SEPARATE OPINION OF JUDGE AJIBOLA

I. INTRODUCTION

(i) *Delimitation or Attribution*

1. I am generally in agreement with the Judgment of the Court, especially with its finding that the Treaty of Friendship and Good Neighbourliness between the French Republic and the United Kingdom of Libya of 10 August 1955 in effect determines the boundary dispute between the Great Socialist People's Libyan Arab Jamahiriya (hereinafter called "Libya") and the Republic of Chad (hereinafter called "Chad"). Primarily, this finding definitively settles the initial but fundamental differences between the Parties as to whether this is a case of delimitation or of attribution.

2. Libya, in its notification to the Court, urged it

> "to decide upon the limits of their respective *territories* in accordance with the rules of international law applicable in the matter" (emphasis added);

while Chad in its own notification asked the Court to

> "determine the *course of the frontier* between the Republic of Chad and the Libyan Arab Jamahiriya, in accordance with the principles and rules of international law applicable in the matter as between the Parties" (emphasis added).

3. In effect, while Chad requested the Court to resolve a boundary or frontier dispute, Libya urged it to decide a territorial dispute. In the recent *Land, Island and Maritime Frontier Dispute* case *(El Salvador/Honduras: Nicaragua intervening)* (*I.C.J. Reports 1992*, p. 351), where no boundary had been determined in several areas of the land territory concerned, the Chamber of the Court dealt with the conflicting territorial claims of the parties first and subsequently carried out a delimitation exercise as a normal judicial assignment. By a similar progression the Court in the present case first eliminated the dispute of territorial attribution by deciding that the Parties were bound by the Treaty of 1955, then concluded without difficulty that the case was not one of attribution of territory but one of the delimitation of a boundary.

4. In this regard, I share the view of Professor Allot [1] when he remarked that:

> "I feel that one can very easily lose one's way in a discussion on political problems in Africa, minority problems, territorial disputes, imperialism, etc. What we should be talking about is boundary disputes, not territorial disputes; in other words, disputes about the boundaries, about where the line is to be drawn. It is quite true that, as a consequence of a territorial dispute or a dispute over a minority, a re-drawing of a boundary may be required, but this is a secondary consequence of that particular dispute."

5. A cardinal consequence of that finding of the Court was the conclusion that Article 3 of the 1955 Treaty, with the Annex I attached thereto, in fact served to establish the frontier which was the subject-matter of the dispute between the Parties. I share the Court's interpretation of this particular Article; however, I shall have some further comments to make.

6. This separate opinion of mine is thus essentially supportive of the Court's Judgment and is meant to deal only with some peripheral but not unimportant aspects of the case. The Court has already dealt with the substantial issues of facts and law involved in the dispute. I, therefore, wish to make certain observations which I consider to be pertinent to this important case, in order to emphasize my individual point of view regarding the main issues placed before the Court and some of the reasoning which led me to support the Judgment.

(ii) *African Boundary Problems*

7. For about a century, perhaps since 1885 when it was partitioned, Africa has been ruefully nursing the wounds inflicted on it by its colonial past. Remnants of this unenviable colonial heritage intermittently erupt into discordant social, political and even economic upheavals which, some may say, are better forgotten than remembered. But this "heritage" is difficult, if not impossible to forget; aspects of it continue, like apparitions, to rear their heads, and haunt the entire continent in various jarring and sterile manifestations: how do you forget unhealed wounds? One aspect of this unfortunate legacy is to be seen in the incessant boundary disputes between African States.

8. The colonial penchant for geometric lines (as exemplified by Lord Salisbury's "horseshoe"-shaped Tripolitanian hinterland), has left Africa with a high concentration of States whose frontiers are drawn with little or no consideration for those factors of geography, ethnicity, economic convenience or reasonable means of communication that have played a

[1] *Boundaries and the Law in Africa: African Boundary Problems*, 1969, p. 9.

part in boundary determinations elsewhere. A writer on African boundary problems has remarked:

> "We find the Somalis distributed between Ethiopia, Somalia, Kenya and Djibouti, the Yorubas in Dahomey and Nigeria, the Ewes in Ghana and Togo. On the west coast of Africa we find a massive sandwich of French-speaking and English-speaking states whose economic contacts almost completely disregard the proximity of their borders. These examples can be multiplied." [1]

9. It is therefore important to bear in mind that most African frontiers are purely artificial, and the boundary in dispute was no exception. In most cases they are boundaries put in place by the colonial powers as a result of agreements between them or with indigenous peoples or through conquest or occupation. I hasten to add that boundaries the world over are, most of them, artificial. But in Africa they are patently even more artificial than elsewhere, since most of them are merely straight lines traced on the drawing board with little relevance to the physical circumstances on the ground. As far back as 1890, Lord Salisbury said:

> "We have been engaged . . . in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were." (Memorial of Libya, Vol. 1, p. 25, para. 3.01: quoted from *The Times*, 7 August 1890.)

10. Consequently, some African countries on gaining their independence, especially in the 1950s and 1960s, began to question the ill-defined boundaries that ignored so many human factors, whether social, political or economic. Four countries then embarked upon irredentist policies, namely Somalia, Morocco, Ghana and Togo. It is important to note that at the time (i.e., before 1970) Libya was not among those countries. As a result of this policy, which in effect questioned the existing "colonial" boundaries and the resultant territorial partition, some major armed conflicts erupted in Africa between Somalia and Kenya, Ethiopia and Somalia, Togo and Ghana, Morocco and Mauritania, Algeria and Morocco.

11. Professor C. G. Weeramantry in the chapter on "Legacies of Colonialism" in his book *Equality and Freedom: Some Third World Perspectives* alluded to the partition of Africa as a classic example of these "artificial divisions" which ultimately resulted in "several dozen frontier

[1] Samuel Chime, *Organization of African Unity and African Boundaries: African Boundary Problems*, 1969, p. 65.

disputes" which have "flared up, some involving heavy fighting between African Nations" [1].

12. Another writer on African boundary problems described the issue thus:

> "One of the remarkable features of independent Africa today is the legacy of ill-defined colonial boundaries. As Ian Brownlie has rightly observed, the European expansion in Africa produced a territorial division which bore little or no relation to the character and distribution of the populations of the former colonies and protectorates. Thus, the international boundaries now inherited by the newly independent African States were arbitrarily imposed by ex-colonial European powers." [2]

It was against this background that Libya's claim fell to be understood.

II. Territorial Claim by Libya Examined

13. Libya's claim was premised on the thesis that at all the material times relevant to this dispute, the borderlands were never *terra nullius*, even before the arrival of France. Particularly in the "borderlands" to the south of Libya, dividing it from Chad, there had never been a defined boundary, either conventional or otherwise. Libya's other fundamental point was that France never acquired any title to the borderlands, either by treaty, by occupation or by conquest; and since Chad succeeded to France's territorial titles, *a fortiori* Chad held no title from France. But that was not to say, according to Libya, that title did not exist. It was at all time vested, Libya claimed, in the indigenous tribes, the Senoussiya and, on the international plane, in the Ottoman Empire, and it passed to Italy after the Treaty of Ouchy in 1912. It was this same title that passed to Libya on 24 December 1951, the date of its independence.

14. Significantly, Libya's argument that territories inhabited by tribes or peoples having social and political organizations are not to be regarded as *terra nullius* echoes the Court's comment in the *Western Sahara* case that:

> "in the case of such territories the acquisition of sovereignty was not

[1] *Equity and Freedom: Some Third World Perspectives*, Hansa Publishers Ltd., June 1976, at p. 46.

[2] A. Oye Cukwurah, "The Organisation of African Unity and African Territorial and Boundary Problems, 1963-1973", *Indian Journal of International Law*, Vol. 13, p. 178.

generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers" (*I.C.J. Reports 1975*, p. 39, para. 80).

15. Libya, having denied the existence of any established boundary to the south, claimed in its submissions that it had title:

"to all the territory north of the line shown on map 105 in Libya's Memorial . . . that is to say the area bounded by a line that starts at the intersection of the eastern boundary of Niger and 18° N latitude, continues in a strict south-east direction until it reaches 15° N latitude, and then follows this parallel eastwards to its junction with the existing boundary between Chad and Sudan" (CR 93/29, p. 72).

(i) *Libya's Territorial Claim and "Litigation Strategy"*

16. Libya's claim encompassed the regions of Borkou, Ennedi and Tibesti, including Erdi, Kanem and Ounianga, or what Libya described as the "borderlands":

"a handy geographical term of reference . . . it is defined in the north by the 1919 Anglo-French Convention line claimed by Chad, and in the south by 15° N latitude" (CR 93/16, p. 12).

17. In support of this claim to the entire "borderlands", Libya in its Memorial and oral argument referred to economic, religious, geographic, climatic and security factors. As to the economic factor, mention was made of the Central Saharan trade routes from the Mediterranean coasts of Cyrenaica and Tripolitania to the hinterlands. Examples were given of such trade routes from Tripoli to Sokoto and Kano in Nigeria, via important places like Nalut, Ghadamès, Ghat and Agades; another from Misuratah to Kuwka via Mourzouk and Bilma. A third ancient route started from Benghazi and reached Manssenya in Baguirmi via Koufra, Tekro (in Ennedi) and Abeche. It was the view of Libya that trade had since ancient times been the main factor in the contacts and relationships between the peoples of the northern and southern reaches of the Sahara.

18. Libya also suggested that geography provided a criterion for the Court to consider especially the geographical features of the terrain. In that connection it argued that the Court had the same discretion as a demarcation commission to effect the establishment of a boundary *de novo* where none existed, as allegedly in this case. As to religion, Libya placed much emphasis on its connection with the Senoussi and the Muslim Ottoman Empire, claiming that the northern part of Africa as well as

the borderlands were predominantly Muslim, whereas to the south Chad was populated by Christians and animists. With regard to the climatic factor, Libya pointed out that, while the entire area of the borderlands shared a desert climate and vegetation with Cyrenaica and Tripolitania, the south of Chad enjoyed the Sudan climate, which is tropical in nature.

19. On the issue of security, Libya was of the opinion that the Tibesti Massif posed a potential danger to its petrochemical-industrial complex in the Sirt Basin — hence from the viewpoint of Libya's national defence it was of utmost importance that the Tibesti Massif and the adjacent border be secure. Adducing the security consideration in support of its territorial claim, Libya submitted that:

> "In carrying out the task of attribution of territory and determining which State has the better claim to title over territory falling within the General Setting of this dispute, it is the view of Libya that the security interests of each State in the light of all the facts are factors that should not be overlooked. Attributing to Libya the regions described in its submissions to which Libya claims to have clear title, would take full account of Libya's security interests, while at the same time leaving an extensive land area between such a Libyan frontier and the strategic and economic heartland of Chad — what the French have called 'le Tchad utile'." (Memorial of Libya, Vol. 1, p. 68, para. 3.110.)

