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THE HAGUE

Cour internationale
de Justice
LA HAYE

YEAR 1993

Public sitting

held on Wednesday 16 June 1993, at 10 a.m., at the Peace Palace,

President Sir Robert Jennings presiding

in the case concerning Territorial Dispute

(Libyan Arab Jamahiriya/Chad)

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le mercredi 16 juin 1993, à 10 heures , au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

en l'affaire du Différend territorial

(Jamahiriya arabe libyenne/Tchad)

COMPTE RENDU

Present:

President Sir Robert Jennings

Vice-President Oda

Judges Ago
Schwebel
Bedjaoui
Ni

Evensen

Tarassov

Guillaume

Shahabuddeen

Aguilar Mawdsley

Weeramantry

Ranjeva

Ajibola

Herczegh

Judges *ad hoc* Sette-Camara

Abi-Saab

Registrar Valencia-Ospina

Présents :

Sir Robert Jennings, Président

M. Oda, Vice-président

MM. Ago

Schwebel

Bedjaoui

Ni

Evensen

Tarassov

Guillaume

Shahabuddeen

Aguilar Mawdsley

Weeramantry

Ranjeva

Ajibola

Herczegh, juges

MM. Sette-Camara

Abi Saab, juges *ad hoc*

M. Valencia-Ospina, Greffier

The Government of the Libyan Arab Jamahiriya is represented by:

H.E. Mr. Abdulati Ibrahim El-Obeidi
Ambassador,

as Agent;

Mr. Kamel H. El Maghur
Member of the Bar of Libya,

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A.
Whenwell Professor emeritus, University of Cambridge,

Mr. Philippe Cahier
Professor of International Law, Graduate Institute of International Studies, University of

Gen

Mr. Luigi Condorelli
Professor of International Law, University of Geneva,

Mr. James R. Crawford
Whenwell Professor of International Law, University of Cambridge,

Mr. Rudolph Dolzer
Professor of International Law, University of Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

Mr. Walter D. Sohler
Member of the Bar of the State of New York and of the District of Columbia,

as Counsel and Advocates;

Mr. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

Mr. Rodman R. Bundy
Avocat à la Cour, Frere Cholmeley, Paris,

Mr. Richard Meese
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Loretta Malintoppi
Avocat à la Cour, Frere Cholmeley, Paris,

Miss Azza Maghur
Member of the Bar of Libya,

as Counsel;

Mr. Scott B. Edmonds
Cartographer, Maryland Cartographics, Inc.,

Mr. Bennet A. Moe
Cartographer, Maryland Cartographics, Inc.,

Le Gouvernement de la Jamahiriya arabe libyenne est représenté par :

S. Exc. M. Abdulati Ibrahim El-Obeidi
ambassadeur,

comme agent;

M. Kamel H. El Maghur
membre du barreau de Libye,

M. Derek W. Bowett, C.B.E., Q.C., F.B.A.
professeur émérite, ancien titulaire de la chaire Whewell à l'Université de Cambridge,

M. Philippe Cahier
professeur de droit international à l'Institut universitaire de hautes études internationales de
l'université de Genève,

M. Luigi Condorelli
professeur de droit international à l'Université de Genève,

M. James R. Crawford
titulaire de la chaire Whewell de droit international à l'Université de Cambridge,

M. Rudolph Dolzer
professeur de droit international à l'Université de Mannheim,

Sir Ian Sinclair, K.C.M.G., Q.C.

M. Walter D. Sohler
membre des barreaux de l'état de New York et du district de Columbia,

comme conseils et avocats;

M. Timm T. Riedinger
Rechtsanwalt, Frere Cholmeley, Paris,

M. Rodman R. Bundy
avocat à la Cour, Frere Cholmeley, Paris,

M. Richard Meese
avocat à la Cour, Frere Cholmeley, Paris,

Mlle Loretta Malintoppi
avocat à la Cour, Frere Cholmeley, Paris,

Mlle Azza Maghur
membre du barreau de Libye,

comme conseils;

M. Scott B. Edmonds
cartographe, Maryland Cartographics, Inc.,

M. Bennet A. Moe
cartographe, Maryland Cartographics, Inc.,

Mr. Robert C. Rizzutti
Cartographer, Maryland Cartographics, Inc.,

as Experts.

The Government of the Republic of Chad is represented by:

Rector Abderahman Dadi, Director of the Ecole nationale d'administration et de magistrature de N'Djamena,

as Agent;

H.E. Mr. Mahamat Ali-Adoum, Minister for Foreign Affairs of the Republic of Chad,

as Co-Agent;

H.E. Mr. Ahmad Allam-Mi, Ambassador of the Republic of Chad to France,

H.E. Mr. Ramdane Barma, Ambassador of the Republic of Chad to Belgium and the Netherlands,

as Advisers;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institut d'etudes politiques of Paris,

as Deputy-Agent, Adviser and Advocate;

Mr. Antonio Casses, Professor of International Law at the European University Institute, Florence,

Mr. Jean-Pierre Cot, Professor at the University of Paris I (Panthéon-Sorbonne),

Mr. Thomas M. Franck, Becker Professor of International Law and Director, Center for International Studies, New York University,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law, University of London,

as Advisers and Advocates;

Mr. Malcolm N. Shaw, Ironsides Ray and Vials Professor of Law, University of Leicester, Member of the English Bar,

Mr. Jean-Marc Sorel, Professor at the University of Rennes,

as Advocates;

Mr. Jean Gateaud, Ingénieur général géographe honoraire,

as Adviser and Cartographer;

Mr. Jean-Pierre Mignard, Advocate at the Court of Appeal of Paris,

Mr. Robert C. Rizzutti
cartographe, Maryland Cartographics, Inc.,

comme experts.

Le Gouvernement de la République du Tchad est représenté par :

M. Abderahman Dadi, directeur de l'école nationale d'administration et de magistrature de N'Djamena,

comme agent;

S. Exc. M. Mahamat Ali-Adoum, ministre des affaires étrangères de la République du Tchad,

comme coagent;

S. Exc. M. Ahmad Allam-Mi, ambassadeur de la République du Tchad en France,

S. Exc. M. Ramdane Barma, ambassadeur de la République du Tchad en Belgique et aux Pays-Bas,

comme conseillers;

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre et à l'Institut d'études politiques de Paris,

comme agent adjoint, conseil et avocat;

M. Antonio Cassese, professeur de droit international à l'Institut universitaire européen de Florence,

M. Jean-Pierre Cot, professeur à l'Université de Paris I (Panthéon-Sorbonne),

M. Thomas M. Franck, titulaire de la chaire Becker de droit international et directeur du centre d'études internationales de l'Université de New York,

Mme Rosalyn Higgins, Q.C., professeur de droit international à l'Université de Londres,

comme conseils et avocats;

M. Malcolm N. Shaw, titulaire de la chaire Ironsides Ray and Vials de droit à l'Université de Leicester, membre du barreau d'Angleterre,

Mr. Jean-Marc Sorel, professeur de l'Université de Rennes,

comme avocats;

M. Jean Gateaud, ingénieur général géographe honoraire,

comme conseil et cartographe;

Me. Jean-Pierre Mignard, avocat à la Cour d'appel de Paris,

Mr. Marc Sassen, Advocate and Legal Adviser, The Hague,

as Counsel;

Mrs. Margo Baender, Research Assistant, Center of International Studies, New York University, School of Law,

Mr. Oliver Corton, Collaborateur scientifique, Université libre de Bruxelles,

Mr. Renaud Dehousse, Assistant Professor at the European University Institute, Florence,

Mr. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

Mr. Joseph Tjop, attaché temporaire d'enseignement et de recherche at the University of Paris X-Nanterre,

as Advisers and Research Assistants;

Mrs. Rochelle Fenchel;

Mrs. Susal Hunt;

Miss Florence Jovis;

Mrs. Mireille Jung;

Mrs. Martine Soulier-Moroni.

Me Marc Sassen, avocat et conseiller juridique, La Haye,

comme conseils;

Mme. Margo Baender, assistante de recherche au centre d'études internationales de la
Faculté de droit de l'Université de New York,

M. Oliver Corten, collaborateur scientifique, Université libre de Bruxelles,

M. Renaud Dehousse, maître-assistant à l'Institut universitaire européen de Florence,

M. Jean-Marc Thouvenin, attaché temporaire d'enseignement et de recherche à l'Université de
Paris X-Nanterre,

M. Joseph Tjop, attaché temporaire d'enseignement et de recherche à l'Université
de Paris X-Nanterre,

comme conseillers et assistants de recherche.

Le secrétariat de la délégation sera assuré par:

Mme Rochelle Fenchel;

Mme Susal Hunt;

Mlle Florence Jovis;

Mme Mireille Jung;

Mme Martine Soulier-Moroni.

The PRESIDENT: Please be seated. Mr. Sohier.

Mr. SOHIER: Thank you, Mr. President. Before I begin, I would like to say what a special honour it is to appear before this Court.

Mr. President, Members of the Court, my task today is to pick up the thread of Libya's argument at the point where Sir Ian Sinclair left off yesterday. He noted that his presentation would be followed by a detailed review of the history of the various *actes internationaux* that might be considered relevant to the existence or non-existence of a conventional boundary between Libya and Chad — whether or not these *actes internationaux* were *en vigueur* on the critical date and whether or not they were listed in Annex I of the 1955 Treaty.

I shall conduct such a review covering the period up until 1912. At the same time as I discuss the *actes internationaux*, I shall review the situation on the ground at the relevant time. The principal focus of my remarks today shall be the 1899 Anglo-French Declaration and the 1900-1902 Franco-Italian Accords.

Because they are relevant to the object and purpose of the international agreements that followed, certain background events, occurring after the 1885 Congress of Berlin, should also be mentioned.

These are:

- The increasingly serious confrontation between Great Britain and France concerning the region of the Upper Nile;
- The hinterland recognized for Egypt and sphere of influence for France in respect of Algiers; and the ensuing Ottoman protest and claim of the hinterland for Tripolitania;
- The French military penetrations aimed at Lake Chad; and
- The delimitation agreements among the major Powers that settled the partition of West Africa.

By the time of the British occupation, in 1882, Egypt had sent military expeditions into Darfour, Bahr al Ghazal and the equatorial regions of Sudan down to the headwaters of the White Nile, extending almost as far south as the Equator. They formed the basis of Egypt's hinterland claim.

The *Khadivate's* claim was challenged by the Islamic leader, known as el-Mahdi. Starting in 1885, el-Mahdi pushed northward and took control over the general area of the Upper Nile — what is now modern Sudan.

Great Britain intervened through the *Khedive*. The Commander-in-Chief of the British army, Lord Kitchener, launched an attack south into Sudan, defeating el-Mahdi at the battle of Omdurman (near Khartoum) in 1898. He then moved south to Fachoda (at 10° N latitude). These events culminated in the Fachoda crisis in the fall of 1898.

Thus, by the end of 1898, Egypt — then a part of the Ottoman Empire — had established its territorial claim to title as far south as Fachoda, and based on its earlier penetration, even further south. This, then, was the Egyptian hinterland.

The Egyptian hinterland claim had already been recognized a few years earlier by France. For the French Government had protested the 1894 Treaty entered into between Great Britain and the Free State of Congo. That Treaty concerned territorial rights as far south as 5° N latitude and even beyond. France informed Great Britain in a memorandum, signed by the Foreign Minister, M. Hanotaux, of 7 August 1894 that Article 2 of the Treaty infringed the rights of the Sultan and the *Khedive* over the provinces of the Upper Nile. The French Government took the position that the 1894 Treaty was not reconcilable with the firmans, or proclamations, issued by the Sultan concerning or with international agreements guaranteeing the integrity of the Ottoman Empire.

As to Algiers, it had been a province of the Ottoman Empire until its conquest by France in 1830. This came about after an incident involving a slapping in the face of the French Consul. In due course, France sought a hinterland for Algiers south to Lake Chad. It achieved this aim in the 1890 Anglo-French Declaration, in which a French sphere of influence south from the Mediterranean down to the Say-Barroua line was recognized by Great Britain (as is now being illustrated on the screen).

So by 1899, extensive hinterlands south from the Mediterranean had been recognized for both Egypt and Algiers. For purposes of comparison, the area comprising the "Libya-Chad borderlands" had just been placed on the screen. When compared to these hinterlands of Algiers and of Egypt, the

area of the borderlands appears quite modest.

The term "borderlands" is used here by Libya, as well as in its written pleadings, as a handy geographical term of reference. As shown on the screen, it is defined in the north by the 1919 Anglo-French Convention line claimed by Chad, and in the south by 15° N latitude. (It is also No. 1 in the Judge's folder.) I should in this regard mention that the maps appearing in the folder to which I shall refer, or which will be relevant to what I am discussing, start at No. 17 and end at No. 51. As the Judges may have noted, the folder turns this way rather than sideways, which is somewhat helpful for your neighbour. The order of the maps is not necessarily exactly the order in which they come up in the speeches. For example, I have just referred to No. 1.

I should also define another term now, and that is the term "Sudan", which is used in two senses in Libya's pleadings. It is used to refer, as here, to the region of savannah lying south of the Sahara, roughly south of 15° N latitude. The other sense in which "Sudan" is used is, of course, in referring to the region to the east of the borderlands that was the Anglo-Egyptian Sudan and is now the modern State of Sudan, as you can see on the map.

At about the same time, the French had begun to establish themselves in the coastal regions of West Africa around the Senegal river; and French colonial aspirations were forming to extend France's sphere of influence and territorial claims east from the shores of West Africa to Lake Chad, and from there, all the way across Africa to the Upper Nile and the Red Sea.

Turning next to Tripoli, in 1835, the Ottoman Empire expelled the ruling Karamanli dynasty, putting an end to its loose, indirect rule there. This was in part due to the Caliph's alarm over the French conquest of Algiers in 1830. An Ottoman Government was installed in Tripoli, which became a province or *vilayet* under a *Wali* or Governor. The Ottoman administrative structure established in 1835 lasted until the Treaty of Ouchy of 15 October 1912, which required the Ottoman Empire to withdraw from Tripolitania and its hinterland, the borderlands.

