# ICJ Judgment (1994) on the Libya/Chad Territorial Dispute:

## A Brief Overview and Observations

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## Introductory remarks

The frontiers of African States as we know them today would have been drastically different if it were not for the (post-1880's) European Scramble for Africa and the various treaties concluded by colonial powers between themselves, and in rare cases with African States. Many communities in Africa had not yet developed to the level of kingdoms or other forms of political entities in the present sense of the term, and in effect, there could have been expansion or contraction of such entities in due course of subjugation or assimilation among neighboring peoples.

One may assume that many boundaries would have followed shared historical, cultural, religious and linguistic identities. However, the path that German and Italian populations (for example) have gone through to arrive at their current boundaries clearly indicates that the march towards stable demographic frontiers could have possibly taken longer.

Colonial boundaries are thus bittersweet. On the one hand, relatives were arbitrarily given citizenships of two neighbouring States in spite of their bond. And on the other hand, delimitation of boundaries based on demographic factors would have resulted in hundreds of mini-states that could have still faced internal and external turmoil owing to polarized demands for independence on the ground of minuscule differences and variations in identity. Wisdom and pragmatism have thus forced African States to respect the boundaries that they have inherited from the colonial powers despite the shortcomings of the artificial fences imposed on them. Such was the decision of African Heads of States during the Cairo Declaration (1964). The same principle of respect to colonial boundaries has been enshrined in the Charter of the Organization of African Unity (1963), and Article 4/b of the (2000) Constitutive Act of the African Union.

Various episodes of history have determined the frontiers of African States. For example, the colonization of neighbouring peoples by the same colonial power has led to the unification of neighbouring clans, nationalities,

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sovereign entities and kingdoms after independence. Such is the case of the old civilizations of Tripolitania and Cyrenaica whose shared history under the Ottoman Empire and colonization by Italy after 1912 enabled these two 'provinces' and Fezzan to be regions of Libya. It is to be noted the current borders of most North African states might have been drastically different if it were not for fall of the Ottoman Empire as a result of the First World War. North Africa could either have had smaller states based on their independent peripheries of accountability to the Ottoman Empire, or a wider assimilation depending on the strength and magnitude of the Pan-Arabic and Pan-Islamic mindset upon independence.

The Libya/Chad territorial dispute is thus a typical outcome of the colonial legacy. In the territorial dispute before the International Court of Justice (1990-1994), Libya mainly invoked the issue of coalescence of rights and titles, while Chad underlined, *inter alia*, claimed the rights it has succeeded from the treaty concluded while France was the colonial power of French Equatorial Africa. This comment briefly highlights the issue of jurisdiction, the contentions of both States, findings of the Court, and reasoning of the Court followed by critical observations.

# 1. Territorial Dispute and ICJ's Jurisdiction

## 1.1 The Territorial Dispute: Aouzou Strip

The population of Northern Chad[1] and Southern Libya have shared roots. The term "Aouzou strip" is not designation of a region based on demographic

[1] "Traditionally, the region around Lake Chad was a focal point for trans-Saharan trade routes. Arab traders penetrated the area in the 7th cent. A.D. Shortly thereafter, nomads from North Africa, probably related to the Toubou, entered the region; they eventually established the state of Kanem, which reached its zenith in the 13th cent. Its kings converted to Islam, the religion also practiced by the successor state of Bornu. The Wadai and Bagirmi empires arose in the 16th cent.; they warred with Bornu and in the 18th cent. surpassed it in power. By the early 1890s all of these states, weakened by internal dissension, fell under the control of the Sudanese conqueror Rabah el Zobaír."

"French expeditions advanced into the region in 1890, and French sovereignty over Chad was recognized by agreements among the European powers. In 1900, French forces defeated Rabah's army, and by 1913 the conquest of Chad was completed; it was organized as a French colony in French Equatorial Africa and remained under military rule. Chad was later linked administratively with Ubangi-Shari (now the Central African Republic), but in 1920 it again became a separate colony. It was granted its own territorial legislature in 1946. In the French constitutional referendum of 1958, Chad chose autonomy within the French Community. Full independence was attained on Aug. 11, 1960, with Ngarta Tombalbaye as the first president."

Chad, History (Encyclopedia) Accessed March 19, 2009 http://www.infoplease.com/ce6/world/A0857238.html

considerations. The strip of land that was seized by Libya (known as the Aouzou Strip) was the center of dispute between the two States. Eventually, Libya's claim went beyond the Aouzou Strip and by the time the dispute was brought to the International Court of Justice, the territory claimed by Libya (during the ICJ adjudication) included the entire *BET* (the Borkou, the Ennedi and the Tibetsi) *Region*. In addition to series of Libyan military operations until the dispute was settled by ICJ decision in 1994, factional polarities made Chad vulnerable to incessant political instability and civil wars starting from 1963 during which the FROLINAT (*Front de libération Nationale*), with the support of Libya started its rebellion against Tombalbaye's government.

The strip (as stated in ICJ's judgment)[2] is mainly the area of land that is between the frontier line in the 1919 Anglo-French Convention line which is now upheld in the 1994 ICJ decision and the 1935 Franco-Italian Treaty (sometimes referred to as the Laval-Mussolini Treaty) line, which didn't enter into force because it was not exchanged between the States even if both States had ratified it.[3]

Various efforts were made to facilitate negotiations towards the peaceful settlement of the territorial dispute. The efforts made by the Organization of African Unity towards negotiations and mediation were stronger and more effective than those made by individual governments. In 1977, the Organization of African Unity set up a commission to look into the border dispute. In 1981, the OAU attempted to replace Libyan forces by pan-African peacekeeping force, but in vain. Despite escalated fighting between Chad and Libya, OAU managed to mediate cease fire in 1987 which came into effect in September 1987.

Unfolding events witnessed Talks in Gabon (July 1988) and resumption of diplomatic relations since October 1988. It was under such setting that Libya and Chad concluded a Framework Agreement (August 1989) to peacefully settle their territorial dispute, and then opted to refer their territorial dispute to the International Court of Justice in August-September 1990.

