DISSENTING OPINION OF JUDGE SETTE-CAMARA

I regret that I have been unable to agree with the Court's majority in the present Judgment in its appraisal of the facts, in its reasoning and in its conclusions, and therefore feel under the obligation to explain why I see this case differently.

The disputed zone is the so-called Libya-Chad borderlands, bounded to the north-east by the east-south-east line of the Anglo-French Convention of 8 September 1919, to the south by the 15° north latitude parallel, to the west by the 24° E meridian and to the east by the 16° E meridian. It covers an area of some 530,000 km² and encompasses the Borkou-Ounianga, the Ennedi and the Tibesti, what Chad refers to as the BET (excluding northern Kanem). The population of the area is under 100,000, compared with Chad's population of some 5.4 million, including the BET. The area contains 2 per cent of Chadian local population and it is a poor, bare and inhospitable region.

In spite of the desertic nature of this zone, that we shall for convenience continue to call the borderlands, it was never a *terra nullius*, open to occupation according to international law. The two Parties concur as to that, and echo herein the analogous finding of the Court in the *Western Sahara* case. The land was occupied by local indigenous tribes, confederations of tribes, often organized under the Senoussi Order. Furthermore, it was under the distant and laxly exercised sovereignty of the Ottoman Empire, which marked its presence by delegation of authority to local people.

That was the background of the dispute: the human presence prior to its beginning was constituted by the indigenous peoples and the Sublime Porte. Although the cabinets of the great European Powers were engrossed with the task of carving up Africa for the sake of their colonial designs, they did not go beyond their distribution of future spheres or zones of influence, since the non-existence of areas of *terra nullius* excluded the possibility of occupation, short of outright conquest by armed forces.

The fact is, on the one hand, that it was not until the year following the 1912 Treaty of Ouchy, which put an end to the war between Italy and the Ottoman Empire, that any French intrusion beyond the *de facto* boundary line agreed upon with the Ottomans occurred. By 1913 France had not completed its military action in the borderlands. And before 1919 there was nothing resembling a civil administration. As far as Tibesti is concerned, it was not even militarily occupied until 1930. France had abandoned the Tibesti in 1916. Anyway, even the French military pres-

ence from 1913 to 1919 did not extend north of the strict south-east line.

On the other hand, Italy, in spite of its long-standing ambitions over Cyrenaica and Tripolitania — the subject of secret arrangements with France in 1900 and 1902 — did not possess any actual hold on any territory in North Africa until 1911.

Therefore the sovereignty over the whole region appertained to the Porte which, furthermore, claimed, as Tripolitanian hinterland, vast expanses to the south covering most of what is today Chad. The hinterland doctrine was contested by the colonial Powers — which nevertheless made use of it whenever it chimed with their interests (e.g., Algerian and Egyptian hinterlands). But short of the hinterland, the sovereignty of the Ottoman Empire over the present disputed area was beyond contention. So historic title over the region belonged first to the indigenous peoples, tribes, confederations of tribes, sometimes organized under the Senoussiya, and eventually passed to the Ottoman Empire before the colonial Powers set foot in the area.

But the European Powers did not wait long to implement their designs on the African continent. The ambitious policies of France were to unite the French territories of north, west and central Africa and to link the Atlantic Ocean to the Red Sea by a continuous belt of French-dominated territories. France had already conquered Algeria through a long war (1830-1871) and through the Treaty of Bardo of May 1881 had made Tunisia a French protectorate. On its side Great Britain had occupied Egypt in 1882, making it a protectorate, against the wishes of France, traditionally interested in Egypt. The two colonial Powers were also disputing the domination of the Sudanic countries extending as far as west Africa.

In this scenario of colonial ambitions, frictions were bound to arise, and they led to the Fashoda incident, which brought France and Great Britain to the brink of war. To soften the shock of the confrontation of their ambitions the Powers felt bound to negotiate conventional solutions.