The installation by the Caliph of direct control in Tripoli in 1835 was the beginning of the Ottoman moves south into Tripolitania and its hinterland in the face of French military aggression threatening this part of the Ottoman Empire. These Ottoman actions culminated in the establishment

of direct Ottoman administration in the borderlands, beginning in 1908 and lasting until March 1913.

The opportunities for profitable trade made it inevitable that the regencies and protectorates along the Mediterranean coast should look inward from the sea toward the interior and consider these hinterland regions as subject to the sovereignty of the Powers controlling the coasts. This was fostered by the great trade routes running south into the Sudanic regions south of 15° N latitude.

Following the General Act emerging from the 1885 Berlin Conference, giving new impetus to the colonial scramble for Africa, France proceeded to launch a three-pronged advance into the interior of Africa (see map folder No. 17). Lake Chad was the goal:

- From West Africa, the French campaign led by Captain Voulet and Lieutenant Chanoine, which began in 1879, was characterized by its extreme cruelty.
- From the French Congo, the Gentil expedition ran into the powerful forces of Rabbah.
- From Algeria, the Foureau-Lamy Mission (1898-1900) encountered the ferocious resistance of the Tuareg tribes.

The French force converged on Lake Chad in 1900.

After the Porte had asserted direct control over Tripoli in 1835, he began to extend administrative control southward. Posts were established in Gadamès in 1862, in Mourzouk in 1865 and at Ghat in 1875 (Folder No. 18). As the map shows, these oases lay along the main trade routes from Tripoli. At the time, a European traveller into the interior had, first, to obtain a *laissez-passer* from the Governor (or *Wali*) of Tripoli. For the *Wali* maintained virtual control over access to the interior along trade routes. There was a constant north/south flow of commerce along these routes; and the *Wali* — who was the Porte's representative — was in frequent communication with his fellow Muslims in the Sudanic Sultanates. In addition to Islam, the *Wali* and these peoples in the south had in common the Arabic language.

1890 Declaration

This brings me to what is commonly known as the 1890 Anglo-French Declaration. It consisted of declarations exchanged between Great Britain and France. Under them, Great Britain

recognized a French sphere of influence south of its Mediterranean possessions, down to a line drawn between Say, on the River Niger, and Barroua, on Lake Chad. The Declaration also provided for an Anglo-French commission to delimit this line.

Although the Say-Barroua line lay well to the west of what is now the Libya-Chad borderlands, the 1890 Declaration is directly relevant to this case for a number of reasons:

First, in the Declaration, Great Britain *specifically recognized* a French sphere of influence. It brought about a true *delimitation* between a British sphere of influence south of the line and a French sphere recognized to the north. In contrast, as I shall demonstrate shortly, the 1899 Anglo-French Declaration, concerning territory lying north of 15° N latitude, did not.

Second, in 1898, the Say-Barroua line was modified as a result of the work of the Anglo-French commission. It was delimited as a boundary line between France and Great Britain. The conduct of Great Britain and France to proceed at once to establish a treaty a boundary based on the 1890 line was completely different from their conduct in respect to the 1899 Declaration.

A *third* point concerns the geographical location of the Say-Barroua line. The eastern portion of the line lay directly south of Lake Chad, lies directly south of the city of Tripoli, The distance southward from the Mediterranean coast of Algeria, over territory recognized by Great Britain as being within the French zone of influence, was some 2,500 km. This zone covered an immense territory in which at the time France had no presence at all except in areas close to the Algerian coast.

Unlike the Caliph and the *Wali* of Tripoli, the French authorities had virtually no knowledge of the area south of the regions of Ghadamès and Ghat. They had no contact with it or with its peoples. The first French expedition, under Captain Monteuil into the area of Lake Chad only started in 1890; and it originated from West Africa, not Algeria.

And there is a *fourth* point, the 1890 Declaration provoked an immediate Ottoman protest. Of great concern to the Caliph was the fact that this French sphere, recognized by Great Britain, embraced some of the major trade routes from Tripoli south to the Sudan. With its protest, the Caliph described in detail the Tripolitanian hinterland over which he proclaimed Ottoman

sovereignty. The origin of the territorial dispute between Libya and Chad in this case can thus be said to date from the 1890 Declaration and the Ottoman protest it provoked.

The Ottoman protest lodged after the 1890 Declaration was one of several Ottoman protests against Anglo-French agreements that encroached on what the Porte regarded as the Tripolitanian hinterland.

In the Ottoman protest of 1890, delivered by the Ottoman Ambassadors in Paris and London, the Caliph spelled out what he regarded as his territorial rights threatened by the 1890 Declaration. The territory he described as the Tripolitanian hinterland is shown on the map on the screen.

It may be noted that the area over which the Ottoman Empire asserted sovereignty extended all the way south of Cameroon, where German interests were developing. These were to be formally recognized by Great Britain and France in treaties with Germany signed in 1894.

The southward extent from the Mediterranean of the Tripolitanian hinterland claimed by the Porte is not substantially greater than the Algerian hinterland recognized by Great Britain in the 1890 Declaration as France's sphere of influence (some 2,500 km versus some 2,900 km).

The Tripolitanian hinterland claimed by the Porte is less extensive than the Egyptian hinterland claimed by the Ottoman Empire and recognized in 1894 by the French Government (some 2,900 km against 3,100 km) (folder No. 21). So the subsequent French outcry that the Ottoman claim was preposterous in reality reflected the fact that it transgressed on French colonial aspirations. And it will be recalled that French forces, in their penetration of Africa from the west and south, were nowhere near even Lake Chad in 1890. They were not to converge on Lake Chad for another ten years. In contrast, Ottoman administration had been established in the key oases of Tripolitania and the Fezzan; and the *Wali* of Tripoli controlled access to the south along the caravan routes and was in regular communication with the peoples of this hinterland.

There is another difference that I should also bring out here and will be developed later by Professor Crawford and Mr. Maghur, and that is that the French claim was to sphere was of influence whereas the Ottoman Note asserted sovereignty over the area.

Thus the notion that the 1890 Ottoman claim was excessive or unrealistic is inaccurate and

misleading. It had a solid basis. Relative to the Algiers and Egyptian hinterland claims, it was roughly comparable in extent. And by 1911, when delimitation negotiations were foreseen, it had been greatly reduced as a result of a recommendation of the *vilayet* of Tripoli, as shown on the screen. It was this reduced claim that formed the basis of Italy's claim following World War I. This can be seen from Italy's formal 1929 proposal now placed on the screen. The screen actually showed one other programme as well, which was the 1928 minimum programme recommended by the Italian Government (Folder Nos. 56, 57).

The 1898 Anglo-French Convention; the Fachoda Incident.

By 1898, a series of boundary delimitation treaties had started to change radically the map of Africa south 15° N latitude. The resulting boundaries are portrayed on the screen (folder No. 22). These boundaries are not being put in question here; so as far as Libya is concerned, they are established boundaries. They are mentioned only to demonstrate that, when the Colonial Powers intended to delimit boundaries or even spheres of influence, they did so explicitly, they did so in detail, and they did so in international agreements.

- The boundaries to which I just referred extended from the Ivory Coast on the west (French), across the Gold Coast, Togo, Dahomay, Lagos and German Cameroon.
- From the Gulf of Guinea, France and occupied territory that became the French Congo (now the States of Congo and the Central African Republic).
- The boundary between French Congo and Belgian Congo (now the States of Congo and the Central African Republic).
- The boundary between the French Congo and the Belgium Congo (now Zaire), along the Oubangui River, was delimited in 1885 and 1887.

The 1898 Convention filled in certain gaps in these boundaries between French and British territories as far east as Lake Chad, thus completing the partition of West Africa.

This map now on the screen is a composite view of the entire picture up to the 1898 Declaration and it includes as well the Article 2 delimitation under the 1898 Declaration up to 15° N latitude.

I turn now to the crisis that provoked the 1899 Declaration. This was the Fachoda crisis, which almost led to war between Great Britain and France.

As shown once again on the map, by the end of 1898, France had reached agreement with Great Britain over its Algerian hinterland, in spite of the Ottoman protest. A southern boundary of Algeria had been delimited as far south as approximately 14° N latitude and as far east as Barroua on Lake Chad, that was the delimited boundary. The *Khedivate* of Egypt had encountered more difficulty but had finally driven out of Sudan and Mahdi and in 1898 forces under the command of Lord Kitchener (Egyptian forces) had again moved south as far as Khartoum. In the meantime, a small French force led by Captain Marchand was making its way across Africa from the French Congo to the Nile with the objective of heading off the British in the region of the Upper Nile.

Captain Marchand and his small, exhausted band, reached Fachoda on the White Nile on 10 July 1898 and occupied the small Fort there. He was surprised to find the French flag already flying that had been raised some days earlier by a Russian colonel. Fresh from his victory over the Mahdi at Omdurman, Lord Kitchener steamed up to the Nile with a large force. On 19 September 1898 the famous Kitchener-Marchand meeting at Fachoda took place. (Folder No. 23.) Our screen has the capability of depicting this but we will spare the Court.

I will only mention one thing that happened at the meeting. During it Lord Kitchener made it clear that he represented the *Khedive* of Egypt as well as the Porte and that the Ottoman Empire, through him, was establishing its territorial claim over the region of the Upper Nile.

On 4 November 1898, the French Government ordered with withdrawal of French forces from Fachoda, and the new French Ambassador in London, M. Paul Cambon, approached Lord Salisbury on 12 January 1899 to remind him of the British promise given to his predecessor to examine with France the delimitation of their spheres of action in the region of the Bahr al Gahazal, lying just west of Fachoda. Thus began the three-month negotiations conducted by Lord Salisbury and M. Cambon culminating in the 1899 Anglo-French Declaration of 21 March 1899 that was tagged onto the 1898 Convention.

Before beginning a detailed analysis of the 1899 Declaration, I should like to mention one

matter that came up early in the negotiations and bears directly on the Ottoman hinterland claim.

At the outset of the negotiations, discussion was focused on the region of the Bahr al Ghazal, to the west of Fachoda. It is this region right here that I am pointing to. France's preoccupation was to link together ("grouper" as M. Cambon put it) the French possessions of Congo and Oubangui with its West African possessions and with Algeria and Tunisia. But once this was assured, M. Cambon said to Lord Salisbury: "We can leave for Tripolitania a certain hinterland".

It is not surprising that early on in the 1899 Declaration negotiations M. Cambon should say this to Lord Salisbury. Algiers had gotten its hinterland and so had Egypt. And the Porte had already asserted his sovereignty over an extensive Tripolitanian hinterland.

Lord Salisbury replied to M. Cambon: "Yes, we could draw a line in the shape of a horseshoe".

We have drawn on the map a horseshoe-shaped hinterland (folder No. 24). Its southern arc hits 15° N latitude. Of course, this shape could be adjusted to allow for a wider band of French territory to the south, as is being shown on the screen. Its southern arc could hit 16° N latitude or 17° N or even 18°. In 1899, the French, in their three-pronged attack, were only just reaching Lake Chad and had yet to take on the forces of the Rabbah. So it is apparent that quite a sizable hinterland could have been contemplated without interfering with inter-communication between areas where there were French forces on the ground.

I should like now to take a close look at the 1899 Anglo-French Declaration. It is the first, chronologically, of the two essential mainstays of the French-Chadian conventional boundary thesis. The other, 1899 Anglo-French Declaration.

Since the discussion I have just completed bears directly on the Declaration's object and purpose, I shall take that question up first, before turning to the text.

The competing claims of Great Britain, France and Germany in *West Africa* had been settled by 1898 in a series of detailed boundary delimitation treaties. The Anglo-French Convention of 1898 completed these boundary delimitations, but the confrontation between France and Great Britain in East Africa and the Upper Nile, far from being resolved, had reached a dangerous stage.

The 1899 Declaration had one essential purpose: to resolve the crisis over the Upper Nile. It accomplished this purpose by delimiting, to the south of the borderlands, that is south of 15° N latitude, a boundary between French and British territories lying to the east of Lake Chad in such a way as to exclude France from the Upper Nile Basin. In return, the region of the Sudan between Darfour in the east of Lake Chad in such a way as to exclude French. The Court will recall that the area referred to as "the Sudan" is the region of savannah lying south of the Sahara, roughly south of 15° N latitude.

This was a real boundary delimitation, but it only concerned the regions situated between 5° and 15° N latitude. Fachoda lies at about 10° latitude.

The 1899 Declaration had a subsidiary purpose as well — a *negative* purpose. That was to draw a line limiting France's advance to the east toward Egypt in the territory to the north of 15° latitude. Article 2 of the 1899 Declaration dealt with the boundary delimitation south of 15° N latitude; Article 3 accomplished the subsidiary *negative* purpose of the Declaration, north of 15° N latitude.

At the time, in statements made to the Italians in both Rome and London, the British Government made it explicitly clear that Article 3 and Article 3 line had only a negative object. I refer to the Libyan Memorial, paragraph 5.59 for the reference.

That, then, was the 1899 Declaration's object and purpose. Now I turn to examine the terms of the 1899 Declaration, their ordinary meaning within their context and in the light of the Declaration's object and purpose. The text in both English and French has been placed on the screen (folder No. 25).

The opening paragraph indicated that the Declaration was to be added on to Article 4 of the 1898 Convention and become a part of it. In fact, they were subsequently ratified together. I mention this because it brings out the fact that the 1898 Convention formed part of the context of the 1899 Declaration.

In Article 1, there are several things to note:

First, the two Governments undertook in Article 1 not to acquire territory or political

influence to the west and east respectively of a *boundary* line, or as expressed in the English text a "*line of frontier*" (*ligne frontière*). The line of frontier referred to in Article 1 is then defined in the *next following* paragraph, that is in Article 2. Article 1 makes no reference to the line described in Article 3, only to the Article 2 line.

Second, Article 1, combined with Article 4, made it clear that Article 2, but not Article 3, was intended by the parties to be a *boundary delimitation* between British and French territories. The Court will observe that the term "line of frontier" or *ligne frontière* is used in both Articles. Article 4 provided for the appointment of a boundary commission charged with the task of delimiting on the spot the frontier line in accordance with the indications given in paragraph 2, that is in Article 2. There is no mention of Article 3.

