography of the sea, the demarcation of the territorial waters between Angola and Namibia was successfully completed, thus duly establishing the clarity and certainty of the maritime boundary between the two countries.

The !Garib/Orange River boundary and the apparent perpetuity of its imbroglio

The English–German Boundary Treaty (the so-called Helgoland Treaty) of 1 July 1890 defined the boundary between Namibia and South Africa as –⁶

... a line commencing at the mouth of the Orange River and ascending the north bank of that river to the point of its intersection by 20th degree of east longitude.

The delimitation of the British–German spheres of influence in Nama(qua)land had, ab initio, the detrimental effect of denying – both de iure and de facto – the inhabitants of the territory then occupied by Germany (then Deutsch-Südwestafrika, today’s Namibia) access to the waters of the !Garib/Orange River. No wonder then that, as early as May 1899, “the Rahman’s Drift Ferry question arose”⁷ and continued for the entire period of German rule in Deutsch-Südwestafrika until Germany’s demise as a colonial power in south-western Africa in the aftermath of World War I. The Rahman’s Drift Ferry question arose when an entrepreneur residing in Great Nama(qua)land (i.e. in Namibia), who wanted to run a ferry service in the !Garib/Orange, could not even establish a pontoon on the Namibian side of the river because, by treaty, it was part of the British-held Cape Colony.⁸ It is certainly an ugly legal situation that de iure excludes the inhabitants of one

5 (ibid.:2).

6 Hertslet (1899:899).

7 Hangula (1991:229).

8 Hangula (1993:105–116).

country or makes them dependent on the *grace* of its neighbouring country on the other side of the river to have access to water in that river.⁹

Although, during the South African occupation of Namibia, “the problem of access to the water of the river for the inhabitants of Great Nama(qua)land became less acute”,¹⁰ the de facto transformation of the *international* boundary on !Garib/Orange River into an *administrative* one during the South African occupation and administration of Namibia did not solve the problem. Instead, it masked and even compounded the problem to a certain extent, as it rendered the border quasi-non-existent for almost a century.

Following the demise of the apartheid regime in 1994 and the creation of an inclusive and democratic government in South Africa, led by the legendary Nelson Mandela, the new South African government showed itself to be amenable to a medium *filum aquae* boundary profile. Such profile would allow the communities on both sides of the river to have access to the water resources in tandem with the current stand in international law, which requires that communities of riparian states have access to common water courses.¹¹ This legal position also conforms to the provisions of Article 14 of the Namibian Constitution and, hence, the gentlemen’s agreement reached at the time between the then heads of state of Namibia (President S Nujoma) and the new democratic South Africa (President N Mandela) to have the boundary between the two countries running in the middle of the river.

Unfortunately, the promising gentlemen’s agreement that was reached informally by the two heads of state and of sisterly countries and parties on the occasion of President Mandela’s last visit to Namibia at the end of 1998 as the President of South Africa appears to have suffered serious setbacks. This was after some South African civil servants objected to the deal due, apparently, to South African citizens’ interests accrued in the !Garib/Orange, and following the collapse or failure of the Namibian–South African talks in Cape Town in 2004/5[?]. Ever since the changing of the guards at the helm of the two governments at the time, no more talks on the boundary issue appear to have taken place. This is due to, amongst other things, an apparent change in the order of priorities, which had by then shifted to the issue of the reintegration of Walvis Bay into the Namibian mainland.

Indeed, it appears that, in the wake of the Namibian–South African negotiations regarding the reintegration of Walvis Bay, the !Garib/Orange River boundary issues lost momentum and got relegated *sine die*. Moreover, not only did the technical people who were charged with this responsibility not agree on a number of issues, but the then foreign ministers of the two countries – Nkozana Dlamini-Zuma and Hidipo Hamutenya – did not seem ever to have met on the matter.