20. The above arguments, derived from human and physical considerations, may be seen as the first leg on which Libya's claim rested. The second leg was of a diplomatic nature and concentrated on the Rome Treaty of 1935, otherwise referred to as the Laval-Mussolini Treaty. This was the Treaty between France and Italy which specifically defined the boundary between Libya and the territories of French Equatorial Africa and French West Africa east of Toummo.

21. The 1935 Treaty did not enter into force formally because Italy refused to proceed with the exchange of the instruments of ratification. However, the argument of Libya was that this did not diminish the Treaty's importance or its relevance as an essential factor to be taken into consideration in the settlement of the dispute before the Court. The Parties disagreed as to who would have conceded territory to the other. The argument of Libya was that Italy made such concessions to France in return for a promise that the French would support the Italians' conquest of Ethiopia, and that it was the French refusal to keep to that agreement that led to Italy's refusal to exchange the instruments of ratification.

22. Chad claimed that it was France that in 1935 offered concessions of territory to Italy, based on the "colonial concession" promised under Article 13 of the London Treaty of 1915. However, that point is of less

importance to the argument of Libya that the Court could take this Treaty into consideration in arriving at a just and equitable decision.

23. Libya claimed that the 1935 Treaty was the only international instrument which throughout the history of this dispute was intended to plot a line defining once and for all the boundary in the area in dispute and which actually would have attained its purpose but for the non-exchange of the instruments of ratification. It was a Treaty, Libya claimed further, that had been fully negotiated and concluded by two States which both effectively exercised sovereignty over the territories to be delimited. Libya thus asserted that valuable indications could be gleaned from a delimitation treaty which reached the very brink of enforceability. Indeed, Libya highlighted the ebb and flow of Franco-Italian negotiations between 1912 and 1935 as furnishing an equitable consideration in its favour. Chad might well have suggested that the Accord-Cadre allowed the Court to operate solely within the bounds of law, *stricto sensu*, but according to Libya:

> "ce constat n'exclut nullement le recours à l'*aequitas infra legem*, qui au contraire est toujours approprié, comme votre Cour l'a dit et répété tant à propos des délimitations maritimes que des délimitations terrestres" (CR 93/20, p. 40).

24. A clear picture of Libya's claim has now emerged: that there was no existing boundary between Libya and Chad, either through French conquests or occupation or by virtue of the Treaty of 1955, particularly Article 3 with the list of international instruments annexed thereto; that the Court was therefore in a position to decide a territorial dispute rather than a boundary dispute; that in doing so the Court should take into consideration the Rome Treaty of 1935 even though the instruments of ratification had not been exchanged; that the territory in dispute was at no time a *terra nullius* but that at all material times title was vested in the indigenous peoples and the Senoussi while on the international plane title was vested in the Ottoman Empire, which eventually passed it to Italy. Hence Libya concluded that its territorial claim should extend as far south as 15° N latitude.

25. There is little doubt that Chad was taken aback at the extent of Libya's claim, which it had expected to be limited to the 1935 line that Libya had relied upon since 1977 before the Security Council, the General Assembly and the Organization of African Unity. Hence it asserted that:

> "To get half of Chad would be splendid, but really Libya would be satisfied with everything north of the 1935 line. That line could not be argued for as such, because of the non-ratification of that Treaty. So the dispute would be turned into one about territory rather than frontiers, large territorial claims would be made, and

then on the very last day of the oral argument Libya would reinsert the 1935 line as a species of *equity*." (CR 93/21, p. 55, para. 63.)

26. Chad remarks that over the years Libya has not been consistent regarding its territorial claim. Libya's submission to this remark is to the effect that the past policies of its Government on this matter had little to do with the present case, when only the pleadings and submissions before the Court are relevant. I was not persuaded by this line of argument: on the contrary, I am of the opinion that the converse is the position in international law.

27. My view finds confirmation in the case-law of the Court. For example, in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)*, the Court, in interpreting very recently the 1965 Agreement between Norway and Denmark, took into consideration the text which the Norwegian Government submitted for parliamentary debate in 1979-1980:

> "This absence of relationship between the 1965 Agreement and the 1979 Agreement is confirmed by the terms of the official communication of the latter text to Parliament by the Norwegian Government. Proposition No. 63 (1979-1980) to the Storting states that:
>
> > 'On 8 December 1965 Norway and Denmark signed an agreement concerning the delimitation of the continental shelf between the two States.
> >
> > The agreement did not cover the delimitation of the continental shelf boundary in the area between Norway and the Faroe Islands.'
>
> Since, as noted above, the 1965 Agreement did not contain any specific exclusion of the Faroe Islands area, or of any other area, this statement is consistent with an interpretation of the 1965 Agreement as applying only to the region for which it specified a boundary line defined by co-ordinates and a chart, i.e., the Skagerrak and part of the North Sea." (*I.C.J. Reports 1993*, p. 51, para. 29.)

28. Another example that strongly confirms my view is to be found in the *Nuclear Tests* cases in 1974 when the Court concluded that the statement of the French Government that it would not carry out any further atmospheric nuclear testing had legal implications.

(ii) *The Salient Questions*

That said, what Chad styled as Libya's "litigation strategy" (CR 93/21, p. 55, para. 64) deserved to be evaluated with the aid of four pertinent questions:

1. How much reliance could Libya now place on the 1935 Rome Treaty?

2. How sound was the thesis of Libya that there was no boundary between it and Chad?
3. Was Libya correct in its interpretation of the provision of Article 3 (with its Annex I) of the 1955 Treaty?
4. How strong were the claims and submissions of Libya regarding the BET region?

(iii) *The Rome Treaty and Equity*

29. Among the conventional boundaries involved in this dispute the Rome Treaty might have been regarded as the "second best", in the sense that the Court would have been compelled to look more closely into it in the event of the absence or invalidity of the 1955 Treaty. In such a situation, a certain application of equitable principles might have become a necessity, but where equity has a role in a boundary dispute, that role is invariably limited. Equity may be applied only to fill in a gap. It could be *aequitas infra legem* or *aequitas secundum legem* but not *aequitas praeter legem* or *contra legem.* Both Parties virtually agreed that this was the position in international law. But since a conventional boundary had been recognized by the 1955 Treaty and the Rome Treaty's instruments of ratification had not been exchanged, equity had in fact no role to play in this matter; to apply it would have been to apply equity *extra legem* — and in any case, equity follows the law.

30. Even in maritime delimitation cases, where the Court has developed the law considerably on this issue with regard to equitable principles and equitable factors, equity does not operate *contra legem* but *infra legem.* In conclusion here, one can say that equity had no role to play in this particular case and that the Rome Treaty, though of some historical interest, was never in force and was therefore not applicable *de jure.*

(iv) *Libya's "No Conventional Boundary" Thesis*

31. This point is touched upon here in order to highlight the shifting positions taken by Libya from the inception of the dispute. First there was the period of silence and acquiescence, then the period of denial of occupation of part of the Tibesti region, followed by a claim that Libya had a right to such action under the Rome Treaty of 1935. Then before the Court Libya argued that, while no boundary had been established, the Rome Treaty ought to be taken into account from the standpoint of equitable considerations. But no matter what justifications could be found for each of those stances, the allegation of the non-existence of a

conventional boundary stood or fell with the interpretation of the 1955 Treaty.

(v) *Libya's Interpretation of the 1955 Treaty*

32. All that needs to be said here is that it appears to me that Libya denied neither the validity of the 1955 Treaty nor the fact that it was relevant to the present dispute. The Court has meanwhile found that it may be applied so as to define a conventional boundary, a conclusion with which I am in full agreement.

(vi) *How Strong Was the Claim of Libya Regarding the BET Region?*

33. Having decided that there is a conventional boundary established between Chad and Libya, one might consider it redundant to examine this question. Nevertheless it may not be entirely out of place to do so, because of the importance of this case in Africa.

34. Assuming for a moment, therefore, that the Treaty of 1955 did not create a boundary, it might still have been very difficult to find in favour of Libya on the basis of the historic, religious, economic, geographic and security considerations it placed before the Court. Earlier in this opinion, I have expressed my view on this point, referring to the history of Africa and its colonization. The colonial powers did not take all those factors into consideration when the partitioning took place in the nineteenth and twentieth centuries. Tribes and indigenous peoples are spread all over Africa without regard for boundaries or the entity of States.

35. President Tsiranana, the then Head of State of Madagascar said in 1963[1]:

> "It is no longer either possible or desirable to modify the frontiers of nations in the name of *racial or religious criteria* . . . if we were to take as a criterion of our frontiers *either race, tribe, or religion* certain States in Africa would be wiped off the map." (Emphasis added.)

36. Take for example the Senoussi Order, whose grand patron hailed from Algeria: the influence of this Order stretched across the whole of Northern Africa, especially Algeria, Morocco and Egypt. The influence of the Order also stretched to the south through the length and breadth of the present Chad and beyond. As early as 1856 a Senoussi *zawiya* was established in Kuka Bornou. The logical consequence of Libya's claim based on Senoussi title alone could involve the integration of about eight nations altogether as one State in Africa. So much for religious and cultural factors. Economic and geographical considerations would present

[1] ICAS Summit/Gen/Inf/14, p. 4; see also Boutros Boutros-Ghali, *Les conflits de frontières en Afrique*, 1972.

even more fluid and unreliable guides. Besides, they would often conflict with findings drawn from considerations of an ethno-cultural nature.

37. That is why I am in entire agreement with the view of the Chamber of the Court in the case of the *Frontier Dispute (Burkina Faso/Republic of Mali)*:

> "The Chamber would however stress more generally that to resort to the concept of equity in order to modify an established frontier would be quite unjustified. Especially in the African context, *the obvious deficiencies of many frontiers inherited from colonization, from the ethnic, geographical or administrative standpoint*, cannot support an assertion that the modification of these frontiers is necessary or justifiable on the ground of considerations of equity." (*I.C.J. Reports 1986*, p. 633, para. 149; emphasis added.)

38. To conclude, I found it difficult to support any of the submissions presented to the Court by Libya in the present case.

