International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1993

Public sitting

held on Monday 21 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le lundi 21 juin 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, président

en l'affaire Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

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

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whenwell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of Gen

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whewell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohier
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

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

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Le Gouvernement de la Jamahiriya arabe libyenne est représenté par :

S. Exc. M. Abdulati Ibrahim El-Obeidi
ambassadeur,

comme agent;

M. Kamel H. El Maghur
membre du barreau de Libye,

M. Derek W. Bowett, C.B.E., Q.C., F.B.A.
professeur émérite, ancien titulaire de la chaire Whewell à l'Université de Cambridge,

M. Philippe Cahier
professeur de droit international à l'Institut universitaire de hautes études internationales de l'Université de Genève,

M. Luigi Condorelli
professeur de droit international à l'Université de Genève,

M. James R. Crawford
titulaire de la chaire Whewell de droit international à l'Université de Cambridge,

M. Rudolph Dolzer
professeur de droit international à l'Université de Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

M. Walter D. Sohier
membre des barreaux de l'état de New York et du district de Columbia,

comme conseils et avocats;

M. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

M. Rodman R. Bundy
avocat à la Cour, Frere Cholmeley, Paris,

M. Richard Meese
avocat à la Cour, Frere Cholmeley, Paris,

Mlle Loretta Malintoppi
avocat à la Cour, Frere Cholmeley, Paris,

Mlle Azza Maghur
membre du barreau de Libye,

comme conseils;

M. Scott B. Edmonds
cartographe, Maryland Cartographics, Inc.,

M. Bennet A. Moe
cartographe, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'études politiques of Paris,

as Deputy-Agent, Adviser and Advocate;

Mr. Antonio Cassese, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Counsel and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Counsel and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

M. Robert C. Rizzutti
cartographe, Maryland Cartographics, Inc.,

comme experts.

Le Gouvernement de la République du Tchad est représenté par :

M. Abderahman Dadi, directeur de l'école nationale d'administration et de magistrature de N'Djamena,

comme agent;

S. Exc. M. Mahamat Ali-Adoum, ministre des affaires étrangères de la République du Tchad,

comme coagent;

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

S. Exc. M. Ramdane Barma, ambassadeur de la République du Tchad en Belgique et aux Pays-Bas,

comme conseillers;

M. Alain Pellet, professeur à l'Université de Paris X - Nanterre et à l'Institut universitaire d'études politiques de Paris,

comme agent adjoint, conseil et avocat;

M. Antonio Cassese, professeur de droit international à l'Institut universitaire européen de Florence,

M. Jean-Pierre Cot, professeur à l'Université de Paris I (Panthéon-Sorbonne),

M. Thomas M. Franck, titulaire de la chaire Becker de droit international et directeur du centre d'études internationales de l'Université de New York,

Mme Rosalyn Higgins, Q.C., professeur de droit international à l'Université de Londres,

comme conseils et avocats;

M. Malcolm N. Shaw, titulaire de la chaire Ironsides Ray and Vials de droit international à l'Université de Leicester, membre du barreau d'Angleterre,

M. Jean-Marc Sorel, professeur à l'Université de Rennes,

comme avocats;

M. Jean Gateaud, ingénieur général géographe honoraire,

comme conseil et cartographe;

Me Jean-Pierre Mignard, avocat à la Cour d'appel de Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Olivier Corten, Assistant at the Faculty of Law of the Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;
Mrs. Susan Hunt;
Miss Florence Jovis;
Mrs. Mireille Jung;
Mrs. Martine Soulier-Moroni.

Me Marc Sassen, avocat et conseiller juridique, La Haye,

comme conseils;

Mme Margo Baender, assistante de recherche au centre d'études internationales de la Faculté de droit de l'Université de New York,

M. Olivier Corten, collaborateur scientifique, Université libre de Bruxelles,

M. Renaud Dehousse, maître-assistant à l'Institut universitaire européen de Florence,

M. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche à l'Université de Paris X - Nanterre,

M. Joseph Tjop, attaché temporaire d'enseignement et de recherche à l'Université de Paris X - Nanterre,

comme conseillers et assistants de recherche;

Mme Rochelle Fenchel;
Mme Susan Hunt;
Mlle Florence Jovis;
Mme Mireille Jung;
Mme Martine Soulier-Moroni.

Mr. PRESIDENT: Please be seated. Mr. Maghur.

Mr. MAGHUR: Thank you, Mr. President.

Mr. President, Members of the Court, as explained on Friday, Libya now turns to a different phase of its case. This part of its case deals with the territorial dispute presented to the Court on the basis and assumption that no treaty in force establishes a boundary between Libya and Chad. The task Libya turns to now in its oral argument is to establish which territory within the borderlands appertains to each of the Parties.

It is my particular task today, to be shared with Professor Dolzer, who will speak tomorrow, to examine the basis of Libya's claim to title in the borderlands inherited from the Ottoman Empire and from the Senoussi peoples. This will involve examining the particular circumstances of this case to which the legal principles, which Professor Crawford will discuss later today, are to be applied. In setting about this task, I shall, first, describe some of the pertinent aspects of the geography of the region and, then, undertake a more detailed examination of the peoples living in the borderlands.

After that, I shall turn to the situation as it existed in 1890 when the Ottoman Empire challenged Great Britain's recognition of a French sphere of influence, running south from the Algerian coast as far as Lake Chad, as affecting regions over which the Ottoman Empire asserted sovereignty. The Ottoman challenge, it will be recalled, was accompanied by a detailed description of the extent of the Tripolitanian hinterland claimed by the Caliph in Istanbul. The respective merits of the Ottoman and French claims at the time will be examined.

Mr. President, the borderlands are in a part of North Africa whose place in the colonial history of Africa differed from the regions of Africa to the south. North Africa above 15° N latitude, essentially the part of Africa comprising the Sahara and the coastal regions north of this vast desert, has always had a Mediterranean orientation and connection. It was never colonized like the part of Africa lying to the south.

North Africa above 15° N latitude was the domain of the Ottoman Empire. It was not receptive to European Christian colonization. The tribes in the area were not only organized by they also had an organized religion — Islam. As Muslims, their allegiance was to the Caliph in Istanbul.

The Caliph was the sovereign ruler of the Islamic peoples and their lands. His rule was at one and the same time religious and temporal, there being no separation between the two in Islam. I will not go into the interesting history of the Caliphate following the death of the Prophet in 632 AD. The Caliphate had moved, successively, from Medina, to Damascus, to Baghdad and finally to Istanbul, where it was situated well before 1800. To the Turks, the Caliph was known as the Sultan. To other Powers, the Caliph was called the Porte — and often the Sublime Porte, meaning the "highest door". In North Africa, he was called the Caliph. All these titles reposed in the same person.

The Caliph in Istanbul was the head of the Ottoman Empire. It was not a centralized State; it functioned largely through delegation. This feature of Ottoman rule is important in our case. Chad assumes that because the Ottomans did not rule the borderlands with the full array of military, police, administrators, tax-collectors, courts and so on, the Ottoman Empire had no claim to sovereignty. This view of the matter is totally mistaken. The Ottoman rule was indirect, or delegated, because that was the Ottoman way of governing. But it is important to note, as well, that such indirect rule *was all that was needed at the time*. The people accepted the Caliph as their spiritual and temporal ruler. Ottoman rule in the borderlands was not an alien, hostile rule, and the Ottomans could indeed rely on substantial delegation.

As examples of Ottoman rule by way of delegation, the Porte sent *Walis* (that is, Governors) to Algeria, Tunis and Tripoli. He appointed a *Khedive* to Egypt (this was the Egyptian equivalent of *Wali*). And these Governors were delegated full authority to govern, subject only to the restrictions that they follow the Koran and the acts of the Prophet, that they consult with the learned men, and that they use their best judgement. The *Walis*, in turn, delegated authority to, for example, *Mudirs*, who were country administrators, and they, in turn, to district officers or *Kaimakams* — a word meaning, literally, "the man who sits in another's place". The *Walis* were given titles ranging from Pasha, the highest title, to *Bey* or *Dey*, to *Mutassarif*, the lowest.

The *Walis* of North Africa were Ottomans assigned to their posts from Istanbul. This included the first of the Karamanli sent to Tripoli, who held the high title of Pasha.

Mr. President, I should like to invite the Court now to take a broad look at certain regions of Africa and their inhabitants at the end of the 19th century.

I turn, *first*, to the physical geography of this part of Africa:

On the map on the screen appear the principal African rivers — the Senegal River, the Niger, the Congo and its tributaries, Lake Chad and the Chari River, the Nile (White and Blue Nile). The regions of these rivers and of Lake Chad were the *main target* of European colonization. The rivers provided access to the interior; and the lands fed by them were fertile and populated. The colonization of these regions came from the west and the south, not from the Mediterranean to the north.

To the north extend the vast desert regions of the Sahara, including the Libyan Desert, roughly north of 15° N latitude (folder No. 79). In this hostile environment, only scattered settlements of essentially nomadic tribes existed. These were Muslim tribes, who had come to accept the authority and leadership of the Senoussi. The Caliph considered these regions and the people living there to be the domain of the Ottoman Empire, and *allegiance* to the Caliph was expressly recognized by the Senoussi and by the peoples whom they led.

Continuing the description of the physical geography, it will be noted that the mountainous regions of Tibesti and Ennedi lie in the borderlands. The topography of the borderlands emerges with particular clarity on the landform map now on the screen, bringing out the harshness of the environment. The line that happens to appear on this map published in 1952 is the 1935 Treaty line.

Mr. President, turning from the physical geography, the map shows the major trade routes and key oases which you can also find as No. 80 in your folders. In a desert region such as the borderlands, the trade routes and oases were essential for the economic life of these regions and the peoples living there. It was along the trade routes that the Senoussi Order established its lodges, which were called *zawiyas*. I will describe the Senoussi Order and the functions of the *zawiyas* in a few moments.

I turn next to the general location of the principal tribes inhabiting the borderlands and the surrounding regions:

In 1890, the borderlands were inhabited by organized Muslim tribes, paying allegiance to the Caliph in Istanbul. In large part, the tribes of the borderlands were nomadic, scattered among the principal oases of the desert and the harsh mountainous regions of Tibesti and Ennedi. Some were distinctively Arab tribes — the Awlad Sulaiman, the Gadhadfa and the Orfella — who had come south from Cyrenaica and Fezzan. There was a constant interchange between them and their fellow tribesmen remaining in the north. The German explorer Nachtigal, who travelled through much of the borderlands in the 1960s and 1870s, recorded that the Awlad Sulaiman were at the time in firm control of much of the region of Kanem.

The general location in the region of these three tribes is shown on the screen, together with the two main Libyan tribes in the Koufra oases, the Magharba and the Zuwaya. A sizeable number of Libyan traders in the main centres of the borderlands largely controlled economic life. What is shown on the screen is necessarily approximate given the living habits of the predominantly nomadic tribes.

Two other tribes, with an ancient history in the region, were the Tuareg and the Toubou. In the regions shared by Libya and Algeria, the Tuareg, who were organized as a confederation of tribes, were the dominant tribe. Tibesti was the domain of the Toubou — or, more precisely, the branch of this tribe known as the Teda Toubou. Although there has been much scholarly discussion about the origin of the Toubou, it is well established that for a considerable period of time in the distant past they had dominated much of southern Fezzan and Cyrenaica. It was only natural, therefore, that after the Toubou established themselves in Tibesti their principal ties remained to the north.

As the map shows, the regions inhabited by these various tribes overlapped. All of these tribes had strong ties to the north either because of their Libyan Arab origin or because of historical, social and commercial links to Libya — and above all because they came to be Senoussi tribes, having willingly accepted Senoussi leadership and doctrine. In 1952, after the independence of Libya, the sheikh of the Awlad Sulaiman was named *Wali* or governor of Fezzan in newly independent Libya.

This then was the territory into which the French military forces fought their way, arriving at Lake Chad in the period 1899-1900.

It would not be possible to consider any of the regions of the borderlands lying north of the Sudanic Sultanates as *terra nullius* at that time. For these were lands, to quote in part from paragraphs 80 and 81 of the *Western Sahara* case, "inhabited by tribes or peoples having a social and political organization . . . under chiefs competent to represent them" (*I.C.J. Reports 1975,* p. 39, paras. 80-81).

What I want to point out is that tribes like the Awlad Sulaiman, the Gadhadfa and the Orfella were ruled and represented by Libyan *sheikhs*.

The Toubou in Tibesti were led by a *Derde*. The Tuareg were a confederation of tribes, led by their sheikhs. If these tribes were considered by European visitors to the region to be hostile and unruly, compared to more sedentary peoples, it was because they wished to be left alone and they resented foreign intruders. The harsh conditions of the Sahara Desert and the mountainous regions such as Tibesti tended to make the inhabitants there difficult to get on with — almost, it would seem, reflecting the harsh conditions of their environment. This was, and still is, a rather common characteristic of nomadic desert peoples.

Mr. President, the French military forces recognized the leadership of these peoples and tribes and their social and political organization at the time. In 1862, the Prince de Polignac entered into formal commercial arrangements on behalf of France with the Ajjer Tuareg tribes. Repeated attempts were made by the French to enter into agreements with different *Derde* of the Toubou of Tibesti. But when French forces entered into the borderlands starting in 1913, the *Derde* of the Toubou, rather than submit to the French, fled to the north where many of his tribesmen lived in southern Tripolitania and Cyrenaica.

