

SEPARATE OPINION OF JUDGE SHAHABUDDEN

The case at bar recalls a world now left behind. In telling flashes, it illuminates an age when international law tended to develop as a legal construct supportive of the global projection of the power of a single region; when in important respects it was both fashioned and administered by leading members of a select community; when that community, by itself called the international community, bore little resemblance to the world as it then stood, and even less to the world as it stands today. The record of the Court speaks of those days; it is not easy to recover the various standpoints of the period. Both Parties, however, correctly accepted that the legal manners of the times were not on trial. Thus, if it were necessary to examine some of the issues bequeathed by the past to the present, it is possible that it is the law as it then was which would still govern.

As it has turned out, there is no need to do so. This is because, interesting and important as those issues are, they stand foreclosed by the answer which the Court has returned to what both sides agreed was the threshold question, that is to say, whether the boundary claimed by Chad is supported by the 1955 Franco-Libyan Treaty. The Court's answer is, I think, inevitable. It results from the application of the normal principles of interpretation to the wording of Article 3 of the Treaty, as set out in paragraph 39 of the Judgment. The first part of the Article, up to the words "on the other", necessarily implies that the Parties (Chad claiming through France) recognize the existence of frontiers separating all of the territory of Libya from all of the French territories mentioned, inclusive of the territory of Chad. As to what those frontiers are, the Article refers the reader to the international instruments listed in Annex I to the Treaty. Absent compelling reasons to the contrary, those instruments must accordingly be construed so as to produce a comprehensive definition of the frontiers, including a frontier separating the territory of Libya from the territory of Chad, consistently with the above-mentioned recognition, impliedly made by the Parties, that frontiers exist in relation to all such territories.

A difficulty which I do, however, have concerns the principle of stability of boundaries, to which the Judgment refers: is the principle germane to the issue whether the 1955 Treaty can be considered to be a treaty establishing a boundary between Libya and Chad? The principle (by whatever name called) is of wide application in the field of boundary delimitation. Its utility is clear in considering the question, examined in paragraph 72 of the Judgment, concerning the permanence of a bound-

ary established by treaty. But how far, if at all, does it aid in resolving a problem of interpretation as to whether a treaty can be considered to be a treaty establishing a specific boundary, and more especially a boundary of substantial length as in this case? As is pointed out in paragraph 46 of the Judgment, the use of the word "frontiers" in the plural in Article 3 of the 1955 Treaty is

"to be explained by the fact that there were differences of legal status between the various territories bordering on Libya for whose international relations France was at the time responsible, and their respective frontiers had been delimited by different agreements".

I agree with the Court that that provision of the 1955 Treaty is nevertheless to be interpreted as meaning that it was "aimed at settling all the frontier questions, and not just some of them". The one small question which occurs to my mind is whether the principle of stability of boundaries helps to establish that interpretation (see paragraphs 47 and 48 of the Judgment).

The operation of the principle in this case has to be considered within the framework of the Court's Judgment, which rests on the 1955 Treaty, and not on *effectivités* or any other ground. Libya accepts that the 1955 Treaty is a boundary treaty as to some parts of its territory, but not as to all; in particular, it denies that the Treaty was intended to establish a boundary between its territory and that of Chad. That is the short issue before the Court: did the 1955 Treaty in one way or another establish such a boundary? It could only do so if it was intended to settle comprehensively the boundary between Libya and all adjacent French territories, which then of course included the territory of Chad. So the real question presented by recourse to the principle of stability of boundaries in proof of that proposition is whether the principle creates a presumption that a boundary treaty is intended to settle comprehensively all the boundaries between the contracting parties (see CR 93/32, pp. 18-20 and 31, Professor Cot, for Chad; and cf. CR 93/27, p. 29, Sir Ian Sinclair, Q.C., for Libya).

The principle of stability of boundaries, as it applies to a boundary fixed by agreement, hinges on there being an agreement for the establishment of a boundary; it comes into play only after the existence of such an agreement is established and is directed to giving proper effect to the agreement. It does not operate to bring into existence a boundary agreement where there was none. Libya says that the 1955 Treaty was not a boundary treaty as between its territory and that of Chad; that, in effect, it made no boundary agreement relating to the territory of Chad. It begs the question so raised to seek to answer it by pleading the principle that parties to a boundary agreement are presumed to intend to establish a definite, complete and continuous boundary. Parties to what boundary agreement? Whether there was ever such an agreement is itself the issue.

In *Sovereignty over Certain Frontier Land* the Court first noted the existence of the Convention of 8 August 1843, and in particular the preamble thereof which recorded the common intention of the two States "to fix and regulate all that relates to the demarcation of the frontier between" them (*I.C.J. Reports 1959*, p. 221). It was in the light of the existence of this agreement for comprehensive demarcation of the frontier between the two kingdoms that the Court proceeded to consider the question whether the Mixed Boundary Commission established by the Convention could properly leave in suspense the issue of the right of either party to certain plots of land. An affirmative answer was excluded, as it would leave undemarcated part of the territory which the Convention required to be demarcated. The situation here is different: Libya denies that any agreement exists for the delimitation of its territory from that of Chad, let alone any agreement for demarcation.

