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Cour internationale
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YEAR 1993

Public sitting

held on Tuesday 15 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le mardi 15 juin 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Presents:

President Sir Robert Jennings

Vice-President Oda

Judges Ago
Schwebel
Bedjaoui
Ni

Evensen

Tarassov

Guillaume

Shahabuddeen

Aguilar Mawdsley

Weeramantry

Ranjeva

Ajibola

Herczegh

Judges *ad hoc* Sette-Camara

Abi-Saab

Registrar Valencia-Ospina

Présents :

Sir Robert Jennings, Président

M. Oda, Vice-président

MM. Ago

Schwebel

Bedjaoui

Ni

Evensen

Tarassov

Guillaume

Shahabuddeen

Aguilar Mawdsley

Weeramantry

Ranjeva

Ajibola

Herczegh, juges

MM. Sette-Camara

Abi Saab, juges *ad hoc*

M. Valencia-Ospina, Greffier

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Member of the Bar of Libya,

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Professor of International Law, Graduate Institute of International Studies, University of

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Mr. James R. Crawford
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Professor of International Law, University of Mannheim,

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Mr. Scott B. Edmonds
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Cartographer, Maryland Cartographics, Inc.,

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comme coagent;

S. Exc. M. Ahmad Allam-Mi, ambassadeur de la République du Tchad en France,

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Mme Mireille Jung;

Mme Martine Soulier-Moroni.

The PRESIDENT: Please be seated. Sir Ian Sinclair.

Sir Ian SINCLAIR: Mr. President, Members of the Court,

The second half of the statement made by Mr. Maghur yesterday was devoted to a brief account of Libya's views on the significance of the Franco/Libyan Treaty of 1955 to a resolution of the territorial dispute between Libya and Chad. Mr. Maghur rightly placed the 1955 Treaty in the context of the broad political relations between Libya and France in the early and mid-1950s. Now, the Court will be aware from the lengthy written pleadings that the first major element in Libya's case is that there is not now, nor has there ever been, a conventional boundary between Libya and Chad, or between the territories now comprised in Libya and Chad, whether on the basis of Article 3 of the 1955 Treaty read in isolation, or on the basis of any of the other international instrument not referred to in Annex I. That is the broad framework of this opening part of Libya's oral pleading. Within that broad framework, my particular task is to present Libya's considered views on the significance and meaning of Article 3 of the 1955 Treaty in the context of the present territorial dispute.

The Court will of course be familiar with the principle of "contemporaneity" in treaty interpretation. The late distinguished Judge Sir Gerald Fitzmaurice formulated this principle in the following terms:

"the terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded." (33 *BYBIL*, 1957, p. 212.)

That principle has been applied by the present Court, for example, in the *Rights of Nationals of the United States of America in Morocco* case (*I.C.J. Reports 1952*, p. 189).

Of course, as the Court will be aware, this principle of contemporaneity in treaty interpretation is not unqualified. We know from the Court's Judgment in the *Aegean Continental Shelf* case (*I.C.J. Reports 1978*, p. 32) and from its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*I.C.J. Reports 1971*, p. 31) that expressions may be used in a treaty which are, as it were, by definition, generic and which may lend

themselves to an evolutionary interpretation. However, subject to this qualification, the principle of contemporaneity, as an expression of the broader concept advanced by Max Huber in the *Island of Palmas* arbitration that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to be settled" (2 *UNRIAA*, p. 845), certainly has its part to play in the process of interpretation.

Now, Mr. President, Libya has thought it right to begin this series of presentations by taking first the 1955 Treaty. This is because both Libya and Chad accept that this should be the starting point. Chad indeed asserts in its Memorial that the 1955 Treaty constitutes *un titre contestable* determining the international boundary between Libya and Chad (MC, Chap. III). Chad likewise insists in its Reply that the 1955 Treaty has an exceptional importance for the purpose of the settlement of the dispute submitted to the Court (RC, para. 5,56). True, Chad appears at time to resile from this position, particularly in its most recent pleading. Thus, Chad now appears to maintain that by the 1955 Treaty, France and Libya confirmed the line of the disputed boundary; but that, even if they had not concluded this Treaty, the line would still have been the same by reason of the fact that, at the time of Libya's and indeed Chad's independence, it resulted from previous agreements to which the two States had succeeded; and that, even if, in their turn, these previous agreements must be ignored, the Aozou strip would not be less Chadian because of the effectiveness of the French and Chad presence in that area (RC, para. 1.32). Now, the Court may think that this marks a substantial retreat from Chad's opening position that the 1955 Treaty constitutes *un titre incontestable* determining the boundary between Libya and Chad. At the very least, it seems to herald a certain distancing by Chad from the terms of the 1955 Treaty.

The Court will hardly need reminding that Chad has advanced three distinct theories to sustain its case that the boundary runs along what Chad refers to as the 1899/1919 line — that is to say, the south-east line described in Article 3 of the Anglo/French Additional Declaration of 1899 as "interpreted" by the final paragraph of the Anglo/French Convention of 8 September 1919. The *first* theory is that, by virtue of Article 3 of the 1955 Treaty, Libya and France agreed that the boundary between Libya and Chad should be the line already fixed by the international acts listed in Annex I,

and notably the two Anglo/French treaty instruments to which I have just referred; and this quite irrespective of the status of that line or the opposability of the international acts concerned to Libya. On this first theory, Article 3 is *constitutive* of the boundary between Libya and Chad east of Toummo. The *second* theory is that the south-east line described in Article 3 of the 1899 Declaration, while conceded by Chad to have divided only spheres of influence in 1899, had become a true boundary line as between Britain and France, and subsequently as between Italy and France, by reason of French occupation of territories up to the 1919 line in the period between 1913 and 1919, and of recognition of that line by both Great Britain and Italy. The *third* theory is that, irrespective of any treaties, precisely the same line had become a true boundary line by 1919 based on French *effectivités* alone. Now, it is, of course, a curious feature of the three theories that they all lead to an identical line.

I would stress that my task this morning is confined to addressing the first of these three theories advanced by Chad. Other of my colleagues will be reviewing the arguments of law and fact which are alleged to underpin or to support the other two theories, and will demonstrate how fragile — indeed how totally lacking in conviction — those arguments are.

By way of contrast to Chad's downgrading of the 1955 Treaty, Libya continues to insist on its central significance. Libya has not challenged, and does not challenge, the validity of the 1955 Treaty in general, or of Article 3 of that Treaty in particular. Libya has however drawn attention to certain instances of French conduct during the 1955 negotiations, which might be regarded as falling short of the standard of good faith applicable in such circumstances and which, in Libya's submission, must be taken into account in interpreting the combined effect of Article 3 and Annex I (CML, paras. 7.20 to 7.38). Libya is, of course, convinced that the ordinary meaning of Article 3 bears out fully the interpretation for which Libya contends — namely, that it did not *constitute* (or *determine*) a boundary in any sector of the line where no such boundary had been delimited pursuant to prior agreements and that it operated solely as a *recognition* by both Parties of those boundaries which had already been delimited as boundaries under such prior agreements. But, if any doubt remains on this aspect of the matter, Libya contends that this doubt must be resolved in

favour of the Libyan interpretation and against that of Chad, because of the proven evidence of French conduct during the 1955 negotiations. That conduct was of course designed, if not actively to mislead Libya over the legal basis of what France asserted was Libya's southern boundary east of Toummo, at least to prevent any substantive discussion of that portion of the alleged boundary. Now, Mr. President, Members of the Court, Libya accepts that "Article 3 of the 1955 Treaty is directly pertinent to resolving the present dispute" (RL, para. 5.04); and, indeed, Libya suggests that "The Court may well regard the 1955 Treaty as the logical starting point in its consideration of how to resolve the territorial dispute in this case" (RL, para. 5.01). Since both Libya and Chad (although the latter with some reservations) regard the 1955 Treaty as being of critical importance to the resolution of the present dispute, Libya will begin by analysing Article 3 of that Treaty.

Before doing so, a brief word is necessary about the immediate background to the 1955 Treaty. I will begin with the events of World War II, when Libya, then under Italian sovereignty, was the scene of major military operations. By mid-1943, with the defeat of Axis forces in North Africa, Allied forces were in military occupation of the whole of Libya. More precisely, British forces occupied Cyrenaica and Tripolitania while Free French forces, advancing from French Equatorial Africa, occupied the borderlands and the Fezzan. This was the position until the end of 1951 when Libya achieved its independence. But, with the end of World War II, discussions had already begun between the four major Allied Powers as to the future destiny of the Italian colonies in Africa, including Libya. These initial Four-Power discussions led to the incorporation in the Italian Peace Treaty of Article 23 and Annex XI, the latter being a Four-Power Declaration. Under Article 23, as you will hear further from Professor Condorelli later on, Italy renounced all right and title to the Italian territorial possessions in Africa, including Libya. These possessions were to remain under their present administration pending their final disposal. The Four Powers were jointly to decide upon the final disposal of the Italian colonies in Africa within one year from the date of entry into force of the Peace Treaty. The Four-Power Declaration specified that "the final disposal of the territories concerned and the appropriate adjustment of their boundaries" was to be made by the Four Powers "in the light of the wishes and welfare of the inhabitants and the interests of peace

and security, taking into consideration the views of other interested Governments". The Four-Power Declaration went on to stipulate that if the Four Powers were unable to agree upon the disposal of the former Italian colonies within one year from the entry into force of the Peace Treaty, the matter would be referred to the United Nations General Assembly for a recommendation, the Four Powers agreeing in advance to accept that recommendation.

The Court will have noted that what was reserved to the Four Powers was the right of *final disposal* of the Italian territorial possessions in Africa. The Peace Treaty did not transfer *sovereignty* over Libya and the other former Italian colonies in Africa to the Four Powers, either jointly or severally. With the entry into force of the Italian Peace Treaty, sovereignty over Libya remained in abeyance pending the decision to be taken on its final disposal either by the Four Powers jointly or, in default thereof within the specified time-limit, by the United Nations General Assembly.

Now, as the Court will be aware, the Four Powers were unable to reach agreement on the "final disposal" of Libya within the time-limit stipulated, so the question of Libya was duly referred to the United Nations General Assembly. It is interesting, however, that during the Four-Power discussions in 1948, France put forward a substantial claim for frontier revision. Mr. Maghur has already referred briefly to this French proposal. As the Court will see, it would have involved the placing of substantial areas to the east of Ghadames and Ghat within French territory, and straightening Libya's southern "boundary" in the Toummo and Tibesti areas so that it ran along the Tropic of Cancer as far as the 20th parallel of longitude. The Court will of course find this as Map No. 9 in the Judges' folders. And as the Court will see, this would have been all very much to the advantage of Tunisia, Algeria, French West Africa and French Equatorial Africa and to the clear disadvantage of Libya. All this is admitted by Chad in its Memorial (MC, para. 57). Perhaps fortunately, the Four Powers did not accept the French claim for frontier revision.

This abortive attempt on the part of France to secure substantial territorial gains for French possessions in Africa at the expense of Libya deserves particular mention, since it contrasts so vividly with what Chad asserts, both in its Application to the Court of 3 September 1990 and in its supplementary letter to the Court of 28 September 1990, to have been the true object and purpose of

Article 3 of the 1955 Treaty, namely to secure the explicit consecration of the *uti possidetis* of 1951 based upon previous specified agreements. There can be no doubt that the 1948 French proposal to the Four-Power to the Four-Power Commission, had it been accepted, would have ridden roughshod over any notion of *uti possidetis* and would have radically redrawn the boundary between Ghadames and Toummo delimited by the 1919 Franco/Italian Agreement.

