Non-Corrigé
Uncorrected

Traduction
Translation

CR 93/23 (traduction)
CR 93/23 (translation)

Mardi 29 juin 1993
Tuesday 29 June 1993

010 Le PRESIDENT : Veuillez vous asseoir. Je donne la parole à M. Pellet.

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

1. It is my task this morning to introduce the presentation of what may be regarded as Chad's second argument. It consists in showing that, even if France and Libya had not concluded the Treaty of Friendship and Good Neighbourliness of 10 August 1955, the border would nevertheless exist and that its course would arise directly from the agreements to which that Treaty refers.

This "second argument", let me stress once more, is a subsidiary one: the 1955 Treaty is sufficient in itself. Chad puts forward this alternative argument only on the assumption that the Court, contrary to what Chad sincerely expects, might consider that the problem submitted to it under the Framework Agreement of 1989, cannot be settled by application of the 1955 Treaty alone, whose meaning nevertheless seems so clear.

2. You will not be surprised that the course of the border arising from this second argument is identical to the one I described yesterday, since it is the same international instruments as those referred to by the 1955 Treaty which apply, in other words, essentially again the Franco-British Declaration of 1899, the Franco-Italian exchange of letters of 1902 and the Convention between France and Great Britain of 8 September 1919.

There is, however, a great difference between these two arguments: in the former, the opposability of this border line to Libya revolves upon the expression by that country of its consent to be bound by the ratification of the Treaty of 10 August 1955; in the case of the second argument, the one I am now introducing, this basis disappears since, for

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the purposes of the discussion, this argument disregards this Treaty, which is nevertheless so fundamental. Essentially, the question to be asked is what would happen if the 1955 Treaty did not exist. This, I readily admit, is a somewhat surrealistic exercise, for this Treaty does indeed exist, but Libya is so anxious to empty it of its substance that one should pause for a moment to consider what, I repeat, is a purely academic hypothethis.

3. The starting-point of the entire agrument is, naturally, that Libya succeeded Italy. In principle, it does not dispute this. Nevertheless, one cannot help thinking that Libya has a regrettably selective concept of the succession. In this domain, there is no succession "without liability to debts beyond the value of the assets descended". If Chad's northern boundary were opposable to Italy, it must also be so to Libya (as well as to Chad itself). Succession of States is, as noted by the Chamber of the Court in the case of the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (*I.C.J. Reports 1992,*, p. 389), the true title to which each of the parties can lay claim.

Also, for Chad's argument to be well-founded, the border it claims would obviously have to have been opposable to Italy before the independence of Libya. In other words, the treaties establishing this border would either have had to have been concluded by Italy, or the boundary they establish would have had to be applied to Italy in some other way. I shall endeavour to show that this condition is satisfied and that the 1900 and 1902 Agreements fixed the western part of the boundary between the two countries and entailed the opposability to Italy of the western segment of that boundary between the 16th and 24th meridians.

4. My remarks will turn upon two ideas. First, we will see that, by
012 the 1900 and 1902 Agreements, Italy recognized the existence of a French sphere of influence beyond the boundary between Tripolitania and Cyrenaica; second, I shall consider what the consequences of this recognition were as regards the course of the boundary.

I shall therefore deal with the problem of:

I. ITALY'S RECOGNITION OF THE FRENCH SPHERE OF INFLUENCE

and more specifically with the problem of:

(a) The scope of the Franco-British Declaration of 1899

5. During the written phase, Libya did not dispute that, by the 1899 Declaration, Great Britain recognized to France an area (or a sphere, the two terms being wholly interchangeable in the vocabulary of the period) of influence. On this point, the Parties seemed to agree, even though they did not draw the same consequences therefrom.

In the oral phase, Libya has changed its mind. This it is (perhaps) entitled to do, but it certainly does not help to clarify the discussion. Hence, Mr. Sohier draws a subtle distinction between "zone" on the one hand and "sphere of influence" on the other (CR 93/17, p. 28), and Professor Crawford also points out that Article 3 of the Declaration did not, strictly speaking, create a sphere of influence in France's favour (CR 93/19, p. 52).

On the other hand, other counsel for Libya have adhered to a more orthodox position. This is the case of Professor Cahier who, for his part, does not hesitate to speak of a "French zone of influence" (CR 93/17, p. 28).

It is Mr. Cahier who is right, not Messrs. Sohier and Crawford. There would seem to be no doubt that the prime object of the Franco-British Declaration of 1899 is to concede to France a sphere (or zone) of influence.

013 This is self-evident, but the confusion encouraged by Libya obliges me to return to this point.

6. The fact that, in 1899, Great Britain recognized a sphere of influence to France is attested:

- by the text of the Additional Declaration,
- by its context,
- by the *travaux préparatoires*, and
- by the subsequent practice of the Parties and third States.

To start with the text. According to Article 3 of the Declaration, which you must know by heart now, "it is understood, in principle, that to the north of the 15th parallel the French zone shall be limited ...". "*The French zone* ...".

This expression must be read in context and, in particular, it must be borne in mind that the Declaration is *additional* to the Franco-British Convention of 14 June 1898, fixing the delimitation of the French and British possessions "and" (this is the exact title) "*and the spheres of influence* of the two countries in the east of the Niger".

014 More precisely, it refers to Article IV of the 1898 Convention, which expressly recognizes "as falling within the French *sphere*, the northern, eastern and southern shores of Lake Chad". It is this provision, Article IV of 1898, that has to be supplemented by the Additional Declaration, which forms an "integral part" of it.

7. This interpretation is confirmed by the *travaux préparatoires*. I do not intend to go back in detail over it and shall confine myself to noting that the expression "sphere" or "zone" of influence recurs constantly in the words, written or spoken, of the chief protagonists in the negotiations, be it Lord Salisbury, Cambon or Delcassé, the French Minister for Foreign Affairs. As an example, let me quote Cambon:

> "behind Tripolitania lie the lands we claim as necessarily being within our sphere of influence, namely Borkou, Tibesti, Ouanianga, Wadaï, Kanem ..." (Dispatch of 23 January 1899 annexed to the Libyan Memorial, French Archives Annex, p. 12).

Similarly, in a memorandum addressed on 14 March 1899 to Sir Thomas Sanderson, who, as Libya rightly stresses, did play a role in the negotiation (cf. Reply, p. 102, par. 6.34), it is stated that Article 3 "contains a recognition that certain places fall *within the French sphere* ..." (Annex 5 to Chad's Reply: see also CR 93/16. p. 37) (emphasis added).

Moreover, this was indeed how the third States interpreted the Franco-British Declaration. Turkey, which in its memorandum of 19 May 1899, protests against the "delimitation" - the *delimitation*, Mr. President, I shall return to this - "of *spheres* of influence" arising from the 1890 and 1899 Agreements (Annex 6 to the Chad Memorial). Likewise Italy, since in his statement to the Senate of 24 April 1899, Canevaro, Italian Minister for Foreign Affairs, describes the Declaration of 21 March as delimiting the "*sphere* of influence" - there the expression is! - of both France and Britain (Annex 6 to Chad's Reply).

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However, these interpretations involve an approximation: for it is certain that the 1899 Agreement does not place the French and British zones on the same level.

Article 3 does not refer to the British zone; it confines itself to stating that "the French zone shall be limited to the north-east and east by a line which shall start from the point of intersection of the Tropic of Cancer ...", etc.. A French zone of influence, then, certainly, but not, strictly speaking, any British zone of influence on the other side of the line. Rather, a French "zone of disinterest" or, as Mr. Sohier

put it positively on 16 June, an "area of British interest" (CR 93/16, p. 56). We know the reasons for this lack of reciprocity. These are, first and foremost, the obsessions of Cambon and Delcassé with "avoid[ing]", as the latter writes in a dispatch dated 25 February 1899, "giving legal recognition to Britain's situation in Egypt" (ML, French Archives Annex, p. 23), which, moreover, explains the attachment of the 1899 Declaration to the Convention signed the previous year. And Mr. Sohier recognizes this in his statement of 16 June (CR 93/16, pp. 22-23, and 40). Lord Salisbury showed himself to be very understanding in this respect; as early as 8 February 1899, he had made a statement to Cambon which could not be clearer: "I admitted" - the speaker is Lord Salisbury - "that it was not so much of an object to us, as we did not attach much importance to any arrangements that were made to the north of the 15° parallel of latitude ..." (ML, British Archives Annex, p. 1). On the other hand, the British are most anxious not to let France move closer to Egypt, whence the line I shall return to shortly to limit the French zone.

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8. I fear all this is rather remote from the subject we should have been dealing with. But Libya has made a great issue out of the divergences it believes it detects between the attitude of France on the one hand and Great Britain on the other. With respect to the Ottoman or Italian protests between 1899 and 1934, there may well be nuances in the manner of replying, but I do not believe there are any real divergences; it is simply that, whereas the Gallic cock wears out its spurs in the arid mountains of Tibesti, the British lion warms itself in the sunshine of the Nile Valley.

At all events, whether it is the Declaration of 1899 or the Convention of 1919, Great Britain reacts with the greatest composure, a truly British composure. Chad has given ample illustration of this in

its pleadings (cf. Memorial, pp. 195-197; Counter-Memorial, pp. 314-316, paras. 8.39-8.45, or pp. 326-328, paras. 8.65-8.75). I shall confine myself to three telling examples:

- Prinetti, who was concerned at the Franco-British apportionment of 1899, was assured by Lord Currie, British Ambassador to Rome, in his memorandum of 11 March 1902, that this agreement did not in any way prejudice the rights of other Powers, "and that, in particular, as regards the *vilayet* of Tripoli and the Mutessariflik of Benghazi, all such rights remain entirely unaffected by it" (ML, British Archives Annex, p. 80); all that can be deduced from this is that his Britannic Majesty's Government remains cautious and the Foreign Office memorandum of 3 February 1902, to which the Libyan Counter-Memorial attaches particular importance (p. 156, para. 4.103), says precisely this; in substance, that memorandum indicates that, *a priori*, the 1899 Declaration does not prejudice the rights of any third State, but should this be the case, it is the French who must be approached (*ibid.*, p. 73).

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- The same general tone in the British reactions to the Italian protests this time aimed at the Convention of 8 September 1919. The Foreign Office Note Verbale of 5 February 1923, in reply to the Italian protest of 18 December 1921, is significant: Professor Cahier quoted only an extract from the end of this document (CR 93/17, p. 34). I believe it needs to be read in full, for it aptly conveys the British attitude:

> "The French Government, it has been ascertained, entirely share the view of His Majesty's Government that the arguments put forward in Monsieur Taliani's note under reference cannot be regarded as well founded. Moreover, His Majesty's Government understand that the French Government have in addition particular reasons for regarding the Italian standpoint as untenable." (ML, British Archives Annex, p. 40.)

Still the same position: the Italians cannot claim any right, but, in any case, all of this is a matter for the French ...

- Great Britain, this is the third example, had "claims" only on the area situated beyond the sphere of influence it had recognized to France by the Declaration of 1899; even these "claims" were not strongly stated and it made no fuss when, by Article 3 of the Treaty constituted by the Rome exchange of notes of 20 July 1934, it abandoned it, ceding the Sarra Triangle to Italy. All the same, it should be noted in passing that this took a proper agreement.

The French do not share this attitude, however. They intend to exercise the rights conferred upon them by the Declaration of 1899 and to effectively occupy the zone of influence Great Britain had thereby recognized to them. This was to be the case by 1914. Meanwhile, the Declaration has only the relative effect of treaties; it binds the Parties but is *res inter alios acta* as regards third countries. I shall not dwell on this any longer; regardless of what Libya would have us believe, Chad agrees; it has said so in its Memorial (p. 176) and has not changed its mind since.

018 In this respect, Chad can subscribe to the bulk of the long lesson in law Professor Crawford felt it incumbent upon him to give us last week (CR 93/19, pp. 46-52): a treaty recognizing a zone of influence does not, of itself, constitute a territorial title, albeit an inchoate one, and here too, Chad has never written anything to the contrary.

019 However, such a treaty constitutes an announcement that the beneficiary will seek, through effective occupation, to create such a title and signifies that the other State party to the treaty undertakes not to stand in its way. Third States are not bound in any wise.