[2] International Court of Justice, *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/ Chad*) Judgment of 3 February 1994 , Paragraph 69

[3] One of the episodes of history that had impact on the Chadian/Libyan border was Italy's invasion of Ethiopia in 1935. During the same year, France and Italy had signed a boundary treaty that had put most parts of the Aouzou Strip into Libya. The treaty was ratified in both States, but due to the French non-recognition of Mussolini's act of invading Ethiopia and other subsequent factors, the ratified treaty was not exchanged between the signatories. As a result, the treaty could not be in force, and Libya's legal ground to claim the Aouzou Strip has been substantially weakened as a result.

## 1.2 Jurisdiction

The International Court of Justice based its jurisdiction on two notifications (from Libya and Chad) of the Framework Agreement (*Accord-Cadre*) on the Peaceful Settlement of the Territorial Dispute that was concluded between Libya and Chad on 31st August 1989.[4] Libya requested *decision upon the limits* of the respective territories of the parties "in accordance with the rules of international law applicable in this matter." And, Chad relied as a basis for the court's jurisdiction principally on Article 2/1 of the 31 August 1989 Accord-Cadre, and "subsidiarily, on Article 8 of the Franco-Libyan Treaty of Friendship and Good Neighborliness of 10 August 1955. Chad requested 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."

The legal grounds that led the parties towards the decision to resolve their territorial dispute peacefully (as stated in the preamble of the Framework Agreement) are:

a) "[T]he resolution of the Organization of African Unity (OAU), in particular resolution AHG/Res. 6 (XXV) on the Libya /Chad territorial dispute" and,

b) [T]he fundamental principles of the of the United Nations, namely:
   - Peaceful settlement of international disputes
   - Sovereign equality of all States,
   - Non-use of force or threat of force in relations between States;
   - Respect for the national sovereignty and territorial integrity of each State;
   - Non-interference in internal affairs.

According to the Framework Agreement, The parties undertook "to settle first their territorial dispute by all political means, including conciliation, within a period of approximately one year, unless the Heads of State otherwise decide."[5] The Framework Agreement further provided that "In the absence of a political settlement of their territorial dispute, the two parties undertake to submit the dispute to the International Court of Justice."[6]

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[4] The ICJ received the notifications from Libya (on 31 August 1990) and Chad (on 3 September 1990) and a letter from the Agent of Chad on September 20th 1990. Both States agreed that "the proceedings had in effect been instituted by two successive notifications of the Special Agreement constituted by the Accord-Cadre of 31 August 1989."

[5] Art. 1, Framework Agreement (*Accord-Cadré*) on the Peaceful Settlement of the Territorial Dispute between Libya and Chad (31 August 1989)

[6] *Ibid*, Article 2(a)

Both Parties accepted the jurisdiction of the Court on the basis of the *Accord-Cadre*. However, Chad has added that, subsidiarily, the jurisdiction of the Court is also based upon Article 8 of the 1955 Treaty which provides that:

> 'Such disputes as may arise from the interpretation and application of the present Treaty and which may prove impossible to settle by direct negotiations shall be referrd to the International Court of Justice at the request of either Party, unless the High Contracting Parties agree upon some other methods of settlement.'[7]

The jurisdiction of the court as conferred upon it by the *Accord-Cadre* has not been contested, and the issue of additional ground of the Court's jurisdiction has not been considered by the Court.

Moreover, Articles 2/b to 6 of the Framework Agreement embodied various commitments of both parities regarding measures and monitoring schemes that would de-escalate the tension and conflict and stabilize peace and order while adjudicatory peaceful settlement is underway.[8] And after the decision of the International Court of Justice, efforts were made to monitor withdrawal of Libyan forces from Aouzou Strip.

# 2. Issues of Contention

## 2.1 Libya's core arguments

Libya contested the existence of boundary with Chad, and argued that there is no boundary in the contested region (East of Tuommo) by virtue of any existing international agreement, and requested for the *determination of* the boundary. Libya considered the case as *attribution* of territory, while Chad considered it as *location* of boundary.

Libya argued that the territory is not *terra nullis*. The title of the territory was vested in peoples inhabiting it; i.e. tribes and confederations of tribes owing allegiance to the *Senoussi Order* an order that accepted the Senoussi leadership and fought encroachments of France and Italy.

[7] *Supra* note 2, Paragraph 22

[8] The commitments include the following:

a) Withdrawal of forces (to distances to be agreed on – Art. 2/c) from the positions in the disputed regions, under the supervision of a commission of African observers, and to refrain from establishing any new presence in any form in the said region (Art. 2/b);
b) Observing the concomitant measures until the International Court of Justice hands down a final judgment on the territorial dispute (Art. 2/d);
c) Release of all prisoners of war (Art. 3),
d) Sustaining cease fire and restraint from all kinds of hostilities, particularly: media campaign, intervention in the internal and external affairs of the other State, refrain from assisting hostile forces in either of the two countries, and proceed to treaty of friendship and good neighborliness (Art. 4)

The *Senoussi Order* is a religious confederation founded around early 19th Century and welded good influence and a certain authority in North and North-East Africa. These indigenous peoples were religiously, economically and culturally part of the Libyan Peoples. The community of titles of these indigenous peoples had been transferred to the Ottoman Empire until 1912 after which Italy acquired the title, and ultimately, the title has been transferred to Libya since 1951. In short Libya claimed the coalescence of rights and titles.

### 2.2 Chad's claims

Chad's application (on September 3rd 1990) stated that its boundary with Libya has already been determined by the August 10th 1955 Treaty, and requested the Court to locate the boundary according to the treaty.

In the alternative, Chad claimed that even before 1955, France had acquired *effectivités* (i.e. peaceful and continuous exercise of state power) over the area under dispute. Chad further stated that the existence of boundary was not in dispute until the 1970s.

