CR 93/20

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 1993

Public sitting

held on Tuesday 22 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

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

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le mardi 22 juin 1993, à 10 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, président

en l'affaire Différend territorial
(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President	Sir Robert Jennings
Vice-President	Oda
Judges	Ago
	Schwebel
	Bedjaoui
	Ni
	Evensen
	Tarassov
	Guillaume
	Shahabuddeen
	Aguilar Mawdsley
	Weeramantry
	Ranjeva
	Ajibola
	Herczegh
Judges *ad hoc*	Sette-Camara
	Abi-Saab
Registrar	Valencia-Ospina

Présents :

Sir Robert Jennings, Président
M. Oda, Vice-Président
MM. Ago
Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Ajibola
Herczegh, juges

MM. Sette-Camara
Abi-Saab, juges *ad hoc*

M. Valencia-Ospina, Greffier

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The PRESIDENT: Mr. Bowett.

Mr. BOWETT: Thank you, Sir.

Mr. President, Members of the Court, yesterday I examined Chad's hypothesis that France acquired title by 1919 on the basis of an effective peaceful occupation and I showed that on the facts that was not tenable. Now today, I turn to the only other possible alternative, "Title by Conquest".

(b) Title by Conquest

Chad does not assert that title was claimed by French conquest, nor did France ever make such a claim. So, from that point of view any discussion of this hypothesis may appear redundant.

One sees, immediately, why France chose not to rely on conquest. Such a hypothesis faced problems both under the traditional law and under the new law introduced in 1919 under the Covenant of the League of Nations.

Under international law a belligerent occupation did not confer title. The widely-dispersed meagre French presence would not have constituted a sufficient belligerent occupation, but, in any event, no sovereign title could be acquired by belligerent occupation. The acquisition of sovereignty could come about in only one of two ways. *Either*, through a cession of territory in a treaty of peace; or by *debellatio* — the end of hostilities brought about by the complete subjugation of the enemy — followed by formal annexation. Indeed, in the case of attempted acquisition of only part of the territory of a State, partial annexation led to acquisition of title only when expressly consented to by the defeated State.

Now it is not in dispute that, in the present case, neither happened. No treaty of peace was ever concluded, and no formal annexation occurred.

The question arises why France, having pursued a military campaign for over 20 years to subjugate the peoples of this area, and to claim sovereignty over their lands, chose not to follow the traditional methods of acquiring sovereignty, following a military victory.

We can only speculate as to the reasons but they may have been two. First, "annexation" following *debellatio* implied a pre-existing legal title — a title that was being displaced by the annexation, so that annexation proclaimed a new, but derivative title. Now, that is exactly what

France wished to avoid. For that would involve accepting the notion that a prior title had existed — whether in the local tribes, the Senoussi and the Ottoman Empire, or, after the Treaty of Ouchy, in Italy as successor to the Ottoman Empire. Second, once France had accepted the obligations of the League Covenant, it would be impossible for France to openly assert a title founded on conquest.

Thus, France had good reasons for avoiding any claim to title by conquest.

But — and this is an important qualification — a State cannot avoid certain binding rules, applicable in one context, by unilaterally qualifying the situation as belonging to a quite different context. In short, if the situation was truly one of conquest, it was not open to France to avoid the rules relating to conquest, simply by a unilateral characterization of the situation as one of a title and a boundary recognized by treaty. That is the characterization the Court must make. And if the Court finds no treaty boundary existed, and rejects *terra nullius*, we are inevitably forced to consider the legality of the only possible alternative basis for the French claim: that is, title by conquest.

Now let us apply the traditional requirements of title by conquest.

(i) The traditional requirements of title by conquest

It follows from my earlier discussion of the facts that France could not meet these requirements. Complete subjugation did *not* occur, for periodic hostilities continued until the 1930s; the records are full of references to these hostilities. I would invite the Court to examine the Exhibits produced with Libya's Reply, Volume 3, and especially Exhibits 7.3, 7.4 and 7.5. France never assumed the full control of the territory, or the exercise of powers of government over the territory and its people, for *debellatio* to occur. And certainly no formal act of annexation ever took place. So, even by reference to the traditional requirements France could not have acquired title by conquest.

(ii) The new limitation on conquest introduced by the Covenant to the League of Nations, 1919 and the Pact of Paris 1928

That these treaty obligations were binding on France from 1919 onwards, to the benefit of Italy, and arguably of the Senoussi, cannot be disputed. The obligations could not be avoided by simply pretending that, by 1919, France had already acquired title to the territory, and therefore despite its armed invasion no question of any breach of obligation towards either Italy or the Senoussi could arise.

Even if we place the most favourable construction on the French position, it would have to be conceded that France was aware that the matter of title was in dispute. The long series of negotiations between France and Italy, begun in June 1919 (see ML, para. 5.249) and continuing for the next 15 years, surely demonstrated that Italy claimed these territories. Whether or not France accepted the Italian claims, the existence of these claims precluded France from arguing that the obligation of Article X of the League Covenant did not apply because the territory belonged to France. That could not be assumed. That was clearly in dispute. And therefore France could not escape the prohibition of Article X by pretending that its own title was beyond dispute.

The conclusion must be that, given these obligations, France could not claim title by conquest. True, it did not do so; nor does Chad now claim on this basis. But what is important is to recognize that the obligations cannot be circumvented by relying on a theory of occupation. If the occupation was by force, and it occurred after 1919, it was equally prohibited however France, or now Chad, chose to describe it. Conquest or occupation makes no difference: if it was carried out by military force, it was illegal, and no lawful title could arise from it.

3. Chad's argument of "consolidation" of its title: the myth of acquiescence in the 1899-1919 "boundary"

In Chad's Memorial we find a whole Chapter — Chapter V to be exact — devoted to the theme that the 1899-1919 boundary was "consolidated" by the recognition of that line, or acquiescence in that line as a boundary, by other interested States during the period 1919-1955.

Chad's reliance on "consolidation" is rather telling. It is as if Chad accepts that its title to the territory, and the notion of an agreed boundary, is flawed: and Chad seeks to remedy those flaws by

postulating a general recognition of, or acquiescence in, its title and that specific boundary.

One thing at least is clear. If such a theory is to be advanced by Chad, then Chad must prove *knowledge* on the part of those said to have recognized or acquiesced in both title and boundary. For consolidation rests on what the Court describes in the *Anglo-Norwegian Fisheries* case as "the notoriety of the facts, the general toleration of the international community ..." (*I.C.J. Reports 1951,* p. 139). In short, consolidation, which is a form of consent, express, or implied, presumes knowledge of what was being consented to.

Now, as I shall presently show, there never was such consent, recognition or acquiescence: not by Italy, not by the Senoussi, not by Great Britain, not by the United Nations, and not by Libya. That can be shown as a fact.

Let us look at the various "actors" in turn, to see what their reactions really were.

(a) Italy

Italy protested vigorously against the 1919 Anglo-French Convention and the new line it proposed to substitute for the 1899 line. You cannot deduce from Italy's protests against the 1919 line an acceptance of the strict south-east line, the 1899 line, *as a boundary*. For Italy protested both against the change in the location of the line *and* the change in the status of the line. Italy was prepared to accept that the 1899 Convention had established a limit to any future French claims, but Italy had never recognized that line *as a boundary* (look, for example, at the Italian protest of 14 May 1930; MC III, Ann. 125). Indeed, Chad does not argue that Italy did accept the 1899 line as a boundary. Chad's theory of Italy's "acquiescence" relies on two pieces of evidence. The first is the abortive 1935 Laval-Mussolini Treaty, in which Chad purports to find an Italian recognition of the 1899-1919 line; and the second is the Jef-Jef incident in 1938.

(i) The 1935 Treaty

Now, as to the 1935 Treaty, since this has been covered in detail by Professor Condorelli, I need only repeat that *nothing* in the Italian position ever conceded *either* that France was sovereign over the borderlands, or that the boundary was clearly established on the 1899-1919 line, or that the

1935 Treaty contemplated a cession to Italy of French territory. Quite the reverse in fact.

And there is a curious aspect to this particular argument by Chad, which I must draw to the attention of the Court. The treaty was abortive, and Chad would be the first to deny that Libya had acquired any rights under the treaty. *A fortiori*, Libya could not acquire rights by virtue of the negotiations. Why, therefore, does Chad assume that Libya has acquired obligations by virtue of the negotiations? For that is what Chad is really arguing. The argument is essentially that, in the negotiations, Italy recognized French title (and the specific 1899-1919 boundary); and that Libya succeeded to Italy; and that Libya is therefore bound.

But, absent an estoppel, how could abortive negotiations create an obligation binding on a successor State? One can see that Italy's own position might be prejudiced by what Italy said during the negotiations. It is as if the two parties actually bargaining create rights *in personam*, as they might do in any negotiations for any kind of treaty.

But what binds a successor State is an actual boundary treaty, creating rights *in rem*. And if no treaty emerges, there is no reason to bind a successor State to a mere bargaining position, any more than one would bind a successor State to some form of political, or personal treaty, or to a negotiating position adopted for that purpose.

The relevance of the 1935 Treaty is not that it created rights or obligations, but rather that it evidences the recognition by both Parties that no previous boundary existed, and that Italian claims to the territory north of the 1935 line should be preferred.

(ii) The Jef-Jef incident

This, too, has been dealt with exhaustively by Professor Condorelli. I need only stress that Italy did *not* expressly recognize the 1899-1919 boundary. All it recognized was that the particular well lay in the zone which was to become Italian under the terms of the 1935 Agreement.

It really is rather extraordinary that Chad should try to build out of this one incident a "recognition" of the 1899-1919 line. You have to look at a State's conduct as a whole. Given Italy's protests against the 1919 line, given Italy's claims communicated to France in negotiations, it verges on the absurd to distort this one minor incident so as to imply acquiescence in the 1899-1919

boundary.

(b) The United Nations

Now let me deal with the United Nations. As regards Chad's thesis that a general recognition of the 1899-1919 boundary emerged from the discussions in the United Nations, in the years 1948 to 1952, this, too has been thoroughly examined by Sir Ian Sinclair. It is as perverse a reading of the record as can be imagined. It was precisely this southern boundary about which the United Nations was not clear, and not satisfied: and hence the call for negotiations between France and Libya, after independence.

(c) Libya's own conduct

Now as to Libya's own conduct, Chad relies on Libya's own conduct, post-independence, to show a Libyan recognition of the 1899-1919 boundary. But it is here that the requirement of knowledge is crucial. Libya could not acquiesce in legal rights about which Libya knew virtually nothing. And France quite deliberately avoided any discussion with Libya of the actual legal basis upon which a treaty-boundary might be established. Libya was shown no treaty texts, no maps, no records — nothing!

So, even if the Aouzou incident of 1955 supported Chad's interpretation that Libya then accepted that Aouzou lay in French territory — which, as Professor Cahier has shown, it did not — *without knowledge*, Libya could not be bound by any such statement.

(d) The attitudes of the Senoussi

It will be noted that Chad nowhere refers to any recognition of, or acquiescence in, French title — or to this particular boundary — by the indigenous Senoussi tribes. Their attitudes are apparently irrelevant.

If we were faced with a critical date of 1899, or even 1919, that might be acceptable. The right of self-determination was at that time embryonic — a precept of political good sense rather than a legal principle. But here the critical date is 1951, and, what is more, to provide consolidation of the French title Chad is quite prepared to look at events in 1955, and even 1960, the year of

Chad's independence.

Now by 1960 the right of self-determination was well-established and one would have thought that Chad might have sought to show that, as part of the "consolidation" of French title, there was acquiescence in that title by the indigenous peoples.

The total absence of any such evidence speaks for itself. Perhaps the most important element in any such consolidation — the consent of the people — is totally lacking.

Mr. President, that concludes what I have to say. I would be grateful if you would call on Professor Dolzer.

The PRESIDENT: Thank you very much, Professor Bowett. Mr. Dolzer.

Mr. DOLZER: As I take the floor for the first time I permit myself to say that I am honoured and that I am grateful that this task was entrusted to me.

Mr. President, Members of the Court, at the heart of the Libyan case lies the fact that the Ottoman Empire and the Senoussi peoples held title to the borderlands in 1912. I shall now discuss the factual and legal basis of this title.