(b) Recognition by Italy of the French sphere of influence

9. Among these third States, two are more particularly interested and thus more particularly concerned: Turkey and Italy. As early as 1890, the former asserted its "rights" - I put the word in quotation marks - on the hinterland of Tripolitania. If one speaks of territorial rights, they are, like those of France, moreover, purely virtual; these are contradictory claims, not opposable to other States as long as they have not been substantiated by "the actual, continuous and peaceful display of State functions" (*Island of Palmas* case, award of Max Huber, 4 April 1928, *RGIDP* 1935, p. 166). The two Powers, France and Turkey, are aware of this and were to embark upon a "race for Tibesti", where they would arrive more or less at the same time, but France was to remain there and that makes all the difference. Other counsel of Chad will develop this point further.

10. The other State concerned at the colonial appetites of the French is Italy. To be sure, Italy, as Libya is fond of repeating, has no right over Libya, not even a virtual one. It cannot claim any hinterland whatever (or it would be a "trans-Mediterranean hinterland"; even counsel of Libya have not thought of this despite their ingenious imaginations) and no Power has recognized in favour of Italy the least sphere of influence in North Africa. It will be the primary ambition of the Mediterranean policy of the young Kingdom, not without success.

To be sure, the United Kingdom remains cautious and one can only pay tribute to the perspicacity shown by Mr. Sohier when, taking the opposite view to that of the Libyan Counter-Memorial (p. 156, para. 4.102), he recognized that the Franco-British Agreement of 1912 - which, in reality, is more in the nature of a unilateral declaration by Great Britain - was "of less direct relevance" for our case than that concluded with France the same year (CR 93/16, p. 56).

11. France, which seeks to placate Italy in the perspective of its designs on Morocco, was not to display the same reticence.

It is true that, as pointed out by Libya, one of the purposes of the exchange of letters of 14 and 16 December 1900 between Barrère, French Ambassador to Rome, and Marquis Visconti Venosta, Italian Minister for Foreign Affairs, "concerned France's interests in Morocco" (CR 93/16, p. 47). But this is only part of the truth: to be sure, in his letter of 16 December Visconti Venosta gives the assurance that Italy would not oppose a French venture in Morocco, on which point, by contrast, Barrère's letter of 14 December is silent. On the other hand, both letters deal with the question of Italy's right "to develop its influence with regard to Tripolitania and Cyrenaica", as the Minister modestly puts it, whereas the French Ambassador says that

> "the Convention of 21 March 1899, by its exclusion of the *vilayet* of Tripoli from the partition of influence for which it provides, implies *for the sphere of French influence*, in relation to Tripolitania-Cyrenaica, a boundary that the Government of the Republic has no intention of overstepping ..."

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I wish to emphasize the expression: "for the sphere of French influence". It is important on two counts: first, this expression clearly shows that France and Italy each consider that the 1899 Declaration reserved a sphere of influence to France; second, it also reveals that Italy recognized in favour of France the benefit of this sphere of influence. Indeed, it is hard to see how the former, Italy, could have been content with the assurances given by the latter, France, that it would not extend its sphere of influence beyond a given limit if, at the same time, Italy had challenged the existence and validity of such a sphere.

As Mr. Sohier rightly remarked a fortnight ago (CR 93/16, p. 49), the fact remains that the exchange of letters of December 1900, while positing the principle of a future extension of Rome's influence in

Tripolitania-Cyrenaica and establishing the recognition by Italy of the French sphere of influence outside the vilayet of Tripoli, on the one hand does not constitute a border treaty and, on the other hand, does not place the two States on an equal footing, since Italy is recognizing a *fait accompli* (the French sphere of influence arising from the 1899 Declaration), whereas Italy's rights in Libya are subordinate to "a modification of the political or territorial state of Morocco".

12. These two lacunae would be filled by the exchange of letters of 10 July to 1 November 1902 between Prinetti, the new Italian Minister for Foreign Affairs, and Barrère.

Three points should be noted:

- to begin with, the two States mutually recognize for the benefit of each other, in general terms, spheres of influence - in Morocco for France *and* in Tripolitania-Cyrenaica for Italy, though this runs counter to what is stated by Libya (CR 93/16, p. 53) - which does not speak of Tripolitania-Cyrenaica - and in this connection, Chad wishes to specify once more that it in no way denies that the expression "aforesaid regions" which appears in the Agreement obviously refers to Morocco and Tripolitania; but that expression is not the basis for Chad's affirmation -
- and that is my second point - that Italy recognized in another manner the existence of a French sphere of influence such as was established by the Anglo-French Declaration of 1899; this follows from the reference made in 1902 to the exchange of letters of 1900, which, as we have just seen, recognized the French sphere of influence;
- and lastly, third, the two States agreed on the course of the Tripolitanian boundary; I shall revert to this presently.

13. First we must assure ourselves that the *travaux préparatoires* and the subsequent practice of the Parties to the Franco-Italian Agreements of 1900 and 1902 confirm the interpretation according to which these exchanges of letters in fact endorsed the mutual recognition by France of a possible zone of expansion of Italy in Tripolitania-Cyrenaica, and by Italy of the French sphere of influence.

Chad has already spoken at length on this point (MC, pp. 145 ff.; CMC, pp. 196 ff. and 206 ff.; RC, pp. 35 ff.) and no new elements in this respect are to be found either in the Reply of Libya or in the oral arguments of its counsel.

With regard to the *travaux préparatoires*, it therefore suffices to recall that it was Marquis Visconti Venosta himself who insisted that the following words should be added to Barrère's letter of 14 December 1900: "by its exclusion of the *vilayet* of Tripoli from the partition of influence which it endorses" (cf. ML, French Archives Annex, p. 85); this expression, by itself alone, sums up the two essential aspects of the exchange of letters that concern us - partition of influence, vilayet of Tripoli.

It should also be recalled that in his speech before the Italian Chamber of Deputies on 14 December 1901, Prinetti repeated the general idea of the preceding year's exchange of letters. I am well aware that Libya sets great store by a word which does not appear in the Agreement of 14-16 December 1900 (cf. CR 93/16, p. 51); the Italian Minister did indeed say:

> "The Government of the Republic [meaning France] has taken care to inform us that the Franco-British Convention of 21 March 1899 marked for France, in relation to the region bordering on the eastern boundary with its African possessions, and in particular with respect to the Vilayet of Tripoli, a province of the Turkish Empire, a limit which it did not have the intention to overstep ..." (MC, Ann. 333.)

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Why the "*eastern* boundary"? For a reason which emerges more clearly if we read the Italian Minister Prinetti's statement in conjunction with the speech made by Mr. Delcassé before the French Chamber of Deputies a few weeks later, which Mr. Sohier was careful not to cite although the two statements had been closely co-ordinated. Yet the French Minister's speech clarifies that of his Italian colleague by spelling it out in greater detail:

> "The African Convention of 21 March 1899, which has definitively included in our sphere of influence the territories of the Borkou, the Tibesti, the Kanem, the Baghirmi and the Ouadaï, thereby linking the French coast of the Congo with the Algerian and Tunisian Mediterranean coasts, thus represents for us, in respect of the other countries and regions bordering the eastern frontier of our African domain, the limit which we have no intention of overstepping ..." (MC, Ann. 334.)

This "eastern frontier" is therefore constituted by the long line which, from the Congo to the Mediterranean, marks the limit of France's possessions and which is, in effect, globally situated to the east of these: Delcassé and Prinetti had a less "mathematical" concept of geography - as did Lord Salisbury or Cambon - than the Libyan Party!

14. Italy subsequently reiterated the undertakings assumed in 1902. My colleague and friend Professor Cassese will speak about these presently, as well as about the circumstances that surrounded and followed their conclusion.

True, Italy later marked, with a certain vehemence, its opposition to the Franco-British Convention of 8 September 1919. But those protests themselves are significant; they relate to the line - new according to Italy - specified by the 1919 Convention and in no way bring into question the recognition by Rome of the sphere of influence or of the colonization that resulted therefrom. I cite as evidence - but it is only one example among many others - the note of 1 July 1932 whereby the Italian Government affirmed

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> "the full and complete validity ... of that part of the Franco-Italian notes (*sic*) of 11-12 September 1900 and 1 November 1902 which refers to the territorial limits of French expansion in North Africa by reference to Tripolitania-Cyrenaica ..." (CMC, Ann. 72).

In several other notes addressed to the French and British Governments by that of Rome, Italy recalled the terms of the 1900 and 1902 Agreements and admitted that these endorsed the existence of a French "sphere of influence" (the expression appears frequently in the notes) (cf. CMC, pp. 181-182, para. 7.44) beyond the frontiers of Tripolitania-Cyrenaica.

15. By the text of the 1900 and 1902 Agreements, confirmed by the *travaux préparatoires* and by its consistent subsequent attitude, Italy therefore recognized the opposability to itself of the Anglo-French Declaration of 21 March 1899, at least with regard to the sphere of influence which that Declaration recognized France as having.

What legal consequence did this entail, Mr. President? Truly, an altogether essential consequence: from then on, Italy could no longer claim that the French sphere of influence was not opposable to it. Unlike the Ottoman Empire, it had accepted a fact which but for this would not have compelled its recognition. True, it would be able to proclaim itself the Ottoman Empire's successor, but only to the extent that the rights which the Turks claimed did not encroach upon those it had itself recognized France as having. Independently of the fact that one does not succeed to claims and that the alleged "rights" of the Sublime Porte were no more than claims, as Mr. Malcolm Shaw will demonstrate, any other theory would rob the very idea of a zone (or sphere) of influence of all substance; yet that idea, as the Court

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recalled in the passage from its Advisory Opinion in the *Western Sahara* case cited by Professor Crawford himself, has the following effect: by a treaty concerning a sphere of influence

> "one party granted to the other freedom of action in certain defined areas, or promised non-interference in an area claimed by the other party" (*I.C.J. Reports 1975*, p. 56).

These views are shared by the most authoritative doctrine, which I have quoted in the manuscript handed in to the Registry (cf. Charles Rousseau, *Droit international public*, III, *Les compétences*, Sirey, 1977, p. 199; see also John Westlake, *Collected Papers* by L. Oppenheim, Cambridge University Press, 1914, pp. 191-193 or Thomas H. Holdich, *Political Frontiers and Boundary Making*, Macmillan, London, 1916, pp. 96-97), and the Permanent Court also proceeded on the basis of the same idea in the *Eastern Greenland* case (*P.C.I.J. Series A/B, No. 53*, p. 73).

It remains for me to establish what was the limit that the Agreements of 1900 and 1902 - especially the latter, the former being imprecise in this respect - what was the limit those Agreements imposed upon French expansion. That will form the subject of the second part of my statement.

II. THE LIMIT OF THE FRENCH ZONE OF INFLUENCE RECOGNIZED BY ITALY

(a) Recognition by Italy of the frontier of Tripolitania

16. I come, then, to the limit of the French zone of influence recognized by Italy, and we shall see first that Italy recognized the frontier of Tripolitania. We shall then go on to speak of the limit of the French zone itself. By the exchange of letters of December 1900, Italy recognized that France had a right to extend its influence in the region adjoining Tripolitania-Cyrenaica by virtue of the Agreement of 21 March 1899. As to the limit of that French zone, this first accord remains imprecise.

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Imprecise, but not silent. In it, France admits that the Franco-British Agreement of 1899

> "implies for the sphere of French influence, in relation to Tripolitania-Cyrenaica, a *limit* that the Government of the Republic has no intention of overstepping".

Moreover, as I recalled a few moments ago, some words were added at the request of the Italian Minister for Foreign Affairs; Visconti Venosta had in fact requested and obtained from Barrère that it be specified that "the Convention of 21 March 1899" excluded "the *vilayet* of Tripoli from the partition into zones of influence which it endorses". Italy, for its part, reserved "the right to develop its influence with regard to Tripolitania and Cyrenaica".

Thus, at the same time as it reserved for itself a zone of influence in Tripolitania-Cyrenaica, Italy recognized France's right to develop its zone of influence outside the limit of the former (meaning Tripolitania-Cyrenaica). The exchange of letters of 1900 does not, however, specify where that limit is situated. And that was to be one of the objects - the object with which we are concerned here - of the 1902 Agreement.

17. As the Libyan Party admits (CR 93/16, pp. 52 and 54), it was Italy that was not fully satisfied with the 1900 exchange of letters: not only were its possible rights over Libya merely conditional - conditionally recognized by France, to be completely precise - but also the boundary of Tripolitania-Cyrenaica had not been defined by the Agreement, an indirect result of this being that the limit of the French zone of influence, too, remained imprecise.