### 2.3 Other issues considered by the court

a) The existence of the 1955 Treaty is not an issue in dispute.
b) Libya's argument of inexperience (when it signed the 1955 Treaty) has not been pushed to the extent of invoking invalidity of the treaty itself.
c) The 1955 Treaty did not only recognize treaties in force on 24th December 1951 because there was no express statement to that effect. In fact, the minutes indicated the acceptance of an Agreement concluded in 1919.
d) The ICJ further considered whether the conduct of and the relations between Libya and Chad after the 1955 Treaty negated the terms of agreement in the Treaty. The Court found that the conclusion of a treaty in 1966 didn't indicate territorial disputes. Moreover, Libya never contested UN documents that recorded the area of Chad to be 1,284,000 square miles since Chad's independence in 1960.

## 3. Findings and Reasoning of the Court

### 3.1 Findings of the ICJ

The Court decided that the 1955 Treaty wished to define common frontiers. Reference to intertemporal law and examining the history of the dispute have not been found to be necessary to render judgment, because the 1955 Treaty was considered to be the basis of the Court's decision. And the Court (in paragraphs 57 to 65) stated the instruments that shall be the basis of delimitation. On February 3rd 1994, the International Court of Justice found that the

*Treaty of Friendship and Good Neighbourliness* that was concluded between France (the Colonial power of French Equatorial Africa) and Libya on 10 August 1955 *defines and determines* the course of the boundary between the Chad and Libya.

The Court (by votes 16 to 1) declared that the boundary between Libya Chad "is *defined* by the Treaty of Friendship and Good Neighbourliness concluded on 10 August 1955 between the French Republic and the United Kingdom of Libya."[9] Sixteen judges of the ICJ including the Court's President, Vice-President were in favour of the decision; and three of them appended separate opinions arriving at the same conclusion regarding the findings of the Court. However, Judge ad hoc Sette-Camara gave a dissenting opinion.

## 2.1– Reasoning of the Court

Under paragraphs 17 to 21 of its Judgment, the Court states the submissions of Libya and Chad. These paragraphs state Libya's contention that there is no existing boundary between Libya and Chad and its request for the *determination of* boundary. They also state Chad's submission that there is an existing boundary which can be *located*.

Libya's claim is based on *coalescence* of rights and titles. Libya contended that the indigenous inhabitants, the Senoussi Order, had rights and titles over the contested region, which according to Libya was transferred to the Ottoman Empire, and then to Italy in 1912. And upon independence, Libya claimed to have succeeded these rights and titles since 1951.

Chad, on the other hand, invoked the Treaty of Friendship and Good Neighbourliness that was concluded by France and Libya on 10 August 1955. Moreover, Chad alternatively submitted that "the line delimiting the zones of influence in earlier treaties referred to in the 1955 Treaty had acquired the character of boundaries through French *effectivités*" (i.e. peaceful and continuous exercise of State power)" which according to Chad can be a valid legal basis for Chad's claims irrespective of treaty provisions.

### a) The 1955 Treaty and its significance in the decision of the case

*Background*

Paragraphs 35 to 56 of the Court's decision state the negotiations opened in 1955 between Libya and France and analyze the treaty in relation with the various issues involved in the border dispute. In November 1954, "Libya had informed France that it did not intend to renew a provisional military arrange-

[9] *Supra* note 2, Paragraph 77

ment of 24 December 1951 under which French forces remained stationed on Libyan territory, in the Fezzan." And France had the objective of putting an end to "the longstanding disagreement between France and Italy" with regard to the frontier resulting from the Anglo-French agreements of 1898, 1899 and 1999 (stated in paragraphs 28 and 31 of the Judgment). The Court noted that "obtaining Libyan acceptance of those agreements, which entailed recognition of the inapplicability of the non-enforceable Treaty of 1935, was important to the French."[10] (Paragraph 35).

*Validity of the treaty*

The Court in Paragraph 36 observed that "*Neither Party questions the validity of the 1955 Treaty* nor does Libya question Chad's right to invoke against Libya any such provisions thereof as relate to the frontiers of Chad."[11]

> Libya has contended that, at the time of the Treaty's conclusion, it lacked the experience to engage in difficult negotiations with a Power enjoying the benefit of long international experience. On this ground, Libya has suggested that there was an attempt by the French negotiators, to take advantage of Libya's lack of knowledge of the relevant facts, that Libya was consequently placed at a disadvantage in relation to the provisions concerning the boundaries, and that the Court should take this into account when interpreting the Treaty; it has not however taken this argument so far as to suggest it as a ground for invalidity of the Treaty itself.[12]

*Article 3 of the Treaty and Annex I*

Paragraph 37 states that the 1955 Treaty is "a complex treaty, comprised, in addition to the Treaty itself, four appended Conventions and eight annexes; it dealt with a broad range of issues concerning the future relationship between the two parties. It was provided by Article 9 of the Treaty that the Conventions and Annexes appended to it formed an integral part of the Treaty. One of the matters specifically addressed was the question of frontiers, dealt with in Article 3 and Annex I."

Article 3 of the 1955 Treaty reads as follows:

> The two High Contracting Parties recognize that the frontiers between the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa on the one hand, and the territory of Libya on the other, are those that result from the international instruments in force on the date of the constitution of the United Kingdom of Libya as listed in the attached Exchange of Letters (Ann. 1)."

In paragraph 38, the Court considers "Article 3 of the Treaty, together with the Annex to which that Article refers" as decisive regarding the outcome of

[10] *Ibid*, Paragraph 35 | [11] *Ibid*, Paragraph 36 | [12] *Ibid*

the case. The Court's reasoning reads "If the 1955 Treaty did result in a boundary, this furnishes the answer to the issues raised by the Parties: it would be a response at one and the same time to the Libyan request to determine the limits of the respective territories of the Parties and to the request of Chad to determine the course of the frontier."

As stated in Paragraph 40 of the judgment, Annex I of the Treaty comprises an exchange of letters and reference to the following:

a) the Franco-British Convention of 14 June 1898;
b) the Declaration completing the same, of 21 March 1899;
c) the Franco-Italian Agreements (Exchange of Letters) of 1 November 1902;
d) the Convention between the French Republic and the Sublime Porte, of 12 May 1910;
e) the Franco-British Convention of 8 September 1919; and,
f) the Franco-Italian Arrangement of 12 September 1919.