It would not only have done that: it would have involved the further appropriation of substantial portions of Libyan territory in the south by drawing the boundary line between Libya, on the one hand, and the French possessions on the other hand, along the Tropic of Cancer as far as the 20th longitude. Certainly, it can hardly be maintained that France adhered to the *uti possidetis* principles in its approach to the boundaries of Libya in 1948. There is the further consideration that France was seeking to achieve this substantial revision of Libya's external boundaries through the medium of the activities of the Four-Power Commission. France was obviously seeking to achieve the imputation of Libyan territories, not through a process of negotiation in which account would have to be taken of Libyan interests, but under what one might term the euphemistic rubric of "boundary adjustments" which, by a strange quirk, always seemed to favour French interests.

It only remains to point out that the French military did not abandon the idea of securing a revision of what they conceived to be Libya's southern boundary in favour of French West Africa and French Equatorial Africa, notwithstanding the failure of the French Government to persuade the other members of the Four-Power Commission to accept France's proposal for frontier revision in 1948. In 1953, 1954 and 1955, the French military produced, for internal consideration in France, three different proposals for Libya's southern boundary, all of which shared a common theme. East of Toummo there would be a triangular piece of territory to the north of the 1919 line which would be attributed to French West Africa and French Equatorial Africa, so as to encompass the entirety of the Tibesti massif in French territory: in return, the south-east line from the 20th longitude eastwards should be drawn parallel to, but south of the 1919 line intersecting the 24th longitude at about 19° N rather than 19°30' N, thus affording some compensation to Libya.

When the Franco/Libyan negotiations were resumed in July/August 1955, the French

negotiating delegation was in fact authorized to make the proposal now being shown on the screen if it felt it could do so without raising the fundamental question as to the validity of the French thesis concerning Libya's southern boundary (RL, Supp. Ann. No. 6.6, Doc. No. 5); but, perhaps wisely, the French delegation did not believe this condition could be met, so that the proposal was never formally tabled.

Now, Mr. President, I do not fortunately need to go into detail at this stage about the handling of the Libyan question in the United Nations General Assembly in 1949 and 1950, but will do so in a later intervention. Suffice it to say that the General Assembly, by a large majority, recommended in Section A of resolution 289 (IV) of 21 November 1949, that Libya be constituted an independent and sovereign State; that this independence should become effective as soon as possible and, in any case, not later than 1 January 1952; and that a constitution for Libya should be determined by representatives of the inhabitants of Cyrenaica, Tripolitania and the Fezzan meeting and consulting together in a National Assembly. Section C of the same resolution dealt specifically with the boundaries of the former Italian colonies and called upon the Interim Committee of the General Assembly "to study the procedure to be adopted to delimit the boundaries of the former colonies in so far as they are not already fixed by international agreement", and to report with conclusions to the fifth regular session of the General Assembly.

The Interim Committee commissioned a study of this question from the United Nations Secretariat. The Secretariat study which was submitted to the Interim Committee on 27 January 1950, reflected the uncertainty which existed at the time as to whether Libya's southern boundary east of Toummo had been delimited by the international agreement, and if so by what agreement. France had contributed to that uncertainty by supplying inaccurate information to the Four-Power Commission. For example, France had asserted, *inter alia*, that the line shown on a map produced by the *Gouvernement-général de l'Algérie* was based on a (non-existent) Franco/Italian Protocol of 10 March 1924. It is therefore hardly surprising that the Secretariat study, while reproducing these French explanations, annexed a "Sketch-Map of Libya's Frontiers" showing a dashed line east of Toummo with three questionmarks superimposed on it — this you will

find, gentlemen, as map No. 6 in the Judges' folders. Mr. Maghur has already shown you the sketch-map. It will be seen that the dashed line with question marks shown on this sketch-map was not the east-south-east line resulting from the Anglo-French Convention of 8 September 1919; it was in fact closer to, but not identical with, the 1935 Treaty line, as you will see on the screen. This clearly indicated the doubt that existed at the time as to whether, and if so to what extent, Libya's southern boundary had already been delimited by international agreement.

During subsequent discussions in the Interim Committee and the *Ad Hoc* Political Committee, the majority view was clearly that the General Assembly had no competence to rectify or adjust already existing boundaries, and that a clear distinction must be drawn between the concepts of delimitation, demarcation and rectification of a boundary.

In the light of these discussions, the United States delegation presented a draft resolution initially to the Interim Committee and subsequently in a slightly modified form to the *Ad Hoc* Political Committee. This draft resolution later became General Assembly resolution 392 (V) of 15 December 1950, which provided *inter alia* (and this is the most significant portion of the resolution):

"That the portion of its boundary [this is Libya's boundary] with French territory not already delimited by international agreement be delimited, upon Libya's achievement of independence, by negotiation between the Libyan and French Governments, assisted on the request of either party by a third person to be selected by them or, failing their agreement, to be appointed by the Secretary-General."

In introducing this draft resolution, the United States delegate specifically argued: "that boundaries which had not yet been delimited should be delimited by negotiations between the States concerned".

And she went on to emphasize: "that the contemplated procedure was applicable only to the delimitation of the boundaries and not to their rectification".

So it was quite clear that the resolution was to apply only to the delimitation of boundaries which had not yet been delimited.

Prior to the vote on this resolution, the French representative in the *Ad Hoc* Political Committee had intervened to explain the French position. He first of all presented a claim for *rectification* of the boundary between Libya and Algeria in the region of Ghat and Serdeles, making

it quite clear that this was indeed a question of boundary rectification. He then attempted to clarify France's position as regards Libya's alleged southern boundary east of Toummo. He first of all correctly pointed out that the 1935 Treaty of Rome between France and Italy had not been ratified, and then asserted, much more controversially, that, in these circumstances, reference should be made to "previous provisions fixing that section of the boundary". In this context, he cited the Franco/Italian Accord of 1902, with its reference to the boundary of Tripolitania "indicated in the map annexed to the Additional Statement of 21 March 1899", and the Anglo/French Convention of 8 September 1919, together with the Anglo/French Declaration of 21 January 1924, relating to the Anglo/French Protocol of 10 January 1924. Already, we can note the false reference to the map supposedly annexed (but in fact not annexed) to the 1899 Additional Declaration. He concluded by asserting that "the matter was therefore governed at present by all the texts he had just quoted". If this statement was intended to assert Libya's boundary with French West Africa and French Equatorial Africa was already *delimited* by international agreement, it is inconceivable that France should thereafter have voted in favour of resolution 392 (V), as France in fact did, both in Committee and in Plenary. It is inconceivable because, apart from Libya's southern boundary east of Toummo, there was no other portion of Libya's boundary with French territory which had not already been delimited by international agreement. Libya's boundary with Tunisia had been delimited by the Franco/Ottoman Convention of 19 May 1910, and the Secretariat study had duly noted this, adding that no claims or questions had been raised with regard to it. Libya's boundary with Algeria had likewise been delimited by virtue of the Franco/Italian Agreement of 12 September 1919 (as noted in the Secretariat study), and, although France had indeed presented to the United Nations a territorial claim in respect of the region of Ghat and Serdeles, this was a claim for *rectification* of the boundary (as the French representative himself admitted) and, for this reason, fell outside the scope of General Assembly resolution 392 (V). Accordingly, the only portion of Libya's boundary with French territory to which the resolution could apply as being "not already delimited by international agreement" was the boundary with French West Africa and French Equatorial Africa east of Toummo and running to the Sudan boundary. Chad has never sought to

give a meaning to General Assembly resolution 392 (V) other than the one I have just given. The latest Chad explanation, given in its Reply, is that the resolution refrains from specifying to what extent the boundary between Libya and French possessions in Africa is delimited or not. But the weakness of this explanation is manifest. The General Assembly proceeded on the assumption that there *was* a portion of Libya's boundary with French territory which had not already been delimited by international agreement. What portion could that be other than the southern boundary between Toummo and the Sudan border? Chad is careful not to respond to this crucial question.

One other event in the period preceding Libya's achievement of independence must be noted. On 7 October 1951, there was promulgated the Constitution of the United Kingdom of Libya. It has already been referred to briefly by Mr. Maghur. This had been drawn up with great care. Article 4 of the Constitution deals specifically with Libya's boundaries. What is highly significant — and I must mention that this appears as Item No. 11 in your Judges' folders — is that to the east, Libya admits that its boundary coincides with the "boundaries" of the Kingdom of Egypt and of the Anglo-Egyptian Sudan; and to the west, Libya admits that its boundary coincides with the "boundaries" of Tunisia and Algeria. But, to the south, the word "boundaries" is significantly omitted. Now this reflects the same conclusion as had been adopted in General Assembly resolution 392 (V), of the previous year and illustrated on the "Sketch-Map of Libya's Frontiers" annexed to the United Nations Secretariat study: the undetermined nature of Libya's southern boundary.

So much, at this stage, for the general background to the provisions of the 1955 Treaty relating to Libya's boundaries. The more immediate background was Libya's desire to achieve the removal of French military forces from the Fezzan. French forces had remained in the Fezzan since Libya had achieved independence under a temporary agreement which had to be renewed every six months. It was in fact renewed seven times. But in November 1954, the Libyan Government made it clear that it did not intend to renew this temporary agreement. Libya was prepared to enter into negotiations with France, but only on the basis that the negotiations would have as their point of departure the evacuation of French forces from the Fezzan. France's relations with the Arab world generally were strained at this time, primarily as a result of general Arab support, within the

framework of the anti-colonialist movement, for nationalist opinion in Tunisia, Morocco and Algeria. France was also at this time disenchanted with British and United States policy towards Libya. Both these States had achieved satisfactory agreements with Libya for the maintenance of their military facilities in Libya, and France looked to them for a degree of support in their negotiations with Libya which, in French eyes, was not forthcoming. It was in these difficult circumstances that France, with considerable reluctance, embarked on negotiations with Libya at the end of 1954, the negotiations being directed towards the conclusion of a Treaty of Amity. In these negotiations, and in return for their agreement to evacuate French forces from the Fezzan, France sought compensation with respect to security and frontiers.

Mr. President, I have spent a good deal of time in describing the general background and the immediate background to the opening of the negotiations between France and Libya at the end of 1954 which led to the conclusion of the 1955 Treaty, with its related conventions and other instruments. But the main purpose of the statement which I am making this morning is to address the question of the interpretation of Article 3 in the light of Chad's first thesis, namely that the 1955 Treaty itself *accomplished* the delimitation of Libya's southern boundary east of Toummo by a kind of *renvoi* to the *actes internationaux* listed in Annex I.

In other words, as I have said already, Chad's first thesis is that Article 3 was constitutive of Libya's southern boundary with French West Africa and French Equatorial Africa. By way of sharp contrast, Libya contends that Article 3 of the 1955 Treaty, read with Annex I, is not constitutive of any boundary, but is merely declaratory of the boundary status quo as of the date of Libya's independence, and is thus an affirmation of the strict *uti possidetis juris* principle as of that date. Does the text of Article 3 of the 1955 Treaty shed any light on the force of these respective contentions? Chad appears to assume that the wording of Article 3 fully supports her first thesis. For Chad, the 1955 Treaty constitutes *un titre incontestable* (MC, Chap. III, p. 94, para. 1) determining the international boundary between Libya and Chad. For Chad, and again I am quoting, this time from the Chad Counter-Memorial, a simple reading of the provisions of Article 3 and Annex I is sufficient to resolve definitively the boundary dispute (CMC, Chap. XI, p. 481,

para. 11.12). Chad asserts, and here I am citing from their Reply, that it only wishes to give to the terms of Article 3 of the 1955 Treaty their natural and ordinary meaning in the context of the Treaty as a whole (RC, Chap. V, p. 125, para. 5.34).

