SEPARATE OPINION OF JUDGE YUSUF

Uti possidetis juris *and the OAU/AU principle on respect of borders are neither identical nor equivalent — The Cairo Resolution and founding instruments of the OAU and AU do not refer to* uti possidetis juris *— The two principles must be distinguished in light of their different origins, purposes, legal scope and nature — The Court should have cleared up this confusion — The OAU/AU principle is not concerned with the relationship between title and* effectivités *— Nor does it confer preference on one over the other — The reference to territorial integrity in the OAU/AU founding instruments cannot be interpreted as implicitly containing the principle of* uti possidetis juris *— It is the inviolability of boundaries which is implicit in territorial integrity — Inviolability does not mean invariability or intangibility — The 1987 delimitation agreement between the Parties distinguishes this case from previous frontier delimitation cases —* Uti possidetis juris *had no role to play in this case — This should have been recognized in the Judgment.*

I. INTRODUCTION

1. While I am in agreement with the decision of the Court, I feel obliged to deal in this opinion with certain issues, which the Court did not adequately address in the reasoning of the Judgment, particularly as regards the applicable principles invoked by the Parties in their pleadings before the Court (see paragraph 63 of the Judgment).

2. In its analysis of the rules and principles invoked by the Parties in their Special Agreement, the Court refers to the following three principles in paragraph 63 of the Judgment: *(a)* the principle of intangibility of boundaries inherited from colonization; *(b)* the principle of *uti possidetis juris*; and *(c)* the principle of respect of borders existing on achievement of independence adopted by the Organization of African Unity (OAU) in its Resolution AHG/Res. 16 (I) in 1964 at the first session of the Conference of African Heads of State and Government held in Cairo, Egypt (hereinafter, the "Cairo Resolution"), and later enshrined as Article 4 *(b)* in the Constitutive Act of the African Union (AU).

3. Apart from the fact that the Judgment does not explain the legal effect and implications of these principles in the instant case or the manner in which they are to be applied to the boundary dispute between the Parties, the Court appears to treat them as being interchangeable or at least equivalent in their legal nature, scope and effects. The assumption of equivalence, particularly between *uti possidetis juris* and the OAU/AU principle of respect of borders existing on achievement of independence, is based on a *dictum* of the Chamber of the Court in its Judgment in the case concerning the *Frontier Dispute* (*Burkina Faso/Republic of Mali)* of 22 December 1986.

4. The Chamber of the Court formed to deal with the above-mentioned case stated, *inter alia*, as follows:

> "The Charter of the Organization of African Unity did not ignore the principle of *uti possidetis*, but made only indirect reference to it in Article 3, according to which member States solemnly affirm the principle of respect for the sovereignty and territorial integrity of every State. However, at their first summit conference after the creation of the Organization of African Unity, the African Heads of State, in their Resolution mentioned above (AGH/Res. 16 (I)), adopted in Cairo in July 1964, deliberately defined and stressed the principle of *uti possidetis juris* contained only in

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an implicit sense in the Charter of their organization." (*Frontier Dispute, Judgment*, *I.C.J. Reports 1986*, pp. 565-566, para. 22.)

5. Following the above statement by the Chamber of the Court, it appears to have been widely assumed, not least by the Court itself in subsequent cases concerning frontier delimitation between African States, that the principle of respect of boundaries existing on achievement of independence adopted by the OAU in its Cairo Resolution, and later by the AU, constitutes an African *uti possidetis juris* which is identical to the principle of Spanish-American origin. For example, in its Judgment of 12 July 2005, the Chamber of the Court in the case concerning the *Frontier Dispute (Benin/Niger),* after referring to the 1986 Judgment, stated that the principle of *uti possidetis juris* had been recognized on several occasions in the African context and that "it was recognized again recently, in Article 4 *(b)* of the Constitutive Act of the African Union" (*I.C.J. Reports 2005*, p. 108, para. 23).

