(c) Case Analysis

Some Procedural and Substantive Aspects of the *Libya/Chad* Case

Keywords: Chad; International Court of Justice; Libya; treaty.

1. INTRODUCTION

Libya has come three times before the International Court of Justice (ICJ) on the basis of special agreements.[1] At present, Libya has pending before the Court two cases it has brought by unilateral application, respectively against the United Kingdom and against the United States, concerning *Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie*.[2] For its part, Chad had never come before the Court since its accession to independence in 1960.

The present case came to the Court on the basis of the notification of a special agreement entitled 'Framework Agreement (*Accord-Cadre*) on the Peaceful Settlement of the Territorial Dispute' concluded at Algiers on 31 August 1989.[3] By this *Accord*, both parties agreed to try to settle their territorial dispute first by all political means, and if this was not possible within "approximately" one year, then "the two Parties" undertook "to submit the dispute to the International Court of Justice".[4]

1. Continental Shelf case (Tunisia/Libyan Arab Jamahiriya), 1982 ICJ Rep. 18; Continental Shelf case (Libyan Arab Jamahiriya/Malta), 1985 ICJ Rep. 13; and the instant case: Territorial Dispute (Libyan Arab Jamahiriya/Chad), 1994 ICJ Rep. 6, reproduced *in* 33 ILM 571 (1994).
2. *See* Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Yamahiriya *v.* United Kingdom) 1992 ICJ Rep. 3; and Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Yamahiriya *v.* United States of America) 1992 ICJ Rep. 114.
3. *See* Accord-Cadre, 29 ILM 15 (1990).
4. *Id.*, Art.2; and Libya/Chad case, *supra* note 1, at 9, para. 2. On the nature of this Accord, *see further infra*.

Leiden Journal of International Law 9: 167-183, 1996.
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https://doi.org/10.1017/S092215659600012X Published online by Cambridge University Press

After nearly two years since the Judgment was pronounced, this case has not been the object of much commentary. In fact, I have only come across one full-fledged article dealing with it.[5] The reason would seem to be that, in spite of the enormous outpouring of legal arguments by the parties - "2,344 pages of written pleadings [...] not including [...] the 21 volumes of annexes, and [...] a month of oral pleadings"[6] - the case was decided on a fairly simple and straightforward basis: the interpretation of the 1955 Treaty. Nontheless, there are many questions that were raised and, although not directly answered, new insights were provided, either by the Court's silence, or by the way they were focused. Constraints of space have stopped me from exploring at least three of these important topics: equity, human and peoples rights, and acquiescence.[7]

2. Some Procedural Questions

2.1. Filing an application

The Agreement was notified by Libya to the Court on Friday 31 August 1990. Chad was apparently taken off guard by the rapid Libyan *notification* and felt compelled to communicate to the Court on 1 September (a Saturday), by facsimile, an *application* instituting proceedings against Libya. The application was finally 'filed' in the Registry of the Court on 3 September 1990. This detail tells us that a case cannot be filed by facsimile. The careful wording of the Judgment says that Chad "communicated" an Application by facsimile and then, later, "filed" the Application.[8]

5. M.G. Kohen, *Le Règlement des Différends Territoriaux*, 99 RGDIP 301 (1995).
6. Deputy-Agent of Chad during the last day of oral hearings, CR 93/32, at 10. At the time of writing, all documents submitted by the parties concerning this case, had not yet been published. Publication of these materials will be forthcoming in the relevant 'Pleadings'.
7. *See, e.g.*, Succesion to Acquiescence, CR 93/21, at 43; Must Judgments, to be Equitable, Resemble What Could Have Been an Agreement of the Parties?, CR 93/20, at 45; and Peoples and Territory, CR 93/18, at 70-72.
8. The Court will usually receive documentation by most means, even from "non-appearing" states. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States of America) (Merits), Judgment, 1986 ICJ Rep. 14, at 44, para. 73. But the notification of a special agreement or an application is another matter.