9 Hangula (1991:221–223).

10 Hangula (1993:117).

11 World Bank; Global Environment Facility.

An incongruous status of political suspense

Namibia's grape producers at Aussenkehr and all others who are involved in similar economic ventures on the shores of the !Garib/Orange are doing so through irrigation and water from that perennial river. Bearing in mind the Anglo–German treaty of 1 July 1890, and in terms of that prevailing international legal instrument, one could, however, apodictically say that such activities are happening purely due to the gracious tolerance being exercised by South Africa, emanating from that country's historic-political and via its link to Namibia through its previous administration of the latter. This assertion is based on the fact that international lawyers call Namibia a *non-riparian state* as far as the !Garib/Orange is concerned, because the aforementioned treaty set the boundary on the “north bank”, thus intentionally excluding Namibia from the river and its water – as became evident through the Rahman's Drift Ferry question. Let that ‘legal intention’ be as it may; but can the inhabitants of such an arid area as what was then Namaland and the Namib Desert truly *now* live without access to the waters of their ancestral river, just because two foreign colonial powers so decided at a time and in the name of a discredited pre-human-rights ideological doctrines of imperialism and colonialism?

The answer to the above pertinent question is obvious. I also tend to believe that it was in the consideration of the above that the two statesmen – Nelson Mandela and Sam Nujoma – let themselves be guided by African wisdom, according to which water is life, when they decided that the Namibia–South African boundary should follow the middle of the !Garib/Orange so that the communities on both sides of the river obtained access to the water and its resources. The ethically and wisdom-inspired decision of these statesmen, as well as those who crafted the Namibian Constitution, should be upheld by our generation and by posterity. It is true that Namibians currently have access to the waters of the !Garib/Orange, but this is an inertial state of affairs that has no legal backing.

It may also be true that a number of South African citizens might have rights accrued on the Namibian side of the *middle* of the river. At a time that the integration of the Southern African Development Community (SADC) is moving at high speed, such rights or privileges are not difficult to guarantee. From Merilla and Ceuta (Morocco) to Cabinda, and the famous Lozi Privileges on the Zambezi River, as well as to the more recent International Court of Justice judgment on Kasikili/Sedudu Island on access to the waters and resources around that island, there have been plenty of examples of honouring rights accrued.

Conclusion

With the exception of the ugly chapter of the Mishake Muyongo secession attempt that is reminiscent of the Africa of the early 1960s, Namibia has been at peace within, with its neighbours, and with the international community. Legally and geodetically, it has a state of certainty almost throughout its international boundary, including its territorial waters.

However, the state of *suspense* regarding the boundary at the !Garib/Orange River begs for clarity.

The lack of clarity and certainty with regard to the profile of the !Garib/Orange River boundary may pose serious international, legal, diplomatic, administrative and economic problems associated with exercising rights of sovereignty; rights associated with the United Nations Convention on the Law of the Sea; and rights and obligations concerning the exploitation, use and protection of related resources by authorities of communities of the two states.¹² This is more critical when it comes to the much-needed projection of the boundary into the sea for the determination of the territorial waters of the two countries and their application of the *erga omnes* and principles concerning the sea bordering the two countries.

Through the Rahman's Drift question in the German colonial period and the similar challenge of the then incoming South African Administration, it became clear that it was not possible for Namibia and the inhabitants of Namaland to be deprived of !Garib/Orange River waters on the basis of an ill-conceived 'legal intention' of distant colonial negotiators who crafted the Helgoland Treaty that set the international boundary on the "north bank" of the river. Furthermore, this state of affairs is waiting *ad Calendas Graecas* for a geodetic determination of the baseline of the conventional boundary so as to enable its profile to be projected into the sea for the sake of the demarcation of the territorial waters of the two neighbouring countries. In fact, it is delaying boundary clarity in particular and, consequently, certainty for the two countries to exercise both their rights of sovereignty and their international obligations.

Since the coastal waters and their seabeds off the Namibian and South African coasts appear to be rich in resources such as fish, diamonds, gas and other strategic minerals – including perhaps even petroleum,¹³ it is important that the two countries create lasting clarity and certainty with regard to the profile of their common boundary on the !Garib/Orange. The current suspense status of the boundary is incongruent with the aim and objective of a boundary as well as with the good relations existing between the two governments and peoples.

The warm relationship that obtains between the leadership of the two countries and the existence of highly experienced politicians in law and diplomacy, both in the Namibian Cabinet and at the Presidency itself, could be used to sort out the prevailing issues and stalemate, if any, and create the dearly needed certainty at the !Garib/Orange River: the only portion of the international boundary of Namibia where an unhealthy lack of certainty continues to exist.

12 Höpker (1983:85–86).

13 (*ibid.*:85).

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