Now, I have to say that Libya takes issue with Chad on each of these propositions. Libya relies likewise on the literal interpretation of Article 3, but reaches conclusions diametrically opposed to those of Chad. So what does Article 3 say? And here we have the text. It is item No. 12 in your folders. It says in English translation that France and Libya recognize that the boundaries separating the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa, on the one hand, from the territory of Libya, on the other hand, are those boundaries which result from international acts in force on the date of the constitution of the United Kingdom of Libya, as listed in Annex I. So Article 3 does not delimit any boundary at all. It is directed towards the recognition by the parties of boundaries already fixed and delimited before the date of Libya's independence. And there clearly were such boundaries. Neither Libya nor Chad dispute that the boundary between Tunisia and Libya was originally delimited by virtue of the Franco/Ottoman Convention of 12 May 1910. Neither Libya nor Chad dispute that the boundary between Libya and Algeria was initially fixed by virtue of the Franco/Italian Agreement of 12 September 1919, although the boundary line so fixed was subsequently rectified in relation to the sector between Ghat and Toummo as a result of the inclusion in Annex I of the 1955 Treaty of a provision identifying three specific points through which the boundary line should pass; and that boundary line was rectified yet again as a result of the Exchange of Letters between France and Libya of 26 December 1956, to which I will have occasion to refer in more detail shortly. The Court will have noted that both the Franco/Ottoman Convention of 1910 and the Franco/Italian Agreement of 1919 are listed on the Annex I list. I would in addition stress the significance of the phrase *sont celles qui* which appears in Article 3. The Arabic and French language texts of the 1955 Treaty are equally authentic. In the Arabic text of Article 3, the words corresponding to *les frontières* are repeated instead of using the word *celles*, so that the equivalent in French would read: "reconnaissent que les frontières séparent les territoires . . . sont *les frontières* qui résultent . . ."

The Court will have noted that one of the few points on which both Libya and Chad appear to be in agreement concerns the critical date. Both parties accept that the critical date in this case, so far as Libya is concerned, is the date of Libya's independence, that is to say 24 December 1951; and, so far as Chad is concerned, the date of Chad's independence, that is to say, 11 August 1960. But it is in fact the date of Libya's independence which is the most significant date, and Chad itself seems to accept this when she states in her Memorial:

"Lorsque la Libye devint un Etat indépendant, elle le fut dans le cadre de ses frontières telles qu'elles existaient au moment de son accession à l'indépendance, le 24 décembre 1951." (MC, pp. 88-89, para. 138.)

The notion of a "critical date" is, generally speaking, that it is the date on which a dispute may be said to have "crystallized", so that a court has to look at the evidence of title as it existed on that date. Evidence as to claims or conduct after the critical date is certainly not excluded, but in principle is treated as serving only to clarify or confirm what the situation was on the critical date.

The concept of the "critical date" has a respectable pedigree. Its genesis is usually found in the *Island of Palmas* Award. There was much discussion of the concept by counsel for both parties in the *Minquiers and Ecrehos* case, although, in the event the Court did not find it all that relevant in the particular circumstances. On occasion, tribunals have relied more on a "critical period" than on a precise "critical date", as in the Award in the *Taba* arbitration of 1988 (80 ILR, p. 226).

The "critical date" is particularly relevant in situations such as the present one, where a new State, or more than one new State, comes into being. This is because of the principle of *uti possidetis juris*, according to which a new State succeeds to, or inherits, the territory and the boundaries existing at the date of independence. The Court will recall that it made this very point with great clarity in its Judgment in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*:

"By becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. This is part of the ordinary operation of the machinery of State succession . . . the principle of *uti possidetis* applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is, i.e., to the 'photograph' of the territorial situation there existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock . . ." (*I.C.J. Reports 1986*, p. 568, para. 30.)

So, in the present case, we must take our photograph of the legal situation as of 24 December 1951 — the date of Libya's independence. What happened thereafter cannot modify the situation unless there has been some new cession of territory which neither side alleges in relation to the border area east of Toummo. Conduct by either Party subsequent to 24 December 1951 is of course admissible, but only to prove, or disprove, the situation as it existed on that date.

It is of course Libya's contention that the only rectifications made to Libya's boundaries by the 1955 Treaty, and indeed by the subsequent 1956 Exchange of Letters, were modifications of her boundary with Algeria and that, in all other respects, the 1955 Treaty simply confirmed the boundary status quo — that is to say, as between Libya and what was later to become Chad, the absence of a conventional boundary.

But Chad has argued that the Libyan interpretation of Article 3 implies that that Article can be interpreted as not regulating any boundary question (CMC, Chap. XI, p. 486, para. 11.23). This, I may say, Mr. President, is demonstrably false. Article 3, read with Annex I, was designed to ensure the recognition by *both* Parties of any pre-existing boundary which might result from the international acts listed in Annex I. This was important not only to Libya but also to France, since Libya was the first State bordering French territory and French possessions in Africa to achieve independence in the post-war era. There was uncertainty in the 1950s as to what would be the position of newly independent States in Africa with reference to boundaries which the colonial powers had fixed as between themselves prior to the achievement of independence. The Court will recall that it was not until 1964 that the African Heads of State and Government approved the text of the Cairo Declaration. So there was definite advantage to France in ensuring that Libya would no longer be entitled to contest those boundaries which the Colonial Powers had already fixed conventionally as between themselves prior to the critical date.

It will of course now be evident to the Court that Libya and Chad are in fundamental disagreement as to the meaning which must be attributed to Article 3 of the 1955 Treaty. Both invoke the general rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties, and, in particular, both rely upon the rule stated in paragraph 1 of that Article, namely:

"A treaty shall be interpreted in good faith in accordance with the ordinary

meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Yet the Parties reach diametrically opposed conclusions as to the meaning to be attributed to Article 3 of the 1955 Treaty, read in conjunction with Annex I. Chad's first theory is that the ordinary meaning of Article 3 supports the conclusion that this Article *achieves* the *delimitation* of the boundary east of Toummo by way of a *renvoi* to the international acts listed in Annex I. Libya firmly denies this, pointing out that the text of Article 3 goes no further than to confirm that those *boundaries* which result from international acts in force as of the date of Libya's independence shall be taken as the boundaries between Libya and French possessions and territories bordering Libya. Now, I would reserve the right at this stage to revert later in this statement to any arguments which might be derived from the "context" of the 1955 Treaty. I would also reserve the right at that point to offer a few observations on the "object and purpose" of the 1955 Treaty. But it is already sufficiently apparent that the views of the Parties on the interpretation of Article 3 of the 1955 Treaty are so divided that recourse may usefully be had to the supplementary means of interpretation for which Article 32 of the Vienna Convention on the Law of Treaties makes provision. The Court will of course recall the terms of Article 32 of that Convention:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable."

Mr. President, I must say at once that Libya does *not*, and I repeat *not*, take the position that, in the present case, recourse to supplementary means of interpretation is necessary to *determine* the meaning of Article 3 of the 1955 Treaty. Libya firmly believes that the interpretation which it upholds is fully in accordance with Article 31 of that Convention and neither leaves the meaning ambiguous or obscure nor leads to a result which is manifestly absurd or unreasonable. But Libya *does* take the position that, in this case, recourse to supplementary means of interpretation will amply *confirm* the interpretation which Libya puts on the text. I have already, I must admit,

Mr. President, anticipated making reference to supplementary means of interpretation by analysing at some length the circumstances of the conclusion of the 1955 Treaty. Indeed, Libya regards the circumstances of the conclusion of the 1955 Treaty as being of prime importance in the present case, bearing in mind the need for the Court to bear constantly in mind the historical background against which the Treaty was negotiated. As one distinguished commentator has observed when commenting on the circumstances of conclusion of a treaty:

"Il s'agit du cadre historique que forme l'ensemble des événements qui ont porté les parties à conclure le traité pour maintenir ou confirmer le *statu quo*, ou apporter un changement qu'une nouvelle conjoncture nécessite." (Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités," *RCADI* (1976-III), Vol. 151, p. 90.)

But at this point, it may be helpful if I were to analyse such *travaux préparatoires* of the 1955 Treaty as the Parties have been able to lay before the Court in their written pleadings to see what light they shed on the differing interpretations upheld by Libya and Chad.

The first point to note about these *travaux* is that they may be incomplete, at least with respect to the second phase of the negotiations in July and August 1955. I will have occasion to draw attention at a later stage to certain notable gaps in the archives of the French Ministry of Foreign Affairs. For its part, Chad has complained about the virtual absence of Libyan records of the negotiations immediately preceding signature of the 1955 Treaty, and has in particular accused Libya of failing to provide to the Registry copies of the complete documents of the Libyan records of which it provided extracts at Annexes 73 and 74 to the Libyan Memorial (RC, pp. 118-119, paras. 5.12 to 5.15). It should be said straightaway that Libya has nothing to hide. It was explained in paragraph 5.459 of the Libyan Memorial that the limited Libyan records relating to the second phase of the negotiations consisted primarily of unsigned minutes. This is not altogether surprising, given that the negotiations were taking place in Tripoli and that, as a newly-independent State, Libya was suffering from a shortage of trained personnel. In deference to the Chad complaint, however, Libya has furnished to the Registrar of the Court, under cover of a letter from the Libyan Agent of 4 December last, the complete texts of the records of which it furnished extracts at Annexes 73 and 74 to its Memorial. And it will be seen that the additional materials so furnished do not directly

concern the boundary problem, the extracts having included all material strictly relevant to the boundary.

The second point to note (and it is much more significant than the first) is that the *travaux*, and particularly the more recent *travaux* from French sources furnished by Chad, confirm that the French delegation to the second phase of the negotiations were under instructions not to enter into substantive discussions with the Libyan delegation about the boundary east of Toummo. We know already that, on 2 May 1955, the Governor-General of the AEF had written to the Ministre de la France d'Outre-Mer warning the French authorities of the risk the French negotiators would be running if the question of the southern boundary were opened up for discussion. More specifically, after setting out the long-standing French thesis as to the legal basis for this boundary (which, of course, the French Government of the day had temporarily discarded in 1935, as you will presently hear), he argued:

"To request Libya to recognise the actual boundaries would risk implying that we retain doubts as to the strength of our rights and would put us more or less in the position of supplicants and expose us to a refusal which would give an appearance of a legal basis to possible claims by Tripoli." (ML, French Archives Annex, p. 169.)

In his view, the question of the delimitation of the southern boundary between Libya and the AEF should only be raised in the agreements to pose the principle of what he described as "a delimitation on the ground" to be undertaken in the future, taking as the *sole* basis the treaties in force as of the date of the creation of the Libyan State (ML, pp. 370-372, paras. 5.437-5.439). The long-standing French thesis was of course that Libya's southern boundary had been determined by the 1899 Anglo/French Additional Declaration as modified by the Anglo/French Convention of 1919, Italy having formally recognized, according to that thesis, the 1899 Additional Declaration by virtue of the 1900 and 1902 Franco/Italian Accords. Thus, the French position at this time was based exclusively upon the predicated existence of a *conventional* boundary deriving from these international acts, allowing absolutely no room for extraneous factors such, for example, as colonial *effectivités*. But the strong advice of the Governor-General of the AEF was not to get into any discussion about the legal basis of Libya's southern boundary beyond providing in the Treaty for a delimitation on the ground in the future, to be undertaken on the basis of treaties in force as of the

date of Libya's independence. Chad has sought to downplay the significance of this advice by describing the Governor-General as *un fonctionnaire français* and by describing his letter as *un instrument somme toute mineur* (CMC, p. 530, para. 11.130). But this is thoroughly misleading. The Governor-General was a senior and highly respected official, whose knowledge of the boundary problem as it affected French Equatorial Africa was second to none. Moreover, evidence from French archives confirms that his advice was strictly followed during these negotiations; and indeed the instructions given to the French negotiators when negotiations were resumed in July 1955, were entirely in line with the tactical advice which he had urged upon the French Government (RL, paras. 5.91-5.95 and Supp. Ann. No. 6.6).