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2.2. Address for service

Article 40(1) of the Rules of Court indicates that the agents of the parties "shall have an address for service at the seat of the Court".[9] In the instant case, Chad in its Application indicated to the Registrar that it wanted all communications sent to an address in N'Djamena. Later, in a letter sent by the Agent of Chad to the Registrar on 28 September 1990, he requested that all correspondence relating to the case be sent to the Co-Agent at an address in Brussels.[10]

3. JURISDICTION

3.1. Multiple basis for jurisdiction

Chad invoked jurisdiction on the basis of the *Accord-Cadre* of 1989 and of a 1955 Treaty which will be discussed further later. The Court decided that since the jurisdiction conferred by the *Accord-Cadre* had not been disputed,[11] there was no need to consider the further ground of jurisdiction allegedly conferred by the 1955 Treaty. The ostensible emphasis would seem to center on the lack of dispute over the ground of jurisdiction and not on which is the broader or better ground of jurisdiction.

But this impression is perhaps misleading. In *Military and Paramilitary Activities in and Against Nicaragua* (Jurisdiction and Admissibility),[12] and *Border and Transborder Armed Actions* (Jurisdiction and Admissibility)[13] Nicaragua invoked in each case two different grounds for jurisdiction that were contested by the other party. In the first case, the Court considered

9. Rules of Court, 1978 ICJ Acts and Documents No. 5, at 92-161, reproduced *in* 17 ILM 1286 (1978).
10. Compare the Application of Denmark instituting proceedings against Norway on 16 August 1988 in the case concerning the Maritime Delimitation in the Area Between Greenland and Jan Mayen, 1988 ICJ Rep. 66. Here the Applicant selected as its address the Royal Danish Ministry of Foreign Affairs, in Copenhagen, Denmark.
11. On the question whether this Accord was sufficient in itself for conferring jurisdiction, *see* Section 3.2., *infra*.
12. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States of America) (Jurisdiction and Admissibility), 1984 ICJ Rep. 392.
13. *See* Border and Transborder Armed Actions (Nicaragua *v.* Honduras) (Jurisdiction and Admissibility), 1988 ICJ Rep. 69.

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and admitted both grounds of jurisdiction invoked,[14] and in the second case, one ground was considered sufficient without need of going into the other.[15] The result of this procedure was that by considering both grounds of jurisdiction in the *Nicaragua* case, the Court was able to find almost unanimously that it had jurisdiction.

So, perhaps the more correct impression is that the dispute over jurisdiction must spill over into the Court, in order for it to consider alternative grounds. Furthermore, that this alternative ground of jurisdiction must bring new support among the members of Court to the finding on jurisdiction.

3.2. Framework agreements

In a recent issue of this *Journal*, Professor Rosenne points to a new development in the way of conferring *ad hoc* jurisdiction on the Court: the so called 'framework agreements' as distinct from the traditional 'special agreements'. He cites four cases that have thus far been brought on on this basis: the *Asylum* case and its offshoots, the case concerning the *Arbitral Award of the King of Spain*, the *Land, Island and Maritime Frontier Dispute* and the present *Libya/Chad* case.[16]

Although there is room for the view that the Land, Island and Maritime Frontier Agreement is in no way different from the usual special agreements, the real point to be made is that the Libya/Chad Agreement shows an interesting difference compared to the other three cases mentioned.[17] Professor Rosenne points out that one of the characteristics of this type of agreements is that they specify "how the Court is to be seised".[18] Precisely this fundamental trait was absent from the

14. Nicaragua case, *supra* note 12, at 425, para. 76, and at 428, para. 83.
15. Border and Transborder Armed Actions, *supra* note 13, at 88, para. 41, and at 90, para. 48.
16. Asylum case (Colombia/Peru), 1950 ICJ Rep. 221; Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras *v.* Nicaragua), 1960 ICJ Rep. 192; Land, Island and Maritime Frontiers Dispute (El Salvador/Honduras; Nicaragua Intervening), 1992 ICJ Rep. 351; and Lybia/Chad case, *supra* note 1. *See also* Sh. Rosenne, *The Qatar/Bahrain Case, What Is a Treaty? A Framework Agreement and the Seising of the Court*, 8 LJIL 161, at 172 (1995).
17. Professor Gautron considered the peculiar nature of the Libya/Chad '*Accord-Cadre*' and compared it to a 'convention d'armistice'. *See* J.C. Gautron, *La Libye et le Tchad Devant la Cour*, 35 AFDI 205, at 211 (1989).
18. *See* Rosenne, *supra* note 16, at 173.