The seven key events during this period, to which I shall refer, are the following:

First, the sporadic and ineffectual French military raids into the borderlands in the period 1906-1909;

Second, the Ottoman move into the borderlands starting in 1908 and ending in 1913;

Third, the *modus vivendi* reached between 1908 and 1913 under which French military forces remained south of a *de facto* line running roughly along 15° N latitude;

Fourth, preparations made for Ottoman-French negotiations to delimit the southern boundary of Tripolitania in 1911-1912;

Fifth, the French advance into the borderlands after the Ottoman withdrawal pursuant to the Treaty of Ouchy, with the objective of defeating the Senoussi and establishing a neutralized military northern front, but not to occupy and administer the region;

Sixth, the fierce resistance of the Senoussi peoples to the French invasion;

And finally, the official approach of Mr. Bonnel de Mezières, the French representative to the Head of the Senoussi, seeking to reach a French-Senoussi *modus vivendi*.

I should like to turn, first, to what was happening on the ground during the period after the signing of the 1899 Declaration up until the end of 1912, when the Treaty of Ouchy between Italy and the Ottoman Empire was signed.

The map now on the screen (Judge's folder, No. 18), discussed earlier by Mr. Sohier, shows the initial installation of direct Ottoman administration in the regions south of Tripoli. These first Ottoman posts were established at major oases along the trade routes, which the *Wali* of Tripoli controlled and in the interior of Tripolitania, following the Porte's replacement in 1835 of the Karamanli in Tripoli by a *Wali* sent from Istanbul.

Subsequently, the Ottomans began to move further southward:

The first incident of note concerned Djanet, in 1906. As can now be seen on the map (Map No. 46), this oasis is just south-west of Ghat, where an Ottoman garrison had been established in 1875. Word that the Ottomans had established a post at Djanet caused a great stir in Paris. For a time the occupation of the oasis was disputed between French forces and the Ottomans, creating at this point a potentially dangerous situation. As a result, a formal status quo agreement was reached in 1906 between France and the Ottoman Empire. In 1907, as troubles continued, the Governor-General of Algeria issued an order forbidding French troops to venture east of 6° E longitude. This line, adjusted from east of Paris to east of Greenwich, is now shown on the screen.

Additional Ottoman posts were established at Segeden, in 1906, and at Yat, in 1910.

Meanwhile, the French moves into Kaouar, to the west of the borderlands, caused the Porte, through his representative in Tripoli, to decide urgently to install posts throughout the borderlands. Following a French raid on Aïn Galakka in 1907, the *Derde*, or leader, of Toubou in Tibesti, visited the *Mudir* of Mourzouk asking for Ottoman assistance in the face of the French threat. As a result, the *Derde* was then appointed by the *Mudir* of Mourzouk as *Kaimakam*, or District Officer in charge of administration of this Ottoman district of Tibesti. An Ottoman administrative post was established at Bardaï in 1908. The Ottoman Empire at the time claimed that a *Kaimakam* of Tibesti

had first been appointed over 25 years ago, a claim disputed by the French. Two of the relevant French documents discussing this disputed claim are summarized in Volume 2 of Libya's Reply (Supplementary Annex Nos. 9.9 and 9.10, and annexed in Volume 3).

Next, a blockhouse was constructed in Bardaï and a substantial Ottoman garrison was installed. Two other Ottoman posts between Mourzouk and Bardaï were established — at Tedjerré and at Al Qatrum in 1909. Another blockhouse had been built near Zouar in Tibesti by 1911.

Now, it is important to emphasize that these actions taken by the Ottoman Empire were entirely different from the military actions of the French when they invaded the borderlands after 1912. The Porte was acting to defend the peoples and regions which he regarded — and publicly proclaimed — to be under his sovereignty. The Senoussi peoples of the region requested these Ottoman garrisons to occupy key posts in their lands. There was a pragmatic co-operation between the Senoussis and the Ottomans; their common objective was to preserve peace, to organize economic life and to defend their land whenever necessary.

Against this background, the Ottoman Empire continued to move its garrisons and administrative authority into the borderlands, now progressing generally south-eastward from Bardaï into Borkou and Ennedi. Ennedi became important to protect, for the French had defeated the Sultan of Oudaï, just to the south, and seized its capital Abéché in 1909. Ounianga, which the Senoussi firmly controlled, however, was not then threatened by the French advance, so no Ottoman post needed to be established there.

In 1909 the Ottomans began to construct a post at Yen near Aïn Galakka, which had become the bastion of the Senoussi forces after the fall of Bir Alali in 1902. A substantial force was subsequently garrisoned there. Then, in 1912, Ottoman posts were established at Faya, in Borkou, and at Baki, near Fada, in Ennedi — and finally at Oum Chalouba, just south of 16° N latitude. All these posts fell under the civil authority of the *Kaimakam* at Aïn Galakka.

Now, essentially, this was not a military operation. It was the installation of Ottoman civil authority in the area, supported by a military and gendarmerie contingent. There is no record of Ottoman forces, in large part, by the way, composed of gendarmes from Fezzan, there is no record

of them being engaged in any fighting — certainly not with the Senoussi peoples who welcomed them to the region. Nor with the French either, who had strict instructions not to advance into the borderlands. For the issue of sovereignty was to be settled by diplomatic means not by force, on the table, not on the battlefield. These were the explicit instructions given by the French Government to the French commanders in the field.

I turn next to the movement of French forces into the regions to the north and east of Lake Chad, but still south of the borderlands up through 1912 — leaving now aside French activities in Kaouar, which I have already touched upon. As mentioned earlier, the three-pronged French advance on Lake Chad culminated in 1900 when these forces converged on the shores of Lake Chad. French forces then embarked on three separate wars (Map No. 47).

Now, what did these French forces consist of? They were composed of a small number of French commissioned and non-commissioned officers; the rest were conscripted West Africans — I submit, hardly a force intended to effect a peaceful civil occupation of the territory.

In 1901, the French attacked the Senoussi *zawiya* at Bir Alali, whose location can be seen on the screen. It had been turned into a fortified *zawiya*, a bastion of the indigenous peoples' fight against the French assault. The first French attack, in 1901, when the French tried to take the *zawiya* by surprise, ended in disaster for the French. It was a clear defeat for the French forces, who had to withdraw, driven off by the combined forces of the Tuareg and Awlad Sulaiman tribes.

However, the French returned next year in 1902 with a much larger force and then overcame the fierce resistance of these Senoussi tribes. They destroyed now the *zawiya* including its mosque and its library.

Earlier, another war conducted by the French involved the defeat of Rabbah at the Battle of Kousseri in 1900. This opened the way to the *third* war launched against the Sultanate of Ouadaï, which later began in earnest in 1906. Abéché, the capital, was occupied by French forces in June 1909, and a new Sultan was now proclaimed by the French. However, sporadic fighting continued until 1912, when the French military took over.

Up to this point, French military activities had occurred well south of 15° N latitude: Abéché,

for example, lies to the south of 14° N latitude. However, there had been several forays north of there: Faya and Oum Chalouba in 1906; Aïn Galakka in 1907; Oum Chalouba again in 1909. But, one has to note that these incursions were harshly criticized at the senior French military level as being pointless, for they achieved no practical results (RL, Exhibit 9.5).

Mr. President, Chad's written pleadings describe the French invasion of the borderlands — the region north of course of 15° N latitude — as if it really began after 1900 when French forces moved into the regions north and east of Lake Chad and as if it was thereafter a continuous, evolving process. Chad treats the French forays north of 15° N latitude in 1906, 1907 and 1909 as if they represented the beginnings of French occupation of the borderlands and as a part of this ongoing continuous process. This is a total misrepresentation of what really took place. For from the time of the incidents at Djanet in 1906, which led to the appointment of a *Kaimakam* of Tibesti in Bardaï in 1908 and the construction of a blockhouse there and another further south near Zouar — from that time until the Treaty of Ouchy, — the French advance into the borderlands was halted on orders of the French Government in Paris. In consequence, the French had to find a way to adapt to this new situation. And that is precisely what happened.

Just as at Djanet, to the west of the borderlands, where a status quo agreement was reached in 1906 pending diplomatic settlement, so in the borderlands a *modus vivendi* was reached between France and the Ottoman Empire. From 1909, after the French had occupied Abéché in Ouadaï, until after the Treaty of Ouchy and in fact until mid-1913, the situation on the ground in the borderlands remained as now shown on the screen. French forces occupied posts at a series of oases stretching from Ziguei (near Bir Alali) on the west, to Ati in the centre, and on to Abéché and Arada, on the east. The most northerly posts were Ziguei, south of 15° N latitude, and Arada, almost exactly on this line of latitude. There they remained until instructions from Paris permitted them to move northward into the borderlands. But this move did not begin until after the start of 1913.

Thus, a *de facto* line, which is depicted now in general fashion on the map on the screen (Map No. 48), came into being. It was not a specific line such as the line of 6° E longitude which French forces in the region of Djanet were ordered not to go beyond. But it was observed by the French.

This *modus vivendi* or *arrangement passager*, which is so specifically referred to in French documents, is ignored in Chad's pleadings. It is camouflaged by Chad's presentation of the facts as if the French invasion of the borderlands was a continuous event following the destruction of the *zawiya* at Bir Alali. In reality it was not. Until mid-1913, French forces remained below 15° N latitude, except for those few ineffectual forays to the north.

I should like to focus now on the purpose and nature of the Ottoman presence in the borderlands after 1908.

The Ottoman move into the borderlands was the result of a deliberate policy of the Ottoman Empire to install direct control in areas over which the Caliph had claimed sovereignty in 1890 in order to halt the French military challenge;

This Ottoman move was carried out on behalf of the Caliph essentially by the *Wali* of Tripoli through the *Mudir* of Mourzouk;

The Ottoman move into the borderlands was continuous and quite rapidly achieved, given the nature of the terrain. It began with Bardaï in the north-west of the borderlands in 1908 and ended, in the south-east of the borderlands, with Baki to the west of Fada and with Oum Chalouba;

The entire Ottoman operation was under the civil control of *Kaimakams* appointed by the Caliph's representatives. The main posts, such as those at Bardaï and Aïn Galakka, were substantially manned, the military component being made up largely of Albanian troops and gendarmes from Fezzan. Several of these posts were garrisoned by as many as one hundred or more persons and the military contingent was equipped with canons. Modern forts and other defensive installations were constructed there.

The Ottomans, of course, joined forces, and worked in co-operation with the Senoussi tribes, whose strength at places such as Aïn Galakka was formidable.

The extension of Ottoman administration into the borderlands, of course, had been anticipated by the French authorities. As early as 1907, M. Gambon, the French Ambassador to London, had warned that, in order to prevent such a move by the Ottomans, there was an urgent need for France to at least send a mission into Tibesti and Borkou. But his proposal was not accepted, and the

events he feared then rapidly took place.

Mr. President, France attempted to describe the Ottoman presence in the borderlands as ephemeral or platonic. The evidence shows that this argument was self-serving and inaccurate. It was a substantial presence and it was continuous between 1908 and the end of 1912, and it was in direct implementation of a claim of sovereignty. It also was carried on at the invitation of and in conjunction with the Senoussi tribes and the Senoussi Order.

Now, of course, the Ottomans were not in the borderlands to fight. The reason was simple, they had nobody to fight against. The mere presence in the borderlands of these Ottoman posts brought to a halt the French advance on the clear instructions of the French Government. These instructions were criticized in the French press at the time and, indeed, they were a source of frustration for the military commanders in the field, but they were obeyed and that is what counts. From the French Minister of Colonies Messimy right up to the President of France himself it had been determined and decreed that the issue of the southern boundary of Tripolitania could be settled only at the conference table. All of these events are fully discussed in Libya's written pleadings (see, in particular, Part IV of the ML and Supp. Anns. 7-11 in Vol. 2 of the RL).

Together with the Senoussi and the Ottoman civil and military forces, the Ottomans completely controlled the borderlands between 1908 and 1913. All the essential components of governmental administration were there, whether measured by Islamic standards or by those of the Western European Powers. Order was maintained in the borderlands with the exception of military actions aimed at the threatening French forces, the so-called *rezzous*, although even these diminished with the arrival of the Ottomans, who attempted to co-operate with the French. The correspondence between Colonel Largeau and the Ottoman commander at Aïn Galakka discussed in the pleadings fully supports this conclusion.