*Interpretation of the term 'recognize' in Article 3*

The Court recalled customary international law as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties (paragraph 41) and stated that the principles of good faith and ordinary meaning to be given to its terms in their context and in the light of its object and purpose. The Court then observed (paragraph 42) that according to Article 3 of the 1955 Treaty, the parties "recognize *[reconnaissent]* that the frontiers ... are those that result" from the international instruments annexed to the 1955 Treaty. "The word 'recognize' used in the Treaty indicates that a legal obligation is undertaken. To *recognize* a frontier is essentially to '*accept*' that frontier, that is, to draw legal consequences from its existence, to respect it and to renounce the right to contest it in future."

According to the Court, Article 3 of the 1955 Treaty would be deprived of its ordinary meaning if according to Libya's contention "only some of the specified instruments contributed to the definition of the frontier, or that a particular frontier remained unsettled." The Court (paragraph 43) thus observed that "[b]y entering into a treaty the parties recognized the frontiers to which the text of the Treaty referred; the task of the Court is thus to determine the exact content of the undertaking entered into."

Libya (paragraph 44) argued that "only the Franco-Ottoman Convention of 1910 and the Franco-Italian Agreement (1919) had produced frontiers binding on Libya at the time of independence, and that such frontiers related to territories other than those in issue in this case", and further contested the application of the 1899 Franco-British Declaration which, according to Libya "merely defined, north of the 15$^{th}$ parallel, a line delimiting spheres of influ-

ence, as distinct from a territorial frontier." Libya further argued that the 1919 Franco-British Convention does not confer any other status, and also contested the 1902 Franco-Italian Exchange of letters on the ground that it "was no longer in force, either because Italy renounced all rights to its African territories by the 1947 Peace Treaty …, or for lack of notification under Article 44 of that Treaty".

The Court did not accept Libya's arguments on the ground that the issue whether or not the instruments attached to the 1955 Treaty determined boundaries was irrelevant.[13] The Court stated that if any one of the instruments did not have the status of determining territorial boundary, the 1955 "agreement of the parties to '*recognize*' it as such invests it with a legal force which it had previously lacked." In paragraphs 46, 47 and 48 the Court rejected Libya's request regarding the plural form of the term "frontiers" in Article 3 of the 1955 Treaty, which according to Libya indicates the intention of the parties to delimit "some of their frontiers, not that of the whole of the frontier."

*The issue of annexed instruments not in force (en vigueur)*

One of the issues raised by Libya was the argument that "the instruments mentioned in Annex I …were no longer in force at the relevant date." The Court did not accept this contention [14] on the ground that "Article 3 does not refer merely to the international instruments '*en vigueur*' (in force) on the date of the constitution of the United Kingdom of Libya, but to the international instruments '*en vigueur*' on that date "*tels qu'ils sont définis*" (as listed) in Annex I."

The court observed that "[t]o draw up a list of governing instruments while leaving to subsequent scrutiny the question whether they were in force would have been pointless." The reasoning added, " It is clear to the Court that the parties agreed to consider the instruments listed as being in force for the purposes of Article 3, since otherwise they would not have referred to them in the Annex." The Court substantiated its reasoning by the fact that the "non-ratified Treaty of 1935, which was never *en vigueur* and is not mentioned n the Annex."

The Court added that the intention of the parties "to reach a definitive settlement of the question of their common frontiers" is conveyed in the text of Article 3 of the 1955 Treaty, and that "any other construction would be contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness." [15]

[13] *Ibid*, Paragraph 45 | [14] *Ibid*, Paragraph 50 | [15] *Ibid*, Paragraph 51

**b) The frontier line (paragraphs 57-65)**

The judgment considers the Franco-British Declaration of 1899, and discusses the *Livre jaune* published a few days after the adoption of that Declaration by French authorities that had the text of the Declaration including a map.[16] The Court observed that "the question of the position of the limit of the French zone may be regarded as resolved by the Convention of 8 September 1919 signed at Paris between Great Britain and France [17] supplementary to the 1899 Declaration signed in London on March 21, 1899." The Court explains the variations in the instruments regarding the frontier line (paragraph 60) and "concludes that the line described in the 1919 Convention represents the frontier between Chad and Libya to the east of the meridian $16^0$ east. To the west of that meridian, the court examined the Franco-Italian Exchange of Letters of 1 November 1902 and ultimately observed that the map referred to in the Exchange of letters "could only be the map in the *Livre jaune*, which showed a pecked line indicating the frontier of Tripolitania. That line must therefore be examined by the Court."[18]

In paragraphs 63 to 65, the Court indicated "how the line which results from the combined effect of the instruments listed in Annex I to the 1955 Treaty is made up." The court stated that "[i]t is clear that the eastern endpoint of the frontier will lie on the meridian $24^0$ east, which is here the boundary of the Sudan. To the west, the Court is not asked to determine the tripoint Libya-Niger-Chad; Chad in its submissions merely asks the Court to declare the course of the frontier "as far as the fifteenth degree east of Greenwich."[19]

The conclusion of the court[20] with regard to the frontier line is that it shall be determined "by the Anglo-French Convention of 8 September 1919. The Court then ruled that "the boundary is a straight line from the point of intersection of the meridian $24^0$ east with the parallel $19^030'$ north to the point of intersection of the meridian $16^0$ east with the Tropic of Cancer." And "From the latter point, the line is determined by the Franco-Italian exchange of letters of 1 November 1902, by reference to the *Livre jaune* map" which "runs towards a point immediately to the south of Toummo; before it reaches that point, however, it crosses the meridian $15^0$ east, at some point on which from 1930 onward, was situated ... between French West Africa and French Equatorial Africa."