It is not surprising, therefore, that this limit was specified at Prinetti's request. The result was the formulation which we find in the two letters dated 1 November 1902 and which Libya so greatly dislikes:

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> "On that occasion it was explained" (the reference is to the preparatory talks between Prinetti and Barrère) "that the limit to French expansion in North Africa, as referred to in [Barrère's] letter of 14 December 1900, is to be taken as corresponding to the frontier of Tripolitania as shown on the map annexed to the Declaration of 21 March 1899, complementing the Franco-British Convention of 14 June 1898."

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The limit referred to is the wavy line surrounding Tripolitania and starting at Ghadamès which is to be found in the upper left-hand part of the map, next to the legend. We have already seen it. And you are going to see an enlargement of it. And this, then, is the frontier of Tripolitania.

18. I am aware, Mr. President, that the Libyan Party challenges this on the pretext that the line is

> "just a wavy, dashed line, not identified on the map's legend as a boundary of any kind, which represented, notionally, *what was commonly regarded at the time to be the Tripolitanian frontier*" (CML, p. 237, para. 4.254; emphasis added by us).

This concept - a very new one - of a "notional boundary" is somewhat baffling, but Libya's counsel are faithful disciples of Giraudoux, who regarded the law as "the finest school of the imagination", and I prefer not to follow them into this territory where we would lose our way amidst vain conjectures.

On the other hand, I note that Libya admits that this line "was commonly regarded at the time to be the Tripolitanian frontier". The admission is revealing: there exist throughout the world numerous frontiers that are not hallowed by any treaty; they are none the less frontiers in the full sense of the word. Need it be recalled, moreover, that "the general toleration of the international community" towards Norway's line establishing the limit of its territorial sea constituted one of the bases of the solution adopted by the Court in the *Fisheries* case (*I.C.J. Reports 1951*, p. 139)? *Mutatis mutandis*, the same applies here: as Libya itself states, the line of the Tripolitanian

frontier on the *Livre jaune* map is only the cartographic expression of this general recognition, as is also, for example, the - identical - frontier appearing on the Justus Perthes map of 1892 and as attested by the sketch-map prepared by the Foreign Office in 1902 which is reproduced on page 206 of the Libyan Memorial.

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The Justus Perthes map you see projected behind me calls for a remark. As I said last Friday (CR 93/21, p. 27), Libya has reproduced, in its Reply, this map, which appears on page 2 of the Chad's *Cartographic Atlas*. But, curiously, the frontier line is not identical in the two maps: it seems that the Libyan Party has retouched it so as to make of the dotted line with a yellow line running alongside it on the original map - which Chad has filed with the Registry - a solid line. This is unfortunate, Mr. President, for now this line no longer corresponds to any legend whereas actually it marks, as the legend of the "real" Justus Perthes map very clearly indicates, the "Turkish colonial frontiers" (*Kolonialgrenzen*).

This goes very far, Mr. President, for it disposes at the same time of the "golden legend" of the Ottoman hinterland which supposedly was under Turkish territorial sovereignty well to the south of this frontier. Not so: that territorial sovereignty stopped right at the frontier of Tripolitania as it was generally accepted at that time (we are in 1902); as it appeared on the period's maps; as it corresponded, in fact, to Turkey's establishment on the ground; and as the Italian Under-Secretary of State, Mosca, recognized 12 years later to be shown accurately on *"la carta che fu redatta* in seguito *alla convenzione anglo-francese"* - "the map drawn up *subsequently*". I would like it to be "subsequently", Mr. President, since Professor Condorelli says so! (CR 93/17, p. 48) - subsequently, then, to the Anglo-French Agreement of 1899 (RC, Ann. 28).

031 19. But there is more. The frontier line that concerns us not only formed the subject of a general recognition born of the conviction manifested by the maps and of the silence of everyone. In this particular case, Italy accepted this line explicitly, expressly and by agreement through the Prinetti-Barrère Agreement of 1902.

The precise legal status of this map - in respect of which the two Parties agree in admitting that it was not annexed to the Franco-British Declaration of 1899 but only to the French publication, a highly official one, and known to the British, that is the *Livre jaune* - matters little. The fact is, as Mr. Sohier recalled in his statement of 16 June, that it was at Prinetti's express request that this map was explicitly mentioned in the Accord (CR 93/16, pp. 54 and 55). Indeed, as Ambassador Barrère states in a dispatch dated 22 June 1902, it was the Minister who

> "asked that it be mentioned that the frontiers of our African possessions on the side of Tripoli are those shown by the map annexed to the 1898 Anglo-French Convention" (ML, French Archives Annex, p. 121).

Such was the general formulation maintained in the exchange of letters signed some days later - with, however, two changes. One was purely formal. It consisted in replacing "1898" by "1899" - probably a matter of a simple transcription error made by Barrère or his secretariat or, perhaps, as Libya conjectures in its Memorial (p. 207, para. 5.95), a *lapsus linguae* by Prinetti. The second change was more important: instead of referring, as had initially been envisaged, to "the frontiers" of "the African possessions" of France, the exchange of letters referred to "the frontier of Tripolitania" shown on the map, as though Italy,

032 indifferent to what France might do in its African possessions, meant above all to secure its own colonial expansion in the region and, to that

end, to have defined, as Libya writes in its Memorial (p. 207, para. 5.95) "with more precision the boundaries of the '*vilayet* of Tripoli'".

Satisfaction having been given to Italy, "without difficulty" as Barrère wrote in his dispatch of 22 June 1902, "Prinetti's addition", to cite the Libyan Memorial once again, "gave a more formal status to the wavy line, at least as between France and Italy" (*ibid.*). Small matter, then, that the legend appearing on the map should not expressly define this line as the frontier of Tripolitania, unlike the Justus Perthes map on which it is directly based; for the purposes of the Franco-Italian exchange, that is the point at issue.

20. The consequences of this were twofold:

First, Italy and France recognized, at least in their relations *inter se*, the course of the frontier of Tripolitania-Cyrenaica; it is that resulting from the map referred to in the 1902 Agreement. True, that agreement was *res inter alios acta* in respect of third States, and in particular in respect of Turkey, and Chad has never claimed and does not claim that the Porte was bound by the Franco-Italian exchange of letters. But Italy, for its part, was bound by the Agreement. France recognized its right "to develop its sphere of influence" in Tripolitania-Cyrenaica, but the frontier of Tripolitania-Cyrenaica was, this time, precisely defined in the relations between the parties. They could, of course, reverse their agreement, but together and only through the conclusion of a new treaty. And, as Professor Cassese will show presently, no such treaty ever materialized.

033 The second consequence of the exchange of letters of 1902 is that this "frontier of Tripolitania" constitutes "the limit of French

034 expansion in northern Africa". France cannot encroach upon the boundary thus defined, but as for the rest, it can do what it wished. In any

case, Italy recognized it as having this right to do as it wished, which, as a result, became opposable to Italy.

(b) The opposability to Italy of the limit of the French sphere of influence

21. As you know, during the next 12 years France was to take effective possession of the sphere of influence it had been recognized as having by the 1899 Declaration and the 1902 Agreement, thus transforming into a real colony what had been but a zone of influence, a virtual, dotted-line colony if you wish. Mr. Cassese will also recall these facts.

Vis-à-vis Italy, this expansion could, legally, have reached the frontier of Tripolitania.

Vis-à-vis Great Britain, however, France was bound by the Additional Declaration of 21 March 1899. This Additional Declaration had limited the French zone to the north-east and east and, while Italy could not oppose that limit to the French, the British for their part could invoke that limit.

At one time, France believed that the 1899 line itself was opposable to Italy. But, Mr. President, as the Agent of Chad remarked last Friday, France is France and ... Chad is Chad. And a more attentive study had convinced him that, in fact, the exchange of letters of 1902 did not limit the French zone of expansion except by the frontier of Tripolitania.

At the most it might be maintained that Italy, whose authorities had knowledge of the 1899 map to which the 1902 Agreement refers and, consequently, of the "limit of French possessions" which appears on the map - this is clearly stated in the legend - that Italy, therefore, could not in good faith dispute that limit. The 1899 Declaration was, it is true, *res inter alios acta* so far as Italy was concerned; not the map which both parties regarded as being annexed thereto.

But let us leave this aside and let us agree, for argument's sake, that we must adopt a literal interpretation of the exchange of letters of 1902, which does not refer to this "south-east line". In that case, France's freedom of action was still greater: Italy recognized France as having a sphere of influence which, virtually, authorized it to establish its colonial possession as far as the frontier of Tripolitania. That was only partially to be the case.

22. It was to be the case to the east, where the French were already established by reason of the protectorate over Tunisia in 1881 and the conquest and subsequent occupation of Algeria. It was also to be the case to the south: for we must, decidedly we must consider Niger, where France did occupy the zone of influence it was recognized as having under the 1898 and 1899 Agreements, and that at the very beginning of the 20th century. So the southern frontier of Tripolitania also became the northern frontier of the French colony of the Niger. In this connection I take the liberty to recall that at the time the Tibesti formed part of Niger and not of Chad, in which it was incorporated only in 1930. Unless Libya proposes to dispute the frontier of Niger as well - perhaps that is its intention? At all events, the question may be asked - the upshot is that Libya's southern frontier between Toummo and the Tropic of Cancer indeed follows the frontier of Tripolitania appearing on the map accepted by Italy in 1902.

23. On the other hand, the same is not the case to the east of the intersection of the Tropic of Cancer and the 16th meridian. Here, French expansion is legally limited only by the undertakings assumed towards Great Britain (not towards Italy) in 1899.

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Where is this limit situated? This, Mr. President, is of little importance: even if we agree for argument's sake that this limit does not result precisely from the 1899 Declaration, it was established

without any ambiguity whatever by the Additional Agreement concluded between France and Great Britain on 8 September 1919. Whatever the situation might have been previously, this limit - thenceforward a frontier, because France effectively occupied the sphere of influence which Britain and Italy had recognized it as having - this limit, then, is constituted by a line which, starting at the Tropic, shall run (I cite the 1919 Convention) "thence to the south-east until it meets the 24th degree of longitude east of Greenwich at the intersection of that degree of longitude with parallel 19°30' of latitude".

This frontier compels recognition by Italy.

Oh, surely not because Italy accepted it: it was to protest against this line repeatedly between 1921 and 1935. But, here again, Libya equates a little lightly claims or protests with rights. The question is not whether Italy protested: it did protest. The question is, rather, whether its protests were legitimate; whether its claims were well founded in law. And they were not: in 1902, Italy had clearly agreed that France could pursue its colonial expansion as far as the frontier of Tripolitania: the 1919 line is nowhere near that limit to the east of the intersection of the Tropic of Cancer and the 16th meridian east of Greenwich. There is therefore no legal motive at the basis of the Italian protests, especially since at that time the French were effectively established in the region, while the Italians arrived there only much later: Koufra was taken only in 1931, and Italy was not to obtain until 1934 the renunciation by Great Britain, by a treaty, of its claims to the Sarra triangle.

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24. Mr. President, the Parties have nevertheless long been in conflict about the course of the limit of the French sphere of influence resulting from the Franco-British Agreement of 21 March 1899. As the proceedings advanced Libya was led to put the accent on the mathematical

line which it calls "strict south-east line", with all the more apparent conviction since it seems to be aware that it has no alternative course to defend as it rightly rejects the line resulting from the Laval-Mussolini Treaty of 1935 and clearly cannot take seriously the 15th parallel north which is justified by no - I repeat no - valid argument, legal or not. For its part Chad considers that the "south-east line" is appropriately represented by the *Livre jaune* map.

Besides, and in view of what I believe I have established up till now, I think I can be fairly brief about this quarrel, which has taken on exaggerated importance in relation to the real legal stakes: since Italy, by the agreements of 1900 and 1902, admitted that the French zone of influence could extend up to the frontier of Tripolitania shown on the 1899 map, it could not protest against the colonial ascendancy of France as long as it did not encroach upon its own sphere of influence: Tripolitania - and the 1919 course fully observed that condition.

25. In view of this, why - since I do not after all want to avoid discussion - does Chad argue that in any case this course does not, or practically not, differ from that of 1899? The reasons are very numerous and are explained in great detail in the pleadings of Chad (cf. MC, pp. 185-197 and CMC, paras. 8.80-8.121). I shall confine myself to referring once again in brief to the principal reasons, particularly in the light of what counsel for Libya have repeated in their statements.

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Let us begin with the text of Article 3 of the Declaration if we may, Mr. President. There are two elements to be noted. Firstly, the expression "in principle" - "It is agreed in principle ...". This wording at the beginning of Article 3 shows that the signatories did not have the feeling that they were solving a mathematical problem; simply, because the limit of the French zone had to be settled in that almost

unknown region, for the reasons that I have given, they indicated from the outset that they were only indicating general directions, which is confirmed moreover by the words "in a south-easterly direction".

