CR 93/29

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1993

Public sitting

held on Thursday 8 July, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerningTerritorial Dispute
(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le le jeudi 8 juillet , 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

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The PRESIDENT: Please be seated. Mr. Crawford.

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

A. Introduction: Chad's new position on original acquisition

1. In this part of the Libyan Reply it is proposed to focus on the legal issues which now divide the Parties to the "différend territorial", the dispute submitted to the Court. I say, the legal issues which now divide the Parties, because there has been a great deal of movement on the part of Chad in this regard. Professor Higgins complained, in her pleading of 30 June 1993 (CR 93/24, p. 25), of the "countless . . . iniquities" attributed to Chad in terms of its reliance on a colonial view of international law. Mr. President, each one of the propositions attributed to Chad in my argument of 21 June (CR 93/19, pp. 36 (para. 9), 37-88 (paras. 10-12), 39-40 (paras. 17-18), 46-48 (paras. 32-36), 50 (para. 42), 52-54 (paras. 48-52), 57 (para. 55)) was illustrated by precise reference to and brief quotation from Chad's pleadings. I deeply regret that my French is not good enough to have concocted those passages. In fact what Chad has done is to abandon its entire legal argument on the issue of original acquisition, as contained in its written pleadings, and to start anew. So it is no longer argued that spheres of influence are equivalent to territorial titles (although Professor Pellet still persisted in referring to Chad in 1902 as "une colonie virtuelle" (CR 93/23, p. 34)). It is no longer argued that the peoples of the region were outside the protection of the law of nations, and had no rights under international law. Nor is it any longer inferred that the borderlands were *terra nullius*. The Court will have noted that it took Chad three rounds of written argument and three days of oral argument, before it could be brought to make its position clear on this issue, to state explicitly that the borderlands were not *terra nullius*. Professor Shaw, whose speech referred to original title, might have been expected to tell us, but remained coy. It took Professor Higgins, in her robust way, finally to make the position clear (CR 93/24, p. 22).

2. Leaving behind the ruins of Chad's argument to date — rather as the French soldiers left behind the ruined library at Bir Alali — Chad starts again, in the pleading of Professor Higgins, to redefine its position on the acquisition of title. What does it say now?

B. The role of "occupation" of territory not *terra nullius*

3. Having accepted that the borderlands were not *terra nullius*, Professor Higgins went on to say that nonetheless a colonial power could acquire sovereignty by means other than agreement (CR 93/24, p. 32), by means she persisted in referring to as occupation, albeit forceful occupation. At this point her argument took on apocalyptic overtones. Not to confirm the 1919 boundary would, she said, bring into doubt most of the boundaries of Africa (CR 93/24, pp. 32-3). It would undermine the legitimacy of settler States everywhere in the world, in much of North America, and even — and Mr. President this was a particularly wounding blow — the whole of my own country, Australia (CR 93/24, p. 32). Of course Australia would be protected by Article 59. The Court could not have said, in what Professor Higgins called its *dictum* in the *Western Sahara* case, that is to say its express answer to an express question asked by the General Assembly, that occupation was only appropriate to *terra nullius* because, she said, that would bring juridical anarchy.

4. But the Court, in paragraph 79 of is Opinion, was quite clear in referring to *terra nullius* as a necessary prerequisite to occupation in the proper sense of the term. It said this not once but three times. Mr. President, in English we have a statement, a well-known quotation, "what I say to you three times is true". We all know that this is not necessarily the case. We have head Chad's argument repeatedly asserting propositions which Libya denies. But what I say to you three times must be deliberate. The idea that the Court did not mean what it said three times is rather unusual. I set out the relevant passages in my earlier pleading and I will not repeat them here (CR 93/19, p. 41). Professor Higgins in effect accused the Court of legislating retrospectively, of overturning the actual expectations of those involved at the time. But the idea that occupation was appropriate, and only appropriate, as a method of acquisition of *terra nullius* was well accepted in the State practice of the period. I quote, for example, a British statement in 1839 in relation to New Zealand, when it was said that an assumption of sovereignty was "strictly contingent upon the indispensable preliminary of the territorial cession having been obtained by amicable negotiation with, and free concurrence of, the native chiefs" (*Correspondence relative to New Zealand*, 1840 No. 11, pp. 68-9). And this idea goes back to Victoria, who had said that

> "the aborigines undoubtedly had true dominion in both public and private matters, and . . . neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners" (*De Indis*, Vol. 1, proposition 24 (1532).

This was published in 1532. This is the doctrine that Professor Higgins treated as a dangerous heresy, an innovation, an *ex post facto* invention by this Court in 1975, and that evoked from her such cries of alarm.

5. Her argumentative technique involved not merely threats of the apocalypse: it also involved studied inattention to what the Court, and Libya, actually said. The Court in *Western Sahara* referred to occupied territory being acquired by "cession or succession". *I.C.J. Reports 1975*, p. 12 at p. 39 (para. 79)). It was not necessary for the Court to specify what was involved in the concept of succession, since Spain had made treaties with the tribes. But one can infer that succession would involve a number of other possibilities, and these were explicitly canvassed in my speech and that of Professor Bowett in the first round (CR 93/19, pp. 64, 65-66; CR 93/20, pp. 10-19). One such possibility is *debellatio*, complete suppression of the State. A non-State entity with rights over its own land recognized under international law must be entitled to protection. But not to more protection than would be accorded to the State itself. So *debellatio* would apply. Another possibility might be conquest, if one admits conquest as a separate means of acquiring title — I will return to that issue shortly. And then there is the possibility of consolidation, that is to say, general acceptance of a situation which, whatever its origins may have been, has been generally recognized and accepted. Professor Bowett carefully dealt with that possibility earlier (CR 93/20, pp. 14-19). So there is no apocalypse, and no juridical anarchy. And Chad's angry insistence on the possibility of military occupation of an already occupied territory — so that is what Professor Higgins' new theory amounted to (CR 93/24, pp. 32-3) — is left without a juridical basis.

6. Perhaps Chad now argues that title could have been acquired by forceful occupation in relation to a group that did not have title. This appears to be its case with regard to the French use of force against the Senoussi. Professor Higgins said "Conquest . . . does not seem to describe the occupation of the BET, when military activity was directed against the Senoussi and others who did not have international title" (CR 93/24, p. 38). But this is tantamount to saying the territory was *terra nullius*, which Chad now denies. And no distinction can be made between the Senoussi and the

local tribes, not only because the tribes were Senoussi but also because France fought against them as well, and in conjunction with the Brotherhood. So either the territory was *terra nullius*, which both Chad and Libya deny, or the proposition has no relevance in the present case.

7. Mr. President, it might be asked what is the function of the traditional rules relating to the acquisition of title, if in addition to cession one admits the other possibilities to which I have referred. In the end the superior power could prevail, so what was the point of making these distinctions? The answer is that the rights and interests of other legal persons might be involved, and they could insist on the observance of international law requirements, and on the legal consequences which would flow from the transactions, for example in terms of succession or compliance with treaty commitments.

8. And the point is that the Ottoman Empire, and subsequently Italy, were involved, did assert their successive rights. So for that matter did the Senoussi, in a series of transactions before and after 1912, a series of transactions that had at the very least the appearance of international transactions, and in the spirit of the Court in the *Western Sahara* one would say also the reality. The involvement of Italy provides yet another reason for dismissing Professor Higgins' vision of the apocalypse. She complained that Libya's argument based on the impossibility of French acquisition of Italian title after 1912 was a new argument (CR 93/24 p. 41). It is of course fully developed in Libya's pleadings (see e.g., RL, pp. 225-227, 252-255 with references to earlier pleadings). It means that, at one level, at least, the dispute between France and Italy after 1912 was just another in the long list of disputes over title to territory. Of course, at another level it did involve the Senoussi tribes as belligerent, but that can hardly be thought to *improve* Chad's case.

C. The legal status of spheres of influence

9. I pass then to the legal status of spheres of influence. In relation to that issue, the running was taken up by Professor Pellet. He retreated, it is true, from the earlier suggestions of spheres of influence as themselves involving or producing juridical titles (CR 93/23, p. 18). They were now not juridical but merely potential, as Libya has always asserted.

10. But he sought to insist that the so-called Italian recognition of the French zone in 1902

must have involved the legal consequence that Italy did not acquire territory within that zone by the Treaty of Ouchy in 1912. Otherwise, he said, spheres of influence agreements would have no meaning or substance (CR 93/23, p. 25). But as I have already pointed out, it cannot be assumed that spheres of influence agreements had any legal meaning or substance, other than on a purely bilateral basis as treaties between the parties (CR 93/19, pp. 46-52). They did not bind the territorial sovereign, who in every case was not a party to them. The territorial sovereignty of the Ottoman Empire was not controlled or limited by sphere of influence agreements concluded between third States. Such agreements were *res inter alios acta* so far as the territorial sovereign was concerned. The point can be put another way, by analogy from the law of State succession. In the standard case of succession, a bilateral treaty is not succeeded to unless it either establishes a boundary or relates to the régime of a boundary. It could not possibly be argued that a sphere of influence agreement related to the regime of a boundary, in this sense. International law is perfectly familiar with the distinction between status and contract, in its terms between title and treaty. Although the application of that distinction in the case of major multilateral treaties can produce difficulties, no-one has ever suggested that bilateral treaties prevail over territorial title. And it follows from that elementary distinction that, as bilateral treaties, sphere of influence agreements would not prevail over territorial rights already existing or subsequently acquired. If I promise my wife not to buy an expensive car, that does not stop me from acquiring title to a car that I subsequently buy, even though in doing so I break the promise to my wife. The same thing would be true about a promise to a bank manager, although the remedy might be different. Similarly, even if it is accepted, for the purpose of the argument, that Italy recognized a French sphere of influence to the south of Tripolitania, as marked on the map, that would not stop Italy acquiring title in that area from a third State, as it did under the Treaty of Ouchy. Of course, the assumptions of the Chad argument are also unfounded: Italy did not recognize any French zone in 1902, as Mr. Sohier has amply demonstrated.

D. Shared sovereignty and the Senoussi

Mr. President, I now move to the subject of shared sovereignty and the Senoussi.

11. Professor Shaw, dealing with the legal test for the acquisition of sovereignty over the borderlands, did not diverge to any great extent from the analysis of that issue presented by Libya in the first round (CR 93/24, pp. 14-15). In particular he did not seek to maintain the wholly erroneous analysis of the issue of Moroccan sovereignty in the *Western Sahara* case, that was contained in Chad's written pleadings (CR 93/19, pp. 55-8). He did, it is true, misstate and misapply the law to the facts of our case, as Professor Dolzer will shortly demonstrate. But for present purposes his remarks call only for a few observations.