**c) Attitudes of the parties subsequent to the treaty (paragraphs 66-71)**

The Court [21] further examined the "subsequent attitudes of the parties to the question of frontiers" and found that "no subsequent agreement, either be-

[16] *Ibid*, Paragraph 58
[17] *Ibid*, Paragraph 59
[18] *Ibid*, Paragraph 61
[19] *Ibid*, Paragraph 63
[20] *Ibid*, Paragraphs 64, 65
[21] *Ibid*, Paragraph 66

tween France and Libya, or between Chad and Libya, has called in question the frontier in this region deriving from the 1955 Treaty." On the contrary, the Court found that the treaty between Libya and Chad on 2 March 1966 "refers to friendship and neighborly relations between the Parties, and deals with frontier questions." The Court cited Articles 1 and 2 of the 1966 Treaty that "mention 'the frontier' between the two countries, with no suggestion of there being any uncertainty about it." The Court further cited Articles 4 and 7 of the 1966 Treaty that deal with frontier permits and frontier authorities, and concluded that "[i]f a serious dispute had indeed existed regarding frontiers, eleven years after the conclusion of the 1955 Treaty, one would expect it to have been reflected in the 1966 Treaty." The judgment states the agreements in 1972, 1974, 1980 and 1981 in support of the finding that subsequent agreements implied the existence of frontiers between the two States. [22]

Moreover, the Court further stated that "[t]he report for 1955[23] shows the area of Chad's territory as 1,284,000 square kilometers, which expressly includes 538,000 square kilometers for the BET (Borkou, Ennedi, Tibesti Region)."[24] It further mentioned the United Nations publications which from the year of independence of Chad in 1960 "state the area of Chad as 1,284,000 square kilometers." [25] The court concluded that "Libya did not challenge the territorial dimensions of Chad as set out by France" which consider the BET Region as part of the territory of Chad in accordance with the 1955 Treaty.

On the contrary, Chad has consistently adopted the position that its boundary includes the Aouzou Strip.[26] The Court states the consistent claim of the Aouzou Strip in Chad's complaints submitted to OAU (1977), and complaints to the UN General Assembly about the encroachments alleged to have been made into its territories by Libya "[i]n 1977 and 1978, and in each year from 1982 to 1987)." The Court further noted Chad's repeated complaints to the Security Council, in 1978, 1983, 1985 and 1986, thereby indicating the consistency of Chad's conduct in relation to the location of its boundary."[27]

**d) Permanence of boundaries despite temporary treaty**

Article 11 of the 1955 Treaty provides that the Treaty "is concluded for a period of 20 years." The last paragraph of the provision further provides that the Treaty "can be terminated by either Party 20 years after its entry into force, or at any later time, provided that one year's notice is given to the other Party." Nevertheless, the Court regarded the effects of the Treaty with

[22] *Ibid*, Paragraph 67
[23] United Nations doc. ST/TRI/SER.A/12, p.66
[24] *Supra* note 2, Paragraph 68
[25] The decision indicates Yearbook 1960, p.693, App. I
[26] *Supra* note 2, Paragraphs 69,70
[27] *Ibid*, Paragraph 71

respect to the delimitation of boundaries as permanent independent of the fate of the 1955 Treaty.

> … The Treaty, must be taken to have determined a permanent frontier. There is nothing in the 1955 Treaty to indicate that the boundary agreed was to be provisional or temporary; on the contrary it bears all the hallmarks of finality. The establishment of this boundary is a fact which, from the outset, has had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries…. (paragraph 72)
>
> A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary. In this instance the Parties have not exercised their option to terminate the Treaty, but whether or not the option be exercised, the boundary remains. .. [T]he continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed.'…[28]

### 3.3- Separate Opinions

Judge Ago forwarded a separate declaration[29] and added his vote to the majority opinion in favour of Chad. He stated his view and conviction that, at the time of the independence of Libya, its southern frontier, i.e. the French possessions of West Africa and Equatorial Africa "had not yet been the subject of a treaty delimitation between the parties then directly concerned." However Judge Ago recognized that "by concluding the Treaty of 10 August 1955 with France, the Government of Libya, which was primarily interested in other aspects of the body of questions to be settled, implicitly *recognized*, with regard to that southern frontier, the conclusions which the French Government deduced from the instruments mentioned in Annex I to that Treaty."

Judge Shahabuddeen observed that there is a treaty relating to the boundary between Libya and Chad which was intended to establish complete delimitation of frontiers "between Libya and all adjacent French territories, including the territory of Chad. … It is neither relevant nor necessary to import the principle of stability of boundaries to reach that conclusion: the normal principles of treaty interpretation suffice." [30]

The third separate opinion submitted by Judge Ajibola shares the finding that the 1955 Treaty with the Annex I attached thereto establish "the frontier which was the subject-matter of the dispute between the Parties." According to Judge Ajibola the separate opinion is "essentially supportive of the Court's

[28] *Ibid*, Paragraph 73

[29] Declaration of Judge Ago, *Supra* note 2 , page 43

[30] Separate Opinion of Judge Shahabuddeen , *Supra* note 2 , page 50

judgment and is meant to deal only with some peripheral but nor unimportant aspects of the case."[31] The separate opinion discusses the profile of African boundary problems caused by the colonial legacy. Judge Ajibola regarded Libya's claim of coalescence of rights and titles as the first leg of its argument and the Rome Treaty of 1935 (the Laval-Mussolini Treaty) as the second leg.

Judge Ajibola observed that the Court would have been compelled to look at the 1935 Treaty "in the event of the absence or invalidity of the 1955 Treaty" owing to the necessity of reference to equitable principles to fill gaps. "But since a conventional boundary had been *recognized* by the 1955 Treaty and (because) the Rome Treaty's instruments of ratification had not been exchanged, equity had in fact no role to play in this matter" (paragraph 29). Judge Ajibola also states why Libya's argument about transfer of titles from the *Senoussi Orde*r to the Ottoman Empire and then to Italy and Libya is not acceptable: "… 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" (para 36).

Judge Ajibola further raises the issues of estoppel, acquiescence, preclusion and recognition,[32] regarding which he noted 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 (paragraph 114). Moreover, he addresses the issue of *uti possidetis* in relation to Libya's arguments and supports Chad's argument of French *effectivités* (paragraph 128) as supplementary grounds to substantiate the reasoning of ICJ's judgment in favour of Chad.