Other textual arguments were advanced by MacMichael, one of the principal negotiators of the Convention of 8 September 1919, in his letter of 7 March 1919 to Vansittart. May I refer you to this, Mr. President, Members of the Court. He concluded: "if the line is
039 drawn due south-east it becomes ridiculous" (MC, Ann. P.12). A week later he went further in a long note with much detail on the "several absurdities" to which what he called the "literal line" led, and advised the adoption towards the French of a more common-sense position (RC, Ann. 40). Libya does not seem to be moved by this wise advice and confines itself, in some of the many maps that it has prepared, to noting the existence of a "gap". I do not always understand the legal conclusions it draws from this (cf. CML, Map No. 16 or Map No. 29 in the Judges' folder and CR 93/16, p. 41). Chad for its part sees in this an *a contrario* confirmation of the impossibility of the mathematical line.

26. One of the outstanding features of the negotiation between Lord Salisbury and Ambassador Cambon was the determination of France to obtain the whole of the heights and oases of Tibesti and Ennedi, and Great Britain had always agreed to accede to that request. True, Chad does not contest the fact that, as Libya recalls (cf. CR/93/16, p. 37), the parties based themselves not on the maps drawn up from 1910 onwards - which place these mountains correctly - but on maps dating from the end of the 19th century: the Justus Perthes map of 1892 which you have here, or the French staff map of 1896. But on both these maps it is clear that the mathematical line dear to Libya intersects the massifs - especially those of the Ennedi - that are shown on them, although these maps show them as being located further south than they are in actual fact. This

certainly does not correspond to the intention of the parties, all the less since several times France had insisted on a strip of desert being
• 040 allotted to it at the foot of and to the north of these mountains. The course of the *Livre jaune* is the only one which, based on the maps of the period, leaves the oases and the heights of Tibesti, Ennedi, Borkou and Ounianga on the French side.

27. On this point, Libya has made much of an episode that took place on 19 March 1899, three days before the signature of the Declaration. This episode is related in a dispatch from Cambon to Delcassé that very evening (ML, French Archives Annex, pp. 39-41). It comments on a British draft that would have made the line that interests us start from the *18th parallel*; this is what Cambon wrote:

> "I pointed out that it was impossible to continue the delimitation as far as the 18th parallel, as this would mean our losing a significant part of the territories that we were claiming to the north of the Darfour ..."

It was after that objection that the actual wording was adopted, after some hesitation. The interpretation of this episode advanced by Libya in its Memorial (pp. 176-178) and recalled by Mr. Sohier in his speech of 16 June (CR 93/16, pp. 38-39) is absolutely extraordinary. Basing itself on the statement that the verb "to push" applies to the delimitation coming from Darfour (whereas it is clear that it concerns the "south-east" line), Libya concludes that France had asked that the arrival point of the line should be pushed back towards the south. This, which ran counter to all the negotiating objectives pursued by France, cannot be advanced seriously because it is evident that quite the opposite is true. What Cambon is protesting against is the loss of certain territories of the future B.E.T. that the line proposed by Lord Salisbury would involve; "to push" this delimitation southwards
• 041 would obviously aggravate that drawback. And if in fact this episode is

important it is because it shows that the arrival point of the line is necessarily *north* of the 18th parallel since, and on this point the Parties agree, Lord Salisbury accepted Cambon's objection.

28. Everything therefore goes to show that the parties had in mind a line that was certainly "south-east" within the meaning that non-cartographers give this term and certainly not a "strict south-east line" as affirmed by Libya. This is what the *Livre jaune* map reflects. Let us look at it again.

I am not a cartographer or a geographer, Mr. President, and I must say in all conscience that I have never had the slightest doubt about the fact that the dotted red line that I have underlined, descending from the Tropic of Cancer to the 24th parallel is indeed in a "south-east direction". Lord Salisbury and Cambon were not cartographers or geographers either and they would no doubt have been greatly surprised if they had been told that this line, which corresponded to their intention of leaving the whole of the B.E.T. in the French zone, was not south-east, in a south-east direction. All the more since they had taken the precaution of describing the course only "in principle" and in the direction. Moreover, one might add that the line in question is not strictly east-south-east either as Libya now affirms (CR 93/16 p. 34): if that were the case, it would go further north.

29. The text of the Declaration, the aims pursued by the parties and plain common sense therefore lead us to consider that the *Livre jaune* map faithfully reflects the ideas of the negotiators. It was published in the *Livre jaune* on 25 March. It was known to the British, as Chad has shown (cf. MC, pp. 161-163) and as the note from Sir Thomas Sanderson, then Ambassador in Paris, to Lord Salisbury shows. The note is dated 27 March; in it Sanderson draws attention to the evident difference between the text and the map, while considering that it is not of great

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importance ("I do not think that it matters much"); Salisbury read it since he initialled it (ML, British Archives Annex, p. 37); and yet the British did not react. Can clearer acquiescence be imagined, Mr. President? The *Livre jaune* map is not formally annexed to the Declaration but it is just as though it was, and it is not improper to see in this an authentic interpretation of the desire of the parties which was to be confirmed by the Supplementary Convention of 8 September 1919.

30. True, it may be argued that there is a difference between the course of the *Livre jaune* map and the one resulting from the 1919 Convention. The former - the *Livre jaune* map - seems to reach the 24th meridian at approximately the 19th degree of latitude north - I say "approximately" for it should be recalled that the map is on the scale of 1:12 million, a scale which excludes any precision. The latter, the text of 1919, made the limit go up to 19°30'. It was those all the same very approximate 30' of difference that led the Ambassador of France in Rome to admit in the note sent to the Italian Minister for Foreign Affairs of 7 February 1923, that "this interpretation, so close to the provisional line on the 1899 map, slightly enlarges the French zone of influence at the expense of the Anglo-Egyptian domain" (MC, Ann. 102).

But Mr. President, I wish to correct the impression that my skilful colleague, Mr. Cahier, wished to give the Court two weeks ago (CR 93/17, p. 18). This possible difference between the course of the 1899 map and the course resulting from the Supplementary Convention of 1919 is approximately 22,000 square kilometres maximum and in no case 180,000 square kilometres, as Mr. Cahier let it be understood. This much larger area would represent the territory between the 1919 frontier and the "mathematical line" which as we have seen has no legal foundation and which would result in transferring not only desert territories, as

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Mr. Cahier said, but oases like those of Ouri, Tekro and Ounianga Saghir to Libya. Let us not draw arbitrary lines on maps, as the colonial Powers did in their time, in keeping with the detestable mores and laws of the time. We do not speak of abstract problems, Mr. President, and we must not lose sight of the fact that it is the fate of real, flesh and blood men and women that is at stake.

31. Besides, whatever may have been the differences between the course of 1899 and that of 1919, there would be no consequence as to the solution of the dispute before the Court. If that were the case, if there were such a difference, which I grant only for the purposes of discussion, it would in any case be the 1919 frontier that compelled recognition.

True, once again, Italy did not accept it. But by the Agreements of 1900 and 1902 it committed itself to allowing France to extend its influence up to the frontier of Tripolitania. Since that condition was met - and it was - its protests were in vain: *pacta sunt servanda* ...

Italy was in fact doubly bound. Because of the Agreements of 1900 and 1902, which it admitted in 1932 were still in force (this in its note of 1 July which I quoted just now). But it was also bound as successor of Great Britain to which it succeeded in the region, following the Treaty of Rome of 20 July 1934, in other words nearly 15 years after the conclusion of the Supplementary Convention of 1919.

32. To sum up, Mr. President, the conclusions of Chad on this point are as follows:

1. France had a sphere of influence in the region claimed by Libya recognized by the Franco-British Declaration of 21 March 1899;

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2. the limit of the zone of influence was constituted by a line shown on the *Livre jaune* map running from the intersection of the Tropic of Cancer to the 24th meridian east of Greenwich at approximately the level of the 19th degree of latitude north;

3. this limit was confirmed by the Franco-British Convention of 8 September 1919;

4. by the exchanges of letters of 1900 and 1902, Italy recognized that France had the right to extend its influence to the frontier of Tripolitania shown on the map of 1899:

5. this line constitutes the frontier between Libya and Chad west of the 16th meridian and up to the tripoint with Niger;

6. on the other hand, east of the 16th meridian the frontier is formed by the line defined by the Franco-British Supplementary Convention, which constitutes the authentic interpretation of the Declaration of 1899; and Italy had no right to protest against the Supplementary Convention and its consequences by reason of the Agreements of 1900 and 1902; more precisely it could contest; but it had no valid grounds for doing so.

Of course for these conclusions to be completely correct, the legal situation created by the Agreements must not have been subsequently modified. Mr. President, this is what my friend and colleague Mr. Cassese will show you, I expect after the break, if you will kindly allow him to speak then.

Mr. President, Members of the Court, thank you for your attention.

Le PRESIDENT : Merci, beaucoup, Monsieur Pellet. Nous allons nous interrompre maintenant et ensuite M. Cassese prendra la parole.

The Court adjourned from 11.20 a.m. to 11.35 a.m.

046 Le PRESIDENT : Veuillez vous asseoir. Monsieur Cassese.

Mr. CASSESE: Thank you.

1. Mr. President, Members of the Court, since this is the first time that I have the honour to plead before this august body, I am sure that you will understand my emotion and will show me your kind indulgence.

TERRITORIAL TITLES CLAIMED BY LIBYA: THE OTTOMAN HERITAGE AND THE COLONIAL CLAIMS OF 1915

2. Like my colleague, Mr. Alain Pellet, in his pleading today, I shall deal with the *second thesis* of the Republic of Chad, according to which the delimitations of 1899 and 1919 are fully opposable to Libya, even if the Treaty of 1955 is not taken into account.

3. The Republic of Chad has proved so far that the boundary line of 1899 was opposable to Italy on the basis of the Franco-Italian Agreement of 1902, and that it could consequently be invoked against Libya, which succeeded to Italy.

Nevertheless, this opposability of the boundary line of 1899 is contested by Libya on the basis of two arguments.

On the one hand, Libya invokes what it calls the "Ottoman heritage", or the claims of the Sublime Porte to the hinterland of Tripolitania, which are supposed to have been inherited first by Italy and then by Libya. On the other hand, our opponents invoke the "colonial heritage", claiming that Article 13 of the London Agreement conferred on Italy a right to territorial compensation which has now been inherited by Libya.

047 With your permission, I should like to try and prove to you that these two arguments do not bear close scrutiny.

4. I shall begin with the so-called "Ottoman heritage" of Libya.

I. The Ottoman "heritage"

Mr. President, Libya invokes this heritage to explain why the 1899 line is not opposable to it. According to Libya, the Treaty of Ouchy - also known as the Treaty of Lausanne, for you all know that Ouchy is part of Lausanne, by the Lake: there is a small hotel where the treaty in question was signed. Thus according to the Libyan Party, the Treaty of Ouchy - or Lausanne - together with the Treaty of London of 1915 sanctioned Italy's succession to Turkey, a succession which remained unaffected by the Poincaré-Tittoni Agreement of 1912.

I now propose to review briefly - and I promise to be brief - these two international agreements, beginning with the Treaty of Ouchy or Lausanne of 1912.

1. The Italo-Turkish Treaty of Ouchy (1912)

5. Our eminent colleagues on the other side of the bar have asserted that "Chad is undoubtedly afraid of the Treaty of Ouchy" (CR 93/16, p. 76). Nothing of the kind! We simply consider that this Treaty is quite irrelevant to the purpose of determining the southern frontier of Libya, for two main reasons.

6. The first reason is that the Treaty of Ouchy is ambiguous and even self-contradictory. This can be easily explained: Italy, in its imperialistic bulimia, wanted to lay hands on Libya, but only succeeded in conquering the coastal areas of the country. Hence its need to treat with the Ottoman authorities: although the Treaty enabled it to proclaim its sovereignty, it was obliged to make a whole series of concessions to the Turks, which explains the obscure and complicated content of the Treaty. In this connection, I cannot resist the temptation of quoting from the comments of an eminent Italian historian, Gaetano Salvemini, who wrote at the time that this Treaty

> "reminds us of the chromo-lithographies which are to be found in certain country inns, and which represent a woman of easy virtue, brazen and with a smiling, insinuating expression, who, from whatever part of the room you stand to look at her, seems to be looking at you all the time and only to be smiling at you. If three of you stand looking at her at the same time from three different angles, she will smile and flatter all three of you at once ... Who is the Treaty of Lausanne smiling at? Turkey? Italy? The Muslims of Libya? All of them? None of them? We have a vague and almost instinctive impression that the Treaty of Lausanne is destined to remain in the history of international relations as one of the most refined diplomatic take-ins of all time." (CMC, Ann. 122, para. 7.)