12. The first point, which is applicable equally to Professor Cassese, relates to the problem of double standards. Professor Cassese was eloquent about the nature of the terrain, the importance of oases and of control over caravan routes (CR 93/24, pp. 46-7). He concluded that it was possible to control the borderlands with a comparatively few men and very limited resources, and that the French had done so within a short time of the Ottoman departure, despite the bitter hostility of the tribes (CR 93/24, p. 49). But there is no trace in Chad's presentation of any acceptance of the same standards in relation to the Ottomans. According to Chad, the Ottomans could not establish their sovereignty, despite substantial prior involvement in the region, a long-standing and well-known claim to it, the support of the people and the Senoussi Brotherhood, a substantial civilian and military presence in the period of direct rule from 1908-1913, and control over the oases and the caravan routes (CR 93/23, pp. 78-82). Their claim was precarious, ephemeral. By contrast, according to Chad, within months, or at worst a year or two, France had securely established its sovereignty, despite the bitter opposition of the people, no prior legal entitlement or presence, and no civilian administration of any kind. This is a purely self-serving argument. Moreover it suggests that Chad is still really treating the position as involving an occupation of *terra nullius*. Only over *terra nullius* could sovereignty be so rapidly and readily established: in the case of a bitterly contested military occupation, much more would be required. And as Professor Bowett will again show in the discussion of French *effectivités* after 1913, that was not forthcoming.

13. The same unbalanced and unilateral assessment can be seen in relation to the hinterland issue. On either side of Libya were territories to which a vast hinterland was claimed and

recognized. In the case of Egypt, this extended to Nubia, Darfour, Kordofan and Sennar, as indicated in the Ottoman *firman* of 13 February 1841. In the case of France it extended down to the Say-Barroua line, as recognized by Britain in 1890. And yet when it comes to any Ottoman claim, Chad goes so far as to deny the existence of the doctrine. It was uncertain (CR 93/24, p. 10), it gave no rights (*idem*, p. 11); its status was "controversial at best" (*ibid.*). No doubt, as I indicated in my earlier presentation, the hinterland doctrine was not an independent basis of title. But in the case of the Ottoman Empire the claim was publicly made as a claim to sovereignty, and it co-existed with social and religious links with the people of the area. All this Chad ignores — another indication of double standards.

14. Professor Shaw seemed to be perplexed generally, Mr. President. He professed not to understand the idea of joint title, or of a sharing of the competences of sovereignty, except in the distinct context of federalism or condominium. In the absence of some formal constitutional arrangement or treaty, sovereignty could not, he seemed to think, be shared (CR 93/23, p. 74). In his view, any claim to sharing "really" amounted to a claim of a federation or a condominium (*ibid.*), or at best a "protectorate" (*id.*, p. 76), which again required, and I quote: "the formal division of the attributes and exercise of sovereignty". Professor Shaw seemed to dwell in a heaven of territorial concepts, an international law of artificial categories, as if it is necessary for political arrangements to be forced into a fixed number of predetermined types. This was curious to hear, coming from a British public lawyer, and given the notorious reluctance of British law to classify its own constitutional arrangements. His was the system that developed such mysterious legal constructs as the Isle of Man, the older dominions, British nationality under the 1948 Act, special treaty relations with the Emirates of the Gulf. His is the system which is now grappling, in its own distinctive way, with the European Community, and making special arrangements for the Government of Hong Kong and even of Northern Ireland. Yet according to Professor Shaw, we are reduced to a meagre *menu fixe* consisting of federation, condominium, and protectorate for dessert. On the subject of protectorates, the Foreign Jurisdiction Act 1890 (UK), under which all British protectorates were governed, envisaged that jurisdiction could be acquired not only by treaty but also by "grant, usage,

sufferance or other . . . means". And that indeed happened. The British experience, while rich, was not unusual: arrangements for the government of territory have always been diverse. The function of lawyers is not to force these arrangements into a few narrow categories, as Professor Shaw sought to do.

15. Mr. President, I will not repeat here what I said in the first round on the question of the analysis of entities in which governmental powers are concurrently exercised at different levels (CR 93/19, pp. 60-1). I cited the case of *Lighthouses in Crete and Samos (1937, P. C. I. J., Series A/B, No. 71)* not because we are dealing here with the gradual separation of part of the Ottoman Empire, but because it represents one way of undertaking that analysis. The point I was making, and that Chad has failed to address, is that either one treats the unit within which powers are shared in accordance with some notion of partnership or shared sovereignty, or else one looks at the various powers as contributing to the constitution of the entity as a whole. Chad's argument is a form of analysis for the purpose of dismemberment, the strategy, I repeat, of divide and conquer. Of course, there is a question whether the Ottoman Empire as a unit included the borderlands in 1912, and Professor Dolzer will deal with Chad's factual arguments on that question shortly.

16. A further point, Mr. President, Members of the Court, relates to the situation once sovereignty, shared or unitary, has been established. On this point I am pleased to report our complete agreement with what was said by Professor Higgins. She said that: "the loss of title by a State over part of its territory, under international law, is effected not by a paucity of *effectivités* . . . but by cession or by the clearest withdrawal of all exercises of sovereignty by that State, coupled with an intention to abandon its title" (CR 93/26, p. 24). It is true that Professor Higgins only said that once, but we can assume that she meant it. And she went on to refer to the dispute over the Falkland Islands, and to the substantial international support Argentina has had for its underlying claim in that case (*idem*, p. 28). Mr. President, one can imagine hearing Professor Cassese eloquent on the *effectivités* of the United Kingdom over the Falkland Islands since 1833. But as Professor Higgins points out, that is not the issue, once it is established that Italy acquired sovereignty over the borderlands by succession to the Ottoman Empire, and made its protests at subsequent French

effectivités.

E. Conquest as a root of title

17. That brings me naturally to the question of French conquest as a root of title to the borderlands in the period after 1913. As I have already noted, Professor Higgins complained at the imaginary argument that required "peaceful cession" to bring about a transfer of territory which was not *terra nullius*. According to Chad, before 1919 (in the case of League members), before 1928 (in the case of States generally), before 1945 (in the case of non-State entities occupying their own territory), war was lawful and conquest consequently was an available mode of acquisition (CR 93/24, pp. 40-42).

18. Now in one respect, at least so far as the position before 1919 is concerned, Professor Higgins is undoubtedly right. I have already referred to the case of *debellatio*, the complete subjugation of a State or other entity. That was possible before 1919. But since, on Libya's case, title to the territory in question belonged to Italy as successor to the Ottoman Empire, the situation could not have been one of complete subjugation. So far as partial subjugation was concerned, different views of the position were held. For example, Verosta has recently summarized the law on this point in the following way:

> "Acquisition of territory required the approval of the former sovereign. Conquest as such conferred no legal title. Cession only became legally valid after the conclusion of a treaty, usually a peace treaty." (*Encyclopedia of Public International*, Vol. 7, p. 166.)

19. This was the position adopted by many standard treatises on international law in the 19th century (see e.g., Jean-Louis Klüber, *Droits des gens moderne de l'Europe* (1819), Vol. 2, p. 298; Heffter, *Das Europäische Völkerrecht des Gegenwart* (1948), P. 229). It was also the view stated for instance by the Supreme Court of the United States (see *The American and Ocean Insurance Companies* v. *356 Bales of Cotton* (1828) Peters, p. 510 at p. 536. Cf. also *Bindels* v. *Administration des Finances*, [1947] *Annual Digest and Reports of Public International Law Cases*, p. 45 at p. 49). Phillipson's standard work, published in 1916, concluded that in nearly all of the cases of partial annexation, the transfer of sovereignty occurred on the basis of a subsequent

treaty (C. Phillipson, *The Termination of War* (London, 1916)). It is true that another tradition, represented by writers such as Hall, who was cited by Professor Higgins (CR 93/24, p. 38), did allow conquest as such as a root of title. But in the case of acquisition of part of a territory, it is hard to see how Hall's position was consistent with the rules relating to prescription, which required a substantial period of adverse possession. The rules relating to prescription, the attitude taken by the defeated or excluded sovereign remained significant. Professor Higgins herself said it remained significant in the case of Argentina. And this suggests that the mere fact of conquest could not itself have produced a transfer of legal title.

20. Applying this conclusion to our case, the essential point is that if the whole territory, including the borderlands, was under Ottoman sovereignty, and if Italy succeeded to that title, then even under the pre-covenant law France could acquire title to all or part of the borderlands only in three ways. Either by cession (because this would be a case of partial annexation, not *debellatio*). Or by consolidation. Or by arguing that the territory had been abandoned and had become *terra nullius*. But first, there was no cession; there were not doubt opportunities for cession, for example in 1947, but that did not occur. Secondly, as Professor Bowett has shown, there was no consolidation, given Italian protests and the subsequent uncertain diplomatic history (CR 93/20, pp. 14-19). And Chad has not argued, and could not argue, that the territory became *terra nullius* in 1913 (cf. CR 93/19, p. 44), notwithstanding that the French took the library away. And if that is true before 1919, it must be true, *a fortiori*, in relation to the subsequent period when the law was developing further in the direction of the prohibition of the use of force as a method of acquiring rights. This point will be taken further by Professor Bowett in his discussion of French *effectivités* after 1913.

F. Decolonization and territorial integrity

21. Mr. President, I now turn to a group of issues, presented in the most apocalyptic terms by two members of *l'équipe tchadienne*, and related to the modern law of territorial integrity and self-determination. By operation of law, Professors Higgins and Franck argued, Libya's claim — even if it had been valid in, say, 1947 — had been lost. Any other decision on the part of the Court

would, they warned, produce the most awful consequences. The law whose operation avoided such cataclysms, in their view, took two forms, particular and general. The first was the particular rule of intangibility of frontiers announced by the OAU in the Cairo resolution; the second was the general law of self-determination and territorial integrity. I will deal with the particular first.

