INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING THE CONTINENTAL SHELF

(TUNISIA/LIBYAN ARAB JAMAHIRIYA)

VOLUME V

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DU PLATEAU CONTINENTAL

(TUNISIE/JAMAHIRIYA ARABE LIBYENNE)

VOLUME V

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held at the Peace Palace, The Hague,
from 29 September to 21 October 1981 and on 24 February 1982,
Acting President Elias presiding

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tenues au palais de la Paix, à La Haye,
du 29 septembre au 21 octobre 1981 et le 24 février 1982,
sous la présidence de M. Elias, Président en exercice

SIXTEENTH PUBLIC SITTING (29 IX 81, 10 a.m.)

Present : *Acting President* ELIAS ; *Judges* FORSTER, GROS, LACHS, MOROZOV, NAGENDRA SINGH, MOSLER, ODA, AGO, EL-ERIAN, SETTE-CAMARA, SCHWEBEL, EL-KHANI ; *Judges* ad hoc EVENSEN, JIMÉNEZ DE ARÉCHAGA ; *Registrar* TORRES BERNÁRDEZ.

STATEMENT OF MR. EL MAGHUR

AGENT FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

The ACTING PRESIDENT : The Court will today begin to hear the oral argument on behalf of the Government of the Socialist People's Libyan Arab Jamahiriya.

Mr. EL MAGHUR : In the name of God the Merciful and Misericordous.

Mr. President and Members of the Court : it is a great honour and privilege to appear again before this eminent Court after such a short interval.

I should like to state at the outset what you will perceive to be a major theme running through my remarks today. It is that Libya is here before the Court to ask for no more than what it is legally entitled to. And what Libya is entitled to is not based on accusations and criticisms but on facts as they really are. As the Agent of Libya it will be my duty to comment on a number of aspects of the case that should never have arisen. But it falls on me as Agent to do this so as to lighten the load of detail for counsel who follow me so that they can get on with the main elements of the case. There are many things – many details – that I could deal with today, but I have tried to be quite selective in order that my remarks may be brief.

I must confess that I and my colleagues are a little hesitant about being brief. Having been so in the Libyan Memorial, we stood accused in the Tunisian Counter-Memorial of failing to inform the Court properly and of oversimplification. But when we sought to reply adequately to the Tunisian Memorial in the Libyan Counter-Memorial we were accused of attempting to swamp the Court with details to confuse and overcomplicate the issues.

This theme seems to be important to the Tunisian case since counsel for Tunisia have persisted in it during the oral phase of this case as well. For example, Professor Jennings suggested that the Libyan written pleadings comprised – to use his words –

> "a mass of scientific material so voluminous and wide-ranging that it must have raised acutely already in the minds of Members of the Court the question of the legal criteria of relevance or irrelevance that should be applied to this mass of material to make it manageable for purposes of actual decision on this question submitted to the Court".

Professor Virally made sure the point was made again.

We shall not be thrown off the track by this sort of statement. And further along in my remarks I shall review the technical annexes and documentation furnished with the Libyan Counter-Memorial and Reply to show how

they were required to be submitted by the many irrelevant and erroneous allegations contained in the Tunisian Memorial. I shall cite chapter and verse. Out of respect for the Court, Libya will put forward all the pertinent facts and legal points it considers appropriate in as expeditious a way as possible without heed to this appeal to the sympathy of the Court by members of the Tunisian delegation, and we trust to the good judgment of the Court to distinguish between artifice and sincerity.

In agreeing to submit this matter to the Court, Libya has affirmed its faith in the resolution of disputes by peaceful means and in the supremacy of law. Moreover, Libya has actively participated in the work of the Third Conference on the Law of the Sea from the very start. Libya has co-sponsored many draft resolutions.

It is also of note that Libya, being engaged in this case before the Court, has signed and ratified another special agreement with respect to delimitation – the delimitation of the continental shelf between Malta and Libya.

In appearing before the Court and requesting the Court to rule upon this important matter, Libya is comforted by the fact that the legal process will be applied here with fairness and objectivity. We are within the walls of a great hall of law – the noise of the outside world of propaganda and strife is shut out.

I should like now to turn to the preliminary stages of discussions between the Parties before they decided to come to this Court. In particular, this brief historical review will examine the discussions between the Parties ; the Notes Verbales ; and the protests and counter-protests.

The story began in 1968. Tunisia first, and then Libya had granted concessions to the same company. There was danger of overlap ; the western boundary of the Libyan concession in fact ran right up against and parallel with the Tunisian concession's eastern boundary. A meeting was suggested by Tunisia. The agenda Tunisia proposed was to discuss among other things the "maritime boundaries" between them. This term embraced more than the continental shelf.

What positions were advanced at this meeting ? Tunisia asserted that on the basis of "historic rights" coupled with considerations of coastal configuration the maritime boundaries between the States should lie along a line extending from Ras Ajdir at an angle of 45° to the 50-metre isobath. The Tunisian delegation was prepared to discuss a point at sea outside these waters defined by alleged historic rights from which the maritime frontier to be delimited between Libya and Tunisia would start, that is beyond the 50-metre isobath. Tunisia was not prepared to discuss the demarcation of territorial waters since it regarded this question as already decided. Libya's position was that the matter remained to be decided ; that pillar 31 at Ras Ajdir was the start of the maritime frontier ; and that the line of demarcation should extend northward from Ras Ajdir. Libya regarded this as a logical extension of the north-south line established by the 1910 Convention, its northernmost point being at Ras Ajdir on the coast. This position had already been asserted by Libya in its 1955 Petroleum Law and Regulation, published in the *Official Gazette* along with a map depicting such a line extending due north from Ras Ajdir for a distance of approximately 62.9 nautical miles. It took the position that a 45° line from Ras Ajdir would infringe on the Libyan waters. The minutes of this meeting recorded by Tunisia, which are found in Annex 8 of the Tunisian Memorial (I), do so summarize the Libyan position.

At the time, the territorial waters of Tunisia had been set at six miles from the low-water mark by its 1963 Law ; the territorial waters of Libya had been set at 12 miles by its 1959 Law. The 50-metre isobath lay far outside the

territorial waters of either State. From Ras Ajdir to the junction of the 45° line with the 50-metre isobath was 31.9 nautical miles.

The year 1968 marked the beginning of Tunisian interest in the "maritime boundaries" between Libya and Tunisia for another, more significant reason. The first Libyan oil concessions had been granted in the western off-shore area of Libya.

Four years passed before the first meeting at the political level occurred between the two States at which maritime frontiers were discussed. This meeting, during December 1972, was between the political leaders of the two countries. At this meeting, the Libyan position underwent a drastic change. Libya proposed that there should be no boundaries between the two States or any other Arab country. The continental shelf and sea-bed and fishing zones should be regarded as a unity to be jointly exploited by a single entity to be formed by the two States.

This top-level meeting culminated in a joint agreement for the joint exploitation of the continental shelf. I must pause here to say that I found it a little surprising to read in the Tunisian Memorial at paragraph 1.12 that the Tunisian Government had "peu d'enthousiasme" for this formula. I should have thought under the circumstances Tunisia might have recognized that this move was potentially very beneficial and quite generous on the part of its neighbour. But apparently not so. Only the other day Professor Jennings told the Court – to use his words – "Libya has up to the present displayed no great enthusiasm for a delimitation fairly dividing petroleum resources between the Parties". So now it is Libya that has "peu d'enthousiasme"!

It will be recalled that this joint agreement called for the formation of technical committees to follow up on the work of the Supreme Committee presided over by the two Prime Ministers. The Continental Shelf Committee thus formed was charged with the creation of an entity to carry out the joint exploration and exploitation of the continental shelf. Apparently Tunisia's "peu d'enthousiasme" did not inhibit proceeding with this task, for the Committee met almost at once, from 29 January to 1 February 1973, as did other joint technical committees appointed to consider other areas of joint interest taken up at the meeting of the Supreme Committee.

Without taxing the Court with too much detail, I can summarize what ensued as follows. The Continental Shelf Committee – charged with the task of drafting the by-laws of an entity to engage in joint exploitation – produced three proposals for agreement, which went back up to the Supreme Committee but were sent back for more study.

Subsequent meetings of the Continental Shelf Committee were held between 13 and 20 March 1973 and 9 to 10 August 1975, but no draft was produced. The Tunisian delegation insisted throughout that before drafting the by-laws of this entity for joint exploration and exploitation the Parties must discuss delimitation of the continental shelf, thus attempting to make the Committee a vehicle for delimitation, not joint exploitation. But this was not within the mandate of the Committee, and this point was made continually by the Libyan delegation.

Given the insistence of Tunisia on proceeding first with a task outside the terms of reference of the Committee and beyond the competence and authority of the delegates of either State, it is not surprising that further meetings of the Committee in August 1975 and March 1976 yielded no results.

The beginning of 1976 saw a change in the atmosphere. An important event had occurred: oil had been discovered in the Libyan off-shore concessions. This ushered in an era of protests and counter-protests. The famous

memorandum of 1976 (18 May) was circulated by Tunisia, the text of which is reproduced in paragraph 41 of the Libyan Memorial. This charged atmosphere led to resort once again to the political level and to a meeting of ministers of the two countries. Of the many joint problems solved between the two countries, the continental-shelf matter was the only one to be settled. These consultations led to issuance of the joint communiqué of 24 August 1976, the text of which is set forth in Annex I-11 to the Libyan Memorial (I, p. 529).

From this point until notification of the Special Agreement to this Court, the contact between the Parties consisted of formulating the Special Agreement, and the issues did not at all relate to negotiations relating to the dispute.

The last contact at the political level before notification to the Court of the Special Agreement occurred when the Foreign Secretary of Libya and the Minister of Foreign Affairs of Tunisia signed the Special Agreement in the presence of the Secretary-General of the Arab League.

What does this history of contacts between the Parties come down to ? It is quite clear. There were only five meetings at the political level : the 1972 meeting of heads of State ; the two 1973 meetings of the Supreme Committee presided over by the Prime Ministers which disposed of all the various issues between the two countries except the continental shelf which it sent back to the technical level for further work on the by-laws of the single entity for joint exploitation ; the ministerial-level meeting in August 1976 from which the joint communiqué to go to the Court issued ; and the meeting in the presence of the Secretary of the Arab League.

There were seven meetings at the expert level. Four were to work on the draft by-laws of an entity to conduct joint exploration and exploitation ; three involved drafting and agreeing upon the Special Agreement to go to the Court.

None of these meetings of any joint group was for the purpose of negotiating a delimitation of the continental shelf. Although such questions and other questions such as fishing and the territorial sea did come up at the expert-level meetings, and views as to the respective positions of each delegation were exchanged, it was neither within the assignment of the committee nor the competence of the delegates to negotiate such questions. No agreed upon official minutes were kept of those meetings.

The Tunisian attitude during this period was clear. For a period of 12 years between 1968 and 1980 : a line of 45° from Ras Ajdir to the 50-metre isobath. Beyond that point Tunisia claimed a line of equidistance.

Thus it is apparent that over a period of nine years of contacts between the delegations of Tunisia and Libya to one committee or another there were no real negotiations on delimitation between the two Parties, as that term is referred to in paragraph 87 of the *North Sea Continental Shelf* cases. It is not true that the dispute in this case arose because of Libya's intransigent attitude. It was Tunisia that adhered to its preconceived position which it refused to moderate or even discuss. But the point of all of this is not to fix the blame for the lack of negotiations but to underline the fact that such negotiations have yet to occur. It is to the Court that the Parties look to establish the framework for these negotiations, just as in paragraph 87 of the *North Sea Continental Shelf* decision the Court said that "whatever the details of the negotiations carried on . . . they failed of their purpose", and that "fresh negotiations are to take place on the basis of the present Judgment".

It is noteworthy that during this same period the Parties were able through negotiations to solve a large number of other matters and issues which resulted in agreements between the two countries. It will be recalled that the Libyan Counter-Memorial (II) at paragraphs 45 to 47 referred to 24 of such

agreements still in force, 16 joint *procès-verbal* and five joint ventures or enterprises.

I should refer here to a remark of Professor Abi-Saab during his analysis of the Special Agreement. You will recall he suggested that the Parties could not have inserted the period of three months in the Agreement if the political and substantive negotiations, rather than negotiations over purely technical matters, had been contemplated. And he referred to the – to use his own words – "historical experience of almost ten years of frustrating and fruitless efforts at direct negotiations over these very same issues". This is just not the case as I have just finished demonstrating. There were no such negotiations. With the political will to agree, other major matters were quickly disposed of between the two States. The negotiations that remain to take place between the Parties here – within the framework of the Court's judgment including the practical method for applying the principles and rules announced by the Court – can be successfully conducted and terminated in three months. As will be made clear in the course of our pleadings, Libya regards the experts of the Parties as having a role which must involve genuine negotiations, and this need is made even more categorical by the fact that, up to now, there have been no real negotiations.

Although I shall leave to my colleagues the detailed discussion of the Special Agreement by which the Court acquired jurisdiction over this case, I must refer very briefly to one point raised again in these proceedings. This is the issue created by the addition in the French translation of the original Arabic text forwarded to the Court by Tunisia of the words "*avec précision*" which Libya has stated do not properly belong there according to a faithful translation. This issue involves my native tongue, Arabic, and it relates to an Agreement entered into between Libya and Tunisia that I do not want to see doctored on the pretext of a more accurate translation. And that is why, Mr. President, the written pleadings of Libya have made "much ado" about this issue – to use Professor Abi-Saab's phrase.

Let me assure the Court, however, I am not here to bicker over translations. If all that adding the words *with precision* does is to ask the Court to render a clear and precise decision that is easily understood and implemented, then there is no issue except perhaps as to the less than courteous tone that adding these words would lend to the text of the Agreement. But if the suggested words are intended to provide the basis for a new conception of paragraph 2 of the Special Agreement, then Libya cannot accept this addition. I bring to the attention of the Members of the Court the fact that this matter of translation was treated in detail in Annex II-1 to the Libyan Reply **(IV)**, which contained relevant excerpts from the Arabic-English dictionaries. I believe that this Annex also disposes of the effort of Professor Abi-Saab to modify even Tunisia's own translation by shifting from the word "clarify" to "elaborate".

It is a happy circumstance that two of the Judges of this Court have Arabic as their tongue and hence the Court is in an excellent position to inform itself upon this point.

There is another significant element in the picture that necessarily coloured the events that took place and which must be borne in mind in order to understand the attitudes and actions of the Parties. On 12 January 1974 the two States signed the *Jerba Declaration of Unity* which proclaimed the intention of the two countries to merge into one political entity. This event is mentioned in paragraph 23 of the Libyan Counter-Memorial and the text of the document can be found at Annex 5 **(II)**. The Declaration was ratified by Libya but has not yet been ratified by Tunisia. This intention to merge the

two countries necessarily affected everything that Libya did, a point to which I shall come to again a little further on.

Thus, to summarize this history of contacts between the two States in respect to the continental shelf, the following is apparent. *First*, the context in which the contacts occurred, at least after 1972, was joint exploration and exploitation and the formation of an entity to carry this out and not delimitation of the continental shelf. *Second*, the detailed discussions occurred in meetings between experts and not at the political level. The focus of these experts was always quite narrow. In one case, to draft the by-laws of an entity ; in the other case, to draft a Special Agreement. The limited scope of the experts can be seen, for example, in the document annexed to the Tunisian Memorial (I), Annex 23, with particular reference to the third to last paragraph, appearing on page 54. *Third*, at the few political-level meetings that did occur, agreement was reached – as to joint exploration and exploitation, the details to be worked out by the experts, as to referring the matter to this Court, and as to the terms of the Special Agreement. *Fourth*, when the subject of delimitation did come up at the various meetings, Tunisia dealt with the subject by stating and restating its position. There was no effort at compromise, except in the context of the very significant effort at compromise made by Libya.

Nor was the Libyan attitude of compromise restricted to the proposal for the joint exploration and exploitation of the continental shelf. Another example, mentioned in the Libyan Memorial and Counter-Memorial, is Libya's restraint after the granting of a concession by Tunisia in 1966. It will be recalled that below the 34° parallel this concession moved eastward from the due north line from Ras Ajdir that formed a part of the eastern boundary of Tunisia's initial concession of 1965 to a line of 26° from Ras Ajdir. Libya's first concession in 1968, instead of adopting as its western boundary a due north line from Ras Ajdir – as its 1955 Petroleum Law and Regulations would have warranted – avoided the possibility of conflict by adopting the same line. Libya has never granted a concession to the west of this 26° line, not because it saw its sovereign rights as ending at that line – and in this regard Libya agrees with Tunisia that a concession boundary is not a line of delimitation (see IV, Tunisian Reply, para. 1.03) – but because its whole policy was linked to the aim of unity and joint exploration and exploitation. Within the context of efforts to agree on the terms of joint exploration and exploitation of the area, the 26° line was a purely provisional accommodation to avoid disputes.

A more dramatic effort at compromise occurred with Colonel Ghadaffi's statement of 2 June 1977. The full text of this statement and its English translation appears as Annex 17 of the Libyan Counter-Memorial (II). To quote briefly from this statement, Colonel Ghadaffi said :

> "Let Tunisia come to unity with Libya tomorrow, a unity that ensures equality of Tunisia and Libya in sharing the oil, from the continental shelf to the field of As-Sarir. This is the correct historical solution."

Now the oil field of As-Sarir is on the land territory of Libya southeast of the Gulf of Sirt. It is one of the largest oil fields in the world.

What about the other Party in this case ? What were they up to during this time ? Asserting historic rights to a 45° line from Ras Ajdir to the 50-metre isobath – historic rights claimed to stem from a 1904 Instruction. Claiming the right to delimitation after that point on the 50-metre isobath along a line of equidistance. Granting a concession in 1972 that lunged to the east of the

26° line to a point roughly where an equidistance line would have put them. Hardly what can be termed compromise !

And what else was the other Party in this case up to during this period ? Five years after the first contacts to discuss "maritime boundaries", in 1973 Tunisia amended all its earlier legislation. It closes the Gulf of Gabes – a gulf never closed before. It invents new baselines to extend its territorial seas way to the east and discovers rocks around the Kerkennah Islands that were never before recognized as appropriate for the drawing of baselines.

What is the picture today as we come before this Court in the oral pleadings ? What are the positions of the Parties as revealed by their written pleadings ?

Libya's legal position is what it was in 1968. Delimitation should proceed northward. This position of Libya dates back to its 1955 Petroleum Law and Regulation. The map attached to that Regulation clearly indicates the international maritime boundary between Tunisia and Libya which Libya claimed. It is indicated by dots, it is true, Mr. President, but this is the way international boundaries are shown on maps.

I must take a moment here to mention a matter dealt with in some detail in the Libyan Reply. It relates to the Tunisian accusation on page 15, footnote 15, of the Tunisian Counter-Memorial **(II)** to the effect that Libya had erroneously translated Regulation No. 1 implementing the Libyan 1955 Petroleum Law and hence had falsified its meaning. The authors of the Tunisian Counter-Memorial must have thought they had struck gold – gold rather than oil apparently. But if this was an effort to divert attention from the main point it did not succeed.

To summarize what was said in the Libyan Reply, the fact that the Arabic and English texts diverge, as quite correctly noted in the Tunisian Counter-Memorial, is of no significance whatever. The original text was prepared in English back in 1955 for reasons gone into in the Libyan Reply. The technical error occurred in putting the English text into Arabic and not the reverse, so the Tunisian accusation of a deliberate falsification by Libya of a document submitted to the Court evaporates into thin air. The fact that Arabic was and is the official language of Libya does not alter in any way this fact. The Libyan Reply provided extensive documentation to set the record straight, but Tunisia seems bent on trying to keep the issue alive. It was brought up again during the oral hearings. I can understand Tunisia's concern over this Law, Regulation and Map. It is a major element in the case and a relevant circumstance of the first order of importance. But I should add, Mr. President, that neither I nor the members of the Libyan delegation are accustomed to being accused of deliberate falsification. It is out of respect for the Court that our response has been so restrained.

I shall return again to the subject of this 1955 legislation in a few minutes. In the meantime, we shall place on the easel an enlarged copy of Map No. 1 [1], which is in the folder [2] of each Judge. This Map was officially published in the *Libyan Gazette*. I call your attention to the clearly marked international maritime boundary indicated on this map.

There are two additional points I wish to note at this stage. First, Libya had attained independence in 1952 just three years prior to the enactment of this legislation and its publication along with Map No. 1 in the *Official Gazette*. Second, it is significant to note that the Tunisian Reply (IV, para. 1.05) con-

[1] Not reproduced. (See **I**, p. 467.)

[2] See *infra*, Correspondence, No. 108, and **IV**, p. 512, footnote.

cedes the point that at the time of enactment of Libya's 1955 Law, the sole international frontier between the two States was the land frontier. From this it is easy to see how the 1955 Law, Regulation and Map No. 1 have a direct bearing on and refute the claim in Tunisia's pleadings, based on alleged historic rights, of a maritime boundary along a line of 45° from Ras Ajdir.

To return to what I was saying, Libya has not proposed to this Court – as the Tunisian Counter-Memorial has suggested – that the line set forth in clear terms as a boundary line on Map No. 1 issued with the 1955 Law and Regulation should continue due north right up to the line of delimitation between Tunisia and Italy. At the approximate latitude of Ras Yonga, Libya proposes that the line of delimitation to be agreed upon by the experts should reflect, by a veering to the northeast, the Sahel peninsula which takes a northeasterly direction from approximately Ras Yonga to Ras Kaboudia, as well as the important geological dividing zone known as the Atlas Fold Front, also called the Gabes-Ragusa Line. Why does Libya propose such a veering to the northeast? Because the coast in question, characterized by Libya as anomalous, is nevertheless there. And to accord with geological factors as well, which are discussed in the Libyan Reply with regard to the Atlas Fold front. Not to veer might show a disregard of the equitable principles announced by this Court in 1969 and the Anglo-French Court of Arbitration in 1977. These require the Parties to take into account the relevant circumstances in the area concerned, both geographical and geological. So also does the Special Agreement between the Parties to this case. When the line of delimitation is agreed in the negotiations between the Parties, an important part of the negotiations will be to take account of these relevant circumstances, in the light of the directions given by the Court.

The Tunisian Reply, perhaps to deflect attention from the radical change in the Tunisian position when they abandoned equidistance, has called this the Libyan *méthode correctrice* and Professor Ben Achour came up with the tongue twister *méthode rectificatrice*. But this is another illustration of one of the techniques of the authors of the Tunisian pleadings with which I shall deal in detail in a few moments. The technique is to mis-state the Libyan Memorial, to claim that Libya has advocated a due north line all the way up to the Gulf of Hammamet and then to claim that the proposal set forth in the Libyan Counter-Memorial is a change of position – a correction. This, of course, is not the case. One wonders why so much of the Court's time has been taken up with an attack on a proposal which the Libyan Counter-Memorial made clear was not being advocated by Libya.

Leaving aside its mis-stating of the Libyan position and inferring that Libya has modified, has "*corrected*", its proposal, Tunisia has adopted a position before this Court that is remarkably different from that of Libya and could very well be regarded as a major change, a major "*correction*", if you will. For after 12 years of apparent loyalty to the cause of equidistance, Tunisia suddenly abandons equidistance in its written pleadings in this case.

It was perhaps wishful thinking on Professor Jennings' part to suggest that Libya's surprise at the abandonment of equidistance by Tunisia was mingled with – to use his words – "some slight resentment" – that Libya's rejection of equidistance was – again to quote the Professor – "almost anxious". That the Libyan pleadings were a "grumble" – an "expression of disappointment". Well, this is clearly not so. Libya, too, has rejected equidistance. But it does think this radical shift in position should be closely examined by the Court in the light of the circumstances of this case and in assessing the sheaf of lines unveiled by Tunisia for the first time in its Memorial.

Libya regards equidistance, whether strict or modified, as entirely unsuited to the circumstances of this case. There is now common cause between the Parties on this point.

I am now forced to turn to and deal with some of the comments in the Tunisian Memorial characterizing the events and actions of the Parties prior to notification of the Special Agreement to the Court. This is regrettable, digging up the past, but the record cannot be permitted to stand as the drafters of the Tunisian written pleadings would propose. In paragraph 1.02 of its Reply (IV), Tunisia still clings to its description and characterization of events. So, despite the more moderate tone of the oral arguments, the record simply has to be set straight.

The incidents between our two States – and I am happy to observe that we stand today before this Court as Arab brothers, as adjacent friendly Arab States – these incidents started in 1976. The new circumstance that overshadowed all else was that oil had been discovered in the Libyan off-shore concessions.

The thing about the 1976 incidents that must be stressed is that they were fabricated. What then was the motivation for creating these incidents. The answer is oil. Certainly not fish ! Certainly not sponges !

Starting in 1968, Libya began its exploration activities in the newly granted Concession 137. The activities were conducted for Libya by the French company Elf-Aquitaine, the same company that obtained the Tunisian concession granted in 1966, that bordered Concession 137 to the west. Libyan activities were not secret.

Then oil is discovered in the Libyan concession. And having discovered oil, and knowing that its neighbour to the west had not yet had such a stroke of luck, what did Libya do ? It proposed a régime of the continental shelf not based on delimitation but joint exploitation. And although in discussions its position as to delimitation remained based on the Libyan 1955 Petroleum Law and Regulation, Libyan activities did not occur to the west of the line between the Tunisian and Libyan concessions adopted as a sort of practical solution. Although the 1955 Law and Regulation had been in effect all those years, Libya wanted to live with its adjacent Arab brother as a friend while seeking to work out the arrangements for joint exploration and exploitation.

The maritime boundaries asserted by Libya in 1955 were not objected to by Tunisia, which incidentally at the time of enactment had yet to achieve its independence and was being administered by a major power that knew all about oil exploration in both Libya and Tunisia. And that power had no shortage of legal and geological experts available to it – people who make it their business to know about a neighbouring State's legislation, and where the oil is to be found.

The Tunisian Reply attempts to discount the significance of Libya's 1955 Law, Regulation and Map No. 1, even to the point of suggesting that the 1955 Regulation was only an internal circular. But the Arabic term is unambiguous – "laiha" means regulation. And this Regulation was published in the *Official Gazette*, as were the other regulations issued under this Law. Much of what is said in the Tunisian Reply in this respect was by fortunate circumstances dealt with in the Libyan Reply. The fact that the 1955 Law, Regulation and Map No. 1, contrary to what is said in paragraphs 1.03 and 1.04 of the Tunisian Reply (IV), did purport to indicate international maritime boundaries need not be dealt with again here. These documents on their face disprove the Tunisian argument set forth in these paragraphs as the analysis in paragraphs 10 through 14 of the Libyan Reply makes clear. They also answer the same points repeated during oral argument by Tunisian counsel.

However, the Tunisian Reply makes a new argument. A concession map is unveiled and filed with the Court and described on page 18 as "La carte (116) officielle libyenne des zones pétrolières". The same map was produced here in Court by Professor Ben Achour. It is said by Tunisia that this map contravenes the Libyan case regarding Map No. 1. Well, the case has again been mis-stated as in the case of the accusation of a falsified translation. Let me explain the situation.

Map No. 1 here on the easel – a copy is in the folder of each Judge as Map 1 – was attached to the 1955 Regulation and is part of the 1955 legislative package. It is drawn on a scale of 1:2.000.000 and on it are indicated the international boundaries and the petroleum zones and it is signed by the Minister of Economy. You will recall that the 1955 Regulation called for these boundaries to be put on Map No. 1. The legend shows the form of dots that represent a boundary line as opposed to a zone line.

Now when concessions are granted by Libya, the co-ordinates are given with reference to this official map. Map No. 1, whose title is *The Official Map of the Petroleum Zones in Libya*. The Ministry of Oil and the oil companies maintain maps on the same scale as Map No. 1 – purely concession maps – and draw on these maps for their own information the boundaries of each concession announced. The map produced by Tunisia was compiled and printed by the Ministry of Petroleum Affairs in conjunction with the Oasis Oil Company of Libya in this fashion. The data on this map were stated to be current as of 4 September 1968. But note its title : "*Official Map of Petroleum Concessions in Libya*." Petroleum concessions and not petroleum zones as stated in the Tunisian Reply. This difference is basic. This and other maps like it are a compilation of concessions as of the date of the map. They do not officially portray either zones or international boundaries. The 1968 map shown to you by Tunisia even contains a statement that boundaries shown are not official. To quote the statement exactly : "International boundaries as illustrated herein are neither final nor binding on the Libyan Government."

Why, dozens of such maps put out by the Ministry of Oil and the oil companies each year could have been produced for the Court. Tunisia has selected one of these maps, misnamed it the "*Carte officielle libyenne des zones pétrolières*", which it is not, and has attempted to build its case against the 1955 Libyan Law, Regulation and Map No. 1 around this flimsy structure. It would not be expected that such a map should show any off-shore international boundaries, and if it did the boundaries shown would not be official. But Map No. 1 was intended to show international boundaries, and as shown such boundaries acquired an official status.

About all that can be said about this evidence provided by Tunisia is that it is incomplete, was misunderstood and proves nothing.

Tunisia also attempts to challenge the significance of the 1955 Law, Regulation and Map No. 1 on the basis that Libyan Law No. 2 of 18 February 1959, relating to the outer limits of the Libyan territorial waters, did not also indicate the lateral international boundaries. The limited scope of the 1959 Law itself answers this argument. The substantive paragraph in the English translation contained only the following 11 words : "The Libyan Territorial Waters shall be fixed at 12 nautical miles." However, having made this argument, Tunisia may have to live with it. For the 1963 and the 1973 Tunisian Laws did purport to set international maritime boundaries and *yet both Tunisian Laws are totally silent as to any international boundary between Tunisia and Libya.* The 1962 Tunisian Law – still unmentioned by Tunisia even during the oral hearings – did assert a maritime boundary along the 45°

line, but it was quickly revoked. As the expression goes : "What is sauce for the goose is sauce for the gander."

So one must wonder what Professor René-Jean Dupuy was getting at when he suggested that failure of Libya to protest the Laws of 1963 and 1973, not to speak of the 1951 Decree, constituted acquiescence in the claimed 45° line. Surely, the Professor is aware that none of these Laws proclaimed a lateral boundary line – except for fishing. And yet Professor Dupuy stated to the Court that the 1951 Decree defines very precisely the maritime boundary between Tunisia and Libya as the line ZV 45°. It does not. No maritime frontier is mentioned in that Decree. Even more bizarre is the suggestion of acquiescence in the 1904 Instruction which establishes a "zone de surveillance" limit "vers le nord est". In 1904, the land boundary was not even at Ras Ajdir ! It was not until six years later that Ras Ajdir was chosen as the land boundary.

But let me get back to the matter of oil. The initial Libyan off-shore oil concessions were granted in 1968. What was Tunisia's reaction? It was to move further eastward – a move that had begun in 1966 when Tunisia modified a concession, the eastern boundary of which became a zigzag line from Ras Ajdir in a 26° direction. I remind you again that the initial Tunisian concession in this area, identified in the Tunisian Reply as Concession No. 2 granted in 1965, followed a due north line for a considerable distance seaward along its eastern boundary. This accorded with the 1955 Libyan legislation up to the 34° parallel.

I must remind the Court of this because it was nowhere mentioned in the Tunisian Memorial – and was in fact camouflaged – that Tunisia's initial concession was not that granted in 1966 but in 1965 and that this concession observed a due north line along the significant portion of its eastern boundary, eastern limits.

Then in 1972 Tunisia made a big move again to the east in a new concession extending roughly to where a line of equidistance would allow it to move, a line of equidistance starting not from Ras Ajdir – since for a while that line would have run west of north – but from the point where a line of 45° E intersects with the 50-metre isobath. Exactly how the point of intersection and the equidistance line are joined up has never been clear. Yet there is a curious fact to note in all of this. No Tunisian concession has ever been granted within the area east of a due north line as far as the 45° line and along that line out to the 50-metre isobath. I say this is a curious fact since this area falls within the area over which Tunisia claims incontestable historic rights from time immemorial.

Aside from everything else, this Tunisian move to the east in 1972 covers an area that can only be for possible delimitation between Libya and Malta. We noted with interest, from the statements made during the oral hearings over Malta's intervention request, that Malta appears to share this view.

It should be emphasized that during this period from 1968 right up to the time of submission to the Court, Libya enacted no legislation that could conceivably have affected delimitation in this case. It commissioned no special studies, unlike the study undertaken by the Université de Provence and supported by the oil companies Total and Elf-Aquitaine and by the Tunisian Government. This study was commissioned in 1975 – the Special Agreement in this case was entered into in 1977 – the study was published in 1979, just before notification of the Special Agreement to the Court by Tunisia. Much of the scientific material contained in the Tunisian Memorial is evidently derived from this study, which is filed with the Court. Apparently, these scientific

studies do not figure in Tunisia's calculation of the mass of scientific data with which it claims Libya has swamped the Court.

Somewhere between 1971 and shortly after the notification of the Special Agreement of this Court, Tunisia and Libya exchanged *26 Notes Verbales*. Of these, 17 originated from Tunisia ; 9 from Libya. These *Notes Verbales* related to the incidents involving the *Maersk Tracker, Scarabeo IV* and the *J. W. Bates*. The Libyan Counter-Memorial **(II)** covered this whole story in considerable detail in paragraphs 44 to 59 and in its documentary annexes, and I need not take the Court's time up with it now.

However, certain aspects of this history are deserving of further brief mention here. For among the 26 notes exchanged during this period, most were reply notes or notes of repetition. The whole exchange came down to 4 Tunisian notes and 2 Libyan notes, and the whole matter comprising these so-called incidents can hardly be described as very serious.

In its various notes, Tunisia hammered home its basic legal premise : that equidistance was the proper method of delimitation in accordance with international law in the circumstances.

And let us take a look at the two locations at which the drilling platform *Scarabeo IV* undertook its wildcat activities. One such location was 45 kilometres due east of the 26° line. It was 220 kilometres distant from Gabes. It was at a point to the north-east of a 45° line from Ras Ajdir. It was to the south-east of a line of equidistance from Ras Ajdir. At this same location it had previously drilled two wells. The location of this drilling platform can be seen
(117) on the area map on the easel beside me. This map is in the folder of each Judge. A red dot has been placed on this map in the approximate location of the *Scarabeo IV*. Note its location in reference to the 26° line and its distance from Gabes – 220 kilometres !

Moreover, the sites protested lay outside the Tunisian formula of 45° to the 50-metre isobath and thereafter a line of equidistance. They were to the east
(64) and south. I invite the Members of the Court to examine Map No. 6 of the Libyan Counter-Memorial where these sites are shown. So apparently Tunisia decided a new basis for these protests must be created. The sheaf of lines set forth as proposed practical methods of Tunisia in its Memorial would accomplish this result. For example, a 63° line from Ras Ajdir off toward the "Ionian Abyssal Plain" would accomplish this result as I said. As a result of this line, any Libyan drilling activity practically within cannon shot of its shores became eligible for protest. And with this sheaf of lines came a new definition of the Gulf of Gabes stretching 120 kilometres beyond the land boundary at Ras Ajdir. All of these exaggerated protests, and all this pointless publicity was therefore directed by Tunisia in order to give the impression that by conducting wildcat operations Libya was stealing someone else's oil : it was laying the groundwork for claiming a 65° line in 1980 by its sheaf of lines.

As a final chapter to this discussion, I should like now to turn briefly to the Tunisian Petroleum activities of the fields of Isis, Zohra and Garrafa. It devolves on the Libyan delegation to put before the Court these facts – I should say these highly relevant circumstances – since Tunisia studiously avoided doing so during its oral presentation.

We have already seen how after its first concession granted in 1965, Tunisia started its move eastward (and southward). In 1966 it went from due north of Ras Ajdir to 26° as the southern section of the eastern concession boundary. In 1972 this move went much further to the east with a new concession of that year. Tunisia then drilled the Garrafa well. It was a dry hole.

In 1974 Tunisia drilled the Zohra well, east of 26°, and it too was a dry hole.

(117) A blue dot has been placed on the map to indicate this well. However, the Isis well was drilled in that year and found to be productive. This is shown by the yellow dot. Unfortunately, a productive well is not necessarily a commercial well, and at the time that proved to be the case with Isis. In any event, as the Court can see from Map 2 in the folder of each Judge, the well was east of the 26° line, and Libya contacted the French company conducting the operations, Total, and informed it that the well was located on the Libyan concession areas and should be closed down. The company complied with this request, and the Isis matter was dealt with without publicity or propaganda.

I shall turn now to the period after the Special Agreement was notified to the Court.

Unfortunately, the protests of Tunisia continued but a new format was adopted, consisting of depositing the protests with the Registry of the Court, certainly a curious procedure. Libya on the other hand refrained from protest but instead reserved its right with regard to protests of Tunisia as to activities on what Libya regarded as clearly its continental shelf. Libya did not address itself to the Registrar. During this period it did not request that Tunisian activities halt or that platforms be removed at once. But again, there was an effort to make incidents, to pretend that Libya was stealing someone else's oil. Not only did Tunisia send to the Registry its own protests, but it also sent the Libyan responses and reservations of position – every piece of paper !

Now there was one reservation by Libya which Tunisia singled out and made a great fuss over in the Tunisian Counter-Memorial. This was a protest involving activities of the *Douglas Carver* at coordinates which when plotted placed the activities to the west of a due north line and due east of the Gulf of
(55) Hammamet. Paragraphs 8.10 and 8.11 and Figure 8.01 of the Tunisian Counter-Memorial (II) make the most of this diplomatic note from Libya. But it strains credulity to suggest that Tunisia was not aware that this diplomatic note of 10 July 1980 contained an obvious error. I need not take up the Court's time with the details. The matter is fully discussed and documented in the Libyan Reply, paragraphs 15 to 20, which I respectfully invite the Members of the Court to examine.

The *Douglas Carver* matter is another illustration of how incidents have been created or attempted to be created to discredit the position of Libya. No one could have seriously believed that Libya claimed areas of continental shelf in the Gulf of Hammamet west of a due north line. The Libyan view of how the law should most practically be applied in these circumstances, set forth in the Libyan Counter-Memorial, instead finds Libya veering to the northeast to reflect relevant circumstances relating to the geography of Tunisia – and the geology of the Pelagian Block – and this veering was proposed to occur way down south roughly at the parallel of Ras Yonga. And yet during the oral hearings the Tunisian counsel persisted in projecting a due north line up past the Gulf of Hammamet.

Libya is not interested in playing games before the Court. Its positions are advanced seriously. And it takes the case seriously as the wealth of documents and data furnished to the Court indicates. It is not suggesting some extreme claims to the west of due north to better its negotiating position. It has not found an "abyssal plain" to which it can direct an outrageous line that would clearly infringe on the sovereign rights of Tunisia.

To express the way we feel about all these matters I should like to invite the attention of the Members of the Court to the Libyan Reply, paragraph 20.

If the case before the Court involved a partage rather than a question concerning delimitation, then the Tunisian tactic of exaggerated claims and

incidents might be better understood. It would be to stake out a sort of extreme negotiating position. But here we are dealing with the application of the principles and rules to the true facts. The Parties have a duty to assist the Court, not to confuse and complicate the picture.

Let me conclude this unpleasant chapter by saying that it is not my purpose here to revive these alleged incidents and so-called disputes. The Libyan Memorial covered this era very briefly. However, Libya has been forced to set the record straight as a result of allegations made in the Tunisian Memorial and Counter-Memorial. To paraphrase a well-known remark from Shakespeare's play, *Julius Caesar*: I have come to bury our differences not to praise them.

I have already mentioned that the principal characteristics of Libya's actions and attitudes since 1952, when Libya achieved its independence, were restraint and responsibility. It is too bad that Tunisia has not been willing to recognize the fact of restraint and that the authors of the Tunisian Reply at page 18 have again questioned Libya's motives in this respect. We are content to let the facts speak for themselves.

By 1968 – the year of Libya's first off-shore concession and the year discussions between the Parties commenced – Tunisia's maritime claims were to be found in its 1963 Law. This followed on the heels of a law enacted in 1962 which Tunisia had repealed, and failed to mention the text in their pleadings or during the oral hearings. The 1962 Law claimed a territorial sea out to the 50-metre isobath from the parallel of Ras Kaboudia to the point of intersection with a line 45° from Ras Ajdir. This assertion, which met with objection from other maritime powers, is geographically depicted on Map (59) No. 11 appearing opposite page 50 of the Libyan Counter-Memorial, together with the territorial sea claims of the 1962 and 1963 Tunisian Laws. The 1962 Law was the first Tunisian legislation to purport to deal with lateral maritime limits, because the 1904 Instruction and the 1951 Decree involved only fishing zones and areas of surveillance. So also did the 1968 Tunisian fishing legislation. Yet the law of 1973, which abrogated the 1962 Law, failed to deal with lateral boundaries and only mentioned a line of 45° from Ras Ajdir in the distinctly different context of a contiguous fishing zone beyond the six-mile territorial sea as proclaimed by the Law. This, of course, is in contrast to the 1955 Libyan Petroleum Law and Regulation and Map No. 1, the Map depicting Libya's position as to such boundaries. Thus when the 1968 discussions between Tunisia and Libya commenced, Tunisia had taken no legislative step to state its claim as to lateral boundaries and Libya did. Moreover, the eastern limits of the 1965 Tunisian concessions followed a due north line for a distance of some 57.7 nautical miles, starting a few miles off Ras Ajdir, apparently respecting the Libyan claim.

In 1968, Tunisia had its coasts, its gulfs (one closed, others not), its fishing waters, its banks around the Kerkennah Islands, and its islands (some dominated by agriculture, others by tourism). In 1968 Tunisia was guided by only one method in respect to delimitation – the method of equidistance. And in subsequent years it not only so informed Libya repeatedly, but also Aquitaine, the French oil concessionnaire with adjoining concessions from both Libya and Tunisia, and the world at large including ultimately the Secretary-General, the Security Council, the OAU, the League of Arab States and every foreign mission accredited to Tunisia.

What would equidistance have been in 1968 from the standpoint of Tunisia? It would have been measured from the normal low-water mark; there were no baselines that closed the Gulf of Gabes. Nor were there baselines enclosing the banks around the Kerkennah Islands and El Biban.

There was no 45° line, and no 50-metre isobath, so far as territorial waters or maritime sovereignty were concerned : these had been legislatively erased in the 1963 repudiation of the 1962 Law. There was no Tunisian protest to the 1955 Libyan Petroleum Law. There were no previous activities or concessions east of the 26° line. And the "Ionian Abyssal Plain" and the *lignes de crêtes* had yet to be conjured up.

Then a Libyan offshore concession was granted. Tunisia initiated the first meeting between the Parties, and Libya was informed that in view of Tunisian "historic rights" there was nothing to discuss until one arrived at the intersection of a 45° line from Ras Ajdir with the 50-metre isobath. Everything to the west of such a line was beyond discussion.

I have already mentioned that a line of equidistance starting at Ras Ajdir presented problems for Tunisia. It ran to the west of due north for a while. So 45° to the 50-metre isobath became a non-discussable position. But this was not good enough. The oil was further to the east, and to the south of any equidistance line. So in 1975 a new Tunisian law and decree proclaiming new baselines and, in particular, closing the Gulf of Gabes is enacted. Already in 1972 a new concession had been granted lunging far to the east to approximately where an equidistance line from the new 1973 baselines would come.

I should digress here to mention that in the Tunisian Reply at paragraph 3.37 the impression is given that the Libyan proposals would allocate to Libya a large part of the offshore petroleum resources of Tunisia. But none of the oil wells listed as lying east of any line of direction which we would consider as being appropriate and consistent with the legal principles and rules applicable are productive oil wells – and there are no productive gas fields among them either. They have been abandoned by Tunisia.

Now what was the object of this remarkable piece of legislation in 1973? It was to attempt to remove from consideration a huge chunk of the continental shelf. An area termed the "Gulf of Gabes" but bearing no resemblance to its proper geographic limits is closed off by a baseline running from a base-point that does not even appear on French maritime charts to Ras Turgueness on the Island of Jerba. I respectfully invite the attention of the Members of the Court (119) to a map in the folder of each Judge to illustrate what I am saying. To this enormous area is added a 12-mile territorial sea. The result in certain areas is to exceed even the area covered by the 50-metre isobath. Base-points around the Kerkennah Islands are also selected, many of them invalid under international standards. To this area is also added a 12-mile territorial sea. However, the 1973 Tunisian Law and Decree did not mention lateral boundaries. An attempt to fill this gap was started in 1968 by the Tunisian claim of a 45° line out from Ras Ajdir to the 50-metre isobath, a claim based on alleged "historic rights" and citing in support the 1904 Instruction – an internal circular that relates only to "zones de surveillance", not maritime boundaries and in any event does not specify a line of 45°.

During this period Tunisia entered into a series of fishing agreements with Italy. It also sought a basis for claiming international acquiescence in a lateral boundary with Libya of 45° out to the 50-metre isobath. The fact that this boundary is mentioned in fishing agreements with Italy is of no legal significance. Italy can no longer decide Libya's boundaries. Of course, Italy had no concern over the lateral boundary with Libya. It had no interest as to its location. The fishing agreements were unrelated to delimitation between Libya and Tunisia of the territorial waters or the continental shelf.

The delimitation agreement reached between Tunisia and Italy in 1971

served serveral useful purposes for Tunisa. It secured for Tunisia a defined continental shelf between Ras Kaboudia and Cap Bon and on to the north. The equidistance line was calculated giving limited effect to the Italian Pelagian Islands. But the agreement also affected parts of the continental shelf appertaining to Libya and to Malta. The line on the southeast side of the delimitation has the effect of blocking Libya and Malta from areas of the
(1) continental shelf. This line was greatly extended by Tunisia in its figure 1.01 in the Tunisian Memorial so far as even to hook up with an equidistance line between Libya and Tunisia. The extent to which the line was extended so far
(71) into areas appertaining to Malta and to Libya is shown in Figure 3 of the Libyan Counter-Memorial. It is not surprising that Malta, in the intervention proceedings, felt it necessary to inform the Court that it did not recognize the agreement between Italy and Tunisia.

This completes a chapter of this brief history. The part of the continental shelf north of Ras Kaboudia is already delimited in the Italian-Tunisian Treaty. An enormous area called the "Gulf of Gabes" is swallowed up by a closing baseline to which an additional 12-mile territorial sea is added. A 45° line from Ras Ajdir to the 50-metre isobath is claimed on the basis of "historic rights". New Tunisian concessions are granted far to the east. The southeast part of the line of delimitation with Italy is quite improperly extended so as to block off Libya and Malta and connect up with an equidistance line between Libya and Tunisia. While this is happening, the world is being given the impression that Libya is obstinately refusing to negotiate with Tunisia and exploiting Tunisia's natural resources.

The Tunisian written pleadings have made much of the fact that no formal protest of the 1973 Tunisian baselines was made until 1979, after the Special Agreement had been notified to the Court. This is a very superficial and erroneous reading of the situation. In fact, throughout its negotiations with Tunisia, Libya has always rejected the baselines in the same breath that it rejected equidistance, once the guiding principle of Tunisia. *The Declaration of Jerba* of 12 January 1973 quite evidently made inappropriate any notion of formal protest as to the internal legislation of either State in view of their agreement to unite.

An aspect of the 1973 baselines not heretofore discussed relates to the principle recognized internationally that the baselines of a State should be put on maps and published. Tunisia has produced neither the implementing Decree nor any maps showing the baselines, even though Article 2 of the 1973 Decree itself, which appears in Annex I-17 of the Libyan Memorial, expressly contemplates the preparation of such maps. Are there such maps in existence ? We have been unable to find them. If they exist, why have they not been furnished to the Court ?

There is a further aspect to the 1973 baselines. It is apparent that from the moment Tunisia thought that it had a dispute with Libya over the continental shelf it began to enact laws and regulations changing the *status quo* in order to attempt to better its position, and thus, when it became apparent that the 1963 baselines were insufficient to achieve a line of delimitation by virtue of equidistance that would bring Tunisia to where the oil was or was most likely to be, these baselines were changed by a new law, the 1973 Law and Decree.

Surely international relations cannot be based on the following kind of scenario : a friendly, adjacent State suggests amicable negotiations leading to agreement on delimitation of the continental shelf appertaining to each. In the meantime, it claims part of the continental shelf on the basis of fictional historic rights such as a bay which it now claims to be an historic bay but

which only ten years before was not in any sense regarded as constituting internal waters of the State in its own internal legislation. It asserts historic rights to justify a non-negotiable stance as to the maritime boundary between the territorial waters of each State and for the first leg of any continental shelf delimitation. It extends petroleum concessions far across in front of the coast of the other State. It reaches an agreement with a third State and extends the resulting line of delimitation so as to block off its neighbour and still another State. It relies on the principle of equidistance based on a 1963 Law providing for certain baselines. Ten years later it completely changes the baselines to improve the equidistance line. Seven years later it abandons equidistance and invents a new set of lines.

M. BENGHAZI : Avec votre permission, Monsieur le Président, M. Jennings va faire quelques remarques de procédure au sujet de certains documents qui nous sont présentés par la délégation libyenne.

Professor JENNINGS : Mr. President and Members of the Court : I shall make it very brief indeed, and I apologize first for interrupting at all the statement of the distinguished Agent for Libya. This morning, when we arrived in Court, we were presented with five copies [1] of this fascicule of documents and obviously we have not had time to study them and we feel, therefore, that following the example of our Libyan friends we ought to make a quite general reservation of our position pending that study. At the same time, I am instructed to add that in the view of Tunisia, provided reasonable notice is given to the other Party, it is important that the Court should be put in possession of all material that might assist it to make a proper decision in the case.

The Court adjourned from 11.20 a.m. to 11.45 a.m.

Mr. EL MAGHUR : Mr. President and Members of the Court : I should like to illustrate certain points I now intend to make with the use of a large map. This is an enlarged version of one of the standard maps of the area used by Libya in its Counter-Memorial. By means of an overlay to this map I should like now to trace the portions of Libyan coast relevant to Tunisia and those relevant only to a possible delimitation with other States, in particular Malta.
(118) For the convenience of the Court, this same information is depicted on a map in the folder of each Judge.

Now let us examine this map and see which coasts of Tunisia and Libya are relevant to which State. I shall start not at Cape Bon or at Ras Kaboudia or at the point on the Libyan coast east of the frontier, but at the frontier itself, Ras Ajdir. This is because any method of delimitation must begin at this point, or more correctly at the point where the line of delimitation of the territorial sea from Ras Ajdir meets the edge of the 12-mile territorial sea.

The Tunisian coast from Ras Ajdir to Gabes and from Gabes to Ras Kaboudia is relevant as between Tunisia and Libya. The Tunisian coast between Ras Kaboudia and Cape Bon is quite clearly the coast relevant to the Pelagian Islands and Malta. The coast from Cape Bon to the Algerian border requires no comment here except to note that it is on this coast that Tunisia's two principal cities are located. No potential encroachment by Libya is remotely at issue. Contrast this fact with the critical coastline of Libya north of its capital of Tripoli across which the proposed Tunisian sheaf of lines cut.

[1] See *infra*, Correspondence, No. 108.

Returning to our starting point at the frontier, from Ras Ajdir to a point along the Libyan coast at 12° 36′ is the relevant coast on the Libyan side as between Tunisia and Libya. The coast from 12° 36′ to the east is relevant to a future
(118) delimitation with Malta. In examining these points on the map in the Judges' folders, it is useful to turn the map upside down and these relationships become even more evident.

These relationships between coasts and opposite or adjacent States are not subject to unilateral decision. They are fashioned by nature and are not to be refashioned. The Cape Bon-Ras Kaboudia coast of Tunisia was regarded as relevant as between Italy and Tunisia as reflected in the delimitation agreement with Italy. Clearly, this coast is of no concern to Libya.

Now if we place the second overlay on the map, we see how the claims
(119) of Tunisia have expanded. This can be followed on a map 4 in your folder. The red line here shows the 1973 Tunisian baselines; the black line shows the 12-mile territorial sea of Tunisia measured from the 1973 baselines. The blue line shows the area falling within the 50-metre isobath. Note how the 1973 legislation established lines even exceeding the 50-metre isobath in one area.

But Tunisia has also enlisted scientists in its continental shelf brigade. What they have found is an additional area outside the 50-metre isobath that is Tunisia's continental shelf. This is shown in green by a third overlay which is
(120) on another map in each folder. However, some of their proprietary continental shelf claim was ignored in the Italian delimitation agreement and was allowed to fall to Italy.

So what is left for delimitation between Libya and Tunisia according to Tunisia? It is whatever lies beyond the 50-metre isobath – outside the 1973 territorial sea claims of Tunisia where they exceed the 50-metre isobath and outside the "plateau tunisien".

Now let us examine what the sheaf of lines accomplishes. It seems to divide more or less equally the area that is left to be delimited, giving Libya its equitable share. And why should Libya complain, Libya with "une belle façade", with a length of coast stretching on to Egypt? Presumably, any future delimitation with Malta, with Crete and with Egypt are not relevant. How could one characterize this position of Tunisia except as a sort of macro-geography in disguise?

But what is really being argued for here by the proposed Tunisian sheaf of lines depicted here? A total refashioning of nature as depicted by the lines running out at approximately 63° from Ras Ajdir.

Such an extreme claim – such a bizarre result – such a refashioning of nature, could only be put forward if equidistance were abandoned. Thus, the sheaf of lines and the various arguments to support it were invented. Mr. President, one wonders how a State can defend a method of delimitation for such a long time without discovering the abyssal plain to which a line of delimitation must necessarily be directed. Or that its coast is complex, not simple. Or the *rides* and *falaises*. Or the east-west transversals, compelling a delimitation on the basis of irrefutable scientific evidence to follow a line of 63° from Ras Ajdir cutting right across the Libyan coasts.

The reason for the *volte-face* is quite obvious. As oil was discovered in the area east of the 26° line Tunisia found that an equidistance line would not allocate to it areas of the continental shelf where oil had been discovered or where the highest likelihood of discovering oil in commercial quantities existed. For this, Tunisia's claims would have to be asserted to the east and to the south of the line of equidistance.

It is the position of my Government that the Libyan case should be put to the Court in a completely straight forward fashion. The Libyan case as set forth in its written pleadings is not an exaggerated claim to be used as a base from which to hammer out a compromise with our neighbours. Libya has not changed its position at all since 1968 – nor in fact since 1955.

I should like now to turn again for a few minutes to the position of the Parties before this Court. In 1968 it should have been quite possible for two friendly Arab States, adjacent to each other, to work out their problems on a bilateral basis. I have already recounted in detail the history of this period and how the Parties ended by coming to this honourable Court. The intervening incidents – the manœuvring – were the sorts of things that happen between any two neighbouring States. Normally they can be overlooked as trivial. Man was made in the image of God, but the image was imperfect.

Enough has been written and said about Libya's dismay over the Tunisian Memorial. Libya's position was distorted. Libya was accused of many things it had not done. The history of trivial incidents was dredged up, magnified many times, and blamed on Libya. We read that the States were not coming before the Court as equals – one was said to be powerful, the other weak – one was said to be rich, the other poor. I caught an echo of this theme even in the remarks of my good friend, Ambassador Benghazi, the Tunisian Agent. And Professor Jennings seemed to take up the theme again when he suggested that the outcome of this case might be of greater importance to Tunisia than to Libya. So did Professor Pierre-Marie Dupuy.

This posed a dilemma for Libya. Was it to ignore this history of incidents it regarded as trivial or set the record straight ? Was it to continue to avoid irrelevant matters and laugh off the characterization of itself as powerful and rich and unfairly advantaged ?

Libya decided that it should set the record straight – and it did so in the Libyan Counter-Memorial. It even annexed a very candid study of Libya's economic situation. It is in this context as well as in the light of the remarks made during the oral phase that I wish to make certain additional observations.

Before and after independence, Libya was poor, dispersed, in the desert, with refugees around the world. Its land was arid ; it lacked natural resources. Its population was small. It received help and assistance from international funds, from its neighbours and its Arab brothers, for which it is grateful. But Libya never said that its poverty created a right to the houses of its neighbours, instead of its tents ; to the green trees, instead of the desert ; to the rivers and wadis, instead of its parched lands ; to the natural resources of others, to their education, to their sanitary conditions, to their "creative minds".

I recall vividly the famine that devastated Libya in 1948 – only 32 years ago. At that time of Libya's independence it was considered by an organ of the United Nations as the poorest nation on earth. Its humble circumstances have led Libya to be especially grateful over its new-found, but unfortunately depletable wealth. It is sharing it with others – while it lasts, and we know that it will not last forever. Within 50 years the relative wealth of Tunisia and Libya may be changed dramatically. But when it comes to sovereign rights, the Libyan attitude is this : it is ready to exploit jointly the natural resources ; it is anxious for unity with its neighbour, its adversary in this case ; but it will not concede its sovereign rights.

Libya's attitude about the new-found, depletable resources has resulted in aid to other nations, including low-interest loans. I have already referred to, and the Libyan Counter-Memorial lists, the large number of agreements of

assistance with Tunisia, agreements which apparently our neighbours would prefer not to bring to the Court's attention, as I have observed earlier.

Libya does not appear before this Court as powerful and rich, or weak and poor. It is here with its neighbour on equal terms to request guidance and that justice be done. If it appears to defend itself a bit too vigorously it is only out of pride. Its position is not "*brutal*", as Mr. Jennings has suggested. And as for "la demeure du grand vide", a description resurrected at these oral hearings, we are ready to share our wide open spaces with our neighbours as well.

I shall now come to a matter discussed at the start of my statement. It is provoked by the remarks in paragraphs 2 and 3 of the Introduction to the Tunisian Reply, remarks taken up again repeatedly in Tunisia's oral pleading. Libya is accused of submitting with its Counter-Memorial a plethora of documents, annexes, maps and figures in order to overwhelm and confuse the Court. I must deal with this subject in some detail because in some ways it goes to the heart of the case before the Court.

Libya from the outset of its written pleadings has tried to follow the letter and spirit of Article 50 of the Rules of Court. Original documents and complete translations have been furnished. If a document was published in the *Official Gazette*, a copy of the Gazette version has been furnished. Our friends have now said that this effort at completeness and accuracy was motivated by a desire to obscure the issues – to overcomplicate the facts.

As to the alleged mass of scientific data contained in the Libyan annexes, let us take a closer look. The target of the Tunisian Reply in this respect was the Libyan Counter-Memorial. I shall not linger over the Counter-Memorial itself nor over the documentary annexes. The special map annex needs no justification. It was prepared for the convenience of the Court. So let us turn to the technical annexes to the Counter-Memorial **(III)**.

Annex 1. Annex 1 is a broad geographical study of the area of the Gulf of Gabes and the Jeffara Plain. It was occasioned by the very distorted picture given by Tunisia of the entire region from the Kerkennah Islands to Ras Ajdir being some sort of economic or ecological unit. I refer in particular to paragraphs 4.19 to 4.45 of the Tunisian Memorial **(I)**. This study, in addition to refuting Tunisia's claim, points out the importance of the Jeffara Plain and its basic unity. It points up the geographical importance of the Tunisian coast between Gabes and Ras Ajdir and its close relation to the Libyan coast lying to the east of the frontier. I should observe that there is little if any real geologic content to this report. It is mostly geography in its broadest sense including economic and ecological factors, industry, natural resources, etc.

Annex 2 is almost straight geography. It is a study by Drs. Blake and Anderson, two experts very familiar with the region. Professor Pierre-Marie Dupuy seemed to have little to criticize in their report except that they included a description of the entire North African coast from Morocco to Egypt. I am afraid he gave the erroneous impression that most of this report dealt with irrelevancies, which it did not. Again, this is not geologic data with which Libya has been said to have swamped the Court. This geographical study was necessitated in light of Chapter III of the Tunisian Memorial **(I)** and in particular by paragraphs 3.12 to 3.15 purporting to describe the coasts of Libya and Tunisia and by paragraphs 3.17 and 3.31 dealing with various geographic details. Page 1 of this study by Drs. Blake and Anderson starts off with some interesting language in light of Professor Dupuy's discussion of geography :

"Before considering the coastlines and coastal zones of eastern Tunisia

and western Libya, it is necessary to view this particular stretch in the context of the entire North African coastline . . ."

And they cite as one of the reasons for this the fact that the Cape Bon-Ras Zarruq coastline occurs at a zone of major change – a perhaps more scientific way of saying that it is an anomaly. The report goes on to say that the overall trend of this North African coastline is east-west and that only the coastlines of Tunisia and Libya display any major departure from this. Therefore, they say that the North African coastline is broadly oriented northwards.

And what does this geographical study in Annex 2 say about the Libyan and Tunisian coasts ? It says – and I quote from page 9 : "While the Libyan coast is virtually monodirectional, facing north, the coast of Tunisia exhibits a wide range of orientations with the basic component well north of east." And further along at page 15 :

> "The Tunisian coast is dominated by a northeastern and southeastern orientation with only the Gulf of Hammamet facing due east. The Libyan coastline is largely facing due north except for the eastern sector which is angled slightly to the east of north."

These points can be seen on the map on the easel, one of the entire North African coast. This map (map No. 1 of the Libyan Counter-Memorial (II)) is in each Judge's folder. And I urge the Members of the honourable Court to examine the geographical study of Annex 2 to the Libyan Counter-Memorial and the figures in it. During the Tunisian presentation of geography, the coast of Libya was said to run northwest/southeast, which it does not. In the area of interest to us the direction of the Libyan coast is west-northwest/east-southeast. I invite the Court to look at this map on the easel showing the coastlines. From Ras Ajdir to Tripoli is almost exactly east-west in direction.

To return to my recitation – and I apologize, Mr. President, if this is detailed but it is essential to make these points – *Annex 3* to the Libyan Counter-Memorial is a study by Drs. Blake and Anderson of the Libyan fishing industry. It was instigated by paragraphs 4.32 to 4.35 and the complementary note No. 4 of the Tunisian Memorial (I) which incorrectly tried to show the Region of the Gulf of Gabes as an economic and ecological unit. These texts convey the false impression that Tunisia has always had a monopoly of the exploitation, especially through fishing, of the entire area of what is called in these texts the "Region of the Gulf of Gabes".

Annex 4 study of Drs. Blake and Anderson on the Greco Bank was directed at the Tunisian claim of a maritime frontier along the 45° line from Ras Ajdir. I (12) refer to Figure 4.06 and paragraphs 4.75 to 4.88 of the Tunisian Memorial and Submission I.2. Please note again that Annexes 3 and 4 do not relate to geology.

Annexes 5A and *5B* concern the model and the block diagrams prepared to expose the faulty description given by Tunisia of the geomorphology of the region. They involve geomorphology, not geology as such. I shall not take the Court's time to cite all the portions of the Tunisian pleadings to which this (16) work was directed. This figure on the easel, blown up from Figure 5.07 of the Tunisian Memorial should suffice – this is the figure purporting to show *falaises* with teeth-like markings.

The rather long but very interesting *Annex 6* – which concerns history not geology – covers the historical background in order to refute statements alleging the constant exercise of Tunisian sovereignty over the area of the Gulf

of Gabes, in particular paragraph 4.02 and paragraph 4.46 and paragraph 4.88 of the Tunisian Memorial.

Annex 7 explains the map projections and base maps used in the Libyan pleadings. It explains how Libya's independent geographers at the University of Maryland went about preparing the maps used for Libya's case.

Annex 8 is a rebuttal of the two geometric methods used in two of Tunisia's sheaf of lines.

Annex 9 is a chronological review of offshore licences in Tunisia prepared by Petroconsultants, the Geneva-based experts in this field. Note again, please, that the last four annexes do not involve geology.

Now at last we come to four annexes that do involve geology, *Annexes 10, 11* and *12A* and *12B*. *Annex 10* shows the hydrocarbon trends in the Pelagian Basin. It is a six-page report with five extremely interesting figures, some of which are used by me and my colleagues during this oral presentation. For example, a map in each Judge's folder comes from this study (plate 4). This data is all the more important in the light of Tunisia's failure to discuss either the location of oil wells and the gas fields or the history of the concessions during their oral presentation. Are these not relevant circumstances? We heard so much during the Tunisian presentation about irrelevant facts and irrelevant theories that it surprised us very much not to hear a word about two of the very most relevant facts – oil wells and gas fields and the location and history of concessions.

Annex 11, a study by Dr. Fabricius, responds to the many allegations regarding geomorphology and geology in the Tunisian pleadings.

Annexes 12A and *12B* are avowedly geological studies and I do not pretend that they are easy reading. But they are essential studies for several reasons. They establish the basis for the indications by Libya of the ancient coastlines – a matter of key importance to this case as Professor Bowett will explain. They discuss the origins of the Pelagian Block – an important element in understanding the whole picture. They also deal with the subject of salt walls, a matter so incorrectly dealt with in the Tunisian written pleadings and oral presentation.

Finally, *Annex 13* is a frank economic study of Libya that has nothing to do with geology.

And just to glance at the geological annexes attached to the Libyan Reply (IV), again several annexes did not deal with geology and those that did are relatively short and focused on issues that divide the Parties.

Annex II-9 is a refutation of the abyssal plain arguments of Tunisia by one of the world experts in the field, Dr. K. O. Emery.

And *Annex II-6* is a most important study by Columbia University's Lamont-Doherty Laboratory. It is a direct answer to the invitation contained in the Tunisian Counter-Memorial (II), paragraph 4.11, which is discussed in paragraphs 81 to 85 of the Libyan Reply (IV). You will recall that Tunisia in paragraph 4.11 said that if Libya could establish the continuity of the North African landmass northward into the Pelagian Block it would indeed have made its case for natural prolongation to the north. But the Tunisian Counter-Memorial said this continuity was interrupted by the Permian Hinge. The Columbia Study totally discredits this argument. It establishes the continuity of the North African landmass northward into the continental shelf of the Pelagian Block. It proves Libya's case for natural prolongation. By the way, Mr. President, we thank our Tunisian friends for this invitation, and we do not apologize for this study. The importance of this study was brought out clearly during the oral presentation by Tunisia of its scientific claims.

Finally, for the sake of completeness, *Annexes II-4, II-5, II-7* and *II-8* of the Libyan Reply **(IV)** may also be cited. *Annex II-4*, like Annexes 5A and B of the Counter-Memorial, contains additional block diagrams covering a much smaller area of the continental shelf, focusing on the area of Ras Ajdir.

Annex II-5 answers the ill-founded Tunisian claim that the salt features found in the Pelagian Block establishes a connection between it and the Atlas mountain area of Tunisia where salt is also found.

And as to *Annexes II-7* and *II-8*, it is enough to read their titles to show their object : the first is a "critical evaluation and comparison of some structural maps of the Tunisian Counter-Memorial", and the second a "critique of the east/west transversals or axes claimed by Tunisia : the Gafsa-Gabes Axis".

So where is this mass of geologic data with which the Court has supposedly been flooded ? I urge the Members of the Court not to be misled by such statements by our Tunisian friends. None of us should be scared away from considering the geologic evidence – it is essential to this case. But we agree with Professor Jennings – this is not a dispute about geology. The Court is not being asked to choose between rival theories of geologists about geology as Professor Jennings suggested. In fact, the scientific points made by Libya, which will be taken up by Professor Bowett and Professor Fabricius, and covered by brief statements from other experts of the Libyan delegation, can be put forward in quite simple terms. The scientific data on which they are based is not really in this dispute. The scientific theories are well accepted – although geologists like lawyers can always find points to disagree over. These points do not go to the essentials of this case. The Members of this Court do not need to take a crash course in geology to understand the propositions advanced by Libya.

With regard to documentation, as footnote 2 on page 12 of the Libyan Reply **(IV)** observed, the incompleteness and inadequacy of the Tunisian documentation and translations have been unfortunate. No one is perfect. We all make mistakes. Yet some of the Tunisian omissions are quite revealing. Enough has been said of the Tunisian 1962 Law, mention of which was totally omitted from the Tunisian written pleadings. In fact, a stony silence continues during the oral pleadings as well. But with regard to other documents, the Tunisian annexes provide translations – often only partial translations that leave out important provisions – but not the original documents. Annex 1-9 to the Libyan Reply contains a list of examples of discrepancies and gaps in the documents furnished. Perhaps the most glaring example of deficiency of documentation relates to Annex 89 to the Tunisian Memorial relating to vessels' arrests. This of course leaves aside what if any importance these arrests, even if proved, would have had for this case.

To show what I mean, I must go into some detail – but I shall try to be brief. These vessel arrests have been presented by Tunisia as proof that the exercise by Tunisia of regulation and control over foreign fishing ships in the maritime area out to the 50-metre isobath constituted the exercise of sovereignty. In paragraphs 110 to 123 of the Libyan Counter-Memorial this characterization of such limited jurisdiction and surveillance as an assertion of sovereignty has already been refuted.

But quite aside from the faulty legal conclusions drawn in the Tunisian pleadings from these vessel arrests, what about the evidence itself ? Between 1948 and 1977, 69 *procès-verbaux* are cited against fishing vessels said mainly to be Italian but also Greek and Tripolitanian. In paragraphs 122 and 123 and
(70) Map No. 12 of the Libyan Counter-Memorial **(II)** the exaggerations contained in the Tunisian Memorial are revealed. For example, only one Tripolitanian

vessel was mentioned in the list contained in the Tunisian Annex 89. Its position when seized was plotted to be 16 miles north-northeast of Ras Ajdir, outside Libyan territorial waters and on the high seas. However, a signed copy of the settlement (the "transaction") is not provided. It is only mentioned in the margin of the *procès-verbal*.

The list of 69 alleged *procès-verbaux* was contained in Annex 89 to the Tunisian Memorial and hence was first made available for scrutiny on 30 May 1980. The documentary proof, however, was not furnished until 15 July 1981, more than 13 months later, so that Libya was not able to comment on this documentary proof in its Reply and must take up the Court's time now to do so.

Of the *procès-verbaux* mentioned in Annex 89, 23 were not furnished by Tunisia. As far as Libya is concerned, the number of 69 alleged arrests thereupon became reduced to 46 through failure of proof.

Of the 46 *procès-verbaux* furnished – apparently photocopies of the original documents – 14 present other kinds of problems. Some are illegible either as to the coordinates, the name of the vessel or the nature of the violation. Others do not correspond to their identification in Annex 89. It is a mystery how the authors of the Tunisian Memorial were able to compile the list from such faulty documentation.

(70) To take a concrete example, on the Map No. 12 prepared on the basis of Annex 89, the arrests Nos. 1 and 2 are located 20 nautical miles apart. When one reads the *procès-verbaux* one can see that the two Greek ships were arrested 500 metres from each other – on the same day, at the same hour.

Now it is necessary to see the settlements as well as the *procès-verbaux* to understand the nature of the arrest. Of 47 settlements alleged, however, only 5 were produced by Tunisia. Of 5 judgments alleged, only one was produced, and 17 *procès-verbaux* were not accompanied by further documents leaving us in the dark as to what resulted from these arrests.

What it comes down to is this. Only about ten of the alleged cases are properly documented and can be accepted as validly proved. How can legal claims of exercise of sovereignty be advanced on the basis of such flimsy evidence?

I mentioned at the outset of my statement to the Court that I have served on both sides of the bar. This makes me more aware than I might otherwise have been that truth alone serves the case. The Parties cannot fabricate the facts. Nature cannot be refashioned to accommodate a position or a claim. Science cannot be invented or falsified.

The issue before this Court is a legal issue : the legal principles and rules to be applied in delimiting the continental shelf between Tunisia and Libya. The continental shelf in this context – in the context of the Special Agreement between the Parties – is a legal institution not a scientific one – not a geological or geographic institution, whatever the overlapping and confusion in terminology may be. Whatever Tunisia might suggest, the Libyan case is a legal case – not a scientific one – not a geologic one. The role of evidence is to contribute to the Court elements of the factural basis on which the Court may build its legal principles. I do not mean by this to diminish the importance and role of science in this case. It supplies some of the essential raw materials – the facts with scientific interpretation. But it is misleading to describe the Libyan case as a monolithic geologic case, although I was taken by the choice of "monolithic" as an adjective – a term that comes from the Greek meaning "one stone". Well, geology is not just about stones – or as Professor Jennings mentioned "the structure of ingradient rocks", whatever they are. And if we are all to act as if we are living in the closing years of the 20th century we must

show awareness of the strides made in scientific understanding of the world in which we live.

In pleading the facts, Libya has made a separation between historical facts and scientific facts, a separation reflected in its written pleadings and annexes. It has tried to show the pertinence of these facts to the case before the Court. For it is the Court's guidance as to the law which will decide – not the views of scientists or historians. Otherwise this Court would be composed of social and physical scientists, as Professor Jennings has also pointed out.

With regard to the scientific aspects of this case, it has been suggested to the Court that there is some sort of relevancy scale that should govern. For example, data from more recent geologic times are suggested to be of greater significance in determining the element of natural prolongation than less recent times. I take this example because it is basically so absurd. Why are the Parties here before the Court in connection with delimitation of the continental shelf? Because of the presence of exploitable natural resources in the subsoil of this shelf area. This was the impetus behind the Truman Proclamation – the 1958 Geneva Convention – the Third Conference on the Law of the Sea. What are the natural resources of interest in this case? Petroleum resources ; oil and gas. Can you imagine suggesting to a petroleum geologist that he ignore geologic formations that are over 7 million years old or that are below a certain depth ? Why, he would laugh one out of the room for such a ridiculous suggestion.

Libya has made a study of Libyan, Tunisian and Algerian petroleum discoveries on-shore and off-shore. The chart that has been put up on the easel (109) behind me is an enlarged copy of Figure 7 of the Libyan Reply, a copy of which is in the folder of each Judge. It indicates the age and relationship between geologic periods. In this study 165 wells were analyzed. One well was found in reservoir rock having a geological date of 38 million years ago. Forty-eight wells were found in reservoir rock dating back 54 million years. For 37 wells it is 135 million years. For 20 wells it is 225 million years. For 35 wells it is 345 to 395 million years. And for 24 wells 500 to 570 million years.

And yet this Court is being asked to consider that recent geologic times – say 7 million years ago – alone have relevance. Only one of the wells involved in the study that I have just referred to is in strata younger than 50 million years ago ; and this well dates back 38 million years.

Similarly, it has been suggested by Tunisia that data at the surface of the seabed or at relatively shallow depths – several hundred metres is mentioned – is more significant, is of greater probative value, than data derived from greater depths. I have had put up another chart on the easel ; this is an enlarged (110) version of Figure 8 of the Libyan Reply (IV). A copy is also in the folder of each Judge. This chart shows the depth of wells in the offshore Pelagian Basin. There are 26 wells depicted here. All 26 wells exceed a depth of 4,000 feet and one well exceeds a depth of 16,000 feet. Again, how can such a criterion as depth seriously be put forward in measuring the probative value of geologic data ?

If the natural resources of paramount interest were octopus, perhaps more recent times would be more significant. And so might bathymetry. But how relevant can bathymetry be to the delimitation of rights to exploit the petroleum resources of the continental shelf ?

The role of science in this case – the role of geology in particular – is to reveal pertinent facts. Geology is not concerned here with the law or with legal concepts. Science gives us the unvarnished facts as my English-speaking colleagues would say.

Another characteristic of science is that it is *unbiased*. It should not be

conjured up to defend one thesis or another. Libya has tried to put forward the scientific evidence in this spirit.

In this respect, I should like to call the Court's attention to certain devices employed by the authors of the Tunisian pleadings, and particularly highlighted by the Tunisian Reply, that are used to try to discredit the Libyan case and advance Tunisia's claims. These same devices, somewhat muted, were used during Tunisia's oral presentation as well. First, there is the technique of outright insult. For example, in paragraph 2.59 of the Tunisian Reply (IV), Libya is accused of bending scientific fact to suit pre-established conclusions. The same suggestion, phrased more politely perhaps, was made orally several times by Tunisian counsel. From the written pleadings to date and from the presentation of the scientific factors during the oral proceedings, I believe the Court may draw quite a different conclusion.

I have already dealt with the second, and somewhat related technique employed in the Tunisian pleadings – accusing Libya of having swamped the Court in its Counter-Memorial with documents and annexes of all kinds in a deliberate effort to confuse and blur the issues. I do not choose to believe that the Court will doubt the sincerity of Libya's efforts to put before the Court all the documents and facts relevant to this important case.

Third, Libya is constantly accused of inconsistencies as if Libya keeps trapping itself in its own arguments. But when Libya has advanced factual data it has not been to engage in tactics – in game playing. And these supposed inconsistencies, if they exist at all, arise only as a result of several other Tunisian techniques. One is to grossly distort the position of Libya – for example to suggest that Libya maintains that the African Plate has moved northward, thus supporting the supposed northward thrust argument of Libya. This naive assertion was never made by Libya, but having distorted the Libyan position Tunisia proceeds to ridicule the distortion. It was astonishing how many times this same statement about the African Plate moving to the north was made during the oral hearings by members of the Tunisian delegation. Apparently the notion seems to fit in their minds with the phrase "northward thrust" which they love to repeat. This sort of technique is too obvious to require further comment until later on in the specific context of the scientific discussion.

Then Tunisia has resorted to a rather similar device – to divide Libya from its experts. To succed in this device, the expert is misquoted or quoted out of context and then an inconsistency between the expert and the written pleadings of Libya is triumphantly revealed. Let me just mention one example, perhaps the most blatant attempt. Paragraph 2.09 of the Tunisian Reply quotes from Annex 12B (III), of the Libyan Counter-Memorial – containing a scientific study by Dr. Ankatell of the University of Manchester, England, a geologist who knows well this area of the world. This study is cited in support of the famous Rides de Zira et de Zouara. But the "bulge" referred to in the Ankatell piece is related to a bulge in an ancient shoreline and has nothing to do with this alleged morphological feature.

Perhaps the eye was caught by a reference to salt walls in the Ankatell piece, and since salt walls may have caused the rather negligible bump on the ocean floor that Tunisia likes to call a "ride" some connection between the Ankatell reference and this so-called ride must have been made by the Tunisian authors.

Incidentally, Mr. President, did you notice that the Ride de Zouara seems to have disappeared. Where has it gone? But I leave this point to a later phase of our presentation.

Now, Libya has made no effort to control or censor its experts. No doubt

some points of difference exist. The same is the case with the distinguished lawyers serving the Libyan delegation. However, I am aware of no point of importance to this case on which either our scientific or legal experts are in disagreement.

There is another important point to note as well, a point which I have already mentioned a few minutes ago. The differences between the Parties as to scientific aspects of this case do not stem primarily from the sources used or the basic data drawn upon. It will have been noted that the written pleadings of each side cite the same sources, which are relatively limited in number. The quarrel is not over scientific data either. Libya in fact used bathymetric data derived from sources cited by Tunisia to construct its model of the Pelagian Block. It is striking how closely this model follows the relief Map ES-10 of Annex I, the technical study, to the Tunisian Counter-Memorial (II). This map, entitled "World Scientific Ocean Floor Relief Model", was prepared by the Defense Mapping Agency of the United States Navy Department. The full-scale map has been furnished to the Court by Tunisia and I urge the Members of the Court to examine it in relation to the model prepared by Libya.

And just a word on the subject of block diagrams. We are living in the modern age of computer technology. The use of this technology to prepare three-dimensional graphic displays such as block diagrams, so that we amateurs can understand what the lines on a map really mean, is so well accepted as to be completely non-controversial. I would hazard the guess that Professor Morelli has used this technique on occasion, or certainly that many of his colleagues have.

The differences between the Parties over science results, in some cases, from the gross exaggeration of very minor features. In other cases, it results from arbitrary conclusions drawn from data such as the construction of alleged east-west transversals which, as the Libyan Counter-Memorial showed, have no basis in fact. Or the effort to carve up the Pelagian Block into various distinct regions, whereas it is in reality a continuous single area of continental shelf which topographically resembles a gently rolling plain. And, in still other cases, it results from erroneous conclusions drawn from scientific data or a failure to consider the real geologic significance of scientific data commonly accepted.

I have already touched on geography in discussing the annexes to the Libyan pleadings. We are told the Tunisian coast faces east. However, Libya produced a full coastal description by geographers expert in the area. The facts are otherwise. Tunisia has claimed very publicly that its coast was simple. This, of course, was when the method of equidistance was being espoused. With the demise of equidistance arrived the high complexity of the Tunisian coast. Libya agrees with Tunisia's current position as to its coast. It is complex. Some of it is northward facing. Very little of it in fact faces east. It is also anomalous. Our expert geographers and geologists have confirmed this, though perhaps in somewhat more scientific language. Libya has supported its conclusions with full geographical annexes and descriptions by experts.

And Libya has difficulty in understanding the vehemence with which Tunisia denies that the general direction of the North African coast is east-west. Or that the general direction of the natural prolongation of the North African coast is to the north. After all, it is *North* Africa we are talking about – not *East* or *West* Africa. On Map No. 1 of the Libyan Counter-Memorial, Libya portrayed the North African coast. I have had an enlarged copy of this map again placed on the easel beside me. A copy is in the folder of each Judge. Notice how the boundaries run north to the Mediterranean – how the

capitals are ranged along the north coast. This is obviously an east-west expanse of coast facing north. It is as obvious as the nose on my face. It was also obvious to Drs. Blake and Anderson. So why such a fuss ? And why such a fuss about looking at the entire continent, or at least its northern part, from time to time. The case before the Court relates to something called the *continental* shelf. This term itself suggests a continental approach.

We North Africans have always looked north with pride. No small section of the coast, whether it be the irregular Gulf of Sirt or the aberrational coast of Tunisia around the Gulf of Gabes up to Cape Bon, can change this. We North Africans look north, and we always will barring some dramatic event of plate tectonics.

How could an objective geographic presentation to this Court so ignore aspects of human and economic geography other than fishing ? Tunisia's omission of its booming tourist industry is puzzling. What about Tunisian agriculture, handicrafts and other natural resources such as phosphate ? This inaccurate, incomplete picture in the Tunisian Memorial forced Libya in its Counter-Memorial to annex materials that would otherwise not have been considered relevant. It has burdened the Court with this material to correct the picture given the Court.

If the Tunisian theory of history is to be applied to the institution of the continental shelf, the institution will cease to exist. The travels of Ulysses around the shores of Djerba in his dialogue with the lotus-eaters and the mermaids will establish irrefutable claims of Greece, valid since time immemorial. During a certain period of history, in the reign of Septimus Severus, the Libyan-born Emperor of Rome, would furnish the basis for Libyan claims over the Adriatic. Going from the sublime to the ridiculous, Syria and Iraq might lay claim to the continental shelf of Spain, Great Britain to that of the United States and India, and the pirates to the whole Mediterranean.

Libya has viewed history in a different way, and if it has ventured afield it has been only to set the record straight. Libya's documentation has been from the archives of governments, sometimes not easy to obtain, not from the records of old families or of special courts. It has included some material as to the maritime boundaries which is highly pertinent. It is unfortunate that the Tunisian Counter-Memorial accuses Libya of trying to reopen in these proceedings the questions settled in 1910 as to the land boundaries. This we flatly deny. If family histories could affect delimitation, then the Siala family, cited in the Tunisian pleadings as owning part of the sea, would give rise to Libyan claims over Tunisian waters since part of this family inhabited and still inhabits Libya. In fact, Mr. President, I wonder if their Tunisian kin still recognize their portion of this maritime heritage ? It would certainly simplify the task of the Court if delimitation could be determined on the basis of the relative proportions of this family living in Tunisia and in Libya.

But to return to reality the institution of the continental shelf dates only from 1949 – Herodotus, the Fatimids, private families, sunken monasteries really have no relevance.

I have to admit – and I am sure some Members of the Court had the same reaction – that some of the stories and of the history presented by Tunisia were as interesting as they were charming. I am afraid our historical annexes which we felt obliged to furnish may have appeared a bit stodgy in comparison. Fiction is more readable than fact ; documentary evidence often gets *very boring*.

As for fishing – and I have to admit a serious weakness for the sport for

(72) there is fishing off Libya – I draw your attention to Map No. 13 of the Libyan Counter-Memorial which is based on a 1952 FAO Report. This shows the sponge-fishing grounds off of Libya. An enlarged copy of this map has been put up on the easel. It appears in each Judge's folder. Note incidentally that the western boundary indicated on this FAO map runs due north from Ras Ajdir.

I am about to conclude. But I feel I should direct a few remarks to certain points that stood out in my mind after hearing the Tunisian oral presentation. These involved what seemed to be a shift of emphasis, and in some cases almost a new theme.

First, while denouncing Libya's use of geology and espousing bathymetry and geomorphology as the pertinent factors, Tunisia seemed itself to be moving toward geology, as if they knew that a case resting only on the surface of the seabed would not stand up. I even started to count the number of times reference was made by the Tunisian experts to geologic periods hundreds of millions of years ago. This kept coming up all the time.

Second, I noted the attempt to marry historic rights and natural prolongation, really a new theme. Historic rights seem to have been sneaked under the scientific mantle of natural prolongation. I do not know whether this development resulted from a feeling that the Tunisian historic rights case would not stand up or that its claim that natural prolongation is to the east is fragile and needs bolstering, but I shall not speculate further.

Third, the area of concern in the Tunisian mind seems to be defined by the coastlines abutting the Pelagian Block, which would extend the area to the north all the way to Cape Bon. I have already discussed what coasts are relevant to this case, and can only speculate that Tunisia feels it needs an additional, substantial length of coast to support its extreme claim. If this is not macro-geography, what is it ?

Fourth, although we have heard a great deal about the interpenetration of man and water in an ecosystem since time immemorial, and about fishes and fish traps and sponges, why have we heard nothing about oil wells and gas wells and concessions and what the Court in paragraph 101 (D) (2) of its 1969 *dispositif* identified as being "natural resources of the continental shelf areas involved" – a factor to be taken into account ? Why this silence in the oral presentation of Tunisia ? Why ignore such an important factor : the factor which essentially has brought the Parties together in this Hall of Justice in the first place ? I suggest the answer lies in the fact that there *are no productive Tunisian oil or gas wells of major significance – and no major fields operated under Tunisian concessions – which would be affected by what we would propose, whereas a great many Libyan wells would be amputated and annexed by any of Tunisia's sheaf of lines.*

I should return again to my opening remarks regarding a major theme of the Libyan case. Our prophet once said and I shall repeat what he said in Arabic [1] and then paraphrase the statement in English :

> "Thou come to me with your disputes. Some among you may be more eloquent in his defence – in proving his case – and I adjudicate in his favour on the basis of what I have heard from him. But if I give to him what belongs to his brother, he shouldn't take it because I have given him a piece of Hell."