III. CHAD'S CASE

39. Chad's general submission on this case was that it concerned the delimitation of the common boundary between the two Parties. As far as Chad was concerned, the Franco-Libyan Treaty of 10 August 1955 defined the frontier between it and Libya. In his opening address, the Agent for Chad expressed the view of the Government of Chad as follows:

> "In Chad's view, the Treaty of 10 August 1955 is the key to the dispute. Libya negotiated, signed and ratified it freely. The Treaty cannot be sidestepped, it is decisive. Its implementation suffices to settle the dispute." (CR 93/21, p. 14.)

40. Chad put forward two subsidiary theses in support of this submission. It contended that, even if the Franco-Libyan Treaty of 1955 had not been concluded or were inapplicable, the frontier definition resulting from certain international instruments would be the same. Alternatively Chad argued that the same frontier line would result from French *effectivités* in the borderlands, assuming that the first two lines of contention failed. Chad further buttressed its claim that a conventional boundary actually existed with allegations of acquiescence and estoppel against Libya. The issue of *uti possidetis juris* was also raised by Chad, referring to the Cairo Declaration of the Organization of African Unity in 1964, and a part of the decision of a Chamber of this Court in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* (*I.C.J. Reports 1986*, p. 554).

IV. The 1955 Treaty and the Stand of the Parties

41. Libya agreed with Chad that the starting point in this case should be the Franco-Libyan Treaty of 1955 (hereinafter called "the 1955 Treaty"). Counsel stated on its behalf:

> "'Article 3 of the 1955 Treaty is directly pertinent to resolving the present dispute' (Reply of Libya, para. 5.04); and, indeed, Libya suggests that 'The Court may well regard the 1955 Treaty as the logical starting point in its consideration of how to resolve the territorial dispute in this case' (*ibid.*, para. 5.01). Since both Libya and Chad (although the latter with some reservations) regard the 1955 Treaty as being of critical importance to the resolution of the present dispute, Libya will begin by analysing Article 3 of that Treaty." (CR 93/15, p. 15.)

42. Chad, for its part, made it clear at the opening of its oral arguments that its most important thesis was that the Treaty of 1955 "quite unambiguously identified a boundary line" (CR 93/21, p. 28). Counsel added: "Let us begin at the beginning. And the legal beginning — and also the end — is the Treaty of 10 August 1955 between France and Libya." (CR 93/21, p. 29.)

V. Interpreting the 1955 Treaty

43. The Judgment of the Court dealt adequately with the interpretation of Article 3 of the 1955 Treaty which I need not repeat in this opinion, but I shall only touch on some areas of it which I think are supportive of the Judgment.

(i) *Object and Purpose of the 1955 Treaty*

In the interpretation of any treaty it is equally essential to look into its actual object and purpose (cf. Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties).

44. As far as the 1955 Treaty is concerned, Libya's view on this point is straightforward — its own object was to secure the removal of the French army from Fezzan in order to give effective meaning to Libyan independence. All other considerations were secondary and in fact unimportant. To say the least, Libya was not then interested in the delimitation of the southern boundary, and would have preferred not to have anything to do with the issue of delimitation of the frontier. Reference was made to the fact that Libya was ill-equipped for such exercise in 1955, and in particular lacked appropriate experts.

45. Mr. Kamel Maghur for Libya said that:

> "When the negotiations that ultimately led to the 1955 Treaty

started in January 1955, I would estimate there were not more than five lawyers in Libya. Only one lawyer, Mr. Fekini, fresh from law school in Tunisia, with no experience of any kind, was assigned to assist the Libyan team . . . Like Mr. Fekini, I knew nothing about matters of international law and international boundaries when I graduated from law school." (CR 93/14, p. 67.)

46. It is alleged by Libya that France also was loath to go into the issue of delimitation. Mention was persistently made of the letter of 2 May 1955 from the Governor-General of French Equatorial Africa to the Ministre de la France d'Outre-Mer. The letter advised: "la nécessité de faire reconnaître par ce pays [la Libye] les frontières résultant de la déclaration franco-britannique de 1899" (Memorial of Libya, Vol. 1, p. 370, para. 5.437).

47. But the letter did not stop there. It went further to state clearly the objective of France with regard to the southern frontier of Libya with Chad at this crucial time, which was about four months before the signing of the 1955 Treaty. According to Libya, this corresponded to the French thesis that had first been formulated and fully articulated in 1921-1922 in response to the Italian protest against the 1919 Anglo-French Convention. Thus the French thesis on the frontier, as explained in the letter, is said to be as follows:

"— that Libya should be considered to be a successor State to Italy not to Turkey;
— that Libya's southern boundaries were determined by the 1899 Anglo-French Additional Declaration, as modified by the 1919 Anglo-French Convention;
— that Italy had formally recognized the 1899 Additional Declaration in the 1900-1902 Franco-Italian Accords; and
— that Libya could base no claim on the 1935 Treaty because these accords *'n'ont jamais été exécutés'*." (*Ibid.*; emphasis added.)

48. The letter of 10 May 1955 which the French Embassy in London sent to the British Foreign Office, and which Libya quoted in its Memorial, suggests moreover that both parties took the same attitude towards delimitation, for it states:

"Les deux gouvernements conviennent de s'en tenir, en ce qui concerne le tracé des frontières séparant les territoires français et libyen, aux stipulations générales des textes internationaux en vigueur à la date de la création de l'Etat libyen." (*Ibid.*, p. 375, para. 5.445.)

49. May one perhaps deduce therefrom that there was no disagreement as to the object and purpose of the Treaty? Libya at the last moment agreed that the boundary had been fixed by the international acts. Libya, mentions that:

> "Libya did, at the last moment, agree to this proposed rectification, under considerable pressure from the French negotiators; and the text of what was agreed by way of identification of these points was embodied in Annex I to the 1955 Treaty." (CR 93/15, p. 38.)

50. What was the purpose and object of this 1955 Treaty according to Chad? As far as Chad is concerned, it was a package deal to ensure peace and stability within that region. In the eyes of Chad, it was a Treaty of Friendship and Good Neighbourliness between France and Libya. As stated in Chad's Counter-Memorial:

> "it comes in the form of a body of provisions concerning a great variety of subjects: the presence of French troops on Libyan territory, economic, financial and cultural co-operation, frontier régime, etc. Its object is very generally to facilitate relations between the parties and establish co-operation between them." (Counter-Memorial of Chad, Vol. I, p. 505, para. 11.68.)

51. In the terms of the title, text and content of the Treaty, the view of Chad seems to me to be the correct approach, even though each of the parties could aim at a kind of *quid pro quo*. This was expressed in a letter of 5 January 1955 from the British Embassy in Paris to the Foreign Office in London, based on the information provided by Mr. Jerbi, one of the members of the Libyan delegation at the negotiations of the Treaty. According to the letter:

> "the French Government had taken the view at the outset of the January negotiations that France was willing to withdraw its forces from Fezzan provided certain related questions were settled at the same time, one of them being that 'the frontier between Fezzan and French territory must be properly delimited'" (Memorial of Libya, Vol. 1, p. 375, para. 5.446).

52. It should also be remembered that at this time between 1953 and 1954, Britain and the United States of America had concluded agreements on security and alliance with Libya, while France was left out.

53. Whatever may be the motive of the parties independently, there is no doubt that the object and purpose of the 1955 Treaty was to ensure friendship and good neighbourliness between the parties. The special rule of interpretation of treaties regarding boundaries is that it must, failing contrary evidence, be supposed to have been concluded in order to ensure peace, stability and finality. Many multilateral conventions have provisions safeguarding and ensuring stability and finality with regard to boundary treaties. An example of such treaties is the 1978 Convention on the Succession of States in Respect of Treaties (which I referred to above) especially Article 11 therein, which stipulates that a succession of States does not alter or affect a boundary established by a treaty, and neither does it affect the obligations and rights established by such a treaty when

it involves the issue of boundaries. Similarly, in the 1969 Vienna Convention on the Law of Treaties, Article 62, paragraph 2 *(a)*, provides:

> "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty
>
> (a) *if the treaty established a boundary.*" (Emphasis added.)

54. Furthermore, Article 62, paragraph 2, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations also created an exemption regarding boundary treaties by stating that:

> "A fundamental change of circumstances may not be invoked as ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations *if the treaty establishes a boundary.*" (Emphasis added.)

55. The 1955 Treaty does not exclusively deal with the issue of boundaries, nevertheless it is common ground that it is partially a boundary treaty in view of Article 3 of the Treaty and Annex I thereto. Failing proof to the contrary, this Article must be viewed as a provision inserted by both parties to establish and ensure some degree of stability and finality with regard to their boundary.

56. The jurisprudence of the Court in matters of conventional boundaries lends firm support to the above analysis. The celebrated authority on this point is the clear pronouncement of the Court in the case concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)*, decided in June 1962. The Court in that case established the principle of stability and finality as follows:

> "In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious." (*I.C.J. Reports 1962*, p. 34.)

57. Perhaps this decision of the Court, with its judicial flavour of *quieta non movere,* was aimed at ensuring finality and certainty on any dispute presented to it, and thereby preventing protracted and endless litigation which at times provoke hostilities and armed conflict.

58. The object and purpose of the 1955 Treaty as a whole was undoubtedly multiple, since it was a Treaty with so many dimensions, containing *inter alia* a particular convention on good neighbourliness spelling out how to effect "good-neighbourly relations", by, for example, ensuring the free movement of citizens from one territory to the other; a convention on economic co-operation; and also a cultural convention on education, language, etc. It also contains many annexes to spell out the objects and purposes of the Treaty comprehensively. But it is equally clear that a part of the object and purpose of the Treaty was to establish once and for all the Libyan southern boundary. This was in fact, to my mind, accomplished.

(ii) *Integration Approach*

59. While it is not my wish to treat the "intention approach" as a distinct heading of interpretation in this opinion — if only because such an approach may be over-subjective and thus undesirable (the Court has never followed this approach either) — whatever substance, if any, can be derived therefrom can easily be discussed and subsumed under the integration approach, which may perhaps highlight the intention of both Parties. The integration approach will equally deal adequately with the entire content of the 1955 Treaty in the way expressed thus in Article 31, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties:

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its *preamble and annexes:*
>
> *(a)* *any agreement* relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> *(b)* *any instrument* which was made by one or more parties in connection with the conclusion of the treaty *and accepted by the other parties* as an instrument related to the treaty." (Emphasis added.)