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Libya/Chad agreement but had been clearly indicated in the other cases cited. In fact, the *Libya/Chad* case and now the *Qatar* v. *Bahrain* case[19] might seem to form a special category of framework agreements that do not indicate how the Court is to be seized. The difference between these last two cases is that Libya did not contest the jurisdiction whilst Bahrain did do so. This afforded the Court the opportunity for finding that even if the agreement does not clarify how "the parties" are going to seize the Court (e.g. jointly or separately), either one may do so.[20] In practice, then, it is now difficult to distinguish among these several framework agreements.

4. THE POSITION OF THE PARTIES

Libya contended that there was no agreed boundary and that the dispute was one regarding "attribution of territory". For Chad there was an agreed boundary and the dispute was over the "location of a boundary",[21] and it claimed a specific line of delimitation. For its part, Libya, although maintaining that there existed no boundary, submitted it had title to all the territory north of a specified line that mostly followed a parallel of latitude and identified this area as the Libya-Chad "borderlands".[22]

The sometimes complex and generally lengthy argumentation of the parties was summarized thus by the Court:

> Libya bases its claim to the Borderlands on a coalescence of rights and titles: those of the indigenous inhabitants, those of the Senoussi Order (a religious confraternity, founded some time during the early part of the nineteenth century which wielded great influence and a certain amount of authority in the north and north-east of Africa), and those of a succession of sovereign States, namely the Ottoman Empire, Italy, and finally Libya itself. Chad claims a boundary on the basis of a Treaty of Friendship and Good Neighbourliness concluded by the French Republic and the United Kingdom of Libya on 10 August 1955 [...].[23]

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19. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar *v.* Bahrain) (Jurisdiction and Admissibility), Judgment, 1995 ICJ Rep. 6.
20. *See id.* This statement is an over-simplification of an absorbing Judgment. What is quite clear is that in the future it will be more difficult to take the name of the Court in vain.
21. Libya/Chad case, *supra* note 1, at 14, para. 19.
22. *Id.*, at 15, para. 20.
23. *Id.*, at 15, para. 21.

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At the end, most of these arguments were ignored because the Court's finding was that "the 1955 Treaty completely determined the boundary between Libya and Chad."[24]

Therefore:

1. the discussion whether the case was over a boundary or over a territorial dispute was irrelevant;
2. it was unnecessary to go into the history of the "borderlands" claimed by Libya on the "basis of title inherited from the indigenous people",[25] the Senoussi Order, the Ottoman Empire, and Italy;
3. there was nothing to discuss concerning the "principle of *uti possidetis*" since it was Libya, an original party to the Treaty, that contested its terms;
4. the question of the effectiveness of possession in the past was not relevant;
5. the declaratory or constitutive nature of the 1955 Treaty need not be considered;
6. the concepts of *terra nullius*, spheres of influence, and of the *hinterland* doctrine are also outside the ambit of the judgment;
7. the question of the rules of intertemporal law are not applicable; and
8. there is no need to deal with the history of the dispute before the UN and the Organization of African Unity (OAU).[26]

5. The 1955 Treaty

On 10 August 1955, Libya and France concluded a 'complex' Treaty of Friendship and Good Neighbourliness to which were appended four con-

24. *Id.*, at 38-40, para. 76, *in fine*.
25. *See* W.M. Reisman, *Protecting Indigenous Rights in International Adjudication, Editorial Comment*, 89 AJIL 350-362 (1995). Reisman takes the view that the ICJ only paid lip-service to the question of the rights of indigenous peoples and points out how the Court has found ways of ignoring the issue.
26. Libya/Chad case, *supra* note 1, at 38-40, paras. 75-76. The pleadings of the parties have a wealth of material on all these questions.

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ventions and eight annexes.[27] The pertinent provisions relating directly to frontiers are in Article 3 of the Treaty and in Annex I. In the translation provided by the Registry, Article 3 reads:

> [t]he 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 (Annex I).[28]

For its part, Annex I comprised an exchange of letters which, after quoting Article 3, indicated that the "reference" was to certain instruments it then proceeded to list.[29]

The Court, after making its customary allusion to Article 31 of the Vienna Convention on the Law of Treaties,[30] concluded that the texts of Article 3, together with Annex I, were clear:

1. [t]o recognize a frontier is essentially to 'accept' that frontier.[31]
2. [i]n the view of the Court, the terms of the Treaty signified that the parties thereby recognized complete frontiers between their respective territories as resulting from the combined effect of all the instruments listed in Annex I; no relevant frontier was to be left undefined and no instrument listed in Annex I was superfluous.[32]
3. [a]ny other construction would be contrary to the actual terms of Article 3 and would render completely ineffective the reference to one or other of those instruments in Annex I.[33]

