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Robert W. McKoeon

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The Aouzou Strip: Adjudication of Competing Territorial Claims in Africa by the International Court of Justice

INTRODUCTION

The Aouzou Strip is a 100 kilometer wide slice of desert which runs the length of the border between Chad and Libya.¹ For 100 years the nationality of the area has been disputed, and it was not until fairly recently that the quarrelling parties agreed to a peaceful settlement of the border dispute by the International Court of Justice (I.C.J.).²

The question arises, why the fuss over an area with land of few inhabitants,³ where nothing grows?⁴ The answer lies primarily in the region's strategic importance.⁵ In addition, the Aouzou Strip is rich in resources of uranium and phosphates which have not yet been exploited.⁶

Chad and Libya have competing legal claims to the region. This Note will present the historical facts surrounding this controversy, as well as the international legal principles, thereby arriving at a conclusion as to which country's case is the most meritorious. This note will not discuss the political motives of the dispute over the Aouzou Strip.

¹ *Libya Said to Annex Area of Chad*, N.Y. Times, Sept. 8, 1975, at 3, col. 4.

² Comarin, *Tchad-Libye: A qui Appartient la Bande d'Aouzou?*, JEUNE AFRIQUE 4 (Sept. 4, 1989).

³ Guilhaudis, *Remarques à propos des récents conflits territoriaux entre états africains*, 25 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 223, 227 (1979) [hereinafter A.F.D.I.]. The majority of inhabitants are Teda and Toubou tribesmen. Though Muslim, they have been historically hostile to intruders from Libya. See Comarin, *supra* note 2, at 6. See also Brooke, *African Disputes Pit Arab vs. Black*, N.Y. Times, June 5, 1988, at 15, col. 1. Due to the region's scarce population and historical animosity to Libya, this Note will not consider principles of self-determination. For a concurring argument, see Guilhaudis, *supra* note 3. In addition, Guilhaudis asserts that the Libyan presence in the Aouzou Strip is merely an expansionist challenge to territorial boundaries. *Id.* at 229-30.

⁴ Alibert, *L'affaire du Tchad 1980-1985*, REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 345, 365 (1986) [hereinafter R.G.D.I.P.].

⁵ The Aouzou Strip provides a necessary launching point for the Libyan military to furnish rebels in Chad and surrounding States with arms and various other supplies. See M. KELLEY, A STATE IN DISARRAY: CONDITIONS OF CHAD'S SURVIVAL 38 (1986). By aiding rebel groups, Colonel Kadhafy intends to abolish colonial boundaries which hinder the success of Pan-Arabism, and to unify an Arab and African nation. See Lemarchand, *The Case of Chad*, in THE GREEN AND THE BLACK 106 (1988) [hereinafter *The Case of Chad*]. See also Lemarchand, *The Crisis in Chad*, in AFRICAN CRISIS AREAS AND U.S. FOREIGN POLICY 239, 244-45, 252-53 (1985) [hereinafter *The Crisis in Chad*].

⁶ Alibert, *supra* note 4, at 365.

HISTORICAL BACKGROUND

In order to understand the origins of the conflict between Chad and Libya over the Aouzou Strip, the histories of both Chad and Libya must first be examined.

Chad is the largest and one of the most diverse countries of French Equatorial Africa both in terms of population and area.⁷ The population of Chad at 4.5 million⁸ is comprised of more than 200 ethnic groups.⁹ However, the north and center-east of the country is predominantly Arab and Muslim, while the south is generally Black and Christian.¹⁰ The official languages of Chad are French and Arabic.¹¹ It was not until 1891 that the French first penetrated Africa in the area of what is now Chad.¹² By 1914, all of Chad had been conquered by the French, and was made a French colony in 1920.¹³

The borders of Chad encircle 1,284,634 square kilometers, roughly the size of Texas, Oklahoma and New Mexico combined.¹⁴ Within these borders there are three climate zones - desert, sahel and tropical.¹⁵ Chad is landlocked in central Africa, with Libya being its neighbor to the north.¹⁶

The borders of Libya encircle 1,758,610 square kilometers of desert and semidesert.¹⁷ Ninety-seven percent of Libya's 3.6 million inhabitants are Sunni Muslim, and the official language is Arabic.¹⁸ Libya was conquered in the sixteenth century by the Ottoman Turks, and remained under their control until the Italian conquest in 1911.¹⁹

Since the times of the empires of Rome and Carthage, trans-Saharan trade routes through Libya and Chad have existed.²⁰ Populations moved back and forth across the Chad-Libyan border in trade caravans as

⁷ BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTES: CHAD 3 (Aug. 1988) [hereinafter BACKGROUND NOTES: CHAD].

⁸ *Id.* at 1.

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ *Id.* at 1.

¹² *Id.* at 3.

¹³ *Id.* During the period between 1916-1929, France temporarily lost control of the Aouzou Strip to rebel Senoussiste tribesmen. See also Comarin, *supra* note 2, at 6.

¹⁴ BACKGROUND NOTES: CHAD, *supra* note 7, at 1. This figure includes the 114,000 square kilometers of the Aouzou Strip.

¹⁵ M. KELLEY, *supra* note 5, at 4.

¹⁶ Libya is comprised of three regions: Cyrenaica, Tripolitania and the Fezzan. G.A. Res. 289, U.N. Doc. A/1251, at 10 (1949). All three regions will hereinafter be referred to as "Libya."

¹⁷ BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, Pub No. 7815, BACKGROUND NOTES: LIBYA 1 (Aug. 1985). [hereinafter BACKGROUND NOTES: LIBYA]. This figure does not include the 114,000 square kilometers of the Aouzou Strip. Comarin, *supra* note 2, at 4.

¹⁸ Comarin, *supra* note 2, at 1.

¹⁹ *Id.* at 3.

²⁰ M. KELLEY, *supra* note 5, at 26.

nomads, and later to spread the Islamic religion.²¹ The history of the region is one of societies in movement, societies which consider the right of passage more important than the right to camp.²² Therefore, the concept of the border as a precise, identifiable line of demarcation between territorial units is alien to these societies.²³

Prior to the complete conquest of Chad in 1914, France began negotiating treaties in order to establish Chad's borders. The first of such treaties was the June 14, 1898 Convention between France and Great Britain.²⁴ The Convention of 1898 served mainly to delimit possessions west and east of the Niger River.²⁵ In the subsequent March 21, 1899 Supplementary Declaration to the Convention of 1898,²⁶ the northern border of Chad was delimited for the first time and included the area presently called the Aouzou Strip.²⁷ The Declaration of 1899, concerning Chad's northern border, was reaffirmed by Great Britain and France in 1919.²⁸

Though the Declaration of 1899 defined Chad's northern border, the Declaration did not include the one country to Chad's north which it affected, Turkey. After the signing of the Declaration of 1899, Turkey publicly denounced the treaty, stating that its historic rights extended as far south as Lake Chad, and that under no circumstances would Turkey

²¹ *The Case of Chad*, *supra* note 5, at 107. The area between southern Libya and central Chad became known as the Libyan hinterland. See *infra* note 29.

²² *The Case of Chad*, *supra* note 5, at 107. One of Libya's claims to the Aouzou Strip is based on this historical interaction within the Arab Nation. See *The Crisis in Chad*, *supra* note 5, at 245 n. 4.

²³ *The Case of Chad*, *supra* note 5, at 107.

²⁴ Convention for the Delimitation of Possessions West and East of the Niger, June 14, 1898, France-Great Britain, 1899 Gr. Brit. T.S. No. 15 (Cmd. 9334), 186 C.T.S. 313 [hereinafter Convention of 1898].

²⁵ *Id.* Delimitation is "[t]he act of fixing, marking off, or describing the limits or boundary line of territory." BLACK'S LAW DICTIONARY, 385 (5th ed. 1979).

²⁶ Declaration completing the foregoing Convention of June 14, 1898, Mar. 21, 1899, France-Great Britain, 1899 Gr. Brit. T.S. No. 15 (Cmd. 9334), 186 C.T.S. 331 [hereinafter Declaration of 1899].

²⁷ *Id.* art. 3, at 332-33. The pertinent text reads:

[T]o the north of the 15th parallel the French Zone shall be limited to the northeast and east by a line which shall start from the point of the intersection of the Tropic of Cancer with the 16th degree of longitude east of Greenwich. . . shall run thence to the south-east until it meets the 24th degree of longitude east of Greenwich. . . and shall then follow the 24th degree until it meets, to the north of the 15th parallel of latitude, the frontier of Darfur as it shall eventually be fixed.

Id.