7. Apart from its basic ambiguity, there is a second reason why this Treaty is quite irrelevant for the purposes of determining the spatial boundaries of Italy's inherited rights in Libya: although it establishes that Italy has acquired sovereign rights over Libya, *this Treaty makes no mention of the frontiers of the country*.

Our honourable opponents skim over this point, pointing out that under this Treaty Italy "naturally inherited all the legal titles previously held by the Ottoman Empire and relevant to the subsequent delimitation" of the southern boundary (CR 93/16, p. 63). This presupposes that the Turks held sovereign legal titles to southern Libya.

Yet as my colleague Professor Shaw will show you in a few minutes, the Ottoman Empire never exercised sovereignty south of the 1899 line; 049 it therefore *never* acquired such a sovereign title. The claims it put forward in this regard remained without any legal effect, since they were not recognized by the other Powers and could not be established *in situ*.

The whole Italian "heritage" with regard to the southern boundary of Libya boils down to vague colonial claims which were never recognized by the international community. This leaves us far away from the so-called "territorial rights" to Borkou-Ennedi-Tibesti (B.E.T.) which our opponents mention on every possible occasion.

That is why it is right to maintain that the Treaty of Ouchy did not affect the future of the frontier in question. Italy indeed inherited the territorial rights formerly held by the Sublime Porte, but through the force of circumstances it could inherit only Turkey's *effectively established rights*, which did not apply to the Turkish claims to the B.E.T. Moreover, as Mr. Pellet has emphasized, Italy had recognized the boundaries of Tripolitania and Cyrenaica through an agreement in good and due form, and was bound by that recognition.

2. The Franco-Italian Agreement of 1912 (Poincaré-Tittoni Agreement)

8. I now come to the Poincaré-Tittoni Agreement of 1912.

According to the Libyan Party, this Agreement has no effect on the delimitation of Libya's southern frontier. But it is the very opposite that is true, as I shall now show you.

9. Let us first consider the *text* of the Agreement which appears as No. 1 in your file.

10. This text is clear:

The two Parties proclaim themselves to be *"desirous of implementing their Agreements of 1902"*. To that end they undertake *inter alia* not

50 in any way to impede such measures as they might see fit to take, Italy in Libya and France in Morocco.

The reference to the 1902 Agreements is not fortuitous. It represents much more than a mere "whereas" of a preamble, but stresses that the *essential purpose* of the Agreement is to confirm the 1902 Agreement. It is true that in 1902 the purpose of the arrangements between the two countries was merely to delimit their respective spheres of influence, since Italy did not yet exercise any effective authority in Libya. By 1912, however, Italy had occupied Libya and had acquired sovereign rights there, and in that context the reference to the

1902 Agreement in the Treaty of 1912 assumes quite a different significance: France and Italy undertake to recognize as the southern *frontier* of Libya the line appearing on the 1899 map which Italy had recognized in 1902.

11. Furthermore, this interpretation is confirmed by the *travaux préparatoires* of the Agreement.

12. Our eminent opponents have stressed in their pleadings that the 1912 Agreement contains no mention whatsoever of boundary questions. Yet a study of the *travaux préparatoires* shows that these questions were borne in mind by the negotiators on both sides. Since the Republic of Chad has dwelt at length on this matter in its Counter-Memorial (CMC, paras. 7.22-7.28), I can confine myself to two points in this connection.

13. First of all, the negotiations took place at a time when France *had not yet recognized* the new situation that arose from the Treaty of Ouchy, namely, Italy's acquisition of sovereignty over Libya; France had not yet recognized this.

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France further stressed that it could not recognize Italy's sovereignty over Libya "without indicating" - in the words of Minister for Foreign Affairs, Poincaré (CMC, Ann. 31, No. 193), "the territory it [Italian sovereignty] is to cover and without safeguarding our rights". You will see that this is very far from the "unconditional recognition" claimed by our opponents.

It is true that the French reservation relates only to the frontier between Algeria and Tripolitania, but the reason why Poincaré did not raise the question of the southern boundary is obvious: France considered that the southern boundary of Libya was not open to discussion: it had been clearly established by the Franco-Italian

Agreements of 1902, and there was therefore no need to specify French rights in that case. That is why the Treaty contains no mention of the boundary.

The second point to be stressed is that *it was Italy* that proposed to mention the 1902 Agreements explicitly in the Poincaré-Tittoni Agreement. The Italian Minister for Foreign Affairs, San Giuliano, proposed "that the Agreement to be signed should be explicitly founded upon the 1902 Agreement", "in order to affirm the continuity and efficacity of our Agreements" (CMC, Ann. 36, No. 241).

14. What conclusion is to be drawn from the text of the 1912 Agreement and from the *travaux préparatoires*? The conclusion is simple and unequivocal: several days after the Treaty of Ouchy, the Italians reaffirmed by an Agreement with France that they remained bound by the provisions of the Franco-Italian Agreement of 1902. Accordingly Italy, henceforth holding sovereign rights over Libya, undertook to regard the 1899 map as determining the southern boundary of Libya, thereby renouncing any rights inherited from Turkey to the south of the southern boundaries of Libya. In other words, this undertaking of 1912 created a real *estoppel* for Italy. Far from opposing the 1902 Agreement, Italy reaffirmed its validity at a time when Tripolitania-Cyrenaica was no longer - at least in part - a sphere of influence for Italy, but a real colony.

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3. The Treaty of London of 1915

15. I now come to the Treaty of London of 1915, in which Libya claims to see a confirmation of its theory about the Ottoman heritage. Libya makes particular reference to Article 10, which you will find under No. 2 in your file and which you can also see on the screen.

It is true that under this Article 10, Italy obtained from the contracting Powers to the London Agreement the termination of the rights and privileges that it had been obliged to concede to Turkey in concluding the Treaty of Ouchy of 1912, which marked the end of Ottoman sovereignty over Libya.

16. But what were these rights?

Our Libyan colleagues have recalled them in the historical fresco that they have so ably drawn. The rights and privileges that the Sultan had retained in 1912 related *both* to the protection of Ottoman interests in Tripolitania and in Cyrenaica, and to the maintenance of the Sultan's prerogatives in religious matters.

In both cases, the rights concerned were in no way territorial in nature: Italy, which was in a position of strength, had categorically refused any concession that could have hampered the annexation of Libya.

• 053 Thus, all that Italy obtained from the Treaty of London of 1915 was an undertaking to put an end to that last vestige of the former Ottoman sovereignty, and this was done by the Treaty of Peace of Lausanne, in 1923.

17. A mere recapitulation of the relevant provisions and of their context suffices to show that neither the Treaty of London nor the Peace Treaty of 1923 provided for Italy's succession to Turkey. Both Treaties confined themselves to providing for the abolition of the privileges retained by the Sultan in 1912, to which these two Treaties refer - and

• 054 no more. It would therefore be wrong to ascribe to these provisions an "unreserved recognition" of Italy's succession to the rights of Turkey.

18. To make things quite clear, I am not talking here of State succession *in general*: no one would deny that Italy succeeded to Turkey in Libya. What we are contesting is that Italy inherited any rights that Turkey might have had to the territories south of the

1899 line. In this respect Italy could not succeed to Turkey, since it had renounced all claims of that kind under its Agreements with France of 1902 and 1912.

4. Italy's subsequent practice

19. Italy's subsequent practice should serve to confirm that it did not feel able to lay claim to any heritage of that kind.

A perusal of the many Italian diplomatic notes will show that even when, between 1921 and 1934, Rome protested against the effective occupation of B.E.T. by France, the Italian authorities alleged that France had violated its *conventional* undertakings vis-à-vis Italy.

Thus, Italy maintained that France was violating the Anglo-French Convention of 1899, recognized by Italy in 1902 and 1912. But at no time did it invoke any rights of succession to the Ottoman Empire.

20. I should also like to remind you of the statement that the Italian Minister for Foreign Affairs, Mr. Tittoni, delivered in the Chamber of Deputies on 27 September 1919, or long after the Italian conquest of Libya. Mr. Tittoni recalled in his statement that:

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> "as early as the Prinetti-Barrère Agreement of 1 November 1902, *we recognized* the boundary of the Franco-British Convention of 15 (*sic*) June 1898 (*sic*), which allocated the Tibesti and the Borkou to France" (MC, Vol. V, Ann. 337; emphasis added by Chad).

Incidentally, Tittoni seems to have made a mistake about the date, since he should have cited the 1899 Convention; this must have been a slip of the tongue. In any case, I would ask you to note the terms used in this statement by Mr. Tittoni, Minister for Foreign Affairs of Italy: "we *recognized*" and the reference to "*the boundary*" of 1898; and you will see that he makes no mention of any *rights of succession* of Italy to

the Ottoman Empire. This public statement of position emanating from the main Italian organ responsible for international relations is undeniably of vital importance.

21. But our opponents have tried to use to their advantage a note of 1929 in which the French Ambassador to Rome, Beaumarchais, gives an account of his meetings with Mussolini (CR 93/18, p. 25).

During these meetings, Mussolini put forward a series of claims, going so far as to invoke the old theory of the Ottoman heritage which, he said, his services were urging him to disinter. But the whole tone of the discussions clearly shows that this was merely a trial balloon among so many others.

In any case, the French Ambassador firmly rejected Mussolini's attempts, reminding him that the situation was definitively settled by the Agreements of 1899 to 1902 (RL, Vol. II, Exh. 5.4, p. 336).

22. The Italians subsequently upheld a less tortuous thesis than that of Mussolini. The Republic of Chad has amply illustrated this point
056 in its pleadings, showing, in particular, how despite the warlike inclinations of the Ministry of the Colonies, the viewpoint of the Ministry of Foreign Affairs, which was, rightly, more concerned with the legal context, had always ended by prevailing (see RC, paras. 7.37-7.60). I shall mention only two statements as examples.

23. The first comes from the Head of the Africa Department of the Ministry of Foreign Affairs, Mr. Guariglia. In a note addressed in 1930 to the Italian Ambassador in Paris, this great expert in African problems stated his disagreement with the interpretation of the Italian Ministry for Colonies in the following terms:

> "it is pointless to refer to the period during which Ottoman garrisons were established in Tibesti, since *we are debarred* from using those arguments in view of the Prinetti-Barrère exchange of notes" (MC, Vol. V, Ann. 117; emphasis added by Chad).

The Ambassador in Paris further stated in his reply:

> "One should keep to the legal transactions entered into in 1902 and to Article 13 of the Treaty of London, while giving to all those provisions the application most favourable to our thesis (...). I advise against abandoning those *indisputable legal bases* (...) to act in a different manner and to contest the sovereignty of France to the south of our 1899 line would, in my opinion, be to take action *without any legal basis* and in a manner out of keeping with our previous acts." (CMC, Ann. 64; emphasis added by Chad.)

24. You will note that this thesis without any legal basis to which the Italian Ambassador refers is the famous thesis of the Ottoman heritage, the thesis that Libya is trying to resuscitate today!

25. It is true that Italy had claimed this heritage, but against Great Britain. Libya has recalled this before the Court, referring to Italo-British negotiations concerning the so-called "Sarra triangle" (CR 93/18, p. 25). But this merely confirms my argument: the Sarra region lies outside the French sphere of influence, and Italy was not
057 bound vis-à-vis Great Britain, so that in any case invocation of the Ottoman heritage was superfluous. Moreover, the Sarra triangle devolved on Italy not by inheritance but by treaty, the Treaty of 1934.

II. THE COLONIAL HERITAGE: THE "RIGHT" TO TERRITORIAL COMPENSATION

26. I now come to the second part of my pleading, concerning the rights that Libya claims still to derive from the Treaty of London of 1915. There again a heritage is involved, but this time it is of a different kind, since what Libya is claiming is the *Italian colonial heritage*.

27. Our opponents have made much of Article 13 of the Treaty of London of 1915, which they have made one of the cornerstones of their
058 arguments. In this connection, one is struck by the parallels between today's Libya and colonialist Italy.

Just as Mussolini's Italy did for over ten years, the Libyans are today essentially basing their claims on Article 13. Yet this provision is somewhat reminiscent of the famous General Act of the Berlin Conference of 1885 on the partition of Africa between European Powers: indeed, what does Article 13 do other than provide, just like the General Act of Berlin, for a dismemberment of African territories, this time, in favour of an imperialist Power, Italy, and at the expense of other imperialist Powers?