There is not only indisputable evidence of the fact that the Ottomans had established their authority and control in the borderlands, but also that the French were aware of this fact. The French Minister of Colonies stated in a letter of 10 October 1911 that if reports which had reached him of the construction of a blockhouse near Zouar in Tibesti were true, this would, he said, be "une

manifestation indiscutable de l'occupation effective ottomane dans ces régions". It would be an indisputable manifestation of effective Ottoman occupation. Now, in fact, not only was there a blockhouse built at Zouar on the southern edge of the Tibesti massif, but three years earlier a very impressive blockhouse had been built in central Tibesti in Bardaï. This post was headed by a civilian *Kaimakam* and was soon occupied by a substantial garrison of over 100 gendarmes, soldiers and civilian officials.

It is incontestable that an *arrangement passager* or *modus vivendi* came into being between 1908 and 1913 along a *de facto* line, previously shown on the screen, that is generally along the line of 15° N latitude. I say these facts are incontestable because they are so fully established by the evidence. Now I have to add whether or not Chad contests them is not known, for to date, Chad's pleadings have simply ignored them. In any event, these status quo or *modus vivendi* agreements themselves attest to the effect produced by the Ottoman decision to install direct governmental authority in these regions.

It is now appropriate to turn to the preparations being made by the French Government and the Caliph to negotiate the delimitation of Tripolitania's southern boundary. Mr. President, I would suggest that this was one of the more telling events in the entire history of this territorial dispute. Reluctantly, the Caliph had gone ahead to delimit, in 1910, the Tripolitanian boundary with Tunisia, even though he did not recognize the French protectorate there. Now, a year later, France pressed to have the rest of the Tripolitanian boundary settled.

The reason for the French impatience and their desire to reach an arrangement there was, of course, that the French grew increasingly concerned as the Ottoman move into the borderlands continued. The French Government was convinced that the Caliph was stalling in setting a date in order to gain time to complete the Ottoman move into the borderlands and thus gain a tactical advantage in the negotiations. So the French Government took the public position that in the negotiations the French would simply refuse to consider Ottoman moves on the ground in the borderlands as a factor in settling the question.

Now as Libya has shown last week, the French Government at no time injected the element of

effectivités into the determination and negotiation of this boundary. As just mentioned, the French rejected *effectivités* as a factor in 1912 in respect to Ottoman moves that had taken place; later the French Government were never to raise the issue of French *effectivités* during the negotiations with Italy leading to the 1935 Treaty; and in the negotiations that led to the 1955 Treaty, the French Government insisted on a formula in Article 3 of the Treaty that relied only on international agreements *en vigeur* in 1951 and ruled out *effectivités*. This was in part due to France's fear of Libya's claims based on the presence of the Senoussi, on the strength at the time of the Ottomans and later on Italian occupation.

Returning now to the situation in 1911, the French pressed the Porte to agreed to a delimitation conference. The Porte ultimately agreed, and the conference was scheduled to take place in Tripoli at the end of 1911. Of course, it never took place due to other events. We do not know what role legal considerations would have played in such negotiations. What we do know is that the *vilayet* of Tripoli had privately proposed to Istanbul a substantial reduction in the hinterland claim as it had been set out in 1890.

This proposal appears now on the screen (Map No. 3). It is evident that this proposal reflected the events that had occurred since 1890. As the Court will now see, it was, in fact, not very different from Libya's claim in this case before this Court.

It is not without interest to pause here for a moment and to consider what legally relevant factors would have been discussed during the negotiations between the French and the Ottomans. Of course, Italy inherited these rights and claims that the Ottomans would have brought to the conference table. The French would presumably have pointed to the Anglo-French Declaration of 1899, knowing well that it was not opposable to the Ottomans. The Caliph's representatives would have been fully aware of that fact and also that, contrary to France's contention at the time, there had been no map attached to that Declaration. The Ottomans would have pointed to their claim of 1890, to the proposed reduction of their claim in 1911, and to the effective Ottoman presence in the borderlands, side-by-side with the Senoussi peoples, who welcomed them.

Now, on the whole the French had obviously become quite dissatisfied with the status quo.

They now sought to find a solution to the unresolved territorial dispute not only with the Ottomans but also with the Senoussi. In fact, the French Government recognized the need to attempt to negotiate not only with the Ottomans, but also with the Senoussi as early as 1911, even before invading the borderlands militarily. For the Minister of Colonies commissioned a senior French official, M. Bonnel de Mezières, to get in contact with the Senoussi Order and try to work out some sort of *modus vivendi*. Today, this person might be called something like a roving ambassador, and he had in hand a specific mandate from the French Minister of Colonies, a document in evidence in this case (ML, French Archives Ann., p. 250).

This interesting, and at times rather comic, episode is described and documented in Libya's pleadings (LM, Part IV; LR, Vol. 2, Supp. Ann. 10). It came to light that M. Bonnel de Mezières, in carrying out his mission, had undertaken to take up formally the question of the southern boundary of Tripolitania with the Head of the Senoussi, or at least that was what the latter believed, and with good reason, it must be said. The French emissary appeared to have agreed that on its eastern side the southern boundary of Tripolitania should be drawn at the latitude of Arada, which lies exactly on the line of 15° N latitude.

Now, the Head of the Senoussi appeared ready to agree to this part of the boundary, but in his formal reply to the proposal he set out the Senoussi demands, which included a demand that the French withdraw south of Bir Alali and, in addition, return the 700 books removed from its *zawiya* destroyed by the French in 1912. The western point of the line seemingly suggested by the Senoussi was Kousseri, to the south-east of Lake Chad on the Chari River where the French defeat of Rabbah had taken place in April 1900. Such a line between Arada (15° N) and Kousseri appears on the map on the screen. As is now being shown it is considerably to the south of the 1911 proposal of the vilayet of Tripoli, and quite different in that it would have included Kanem as part of the Tripolitanian hinterland, which the 1911 proposal would have excluded. The map also shows this line in comparison to the 1908-1912 *de facto* line separating the Ottomans and the French. It would have fallen well south of that line, as well.

Now, when word got out about this exchange of proposals, it caused a great stir in French

governmental circles in Paris and in the field. It came as a special shock to Colonel Largeau and M. Merlin, Governor-General of the AEF. The proposal of this French emissary concerning Arada was quickly denounced by the French Government on the grounds that he had exceeded his authority.

I have reminded the Court of this episode because of the light which it throws on the position that France took later, and Chad takes today. Just as the French agreed in 1911 to negotiate with the Ottoman Empire the southern boundary of Tripolitania, so in 1911 France approached the Head of the Senoussi to try to work out this kind of a *modus vivendi*. This was tantamount to recognition of the status of the Senoussi and the Senoussi peoples as holding claim to title to the territories which they inhabited.

Mr. President, while I was rapidly going over the various events of significance that transpired up until 1919, their relevance in the light of the legal principles set out earlier by Professor Crawford may have been obvious.

The central question is whether the Ottoman Empire succeeded in establishing effective governmental authority in the borderlands during the period from the start of the Ottoman move to Bardaï in 1908 and the final Ottoman withdrawal from Baku and Oum Chalouba around March 1913. The answer is clearly yes, for many reasons:

— The French recognized this fact, as the evidence discussed above shows;

— The coming into being of the *modus vivendi* was an acknowledgment of the establishment of Ottoman authority in the borderlands;

— The Ottoman posts were spread throughout the borderlands where control was necessary, excluding only Ounianga, which was under firm Senoussi control;

— Ottoman authority was backed by the consent of the Senoussi peoples and the Senoussi Order and, hence, had behind it the entire forces of these peoples, which were considerable;

— The Ottoman installations in the borderlands were both civil and military, with the civil element in control and reporting back to the *Mudir* of Mourzouk and the *Wali* of Tripoli;

— Finally, all Senoussi peoples of the borderlands paid allegiance to the Caliph, and this was

expressly confirmed in many ways, as Mr. Maghur has brought out so clearly yesterday.

Thus, it is clear that the requirements for acquisition of title were fulfilled in the borderlands by the Ottoman Empire at the time. In fact, the intensity of the combined activities of the Ottomans and the Senoussi went well beyond what would have been necessary to ground a claim to title in these sparsely populated and desolate areas.

Compared to the subsequent French military invasion, evidence of effective exercise of governmental authority by the Ottoman Empire was manifest. The French military activities were not carried out with the intent to occupy the borderlands in any event *(animus occupandi)* on the part of the French. There was never any doubt as to the Ottoman intention to govern this region, and they had the support of the inhabitants — the Senoussi peoples. Thus, the Ottoman authority that was established was continuous and peaceful, unlike the French, who until the mid-1930s were engaged in fighting the Senoussi people living in the borderlands.

Finally, there was clearly no abandonment of title by the Ottomans and by the Senoussi peoples. In 1912, Italy inherited the Ottoman title under the Treaty of Ouchy. And the Senoussi peoples remained on their lands and continued their fight against the French military invasion.

I turn now to the developments after 1912. Professor Bowett has described the French military invasion of the borderlands starting in 1913. My purpose here is only to bring out the contrast between the nature of the Ottoman activities in the borderlands and those of the French, and thus also to underline the important differences between the French and the Ottoman activities. The following are the most striking differences and contrasts:

— The French invasion was purely military; its purpose was not to occupy the borderlands but to defeat the Senoussi, who the French saw as the source of all their difficulties in the borderlands but also in other parts of Africa;

— At no time before 1919 (and in fact not even by 1930) were French military forces in control of the borderlands; there was repeated armed conflict throughout the area;

— If French forces deployed in the borderlands were more numerous than the Ottoman forces who had left, it was only because the French were opposed by and had to fight against the Senoussi

peoples, while the establishment of direct Ottoman authority had been requested and accepted by these peoples and by the Senoussi leadership;

— The Senoussi peoples and the Senoussi Order leading them paid allegiance to the Caliph; they refused to enter into any deals with the French;

— In contrast to the Ottoman garrisons, all of them, by the way, Muslims, the French forces consisted of West Africans conscripted by the French and led by a small number of French officers. That was hardly an attempt to occupy the borderlands. Their mission was to destroy the centres of resistance so as to secure what the French always called the "Tchad utile", the regions lying south of the borderlands;

— The establishment of French posts was sparse and intermittent and it failed to include large parts of the northern borderlands including all of Tibesti. This is being demonstrated once again, now, on the screen by a map used earlier by Professor Bowett;

— Prior to 1919, Colonel Largeau and Governor-General Merlin proposed agreeing to allow the Senoussi to take over the French posts established at Gouro and at Ounianga Kebir, for they felt these posts could not be held; the French Government rejected the proposal in the light of prospective negotiations with the Italians.

Now, certainly nothing occurred prior to the end of 1919 that implied any abandonment of the rights of the Ottoman Empire. In its written pleadings, Chad, just like the French had done, claimed that the French routed the Senoussi, who withdrew to Koufra and, in effect, so the Chad and the French, abandoned the borderlands. But such a conclusion is wrong on many counts:

— The Senoussi Order moved its headquarters north again from Gouro to Koufra in 1902 after the destruction of Bir Alali and the death of the Great Senoussi. This was long before the French invasion of the borderlands in 1913. It was a strategic move by the Head of the Senoussi taken primarily for reasons of security but which, with the Italian invasion of Libya, permitted the Senoussi Order to bring to bear their leadership and direction of the tribes in the north opposing the Italian forces and of the tribes in the borderlands fighting the French;

— The resistance to the French invasion of the borderlands by the Senoussi was unremitting into

the early 1930s; the map which is No. 83 in your folders, already shown by Professor Bowett, depicts battles all over the borderlands during this period; this resistance continued to be guided and led by the Senoussi Order from Koufra;

— The French-Chadian thesis concerning the alleged abandonment of the borderlands by the Senoussi after 1902 fails to take account of another essential point: the inhabitants of the borderlands did not flee to the north with the arrival of the French forces; they remained on their lands and they fought the French advance; and it was the Senoussi and the Senoussi peoples who held title to these regions and bore allegiance to the Caliph. The territorial rights of the Senoussi peoples were, in turn, represented on the international level by the Caliph to whom they paid allegiance.