As to the text of Article 2, it defined a "line of frontier" — a boundary line — running from south to north. Its starting point was the boundary between the French Congo and the Belgian Congo, and from there it followed — this is at about 5° N latitude — it followed the line of the water-parting of the watersheds of the Congo River and the Nile north to 11° N latitude, as is shown here on the map. From this point north to 15° N latitude, the boundary line was to be drawn so as to separate the Kingdom of Ouadaï from the Province of Darfour as constituted in 1882. This second part of the boundary by 21° E and 23° E latitude. This is the shaded rectangular area on the screen.

The part of the boundary between 5° and 11° N latitude was relatively easy to determine on the basis of maps showing the parting of the watersheds, but delimiting the boundary between 11° and 15° N latitude was a more complicated task for the boundary commission to undertake. In fact, it was not undertaken by a boundary commission until 1919, some 20 years later.

Coming now to Article 3 of the 1899 Declaration, unlike Article 2, which defined a line running from south to north, the line defined in Article 3 ran in the other direction, from north-west to south-east, starting at the intersection of the Tropic of Cancer and 16° E latitude and descending to the south-east. This was a last-minute shift. Until the last two days of negotiations, the Article 3 line was defined as running south-east/north-west, just as the Article 2 line ran south/north. I shall go into why this shift was made when I return to the *travaux*.

Article 3 starts out with the words, "It is understood, in principle, that . . .". Although the words "in principle" appear twice in Article 2, they modified the direction of the boundary line there. In Article 3, the words "in principle" modified the understanding expressed there rather than the direction of the line.

The understanding expressed in Article 3 was that "to the north of the 15th parallel — that is 15° N latitude — the *French zone* shall be *limited* to the north-east by a line". I would remind the Court that 15° N latitude marked the end of the boundary line described from south to north in Article 2.

Article 3 thus created a *limit* to a French *zone*. the word used is "zone", not "sphere", not "sphere of influence". "Sphere" (or *sphère* in French) was the term consistently used elsewhere in the 1898 Convention. "Zone" (or *zone* in French) cannot be found anywhere else in the Convention or Declaration.

Article 3 did not define the French zone. There is no recognition of any regions as lying within the French zone. There is no mention of a British zone or limit to any British zone. The line is described simply as a *limit* beyond which the French zone was agreed not to extend. Thus, there is in Article 3 no delimitation of spheres of influence — only a line limiting a French zone.

Article 3 then goes on to define this line of *limitation*. The Article 3 line was a start from a specifically identified point (the Tropic of Cancer — 16° E longitude) and descend from there "to the south-east" until it met 24° E longitude. The line was then to follow 24° E until it met, "to the north of 15° N latitude", the frontier of Darfour "as it shall eventually be fixed".

This brings out two things:

First, the starting point of the line was not linked to any other boundary. There is no mention, for example, of a Tripolitanian boundary — in fact, the names Tripolitania or Tripoli are entirely missing from the Declaration.

The *second* points that the end-point of the Article 3 south-east-descending line was not specified as coinciding with the end-point of the north-ascending Article 2 line at 15° N latitude. yet intended to meet at the same point. Why was this so?

The answer is that the Article 2 line had no specific end-point to refer to — where the north-ascending lines intersected 15° N latitude — since, between 21° and 23° E longitude, that boundary line had yet to be delimited with precision. Only the principle had been agreed as to the course of the line — to divide Ouadaï from Darfour — and that was not such a simple task. For one thing, the two maps being used by Great Britain and France — a German map of 1892 and a French army map of 1896 — produced different results. Paradoxically, the French wanted to use the German map and the British and French map. This, incidentally, illustrates the fact that the maps being consulted at the time reflected an incomplete knowledge of the geography of the region.

This inability to agree on a map for defining the Article 2 sector was one of the reasons that no map was referred to or annexed to the 1899 Declaration. Another reason was that, if a map were annexed, France feared it would imply French acceptance of the British occupation of Egypt. It is important to note that it was France that insisted that a map not be referred to in, or annexed to, the Declaration. And certainly a map would quickly have aroused the attention of the Ottoman Empire.

I mentioned that there was no precise end-point to the Article 2 line. This explains why, in the last several days of negotiation, the definition of the Article 3 line, until then described as running from south to north, like the Article 2 line, was shifted to a line running instead for north to south — or more accurately, from north-west to south-east. For it is axiomatic that in order to draw a line a starting-point must be known. If the exact end-point is not known, then the line can be described by giving its direction together with a formula to deal with the uncertainties as to the ultimate end-point. This is exactly what Article 3 accomplished.

What was the intended direction of the Article 3 line? The terms of Article 3 answer this question: the line was to run "to the south-east" — "*dans la direction du sud-est*" — not to the east-southeast, not southeastward, and not in a southeasterly direction — "to the south-east". As I have just explained, the Article 3 line could not have been defined at the time as a straight line drawn to the point of intersection of 24° E and 15° N, because the Article 2 sector line, which was to divide Ouadaï from Darfour, was not necessarily going to end at the precise point. So, instead, Article 3 specified a south-east line to be drawn to the point where this line intersected 24° E longitude. From

there, it was to continue south also in the line of longitude and end at the meeting point of 24° E and the frontier of Darfour "as it shall eventually be fixed". This point, too, was not known.

The negotiators of the 1899 Declaration had in front of them the two maps that I just mentioned. In fact, there is no disagreement between the Parties, and in fact Chad has placed in evidence excellency copies of these maps, which Libya is using for this analysis.

However, there is a critical difference of view between Libya and Chad over the intended direction of the line defined in Article 3. Chad says the Article is vague and unclear, and it resorts to the *travaux* to attempt to demonstrate that the line defined as running "to the south-east" actually was intended to run to the east-southeast. Libya considers that Article 3 is clear concerning the direction of the line. It was to run "to the south-east". The text is neither ambiguous nor obscure.

I should like to demonstrate now what I have just said concerning the intended direction of the Article 3 line on a reproduction of one of the two maps that lay in front of the negotiators in 1899 — the French Army of 1896.

Now the terms of Article 3 are that the line shall start at the point of intersection of the Tropic of Cancer and 16° E longitude. The line shall run thence to the south-east until it meets 24° E longitude. Such a line is shown on the screen. The Court will note that the point of intersection of this line and 24° E longitude is north of 15° N latitude and also north of the notional frontier of Darfour shown on the French Army map, thus perfectly matching the text of Article 3 (folder Nos. 26, 27).

The text of Article 3 provides that the line shall then follow 24° E until it meets, to the north of 15° N latitude, the frontier of Darfour as it shall eventually be fixed. As the Court can see, the line on the screen has done that as closely as possible. It has descended south along 24° E longitude until it intersected the Darfour boundary. A strict south-east line drawn on this map therefore perfectly matches the ordinary meaning of the terms of Article 3.

What emerges from this analysis is that the negotiators of the 1899 Declaration came up with a rather clever solution of the dilemma of not knowing exactly where to end the Article 3 line. They found that a strict south-east line would intersect 24° E longitude just north of where the maps

showed the national Darfour frontier to lie. This gave them a precise end-point to the Article 3 south-east line, and one that would be fairly close to the ultimate end-point to the Article 2 line, after it had been delimited in detail, which it was logical to assume would also coincide with the northern boundary of Darfour.

The *context* of Article 3 supports Libya's interpretation as to the intended direction of the Article 3 line. The expressions "to the west" and "to the east" appear in Article 2 of the 1899 Declaration; "to the north", "to the east" and "to the north-east" appear in Article 3. The words are clearly intended to mean precisely what they say: they point to a precise direction, just as "to the south-east" does.

As earlier noted, the 1899 Declaration was added on to Article 4 of the 1898 Convention. So the Convention forms part of Article 3's context. The text of the Convention is full of references to directions.

When the direction was intended to be generally, but not precisely, described, the term "northward" (*vers le nord*) or "eastward" (*vers l'est*) appears. For example, in Article 1 of the Convention, the line there is described as following the thalweg of a river wanders northward; it does not follow a true north direction.

The terms "northward" and "eastward" are also used to describe the direction of the line when it follows a line of longitude or latitude, for such a case the precise direction of the line is predetermined by the line of longitude "eastward". This could only mean true east or due east. It is interesting to note here that the French phrase used to describe this true east line is *dans la direction de l'est*. The Court will recall that the French text of the description of the Article 3 line in the 1899 Declaration uses the same form of words, *dans la direction du sud-est*.

Elsewhere in the Convention appears such a phrase as "in a northerly direction", one again sees that the line appears to run more north-northeast than true north. And elsewhere, one finds directions such as "due north" and "due south", as in Article 4. But it has not been customary practice in geographical terminology to use the adjective "due" except in conjunction with the principle directions of north, south, east and west.

Perhaps I can now summarize what Libya considers to be the ordinary meaning of the terms of Article 3 of the 1899 Declaration in their context, and in the light of their object and purpose.

First, as to the *nature* of the Article 3 line, it cannot be interpreted as a *boundary line*. Chad concedes this point. The 1899 Declaration provides for no boundary north of 15° N latitude. the corollary of this agreed position is that for the Article 3 line to become a boundary line would require an explicit amendment by the parties to the Declaration so as to provide for this change in the nature of the Article 3 line. And Chad appears not to accept this proposition, contending that the Article 3 line as a result of alleged French *effectivités* was transformed into a boundary.

Sir Ian Sinclair has already dealt with Chad's contention in the context of the 1955 Treaty. Professor Bowett will deal with it further when he examines Chad's claim to title based on French *effectivités*. On both legal and factual grounds this contention of Chad must be rejected. It is important to bear in mind that this was an argument never advanced by France.

The *Second* conclusion to be drawn from the ordinary meaning of Article 3, again concerning the *nature* of the Article 3 line, is that it was a line of *limitation* to a French zone. Article 3 contained no definition or recognition of either a French or a British sphere of influence on either side of the line. It is axiomatic that a line cannot be a line of delimitation of spheres of influence if no such spheres of influence are recognized or defined.

Once again, therefore, for the nature of the Article 3 line to change so as to be a line of delimitation of spheres of influence would require an explicit amendment of Article 3 so as to recognize and define which spheres and to determine the line and to describe the line as delimiting these spheres.

The *third* conclusion concerns the intended direction of the Article 3 line. I will not repeat now the conclusion of this. Libya considers the text to be perfectly clear — "to the south-east" and that a true south-east line perfectly bears out the intent of the text of Article 3. I should pause here perhaps to explain why the direction of the line is such an important matter in this case.

As Sir Ian Sinclair pointed out, Chad's three theories all lead to the exact same line. It is fundamental to Chad's case, in order to reach such a conclusion, as well as to Chad's argument that

Chad's claimed line was opposable to Italy, that Chad establish that the line described in Article 3 of the 1899 Declaration was virtually the same line as the line shown on the *Livre jaune* map published by the French Government in 1899, and as the 1899 line was modified by the so-called "interpretation" set out in the 1919 Anglo-French Convention. If the intended direction of the 1899 line was strict south-east then Chad cannot establish either proposition, for the *Livre jaune* line and the 1919 line followed a quite different direction — east southeast. Of course, even those two east-southeast lines were appreciable different, one from the other.

Let me remind the Court of the difference between these lines. Each line, now on the screen, follows a quite different direction. But the difference between a strict south-east line and the other two lines is the more striking. One does not need, as Chad has suggested, a magnifying glass or even a strong pair of glasses to see the difference in the directions taken by these lines (folder No. 28).

The importance of this point was not lost on the French Government, for it was an essential element of the French thesis as to a southern boundary of Libya that the 1919 Convention did not materially alter the direction of the 1899 line. That would explain why the French Government — contrary to fact — consistently described the *Livre jaune* map as having been annexed to the 1899 Declaration. For the difference between the *Livre jaune* map line and the 1919 line arguably could be explained away as minimal — and the French Government attempted to do so. Of course, even this is not so, as the lines on this screen reveal.

In disputing Libya's position as to the direction of the Article 3 line, Chad has relied on certain documents of the British Sudan Service in Khartoum prepared many years later — in 1919 and in 1923. They are hardly what could properly be called *travaux* of the 1899 Declaration. Chad also relies on Sudan Service documents to argue that to interpret the Article 3 line as describing as a strict south-east line would lead to an absurd and unreasonable result.

There is a full discussion in Libya's Counter-Memorial (starting at para. 4.182) of these documents produced with Chad's Memorial and of Chad's arguments based on them. However, Chad has with its Reply added some Sudan Service documents, without either discussing the evidence in its Reply or formulating the propositions that Chad would derive from them.

But I will deal here with one of Chad's arguments. This is that a strict south-east line would have led to a manifestly absurd and unreasonable result. A 1919 analysis by the same British Sudan Service said that a strict south-east line would be "ridiculous" because such a line would, it was argued, be inconsistent with the object and purpose of the 1899 Declaration. That was, the argument continued, to recognize the regions of Borkou, Tibesti and Ennedi and falling within the French sphere of influence.

This conclusion was wrong on several counts. I have already demonstrated that no such recognition or definition of a French sphere of influence emerges from the text of Article 3. All the evidence points to the fact that Great Britain refused to recognize or identify a French sphere of influence north of 15° N latitude, just as France refused to recognize a British sphere. The object and purpose of Article 3 was to establish a line placing a limit to France's potential expansion eastward in the direction of Egypt and the Nile — a limit to a French zone — not to recognize and define spheres of influence.

The *travaux* reveal that for a time, in the drafts to Article 3 exchanged between the parties, the line was described in terms of the regions to be left on the French side of the line. This was abandoned in the end. Any mention of regions was omitted from Article 3, and the present text, provided for a line running "to the south-east" from the designated starting point on the Tropic of Cancer, was substituted. Why this was done was explained by Mr. Cambon in his despatch to French Foreign Minister Delcassé on 20 March 1899 — one day before signature. Here is Mr. Cambon's explanation:

"It must not be forgotten that we are exposed to the claims of the Sultan and to the suspicions of Italy. A provision, precise enough to assure for us incontestably the regions between the south of Tripolitania and Darfour, and vague enough to allow us to decline any conversation with the Porte, seems to me preferable to an enunciation or mention of any territory." (ML, French Archives Ann., p. 44.)