²⁸ Supplementary to the Declaration of March 21, 1899, and The Convention of June 14, 1898, Respecting Boundaries West and East of the Niger, Sept. 8, 1919, United Kingdom-France, 1921 Gr. Brit. T.S. No. 6 (Cmd. 1239), 161, 165, 225 C.T.S. 480, 482 [hereinafter Boundary Convention of 1919].

allow the French to occupy northern Chad.²⁹ In any event, at the time of the Declaration of 1899 neither Turkey nor France had control over northern Chad.³⁰

On November 1, 1902, the Italian Minister of Foreign Affairs sent a letter to the French Ambassador in Rome concerning Italian interests in Libya.³¹ In this letter, the Italian government acknowledged the delimited borders of the Declaration of 1899, and further declared that the borders between Libya and Chad were not contrary to Italian interests in the area.³² The French Ambassador replied by assuring Italy that the Declaration of 1899 would be the extent of French expansion in central Africa.³³ However, Italy was not pleased with the Declaration of 1899, and claimed that France had dealt Italy a bad hand.³⁴ Italy believed that it should have been made a party to the Declaration of 1899.³⁵

In the face of French advances northward, tribesmen from northern Chad requested Turkish aid.³⁶ Turkey responded by sending troops to assist the tribesmen sometime between 1906 and 1911, and was successful in deterring the French.³⁷ Soon thereafter, Turkey began imposing its government on the inhabitants, and the Turkish flag was raised.³⁸ The

²⁹ Comarin, *supra* note 2, at 5. Turkey sent a note to Paris stating that the area of northern Chad belonged to Turkey's possession of Libya. The note's claim was based on the concept of the hinterland, whereby a state in possession of coastal territory acquires more easily rights to uncontrolled inland territory. The claim was rejected by France, stating that the hinterland does not constitute a right, but merely facilitates the acquisition of rights to territory. The French position was that the border had to be delimited somewhere, and that the agreed upon limits in the Declaration of 1899 were fair for they allowed Turkey to claim the rest of the territory in southern Libya which was still not in its possession. *Chronique des faits internationaux*, 6 R.G.D.I.P. 307, 312-313 (1899) [hereinafter *Chronique des faits*]. For a complete discussion on the concept of the hinterland, see Paisant, *Les droits de la France au Niger*, 5 R.G.D.I.P. 28 (1898).

³⁰ Comarin, *supra* note 2, at 5.

³¹ Il ministro degli Esteri, Prinetti, all'ambasciatore di Francia a Roma, Barrere [Letter from the Minister of Foreign Affairs of Italy, Mr. Prinetti, to the Ambassador of France to Rome, Mr. Barrere], 6 I Documenti Diplomatici Italiani (Italy), 3rd Series, 1896-1906, No. 619, 428, 192 C.T.S. 156 [hereinafter Prinetti Letter]. Italy had been seriously considering colonization of Libya since 1881 as a "consolation prize" for the loss of Tunisia to the French. See C. SEGRÈ, *FOURTH SHORE: THE ITALIAN COLONIZATION OF LIBYA* 20 (1974).

³² Prinetti Letter, *supra* note 31, at 428, 192 C.T.S. at 157.

³³ L'ambasciatore di Francia a Roma, Barrère, al Ministro degli Esteri, Prinetti [Letter from the Ambassador of France to Rome, Mr. Barrère, to the Minister of Foreign Affairs of Italy, Mr. Prinetti], 6 I Documenti Diplomatici Italiani (Italy), 3d Series, 1896-1906, No. 620, 429, 429-30, 192 C.T.S. 155, 155 [hereinafter Barrère Letter]. The exchange of the Prinetti Letter and the Barrère Letter will hereinafter be called the Accord of 1902.

³⁴ *Chronique des faits*, *supra* note 29, at 313. Italy was alarmed by French and British penetration into the Libyan hinterland. See C. SEGRÈ, *supra* note 31, at 20.

³⁵ *Chronique des faits*, *supra* note 29, at 313.

³⁶ Comarin, *supra* note 2, at 6.

³⁷ Sources do not agree on the exact date of the Turkish intervention, but all fall sometime between 1906-1911. B. LANNE, *TCHAD-LIBYE: LA QUERELLE DES FRONTIÈRES* 36-55 (1982).

³⁸ *Id.* See also Comarin, *supra* note 2, at 6.

result was an effective Turkish occupation of the region.

Turkey's efforts were short-lived though, for Italy declared war on Turkey in 1911.³⁹ Within one year Italy had expelled the Turks from Libya, and a treaty was signed on October 15, 1912, whereby Turkey ceded to Italy all of its territorial possessions in Libya.⁴⁰

Though the actual borders of Libya had not been defined in the Treaty of 1912, France soon came to the understanding that Italy was including all the territory in Chad that had been under Turkish control prior to the war in 1911 as part of Libya.⁴¹ Italy's desires of expansion in Africa were certainly in contradiction with its official acknowledgement in 1902 of the validity of the Declaration of 1899.⁴²

In 1914, war broke out in Europe and the Allies began courting neutral Italy.⁴³ In order to secure Italy's entrance into the war against the Axis powers, France and Great Britain agreed that if they should increase their colonies in Africa at Germany's expense, France and Great Britain would equitably resolve territorial disputes with Italy's African colonies in favor of Italy.⁴⁴ In relying upon this agreement, Italy declared war on the Axis powers.

After World War I, France was the first to honor its treaty obligations by extending the western border of Libya, and granting other territories to Italy in 1919.⁴⁵ Great Britain later followed suit in 1924, and resolved the border dispute in the Eritrea-Sudan frontier in favor of It-

³⁹ J. WRIGHT, LIBYA 126-27 (1969).

⁴⁰ *Accordo preliminare di pace fra l'Italia e la Turchia seguito da un Firmano Imperiale, da un Decreto Reale e Da un Tradé Imperiale* [Preliminary Accord of Peace Between Italy and Turkey Resulting from an Imperial Firman, a Royal Decree and an Imperial Trade] Oct. 15, 1912, Italy-Turkey, 22 *Trattati e Convenzioni* Jan. 1, 1912-Dec. 31, 1913 Italy 226, 217 C.T.S. 137, 139 [hereinafter *Treaty of 1912*].

⁴¹ Comarin, *supra* note 2, at 6. This territory included the Aouzou Strip and territory deeper south into Chad.

⁴² See *supra* notes 31-35 and accompanying text where Italy officially states its interests in Africa to be in conformity with the Declaration of 1899 and secretly is displeased. In addition, some Italian colonists began to anticipate an empire which would extend from the Mediterranean Sea down to Lake Chad in southern Chad. Comarin, *supra* note 2, at 6.

⁴³ Comarin, *supra* note 2, at 6.

⁴⁴ Agreement between France, Great Britain, Russia, and Italy providing for Italian Naval and Military Co-operation with the Allied Powers and making certain Territorial and Other Arrangements, Apr. 26, 1915, France-Great Britain-Russia-Italy, art. 13, 221 *Parry's T.S.* 56, 60 [hereinafter *Treaty of London*]. Libya was one of the Italian colonies specifically mentioned in article 13. *Id.* art XIII.

The term "equitable" was not defined in the Treaty of London, and an adjudicatory body was not formed to determine which concessions would be equitable.

⁴⁵ *Accordo concluso per regolare alcune questioni pendenti concernenti gli interessi francesi e quelli italiani in Africa* [Conclusive Accord Resolving Some Pending Questions Concerning French and Italian Interests in Africa], Sept. 12, 1919, France-Italy, 25 *Trattati e Convenzioni (Italy)* 3, 3-7 (1919) [hereinafter the *Accord of 1919*]. Nevertheless the French concessions were minor and the Aouzou Strip remained in French possession.

aly.⁴⁶ Questions about the 1924 agreement were clarified by treaty, again in favor of Italy.⁴⁷

The Accord of 1919 with France did not satisfy Italy. Italian demands that the borders of southern Libya extend as far south as Lake Chad grew more fervent.⁴⁸ The Fascist Mussolini was now in control in Italy. France, desiring to lure Mussolini away from Hitler, announced that it was willing to allow further concessions to Italy in Africa.⁴⁹

On January 7, 1935, the French Foreign Affairs Minister Pierre Laval and Mussolini met in Rome. In accordance with the Treaty of London, Laval and Mussolini signed the Treaty of Rome which revised the Accord of 1919 and specifically ceded to Italy the area now called the Aouzou Strip.⁵⁰ In Article 7 of the Treaty of Rome, both parties agreed to have the Treaty ratified and that the Treaty would enter into force when the instruments of ratification were exchanged in Rome.⁵¹

Public opinion in France was exuberant and the French National Assembly was very pleased that Laval had succeeded in luring Italy away from Germany.⁵² On March 26, 1935, the National Assembly approved the Treaty of Rome and passed a law allowing the French President Albert Lebrun to ratify and execute it.⁵³ Lebrun thereafter ratified the Treaty of Rome.⁵⁴

The Italian Parliament approved the Treaty of Rome on May 29, 1935.⁵⁵ King Victor-Emmanuel and Mussolini then ratified it on June 13,

⁴⁶ Exchange of Notes Between Italy and the United Kingdom Approving the Agreement for the Rectification of a Section of the Eritrea-Sudan Frontier, May 19, 1924, Italy-United Kingdom, 1924 Gr. Brit. T.S. No. 29 (Cmd. 2222), 28 L.N.T.S. 497.