## 4. Dissenting Opinion

Judge ad hoc Sette-Camara supports the Libyan argument that the borderlands were never a *terra nullius.* "In spite of the desertic nature of this zone, … it was never a *terra nullus*, open to occupation according to international law"[33] and that "the non-existence of areas of *terra nullus* excluded the possibility of occupation, short of outright conquest by armed forces." The dissenting judge stated that "[t]he land was occupied by local indigenous tribes, confederations of tribes, often organized under the Senoussi Order. Furthermore, it was under the distant and laxly exercised sovereignty of the Ottoman

[31] Separate Opinion of Judge Ajibola, *Supra* note 2 , p.52
[32] *Ibid*, pp. 51, 52
[33] Dissenting Opinion of Judge Sette-Camara, *Supra* note 2 , p. 93

Empire, which marked its presence by delegation of authority to the local people."[34] Historic title over the region, according to the dissenting opinion " belonged first to the indigenous peoples, and eventually passed to the Ottoman Empire, and later to Italy."[35]

The dissenting opinion then addresses the following key questions:

a) Whether there is or has there ever been, a conventional boundary between Chad and Libya east of Tuommo leading to the Sudanese border; and

b) Whether the Conventions listed in Annex I to the 1955 Treaty are actually boundary treaties to which provisions the Cairo Declaration of 1964 and Article 11 of the 1978 Vienna Convention on Succession of States in Respect of Treaties apply.

Judge Sette-Camara responds to the first issue in the negative (page 95), and states that the non-existence of boundary "was explicitly and clearly recognized by the French Government when it presented its *Exposé des motifs* to the French Parliament in relation to the ratification of the 1935 Treaty (which)… could have been a real treaty (if it were not) for lack of ratification due to the political evolution of events at the time."

With regard to the second issue, the dissenting opinion states that the 1899 Convention that is tagged to the 1898 Conventions was never meant to determine boundary lines but "was aimed at dividing spheres of influence between the two big colonial Powers, France and Great Britain.[36] Judge Sette-Camara holds the same view about the 1919 line and emphatically remarks that "both were intended to divide spheres of influence and by no means could be interpreted as constituting international boundaries" (page 96), and that the 1902 exchange of letters had little to do with the frontier in dispute. The dissenting opinion then examines whether the treaties listed in Annex I were in force (*en vigueur*) and considers the 1902 Fronco-Italian exchange of letters, secret agreements and thus unacceptable.[37]

Judge Sette-Camara concludes that "none of the three treaties invoked by Chad qualifies for international recognition as a frontier treaty."[38] The dissenting opinion further noted that the 1955 Treaty lapsed in 1975,[39] because "Article 54 of the Vienna Convention on the Law of Treaties provides, *inter alia*, that the termination of a treaty takes place in conformity with the provisions of the treaty." According to the dissenting opinion, Chad's argument that the boundary agreements in the 1955 Treaty remain effective despite lapse of the 1955 Treaty "cannot be taken for granted, and their role in providing an internationally recognized frontier remains to be proved."[40]

[34] *Ibid*
[35] *Ibid*, p. 94
[36] *Ibid*, p. 95
[37] *Ibid*, p. 98
[38] *Ibid*
[39] *Ibid*
[40] *Ibid*

The issue of *effectivités*, according to Judge Sette-Camara, should be disregarded.[41] He stated that *effectivités* requires the peaceful and continuous exercise of State power, and "the resistance of the local tribes, and particularly of the Senoussi, never allowed the establishment of the exercise of peaceful and continuous State power by France. It was always military occupation, and authority was exercised by military officers."[42] The dissenting opinion notes that "no concrete evidence of *effectivités*, was presented in the case file, of either Ottoman, French or Italian *effectivités*," and observes that "any invocation of *effectivités* should simply be disregarded."

The dissenting opinion further states that the Treaty of Co-operation and Mutual Assistance did not mention frontiers, and in "the 1974 Treaty the only reference to frontiers was a condemnation of the arbitrarily established colonial frontiers, obviously in contradiction to the 1964 Cairo Declaration." Moreover, Judge Sette-Camara cites the treaty signed in 1980 and notes that "there was no mention of the presence of Libyan troops on Chadian territory. Yet another treaty was signed in 1981 ignoring the 'invasion' by Libyan troops of the Aouzou strip."[43]

On the basis of the reasons summarized above, Judge Sette-Camara observes that "the titles to the territory asserted by Libya are valid. Neither France nor Chad could present any sounder titles than the three layers of title" namely the title of the indigenous peoples "and the Senoussi Order, the Ottoman Empire's sovereignty over the area, passing to Italy in 1912 and thence to Libya in 1951."[44]

Judge Sette-Camara states that it is inappropriate to invoke '*pacta sunt servanda*'in relation with the 1955 Treaty because this established principle of international law "applies only to treaties in force, and Article 11 of the 1955 Treaty renders its validity after the 20 years deadline, to say the least, debatable."[45]

With regard to delimitation, Judge Sette-Camara noted that a compromise solution [46] should not have been excluded, which regrettably, neither the Parties nor the Court explored. The two possibilities were "the United Nations Map No. 241, which is close to the 1935 line but not identical to it", or revert "to the 1899 strict south east line, which was at the origin of the dispute, and which continues to appear on very recent maps, for instance, the 1988 OAU map attached to its Sub-Committee's report on the Libya-Chad dispute." According to Judge José Sette-Camara, either of the lines "would have offered the advantage of dividing the Tibesti Massif between the two countries"

[41] *Ibid*, pp. 98-101
[42] *Ibid*, pp. 98-99
[43] *Ibid*, p. 99
[44] *Ibid*, p. 102
[45] *Ibid*
[46] *Ibid*, p. 103

which is necessary "for the possible defence of one country or the other, as repeatedly asserted by both parties."