6. It is my view that *uti possidetis juris* and the principle endorsed by the OAU in the Cairo Resolution, and later inscribed in the Constitutive Act of the AU, are neither identical nor equivalent. Although the Court, in the present Judgment (paragraph 63), has slightly moved away from the above-quoted *dicta* of the 1986 and 2005 Judgments equating *uti possidetis juris* to the Cairo Resolution and to Article 4 *(b)* of the Constitutive Act of the AU, I am still of the view that the difference between the two principles merits further elucidation so that they may not be similarly confounded in the future.

II. The Cairo resolution and OAU/AU principles on borders

7. It is instructive to start with the text of the Cairo Resolution and of the OAU/AU principles referred to in the above-mentioned Judgment of the Chamber of the Court. Under Article III, paragraph 3, of the OAU Charter, the member States declared their adherence to the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence".

8. The text of the Cairo Resolution entitled "Border Disputes among African States" reads as follows:

> "Considering that border problems constitute a grave and permanent factor of dissension;
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> Conscious of the existence of extra-African manoeuvres aimed at dividing African States;
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> Considering further that the borders of African States, on the day of their independence, constitute a tangible reality;
>
> Recalling the establishment in the course of the Second Ordinary Session of the Council of the Committee of Eleven charged with studying further measures for strengthening African Unity;
>
> Recognising the imperious necessity of settling, by peaceful means and within a strictly African framework, all disputes between African States;

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> Recalling further that all Members have pledged, under Article IV of the Charter of African Unity, to respect scrupulously all principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;
>
> 1. Solemnly reaffirms the strict respect by all Member States of the Organization for the principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;
>
> 2. Solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence."

9. Article 4 *(b)* of the Constitutive Act of the AU lists as one of the principles of the Union the "respect of borders existing on achievement of independence".

III. THE OAU/AU PRINCIPLES AND *UTI POSSIDETIS JURIS*

10. As a preliminary remark, it may be noted that none of the official documents of the OAU or of its successor organization, the AU, relating to African conflicts, territorial or boundary disputes, refers to or mentions in any manner the principle of *uti possidetis juris*. As stated by a keen observer of the origins and evolution of Pan-African organizations, and an advocate of an "*uti possidetis* africain", "it would be important to underline that the American precedent was never explicitly invoked during the *travaux préparatoires* of the Addis Ababa Conference, and even less by the Heads of State in their inaugural speeches"[1]. Equally significant are the differences between the two principles with regard to their origin and purpose, their legal scope and content and their legal nature.

1. Differences in origin and purpose

11. The Spanish-American Republics, which emerged from colonization in the early nineteenth century, adopted the principle of *uti possidetis juris* in order to address an issue of acquisition of title to territory, which was not satisfactorily resolved by any of the traditional modes of acquisition of title in classical international law[2]. The classical modes of acquisition of territory — occupation, prescription, cession, accretion and subjugation — did not provide for the situation in which a new State came into existence through decolonization[3]. In particular, the main question for the new Republics revolved around the issue of who possessed the legal title in regions which were sparsely populated and in which the limits were vaguely known or inadequately defined. To deal with this problem, it was decided by the former Spanish colonies, as described by the Swiss Federal Council in the Colombia-Venezuela Arbitral Award of 1922, that these regions would be:

> "reputed to belong in law to whichever of the republics succeeded to the Spanish province to which these territories were attached by virtue of the royal ordinances of the Spanish mother country. These territories, although not occupied in

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[1] B. Boutros-Ghali, *L'Organisation de l'unité africaine*, Paris, Armand Colin, 1969, p. 48, at footnote 3. The French text reads as follows: «il convient de souligner que le précédent américain n'a jamais été expressément invoqué lors des travaux préparatoires de la conférence d'Addis Abéba, et encore moins par les Chefs d'Etat dans leurs discours d'inauguration».

[2] In *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening),* the Chamber of the Court characterized *uti possidetis juris* as follows: "Thus the principle of *uti possidetis juris* is concerned as much with title to territory as with the location of boundaries . . ." (*Judgment, I.C.J. Reports 1992*, p. 387, para. 42.)