By way of illustration of this point, I would draw the Court's attention to Exhibit 6.6 to the Libyan Reply, which is commented upon at Supplementary Annex No. 6.6 to the Libyan Reply. Point 1 of this particular Supplementary Annex discusses various documents prepared in Paris and brought to Tripoli by M. Dejean on the resumption of the negotiations in July 1955. The Court will recall that, during the first round of negotiations between France and Libya in January 1955, a certain amount of progress had been made on the boundary problem. In particular, it would seem that both delegations were prepared to accept a general formula for the text of Article 3 in the following terms:

"Les deux gouvernements conviennent de s'en tenir, en ce qui concerne le tracé des frontières séparant les territoires français et libyen, aux stipulations générales des textes internationaux en vigueur à la date de la création de l'Etat libyen." (RL, Ex. 6.4.)

This text was duly conveyed to the British Foreign Office by the French Embassy in London on 10 May 1955 as an element of agreement achieved during the January negotiations (ML, p. 374, para. 5.445). Now, the first of the documents brought to Tripoli by Mr. Dejean on the resumption of negotiations in July 1955, is a variant of the formula already agreed in January for what was to become Article 3 of the Treaty. It would appear from Annex 102 to the Chad Reply that this draft was tabled on that date:

"Les deux Hautes Parties Contractantes reconnaissent que les frontières séparant le territoire de la Libye d'une part, des territoires de la Tunisie, de l'Algérie, de l'AOF et de l'AEF, d'autre part sont celles qui résultent des actes internationaux en vigueur à la date de la constitution du Royaume-Uni de Libye."

It may be surmised that this new text was thought to be more suitable for incorporation in the eventual Treaty than the formula agreed in January, having regard to the possible imprecision of such terms as *stipulations générales*. No change of substance, however, seems to have been intended. To assist the Court, I now show the agreed January formula and the alternative text of Article 3 tabled by Mr. Dejean on 19 July.

It will also be seen that this new text is virtually identical with the text of Article 3 as finally adopted, with the significant omission of the reference to the list of *actes internationaux* in Annex I. But among the documents brought to Tripoli by Mr. Dejean was an alternative version which would have completed this text of Article 3 by adding an extra sentence: "Ces frontières figurent sur la carte jointe en annexe au présent traité." This alternative version would also have embodied another paragraph in the following terms:

"La délimitation, sur le terrain, de la frontière entre Ghat et Toummo sera effectuée, d'accord entre les Hautes Parties Contractantes, dans un délai de [left blank] à dater de la mise en vigueur du présent traité."

The same set of documents also contains proposed language obviously designed to complete this additional paragraph:

"L'article devrait être complété ainsi: 'dans un délai de 6 mois à dater de la mise en vigueur du présent traité, et en tous cas, avant le retrait des forces françaises du Fezzan. Cette délimitation maintiendra en territoire français la trouée de Takharkhouri, le col d'Anai, la Gara Derouet et Djemel (cote 10.10) et le puits de Toummo auquel cependant les ressortissants libyens auront accès.

A l'est de Toummo la délimitation de la frontière sera l'objet d'une convention ultérieure entre les Hautes Parties Contractantes."

There is absolutely no evidence in the *travaux* to indicate that this alternative version was ever tabled. Ambassador Dejean was presumably authorized to draw upon it only if he could not achieve agreement upon the text of Article 3 which he did not table. Nevertheless, the alternative version is a significant indicator of French intentions, since it demonstrates that the French Government would have been prepared to accept a text specifically stating that the delimitation of the boundary to the east of Toummo will be the subject of a later convention between the High Contracting Parties. This is in itself sufficient to dispose of the first Chad theory that the 1955 Treaty itself provided for the delimitation of the boundary east of Toummo.

That the French negotiators faithfully followed their instructions in this respect seems beyond dispute. There is absolutely nothing in the *travaux préparatoires* of the 1955 Treaty relating to boundaries to show that the southern boundary east of Toummo was ever discussed in substance. Even Chad admits that boundary negotiations preceding the conclusion of the 1955 Treaty bore virtually entirely upon the sector between Ghat and Toummo, where the french negotiators were seeking Libyan agreement to a *rectification* of the boundary to ensure that it passed through three identified points (CMC, para. 11.123). That boundary had, of course, been fixed by the Franco/Italian Agreement of 12 September 1919. Libya did, at the last moment, agree to this proposed rectification, under considerable pressure from the French negotiators; and the text of what was agreed by way of identification of these points was embodied in Annex I to the 1955 Treaty. But even the identification of these three points did not, as I will shortly demonstrate, have the effect of delimiting finally the rectified boundary in this sector, since the text in Annex I left open the course of the line joining the three identified points, and indeed joining the final agreed point to Toummo.

Chad has of course argued that the inclusion of Article 3 and Annex I in the 1955 Treaty testifies to the intention of both Parties to reach a comprehensive and definitive settlement of all outstanding questions concerning Libya's boundaries with adjoining territory, and Chad has cited, in this context, a well-known passage from the Advisory Opinion of the Permanent Court in the case concerning the *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (MC, p. 68, para. 80 and CMC, p. 507, para. 11.72). Libya does not dispute the general thrust of that particularly passage, but contends that it has no application to the present case. In the first place, the text of Article 3 of the 1955 Treaty, particularly having regard to the use of the word *reconnaissent*, signifies that the parties did not envisage Article 3 as fixing any boundary or partial boundary, but rather as constituting a recognition by France and Libya of those boundaries which had already been fixed by international acts in force as of the date of Libya's independence, subject of course to any rectification of those boundaries brought about by the combined effect of Article 3 and Annex I. In the second place, the *travaux préparatoires* of the 1955 Treaty amply confirm that

neither France nor Libya wished to discuss, far less agree upon, the course of the hitherto undelimited boundary between Libya and Chad east of Toummo. That France did not wish to do so is plainly attested to by the following evidence:

- (1) the letter of 2 May 1955 from the Governor-General of French Equatorial Africa to which I have already referred (LM, pp. 370-372, paras. 5.437-5.439);
- (2) the documents prepared in Paris and brought to Tripoli by Ambassador Dejean on the resumption of the negotiations in July 1955. I drew attention to these documents only a few moments ago (RL, Supp. Ann. No. 6.6, point 1).

That Libya equally did not wish to do so emerges clearly from the Libyan minutes of the July negotiations. Thus, the Libyan Prime Minister is recorded as having said at a very early session of the resumed negotiations on 20 July 1955, that

"the question of the frontiers has no connection with the Treaty and it must not be linked with it, especially since the drawing of the frontiers requires experts and specialists who are not currently available in Libya" (ML, p. 382, para. 5.459).

Admittedly, Libya was later persuaded to withdraw from this rather over-rigid position, at least to the extent of showing willingness to negotiate on a limited rectification of the boundary between Libya and Algeria — but only the boundary between Libya and Algeria.

The *travaux préparatoires* of the 1955 Treaty are singularly silent on the genesis of the list of *actes internationaux* in Annex I. Chad offers no real explanation for this strange gap in the French archives beyond the bizarre frankly unbelievable speculation that the question of the delimitation of Libya's southern boundary was relatively secondary in the eyes of the parties as a result of the unequivocal position taken by France before the United Nations in 1950 and 1951. There is also a suggestion, which may appear as disingenuous to Members of the Court as it does to me, that there was no need to have records or reporting telegrams of the final stages of the negotiations at the beginning of August 1955 since the negotiations at the beginning of August 1955 since the negotiations resulted in an agreed text, namely, the Treaty of 10 August 1955 (RC, p. 117, paras. 5.10 and 5.11). As one who participated in a wide variety of treaty negotiations over a period of more than 30 years, I think I can confidently assert that this is contrary to all experience.

Now, Chad has annexed to its Reply some 30 documents purporting to be the French *travaux* of the July-August negotiating sessions in Tripoli. But the French *travaux* appear to be incomplete. For example, there is no French report on the 20 July negotiating session, although the Libyan minutes (see ML, p. 382, para. 5.459) record an important discussion on boundaries, in which, as I have just indicated, the Libyan Prime Minister insisted that "the question of the frontiers has no connection with the Treaty and it must not be linked with it". Is it really credible that the French negotiators did not report to Paris on this? Again, although the telegrams at Annexes 112 (Paris to Tripoli) and 113 (Tripoli to Paris) to the Chad Reply are both dated 26 July, neither concern boundaries; and yet we know from the more limited Libyan records (see ML, p. 382, para. 5.460) that, on 26 July, the two parties agreed to an "interpretative letter" relating to the frontiers and similarly they agreed to the formation of a Franco-Libyan Committee to demarcate the frontier. This would seem to have been a reference to the *procedure* whereby effect would be given to whatever was agreed subsequently about the rectification or clarification of the boundary between Ghat and Toummo since, as we know, the "frontier" which the Franco-Libyan Committee was to demarcate was the boundary between Ghat and Toummo.

Both sides have produced *travaux* relating to the important discussion of boundaries at the negotiating session on 28 July (see ML, p. 382, para. 5.460 and Ann. 117 to the RC). The two records do not match all that closely. But what is clear from the French record is that, even at this late stage, the Annex I list had not yet appeared, since it is specifically mentioned in the French record that the formula already agreed for the content of Article 3 — namely, that the boundaries are those which result from international acts in force as of the constitution of the Kingdom of Libya — was maintained. Annex 120 to Chad Reply, constituting of a dispatch from Ambassador Graham in Tripoli to the Foreign Office of 30 July, reports on a conversation which Graham had with Ambassador Dejean on 29 July confirming the accuracy of the French record of the 28 July negotiating session on this particular point.

The only occasion on which reference is made to the Annex I list in the French *travaux* most recently made available by Chad is in Annex 130 to the Chad Reply. This is the text of the

Aide-Mémoire given to the Libyan Prime Minister on 8 August by Ambassador Dejean. In that Aide-Mémoire, it is specifically stated:

"Nous avons admis, dans l'Article 3 du Traité . . . que les frontières étaient déterminées par les actes internationaux en vigueur. Nous sommes d'accord sur la liste de ces actes."

Ignoring for the time being the inaccuracy of the citation from Article 3 in this Aide-Mémoire, this is the first indication in the French *travaux* of the existence of the Annex I list.

Mr. President, this is possibly the time at which we should have a break for coffee. I am sorry to have kept the Court going for such a long period of time.

The PRESIDENT: This will be a convenient time, Sir Ian, and we will go along now.

The Court adjourned from 11.20 to 11.40 a.m.

The PRESIDENT: Please be seated. Sir Ian Sinclair.

Sir Ian SINCLAIR: Well, Mr. President, Members of the Court, before our welcome coffee break I had been summarizing the French *travaux* on the appearance of the Annex I list. So what conclusions can we draw from this summary? Surely, first, that the French *travaux* are incomplete. We know already that the Libyan *travaux* are incomplete. Libya frankly admitted, in paragraph 5.459 of its Memorial, that its records relating to phase two of the negotiations, consisting of unsigned minutes, were "quite limited". This is hardly surprising, given the sparse resources in knowledgeable manpower available to the Libyan negotiating delegation at the time. But the same can hardly be said of the French delegation. It is, in our view, virtually beyond belief that the Annex I list should have made its appearance in the text sometimes between 28 July and 8 August without any mention being made in the French *travaux* of the reasons why the French delegation should so suddenly, and at so late a stage, have insisted on the inclusion of such a list in Annex I. Even Chad appears to concede that the French *travaux* on the boundary question are incomplete, since, in paragraph 5.11 of the Chad Reply, reference is made only to French diplomatic archives accessible to the public.