60. Handling the interpretation of the 1955 Treaty under what is here referred to as an integration approach cannot but touch on some of the points earlier referred to under "object and purpose", which I do not intend to repeat. Again, it must be observed that each Party, in the presentation of its case to the Court, submitted volumes of diplomatic documents, including correspondence, agreements, notes or *procès verbaux*, and maps. These documents were effectively used during the oral proceedings. On the diplomatic documents relating to the period from January to August 1955, some important and pertinent observations can be made. It may be appropriate to start from the Laval-Mussolini Treaty of 1935, which was in the limelight between 1935 and 1955. That Treaty undoubtedly featured a boundary which gave Libya some advantage or concession (even though this was disputed by Libya). It went with a map which put the entire "Aouzou strip" within the territory of Libya. Even

though the Treaty was signed it was not exchanged between the parties. Italy refused to do so because it accused France of a breach of faith with regard to what was agreed on the concession to be granted to Italy, in connection with its colonies in Eritrea and Somalia.

61. This 1935 Treaty underlay a map that indicated the boundary which Italy, and subsequently Libya, erroneously relied upon for some time and which brought about a conflict of opinions between Italy and France before 1947, and between Libya and France before the signing of the 1955 Treaty.

62. Thus, between 1935 and 10 August 1955, two incidents occurred which clearly gave an indication of the stands of both parties with regard to the boundary south of Libya. The incidents were the Jef-Jef incident in 1938 and Aouzou incident on 28 February 1955. Even though the facts were disputed by the Parties, it is obvious that while France was relying on the 1899/1919 frontier as Libya's boundary to the south with Chad, Italy still relied on the 1935 line. These incidents are significant for two reasons. On the Jef-Jef incident, there was a tacit understanding that Italy (and Libya for that matter) could not rely on the 1935 Treaty, the ratification of which was not exchanged. On the Aouzou incident, there was also a tacit understanding that, since the 1935 line was no longer in place, the parties agreed to revert to the 1899/1919 line.

63. Between January and 10 August 1955 (when the 1955 Treaty was signed) there were as many as 64 documents dealing with negotiations on the draft text or what should be the agreed context of the Treaty. Seventeen deal with the Aouzou incident, while others deal with maps, controversies and the movement of French troops from Fezzan. Even though there are conflicting views and different interpretations attached to these documents by the Parties, a reasonable formulation of what may be considered as a consensus *ad idem* clearly emerged. On the Libyan side, the most important issue was the movement of the French troops out of Fezzan, and it was equally prepared to give "concessions" if this movement out of Fezzan could be completed as soon as possible. Libya was also interested in any form of assistance from France. France, for its part, made the issue of the Libyan southern boundary a *conditio sine qua non*, and as far as it was concerned the 1899/1919 lines had to be recognized as the frontier line.

64. Furthermore, contrary to the submission made during the oral proceedings by Libya, France was not, in my opinion, absolutely happy about the 1955 Treaty. The situation and circumstances of that period gave a clear indication that France just had to swallow a bitter pill by signing such an agreement. Reading all the relevant documents, it is clear that what France wanted at the material time was not a treaty of friendship and good neighbourliness, but a treaty of alliance with Libya like the ones it signed with Britain in 1953 and the United States of America in

1954. Take, for example, the Defence Committee of the French Union which, while giving as part of its conditions for the ratification of the 1955 Treaty, stated as follows:

> "1. Any Franco-Libyan agreement must, on account of its military and good neighbourliness conventions, take the form of a treaty of alliance, so as to constitute *de jure* recognition by the Libyan State of the sovereignty of France over its African territories.
>
> 2. This treaty must recognize our right to bring Fezzan under military occupation again in time of war or in the event of a crisis, the definition of which will have to cover our African security in the vicinity of this region." (Memorial of Libya, Vol. 6, Exhibit 76, p. 1051.)

65. In fact, the Assembly of the French Union expressed regret with regard to the draft Treaty of 1955, when it expressed an opinion as follows:

> "*(a)* that the insufficiency of Western solidarity has not allowed France to preserve its position in Fezzan as would have been appropriate, such shortcomings in solidarity being liable to compromise the Atlantic Alliance" (*ibid.*, p. 1050).

66. In the overall context of the Treaty, therefore, France did not, in fact, achieve its aim, and a careful reading of what transpired in its Parliament, especially during the debates of the meeting of 22 November 1955, will throw some light on this view. In his explanation to the National Assembly of France on the Treaty, Mr. Daniel Mayer, the Chairman of the Foreign Affairs Commission and Rapporteur, touched on what France would have wanted from Libya, regarding such a Treaty, if it could have had its way:

> "At the time, France sought to conclude with the new Federal Kingdom *an alliance* that would have placed her, in Fezzan, in a situation analogous to that of Great Britain in Tripolitania and Cyrenaica.
>
> It was unfortunately impossible to accomplish that objective since the Agreements signed in 1953 with Great Britain and the following year with the United States, had amply provided our interlocutors with the resources they needed and enabled them to disregard the very modest *quid pro quo* we were able to propose to them in exchange for a right of permanent occupation of Fezzan, where our troops had been stationed since 1942." (*Ibid.*, Exhibit 71, p. 5017; emphasis added.)

67. Mr. Mayer went further in his address to the French National Assembly, lamenting the possible political and psychological consequences of the failure of France to secure the best deal from Libya and its having to content itself with the second best agreement — the 1955 Treaty:

> "Admittedly, this treaty can give rise to criticism and it involves, on our part, *concessions liable to hurt our pride in certain respects.*
>
> Since our troops covered themselves with glory in the Fezzan, our African army will no doubt be sensitive to the withdrawal of our forces from there." (Memorial of Libya, Vol. 6, Exhibit 71, pp. 5017-5018; emphasis added.)

68. There is no doubt that Fezzan was a very thorny issue in this Treaty, when Libya was in fact prepared to pay the price to get rid of the French troops (about 450 soldiers in all) from its territory and France was most reluctant to leave Fezzan. To France, Fezzan was a strategic area of importance with regard to its colonies in North Africa vis-à-vis Equatorial Africa. France even considered that she was left out in the cold, because while British and American troops were being welcomed into Libya, her own troops were being asked to move out under this 1955 Treaty. But at the same time France understood that it would be better to move out honourably and free from Fezzan than:

> "to evacuate it within a few weeks, perhaps within a few days, after being condemned by a near-unanimous vote in the United Nations, where, it cannot be denied, we would be very hard put to find any argument in support of our continued occupation of the area . . ." (*ibid.*, p. 5025).

69. In fact, Mr. Jacques Soustelle, in the National Assembly referred to the 1955 Treaty as follows: "Treaty of Friendship? What friendship is this?" (*Ibid.*, p. 5022.)

70. Nevertheless, it remained clearly expedient and desirable for France to sign such an agreement with Libya. In the absence of an alliance, France needed peace and good neighbourliness from Libya with its own new and powerful "allies"— Britain and the United States of America. This was clearly reflected in the debate at the French National Assembly:

> "True, there is no more praiseworthy aim than that of establishing or consolidating *peace and good neighbourly relations in any part whatsoever of areas containing so many hotbeds of violence.*" (*Ibid.*, p. 5020; emphasis added.)

71. It is therefore my view that in order to establish an atmosphere of peace and stability between the two nations, a clear and distinct delimitation of their respective boundaries was a *conditio sine qua non.* Hence the importance of Article 3 with Annex I of the 1955 Treaty, which in my opinion clearly established a frontier as agreed to and never denied either by Libya or France until recently (by Libya). If, on the other hand, one considers the entire content of the negotiations that took place between France and Libya before the signing of the 1955 Treaty on 10 August,

there is no doubt whatsoever that both parties reached agreement to establish a boundary between them as indicated in Article 3 of the Treaty.

72. As early as 2 January 1955, the Libyan negotiator, Mr. Mustapha Halim, while discussing the question of negotiation with France, said:

> "I am asking for the final and unconditional evacuation of Fezzan and I shall not go back on what has already been said.
>
> As you [France] are afraid that there may be disturbances on your frontier, I am resolved to conclude an agreement with you." (Reply of Libya, Vol. 3, Exhibit 6.4, p. 2.)

73. The overall or general consideration which was to form the basis of their negotiations and which ultimately led to the agreement of the 1955 Treaty, was thus made clear by Libya from the inception. One can see the necessary element of *quid pro quo* between both parties. Another important point prior to the commencement of this negotiation must also be kept in view. The agreement that France signed with Libya on its independence (24 December 1951) with regard to the French troops on the soil of Libya (in Fezzan) expired on 31 December 1954 and France was expected to evacuate its troops from Fezzan.

74. The record of the initial negotiations between France and Libya of 8 March 1955 shows very clearly what each party agreed to. While France gave an undertaking to: "withdraw its military forces currently stationed in Fezzan within a period of 12 months after the entry into force of the treaty" (*ibid.*, "Négociations franco-libyennes — Projet de procès-verbal", p. 2), this was qualified by Libya which considered that such evacuation should be completed "by 31 December 1955 or, at the latest, ten months after the signature of the treaty, which should be concluded as early as possible" *(ibid.)*.

75. The issue of the frontier was also dealt with in the same draft agreement. In section IV of the same summary record of Franco-Libyan negotiations, Libya definitively agreed with France as follows:

> "The two Governments agree, so far as the *frontier line* between the *French and Libyan territories* is concerned, to *abide* by the general provisions contained in the *international instruments in force* on the date of the *establishment of the Libyan State.*" (*Ibid.*, p. 5; emphasis added.)

76. There are some important points to be noted in the text of this negotiation. In the first case, some of the words employed are similar, if not the same, as those contained in the final text of Article 3 of the 1955 Treaty. Words like "frontier", "territories", "in force" and "international instruments" are common to both texts, which clearly shows that Libya all along desired to negotiate an agreement on the frontier issue. Furthermore, Libya agreed to *"abide by"* the general provisions of the relevant international instruments. This clearly indicates that even though Libya might before then have been nursing some doubts about this particular frontier, it then agreed to stand by it. It should also be

observed here that, unlike the final text of the 10 August 1955 Treaty, this draft negotiation record referred to the *"frontier line between the French and Libyan territories"*, which is a clear and unambiguous reference to the southern boundary of Libya. About this time, a letter from one of the French High Commissioners in French Equatorial Africa, Mr. Chauvet, vividly demonstrated the way France wished to couple the evacuation of French troops from Fezzan to the delimitation of the boundary to the south of Libya. In his letter he advised as follows:

> "In order to anticipate any subsequent claim by Libya to the *portion of Tibesti then ceded to Italy*, Mr. Colombani considers that the *withdrawal of the French troops from Fezzan*, if this should be decided, should be made conditional on the *fixing and demarcation of the frontier line* as defined by the *Franco-British Declaration of 21 March 1899*." (Reply of Libya, Vol. 3, Exhibit 6.5, Letter of 10 February 1955, p. 1; emphasis added.)