It had been the French tactic in fighting their way toward Lake Chad to enter into agreements with local chiefs. This was particularly the case in the Sudanic Sultanates, although even there the French confronted obstacles. The major obstacle was Rabbah. However, the combined French forces succeeded in defeating him in 1900, opening the way to further agreements with the local

chiefs. Further to the east, the Sultan of Ouadaï put up a ferocious fight, but in the end his forces were defeated; and the Sultan was deposed by the French and replaced by a more docile Sultan of their choosing.

Mr. President, Libya took pains to describe — and to support with evidence — these facts in its Memorial. I particularly commend to the attention of the Court Part IV of Libya's Memorial, and Volume 2 of its Reply, Supplementary Annexes 7 through 11.

As Professor Crawford will explain, the fact that the borderlands were not *terra nullius* has a dual significance in this case. First, it meant that title to the region could not be acquired by occupation. Second, it meant that the peoples of the borderlands had the legal capacity to hold title over their lands.

This brings me to the entry of the Senoussi on to the scene. I have deliberately taken up the question of *terra nullius* based on the *pre-Senoussi* situation in the borderlands. For I wanted to demonstrate that the region was not *terra nullius* before the advent of the Senoussi. But if this question were in doubt — which I frankly cannot conceive of — then any such doubt is certainly banished by the assertion of Senoussi leadership and authority over the peoples of the borderlands. This was an event that preceded the arrival of the French three-pronged advance on Lake Chad. And the Senoussi had been firmly in control of the borderlands some 13 years *before* French forces were authorized by the French Government to advance into the borderlands in 1913.

Starting in the latter part of the nineteenth century, this powerful new force, the Senoussi Order or Brotherhood, entered the scene. By the end of the century, the Senoussi had established their *zawiyas*, or lodges, throughout the area as the Judges can also see from Map 19 in their folders.

Both the Senoussi Order and the *zawiyas* they established have been fully described in Libya's written pleadings and in the evidence annexed to them so I need only summarize the situation here (ML, starting at para. 1.22, para. 3.44, para. 4.78, para. 4.151 and para. 5.221; CML, starting at para. 5.11 and paras. 8.64-8.67; RL, starting at para. 7.46 and paras. 9.16 and 10.06. See also LR, Vol. 2, Supp. Ann. No. 3, the note on the "Role of the Senoussi in the Central Sahara"; and LR, Vol. 3, Anns. 13 and 14).

Libya has preferred to simplify somewhat the terminology used. The term "Senoussi" refers to the Senoussi Brotherhood or Order; but the word is also used as an adjective, as in the expressions "Senoussi tribes" or "Senoussi peoples". The Senoussi themselves were not a tribe. The term "Senoussi tribes" refers to the tribes of the region who embraced the Senoussi doctrine. For the Senoussi carried out their mission, both religious and civil, through the organized tribes.

It is important to point out that, without exception, the tribes of the borderlands were Muslims embracing the Senoussi doctrine and paying allegiance to the Caliph in Istanbul. Thus, the tribes I mentioned earlier, the Awlad Sulaiman, Qadhadfa and Orfella — the Arab tribes who came south from Cyrenaica and Fezzan — were all Senoussi tribes who accepted the Senoussi doctrine and Senoussi leadership and authority. The same is true of the Tuareg and the Toubou, particularly the latter, who became the staunchest of Senoussi followers. This is confirmed, for example, by a 1911 French military despatch, cited at paragraph 5.71 of Chad's Counter-Memorial, in which it is reported that the Toubou received their orders from the Senoussi whom they blindly obeyed.

Just as Tibesti, the land of the Toubou, was firmly controlled by the Senoussi when the French arrived at Lake Chad in 1900, so also was the region of Borkou to the south. Chad concedes this in its Memorial; and again in its Counter-Memorial at paragraph 5.69, where it is said that "in reality the real power ("le pouvoir effectif") was exercised in the region by the Senoussi". Mr. President, there is no question, therefore, about the fact that the Senoussi were the controlling force in the borderlands in 1900 when French military forces arrived at Lake Chad. The peoples of the region were members of Senoussi tribes who had accepted the leadership and authority of the Senoussi Order. In 1899, the Senoussi Order moved its centre south from Koufra in Cyrenaica to Gouro, just east of the Tibesti massif, in order to be in closer touch with events resulting from the mounting French military threat.

The Senoussi had just performed the remarkable task of bringing together the Tuareg and Awlad Sulaiman tribes — who up until then had been warring against each other. They established in Kanem the Bir Alali *zawiya* and proceeded to harness the fighting forces of these two tribes to repel the French attack.

Certain parts of Chad's Counter-Memorial reveal an attempt to retreat from Chad's initial, accurate assessment of the role of the Senoussi set out in Chad's Memorial. Chad attempts to portray the Senoussi as having had a purely religious influence in the region. Chad's Counter-Memorial suggests that the Senoussi Order was not even Libyan since the Grand Senoussi, who founded the Order, was born in Algeria. This is hardly a serious argument. Was Napoleon any less French because he was born of parents named Carlo and Letizia Buonaparte on an island that only the year before had been ceded to France? In any event, in the early 1800s, questions of nationality and boundaries had little meaning in the Muslim regions of North Africa. What mattered was the common sharing of Islamic beliefs and loyalty to the Caliph.

To set the record straight, Mr. President, let me explain a few of the essential facts concerning the Senoussi. These are historical facts which are not altered by the more recent political history of the Senoussi in Libya. In this regard, I have to mention that just after these oral proceedings began, an article appeared in *Le Monde*, on 15 June, quoting Chad's Deputy-Agent concerning Libya's reliance on its Senoussi inheritance. I have no doubt that Professor Pellet was misquoted. No one has forgotten that the present régime in Libya deposed the late Senoussi King of Libya in 1969. But that does not mean that the Senoussi have ceased to be a part of Libya's history. Libya's greatest hero is the legendary Omar Mikhtar, who led the fight of the Libyan peoples against the Italians. He was a leading Senoussi sheikh.

Mr. President, the founder of the Senoussi Order or Brotherhood, known as the Grand Senoussi, was born in Algeria around 1787 of a prominent Sharifian family. The word "Sharifian" refers to any dynasty related to the Prophet.

He studied in Fez until his early thirties, when he left to make the pilgrimage to Mecca. It was there that the Grand Senoussi met the future Sultan of Ouadaï, who became a loyal follower. In later years, the Senoussi Order even established a *zawiya* at Abéché, the capital of Ouadaï.

The Grand Senoussi founded the first *zawiya* in northern Cyrenaica near the Mediterranean coast in 1843, which became the center of the Order. In 1856, the Grand Senoussi moved the Order's centre south to an obscure oasis, Jaraboub, which was selected because of its location on the

east/west pilgrimage route across North Africa and Egypt to Mecca. Jaraboub was transformed into a great centre of learning with a university and a huge library embracing a wide range of subjects including religion, law, philosophy, history, astronomy and poetry. To quote the British historian Evans-Pritchard:

> "it would have been difficult to have found anywhere in the Islamic world at the time, outside Cairo, a circle of better scholars".

The Grand Senoussi's son by his second wife, a Libyan woman, took over as Head of the Senoussi Order at the death of the Grand Senoussi. He is known as the Great Senoussi. He was devout like his father but also, to use the words of Evans-Pritchard, was said to be "an eloquent and inspiring leader and . . . an able organizer". His followers revered him, and he was called the "Mahdi" — or what might be described as the second coming of the Prophet.

In 1895, the Order's centre was moved south to Koufra, on the eastern caravan route from Benghazi to Ouadai. From there the Order intensified its activities in the borderlands and in regions further south and west, where *zawiyas* were established at oases along the caravan routes. In the light of the French military advance, in 1899, the Order's centre was again shifted southward to Gouro, just east of the Tibesti massif, where the Senoussi could better organize and control the tribes of the borderlands to meet the French military threat.

The Senoussi movement southward followed the eastern trade routes from Benhazi and the western trade routes from Tripoli. This can be seen on the map on the screen. Starting from the first Senoussi *zawiya* established by the Grand Senoussi at al-Baida in Cyrenaica in 1843, the Senoussi Order moved southward along the eastern trade routes, establishing *zawiyas* at various key locations. In the borderlands, major *zawiyas* were established at Ounianga Kebir and Ounianga Seghir in 1871-1872, in Ennedi in the 1880s and southward into Ouadai, where a *zawiya* was established at Abéché. The Order's Headquarters was moved south to Djaraboub in 1856 and then to Koufra in 1895. The Great Senoussi supervised the digging of the Sarra Wells in 1898.

One of the major *zawiyas* in the borderlands was established to the south of Tibesti at Aïn Galakka, in the region of Borkou. Shortly before that, in 1896, the major Senoussi *zawiya* at Bir Alali had been established, just east of Lake Chad. The French destroyed this *zawiya* in 1902. Like

the *zawiya* at Aïn Galakka — but unlike *zawiyas* elsewhere where there was no threat from French forces — the Bir Alali *zawiya* had been heavily fortified.

As Senoussi control progressed southwards — and with the conversion of the powerful Zuwaya and Magharba tribes in the region of Koufra into ardent Senoussi followers — the great eastern trade routes to the Sultanate of Ouadaï flourished. As I mentioned earlier, the Sultan of Ouadaï himself was a loyal Senoussi follower.

On the west, Senoussi *zawiyas* were also established early at the major oases on the well-established trade routes from Tripoli to the south: Migda (1845), Mourzouk (1850), and so forth, as shown on the map.

With the encouragement of the Derde, the leader of the Toubou in Tibesti, a *zawiya* was established in Bardaï, the most strategically situated oasis in Tibesti, and the Toubou became and remained the most loyal of Senoussi tribes.

This, then, was the situation that prevailed around the turn of the century, with the Senoussi in control of extensive areas of North Africa, including the borderlands regions.

The Senoussi *zawiyas* were the principal instrumentality through which the Senoussi Order exercised its functions. Primarily, the *zawiyas* were religious and educational centres, but they had a commercial function, as well, and served as hostels to the travellers along the trade routes. When the French started to invade the borderlands, the more strategically located *zawiyas* also as armed fortresses.

The Court will now see on the screen an artist's rendition of a *zawiya*, modelled after the one at Ain Galakka in Borkou. I should like to explain the purpose and operation of a *zawiya* in order to show the functions performed by the Senoussi and how they exercised their leadership over the peoples of the borderlands.

I shall begin with a sketch of the City of Medina, the first city built by the Prophet, for a *zawiya* was based on the Muslim concept of a city built around a mosque, of which Medina was the prototype. The central point brought out by this sketch concerns location. Just like Medina and other Muslim centres, *zawiyas* were typically located at key oases along caravan routes — at places

where people gathered, where was communication with other oases and where trade flourished.

Allow me, Mr. President, to pause here a minute. Medina was built by the Prophet when he was forced to emigrate from Mecca to Medina — an event known as the *Hejirah*. The first day of the *Hejirah* marks the start of the Islamic calendar, and each year it is the beginning of the Islamic New Year. That day, Mr. President, happens to be today; and I take this opportunity to join my fellow Muslims all over the world in their congratulations. Thank you, Mr. President.

The next sketch, taken from the official French Military History of the A.E.F., shows the Aïn Galakka *zawiya* and its surrounding wells and farm lands.

Now, in the next sketch, we see a drawing of the layout of this *zawiya*. This illustrates the several functions that were performed by the *zawiya*. The *zawiya* might be compared to a European walled city of medieval times or to Christian monasteries that in case of need were fortified and armed. Normally, the *zawiya* was not fortified. It was the French military advance that had caused this feature to be added, just as organizing the tribes against the French invasion was a function added to those ordinarily performed by the Senoussi.

The heart of the *zawiya* was the mosque, shown here on the right side of the sketch. The word *zawiya* means "corner" in Arabic. Here in the mosque, in the domed area called el-Kuba, was the Sheikh's "corner", the place where he prayed, facing Mecca. The mosque had both open and enclosed spaces. It was to the mosque that the young came to study under the Sheikh's supervision. His own family living quarters were across on the other side of the *zawiya*. In normal times, aside from the Shikh's family, other notables occupied this section. The other residents of the oases lived in the areas surrounding the *zawiya*, where the camels and horses were tended and crops were grown.

What we see here is an outline of all the *zawiya*'s functions:

— Religious

— Educational

— Trade

— Providing shelter to travellers

— The administrative functions of the Sheikh, which included settling disputes and raising

revenue

— Communication

— Protection against the invading forces of the French.

When the *zawiya* was threatened, things changed rapidly. The tall, thick walls around the *zawiya* allowed it to become a military bastion into which the people came to live. It then became a walled town.

Mr. President, the functions performed by the Senoussi reflected the obligations of government under Islamic doctrine, which were:

— To defend the faith;

— To develop the land — which in practical terms in the regions of North Africa in question meant maintaining and protecting the caravan routes and developing and protecting the sources of water;

— To safeguard the subjects of the State, whether Muslim or not;

— To recruit an army;

— To raise funds to support the State;

— To fulfil the laws governing the relations of citizens, including the rendering of justice and mediating disputes; and

— To teach the Islamic religion.