In 1910 France and the Ottoman Empire reached agreement on the delimitation of the western frontier of Tripolitania, contiguous to Tunisia, running south from Ras Ajdir on the Mediterranean coast to Ghadamès. The Convention "fixant la frontière entre la régence de Tunis et le vilayet de Tripoli" was a very detailed delimitation agreement. It was demarcated by the emplacement of 333 boundary pillars. The section of the western frontier of Tripolitania, running from Ghadamès in the direction of Toummo, corresponds to the wavy dashed line considered to be the south-western frontier of the Vilayet of Tripoli, which is represented on the *Livre jaune* map, and referred to in the 1902 exchange of letters between France and Italy (the Prinetti-Barrère Agreement). If one appraises the frontier situation in 1902, it is surprising that Chad should

now try to upgrade a frontier line agreed upon by France and Italy. Indeed the whole region comprised within the wavy dashed line was under the sovereignty of the Ottoman Empire. How could France, at the time still hundreds of kilometres south of Tripolitania, and Italy, at the other side of the Mediterranean, conclude a treaty that would establish a frontier between them? A treaty *inter alios acta*? Moreover, the reference in the 1902 exchange of letters to the frontier of Tripolitania is clearly to a limit to future French expansion, not to any conventional frontier.

In fact, in the present case there were two key questions to be resolved:

1. Is there, or has there ever been, a conventional boundary between Libya and Chad east of Toummo leading to the Sudanese frontier?

2. Are the Conventions listed in Annex I to the 1955 Libya-France Treaty of Friendship and Good Neighbourliness actually boundary treaties to which the provisions of the Cairo Declaration of 1964 and Article 11 of the 1978 Vienna Convention on Succession of States in Respect of Treaties apply, that is to say, do they *ipso facto* escape the application of the *tabula rasa* general rule?

As to the first question, I am convinced that there is not, nor has there ever been, a boundary line conventionally established marking the southern frontier of Libya east of Toummo. Neither Party has produced evidence of any treaty or agreement covering that part of the Libyan frontier. The only attempt at drawing a frontier described in detail from Toummo eastwards towards the Sudan was the 1935 Laval-Mussolini Treaty. The fact that there was no prior boundary east of Toummo was explicitly and clearly recognized by the French Government when it presented its Exposé des motifs to the French Parliament in relation to the ratification of the 1935 Treaty. That 1935 line could have been a real frontier according to the principles of international law. But since the treaty in question never entered into force for lack of ratification due to the political evolution of events at the time, the line never became a conventionally agreed frontier, although it still appears on many maps, some relatively recent, and is resorted to by Chad itself as the southern limit of the so-called "Aouzou strip".

As to the second question, I am likewise convinced that the 1899 line of the Additional Declaration tagged to Article 4 of the 1898 Franco-British Convention was never considered as a boundary line. It was aimed at dividing spheres of influence between the two big colonial Powers, France and Great Britain. Furthermore, Lord Salisbury, Prime Minister and Minister for Foreign Affairs of Great Britain, recognized that it was less than a division of spheres of influence. It was merely a line establishing the limits of the French expansion northwards and eastwards, laboriously negotiated and agreed upon under the shadow of the Fashoda incident. Therefore, according to him, it had a purely negative purpose, and it would be difficult to consider it a boundary line — at that time or now — because, as I submit, there is no question of any *effectivités* that could modify the nature of the line so as to endow it with any such status.

As to the Convention of 8 September 1919, between France and Great Britain, supplementary to the Declaration of 21 March 1899, it deals mostly with the frontier between Chad and the Anglo-Egyptian Sudan, and not with the Libya-Chad boundary. Hence the fact that it is known as the Wadai-Darfour Convention. It is therefore more related to Article 2 of the 1899 Declaration than to its Article 3. Indeed, the *Exposé des motifs* of the draft law submitting to the French Parliament the text of the Agreement calls it *Traité de délimitation entre le Ouadai et le Darfour*.

The only proviso that bears any relation to Article 3 of the 1899 Declaration is its final paragraph, which reads:

"It is understood that nothing in this Convention prejudices the interpretation of the Declaration of the 21st March, 1899, according to which the words in Article 3 '... shall run thence to the south-east until it meets the 24th degree of longitude east of Greenwich (21° 40' east of Paris)' are accepted as meaning '... shall run thence in a south-easterly direction until it meets the 24th degree of longitude east of Greenwich at the intersection of that degree of longitude with parallel 19° 30' of latitude.'" (Memorial of Libya, "International Accords and Agreements Annex", Vol. 2, No. 17, p. 165.)