The Court continued its analysis from other perspectives: The object and purpose of the Treaty was manifest from:

1. the Preamble which referred to questions arising "from their geographical location"; and

27. *See* Libya/Chad case, *supra* note 1, at 20, para. 37.
28. *Id.*, at 20-21, para. 39.
29. *Id.*, at 21, para. 40.
30. *Id.*, at 21-22, para. 41. For the Vienna Convention on the Law of Treaties, *see* 8 ILM 679 (1969).
31. Libya/Chad case, *supra* note 1, at 22, para. 42.
32. *Id.*, at 22, para. 43.
33. *Id.*, at 23-24, para. 47.

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2. other provisions of the Treaty, particularly Article 5 which referred "to the Libyan territory as defined in Article 3".[34]

The context was also seen as reinforcing the conclusions of the Court. This context consisted of one of the four Conventions concluded at the same time as the 1955 Treaty - the Convention of Good Neighbourliness - which referred to the "frontiers, as defined in Article 3" and which contained provisions governing the trans frontier movement of the inhabitants in the region between Libya and present-day Chad.[35] On the question of the *travaux préparatoires*, the Court concluded that it was not necessary to go into them in order to "elucidate the content of the 1955 Treaty", but that it would proceed to do so merely to confirm its reading of the text.[36] These documents spoke of leaving the "implementation" of the Treaty "to the near future" and also of the need of an agreement on "demarcation" of the frontiers. The Court saw in the use of both expressions - "implementation and demarcation" - a presupposition of the existence of a prior delimitation. In particular,

> [u]se of the term 'demarcation' creates a presumption that the parties considered the definition of the frontiers as already effected, to be followed if necessary by a demarcation, the ways and means of which were defined in Annex I.[37]

After establishing where the frontier lay on the basis of the instruments mentioned in Annex I, the Court went on to consider the subsequent attitude of the parties to the questions of frontiers. This subsequent attitude is reviewed in the light of several treaties which were concluded by Libya and Chad after this last state acceded to independence (between

34. *Id.*, at 25-26, para. 52.
35. *Id.*, at 26-27, paras. 53-54.
36. *Id.*, at 27, para. 55. On the question whether the *travaux préparatoires* may only be used to confirm the reading of a text and not to contradict it, *see* Qatar *v.* Bahrain case, *supra* note 19, at 27-39 (Judge Schwebel, Dissenting Opinion). Judge Schwebel's opinion is that this would be contrary to the cardinal injunction of the good faith interpretation of a treaty.
37. Libya/Chad case, *supra* note 1, at 28, para. 56. A curiosity: after the Judgment was rendered in the instant case, the parties signed an 'Agreement on the Implementation of the ICJ Judgment Concerning Territorial Disputes', 33 ILM 619 (1994). Art. 6 of this Agreement states that the two countries have agreed "to undertake the *delimitation* of the common frontier [...] in accordance with the Judgement of the International Court of Justice delivered on 3 February 1994" (emphasis added).

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1966 and 1981). These were basically Treaties of Friendship but had references to "frontiers" and not one of them "called in question the frontier in this region deriving from the 1955 Treaty".[38]

The 1955 Treaty had an important provision which the Court took into consideration almost as an afterthought at the end of its reasoning on points of law. This provision was that the Treaty was "concluded for a period of 20 years" and that it could "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."[39]

The Court's opinion was that

> [t]hese provisions notwithstanding, the Treaty must, in the view of the Court, 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 [...].[40]

The Court added that "a boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy".[41]

6. Stability and Finality of Boundaries

There is the view that the most innovative aspect of the case is the reaffirmation of the principle of stability and finality of boundaries.[42]

38. Libya/Chad case, *supra* note 1, at 34-35, para. 66. Libyan troops had crossed into part of the "borderland" areas in the early 1970s. Therefore, Libya's view on this question was that those agreements concluded after this occupation which failed to mention problems in the frontiers, proved that Chad accepted the occupied areas as Libyan. *See, e.g.*, Libyan Counsel oral pleadings, CR 93/18, at 20-47 (translation); and Libya/Chad case, *supra* note 1, at 101 (Judge Sette-Camara, Dissenting Opinion).
39. *Id.*, at 37, para. 72.
40. *Id.*
41. *Id.*, at 37, para. 73. We now know with certainty that boundary provisions survive treaties that give them birth, but is this also true of a compromisory clause like the one in the 1955 Agreement? Since the Court did not consider this other ground for jurisdiction, this enigma persists. *See id.*, at 15, para. 22.
42. *See, e.g.*, Kohen, *supra* note 5, at 320.