It is an irony of history that a country like Libya, which sets itself up as a champion of anti-colonialism, is reduced to staking everything on a provision which is archetypal of a colonialism that has fortunately become a thing of the past.

28. But let us take a closer look at the specific arguments that Libya draws from this provision of 1915.

This provision, which appears as number 2 in your file and which is also shown on the screen, may be illustrated as follows.

29. The Libyan thesis comprises the following three main points:

(i) first, Article 13 provides for two types of compensation in favour of Italy - cessions of territory and the settlement in its favour of disputed frontiers;

(ii) secondly, also according to Libya, these two aspects are also present in the Laval-Mussolini Agreement of 1935, which provided for a cession of territory in favour of Italian Eritrea and for the determination of the disputed frontier in southern Libya;

(iii) thirdly, since the Laval-Mussolini Agreement never entered into force, Italy's rights under Article 13 passed to Libya on the occasion of its independence, despite the fact that Italy renounced all its rights to its African colonies

> in 1947. According to Libya, the right referred to in Article 13 belongs to the category of territorial rights which, under the Vienna Convention on Succession of States in respect of Treaties, always devolve upon the successor State.

30. You will see that this reasoning on the part of Libya appears to be logical, if viewed from a great distance. A close scrutiny of it will show, however, that each of its three aspects is erroneous.

31. But before examining these three lines of the Libyan argument, I should like to draw your attention to an important point, namely, that the thesis of the *colonial heritage*, based on Article 13 of the Treaty of London, is in contradiction with the thesis of the *Ottoman heritage*. Why is this so? It is because, in basing their main claims on the "equitable compensation" provided for in the Treaty of London, first Italy and then Libya implicitly recognized that they had *no specific legal title* over the B.E.T. - and indeed it is hard to see why they should claim compensation in that region if they already held a *specific title*.

32. Let us come back to the Treaty of London and begin by interpreting its Article 13.

Libya has asserted on several occasions (see for example CR 93/17, pp. 81-82) that Article 13 "lays down an obligation that devolves upon France to the advantage of Italy". This is an assertion which *completely distorts* the scope of this provision.

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Let us read it together, and you can draw your own conclusions. Does Article 13 confer on Italy the *right to demand* increased territories in Africa? Does it at the same time impose an *obligation* on France and Great Britain to transfer territories to Italy? Does it specify the territories in respect of which Italy might claim such increases? Nothing of the kind, Mr. President.

This disconcertingly vague provision of Article 13 merely states that the two Powers "agree *in principle* that Italy *may* claim some equitable compensation".

Italy thus did not acquire an actual *right* other than that of putting forward some claims in the future, without any correlative obligations on the part of France and Great Britain being specified. You will see that everything is left in the air. In other words, Article 13, far from laying down specific rights and obligations, confines itself to an undertaking by the two Powers in favour of Italy which is uncertain in scope and *essentially political* in character. I would add that the binding nature of Article 13 is so tenuous that one would even hesitate to define this Article as a *pactum de contrahendo*, that is to say, as a legal obligation to conclude a future agreement.

In this connection, may I remind you that the content of the draft article submitted by Italy was quite different, since it was proposed to specify that "*a special agreement will be concluded* in order to *guarantee* to Italy some degree of equitable compensation" (RC, para. 3.09). Accordingly, a special agreement was to be concluded to guarantee equitable compensation for Italy. You will see the difference between the Italian proposal and the text that was adopted: Article 13 in its final wording imposed neither the negotiation nor - *a fortiori* - the conclusion of a future agreement, but at most contained a very vague promise that after the war France and Great Britain would *take a favourable view* of all Italian territorial claims in Africa.

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33. Moreover, the extreme vagueness of Article 13 was to be confirmed by the facts.

On the basis of this provision of Article 13, Italy laid claim *sometimes* only to the Aozou strip - for instance, at the time of the Laval-Mussolini Treaty -, and *sometimes* to the entire territory of Chad and to large parts of Niger, Nigeria and Cameroon, under the famous "maximum programme". This shows how extremely vague Article 13 was.

34. You may be searching for the reason for this deliberate impression - for there is every reason to believe that it was deliberate. France and England did not wish to tie their hands with unduly specific provisions, something that can be deduced in particular from the rejection of a draft in which Italy listed the zones to which the compensation should extend. France, which had considerable apprehensions concerning Italian designs on Djibouti, refused to go beyond a simple political *promise*. All these points are explained in detail in the Reply of Chad (RC, paras. 3.05-3.14), and I shall not dwell on them.

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35. On the other hand, I think it useful to draw the attention of the Court to the striking contrast between Article 13 and other provisions of the Treaty of Lomdon, which are couched in completely unambiguous terms. For instance, Article 4, which you will find in your folder, provided that "under the Treaty of Peace, Italy shall obtain the Trentino, the cisalpine Tyrol with its geographical and natural frontier (the Brenner frontier)" followed by other specific indications which I shall spare you. Furthermore, Article 5 of the same Treaty - another of the provisions that you will find in your folder - provided that

> "Italy shall also be given the province of Dalmatia within its present adminstrative boundaries, including to the north Lisarica and Tribania; to the south as far as a line starting from Cape Planka, on the coast",

followed by other indications.

I shall stop my enumeration of the rules of the Treaty of London at this point, since their contrast with Article 13 of that Treaty is quite obvious. On the one hand, you have provisions which specify in great detail the boundaries of the territories to be transferred to Italy after the war, and on the other hand you have Article 13, the imprecision of which could not be more striking: on the one hand, the illumination of Cartesian precision, and on the other hand the penumbra of vague political undertakings.

36. I now come to my second argument. Contrary to the allegations of our opponents, Article 13 was concerned with territorial cessions only. This emerges clearly from the text of the provision itself, from the *travaux préparatoires* and from the subsequent practice of the parties. I now propose to review these three points: text, *travaux préparatoires* and subsequent practice.

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37. First of all, let us take the *text* of Article 13. Libya is making every effort to interpret the "equitable compensation" that Italy may claim as an implicit reference to possible boundary delimitations. Yet the wording of this provision clearly shows that it relates exclusively to cessions of territory in favour of Italy, in areas situated on the frontier between the Italian colonies and those of its allies at the time - France and Great Britain.

38. In the presence of such clear wording, why does Libya insist on speaking of a mere boundary "delimitation"? Such an interpretation is devoid of any historical verisimilitude. It may usefully be recalled here that the Treaty of London listed the conditions which Italy intended to use as a bargaining point for its entry into the war on the allied side. How can we believe that the Italian Government would have required a mere "delimitation" of the boundary in a desert region as the price of its participation in one of the bloodiest wars in its history? Can we

really believe that the Italian Government, which dangled before a reluctant public opinion the immense colonial benefits that its decision would bring, would be content with so little? The hypothesis is quite simply inconceivable.

39. As the *travaux préparatoires* of the Treaty clearly show, Italy was in fact much more ambitious. The documents submitted by the Republic of Chad add up to a whole *catalogue of claims* that the Italian Government intended to submit to its partners. It is a mixed bag containing the extension of Italian rights over Tunisia, cessions of territory in the east, west and south of Tripolitania, in Somalia and so forth.

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With regard to the regions with which we are concerned, there is also this reference which is so pertinent that I cannot resist the temptation of quoting it:

> "We could ask for a whole or a part of Tibesti and Borkou which were *formerly* considered to appertain to Tripolitania." (Telegram from the Italian Ambassador in Paris, Tittoni, to the Minister for Foreign Affairs, 23 March 1915; RC, Ann. 31; emphasis added by Chad.)

This is indeed a significant passage, which confirms both that Italy was solely and understandably concerned with *cessions* of territory and that it was aware of the fact that at the time when the negotiations took place - in 1915 - Borkou and Tibesti were under French sovereignty.

40. Finally - and this is my third observation - *subsequent practice,* the subsequent practice of the parties, should confirm that Italian territorial ambitions were not confined to a mere "delimitation" of the boundaries. During the peace negotiations which took place in Paris in 1919, France proposed to cede a part of Tibesti to Italy, in pursuance of Article 13 of the Treaty of London.

Italy *rejected* the French proposal, claiming "the whole of the Saharan territory of Tibesti, Borkou, Ennedi, in their geographical and ethnic delimitations" (MC, Ann. 92). In its report on the negotiations, the Supreme Inter-Allied Council stated that France and Italy had been unable to agree on "a rectification of the ... southern frontier of Libya" (MC, Ann. 89). But to speak of the "rectification" of a frontier obviously has no meaning unless it is accepted that such a frontier indeed exists, and it will thus be seen that, in the opinion of *all* the parties concerned, Article 13 only covers the cession of territories.

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Since French sovereignty over the B.E.T. was admitted by all those concerned, the only outstanding question was that of the extent of the equitable compensation to which Italy was entitled.

On the other hand, a compromise was reached on the rectification of the frontier between Libya and Algeria. The Franco-Italian Agreement of 12 September 1919, concluded in pursuance of Article 13 of the Treaty of London, allocated to Italy a part of the territory under French sovereignty. Once again, the matter was considered *exclusively* in connection with the cession of territory: the conclusion of subsequent agreements was envisaged, but always in the same connection.

41. That was the Italian interpretation of this Franco-Italian Agreement of 1919. Speaking before the Chamber of Deputies several days after the conclusion of the Agreement, the Minister for Foreign Affairs, Tittoni - Tittoni again! - pointed out that the *transfer* concerned would "certainly be useful, but did not amount to much", at the same time adding that "the matter of the Tibesti and the Borkou, or of alternative compensations instead of those regions, remains open and will be the subject of further negotiations" (MC, Ann. 337; emphasis added by Chad).

066 Members of the Court, you are well aware of what happened. Invoking Article 13, Italy was to go as far as claiming the whole of Chad in its "maximum programme" of 1928 - this was indeed very far from a mere frontier delimitation! - and it ended up in 1935 by contenting itself with the *ceding* of a relatively small part of French territory, namely what has become usual to call the Aouzou strip.

42. Mr. President, the "rights" of Italy by virtue of Article 13 so specified, we must now ask whether Libya has succeeded to them.

It is granted by Libya that by Article 23 of the 1947 Peace Treaty Italy renounced all its rights, titles and claims concerning its former African colonies.

The effect of this provision may be questioned: did it operate a transfer of sovereignty to the benefit of the Four Great Powers, or did it leave the question of sovereignty over Libya in suspense? There is no need to settle the question: unquestionably Article 23 ended Italian sovereignty.

Consequently, what happened between 1947 and 1951 - the date of Libyan independence - to the territorial claims arising from Article 13 of the Treaty of London for Italy?

43. The reply is clear: these claims ended for a very simple reason: they were colonial claims of a *political* nature, claims that lost all raison d'être with the end of Italian colonialism in Africa.

44. But Libya refuses to acknowledge the facts; Libya obstinately invokes Article 11 of the Vienna Convention on Succession of States in

067 Respect of Treaties, which, as we know, establishes customary international law in this area. Our eminent opponents affirm that by virtue of this Article 11, which states that there is always a succession

in territorial régime matters, Libya inherited the political claim that Italy derived from the London Agreement. Mr. President, I believe that this contention is untenable for two reasons.

45. First of all, State succession clearly involves only the transfer of territorial rights and titles that *existed and were valid* at the time of the succession. But the claims deriving from Article 13 ended in 1947, as I said just now. The parties to the Peace Treaty of 1947 were the four parties to the London Agreement - which were France, Great Britain, Russia and Italy. Therefore the Treaty of 1947, *lex posterior*, supersedes the London Agreement. Far from giving effect to the claims arising from Article 13, in 1947 the parties agreed on the definitive renunciation by Italy of those claims.

Article 13 of the Treaty of London was therefore abrogated *inter partes*.

This, Mr. President, is confirmed by Article 2 of Annex XI of the Treaty of Peace, which provides that:

> "The final disposal of the territories concerned and the appropriate adjustment of their boundaries [the Italian colonies in Africa] shall be made by the Four Powers [United States, France, United Kingdom, Soviet Union]."

This provision clearly presupposes the total extinction of Italian rights, titles and claims in Africa. At the same time, it gave the Four Powers the right, not only to dispose of the Italian colonial territories, but also to make appropriate *adjustments to their boundaries*. Clearly, Mr. President, Italy left the stage and all its rights were extinguished.