(a) The effect of OAU resolution 16(I) (the Cairo resolution)

22. On 21 July 1964, the OAU adopted the Cairo resolution. Two States, Morocco and Somalia, reserved their positions. Libya did not, but supported the Resolution, and Sir Ian Sinclair has explained why. But seeing Libya's support for the Cairo resolution as another hedge under which a tacit acquiescence might be hiding, Professor Higgins pounced. She argued that because Libya did not protest or lodge a reservation to resolution 16(I), it therefore acquiesced in the existing boundary with Chad, independently of the legal validity of that boundary (CR 93/21, pp. 32-3). But it is clear that the purpose and effect of the Cairo resolution was to confirm the status quo so far as boundaries were concerned, "the boundaries existing on their achievement of national independence". The phrase is reminiscent of that in the 1955 Treaty itself and had, in Libya's submission, precisely the same effect. Just as the 1955 Treaty did not create a boundary where none previously existed, so the 1964 resolution did not do so. Otherwise its effect would have been to eliminate all existing boundary disputes in Africa, except perhaps those involving Morocco and Somalia.

23. The point is explained by Brownlie, held out as an authority on the subject by Chad, in his book on *African Boundaries*, in the following terms:

> "The object of the Cairo resolution was realistic enough: decolonization was not to be the occasion for new sources of doubt and controversy. This policy does not and cannot avoid all disputes. Thus where a colonial alignment was obscure, or remained undemarcated, the inheritors would face the same boundary problems — but no more . . . [T]he principle . . . does not erase the existing agenda of disputes." (I. Brownlie, *African Boundaries* (1979), pp. 11-12.)

24. It should be noted that the members of the OAU were put under considerable pressure not to raise individual disputes at Cairo: the resolution was seen as a statement of general principle, not a determination of particular cases. In the case of the two States that did make reservations to the Cairo resolution, Morocco and Somalia, their disputes were then under active consideration by the

OAU, and, I might say, did not involve disputes about where boundaries were to be located. It was no doubt this which caused them to make those reservations, despite pressure not to do so.

25. In fact neither the OAU nor major African States have regarded the Cairo resolution as disposing of particular territorial disputes, for example in cases where there is said to have been a divergence between administrative boundaries and territorial title at independence. I will take only two examples, and I do so for the purposes of illustration and not to express a view, one way or another, on the issues involved, in those cases. I might have chosen many others, including disputes where it is acknowledged that there is no boundary, even in principle, in a given area.

26. My first example is the dispute between the Arab Republic of Egypt and the Sudan over their land boundary, a dispute which existed at independence and has not yet been settled. The relevant treaty provides that the 22❍ parallel constituted the boundary between Egypt and the Anglo-Egyptian Sudan. (I note in parenthesis that both were then formally part of the Ottoman Empire in accordance with rules of international law that Chad does not acknowledge.) But the administrative boundary between the two does not follow the 22❍ parallel in important respects, and there is disagreement between the two States as to the true location of the boundary now. The origins of the dispute go back to 1899-1902 (for details see Brownlie, *African Boundaries* (1979) pp. 110-120).

27. The second example is the dispute over the boundary between Ethiopia and Kenya, which arose in 1891 and was settled by treaty in 1970. That dispute involved a question of the limits of tribal penetration of a given area, a discrepancy between a treaty line and a *de facto* boundary, an unratified boundary demarcation which nonetheless had a degree of intrinsic authority (see Brownlie, *op. cit.*, pp. 775-825).

28. Mr. President, if Professor Higgins was right about the effect of the OAU resolution, why were not other States which remained silent at Cairo (for example, Egypt itself, a prime mover of the resolution) prevented by their silence from maintaining their own disputes? The answer is simple: because the resolution was not concerned to resolve, one way or another, disputes as to title or uncertainties over the location of a boundary. Indeed it would follow from Professor Higgins'

argument that States (such as Algeria or Ethiopia) which remained silent in 1964 would be prejudiced in relation to their disputes by comparison with States (that is, Morocco and Somalia) which did express reservations. No one has ever suggested that the Cairo resolution had, or was intended to have, that effect.

29. This view of the Cairo resolution was confirmed by a Chamber of this Court in the *Frontier Dispute* case. There the Court took the opportunity to make some luminous remarks on the general issue of *uti possidetis juris*. It stressed that this was not just a regional practice adopted in South America or Africa, but "a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs" (*I.C.J. Reports 1986*, p. 565). And after referring t the Cairo resolution, the Chamber went on to refer to one particular aspect of the principle which is of particular relevance to our case. It said:

> "The first aspect, emphasized by the Latin genitive *juris*, is found in the pre-eminence accorded to legal title over effective possession as a basis of sovereignty." (*I. C. J. Reports 1986*, p. 566.)

The second aspect the Chamber referred to was the *uti possidetis* doctrine as applied to former administrative boundaries within a single colonial State, which is an issue, of course, not involved in the present case. And it then went on to say:

> "The territorial boundaries which have to be respected may also derive from international frontiers which previously divided a colony of one State from a colony of another . . . There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis*. Hence the numerous solemn affirmations of the intangibility of frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by organs of the Organization of African Unity itself [these statements, the Chamber emphasized], are evidently declaratory rather than constitutive . . ." (*Ibid.*)

30. I stress the words "pre-existing international frontiers". Like the general rule of international law to which the Chamber referred — and for that matter, like Article 3 of the 1955 Treaty — the OAU resolution is declaratory rather than constitutive. That resolution does not dissolve or create title, it refers to existing title. And African States are equally bound by it, whether or not they made reservations at Cairo.

31. I should note, for the sake of completeness, that there is no suggestion in the OAU Reports on the present dispute that Libya was in any way precluded from raising its claims because it voted for the Cairo Declaration. Nor indeed did the Report say that Libya's claim violated the *uti possidetis* principle, although the Report did note that that was an issue in the case (*Final Report*, p. 36).

(b) The law of territorial integrity and Libya's failure to obtain an exemption from that law

32. Mr. President, Members of the Court, the second of Chad's apocalyptic arguments was presented by Professor Franck. He argued that under the modern international law of self-determination and territorial integrity, a State cannot seek to re-open territorial issues settled by the exercise of self-determination. Once the people of a given territory have decided on their future, whether in terms of independence or integration with another State, their decision cannot be reopened. Indeed it cannot be reopened even with the support of the people concerned, and even though those people were never given the choice of expressing a preference in favour of the claimant State (CR 93/25, pp. 48-59). This principle excludes irredentist claims as much as secession, and it therefore, he argued, precludes Libya from making the present claim.

33. Professor Franck went further, finding yet another case of acquiescence on Libya's part. Libya had not, like Nigeria in relation to the Northern Cameroons, sought an "exemption" from the principle of territorial integrity when Chad became independent. The General Assembly could, he said, in a given case, grant such an exemption, and allow a separate vote to be taken in part of a self-determination territory by part of its people. Libya could have sought such an exemption and did not do so. Accordingly, in his view, it is now precluded from bringing its claim (CR 93/25, pp. 58-59).

34. And the argument was reinforced by the now customary reference to a chamber of horrors which would be produced if the Court failed to accept the 1919 line. The history of decolonization would have to be rewritten, the clock turned back. The Third World, Professor Franck implied, would lie in ruins (CR 93/25, pp. 63, 67).

35. Mr. President, Members of the Court, you have heard this before, and will be no more

impressed at the tactic. Libya does not claim that all or part of the borderlands should be included within its territory on grounds of ethnic affinity or the wishes of its population. Nor, it may be said, does Chad before this Court.

Notwithstanding close links with that population, Libya's claim is not based on ethnic identification, or on the existence of Libyan *irredenta* in Chad. Nor is it based, as were the claims of Morocco and Mauritania to the Western Sahara, on previous legal ties or sovereign rights over the borderlands, legal ties or sovereign rights which had acknowledged to have been supplanted and replaced definitively by the colonizer.

36. Libya's position is different. Libya's position is that in relation to all or part of the borderlands, the sovereignty of the Ottoman Empire, and then of Italy, and now of Libya, was never acquired by France, and thus was never acquired by Chad. If a territorial boundary can be discerned which results from a treaty binding on Libya, and in particular from a treaty listed in Annex 1 of the 1955 Treaty, Libya accepts that its territory extends no further than that boundary. If no such territorial boundary exists, it claims title to the areas over which it had a valid claim to sovereignty — that is to say, legal title — at the date of its independence. In principle, Chad itself claims no more: it does not say that it acquired sovereignty over the borderlands, or any part of them, by reason of an act of self-determination of the people of the borderlands as such before 1960. Despite Professor Franck, the Parties actually agree on the underlying legal position.

37. That position was stated and I quote again without embarrassment, by the Chamber in the *Frontier Dispute* case. It noted that:

> "At first sight this principle of [*uti possidetis juris*] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is to often seen as the wisest course . . . The essential requirement of stability . . . has induced African States judiciously to consent to the respecting of colonial boundaries, and to take account of it in the interpretation of the principle of self-determination of peoples.
>
> Thus the principle of *uti possidetis* has kept its place among the most important legal principles, despite the apparent contradiction which explained its coexistence alongside the new norms." (*I. C. J. Reports 1986*, at p. 567; cf. *idem*, at p. 662 (separate opinion of Judge *ad hoc* Abi-Saab).)

Again I stress the words "the territorial status quo". This was not, as the Court elsewhere made clear, a simple reference to *effectivités* at the moment of independence but to the position of legal title at that time (*I. C. J. Reports 1986*, at p. 566, and on the priority of legal title over *effectivités* see also *idem*, p. 587). The principle of *uti possidetis juris* is the relevant one, a rule of general

international law reflected in the law of decolonization.

38. Indeed it is the *same* rule as that expressed in the OAU resolution. Out of deference to the parallel arguments of by Professors Higgins and Franck I have treated the issue separately but, as the Chamber made clear in the *Frontier Dispute* case, it is the same rule that is involved. And just as there is no basis in Libya's conduct in relation to the Cairo resolution for implying an acquiescence or abandonment of claims, so there is no basis in Libya's conduct in relation to the combined principle of self-determination and territorial integrity.

G. Conclusion

39. Mr. President, Members of the Court, in this case, those two horsemen of the apocalypse, Professors Higgins and Franck, have ridden up to the bar, not once but repeatedly, reporting all sorts of catastrophes and difficulties from beyond the horizon. These catastrophes and difficulties will ensue, they warn, if this Court decides this specific case against Chad. In effect they ask the Court to take its eyes off the present case in order to contemplate the possible consequences, and to be terrified at them. But the problems of the world, among which territorial and boundary disputes are undoubtedly to be counted, are not to be solved collectively, as a job-lot. They are to be solved by looking at the particulars, the details in which, as Mr. Sohier reminds us, the good Lord, in English it is usually translated as the devil, resides. Indeed you might wonder why Chad has issued these vague and portentous threats when it could have been concentrating on the merits of its particular arguments. This is a well-known strategy of Counsel with a bad case, a case in which they have no confidence.