We do not doubt that the Tunisian case is put forward in all honesty. As to

[1] Not reproduced.

Libya, it is asking for no more than it believes legally belongs to Libya. Libya seeks not a piece of Hell. It asks only for what it is entitled under law as applied to the real facts. It makes no extreme claims – it doesn't exaggerate – distort – or mis-state the facts – with the hope of getting a little piece of Hell.

Mr. President, now it gives me great pleasure to introduce counsel who are to assist in putting the case of Libya to the Court.

Sir Francis Vallat will follow me next and set forth the main lines of the Libyan case. Professor Antonio Malintoppi will deal with lateral delimitations and Professor Claude Colliard will then take up the matter of Tunisia's claimed historic rights. Professor Herbert Briggs will discuss equitable principles and the new accepted trends at the Third Conference on the Law of the Sea. Professor Derek Bowett with the help of the experts of my delegation will present the scientific case of Libya. Finally, Mr. Keith Highet will deal with the Libyan practical method for applying the principles and rules of law to the circumstances of the area.

The Court rose at 12.50 p.m.

SEVENTEENTH PUBLIC SITTING (30 IX 81, 10 a.m.)

Present: [See sitting of 29 IX 81.]

ARGUMENT OF SIR FRANCIS VALLAT

COUNSEL FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Sir Francis VALLAT : Mr. President and Members of the Court : it would obviously not be possible for me to begin without adding my personal condolences to the tributes to Sir Humphrey Waldock paid by you, Mr. President, on behalf of the Court and by the Agents of the Parties. Like the Members of the Court, I feel his loss deeply. He was a man for whom I had the greatest admiration and affection.

It is not long since he presided over the Court when it considered the application of Malta to intervene in this case. On that occasion, I was able to say with sincerity what a great honour and pleasure it was to appear before this Court in its present composition. I am glad to be able to say again with equal sincerity what a great honour and pleasure it is on this occasion to appear before the Court in its present composition.

It may be helpful to the Court if, at the outset, I give a brief outline of my oral pleading. My observations will be presented under the following five headings :

1. Method and style of Tunisia's written pleadings.
2. Diplomatic history.
3. Petroleum legislation and grants of concessions.
4. The Special Agreement.
5. Principles and rules of International Law.

May I hasten to assure the Court that the first two sections will be very brief ; the third and fourth will be short ; and the major part of my speech will be devoted to the main question before the Court, namely the principles and rules of international law that may be applied in the delimitation.

1. Method and Style of Tunisia's Written Pleadings

It is deeply to be regretted that, in a case which concerns such an objective matter as the delimitation of the continental shelf, Tunisia should have chosen in its written pleadings a technique of denigration and insinuation against Libya. This as is already known to the Court has forced us to respond and to devote valuable time to dealing with accusations, sometimes of extraordinary generality and inaccuracy. Happily, during the oral hearing, the tone has changed to one which, if I may say so, is much more worthy of this honourable Court.

Nevertheless, Ambassador El Maghur, as Agent for Libya, has necessarily been obliged to deal with a number of accusations made against Libya concerning its methods both in the diplomatic exchanges and in the conduct of the present proceedings. The basic fact I fear is that Tunisia has tried to produce a one-sided impression of the total unreasonableness of Libya. It has been necessary to restore the balance.

It does not rest with me to pursue these unpleasant aspects of the presentation of the case to the Court save so far as they might have a bearing on the attitude of the Court towards the merits of the case itself. In the first five paragraphs of the Tunisian written Reply – that is to say in the introduction – an attempt is made by language which I regret I can only describe as insulting to any responsible counsel, to brush aside the whole of the Libyan case as presented in the Memorial and the Counter-Memorial. The accusation is made that the Memorial of Libya distorted the truth by being over-simple and that an attempt is made in the Counter-Memorial to distort the truth by over-complicating it, apparently with the purpose, according to the Tunisian pleading of shrouding the facts in a mass of words.

So far as the Memorial is concerned, it speaks for itself. There is no need to apologize for its comparative brevity and simplicity. But Libya has been accused of a change of tactics as between the Memorial and the Counter-Memorial, which is apparently supposed in some way to detract from the solidity of the case put forward by Libya. But the wisdom of the course followed by Libya is amply demonstrated by the complete change in the very nature of the claim put forward by Tunisia as between the memorandum of May 1976, which was so widely distributed to the world, and the Tunisian Memorial. Of course, Tunisia is entitled to change its ground if, as undoubtedly is the case, the ground first chosen is unsound. But this is not a reason for inviting the Court to put aside all the material and all the arguments carefully and correctly put forward in the Libyan Counter-Memorial.

Of course, we regret the necessary bulk of the Libyan Counter-Memorial. In principle, we would not have chosen to present such a mass of material to the Court. There were, however, two good reasons for doing so. The first was, as I have said, the need to counter the wholly one-sided picture of the diplomatic exchanges presented by Tunisia in its Memorial – a matter which Libya has always regarded as irrelevant to the question concerning delimitation of the continental shelf which is now before the Court. The second reason was the need to provide the Court with independent evidence supporting the Libyan scientific case – that is to say the case on the facts pertinent to the question of delimitation. I will not waste the time of the Court by going again into the reasons for the attachment of other annexes, but, as explained by Ambassador Maghur, each of them has a purpose either in response to the Tunisian Memorial or in support of the position of Libya concerning the question of delimitation. There is no question, no question, as suggested in the Tunisian Reply of merely adding to the mass and making it more imposing. These accusations made in the Introduction to the Tunisian Reply are, I regret, characteristic of the Tunisian method in the written pleadings and may perhaps suggest it themselves, contrary to the insinuation of those pleadings, the weakness and levity of the case put forward on behalf of Tunisia.

The main point that I wish to make in this context is that, in the view of Libya, the facts and the scientific evidence in this case are crucial. Both Parties, though for different reasons, have quite rightly discarded the method of equidistance, which is wholly unsuited to the circumstances of the present case. Both Parties have appealed to facts and to scientific evidence. We think that the case put forward by Tunisia, based largely on what we can only regard as exaggerations or distortions of the facts, is extremely weak. For example, to re-name certain low-lying banks as *rides* does nothing to increase their physical importance as features in continental shelf delimitation. Nor, as we shall show, in due course, does naming other features as *falaises* or cliffs make these features significant for that purpose.

The attempt to brush aside as trivial and irrelevant the facts put forward in the Libyan written pleadings, and in particular the scientific facts, simply will not do. We are now concerned with the question as to which areas of continental shelf as between Tunisia and Libya are to be regarded as the natural prolongation of those two States. This is not a question which, in our submission, can be answered by comparatively trivial variations in bathymetry but must turn on the physical, if you like the geological, structure of the shelf in relation to the adjoining landmasses. I shall be returning to this question shortly when examining the legal principles and rules applicable in the present circumstances. But, at the moment, I wish to stress the weight which we attach to the scientific evidence as showing, in our view, beyond question that the part of the Pelagian Block with which we are concerned is in fact a prolongation northward of the continental mass to the south. And may I stress here that it is with a part of the Pelagan Block that we are concerned. It is true that the evidence in support of this view is technical and inevitably depends on complicated data but that does not alter the essential character of the continental shelf and the corresponding value of the scientific evidence.

It will be our purpose throughout this oral hearing to try as far as possible to avoid what might be described as personal attacks on the method of the presentation of the case on behalf of Tunisia and to concentrate on trying to assist the Court in clarifying the issues and the facts before it. With this end in view, it is our intention through one of our counsel, Professor Bowett, to explain more simply the upshot and impact of the scientific evidence and, having regard to the general accusations of levity made by Tunisia, we will also ask the Court to hear directly from that great expert, Professor Fabricius, who, with the leave of the Court, will present expert evidence in accordance with the notice which has been duly given. Again, of course we regret having to trouble the Court with such oral evidence, if I may call it that, but, having regard to the attitude taken by Tunisia which seeks to cast aside with a single puff of wind the whole of the Libyan case and to dispute the scientific validity of the block diagrams which Professor Fabricius has prepared for submission to the Court, we have on careful reflection come to the conclusion that we have no other course than to tender him as an expert before the Court.

It is my wish to pass from this distasteful task of refuting some of the more blatant accusations made by Tunisia, but, before doing so, there is one other accusation made in the Tunisian written Reply which cannot be overlooked. The accusation is both remarkable in character and unsubstantiated in fact. Yet, it is the kind of accusation that, I suggest, should never be made by one State against another in judicial proceedings unless it can be fully proved and supported. I refer to the statement in paragraph 3.39 of the Tunisian Reply (IV) which in English reads as follows: "As for the other considerations put forward by Libya in justification of its method, they are such perversions of the truth that they do not merit any detailed refutation."

This is, I fear, the second "first" in these proceedings. I do not recall ever, in any international proceeding or indeed in any other judicial proceeding, having been accused of a perversion of the truth. Moreover, if one looks at the Reply, there is no serious attempt in that document itself to substantiate this accusation. It is simply said that the considerations "do not merit any detailed refutation", and I am quoting from the English text. Tunisia does, however, offer, in a footnote, some scanty and I suggest ill-advised comments on the considerations put forward by Libya in paragraph 524 and following of its Counter-Memorial (II) in support of its suggested practical method.

It will, in due course, be necessary to deal in detail with the footnote 6 which appears on page 65 of the Tunisian Reply **(IV)**. But, as this is a matter that will have to be examined by Mr. Highet in his exposition of Libyan views on the practical method, I will leave the main comment to him. Nevertheless I feel that I have to take one example as an illustration of the general rejection of the charge which I am making at this stage.

I think it is necessary to illustrate my rejection of the charge. The example I take is paragraph 2 of footnote 6. This paragraph first misquotes paragraph 525 of the Libyan Counter-Memorial **(II)** and then, on the basis of this misquotation, apparently purports by means of two casual remarks to substantiate a charge of perversion of the truth. According to the English translation Libya is supposed to have said in paragraph 525 : "The northerly projection would respect both States' historic rights of maritime jurisdiction."

In the face of this truncation and distortion of what is said in paragraph 525 of the Libyan Counter-Memorial, it is necessary to read into the record the whole of that paragraph, and with your leave, Mr. President, I will do so :

> "Second, this northerly projection is in accord with the related history of the maritime jurisdiction exercised by the Parties in this general area, including specifically the location of vessel arrests and – to the extent relevant (if at all) – the fishing practices of both States as well as of third party States."

End of that part of the quotation.

The more pertinent sentence is the second one which is wholly omitted from the Tunisian comment, namely :

> "Although not legally relevant to questions of shelf delimitation, it should be noted that the areas within which the actual, established fishing rights of Tunisia have been exercised would be on the Tunisian side of any line consistent with these two segments of general direction."

The first comment is that paragraph 525 of the Libyan Counter-Memorial is referring to the practical method suggested by Libya which suggests that, for reasons that have been and will be explained, the direction of the delimitation ultimately agreed between the Parties should veer somewhat east of north. The words used are not as in the Tunisian Reply "the northerly projection" but "this northerly projection" which is obviously and clearly referring to the northerly projection contemplated by the Libyan practical method. That there is a misinterpretation of the Libyan pleading is made apparent by the reference (51) in paragraph 2 of the Tunisian footnote to the Figure 3.01 facing page 37 of the Tunisian Counter-Memorial. That figure, it will be recalled, without any justification from the Libyan case, shows a thick brown line going due north of Ras Ajdir past the Kerkennah Islands, past Ras Kaboudia and north of Pantelleria. No such line has ever been suggested or contemplated by Libya. This in itself shows how ill-founded and ill-advised is the Tunisian accusation of perversion of the truth, so far at least as it relates to the second consideration.

I shall turn in a moment to the question of vessel arrests, of fishing vessels, but there is another point that I want to make first. It is this. The Tunisian pleading asserts : "this line cuts across the area of Tunisian historic rights." Remember please, Mr. President and Members of the Court, that this is an assertion by Tunisia of perversion of the truth. There is no merit in this assertion. It is ill-founded in so far as it appears to refer to a line – the brown line – which is not the subject-matter of the Libyan pleadings. It is also ill-founded and ill-advised because it is based on the assumption that Tunisia is

right and Libya wholly wrong regarding the question of the nature and extent of Tunisian fishery rights. In fact, as the Court well knows, these are both disputed by Libya in the present proceedings. Libya does not accept that the actual sponge banks fished by Tunisia extend to the 50-metre isobath. It may be unpalatable to Tunisia but, in the view of Libya, it is indeed true to say that any established fishery rights of Tunisia are located to the west of the kind of line contemplated in the Libyan practical method.

Now let me turn briefly to the question of vessel arrests. This is a matter with which the Agent has already dealt so far as the documentary support is concerned. Nevertheless, I would like to call attention to the insubstantial character as evidence against Libya of the list referred to in paragraph 2 of footnote 7 to paragraph 3.39 of the Tunisian Reply (IV) – that is to say the list which is set out in Annex 89 to the Tunisian Memorial (I).

(70) In the first place, the accusation of perversion of the truth is particularly ill-founded in this context because it is perfectly clear from Map No. 12 of the Libyan Counter-Memorial (II), that Libya not only has taken the trouble to plot the location of the alleged vessel arrests to the best of its ability but has also placed the results of its labours before the Court.

Secondly, the pertinent question is not simply the number of arrests that have taken place here or there. The real question is the overall effect of the arrests and the area to which they relate.

It is quite apparent that, even leaving out of account the question of Libyan practice and giving the fullest possible weight to each and every alleged arrest by Tunisia, a line drawn in accordance with the suggested Libyan practical method would in fact leave by far the greater part of the area in which Tunisian arrests are said to have taken place to the west of a possible line. But even as a matter of detail, leaving on one side the arrests that are claimed to have been effected by Tunisia to the north of the latitude of Ras Yonga, a count shows that the number of arrests to the east of a northerly line is not greater but less than the number to the west of that line. According to my count using the list in Annex 89, at its face value, in this region there were 11 arrests to the east of the line and 14 to the west. So that as regards the area where the line drawn in a northerly direction would apply even the Tunisians, it seems to me, have got it wrong when they say that over half of the vessels arrested by the Tunisian authorities were seized to the east of this line. It is, of course, not possible to be so specific about the arrests to the north of the latitude of Ras Yonga because, according to the Libyan suggested practical method, even the general direction of the line has yet to be determined.

The real point however is, not the number of arrests that have been made here or there, but the evidential value of the arrests on which Tunisia relies. As was pointed out in the Libyan Counter-Memorial, only one of those arrests affected a Tripolitanian or Libyan boat. This was the arrest said to have taken place in March 1952 about *16 milles dans le 90 de la bouée de Ras Zira*. In paragraph 123 of the Libyan Counter-Memorial (I), the approximate position of that arrest was given as 33° 27' 30"N, 11° 39'E. But, as also pointed out in that paragraph, this location was outside Libyan territorial waters and on the high seas and no notification was ever made by the Italian owner to the Libyan authorities. So, naturally, there was no protest by Libya. There was no reason why there should have been. This single incident is worthless as any evidence of the existence of Tunisian historic rights, or of Libya's acquiescence in such
(70) rights. Moreover, as is shown by Map No. 12 to which I have referred, no vessel was ever seized by Tunisia in Libyan territorial waters within the area between the due north line from Ras Ajdir and the alleged 45° bearing.

Otherwise, the alleged arrests are such flimsy evidence of historic rights that they can and should be disregarded as evidence in support of the established fishing rights of Tunisia referred to in paragraph 525 of the Libyan Counter-Memorial.

Apart from the one Tripolitanian incident, according to my calculations, of the remaining 68 incidents, 5 related to Greek vessels and 63 to Italian vessels. The point is not made clear in Annex 89 to the Tunisian Memorial (I) but no doubt the arrests of Italian vessels were in accordance with a bilateral agreement between Tunisia and Italy. There is, of course, no reason – no reason at all – why Italy should not agree to the arrest of its vessels on the high seas by Tunisia but such arrests have no pertinence as evidence of historic rights as against Libya.

The legal authority under which the proceedings were taken also leads to a similar conclusion. According to Annex 89 (if my reckoning is correct), the proceedings in the 68 or 69 incidents listed in Annex 89 were as follows:

DB 1951	15
Loi 16 oct. 1962	2
Loi 1963	19
Loi 1973	27

Only five of these refer to earlier measures. There is one, item 69, related to the circular of 31 December 1904 and five related to the Decree of 17 July 1906, including item 40 where there is an apparent slip giving the date as 27, not 17, July [but that is trivial].

When one adds to these facts the dates of the *procès-verbaux*, the earliest of which was 1950 and most of which were more recent, it is apparent how flimsy is the table of alleged vessel arrests as evidence of historic or well-established rights. I am not taking the time of the Court to detail the date of the *procès-verbaux* in each case but it is obvious that proceedings brought, for example, under the 1963, and 1973 laws, must have been subsequent to the effective date of those laws. As I have just said, there were 19 incidents under the Law of 1963 and 27 under the Law of 1973. If these arrests are evidence of anything, they are evidence of the efforts of Tunisia, especially in the last two decades, to press its maritime jurisdiction eastward.

I am sorry this has taken quite a long time but the facts and allegations involved are not without pertinence in the case itself, and I hope that in the light of this response we shall not be faced with any further accusations of perversion of the truth.

There, I hope, so far as I am concerned, I can leave buried forever the Tunisian accusation of perversion of the truth, and, so far as other aspects of the seven considerations are concerned, leave them to my colleagues. These considerations are, of course, those set out in paragraphs 524-530 of the Libyan Counter-Memorial (II), to which I would like to refer, because they support the practical method for the application of the principles and rules of international law suggested by Libya, and I am in fact very grateful to our opponents for having directed attention to those considerations.

2. Diplomatic History

I shall only refer to particular aspects that seem to be relatively important and I shall try to deal as briefly as possible with the diplomatic history. May I refer, in that connection to paragraphs 1.01 and 1.02 of the Tunisian Reply

(IV). Once more we have an attempt to brush aside all the material and considerations set out under the general title "The Historical Background" in the Libyan Counter-Memorial. It really is extraordinary to try to sweep aside all the facts and arguments which have been presented by the complaint that the elements are under the convenient title "The Historical Background", or that it is a "heterogeneous assemblage" and collection of "disparate topics". This may or may not be a valid criticism of the title chosen but it does not begin to touch the force and effect of the various parts of the case set forth by Libya under that title. I feel confident, Mr. President and Members of the Court, that you will not be in any way deterred by such an irrelevant method of attempting once more to blow aside the substance of the Libyan case by a single puff of wind as if it were so much casual thistledown. One can only regard such a method of dealing with concrete considerations as virtually an implied admission of the pertinence of the facts put forward and the effectiveness of the arguments presented.

It is noticeable, for example, that there is a complete failure to comment on the Libyan Counter-Memorial (II), Part I, Chapter I, Section 4, entitled "Relevance of the Diplomatic History" – perhaps this title is not quite right, it might better be called "The Non-relevance of the Diplomatic History", but that is another matter. That chapter is designed to restore the balance of the one-sided and slanted picture of discussions and written exchanges between the Parties presented in the Tunisian Memorial. Ambassador El Maghur has already drawn attention to a number of facts which fill out and correct the one-sided picture presented by Tunisia and there is no need for me to comment further.

In any event, as I have just stated, the diplomatic exchanges are to a large extent irrelevant to the question of shelf delimitation. There are, however, one or two aspects that have pertinence either to that question or to the significance of the positions taken by the Parties during the present proceedings. One such point which is worth emphasizing is the initial rejection of Tunisia's claims in July 1968 and Libya's reliance, even at that stage, on a northerly line. This position is substantiated by the Tunisian Memorial itself through its unilateral record of the discussions in July 1968 set out in Annex 8B to the Memorial. Part B of Annex 8 purports to state the position of the Libyan delegation. It is there stated that for the Libyan delegation the point of departure for the delimitation of the continental shelf should be the point of meeting of the 12-mile limit (the extent of the territorial sea as established by the Libyan Law of 18 February 1959) with a line starting at Ras Ajdir and running towards the north – not of course towards the northeast.

As this incomplete statement of the position of the Libyan delegation clearly shows, that delegation firmly rejected any claim by Tunisia based on a line running not northward but towards the north-east. In fact, the Libyan delegation also rejected the claim of Tunisia to a delimitation of the continental shelf based upon its claim to a fishery zone delimited by line north-east ZV 45° from Ras Ajdir and the 50-metre isobath. In this respect, the unilateral record of Tunisia is deficient but, in spite of that, the position of the Libyan delegation is clear by necessary implication from what is stated in the unilateral Tunisian record concerning the line running towards the north-east.

That Libya was not prepared to accept the Tunisian contentions regarding the delimitation of territorial waters and the extent of its fishery zones is also apparent from the fact that Libya was insisting on an agenda including "territorial waters", "fishing zones" and "continental shelf". This position adopted by Libya is made clear by the Tunisian Memorial, paragraphs 1.11

and Annex 15 to the Tunisian Memorial (I). The Annex is a note of 19 June 1972 from the Libyan Ministry of Foreign Affairs to the Tunisian Ambassador in Tripoli, which does have pertinence in this connection. According to the third subparagraph of the note, Libya was saying that the forthcoming negotiations should be concerned with three matters: delimitation of (i) territorial waters, (ii) the fishery zones, and (iii) the continental shelf. The obvious implication is that, in 1972, Libya was still not accepting the Tunisian position on any of these matters.

So that the point may not be forgotten, when I come to examine the question of petroleum legislation and grants of concessions, may I observe that the Libyan note of 19 June 1972 also stated that the new Tunisian exploration permit No. 17 was the cause of the actual difficulty and that the major part of the area concerned in this permit was situated inside the Libyan continental shelf. However, the point that I wish to stress at the moment is that at no stage did Libya accept the Tunisian contentions regarding the delimitation of the territorial sea, the fishery zones or the continental shelf.

Another aspect of the diplomatic exchanges which is of significance is the "May memorandum", that is the memorandum of May 1976 to which I have referred. This stated the position of Tunisia based on alleged historic fishing rights and the method of equidistance to which Tunisia obstinately adhered – obstinately and wrongly adhered – until the filing of its Memorial in the present case. Indeed, as we all know, in an attempt to extend its claim even further east and further south, Tunisia has abandoned the equidistance method in these proceedings. This is now common ground between the Parties.

Nevertheless, it would not be right for me to pass over in silence, forgive the word but it applies, the implausible explanation of the change in policy given by Professor Jennings. I am referring to the record (IV, pp. 422-423). I ignore the sarcastic thrust at the Libyan written pleadings and pass to the point of substance. Professor Jennings explained the change by saying that the Special Agreement refers specifically to recent tendencies of the law and that, if I understood him correctly, in the light of the law as it is developing, it was reasonably to be expected that the Tunisian case would take full account of equitable principles as they have manifestly developed within the law since the question first arose. I am not quite sure of the date to which he was referring, but presumably he meant July 1968. Mr. President, we have listened in vain for an explanation of how equitable principles are supposed to have developed since that time.

In any event, what seems to be pertinent on the basis of the part of the Special Agreement, to which he was apparently referring, are the words "as well as the new accepted trends in the Third Conference on the Law of the Sea". No doubt we have all looked at the drafts that have been prepared by the Third Conference. In the light of the various drafts concerning delimitation of the continental shelf, Article 70 in 1975, and Article 83 in the drafts of 1977, 1979 and 1980, it is impossible to find an excuse for the Tunisian change in the basis of its claim [1]. Each and everyone of those texts refers to the possibility of using "where appropriate" the median or equidistance line. Unless my reading is faulty, it is only in the current Article 83, paragraph 1[1], that we find the

[1] Informal Single Negotiating Texts: 1975, A/CONF.62/WP.8; 1976, A/CONF. 62/WP.8, Rev.1; Informal Composite Negotiating Texts: 1977, A/CONF.62/WP.10 and Add.1; 1979, A/CONF.62/WP.10/Rev.1; 1980, A/CONF.62/WP.10/Rev 2 and Rev. 3; Draft Convention on the Law of the Sea: 1981, A/CONF.62/L. 78.

express reference to equidistance omitted. To have based the Tunisian Memorial on this text would have been far-sighted indeed.

If it was considered by Tunisia that the equidistance method was appropriate in 1968 or 1976, why was it not considered to be appropriate at the time when the Tunisian Memorial was filed? The very weakness of the excuse for the change must raise questions and doubts as to the reasons for Tunisia putting forward a completely new case in the Memorial. Did Tunisia hope by this further step eastward at once to enlarge the area of Tunisian claims and the area to which Article 1 of the Special Agreement refers. At the date of the Special Agreement, so far as Libya knew, the dispute between the Parties concerned a conflict between the Libyan claim starting with a northerly line in accordance with the 1955 Law and Regulation and the most extreme equidistance claim put forward by Tunisia. What equitable principle has led to the extension of the area of Tunisia's claims considerably further to the east than even Tunisia claimed in 1976? There may be other points in the diplomatic exchanges that may have marginal relevance, but I think that the ones that I have mentioned are the most important. I would not, of course, wish to over-emphasize that importance since, as has already been said on more than one occasion, the diplomatic history in a way has no direct bearing on the question of shelf delimitation.

3. Petroleum Legislation and Grants of Concessions

It is a subject which is much closer to the heart of the matter before the Court. It is a matter on which the Tunisian written pleadings have shown remarkable sensitivity. Paragraphs 1.03 and 1.04 of the Tunisian Reply (IV) seem to try to drive a wedge, as it were, between the Libyan Petroleum Law No. 25 of 1955 and Regulation No. 1 of the same year. This in itself is a futile effort because it is plain that the Law and the Regulation, as is normal in such circumstances have to be read together. The Law without the Regulation would not operate and the Regulation without the Law would have no authority.

Having regard to the Tunisian Reply, it is again necessary to try to clarify the Libyan view of the nature and effect of the Law and the Regulation in the context of the present proceedings. Libya does not present the 1955 Law as "an act of delimitation" of the continental shelf. As we all know, in the strict sense, it could not be an act of delimitation. It could only amount to a claim to sovereign rights in certain areas. On this I do not think that there is any real difference between Tunisia and Libya if one reads carefully what is said in the second subparagraph of paragraph 1.03 of the Tunisian Reply.

While it is true that the Libyan Petroleum Law does not, is not and does not purport to be, "an act of delimitation", it does indicate in general terms the areas to which it is intended to apply. It is clearly intended to apply not only to areas of land but also to maritime areas. This seems to have been overlooked in the last sentence of paragraph 1.03, which says: "What is more Article 3 of the Law expressly concerns no other areas but areas on land."

Mr. President, let me refer to paragraph 33 of the Libyan Memorial (I), which, quoting the pertinent passage from paragraph 1 of Article 4 of the Petroleum Law, expressly says that the Law –

> "shall extend to the sea-bed and subsoil which lie beneath the territorial waters and the high seas contiguous thereto under the control and

> jurisdiction of Libya. Any such sea-bed and subsoil adjacent to any zone shall for the purposes of this Law be deemed to be part of that zone."

Tunisia, in drafting its Reply, seems to have overlooked that provision.

The text of the Law in Arabic is set out in Annex I-9A to the Libyan Memorial and an English translation of what are believed to be the relevant articles in Annex I-9B. If I may, I should now like to refer to the provisions of Articles 1 to 4 as they are found in the English translation. The reason is that it is necessary to put the regulation into the context of the law.

By Article 1, all petroleum in Libya in its natural state in strata is declared to be the property of the Libyan State. The exclusive character of the rights of the Libyan State are emphasized by paragraph 2, which prohibits any person from exploring or prospecting for, mining or producing any petroleum in any part of Libya unless authorized by a permit or concession issued under the 1955 Law. These provisions might give the impression that the Law was limited to the land territory of Libya. This would be a false impression as appears from an examination of the articles that follow.

Article 2 provides for the establishment of a Petroleum Commission. I am sorry to have to do this, but I have to do this because an attack has been made on the status of the petroleum regulation. I repeat, Article 2, provides for the establishment of a Petroleum Commission. I do not need to trouble the Court with all the provisions of Article 2 but, by paragraph 3, the Commission is made responsible for the implementation of the provisions of the Law under the supervision of the Minister. It is responsible for the grant and so forth of permits and concessions under the law. This article has to be read with Article 24 of the law, which provides:

> "The Commission shall prepare such Regulations as may be necessary for the implementation of this Law, including Regulations for the safe and efficient performance of operations carried out under this Law, and for the conservation of the petroleum resources of Libya, and shall submit such Regulations to the Minister for approval and promulgation provided that no Regulation or alteration thereof shall be contrary to or inconsistent with the provisions of this Law or adversely affect the contractual rights expressly granted under any permit or concession in existence at the time the Regulation is made or altered."

Now, Regulation No. 1 of 1955 was made in accordance with these provisions and it was promulgated accordingly. It clearly has the authority of law. I shall, however, return to this point in a moment.

Continuing with the provisions of the Law itself, may I refer to Article 3 which is mentioned in the sentence which I have quoted from the Tunisian Reply. The intent of Article 3, as its title indicates, is the division of the territory of Libya for the purposes of the Law into four Petroleum Zones. The relevant one is, of course, the First Zone which consists of the Province of Tripolitania. For some reason, which is difficult to explain, the Tunisian Reply (IV) in paragraph 1.03, has stopped at Article 3 and failed to pass over to Article 4. If there were any doubt about the meaning of the expression "the territory of Libya" as used in Article 3, any doubt is removed by the provisions of paragraph 1 of Article 4 which I have already quoted. In connection with the boundaries of the Zones, it is expressly provided that the Law shall extend to the sea-bed and subsoil which lie beyond the territorial waters and the high seas contiguous thereto. It is also expressly provided that any such sea-bed

and subsoil adjacent to any Zone shall for the purposes of the Law be deemed to be part of that Zone. Paragraph 2 of Article 4 gives power to the Commission in case of doubt to determine the boundary of any Zone for the purposes of the Law. In the light of the provisions of paragraph 1, there can be no doubt whatever that this refers to sea areas as well as land areas.

If I may now pass on to the allegation in paragraphs 1.04 and 1.05 of the Tunisian Reply, it must by now be perfectly plain that Petroleum Regulation No. 1 of 1955 was not a mere circular. The translation point has already been disposed of by Ambassador El Maghur, and in the end event it has nothing whatever to do with the boundary with which we are concerned. It remains for me to stress that the Regulation was indeed given the force of Law. As stated in paragraph 31 of the Libyan Memorial, Petroleum Regulation No. 1 was promulgated on 16 June 1955 and published, together with an official map of Libya entitled "Map No. 1", in Gazette No. 7 of 30 August 1955. A copy of the map, as published, appears opposite page 15 of the Libyan Memorial (I) and clearly shows a northerly line from Ras Ajdir – a line, it should be noted, which does not run indefinitely north but for a distance of some 63 nautical miles from the coast. Beyond that distance, the boundaries of Zone 1, and accordingly of the Libyan claim to exclusive rights to explore and exploit the petroleum resources of the continental shelf, were left undefined.

May I add just a few words further concerning the status of Petroleum Regulation No. 1. As I have just said, it was duly promulgated by the Minister of National Economics in accordance with Article 24 of the Petroleum Law No. 25. If one looks at Annex 1-9D to the Libyan Memorial, it will be seen that this fact is recited in the preamble to the Regulation and that the Minister also recites that he was acting on what had been submitted to him by the Petroleum Commission. This procedure was in conformity with Article 24 of the Law. Article 1 of the Regulation deals with the map.

I cannot do better, for present purposes, than read the words of the Regulation itself. Article 1 says:

> "There shall be an official map of Libya for the purposes of the Petroleum Law 1955 to a scale of 1 : 2,000,000 called Map No. 1, which is attached as the First Schedule hereto. On this map, the international frontiers, Petroleum Zones, and the grid shall be indicated."

Then Article 2 defines the Petroleum Zones for all purposes of the Petroleum Law. The First Zone is the only one that concerns us here. I will not read the whole of the text, which is set out in Annex 1-9D to the Libyan Memorial. It is sufficient to quote the first part of the definition, which is as follows:

> "The First Zone – consists of the Province of Tripolitania bounded on the north by the limits of territorial waters and high seas contiguous thereto under the control and jurisdiction of the United Kingdom of Libya, and on the east by 18° 50' longitude until it intersects the coast line . . ."

The references in Articles 1 and 2 to "the international frontiers" and "the high seas contiguous to the limits of territorial waters under the control and jurisdiction of the United Kingdom of Libya" makes it absolutely clear that the Regulation is dealing, not only with land territory for purely internal purposes, but is also dealing with the international frontiers claimed by Libya extending to the contiguous high seas under the control and jurisdiction of Libya. The northern boundary of the Zone is not otherwise defined, but the western

boundary is defined by reference to the border of Tunisia. From the point where the line of 31° latitude reaches the border of Tunisia the western boundary of the Zone runs "in a general northerly direction along the international boundary". If one reads this definition together with Article I and Map No. I of the Petroleum Regulation, the implication of continuation of the general northerly direction of the international boundary is made clear for all the world to see. This is the boundary line that Libya was claiming in 1955 and it is the basis, in part, of the practical method submitted to the Court in the present proceedings. It is the line which Libya, for sound reasons, believes is the proper one today.

Having regard to the provisions of the Petroleum Law and the Regulation read together, the northerly line cannot be regarded otherwise than as a claim to a continental shelf boundary, at least as far west and as far north as indicated on the map. In that sense, the Law and the Regulation, of course, did not create an "international boundary", because such a boundary could not be created by a single unilateral act. As paragraph 1.05 of the Tunisian Reply (IV) says "The only 'international boundary' existing at the time was of course the land frontier". And, in the sense of a defined and agreed boundary this is quite clearly so.

As no doubt the Court will assume, I am making no "important admissions" with respect to the paragraphs of the Tunisian Reply that I am discussing at the moment, but for the sake of safety perhaps I should mention that the significance of the international boundary, that is to say the land boundary, and the generally north-south direction of that boundary as described in the Boundary Treaty of 1910, will be examined later, by my colleague, Professor Malintoppi.

Now, if I may turn to another aspect of the situation, we do not naturally accept the conclusion stated in paragraph 1.06 of the Tunisian Reply, concerning the factual and legal position or the motives attributed to Libya. It is clear that the Libyan view of the 1955 Libyan petroleum legislation is the correct one and it is also clear that the Tunisian purpose throughout has been to try to push its control and jurisdiction further and further eastward and southward either through the grant of petroleum concessions or otherwise.

In paragraphs 1.06 to 1.10 of its Reply, Tunisia tries to blur the clear picture of its eastward (and southward) push. The grant of petroleum concessions is only one element of this progression. However, the attempt of Tunisia, even in this connection, to blur the picture can easily be seen to be contrary to the real position.

I do not want to place too much emphasis on the question of the grant of petroleum concessions. This, again, is, in a sense, a matter of secondary importance. The history is a little complicated, and I would refer in this connection to the Libyan Counter-Memorial, paragraphs 31 to 37, where it is indicated. Nevertheless it is necessary and desirable that the Court should be given as clear and correct a picture as possible. For this purpose, I should like to try to indicate chronologically the story of the grant of concessions with the aid of a map which I shall have put on the easel.

The meeting adjourned from 11.15 a.m. to 11.30 a.m.

Mr. President, before the interval I was about to try to put into very clear and simple form the story of the grant of oil concessions and for this purpose I now have on the easel behind me a map which is the basic map that has been
(121) used by Libya for the purpose of the written pleadings and which is in the map

folder, which has been provided on behalf of Libya for each of the Judges. It is a very pretty and colourful picture but that is not a point on which I rely in itself.

On this map the concessions have been indicated by rather brilliant, and I hope, distinctive, colours. What I hope to do is to indicate the steps by which, as it were, the grant of concessions has developed – with the aid of the map behind me. In order to show the progression of concession grants, I am going to use the help of overlays and in due course the original of this map with the overlays will be placed in the Registry of the Court so that it can be examined in conjunction with the small map in the folder before the Court.

Now, the first area to be covered is shown in orange. Without going into undue detail I shall, for convenience, call this the Tunisian 1964/65 concessions. It shows the position as it was, as we understand it, at the end of 1965 – this is the orange area which I hope is visible to all Members of the Court. The points that I should like to call to the attention of the Court with respect to the extent of these concessions is their limited area, then the fact that they are not noticeably related to the 50-metre isobath or to the 45° line. But perhaps the most significant fact is the length of boundary, which is quite obvious, which runs, actually due north, from Ras Ajdir.

Now the next step was the grant in 1966 of another concession by Tunisia, the area of new concession adjoined or really dove-tailed into the area of the 1964/65 concessions. This area is shown in red, it's been added. Now this time it is quite clear the area stretches south towards Ras Ajdir. The main point to which I would like to call attention is the eastern boundary of this area (121) which, in a general sense, although a zigzag, follows a direction of 26° from Ras Ajdir. Again it is difficult to see any relationship between this concession and the bathymetric lines on which Tunisia has relied, even in terms of the area being more accessible because the water is shallower. Certainly there is no use again in this concession of the ZV 45° or the 50-metre isobath.

It is at this stage that Libya enters on the scene. Early in 1968, I think it was in April, Libya granted Concession No. 137. The area of this concession is shown in yellow on the overlay. This is the area which now appears to run generally parallel on the western side with its western boundary generally at (121) 26° from Ras Ajdir. One thus had the situation in which there were two concessions granted respectively by Tunisia and by Libya with virtually a common boundary. Theoretically there were little gaps, of course, but virtually a common boundary.

There then followed the resulting discussions in July 1968 to which I shall refer and which are recorded in the Tunisian unilateral record in Annex 8 to the Tunisian Memorial (I). Well as is known, largely because Tunisia was not prepared to discuss the territorial sea lateral boundary or other maritime boundaries, the talks were deadlocked from the beginning. That was the position at the end of 1968.

There were no further steps until Tunisia granted (I obviously mean no further steps in the grant of concessions) Concessions Nos. 8 and 9. I think that this was in 1972. The whole area, and it's a large one, is shown by the (121) overlay in olive green. The area of these concessions, that is Nos. 8 and 9, speaks for itself. It must be obvious that with such an extension eastward, even north of Tripoli, Libya could not possibly sit back and do nothing about the grant of a Tunisian concession extending, as this one did, so far south and so far east. Now it is happily not necessary for me to fill in the political background of that period which has already been described by Ambassador El Maghur. The fact is that, in 1974, Libya granted concessions also covering

large areas which are shown by the overlay in blue. The western boundary was an extension of the 26° western boundary of Concession No. 137. Of course, the obvious result was that concessions were granted by Tunisia and by Libya covering the same area. This is shown by the darker area both on the (121) large map and on the small map in the folder. On the map in the folder the darker area comes out in a sort of green colour. The overlap is in a way much clearer on the overlay, but it is in either case the darker area that is the area of overlap.

Well, if this was the concession situation as it existed in 1977 at the date of the signature of the Special Agreement, it shows the clearest possible eastward thrust by Tunisia in the grant of its concessions and it shows the self-restraint of Libya in following the 26° line from Ras Ajdir. It certainly did not mean that Libya was in any way abandoning its claim to a line which, at any rate, went from Ras Ajdir northerly in accordance with the map which was published with Regulation No. 1 (I, p. 467).

There might be a temptation to say that this does not matter, because in the paragraphs of the Reply to which I have referred, Tunisia has tried to play down its responsibility for the grant of concessions and at the same time to paint a picture of a kind of self-righteousness in granting them. There are various comments that might be made on this approach. These comments are perhaps somewhat diverse but, having regard to the positions taken by Tunisia in paragraphs 106 to 110 of the Reply, some comments have to be made.

First, it will be seen that the initial grant of a concession made by Tunisia, as shown on this map, Map 11, was bounded on the east by the line running in a direction north from Ras Ajdir. That Tunisia was aware of the significance of the grant of concessions and the risk of conflict in this connection with Libya is exposed by the unilateral record of the discussions in July 1968, which is set out in Annex 8 to the Tunisian Memorial. The passage in question is the first paragraph in that record under the heading "A – Position de la délégation tunisienne" (p. 23 of Annexes to the Tunisian Memorial (I)). I apologize that I have to read the passage in French but I only have the text in French and therefore, in spite of my terrible accent, I shall have to inflict it on the Court.

> "La délégation tunisienne a précisé qu'elle n'était pas venue en Libye pour discuter des frontières maritimes tuniso-libyennes, mais plutôt de coordination pour l'exploitation des richesses minérales sous-marines, situées en haute mer, c'est-à-dire de la délimitation du plateau continental, du fait qu'une société étrangère a signé avec nos deux pays des conventions ayant pour champ d'activité des régions maritimes voisines."

(121) That is a clear reference to the two concessions (red and yellow) on the map of the grant of concessions and surely shows out of the very record of Tunisia itself the significance which Tunisia attached to the grant of those concessions. Both these concessions, it may be noted, were to the French company, Aquitaine, and as I have just said, not only does it show that Tunisia was fully aware of the grant of the concession by Libya, but it also shows that Tunisia was fully aware of the significance in connection with the problem of the delimitation of the continental shelf of the grant of concessions.

The application by Aquitaine was naturally made in accordance with the Petroleum Law of 1955 [that is the application to Libya] and the Regulation made thereunder. There can be no doubt that Aquitaine had made itself familiar with the requirements of the law under which it made its application. In these circumstances, as has already been stated in the written pleadings, it seems incredible that Tunisia was not, if indeed this is alleged to be the case,

fully aware of the Libyan legislation including the Regulation and that means fully aware of the Libyan claim to a continental shelf boundary running to the north.

Another point that emerges is that the applications by Aquitaine were made by the Company to Tunisia and Libya respectively, and, of course, made in accordance with their respective laws. Tunisia has tried to make play with the provision of its law under which applications were made by companies with respect to certain areas. It has referred in this connection to Article 37 of the Tunisian Decree of 1 January 1953, which incidentally is not included in the extract from the Decree in Annex 1 to the Tunisian Reply. However, it appears that all that the article does is to define the grid system, and that the article is not in itself of any significance. But, just as applications for concessions are made by oil companies to Tunisia, so are they made by oil companies to Libya. If I may again refer to Annex I-9B to the Libyan Memorial (I) it will be seen from Articles 5 and 6 of the 1955 Petroleum Law that applications may only be submitted by eligible applicants, and that the applicant has to submit the application to the Commission making separate applications in respect of each petroleum zone. Incidentally special attention is thereby called to the boundaries of the respective petroleum zones. Paragraph 2 of Article 6 requires that the applications shall show the area the applicant desires to work. Thus, there does not seem to be any material difference in this respect between the law and practice in Tunisia and Libya. I suggest that it is pointless for Tunisia to try to brush off responsibility for the grant of concessions by saying that the applications came from the oil companies, and that it was left to the oil companies to define the limits of the concession areas in their applications.

The fact is that, whether the areas are initially designated in the application of the companies or not, the grant of a concession is an act of the State by which it asserts the right to grant a concession for the exploration and exploitation of the resources of the continental shelf to the company to which the concession is granted. This is the significance of the grant of concessions which is applicable both to Tunisia and to Libya. A concession, of course, is not a unilateral act of delimitation of the international boundary of the continental shelf. It does, however amount to a claim by the State granting the concession to the right to do so in the area to which the concession applies. It is in this sense an assertion of sovereign rights. It does not limit the claim of the State to the boundaries indicated in the concession but it does amount to a claim up to the limits of the boundaries of the concession. So whatever the source of the application, the grant of concessions by Tunisia, which are well illustrated on this map, does establish the ever-increasing eastward stretch of its claims. Be that as it may, Tunisia cannot deny full responsibility for the even more extreme claim put forward for the first time in its Memorial to a boundary as indicated by the sheaf of lines shown, for example, on the map (38) (Tunisian Memorial, Fig. 9.14) and I am referring to the French version.

That perhaps is the crux of the matter.

Now comes, in connection with the granted concessions, what I am tempted to call the crown of arrogance. In the paragraphs of the Reply to which I have referred, Tunisia says that it only granted concessions in areas which were indisputably Tunisian, even to the extent, in the case of concessions further to the east, of defining the boundary by reference to an equidistance line, and, naturally, whatever boundary might ultimately be agreed with Libya. There is, of course, an element of self-contradiction in these assertions because they refer partly to the so-called indisputable rights of Tunisia and at the same time

to a boundary to be agreed with Libya. Ultimately, it is surely the latter that must govern. However that may be, the point that I wish to make at the moment is that the concessions themselves, in spite of the position taken by Libya, extended, albeit on a provisional basis, to a so-called equidistance line. Now Tunisia is trying to push even further eastward and southward on grounds put forward for the first time in the Tunisian Memorial.

I cannot and will not try to unravel the Tunisian motives for advancing this claim for the first time in its Memorial. But Tunisia has characterized the Libyan claim as amounting to one-way equity. The same can certainly be said of the Tunisian sheaf of lines, except that it leaves virtually no room for the application of equitable principles – only the principle of natural prolongation for reliance on which Libya has been so heavily and illogically criticized by Tunisia. It is a very odd situation that this accusation has in effect been turned upside down by the very argument put forward by Tunisia. Of course, Libya wholly rejects the exaggerated and unreasonable claim by Tunisia and relies on the case as presented in a positive fashion as objectively as possible in the Libyan written pleadings, as explained and amplified during the present oral hearing.

This brings me to the end of my observations on the facts, or what might generally be called the historical background, and I now turn to a consideration of the legal questions which constitute the matter directly before the Court.

4. The Special Agreement

The Special Agreement submitting the matter to the Court is the basis of the Court's jurisdiction in the present case. Interpretation of the Agreement has been examined in the written pleadings of both Parties and I would respectfully refer the Court to the relevant parts of the Libyan pleadings (Libyan Memorial (I), paras. 2-8 ; Libyan Counter-Memorial (II), paras. 416-435 ; Libyan Reply (IV), paras. 99-103). Nevertheless, as the question of interpretation has been discussed at some length in the Tunisian oral argument, particularly by Professor Abi-Saab, I should like to take a fresh look at it in the light of factors which have emerged in the course of the written and oral pleadings. I do this not so much from the point of view of either Party ; I do this more to try to ascertain as objectively as possible the nature of the matter submitted to the Court and its true significance. I think that this is very important. There is no intention whatsoever either to limit or to expand the role of the Court. My intention is simply to try to assist the Court in arriving at a proper interpretation. This objective is of prime importance both from the point of view of the Court and from the point of view of the Parties. It is obviously vital that the Court shall carry out the role duly assigned to it by the Agreement ; it is equally vital that the Parties shall both be satisfied that the Court has done this. It is not in the interests of the Court or of either Party that we should try to persuade the Court to adopt a distorted or one-sided view of the meaning of the provisions of the Agreement.

For this reason, I think that it is desirable at this stage to start from first principles and to look carefully at the language of the Agreement itself. Underlying the whole question of delimitation of the continental shelf are certain basic principles which have been widely accepted by States both in practice and as principles of law. Probably the most fundamental of these principles is that delimitation is to be settled by agreement. This principle has been expressed both in Article 6 of the Geneva Convention on the Continental

Shelf and in Article 83, paragraph 1, of the August 1980 version of the draft convention prepared by the Third United Nations Conference on the law of the sea (A/Conf.62/WP.10/Rev.3 and Corr.1). It also appears in what seems to be, if I may use the term, a consensus version of Article 83, paragraph 1, approved for the draft convention on the law of the sea (A/Conf.62/L.78 of 28 August 1981), in August 1981. The text so approved reads as follows, and I read it because I think it has not yet been placed before the Court :

> "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

It is difficult to think of a clearer statement of the principle than is contained in what is now the latest text of the draft convention on the law of the sea and the statement clearly says that delimitation of the continental shelf shall be effected by agreement.

The basic principle of delimitation by agreement was also recognized and confirmed in the Judgment of the Court in the *North Sea Continental Shelf* cases. It is perhaps not too early in my remarks to mention one of the most important passages in the Judgment of the Court. And if I may, I will quote the whole of the first sentence of paragraph 85, which appears on page 46 of the Judgment *(I.C.J. Reports 1969)*; I think it is useful to have this before the Court and the Parties as part of the record of this oral hearing. The passage reads as follows :

> "It emerges from the history of development of the legal régime of the continental shelf, which has been reviewed earlier, that the essential reason why the equidistance method is not to be regarded as a rule of law is that, if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which, as has been observed in paragraphs 48 and 55, have from the beginning reflected the *opinio juris* in the matter of delimitation ; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles."

The two essential principles here mentioned by the Court are that delimitation must be the object of agreement between the States concerned and that such agreement must be arrived at in accordance with equitable principles.

It is against the legal background of these two basic principles that the interpretation of the Special Agreement in this case should be examined. There is nothing wrong in leaving the delimitation to be settled by agreement between the Parties. Indeed, this is in accordance with the basic principle stated by this honourable Court itself. Accordingly, when we say that it is not part of the function of the Court in this case to go so far as to settle the question of delimitation itself but to leave that to the Parties, we are presenting a view which is in accord with international law and which leaves to the Court and the Parties, respectively, a proper role.

It is with some hesitation that I venture to revert to Article 1 of the Special Agreement. But it is necessary to do so in order to develop one or two points that do not seem to have emerged clearly in the course of the written pleadings. As I have said, I am trying to examine the provisions of the Special Agreement as objectively as possible, and for this purpose it is necessary to adhere as

closely as possible to the words of the Agreement itself. I am assuming that the English translation is a faithful reflection of the original Arabic in the form in which it was submitted to the Court under cover of the letter of 14 February 1979 from the Secretary of Foreign Affairs of Libya. If there are still any questions of translation outstanding, these can no doubt be disposed of by those among the Members of the Court and the delegations of the Parties whose mother tongue is Arabic. Let me make it clear, however, that we do not accept the insertion of the words *avec précision* which the Tunisian delegation has tried to revive.

Well, turning to Article I of the Agreement, the Court is requested to render its Judgment in a defined "matter". It may not be at first sight of much significance that it is a single matter and not two separate questions that is submitted to the Court for its Judgment. If one adheres to the word "matter", which is used in the text, one sees the two paragraphs that follow in proper perspective. The first is related to the principles and rules of international law, and the second is, as it were, an extension which asks the Court, as a further request, to clarify the practical method for the application of these principles and rules in this specific situation. May I in this connection interject that when for convenience I have been using the expression "practical method" I have been using that in the sense in which it is used in the Special Agreement in the language to which I have just referred. I do this so that there should be no misunderstanding. I am not talking about a method of delimitation or anything like that.

The primary task for the Court under Article I is to state what principles and rules of international law may be applied for the delimitation of the area of the continental shelf appertaining to Libya and the area of the continental shelf appertaining to Tunisia. This is *par excellence* a judicial task purely in the legal field. The Court is asked to state for the benefit of the Parties the principles and rules of international law that may be applied by them. The rules are then to be applied by the Parties for the delimitation of the areas of continental shelf already appertaining to Libya and to Tunisia respectively. There can be little room for doubt that this part of the first subparagraph of Article I was drafted with one eye on the submission to the Court in the *North Sea Continental Shelf* cases and to the Judgment of the Court in those cases. Accordingly, Article I is not concerned with the question of ascertaining which areas appertain to the two States. I would like to repeat that. Article I is not concerned with the question of ascertaining which areas appertain to the two States. Still less is it concerned with the division of the area into equitable shares. This is, I think, common ground between the Parties. Although I thought I detected some shades of confusion in the speech of Professor Jennings in this connection, I feel sure that he does agree that the Special Agreement is concerned not with sharing on a basis of equity, but with delimitation in accordance with equitable principles.

This point is made clear by the second part of the first subparagraph which asks the Court to take its decision "according to equitable principles and the relevant circumstances which characterize the area as well as the new accepted trends in the Third Conference on the Law of the Sea". In my submission, this provision does not, and indeed could not, bind the Court as to the principles and rules of international law which it is asked to state "may be applied for the delimitation". Its function is to call the attention of the Court to certain matters which the Parties desired the Court to take into account in taking its decision, and by "decision" in the context I assume that the Agreement means Judgment, as in the introductory words of the Article.

This is my general approach to the second part of the first subparagraph. However, I do not believe that the practical effect is the same with respect to each of the factors mentioned. First the Court is asked to take its decision according to "equitable principles". As I have just recalled, the Court itself, in the *North Sea Continental Shelf* cases, paragraph 85, stated that agreement in accordance with equitable principles was among the basic principles concerning delimitation. Therefore, it must be the case that the Court would reach a decision according to equitable principles whether this provision was contained in Article 1 of the Special Agreement or not. It is not for me to discuss here the role of equitable principles in the present case : this is a matter which is to be dealt with by my distinguished colleague, Professor Briggs. If the function of the reference to "equitable principles" is comparatively easy to discern, the same is not necessarily true of the reference to the relevant circumstances which characterize the area. These words need to be examined a little more thoroughly.

Therefore, I should like to leave that on one side and say a few words about the final phrase, which is "as well as the new accepted trends in the Third Conference on the Law of the Sea".

The reference in itself is quite clear. I think that it is equally clear that the Court cannot be bound to regard as principles and rules of international law new trends merely because they have emerged during the Third Conference on the Law of the Sea. To be effective for this purpose, they must be, in the words of the article, "new accepted trends", but I think one has to go a step further for the purposes of the establishment of new rules of customary international law. So that in this context, I would ask the Court to read this as meaning "generally accepted" in the sense that the trends have become part of customary international law. The mere fact that a newly stated rule or principle is contained in the latest draft produced by the Third United Nations Conference on the Law of the Sea is not, I suggest, in itself sufficient to convert that rule or trend into a rule of customary international law. I think that this is elementary and I think it must be right. Again, it is not for me, at this moment, to embark on an examination of the fruits (ripe or unripe) of the Third United Nations Conference on the Law of the Sea.

I will leave the slightly difficult point that I have just been discussing and turn to the significance of the words "the relevant circumstances which characterize the area". These are the words which invite the Court, in stating the principles and rules that may be applied, to examine the factual aspects. But what facts are comprised within the words which I have just quoted ? This is not an easy question to answer. It would be difficult to define in the abstract what are "the relevant circumstances which characterize the area". Nevertheless, it may be observed that the words do not refer to any "circumstance", but only to the relevant circumstances, that is to say those relevant to the delimitation.

I suppose in a loose sense, it may be thought that what is relevant is a question of degree. It would, however, be more accurate to say that a fact is either relevant or it is irrelevant ; but if facts are regarded as relevant, the weight or importance to be attached to them may vary and this may be a significant distinction in the context of the present case. The Court may well take the view that a number of facts or circumstances are relevant but that the same weight or importance does not attach to all of them.

As explained with precision in paragraph 69 of the Libyan Reply **(IV)** we do not accept the kind of scale of relevance which is suggested by the Tunisian scientific experts on page 14 of Annex 1 to the Tunisian Counter-Memorial

(II). The suggestion of a scale of relevance is confusing : it tends to distract from the real issues. But, as will become clearer and clearer during the course of the present oral hearing contrary to what seemed to be the view of Tunisia at an earlier stage, geology – including what might be called deep geology – is relevant and most important with respect to the natural prolongation of Libya and Tunisia in the specific situation of the present case. At the other end of the "scale", it may be said that with reference to natural prolongation something such as the existence of a sponge bed is so insignificant as to be virtually of no relevance to continental shelf delimitation.

In the present instance, the text itself does provide some guidance as to the circumstances relevant to delimitation. This is found in the words "the relevant circumstances which characterize the area". Grammatically, the area would appear to refer to the area of continental shelf comprised in the areas appertaining to Libya and to Tunisia. Accordingly, the circumstances appear to be those which actually characterize that area : mainly, no doubt, its physical characteristics but also, I suppose, its legal or what have been called political characteristics.

In other words, the physical factors, be they geological, relating to the subsoil, or geographical or morphological, relating to the surface, are among the circumstances which the Court is asked to take into account. Libya does indeed maintain that, in the present case, the geological factors are the most important. The weight of the evidence is in that sense. Even if the facts may seem difficult or complicated or the evidence is voluminous, that is no reason why the Court should cast it on one side as Tunisia in effect asks as irrelevant or unimportant. In the context of petroleum resources, which are at stake here, the geological factors are indeed of prime importance.

It would be pointless at this stage to try to list all the circumstances or facts that may be relevant. However, as the continental shelf is the natural prolongation of the land territory of a State, the land boundaries of a State are clearly relevant to delimitation. This is, I think, common ground between the Parties. They determine the points on the coast from which the natural prolongation of the continental shelf (at least in a physical sense) begins. Similarly, the lateral boundary dividing the territorial sea of two adjacent States must also at least be a relevant factor because the continental shelf will continue seaward along the line of delimitation of the territorial sea to the point where it reaches the outer limit of the territorial sea. Now I know I shall be told you have forgotten that the continental shelf begins legally at the territorial sea limit, but in the physical sense – in the actual sense – there cannot be a gap between the shoreline and the territorial sea. Therefore effectively the continental shelf must continue seaward from the coast to the outer limit of the territorial sea and the boundary delimiting the territorial sea must be a relevant factor. These are factors which are clearly relevant to delimitation. The factual situation is one of which the Court is bound to take cognizance. If one may try to visualize the judgment of the Court, it is difficult to imagine that the Court could fail to relate the facts including those of political geography. Such facts are clearly relevant. But it does not follow that the Court is given a mandate to make a binding determination on such matters if they are in dispute.

I may be wrong in this analysis but it seemed to me that it was in the interests of the administration of justice that I should at least make an attempt to try to clarify the position on this point.

The problem that I have raised is inherent in the circumstances of this case. It is indeed one of the aspects of the matter which will make the guidance of

the Court so helpful in assisting the Parties to arrive at an agreed settlement without any difficulties.

The importance of the relevant circumstances which characterize the area in this particular case is underlined by the obvious link with the second subparagraph of Article 1, which asks the Court "to clarify the practical method for the application of these principles and rules in this specific situation". The specific situation must comprise the relevant circumstances and be related to the area in question. It is the circumstances of this particular case which are important in the context of the practical method, and I submit that, in the circumstances of the present case, the geological factors are of prime importance. They cannot therefore be ignored either by the Parties or by the Court and must be taken into account in the delimitation in this specific situation. I am happy to note that in the Tunisian oral pleadings the references to geology have tended to expand.

However, that is not the main point that I would like to make on subparagraph 2. The view has already been expressed on behalf of Libya that there is here one question rather than two. (In this respect I refer the Court to the written pleadings – the Tunisian position as stated in their Memorial (I), paras. 2.03-2.27, and the response in the Libyan Counter-Memorial (II), paras. 433-435). A quick glance at the actual language used will reveal why. The Special Agreement says, in the second subparagraph of Article 1, "the Court is further requested to clarify the practical method for the application of the principles and rules in this specific situation".

Why do I stress "for the application of the principles and rules" ? It is, quite simply, because the "practical method" to be clarified is not, in the terms of the Special Agreement, a practical method of delimitation, as persistently repeated by members of the Tunisian delegation. It is a practical method for applying legal principles and rules in this specific situation so that a delimitation may then result, as being agreed on by the Parties and their experts.

The difference is not without a distinction. It may be that in any delimitation of shelf areas between opposite or adjacent States an almost infinite number of methods of delimitation could be devised. But they would not necessarily bear a relationship to or stem from an application of the legal principles and rules relevant to continental shelf delimitation.

If we look briefly at the nature of the requests put to this Court in the *North Sea Continental Shelf* cases and the Court of Arbitration in the Channel arbitration, the distinct nature of the Special Agreement in this case becomes apparent. For the Parties here agree that the Special Agreement has asked the Court to go further than to indicate the applicable principles and rules alone as in the *North Sea Continental Shelf* cases. Similarly, the Parties share the view that the Court has not been asked to draw the actual delimitation line – which would in effect be the same as to indicate the precise method of delimitation – as was the case in the Anglo-French arbitration, although, as we shall see later, Tunisia would have the Court come very close to doing just this.

In a sense, the Special Agreement in this case falls half-way between those in the *North Sea Continental Shelf* cases and the Arbitration Agreement in the Anglo-French arbitration. For, in clarifying the practical method for the application of the principles and rules, the Court has been invited to indicate the additional considerations and factors which should be taken into account and weighed and balanced, so that the experts can "delimit these areas without any difficulties". But the Court has not been invited to set out the specific method of delimitation itself.

It is not necessary for me at the moment to examine the remaining

provisions of the Special Agreement. The point that emerges from the examination of Article 1 is that the Court is concerned essentially with the principles and rules of international law, and is concerned with them for the purposes of a delimitation by the Parties in the specific situation of the present case. This naturally leads me to an examination of the principles and rules of international law, not in general and in the abstract, but ultimately as they may be applied by the Parties in the specific situation of the present case.

5. Principles and Rules of International Law

It is my intention, in due course, to do this both generally and having regard to their application in this specific situation. I should like to observe at the outset, however, that it is difficult to divide one's remarks into neat and logical compartments because the various aspects of the question of the continental shelf and its delimitation are so intimately inter-connected. But there are different aspects which need to be distinguished quite clearly.

First, there is the character of the continental shelf, of which the essential characteristic is natural prolongation. Secondly, there is the question of the outer limit of the continental shelf, which is a different question. Thirdly, there is the question of delimitation which, in the present instance, is a delimitation of adjoining continental shelf areas as between States with adjacent coasts. In the presentation of the Tunisian case, there has been some confusion between the nature of the continental shelf as such and the criterion, or criteria, established for its outer limit. It seems to me that this confusion has led Professor Jennings, for example, into a slight tangle between the role of fact and law in the concept of natural prolongation (what he seemed to regard as a mixed question of fact and law – I refer to **IV**, p. 415 and pp. 416-417. It also seems to have led to some misunderstanding about the relative importance of bathymetry. I would, however, subscribe to his statement that the "juridical continental shelf is primarily based upon physical fact". (That appears at **IV**, p. 416.) But that physical fact is, of course, "natural prolongation".

Development of the concept of the "continental shelf"

I think it is now necessary to examine the development of the concept of the continental shelf. I will do this very briefly.

As we all know, the introduction of the legal régime of the continental shelf virtually began with the Truman Proclamation of 28 September 1945. It was related to a continent which unquestionably had a continental margin. There was, so far as the United States and the Truman Proclamation were concerned, no need to go into the question of continuity or natural prolongation. The fact of the continental shelf was easy to see and even self-evident.

However, as the claim to exercise jurisdiction and control with respect to the resources of the sea-bed and subsoil beyond the territorial sea inevitably involved some interference with the old concept of the freedom of the high seas, it was necessary to devise some limit to the extent of the continental shelf. The Proclamation itself made no provision for an outer limit. However, a White House press release issued on the same day said that submerged land contiguous to the continent and covered by no more than 100 fathoms of water was considered as continental shelf. No reason was given for this somewhat arbitrary limit, although the Proclamation was made in the context of prospective oil and other mineral resources in the continental shelf.

The press release made this interesting comment: "It is quite possible,

geologists say, that the oil deposits extend beyond this traditional (three mile) limit of national jurisdiction". A hint as to the reason for the choice of the 100-fathom line was given by a reference to the possibilities of developing technology.

The mainspring of the Proclamation was the need for new resources of petroleum and other minerals. From the beginning, the practical question was one of recovering oil and gas resources from the subsoil of the continental shelf. These were resources found in the subsoil and not on the surface. There was no question whatever of the nature of the shelf being made dependent on a gentle slope as indicated by bathymetry. The practical question was what was regarded as the reasonable maximum depth at which the subsoil of the continental shelf could be explored and exploited. This was a question not of natural prolongation but a question of outer limit.

The Truman Proclamation caused a good deal of heart-searching in many of the capitals of the world. It posed what was for most international lawyers a novel theory with correspondingly novel problems. It did not fit neatly into any existing concepts of sovereignty and the acquisition of sovereignty or into concepts relating to the law of the sea. Nevertheless, it was soon recognized that the doctrine had come to stay.

Initially, many people thought that the doctrine could only have application to a continent with a continental margin in the strict or technical sense. But it was soon accepted that the doctrine need not be confined to cases where there was a continental margin in that sense. For example, it may be said that, in the technical sense of a shelf, a slope and a rise, there is no continental shelf between the United Kingdom and France in the English Channel. It may also be said that, in that sense, the sea-bed and subsoil of the North Sea between the United Kingdom and Norway and other countries is not a continental shelf. So it was inevitable that the doctrine should be extended so as to apply in such areas, although there might not be a continental shelf in the same physical sense in which physically there is a continental shelf along the seaboard of the east coast of the United States.

The Truman Proclamation was followed by a number of countries which claimed rights over continental shelf areas. It will be recalled that in the early days there were differences of view as to whether States should have full sovereignty over the sea-bed and subsoil of the continental shelf or whether they should simply have jurisdiction or control or exclusive rights for the exploration and exploitation of the continental shelf. As is so well known, the result was not in favour of sovereignty or of mere exclusive rights to resources. The coastal State was, according to Article 2, paragraph 1, of the 1958 Geneva Convention on the Continental Shelf, to have sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources.

Different views also emerged as to the criteria for determining the outer limit of the continental shelf. It was in the context of this question that, following the work of the International Law Commission, a 200-metre line emerged in Article 1 of the 1958 Geneva Convention. However, this limit was an arbitrary one; as with the 100-fathom line in the United States claim of 1945, the rationale of the limit was the current state of technology, not bathymetry as such. The 200-metre limit was moreover qualified by the exploitability test provided in Article 1. Thus, bathymetry, in the sense in which Tunisia tries to use it, never has been a characteristic of the "juridical continental shelf".

If our time were unlimited, I would like to go fully into the development of the concept of the continental shelf in international law. This would obviously

include, as a major portion, the story of the preparation of the draft articles on the continental shelf by the International Law Commission. But to tell this story would create a major diversion and I shall only address myself to the short reference that was made by Professor Jennings (IV, p. 407). He used the reference to page 131 of Volume I of the *Yearbook of the International Law Commission* for 1956, which was made in paragraph 95 of the 1969 Judgment, as implying that the Court understood, or rather misunderstood, the meaning of geology as referring to the "degree of declivity or slope or depth below sea level". It is true that the definitions adopted by the International Committee of Scientific Experts of 1952 had been in such terms. But it is equally clear that these definitions were not actually adopted by the International Law Commission for the purposes of its draft articles. In its draft Article 1, paragraph 1, the Commission was, in any event, defining "submarine areas" and doing this so as to apply to the soil and subsoil of "the submarine shelf, continental and insular terrace, or other submarine areas". These terms only correspond in part to the terms used by the Committee of Experts.

The Commission was not in the least concerned with slope or declivity. It was concerned with establishing an outer limit to the "submarine areas", using the 200-metre and exploitability test. The expression "submarine areas", corresponded to the term "continental shelf" used in the Convention. May I also call attention to the fact that the draft article was concerned with the soil and subsoil, not just the surface, and it was also particularly concerned with the natural resources referring to "the mineral riches of the soil and subsoil of the submarine area, as well as to the living resources which are permanently attached to the bottom".

Of course in Article 1 of the 1958 Convention, the expression "continental shelf" was restored to the definition, but the reference to "the submarine shelf, continental and insular terrace and other submarine areas" was omitted, and we arrived at the general concept of the juridical "continental shelf" as referring to the sea-bed and subsoil of the submarine areas. The expression "submarine areas" was clearly used without any reference to any question of declivity or slope or depth below sea level, except with respect to the outer limit.

If I may now return to the apparent criticism of the Court in its misunderstanding of the term "geological" in paragraph 95, I think that it is clear enough that the reference made by the Court was only to the care which the International Law Commission took to acquire information : it was not really suggesting that geology was to be limited by the character of the definitions drawn up by the Committee of Scientific Experts

If there were any doubt on that point, it is removed by the final sentence of paragraph 95 of the Judgment, which says :

> "The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong."

Well, I suggest it is abundantly clear that in this sentence the Court is referring to subsurface geology rather than what might more properly be called, bathymetry or geomorphology.

The Court rose at 12.55 p.m.

EIGHTEENTH PUBLIC SITTING (1 X 81, 10 a.m.)

Present : [See sitting of 29 IX 81.]

Sir Francis VALLAT : Mr. President, when the Court rose yesterday I had just referred to paragraph 95 of the 1969 Judgment in the *North Sea Continental Shelf* cases and I was referring particularly to the use of the word "geology" in that paragraph. I should now like to return to the development of the concept of the continental shelf.

The problem from the beginning, as I have said, has been one of determining the outer limit of the shelf. It seemed to me that this came out with remarkable clarity from the remarks made by Professor René-Jean Dupuy on Friday, 18 September. I need not go into those remarks now but I will give the reference. It is to IV, pages 477-478.

Up to this stage 1958, there had been little consideration and little need to consider the question of the actual nature – the true nature – of the continental shelf in its physical as well as its legal sense. In most cases, the continental shelf is obviously a physical extension of the land territory, and either there is a continental margin appertaining to the continent or, as in the Channel and the North Sea, there is a common area which physically might be regarded as appertaining to either of two opposite States. It is not surprising, therefore, that, in the majority of cases, it has been found appropriate to effect delimitations by the equidistance method or, as in the United Kingdom/France Arbitration of 1977, some adaptation of it. But this does not answer the question as to the nature of the continental shelf as such.

There is really no guidance on this point in the 1958 Convention on the Continental Shelf because Article 1 is essentially concerned with the extent of the continental shelf for the purposes of the application of the legal régime, which is established in the articles that follow. If one reflects for a moment, this is very clear. If I may paraphrase the wording of Article 1, its true intent is that, for the purposes of the articles, the "continental shelf" is regarded as extending from the outer limit of the territorial sea to the 200-metre line or up to a line where exploitation of the natural resources of the shelf is possible. This, for the purpose of the point I am making, is the upshot of the provision, and it does not seem necessary to quote the article.

In real terms – in physical terms – Article 1 is obviously dealing on the face of it with only part of what may be regarded as continental shelf for legal purposes. It is not dealing with the nature of the shelf as such. However, in considering the nature of the continental shelf, this Court, in the *North Sea Continental Shelf* cases (1969), found it necessary to examine this aspect of the matter. It gave a very simple but highly relevant answer to the effect that the continental shelf of a State is the natural prolongation of its land territory into and under the sea (for example, one may refer to the Judgment, para. 19). The essence of the matter is simply natural prolongation. This has nothing to do with bathymetry. Bathymetry is not, and never has been, the controlling factor as to the nature of the continental shelf. The controlling factor is natural prolongation and, as we know, natural prolongation means the prolongation not merely of the surface but of the landmass of the State. This aspect of the nature of the continental shelf also appears from the fact that it consists of the

sea-bed and the subsoil, and from the beginning, as I have been saying, what has really mattered has been the subsoil. But the fact remained that legally "exploitability" was the controlling factor with respect to the outer limit of the continental shelf.

The discovery and possibility of exploitation of new resources on the ocean floor combined with other factors gave rise, as we know, to grave dissatisfaction among some States about the possible effects of the exploitability test in Article 1 of the 1958 Convention. There is no need, for present purposes, to go into this aspect in any detail, but it will be recalled that, on the initiative of Malta in particular, an item was placed on the agenda of the United Nations General Assembly. In due course, the General Assembly convened the Third United Nations Conference on the Law of the Sea. This Conference was called to review the law of the sea as a whole, naturally including the problem of the extent of the continental shelf.

At this point in my argument, I feel particularly deeply the loss and absence of our dear friend Professor Yasseen. He was intimately acquainted with the proceedings and results of the Third Conference on the Law of the Sea, and I would have greatly welcomed the assistance that he would have given. I shall have to deal myself with some aspects of this matter and Professor Briggs will also have a contribution to make on this aspect of the case. So there are one or two aspects on which I think that it is necessary for me to touch at this stage.

At the moment, let me concentrate on the theme of the nature of the continental shelf itself. Contrary to what has been suggested by Professor Jennings (**IV**, pp. 409 f.), there is no more in the draft convention prepared by the Third Conference on the Law of the Sea to confirm a gentle slope or periodic changes in bathymetry as a characteristic of the "continental shelf", in its juridical sense, than there was in preceding sources. The term "irrelevant" has been used so frequently and so loosely in these proceedings that I rather hesitate to use it again. Yet, if ever there were an example of irrelevance it is to be found in the lack of bearing on this point of Article 76, paragraph 1, of the draft convention on the law of the sea. The text which we now have is (and I think it useful to give the reference here) in A/Conf./L.78 of 28 August 1981. That is clearly the latest text on which we shall want to rely. The definition in paragraph 1 of Article 76 once more defines the continental shelf in terms of natural prolongation. It makes no reference to a gentle slope. No reference to declivity. The only point where geomorphology enters is for the purpose of defining the outer limit at the outer edge of the continental margin where this lies beyond 200 nautical miles. Now what becomes of the concept of the gentle slope where you have a very narrow continental margin and a hundred or more nautical miles beyond that which is beyond the continental margin? This is still part of the continental shelf of the coastal State. On what does that right depend? It depends on natural prolongation, not on gentle slope or declivity.

As a clarification of the position, paragraph 1 of Article 76 of the draft convention is very illuminating, and I beg leave to read it to the Court at this point.

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory . . ."

That is the definition of the continental shelf as such, both in substance and in law. The characteristics of the shelf are that it comprises the sea-bed and subsoil of the submarine areas; that the areas extend beyond the State's territorial sea; and that it extends throughout the natural prolongation of its

land territory. The essential physical element of this definition is "the natural prolongation of its land territory". We are, of course, by hypothesis talking about the sea-bed and subsoil of the submarine areas and, as a matter of law, we are only concerned with the application of the legal regime of the continental shelf to the areas beyond the territorial sea. But the characteristic which is both factually and legally relevant is "natural prolongation of its land territory". There is nothing here about gentle slope or bathymetry or anything of the kind. As we all know, areas of continental shelf which are the natural prolongation of a State may rise and fall. There may be undulations, even quite deep indentations, in the areas of the continental shelf which are the natural prolongation of a State. But I shall return to this point in due course.

I suspect that our opponents may well be saying "Ah, but he has forgotten the rest of paragraph 1 of draft Article 76". Not at all. The rest of paragraph 1, which is the part on which Professor Jennings really relied, is again concerned, not with the nature of the continental shelf but with its extent. I should therefore now like to complete the quotation from paragraph 1 – after the words "the natural prolongation of its land territory" by adding, as does the text – and here is the definition of extent –

> "to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".

And so we have immediately the picture that I was drawing a minute or so ago.

It is thus absolutely clear that the reference to the "outer edge of the continental margin" is used for the purposes of defining the extent of the continental shelf in cases where the continental margin is at a distance of more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Where the continental margin is less distant than 200 nautical miles, the outer edge of the "continental shelf" within the meaning of Article 76 extends to a distance of 200 miles whatever the bathymetry and whatever the depth of water.

But that is not the whole of the story. In paragraph 3, of draft Article 76, it is said that "the continental margin comprises the submerged prolongation of the land mass of the coastal State" – once more confirming the principle of natural prolongation of the landmass and the continental margin consists of the sea-bed and subsoil of the shelf, the slope and the rise.

Now there is not a word here about changes in the depth of water above the shelf as being significant in any way whatever. In this context geomorphology does not begin to become pertinent until one reaches the slope and the rise.

The provisions of Article 76 become more and more technical and I do not think that it is necessary to go through them in detail. In the main, this has already been done for us by Professor Virally. But, ultimately, limits in terms of nautical miles are set to the possible extent of the continental shelf where the margin extends beyond 200 nautical miles. According to paragraph 5, the line of the outer limits of the continental shelf on the sea-bed shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured, or shall not extend 100 nautical miles from the 2,500-metre isobath. Once again, the reference to bathymetry or to an isobath is for purposes of fixing the outer limit of the continental shelf and for the purposes of the legal régime applicable to it. Even here, it is coupled with a limitation, not in terms of depth, but in terms of distance. What is important is that all of

the area of continental shelf, however the outer limit is determined and whatever its topography, is the "natural prolongation" of the coastal State. If anything were required to show that a gentle slope is not one of the characteristics of the continental shelf, within its legal and basically its physical meaning, surely Article 76 is conclusive.

Tunisia has relied on the development in the third conference to show the importance of bathymetry especially in connection, I suspect, with delimitation. In fact, it purports to base two of its proposed methods of delimitation on bathymetry. But, even if Article 76 did show that bathymetry constitutes an essential characteristic of the continental shelf – which it does not – it would have no bearing on the problem of delimitation for the simple reason that paragraph 10 of Article 76 expressly provides, as Professor Virally recalled, that the provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.

No doubt, counsel advising Tunisia will have some further explanation to offer, but I am at a loss at the moment to know what it could be. I would submit that, if anything, Article 76 of the new draft convention on the law of the sea is destructive of Tunisia's case, which purports to be based on bathymetry or geomorphology. Bathymetry cannot be a substitute for the true natural prolongation of the land mass of the coastal State.

While I am referring to the Third United Nations Conference on the Law of the Sea, I think it would be convenient to interject one or two points which have been raised in that connection. Towards the end of his speech (IV, pp. 420-421), Professor Jennings made two points concerning "recent tendencies of the law". If I understood him correctly, the first was that the use of the new 200-mile distance limit cannot of itself be of definitive significance with respect to the boundaries of the continental shelf between opposite and adjacent States. If that is a correct representation of his view, I would not wish to disagree. But he added a comment, somewhat out of context, in which he said :

> "Although, as the Court said in 1969, proximity is a factor it is one among many other factors and relevant circumstances, including natural prolongation, historic rights and the rest are also factors."

Of course, I am reading from the uncorrected version of the record. I find this observation, in this form, remarkable, because I cannot find any such statement in the 1969 Judgment of the Court. Perhaps it may be provided later. And also because it refers in a haphazard fashion to "many other factors and relevant circumstances", lumped together with "natural prolongation, historic rights and the rest" as also being factors. Surely Professor Jennings is not trying to put "natural prolongation, historic rights and the rest" on an equal footing.

As I understand the case now put forward by Tunisia, it is essentially based on what they regard as natural prolongation which is, according to them, determined by bathymetry. No doubt, again, we shall have a clearer explanation of this statement during the Tunisian reply.

The second point made by Professor Jennings related to fishery rights and the exclusive economic zone. Here, of course, we are in the field of developing law and the problems are far from clear. The law on the exclusive economic zone is still in process of development and I suspect has a long way to go. However, my first impression, but it is no more than that, is the same as that of Professor Jennings. It is that, perhaps in the majority of cases, the determination of the continental shelf boundary as between States, having

opposite or adjacent coasts will, for practical purposes, determine the limitation of the respective exclusive economic zones. There is no need to go into the reasons for this tentative conclusion. However, I do not follow the argument that this new situation is one that must necessarily affect the equities. It was said that, where any part of the zone has from time immemorial been exclusive to one of the coastal States, the equities must surely demand that it remains so. Ignoring for the moment the obvious jump from an exclusive right in respect of the sponge fishery in the case of Tunisia, which perhaps exists in certain areas, to the more general proposition of the zone claimed by Tunisia, having been from time immemorial exclusive to Tunisia, I do not follow the conclusion. The conclusion is that,

> "It is unthinkable that an area which has from time immemorial been exclusive to one State should as a result of the determination of the boundary of sea-bed and subsoil rights, now and henceforward become the exclusive fishery of the other State."

This is a result which certainly does not follow necessarily from the provisions concerning the exclusive economic zone contained in the draft convention on the law of the sea, to which I have referred.

Indeed, I very much doubt whether that is the intended effect of the provisions on the exclusive economic zone. Article 56 of the draft convention deals with the rights, jurisdiction and duties of the coastal State in the exclusive economic zone and, by paragraph 2, it is provided that in exercising its rights and performing its duties under the convention in the zone, "the coastal State shall have due regard to the rights and duties of other States". It is true that Article 68 of the draft convention says that : "this part" – that is the part on the exclusive economic zone – "does not apply to sedentary species as defined in Article 77, paragraph 4". But, if there were to be any loss of historic rights, it would be by virtue of the delimitation of the continental shelf, to which Article 77 applies. It would not really follow from the provisions concerning fisheries in regard to the exclusive economic zone.

Now, apart from the question of sedentary species I have made some enquiries and the conclusion I reach is that the matter is one that should be settled by agreement between the two States concerned, in the context of an agreement on the delimitation of the exclusive economic zone because the delimitation of the zone is to be by agreement and clearly in that context an agreement on special fishery rights would obviously be an equitable way of dealing with the situation. I am afraid that what I have been saying is very involved but I think that the question is very involved. The reference to the exclusive economic zone in my view only complicates the argument and really adds nothing. I would simply revert to the proposition that the right to take sedentary species may normally follow the delimitation of the continental shelf but this does not mean, conversely, that a continental shelf delimitation has to be governed by the right of a State to take sedentary species in an area which is the natural prolongation of the landmass of the neighbouring State. The arguments based on the provisions of the exclusive economic zone in the latest draft convention on the law of the sea do not establish the contrary. Nor is the Tunisian argument strengthened by reliance on what I can only regard as a wholly spurious ground that such a right of fishery is tantamount to natural prolongation of the landmass of the State possessing that right.

I hope it was convenient to add those comments on the draft convention on the law of the sea and, having cleared those two points out of the way I now come to the next stage in the consideration of the basic questions.

NATURAL PROLONGATION

Having established, I hope, quite clearly that the essential characteristic of the continental shelf is natural prolongation of the landmass of a State, what then is the meaning of natural prolongation as such a fundamental characteristic? In this connection, we tend to become confused by the use of terms such as "mixed fact and law" and the "juridical sense". Of course, the expression "natural prolongation" has become a legal term in the sense that it has been used in the jurisprudence of this honourable Court and in a series of texts defining the continental shelf for the purposes of the new draft convention on the law of the sea. It is also true that the physical fact of natural prolongation has a legal aspect in the sense that the shelf is physically connected with the land territory of the State. It is, therefore, subject to the legal limits of the land territory of the State.

In other words, there is, in a sense, a legal aspect to natural prolongation because its starting point on the coast must legally be dependent on the territorial land boundary of the State.

Similarly, the legal effect of the physical fact of natural prolongation must be dependent on the outer limit of the territorial sea and, in my view, the point where the lateral boundary of the territorial sea meets that outer limit (assuming, of course, that there is a settled lateral boundary). The general proposition surely must be that natural prolongation continues beyond the territorial sea from that point. That is elementary. But none of this affects the physical character – the factual character – of natural prolongation as such. There is no justification in the jurisprudence of this Court, or in the Decision of the Court of Arbitration in the United Kingdom/France case, 1977, to justify the view that there is a mixture of fact and law involved in the concept of natural prolongation which somehow cloaks or modifies its meaning. There is absolutely no room, I may observe in passing, for the idea of a notional natural prolongation by access or by fishing practices.

At this point, I find myself in some difficulty as counsel. My difficulty is that so much doubt has been raised about the meaning and role of natural prolongation that it seems to be essential to try to clarify that issue, even though it is in reality quite clear from the principal sources on which both Parties rely in this case. On the other hand, I hesitate to take the time of the Court, and to try the patience of its Members, by going through in detail passages in the 1969 Judgment of this Court and in the 1977 Decision of the Court of Arbitration, with which they are all very familiar. I am afraid, however, that, on balance, my duty both to the Court and to my client makes this necessary in some measure so as to leave no room for doubt or misunderstanding as to the essentially factual meaning of "natural prolongation". I shall try to be as brief as possible.

The first point I would make is a general one. The whole of the two judgments treat natural prolongation as a physical fact – a matter of fact. Its physical characteristic is clear from the 1969 Judgment of the Court read as a whole and this meaning is adopted and somewhat developed in the 1977 Decision of the Court of Arbitration, which brings out not only the physical nature of natural prolongation but also that it has both geological and geographical aspects. I suggest also that the use of the term "natural prolongation" in the text of the definitions of the continental shelf, adopted in the various texts prepared by the Third United Nations Conference, is clearly in a physical and factual sense. So far as the *North Sea Continental Shelf* cases are concerned, I should like to refer, of course, to the whole Judgment but in

particular to paragraphs 19, 39, 43 and 95. With the indulgence of the Court may I now turn to those passages.

In paragraph 19, the Court made its (if I may use the word without disrespect) famous statement based on and derived from Article 2 of the 1958 Geneva Convention, which reads as follows :

> "More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt as the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, – namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land . . ."

In other words, the rights of the coastal State depend on the fact of the natural prolongation of its land territory. Of course, the determination of what is its land territory depends on legal factors but, having determined the land territory, what is the "natural prolongation" is essentially a question of fact.

The thread is picked up again in paragraph 39, in which the Court says :

> "The *a priori* argument starts from the position described in paragraph 19, according to which the right of the coastal State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea."

Here, again, the Court is clearly referring to the land as such and is using the expression "natural prolongation" in a factual sense and not with a meaning of mixed fact and law.

Then, in paragraph 43, the Court said :

> "More fundamental than the notion of proximity appears to be the principle – constantly relied upon by all the Parties – of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State."

Now, those statements were actually reflecting and referring to the views of the Parties. The Court continued :

> "There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant."

The whole of this paragraph is, of course, very well known and, if I may, I shall omit part of it and come to the place where the Court said :

> "What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion, – in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea."

In my submission, that passage is clearly treating natural prolongation or continuation or extension as a fact and not as a question of mixed fact and law. The rest of paragraph 43 is also important but I shall return to that later in

another context and omit it for the moment so as to avoid unnecessary repetition.

In passing to paragraph 95 of the Judgment, I am not overlooking paragraph 85, subparagraph *(c)*, for example, to which I shall also revert in due course. But coming now to paragraph 95, the Court put beyond any doubt the point that I am now trying to make. It said :

> "The institution of the continental shelf has arisen out of the recognition of a physical fact ; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of the legal régime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics . . ."

The first part of that quotation states the legal position with extreme clarity. The institution of the continental shelf has arisen out of the recognition of a physical fact and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of the legal régime. The continental shelf is, by definition, an area physically extending the territory, and so on. I suggest that that puts beyond any question the essential physical characteristic of natural prolongation. As I have already said, I do not think that the Court was wholly unaware of the meaning of "geological" when it used this term in conjunction with the reference to geographers and hydrographers. But the development of the theme of the geographical and geological aspects is something which emerges more clearly in the context of the 1977 Decision. Adhering, for the moment, to the point that I am trying to make, the Court, in the passage which I have just quoted, puts the matter so clearly and so directly that it must be beyond argument : "The institution of the continental shelf has arisen out of the recognition of a physical fact."