Well, Chad would argue, echoing the Sudan Service's comments in 1919, that is precisely the point — a strict south-east line would not have left these regions, no longer identified in the text, on the French side of the line. Of course, the short answer to that is whether the line had this result or not is immaterial. The parties had agreed on a new form of words for describing the line in Article 3

of these included a clear indication of the direction of the line — "to the south-east" — not to the east-southeast or some other direction.

But even were this point concede for purpose of the argument, which it is not, the Sudan Service and Chad are still wrong, for they were looking at 1919-vintage maps rather than at 1899-vintage maps. A strict south-east line drawn on the German and French maps consulted by the negotiators in 1899 would have left on the French side of the line virtually all these regions. I invite the Court to inspect Nos. 26 and 27 in their folder at their leisure. This same point is now demonstrated on the screen.

Since this point has been so fully discussed and illustrated in Libya's Counter-Memorial, starting at paragraph 4.71 and various maps there, I will not go further into this demonstration.

I will, however, continue a little bit further into the *travaux*.

Following the exchange of a number of drafts after the start of negotiations in January 1899, the French tabled, on 9 March, a new draft of the Declaration. The course of the line described in Article 3 of the French draft was to start at 14° N latitude and to be drawn to the north so as to pass to the east of the mountains forming the regions of Soghaous, Ennedi, and so on, so the regions were mentioned in this draft. The line was to be so drawn so as to leave also in the French sphere — in this draft was "sphere" and not "zone" — a belt of sand at least 10 miles from the foot of the mountainous *massif* forming these regions. So the draft used the word "sphere", defined the regions falling within this "sphere", then it added a 10-mile zone of sand north of the *massif*. These directions are so unclear that it would not be possible to put on a map the proposed French line.

Lord Sanderson passed the French draft on to Lord Everett in the War Office for his review and comments. He also formulated his own detailed critique and sent it to Lord Salisbury, rejecting out of hand the draft of Article 3 prepared by the French. One of Lord Sanderson's comments on the French draft of 9 March is of particular relevance in confirming the object and purpose of Article 3.

He said he found the French revision of this Article objectionable because:

"It contains a recognition that certain places fall within this sphere, whereas we do not wish to go farther than renounce any claim to them ourselves." (ML, British Archives Ann., p. 4.)

As we have seen, the British position prevailed in the final text, which contained no recognition or definition of a French sphere.

On 19 March, a draft was presented by Lord Salisbury. Its Article 2 and Article 3 lines are now displayed on the screen (folder No. 29). This draft and M. Cambon's reaction to it constituted a pivotal moment in the negotiations. Chad's Counter-Memorial has referred to it as "cet épisode crucial".

What the British draft did was to extend the Article 2 *boundary line* to 18° N. From there another line, the Article 3 line, was to be drawn to the point of intersection of the Tropic of Cancer and 16° N latitude. This line trended west-northwest-/east-southeast. It was described in the draft as following a "north-westerly direction", not "to the north-west" — for Lord Salisbury knew full well the line was not a strict north-west line: it trended west-northwest/east-southeast.

The British 19 March draft was the first draft in which the point of intersection at the Tropic of Cancer appeared. The end-point of the Article 2 line continued to coincide with the starting point of the Article 3 line. The line also continued to be described as running generally from south to north.

M. Cambon's immediate reaction, as reported to M. Delcassé, was that it was impossible to *push* the delimitation up to 18° N latitude ("pousser la délimitation jusqu'au 18° parallèle"). From the negotiations that had preceded, it is clear that what M. Cambon meant was that the end of the Article 2 boundary line, which had in the prior drafts been the starting point of the Article 3 line, ought not to be pushed north of where it consistently had remained during the negotiations — at 15° N latitude or even further south.

As the handwritten draft table by Lord Salisbury on 19 March shows, Lord Salisbury accepted M. Cambon's objection. the figure 18° N was crossed out and 15° N substituted for it, as the close-up on the screen reveals (folder No. 30). The effect of Lord Salisbury's modification to his proposal is now shown on the screen. The line is now shifted — his first proposal is the top line, his modified proposal is the bottom line.

It was at this stage, two days before signature, that several other last-minute changes in

Article 3 were made. Lord Salisbury's 19 March draft, to which I have just referred, had finally picked an end-point of the line — still describing from south to north — on which agreement could be reached. This was compromise between the British proposal to end the line at Toummo and the French proposal to end it considerably further to the north-east of Toummo. This compromise end-point was the intersection of 16° E longitude and the Tropic of Cancer. The starting point of the Article 3 line still running from south to north that Lord Salisbury agreed to, after M. Cambon objected to pushing the line north 18° N latitude at the point of intersection of the Article 2 boundary.

But there is a problem with that point. It could not then be identified since the part of the Article 2 boundary between 11° and 15° N latitude had not been fixed in Article 2 — although the principle had been agreed. I have discussed this problem already.

After what M. Cambon described as a "rather long discussion", the direction of the line as described in Article 3 was reversed: instead of ascending in a "north-westerly direction" under the first draft of Lord Salisbury, it was to descend "to the south-east". This shift is not explained in the *travaux*, but the reason is self-evident. Only one end of the line could be fixed at the time — the northern end — for Lord Salisbury's starting point for the line at 18° had been rejected, leaving a point to be fixed later along the line of 15° N latitude, a point not then known. So the only possible starting point of the line was the known. So the only possible starting point of the line was the known and agreed point on the Tropic of Cancer. Thus, the description of the direction of the Article 3 line was reversed.

At this point, agreement was near. The French, however, still refused to accept the reciprocal clause in the British draft prescribing that each party could not go beyond the line. M. Delcassé feared it implied an indirect recognition of English rights over the Middle and Upper Nile, as M. Cambon put it. On their side, the British did not want to define or recognize a French sphere of influence to the west of the line. What resulted was another rather clever compromise to resolve the impasse. The idea of reciprocity was abandoned, and the description in the text of the line was changed so as to be expressed as a limit to the French zone. The words "sphere" or "sphere of

influence", which consistently appeared elsewhere in the 1898 Convention, as well as in earlier drafts of the Declaration, were removed, and hence any possible implication of British recognition of a French sphere of influence. From the French standpoint, a limitation imposed on the "French zone" raised no implication of a British presence on the other side of the line.

The *travaux*, therefore, confirm that, north of 15° N latitude, the 1899 Declaration did not purport to establish a boundary or delimitation of any kind. Article 3 merely described a south-east line as the limit to the French zone. This zone was intentionally not defined or recognized in a positive sense. This zone was intentionally not defined or recognized in a positive sense in the Declaration.

Now the Court will note that the south-east line described in Article 3 extended from the Tropic of Cancer, not to 23° E, but to 24° E longitude, from where it then descended due south to the Derfour frontier. Since the Article 2 boundary still to be precisely delimited was to extend no further east than 23° E, a gap would inevitably result between the end point of the Article 3 *line* and the Article 2 *boundary*. And this is shown on the screen (folder No. 29). This gap came about because the British refused to agree to French demands to extend the Article 2 sector eastward. This gap was not dealt with until the 1919 Anglo-French Convention.

I have come to the end of my remarks concerning the 1899 Declaration. Before moving on, I should like to pause in order to show, by way of summary, on what I shall refer to as the *boundaries* map, the conventional boundaries of any relevance to this case, as to the end of 1899.

First, we see on the screen the 18902 S Syay-Barroua sphere of influence line, delimited as a boundary in 1898. Of course, it was not opposable to Italy or to the Ottoman Empire, which protested it. It also concerned areas outside the Libya-Chad borderlands. But it was a boundary having a certain relevance to this case, as I have explained, so, I leave it on the map.

Second, there is added to the map the boundary delimitation under Article 2 of the of the 1899 Declaration as far north as 15° N latitude. The strict south-east line of Article 3 is being placed on the map, but it is being removed. It certainly was not a boundary in 1899, a fact that Chad has conceded. In fact, it was not a delimitation of any kind.

Third, a boundary was agreed between Great Britain and Egypt in the Butros Ghali-Cromer Arrangement of 19 January 1899 (this is in Chad's Production 250). It established a boundary between Anglo-Egyptian Sudan and the *Khedivatei* of Egypt along 22° N latitude. This line will remain on the boundary, for it was a real territorial boundary, and it has a certain relevance to this case, as will be seen later.

Thus, as of the end of 1899, the lines appearing on the map on the screen were the only boundaries having any relevance to this case.

Mr. President, this has perhaps been hard work for the Court, and this might be a convenient moment to take our break.

Mr. PRESIDENT: Thank you very much, Mr. Sohier. We will do that now, thank you.

The Court adjourned from 11.15 to 11.35 a.m. IDENT: Please be seated

. Mr. Sohier.

Mr. Sohier:

Conduct Subsequent to the 1899 Declaration

Certain conduct, Mr. President, Members of the Court, following the 1899 Declaration is relevant and of importance. Much as this has been fully discussed in Libya's Pleadings.

*First, there was the Ottoman protest against the 1899 Declaration, and interestingly Germany sent a note verbale to Great Britain noting that the 1899 Declaration was res inter alios acta. The most significant action by the two signatories to the Declaration, Great Britain and France, was the issuance shortly after the Declaration was signed of a French *Livre jaune* publication of the 1899 Declaration to which was attached a map.*

As the Court well knows there was no map attached to the 1899 Declaration. France had opposed the attaching of a map and no map is referred to. In contrast, with respect to the 1898 Convention, maps were referred to and annexed.

I will not go into the analysis of the *Livre jaune* map which has been done fully in Libya's

written pleadings. And, I will not go into any detail of the British reaction to the *Livre jaune* map except to remind the Court of the reaction of Lord Sanderson in a note to Lord Salisbury in which he noted that:

"The French have drawn the line from the Tropic of Cancer to east-southeast instead of south-east.

I do not know that it matters much.

Otherwise this line seems fair." (ML, British Archives, Annex, p. 37.)

The word "otherwise" is rather important, which suggests that the direction of the line is not fair, is incorrect. Now, I will not develop this further because this has been extensively dealt with in the pleadings of Libya.

However, there is another element of conduct by Great Britain that is extremely important and which I can cover very quickly by showing the maps. This was that after the 1899 Declaration and after having seen the *Livre jaune* map put out by the French, which was really not much more than a sketch-map, the British War Office issued a number of maps and I should like to put them up.

First, there was the 1916 British War Office map; it shows a strict south-east line (folder No. 32).

Then there was a 1906 British War Office map revised to August 1913; it shows a strict south-east line (folder No. 33).

Then there was a 1914 British War Office map. Again, a strict south-east line (folder 34).

It is quite remarkable that not one of these maps appeared among the 162 maps in Chad's map Folder.

However, in Annex 177 to Chad's Reply, a number of official maps issued following the signing of the 1899 Declaration were placed in evidence by Chad.

They put in evidence the 1914 War Office map that resembles the 1916 map furnished with Libya's Memorial. They also attached successive editions, 1921, 1928 and 1934. But it is the 1914 one that is interesting, because in 1919, of course, Great Britain agreed to a change in direction of the line. What they considered the direction of the line in 1914 is what is interesting — a strict south-east line. The pink scores along the line were superimposed by Chad in their Map Atlas

(folder No. 35).

Then in their Reply, Chad produced another 1914 War Office map. (folder No. 36). This is the same one that Libya has furnished. Again, a strict south-east line.

So, this group of nine British maps furnished by Chad shows, as the Article 3 line, a strict south-east line on the editions of the maps issued prior to 1919, the British War Office maps.

There is another British map of importance — one issued in 1899, shortly after the signing of the 1899 Declaration — I think that is a very important point — by the Royal Geographical Society. It was just after the signing of the Declaration. It, too, shows a strict south-east line (folder No. 37).

The important point is that, seemingly with but one exception, that Chad has put into the record, all the pre-1919 British maps placed in evidence by Libya and Chad show a strict south-east line for Article 3. The exception is a 1909 edition of the 1904 map issued by the Sudan Service. So, Libya will postpone any discussion of this map and other evidence in the form of documents from the Sudan Service until Libya hears what Chad has to say about this map.

1900-1902 Accords

I come now to the second mainstay of the French-Chadian conventional boundary thesis: the 1900-1902 Accords. An important part of the heavy burden Chad expects these Accords to bear is to provide the basis for making opposable to Italy (and hence to Libya) the 1899 Declaration and the so-called "interpretation" of it in the 1919 Anglo-French Convention. It would seem reasonably clear that even under such a theory of opposability, whatever, arguably, became opposable to Italy in 1902 could not have been other than what was binding on Great Britain at the time. As I have just finished demonstrating, this did not include a conventional boundary north of 15° N latitude between Libya and any French territories, or, in fact, any delimitation at all, even of spheres of influence.

These Accords consisted of the 1900 and 1902 Franco-Italian Accords and the 1902 Anglo-Italian Accords. They were all secret agreements. The Franco-Italian Accords did not become publicly known until about 1919, and their texts were not first published by the French Government until 1920. As a result, for many years, these texts did not receive the public scrutiny

usually given to published treaties and international agreements. Hence, it was easier to invent myths as to their meaning and effect. And this is exactly what happened in the case of the Franco-Italian Accords.

The 1900-1902 Franco-Italian Accords are an essential element of Chad's contention that in 1951, when Libya attained independence, there was a conventional boundary between Libya and France. These Accords had also been the crux of France's earlier thesis as to a Libyan boundary. In fact, in June 1955, when the second stage of the negotiation leading to the 1955 Treaty was about to start, the French informed the British Foreign Office, in the court of seeking British support, that the 1902 Accord was the "*texte de base*" of the French position and, of course, it is in connection with the 1902 Accord that the famous *Livre jaune* map gained such prominence and has acquired such an important role in Chad's case.