The first three of the boundary negotiations attempted — in 1911 with the Ottomans, the same year with the Senoussi, and in 1914 with Italy — failed to take place. The French Government finally did succeed in reaching a boundary settlement with Italy in 1935 — one certainly far more favourable to France than would have been achieved against the Ottoman Empire or the Senoussi in 1911. But that settlement did not result, as we have heard, in a conventional southern boundary of Libya due to the failure to exchange ratifications.

Thus, the titles held by the Senoussi peoples and the Ottoman Empire in 1912 remained intact. The Ottoman title was passed on to Italy. The title of the Senoussi peoples became represented at the international level by Italy. This title had been acknowledged by France when it attempted, but failed, to strike a deal with the Head of the Senoussi. Subsequently, both Italy and Great Britain were to enter into treaties with the Senoussi that implicitly recognized the title held by the Libyan peoples under their leadership.

Mr. President, Members of the Court, here, today, Libya's position is very much what the Ottoman position was on the eve of the scheduled 1911 negotiations with France when it represented at the international level the rights and titles of the indigenous Senoussi peoples. This was the position inherited by Italy in 1912 under the Treaty of Ouchy. And hence, it is not surprising at all that before this Court Libya's claim, as shown on the screen (Map No. 3), resembles so closely the

Ottoman position in 1911, reduced from 1819 as proposed by the *vilayet* of Tripoli.

This concludes my remarks, and I thank the President and the Members of the Court for their attention. If it is convenient, Mr. President, I would suggest that we now have the break and that you will later on call on Professor Condorelli.

The PRESIDENT: Thank you very much, Professor Dolzer. We will have our break now.

The Court adjourned from 11.15 to 11.30 a.m.

The PRESIDENT: Mr. Condorelli.

M. CONDORELLI :

1. Introduction

Merci Monsieur le Président. Monsieur le Président, M. Cahier et moi-même avons eu l'honneur de vous entretenir la semaine dernière sur toute une série d'événements relevant de la période coloniale. Ces plaidoiries précédentes s'inscrivaient dans le contexte de la démonstration que la frontière entre la Libye et le Tchad n'a jamais été délimitée jusqu'à aujourd'hui et que par conséquent votre Cour est appelée à établir ex novo la délimitation en question. Bien entendu, je ne vais pas revenir sur cette démonstration. Nous en sommes maintenant à un stade ultérieur de l'argumentation libyenne : la Libye est en train de vous présenter son point de vue quant aux principes et critères juridiques dont il devrait être fait application afin de parvenir à une solution juste et équitable du présent différend.

La tâche dont je vais m'acquitter aujourd'hui est, justement, celle de concourir à la reconnaissance, à la recherche des principes et critères juridiques à appliquer, en prenant spécialement en considération ceux qui se rattachent plus directement à l'"héritage colonial".

Qu'il me soit permis de préciser dès le départ un point. Je viens de parler de principes et

critères "juridiques" à utiliser afin de parvenir à une solution "équitable" du différend. Ces propos évoquent certes l'équité, mais je tiens à souligner encore à ce sujet ce que M. Bowett a éloquemment illustré, dans sa plaidoirie de vendredi : il n'est pas question de faire appel ici à l'équité afin de demander à votre Cour de résoudre le présent différend *ex aequo et bono*, étant donné que l'accord-cadre de 1989 envisage un règlement judiciaire *secundum jus*, et non pas une solution basée sur l'article 38, paragraphe 2, de votre Statut. Cependant, ce constat n'exclut nullement le recours à l'*aequitas infra legem*, qui au contraire est toujours approprié, comme votre Cour l'a dit et répété tant à propos des délimitations maritimes que des délimitations terrestres.

Monsieur le Président, je m'excuse d'insister sur une notion aussi élémentaire. Mais c'est que le Tchad s'obstine à nier à tout prix un concept qui devrait pourtant relever de l'évidence même, lorsqu'il prétend que l'équité n'aurait aucun rôle à jouer dans les différends territoriaux, comme celui qui vous est soumis (contre-mémoire du Tchad, p. 36, par. 1.52 s.) : soit dit en passant, voilà une attitude étonnante, qui fait fi de votre jurisprudence, et qui amène à remarquer combien la Partie tchadienne semble redouter l'équité !

Ceci étant précisé, je voudrais maintenant en venir à la première indication qui se dégage de la période coloniale quant aux principes et critères juridiques applicables.

2. Le caractère maximal des revendications française et italienne en tant que points de départ dans la négociation

Monsieur le Président, Messieurs les juges, au lendemain même du traité d'Ouchy et de Lausanne de 1912 la France, après avoir reconnu sans réserves l'établissement de la souveraineté italienne sur la Libye, s'est empressée dès 1913-1914 de se préparer aux futures négociations avec le gouvernement italien en vue de parvenir à la délimitation des territoires coloniaux respectifs. Depuis le début, le choix français est fait : le moment venu, la France va s'asseoir à la table de négociation en présentant à l'Italie la thèse que nous connaissons très bien — que vous connaissez parfaitement, Messieurs les juges, puisqu'il s'agit en substance, à quelque nuance près, de la même thèse que soutient aujourd'hui devant vous la Partie tchadienne : tous les territoires au sud-ouest de la ligne figurant dans la carte prétendument annexée à la déclaration franco-anglaise de 1899 appartiennent

à la France, puisque l'Italie aurait "adhéré" à cette déclaration.

Il n'est bien entendu pas question ici de revenir sur le caractère artificiel et spécieux de cette thèse : ceci nous l'avons déjà démontré. Ce qu'il importe maintenant de souligner est que la thèse en question avait été très évidemment élaborée en tant que position de départ en vue de futures négociations : une position de départ indiscutablement excellente à cause du *fumus boni juris* que lui donnait le fait de se baser sur des arguments déduits, plus ou moins correctement à vrai dire, de traités liant les diverses puissances européennes.

Mais qui dit "position de départ" dit "thèse maximale", que l'on jette d'entrée de jeu sur le tapis vert des pourparlers diplomatiques afin de fixer les bornes à l'intérieur desquelles on cherchera ensuite, par rapprochements graduels de positions de part et d'autre, la solution de compromis, le *quid pro quo*, l'arrangement transactionnel.

Il convient de rappeler encore, pour compléter le tableau, que la thèse française de 1914 devait par la suite, dans les années vingt, subir une retouche; une retouche qui allait la rendre — si je peux m'exprimer ainsi — encore plus "maximale" qu'avant : ceci arrivera lorsque la France finira par soutenir que la ligne de 1899 (ou plutôt la ligne figurant dans la carte non annexée à la déclaration de 1899) s'identifierait en fait et en droit avec celle, pourtant bien différente, établie par l'accord franco-britannique de 1919; et que cette dernière ligne (celle de 1919 donc) engageait l'Italie parce que celle-ci l'avait acceptée en 1902, c'est-à-dire quelque 17 ans avant qu'elle ne fût tracée ! En somme, la thèse en question avait désormais perdu toute vraisemblance, mais ce n'était pas bien grave puisqu'il s'agissait encore une fois de la position diplomatique de départ en vue d'une future négociation.

Messieurs les juges, l'histoire des deux décennies de négociation entre la France et l'Italie prouve de la façon la plus efficace le bien-fondé de cette analyse. Pendant vingt ans, la France n'a pas cessé de faire état de sa disponibilité à la recherche d'une solution de compromis, en faisant des propositions diverses qui, toutes, je dis bien toutes, s'écartaient dans des mesures variables de la position de départ. Pour confirmer ce point, il suffit de rappeler ici comment le Quai d'Orsay évalua la délimitation résultant du traité Mussolini-Laval de 1935 (qui comportait notoirement la

reconnaissance comme Italiens de 114 000 km^2 de territoire par rapport à la position française de départ). La note interne du Quai d'Orsay du 24 janvier 1935 (mémoire du Tchad, p. 348, par. 10; mémoire de la Libye, p. 323, par. 5.322), admet en toutes lettres ceci :

> "La frontière qui séparera désormais la Libye de l'AOF et de l'AEF à l'est de Toummo reste très en-deçà des demandes présentées par l'Italie et même de certaines offres faites par la France depuis 1919."

Messieurs les juges, vous avez bien entendu : c'est le Quai d'Orsay qui jubile parce que la ligne de 1935, je le répète, "reste très en-deçà... de certaines offres faites par la France" ! La diplomatie française chante victoire, en constatant que l'Italie s'est contentée de très peu : elle s'est contentée de bien moins de ce que la France avait été prête à lui donner. Et le 25 mars 1935 le ministre français des affaires étrangères, Laval, adoptera devant le Sénat français le même ton triomphaliste, lorsqu'il aura l'outrecuidance d'exprimer ses regrets parce qu'en concluant le traité de Rome la France n'avait pas satisfait davantage les requêtes territoriales italiennes (mémoire de la Libye, p. 330) !

Ces faits démontrent, au-delà de tout doute possible, que la thèse française, que le Tchad reprend aujourd'hui à son compte, a toujours été une thèse maximale de départ pour la négociation. Je dois maintenant ajouter qu'il en a été bien entendu de même du côté italien. L'Italie aussi avait des thèses maximales, qui reprenaient les revendications ottomanes dans leur version extrême. Mais ce que la diplomatie italienne appela le *Programma massimo* (le programme maximum) n'était que la position de départ choisie afin d'entamer la négociation. Ensuite, en cours de route, des prétentions beaucoup plus mesurées, beaucoup plus réalistes pourraient être émises, et le furent effectivement : ce fut le cas, par exemple, du *Programma medio* (programme médium) du *Programma minimo* (du programme minimum), dont le professeur Bowett parlera tout à l'heure. Je voudrais faire remarquer ici, en passant, que la demande que la Libye présente à votre Cour se rapproche beaucoup de la revendication minimale italienne, et non pas du *Programme massimo* italien; alors que la prétention tchadienne est identique à ce que vous me permettrez d'appeler le *Programma massimo* de la France.

Messieurs les juges, en énonçant d'entrée de jeu des prétentions maximales et en affrontant la

discussion à partir de là, la France et l'Italie ont fait ce qu'imposent l'art de la négociation et le droit international. Tout négociateur sait bien, en effet, que l'issue d'une vraie, d'une bonne négociation ne saurait jamais être représentée par l'accueil intégral de la requête d'une partie et le rejet tout aussi intégral de la prétention de l'autre : en l'espèce, la France et l'Italie n'ont pas fait exception à cette règle, comme le montre le fait qu'elles se sont toujours montrées disponibles à envisager des "concessions" à la partie adverse.

Ce faisant, la France et l'Italie respectaient un principe bien établi de droit international. Celui d'après lequel, dans tous les cas où une négociation est nécessaire pour parvenir au règlement d'un différend, les parties sont soumises à une véritable obligation de "se comporter de telle manière que la négociation ait un sens, ce qui n'est pas le cas lorsque l'une d'elles insiste sur sa propre position sans envisager aucune modification". C'est votre Cour qui s'est exprimée ainsi dans l'affaire du *Plateau continental de la mer du Nord*, dans l'arrêt du 20 février 1969, par. 85, *a)*.

Naturellement, cette obligation qui, à l'époque, pesait sur la France et l'Italie, pèse aujourd'hui, depuis leur indépendance, sur le Tchad et sur la Libye. Les Parties n'ayant pas pu régler par voie d'accord leur différend, et ayant accepté d'en remettre la solution à votre Cour, c'est à vous qu'il appartient maintenant de trouver un règlement juste et équitable qui prenne en considération tous les éléments juridiques pertinents. Parmi lesquels il faut compter l'obligation des Parties de ne pas prétendre que soit conforme à la justice le règlement d'un *différend* territorial comportant l'acceptation intégrale de la position que l'une des Parties avait elle-même clairement définie comme un simple point de départ en vue de négociations futures.