As I have been saying, the continental shelf is "an area physically extending the territory of most coastal States". This is surely what the Court meant by "natural prolongation or continuation or extension of the land territory of a State into and under the sea".

The 1969 Judgment of the Court was, in its general lines and its basic theory, followed in large measure by the Court of Arbitration in 1977. In particular, in paragraph 77 of the 1977 Decision, the Court of Arbitration expressly aligned itself with the passage from paragraph 19 of the 1969 Judgment, which I have already quoted, saying, in effect, "the most fundamental of all the rules of law relating to the continental shelf " makes the *ipso facto* and *ab initio* rights of the coastal State dependent on the fact that the area of continental shelf "constitutes a natural prolongation of its land territory into and under the sea".

There is absolutely no classification of that fact as being partly a legal notion, and so far as I am aware there is no indication in that sense in the Decision of the Court of Arbitration. But what the Court of Arbitration does is to develop or examine more deeply the actual meaning of natural prolongation and it considers both its geological and its geographical aspects. In the circumstances of the *North Sea Continental Shelf* cases, there was clearly no reason for the Court to take into account or to go into geological factors. The situation was

essentially one where the geographical and configurational features of the coast were most important. Each case of delimitation has to be considered on the basis of its own particular facts. And the essential and fundamental fact being, of course, natural prolongation.

In the Channel Arbitration, the situation was again somewhat different from the situation in the *North Sea Continental Shelf* cases. In the Arbitration the Court of Arbitration was dealing with a situation basically between States with opposite coasts and one in which, broadly speaking, both Parties adopted equidistance as the appropriate method of delimitation. Nevertheless, there were geological aspects and the Court of Arbitration did take account of geological factors. This was so even in a case where the tribunal was in general applying the equidistance method as between States with opposite coasts.

In the present case where Tunisia in its written Reply has tried to brush aside or to blow away like thistledown the fundamentally important facts of geology, it is important to see just what role those factors did play in the Channel Arbitration, and if I may I should now like to turn to that aspect of natural prolongation.

ROLE OF GEOLOGY

In the last quarter of the 20th century, I imagine that everyone knows something of the reality of geology. If the practical application of geology had not evolved in the last few decades, the world would be without the rich sources of petroleum and gas which it enjoys. The study may be highly technical, detailed in its data and difficult. But it is not a myth or a phantom. It may be less obvious or less easily ascertained than surface geography but, in terms of true substance of the "mass" of the continental shelf, it has more reality. It cannot be brushed aside as being not pertinent or difficult to grasp.

What I am saying would be true whether tribunals have referred to geology or not, but let us look at the attention paid to geology in a case in which the essential geological continuity of the shelf was common ground between the Parties and where the case basically concerned the use of a median line between States having opposite coasts. Even in these circumstances, the Court of Arbitration considered, and where appropriate applied, geology.

The thread runs through the whole of the 1977 Decision. It is a little more difficult to pick out the relevant paragraphs in a decision which was necessarily long and detailed, because the Court of Arbitration was concerned with detail in actually making a delimitation in a situation which was very different from the present one.

Accordingly, my selection of paragraphs, for which there is no need to apologize, does not attempt to be exhaustive. But, I would refer to the following paragraphs of the Decision : 2, 4, 9, 11-12 and 105-107. So as to try and avoid any mistaken accusation of distortion, I regret that I feel it necessary to quote rather more from these paragraphs than I might otherwise do.

The stage is set by paragraph 2 (p. 22 of Cmnd. 7438), which contains this statement :

> "The area of continental shelf with which the Court is concerned in the present arbitration (hereafter for convenience termed the 'arbitration area') forms part of the continental shelf of north-west Europe . . ."

This Court will note how the Court of Arbitration saw the shelf as lying off a continent of north-west Europe and not merely off the particular sections of the French and English coasts. The Court of Arbitration then described the

submarine areas falling within the arbitration area and concluded the paragraph with the following statement :

> "The continental shelf of this area, as the information before the Court clearly shows and both Parties have stressed in their pleadings, is characterized by the essential continuity of its geological structure."

The stage is thus set by a geographical description of the area and the characterization of it by "the essential continuity of its geological structure".

Before continuing with this train of thought, may I also call attention to the reference to geology in paragraph 4 of the Decision. One there finds this revealing statement :

> "it is common ground between the Parties that, although some distance from the mainland, the Scilly Isles are geologically a natural prolongation of the Cornish peninsula and an integral part of the landmass of the United Kingdom".

This is a most significant statement : it confirms that natural prolongation, in its factual sense, can be determined geologically, as indeed it had to be in the case of the Scilly Isles because they were separated from the mainland by some 21 nautical miles of water. I am not suggesting that the Court of Arbitration was there referring to natural prolongation of the continental shelf as such, but the important point is that the Court recognized that geology was decisive in determining that the Scilly Isles were a natural prolongation of the Cornish peninsula and an integral part of the landmass of the United Kingdom. I do suggest that no amount of playing with words can avoid the clear implication that the same use of geology does apply to natural prolongation in the case of submarine areas extending from the land territory of a State, which are to be regarded as an integral part of the landmass – I use the latest term in the draft convention – of the landmass of the territorial State.

Geology appears again in paragraph 9 of the Decision of the Court of Arbitration which reads as follows :

> "Geologically, the Channel Islands archipelago and the seabed and subsoil of the Golfe breton-normand form part of the same armorican structure as the landmass of Normandy and Brittany. This gulf is characterized by the same essential geological continuity as the rest of the English Channel, but the geomorphology of the Channel is here marked by a distinct fault, known as the Hurd Deep (Fosse Centrale). Situated a few nautical miles to the north and north-west of the Alderney and Guernsey groups, that fault or series of faults extends in a south-westerly direction for a distance of some 80 nautical miles, with a width of between one and three nautical miles and a depth of over 100 metres."

The first sentence is the one to which I particularly wish to call attention here. I have included the rest of the paragraph because I shall be referring to the Hurd Deep again in a moment.

Returning to the theme of the geological continuity of the continental shelf, we find that this is again mentioned in the statement of facts in paragraph 11 of the Decision. Then, the Court of Arbitration passed on to a discussion of certain geological features in paragraph 12. I think that an examination of paragraph 12 is truly necessary, though I need not read the whole of it. At the beginning of the paragraph, the Court drew attention to the presence in the Atlantic region of certain geological faults or groups of faults in the structure of the continental shelf to the west of the Ushant-Scillies line. Again, fortunately,

the Parties were in accord as to the existence of the geological faults in the structure of the region and as to the generally southwesterly trend of the faults. The Court said (para. 12):

> "They (the Parties) are also at one in considering that the faults do not detract from the essential geological continuity of the continental shelf. They are not, however, in agreement as to the sufficiency of the scientific information regarding the geological features in question or as to its correct interpretation; nor are they agreed as to the significance of the faults in relation to the geology and geomorphology of the shelf."

The question here was not one of the total irrelevance of geology. Quite the contrary, the Court of Arbitration was clearly accepting the relevance of geology and, much as in the present case, was confronted with questions concerning the sufficiency of the scientific information (in our case we are told by the other side that there is too much), but we are concerned with the significance of the faults in relation to the geology and the geomorphology of the shelf.

What the Court said towards the end of paragraph 12 is of particular interest. The Court said:

> "These differences between the Parties relate to the alternative and subsidiary Submission put forward by the United Kingdom that if a continuous median line should not be adopted as the boundary throughout the arbitration area, the Hurd Deep and Hurd Deep Fault Zone provide the only appropriate dividing line between the natural prolongations of the continental shelves of each country. The Court, for reasons given later in this Decision, does not find it necessary to resolve the differences between the Parties concerning the character and the significance of the geological faults of the continental shelf."

If we then continue with our examination of the Decision, we find that the United Kingdom Submission regarding the Hurd Deep and the Hurd Deep Fault Zone is put on one side, not because of the irrelevance of geology but because of its relevance. The essential point was that the Hurd Deep Submission was rejected because as a matter of geology, the Hurd Deep was not regarded by the Court as a feature which marked a fundamental discontinuity in the shelf area. One may here refer to paragraphs 105-106.

In paragraph 107, the Court said that it shared the view repeatedly expressed by both Parties that the continental shelf throughout the Arbitration area was characterized by its essential geological continuity, and concluded:

> "The geological faults which constitute the Hurd Deep and the so-called Hurd Deep Fault Zone, even if they be considered as distinct features in the geomorphology of the shelf, are still discontinuities in the sea-bed and subsoil which do not disrupt the essential unity of the continental shelf either in the Channel or the Atlantic region."

The remark that follows is perhaps not without significance in the present case. The Court added: "Indeed, in comparison with the deep Norwegian Trough in the North Sea, they can only be regarded as minor faults in the geological structure of the shelf; . . ." So the Court of Arbitration disposed of the geological arguments, not on the ground that geology was irrelevant or unimportant, but on the ground that was itself geological, namely the essential geological continuity of the continental shelf in that case.

I suggest, therefore, that it is clear on the basis of the authorities to which

Tunisia has referred, first, that the rights of the coastal State arise *ipso jure* and *ipso facto* over the continental shelf by reason of the natural prolongation of its territory into and under the sea; secondly, that natural prolongation is essentially a physical fact, which is dependent on geological and geographical factors. Accordingly, the continental shelf is truly a juridical concept but natural prolongation is essentially a factual one.

Now judging from the writings of Professor Jennings, which are of most excellent quality, I doubt very much whether he would quarrel with these two basic ideas. Nevertheless, by way of conclusion on this phase of my address to the Court, may I observe that I find some difficulty in following the logic of Professor Jennings in the statement made on Wednesday, 16 September. I am referring, in particular, to the passage that begins with the last paragraph on page 408, *supra*. If I understood him, his argument seems to run as follows: bathymetry defines what the continental shelf is – which seems to be posed as a major premise; the continental shelf is the natural prolongation of the landmass, which seems to be posed as a minor premise; these are followed by the conclusion that natural prolongation is shown by bathymetry. It is apparent that this kind of reasoning is fallacious. As is perfectly clear from all the relevant material, the major premise is faulty to start with. Bathymetry is used to measure the area or more accurately is used to measure the outer limit of the continental shelf in some but not in all instances. Bathymetry is not used to establish to whom the shelf belongs. This message comes from the examination of natural prolongation. As a matter of logic it simply does not follow that natural prolongation is shown by bathymetry. In a crude English metaphor, the argument presented puts the cart before the horse. Besides, the authorities show quite clearly that natural prolongation is not shown by bathymetry but by a combination of geology and geography, or perhaps I should say more accurately geological and geographical facts. Perhaps I may just add that the appurtenance of the continental shelf areas to the coastal State, as far as I am aware, never has been determined by bathymetry.

No doubt comments will be made on behalf of Tunisia in response to the observations that I have made. If so, it may be necessary to respond. For the moment I do not think that it is necessary for me to add anything on this aspect of the case. I will leave the presentation of the case concerning the physical facts to my colleague, Professor Bowett, and to the expert views of Professor Fabricius, Dr. Vita-Finzi and Professor Hammuda.

DELIMITATION

There are certain aspects of this question which are surely clear and on which common views are held by both Parties. There are certain basic principles, namely that delimitation is to be settled by agreement, that agreement shall be in accordance with equitable principles; but that the legal nature of the institution of the continental shelf, which arises from the fact of natural prolongation and the *ipso facto* appurtenance of areas of continental shelf to the coastal State, excludes equitable shares from the concept of equitable principles. In other words, it is not the object of delimitation to secure distributive justice. The purpose of equitable principles in a delimitation is rather to avoid exaggerated distortion resulting from unusual features. As I have already indicated, this is an aspect of the case which will be examined by Professor Briggs. The aspect on which I should like to concentrate for the moment is the possible scope for the application of equitable principles. At this

stage, it becomes necessary to bear in mind the facts of this specific situation. That is to say the situation in the present case.

It has been part of the tactic of Tunisia to extend northward the relevant coast of Tunisia for the purposes of the delimitation. What I mean is that they seem to have regarded the coast as extending all the way from Ras Ajdir to Cape Bon. It does create a sort of artificial coastline running along the 10° meridian from Cape Bon to the south-west corner of the Gulf of Gabes. This is obviously an imaginary coastal front which is quite different from any actual Tunisian coast which may be extended into and under the sea. The coastline north of the promontory of Ras Kaboudia, which faces away from Libya, has already been taken into account in delimitation with Italy and cannot in the circumstances reasonably be considered for the purposes of the present delimitation. I think a glance at the map shows that this is clearly so. Even in the Tunisian case it seems to be wholly irrelevant, because in no way could it be said that the bathymetric lines to the east from Ras Kaboudia southward have anything to do with the stretch of coast from Ras Kaboudia to Cape Bon.

Nevertheless, Tunisia has tried to focus attention on the whole so-called east-facing coast of Tunisia and its alleged natural prolongation, as demonstrated by a series of isobaths. Apart from the fact that isobaths do not establish the physical natural prolongation of the continental shelf, the attempt to give an eastward projection based on the coast from Cape Bon to the Gulf of Gabes tends to obscure the essential fact that Libya and Tunisia are, after all, adjacent States, and that in considering the delimitation between adjacent States as in this case, with a common boundary reaching the sea at Ras Ajdir, it is necessary to start by considering the natural prolongation of the landmass of the two States from the point where the land boundary between them reaches the coast. Tunisia obviously does not want to concentrate on this because it destroys the pretty picture of the coast of Tunisia marching eastward indefinitely up the Mediterranean. To get the picture right, it is necessary to start from the boundary point. As I have already said, if there is a settled delimitation of the territorial sea, it is inevitable that the division of the physical shelf area shall be regarded as following the line of delimitation of the territorial sea as far as its outer limit. Beyond that point, where the legal régime of the continental shelf begins, the legal situation is reversed and the appurtenance of areas of shelf to each State depends on natural prolongation. In these circumstances, as in the present case, the geological and geographical factors will for some distance be identical for both States. At this stage, there should be no difficulty in principle about the direction of the delimitation. It should follow, what may be loosely called, the direction of the common natural prolongation of the landmass of the two States.

If we were concerned with a straight-forward delimitation between States with adjacent coasts, there would be basically no problem about the delimitation, and some looseness in the use of the expression "direction of natural prolongation" probably would not matter because it would in all probability be the same for both States, at least from the starting point of the delimitation.

But if one reflects for a moment, the idea of direction of natural prolongation needs to be handled with some care. Natural prolongation is concerned with the extension of the landmass of a State, which does imply an element of direction, but it is also concerned with the question of what parts of the sea-bed and subsoil are in fact to be considered as parts of the landmass of the coastal State. We have here a concept of area and mass which is geometrically speaking not strictly compatible with the idea of direction.

Let me put the point simply in the terms of the facts in the present case. According to Libya, the question of delimitation falls within the area of the Pelagian Block, though not extending to the whole of it. The Pelagian Block is, we believe, undoubtedly part of the stable African platform to the south. It is, accordingly, as a whole, geologically part of the landmass to the south rather than to the west. This, we say, is the determining factor in natural prolongation in this case. Whether one speaks of the "direction" of the natural prolongation, or the relationship between the continental landmass and the adjoining shelf, does not matter. The point is that the area of shelf lies to the north of the landmass to the south : and as a fact of geological history, has been stretched, or pulled, out of it. So the relationship – or direction – is clear. This is the important factor. But, it is a factor which is common to the northward-facing coast of Tunisia, which continues westward from the northward-facing coast of Libya. In this context, the exact direction of the coast is not of much significance. The point that I am making is that the geological facts militate in favour of the northward-facing coast of Tunisia just as much as they do in favour of Libya, and, coupled with the common geography, provide a common basis for the natural prolongation of both States. Now this is clearly the picture, but it is a picture which Tunisia has tried to discard.

What is unusual or anomalous in this case is that, contrary to the physical relationship between the Pelagian Block to the north and the landmass of Tunisia and Libya to the south, the coast of Tunisia in the region of the Gulf of Gabes turns at right angles to itself. This does not alter the geological situation, but it does introduce a new geographical consideration. As the Court knows, it is the case of Libya that this geographical consideration cannot begin to have any effect on the delimitation until somewhere about the latitude of Ras Yonga. North of that latitude, although geologically the sea-bed and subsoil continue to be part of the Pelagian Block, nevertheless geographically it may be said that the shelf areas in front of the coast – say between Ras Yonga and Ras Kaboudia – do constitute in that sense part of the natural prolongation of Tunisia. In other words, the actual physical situation produces a picture which is, as it were, blurred by the combined effect of the relevant facts.

This, it may be thought, produces an area of overlap or a marginal area, as illustrated in the Libyan Reply by Diagram 2, in which delimitation should be determined in accordance with equitable principles.

Let me interject at this point, Mr. President, that it is astonishing to hear Tunisia accuse Libya of brutality in applying the principle of natural prolongation when it seems, at this oral hearing, it is Libya and not Tunisia that recognizes the possibility of the application of equitable principles in these circumstances. We have been looking and listening for the element of equitable principles to be applied in the Tunisian case, but really in vain. The only attempted use of such principles, and I shall be corrected if I have misunderstood the case, but as I understand it the only attempted use of such principles seems to be (i) to bolster the claim, which we reject, based on alleged fishery rights, which cannot, cannot, determine shelf delimitation ; or (ii) possibly in the remote "borderland" which, according to the Tunisian argument, lies beyond the shelf properly so-called.

At this stage, and I am coming near the end of my long address, I should like to turn briefly to what this honourable Court has said about delimitation and the application of equitable principles. As I have said, the development of this concept will be left to Professor Briggs.

There is no need for me to revert again to a discussion of the rejection by

the Court in 1969 of the notion of the just and equitable share. It follows clearly from the Judgment of the Court that, if appurtenance is established beyond doubt by the fact of natural prolongation, that should be an end of the matter. It is obviously equitable that a State should, as a result of a delimitation, be left with the areas over which it has continental shelf rights *ipso facto* and *ab initio* by reason of the natural prolongation of its land territory. The Parties seem to be in agreement on this proposition, and I accept entirely Professor Virally's statement :

> "Il serait, en effet, particulièrement inéquitable, sous prétexte de délimitation, de priver un Etat côtier d'une étendue de plateau continental à laquelle il a droit, c'est-à-dire d'une partie de son prolongement naturel." (IV, p. 492.)

That statement accords fully with Libyan Submission No. 9. The question of the application of equitable principles arises where, for some reason, natural prolongation does not give a clear answer. For example, as we say in the present case, this situation may arise at or about the latitude of Ras Yonga.

Earlier I promised to revert to paragraphs 43 and 85 *(c)* of the Court's 1969 Judgment, and this is the proper point at which to do so. I then quoted the passage from paragraph 43, in which the Court said that what conferred the *ipso jure* title of the coastal State is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion. Without repeating that quotation, may I quote the next sentence of the paragraph :

> "From this it would follow that whenever a given submarine area does not constitute a natural – or the most natural – extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State, – or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it." (*I.C.J. Reports 1969*, p. 31.)

Now before commenting further, I would refer to the whole of paragraph 85 of the Judgment, but, for immediate purposes, limit myself to part of it. It will be recalled that the Court said in connection with the application of equitable principles :

> "it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field, namely :".

Then follow subparagraphs *(a)*, *(b)* and *(c)*, and subparagraph *(c)* reads :

> "for the reasons given in paragraphs 43 and 44, the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State" (*I.C.J. Reports 1969*, p. 47).

The ideas expressed in paragraphs 43 and 85 of the Judgment are reflected in the dispositive in paragraph 101. I do not think that it is necessary to inflict on the Court a reading of the paragraph, but I suggest that the upshot is that the Court recognized that in some situations there might be an apparent

conflict or overlap of the natural prolongation of two States. Indeed, the Court of Arbitration in 1977 seemed to view the English Channel in this very light. In many situations, this would have no significance, but in a situation such as the one that exists in this case, where the coasts of one of two States with adjacent coasts consist of two lengths which are at right angles to each other, it seems that there must be some area of overlap and in that area delimitation has to be determined, no longer by the application of the principle of natural prolongation, but by the application of equitable principles.

I am not here suggesting, on the other hand, that natural prolongation can automatically determine the exact line of delimitation, but it can indicate the general direction that the line should take; and the Parties, recognizing the facts of physical natural prolongation, should then be able to agree readily on a line of delimitation. In doing so, they will obviously have to take into account factors such as the land boundary, the lateral boundary of the territorial sea, and possibly the outer limits of the territorial sea. There may be other circumstances that have to be taken into account but, as has been explained in the written pleadings and as will be made clearer by subsequent speakers, Libya does not accept that delimitation of its continental shelf should be affected by the fishery claims of Tunisia or by baselines and extended territorial sea limits claimed as recently as 1973 – long after the dispute about maritime boundaries arose between the Parties and which have been rejected expressly and by implication by Libya by virtue of the 1955 Libyan Petroleum Law and Regulation and Map No. 1 (I, p. 467) and otherwise.

The Libyan case may be technically difficult, but it is solidly based, and we shall do our best during the presentation of our oral pleadings to simplify and clarify it for the benefit of Members of the Court.

I have led my remarks up to the point of consideration of the practical application of the principles and rules of international law and also indicated that this aspect of the case will be dealt with by Mr. Highet. As also stated by Ambassador El Maghur, the Agent, at the end of his speech, I shall now be followed by several speakers who will develop the historical, scientific and legal aspects of the case for Libya. However, with the leave of the Court, I should like to stop my presentation at this point and continue later with a short statement designed to provide a link between other aspects of the case and the contribution to be made by Mr. Highet. I believe that this course is convenient and I hope that it will be acceptable to you, Mr. President, and to the Members of the Court.

The Court adjourned from 11.25 a.m. to 11.50 a.m.

PLAIDOIRIE DE M. MALINTOPPI

CONSEIL DU GOUVERNEMENT DE LA JAMAHIRIYA ARABE LIBYENNE

M. MALINTOPPI : Monsieur le Président, Messieurs les juges, ma tâche ici est simple et nettement définie. Il m'appartient de vous présenter certaines considérations qui concernent les délimitations latérales des juridictions respectives de la Libye et de la Tunisie. Mon exposé sera donc limité dans l'espace, puisque ces délimitations y seront considérées à partir de la frontière terrestre et jusqu'à la ligne bathymétrique de 50 mètres, laissant ainsi à mon collègue, le doyen Colliard, le soin de préciser notre position dans le cadre de la question des droits historiques, quant aux limites de la zone de pêche vers l'extérieur. Ma tâche sera aussi limitée dans le temps, puisque l'agent du Gouvernement libyen nous a déjà présenté le point de vue de son gouvernement pour ce qui concerne la période qui suit l'indépendance du pays.

Mon exposé se situe donc sur le plan de ce qu'on appelle les considérations historiques. Or, s'il est vrai que d'après Schlegel l'historien est, en quelque sorte, le prophète du passé, il incombe au juriste, lorsqu'il se penche sur des faits et des situations d'antan, de veiller à établir la présence du passé. En d'autres termes, il appartient au juriste de montrer l'influence que les faits et les rapports du temps passé exercent sur les faits et les rapports juridiques du temps présent. Pareille influence peut se manifester sous des formes différentes et de maintes façons. Pour ma part, je tâcherai de concentrer mes efforts sur les points essentiels mais surtout sur certaines considérations qui font apparaître la toile de fond de la présente affaire. Assurément, si l'on regarde de près cette toile de fond, on pourra s'apercevoir que certains des éléments qui la composent ne constituent pas un simple décor. Bien au contraire, ils se situent au milieu de l'action et – trêve de métaphores – dans la recherche des règles et des principes susceptibles de favoriser un résultat équitable dans la présente affaire. Pour atteindre ce but, que la Cour se rassure, je n'ai nullement l'intention de remonter trop loin. Si elle le désire, la Cour pourra aisément trouver toutes les données nécessaires dans de dossier de M. Joffe et de son équipe de l'Université de Londres (III, contre-mémoire libyen, annexe technique 6 ; IV, réplique libyenne, annexe technique II-2). Je me propose, quant à moi, de vous illustrer certains faits et certaines considérations qui ont trait à la formation des limites latérales entre lesdits pays. L'histoire des limites en mer commence en 1904. C'est à ce moment, en effet, qu'aux dires de la Partie adverse elle-même, une ligne se serait formée qui, partant du point terminal de la frontière terrestre, aurait délimité, en direction du nord-est 45°, et jusqu'à la ligne bathymétrique de 50 mètres, une zone de pêche soumise à la juridiction tunisienne. Bien entendu, l'histoire de la question des limites maritimes n'a fait que commencer en 1904 et l'un de ses chapitres se déroule actuellement devant vous.

Quant à la frontière terrestre, son histoire a été close par le traité de Tripoli du 19 mai 1910 qui fixa définitivement la section terminale de cette frontière sur la mer. Si je souligne ici le caractère définitif de la frontière terrestre, c'est en raison du fait que les réactions de la Partie adverse aux sections de nos écritures consacrées à la formation de la frontière terrestre, ces réactions – disais-je – nous ont paru quelque peu hors de proportion. Je pense notamment aux pages 11 et 12 du contre-mémoire tunisien (II) et à l'annexe II-1

à cette pièce et je prends note qu'au cours de la procédure orale on s'est borné à qualifier le problème de manœuvre de diversion. Je ne souscris pas, bien entendu, à une telle appréciation, je le répète, mais je constate avec satisfaction qu'au cours des discussions orales la question semble avoir été ramenée à ses véritables proportions. En réalité, nous sommes ici confrontés à une simple divergence d'opinion entre les Parties sur le point de savoir quelles sont les questions pertinentes dans le cadre de la présente affaire. La Partie adverse estime que tout ce qui se rapporte à la formation de la frontière terrestre devrait être écarté du prétoire. Il n'y aurait là rien de pertinent. C'est un argument auquel il serait défendu de toucher. Beaucoup plus modestement, nous estimons, de ce côté de la barre, qu'il y a dans ces faits historiques plusieurs éléments utiles qui peuvent faciliter la tâche de la Cour et lui permettre de saisir les racines des difficultés auxquelles les deux pays se sont heurtés, de dégager la portée exacte des conséquences juridiques des faits historiques, de parvenir à des solutions qui tiennent compte de tous les éléments en jeu.

En particulier, la Partie adverse oublie une considération qui possède par contre une importance capitale. Si l'on examine les circonstances dans lesquelles on a fixé la frontière terrestre aux abords de la mer, on est en mesure de mieux comprendre comment et pourquoi l'on est arrivé à invoquer ici une instruction administrative de service émise à Tunis en 1904 pour inventer petit à petit, peu à peu, pas à pas, une ligne de démarcation en mer de 45° et pour prétendre que, depuis cette date, elle aurait été internationalement établie et acceptée. Ainsi donc, la réaction de la Partie adverse au cours de la procédure écrite apparaît sous sa lumière véritable. C'était de toute évidence un prétexte pour détourner l'attention du fond de la question et pour éviter que l'examen de la formation de la frontière terrestre n'expose au grand jour les procédés employés dans l'effort tunisien pour fabriquer la ligne de 45°.

Les connexions entre la délimitation terrestre et la délimitation maritime deviennent ainsi particulièrement évidentes. Les différents problèmes s'enchevêtrent et s'intègrent les uns dans les autres. Mais ce sont surtout les parallélismes qui sont parfois frappants. Il s'agit, ainsi qu'on le verra plus loin, de parallélismes d'action politique, de méthodologie diplomatique, de moyens pratiques employés, de tactiques juridiques qui caractérisent les vicissitudes de l'histoire. Mais laissons donc parler les faits.

C'est donc dans le but de contribuer à élucider en tous points les différents aspects et les liens complexes du problème dont la Cour est actuellement saisie que la Libye a jugé opportun d'inclure dans les pièces de la procédure écrite des exposés et des considérations très succincts qui concernent l'histoire relative aux délimitations – tout autant, bien entendu, qu'aux non-délimitations – entre la Libye et la Tunisie. Certes, ces faits et ces considérations ne sont pas tous d'une importance égale dans le contexte de la présente affaire. Néanmoins, il était opportun que la Cour fut renseignée quant au cadre historique dans lequel il convient de situer la recherche des principes applicables à la délimitation du plateau continental appartenant à chacune des Parties en cause. Ainsi le mémoire (p. 12 à 14 et annexes I-3 à I-8, I) et le contre-mémoire (p. 32 à 35 et annexes 18 à 20, II) contiennent certaines remarques sur l'histoire de la frontière terrestre. L'histoire des relations entre les juridictions maritimes de l'Italie et de la Tunisie est plus particulièrement traitée dans le contre-mémoire (p. 56 à 62 et annexes 37 à 45) et dans la réplique (p. 20 et suiv., et annexes I-18 et suiv., IV) qui revient elle aussi, brièvement, sur la question de la frontière terrestre (p. 12 à 14 et annexes I-11 et I-12). Il va de soi, mais il faut peut-être le préciser pour autant que de besoin, que j'emploie ici le terme *juridiction* au sens large, c'est-à-dire dans le sens de l'exercice de pouvoirs

étatiques en général et sans préjudice du caractère souverain ou non des pouvoirs en question. De même le mot *délimitation* sera toujours utilisé ici au sens large, sans préjudice de la nature et de la portée juridique des confins limitant dans l'espace l'exercice des pouvoirs dont il s'agit.

PLAN DE L'EXPOSÉ

En premier lieu, j'examinerai brièvement le processus de formation de la frontière terrestre aux abords de la mer à partir de l'occupation française et jusqu'au traité de 1910. D'autres parties de la frontière terrestre ont fait l'objet d'accords postérieurs et le traité du 10 août 1955, qui suit l'indépendance de la Libye, a confirmé l'ensemble de ces délimitations. Mais puisque c'est le traité de 1910 qui fixa à Ras Ajdir le point terminal de la frontière terrestre sur la côte, c'est notamment à ce traité qu'il convient de se reporter si, dans la présente affaire, l'on devait juger nécessaire, convenable ou opportun de prendre en considération le point où la frontière terrestre débouche sur la mer.

En deuxième lieu, il faudra prendre en considération les fameuses instructions tunisiennes sur le service de la navigation et les pêches maritimes qui datent du 31 décembre 1904. Ces instructions, on nous l'a maintes fois opposé, auraient introduit, selon la Partie adverse, la ligne de 45°. Il s'agit donc d'une question centrale dans le cadre de la présente affaire.

En troisième lieu, l'on devra considérer certains aspects de la guerre de 1911-1912 entre l'Italie et l'Empire ottoman, parce que cette guerre constitue, à notre avis, le véritable début de l'histoire de la délimitation latérale des juridictions maritimes respectives de la Libye et de la Tunisie. En effet, c'est à l'ouverture même des hostilités qu'il y a une première prise de position sur la mer à l'occasion de la déclaration de blocus des côtes ottomanes en Afrique notifiée par l'Italie aux autres Etats.

En quatrième lieu, j'essaierai de montrer comment, immédiatement après la fin de la guerre italo-ottomane, un incident issu de l'arrestation de trois bateaux de pêche par les autorités italiennes placera la question des limites latérales des juridictions maritimes sur un plan très concret et aboutira à la recherche de solutions provisoires, transitoires, *de facto*, mais néanmoins respectées plus d'un quart de siècle durant. Ces solutions, bien entendu, restent ce qu'elles sont. Elles ne constituent nullement ni la solution juridique arrêtée par les Parties, ni un fait juridique consolidé par la pratique et par le temps. Elles représentent pourtant des lignes, des directions, des tendances issues de l'histoire locale qui montrent aussi, et en tout cas, combien les prétentions actuelles du Gouvernement tunisien sont éloignées des réalités.

Finalement et *en cinquième lieu*, l'on verra que cette situation n'a pas changé pendant la période suivante et que, par conséquent, toute démarcation maritime reste encore à faire entre la Libye et la Tunisie.

LE POINT TERMINAL DE LA FRONTIÈRE TERRESTRE SUR LA MER

Monsieur le Président, avec votre permission je passe immédiatement à l'examen de la question qui concerne la détermination du point où la frontière terrestre touche la côte. C'est la question qui se place en premier, du point de vue du temps, car il faut remonter un quart de siècle avant le traité de 1910 pour en cueillir les antécédents. A cet égard, il me suffira d'établir trois choses : *primo*, que le tracé de cette section de la frontière et notamment le choix de son

point terminal sur la mer n'avait pas de fondement ni naturel ni historique ; *secundo*, que des considérations d'ordre purement militaire ont conduit à la solution définitive ; et *tertio*, que pareille solution était celle arrêtée par l'une des Parties, et, plus précisément, par la puissance européenne qui gérait à l'époque, selon l'esprit politique et les règles juridiques du temps, les relations internationales de la Tunisie.

Nous savons tous ici fort bien que la délimitation des frontières en Afrique – je songe notamment à cet égard à l'excellente étude du professeur Boutros-Ghali sur *Les conflits de frontière en Afrique* (Paris, 1972) – a été encore moins rigide qu'en Europe. Les confins entre les peuples de l'Afrique ont eu des contours incertains. Assez souvent, c'est plutôt une « zone grise » qui caractérise la séparation entre entités dont la plupart sont ethniquement pluralistes. Dans ces conditions, l'on comprend et l'on apprécie d'une manière encore plus nette la sagesse des Etats de l'Afrique nouvelle qui ont décidé de conserver les délimitations adoptées par les puissances coloniales, et ce dans un contexte qui, dans la plupart des cas, n'avait que très peu à voir avec la situation réelle du territoire et de son milieu humain.

Cependant, et même dans l'incertitude qui planait sur les frontières dans l'Afrique de jadis, certains faits peuvent être établis grâce aux moyens propres à des recherches de ce genre. Ainsi, et quelle que soit l'étendue de la zone grise interposée entre les populations de la Libye et celles de la Tunisie d'aujourd'hui, une chose semble être certaine : c'est un fait que les cartes antérieures à 1887 – et je ne me réfère ici qu'aux cartes publiées par des imprimeurs européens – situaient la partie finale de la frontière terrestre le long du Wadi Fessi et son point terminal à El Biban, au milieu de la lagune portant le même nom.

Ce fait ressort d'une manière complète – et, permettez-moi d'ajouter, non suspecte – d'un ouvrage fort intéressant. Il s'agit du livre en deux tomes du professeur André Martel sur *Les confins saharo-tripolitains de la Tunisie (1883-1911)*, publié par les Presses universitaires de France en 1965. Ce n'est pas au surplus un ouvrage isolé, mais c'est le volume V de la 4e série (Histoire) des *Publications de l'Université de Tunis*. Il s'agit donc de ce que, dans le langage si caractéristique du prétoire, l'on devrait considérer de notre côté de la barre comme un témoignage hostile. Néanmoins, la Cour voudra bien apprécier que les thèses de la Libye, dans la présente affaire, s'y trouvent beaucoup mieux réfléchies que celles de la Tunisie. Un exemplaire de cet ouvrage peut être consulté ici à la bibliothèque du palais.

Or le professeur Martel à la page 374 du tome premier est formel. Et les deux cartes allemandes du mémoire libyen (annexe I-6) confirment que la frontière, en 1830 et en 1867, se terminait sur la mer à la lagune d'El Biban, au milieu de la lagune, au fort d'El Biban, c'est-à-dire considérablement plus à l'ouest de la frontière actuelle. Selon un calcul qui n'est pas difficile à faire, la distance en ligne directe entre El Biban et Ras Ajdir est de 26,2 kilomètres. Ce n'est qu'après 1883 que, du côté français, on commence à agir comme si la section finale de la frontière terrestre au nord ne suivait plus le Wadi Fessi pour déboucher sur la mer à El Biban, mais suivait plutôt le Wadi Mokta pour atteindre la mer à Ras Ajdir. Nous avons, bien entendu, rassemblé dans le dossier de la procédure écrite les documents essentiels tirés des différentes archives. Ces documents d'ailleurs, qui viennent des archives françaises pour la plupart, sont aussi à la base de l'exposé de Martel à cet égard (t. I, p. 372-374).

Le premier document est constitué par une note sur la frontière entre la Tunisie et la Tripolitaine établie par le ministère de la guerre français en novembre 1886. La note s'ouvre par une constatation qui confirme les considérations que je viens d'exposer :

« Avant l'occupation de la Régence et jusqu'en 1883, les cartes du dépôt de la guerre ont placé au fort des Bibans le point de départ de la frontière entre la Tunisie et la Tripolitaine d'où elle prenait une direction sud-ouest. » (Huitième pièce reproduite à l'annexe I-11 à la réplique libyenne, IV).

Les Bibans, bien entendu, c'est El Biban, et la note poursuit en soulignant le souci d'éviter des conflits avec les Ottamans :

« A la suite d'une communication des affaires étrangères du 15 avril 1882, des instructions furent données aux commandants de nos colonnes pour ne pas dépasser l'oued Fessi, sans une autorisation expresse...

Les instructions du ministre de la guerre ne visaient point la question de la frontière, mais à Tunis, par un malentendu difficile à expliquer, on s'imagina que l'oued Fessi était accepté par le gouvernement [il s'agit bien entendu du Gouvernement tunisien] comme ligne de démarcation politique. »

Le « malentendu difficile à expliquer » devient en réalité beaucoup plus facile à expliquer si l'on se souvient qu'aucune carte géographique de l'époque ne fixait la frontière au-delà du Wadi Fessi. La note elle-même le confirme en ajoutant qu'aucun incident ne s'était produit jusqu'au mois de mai de 1882. Après avoir fait allusion à l'échec de pourparlers officieux pour la délimitation de la frontière, la note relate la première tentative de provoquer un fait accompli :

« Au mois d'octobre dernier [donc en 1886], la construction des signaux élevés par la mission hydrographique entre le Bahiret [lagune] el Biban et le Mokta fut considérée par les autorités de Tripoli comme un empiétement sur le territoire ottoman et donna lieu de leur part à une démonstration maritime. ...

Enfin le dernier rapport mensuel de la Tunisie mentionne que des signaux hydrographiques ont été détruits par les Tripolitains après le départ de la mission.

En résumé, le Mokta, qui constitue une bonne frontière géographique, est revendiqué par les Tunisiens comme formant dans la zone côtière la limite de leur pays, tandis que les Tripolitains soutiennent que cette limite passe à quelques kilomètres au sud de Zarzis. Ni les uns ni les autres ne paraissent posséder de document écrit à l'appui de leurs prétentions. »

Cette partie centrale du document que je viens de lire appelle des commentaires très brefs, mais en même temps précis.

Primo, les autorités ottomanes, tout en n'ayant rien opposé au déploiement des forces françaises sur l'oued Fessi, se sont immédiatement élevées contre toute tentative de passer à l'est de cette ligne.

Secundo, le ministère français de la guerre confirme que l'emplacement de la frontière est contesté et que la ligne du Wadi Mokta est revendiquée par les Franco-Tunisiens alors que les Tripolitains revendiquent celle du Wadi Fessi.

Tertio, de l'avis du même ministère, ni les Tunisiens, ni les Tripolitains d'ailleurs « ne paraissent posséder de document écrit à l'appui de leurs prétentions ». Ce n'est donc pas seulement « par mesure de prudence diplomatique et militaire », ainsi que le prétend le contre-mémoire tunisien (**II**, annexe II-1, p. 10), que les forces françaises hésitèrent avant de pousser vers l'est. C'était aussi, et parce que la France doutait fortement du statut juridique de la frontière, une mesure de « prudence juridique ».

Quarto, le Mokta constitue, aux yeux de l'état-major, « une bonne frontière géographique ». Or, cette expression n'est, dans son contexte, qu'un euphémisme. Une bonne frontière géographique c'est, dans le contexte de l'état-major, une bonne frontière militaire. Dans cette affirmation il n'y a point de jugement de valeur. Ce n'est qu'une constatation qui n'a rien de péjoratif. C'est, tout simplement, une constatation d'ordre historique.

Mais revenons à la note de l'état-major. Après ce que nous venons de commenter, elle tient à mettre en garde contre des conclusions trop optimistes. Cette mise en garde, à la rigueur, pourrait être opposée d'une façon directe à la Partie adverse, qui aimerait accréditer (cf. II, contre-mémoire tunisien, annexe II-1) l'idée que la Tunisie n'aurait même pas « récupéré ... la totalité de ses frontières historiques » (p. 12). La note précitée, en effet, retient l'affirmation faite par le délégué à la résidence générale de Tunis au général commandant la brigade topographique sur la frontière, affirmation selon laquelle : « le Mokta, sans contredit est définitivement sur la côte le point de départ de la frontière tunisienne », pour commenter aussitôt que :

> « La conclusion semble un peu forcée, d'autant plus que l'argument pourrait être retourné contre nous à propos de l'oued Fessi ; elle n'a d'ailleurs pas de valeur pratique, du moment que nos signaux hydrographiques ont été détruits par les Tripolitains. »

Mais l'état-major est évidemment au courant des décisions arrêtées au niveau politique, puisque la note s'empresse de donner satisfaction à la fois au Quai d'Orsay et à la présidence du conseil :

> « M. le ministre des affaires étrangères, ignorant probablement ce dernier incident, s'est approprié dans sa dépêche du 9 novembre la thèse de M. Bompard, sous une forme plus dubitative, il est vrai, puisqu'il parle seulement « d'une reconnaissance implicite par les autorités ottomanes de la frontière tunisienne au point où nous entendons la fixer nous-mêmes. »
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> M. le président du Conseil ajoute que :
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> > « il y aurait avantage à porter de la manière la plus apparente, sur les cartes qui seront publiées désormais par le service géographique, l'indication du point dont il s'agit de la ligne de démarcation entre le Vilayet et la Régence. »

Cette dernière partie de la note de M. le président ne manque pas de prudence. En d'autres termes l'état-major laisse transparaître ses soucis mais il est prêt à se soumettre très volontiers à la raison politique et à se procurer ce qui peut être nécessaire afin que la frontière soit fixée *« au point où nous entendons la fixer nous-mêmes »*. Et voici une phrase qu'il convient de souligner. Face à une telle phrase, on ne peut prétendre, comme le contre-mémoire tunisien (annexe II-1) essaie vainement de le faire, que l'occupation militaire n'a pas déterminé, à elle seule, le tracé de cette section de la frontière terrestre. Les archives sont formelles et, au surplus, non équivoques.

En effet, c'est au cours de ce même mois de novembre 1886 que les affaires étrangères s'étaient adressées au ministre de la guerre par une lettre datée du 9. D'ailleurs, c'est en réponse à cette lettre que la note de l'état-major avait été rédigée. Et la lettre contient ce passage qui fait allusion à la prétendue « reconnaissance implicite par les autorités ottomanes de la frontière au point où nous entendions la fixer nous-mêmes ». Cette lettre – qui figure à l'annexe I-11 à la réplique libyenne (**IV**), septième pièce – contient une indication intéressante, fort intéressante, quant à l'un des moyens que l'on se proposait

d'utiliser pour fixer la frontière au point voulu et qu'on tâchera ensuite d'utiliser sur la mer :

> « Il semble que nous devrions profiter de cette occasion pour occuper désormais d'une manière précise notre frontière du Mokta. Votre département ayant dans ses attributions l'établissement et la publication des cartes de la Tunisie il y aurait à mon avis grand avantage à ce que désormais les feuilles où la région sud se trouve figurée portassent, de la manière la plus apparente, l'indication au point dont il s'agit de la ligne de démarcation entre le Vilayet et la Régence. »

A vrai dire l'état-major n'avait pas tellement tort dans son appel à la prudence en raison de la carence des titres juridiques. L'invitation à la revision des cartes – cette revision que le contre-mémoire libyen a appelée la « campagne des cartes », *maps campaign* – fut conduite par le ministère de la guerre, ainsi que le témoignent les documents contenus dans l'annexe I-11 à la réplique libyenne. Mais on alla trop loin. L'on finit, en d'autres termes, par susciter les réactions italiennes – voilà que l'Italie est entrée pour la première fois dans cette histoire – ce qui devait retarder d'un quart de siècle la fixation de la frontière terrestre au point voulu. La question est relatée à la page 34 du contre-mémoire libyen (II). L'épisode clé est constitué par le zèle d'une société savante. La Société de géographie de Paris publia dans le numéro du premier trimestre 1887 de son *Bulletin* une note affirmant qu'une convention serait intervenue entre la Tunisie et la Turquie au sujet de la frontière terrestre et qu'en conséquence les cartographes seront obligés « à reporter l'ancienne frontière de 32 kilomètres dans l'est » (texte du *Bulletin* reproduit par Martel, *op. cit.*, t. I, p. 377).

Sur quoi, le professeur Martel commente :

> « Effectivement la nouvelle édition des cartes de l'état-major français indique la frontière sur le Moqta. S'appuyant sur cette documentation, la maison allemande Perthes, dans sa 2e édition de la carte de Habenicht : « Spezial Karte von Afrika », croit devoir faire de même. Alors que le tracé frontalier suivait, dans les livraisons précédentes, l'oued El Adjered jusqu'au Nefousa et bifurquait vers l'ouest, la nouvelle publication le reporte sur l'oued Moqta incluant Ouezzen. »

Mais la réaction italienne est véhémente. L'on en arrive à alerter les principales puissances européennes. L'essentiel de la querelle ressort de documents diplomatiques italiens qui figurent dans le contre-mémoire libyen (II, annexe 20). L'opération franco-tunisienne se solde par un échec et le professeur Martel résume d'une manière parlante l'état de la question à l'époque (*op. cit.*, t. I, p. 382) :

> « La Guerre est réticente, les Affaires étrangères, plus résolues, manquent de documents pour appuyer les prétentions tunisiennes. Pour forcer les Ottomans à découvrir les leurs, des opérations diverses se succèdent sans lien apparent ; les sondages du *Linois*, l'expulsion des Tripolitains, les « maladresses » du *Bulletin de la Société de géographie*, les indiscrétions du *Temps*, les protestations diplomatiques. La Porte n'y oppose pas de preuves mais des contre-manœuvres. »

Ce qu'il faut ajouter à ce récit, c'est un tout petit communiqué de presse du ministre des affaires étrangères de France, M. Flourens, aux journaux parisiens, daté du 20 décembre 1887. Il est publié dans le recueil des documents diplomatiques italiens. Il se lit comme suit :

« Nous sommes autorisés à démentir tous les bruits lancés par les journaux italiens au sujet de négociations qui auraient lieu entre la France et la Porte pour la rectification des frontières de la Tripolitaine. »

En réalité, c'est plutôt au *Bulletin de la Société géographique de Paris*, que le démenti ministériel aurait dû s'adresser...

Quoi qu'il en soit, l'on comprend sans difficulté pourquoi, lorsqu'on arriva finalement à convoquer en mars 1893 à Zouara une conférence pour des conversations tuniso-turques, l'on assista en réalité à un dialogue de sourds. Les Ottomans – et Martel aussi le confirme (t. I, p. 554) – pouvaient désormais compter sur les réactions suscitées par l'Italie et n'avaient donc pas la moindre raison d'accéder aux prétentions tunisiennes en souscrivant à un acte formel. Pour la Porte, la seule politique possible était celle du *wait and see*. L'avantage d'une telle politique était évident. Son inconvénient majeur était cependant que la Porte n'avait pas les moyens de s'opposer à la réalisation *de facto* des prétentions franco-tunisiennes.

Nous savons donc que la présence ottomane a été repoussée *de facto*, après la conférence de Zouara, à l'est du Wadi Fessi et jusqu'au Wadi Mokta. Une fois de plus, le professeur Martel relate et commente ces événements avec une objectivité qui lui fait honneur, en soulignant notamment que « les conditions internationales et la faiblesse de la Porte ont favorisé cette prise de possession » (*op. cit.*, t. I, p. 597).

Et le professeur Martel d'ajouter :

« Trois facteurs ont assuré ce succès : claire définition et permanence de l'objectif fixé, continuité d'effort sur le terrain, cohésion entre la pression locale et l'action diplomatique qui ne se ressentent jamais des tensions passagères entre autorités civiles et militaires. Mais [veuillez bien remarquer ceci, messieurs] ces éléments dépendent en définitive du sens du tracé réclamé. » (*Ibid.*, p. 598.)

L'observation est très juste. Il faut qu'un tracé de frontière ait un sens. Seulement, il faut que ce tracé ait un sens pour toutes les parties intéressées. Dans ce cas, par contre, c'est toujours d'un seul côté qu'on veut fixer la frontière là où on l'a décidé. Mais revenons au professeur Martel, qui nous donne son explication sur le « sens du tracé » réclamé :

« Alors que chacun s'accordait à reconnaître la nécessité d'une frontière satisfaisant les deux parties, en admettant des concessions, le commandant Rebillet, en 1889-1890, a « pensé » la frontière en fonction de l'ensemble des impératifs qui devaient en assurer l'établissement et la durée. » *(Ibid.)*

Et la conclusion finale du professeur Martel n'appelle pas de commentaires (sauf un, peut-être) : « La ligne Ras Ajdir, Moqta, Khaouï, Smeïda, Oued Souaregue, donne satisfaction aux Tunisiens sans trop léser les Tripolitains. » Sans trop les léser, donc. Mais on les lése.

Nous en arrivons ainsi au dernier acte : le traité de 1910. Je m'excuse d'avoir été un peu long, mais il fallait, face à la position prise par la Partie adverse dans la procédure écrite, rétablir certaines réalités historiques. Il me reste, pour compléter cette partie de mon exposé, à vous montrer que la conclusion finale a bel et bien été la conséquence inévitable d'une situation de fait et certes pas le « prix de concessions importantes » dans la section méridionale de la frontière, ainsi que le contre-mémoire tunisien s'efforce de l'accréditer (II, annexe II-1, p. 11).

Nous avons reproduit, à l'annexe I-12 à la réplique (IV), les procès-verbaux de certaines séances de la commission de délimitation de la frontière tuniso-tripolitaine réunie à Tripoli en avril-mai 1910. Au cours de la première séance, l'opposition entre les thèses des parties ne saurait être plus nette en ce qui concerne la section septentrionale de la frontière terrestre à partir de la mer. Le débat est acharné, de part et d'autre. Il n'est pas nécessaire d'y insister ici, puisque ce genre de polémique est bien connu dans l'histoire des négociations diplomatiques relatives à la délimitation de frontières. Les Ottomans produisent nombre de cartes de la région montrant que la frontière touche la mer à El Biban, y compris – c'est un petit détail intéressant – la carte : « jointe au livre jaune sur les affaires tunisiennes publiée [évidemment à Paris] en 1881 – carte sur laquelle El Biban est désigné comme point de départ » ; ce à quoi l'on répond de l'autre côté, aussi froidement que possible, « que cette carte est erronée et que son insertion au livre jaune n'a pu être que le résultat d'une erreur matérielle », en feignant ainsi d'ignorer que, comme on l'a vu, c'est seulement à partir de 1886, donc cinq ans après, que la frontière avait été transférée sur le Mokta par les cartes militaires françaises.

Quoi qu'il en soit, la prétention du côté tunisien est présentée d'une manière à constituer *un véritable nolle prosequi*. Le procès-verbal de la deuxième séance, celle du 14 avril, est révélateur. Du côté ottoman on propose de passer à l'examen des titres de propriété sur la région contestée, toute réserve faite quant au tracé de la frontière. Mais la proposition est nettement repoussée, « la Tunisie ne pouvant consentir à reculer la frontière actuelle, sur laquelle sont établies des postes militaires » (deuxième pièce, *ibid.*). La deuxième séance, d'ailleurs, ne dure qu'une heure et la troisième n'aura lieu que quatre jours plus tard, lorsque les délégués de la Porte proposent de passer à l'examen du tracé dans les zones suivantes, en déclarant ne pas considérer la frontière septentrionale comme « indiscutable ».

Mais, pour le côté tunisien, elle l'est. L'on fait état du côté tunisien, au cours de la troisième séance de Tripoli, d'une lettre du 1er juin 1893 dans laquelle Paul Cambon, ambassadeur de France à Constantinople, relate à son ministre, Dovelle, une conversation avec le ministre ottoman des affaires étrangères. Dans cette conversation, Cambon aurait reproché à la Porte que ses délégués à la conférence de Zouara de 1893, après avoir « tout compliqué », avaient abandonné la conférence. Et M. Cambon en conclut, dans des termes qu'il affirme avoir employé à l'égard du ministre ottoman des affaires étrangères :

> « Cela nous est indifférent ; nous n'avons pas besoin de vous pour savoir où sont les limites de la Tunisie, nous les connaissons. Nous avons bien voulu, par une condescendance que je trouve regrettable, ne pas occuper le territoire tunisien jusqu'à ses extrêmes limites : nous l'occuperons désormais... » (Troisième pièce de l'annexe I-12 à la réplique libyenne, IV).

Mais il y a plus. L'un des représentants les plus célèbres de la grande diplomatie de son époque s'empresse de donner des bons conseils à Paris quant à la méthode pour poursuivre ce qu'il appelle sans euphémisme « l'occupation progressive du pays jusqu'au Wadi Moqta ». Ainsi s'exprime Paul Cambon :

> « Cette occupation devrait être précédée de deux ou trois promenades militaires sans importance, opérées par de légers détachements qui de mois en mois s'avanceraient au-delà de Foum Tatahouine, en poussant chaque fois leurs reconnaissances un peu plus loin, puis ces petits détachements camperaient d'une façon permanente, et enfin ils établiraient des bordjs [des fortins] sur leur lieu de campement.

> De deux choses l'une, ou la Porte acceptera sans mot dire cette marche en avant, et la question serait tranchée *de facto*, ou elle nous demandera des explications, et alors je crois pouvoir affirmer que mes explications seront telles que le Sultan se hâtera de faire reprendre les négociations et de prescrire aux autorités civiles et militaires de Tripoli de les mener rapidement à bonne fin. »

Il convient de s'arrêter ici. Que les Ottomans, face à des arguments pareils, aient fini par céder, ce n'est que l'issue inévitable d'un processus ayant à son origine les « promenades militaires sans importance » préconisées par Paul Cambon. Dans les procès-verbaux de la commission de 1910 on ne revient plus sur la première section de la frontière sauf à la fin des négociations et sans discussions. Il n'y a aucun *do ut des*, aucun compromis. C'est la capitulation d'un empire qui ne pouvait plus être sauvé, qui était désormais, selon l'expression célèbre de lord Salisbury, *beyond salvation*.

Dans ces conditions, on voit mal comment la Partie adverse a cru pouvoir affirmer sérieusement que la zone de pêche de la Tunisie aurait été définie dès 1904 par une ligne latérale de 45° et que cette ligne n'aurait rencontré aucune protestation de la part

> « de l'Empire ottoman, qui aurait eu pourtant une excellente occasion d'en présenter une lorsqu'en 1910 fut négocié et conclu entre lui et la Tunisie le traité de délimitation de la frontière terrestre de 1910 » (IV, p. 466).

Comme il s'agit d'une citation, la première extraite de la plaidoirie du professeur Dupuy, je voudrais vous demander la permission de le féliciter à deux titres. D'abord pour son admirable exposé et en deuxième lieu pour la joie qu'il a dû éprouver pour les débuts de son fils qui a été à tout point digne de son père, et c'est tout dire. Je reviens à ma plaidoirie et remercie mon honorable contradicteur d'avoir bien voulu admettre, par cette affirmation, qu'il faut lier en quelque sorte la ligne de 45° au traité de Tripoli et, avant de passer à la mer, je veux bien lui donner une réponse sur ce point.

J'avoue que cet argument ne m'avait pas particulièrement frappé, d'autant qu'en général, à l'époque, la pratique tendait clairement à considérer que les traités en matière de frontières terrestres s'arrêtaient en principe à la mer et qu'en aucun cas ils n'allaient au-delà des eaux territoriales, ainsi qu'on aurait dû le faire ici pour arriver jusqu'à la ligne bathymétrique des 50 mètres. Mais lorsqu'on a à faire avec des arguments dont le fondement est quelque peu douteux, il arrive souvent que trop de réponses viennent en même temps à l'esprit pour que le choix en soit aisé. Finalement, j'ai eu l'agréable surprise de trouver ma réponse déjà faite dans l'exposé d'un autre conseil du Gouvernement tunisien. Permettez-moi donc de laisser au professeur Ben Achour le soin de répondre au professeur Dupuy père dans les termes suivants :

> « L'objet unique de la convention [de 1910] ... était de délimiter le territoire terrestre entre la Tripolitaine ottomane et la Tunisie depuis Ras Ajdir jusqu'à Ghadamès, qui se trouve en plein sud. Jamais, dans l'intention des signataires de cette convention il n'a été question d'établir une frontière maritime ni d'une manière expresse ni d'une manière implicite. » (IV, p. 584).

Je retiens de ces mots, cependant, qu'il n'a jamais été question d'établir des frontières maritimes et je le souligne parce que le professeur Ben Achour se méprend dans ce qu'il suppose que le mémoire libyen (I, p. 481) prétend

affirmer que les parties au traité de 1910 aient implicitement adopté, à cette occasion, une frontière maritime en direction nord. Le mémoire libyen développe un tout autre argument, qui me semble confirmé par les pièces du dossier et notamment par la lettre personnelle de 1914 du résident général à Tunis à son ministre des affaires étrangères à Paris que l'on examinera plus loin (**IV**, réplique libyenne, annexe documentaire I-26, première pièce). C'est l'argument d'après lequel il est permis de supposer que jusqu'à preuve du contraire les parties au traité de 1910, si elles s'étaient penchées sur les frontières maritimes, auraient prolongé en mer la direction de la frontière terrestre vers le nord.

L'« INSTRUCTION » DE 1904 ET LA PRÉTENDUE LIGNE DE 45°

Il est temps maintenant de montrer que cette « poussée vers l'est », que nous avons constatée dans l'histoire de la frontière terrestre, n'est pas un fait isolé. Ce n'est pas un accident de l'histoire, mais la conséquence d'une politique. Une politique sur laquelle nous n'avons pas à porter ici quelque jugement, mais que l'on ne peut ignorer, car la frontière ici en cause n'est pas aussi naturelle que celle formée par les Alpes et les Pyrénées. D'autant plus que la poussée de la frontière maritime va dans la même direction. L'objectif qu'on s'était fixé pour le tracé de la frontière terrestre a été atteint par le traité de 1910. La tentative sur mer se déroule devant vous.

La connexion entre ces deux opérations est telle qu'il y a parfois même des parallélismes d'ordre temporel. L'on se souviendra ainsi de l'incident du *Linois*, auquel allusion est faite à la page 34 du contre-mémoire libyen (**II**). L'on se souviendra, à ce propos, qu'au cours de la deuxième moitié de 1886 l'aviso français *Le Linois* fut envoyé pour effectuer des travaux hydrographiques au large de la Mokta. Des signaux furent installés en mer au lieu correspondant, selon le professeur Martel (*op. cit.*, t. I, p. 372), au Ras Ajdir actuel. Les signaux, semble-t-il et toujours d'après ce même auteur (p. 373), furent détruits par la population locale. N'empêche que c'est précisément en se basant sur cet incident que du côté franco-tunisien l'on se décida, ainsi qu'on l'a vu, à passer outre, et « à occuper désormais d'une manière précise notre frontière du Moqta » (cf. **IV**, réplique libyenne, annexe I-11).

La connexion entre la terre et la mer, Messieurs les membres de la Cour, ne saurait être plus immédiate. L'installation des signaux est la prémisse des « promenades militaires sans importance » et de la prise de possession sur les terres. On est pleinement, en d'autres termes, dans l'optique d'une doctrine bien connue de l'époque coloniale, la doctrine de l'*hinterland* qui accordait à l'Etat contrôlant le littoral un titre sur l'intérieur. Mais, cette doctrine me paraît se doubler d'une doctrine de l'*hintersea* car on cherche à renouveler la manœuvre dans la mer et voilà l'autre élément de connexion temporelle entre la pression exercée sur la terre et celle opérée sur la mer, à une autre occasion encore, la poussée militaire vers l'est est doublée d'une tentative sur la mer.

31 décembre 1904. Une date essentielle pour la Partie adverse qui s'y réfère à plusieurs occasions et de maintes manières. C'est la date de l'instruction de la direction des travaux publics de la Régence de Tunis sur les services de la navigation et des pêches maritimes, qui contient une référence à la limite latérale de la zone de surveillance à l'est, qualifiée comme « une ligne partant de Ras Ashdir *(sic)* et se dirigeant vers le nord-est jusqu'à sa rencontre des fonds de 50 mètres ».

Notons d'abord un élément que, de l'autre côté de la barre, on a souvent

cherché à faire oublier. L'instruction relève d'une circulaire administrative. L'« instruction » ne contient, justement, que des instructions. Elle ne prétend certes pas être la législation relative aux pêches maritimes à l'époque. D'ailleurs, le paragraphe 40 de l'instruction elle-même contient la liste des décrets beylicaux applicables à la pêche maritime. Ce qui est important, c'est que cette liste, après avoir énuméré, entre autres, un décret du 28 août 1897 sur la pêche côtière et la pêche des espèces migratrices, précise clairement le sens et la portée des circulaires. Elle le fait dans les termes suivants, à propos d'une circulaire relative audit décret de 1897 :

> « La circulaire n° 73, du directeur général des travaux publics, du 25 octobre 1897, commente certains articles du décret du 28 août, dont l'application pourrait soulever quelques difficultés : elle donne *in fine* la nomenclature des principaux poissons, mollusques et crustacés pêchés sur les côtes de la Régence. » (I, mémoire tunisien, annexe 77.)

D'ailleurs, le but de l'instruction dans le cas d'espèce est confirmé par le libellé du paragraphe qui concerne la prétendue ligne de 45°. Dans notre cas, il s'agit de la sous-section C (« Instruction pour le service des chaloupes garde-pêche chargées de la surveillance de la pêche des éponges et des poulpes ») de la section VI (« Pêches maritimes »), qui constitue le chapitre IV de l'instruction. Dans cette sous-section, le paragraphe 62 porte sur les garde-pêche affectés à la surveillance, qui, pour la partie du Hount Souk à Ras Ajdir, est confiée au *Grondin*. Ce sont donc des instructions de service, concernant des « promenades militaires » suggérées par l'ambassadeur Cambon.

Observons tout de suite que, s'agissant d'instructions de service, l'on comprend pourquoi la formule adoptée est très générique. Elle manque de la précision nécessaire à la règle juridique. L'indication de la ligne partant de Ras Ajdir est « vers le nord-est », mais, on l'a vu, l'angle d'inclinaison n'est pas déterminé. Il y a donc lieu de se demander pourquoi une affaire aussi importante que la délimitation latérale d'une zone de surveillance sur la pêche, qui de toute évidence pourrait aller à l'encontre des dispositions de l'Etat voisin, ne figure pas dans la législation elle-même. En d'autres termes, on a l'impression que de cette façon on a volontairement emprunté la voie quelque peu détournée de l'instruction de service, comme si on voulait en faire un ballon d'essai pour sonder les réactions de Tripoli et de la Porte. Monsieur le Président, une fois de plus on a une impression de « déjà vu », d'un procédé qui rappelle singulièrement ce qui se passait en même temps sur la terre et qui devait aboutir au traité de 1910.

Sur la mer, les choses se passeront autrement. Sur la côte tripolitaine, il y aura bientôt l'Italie, à la place de l'Empire ottoman. Du côté tunisien, la prudence sera telle qu'il faudra attendre jusqu'en 1951 pour qu'une ligne à 45° apparaisse dans un texte législatif tunisien. Jusqu'en 1951 les Tunisiens ont évité la solution législative. D'autre part, ce n'est pas sur la valeur juridique d'une instruction – effectivement assez discutable, et c'est le moins qu'on puisse dire, quant à sa porté internationale – que la Partie adverse prétend fonder son argumentation. La Partie adverse voudrait plutôt s'appuyer sur le prétendu acquiescement et/ou la prétendue reconnaissance à l'égard de la ligne de 45° de la part de l'Empire ottoman, de l'Italie, de la Libye elle-même. Pour ce qui est de la Libye, l'agent du gouvernement a déjà réfuté cette affirmation. Quant à l'Empire ottoman, on a vu que l'argument est aussi dénué de tout fondement. Reste l'Italie. Un élément fondamental dans notre histoire. Mais son comportement n'apporte pas le moindre soulagement aux soucis de la Partie adverse.

A cet égard, il convient d'observer tout d'abord que sous le prétexte de « mettre un peu d'ordre dans cette étude des réactions italiennes » (IV, p. 467), ainsi que le dit le professeur Dupuy, la Partie adverse cherche à faire flèche de tout bois en plaçant l'attitude italienne toujours au même niveau, qu'il s'agisse des titres historiques, de l'isobathe des 50 mètres ou de la limite latérale que l'on voudrait à 45°.

Je suis heureux de laisser entre les mains si expertes de mon collègue le doyen Colliard le soin de préciser la véritable attitude italienne quant aux deux premiers points. Je me bornerai pour ma part à observer qu'en ce qui concerne la question de la limite latérale, qui est l'objet de mon intervention, celle-ci ne saurait se poser pour l'Italie qu'à partir de l'occupation des côtes tripolitaines, à savoir, après la fin septembre 1911 et donc seize mois après que la question de la frontière terrestre eut été réglée entre les Franco-Tunisiens et les Ottomans. C'est pourquoi j'ai de la peine à suivre mon savant contradicteur, lorsqu'il affirme que :

> « Il faut, pour étudier l'attitude de l'Italie à l'égard de cette ligne, distinguer la période antérieure à la guerre italo-turque et la période postérieure à cette guerre. » (IV, p. 469.)

Je le repète : c'est à partir du 29 septembre 1911 que l'Italie aura le droit de dire quelque chose au sujet de n'importe quelle limite latérale entre la Tripolitaine et la Tunisie. Elle le fera d'ailleurs le jour même, ainsi que nous le verrons sous peu. Mais il y a plus. Même si l'on regarde cette période non pertinente, on note qu'un seul incident s'est produit dans cette partie de la mer. La Partie adverse n'a pu en citer d'autres. Et c'est piquant que nos honorables contradicteurs aient dû puiser dans notre dossier pour sortir ce cas. Effectivement, il s'agit d'un document que la Partie adverse, après tout, aurait préféré ne pas connaître. La Cour pourra aisément constater qu'il s'agit d'une note intérieure pour le directeur général des travaux publics de la Régence de Tunis en date du 12 février 1914 – reproduite à l'annexe I-27 à la réplique libyenne (IV) – qui donne la réponse suivante à la question de savoir si la ligne de 45° avait été invoquée par la Tunisie dans des litiges internationaux :

> « le service des pêches a eu une seule fois [seulement depuis 1892] l'occasion de verbaliser aux abords de la frontière maritime tuniso-tripolitaine.
>
> Le 8 novembre 1910, le baliseur *Eugène Résal* surprenait deux sacolèves grecques et une sacolève italienne pêchant, sans patente, à 18 milles dans le N 20 E de Ras Ashdir *(sic)*.
>
> Sur l'intervention des consuls généraux helléniques et italiens qui ne discutaient pas la légalité de la capture vu la grande distance de terre à laquelle la saisie des bateaux délinquants avait été opérée, le Gouvernement tunisien admit que les capitaines avaient pu de bonne foi se croire plus dans l'est qu'ils ne l'étaient en réalité, et les relâcha des fins de la plainte. »

Ce document est remarquable à plusieurs points de vue et on y reviendra par la suite. Pour l'instant il suffit de rappeler que jusqu'en 1914 la seule tentative d'assurer le respect d'une ligne prétendument déjà affirmée se termina par un retrait stratégique tunisien et se solda donc pratiquement par un échec.

L'audience est levée à 12 h 54

DIX-NEUVIÈME AUDIENCE PUBLIQUE (2 X 81, 10 h)

Présents : [Voir audience du 29 IX 81.]

LA GUERRE ITALO-TURQUE DE 1911-1912 : LE BLOCUS DE LA CÔTE

M. MALINTOPPI : Monsieur le Président, Messieurs les membres de la Cour, seize mois après le traité de Tripoli de 1910, le 29 septembre 1911, le Gouvernement italien communiqua à la Porte la déclaration de guerre. Le traité de Tripoli de 1910 avait été évidemment sollicité par la Tunisie dans le souci de régler la question des frontières terrestres en prenant en considération la décadence irréversible de l'Empire ottoman et les intentions irrévocables du nouveau Gouvernement italien, bien connues d'ailleurs des autorités françaises. Le président du conseil italien, M. Giolitti, ne cache d'ailleurs pas dans ses mémoires que son gouvernement n'avait plus rien à craindre du côté tunisien et que l'attitude de la France fut « pleinement cordiale » (*Memorie della mia vita*, Milan, 1927, p. 225). Or, la déclaration de guerre fut accompagnée, le jour même, par la déclaration du blocus du littoral de la Tripolitaine et de la Cyrénaïque. Cette déclaration, qui fit l'objet de notes verbales adressées à toutes les missions diplomatiques accréditées à Rome, est reproduite à la page 557 de la *Rivista di diritto internazionale* (vol. VI, 1912), revue qu'un maître qui a honoré votre Cour tout autant que la science du droit international, Dionisio Anzilotti, avait fondé cinq ans auparavant. Pour la partie qui nous intéresse, la déclaration était libellée de la façon suivante :

> « à partir du 29 courant le littoral de la Tripolitaine et de la Cyrénaïque, s'étendant de la frontière tunisienne jusqu'à la frontière de l'Egypte, avec ses ports, havres, rades, criques, etc., compris entre les degrés 11,32 et 27,54 de longitude orientale de Greenwich, sera tenu en état de blocus effectif par les forces navales du Royaume [d'Italie] ».

Laissons pour l'instant la question de la limite de la zone de blocus à l'est, c'est-à-dire, vers l'Egypte. Nous y reviendrons sous peu, mais considérons maintenant la limite occidentale, c'est-à-dire, celle vers la Tunisie. La direction donnée dans la déclaration italienne doit évidemment être déterminée en relation avec les méridiens indiqués, à savoir : 11° 32' de longitude orientale de Greenwich.

Ces données – on peut aisément le constater sur la carte – correspondent sur terre au point où la frontière touche à la mer. Mais il convient de ne pas oublier que l'objet de la déclaration italienne est le blocus de côtes et que le blocus, si je ne me trompe pas, est en général effectué par les forces navales. Par conséquent, la limite latérale du blocus n'a de sens que si elle est déterminée en fonction de la mer, d'autant plus qu'il s'agissait de bloquer non pas un port, mais un littoral tout entier et qu'il fallait, partant, effectuer des croisières pour surveiller l'application du blocus. En d'autres termes, il faudrait être doué d'une imagination particulièrement remarquable pour penser qu'aux yeux du Gouvernement italien le blocus devait être limité à 11° 32' sur le littoral, mais que ses forces navales auraient dû se maintenir à l'est d'une diagonale partant de 11° 32' sur la côte et suivant sur la mer l'inclinaison tunisienne de 45° en direction du nord-est. Point n'est besoin de souligner que,

s'il en avait été ainsi, la déclaration de blocus aurait dû être formulée dans des termes fort différents.

Cette constatation a encore bien plus de poids si l'on considère qu'à l'époque le blocus naval devait avoir déjà le caractère de l'effectivité. Dès lors, les navires devaient se tenir tout près de la côte. Dans ces conditions, la connaissance d'une prétendue limite latérale de la zone bloquée, à forte inclinaison, devenait essentielle. En d'autres termes, il était essentiel pour l'Etat qui effectuait le blocus de savoir si ses navires risquaient d'empiéter par des actes de guerre sur des eaux sur lesquelles un pays neutre revendiquait des prétendus pouvoirs de surveillance.

Il est normal que, s'agissant de bloquer une côte dont la direction générale va approximativement dans le sens ouest-est/sud-est, l'indication des points extrêmes du littoral par des coordonnées géographiques n'ait un sens au point de vue des limites de croisière des navires que si ces deux points se prolongent le long de leur méridien. En d'autres termes, et le littoral étant ce qu'il est, toute déviation par rapport au prolongement raisonnable et rationnel sur la mer des points terminaux du littoral bloqué aurait dû être indiquée d'une manière très précise.

En réalité, la déclaration italienne démontre, à la fois dans ses termes et dans son contexte, que la situation des frontières maritimes entre la Tunisie et la Tripolitaine était à l'époque absolument ouverte et qu'en tout cas la déclaration de blocus, bien que dûment notifiée à l'ambassade de France à Rome, ne fit l'objet d'aucune protestation ou même d'aucune remarque du côté franco-tunisien. Et je voudrais poser ici une question de pure rhétorique. Si la ligne de 45°, si chère à la Partie adverse, était dès 1904 aussi irréfutable et effective que la réplique tunisienne le prétend à la page 25, l'on est en droit de se demander pourquoi, en 1911, du côté franco-tunisien, on n'a pas cru devoir s'élever tout de suite, et de la manière la plus nette, contre l'intention d'un autre Etat d'exercer la plénitude de sa puissance navale dans des eaux que l'on affirme être irréfutablement et effectivement tunisiennes. Or, il n'en est rien. La réaction franco-tunisienne, c'est le silence. Un silence totalement injustifié, que l'on ne saurait certes justifier à posteriori en affirmant que la délimitation d'une zone de blocus est autre chose que la délimitation d'une zone de surveillance de la pêche. La guerre italo-turque provoqua plusieurs incidents maritimes entre l'Italie et la France. La Cour se souviendra sans doute que des questions furent soumises ici, à La Haye, à la Cour permanente d'arbitrage. Dès lors, si la France avait voulu réellement exercer à l'époque un pouvoir de juridiction quelconque jusqu'à une ligne aussi anormale que celle de 45°, elle aurait dû préciser sa position en tout cas et sans le moindre délai. Le moyen le plus simple pour le faire était à sa disposition : la France n'avait qu'à répondre à la note italienne notifiant la déclaration de blocus.

D'ailleurs, de l'autre côté de la zone bloquée, c'est-à-dire du côté de la frontière égyptienne, les choses se passèrent bien autrement. Toujours dans la *Rivista di diritto internazionale*, à la page suivante du même volume, l'on trouve le texte d'une nouvelle note verbale italienne, datée du 19 octobre 1911, qui rectifie la déclaration du 29 septembre en signifiant aux missions accréditées à Rome : « que la limite orientale de la côte tenue en état de blocus effectif par les forces navales du Royaume a été modifiée et fixée à la longitude de 25° 11' est de Greenwich ». (C'est hors de la carte [1] évidemment, car il s'agit de la frontière entre la Libye et l'Egypte.)

[1] Voir ci-après, correspondance, n° III.

En réalité, j'ajoute que le texte publié dans la *Rivista* contient une erreur matérielle d'impression, puisqu'il indique la longitude de 5° 11'. L'erreur est manifestement évidente et l'indication exacte se trouve à la page 182 du volume de l'année suivante (1913) de la *Rivista*. En tout cas, ce qui importe ici, c'est que la rectification fut provoquée par une démarche anglo-égyptienne au sujet de la position exacte de la frontière entre la Cyrénaïque et l'Égypte. La prétention anglo-egyptienne, découlant de la question de la baie du Solum (*Rivista*, 1913, p. 182, note 1), fut admise par l'Italie qui rectifia la limite du blocus.

Il n'est pas sans intérêt – n'est-ce-pas ? – de comparer les attitudes anglo-égyptiennes et franco-tunisiennes. Les voisins du côté est de la Libye s'élevèrent sans délai contre une déclaration de blocus qu'ils considéraient comme exorbitante. L'Italie, quant à elle, n'opposa pas la moindre difficulté à réduire l'étendue de son blocus. Et les voisins du côté ouest ? Rien à signaler sur le front occidental.

L'INCIDENT DES BATEAUX GRECS DE 1913

L'état de guerre entre l'Italie et l'Empire ottoman prit fin avec l'accord préliminaire de Lausanne du 15 octobre 1912, suivi par le traité de paix d'Ouchy signé trois jours après. Dès lors et jusqu'à la seconde guerre mondiale, les côtes libyennes demeurèrent soumises à l'occupation italienne. C'est au cours de cette période que l'on commença à s'intéresser au problème des limites respectives des juridictions des deux Etats auxquels appartenaient à l'époque les côtes dont il est question aujourd'hui.

Le 26 août 1913, soit donc dix mois après la fin des hostilités avec l'Empire ottoman, le torpilleur italien *Orfeo* arrêta trois bateaux de pêche de nationalité hellénique. La saisie eut lieu à un point situé à 11,7 milles de la côte. Ce point, d'après le rapport du commandant du torpilleur (annexe 44 au contre-mémoire libyen, II), correspondait aux coordonnées 33° 19' de latitude nord et 9° 22' de longitude est de Paris, les cartes du navire italien étant de toute évidence basées sur le méridien de Paris et non pas sur celui de Greenwich. Pour la précision, la longitude correspondante sur le méridien de Greenwich est 11° 42' 14". Ce
(103) point est indiqué sur la carte 1 de la réplique libyenne. On peut constater que ce point se trouve en deçà de la ligne bathymétrique des 50 mètres qui dans cette zone arrive jusqu'à 25 milles de la côte. Bref, les trois bateaux – *Panaia*, *Aghios Constantinos* et *Taxiarchi* – avaient été saisis à un point qui, d'après la Partie adverse, aurait été revendiqué par la Tunisie dans la fameuse instruction de 1904.

Telle n'était évidemment pas l'opinion du capitaine du torpilleur italien. Il se borna à constater – et à le signaler dans son rapport – que les trois bateaux se consacraient à la pêche des éponges sans être munis du permis exigé par l'article 19 du décret italien du 27 mars 1913 portant le règlement pour l'exercice de la pêche maritime en Libye, qui concernait l'exercice de la pêche dans toute l'extension des bancs spongifères du pays (contre-mémoire libyen, II, annexes documentaires, n° 41). A l'époque la compétence pour connaître des contraventions audit règlement revenait aux autorités portuaires. C'est donc au commandant du port de Zouara, territorialement compétent, que le procès fut confié. C'est ce même commandant qui, le 2 septembre 1913, reconnut que l'un des trois capitaines avait été surpris alors que son bateau se livrait à la pêche des éponges. Il fut dûment condamné. Les autres furent acquittés, leur faute n'ayant pas été prouvée. Le juge, bien entendu, ne manqua

pas d'affirmer que l'arrestation avait eu lieu dans une zone de mer soumise à la juridiction italienne. Ce considérant du jugement mérite d'être retenu, mais avant de le faire il convient plutôt de signaler que l'arrestation des trois bateaux grecs fit l'objet d'une note verbale de l'ambassade française à Rome.

Passons à l'examen de cette note verbale.

La note verbale – datée du 9 septembre 1913, mais ignorant de toute évidence le jugement rendu à Zouara une semaine avant – justifiait l'intervention française par le fait que les pêcheurs grecs étaient porteurs de patentes de pêche tunisiennes, et poursuivait en les termes suivants :

> « Les scaphandriers grecs n'ayant pas l'habitude de faire le point, il serait sans doute difficile de préciser l'emplacement exact où s'est produite l'arrestation. Il paraît toutefois hors de doute que le banc d'éponges où les barques grecques se livraient à leur industrie appartient à l'ensemble des bancs sur lesquels le service des pêches de Tunisie exerce sa surveillance » (**IV**, réplique libyenne, annexe I-25).

L'affirmation est sèche. Aucune preuve n'est apportée quant à l'emplacement exact du point où l'arrestation aurait eu lieu. Aucune disposition législative, aucune instruction n'est invoquée. Aucune référence n'est faite ni à la distance de la côte, ni à la longitude par rapport au point où la frontière terrestre touche la mer. Le souci de la note verbale est surtout celui de souligner un titre générique à l'exploitation des bancs d'éponges que l'on suppose tunisiens :

> « Un usage immémorial attribue à la Régence de Tunis l'exploitation des bancs d'éponges situés sur son littoral. Ce droit d'usage, tout différent des droits qui s'appliquent à la mer territoriale ne porte aucune atteinte au principe de la liberté des mers et aux droits de la navigation. Avant l'occupation française cette industrie maritime faisait l'objet d'une concession et le fermage des éponges et poulpes a été explicitement inscrit parmi les revenus sur lesquels était basée la garantie du passif réservé à la Régence dans la convention du 23 mars 1870 à laquelle le Gouvernement italien était partie contractante. » (**IV**, réplique libyenne, annexe I-25.)

Mais, veuillez bien, Messieurs, remarquer ceci : la note verbale ne saurait éviter de faire une allusion discrète à la délimitation latérale de la zone de pêche :

> « Depuis lors [c'est-à-dire depuis 1870], les seules difficultés qui se soient produites avec le Gouvernement royal en ce qui concerne ce droit d'usage ont eu trait à la délimitation de la zone de surveillance. » *(Ibid.)*

L'allusion est discrète, mais d'importance. Faute de documentation dans les archives, on ne peut faire que des hypothèses. On a déjà vu, et l'on verra à nouveau plus loin, que d'après une note interne à l'administration française les antécédents se réduisent à un seul qui est d'ailleurs dépourvu de toute valeur, mais cette note administrative porte en tout cas une date – celle du 12 février 1914 – qui est *postérieure* à la date de la note verbale de 1913. Puisque les instructions tunisiennes, qui prétendent adopter la ligne de 45° comme la limite occidentale de la zone de pêche, datent de 1904, il est possible, mais nullement prouvé, que les autorités italiennes en aient eu connaissance. Mais jusqu'à septembre 1911 la question des limites occidentales de la zone de pêche n'auraient pu intéresser que l'Empire ottoman. A l'époque de la guerre, l'Italie

déclara le blocus des côtes sans songer le moins du monde à se maintenir à l'est de cette prétendue limite maritime de 45°. L'on arrive ainsi finalement au mois d'octobre de 1912 (fin des hostilités entre l'Italie et l'Empire ottoman) et on voit mal comment une question aurait pu surgir au cours des dix mois qui vont du traité d'Ouchy à l'arrestation des trois bateaux grecs. Bien au contraire, si tel avait été le cas et si la question des limites latérales des zones de pêche des deux pays avait été débattue pendant cette si courte période, la note verbale du 9 septembre n'aurait pas manqué d'y faire une référence précise. En d'autres termes, les « difficultés » qui « ont eu trait à la délimitation de la zone de surveillance » – selon la formule de la note précitée – n'avaient rien à voir avec les limites latérales. Il est beaucoup plus probable que la note en question entendait se référer aux problèmes relatifs à la limite extérieure des bancs tunisiens vers la haute mer, qui sans doute avaient été débattus entre les Italiens et les Franco-Tunisiens. Mais, et surtout, quoi qu'il en soit, une chose est certaine : si, en septembre 1913, la note française faisait allusion à des difficultés ayant trait *à la délimitation* de la zone de surveillance, cela veut dire qu'à cette date aucune limite n'avait encore été arrêtée entre les parties et d'aucune manière. Et voilà un démenti de l'époque à la valeur que l'on prétend attribuer aujourd'hui à l'instruction de 1904.

Mais revenons à la note verbale française. Sa partie finale est non moins intéressante. Son libellé est extrêmement prudent, et ses conclusions ne sont nullement l'expression d'une protestation formelle :

> « Le gouvernement du protectorat ne peut dans ces conditions que maintenir l'affffirmation de ses droits auxquels la capture de barques pêchant avec une patente tunisienne sur un banc réputé comme tunisien porterait une atteinte directe.
>
> L'ambassade de France, en faisant en conséquence toutes réserves en ce qui concerne le libre exercice des droits dudit gouvernement, serait reconnaissante au Gouvernement royal de la renseigner sur les circonstances et les motifs de cette arrestation. » (IV, réplique libyenne, annexe I-25.)

Mais, en l'espèce, les « renseignements » n'étaient pas difficiles à donner. La décision du commandant du port de Zouara – à laquelle il convient maintenant de revenir – avait été formelle quant à l'emplacement où l'arrestation des trois bateaux grecs s'était produite. Le juge avait carrément affirmé que le point en question :

> « alors qu'il est en deçà de la ligne normale à la plage passant par Ras-Ashyir *(sic)*, qui marque le confin entre la Tripolitaine et la Tunisie, se trouve compris dans la distance des bancs d'éponges de la Tripolitaine ... lesquels s'étendent dans cette localité jusqu'à plus de 25 milles de la plage » (II, contre-mémoire libyen, annexe 44).

En d'autres termes, le commandant du port de Zouara prit soin d'indiquer que l'emplacement de l'arrestation tombait sous sa juridiction tant au point de vue de la limite latérale qu'à celui de la distance de la côte.

Le jugement de Zouara, on l'a vu, était daté du 2 septembre. La note verbale française, probablement remise sans connaissance du jugement, datait quant à elle du 9. Moins d'un mois plus tard, le ministère italien répond, le 2 octobre, et sa note est transmise à Paris la semaine suivante par l'ambassade de France à Rome. Messieurs, cette note verbale italienne est une pièce fondamentale, à cause de son contenu d'abord, mais aussi en relation avec l'attitude prise par le

Gouvernement français à son égard. Mais procédons par ordre. La Cour voudra bien apprécier à quel point l'histoire devient intéressante.