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46. I come now, Mr. President, to the second reason for which the claims arising from Article 13 of the Treaty of London did not pass to Libya.

Even if we imagine the impossible and grant that these Italian claims had been mysteriously resuscitated in 1951, they would not in any case have been able to pass to Libya for they were not territorial rights within the meaning of Article 11 of the Vienna Convention on Succession of States in respect of Treaties.

This Article provides, as you know, that a succession of States does not affect: one, treaties establishing a boundary; two, "obligations and rights established by a treaty and relating to the regime of a boundary".

47. If Libya is to be believed, the rights deriving from Article 13 would fall into the second category. This interpretation, Mr. President, shows a misunderstanding of the spirit and letter of the Vienna Convention.

48. The most detailed interpretation of Article 11 of the Vienna Convention is in an article published in l'*Annuaire français de droit international* by Mr. Yasseen who, as you know, chaired the International Law Commission when the draft convention was prepared as well as the drafting committee of the diplomatic conference that adopted the Convention. Mr. Yasseen's interpretation is thus authoritative.

What is the significance of the expression "régime of a boundary" within the meaning of Article 11? asks Mr. Yasseen. And this is his answer:

> "The meaning of the expression "régime of a boundary" may be controversial but it is possible to say that it covers the rights and obligations relating to the boundary that are attached to the territory and whose disappearance in a succession of States would considerably modify the frontier settlement, for instance a grazing right, a right of way or a right of transit." (*AFDI*, 1978, p. 86.)

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By analogy with civil law, Mr. Yasseen speaks in this connection of "real rights" (*ibid.*, p. 82) and he adds:

> "What are certainly not part of the boundary régime and are therefore not transmissible, are the obligations and rights of a *political* nature or qualified as *personal*, whose link with the territory is not sufficiently close." (*Ibid.*, p. 86; the italics are ours.)

49. But, Mr. President, this is precisely what is at issue here: I believe that I have amply shown that Article 13 of the Treaty of London confined itself to establishing a vague political commitment with respect to territorial adjustments, without specifying either the *territories* concerned or the *criteria* that should be chosen to carry out those adjustments. The right that Italy derived from Article 13 was not only *general*; it was also indeterminate since it did not *specifically* cover a precise area but the *whole* of the frontiers of the Italian colonies in Africa. To speak of "régime of a boundary" in this connection is therefore quite inappropriate.

Consequently, how can Libya claim that this political commitment could have passed to Libya?

III. CONCLUSION

50. I therefore come to my conclusion, Mr. President.

Mr. President, the strategy of our opponents, our eminent opponents, consists in trying to block the Court into a *simplistic alternative*: either Libya succeeded Italy and in that case it inherited all the rights that Italy possessed including those by virtue of Article 13: or Libya is in no respect the successor of Italy and is consequently not bound by the obligations deriving for Italy from conventions concerning the southern boundary of Libya (CR 93/20, p. 55). In other words, and to borrow the words of our eminent colleagues on the other side of the bar (CR 93/30, p. 51), either Libya succeeded Italy and in that case it received both its liabilities and its assets, or it did not succeed at all. In the latter case, the liabilities alone cannot be imposed upon it.

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071 Unfortunately for our opponents, the facts do not always lend themselves to this kind of "all or nothing" reasoning. True, Libya succeeded Italy - no one denies it. But it inherited only the rights and obligations of a territorial nature in accordance with the Vienna Convention that I have just mentioned. On the other hand, Libya could not inherit eminently *political rights*, like the colonial claims - highly contingent and conditional - that Italy derived from Article 13: these rights, as we have seen, ended with the Treaty of Peace of 1947.

The same is true of what Libya has called the "Ottoman legacy". Mr. Shaw will show you shortly that this legacy boiled down to a set of claims, I repeat *claims*, I do not say *rights*, which could not be transmitted to the successor State. What is more, in 1902 Italy had committed itself with France to accept the latter's presence beyond the frontiers of Tripolitania-Cyrenaica. It could not go back on that commitment.

Consequently, Mr. President, Members of the Court, neither Italy nor, later, Libya could put forward any title to the incontestable rights that France derived from the delimitations of 1899 and 1919 and its effective occupation of the territories thus delimited.

Mr. President, Members of the Court, I thank you for your patience and I ask you, Mr. President, kindly to give the floor to Mr. Malcolm Shaw.

072 Le PRESIDENT : Je remercie beaucoup Monsieur Cassese et je donne la parole à M. Shaw.

M. SHAW :

Le manque de pertinence du titre originaire

Monsieur le Président et Messieurs de la Cour, c'est pour moi un honneur et un plaisir de me présenter devant vous pour la première fois.

2. Comme mes collègues l'ont expliqué, le titre du Tchad sur le BET est clairement établi en vertu du traité de 1955, qui a institué une procédure convenue pour déterminer la frontière en question. Cette procédure, acceptée par la France, l'Etat qui a précédé le Tchad, et par la Libye même, a consisté à dresser une liste précise d'actes qui étaient censés déterminer la ligne frontière.

3. J'ai toutefois pour tâche d'aider la Cour à comprendre la situation telle qu'elle existait avant que la France n'établisse son titre et donc à apprécier la nature véritable des revendications de la Libye. Mme Higgins traitera des conditions juridiques préalables qui devaient être remplies pour que la France puisse acquérir un titre, et M. Cassese montrera comment ce titre a été établi et analysera la prétendue succession par l'Italie, puis par la Libye, aux revendications formulées à l'époque de l'Empire ottoman. Les droits, quels qu'ils soient, qui ont pu exister sur le territoire en cause pendant les premières années de ce siècle se sont manifestement éteints lorsque la France a établi son autorité de façon permanente en 1913-1914. Il n'en est pas moins utile de nous pencher sur la situation qui existait pendant les années qui ont précédé cette occupation afin d'appeler l'attention de la Cour sur la source de confusion que constituent, par leur nature, les allégations libyennes sur lesquelles, semble-t-il, on se fonde tant maintenant; en effet, comme nous en informe M. Dolzer, "au coeur de l'affaire libyenne réside le fait que l'Empire ottoman et les peuples senoussi possédaient un titre sur les confins en 1912" (CR 93/20, p. 19).

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4. Je voudrais établir les propositions suivantes. Premièrement, l'Empire ottoman n'a jamais eu de titre sur le BET, ni sur la base de l'exercice d'une autorité effective, ni sur aucune autre base. Deuxièmement, l'ordre senoussi n'a jamais été rien de plus qu'une source intermittente d'influence religieuse et, dans une certaine mesure, politique, qui s'exerçait à travers l'Afrique du Nord et l'Afrique centrale, et cette influence, forte en Tripolitaine et en Cyrénaïque, était faible dans le BET. Troisièmement, on ne remédie pas au fait que les Ottomans et l'ordre senoussi n'ont établi aucun titre procédant d'une origine indépendante en essayant de combiner les deux sous la forme de quelque prétendue souveraineté conjointe. Quatrièmement, les populations autochtones, dont les Libyens ont présenté la nature de façon fallacieuse, étaient titulaires de droits sur le territoire, mais n'étaient pas assez organisées pour posséder la souveraineté territoriale en droit international.

Les revendications libyennes

5. L'argumentation de la Libye peut être résumée comme suit. Entre 1890 et 1912, le territoire situé au sud de la Tripolitaine, en particulier le BET, n'était pas *terra nullius*, mais se trouvait plutôt soumis à une forme de "souveraineté partagée" entre l'Empire ottoman, l'ordre senoussi et les habitants autochtones. Il en résulte qu'à l'arrivée des Français, le titre originaire résidait ailleurs et n'aurait pu être acquis que par l'effet d'une conquête, interdite en vertu du droit international postérieur à 1919. On soutient que, de quelque manière, ce soi-disant titre originaire a continué d'exister jusqu'à ce que la Libye l'assimile par voie de succession. On allègue que la Libye

a hérité de tous les titres de l'Empire ottoman par l'intermédiaire de l'Italie, en même temps que de ceux de l'ordre senoussi et des populations autochtones.

6. Pourtant, la Libye fait preuve d'une confusion qui n'est pas négligeable quand elle analyse dans ses écritures cette notion, affirmée par elle, de "souveraineté partagée". Elle fait valoir, d'une part, que les populations autochtones possédaient un titre juridique existant sur la base de leur présence depuis longtemps établie et de leur administration effective (mémoire de la Libye, par. 6.39); d'autre part, on déclare que la souveraineté transférée par l'Empire ottoman incluait les territoires et les populations du Tibesti, du Borkou, de l'Ounianga, de l'Erdi et de l'Ennedi (*ibid*, par. 4.188). On propose alors d'admettre que le territoire et les populations en question se trouvaient "soumis au pouvoir conjoint et à l'autorité partagée des Senoussi et de l'Empire ottoman" (*ibid.*).

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7. Nulle part on ne tire au clair ce que nous devons faire de ce partage entre la souveraineté, le pouvoir conjoint et l'autorité partagée, mais on l'appelle un "ajustement mutuel" (*ibid*, par. 6.28), ailleurs une "communauté de titre" (dans les conclusions qui font suite au paragraphe 6.87) et encore "un titre parallèle et compatible" (par. 6.76).

8. Pour tenter de justifier cette étrange prétention, la Libye a développé dans sa réplique le thème de l'autorité indirecte, en ce sens que le titre sur le BET appartenait aux tribus locales, tandis que l'administration - les pouvoirs exécutif et judiciaire - se trouvaient partagés entre les tribus locales et l'ordre senoussi et que les Ottomans possédaient une sorte d'autorité suprême tout en n'exerçant qu'un "contrôle direct minime" (réplique de la Libye, par. 7.65). Cette tentative est portée à son comble quand on introduit directement dans

l'argumentation l'affirmation selon laquelle "il n'existe aucune forme prescrite pour le fédéralisme" (*ibid*, par. 7.66), pour annoncer aussitôt après "qu'un type particulier de souveraineté territoriale partagée a existé en droit international sous l'appellation de 'condominium'" (*ibid*, par. 7.67). Nous sommes donc incités à croire que cette soi-disant "souveraineté partagée" équivalait en réalité soit à un arrangement fédéral, soit à un condominium. A l'évidence, une fédération repose sur un partage déterminé et formel de la souveraineté interne, tandis qu'il y a un condominium, comme le relève Oppenheim, "là ou deux ou plusieurs Etats exercent la souveraineté conjointement sur un territoire" (*International Law*, 9e éd., p. 565). La Chambre de la Cour elle-même a évoqué récemment, dans l'affaire du *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras; Nicaragua (intervenant))*, des exemples historiques de condominium "à savoir des dispositions en vue de l'administration commune d'un territoire ... entre deux ou plusieurs Etats" (*C.I.J. Recueil 1992*, p. 597). Je ne parviens pas, en l'espèce, à discerner les "deux ou plusieurs Etats" dont il s'agit.

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9. Il existe toutefois une autre expression encore des relations entre les Parties, selon ce qu'affirme la Libye dans ses plaidoiries : les populations autochtones organisées par l'ordre senoussi détenaient le titre, mais étaient représentées sur le plan international par l'Empire ottoman (CR 93/14, p. 26). Cela me paraît ressembler de façon étonnante à un protectorat, mais à un protectorat qui serait apparu par génération spontanée. Or, ce n'est pas ainsi que naissent les protectorats. Ils nécessitent des accords formels établissant le partage formel des attributs et de l'exercice de la souveraineté et même la reconnaissance par des Etats tiers, quand des droits et obligations de caractère

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pertinent sont invoqués, comme il est indiqué dans l'affaire des *Décrets de nationalité promulgués en Tunisie et au Maroc* (*C.P.J.I. série B* n° 4, p. 27).

10. On ne trouve à aucun moment la moindre indication d'une reconnaissance quelconque, ni même d'une simple mention, émanant de tierces parties, voire de l'Empire ottoman ou de l'ordre senoussi, qui ait pour objet des arrangements aussi complexes et aussi cruciaux établissant un lien fédéral, un condominium, ou une représentation internationale pour les territoires en question, et les populations autochtones elles-mêmes n'en parlent pas davantage. Aucun indice ne permet de savoir comment un arrangement de ce genre fonctionnait dans la pratique et quelle partie exerçait tel ou tel droit souverain. Sans un tel accord conclu et accepté dans les formes, on affirme sans rien à l'appui quand on parle de fédéralisme, ou de condominium, ou de souveraineté partagée. C'est à la Libye, qui invoque une forme aussi inhabituelle de souveraineté divisée, qu'il incombe d'en rapporter la preuve.