# 5- Critical Observations

## 5.1- Background: Territorial and demographic paradigms

The Treaty of Westphalia (1648) was a turning point in the emergence of the current conception of nation-statehood, and the role of treaties in the determination of frontiers has been enhanced ever since. The major conferences that followed, namely, the Congress of Vienna (1815) and the Paris Conference of (1919) redrew certain boundaries of Europe and reshuffled spheres of influence. The European conception of rigidly defined territories was unknown to Africa. This conception of rigid inter-state boundaries "reached Africa by way of colonialism initiated at the Berlin Conference of 1884 where European powers agreed on how Africa would be divided among them." [47]

Pre-colonial African kingdoms followed demographic lines of dominion in which some entities were directly subjugated while others enjoyed wider autonomy subject to some loose symbolic manifestations of allegiance. Not every square mile of the land in Africa was susceptible to ownership and sovereignty. There were very wide buffer regions, range of mountains, forests and deserts that were not rigidly divided among communities and kingdoms. "[I]t is the dissonance between pre-colonial and colonial concepts of border which has been responsible"[48] for most border disputes in Africa.

Moreover, the European paradigm is at variance with Islamic legal theory:

> … [W]hereas Islamic political and legal theory and practice define sovereignty in communal terms – although it must be admitted that the provisions for this in Islamic legal practice … are sketchy and inadequate (Schacht 1964; 76) – European jurisprudence – which has effectively become the basis for international law – places a primary emphasis on territory (Delupis 1974; 3-6). This is a consequence of the development of the European concept of the state as an area of unique and sovereign power over which political authority is exercised, rather than relating sovereignty primarily to populations (Joffe 1986; 7). [49]

The 1994 Judgment of the International Court of Justice in favour of Chad thus reflects the prevalence of the European conception of primary emphasis

[47] Nejib Jibril (2004) "The Binding Dilemma: From Bakassi to Badme" *American University International Law Review*, 19 Am. U. Int'l L. Rev. 633, at 634

[48] George Joffe, From Boundaries and State Territory in the Middle East and North Africa. MENAS Press, 1987 © 2002 http://arabworld.nitle.org/texts.php?module_id=4&reading_id=119&print=1 (Accessed on April 19, 2007)

[49] *Ibid*

to territory irrespective of demographic considerations. Needless-to-say, the findings and reasoning of the majority clearly fall under this conception that is the basis of current international law. It is also the expedient option endorsed by African States since the 1964 Cairo Declaration.

### 5.2- Observations regarding events preceding ICJ adjudication

The temporal setting of the late 1980s and early 1990s seemed to have favoured Chad owing to the shift in international balance of forces after the ideological crisis of Libya's allies in the Eastern block, the diplomatic crisis that Libya was encountered after Lockerbie and Habré's successful offensive and victory in the late 1980's. Moreover, the frontier claims of Chad are consistent. On the contrary, Libya's claims ranged from the Aouzou Strip or the 1935 (unenforceable) Treaty line to claims of the entire BET region that would mean 538,000 out of 1,284,000 Square Kilometers (i.e. 41.9 percent) of Chad's territory. The role that Libya played in supporting civil wars in Chad and in fueling factional polarities within the various rebels has ultimately created sense of unity in Chad against Libyan forces, and sympathy from the international community.

Upon first impression, the timing of Libya's agreement to ICJ adjudication seems to be imprudent from the perspective of Libya's interests, because international trends were against Libya. The only explanation in this regard seems to be the possibility of political repercussions of Libya's defeat had it not been immediately followed by peaceful settlement schemes, because the August 1989 Framework Agreement and submission of the case to ICJ might have at least served the purpose of face saving for Libya's leadership. Unless the balance of forces could have changed thereafter, the ICJ decision merely gave a blessing to the facts on the ground because Libya had already been pushed out of the Aouzou Strip.

### 5.3- Observations regarding Libya's major argument

Tribunals don't substitute parties in invoking issues omitted or undermined by the parties themselves. Libya gave much focus to the demographic aspect of the argument relying much on indigenous peoples, Senoussi order, etc. while in fact international tribunals clearly give priority to territorial delimitations made by treaties. The core argument of Libya could thus have been contesting against the validity of the 1955 Treaty, and forwarding as much arguments as possible to that effect. Judge Ajibola has duly noted (in his separate opinion) that the Court would have been compelled to look at the 1935 Treaty "in the event of the absence or invalidity of the 1955 Treaty" thereby rendering reference to equitable principles with the view of filling gaps.

As stated in Paragraph 36 of the judgment, Libya did not question the validity of the 1955 Treaty other than its argument that "it lacked the experience to engage in difficult negotiations with a Power enjoying the benefit of long international experience." Libya has stated that "there was an attempt by the French negotiators, to take advantage of Libya's lack of knowledge of the relevant facts" and "that Libya was consequently placed at a disadvantage in relation to the provisions concerning the boundaries." However, Libya merely asked the Court "to take this into account when interpreting the Treaty" but didn't take "this argument so far as to suggest it as a ground for invalidity of the Treaty itself".

The problem in this regard for Libya seems to be the absence of a provision among Articles 46 to 53 of the 1969 Vienna Convention of the Law of Treaties that can enable a state to invoke inexperience and excessive unfair advantage for the invalidation of a treaty. Yet, attempt could have been made to persuade the court towards considering the situation based on general principles accepted by the major legal systems.

Mr. kamel Maaghur for Libya had said, "When the negotiations that ultimately led to the 1955 Treaty started in January 1955, I would estimate there were not more that 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 …"[50] This argument could have been taken to its logical conclusion to show the pressure to which newly independent Libya encountered when France used Article 3 of the 1955 Treaty as a package deal for its withdrawal from one of the provinces of Libya: Fezzan.

The Libyan delegation couldn't apparently realize the weight of the term "*recognize*" in Article 3. Moreover, the so-called period of lapse of effectiveness of the Treaty as stated in Article 11, might have easily misled the Libyan delegation towards the belief that the treaty would last for only two decades, while in fact the invisible dynamite of a *dipositive* territorial obligation has been concealed underneath which renders a territory binding despite lapse of the treaty.

This argument might not have convinced the Court, but could have at least enabled the court to address the issue of treaties concluded under conditions that can be considered lesion (or unconscionable agreements). Unlike most unfavourable treaties that involve terms of peace in favour of the victor against the interests of the vanquished, the 1955 Treaty was made between France that should have evacuated its forces from Fezzan with no conditions and strings attached.