The Senoussi performed all of these functions in the borderlands as well as elsewhere in Libya. The rallied the warring tribes, which they brought together, to defend Islam against the invading French, in the south, and against the Italians, in the north. The Great Senoussi oversaw the digging of the Sarra Walls south of Koufra in 1898, and it was the Senoussi who caused the eastern trade routes to flourish. Their efforts were clearly devoted to safeguarding the subjects of the State. They raised funds in support of these efforts. They mediated disputes, bringing together the warring tribes. In their *zawiyas*, they worshipped God, taught the Koran and provided education to the peoples. But the most important thing is that the Senoussi performed these functions *in the name of, and under the mantel of,* the ultimate Ottoman sovereignty.

Mr. President, this then is a brief description of the Senoussi Order and of the *zawiyas* that the Senoussi established throughout the zones they controlled. The sheikhs were normally Libyans appointed by the Head of the Order. The key followers, or *ikhwan*, meaning "brothers", were also Libyans. But the Senoussi's functions were carried out within the tribal framework of the major tribes. The Senoussi did not attempt to replace the tribal leadership with its own. The tribal leaders of the borderlands welcomed and accepted the authority of the Senoussi.

In the period before the arrival of the Senoussi, the constant fighting among the tribes of Fezzan, Cyrenaica and the borderlands had seriously interfered with the flow of commerce along the trade routes. The Senoussi succeeded by the end of the 1890s in bringing the tribes together, and once again the trade routes from Tripoli to the Sudan were made secure. In the east, the two great tribes of the Koufra oases embraced the Senoussi doctrine and leadership, permitting the eastern trade routes from Benghazi to Ouadi to flourish. At the time of Senoussi control it was said that a woman could travel alone from Cyrenaica to Ouadaï without being harmed. Similar claims were made as to the safety of the western trade routes south from Tripoli to the Sultanate of Bornou.

Mr. President, the arrival of the Senoussi in the region, and the acceptance of their authority by the peoples, were not well understood at the time by the European explorers of the region or in the European Chanceries. For as I said earlier, in Islam there is no artificial division between the religious and the temporal sides of life. They are the two sides of the Prophet. The Caliph in Istanbul was the religious leader of the Islamic peoples, who paid allegiance to him; and he was their temporal ruler at one and the same time and exercised sovereignty over them and the lands they inhabited. Similarly, the Senoussi Order had both a religious and a temporal function.

But though the Senoussi were openly critical of the standards of Islamic practice maintained by the Caliph in Istanbul, the sovereignty of the Caliph, the Sultan of the Ottoman Empire, was fully recognized. The Senoussi peoples of the borderlands were regarded, and regarded themselves, as *subjects* of the Ottoman Empire. The lands they inhabited were considered to be under Ottoman sovereignty. The Senoussi reinforced this relationship, bringing to the peoples both religious instruction and education and a new level of social and political organization. They settled the

differences between the tribes and opened up the trade routes so that commerce could flourish. Later, they harnessed the military strength of the different tribes in the face of the French invasion. It is totally incorrect to describe the Senoussi as having had only a religious influence in the area, as Chad's Counter-Memorial does.

Mr. President, in fact, so great was the Senoussi power and influence that it initially caused apprehension in Istanbul. But as the Caliph came to know and understand the Senoussi, he realized that benefits would accrue from building a closer relationship. As the threat of the French and, later, the Italian invasion materialized, this relationship became increasingly important. Examples of this may be found in Libya's Reply:

— A report from Benghazi to the Grand Vizier in Istanbul of 5 August 1884 (LR, Exhibit 8.2);

— Despatches of 1886 and 1888 (LR, Exhibits 8.3.1 and 8.3.2);

— An Ottoman Council of State document (LR, Exhibit 8.1);

— An 1891 report of the Ottoman Imperial (LR, Exhibit 8.5.1). This report contains this statement:

> "It is of the utmost importance that (the Head of the Senoussi), whose word is extremely influential among the nomads and the tribes, lend his support to this enterprise in furtherance of this aim it is necessary that the Sublime Porte and the Palace be advised to intercede with him (Head of the Senoussi) in the required manner."

I could go on to read many more documents in this vein, but the essential point has been made. This evidence is summarized in Libya's Reply (Vol. 2, Supp. Ann. No. 8, and set out in the related Exhibits in Volume 3).

Mr. President, that the Senoussi Order fully recognized Ottoman sovereignty was made very clear in 1911 in the letter addressed by the Head of the Senoussi to the major European Powers — two years prior to the French military invasion of the borderlands. Let me read some passages from this letter, which appears as Exhibit 47 to Libya's Memorial:

It begins with this statement:

> "As everyone is aware, the French are engaged in a crusade against the Orient in general and Islam in particular under the pretext of spreading civilization."

Then it goes on to refer to the Anglo-French Declaration of 1899, saying that:

> "France illegally took part of the Turkish possessions to the north of Lake Chad

and certain lands forming part of the vilayet of Tripolitania".

The Head of the Senoussi follows with this declaration of allegiance:

> "It is also well known that the Senoussi congregation has since its foundation been held in universal esteem for the works of its chiefs, who have spread true civilization and true knowledge, reforming the Muslim religion and above all spreading the teachings of the Koran 'nowhere in the sentence' *without ever ceasing to counsel the people to obey the Sublime Porte, for which it prayed day and night, placing itself under the protection of its flag and acknowledging its dominion.* "

The letter then turns to discuss the French military mission, pointing out that:

> "France . . . when it began to penetrate in this region found the contrary to what it had expected, namely that those inhabitants whom it believed to be savages were, instead, instructed and enjoying the advantages of Islamic civilisation."

The letter ends with the following statements:

> "We explained these facts to the Sublime Porte, bringing to its attention the violations that France was undertaking on Ottoman territory, killing its subjects, with the excuse of spreading civilization to the centre of Africa and we trust that it will protest.
>
> We are now publishing these facts in the newspapers to bring to the knowledge of the civilized world the method that France is using in central Africa against quiet and peaceful people, so that the just Powers of Europe may assist the Ottoman Government in preventing the grave injustice of the invasion of our country."

I should now like to turn to an evaluation of the situation at the turn of the Century when the French entered the scene and began to transgress into areas over which the Caliph had claimed sovereignty. What was the nature of each of these conflicting claims, and who had the better claim to title? This conflict in 1890 was really the beginning of the territorial dispute in this case. The initial Ottoman protest and assertion of rights was only the first of several even more detailed notes verbales and memoranda from the Caliph in which the basis of Ottoman rights was carefully stated in both legal and factual terms.

The recognition by Great Britain of a French sphere of influence south of Lake Chad was completely different in character from the Ottoman assertion of sovereignty over the hinterland of Tripolitania. Once again, I must note that these differences have been detailed in Part IV of Libya's Memorial, but let me highlight some of them:

First, on the legal plane, the Ottoman Empire had made a claim to an existing sovereignty. It was a claim to territory appurtenant to sovereign territory, namely Tripolitania, to which the

Ottoman Empire claimed a hinterland. The French sphere of influence recognized by Great Britain in 1890 was nothing of the kind; there was no French assertion of sovereignty involved. The Ottoman assertion of a Tripolitanian hinterland made clear the *animus occupanid* of the Ottoman Empire, one of the essential elements of territorial sovereignty. The French sphere of influence, on the other hand, was no more in 1890 than an agreement of mutual restraint between the British and the French. The French never did have any *animus occupandi* concerning the borderlands, certainly not prior to 1919 or, indeed, prior to 1930. When the French advanced into the borderlands in 1913, it was to *destroy* the Senoussi *not* to occupy the territory.

A second major difference between the French sphere of influence and the Tripolitanian hinterland claimed by the Caliph was that the Ottoman claim was not a claim based only on geography or contiguity — it was based as well on social organization.

It was not a question for the Ottomans, as it was for the French and the British, of drawing lines on maps where no white man's foot had ever trod, as Lord Salisbury out it in his often quoted remark. The lands over which the Ottoman Empire claimed sovereignty in 1890 were inhabited by Muslim peoples who ultimate allegiance was to a common ruler and authority on both religious and temporal matters, the Caliph in Istanbul. The Caliph sent emissaries with gifts into these regions, gifts that signified the relationship between ruler and ruled in the Muslim world. These emissaries reported back to him in Istanbul, informing him of developments in the regions and its peoples. I refer in particular to the 1888 and 1894 reports of Colonel Subhi and Muhammad Basala (See, ML, starting at para. 4.122).

Even closer and more frequent contacts with the peoples in the borderlands were maintained by the Wali of Tripoli, who acted under powers delegated to him by the Caliph. In replying to the Ottoman note of 1890, the French Government displayed its ignorance of the functioning of the Ottoman Empire based on the principle of delegation. The French Government attempted to discount the Ottoman 1890 claim on the grounds that it was not the Caliph but the Wali of Tripoli who maintained frequent contacts with the peoples of the Tripolitanian hinterland. But the French overlooked the fact that the Wali was acting in the name of the Caliph.

Critical to this relationship were the north/south caravan routes that have been described earlier. As the map on the screen shows, the Ottoman hinterland claim embraced the trade routes that had for centuries been essential to the economic and social life of the Mediterranean coastal regions of Tripolitania. The Wali of Tripoli controlled the western caravan routes as well as entry into the interior. A French mission headed by Colonel Flatters, which headed south from Algiers overlooking the requirement of obtaining an Ottoman *laissez-passer*, was decimated in 1881, putting a halt to French penetration southward from Algiers for many years (ML, para. 4.123).

As events developed, the growing French-Ottoman conflict widened beyond a territorial dispute. It became a struggle over control of the western caravan routes, and it was then that the Italian Government's concern sharpened. For Italy had a growing commercial and financial stake in Tripolitania, quite aside from future expectations to inherit one day this part of the Ottoman Empire. The French started to attempt to diver trade from Tripoli to Tunis and Algiers. This was a direct threat to the reliance of the Ottoman Empire and the vilayet of Tripoli on the trade routes running north/south from Tripoli through the Tripolitanian hinterland. In fact, it was regarded as essential to the welfare of Tripolitania and its peoples that these caravan routes not be diverted to the west by the French.

It is evident that, at the turn of the Century, the Ottoman claim to a Tripolitanian hinterland was a claim to title over regions and the peoples living there that had real substance. At this time, the French had made no claim to title at all to regions south of Tripolitania. France had no knowledge of this region and no contact with its peoples. For the French, as for any other European, to even enter the region, an Ottoman *laissez-passer* was required.

Mr. President, instead of attempting any serious discussion of the merits of the Ottoman claim, the French Government loudly objected to what it said was the exaggerated extent of that claim. Earlier in Libya's oral argument, the inconsistency of France's position was discussed and illustrated. In 1894, the French Government had officially recognized the Ottoman Empire's Egyptian hinterland down almost to the Equator. In 1890, an Algerian sphere of influence covering territory almost as extensive as the Tripolitanian hinterland claimed by the Caliph, was recognized in

the 1890 Anglo-French Declaration. Meanwhile, Mr. President, the integrity of the Ottoman Empire had been guaranteed by Great Britain and France in several treaties and this was again noted in the General Act of Berlin of 1885.

The French expansion north of Lake Chad was a blatant attempt to evade that guarantee. Similarly, France's reliance on an alleged treaty-title to the borderlands was a sham. France had acquired no such title. Title remained where it had long rested: with the Senoussi peoples and the Ottoman Empire, who were present in and administratered the territory in question.

The ends of my part of the story, Mr. President, and i would be grateful if you would call on Professor Crawford. I thank you very much.

Mr. PRESIDENT: Thank you very much, Mr. Maghur. Professor Crawford.

Mr. CRAWFORD: Mr. President, Members of the Court.

A. Introduction

1. As Mr. Mughur has pointed out this part of the Libyan case deals with the territorial dispute on the assumption that there is no treaty in force establishing the boundary. Within that framework, my function is to step back from the complex of events and to analyse in a little more detail the applicable law. This will involve two distinct stages.

2. The first stage requires an analysis of the law applicable to the determination of title in a region such as the borderlands in the period before 1919. That was, of course, the period at which the traditional law of territorial title and acquisition held sway. The second stage requires an analysis of the developing modern law. After 1919 new elements come into the picture, especially the prohibition of conquest as a means of acquiring territory. These new elements overlay, supplement, and in some respects supplant the old law. As will be seen, the distinction between the two stages in the development of the law is of considerable significance to this case.

B. The Pre-1919 Law of Territorial Title

3. I turn then, Mr. President, Members of the Court, to the question of the applicable law in relation to disputed title in the period before 1919. In relation to this period the Libyan case is based

on the following four propositions:

* Proposition 1: The borderlands, the disputed area in this case, were not *terra nullius* at any relevant time.

* Proposition 2: The Anglo-French agreements of 1899 and 1919 did not affect the legal status of the territory;

* Proposition 3: In 1912 sovereignty was vested in the tribes, under the organization and influence of the Senoussi Brotherhood, and in conjunction with the Ottoman Empire which represented the territory and its people on the international plane.