I begin with the 1900 Franco-Italian Accord, to take up again first its object and purpose. This principally concerned France's interests in Morocco. The 1900 Accord recognized Italy's right to develop its interests in Tripolitania in exchange for France's freedom of action in Morocco. The 1900 Accord was the first of a number of agreements entered into by France with other Powers in order to gain recognition of France's special status in Morocco.

France's special status in Tunisia is also part of the background of these Accords. For when France, in 1881, established by treaty its protectorate over Tunisia, there was a serious falling out with Italy. In 1882, Italy proceeded to join the Triple Alliance with Germany and Austria. Reconciliation between France and Italy came in 1896, when concessions concerning Tunisia were made to Italy, set forth in three treaties of that year. Thus, a subsidiary purpose of the 1900 Accord was to make Italy less dependant on the Triple Alliance in maintaining the status quo in the Mediterranean. At this point, another factor entered the picture — the 1899 Anglo-French Declaration. For the Declaration had made no mention of Tripolitania, and Italy approached Great Britain and France to ascertain what it meant in regard to Tripolitania.

So with Italy seeking assurances concerning the 1899 Declaration, and France seeking Italian recognition of its status in Morocco, discussions got under way. They were not easy, they lasted for

a year and a half, and in the end, the results were not reciprocal, but favoured France.

This leads me to the form and the text of the 1900 Accord and its ordinary meaning. As to form, the Accord consisted of a letter from French Ambassador Barrère to Italian Foreign Minister Visconti-Venosta containing a unilateral declaration regarding the 1899 Declaration; and a letter dated two days later from Signor Visconti-Venosta to M. Barrère concerning recognition of the freedom of action of France and Italy in Morocco and Tripolitania, respectively. These letters the Judges can see on the screen side by side (folder No. 38). Each letter dealt with an entirely different subject. Neither letter referred to the other. Neither France nor Italy acknowledged the undertakings made by the other, and this form was largely dictated by Italy's concern that the Accord, even though secret, should not be seen as in conflict with its Triple Alliance undertakings and relationship. This was a matter with the Italian King felt particularly strongly about.

It is M. Barrère's letter that is directly relevant. The first two paragraphs — which appear on the screen, first in French, and then in English translation — explain the letter's background and refer to earlier clarifications given to Italy by the French Government concerning the effect of the 1899 Declaration. This letter was intended to make these earlier assurances more explicit.

Then in the key third paragraph, the French Ambassador explains that the 1899 Declaration, in omitted any mention of the *vilayet* of Tripoli, established a *limit* for the French sphere of influence, in relation to Tripolitania — Cyrenaica, which the French Government had no intention to exceed. M. Barrère added that France had no plans to intercept the caravan traffic from Tripoli into the interior.

I should point out that, because the Court will have noted, I said "limit", and the word underlined on the screen is "boundary". Libya takes issue, with great apologies, with the translation of this word by the Registry. So we have substituted in our translation the word "limit" for "boundary". In the context, "limit" is clearly the correct word, as will emerge in the discussion that follows.

The *travaux* reveal the clause "by its exclusion of the *vilayet* of Tripoli from the partition of influence for which it provides" was inserted at Italy's request. By adding this clause, it was made

clear that the omission from the 1899 Declaration of any reference to Tripoli meant that it was excluded from the effects of the Declaration.

It is not surprising that the text of this paragraph soon led to a request for further clarification: it is not a model of clarity. When the British were shown this letter in 1902 they reached the same conclusion.

As to the French declaration concerning caravan routes, it is to be noted that only the western caravan routes to and from Tripoli were mentioned — not the eastern routes from Benghazi to Ouadaï. Both these routes are now shown on the map on the screen (folder No. 40).

I come now to the second letter making up the 1900 Accord — the letter from Italy's Foreign Minister. Its first three paragraphs endorse the exercise of French rights in Morocco, but the rights of Italy in respect of Tripolitania set out in the fourth paragraph are not nearly as broad as France's rights in Morocco. Italy's right to develop its influence in Tripolitania-Cyrenaica would arise only if there were a change in the political or territorial status of Morocco. So it was not entirely reciprocal.

There then occurred an event that has a direct bearing on the meaning intended to be given to M. Barrère's declaration in his letter to Signor Visconti-Venosta. Signor Prinetti had been named Italian Foreign Minister to succeed Signor Visconti-Venosta shortly after signature of the 1900 Accord. He felt under political pressure to make some sort of public statement concerning the contents of the Accord without compromising its secrecy. This was a delicate matter. For, aside from the Triple Alliance, any indication of assurances given to Italy regarding Tripolitania was certain to provoke a protest from the Porte. Tripolitania was, after all, still a part of the Ottoman Empire.

It was agreed between Italy and France that Signor Prinetti would summarize the gist of M. Barrère's letter in a statement to the Italian Parliament. The relevant part of the text of this speech — delivered on 14 December 1901 — which has now been placed on the screen — was agreed word for word between the two Governments before the speech was given. And Signor Prinetti stuck to the agreed text (folder No. 39).

Thus, the agreed text of this speech falls within the context of the 1900 Accord within the

meaning of Article 31, paragraph 3, of the 1969 Vienna Convention. It was, to quote from that provision, a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".

It is the third paragraph of his speech that is relevant and is now on the screen. There Signor Prinetti said that the French Government had taken care to inform Italy that the 1899 Declaration marked for France, in relation to the countries and regions bordering on the eastern frontier of France's African possessions (in particular with respect to the *vilayet* of Tripoli), a limit that it did not have the intention to overstep. The Court will note the word in translation is "limit" not "boundary". He also mentioned the French commitment not to cut the caravan routes from Tripolitania into Central Africa.

This sentence identifies the geographical area at which M. Barrère's declaration was aimed. This area consisted of the countries and regions, including in particular the *vilayet* of Tripoli, bordering on the eastern frontier of France's African possessions. (On the map, France's possessions are coloured in blue, in the upper left.) Thus, the speech as being France's African possessions, to the east of which lay the *vilayet* of Tripoli.

The map has on it the wavy, dashed line around Tripolitania that is taken from the *Livre jaune* map and originally to be found in the 1899 German map.

The blue shading at the bottom of the map shows approximately where French troops, in their three-pronged attack, had reached by 1900, at Lake Chad. As I mentioned before, the French possessions at the time are shown in light blue, on the upper left. It will also be recalled that a French sphere of influence had been recognized by Great Britain down to the Say-Barroua line in 1890. That line had been delimited in 1898. However, the French *possessions* bordering Tripolitania that are referred to be Signor Prinetti could only have been the eastern regions of Tunisia and Algeria, south to about the region of Djanet and Gat.

For French forces had penetrated no further south than there at the time except for one of the three prongs of the French advance on Lake Chad, the Foureau-Lamy Mission, which came south from Algeria but followed a route to the west of the borderlands claimed by the Ottoman Empire.

The strict south-east line of Article 3 of the 1899 Declaration has been placed on the map. It is obvious that this line had nothing to do with the limit to French expansion that Signor Prinetti described in his speech, and which had been agreed word for word with the French. The caravan routes also referred to by him ran from Tripoli to the south. These were the western caravan routes that now appear on the screen. There was no mention of the eastern caravan routes running south from Cyrenaica.

This leads to the 1902 Franco-Italian Accord. Italy was not wholly satisfied with the 1900 Accord. It was not reciprocal — it was not clear precisely what was meant by the eastern frontier with Tripolitania. No such frontier had ever been conventionally defined.

Italy in the meantime was pressing both France and Great Britain for a more specific token of recognition as heir apparent to Tripolitania, and neither France nor Great Britain were willing to go that far.

In form, the 1902 Franco-Italian Accord was a bilateral undertaking. It consisted of an exchange of letters between Signor Prinetti and M. Barrère, and the letter containing almost identical texts. And it, too, was secret.

The French texts of the two letters have been placed side by side (folder No. 41). Taking up, first the initial paragraph of the 1902 Accord, which now appears on the screen in English, the stated purpose of the Accord was to make more precise the commitments resulting from the 1900 Accord so that each of the two Powers might freely develop its sphere of influence in what is referred to as the "aforesaid" regions, without the action of one being subordinated to that of the other. The "aforesaid" regions, as the paragraph clearly shows, were Morocco as to France, Tripolitania as to Italy.

The effect of this paragraph was to correct the imbalance of the 1900 Accord in which, it will be recalled, Italy's right to develop its sphere of influence was made conditional upon a change in the situation in Morocco. But giving Italy the freedom to develop a sphere of influence at the opportune moment was not the same thing as recognizing an Italian sphere of influence. Tripolitania was under Ottoman sovereignty in 1902. France could not have recognized an Italian sphere of influence there,

as Chad now claims. At most, Italy had future expectations in the event Ottoman sovereignty over Tripolitania should cease. France recognized Italy's freedom to develop its sphere of influence there in such an eventuality. Contrary to what Chad contends, France recognized in the 1902 Accord no Italian sphere of influence in Tripolitania; and Italy recognized no French sphere of influence except in Morocco.

Turning to the second paragraph, its apparent intent was to clarify the meaning of the third paragraph of M. Barrère's 1900 declaration. These two paragraphs — one from the 1900 letter, which is on the top, the other from the 1902 letter, which is on the bottom — have been placed, one above the other, on the screen. The matter to be cleared up was just where the line was to be drawn limiting French expansion to the east of its Algerian and Tunisian possessions, for Tripolitania had no conventional boundary. This, incidentally, was a conclusion arrived at by the British Foreign Office and the Italian military staff, and I refer the Court to paragraphs 5.93-5.95 of Libya's Memorial. Nevertheless, some sort of line was needed to define the French limits.

The second paragraph of the 1902 Barrère letter starts off by recalling recent conversations between M. Barrère and Signor Prinetti, certain conversations that are referred to in the letter of 1900. That was the part of the 1900 letter that needed to be made more precise. M. Barrère then proceeds to define this limit by reference to the frontier of Tripolitania indicated on the map annexed to the 1899 Declaration.

Of course, there was no such map. The *travaux* reveal that this entire sentence had been added at Signor Prinetti's request. And as reported by M. Barrère in his 22 June dispatch to M. Delcassé, he said:

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

"No problem" has been M. Barrère's response.

The map specified by Signor Prinetti was a map annexed to the 1898 Convention. There were two such maps, but they were the wrong maps. So this was sorted out, and the reference to the 1899

map which had been included in the *Livre jaune* version was substituted.

In M. Barrère's report, from which I just quoted, the frontier said to have been referred to by Signor Prinetti was the frontier of France's possessions on the side of Tripoli. This was similar to the language of Signor Prinetti's speech the year before, which had been agreed word for word between the Italian and French Governments.

The idea of referring to the line on the *Livre jaune* map depicting the notional frontier of Tripolitania was a practical way to define the limit of French expansion in the 1902 Accord. The map conveniently contained such a line representing this notional frontier.

In both its Counter-Memorial and its Reply, Libya demonstrated that the wavy, dashed line encircling Tripolitania on the map was not identified on the legend of the *Livre jaune* map as a conventional boundary. Libya has also demonstrated that the "extract" of this map appearing in Chad's Memorial contained a modified legend that wrongly identified the wavy, dashed line encircling Tripolitania as a boundary of French possessions according to prior conventions. I shall not demonstrate this here on the screen, but I refer the Court to Nos. 42 and 43 of the Map Folder, where this demonstration is made again and which you may want to consider at your leisure.

When Signor Prinetti suggested that a reference to this line be added to the 1902 Accords, he did not accept it as a boundary of Tripolitania. The map did now show it as a boundary. He accepted it as the definition of what was meant in France's unilateral declaration in 1900 as the limit of French expansion eastward for Tunisia and Algeria toward Tripoli. It was a bilateral agreement making more precise a unilateral declaration. The line on the map was a convenient way of depicting the limit of French expansion.

The other 1902 Accord of relevance, but of less direct relevance, was the Anglo-Italian Accord of 1902. If we can put on the screen now the area that this was concerned with, the Court can see in red that the area of British interest is on the east of Tripolitania. I should point out that the red-shaded area, called "Area of British Interest", is not intended to suggest that either a British or an Egyptian sphere of influence extended into this area. The point is simply that this side of Tripolitania was of interest to the British at the time, not to the French.

In 1902, any potential encroachment of Tripolitania from France's possessions, of course, would have been from the east, from the area that was coloured in blue, and from the British and the Egyptians from the east.

So to conclude, the meaning of these 1900 and 1902 Franco-Italian Accords is straightforward. There was no Tripolitania boundary in 1902, only a notional frontier as shown on the *Livre jaune* map. It was accepted by Italy only in the sense that it explained where M. Barrère in 1900 said France's limit of expansion eastward lay. Neither Italy nor France had any standing then to fix a boundary, in any event.

In these Accords, the only French sphere of influence recognized by Italy had to do with Morocco. And the British Accord dealt with no line north of 15° N latitude and recognized no spheres of influence.

Thus, as of the end of 1902 — if we again put up the *boundary* map on the screen, no change in the boundary situation had taken place as a result of these Accords. The wavy, dashed line encircling "Tripolitaine" on the map, which appears on the screen, was not a boundary for all the reasons explained earlier, not least of which being that it was not identified as a boundary on the map. Until 1910, no part of Tripolitania's frontier was fixed by international agreement, so the wavy, dashed line comes off the map.

There were two other agreements in this period up to 1912 to be mentioned, and I shall do so very quickly because they again were discussed in Libya's pleadings.

The 1910 Franco-Ottoman Treaty was discussed in Libya's Memorial starting at paragraph 5.11. There are three points of relevance here. First, it establishes the boundary for the first time and the text makes that clear. It therefore refutes the notion that there was already a Tripolitanian frontier or boundary. It is another illustration that when France wanted to limit a boundary it did so in detail, and followed up by demarcation. And the two parties to the Agreement, France and the Ottoman Empire or Tunisia, had the status to agree a boundary, which was not the case in 1902 and was not the case in 1899 north of 15° N latitude.

The other Agreement is discussed in great detail in Libya's Reply, paragraphs 6.84 to 6.109,

and that is the 1912 Tittoni-Poincaré Agreement, which Professor Condorelli was deal with as well.