Secondly, Ambassador Dejean had already, as a result of the 28 July negotiating session, reported to Paris, and indeed to Ambassador Graham, that the boundary question had been settled to France's satisfaction — and this even before the Annex I list had made its appearance. (See Annexes 117 and 120 to the RC). This is sufficient in itself to dispose of the Chad argument (advanced in the CMC, p. 528, para. 11.126) that the inclusion of the list of international acts in Annex I had the effect of changing the method of delimitation. This is pure speculation, for which not a shred of evidence exists. And it is belied by the content of the Annex I list itself which, although incomplete and including certain "acts" not in force on the date of Libya's independence, clearly was designed simply to identify the *actes internationaux* to which reference was made in Article 3.

It could well be that the reference in the Libyan minutes of 26 July to the two parties having agreed to "an interpretative letter relating to the frontiers" was simply an agreement to draft such an interpretative letter. What its precise content would be was left undecided. Indeed, it had to be left undecided until the very last moment because, as we know, the negotiating delegations did not agree to the third point on the Ghat to Toummo line until 9 August — the day before signature of the Treaty. And we know that the text of Annex I identifies the three points on the Ghat to Toummo line. There is no evidence to show that, as early as 26 July, the French delegation indicated their wish to see included in the proposed "interpretative letter" the list of international acts which eventually appeared there. All one can say with certainty on the basis of the available evidence is that the final text of Annex I could not have been agreed between the two delegations until 9 August and that the list must have been included in what was subsequently to become Annex I some time between 26 July and 9 August.

This chronological analysis is by itself sufficient to destroy the Chadian argument that the inclusion of the list of international acts in Annex I served somehow to change the method of delimitation agreed upon by virtue of the text of Article 3 itself. The Annex I list is regarded as being of such minor significance that no reference will be found to it in the *travaux préparatoires* of the 1955 Treaty until we suddenly note that, in Ambassador Dejean's Aide-Mémoire to the Libyan Prime Minister of 8 August (Annex 130 to the RC), mention is made of the two sides being in agreement on the list of international acts referred to in Article 3. The astonishing lack of evidence as to the genesis of the Annex I list and as to the date on which that list was incorporated into the text of Annex I certainly does not suggest that the list was intended to do more than identify the principal international acts which are or might be relevant to the delimitation of the frontier as a whole.

Now, Mr. President, the French *travaux* are also illuminating in a negative way in shedding light on the relationship between Article 3 of the 1955 Treaty and General Assembly resolution 392 (V). The Court will have noted that neither the preamble to the 1955 Treaty nor the text of the Treaty itself make any reference to this resolution which, as I have already argued,

sufficiently identified the contested boundary east of Toummo as being "the portion of [Libya's] boundary with French territory not already delimited by international agreement". Chad's position on the significance of the resolution has changed markedly during the development of the written pleadings. Initially, Chad sought to argue that resolution 392 (V) supported the thesis that Libya's southern boundary had been already delimited by international agreement, and that it was accordingly unnecessary to have recourse to the procedure recommended in that resolution (MC, Chap. I, p. 30, para. 63). By way of sharp contrast, but within the framework of the same written pleading, Chad maintained that the negotiation of the 1955 Treaty had particularly as its object the fulfilment of the mandate conferred by resolution 392 (V) (MC, Chap. III, p. 115, para. 55). These contradictions are not resolved by what Chad says in its subsequent written pleadings. In its Counter-Memorial, Chad appears to argue that the object and purpose of resolution 392 (V) was to ensure that Libya's external boundaries should be completely delimited so as to leave no room for any dispute in future. But then, after reciting the terms of Article 3 of the 1955 Treaty, the Chad Counter-Memorial revealingly adds: "Il s'agit en quelque sorte de la réaffirmation sous une autre forme des termes de la résolution 392 (V)" (CMC, p. 533, para. 11.137).

So, in Chad's view, Article 3 of the 1955 Treaty is simultaneously the fulfilment of, and the reaffirmation of, resolution 392 (V). But I would submit, Gentlemen, that in terms of pure logic it simply cannot be both. One cannot, at one and the same time, seek to maintain that Article 3 of the 1955 Treaty gives effect to resolution 392 (V) and yet amounts to no more than its restatement. The Court may recall the following dialogue from the Mad Hatter's tea party in Lewis Carroll's *Alice in Wonderland*:

"Then you should say what you mean", the March Hare went on.

"I do", Alice hastily replied; "at least — at least I mean what I say — that's the same thing you know."

"Not the same thing a bit!" said the Hatter. "Why, you might just as well say that 'I see what I eat' is the same thing as 'I eat what I see'."

Mr. President, Libya would submit that there can be no room here for the kind of verbal pyrotechnics represented by that dialogue. The plain fact of the matter is that Chad has no

convincing explanation to offer for the relationship between resolution 392 (V) and the 1955 Treaty. Libya's position on that relationship is, on the other hand, simple and fully in keeping with the facts. Resolution 392 (V) had called upon Libya and France to delimit Libya's southern boundary as being "the portion of [Libya's] boundary with French territory not already delimited by international agreement". This was not done in the 1955 Treaty, as is confirmed by the fact that no reference is made to the resolution in the text of the 1955 Treaty nor indeed in the preamble. It was not done because neither party to the negotiations wished it to be done. Libya's basic position was that boundary questions should not be dealt with in the 1955 Treaty. In order to achieve its signature, Libya had however (with great reluctance) to accept a rectification or clarification of the boundary in the sector between Ghat and Toummo. France's position, for quite different reasons, was also that there should be no substantive negotiations on Libya's southern boundary east of Toummo. This was because the French negotiators were following instructions *not* to open up for discussion the legal basis for France's long-held theory that, despite the terms of resolution 392 (V), Libya's southern boundary east of Toummo *had* already been delimited by international agreement. This reflects the deep-seated ambivalence of the French position. On the one hand, the French negotiators could not abandon that theory. The then French Government had admitted in 1935, as you will hear, that the boundary between Libya and French Equatorial Africa east of Toummo had not been delimited by international agreement, in the context of the *Exposé des Motifs* accompanying the draft French law authorizing ratification of the Franco/Italian Treaty of Rome concluded earlier in 1935; but the refusal of Italy to proceed to an exchange of instruments of ratification of that Treaty, which *would* have established such a boundary, effectively forced France in the immediate post-war period to resuscitate the earlier theory. On the other hand, there was clearly extreme nervousness on the part of some French administrators (in particular, the Governor-General of French Equatorial Africa) to expose that theory to discussion in the context of the negotiations with Libya in 1955; and this explains why the French negotiators in 1955 were content not to press for a delimitation of the boundary east of Toummo but simply to establish a formula which could serve as the basis for subsequent and separate negotiations between France and Libya to fix (or, if you like, in the French

view, to confirm) that boundary. But of course no such subsequent negotiations took place.

In the light of these indicia from the *travaux* of the 1955 Treaty, the Court may well ask: what, in Libya's view, is the true meaning of Article 3 of the 1955 Treaty, read in conjunction with Annex I? The short answer is that Libya relies on the natural and unstrained meaning of the language used in Article 3: that the two parties, by virtue of this provision, are recognizing that the boundaries dividing the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa, on the one hand, from the territory of Libya, on the other hand, are the boundaries which result from international acts in force on the date of Libya's independence, as listed in Annex I. This is purely declaratory of the boundary situation as of the critical date, which both parties acknowledge to be the date of Libya's independence. If boundaries result from any of the international acts in force on the date of Libya's independence, those boundaries are to be recognized as boundaries between Libya, on the one hand, and France on the other in respect of the French possession or territory concerned. But if, in respect of any particular sector of the total boundary between Libya and French possessions or territory, no boundary results from any of those international acts, then Article 3, read with Annex I, cannot be interpreted as creating *ex novo* such a boundary. Libya is wholly confident that the *travaux préparatoires* of the 1955 Treaty confirm this interpretation of the text. It is Libya's contention, and Libya will establish this in subsequent presentations, that no international act in force on the date of Libya's independence, whether listed in Annex I or not, had delimited a boundary between Toummo and the Sudan boundary establishing the limits of Libyan territory and the territory of its southern neighbour. The Treaty of Rome of 1935, concluded between Italy and France, *would have* delimited such a boundary. But that Treaty never entered into force, for reasons wholly unconnected with the boundary issue.

Now, Mr. President, this pretty well exhausts the guidance which can be obtained from a detailed study of the *travaux préparatoires*. But it remains to be seen whether any light can be shed on the interpretation of Article 3 of the 1955 Treaty from the *context* in which it occurs in the Treaty as a whole. Libya would regard the context of the 1955 Treaty as including not only all the related conventions between Libya and France concluded simultaneously with the 1955 Treaty itself, but

also the Exchange of Letters of 26 December 1956. I will presently come to that Exchange of Letters which, as you will see, modified the boundary line between Ghadames and Ghat to the evident advantage of Algeria. Although this Exchange of Letters post-dates the signature of the 1955 Treaty by some 18 months or so, it must be treated as part of the context of the 1955 Treaty since it was concluded only because France threatened otherwise not to ratify the 1955 Treaty. As the Court will be aware, Article 31, paragraph 2 (a), of the Vienna Convention on the Law of Treaties defines the "context" of a treaty for the purpose of the general rule of interpretation as comprising, in addition to the text, including its preamble and annexes:

"any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty".

Clearly, the Exchange of Letters of 26 December 1956 falls within this definition since, as will shortly become apparent, France made its ratification of the 1955 Treaty conditional upon Libya's acceptance of the 1956 Exchange of Letters.

Now, it is Chad which seeks to draw ammunition favourable to her case from an examination of the context of Article 3 of the 1955 Treaty. What then is the essence of the Chadian argument so far as it relates to the context of Article 3?

Chad asserts that the context of Article 3 supports her contention that that provision, read in conjunction with Annex I, effects the delimitation of the Libya/Chad boundary east of Toummo by reference to the lines which result from the combination of international acts identified in Annex I, all these acts being deemed to have been *en vigueur* on 24 December 1951. To this end, she relies first on Article 5 of the 1955 Treaty itself. The Court will recall that Article 5 makes provision for consultation between the parties in the event that either of them becomes involved in an armed conflict affecting territories in the continent of Africa situated in the northern hemisphere, by reason of aggression or the imminent threat of aggression by another Power. The consultation envisaged is for the purpose of ensuring the defence of their respective territories. As regards France, the territories concerned are defined as those for which France has assumed the defence and which border on Libya — that is to say, Tunisia, Algeria, French West Africa and French Equatorial Africa. As regards Libya, the territory concerned is stated to be Libyan territory as defined in Article 3 of the

Treaty. And Chad seeks to extrapolate from this reference to Libyan territory in Article 5 of the Treaty an acknowledgement by Libya that Article 3 has comprehensively delimited Libya's boundaries with neighbouring territories.

The Court will of course hardly be deceived by this extravagant assertion. The phrase on which Chad relies is a simple cross-reference back to Article 3 and is wholly consistent with the view that part of Libya's boundaries with neighbouring French territories may have resulted from international acts in force on the date of Libya's independence and opposable to Libya, and another part may have been left undetermined, thus requiring still to be delimited by subsequent negotiations between France and Libya on the basis of the criteria indicated in Article 3 of the Treaty itself.