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This principle is seen to have been applied by the Court on two counts:

1. as a rule of treaty interpretation which imposes the conclusion that the object of a boundary convention is to lay a whole boundary;[43] and
2. in declaring that boundary provisions are permanent even if contained in a lapsed treaty.[44]

My opinion on the first point is that the conclusion reached by the Court is based solely on a reading of the specific text of the Treaty and not on the principle of the stability of boundaries. The Court is careful to point out that there was "nothing in the 1955 Treaty to indicate that the boundary agreed was to be provisional or temporary".[45] The Court considered "that Article 3 of the 1955 Treaty was aimed at settling all the frontier questions, and not just some of them", and furthermore, that this was "the manifest intention of the parties".[46] In other words, the conclusion is reached on a reading of the particular text involved[47] and not on a presumption of intent based on the principle of stability of boundaries. If the Court had wanted to give the principle of stability of boundaries a new role as a principle of treaty interpretation it could have said so clearly.[48]

Counsel for Chad did argue that the *Treaty of Lausanne* case[49] established a legal presumption that in entering frontier treaties the parties had the intention of defining the whole of their common frontier throughout all of its length.[50] There is no denying that the phrase quoted from the

43. This view is perhaps quite unwantedly enhanced by the Separate Opinion of Judge Shahabuddeen, who criticizes this impression given in paras. 47-48 of the Judgment. In his opinion it was wrong to invoke the principle of stability of boundaries in a question that simply turned on the interpretation of a treaty. I agree with the sense of his Opinion but my impression is that the Judgment does not invoke this principle in the way he indicates. *See* Libya/Chad case, *supra* note 1, at 45 (Judge Shahabuddeen, Separate Opinion).
44. *Id.*, at 37, para 72.
45. *Id.*, at 24, para. 48.
46. *Id.*
47. *See*, *e.g.*, *id.*, at 24, para. 48, which points to the significance of the use of the "definite article".
48. *See*, *e.g.*, *id.*, at 25, para. 51, where the Court calls the principle of effectiveness "one of the fundamental principles of interpretation of treaties".
49. Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925 PCIJ (Ser. B) No. 12, at 6.
50. CR 93/21, at 69. *See also* CR 93/32, at 7-21.

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Treaty of Lausanne case in paragraph 47 of the Judgment[51] gives this impression, but the fact is that this case was also decided on the "clear wording" of Article 3.[52] Equally, in the instant case, the Court observed that "the text of Article 3 clearly conveys the intention of the parties".[53] In sum, these decisions cannot be used to establish legal presumptions arising from the principle of the stability of borders as a rule for interpreting boundary conventions.

On the other hand, it is evident that the principle of stability and finality of boundaries comes into play significantly in the important *dictum* on the question of the "permanence" of a boundary beyond the life of the treaty that established it. But this *dictum* comes at the end of the reasoning of the Judgment and is not dealt within the context of the reasoning on whether the Treaty did or did not fix a frontier.

7. Position of Parties on the 1955 Treaty

One of the surprising aspects of the Libya/Chad affair is that Libya took no action to denounce the 1955 Treaty according to its terms prior to introducing the case in Court. Once before the Court, Libya did not alledge that the Treaty was not in force[54] or that it had been entered into

51. "[T]he very nature of a frontier and of any convention designed to establish frontiers between two countries imports that a frontier must constitute a definite boundary line throughout its length". *See* Libya/Chad case, *supra* note 1, at 22.
52. In the Treaty of Lausanne case, *supra* note 49, at 25, the Court notes: "[t]his argument appears to rest on the following principle: if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted. This principle may be admitted to be sound. In the present case, however, the argument is valueless, because, in the Court's opinion, the wording of Article 3 is clear."
53. Lybia/Chad case, *supra* note 1, at 25, para. 51.
54. On the question whether the Treaty was in force, ironically it was Chad who admitted in its Counter-Memorial (para. 11.203) that the 1955 Treaty was not in force although it had pointed out in its Memorial, at 97, that the Treaty had not been denounced by either party. Judge Sette-Camara points out that it had "lapsed" in 1975. *See* Lybia/Chad case, *supra* note 1, at 98 (Judge Sette-Camara, Dissenting Opinion). For its part, the Court remarked that the parties had not exercised their right of denunciation, implying that the treaty was in force. *Id.*, at 37, para. 73.