[3] See R.Y. Jennings, *The Acquisition of Territory in International Law*, Manchester University Press, 1963, pp. 7-11 and 37.

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fact, were by common consent deemed as occupied in law, from the first hour, by the new republic."[4]

Thus, the primary purpose of this principle was to ensure that there was no *terra nullius* open to occupation by foreign imperial powers in Spanish America[5].

12. The second objective of *uti possidetis juris* was to establish a method or criterion for boundary delimitation where two States, formerly subject to the same metropolitan power, emerged from decolonization. This was achieved by upgrading former administrative limits to international frontiers among the new Republics. As stated by the Chamber of the Court in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*: "*uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes" (*I.C.J. Reports 1992,* p. 388, para. 43).

13. The situation faced by the African countries in the early 1960s substantially differed from that of the Spanish-American Republics where only administrative boundaries established by Spanish royal ordinances and other Spanish legal instruments existed. First, at the time of independence in the 1960s, there were no regions or territories in Africa which were reputed to be unexplored or which could be considered as *terra nullius* and thus open to acquisition of title through occupation by foreign imperial powers.

14. Secondly, the origin of the post-independence boundaries of African States was varied. It is estimated that only one fourth of the boundaries of African States had an intra-colonial administrative character[6]. The majority of the boundaries of the newly-independent African States were inter-colonial boundaries established through treaties concluded between different colonial powers. The boundaries of two of the founding members of the OAU, Ethiopia and Liberia, neither of which had ever been colonized, were mainly fixed through their own bilateral treaties with the colonial or administering powers of their neighbours. There were also the trust territories under the United Nations Charter, which were not considered colonial territories, since the administering authority entered into a Trusteeship Agreement with the United Nations in respect of the territory concerned and any alterations to it had to be approved in accordance with the provisions of Chapter XII of the Charter[7].

15. The diversity of the boundary régimes which existed on the African continent at the time of independence, and the aversion of the newly-independent African States to the legitimization of colonial law in inter-African relations, led the OAU, and later the AU, to craft its own principle, the legal scope and nature of which will be discussed below. Thus, the lack of reference to *uti possidetis* was not due to a lack of awareness by the OAU member States of the existence of *uti possidetis juris* as a principle or of its use by the Spanish-American Republics following their

[4]*Colombia-Venezuela Arbitral Award,* United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. I, 223, p. 228 *[translation]*.

[5]See the separate opinion of Judge *ad hoc* G. Abi-Saab in *Frontier Dispute (Burkina Faso/Mali)*, where he describes the dual purpose of the principle of *uti possidetis* (*I.C.J. Reports 1986*, p. 661, para. 13).

[6]M. Foucher, "Les Questions Territoriales et Frontalières en Afrique (1964-2010) : La Réaffirmation des Frontières" in Emilia Robin-Hivert, Georges-Henri Soutou (eds.), *L'Afrique Indépendante dans le Système International*, Paris, PUPS, 2012, p. 62.

[7]See Articles 79, 83 and 85 of the UN Charter.

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own decolonization a century earlier[8]. Rather, different situations, and historical circumstances, dictated the adoption of different legal rules and principles.

16. It should also be recalled that despite its title of “Border Disputes among African States”, the main objective of the Cairo Resolution was to discourage territorial annexation by force as well as irredentist, pan-nationalist and secessionist claims. This is evidenced by the fact that the only two countries that voted against the resolution were Somalia and Morocco, both of which had, at the time, irredentist claims against their neighbours, while all the other member States of the OAU, most of whom had boundary disputes amongst them, supported the resolution, which provided for peaceful methods and modalities of resolving such disputes.