* Proposition 4: That sovereignty was acquired by Italy under the Treaty of Ouchy, the Italian inheritance being recognized by other States, including France.

4. To some extent the legal rules which are relevant to these four propositions are not in dispute, and to that extent, I can be brief. But there are important disagreements between the parties on the legal position, and these require some elaboration.

5. The underlying reason for the disagreements is that Chad relies on an extreme pro-colonial view of international law. This was the view that required, for the existence of legal status or rights, some express act of admission by the international community, a community identified with the States of Europe. The Ottoman Empire itself was supposedly so "admitted" in 1856. This was the view that made international legal personality conditional on the existence of a civilization assimilated to European or (as one English writer described it) "white" civilization. This was the view that saw in native peoples occupying their own land mere objects of international law and obstacles to colonization. It was that view that underlay the French attitude at the time, as Partsch points out in his account of the Fashoda incident in the *Encyclopedia of Public International Law* (Vol. 7, p. 86-7). Perhaps in more subtle ways, it underlies the Chad position now.

6. That view was, of course, decisively rejected by the Court in the *Western Sahara* case. It must be stressed that the Court in that case was not merely saying that the new law of the Charter and of self_determination should govern, rather than the old law of territorial aggrandisement. Of course the issue which underlay the advisory opinion was the question of self-determination for the

Western Sahara. The Court was asked two questions about the legal position in the 1880s, but as it pointed out, the reason why it was asked those questions was the possibility that the answer might affect the self-determination of the territory. So the Court was asked, in effect, whether before 1884 there were legal ties between the Western Sahara on the one hand, and Morocco and the Mauritanian entity on the other hand, which were "of such a nature as might affect the . . . decolonization of the Western Sahara" (*I.C.J. Reports 1975*, p. 12 at p. 68, para. 162. The Court gave a negative answer to that question, but it necessarily did so by focusing on the legal position in the period before Spanish colonization. In other words, the Court was dealing with the situation and status of the peoples concerned in the 1880s. And in doing so it was applying, not superseding, the principle of the intertemporal law. Its decision is accordingly central to an assessment of the competing claims of the Ottoman Empire and of France in the period before the First World War.

7. It is remarkable then that nowhere in Chand's pleadings is the case carefully analysed. Indeed in the whole of its pleadings Chad cites no more than a few sentences from the decision. Moreover in the treatment Chad does choose to give, the decision is diminished, treated as inapplicable and finally ignored. In truth the decision is doubly relevant to the present case. It is relevant because it lays down authoritatively the criterion for *terra nullius* and the corresponding legal concept of occupation. And it is relevant because it deals with the assessment of claims to sovereignty over territory which, though not *terra nullius*, was arid and sparsely inhabited.

8. Against this general background I now turn to three basic legal issues which divide the Parties as to the applicable law in the period before 1919. These are:

(1) the test for determining the legal status of the borderlands before 1919, and in particular whether they were or become *terra nullius*;

(2) the status of so-called spheres of influence agreements; and

(3) the test for establishing sovereignty over territory which is not *terra nullius* but which is arid and sparsely inhabited.

Each of these issues has of course been discussed in Libya's pleadings, and what I have to say about them is to be taken in conjunction with that discussion (see especially LR, para. 7.01-7.68).

(1) The Terra Nullius Test and the Tribes of the Borderlands

9. On the first issue, the *terra nullius* test, Chad is strangely reticent. In its Memorial it merely states that effective occupation "is the basis of sovereignty over territories which have no inherent social or political organization" (MC, Chap. II, para. 12): it goes on to cite the *Western Sahara* opinion, one of the few times it does so in the Memorial. Since Chad consistently refers to France as having " occupied" the territory, the statement I have quoted suggests that Chad might regard the borderlands as *terra nullius*. But, although it expresses dark doubts as to whether the tribes had a social or political organization (CMC, para. 5.177), Chad never says in so many words what it thinks the position was. In itself that is remarkable, because it is necessary to determine that question before one can determine which of the various modes of acquisition of territory — occupation, cession or (to the extent that they are recognized by international law) conquest or even prescription, might be relevant.

10. One reason for Chad's reticence is a conflict within its pleadings on this point. In one place in its Memorial (MC, Chap. V, para. 1.77) it states unequivocally that during the years 1899-1902 and again until 1912 "it was the Senoussi who exercised sovereign rights then the territory was not *terra nullius*, and equally obviously, it was not open to occupation. But this passage is disavowed in Chad's Counter-Memorial (CMC, para. 1.31). There Chad states that the position is "plus nuancée". In its context the term "nuancée" can only mean that Chad's position is reversed. Now Chad, castigating Libya for an argument which it itself had advanced in its earlier pleading, argues that the notion of sovereignty was inapplicable at all times before French "occupation" of the territory (CMC, para. 1.33; see also *idem*, para. 5.15).

Mr. President, Members of the Court, there may have been a decline in Senoussi power during the first half of this century, but it was as nothing compared with the decline that seems to have occurred between 1991 and 1992, the dates of the Chad Memorial and Counter-Memorial. From a sovereign entity the Senoussi have become merely an incompetent and febrile religious sect!

11. It must be admitted that the symptoms of that decline can be seen even in Chad's Memorial, despite its apparent acceptance of the sovereign rights of the people of the borderlands.

Thus Chad states that at the turn of the century the borderlands were "soumis à l'autorité, directe ou indirecte, de la Senoussia qui, contrairement à la Sublime Porte, n'avait pas été 'admise au bénéficier du droit public de l'Europe'" (MC, Chap. IV, para. 130). Similarly it says this of the Ottoman Empire: "reconnue comme un Etat à part entière, elle avait vocation à bénéficier des mêmes 'droits' que les autres Etats européens au regard du droit international prévalent alors" (MC, Chap. IV, para. 131). It was for this reason, according to Chad, that the 1899 Declaration was not opposable to the Ottoman Empire (*ibid.*). It had been recognized, it had been admitted. By inference, the 1899 Declaration *was* opposable to the Senoussi and the tribes who had no such benefit.

12. But the point is taken much further in Chad's Counter-Memorial. In addition to retracting the earlier concession about the sovereign rights of the local people under the Senoussi, the Counter-Memorial equates the absence of *terra nullius* with a "Libyan" thesis full of "contradictions et apories" (CMC, para. 5.01-4). According to Chad, the *Western Sahara Opinion* is not applicable "en dehors du contexte spécifique sur lequel la Cour a statué dans son avis" (CMC, para. 5.13), although it does not say what this specific context was. After all, both this case and that case concerned the status nomad Saharan tribes in the last decades of the nineteenth century. Indeed the Court expressly said that it was dealing with the *same* desert (*I.C J. Reports 1975,* p. 12 at p. 4, para. 87).

13. No doubt there are some differences between the two cases. In particular, the *Western Sahara* case concerned the fate of an entire self-determination territory, a territory under Chapter XI of the Chapter, whereas the present case concerns the attribution of disputed territory between tow independent States. But in so far as the Court was dealing with the *terra nullius* point and the existence of judicial links with Morocco or with the Mauritanian entity in the 1880s, its decision is directly relevant here. Perhaps Chad is suggesting that customary international law was different in the Eastern Sahara and in the Western Sahara? But they key point the Court was making in that case was that international law is not relative or regional but universal, that its rules and standards are not determined by any one culture or religion, however influential, and that international law is flexible enough to accommodate different geographical, political and social circumstances. This can

be seen, for example, from its treatment of the Sherifian State — that is to say, Morocco under the Sultan — as a "State of a special character" (*I.C.J. Reports 1975*, p. 12 at p. 44, para. 95). In this context Chad's appeal to the rights of "les . . . Etats européens au regard du droit international public prévalant alors" (MC, Chap. IV, para. 131) is a sign of the weakness of its case.

14. True, Chad does acknowledge in its Counter-Memorial that the indigenous population had exclusive rights over their territory (CMC, para. 5.17). But that title in its view related to the customary law of the tribes (*idem*, para. 5.18). It did not arise from the 'droit international public en vigueur à l'époque" (*idem*, para. 5.17). Thus the rights of the indigenous people are diminished by reference to their customary law. By definition customary law did not prevail against the colonizer. And the rights of the indigenous populations under their customary law, rights that Chad is prepared to concede, would not avail against the French. So the concession of territorial rights proves to be no concession at all.

15. All this is quite inconsistent with the Court's approach in the *Western Sahara* case. The law the Court was there concerned with was *international* law. The test for the territorial rights of indigenous tribes that it enunciated was a test under *international* law. The customary law of the tribes themselves was no doubt relevant, in that it helped to show the existence of a social and political organization at the local level, and of links between particular tribes. But it is obvious that the Court was not applying or giving effect to some sort of tribal customary law in its own right or for its own sake, as Chad's argument suggests.

16. Chad's analysis of the *terra nullius* point in the *Western Sahara* case occurs, curiously enough, in the context of a discussion of the intertemporal law (see CMC, para. 3.08-12). I say curiously, because as we have seen the case concerned the same period of time as the period under discussion here — the late-nineteenth century. There is no suggestion that international law changed in this regard between 1884, the beginning of Spanish colonization of the Western Sahara, and 1899 or 1913. The Berlin Conference of 1885 certainly did not change it, as I will show.

17. Nonetheless Chad argues that the Court in *Western Sahara* did not intend to exclude the possibility of occupation of *terra nullius*. Chad refers to "l'inexactitude de l'affirmation [libyenne]

selon laquelle dans l'avis consultatif concernant le Sahara occidental la Cour aurait estimé qu'au déebut du vingtième siècle, il était juridiquement impossible d'occuper un territorie, lorsque des tribus qui disposaient d'une organization sociale et politique s'y trouvaient" (CMC, para. 3.38; see also *idem*, para. 3.09). A crucial paragraph in its pleadings is paragraph 3.12 of the Counter-Memorial, which repeatedly uses the term "occupation" and which relies on earlier concepts rejected clearly by the Court in its Opinion. And thereafter Chad is consistent in its use of the term "occupation" (e.g., CMC, para. 3.51).

18. Admittedly there were traces of a narrower view in relation to international law and its application to non-European peoples in the doctrine, and to a more limited extent in the practice of European States in the period 1885-1935. Authorities such as Oppenheim, writing in 1905, drew from the premiss, itself dubious, that international law was a purely Western or Christian construct, the conclusion that it applied only to Western or Christian States, or to other States expressly admitted into the concept and to the concert of nations by them. But that conclusion, referred to and relied on by Chad (CM, para. 130) was a complete *nonsequitur*. Nor has it ever been accepted by this Court. As the Permanent Court pointed out, all that the Treaty of paris of 1856 did was to bring about 'the elevation of the position of Turkey in Europe' (*Jurisdiction of the European Commission of the Danube, 1927, P.C.I.J., Series B, No. 14,* p. 40). It is not merely demeaning but historically inaccurate to say that Turkey's status in international law was somehow created or instituted by that Treaty.

19. In short, whatever the historical or intellectual origins of international law may have been — and much has been written, by Judge Ago and others, to illustrate the diversity of those origins — it was quite capable of applying, in its own terms, to international transactions and relations on a worldwide basis. That was certainly the approach of the classical writers, and it has always been the approach of this Court, in the *Right of Passage* case, to take only one example.

20. On the other hand a meaner and narrower spirit was abroad in the 1880s. It was associated with imperialism and the scramble for Africa, seeking to use the universal heritage of the law of nations for its own particular ends. This "somewhat lofty attitude", as you, Mr. President,

described it in a passage quoted by Chad, had a certain influence (R. Y. Jennings, *The Acquisition of Territory in International Law* (1963) p. 20, cited in CMC, para. 3.12). In 1975, the Court decided — by reference to the very period we are considering — that that "lofty attitude" was not accepted by positive international law. I note that the Court's view is now incorporated in the 9th edition of *Oppenheim* (see R. Jennings & A. Watts ed., *Oppenheim's International Law* (9th eds., 1992, Vol. 1, p. 562, note 2).

21. The first question the Court was asked to determine in that case was whether the Western Sahara was *terra nullius* at the time of its colonization by Spain. The Court first defined its terms. It said:

> "The expression *'terra nullius'* was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory. 'Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be *terra nullius* a territory belong to no one — at the time of the act alleged to constitute the 'occupation' . . ." (*I.C.J. Reports 1975*, p. 12 at p. 39, para. 79.)

The issue for the Court, accordingly, was expressed in the following terms:

> 'In view of the Court . . . a determination that Western Sahara was a *'terra nullius'* at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no one in the sense that it was then open to acquisition through the legal process of 'occupation'." (*Ibid*.)

22. What then was the test for *terra nullius*, of whether a territory did or did not belong to someone? The Court said (at para. 80 of the Opinion):

> "Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers." (*Ibid.*)

23. An applying that test it went on to hold unanimously that the territory of the Western Sahara was not *terra nullius* as defined (*ibid*., para. 81).

24. A number of points need to be made about this aspect of the case. The first is the Court's summary dismissal of the different opinions of "certain jurists", or as Judge Dillard put it in his separate opinion, of a certain "measure of doctrinal discord on the subject of sparsely inhabited

lands" (*idem*., p. 124). The doctrinal discord arose from the idea being out about that international law was identified with the European concert of nations, and that rights over territory could only be exercised by or through European States. But such ideas, on which Chad apparently relies, were peremptorily dismissed by the Court.