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under duress. As the Court pointed out,

> [n]either 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.[55]

Libya's contention with relation to the Treaty was limited to telling the Court of the unequal negotiating capacity of Libya in 1955 *vis-à-vis* a superpower like France and "that the Court should take this into account when interpreting the Treaty".[56] Of course this was the object of greater embellishment by Libya in its pleadings.[57] But all these allegations were a fusillade with blank bullets.[58] The inequality of the parties is not generally accepted as a cause of invalidity of treaties. At most, some authors point out that certain types of inequality - especially inequality in the result, in the *quid pro quo* - may serve as an indication of the existence of a cause of nullity and that it can best serve this purpose when trying to identify the coercion to which a state might have been submitted.[59] But to alledge, as Libya did, a sort of inequality of knowledge, an inequality of legal culture, simply points in the opposite direction: that there was no coercion, just ignorance and this is not a legal defence, at least it is not if it does not fit into the mould of error.

8. COERCION

The negotiations that led to the conclusion of the Treaty took place during the Algerian war of independence, with French troops stationed inside Libya in the Fezzan. Counsel for Chad played down the importance of the pressure that could be exerted by "500 French soldiers dispersed in the

55. *Id.*, at 20, para. 36.
56. *Id.*
57. Libya was occupied by three powers at the time of its independence (*see*, *e.g.*, CR 93/14, at 64); there were only about five trained lawyers in all of Libya in 1955 (CR 93/14, at 67); and the Algerian war had started in 1954 (CR 93/14, at 71). French 'listening devices' were used to bug the private conversations of the Libyan negotiators (Libyan Reply, para. 5.02).
58. Even more so as the more pertinent arguments on coercion and the implications of the denunciability clause were not made. *See* Section 8, *infra*.
59. *See*, *e.g.*, A. Remiro Brotons, 2 Derecho Internacional 445 (1987).

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Fezzan".[60] But Chad admitted that Libya agreed to conclude the 1955 Treaty because it was the only way to get the French out of the Fezzan.[61] If the *quid pro quo* for the 1955 Treaty was Libya's acceptance of the borders and French acceptance to evacuate the Fezzan, this simply meant that France was threatening to keep its troops inside Libya without Libya's consent.

Of course, the decision to invoke causes that might have vitiated the consent given to a treaty is a complicated question in which politics and diplomacy are highly involved and legal considerations play a minor role. The international situation facing Libya might have prompted it to avoid a line of argument that would have sounded 'political'. In fact, Libya was even apologetic of the references it was forced to make to the colonial past.[62]

9. Temporality and Denunciation Clause

For some reason, Libya refused to argue against the 1955 Treaty. It is true that there was authority for the point made by the Court in relation to treaties that produced effects beyond their duration such as those that recognized rights *in rem*,[63] but the question could have been raised from another perspective. For example, the main Libyan argument was that no boundary treaty was intended in 1955 and that the only *raison d'être* of Article 3 and Annex I was to 'recognize' (in the sense of confirm) the pre-existing frontiers in those places where there was one; i.e., that the Treaty was merely declaratory. In furtherance of this argument, Libya pointed out a series of facts that indicated that Libya did not believe it was entering into a treaty fixing borders with France in the area that today is Chad.[64]

60. CR 93/22, at 24 (translation).
61. *See, e.g.*, CR 93/32, at 42: "[i]n 1955 Libya secured the prize of French withdrawal from the Fezzan" and Art. 3 of the Treaty was the '*quid pro quo*' for this. The Libyans accepted the French conditions "sans doute avec un 'wry smile'", but with full knowledge of what they were doing. *See* CR 93/32, at 48-49.
62. *See* Libyan Agent's opening statement on 14 June 1993, CR 93/14, at 24. Note: the President of Chad attended this opening session. This is a quite unusual event.
63. *See* A.D. McNair, The Law of Treaties 256 (1961). Only Chad's pleadings contain some material on this point: *see* Memorial, at 87 and 97, and Counter-Memorial, at 558-559.
64. *See, e.g.*, CR 93/27, at 41-42.