The text of the Tittoni-Poincaré Agreement — this is in folder No. 51 — has no mention of a boundary in it at all, and the *travaux* reveal that M. Poincaré originally had the idea at the time to use his negotiating advantages with Italy to settle the boundary question with Italy, but he abandoned that idea and it was left for the future negotiations with Italy.

It is apparent that nothing in the 1912 Tittoni-Poincaré Agreement could have transferred the 1900 and 1902 Accords into something that they were not. There is nothing in the text of 1912 to modify the meaning or effect of the 1902 Accord to which it refers. But this is very fully discussed in Libya's pleading.

I would like to end, therefore, by showing on the *boundary* map once more the boundary situation but I think we will save that for another occasion.

Thank you very much, Mr. President, Members of the Court.

I would be grateful if you would call on Professor Condorelli.

The PRESIDENT: Thank you very much, Mr. Sohier. Professor Condorelli, please.

M. CONDORELLI :

Introduction

Monsieur le Président, Messieurs les juges,

Permettez-moi de vous dire avant tout combien je ressens l'honneur, et en même temps la responsabilité, de prendre la parole devant votre Cour pour la première fois, et combien je sais gré au Gouvernement libyen de m'avoir confié cette haute tâche.

La précédente plaidoirie vous a présenté la situation existant, en droit et en fait, dans les territoires objets du présent différend, à l'époque où la Libye faisait partie de l'Empire ottoman. La carte qui manquait va être présentée tout à l'heure. En l'absence de tout engagement conventionnel limitant l'étendue vers le sud du territoire libyen, le Sultan exerçait paisiblement son autorité sur toute la zone en question : une zone dont les populations étaient reliées à lui par un lien d'allégeance reposant sur la commune foi musulmane. Au nom de ce lien d'allégeance les tribus locales, face au

danger représenté par l'avancée progressive vers le nord des forces coloniales françaises, avaient demandé que la Porte assure au mieux leur défense sur le plan militaire et diplomatique. Et, au nom toujours de ce lien d'allégeance, la Porte avait en effet déployé dans la région les signes tangibles de son autorité (son drapeau, son administration, ses forces militaires) et avait réussi à arrêter l'avancée française.

Ce faisant, l'Empire ottoman n'avait empiété sur les compétences territoriales d'aucun autre Etat; d'après les principes de droit international en vigueur à l'époque, en effet, aucune des puissances qui avait des visées coloniales sur la zone n'y avait acquis de droit de souveraineté. Cette zone, tout en faisant partie de ce que les autorités ottomanes considéraient comme l'*hinterland* de la Tripolitaine, se trouvait donc dans une situation juridique bien différente, par rapport aux autres parties dudit *hinterland*, puisque la présence ottomane y était effective, y était parfaitement légale et correspondait aux vœux des populations concernées.

Autrement dit, sur la revendication territoriale plus large, qu'exprimait la théorie de l'*hinterland*, se greffait ici l'emprise effective de la Porte sur la zone concernée.

Il est temps maintenant, Monsieur le Président, de se pencher sur le moment où la Sublime Porte sort de scène, suite à sa défaite de 1912, et est remplacée en Libye par l'Italie qui va établir sa souveraineté sur le territoire libyen et va la maintenir de 1912 jusqu'à la fin de la seconde guerre mondiale. Il faut alors étudier comment ce transfert de souveraineté a affecté le statut de la zone en question : c'est ce que je vais faire dans la présente plaidoirie, que je vais diviser en trois parties.

Dans la première, j'analyserai les caractéristiques de la succession intervenue en vertu du traité d'Ouchy entre l'Empire ottoman et l'Italie, concernant le territoire libyen.

Dans la deuxième partie, je montrerai d'abord que la France a reconnu sans réserve d'aucune sorte la succession entre la Porte et l'Italie concernant le territoire libyen. Ensuite je rappellerai et confirmerai qu'au moment où cette succession est intervenue, l'Italie n'était liée par aucun engagement préalable avec la France (ni n'en a contracté aussitôt un nouveau) l'obligeant à reconnaître l'existence d'une frontière méridionale libyenne.

Dans la troisième et dernière partie, il sera question des préliminaires de négociation entre la

France et l'Italie en vue de la délimitation des frontières libyennes dans la période précédant le début de la première guerre mondiale; cette analyse permettra de comprendre, entre autres, les raisons qui amèneront l'Italie, après la guerre, à mettre quelque peu en sourdine dans ses discussions avec la France l'argument de l'héritage ottoman et à utiliser plutôt l'argument des droits découlant pour elle de l'article 13 de l'accord secret de Londres de 1915.

PREMIERE PARTIE

Le traité d'Ouchy et la succession entre l'Empire ottoman et l'Italie

1. La conquête italienne de la Libye et l'effet juridique du traité d'Ouchy

Monsieur le Président, Messieurs les juges, il n'y a pas de vraie divergence de vue entre les Parties quant à la signification juridique de l'acceptation par la Sublime Porte, au moyen du traité de paix d'Ouchy des 15-18 octobre 1912, de la situation résultant du conflit de 1911-1912 entre l'Italie et l'Empire ottoman. Il n'est ni contesté ni contestable que, grâce à ce traité de cession territoriale, l'Italie acquit le droit d'exercer sa souveraineté sur l'ensemble du territoire libyen que l'Empire ottoman lui cédait. La Libye a présenté cet argument depuis son mémoire et, dans son contre-mémoire, le Tchad en reconnaît sans difficulté la pleine validité, lorsqu'il admet que, d'après le droit international général en vigueur à l'époque de la conquête italienne de la Libye, en cas d'annexion d'une partie du territoire d'un Etat souverain par un autre Etat souverain, "la succession d'Etat ne portait atteinte ni aux frontières ni aux droits et obligations se rapportant au régime du territoire annexé" (c'est le contre-mémoire tchadien qui se prononce ainsi, p. 272, par. 7.06).

Monsieur le Président le traité d'Ouchy est donc un document important, et ceci malgré qu'il ne contienne effectivement aucune disposition identifiant précisément l'étendue du territoire que la Porte cédait à l'Italie. Le Tchad a tort lorsqu'il prétend que cette absence de précisions suffirait à rendre totalement superflue la prise en considération du traité. Il s'agit là de toute évidence d'une analyse plutôt superficielle : avec ou sans dispositions spécifiques en matière de frontières, le traité d'Ouchy constitue la base juridique légitimant la présence italienne en Libye. C'est en vertu de cette cession conventionnelle du territoire libyen que l'Italie y a acquis le titre juridique de souveraineté, et

donc le droit d'en disposer, y compris au moyen d'éventuels accords de délimitation qu'elle n'aurait de toute évidence pas pu valablement conclure à l'époque où le territoire concerné ne lui appartenait pas.

Finalement, Monsieur le Président, s'il y a un désaccord entre la Libye et le Tchad concernant le traité d'Ouchy, ce n'est pas à propos de la portée juridique du traité dans les relations entre l'Italie et la Porte. Le désaccord porte plutôt sur la question différente (que je vais discuter dans la deuxième partie de ma plaidoirie) de savoir si l'Italie, au moment de succéder à l'Empire ottoman, était ou s'est engagée avec la France à accepter de considérer comme délimité vers le sud le territoire en question. Au sujet de l'effet *inter partes* du traité d'Ouchy, donc, la Cour peut certainement considérer comme établies les conclusions essentielles suivantes, qui ne forment l'objet, me semble-t-il, d'aucune divergence réelle entre les Parties.

En 1912, au moyen du traité d'Ouchy, l'Italie a succédé à l'Empire ottoman dans le titre de souveraineté sur toutes les populations et sur tous les territoires qui, avant la conclusion du traité, étaient légalement soumis à la souveraineté ottomane. Puisque le territoire cédé à l'Italie ne pouvait être que le même qui avait légalement appartenu à la Porte, il s'ensuit que tout accord de délimitation des frontières libyennes qui liait l'Empire ottoman avant octobre 1912 allait lier l'Italie après cette date : tel est le cas de la convention entre la France et la Porte du 12 mai 1910 concernant la frontière tuniso-libyenne. Par contre, dans la région qui forme l'objet du présent différend, aucune délimitation de frontières liant la Porte n'avait été convenue avant 1912; par conséquent l'Italie reçut un territoire non délimité vers le sud et hérita naturellement de tous les titres juridiques précédemment détenus par l'Empire ottoman et pertinents pour la délimitation ultérieure du territoire en question.

2. Confirmations pouvant être tirées de certaines dispositions du traité et de leur mise en oeuvre

Monsieur le Président, Messieurs les juges, la conclusion que je viens de présenter ne se justifie pas seulement à cause de la nature du traité d'Ouchy, accord de cession de territoire. Plusieurs dispositions du traité montrent également, de façon parfaitement claire, comment les Parties concevaient l'objet de cette cession, c'est-à-dire quels critères d'ordre territorial et personnel

identifiaient dans leur esprit un tel objet.

Il faut d'abord rappeler que le traité d'Ouchy est un document complexe, consistant en un accord préliminaire, quatre annexes et un traité de paix définitif. L'accord préliminaire du 15 octobre, au nom du désir des deux Etats de faire cesser l'état de guerre entre eux, les engage à adopter chacun des mesures législatives dont le texte est fixé dans trois des annexes du traité, qui forment "partie intégrante" du traité lui-même. Enfin, le traité définitif, dont le texte figure dans la dernière annexe, devait être signé immédiatement après la promulgation par les deux Etats des deux mesures législatives prévues, et fut effectivement signé à Lausanne trois jours plus tard, le 18 octobre 1912. Or, l'étude de cet ensemble de documents permet de constater quelle était l'intention des parties contractantes : sans aucun doute, la Porte céda à l'Italie le droit d'exercer sa souveraineté sur toutes les populations de la Libye soumises jusque-là à son autorité et sur tous les territoires qui étaient sous souveraineté ottomane.

Concernant les populations, les données pertinentes se dégagent plus particulièrement de deux des documents figurant dans les annexes à l'accord préliminaire : le firman impérial, que le Gouvernement ottoman allait aussitôt promulguer, et le décret royal italien correspondant.

Dans le firman, le Sultan s'adressait aux habitants des territoires qu'il céda à l'Italie et leur concédait une "pleine et entière autonomie". Cette autonomie devait comporter, d'une part une pleine garantie de la liberté religieuse, y compris le droit de maintenir les liens d'allégeance religieuse avec le Sultan, par l'entremise de ses représentants; d'autre part la possibilité de "contribuer" par des conseils appropriés à ce que les "nouvelles lois" auxquelles le pays serait soumis — suivant la prescription du texte — correspondent "à vos besoins et à vos coutumes" (c'est le Sultan qui s'adresse aux populations des territoires concernés).

Du côté italien, le décret royal devait en premier lieu accorder l'amnistie aux membres des populations concernées qui avaient pris part aux hostilités; ensuite, devait garantir la liberté du culte musulman aux habitants de la Libye; enfin, devait permettre la participation de notables indigènes à la préparation de la législation pour les provinces libyennes.

Ces clauses montrent bien qu'en vertu du traité d'Ouchy l'Italie acquit en même temps des

droits et des obligations concernant les populations libyennes : l'Italie se vit reconnu par la Porte le droit d'administrer l'ensemble de ces populations, mais du même coup assumait l'obligation d'en garantir l'"autonomie". Il est évident que le critère d'identification des populations concernées par la cession était constitué par leur lien d'allégeance au pouvoir ottoman : or, justement, il est certain que les habitants de la région en question, à l'époque, avaient un tel lien d'allégeance avec le Sultan, puisqu'elles en reconnaissaient l'autorité tant politique que religieuse.

Venons maintenant au territoire formant l'objet de la cession. Il est vrai qu'aucune disposition du traité ne l'identifie précisément.

Mais une indication indirecte, et décisive, peut être tirée de l'article II du traité définitif, par lequel le Gouvernement ottoman s'engageait à retirer de la Libye ses officiers et ses troupes. Très évidemment, cette obligation se référait à tous les emplacements des territoires concernés où des militaires sous autorité ottomane étaient placés à ce moment-là, en 1912. Or, justement, on peut le voir à l'écran, des forces turques contrôlaient effectivement la zone faisant l'objet du présent différend, comme le Tchad l'a d'ailleurs franchement reconnu dans son mémoire, quitte à tenter de revenir en arrière par la suite dans ses autres écritures (je me permettrai d'observer que ce n'est pas là le seul sujet dans lequel l'argumentation tchadienne révèle un caractère quelque peu erratique...!)

En effet, au paragraphe 135 de la page 179 du mémoire, le Tchad admet que la présence turque dans la région (notamment à Bardaï et à Ain Galaka) fut effective, quoique limitée, et que, "compte tenu des circonstances et du caractère peu hospitalier de la région, cette présence effective aurait pu être de nature, conformément au droit de l'époque, à constituer un titre territorial suffisant" (mémoire du Tchad). Certes, les forces turques furent ensuite retirées en exécution du traité : il ne s'est donc pas agi d'un acte de *derelictio* transformant le territoire concerné en une *terra nullius*, comme le Tchad voudrait le faire croire (mémoire du Tchad, p. 180, par. 138), mais d'une mesure par laquelle l'Empire ottoman s'acquittait de ses obligations de caractère conventionnel envers l'Italie. Celles-ci furent donc indiscutablement mises en oeuvre en les interprétant dans le sens que le territoire libyen cédé par la Porte à l'Italie, et duquel la Porte devait se retirer, comprenait la zone que la Libye revendique aujourd'hui.

C'est exactement ce qu'en janvier 1913 le ministre des affaires étrangères de l'Empire ottoman avait communiqué en toute officialité à l'ambassadeur de France, lequel s'inquiétait des mesures qui avaient été prises par les autorités ottomanes au Tibesti et au Borkou, dans la zone qui nous intéresse; voila ce que l'ambassadeur rapportait le 24 janvier 1913 à son ministre, M. Poincaré, au sujet de cet entretien :

«Gabriel Effendi [le ministre ottoman des affaires étrangères] ... m'a déclaré qu'à la suite du traité de Lausanne le Gouvernement ottoman avait donné l'ordre à tous ses officiers et soldats en Tripolitaine et en Cyrénaïque de rentrer en Turquie." (Réplique de la Libye, vol. 3, pièce 10-21.)