LA SOLUTION PROVISOIRE SUGGÉRÉE PAR L'ITALIE

La note verbale italienne – dont le texte figure à l'annexe I-18 de la réplique libyenne (IV) – ne se borne cependant pas à signaler que l'arrestation avait été effectuée à un point « faisant face à la côte tripolitaine », à 12 milles de celle-ci et donc sur une zone soumise au règlement italien sur la pêche en Libye. La note allait plus loin. Elle rappela d'abord qu'il ne pouvait y avoir de contradiction de fond entre les dispositions italiennes et les dispositions tunisiennes, vu que les principes de ces dernières avaient « servi de base ... pour établir des dispositions analogues en ce qui concerne la Tripolitaine... » Cette considération faite, la note italienne ne se cache pas que les deux systèmes de dispositions, quoique analogues quant au fond, devaient être coordonnés entre eux dans l'espace. C'est précisément là – je le note en passant – le point qui échappe à mon honorable contradicteur (IV, p. 468). Lorsque le professeur Dupuy senior prétend se prévaloir de la similarité des deux textes en matière de pêche et nous opposer que le Gouvernement italien se serait interdit pour l'avenir de protester quant à la limite latérale, il feint d'oublier que la similitude ne concerne que le fond des deux règlements, et en particulier l'adoption du critère bathymétrique, et certes pas la délimitation de la zone tunisienne du côté de la frontière avec la Tripolitaine. Revenons à la note verbale italienne qui dans sa partie, de loin la plus importante, s'exprime dans des termes qu'il convient de citer expressément :

> « Mais comme une délimitation doit exister entre les eaux relativement aux bancs d'éponges dépendant de la Régence de Tunis et ceux dépendant de la Tripolitaine, le ministère des colonies a donné pour instruction au gouverneur de la Tripolitaine de limiter, pour le moment et en attendant que la question soit réglée entre les deux gouvernements, sa juridiction, en ce qui touche la pêche des éponges vers le couchant, à une ligne droite qui, partant d'un point de la côte servant de frontière avec la Tunisie, se prolongeait en mer normalement à la direction de la côte en ce point. »

La ligne en question est évidemment la même que celle retenue par le commandant du port de Zouara dans sa décision. Nous ignorons, car les archives ne nous ont pas donné d'indications à ce sujet, si le commandant du port de Zouara s'était conformé à des instructions dont on aurait perdu la trace, ou bien, ce qui est plus probable, si le ministère italien des affaires étrangères n'anticipait pas sur les instructions italiennes qui, ainsi qu'on le verra, furent certes publiées, mais seulement en 1919, soit à la fin de la première guerre mondiale. Encore une fois, ces détails peuvent être laissés de côté. L'essentiel est que le Gouvernement italien affirme carrément sa juridiction jusqu'à une ligne droite *normale à la direction de la côte*. La formule du considérant du jugement de Zouara est ainsi précisée au point de vue technique : la ligne se prolongeant en mer est présentée par le ministère comme perpendiculaire à la direction de la côte, alors que la décision de Zouara était moins technique en se référant simplement à la « plage » *(spiaggia)* et même pas à la direction de celle-ci.

Mais, bien sûr, le Gouvernement italien ne prétendait nullement répondre, de cette manière, à une question de délimitation formelle de zones de pêche que les parties n'avaient même pas encore effleurée. La propositon italienne n'a qu'un caractère transitoire, et la note verbale le souligne :

> « Cette ligne, orientée à peu près nord-nord-est, semble résoudre provisoirement la question de la façon la plus naturelle et équitable sans compromettre, même au large, les droits des deux gouvernements sur les bancs d'éponges qui leur appartiennent respectivement. »

Et la conclusion, quant au cas d'espèce, est simple et précise :

> « Or le point où le torpilleur a arrêté les trois barques grecques se trouve à l'est de la ligne de délimitation, face à la côte de Tripolitaine et par conséquent sur les bancs appartenant à la colonie. »

Ainsi l'incident est réglé. Mais c'est l'avenir qu'il importait aussi, et surtout, de régler. On ne connaît évidemment pas encore à Rome la réaction française, mais il faut qu'il soit clair – la période de grandes tensions italo-françaises du tournant du siècle n'est pas tellement loin – que la position italienne comporte toute la souplesse nécessaire :

> « Le ministère royal des affaires étrangères croit devoir ajouter que conformément aux instructions du ministère royal des colonies, le gouverneur de la Tripolitaine a décrété que la surveillance dans les eaux frontières soit exercée avec la tolérance que requiert une délimitation non précise et difficile à contrôler. »

La partie adverse a été singulièrement discrète, et pour cause, au sujet de ces deux notes verbales. Mon honorable contradicteur n'a parlé à cet égard que de « réactions épisodiques » de la part des autorités italiennes face à ce qu'il aimerait présenter comme une ligne internationalement acceptée, à savoir, cette fameuse ligne de 45°. Il a donc cru pouvoir glisser à la fois sur la note verbale française *et* sur la note verbale italienne. Je comprends fort bien ce silence, car il aurait été fort en peine de vous expliquer pourquoi, si la ligne de 45° était aussi établie et internationalement acceptée qu'il le prétend, le Gouvernement français a cru opportun de ne pas en faire mention dans sa note verbale du 9 septembre. Les deux notes verbales sont évidemment à nos yeux et, j'ose bien l'espérer, aux yeux de la Cour, des documents ayant la même importance capitale. Mais, à un certain point de vue, c'est surtout la note verbale française qui, du fait de son silence étonnamment discret au sujet de la ligne de 45° oppose un démenti formel à la Partie adverse.

La note verbale italienne, quant à elle, enfonce le même clou, puisqu'elle ignore une ligne que la note française n'avait d'ailleurs nullement mentionnée et puisqu'elle suggère au surplus, comme solution provisoire, une tout autre ligne n'ayant rien à voir avec la ligne de 45°.

Disons tout de suite que nulle part dans les archives, soit italiennes, soit françaises, nous n'avons trouvé de réponse à la note verbale italienne. Après de longues recherches, nous avons finalement trouvé, dans les archives, non pas la réponse, mais deux documents qui nous expliquent pourquoi du côté franco-tunisien on a préféré ne pas répondre à la note verbale italienne. Nous verrons notamment pourquoi du côté franco-tunisien l'on finit par considérer la proposition italienne comme une solution à la fois rationnelle et convenable. Pour ce faire, il convient d'examiner les documents qui figurent aux annexes I-26 et I-27 à la réplique libyenne (**IV**). Mon honorable contradicteur n'a pas pu éviter de s'occuper de l'un des documents reproduits à l'annexe I-26 (**IV**, p. 469 et suiv.), alors qu'il avait soigneusement esquivé les notes verbales et qu'il allait aussi scrupuleusement ignorer les autres documents français. J'ai déjà comblé la première lacune. Avec la permission de la Cour, je veux bien m'occuper maintenant de la seconde.

L'ACQUIESCEMENT FRANCO-TUNISIEN

L'annexe documentaire I-26 à la réplique libyenne comprend deux documents. Ces deux documents sont : *primo*, une lettre en date du 2 février 1914 adressée par le résident général de France à Tunis au président du conseil, ministre des affaires étrangères ; *secundo*, à l'appui de la première, une lettre personnelle du résident général en date du 29 janvier 1914. L'occasion de cette correspondance est précisément l'arrestation par le torpilleur italien des bateaux de pêche grecs dont nous avons déjà parlé. Deux questions sont soulevées dans les documents français : d'abord celle de la distance par rapport à la terre de l'endroit où la saisie a été effectuée ; ensuite, celle de la position du point de saisie par rapport à la limite des eaux tuniso-tripolitaines.

Sur le premier point, le résident général, constatant que la saisie a été opérée à 12 milles marins, n'entend suggérer aucune protestation dans la mesure où il est considéré que cette arrestation italienne est la mise en pratique du principe de la surveillance au-delà des eaux territoriales, principe au sujet duquel le même résident général indique qu'il avait été :

> « soutenu depuis de nombreuses années par l'administration tunisienne et accepté sous certaines réserves en 1902 par le Gouvernement royal, que les nations intéressées ont le droit strict d'exercer une surveillance sur les bancs d'éponges situés bien au-delà des limites de leurs eaux territoriales ». (IV, réplique libyenne, annexe I-26, p. 291).

Sur le second point, au contraire, la lettre du résident général souligne le désaccord existant entre le Gouvernement tunisien et le Gouvernement italien. La lettre du résident général rappelle que :

> « l'administration tunisienne a considéré que la limite des eaux tuniso-tripolitaines correspondait à une ligne partant virtuellement de la borne de la frontière terrestre et se dirigeant approximativement vers le N 45° E ».

Cette affirmation semble forcer un peu les choses, d'abord parce que la note verbale française du 9 septembre 1913 ne faisait aucune mention de la ligne de 45°, et ensuite parce que la ligne en question est la limite d'une zone de surveillance et non pas une frontière internationalement établie. Mais le point fondamental est que la lettre du résident général fait le point sur la réalité internationale existant à ce moment-là.

Il reconnaît expressément que le Gouvernement italien n'admet pas la ligne nord 45° est, car ce dernier estime que la question de la frontière maritime devra être réglée entre les deux gouvernements. En attendant il adopte une limite fort différente, et le résident général, en commentant la position italienne, signale en effet :

> « Par sa note verbale du 2 octobre 1913, le ministère royal a fait connaître que la limite adoptée par les autorités italiennes, en attendant que la question soit réglée entre les deux gouvernements, correspondait à une ligne partant de la frontière tunisienne et se prolongeant en mer vers le NNE, normalement à la direction de la côte en ce point. »

La lettre du résident signale aussi, qu'entre la ligne de 45° et la solution proposée par l'Italie il y aurait un écart de 23°, ce qui fait que, d'après ce calcul, la délimitation italienne aurait une inclinaison de 22° vers le nord-est. Nous avons marqué sur la carte ce calcul du résident général par une ligne rouge qui est partiellement cachée par la ligne jaune. Pour ma part, je crois que

la délimitation suggérée par l'Italie avait plutôt une inclinaison de 20° environ qui correspond effectivement à celle d'une ligne perpendiculaire à la côte. Voilà pourquoi nous avons marqué en jaune, ici, la ligne de 20° qui serait d'après nos calculs la ligne normale à la direction de la côte, selon la formule suggérée par le Gouvernement italien. Mais le point est relativement secondaire. Revenons plutôt à la lettre du résident général. Elle ajoute aussi que cette solution engendrait « des inconvénients au point de vue italien comme au point de vue tunisien » en ce qui concerne l'accès à la fosse de Ras Ajdir. Ce sont donc des observations qui ont trait à la navigation. Et le résident en conclut que :

> « Il y aurait donc un intérêt évident à ce que le Gouvernement français pût amener le Gouvernement royal à accepter comme limite des eaux tuniso-tripolitaines une ligne partant de la pyramide frontière, et orientée vers le N 45° E. »

Mais veuillez bien remarquer ceci, Messieurs : le résident n'insiste pas pour autant sur cette conclusion, il se montre assez souple et il donne deux raisons à cette souplesse. Examinons-les brièvement. D'après le résident :

> « la question n'a pas une importance assez grande pour que nous insistions pour le maintien d'une possession qui n'est pas étayée par des signes tangibles ».

Donc, je constate que la question n'est pas, aux yeux du résident général, d'une importance assez grande pour en faire un différend d'ordre international. D'autant plus, et voilà la deuxième raison, que la possession franco-tunisienne n'aurait pas été étayée par des signes tangibles. Le professeur Dupuy a relevé ce membre de phrase pour lui donner une explication qui a dû lui paraître simple mais qui est en réalité trop simple. Il s'interroge sur l'interprétation qu'il faut donner à la lettre du résident, et voilà la réponse de mon honorable contradicteur :

> « Il [le résident général] dit que la zone d'exploitation des éponges n'est pas marquée par des signes tangibles. Cela signifie non pas, comme l'avance la Libye, que les limites de la zone sont contestables, cela signifie tout simplement qu'elles ne sont pas matérialisées. Et si elles ne sont pas matérialisées, nous savons pourquoi.
>
> Souvenons-nous que cette matérialisation est techniquement impossible, que la commission franco-italienne de 1902 et de 1903 avait elle-même conclu à son impossibilité et que c'était pour cela qu'on avait trouvé d'autres critères. » (IV, p. 469-470.)

Pour ma part, j'avoue que cette explication me paraît insuffisante. Les vicissitudes de la commission franco-italienne de 1902 et de 1903 montrent l'impossibilité de marquer par des signes tangibles une ligne bathymétrique au large de la côte, c'est-à-dire la ligne vers la haute mer. Mais ici il est question d'une ligne qui part de la côte et à laquelle rien n'empêchait de donner des « signes tangibles » ne fût-ce qu'à proximité du littoral. Mais, Messieurs les membres de la Cour, il fallait, après tout, indiquer simplement une direction et deux balises d'alignement auraient largement suffi.

Or c'est plutôt une considération de ce genre qui était présente à l'esprit du résident général. La prétendue « possession » — et non pas « zone » comme l'indique le professeur Dupuy — n'était pas étayée par des signes tangibles alors qu'elle aurait pu l'être. Et c'est cette carence qui rendait à ses yeux bien

difficile que le Gouvernement français pût amener celui de l'Italie à accepter la ligne en question.

Dans ces conditions, le résident général décline la responsabilité de suggérer que l'on oppose à la note verbale italienne une fin de non-recevoir. Bien au contraire, il penche pour la position opposée. Et il laisse apercevoir sans trop de difficulté sa pensée véritable lorsqu'il conclut de la manière suivante :

> « nous ne pouvons que nous en rapporter à Votre Excellence du soin de juger s'il n'y a pas lieu d'accepter comme frontière de mer la ligne normale à la direction générale de la côte, indiquée par l'Italie, comme une solution rationnelle d'un différend qu'il importe de résoudre et pour lequel les éléments d'appréciation ne sont pas d'une précision suffisante » (réplique libyenne, annexe I-26, IV, p. 291).

Cette suggestion nous paraît, après tout, sur le plan historique, assez raisonnable. Il ne s'agissait que d'établir un *modus vivendi* jusqu'à ce qu'une délimitation formelle puisse être effectuée. C'est pourquoi, peut-être, le résident général alla jusqu'à suggérer qu'on accepte la ligne normale à la côte comme « frontière de mer ». Je souligne cette expression, parce qu'elle va même au-delà de l'objet de la proposition italienne qui proposait de délimiter la juridiction seulement « en ce qui touche la pêche ». Il est donc incontestable que la ligne de 45° n'est aux yeux du résident général français à Tunis ni une ligne internationalement reconnue ni une ligne acceptée en particulier par le Gouvernement italien.

On peut se demander pour quelles raisons la proposition italienne a dû apparaître à la Régence tunisienne comme – c'est l'expression exacte qu'on a employée – « une solution rationnelle ». Deux explications au moins nous viennent du dossier et notamment du groupe de documents qui comprend la lettre du résident général au président du conseil dont il a été question il y a un instant. A l'annexe I-26 de la réplique libyenne, il y a un document daté du 29 janvier 1914 et portant l'indication « lettre personnelle du R. G. », c'est-à-dire du résident général. Elle est aussi de toute évidence adressée au président du conseil. Ce qui est important, c'est que le résident général déclare avoir examiné le matin même la question posée par la note verbale italienne avec, entre autres, le capitaine Le Bœuf, qui avait été l'un des principaux artisans de la frontière terrestre et du traité tuniso-ottoman de 1910. Que nous dit-on donc après cette petite réunion ?

Le résident général s'exprime de la façon suivante :

> « Nous avons examiné ce matin ... la question de notre frontière de mer [expression qui revient toujours] et nous avons reconnu qu'il y avait lieu de modifier la conclusion du rapport qui va vous être adressé et qui, en minute, vous demandait d'insister pour faire prévaloir nore tracé sur le tracé italien. Notre tracé était à peu près le prolongement de notre frontière de terre. Mais quand cette frontière a été modifiée par le traité de Tripoli nous n'avons pas prolongé en mer la nouvelle ligne. Si les Italiens le faisaient, le tracé serait plus avantageux pour eux que la normale à la direction générale de la côte. » (IV, p. 290, n° 1.)

Une fois de plus, le résident général a présent à l'esprit une frontière de mer. Ceux qui ont participé à la réunion semblent convaincus : 1) que cette frontière de mer devait correspondre à peu près au prolongement de la frontière de terre ; 2) que le traité de Tripoli de 1910 n'a pas prolongé en mer la nouvelle ligne – ce qui donne, soit dit en passant, un nouveau démenti aux interprétations fantaisistes relatives à de prétendus acquiescements ottomans

lors de la conclusion du traité de 1910 ; 3) que le prolongement en mer de la frontière terrestre aurait été plus avantageux pour la Libye que la ligne normale à la direction de la côte préconisée par les Italiens. Il n'y a pas un mot quant à la ligne de 45°.

L'autre document – qui est contenu à l'annexe I-27 de la même pièce – n'est pas moins intéressant. Il s'agit d'une note pour le directeur général des travaux publics de la Régence, qui est datée de Tunis, le 12 février 1914. Ce document est intéressant parce qu'il qualifie de « rationnelle » la ligne de 45°, alors que la lettre du résident général qualifie également de « rationnelle » la ligne de délimitation provisoire qui avait été proposée par l'Italie et qui devait se situer, selon les calculs du résident général, tout au plus aux alentours des 22° puisqu'on évaluait à 23° l'écart entre les lignes italienne et tunisienne. Or, l'utilisation du même mot « rationnelle » à l'égard de deux lignes aussi différentes témoigne une fois de plus que toute solution aboutissant à un *modus vivendi* était raisonnable et donc acceptable aux yeux du résident général. En même temps, il est aussi évident que la position franco-tunisienne n'était pas si cristallisée que toute autre solution devienne inconcevable pour la Régence.

D'ailleurs, ce même document nous fournit une preuve supplémentaire du caractère indéterminé des limites entre les deux pays, et cela notamment en matière de pêche. Il s'agit d'un petit calcul, qui n'est pas trop difficile à faire. La note en question rappelle qu'une seule fois le service de pêche avait eu, jusque-là, « l'occasion de verbaliser aux abords de la frontière maritime tuniso-tripolitaine ». C'était en novembre 1910, donc avant la guerre italo-turque, lorsque trois sacolèves, dont l'une italienne, avaient été surprises pêchant à 18 milles dans la direction N 20° E. J'observe aussitôt que, si l'on s'en tient aux évaluations franco-tunisiennes de l'époque, ce point est situé du côté prétendument tunisien non seulement par rapport à la ligne N 45° E, mais aussi par rapport à la ligne nord/nord-est que les Italiens allaient proposer en 1913 et qui avait, selon l'interprétation de la Régence, un angle de 22°. Les sacolèves ont été arrêtées sur la ligne de 20°. La ligne proposée par les Italiens était, selon les calculs de la Régence, la ligne de 22°. Mais j'observe également qu'à cette distance du littoral l'écart entre un point situé à 20° et la ligne de 45° est suffisamment grand pour exclure la possibilité d'une erreur des capitaines des trois bateaux. Or, nous savons grâce au document précité que la Régence de Tunis admit, par contre, que les capitaines des sacolèves auraient pu se tromper, ainsi qu'ils le prétendaient, et se croire, de bonne foi, plus à l'est qu'ils ne l'étaient en réalité. Si la Régence accepta une telle justification c'est bien plutôt qu'elle a préféré ne pas aller plus loin. En d'autres termes, il est évident que la Régence de Tunis ne devait pas s'estimer être sur un terrain trop solide. Il est donc plus vraisemblable qu'elle ait préféré se soustraire à une confrontation sur des limites maritimes quelques mois après avoir conclu, à la suite d'une vingtaine d'années de petites « promenades militaires sans importance », la négociation sur la frontière terrestre.

Il est temps de conclure cette partie centrale de mon exposé. Je crois avoir établi d'une manière qui me paraît difficile à contester que la ligne de 45° n'avait nullement été reconnue à la veille de la première guerre mondiale, pas plus d'ailleurs qu'elle ne devait l'être par la suite. Je crois avoir également établi que l'Italie, quant à elle, avait suggéré la solution provisoire et que cette solution provisoire avait été tacitement acceptée par les Franco-Tunisiens.

L'ensemble de ces documents comprend évidemment des actes d'une valeur différente. Le professeur Dupuy, qui ne retient que la lettre du résident général au président du conseil, reproche à ce document d'avoir un caractère interne strictement administratif (IV, p. 469) sans se rendre compte que ce document

est à la base d'un comportement ayant une portée strictement internationale. Il cherche même à réduire la portée d'un tel document en lui reprochant d'avoir été dicté par le souci de ménager les relations avec l'Italie, à la veille de la première guerre mondiale, en oubliant que personne ne pouvait prévoir six mois à l'avance le coup de feu de Sarajevo.

Mais, et surtout, mon honorable contradicteur se méprend s'il estime que nous prétendons fonder cette thèse sur la lettre du résident général à Tunis au président Doumergue. A nos yeux, le fait qui ne saurait demeurer sans conséquence sur le plan international, c'est le silence français face à la note verbale italienne. La lettre du résident général nous donne la motivation du silence. Cette lettre conclut en laissant au président du conseil le soin de juger s'il n'y a pas lieu d'accepter comme frontière de mer – je resouligne ce membre de phrase : « frontière de mer » – la ligne proposée par l'Italie. Confronté à cette suggestion, le Gouvernement français choisit de ne pas répondre à la note italienne. C'est donc ce silence, dans ces circonstances, que nous invoquons ici.

Et je pose carrément la question : l'Italie propose dans une note officielle l'adoption d'une ligne de délimitation des zones de pêche des éponges qui n'a rien à voir avec une limite génériquement indiquée dans une circulaire du directeur général français des travaux publics de 1904. L'Italie fait pareille proposition dans un acte diplomatique aussi formel et qualifié qu'une note verbale. La note est adressée à la France qui assure les relations internationales de la Tunisie. Et voici la question : Est-ce que, dans ces conditions, l'on peut discuter, ainsi que le prétend la Partie adverse, du point de savoir s'il y a eu acquiescement italien à la ligne de 45° ? La réponse me paraît évidente, Messieurs les membres de la Cour. Il saute aux yeux qu'ici on discute plutôt de l'acquiescement franco-tunisien à la proposition italienne. La succession des actes dans le temps ne fait point de doute : 1) la note française, d'abord, qui peut laisser supposer une ligne à 45°, mais qui prend soin de ne pas la nommer ; 2) la note italienne, ensuite, qui présente la question comme celle d'une délimitation qui reste encore à faire ; 3) la même note italienne qui propose une solution provisoire, transitoire ; 4) finalement, le silence français, l'acquiescement franco-tunisien face à cette solution provisoire et transitoire que les autorités françaises à Tunis, quant à elles, considéraient bel et bien « comme une solution rationnelle d'un différend qu'il importe de résoudre et pour lequel les éléments d'appréciation ne sont pas d'une précision suffisante ».

J'en ai ainsi terminé avec ce que mon honorable contradicteur, non sans humour, a rangé parmi les « affaires dépourvues de pertinence » (IV, p. 469). Il me reste à compléter mon exposé avec des données concernant les relations italo-tunisiennes dans la période de l'entre-deux-guerres. La Cour verra que ces données confirment en tous points les arguments que je suis en train de développer.

LES « INSTRUCTIONS » ITALIENNES DE 1919 ET DE 1931 : LES ANNÉES TRENTE

Le professeur Dupuy, en rappelant que les Italiens et les Français avaient adopté des législations parallèles en matière de pêche, suggère (IV, p. 468) qu'un *modus vivendi* se serait établi entre les deux pays, *modus vivendi* qui, d'après lui, se serait traduit par la suite et notamment au cours des années trente, par une attitude plus souple (IV, p. 469-470), ce qui, toujours d'après mon honorable contradicteur, « explique que le Gouvernement italien ait

accepté en fait la délimitation latérale » découlant de la fameuse ligne de 45°.

Il y a un point sur lequel nous sommes d'accord, mon éminent collègue et moi. Une certaine période durant, une solution provisoire s'est établie entre l'Italie et la France en ce qui concerne la délimitation des zones de pêche respectives. Mais là où le professeur Dupuy se trompe, c'est lorsqu'il voudrait vous amener à croire qu'un *modus vivendi* se soit établi autour de la ligne de 45°. Les données du dossier nous montrent exactement le contraire. Elles nous montrent, en d'autres termes, que si un *modus vivendi* s'est établi, c'est dans la mesure où, autour de la ligne perpendiculaire à la direction de la côte – la ligne de 20° approximativement – une solution provisoire, transitoire a été en fait acceptée.

Tout d'abord, il faut souligner qu'un point ne semble pas être controversé entre les Parties : plus aucun incident ultérieur ne s'est produit entre elles aux abords de la zone litigieuse à compter de l'affaire des trois bateaux grecs et jusqu'à la seconde guerre mondiale.

Ayant fait cette constatation, il convient aussitôt d'ajouter qu'après la note verbale de 1913 l'Italie a officiellement confirmé sa position dans le même sens en 1919 et en 1931. Ces données ressortent elles aussi du dossier. Examinons-les.

Le premier document figure au n° 43 du volume II, annexes documentaires, du contre-mémoire libyen (**II**). Il s'agit des instructions pour la surveillance sur la pêche maritime dans les eaux de la Tripolitaine et de la Cyrénaïque du 16 avril 1919, dont le texte original italien est accompagné par une traduction en anglais à l'intention de la Cour. Au point 3 de ces instructions, on peut lire la phrase suivante que je me suis efforcé de traduire en français :

> « En ce qui concerne le confin de mer entre la Tripolitaine et la Tunisie, il a été convenu d'adopter, comme ligne de délimitation, la normale à la côte au point du confin, c'est-à-dire, dans le présent cas, le relevé approximatif nord-nord-est de Ras Ajdir. »

De toute évidence, de telles instructions constituent l'application concrète des principes énoncés par la décision du commandant du port de Zouara, que le ministère italien des affaires étrangères avait fait siens dans sa note verbale du 2 octobre 1913. Avec la fin de la première guerre mondiale, l'Italie avait réaffirmé son occupation de la Libye le long de tout le littoral et le moment était manifestement venu d'exercer une surveillance sur la pêche et de délimiter les extrémités de cette surveillance. C'est ainsi, d'ailleurs, que l'indication de la ligne de démarcation avec la Tunisie s'accompagne, dans le même paragraphe des instructions de 1919, d'une indication analogue à propos de la frontière égyptienne, qui se lit comme suit :

> « Près du confin entre la Cyrénaïque et l'Egypte, on considérera comme limite, aux fins de la pêche, la ligne partant en direction est-nord-est du cap Beacon dans le golfe de Salum. »

La Cour remarquera que le texte du paragraphe relatif à la limite du côté tunisien est libellé d'une façon différente que celui du paragraphe concernant la limite du côté égyptien. C'est notamment le membre de phrase destiné à qualifier l'origine de la limite qu'il faut prendre en considération. Le libellé couvrant le côté tunisien affirme qu'il « fut convenu » *(fu convenuto)* d'« adopter » *(di adottare)* comme ligne de délimitation la ligne normale à la côte. Par contre, le libellé relatif au côté égyptien indique qu'il « sera considéré » *(sarà considerato)* comme limite la ligne partant du cap Beacon. Or, la formule employée pour la limite occidentale fait clairement allusion à quelque

chose qui avait été convenu *(convenuto)* d'une façon évidemment bilatérale, alors que la limite orientale semble en revanche avoir été déterminée d'une manière unilatérale. En d'autres termes, le texte utilisé pour la frontière du côté libyen est tout à fait conforme à la situation qui s'était créée à la suite de la note verbale italienne de 1913 et du silence gardé par les Franco-Tunisiens. Aucun arrangement n'avait été provoqué du côté égyptien, ce qui explique le libellé différent de l'instruction relative à la frontière orientale.

Il faut ajouter que les instructions italiennes avaient une valeur et une portée en tout cas non inférieures à celles de l'instruction franco-tunisienne de 1904, ainsi que leur dénomination même le témoigne. Et puisque les instructions italiennes avaient fait l'objet d'une publicité en tout cas non inférieure à celle de l'instruction de la Régence de Tunis, l'on voit mal pourquoi les Franco-Tunisiens, qui ne pouvaient pas ne pas suivre avec attention les dispositions maritimes adoptées de l'autre côté, auraient maintenu un silence total à cet égard, si ce n'était parce qu'ils étaient raisonnablement satisfaits de la solution provisoire appliquée *de facto*.

Le deuxième document, qui est également reproduit dans les annexes au contre-mémoire libyen (II), au numéro 45, contient les instructions pour la « vigilance » sur la pêche maritime dans les eaux de la Tripolitaine du 25 juin 1931. A l'article 3, alinéa 2, les instructions de 1931 réaffirment, reprenant la formule de 1913 et de 1919, que : « Le confin de mer entre la Tripolitaine et la Tunisie est établi par le relevé approximatif nord-nord-est de Ras Ajdir. »

Ainsi la preuve est faite que l'attitude de l'Italie n'a jamais changé. Je crois ne rien devoir ajouter quant à la valeur et à la portée de ces documents, qui ne sauraient en tout cas être inférieures à celles de cette fameuse instruction franco-tunisienne de 1904 qui est si chère à la Partie adverse.

Ne pouvant rien dire sur le plan des documents, mon éminent contradicteur a cru pouvoir faire confiance à des souvenirs historiques des années trente. Il a fait preuve à cet égard d'une certaine fantaisie. Je crois que quelques mots suffisent pour rétablir les réalités historiques. Mais voyons d'abord l'argumentation du professeur Dupuy :

> « En fait, il faut voir pour expliquer cette attitude de l'Italie, et qui s'assouplit avec le temps, que les pêcheurs italiens continuaient à bénéficier de la convention du commerce et de la navigation italo-tunisienne de 1896. Ils continuaient donc à bénéficier des mêmes droits que les pêcheurs tunisiens dans la zone territoriale de la Régence.
>
> Or, cette convention, nous nous trouvons dans les années trente, devait arriver dix années plus tard à expiration et l'Italie était préoccupée d'obtenir alors des concessions semblables à celles que ses pêcheurs tiraient de la convention qui venait maintenant à expiration. Ceci explique [c'est toujours mon contradicteur qui parle], que le Gouvernement italien ait accepté en fait la délimitation latérale. » (IV, p. 470.)

J'ai cru rêver. Ce qu'on nous suggère ici c'est un bouleversement total de l'histoire. Non seulement les années trente ont été, hélas, l'un des moments les plus difficiles des relations entre l'Italie et la France, mais c'est surtout à cause de la Tunisie que les relations s'étaient détériorées. Je remercie cependant mon honorable contradicteur de m'avoir rajeuni ; de m'avoir ramené aux années de mon enfance, lorsque mon père maintenait intacte, au milieu des persécutions, l'intransigeance antifasciste de notre famille. Mais c'était, il faut bien le dire, l'époque de l'ivresse coloniale du fascisme : l'époque où les chemises noires en délire exigeaient Bizerte et Tunis ; l'époque où Mussolini, dans le paroxisme de sa folie, qualifiait la Tunisie tout entière de pistolet dans les reins de l'Italie.

Au cours de l'entre-deux-guerres, c'était plutôt la France qui tenait à apaiser le mécontentement italien contre les traités de paix de Versailles. En 1924, il est vrai, le président Poincaré songea un instant à dénoncer les conventions avec l'Italie. Mais il n'en fit rien et à partir de 1926 la presse italienne déclencha une campagne furieuse au sujet de la Tunisie. La Tunisie allait rester le point de friction entre les deux pays jusqu'à la détente de 1933 et aux accords Laval-Mussolini du 7 janvier 1935. Mais, Messieurs, c'est la première fois que j'entends suggérer implicitement que, dans le duo Laval-Mussolini, c'était Mussolini qui cherchait à apaiser Laval. D'ailleurs, l'année suivante est celle des sanctions contre l'Italie à cause de l'agression contre l'Ethiopie et Mussolini reprend sa politique antifrançaise qui durera jusqu'à la dénonciation des accords de 1935, à la veille du drame de 1939. Et c'est dans ces conditions – que la Cour, si elle le désire, pourra aisément vérifier à l'aide de quelques publications que l'on trouve ici à la bibliothèque du Palais, et notamment du livre de Monchicourt sur *Les Italiens de Tunisie et l'accord Laval-Mussolini de 1935* (Paris, 1938), aussi bien que de trois articles de Claude Langlade parus dans l'*Europe nouvelle* de 1938 (p. 1364, 1389 et 1419) –, c'est dans ces conditions, disais-je, que l'on prétend vous présenter ici une Italie toute prête à faire aux Franco-Tunisiens une concession d'une importance aussi capitale que l'acceptation pure et simple d'une limite maritime dont la Tunisie aurait été la seule à bénéficier.

Mon estimé contradicteur a dû se rendre compte que son argument ne manquait pas d'imagination. Voilà pourquoi il a jugé nécessaire de l'étayer par des considérations qui, cette fois, vous transportent d'un seul coup dans les années soixante et soixante-dix, en passant par-dessus les années quarante et cinquante.

Son raisonnement est le suivant :

> « D'ailleurs, on ne relève plus d'incidents notables à partir de cette époque et, après la seconde guerre mondiale, l'Italie a reconnu, mais alors cette fois explicitement, les limites de la zone de pêche aussi bien celle des 50 mètres de profondeur que la ligne de 45°. Elle les avait reconnues expressément dans les accords de pêche qu'elle a conclus en 1964, en 1971, en 1976 et qui tous reprennent à cet égard les dispositions du décret beylical du 26 juillet 1951 qui se rapportent à la même ligne ZV 45°. » (IV, p. 470.)

J'aurais beaucoup de choses à dire quant au fond de ces accords qui n'ont pas la portée qu'on prétend leur attribuer. Mon collègue, le doyen Colliard, le fera d'ailleurs, pour autant que de besoin. Mais il s'agit ici de les apprécier par rapport à un élément qui me paraît primordial au début des années cinquante, c'est-à-dire l'accession de la Libye à l'indépendance. Dans ces conditions, l'argument subtil de mon honorable contradicteur se traduit par une nouvelle, et ahurissante, théorie de l'acquiescement rétrospectif. Effectivement, cet argument se ramène à ceci : que l'Italie, qui avait constamment veillé à ne préjuger en rien de la délimitation des confins maritimes entre la Libye et la Tunisie, aurait décidé tout d'un coup, à partir de 1964, de jeter à l'eau un quart de siècle de comportements cohérents pour admettre que, oui, après tout, les Franco-Tunisiens avaient raison, que la décision de Zouara devait être considérée comme nulle et non avenue, la note verbale de 1913 comme non remise à la France, les instructions italiennes de 1919, tout autant que celles de 1931, comme non dictées aux autorités navales. Et même si, *ad absurdum*, l'on devait admettre tout cela, je ne vois pas comment les droits d'un pays souverain tel que la Libye, une fois parvenu à l'indépendance, pourraient être

affectés par les manifestations ou les faits d'un Etat tiers, ainsi que l'Italie l'était devenue, dès 1942, à l'égard de la Libye. En d'autres termes, je ne vois ni comment, ni pourquoi l'ancienne puissance coloniale devrait maintenir une sorte de droit de disposition rétroactive à l'égard de territoires qui étaient naguère soumis à son occupation.

Monsieur le Président, Messieurs de la Cour, je constate que cette dernière partie de mon exposé m'a amené jusqu'à une période postérieure à celle dont il m'incombait de vous parler. Celle-ci, on s'en souviendra, devait s'achever avec la seconde guerre mondiale. J'ai cependant préféré compléter moi-même l'examen des questions qui se rapportent à l'occupation italienne de la Libye. C'est en effet autour de cette période que la plus grande partie de mon exposé a été axée. La Cour me permettra de dire, en concluant pour le moment mon intervention, que je puis considérer en toute sérénité, et même avec un pointe d'orgueil, ce que mon pays a fait pour préserver les droits du peuple libyen sur son plateau continental.

J'espère avoir ainsi montré à la Cour qu'aucune ligne partant du point terminal de la frontière terrestre en direction nord 45° est n'a jamais défini latéralement, du côté libyen, la zone sur laquelle le Gouvernement tunisien affirme posséder des droits historiques bien établis.

L'audience, suspendue à 11 h 20, est reprise à 11 h 45

PLAIDOIRIE DE M. COLLIARD

CONSEIL DU GOUVERNEMENT DE LA JAMAHIRIYA ARABE LIBYENNE

M. COLLIARD : Mes premiers mots seront pour dire très simplement l'honneur que je ressens, Monsieur le Président, Messieurs les membres de la Cour, d'être aujourd'hui appelé à me présenter devant vous dans l'affaire qui oppose la Jamahiriya arabe libyenne et la République tunisienne. Hélas, à ce sentiment de fierté et de privilège doit se mêler la tristesse car notre ami Mustapha Yasseen n'est plus là et je n'oublie pas qu'il m'avait demandé de participer à nos travaux.

LES DROITS HISTORIQUES DE LA TUNISIE, LEUR SENS, LEUR VALEUR, LEUR PORTÉE

L'un des thèmes principaux de la thèse tunisienne est l'affirmation que la Tunisie possède des titres historiques très anciens dont la validité bénéficierait d'une tolérance unanime, délimitant une zone maritime définie dont l'opération de délimitation, objet de la présente affaire, ne saurait remettre en cause l'appartenance à la Tunisie.

Les pages 124 et 125 du mémoire tunisien (I), plus précisément aux paragraphes 4.101, 4.102, 4.103 et 4.104, résument très nettement la position tunisienne sur ce point.

On trouve également l'affirmation de cette position formulée dans le point 2 des conclusions déposées par la Tunisie, demandant qu'il plaise à la Cour de dire et juger :

> « La délimitation ne doit, en aucun point, empiéter sur la zone à l'intérieur de laquelle la Tunisie possède des droits historiques bien établis et qui est définie latéralement, du côté libyen, par la ligne ZV-45° et, vers le large, par l'isobathe de 50 mètres. » (I, p. 201.)

Ces diverses affirmations marquent la thèse tunisienne – celle d'une zone uique – cette thèse peut être résumée de la manière suivante :

Il existe une zone de droits historiques tunisiens. « Elle a bénéficié d'une reconnaissance internationale. » Elle doit échapper à toute opération de délimitation.

Ces points doivent être étudiés.

Comme il s'agit de droits historiques, il m'apparaît que se pose un problème de méthode scientifique de l'étude à entreprendre.

Avec votre permission, Monsieur le Président, j'utiliserai la méthode historique, me référant aux textes et documents, aux pièces d'archives que je voudrais étudier d'une manière précise, me gardant de toute généralisation hasardeuse.

Mon exposé distinguera trois problèmes :

- tout d'abord celui de l'existence de cette zone unique et homogène de droits historiques ;
- ensuite, celui de la reconnaissance ou de la non-reconnaissance internationale de cette zone et de ses limites ;
- enfin, celui de l'évolution qui a conduit aux règlements modernes.

Dans une conclusion, je m'efforcerai de présenter la question générale des relations pouvant exister entre des droits historiques et les principes fondamentaux du régime juridique du plateau continental tel qu'il existe aujourd'hui.

I. La prétendue unité de la zone des droits historiques

Sur ce thème, mon exposé sera conduit en distinguant quatre points successifs.

Je présenterai tout d'abord les raisons pour lesquelles a été imaginée la théorie, à mon sens artificielle, de l'unité de la zone des droits historiques.

Je confronterai ensuite cette théorie abstraite aux réalités véritables telles qu'elles apparaissent avec les activités humaines, le cadre géographique, les régimes juridiques différents.

1. La théorie artificielle de l'unité d'une « zone des droits historiques »

Ainsi qu'il a été relevé dans le contre-mémoire libyen (II), tout particulièrement dans ses paragraphes 96 à 99, la thèse tunisienne affirme l'unité d'une zone de droits historiques.

Cette présentation s'est manifestée d'une manière constante dans les écritures tunisiennes. On la trouve dans le mémoire tunisien (I), paragraphes 4.14 à 4.18, également dans les paragraphes 8.03 à 8.05. Elle apparaît d'une manière
(12) frappante dans la figure 4.06 du mémoire tunisien, « Zone des droits historiques de la Tunisie ».

On comprend parfaitement l'intérêt de cette présentation unitaire.

En présentant une zone maritime dont elle affirme l'unité, la Tunisie entend utiliser un argument d'analogie avec l'affaire des *Pêcheries* norvégiennes et invoquer symétriquement à l'arrêt de la Cour de décembre 1951 le rapport intime qui existe entre certaines étendues de mer et les formations terrestres qui les séparent et qui les entourent, invoquer aussi des liens économiques (*C.I.J. Recueil 1951*, p. 133 ; I, mémoire tunisien, par. 4.07).

La théorie de la zone unique ne correspond pas à la réalité géographique, ni à la réalité humaine des activités de pêche.

Son caractère artificiel se manifeste essentiellement au plan juridique.

Elle amalgame deux régimes juridiques tout à fait différents.

Dans la zone des pêcheries fixes, dont la profondeur est inférieure à 3 mètres, les rapports sont étroits entre la terre et la mer, mais les poissons pêchés sont des espèces qui ne dépendent pas du lit de la mer. Ce sont des *swimming fishes*, le produit de ces pêcheries n'est pas des ressources du plateau continental mais des ressources des eaux surjacentes, même si celles-ci sont peu profondes.

Sur les bancs d'éponges avec des profondeurs plus grandes, en particulier lorsqu'il s'agit de la pêche au scaphandre ou avec la drague particulière qu'on appelle la gangave, les espèces pêchées sont fixées sur le lit de la mer. Elles sont bien effectivement des ressources du plateau continental, mais les pêcheurs qui exploitent ces ressources ne sauraient être confondus avec ceux qui exploitent les pêcheries fixes. Ce sont des marins et pour une très grande part, du moins antérieurement à 1951, ils n'étaient pas de nationalité tunisienne.

(12) La théorie de l'unité de la zone historique que matérialise la figure 4.06, figurant dans le mémoire tunisien, ne correspond pas aux réalités.

Elle mêle les procédés de pêche, les personnels de pêche, les profondeurs, les produits pêchés.

Elle efface les différences, elle ne tient pas compte des conditions d'exploitation.

En utilisant la notion d'accessibilité qui n'est vraie que pour les pêcheries fixes, en la dissociant de son contexte géographique naturel, en l'extrapolant sur des bancs d'éponges on réalise un véritable amalgame juridique qui n'est pas exact.

La théorie de l'unité est une construction artificielle mais qui évidemment est nécessaire pour affirmer le lien entre les ressources marines et une population côtière.

Précisément le mémoire tunisien, après avoir imaginé l'unité de la zone, utilise cette construction par une affirmation analogique, que j'ai déjà mentionnée, avec la situation des pêcheurs norvégiens dans l'affaire des *Pêcheries* en 1951. On relève cette affirmation à la page 87 et au paragraphe 4.36 du mémoire tunisien (I) :

> « Il est permis de dire à propos de la zone des titres historiques ce que la Cour internationale de Justice observait en 1951 pour la région côtière de la Norvège : dans ces régions arides, [c'est] dans la pêche que les habitants de la zone côtière trouvent la base essentielle de leur subsistance. »

On ne peut qu'être un peu surpris par ces affirmations. La Tunisie invoque les ressources de pêche, mais il s'agit de la pêche des éponges, et sans vouloir entrer dans des statistiques complexes, je voudrais simplement faire observer que la valeur totale annuelle des prises d'éponges en 1971 était de 271 000 dinars ; que l'année précédente la valeur du tourisme était de 115 millions de dinars ; que la production industrielle était en 1969 évaluée à 463 millions de dinars ; et la simple exportation des dattes à 2,4 millions de dinars. Ainsi apparaissent des chiffres : 0,23 pour cent du tourisme, 0,05 de la production industrielle, 11,29 pour les dattes. Il me semble exagéré d'affirmer que la pêche des éponges est la base essentielle de la subsistance des populations côtières. Laissons cela.

La thèse de l'« unité de zone » est habile, elle permet d'atténuer les différences qui existent réellement quant aux modalités d'exercice des différents droits historiques et de conférer à des espaces maritimes fort étendus les qualités particulières qui ne concernent, en fait, qu'une partie de ces espaces.

C'est qu'en réalité il n'y a pas une zone de droits historiques, il y a des zones géographiques nettement différentes.

Mais je voudrais formuler ici une observation préliminaire.

Il ne s'agit pas d'opposer une affirmation, si j'ose dire libyenne, de dualité de zones à une affirmation tunisienne, d'unité de zones.

La dualité de zones est affirmée et présentée dans les textes tunisiens eux-mêmes.

Le texte essentiel en la matière est cette fameuse instruction sur le service de la navigation et des pêches maritimes du 31 décembre 1904 qui a été si fréquemment utilisée au cours de nos débats.

L'article 29 de ce texte expose le régime de l'exploitation maritime. Après avoir mentionné au paragraphe 3 la « ceinture de bancs ou hauts-fonds sur lesquels ont été installées un nombre considérable de pêcheries... », après les avoir décrits au paragraphe 4, l'article 29 poursuit en son paragraphe 5 dans les termes suivants : « Au-delà de cette zone, s'étend une autre zone beaucoup plus vaste et beaucoup plus profonde... » (I, p. 343.)

Le texte officiel lui-même consacre donc la dualité des zones.

La même classification se retrouve mot pour mot, dans le document n° 33[1], déposé par la Tunisie le 15 juillet 1981. Il s'agit d'un ouvrage intitulé *La Tunisie : législation, gouvernement, administration* paru en 1910 et dont les auteurs sont MM. Gaudiani et Thiaucourt, et le caractère officiel de cet ouvrage est marqué par la préface qu'il comporte, écrite par M. Alapetite, résident général de la République française en Tunisie à cette époque.

Ainsi, les documents tunisiens eux-mêmes présentent les deux zones. Le contre-mémoire libyen (II) en son paragraphe 96 avait déjà marqué l'absence d'unité des espaces maritimes sur lesquels la Tunisie invoquait des « droits historiques » et noté : « it will be seen that, in fact, the fisheries concerned are very different and operate at different depths and in different areas ».

La réplique tunisienne, au paragraphe 1.13 (IV), visait cette observation en mentionnant que le contre-mémoire libyen invoquait dans le paragraphe 96 de « prétendues différences ».

Ces différences ne sont aucunement prétendues, elles correspondent à la réalité des choses, elles sont reconnues par les textes tunisiens officiels.

De même la réplique tunisienne en ce paragraphe 1.13 après avoir affirmé qu'il s'agit de « prétendues différences » indique ensuite qu'il s'agit simplement de la distinction fort simple entre les deux types de pêcheries :

> « les pêcheries fixes, à raison des installations fixées dans le sol sous-marin et destinées à capturer le poisson et le poulpe d'une part, et les pêcheries d'espèces sédentaires, autrement dit les pêcheries d'éponges d'autre part ».

En réalité, la réplique tunisienne, tout en évoquant de « prétendues différences » formulées dans les écritures libyennes, est obligée de reconnaître l'existence de deux types de pêcheries. Gilbert Gidel dans son traité classique *Le droit international public de la mer* décrit dans la première partie de son monumental ouvrage intitulée « La haute mer », au chapitre premier du livre VII : « Les pêcheries sédentaires », aux pages 491 et 492, les « Pêcheries sédentaires de Tunisie ».

Il classe ces pêcheries en trois catégories. Comme la troisième a rapport aux « fonds corraligènes existant sur la côte nord » qui ne concernent point nos problèmes, il convient d'examiner les deux premières simplement.

Gidel les distingue nettement l'une de l'autre du point de vue géographique et distingue aussi le régime juridique différent de chaque catégorie.

Le mémoire tunisien (I), dans la section II du chapitre IV, a bien distingué, en deux paragraphes, d'une part ce qu'il appelle : « L'exercice de la souveraineté tunisienne sur les pêcheries sédentaires à raison d'installations fixes » (par. 1), et, d'autre part, ce qu'il appelle : « L'exercice de la souveraineté tunisienne sur les pêcheries sédentaires à raison des espèces capturées » (par. 2).

Le mémoire tunisien est bien obligé de distinguer les deux types de pêcheries, mais il s'efforce de minimiser la distinction en affirmant l'unité de la zone, en proclamant que sur les diverses pêcheries sédentaires « la Tunisie exerce une égale souveraineté » (par. 4.97).

A la page 93, le mémoire tunisien cite Gidel et la page 492. Mais la présentation de la citation est assez curieuse, le début de la citation apparaît en note de bas de page (note 63), et la fin de la citation apparaît, au contraire, au texte lui-même avec simplement en bas de page une note de référence (note 64).

Or, une partie de la page 492 de l'ouvrage de Gidel suit de très près et parfois reproduit l'article 29 précité de la circulaire tunisienne de 1904 qui distingue les hauts-fonds, et « au-delà de cette zone ... une autre zone beaucoup plus vaste et où les profondeurs d'eau sont beaucoup plus profondes ... ».

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[1] Non reproduit. Voir ci-après, correspondance, n° 80.

On retrouvera donc la distinction ci-dessus indiquée et la dualité de zones. Cela n'a rien d'étonnant puisque la dualité de zones correspond à la réalité des choses.

L'existence de deux zones distinctes étant ainsi rappelée, il convient de donner pour chacune des zones des précisions sur leur situation géographique d'une part et sur leur régime juridique d'autre part.

2. La réalité des activités humaines en matière de pêcheries

Les activités traditionnelles de pêche sur les côtes tunisiennes au sud de Ras Kapoudia se développent selon deux types tout à fait différents, celui, d'une part, des pêcheries fixes, permettant de capturer des poissons qui nagent dans les eaux surjacentes peu profondes, celui, d'autre part, des pêcheries sédentaires, permettant la récolte d'espèces sédentaires, êtres vivants fixés sur le lit de la mer, en l'espèce les éponges.

Cette distinction bien connue apparaît à l'évidence dans ce texte de droit interne tunisien, l'instruction du 31 décembre 1904 (**I**, p. 325-372). Ce texte qui dans la classification hiérarchique des notes juridiques correspond, au sens du droit administratif français, à la notion de *circulaire*, était signé du directeur des travaux publics. Ce texte apparaît comme ayant joué un rôle fondamental en matière de droits spéciaux de pêche dans ce qui était alors le protectorat.

Pour la réglementation des activités de pêche, le texte établit un régime qui distingue les domaines géographiques dans lesquels s'exercent ces activités particulières, les classant en deux catégories différentes : la zone des hauts-fonds et les bancs d'éponges.

a) *La zone des hauts-fonds*

S'agissant de la zone des hauts-fonds, l'article 29 de la circulaire de 1904 en son paragraphe 3 décrit de la manière suivante la côte tunisienne de Ras Kapoudia à la frontière tripolitaine :

> « Toute cette région, qui comprend la grande île de Djerba et le groupe important des Kerkennah offre un développement d'environ 250 milles marins (460 kilomètres) de côtes basses se prolongeant fort avant dans la mer par une déclivité insensible... » (**I**, p. 343.)

Le paragraphe 4 de la circulaire précise que ces bancs en pleine exploitation s'étendent parfois jusqu'à une distance de 10 à 12 milles, c'est-à-dire 18 à 22 kilomètres, et que ces hauts-fonds sont à peine recouverts de 2 mètres d'eau à basse mer.

Dans son étude classique *La Tunisie orientale : Sahel et basse steppe* (p. 456), le professeur Despois décrit les pêcheries fixes localisées sur des fonds qu'il estime à une profondeur de 1,50 mètre à 2 mètres d'eau à marée haute.

On en trouve également une description dans l'ouvrage de Servonnet et Lafitte sur le golfe de Gabès, paru en 1888 (*Le golfe de Gabès en 1888*, p. 334-336).

Le principe général qui permet d'analyser ce que sont les pêcheries fixes peut être ainsi présenté : circonscrire à marée haute une certaine étendue de mer par des cloisons artificielles. Je voudrais, Monsieur le Président, employer quelques mots de langue arabe qui désignent ces installations et je présente à la Cour, et tout particulièrement aux membres de la Cour dont la langue arabe est la langue maternelle et aussi à tous ceux qui dans cette salle ont la langue arabe comme langue maternelle, mes excuses pour une prononciation qui est certainement très horrible. Ces cloisons artificielles désignées en arabe sous le

nom de *hassira*, pluriel *hasor*, sont établies de manière qu'au renversement de la mer le poisson, entraîné par le courant de reflux, vienne se prendre de lui-même dans des pièges, en arabe *drina*, au pluriel *dreyn*, judicieusement disposés autour de ces cloisons.

Ces divers engins sont confectionnés avec des branches de palmiers et l'on trouve sur les hauts-fonds d'interminables alignements de palmes fichées dans le sable et la vase, d'une hauteur de l'ordre de 2,50 mètres au maximum.

Les poissons entraînés par le courant de reflux voient se dresser devant eux l'obstacle des *hasor*, ils prennent pour une issue l'ouverture plus sombre des *dreyn* et demeurent finalement captifs de ces nasses.

Ces pêcheries fixes appelées *cherfiya* sont très nombreuses et Despois en recense sur le plateau sous-marin des Kerkennah plus de deux mille (*La Tunisie orientale : Sahel et basse steppe*, p. 456).

b) *Les bancs d'éponges et la pêche des éponges*

En face de ces exploitations, se présentent alors d'autres pêcheries : les bancs d'éponges. La circulaire tunisienne de 1904 traite dans son article 29, au paragraphe 5, des bancs d'éponges.

La zone dite des bancs spongifères s'étend au-delà de la zone des pêcheries fixes mais avec évidemment une solution de continuité. En effet, les bancs d'éponges ne se rencontrent pas partout et l'on ne peut considérer, comme le fait la thèse tunisienne, que la zone spongifère succède immédiatement à la zone des pêcheries fixes.

Nous noterons aussi l'expression bancs. Ce sont les bancs spongifères. A leur égard se posent les problèmes de leur délimitation et celui de leur régime juridique bien évidemment.

La délimitation est une opération juridique mais il est évident que la délimitation des zones de pêche portant sur des espèces sédentaires est liée à la possibilité même de pêche, donc à des techniques de pêche que je voudrais évoquer en quelques mots.

Les techniques de pêche aux éponges sont diverses et certaines sont apparues seulement à l'extrême fin du XIX^e^ ou au début du XX^e^ siècle.

Servonnet et Lafitte, écrivant je le repète en 1888, notent :

> « Bien que l'éponge puisse vivre aux profondeurs les plus diverses, on n'a pas encore trouvé le moyen utile, pratique et surtout économique de les pêcher au-delà de 35 à 45 mètres. » (*Le golfe de Gabès en 1888*, p. 373.)

Le géographe Jean Despois dans son livre *La Tunisie orientale : Sahel et basse steppe*, seconde édition de 1955, écrit (p. 461) que les herbiers à Posidonies, Halimèdes et Caulerpes forment un milieu très favorable à la croissance des éponges qui se fixent sur les rhizomes des algues. Il fournit d'intéressantes précisions sur les profondeurs, il indique ainsi que les éponges existent surtout entre 12 et 25 mètres de profondeur.

On voit donc que les bancs spongifères sont situés à une profondeur relativement faible. Une lettre du résident général de France à Tunis, adressée au ministre français des affaires étrangères le 4 juillet 1902, contient une précision sur la répartition des bancs :

> « L'expérience a démontré que la pêche des éponges ne donne guère de résultats pratiques dans des fonds supérieurs à 50 mètres ; les bancs d'éponges les plus riches de la côte tunisienne sont presque tous en deçà de cette profondeur. » (Voir page 225 du mémoire tunisien, I, annexe 80).

Gidel dans son livre classique indique (t. I, p. 491) que :

> « De vastes bancs d'éponges sont attenants au littoral tunisien jusqu'à environ 15 milles des côtes et ne sont pas, à cette distance, recouverts de plus de 30 mètres d'eau. »

Les moyens techniques employés pour la cueillette des éponges marquent les limites effectives de ce ramassage. On distingue en effet la pêche à pied, qui ne peut s'opérer que par de très faibles profondeurs, le pêcheur tâtant le fond avec ses pieds et ramassant les éponges qu'il a touchées ; puis ensuite vient la pêche au harpon avec les kamaki, pêche qui se fait en barque, en utilisant des fourches à plusieurs dents.

Selon un spécialiste, M. Marchis, dans son livre *La pêche des algues marines, des éponges et des coraux* (p. 52), figurant pour partie dans les documents déposés par la Tunisie le 15 juillet 1981, on lit : « ces engins sont utilisés pour pêcher par des fonds de 14 à 15 mètres ». Le professeur François, dans son rapport à la Commission du droit international, note : « la pêche des éponges au trident ne peut s'exercer au-delà de 18 à 20 mètres... » (p. 97). Le professeur Despois dans son livre cité ci-dessus indique que la cueillette au kamaki « permet de prendre des éponges jusqu'à 10 à 12 mètres, très rarement plus » (p. 462). Il faut noter, en effet, que le harpon est manœuvré par un homme, que son manche ne peut pas être d'une trop grande longueur. Il y a aussi le problème de la visibilité sous l'eau. Le procédé dit du « miroir », qui correspond à ce qu'on appelait dans la construction navale en bois la lunette du calfat et qui est tout simplement un seau à fond vitré que l'on enfonce un peu dans l'eau, ce qui permet une meilleure visibilité, car cela libère du phénomène de la réfraction, n'est apparu, d'après Despois, qu'en 1876 sur les bancs tunisiens.

La pêche au scaphandre permet le ramassage des éponges d'une manière très active. Elle est apparue seulement en 1866 et n'était pratiquée, selon les indications de M. Marchis, que par les Grecs (p. 53). Le professeur Despois indique que ces scaphandriers grecs « opèrent sur les fonds situés entre 20 et 30 mètres ; beaucoup refusent de descendre plus bas ».

Quant au rapport François il mentionne que la pêche au scaphandre et à la gangave s'est exercée par des profoneurs ne dépassant pas 50 mètres.

Ce dernier procédé, celui de la « gangave », qui correspond à une sorte de chalut, est très destructeur puisqu'il consiste à racler le fond par une drague. Despois précise que la drague a été introduite par les Grecs des Cyclades en 1875 et que ce procédé permet de draguer les fonds jusqu'à une cinquantaine de mètres (*La Tunisie orientale : Sahel et basse steppe*, p. 462). D'ailleurs l'emploi de la gangave a été interdit par les textes tunisiens ; d'abord par un décret du 17 juillet 1906 en deçà d'une ligne des fonds de 10 mètres puis par un décret du 27 novembre 1922 en deçà des fonds de 20 mètres. Il en va de même pour le scaphandre. La pêche avec ces procédés est d'ailleurs interdite, était interdite, du 1er avril au 31 mai, et elle était prohibée en tout temps dans la mer de Bou-Grara et dans le canal d'Adjim.

Les indications présentées ci-dessus permettent de situer les limites de profondeur des procédés de pêche des éponges.

On remarque, en particulier, que la pêche à 50 mètres n'est apparue qu'à partir de 1876 avec la gangave grecque (Servonnet et Lafitte, *Le golfe de Gabès en 1888*, p. 380), que le scaphandre n'est apparu qu'en 1866, utilisé également par les Grecs.

Il faut noter que pendant longtemps l'utilisation du scaphandre fut réduite

en raison du coût des équipements. Marchis indique (p. 56) qu'il a été pêché en 1920 dix tonnes avec scaphandre et 160 tonnes avec les autres procédés.

Servonnet et Lafitte dans leur livre *Le golfe de Gabès*, publié en 1888, donnent aussi quelques indications statistiques. L'année n'est pas précisée mais il s'agit d'une période très proche de la publication du livre.

Il est indiqué une récolte de 55 à 65 tonnes au trident, de 20 tonnes à la gangave, avec une flotille de cinquante sacolèves grecques. Quant à la pêche au trident, elle était pratiquée par un ensemble alors de l'ordre d'un millier de pêcheurs avec un peu plus de la moitié de Tunisiens et les autres Européens, essentiellement des Italiens (quatre-vingts Grecs, trois cents Siciliens, dix Maltais, p. 398).

Ayant ainsi décrit, rappelé, quels étaient les procédés de pêche, je voudrais maintenant présenter quelques observations d'ordre géographique sous le titre :

3. Le golfe de Gabès et la région du golfe de Gabès

La thèse tunisienne, formulée d'une manière constante, parfois sous la forme poétique du mariage de la terre et de la mer, est celle de l'existence d'espaces maritimes soumis à l'exercice de titres historiques, ces espaces maritimes constituant, d'après les écritures tunisiennes, le golfe de Gabès.

Le mémoire tunisien (**I**), au chapitre IV, « Les droits historiques de la Tunisie », page 71, au paragraphe 4.01, évoque la symbiose de la terre et de la mer, la communion intérieure des populations avec les zones maritimes s'étendant au-delà de leurs côtes et le mémoire affirme que cette union se manifeste : « Dans la région du golfe de Gabès, telle que cette expression est généralement comprise par les géographes, c'est-à-dire, de Ras Kapoudia à Ras Ajdir. »

Il se trouve que le mémoire libyen (**I**) traite évidemment du golfe de Gabès. Il le fait dans son paragraphe 78 et il emprunte la définition spatiale de ce golfe aux instructions nautiques françaises et au *Mediterranean Pilot* britannique.

Le contre-mémoire tunisien (**II**) a critiqué avec beaucoup de vigueur les définitions auxquelles se référait le mémoire libyen, il l'a fait en ses paragraphes 5.29 et 5.30 ainsi que dans l'annexe II-6 au contre-mémoire.

Le contre-mémoire libyen (**II**) reprend dans son paragraphe 82 les définitions déjà utilisées et traite de l'ensemble du problème dans ses paragraphes 81 à 90. D'où une réplique tunisienne aux paragraphes 1 à 12 et suivants (**IV**).

La question n'est pas sans importance. Et on peut déplorer que les écritures tunisiennes emploient à ce propos des termes assez vifs.

Le contre-mémoire tunisien croit relever « des inexactitudes graves » (par. 5.29), l'annexe à ce contre-mémoire note « une délimitation arbitraire » (**II**, annexe II-6, p. 33).

Les écritures tunisiennes ont fait grief aux écritures libyennes de ne pas utiliser de définitions fournies par les géographes mais d'utiliser au contraire des définitions marines.

Ce reproche a été repris dans sa plaidoirie orale, par mon éminent collègue, le professeur Pierre-Marie Dupuy (**IV**, p. 454-455).

Me gardant, quant à moi, de toute polémique je voudrais simplement reprendre la question.

Et il me semble, du point de vue méthodologique, correspondre à une entreprise scientifique que de faire un recensement et de classer les opinions ou

les manifestations d'opinions sans écarter à priori certaines des contributions à la solution du problème.

Je dois dire que j'ai relevé, avec beaucoup de surprise, dans le contre-mémoire tunisien, au paragraphe 5.29, note de bas de page, que l'autorité des instructions nautiques pour la définition d'une baie ou d'un golfe est « généralement considérée comme nulle ». C'est là une affirmation abrupte et péremptoire dont la responsabilité doit être laissée à son auteur. D'une manière assez plaisante le contre-mémoire tunisien dans cette même note cite à l'appui de sa condamnation une décision britannique, l'affaire *Post Office* v. *Estuary Radio Ltd.* de 1976 (3 *All ER* 663)[1]. J'ai eu la curiosité de me reporter au recueil des décisions pour prendre connaissance avec intérêt de ce jugement et j'ai constaté que le *Post Master General* du Royaume-Uni, qui d'ailleurs a gagné son procès dans cette affaire, s'était fait assister devant le tribunal par des experts hydrographes, comme il était d'ailleurs naturel.

Précisément je ne pense pas que l'on puisse faire fi des instructions nautiques et des travaux des spécialistes hydrographes.

Ne peut-on évoquer, dans cette salle, la participation des hydrographes à diverses affaires. Dans l'affaire des *Pêcheries* en 1951 n'y avait-il pas comme conseillers experts pour le Gouvernement britannique deux membres éminents du service hydrographique de l'amirauté ? Dans l'affaire du *Plateau continental de la mer du Nord* n'y avait-il pas pour le Danemark comme conseiller le chef de service de l'Institut hydrographique, pour les Pays-Bas un contre-amiral, chef du service hydrographique de la marine royale néerlandaise assisté d'un adjoint, chef de division dans ce même service ?

Ne peut-on rappeler aussi comme il est mentionné au paragraphe 50 de l'arrêt sur le *Plateau continental de la mer du Nord* de 1969 que la Commission du droit international a eu recours à un comité d'experts hydrographes qui ont étudié diverses méthodes de délimitation et ont rendu leur rapport en 1953.

Ne rejetons pas les travaux des hydrographes.

Je pense qu'il est utile d'étudier les diverses définitions et représentations cartographiques concernant le golfe de Gabès afin de voir si une notion précise se dégage.

Les présentations géographiques sont plus faciles à être utilisées par les non-spécialistes lorsqu'elles revêtent la forme cartographique. C'est ainsi que moi, qui ne suis aucunement géographe, j'ai cru bon de travailler personnellement. J'ai rassemblé un certain nombre de cartes et j'ai cru que ce dossier serait utile à la Cour et il a été distribué à cet effet [2].

J'exposerai tout à l'heure le classement, les distinctions, les regroupements des divers documents cartographiques et je voudrais distinguer donc, d'une part, les instructions, les documents des hydrographes – qui sont incriminés – et puis d'autres documents ou cartes ou éléments cartographiques.

a) *Les travaux des hydrographes*

En ce qui concerne les travaux des hydrographes [3] on les trouve rassemblés dans le dossier qui a été remis à la Cour le 30 septembre, sous la rubrique B,

[1] Voir ci-après, correspondance, n° 120.

[2] *Ibid.*, n° 112.

Les dossiers spécialement préparés à l'intention de la Cour par les Parties pour illustrer leurs plaidoiries ne sont pas reproduits. Si une carte ou illustration contenue dans un dossier est reprise dans le volume des cartes de la présente édition (VI), elle est dûment signalée en marge du texte.

[3] I, p. 537-538, et ci-après p. 439-440.

avec des représentations graphiques [1] correspondantes qui sont empruntées à des cartes officielles.

La réplique tunisienne (IV), au paragraphe 1.12, tente de contester la définition du golfe de Gabès (paragraphe 78 du mémoire libyen, I, et paragraphe 82 du contre-mémoire libyen, II) par les *Instructions nautiques* françaises et le *Mediterranean Pilot* en citant des instructions italiennes : le *Portolano del Mediterraneo*. La citation tunisienne est la suivante : « Le golfe de Gabès, anciennement appelé de la Petite Syrte, est compris entre l'île Kerkennah au nord et l'île Gerbah au sud. »

C'est là une définition peu précise mais qui est beaucoup plus étroite que les affirmations – que je citais tout à l'heure – selon lesquelles le golfe de Gabès s'étendrait de Ras Kapoudia à Ras Ajdir. Par ailleurs, qu'il me soit permis de faire remarquer que le texte utilisé par les écritures tunisiennes est une édition de 1898.

Il est bien évident que depuis cette date de nouvelles éditions du *Portolano* ont paru. J'ai eu la curiosité de m'y reporter et je prendrai la dernière en date, édition 1971, page 326, « Golfe de Gabès » : « Le golfe de Gabès, l'ancienne Petite Syrte, s'ouvre entre le Ras Yonga et l'extrémité nord-ouest de l'île Djerba. »

Cette définition et cette représentation que vous trouverez, Monsieur le Président, dans ce que j'appellerai le dossier, est tout à fait analogue à celle indiquée dans les écritures libyennes.

Celles-ci citent en effet les *Instructions nautiques* françaises. Il y a, et ceci s'explique aisément, un grand nombre d'instructions nautiques françaises traitant de cette question. Elles sont intervenues au cours d'une période de l'ordre de près d'un siècle entre 1876 et 1968, date de la dernière instruction concernant la Tunisie.

Jamais ces instructions n'ont défini le golfe de Gabès comme s'étendant de Ras Kapoudia à Ras Ajdir.

L'édition de 1876, qui donne la définition la plus large, donne une ouverture de 42 milles de largeur à l'entrée.

Dans toutes les éditions suivantes, les *Instructions nautiques* françaises adoptent une définition plus précise et font mention, comme entrée du golfe, du passage entre Ras Yonga et la pointe ouest de l'île de Djerba.

Cette précision apparaît pour la première fois en 1890, à la suite de la mission hydrographique menée à bord du *Linois* qu'évoquait mon éminent collègue le professeur Malintoppi. La description du golfe est faite au chapitre VII (« De Ras Yonga à Ras Ajdir »), alors que celle des Kerkennah est faite au chapitre VI (« De Ras Kapoudia à Ras Yonga : les îles et bancs Kerkennah »).

Dans la section concernant les marées et courants dans le golfe, on peut lire :

> « Le flot venant de l'est longe la côte nord de Djerba avec une vitesse qui dépasse un nœud devant Hurnt Suk, qui, en pénétrant dans le golfe, s'épanouit et forme deux branches principales, l'une dirigée vers la baie des Surkennis, l'autre longeant la côte ouest de Djerba. »

Dans les *Instructions nautiques* de 1899, on lit : « Le golfe de Gabès occupe l'étendue de 40 milles environ, qui sépare le Ras Ungha de la grande île de Djerba. »

Cette définition est reprise en 1911, 1919 et 1932.

La définition la plus récente est fournie par les instructions de 1968 : « Le

[1] Non reproduites.

golfe de Gabès, l'ancienne Petite Syrte, s'ouvre entre le Ras Yonga (Ungha) et l'extrémité N.W. de l'île de Djerba (33° 53′ N – 10° 51′ E). » (I, mémoire libyen, annexe I-19.)

On retrouve, et c'est curieux, une définition identique dans le *Mediterranean Pilot*, dont l'édition de 1951 indique : « Gulf of Gabès is entered between Ras Yonga and Ile of Djerba. » (I, mémoire libyen, annexe I-18.)

Ces diverses définitions, et vous remarquerez la convergence – instructions nautiques françaises, instructions nautiques britanniques, instructions nautiques italiennes – confinent le golfe de Gabès à la partie la plus interne du rentrant de la côte tunisienne.

Le fait qu'une autorité comme celle du *Mediterranean Pilot* adopte cette formule mérite d'être noté.

Et c'est la raison pour laquelle les instructions nautiques de différents pays sont identiques, sans aucune contradiction entre elles et sans que d'autres définitions leur soient opposées.

Il paraît difficile d'ignorer ces documents. N'oublions pas que le golfe de Gabès est ouvert à la navigation maritime, que le port de Gabès reçoit des navires, que son trafic est lié à l'expansion du complexe industriel de Ghamouche et qu'il se développe et que l'établissement de cartes marines relève tout naturellement des hydrographes. Cette identité se manifeste évidemment dans les cartes marines qui ont été soumises ou sont soumises à la Cour, et qui sont mentionnées dans le dossier (carte française 4316 utilisée par la Tunisie le 24 septembre 1981 [1] et carte anglaise 3327).

Je voudrais maintenant, abandonnant les documents des hydrographes, examiner le problème suivant :

b) *Notations géographiques et cartographiques*

Les écritures tunisiennes, au paragraphe 5.29 du contre-mémoire et aux paragraphes 1.12 à 1.17 de la réplique, invoquent une série de définitions de caractère géographique pour contrebattre les notions dégagées unanimement par les hydrographes.

Je voudrais utiliser, par conséquent, le dossier que j'ai constitué et signaler tout particulièrement à l'attention de la Cour certains aspects caractéristiques. Je voudrais plus spécialement distinguer les cartes elles-mêmes et la transcription des mots *golfe de Gabès*.

On doit noter que la thèse tunisienne d'une conception très élargie du golfe de Gabès a été présentée dans la réplique tunisienne (IV) au paragraphe 1.15, note de bas de page n° 18, en s'abritant derrière l'autorité du professeur Jean Despois.

La citation utilisée également lors des plaidoiries orales est empruntée à l'ouvrage *La Tunisie orientale : Sahel et basse steppe* (Paris, Presses universitaires de France, 2e éd., 1955, page 455). Elle se lit :

> « Dans tout le golfe de Gabès, du Ras Kaboudia et Ras Achdir, à la frontière tripolitaine, la navigation des barques, sur les hauts-fonds, est gênée presque partout par d'interminables alignements de palmes fichées dans la vase... »

On a voulu voir dans cette phrase une définition du golfe de Gabès, définition extensive.

Je voudrais simplement faire remarquer que l'ouvrage cité n'a pas pour titre « Le golfe de Gabès », mais s'appelle *Sahel et basse steppe*. On remarquera

[1] Voir IV, p. 588, et ci-après, correspondance, n° 98.

également que cet ouvrage ne contient pas de carte qui, d'une manière non équivoque, mentionne, ou exprime plutôt, une extension du golfe de la sorte. A l'inverse, puisque l'on invoque l'autorité du professeur Despois, je voudrais noter que plusieurs cartes établies par ce spécialiste consacrent une représentation normale du golfe de Gabès dans son acception habituelle. On trouve, dans le dossier que j'ai établi, plusieurs de ces cartes dessinées par le professeur Despois.

C'est, par exemple, dans la série des cartes présentées dans les écritures (21) tunisiennes, la figure 5.13 du mémoire tunisien.

C'est également le cas d'une carte du dossier qui est extraite de l'ouvrage de Jean Despois, *La Tunisie*, 1930.

C'est aussi le cas de la carte du dossier qui est la figure 2 de l'ouvrage de Jean Despois, *La Tunisie*, deuxième édition, 1961.

L'autorité du professeur Despois s'attache à ces cartes et nous relevons que l'expression *golfe de Gabès* n'est pas ici utilisée extensivement.

Bien des cartes du dossier comportent d'ailleurs la même représentation, et je peux dire que, sauf de rares exceptions que je vais présenter dans quelques instants, il s'agit de toutes les cartes, qu'elles soient de caractère strictement scientifique, qu'elles aient été utilisées devant la Cour, ou qu'elles soient des cartes destinées au grand public et que j'ai fait figurer dans la dernière série.

S'agissant de cartes scientifiques, on notera qu'elles ont été souvent utilisées dans les écritures ou les plaidoiries tunisiennes (je n'ai pas utilisé de cartes (20)(21) uniquement présentées par la Libye), et j'ai présenté cela dans le dossier avec (24)(29) les figures classées sous la rubrique C I et portant les numéros 4.02[1], 5.12, (30)(35) 5.13, 5.20, 5.25, 5.26, 5.28, 5.29, 5.30 et 5.31 dans le mémoire tunisien, ainsi que mémoire libyen, annexe II, planche 6[1], et contre-mémoire libyen, vol. II, annexe 107[1].

Ainsi note-t-on une grande convergence et on retrouve une unité qui rejoint l'unité déjà signalée pour les travaux des hydrographes. Cette unité comporte toutefois une limite. En effet, parmi les cartes spécialement établies par la Tunisie pour être présentées à la Cour, on trouve des cartes qui constituent une exception à l'harmonie que j'évoque et ainsi apparaît une distorsion.

Mais il convient de distinguer. Tout d'abord les cartes utilisées par la Tunisie, mais empruntées par ses conseils à des ouvrages ou à des travaux préétablis, correspondent parfaitement aux données générales ci-dessus rappelées, et nous notons donc la convergence.

S'agissant de cartes spécialement établies pour la présente affaire, nous avons alors une distorsion, mais qui, je le répète, est partielle. Les cartes préparées spécialement par la Tunisie pour la présente affaire se trouvent sous la rubrique C II de mon dossier. On peut distinguer sous cette rubrique deux séries de cartes. Je répète, elles ont été spécialement préparées. Mais, il me plaît de le dire, les unes ont une transcription normale et rejoignent donc les cartes que j'ai évoquées précédemment et je salue cette unité. Il s'agit des figures (50) portant les numéros 3.03[1] dans le mémoire tunisien et 1.01 et 1.02[1] dans le (39)(40)(102) contre-mémoire tunisien.

Au contraire, nous trouvons pour d'autres cartes spécialement préparées, (16)(18) pour les cartes n[os] 1, 2 et 9[1] du mémoire tunisien et 2.04 de la réplique (19)(26) tunisienne, les figures 5.07, 5.09, 5.10, 5.14[1] et 5.22 du mémoire tunisien, une transcription très particulière et exagérée.

Déjà le contre-mémoire libyen (II), dans ses paragraphes 86 à 90, avait

[1] Non reproduite.

mentionné ces étrangetés cartographiques destinées à matérialiser d'une manière visuelle l'extension prétendue du golfe de Gabès au-delà du sens habituel de cette expression.

Cette tendance se manifeste avec la transcription de la mention *golfe de Gabès*, avec l'utilisation de caractères de plus en plus gros, avec l'allongement du titre. On relève avec un certain étonnement les plus curieuses de ces cartes sur lesquelles le *S* du mot Gabès apparaît comme se plaçant largement à l'est de la frontière libyenne, à 50 ou quelquefois près de 100 kilomètres.

Pourquoi ces outrances ? C'est la question que l'on peut se poser. Je ne reviendrai pas sur ce problème, il a été traité dans le contre-mémoire libyen aux paragraphes 88 et 89 : il s'agit par cette représentation graphique déformante d'accréditer la thèse artificielle que le golfe de Gabès est un écosystème s'étendant au moins jusqu'à 13° est de longitude.

Mais ces étranges représentations, qui n'apparaissent, je le répète, que dans certains des documents spécialement établis pour la présente affaire et leur présentation devant la Cour et, j'insiste, simplement dans certains d'entre eux, contrastent avec les autres et ainsi disparaît la crédibilité de la thèse qu'elles étaient destinées à illustrer.

J'en arrive maintenant au dernier point de cette première partie. Je voudrais traiter d'un point tout à fait capital :

4. Analyse juridique des « droits historiques »

La Tunisie fait porter l'essentiel de son argumentation de caractère juridique sur l'invocation de droits historiques dont l'existence commanderait la solution du présent litige.

Ce litige, étant porté devant une cour de justice, il est primordial de procéder à l'analyse juridique des droits historiques.

Il apparaît à l'évidence que, du point de vue du droit interne tunisien, les droits historiques se classent en deux catégories différentes qui correspondent évidemment aux modes d'exploitation des pêcheries et il est bon donc de présenter ici, avant d'étudier dans une seconde partie le problème international lui-même, le régime juridique concernant ces pêcheries.

Nous distinguerons les pêcheries fixes et la pêche des éponges.

a) *L'utilisation de pêcheries fixes*

Dans son ouvrage classique, le professeur Jean Despois (dont on parle décidément beaucoup), dans le chapitre VII intitulé « La pêche. Les Kerkena » de *La Tunisie orientale : Sahel et basse steppe*, après avoir décrit les procédés et types de pêche, analyse ce qu'il appelle, bien qu'il ne soit pas juriste, « Les droits d'usage ». Rappelant que la très faible profondeur des bancs a souvent imposé une forme originale aux procédés de pêche, il ajoute que cette faible profondeur « est aussi à l'origine des droits que les riverains prétendent exercer sur la mer, notamment ceux qui utilisent les pêcheries fixes » (p. 465).

Déjà en 1888, dans leur ouvrage *Le golfe de Gabès*, Servonnet et Lafitte indiquaient (p. 362) que les pêcheries apparaissaient comme des propriétés privées, que les « propriétaires se sont toujours crus autorisés à en disposer à leur gré, à se les transmettre à titre gratuit ou onéreux, à en trafiquer, en un mot, comme s'il s'agissait de propriétés terrestres ordinaires ». Ils mentionnaient que les propriétaires avaient des titres de propriété sous forme d'actes dressés en bonne et due forme, revêtus du sceau beylical et contresignés par le ministre compétent.

Je note au passage que la Partie tunisienne, dans sa plaidoirie, a soutenu qu'il s'agissait là de droit de caractère public (IV, p. 462).

Les auteurs, je veux dire Servonnet et Lafitte, exprimaient leur étonnement et leur inquiétude devant cette multiplication d'appropriations privées et ils exprimaient le souhait que soit porté remède à la situation par le recensement, l'adoption d'un régime juridique nouveau reposant sur la domanialité publique, cette notion qui est si chère aux fonctionnaires français, et la précarité de l'utilisation privative de parcelles de ce domaine.

Ils voulaient ainsi proclamer la supériorité de l'intérêt général et restaurer l'autorité de l'Etat. Ce sont des préoccupations analogues que l'on retrouve dans l'instruction du 31 décembre 1904, notamment dans ses paragraphes 29 à 36.

Le paragraphe 30 pose le principe directeur. Il rappelle que des autorisations de pêcheries ont été données à diverses époques, distingue plusieurs cas et la circulaire de 1904 se préoccupait, comme le souhaitaient une vingtaine d'années auparavant Servonnet et Lafitte, du recensement des pêcheries, du contrôle des titres. Elle posait aussi le principe d'une redevance financière sous la forme d'une taxe.

La conception privative des pêcheurs s'est manifestée avec force. Elle s'exprime dans cette expression « notre mer » qui désigne les fonds inférieurs à deux mètres où ils installent leurs pêcheries.

Despois présente un raccourci de la longue lutte entre les pêcheurs et l'administration (p. 467).

C'est en effet une longue histoire. Un arrêté du 30 novembre 1925 a constitué une commission (donc vingt ans après l'instruction) et, finalement, c'est un décret du 5 février 1931 qui a réglé le problème au point de vue juridique.

La commission a relevé que l'usage du domaine public, défini par le décret du 25 septembre 1885, avait procédé jusqu'alors, pour une grande part, « de coutumes qui ont engendré des droits complexes, confus et non définis par les lois ». Elle a considéré qu'il importait « d'abolir cette situation anarchique et de lui substituer un régime positif conciliable avec les dispositions des lois et avec les intérêts légitimes des usagers ».

La régularisation a été acceptée par les représentants des usagers et le remplacement des titres jugés valables a été entrepris. Et le décret du 5 février 1931, qui a opéré cette remise en ordre, a permis que les détenteurs des titres valables reçoivent en échange des permis d'occupation temporaire à long terme du domaine public.

Selon qu'il s'agit des bancs des Kerkennah ou des bancs du continent de la région de Sfax, compris entre la Chebba et la ville de La Skhirra, les modalités sont différentes quant à la durée de la jouissance gratuite et irrévocable.

Mais le régime juridique est assez commun. Il a été finalement établi un droit d'usage d'une certaine durée, un droit d'occupation temporaire à long terme. Ce terme est de soixante ans pour les bancs des Kerkennah et de quatre-vingt-dix-neuf ans pour les bancs de Sfax.

Le juriste ne manque pas d'être intéressé par le régime juridique, en effet la jouissance est accordée sous réserve de l'exploitation normale de ces pêcheries et de leur maintien entre les mains d'habitants, soit des îles Kerkennah lorsqu'il s'agit d'elles, soit de la région côtière continentale considérée.

Nous sommes en présence d'un droit très singulier, très différent du droit de propriété, puisqu'il s'éteint par le non-usage et qu'il s'éteint également si le titulaire n'a pas un lien territorial étroit avec la région maritime. Bien sûr ces droits ne concernent que des espaces particuliers, ces pêcheries fixes, et

n'oublions pas que la pêche n'est pas réservée au-delà de 500 mètres à partir des pêcheries fixes.

Je voudrais maintenant présenter le régime non plus des pêcheries fixes mais celui de la pêche des éponges.

b) *La pêche des éponges*

Le régime juridique de la pêche des éponges a toujours été très différent de celui des pêcheries fixes.

Il a revêtu des aspects successifs en ce sens que l'on peut distinguer, je crois, six phases :

1. Au début du XIX[e] siècle, d'après Servonnet et Lafitte (*Le golfe de Gabès*, p. 425), toute personne voulant pêcher des éponges devait obtenir une autorisation donnée par le caïd de Djerba. Un mamelouk était embarqué à bord du bateau, il prélevait au nom du bey une dîme d'un taux variable et le reste était vendu au profit du pêcheur.

2. Vers 1840, un négociant grec obtint d'Ahmed-Bey, alors sur le trône, le monopole d'exploitation des bancs, moyennant le versement à la cassette privée du bey d'une somme de 20 piastres par quintal et demi d'éponges apporté sur le marché.

L'exploitation fut conduite par le bénéficiaire de l'exploitation sur une grande échelle. Comme il était grec il fit venir ses compatriotes et c'est une flotille d'une centaine de barques montées par plus de cinq cents marins grecs qui exploita les éponges.

Cela ne dura que peu car en 1846 des difficultés surgirent entre le sieur Coutoulouma et un important négociant d'éponges agissant pour des maisons austro-hongroises et italiennes, le sieur Georges Tapia.

Ce dernier intervint auprès du ministre d'Ahmed-Bey, le tout-puissant Ben Aïed, et celui-ci obtint pour son propre compte la concession qu'il fit par prudence placer au nom d'un frère de Tapia, il la fit régulariser par des décrets formels qu'il eut la précaution de communiquer aux consuls étrangers.

La redevance annuelle était de 30 000 piastres, la concession n'étant pas d'ailleurs très nettement délimitée territorialement.

Servonnet et Lafitte (p. 427) indiquent que la maison Coutoulouma ainsi évincée, par ce fait du prince,

> « protesta énergiquement, mais sans succès, par l'organe des consuls généraux de France et de Grèce, auprès d'Ahmed-Bey qui, pour toute explication, invoqua la raison d'Etat. Elle intenta alors, à Ben-Aïed, un procès en réparation du dommage que lui causait l'obligation d'abandonner ses importants établissements de pêche.
>
> Ce procès dura [et je laisse la responsabilité aux auteurs du propos], ce que dure tout procès en Tunisie. Commencé en 1848, il n'était pas tranché en 1855, époque à laquelle, malgré la puissante intervention de M. Léon Roches, l'illustre consul général de France, les maisons Coutoulouma et Rouchon-Tardieu [Rouchon-Tardieu sont des acheteurs d'éponges] durent renoncer à leurs prétentions qu'elles jugèrent sans issue. »

Ainsi Ben-Aïed ou ses représentants conservèrent le monopole de la pêche aux éponges jusqu'en 1869.

3. En 1869 s'ouvre la troisième période, la situation financière de la Régence devint si grave qu'un arrangement financier fut établi par les créanciers, approuvé par le comité international de contrôle et signé par le premier ministre du bey. Nous reviendrons par la suite sur cet arrangement.

Ici je me borne à indiquer que le bey consentit la cession d'un ensemble de revenus que la commission financière allait utiliser pour le service de la dette et son amortissement.

L'ensemble des revenus s'élève à 6 505 000 francs et parmi eux figure pour un montant d'ailleurs modeste, de 55 000 francs, le produit du fermage des poulpes et des éponges.

Avec la cession de ses droits par le bey, une transformation juridique importante apparaissait, comme le notent exactement Servonnet et Lafitte : « le fermage des éponges qui n'avait été jusque-là qu'un revenu particulier du Souverain, devint un revenu public, et les droits de Ben-Aïed tombèrent du même coup en désuétude ».

4. Ainsi apparaît le fermage, ce fermage en tant que régime juridique peut être défini comme la concession de la pêche des éponges par voie d'adjudication publique. Ce fermage comportait des sommes qui sont allées croissant.

D'après Servonnet et Lafitte : 70 000 piastres de 1870 à 1876, 150 000 piastres de 1876 à 1882, 250 000 piastres de 1882 à 1885 et 255 000 piastres de 1885 à 1888. Et bien entendu le livre s'arrête à cette date.

La situation du fermier est curieuse, il existe un cahier des charges, mais il n'avait qu'un caractère formel. Le concessionnaire délivre à tout pêcheur un permis de pêche selon lequel le pêcheur paie entre les mains du fermier et de la douane les redevances prescrites.