11. Il se peut que les conseils de la Libye aient peu à peu pris conscience de certains de ces problèmes redoutables, car je relève que M. Crawford a dit avec insistance qu'on pouvait envisager la situation qui prévalait dans la région en 1912 soit comme une association (et ici l'on se réfère à des protectorats, des fédérations et des condominiums), soit comme une coalescence de l'allégeance, de l'administration et de l'organisation sociale :

> "bien qu'aucune des unités sociales ou politiques à l'intérieur de cette entité ne soit à elle seule dépositaire de tous ces éléments et bien que les relations entre les diverses unités puissent parfois être tendues" (CR 93/19, p. 60).

Il n'y a pas que cela, Monsieur le Président et Messieurs de la Cour, qui est mis à rude épreuve. Il convient toutefois de relever ici une autre

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considération. M. Crawford a essayé de citer l'affaire des *Phares en Crète et à Samos* (*C.P.J.I. série A/B n° 17* (1937)) pour établir que, tant qu'une unité subordonnée n'a pas entièrement rompu ses liens, il convient de traiter l'entité dans son ensemble comme un seul Etat. Voilà qui est bien. Cela ne convient pourtant pas ici pour établir l'unité du BET et de l'Empire ottoman par coalescence. Dans cette situation, l'on n'a pas affaire à un territoire déterminé sur le point de se séparer d'un Etat par une sécession dans les formes et internationalement reconnue, mais au prétendu agrandissement d'un Etat fondé, il faut le dire, sur des éléments de preuve discutables. Il est clair que les deux situations ne sont pas analogues.

L'Empire ottoman

12. Je passe maintenant à l'examen de la position de l'Empire ottoman, sur laquelle la Libye se fonde tant maintenant. Avant 1908, il est tout à fait manifeste que l'Empire ottoman n'exerçait aucune autorité effective, quelle qu'elle fût, sur le territoire en question et cela, des preuves claires l'établissent. Plusieurs documents officiels britanniques le soulignent. Par exemple un mémorandum du 26 février 1902, adressé par la division des renseignements au Foreign Office, fait observer ceci :

> "S'agissant de la frontière méridionale de la Cyrénaïque, bien que la Turquie ait vaguement revendiqué un *hinterland* d'une étendue presque illimitée, l'autorité turque ne s'est jamais exercée au sud des oasis de Jalo et d'Aujila." (Contre-mémoire du Tchad, annexe 4.)

J'indique maintenant cette région sur la projection présentée à la Cour. De fait, la Libye elle-même a ouvertement admis dans son contre-mémoire que, pendant les années qui ont précédé et suivi 1900, "la région n'avait pas encore été occupée par l'Empire ottoman" (par. 4.131).

13. Il n'est pas moins évident qu'en 1908, les Turcs n'avaient même pas établi leur autorité sur l'oasis de Koufra (bien au nord du BET). Une série de dépêches britanniques de Benghazi au Foreign Office le confirment. Par exemple, dans une lettre en date du 18 juillet 1908, il est dit avec insistance que la mission de Hadjii Suleiman Effendi (maire de Benghazi), qui avait apporté des cadeaux et un drapeau ottoman aux Senoussi repliés sur eux-mêmes dans l'oasis, avait échoué car les habitants du pays avaient refusé de laisser hisser le drapeau ottoman (contre-mémoire du Tchad, annexe 9). Dans sa vaste étude parue dans le *Yale Journal of International Law*, Ricciardi a conclu que les Senoussi et les habitants du pays s'étaient associés pour "rejeter même une reconnaissance de pure forme de l'autorité ottomane dans la région" ("Title to the Aouzou Strip : A legal and Historical Analysis", 17 *Yale Journal of International Law*, 1992, p. 301, 350). L'affirmation faite devant la Cour par M. Dolzer (CR 93/20, p. 31) selon laquelle "les populations senoussi" avaient bien accueilli les Ottomans, n'est guère justifiée par les faits. En réalité, comme le déclare la Libye elle-même dans son mémoire à propos de l'établissement d'une présence ottomane au Tibesti pendant la période 1908-1909, "les Senoussi n'étaient pas favorables à cette mesure" (par. 4.130). Les tribus locales se sont abstenues aussi de manifester de l'enthousiasme pour la progression ottomane. Par exemple, s'il est vrai que le *Derde* (ou dirigeant) des Toubou du Tibesti a sollicité quelque assistance des Ottomans en 1907 quand l'avance française s'est rapprochée du BET, ce geste a été suivi peu après d'un appel à l'aide adressé au commandant français à Bilma.

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14. Le dossier établit bien qu'une petite unité turque est arrivée au Tibesti en 1908 ou 1909 et que c'est seulement au cours de l'année 1911 que la Turquie a décidé de renforcer les quelques soldats qu'elle y avait postés et s'est efforçée d'établir son autorité en un

sens réel (contre-mémoire du Tchad, annexe 23). On peut s'arrêter brièvement ici pour signaler que l'arrivée, cette année-là, du capitaine turc Ahmed Rifki dans la région d'Aïn Galakka a entraîné un échange de correspondence avec les Français, au cours duquel ces derniers ont indiqué clairement qu'étant donné que la France était obligée de rester neutre dans la guerre italo-turque qui venait de se déclencher, ils

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s'estimaient tenus de n'entreprendre aucune opération militaire contre lui (réplique de la Libye, annexe, partie B, 10.4 et 10.6). A cela se ramenait le fameux *modus vivendi* dont la Libye fait tant de cas : une simple décision de respecter les règles de la neutralité dans une guerre entre deux autres Etats. Or, même ainsi, les Français ont déclaré avec insistance que cette inaction forcée était subordonnée à la réserve expresse de leurs droits sur la région du BET (*ibid.*). De toute façon, cette présence turque s'est avérée de courte durée : au printemps de 1912, les troupes turques avaient commencé à évacuer la région (contre-mémoire du Tchad, annexe 27).

15. La présence turque dans le BET n'a pas seulement été brève et précaire, elle semble avoir présenté un caractère uniquement et purement militaire. Ce fait n'a pas été contesté dans le mémoire de la Libye (par. 4.126-4.134), bien que les plaidoiries libyennes aient maintenant relevé l'aspect administration civile de la présence ottomane, sans en apporter aucune preuve claire (voir par exemple M. Dolzer, CR 93/20, p. 23 et 34). On fait observer que le *Derde* des Toubou du Tibesti a demandé l'aide des Turcs à la suite du coup de main français contre Aïn Galakka en 1907 et qu'il a reçu le titre de *kaimakam* de la région du Tibesti; mais, comme on l'a déjà indiqué, ce même personnage, le *Derde*, s'est adressé peu après aux Français pour demander de l'aide.

La simple attribution d'un titre ottoman, d'un titre sur le papier, sans qu'on le confirme par aucun élément significatif d'où résulte l'exercice d'une autorité souveraine, ne démontre pas grand-chose.

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16. C'est peut-être cette impossibilité d'établir aucun aspect civil réel de l'éphémère présence ottomane qui a incité M. Maghur à relever, le 19 juin, que "l'administration ottomane était indirecte, ou déléguée" (CR 93/19, p. 12). Voilà qui est un moyen commode de revenir au point de départ. En effet, on va remédier à l'insuffisance de la présence ottomane en se référant à l'ordre senoussi et aux populations autochtones. J'y reviendrai. Pour l'instant, Monsieur le Président et Messieurs de la Cour, je voudrais souligner que la présence ottomane, quelle qu'ait pu être son importance dans la pratique, n'échappait pas à la contestation. Comme il ressort des documents présentés dans nos exposés écrits, les Français ont, entre 1908 et 1911, protesté contre la présence turque dans la région et déclaré avec insistance que ce territoire faisait partie de la sphère d'influence française établie en vertu des arrangements franco-britanniques (contre-mémoire du Tchad, annexes 11 et 16). Je voudrais indiquer en particulier que quand le Gouvernement turc a accepté la réunion, à l'automne 1911, d'une commission franco-turque pour procéder à la démarcation de la frontière entre la Tripolitaine et le Sahara français, le Gouvernement français a spécifiquement informé les autorités ottomanes que :

> "les commissaires français se refuseront à considérer les mesures prises par les autorités turques pour étendre la domination ottomane sur le Tibesti et le Borkou comme constituant des titres en faveur de la Turquie" (*ibid.*, annexe 25).

17. Cette attitude de protestation est un facteur très pertinent pour apprécier la valeur de telles activités dans la perspective de l'établissement d'un titre territorial. Comme Karl le fait observer dans *l'Encyclopaedia of Public International Law*, "en droit, la protestation

est un acte juridique unilatéral dans la mesure où elle exclut les effets juridiques qui résulteraient de son absence" ("Protest", *Encyclopaedia of Public International Law*, publié sous la direction de Bernhardt, vol. 9, 1986, p. 320). L'un des effets juridiques d'une protestation est de réfuter toute présomption d'acquiescement (*ibid.*, p. 323). La protestation remplit bien sûr aussi une autre fonction, celle de sauvegarder les droits existants, de sorte qu'en agissant de la sorte les Français ont à la fois contesté tout titre invoqué par les Turcs et souligné leurs propres droits. Pour ténues qu'aient pu être en fait les manifestations de la présence turque dans le BET, les autorités françaises n'étaient pas disposées à les accepter et ont donc protesté.

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Monsieur le Président, cinq minutes me permettront de mener à son terme cette partie de ma plaidoirie. Je me demandais si, peut-être...

Le PRESIDENT : Oui, continuez cinq minutes.

M. SHAW : Je vous remercie beaucoup.

18. Ainsi, la présence turque dans le BET a-t-elle été brève et ténue. Il est bien établi qu'une revendication de titre fondée sur l'exercice de l'autorité repose à la fois sur l'intention d'agir comme souverain et sur l'exercice effectif d'une telle autorité (comme la Cour permanente l'a fait observer, par exemple, dans l'affaire du *Groënland oriental* (*C.P.J.I. série A/B n° 53, 1933, arrêt*, p. 45-46). Cet exercice de l'autorité n'est pas seulement crucial du point de vue de l'instauration de la souveraineté, mais aussi pour sa continuation (comme indiqué dans l'affaire de l'*Ile de Palmas*, Nations Unies, *Recueils des sentences arbitrales internationales*, vol. 2, p. 839). L'activité initiale d'un Etat n'est qu'un point de départ; si elle ne se continue pas dans le temps à un certain niveau d'intensité, elle s'avère insuffisante pour constituer la source d'un titre international. S'il

est vrai que l'acquisition d'un titre est un concept relatif, qui dépend en partie de la situation locale, il n'en existe pas moins un noyau indiscutable d'activités souveraines qui est requis indépendamment de la nature du territoire dont il s'agit. Tel est particulièrement le cas si l'activité est contestée. Une action superficielle ne saurait suffire. C'est ainsi que, par exemple, dans l'affaire de l'*Ile de Palmas*, M. Huber a déclaré

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> "l'occupation, pour constituer une prétention à la souveraineté territoriale, devait être effective, c'est-à-dire offrir certaines garanties aux autres Etats et à leurs nationaux" (*op. cit.*, p. 846).

Il s'ensuit inévitablement qu'une présence minime et purement militaire, que n'accompagne aucune activité civile exercée sur le territoire et qui ne prend effet que pendant un très petit nombre d'années de façon intermittente, ne peut tout simplement pas satisfaire aux critères requis. L'activité turque était donc d'un niveau sensiblement inférieur au minimum exigé. De plus, la démonstration de l'*animus occupandi* nécessaire requiert sensiblement plus que la simple affirmation de la Libye, surtout compte tenu du soi-disant partage des droits souverains.

19. En réalité, Monsieur le Président et Messieurs de la Cour, même M. Cahier s'est trouvé poussé à admettre, au sujet des droits allégués de l'Empire ottoman, que "ces droits n'étaient pas clairement établis" (CR 93/17, p. 13). Effectivement. C'est un fait indiscutable que la présence des Ottomans était peu fournie, circonscrite territorialement et surtout transitoire. Ils ne sont pas restés. Ils sont partis, et cela ne saurait manquer d'entraîner des conséquences en droit.

Monsieur le Président et Messieurs de la Cour, je vous remercie pour les quelques minutes supplémentaires que vous m'avez accordées; le moment présent conviendrait à une interruption et je souhaiterais, avec votre permission, poursuivre demain matin.

Le PRESIDENT : Oui, je vous remercie, Monsieur Shaw. Nous continuerons demain matin à 10 heures.

L'audience est levée à 13 h 05.