17. Moreover, although it may sound paradoxical, the African principle of respect for the boundaries existing at the time of independence is closely intertwined with the manner in which the OAU decided to deal with the Pan-African vision of integration and unity among all African States. The Pan-African vision, which was advocated by African leaders in the period before independence, was to render boundaries less significant through the unification of the peoples of the continent. For example, the Pan-African congress, in a resolution adopted in 1958 in Accra, Ghana, denounced “the artificial frontiers drawn by imperialist powers to divide the peoples of Africa, particularly those which cut across ethnic groups and divide people of the same stock”, and called for “the abolition or the adjustment of such frontiers at an early date”[9].

18. The OAU neither adopted this vision, nor did it completely abandon it. A tinge of the Pan-African vision was preserved in the form of commitments to work towards African Unity. This is explicitly mentioned even in the Cairo Resolution, where reference is made in the preamble to the establishment “of the Committee of Eleven charged with studying further measures for strengthening African Unity”. The task of this Committee was to propose political action which would further promote the unity and solidarity of the African States[10]. Thus, in the Cairo Resolution, the preservation of the boundaries existing at the time of independence is somehow balanced by the continued efforts towards closer African political and economic integration.

19. Consequently, it may be said that the principle of respect for boundaries in the Cairo Resolution places the boundaries existing at the time of independence in a “holding pattern”, particularly to avoid armed conflict over territorial claims, until a satisfactory and peaceful solution is found by the Parties to a territorial dispute in conformity with international law, or until such time as closer integration and unity is achieved among African States in general, or between the neighbouring countries in particular, in keeping with the Pan-African vision. As such, it implies a prohibition of the use of force in the settlement of boundary disputes and an obligation to refrain from acts of seizure of a portion of the territory of another African State.

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[8]B. Boutros-Ghali, after lamenting that *uti possidetis juris* was not specifically mentioned in the OAU Charter, states that: “There may have been fears that the mention of this principle would not receive unanimous approval, or that it may be said (as it already has been) that the Addis Ababa Charter was an explicit ratification of the Treaty of Berlin. Whatever may be the reason, the adoption of the principle of *uti possidetis* would have been an important step toward expanding the role of international law in Africa.” See B. Boutros-Ghali, “The Addis Ababa Charter”, 35 (3) *International Conciliation* 5, 1964, p. 29.

[9]For the text of the resolution, see C. Legum, *Pan Africanism: A Short Political Guide*, London, Pall Mall Press, 1962, pp. 229-232.

[10]See Z. Červenka, *The Organization of African Unity and its Charter*, Prague, Acadamia, 1968, pp. 55-60.

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2. Differences in legal scope and content

20. As explained above, *uti possidetis juris* had two important aspects as formulated by the Spanish-American Republics at the time of their independence: the absence of *terra nullius* in their territories and the mutual acceptance by the newly-independent Republics of the lines which formerly delimited the internal administrative divisions or sub-divisions of Spanish provinces, *intendencias* and *capitanias* as their international boundaries. The latter component has acquired more relevance in international law over the years, and has come to be regarded as the core element of *uti possidetis juris*. However, as a criterion for the delimitation of boundaries, its application has been mostly limited to converting into international boundaries the administrative boundaries inherited from the same colonial power or the internal boundaries of States emerging from the dissolution of a larger entity.

21. Thus, even in Latin America, Brazil, which gained its independence from a different colonial power (Portugal) and shared former inter-colonial rather than intra-colonial boundaries with its neighbours, adopted the markedly different concept of *uti possidetis de facto*, which gives preference to effective possession rather than legal title based on Spanish colonial legislation[11]. As stated by H. Accioly:

> "En effet, si les anciennes colonies espagnoles pouvaient adopter cette invention juridique, parce qu'il leur serait permis de discuter entre elles les respectives revendications territoriales en se basant sur des lois ou cédules royales émanant de la métropole commune, il est certain qu'elles ne pourraient pas se prévaloir de pareils titres contre le Brésil, car ils ne pouvaient lui être appliqués, et une telle base serait donc sans valeur."[12]

22. Unlike the *uti possidetis juris* of Spanish-America, the OAU/AU principle of respect for boundaries can only be interpreted as a broad principle which affirms the acceptance by all African States of the existing boundaries of the sovereign independent States that came together to form the OAU and later the AU. The OAU/AU principle does not address the issue of title to inadequately defined regions or areas in frontier zones or physically non-existent boundaries. Nor does it lay down a specific peaceful method or criterion to be used for ascertaining the pedigree of disputed boundaries or for attributing title to territory. The specific methods to be used for the peaceful settlement of boundary disputes are left to be determined, on a case by case basis, by the States concerned. *Uti possidetis juris* could, of course, be one such principle, but it would have to be specifically agreed upon by the Parties to the dispute.