Le système du fermage dura quelques années. L'étendue et les limites de la concession ne sont pas fixées de manière précise. On sait toutefois par les indications qui sont contenues dans l'instruction du 31 décembre 1904 que la limite orientale était la ligne partant de Ras Kapoudia, contournant au large les bancs des Kerkennah et de là se dirigeant en ligne droite vers la frontière tripolitaine (article 29, paragraphe 6, de l'instruction), nous retrouverons ce point par la suite.

Le système du fermage ne dura qu'une vingtaine d'années car il fut abandonné en 1892.

5. Alors apparaît le régime de la liberté d'exploitation sous condition et charges.

Avec le décret du 16 juin 1892 apparaît un nouveau régime qui subira diverses transformations avec les décrets successifs du 11 janvier 1895, du 28 août 1897, du 16 juillet 1906, qui lui est relatif à la pêche des poulpes.

Le régime est un régime de liberté assorti de certaines conditions, le paiement d'une taxe auquel est subordonnée la délivrance d'une patente.

Le régime est un régime de liberté en ce sens que quiconque acquitte la taxe est habilité à pêcher, que la délivrance n'est pas refusée. C'est, s'il m'est permis d'employer une expression du droit administratif français, une formule de « compétence liée ».

Le régime est également très libéral en ce sens que les pêcheurs étrangers sont traités comme les nationaux, les uns et les autres payant patente.

Enfin, dans ce régime de pêche des éponges, subordonné à l'acquittement d'une taxe, un contrôle est nécessaire. Il est exercé par des garde-pêche dont la mission est précisée par les articles 62 et suivants de l'instruction du 31 décembre 1904. La limite d'action vers le large ou limite de la zone de surveillance est la fameuse ligne des 50 mètres de profondeur.

6. Ce régime avec les modifications que j'ai déjà indiquées devait subsister jusqu'au régime du décret du 26 juillet 1951, qui a transformé le régime de la pêche des éponges en même temps qu'il transformait le régime plus général de la pêche, cette fois de la pêche dans les eaux surjacentes.

Le décret de 1951 interdit aux étrangers, lorsqu'on se trouve dans la zone réservée, la pêche des éponges.

En résumé, on voit donc que les droits traditionnels appartiennent à deux catégories très différentes :

– La première est celle des pêcheries fixes, l'utilisation privative du domaine public avec un régime juridique défini en 1931 et dérivant des notions du décret du 25 septembre 1885 qui se substituaient aux notions traditionnelles.

Les espèces pêchées dans ces pêcheries sont des espèces mobiles capturées dans des pièges fixes.

Il s'agit d'une capture d'animaux sauvages et non pas comme il a été indiqué à deux reprises par les conseils de la Tunisie d'une « aquaculture », qui se définit comme « l'élevage d'espèces marines », ou d'une « pisciculture », qui se définit d'après le *Robert* comme « l'ensemble des techniques de production et d'élevage des poissons ». Les pêcheries fixes ne sont pas ces fermes marines qui sont expérimentées depuis quelque temps, dans divers pays, par exemple au Japon et plus récemment en France.

Ces poissons, malgré la très faible profondeur, relèvent des eaux surjacentes et aucunement du plateau continental.

– La seconde catégorie est celle des éponges, c'est-à-dire, d'espèces fixées sur le sol de la mer. Jusqu'en 1951, l'exploitation pouvait être entreprise par quiconque acquittait la patente, dans le cadre donc d'un régime correspondant au régime très libéral qu'évoque dans son livre, d'une manière générale, Gilbert Gidel.

L'audience est levée à 13 heures

VINGTIÈME AUDIENCE PUBLIQUE (5 X 81, 15 h)

Présents : [Voir audience du 29 IX 81.]

M. COLLIARD : Monsieur le Président, j'avais consacré ma précédente intervention, au cours de la matinée de vendredi, à l'étude du régime juridique de ces espaces maritimes en lesquels la Tunisie voit une « zone historique ». Je ne reviens pas sur cette démonstration.

II. La ligne de 50 mètres, son établissement et sa valeur internationale

(12) La carte ci-dessus projetée et qui est empruntée aux écritures tunisiennes nous montre la zone revendiquée et elle nous montre la limite vers le large, la ligne de la profondeur de 50 mètres qui a été établie unilatéralement non pas depuis des temps immémoriaux, non pas même au XIX[e] siècle, mais seulement au début du XX[e] siècle par la fameuse instruction du 31 décembre 1904. C'est sur cette ligne que la Tunisie voit la limite extérieure vers le large de ce qu'elle appelle « la zone des droits historiques » et que l'instruction elle-même appelle zone de surveillance.

Le problème que je voudrais étudier aujourd'hui tout d'abord est double.

Je voudrais en effet consacrer les développements qui suivent à l'étude de la ligne de 50 mètres et à son établissement et ensuite examiner si cette ligne a fait ou non l'objet d'une reconnaissance internationale.

Je signale qu'une autre ligne ou je rappelle plutôt qu'une autre ligne est également mentionnée dans l'instruction de 1904 ; c'est la ligne partant de Ras Ajdir et se dirigeant sous un angle de 45° jusqu'à son intersection avec la ligne des 50 mètres. C'est la limite latérale de la surveillance.

Je ne traiterai pas ici du problème de cette ligne latérale qui a été examiné si brillamment par mon éminent collègue et ami, le professeur Malintoppi, avec les conclusions de qui je suis, bien évidemment, d'accord.

Le champ de mon étude étant ainsi délimité, il m'apparaît nécessaire avant d'examiner le problème de la prétendue reconnaissance internationale de cette ligne, de rappeler ses modalités d'établissement et ses caractéristiques générales.

1. Les modalités d'établissement

Le mémoire tunisien, en son paragraphe 4.75, indique : « En Tunisie, la précision des frontières maritimes s'est faite progressivement. »

Cette expression signifie que les délimitations opérées unilatéralement ont varié dans le temps. Les formules souvent employées, du type « de tous temps » ou encore « depuis un temps immémorial » pour caractériser une « souveraineté tunisienne » masquent en réalité une situation particulièrement changeante.

La circulaire du 31 décembre 1904 (I, p. 325-374), souvent invoquée en la matière, contient tout d'abord dans son article 29 une indication intéressante.

Le paragraphe 5 abordant le problème de la zone spongifère indique que dans cette zone

« gisent les bancs d'éponges tunisiens qui, bien que n'ayant jamais fait

l'objet d'une délimitation précise régulièrement notifiée aux puissances, ont été de tous temps considérés comme dépendance de la Régence... »

Un premier trait apparaît donc particulièrement important : le Gouvernement tunisien reconnaissait, à la fin de l'année 1904, après près d'un quart de siècle de protectorat que les bancs n'avaient jamais fait l'objet d'une délimitation précise et qu'aucune notification n'avait été régulièrement faite aux puissances.

Poursuivant son analyse l'article 29 dans son paragraphe 6 rappelle :

« Du temps du fermage [époque qui est close en 1892], la portion de mer soumise à l'adjudication était limitée par l'usage, d'un côté par le rivage, de l'autre par une ligne partant de Ras Kapoudia, contournant au large les bancs des Kerkennah et de là se dirigeant en ligne droite vers la frontière tripolitaine. »

Ainsi est évoquée une première délimitation qui aurait été utilisée au temps du fermage.

Ainsi que l'indique le contre-mémoire libyen (II) en son paragraphe 113 cette délimitation aurait été définie par une ligne droite joignant la limite la plus orientale des bancs des Kerkennah, c'est-à-dire Ras el Mzebla, à l'extrémité du banc d'El Attaya, et la frontière avec la Tripolitaine.

Cette frontière terrestre ne fera l'objet, on le sait, d'une délimitation précise qu'avec la convention de 1910. C'est-à-dire qu'avant 1892 et à la période du fermage la frontière n'est pas définie d'une manière précise et se trouve, en tout cas, à l'ouest de Ras Ajdir.

Cette ligne dont l'article 29 de la circulaire de 1904 dit qu'elle aurait été consacrée par l'usage est très proche d'une ligne nord-sud. En effet si l'on adopte Ras Ajdir comme point frontière encore que ce ne fût pas la circonstance, si pour des raisons de simplification on l'adopte, la ligne Ras el Mzebla/Ras Ajdir a une inclinaison de 2° 15'.

Cette ligne limitant vers le large la portion de la mer objet du fermage a été maintenue après la suppression du fermage ; elle n'avait certainement pas fait l'objet d'une notification ; elle ne se trouve pas mentionnée sur les permis de pêche délivrés par l'administraton du fermage. Elle résultait de l'usage.

Servonnet et Lafitte, dans leur ouvrage sur le golfe de Gabès (p. 394), n'ont pas manqué de relever, en s'en étonnant, l'imprécision du cahier des charges du fermier quant à l'étendue et aux limites de la concession.

Quoi qu'il en soit, le paragraphe 7 de l'article 29 de la circulaire de 1904, à propos de la ligne précitée, indique : « Cette délimitation toute fictive, et qu'aucun signal extérieur n'indiquait à l'attention des intéressés, continua à être mise en vigueur après la suppression du fermage. »

Ainsi que le remarque la suite de l'article 29 il ne pouvait résulter de cette situation que des incidents. Les pêcheurs pris en contravention par les péniches garde-pêche affirmaient qu'ils pêchaient plus au large que ne l'indiquait le procès-verbal.

La nécessité d'une solution précise n'allait pas tarder à se faire sentir. Une lettre du résident général au ministre français des affaires étrangères, en date du 4 juillet 1902, est particulièrement intéressante à cet égard, on la trouve à l'annexe 80 du mémoire tunisien (I).

La lettre du résident général est en effet une réponse à une dépêche du ministre, portant le numéro 242 et datée du 9 mai 1902. Dans cette dépêche, le ministre faisait connaître au résident qu'ayant été saisi de protestations italiennes, en ce qui concerne la délimitation de la zone de surveillance de la

pêche des éponges dans le golfe de Gabès, il avait proposé au Gouvernement italien qu'une commission mixte procède à une reconnaissance des bancs. Après cette reconnaissance, le Gouvernement tunisien devrait procéder aux opérations de balisage nécessaires et en notifier l'exécution aux gouvernements intéressés.

Le résident général, dans sa lettre au ministre, met l'accent sur les difficultés pratiques de l'opération de balisage sur une ligne brisée longue de 470 kilomètres, sur le nombre considérable de bouées et balises qui serait nécessaire, sur les risques de ce balisage et sur la faible visibilité des bouées la nuit par temps de brume.

Le résident général suggérait une autre solution très simple, permettant de déterminer un critérium infaillible pour que les pêcheurs sachent s'ils se trouvent ou non dans la zone soumise à la patente.

Cette solution c'est une ligne de fonds. Une ligne de fonds de 50 mètres puisque, comme il a été indiqué plus haut, « les bancs d'éponges les plus riches de la côte tunisienne sont presque tous en deçà de cette profondeur ».

Cette formule avait évidemment l'avantage de la simplicité. Il existe une sonde à bord de chaque bateau de pêche, il est donc facile de vérifier à quelle profondeur on se trouve et par conséquent si l'on est à l'intérieur ou à l'extérieur de la zone dans laquelle le Gouvernement tunisien exige la possession d'une patente.

La lettre du résident général et sa proposition devaient être suivies d'effet. L'article 29 de la circulaire de 1904 dispose dans son paragraphe 8 que, pour couper court aux difficultés rencontrées : « jusqu'à nouvel ordre, le service des pêches devra n'exercer sa surveillance que sur la portion de mer du golfe de Gabès comprise en deçà de la ligne des fonds de 50 mètres ». (I, p. 344.)

Dans ses articles 62 et suivants, la circulaire porte « Instruction pour le service des chaloupes garde-pêche chargées de la surveillance de la pêche des éponges et des poulpes ».

La zone surveillée est définie par l'article 62 et définit quatre zones, ou quatre sous-zones si l'on préfère, dont l'ensemble constitue la zone de surveillance.

Le mémoire tunisien (I) reproduit, page 11 dans son paragraphe 4.76, les diverses zones de surveillance, telles qu'elles sont définies par l'article 62 de la circulaire.

Ainsi apparaît l'établissement. Un second problème se pose, celui du caractère de cette ligne.

2. Le caractère de la ligne

La circulaire du 31 décembre 1904, texte de droit interne tunisien, a défini la ligne précitée de 50 mètres.

Il convient d'en apprécier le caractère, car tracer une ligne ou adopter une ligne existant dans la nature est une opération juridique qu'il convient d'analyser. L'étude de la ligne fait apparaître un double caractère. Il s'agit d'une ligne nouvelle, il s'agit d'une ligne de surveillance.

a) *Ligne nouvelle*

Ainsi qu'il a été indiqué plus haut à l'époque du fermage, c'est-à-dire en 1892 encore, et plus longtemps ensuite, la ligne extérieure de contrôle par le fermier était une ligne Ras Mzebla-frontière tripolitane, la frontière je le répète, ne se trouvant pas alors à Ras Ajdir mais plus à l'ouest.

La ligne des 50 mètres de fond apparaît d'une manière nouvelle en 1904.

On relèvera que dans l'ouvrage de Servonnet et Lafitte, qui date de 1888,

existe une carte qui définit la limite des bancs actuellement, c'est-à-dire en 1888, exploités, et que cette limite est très en deçà d'une ligne que les auteurs proposent comme limite et qui est une ligne non pas de 50 mètres mais bien inférieure. On trouvera cette carte dans le contre-mémoire libyen, c'est une carte qui est placée entre la page 42 et 43 (II, p. 185) : « Carte d'ensemble du golfe de Gabès. »

Cette carte est précieuse car elle montre que les fonds exploités en 1888 sont de très faible profondeur et en tout cas très en deçà de l'isobathe des 50 mètres, ce qui correspond à la réalité de la cueillette. Cette carte, publiée à Tunis, réduit ainsi à néant l'affirmation selon laquelle la ligne des fonds de 50 mètres eût été choisie en retrait par rapport aux pratiques antérieures à 1904.

Cette affirmation se présente sous deux formes.

Au paragraphe 4.77 du mémoire tunisien (I) il est indiqué :

> « On pourrait, à priori, s'étonner du choix de l'isobathe de 50 mètres comme limite externe, si l'on considère que, de longue date, les pêcheurs tunisiens exerçaient leur industrie jusqu'à des profondeurs souvent bien supérieures. »

Cette affirmation ne paraît pas exacte car la ligne Ras Mzebla-frontière tripolitaine coupe parfois des fonds de 50 mètres mais pas de fonds plus profonds.

Au paragraphe 4.78, l'affirmation est reprise d'une manière différente :

> « Il est très important de noter que la ligne de 50 mètres, loin de constituer un nouvel empiètement sur la haute mer, comme tant de nations y procéderont dans l'avenir, apparaît au contraire comme en retrait par rapport aux zones antérieurement concédées par les beys. »

Il a été noté plus haut, à partir d'observations formulées par Servonnet et Lafitte (p. 394), que la zone concédée n'était pas définie avec précision et la circulaire de 1904, dans son article 29, paragraphe 6, loin d'indiquer ce prétendu retrait mentionne comme limite antérieure cette ligne que j'ai déjà indiquée, la ligne Ras Mzebla-frontière tripolitaine.

En réalité la ligne des 50 mètres constitue une ligne avancée, par rapport aux usages antérieurs.

La « nouveauté » de la ligne des 50 mètres s'explique car elle s'inscrit parfaitement dans le mouvement que présentait, vendredi, à propos de la frontière terrestre, le professeur Malintoppi, et qu'avant lui avaient invoqué l'agent de la Jamahiriya arabe libyenne puis sir Francis Vallat.

Ainsi la ligne est nouvelle, elle est également une ligne dont le sens doit être noté, c'est une ligne de surveillance, de caractère administratif.

b) *Le sens des lignes : surveillance, caractère administratif*

Faisant allusion au régime du fermage, l'article 29, je l'ai déjà indiqué, mentionnait que :

> « Du temps du fermage, la portion de mer soumise à l'adjudication était limitée par l'usage, d'un côté par le rivage, de l'autre par une ligne partant de Ras Kapoudia, contournant au large les bancs des Kerkennah et de là se dirigeant en ligne droite vers la frontière tripolitaine. »

La « Carte des fonds spongifères de la Régence », reproduite dans le contre-mémoire libyen (II, p. 184), reproduite figure 1.01 de la réplique tunisienne,

puisque la Tunisie n'avait pas cité cette carte auparavant, et qui comme l'observe très justement cette réplique a été établie par la direction des travaux publics suite à la circulaire de 1904 et ultérieurement reproduite dans l'édition de 1908 de l'ouvrage de De Fages et Ponzevera sur *Les pêches maritimes de la Tunisie*, utilise comme légendes juste accolées à la ligne isobathe des 50 mètres, « Limite des fonds de 50 mètres » et « Limite de la zone d'action des bateaux garde-pêche tunisiens ». La ligne des 50 mètres définie dans un texte de droit interne qui n'est d'ailleurs qu'une circulaire, cette ligne est une ligne administrative délimitant la zone d'action des bateaux garde-pêche.

Et je voudrais maintenant passer à l'étude du second problème, la reconnaissance internationale. Existe-t-il ou non une reconnaissance internationale de cette ligne ?

3. La prétendue reconnaissance internationale

Mes observations seront présentées à partir de la remarque suivante :

La ligne indiquée ci-dessus n'a pas été établie internationalement, elle a un caractère unilatéral et elle n'a pas fait l'objet d'une reconnaissance non équivoque de la communauté internationale, bien au contraire elle a été formellement contestée.

Reprenons ces points.

a) *L'absence de procédure internationale dans l'établissement de la ligne*

L'adoption d'une délimitation des bancs d'éponge a été faite par une procédure purement interne, de caractère administratif et qui est celle de la circulaire de 1904.

Certes il eût été normal de concevoir une procédure de caractère international dans la mesure où la délimitation concernée se plaçait dans des espaces maritimes de haute mer, c'est-à-dire au-delà des limites habituelles de la mer territoriale.

Et d'ailleurs la formule de l'établissement d'une ligne de délimitation par une commission internationale a été envisagée.

Au début du XX[e] siècle on la trouve dans la lettre du ministre des affaires étrangères français au résident général en date du 9 mai 1902 et dans la réponse de celui-ci en date du 4 juillet 1902, que j'ai évoquées il y a quelques instants.

C'est précisément dans cette réponse que le résident général, pour des raisons de commodité, propose à son ministre la ligne des 50 mètres (voir I, mémoire tunisien, annexe 80).

Le début et la fin de cette réponse du résident général sont fort intéressants quant à la solution internationale de délimitation des bancs.

Au début on y lit :

> « Dans sa dépêche n° 242 du 9 mai dernier relative à la délimitation de la zone de surveillance de la pêche des éponges dans le golfe de Gabès, Votre Excellence me faisait connaître qu'elle avait proposé au Gouvernement royal d'Italie qu'une commission composée d'un délégué italien, d'un délégué du Gouvernement français et des représentants de la Régence prenne passage sur un navire et procède à une reconnaissance des bancs. Il appartiendrait ensuite au Gouvernement tunisien d'effectuer les opérations de balisage nécessaires et d'en notifier l'exécution aux gouvernements intéressés. »

Ainsi apparaît-il nettement que le Gouvernement français envisageait une opération de délimitation de type classique avec une commission internationale, le Gouvernement tunisien se bornant à effectuer ultérieurement les opérations de balisage dont il en notifierait l'exécution.

En proposant, dans le corps de sa lettre, la solution de la ligne des 50 mètres, le résident général inventait une formule qui devait devenir celle de la circulaire de 1904 mais on doit noter, et cela apparaît à la lecture des deux derniers paragraphes de sa lettre, que le résident général n'envisageait pas pour autant une décision unilatérale pour la ligne qu'il proposait. Il proposait au contraire que sa suggestion soit adoptée internationalement. On y lit en effet : « Si cette solution est adoptée, la commission pourra discuter à Tunis, d'abord cartes en mains et ensuite sur place, tous les détails de la question. »

Et il reprenait :

> « Si Votre Excellence veut bien, comme je l'espère, adopter les suggestions qui précèdent, il conviendrait de prier le Gouvernement italien de vouloir bien désigner, sans plus tarder, le délégué qui devra le représenter dans la commission projetée. Ce délégué s'entendrait sur place avec les autres membres déjà désignés pour fixer l'époque des réunions et la marche des travaux de la commission. »

Ainsi, apparaît-il à l'évidence que la ligne des 50 mètres constitue une proposition que recommande la simplicité et qui permet de mettre en œuvre, pour chaque bateau, la technique de la sonde, mais c'est là une solution qui doit être adoptée en tant que principe de délimitation de la zone de surveillance, par une commission, selon une procédure internationale.

Finalement, pour la ligne des 50 mètres, la solution internationale ne fut pas retenue. On ne trouve aucune mention dans les archives de la constitution et de la réunion d'une telle commission. Les indications contenues dans la plaidoirie orale (**IV**, p. 468) du 18 septembre concernant les travaux de cette commission ne sont pas fondées. C'est selon une procédure purement unilatérale que l'on agira.

Ainsi s'explique les difficultés de reconnaissance de ces lignes par des Etats étrangers. L'attitude italienne mérite d'être examinée tout particulièrement.

b) *La non-reconnaissance internationale de la ligne*

La ligne qui n'avait pas été établie internationalement ne va pas être l'objet, et c'est là mon second point, d'une reconnaissance internationale. Dans les paragraphes 4.89, 4.90, 4.91 et 4.92, le mémoire tunisien (**I**) insiste sur la tolérance internationale de la souveraineté tunisienne sur certains espaces maritimes que le mémoire appelle « golfe de Gabès ». Les affirmations sont souvent emphatiques.

Ainsi, trouve-t-on la formule dans le paragraphe 4.90 : « A l'ancienneté de l'occupation tunisienne correspond au contraire le caractère immémorial de l'acquiescement des autres puissances. »

Faire remonter à des temps immémoriaux une délimitation unilatérale établie en 1904 semble quelque peu exagéré. Affirmer le caractère immémorial de l'acquiescement à cette limite, au demeurant relativement récente, relève d'une méthode analogue et constitue d'ailleurs une allégation inexacte comme nous de démontrerons plus loin.

Affirmer, toujours dans le même paragraphe :

> « Depuis la haute Antiquité, il est accepté par tous que les pêcheries

fixes et les bancs d'éponges et de poulpes qui s'avancent bien au-delà des Kerkennah font partie des eaux tunisiennes »

est une formule qui amène à formuler les observations suivantes :

- elle crée une confusion volontaire entre pêcheries fixes et bancs d'éponges, les premières seules étant caractérisées, on l'a vu, par de très faibles profondeurs ;
- elle comporte une erreur zoologique sans importance en visant des « bancs de poulpes » alors que chacun sait que ce céphalopode est un animal mobile qui n'est pas lié au fond de la mer.

Le mémoire tunisien insiste sur la reconnaissance unanime, au paragraphe 4.91, alinéa 2, sur l'absence de toute opposition en laquelle évoquant l'arrêt de la Cour sur les *Pêcheries* norvégiennes de 1951, il voit cette « tolérance générale, fondement d'une consolidation historique » (par. 4.89).

Une étude réaliste des problèmes fait apparaître l'imprécision ou l'inexactitude de ces formules. On constate en effet l'absence de précisions, l'absence de reconnaissance formelle, enfin la contestation elle-même.

i) *L'absence de précisions*

La thèse tunisienne ne définit pas les espaces délimités alors qu'il s'agit évidemment des limites fixées par la circulaire de 1904.

Elle ne précise pas qu'il s'agit d'une surveillance des méthodes de pêche et non pas d'une souveraineté, elle ne précise pas que les conditions de pêche s'appliquent aussi bien aux Tunisiens qu'aux étrangers et que donc le problème est totalement différent de celui posé dans l'affaire des *Pêcheries* norvégiennes.

Ces imprécisions peuvent créer une confusion entre les espaces de pêcheries fixes et les bancs d'éponges, comme elles créent une confusion entre les limites de 1904 et des limites antérieures situées fort en deçà, lorsqu'il s'agissait de bancs d'éponges.

ii) *L'absence de reconnaissance formelle*

Dans les paragraphes 4.97, 4.98 et 4.99, le mémoire tunisien (I) mentionne certains documents en lesquels il prétend trouver les preuves d'une reconnaissance formelle des droits de la Tunisie.

Quatre textes internationaux nous sont cités par la Tunisie, ils sont présentés comme comportant reconnaissance des droits de la Tunisie sur des espaces maritimes.

On ne peut qu'être fort étonné de ces affirmations. Tout d'abord, s'agissant des trois conventions, elles sont fort espacées dans le temps et on constate qu'elles ne concernent absolument pas le problème dont il s'agit. Quant au quatrième texte, il n'est pas une convention et c'est un point que nous allons voir. En ce qui concerne les trois conventions, tout d'abord. Si on lit la convention de délimitation des frontières entre la Tunisie et la Tripolitaine, du 19 mai 1910, texte que le paragraphe 4.99 du mémoire tunisien appelle accord, et qui est le premier texte invoqué, on constate qu'il s'agit de la frontière terrestre telle qu'elle s'étend de Ras Ajdir à Ghadamès, dans la direction nord-sud.

Ce texte ne peut être invoqué par la Tunisie à l'appui de ses prétentions sur des espaces maritimes. En effet, l'interprétation normale de ce texte est qu'il s'agit d'une frontière terrestre. Il n'a aucune incidence sur le problème des frontières maritimes entre la Tunisie et la Tripolitaine, c'est-à-dire actuellement la Libye. D'ailleurs le professeur Ben Achour l'a affirmé (IV, p. 587) et les

écritures tunisiennes, avant lui, l'avaient remarqué. Donc, voici un premier texte que l'on ne saurait invoquer.

Le second traité, invoqué par la Tunisie, est le traité de fraternité et de bon voisinage conclu entre le Royaume de Libye et le Royaume de Tunis le 7 janvier 1957. Ce texte comporte dix articles.

J'en ai fait la lecture la plus attentive, non seulement des articles du traité, mais aussi du préambule, et je n'y ai pas trouvé la moindre mention d'une délimitation territoriale. La citation de ce traité, que l'on trouvera d'ailleurs à l'annexe 92 au mémoire tunisien (I), n'a donc aucun rapport avec notre problème et ne fournit aucun argument pour une prétendue reconnaissance.

Troisième texte : la convention d'établissement du 14 juin 1961 entre le Gouvernement de la République tunisienne et le Gouvernement du Royaume-Uni de Libye. Ici encore, la lecture attentive de la convention ne permet pas de trouver la moindre allusion à des délimitations maritimes.

L'ensemble des trois textes n'apporte donc aucun argument à la thèse tunisienne.

Alors, il faut aborder l'étude du quatrième texte invoqué par la Tunisie et qui, d'ailleurs, chronologiquement se trouve être le plus ancien. Il est reproduit à l'annexe 83 au mémoire tunisien (I) sous l'intitulé « Texte de la convention du 23 mars 1870 relatif à la dette étrangère de la Régence ».

Je dois signaler que le titre officiel de ce document n'est pas « convention ». Il s'agit d'un arrangement conclu et signé par les membres d'une commission exécutive tenant ses pouvoirs d'un décret beylical du 5 juillet 1869.

Dans le *Recueil* De Clerq, au tome XV, supplément 1713-1885, et à la page 540 de ce recueil, dont le texte est reproduit dans l'annexe 32 au contre-mémoire libyen sous son nom véritable : « Arrangement définitif de la dette générale tunisienne, arrêté le 23 mars 1870, par la commission financière instituée par le décret de 1869 », il est indiqué la précision suivante par l'auteur du recueil : « Le document est signé par tous les membres de la commission, avec le sceau du bey et la signature du premier ministre. » Cet arrangement, Monsieur le Président, doit être replacé dans son contexte propre.

La politique financière générale des beys de Tunis avait été au milieu du XIX[e] siècle fort peu rigoureuse, de telle sorte que l'endettement de la Régence vis-à-vis des ressortissants de diverses puissances européennes devint considérable.

Une commission financière internationale fut constituée, composée de représentants de la France, de la Grande-Bretagne et de l'Italie, intervenant pour les créanciers du bey des trois nationalités. Ses travaux aboutirent à un arrangement financier, réduisant quelque peu la dette du bey qui, en échange, s'engageait à affecter divers impôts et revenus au service de la dette et à son amortissement pour un montant total de 6 505 000 francs.

Selon l'arrangement le bey cède « spontanément, librement et dans le plein exercice de ses pouvoirs souverains... » divers revenus. Ces revenus sont énumérés dans une liste qui comporte une trentaine de rubriques, pour le total que je viens d'indiquer.

Parmi ces revenus, à côté des droits de douane, du timbre, du droit sur les vins, etc., figurent les produits des fermages : fermage des tabacs, fermage du plâtre, fermage du sel, fermage du poisson et fermage des poulpes et des éponges.

La thèse tunisienne est que le texte de 1870 a un caractère fondamental et consacre d'une manière irréfutable les droits de la Tunisie. On lit, en effet, au paragraphe 4.98, à la note 127 (I, p. 109) : « Il s'agit d'une reconnaissance internationale d'une importance capitale et d'une grande valeur probante. »

Et se trouve ajouté le curieux argument : « D'ailleurs cette convention a été citée par un très grand nombre d'auteurs. » On trouve dans la suite de la note la référence à trois auteurs, et en même temps que la référence, pour l'un des trois auteurs seulement, le texte de celui-ci.

La première citation émane de Gilbert Gidel, qui indique à la note 2 de la page 492 (et non 491 comme l'indique le mémoire tunisien) :

> « Cet arrangement, approuvé par décret beylical du 25 mars 1870, et placé, quant à son exécution sous la sauvegarde des trois gouvernements européens susindiqués, intéresse la matière des pêcheries sédentaires en ce que les puissances signataires de la convention avaient formellement reconnu la solidité et la validité des impôts et revenus sur lesquels était basée la garantie du passif réservé et que parmi ces revenus figure précisément le fermage des éponges et des poulpes qui est explicitement inscrit dans l'arrangement pour une somme annuelle de francs 55 000. »

Cette citation est éclairante car elle fait apparaître une confusion qui consiste à évoquer une convention du 23 mars 1870. Cette confusion est celle qui a été commise, comme je l'ai indiqué plus haut, par le mémoire tunisien dont l'annexe 83 fournit le « Texte de la convention du 23 mars 1870 relatif à la dette étrangère de la Régence ».

Comme je l'ai déjà indiqué, l'intitulé exact est tout différent : « Arrangement définitif de la dette générale tunisienne, arrêté le 23 mars 1870, par la commission financière instituée par le décret de 1869. » Cet arrangement est établi par le comité exécutif pour mettre à exécution un projet d'arrangement déjà approuvé par le comité de contrôle de la dette et signé par le bey. Cet arrangement est un texte purement financier.

Je rappellerai en effet que, dans le *Recueil* De Clerq (p. 537-539), il est indiqué que le comité exécutif que je viens de mentionner est composé de la manière suivante – c'est un texte émanant du bey – « de deux fonctionnaires de notre gouvernement nommés par nous-même et un inspecteur des finances français, également nommé par nous-même et préalablement désigné par le gouvernement de S. M. l'Empereur » (il s'agit de Napoléon III).

Quant au comité de contrôle, article 10 du décret, il est indiqué qu'il est composé de la manière suivante :

> « deux membres français représentant les porteurs d'obligations des emprunts (ce sont des personnes privées) de l'année 1863 et de l'année 1865 ; de deux membres anglais et de deux membres italiens représentant les porteurs de titres de la dette intérieure. Chacun de ces délégués recevra directement son mandat des porteurs de titres des deux emprunts et des porteurs de titres des conversions de notre royaume. Ils en recevront avis de nous par les soins du comité exécutif. »

Le caractère purement financier de cet arrangement est évident. Cet arrangement, si je puis me permettre, Monsieur le Président, pour employer une expression familière, fait « flèche de tout bois ». Il mentionne des revenus qui vont garantir le service de la dette.

Seules existent dans ce texte des préoccupations financières.

Isoler le « fermage des poulpes et des éponges » de l'ensemble des revenus pour y voir la consécration formelle de droits particuliers sur des espaces maritimes constitue une interprétation des plus audacieuses et des plus artificielles.

J'ai déjà indiqué que le fermage porte sur « poulpes et éponges » et que les poulpes ne sont pas une espèce sédentaire. On notera aussi que, parmi les

revenus alimentant le service de la dette, et sous une autre rubrique, figure la « ferme du poisson ». Tirerait-on argument de la présence de cette ferme sur la liste des revenus s'il s'agit d'une reconnaissance de droits tunisiens sous les eaux elles-mêmes ? On peut également remarquer que figure parmi les revenus une rubrique « Droit sur la pêche du corail ». Or, par une convention relative à la pêche du corail conclue le 24 octobre 1832 entre la France et la Régence de Tunis, la pêche du corail est exercée par les Français qui, selon l'article I, s'engagent à payer pour la ferme du corail 13 500 piastres de Tunis (voir le texte de cette convention dans le nouveau recueil de De Martens, *Nouveau recueil de traités*, t. XIV, texte n° 9).

En réalité, la ferme des éponges est une source de revenus qui, autrefois (je veux dire immédiatement encore avant l'arrangement), relevait du domaine privé du bey et elle a été portée dans la liste de l'arrangement pour accroître les ressources de cette ferme qui comportait un aspect purement financier.

Au demeurant, le produit de cette ferme, tel qu'il est mentionné sur la liste de l'arrangement, parmi les trente rubriques, est faible. Il s'agit de 55 000 francs sur un total de 6 500 000, soit moins de un pour cent, comme l'a relevé le contre-mémoire libyen (II) en son paragraphe 126, alinéa v).

On notera au passage que cette somme de 55 000 francs est un fermage très faible, car le fermage du tabac est compté pour 220 000 francs, celui du sel pour 110 000, celui du plâtre pour 60 000 (c'est le plus voisin) et celui du poisson pour 100 000.

Il apparaît vraiment difficile de soutenir que, par la simple mention d'un revenu financier aussi modeste sur une liste de ressources affectées établie par un comité financier ait pu être réalisée une reconnaissance formelle de droits sur des espaces maritimes dont, au demeurant, à l'époque, aucune délimitation n'existait.

Il est évident que l'arrangement n'est pas une convention internationale et qu'il ne contient aucune reconnaissance internationale de droits souverains de la Tunisie. J'avoue que, affirmer le contraire, me paraît absolument impossible. Et en outre, si, pour un instant, nous supposions que ce texte est ce qu'il n'est pas, une convention internationale, il serait singulier que ce texte signifie la reconnaissance formelle des droits de la Tunisie sur ce que la Partie adverse appelle la zone spongifère, et ceci pour les raisons suivantes : premièrement, le revenu des éponges est, en 1869, un revenu patrimonial du bey.

S'agissant d'une mesure financière, le bey peut la prendre et faire glisser, si j'ose dire, ce revenu de son patrimoine dans les caisses de l'Etat mais faire présenter ce glissement comme une reconnaissance de souveraineté eût exigé une mention formelle.

Deuxièmement, la reconnaissance d'une prétendue souveraineté sur des espaces maritimes, fût-ce le fond de la mer, n'aurait pu se faire sans une indication géographique de ces espaces : il eût fallu viser ces espaces, ils ne sont pas visés, ou le problème n'est pas abordé ; annexer une carte, il n'y en a pas.

Mais, troisièmement, même si l'on admet, toujours pour la simple poursuite d'un raisonnement, qu'il y ait eu une reconnaissance, comment peut-on imaginer qu'elle aurait porté sur la ligne des 50 mètres ? La pseudo-convention – le véritable arrangement financier – est de 1870. Comment pouvait-on reconnaître à l'avance en 1870 une ligne qui ne sera adoptée unilatéralement que trente-quatre ans plus tard ? Par quelle admirable prémonition imagine-rait-on en 1870 une ligne qu'ont simplement envisagée au début du XX^{e} siècle des fonctionnaires français au service de la Régence ?

Comme en témoigne la lettre du résident général de 1902, n'oublions pas que la limite du fermage vers l'ouest, d'après la circulaire de 1904 elle-même,

est cette ligne droite tirée entre l'extrémité du banc des Kerkennah et la frontière tripolitaine. Et cette ligne, qui sera utilisée pendant la période du fermage (et même après), n'est en aucune manière la ligne des 50 mètres.

Peut-on raisonnablement, et c'est le quatrième point, penser que les signataires de l'arrangement eussent été si peu soucieux des intérêts de leur pays pour reconnaître des droits de souveraineté sans le dire expressément, alors que leur débiteur, le bey, était dans une situation financière désespérée et absolument à leur merci ? Comment, d'ailleurs, imaginer que les signataires auraient eu le pouvoir pour le faire ? Je vous ai indiqué, Monsieur le Président, Messieurs les membres de la Cour, qu'ils étaient les représentants des porteurs, qu'il y avait parmi eux un inspecteur des finances, et qu'ils garantissaient des dispositions financières.

Enfin, dernière remarque, il ne faut pas oublier que, lorsque le protectorat sera institué, les fonctionnaires français au service de la Régence soutiennent une politique d'expansion vers l'est ; ils imaginent précisément de revendiquer des limites pour la pêche des éponges. Or, quelques années après l'établissement du protectorat, ils sont loin de songer à la ligne des 50 mètres. Ce ne sera que pour leurs successeurs, une quinzaine d'années plus tard.

En 1888, en effet, Servonnet et Lafitte dessinent la carte des revendications. Elle figure dans les écritures libyennes (contre-mémoire libyen, entre les pages 42 et 43 (II, p. 185)) ; j'ai cité cette carte tout à l'heure (ci-dessus p. 121-122). La revendication porte sur la ligne des fonds de 20 mètres. Comment, lorsqu'on a revendiqué 20 mètres en 1888, aurait-on pu imaginer 50 mètres en 1870 ?

Mais d'ailleurs, à vrai dire, et je vous en demande pardon, Monsieur le Président, Messieurs les membres de la Cour, mon imagination était en mouvement, car j'imaginais l'hypothèse où il se fût agi d'une véritable convention, mais ce ne l'est pas. L'arrangement de 1870 n'est pas une convention, c'est un texte purement financier, ne comportant aucune allusion à des espaces maritimes ; il n'est pas complété par une carte ; il ne peut être invoqué comme impliquant de quelque manière à la reconnaissance internationale d'une ligne.

Telle est donc la situation. En résumé, les trois conventions mentionnées sont totalement muettes sur le problème des frontières maritimes. Et le quatrième texte invoqué, qui n'est pas une convention, ne fournit pas d'argument.

En réalité, la pratique internationale, loin de faire apparaître une reconnaissance ou une tolérance générales, fait apparaître des contestations non équivoques, telles les lignes de la circulaire de 1904, et ce sont ces contestations que je voudrais présenter maintenant.

iii) *Les contestations formelles des lignes*

Il a été indiqué plus haut que le Gouvernement italien élevait des protestations à l'encontre de l'attitude tunisienne.

La réponse du résident du 4 juillet 1902 à la lettre du ministre du 9 mai contient des indications précises sur les réserves italiennes.

Toutefois, la circulaire du 31 décembre 1904 ne prend plus en considération les observations italiennes et adopte unilatéralement les solutions que l'on sait.

Quelques années plus tard, l'attitude italienne se manifeste à nouveau. Elle s'analyse, à la lecture des documents ci-dessous mentionnés, en une double contestation, la contestation de la ligne des fonds de 50 mètres, la contestation de la ligne partant de Ras Ajdir en direction du nord-nord-est.

Je ne parlerai pas de cette dernière ligne puisque le professeur Malintoppi a

traité très brillamment de cette question. Je me bornerai à la ligne des 50 mètres.

Ce sont les diverses pièces figurant comme annexe à la réplique libyenne (**IV**), du 15 juillet 1981, volume I, annexe I-15, qui éclairent le problème de la ligne des fonds de 50 mètres.

Des recherches d'archives que nous avons entreprises ont permis de trouver cette pièce. Elle est fondamentale.

Une note du ministre français des affaires étrangères, en date du 1er août 1911 (**IV**, réplique libyenne, annexe I-15, n° 5), rappelle les éléments essentiels de l'attitude italienne en 1902 et en 1903 et les négociations entreprises par le Gouvernement français, avec le Gouvernement italien, par l'intermédiaire de l'ambassadeur de France à Rome, M. Barrère.

Il est précisé en particulier que le Gouvernement italien avait proposé la réunion d'une conférence internationale, que le Gouvernement français avait proposé la fixation des limites de la zone par des délégués techniques du Gouvernement italien et du Gouvernement tunisien.

Puis, finalement :

> « on a demandé au Gouvernement italien d'admettre que le droit de police du Gouvernement tunisien s'étendrait à la limite des fonds de *cinquante mètres*, fonds qu'il est facile de déterminer sur la carte et aussi dans la pratique, s'il y a une contestation entre les contrevenants et les gardes-pêche, par un coup de sonde.
>
> Le Gouvernement italien n'a pas opposé un « non possumus » à cette nouvelle proposition mais il a cherché à la réduire quant à ses conséquences et il s'est déclaré prêt à reconnaître au Gouvernement tunisien les droits de police dans l'étendue des fonds de *trente mètres*.
>
> A ce moment les pourparlers ont été interrompus et la question est restée en suspens. »

Ainsi, le Gouvernement italien a contesté la ligne des 50 mètres.

Le problème est également exposé dans la lettre, en date du 15 mai 1911, adressée par le résident général de France à Tunis au ministre français des affaires étrangères (**IV**, annexe I-15 précitée figurant à la réplique libyenne, n° 4, p. 262-265). On lit dans cette lettre, concernant la proposition de la ligne des 50 mètres :

> « Ces propositions furent soumises au Gouvernement italien qui se déclara disposé à accepter le principe de la délimitation suggérée par le Gouvernement tunisien pour la détermination des bancs de pêche, à condition que l'on admit la profondeur de 30 mètres. » (P. 264.)

Ainsi se trouve, une nouvelle fois, confirmée l'opposition italienne à la formule des 50 mètres.

Cette contestation est formulée également dans l'aide-mémoire italien du 3 mai 1911 que, Monsieur le Président, Messieurs les membres de la Cour, vous trouverez à l'annexe I-15 de la réplique libyenne (**IV**, p. 259-260). Je cite, à propos de la capture de deux bateaux italiens, l'*Unione* et le *Torino*, par les autorités tunisiennes :

> « Cette question a formé l'objet d'un examen approfondi de la part du Gouvernement royal, qui a été amené à rechercher les traces de conventions ou autres actes fixant les limites de la zone de pêche des éponges sur les côtes tunisiennes.
>
> Des recherches effectuées il résulte que non seulement aucun document international n'a été signé par l'Italie en ce qui concerne la question de la

délimitation de pêche tunisienne mais qu'aussi les droits de propriété de la Régence de Tunis sur cette partie de mer ne peuvent trouver un appui quelconque sur un traité international signé par le gouvernement du Roi. En effet, les seuls documents officiels à la connaissance du département royal des affaires étrangères, traitant la question dont il s'agit, sont des décrets, arrêtés, etc., actes unilatéraux d'administration intérieure n'engageant que la partie qui les a émis, et ne pouvant même pas, par reconnaissance tacite, constituer un rapport juridique d'obligation internationale. »

Le ministre français des affaires étrangères fut très sensible à l'attitude de contestation du Gouvernement royal.

Il la signale au résident général de France à Tunis, par un télégramme du 5 mai 1911, dans les termes suivants :

« Le Gouvernement italien ayant manifesté l'intention de contester théoriquement les droits du Gouvernement tunisien à réglementer la pêche des éponges sur les bancs situés au-delà de la limite des eaux territoriales, je vous prie de m'adresser... » (IV, p. 260, n° 2.)

Le ministre ajoute qu'on pourrait menacer le Gouvernement italien de la dénonciation du traité de 1896 comportant des facilités de pêche s'il s'obstinait à contester les droits du Gouvernement tunisien *(ibid.)*, ce qui montre que le ministre ne considère pas la situation juridique des prétentions de la Régence comme très solides puisqu'il y imagine une mesure ou l'emploi éventuel d'une mesure de rétorsion.

Ce même embarras est exprimé dans la lettre envoyée le 8 mai 1911 par le ministre français des affaires étrangères à l'ambassadeur de France à Rome, M. Barrère.

On lit, en effet (voir annexe I-15, IV, p. 262), après qu'eut été rappelée la formule de la ligne des 50 mètres :

« Sans doute, le Gouvernement italien n'a jamais reconnu expressément cet état de fait qui profite pour une si large part à ses nationaux. Sans doute, dans la rigueur du droit et des principes, peut-il déclarer que cette situation « même par reconnaissance tacite » ne constitue pas un rapport juridique d'obligation internationale. »

Le ministre reconnut ainsi la faiblesse juridique de la position. Il amorce alors une double manœuvre dont il précise les lignes à l'ambassadeur. Il conviendra de s'étonner à l'égard du Gouvernement italien d'une attitude inamicale, il convient de rappeler au Gouvernement italien que la convention de commerce et de navigation italo-tunisienne pourrait devenir caduque dans le délai d'un an, et de conclure : « Le Gouvernement italien comprendrait alors qu'il s'est bénévolement exposé à un sérieux risque. » *(Ibid.)*

Mais les mesures de rétorsion envisagées montrent précisément qu'une argumentation juridique directe n'est pas possible.

Le Gouvernement italien n'a pas reconnu la ligne des 50 mètres.

La ligne des 50 mètres a été contestée de la manière la plus formelle dans les années qui ont suivi la mesure unilatérale l'ayant édictée.

En 1911 la ligne n'est pas acceptée. Dans la note du 1er août 1911 du ministre des affaires étrangères (annexe I-15, IV, p. 265) on peut lire ces formules significatives : « il importe absolument, si l'on recourt à une nouvelle négociation, de réclamer très énergiquement l'adhésion du Gouvernement italien à la limite des fonds de *cinquante mètres* ».

Réclamer très énergiquement son adhésion, c'est la preuve qu'il n'avait pas adhéré.

Et une autre phrase, terminale, en conclusion de la dépêche : « Il paraît donc que nous devons arriver à convaincre le Gouvernement italien de la légimité de notre proposition en ce qui concerne les fonds de cinquante mètres. »

Il est ainsi manifeste que cette fameuse ligne n'est au plan international qu'une « proposition ».

La thèse tunisienne d'une reconnaissance traditionnelle et manifeste est une affirmation mais la réalité diplomatique ainsi qu'en témoignent les pièces d'archives, que je m'excuse, Monsieur le Président, Messieurs les membres de la Cour, d'avoir citées si fréquemment et si longuement mais elles sont décisives et le prouvent, est tout autre.

La « consécration de l'histoire » (IV, p. 465) invoquée par la Partie adverse, ne joue pas dans le sens qui a été suggéré.

III. Des droits « historiques » aux réglementations modernes : les contradictions

Le troisième point que je voudrais aborder est le point des réglementations modernes, des réglementations unilatérales modernes, concernant les espaces maritimes et ce n'est pas sans un certain sentiment d'inquiétude que j'aborde cette partie qui au demeurant ne sera pas la plus longue de mon exposé.

Ce sentiment d'inquiétude trouve son origine dans la formule très sévère de mon excellent ami, le savant professeur René-Jean Dupuy, qui, dans sa plaidoirie orale, a déclaré que l'étude des réglementations modernes prouve « que la Libye n'a rien compris ».

J'encours donc son reproche si je poursuis cette étude avec toutefois quelques sentiments qui me rassurent. D'une part, parce que lorsqu'il disait que la Libye n'avait rien compris, il visait des écritures écrites libyennes et il se trouve que ce passage n'avait pas été écrit. D'autre part, je me sens rassuré dans la mesure où le mémoire tunisien (I) dans son chapitre IV, consacré aux droits historiques, étudie sous la rubrique « La fixation des frontières maritimes », pour une période qu'il appelle « l'époque coloniale et post-coloniale », non seulement la fameuse instruction de 1904 mais aussi des textes plus récents, le décret beylical de 1951, les lois de 1963 et de 1973.

Il me semble qu'en reprenant une étude qui est amorcée dans les écritures tunisiennes, j'échappe à la sévère condamnation que je rappelais.

Bien évidemment je comblerai en outre une lacune puisque j'étudierai la loi du 6 octobre 1962 curieusement absente des écritures tunisiennes, mais ce faisant je resterai dans le domaine du lit de la mer et de la souveraineté puisqu'il s'agit de la mer territoriale et peut-être même ai-je le sentiment d'être plus fidèle à la notion de lit de la mer que les écritures tunisiennes elles-mêmes qui sous le titre général « Exercice de la souveraineté tunisienne sur les pêcheries sédentaires à raison des espèces capturées » traitent de textes qui portent également sur la pêche dans les eaux surjacentes de *swimming fisheries*.

J'affronterai donc le risque de paraître n'avoir rien compris en procédant à l'examen des nouvelles réglementations.

Je le ferai en distinguant deux problèmes différents. Le premier est celui des textes tunisiens, le second est celui des accords de pêches interdites.

A. Les textes internes tunisiens

Le régime de l'instruction du 31 décembre 1904 considéré comme le régime « historique » a subi bien des modifications depuis trois quarts de siècle.

Et on pourrait montrer les variations des textes tunisiens puisqu'ils ont été

multiples en une trentaine d'années : décret de 1951, loi de 1962 très temporaire, loi de 1963 relativement temporaire, elle a duré dix ans, et enfin les textes plus récents de 1973.

L'examen de ces textes s'il est entrepris minutieusement est évidemment un travail très long et très lourd, aussi je crois qu'il faut se borner à quelques points principaux.

1. Le décret du 26 juillet 1951

Le décret de 1951 échappe à la condamnation dans la mesure où il est situé et développé dans les écritures tunisiennes et d'autre part il ne concerne pas simplement les eaux surjacentes bien qu'il s'agisse d'un texte portant sur la pêche car son chapitre III traite de la pêche des éponges.

2. La loi 62-35 du 16 octobre 1962

C'est un texte fondamental. Pour des raisons que nous aurons à exposer, il est totalement absent des écritures tunisiennes. Toutefois son étude n'est pas condamnable puisqu'il crée une zone de mer territoriale et que donc il traite du fond de la mer.

3. La loi du 6 décembre 1963

Ce texte est important, et doublement, dans la mesure où il abroge le texte qui l'a précédé et où il marque un retrait des prétentions tunisiennes sur les espaces maritimes.

4. La loi du 2 août 1973 et le décret du 3 novembre 1973

Les textes de 1973, la loi et le décret, créent une très large zone de mer territoriale tunisienne.

1951, 1962, 1963, 1973, cela fait beaucoup de textes. Mais les notions aussi ont subi des modifications en ce sens que le régime des espaces maritimes est apparu comme complexe dans son évolution.

On a utilisé toutes les notions que le droit international utilise sur des espaces maritimes. On a ainsi adopté la notion de « zone de pêche ». On a « zone de pêche réservée » (1951) puis « mer territoriale » (1962) puis on est revenu à une zone de pêche sous le nom de « zone contiguë » (1963) et puis on a de nouveau territorialisé plus largement avec les textes de 1973.

Dans cet ensemble de textes divers, je voudrais indiquer qu'il y a un élément relativement fixe, la prétention à la zone des 50 mètres et aussi à la limite latérale dont mon collègue et professeur Malintoppi a parlé et démontré la non-reconnaissance internationale.

Par ailleurs, au nord c'est sur le parallèle de Ras Kapoudia que l'on va jouer pour atteindre la ligne des 50 mètres avec des variations qui tiennent à un élément qui est normal, c'est que la largeur de la mer territoriale, il y a quelques années encore, était l'objet de mutations territoriales.

Ce n'est pas ce problème qui me préoccupe mais celui des droits qui vont être non reconnus dans cette zone qui est tantôt une zone de pêche réservée, tantôt une zone de mer territoriale, tantôt une zone contiguë (qui est une variante de la zone de pêche réservée), et qui tantôt est incluse pour partie dans une autre réglementation de la mer territoriale.

Parmi les textes les plus importants, nous avons d'abord le décret du

26 juillet 1951. Il est traité dans le mémoire tunisien, pages 113 et 114. Son texte figure à l'annexe 84 (I). Il décrivait une zone de pêche réservée dans laquelle seuls pourront pêcher les Tunisiens et les Français. Nous sommes en 1951, c'est encore le protectorat.

Ce texte va être remplacé par la loi 62-35 du 16 octobre 1962. Je voudrais, Monsieur le Président, Messieurs les membres de la Cour, attirer votre attention sur ce texte.

Il abroge l'article 3 du décret du 26 juillet 1951 et le remplace par des dispositions selon lesquelles il est instauré un régime très différent de mer territoriale suivant que nous nous trouvons ou non dans une certaine latitude.

De la frontière tuniso-algérienne à Ras Kapoudia, il y a un régime particulier de mer territoriale. On le trouvera dans les écritures remises au Greffe. Mais il est inutile que je lasse la patience de la Cour sur ce point qui n'a pas de rapport direct avec notre question.

Ensuite, de Ras Kapoudia à la frontière tuniso-libyenne, la mer territoriale est cette partie de la mer limitée par une ligne qui, partant du point d'aboutissement de la ligne des 12 milles décrite ci-dessus, rejoint sur le parallèle de Ras Kapoudia l'isobathe des 50 mètres et suit cette isobathe jusqu'à son point de rencontre avec une ligne partant de Ras Ajdir en direction du nord-est – ZV = 45°.

On voit ainsi que la loi de 1962 utilise la notion de mer territoriale avec une distinction géographique importante.

On se trouve donc là en présence d'une revendication tunisienne absolument nouvelle. A la place de cette zone de haute mer sur laquelle s'exercent les droits de surveillance ou de réserve de pêche, nous passons maintenant à la mer territoriale.

Le mémoire tunisien est parfaitement discret. Il ne cite pas la loi de 1962. L'annexe documentaire contient, comme document 84, le décret beylical de 1951 et comme document 85 la loi de 1963 (n° 63-49 du 30 décembre 1963). Cette omission est particulièrement regrettable. Elle est compensée dans les écritures libyennes par la citation de ce texte (annexe I-15 au mémoire libyen, I, p. 533, contenant la loi tunisienne de 1962 telle qu'elle apparaît au *Journal officiel* de la République tunisienne – n° 53 du 16 octobre 1962, publiant la loi n° 62-35 du même jour).

Certes, la loi tunisienne de 1962 a été abrogée par une loi de décembre 1963 et il ne s'agit, en effet, que d'un texte de caractère temporaire. Mais précisément ce caractère temporaire, cette substitution si rapide d'un texte à un autre, n'est pas quelque chose de fortuit.

En effet le texte de 1962 a dû être retiré devant les protestations, devant l'ampleur des protestations principalement italiennes. La Tunisie a été amenée à conclure avec l'Italie un accord de pêche le 1er février 1963, que nous étudierons plus loin et qui adoptait une solution contraire à la loi d'octobre 1962.

La conclusion de cet accord avec l'Italie devait entraîner l'adoption de nouvelles dispositions de droit interne, ainsi s'explique le remplacement de la loi du 16 octobre 1962 par une loi nouvelle n° 63-49 du 30 décembre 1963.

L'audience, suspendue à 16 h 20, est reprise à 16 h 40

Monsieur le Président, Messieurs les membres de la Cour, la loi du 30 décembre 1963 s'est substituée à la loi du 16 octobre 1962. Le mémoire tunisien (I) qui, je le répète, ne cite pas la loi de 1962, cite, au contraire, la loi de

1963, au paragraphe 4.82, en mentionnant qu'elle porte modification du décret du 26 juillet 1951 et en mentionnant que « ce texte permet désormais aux seuls navires battant pavillon tunisien de pratiquer la pêche dans une zone définie par l'article premier ».

Le caractère de la formule est particulièrement elliptique en ce sens que certes le titre de la loi de 1963 est bien : « Loi n° 63-49 du 30 décembre 1963 portant modification du décret du 26 juillet 1951 portant refonte de la législation de la police de la pêche », mais tout de même il ne faut pas oublier, et l'article premier de cette nouvelle loi ne manque pas de donner la précision, que : « L'article 3 du décret du 26 juillet 1951..., tel qu'il a été modifié par la loi n° 62-35 du 16 octobre 1962, est abrogé et remplacé par les dispositions suivantes... » (I, mémoire tunisien, annexe 85.)

Autrement dit ce qui est modifié ce n'est pas seulement le décret de 1951, c'est la modification par rapport à 1962 qui est particulièrement importante.

La loi de 1962, avais-je fait remarquer, instaurait une mer territoriale dans la fameuse zone. Au contraire, en 1963 on revient à une formule qui a été celle du décret de 1951 en employant la notion de « zone contiguë à la mer territoriale » ; c'est une variante légère par rapport à la formule de 1951 qui employait l'expression « zone de pêche réservée ».

Voilà par conséquent la transformation. L'article 3 devient :

> « Est dénommée mer territoriale tunisienne : de la frontière tuniso-algérienne à la frontière tuniso-libyenne et autour des îles adjacentes, la partie de la mer comprise entre la laisse de basse mer et une ligne parallèle tracée à 6 milles au large, à l'exception du golfe de Tunis qui, à l'intérieur de la ligne cap Farina, île Plane, île Zembra et cap Bon, est entièrement compris dans ladite mer.
>
> Une zone contiguë à la mer territoriale tunisienne telle qu'elle est définie ci-dessus est réservée, dans laquelle seuls des navires battant pavillon tunisien [en 1951 il y avait aussi des navires battant pavillon français] pourront être autorisés à pratiquer la pêche.
>
> Cette zone est définie [on retrouve les deux zones de latitude] :
>
> *b)* de Ras Kapoudia à la frontière tuniso-libyenne : par la partie de la mer limitée par une ligne qui, partant du point d'aboutissement de la ligne des 12 milles marins..., rejoint sur le parallèle, [etc., nous retrouvons les mêmes formules]. »

Je voudrais m'arrêter quelques instants sur la loi de 1963. D'abord par ce que si on lit le texte très attentivement on s'aperçoit que la référence à la fameuse ligne de 45° se trouve placée non pas dans le premier paragraphe qui définit la mer territoriale tunisienne de la frontière tuniso-algérienne à la frontière tuniso-libyenne, cette référence se trouve placée dans la partie concernant la zone contiguë et c'est évidemment une formule assez curieuse qui mérite d'être notée et qu'on ne trouvait pas de la même manière dans le décret de 1951.

D'autre part, le texte de 1963, qui est demeuré en vigueur pendant une dizaine d'années, a été appliqué. Les écritures tunisiennes mentionnent en effet, page 26 de la réplique tunisienne (**IV**), un jugement du tribunal de Sfax du 25 août 1965 qui est reproduit en annexe II-7 à la réplique tunisienne.

Je voudrais à ce propos signaler quelques étrangetés pour l'application de la loi dans cette affaire.

Le bateau italien a été appréhendé à plus de 30 milles des côtes. La condamnation précise qu'il péchait dans les eaux territoriales, ce qui est faux

d'après la loi elle-même. A cette étrangeté judiciaire correspond l'étrangeté des écritures tunisiennes qui au sujet du problème du banc spongifère Farwah ou banc Greco citent le jugement ci-dessus mentionné comme faisant justice des prétentions libyennes sur ce banc. Ce qui me paraît étrange c'est qu'on utilise à propos des droits sur les éponges un jugement national intervenu à propos d'une pêche de *swimming fisheries*. Si on lit le jugement on le voit immédiatement puisqu'il est question de 527 kilogrammes de poisson et qu'il est question aussi des filets du navire italien. On ne pêche pas les éponges aux filets.

Sur le problème du banc Greco en tant que banc spongifère, sur les droits libyens, au stade actuel, on se reportera aux écritures libyennes (contre-mémoire libyen (II), par. 127-143, et (III), annexes techniques 3 et 4 audit contre-mémoire) dans lesquelles on trouve des références à diverses réglementations libyennes concernant les éponges.

Voilà donc les quelques observations que je voulais faire sur la loi de 1963 et le développement historique récent amène à évoquer maintenant les lois et décrets de 1973 puisque aussi bien, je le répète, la loi de 1963, pour être moins éphémère que la loi de 1962, et il n'y avait pas les mêmes raisons puisqu'elle n'établissait pas une mer territoriale extraordinairement étendue, a duré une dizaine d'années et elle a été remplacée par deux textes ou plutôt par un texte de 1973 complété lui-même par un décret.

La loi 73-49 du 2 août 1973 et le décret n° 73-527 du 3 novembre 1973 sont pleins d'intérêt et d'enseignements mais je crains de lasser la patience de la Cour et je me réserve, s'il en est besoin, à une phase ultérieure de la procédure de traiter de ces textes de 1973 après m'être borné à les mentionner simplement aujourd'hui comme étape nouvelle dans les variations de textes internes.

B. Les accords internationaux de pêche récents

Il est évident que des accords internationaux comportant une reconnaissance internationale de délimitations territoriales maritimes sont importants. On comprend donc que le paragraphe 1.07 du mémoire tunisien (I) mentionne les accords intervenus entre la Tunisie et l'Italie, successivement le 1er février 1963, le 20 août 1971, le 19 juin 1976. Malheureusement cette mention d'une confirmation des frontières maritimes tunisiennes par l'accord de 1963 « reprise constamment dans les accords subséquents » de 1971 et de 1976, à lire les écritures tunisiennes, est faite d'une manière qui ne correspond pas tout à fait à la réalité juridique.

Une étude précise doit être faite, elle est d'autant plus nécessaire que les accords du 20 août 1971 et du 19 juin 1976 ne sont reproduits dans les annexes au mémoire tunisien que par des extraits qui ne permettent pas d'en apprécier toute la portée et tout le sens.

Ces trois accords intervenus successivement au cours d'une brève période de temps de moins de vingt années présentent des traits communs, chacun ayant toutefois des aspects particuliers.

Le trait commun principal, qu'il convient de souligner tout particulièrement, est qu'il s'agit d'accords de pêche relatifs à l'exercice de la pêche par des nationaux italiens ou à l'interdiction de la pêche faite aux pêcheurs italiens dans ces eaux réservées.

Il ne s'agit pas d'accords sur des frontières maritimes, ce qui serait d'ailleurs étrange, s'agissant de pays qui ne sont pas limitrophes.

La formule du mémoire tunisien, en son paragraphe 1.07, selon laquelle la frontière maritime est confirmée par les accords tuniso-italiens n'est pas exacte

car on voit mal comment l'Italie pourrait confirmer une délimitation entre la Tunisie et la Libye, Etats souverains.

Le second trait est que ces accords ont eu un caractère temporaire, ce qui ne correspond pas non plus à un accord de délimitation.

Le dernier trait est que ces accords ne consacrent pas la notion de mer territoriale telle qu'elle avait été utilisée par la loi d'octobre 1962.

Précisément le premier accord, celui de 1963, 1er février 1963, est destiné à remplacer les dispositions de la loi de 1962.

1. *L'accord du 1er février 1963* dans son article 1 abandonne la notion de mer territoriale pour celle de « zone de pêche réservée aux navires battant pavillon tunisien ».

C'est donc une préfiguration de ce qui sera la solution interne tunisienne de décembre 1963.

La prétention tunisienne exprimée par la loi de 1962 de faire de cette partie de la mer une mer territoriale est abandonnée.

Au fond la loi de 1962 avait été une des tentatives, la plus récente, de l'extension d'espaces maritimes sur lesquels la Tunisie entendait asseoir une souveraineté. L'échec a été enregistré dans l'accord international du 1er février 1963.

Et l'accord tuniso-italien de 1963 n'est pas demeuré en vigueur pendant très longtemps, son article 4 prévoyait que les autorisations de pêche accordées dans des espaces maritimes, qui ne sont pas ceux dont nous nous occupons particulièrement, situés au nord de la Tunisie, portaient sur une période s'étendant simplement jusqu'au 31 décembre 1970.

2. Ainsi s'explique donc qu'il y ait eu un *accord du 20 août 1971* qui reprend exactement dans son article 1 la formule de la zone de pêche réservée telle qu'elle était utilisée par l'accord de 1963.

L'abandon par la Tunisie de sa revendication sur la mer territoriale est maintenu et confirmé.

Cet accord était lui aussi d'une durée d'application limitée, son article 19 prévoyant qu'il était conclu pour une période de deux ans à dater du 1er janvier 1971 et renouvelable par tacite reconduction pour des périodes analogues. Il fut rapidement remplacé par un troisième accord.

3. *L'accord du 19 juin 1976* contient un article 12 qui traite toujours de la même zone de Ras Kapoudia à Ras Ajdir et par lequel l'Italie reconnaît le caractère de zone de pêche réservée aux seuls navires tunisiens, comme elle l'avait fait d'ailleurs dans les accords précédents, s'agissant de cette zone, les bateaux italiens bénéficiant, toujours d'ailleurs, d'un droit de passage inoffensif se matérialisant par le fait que les bateaux de pêche circulent avec les panneaux à bord et les filets retirés.

Là encore il n'est plus question de mer territoriale. Cet accord comportait lui aussi une durée limitée. Son article 18 prévoyait qu'il était conclu pour une période de trois ans à dater de sa signature.

4. *Les textes unilatéraux italiens.* Ainsi depuis le 19 juin 1979 il n'existe plus d'accord de pêche entre la Tunisie et l'Italie. Un régime unilatéral particulier a été établi par l'Italie à l'égard des bâtiments de pêche italiens. Ce sont des textes que, Monsieur le Président, Messieurs les membres de la Cour, nous avons reproduits dans le contre-mémoire libyen en son paragraphe 139 (II). Ce sont des dispositions destinées à conserver ce qu'on appelle les ressources biologiques dans une zone qui est une zone de haute mer.

J'ai ainsi achevé l'étude quelque peu rapide d'ailleurs de ces problèmes récents de réglementation tant interne qu'internationale concernant les espaces maritimes et plus exactement les activités qui sont des activités de pêche.

CONCLUSION GÉNÉRALE

Le régime juridique des « droits historiques » et les principes fondamentaux de l'institution « plateau continental »

Il me faut maintenant aborder la fin de mon exposé. Avec votre permission, Monsieur le Président, je le ferai en tentant d'appliquer à la présente affaire les problèmes des relations entre les droits historiques et les principes fondamentaux de l'institution juridique que constitue le plateau continental.

Il me paraît en effet essentiel, dans un litige d'ordre international, de replacer les droits historiques qui sont invoqués dans le cadre général du droit international et de les étudier à ce point de vue, celui du droit international actuel bien évidemment.

Le litige soumis à la Cour par le compromis établi entre la Jamahiriya arabe libyenne et la République tunisienne appartient, il convient de le remarquer dès l'abord, à l'ensemble complexe des litiges relevant du droit de la mer et qui ont été nombreux déjà à être portés devant les tribunaux internationaux. Je veux dire ici, non pas seulement dans un sens large devant des tribunaux arbitraux, mais aussi devant une cour de justice, la Cour siégeant ici, qu'il s'agisse de la Cour permanente de Justice internationale ou de la Cour internationale de Justice. Ces affaires représentent une part très importante des litiges qui ont été soumis à la Cour et il en sera sans doute aussi dans l'avenir ainsi, puisque l'article 287 du projet de convention sur le droit de la mer tel qu'il a été publié par la troisième conférence, le 7 septembre 1981 s'agissant du texte de langue anglaise, prévoit la Cour internationale de Justice comme l'une des instances internationales compétentes pour le règlement des différends relatifs à l'interprétation ou à l'application de la convention.

Mais me tournant non pas vers l'avenir et les futurs litiges à propos de la convention sur le droit de la mer, me tournant vers le passé, je voudrais tout d'abord, Monsieur le Président, situer la présente affaire par rapport à celles plus ou moins analogues qui l'ont précédée. Ensuite, j'essaierai de préciser comment s'analysent les droits historiques par rapport aux principes fondamentaux de cette institution, le plateau continental, ces principes fondamentaux étant pour l'essentiel formulés par votre arrêt de 1969.

Mais à titre préliminaire je voudrais rappeler que la Cour a été saisie à plusieurs reprises de différends concernant le droit de la mer, des droits de pêche, ainsi rendit-elle l'arrêt de 1951 sur l'affaire des *Pêcheries* norvégiennes ; ainsi rendit-elle, dans un ensemble complexe de plusieurs décisions, l'arrêt du 25 juillet 1974 en l'affaire des pêcheries islandaises.

Ces arrêts portent sur des droits de pêche et mon éminent collègue, le professeur René-Jean Dupuy, a insisté sur le point qu'ils n'ont pas de rapport avec la présente affaire. Peut-être, d'ailleurs, ont-ils quelques rapports dans la mesure où ont été cités ces arrêts, ou certains d'entre eux, ou certaines de leurs dispositions dans les écritures tunisiennes ou dans les plaidoiries.

Il est vrai que le différend anglo-norvégien, que résout l'arrêt de 1951, et que le différend anglo-islandais, à propos duquel intervient, entre autres, l'arrêt du 25 juillet 1974, sont des litiges dans lesquels deux Etats s'opposent à propos de l'exercice de la pêche par leurs nationaux dans certaines zones. Ces problèmes de pêche se posent à propos de la pêche ordinaire dans des eaux surjacentes.

Ces différends sont, à certains égards, simples car les droits qui s'opposent sont de même valeur. Ils sont en outre nettement définis. Ils sont tout de même peut-être plus complexe dans la mesure où se pose des problèmes de délimi-

tation territoriale, d'espaces maritimes et à propos desquels diverses considérations ont été faites concernant des données économiques.

Dans la présente affaire c'est la délimitation et elle seule dont il s'agit. A cet égard, si l'on se tourne vers le passé, l'analogie la plus grande est entre la présente affaire et l'arrêt de 1969. Il s'agit dans les deux cas de la délimitation d'espaces maritimes particuliers, le plateau continental. Il s'agit non pas d'apprécier la validité d'une délimitation nationale norvégienne ou islandaise, au regard du droit international, dans le sillage de la formule « au regard du droit international les lois nationales ne sont que de simples faits ».

Il s'agit ici de préparer l'établissement international de la délimitation en fournissant aux parties les règles et principes du droit international applicables et aussi, dans la présente affaire, en dégageant des méthodes pratiques.

Voici donc les quelques observations que je voulais faire me tournant vers le passé et maintenant je voudrais alors aborder le dernier thème.

L'affaire, Monsieur le Président, Messieurs les membres de la Cour, qui est portée devant vous est une délimitation du plateau continental. Des droits historiques étant invoqués, il convient d'examiner la combinaison des problèmes et des théories en présence. Une telle étude me semble utile pour en faciliter la solution.

Je voudrais la conduire, avec votre permission, en deux temps successifs. Je rappellerai d'abord les mécanismes de la théorie du plateau continental. Ensuite, compte tenu de cette institution juridique j'examinerai le rôle que peuvent jouer les droits historiques. Donc deux séries de développement et tout d'abord :

A. Les mécanismes de l'institution du plateau continental

Parmi les transformations qu'a apportées au système juridique antérieur l'évolution du droit international dans la seconde moitié du XX[e] siècle, il convient de placer la théorie du plateau continental. Cette institution du droit international occupe aujourd'hui une place fondamentale. Elle est régie par la convention de Genève de 1958 dont la portée juridique dépasse d'ailleurs celle de la technique conventionnelle et qui apparaît aussi comme une règle coutumière. Les principes fondamentaux de cette institution ont été dégagés par l'arrêt de la Cour de 1969 et confirmés par la sentence arbitrale de 1977.

Je voudrais reprendre pour son application à la présente affaire l'essentiel de cette construction juridique. Bien évidemment, Monsieur le Président, je n'aurais pas l'outrecuidance de présenter une théorie générale devant vous-même et les membres de la Cour. Il s'agit simplement pour ma part de recouper quelques observations et si je me permets de le faire d'une manière un peu systématique c'est par un simple souci de clarté d'exposition.

Il faut dire aussi que j'ai été en quelque sorte encouragé pour présenter ces observations par les remarques formulées dans un article paru il y a plus de vingt ans déjà, en 1958. Je cite cet article avec émotion et respect, car il a pour auteur le grand internationaliste français, spécialiste du droit de la mer, que fut Gilbert Gidel, qui fut mon maître, de qui j'ai suivi, ici même, un enseignement il y a bien longtemps et dont je salue la mémoire. De cet article intitulé « A propos des bases juridiques des prétentions des Etats riverains sur le plateau continental : les doctrines du « droit inhérent », paru en août 1958 dans la *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht*, je voudrais citer quelques passages particulièrement significatifs aux pages 92, 95 et 93 en soulignant les expressions et mots essentiels.

Page 92 :

« La doctrine du plateau continental a précisément cet avantage que, sainement entendue, elle porte en elle-même un frein de l'éventualité d'une application abusive de la notion qui lui sert de base. *C'est le mécanisme de régulation interne provenant de conditions physiques indépendantes de la volonté des intéressés* qui constitue à notre avis le mérite essentiel de la doctrine de l'*attribution automatique à l'Etat riverain des droits dont le plateau continental est susceptible.* »

Page 95 :

« La CDI a évité tout grief possible de revenir par un biais au système de l'occupation, fictive ou effective, qu'elle venait de condamner en déclarant très nettement au chiffre 5 du commentaire sur l'article 2 du « Projet » que, aux termes de cet article, « le droit de l'Etat riverain est également (ce mot fait allusion à l'occupation) indépendant de toute affirmation formelle de ce droit par ledit Etat ». Il n'est certes pas interdit à l'Etat riverain de proclamer ses droits et l'étendue spatiale dans laquelle il a la volonté de les exercer. Mais les droits eux-mêmes de l'Etat riverain ne dépendent pas de la proclamation ; ils lui sont préexistants comme inhérents à l'Etat riverain, comme lui appartenant *ipso iure*.

Non seulement ils ne dépendent pas du fait même de l'émission d'une proclamation, mais encore ils ne dépendent pas du contenu de la proclamation. »

Page 93 :

« *L'attenance et les droits inhérents qui en résultent au profit de l'Etat riverain sont donc conditionnés par des conditions physiques échappant au pouvoir de volition de l'Etat riverain* : Il en profite ou il les subit.

Aucune doctrine tendant à attribuer des compétences à l'Etat riverain au-delà de la limite extérieure de ses eaux territoriales ne peut ouvrir moins de latitude à l'Etat riverain que la doctrine du plateau continental si on la définit exactement et si on la dégage de toute notion indue de remplacement. »

Ainsi se dessinent les grandes lignes d'un système juridique auquel l'arrêt de la Cour de 1969 et ensuite et pour une part la sentence de 1977 devaient donner une forme plus complète et plus majestueuse. Deux notions fondamentales apparaissent concernant les droits de l'Etat riverain sur son plateau continental : 1) ils sont établis dans le cadre d'un déterminisme physique ; 2) ils sont de caractère objectif et ne reposent pas sur une base volontariste.

1. Le déterminisme physique

Ce déterminisme physique, base fondamentale de la théorie juridique du plateau continental résulte de la combinaison de trois principes, qu'a dégagés l'arrêt de 1969 : droits inhérents, prolongement naturel, enfin la maxime « la terre domine la mer ».

Le droit inhérent

La préexistence du droit inhérent, l'inutilité d'actes quelconques sont présentées aux paragraphes 19, 39, 43 de l'arrêt de 1969. Le professeur sir Francis Vallat, avec l'autorité qui s'attache à sa longue carrière internationale, a

traité de ces points. Je me permettrai simplement de rappeler que ces droits existent *ipso facto* et *ab initio*, paragraphe 19, paragraphe 39, et que le droit international attribue *ipso jure*, paragraphe 43 de votre arrêt de 1969, à l'Etat riverain des droits sur le plateau continental.

Et, il convient de rappeler d'ailleurs l'article 2, paragraphe 3, de la convention de Genève :

> « Les droits de l'Etat riverain sur le plateau continental sont indépendants de l'occupation effective ou fictive aussi bien que de toute proclamation expresse. »

Gidel en 1958, dans l'article ci-dessus mentionné, analysant le commentaire de la Commission du droit international sur son projet d'article en 1956, notait :

> « il demeure certain que la Commission du droit international a entendu rendre le droit de contrôle et de juridiction de l'Etat riverain, sur son plateau continental, indépendant de toute exigence d'occupation ».

Notons particulièrement dans le paragraphe 39 que l'existence du droit peut être constatée mais qu'elle ne suppose aucun acte constitutif. Ainsi se manifeste l'incompatibilité absolue entre la théorie du droit inhérent et la théorie des droits historiques qui est une variante de la théorie de l'occupation. Ce droit préexiste. Il est au commencement. Il ne résulte pas comme le rappelle d'ailleurs très exactement le professeur Virally (IV, p. 488) d'une activité humaine qui l'aurait créé, maintenu et qui serait utilisée pour le démontrer. Inhérent, ce droit n'a pas à être démontré. Sur son plateau continental, l'Etat n'a pas à démontrer son droit, c'est inutile. Sur ce qui n'est pas son plateau continental, l'Etat n'a pas à démontrer son droit. La démonstration est impossible, parce qu'il n'a pas de droit, n'étant pas sur son plateau continental.

Le prolongement naturel

Rappelée au paragraphe 19 de l'arrêt de 1969, la théorie du prolongement naturel est une théorie fondamentale : « la zone de plateau continental qui constitue le prolongement naturel de son territoire ». L'argument est repris au paragraphe 39 :

> « le droit de l'Etat riverain sur son plateau continental a pour fondement la souveraineté qu'il exerce sur le territoire dont ce plateau continental est le prolongement naturel sous la mer ».

Il est développé avec ampleur dans le paragraphe 43. Ces trois paragraphes ont une acception de géographie physique. Ils correspondent parfaitement à ce principe que j'ai appelé le *« déterminisme physique »*.

C'est en vain que l'on chercherait dans ces paragraphes une allusion quelconque à des activités humaines. On trouve des expressions qui relèvent de la géographie physique telles que « au-delà du lit de la mer territoriale » ou encore « zone sous-marine », ou encore « proximité », ou encore « prolongement, continuation, extension du territoire sous la mer », « extension naturelle ou la plus naturelle du domaine terrestre ».

Le passage du physique à l'humain a été présenté lors des plaidoiries tunisiennes.

Le professeur Jennings a indiqué à propos de l'activité des populations côtières : « il est raisonnable d'y voir la preuve de ce que le plateau appartient, y compris physiquement, au pays considéré ». Il fait allusion à la concordance

entre moyens d'existence et « fait physique du prolongement naturel, car l'homme doit nécessairement s'adapter à son milieu ».

Cette argumentation n'est pas sans valeur, concernant les pêcheries fixes, mais elle ne peut être extrapolée.

La maxime « la terre domine la mer »

Le paragraphe 96 de l'arrêt de 1969 replace la doctrine du plateau continental parmi les cas d'empiétement sur des espaces maritimes qui autrefois ne relevaient de personne.

Il note que « zone contiguë et plateau continental sont à cet égard du même ordre ». Il affirme enfin que « dans les deux hypothèses on applique le principe que la terre domine la mer ». Ce principe proclamé par la Cour est évidemment indépendant de la volonté humaine.

Le paragraphe 96 de l'arrêt de 1969 est à cet égard non équivoque. Le vocabulaire qu'il comporte est purement un vocabulaire de géographie physique avec des mots tels que « configuration géographique des côtes », ou bien « prolongement maritime », ou encore « zones aquatiques », enfin « sol et sous-sol », et la Cour note, « mots qui évoquent la terre et non la mer ».

Mon éminent ami, le professeur René-Jean Dupuy a estimé que ce qu'il appelle le fameux *dictum* « la terre domine la mer » n'a jamais trouvé une illustration plus frappante nulle part autant que dans les titres historiques tunisiens (IV, p. 477). Il a consacré bien des développements au thème des activités humaines et de l'exploitation des ressources de la mer.

De telles activités sont évidemment respectables et je reviendrai tout à l'heure sur ce point, mais elles ne sont pas des critères ni des éléments des théories du plateau continental.

L'institution du plateau continental, les droits de l'Etat riverain demeurent définis par le principe du déterminisme physique. Géographie, géologie, voilà les déterminants. Ce principe du déterminisme physique se combine avec un principe symétrique que je voudrais maintenant présenter, celui du caractère objectif de la théorie du plateau continental qui repose sur une base non volontariste. C'est là le second point.

2 La base non volontariste de la théorie du plateau continental

Gilbert Gidel, dans son article précité a affirmé que l'attenance et les droits qui en résultent au profit de l'Etat riverain « sont ... conditionnés par des conditions physiques *échappant au pouvoir de volition de l'Etat riverain* » et il termine par une formule frappée comme une médaille : « Il en profite ou il les subit. ».

Le pouvoir de volition de l'Etat ne jouant pas, il en résulte qu'on doit faire reposer la théorie du plateau continental sur une base non volontariste. La volonté étant liée à l'activité humaine, il apparaît à l'évidence que seules interviennent dans la théorie du plateau continental les conditions physiques. L'aspect non volontariste de la théorie du plateau continental est manifeste. On peut en dégager trois.

Premièrement la notion de droit inhérent existant *ab initio* et *ipso jure* au commencement suppose cette exclusion de la volonté humaine.

Le paragraphe 19 de l'arrêt de 1969 indique ainsi après avoir affirmé l'existence d'un droit inhérent :

> « Point n'est besoin pour l'exercice de suivre un processus juridique particulier ni d'accomplir des actes juridiques spéciaux, son existence ne suppose aucun acte constitutif. »

Deuxièmement, l'article 2, paragraphe 3, de la convention de Genève de 1958, stipule que les droits de l'Etat riverain sont indépendants de l'occupation effective ou fictive, ainsi que de toute proclamation expresse.

Enfin, troisièmement, les droits de l'Etat riverain sont exclusifs. C'est ce qu'indique l'article 2, paragraphe 2, de la convention de Genève :

> « Les droits visés au paragraphe 1 du présent article sont exclusifs en ce sens que, si l'Etat riverain n'explore pas le plateau continental ou n'exploite pas ses ressources naturelles, nul ne peut entreprendre de telles activités ni revendiquer de droits sur le plateau continental sans le consentement exprès de l'Etat riverain. »

Ce caractère de droit exclusif est relevé par le paragraphe 19 de l'arrêt de 1969 :

> « Qui plus est, ce droit est indépendant de son exercice effectif. Pour reprendre le terme de la convention de Genève, il est « exclusif » en ce sens que, si un Etat riverain choisit de ne pas explorer ou de ne pas exploiter les zones de plateau continental lui revenant, cela ne concerne que lui et nul ne peut le faire sans son consentement exprès. » (*C.I.J. Recueil 1969*, p. 22.)

Ainsi apparaît le caractère non volontariste. Ce droit est totalement distinct de l'occupation, sur laquelle il ne se fonde pas.

Il est également indépendant de son exercice, il ne s'éteint pas par le non-usage. Ainsi se manifeste une absence totale de correspondance entre le droit de l'Etat riverain et les droits historiques qui exigent usage répété et occupation.

On pourrait peut-être se demander toutefois si un retour du pouvoir humain, du volontarisme ne se manifeste pas avec la règle de l'exploitabilité.

On sait qu'elle figure à titre de critère alternatif dans l'article 1 de la convention de Genève, après avoir été un critère principal dans les travaux de la Commission du droit international en 1951, après avoir été abandonnée en 1953, l'exploitabilité a fait une réapparition.

On a dit tous les dangers de cette notion et l'on sait que l'article 76 du projet de convention sur le droit de la mer, exprimant les nouvelles tendances, exclut la notion d'exploitabilité.

Mais même actuellement, on ne saurait voir dans la règle alternative de l'exploitabilité une sorte d'ultime preuve de la manifestation de l'activité des habitants des pays riverains.

Il y a en effet une observation un peu marginale qu'il convient de faire. La majorité de la doctrine estime en effet que ce n'est pas la capacité d'exploitaton de l'Etat riverain qui est en cause mais la capacité de l'Etat disposant des moyens techniques les plus avancés. En ce sens, dès 1958, Richard Young, « The Geneva Convention on the Continental Shelf. First Impression », dans l'*American Journal of International Law* (1958, p. 735), et tout récemment Lucius Caflish, « Les zones maritimes sous juridiction nationale, leurs limites et leur délimitation », dans la *Revue générale de droit international public* (1980, p. 87), reprenant des travaux antérieurs et en particulier un cours à l'Académie de droit international donné en 1969. On remarquera que l'exploitabilité se trouve subordonnée à l'Etat riverain. La technique, élément du vouloir humain, est subordonnée à la situation géographique.

Seul l'Etat riverain qui possède un droit exclusif peut ne pas exploiter et ne perd pas ses droits, il peut exploiter ou permettre à autrui d'exploiter et alors la limite du plateau se trouve définie par la technologie la plus avancée, mais

celle-ci n'est pas déterminante, elle est subordonnée à la riveraineté, à la géographie physique.

Ainsi s'affirme plus encore l'aspect non volontariste de la théorie du plateau continental fondée non sur l'activité humaine mais sur des conditions physiques.

Je viens d'exposer les principes sur lesquels repose l'institution juridique nouvelle, apparue il y a un quart de siècle, le plateau continental.

L'incompatibilité de ces principes avec la théorie des droits historiques est certaine. Voilà pourquoi à propos de la présente affaire, s'agissant de la délimitation du plateau continental, les droits historiques sont d'un faible secours.

Est-ce pour autant les faire disparaître ? Que non pas.

B. Le rôle des droits historiques

Je voudrais tout d'abord signaler que je ne méprise pas les droits historiques.

L'exposé de la doctrine du déterminisme physique et l'abandon de tout système volontariste constituent l'affirmation de la primauté des conditions physiques. Primauté qui est à la base de la théorie du plateau continental. Mais je ne voudrais pas que cela conduise à l'inhumanité. Les droits historiques reposent, lorsqu'ils sont fondés, lorsqu'ils sont réels, sur l'activité, sur le travail des hommes. Ce travail est respectable, et je tiens à dire ici mon opinion personnelle. Et à partir de ce travail, au long des jours, on doit examiner les droits historiques. Je n'entends pas écarter en totalité les drois historiques, j'estime qu'il faut les prendre en considération dans la mesure où leur existence est exacte et où leur portée est précisée. Cela me conduit à trois observations.