[50] CR 93/14, p. 67. cited in Abijola's separate opinion, paragraph 45

Moreover, Libya hasn't done what it could have, in the diplomatic sphere. As stated in the judgment, Libya hasn't even protested against the area of Chad registered in UN documents, or hasn't even invoked Article 11 of the Treaty to declare its lapse in 1975. Libya had instead resorted to military operations and towards fuelling civil wars in Chad as a result of which the misery that Chad has undergone seems to have eventually eroded the legitimacy of Libya's position.

### 5.4- Brief remarks on the judgement and dissenting opinion

There seems to be a gap in the reasoning of the majority opinion pertaining to the expansive definitions given to the words "*recognize*" and "*in force*" in Article 3 of the 1955 Treaty. According to Article 3 of the 1955 Treaty:

> The two High Contracting Parties recognize that the frontiers between the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa on the one hand, and the territory of Libya on the other, are those that result from the international instruments in force on the date of the constitution of the United Kingdom of Libya as listed in the attached Exchange of Letters (Ann. 1)."

The words "*recognize*" and "*in force*" seem to deserve detailed and persuasive reasoning beyond what the Court has done. Had Article 3 of the 1955 Treaty been concluded in relation only to the frontier between Libya and the Chadian part of French Equatorial Africa, Libya's recognition of frontiers could have meant recognition of the lines in the conventions attached as Annex I as frontiers. But the Court seems to have pursued an expansive interpretation beyond what the constitutive elements of Article 3 warrant.

The frontiers that Parties to the Treaty "*recognize*" are "*those* that result from the international instruments *in force on the date* of the constitution of the United Kingdom of Libya *as listed* in the attached Exchange of Letters (Annex I)." The word "those" is a *demonstrative pronoun* that refers to "frontiers". In effect, it should be interpreted as "*those frontiers*". The Parties to the Treaty have thus *recognized those frontiers* that result from the instruments attached to the Treaty provided that they were *in force on the date* of the constitution of the United Kingdom of Libya (i.e. on 24 December 1951) *as listed* in the annex of the Treaty.

Libya should have thus been considered to have recognized only those frontiers that result from the instruments attached to the 1955 Treaty. If frontiers don't result from the attached instruments relevant to the Chad/Libya border, Article 3 shall only apply to Libya's border with Tunisia, Algeria, etc. to the extent that there are frontiers that result from the instruments under consideration. The second and third elements that could have been carefully considered are incorporated n the phrase "provided that *they were in force on*

*the date* of the constitution of the United Kingdom of Libya *as listed in the annex* of the Treaty." The term "they" clearly refers to "instruments attached to the Treaty, and the second element has attached a temporal condition to their application, i.e. their being in force on the day of Libya's independence, i.e.-1951. The phrase "*as listed in the annex*" cannot stand on its own, because if it does, it would render the phrase preceding it (i.e. the second element) superfluous and ineffective. Had this been the intention of Article 3, the phrase "*on the date of the constitution of the United Kingdom of Libya*" would not have been necessary.

Closer examination of the case indicates that the instruments regarded as relevant to the case merely determine spheres of influence and not binding frontiers. And if those instruments do not determine frontiers, careful reading of Article 3 could have taken the Court to the observation that *there is no frontier for Libya to recognize that results from the instruments* stated in relation to its boundary with Chad.

Nor is this all, whenever there is inconsistency between the instruments annexed to the Treaty, equitable compromise of interests of the Parties could have been considered. Careful interpretation of Article 3 of the Treaty could have thus enabled the Court to strike a compromise closer to the 1935 unenforceable Treaty on the grounds of equitable principles by disregarding Libya's exaggerated claims of the entire BET Region, and meanwhile upholding a certain portion of Libya's claims in Aouzu Strip.

The dissenting opinion gives more emphasis to coalescence of rights while in fact mainstream judicial jurisprudence is currently based on recognition of treaty-based boundaries. Careful reading of the instruments annexed to the 1955 Treaty clearly shows the non-existence of boundary (between Libya and Chad before 1955) other than spheres of influence. The dissenting opinion has forwarded strong arguments in this regard. Moreover, the dissenting opinion has duly focused on the element of "*in force*" in Article 3. We may validly say that Judge Sette-Camara could have given as much focus to the word "*recognize*." We may also make a major comment on the dissenting opinion's treatment of the issue of lapse of the 1955 Treaty because the dissenting opinion seems to have taken the lapse of the Treaty for granted (page 98) even without the exercise of the option by one of the parties.

## Concluding remarks: A choice among two evils

Most communities in the contested region in Northern Chad and the Southern part of Libya share the same Berber ancestral background. They were also under the same Senoussi Order, and they still have a very strong religious, linguistic and historical bond. The Chadian/Libyan boarder, however,

has accorded different citizenships to relatives merely because their homes happened to incidentally fall within the latitude-longitude-meridian demarcations drawn as per the 1994 ICJ Judgment.

The question is thus *a choice among two evils*. On the one hand there were prolonged animosities, wars and quibbling between Libya and Chad over Aouzou and the BET Region, which had been raging throughout the 1970s and 1980s. And on the other hand, there is now an internationally binding frontier between the States, which in spite of some pitfalls at a closer scrutiny, is the lesser evil in comparison with endless wars due to volatile borderlands.

Subject to the optional clause (as per Article 36/2 of the ICJ Statute), Parties have the option to or not to submit their disputes to the ICJ. But once a dispute is submitted by mutual agreement, ICJ's judgment is binding. As clearly stipulated in Article 94/2 of the UN Charter "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment,"

After decades of bloodshed, civil wars and turmoil, the dust seems to have settled since 1994, despite the lesser evil that Libya is required to gracefully accept. As peace and good neighbourliness blossom in the years and decades ahead, the frontier line can possibly be merely symbolic and not an iron divide between upcoming generations of the Aouzou Strip and their northern relatives. And eventually, sub-regional and regional integration would push such tragic episodes of history into transient moments of pain that preceded African awakening and renaissance. ■