Monsieur le Président, Messieurs les juges, votre Cour cite volontiers dans ses arrêts un *obiter dictum* célèbre qui figure dans une ordonnance du 19 août 1929 de sa devancière, la Cour permanente de Justice internationale : "le règlement judiciaire des conflits internationaux, en vue duquel la Cour est instituée, n'est qu'un succédané au règlement direct et amiable de ces conflits entre les Parties". C'est l'affaire des *Zones franches, C.P.J.I. série A n^{o} 22,* p. 13), donc l'ordonnance de 1929. Je pense qu'il est particulièrement approprié ici de rappeler cette notion fondamentale, s'agissant de mettre en évidence que la mission de la Cour est de faire au moyen d'un

jugement ce que les parties concernées n'ont pas été en mesure de faire par voie d'accord : établir une délimitation territoriale sur la base de tous les droits et de toutes les obligations de droit international qui pèsent sur les parties, y compris celle que je viens d'évoquer.

3. La délimitation non entrée en vigueur de 1935

Monsieur le Président, j'en viens maintenant au traité de Rome de 1935, par lequel la France et l'Italie avaient délimité la frontière entre la Libye et les territoires de l'AOF et de l'AEF à l'est de Toummo. Le traité, on le sait, n'est pas entré formellement en vigueur, puisque l'Italie refusa de procéder à l'échange des instruments de ratification. Mais ceci ne lui enlève pas le rôle d'élément essentiel dans l'affaire qui vous est soumise.

Comment pourrait-il en aller autrement, d'ailleurs ? Le traité de Rome est en effet le seul et unique acte international qui, pendant toute l'histoire séculaire de ce différend, a eu le but affiché de tracer une ligne délimitant la frontière dans la zone en question et qui ait réellement accompli cette tâche.

Comment pourrait-il en aller autrement, d'autre part, puisqu'avant ce traité aucun, je dis bien aucun, des instruments sur lesquels le Tchad base sa prétention n'avait été négocié et conclu par les Etats exerçant effectivement leur souveraineté, de part et d'autre, sur le territoire à délimiter ?

Bien entendu, il n'est pas question de rouvrir ici le dossier des accords Mussolini-Laval : il s'agit exclusivement maintenant de voir dans quelle mesure les accords de Rome de 1935 suggèrent des indications de caractère juridique dont la Cour pourrait tenir compte afin de s'acquitter de sa mission.

Pour procéder à cette analyse, il convient que je revienne sur un point dont le professeur Bowett a parlé vendredi dernier. Dans les deux cas les plus récents de délimitations terrestres qui vous ont été soumis deux Chambres de votre Cour ont insisté de la façon la plus claire et la plus explicite qui soit sur le rôle éminent qu'il faut attribuer à l'*aequitas infra legem* dans le règlement des différends de ce genre. Or, il est important de souligner ce qui a amené la Cour à faire appel à l'*aequitas infra legem* et ce qu'elle a appliqué à ce titre dans les deux affaires : il s'agissait de tirer des indications précieuses, justement d'accords de délimitation qui n'avaient pas été ratifiés.

Dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali)* (l'arrêt de 1986), il a été question d'un procès verbal du 15 janvier 1965 qui contenait des indications précises concernant la manière de délimiter une certaine portion de la zone frontalière, mais qui n'avait pas été approuvé par la suite par les autorités compétentes des deux pays, de sorte qu'il n'avait pas acquis, comme le dit la Chambre (par. 147), "la force obligatoire d'une convention". Malgré cela, l'arrêt de 1986 a constaté que l'équité *infra legem* imposait en l'espèce de s'en tenir à la solution prévue par l'accord non ratifié, au vu de ce que la Chambre appelle "les circonstances dans lesquelles cet accord est intervenu" (par. 149).

Dans l'arrêt du 11 septembre 1992, à deux reprises la Chambre de votre Cour a eu recours a un raisonnement similaire. Ainsi, la Chambre a estimé que la manière appropriée de prendre appui sur l'*aequitas infra legem*, dans un certain secteur, était de faire appel à ce qu'elle dénomme "la délimitation non ratifiée de 1869". La Chambre fait ici allusion à certaines négociations qui avaient eu lieu entre les deux Etats à ladite époque et qui avaient débouché sur un tracé de frontière, sans qu'un accord en bonne et due forme n'ait été conclu par la suite. Or, c'est justement le tracé de 1869 qui apparaît au juge comme "une solution raisonnable et équitable", étant donné que rien, dans les négociations qui avaient amené à le retenir, ne suggérait qu'"il y ait eu un désaccord fondamental entre les Parties au sujet de cette ligne".

Toujours dans le même arrêt de 1992, la Chambre utilise de nouveau, pour un autre secteur, un accord *ad referendum* de 1935 arrêté à la suite de négociations entre El Salvador et le Honduras, mais que les gouvernements respectifs n'avaient pas ratifié ultérieurement. Ici aussi la Chambre a accordé de l'importance au constat que les parties avaient omis les ratifications pour des raisons n'impliquant pas la contestation de la ligne en question (par. 100 et suiv.).

Messieurs les juges, votre jurisprudence incite, me semble-t-il, à raisonner d'une façon similaire au sujet des accords de Rome de 1935. Certes, si le traité de Rome de 1935 était entré en vigueur, il serait parfaitement superflu de se demander maintenant si le tracé de la frontière qu'il prévoit était censé modifier un tracé précédent, ou bien déterminer ce tracé pour la toute première fois.

Mais puisque ledit traité n'est pas entré en vigueur et puisqu'aucun autre instrument international précédent ou postérieur n'a délimité la frontière, il devient alors essentiel, conformément à votre jurisprudence, de poser deux questions précises. La première est dans quelles circonstances la délimitation de 1935 a-t-elle été convenue entre les parties et quel but les parties voulaient-elles réaliser par ce biais ? La deuxième question est pourquoi, par la suite, les parties n'ont pas voulu que le traité entre formellement en vigueur ?

Quant à la première question, la réponse est simple, à la lumière de tous les éléments que nous connaissons : la France et l'Italie ont officiellement reconnu qu'aucune délimitation n'avait jamais été établie auparavant. Le traité de 1935 délimitait donc la frontière pour la toute première fois dans une région contestée et reconnaissait ainsi l'appartenance des territoires, de part et d'autre de la ligne qu'il traçait, à la France et à l'Italie respectivement.

Reste la deuxième question : pourquoi le traité de Rome n'est pas entré en vigueur ? Pourquoi les ratifications n'ont pas été échangées finalement, et ceci malgré les fanfares qui en avaient accompagné la conclusion, malgré les ardents discours des deux gouvernements et l'accueil enthousiaste que lui avaient réservé les deux Parlements, lesquels accordèrent l'autorisation à la ratification à l'unanimité, pour ce qui est du Parlement italien et du Sénat français, et avec une majorité écrasante de 555 contre 9 pour ce qui est de la chambre des députés française ? La réponse est facile. Ce traité représentait une victoire éclatante pour la diplomatie française, qui avait sacrifié très peu de chose par rapport à sa position maximale de départ : Mussolini s'était contenté, comme on le dit à l'époque, de quelques arpents de sable. C'est pour cela que la France multiplia pendant quelque quatre ans les démarches afin de convaincre l'Italie de procéder à l'échange des ratifications.

Mais l'effort fut vain, et on en comprend bien la raison. En 1935 Mussolini, en effet, avait été sévèrement critiqué par les milieux coloniaux italiens pour avoir bradé, comme on le dit à l'époque, le territoire libyen (comme on le dit "sottovoce") : c'est le Tchad lui-même d'ailleurs qui a démontré cela d'une façon fort éloquente dans son mémoire (p. 373). Mais on sait parfaitement, et le Tchad le reconnaît sans difficulté, pourquoi le Gouvernement italien avait accepté de sacrifier à un tel point ses revendications territoriales traditionnelles. Le sacrifice territorial que l'Italie aurait enduré lui

permettait d'obtenir un *quid pro quo* très prisé aux yeux du gouvernement fasciste : en retour, l'Italie recevait discrètement le *nihil obstat* de la France, voire sa bienveillante bénédiction pour l'imminente agression à l'Ethiopie.

Par la suite, l'Italie considéra que la France avait pris, au regard du dossier éthiopien (spécialement à la Société des Nations), une attitude non conforme aux engagements de complicité (ou tout au moins de connivence) qu'elle avait assumés. D'où la riposte : l'Italie laisserait tomber les accords de 1935 pour sanctionner l'attitude peu amicale de la France à son égard, et pour marquer que d'autres relations (celles avec le III^{e} Reich) seraient désormais privilégiées.

Messieurs les juges, voilà pourquoi le traité de Rome n'est pas entré en vigueur. La France y était très attachée, le considérant comme nettement avantageux pour elle; tellement avantageux que même après que les intentions italiennes lui aient été officiellement notifiées, elle fera savoir le 29 décembre 1938 — quelque quatre ans après la signature du traité — à la Grande-Bretagne que le Gouvernement français "entend laisser subsister la base juridique de l'entente conclue en 1935 et reste prêt, en dépit de la tension actuelle, à exécuter intégralement les accords" (mémoire de la Libye, pièce 58). Par contre, du côté italien, les accords en question étaient ressentis comme comportant un sacrifice territorial injustifié, qu'à défaut de contreparties appropriées il ne convenait pas de supporter.

Monsieur le Président, Messieurs les juges, il me semble que toutes les conditions sont réunies, d'après votre jurisprudence, pour que des accords de Rome soient tirées d'importantes indications quant à la délimitation que vous devez effectuer.

Des accords de Rome se dégage, en particulier, une indication évidente et à mon sens univoque : au minimum, les territoires situés au nord de la ligne de 1935 doivent être reconnus comme appartenant incontestablement à la Libye. Ces accords suggèrent également (mais sans donner ici des indications précises) que certains des territoires au sud de cette ligne doivent aussi être considérés comme étant dans la même situation juridique.

4. Héritage colonial et équité

Monsieur le Président, j'en viens maintenant à une dernière série de considérations qui sont

suggérées par une analyse qui m'a amené à explorer diverses facettes de l'influence que la période coloniale exerce quant au règlement du présent différend. C'est une évidence que l'héritage colonial pèse très lourdement sur tout contentieux territorial entre des Etats issus de la décolonisation. Et la présente affaire ne fait pas exception à la règle.

Cependant, si l'on jette un regard d'ensemble à l'argumentation que le Tchad propose à votre Cour, on est frappé par l'impression que le poids de l'héritage colonial n'est ni également ni équitablement réparti entre le Tchad et la Libye : on dirait que l'Italie a transmis à la Libye un legs qui ne se compose que d'obligations et de servitudes en faveur du Tchad, alors que la France n'a transféré au Tchad que des droits et des avantages par rapport à la Libye. On dirait, en somme, que la Libye a reçu exclusivement le passif de l'héritage et le Tchad seulement l'actif.

Pour le Tchad, en effet, cette affaire se résume, finalement, en une série de décisions que la France aurait adoptées, en les négociant le cas échéant avec un Etat tiers, la Grande-Bretagne, face auxquelles l'Italie se serait inclinée, ou n'aurait pas protesté, ou aurait acquiescé, en renonçant par là — mais sans jamais en énoncer explicitement l'intention — aux droits qu'elle aurait pu faire valoir. Et la Libye se trouverait de ce fait — passez-moi l'expression — "coincée", prise au piège, devant supporter les conséquences de cet ensemble d'agissements. Le Tchad, en revanche, n'aurait pas à subir le moindre préjudice pour ce que la France a pu faire ou ne pas faire pendant la période coloniale.

Ainsi, par exemple, en 1902 l'Italie aurait cru à la contre-vérité qu'une carte était annexée à la déclaration franco-anglaise de 1899, et la Libye serait aujourd'hui liée par la bévue que l'Italie aurait commise il y a 90 ans, alors que le Tchad pourrait tranquillement tirer tout avantage du mauvais tour qu'avait joué la France à l'époque. Ainsi encore, la Libye devrait payer aujourd'hui le prix du fait qu'au début du siècle l'Italie se serait conduite de façon à faire croire qu'elle renonçait par anticipation à des droits et titres qu'elle n'avait pas encore et qu'elle n'aurait acquis que quelque dix ans plus tard, lorsqu'il y aurait eu la succession à la Porte concernant le territoire libyen; par contre, le Tchad ne serait d'aucune façon engagé par la reconnaissance parfaitement explicite, faite par la France en 1935, d'après laquelle aucune frontière n'avait jamais été déterminée à l'est de Toummo.