La première est que les droits historiques ne peuvent être pris en considération que s'ils ont existé réellement, et c'est tout le problème, par exemple, de la prétendue reconnaissance d'une prétendue frontière maritime. C'est le problème d'une prétendue zone de droits historiques, zone homogène. Mais dans leur assiette géographique exacte, dans la réalité de leur fait humain sociologique, ils sont un élément, lorsque, du moins, ces réalités existent, à prendre en considération pour autant qu'ils ne sont pas présentés avec quelque exagération.

Deuxième observation. Les droits historiques de la présente affaire ne peuvent être utilisés pour soustraire une partie du plateau continental à la délimitation. Ils ne peuvent prévaloir contre les théories du plateau. La caractéristique essentielle de la théorie moderne est celle du droit inhérent, *ipso jure, ab initio*.

Ainsi que le notait Gilbert Gidel, il y a près d'un quart de siècle, cette théorie du droit inhérent contient une vertu simplificatrice, car elle évite les diverses discussions sur l'occupation et ses modalités. Cette théorie correspond parfaitement à l'idée de délimitation du plateau continental. La délimitation, ainsi que l'a relevé la Cour en 1969, n'est pas un partage, c'est la constatation de droits préexistants.

C'est à une telle notion que se réfère, d'ailleurs de la manière la plus explicite, le compromis (I) intervenu dans la présente affaire. L'article premier mentionne la délimitation de la zone du plateau continental relevant de la Jamahiriya arabe libyenne et de la zone du plateau continental relevant de la République tunisienne.

L'article 2 vise de même la zone du plateau continental de chacun des deux pays et l'article 3 se référant à une phase ultérieure évoque la ligne séparant les deux zones du plateau continental.

La théorie propre du droit inhérent, c'est qu'il existe à partir des diverses données géographiques et géologiques. Le paragraphe 39 de l'arrêt de 1969 indique parfaitement que le droit de l'Etat riverain préexiste sur *son* plateau continental, et précisément il s'ensuit qu'un Etat n'a pas le droit sur un espace maritime qui n'est pas *son* plateau continental.

Un Etat ne peut créer de titres sur une partie du plateau continental qui n'est pas la sienne. Il ne saurait y avoir d'acquisition du plateau, on ne saurait augmenter son plateau, on ne saurait occuper un plateau réputé sans maître ou sans exploitant. C'est à cet égard que la théorie du droit inhérent possède la vertu simplificatrice que louait Gilbert Gidel.

Evidemment, le problème des rapports de la théorie des droits historiques et de la théorie du droit inhérent se pose.

Mais ce problème se résout de lui-même car un Etat ne peut acquérir des droits souverains et exclusifs, il les possède *ab initio* ou il ne les possède pas.

A cet égard la thèse tunisienne apparaît comme singulière, telle qu'elle est formulée dans la conclusion n° 2, selon laquelle :

> « La délimitation ne doit, en aucun point, empiéter sur la zone à l'intérieur de laquelle la Tunisie possède des droits historiques bien établis et qui est définie latéralement, du côté libyen, par la ligne ZV 45° et, vers le large, par l'isobathe de 50 mètres. »

La validité d'une telle réserve territoriale supposerait, d'une part, que n'existe pas la théorie du droit inhérent et d'autre part qu'il s'agisse d'un partage entre deux Etats dont l'un soustrairait à l'avance du partage certains espaces.

Mais nous ne sommes pas en présence d'un partage, nous sommes en présence d'une délimitation, c'est-à-dire non pas d'une opération de création mais d'une opération de constatation.

Refuser à priori que soit délimitée une zone ou, si l'on préfère, refuser que la délimitation puisse empiéter sur une zone est une attitude curieuse.

On ne saurait admettre une soustraction d'un ensemble très important par la superficie et la théorie du droit inhérent s'y oppose. On ne peut donc qu'être surpris par la conclusion n° 2 de la Tunisie.

Je rappellerai qu'il a été reproché aux écritures libyennes d'avoir mentionné, au paragraphe 482 du contre-mémoire libyen (II), qu'à partir d'une certaine ligne les prétentions tunisiennes plus à l'est ne seraient plus crédibles.

Mais, cela n'a aucun rapport, c'est là une opinion, une affirmation ouverte à la discussion et en tout cas soumise à l'appréciation de la Cour. Et d'ailleurs dans les *submissions* libyennes rien ne figure à ce sujet.

Des droits historiques, Monsieur le Président, peuvent être revendiqués, mais ils ne sauraient aboutir à une prédélimitation arbitraire soustrayant une vaste zone à cette opération de délimitation dont la Cour doit définir les principes.

Une troisième et dernière remarque me semble devoir être formulée concernant les droits historiques.

La réalité humaine que rencontre cette expression est ici essentiellement une activité de pêche qui se manifeste principalement avec les pêcheries fixes sur des hauts-fonds.

Le respect de ces drois de pêche peut parfaitement s'opérer. Et d'abord il faut noter que les propositions concernant *the Libyan practical method*, qui seront prochainement exposées par mon excellent et savant ami Keith Highet, n'affectent pas les pêcheries fixes et qu'il sera toujours possible à la phase ultérieure de détermination de la délimitation précise d'établir la ligne dans le respect des droits des usagers des pêcheries.

Dans le chapitre III du contre-mémoire libyen (II), aux paragraphes 160 à 170, nous avons exposé que nous n'avions pas trouvé dans les accords de délimitation de plateau continental conclus entre les Etats, dans la pratique des Etats, la prise en considération, pour la délimitation elle-même, des droits historiques.

Mais les droits historiques réels peuvent être pris en considération d'une autre manière. C'est à ce point de vue que l'accord du 18 décembre 1978 entre l'Australie et la Papouasie-Nouvelle-Guinée nous a semblé de quelque intérêt comme l'indique le paragraphe 164 du contre-mémoire libyen (II), mais il ne semble pas que nos observations aient été bien comprises.

Monsieur le Président, Messieurs les membres de la Cour, je voudrais maintenant conclure en quelques phrases. Auparavant je voudrais m'excuser auprès de vous d'avoir parlé si longuement à deux reprises aujourd'hui et déjà antérieurement vendredi. Je voudrais vous remercier très sincèrement de l'attention que vous avez bien voulu me prêter, ainsi que de votre longue patience car je sais que mes exposés n'étaient point faciles, point faciles à entendre, dans la mesure où ils comportaient beaucoup de citations puisque je voulais suivre pas à pas les documents ou les textes. Je vous remercie donc et je ne vous demande plus qu'un instant de patience.

Je voudrais conclure cette longue étude des droits historiques dans le présent litige par les affirmations ou les négations suivantes :

1. Les droits historiques ne concernent pas d'une manière abstraite et générale une zone unique qui serait *la* zone des droits historiques.

2. Les limites maritimes de ce qui est présenté comme une zone n'ont jamais fait l'objet d'une reconnaissance internationale, les documents établissent l'inverse.

3. Le problème soumis à la Cour est celui de la délimitation à partir du droit inhérent de chacun des Etats sur son plateau continental. Le compromis l'indique formellement et reconnaît les droits inhérents, et je demande la permission de relire l'article 1 :

> « la délimitation de la zone du plateau continental relevant de la Jamahiriya arabe libyenne, populaire et socialiste et de la zone du plateau continental relevant de la République tunisienne »,

l'article 2, « la zone du plateau continental de chacun des deux pays », et l'article 3, se référant à une phase ultérieure, évoque « la ligne séparant les deux zones du plateau continental ».

L'audience est levée à 17 h 38

TWENTY-FIRST PUBLIC SITTING (6 X 81, 10 a.m.)

Present : [See sitting of 29 IX 81.]

ARGUMENT OF PROFESSOR BOWETT

COUNSEL FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Professor BOWETT : Mr. President, may I begin by expressing the sense of privilege which I feel in addressing this Court. My task this morning is to discuss the scientific arguments, a task I approach with some trepidation, but in my submission, a task which is absolutely essential.

SCIENCE

At the origin of the Continental Shelf doctrine lies the physical fact that the land extends into and under the sea. And, as the Court has noted in its 1969 Judgment, the coastal State's legal entitlement to a submarine area rests on the view that the State is entitled, *de jure*, to that area which is the natural prolongation or extension of its land territory.

Now, it is self-evident that science, in particular geology and geography, and including, where appropriate, physiography and geomorphology, can assist in identifying which shelf areas are the prolongation of which land territory. The Court's own Judgment in 1969 attested to the value of scientific evidence, and in this case both Parties have expended considerable effort in assembling such evidence for submission to the Court.

This evidence is in large measure consistent. The evolution of this particular area of shelf, its physical characteristics and its relationship to the adjacent landmass are all matters of scientific knowledge which is, in large measure, non-controversial. The controversies which appear in the pleadings of the two Parties arise from the interpretation of that evidence by the Parties, and from the different legal significance which they attach to it.

Thus, the Court faces the task of having to draw its own conclusions as to the reliability, the relevance and the correct interpretation of all this evidence. I do not believe this task poses any great difficulty, given the facts involved in this case. My main intention is to try to assist the Court by highlighting the points of disagreement between the Parties. And if I appear to oversimplify matters, I do so only in the interest of clarity and because I know that the Court has at its disposal, in written and illustrative form, a whole mass of detailed evidence which it will already have examined and will not wish to have repeated in oral argument by counsel. The Parties are in agreement that the scientific evidence is basic to this case, and each Party has developed its written pleading relying heavily on that evidence. The Parties therefore have the obligation to assist the Court in evaluating this key element in the case.

So far as the scientific evidence is concerned, the task before the Court would seem to lie in answering three essential questions.

First, which is the shelf area within which the delimitation has to be effected ?

Second, what does the scientific evidence tell us about the nature of this shelf area ?

Third, to what extent can the shelf be identified with one part or another of the adjoining landmass as a natural prolongation of that landmass ?

The Parties have presented the Court with an abundance of scientific evidence and argument directed to these three fundamental questions. My own task this morning is to try to assist the Court by examining these questions, each in turn, and, in relation to each question, bringing out the issues of fact and interpretation on which the Parties remain divided. In so doing, I shall suggest to the Court the answers to those three questions which are most consistent with the bulk of the evidence.

There is, however, a preliminary point I must make. In his opening address Professor Jennings really invited the Court to return to and rely on the scientific notions about the continental shelf current in 1952 and 1957. Now, he did this because those definitions viewed the shelf as a geomorphological feature. And because the definitions then current used bathymetry to define the outer-edge of the shelf, his conclusion was that it is the bathymetric evidence which is crucial in this case and the geological evidence relatively inconsequential. Sir Francis Vallat has already explained that this conclusion was not in any way adopted by the International Law Commission or by this Court. Yet the Court is nevertheless invited to adopt it now, in this case.

I trust the Court will reject the invitation, without hesitation. And this, first, for the reason that those early definitions were attempts to define the outer limit of the shelf and were not concerned with delimitation between neighbouring States. Second, for the reason that Professor Jennings cannot really mean what he said. In 1969, he wrote an excellent article on the implications of the Court's Judgment in the *North Sea Continental Shelf* cases. You will find the article in Volume 18 of the *International and Comparative Law Quarterly* for 1969, page 819, and at page 829, he there says, in arguing that the slope is part of the shelf : "For it is not just a question of sea-bed but a question also of subsoil, viz., of the underlying rock structure . . ." Third, having listened to Professor Morelli, Professor Laffitte and Professor Virally, it is clear that the Tunisian case itself, relies, in very large measure, on geology, as well as bathymetry. The necessity to resort to geology to explain the superficial morphology was explained with great clarity by Professor Morelli. He said :

> "Geography (i.e., actual superficial morphology) is not an accident, but the result of physical causes. It is the consequence of the tectonic evolution of an area and of the geological structures below it." (IV, p. 518.)

But, most of all, I hope the Court will decline Professor Jennings' invitation for the reason that our understanding of how the shelf was formed has developed very rapidly since those early days. The old idea of a submerged landmass, with a gradual slope caused by the process of wave-erosion and changes in sea-level is now known to be wrong. It is not a matter of "rival" theories – to use Professor Jennings' words – but of an old idea which is now totally discredited, and a more recent scientific explanation of the evolution of the shelf which is now generally accepted as correct by modern science the world over.

It is, frankly, inconceivable that this Court will, in giving judgment in 1982, base its approach to the scientific evidence on ideas known to be fallacious for

nearly two decades. Indeed, to accept Professor Jennings' advice would be for the Court to forfeit the respect of the entire scientific world : and that is a result I am confident he would deplore as much as I. There is, as I am sure the Court will have observed, a remarkable inconsistency between asking the Court to observe the recent trends of the law – and at the same time asking them to ignore the vast increase in our scientific knowledge about the creation of the shelf, acquired over the past 25 years.

So, inevitably, the Court will need to look at the best available scientific evidence to explain the nature of this particular area of shelf. Libya has gone to a great deal of trouble to provide the Court with such evidence, and to assist it in its task. I detected a strong hint of criticism on that score, from Professor Jennings and Professor Virally, as if we had somehow burdened the Court with a mass of irrelevant material. The material is highly relevant and we have every confidence in the Court's ability to master this material.

Now let me turn to the first of the three questions I posed.

The first question is to define the shelf area which concerns us.

There is, quite obviously, a large measure of disagreement between the Parties on the question of what is the relevant area of shelf and, more particularly, the area within which the line of delimitation must lie. In due course, my colleague Mr. Highet will deal with this in quite specific terms. I believe that for the purpose of evaluating the scientific evidence, I need go no further, and need be no more precise, than to say that the shelf area we are concerned with is part of the Pelagian Block, and on that at least the Parties are agreed. Incidentally, the terms "Pelagian Block" and "Pelagian Basin" are interchangeable but I will use "Block" to avoid any confusion.

Now the Pelagian Block can be seen on this map here. This is Professor Burollet's map. It was produced in the Libyan Reply (IV), Technical Annex
(115) II-8, Figure 1, and I think it is in the folder[1] which each Judge has before him now. It is an area bounded on the west by the north-south axis, in the south by the Jeffara Flexure, in the east by the Misratah-Malta Escarpment, and in the north along the Pantelleria Trough. Some scientists would place the boundary even further north through Sicily, but, as Dr. Lazreg quite properly said, it is outside our area of concern, so it really does not matter. Now the Pelagian Block is a shallow depression, rather like a saucer, comprising both land and sea. And the area for delimitation is only in the south-west section of the Block, but it is necessary to look at the Block as a whole to form a clear impression of its relationship with the adjoining landmass.

We need to identify the nature of this Block, so let us turn to the second fundamental question.

What does the scientific evidence tell us about the nature of this Pelagian Block ?

Now the nature of the Pelagian Block is best explained by looking at how it originated. The detailed scientific description is fully set out in Annex II to the Libyan Memorial (I) ; in Professor Fabricius' paper given as Annex II to the Libyan Counter-Memorial (II) ; in Annex 12B to the Libyan Counter-Memorial, that is Dr. Ankatell's report ; and in the Study of the Evolution of the Libyan Margin prepared by Columbia University, which you will find in Annex II-6 to the Libyan Reply (IV). But let me summarize in simple terms without, I hope, distorting the picture.

[1] Filed 5 October 1981. (See IV, p. 512, footnote.)

Imagine two vast continental masses, Eurasia and Africa – two enormous plates floating on the mobile layer beneath the earth's crust. These plates, or continents, began to drift apart, and you have in your folder diagrammatic illustration of this process – it is Figure 14 in Annex 12A to the Libyan Counter-Memorial (III). Now this process, known as "rifting", stretches the continental crust – the uppermost layer of the earth's surface – so that at the edges of the plates, the layer thins out rather like a slab of soft, treacle toffee or nougat which would stretch and thin out as you pull it apart, until it finally snaps in the middle, to leave a thin edge. And because, at the edges of the plate, the crust is now thinner, it begins to drop or subside, and so, at the edges of the plate, depressions or basins are formed. These gradually fill up with sediment and form the typical continental shelf. The Pelagian Block, for example, has received between 5 and 6 kilometres of sediment, dumped on top of the original crust or "basement" as it is sometimes called. And there is a clear, inverse relationship between the thickness of the crust and the thickness of the overlying, sedimentary strata. The thinner the crust, as you move towards the edge of the plate where it finally snaps off, the more it subsides, and the thicker the sediments that eventually overlie it. Thus, as you move to the edge of the plate or margin, away from the landmass, the crust gets thinner, and, correspondingly, the sediments will get thicker. That is an important point and the Court will see, in due course, how crucial this is to a correct interpretation of the evidence.

In the Mediterranean, when this original rifting happened during the late Triassic or early Jurassic era – about 200 million years ago – this produced an ocean, the Tethys Ocean, between the African and Eurasian Continents. The coastline of the African Continent ran broadly east-west and slightly to the south of the present Libyan coastline along the line shown on this map. That
108 Map is Figure 6 in the Libyan Reply ; it is 3 in the Judges' folder. Now most of what is now Tunisia lay submerged under the sea. But the shelf was already there, lying to the north of the continent. And it is important to grasp the fact that the shelf existed before most of Tunisia emerged as dry land. I believe that a careful reading of Professor Laffitte's statement (IV, p. 540) and Dr. Stanley's statement (IV, p. 524) will confirm that there is no disagreement on this score.

Further movement of the two plates continued and, in the Tertiary era, between 53 and 18 million years ago, in the Western Mediterranean the plates closed, cutting off the Mediterranean from the Atlantic, and the Mediterranean began to get shallower. As the two plates closed, the enormous pressures between the plates compressed the sedimentary and basement rocks lying under the former Tethys Sea. This literally threw up the Atlas mountains, and most of what is now northern and central Tunisia emerged from the sea. Much of the area of the Pelagian Block was now above water, but only just ; the Mediterranean was virtually a series of salt lakes. And to the extent that parts of the Pelagian Block were then above sea level, the situation was simply that. For Tunisia to say that Tunisia then extended further eastwards, all those millions of years ago, is sheer wishful thinking. Parts of the Block were above water, that is all. You cannot, by that fact, assume it was part of Tunisia any more than you can assume it was part of Libya. If you wish to ask the further question of whether, geologically, this Block was an extension or prolongation of the land to the south – or the land to the west – then that is quite another question, with which I shall deal in a moment. But to assert that it was the easterly extension of the Tunisian coast is to indulge in a sheer flight of fantasy.

Then, more recently, about 5 million years ago, the Straits of Gibraltar opened, allowing the waters from the Atlantic to flow into the Mediterranean

Sea, raising the sea level again and inundating most of the Pelagian Block, save for the Kerkennah Islands and the coastal plains of the Sahel in Tunisia and the Jeffara on the Tunisian and Libyan coasts to the south. But the sea level did not remain constant. During the last 5 million years, either by reason of oscillations in the level of the oceans, so called "eustatic changes", or because of regional uplifts of coastal areas, the sea advanced and retreated over parts of the Pelagian Block. And that is why one finds marine deposits on what is now dry land. Let me add, in parenthesis, that the last major change of sea level took place between 16,000 and 6,000 years ago as the result of the retreat of glaciers over the entire northern hemisphere. That was before human settlements were established, and nothing I have said gives support to the Tunisian thesis of ancient cities being submerged by a general rise of sea level.

What is certain, however, is that, because of these changes, a large sedimentary basin developed stretching from the Sirt Basin in the east to the limit of the Pelagian Block in the west and you will see this described graphically in Dr. Emery's study in the Libyan Reply (IV), Annex II-9, Figure 1. And thus a link was established between the Pelagian Block and the Sirt Basin which is still apparent today, and which accounts for much of the area having oil and gas potential. This sedimentary basin did not extend into Tunisia beyond the north-south axis, for the reason that, once the Atlas mountains were formed, they produced an uplift which acted like a barrier, preventing any further deposition of marine sediments into what is now central and northern Tunisia. Of course, there were older sediments, laid down on the shelf before Tunisia emerged and the Atlas was formed, which can be found west of the north-south axis : but not these recent sediments. And even these older sediments, west of the north-south axis, tend to be different. They are essentially limestone, in contrast to the argilacious sediments, the muds and the clays found east of the axis where the subsidence of the crust was much greater. So the north-south axis forms the boundary between two different geological provinces and this difference in sedimentation is one aspect of the importance of this north-south axis. But the north-south axis is older than the Atlas Mountains and has another aspect, also of importance. The movements of these plates set up enormous stresses and the plates not only drifted apart or collided but also rotated. The African plate experienced both rifting and rotation so that areas of stress developed, and not necessarily coincident, in direction, with the direction of the main rifting. One such area of stress was the area of faulting which ran – and still runs – from the Sirt Basin right up into the Pelagian Block. It is this which is illustrated by Plate 5 attached to the Report by Professors Hammuda and Missallati in Annex II to the Libyan Memorial. Thus you find the same tectonic trends stretching from the Sirt Basin, right up into the Pelagian Block. And you find virtually no evidence of these trends to the west of the north-south axis. And that is why, in a structural or tectonic sense, we say that to the west of this north-south axis, Tunisia has no real affinity with the Pelagian Block. In technical terms, we find alpine or compressional tectonics to the west of the axis, the result of pushing together, and African or rifting tectonics, the result of pulling apart, to the east. Now that is a generalization but as a statement of the broad picture I believe it to be accurate.

Now of course the dividing line between these tectonic areas is not clear-cut. The evidence is not black and white, and particularly in the north of the Pelagian Block, as one nears the north-south axis one finds overlays and intrusions – with the younger Alpine tectonics superimposed on the older, African structures underneath. I need scarcely add, Mr. President, that Libya

does not deny that Tunisia lying to the east of the north-south axis is part of the Pelagian Block. All our maps show this quite clearly. The suggestion in the Tunisian pleadings (Tunisian Counter-Memorial (II), para. 4.25) that we do so deny I find difficult to comprehend. Thus the fundamental picture remains clear : the tectonics and the sedimentry deposits are different east and west of the north-south axis. Now Tunisia has seized on this mixed area here – the area of superimposed, overlapping tectonic trends – in an attempt to prove that the tectonics of the Block are similar to those of Tunisia as a whole, and
(104) Atlasic rather than African. If you look at this map (Libyan Reply (IV), Fig. 2, which is in your folder) you will see depicted the Atlas Fold Front – otherwise called the Gabes-Ragusa line – which marks the general limit eastward of the Atlasic formations. But the conflicting trends do lie to the west of this, an area of mixed tectonics, as one might say. So one has, as far west as the Atlas Fold Front an area of clearly African tectonics, linked with the Sirt Basin system. Then west of this line as far as the north-south axis, a mixing of African and Atlasic tectonics. And west of this north-south axis the system is predominantly Atlasic. So much for the western boundary of the Pelagian Block, the north-south axis.

And now a word about the other boundaries to the Pelagian Block. In the north movements of the two plates caused a series of rifts to form – the Linosa, Pantelleria and Malta Troughs. On the north side of these Troughs, one finds a somewhat different structure, a continuation of the Atlas uplifts, running through into Sicily and eventually Italy.

To the east the boundary of the Block is the Malta-Misratah fault line, or Malta Escarpment. This Escarpment can be identified easily on all the maps, lying along here. There is no dispute about its location. But I would ask the Court to bear in mind that it is not the same as the line of *faluises* depicted in some of the Tunisian maps : these lie much further to the west, as we shall see in due course.

We come now to the southern boundary of the Block – the Jeffara Flexure – which lies within the Permian Hinge Zone. This zone is simply the general line along which the Block bent downward when the downward tilting began. The word "hinge" is very apt, for it was along this line that the bending and stretching occurred, and to the north of the hinge the crust starts to get thinner. But, contrary to what Tunisia suggests, there is no radical difference in the African landmass on the two sides of the hinge. There is no radical difference between the Pelagian Block and the main African Plate lying to the south, in both Libya and Tunisia ; on the contrary one finds fundamental continuity between the two.

Why then, the Court may ask, do we say the north-south axis is a boundary to the Block of a different kind, dividing areas that are structurally different ? The answer is, quite simply, that west of the north-south axis there is this massive overlay of the Atlas mountains and one finds an area of Alpine or Atlasic tectonics, very different from the Block or African tectonics to the east. In contrast, north and south of the Permian hinge there is no structural difference : the same earth's crust simply gets thinner. The hinge marks the line along which the same geological formations are stretched and bent downwards and, as a result, the faulting typical of a shelf and caused by the stretching and bending is to be found north of the hinge. And, of course, the sedimentary deposits will be found seaward of the hingeline, for they accumulate only where the crust has subsided. But let me emphasize that the hingeline is a normal feature of most continental margins, and typical of the normal continuity from landmass to shelf.

I hope this description of the origins of the Pelagian Block will make it easier for the Court to follow the scientific arguments of the Parties. Turning to the first of those arguments, let me explain how the two Parties describe the Block as it now exists.

The Libyan pleadings view the Block, and the relevant shelf area, as an area of fundamental geological continuity, extending northwards from the main African landmass. This is consistent with its origin, as I have just described, and we can find no features in the shelf area – whether of a topographical or even more fundamental structural kind – which could justify the Court in treating it otherwise. I do not say we can find no features. I say that we find none which a court could treat as disrupting the essential geological continuity of the shelf.

Now, the Tunisian description of the Block rejects its essentially homogeneous character. I have put up on the board the illustration from the Tunisian
(18) Memorial (I) (Fig. 5.09 – which is I believe in your folder). Now you will see from this that for Tunisia the Block really consists of three separate morphological entities. The first is the zone in the north, east of Cape Bon in the Gulf of Hammamet and stretching over to the shelf of Malta : now this lies outside the area of concern for purposes of delimitation, so it need not detain us. The second is the so-called Tunisian shelf, in the centre, and the third is the topographical low zone to the south, embracing the Gulf of Gabes and the Tripolitanian Furrow. These second and third zones are graphically described in the concluding paragraph of the Tunisian Scientific Study (Tunisian Counter-Memorial (II), Annex 1) in these terms :

> "in order to move from the Libyan coastline to the Tunisian Shelf it is necessary to descend into the Furrow [i.e., the Tripolitanian Furrow] and then climb up its northern flank".

So, you have there a picture of an extensive low zone – the Tripolitanian Furrow – parallel to the Libyan coastline and, to the north of it, the elevated zone of the Tunisian shelf, depicted as two distinct entities on the basis of the morphological or bathymetric evidence.

It will also be apparent to the Court that Tunisia sees this same bathymetric evidence as providing identifiable limits to the shelf in the east, as well as
(19) in the south. And, in Figure 5.07 of the Tunisian Memorial one has depicted a fearsome line of underwater cliffs – dubbed the *falaises sous-marines* – which are said to mark the limit of the shelf proper and the beginning of the "borderland", the *avant-pays*. To the south, we are told, lie the *rides* of Zira and Zuara.

On the basis of the Tunisian Memorial, we had assumed that the evidence for these divisions in the Pelagian Block lay in the actual present-day bathymetry. By which I meant the actual contours of the seabed. It was to test the Tunisian assertions that the Libyan Government commissioned a detailed scientific study and the preparation of a relief model (II, p. 242, para. 233) based on that study, so that the Court might see what the seabed actually looks like.

Now this is that model. One should find the division between the Tunisian shelf and the Tripolitanian Furrow – the *rides* of Zira and Zuara – about here, along this line. And I have, for the convenience of the Court, just marked it faintly with a red line. One should find the eastern limit of the shelf – these *falaises sous-marines* – and the beginning of the so-called borderland along this line : the irregular line which is faintly marked in green. I have to state quite frankly to the Court that both we, as counsel, and the scientists advising

us, had some difficulty in detecting these features. I will not say more about them now, since I shall be examining them in some detail with Professor Fabricius.

It is, of course, true that in the Tunisian Counter-Memorial we have been provided with additional evidence. Map ES-10 in the Scientific Annex to the Tunisian Counter-Memorial shows the present-day relief model of the Mediterranean Ocean floor ; and that shows nothing of either the *rides* or the *falaises*.

There is also evidence of a different kind, that is to say evidence of the contours of the sea-bed in ages past. Maps ES-11 and ES-12 represent an attempt to reconstruct the topography of the sea-floor on the basis of seismic evidence. Map ES-11 represents between 7 and 10 million years ago and Map ES-12 about 75 million years ago. The Court will already be familiar with these maps – Professor Morelli [1] reproduced them in colour. I do not think they need detain us now, but simply let me submit that one can detect nothing on either map of the *falaises sous-marines* or the *rides*. The maps may well show some support for the Tunisian "transversals" argument – the argument that you have a low zone in the south and a high zone further north, with both zones extending into Tunisia. Yet, as I shall presently show in examining the Libyan evidence, this is in no way inconsistent with the unity of the Pelagian Block as a geological formation, or with the view that the shelf is a prolongation northward of the landmass to the south.

Before leaving the Tunisian bathymetric or morphological evidence, I should like to say a word about its legal significance. So far as concerns the question whether the Pelagian Block is, or is not, a continuous single shelf, the Tunisian evidence has one essential aim. And that is to show that it contains features which not only destroy its essential geological unity but also provide potential boundaries. The *rides* of Zuwarah and Zira have no other purpose.

As I have indicated, we have had some difficulty in even locating these features, and I am bound to say that we were not helped by the Tunisian maps. In a succession of maps we were shown either one or the other of the two *rides*, rarely both. The location of these *rides* seemed to be constantly changing. For example, on Map No. 1 to the Tunisian Memorial (I) we find the *ride* of Zira, which could coincide with little bends in the isobath, and running out to a depth of 300 metres (or so we are told in the Tunisian Reply (IV), para. 2.06). Zuwarah is also there in words printed on the map, but lying to the south-east and not, apparently, coinciding with any isobathic peculiarities. On Map No. 2, the *ride* of Zuwarah has disappeared : only Zira is shown, but this time apparently going out as far only as the 100-metre isobath. On Figure 5.22 of the Tunisian Memorial Zuwarah has reappeared ! But, instead of lying parallel to Zira it is now a continuation of Zira, and trending virtually due east : whereas previously both *rides* trended north-east. Figure 5.12 shows neither *ride*, nor any prominence in the isobaths that might be identified with them. Figure 9.01 shows both *rides*.

In the Reply stage, in Map 2.01, the two *rides* are again parallel to each other, with Zira trending east, but only out to the 115-metre isobath ; and Zuwarah trends north-east out to the 100-metre isobath. Map 2.03 includes neither *ride* by name : but from the isobaths one can detect a bank running out to the 150-metre isobath – Zira perhaps – but nothing to suggest a second *ride* parallel to it and further to the south. On Map 2.04 the *ride* of Zuwarah is

[1] See IV, pp. 518-519.

still not depicted, although Zira is there, but this time running north-east and out as far as the 200-metre isobath.

As I say, we had difficulty in locating these features, and we were not impressed by the discrepancies in their description. But I will leave the Court to form its own impression. The recent revision of the Tunisian submissions confirms the view that the *ride* of Zuwarah has proved too elusive to be relied upon, and hence the emphasis is now placed on Zira.

However, even taking the most charitable view of these features it must be doubted whether they could serve the purpose which Tunisia seeks. I say this because, while it is by no means clear what type of morphological feature can constitute a fundamental break in the continuity of a shelf so as to have any effect in law on the boundary, what is clear is that features of far greater prominence have been denied any such effect.

We felt it might assist the Court to have some comparison between the Pelagian Block and the two morphological features which have been considered judicially. I refer of course to the Norwegian Trough, referred to by this Court in its 1969 Judgment, and to the Hurd Deep, considered by the Court of Arbitration in 1977. Now you have this map in your folder. It is also (82) to be found in the Libyan Counter-Memorial as Figure 12. Now you will see that we have here superimposed the Norwegian Trough on the Pelagian Block. And as the Court will see, in size and significance it reduces the *rides* of Zira and Zuwarah to insignificance. Let me just give the Court the figures. The Norwegian Trough is 700 kilometres long, up to 100 kilometres wide, and has an average depth of 250 to 300 metres below the surrounding sea-bed. The Zira *ride*, the larger of the two *rides*, is 100 kilometres long, 30 kilometres wide at its base, with a maximum elevation above the sea-bottom of only 35 metres : I take those figures about the *ride* of Zira from Professor Morelli's statement. And you remember Dr. Stanley's figures on the gradient of this *ride* of Zira. Between 0.25 and 1 per cent., that is to say a maximum gradient of 1 in 100. Now neither the United Kingdom nor Norway treated that Norwegian Trough as a boundary. And yet this Court is being asked to treat the *ride* of Zira as one, (83) apparently in all seriousness. Now Figure 13 of the Libyan Counter-Memorial, which is also in your folder, shows the Hurd Deep, a feature whose existence is beyond question, and a feature which is of far greater significance than these two supposed *rides*. Its average depth, *average* depth, is 115 metres – or 45 metres below the surrounding sea-bed. Therefore even its average depth is greater (far greater) than the maximum elevation of the *ride* of Zira. And yet, in the 1977 Award, the Court of Arbitration expressly rejected the submission by the United Kingdom that the Hurd Deep could constitute a boundary, for reasons explained by Sir Francis in his earlier statement.

The conclusion I therefore invite the Court to reach is twofold. First, that on all the evidence the Pelagian Block is a continuous single shelf. And, second, that the features relied upon by Tunisia are not such as to constitute a break in the fundamental unity of the shelf so as to provide a boundary between the two Parties.

I turn now, Mr. President, to the third, and perhaps most difficult question. That question is : is the shelf area a prolongation eastwards of Tunisia, as Tunisia contends ? Or is it a prolongation northwards from the Tunisian and Libyan coasts to the south ?

Let me first say a word about the kind of evidence on which the two Parties rely.

Tunisia's case by and large rests on the evidence of bathymetry and geomorphology. That is to say, Tunisia relies upon what are basically surface

or topographical features of both the sea-bed and the adjoining land. To the extent that the Tunisian evidence goes to the subsoil, it is subsoil of a depth of only several hundred metres, and with a history of no more than 7 million years. Indeed, Tunisia criticized the Libyan evidence because, being more geological in character, it relates to events which occurred up to 500 million years ago and which Tunisia suggests depend for proof on sources which are unreliable and irrelevant. There is some inconsistency in the Tunisian view about reliability and relevance, for Tunisia does not hesitate to stress the importance of the Permian Hinge in an attempt to show that the Block is distinct from the main African Plate, even though the Hinge is a feature some 250 million years old. Tunisia also makes much of the Kerkennah and Kasserine uplifts : both features at least 75 million years old. So did Professor Morelli in showing the seismic horizon at the top of the Mesozoic, also 75 million years old, on his Map ES-12. But let us set that aside and return to the main criticism.

The answer to the criticism is obvious enough.

First, it is patently clear that this whole dispute is about oil resources. These oil resources lie in strata which are both deep and old. And those strata are still there, even though they were laid down between 50 and 500 million years ago ; these strata are today what actually *is* the continental shelf. Ambassador El Maghur, in his opening statement, used some figures which I think are highly relevant to the point I am now making, so it may be helpful to repeat them. The likelihood of oil occurring in rocks of different ages can be illustrated by the number of wells in Libya in which oil has been found in rocks of a particular age. Let me give you the figures :

In the recent, Oligocene, rocks (about 38 million years ago), only one well.

In the Eocene and Paleocene (between 37 and 65 million years ago), 48 wells.

In the Upper and Lower Cretaceous (between 65 and 135 million years ago), 37 wells.

In the Triassic (between 195 and 230 million years ago), 20 wells.

In the Carboniferous and Devonian (between 280 and 355 million years ago), 35 wells.

And in the Ordovician (from 435 to 500 million years ago), 24 wells.

So the Court will see that in the recent, geologically young strata with which the Tunisian evidence is concerned, there is virtually no oil. What, then, is its relevance ? Natural resources of interest in this case are the oil and gas. How then does it help to concentrate on evidence of strata which contain neither oil nor gas ? How can it be right to eliminate from consideration the very strata where the oil is ?

Second, and irrespective of the oil, the relationship between the shelf and the adjoining land cannot be judged by bathymetric or topographical evidence alone. This is the point Professor Morelli made repeatedly, and it is obviously right. The relationship of the Pelagian Block to the adjacent landmass can only be explained by taking into account the whole origin of the Block. It was for this reason that I gave to the Court a simplified account of its origins. And the conclusion that the Block is an extension northwards of the African landmass to the south is not one which can be deduced at all from the superficial topographical evidence of bathymetry and the like, but depends upon the far more basic sciences of geology, of Plate tectonics and physiography. Indeed, far from being irrelevant, it is to these sciences that one must turn to fully understand the relationship of shelf to landmass. For the study of geology, of which plate tectonics is today an essential element, does not deal solely, or

even principally, with the fate of one plate against another. It explains the interaction of plates and events, along with their boundaries, without in any way assuming that neighbouring parts of, say, the African Plate have identical geological histories. It is equally the Libyan view that these same fundamental sciences explain the bathymetry : a view with which Professor Morelli seemed to be in entire agreement. The whole point of the transparent overlay of the (46) tectonic trends, over the bathymetric map, in Figure 13 of the Scientific Study attached as Annex II to the Libyan Memorial (I) was to illustrate exactly that view. For the Tunisian Reply (IV), at paragraph 12, to accuse us of ignoring the link between geology and geomorphology is, frankly, beyond comprehension.

And it should not be assumed that bathymetry is somehow an exact science – whereas geology is not. Bathymetrics involves exactly the same process of interpretation of the evidence.

There is a separate Tunisian criticism of the Libyan scientific evidence which meets with a similar answer. This is the criticism that Libya's evidence has to do with macrogeology, geology on a large scale, and is divorced from the specific area and the specific coasts in question. My answer to that is that the events which accounted for this particular relationship of shelf to landmass, and even shaped the coasts themselves, were great events, occurring on a grand scale, both spatially and temporally. It is no use trying to focus on one small area and attempting to understand them. One must, in the task of delimitation, turn to the area under consideration, obviously. But only after having understood its origin in the larger scheme of things.

However, setting aside these general Tunisian criticisms of the Libyan scientific case, we must now turn to the details of this third question of the relationship between the shelf and the landmass. I propose to examine first the Tunisian argument, and I will summarize the Libyan comments on that argument. Then I will summarize the Libyan argument and examine the Tunisian comments on that argument.

THE TUNISIAN ARGUMENT

Let me take first the Tunisian argument. This is essentially an argument to show that the shelf is a projection eastwards of the Tunisian east-facing coast. Its components are the following :

First, there is the argument that the Pelagian Block is an intermediate zone, a prolongation of the Atlas region to the east and not part of the stable African (or Sahara) Platform. The argument seems to be twofold. First that, to the north of the African landmass, the crust is thinner and more flexible, permitting substantial deformation. This is true. But all that shows is that, as in any other continental margin, once you get seaward of the hingeline, the crust gets thinner and is subject to faulting as it subsides. That fits exactly with the description I have given to you of how this shelf originated. Then we are told that this thinner crust is identifiable with the Atlas Region, and not the African Platform. Now that is the important assertion.

The basis for this important assertion lies first and foremost in what I may describe as the transversals argument. That is to say, the argument that there are east-west links between the Block and Tunisia represented by three levels of predominant structural features. You will see them here on this map – the (22) map is in your folder and is taken from the Tunisian Memorial (I), Figure 5.18. Now in the north a subsidence furrow is said to extend from the Gulf of Hammamet in the west to the Tunisian Furrow in the east ; in the centre you

have the alleged high zone from Kasserine in the west through the Agareb, the Kerkennah Moles and through to the Melita and Medina Banks in the east. In the south you have the claimed line of subsidence extending from the Chotts in the west through the Gulf of Gabes and into the Tripolitanian Furrow in the east.

Let us examine the apparent origin of this argument which is fundamental to the Tunisian case. In so doing, let me ask the Court to bear in mind that identity or continuity between one area and another may be proved, or disproved, by different types of evidence. It may be evidence about the continuity of sedimentary rocks. It may be evidence about the continuity of tectonic trends. Or it may be evidence about the type of faulting that you find. The Tunisian argument seems to stem from Professor Burollet's tectonic sketch map in his standard work on Tunisian geology published in 1967. This is
(115) reproduced as Figure 1 in the Libyan Reply (**IV**), Annex 8, and it is also in your folder. Now, it is of extreme interest to compare the map in that work – in Figure 1 – with Figures 5.14 and 5.15 of the Tunisian Memorial (**I**), which you have in your folder. The Court will note that, on the earlier map (Fig. 1) there is little suggestion that these transversals extend westwards beyond the north-south axis. It is only in the figures in the Tunisian Memorial that the north-south axis disappears, to allow the impression of continuity, and its significance played down in the text. This is surprising for much of Professor Burollet's earlier work had stressed the importance of the north-south axis. In 1956, in his classic study of Central Tunisia, he wrote :

> "Un axe NS . . . a représenté une ligne majeure de la paléogéographie depuis le jurassique ; il s'agit certainement d'une cassure du socle . . . Le caractère original de la Tunisie orientale est dû à ce qu'elle est isolée de la zone atlasique proprement dite par cet axe . . ."

That view he repeated in a guidebook of the Petroleum Exploration Society of Libya, written in 1967 : "The North-South Axis is of great significance in the tectonic and paleogeographic history of Tunisia. It formed the eastern boundary of the Atlas zones . . ." That same view has been repeated by Professor Burollet in recent articles in 1974 and 1978. It was reassuring to find that both Dr. Lazreg and Professor Laffitte referred to the north-south axis as the western boundary of the Pelagian Block, so perhaps they share Professor Burollet's view of its importance as a boundary. But there is, apparently, a conflict between Professor Burollet's published views and the Tunisian Scientific Study of which he is a co-author. The conflict disappears, however, when one grasps the simple fact that Burollet was treating the north-south axis as a *tectonic* boundary. Of course, if you ignore the tectonics, and concentrate purely on the old, sedimentary strata, you will find some evidence of continuity across the north-south axis. In contrast, if you take the newer sediments, or even look at the type of the older sediments, there will be no real continuity, because the Pelagian Block was always a deeper basin than the area to the west – a deeper basin here than in Tunisia to the west. And that is why the Block area has, for example, the clays and muds and Tunisia the limestone. You will remember the distinction Professor Laffitte made between the hard rocks to the west of the north-south axis and the soft rocks to the east (**IV**, p. 539). Thus if you take tectonics or new sediments or the type of older sediments, your transversal argument is destroyed. But if you take the high and the low zones, and nothing else, you have a plausible argument. And that is exactly what Tunisia has done. It is what one might call a "judicious"

selection of the evidence. Now it remains to see exactly how that judicious selection has been done.

The Court adjourned from 11.15 a.m. to 11.35 a.m.

Now the crucial transverse in the Tunisian argument is the line of Chotts – for it is these that are alleged to extend into the Gulf of Gabes. Yet two of these, the Chotts Djerid and Rhassa, were viewed by Burollet in an earlier article, in 1956, which we have in the Libyan Counter-Memorial **(II)**, Annex 84, as an extension of the south-Aurès Trough in Algeria. So, in Professor Burollet's earlier view, the Tunisian Chotts are an extension of the Algerian feature – further west. Now the Chott el Djerid is the largest of these Chotts and it therefore merits particular attention. The Tunisian thesis, of course, is that it is an area of subsidence : hence the link with the Gulf of Gabes. In fact, Libya has submitted to the Court in the Libyan Reply **(IV)**, Annex 11-8, a specific study by Messrs. Richards and Vita-Finzi which shows that, on the contrary, the Chott was in communication with the sea 30,000 years ago and has since been uplifted by between 48 and 90 metres. So that it is now no longer subsiding. But the conclusion which emerges from all this is really remarkably straightforward. Of course there are some similarities between the Chotts in Algeria, and Tunisia, and the Gulf of Gabes. All this strip, right along the coast, right along the North African coast was in ancient times the submerged continental shelf, accumulating similar sediments. So, obviously, you will find some evidence of continuity in these ancient sediments. But the continuity is convincing only if you simply ignore the lack of continuity in the tectonics, or the newer sediments, or in the question of type of older sediments.

Now, the transverse in the centre, the high zones or "moles" from Kasserine to Kerkennah equally show an east-west trend only in a very limited sense, being based on the old sediments. As Dr. Ankatell has shown (Libyan Counter-Memorial **(III)**, Ann. 12A, Figs. 2-4), the dominant tectonic trends are, to the west of the north-south axis, north-east to south-west, and to the east of the north-south axis, they are north-west to south-east. The Tunisian interpretation of these trends as east-west is simply not tenable once you look at anything other than the old sediments.

Second, we have a Tunisian argument that the facies maps – the maps showing the different sedimentary deposits – support this east-west trend. The suggestion is that the marine facies in the Pelagian Block correspond with those found in Central Tunisia and have little affinity with those on the Libyan landmass or the African Plate. The point is purported to be demonstrated on Tunisian Map ES-11. It is essentially the same argument as the first, because it, too, relies on the continuity of the old sedimentary deposits.

And to be accurate, the picture is not quite so uniform as Tunisia suggests. If the Court will refer to Dr. Ankatell's study (Libyan Counter-Memorial **(III)**, Ann. 12A), during Jurassic times the trends in the sedimentation are not strictly east-west but rather north-west to south-east.

However, the essential point is that the data on which the whole Tunisian argument about transversals and facies is based really shows only one thing. And that is that the original coastline of the African Continent ran roughly east-west, with what is now Tunisia for the most part submerged by the sea. The importance of the configuration of the original coastline can hardly be exaggerated. For the continental shelf was built up to the north of it, with great layers of sediment being laid down parallel to the coastline, in the same way

every shelf is built up. Of course there are sedimentary affinities between Tunisia and the shelf. Tunisia is mostly emerged shelf. And it lies along the same sediments that run east-west, parallel to the ancient shoreline. But what that shows is simply that this is a shelf lying to the north of the continental landmass ; a shelf pulled out, northwards, from that landmass ; a shelf which is a prolongation of the continental landmass to the south.

Then there is a third argument. Tunisia suggests that the horsts and grabens – the highs and lows – in the Pelagian Block are by age related to Tunisia, and not to the Sirt Basin. Specifically, Tunisia suggests that those in the Pelagian Sea are Miocene, while in the Sirt Basin they are Cretaceous. But, as Dr. Ankatell has shown in the Libyan Counter-Memorial (**III**, Ann. 12B) the Pelagian grabens are probably reactivated grabens, dating from the Mesozoic period, and hence no younger than those in the Sirt Basin. The main point, however, is not the age, but the cause of these features. The evidence is that these Pelagian horsts and grabens are the result of rifting. They were created when the African and European Plates pulled apart. They are the product of the same forces that created the Sirt Basin rift system and which are very different from the anticlines and synclines, the highs and lows, in Tunisia, which are the result of the folding or compression of the Atlas mountains when the plates closed, and not the rifting that occurred when the two plates separated. Of course, the formation of these horsts and grabens in the Pelagian Block was not instantaneous, and some variation on age is to be expected. But the important point is that what caused them was African, i.e., Libyan tectonics, the "rifting" process : and not Atlasic or Tunisian tectonics due to a quite different process of compression and folding.

Fourth, Tunisia alleges the existence in the Pelagian Block of certain salt-walls which correspond to those found in Tunisia, but which are not to be found in Libya. These salt walls are said to coincide with the elusive *rides* of Zira and Zuwarah.

Now salt-walls result from salt tectonics. The initial formation of marine salt deposits presupposes, obviously, areas of land – salt flats – covered by shallow salt water and subject to evaporation. Gradually a thick deposit of salt is formed, but then, as the sea retreats and leaves dry land, or conversely becomes much deeper, different layers of sediments are piled on top of the salt. These later sediments may be sand, shale or limestone. But because of the difference in density or plasticity, the salt layer, which is of lower density and relatively fluid, pushes up, breaking through the sedimentary layers to form a wall or dome ; rather like mud oozing up through cracks in a pavement, or to take Professor Laffitte's image, like lava breaking through the superjacent structures.

This break-through of the salt will tend to occur where there is a weakness, such as a fault, in the overlying sediment. As Dr. Ankatell has shown, in the Libyan Counter-Memorial, Annex 12B, the most likely cause of the salt domes off the coast, in the Pelagian Block, was the faulting caused by the same tectonic evolution as can be seen right down into the Sirt Basin. As Dr. Ankatell graphically says, the likely origin is "Libyan Style" tectonics. The memorandum by Professor Fabricius – Annex II-5 to the Libyan Reply (**IV**), – reaches the same conclusion.

Now this process of the formation of salt-walls can happen anywhere – and does. In the North Sea, for example. The fact that it also happened in Tunisia really signifies nothing. For faults exist in Tunisia and thus have allowed the break-through of salt domes. But when one looks to the origin of the faults, the event that triggered off the break-through movement, one sees

that it was Atlasic faulting in Tunisia – quite different from the earlier faulting which allowed the break-through in the salt in the Pelagian Block, and which was part of the Sirt Basin system.

But, says Tunisia, the age of the salt-walls is contemporaneous with the Tunisian salt domes, not the Sirt tectonic system. This, I am afraid, is speculation. The evidence relied upon by Tunisia is drawn from surface deposits, and if the geological dating of the salt-walls is taken from the deeper, underlying strata, the age can be argued to be the same as for the Sirt Basin system in Libya.

And then, finally, we have the Tunisian bathymetric argument. This appears to be the central argument of the whole Tunisian scientific case. It is, essentially, that the Pelagian Block was once part of Tunisia but is now submerged. The bathymetric contours are said to follow the shape of the Tunisian coast, representing "terraces", ancient shorelines, which the sea has reached at various stages of its invasion of Tunisia.

The picture is fanciful and very far removed from the actual evidence. So let us look at the evidence.

Both Parties agree that the bathymetry really has its origins in the geological history of the region. This emerges with extreme clarity from the Tunisian Scientific Study, that is Counter-Memorial (II), Annex I, page 32, where the Tunisian Study says this : "The real causes of the bathymetric configuration of the Pelagian Block remain profoundly geological and structural in character."

In fact, as we have seen, Maps ES-11 and ES-12 of the Tunisian Annex I show us the depths, not of the present sea-bed but, on the basis of seismic soundings, of deposits at the top of the Miocene and the top of the Mesozoic – that is to say, ES-11 is between 7 and 10 million years ago and ES-12 is about 75 million years ago.

So at least we have got away from the present contours of the sea-bed ; and these maps essentially abandon the argument that the present bathymetry is the significant evidence. This is clearly right, for the sea-bed's contours are often very impermanent, being subject to movement by tidal currents, so it could never be safe to deduce an affinity between a shelf and a mainland by such ephemeral evidence.

But does this deeper, seismic evidence in fact support the Tunisian bathymetric evidence ? In fact it does not. As we have already seen, those Maps ES-11 and ES-12 go to support the transversals argument I referred to earlier, not the bathymetric argument. The Tunisian bathymetric argument really appeals to the superficial similarity between some, not all, of the bathymetric contours and the general outline of the coast. But, as Dr. Vita-Finzi will demonstrate to the Court later, and as Dr. Fabricius will also, these echoes are not entirely faithful to the coast. Moreover the really significant bathymetric features are tectonic in origin. It was to demonstrate that point that in the Libyan Memorial we reproduced that map of the tectonic trends with the bathymetric contours superimposed on a transparent overlay. In fact, the coastlines have, at different times, moved their location on the Pelagian Block : but in no definite pattern, and certainly not always facing towards the east. So this idea of a succession of terraces, facing eastwards and reflecting the Tunisian coasts is not tenable. And the *falaises*, of which so much has been made, is a tectonic and not an erosional feature, and it never was a true coastline.

The truth of the matter is that Tunisia is really asking the Court to look at the evolution of this area in the wrong sequence. It is not that Tunisia was submerged in the east – as Tunisia says – but rather that Tunisia rose in the

west. Permit me to explain in simple terms with the help of this model (II, p. 242, para. 233).

Originally the coastline ran roughly east-west, so I have the coast with me, the land with me, and the shelf pointing towards the Court. Now all of it was part of the African Plate. At that stage there was no doubt that the shelf lay to the north of the landmass. Then, under the tremendous pressures of the collision between the African and European Plates, the African Plate buckled, thrusting part of the shelf upwards to form what is now Tunisia. The shelf lying north of the original coastline was both elevated in the west and depressed in the east. And that is why in the Pelagian Block you now find it shallow in the west and deeper towards the east.

Nothing has changed the essential relationship between the landmass and the shelf. Of course, the upthrust Tunisia changes. Plate movements piled up the Atlas mountains, on top of the original shelf, here in the north. But the Pelagian Block – this area – remained as it always had been : a shelf to the north of the main landmass lying here to the south. And it did not somehow become a prolongation to the east of this newly emerged landmass which is now Tunisia. It remained, as it always had been, a prolongation of the main African landmass to the south. And that, Members of the Court, is essentially why Libya maintains with confidence that the shelf is – as it has been since ancient geological times – a prolongation to the north of the adjacent African landmass.

I would now like to summarize very briefly the Libyan scientific case, and then examine the Tunisian criticisms on that case. Now the detailed case is explained in the written pleadings, so I shall only restate the basic propositions, and I will confine my remarks to the propositions relating to the affinity between the Pelagian Block and the landmass to the south.

We have, *first*, the basic proposition which I have described earlier : the shelf area along the whole North African coast, and including this particular area, originally lay to the north of the landmass. The evidence for this can be (108) seen in Figure 6 of the Libyan Reply (**IV**). This is not, I believe, seriously disputed by Tunisia despite what Professor Jennings has said about its speculative character. In fact their own facies data confirm this basic proposition, and Professor Laffitte was able to date these shorelines quite precisely (**IV**, p. 533).

Second, Libya says that the whole weight of the tectonic evidence shows that Tunisia was lifted up out of the sea and the Pelagian Block tilted very slightly northeastwards without disturbing the essential relationship of the Block as a projection to the north of the landmass to the south and part of the African Plate.

Confirmatory evidence of this is plentiful enough. In the Libyan Counter-Memorial (**II**), Annex 12A, you have Dr. Ankatell's study – it shows the facies maps where the bands of shallow water types are succeeded by bands of deeper water types as one moves northwards from the coast. So the sea gets deeper northwards, establishing this pattern of marine sedimentation.

The evidence that the shelf was formed to the north of the main African landmass is not however confined to the facies maps, and I would refer the Court to the study by Columbia University, a study by a group of scientists led by Professors Pitman and Ryan, which is Annex II-6 to the Libyan Reply.

Now this study applies the science of plate tectonics to the problem of determining how a continental shelf was created. In particular, it demonstrates the application of a particular technique which shows in which direction the lithosphere – the earth's surface or crust – was stretched during rifting. It

shows how the shelf was gradually built up, and it shows, most importantly, from which landmass the shelf was pulled or stretched during rifting. Indeed, if by natural prolongation we are concerned to enquire which landmass is prolonged into and under the sea, then this technique demonstrates precisely how, and in what direction, that prolongation occurred.

The technique is based upon a number of known elements.

First, the lithosphere or earth's crust thins out as it is pulled apart during rifting and it thins out in the direction of the pull. So, if we can identify the direction in which the crust thins out we identify the landmass from which a particular shelf area was pulled during rifting.

Second, this "thinning out" is followed by subsidence which occurs in two phases. The first phase of subsidence is called tectonic subsidence and this occurs as the crust drops to restore the equilibrium between the main landmass and the stretched lithosphere. You may visualize the entire lithosphere as a floating mass, floating on the aesthenosphere : a mass light in density at the top, heavy at the bottom. And as the light crust is stretched and thinned, so it drops, allowing the weight of water on top to produce equilibrium with the unstretched, heavier lithosphere on the landward side. The thicker it is, the closer to the original landmass and the less subsidence occurs ; the thinner it is, the closer to the edge of the shelf and the greater the amount of subsidence. And the progression from thick to thin shows the direction in which the original lithosphere was stretched. In geological time, this first phase is completed very quickly. Once completed, there begins a second phase which lasts much longer, and during which sedimentary deposits gradually build up on top of the crust which has subsided. And the weight of this accumulation of sedimentary deposits – some 5 to 6 kilometres in the Pelagian Block – causes yet further subsidence of the crust.

Now we are only interested in the first-phase subsidence : the "tectonic" subsidence. The reason for this is that we need to know what happened to the crust itself, and we are not concerned with the accumulation of sediments. It is the crust alone that interests us because our aim is to find out where it is thick and where it is thin, because that will tell us in which direction the crust was stretched, or pulled out of the adjoining landmass. And, since the amount of tectonic subsidence is directly related to the thickness of the crust – the thinner the crust, the greater the subsidence – that subsidence gives us the essential information we need.

Our only problem is to eliminate the effect of the sedimentary, second-phase subsidence so as to isolate and identify the degree of early tectonic subsidence. Now this is done by the process called "back-stripping", described in the Columbia Study. It really consists of taking each sedimentary layer in turn – stripping it back, as it were – and calculating where the level of the crust would have been had it not been for the additional weight of that layer. And thus eventually, having taken each layer in turn, we arrive at a true calculation of the tectonic substance.

Third, and finally, having isolated the true tectonic subsidence of the crust, we know exactly where the subsidence was greatest, and we know its relative thickness over the shelf area. And we therefore know in which direction it was pulled, from which landmass it was extracted or prolonged during rifting.

(112) Now the Columbia study chose three wells, with locations, which are shown on Figure 9 in the Technical Annex II-6 to the Libyan Reply **(IV)**, which you have, I think, in your folder. As you will see, these wells are in a line running west to east. Now if, as Tunisia contends, the shelf was a prolongation eastwards, then the tectonic subsidence would be greater and the

crust thinner as you moved eastwards. In technical terms, the B value, the measurement of the extent of thinning, would be higher as you moved towards the east. Members of the Court, this did not prove to be so. The Columbia study is quite clear in its conclusions. As it says on page 10, "this is not the case". Now this is not theory. This is a scientific conclusion based upon analysis of data from actual well drilling, and there is, therefore, clear scientific evidence that the shelf is not a prolongation eastwards.

The remaining question is, is the shelf a prolongation in a northerly direction, as Libya contends ?

Well now, the Columbia study does not attempt to answer that question by the same technique ; in fact, it could not do so for that would have required a line of wells stretching northwards towards Sicily, and we have no such wells. But the Columbia study was able to conclude that, during rifting, the direction of the pull was north-northeast, and this conclusion was reached, not by the technique I have just described, but by reference to the relationship well established and commonly found between the fall-line, the hingeline, the coastline and the edge of the shelf (it is this pattern – fall-line, hingeline, coast and edge of shelf).

Now, this is a pattern of structures, a series of parallels, common to most continental margins. You find this series of parallel zones or structures, and the Columbia study, at Figures 4 and 5, demonstrated this pattern along the North American Atlantic seaboard. Now the direction of the rifting or "pull-apart" is always at right angles to the hingeline, to these parallels. And let me emphasize that this pattern of structures does not depend upon the science of plate tectonics. It can be established by traditional geology.

In the situation before the Court there is no doubt about the line of the Permian hinge, or the line parallel to it marking the edge of the North African continental margin. They are portrayed here, on this map – there you have your hingeline, there you have your coast, up here you have the edge of the margin, those are your parallels. Thus, as the Columbia study concludes, it is certain that the direction of the "pull-apart", the direction in which the crust was stretched during rifting, is at right angles to these lines in the direction which leads north-northeast. Now what that means is that this area in the Pelagian Block is the crust which was pulled or stretched out of the landmass here to the south.

I might mention one other important point about the hinge zone. As the Columbia study shows, this is a normal feature of a continental margin. But it does not mark the edge of the continent and it does not, as the Tunisian pleadings argue, mean that the landmass to the south of the hinge zone is different from the shelf to the north. The hinge zone is simply the line along which the lithosphere – the earth's crust and upper mantle – began to be stretched and thinned during rifting. But, on both sides of the hinge zone, it is the same earth's crust, the same landmass.

Now the evidence about the linkage between the tectonic trends in the Sirt Basin and the Pelagian Block is clearly of quite a different kind. It points to the same conclusion, but it is different. And the Court will not, I know, be misled by the Tunisian comment at paragraph 4.9 of the Counter-Memorial (II), that Libya falls into a contradiction in arguing that the shelf is a northerly prolongation, but has shown tectonic trends running to the northwest. The statement that the shelf is a northerly prolongation is a statement about the location of the shelf in relation to the landmass and its geological continuity with it. As I have just explained, during rifting the shelf was pulled out of the main lithosphere lying to the south. Now the tectonic linkage between the fault

zones in the Pelagian Block and those in the Sirt Basin show something quite different. There is no contradiction. So let me continue with the evidence and explain. The detailed tectonic evidence is set out in Annex II to the Libyan Memorial (I) and also paragraphs 263 to 274 of the Libyan Counter-Memorial (II). What it shows is that, as the African and European Plates pulled apart, a rift system developed which runs up the African Rift Valley, into the Sirt Basin and then swings northwestwards into the Pelagian Block. The rift is not the same as the line along which the two plates separated, and the edge of the continental margin was formed. There is no single, unique rift caused by plate movements. Quite often there are other rift systems, lines of tension and stretching within the plate, quite apart from the line of rifting at the outer edge of the plate. This is a common enough phenomenon. You will find rift systems in the North Sea, down the Rhine Valley, in West Africa, and in East Africa running tangentially away from the line of rifting at the edge of the plate. So there really is no contradiction between showing rifting which created a stretching of the crust to the north, to form the continental shelf, and showing a second separate rifting within the plate along a direction running north-northwest from the Sirt Basin. So far as this second rift system is concerned, the tectonic continuity is unmistakable and again it confirms the view that the Block is an extension of the main African landmass. As I indicated earlier, the Tunisian demonstration that evidence of Atlasic trends intrude into the Block in no way undermines the basic truth of this assertion.

The Tunisian counter-argument really rests on their theory about the significance of the Permian hinge running along here. In fact Tunisia virtually concedes that, but for this feature, the Permian hinge, Libya would have a good case. So it is important that we understand the significance of this fault line.

The Tunisian Scientific Study (II, Tunisian Counter-Memorial, Ann. 1, p. 16) implies that the Libyan Memorial (I) itself in Annex II, Plates 1 and 2, confirms the fact that this hingeline separates two fundamentally different geological domains, and that to the north of the hingeline the mass is no longer part of the African Continent. That view totally misinterprets those features and represents, I am afraid, a lack of understanding of the normal relationship between a hingeline and the shelf beyond it.

The true position is explained in the Columbia study. It is that the hingeline is the line along which the stretching of the lithosphere began, as I have previously explained. The thinning out produced subsidence and that created a fault line, as it does in most continental margins. But this in no way impaired or altered the geological identity and continuity between the mass to the south and the Pelagian Block to the north. Plate 2 from Annex II of the Libyan Memorial shows this quite clearly, that is in your folder and if you examine that figure in your folder, you will see the hingeline identified along here, and, as the Court will see, the strata are identical on both sides of the hingeline. The strata you observe are, of course, the sedimentary deposits on top of the basement – the stretched crust. And because the basement has subsided, as a result of thinning, the sedimentary deposits become deeper or thicker as you proceed out towards the edge of the shelf in a northerly direction. The Court will recall how Professor Laffitte repeatedly recognized that the sediments become thicker to the north.

Now it is at this juncture that I can best comment on the statements by Professors Morelli and Laffitte. It is clear that the Tunisian case rests heavily on their statements. And their distinction as scientists is beyond question.

It became clearer and clearer, as their statements progressed, that neither

Professor Morelli nor Professor Laffitte was talking about natural prolongation in the sense used by this Court in 1969 and adopted by the law. Neither was talking about the progression from continental landmass, to continental shelf, and to the edge of the continental margin. They were both talking about continuity, *laterally*, between the sedimentary formations *along* the continental shelf.

Let us focus, for a moment, on what Professor Morelli said about the Permian hingeline. The Court will recall that he stated that the area to the north – the Pelagian Block – was geologically fundamentally different from the stable, African landmass to the south. And he had no hesitation in finding a lateral continuity between the Pelagian Block and Tunisia to the west. But, clearly, what Professor Morelli has in mind is the undoubted, lateral continuity between one part of the sedimentary deposits on the shelf and the adjoining part of the shelf. And look at Professor Laffitte's discussion of continuity on **IV**, page 550, he is using it in exactly the same sense.

May I revert to the diagram I have used previously to illustrate the normal, and undisputed, sequence or progression from landmass to shelf? We have this sequence, in parallel zones: stable landmass; fall-line; hingeline; coastline; and the edge of the shelf. Now this is the fall-line, hingeline, coastline and the edge of the shelf. This is the normal progression in continental shelves throughout the world. It is not peculiar to the North American Continent or to the Mediterranean, but it is the same progression that you find off the North African coast.

Now there is no doubt about the location of the stable African platform, and the continental landmass; or about the location of the hingeline here (map,
(77) **IV**, Libyan Reply, Fig. 1), and you remember that its continuation further to the west was identified by Professor Laffitte as the south-Atlasic accident. You will recall that he spoke of the same lineament which stretches from the Atlantic to the Red Sea (**IV**, p. 538). There is equally no doubt that the Pelagian Block and Tunisia to the west, were at one time both submerged shelf: today, of course, Tunisia has emerged, and the Block remains submerged. Remember Dr. Stanley's clear statement about "the emerged portion of eastern and central Tunisia" and the "submerged adjacent Pelagian sea-floor" (**IV**, p. 524).

So we can put in the outlines. There is emerged Tunisia and the still submerged Pelagian Block. Now obviously, you will find similarities in the sedimentary rocks between Tunisia and the Pelagian Block. They were both parts of the shelf and, laterally, there is obvious continuity. And this is the Tunisian "transversals" argument.

But the crucial question is: "What has that to do with natural prolongation of the continental landmass?" Continuity, or linkage, between one part of a shelf and another – which is Professor Morelli's concept – is totally different. But he is not merely talking about something quite different from natural prolongation, he is going in the wrong direction – he is going across the shelf, instead of from the landmass at right-angles to the hingeline, out towards the edge of the shelf or margin. Indeed, in the sense in which both Professor Morelli and Professor Laffitte are using the concept, there never could be natural prolongation from continental landmass to shelf. Because if they say the stable landmass on the one side of the hinge (and the sedimentary deposits on the other side of the hinge, and the sedimentary deposits on top of the shelf on the other side of the hinge) are different and therefore there is no natural prolongation from one to the other, we reach the quite extraordinary conclusion that there never can be natural prolongation from the landmass across the hinge on to the shelf. So we reach the quite extraordinary

conclusion on Professor Morelli's thesis that you will never find natural prolongation from landmass to shelf. Now something is clearly wrong, and so, too, with Professor Laffitte's views.

What is wrong is not their science. Let me make it absolutely clear – I do not question the scientific knowledge or integrity of these two distinguished scholars. What is wrong is that they have not understood, I'm afraid, the sense in which natural prolongation has been used in the context of the legal institution of the continental shelf ; or, in other words, what the lawyers have meant by "natural prolongation".

You will, naturally, find "continuity" along one sedimentary structure as you go parallel to the hingeline and the edge of the shelf. These structures, these layers, were built up at the same time, usually by the same sediments. And, obviously, if one part of the shelf is later raised out of the sea – as Tunisia was – the continuity will still be there. But surely that is not what the Court meant by the natural prolongation of the landmass, into and under the sea ? That prolongation implies that you move, not parallel to the landmass, but at right angles to it, and at right angles from the hingeline, in exactly the wrong direction in terms of the analysis by Professors Morelli and Laffitte.

Now much the same difficulty arises with the frequently repeated Tunisian proposition that since Libya, Tunisia and the whole shelf area are part of the same African Plate, you cannot have a direction to its natural prolongation. You find this in Dr. Lazreg's statement (**IV**, p. 503) and you find it picked up by Professor Virally in his picturesque imagery of everyone being in the same ship and all going in the same direction (**IV**, p. 555).

Now the continental landmass and the adjoining continental shelf are *always* on the same plate. The shelf is the stretched part of the continental crust. And if you say that, for this reason, you cannot talk of a direction to the natural prolongation, you are really denying that the Court's concept of natural prolongation has any meaning at all. For I have no doubt that this Court did envisage a progression, a direction, in which the continental landmass was continued into and under the sea.

Now, without repeating what I said in relation to the statements of Professor Morelli and Professor Laffitte, let me simply say that Dr. Stanley's statement raises similar problems. Can it really be thought that by "natural prolongation" we mean no more than the direction in which a shelf may have been tilted ? For tilting, towards the east – or more accurately north-east – is all that it is. And all those complex "drainage" patterns are really nothing more than that. I refer of course, to the Tunisian Folder Figure 59 – perhaps best recalled as the bathymetric chart with a bad attack of varicose veins. And the Court will note that we are not dealing with an argument that the Tunisian landmass drained away into the shelf. For Professor Morelli made it quite clear that the transport of land sediment has been minimal : sedimentation in the shelf area is marine in origin (**IV**, p. 507). So neither Tunisia nor Libya can make out an argument for the shelf sedimentary deposits being their landmass, washed out to sea.

Of course, if the Tunisian argument was that the Malta-Misratah Escarpment, this feature, to the east was the true slope, beyond the shelf, going down to the deep ocean bed, being further east in the Ionian Abyssal Plain, we might have a more substantial basis for the idea of natural prolongation towards the east. There is just a hint of this argument, especially in the Tunisian oral argument, in the oral statements made by the Tunisian scientists. But the scientific fallacies in such an argument would really be insurmountable. For how could we then explain the extraordinary phenomenon of the edge

of the shelf at right angles to the hingeline ? Or disguise the fact that the Malta-Misratah Escarpment is not a slope at all, but a fault, or perhaps the result of the rifting process having ceased earlier in the east than in the west ? In any event it is not a continental slope.

How could we explain the fact that, whilst complex, the area of the Ionian Abyssal Plain is not oceanic crust – the deep sea-bed – it is continental crust ? If the Court will examine Figure 28, produced by Professor Morelli, you will see quite plainly that the Ionian Abyssal Plain is continental crust. And how could we explain away the fact that, as Professor Laffitte kept reminding us, the sedimentary deposits get thicker towards the north, as you move away from the hinge-zone – evidence not conceivably consistent with the edge of the shelf, and the slope, lying to the east ? Indeed, the argument is exposed in all its error by Dr. Lazreg. Listen to what he says of the Malta-Misratah Escarpment :

> "To the east of the flexure, the bowl of the Gulf of Sirte is essentially a continental rise physiographically prolonging the Sirte Basin in the direction of the Ionian Abyssal Plain." (IV, p. 501.)

Now, let me mark those last words well : "prolonging the Sirte Basin in the direction of the Ionian Abyssal Plain". If rise there be, it prolongs the Sirte Basin in the direction of the Ionian Abyssal Plain. Now that is Libyan territory, with a prolongation to the north. There is nothing there about the slope and rise being a prolongation towards the east of the Tunisian landmass lying far to the west. The truth of the matter is that, if you want to argue that the Malta-Misratah Escarpment is a slope you have insurmountable problems. And yet there are fewer problems if you look for the slope where the slope should be, to the north of the Pelagian Block.

I can perhaps now summarize by stating the Libyan answers to the three questions I posed at the beginning.

First, we are concerned with a delimitation within the area of the Pelagian Block.

Second, the shelf area within the Block is an area of fundamental continuity, both geologically and geomorphologically.

Third, it is the natural prolongation of the landmass to the south.

Now, evidently, those answers do not in themselves resolve the problem before the Court. For the Court is requested to guide the Parties on the principles and rules which should govern delimitation, and also on the method to give effect to those principles and rules. So, inevitably, we are bound to take the use of the scientific evidence yet a stage further and ask : "does it help us to determine the principles, or rules, or even the methods which will provide the correct delimitation in law ?"

Both Parties have answered this question affirmatively.

Let us examine, first of all, the Tunisian answers.

The first Tunisian method rests on what Tunisia regards as important geomorphological features. We think they are trivial. But let us set that aside and try to follow the logic of the method. I have some difficulty with this but I hope the Court will bear with me.

We are told by Professor Morelli that the Tripolitanian Furrow is one of the two salient geomorphological features of the entire Pelagian Block. Professor Virally agrees. For him it is the true natural frontier. It is this feature which he compares with the Norwegian Trough and he says "the thalweg of this valley . . . constitutes a true natural submarine frontier" (IV, p. 560). Now we

know where that thalweg is. The thalweg is this line here. I have sketched it already very faintly in blue. It is marked very clearly for us on Figure 17, produced by the Tunisian side, and we have no quarrel with that. It runs parallel to the Libyan coast.

But does the Tunisian method follow this thalweg ? Not at all. It takes off along a line cutting across it, following the so-called *ride* de Zira, along this line. We had best forget about the *ride* de Zuwarah and concentrate on Zira.

Now Professor Virally says we follow the *ride* de Zira down the slope to the 400-metre isobath which would take us about there. But then we have a problem. It is too close to the Libyan coast. As he says with disarming frankness : "Le Gouvernement tunisien a considéré, cependant, que cette isobathe se rapprochait de trop près des côtes libyennes en ce point" (**IV**, p. 607). So, what is to be done ? The answer given by Professor Virally is that we must obey the commands of equity and choose, instead, the 300-metre isobath.

So, when all is said and done, it is equity, not geomorphology which dictates this line. And, after that, we go straight over to the Melita Rise, for reasons which are not entirely clear to me.

And so we come to the second method. This, we are told, is a simplification of the first method. The method is to join the terminal point of the land boundary with the centre of the Ionian Abyssal Plain. It produces a straight line rather than a sinuous line, a line going somewhat like that. Its foundation is said to lie in Article 76 of the draft convention which, it is said, embraces the idea of a progression from shelf, to slope, to rise. There are serious difficulties in this reasoning. The first is that Article 76 has nothing to do with boundaries between neighbouring States. The second is that Article 76 says nothing about abyssal plains and yet the whole purpose of this second method is to adopt a progression towards the Ionian Abyssal Plain. The normal progression is from shelf, to slope, down to rise, and then to the deep sea-bed where one finds oceanic crust instead of continental crust. There is no necessary correlation between the deep sea-bed and an abyssal plain. The existence of such a plain, or its location, is largely fortuitous, as the study by Dr. Emery, one of the world's most distinguished geologists, demonstrates : you will find that demonstrated with extreme clarity in Annex II-9 of the Libyan Reply (**IV**). What Dr. Emery's study does show is that abyssal plains are features of the oceanic crust and they are not features of the continental margin. Their relationship to the margin is fortuitous. These plains are simply deep ocean-floor areas where the overlying sediments are thick enough to completely bury the volcanic hills which are found throughout the ocean bed. They are depositional, not structural features, and, whether they exist at all or what shape or position they assume, depends on the currents deep in the ocean and the amount of sediment available. Many continental shelves have no abyssal plain beyond them ; some have plains which stretch, elongated, over hundreds of miles with no centre to which lines of delimitation could conceivably be drawn.

If we may concentrate on the Ionian Sea, our scientific advisers tell us that (40) in the area embraced by map No. 2 of the Tunisian Memorial (**I**) there are in fact 45 abyssal plains large enough to be identified from the contours. The Ionian Plain identified by Tunisia is, in fact, two plains separated by the Medina Bank, and this can be seen quite clearly on Tunisia's own map which (27) is Figure 5.23 of the Tunisian Memorial.

But perhaps the main point is not the accidental nature of the location and shape of these plains, but rather the fact that they can tell us nothing about natural prolongation. For natural prolongation has to do with the geological

and geophysical unity between the shelf and the landmass : it concerns their structural relationship. The question which way the shelf has been tilted is really quite irrelevant to this. In the present case, there is no dispute that the Pelagian Block is very slightly tilted to the north-east. But that accident of tilting in no way affected the structure of the shelf or affected its relationship to the landmass.

I have, so far, confined my comments to the scientific deficiencies of the Tunisian methods. There are of course objections of a different kind, objections of legal principle. There is, so far as I am aware, no basis for this method, either in law or in State practice. And, in this particular case, the Tunisian method would produce the most blatant encroachment into the Libyan shelf, a result which is patently inequitable. But these objections of legal principle will be explained by my colleague, Mr. Highet, in due course, so I shall say no more about them.

I think that concludes all I need say about the scientific evidence drawn from geology, geomorphology and physiography. It remains for me to say something about geography.

Now, Libya of course accepts the view expressed both by this Court and by the Anglo-French Arbitration Tribunal that natural prolongation has its geographical aspect. It is probably the case that the geographical features are easier to comprehend than the geological and physiographical, if only because they are more apparent to the eye from an examination of the maps.

The essential difference between the Parties lies in the view they take of the Tunisian coast. Tunisia asks the Court to concentrate on its so-called "east-facing" coast – for the reason that this fits in with its thesis of an eastwards prolongation into the shelf. That is the real reason. Of course Tunisia has a different ostensible reason – the alleged geographical, historical, economic and ethnological unity of the Gulf of Gabes. But it is pure fiction. As we have shown in Annexes 1, 6 and 13 of the Technical Annexes of the Libyan Counter-Memorial (III), it is the Jeffara Plain – the whole area along this north-facing coast, extending into both Libya and Tunisia, which is the unity – not Gabes.

In contrast, Libya invites the Court to concentrate on the Tunisian coast lying between Ras Ajdir and Gabes.

In Libya's view, this approach to the geographical configuration is justified for a variety of reasons.

First, this is a substantial stretch of the Tunisian coast, to the east of Ras Ajdir, and, more importantly, it is the coast from which, consistently with the geological evidence, the shelf extends.

Second, if one takes the whole Tunisian coast relevant to this delimitation, that is to say from Ras Ajdir to Ras Kaboudia, the stretch from Ras Ajdir to Gabes is the only stretch consistent with the general trend of the African coastline. The coastline north of Gabes is something of an anomaly in the context of that coastline.

Naturally, Tunisia rejects this characterization of its coast as anomalous, and rejects what it describes as Libya's use of macrogeography. But, whether something is anomalous or not can only be tested by reference to the general pattern : that is why Libya feels entitled to ask the Court to look at the whole North African coast, to establish the general pattern. You cannot apply the test simply by looking at the particular locality. And, as to the Tunisian argument that the North African coast does not in any event have a generally east-west trend, well, I can only say that we are content to let the Court reach its own conclusion, simply by looking at the map.

There is, in addition, one further element to support Libya's description of the coast north of Gabes as anomalous. The geological history of the coast supports that view. As I described earlier, the ancient coastline, at various times did run broadly east-west, through the area of Gabes. Tunisia to the north was submerged shelf, subsequently lifted out of the sea by formidable tectonic forces. Therefore it is not unreasonable or unrealistic to describe this part of Tunisia as anomalous, by comparison with the North African coast as a whole.

Now, the third reason is that, as we have explained in the Libyan Counter-Memorial (II), the Tunisian coast around Gabes turns through almost 90°. Now with a coastline at right angles the two coasts necessarily abut on to the same area of shelf : it simply cannot be otherwise. So, if the shelf area is viewed as the prolongation, in geographical terms, of the coast, one is forced to ask the question "which coast" ? It cannot be *both* coasts if the concept of prolongation implies a sense of direction, because the same shelf cannot go in two directions. It therefore makes sense to view the shelf as the geographical extension of the same coast from which it is the geological extension. Particularly so when this is the coast where the land boundary lies. Now, this brings me to the fourth and perhaps most compelling reason.

The fourth reason is simply that, with the land boundary at Ras Ajdir, one must necessarily start the delimitation from that coast. Whatever method of delimitation one uses, this is the coast from which one starts and this is the coast which is going to control the delimitation. And, if you start from Ras Ajdir, moving west along the Tunisian coast, and suddenly, at Gabes, turn through 90°, what else is that but an anomaly ?

What then, is the significance of the Tunisian coast north of Gabes ? Let me say, to begin with, that it would be wrong to regard this as a simple north-south coast, facing east. It is, in fact, multi-directional because of the concavity of the Gulf and the thrust north-eastwards of the Sahel promontory. One can, it is true, construct a general north-south axis by looking at the general direction of the entire Tunisian coast north of Gabes : and Libya has done this, in its Counter-Memorial on page 200, simply for the purpose of ascertaining the degree to which the Sahel promontory constitutes a change in the general direction of the Tunisian coast. But to describe the actual coast as north-south, or east-facing, would be simply inaccurate.

Taking the coast with all its complexities and directional changes, we see little reason to take up the time of the Court with a detailed commentary on the concavities of the Gulf or the relationship between the Kerkennah Islands and the Sahel formations or even the distinction Tunisia sees between the Kerkennah Islands and the Scilly Islands. I say this because, in fact, none of these features really affects the delimitation. Given that neither Party accepts that equidistance as a method can produce an equitable result, these features no longer control any line of delimitation, so there seems little to be gained from discussing them.

There is, however, one exception, and that is the Sahel promontory itself. We gave very careful consideration to the whole configuration of the Tunisian coast, and, in the result, we concluded that the Sahel promontory was a feature large enough and important enough in the configuration as a whole, to warrant reflection in any scheme of delimitation. It was a feature sufficiently dominant to require reflection, as part of the application of the geographical aspect of natural prolongation. And that is why, in the proposed Libyan method, we caused the direction of any line to change from north to north-east – to veer roughly at the parallel of Ras Yonga.

It is in that way that we see geography influencing the method. That method will be explained in detail by my colleague, Mr. Highet, so I need say no more.

But how does Tunisia see geography affecting the delimitation ? I confess I do not find it easy to answer that question. Clearly the two methods I have already described – the line of crests and the line of direction towards the abyssal plain – have their origins in geomorphology rather than geography. There remain only the two variants of the so-called geometric method. These do depend upon the actual, or more usually hypothetical, configuration of the coasts, so I suppose one is entitled to consider these methods as flowing from the Tunisian view of geographical natural prolongation.

Libya has already submitted a detailed commentary on these methods as Annex 8, of the Counter-Memorial (**III**), and a summary commentary on pages 183 to 188 of the Counter-Memorial (**II**). I will spare the Court a repetition of that, and say only this, simply to emphasize what we believe to be the fundamental defects of those two extraordinary methods. They have, to my knowledge, no basis in law or State practice. They proceed on the basis of a selection of coasts which is arbitrary and incorrect. They distort the direction of those coasts, so that the figures bear little resemblance to reality. They produce what purports to be an equitable allocation of shelf areas by an equally arbitrary selection of those areas – for example including areas already delimited as between Italy and Tunisia, and areas which could only be properly delimited as between Malta and Libya. Now in the Tunisian Reply (**IV**), Annex 12, Tunisia has castigated the Libyan comments on the Tunisian geometrical methods for their obsession with areas. Apparently, or so we are told, the methods are concerned with distances, with coastal lengths. Yet several of the diagrams – Figures 9.05, 9.06, 9.07, 9.09, for example – are quite clearly concerned with areas. Indeed, it could scarcely be otherwise if we are concerned to apply the test of proportionality, as a guide to the equity of the result. For proportionality is a ratio of coastal lengths to areas of shelf. So we make no apology for our obsession with areas. We are also castigated for deforming the Tunisian diagrams by inserting parallelograms where none were intended. But look at the sequence of Figures 9.09 to 9.10. The first justifies the translation of the bissectrice from the angle of the apex of the triangle to the actual frontier, by reference to areas enclosed by parallelograms. Figure 9.10 applies the same method – but without the parallelograms – to the actual coasts in this case. All we have done is to complete the sequence by adding the parallelograms – with the somewhat extraordinary results that our adaptation of Figure 9.10 reveals. The Tunisian Reply has done nothing to cause us to revise our criticism of these methods, nor has Professor Virally's exposition. I have no wish to take up the time of the Court with a repetition of that criticism in detail.

But let me invite the Court to consider certain defects which, I submit, invalidate the whole geometrical exercise. Now, let us start with the simple diagram used by Professor Virally (**IV**, p. 611). We start with a simple right-angled coast, with two coastal lengths A and B. Let us not concern ourselves with whether they belong to one or two different States. Let us just think of them as coasts, coasts which have a natural prolongation – an area of shelf which should appertain to those coasts. Now, in this area it is agreed by both sides that an equidistance line, a bisector, would produce an equitable result. And, clearly, that must be so ; the two lengths of coast face into the same area of shelf. They prolong into exactly the same area. They both cannot have the same area, they must share it. If they have equal coasts they share it equally.

Now, let us take the exercise a stage further. If we extend the coasts and place the frontier here, then we are told what we must now do is to transfer that bissectrice from that point, the apex of the right-angle, to here, to produce that line. Now, why is that? What is the logic behind transferring that bissectrice. The Court will see immediately what has been done. What has been done is that this length of coast, if you like Gabes-Ras Ajdir, which previously was equitably satisfied with this area, is now no longer satisfied but demands compensation, equitable allocation further to the east. Here.

What that method does, of course, is notionally to transfer the Tunisian coast some 70 miles eastwards as if the actual Tunisian coast went like that. Once again you would get something like the situation in which the bissectrice would be an equitable solution. But that is only by dint of notionally transferring the Tunisian coast 70 miles to the east and of course excluding this whole area from any calculations of proportionality. This whole area is deemed, as it were, to belong to Tunisia and not to be counted for questions of proportionality, to the east of this line.

Of course, the problem is what do you do with this length of coast since a good deal of the shelf area in front of it has now, by this method, been allocated to this coast. Of course the answer is you compensate this length of coast by slanting that across and you give to this length of coast a share of shelf in front of the next length of coast. So each length of coast gets its equitable allocation only by dint of having its area slanted over and being compensated by an area of shelf in front of the next coast along. And of course you can carry on doing that for quite some time until you come to a third State X.

And if there is another boundary here you can be quite sure that the third State would object vociferously to having this State compensated in relation to this acquisition by giving to this State an area of shelf which lies in front of State X's coast. You simply cannot compensate by shifting over the areas all the way along the coast.

And, of course, if there is yet another State somewhere in this area then the problems become even more acute and the objections to this method become even more self-evident.

Now, I don't need to comment on the second geometrical method. The second geometrical method is simply a variation of the first. The only difference is that this line instead of being the bissectrice, the equal division of that angle, is a line which divides the angle in the ratio of the two lengths of coast. So that you take that coast over that coast, which gives you ratio, and then you divide that angle in the same ratio. That is the only difference. Basically, it is the same method and of course it is subject to exactly the same objections as this transfer of the bissectrice.

In conclusion, I invite the Court to accept that the Libyan view of the scientific evidence is basically correct. We are dealing with a single, continuous shelf; and it is a shelf which prolongs the landmass northwards. And, on that view, the Tunisian methods of delimitation are really quite untenable. Conversely, that view of the matter does provide a sound basis for devising an alternative method, and that alternative method will be explained to the Court in detail by my colleague Mr. Highet.

The Court rose at 1 p.m.

TWENTY-SECOND PUBLIC SITTING (7 X 81, 10 a.m.)

Present : [See sitting of 29 IX 81.]