Cette déclaration se référait donc à la zone que nous sommes en train de discuter. Comme on le voit, tant pour la Porte que pour la France, il allait de soi que les obligations découlant du traité d'Ouchy portaient également sur la zone en question. On est confronté ici, de toute évidence, à un élément très significatif de la "pratique ultérieurement suivie dans l'application d'un traité" qui, d'après les principes consacrés à l'article 31 de la convention de Vienne sur le droit des traités, a un rôle capital dans l'interprétation des traités internationaux.

Monsieur le Président, il est important de signaler à ce sujet que le mémoire tchadien admet à plusieurs reprises que le retrait des forces ottomanes de la zone en question intervint en exécution des clauses du traité d'Ouchy (contre-mémoire du Tchad, p. 187, par. 5.53; p. 191, par. 5.65; p. 215, par. 5.132; p. 250, par. 6.35; p. 258, par. 6.55). Ces admissions explicites rendent, me semble-t-il, superflue toute discussion ultérieure et permettent de considérer comme établi qu'au moyen du traité d'Ouchy la Porte céda à l'Italie l'ensemble du territoire libyen, y compris la zone qui forme l'objet du présent différend.

3. Les ambiguïtés du traité d'Ouchy ne concernent pas l'étendue du territoire cédé à l'Italie et, de toute façon, furent éliminées par la suite

Monsieur le Président, dans le cadre de sa stratégie visant à conjurer l'effet du traité d'Ouchy sur le règlement du présent différend, le Tchad insiste sur le fait que ce traité, outre son imprécision concernant les limites du territoire cédé, était délibérément vague, obscur, contradictoire et ambigu, comme d'ailleurs plusieurs commentateurs à l'époque l'observèrent (contre-mémoire du Tchad, p. 275 et suiv.)

La Libye n'a aucune difficulté à reconnaître cela : il est vrai que par une très habile négociation la diplomatie ottomane avait réussi à arracher à l'Etat victorieux un traité de paix singulièrement modéré, qui maintint à la Porte une étonnante série de droits et de privilèges en Libye; l'Empire ottoman put même prétendre par la suite qu'il avait cédé à l'Italie seulement l'exercice de la souveraineté sur le territoire concerné, alors que la titularité de cette souveraineté était retenue par elle.

Cependant, il faut aussitôt souligner que l'ambiguïté du traité concernait des aspects qui n'ont rien à voir avec la validité des remarques précédentes quant à l'identification des limites spatiales du territoire cédé et des populations concernées par cette cession. Il est vrai que le traité d'Ouchy semblait répartir de façon très étrange les compétences relatives au territoire et aux populations libyens entre l'Italie et l'Empire ottoman. Mais il reste — et c'est l'essentiel — que le territoire et la population concernés par cette répartition étaient bien ceux tout entiers de la Libye, tels que la Porte les contrôlait avant 1912.

Il convient encore d'ajouter que de toute façon les ambiguïtés du traité d'Ouchy furent levées par la suite, au moyen de l'abolition de tous les droits et privilèges qu'il laissait subsister en faveur de l'Empire ottoman. Déjà en 1915 l'Italie, la France et la Grande-Bretagne s'étaient accordées entre elles pour que cette abolition intervienne dès que possible : l'article 10 du traité secret de Londres de 1915 le dit : "L'Italie sera substituée en Libye aux droits et privilèges appartenant actuellement au Sultan en vertu du traité de Lausanne."

Après la guerre, enfin, la Turquie elle aussi accepta cette abolition en vertu de l'article 22 du traité de Lausanne de 1923, dont il sera question dans la prochaine plaidoirie du professeur Cahier.

Monsieur le Président, tous les éléments recueillis démontrent le bien-fondé de la conclusion principale de cette première partie de plaidoirie : en octobre 1912, l'Italie succéda à l'Empire ottoman dans le droit de souveraineté sur la totalité du territoire libyen, tel que la Porte le contrôlait précédemment, y compris donc la zone qui forme l'objet du présent différend. Cette succession comporta que l'Italie resta liée par les accords de délimitation que la Porte avait conclus avant cette date. En revanche, là où le territoire n'était pas délimité, l'Italie hérita de cette situation et, donc, d'un

territoire aux frontières non définies; elle hérita également de tous les titres juridiques que la Porte aurait pu invoquer afin de parvenir ultérieurement à la définition des frontières.

Mais les remarques précédentes démontrent aussi autre chose : en succédant à la Turquie, l'Italie s'était engagée à administrer sa colonie libyenne en respectant l'autonomie des populations locales; autrement dit, l'Italie avait souscrit l'obligation internationale de respecter l'identité de ces populations et de leur garantir une forme de *self-government*. L'Italie reconnut ainsi que le peuple libyen avait des droits internationalement garantis qui lui étaient opposables. Or, il est important de rappeler que pendant la première période de sa présence coloniale en Libye, et avant l'arrivée du fascisme au pouvoir en Italie, l'Italie essaya justement de s'acquitter de ses obligations à l'égard des populations libyennes.

Les étapes principales de cette "politique de pacification" menée par l'Italie face à la résistance organisée en Libye, sous l'égide des Senussi, avec toute la panoplie d'accords conclus entre les deux pouvoirs, l'Italie et la Senussya, ont été évoquées dans le mémoire libyen (p. 271 et suiv.), et je n'ai pas l'intention d'y revenir maintenant. Je n'ai pas non plus l'intention de reprendre le récit concernant la dénonciation successive de tous ces accords, décidée par le Gouvernement italien le 1^{er} mai 1923, après l'arrivée du fascisme au pouvoir et le déclenchement de la sanglante répression qui se termina avec la fin de la seconde guerre entre l'Italie et la Senussya (1923-1932). Je voudrais seulement souligner combien tous ces événements mettent en évidence la signification de la lutte continue du peuple libyen, d'abord contre le pouvoir colonial français venant du sud, puis contre le pouvoir colonial italien arrivant du nord : véritable lutte de libération menée par un peuple dont l'identité, en tant que peuple justement, ainsi que son droit à l'autonomie, ont été internationalement reconnues pour la première fois en 1912, en vertu du traité d'Ouchy.

DEUXIEME PARTIE

La reconnaissance par la France de la souveraineté italienne sur la Libye suite au traité d'Ouchy et la question de la délimitation du territoire libyen

1. La thèse tchadienne

Monsieur le Président, j'en viens maintenant à la deuxième partie de ma plaidoirie. Je viens de

constater qu'en octobre 1912 l'Italie acquit par voie conventionnelle le titre de souveraineté sur l'ensemble du territoire libyen, tel qu'il était soumis à l'emprise de l'Etat prédécesseur avant cette date. Or ce territoire n'avait jusque-là été délimité, quant à sa frontière méridionale, par des actes capables de lier le souverain territorial, à savoir l'Empire ottoman. De son côté, l'Italie n'avait certainement pu, je l'ai dit, conclure valablement un quelconque accord de délimitation par rapport à un territoire avant que celui-ci ne lui appartienne. Le Tchad ne semble d'ailleurs pas prétendre le contraire.

La thèse du Tchad (très compliquée à vrai dire, et difficile à synthétiser en termes clairs) est plutôt — semble-t-il — qu'en 1900-1902 l'Italie avait obtenu de la France que celle-ci lui reconnaisse la liberté de développer sa sphère d'influence en Libye, mais en contrepartie aurait reconnu à son tour la validité de la sphère d'influence française, dans les limites résultant de la déclaration franco-anglaise de 1899. Tant la déclaration de 1899 que la prétendue reconnaissance par l'Italie de sa validité ne pouvaient évidemment pas produire le moindre effet juridique pour la Porte, en tant que *res inter alios*. Mais, d'après le Tchad, dès que l'Italie obtint la souveraineté sur le territoire libyen, elle se serait trouvée liée envers la France par sa propre reconnaissance et, conséquemment, empêchée de revendiquer au titre des droits ottomans des territoires situés dans la sphère d'influence française : de ce fait, la ligne prétendument reconnue par l'Italie comme limite de la sphère d'influence française se serait transformée, comme par enchantement, en ligne-frontière. En somme, l'opinion du Tchad est — à ce qu'il paraît — qu'en 1900-1902 l'Italie aurait contracté à l'avantage de la France un engagement, relatif à des sphères d'influence, ayant un effet retardé et éventuel, c'est-à-dire soumis à une sorte de condition suspensive : cet engagement allait devenir opérationnel, et changer de nature en engendrant une frontière, dans le cas d'une future conquête italienne de la Libye et à partir de ce moment-là exclusivement.

Monsieur le Président, Messieurs les Juges, la Libye a déjà démontré que la thèse tchadienne concernant les accords franco-italiens de 1900-1902, n'est pas seulement (comment dirais-je ?) "acrobatique" : elle est aussi carrément erronée, puisqu'elle s'appuie sur une interprétation, vous l'avez entendu, qui n'est soutenue ni par la lettre, ni par l'esprit, ni par les travaux préparatoires de

ces accords. Je n'ai donc pas besoin, de revenir sur ce point. Il convient toutefois d'ajouter maintenant que les accords franco-italiens de 1900-1902 avaient été conclus à une époque où la situation sur le terrain, concernant le sud libyen, n'avait rien de commun avec la situation de 1912. En 1902, la pénétration coloniale de la France n'avait concerné que des zones très lointaines de celle qui forme l'objet du présent différend autour du lac Tchad : on pourrait même dire que la zone du présent différend était pour les Européens une véritable *terra incognita* : on n'avait qu'une très vague connaissance de ses caractéristiques tant géographiques qu'humaines. Cette zone n'avait donc pas besoin d'être protégée et défendue par la Porte, puisqu'aucun danger imminent d'invasion étrangère ne la guettait en 1902. Mais en 1912, à la veille du traité d'Ouchy, la France s'était beaucoup rapprochée de cette dernière zone, même si elle n'y avait pas encore pénétré, alors que la Porte, pour parer justement à la menace désormais toute proche de l'invasion française, y avait déployé les signes extérieurs de son emprise souveraine effective, notamment en y plaçant des garnisons pour la défendre conjointement avec la Senussya.

Par conséquent, si l'interprétation tchadienne des accords franco-italiens de 1900-1902 était exacte, l'engagement prétendument contracté par l'Italie en 1902, qui était d'après le Tchad de ne pas contester le droit de la France *d'étendre* sa conquête vers le nord jusqu'à la ligne de 1899, se serait magiquement transformé, en octobre 1912, en un engagement radicalement différent : à savoir, la renonciation à des droits territoriaux à peine acquis en vertu du traité d'Ouchy, et dont l'extension exacte ne pouvait pas avoir été prévue dix ans plus tôt. En 1902, en effet, ni la France ni l'Italie ne pouvaient prévoir la situation factuelle et juridique dans laquelle allaient se trouver en 1912, dix ans plus tard, les régions du Sud libyen; elles ne pouvaient pas deviner, en particulier, que l'Empire ottoman y aurait placé les signes visibles de son emprise souveraine effective, notamment sous la forme la plus évidente d'installations militaires fixes qui n'existaient pas au début du siècle. En somme, il n'est pas crédible qu'une pareille transformation radicale de la nature et de l'effet de l'engagement de 1902 soit intervenue en 1912 sans que les Etats concernés l'aient constatée et en aient pris acte ouvertement.

Or, que s'est-il passé après la conclusion du traité d'Ouchy, entre la France et l'Italie ?

2. La reconnaissance unilatérale et sans réserve par la France, le 20 octobre 1912, de la souveraineté italienne en Libye

Ce qui s'est passé est que la France, comme les autres puissances européennes, s'est hâtée de reconnaître unilatéralement la nouvelle situation; et ce déjà le 20 octobre 1912, deux jours après la conclusion du traité définitif. La formule qui a été utilisée par le ministre des affaires étrangères français de l'époque, M. Poincaré, comme il le relate lui-même (réplique de la Libye, pièce 5), est la suivante : "Le Gouvernement de la République reconnaît la souveraineté de l'Italie sur la Tripolitaine et la Cyrénaïque." En somme, au moment où, en vertu du traité d'Ouchy, l'Italie devenait juridiquement le nouveau maître du territoire libyen, en succédant à tous les droits y relatifs dont l'ancien maître était le titulaire, la France a pris acte de cette situation et reconnu sans la moindre réserve qu'elle lui était opposable : autrement dit, la France a reconnu que, par rapport au territoire en question, l'Italie allait se trouver exactement dans la même situation juridique qui était auparavant celle de la Turquie.

3. Le traité Tittoni-Poincaré du 28 octobre 1912

Mais après l'avoir fait unilatéralement la France a confirmé, par voie cette fois-ci de convention, la reconnaissance de la situation juridique issue du traité d'Ouchy : je me réfère ici au traité Tittoni-Poincaré du 28 octobre 1912, dont le rapport avec les accords franco-italiens de 1900-1902 a été expliqué partiellement dans la précédente plaidoirie de M. Sohier. De ce fait, je n'ai pas besoin de revenir sur l'analyse détaillée de ce traité. Je me limiterai seulement à rappeler que ce traité ne porte aucunement sur des questions de frontières; les travaux préparatoires confirment de la façon la plus nette que les parties n'eurent pas la moindre discussion sur la frontière méridionale de la Libye et même (comme le Tchad l'a d'ailleurs admis) qu'elles ne songèrent jamais à évoquer cette question pendant aucune phase de la négociation, alors qu'elles évoquèrent à un moment donné le dossier de la frontière occidentale (celle du côté de l'Algérie) qui fut finalement laissé lui aussi de côté.