The line of Article 3 of the 1899 Declaration, in following a strict south-east direction — and that seems to have been the intention of the negotiators in the light of the *travaux préparatoires* —, would intersect the 24° E meridian at 15° 35' N of latitude, approximately where it meets the Wadi Howa. The same line as depicted on the *Livre jaune* map would meet the 24° E meridian at the latitude of 19° N. According to the 1919 Franco-British Convention, the intersection would occur at 19° 30' N, and Chad maintains that it was never a strict south-east line, but an east-south-east line. So there would be a substantive modification in the course of the line, which would have been pushed northwards some four degrees.

It is therefore not surprising that Italy protested against this Convention, negotiated and concluded without its knowledge, which would have amputated some 180,000 km² of Libyan territory. Moreover, if the paragraph opens with the statement that "nothing in this Convention prejudices the interpretation of the Declaration of the 21st March, 1899", it is obvious that the 1919 line has the same nature as the 1899 line, namely both were intended to divide spheres of influence and by no means could be interpreted as constituting international boundaries.

In the eyes of Chad, the Treaty of Friendship and Good Neighbourliness concluded by France and Libya on 10 August 1955, which it considered the most important and decisive document in the dossier, provided the evidence of the southern frontier of Libya east of Toummo. The negotiations on the Treaty took place in two stages: in Paris from 4 to 6 January 1955 and in Tripoli from 9 July to 10 August of the same year. Prime Minister Mendès-France and his Libyan counterpart, Mustapha Ben Halim, participated in the Paris session and Ben Halim and Ambassador Dejean participated in the second stage in Tripoli. The perusal of the existing minutes of these encounters, which are far from complete, reveal the adamant positions of the parties: France fighting for the establishment of the frontier line and Libya insisting on the withdrawal of the French forces from the Fezzan. Libya regarded that as having constituted the main objective of the Treaty, described as an "evacuation treaty". At the end of the negotiations - and the minutes do not explain how or with what arguments — the text of Article 3 of the Treaty was approved, according to which the frontiers were those arising from the international acts in force at the date of Libya's independence, which were listed in Annex I to the Treaty. The Annex, agreed upon by exchange of letters, lists six international acts. During the oral proceedings Chad reduced that list to three main instruments: the 1899 Additional Declaration, the 1902 Prinetti-Barrère Agreement and the 1919 Anglo-French Convention.

In spite of the Chadian arguments I still doubt whether any of these three instruments can be considered a boundary treaty. The 1899 Declaration, as has been said, divided the spheres of influence or, as Lord Salisbury, the chief British negotiator, contended, not even that. The objective of the line was a negative one, namely to mark the limits of the French expansion northwards and eastwards. The 1902 exchange of letters between Prinetti and Barrère, a follow-up of the 1900 exchange of letters between Visconti-Venosta and the same Barrère, had little to do with the southern frontier problem. It dealt with reciprocal respect for French interests in Morocco and future Italian ambitions in Tripolitania and Cyrenaica. It includes, nevertheless, a reference to the frontier of Tripolitania, appearing as a wavy dashed line on the *Livre jaune* map, but only as a limit to French expansion northwards. As to the 8 September 1919 Convention between France and Great Britain, said to be "supplementary to the Declaration of 21 March 1899", it should again be recalled that its last proviso read: "nothing in this Convention prejudices the interpretation of the Declaration of the 21st March, 1899". But this text is ambiguous: whose interpretation? Besides, the 1919 Convention in adopting an east-south-east line changed considerably the terminal point of the line. Furthermore, if "nothing . . . prejudices the interpretation of the Declaration of the 21st March, 1899", the consequence would be that the 1919 line also divided spheres of influence and not frontiers.

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On the other hand, the point whether the treaties listed in Annex I were *en vigueur* also deserves examination. The 1902 Franco-Italian exchange of letters, for one, besides being alien to the frontier problem, was a secret agreement whose survival after the League of Nations' condemnation of secret treaties is, to say the least, doubtful. I have also doubts whether originally secret agreements were ever accepted for registration with the United Nations Secretariat.

My conclusion, therefore, is that none of the three treaties invoked by Chad qualifies for international recognition as a frontier treaty or could consequently benefit from the exceptional treatment enshrined in the Cairo Declaration and in Article 11 of the 1978 Vienna Convention on Succession of States in Respect of Treaties.