25. The second point relates to the issue of treaty-making by the tribes. It is true, as the Court pointed out, that Spain had not treated the territory as belonging to no one, but had made a series of agreements with the tribes. That was certainly relevant in confirming the Court's conclusion on the issue of status. But it could not have been decisive in principle, in the sense that a different decision by Spain would have rendered the territory *terra nullius* after all. Although recognition and the practice of third States will be relevant to the question of status, the negative decision of a single State cannot be decisive. Thus if Spain had decided to take the territory by force of arms rather than negotiation, it could not have argued that its conduct was mere occupation of *terra nullius*. The rights of socially and politically organized tribes over their territories were not recognized by international law exclusively to allow those tribes to surrender their rights.

26. The third point to be made about the decision is to contrast the clear and unambiguous conclusion of a unanimous Court with the evasive and taciturn treatment given it by Chad, in particular in its Counter-Memorial. There, Chad accuses Libya of "inexactitude" in affirming that the Court excluded the possibility of occupation in the legal sense in respect of territory which was not *terra nullius* (CMC, para. 3.38). On a plain reading that is precisely what the Court did do, so that one can say that the inexactitude is all Chad's. But, heedless, Chad goes on to refer throughout to the French acquisition of the borderlands as an "occupation". It does so, it says, for two reasons, one general and one particular (CMC, para. 3.12). The general reason is the inter-temporal law. In effect this treats the Court's view of the law in force in another part of the same desert at almost the same period as simply wrong. The second reason, according to Chad, is that "La France avait occupé" in a general and "non-technical" sense — the general and "non-technical" sense referred to by the Court in paragraph 80 of the *Western Sahara* opinion — it leaves open all the questions of the legality, validity and extent of that "occupation". On the other hand if, as seems more likely, it

uses the term in its proper technical sense, then again it ignores or contradicts the Court's decision, and does so without even doing the Court the courtesy of explaining why.

27. One alternative explanation — although it is not something that Chad has so far dared to argue — is that in 1913 the borderlands reverted to being *terra nullius* with the Ottoman withdrawal. There were elements of such an idea in the earlier French claims to the Sudan, and I use here the term Sudan, in its modern sense of what might then have been called the Anglo-Egyptian Sudan. When the followers of the Mahdi took over the southern Nile valley, the French position was that the territory in question had become *terra nullius*. Captain Marchand said exactly this to General Kitchener during their famous and apparently bibulous interview at Fashoda. The Sudan was "abandoned by Egypt and therefore without a legal owner", he said (Marchand's dispatch, *Figaro*, 20 November 1898, quoted in T. Pakenham, *The Scramble for Africa* (1991) 548). This was yet another manifestation of the discredited idea that European civilization was a prerequisite for sovereignty.

28. The position is that territory once occupied by an organized society could only become *terra nullius* by abandonment of sovereignty, equally there is a presumption against territory become *terra nullius*. Since neither recognition as part of the European concert of nations nor "civilization" was required for territory not to be terra nullius, the extension of control over territory by the indigenous people, ousting a European power, could not produce the result that the territory became terra nullius. *A fortiori* with the transfer of title from one "civilized State" (the Ottoman Empire) to another (Italy). Thus there is no basis whatever for the idea that the borderlands became *terra nullius* after Ottoman withdrawal in 1913.

29. So far I have assumed that it is unlikely that the Court would hold that the borderlands are legally *terra nullius*. After all they shared many of the characteristics of the Western Sahara, both in geographical and human terms. The facts in the present case have already been outlined by my colleague, Mr. Maghur. Applying the Court's test of social and political organization, it is quite obvious that the borderlands were not *terra nullius* in 1912, or for that matter in 1899. I would only note that the *sawiya* at Bir Alali contained what was, by the standards of the time, a significant

library of 700 volumes. A library is not something one would expect to find in a *terra nullius*.

The Court adjourned from 11.25 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. Mr. Crawford.

Mr. CRAWFORD:

(2) The Legal Status of "Spheres of Influence"

30. Mr. President, Members of the Court, before the pause I was discussing the first of three legal issues as to which the Parties diverge in relation to the pre-1919 law, that is to say, the test for whether territory is *terra nullius*. I turn now to a second issue on which there is a significant difference between the parties, that is to say, the legal status of spheres of influence.

31. To be fair, on this point is is some measure of agreement. Chad does not argue that the 1899 Declaration had the effect of forthwith creating a territorial boundary. It acknowledges that sphere of influence agreements "ne remettaient en principe pas en question les droits appartenant aux dirigeants indigènes" (MC, Chap. II, para. 55) — although, as we have seen, it now regards those rights as by definition non-existent anyway. It accepts that a sphere of influence agreement is *res inter alios acta* so far as third States are concerned (CMC, para. 8.13). To this unremarkable extent the Parties are agreed.

32. On the other hand it is clear that Chad assumes that a sphere of influence agreement has a certain objective effect, since it says that

> "Quand des Etats, dans un traité, se sont mis d'accord pour établir un tracé entre leurs sphères d'influence respectives ... il s'ensuit que ce tracé prend les caractéristiques d'une frontière internationale quand le titre de souveraineté sur le territoire, dans un sens plus général, est établi... [L]e titre juridique par rapport à la frontière même est celui déterminé par les traités en question." (CM, Chap. II, para. 11.)

If all this means is that, when a State targets a territory for acquisition by agreement with another State, and then actually acquires it, the territory so acquired is the territory targeted, then it is a truism. But it appears that Chad seeks to confer some legal value on the process of targeting, which is another thing altogether. For it says that "la présence effective de la France constitue le *signe* que la ligne définie par les accords . . . constituait bien une frontière internationale" (MC, Chap. II, para. 37; emphasis added). In its view subsequent *effectivités* and acquiescence merely "confirment l'existence de ce droit", that is to say, of the pre-existing legal title *(ibid.)*. It was for this reason that

it claims the 1899 Declaration had "une valeur juridique en [elle-même]" (MC, Ch. IV, para. 238).

33. In short, according to Chad, a sphere of influence agreement creates "un titre imparfait" (RC, para. 4.22), *imparfait* perhaps, but a *titre* nonetheless. All that subsequent acquisition of the territory does is to *confirm* that title (cf. CM, Chap. V, para. 127; Chap. V, para. 181; CMC, para. 9.02).

34. In other words on the Chad thesis a zone of influence is a territorial boundary, a territorial status, *manqué*, and only temporarily *manqué*. Recognition by a third State converts the zone into a territorial right, at least vis-à-vis that State, and prevails over any territorial rights or claims that State may have (MC, Chap. IV, para. 121; CMC, para. 3.38).

35. Similarly it was because these treaty rights had, in Chad's view, some sort of objective existence that Chad could argue that they would prevail over the subsequent acquisition of title to the territory by Italy when it succeeded to the Ottoman Empire in respect of its Libyan territories (RC, para. 2.59).

36. So obsessed is Chad with its quasi-territorial view of spheres of influence that despite acknowledging that Article 3 of the 1899 Declaration was not reciprocal (CMC, 8.20), it persists in talking about "implicit" French recognition of a British zone, and about British abandonment of cession of the Sarra triangle to italy in 1934 (*idem*, para. 8.21; see also *idem*, paras. 8.64, 8.74 ("ses propres droits"); MC, Chap. I, para. 24). On this view Italy actually succeeded to Great Britain in 1934 in this important sector (MC, Chap. IV, para. 207). No doubt Chad needs to invent a British zone on the other side of the 1899 line in order to pursue the thesis that the territory on the other side of the line, on the British side of the line, was not Ottoman or Italian but British or at least — on Chad's view of spheres of influence — virtually British. The remarkable consequence, according to this reasoning, is that the line was an international boundary between Britain and France, the parties to the 1899 and 1919 agreements (RC, para. 4.21). Mr. President, it is sometimes said that Great Britain acquired its Empire in a fit of absence of mind and this would be only the most striking example of that phenomenon.

37. Against this background of Chad's inflation of the concept of spheres of influence, it is

something of a relief to turn to the law. The essential point is that the term "sphere of influence agreement" — like many other terms which developed at the time of Western colonization — is a descriptive label, not a term for a separate legal status. One can say the same thing, for example, about protectorate. The question is not how to define "sphere of influence agreement" but what are the incidents of the particular transaction. In the present context, the question is what are the terms of the relevant treaty, and what are its effects as a treaty.

38. So that is all that a sphere of influence agreement is — a treaty — as the Court made clear in the *Western Sahara* case, in another passage not cited by Chad. The Court had been referred to a number of such agreements entered into by Spain, France and Germany and relating to Morocco. It is a characteristic of spheres of influence agreements that they relate to the territory of a third party. By a strange irony, in that case the agreements were relied on by the victim, Morocco, as showing the extent of the territory then recognized as belonging to it. The Court disagreed. As paragraph 126 of the Opinion says:

> "These agreements . . . are of limited value . . . for it was not their purpose either to recognize an existing sovereignty over a territory or to deny its existence. Their purpose . . . was rather to recognize or reserve for one or both parties a 'sphere of influence' as understood in the practice of that time. In other words, one party granted to the other freedom of action in certain defined areas, or promised non-interference in an area claimed by the other party. Such agreements were essentially contractual in character." (*I.C.J. Reports 1975*, p. 12 at p. 56, para. 126.)

39. The Court's dismissal of spheres of influence as "essentially contractual in character" is in no way a retrospective rationalization of an unsavoury phenomenon. It reflected the best understanding of the colonial powers themselves at the time. This is what Sir Eric Beckett, then Second Legal Adviser at the British Foreign Office, said of spheres of influence agreements in a memorandum of 29 August 1934:

> "Spheres of influence in international law, whatever their political significance, mean nothing at all. If a state admits it has not sovereignty over a territory, but only claims a sphere of influence over it, then apart from treaty obligations binding particular powers not to enter the sphere of influence . . . legally any other power can go there and take steps to make itself sovereign." (CML, Exhibit 12.)

40. In short, spheres of influence agreements were nothing more than treaty arrangements

between States, governed by the law of treaties, and not in any sense territorial arrangements governed by the law of territorial status. And that simple but sufficient view of them enables one to answer a range of otherwise perplexing questions about them.

41. To take the simplest issue first, what was the legal effect of spheres of influence agreements? The answer is that they were purely bilateral, and gave rise to no rights of a territorial character at all. it is necessary to insist on this, if only because of the variety of phrases used by Chad to try to conure up some form of legal status deriving from the 1899 Declaration and the 1919 Agreement. In particular, a sphere of influence agreement had no effect in exempting the State whose sphere it was from compliance with the international law requirements for the acquisition of territory. A sphere of influence agreement did not change the applicable law relating to the acquisition of territory. It did not create an inchoate title — as discovery of uninhabited territory might perhaps have done in earlier centuries. Its effect was purely negative and essentially political: it was that, if complied with, it took a potential rival out of the picture.

42. This can be seen even from Chad's best efforts to give the "institution" (Chad's word) of spheres of influence some juridical content. For example it says that:

> "le droit applicable aux zones d'influence était ... bien fixé : si leur reconnaissance ne constituait pas un titre territorial opposable aux tiers, elles n'étaient pas moins, dans l'immense majorité des cas, le prélude à l'établissement, de part et d'autre de la ligne convenue, de la domination coloniale des puissances signataires" (CMC, para. 8.15).

But the proposition that such agreements were a prelude to colonial domination is not a proposition of law at all. The prelude was a mere preliminary, and one lacking intrinsic legal effect so far as the territory itself was concerned. Similarly in its Reply Chad admits "qu'un traité établissant une sphère d'influence ne créait un titre suffisant à la souveraineté mais constituait un simple 'pas' vers celle-ci" (CR para. 4.08.). But a "pas" is no more a juridical institution than a "prélude". The trust is that Chad is covertly inventing such an institution, an institution never distinctly recognized or endorsed by international law.

43. A second question arises. What would the legal effect be of the recognition of a sphere of influence agreement by an interested third State? The question assumes the intermingling of two

problematic concepts — "spheres of influence" and "recognition". Recognition is merely an act of a State, which may take a variety of forms, accepting a given situation. What the legal consequences may be of that act, at the time or prospectively, will depend on the circumstances of the case and ter terms used by the parties. Here as elsewhere "recognition" has no magical effect. But in so far as generalizations are possible one can say this. Recognition, although it may give rise to the opposability of a legal status or situation, does not alter the situation, does not change something from one king into another kind. In particular, recognition of a sphere of influence by a third State does not change the sphere of influence into something which it is not, such as a territorial title.

44. And then thee is a third question. What would the legal effect have been of the breach of a sphere of influence agreement, so far as title is concerned? For example, what would have been the legal effect of a State acquring territory on the wrong side of the line of a sphere of influence agreement to which it was a party, or which it had recognized? The answer is clear. Since the sphere of influence agreement is merely a bilateral treaty obligation, the answer must be that such an acquisition, by a State, notwithstanding that it breaches the treaty, would be legally effective as against the world. Vis-à-vis the other State party, the acquisition might be a breach of the treaty, and that might call for reparation, or it might be cured by recognition by the injured State, or it might simply be ignored. But just as a State does not lose sovereignty over territory by violating a bilateral treaty obligation with respect to that territory, so it does not cease to acquire territory because its acquisition violates a bilateral treaty.