The ACTING PRESIDENT : Please be seated. The Court has learnt with sorrow of the death of President Sadat of Egypt and has expressed to Judge El-Erian, a national of Egypt, the deepest sympathy of all his colleagues. I ask all present to rise and stand for a minute of silence. We may resume our seats.

Professor BOWETT : May it please the Court : we would wish to offer two statements. The first of these will be by Dr. Vita-Finzi, who teaches at London University and is a graduate of Cambridge University. Dr Vita-Finzi has done extensive field work in Libya as well as in Tunisia, and he is the author of *The Mediterranean Valleys* and many papers on the geology of the Mediterranean and the Near East. The second statement will be by Dr. O. S. Hammuda, one time Chairman of the Geology Department at Al-Fateh University, Tripoli. Dr. Hammuda gained his B.Sc. Degree in geology and mathematics at the University of Illinois and his Masters Degree and Ph.D at the University of Colorado for his work on the geology of Libya. He worked for four years in oil exploration in Libya and served as Minister of Dams and Water Resources in 1976-1978. He is now Technical Adviser to the National Oil Corporation of Libya and that corporation holds well-logs and other borehole data as well as the geophysical records obtained by oil companies engaged in oil exploration on land and offshore. He is also the author of a number of papers on the geology of Libya. The Registrar's letter of 6 October asked for an indication of the points to which Dr. Fabricius's evidence will be directed and of its relevance to the issues in the case. Dr. Fabricius will describe the geological evolution of this area of continental shelf and explain the importance of the shorelines. It is highly relevant to the relationship between the landmass and the shelf. He will then discuss tectonics in relation to the Pelagian Block and the boundaries to that Block. Then he will comment on the Tunisian "transversals" argument and bathymetry and on the models and block diagrams used in the pleadings. Both Parties have made much of these so their relevance is clear. Then he will comment on the various features alleged to be on the shelf – Tunisian Furrow, *les falaises sous-marines, les rides de Zira et de Zouara*, and the Tunisian "terrace" argument. Again the relevance is clear from the pleadings. He will then deal with the Ionian Abyssal Plain, the feature on which one of the Tunisian methods is based and finally he will say a brief word about the Columbia Study which is cental to the Libyan argument.

STATEMENT OF DR. VITA-FINZI

EXPERT FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Dr. VITA-FINZI : Mr. President, Members of the Court : it is an honour to be allowed to address you and a privilege to speak in this case. My task is to discuss certain matters that bear on the recent geological evolution of the area. For this, we have to rely on bathymetric charts, boreholes, sediment samples and other data sources all of which, as Professor Bowett has observed, require some measure of interpretation.

Without a body of theory interpretation is of course impossible. One needs some kind of predictive or explanatory skeleton on which to hang one's findings and to know where and how to look for more information. And without new or at least revised theories, science and technology stand still.

I take it no one scoffs at atomic theory because it is a theory, or at the theory of relativity because it was born in the mind rather than in a calculating machine. And I take it no one denies that our understanding of nature has benefited from the explanatory power and predictive power of these and similar bodies of theory.

Now plate tectonics is less ambitious, and the ideas it embodies have still to be elaborated ; but they have invigorated geology beyond recognition. They have also proved their practical value to economic geologists and seismologists, among others. And they are constantly being adjusted in the light of field observations, in the Mediterranean Sea not least through the distinguished work of Professor Morelli and his associates.

Professor Laffitte quoted from a report of the International Union of Geological Sciences and the International Union of Geodesy and Geophysics to the effect that we cannot explain how plates move, that plates are not invariably rigid, and that the links between field data and their explanation is often either conjectural or unclear. I fear he did not quite convey the spirit of the report, which spoke highly of the success of the theory in unifying the interpretation of previously unrelated and diverse observations. Indeed, the questions summarized by Professor Laffitte amounted to a research strategy designed to plug some of the gaps. It is gratifying to note that the two international bodies responsible for the report helped to sponsor the symposium on the structural history of the Mediterranean Basins held in Split in 1976 on which the Libyan Counter-Memorial drew for many of its arguments.

More trivial, perhaps, but still disturbing, is the misunderstanding displayed by some of our distinguished Tunisian colleagues, in the Tunisian delegation, of the phrase "northward thrust". To anyone familiar with colloquial English it denotes direction not necessarily linked to movement. The stairway of this building thrusts into the garden without actually sliding across the lawn. The African Plate points north and that, rather than its motions, is what the phrase signifies.

Now, this brings me to the eastward thrust depicted by the Tunisian team in the bathymetric and topographic evidence that underlies much of their case.

In an attempt to demonstrate the intimate connection between Tunisia and the sea to its east, great play has been made of the alleged parallelism between the modern coast and the isobaths, or contours, offshore.

(101) A glance at Map 2.03 of the Tunisian Reply which we display here, shows that many depth contours are in no way parallel to the coast. Take for example the 200-metre isobath, which here protrudes, and here it moves towards the west in direct opposition to the coast. Here it moves eastward where the Tunisian coast is directed towards the west. This isobath clearly reflects the grabens or subsiding blocks of the Fosse de Jarrafa and the Fosse de Zohra. These depressions can be traced into the so-called Plateau Tunisien. The Fosse de Jarrafa in particular is prolonged by depressions which are clearly visible on the Tunisian map.

In short, the horst or ridge topography that we see in this zone is a product of processes operating here – faulting processes – rather than a reflection or an expression of the Tunisian mainland to the west.

Moreover even west to the 200-metre isobath, which I have just followed, we find that there are bathymetric trends that depart from any east-west projection from the land. Take, for example, the depression between the Kerkennah Islands and the mainland which runs north-east-south-west and which in fact is a reflection of tectonic trends that are manifested on the islands themselves.

Again, we were told that the "drainage channels" derived from such isobaths lead inexorably to the east. The chart reproduced as Figure 59 [1] in the Tunisian folder and which is here on the board, suggests that some parts of the shelf are characterized by internal drainage ; for example, here we have a closed depression into which the drainage lines flow. Now, if we correct the map by eliminating channels which could be said, as depicted there, to be running in two directions at the same time, we see that the drainage to the west of this point is internal and the drainage to the east is restricted to the zone off the Libyan coast, at and east of Ras Ajdir.

In addition to that, we might observe that the bulk of the area to the west of the 200-metre isobath drains towards the north, towards the linear depressions that both sides accept as lying close to the northeastern margin of the Pelagian Sea.

Now this leads on to the question of former shorelines. Professor Laffitte has said that ancient geographies are fanciful although he himself made brilliant use of ancient shorelines in his exposition. At all events his warning came too late. His colleague Dr. Stanley, and the authors of the Tunisian Memorial before him, bemoaned Tunisia's loss of land to the rise in sea level that marked the close of the last glacial episode. Tunisia, they claim, lost more than Libya and presumably they imply by this that it should be correspondingly compensated.

(17) The Tunisian Memorial presented a map (Fig. 5.08) which was in the Tunisian folder and is in our new folder [2]. This allegedly represents the shoreline at the peak of the last glaciation 15,000 years ago. The sources on which the shoreline map in the folio is based is that fine volume *La mer pélagienne* which was providentially published by the University of Provence in 1979. In that volume the authors indicate the presence of sands and gravels at depths of between 100 and 250 metres. The authors of those reports suggested that some of the sediments might have slipped down to their present position and that others might have accumulated along an ancient shoreline. Let us now look at the Tunisian folder, Figure 61[2], which is also in our new folder. This shows shifts in the position of sea-level over the last few millennia

[1] Not reproduced. (See IV, p. 512, footnote.)

[2] Filed 5 October 1981. Not reproduced. (See IV, p. 512, footnote.)

on the basis of points each representing a dated sample for which we have an age, which is the x-axis, and a depth, which is the y-axis. Now, these points are derived from all parts of the world and they include areas which are actively subsiding. The present depth does not necessarily correspond to the depth at which they formed. In other words, the graph and the envelope of depths derived from it, will give an exaggerated impression of the maximum depth to which the sea fell 15,000 years ago. But, let that pass, what is clear from the diagram is that even at the maximum it did not reach the 150 metres which is alleged in some presentations of this figure and in fact the sea-level is given by the authors of the diagram as having lain somewhere between 70 and 130. Let us accept 130. Even then the sands that lay between 130 and 250 below sea-level escaped the waves. The line of cliffs or *falaises* which is present in Figure 5.07 of the Tunisian Memorial and shown here on the board would have lain 50 or more metres below the lowest position of sea-level.

The fact that these *falaises* are structural, as can be seen in the *fosse* or grabens of those two locations is clear and is endorsed by the fact that the alignment of the *falaise* does not follow the contours as a coastline would. And, it is reassuring to find this inference supported by the sea-level evidence. The *falaise* cannot represent a continuous former shoreline.

But let us see what the ancient topography was like.

The main scientific source drawn upon by the Tunisian spokesman for this work is that same collection of papers, *La mer pélagienne*. This volume includes a series of radiocarbon dates on deposits in the offshore zone, including the so-called Gulf of Gabes. And what we have done in this figure, which comes from the Libyan Counter-Memorial, is to plot the depth of ages corresponding to the boreholes and indicate whether they are less than 16,000 years old or more, so as to indicate where the topography of the sea floor lay 16,000 years ago. We have interpolated this line between ages which are less than 16,000 or more than 16,000 ; and what this figure seems to demonstrate is first that when the sea level dropped to its maximum low level of 130 metres, it did not expose this area, and therefore it demonstrates that that area could not have been submerged again when the sea-level rose.

The second point which we derive from this information is the topography of the sea floor now, which is this eastward sloping zone here, which is very different from what it was at the time, which is perhaps less undulating than shown here, but certainly has no general eastward slope. If anything it has a north-south grain. In short, the drawing of old shorelines on the basis of bathymetric data relating to the present day begins to look distinctly unconvincing.

Now what of coastal Tunisia ? In the Chott Jerid, where lake deposits and lagoon deposits are allegedly present, we recently found, in March of this year, that the beds in question are rich in the oysters living now in the Mediterranean Sea. As Professor Bowett recalled yesterday, radiocarbon dating of these oysters gave a result of between 25,000 and 35,000 years ago. The conclusion one must reach is that the Chott was, at that time, linked to the sea. In short, its shoreline represented a return to the east-west alignment of the coastline that has typified the North African coast for much of its history.

Now these sites lie at 40 metres above sea-level. The sea 30,000 years ago lay 40 metres or more below its present level. It follows that that part of what the Tunisian side calls an axis of subsidence, and which it links to the Gulf of Gabes in contradiction to what Dr. Pierre Burollet has been saying for many years, this axis of subsidence is seen to have risen by at least 80 metres in the last 30,000 years. That is a rate, an average rate, of 2.5 millimetres a year. In

(22) short, the Tunisian transversal argument, which is summarized in Map 5.18 of the Tunisian Memorial (I), is here seen to be directly opposed by the available field evidence.

Doubtless the Chott did subside in earlier times, just as the Himalayas subsided before they were folded. The fact that the Chott is a basin provides no clue to its behaviour in the last 30,000 years. Morphology on land, like the bathymetry at sea, can give a misleading picture of geological history unless it is supplemented and if necessary corrected by other sources. I suspect that no jury would decide a case of human kinship on facial resemblance alone. It would turn to blood groups, which nowadays use new immunological techniques which though still exploratory are beginning to yield unambiguous answers. I therefore hope the Court is satisfied that Libya need make no apology for its use of geological data, however novel some of the techniques and concepts relied on in trying to resolve the problem before us.

STATEMENT OF PROFESSOR HAMMUDA

ADVISER FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Professor HAMMUDA : In the name of God, the Merciful, the Benevolent. Mr. President and Members of the Court : it is a great honour and privilege to appear before this eminent Court. I will speak on certain geological matters of which I have personal knowledge based on extensive fieldwork and access to the subsurface data obtained by geophysical methods, and drilling for oil and water exploration.

Data gathered from continental margins are used to validate plate tectonics and not the other way around. Features such as the hingeline, called the Jeffara Flexure by the Tunisian Memorial, the fall-line and the continental margin, which are observed geologically through the accurate drawing of cross-sections from well data like the ones shown in Annex II, Plates 1 and 2, of the Libyan Memorial (I) and in Annex II-6 of the Libyan Reply (II) conform to the principles of plate tectonics.

What in fact is found in most continental margins is a series of structures and zones that extend, basically in a parallel pattern, and which one must cross to go from the interior of the continent to the ocean basin.

These structures and zones are, first, the fall-line, where the basement is seen to drop or dip gently seaward ; then the hingeline seaward from the fall-line ; then the actual coast and the different submerged zones of the continental margin. Sediments are usually found to thicken gradually away from the fall-line towards the edge of the margin. The greatest subsidence and sediment accumulation is found seaward of the hinge zone.

This pattern is found at the southern margin of the Pelagian Basin. It does not depend for proof on plate tectonics, it is more based on observations from well data and from geophysical methods. The geological structures can be demonstrated by data from drill holes and seismic reflections as well as field mapping. These all indicate that the original Mesozoic continental margin of North Africa was developed as a north-facing margin trending east-west, facing an ocean basin to the north. This north-facing margin was developed during Late Triassic or Early Jurassic time, that is to say, 170 to 195 million years ago. The position of the shorelines along which this continental margin was developed is shown by maps submitted by Libya, Figure 6 of the Libyan Reply (IV), as well as by Tunisia, Plate ES-5, Annex I, of the Tunisian Counter-Memorial (II). The Libyan figure has been enlarged and placed on the easel. It is also contained in the folder of each judge as Figure 3. This is the same figure Professor Bowett referred to in his statement.

It is quite clear from both the Tunisian and Libyan maps that the original continental margin originated to the north of the landmass. Zones of elevation and subsidence were developed on the rim of the African Continent parallel to the gross features of the coast. These zones are of African affinity and form part of the north-facing margin. Any east-west or west-east trend is the result of the fact that the older sediments were deposited parallel to the coastline. However, it is interesting to note that these older sediments also reflect a progression seaward from thinner sediments in the south to thicker sediments towards the north.

It is widely accepted that the whole region now occupied by the Atlas

mountain ranges was part of this north-facing continental margin on an east-west trending coast. This region was elevated out of the sea when the Atlas mountains were formed, and now it constitutes part of the Alpine folded belt.

Therefore, we can say that the north-facing continental margin of North Africa west of a line extending roughly from the Gulf of Gabes to western Sicily was involved in the collision between the African and the European Plates during tertiary time with consequent overprinting of the margins, creating a zone of overlap between two tectonic domains. An enlargement of (104) Figure 2 of the Libyan Reply shows this zone. To the east of this line collision between Africa and Europe has not yet occurred and the original normal sequence of the continental margin : fall-line, hingeline and shelf, can still be recognized as is evident from the cross-sections included in the Libyan (47) (48) Memorial (I), Annex II, plates 1 and 2, and the Libyan Reply (IV), Annex II-6, (113) (114) plates 10 and 11. These cross-sections are based on well data and seismic reflection profiles, not theory, and they also confirm that we are dealing with a shelf lying to the north of the African mass. Progression in sedimentary thickness towards the north is also evident. Both Professor Morelli and Professor Lafitte arrived at the same conclusion in their oral pleadings (IV, pp. 520-522, and 537-538).

It is also clear from the cross-sections and as is described by the Columbia University study (IV, Libyan Reply, Ann. II-6), that :

> "while the hinge zone is a major structural boundary, it does not mark the edge of the continent. Rather it separates basically unaltered continental crust from originally similar continental crust which was thinned, extended and heated during the rifting process."

If you look at the cross section in the Libyan Memorial (I), Annex II, Plate (48) 2, on which we have indicated the position of the present shoreline (it is this figure and that is the position of the present shoreline, and this towards the sea, and that towards the land : we indicated that by a red arrow at the top of the figure – this figure has been displayed and mounted on the easel) you will see complete continuity from land to sea best reflected by Quaternary and Miocene sediments deposited in the interval between 25 and 6 million years ago. In addition, older sediments are faulted, but present on both sides of the hinge zone.

Take, for example, one of these bands here. It is present here, on land, and on the hinge zone, and it is present also offshore here as being covered by the normal faulting in this area, contingent to the salt tectonics.

I now wish to turn to the question of whether the northwest-southeast trending fault bounded depressions (or grabens) depicted so clearly in the Pelagian Sea by the authors of the Tunisian Memorial are, as we submit, closely related to those of the Sirt region. The map placed on the board behind (85) (89) me is on plate 5, Annex II, of the Libyan Memorial (I) also Figures 15 and 19 of the Libyan Counter-Memorial (II). You will recall that the suggestion was submitted by the Tunisian Counter-Memorial and Tunisian Reply on the grounds that the two sets of faults are of different age – that is to say the faults in the Sirt basin and the faults in the Pelagian Block – and that they have different orientations.

First, let me speak about the age of the two systems ; both areas (the Pelagian Basin and the Sirt Basin) yield evidence of rifting at least as far back as mid-Tertiary time. The continuation of these movements into the Quaternary in the Pelagian Sea has been demonstrated by Winnock and Bea in the collection of papers edited in *La mer pélagienne*. University of Provence

Publication, 1979. Also Conant and Goudarzi of the United States Geological Survey, and authors of the first modern geological map of Libya, suggest that movement in the Sirt Basin started in the late Cretaceous and continued at least intermittently to the Miocene, and perhaps to the present.

Second, I come to the geometric relationship between the two sets of faults. As the figure shows, the lineaments lie on a curve rather than a straight line, but the continuity between them is clear. In parts of the Sirt area the alignment is closer to north-south than north-west-south-east. This alignment echoes one of the most ancient African tectonic trends and thus reinforces the case for seeing the fault pattern as a direct link between the Pelagian Sea and the continental mass to the south.

It has been clearly indicated in the Libyan written pleadings that the North African region is characterized by two main tectonic systems ; the Atlas Fold Belt west of the north-south axis and the Sirt Basin Rift System. The Atlas Fold Belt consists of folding and overthrusting caused by compressional forces which are typical of the Alpine domain. In contrast, the Sirt Basin Rift System consists of block faulting (horst and grabens) caused by extensional forces. This system is the dominant structural trend in both the Pelagian Block and on the Libyan landmass.

EVIDENCE OF PROFESSOR FABRICIUS

EXPERT CALLED BY THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

The ACTING PRESIDENT : The Agent of the Libyan Arab Jamahiriya has indicated that it is his intention [1] to call Dr. Frank Fabricius to appear as an expert within the meaning of Articles 63 and 65 of the Rules of Court, and has furnished the information required by Article 57 of the Rules [2]. No objection has been made under Article 63 of the Rules by the Agent of Tunisia. The Court will, therefore, hear the expert witness and for the guidance of the Agents and counsel of the two Parties, I propose to indicate the broad lines of the procedure to be followed for that purpose. Counsel for Libya has already indicated to the Court this morning the points to which the expert evidence of Dr. Fabricius will be directed and the particular issue or issues in the case in which that evidence is said to be relevant. Dr. Fabricius will take his place at the speakers' desk and will make the declaration laid down in Article 64 of the Rules of Court. He will then first be questioned by counsel for Libya. On completion of that questioning, counsel for Tunisia will be entitled to cross-examine. On completion of the cross-examination, an opportunity will be afforded counsel for Libya for a brief re-examination which should so far as possible be limited to points arising out of Dr. Fabricius' answers to counsel for Tunisia. It will probably be convenient for any questions which Members of the Court may wish to ask to be put to Dr. Fabricius between the cross-examination by counsel for Tunisia and re-examination by counsel for Libya but in this respect we shall be guided by events. I shall in any case ask that Dr. Fabricius remain available for possible further questions by the Court or its Members following their study of his evidence in the verbatim record. I now invite Dr. Fabricius to come to the rostrum and address the Court.

Professor FABRICIUS : Mr. President, Members of the Court. I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth and that my statement will be in accordance with my sincere belief.

Professor BOWETT : Would you please tell the Court your full name.

Professor FABRICIUS : Dr. Frank Fabricius.

Professor BOWETT : Now I am going to read out the details of your present appointment and your professional background and I want you to interrupt me if anything I say is incorrect.

I understand you are the Head of the Institute of Geology and Mineralogy, and acting holder of the Chair of Geology at the Technical University of Munich and Director of the Marine Geological and Sedimentological Division of the Institute.

You are the Chief Delegate of the Federal Republic of Germany at the "Commission Internationale de l'Exploration Scientifique de la Méditerranée" and you are Vice-President of the Commission.

You are a member of the Geological and Marine Geophysical Committee of the same Commission, and a member of several international and national geological and sedimentological societies.

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[1] See *infra*, Correspondence, No. 86.

[2] See *infra*, Correspondence, No. 113.

You were a member of the Scientific Staff aboard the US Drilling Vessel *The Glomar Challenger* (Leg. 42A, Mediterranean Sea) in 1970 and have been on other scientific cruises. And you have published a number of articles on topics concerned with the geology of the Mediterranean area. You hold the diploma in Geology from the Technical University of Munich. You are a Doctor of Science of the same University and you possess the Habilitation from the Technical University of Munich.

Now Dr. Fabricius, as a scientist, are you familiar with the Mediterranean ?

Professor FABRICIUS : Yes, I am.

Professor BOWETT : More so than with other maritime areas ?

Professor FABRICIUS : Yes, indeed, I virtually spent my entire professional life as a scientist in studying the Mediterranean Sea.

Professor BOWETT : Well now, could you describe to the Court the origin and evolution of the continental shelf area in the general area of the central Mediterranean – and by that I mean the area off the shores of both Tunisia and Libya ?

Professor FABRICIUS : Could I get a general map please ? – of the entire Mediterranean ?

Of course, this evolution of the Mediterranean Sea is very complex and has to be abbreviated here, but it goes as follows.

The general area covered by the present Mediterranean Sea was over a long period replaced by another sea, an ocean which we in geology call Tethys. This ocean was much larger than the present Mediterranean Sea – it had a size perhaps comparable to the present Atlantic Ocean, or part of it. A principal feature of this Tethys Ocean it that is was a long west-east extended ocean and I should say that a more detailed description of this history is contained in a memorandum which I prepared and which is set forth as Annex 11, Volume III, to the Libyan Counter-Memorial.

Between 60 and 20 million years ago – what we, in geology, call the Tertiary time – the Tethys Ocean began to experience a series of major transformations ultimately becoming what is now the Mediterranean Sea. This process continues today as evidenced by the many earthquakes in this area.

What one must visualize in understanding the development of this area of the continental shelf – what we call the Pelagian Sea in the centre of the Mediterranean Sea – is this. There were two huge continental masses – Eurasia, a complex of Europe and Asia to the north, Africa to the south – both virtually floating separately on a mobile layer below the earth's crust. They were like two giant icebergs colliding and at different times drifting apart. It was these forces that caused the transformation of the Tethys into the, what we now call, Mediterranean Sea. These forces formed the Atlas mountains (here, in the Maghreb area) and also the Alpine mountain ranges, almost surrounding the total Mediterranean Sea.

The African continental shelf developed as a north-facing continental margin sometime in the period of about 170 to 195 million years ago. The northern limit of the coastline at that time was located generally to the north of the African Continent and, of course, it was oriented to the south of the present Libyan coastline, running about east-west across Tunisia and Algeria in, as I said, a generally west-eastern direction. Most of what is today Tunisia was part of the continental shelf to the north of the African landmass which trended east-west. Similarly, the present Jeffara Plain and most of the Pelagian Block constituted continental shelf to the north of the African landmass.

The degeneration of the Tethys Ocean culminated in what is now the Mediterranean area becoming a series of salt lakes and islands. The Pelagian Block was barely covered with water. This period was between about 7 and 5 million years ago and, if I may say rather young for geological evolution. Then about 5 million years ago the Strait of Gibraltar opened and water flowed in to establish the Mediterranean Sea.

During this period, the collision of the continental masses of Europe (or better, Eurasia) and Africa – what are called also the European and the African Plates – this collision set in motion compressional forces and other events that resulted in the formation and uplifting of the Atlas mountains, as I mentioned before. As part of the same process the continental shelf area to the north of the African landmass bordering the Atlas area was also uplifted, and Atlasian Tunisia virtually emerged from the sea. It was these events that resulted in the present configuration of the Tunisian coastline which formerly had been submerged continental shelf or, more accurately speaking, margin to the north of the generally east-west coast of the African landmass. This uplift above sea-level of the Atlas and of most of Tunisia took place, as I told you before, at about 5 million years ago, and I want to emphasize this is still active today in a broad sense.

The Pelagian Block remained almost unchanged. Although there have been periodic changes in sea-level during the last 5 million years, the last major drop, as we have just learnt from Dr. Vita-Finzi, was a drop of about 120 to 140 metres below the present sea-level. That occurred about 16-15,000 years before the present.

Professor BOWETT : Now, as I understand you, you are saying that at the time the continental shelf developed the coastline ran in an east-west direction and it lay slightly to the south of what is now the Libyan coast. I want you to look at this map on the board which the Judges have in their folder – it was (108) Figure 6 of the Libyan Reply. I want to put to you what Professor Jennings said about this figure on the first day of these proceedings. I refer to the Public Hearing of 16 September, IV, at page 414. He said to the Court, the Court "need not linger over the 'postulated' North African shoreline in the late Triassic period, illustrated in Figure 6 of the Libyan Reply". Now that is the shoreline on the top diagram, is it not ?

Professor FABRICIUS : Yes, that is right.

Professor BOWETT : And he went on to speak of what he called "esoteric, and speculative learning". May I ask you, how do you react to that ?

Professor FABRICIUS : Well, I believe in this respect, Professor Jennings is wrong. There is nothing esoteric about these lines. They are not speculative. As a general description of where the shorelines lay at various times, that figure is accurate and it would be accepted by all scientists in the earth science. I of course have to admit that, especially in the Sahara area (for instance here) where we do have a lot of erosion, there might be some areas which we do not exactly know the location of the ancient coastlines. They might have been some 10 kilometres, or 20 kilometres, to either side. But from evidence which we do have from this, or from that, or from both sides, we can deduce these coastlines pretty well and pretty correctly.

Professor BOWETT : Now let me just ask you to turn your attention to the other map. Now there you have portrayed the entire North African coastline. Let me ask you a very general question about the relationship of the shelf to that coast along the North African coastline as a whole. What is that relationship ?

Professor FABRICIUS : Well, in general, and we have to look here at the entire northern rim of the African Continent, we have to accept a northern direction of the margin. If we go into particular areas it is very clear no one would deny that, let us say from this area to the north, the margin is developed, no one would deny that the sequence, continent, coastlines, slope and so on, is running to the north in this area, for instance of the Sirt Basin. The same is true perhaps in Morocco and Algeria. No one would deny a northern direction of the sequence, continent, shore, slope and deep sea to the north. Now, we come to this area of the central Mediterranean Sea and there the difficulties arose that we have been told that a natural continuation, or prolongation, meaning continent shoreline and then a slope and the connection to the deep sea is towards the east. As a geologist, I am asking if this is the position – where does this change start ? Northwards prolongation was all in this area – about here – and only here do we have a different one and this I don't believe. I think here, in this area, we do have a northern prolongation exactly as I said, from here towards the north on the Pelagian Shelf. That is an important point – I want us to be quite clear.

Professor BOWETT : Are you saying thay there is no geological justification for looking at the Pelagian Sea area as an extension to the east ?

Professor FABRICIUS : No, there is no scientific justification.

Professor BOWETT : Let me ask you another question about the shorelines. Now, if I understand you correctly, in your earlier statement, you say that the Tunisian shoreline – and I refer to the Tunisian shoreline that runs from Cap Bon down to Gabes running from north to south and facing generally eastwards – is the result or the product of the formation of the Atlas Mountains and the uplift of that part of the African Plate ?

Professor FABRICIUS : Yes indeed. As I told you before, these shorelines before the uplift have been east-west and now to the north they are still east-west and we have to connect these so-called east-facing shorelines to the rather late uplift of the Maghreb area.

Professor BOWETT : These forces that produced the Atlas Mountains and the emergence of Tunisia – what effect did they have on the Pelagian Block ?

Professor FABRICIUS : Yes. Well, this is best shown on the plate here (104) which is in the folder of the Judges, and which is Figure 2 of the Libyan Reply. This map shows an important transitional area which is shaded here. That means we do have an influence of the formation coming from the main continent of Africa and extending towards the north. We do have, nevertheless, a certain influence of this mountain formation coming from far to the west, in this area here around Cap Bon and so on. Here we have in this dark shading an interfering of both tectonical systems I might say. Here we do have already some of the Atlasic tectonics but they are still dominated by what I would call African tectonics in this area here. Further to the northwest it is an intermediate area where, in some places certainly, the folding takes the style of the Atlasic mountain ranges, stronger than the other areas.

Professor BOWETT : So we have a significant boundary then along the line of that Atlas Fold Front ? Is that correct ?

Professor FABRICIUS : Yes. It is certainly not a line, it is a zone of transition but it is very significant.

Professor BOWETT : Now, in the course of the pleadings on both sides another feature has been mentioned and that feature is the north-south axis. On this map before you – the map of the Pelagian Block, that is Figure 1 in

the Libyan Reply (IV), Annex II-8 – the north axis is shown. Would you identify it and then tell the Court what is the importance of that feature ?

Professor FABRICIUS : The so-called north-south axis is this axis which is running down here from an area around Tunis down almost to Gabes. It was established by Professor Burollet. He showed that the nature of this axis is a major geological one although it is not a feature as obvious as the Malta-Misurata Escarpment but it is marking the limit – the western limit – of the Pelagian Block. So this Pelagian Block – and here both Parties are in agreement – is bounded here to the west at this north-south axis.

Professor BOWETT : So that is the western boundary of the Pelagian Block ?

Professor FABRICIUS : Correct.

Professor BOWETT : Are you familiar with the scientific arguments in the Tunisian written pleadings ?

Professor FABRICIUS : Yes, I am. I have read them several times with attention.

Professor BOWETT : Now I want to ask you about what I would describe as the Tunisian "transversals" argument. I think this is perhaps illustrated best (22) by the map we have now put upon the board, that is Figure 5.18 of the Tunisian Memorial (I). By "transversals" I mean the Tunisian argument that there are a series of east-west links – in the north the low zone, from the west running through towards Malta ; in the centre this high zone from the Mole of Kasserine through the Mole of Kerkennah and running through to the Plateau of Melita ; and then in the south this low zone running through from the Chotts in the west right through the Gulf of Gabes into the so-called Tripolitanian Furrow. That is what I mean by the "transversals" argument. What I want to ask you is simply this : as a scientist, how do you react to that argument ?

Professor FABRICIUS : Well, I think this argument is valid but only in a very limited sense. I cannot agree with the Tunisian claim that the west-east transversals really establish a link between a continental shelf and the continent itself except in a certain sense that the Pelagian Block and central and northern Tunisia had a unique – I would say – uniform history before they were a submerged continent, as part of that shelf. This part stayed mostly submerged, rising in rather young times afterwards. So, there are differences ; there are similarities, of course. But besides the similarities as, for instance, Professor Laffitte said, there are also real differences and the argument of the transversals thesis fails on other grounds as well.

For instance, there is a depression, as Dr. Vita-Finzi already told us, in this direction between the mainland of Tunisia and the Kerkennah Islands. But even more important there are depressions and as we have been told by Professor Morelli, my distinguished colleague, we have a rather important depression going down to almost 400-metres which separates the so-called Tunisian Plateau from the Melita Plateau. So there are differences even on a large scale, and on big structures.

The pronounced northeastern-southwestern direction which I have pointed out here west of Kerkennah is certainly not in agreement with the straight running east-west axis of a major structural formation and the same is true for this area.

The Court adjourned from 11.23 a.m. to 11.45 a.m.

Professor BOWETT : Professor Fabricius let me now turn to what I would describe as the Libyan thesis. Now, the Libyan pleadings describe this shelf area as an area of fundamental geological continuity. Do you agree with that view ?

Professor FABRICIUS : Yes, I do. This is consistent with a normal prolongation, with a normal progression from a landmass across the hingeline (landmass, hingeline, here) to the shelf and to the deeper sea and out to the edge of a continental margin. It is opposite to the idea that the continental margin would be at this area, and it is inconsistent with the continental margins at the other areas of the African northern coast. They are a reflection (hingeline, coastline, shelf) of the same geological feature and this is a feature which we find all over the world where we are dealing with a continental margin. We do have a hingeline, we do have a shelf, sometimes having even these transversal depressions or the basins and high zones. This depends on several geological questions, such as sedimentation and so on. It is normal.

Professor BOWETT : Let me just develop this notion of continuity a bit further. I want to look at it in terms of the bathymetric evidence. Is bathymetry within your own field of expertise.

Professor FABRICIUS : I would say my particular fields of expertise were the branches of geology and sedimentology and especially marine geology. This includes, for a large part, geomorphology and also the topography of the sea floor.

I am very familiar with the depiction of geomorphology and various means of construction of maps and block diagrams, models and so on.

Professor BOWETT : Did you prepare this model [1] ?

Professor FABRICIUS : Yes I did.

Professor BOWETT : Could you explain briefly to the Court exactly how that model was prepared ?

Professor FABRICIUS : As I stated in the Annex 5 of the Counter-Memorial (III) this block model is based mainly on a morphological, topographical map of the Tunisian part and, in addition, for the land side I took Tunisian maps published by Tunisian agencies. For the Libyan part I took an American map.

Now, the contour lines from this sea area were taken from one of the published Tunisian maps placed exactly on a sheet of plastic of a certain thickness, and by carbon paper these contour line were transferred on to a sheet of plastic. These sheets of plastic of a certain thickness, we used both for the interval of 200 metres on the land, and in the deeper areas below 600 metres. The thickness of these plastic sheets was about two-tenths of a millimetre. For the intervals of 100-metre depths which we used in this area here (which is mainly light blue) we used sheets of only half that thickness. They were put one upon the other in the exact place so they are a three-dimensional reproduction of a map.

Professor BOWETT : Do you suggest that that is a faithful model, without exaggeration ?

Professor FABRICIUS : Yes especially because it is without exaggeration, that is vertical exaggeration. It is faithful, it is more faithful than a model which is exaggerated vertically.

[1] See II, p. 242, para. 233.

Professor BOWETT : Professor Jennings made a comparison between what he described as "the extended shallow area which is found off the Tunisian coast" and the "narrow, quickly plunging area off the Libyan coast" (**IV**, p. 426). Could I ask you, could you indentify on that model this "narrow, quickly plunging area" off the Libyan coast ?

Professor FABRICIUS : Well, I am afraid I can't. To my understanding of this situation we actually do not have a quickly plunging area ; if we want to deal with something like a quickly plunging area we should go further to the east. In this area which we are concerned with we actually should not speak of quickly plunging coastal areas.

Professor BOWETT : So in fact you are going to the Gulf of Sirt before you get to a quickly plunging area ?

Professor FABRICIUS : That is right.

Professor BOWETT : Let me ask you about the two sets of block diagrams which are used in the Libyan pleadings. The first set is Figure 11 in the Libyan Counter-Memorial (**II**). The second set is Annex II-4 of the Libyan Reply (**IV**).

(81) Now the first block diagram, that is Figure 11, has come under criticism in the Tunisian Reply. In brief, what the Tunisians say is that it is a distorsion. That is because one single bathymetric point fed into the computer covers several square kilometres, so that it is like looking at the Pelagian Block from an altitude of 300,000 metres.

How would you respond to that criticism ?

Professor FABRICIUS : Well I hasten to say the diagram is not at all distorted. The data we used are data from the same source as from the Tunisian maps and these sources were indicated, for instance, in Annex 5B to the Libyan Counter-Memorial and the diagrams cannot be better than the sources. Block diagrams are, of course, a well-known, well-accepted technique for giving a realistic three dimensional view of a topographical feature. It may assist the expert as well as the layman in understanding the same data that appear on a map but which can easily be misunderstood. The area concerned, of course, is very large – it is roughly the entire Pelagian Block, including land areas. Necessarily, any block diagram, just like any map, must omit small-scale irregularities. On a map of a scale of 1:2,000,000 there is the same, so to say, smoothing effect as on a block diagram of a comparable area. For example, a 10-metre high feature would hardly appear. A map, even a bathymetric map, covering the same area as a block diagram would also be like looking down from a satellite at an altitude, as you mentioned, of about 300,000 metres. The reduction of the scale is the same. However, a block diagram permits the layman to understand what a bathymetric map says by physically showing the relief rather than relying on someone's acquired skill in the interpretation of contours.

Professor BOWETT : So, if I understand you, that diagram contains no more distortion than a bathymetric map of the same scale. Now, let me ask you to turn to the second set of diagrams. We have one of them on the board here, that is in the Libyan Reply (**IV**), technical Annex II-4 and it is, I think, in the Judges' folders. Now I take it that diagram covers a much smaller area than the first set of diagrams. Is that right ?

Professor FABRICIUS : That is correct.

Professor BOWETT : And it is, therefore, more detailed ?

Professor FABRICIUS : Yes we have used, as I have written in the annexes

– the technical annexes – about 20,000 single points to construct these diagrams. These diagrams are based on the data which was the best available at this particular time, that means we have used manuscript charts, data from oil companies' activities, and those, I think, are at the moment the best ones. They have been used as a base for these Unesco maps and, as I presume, for the Tunisian map too.

Professor BOWETT : Is there anything unusual in the way in which this has been prepared ?

Professor FABRICIUS : No, not at all. Of course, this diagram has a vertical exaggeration of ten times but, as you may recall, I also provided diagrams of no vertical exaggeration and of 25 times vertical exaggeration. They really do give good information on the morphology of the Pelagian area. And, I have to remind the Court that even the Tunisian side has provided some quite good block diagrams. Unfortunately they didn't show the vertical exaggeration which changed somewhat and I have calculated this. Some were about some 25 times vertically exaggerated and others up to 62 times. None of these Tunisian diagrams shows what exaggeration is used and this is rather important as you may know that the area without vertical exaggeration just looks like a plain, almost without any feature.

Professor BOWETT : Do you stand by these block diagrams, as legitimate and scientifically accurate ?

Professor FABRICIUS : Yes, I do.

Professor BOWETT : Now, let me turn to see what your model and your block diagrams tell us about various features, features which Tunisia has suggested are important, morphological or topographical features of the shelf. I want to take first what is called the Tripolitanian Furrow, and it can, I think, (18) be seen on the Tunisian Memorial **(I)**, Figure 5.09, which is now here on the board. It is in the Judges' folder.

Now, let me ask you – do you recall in the Tunisian pleadings the description of the Tripolitanian Furrow as an extensive low zone, running parallel to the Libyan coast line, and forming a separate morphological entity from the Tunisian shelf to the north ?

Professor FABRICIUS : Yes, I do.

Professor BOWETT : Good. Let me refresh your memory by quoting from the Tunisian Scientific Study – that is in the Counter-Memorial, Annex I : "in order to move from the Libyan coastline to the Tunisian shelf it is necessary to descend into the Furrow and then climb up its northern flank". Now, does your own research suggest that that is a correct view, that there are these two distinct morphological regions – the Furrow and then the elevated shelf ?

Professor FABRICIUS : Well, not really. This is what we call the Tripolitanian Furrow, or *Sillon tripolitain*. They do exist, of course, but the names or the terms which are given to these areas of depression and the adjacent high areas are not adequate to describe the actual feature. They are dramatizing and, I would say, as a matter of fact to me they are of no particular significance. There is a sort of zone of depression or basin, which the Libyan Memorial termed the Gabes-Sabratha Basin (which is a different term for the same feature) but it is not a "furrow" and doesn't show really a "thalweg", nor is it consistent with the definition of a "valley". These terms are used in the Tunisian Reply and I should add that these features could perhaps better be

called basins, or perhaps a continental shelf basin – slightly filled with sediment. They are quite common features but I prefer continental shelf basins.

Professor BOWETT : Now, you say they are common features. Would you find such features in the North Sea, for example ?

Professor FABRICIUS : Yes.

Professor BOWETT : I wonder whether you could point out for us on your model here where, on the basis of the Tunisian pleadings, you would assume the so-called furrow to end and then the rise up the northern face of the furrow, up to the shelf, to begin ?

Professor FABRICIUS : Well, the furrow extends here in this area, and the rise is maybe situated about in this area here – or this part here. (The Kerkennah) perhaps to the east.

Professor BOWETT : I see.

Professor FABRICIUS : They are very difficult to see. They are barely perceptible, and if you look at the first set of block diagrams which we have provided, they cannot really be seen without a very important vertical exaggeration. This is necessary. If we don't vertically exaggerate they do not show up.

Professor BOWETT : So, if you have to exaggerate them vertically to show them, presumably you would scarcely have to climb up them ?

Professor FABRICIUS : No, if I would walk across these features, I would hardly notice the incline and certainly I would not have to climb these flanks. If you go, for instance, north of Ras Ajdir over a certain distance, perhaps 100 kilometres – this is not shown on this map – you have a slight inclination. You go down about 80 metres and then you perhaps go up in the direction of Kerkennah for some distance, about 50 kilometres ; that means an inclination of about 1 in 1,400, which is not very important. Certainly nobody had to climb up on these Kerkennah Islands coming from the east. But, these figures which I just gave you are exactly the same as those which we have been presented by Professor Morelli, and he (may I be allowed to use this figure he showed to us) showed us that in several meridians we had to descend into the thalweg, which he was indicating here. I will not repeat all these figures, I take only three meridians as an example. Unfortunately, Professor Morelli has forgotten to indicate the distance. He told us that from the seacoast we had to descend to 95 metres water depth ; but this is a distance of almost exactly 105 kilometres ; and that means a slope, an inclination, of only 0.09 per cent. That means, in other terms, 1 in 1,105 or something which is very, very low gradient. And then he told us we had to go up on this ridge here – the distance here is again about 57 kilometres (we are going up to a water depth of 45 metres). Again this inclination is only less than a tenth of 1 per cent, that means 1 in more than 1,000. So, similarly, but a little bit steeper, is the case with the next meridian, that is the thirteenth meridian, which is a little bit to the east of Tripoli. This is a distance of 115 kilometres and a slope with an inclination of only 0.24 per cent equal to 1 in 410. And then we have to go on up the slope a little bit, but certainly not to climb, until a water depth of 100 metres, for exactly 56 kilometres. And this again is an inclination of 0.34 per cent. And, coming now to the last meridian, the distances are a bit smaller, only 70 kilometres. From the coast line, zero level, we had to go down to 450 metres, but nevertheless it is less than 1 per cent and equals 1 in 165. On the other hand, if we then go from the so-called thalweg to the north, we are hitting the 400-metre line, and again this means only 50 metres of difference

over a distance of 82 kilometres – quite a large distance. Here we again have a slope, or an inclination, of a tenth of what I previously described, of only 0.06 per cent, which actually is not important. I would say all these figures are typical – really typical – of a plain, not of a valley or of a sillon.

Professor BOWETT : If you describe it as a plain, could you give the Court any analogy in terms of countryside with which the Court might be familiar ?

Professor FABRICIUS : Well, you are familiar with the area here in the Netherlands and I do not exaggerate – you can look to the countryside between Amsterdam and The Hague (which actually has been at sea-level at some time ago) which is as you know *flat* – *completely flat*. The inclinations which you might find there are some bumps and very, very gradual inclinations and they are similar in this order of magnitude.

Professor BOWETT : Well, Dr. Fabricius, Amsterdam to The Hague may be quite a walk, but it is scarcely a climb.

Professor FABRICIUS : No sir, it is not.

(15) Professor BOWETT : Now let me ask you to turn to a different feature. In the Tunisian pleadings, there was a depiction on their Figure 5.07 of what were called the *falaises sous-marines* ; and these, if I may remind you, are supposed to mark the limit of the shelf-proper, before you move into the *avant-pays* or the borderland beyond. Now we have that figure there on the board, just to refresh your memory. Tunisia has also provided in its Reply some echographs. These are plates 2.01 and 2.02 and they are also on the board here. Tell me first, do you quarrel with the data which they have used ?

Professor FABRICIUS : No, I don't quarrel with the data, they are the same kind which we use in constructing sea-bottom morphology.

Professor BOWETT : Fine. What do you say about the interpretation or the use of that data on these echographs ?

Professor FABRICIUS : Well, unless you are not somewhat familiar with these features, they can be rather misleading to you. They are normal echographs. They show the bottom reflection and, as these echograms are usually made, the scale, the vertical scale, is quite different from the horizontal scale. It is, so to say, a compression of time. And the so-called *falaise*, or these slopes (which actually are not very high here in this area) seem to an untrained eye what I would call rather steep. But actually they are not. These horizontal compressions, for instance here in this area (I have repeated this here, this blue part) if you calculate the same vertical scale and the same horizontal scale it is exactly the inclination you have here on this brown wedge. Let me make it quite clear, we are dealing with an inclination here (this one) that is the same as this one here ; and this is the wedge without exaggeration. The same is true for this area here. Here I took as an example this area (repeated here) and this wedge shows the two forms of the inclination of 4° and 9°. Well, I won't repeat this for the entire business.

Professor BOWETT : Let me make it quite clear to the Court that the coloured parts on this edge are not in the original Tunisian documents but they are provided by Professor Fabricius.

Now, there is actually a description of these *falaise* in the pleadings – they are described as being in places "almost vertical". Do you see any evidence of anything "almost vertical" ?

Professor FABRICIUS : Well, these examples which have been given to us

and in addition the maps, the charts (bathymetrical charts) which were produced by both sides do not in general show anything vertical. There might be very, very few steep areas. But if we know the nature of these so-called *falaise* we would not find them remarkable.

Professor BOWETT : How then would you describe these features ? What is their significance ? – these *falaise* ?

Professor FABRICIUS : These *falaise* are not as (to say it very modestly) dramatic as it has been shown here on this map. They are very small in distance and they are, for the large part, not larger than this black line – the "teeth" here on this diagram are an artist's addition I would say, but certainly not a scientist's one.

Professor BOWETT : When you say not larger than the black line, you mean not larger in length or in breadth ?

Professor FABRICIUS : In breadth.

Professor BOWETT : I see. I am sorry to have interrupted.

Professor FABRICIUS : These *falaise* are extending, of course, for quite a long distance. They are quite important in length, but nevertheless they are not as shown in the Tunisian Memorial. They are not an erosional feature and I think Dr. Vita-Finzi showed it quite clearly that they cannot be.

Professor BOWETT : Can I ask you, are you agreeing with Dr. Vita-Finzi's view that they cannot be an ancient shoreline ?

Professor FABRICIUS : Yes, completely, Professor.

Professor BOWETT : Let me turn to a third feature. Do you recall the Tunisian contention that there exist two *rides* – these are the *rides* of Zira and Zuwarah – do you recall that ?

Professor FABRICIUS : Yes, I do.

Professor BOWETT : Now, as you understand the Tunisian pleadings, where would you say those *rides* lie on your model here ?

Professor FABRICIUS : Well, there is a little indentation on this one contour line and I think the *ride de Zira* could be situated in this area here.

(100) Professor BOWETT : Now, on Map 2.01, which was annexed to the Tunisian Reply (IV), and that is the map on the board here now, these features or at least the *ride de Zira*, appear to show up rather clearly – if I may just borrow your pointer – there. Now that shows up rather clearly. What do you say about that particular chart then ?

Professor FABRICIUS : Well the scale of this chart is 1:100,000 ; that means quite a big area. I do not quarrel with the data which are presented on this chart, but nevertheless it is not usual that on a chart of this scale to find an interval of 5-metre isolines ; usually they are less dense, but nevertheless these very dense isolines are certainly able to show a very faint, even a very faint feature here on the sea-bottom. From looking at this chart, and actually I made a cross-section here below there from this point "A" (from this point here) to this point (cross-section here). If I do not exaggerate, this is demonstrated here, but you would not see it at this distance – I barely can see the difference in sea-level from where I stand. To explain further, these are these two very thin lines and there is only a very small difference from the middle to the end. That is from the crest of this feature to these areas where we can say we have normal sea-bottom. That means I have made a slope of one metre here. These

two lines, which are very near to one another, they have a distance here at this point of only 2.7 millimetres. And that is the inclination in nature which we find when we are going up here and descending there or coming from this area. So this is not a important feature – it is not what we usually call a ridge.

Professor BOWETT : So if you treat this as a bank, and you start walking up the bank, are you saying that the incline that you move up is as gradual as the difference between those two lines on the bottom ?

Professor FABRICIUS : Yes, that is exactly the inclination we find in nature, as an average inclination.

Professor BOWETT : Well now, as a geomorphologist, and accepting the existence at least of the *ride* of Zira, how would you describe that feature ?

Professor FABRICIUS : Well as I just mentioned, I would not call it a *ride* ; it is perhaps a bank. Its extensions are quite important. This is clear. The length is somewhat about 60 to 100 kilometres – it depends on where you start this bank or where you end it. If the surrounding area is rather uniform, rather a plain (and just to describe this feature I could say this is like a dune ridge on a perfect, or almost perfect, plain) it is as we have here in our neighbourhood, between Amsterdam and The Hague. A ridge which in the middle at its centre here, is 35 metres above usual sea-level ; and the distance here is about 10-15 kilometres. That means from both sides of this crest point, if I may say so, you are going almost 5 to 10 kilometres horizontally (not literally) but at a very, very low inclination. Seeing this in nature (or being a fish, if you permit, on the sea-floor) you would not hardly see it. It is a very, very shallow feature.

Professor BOWETT : Dr. Fabricius, in the Tunisian Pleadings there is a suggestion that these *rides* coincide with salt domes. Do you think that likely ?

Professor FABRICIUS : Yes, that is right.

Professor BOWETT : How observable, as morphological features, would you expect these salt domes to be ?

Professor FABRICIUS : I just did not get your correct question.

Professor BOWETT : Let me re-phrase it. How could you observe the salt dome ?

Professor FABRICIUS : As we have been shown by Professor Morelli, there are means, especially geophysical ones, to know that there is salt below. We know these features quite well from the north of Germany, the North Sea and from other areas. And if we drill into such a feature – I don't know whether this was done here – we are hitting salt. They are well known and their nature is well known too.

Professor BOWETT : I understand. So you just rely upon drilling, on geology, and not bathymetry.

Professor FABRICIUS : No, that is right.

Professor BOWETT : Now, what inference would you draw from the fact that there are also salt domes on the Tunisian mainland ?

Professor FABRICIUS : There are, as I have made clear in my paper on Salt Structures in Annex II-5, which I have referred to earlier, these salt domes in the area of Ras Ajdir. The salt features which are in the northern part of Tunisia are quite different. I can compare it from my own experience with the salt domes which we do have as salt features in the Alps and with salt features

which we do have below the German northern area. One is a typical salt feature produced by faults. The other is produced by a mountain formation, by the folding or thrusting of parts of the mountains, and here in this case I can say these salt domes, which are off the Libyan coast, are of a type due to a block faulting. I would say that it, typically, can be compared with a block faulting in the rift zones of the African domain while the Atlasic salt domes are more Alpine and of quite a different structure.

Professor BOWETT : Dr. Fabricius, the Tunisian pleadings say expressly that these salt domes, coinciding with the *rides*, are different from the salt domes in Libya, in the Sirt Basin – is that true or false ?

Professor FABRICIUS : I don't know by my own study the salt domes in the Sirt Basin. The point in the Tunisian Memorial is that they do have a different age. I would not put too much weight on the question of whether age is important or not. It is very difficult to determine the age of salt. That is a very difficult task and, in addition, the age does not matter in this respect.

Professor BOWETT : Well, what does matter ?

Professor FABRICIUS : The feature, the tectonic, the nature – how these salt domes are connected with the normal tectonical features of this particular area.

(40) Professor BOWETT : Now, if I can just remain with bathymetry for a moment, let me turn to Tunisian Map No. 2 from the Tunisian Memorial. It is here on the board – and I would like you to really address the main Tunisian argument that the bathymetry of the shelf reflects a series, or represents a series, of "terraces" which reflect in turn the Tunisian coastline. Is that a fair, layman's description of the argument ?

Professor FABRICIUS : Yes, I suppose so.

Professor BOWETT : Does the argument have any merit ?

Professor FABRICIUS : I do not believe so. The suggestion behind the argument of the "terraces" (which are in this area here) is that they face in a so-called easterly direction ; but this has not always been so. If these "terraces" are related to a sea-level fluctuation, we must go into more ancient time. Even if we do not speak of the findings of Dr. Vita-Finzi (who just recently showed that there is a rather young coastline going east-west) in older times there has been an east-west extension of the sea-level and of the coastline. I want to recall the Ankatell Report (which is Ann. 12B to the Libyan Counter-Memorial (II)), showing that this is for instance true in the Tertiary Period. These older sediments which we are concerned with are the source of the oil and the gas, and so I think they are especially important for the case. In more recent time, the sea-bed became dry land and the Tunisian land was out of the reach of the sea. So, the maximum retreat of the 140-metre line (which might be somewhere here) could not have really produced the so-called *falaises*. Indeed they are not an indication of the sea-level itself. And, in addition to that, bathymetry, especially of the Pelagian Block which is cut by so many faults, cannot be explained only by looking at the bathymetry as a shifting of sea-levels. There is a lot of tectonic evolution which has affected especially this plateau here or this Pelagian Block and this evolution has formed a part, or perhaps most of the so-called cliffs. And these cliffs, to my understanding are not formed by the sea-level, that is to say they are not ancient coastlines. They appear in most parts (especially if they go much beyond the 140-metre line). They even are indicated here on another map which you might recall. They are

going down 200 or 300 metres which at that time was *not* touched by the sea-level.

Professor BOWETT : Let me make sure I really understand you. You are saying that the bathymetry does not reflect either the present or even past shoreline but is really the product of the tectonic evolution of the Pelagian Block ? Is that what you are saying ?

Professor FABRICIUS : Yes. I think for a good part especially in this area where the so-called *falaises* are, we do have quite a bit of morphological transformation of a former level sea-bottom. If I recall it right, one of the Tunisian Maps (Counter-Memorial (II). Ann. II, Map ES-II) showed or indicated that at the end of the Messinian time, the sea-bottom was almost flat. And now we find here indentations into the Block. This is along the contour of these lines. These contours are, where these *falaises* are, *in no way* reflection of this coast. And to my understanding the formation of these high zones is due to a complex of several features. I might perhaps take several colours to illustrate. We do have depressions without grabens, depressions which are going down. These are lower than the usual sea-bottom which we have here, on a rather flat area. You do have a depression here – the extension of this feature which is called the Fosse de Jarrafa ; and you do have these features and they may extend below the sea floor but we just cannot see it. You may detect it by geophysics. There are also depressions in this area here. We do find that these depressions here are running towards the north-west. They are related to block tectonics, to faulting. In the middle of these deep features we have positive features which go down here in a southeast direction. We have it here. So by a careful study, you can divide this entire plateau into a series of depressions, tectonic depressions and highs.

What is very interesting too, and I mentioned it at the beginning of my statement, here we have a depression going parallel to the coastline of Tunisia and the Kerkennah Islands. We have another depression which roughly goes in this northwest-southeast direction separating the Plateau de Melita from the so-called Tunisian Plateau. It has a depth of almost 400 metres, which is not so unimportant. At least I would say it is more important than the depression which we have off Ras Ajdir which is merely 100 metres, perhaps. In addition (I must make this complete) we do have an elevation here on the Kerkennah Islands which might have some relation to the Sahel area, especially as the direction of these lows and highs are similar. We do have these fault lines running like this. We do have these lines here and, if you want, the bathymetric lines are reflecting somewhat the coast of the Kerkennah Islands which is shown on the geological maps to be a tectonically controlled coast. The arguments that the bathymetric lines are reflecting the coastline are not valid, for instance, in this area here where you have a prolongation into another direction, into northeast. So, finally, we end up with a differentiation. Of course, if in an area – for instance here at the Kerkennah high – two lines of highs are meeting we certainly do have an important high area, while in others, where the lows are relatively more important, the extension of such a high is reduced. So, if we look to the morphology, with some geological knowledge of course, we can find some Atlasic directions in this area which are reflected even in the extension of the Kerkennah. We do know these graben faults which are directed to the Sirt Basin.

Professor BOWETT : What caused the bathymetry to deepen as you move towards the east ?

Professor FABRICIUS : Well, of course there might be some erosional feature, especially in the Quaternary time when parts of this Pelagian area have been exposed to the air. There might have been some erosion, probably in the southern area, certainly also in the northern area, but as the investigations of the young sediments have shown, the erosional features which perhaps have been there cannot be detected on the sea-bottom today, or not easily. I think this inclination towards the east is as well a result of the uplifting of this area in the northwest as perhaps also the descending to the basin of the Syrtis. So it certainly is not only an erosional feature ; more likely it is a tectonical feature.

Professor BOWETT : I see. Now, what about this feature which is called the Ionian Abyssal Plain ? Do you recall the Tunisian method which postulated a direction for a boundary, which proceeds from Ras Ajdir towards the centre of the Abyssal Plain ? Do you recall that ?

Professor FABRICIUS : Yes, I do.

Professor BOWETT : Can we regard this relationship between the Abyssal Plain and the Shelf as a meaningful relationship ? Is it normal ?

Professor FABRICIUS : In this particular case here the relation between the area under consideration and the Ionian Abyssal Plain has no scientific merit. Here we have the Ionian Abyssal Plain which is standing quite at the side and we are dealing with this other area. Indeed there is a little abyssal plain, the so-called Sirt Abyssal Plain, which is a little bit more to the south of the Ionian Abyssal Plain. But there are perhaps some other plains – deep sea plains – starting to descend here in this graben zone, relating to a so-called drainage pattern. Some of these little plains might be even as well related to a succession of coasts and the shelf and the abyssal plain, as in the study of Dr. Emery was quite nicely explained.

Professor BOWETT : Let me just turn to a different matter. I want to ask you about the study done by the team of scientists from Columbia University. First of all, what is the international reputation of this team of scientists and, in particular, the reputation of Professor Ryan ?

Professor FABRICIUS : I know Professor Ryan personally and I know him for quite a while. He is well known in the international world of science. The group of the Lamont-Doherty Geological Observatory have a very high reputation in marine geology and oceanography and, coming back to Professor Ryan, he has studied most of his life in the Mediterranean Sea and knows it very well too.

Professor BOWETT : Let me just remind you of the conclusion which the Columbia Study reached and that was that, not merely as a matter of theory but also on the actual evidence taken from well drillings and well data (and they took three wells remember), the Tunisian thesis that this is a shelf being prolonged eastwards is simply wrong. Now, do you agree with that conclusion or not ?

Professor FABRICIUS : Yes. If you mean by a prolongation the direction from the continent across the hingeline, a feature known in every continent almost, to the shelf down the slope and down to the deep sea, I think it is in the east-west direction, it is not a natural prolongation. It is, to my understanding of this situation, the way from the south to the north and a way from the main landmass perpendicularly across the hingeline across the shelf down to the north. So the study of Dr. Ryan, to my understanding, quite clearly demonstrates that an easterly, prolongation does not exist.

Professor BOWETT : Now the Libyan thesis is that the prolongation is of landmass across the hingeline and then in a northerly direction towards the outer edge of the margin in a northerly direction – would you agree with that thesis ?

Professor FABRICIUS : Yes, as I have said before. To my geological understanding of this area I would say that this shelf off the Pelagian Sea or Pelagian Block is a real prolongation of the main continental landmass to the south.

Professor BOWETT : Mr. President that concludes all the questions I wish to put to this witness. He is now available for cross-examination.

The ACTING-PRESIDENT : The Tunisian counsel has indicated that he will be ready to cross-examine Dr. Fabricius at 3 o'clock. Professor Virally, do you wish to say something different ?

M. VIRALLY : Oui, si vous le permettez, Monsieur le Président. J'avais en effet pensé qu'il serait nécessaire que je consulte les experts du Gouvernement tunisien avant la *cross-examination* mais, compte tenu de la façon dont a été conduit l'exercice auquel nous venons d'assister, je pense que cela n'est pas nécessaire. Je puis immédiatement, si la Cour le souhaite, poser quelques questions très brèves.

The ACTING-PRESIDENT : Please go on, Professor Virally.

M. VIRALLY : M. Fabricius, vous connaissez certainement la définition de la marge continentale qui est donnée dans l'article 76 du projet de convention sur le droit de la mer, qui l'a définie comme étant la succession du plateau, du talus et du glacis. Considérez-vous, en tant que géologue, que cette définition est correcte ?

Professor FABRICIUS : Yes, I think so. It is correct. It is of course a definition which is perhaps not completely stating the entire geology of such a margin. It is a part of it. It is a legal, but it is certainly not the entire geological explanation of the situation.

M. VIRALLY : Mais elle est correcte à votre sens ?

Professor FABRICIUS : I don't have it now before my eyes but I think so.

M. VIRALLY : Et pensez-vous que le fait que l'article 76 parle du plateau continental d'un Etat côtier ajoute quelque chose à cette définition et a un sens du point de vue du géologue ?

Professor FABRICIUS : To be frank, I do not understand this question. This has an importance to the geologist ? But we are not learning our science from the Court.

M. VIRALLY : Non, mais vous apparaissez devant la Cour et vous faites une déposition sur des faits géologiques qui intéressent un problème de délimitation. Je pense que le droit dans ce cas a tout de même un certain intérêt pour le géologue.

Professor FABRICIUS : A professional interest, probably. It wouldn't be a scientific one.

M. VIRALLY : Je voudrais vous poser une dernière question, qui est la suivante : vous avez utilisé à plusieurs reprises au cours de vos réponses, de votre exposé, l'expression de prolongement naturel. Qu'entendez-vous par là ?

Professor FABRICIUS : Natural prolongation is, as I stated before, the system of geological and geophysical findings from the continent – from the

landmass – across several features which are either related to geology or to topography such as the coastline – features typical for a shelf – for instance, the series of faults running roughly parallel to the hingeline, a line from which in most cases the shelf was extended into the outer areas.

The Court adjourned at 12.55 p.m.

TWENTY-THIRD PUBLIC SITTING (7 X 81, 3 p.m.)

Present : [See sitting of 29 IX 81.]

ARGUMENT OF PROFESSOR BRIGGS

COUNSEL FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Professor BRIGGS : Mr. President, Members of the Court, I am honoured to appear again before this Court. The membership has changed, the membership changes – I cannot refrain from expressing my deep personal sense of loss – a loss all international lawyers feel – at the permanent absence of Humphrey Waldock – but the Court will continue to provide enlightenment and serve the cause of peace and justice. It is a particularly happy augury that for the first time in a contentious case, two brother Arab States now appear to seek the arbitrament of this Court.

It falls to me to discuss the application of equitable principles in the circumstances of the case. I shall discuss first the relation of the concept of natural prolongation to equitable principles. Second, equitable principles and relevant circumstances. Third, proportionality as an equitable principle. And, I will conclude, fourthly with a few words on the new accepted trends in the Third Conference on the Law of the Sea.

Despite differences in the English and French translations of the authentic Arabic text of Article 1 of the Special Agreement of 10 June 1977, it is clear that the Parties reached complete agreement on calling to the particular and specific attention of the Court the importance which they attach to resort to equitable principles (among other things) in the determination of the law applicable to the delimitation of the continental shelf between them.

This agreed emphasis by the Parties on the importance of the role of equitable principles in a continental shelf delimitation has been constantly borne in mind in the preparation of the Libyan case and was clearly exemplified in seven of the twelve Submissions set forth in the Libyan Memorial (I) of 30 May 1980, that is to say in Submissions 3 and 7-12 inclusive. Submissions which have been maintained in the later written pleadings of Libya.

In startling contrast are the Submissions set forth in the Tunisian Memorial of the same date. Members of the Court will not find a single reference to equitable principles in those Submissions of May 1980 – not even an implicit mention. These Submissions refer to allegedly relevant historical rights to geomorphological and geographical considerations and coastal configurations and then set forth the famous or should I say infamous, sheaf of geometrically devised delimitation lines which Members of the Court can see at a glance have no relation, absolutely no relation to equitable principles, or to an equitable delimitation of the shelf in issue. What is equitable ? What can be equitable about a delimitation line or a sheaf of lines drawn with the purpose of cutting off Libya from the natural northern prolongation of its landmass under the sea, while leaving intact the comparable and adjoining northerly natural prolongation of Tunisia from its coastline between Ras Ajdir and Gabes ?

In December 1980, the Tunisian Counter-Memorial (II) seeks to soften this harsh disregard of equitable principles by slipping into its Submissions a new paragraph, paragraph I-3, which has been translated by the Court's Registry as follows :

> "The delimitation must also be effected in conformity with equitable principles and taking account of all the relevant circumstances which characterize the case, it being understood that a balance must be established between the various circumstances, in order to arrive at an equitable result, without refashioning nature."

We now, therefore, have Tunisia asking the Court to adjudge and declare that the delimitation must be effected in conformity with equitable principles and should arrive at an equitable result, without refashioning nature.

Libya can agree with this Tunisian request to the Court : but does the Tunisian Government itself agree with its own request ?

Except for the citations in parentheses (and now an emphasis on the so-called Zira *ride*), not a single word of Tunisian Submission II, paragraphs 1 and 2, has been changed. In its Counter-Memorial and Reply and now orally the Tunisian Government is still asking the Court, in disregard of equity and equitable principles, in disregard of the Special Agreement between the Parties, in disregard of its own Submission in paragraph I-3, in disregard of all of this Tunisia is still asking the Court to recommend to the Parties a line or sheaf of lines which would lead to a flagrantly inequitable result. Indeed, after discussing equitable principles with some eloquence, Professor Jennings himself concluded (IV, p. 426) his remarks with a plea for a continental shelf boundary line bearing roughly 65° east from Ras Ajdir without showing awareness of the glaring inconsistency of this line with his plea for the application of equitable principles and non-encroachment on the natural prolongation of Libya.

Unhappily, the words of the new Tunisian Submission I-3 appear to be just that – words – words which apparently should not be allowed to affect the proposed Tunisian delimitation lines originally set forth in the Submissions without reference to equitable principles, in flat contradiction with equitable principles or an equitable result, and now maintained with only lip-service to equity.

It is true that in both the Tunisian Memorial and in its Counter-Memorial and in oral argument other words can be found which ask the Court to consider equitable principles and an equitable result. It is therefore incumbent on me to outline for the Court the differences which appear to exist between the Parties on concepts of equity, equitable principles, equitable results, proportionality and in particular the application in the circumstances of the case of these concepts.

I will not extend my remarks to embrace a theoretical discussion of the relation of law and equity. Much has been written on this relationship, as the eminent Members of this Court are fully aware. It will suffice here to repeat what the Libyan Memorial (I) in paragraph 96 stated, in quoting the words of this Court – the *North Sea Continental Shelf* cases, paragraphs 85 and 88 – that

> "it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles . . ." (*I.C.J. Reports 1969*, p. 47)

and that it is precisely a rule of law that calls for the application of the equitable principles which govern the delimitation of adjacent continental shelves.

RELATION OF THE CONCEPT OF NATURAL PROLONGATION TO EQUITABLE PRINCIPLES

I turn first to the difference which appears to have arisen between the Parties during the course of these pleadings, the difference as to the applicability of equitable principles to natural prolongation. Chapter VI of the Tunisian Memorial sets forth with clarity the evolution of the juridical concept of the continental shelf by which a State's legal title to appurtenant areas of continental shelf is based upon the physical continuity into and under the sea of the landmass of that State. The Tunisian Memorial (I), in paragraph 6.32, quotes with approval, from paragraph 19, of the *North Sea Continental Shelf* Judgment of this Court, according to which "the most fundamental of all the rules of law relating to the continental shelf" – quite independent of any treaty – is the inherent right of a State to "the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea . . . by virtue of its sovereignty over the land". The Tunisian Memorial also quotes, in paragraph 6.33, with approval, from paragraph 95 of the same Opinion of this Court, where stressing the geology of the continental shelf, this Court observes that the juridical concept of the continental shelf "has arisen out of the recognition of a physical fact" and that this link between the law and the physical extension of a State's territory into and under the sea "remains an important element for the application of its legal régime". I must also note that the Tunisian Memorial quotes in paragraph 6.34 from paragraph 43 of the Court's Judgment of 1969, in which the Court, stressing the notion of :

> "the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State"

concludes :

> "What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion, in the sense that, although covered with water, they are a prolongation or continuation of that territory, and extension of it under the sea." (*I.C.J. Reports 1969*, p. 31.)

These fundamental holdings of the International Court of Justice, quoted with approval in the Tunisian Memorial, are fully accepted by Libya, indeed, they are basic to our case. What then, is the issue which has led me to repeat them here ?

It is the unexpected change of position by Tunisia in her Counter-Memorial which points up the issue. Although the Court's opinions which I have quoted do not condition title to appurtenant continental shelf acquired through the natural prolongation concept by any equitable consideration, it is now the complaint of Tunisia that Libya seeks to dissociate equitable principles from natural prolongation. I refer to the Tunisian Counter-Memorial (II), paragraph 2.07, Chapter VI, Section I, paragraphs 6.03 and the following, entitled *La dissociation entre prolongement naturel et équité*.

But the Tunisian position is not consistent. In paragraph 2.06 of the Tunisian Counter-Memorial (II), Tunisia appears not to object to the Libyan conclusion, which is stated in paragraph 90 of the Libyan Memorial : "There

can therefore be no possible inequity in a delimitation which is consistent with the physical facts of natural prolongation."

Professor Virally appears expressly to have agreed with this conclusion, when he stated (IV, p. 492):

> "Il serait, en effet, particulièrement inéquitable, sous prétexte de délimitation, de priver un Etat côtier d'une étendue de plateau continental à laquelle il a droit, c'est-à-dire d'une partie de son prolongement naturel."

Incidentally, this idea reappears in Libyan Submission No. 9.

However, in the same Counter-Memorial, paragraph 2.07, Tunisia complains that Libya is adopting a position contrary to international law as defined in the Court's 1969 Judgment, when it suggests that equitable principles come into operation only where the physical facts of natural prolongation no longer assist in defining the respective limits of the two shelf areas.

Developing this contention in paragraph 6.03, the Tunisian Counter-Memorial complains that Libya accords a subsidiary place to equity in relation to natural prolongation. My distinguished and learned friend, Professor René-Jean Dupuy, makes the same charge, IV, page 617. The further assertion is made that Libya regards equitable principles as applicable only where there exist overlapping claims to natural prolongations of two States, or, where geology alone is insufficient to indicate an appropriate delimitation. This latter refers to a charge which Libya has never made. In the Tunisian Counter-Memorial, paragraph 6.05, the Tunisian charge against Libya goes to the extreme length of attributing to Libya the view that "equitable principles have no role to play in the present case". It is really incredible that such a loose assertion should be made after a reading of the Submissions set forth in the Libyan Memorial. And, of course, it is even less credible now that Tunisia has had an opportunity to examine the Libyan Counter-Memorial and Reply. It is simply not true.

Nevertheless, this Tunisian charge requires some comment.

In the passages quoted above from paragraphs 19, 95 and 43 of the Court's Judgment in the *North Sea Continental Shelf* cases, the Court was not discussing delimitation as such. It was setting forth the rules of customary international law by which a State acquires title to appurtenant areas of continental shelf. The Court did not refer to equity or to equitable considerations in setting forth its conclusions on the acquisition of a legal title. The Tunisian pleadings have nevertheless quoted these passages with approval.

Now, however, Tunisia appears to be contending (and this is in Chap. VI of the Counter-Memorial (II), Sec. I) that title to any and all areas of the continental shelf involved in a delimitation depends upon the application of equitable principles to natural prolongation.

The same fallacy appears to underly many of the remarks to the Court of my learned friend, Professor Jennings, on 16 September.

Now we can only agree with Professor Jennings when he said (IV, p. 415) that "the link between natural prolongation . . . and equitable principles is surely to be found in . . . the principle of non-encroachment", that is, in leaving to each Party those parts of the continental shelf which constitute a natural prolongation of its own land territory under the sea without encroachment on the natural prolongation of the land territory of the other. This principle of non-encroachment is, as Professor Jennings adds, based upon the legal title acquired *ipso facto* and *ab initio* by a State in virtue of its sovereignty over its own – but only over its own – natural prolongation.

At this point, however, we part company with Professor Jennings. We cannot at all accept his statement that equity or equitable principles have to be considered "from the first" (p. 417 of his remarks) or "right from the commencement" in the identification of natural prolongation (that is on p. 418), that is, in the determination of legal title to appurtenant continental shelf.

I have just shown that the Court made no reference at all to equitable principles when it was discussing the rule establishing the legal title of a State to its physical natural prolongation under the sea. Equitable principles played no role in identifying appurtenant continental shelf based upon the juridical concept of natural prolongation.

The Libyan position is therefore that in normal circumstances the title of a State to its appurtenant continental shelf – that is to say, the natural prolongation of the landmass extending beyond its coasts under the sea – will be determined as the Court has stated in its *North Sea Continental Shelf* Judgment : its rights will be inherent and will exist *ipso facto* as a natural prolongation of its land area without reference to equity. Some States will have larger appurtenant areas of continental shelf than others – but, as the courts have observed, nature must not be refashioned.

It is further the Libyan view that it is only in disputed marginal areas between States that title will be based upon natural prolongation as qualified by equitable principles. This, of course, is what the Court held in paragraphs 19, 95, 43, as related to its dispositif in paragraph 101, in which it deals specifically with delimitation rather than title.

There is here no inconsistency between a title acquired by the juridical rule which looks to the physical facts of natural prolongation and the role of equitable principles in a subsequent delimitation process with another State. The Tunisian characterization of the Libyan thesis as "an eccentric view of natural prolongation" in defiance of equitable principles (*ibid.*, p. 419) is thus an arrow which falls quite wide of the mark.

Far from adopting a position contrary to international law as defined in the Court's 1969 Judgment (II, Tunisian Counter-Memorial, para. 207), Libya is basing its case on that Judgment.

Moreover, far from finding that equitable principles have no role to play in the present proceedings, Libya is setting forth, not only in her Submissions, but also in Part III, Chapter II, paragraphs 363 ff., of her Counter-Memorial (II), specific conclusions as to the role of equitable principles in this case ; and in Part IV on "The Practical Method for the Application of the Principles and Rules", the Libyan Counter-Memorial explicitly relates its proposals to the equitable nature of the results they would produce. We respectfully call the attention of the Court to these passages of the Libyan Counter-Memorial, in particular paragraphs 363 ff., 519 ff., and the Libyan Submissions (pp. 217-219).

EQUITABLE PRINCIPLES AND RELEVANT CIRCUMSTANCES

A consideration which appears to have led the Tunisian pleadings to distort the relation between equitable principles and the concept of natural prolongation may be found perhaps in the emphasis placed by Tunisia on the relation between equitable principles and relevant circumstances.

I therefore turn to the relation between equitable principles and relevant circumstances which characterize the area – both of which are called to the particular attention of the Court in Article 1 of the Special Agreement.

In the *North Sea Continental Shelf* cases, this Court observed in paragraph 92 that, although the Parties had reserved for themselves the application of the

principles and rules laid down by the Court, it would be insufficient simply to rely on the rule of equity without indicating possible ways in which it might be applied. The Court continued in paragraph 93 that there was no legal limit to considerations which might be relevant in a balancing designed to produce an equitable result. It is noteworthy, however, that the Court relied more heavily on geology and geography than on other considerations. Stressing the notion that the legal concept of the continental shelf has arisen as a recognition of a physical fact, the Court concluded in paragraph 95 : "The appurtenance of the shelf to the countries in front of whose coastlines it lies . . ." Mr. President, I emphasize those words "in front of" because of the disparaging remarks we heard from Professor Jennings and Professor Virally ; this is the Court itself in paragraph 95 using that term "in front of". I will quote it now – paragraph 95 :

> "The appurtenance of the shelf to the countries in front of whose coastlines it lies is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong." (*I.C.J. Reports 1969*, p. 51.)

In the next paragraph, paragraph 96, the Court stresses geography, observing that pronounced coastal configurations should not be ignored "since the land is the legal source of the power which a State may exercise over territorial extensions to seaward".

While the Court was deciding only the case before it, its treatment of the relation between equitable principles and relevant circumstances, with the stress on geology and geography, was expressed in general terms, which we believe are applicable to the present proceedings.

We draw the same conclusion from a study of the 1977 Decision of the United Kingdom/France Court of Arbitration on delimitation of the continental shelf. While the parties to that case advanced as equitable considerations to be taken into account various claims relating to navigation, security, military installations, the political status of islands, economics, coastal fisheries (cf., paras. 161, 171, 184, 187, 188), the Court could not regard them as exercising a decisive influence on the delimitation of a continental shelf boundary in a case where geology, natural prolongation and geographical considerations played so important a role. You may find the citations in Command paper 7438 of Her Majesty's Stationery Office, paragraphs 161, 171, 184, 187, 188 of the arbitral court's opinion.

Admittedly, circumstances and their relevance will vary from case to case, but in the delimitation of a continental shelf boundary it appears from State practice that geological and geographical considerations will play a primordial role, if only because of the basic rule of international law that title to an appurtenant area of continental shelf derives from natural prolongation. Certainly, in the present proceedings, Libya believes itself justified in stressing the geology of natural prolongation as tempered by relevant geographical considerations.

The Tunisian pleadings themselves recognize the importance of geographical and geological (e.g., I, Tunisian Memorial, para. 7.18) or, more often, geomorphological, factors in a continental shelf delimitation. However, the Tunisian Counter-Memorial, paragraph 6.16 and the footnote 8 on page 70 complains that Libya reduces relevant circumstances to purely physical

considerations of geology and geography and totally ignores economic and what they term as "human" considerations which – they believe – explain the existence of Tunisia's historic titles in the region of the Gulf of Gabes.

Here, again, not content with rejecting Libyan views, the Tunisian Counter-Memorial makes the wholesale charge – unsupported by any credible evidence – that Libya attempts to refashion nature and to eliminate the geographical circumstances relevant to the area (II, Tunisian Counter-Memorial, Chap. VI, Sec. II, paras. 6.14 ff.). In words more eloquent than accurate the Tunisian Counter-Memorial (para. 5.31) suggests that Libya is inviting the Court *"à effacer les îles, à combler les golfes et à raboter les péninsules"*. The specific charge made against Libya is that it seeks to remodel the Tunisian coastal configuration by ignoring the Gulf of Gabes and the convexity of the Sahel to Ras Kaboudia and the jutting fringe of islands of Kerkennah and Djerba and their low-tide elevations. (Cf., II, Tunisian Counter-Memorial, Chap. V, Sec. II, paras. 5.17 ff.)

We find it difficult to give credence to such charges because it is Tunisia itself which has minimized the relevance of its coastal configuration to any delimitation of its continental shelf. The entire expanse of the natural prolongation of Tunisia out to a line based on the 50-metre isobath – ZV 45° angle is arbitrarily excluded from consideration by Tunisian Submission 1-2, allegedly because of "historic rights". In other words, it is not the natural configuration of the Tunisian coast with its Kerkennah Islands fringe and Gulf of Gabes but an artificially devised line substituted for the coastal configuration on which Tunisia relies in relation to the proposed continental shelf delimitation with Libya.

The Tunisian Memorial (**I**, para. 7.15) admits that it is not on equitable principles that Tunisia bases its claim to the physical continuation of its landmass under the sea out to the 50-metre isobath – 45° line. The purpose of the ingenious but fragile efforts of Professor René-Jean Dupuy (**IV**, pp. 472 ff.) – the purpose of Professor Dupuy's efforts to transform jurisdictional or fishery claims in or over maritime areas into a claim of sovereignty over the sea-bottom is clear – the purpose is clear. It is the exclusion of this entire area between the Tunisian coastline and the 50-metre isobath – 45° line from consideration in the delimitation process.

One wonders whether it is the weakness of Tunisia's claim of historic rights in this area which has led to the manœuvre of attempting to establish historic rights as an acquisitive element in a claim of natural prolongation, which is inherent. This is a point carefully examined by my learned friend, Professor Colliard, and I need not belabour the point. (On the other hand, one also wonders whether it is the evident weaknesses in Tunisia's scientific support for natural prolongation which have also encouraged her to adduce the irrelevant element of fishing rights.)

But the point which I wish to make here is that by the device of refusing to admit that the sea-bed and subsoil of the areas to the west of the 50-metre isobath – 45° line constitute "continental shelf" in a juridical sense, Tunisia seeks to remove the entire expanse from consideration in the delimitation procedure and this, as I have stated in contradiction with equitable principles and relevant geographical, as well as geological, circumstances. By denying the label "continental shelf" to the area, by alleging a title based upon exaggerated maritime claims, Tunisia inequitably reduces the area of concern which my learned friend Mr. Highet will discuss, and Tunisia herself treats her coastal configuration as really irrelevant to a delimitation.

Further observations are called for by this deliberate choice of Tunisia to

bound her claimed area of historic rights by lines which are independent of both the actual Tunisian coastal configuration and of the straight baselines promulgated by Tunisia in 1973 (and which, incidentally, Libya challenges).

This Court will have noted the emphasis – indeed the insistence of Professor Jennings on the relation of coastal configurations – actual coastlines with their sinuosities – to a delimitation of the continental shelf. But one must look again at the Tunisian Submissions.

The boundary lines proposed by Tunisia in Submission I-2 and set forth in Submission II are contradicted by Tunisian Submission I-3, in which Tunisia states that the delimitation of the continental shelf must be in conformity with equitable principles, taking account of all the relevant circumstances of the area "without refashioning nature" – which can only mean, in the circumstances, without disregarding or refashioning the Tunisian coastline.

Despite the efforts of Professor Virally on 25 September to demonstrate that the proposed Tunisian boundary lines are in accord with equitable principles and would produce an equitable result, the record of the Tunisian pleadings is singularly lacking in any credible evidence to support this assertion. Careful examination of the circumstances considered relevant by Tunisia as leading to bathymetric, physiographic, or geometric lines which constitute a substantial encroachment on the continental shelf of Libya, reveals that they bear no relation to equitable principles. Is this what Professor Dupuy meant when he observed (IV, p. 615) that the application of equitable principles requires the greatest realism? The proposed Tunisian lines do not respect the natural prolongation of Libya; nor do they conform to equitable principles, despite Tunisian assertions to the contrary. One must add that these proposed lines bear no observable relation to the Tunisian coastline.

It follows that the Tunisian attempt to shift notionally eastward the geographical angle which occurs exclusively in Tunisia's coastline and to base their geometrical argument on the pretence that the angle exists at the boundary pillar at Ras Ajdir is a blatant attempt to refashion nature and geography.

Can Tunisia then be heard to charge Libya with refashioning nature and with disregarding the sinuosities of the Tunisian coastal configuration when the seaward boundary of Tunisian claims of historic title and the lines advocated in the Tunisian Submissions do precisely that? The equitable principle *allegans contraria non audiendus est* – upheld by this Court in the *Arbitral Award Made by the King of Spain on 23 December 1906* case (*I.C.J. Reports 1969*, pp. 192, 207, 209, 213) and in the *Temple of Preah Vihear* case (*I.C.J. Reports 1962*, pp. 6, and 32). This principle would seem to foreclose Tunisia from reliance upon an argument which is contradicted by her own behaviour. The principle is elaborately discussed by the late Judge Alfaro in his separate opinion in the *Temple of Preah Vihear* case (*loc. cit.*, pp. 39 ff.).

The fallacious nature of the Tunisian charge that it is Libya which seeks to eliminate relevant circumstances and to refashion the Tunisian coastline appears even more vividly when one turns to the Libyan Memorial (I), where Libya expressly explicitly states in paragraph 89 that:

> "The principle of natural prolongation must necessarily be applied, not in the abstract, but in relation to the geographical, geological and other relevant circumstances of the particular area"

and in paragraph 92 that:

> "it is the geographical features of the coastline of a State which provide

the base points employed in delimiting the outer limits of the territorial sea, and, as proposed in [Article 76 of the draft convention on the law of the sea], of the continental shelf as well".

The Libyan Memorial continues by noting with approval the rejection by the Anglo-French Court of Arbitration of a French proposal because it "detaches the delimitation almost completely from the coasts which actually abut on the continental shelf" (para. 93). Nor can Libya be faulted – as the Tunisian Counter-Memorial attempts to do (paras. 6.13, 6.17 and the following, *inter alia*). Nor can Libya be faulted for concluding in paragraph 94 of the Libyan Memorial :

> "It is apparent that the geographical configuration of a coast – whether concave or convex, whether primarily regular, or highly irregular, containing gulfs, promontories or offshore islands or islets – may determine decisively whether, in particular circumstances, the equidistance method is equitable."

The reference to the equidistance method in this passage may now appear irrelevant in view of Tunisia's shift of position from her May 1976 Memorandum. In any case, it is redundant ; as the Anglo-French Court of Arbitration further observed in paragraph 84 :

> "the validity of the equidistance method, or of any other method, as a means of achieving an equitable delimitation of the continental shelf is always relative to the particular geographical situation".

That was the position set forth by Libya in her Memorial ; and that continues to be her position. The baseless nature of the Tunisian charge on this point will be further demonstrated by my learned friend, Mr. Highet, when he develops the Libyan concept of the practical method for application of the law to the facts of the case and which does take account of the Tunisian coastline.

I should like to call attention briefly to a further point in this connection. In paragraph 6.22 the Tunisian Counter-Memorial notes – apparently with approval – the fact that the then current version of paragraph 1 of Article 83 of the draft convention (informal text) on the law of the sea, in that paragraph, the requirement that a delimitation shall take account "of all the relevant circumstances" has been dropped and replaced with the requirement to take account "of all the circumstances prevailing in the area concerned".

It can certainly not have been the intention of the Conference to discard the concept of relevancy and to proclaim that all circumstances – whether relevant or irrelevant – must be taken into account. Nor does the Tunisian Counter-Memorial go so far. It continues to stress the relevance of historic, economic and geographical circumstances under the new text.

The issue, therefore, continues to turn upon what, in the circumstances prevailing in the area concerned, is relevant. Counsel for Libya have demonstrated that the Tunisian claim of historic rights whatever may be its limited justification inshore, can have no relevance to the delimitation of the continental shelf with Libya. Nor is Libya claiming the inshore areas off the Tunisian coast.

It has been my purpose to show that, although the Tunisian claim of historic rights within the 50-metre isobath – 45° line effectively reduces the relevance of the Tunisian coastal configuration and the four Tunisian methods ignore it, nevertheless, in the opinion of Libya, the Tunisian coastline remains a circumstance to be considered in the delimitation of the continental shelf wherever it is relevant.