77. By July 1955, the position of both parties was very clear, as may be ascertained from the preliminary draft of the "Treaty of Friendship and Good Neighbourliness" negotiated in Tripoli, which served as the basis of the final text in August (*ibid.*, Exhibit 6.6, p. 1).

78. In conclusion on this part, there is no doubt that both parties, just as they agreed that France should evacuate its troops from Fezzan, equally and undoubtedly agreed that the frontier to the south of Libya should be delimited, and in fact, they carried out this intention within the context of the Treaty.

(iii) *Good Faith*

79. The principle of good faith is a fundamental one in interpretation of treaties. In this context good faith is essentially the good faith of all the parties to the treaty. It is a principle that is closely interwoven with the principle of *pacta sunt servanda*, as clearly stated in Article 26 of the 1969 Vienna Convention on the Law of Treaties which says that "every treaty in force is *binding* upon the Parties to it and *must* be performed by them in *good faith*" (emphasis added). In addition to this, certain provisions of the United Nations Charter give very strong support to this principle. A part of its preamble states that the United Nations would:

> "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained".

Furthermore, Article 2, paragraph 2, of the Charter enjoins:

> "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall *fulfil in good faith the obli-*

gations assumed by them in accordance with the present Charter." (Emphasis added.)

80. Elias, in his book [1] referred to some of the arbitral and judicial decisions on this point. Such an example is the *North Atlantic Fisheries* case [2]. In this case, after the Arbitral Tribunal had observed that the principle of international law is that treaty obligations are to be executed in good faith, it further held:

> "But from the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the Treaty."

81. The Permanent Court of International Justice also made many pronouncements on the principle of good faith [3]. The Court applied it, in the case concerning the *Rights of Nationals of the United States of America in Morocco*, to the interpretation of Articles 95 and 96 of the Act of Algeciras, pronouncing as follows: "The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith." (*I.C.J. Reports 1952*, p. 212.)

82. If there is an obligation on the part of all the parties not to defeat the object and purpose of a treaty prior to its entry into force (Article 18 of the Vienna Convention), the parties are *a fortiori* also under obligation not to defeat such objects and purposes of a treaty when it has ultimately entered into force. In fact, the original International Law Commission draft of Article 18 of the Vienna Convention contained a provision, subsequently discarded as unnecessary, that the parties to a treaty (after its execution) must refrain from any act that may prevent its application [4].

83. In final analysis, execution in good faith is essential to the protection of the "considerations" mutually granted by and between the parties in a treaty, to use a term from the Law of Contracts in Common Law. "Good faith" implies that all parties to a treaty must comply with and perform all their obligations. They may not pick and choose which obligations they would comply with and which they would refuse to perform, ignore or disregard. Treaties like any agreement may contain obligations "beneficial" or "detrimental" to a particular party or parties, neverthe-

[1] T. O. Elias, *The Modern Law of Treaties*, 1974, p. 41.

[2] United Nations, *Reports of International Arbitral Awards (UNRIAA)*, Vol. XI, p. 188.

[3] Examples are (1) *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 28; (2) *Minority Schools in Albania, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 64*, pp. 19-20.

[4] *Yearbook of the International Law Commission*, 1952, Vol. II, p. 7.

less, all the obligations, whether executory or not, must be performed. Hence Elias remarked further:

> "Accordingly, performance in good faith means not only mere abstention from acts likely to prevent the due performance of the treaty, but also presupposes a fair balance between reciprocal obligations." [1]

84. In order to sustain the necessary compromissory equilibrium, or what Elias called "fair balance", in this case, each of the Parties must be seen to carry out all its part of the obligations. Libya cannot pick and choose which obligations it would perform, neither can France. The fundamental considerations in this Treaty of 1955, the *quid pro quo,* are the issue of France's evacuation from Fezzan and the issue of Libya accepting that Article 3, with Annex I, of the 1955 Treaty had recognized and established the Libyan southern boundary with Chad. This is the fundamental basis of the package deal, as joint and indivisible obligations opposable to both parties. Rosenne, in one of his articles [2] remarked on good faith thus:

> "It is a *cardinal principle* of interpretation that a treaty should be interpreted in *good faith* and not lead to a result that would be *manifestly absurd or unreasonable.* The interpretation by the Secretary-General and by the Security Council of the provisions of the Statute on the filling of casual vacancies in this case may be held up as an illustration of an interpretation meeting this condition." (Emphasis added.)

85. A second look at the 1955 Treaty plainly indicates many obligations on the part of France to be performed which are all quite beneficial to Libya and which were in fact performed. Some of these obligations are contained in the Convention on Economic Co-operation and also Annex V to the Treaty. In Annex VIII, for example, France transferred to Libya:

> "I. Those buildings, which were formerly Italian, together with the buildings erected by the French forces (with the exception of the group of buildings marked 'G' on the attached plan) shall be *transferred to the full ownership of the Libyan authorities.*" (Memorial of Libya, Vol. 2, Exhibit 28, p. 15.)

86. This content of Annex VIII was replied to by Mustapha Ben Halim on the same date — 10 August 1955, confirming "that the Government of Libya is in agreement with these proposals" *(ibid.)*. This

[1] *Op. cit.*, p. 43.
[2] "The Election of Five Members of the International Court of Justice in 1981", 76 *American Journal of International Law*, 1982, pp. 365-366.

is a clear example where a part of the obligation and benefit contained in the Treaty had been executed. One wonders why any other obligation contained in the same Treaty should be treated differently. McNair describes good faith as follows:

> "The performance of treaties is subject to an *over-riding obligation of mutual good faith.* This obligation is also operative in the sphere of the interpretation of treaties, and it would be a breach of this obligation for a party to *make use of an ambiguity* in order to put forward an interpretation which it was known to the negotiators of the treaty not to be the intention of the parties." [1] (Emphasis added.)

87. This, perhaps, summarizes the situation in this case, where negative interpretation is now being placed on a part of an Article (Article 3 with its Annex I) by Libya in this matter, while some aspects of it are considered operative and effective. To interpret this Treaty, therefore, in good faith one must treat all aspects of it and particularly Article 3, with its Annex I, as equally valid, and as equally binding.

(iv) *Travaux Préparatoires*

88. In the interpretation of treaties, preparatory work and the circumstances of their conclusion are considered as secondary or supplementary means, either for confirming the primary meaning or for determining the same when other means of interpretation lead to results which are either obscure, or ambiguous, manifestly absurd or unreasonable. This is stated in Article 32 of the Vienna Convention. For actually determining the meaning, I doubt that there is any need at all to resort to the *travaux*, firstly because the primary means of interpretation do not leave any residue of ambiguity or absurdity, and secondly because the voluminous items of correspondence, maps, negotiation documents, reports and parliamentary debates presented to us as forming part of the *travaux préparatoires* are themselves frequently subject to conflicting interpretations.

(v) *The Subsequent Acts of the Parties*

89. In rounding off my opinion on the interpretation of the 1955 Treaty, I must consider whether the situation or the acts of the Parties after the Treaty had come into effect have any relevance. The need for this transpires from paragraph 3 of Article 31 of the Vienna Convention on the Law of Treaties of 1969 which states as follows:

"There shall be taken into account, together with the context:

[1] *The Law of Treaties*, 1961, p. 465.

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

90. Some international instruments were mentioned by the Parties, but given different interpretations. The Agreement of 26 December 1956 took the form of an exchange of letters concerning delimitation of the Franco-Libyan frontier with regard to the boundary between Algeria and Libya. It amounted to a modification or rectification of the boundary line established on 12 September 1919 between Italy and France. This boundary negotiation and the subsequent Accord has nothing to do with the frontier in issue in this case.

91. The linkage of this Agreement with the 1955 Treaty is that the line of September 1919, which is mentioned in the said letter of 26 December 1956 addressed to the Minister for Foreign Affairs of Libya, Mr. Ali Sahli by Mr. Jacques Dumarçay, and positively replied to on the same date, is one of the six frontier lines mentioned in Annex I to Article 3. This also is the frontier line agreed to by both parties as establishing a boundary between Libya and Algeria. If there is any conclusion to be deduced from this Agreement at all, it may be considered as still somehow supportive of the effective validity of the 1955 Treaty, otherwise this is an Agreement that is clearly separate from the boundary in dispute. This fact is confirmed by Libya in its Memorial thus:

> "The 1956 Agreement concerned the Algerian-Libyan frontier between Ghadamès and Ghat. It is relevant to the territorial dispute between Libya and Chad because it has an important bearing on the 1955 Treaty, just as does the provision of Annex I . . . of the Libyan frontier further south, between Ghat and Toummo. Since neither frontier sector concerned the present frontier area between Libya and Chad, the rectifications of these sectors of the Libyan boundary are not part of the territorial dispute between Libya and Chad." (Memorial of Libya, Vol. 1, p. 393, para. 5.485.)

92. The next international instrument to be considered is the 1966 Accord. It is the Treaty of Good Neighbourliness and Friendship between the Republic of Chad and the United Kingdom of Libya. It is significant to note that the Parties entered into this Accord when both of them had secured their independence, Libya on 24 December 1951 and Chad on 11 August 1960. It is equally important to note that before and after Chad's independence and even until the signing of this 1966 Accord, Libya had never challenged nor protested the boundary line established in the 1955 Treaty, neither did it claim that no boundary had been established. On the contrary, there are all the indications in the 1966 Accord that lend credence to the idea that Libya knew and accepted that the

frontier between it and Chad had already been established. For example, in the 1966 Accord the word "frontier" was mentioned seven times. Reading through the Agreement as ratified, one finds an unequivocal indication within the content of the Accord that both Parties were aware of the establishment of their common frontier and that they intended to keep to it where it had already been delimited. Articles 1 and 2 of the Accord throw sufficient light on this fact.

> "*Article 1*
>
> The Government of the Kingdom of Libya and the Government of the Republic of Chad undertake to take all necessary measures to ensure the *maintenance of order and security* along the *frontier* between their two countries through contact and co-operation between their respective security authorities, such measures not to affect the right of asylum as recognized in international practice.
>
> *Article 2*
>
> The Government of the Kingdom of Libya and the Government of the Republic of Chad undertake to facilitate the movement of *people living on both sides of the frontier* between the two countries within the geographical area bounded by the following points . . ." (Memorial of Libya, Vol. 2, Exhibit 32, p. 2; emphasis added.)