Paragraph 47 of the Judgment quotes from the Advisory Opinion of the Permanent Court of International Justice in the *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* case the words:

"It is . . . natural that *any article designed to fix a frontier* should, if possible, be so interpreted that the result of the *application* of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier." (*P.C.I.J., Series B, No. 12*, p. 20; emphasis added.)

The second part of that statement, relating to "the establishment of a precise, complete and definitive frontier", turns on the words in the first part "any article designed to fix a frontier"; it relates to the *application* of the provisions of an article which is designed to fix a frontier. It is only if it is first established that the article is "designed to fix a frontier" that the principle of stability of boundaries, referred to in the second part, begins to operate. The question here is whether Article 3 of the 1955 Treaty was an "article designed to fix a frontier" between Libya and Chad; the second part of the statement concerning the principle of stability of boundaries does not help to answer that preliminary question. On the contrary, that question must first be answered, and answered in the affirmative, before the principle can come into play.

To invoke the principle of stability of boundaries where the issue is whether the 1955 Treaty was a treaty which was intended to establish a boundary between Libya and Chad is really to make it say that every boundary treaty is to be interpreted as intended to delimit the entirety of the adjoining territories of the Parties. The *Treaty of Lausanne* case does not say that. There, Article 3, paragraph 2, of the Treaty read:

"From the Mediterranean to the frontier of Persia, the frontier of Turkey is laid down as follows:

(1) With Syria:

The frontier described in Article 8 of the Franco-Turkish Agreement of October 20th, 1921;

(2) With Iraq:

The frontier between Turkey and Iraq shall be laid down in friendly arrangement to be concluded between Turkey and Great Britain within nine months.

In the event of no agreement being reached between the two Governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations.

The Turkish and British Governments reciprocally undertake that, pending the decision to be reached on the subject of the frontier, no military or other movement shall take place which might modify in any way the present state of the territories of which the final fate will depend upon that decision." (*P.C.I.J., Series B, No. 12*, pp. 18-19.)

The main question for advice was this:

"What is the character of the decision to be taken by the Council in virtue of Article 3, paragraph 2, of the Treaty of Lausanne — is it an arbitral award, a recommendation or a simple mediation?" (*Ibid.*, p. 6.)

In other words, failing a consensual determination of the boundary between Turkey and Iraq, which was to be made by Turkey and Great Britain within nine months, could the Council of the League of Nations itself determine the boundary? Or could it only make a recommendation or act by way of mediation?

The Court was of opinion that

"the intention of the Parties was, by means of recourse to the Council, to insure a definitive and binding solution of the dispute which might arise between them, namely, the final determination of the frontier" (*ibid.*, p. 19).

The first supporting reason which the Court gave was that Article 3 of the Treaty, as it clearly stated, "intended to *lay down* the frontier of Turkey from the Mediterranean to Persia" (original emphasis). As between the two undisputed terminal points thus established by the Treaty itself, the frontier necessarily had to be "continuous and definitive". It could be neither continuous nor definitive if any gaps left by failure of Turkey and Great Britain to agree on its course here and there could not be filled by a determination made by the Council. It was in these circumstances that the Court said:

"Not only are the terms used ('lay down', *fixer, déterminer*), only to be explained by an intention to establish a situation which would be definitive, but, furthermore, the very nature of a frontier and of any convention designed to establish frontiers between two countries

imports that a frontier must constitute a definite boundary line throughout its length." (*P.C.I.J., Series B, No. 12, p. 20.*)

These remarks were directed to ascertaining the character of the function which fell to be performed by the Council of the League of Nations. They were not intended to suggest that every frontier agreement between parties was to be presumed to extend to the entirety of their adjacent territories. The Court was not concerned with any question as to what was the overall length of the agreed boundary. It was merely concerned with the mechanism for ensuring that, throughout its undisputed length, "From the Mediterranean to the frontier of Persia", the frontier should be definitive and continuous. This explains the terminal words "that a frontier must constitute a definite boundary line throughout its length", i.e., throughout whatever that length was under the agreement providing for the fixing of the frontier. In other words, the case was not about overall length, but about gaps within an undisputed overall length. By contrast, the issue here concerns not gaps within an overall length, but overall length itself: did this, or did this not, include the specific and very long frontier between Libya and Chad?