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The important point here, is that even within this line of reasoning, the fact that the 1955 Treaty was concluded for a fixed period militates in favour of the Libyan thesis that its object was not the laying down of frontiers. Undoubtedly someone with expertise in the Quai d'Orsay might have known which way the ball was going to bounce, but it is certainly understandable that the "five" lawyers in all of Libya might not have considered that a treaty that could be denounced and that had a fixed term would bind them permanently on the question of frontiers. Furthermore, no one in 1955 could have certified that this *dicta* was a principle of international law generally accepted and would of necessity be considered as such by the ICJ. The natural reaction of any legal adviser would have been to state clearly in the treaty itself that the issues relating to frontiers were not meant to be temporary. Why was this not done? Chad posed the question: if the parties to the 1955 Treaty really wanted to reserve their right to negotiate further on the question of the frontier, why did they not say so expressly or even implicitly?[65] My question would be the opposite: if the parties wanted a definitive boundary in a treaty subject to denunciation, why did they not say so? The lack of caution on such a crucial point, tied to the non-registration of the Treaty by France, can only make one wonder.

10. Non-Registration of Treaties

The 1955 Treaty, on which the instant case was decided, was registered by France (at Chad's request) after the initiation of the proceedings; that is, nearly 40 years after it came into force.[66] In accordance with Article 102 of the UN Charter treaties entered into by any member state shall be registered with the Secretariat as soon as possible. The sanction for unregistered treaties is that they may not be invoked before any organ of the UN.

The lack of opportune registration of the Treaty was discussed by the parties,[67] but Libya never contested the competence of the Court to

65. *See* Counter-Memorial, at 495, para. 11.48.
66. *See* I Chad Memorial, at 96.
67. In the case of Libya: Memorial, para. 5.504 *et seq.*; Counter-Memorial, para. 3.129 *et seq.*; Reply, para. 5.65 *et seq.*; and oral pleadings, CR 93/15, at 73-74. In Chad's case: Memorial, at 95-97; and Counter-Memorial, at para. 11.193 *et seq.*

https://doi.org/10.1017/S092215659600012X Published online by Cambridge University Press

consider it or the good faith of Chad (France) in requesting it's registration at so late a date.[68] Its arguments on this point were made in support of its main contention that the 1955 Treaty did not fix a frontier and that this was why France never bothered to register it. This was contrasted with the contemporaneous attitude of France with another Treaty signed in 1956 with Libya (France for Algeria) which, according to Libya, comprised a real delimitation Treaty and which France promptly proceeded to register. Libyan counsel found this contrast "illuminating in demonstrating the contemporaneous French attitude towards the boundary provisions of the 1955 Treaty".[69] For its part, the Court did not find this illuminating and made absolutely no reference in the Judgment to the question of registration.[70]

The question of registration came up again in the case between Qatar and Bahrain[71] which was partially decided[72] on 1 July 1994, a few months after the case under review here. In this case, the Minutes of a Meeting of the Parties held on 25 December 1990 were understood by one party (Qatar) to be an international agreement. Qatar duly requested their registration on June 1991; i.e., shortly before filing the Application on 8 July 1991. In this case, the matter of the registration was an insignificant point and the Court could have avoided saying anything about it.[73] Yet

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68. On the question of good faith and the delay in registering a treaty, the last Oppenheim edition says: "[i]t would be contrary to good faith to permit a party to a treaty which has not been registered for a number of years to make the treaty enforceable by registering it at a moment when it suits it to do so". *See* R.W. Jennings & A. Watts, Oppenheim's International Law 1316, n. 2, 9th ed.(1992). This opinion is of more interest if we recall that one of the Editors of the ninth Oppenheim edition, Sir Robert Jennings, was President of the Court at the time of the present case. This citation and others in this commentary that reflect on the attitude of the parties are not taken from the pleadings of Libya. Libyan counsel must have been under special instructions to avoid certain subjects.
69. CR 93/15, at 74.
70. On the other hand, the Court took special notice of the fact that the *Accord-Cadre* had been registered with the UN Secretariat. *See* Libya/Chad case, *supra* note 1, at 9, para. 2.
71. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar *v.* Bahrain) (Jurisdiction and Admissibility), 1995 ICJ Rep. 6, at 112.
72. Judge Oda called the Court's Decision the first "interlocutory Judgment" ever rendered by the present Court or its predecessor. *See id.*, at 134 (Judge Oda, Dissenting Opinion).
73. The Court has never applied the sanction of Art. 102 even though on many occasions it has been faced with the problem of unregistered treaties. *See* J.P. Jacqué, *Article 102*, *in* J.-P. Cot & A. Pellet (Eds.), La Charte des Nations Unies 1369 (1985).