We know, for example, that the Franco/Libyan negotiations in 1955 did not finally resolve the disputed question of the course of the boundary line between Ghat and Toummo. France had succeeded in securing, in the text of Annex I to the 1955 Treaty, Libyan agreement to the proposition that the boundary line should pass through the three identified points of the trouée de Takharkhour, the Col d'Anai and point 1010. But this left entirely at large what should be the course of the line joining these three points, and indeed the course of the line joining point 1010 to Toummo. As the Court will see from the sketch illustrating possible boundary scenarios between point 1010 and Toummo, the course of the boundary between point 1010 and Toummo was not resolved during the 1955 negotiations, nor indeed subsequently. The sketch map now illustrated is based directly upon the map accompanying a note of 9 September 1960, from the "Service du Levant" of the Quai d'Orsay addressed to the Service responsible for the Affairs of the French Community (RL, Exh. 6.9). It will be equally clear to the Court that Article 3 of the 1955 Treaty, read in conjunction with Annex I, did not definitively delimit that sector of the boundary between Libya and Algeria which joins Ghadamès and Ghat. This is because, as we are already aware, France insisted in 1956 on rectifying this sector of the Libyan/Algerian boundary to secure the inclusion of the whole of the Edjelé oil field in Algerian territory, and indeed threatened not to ratify the 1955 Treaty unless this additional rectification were made. So, Mr. President, all the Chadian claims that Article 3 of the 1955 Treaty, read in conjunction with Annex I, had exhaustively delimited Libya's boundaries with

neighbouring French possessions or territories are shown to be false. Libya can cite numerous admissions in documents prepared by French officials subsequent to 1955 to the fact that the boundary between Ghat and Toummo remained to be delimited, notwithstanding the terms of Annex I to the 1955 Treaty. For example, in a note of 15 July 1958, from the "Service du Levant" of the Quai d'Orsay (RL, Exh. 6.9, first document) reference is made to Annex I to the 1955 Treaty.

But, the note continues (in English translation):

"However, the boundary has not been delimited on the ground and this imprecision has been a source of incidents. Two serious incidents occurred on 17 September and 3 October 1957."

In a further note from the "Service du Levant" of the Quai d'Orsay of 11 February 1960 (RL, Exh. 6.9, sixth document), it is specifically stated (again in English translation, and this is simply a short extract from the document):

"From Ghat to Toummo, the boundary between France (in respect of Niger) and Libya remains imprecisely defined by the Franco/Italian Arrangement of 1919 and the Franco/Libyan Treaty of 10 August 1955. The Libyan Government, supporting the territorial pretensions of its Touareg tribes, has never accepted the proposals of the French Government to proceed to the precise delimitation and demarcation of this part of the boundary . . ."

Even as late as April 1968, a note prepared in the Quai d'Orsay on the boundary between Algeria and Libya south of Ghat admits quite frankly that between Ghat and Toummo there has been no delimitation of the boundary:

"Aucune délimitation n'ayant encore été effectuée sur le terrain, des zones contestées subsistent notamment au Sud de Ghat, et cette situation favorise la naissance d'incidents de frontière." (RL, Exh. 6.9, eleventh document.)

Perhaps even more illuminating is a comment made by the French Ambassador to Libya in a despatch to the French Foreign Minister of 13 April 1961 (shortly after Chad's independence). This despatch analyses Libya's boundary problems and it contains the following passage:

"Je sais très bien que les Libyens se mordent les doigts de n'avoir pas essayé de discuter avec nous la question de leur frontière avec le Tchad et le Niger quand il en était encore temps; ils comprennent maintenant que les 'frères africains' se montreront des adversaires encore plus difficiles." (RL, Exh. 6.7 (tenth document).)

There could be no clearer statement that, in 1961, the French Ambassador to Libya regarded the boundary between Libya and Chad as still remaining to be delimited.

These are but a few examples of a series of French official documents post-1955 which testify to an unqualified acknowledgement on behalf of France that Article 3 of the 1955 Treaty had by no means resolved all boundary problems between France and Libya. In the face of all this evidence, this cloud of witnesses, how can it be plausibly contended that the simple cross-reference to Article 3 which is contained in Article 5 of the 1955 Treaty is sufficient to create a presumption that the effect of Article 3 was comprehensively to delimit all Libya's boundaries with neighbouring French territories or possessions? If even French officials frankly admitted in 1960 that the 1955 Treaty did not delimit the sector from Ghat to Toummo and the sector from Toummo to the Sudanese frontier, and that these sectors remained to be delimited as a result of negotiations with Libya, how can Chad now advance arguments so clearly at variance with the facts?

Now, Chad also invokes the provisions of Articles 1, 9, 10 and 11 of the "Convention de bon voisinage", and Article II of Annex III to the "Convention particulière" in support of her argument that the context of the 1955 Treaty is consistent only with the Chad contention that Article 3 operates to delimit exhaustively all Libya's boundaries with neighbouring French territories. Chad argues that Article I of the "Convention de bon voisinage" confirms that all Libya's boundaries are defined by Article 3 of the Treaty (CMC, pp. 499-500, para. 11.56). But this is simply a repetition of the Chad argument with respect to Article 5 of the Treaty itself and is open to precisely the same objection as I have just indicated.

What might appear to be of greater significance are the references to selected geographical features in Articles 9, 10 and 11 of the "Convention de bon voisinage". Article 9 is a general provision whereby the two Governments undertake to provide facilities for the free movement of nomads from tribes traditionally trading on one side or the other of the boundary in order to maintain the traditional caravan routes between certain named regions.

Article 10 establishes a wide zone open to caravan traffic practised by nomads who were holders of a special card. It identifies this zone, on one side or other of the boundary, as being limited, in "French territory" by a line passing through certain specified locations and in "Libyan territory" by a line passing through other specified locations. The map which we are about to show

shows the extent of the Article 10 zone. It will, of course, be noted that the 1955 "Convention de bon voisinage" concerned the entire frontier area between Libya and adjoining French territories for the defence of which France had assumed responsibility. Thus, some of the specified locations are in present-day Algeria or Niger.

It will be apparent to the Court that the object and purpose of the 1955 "Convention de bon voisinage" was to record agreement on practical measures necessary for ensuring frontier security and for assisting cross-frontier circulation. Many of these practical measures had indeed been recommended in a letter of 10 February 1955 from the *Ministre de la France d'Outre-Mer* to the French Minister of Foreign Affairs, drawing upon earlier proposals which he had made on 27 July 1953 (RL, Exh. 6.6).

The Minister draws a clear distinction in this letter between the *régime frontalier* and the course of the boundary itself. The *régime frontalier* has no bearing on the course of the boundary. What is of course particularly interesting about the Article 10 zone that you can see is that it left a great deal of leeway for the subsequent determination of a boundary line within the limits which it fixed. As can be seen, both a strict south-east line in accordance with Article 3 of the 1899 Additional Declaration and the line fixed by the 1935 Franco/Italian Treaty would fit easily into the zone. But of course the object and purpose of the Article 10 zone was simply to indicate the area within which the nomadic tribes were accustomed to circulate. It was not to determine questions of title to territory as between Libya and France. In this context, the Court will readily recall that, within the framework of the "Convention de bon voisinage" as a whole, *territoire français* was defined as meaning territories for the defence of which France had assumed responsibility. Accordingly, no implication can be drawn from the references to *territoire français* in Article 10 of the Convention that the named locations necessarily lie on the French side of any boundary line that might eventually be established between the parties or their successors in title.

Now, the final element, Mr. President, of the "context" of Article 3 on which Chad relies is the reference of Article II of Annex III to the "Convention particulière" to Piste No. 5. Piste No. 5 is the route which, starting from a point in Tunisia proceeds southwards and southeastwards and "pénètre

en territoire du Tchad dans la région de Mouri Idie". As explained at paragraph 55 of the Libyan Reply, this description is far from being precise, as is shown by the map here illustrated. It will be seen that the map shows both a *Col de Mouri Idie* and a geographical feature named *Mouri Idie* itself. Which one is meant? Moreover, the description is deliberately vague: *dans la région de Mouri Idie* does not give an exact indication of a crossing-point, even if one could identify which geographical feature is meant.

Finally, Mr. President, in analysing the "context" of Article 3 of the 1955 Treaty, Chad deliberately leaves out of account the Franco/Libyan Exchange of Letters of 26 December 1956. Chad does not ignore this Exchange of Letters entirely, but endeavours to downgrade its significance. What are the facts? The Franco/Libyan Treaty was signed on 10 August 1955. It was signed subject to ratification. The Court will be aware that one of the related Franco/Libyan agreements, also signed on 10 August 1955, was the Agreement relating to the withdrawal of French forces from the Fezzan. This provided for the withdrawal of French forces from the Fezzan to be completed by 30 November 1956. However, the French Government of the day did not even present the 1955 Treaty to the Assemblée nationale in Paris for approval until 13 November 1956, some 15 months after signature. Why the delay? The French Government were no doubt nervous about securing the necessary approval from the Assemblée nationale for the Bill which would authorize ratification of the 1955 Treaty, particularly at a time when France's relations with the Arab world were strained. But I would suggest that another, and more significant, consideration was involved. At the end of 1955, it was confirmed that oil, in commercial quantities, had been discovered in the vicinity of Edjelé, at a location very close to the line fixed by the Franco/Italian Arrangement of 1919. But France knew, much earlier, that there was every likelihood that this would be a major oil strike. It was clearly in France's interest to ensure that the line between Ghadamès and Ghat, although in principle delimited by the Franco/Italian Agreement of 1919, be rectified in such a way as to ensure that the bulk of the Edjelé oil field fell on the Algerian side of the line. At French insistence, negotiations were accordingly re-opened between Libya and France in the early months of 1956 with a view to delimiting more precisely the boundary line between Ghadamès and Ghat.

These negotiations, which were to result in the Exchange of Letters of 26 December 1956, were still continuing in November 1956. Again, it was very much in France's interest in her ongoing negotiations with Libya in 1956 to magnify the difficulties which the French Government were encountering with the Assemblée nationale in securing Parliamentary approval to ratify the 1955 Treaty. In this context the Court will recall the episode of the Isorni amendment which is referred to in the Libyan Memorial at paragraphs 5.498 to 5.499.

It is incidentally the 1956 Exchange of Letters which gives the lie to the Chad arguments that Article 3 of the 1955 Treaty finally accomplished the delimitation of Libya's boundaries with adjoining French territories. The boundary between Libya and Algeria was the most sensitive from the French point of view, for Algeria was, at this time, a department of metropolitan France. Yet during the 1955 negotiations, the French demands for rectification of the Libyan/Algerian boundary had been limited to securing Libyan agreement to the three identified points between Ghat and Toummo. No question had been raised by France as to the course of the line between Ghadamès and Ghat. It is only some months *after* signature of the 1955 Treaty, but *before* that Treaty had been submitted to the French Assemblée nationale for approval, that France raises the issue of the course of the boundary between Ghadamès and Ghat, particularly in the area of Edjelé. In the summer of 1956, French officials recommended that it should be made clear to the Libyan Prime Minister that the outcome of the French Parliamentary debates on the ratification of the 1955 Treaty would depend largely on the result of the continuing negotiations on the course of the boundary between Ghadamès and Ghat. Little attempt is made to disguise the element of blackmail involved.

Thus, an undated note for the President of the Council of Ministers prepared jointly by the Direction générale des affaires politiques and the Direction d'Afrique-Levant of the Quai d'Orsay and, from internal evidence, submitted in July or August 1956, is devoted to the need for the French Government to define its position with respect to the ratification of the 1955 Treaty. The note points out that the renewed negotiations about the delimitation of the Libyan/Algerian boundary will run into serious difficulties if the 1955 Treaty is not ratified, and it continues:

"Or, un arrangement frontalier est indispensable si nous voulons conserver le très important gisement pétrolier récemment découvert à Edjelé, et dont la possession est vitale non seulement pour l'approvisionnement futur de la France en pétrole mais aussi

pour le développement économique de l'Algérie."

The note then goes on to recommend *inter alia* that the leader of the French delegation in Tripoli should make it known confidentially to the Libyan Prime Minister that the outcome of the French Parliamentary debates on ratification of the 1955 Treaty will depend in large measure on the result of the discussions on the delimitation of the boundary; in other words, he would indicate that if these discussions resulted in a solution satisfactory to France, the French Government would undertake to hasten as much as possible the procedure of ratification and to use all its authority to bring about this solution.