40. Mr. President, Members of the Court, two responses can be made to the *in terrorem* arguments.

41. The first response is, as I have shown, that the threats are wildly exaggerated; the misapprehended consequences are unjustified in law. The sky will not fall if Chad's boundary is held to lie somewhere other than along the 1919 line.

42. The second response is that the claims presented by the Parties are particular indeed. Chad's primary argument here is that a territorial boundary was created by three treaties. None of

them purported to establish a territorial boundary. Each of them was concluded between States which were not at the time sovereign on either side of the line. Each of them referred to a quite different line. The Court need have no fears that its decision on that argument will create an undesirable precedent, or indeed, because the argument is special, any precedent at all.

43. Thank you for your attention, Mr. President, Members of the Court. Mr. President, I ask that you call on Professor Dolzer who will address you on the issue of title to the borderlands in the period before the Treaty of Ouchy.

The PRESIDENT: Thank you very much Professor Crawford. Professor Dolzer.

Professor DOLZER: Mr. President, Members of the Court, in Chad's first round presentation, Professor Shaw set out the points which I shall address today in supplementing the formulation of Libya's case in legal terms by Professor Crawford. Professor Shaw essentially made four points (CR 93/24, p. 21):

— *First*, that the Ottoman Empire never acquired title to areas of the borderlands because any Ottoman control exercised there never constituted effective control. This proposition relies, in turn, on the argument that Ottoman control was short-lived and purely military in nature;

— *Second*, Professor Shaw said that the Senoussi were a purely religious sect, exercising only intermittent influence, which was particularly weak as he said in the borderlands;

— *Third*, that the Senoussi never accepted the establishment of Ottoman authority in the borderlands;

— *Fourth*, that the indigenous peoples and tribes were insufficiently organized to hold any real territorial title, the prime example being the clan-organized Toubou; and that these tribes, Professor Shaw said, never accepted Ottoman authority or Senoussi leadership or control.

Mr. President, Members of the Court, Chad makes these contentions without any real attempt to address the evidence that Libya has produced that proves them wrong. Since Mr. Maghur has dealt with so much of this during his second intervention during the first round, and in his speech

during the second round, I need only briefly address certain of the major points.

* * *

Ottoman Sovereignty

As to the first of Chad's contentions concerning Ottoman control in the borderlands, the evidence positively establishing the fact of Ottoman control may be found in Part IV of Libya's Memorial and in the documents annexed to Libya's Reply. Professor Shaw has chosen to ignore this evidence; and he also ignores the evidence of French recognition of effective Ottoman authority in the borderlands in the period 1908 to 1913.

We do note, however, that there is a new nuance inasmuch as Chad now does speak of the exercise of Ottoman sovereignty, and I quote Professor Shaw:

> "Such exercise of Ottoman sovereignty as there was at the relevant time was ephemeral, disjointed and exclusively military". (CR 93/24, p. 21.)

That sentence is, of course, remarkable inasmuch as it seems to imply that, indeed, sovereign rights were exercised by the Ottomans. International law knows of no concept of "half-sovereignty" or "almost sovereignty". Either sovereignty is established, or it does not exist; *tertium non datur*.

Now Chad's pleadings also fail to reflect an understanding of the nature of the Ottoman installations established in the borderlands. These installations were civil in character, headed by a *Kaimakam* appointed by the *Mudir* of Mouzouk, who in turn reported to the *Wali* of Tripoli. They were organized in the typical Ottoman-Islamic way of delegation by authority. The principal Ottoman forces were gendarmes with a complement of military troops. The gendarmes were largely Fezzanese Arabs. This was a continuation southward of the installation of direct Ottoman control that began in Tripoli in 1835 following the French take-over in Algiers. But not by Ottoman military force by the direct assertion of Ottoman sovereign authority.

In the period 1908 to mid-1913, the borderlands fell under the total control of the Ottoman Empire, a control only possible as a result of the acceptance of the local peoples and of the Senoussi Order who, in turn, controlled and led the various tribes. The Ottoman control and authority exercised in the borderlands was far more effective up until the Treaty of Ouchy, and was far more effective than the meagre French military presence that followed. A moment ago Professor

Crawford has drawn your attention to the double standard of Chad in this context.

Since the above was quite fully dealt with by Libya during the first round and in the written pleadings, I should now like to concentrate on French recognition of Ottoman control at the time and on the coming into being of *a modus vivendi* between the French and the Ottomans.

The French official military history of the AEF, over and over again refers to this *modus vivendi* and to the instructions of the French Government in Paris to the local forces to respect this. The *de facto* line resulting, running roughly along 15❍ N latitude, is again illustrated on the screen. I should like today only to mention one telling example of French recognition, which concerns the correspondence between the French commander of the AEF military forces, Colonel Largeau, and the senior Ottoman military officer at Aïn Galakka, Captain Rifky.

This key document is a letter sent by Colonel Largeau to Captain Rifky on 2 September 1911 (see RL, Exhibit 11.3). This was some months after Colonel Largeau learned of Ottoman authority being established at Aïn Galakka. His letter had been delayed by higher French authorities, who insisted that the proposed letter submitted by Colonel Largeau on 10 May 1911 be toned down.

The May draft by Colonel Largeau contained a firm protest lodged against the Ottoman presence in Borkou. This protest was required to be deleted in the final version. No word of protest appears in the letter sent. What remained in the letter was a reservation of French rights based on what were described as the "diplomatic accords" establishing a French sphere of influence.

In his May draft, Colonel Largeau also threatened to chase back to Borkou any *rezzous* that originated from there. In the final version, that threat was eliminated and the Ottoman representative was requested, in the spirit of good neighbourly relations, "to use all of his power to halt the formation of *rezzous* in Borkou". Moreover, the final version asked the Ottomans to issue a *laisser-passer* (a permit) to any inhabitant of Borkou wishing to visit Kanem or Ouadaï.

Mr. President, Members of the Court, this letter, as modified, and finally sent, clearly reflected French recognition of the exercise of effective Ottoman authority in Borkou.

What the final letter also brings out is that the so-called French "protests" consisted of the alleged reservation of rights, in reality not existing, combined with an acknowledgement of Ottoman

control pending the resolution of their dispute over the Ottoman hinterland through negotiations to be conducted by the joint commission scheduled to meet in Tripoli at the end of 1911. Now of course the Italian conquest of Libya and the defeat of Ottoman forces there leading to the Treaty of Ouchy, put a halt to these negotiations.

Chad suggested in the oral pleadings that France accepted the *modus vivendi* line in order to stay neutral between Italy and the Ottomans. The war between Italy and the Ottoman Empire started only on 29 September 1911. Five months earlier, in April 1911, the French Ministry of Colonies had already stated in the Chamber of Deputies that France had checked the situation on the ground, but had decided not to take any action against the Ottomans in the borderlands (ML, p. 140, para. 4.146). The French Minister explained this position before the war not on the basis of arguments of neutrality but on the basis of France's alleged rights under existing treaties. Clearly, France treated the sphere of influence agreement as creating territorial rights against a third party, an indefensible position and one which Chad does not seek to defend before this Court.

I should mention also, while on the subject of French recognition of Ottoman control, the documents appearing in Exhibit 11.3 to Libya's Reply. For example, in a dispatch of 2 October 1911, the French Minister of Colonies pointed to the construction by the Ottomans of a blockhouse in Tibesti as "une manifestation indiscutable de l'occupation effective ottomane dans ces régions".

In oral argument, Chad suggested that the Ottomans had their very first contacts with the borderlands in 1908 (CR 93/23, p. 77). This is not so. The *Wali* of Tripoli, in conjunction with the Senoussi, controlled the north-south caravan routes that traversed the borderlands; (see ML, p. 47, para. 3.54 *et seq*. and p. 81, para. 4.30). This, indeed, had been a principal basis of the 1890 Ottoman claim to a Tripolitanian hinterland.

The north-south trade routes across the Sahara were an essential element in the economic life of the peoples of the borderlands and of the Sudan further south. The trade routes formed an economic nexus between the Mediterranean and the Sudanic States, with the tribes of the desert overseeing their safety and the maintenance of oases along the way.

During the first round, Libya brought out the fact that the *Wali* of Tripoli — acting under authority delegated to him by the Caliph — controlled entry into these areas. To go south into the borderlands at the turn of the century, an Ottoman permit (*laisser-passer*) was essential.

The Senoussi

The Court has earlier seen a map which shows the Senoussi presence in the borderlands. I have had this map placed back now on the screen.

Professor Shaw has asserted on 30 June (CR 93/24, p. 12) that the Senoussi failed to achieve "a certain level of organization and central direction" and therefore were not capable of holding title alone or in concert with others. He premised his argument that the Senoussi were incapable of exercising sovereign authority over the borderlands on the assertion that the Senoussi were essentially a religious movement that added a military dimension only with the appearance of the French from the south. From this, Professor Shaw concluded that the Senoussi "never exercised sovereign rights over the indigenous peoples" (CR 93/24, p. 21).

Mr. President, this is simply incorrect.

The Court will be aware that this assertion is also at odds with Chad's statements in its Memorial, and I cite from the English translation:

> "It can easily be demonstrated that neither France nor Great Britain after the 1899 Declaration, and neither France nor Italy after the 1902 Agreement, acquired any sovereign rights over the B.E.T. by virtue of these agreements. *For indeed, at the time, and until 1912, it was the Senoussi who exercised sovereign rights over the region*." (MC, p. 254, para. 177; emphasis added.)

Instead of this position taken in the Memorial, Chad now seeks to rely on Evans-Pritchard, a leading authority on the Senoussi, to the effect that the political and economic organization of the Senoussi was crude (CR 93/24, p. 12). But here, Chad focuses only on the Senoussi leadership without looking at the broader context of power. But Evans-Pritchard, the same author that Chad quotes, also wrote:

> "I have maintained in the foregoing pages that the Sanusiya kept its cohesion and developed into a political organization largely because it was identified with the tribal system of the Bedowin." (Evans-Pritchard, p. 84.)

To this can be added a *contemporary* account of a British authority furnished to the Foreign

Office in 1918 which described the role of the Senoussi and their *zawiyas* in the following terms:

> "for all and sundry, the Zawiya afforded a secure and profitable meeting place where domestic, tribal, commercial, religious and legal difficulties could be arranged, *and such contact with the outer world maintained as was politically desirable or commercially necessary*" (ML, p. 46, and British Archives Annex, p. 127; emphasis added).