93. Then this Article goes on to state specified places within the territory of Libya as Koufra, Gatroun, Mourzouq, Oubari and Ghat and others within Chadian territory as Zouar, Largeau and Fada. Whatever may be the argument on the interpretation of the 1955 Treaty, it seems to me very clear from this Article that both Parties are perfectly aware of the location and establishment of their common boundary. Otherwise, if there is no frontier or such frontier is unknown, it is apparently inconceivable that both Parties would mention in the 1966 Treaty, the issue of "maintenance of order and security" or undertaking "to facilitate the movement of people living on both sides of the frontiers between the two countries". Even though Libya tried to explain this fact in its Memorial, it admitted in paragraph 5.541 on page 416 thereof that "in dealing with these questions, the 1966 Accord supports and confirms the 1955 Treaty without any doubt".

94. The last of the international acts is the notification of Chad to the Court dated 3 September 1990. Here the argument of Libya is that since Chad had included in it two other agreements, viz., the Protocol of 10 January 1924 and the Declaration of 21 January 1924, which were not included in Annex I to Article 3 of the 1955 Treaty, the listing of such international acts is not exclusive, and no boundary could possibly have been established. This argument of Libya is contained in its Memorial at paragraph 5.475. This, to me, is not an impressive argument at all. Whatever Chad may attempt to add in a separate context to the list featured

in Annex I, cannot *ex hypothesi* form part of that Annex as attached to Article 3. It is not necessary to read into Annex I or for that matter Article 3, what is not contained therein. The Article as it stands, with the six international instruments, sufficiently established the necessary boundaries as intended by both parties. It is, therefore, not difficult for me to conclude on this point that, notwithstanding contrary arguments, the subsequent acts of the Parties support and confirm the frontiers as indicated in Article 3, with its Annex I, of the 1955 Treaty.

95. I have now in support of the decision of the Court, concluded what I may call my intrinsic interpretation of the 1955 Treaty, and in particular the provision of Article 3, with Annex I thereof, and my view is that the Treaty has *inter alia* established the frontier between Libya and Chad. What I now wish to examine are other means of verification of my conclusion, and this I have decided to call extrinsic interpretation. Before I conclude this separate opinion, I therefore wish to examine the role that the principles like acquiescence, estoppel, recognition and *uti possidetis juris* could possibly play in this matter. The analogous concept of preclusion or foreclusion may also be touched upon.

VI. Estoppel, Acquiescence, Preclusion and Recognition

96. Estoppel in international law is a developing principle that it may be difficult to classify at this moment, either as forming part of customary international law or as belonging to the general principles of international law. It has its historic root, perhaps not only in the common law but also in civil law systems, which also include among their concepts "preclusion" or "foreclusion". Hence, in international arbitral or judicial tribunals estoppel and preclusion have tended to be referred to interchangeably or indiscriminately. In many instances they are bound up with the doctrine of acquiescence, which is at times described as absence of protest. MacGibbon, who considers acquiescence as an estoppel, said:

> "The growing frequency with which use is made of arguments based upon the principle of estoppel affords a valuable indication of the extent to which the doctrine of acquiescence itself constitutes a precept for equitable conduct in which considerations of good faith are predominant." [1]

97. Judge Sir Hersch Lauterpacht also expressed the view that absence

[1] "The Scope of Acquiescence in International Law", *British Year Book of International Law*, Vol. XXXI, 1954, p. 147.

of protest may in itself become a source of legal right in relation to estoppel or prescription [1].

98. In other words, acquiescence amounts to tacit or implied consent, which may constitute an admission or recognition. This I believe to be apposite to the present case. As an acquiescent State, Libya is precluded from denying or challenging the validity of the boundary established by the 1955 Treaty. What then, precisely, is estoppel in international law? McNair expressed the principle in a simple way thus:

> "It is reasonable to expect that any legal system should possess a rule designed to prevent a person who makes or concurs in a statement upon which another person in privity with him relies to the extent of changing his position, from later asserting a different state of affairs. *Allegans contraria non est audiendus*, or in the vernacular: 'You cannot blow hot and cold.'" [2]

Elias expressed a similar view thus:

> "Equally, a state must be precluded from subsequently invoking any ground of which he had become aware but in which it has acquiesced. This would amount to what in certain legal systems is called estoppel by conduct." [3]

99. In short, estoppel entails reliability, good faith, finality, stability and consistency. As Judge Anzilotti once remarked, the silence maintained by a State may mean consent after a situation has been notified or become generally known [4]. Verykios confirmed the statement of Anzilotti when he also remarked that it is generally admitted that long silence maintained without reason is equivalent to consent [5].

100. Recognition is also considered as an aspect of estoppel. It has generally been admitted that every act of recognition creates an estoppel [6]. There are also provisions in the Vienna Convention on the Law of Treaties of 1969 which give sufficient indication as to the justification and legitimacy of these principles. For example, Article 45 deals with the loss of right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty.

101. Article 45 states that such a right may be lost if by reason of the conduct of a State it can be considered that it has acquiesced in the validity of the treaty or in its maintenance in force or in operation as the case may be.

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[1] *British Year Book of International Law*, Vol. XXVII, 1950, pp. 395-396.
[2] *The Law of Treaties*, 1961, Chap. XXIX, p. 485.
[3] *The Modern Law of Treaties*, 1974, p. 141.
[4] *Cours de droit international*, 1929, p. 344.
[5] *La prescription et droit international*, 1934, p. 26.
[6] Schwarzenberger, "The Fundamental Principles of International Law", *Collected Courses of the Hague Academy of International Law*, 1955, Vol. 87, p. 253.

102. We may now ask what has been the attitude of both the Court and the Permanent Court of International Justice regarding these principles. One can say that there are about six such cases, mostly involving territorial claims and one dealing with the procedural question of jurisdiction. I shall now deal with some of these cases highlighting important aspects of them with regard to estoppel, acquiescence, recognition, etc.

(i) *Legal Status of Eastern Greenland*[1]

103. In 1933, the Permanent Court of International Justice had to decide on the issue of the Danish claim of sovereignty over Greenland. The Court held that Norway could not object to the Danish claim because the Norwegian official had previously made a statement which is not consistent with such claim. The pronouncement of the Court was clear:

> "The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs." (*P.C.I.J., Series A/B, No. 53*, p. 71.)

104. The Court in its Judgment made it clear that even though the undertaking given by Mr. Ihlen may not constitute a definitive recognition of Danish sovereignty, but at least it did constitute an engagement obliging Norway to refrain from occupying any part of Greenland which in effect is tantamount to estoppel.

(ii) *Fisheries* case (*United Kingdom* v. *Norway*)[2]

105. It is in this case that the Court first pronounced on international estoppel without actually saying so in 1951. Norway effected the delimitation of its coastline along the North Sea which was objected to by the United Kingdom, hence the filing of the Application by the latter. The Court observed that Norway had consistently, for a period of over 60 years, been exercising such a right of delimitation without any protest or the same being contested by the United Kingdom, who must have had

[1] *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22.

[2] *I.C.J. Reports 1951*, p. 116. See also (1) *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), I.C.J. Reports 1960*, p. 192; (2) *Nuclear Tests (Australia* v. *France), I.C.J. Reports 1974*, p. 253; (3) *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), I.C.J. Reports 1984*, p. 246.

notice of the same. The Court held that the United Kingdom's silence for such a long period amounted to acquiescence hence Judgment was given in favour of Norway. The Court held:

> "The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.
>
> The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom." (*I.C.J. Reports 1951*, p. 139.)

(iii) Case concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)* [1]

106. In 1962, the Court also had the opportunity to pronounce on international principles of estoppel in this case between Cambodia and Thailand with regard to their boundary dispute. As a result of the Agreement entered into in 1904 between the then French Indochina and Siam (now Thailand), the surveyors produced 11 maps which were sent to the Thai Government who never objected to them. Consequently, it was realized later that the valuable and important Preah Vihear promontory together with the Temple was on the Cambodian side of the frontier. The Court held that Thailand's failure to object to the particular map when it ought to do so compelled it to recognize the boundary as established. The conclusion of the Court (which is similar to the situation in this case with regard to the 1955 Treaty), is very remarkable and important to note:

> "The Court will now state the conclusions it draws from the facts as above set out.
>
> Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier." (*I.C.J. Reports 1962*, p. 32.)

107. The Court established this principle of international estoppel definitively for all time in the case quoted above as follows:

> "In fact, as will be seen presently, an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were

[1] *I.C.J. Reports 1962*, p. 6.

> otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*" (*I.C.J. Reports 1962*, p. 23.)

108. There are many awards of international tribunals also supporting the principles of estoppel or acquiescence in the sense of silence or absence of protest. To mention a few, one may refer to the *Alaskan Boundary* case, where the occupation and possession of Alaska for over 60 years, first by Russia and then by the United States of America, disentitled Great Britain to its claim over the territory, since there was never any British objection or protest at such occupation. In the *Delagoa Bay* Arbitration of 1875, the Award was given in favour of Portugal against the Dutch and the Austrians, because of Portugal's continued claims to sovereignty without any objection or protest on the part of Austria or the Netherlands. The same result was given in the *Guatemala/Honduras Boundary* Arbitration in favour of Guatemala.

109. In 1909, in the *Grisbadarna* Arbitration between Sweden and Norway, the Permanent Court of Arbitration in its award decided that Norway had acquiesced in certain acts of Sweden; consequently, the claim of Sweden was upheld. To complete this picture of international awards, mention must be made of the celebrated Award of Judge Huber in the *Island of Palmas* Arbitration, where the arbitrator adjudged that, as between the Netherlands and the United States of America, the latter had a better title to the disputed island, because of its continuous and peaceful display of State authority during a long period of time, which Spain and others had acquiesced in.

110. All these legal, judicial as well as arbitral references fortify my view, based on the principle of estoppel, that the silence or acquiescence of Libya from the date of signing the 1955 Treaty to the present time, without any protest whatsoever, clearly militates against its claim.