Quant à la référence — puisque c'est cela le problème important; le traité Tittoni-Poincaré se réfère aux accords franco-italiens de 1902 — il faut rappeler que cette référence figure dans un considérant du préambule, et elle a pour but d'expliquer la raison qui amenait les parties à confirmer

des engagements préexistants : des engagements qui, comme le traité l'explique, n'ont rien à voir avec les frontières. En somme, le traité de 1912 évoque les accords de 1902 afin de spécifier quelles obligations découlent de ceux-ci dans la nouvelle situation résultant du fait que l'Italie a acquis la souveraineté sur la Libye; or, le fait même que dans le traité il est question d'obligations qui ne concernent en rien les frontières libyennes est la preuve la plus claire qui soit que tant pour la France que pour l'Italie les accords de 1902 étaient dépourvus de toute pertinence en matière de délimitation.

En conclusion, sur ce point, outre la confirmation de la reconnaissance par la France de la souveraineté italienne sur le territoire libyen, le traité Tittoni-Poincaré ni n'exprime ni n'implique la reconnaissance ou l'acceptation par l'Italie d'une quelconque frontière méridionale du territoire libyen; également, ce traité ni n'exprime ni n'implique la moindre renonciation par l'Italie aux titres territoriaux faisant partie de l'héritage ottoman.

4. Après 1912 la France a explicitement reconnu la souveraineté italienne sur la Libye comme issue du traité d'Ouchy

Monsieur le Président, Messieurs les juges, dans ses écritures le Tchad soutient que la France aurait reconnu la souveraineté italienne sur le territoire libyen, mais non pas le traité d'Ouchy qui était et restait pour elle *res inter alios*. On peut comprendre la préoccupation qui est à l'origine de cette distinction quelque peu byzantine : c'est que le Tchad a sans aucun doute peur du traité d'Ouchy, vu que celui-ci transmet à l'Italie l'ensemble des titres territoriaux que l'Empire ottoman possédait par rapport à la Libye avant octobre 1912. Autrement dit, si la France a reconnu le traité d'Ouchy, la France a reconnu aussi que l'Italie a hérité de tous les titres territoriaux que le traité d'Ouchy lui a transmis.

Mais la thèse tchadienne est indéfendable pour diverses raisons.

Il faut dire en premier lieu que la France n'avait pas pu reconnaître sans la moindre réserve la souveraineté italienne sur le territoire libyen, deux jours après la conclusion du traité d'Ouchy, sans reconnaître la source de cette souveraineté, puisqu'il s'était agi justement d'une acquisition en vertu d'un traité de cession territoriale.

Mais il y a bien plus. Si le traité d'Ouchy n'est pas nommément cité dans l'acte unilatéral français de reconnaissance, et non plus dans le texte du traité Tittoni-Poincaré, quelques ans plus

tard, en revanche, il a formé nommément l'objet de diverses dispositions conventionnelles liant la France, qui en a donc reconnu explicitement la conformité à ses intérêts. J'ai déjà cité les plus importantes de ces dispositions, sur lesquelles le professeur Cahier reviendra : il s'agit de l'article 10 du traité de Londres de 1915 et de l'article 22 du traité de Lausanne de 1923.

En somme, tant en 1915 qu'en 1923 la France a participé à des accords internationaux reconnaissant explicitement que l'Italie avait succédé à l'Empire ottoman, concernant la Libye, justement en vertu du traité d'Ouchy. A ces occasions, la France a même reconnu que l'Italie avait succédé à la totalité des droits et titres concernant le territoire libyen, y compris ceux qu'au début le traité d'Ouchy avait maintenus en faveur de la Sublime Porte.

TROISIEME PARTIE

Les événements saillants entre 1912 et la première guerre mondiale

1. Les préparatifs français de 1913-14 en vue de négociations avec l'Italie

J'en viens maintenant, Monsieur le Président, Messieurs les juges, à la troisième et dernière partie de ma plaidoirie. Mon but ici est de mettre en lumière certains événements saillants intervenus entre le moment où l'Italie devient souveraine en Libye et la première guerre mondiale. Il s'agit d'événements importants parce qu'ils permettent de comprendre quelle sera désormais la stratégie de négociation de la France et de l'Italie concernant le dossier de la frontière méridionale de la Libye, et ce jusqu'à la fin de leur emprise coloniale respective.

Il convient de commencer par les grandes lignes de l'action française, tant sur le plan militaire que sur celui diplomatique.

Au plan militaire, on sait qu'en juin 1913 le Gouvernement français, profitant du retrait des forces turques de la région et des difficultés auxquelles était confrontée l'Italie pour établir son emprise sur le territoire libyen, autorisa le colonel Largeau à lancer une offensive vers le nord. Celle-ci amena finalement, entre 1913 et 1919, à l'établissement d'un nombre très limité de postes militaires dans une partie seulement de la région en question : comme la Libye l'a démontré dans ses écritures (contre-mémoire de la Libye, p. 259 et suiv., par. 5.35 et suiv.), la présence extrêmement réduite des forces françaises ne concerna de toute façon, ni la zone qui depuis les années

soixante-dix a été appelée la "bande d'Aouzou", ni les territoires au nord de la ligne de sud-est telle que prévue par la déclaration franco-britannique de 1899. Là où cette présence a eu lieu, il s'est agi en plus d'une présence purement militaire qui ne comporta aucune administration effective de la vie civile dans les territoires concernés et n'a jamais acquis un caractère pacifique, puisque les forces françaises furent continuellement harcelées par les tribus locales sous le guide de la Senoussya.

Quant au plan diplomatique, il faut discuter rapidement des préparatifs français de 1913-14, en vue des négociations futures avec l'Italie concernant la délimitation entre les possessions coloniales françaises et la nouvelle colonie italienne. Les documents présentés à ce sujet au Parlement français, à savoir les rapports Marin de 1913 et 1914 (contre-mémoire de la Libye, p. 232; réplique de la Libye, p. 143), sont du plus grand intérêt, puisqu'ils définissent pour la première fois, dans ses lignes essentielles, la thèse de fond que la France utilisera régulièrement depuis lors : la ligne (voire les lignes) résultant de la carte (non) annexée à la déclaration franco-anglaise de 1899 constitue(nt) la frontière de la Libye, puisque l'Italie a "adhéré" à cette déclaration et a donc "reconnu" la ou les lignes en question. Par conséquent, (c'est la thèse française) la délimitation étant faite, seulement une opération de démarcation resterait à effectuer. Aujourd'hui, c'est le Tchad qui reprend à son compte cette thèse, à quelques détails près, et la présente à votre Cour.

Monsieur le Président, Messieurs les juges, voici un fait indiscutable : le Tchad vous demande en substance de régler aujourd'hui le différend en prenant pour argent comptant la thèse française de 1913-14. Or l'histoire même du différend se charge, si l'on veut bien la lier, de mettre clairement en lumière que les caractéristiques essentielles de cette thèse la rendent absolument non idoine à servir de base pour un juste règlement du différend territorial qui vous est soumis.

Qu'il me soit permis d'illustrer avant tout l'aspect le plus singulier et le plus étonnant de cette thèse, qui en met d'emblée en exergue le caractère profondément inéquitable. La France d'abord et le Tchad maintenant prétendent qu'une délimitation très précise de source conventionnelle serait venue en existence sans avoir jamais été négociée par les autorités responsables des territoires délimités : cette délimitation résulterait en effet de l'accumulation et de l'imbrication d'une série d'instruments

internationaux d'époques diverses, tous conclus par des Etats qui, aux moments pertinents, n'exerçaient pas leur souveraineté sur les territoires concernés. De plus, la délimitation en question représenterait une sorte de résultat non intentionnel découlant par implication de traités internationaux dont aucun n'avait pour but direct ou indirect de fixer des frontières.

J'en viens au deuxième aspect. Si l'on étudie de près à quelle occasion et dans quel but la thèse en question avait été mise au point en 1913-14 par la France, on s'aperçoit sans l'ombre d'un doute qu'il s'était agi ni plus ni moins que de fixer des positions de départ pour des négociations futures. La France, en somme, allait se présenter aux rendez-vous de négociations diplomatiques avec une certaine requête, et c'est à partir de là qu'elle aurait discuté, en quête d'un compromis approprié.

C'est d'ailleurs exactement ce qui s'est passé pendant plus de deux décennies de pourparlers diplomatiques franco-italiens, jusqu'en 1935 : la France, en effet, a toujours accepté d'envisager des "concessions", comme on les a appelées, à l'Italie à ce sujet. Et ce qui fut considéré à l'époque du côté français comme une belle victoire diplomatique, à savoir la ligne résultant du traité Mussolini-Laval de 1935, représentait en effet une "concession" de quelque 114 000 km² de territoire par rapport à la thèse de départ. Mais il ne faut pas anticiper : je reviendrai sur cette question dans une prochaine plaidoirie.

2. L'article 13 du traité secret de Londres de 1915

Et j'en viens maintenant à mon dernier point. Il s'agit de voir ce qu'il se passe du côté italien concernant cette période, tant sur le plan diplomatique que sur le plan militaire. Sur le terrain, l'Italie est confrontée à de grandes difficultés pour établir son emprise effective au delà des côtes libyennes : en effet, il lui faudra la fin des années vingt et deux guerres contre les Senoussi pour qu'elle puisse étendre son contrôle au sud libyen, au prix de campagnes militaires coûteuses, interminables et extrêmement sanglantes. Mais sur le plan diplomatique la position de l'Italie s'est entre-temps bien renforcée, puisque un événement d'importance s'est vérifié après la conquête italienne de la Libye et avant l'explosion de la première guerre mondiale : cet événement est la conclusion du traité secret de Londres du 26 avril 1915.

Comme on le sait, l'article 13 du traité engagea la France et la Grande-Bretagne à "compenser" (c'est le mot utilisé) équitablement l'Italie si, à l'issue de la guerre qui s'annonçait, leurs domaines coloniaux respectifs allaient s'agrandir au dépens de l'Allemagne. Ces compensations à l'avantage de l'Italie devaient consister, suivant la lettre du traité, "dans *le règlement en sa faveur* des questions concernant les frontières ... [de divers territoires] ... de la Libye". (Les italiques sont de moi.)

Monsieur le Président, Messieurs les juges, dans leurs écritures, les Parties ont évalué de façons très différentes la signification de cette disposition. Mais quelle que puisse être l'interprétation exacte qu'il convient de lui donner, une chose est indiscutable : si les mots ont un sens, l'article 13 implique nécessairement qu'en 1915 les trois parties reconnurent l'existence de questions de frontières, concernant la Libye, qui n'avaient pas été réglées auparavant. Pour ces questions pendantes il était donc prévu qu'elles seraient réglées en faveur de l'Italie : autrement dit, la France et la Grande-Bretagne s'étaient engagées à accepter une solution favorable aux revendications italiennes. Certes, il n'est pas exclu qu'une cession territoriale ait pu faire l'affaire, mais la cession n'était sûrement pas la seule manière de respecter la disposition en question : il pouvait aussi s'agir de la détermination pour la première fois d'une frontière, effectuée en privilégiant les prétentions et les revendications italiennes.

Il faut tout de même observer que la pratique subséquente confirme nettement cette interprétation. Elle met même en évidence que, pour ce qui est de la Libye, il ne fut jamais question entre la France et l'Italie de retoucher la seule frontière déjà délimitée (celle entre la Tunisie et la Tripolitaine) : l'Italie n'invoquera l'article 13 qu'afin de clore des questions qui étaient restées ouvertes jusque-là, faute de délimitations conventionnelles pré-établies; et la France acceptera ce point de vue et reconnaîtra que l'article 13 est pertinent pour la fixation de la frontière algéro-libyenne et pour la frontière méridionale.

Il ne faut pas oublier, à ce propos, que l'influence de l'article 13 sur le règlement du différend relatif à la frontière méridionale a été reconnue par les Etats intéressés, y compris la France, lors des débats intervenus à la fin de la guerre, dans le cadre de la commission coloniale créée par le conseil

suprême allié en 1919; et ceci même si la France refusa de s'incliner aux revendications que l'Italie présenta à cette occasion, sur la base de préparatifs et de programmes coloniaux qui avaient été élaborés par les diplomates italiens à partir de 1916. Il en va de même pour toute la négociation franco-italienne d'après 1919, dans laquelle l'article 13 de l'accord de Londres de 1915 a joué un rôle important : les plaidoiries successives se chargeront de le démontrer.

En somme, Monsieur le Président, Messieurs les juges, et en conclusion, grâce au traité de Londres de 1915 l'Italie a pu se prévaloir, dans ses discussions avec la France au sujet de la frontière méridionale de la Libye, d'un nouvel argument de poids : la France devait s'acquitter d'une obligation spécifiquement souscrite à l'avantage de l'Italie et dont la France a explicitement reconnu l'applicabilité et l'impact pour ce qui est du règlement du différend en question. Il était parfaitement naturel, dans ces conditions, qu'à partir de 1915 l'Italie fasse surtout appel à l'article 13, plutôt qu'à l'héritage ottoman, pendant le processus de négociation : de toute évidence, il était plus avantageux et plus prometteur pour l'Italie d'appuyer ses prétentions sur une base juridique incontestable pour la France (et dont effectivement celle-ci a toujours reconnu la pertinence), alors que l'autre base juridique essentielle des titres italiens (la succession aux titres ottomans) n'a pas fait l'objet d'une reconnaissance précise par la France par voie de traité et fut même contestée par celle-ci une fois mise au point sa stratégie diplomatique. Toutefois l'Italie, en décidant de miser davantage sur le traité de 1915 plutôt que sur les titres ottomans, choisissait l'argument qui se révélait le plus efficace dans les pourparlers avec la France. Mais en agissant ainsi l'Italie n'a certainement pas perdu les titres qu'elle préféra mettre au second plan à cause d'un choix diplomatique parfaitement raisonnable dans les circonstances de l'espèce : il est d'ailleurs certain qu'un Etat n'a pas l'obligation d'utiliser pendant la négociation tous les arguments juridiques existant en sa faveur et, tant que la négociation n'a pas abouti, ne perd pas le droit de se prévaloir par la suite d'arguments moins utilisés.

Je vous remercie, Monsieur le Président, Messieurs les juges, de votre patiente attention à cette heure tardive.

The PRESIDENT: Thank you very much, Professor Condorelli. So we continue tomorrow at 10 o' clock with Professor Cahier. Thank you.

L'audience est levée à 13 h 00.