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it chose to dedicate two paragraphs[74] to the question stressing that:

> [n]on-registration or late registration [...] does not have any consequence for the actual validity of the agreement [...]. The Court therefore cannot infer from the fact that Qatar did not apply for registration of the 1990 Minutes until six months after they were signed that Qatar considered, in December 1990, that those Minutes did not constitute an international agreement.[75]

This inference of the Court contains two aspects:

1. since non-registration does not affect the validity, it does not reflect on the attitude of the parties; and
2. the moment in which that attitude has to be judged is at the signing of the instrument.

If this reading is correct then, with due respect, I must disagree. Inferences can be drawn from any action or non-action of the parties before signing (*travaux préparatoires*) during the act of signing, and after the signature (attitude of the parties). These actions or non-actions may be considered even if they are not directly connected with the instrument itself. Thus, an attitude related directly to the instrument must have some meaning. It is true that there is no sanction of invalidity for non-registration but it is also true that there is a duty to do so. Now, if the reasoning is based on the subjective circumstance that parties do not expect any consequences from not registering, this is also not entirely correct: the validity may not be affected by non-registration but the teaching of the most highly qualified publicists indicates that inferences can be drawn from these actions. The last Oppenheim edition, for example, offers the opinion that registration does not make a treaty out of a non-treaty, but "in cases of doubt, however, the fact of registration might be considered to shed light on the parties' intentions concerning the legal nature of the instrument".[76] And, arguing *a contrario* the Judgment in the *South West Africa* cases,[77] the suggestion is made that "intentional non-registration may be evidence of

74. *See* Maritime Delimitation case, *supra* note 64, at 16-17, paras. 28-29.
75. *Id.*, at 17, para. 29.
76. *See* Jennings & Watts, *supra* note 68, at 1317. For another opinion along these lines, *see* Sh. Rosenne, Developments in the Law of Treaties 412-413 (1989).
77. South West Africa cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa) (Preliminary Objections), 1962 ICJ Rep. 319, at 322.

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an intention that the instrument should not constitute a treaty or international agreement".[78] Therefore, unless the parties may only be presumed to be aware of the codified law when judging their attitudes, non-registration must have some implications.

One final point on the question of attitudes. After concluding that the text of the 1955 Treaty was clear, and that a frontier resulted from it, the Court considered the "subsequent attitude of the Parties to the question of frontiers".[79] One of these considerations was the attitude of the parties before international *fora* when frontiers were at issue. The Court found it pertinent to mention that Libya had never objected to French reports to the UN that showed the "area of Chad's territory as 1,284,000 square kilometers" which necessarily included the area in dispute.[80] A recent commentary found it "saisissant" that the Court should take note of this fact and ignore Chad's silence during the Libyan occupation of the area in dispute.[81] For my part, I also found it astounding that the Court should have considered pertinent these minutia and should have ignored the implications of the attitude of the parties as reflected in the non-registration of the Treaty by Libya, France (until Chad's independence), and by Chad itself from 1960 onwards.

Carlos J. Argüello-Gomez[*]

78. Jennings & Watts, *supra* note 68, at 1317, n. 7. There the statement at the end of the Final Act of the Helsinki Conference on Co-operation and Security in Europe of 1975 (*see* 14 ILM 1292 (1975)) is also recalled, to the effect that that instrument "is not eligible for registration under Article 102 of the Charter of the United Nations". But, of course, this is an express manifestation of intention.

79. *See* Libya/Chad case, *supra* note 1, at 34-35, para. 66. Note that the consideration is not on the attitude to the 1955 Treaty but on the question of frontiers.

80. *Id.*, at 36, para. 68.

81. *See* Kohen, *supra* note 5, at 317.

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https://doi.org/10.1017/S092215659600012X Published online by Cambridge University Press