45. To summarize this section of my argument, spheres of influence agreements were simply arrangements between potential colonizers, which could give rise to obligations as between the parties, but which inherently lacked objective legal effect, and which could not themselves give rise to territorial titles. Moreover they were not a distinct juridical category. What particular legal effects they had, as between the parties or as against a third State which had recognized them, depended always on the terms of the agreement or recognition considered in the light both of the law of treaties and of the law of territorial status, to the latter of which they were essentially alien.

46. In discussing this issue I have assumed, for the sake of argument, that Article 3 of the

1899 Declaration created a sphere of influence agreement in the sense in which I have been using that term. Certainly Chad regards it as a classic example of the "type" (MC, Chap. II, para. 54). But here again, Chad's argumentation suffers from what I can only call closet colonialism, the tendency to see in every action, in every transaction, a confirmation of colonial claims even though these bore no relation to reality. As Mr. Sohier has shown Article 3 of the 1899 Declaration was a very particular arrangement. It took the form of a negative and unilateral stipulation, one which was obviously not a disposition of territory in any sense. Thus the Article 3 line did not even create a sphere of influence "properly so-called", if one can have a sphere of influence "properly-so called", and it is incapable of having the important effects Chad claims for it.

(3) The Test for Sovereignty over Desert Areas: Control and Allegiance

47. Mr. President, Members of the Court, I turn now to deal with the third and no doubt the most important of the legal issues which are raised as to the law of territorial title before 1919. The issue is the following: what is the test in international law for the acquisition of sovereignty by a State over areas such as the borderlands? I assume for the purposes of this discussion that the areas were not at the relevant time *terra nullius*, and that their legal status was unaffected by the Declaration of 1899.

48. Again, on this issue the Chad pleadings are remarkable for their inconsistency and reticence. Having initially attributed sovereign rights over the borderlands to the Senoussi (MC, Chap. V, para. 177), Chad subsequently makes a *volte-face* — in its own words a retreat to a position "plus nuancée — and argues that the entire notion of sovereignty was inapplicable at the time before French "occupation" (CMC, para. 1.33).

49. According to Chad, the Senussi Order was incapable of possessing "un titre juridique international — autrement dit, des droits de souveraineté — sur le territoire dont il est question" (CMC, para. 5.136). The reason is that non-State entities could then possess no rights at all in international law (*idem*, paras. 5.137, 5.139, 5.164-5), as distinct from under their own customary laws (*idem*, paras. 5.167 ff.). Chad seeks to exorcise the spectre of Senoussi rights, because to acknowledge those rights would be to ignore totally "les droits souverains acquis par la France en

conformité avec les règles du droit international en vigueur à l'époque, aussi critiquables que celles-ci paraissent aujourd'hui" (CMC, para. 5.191). That argument tends to overlook the point that the very issue in this case is whether French sovereign rights over all or part of the borderlands were "acquis . . . en conformité avec les règles du droit international en vigueur à l'époque", and that to decide this issue it is impossible to overlook the role of the Senoussi. Chad's argument precisely inverts the issue, as if the Senoussi came *after* the French.

50. And in its Reply Chad goes further, dismissing the Senoussi with a wave but without a tear. Of this former sovereign entity, it says only that "il ne paraît pas utile de revenir à ce stade" (RC, para. 2.27).

51. Similarly the tribes themselves had no relevant rights: in a world confined to sovereign States, mere tribes could have no "droits souverains — c'est-à-dire de droits relevant du droit international public" (CMC, para. 5.183). Anyway the rights of indigenous peoples, according to Chad, are "un sujet, en soi, non dépourvu de controverses" (CMC, para. 5.181) — blithely ignoring the point that the issue here is the right of an indigenous people to their own lands before colonization, not the position of an indigenous remnant whose independent status and rights have already been lost.

52. Nor does the Ottoman Empire fare any better. According to Chad, the Ottoman Empire's influence in the borderlands before 1908 was "fort ténue — si même elle en avait une". And that influence, if any, "ne s'apparente en aucune manière à une quelconque souveraineté territoriale" (MC, Chap. IV, para. 130). After 1908, Chad grudgingly admits, the Ottoman position improved, but not by much. Chad accepts that Ottoman presence in the borderlands *might* have led to an acquisition of sovereignty (CMC, para. 135), and that the Ottoman Empire, unlike the Senussian tribes, could benefit from international law in force at the time. But the problem now is that the Ottoman presence was too transitory (*idem*, para. 137).

53. In summary, Chad appears to argue that, because none of the three interested parties, the Ottoman Empire, the Senussi and the tribes, themselves exercised the full range of powers in international law (and indeed two of the three definitionally could not have done so), therefore no

rights a tall existed over the territory in international law. The argumentative strategy could be described as that of "divide and conquer" — no doubt Chad would prefer to say, "divide and occupy".

54. Turning now to the applicable law, one starts from the basic proposition that — in the words of the Permanent Court in the *Eastern Greenland* case . . .

> "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual display of such authority" (*P.C.I.J., Series A/B, No. 53,* pp. 45-6).

This statement, of course, related to a dispute involving acquisition of sovereignty by essentially peaceful means on territory not claimed by any other State. With respect to the borderlands before 1913, that was the position of the Ottoman Empire, not that of France. With respect to the position after 1913, France was not a peaceful occupant, and it found itself at all times opposed to the claim of Italy as the successor of the Ottoman Empire.

55. Nonetheless on this issue I should again record some points of agreement between the Parties. First, we agree that there is a distinction in law between the acquisition and the loss of territorial sovereignty. The acquisition of territorial sovereignty is something which has to be demonstrated, and is not to be presumed. In particular it is not to be presumed from the mere existence of agreements between third States, such as sphere of influence agreements (cf. *I.C.J. Reports 1975,* p. 12 at pp. 49 ff.). By contrast, once territorial sovereignty has been acquired there is a presumption that it has not been abandoned: temporary absences (such as in time of armed conflict or civil war) do not readily lead to the result that the former sovereign has been displaced. The second point of agreement is this: there is no strict or invariable standard of territorial administration for determining who is the territorial sovereign at a given time. International law takes account of differing circumstances. If a dispute over title arises, the issue is: which of the potential claimants has the better case. And thirdly, it is necessary in assessing claims to sovereignty to bear in mind the nature of the terrain, and the necessary adaptations to terrain and climate made by the local people (see *I.C.J. Reports 1975,* p. 12 at p. 41, para. 87).

56. On these three points Chad and Libya are agreed: it will be a matter for my colleague, Professor Dolzer, to show how they applied to the borderlands at the relevant time, that is to say, for present purposes, the period immediately before 1913.

57. But this raises the question of what test is to be applied in determining the legal validity of claims of sovereignty to territory such as the borderlands. This issue underlay the second question asked of the Court by the General Assembly in the *Western Sahara* case. But Chad's analysis of this aspect of the decision, as of the first issue dealing with terra nullius, is cursory (see CMC, paras. 5.185-93, esp. para. 5.192). It asserts that the case stands for no general legal doctrine: "Cet avis ne vaut que pour le contexte historique spécifique sur lequel il porte" (CMC, para. 5.186). But any way according to Chad the case would not avail Libya here. The reason is as follows:

> "L'existence d'un lien juridique d'allégeance entre le Sultan du Maroc et quelques-unes des tribus occupant le territoire, et une démonstration manifeste de l'autorité du Sultan sur ses tribus n'ont pas été jugées [par la Cour] suffisantes pour fonder un lien juridique de souverainteté territoriale. Mais même si l'on reconnaissait l'existence de liens quelconques entre les tribus indigènes du B.E.T. et les Senoussistes, il faut noter que la Libye n'est pas dans une position comparable à celle du Maroc dans l'affaire du Sahara Occidental." (CMC, para. 5.192; reaffirmed without elaboration in CR, para. 4.19.)

58. It is useful to analyse the reasons why this Court rejected Morocco's claim to have been sovereign over the Western Sahara before 1884, not least because Chad, in the passage I have just quoted, seriously misstates and misunderstands those reasons.

59. First of all, Morocco's claims were based essentially on "immemorial possession" (*I.C.J. Reports 1975*, p. 12 at p. 42, para. 90), but that claim, the Court found, was based on "equivocal" evidence (*ibid*).

60. The main internal manifestations of Moroccan control over the territory derived from "evidence alleged to show the allegiance of Saharan caids, that is to say sheikhs, to the Sultan . . ." (*I.C.J. Reports 1975*, p. 12 at p. 45, para. 99). It is important to note that the Court did not reject the relevance of the argument based on allegiance. Far from it: it had earlier expressly accepted that the special character of the Sherifian State must be taken into account (*I.C.J. Reports 1975*, p. 12 at pp. 43-4, para. 94). In that context, it noted that this special character . . .

> "consisted in the fact that it was founded on the common religious bond of Islam

> existing among the peoples and on the allegiance of various tribes to the Sultan, through their caids or sheikhs, rather than on the notion of territory. Common religious links have, of course, existed in many parts of the world without signifying a legal tie of sovereignty or subordination to a ruler . . . Political ties of allegiance to a ruler . . . if [they are] to afford indications of the ruler's sovereignty, must clearly be real and manifested in acts evidencing acceptance of his political authority. Otherwise, there will be no genuine display or exercise of State authority." (*I.C.J. Reports 1975*, p. 12 at p. 44, para. 95.)

61. Note that the distinction the Court is making here is not a distinction between allegiance on the one hand, and effective political control on the other. It is a distinction between authority, on the one hand, and on the other hand allegiance of spiritual or religious character which is *not* associated with any form of political subordination or acceptance of political control. No doubt the followers of a particular religion may be subject to special demands, over and above the allegiance which flows from belonging to a given State. But this Court is not a court of conscience associated with a given religious tradition. Its concern is with the actual exercise of political control, including through the allegiance of a people or group to a superior authority. No doubt the existence of religious respect or attachment may be a *reason* why a people or group accept the authority of a superior. But it is the acceptance, and the manifestation of that acceptance, which matters.

62. And it was precisely this acceptance, and its manifestation, that Morocco could not sufficiently demonstrate in the *Western Sahara* case. It is not, as Chad asserts in the passage I have already quoted (CMC, para. 5.192), that the existence of a juridical link of allegiance between the Sultan of Morocco and numbers of the tribes, combined with a manifest demonstration of the Sultan's authority over the tribes, was judged by the Court to be insufficient to establish sovereignty. It is that the juridical link of allegiance and the manifest demonstration of authority were not shown to exist *at all*, or to any significant degree. In effect the Court accepted Spain's argument that the documentary and other items of proof of the Sultan's authority related to areas of southern Morocco itself, and not to the disputed territory (see *I.C.J. Reports 1975*, p. 12 at p. 46, para. 100, 47-8, para. 104-5). Expeditions made by the Sultan to the area, on which Morocco relied, did not reach the area (*idem*, p. 46 paras. 100-1, pp. 47-8, para. 104). The appointment of caids would have been relevant, but again these appointments related only to area within Morocco itself (*idem*, p. 47,

para. 103. It was not that the allegiance of the tribes would not have been relevant to the Sultan's claim to exercise authority: the Court held there was "no convincing evidence" of such allegiance.

63. Indeed it was precisely because there was evidence of the allegiance of some of the tribes of the territory (though not the most important ones) that the Court was able to hold that there were legal links at the relevant time between the territory and Morocco (see especially *idem*, pp. 48-9, paras. 105-7).

64. This conclusion was not displaced by the evidence of international arrangements, including spheres of influence agreements, relating or arguably relating to the territory (see *idem*, pp. 49-57, paras. 108-129). On the contrary both the internal and the international evidence supported the Court's conclusion that the Sultan's role in the territory was limited to political influence as distinct from direct or even indirect control (*idem*, pp. 56-7, para. 129).

65. In its assessment of the arguments for Moroccan sovereignty before 1884, the Court must have been influenced by the evidence of competing legal links with a non-State entity, the so-called Mauritanian entity. (I pause here, Mr. President, to note that on the case presented by Chad, the very idea that there could have been international legal links with a non-State entity is a contradiction in terms — yet another example of Chand's tendency to ignore or contradict the Court's reasoning.) By contrast the Court was perfectly prepared to countenance that idea, citing the *Reparations* case (*I.C.J. Reports 1949*, p. 149). The point for present purposes, however, is that the overlapping between the Moroccan and the Mauritanian claims itself militated against the Moroccan claim, which was a claim to territorial sovereignty, a claim by its nature exclusive.

66. The Court may obtain some assistance in determining the question presently under discussion from the decision of the Court of Arbitration in the *Sharjah-Dubai* case, which is now reported in the International Law Reports (case concerning *the Border between the Emirates of Dubai and Sharjah* ((1981 91 *ILR* 543). The Court of Arbitration had to deal with a territorial dispute involving an arid area of the Arabian peninsula. The dispute concerned territory occupied by the Bani Qitab, a nomadic tribe which, although it generally owed allegiance to the ruling family of Sharjah, was independent-minded and was not above concluding temporary alliances with other

rulers.