I have emphasized, in particular, the last part of this sentence which attests to the Senoussi's role with respect to the political and commercial contacts with the outside world, for it reflects the fact that the Senoussi exercised these attributes of sovereignty.

Chad's entire effort to equate the religious basis of the Senoussi with an organized entity incapable of holding any rights under international law, is unconvincing on its face. Libya has fully addressed the Senoussi and their organization in the written pleadings (ML, pp. 9-11, 44-55). Allow me to quote Evans-Pritchard again:

> "They were schools, caravanserai, commercial centres,social centres, forts, courts of law, banks, store-houses, poor-houses, sanctuary, and burial grounds, besides being channels through which ran a generous stream of God's blessing. They were centres of culture and security in a wild country and amid a fierce people." (Evans-Pritchard, p. 79.)

Moreover, Mr. President, if the Senoussi were not capable of exercising sovereign authority over the borderlands, as Chad *now* contents, then why, in 1911, did the French attempt to negotiate a *modus vivendi* with them? You will recall that the French Ministry of Colonies had given specific instructions to M. Bonnel de Mezières to reach such an agreement with the Senoussi and to assure them that the French had no intention of going beyond Arada, which, as Mr. Maghur showed you, lies at 15° N latitude. Clearly, the French recognized the Senoussi as exercising authority and control over the areas lying to the north of 15°, and therefore were prepared to negotiate with them, not with the individual tribes whom the Senoussi organized.

Ottoman — Senoussi Links

I turn to my third subject. In the oral hearings, Chad not only denied that the Senoussi had a minimum level of organization, Chad also asserted that the link between the Ottomans and the Senoussi did not exist.

Now, Mr. Maghur has shown at great length how the system of delegated power operated

between the Ottomans and the Senoussi, and Chad has produced no evidence to the contrary.

And it is not an Ottoman source, but a *French* document put in evidence in this case (ML, French Archives Annex, p. 43) which presents the most direct and the most relevant report of the relationship between Ottoman and the Senoussi. According to this French report, a Turkish officer "aurait été appelé par les Marabouts senoussistes de Koufra pour inspecter la garnison de la Zaouiech senoussiste composée d'arabes tripolitains et porter à Aïn Galakka un drapeau turc". The Senoussi did not ask the Ottomans for advice, they asked them to fly the Turkish flag, and the Ottomans acted promptly.

Nevertheless, Chad still doubts whether the Senoussi indeed welcomed the presence of the Ottomans during the relevant period. The fact that the Senoussi accepted the authority of the Ottomans is expressly stated in that famous letter addressed by the Head of the Senoussi in 1911 to the major European Powers, to which Mr. Maghur has already drawn the attention of the Court in the first round.

In that letter, the Senoussi indicated in the clearest terms that he considered at the time that the borderlands belonged to the Ottoman Empire: The letter states:

> "When the agreement was made between Britain and France concerning Egypt and the Sudan, France illegally took part of the Turkish possessions to the north of Lake Chad and certain lands forming part of the vilayet of Tripolitania." (ML, Exhibits, Annex, Vol. 6, No. 47.)

And in the same document, the Senoussi are referred to as "subjects" of the Sublime Porte. The allegiance of the Senoussi and the Senoussi peoples to the Caliph at the time is an established, proven fact.

The Senoussi and the Senoussi Tribes

I turn now to my fourth subject, the indigenous tribes. Focusing on the Toubou, Professor Shaw tried to establish that the Toubou, because they were organized by clans, failed to qualify as organized peoples capable of holding territorial title.

Mr. President, it seems absurd to me to try to distinguish between these various borderland tribes. Were the Tuareg tribes sufficiently organized to hold territorial title, but the Toubou not? We know that the French Government in 1864 entered into a treaty with the Ajjir Tuareg, certainly a

recognition of their status as holders of title. Are the Toubou so different because they are organized into clans? Surely, the Court does not want to open the doors to legal assertions based on quibbling about the complexities of tribal organizations in the borderlands.

What is clear, as Chad admits, is that the tribes lived in territory which was not *terra nullius*. And, as described and documented in great detail in Libya's pleadings, these tribes were organized and led by the Senoussi who played an instrumental role in mediating inter-tribal disputes, providing education, maintaining commerce and, ultimately, organizing defence against the French.

Ottoman Administration compared with French Military Presence

Mr. President, I invite the Court to compare the nature of the Ottoman and the Senoussi administration and control with the French invasion of the borderlands.

After initial, unsuccessful attempts, the French sacked Bir Alali in 1902 and destroyed the famous library there. Further attacks were mounted against the indigenous peoples whose defence was organized and led by the Senoussi. We have documented these incidents in our pleadings and illustrated them for the Court during the first round. This situation persisted until 1911-1912 when the *modus vivendi* came into being with the Ottomans and the French, and when discussions were opened up.

Now, contrary to the Ottomans and the Senoussi, the French advance into the borderlands was not welcomed by the people; it was vigorously opposed and fought against. The French presence was a purely military and hostile presence.

Long after the Ottomans were obliged to withdraw from the borderlands in 1913, the Senoussi continued to organize resistance against the French, even into the 1920s and 1930s.

The Ottoman-Senoussi administration and control of the borderlands was civil and peaceful; the French presence was purely military and not peaceful until long after 1919.

Mr. President, Libya's pleadings have spelled out in such detail and with such a plethora of evidence the key facts, that it is difficult for us to take seriously the uninformed and undocumented contentions of Chad on this point. They only mirror the biased French military accounts that so prejudiced the views of the French Government at the time toward the Senoussi and regarding the

extent and nature of Ottoman assertion of sovereignty. The Court has heard a detailed, very substantive account from Mr. Maghur on these very matters during the first round and there is no need in this rebuttal to add more.

Concluding Remarks

Against the background of the lack of convincing arguments on the part of France, formerly and Chad, today, one wonders why both States would insist that the Ottomans did not acquire a joint title by 1912. Why, one asks, would Chad seek to deny a conclusion which the evidence so clearly establishes? Well, the reason is obvious. It was difficult, apparently for France, and it is difficult for Chad today, to admit that at the historical origin of the dispute lies an incorrect assessment of the legal situation on the part of France, that is to say that France wrongly argued at the time that the 1819 Declaration gave it territorial rights. France must have known, and Chad knows today, that once that incorrect assessment at the origin of the dispute is revealed, the interpretation of the further sequence of events becomes flawed, and the house of cards, the entire case which was built by France, starts to collapse.

Ultimately, Libya submits, this is the simple reason why France and Chad have tried so desperately to invent arguments and to avoid the facts in order to deny the title which the Ottomans and the Senoussi had, in reality, acquired by 1912.

Mr. President, Members of the Court, this concludes my part. It may be a good time for a break, if you agree. I thank you for your attention, and I would be grateful, Mr. President, if, after the break, you would call on Professor Bowett.

The PRESIDENT: Thank you very much, Professor Dolzer. We will do that, we will take our break now.

The Court adjourned from 11.15 to 11.35 a.m.

The PRESIDENT: Professor Bowett.

Mr. BOWETT: Mr. President, Members of the Court, it is my task, initially, to address the issue of *effectivités*, that is the question whether France, or later Chad, demonstrated effective, governmental or administrative control over the borderlands.

Effectivités

There is, however, an initial note of caution to be recorded. The relevance of *effectivités*, so crucial to Chad's second and third theories, depends on how the Court characterizes the territory.

If the Court decides, contrary to the views of both Libya and now Chad, that when the French military forces arrived in the borderlands they were *terra nullius*, then certainly *effectivités* become highly relevant. For any title would be acquired by occupation, and thus based on *effectivités*. And it would be important to contrast what France, and later Chad, had done by way of actual administration with what the Ottoman Empire, the Senoussi, Italy, and then Libya had done. The Court could legitimately weigh and contrast the competing evidence to see who had the better title.

But if, as both Parties agree, the territory was not *terra nullius* and there was a pre-existing title the position changes radically. For France has to prove a *derivative* title and such a title has in this case to be based on *conquest*. As Professor Crawford has just indicated, we must reject this curious notion of "non-technical occupation" advanced by Professor Higgins. It has no place in the law: it means conquest, however you call it.

And if the mode of acquisition truly is conquest, and if the Court accepts that acquisition of territorial title by conquest was unlawful after 1919, it follows that a claim of title based on conquest is invalid.

So the question then becomes whether this invalidity can be "cured" by evidence of effective occupation. Prima facie, it cannot. On this point I agree entirely with Professor Higgins. As she rightly says:

> "military occupation precludes subsequent acts from being considered as *effectivités*, which can on the one hand displace an existing title and on the other evidence displays of sovereignty to acquire new title" (CR 92/26, p. 29).

That is exactly the principle to be applied to the French military occupation of the borderlands. A title claimed in violation of one of the most fundamental — perhaps *the* most fundamental — rules of law, the prohibition of war as a means of territorial acquisition, cannot be cured by occupation or evidence of control.

To give but one example of the irrelevance of control where the title is defective, there is little doubt that South Africa performed many acts of sovereignty in the territory of South West Africa, pursuant to its claim that it had annexed that territory. No one doubted the "effectiveness" of South African control. But that did not avail South Africa, because the international community rightly regarded South Africa's claim of title as void *ab initio*.

Let me make two things clear. First, I do not doubt that the general recognition by the international community of a title could cure this defect: but this has not occurred in this case. Second, I am *not* trying to apply rules of law retrospectively. I ask only that the Court applies Article X of the League Covenant to French military penetration of the borderlands *after* 1919: and applies the Pact of Paris to such penetration *after* 1928.

However, if the application of those legal rules produces an invalid title, it is certainly not cured by the failure of Italy, or later Libya, to protest. No one State can "acquiesce" in a violation of such rules: only the international community as a whole can do that.

Subject to that important qualification, let us look at the evidence on which Chad now relies. And I think the picture is best looked at chronologically.

1. The evidence of *effectivités*

(a) Prior to 1919

I see no reason to retract what I said in the first round. The French had withdrawn from Tibesti entirely, and they had two companies at Faya and Fada, with small outposts at Aïn Galakka, Gouro and Ounianga. You can see their location on the screen — it is map 82 in your folder. I have added the strict south-east line.

Professor Cassese emphasizes that the borderlands are not Holland: I agree. But 300-400 men to occupy and *administer* this vast territory? Even a Dutchman would blush at that claim.