23. Moreover, the relevant territory, the boundaries of which have to be respected under the OAU/AU principle, is neither the one that existed during the colonial period as a colony nor the pre-colonial historical territory of African States, but has rather to be understood as the post-independence territory of the OAU/AU member States. Indeed, as a result of the exercise of the right to self-determination consecrated under the Charter of the United Nations, the peoples of African colonies or trusteeship territories were often able to freely determine their political status prior to independence in one of the following ways: the formation of a single sovereign State; the division of a trust territory into two separate States; the unification of part of a colony or trust

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[11]As was stated by the Chamber of the Court in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*: "It should be recalled that when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law . . ." *(Judgment, I.C.J. Reports 1992*, p. 559, para. 333.)

[12]H. Accioly, "Le Brésil et la Doctrine de l'uti possidetis", *Revue de Droit International*, Vol. 15, 1935, pp. 36-45, at p. 45.

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territory with a neighbouring State; the unification of two colonies or of a trust territory with a colony.

24. This situation sometimes resulted in the emergence of a single independent State from the union of a former colony with a former trust territory, e.g., British and Italian Somaliland. It has also led to the merger of a trust territory or a part thereof with another colonial or trust territory; for example, the northern part of the trust territory of Cameroon under British administration merged with Nigeria, while the southern part opted for integration with the trust territory of Cameroon under French administration. Similarly, the British-administered trust territory of Togoland was united with Ghana following a plebiscite under the auspices of the United Nations. On other occasions, two independent States emerged from the division of a single trust territory, e.g., the case of Rwanda and Burundi.

25. It is, of course, one thing to call for respect of boundaries, as was done in the Cairo Resolution or as is currently consecrated in Article 4 *(b)* of the Constitutive Act of the AU; but it is another thing to determine where such dividing lines actually run. It is in the latter case that a principle such as *uti possidetis juris* becomes relevant. According to the prevailing Latin American conception, *uti possidetis juris* is based on a dichotomy of title and *effectivités,* whereby title, if it is found to exist, will trump the *effectivités* or the effective possession of the territory[13].

26. The relationship between title and *effectivités* in the determination of the boundary to be respected was never spelled out or even mentioned in OAU or AU documents. In view of the above-described diversity and complexity of the process of independence of African States, the varied legal régimes under which the delimitation of their boundaries was carried out before independence (e.g., international treaties, administrative boundaries, trusteeship agreements), and the sharply divided opinions among African States at the time of independence, it appears that the OAU/AU deliberately refrained from engaging in a detailed consideration of legal issues, such as whether title to territory, possession or *effectivités* should prevail. Similarly, these organizations declined to lay down, as part of the public law of Africa, a specific peaceful method applicable to the settlement of all potential boundary disputes among all African States, or to the determination of the course of such boundaries.

27. Instead, the Pan-African organizations limited themselves to the affirmation of a general and broad principle of respect of the boundaries of member States in order to safeguard peace and stability in the continent. In other words, neither the Cairo Resolution nor the AU principles have gone so far as the Spanish-American States in defining a specific method to be used to determine the course of African boundaries. This does not, however, mean that African States cannot or have never had recourse, in the settlement of bilateral disputes, to the use of *uti possidetis juris* as a principle applicable to the delimitation of their boundaries or as a method of ascertaining the pedigree of such boundaries. As clearly indicated by the Judgments of the Court referred to above, they have indeed done so and will most probably continue to do so in the future particularly with respect to former administrative boundaries inherited from the same colonial power.