⁴⁷ Treaty Regulating Certain Questions Concerning the Boundaries of Their Respective Territories in East Africa, July 15, 1924, Italy-United Kingdom, 1925 Gr. Brit. T.S. No. 29 (Cmd. 2427), 36 L.T.S. 379, No. 936.

⁴⁸ Comarin, *supra* note 2, at 7.

⁴⁹ B. LANGE, *supra* note 37, at 126.

⁵⁰ Trattato relativo al regolamento dei loro interessi in Africa [Treaty Regulating Respective Interests in Africa], Jan. 7, 1935, France-Italy, art. 2, 49 Trattati e Convenzioni Jan. 1 -Dec. 31, 1935 (Italy) 16, 17-18 [hereinafter Treaty of Rome]. The official French *résumé* of article 2 of the Treaty of Rome, found in 42 R.G.D.I.P. 24 (1935), reads:

The frontier separating Libya from French West Africa and French Equatorial Africa will be determined by a line which, starting from Tummo . . . will meet the western frontier of the English-Egyptian Sudan at the intersection of 24 degrees longitude east of Greenwich and 18 degrees 45 minutes latitude north. This line places Aouzou within Italian territory. [Translation by author].

For a map detailing the names of the towns mentioned in article 2 and depicting the new border, see B. LANGE, *supra* note 37, at 134.

⁵¹ Treaty of Rome, *supra* note 50, art. 7, at 19.

⁵² B. LANGE, *supra* note 37, at 135-47.

⁵³ *Id.* at 147.

⁵⁴ *Id.*

⁵⁵ *Id.* at 167.

1935.⁵⁶ The instruments of ratification, however, were never exchanged between Italy and France.⁵⁷ The Aouzou Strip was to never come under Italian control.⁵⁸

Italy was not satisfied with the Treaty of Rome.⁵⁹ Italian ambitions in Africa soon made this clear to France. On December 28, 1935, Laval recounted to the French government that Mussolini had told him that he "did not want to continue collecting deserts."⁶⁰ France remained uncertain as to whether Italy considered the Treaty of Rome valid.⁶¹

On December 17, 1938, Italy finally informed France that it considered the Treaty of Rome to be void and not in force.⁶² Italy based its allegations on French noncompliance with Article 1 of the Treaty of Rome.⁶³ The convention in Article 1 to resolve the rights of Italians living in Tunisia had never been convened and the agreement to be reached at the convention was to enter into force on the same day as the Treaty of Rome.⁶⁴ However, Italy did leave open the possibility of renegotiation.⁶⁵ The immediate French response refuted the Italian allegations, countering that it was not France's fault the convention had never taken place and that Italy was deceitfully trying to place blame for the Treaty's failure on France.⁶⁶ The French response did not comment on renegotiation.⁶⁷ On June 10, 1940, Italy declared war on France and Great Britain.

On February 10, 1947, the Allies made peace with Italy.⁶⁸ In the peace treaty, Italy renounced all rights and title to the Italian territorial possessions in Africa.⁶⁹ In addition, the treaty granted the Allies the au-

⁵⁶ *Id.* at 168.

⁵⁷ *Id.*

⁵⁸ Comarin, *supra* note 2, at 7.

⁵⁹ B. L'ANNE, *supra* note 37, at 150.

⁶⁰ *Id.* at 154-55 [translation by author].

⁶¹ *Id.* at 154-68.

⁶² La note italienne du 17 décembre 1938 et la réponse française: la note italienne [The Italian Note of December 17, 1938 and the French Response: the Italian Note], Dec. 17, 1938, *Journal des Débats* (Mar. 31, 1939). This Note was from the Italian Minister of Foreign Affairs, Count Ciano, to the French Ambassador to Rome, François Poncet. The Count's letter stated in pertinent part: "The Treaty of January 7, 1935 which . . . was never executed . . . is void of content and obviously cannot be considered today as being in force" [translation by author].

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ La note italienne du 17 décembre 1938 et la réponse française: la réponse française [the Italian Note of December 17, 1938, and the French Response: The French Response], *Journal des Débats* (Mar. 31, 1939). This response was from the French Ambassador to Rome, François Poncet, to the Italian Minister of Foreign Affairs, Count Ciano.

⁶⁷ *Id.*

⁶⁸ Treaty of Peace with Italy, Feb. 10, 1947, Allied and Associated Powers-Italy, art. 23, T.I.A.S. No. 1648, at 138, 49 U.N.T.S. No. 747 126, 139.

⁶⁹ *Id.* By 1942 Libya had fallen into Allied hands. Since that time Libya was under French and

thority to determine the boundaries of the former Italian possessions.⁷⁰ The treaty further provided that all treaties between Italy and the Allies before World War II were void, except for those an Allied power may wish to keep in force or revive.⁷¹ In keeping with this provision of the treaty, France notified Italy of all the prior treaties they deemed to be in force; the Treaty of Rome was not one of them.⁷² Therefore, Italy lost its colony of Libya and the Treaty of Rome was certainly no longer valid.

In order to resolve the manner in which Libya's borders should be delimited, the United Nations (U.N.) passed a resolution recommending that the delimitation of the borders between Chad and Libya be directly negotiated between France and Libya.⁷³ Soon thereafter, France began negotiating with the newly independent Libya. On August 10, 1955, the two countries agreed⁷⁴ to honor the Convention of 1898, the Declaration of 1899, the Accord of 1902, the Accord of 1919, and the Boundary Convention of 1919 between France and Great Britain.⁷⁵ There was absolutely no reference made to the Treaty of Rome⁷⁶ and Libya thereby impliedly conceded that the Aouzou Strip belonged to Chad. It was further agreed that the treaty would remain in force for twenty years.⁷⁷ Both France and Libya ratified the treaty and the instruments of ratification were exchanged on February 20, 1957.⁷⁸

Chad became an independent country on August 11, 1960.⁷⁹ Upon obtaining independence, Chad declared intangible⁸⁰ its inherited boundaries.⁸¹

The principle of the intangibility of borders was soon after incorpo-

British military authority. See H. VILLARD, *LIBYA: THE NEW ARAB KINGDOM OF NORTH AFRICA* 29 (1956). Unable to decide who should be the trustee of Libya, the matter was deferred to the United Nations ("U.N."). On November 21, 1949, the U.N. passed a resolution calling for a united, independent Libya by 1952. G.A. Res. 289, 4 U.N. GAOR Supp. (No. 16) (250th plen. mtg.) at 10, U.N. Doc. A/1251 (1949).

⁷⁰ Treaty of Peace with Italy, *supra* note 68, Annex XI, at 214.

⁷¹ *Id.* art. 44, at 143.

⁷² B. LANE, *supra* note 37, at 184.

⁷³ G.A. Res. 392, 5 U.N. GAOR Supp. (No. 20) at 22, U.N. Doc. A/1775 (1950). Libya had gained its independence on December 24, 1951. BACKGROUND NOTES: LIBYA, *supra* note 17, at 1.

⁷⁴ *Traite d'amitié et de bon voisinage* [Treaty of Friendship and Good Neighborly Relations], Aug. 10, 1955, France-Libya, *J.O.*, No. 57-436, at 3661 [hereinafter Treaty of 1955].

⁷⁵ *Id.* Annex 1. Annex 1 states that: "The two High Contracting Parties recognize that the boundar[y] separating the territory of Libya . . . from French Equatorial Africa [Chad is] defined . . . in the following [five international agreements listed in the text] [translation by author]."

⁷⁶ *Id.*

⁷⁷ *Id.* art. 11.

⁷⁸ *Id.* at 3661.

⁷⁹ B. LANE, *supra* note 37, at 221.

⁸⁰ Intangible borders refers to the inviolability and integrity of the territory of a State. Alibert, *supra* note 4, at 366.