67. The Court of Arbitration observed that, especially in earlier times, it was by way of the allegiance of the various tribes that the control, and thus the sovereignty, of Sharjah was largely exercised. Thus it saw allegiance and control as dual criteria, as complementary criteria, for sovereignty, with deficiencies in the one able to be compensated for by the presence of the other.

68. It stressed the importance of the time and the place at which the issue arose, noting that . . .

> "The two criteria of allegiance and control must . . . in their application, have regard to the region under consideration. In the interior of the disputed boundary area the criterion of control may be of very limited significance in the distant past, but perhaps of slightly greater significance in the more recent past. This is still a desert region with a nomadic population." ((1981) 91*ILR* p. 543 at p. 589.)

69. The Court of Arbitration went on to apply this dual test to the Bani Qitab, paying special emphasis to the question of allegiance. It concluded:

> "that the Bani Qitab who inhabit the disputed territory owed allegiance to the Ruler of Sharjah, even if at times there were temporary interruptions to this link." 91 *ILR* p. 543 at p. 652.)

70. I should add that the Court of Arbitration found it necessary to distinguish the *Western Sahara Opinion*, a habit that seems to be catching. That case, it said, "concerned a situation very different as to region and as to period" (*idem*, p. 641). Perhaps it thought that this Court did not pay sufficient attention to the possibility of indirect Moroccan control through the allegiance of the tribes of the Western Sahara. It also stressed — and who can deny it — that "each territorial problem has its own specific characteristics" (*ibid*.). But, as I have tried to point out, the Court in the *Western Sahara* case fully accepted the idea that control might be manifested by the allegiance of a tribe or people, provided the allegiance was genuine and was manifested in some way. It certainly did not regard it as necessary for that manifestation to take any particular form, such as the payment of taxes.

71. So the two decisions are entirely consistent — as can be seen by the weight that this Court paid, in the *Western Sahara* case, to the criterion of allegiance in relation to southern Morocco. It

was precisely the factors which Chad claims were inadequate as proof of sovereignty over the Western Sahara that this Court accepted — in their application to the southern tribes of Morocco — were enough to establish the sovereignty of the Moroccan State in that region.

72. By way of summary, it is possible to look at the situation in the borderlands in 1912 in two different ways — one of them is based on the idea of partnership, the other is based on the idea of coalescence in a hierarchy. Following the line of partnership, one can treat the situation as based on some form of shared rights or shared sovereignty. International law certainly allowed for this, for example in the context of the various forms of protectorates. The division of sovereign competences between different units is nothing extraordinary, whether within a federation, a condominium or in some other political structure.

73. Alternatively, one can seek to identify the entity in which allegiance, administration and social organization coalesce, even though none of the social or political units within the entity is alone the repository of all these elements, and even though the relations between the various units may sometimes be strained. Provided the subordinate unit has not entirely broken away and asserted its independence, it is proper to treat the entity as a whole as a single State: this is what the Permanent Court did, for example, in the case of *Lighthouses in Crete and Samos, 1937, P.C.I.J., Series A/B, No. 71*.

74. What one cannot do is to deny the relevance of popular sovereignty or participation at either level — in the present case, deny that the Senoussi people had real legal rights, and at the same time deny the relevance of their activities and allegiance in the constitution of Ottoman sovereignty. And this reductivist approach is precisely that taken by Chad. On the contrary, the consequence of applying the rules and principles I have referred to is that in 1912 the Ottoman Empire had sovereignty over the territory occupied by the peoples submitting themselves to its authority — that is to say, to all the Senoussi peoples. And this conclusion follows whether one adopts as the appropriate form of analysis the idea of partnership or that of coalescence within a hierarchy. Either way the Ottoman Empire was sovereign over the territories concerned in this case by reason of the combination of its own claims and of activities carried out under its auspices, and

not adversely to it.

(4) Two Associated Issues: The Hinterland Doctrine and the Relevance of the Berlin Conference

75. Mr. President, Members of the Court, before moving to discuss the impact in the present dispute of the changes resulting from the League of Nations Covenant and subsequent instruments, I should touch briefly on two other issues — first, the hinterland doctrine; secondly, the impact of the Berlin Conference on the legal position of the Ottoman Empire.

76. The issue of the Ottoman Empire's long-standing *hinterland claim* has been discussed in the Replies of both Parties (RC, paras. 2.06-2.26; RL, para. 7.57). Hinterland claims were no substitute for the control of and acceptance of authority by the people of the territories concerned. On the other hand, the idea that sovereignty over coastal territory generated some form of hinterland did have a considerable influence, and there was room for the recognition of hinterland claims in international law as supplementary to the basic tests of allegiance and control. Hinterland claims also served various external functions, in particular in making clear the *animus occupandi* of the claimant States. After all a hinterland was a zone appurtenant to sovereign territory, and a hinterland claim — unlike a sphere of influence agreement — was thus a claim to an existing sovereignty.

77. It should also be said that there is an important difference between hinterland claims which were based merely on geography — sector claims one might call them — with those based on social organization. Even geographical hinterland claims achieved a level of recognition at the relevant time, as has been seen. By contrast the Ottoman claim was to a hinterland where the peoples were known to and by the claimant State, and which to a considerable extent accepted its authority.

78. The second issue to which I should briefly refer is the relevance of the Final Act of the Berlin Conference of 1885 for the present case. Chapter VI of the Final Act was entitled "Declaration relative to the Essential Conditions to be Observed in Order that New Occupations on the Coasts of the African continent may be held to be Effective". Chapter VI consisted of two articles. For present purposes the relevant one is Article XXXV, by which the States parties

recognized . . .

> "the obligation to ensure the establishment of authority in regions occupied by them on the coasts of the African Continent sufficient to protect existing rights, and, as the case may be, freedom of trade and of transit . . ." (ML, International Accords and Agreements Annex, Vol. 2, No. 1.)

In terms this applied only to occupation along the coasts, although it was in practice later applied also to acquisitions inland. But the important point for present purposes is that it was agreed that Chapter VI would only apply to "new occupations", and therefore that the existing territorial rights of the Ottoman Empire were not affected. The distinction thus drawn between the acquisition of new titles and the maintenance of existing rights is also reflected as we have seen in general international law. Where the local population accepted and coexisted with claims to sovereignty made by the Ottoman Empire, claims to that sovereignty were legitimate and could be recognized. The assertion of a new title, against the wishes of an existing sovereign and of the people of the territory, was quite another matter.

C. THE IMPACT OF THE MODERN LAW OF TERRITORIAL TITLE

79. Mr. President, Members of the Court, I now turn to the final stage of my presentation, which involves an analysis of the developing modern law of territorial status so far as relevant to this case. There was of course a considerable degree of continuity in the law. Thus the basic elements of "continuous and peaceful display of actual power in the contested region" continued to apply in the case of territory not claimed by any other State (*Island of Palmas* case (1928) 2 *UNRIAA* at p. 857). In the case of territory belonging to another State, the presumption against abandonment of sovereignty continued to apply, and also the protection offered to vested rights by the rather strict rules on extinctive prescription, if indeed that institution existed at all, especially in cases where the displaced sovereign continued to protest against its displacement. But in addition, the law after 1919 developed in the direction of prohibiting any acquisition of territory by the use of force.

80. The first stage in this development was Article X of the Covenant of the League of Nations, intended to outlaw war as a means of challenging the territorial integrity of States. It provided that:

> "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."

Chad argues (CMC, paras. 3.43-49) that any such obligation extended only to other Members of the League, and that States Parties to the League remained free to commit acts of aggression against the rest of the world. The argument is not only controversial but irrelevant. For Italy was a Member of the League, and under the Treaty of Ouchy Italy had succeeded to the Ottoman sovereignty in Libya in its full extent — a succession unconditionally recognized by France.

81. But quite apart from this, there is real difficulty in supposing that the Covenant left Member States entirely free to resort to war against non-Members, or against peoples like the Senoussi who lacked recognition as State entities. For if international law recognized their capacity to hold territory, so that their lands were not *terra nullius*, it would make little sense to recognize their legal title, but to deprive that title of all protection. The new principle of the outlawing of war was coherent only if it protected the territorial integrity of all entities and peoples whose title to territory was recognized by the law.

82. In any event it was France itself that initiated the 1928 General Treaty for the Renunciation of War, the Pact of Paris, which contained a further general renunciation of war. It provided that:

> "the High Contracting Parties solemnly declare . . . that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another".

83. Mr. President, it is sometimes said that the manifest failures of the 1930s, the collapse of the League, the failure of the Covenant and the Pact of Paris to maintain the peace, the tragedy of appeasement, together had the effect of cancelling the progress that was made after 1919. But the fact is that international law was invoked in the 1920s and the 1930s against aggression. And the proposition that international law prohibited conquest, even in the inter-war period, was widely accepted.

84. Moreover, that proposition related to two other aspects of the rules of territorial title which had their roots in the old law. The first was the idea that the control of territory had to be

peaceful and uncontested: as Professor Bowett will show, the French attacks on the borderlands were neither peaceful nor uncontested, whether by the Senoussi tribes or by Italy. Even traditional international law allowed a displaced sovereign to maintain its rights over quite long periods of time by protest, and that position can only have been reinforced under the developing régime which sought to prohibit the use of force in international relations altogether.

85. The second aspect of the traditional law which can only have been reinforced by the developments after 1919 related to the place of conquest itself as a root of title. It is sometimes loosely said that conquest was an alternative to cession as a mode of acquisition of title. But the real position was that conquest might lead to a cession of territory which was valid although the defeated State had no choice but to consent. The characteristic of the old law was not that conquest as such was a root of title, but that treaties were valid even if they had been procured by the use of force. And the traditional law also took account of the one situation with which treaties of peace or treaties of cession could not deal — that is to say, *debellatio*m the situation where the opposing State had been extinguished, so that there was no subsisting title-holder, no one who could conclude the treaty of cession. In the borderlands, there was neither cession nor *debellatio*. On the contrary there was consistent protest from Italy, and an acceptance by both parties that the limits of the respective possessions of France and Italy were yet to be determined.

D. CONCLUSION

86. Mr. President, Members of the Court, in this as in other respects Chad's position is a curious one. It does not deny that now the law prohibits the acquisition of territory by force, or the use of force against peoples whether or not they are organized in a State. It apparently accepts that the *Western Sahara* case reflects the modern position — or why would it discuss it under the rubric of the intertemporal law? All these developments in the law Chad accepts, but it seeks by all means to delay their coming, to hold them off until its title to the borderlands can have been perfected, even if in ways which it accepts were "critiquables" (CMC, para. 5.191). In these respects Chad's position reminds one a little of Saint Augustine before his conversion — Lord, make me just, but not yet> But the comparison fails in this respect: it assumes that the conduct would have been effective

to achieve the result desired by Chad even under the old dispensation. And that, as Professor Bowett will now show, was by no means the case.

Thank you, Mr. President.

The PRESIDENT: Thank you, Professor Crawford. Professor Bowett.

Professor BOWETT: Thank you, Mr. President.

CHAD's CLAIM TO TITLE

Mr. President, Members of the Court, my task is to examine Chad's claim of title to the borderlands. I use that phrase deliberately. Chad would prefer that we discuss simply an issue of *boundaries*: but a boundary presupposes that the States on either side of that boundary possess a valid *title* to the territory. And you cannot ask a court to determine a boundary without satisfying the court that you have title to all the territory on your side of the boundary.

1. Chad's three theories justifying the so-called 1899-1919 line

Chad bases its case for the so-called 1899-1919 line on three theories.

First, that by Article 3 of the 1955 Treaty, the Parties had agreed that the boundary should be the line already established by the international acts listed in Annex 1.

Second, that the 1899 line, although not originally a true boundary, had become a true boundary by reason of French occupation *(effectivités)* between the years 1913 and 1919 and recognition of that line as a boundary by both Great Britain and Italy.

Third, and irrespective of any treaties, the same line had become a boundary by 1919 based on French *effectivités* alone.

Now I do not dispute Chad's right to advance as many theories as it wishes. But when the Court comes to judge these theories, the Court's reaction must depend to some extent on the consistency with which these theories have been advanced. Novelty may not be fatal. But it justifies a certain scepticism.

Chad undoubtedly claims by succession to France. Yet it is clear that before the United

Nations in 1950-1951 France was advancing a different theory. This was that the 1899-1919 boundary was already established by the international acts: not by the 1955 Treaty, as in Chad's first theory. For France did not, and could not, rely on the later 1955 Treaty. Nor did France rely on occupation or recognition as in Chad's second and third theories.

Indeed, as we have seen, the effect of Article 3 of the 1955 Treaty was to *exclude* reliance on *effectivités*, and this was quite intentional on the part of France. France wishes to base the negotiations with Libya exclusively on the treaties in Annex I, following the advice of the French Governor-General of the AEF. The reason why France wishes to avoid all reliance on effectivities is not clear from the records. It could be that France had no conviction that its own occupation met the required standard of effectiveness. Certainly France was worried about Italian claims based on occupation and in the 1935 negotiations between France and Italy, France avoided all discussion of *effectivités*. It may even be that France recognized that an occupation based on military force was highly-questionable, legally, after 1919. But, whatever the reason, the fact is that in 1955 France did exclude any claim based on *effectivitiés*.

The result is that, in so far as Chand's second and third theories *do* rely on French effectivités, those theories are now suspect on two grounds.