Ainsi encore, la Libye devrait subir les implications d'arrangements d'une lointaine époque qui poursuivaient des buts autres que celui de l'établissement des frontières et qui avaient été conclus derrière le dos de l'Etat qui exerçait sa souveraineté sur le territoire libyen : c'est-à-dire, derrière le dos de la Turquie en 1899 et en 1902 et derrière le dos de l'Italie en 1919.

Voilà des exemples déjà assez impressionnants de l'approche fondamentalement déséquilibrée dont le Tchad se fait le champion. Mais il y a bien plus : il y a deux étapes de l'argumentation tchadienne qui représentent — qu'il me soit permis de le dire — de véritables chefs-d'oeuvre du genre.

La première est celle qui concerne l'accord franco-anglais de 1919, qui "interpréta" la déclaration franco-anglaise de 1899, en déplaçant très nettement vers le nord la ligne de sud-est qui était prévue dans cette dernière. M. Cahier vous a parlé des protestations fermes et continues que l'Italie adressa tant à la France qu'à la Grande-Bretagne à ce sujet, dès qu'elle eut connaissance de ce que les deux Etats avaient secrètement tramé entre eux. En bon droit, de telles protestations comportent que l'accord de 1919 — *res inter alios* — ne pouvait produire aucun effet pour l'Italie et ne peut en produire aujourd'hui aucun pour la Libye, Etat successeur de l'Italie. Mais, comme vous le savez, la thèse du Tchad est toute autre : pour le Tchad, ce sont les protestations italiennes qui ne valaient rien et qui n'ont produit aucun effet, pour la simple raison que l'Italie, d'après le Tchad, n'avait aucun titre juridique pour protester.

Même en laissant de côté les remarques critiques que la Libye vous a déjà présentées, il faut avouer que cette thèse laisse vraiment bouche bée, parce qu'elle fait penser à une sorte de double saut périlleux : le Tchad voudrait vous faire croire qu'en 1919, lorsqu'elle était souveraine en Libye, l'Italie n'était pas juridiquement habilitée à protester contre le déplacement de la ligne de 1899; alors qu'en 1902, quelque dix ans avant qu'elle ne foulât le sol libyen, l'Italie aurait eu d'après le Tchad tous les titres juridiques pour accepter la même ligne ! En somme, l'Italie avait le titre pour dire oui, mais pas le titre pour dire non ! Ceci avec la conséquence remarquable que voici : la Libye serait aujourd'hui liée par l'acceptation italienne de 1902, mais ne pourrait pas se prévaloir du bénéfice des protestations italiennes des années vingt et trente !

J'en viens, pour terminer, à une deuxième étape, tout aussi surprenante, du raisonnement tchadien. Il s'agit ici de la question de savoir si la Libye peut ou non invoquer à son avantage l'article 13 de l'accord de Londres de 1915, qui imposait à la France l'obligation d'accepter un règlement favorable à l'Italie des questions pendantes concernant les frontières libyennes : une obligation dont la France ne s'est pas acquittée complètement, comme le Tchad le reconnaît sans difficulté. Le Tchad, on le sait, répond par la négative. Son argumentation est que le traité de paix de 1947 a balayé ce qui restait des droits que l'Italie pouvait tirer de l'accord de Londres : ceci du fait même que l'Italie — en vertu de l'article 23 du traité de paix — perdit ses colonies africaines, y compris la Libye, avec tous les droits et titres y relatifs. Ces droits et titre — soutient le Tchad — furent transférés aux quatre puissances, dont la France et la Grande-Bretagne. D'après le Tchad, la conséquence en est que les droits que l'Italie pouvait tirer de l'accord de Londres envers ces puissances prirent fin puisque "à l'évidence, on ne peut pas être titulaire en même temps d'un droit et de l'obligation correspondante" (réplique du Tchad, p. 85).

Messieurs les juges, si je rappelle ce dossier, qui vous a été déjà illustré, c'est pour une seule raison : je voudrais vous faire noter que d'après le Tchad le traité de paix aurait (semble-t-il) fait *tabula rasa* exclusivement des droits que l'Italie avait envers la France au sujet du territoire libyen : de ce fait, la Libye ne pourrait pas s'en prévaloir aujourd'hui contre le Tchad. Par contre, les obligations que l'Italie avait contractées à l'avantage de la France, auraient miraculeusement survécu, de sorte qu'aucun obstacle n'empêche aujourd'hui le Tchad de les invoquer devant votre Cour. Et dans cette mouvance la réplique tchadienne (p. 92) pousse l'audace jusqu'au point de réprimander sévèrement la Libye parce qu'elle ose invoquer à son avantage les dispositions d'un traité entre les puissances coloniales qui "en prévoyant ... le 'charcutage' de l'Afrique, porte la marque du cynisme impérialiste le plus intolérable" (c'est le Tchad qui parle). Comme si les instruments franco-anglais de 1899 et de 1919 n'étaient pas les fils du même cynisme impérialiste, comme s'ils ne portaient pas la marque de la même approche colonialiste !

Monsieur le Président, Messieurs les juges, je pense que je n'ai pas besoin d'ajouter grand chose pour dénoncer le caractère fondamentalement inéquitable de l'approche tchadienne concernant

la répartition du legs colonial entre les Parties au présent différend. Votre Cour saura faire oeuvre de justice en adoptant une solution conforme non seulement au droit, mais à l'équité aussi; et l'équité demande — la Libye en est convaincue — qu'un équilibre satisfaisant soit trouvé quant au poids de l'héritage colonial que la Libye et le Tchad sont appelés à porter.

5. La prise en compte des aspirations et du bien-être des populations concernées par la délimitation

Monsieur le Président, je viens de développer trois arguments qui se basent sur les faits et gestes des puissances coloniales avant l'indépendance de la Libye et du Tchad. Il est grand temps maintenant de parler d'arguments d'un ordre différent, portant sur la dimension humaine de l'affaire dont votre Cour est saisie. La période coloniale voit apparaître des principes juridiques, relatifs aux aspirations et au bien-être des populations concernées, qu'il est nécessaire de prendre en compte maintenant afin de parvenir au juste règlement du présent différend.

Bien sûr, il faut garder constamment à l'esprit ce qu'a souligné l'arrêt du 22 décembre 1986 de votre Chambre, paragraphe 149, qui a été repris par celui du 11 septembre dernier, paragraphe 58, je me réfère à l'idée suivant laquelle : "rien n'autorise un recours à la notion d'équité pour modifier une frontière établie".

Mais nous ne sommes pas dans ce cas de figure : la conviction de la Libye est que les arguments relatifs à la dimension humaine ont une importance toute particulière dans la présente affaire justement parce qu'aucune frontière n'a jamais été tracée dans la région en question, ni pendant ni après l'époque coloniale. La Cour devant établir une telle frontière pour la première fois, il est naturel que la dimension humaine soit l'objet d'une attention spéciale de sa part. Or, cette attention spéciale, en l'espèce, n'est pas requise seulement par l'*equitas infra legem*, mais aussi par les règles juridiques applicables.

C'est que pendant la période italienne voient le jour des normes internationales qui consacrent les intérêts légitimes des peuples de la région, qui attribuent à ces peuples des véritables droits internationalement garantis et qui obligent spécifiquement à effectuer la délimitation en prenant compte les intérêts des peuples concernés. De façon emblématique, ces normes se situent au tout début et à la toute fin de la période dont je suis en train de m'occuper.

Les normes du début sont celles du traité d'Ouchy de 1912, dont j'ai déjà parlé dans ma première plaidoirie. Je ne reviendrai sur ce sujet qu'un seul instant, pour rappeler que le traité en question transmettait à l'Italie le territoire libyen en faisant peser sur cet Etat l'obligation de respecter l'"autonomie" des populations concernées, ce qui impliquait le droit de celles-ci d'exercer librement leur culte ainsi que le droit de participer à la gestion de la chose publique.

Ce régime impliquait donc la reconnaissance internationale de l'unité, de l'identité et des droits du peuple libyen : le pouvoir colonial italien était par conséquent soumis à l'obligation internationale de gérer la Libye en respectant ces principes.

Or, il me semble évident que cette obligation devait nécessairement s'appliquer aussi à la gestion du dossier frontalier. Autrement dit, la négociation en matière de délimitation devait être menée du côté italien, non seulement dans l'exercice des droits dont l'Italie avait hérités de son prédécesseur, mais aussi dans le respect des obligations que l'Italie avait contractées au sujet de la Libye, y compris celle relative à la préservation de l'unité, de l'identité et de l'autonomie du peuple libyen.

Monsieur le Président, je n'ai pas besoin de rappeler ici qu'après la première guerre contre la Senoussia (1911-1917), l'Italie commença par essayer de respecter ses obligations à l'égard du peuple libyen et ceci en concluant toute une série d'accords avec la Senoussia, qui en fait luttait pour l'indépendance. Je passerai également sur le tournant de 1923, qui représenta un changement radical dans l'attitude du Gouvernement italien. Celui-ci dénonça tous les accords avec la Senoussia et lança la grande campagne militaire, c'est-à-dire la deuxième guerre entre l'Italie et la Senoussia (1923-1932), qui se termina par l'écrasement de la lutte anti-coloniale, symbolisé tragiquement par le procès et la pendaison du héros légendaire et leader de la lutte de libération libyenne contre l'Italie, le cheikh Senussi Omar el Mukhtar, dont vous avez déjà entendu parler, et qui avait été investi par la Senoussia de la charge de diriger toute la lutte armée contre les forces italiennes. Il est évident que le régime fasciste italien s'était ainsi rendu responsable de la violation des obligations internationales qui pesaient sur lui à l'égard du peuple libyen. Mais il faut souligner maintenant que, malgré tout, ces obligations sont restées en vigueur pendant toute l'époque coloniale, le traité de Lausanne de 1923 ayant aboli les droits et privilèges que la Turquie avait conservés en Libye en vertu du traité

d'Ouchy, et non pas les droits que ce traité garantissait au peuple libyen.

Monsieur le Président, Messieurs les juges, si j'évoque maintenant ces obligations internationales à l'égard du peuple libyen que l'Italie aurait dû prendre en compte dans la gestion du dossier frontalier, ce n'est pas pour proposer à la Cour d'appliquer maintenant le traité d'Ouchy. Ceci d'autant plus que les obligations prévues à l'avantage du peuple libyen pesaient sur l'Italie, et non pas sur la France (ou, encore moins, sur le Tchad aujourd'hui). Mais mon but est autre : mon but est de mettre en lumière la relation de continuité qui existe à ce sujet entre le traité d'Ouchy de 1912 et le traité de paix de 1947, c'est-à-dire l'instrument international qui clôt cette fois-ci la période coloniale italienne et qui s'occupe, comme on le sait, de la Libye ainsi que du problème de ses frontières. Or, à la différence du traité d'Ouchy, le traité de paix de 1947 a créé toutes sortes d'obligations non seulement pour l'Italie, mais aussi pour la France, qui en est l'une des parties; et dans la mesure où des dispositions du traité de paix portent sur la question qui forme l'objet du présent différend territorial, la Libye et le Tchad en sont incontestablement liés au titre d'Etats successeurs.

Je voudrais rappeler l'aspect pertinent de l'annexe XI du traité de paix. C'est à la décision unanime des quatre puissances que le traité de paix confiait la mission de déterminer le sort définitif de la Libye, mais aussi de procéder aux "ajustements appropriés — c'est la terminologie utilisée — de ses frontières, et ceci "en tenant compte des aspirations et du bien-être des habitants, ainsi que des exigences de la paix et de la sécurité". C'est la formule qu'on trouve dans le traité de paix. Pour ce faire, les quatre puissances avaient un an de temps, après quoi la tâche serait transmise à l'Assemblée générale. C'est ce qui arriva effectivement, à cause du désaccord entre les puissances, provoqué notamment par les aspirations de la France d'annexer au territoire de ses colonies environnantes des portions substantielles du territoire libyen.