A later joint note of 13 November 1956, from the same source in the Quai d'Orsay, is revealingly candid about French objectives in the continuing negotiations about the delimitation of the boundary between Ghadames and Ghat:

"Entre Ghat et Ghadamès, où d'importants gisements pétroliers ont été récemment décelés, notre intention est de demander au Gouvernement libyen de consacrer dès maintenant, par un échange de lettres, la définition française de la frontière algéro-fezzanaise plaçant les zones les plus intéressantes en territoire algérien *en dépit des dispositions peu favorables que contiennent, à ce sujet, les textes internationaux.*" (Emphasis added.)

Here, there is a clear admission that France is seeking to modify, for her own benefit and that of Algeria, existing international agreements defining the boundary between Algeria and the Fezzan in a manner less favourable to French interests. The same note goes on to indicate that the withdrawal of French forces from the Fezzan should be made conditional upon the prior acceptance by Libya of these proposals. It is no exaggeration, therefore, Mr. President, to apply the term "blackmail" to French conduct in the negotiation of the Franco/Libyan Exchange of Letters of 26 December 1956. Both the notes from which these extracts are taken are at RL, Exh. 6.7.

Now the Exchange of Letters of 26 December 1956, modified the line between Ghadames and Ghat which had been fixed by the Franco/Italian Arrangement of 1919 in such a way as to ensure that the Edjelé oil field was fully incorporated within Algerian territory. The Court will now see on the map the extent of the territorial gains achieved by France by virtue of this Exchange of Letters. It clearly formed part of the context of the 1955 Treaty, since it was made between Libya and France in connection with the conclusion of the 1955 Treaty, as the foregoing evidence amply confirms.

There are other elements of French and Libyan conduct which may not, strictly speaking, form part of the context of the 1955 Treaty, but which certainly have to be taken into account as being part of the circumstances of the conclusion of that Treaty.

One such element of conduct bearing upon the interpretation of the boundary provisions of the 1955 Treaty is *Libyan Petroleum Regulation No. 1* and *Map No. 1* of 14 August 1955. As Mr. Maghur has already analysed these materials in some depth yesterday, I will forbear from repeating his explanation.

It remains only to consider the "object and purpose" of Article 3 of the 1955 Treaty. Chad assumes that that object and purpose was to achieve a comprehensive delimitation of Libya's boundaries with neighbouring French territories to the east and to the south. Libya makes no such assumption. In Libya's submission, the *travaux préparatoires* of the 1955 Treaty are consistent only with the view that the ambitions of the parties were much less far-reaching. Libya's prime objective was to secure the removal of French forces from the Fezzan. Libya was neither prepared nor equipped to enter into detailed negotiations on the course of her boundaries with neighbouring French territories. Libya was reluctantly persuaded to enter into detailed negotiations on her boundary with Algeria between Ghat and Toummo in the face of the French demand that the boundary line in this sector be rectified so as to pass through the three identifiable points which I have already mentioned. But, as we have seen, Libyan agreement to this demand did not bring about a delimitation of the boundary even in this sector, as French officials frankly admitted several years later. Nor can it be said that the unqualified object and purpose of the *French* delegation during the 1955 negotiations was to achieve such a comprehensive delimitation of Libya's boundaries with neighbouring French territories. The evidence that the French delegation was under instructions during both phases of the 1955 negotiations not to open up for discussion the legal basis for the French theory that Libya's southern boundary between Toummo and the Sudanese frontier had *already* been delimited is compelling. But why was the French delegation required to act under such constraints? What did they have to fear? Was it because the French Government well knew that their theory as to existence of a conventional boundary east of Toummo would not stand up to close

scrutiny? Was it because, to adapt the story of Hans Christian Andersen, the Emperor would be revealed as having no clothes? The questions are no doubt rhetorical, but they are none the less suggestive of the answers that inevitably present themselves.

Now, Mr. President, this still leaves open a series of unresolved questions bearing on the interpretation of Article 3, read in conjunction with Annex I. The first, and possibly the least important, is whether the Annex I list was intended to be an exhaustive or a non-exhaustive listing of the international acts relevant to a determination of the boundary east of Toummo. Libya has already given in its written pleadings its reasons for regarding the Annex I list as being non-exhaustive (see CML, pp. 51-52, paras. 3.12 to 3.16 and RL, pp. 37-38, paras. 4.09 to 4.11).

The second, and more significant, unresolved question bears on the interpretation of the phrase *actes internationaux en vigueur* in the context of Article 3. Here we have a striking inconsistency in the Chad position. The natural and unstrained meaning of the phrase *actes internationaux en vigueur* appearing in Article 3 is that one is confined to a consideration of those international acts actually in force as of the date of Libya's independence in 1951 and binding as of that date upon Libya or its predecessor in title. This is the position which Libya takes. It is also the position which Chad takes, at least in its Counter-Memorial. Thus, if you look at paragraph 11.20 of the Chad Counter-Memorial, it unequivocally argues:

"La frontière ne peut être déterminée que par rapport aux actes internationaux en vigueur à l'indépendance de la Libye. On a ici une double limitation: sont exclus, d'une part les actes non internationaux, comme par exemple des actes administratifs internes aux puissances coloniales et, d'autre part, les actes internationaux qui ne seraient pas ou plus en vigueur le 24 décembre 1951, date de l'indépendance libyenne."

The same point is repeated even more clearly in paragraph 11.42 of the Chad Counter-Memorial, where Chad acknowledges that the Franco/Italian Treaty of Rome of 1935 has to be excluded from consideration not so much because it is not listed in Annex I as because it *never* entered into force and could not therefore fulfil the condition specified in Article 3 itself of being an international act in force as of the date of Libya's independence.

It is perhaps not altogether surprising that Chad in its Reply seems tacitly to have abandoned this position. Chad now appears to be arguing that the failure of France to notify the Franco/Italian

Accords of 1900 and 1902 and the Franco/Italian Agreement of 12 September 1919, under Article 44 of the Italian Peace Treaty is explicable on the basis that, by virtue of Article 23 of the Peace Treaty, Italy had renounced all right and title to its territorial possessions in Africa, that is to say, Libya, Eritrea and Italian Somaliland. Therefore, according to Chad, it was not for Italy, nor for France in the context of its bilateral relations with Italy, to consider treaties relating to the boundaries of the former Italian colonies as maintained, reactivated or abrogated (RC, para. 5.50). Alternatively, Chad appears to maintain that the legal effect of the phrase in Article 3 "tel qu'ils sont définis dans l'échange de lettres ci-jointes (annexe 1)" is to indicate the texts which the parties themselves considered to be *en vigueur* at the relevant time (RC, p. 132, para. 5.55). The weakness of both these arguments is self-evident. Leaving aside the fact that this fundamental change in the Chad position is indicative of a pronounced nervousness on the part of Chad as to the consequences of the clear admissions made in paragraphs 11.20 and 11.42 of the Chad Counter-Memorial, the first new argument presented in the Chad Reply fails to explain why reference was made to the *en vigueur* condition in Article 3 of the 1955 Treaty; nor does it establish by itself that the Franco/Italian Accords of 1900 and 1919 were *en vigueur* as of the date of Libya's independence.

Let us just consider a little bit more closely whether the Franco/Italian Accords of 1900 and 1902 can, as a matter of treaty law, be regarded as having been still in force on the date of Libya's independence, that is to say on 24 December 1951. I need not go into much detail at this stage about the content of these two agreements. Mr. Sohier will, in a later presentation, examine their meaning exhaustively in the light of the circumstances prevailing at the time of their conclusion in 1900 and 1902 respectively. It is sufficient for present purposes for the Court to note that these were originally secret agreements, kept confidential by the parties because they related principally to the recognition by Italy of French rights in Morocco in return for a recognition by France of Italian interests — Italian *interests* note, not Italian rights, — in Tripolitania/Cyrenaica. It would have been extremely awkward for the content of these arrangements to have been made public at the time, as Tripolitania/Cyrenaica was universally acknowledged to be an integral part of the Ottoman Empire in 1900 and 1902. Now, this brief description of the content of the 1900 and 1902

Franco/Italian Accords, coupled with the more elaborate analysis which you will presently hear from Mr. Sohier, will, in Libya's submission, enable the Court to conclude that all the Chadian contentions as to the effect of these two agreements are mistaken. These two agreements are typical of the purely personal compacts made between colonial powers at the turn of the twentieth century, whereby each sought to obtain recognition from the other for the position it had carved out, or was hoping to carve out, in particular parts of Africa. But these agreements of 1900 and 1902 depended for their continuing validity on the retention of the Italian position in relation to Libya — as potential successor to the Ottoman Empire until 1912 and as sovereign power in Libya from 1912 to the entry into force of the Italian Peace Treaty in 1947. Once that position had disappeared, as it did with the entry into force of the Italian Peace Treaty, the *raison d'être* of the 1900 and 1902 Franco/Italian Agreements also disappeared. Professor Condorelli, in a later intervention, will be discussing the effect of non-registration of these two agreements under Article 44 of the Italian Peace Treaty. I would simply make the point that, quite apart from the legal effect of non-registration under Article 44 of the Italian Peace Treaty, and the motives which might have led France not to register the 1900 and 1902 agreements, there is in fact reason to conclude that the continuance in force of these agreements depended on the continuing retention by Italy of title in respect of Libya so that they automatically ceased to be in force as soon as Italy's renunciation of right and title to Libya took effect.

Now, Mr. President, the alternative argument at paragraph 5.55 of the Chad Reply is highly suspect. It involves attributing to the parties an intent to *deem* certain international acts to have been in force on 24 December 1951, irrespective of whether they were in fact in force on that date. Moreover, it involves attributing to the parties an intent to do this *retrospectively*, since the international acts alleged to have produced a particular boundary must have done so on the critical date, that is to say, 24 December 1951. *Prima facie*, this is highly unlikely. As we have seen, the Annex I list was included in the text at the very last moment and apparently without discussion. Libya did not have the time to form any considered view as to whether the international acts which France had included in the list were or were not in force on 24 December 1951. This was no doubt

immaterial as regards the Franco/Italian Agreement of 12 September 1919, since the modifications to that Agreement embodied in the text of Annex I itself — that is to say, the specification of the three points through which the line from Ghat to Toummo must pass — those modifications sufficiently indicate that France and Libya were treating that Agreement, or, perhaps more accurately, the effects of that Agreement, as still subsisting on 24 December 1951. The fact remains that the *en vigueur* condition is specified in Article 3 itself and has to be satisfied. That condition is independent of the content of the Annex I list. The Annex I list is prefaced by the phrase "Il s'agit des actes suivants." This would appear to be purely descriptive of the acts themselves and to carry no implication as to whether they were or were not in force on 24 December 1951, a condition which had to be separately and independently satisfied under Article 3.

The fact is that the language of that part of Article 3 which refers to the Annex I list, and of the introductory words to the Annex I list itself, is far from clear. The most natural meaning to be attributed to that language and those words is that they refer to international acts which were actually in force as treaty instruments on 24 December 1951, and (independently of the 1955 Treaty) binding, as of that date, on Libya or its predecessor in title. An alternative, but less likely, meaning is that the language and words refer to international acts which, whether they were or were not in force as treaty instruments on 24 December 1951, had earlier been in force and had established territorial boundaries which were binding on Libya's predecessor in title. On this alternative view, the words *en vigueur* refer to the *effects* of the treaty instrument rather than the treaty instrument itself. But what seems to be excluded, Mr. President, is an interpretation of that language and those words which would cover international acts actually in force on 24 December 1951, in the sense that they were then binding on some entity other than Libya or Libya's predecessor in title, the effect of Article 3 of the 1955 Treaty being to render these acts opposable to Libya. This is excluded because there is nothing in the wording of Article 3 or Annex I to suggest that its purpose was retrospectively to render opposable to Libya international acts which were not opposable to Libya or its predecessor in title as of 24 December 1951.