⁸¹ B. LANE, *supra* note 37, at 222.

rated into Article 3 of the Charter of the newly formed Organization of African Unity (O.A.U.).⁸² The O.A.U. was founded on May 25, 1963, and both Libya and Chad are member states.⁸³ The O.A.U.'s preamble stresses the preservation of the sovereignty and territorial integrity of the member states.⁸⁴

The O.A.U. reconvened in Cairo from July 17 to July 21, 1964 in order to clarify the meaning of Article 3 of the Charter. A resolution was passed, to which Chad and Libya were signatories, stating that all members would commit themselves to respect the borders existing at the moment they achieved independence.⁸⁵ "This is the triumph of the principle of boundary succession, also known as *uti possidetis*."⁸⁶

On September 1, 1969, Colonel Kadhafy overthrew the monarchy of King Idris and became the new leader of Libya.⁸⁷ Since 1965, a civil war had been waging in Chad and Colonel Kadhafy began supporting one revolutionary group called FROLINAT.⁸⁸

By 1971 Chad had lost control of the Aouzou Strip.⁸⁹ Libya began occupying the area in the first half of 1973.⁹⁰ It was then rumored that Colonel Kadhafy and Chadian President Tombalbaye had signed a secret agreement in 1972 whereby Chad ceded the Aouzou Strip to Libya in exchange for twenty-eight million francs and Libya's guarantee that it would stop funding FROLINAT.⁹¹ It is fact, however, that negotiations had taken place, and that Colonel Kadhafy did agree to withdraw sup-

⁸² The Charter of the Organization of African Unity [hereinafter O.A.U. Charter], reprinted in A. J. PEASLEE, *INTERNATIONAL GOVERNMENTAL ORGANIZATIONS*, vol. 2, pt. 1, 1165-76 (1974).

⁸³ A. J. PEASLEE, *Organization of African Unity*, in *INTERNATIONAL GOVERNMENTAL ORGANIZATIONS*, vol. 2, pt. 1, 1160, 1164 (1974).

⁸⁴ O.A.U. Charter, *supra* note 82, at 1165. The Charter's preamble also makes reference to the principle of self-determination of peoples. *Id.* However, the O.A.U. has been criticized for strictly adhering to *uti possidetis*, and failing to reconcile the preservation of territorial boundaries from independence with self-determination. Guilhaudis, *supra* note 3, at 240-43.

Conversely, the International Court of Justice (I.C.J.), subject to the factors limiting its discretion in *infra* note 170, will interpret *uti possidetis* in light of principles of self-determination. The rationale is that the I.C.J. desires an equitable judgment, thereby promoting world order. *See* Frontier Dispute Judgment (Burkina Faso v. Mali), 1986, I.C.J. 554, 661-63 [hereinafter Frontier Dispute Judgment]. In any event, since self-determination is not at issue in the present case, possible mitigation of the effects of *uti possidetis* to Chad's territorial title will not be discussed. *See* Guilhaudis, *supra* note 3, at 223-43, explaining why self-determination is not an issue in the present case.

⁸⁵ O.A.U. Resolution AHG/16-1, only denounced publicly by Somalia, *see* Borella, *Organisations internationales regionales, Le Regionalisme Africain en 1967*, A.F.D.I. 621, 625 (1964).

⁸⁶ Borella, *supra* note 85, at 625 [translation by author].

⁸⁷ BACKGROUND NOTES: LIBYA, *supra* note 17, at 3.

⁸⁸ FROLINAT is comprised mainly of Muslim tribesmen of Arabic origin from northern Chad. *See* B. L'ANNE, *supra* note 37, at 228. FROLINAT is the abbreviation for the Front de Liberation National Tchadien. *The Case of Chad*, *supra* note 5, at 111.

⁸⁹ B. L'ANNE, *supra* note 37, at 228.

⁹⁰ *Id.*

⁹¹ Comarin, *supra* note 2, at 10.

port from the FROLINAT and provide Chad with financial assistance if Chad would sever relations with Israel.⁹² On November 28, 1972 President Tombalbaye broke relations with Israel.⁹³

Libyan occupation of the Aouzou Strip did not become public until May 8, 1975 when a French newspaper, *Le Figaro*, reported that Libyan troops had seized control of the northern frontier of Chad.⁹⁴ By September 8, 1975, it was reported that Libya had annexed the area pursuant to the secret agreement between Colonel Kadhafy and President Tombalbaye.⁹⁵ However, the next day Libya denied the annexation and stated that the report was "a pure invention and a flagrant colonialist attempt to sow discord and to poison the atmosphere between brotherly African countries."⁹⁶ It would follow, therefore, that Libya was denying the existence of any secret agreement.

It was not until 1977 that Chad publicly complained of the Libyan presence, stating: "Aouzou is an integral part of Chad. We will never accept Libyan occupation in this area."⁹⁷ Libya did not publicly counter the Chadian statement until 1980 when Colonel Kadhafy declared: "Aouzou is a Libyan oasis and its inhabitants would not understand if someone were to tell them that they are Chadian and not Libyan."⁹⁸

Finally, on October 30, 1987, the O.A.U. convened an ad hoc committee to determine the nationality of the Aouzou Strip.⁹⁹ Surprisingly, Libya presented a photocopy of a letter from President Tombalbaye to Colonel Kadhafy dated November 18, 1972.¹⁰⁰ In pertinent part, the letter states: "In my position as legal President of Chad, I affirm to you that the Aouzou Strip was and will be, without any doubt, an integral part of Libyan territory."¹⁰¹ Libya, however, was not able to furnish the original letter and there is much skepticism as to the validity of the photocopy.¹⁰² It certainly was timely for Libya to have presented the letter before the

⁹² *The Case of Chad*, *supra* note 5, at 143.

⁹³ *Id.*

⁹⁴ M. KELLY, *supra* note 5, at 36.

⁹⁵ *Libya Said to Annex an Area of Chad*, *supra* note 1 at 3, col. 4.

⁹⁶ *Libya Denies News Report She Annexed Part of Chad*, N.Y. Times, Sept. 9, 1975, at 9, col. 1.

⁹⁷ Statement by then President of Chad and leader of the First Army of the FROLINAT, M.G. Oueddei [translation by author]; see Alibert, *supra* note 4, at 366. Tombalbaye had been deposed and assassinated on April 13, 1975 whereby Oueddei acceded to power. B. LANGE, *supra* note 37, at 231. In 1982, Oueddei was displaced during a military takeover by the present President of Chad, Hissène Habré. Alibert, *supra* note 4, at 372. Habré was the leader of the Second Army of the FROLINAT and he had continually denounced the Libyan occupation from its beginning. See Comarin, *supra* note 2, at 10.

⁹⁸ Alibert, *supra* note 4, at 365 n. 95 [translation by author].

⁹⁹ The full letter has been reproduced in Comarin, *supra* note 2, at 9.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 9 [translation by author].

¹⁰² *Id.* at 10.

O.A.U., twelve years after the death of the only person who could have verified it, former President Tombalbaye.

The O.A.U. ad hoc committee has yet to make an official declaration as to whom the Aouzou Strip belongs as a result of Libyan attempts to delay such a declaration.¹⁰³ The ad hoc committee has, however, recognized the alleged letter by President Tombalbaye as "pertinent since it specifically states that the Aouzou Strip is part of Libyan territory."¹⁰⁴

The conflict between Libya and Chad reached world wide attention on December 15, 1980, when Libyan and rebel troops captured N'Djamena, the capital of Chad far in the south.¹⁰⁵ French aid to Chad, comprised of weapons and troops, helped Chad repel the Libyan advances.¹⁰⁶ By 1987, Chad had regained all of its territory as far north as the Aouzou Strip, but not including the Aouzou Strip.¹⁰⁷ After heavy losses and waning support at home, Libya restored diplomatic ties with Chad on October 3, 1988, and agreed to negotiate a peaceful settlement to the dispute over the Aouzou Strip.¹⁰⁸

The culmination of these negotiations resulted in the signing of the Accord for the Peaceful Resolution of the Territorial Dispute in Algiers on August 31, 1989.¹⁰⁹ The Accord calls for a cease-fire and the resolution of the dispute by political means within one year.¹¹⁰ If the two countries have not come to a settlement within that time period, they will have conferred jurisdiction on the I.C.J. to determine the nationality of the Aouzou Strip.¹¹¹

INTERNATIONAL LEGAL PRINCIPLES

Libya and Chad both base their competing claims to the Aouzou Strip upon several historical facts. Libya has advanced claims based on its Turkish and Italian heritages,¹¹² the Treaty of Rome of 1935,¹¹³ and

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.* [translation by author].

¹⁰⁵ M. KELLEY, *supra* note 5, at 17.

¹⁰⁶ *Id.* at 18.