As to the 1955 Treaty, it had an agreed duration of 20 years, a duration which was explicitly established by the parties for each of the concessions made to France. Now, Article 54 of the Vienna Convention on the Law of Treaties provides, *inter alia*, that the termination of a treaty takes place in conformity with the provisions of the treaty. Therefore the 1955 Treaty lapsed in 1975. The Parties were discreet in discussing its Article 11. But the Chadian Counter-Memorial dealt with it, accepting the fact that the Treaty lapsed in 1975, though only to contend that the provisions of Article 3 and Annex I survive the Treaty because the latter contains boundary agreements and consequently benefits from the exception to the *tabula rasa* rule reserved for dispositive and territorial treaties. But the character of those provisions cannot be taken for granted, and their role in providing an internationally recognized frontier remains to be proved.

It is important to recall that France made the ratification of the 1955 Treaty conditional on the conclusion of the 1956 Agreement on the rectification of the Franco(Algerian)-Libyan frontier that would turn over to France the oil field of Edjelé. Indeed the French Parliament approved the Isorni Amendment, that added the following article to the proposed law authorizing ratification: "Les instruments de ratification seront déposés lorsque sera intervenu l'accord fixant la frontière entre le Royaume-Uni de Libye et l'Algérie." (Memorial of Libya, Vol. 1, p. 398.)

That is why the 1955 Treaty was not ratified before 1957. And once the rectification of the Libyan-Algerian border had been settled, France did not bother to register the 1955 Treaty with the United Nations Secretariat until 1991.

I now turn to the question of *effectivités*, that is to say, to the peaceful and continuous exercise of State power, to use the language of Max Huber in the *Island of Palmas* arbitration. Until the Italo-Turkish war of 1911 and the Treaty of Ouchy of 1912 there is no doubt that the colonial *effectivités* in the disputed area were exercised by the Ottoman Empire, through a distant and lax system based on the delegation of its powers to local administrations. It is contended in the dossier that there was a shared sovereignty between the Ottomans and the local indigenous peoples, especially those organized and directed by the Senoussiya. Chad contests the validity of these effectivités, but the fact is that there was no French presence in the area prior to the Treaty of Ouchy and the withdrawal of the Ottomans. It was only afterwards, namely in 1913, that the French incursions trespassed beyond the modus vivendi line established with the Ottomans. In successive incursions the French occupied the key points, attacked and destroyed zawiyas and tried to establish a domination of the borderlands, especially of the BET. But the resistance of the local tribes, and particularly of the Senoussi, never allowed the establishment of the exercise of peaceful and continuous State power by France. It was always a military occupation, and authority was exercised by military officers. Even after the independence of Chad, French military were retained in the administration of local oases. Moreover, Chad did not provide any documentary proof of the exercise of peaceful State power. No documentation appears in the dossier, in contrast to the case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) in which volumes of certified documentation were provided as evidence of the peaceful and continuous exercise of State power.

The fact is that no concrete evidence of *effectivités* was presented in the case-file, of either Ottoman, French or Italian *effectivités* and, of course, still less of Senoussi *effectivités*. So I believe that any invocation of *effectivités* should simply be disregarded. Chad's suggestion that there existed a *sui generis* type of *effectivités*, owing to the peculiar geographical circumstances of a desertic and inhospitable area, is not convincing. It does not match up to the famous criteria on the role of *effectivités* enshrined in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case.

The Chadian Memorial quoted French documents which confirm that the occupation of the BET was carried out for the enforcement of their hold on the zones of influence, and not to effect an occupation such as could underpin a peaceful and continuous exercise of State power. For instance, in 1913 the French forces occupied Zouar and Bardai, the main town of Tibesti. But they withdrew as early as 1916 and did not come back until 1930. The "reconnaissance patrols", *tournées militaires*, sporadically conducted with long intervals, could not suffice to establish the existence of any genuine *effectivités*.