(i) Consistency: how much credibility ought to be attached to a claim when the grounds on which the claim is based have been changed so radically over the years?

(ii) Succession: if Chad claims title by succession to France, is it open to Chad now to claim that same title on grounds quite different from those advanced by the predecessor State, France? It is difficult to see that a radical change in the *basis* of title in the claim by a successor State gives it much credence. On the contrary, the existence of inconsistency between predecessor and successor State will tend to diminish the credibility of the claim.

2. Chad's Reliance on effectivités

Even if Chad is entitled to rely on French *effectivités*, despite Article 3 of the 1955 Treaty, both the second and third Chadian theories face insurmountable obstacles.

Essentially, Chad must make a choice. Either it must argue that the territory was *terra*

nullius, so that France acquired title by occupation. Or that the territory, not being *terra nullius*, was acquired by conquest.

Let me take those two hypotheses in turn.

(a) Occupation of Terra Nullius

The borderlands could not possibly be characterised as *terra nullius* between the years 1913-1919. So this hypothesis fails at the outset.

But even if that were not so, Chad's thesis would face serious difficulties, for Chad would have to show that, on the facts, France had, between the years 1913 and 1919, established an effective, peaceful possession of the territory in accordance with the criteria prevailing in the law at that time. Chad does not, and cannot, substantiate such a claim.

(i) The Facts

Between 1909 and 1913 the French military advance northwards had halted on instructions from the French Government. The Ottoman forces, in co-operation with the local tribes organized by the Senoussi, held the borderlands, and a sort of *de facto* boundary between the two opposing sides emerged. You can see this line on the map now displayed on the screen (Map No. 48). In 1912, the Ottoman forces were at Bardaï, Zouar, Aïn Galakka, Baki (near Fada) and Oum Chalouba.

Chad, in its Counter-Memorial (paras. 6.51-6.55) suggests that France halted its invasion simply because it had no wish to embarrass an ally, the Ottoman Empire. The reasons do not matter. The facts are that the French realised they were opposed by the Ottoman-Senussi alliance; that France knew the Ottomans and the Senussi occupied the territory under a claim of right, and that any further movement northwards by the French would lead to hostilities.

Then the situation changed. After the Italian invasion of Tripolitania-Cyrenaica, the Ottoman Empire was defeated, and under the Treaty of Ouchy the Ottomans were required to withdraw the Ottoman administration from these areas. By March 1913 the Ottomans had withdrawn, leaving the Senussi to fight alone. By June 1913 the French Government authorized Colonel Largeau,

commanding the French A.E.F. forces, to enter Borkou. In authorizing the advance of French forces into the borderlands, the French Government was not motivated by the desire and intent to occupy this region. It was purely a defensive move into what the French military called the "northern front" in order to protect the more fertile and populated regions lying sough of 15❍ N latitude, which the French were then in the course of occupying, ultimately with the reluctant agreement of the peoples living there. The absence of an intent to occupy the region is specifically shown by the three French decrees issued between 1900 and 1906 relating to the military administration of the AEF (ML, paras. 4.115-4.120).

Ain Galakka was attacked in November of 1913, Faya in December and Gouro a few days later. A French column reached as far north as the Sarra Wells in April of 1914, some 100 kilometres north of where the *Livre jaune* map would have placed the line (Map No. 81). But these military penetrations had no permanence. Indeed, the expedition to the Sarra Wells was designed simply to see whether they could be destroyed. The columns struck wherever they perceived Senoussi resistance to be found in strength, and then withdrew. Only two small outposts were left in the north of Borkou and in Ounianga: one at Gouro and one at Ounianga-Kebir.

However, the French then moved against Tibesti from another direction (Map No. 81). This time a French column came, not from the south where the French forces under Colonel Largeau had operated, but from the west, from French West Africa (the AOF). Zouar was occupied in December of 1913, Bardaï in July of 1914, and reconnaissance patrols were dispatched to Aouzou, Yao, Wour and Kayougue.

However, the French then came under pressure because of fierce Senoussi resistance, and the French decided to disband the column in Tibesti. It was disbanded in October of 1914, leaving a detachment of some 80 men at Bardaï, and an even smaller detachment — two sections only — at Zouar. But by the end of July 1916 both these detachments were withdrawn.

So, in Tibesti, there was no French presence of any kind, from July 1916 until November 1929, when one French company — say 90 men — re-entered Bardaï.

As regards Borkou and Ennedi, the French remained at a few, isolated posts (Map No. 82).

Chad's Counter-Memorial (para. 6.74) suggests there was a battalion at Mao, and two further companies at Faya, and Fada, with additional small posts at Aïn-Galakka, Gouro, and Ounianga. We are not told the numerical strength of these troops, but we are probably speaking of a maximum of 300-400 men — to establish an effective occupation over an area about four-fifths the size of metropolitan France. And, significantly, apart from this purely military presence, we have no evidence of any civil administration or any intention to establish an effective government of the territory. The tribes were left to govern themselves. The concern of the French was to protect their garrisons, the caravans, and "Chad utile" to the South.

It must be borne in mind that Chad's case is that the French title, based on occupation, was perfected b y 1914, or at the latest 1919. (Chad's Memorial uses 1919, but the Counter-Memorial, para. 6.23, advances the date to 1914.) That choice of dates is interesting. Why, it may be asked, does not Chad rely on French *effectivités* in the 1920s or the 1930s? Chad itself does not provide the answer, so we must speculate. Is it that Chad wishes to demonstrate that a French title was perfected in 1919 so as to coincide with the 1919 Anglo-French Convention: and thus make the Italian claims in the 1920s and 1930s claims to a cession of French territory? Or is it that Chad accepts that French military conquest after 1919 was prohibited by the Covenant of the League? Or is it that 1914 is a more attractive date because it avoids highlighting the impact of the League Covenant in the way 1919 does? Or perhaps because in 1914 the French were still in Tibesti? We shall have to refer to each hypothesis in due course.

If these, then, are the facts, we need to examine whether, by reference to the criteria established by the law at that time, France could have acquired a valid title based on occupation.

(ii) Application of the criteria for title by occupation

As Professor Crawford has explained, the traditional requirements for an effective occupation are twofold: *animus occupandi* — the intention to occupy as sovereign, and *corpus occupandi* — evidence of effectiveness. As to the first, it seems clear from what I have already said of the French military incursions that there was no intention at that time — I speak of 1913-1919 — to establish sovereignty. France knew its resources were too few. The most it could hope for was to use its

limited military resources to "neutralize" the borderlands to make sure the Senussi tribes there did not threaten the French hold on the territory south of 15° latitude.

As to the second requirement, could it really be suggested that France displayed sufficient *corpus occupandi*: what Huber was to describe in the *Palmas Island* case as: "the continuous and peaceful display of actual power in the contested region . . ." (*UNRIAA*, Vol. II, p. 857).

As regards continuity, we can accept that the notion varies with the nature of the territory: as Huber himself acknowledged (pp. 867-867), some degree of discontinuity can be tolerated when the territory is uninhabited or sparsely inhabited.

But in the present case, as regards the Tibesti, we have no continuity at all, from 1916 to 1929: the French were completely absent from this vast stretch of territory. Accordingly, it is impossible to see how France could have acquired any title to Tibesti by 1919, or at any time between 1916 and 1929. Even when France returned to Tibesti in 1929 its entire force consisted of 190 men (MC, Vol. III, p. 110). Imagine trying to occupy the whole of Tibesti, effectively, with 190 men!

As regards the requirement that the occupying State's powers should constitute a "peaceful" display of sovereignty, this requirement served to distinguish sharply a title acquired by occupation from a title acquired by conquest. The latter, as we shall see, was subject to very different rules, and applied in quite different circumstances. At least, that was so under the traditional law. But the traditional concept of a "peaceful" occupation had to be applied consistently with the evolving rules of general international law. As the Court noted in the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1978,* p. 33, para. 80), words or concepts require a contemporaneous interpretation consistent with the evolving law.

After 1919, therefore, when the League Covenant introduced the new rule prohibiting war as a means of territorial acquisition, it became necessary to interpret the traditional requirement of a "peaceful" occupation of a *terra nullius* so as to produce consistency with the new rule.

So for France, bound by the League Covenant, the requirement of "peaceful" occupation and the obligation to refrain from war coalesced. It was no longer open to France to argue that hostilities

used to subdue the inhabitants of *terra nullius* were lawful — because the Covenant prohibited only war against States — or, conversely, to argue that the customary law concept of "peaceful occupation" meant only "non-belligerent occupation" — so as to be satisfied provided the occupying State did not regard itself as a belligerent Power. The coalescing of the customary concept and the new treaty prohibition meant that *irrespective of the status of the inhabitants* the attempt to acquire sovereignty over their territory was illegal. In short, it meant that where a State used force to occupy territory, whether against a State or any people having title, that use of force precluded the acquisition of a valid title.

It must be clear that, in relation to Borkou and Ennedi, the French presence was not "peaceful". It could not be if the presence was entirely military. There would have been little point in maintaining a purely military control if France could have administered the territory peacefully with a more normal civil administration, plus a police force. But, of course, the French had to have a military presence. The resistance of the Senoussi tribes continued long after the end of the First World War, with attacks on French outposts being recorded into the 1930s (see CML, paras. 5.35-5.94).

The official French *Histoire Militaire* records a series of attacks, through 1915, 1916, 1917-1918, with Sheikh Erbeimi leading a sizeable force of 800 men against the French (see CML, Vol. 2, Exhibit 13, p. 467). This History, which is included in relevant part in Libya's written pleadings, is well worth reading for anyone disposed to give credence to the view that France had established a "peaceful" occupation. The French so-called "reprisals" continued to the north of Ennedi in 1926 and 1927. The widespread location of the fighting, in the period 1914-1927 can be seen on the map behind me (map No. 83). A report from the Governor-General of the AOF to the Minister of Colonies of July 1926 put the position as follows:

> "En resumé : le fait saillant qui ressort de cet ensemble d'événements, c'est l'autorité incontestable dont jouissent les chefs de la Senoussia, dans tous les territoires qui touchent aux frontières Nord-Est de la Colonie du Niger ou du Tchad, autorité qu'ils pourraient, le cas échéant, employer à grouper contre nous toutes les populations, fort bien armées, qui leur obéissent strictement, et celles des zones limitrophes, telles que le Tibesti qui échappent à notre surveillance directe." (RL, Vol. 3, Exhibit 11.4.)

The 1929 report of Captain Aubert put the position bluntly. Speaking of the region of Aouzou to which France had decided to return, he describes it as a:

> "région qui, depuis l'évacuation du Tibesti, n'a été visitée qu'une seule fois en 1923, dont les habitants n'ont jamais été soumis à la moindre action politique et d'où sont sortis, surtout en 1926 et 1927, de nombreux rezzous sur le Nord de l'Ennedi" (MC, Production 45).

But this resistance continued after the French return. A report in 1933 describes Modra as a "centre of rebellion" (LR, Vol. 3, Exhibits 7.3 and 7.4).

That, then, was the pattern. A small French force, located at two main points — Faya and Fada — with smaller outposts at Aïn-Galakka, Gouro and Ounianga (map No. 82). There was no intention to establish sovereignty, and no pretence at effectively occupying the whole territory. The reason why the hostilities are sporadic is simply that the tribes continued their normal life-styles as if the French did not exist and the "hit and run" tactics were the kind of guerrilla warfare that best suited the tribes. For the French did not trouble them greatly. They exercised no real administrative control, imposed no laws and, apparently, at this stage, no taxes. But their presence was never accepted, and resentment was occasionally demonstrated by a raid — that the French described as a "rezzou" — against one of their detachments, or a supply caravan. In reality, these attacks by the Senoussi tribes were a reflection of the deep resentment against this alien intrusion into their lands. The French Ministry of the Colonies, reporting to the French Minister for Foreign Affairs on 30 July 1930 — and referring to Tibesti, Ennedi and Borkou — stated quite openly that France had established no more than "une occupation rudimentaire" (MC, Vol. III, p. 177). Mr. President, a "rudimentary occupation" is not an *effective* occupation.

The notion of "effective occupation" has never been applied to this sort of nominal, superficial military presence: it has always conveyed the idea of government or administration of the territory.

The resolution of the Institut de Droit International, adopted at Lausanne in 1888, postulated two conditions for an effective occupation: (1) taking of possession, and (2) an official notification of this fact (Ann. de l'IDI (1888-9) 173, 201-4).

These conditions were never fulfilled. France never really attempted to fulfil them. Only in

1933-1934 do we get some evidence that France attempted, not very successfully, to take the people and start taking a census (RC, Vol. III, pp. 364-365). This suggests that France never really saw its military invasion of the borderlands as the peaceful occupation of a *terra nullius*. It was an attempt at military conquest, no different from the wars the French had fought in the areas further south, against the Senoussi forces defending Bir Alali in 1901 and 1902.

So the question we must now turn to is whether an alternative basis of French title is possible, namely occupation by conquest. But that, Mr. President, I think ought to wait until tomorrow.

The PRESIDENT: Very well, if you feel like that, yes, we'll continue tomorrow, Mr. Bowett. Thank you.

The Court rose at 1.10 p.m.