¹⁰⁷ Chad had temporarily captured the village of Aouzou. See Lewis, *France Refuses to Back Chad Offensive*, N.Y. Times, Aug. 11, 1987, at 3, col. 5. However, by virtue of a truce agreement administered by the O.A.U., Libya presently controls most of the Aouzou Strip as it has done since 1973. See Mdlongwa, *African Ministers Call for End to Chad-Libya Conflict*, REUTER LIBR. REP. (July 21, 1989) (Lexis, Nexis library, Wires file).

¹⁰⁸ Ibrahim, *Libya and Chad Restore Ties and Vow to Settle Dispute Peacefully*, N.Y. Times, Oct. 4, 1988, at A8, col. 1.

¹⁰⁹ Accord cadre sur le règlement pacifique du différend territorial [Accord for the Peaceful Resolution of the Territorial Dispute], Aug. 31, 1989, Chad-Libya, 94 R.G.D.I.P. 548 (1990), 29 I.L.M. 15 (1990) [hereinafter Peaceful Resolution of 1989].

¹¹⁰ *Id.* arts. 1, 4.

¹¹¹ *Id.* art. 2(a).

¹¹² Alibert, *supra* note 4, at 365-66.

the secret agreement between Chad and Libya of 1972.¹¹⁴ Chad relies upon the Convention of 1898, the Declaration of 1899, the Boundary Convention of September 8, 1919, the exchange of the letters of December 17 and 25, 1938, and the Treaty of 1955.¹¹⁵ Discovering which country holds valid title to the Aouzou Strip will be determined by applying the international legal principles to the historical facts.

There are several ways in which a State may acquire title to territory. For the purposes of this Note, however, only four will be examined: occupation, cession, *uti possidetis* and conquest.¹¹⁶

Occupation

Occupation requires establishing sovereignty over a territory which is not under the control of another State.¹¹⁷ In the nineteenth and early twentieth centuries, a territory inhabited by a people judged to possess a civilization inferior to that of the European powers was considered *terra nullius*¹¹⁸ and therefore subject to occupation. Under the modern view,

¹¹³ *Id.* at 366.

¹¹⁴ Comarin, *supra* note 2, at 8.

¹¹⁵ Alibert, *supra* note 4, at 366.

¹¹⁶ Under international law, there are five accepted ways of acquiring territory: occupation, accretion, prescription, cession and conquest. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 134 (3d ed. 1979). *Uti possidetis* is a derivative mode of acquisition of territory which is only binding upon States by agreement. 2 *DIGEST OF INTERNATIONAL LAW* 1086 (M. Whiteman ed. 1963) [hereinafter 2 Whiteman].

Title by accretion involves the addition of territory, usually by natural causes, to territory already under the sovereignty of the acquiring State. J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 192 (8th ed. 1976). This form of acquisition does not apply in the instant case since new territory has not been added to the already existing territory.

Title by prescription relates to territorial acquisition by continued, prolonged, and peaceful occupation by one State of the territory belonging to another State. G. VON GLAHN, *LAW AMONG NATIONS*, 277 (3d ed. 1977). Prescription requires that in order for the occupying State to acquire title, the occupying State must not encounter protests by the State whose territory is being occupied. *Id.* The amount of time which must pass before prescription may confer title depends upon whether there is a conviction that the present condition of the territory is in conformity with international order. 1 *OPPENHEIM'S INTERNATIONAL LAW* 576 (H. Lauterpacht 8th ed. 1955) [hereinafter *OPPENHEIM*]. In the *Island of Palmas* case (Neth. v. U.S.), 2 R. Int'l Arb. Awards, 829, 869 (1928), the international arbitral court determined that 200 years of continued, peaceful occupation was sufficient to confer title.

In the present case, the only point in time where prescription could operate is from 1973 to 1977. This is since Libya's occupation began in 1973 and Chad subsequently protested the occupation in 1977. However, four years of peaceful occupation certainly is not a sufficient amount of time to confer title by prescription, especially since Chad had been preoccupied with its civil war. In addition, most African States continue to denounce Libya's occupation of the Aouzou Strip. See generally 38 U.N. SCOR (2419th mtg.), U.N. Doc. S/PV 2419 (1983). This discord amongst the African States is evidence that Libyan nationality of the Aouzou Strip would disrupt international order, thereby precluding Libya from acquiring title to the territory by prescription.

¹¹⁷ J. STARKE, *supra* note 116, at 185.

¹¹⁸ G. VON GLAHN, *supra* note 116, at 274.

land inhabited by organized tribes cannot be considered as *terra nullius*, and valid title to the territory may only be acquired by local agreements with the rulers of the tribes.¹¹⁹

In order to acquire valid title to territory by occupation, the State must first demonstrate its intention to act as sovereign.¹²⁰ Nothing less than a permanent intention to assume control is required.¹²¹ One means by which a State may express its permanent intention is to notify other interested States of its claims.¹²² Notification may, for example, be effectuated by treaties, diplomatic correspondence, and official proclamations.

The second requirement necessary to acquire valid title is the actual exercise or display of authority over the territory.¹²³ Evidence of these acts are satisfied by effective possession and control through extension of the State's government and military to the territory.¹²⁴ Treaties delimiting boundaries with other States recognizing the State's sovereignty may also be evidence of authority.¹²⁵ The complete establishment of territorial sovereignty may be prolonged so long as there is a "progressive intensification of State control."¹²⁶

Nevertheless, when there are competing claims to a territory, valid title encompasses only that land which has been effectively occupied.¹²⁷ It follows therefore that a State's claims based on the hinterland¹²⁸ and the establishment of a sphere of influence alone do not vest territorial rights in the State.¹²⁹ Once a territory has been effectively occupied, no other State may acquire title to the territory through occupation.¹³⁰

As a State acquires a territory through occupation, it may lose its territory by dereliction.¹³¹ Dereliction is the complete abandonment of territory by a State with the intention of withdrawing forever.¹³² Should a State be temporarily forced out of a territory due to a revolt by natives, the State does not lose title to the territory if it intends to retake possession.¹³³

In 1899, neither Turkey nor France displayed an effective occupa-

¹¹⁹ J. STARKE, *supra* note 116, at 185.

¹²⁰ *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (Ser. A/8) No. 53, at 46.

¹²¹ J. STARKE, *supra* note 116, at 186.

¹²² *Id.*

¹²³ *Legal Status of Eastern Greenland, supra* note 120, at 46.

¹²⁴ I.G. SCHWARZENBERGER, *INTERNATIONAL LAW* 298 (3d ed. 1957).

¹²⁵ J. STARKE, *supra* note 116, at 186.

¹²⁶ *Island of Palmas case (Neth. v. U.S.)*, 2 R. Int'l Arb. Awards, 829, 867 (1928).

¹²⁷ OPPENHEIM, *supra* note 116, at 560.

¹²⁸ *See supra* note 29 for an explanation of the hinterland.

¹²⁹ OPPENHEIM, *supra* note 116, at 561-62.

¹³⁰ *Id.* at 562.

¹³¹ *Id.* at 579.

¹³² *Id.* at 579-80.

¹³³ *Id.* at 580; *see also* I. BROWNLIE, *supra* note 116, at 148-49.

tion of northern Chad. By the then prevailing standards, northern Chad was *terra nullius*. It follows that the claim by Turkey to the Libyan hinterland in northern Chad did not grant Turkey legal title. Reciprocally, France's Declaration of 1899 did not vest it with title to northern Chad. Acquisition of title did not occur until 1906 when Turkey effectively occupied northern Chad, thereby vesting Turkey with title. In 1912 Turkey's withdrawal from northern Chad extinguished its claims to the territory. The Treaty of 1912 evidenced a Turkish intent never to return to northern Chad. Hence, Turkey lost sovereignty by dereliction and northern Chad once again became *terra nullius*.¹³⁴

The subsequent French occupation in 1914 of northern Chad conferred upon France valid title to the territory. The Boundary Convention of 1919 with Great Britain reaffirming the Declaration of 1899, and the imposition of colonial status in 1920 on all of Chad was evidence of French intentions to maintain its control over northern Chad.¹³⁵

Therefore, France held valid title to all of Chad, including the Aouzou Strip. Libyan arguments of ownership of the Aouzou Strip based on the Turkish occupation are meritless due to the dereliction by Turkey.

Cession

Cession of territory by one State to another State involves the complete transfer of sovereignty of the ceded territory.¹³⁶ A State may not transfer more rights to a territory than it actually possesses.¹³⁷ Cession will become effective only after sovereignty has actually been transferred.¹³⁸ The full consent of the respective governments is mandatory to effectuate the cession.¹³⁹

Cession may only be completed pursuant to a treaty between the ceding State and the acquiring State.¹⁴⁰ In addition, a treaty of cession is not considered valid until all the provisions for approval and ratification agreed upon in the treaty have been performed.¹⁴¹ A State is not legally obligated to ratify a treaty,¹⁴² nor is a State bound to a ratified treaty until the instruments of ratification have been exchanged.¹⁴³

¹³⁴ See *supra* notes 29-40 and accompanying text.