L'Assemblée générale cependant décida de ne pas envisager des modifications des frontières, comme sir Ian Sinclair l'a illustré : elle considéra que sa mission était de s'occuper exclusivement de la délimitation de ces seules frontières qui n'avaient pas été déjà fixées par des accords internationaux. Or, dans la résolution 289 (IV) de 1949, section C, il est explicitement établi aux

points 1 et 2 du préambule que toute l'opération est placée sous l'emprise des principes proclamés dans le traité de paix, y compris, en particulier — cela est répété explicitement — celui relatif à la prise en compte des aspirations et du bien-être des populations concernées. Ensuite, en 1950, l'Assemblée générale décidera (résolution 392/(V)) de confier à un futur accord direct entre la Libye et la France la délimitation des frontières.

Et puis, nous le savons, en 1955 la Libye et la France ne réussirent pas à délimiter les frontières qui n'avaient pas été déjà fixées à l'époque coloniale : elles n'ont su rien faire d'autre que confirmer les délimitations préexistantes. Depuis 1955 il est notoire que la situation n'a pas changé, et les négociations entre la Libye et le Tchad, tant directes que dans le cadre de l'OUA, n'ont pas porté de fruit, sauf pour ce qui est du compromis qui constitue la base de votre compétence.

C'est donc à votre Cour qu'il revient finalement, après tant de détours et de vicissitudes, de régler définitivement un si vieux différend que les Parties concernées n'ont pas su résoudre, puisqu'elles n'ont pas été en mesure de s'acquitter de la tâche que leur avait confiée l'Assemblée générale des Nations Unies. La mission de votre Cour va représenter, en somme, l'accomplissement de celle de l'Assemblée générale et se réalisera sur la base des mêmes principes juridiques, y compris celui qui prescrit de prendre en considération les souhaits et le bien-être des populations concernées, et donc leurs liens ethniques, culturels et sociaux. Il faut en conclure que dans le cas du présent différend le poids des arguments relatifs à la dimension humaine ne dépend pas seulement de l'*aequitas infra legem*, mais découle d'un principe juridique en vigueur et spécifiquement applicable à l'opération de délimitation dont votre Cour est saisie.

Monsieur le Président, Messieurs les juges, voilà les raisons qui amènent la Libye à vous prier de bien vouloir dire et juger que la frontière entre la Libye et le Tchad doit être établie en tenant compte du facteur humain, c'est-à-dire en respectant les liens d'allégeance des populations de la région : leur histoire, leur culture, leur religion, leur organisation sociale expriment un rattachement prépondérant, auquel les normes applicables attribuent un rôle distinct afin que soit déterminée l'appartenance à l'une ou à l'autre des Parties au présent différend des territoires qui constituent leur espace vital. Et ce rattachement joue indiscutablement en faveur de la Libye : M. Bowett reviendra

encore sur cet aspect, qu'il reliera à l'ensemble de l'argumentation de la Libye.

6. La prise en compte de considérations concernant la paix et la sécurité

Je n'ai, Monsieur le Président, qu'à toucher un tout dernier point au sujet duquel, je vous rassure, je pourrai être extrêmement bref.

C'est que les mêmes remarques que je viens de présenter au sujet de la dimension humaine pourraient être répétées, mot à mot, à propos des "exigences de la paix et de la sécurité". Ces termes figurent eux aussi à l'annexe XI du traité de paix avec l'Italie en tant que critères devant présider, tant à la détermination du sort définitif de la Libye, qu'à l'"ajustement" de ses frontières. Je n'ai donc pas besoin de justifier ultérieurement l'affirmation suivante : c'est le droit applicable, et non pas seulement l'*aequitas infra legem*, qui impose à votre Cour d'établir dans le cas présent une délimitation qui soit conforme aux exigences de la paix et de la sécurité, c'est-à-dire qui soit équilibrée, juste et rassurante, qui soit capable de représenter un facteur d'apaisement, de stabilité et de détente pour les peuples et pour les Etats concernés, et non pas une source de tensions nouvelles.

Monsieur le Président, Messieurs les juges, mon espoir le plus sincère est que les observations que j'ai eu l'occasion de vous présenter vous soient utiles afin que vous puissiez vous acquitter de votre tâche.

Je vous remercie.

The PRESIDENT: Thank you very much Professor Condorelli. And now Professor Bowett I think.

Professor BOWETT:

LIBYA'S SUCCESSION TO TITLE

Mr. President, as we approach the end of Libya's presentation of its case during this first round of pleading, it is necessary to begin pulling together all the various strands of the argument.

1. The coalescence of rights and titles in Libya

The location of title has to be looked at on three different levels: for the situation was not the

simple one of a unitary State with a high degree of centralization. Title lay at three levels: with the indigenous tribes at the grass roots level, with the Senoussi at the level of administration and co-ordination between all the tribes throughout the territory, and with a succession of sovereign States — the Ottoman Empire, then Italy, and now Libya — at the international level.

(a) The indigenous tribes

As to the indigenous tribes, the title of the various tribes is not only the longest established claim of title, it is also the one constant in the changing scene. The tribes were there, as socially-organized units, long before the Colonial Powers became interested in this part of Africa: and they are still there now. Their occupation of the borderlands has been continuous, outlasting the Ottomans, the French and the Italians.

The Court has before it a Petition from the Tibesti tribes, dated 3 November 1991 (CML, Vol. 2, Exhibit 3) affirming that these tribes regard themselves "as part of Libya". It is not simply that they see a more prosperous future with Libya: their past has been with Libya, during decades which have seen in Libya, not prosperity, but poverty, war and famine. Their allegiance to Libya has never wavered.

(b) The Senoussi

As to the Senoussi, the cohesion brought to these tribes by the Senoussi has already been amply demonstrated. The partnership between the Ottomans and the Senoussi was never more in evidence than in fighting the French. But in terms of actual administration of the territory the Senoussi were the dominant partner. And Chad does not dispute this. As Chad says in its own Memorial, in 1912 the Senoussia were clearly sovereign.

Chad concedes that, until 1912, sovereign rights over the whole of the borderlands lay with the Senoussi and the Senoussi peoples.

It is evident from the record that France all but recognized the sovereignty of the Senoussi. France did establish formal relations with the Tuaregs, signing the Convention of Ghadamès on 10 March 1863 (see RL, Exhibit 7.10) so France recognized that the territory of the Tuareg was not

terra nullius. The negotiations between France and the Senoussi between 1911 and 1914 (see ML, paras. 4.151-4.165) were designed by France to lead to an agreement.

But France never doubted the reality of Senoussi control over the borderlands. And it was a control which far exceeded any that France itself exercised over the next 50 years.

And there can be no doubt as to the "Libyan" character of the Senoussi. The Senoussi brotherhood was in Tripolitania and Cyrenaica, and it was in the coastal regions of Libya that they carried on their prolonged war of resistance to the Italian invasion, from 1914 until the Treaty of Acroma on 17 April 1917 (ML, International Accords and Agreements Annex, No. 16). And again from 1923 to 1932 during the second Italo-Senoussi war as just described by Professor Condorelli (see ML, paras. 5.221-5.246).

And during the Second World War, the Senoussi again fought, alongside the British, to liberate Libya from the Axis Powers, and it was not surprising that the Emir Idriss, the Senoussi leader, should be the first ruler of the newly-independent Libya.

Hence, there can be little doubt as to Libya's succession to that part of the title to sovereignty over the borderlands which stemmed from Senoussi control. The Senoussi were Libyan: they were the very core of the new State.

(c) Title in the sovereign State

As regards title in the sovereign State, in terms of succession on the international plane, the succession from the Ottoman Empire, to Italy, and then to Libya is clear and direct.

The Ottomans had the prior claim — that is prior to France — and the French were made aware of this claim in 1890, before France even reached Lake Chad.

Now certainly, the Ottoman Empire did not back up that claim by military force throughout the whole area of its claim. Military force was not required for the tribes accepted the Ottoman claim to sovereignty, and the presence of the Ottoman *Kaimakams*, using the traditional delegation of authority, was all that was required. But it did so as regards the borderlands once the French threatened to invade. The map now displayed (Map No. 48) shows how the Ottomans responded to the French invasion with military forces, holding the French south of a *de facto* boundary until their

withdrawal in 1913.

That Turkish claim passed directly to Italy under the Treaty of Ouchy of 1912. France recognized Italy as successor to the Ottoman Empire five days after the Treaty of Ouchy (RL, para. 6.73), and again by Article 10 of the secret Treaty of London of 1915.

It is true that Italy did not send Italian forces to replace the Turkish forces being withdrawn from the borderlands under the Treaty of Ouchy. Italy was militarily fully occupied in the north of Libya, trying to subdue the Ottoman and then the Senoussi forces. And it was Italy's preoccupation with the Senoussi which gave France her chance to allow the French forces to advance northwards into the borderlands.

But this preoccupation with the north of the country by Italy cannot be taken to imply an abandonment of Italian claims to the borderlands as successors to the Ottoman Empire. There were two "programmes" prepared in 1916. And during the 1920s the Italian Ministry of Colonies prepared three "programmes" — essentially three possible claims as successor to the Ottoman Empire. The "maximum" programme of 1928 (Map No. 53) was only slightly different from the Ottoman 1890 claim — extending, as you can see, far to the south of Lake Chad. Now, the "medium" programme (Map No. 54) still extended far south of the borderlands. Even the "minimum" programme, although excluding Kanem, went as far south as 15° latitude (Map No. 55). So it is quite evident that Italy saw itself as successor to the Ottoman claims. Abandonment was never contemplated at that stage.

Moreover, it was clear that the indigenous tribes and the Senoussi had never abandoned their title.

Even more important, France recognized the linkage between the Senoussi and the Italian claims, accepting that, despite the hostility between the two, when opposed to France, Italy could benefit from the Senoussi claims. Thus, as early as 24 October 1916, the French Foreign Minister for Colonies warned of the dangers of abandoning the Tibesti:

> "Les abandonner, même momentanément, aux Senoussis, c'est faciliter les revendications de nos voisins [he is referring to the Italians], qui se considèreront comme les héritiers de la Confrérie." (RL, Vol. 3, Exhibit 11.3.)

So Italy not only succeeded to the Ottoman claims, but stepped into the Ottomans' shoes in the partnership of title that had earlier rested in the tribes, the Senoussi and the Ottoman Empire.

What, then, caused Italy to retreat from the Ottoman claims so dramatically in agreeing to the 1935 line? There were two main reasons. One was Marshal Badoglio's lack of interest in territory he considered to be sterile, unproductive desert (ML, para. 5.306).

The second, and far more important, reason was that Mussolini thought that by abandoning his Libyan claims he had secured French support for his conquest of Ethiopia. And so the 1935 Treaty came about.

The Court is by now fully aware of why the 1935 Treaty never came into effect. That it was a retreat from, or abandonment of, not only the Senoussi claims but also the Ottoman claims is beyond doubt. And had the 1935 Treaty entered into force, Libya's position would now be very difficult. Arguably, Libya's position would have been irretrievably compromised.

Fortunately that did not occur, so the position is that Libya inherited from Italy the claims *as they existed pre-1935.*

The difficulty is that, as claims to *title*, these claims do not immediately translate into a clear, identifiable claim to a specific boundary line. It is a difficulty inherent in this type of territory. With nomadic tribes in desert or mountainous territory, precise boundaries have rarely been recognized. Moreover, unlike the Spanish territories of South or Central America, there were never any clear administrative boundaries established by the Ottoman Empire, or by Italy, or even, let me add, by the French to the south.

But the difficulty is not insurmountable, and the law does possess criteria which can assist in identifying a boundary in circumstances such as these. It is to these that I now turn.

2. The boundary which emerges from the whole history of the affair, in accordance with the criteria provided by the law

Chad accepts that in 1912 it was the Senoussi who exercised sovereign rights over the whole of Borkou, Ennedi and Tibesti; and that accords with Libya's view, so we have an agreed premiss with which to start.

And from this agreed premiss we can now move quite easily to our first criterion. What, on the factual evidence were the limits to French effective possession established between 1912 and 1919, the date by which Chad says French title was effectively established?

(a) The limits to French effective possession acquired by conquest between 1912 and 1919

Chad argues that the French title — and the boundary establishing the limits of that title — were established by 1919. So we need to look at the extent of French conquest during these seven years, before conquest became outlawed as a means of acquiring territory.