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[13]"Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice." (*Frontier Dispute (Burkina Faso/Mali), Judgment, I.C.J. Reports 1986*, pp. 586-587, para. 63.)

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3. Differences in legal nature

28. The two principles — *uti possidetis juris* and the OAU/AU principle on the respect of boundaries — also differ in their legal nature. First, a distinction needs to be made between a broad principle which places frontier disputes among African States in a "holding pattern" until a peaceful solution is found between the parties concerned, and a specific principle which embodies the criteria and methods for ascertaining the pedigree of a boundary and for determining title to territory on the basis of colonial legislation. *Uti possidetis juris* corresponds to the latter, while the Cairo Resolution and the Article 4 *(b)* of the Constitutive Act of the AU lay down the former.

29. Secondly, the OAU/AU principle is specific to the African continent where it is considered as part of the public law of Africa applicable to all African States, but has no claim to being a general principle or a customary rule of international law. Conversely, *uti possidetis juris* has been characterized as follows by the Chamber of the Court in *Frontier Dispute* (*Burkina Faso/Republic of Mali)*:

> "Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs." (*Judgment, I.C.J. Reports 1986*, p. 565, para. 20.)

30. The Chamber of the Court did not justify this sweeping statement nor did it give clear reasons as to the source of this conclusion except to say that, in addition to its Spanish-American origins, *uti possidetis juris* also found application and recognition in Africa. However, the alleged acceptance of the principle by all African States appears to be based on the assumption that the OAU principle established in the Cairo Resolution of 1964 was synonymous with or equivalent to *uti possidetis juris*. Nevertheless, the Chamber later observed in the same Judgment that:

> "*[u]ti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs" (*ibid.,* p. 566, para. 23).

31. The latter statement of the Chamber, which emphasizes the specific role of *uti possidetis juris* with respect to former administrative boundaries, appears, in my view, to correspond more to the actual practice of States than the earlier conclusion characterizing *uti possidetis* as a general principle applicable to all situations of decolonization. Even in the case of African States, recourse to *uti possidetis juris* is generally for the purpose of delimitation or demarcation of former administrative boundaries, as was the case in *Frontier Dispute* (*Burkina Faso/Republic of Mali)* or in *Frontier Dispute (Benin/Niger)*. *Uti possidetis juris* would indeed be redundant in the case of disputes over boundaries delimited by an international treaty concluded either between two colonial powers or between an African State and a colonial power or between two African States[14].

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[14]In its Judgment in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, the Court stated as follows: "It will be evident from the preceding discussion that the dispute before the Court . . . is conclusively determined by a Treaty to which Libya is an original party and Chad a party in succession to France . . . Hence there is no need for the Court to explore matters which have been discussed at length before it such as the principle of *uti possidetis* and the applicability of the Declaration adopted by the Organization of African Unity at Cairo in 1964." (*I.C.J. Reports 1994*, p. 38, para. 75.)

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32. Thirdly, the principle of *uti possidetis juris* constitutes a method of determining the course of a boundary on the basis of legal title, and offers a criterion for ascertaining the pedigree of such a boundary. This is indeed the main reason why it has become a very useful tool for the settlement of boundary disputes in cases involving former administrative boundaries or boundaries arising from the dissolution of a larger entity. The OAU/AU principle on the respect of boundaries could not be of much help, nor was it conceived to offer criteria, in the ascertainment of the pedigree of boundary lines. It prescribes respect for, and prohibits assault on, the territories of the OAU/AU member States as they existed at the time of independence. Thus, as pointed out above, the relationship between title and *effectivités*, or the need to give preference to one over the other, or the manner in which such title should be determined, is neither explicitly nor implicitly dealt with in the OAU/AU principle.