Chad on various occasions invoked the Jef-Jef incident of 1938 and the Aouzou-Moya incident of 1955 as evidence of French sovereignty in the area. In fact, these were minor incidents whose importance was inflated on purpose. In the first incident a few unarmed Italian workers drilling a well were expelled by French troops. In the second a civilian Libyan group accompanied by a few soldiers, escorting a United Nations statistics specialist, were likewise forced to withdraw to the claimed French frontier. I believe that the reasons aligned by Libya to contend that *effectivités* could not play a decisive role in this case were valid. The basic question was a question of title, and the legal title has been shown to reside first with the indigenous population, especially the Senoussi peoples, the Ottoman Empire, and later Italy. This was the title that Libya inherited. France never occupied the Libya-Chad borderlands (whether by peaceful means or by conquest) until after 1929, by which time occupation by force was unlawful under international law. In any event, the territories in question were not *terra nullius*, so that the occupation by a French military presence was, to use the words of Chief Justice Hughes of the United States Supreme Court, "a mere usurpation".

Moreover, one should recall that the 1955 Franco-Libyan Treaty, which according to Chad was the rock on which the whole Chadian case rested, disregards completely the question of *effectivités*, relying exclusively on the conventions in force at the date of Libyan independence for the purpose of defining the borderline east of Tourmo.

I now turn to the so-called "Aouzou strip". The Chadian Memorial itself (Vol. I, p. 17) recognizes that the expression "Aouzou strip" is of recent use, appearing at the end of the 1970s because of "usage journalistique". It encompasses the region that would have been "ceded" by France to Italy under the terms of the Laval-Mussolini Treaty. It is delimited by two lines: the 1935 Treaty line and the 1899 Franco-British Convention line. It is curious that Chad should have invoked the line of the 1935 Treaty, describing in full detail the southern limit of the "Aouzou strip". For the northern limit, it relied on the 1899 line as it appears on the *Livre jaune* map. The "Aouzou strip", including a small intrusion into the territory of Niger, covers an area of 144,000 km² — 1,040 km long and 140 km wide. The strip is divided into parts corresponding to the Borkou, the Ennedi and the Tibesti; in other words, it is the BET.

The position of the French Government concerning the sovereignty over the *"bande d'Aouzou"* is somewhat dubious. For instance, on 27 March 1985, the Minister of Defence, Charles Hernu, said in an interview:

"La bande d'Aouzou est hors du Tchad. Cela, tout le monde en est d'accord. Même le président Habré le reconnaît. C'est une affaire qui remonte à 1934." (See Counter-Memorial of Libya, Vol. 1, p. 312.)

Therefore, nobody less than the Minister of Defence of France confirmed the clear-cut statement of President Tombalbaye in his disputed letter to the Libyan Head of State.

As has been said, the Parties disagreed on the nature of the task that lay before the Court. Libya contended for a distribution of territories,

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having in mind the historic colonial titles. Chad maintained that the southern frontier of Libya existed, and resulted from the international instruments *en vigueur* at the time of Libya's independence. Indeed, according to Chad, the task of the Court was confined to the choice of one of the two lines limiting the Aouzou strip, despite the fact that in the Accord-Cadre there is not the slightest mention of the "Aouzou strip". Chad contended that whatever the task of the Court might be, it would have to establish a frontier line.

Chad agreed that by virtue of the Treaty of Ouchy, confirmed by the 1923 Lausanne Peace Treaty, Italy inherited all the sovereign rights of the Ottoman Empire, yet Chad denied that the Porte had any sovereign rights over the BET.

Libya appealed to considerations of equity if the Court had to establish *ex novo* a boundary line, urging it to produce a line which was practical, fair and sensible, taking into consideration the interests of the Parties and the peoples of the region. Chad categorically rejected any resort to considerations of equity, even *infra legem*.

The relationship between the two countries has been far from peaceful. Early in 1963 the internal situation in Chad was conducive to a rebellion that triggered the creation of the FROLINAT (*Front de libération nationale*). In the same year a treaty of friendship between Chad and Libya was concluded, dealing mainly with security of communications, but providing nothing on frontiers.