We can illustrate the situation best on the map. Remember that the Ottomans had held the French roughly along the 15° parallel until their withdrawal in 1913 (Map No. 48). Then, after the Treaty of Ouchy had brought about the Turkish withdrawal, the French advanced. But what occurred was not a steady advance, with the French forces consolidating and occupying all the territory behind their lines. There were no lines. The French forces were too small for that. What we had were a series of penetrations by French columns, culminating in isolated battles. The French progress can be seen on the map now on the screen (Map No. 81).

The French occupied Oum Chalouba, just north of 15° and then in May 1913 a French column, some 90 men under a Lieutenant Dufour, attacked Oum el Adam, and fought off a strong counter-attack on 21-22 May. Further Senoussi attacks occurred, against a convoy at Oum Chalouba on 6 June, against Ati — as far down as 13° parallel — in August, and against a caravan near Tekro on 22 November.

But the French took Aïn Galakka on 27 November 1913, they took Faya on 3 December and, leaving 50 men at Faya, sent a column north to Gouro which they reached on 14 December.

But when the official French history speaks of "la conquête de Borkou", one has to bear in mind not only the limited size of the French military presence, but also the continuing hostilities (Map No. 82). As the figures of the French official military history shown, in Borkou the French presence consisted of the 7th Company at Faya, the 8th Company at Fada, and small outposts at Aïn Galakka, Gouro and Ounianga-Kebir; perhaps 300 men at most.

This was not an effective belligerent occupation of the whole of Borkou. Mohammed Erbeimi

attacked the post at Gouro in November 1914, and attacks continued through 1915. Between April and May 1915, fighting was still occurring around Gouro (Map No. 83).

By 1916 the Senoussi attacks are characterized as becoming "more aggressive", with Mohammed Erbeimi mustering 800 men near Fada. As the official history reports: "En résumé, fin 1916, la situation sur cette frontière [speaking of Borkou-Ennedi] restait sinon grave tout au moins inquiétante." (LCM, Exhibit 13, p. 467.)

Scarcely a description of an effectively-occupied territory!

In 1917, the French remained in occupation of the same five places — Faya, Fada, Aïn Galakka, Gouro and Ounianga-Kebir (Map No. 83). They sent out reconnaissance patrols, still chasing Mohammed Erbeimi and skirmishing with the Senoussi whenever the two sides met. Erbeimi captured a French supply caravan, en route from Oum Chalouba to Faya, only for the French to retake it two days later.

By 1918, some Senoussi chiefs sought a truce with the French, but not Erbeimi, and French reconnaissance patrols ranged further north to the outskirts of the Tibesti mountains. Even in 1919, clashes with what are described as *rezzous* or *dissidentes* are still reported; and no further locations are actually occupied, permanently, by French forces.

What conclusion does all this suggest? It must be that by the end of 1919 there was no occupation in the sense required by international law north of the 15° parallel. Kanem, to the west, was relatively secure. But neither Borkou nor Ennedi were securely occupied — and, of course, Tibesti had been completely evacuated by the French. Whether you call it "effective" occupation or "belligerent" occupation, it could not have been achieved by so few men, controlling so few places. Certainly, given the continuing resistance to the French. And so the 15° latitude emerges as the maximum northerly reach of any *effective* occupation by France. The occasional clashes that occurred to the north of 15° parallel were not part of any scheme by France to occupy territory north of 15°; they were part of the policy of "pacifying" the Senoussi tribes so as to protect the territory south of 15°.

Now, before leaving this part of my presentation I ought to say a few words about the map

appearing in Chad's Counter-Memorial at page 254, which is entitled "Progression de l'Occupation Française 1900-1914". The reason is that what I have just said about the nature and extent of the French occupation or military penetration into the borderlands does not tally at all with Chad's Map. And the Court is entitled to an explanation.

The explanation is simple enough: Chad's Map is a complete distortion of the true picture. Let me give a few examples.

Aouzou is marked by Chad as if occupied in 1914. The truth is that a French column passed through Aouzou in 1914. It was not "occupied" until 1930, and then left completely unmanned from 1935 to 1937, briefly re-manned from 1937 to February 1938, and then vacated again until April 1954.

Bardaï is marked as "occupied" in 1914. But it was in fact abandoned two years later in August 1916 and not re-established until 1930.

Wour is also marked as "occupied" in 1914: the first French post was actually established in 1930.

Tekro is similarly marked. In fact it was passed through by a French patrol in 1914 on the way to the Sarra Wells to se if the wells could be destroyed. The first French post was not established there until December 1933.

The Court will understand my request that it should not place reliance on Chad's Map. The account of events I have given is based on the official French Military History of the campaign and, to the best of our knowledge, is accurate.

(b) The limits to be discerned from the negotiating positions of the parties during negotiations over the boundary

Let us now examine the limits to be discerned from the negotiating positions of the parties during the negotiations over the boundary. In examining the negotiating positions assumed by the parties, we need to keep in mind the distinction made by the Court — I refer to the recent Judgment in the *Honduras/El Salvador* case — between offers made without prejudice, and clearly designed to achieve a compromise, and statements of position which reflect a party's own view of its legal

claims.

We know that, in preparation for boundary negotiations between the Ottoman Empire and France, the Vilayet of Tripoli prepared its own proposal in 1911. And you can see this represented on the map (Map No. 85), and it is clearly an attempt to reflect the realities of the situation. As compared with the Ottoman claim of 1890, the 1911 proposal suggested a degree of realism. The French control over Lake Chad was accepted; the French control over Kanem, directly north of Lake Chad, was accepted. But to the east it is the 15° line of latitude which stands as the limit to which French claims were to be admitted. Borkou, Ennedi and Tibesti lie *outside* the area to be conceded to France.

Now, with the start of the Italo-Turkish war in 1911, nothing came of the planned negotiations, and it was left to Italy to take up the negotiations.

The Court is already familiar with the development of the Italian negotiating position. Italy's first "programmes" were prepared in 1916. By 1928 Italy had conceived of three "programmes" or claims: a "maximum"; a "median" claim; and a "minimum" claim as I have already mentioned.

Now let us take this last, minimum claim (Map No. 56). It displays a marked similarity to the 1911 proposal by the Vilayet of Tripoli, which is now being shown on the screen. That is to say, France was conceded to have acquired Kanem. But, further east, the claim goes down as far as 15° latitude, and the whole of Borkou, Ennedi and Tibesti lie *outside* French control. The major difference lies here in the west, in Kaour, where Italy's claim extended further westwards.

Now, certainly these Italian "programmes" were internal studies, and not, as such, presented to the French. But they do indicate what Italy thought its entitlements might be and, in a sense, the very fact that they were internal increases their significance. For they were not designed as a pure negotiating tactic, an extravagant claim to be shown to France as the first shot in a bargaining process.

The first claim formally communicated to France came in 1929. And it can be seen on this Map (Map No. 57) and, clearly, it is less ambitious than the earlier "minimum" claim. It shows a retreat both in the west and in the south: the line moves up from 15° to 18°, so as to divide Borkou

and Ennedi.

But here we are clearly seeing a bargaining process and, as such, it is a less reliable indicator of what Italy itself regarded as a reasonable maximum claim.

This is even more true of Italy's compromise offer in 1935. This resulted in final agreement between Italy and France on a line which divided Tibesti, and then proceeded south-west to meet the line of 24° longitude at 18°45' latitude (Map No. 64). The effect of this was more or less to divide the territory between the strict south-east line established in the 1899 Convention and the 1919 line.

But this was pure compromise. Whatever the merits of the 1935 line as a compromise between the Italian and French claims, the fact is that it never became a conventional boundary.

This is why Libya feels entitled to go back to the proposals of the Ottomans and of Italy itself, developed long before this outrageous "bargain" was conceived. And this is why, in Libya's present claim, Libya has relied far more on the 1911 proposal, and the Italian "minimum" proposal conceived in 1928.

Now, Libya's present claim can be seen on the map now on the screen behind me, together with the 1911 Ottoman proposal and the 1928 Italian "minimum" claim (Map No. 86). As can be seen, it follows the earlier recognition by both the Ottomans and Italy, that Kanem had been lost to the French. But it adheres to the view that, further east, 15° of latitude was the correct boundary, and that Borkou, Ennedi and Tibesti must remain on the Libyan side of any boundary.

As Libya itself has recognized in its written pleadings, that cannot be the end of the matter, in the sense that, in any exercise of attribution of territory, the Court is entitled to have regard to certain equitable criteria. We must therefore move on to see whether these criteria support, or reject, a boundary in that location.

(c) The relevance of equitable criteria

Of these criteria, four seem to be of direct relevance.

1. The ties that naturally link the people of the borderlands to Libya

Ethnically, culturally, linguistically and religiously, the tribes of the borderlands have always

been linked to Libya. The military campaigns fought by the French were designed to destroy those links, and they failed.

It is beyond belief that the Court, as the principal judicial organ of the United Nations, will ignore these links in carrying out its task. Perhaps the most singular advance made by the United Nations over the last 40 years or so is to recognize that territory belongs to the people that inhabit it. It is not a commodity to be bartered as if the inhabitants did not exist. This consideration is all the more relevant to the present case, precisely because, under the 1947 Treaty of Peace with Italy, the United Nations has taken over the task of establishing the boundaries of Libya, taking into account the aspirations and the well-being of the inhabitants.

2. Geographical considerations

The borderlands are, geographically, very different from Chad. North of 15° latitude, one moves from savannah to desert, and with that change comes a change in the people and in their lifestyle. The desert nomad, the Arab, replaces the African farmer and pasturalist.

The Tibesti mountains are, of course, a special feature. Their very inaccessibility has always distinguished them from the rest of the borderlands. It is no accident that the French abandoned the Tibesti completely from 1916-1929, and it is no accident that Libya has always attached a special importance to controlling the Tibesti.

The occasional rumours of vast mineral riches within the Tibesti are now discounted. There is virtually no evidence to support such rumours.

3. Economic considerations

The reality of the economic considerations that affect this area are not these myths of mineral riches, but rather the long-established economic ties that exist between the people of the borderlands and Libya to the north.

The caravan routes have always gone north, to the Mediterranean coast. It is towards Libya that the people have traditionally looked — for their supplies, for markets for their animals, for medical help when needed, and for military help to meet foreign invasions from the south.

4. Consideration of long-term stability

So far as the inhabitants of the borderlands are concerned, a stable boundary marking their attachment to Libya will contribute to the long-term security of the region as a whole. The civil war that has raged in Chad may have had many causes. But not the least of these has been the attempt to retain the vestiges of control left by the French, and so artificially divide the people of the borderlands from Libya.

For Libya itself, security is a matter of the highest priority. It is no accident that the primary aim of France, in moving the south-east line from its position in 1899 to its position in 1919, was to control the whole of the Tibesti. It is equally no accident that Italy opposed this, and, even in the compromise proposal of 1935, insisted on retaining the northern half of the Tibesti. For the Tibesti have always dominated the strategic thinking about the region.

This situation has not changed. It is not that, today, Libya fears an attack by Chad. Libya and Chad are moving towards an amicable co-operative relationship. But there may be other Powers that might in the future see Libya as vulnerable to an attack from the south — an attack that would lead into the Libyan oilfields and the Libyan water basins. So, for Libya, the Tibesti are an important part of its territory that it must defend. The demands of peace and security were determined to be relevant to Libya's boundaries in 1947, by the express terms of the Treaty of Peace: their relevance in 1993 is even greater.

Mr. President, Members of the Court, these are the criteria and factors which Libya would urge on the Court as legally relevant to producing an actual boundary line. It is not a line, every point of which can be supported by concrete, historical evidence. But the essential location of the line does emerge from the criteria and factors I have just outlined. And the equitable considerations are fully consistent with Libya's claim.

Mr. President, Members of the Court, that concludes the first phase of Libya's argument.

On behalf of the Libyan Agent and all Libyan counsel, I would like to express to the Court our appreciation for its patience and courtesy. Thank you.

The PRESIDENT: Thank you very much, Professor Bowett.

Now, before we adjourn, I ought to say that the Court has received a communication from the Agent of Chad to the effect that six sessions will suffice for the presentation of the Chad first round of pleadings and accordingly we shall begin with the Chad presentation on Friday morning at 10 o'clock. There will be no session on Friday afternoon and we shall resume on Monday morning at 10 o'clock.

Thank you very much.

The Court rose at 1 p.m.