33. Moreover, to the extent that a key characteristic of Spanish-American *uti possidetis juris* is that the borders existing at the time of independence are to be determined by reference to the Spanish legislation of the time, it is difficult, if not impossible, to ascribe a similar intention to "consecrate" the colonial law to the African States which adopted the Cairo Resolution or the principles of the AU Constitutive Act. The rejection by the OAU/AU of a rearrangement of borders on ethnic lines or on the basis of historical and geographic claims does not amount to an acceptance of colonial law as title to territory. It was certainly not the intent of the member States of the OAU or the AU to collectively ratify, through the adoption of this principle, the General Act of Berlin of 1885 or to recognize the administrative law of the colonial powers.

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34. There is no doubt that the principle of *uti possidetis juris* has served, over the years, many advantageous functions in Latin America, and continues to play a useful role in the settlement of boundary disputes in other parts of the world. It cannot, however, be considered as a synonym of the principle endorsed by the OAU in 1964, and later inscribed in the Constitutive Act of the AU principle which deals with respect of the boundaries of sovereign independent States in accordance with the United Nations Charter and with the founding instruments of the OAU and AU.

35. The OAU member States, and later the AU, adopted the principle of respect of boundaries existing on the achievement of independence out of a sense of pragmatism in order to ward off conflict and chaos in the African continent. It is an African principle which applies among all member States of the Pan-African organization and imposes upon them the obligation to respect the boundaries existing at the time of independence, pending the peaceful resolution of any border dispute which may arise between them. It is in this context that it may be said that the two principles share a similar rationale in so far as they both seek to encourage recourse to the peaceful settlement of frontier disputes in conformity with international law.

36. The international legal principles to be applied for this purpose may, of course, include the principle of *uti possidetis juris.* It has indeed happened in the past, and it may also happen in the future, that two African States agree to have recourse to the application of the principle of *uti possidetis juris* in a bilateral frontier dispute before the Court or before arbitral tribunals. In

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such cases, the application of *uti possidetis juris* is based on a bilateral understanding or agreement, but not on a general principle or customary norm that has emerged as a result of the adoption of the 1964 Cairo Resolution or of the Constitutive Act of the African Union.

IV. THE PRINCIPLE OF TERRITORIAL INTEGRITY AND *UTI POSSIDETIS JURIS*

37. The passage of the 1986 Judgment of the Chamber of the Court quoted in paragraph 4 above also suggests that there was an indirect reference to *uti possidetis* in Article III, paragraph 3, of the OAU Charter. As shown in paragraph 7 above, Article III, paragraph 3, of the OAU Charter declared the adherence of its member States to the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence". It is the reference to "respect . . . for territorial integrity" that the Chamber of the Court appears to have found to contain, in an implicit sense, an *uti possidetis* principle applicable among all African States.

38. The OAU Charter was replaced by the AU Constitutive Act on 26 May 2001. Thus, Article III, paragraph 3, no longer exists. In its place, one of the objectives of the Constitutive Act of the AU, as an instrument of solidarity among African States, is to "defend the sovereignty, territorial integrity and independence of its Member States" (Art. 3, para. *(b)*). Perhaps this evolution of the principle of territorial integrity in the constitutive instruments of the Pan-African organizations already sheds some light on the distinction between *uti possidetis juris* and territorial integrity. It may, however, still be useful to say a few words about the difference between the two principles, particularly in the context of the founding instruments of the OAU/AU.

39. It is erroneous, in my view, to read into the time-hallowed principle of respect for territorial integrity a reference to the principle of *uti possidetis juris* or to assimilate these two distinct principles of international law. If one reads an indirect reference to *uti possidetis* in Article III, paragraph 3, of the OAU Charter because of its language on "territorial integrity", then the same conclusion must be reached concerning Article 2, paragraph 4, of the United Nations Charter. The two Charters refer to territorial integrity as a fundamental principle of international law and an essential foundation of peaceful relations between States, but neither of them deals with *uti possidetis juris.*

40. In so far as boundaries may be likened to the outer shell of the territory of the State, it is the inviolability of those boundaries which is implicit in the concept of territorial integrity. This is, however, quite different from *uti possidetis juris* as discussed in section III above. Inviolability bars the alteration of existing boundaries by force. It also implies that such alteration, should it occur, is not capable of producing any legal effect. This is clearly articulated in the 1970 United Nations Declaration on Principles of International Law (General Assembly resolution 2625 (XXV)), according to which:

> "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States."