By 1955 the discovery of oil and the promulgation of the first Libyan Petroleum Regulation opened the door to a brighter future for Libya. By 1971 Chad, alleging interference in internal questions, had broken off relations with Libya, but relations were resumed in 1972 when a new treaty of co-operation and mutual assistance was signed. Again there was no mention of frontiers. It was around then that the episode of the Tombalbave letter occurred. Following the 1972 Treaty other agreements between Libya and Chad were concluded. In the 1974 Treaty the only reference to frontiers was a condemnation of the arbitrarily established colonial frontiers, obviously in contradiction to the 1964 Cairo Declaration. A new treaty was signed in 1980 and again there was no mention of the presence of Libyan troops on Chadian territory. Yet another treaty was signed in 1981, ignoring the "invasion" by Libvan troops of the "Aouzou strip". (On the Chadian internal front, the Accord de Lagos sur la réconciliation nationale au Tchad, concluded in Lagos on 13-18 August 1979, by all Chadian political parties, assisted by the representatives of Cameroon, Libya, Niger, Nigeria, Senegal, Sudan, Congo, Liberia, Benin, Central Africa and the representative of the Organization of African Unity, had not dealt at all with the occupation of the "Aouzou strip" by Libyan troops. Its objective was a cease-fire and the creation of the Gouvernement d'union nationale de transition (GUNT).) The complaints presented by Chad to the United Nations Security Council produced no solution but were apparently conducive to the conclusion of the AccordTERRITORIAL DISPUTE (DISS. OP. SETTE-CAMARA)

Cadre of 31 August 1989, by virtue of which the present case came to the Court.

I believe that the titles to the territory asserted by Libya are valid. Neither France nor Chad could present any sounder titles than the three layers of title enuring to Libya, namely those of the peoples inhabiting the territory, tribes, confederations of tribes and the Senoussi Order, the Ottoman Empire's sovereignty over the area, passing to Italy in 1912 and thence to Libya in 1951.

The argument of Chad that the claim of Libya would involve half of Chadian territory was unimpressive. Not only does it beg the question but it also works the other way around, since Chad's claim involves a substantial part of Libyan territory.

The claim of Libya represented on map 105 of the Libyan Memorial was based on succession to Ottoman claims that went much farther to the south.

The concluding paragraph of the Judgment, paragraph 76, invokes the *pacta sunt servanda* rule to justify the line enshrined in the operative part, which would result from the 1955 Treaty. Nobody would challenge this fundamental rule of international law, what Hans Kelsen established as the *Grundnorm* of international law. But it obviously applies only to treaties *in force*, and Article 11 of the 1955 Treaty renders its validity after the 20 years deadline, to say the least, debatable.

Paragraph 77, containing the *dispositif*, resorts to the line of the 1919 Franco-British Convention, the so-called "Wadai-Darfour Convention" which, incidentally, dealt with the southern frontier of Libya with the French territories, moving it northward. The 1899 strict south-east line was indeed progressively moved northward: first with the Livre jaune map, in a unilateral modification of the original line, without consultation with the British, something which, according to the handwritten note of Lord Thomas Sanderson, Permanent Under-Secretary of State for Foreign Affairs, "did not matter much". The fact is that the 1899 line, following a strict south-east direction --- and that seems to have been the intention of the negotiators in the light of the travaux préparatoires would intersect the 24° E meridian at 15° 35' N of latitude, approximately at the place where it meets the Wadi Howa. The same line, as depicted on the Livre jaune map, would meet the 24° E meridian at the latitude of 19° N. According to the Franco-British Convention, the intersection would occur at 19° 30' N. Chad contended that it was not a strict south-east line, but an east-south-east line. Therefore there is a substantive modification in the course of the line, which has been pushed northward some four degrees. And that is the line which the *dispositif* of the Judgment takes as the basis for defining the boundary between the Republic of Chad and the Libyan Arab Jamahiriya.

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But one could not exclude a compromise solution which, regrettably, neither the Parties nor the Court explored. There were two possibilities for drawing a fair and equitable line: the first would have been the line of United Nations map No. 241, which is close to the 1935 line but not identical to it. Given that Chad had not scrupled to use the 1935 line as the southern limit of the "Aouzou strip", I cannot see why it would have objected to its use for a boundary *ex novo*.

The second solution would have been to revert to the 1899 strict southeast line, which was at the origin of the dispute, and which continues to appear on very recent maps, for instance, the 1988 OAU map attached to its Sub-Committee's report on the Libya-Chad dispute. This, in my view, is the most obvious, and perhaps the most equitable, line.

Both those lines would have afforded the advantage of dividing the Tibesti Massif between the two countries. And it is not necessary to emphasize the importance of the Tibesti Massif for the possible defence of one country or the other, as repeatedly asserted by both Parties.

(Signed) José Sette-Camara.