¹³⁵ See *supra* notes 13, 28 and accompanying text.

¹³⁶ OPPENHEIM, *supra* note 116, at 547.

¹³⁷ Island of Palmas case, 2 R. Int'l Arb. Awards at 829, 842.

¹³⁸ 2 Whiteman, *supra* note 116, at 1088.

¹³⁹ THE AMERICAN SOCIETY OF INTERNATIONAL LAW, INTERNATIONAL LAW IN THE TWENTIETH CENTURY 298 (L. Gross ed. 1969) [hereinafter AMERICAN SOCIETY].

¹⁴⁰ OPPENHEIM, *supra* note 116, at 548. However, AMERICAN SOCIETY, *supra* note 139, at 298, states that there is not a prescribed manner in which cession must take place.

¹⁴¹ C. FENWICK, INTERNATIONAL LAW 523 (4th ed. 1965).

¹⁴² *Digest of International Law* 50 (M. Whiteman ed. 1970) [hereinafter 14 Whiteman].

¹⁴³ *Id.* at 47. This is, of course, subject to a provision in the treaty to the contrary.

The municipal law of States has absolutely no bearing upon international law governing cession.¹⁴⁴ Statements by the diplomatic representative of a State to another State pertaining to a question falling within his province is binding on the diplomat's State.¹⁴⁵ A ceding State cannot renege on its own grant.¹⁴⁶ The rationale behind this principle is that the government of a State has the fullest opportunity to study a treaty and decide whether it has the constitutional power to bind its State to the treaty.¹⁴⁷ This rationale follows from the general notion that a State understands its own laws better than another State could. "[A]ny failures to comply with constitutional provisions in entering into a treaty will be the clear responsibility of the Government of the State concerned."¹⁴⁸ The principle derives its acceptance from the fact that many States have tried to rescind treaties, based on noncompliance with their constitutions, in order to escape from their treaty obligations.¹⁴⁹ In addition, if a contracting State is reasonably ignorant of the latter State's constitutional defect in the treaty, the contracting State may assume the treaty to be proper and hold the latter to the obligations of the treaty.¹⁵⁰

However, where municipal rules contain constitutional restrictions on the Government, treaties by the Head of Government or Head of State in violation of the State's constitutional restrictions are not binding upon the State if the "violation was manifest and concerned a rule of its internal law of fundamental importance."¹⁵¹ The test adopted, to determine which violation is manifest, is that violation which "would be objectively evident to any State conducting itself in the matter in accordance with normal practice in good faith."¹⁵² Therefore, the test requires that a negotiating State should have known that the agent of the other State could not have had the requisite authority.

It thus follows that in 1912, when Turkey ceded its possession of Libya to Italy, Italy acquired all of what Turkey possessed, there included northern Chad. However, the Italian Minister of Foreign Affairs' official letter to France in 1902,¹⁵³ acknowledging and agreeing to the

¹⁴⁴ OPPENHEIM, *supra* note 116, at 547.

¹⁴⁵ Legal Status of Eastern Greenland, *supra* note 120, at 71. This principle is known as recognition — where a State, which has recognized the title to a territory by another State, is estopped from contesting the title to the territory at a later date. AMERICAN SOCIETY, *supra* note 139, at 295-96.

¹⁴⁶ J. STARKE, *supra* note 116, at 193.

¹⁴⁷ 14 WHITEMAN, *supra* note 142, at 14.

¹⁴⁸ *Id.* at 14-15.

¹⁴⁹ *Id.* at 15.

¹⁵⁰ *Id.* at 261.

¹⁵¹ Vienna Convention on the Law of Treaties, art. 46, para. 1, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (entered into force Jan. 27, 1980).

¹⁵² *Id.* at art. 46, para. 2.

¹⁵³ See *supra* notes 31-32 and accompanying text.

northern boundaries of Chad as set forth in the Declaration of 1899, precluded Italy from asserting its territorial rights to the region since the Italian Foreign Minister made a representation to the French which clearly fell within his authority.¹⁵⁴ Thus, Italy could not have legally acquired title to northern Chad; the region of northern Chad legally became French by occupation in 1914.

In 1935, the Aouzou Strip was not ceded to Italy since the required exchange of the instruments of ratification had never taken place pursuant to Article 7 of the Treaty of Rome. In addition, this "cession" never became effective since Italy had never exercised any sovereignty over the area, and France continued to occupy it.¹⁵⁵

The unratified Treaty of Rome was to never be considered again in future negotiations between France and Italy, and later Libya. Pursuant to the Treaty of Peace with Italy of 1947, France notified Italy of all treaties which were to remain in force. The Treaty of Rome, of course, was not among them. The subsequent Treaty of 1955, where France and Libya agreed to the boundaries set forth in the Declaration of 1899, demonstrated an implied Libyan renunciation of claims to the Aouzou Strip. Thus, Libya acknowledged that the Aouzou Strip belonged to Chad.¹⁵⁶

According to Article 1 of the Constitution of the Republic of Chad, "Chad is a sovereign Republic, one and indivisible."¹⁵⁷ Concerning the President, the Constitution proclaims him to be "the Head of State and of the Government."¹⁵⁸ In addition, the President is the "guarantor of . . . the integrity of the territory of the Republic. . . ."¹⁵⁹ International agreements of a legislative nature may only be ratified by a law.¹⁶⁰ Authorization to ratify international agreements contrary to the Constitution may only be done pursuant to a constitutional amendment.¹⁶¹

¹⁵⁴ The letter is virtually identical in import as that from the Norwegian Foreign Minister renouncing Norway's claims to Greenland. In *Legal Status of Eastern Greenland*, *supra* note 120, at 71, the international court bound Norway to its Foreign Minister's letter since it represented the position of the entire Norwegian Government.

¹⁵⁵ See *supra* notes 50-58 and accompanying text.

¹⁵⁶ See *supra* notes 68-78 and accompanying text.

The I.C.J., as a court of law, can only interpret international treaties; it cannot attempt to revise them even if the consequences would not be satisfactory. 1 S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 97 (1965). Thus, the Treaty of 1955 guaranteed the Chadian nationality of the Aouzou Strip up to at least 1972 — the year in which Chadian President Tombalbaye allegedly "ceded" the Aouzou Strip.

¹⁵⁷ CONSTITUTION OF THE REPUBLIC OF CHAD, Apr. 16, 1962, *reprinted in* 1 CONSTITUTIONS OF NATIONS 65, 66 (A. Peaslee 3d ed. 1965).

¹⁵⁸ *Id.* at 67 (art. V).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 79 (art. LXX).

¹⁶¹ *Id.* at 79 (art. LXXI).

Though the President of Chad is the Head of State, he is subject to constitutional restrictions on his authority. The cession of the territory of a State is indeed an act which requires the highest authorization. Clearly evident from the Chadian Constitution, the President acts to maintain the State's territorial integrity. Without express authority by the Chadian Government,¹⁶² an agreement of cession by the President could not be binding as a matter of Chadian domestic law. Certainly any such agreement of cession must be a manifest violation which would fall under the purview of Article 46 of the Vienna Convention.¹⁶³ Cession of territory is not normal practice. Libya, if acting in good faith, could not have reasonably relied on the Chadian President's authority to cede territory without the complete consent of the Chadian Government.¹⁶⁴ Indeed, approval by the entire Chadian Government was required.¹⁶⁵

Evidence of Libyan knowledge of the inherent lack of authority of a Chadian President to enter into such an agreement is the secrecy surrounding the agreement and the subsequent denial of such an agreement in 1975.¹⁶⁶ In addition, Libya has not until recently provided a photocopy of the letter, which is certainly subject to questions of validity.¹⁶⁷

In applying the principles of cession to the facts, when Italy acquired title to Libya in 1912, Italy did not acquire title to the Aouzou Strip. The Aouzou Strip remained *terra nullius* until the successful French occupation in 1914. The Treaty of Rome of 1935 never entered into force since the required exchange of the instruments of ratification never took place, Italy never occupied the area, and the Treaty was formally made void by the Treaty of Peace with Italy. In addition, the agreement of cession contained in the letter by the Chadian President

¹⁶² In this case the authority to cede the Aouzou Strip would more than likely emanate from a constitutional amendment.

¹⁶³ See *supra* text accompanying notes 148-49.