Professor Cassese says that France sent reconnaissance patrols — *tournées militaires* — frequently into Tibesti during the period 1916-1929 (CR 93/24, p. 49). We must be careful not to over-estimate this military activity. Patrols were sent intermittently — in July 1916, January 1917, April 1919, February-March 1922 — Captain Rottier's mission — June-September 1923, and January 1929 (see CML, Vol. 1, pp. 276-277). Thus, several years might elapse between patrols. The patrols were designed either to inflict reprisals on the Tibesti tribes, or to gain scientific and other information. There can be no basis for a claim that Tibesti was "occupied", and Chad does not dispute that permanent posts were not re-established by France until 1929.

I accept that the clashes between the Senoussi tribes and the French were sporadic. As I said, this type of guerilla warfare suited the tribes. But no conclusion of general, complete control can be drawn from this. The real explanation is that the French were so few, and so widely-dispersed, they did not greatly trouble the tribes.

To say, as Professor Cassese does (CR 93/24, p. 53), that it was enough for France to control four oases, and spread out from there over the surrounding districts, controlling the caravan routes, is *not* to prove effective occupation. The Ottomans, too, had such control prior to 1913, and yet Chad denies there was Ottoman sovereignty. Such control as France did exercise merely demonstrates the interest of France in keeping control over its lines of communication — the caravan routes. It says nothing of control over the inhabitants and the exercise of powers of administration.

Certainly Professor Cassese asserts that the BET was placed under civil administration in 1917 — with French officers exercising powers of justice, taxation, and census-taking (p. 56). But where is the evidence that they did anything? An administrative order is not, *per se*, effective occupation: it is a piece of paper, and nothing more, without proof that such powers were effectively exercised.

(b) The period 1919-1928

We are told nothing of this period. We know from the French Military History that the French camel-troops were re-organized and concentrated on Kanem, Borkou and Ennedi in 1924 (CML, Vol. 2, Exh. 13, p. 485). So this confirms that Tibesti was not occupied. For the rest of the BET

we are told nothing until the re-occupation of Tibesti — or certain posts in Tibesti — in 1929. Military responsibility for Tibesti was transformed from the AOF (that is to say Niger) to the AEF (Chad) in November 1929, and administrative responsibility was transferred in the following year. The reason for the transfer was to unify the territories facing a perceived Italian threat.

(c) The Period 1928 onwards

Now as to the period after 1928. We know that Bardai, in Tibesti, was occupied by the sixth company. And Professor Cassese tells us France assumed additional civil responsibilities: the organization of education, the establishment of prisons, the organization of elections (p. 56). But where and when was this? Do we have any evidence of this "contrôle étatique"? Certainly not in Professor Cassese's speech.

And through all of this evidence of what France did, there is a question about *why* France did it: was there really an intention to occupy as sovereign? On 30 June, Professor Cassese attempted to illustrate "the intention of the French to occupy the BET in order to exercise their sovereign power", those are his words. In other words, France's *animus possidendi*. In this respect, he referred to four annexes to the pleadings of Chad or Libya (CR 93/24, pp. 54-55). And I think we should look at these four documents.

As to the first, the note by Colonel Largeau of 1911, I would say that it concerns Borkou and not the BET as a whole (MC, Vol. II, Ann. 83).

The second document is an internal French correspondence in 1913 between the Ministry of the Colonies and the Ministry of Foreign Affairs (Ann. 87). I doubt whether it shows a French recognition of the urgency of a manifestation of *animus possidendi*: it says "The commander of the territory of Chad . . . on leave in France, should, following his return to the colony, and after a study on the ground . . . examine the opportunity of an immediate organization of Borkou. He will act in agreement, if necessary, with the military commander of Niger so that the operation undertaken to this end be followed by an affirmation 'on the Tibesti'." Now I offer that only as a tentative translation because the document is not very legible. But, clearly this is a discussion of future plans, not an actual assertion of sovereignty over Tibesti.

Professor Cassese makes much of the promulgation of legislative instruments as the "best evidence" of an *animus possidendi*. I have re-read these documents carefully, as well as those Chad included in its pleadings, and I must say that I could not find in any of them any specific mention of the BET. The texts mentioned are general in so far as they cover either the whole of French Equatorial Africa or the military territory of Chad as a whole.

2. The Legal Effect of the so-called *effectivités*

What of the legal effects of these *effectivités*? The effect of these *effectivités* was, we are told, to transform the 1899 line — as re-interpreted in 1919 — into a true boundary: in short, to establish French title south of this line.

In my submission, it would be doubtful whether, on this evidence, France could demonstrate effective occupation of a *terra nullius*. Given that this territory was not *terra nullius*, so that France had to displace a pre-existing title; and given further that France purported to do so by military force, contrary to its treaty obligations, the conclusion is clear. France did *not* acquire a valid title.

The only remaining question is whether this defective title could be "cured" by some sort of recognition or acquiescence, so I turn to the question of recognition of the French claim.

3. The question of "recognition" of the French claim

Professor Cassese has suggested to the Court that Italy recognized French title to the Borderlands, based on French *effectivités* (CR 93/24, pp. 59-82). By a somewhat quixotic argument, it is suggested that two Italian protests, in 1924 and 1931, were confined to challenging France's claim of title under the 1919 Convention, but did not challenge the French claim of title under customary international law (p. 60). You may well wonder what the purpose of so limited a protest might be.

Now the Italian Note of Protest of 1924 (MC, Vol. II, Ann. 104) made no distinction of that kind. It simply noted that both Great Britain and France had trespassed beyond the strict south-east line of 1899. It was in no sense a "recognition" of the validity of a customary title acquired by France to the whole of the borderlands.

The internal Italian note of 11 December 1931 simply advised that a note of protest to France should not be confined to the French incursion at Afafi, but should be in quite general terms, protesting against any French attempt to progressively establish military of administrative control over Tibesti. It actually proves the opposite of what Professor Cassese suggests. And, of course, as a purely internal note, never communicated to France, it is not really evidence of recognition in any real sense.

Then there is the Italian school map incident, already covered by Professor Condorelli. Italy agreed to leave white the area of the borderlands — rather than colour them in the same colour as Libya. How this is a recognition of French *effectivités* escapes me.

The next piece of so-called evidence of recognition is the 1935 Treaty. The thesis is that it was a treaty of *cession*: therefore this proves France had title over the area *north* of the 1935 line. Again, Professor Condorelli has dealt with this, so I need only repeat that, by reference to the Italian claim, Italy was ceding territory to France.

So, too, with the 1938 Jef-Jef incident. It conveys no Italian recognition of anything, except perhaps the fact that unarmed Italian workmen chose not to argue with armed French soldiers.

And that, really, is it! That is the evidence put before you by Chad to show that Italy recognized a French customary law title to the whole of the borderlands. We have a phrase in English about "scraping the bottom of the barrel". The Court may well have difficulty in seeing the barrel in an argument so devoid of substance.

But then we are told that Libya, yes *Libya*, recognized French title. And the evidence amounts to the Aouzou incident in 1955, about which the Court has heard more than enough. In 1955 the Libyans were not in a position to know where the boundary lay — and France was not too keen to tell them. Moreover Aouzou is one small village, actually lying *south* of the 1899 strict south-east line. It is *not* the whole borderlands, nor even the whole of the Aouzou Strip.

4. Evidence of a Chadian administration

So we are left, finally, to consider Chad's *effectivités* — what Professor Sorel describes as the Chadian exercise of sovereignty (CR 93/25, pp. 69-85). In fact all the control remained in French

hands. The French military remained until 1965, and French administrative personnel remained until 1968, as Professor Sorel reminds us (at p. 71). It may well be that, under the 1960 technical agreements, these French personnel were regarded formally as acting on behalf of the Chadian Government. One suspects that this was a matter of pure form and that, in practice, they received their instructions from Paris, as before.

Perhaps elementary schooling was undertaken by the Chadians, but probably not powers of government. Even the few exploration permits, granted to French companies, were, one suspects, arranged by the French authorities, with little more than a Chadian signature to authenticate their provenance as the Government of Chad.

So when the rebellion in Northern Chad erupted in 1968, three years after French forces had withdrawn, the reality was *not* that a Chadian administration was evicted. There had never been a real Chadian administration, but only the residue of a French administration.

Mr. President, that brings me to the second, and last, part of my statement.

The task of the Court

Chad's written pleadings showed an attempt to limit the Court's task to choosing between two lines: the so-called 1899-1919 line or the 1935 line. This was done on the basis of an argument that discussions in the OAU and the United Nations formed part of the "context" of the *Accord-Cadre*, and so clarified the meaning of "territorial dispute".

That attempt, plainly ill-conceived, has been abandoned: the argument was legally unsound.

Professor Higgins has now tried a different argument (CR 93/21, pp. 34-50). It rests on two propositions, one of law and one of fact, and both are wrong.

The proposition of law is essentially that a party may not, in litigation, advance an argument or claim not advanced in prior negotiations (p. 48, para. 46; p. 50, para. 50). That is clearly wrong, as every Judge on this Court must know from his own experience. Cases abound to disprove it.

In *Tunisia/Libya* the sheaf of three claim-lines advanced by Tunisia before the Court had never been advanced in negotiations. In *Sharjah/Dubai* Sharjah advanced in litigation a claim for a maritime area for the island of Abu Musa never advanced in negotiations. In the *Gulf of Maine* the

extreme US claim-line was advanced, for the first time, in written pleadings. In the *Taba* case the Israeli argument that pillar 91 could not be located because it was not, in the terms of the *compromis*, the "final" pillar, was made for the first time in the final stage of oral argument. In *El Salvador/Honduras* the El Salvadorian claim that the closing-line across the Gulf of Fonseca was not a "base-line" for the purpose of measuring the territorial sea, but part of the territorial sea of either Nicaragua or El Salvador, appeared for the first time at the Counter-Memorial stage. I suspect this list could be continued all morning.

The truth is that the Court's competence is determined by the terms of the *compromis*, or Special Agreement, nor the prior negotiations over the dispute: prior negotiations of the *compromis* may be relevant as *travaux préparatoires*, but not prior negotiations of the dispute. Here we have given the Court competence over a "territorial dispute", and subject to that broad term, each Party is free to formulate its claims. It may well be that Chad now wishes it had defined the dispute as being confined to the Aouzou strip, or a choice between the two lines. But Chad did not do so: and, if Chad had insisted on so arbitrary a definition, there would have been no Special Agreement.