111. There were many occasions, some of which I have referred to, when Libya could have protested to Chad or even France (between 1955 and 1960) that the Treaty was invalid or had failed to create the expected boundary, yet Libya was silent. Since 1955, Libya had many opportunities to protest against this frontier but it did nothing. Instead, it signed another Treaty with Chad in 1966 without making mention of any defect or presenting a case of nullity or even raising any objection whatsoever against the 1955 Treaty. On the contrary, the Treaty of 1966 apparently

confirmed the boundary established by the 1955 Treaty because in 1966 it recognized that there was a boundary in place. Another opportunity that knocked at the door of Libya was in 1964, during the Cairo Conference of the Organization of African Unity, when at least four nations, including Somalia and Morocco, protested at the Cairo Declaration, but Libya did not. It did not oppose the Declaration based by the Conference on the principle of intangibility of frontiers.

112. Perhaps one should have started with 11 August 1960, when Chad secured her independence. That was a unique opportunity for Libya to protest the boundary of Chad as presented by France to the United Nations. But on the contrary, all that Libya did was to welcome Chad into the fold of independent States — there was no protest of any kind. Next, one may ask what Libya did all the time that it was being repeatedly accused of aggression before international and regional bodies? Chad, on many occasions, presented its case against Libya before the General Assembly and the Security Council. It also took its case before the Organization of African Unity. But Libya continued either to flatly deny occupying Aouzou or (at a later stage) claimed the 1935 Laval-Mussolini frontier, and, of course, that is a line not accepted by both Parties, because the ratifications were not exchanged. Chad started from the 1970s to take its case to appropriate international bodies which dealt politically and legally with inter-State disputes. But Libya did nothing.

113. Libya submits that Chad is estopped from claiming any longer the Aouzou strip. But Chad kept protesting all along against what it considered an illegal occupation by Libya. Chad, at the General Assembly of the United Nations, accused Libya of acts of aggression in 1971, 1973 and 1974. It was part of Chad's case that it made its complaint to the Organization of African Unity in 1977 and kept the same before that body for 11 years, but Libya's reaction, according to Chad, was merely evasive. It may be necessary to quote Chad's list of protests, some of which Libya even confirmed:

> "Of course, Chad, too, insisted that there was a frontier, the frontier described by the 1955 Treaty and its annexed instruments, and it protested Libya's violation of that line. Chad complained to the United Nations General Assembly as early as 1971 that Libya harboured expansionist aims; it had not actually arrived yet. Thereafter it protested vociferously against Libya's invasion: at first to Libya, as we have seen from Professor Sorel, then to the General Assembly in 1977, 1978, 1982, 1983, 1984, 1985, 1986 and 1987, and the Security Council in 1978, 1983, 1985 and 1986. It stated that Libyan forces had crossed the 1955 line, that the invaders were still there,

and that they ought to be required to withdraw back behind that frontier." (CR 93/31, p. 80.)

114. The sum total of my view on the issue of estoppel, acquiescence, recognition, etc., is that while I do not agree with Libya's claim of acquiescence against Chad over its (Libya's) occupation of Aouzou, I am convinced that, by the silence and conduct of Libya, there is, without doubt, a strong case for saying, in favour of Chad, that Libya is estopped from denying the 1955 Treaty boundary since it has acquiesced in and in fact recognized it.

VII. *Uti Possidetis*

115. The term *uti possidetis juris* has its historical origin in Roman law. It was designated as a formal order of the Praetor which forbade the disturbance of any immovables between two individuals once it could be proved that the possessor of such immovables was in peaceful possession without use of force and had not clandestinely obtained permission given by the claimant *(nec vi, nec clam, nec precario ab adversario)*. Niebuhr opined that the origin of the procedure was to protect the occupants of the public land even though they could not show original titles and hence could not sustain an action in title or ownership. The writ is therefore designed to give such people the recognition and sanction of the State. The possessor, once issued with this award, was forever free from any molestation or claim by the adversary because this interdict served as the possessor's title. Soon it became an auxiliary process used in determining which of two claimants had a better title. The Praetor framed the formula thus:

> *"Uti eas aedes, quibus de agitur, nec vi nec clam, nec precario alter ab altero possidetis, quominus ita possideatis, vim fieri veto."*

Standardly translated to mean:

> "Whichever party has possession of the house in question, without violence, clandestinely or permission in respect of the adversary, the violent disturbance of his possession I prohibit." [1]

116. The final text of the decree is formulated in a very elegantly worded manner as follows *"uti possidetis, ita possideatis"* "as you possess, so may you possess". This principle has, however, been developed in

[1] John Bassett Moore, *Memorandum on Uti Possidetis*, 1911, p. 6.

international law not as a mere recognition of possession, but also as a justification of territorial rights and sovereignty.

117. Nowhere in the world has the principle of *uti possidetis* been more greatly developed than in Latin America, with regard to the settlement of States' boundaries at the beginning of the nineteenth century, especially in the former Spanish colonies in South and Central America.

118. The doctrine of *uti possidetis* in this region of the world is based on the concept that there was nothing like *terra nullius* even during the Spanish and Portuguese colonial rule and regardless of whether the territory in question was physically occupied at the material time or not. The assumption here, as a general principle, is that boundaries must remain as they were in law at the declaration of independence, namely, 1810 with regard to the Spanish colonies in South America and 1822 for those in Central America. Before going further it must be observed that hitherto the idea of *uti possidetis* used to be employed by international lawyers to connote a method of determining the territorial changes that had occurred as a result of an armed conflict. But it cannot be denied that it was in Latin America that *uti possidetis* was given a definitive meaning and application because of its apparent advantages. It was a convenient principle to apply within such a region where all the emerging independent States (with the exception of Brazil which was a former colony of Portugal) were formerly under Spanish rule. *Uti possidetis* is based on constructive possession since the Spanish administrative provinces were not effectively occupied to the knowledge and understanding of the new independent States. A very clear picture of this principle is reflected in the Colombia-Venezuela Arbitral Award of 1922, where the Swiss Federal Council remarked:

> "When the Spanish colonies of Central and South America proclaimed themselves independent in the second decade of the nineteenth century, they adopted a principle of constitutional and international law to which they gave the name *Uti Possidetis Juris* of 1810, with the effect of laying down the rule that the bounds of the newly created Republics should be the frontiers of the Spanish Provinces for which they were substituted. This general principle offered the advantage of establishing an absolute rule that there was not in law in the old Spanish America any territory without a master; while there might exist many regions which had never been occupied by the Spaniards and many unexplored or inhabited by non-civilized aborigines, these regions were reputed to belong in law to whichever of the Republics succeeded to the Spanish Province to which these territories were attached by virtue of the old Royal Ordinances of the Spanish Mother Country. These territories although not occupied in fact were by common consent deemed as occupied in law

> from the first hour by the new Republic. Encroachments and untimely attempts at colonization on the part of the adjacent State, as well as occupations in fact became without importance and without consequence in law. This principle had also the advantage of suppressing as it was hoped, disputes as to limits between the new states . . ."[1]

119. Thus the doctrine formed part of the constitutional and international law of the States in Latin America. However, at least in principle the doctrine served many advantageous functions; it may be considered as an extension of the Monroe Doctrine, in order to ward off possible re-colonization of the territories by declaring there was no *res nullius*, and it also served as a just and equitable foundation for the settlement of all their boundary disputes. For example, in 1847 *uti possidetis* was by and large accepted by the Latin American community as basis for the delimitation of their boundaries, as reflected in the Treaty of Confederation signed at the Congress of Lima that year. Article 7 of the Treaty reads *inter alia* as follows:

> "The Republics of the Confederation recognize, as a principle based on law, the *uti possidetis* of 1810 for the determination of their respective boundaries and in order to demarcate such limits, where they are not natural and clear, agree that the Governments of the two Republics concerned will name commissioners, who having examined the disputed territory, shall fix the boundary between the two Republics according to the water-sheds, the *thalweg* or other natural boundaries, as far as the terrain would permit . . ."[2]

120. Nevertheless, there are two schools of thought on this principle at least in its interpretation. There are those who argued that *uti possidetis* must mean merely a juridical line or constructive occupation — *uti possidetis juris* or *"de jure"*. While the other, to which Brazil apparently belongs hold the contrary view that the principle must be based on a rightful and actual occupation of the territory — *uti possidetis de facto.*

121. It must however be observed that the *uti possidetis juris* doctrine is not an exception in the field of international law. Similar principles are shared with other norms of the law like the principle of *terra nullius* already mentioned and as enunciated in the case of *Western Sahara* earlier mentioned; the doctrine of hinterland of an occupied territory which as reflected in this case led France to enter into treaties with Britain and other powers to secure for themselves zones or spheres of influence.

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[1] *UNRIAA*, Vol. I, p. 228, or Hyde, *International Law*, Vol. I, p. 503, note 16.
[2] Footnote of *Nederlands Tijdschrift voor Internationaal Recht*, Vol. XX, 1973, p. 269.

It may also be mentioned that in the *Greenland* case, Denmark's claim to the entire island was adjudged as recognized by Norway even though only part of the island was then occupied by Denmark. With regard, therefore, to the issue of delimitation or demarcation of boundaries between former colonies of Spain in Latin America, it can be generally expressed, that they all succeeded to the colonial territories devoid of any limitation based on *terra nullius* on the basis of constructive rather than actual possession. It was a kind of legal fiction, hence the use of the word *"juris"*.

122. It must however be pointed out that the application of this principle is not without its difficulties on the ground, especially where the administrative boundaries are not clear, but at least it can be said that it gave a definitive starting point. While there is no doubt that, at least, in principle the doctrine of *uti possidetis juris* is applicable and applied among all the former Spanish colonies, one cannot say so regarding non-former Spanish territories. A case in mind is that of Brazil which is a former Portuguese colony. Even though Brazil accepts in principle the doctrine of *uti possidetis* her interpretation, as already mentioned, is that there must be actual physical possession or occupation of the territory in question. As a result it was the interpretation of this doctrine as accepted by Brazil that was adopted in all the boundary dispute cases between it and other former Spanish colonial countries in Latin America as reflected in some Arbitral Awards — i.e., Argentina-Brazil in 1895. Furthermore, the treaties which Brazil finally concluded with her Spanish-speaking neighbours for the fixing of new boundaries were based on "the actual possession of the respective countries when they acquire independence" [1].

123. After giving a full background of the doctrine of *uti possidetis* it is now essential to relate its relevance to this dispute between Libya and Chad. Even though the Court did not consider it necessary to deal with this doctrine and its bearing on the present case despite the fact that both Parties mentioned it significantly in their arguments, I consider it expedient to deal with it in this separate opinion, without in any way detracting from my support for the Court's Judgment.