¹⁶⁴ To draw an analogy, if President Bush were to mail a letter to Ottawa ceding Maine to Canada, could the Canadian Government possibly be justified in relying on Bush's authority as President without any further authorization by the Congress and the Supreme Court?

The Government of Chad, like that of the United States, is subject to constitutional restrictions and is divided into three equal branches. The analogy is as applicable to the present case with Chad and Libya as it was to the proposed scenario.

¹⁶⁵ See *supra* note 139 and accompanying text.

¹⁶⁶ It may be argued that since Libya began occupying the Aouzou Strip in 1973, and the Chadian Government did not protest until 1977, the Chadian Government acquiesced in the cession. However, the agreement of cession was secret between Colonel Kadhafy and President Tombalbaye; the world did not learn of the occupation until 1975; Chad was preoccupied with its civil war. In considering these circumstances, Chad's delay in protesting the Libyan occupation was reasonable and does not evidence acquiescence.

¹⁶⁷ See *supra* notes 89-93, 95-102 and accompanying text.

Irrespective of the letter's validity, Libya should have known, when conducting foreign relations with a constitutional government of equally divided powers, that the President alone did not have the authority to bind his Government.

was a manifest violation of Chad's Constitution. Libya should have reasonably known, and from the evidence it probably did know, that the Chadian President was not authorized to conduct such a cession. Furthermore, the validity of the photocopied letter is highly questionable. Libya's claims, therefore, to the Aouzou Strip based on principles of cession will fail.

Uti Possidetis

In accordance with *uti possidetis*, when a State becomes independent from its colonial power, the State automatically inherits its colonial boundaries.¹⁶⁸ Any efforts by another State to colonize, occupy, or otherwise violate the State's territory after it has gained independence are ineffective and of no legal consequence upon the State's territorial boundaries.¹⁶⁹ In short, "[a]s you possess, you shall continue to possess."¹⁷⁰

The doctrine of *uti possidetis* was first widely employed by the Latin American countries during the early nineteenth century.¹⁷¹ In accordance with this doctrine, title to a territory is granted even if the territory has never been occupied by the newly independent State.¹⁷² In Latin America, territories were "by common consent considered occupied in law from the first hour by these newly created [S]tates."¹⁷³

The purpose of *uti possidetis* is to protect the independence and sta-

¹⁶⁸ 2 Whiteman, *supra* note 116, at 1087.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1088 (quoting Case Concerning Sovereignty Over Certain Frontier Land, 1959 I.C.J. 209, 255).

Whenever possible, the I.C.J. applies equity *infra legem* to find an equitable solution derived from the applicable law. Frontier Dispute Judgment, *supra* note 84, at 568 (quoting Fisheries Jurisdiction (W. Ger. v. Ice.), 1974 I.C.J. 175, 202). Equity *infra legem* guides the court in interpreting and applying the law. *Id.* at 662.

This recent case before the I.C.J. concerned a border dispute between the African countries of Burkina Faso (formerly Upper Volta) and Mali. Since both countries are members of the O.A.U., the court resolved to determine the borders in accordance with *uti possidetis*. *Id.* at 567.

In order to reconstruct the borders each country inherited from independence from France, the court traced French mandates delimiting borders from the early 1900s. *Id.* at 570. The I.C.J. was faced with creating a border from few points of reference and inaccurate charts. Judge Abi-Saab, in describing the court's discretion to apply equity *infra legem*, stated that the fewer the facts available, the greater the court's "degree of freedom." *Id.* at 662. It follows, therefore, that the more facts available, the less discretion the court has to apply equity *infra legem*. In the present dispute between Chad and Libya, the boundary lines have been explicitly and clearly described since the Declaration of 1899. Thus, this case is clearly distinguishable from the Burkina Faso-Mali dispute. The I.C.J. will not have discretion to apply equity *infra legem* in determining the correct border and must strictly adhere to the applicable international agreements. See 1 S. ROSENNE, *supra* note 156, at 97.

¹⁷¹ 2 Whiteman, *supra* note 116, at 1087.

¹⁷² AMERICAN SOCIETY, *supra* note 139, at 299.

¹⁷³ *Id.*

bility of new States once the colonial power has left.¹⁷⁴ This protection accorded to newly formed, weak governments eliminates the risk of challenges by aggressive neighbors to the borders of the new States.¹⁷⁵ The doctrine is not generally accepted customary international law,¹⁷⁶ and therefore is not binding upon States except when specifically agreed upon by convention.¹⁷⁷

In 1963, the O.A.U. was formed and its Charter incorporated the doctrine of *uti possidetis*. The subsequent Cairo Resolution of 1964¹⁷⁸ formally defined this doctrine as preserving the boundaries inherited from decolonization.¹⁷⁹ The principle of *uti possidetis* is applicable to all African states which are members of the O.A.U., even if they became independent before 1963.¹⁸⁰ Since both Libya¹⁸¹ and Chad are signatories to the Charter, they are both bound by it.

In 1950 when Libya became independent, its southern boundaries were in question. The U.N. resolved that France and Libya should negotiate between themselves a final, fixed border. The result was the Treaty of 1955, delimiting the border between Libya and Chad in conformity with the Declaration of 1899. The Treaty of 1955 affirmed the French nationality of the Aouzou Strip.¹⁸²

When Chad became independent in 1960, it automatically inherited its colonial boundaries, including the Aouzou Strip, since all rights to the territory were conveyed to it by France. Chad and Libya are bound to respect their borders inherited from decolonization since they are signatories to the O.A.U. Charter.¹⁸³ Therefore, Chad's possession is uncontested under international law according to the principle of *uti possidetis*. Occupation of the Aouzou Strip by Libya will not confer title to it. Libya is obligated, under international law, to respect Chad's borders upon its independence.

¹⁷⁴ Frontier Dispute Judgment, *supra* note 84, at 565. For an additional description of the purpose of *uti possidetis*, see *id.* at 661-62.

¹⁷⁵ *Id.* at 565. *Uti possidetis* was implemented to deter non-American States from further colonization in Latin America. Any occupation of territory by a foreign State would not vest title. AMERICAN SOCIETY, *supra* note 139, at 299.

¹⁷⁶ 2 Whiteman, *supra* note 116, at 1086. The principle is not recognized by the international community as international law, which requires occupation as the foundation of sovereignty. *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See *supra* notes 82-86 and accompanying text.

¹⁷⁹ *Id.*

¹⁸⁰ Frontier Dispute Judgment, *supra* note 84, at 567.

¹⁸¹ In a dispute over the continental shelf between Libya and Tunisia, Libya fully supported the stability of the land frontier based on the principle of *uti possidetis* embodied in the O.A.U. Charter. See Case Concerning the Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18, 66.

¹⁸² See *supra* notes 73-78 and accompanying text.

¹⁸³ See *supra* notes 79-84 and accompanying text.

Conquest

Title by conquest has recently become synonymous with cession made under duress.¹⁸⁴ Conquest was a term used to describe the territory of an enemy State which had been effectively occupied during war and then retained at the end of the war without confirmation in a treaty of peace or other official document.¹⁸⁵ Hence, conquest conferred an inchoate title which had to be made valid by either complete subjugation of the enemy State or by its silent acquiescence that the conquered territory had fallen into the hands of the aggressor State.¹⁸⁶ In the first instance, the extinction of the former sovereign left the territory as *terra nullius*

¹⁸⁴ C. FENWICK, *supra* note 141, at 424.

¹⁸⁵ *Id.* Fenwick and von Glahn claim that when Italy had defeated Turkey in 1912, Italy did not acquire title to Libya by a treaty of cession, but rather by prescription in presuming Turkey had permanently abandoned its possession of Libya. They base their assertion on the Trattato di Pace concluso fra l'Italia e la Turchid [Treaty of Peace Concluded between Italy and Turkey], Oct. 18, 1912, Italy-Turkey, 22 Trattati e Convenzioni Jan. 2, 1912-Dec. 31, 1913 (Italy), 217 C.T.S. 160, which makes no reference to cession of Libya. C. FENWICK, *supra* note 141, at 424; G. VON GLAHN, *supra* note 116, at 280. However, in the earlier Treaty of 1912, *supra* note 40, at 226, 217 C.T.S. at 137, the preamble states that Italy has proclaimed its sovereignty over Libya, and that Turkey has formally recognized Italy's sovereignty over Libya. In addition, Annex 2, incorporated into the Treaty by Article 9 of the Treaty, specifically declares that Libya "has been submitted under the full and entire sovereignty of the Kingdom of Italy" pursuant to the law of Feb. 25, 1912. *Id.* at 230, 217 C.T.S. at 139.