So, as a matter of law, Chad's proposition is wrong. The Court is not bound to confine the dispute to a meaning favourable to one Party. It is fully competent to examine the claims of both Parties, on their merits, provided they objectively relate to a "territorial dispute".

> The proposition is equally wrong on the facts. Professor Higgins has stated:
>
> "The OAU organs . . . all proceeded on the assumption that the dispute was about the Aouzou strip and Libya's claim was to the 1935 line." (CR 93/21, p. 35.)

Now I want to take the Court through those parts of the Report of the OAU Sub-Committee which dealt with the frontier dispute between Libya and Chad (First Report of the Sub-Committee of Legal and Cartographic Experts, 9 July 1987; Organization of African Unity, Libya-Chad Frontier Dispute, pp. 30-31; MC, Prod. 81). As the Court is aware, Libya provided documentation to this Sub-Committee, but told the Sub-Committee that, in Libya's view, it lacked the technical expertise to resolve the dispute and so Libya made no submissions (Report of May/July Meetings, 1987, p. 28).

Now the 1987 Report summarized the Libyan position on the legal issues in seven propositions. I am going to put up on the screen in English translation the first five of these: you

will find this text and the original French in your folder.

Proposition one. "Was the occupation of Borkou, Tibesti and Ennedi by the Turks really effective according to the criteria of international law?"

Proposition two. "What is the legal effect of the Turkish protests at the time of signature of the Franco-Britannic Treaty of 1899?"

Proposition three. "In the absence of a conventional boundary, was the Turkish hinterland claim, which included the North of Chad, opposable to the other colonial Powers of the period, notably France and Great Britain?"

Proposition four. "Did the Turkish occupation of Northern Chad give rise to a State-like organization according to the criteria of international law?"

Proposition five. "Were there links — historical, linguistic, religious, and above all institutional — between the people of Northern Chad and the peoples of Southern Libya?

In other words, can it stated that the links between the Senoussi and the peoples of Northern Chad could validly constitute a linkage of Northern Chad to Libya?"

Well, not much evidence there that Libya's claim was confined to the Aouzou strip and the 1935 line! All the references are to "Northern Chad". Not much evidence there that, in Professor Franck's words, the OAU "had not the slightest inkling of the case Libya's counsel has produced for this Court" (CR 93/26, p. 51). Now certainly a seventh proposition — the only one referring specifically to the Aouzou strip — raised the question whether Libya's occupation of the Aouzou strip — raised the question whether Libya's occupation of the Aouzou strip since 1973 created a prescriptive right to the strip. But this was seen as one element only in a much wider claim and it was entirely the Committee's idea that a claim might be based on prescription. Libya never contemplated such a claim.

In the 1988 Report (Second Report of the Sub-Committee of Legal and Cartographic Experts, 27 January 1988; Organization of African Unity, Libya-Chad Frontier Dispute, pp. 35-36; MC, Prod. 82) the Sub-Committee again reviewed the elements of Libya's position, as revealed in the Libyan documentation. And, clearly, Libya now appeared to be assuming that the 1935

Franco-Italian Treaty was valid. Now this was an error, although the Sub-Committee's report was inconclusive on this particular point. Even more curious, the summary of Chad's position raises the *question* of the validity of the 1935 Treaty, but does not say that Chad absolutely rejected that the Treaty could have any legal effect. Moreover this Report, in summarizing Chad's position, portrays it as being based exclusively on *treaties*: there is not a hint of any reliance by Chad on French *effectivités*. So, on the argument Chad now makes before this Court, Chad's second and third theories must be excluded, because they were not advanced in any prior negotiations.

What conclusions can we draw from this? Libya certainly seemed to be making an incorrect assumption about the 1935 Treaty. But it needs to be emphasized that Libya made no submissions to the OAU. Quite clearly, Libya had in its documents raised the whole history of the dispute, basing itself on the original Ottoman claims. Libya had *not* confined the dispute to the Aouzou strip. And if Libya made a mistake over the 1935 Treaty in 1978, is Libya to be condemned for ever to plead on the basis of that mistake? Is Libya to be condemned to arguing before this Court on the basis of the 1935 Treaty, despite the fact that Libya accepted nearly fifteen years ago that the 1935 Treaty was never in force? And as to Libya's "silence" about any other basis for claim, the records of the OAU reveal that the Sub-Committee fully understood the nature of the Libyan claim. It was not some ingenious argument conjured up by Libya's counsel years afterwards. Professor Higgins's vivid imagination of the meetings of Libya's counsel may provide some amusement, but it is no substitute for reading the documentary record.

Similarly, careful scrutiny of the documents will show that the suggestion that Libya renounced any claim to the BET is totally unfounded. This "myth" of a Libyan renunciation of claim to the borderlands is yet another way in which Chad tries to confine the Court to the Aouzou strip.

Professor Higgins is recorded as saying this:

> "During the negotiations with France for the Treaty of 1955 Libya renounced any claim to the BET — and did so in the context of accepting that the frontier was the one identified in the treaties of reference annexed to the text of the treaty being prepared." (CR 93/21, p. 31.)

She cites in support of this proposition the "Draft Minutes of 5 March 1955, Annex 342". The relevant part of those Minutes — they are actually the Minutes of 3 March — is now on the

screen. I would like the Court just to cast its eye over that wording.

You will see that the proposition is plainly wrong for the following reasons:

First, the draft minutes prepared by France were never agreed by Libya, and so could not commit Libya to anything.

Second, the wording does not support the proposition. To suggest that this agreed January 1955 formula constitutes a renunciation by Libya of her claim to the borderlands is absurd. It says no such thing. To agree to abide by international agreements in force is *not* to agree to renounce all claims to the borderlands. That would depend entirely on what the effect of the treaties was.

Third, in any event, it was the *French* who, in July 1955, tabled an alternative version of Article 3 which Libya eventually accepted;

And, fourth, this January 1955 text on which Chad relies does not relate solely to the southern boundary and does *not* specify that a pre-existing boundary divides French and Libyan territory throughout its entire length; again, that would depend on the treaties.

Lastly, there was no Annex I in the January 1955 text, so that it is wholly misleading for Professor Higgins to refer to the frontier "identified in the treaties of reference annexed to the text of the treaty being prepared". The Annex did not exist.

Professor Higgins is also recorded as saying, at page 31 of the same statement, that:

> "In 1956 Libya requested the actual demarcation of a section of its frontier with Algeria. It raised no issue about its frontier with Chad."

This too is quite wrong. In the first place, it was *France*, not Libya who requested the re-opening of negotiations in 1956 for the *rectification* of the boundary south of Ghadamès in the region of the Edjelé oil field. In the second place, Libya *did* propose at the opening of the 1956 negotiations that there should be a general review of the whole frontier to include a review of the agreements or treaties to be resorted to in this regard; but the French delegation adamantly *refused* to undertake such a review. The whole story is spelt out in detail in paragraphs 3.109 to 3.112 of the Counter-Memorial of Libya, with Libya's record of the 1956 negotiations to be found in Exhibit LCM 9. Chad has never responded to this material, and Professor Higgins has given to the Court a very inaccurate picture of what happened.

Mr. President, I turn now to the question of how the Court should approach its task. Having rejected Chad's artificial attempt to restrict that task to a choice between two lines, I am in duty bound to try to assist the Court by expressing a more positive view of how the Court should approach that task.

It is fairly clear what the Court should *not* do. And that is to respond to the ill-concealed invitation by Professor Higgins (CR 93/26, pp. 10-23) to inquire into the causes of the civil war in Chad and the justification — or lack of it — for the so-called "intervention" in that civil war. We have a Special Agreement which Chad wants to construe narrowly, but at the same time to widen out of all recognition. Let us stick to the Special Agreement: the Court is concerned with a territorial dispute.

Within that framework, it seems to me clear that a number of different issues have to be considered. There is one matter I will take first because, in my view, it affords little guidance and should be discounted. I refer to the post-independence conduct of the Parties.

Post-Independence Conduct

A dispassionate observer, reviewing the conduct of both Parties since their independence, might find it difficult to distinguish between them. Situations arose in which both Parties might have made claims, or reserved their positions, or made agreements in more guarded terms.

But it has to be accepted that both Libya and Chad, as newly-independent States, faced unusual difficulties. They both accepted that, necessarily, they shared a common boundary which the Court has to identify in this case. But whether such a boundary had been delimited by agreement, or where it might lie, were not easy questions to answer, given the tortuous and complicated history of this area of Africa.

Chad now suggests, through her counsel, that Libya should be penalized, and should forfeit its claim because that claim was not voiced in 1951, or 1955, or 1960. But the same arguments could be made against Chad which, on many occasions, has negotiated with Libya without expressly safeguarding its claim. Indeed, even France failed to make in 1950-1951, and again in 1955, the claims which Chad now makes. Chad's second and third theories are wholly new.

The doctrine of "forfeiture" of claims, so eloquently made by Professor Franck, cuts both ways. Moreover, it runs counter to the established principle of extinctive prescription. To extinguish a claim requires both knowledge of the claim and the lapse of a long period of time. International practice has known periods of 30 or even 50 years. It would be quite contrary to this principle to visit forfeiture of a claim upon a State, simply because of its failure to advance that claim at an opportune time.

This being the case, there is, in Libya's submission, every reason for the Court to concentrate on the position in 1951 — the date both Parties accept as the critical date, and to see what claims could legitimately had been made on that date. For had the matter been settled then, on the date of Libya's independence, the boundary would have been accepted by all parties.

On that date France accepted — and was bound to accept — that Libya emerged as successor to Italy. Whatever position France might have taken on Libya's claim to have inherited Senoussi and Ottoman claims, it is impossible to believe that France could have denied Libya's succession to Italy. And if Libya succeeded to Italy, and was committed by Italy's conduct as sovereign, then Libya's position in 1951 could be no worse than Italy's.

The Libyan "Colonial" Inheritance from Italy

The position, as between Italy and France can be summarized in three propositions.

1. Italy arguably accepted the 1899 Anglo-French Declaration.

Italy may have questioned the status of that line, that is to say questioned whether it had become a true boundary, but Italy's violent reaction to the 1919 line *may have* implication that Italy accepted the 1899 line, and rejected 1919 *because it departed from the 1899 line*. Much of the Italian map evidence *might* support the argument that Italy accepted a strict south-east line.

2. Italy totally rejected the 1919 line.

The historical record on this is quite clear. Chad's attempt to prove that Italy had lost the right to object to such a line, in 1902 and 1912, is, as Mr. Sohier has shown, quite without foundation.