Nor is the foregoing reasoning at variance with the *Jaworzina*, also cited by Chad. There three pieces of territory were in dispute between Poland and Czechoslovakia. The settlement procedures involved a Decision given on 27 September 1919 by the Supreme Council of the Principal Allied and Associated Powers acting under enabling treaty provisions. The Decision delimited the three territories with a view to the settlement of the dispute through the holding of a plebiscite. The plebiscite was not held and recourse had to be made to other settlement procedures. Poland contended that the delimitation lost all value once it had been decided to abandon the plebiscite. Distinguishing between the delimitation as a first step in the application of the settlement procedures and the remainder of the settlement procedures, the Permanent Court of International Justice held

"that the Decision of September 27th, 1919, determined once and for all the territories in dispute and that the successive decisions taken with a view to the settlement of this very dispute must be considered as relating to the territories thus determined" (*P.C.I.J., Series B, No. 8, p. 23.*)

Poland did not deny that the Decision of 27 September 1919 effected a delimitation; the issue which it raised was whether that delimitation was still in force. To resolve this point, the 1919 Decision could be helpfully construed on a footing consistent with the principle of stability of boundaries. Here, by contrast, Libya is not raising any question as to the continuance in force of a boundary agreement, if there was one; it is saying that there was simply no boundary agreement. The *Jaworzina* does not

help to answer the question raised by Libya as to whether the 1955 Treaty was a boundary treaty in relation to its southern territories.

More to the point is the *Monastery at Saint-Naoum*, in which the Permanent Court of International Justice found that the London decision of 11 August 1913 had fixed certain parts of the Albanian frontier, but not the part relating to the frontier in the region of Saint-Naoum, which it found "had indeed remained undetermined . . ." (*P.C.I.J., Series B, No. 9*, p. 20). In reaching that conclusion the Court did not seek to beg the question by commencing the task of interpretation on the basis that the principle of stability of boundaries required the decision of 11 August 1913 to be interpreted as having been intended to fix all of the frontiers of Albania. Had it started out with any such presupposition, its conclusion might well have been different.

This understanding of the case-law is not at variance with the observation of this Court in the *Temple of Preah Vihear*:

"In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality." (*I.C.J. Reports 1962*, p. 34.)

The principle of stability of frontiers applies "when two countries establish a frontier between them". Libya says that France and Libya made no agreement establishing any frontier between Libya and Chad. It is only after it has been proved that Libya and France did make an agreement establishing such a frontier that the principle of stability of frontiers will apply. It will then apply so as to give due effect to the agreement establishing the frontier, and not in proof of the existence of the agreement. Also, in the *Temple of Preah Vihear* the question was, not what was the overall length of the boundary, but where was the boundary in a specific sector of its agreed overall length. The observation of the Court quoted above is not the same thing as saying:

"In general, when two countries establish a frontier between them, one of the primary objects is that it shall extend throughout all of their adjacent territories."

If there are elements which show that a treaty was intended to achieve a comprehensive delimitation, they can be taken into account to the extent admissible in the course of applying the normal canons of treaty interpretation, without the need to encumber the process of interpretation with any presupposition that the principle of stability of boundaries requires the treaty to be interpreted as intended to achieve a comprehensive delimitation. It is easy to think of cases in which the adjoining areas are so extensive as to make it both practical and sensible for parties to agree a boundary for some particular sector only. It would introduce an unnecessary complication if such an agreement had to be construed on

the basis of a presumption that the boundary was intended to be comprehensive. The other legal authorities cited by counsel for Chad do not overthrow this conclusion and I do not propose to deal with them.

The principle of stability of boundaries is a valuable one. But where, as here, it is invoked in relation to a boundary said to be fixed by treaty, its proper use is in the interpretation and application of the treaty if it exists, and not in proof of the existence of the treaty. Apart from questions concerning the course of an agreed boundary in particular sectors, the principle may no doubt assist in resolving a question as to the precise location of the end-points of an agreed boundary; but, where the distances are on the scale of those involved in this case, it is not credible to assert that the argument is about the precise location of an end-point of an agreed boundary. The question raised by Libya is one as to whether there is any agreement establishing any boundary at all between its territory and that of Chad. The principle of stability of boundaries cannot be used to prove the existence of the contested agreement; that proof must be made in other ways.

As it happens, it is clear that there is a treaty relating to the boundary between Libya and Chad. This is because, as mentioned above, the text of the 1955 Treaty shows that the parties to the Treaty intended to establish a complete delimitation as between Libya and all adjacent French territories, including the territory of Chad. It is neither relevant nor necessary to import the principle of stability of boundaries to reach that conclusion; the normal principles of treaty interpretation suffice. To adapt the words used by Charles De Visscher on the subject of extensive or restrictive interpretations, to begin with a presumption that every boundary treaty is intended to be territorially comprehensive "c'est anticiper sur les résultats du travail interprétatif . . ." (Charles De Visscher, *Problèmes d'interprétation judiciaire en droit international public*, 1963, p. 87).

(Signed) Mohamed SHAHABUDDEN.