Since the Treaties are successive and relate to the same subject matter, article 30, paragraph 3 of the Vienna Convention on the Law of Treaties applies. Article 30, paragraph 3 states that: "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under art. 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." Vienna Convention, *supra* note 151, art. 30, para. 3.

Article 59 states in pertinent part that such a treaty will be void if:

* * *

- (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
- (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

* * *

Id. at 310.

Due to the fact the later treaty did not void the earlier, the later treaty was more concerned with continued trade and tariffs, and from the actions of the contracting parties the earlier treaty was intended to remain in force and was compatible with the later treaty, Article 30 of the Convention applies. Therefore the earlier Treaty of 1912 remained *en vigueur*. Italy thereby acquired title to Libya by a treaty of cession and not through conquest. Hence, possible Libyan claims arising from their Turkish heritage to title to the Aouzou Strip based on a lack of time for prescription to take effect, thereby denying France title to the territory, will not hold. In addition, according to the principles of occupation, Turkey would have lost title to the Aouzou Strip by dereliction. In any event, the Treaty of 1955 finally delimiting the border would extinguish any such claims by Libya.

¹⁸⁶ C. FENWICK, *supra* note 141, at 424. In addition to silent acquiescence, title could be consolidated by the defeated State's recognition of, or consent to, the aggressor State's sovereignty. See AMERICAN SOCIETY, *supra* note 139, at 297-98.

whereby title could be conferred by occupation.¹⁸⁷ In the second instance, title could be conferred by prescription based on the presumption the former sovereign had abandoned the territory.¹⁸⁸ In order for title to be effectuated by prescription, the aggressor State must thereafter peacefully and continuously assert its jurisdiction over the territory

long enough to enable any Power who might have considered herself as possessing sovereignty over the [territory], or having claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.¹⁸⁹

In addition, sovereignty must have been imposed over the territory for such a period of time that there exists a conviction amongst the international community that the present condition of the territory is in conformity with international order.¹⁹⁰

Since the adoption of the Covenant of the League of Nations in 1920, these forms of aggressive territorial acquisition appear to have lost their validity.¹⁹¹ The U.N. Charter stipulates the duty of member States to refrain from the use of force against the territorial integrity of other States.¹⁹² As far as member States are concerned, the U.N. Charter has ended the legality of territorial acquisition by conquest.¹⁹³

When Libya began its occupation of the Aouzou Strip in 1973, it breached its duty under the O.A.U. Charter to respect and refrain from violating the territorial integrity of Chad.¹⁹⁴ The ensuing armed conflict between Chad and Libya left Libya in possession of the Aouzou Strip,¹⁹⁵ thereby in violation of its U.N. Charter duties. Present day international law will not grant legal title to Libya from actions in contravention of its charter obligations. Moreover, the principle of *uti possidetis*, to which

¹⁸⁷ C. FENWICK, *supra* note 141, at 424.

¹⁸⁸ *Id.*

¹⁸⁹ Island of Palmas case, R. Int'l Arb. Awards at 829, 867.

¹⁹⁰ OPPENHEIM, *supra* note 116, at 576.

¹⁹¹ C. FENWICK, *supra* note 141, at 425.

¹⁹² The U.N. Charter, Article 2, Paragraph 4 states that "[a]ll Members shall refrain in their international relations from the threat of or use of force against the territorial integrity or political independence of any state." H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS*, 40 (Supp. 1986).

¹⁹³ G. VON GLAHN, *supra* note 116, at 281-82.

There is authority which supports the validity of title to territory obtained by traditional principles of conquest. According to AMERICAN SOCIETY, *supra* note 139, at 298, the duty in Article 2, Paragraph 4 of the United Nations Charter to refrain from the use of force against the territorial integrity of a State does not exclude territorial acquisition by force. It is asserted that the only consequences of a breach of this duty are expulsion from the U.N. and enforcement measures by the Security Council. *Id.* Even if this may be the case, Libya would still not be able to acquire title even by traditional principles of conquest. See *infra* text following note 193.

¹⁹⁴ See *supra* notes 82-86 and accompanying text.

¹⁹⁵ See *supra* notes 90, 107 and accompanying text.

Libya is bound,¹⁹⁶ prohibits any acquisition of territory through the violation of a State's territorial integrity.

Even under the traditional principles of conquest, Libya may not acquire title to the Aouzou Strip by way of prescription.¹⁹⁷ Title by conquest is precluded since Chad denounced, in 1977, the Libyan presence within a reasonable amount of time.¹⁹⁸ The condemnation by Chad and subsequent struggle to regain control evidence a Chadian intent not to abandon the Aouzou Strip. In addition, several African States have strongly denounced Libya's occupation of the Aouzou Strip,¹⁹⁹ thereby signifying the occupation's divergence from international order. Hence, Libya may not assert a claim of title to the Aouzou Strip based on conquest.

CONCLUSION

From an examination of the legal principles of territorial acquisition, it is evident that the Aouzou Strip has been an integral part of Chad since 1914. Though Turkey briefly acquired title to the territory from about 1906 to 1912, the subsequent war with Italy resulting in the cession of Libya terminated Turkey's title. Italy, having declared to France that it would respect the Declaration of 1899, was estopped from acquiring title to the Aouzou Strip.

France gained title to the Aouzou Strip in 1914 through occupation. Since the instruments of ratification of the Treaty of Rome of 1935 had never been exchanged, Italy had never taken possession, and because the Treaty of 1947 nullified the Treaty of Rome, the Aouzou Strip was never ceded to Italy. In addition, the Treaty of 1955 between France and Libya cemented the border in conformity with the Declaration of 1899. Further strengthening of the boundary line was Chad's emergence as a sovereign State. Chad's succession to its colonial boundaries was assured by the doctrine of *uti possidetis*.

The letter of 1973 from Chadian President Tombalbaye to Colonel Kadhafy is void due to Article 46 of the Vienna Convention. In addition, Libyan violations of Chad's territorial integrity will not confer upon Libya title to the Aouzou Strip. These aggressive actions by Libya are in contravention to the Charters of the U.N. and the O.A.U. The I.C.J.

¹⁹⁶ See *supra* notes 180-81 and accompanying text.

¹⁹⁷ See *supra* note 116 discussing why prescription cannot operate.

¹⁹⁸ The determination of the reasonableness of delay is derived from considerations of Chad's series of new governments, Chad's ensuing civil war, the Libyan occupation not publicly known until 1975, and Libya's denial that it was annexing the territory in 1975. See *supra* notes 94-98 and accompanying text. This determination is made pursuant to the test set forth in the text of *supra* note 189.

¹⁹⁹ See generally 38 U.N. SCOR (2419th mtg.), U.N. Doc. S/PV 2419 (1983).

cannot permit Libya to fall short of its obligations under the Charters, and must determine the Aouzou Strip to be an integral part of Chad.

*Robert W. McKeon, Jr.**

* J.D. Candidate, Case Western Reserve School of Law (1991), M.A., Middlebury College (1988), A.B., College of the Holy Cross (1987).

APPENDIX

- 1898 France-Great Britain: Convention for the Delimitation of Possessions West and East of the Niger.
- 1899 France-Great Britain: Declaration fixing the northern border of Chad.
- 1902 Italy-France: Letter from Italian Foreign Minister accepting the declared northern border of Chad.
- 1902 France-Italy: Letter from French Foreign Minister assuring Italy of the limit of French expansion north.
- 1912 Italy-Turkey: Peace treaty whereby Turkey ceded Libya to Italy.
- 1915 Italy-Allied Powers: Concessions to Italy in Africa for its entrance into the War.
- 1919 France-Great Britain: Reaffirmation of the Declaration of 1899.
- 1919 France-Italy France: cedes some territory to Italy in Africa.
- 1935 France-Italy: Treaty of Rome, ceding the Aouzou Strip to Italy (instruments of ratification never exchanged).
- 1938 Italy-France: Italy denies validity of the Treaty of Rome.
- 1940 Italy-France: Declaration of War
- 1947 Italy-Allied Powers: Treaty of Peace with Italy whereby Italy relinquishes possessions in Africa.
- 1951 Libya: achieves independence.
- 1955 Libya-France: Treaty of 1955, reaffirming the border set by the Declaration of 1899.
- 1960 Chad achieves independence.
- 1963 Organization of African Unity formed, Chad and Libya are members.
- 1972 Chad-Libya: Secret letter of cession of the Aouzou Strip by Chadian President Tombalbaye to Libyan leader Colonel Kadhafy.
- 1973 Libya occupies the Aouzou Strip.
- 1977 Chad protests the Libyan occupation.
- 1989 Chad-Libya: Agreement to submit the territorial dispute to the I.C.J. if the dispute cannot be resolved by political means within one year.