124. What then is the bearing and the relevance of *uti possidetis* to this dispute? Is the doctrine of *uti possidetis* of universal application and therefore applicable to all boundary disputes in Africa and therefore the dispute herein? Is the issue of intangibility of frontiers existing at the time of independence of African States mere political rhetoric with no

[1] Hyde, *International Law*, Vol. I, p. 502.

legal effect in international law? In applying the principle of *uti possidetis* to boundary disputes in Africa should it be *de facto* or *de jure*? What role if any can *effectivités* play in this regard? What is the significance of some of the recent case-laws on this doctrine? These questions and more have to be examined with regard to this case.

125. First, there is need to examine the inroad of this doctrine into Africa. There is no doubt that Africa is the most partitioned continent in the entire world. It is, therefore, not surprising to learn that as early in the history of the Organization of African Unity as 25 May 1963, by its Charter, it solemnly declares the principle of respect for the sovereignty and territorial integrity of each State and its inalienable right to independent existence — Article II, paragraph 3. This was followed by the Declaration adopted by the Assembly of the African Heads of State and Government at the Cairo Conference on 17 July 1964, which states *inter alia*:

> "*Considering* that border problems constitute a grave and permanent factor of dimension,
>
> *Conscious* of the existence of extra-African manœuvres aimed at dividing African States,
>
> *Considering further* that the borders of African States, on the day of their independence, constitute a tangible reality,
>
> *Recalling* the establishment in the course of the Second Ordinary Session of the Council of the Committee of Eleven charged with studying further measures for strengthening African Unity,
>
> *Recognizing* the imperious necessity of settling, by peaceful means and within a strictly African framework, all disputes between African States,
>
> *Recalling further* that all Member States have pledged, under Article VI of the Charter of African Unity, to respect scrupulously all principles laid down in paragraph 3 of Article III of the Charter of the Organisation of African Unity,
>
> 1. Solemnly *reaffirms* the strict respect by all Member States of the Organisation for the principles laid down in paragraph 3 of Article III of the Charter of the Organisation of African Unity;
>
> 2. Solemnly *declares* that all Member States pledge themselves to respect the borders existing on their achievement of national independence." [1]

126. Many Heads of State at the Cairo Conference explained in their statements the reason why it is necessary for Africa to adhere to the prin-

[1] Ian Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopaedia*, p. 11.

ciple of intangibility of frontiers. Many of them stressed the need for realism, stability and the desire to ensure finality on the issue. They considered this principle as the only means of reducing incessant disputes among the emerging nations of Africa. The Ethiopian Prime Minister said:

> "It is in the interest of all Africans now to respect the frontiers drawn on the maps, whether they are good or bad, by the former colonizers." [1]

The President of Mali gave a similar warning and advised thus:

> "we must take Africa as it is, and we must renounce any territorial claims, if we do not wish to introduce what we might call black imperialism in Africa . . . African unity demands of each one of us complete respect for the legacy that we have received from the colonial system, that is to say: maintenance of the present frontiers of our respective states . . . Indeed, if we take certain parts of Africa in the pre-colonial period, history teaches us that there existed a myriad kingdoms and empires . . . which today have transcended, in the case of certain states, tribal and ethnic differences to constitute a nation, a real nation . . . if we desire that our nations should be ethnic entities, speaking the same language and having the same psychology, then we shall find no single veritable nation in Africa." [2]

127. In their dissenting opinions in the case of *Sovereignty over Certain Frontier Land (Belgium/Netherlands)* both Judges Armand-Ugon and Moreno Quintana agreed that the *uti possidetis* principle should be treated as a general principle of law. This stand has since been taken by the Chamber of the Court in the *Frontier Dispute* case *(Burkina Faso/Republic of Mali)* [3]. Considering the position of newly independent States anywhere in the world, but particularly in Africa, the Chamber felt that the application of this principle ought to be universal wherever it may occur. In support of this view, one may add that it was supported in the *Temple of Preah Vihear* case and *Rann of Kutch* Arbitration which are boundary disputes relating to territories outside Africa, in the Indian subcontinent. The rationale behind this decision, as was stated by the Chamber, is not far-fetched; to prevent the independence and stability of the new States from incessant boundary disputes and endless armed conflicts, once the colonial powers had left. It is for this reason that it was thought desirable and in accord with international law by the Chamber that the new Afri-

[1] McEwen, *International Boundaries of East Africa*, p. 24.
[2] *Ibid.*
[3] *I.C.J. Reports 1986*, p. 554.

can States should respect and abide by the administrative boundaries established by their former colonial power. In strongly supporting the view of the Chamber of the Court in this case, the *uti possidetis* principle should no longer be viewed as a principle limited in its application and scope to Latin America and African States, but one of general scope and universality which has now finally emerged as a principle of customary international law. Regardless of whether some Members of the Organization of African Unity objected to this principle in 1963 and after, it is now considered to be a principle of general application to the entire boundary disputes in Africa in particular, unless parties to any dispute of this nature specifically agree to the contrary that the principle of *uti possidetis* should not be applied.

128. It is argued that the principle of *uti possidetis* as applied in Latin America — *de jure* — cannot be applied in Africa where effective occupation is required. It is futile to enter into any controversy generally on this argument and I shall not do so, but it may be sufficient to say that this is not applicable to the case in hand. There is sufficient and at times incontrovertible evidence of French *effectivités* from 1930 to 1943, from 1951 to 1954 and up to the time of the independence of Chad in 1960. The *effectivités* continued up to 1971-1973 when Libya occupied the Aouzou area. It can therefore be said that if the French *effectivités* was in doubt in 1912 it was not at all the material time, i.e., in 1951, when Libya had her independence, in 1955 when France and Libya signed and ratified the Treaty of Friendship and Good Neighbourliness, and 1960 when Chad gained her independence. But does it matter seriously whether the principle is *uti possidetis juris* or *uti possidetis de facto* with regard to its application in Africa? In its Judgment on 22 December 1986, the Chamber of the Court emphasized that what is paramount is the maintenance of the status quo at the time of independence and the principle of respect for the boundaries established as a result of treaties and those resulting from mere administrative divisions. The Judgment undoubtedly gave preference to *uti possidetis juris* as a legal right over actual or effective occupation as the yardstick for title to a territory. Nevertheless it does not deny the fact that effective occupation could be taken into consideration (see the case of the *Frontier Dispute (Burkina Faso/Republic of Mali), I.C.J. Reports 1986*, pp. 565-566, paras. 22-24, and p. 586, para. 63). After the Chamber of the Court had dealt extensively with the history, nature, purpose and rationale of *uti possidetis juris* it went on to remark in this case thus:

"There is no doubt that the obligation to respect pre-existing

international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis. Hence the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by organs of the Organization of African Unity itself, are evidently declaratory rather than constitutive: they recognize and confirm an existing principle, and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent.*" (*I.C.J. Reports 1986*, p. 566, para. 24; emphasis added.)

129. There is another important argument put forward in this case. Since Libya obtained her independence in 1951 and Chad in 1960 (the so-called critical dates) could one expect a Declaration passed in 1963 and 1964 — (four years later in the case of Chad and thirteen years later in the case of Libya) — to be binding on them? How could one expect a subsequent act and a declaration for that matter to alter the boundary situation of the Parties. It should also be observed that that was about nine years after the 1955 Treaty. In fact Libya did mention this fact in its oral argument that the Declaration was in effect already applied in advance:

"What Libya and France were doing in Article 3 of the 1955 Treaty was precisely to apply in advance, in their mutual relations, the terms of the Cairo Declaration to be adopted nine years later in 1964. That is why Libya never had any problems with the Cairo Declaration; she had already accepted the principles which it embodied in the 1955 Treaty with France." (CR 93/27, p. 57.)

130. This approach must have been taken into consideration by the Chamber in the *Frontier Dispute* case since Burkina Faso and Mali achieved independence like Chad in 1960, before the adoption of the Organization of African Unity Charter of 1963 and the Cairo Declaration of 1964. This point was definitively referred to by the Chamber in this case under discussion as follows:

"*Thus the principle of* uti possidetis *has kept its place among the most important legal principles, despite the apparent contradiction which its coexistence alongside the new norms implied.* Indeed it was by deliberate choice that African States selected, among all the classic principles, that of *uti possidetis. This remains an undeniable fact. In the light of the foregoing remarks, it is clear that the applicability of* uti possidetis *in the present case cannot be challenged merely because in 1960, the year when Mali and Burkina Faso achieved independence, the*

Organization of African Unity which was to proclaim this principle did not yet exist, and the above-mentioned resolution calling for respect for the pre-existing frontiers dates only from 1964." (*I.C.J. Reports 1986*, p. 567, para. 26; emphasis added.)

131. The Chamber also considered another principle in international law that conflicts with *uti possidetis juris* — the right of people to self-determination, but observed that the overriding interest of preserving the independence that has been achieved by much sacrifice and the maintenance of the *status quo* in terms of African boundary should be seen as the wisest course that was taken by African statesmen. The Chamber remarked that:

> "The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples." (*Ibid.*, p. 567, para. 25.)

132. Another issue to be considered here as it relates to the dispute is to answer the question of what is the critical date. There are few important dates to be considered. Libya achieved her independence on 24 December 1951; as far as Libya is concerned that must be the critical date in this regard and it is her argument that there was no boundary conventional or otherwise on this date between her and Chad. The critical date for Chad is 1960 when she obtained her independence. Since this is the last of the two dates can one therefore consider this to be the critical date? This may be a very persuasive argument since on this date the Treaty of 1955 had already established a boundary to the south of Libya.

133. Only last year the Chamber of the Court further elucidated on the principle of *uti possidetis* vis-à-vis subsequent treaties and the notion of the critical date, in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* when the Chamber held thus:

> "There has also been some argument between the Parties about the 'critical date' in relation to this dispute. The principle of *uti possidetis juris* is sometimes stated in almost absolute terms, suggesting that the position at the date of independence is always determinative; in short, that no other critical date can arise. As appears from the discussion above, this cannot be so. A later critical date clearly may arise, for example, either from adjudication or from a boundary treaty." (*I.C.J. Reports 1992*, p. 401, para. 67.)

134. Thus it can be concluded that the 1955 Treaty accords with the principle of *uti possidetis* and that the Parties to this dispute are bound

by it. Consequently, Article 3 with Annex I of the 1955 Treaty established the frontier between the two Parties. The objective of the principle *uti possidetis* is not in doubt; whether *de facto* or *de jure* the methods of approach are similar in effect because its aim is to provide, ultimately, a stable and permanent solution of boundary problems.

(Signed) Bola AJIBOLA.