Now, Mr. President, as I have indicated, Chad has signally failed to produce any *travaux*

préparatoires relating to the genesis of Annex I. In the circumstances, and again bearing in mind the incidence of the *contra proferentem* rule in the interpretation of treaties, upon which Libya has enlarged in the Libyan Counter-Memorial (CML, paras. 7.31-7.37), Libya is confident that the Court will reject the argument advanced in paragraph 5.55 of the Chad Reply.

Now, the third unresolved question bearing on the interpretation of Article 3 relates to the issue of the extent to which colonial *effectivités* are to be excluded in the determination of the boundary east of Toummo. The *travaux préparatoires* amply confirm that France, which was the author of Article 3, firmly believed that a boundary line separating Libyan territory from the territory of French Equatorial Africa (now Chad) *would* result from the international acts in force on the date of Libyan independence. Libya, not having studied the matter in any detail and not being equipped at the time with sophisticated legal advice on boundary matters, was not in a position to challenge the view that a boundary line might result from these acts; but it clearly could not commit itself to the view that such a boundary line did result from these acts. Hence the careful and cautious language of Article 3. What is important to bear in mind, however, is that the French were relying exclusively on a conventional boundary resulting from identified or identifiable international acts. This accorded with the long-held French theory developed initially in the 1920s. Thus, in 1955, Article 3 was drafted on the assumption that a boundary line east of Toummo might or, in the French view, would result from one or more of the international acts to be listed in Annex I. It simply did not address the issue of the relevance of colonial *effectivités* in the event that a conventional boundary east of Toummo and opposable to Libya did not result from any of the international acts concerned, whether or not listed in Annex I.

Now, the Court will be aware that Libya's basic contention is that none of the international acts on which Chad seeks to rely established a territorial boundary east of Toummo opposable to Libya or indeed to Italy or the Ottoman Empire as Libya's predecessors in title. If this is correct, and Libya is firmly convinced that it is correct, then Article 3 ceases to be relevant as regards the determination of that boundary. What then would be the position? Article 3 had, by clear and inescapable inference, excluded reliance on colonial *effectivités* as a factor to be taken into account

in determining a boundary pursuant to its terms. But if Article 3 ceases to be relevant to the determination of the boundary east of Toummo, can one continue to ignore colonial *effectivités*? Even assuming that, in 1955, France firmly believed that a conventional boundary east of Toummo would result from the relevant international acts, there is, in Libya's view, insufficient evidence to indicate that France was totally abandoning any reliance on colonial *effectivités* as an element to be taken into account in the determination of that boundary if that firm belief proved in the event to be unfounded. In principle, and on the assumption that a conventional boundary east of Toummo does not result from any of the international acts concerned (and this is Libya's contention), whether listed in Annex I or not, the position must be that that boundary will result from the application of rules of general international law relating to the determination of title to territory in dispute. Libya has already indicated, in its written pleadings, the elements which, in its view, are to be taken into account in determining title to territory in the absence of a conventional boundary. Libya will of course revert to this major aspect of the case in the second half of its oral pleading. Libya has demonstrated that the Libya/Chad borderlands were not *terra nullius* in the opening years of the 20th century when Chad asserts that France acquired title by occupation. Libya relies *inter alia* on the Court's Advisory Opinion in the *Western Sahara* case in support of the proposition that the borderlands were not *terra nullius* at the relevant time. But even if this were not so, there is no evidence that France acquired a valid title to the borderlands by way of effective occupation by 1914 (or even by 1919). And after 1919, acquisition of title to territory as a result of the use of armed force was prohibited as a matter of general international law.

It is curious that France should so decidedly have sought to exclude reliance on colonial *effectivités* in the text of Article 3. France was obviously concerned that Italian colonial *effectivités* (particularly during the period from 1940 to 1943) that those Italian colonial *effectivités* could cast a significant measure of doubt on the French claim to title over the borderlands; the *travaux préparatoires* of the 1955 Treaty confirm this. It may be also that France was indirectly accepting that military occupation based on conquest could not, after 1919, constitute a good claim of title to the borderlands and so was prepared to exclude colonial *effectivités* as an element in the

determination of title under Article 3 of the 1955 Treaty. Whatever the reason, there can be no doubt that the deliberate exclusion by France of colonial *effectivités* as an element to be taken into account in determining a boundary under Article 3, is strongly indicative of a complete lack of confidence by France in the validity of any argument, whether on the law or on the facts, that she could have established title to the borderlands on the basis of colonial *effectivités* alone or in conjunction with any of the relevant international acts.

Now, Mr. President, I am coming to the end. But there is just one other feature of the circumstances surrounding the conclusion of the 1955 Treaty to which I must draw attention: and that is the deliberate failure of France to register the Treaty with the United Nations Secretariat under Article 102 of the Charter until the year 1991, and then only at the request of the Government of Chad. The facts are fully set out in the Libyan written pleadings: see ML, paras. 2.12 and 5.504 to 5.510 and RL, paras. 5.67 to 5.69.

In its Memorial, Libya had contrasted France's deliberate failure to register the 1955 Treaty shortly after its conclusion with France's eagerness to register the Franco/Libyan Exchange of Letters of 26 December 1956. Which as we know modified the Franco-Italian Agreement of 1919 to ensure that the Edjelé oil field fell on the Algerian side of the boundary line. So this Exchange of Letters of 1956 genuinely did purport to establish an international boundary. And what happens? France promptly files the Exchange of Letters for registration with the United Nations Secretariat under Article 102 of the Charter, and the registration duly takes effect on 19 May 1958. This is some three-and-a-half years before consideration is even given within the Quai d'Orsay to the possible registration of the 1955 Treaty.

Libya has drawn attention to this episode, not because the lengthy delay in effecting registration casts doubt upon the validity of the 1955 Treaty or upon the ability of either party to invoke it, but rather because it is illuminating in demonstrating the contemporaneous French attitude towards the boundary provisions of the 1955 Treaty. For, if France had in truth taken the view that Article 3 of the Treaty, read with Annex I, *achieved* the delimitation of the boundary east of Toummo between Libya and what was later to become Chad (and this is what Chad's first theory

requires), then France had every reason to effect rapid registration of the Treaty under Article 102 of the Charter. This was in fact precisely what France did as regards the Exchange of Letters of 26 December 1956. The lengthy delay in effecting registration accordingly testifies to a firm conviction on the part of the French authorities that the 1955 Treaty did not itself fix or determine any of Libya's boundaries with French territory. In other words, it conforms entirely to the pattern of all the other evidence relied upon by Libya to establish that Article 3 of the 1955 Treaty did no more than confirm the territorial status quo as of the critical date.

Mr. President, Members of the Court, you will be relieved to hear that this effectively concludes my presentation. I must apologize to the Court for the discursive nature of my address. But I have had to draw heavily on a wide range of materials and evidence which not only support and sustain the interpretation which Libya puts on the text of Article 3 of the 1955 Treaty but which are also wholly incompatible with the interpretation which Chad seeks to put upon that text. In the end, the Libyan position on the interpretation of Article 3 of the 1955 Treaty can be summarized in the following propositions.

1. Libya relies on the literal meaning of Article 3 — namely, that the two Parties recognize that the boundaries separating Libya from adjoining French territories are those which result from international acts in force on the date of Libya's independence and opposable to Libya or Libya's predecessor in title.

2. Libya regards Article 3 as being declaratory of the boundary status quo as of the critical date, not as being *constitutive* of a boundary in any sector where no such boundary had previously been determined.

3. In the sector between Toummo and the Sudanese frontier, the overwhelming weight of the evidence is that no true boundary dividing the territory of what is now Libya from the territory of what is now Chad had been determined prior to the date of Libyan independence. In particular, no true boundary line opposable to Libya in this sector can be argued to have resulted from the combined effect of the Anglo/French Additional Declaration of 1899, the Franco/Italian Accords of 1900 and 1902 and the Anglo/French Convention of 8 September 1919.

4. The available evidence bearing on the negotiation of Article 3 of the 1955 Treaty amply confirms that no attempt was made to negotiate *de novo* a boundary between Toummo and the Sudanese frontier. Indeed, the available evidence shows that both Libya and France (though for widely differing reasons) were reluctant even to engage in detailed discussions about the legal basis for the alleged conventional boundary in this sector.

5. The context of Article 3 of the 1955 Treaty is wholly consistent with the Libyan interpretation, and is wholly opposed to the Chad interpretation. In particular, the Franco/Libyan Exchange of Letters of 26 December 1956, which must be considered to be part of the "context" of Article 3 of the 1955 Treaty, demonstrates beyond question that the 1955 Treaty did not definitively resolve, and was not intended to resolve, all outstanding boundary issues between Libya and France.

6. The *travaux préparatoires* of the 1955 Treaty and the circumstances of its conclusion again give overwhelming support to the Libyan interpretation of the legal effect of Article 3, read in conjunction with Annex I.

7. Although the language of Article 3, read in conjunction with Annex I, might suggest that the list of *actes internationaux* in Annex I was intended to be *limitative*, Libya is not entirely convinced that this was indeed the common intention of the parties, particularly in the absence of evidence in the *travaux préparatoires* relating to the genesis of the Annex I list and the point of time at which it was included in the text.

8. Libya contends that the expression *actes internationaux en vigueur* used in Article 3 of the 1955 Treaty must be interpreted as referring to international acts actually in force as of the date of Libya's independence, and as *not* including international acts not in force or no longer in force as of that date.

9. Article 3 of the 1955 Treaty, read in conjunction with Annex I, excludes reliance on colonial *effectivités* as an element to be taken into account in the recognition of a boundary pursuant to its terms. But Article 3 and Annex I were concerned only with *conventional* boundaries. The deliberate exclusion by the parties (and particularly by France) of colonial *effectivités* as an element to be taken into account in determining a boundary under Article 3 is in any event indicative of a

complete lack of confidence on the part of France in the validity of any argument, whether on the law or on the facts, that she could have established title to the borderlands on the basis of colonial *effectivités* alone or in conjunction with any of the relevant international acts.

10. The circumstance that France did not register the 1955 Treaty under Article 102 of the United Nations Charter until 1991, while she registered the Franco/Libyan Exchange of Letters of 1956 shortly after its conclusion, confirms the Libyan view that France had no belief, in the years following the conclusion of the 1955 Treaty, that that Treaty *effected* the delimitation of a boundary between Libya and what is now Chad east of Toummo.

11. Mr. President, you will be relieved to hear that this is the final proposition. As a matter of law, the Court would in any event be entitled to take into consideration the circumstance that France may not have acted during the boundary negotiations with Libya in 1955 and 1956 in a manner entirely consistent with the standard of good faith required in the negotiation of treaties and, in the event of the Court's retaining any doubt as to the meaning to be attributed to Article 3 of the 1955 Treaty, to give effect to the principle of good faith by upholding the Libyan interpretation and rejecting the French interpretation now espoused by Chad.

Mr. President, Members of the Court, I thank you for your close attention. I will be followed, tomorrow morning obviously, by Mr. Sohier who will begin by giving a general description of the geography and the inhabitants of the borderlands, and will then proceed to examine the content and the significance of the principal international agreements up to 1912. Thank you.

The PRESIDENT: Thank you, Sir Ian. So, Mr. Sohier, until tomorrow morning at ten o'clock. I am getting a little anxious about the slippage each day so far on the agreed timetable, but no doubt Libya is taking this into consideration in planning the rest of the use of the agreed timetable. So, ten o'clock tomorrow morning. Thank you very much.

The Court rose at 1.00 p.m.