41. The reference in the Cairo Resolution to Article III, paragraph 3, of the OAU Charter, may be construed as a reference to the inviolability of boundaries which is implicit in the principle of territorial integrity, but cannot be taken to have "deliberately defined and stressed the principle

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of *uti possidetis juris* contained only in an implicit sense in the Charter of their organization", as stated by the Chamber of the Court. In this, the principle enunciated in the Cairo Resolution is similar to principle III on the "Inviolability of frontiers" in the Final Act of the Conference on Security and Co-operation in Europe of 1975, according to which:

> "The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting those frontiers.
>
> Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State."[15]

42. As formulated above, the principle of inviolability of boundaries may be considered to constitute a basic element of the broader principle of territorial integrity of States, and it was in the context of the relationship of these two principles that the Cairo Resolution also referred back to Article III, paragraph 3, of the OAU Charter. It should, however, be noted that inviolability does not mean invariability or intangibility of frontiers, in general. It means that any territorial changes are effected by mutual consent, or through other means of peaceful settlement of disputes, in conformity with international law.

43. The OAU/AU member States prescribed the principle of respect of boundaries existing on achievement of independence, and implicitly recognized their inviolability in the sense discussed above, in order to ensure peace and stability in the African continent in the same way that the Conference on Security and Co-operation in Europe adopted a similar principle in 1975 to promote security in the European continent. Both prescriptions derive their inspiration from the broader principle of territorial integrity enshrined in the United Nations Charter. Neither of them was directed, in my view, to define or stress the principle of *uti possidetis juris* which has a different meaning and normative content.

V. CONCLUDING REMARKS

44. Although the Parties — Burkina Faso and Niger — invoked the principle of *uti possidetis juris* in their pleadings, this case is quite different from the previous cases of *Frontier Dispute (Burkina Faso/Mali) (I.C.J. Reports 1986)* and *Frontier Dispute* (*Benin/Niger) (I.C.J. Reports 2005)*. In the present case, Burkina Faso and Niger concluded an agreement in 1987 on the delimitation of their common boundary. They have not, however, been able to agree, since that time, on the interpretation and application of the agreement with respect to the actual course of the boundary line. The dispute they have submitted to the Court concerns this disagreement.

45. Unlike the previous delimitation cases mentioned above, this dispute between the Parties, which concerns the interpretation and application of an international agreement, did not have to be appraised in the light of French colonial law, or "droit d'outre-mer". In other words, the Court was not required, in the present case, to determine what constituted for each of the Parties the colonial heritage to which the *uti possidetis* was to apply. The Parties had already specified that in their own delimitation agreement.

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[15]Organization for Security and Co-operation in Europe, *Final Act of the Conference on Security and Co-operation in Europe,* 1 August 1975, 14 *ILM*, 1292.

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46. Thus, despite the fact that Burkina Faso and Niger inherited the former administrative boundaries of French West Africa, which became international boundaries upon their accession to independence, it is my view that the principle of *uti possidetis juris* had become redundant in this case as a result of the conclusion of the 1987 delimitation agreement between the two independent States. The Court was asked to interpret this delimitation agreement.

47. The Judgment should have clearly recognized that *uti possidetis juris* and "droit d'outre-mer" had no effective role to play in this case. A statement similar to the one made by the Court in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (*I.C.J. Reports 1994*, p. 38, para. 75, and cited at para. 31, footnote 14 above) could have been made in the Judgment. The Court could also have seized this opportunity to clear up the confusion between *uti possidetis juris* and the OAU/AU principle on the respect of existing boundaries upon which the 1987 Agreement between the Parties appears to be based.

(Signed) Abdulqawi A. YUSUF.

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