3. The 1935 Treaty was abortive.

On this Italy and France agreed, and Libya and Chad now agree. The point of dispute is now

whether the 1935 line would have represented a gain, or a loss, of territory to Italy. I find it had to understand why Italy should refuse to ratify a treaty *giving* it territory. The point has some significance because a *loss* to Italy suggests that the prior position was the 1899 line, the strict south-east line: a *gain* implies that the prior position was the 1919 line.

The Libyan Inheritance under Article 13 of the Treaty of London, 1915

There remains, of course, the more controversial question whether, by virtue of *this* treaty provision, Article 13, Italy was entitled to a southern boundary with the French possessions in Chad which was *more beneficial*, more favourable to Italy than the 1899 line. Italy clearly thought so, and based its more ambitious claims in the 1920s-1930s on this argument. The Court has seen demonstrated on the screen the various Italian "programmes", advanced, in part, on the basis of this claim.

In so far as Article 13 envisaged benefits which were *territorial*, and linked to the territory of what is now Libya, Libya is entitled to succeed to those benefits.

The Libyan Inheritance from the Senoussi and the Ottoman Empire

Now, as to the separate Libyan inheritance from the Senoussi and the Ottoman Empire, Libya argues that, quite separately from any claim or title inherited from Italy, Libya has inherited a separate but equally valid title from the Senoussi and the Ottoman Empire to all that territory which, prior to 1919, had not been effectively claimed by France. Now, that date is the controlling date because, whatever Chad may now say, the true basis of any French claim to title was conquest: and in 1919 conquest was outlawed as a basis of title.

Chad concedes that there was prior title, prior to the French invasion of the borderlands. And thus the argument for a French title assumes *either* abandonment, to leave the territory as *terra nullius*, or conquest, or "consolidation" as the basis for a new French title.

Abandonment is not argued, and the continuing, hostile presence of the Senoussi, plus the Italian claims, demand rejection of any such argument. "Consolidation" in the form of a general, international recognition was never give: there were too many international maps showing lines

other than the 1919 line for that. And in 1950 the United Nations refused to recognize any specific boundary, so that international recognition of French title up to the 1919 line was not given. Consolidation therefore cannot support the 1919 line.

Thus the issue is conquest. Did France effectively conquer the whole territory? Could conquest give France a valid title in any event? Did Italy's reliance, in negotiations with France, on Article 13 of the Treaty of London, mean an abandonment of the claims based upon the Ottoman succession: or was this simply a negotiating position? And could this commit Libya, as successor State?

Libya says "No" to all questions. And if the Court shares Libya's view then this inheritance has to be added to Libya's "colonial inheritance", and this supports a line based not just on the 1899 strict south-east line *but on the factual evidence of what areas lay within French effective control in 1919*.

The Myth of a Resolution of the Boundary Dispute by General Assembly Resolution 392 (V)

And then we face this myth of a resolution on the boundary dispute, by General Assembly resolution 392 of the fifth session. Now Chad first argues that Libya's territory was fixed by the United Nations in 1951, implicitly, by resolution 392 (V), which Professor Franck has argued involved on the part of the United Nations as acquiescence in the position of France. Mr. President, that argument will not detain the Court for very long. It is quite clear, from the text of resolution 392 (V) and from the surrounding circumstances, including the UN map and Libya's Constitution, that the General Assembly did not then fix Libya's southern boundary. If the resolution did not actually determine that the boundary remained to be delimited, as the English text of the resolution would suggest, it certainly allowed that that might be the case, and that the determination of the boundary was a matter for negotiation between the parties. Chad's argument of United Nations acquiesence cannot be accepted. In fact the parties — Libya and France — in 1955 accepted the need to negotiate, so we can turn to the 1955 Treaty.

The 1955 Franco-Libyan Treaty

As regards the 1955 Treaty, there remains the question of whether, by virtue of this treaty, Libya agreed to surrender any territory or claim to which it was otherwise entitled.

The confusion amongst Chad's counsel as to whether the Treaty was declaratory of a pre-existing title, or constitutive of a new title has already been emphasized by Sir Ian Sinclair.

The "constitutive" view is impossible to accept — no negotiations, no texts, no maps, it defies belief. As an agreement to examine the frontier question on the basis of an agreed list of international instruments, it is acceptable. But in addition, Chad attempts to rely on French *effectivités*, then it must be the *effectivités* on *both* sides: not just French *effectivités*, but also those of the Ottomans and the Senoussi. And to the extent that these become relevant, one moves towards a line nearer to the 15° parallel rather than the 1919 line.

As to the texts themselves, it remains Libya's view that none of those listed in Annex I provides a conventional boundary as between Libya and Chad. The only conventional instruments directly concerning this southern boundary were the 1899 and 1919 agreements, and it is a curious irony of this case that neither Great Britain nor France, the parties to those agreements, in fact held title, either in 1899 or 1919 to the territory north and south of the line they agreed. The Ottoman protest to the 1899 Declaration is a matter of record. It will be for the Court to decide whether Italy's subsequent conduct, as territorial sovereign in succession to the Porte, weakened that protest. The Italian protest against the 1919 line remained firm and unequivocal, and that Chad does not deny.

Negotiations prior to the Critical Date not Producing Agreement

Then there are the negotiations prior to the critical date, but not producing an agreement. These remain a valuable source of reference for the Court precisely because, as I explained in the first round, they reveal the real claims of the Parties. The relevant negotiations are, of course, those between Italy and France, and, though abortive, they confirm that the 1935 line was for Italy a retreat from the boundary to which Italy believed it was entitled.

Other Criteria

The various other criteria which Libya has urged on the Court — geographical, economic, human and strategic — remain, in Libya's view, highly pertinent. Professor Franck has told the Court categorically that the interests of the people of the borderlands are clear, and that they have already exercised their right of self-determination in 1959 (CR 93/25, pp. 58-60). I wish I could share his confidence. The issue put to the vote in 1959 was, under the new 1958 French Constitution, confined to a choice between three forms of association with France, within the French Community, and Chad chose to be a member State. No one asked the people whether they wanted their future to lie with Libya. Given the terms of the Peace Treaty with Italy, these factors cannot be ignored, and it cannot be in the interests of either Party to produce a boundary lacking a basis in good sense. For boundaries must endure. And the boundary to be fixed by this Court will divide Libya and Chad long after the civil war in Chad, or the governmental régimes in Chad and Libya, are matters of history.

Speaking of "endurance", Mr. President, I have the feeling this Court has endured enough. I would ask the Court to accept the thanks of all of Libya's counsel for its patience and courtesy. And, finally, Mr. President, I would ask you to call on Libya's Agent so that he can present Libya's final submissions.

The PRESIDENT: Thank you very much, Professor Bowett. Mr. El-Obeidi, please.

Mr. EL-OBEIDI: Mr. President, distinguished Members of the Court, this brings us to the close of Libya's presentation.

For a dispute such as the present one, which really had its genesis almost 100 years, there are necessarily a great many facts and legal points to put before the Court. Our purpose in these hearings has been to try to narrow the issues dividing the Parties and to assist the Court in appreciating the essential facts.

In this connection, I should note that in addition to the points brought out in our second round on the issue, Libya will be furnishing a written answer to Judge Guillaume's question by the close of these proceedings.

Mr. President, the Court will be aware that it has previously rendered two decisions involving maritime delimitations between Libya and neighbouring States. In each instance, those decisions have helped to solve delimitation questions and have been applied by Libya. In this case as well, Libya has every confidence that the decision of the Court will resolve the territorial dispute between Libya and Chad and will be applied accordingly.

It only remains for me to read for the record Libya's final submissions, which are unchanged.

Submissions

Having regard to the various international treaties, agreements, accords and understandings and their effect or lack of effect on the present dispute, as set out in Libya's Memorial, Counter-Memorial, Reply and oral pleadings;

In view of the other facts and circumstances having a bearing on this case, as discussed above, and in Libya's pleadings;

In the light of the conduct of the Parties, of the conduct of other States or political, secular or religious forces, whose conduct bears on the rights and titles claimed by the Parties, and of the conduct of the indigenous peoples whose territories are the subject of this dispute;

In application of the principles and rules of the international law of relevance to this dispute;

May it please the Court, rejecting all contrary claims and submissions:

To adjudge and declare, as follows:

1. That there exists no boundary, east of Toummo, between Libya and Chad by virtue of any existing international agreement.

2. That in the circumstances, therefore, in deciding upon the attribution of the respective territories as between Libya and Chad in accordance with the rules of international law applicable in this matter, the following factors are relevant:

(i) that the territory in question, at all times, was not *terra nullius*;

(ii) that title to the territory was, at all relevant times, vested in the peoples inhabiting the territory, who were tribes, confederations of tribes or other peoples owing allegiance to the Senoussi Order who had accepted Senoussi leadership in their

fight against the encroachments of France and Italy on their lands;

(iii) that these indigenous peoples were, at all relevant times, religiously, culturally, economically and politically part of the Libyan peoples;

(iv) that, on the international plane, there existing a community of title between the title of the indigenous peoples and the rights and titles of the Ottoman Empire, passed on to Italy in 1912 and inherited by Libya in 1951;

(v) that any claim of Chad rests on the claim inherited from France;

(vi) that the French claim to the area in dispute rested on "actes internationaux" that did not create a territorial boundary east of Toummo, and that there is no valid alternative basis to support the French claim to the area in dispute.

3. That, in the light of the above factors, Libya has clear title to all the territory north of the line shown on map 105 in Libya's Memorial, on map LC-M 55 in Libya's Counter-Memorial and on map LR 32 in Libya's Reply, that is to say the area bounded by a line that starts at the intersection of the eastern boundary of Niger and 18° N latitude, continues in a strict south-east direction until it reaches 15° N latitude, and then follows this parallel eastwards to its junction with the existing boundary between Chad and Sudan.

Thank you, Mr. President and Members of the Court for the courtesy and patience shown by the Court in listening to Libya's case. And, if you would allow me, I would wish to place on record the gratitude of my country to those counsel who have so ably represented Libya. I would also express appreciation of the friendly spirit which the Agent of Chad and his team have shown throughout these proceedings. Thank you very much, Mr. President.

The PRESIDENT: Thank you very much, Mr. El-Obeidi. That completes the presentation by Libya in the oral proceedings and the Court will adjourn until 10 o'clock on Monday morning, when we will begin to hear the Rejoinder of Chad. Thank you very much.

The Court rose at 12.45 p.m.