PROPORTIONALITY AS AN EQUITABLE PRINCIPLE

I turn now to the concept of proportionality as an equitable principle, and will examine its relevance in the current proceedings.

Proportionality is an elusive concept which requires careful analysis. As the law on this point has evolved in the decision of this Court in its *North Sea Continental Shelf* Judgment and the decision of the Anglo-French Court of Arbitration on the Continental Shelf, it has become clear that no principle of proportionality confers a title or provides a distributive apportionment of shares of continental shelf on a State. Proportionality has no place in connection with *de jure* appurtenance upon which title is founded.

Although this Court thus decisively rejected the concept of proportionality as requiring an equal partition of the large expanses of continental shelf adjoining two or more States, it nevertheless held in paragraphs 18, 20, 99 and 101 (C)(2) that in "a disputed marginal or fringe area, to which both Parties are laying claim" an equitable delimitation should effect a division of that limited disputed area "in agreed proportions or, failing agreement, equally".

In our pleadings, we have attempted to keep clearly in mind this distinction between proportionality as a partition of large expanses of continental shelf – which the courts agree in rejecting because of the *de jure* appurtenance of the shelf to the coastal State – and the permissible proportionate partition of limited marginal areas to which competing claims are made. The statement made in paragraph 510 of the Libyan Counter-Memorial that the concept of proportionality is applicable solely to marginal areas of continental shelf where the application of the principle of natural prolongation leads to conflicting results – although this statement has unfortunately misled counsel for Tunisia, Tunisian Reply **(IV)**, paragraphs 3.25 – and the following, this statement was clearly intended, as the context of paragraphs 510 to 516 of the Libyan Counter-Memorial **(II)** show, to refer to a concept of proportionality as a permissible partition of disputed marginal areas in an equitable delimitation and not to an impermissible partition of areas already appertaining *de jure*. In taking this position, Libya not only follows closely the reasoning of the Court in the *North Sea Continental Shelf* cases but it follows the actual method employed by the Parties to that case in their eventual settlement after the decision.

This, however, is not the only concept of proportionality. An entirely different concept appears in paragraphs 98 and 101 (D) (3) of the 1969 Decision of this Court where looking to the results of a delimitation in accordance with equitable principles, proportionality is regarded more as a ratio between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines (para. 98). This conception of proportionality may appear to rest more on a factual correlation that, generally speaking, the longer the coastline of a State, the greater the area of its appurtenant continental shelf, rather than on any working concept of equitable partition.

It is a third concept of proportionality to which I would now like to direct the attention of the Court – a concept which involves no active allocation of shares but looks to the results of a particular line or a proposed line of delimitation. The Anglo-French Court of Arbitration clarified this concept in its 1977 Decision when it stated in paragraph 101 :

> "The equitable delimitation of the continental shelf is not . . . a question of apportioning – sharing out – the continental shelf amongst the States abutting upon it. Nor is it a question of simply assigning to them areas of

the shelf in proportion to the length of their coastlines ; for to do this would be to substitute for the delimitation of boundaries a distributive apportionment of shares. Furthermore, the fundamental principle that the continental shelf appertains to a coastal State as being the natural prolongation of its territory places definite limits on recourse to the factor of proportionality."

Proportionality – concludes the Court of Arbitration *(ibid.)* – is rather "to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights [that is to say title] to areas of continental shelf". In other words, proportionality according to the Court of Arbitration is a criterion "for determining the reasonable or unreasonable – the equitable or inequitable" effects in all the geographical circumstances which may result from selecting a particular line of delimitation (para. 100). So we have embraced this conclusion in Libyan Submission No. 12. And if I understood him correctly, Professor Virally also accepts this view, **IV**, pages 601-602.

Although the courts have termed proportionality a "factor", or "criterion", in this third sense proportionality may appropriately be considered an "equitable principle" since it serves both to test and to promote a delimitation which, as this Court has held, must be "equitably effected" (*loc. cit.*, para. 20).

The balancing of equities which results from an application of this principle of proportionality will inevitably involve a comparative survey of areas which would appertain to each Party following a particular delimitation. It should be emphasized, however, that this balancing of equities involves in itself no allocation of shares.

For the making of this comparative survey, Libyan Submissions Nos. 11 and 15 are of particular relevance. Libyan Submission No. 11 reads : "For the purpose of achieving an equitable delimitation, the whole of the sea-bed and subsoil beyond the low-water mark along the coast of each Party is to be taken into account." And Submission No. 15 reads : "The baselines promulgated by Tunisia in 1973 are not opposable to Libya for the purposes of the delimitation and the results of giving effect to them would in any event be inappropriate and inequitable."

On 30 December 1963, Tunisian Law No. 63-49, the text of which is reproduced in Annex 85 to the Tunisian Memorial (I), this Tunisian Law provided that its territorial sea of six miles should be measured from the low-water mark along its entire coast, including islands, from the Tunisian-Algerian frontier to the Tunisian-Libyan frontier except for the Gulf of Tunis – but not excepting the Gulf of Gabes. Ten years later in 1973, after conversations had commenced with Libya looking towards a delimitation of their continental shelves, Tunisia promulgated Law No. 73-49 of 2 August 1973, and Decree No. 73527 of 3 November 1973, according to which – for the first time in history – straight baselines were employed to close the Gulf of Gabes and other areas as "internal waters". The texts of both law and decree may be found in Annex I-17 to the Libyan Memorial. In the Tunisian Memorial and Counter-Memorial, particularly in Annex II-6 to the latter, Tunisian pretensions to an exaggerated Gulf of Gabes or to what is vaguely termed "the Gulf of Gabes area" is extended from Ras Kaboudia to Ras Ajdir – and on some maps, even more easterly across the Libyan coast. The Court will have noted the searching examination of this subject by Dean Colliard.

By a process of *dédoublement* (cf., also II, Tunisian Counter-Memorial, para. 1.31) almost the entire area north of the Tunisian coastline from Ras

Ajdir west to Gabes is claimed as one to which Tunisia has historic rights and which must be completely excluded from any calculations of proportionality because the area does not constitute a continental shelf, in a juridical sense. The result is most curious.

The natural submarine prolongation northward of the Libyan landmass provides Libya with title to a continental shelf, to the north of it. But, the comparable natural prolongation northward of the Tunisian landmass from Ras Ajdir west to Gabes apparently fails to provide Tunisia with any continental shelf at all because title to the area rests, according to the Tunisian pleadings, on maritime claims, not on natural prolongation. Thus, the Tunisian Submissions have the effect of removing the claimed zone of historic rights from any calculations of proportionality in determining the equity of a continental shelf delimitation and I would refer to the Tunisian Memorial (**I**), paragraphs 4.104 and 9.02.

Now, this may explain why Tunisia seeks to encroach on the continental shelf appertaining to Libya by natural prolongation. However, the fallacy underlying Tunisian reasoning is clear. The land frontier between Libya and Tunisia is at Ras Ajdir ; but this politically determined circumstance has not changed the basic geological fact of the northerly natural prolongation under the sea along the entire north-facing coasts of both Libya and Tunisia. No credible evidence either geological or geographical, permits the conclusion that an abrupt change in the northerly natural prolongation of the landmass occurs once it reaches the boundary pillar at Ras Ajdir, and continues westward. However, Tunisia dismisses as irrelevant this physical continuity of the Tunisian landmass under the waters claimed as territorial sea or claimed as historic waters and, in reliance on the treaty definition of the continental shelf, denies the area that character. The fact remains that a sizeable area of the natural prolongation of Tunisia underlies maritime areas it really claims by reference. I say really claims by reference to the legal character of the superjacent waters. A textual critique of treaty definitions of the continental shelf may throw light on the problem.

The 1958 Geneva Convention on the Continental Shelf (to which neither Libya nor Tunisia are parties) provides in Article 1, in part, that

> "For the purpose of these articles, the term 'continental shelf' is used as referring *(a)* to the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea . . ." ;

and in Article 3, "The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas . . .". Both these articles were regarded by the International Court of Justice in its *North Sea Continental Shelf* Judgment, paragraph 63, as reflecting "received or at least emergent rules of customary international law relative to the continental shelf".

The strongest argument that Tunisia can make on the basis of the above articles is that the articles exclude *a contrario* from the legal definition of the continental shelf the geological submarine prolongation of the landmasses until the outer boundary of the territorial sea is reached. In a physical sense, however, the sea-bed and subsoil under the territorial sea are part of the shelf of the continent (as both Professor Jennings (**IV**, p. 420) and Professor Virally (**IV**, pp. 603-604) have admitted), that even though a State's title to the area is derived from the legal character of the superjacent waters rather than from natural prolongation as such.

Now, explicit confirmation that the shelf of the continent is naturally

prolonged into and under the high seas, via the bed of the territorial sea – even though the latter is under a different legal régime – was provided by this Court in paragraph 43 of the *North Sea Continental Shelf* Judgment – but it deliberately chose and employed the words "natural prolongation", "continuation", and "extension" of a State's land territory as the basis for legal title to appurtenant continental shelf.

We turn now to the definition of the continental shelf set forth in Article 76 of the draft convention on the law of the sea. Although the definition in Article 76 is not stated to be "for the purposes of this convention" it is clear that the legal definition is not intended as a scientific definition of the continental shelf. The definition provides in part that

> "the continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory"

to a distance, *inter alia*, measured "from the baselines from which the breadth of the territorial sea is measured".

By limiting the legal concept of the continental shelf to submarine areas beyond the claimed territorial sea of a State, areas of varying breadth can be excluded by a State from the legal definition even though these submarine areas actually constitute a natural prolongation of its landmass under the claimed territorial sea.

However, the Article 76 definition, by referring explicitly to "submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory", this Article 76 definition echoes paragraph 43 of the *North Sea Continental Shelf* Judgment of this Court and clearly implies a continuum of natural prolongation of its land territory which physically contains no gap between a State's coastline and its claimed baselines or territorial sea limits.

The reason why treaty definitions of the continental shelf have excluded the areas of sea-bed and subsoil under the territorial sea is, of course, the different legal régime of the territorial sea from that of the high seas. A State was already recognized as sovereign over the sea-bed and subsoil of its territorial sea (as provided in Article 2 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, *TIAS* 5639) and required no additional title to them based upon continental shelf appurtenance. However, this physical continuum of the natural prolongation of a State's landmass under its territorial sea exists and this existence is clearly recognized by the treaties and by the courts as well as by our opponents in this case.

We are not asking the Court to make any ruling on the legality of claims to the territorial sea. The Parties are in agreement that this jurisdiction has not been conferred on the Court in this case.

We are, however, pointing to the inequity of excluding a part of the actual submarine extension of a State's landmass from calculations testing the proportionality of the result or the equities of a particular delimitation line.

If both States involved in the continental shelf delimitation claimed equivalent breadth of territorial sea or comparable baselines, it might matter little whether the sea-bed and subsoil of the territorial sea were labelled "continental shelf" or not. Quite different are the effects of unilateral claims of varying breadth, of arbitrary extensions seaward of either the claimed baselines or the outer limit of a claimed territorial sea, and even larger areas allegedly based upon claims of historic title.

The effect of such claims is to exclude, I repeat, from the legal definition of the continental shelf substantial areas of the geological shelf of the continent

subjacent to the claimed areas of internal waters or territorial sea. These areas of physical continental shelf would nevertheless appertain to the coastal State and would *pro tanto* inequitably distort the area of continental shelf to be delimited with a neighbouring State. Calculations of proportionality by which the equitable character of a particular delimitation may be tested should therefore take account of the whole of the sea-bed and subsoil beyond the low-water mark along the coasts of each Party. Only in this way can we be assured of complying with the injunction of this Court (*North Sea Continental Shelf* cases, para. 20) that "the delimitation itself must indeed be equitably effected . . .".

There remains to be noted the question asked by the Tunisian Counter-Memorial in paragraph 7.24. Why, they ask, should the equity of a continental shelf delimitation be tested by comparing the proportionality of areas which are not the object of that delimitation ?

The Tunisian characterization of the application of such an equitable test as a "blatant artifice" betrays a failure to grasp the purpose of proportionality as an equitable criterion in a delimitation of the continental shelf. May I quote again from the opinion of this Court in the *North Sea Continental Shelf* cases ? In paragraph 18, this Court has observed that :

> "Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area." (*I.C.J. Reports 1969*, p. 22.)

And, in paragraph 43 the Court said :

> "What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion . . ." (*I.C.J. Reports 1969*, p. 31.)

These passages make clear that a delimitation line does not confer title to the wide expanses of continental shelf on either side of the delimitation line. Such large areas physically prolonging a State's landmass, "although covered with water" (*ibid.*), already appertain, as does the sea-bed and subsoil under the territorial sea.

Nevertheless, it is customary for States to include these large expanses of continental shelf already appertaining to them and which abut on the coasts in question in comparative calculations of proportionality and of testing whether the results of a proposed delimitation accords with equitable principles. Tunisia has itself resorted to this method in its written pleadings.

In other words, the comparison of areas appertaining to a State after a continental shelf delimitation is not limited to the relatively narrow disputed marginal zone for which a delimitation line provides an equitable division ; nor is it limited to areas to which competing claims have been made.

Now the Tunisian Co-Agent, Professor Belaïd, has questioned this view, **IV**, pages 576, and 577, on the ground that it appears to attribute to Tunisia, as continental shelf, areas of maritime waters which are already a part of its national territory. Libya, however, challenges the extent of Tunisian claims to internal, territorial or historic waters beyond its coastlines.

In a case such as the present, where one of the Parties attempts by unilateral fiat to remove from the equitable test of proportionality large areas beyond the coast line claimed as inland waters, territorial sea or historic waters, a balancing of the equities will nevertheless require the inclusion of all areas of a State's natural prolongation seaward from its coasts whatever the label

attached to the superjacent waters. Nor does the application of such an equitable criterion infringe in any way the jurisdiction or title of a State to its territorial sea. It has the limited, but important, purpose of contributing to the injunction of this Court which I have already quoted : "The delimitation itself must indeed be equitably effected . . ."

This concludes what I wish to say with regard to the application of equitable principles, including proportionality, in the circumstances of this case.

However, before resuming my seat, I must say a few words about the new accepted trends in the Third Conference on the Law of the Sea. Our distinguished and learned colleague and friend, Ambassador Mustapha Kamil Yasseen, was to have spoken on this topic. He had actively participated in the Conference and we feel his loss deeply and with personal sorrow.

We are in the fortunate position of agreeing with our learned friend Professor Abi-Saab when he stated (IV, pp. 431-432) that "By requesting the Court to take its decision according to the new accepted trends, the Parties are inviting the Court to consider whether such trends have already yielded new rules of international law . . .".

In the preparation of the Libyan pleadings, counsel have from the beginning studied the successive drafts of the Convention on the Law of the Sea and they have referred to their provisions where relevant. These references require no summation here and can be found throughout our pleadings.

Perhaps I may single out one example. The Court will have heard Sir Francis Vallat a few days ago when he demonstrated so convincingly that Article 76 of the draft convention on the law of the sea is devastatingly destructive of the Tunisian attempt to substitute bathymetry for the natural prolongation of the landmass in accordance with the 1969 Decision of this Court.

I do not think that the Court would find it helpful for me to make a textual critique of Article 76 or the other articles in Part VI of the draft convention on the law of the sea.

I would, however, like to emphasize the current version of Article 83 dealing with the delimitation of the continental shelf. In earlier versions, the controversy over whether the delimitation should be effected on equidistance principles or in accordance with equitable principles had sharply divided the Conference, although, I believe, Tunisia and Libya both favoured the equitable principles approach at the Conference.

In the current version, paragraph 1 of Article 83 provides :

> "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice in order to achieve an equitable solution."

This provision might have been designed for this very case. The Parties have asked the Court to declare the applicable law in the circumstances of this case in order that they may reach agreement on an equitable solution.

The Court adjourned from 4.25 p.m. to 4.45 p.m.

ARGUMENT OF MR. HIGHET

COUNSEL FOR THE GOVERNMENT OF LIBYA

Mr. HIGHET :

1. INTRODUCTION

Mr. President and Members of the Court. I am proud and pleased to be able to appear before you again. May it please the Court : it is my task and privilege to present Libya's views on the practical method for the application of the principles and rules of international law in this specific situation.

Now I will begin at the obvious beginning point, which is the interpretation of the Special Agreement, since that affects what we mean by the words, the "practical method".

I should at the outset perhaps repeat the cautionary note which was sounded the other day by Sir Francis Vallat : whenever the verbal shorthand of the "practical method" is used by us for convenience or brevity, it is fully intended to mean the practical method for the application of the principles and rules in this specific situation in the sense of Article 1 of the Special Agreement ; and it is not intended to mean a practical method of delimitation in, if I may say, the Tunisian sense. The words are less important than the ideas which they convey ; and I shall come to those ideas in a minute.

When I have dealt with the question of interpretation, I will next discuss the role of the Parties and of the experts of the Parties, following the decision of this honourable Court.

Third, I shall consider in some detail various aspects of our practical method, or suggestion, as to how the principles and rules may best be applied to the facts of the present case.

In this part of my address I will consider first matters relating to natural prolongation, and second the issue of relevant circumstances. I will probably have to suspend my address this afternoon in the middle of the relevant circumstances, which may seem appropriate, Mr. President, and resume again at that stage on Friday morning, if the Court please.

2. THE ROLE OF THE COURT

First, the matter of the interpretation of the Special Agreement. This has already been discussed by our Agent and also by Sir Francis. I would like to give the question a different focus, in connection with the way in which the practical method should be viewed, evolved and formulated.

The Special Agreement asks the Court to go further than just indicating principles and rules alone. That was the situation in the *North Sea Continental Shelf* cases.

But the Court has not been asked to draw the actual line of delimitation. That was the position in the Anglo-French Arbitration. Here the Court has indeed been invited to indicate the considerations and factors which should be taken into account, so that the experts of the Parties can "delimit these areas without any difficulties". But still, the Court has not been requested to set out a

specific method of delimitation such as, for example, equidistance. It clearly has not been invited, in the words of my learned friend Professor Abi-Saab, to describe an "operational means of effecting delimitation" (**IV**, p. 434). Although it was true that in the *North Sea Continental Shelf* cases the word "method" was used in conjunction with the word "delimitation": that was because the whole case was initially focused on the question whether the equidistance method had to be applied.

In the present case, the context is different. Moreover, if the Parties to this case had wanted to say "method of delimitation", they would have said it. But what they did say about method was, with respect, very different from what Professor Abi-Saab referred to as a term of art for delimitation. What they in fact said was "practical method for the application of these principles and rules in this specific situation" and they even set this part of that sentence apart from the reference to the delimitation by the "experts of the two countries". In addition, Article 2 of the Special Agreement says that:

> "Following the delivery of the judgment of the Court, the two Parties shall meet to apply these principles and rules in order to determine the line of delimitation . . ."

I stress the words "to apply these principles and rules". This confirms our analysis that when the Parties did not say that the Court was to decide on a method of delimitation, they meant what they said, or rather, what they did not say.

But to indicate a very precise method of delimitation – as Tunisia would have the Court do – is for all intents and purposes, Mr. President, the same as taking over the task of drawing the line. Once the method becomes so precise that it only remains for the experts of the Parties to plot the co-ordinates and join them together, the Court will, by indicating such a method, in effect, have drawn the line. It certainly will not have confined itself to indicating a method for applying principles and rules. It will have indicated a method of delimitation.

Now, of course, in the Anglo-French Arbitration of 1977, the Court of Arbitration did just that. Although it left the mere plotting of co-ordinates and the inscription of the line on the chart to its own expert, it could equally well have done that work itself. In law, it was the Court's line.

Tunisia suggests an almost identical role for this Court in this case; the only difference being that the experts here will belong to the Parties and not to the Court. Now this must be an erroneous view of the terms of our Special Agreement.

Moreover, apart from equidistance and one or two other methods as such, how many such valid methods can in fact be identified? Offhand, there were only four, I would remind the Court, that the committee of experts considered as worth mentioning to the International Law Commission in 1953.

Surely there has not been a multitude of methods thrust upon the world since that time. Our position is that Tunisia, in spite of her diligent efforts, has not, in fact, succeeded in adding to that number. None of the techniques of delimitation represented by the Tunisian sheaf of lines, or, to borrow a felicitous word from Professor Jennings, by the "fascicule" of lines, not one of these is methodical in the sense of being unarbitrary, of resting on sound premises, of applying general principles of law to particular circumstances of fact. To the contrary, they are systems or devices which have obviously been generated by the need to attain a pre-determined result.

It is, in fact, possible to envisage an indeterminate number of methods of

delimitation. But they would all be – or mostly be – arbitrary. They would not correspond to the principles of law.

For example, bizarre or random techniques could be employed to draw a line. There is no doubt that any such random system – no matter how capricious – could technically qualify as being a method of delimitation. It could even be used to draw a delimitation line. But no one would contend that any such method would be an application of the principles and rules of international law.

It is our submission that each of the lines of the Tunisian sheaf falls into this category. There is something wrong with each of them, and none of them is consistent with international law or practice.

Moreover, in the present case it can hardly be supposed that, after the judgment, the Parties would agree on a method of delimitation which would be inconsistent with the principles and rules which the Court had decided they should apply.

As Sir Francis has already indicated, the Tunisian interpretation results in the practical method question becoming separated from the principles and rules question. The methods have become only methods of delimitation, and in consequence the need for the practical method to have evolved from the principles and rules and to be consistent with them at all times has been placed at one, or possibly more, removes.

So what our learned opponents have done is to conjure up, with respect, four constructs, which they label "practical methods", to deal with what they perceive to be the geomorphological and geographic facts of the case.

But Tunisia has related her methods or constructs to only a few characteristics of the area. They do not relate to all the relevant circumstances. Nor do they relate to, or derive from, all the principles and rules of international law.

For example, as Sir Francis said on 1 October, we have strained our ears waiting for a statement by Tunisia of how equitable principles can be seen to apply to her sheaf of lines. And my learned friend Professor Briggs has spoken to the Court on precisely that aspect of the problem. And we do not recall hearing any real discussion at all about petroleum deposits or producing wells.

Now, there is no convincing – if I may say credible – connection between the principles and rules of law, on the one hand, and the four Tunisian methods, on the other. Let me say there are three aspects to this lacuna or lack of connection.

First, it is because the Tunisian sheaf appears to have been constructed after the fact, in order to reach the substantive results desired from the beginning.

Second, this process is facilitated by a strained interpretation of the Special Agreement.

Third, in our view this false dichotomy is a necessary ingredient of the Tunisian case. It is impossible to reconcile the sheaf of lines with the applicable principles of law, or to describe them as being practical methods of applying them.

3. The Role of the Parties and Experts

Tunisia's view is that the role of the Court should be to prescribe a method of delimitation to the Parties which their experts will then sit down and execute. This has been amply brought out in the comments made by Professor Abi-Saab. There can be no doubt whatever that in the Tunisian view the role

of the experts is correspondingly minimal. And how this squares with the fundamental concept that delimitation should be by agreement is beyond us.

But it is directly congruent with this position that Tunisia spares hardly any time or energy to consider the role of the experts of the Parties. It is most revealing to note that neither Professor Abi-Saab nor any of the other counsel for Tunisia considered the role of the experts as worthy of any substantive discussion, except to say that the experts should not have much to do because three months is a very short time.

This seems odd in view of the fact that the experts are mentioned repeatedly in the Special Agreement. At least three articles concern the experts and delegations of the Parties.

What relationship is there, then, between the role of the experts in the post-decision phase and the terms of the Special Agreement ?

Article 3 contemplates returning to the Court, or a return to the Court, after three months following the judgment if an agreement on delimitation has not then yet been reached, unless that period is renewed once or more by the Parties. There is no reason given for the failure to reach agreement.

In that instance the Court could then make things more clear and more specific, if necessary, with less room for any further confusion or disagreement for whatever reason. Such a step would constitute a logical clarification of the matter which would be entirely appropriate at that stage.

The connection between the word "clarify", in the last sentence of Article 1 of the Special Agreement, and the word "clarifications", in Article 3, now becomes obvious. Rather than a "judgment by instalments" – I use the words attributed to us by Professor Abi-Saab (IV, p. 439) – the Special Agreement contemplates a very practical method of ensuring the effectiveness of this Court's decision.

If the Parties have difficulty in applying the principles and rules in accordance with the method clarified by the Court, the Court can then help them to do so – all within the jurisdiction already provided for by the Special Agreement.

But Professor Abi-Saab says that any return to the Court would be unjustified, except "in cases of contingencies unforeseeable at the time of the judgment", and that return to the Court "is *never* by prior design, as this would contradict the finality which is the essence of judgment" (IV, p. 439).

The statements have led us to re-read the interpretative judgments in the *Interpretation of Judgment No. 3, Judgment No. 4, 1925, P.C.I.J., Series A, No. 4* (Treaty of Neuilly) ; the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13* ; and the *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, I.C.J. Reports 1950*, page 395.

In 1925, in the *Treaty of Neuilly* case *(Interpretation)* the Permanent Court declined the Greek request for interpretation on the ground – and this is very pertinent here – that the question asked was "clearly based on a different conception unknown to the special agreement" (p. 7).

In 1927, in the *Chorzów Factory* case *(Interpretation)* the Permanent Court granted the German application, and it focused closely on "the meaning of the expression 'meaning or scope of the judgment'" in Article 60 of the Statute (p. 11). It was quite clear to the Court that the request for interpretation submitted by the German Government was entirely based on that article, Article 60.

In 1950, the *Asylum* case also concerned the interpretation of Article 60 of the Statute of the Court. In declining the Colombian request for interpretation, this Court stated that the purpose of a request under that Article :

> "must be to obtain an interpretation of the judgment . . . [and] to obtain clarification of the meaning and scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided" (*I.C.J. Reports 1950*, p. 402).

The Court also said that : "Any other construction of Article 60 of the Statute would nullify the provision of the article that the judgment is final and without appeal." *(Ibid.)*

With this, we can hardly quarrel. It is, of course, an authoritative interpretation of Article 60. But what might happen in the context of Article 3 of the Special Agreement in this case does not depend on the use of Article 60 of the Statute.

Now, Professor Abi-Saab said that Article 3 "does nothing more than reiterate the general principle provided for in Article 60 of the Statute" (IV, p. 440). But if the Parties had intended to rely on Article 60, they would not have needed to include Article 3.

Although this question – which does not arise at this time – is of course one for the Court to decide, no procedure under Article 3 would have to be based on a title of jurisdiction under Article 60 of the Statute, since Article 3 provides for an independent and supplementary title of jurisdiction under our original Special Agreement.

Now, as a practical matter, of course, the Parties can always agree to postpone any such return to the Court, especially if they are following the guidelines for meaningful negotiations of the *North Sea Continental Shelf* cases, to which our Agent referred.

In conclusion : nothing that we have said or might say about the post-decision phase in this case would contravene any of the principles, including that of the finality of judgment and the binding force thereof, expressed in the jurisprudence of this Court or of its predecessor.

But the interpretation of this Article 3 does impinge upon the appropriate interpretation of the Special Agreement with regard to that phase of the case, and in particular upon the role of the Parties and their experts.

Who will the "experts" be ? They will necessarily cover a broad range of areas of competence. It would be logical to expect that the "experts" would include persons at the policy level, with diplomatic and legal backgrounds, in addition to geologists and geographers and cartographers and, as Dean Colliard has recently reminded us, even perhaps hydrographers.

But the guidance now to be given by the Court to the Parties and their experts must, of course, include the legal principles and rules of international law that are to be applied, as well as any that the Court considers not to be relevant or applicable. The relevant circumstances to be considered by the experts of the Parties could also be indicated by the Court, perhaps with some indication of their relative importance and weight.

Now among those factors on which the Court's guidance would be necessary would be the nature and extent of the continental shelf in question and whether that shelf may be said generally to be the extension or prolongation of the two States' coasts in the vicinity of Ras Ajdir – that is the coast where one finds the actual political boundary between them.

Of course, guidance as to the nature of the relevant shelf areas suggests in itself that the Court could also indicate the extent to which a given geological or geomorphological feature can – or cannot – be considered as a fundamental or basic discontinuity in the shelf area concerned, as well as the actual nature and extent of the shelf and any structural and geological features

which might indicate the extent to which a given geological or geomorphological feature can, or cannot, be considered as a fundamental or basic discontinuity in the shelf area concerned, as well as the actual nature and extent of the shelf and any structural and geological features which might identify it more closely with one landmass than with another.

And the Court might also indicate which features, if any, of the coastal configuration would in fact influence the delimitation, and in what manner, or manners, the Parties should take into account the relevant circumstances of geography, given the position and history of the land boundary.

The Court would also wish to consider the natural mineral resources, and the presence or absence of existing oil and gas wells, and fields, in the area. Related to these matters, undoubtedly, are the relevant legislative enactments of each State as they relate specifically to these resources.

The Court might also suggest guidance as to how the Parties should take account of other potential or existing delimitations between one or another of the Parties and third States.

In accordance with the Submissions made, the Court will no doubt also wish to give guidance to the Parties about other factors or circumstances – for example : the legal effect to be attributed to any historic elements, as well as any means or practical method by which existing practices might be taken into account and adequately safeguarded.

Now, the Court's guidance might have to be quite specific in some instances, for example : concerning the legal effect to be given to features such as the *rides* or the *falaises* and the bathymetric and geomorphological arguments of Tunisia. This would accord with the issues framed in her Submissions.

In particular, the Court could guide the Parties by indicating whether they are to treat bathymetric contours as appropriate guides for any purpose of their delimitation.

Finally, the Court might like to consider whether to discuss practical, and technical matters, such as the choice of a standard map ; the conventions for cartographic projections ; the use of computers ; and the like. Many of these were discussed in our written pleadings. And it is with respect to these many questions that guidance of the Court to the Parties and their experts could be addressed.

I shall now turn to the "practical method" itself.

4. Natural Prolongation

The articulation of the "practical method" first appeared, expressed in general terms, in our Memorial (I, para. 178, and in our Submission 5).

I also refer specifically to the more detailed discussion contained in our Counter-Memorial (II, paras. 468-531, at pp. 189-211) and in the new Submission 7, which was added at that stage to supplement and elaborate the thought originally expressed in Submission 5 (which by then had become Submission 6).

The contents of Submission 7 are amplified and broken down into separate subparagraphs in our Counter-Memorial (II, para. 473, at p. 190), to which I specifically invite the Court's attention.

When the principles of law, as expounded by Sir Francis, are applied to the factual evidence, as described and presented by Professor Bowett and our experts, today, we say that there can be but one conclusion : that the "natural prolongation" of that section of landmass is to the north.

Since a shelf delimitation must commence at the edge of the territorial seas

concerned, we conclude that the delimitation must proceed or continue, northward of the lateral boundary at the outer limit of the territorial sea, and in a direction which reflects the natural prolongation northward of the land-masses concerned. This is how it is stated in subparagraph i, on page 190 of our Counter-Memorial, and in our seventh Submission.

Consideration of the principle of natural prolongation in this context, however, raises two difficult questions. Our opponents have repeated them several times.

First, how can one determine, from the "natural prolongation" alone, an exact direction for a precise line of delimitation ?

Second, if delimitation should proceed by recognizing the fact of a northward natural prolongation, how do we explain the change in direction – the veering – which occurs at the latitude of Ras Yonga ?

First, I shall deal with the question of "direction" of natural prolongation.

On the factual plane, as Sir Francis has anticipated and Professor Bowett has concluded, "natural prolongation" is found to exist as a physical fact when the scientific evidence demonstrates affinity or appurtenance of the continental shelf to the continental landmass.

However, after natural prolongation has been found to exist in fact on the scientific evidence, the rules of law take over. First then, on the factual plane, the scientific evidence which establishes the affinity or appurtenance of the shelf to the landmass also determines the existence of the natural prolongation of the continent, from dry land to the limit of the submerged shelf.

We would deny however that natural prolongation in that sense can ever, or hardly ever, be determined simply by regarding the bathymetric contours and following their most convenient or apparent sequence, from shelf to slope to rise. Natural prolongation is not to be found in such an easy, or indeed superficial, way.

As I hope to point out on Friday, such a way of proceeding is also arbitrary. It can therefore not be, by definition, in application of the principles of international law, for they cannot be arbitrary.

If it has been intended to be definable by the technique of examining bathymetry or declivity, one would have thought that this Court would have said something to that effect somewhere in its Decision in 1969. But it did not. One would also have thought that the Third Conference on the Law of the Sea would have defined it that way. But it did not.

What it did define was the shelf itself : not any test or description relating to the question of whose natural prolongation a given area of shelf might be. Tunisia confuses these ideas, via what we have called, or are calling, the "Article 76 Fallacy", which can be stated in a nutshell as follows :

(i) The area of continental margin is defined by Article 76 as consisting of the shelf and the slope and the rise.

(ii) The shelf is described as comprising the sea-bed and subsoil extending beyond the territorial sea, throughout the natural prolongation of the land territory.

(iii) Therefore, natural prolongation of the land territory is to be defined in terms of the shelf and the slope and the rise.

This is a fallacy because there is a missing middle term, which is :

(iv) Natural prolongation can be defined or determined in the same manner as the area of the continental margin.

It is a leitmotiv ; it runs like a musical theme through the Tunisian case. We

were stunned at the deftness and flexibility with which the concept of natural prolongation was described in our opponent's pleadings, so as to lead with apparently irresistible logic to the seeming validity of the "Article 76 Fallacy".

Moreover, it is a simple fact of common sense that natural prolongation in geologic terms can rarely if ever give a precise line or azimuth. And we had thought this obvious all along.

The natural prolongation northwards of the North African landmass, on both sides of the Tuniso-Libyan frontier, is not marked with co-ordinates embedded in the rock, or gridlines on the sea-bottom, to facilitate delimitation by the Parties and their experts. And we never thought it would be as easy as that. Well then, how to proceed ?

In the case of adjacent States, the initial stage of any delimitation (of *any* delimitation) of the shelf must commence in a relatively precise and restricted zone. This will be determined almost entirely by the location of the terminal point of the land boundary.

The predominant evidence of general direction of the natural prolongation must then be considered in relation to the specific line of direction assumed by the land boundary in its last segment before it ends. Indeed it cannot be otherwise. Any delimitation must logically begin at a point seaward of that last segment and not seaward of any other part of the coast.

However, the shape of a "landmass" – an area of land – cannot be determined by a single reference point such as the intersection of the land frontier with the coast, any more than it could by the mere outline or configuration of a coastline between two such terminal points.

For it is the landmass with which we are concerned. It is not the natural prolongation of the coastline into and under the sea for which we are looking. The coastline merely tells us where the dry land stops and the water begins. In the words of our opponents it is the zero-metre isobath.

But the underlying subsoil of the shelf is a continuum from the landmass behind the coast out to, and into and under the sea.

So how far back along the land frontier is it necessary to look ? Well, in the present case, the straight segment south of Ras Ajdir proceeds in a substantially undifferentiated manner (segment) for about 60 kilometres. A rule of reason would say that this is fully adequate for determining the landmasses involved. There can hardly be a question as to which political State governing which landmass lies on which side of that land frontier, nor in what orientation.

The degree of propriety (this is the next stage) and precision of any technique like that will, and must, logically decrease in proportion to the distance from the coast. Why ? Because, at a certain point seaward, additional relevant circumstances should also have to be taken into consideration.

Indeed, the propriety of taking relevant circumstances into account, in order to assist in the process of refining a general line of direction, is only emphasized in a case such as the present one, where the actual language of the Special Agreement requests that "the relevant circumstances which characterize the area" are to be specifically considered by the Court.

Well, these circumstances could include the following : any fundamental (for example) discontinuity in the shelf, such as, in effect, to create two shelves, which is sufficiently proximate to the terminal point of the land boundary so that the discontinuity can be perceived – legally as well as physically – as creating two different shelves between the two States. Now, we say that this certainly does not exist here. Tunisia hints, but does not say, that it might.

The circumstances would already have included the direction of the land

boundary before its termination. They cannot avoid including the general and particular geographical configuration of the coasts.

They should also include the practice of the Parties in asserting jurisdiction over the shelf, or over substantial shelf resources – as well as any substantial existing installations for exploitation of shelf resources.

I shall not give a detailed list of irrelevant circumstances, which could be an endless catalogue, but would simply remind the Members of the Court that it is our view that many if not most of the circumstances relied on by Tunisia as "relevant" circumstances are in fact not relevant, either to the process of delimitation itself, or to the area in which the delimitation is to occur. I shall specify these later.

As Professor Bowett pointed out yesterday, the so-called "*ride* de Zira" is both so insignificant and so elusive that it is not a "relevant circumstance" for delimitation of this area. And the Ionian Abyssal Plain is irrelevant both in scientific fact and in geographic location. This relates to Tunisian Submission II-1. Similarly irrelevant are the "historic rights" asserted in Submission I-2.

Moreover, the use of any geometric, schematic or diagrammatic method of constructing a line of delimitation based only on geography, and even then on it, in a highly simplified form, is irrelevant. This was in substance conceded in the oral statements of Professor Belaid and Professor Virally (**IV**, pp. 570 f. and 608 f., respectively).

To the extent therefore that these do not reflect all the relevant circumstances or indeed any circumstances other than geography simplified, their use is inconsistent with the consideration of all those circumstances. They become not relevant.

It cannot therefore be valid in the refinement of the general line of direction into a specific line. Its use would be inequitable *per se*.

This applies to the two Tunisian geometric constructions representing the "anti-amputation line" and the "angular bisector" line (the *bissectrice*) proposed in Tunisian Submissions II-2 *(a)* and *(b)*.

The fact that the result which may be obtained by applying either of these geometric proposals is roughly similar to the results which are obtained by the arbitrary bathymetric lines does not justify the one by the other.

And so Professor Jennings, with respect, erred when he concluded that "it is also significant in the Tunisian Submission that all these methods . . . do lead indeed to a sheaf of lines and not to disparate results" (**IV**, p. 422). And this point was reiterated by Professor Virally on 25 September (**IV**, p. 593).

To the contrary, we would say that the closeness of this sheaf or fascicule is entirely owing either to coincidence, which seems unlikely, or – far more likely – owing to the fact that Tunisia has first determined where she wanted to end up, and then found various reasons and arguments to support a sheaf of lines on the way to that target.

Although the Court did say, in 1969, that "other methods exist and may be employed, alone or in combination, according to the areas involved" (*I.C.J. Reports 1969*, para. 85 *(b)*) – this does not mean that the results produced by two bathymetric methods, which ignore the relevant circumstances and geological realities, and include arbitrary techniques and irrelevant circumstances, can either be cured or confirmed by the results produced by two other unrelated geometric methods, which ignore everything except oversimplified and somewhat distorted geographical outlines.

For example, if the result of applying method A, which is deficient for reasons 1 and 2, is similar to the result reached by applying method B, which is erroneous for reasons 3 and 4, the correct conclusion is not, in our submission,

that method B has cured the deficiencies in method A, or vice versa. Two wrong methods do not make one right result, simply by reason of parallelism. It is not the same as if the methods had been right to begin with, and were therefore confirmed by their results. It is as if, in Breughel's painting of "The Blind Men Leading the Blind", that the blind men were all presumed to be sighted, just because they all ended up in the same ditch.

Although we listened most attentively to what Professor Jennings had to say on this subject, we were completely at a loss to understand how he could have reached the conclusions he did. I refer to his statement in this regard, IV, at page 422, where he stated that the sheaf of lines constituted methods :

> "all of which reflect more or less what [Tunisia] considers to be the relevant circumstances and factors, and all of which respect the physical facts of the natural prolongation".

And yet it is clear that they do not reflect all the relevant circumstances ; they are in fact highly selective, and, with respect, they certainly do not reflect natural prolongation.

I now return to our line of direction and its refinement. Going seaward : the further the proposed line of delimitation extends from the shore, the less proximate – and the more tenuous – become the effects of shore-related circumstances, such as the direction of the last segment of the land boundary, and the stronger become the effects of other circumstances, such as the distant change in direction of another coastline ; or the location of offshore producing petroleum wells ; or the increasing geographical proximity of other shorelines which may have changed direction, and the like.

Now the strength with which these other influences are brought to bear is in direct proportion to the distance which the line has progressed seawards from the coast.

Although the physical fact of the entire shelf – the species of platform referred to by this Court in 1969 – although that may be determined easily, in the case of adjacent States – a fundamental dilemma is always presented concerning the precise direction or azimuth which the sea frontier should assume, starting either with the frontier point or at a point at the edge of the territorial sea.

This will be true even to a small degree, no matter how clear the geological evidence of the general direction of natural prolongation may be. Thus, although appurtenance may be readily identified as long as there is only one coastal State, the moment that there are two, a dilemma of the frontier is presented, relating to the precise azimuth or direction to be taken by the shelf boundary between them.

This dilemma of the frontier, in our submission, can only be resolved by interpreting *de jure* appurtenance to include consideration of relevant circumstances, together with physical geology, as part of the process of establishing the conditions necessary for precise determination of *de jure* entitlement in that area.

It is as if the process needed four stages, each of which is deemed to have occurred simultaneously, or to have simultaneous effect.

First, the examination of general direction as indicated by the facts of physical natural prolongation.

Second, its refinement into a more precise line, commencing in the vicinity of the land boundary, by reference to the relevant coastal circumstances such as land boundary continuation and other elements.

Third, its further refinement at a greater distance offshore, by other relevant circumstances.

Fourth, its concretization into a delimitation line.

The answer to the first question, then, is that, although the principle of natural prolongation is the basic principle or rule governing the legal institution of the continental shelf, the law recognizes that the application of the principle may not always be simple, because the evidence may not establish clearly and decisively that a particular area of shelf is the natural prolongation of one State, to the exclusion of another State.

And so we turn to the second question : Why veer ?

It cannot be inconsistent with the concepts of natural prolongation and *de jure* appurtenance for the specific direction (the specific direction) of a proposed line of delimitation to "veer", or to change direction at a certain point, in order to take into account new circumstances relevant to that area.

Now surely that is the response to the question "Why veer ?" The answer is precisely that the bend in Aristotle's leaden ruler mentioned by Professor Abi-Saab – the leaden ruler which is perhaps the law – is always required by equity in order to take all the relevant circumstances into account, so that fair measurement by the leaden ruler may be achieved. The bend in the leaden ruler is, in our view, at the approximate latitude of Ras Yonga.

In this context we noted with somewhat wry satisfaction that the obvious factual deficiencies in the Zuwarah *ride* have now caused it to assume a distinct back seat to the Zira *ride*, Tunisian Submission II-1 having been discreetly changed to that effect.

But our satisfaction was even more acute when we learned that Professor Virally has now produced a veer of his own, whilst somehow avoiding any heavy weather at the hands of his colleague Professor Ben Achour. But we certainly encountered that heavy weather. We were accused of having advanced two proposals, the first of which was exaggerated into the brown
(51) line depicted on Figure 3.01 of Tunisia's Counter-Memorial. The Court will recall that this line went considerably north of Tunis and of Pantelleria. It was the line mentioned by Ambassador El Maghur (at pp. 11, 15, *supra*) and it was discussed by Sir Francis Vallat as well (p. 36, *supra*). It represents, or represented, a misrepresentation of our legal case which Tunisia has called "*la méthode du* northward thrust". The second proposal which we were alleged to put forward was referred to then as "*la méthode correctrice*".

But Professor Virally's veer (it occurs IV, p. 607) was not criticized. It even escaped the indignity of being referred to as "*une méthode rectificatrice*". Having settled upon the 400-metre isobath as being the best isobath for his "*ligne des crêtes*", Professor Virally's client must then have had second thoughts. Professor Virally stated : "Le Gouvernement tunisien a considéré, cependant, que cette isobathe se rapprochait de trop près des côtes libyennes en ce point . . ." *(Ibid.)*

One asks oneself, how did they know ? What standards did they apply ? Were they considering encroaching in front of our coasts, in spite of the disavowal of those terms by Professor Jennings ?

But Professor Virally continued :

> "et que l'équité commandait de choisir plutôt l'isobathe des 300 mètres, également bien marquée, même si elle est moins significative, mais qui se trouve sensiblement plus au nord" *(ibid.)*.

And he concluded by saying, as Professor Bowett noted yesterday morning, that equitable principles had to be applied even if "au détriment même de ses

intérêts et de ce que l'observation de la nature amène à conclure sur la position exacte du prolongement naturel de la Tunisie en cet endroit" *(ibid.)*. We find that language very significant.

In small compass, I am tempted to say in a "microgeographic" context, Tunisia has ostensibly done exactly what we have done in relation to the geographical circumstances which become so evidently altered at Ras Yonga.

To sum up, then: the physical evidence for a general direction of the continuation seaward of the continental landmass is thus refined, on the legal plane, into a specific direction for the boundary which, by agreement, can then be used to separate one State's shelf from the other's.

But the precise boundary separating one entitlement from the other can only be finally determined on the legal plane by agreement and in conjunction with the other fundamental rule of delimitation: that it be accomplished in accordance with equitable principles. Since equitable principles imply the consideration of all relevant circumstances, we have come full circle.

I should now like to turn to the reverse of the coin of natural prolongation. That is the aspect of the principle of natural prolongation which may be called "the principle of non-encroachment".

The basic principle of "non-encroachment", which was treated in imperative terms by the seminal paragraph 85 of the 1969 Judgment, in its subparagraph *(c)*, is inextricably interwoven with the basic principle of natural prolongation. One is a reflection of the other.

"Non-encroachment" comes into effect in the instance of adjacent States and of opposite States, but more acutely and more quickly in the case of the former, since – as I have discussed – the "dilemma of the frontier" is then immediately posed as it is in all cases of adjacent delimitation. In this present case it is of vital importance.

The principle will place a very heavy burden upon either State crossing over to the other side of the appropriate line running seaward from the territorial sea boundary. It will in effect forbid it.

It is for this reason that we take so seriously the extension of the land boundary northwards: its logical direct continuation. It is for this reason that we take so seriously the 1955 Petroleum Law and Regulation.

Encroachment or non-encroachment – like natural prolongation itself – is to be determined in the main by the fundamental evidence of geology. Yet as I have discussed, the rendering of a strong directional trend into a precise line may require the consideration of other elements: the relevant circumstances of geography and other characteristics of the immediate area, and then also of the area beyond that.

In order to attain a proper refinement of the line, to reflect faithfully the natural prolongation of a State's land territory, and to avoid encroachment on the natural prolongation of the other State, the Parties should be directed to consider all the relevant circumstances which characterize the area.

5. Relevant Circumstances

As I have already noted, the Special Agreement refers specifically to the importance of all the relevant circumstances.

The Court has also noted – and I quote from its 1969 Judgment – that "there is no legal limit to the considerations which States may take account of" (*I.C.J. Reports 1950*, p. 50). There is, however, a practical limit. The

circumstances must be relevant. They must relate to the delimitation of this shelf in this area.

Well, what are they ?

First, we are dealing with adjacent States. It should come as no surprise that the Parties agree that the position of the land frontier on the essentially north-facing coast at Ras Ajdir is relevant. Moreover, it is also both indicative and relevant that the land boundary follows a general north-south direction below Ras Ajdir.

It is from the outer limits of the territorial sea off Ras Ajdir that a delimitation will fix the western-most boundary of the Libyan continental shelf in the area of concern, and will fix the eastern-most extension of the Tunisian shelf. As I said a moment ago : each side or each Party should bear a heavy burden to justify its crossing to the other side of a northward continuation of the land boundary line of direction.

I might add that this burden would not bother us, for we have suggested no crossing to the west of that line. But the burden does lie on the shoulders of our opponents, and very heavily so. They are suggesting a sudden and dramatic turn, at an angle of some 65° to the right and the east, creating a sharp angle at Ras Ajdir.

This is a divergence not of 10°, or 20 or even 30. It is more than twice that.

Professor Virally introduced the analogy of a terrestrial boundary commission and he said that, in the case of this delimitation, an imaginary submarine boundary commission recognizing the "ligne des crêtes" [crestline] would "suivre, avec le plus de fidélité possible, la ligne des points hauts qui sépare le prolongement naturel des deux Etats" (IV, p. 606).

How does that work in reference to Ras Ajdir ?

What justifies the boundary commission, in Professor Virally's analogy, suddenly lunging dramatically to one side : almost two-thirds of the way to a right angle ? Is it perhaps a distant, submerged, mountain peak which we have not yet taken into account ?

Second, as Professor Bowett discussed yesterday and as Professor Fabricius has further elaborated in his evidence this morning, we are dealing here with a shelf area which constitutes a part of the Pelagian Block. It is a continuous shelf area, one of an essentially homogeneous character.

Now, the configurations and declivities of the sea bottom in the area with which we are concerned are in no manner able to be used rationally or equitably as markers or determinants for a shelf boundary.

As Professor Bowett made clear yesterday, geomorphological features of far greater significance, far greater importance – namely the Hurd Deep and the Norwegian Trough – have not been considered as factors which affect delimitation in any way whatever.

A corollary of this, of course, is that the importance of bathymetry as a relevant circumstance has been greatly diminished, if it can still be said to have any effect at all. The slope of the Pelagian Block as a whole is virtually imperceptible, whether viewed from south to north or from west to east. As Dr. Fabricius said this morning, it is as flat as the polders outside The Hague.

Now the recent trends in the Third Conference on the Law of the Sea are also testimony to the diminished importance of bathymetry. We find it particularly ironic, in the light of what the Third Conference has actually done with bathymetry, to hear the theme of the Article 76 fallacy played over and over again throughout the Tunisian oral presentation : – defining the margin and shelf in terms of bathymetry ; describing the shelf in terms of natural prolongation ; and then defining natural prolongation in terms of bathymetry.

Third, "the general configuration of the coasts of the Parties", to quote from the *dispositif* in the *North Sea Continental Shelf* cases, must also be a factor. The generally east-west running coast – that is to say : the north-facing coast from roughly Gabes to somewhat west of Tripoli – that's the coast of central importance.

Now it is along this segment of the coast that one finds the land boundary between Libya and Tunisia. At the same time, it is apparent that some account must be taken of the sudden change in direction of that coast as it turns around the inside of the Gulf of Gabes and then runs out to the north-east.

Particularly significant is the section of coast lying further north, approximately between Ras Yonga and Ras Kaboudia. Strictly speaking, that section of coast is an "anomalous feature" inasmuch as it departs radically from the overall east-west coastal orientation of North Africa. Its configuration is the result of relatively recent and deep-seated geological occurrences, which have been described by Professor Bowett.

Now by using the word "anomaly", we certainly intended no disrespect to that section of coast. Nevertheless, this coast exists ; it is there ; it is, therefore, to be taken into consideration and balanced or weighed in the formulation and the clarification of a proper practical method of applying the law in order to lead to an equitable result.

Professor Ben Achour asked why we now take account of the promontory of the Sahel, which we have once characterized as an "anomaly" (IV, p. 588). The short answer is that the question confuses ideas of two different kinds. The coast is there – it must be taken into account. But it is also an anomaly. The fact that a feature is anomalous does not mean that it should be ignored.

Fourth, there exist segments of coast, both of Tunisia and of Libya, which are clearly not relevant for the purpose of clarifying the practical method "in this specific situation". Their very irrelevance is thus itself a relevant consideration. This question, of what might be termed "irrelevant coasts", turns to a large extent on another factor.

That factor is the presence of third States, and of actual or prospective delimitations with third States in the same region. These two factors, taken together, relate to the considerations underlying the area of concern.

As is well known, the need to take into account neighbouring third States was explicitly recognized by this Court's decision in 1969. To a lesser extent, it was also noted by the Court of Arbitration in the Anglo-French Arbitration. But when we examine the way Tunisia has taken into account the various relevant circumstances, the conclusions which she has reached regarding the presence of neighbouring States are startling indeed.

For example : Tunisia contends that the segment of its coast stretching from Ras Kaboudia to Cape Bon – as well as the Libyan coast eastwards from a point approximately halfway between Zuwarah and Tripoli are relevant to this (118) delimitation ; if the Members of the Court will refer to a map in the folder of 28 September 1981, they will find these sections of the coast clearly illustrated in colour. Now this proposition cannot be right, for at least two reasons.

First, the segments of the coast I have just mentioned are far distant from the coasts abutting on the area of shelf where the delimitation must occur.

And, second, these segments of coast all abut on remote or irrelevant shelf areas. They are coasts which have been taken into account in an actual delimitation between Tunisia and Italy, or will be considered in prospective delimitations between Libya and other States. But those areas of shelf concerned are far distant from the area of concern here.

Tunisia has countered in her Reply and her oral pleadings by saying that

State practice knows no restrictive rule which would bar consideration of these coasts. And she cites the North Sea delimitations as evidence that a State can refer to the same coast more than once, in cases of separate delimitations.

But the situation here is not analogous to that in the *North Sea* cases. There, for example, the coast of the Netherlands could have been said to be relevant for delimitation with both the United Kingdom and the Federal Republic because of its proximity – its relationship – to shelf areas which actually concerned both of those other States.

The Dutch coast was opposite to the coast of the United Kingdom and it was adjacent to the coast of the Federal Republic, and all three coasts abutted on the same area of shelf. The Dutch coast, therefore, had to be viewed in the context of its entitlement to the same area of shelf vis-à-vis both the Federal Republic and the United Kingdom.

But here, it is different. The coasts of Tunisia and Libya which face third States are wholly removed from the area within which the Libyan/Tunisian delimitation must occur – that is, the area off Ras Ajdir from where the ultimate delimitation must of course commence.

Tunisia seeks to consider her coast north of Ras Kaboudia twice : doubling the length of her apparent coast line in respect of areas – such as the area of concern in this case – as to which that section of coast has no conceivable relationship.

This consideration, Mr. President, of irrelevant coast line has the same effect, but for different reasons, as counting both sides of the Gulf of Gabes – which was discussed in paragraph 113 of our Reply. But the result is the same : Tunisia multiplies the lengths of her coasts by irrelevancy or by redundancy. Thus Professor Ben Achour was heard to say that the Tunisian coasts were four times – in the area he was discussing – four times the length of the Libyan coasts : well, this must have reflected to a considerable degree such irrelevant or redundant coasts (IV, p. 590).

Fifth, we have the existence of a number of legislative enactments by both Parties. As far as Tunisia is concerned, these deal primarily with internal regulations governing surveillance of fishing and with various laws relating to Tunisia's claimed territorial sea.

The situation regarding Libya is quite different. Not merely does there exist a similar panoply of laws and regulations concerning fishing surveillance and the gathering of sponges, mentioned in our Counter-Memorial : there also exist legislation and regulations which unequivocally and directly indicate the assertion of sovereign rights over the most important resources of the area in question, which express a claim of sovereign rights concerning the shelf as a shelf, and which clearly state the right to regulate extraction of the primary shelf resource, petroleum.

Finally, there is a sixth criterion or factor which we submit is of indisputable relevance. This relates to the existence of petroleum fields and wells within the area of concern. The decision in the *North Sea Continental Shelf* cases explicitly held that the factors to be taken into account are to include : the physical and geological structure, and natural resources, of the continental shelf areas involved" (para. 101 (D) (2)).

In our view, the existence of individual productive wells which could be affected by a delimitation line must be taken into account in the course of clarifying the practical method for the application of the legal principles and rules.

We listened with great attention to our Tunisian colleagues but we did not detect any real argument addressed to this highly relevant circumstance. Why

is this ? We can only conclude that – as our Agent has said – Tunisia finds herself embarrassed by her own sheaf of lines, which would clearly disrupt and amputate producing Libyan installations. This is particularly so because the Libyan general line of direction would have little, if any, effect upon any similar Tunisian installations.

We do not say that the line of delimitation should be zigzagged so as to avoid placing each such well in the shelf area of that State under whose concession grant it was drilled. That would be inconsistent with the other principles and rules. It might even constitute an otherwise inequitable solution.

But what we do say is that some provision can be made, if necessary, to accommodate existing producing installations. The line to be agreed upon might avoid directly "amputating" certain wells. I would respectfully remind the Court here that, in the *North Sea Continental Shelf* cases, the area of concern contained no producing wells, but was only an area of "wildcatting". Thus, this question, as such, did not arise in 1969.

I might add that the Court will of course be aware that one of the reasons why the line of delimitation should not be unduly "bent" in order to appear to grant more resources to one State, which at the moment appears to possess only a few, the argument of a "just and equitable share" in a sense reformulated – that the reason why the line should not be so "bent" is precisely because who knows what might be discovered in a year or two after the decision of the Court, and after the delimitation as between the Parties ? The delimitation is a permanent boundary. It cannot therefore be based upon a comparative situation which might well prove to be transitory.

I would finally recall that my colleague Dean Colliard has already referred to the possibility of protective measures which could also be employed to avoid disruption of any established fishing interests, no matter how minor they may appear in comparison to petroleum resources.

The Court rose at 6 p.m.

TWENTY-FOURTH PUBLIC SITTING (9 X 81, 10 a.m.)

Present : [See sitting of 16 IX 81.]

Mr. HIGHET : Mr. President, Members of the Court ; before the Court rose on Wednesday evening, I had just completed a discussion of what we perceive to be six categories of relevant circumstances or factors to be taken into account in this specific situation, and I concluded on Wednesday evening by mentioning the issue of the existence of petroleum fields and wells within the area of concern.

I shall now turn to a brief discussion of the seven specific considerations which were adduced in the Libyan Counter-Memorial in paragraphs 524-530 (II). We said, in the Counter-Memorial, that application of our method would result in a delimitation which would take these considerations into account. The brush-off given to these seven paragraphs in the Tunisian Reply is quite extraordinary: however, it has already been noted by Sir Francis. For Tunisia, these considerations therefore no longer exist. And so Tunisia is quite unabashedly able to contend, which it did in paragraphs 3.22 and 3.23 of its Reply (IV), that we have cited no relevant circumstance other than the change in direction of the Tunisian coast produced by the Sahel Promontory and that all or any other circumstances "are therefore completely undetermined, not to say unknown" (para. 3.23).

This is perhaps an extreme example of an ingenious technique of pleading. First you sweep aside or ignore the considerations advanced by your opponent and then you say that your opponent has not advanced any.

Since these considerations no longer exist for our Tunisian colleagues, it might be well to remind them now of what they were.

The first factor (which we mentioned in para. 524 of our Counter-Memorial (II)) was that our suggestion would conform, in its first part, to the western boundary of Petroleum Zone No. 1 under the 1955 Libyan Petroleum Law. Tunisia questions the effect of the Libyan Petroleum Law and Regulation and Map No. 1 thereunder, indicating that it is merely "a unilateral act by one State". Sir Francis has dealt extensively with this.

Let me only stress that there can be no doubt that the Libyan legislation was the only enactment by either Party dealing exclusively with sovereign rights over an important shelf resource. It proclaimed quite unambiguous rights which Tunisia has never protested. Tunisia's early concessions, as the Court has been shown, were consistent with it and coincided, in the east, with its western boundary.

Our second point was in paragraph 525. That was that the northerly projection would accord with the maritime jurisdiction exercised by the Parties in the general area, including the location of vessel arrests and, to the extent relevant, with the fishing practices of all concerned. It was pointed out – even though it was not legally relevant – that "the areas within which the actual, established fishing rights of Tunisia have been exercised would be on the Tunisian side of any line which would result".

Now Tunisia has stated that the "line cuts across the area of Tunisian historic rights". Our colleague, Dean Colliard, has demonstrated that Tunisia's assertion is simply untrue. Whatever fishing practices Tunisia did engage in

– at least those relating to fixed fisheries – must have been limited geographically to areas lying in very close proximity to the Tunisian coast. And these areas will remain unaffected by the results of applying the Libyan practical method.

As for the vessel arrests, this is a point to which we have already addressed ourselves. It may be noted now that to leave every single vessel arrest by Tunisia – no matter where it occurred, and no matter what vessel was arrested, and of what flag – on the western side, if you will, of an ultimate line of delimitation, would be clearly inequitable to Libya. It would also create a new form of prescription to continental shelf.

The third point raised in the Libyan Counter-Memorial in paragraph 526 (II) was that Tunisia was not "deprived" (that is the word we used, "deprived") of its shelf in the relevant area, since the Tunisian coast west of Ras Ajdir "would have its projection to the north". This point was illustrated by simple diagrams. It still holds true.

It goes without saying that the Tunisian coast north-east and north of Ras Yonga is also not deprived of its shelf, since our proposed line of direction veers and reflects all the relevant circumstances – including the peculiar geographical configuration of that coast – i.e., of eastern Tunisia.

And in this connection, it is not justified for Tunisia to say – as, with respect, Dean Belaid has done – that :

> "la seule circonstance que la Libye admet en fait, sur le plan géographique, est un prétendu changement de direction de la côte tunisienne au niveau de Ras Younga" (IV, p. 569).

Now we have not spoken at length about the Kerkennah Islands and their *hauts fonds découvrants*, but I should here remind our Tunisian colleagues of a footnote to our Counter-Memorial which they had perhaps hoped to forget, on page 201. There the existence of the brown line of Figure 3.01 of the Tunisian Counter-Memorial – the exaggerated north line attributed to us – its existence was there anticipated by our own Counter-Memorial and disqualified by us because, amongst other grounds, "it would pass close by the Kerkennah Islands". (51)

Thus – as I said – we even specifically mentioned the Kerkennahs before the brown line appeared on Tunisia's maps. We need not mention them again, since they are in any event fully respected by our suggested line of direction.

The fourth point was in paragraph 527. It very specifically said that the northerly projection "would result in a delimitation which does not place the oil fields drilled under concessions granted by one Party in the shelf area of the other".

I stress the words "oil fields". This does not mean "oil wells". Nor does it mean "gas fields" or "gas wells". And in no event does it mean "exploration rigs" or "exploration wells", and it certainly does not mean "dry holes".

It does not mean "abandoned wells", whether of oil or of gas, which is precisely what the Tunisian wells east of the general line are.

It means just what it says : "oil fields drilled". Now Tunisia's footnote – in their Counter-Memorial comments that "this is simply not true" (cf. para.3.37). And yet when paragraph 3.37 is consulted, one finds that the reference there is to individual "boreholes and wells", not to "oil fields". The fact is that "*puits forés*" are not oil fields. Our contentions concerning oil fields cannot be contradicted by information concerning abandoned oil wells. Perhaps the Tunisian attitude concerning this point can be related to the reluctance of

Tunisia's counsel to discuss the subject of oil during eight days of oral pleadings.

Our fifth point was in paragraph 528. That was that two sedimentary basins would be left on the Tunisian side of the likely line of delimitation. We said that this would be "consistent with the 'unity of deposits' " injunction in paragraph 97 of the *North Sea Continental Shelf* cases.

This reference to the Court's language, however, was rejected by the same footnote in the Tunisian Counter-Memorial, merely by a bald assertion that it "has not the slightest connection with the idea of the unity of a deposit, as employed by the Court in 1969". Now this is wholly wrong. Our statement in paragraph 528 was a statement of objective fact. It is obviously consistent with the Court's concern for the unity of deposits, to the extent that it avoids interruption of any such unity.

(65) One need only look at Map No. 7, entitled "Tunisian Petroleum Activities" of our Counter-Memorial, to which I respectfully refer the Court, to see how the probable result of application of the Libyan practical method would respect these circumstances and would have a minimal effect on Tunisian producing wells and petroleum deposits. In particular, it would leave the productive Ashtart field entirely on the Tunisian side.

Now it is in this light, Mr. President, that I might take a closer look at the criticism levelled against the Libyan practical method, by paragraph 3.37 of the Tunisian Reply. There, Tunisia complained that a large proportion of – to use the Tunisian Reply's own words – "the Tunisian boreholes and wells" would find themselves on the Libyan side. The Reply then went on to name nine specific wells which would suffer this fate.

Well, when we examined the wells, however, we find that they were either dry holes or apparently abandoned as being incapable of commercial production.

In fact, one need only turn to footnote 6 to paragraph 3.37 of the Tunisian Reply to find confirmation of this point. For there it is admitted that with the exception of the Ashtart field – which, as I have just indicated, the Libyan practical method leaves untouched – all drillings except at Isis and Miskar have been abandoned.

Now, as for Isis, to take that first, the Libyan Counter-Memorial noted how the French company operating at that site stopped work in response to Libyan objections. Significantly Tunisia did not protest this action. As for Miskar, the Tunisian Reply itself suggests that only "small pockets" of gas may exist there, which may or may not prove commercially exploitable. How enormously different would be the effect of any of the Tunisian sheaf of lines upon the equivalent Libyan petroleum activities and deposits. This point I will consider again later.

Our sixth point, in paragraph 529, was that a northerly projection would be consistent with the last directional trend of the land boundary. This point is, as we have indicated before, a relevant practical circumstance which surely must be taken into account.

Yet it has been responded to merely by argumentative denial, with no reasoning or proof of any kind.

And finally our seventh point (that was para. 530) was to the effect that a northerly projection respects the national security of both States to the extent that this issue is raised by the particular circumstances of the area.

Now this must also be a relevant circumstance. To ignore it would be creative of inequity. Our opponents again brush aside even the slightest consideration of this point.

Yet the importance of the Kerkennah Islands is compared with Tripoli – one of the busiest ports in the Mediterranean – the capital city of Libya, on the sole, north-facing, Libyan coast. Tunisia has wisely ignored our point in paragraph 530 that "no major Tunisian city is situated similarly to the city of Tripoli on the Pelagian Sea Littoral".

I shall not at this stage further repeat the considerations and circumstances which our practical method takes into account.

In summary, I would only say that the Libyan proposal of the method by which the law should be applied in this specific situation is, in itself, composed of those circumstances and of our suggested response to them. It is thus entirely congruent with the basic principles of law. It is, in our submission, a logical evolution of those principles and an equitable application of them.

The Libyan practical method, not being a proposed method of delimitation, cannot be set down in an exact line in the way in which the Tunisian sheaf can be portrayed. Now, even though our Tunisian opponents appear to have withdrawn a bit from the idea that their sheaf of lines is in fact a sheaf of lines, and to have taken the position that it has become a sheaf of illustrations, or suggestions of "only an approximative character", their approach in their Memorial gives away the truth of the matter ; and so does the very wording of their submissions.

But the Libyan practical method, being only, in our submission, a methodical series of proposals as to how the law should be related to the circumstances as and when they are encountered, cannot be set down in the shape of a formula or a prescription.

And certainly not in the shape of a map with a line or lines unequivocally drawn upon it. Thus I do hope that it will not be disappointing that I am not, at this stage, suddenly producing such a line. To produce a line of that type would be wholly inconsistent with the presentation of our case, from the Memorial on through the Reply.

But the diagrams and maps which appeared in our pleadings – and in particular, in our Counter-Memorial in rebuttal to the quite unexpected sheaf of lines in Tunisia's Memorial – they really did only have an approximative character. And that is why we called our proposed solution in part a line of direction, and why we could not bring ourselves to portray it with anything other than little arrows. Even those little arrows were, in our view of the law, too evocative of a line for our entire comfort, but we were not able to think of any other alternative except to eliminate maps altogether.

The same comment applies to the degree of specificity of other maps or diagrams, such as those illustrating our "area of concern" or any areas of overlap.

These are elements of argument, intended only to offer guidance, and no precise formula or solution.

I return again to paragraph 473 of our Counter-Memorial. Now, that is the paragraph on page 190 which sets forth the practical method of applying the law in terms of four subparagraphs. It is my respectful submission that the formulation of the law, in regard to the facts, which is substantially along these lines is, in fact, what is called for by Article 1 of the Special Agreement. It is such a formulation, and hardly a choice of lines, which can most realistically be seen as creating the appropriate context for the negotiated agreement between the Parties which is so much an inherent principle of shelf delimitation. And at this stage I would also respectfully draw the attention of the Court to the nine specific legal propositions which we set out in a series, at pages 132 to 138 of our Counter-Memorial.

6. TUNISIA'S DISTORTION OF OUR CASE

I shall now analyse the key distortions of the Libyan legal case which have played such an important role in the Tunisian presentation – both written and oral.

The most important single element of this distortion is, of course, in our view, the artificial characterization of the Libyan case as being comprised of a *méthode de base*, a basic method, and a *méthode correctrice*, a corrective method. This false dichotomy became most triumphantly asserted on 24 September in the speech of Professor Ben Achour (IV, p. 578 ff.).

Why is this a false dichotomy. It is false because, with seeming perfect logic, it rests on a major premise which is itself false. That is, that our Memorial was setting forth a method of delimitation with the same degree of specificity and "*précision*" as that with which the Tunisian Memorial had set forth its sheaf of lines.

But the fact is that our Memorial did not set forth a method of delimitation and did not portray lines or the drawing of lines. This difference in approach has in the main arisen because of the divergence of the views of the Parties on the interpretation of the Special Agreement and the role of the Court, which I discussed on Wednesday.

It was only natural (and indeed appropriate) that our suggested method for application of principles of law to the facts should become elaborated and developed in the course of the written pleadings. And, as has been said, Tunisia's abandonment in her Memorial of her former reliance on equidistance, in essence required an extensive and orderly development of the Libyan case, in response to Tunisia's two new bathymetric proposals and the two new geometric exercises.

But the reason why Professor Ben Achour is, with great respect, completely misguided in his division of our case into two separate parts, is that there is nothing for the corrective method to correct. There never was.

(51) To postulate that it is a corrective method, one must believe in the explicit existence of something – such as precisely the brown line of Figure 3.01 of the Tunisian Counter-Memorial – which is to be corrected. And that can only be true if that position has been advanced.

Now, we would vehemently resist any accusation or distortion which would say that we have advanced any such line.

Thus the first and most important distortion by Tunisia is that she is attacking, and purporting to destroy, a case which has not been advanced in these proceedings. It is the well-known tactic of setting up a "straw man" and then destroying him with gusto. But this does not assist the Court.

In the course of presenting his argument, Professor Ben Achour went so far as to refer to the general principle set forth in our Memorial as being "la méthode du *northward thrust*" (IV, p. 579). Surely this is indicative of a perception which might properly be attributed to the Tunisian case rather than to our own. Why would that be ?

Opened by Professor Jennings, supported by Professor Abi-Saab, consistent with Professors Belaid and Ben Achour, and concluded by Professor Virally, the Tunisian oral pleadings have proceeded by specifying lines or specific methods of delimitation, in the sense referred to by Professor Abi-Saab as "certain operational means of effecting delimitation" (IV, p. 434). Thus our opponents discern or perceive, albeit it fallaciously, a specific method of delimitation in our views of how the law should be applied to the facts.

Their vision has clouded our case as well as their own. Our case is

perceived in terms of Tunisia's own optical perspective : in the evocative words of Professor Virally, the brown line, which we have never advocated or advanced, remains in the mind's eye : "l'impression visuelle peut subsister, par une sorte de persistance rétinienne" (IV, p. 599).

But, his subject then was our "area of concern" – a subject to which I shall return shortly – which, in our view, entirely merits such a retinian memory, showing as it does the inescapable disproportion and excessive angularity of the Tunisian fasicule of lines. But the brown line deserves no such persistence. It was even portrayed to the Court and put up on a screen behind me on September 24 ! It is a position falsely attributed to us.

Even more fundamentally, it is an "operational means of effecting delimitation" which is falsely attributed to us, without merit either in the form or the substance of the matter.

There is another point of difference between the Parties which must be dealt with here. That relates to the selection of Ras Yonga as the approximate location of the established turning point for the Tunisian coastline in the relevant area.

As one proceeds northwards of Ras Ajdir, there comes a point – and of course it is impossible to fix it precisely, as if it were a navigational beacon, or a benchmark, on a map – where, in the balancing of all the relevant circumstances, the effect of certain factors becomes more pronounced. We are not of the view that this point can be pinpointed, and certainly not pinpointed unilaterally.

Indeed, this is the type of determination which might reasonably be left to the Parties and their experts to establish in the negotiations leading up to their agreement. But we do take the view (expressed in our Counter-Memorial) that there are several compelling reasons why that point might be said to occur at the approximate latitude of Ras Yonga.

However, at paragraph 3.19 of the Tunisian Reply (IV), it was stated that "a mere glance at any map of the region shows that Ras Yonga does not mark any significant change in direction". And Professor Ben Achour said that the choice of Ras Yonga "*est tout à fait arbitraire*" ; he produced a map of the Gulf of Gabes, upon which he attempted to make the point that :

> "le fond du golfe de Gabès est parfaitement circulaire et donc on ne peut pas dire à quel moment exactement il change de direction, parce que le fond du golfe change de direction à tous les moments puisqu'il est constitué par un arc de cercle" (IV, p. 589).

But, this precisely demonstrates our point. As the Court may see – by a mere glance at any map – Ras Yonga sticks out slightly ; it is a slight promontary beside the Kneiss Islets ; but more important it is the point at which the change of direction of the Gulf of Gabes – the arc of the circle – the words of Professor Ben Achour – can definitively be said to have terminated. It is, in fact where the coast straightens out.

It is doubtless for this reason that Ras Yonga has long served as the natural recorded entrance point for the Gulf of Gabes : that was described by Dean Colliard. It is both useful and important to pick a point at which one can say : this feature stops here, and the coast line resumes another course there.

And that point we believe is Ras Yonga. It is not possible to represent the general direction of that coast by a zig-zag, the zig-zag actually described by the line of the coastline. To do that would be to elevate an "anomaly" into a generality.

In the words of the fifth Libyan Submission, it would determine a general

change in direction "by the incidental or accidental direction of . . . [a] . . . particular part of the coast".

Of course there are other reasons why our proposed general line of direction should veer more or less at that latitude. Some of these I have already had occasion to mention.

First, as Sir Francis has already discussed, the Libyan legislation embodied in the 1955 Petroleum Law and Regulation asserted sovereign rights over the most significant shelf resource. The western boundary of Zone No. 1 constituted a straight northerly prolongation of the land boundary through the territorial sea. It continued northward for a distance of some 62.9 nautical miles seaward from Ras Ajdir. Now that is very close to the latitude of Ras Yonga.

(51) I would remind the Court that, as shown so graphically in Map No. 4 of our Counter-Memorial, the early Tunisian concessioris coincided with that line and indeed they give every appearance of having accepted it.

It is a highly relevant circumstance. The Libyan Petroleum Law was promulgated some 26 years ago : 18 years before the baselines drawn around the Kerkennah Islands and purporting to close the Gulf of Gabes ; 21 years before Tunisia's 1976 Memorandum which espoused equidistance but from which Tunisia has now resiled ; and well before any indication that Tunisia would in her Memorial allege so-called "historic rights" as a circumstance relevant to delimitation, and would contend for a "sheaf of lines" burgeoning out at 65° to the east, based wholly upon bathymetry or plane geometry.

Finally the natural limits of the Jeffara Plain – the principal on-shore geographic feature – end roughly at Ras Yonga. And it may also properly be said that the promontory of the Sahel also begins approximately at Ras Yonga.

I turn to the "area of concern".

As the Court will recall, the last leg of the practical method advanced by Libya for the application of the legal principles to the facts, was the avoidance of encroachment. And this was presented both in our Submission 7 and in subparagraph iv on page 190 of our Counter-Memorial.

The formulation of the "area of concern" operated in two senses – in two senses ; first under heading (1) on page 192 of the Counter-Memorial the statement that "The Extreme Claims of a Party Are Not Necessarily Determinative of the Continental Shelf to Be Delimited".

It was illustrated by a simple reproduction of the Tunisian "sheaf of lines"
(38) from Figure 9.14 of the Tunisian Memorial. In our submission, that sheaf of lines as represented in that figure almost speaks for itself. They could not conceivably represent a reasonable limit to the true area of concern.

Professor Virally, in his attack upon the "area of concern", seems to have forgotten this principal reason for its introduction (IV, p. 598).

But it also operated in a second sense, expressed as a heading on page 193 of the Counter-Memorial : that was that "The Court Should Not Contemplate the Division of an Area Which Would in No Event Fall to Be Delimited between the Parties".

Now the "area of concern" received some energetic handling in the Tunisian Reply, and I must therefore pause for a moment to deal with it. In paragraph 3.30 of its Reply (IV), Tunisia stated that :

> "According to Libya, it would be 'appropriate for the Court' to determine the extent of the area of continental shelf within which the Parties and their experts should effect a delimitation pursuant to its decision". (Citation to para. 477 of our Counter-Memorial.)

Tunisia then went on to conclude – at the end of this same paragraph – that "there cannot be any question of establishing, within the framework of the present proceedings, a Tuniso-Libyan zone defined in relation to the rights of third States".

I hasten to reassure the Court that Libya never had any such "determination" in mind. And to the contrary, we have been seriously misquoted.

The Court will note that in the quotation I read from paragraph 3.30, the Tunisian Reply has limited the internal quotation marks to surround the phrase "appropriate for the Court", but has not continued the quotation any further.

But when you look back at the actual wording of our paragraph 477 of the Counter-Memorial (II) – the hook from which hangs the Tunisian argument – one sees that what we really said (and I invite the Court to review the exact language, at p. 192 of the Counter-Memorial) is that "it thus appears appropriate for the Court to consider the extent of the area of continental shelf", etc.

Tunisia misstates the Libyan pleading by saying that we are asking the Court to "determine" the area of concern ; yet Libya has only suggested that the Court "consider" it.

It is an element of argument, not a submission.

A few more points were made by our Tunisian colleagues in their oral argument on this subject. Professor Virally criticized the "area of concern" by saying : "elle aboutit à diviser la mer Pélagienne en plusieurs parts" (IV, p. 597).

Recalling that the suggestion is not that the Court is being asked to determine anything, but only to consider it, what is wrong with this ? One may look in vain in the Special Agreement to find a reference to the Pelagian Sea, which our opponents assume cannot be divided into parts. Is there anything to suggest, and I quote from the Special Agreement, that the "areas of continental shelf appertaining to" the Parties must be defined as extending to include all of the Pelagian Sea ?

Now, in our view the Tunisian claims are so far-fetched, so extreme and so inequitable that it must be a condition of their assertion that the area for delimitation somehow be visually enlarged and extended to a point some 130 kilometres to the east of Tripoli, 250 kilometres to the east of the land boundary ! With an inappropriately large or extended area, the optical effect of the 65° Tunisian sheaf of lines becomes slightly less astonishing.

(58) (77) And yet a mere glance at Figures 1 or 7 to our Counter-Memorial will show how extreme and inappropriate is the claim by Tunisia. It would completely emasculate any perfectly justified claim of Libya to shelf areas between itself and Malta.

If there is something wrong about our "area of concern", what area would Tunisia suggest ? We have heard no counter-suggestion from our opponents : no doubt because they would have to indicate one which stretches all across the Pelagian Sea past Malta almost to the 15th meridian of longitude. They cannot do that without also exposing the excessiveness and the disproportionality of Tunisia's demands.

The forgotten first principle which suggested the area of concern to us in the first place – that the extreme claims of a party are not necessarily determinative of the continental shelf to be delimited – has therefore been confirmed, both in spirit and in substance.

This matter is analogous to the question of "proportionality", to which I shall now turn with the Court's permission. Tunisia advanced all sorts of

extreme calculations, based on a wide variety of misreadings of the Libyan Memorial, in her Counter-Memorial.

We responded to these calculations in paragraphs 106 through 115 of our Reply. We have listened very carefully, but we have heard no further indication by our opponents of how they may view proportionality as affecting their sheaf of lines. It is as if they are avoiding the question even of a negative test. And from this effective silence on both these points we draw our own conclusions.

When the Court said, in its 1969 *dispositif*, that the element of proportionality is a factor "to be taken into account" by the Parties in their delimitation (para. 101 (D)(3)), it was noting for the record that such a factor was not determinative, or controlling, as were indeed the other elements of natural prolongation and non-encroachment described in paragraph 101 (C)(1).

Now, the factor of proportionality was an additional factor, but not an original element, and is clearly set out as such. This is why the Court of Arbitration was absolutely correct in its rejection of "nice calculations" of proportionality as a source of entitlement.

The Court in 1969 explicitly indicated to the Parties, when considering proportionality as a factor, also to take "account . . . for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region" (para. 101 (D)(3)). This is a point which seems to have been entirely lost on Tunisia : her position would result in a severe contraction of shelf areas for delimitation as between Libya and Malta.

So what is the validity of considering the area of concern ? First : it is axiomatic that one of the basic rules of self determination is that it be by agreement between the Parties. Such an agreement is, vis-à-vis third States, *res inter alios acta*.

A fortiori, it is to the detriment of no State that Libya now indicates that there could be a reasonable outer limit to the area subject to its present delimitation with Tunisia.

It would therefore be wrong to suggest – as Tunisia has done – that we are somehow doing an "injustice" to Tunisia by "ignoring" its 1971 delimitation agreement with Italy. I refer to paragraph 3.33 of the Tunisian Reply, and Figure 3.03 also to that Reply [1].

Now there is the implication that Libya, and all other States, are bound by the Italo-Tunisian delimitation of 1971. The Tunisian Reply in paragraph 3.38 says that "the entire construction of the 'area of concern' ignores the Italo-Tunisian delimitation . . .". Yet this point has no real substance at all. We do not ignore the delimitation of 1971. We take it into account, but without being bound by it or committed to every part of it : no more than Germany was bound in 1969 by the pre-existing delimitations agreed between the United Kingdom and the Netherlands and Denmark.

And it follows that the agreement reached between Tunisia and Italy does not prevent Libya from asserting that it must share, as appropriate, in the continental shelf ascribed by Italy to Tunisia. This can affect no State other than Tunisia.

I shall now turn, if I may, to the question of the territorial sea boundary. Paragraph 3.04 of the Reply deals with it.

[1] See IV, p. 54.

The Court will recall what we said in our Counter-Memorial. The Tunisian lines are constructed "as from the frontier point on the coast". They must therefore pass through the territorial sea outer boundary. Because they proceed at such a sharp angle to the east they must therefore necessarily intersect the territorial sea boundary at that sharp angle.

For Tunisia to suggest that at least two of its lines should be drawn "as from the frontier point on the coast" would presuppose a point of intersection at an angle of some 64° or 65° from Ras Ajdir through the limit of the Libyan territorial sea.

Now our point was that if lines such as these had been intended to be determined by this Court, and if such a point then became a starting point, or the starting point, for shelf delimitation and were to be precisely so indicated by this Court, it would forever substantially prejudice or prejudge the location of the lateral boundary of the territorial sea in a future — I stress that word — in a future negotiation concerning it.

This argument, of course, was based upon the assumption that execution of the Court's judgment would not be delayed to await agreement on a territorial sea boundary. Otherwise our argument would never have made sense. This therefore supported our reading of the Special Agreement that the Court was never intended "in effect" to draw such a line. It contradicted the Tunisian reading of the so-called "second question", and it also affected their Submissions.

Now Professor Virally has done some energetic work on this point during the oral proceedings, but he has taken it dangerously far. First, he said that the Court does not have jurisdiction to determine the territorial sea boundary, and that no one could imagine its determination by the Parties being accomplished in less than three months.

And from this he drew an inference which we would sharply reject as being both an exaggeration and a distortion, with respect.

He said, and I shall quote from IV, p. 596, of the record of 25 September :

> "La Libye tiendrait ainsi un moyen de retarder indéfiniment l'établissement de la ligne de délimitation du plateau continental, pour laquelle la Cour est compétente, et de faire échec ainsi à la fois à l'arrêt de la Cour et au compromis en vertu duquel il aura été rendu."

He added that "La Cour internationale ne peut certainement pas admettre un tel résultat".

Well, it is obvious that this insinuation, Mr. President, cannot possibly take into account that our argument was in fact that, if the shelf boundary were fixed in such a precise manner along the azimuths proposed by Tunisia, it would prejudice any "future", i.e., subsequent, delimitation of territorial sea between the Parties.

And how can one read this, and then infer that Libya could use this point as a means of frustrating the decision of the Court ? The decision of the Court will already have been implemented for this point to make sense. And here I specifically refer the Members of the Court to paragraphs 422-430 of our Counter-Memorial (II).

For the territorial sea delimitation to be prejudiced, the shelf delimitation agreement must needs already have been signed by the Parties. What we were suggesting, and what our opponents thus attempt to resist, is the common sense observation that perhaps it was not intended that the Court should be so specific about the starting-point to begin with. The Tunisian submissions were examined in this light and found wanting. But rather than change their theory

of the case, our opponents come close to accusing us of thinking up ways to frustrate the future decision of the Court.

Returning to the effect, if I may, on the territorial sea boundary, it should be noted that the Libyan view of the case would not have the extreme results which the Tunisian lines would have in the same context.

It is our view that our practical method leading to a shelf delimitation would not, in any event, prejudice a reasonable or a traditional solution of any difficulties concerning the Tunisian-Libyan territorial sea. But this would not be true in the slightest as to the Tunisian sheaf of lines.

But then, in an attempt to escape from this double dilemma, the Tunisian Reply said "There is nothing to prevent the two points [the shelf boundary and the territorial sea boundary] being different" (**IV**, para. 3.04). In such event, it said "they will be joined by the line representing the outer limit of the territorial sea, which will also mark the limit of the continental shelf between them . . .".

Now, we reject this proposition out of hand as being completely contrary to common sense. Obviously there will be a problem if the territorial sea boundary ends in one place, and the continental shelf boundary starts in another. One would be presented with a sort of inadvertent zig-zag which need only be visualized to be rejected. And it will not escape the notice of the Court that Tunisia is quite unable to cite any example of State practice of the adoption of such a zig-zag boundary to support its curious contention.

Finally, there are several more points emerging from the Tunisian oral pleadings which I would like to take up here.

The first emerges from Professor Virally's address, at **IV**, pages 599-600, of the record of 25 September. He questioned the statement made in paragraph 130 of our Reply, concerning the realism of an approach which would pass a line of delimitation "in front of" its capital city. I refer generally to the discussion in pages 59 through 64 of the Reply and to paragraph 530 on page 211 of our Counter-Memorial (**II**).

We were accused by Professor Virally of employing "la règle du double standard, au détriment de la Tunisie" (**IV**, p. 600).

Examined closely, Professor Virally's own words demonstrate the weakness of his argument and, ironically, they also confirm the essentials of our practical method or approach.

On page 600, Professor Virally said :

> "aucune ligne de délimitation orientée vers l'est ne peut satisfaire la Libye, parce qu'elle passe devant ses côtes, quelles que soient par ailleurs les justifications de droit et de fait qui imposent de l'adopter".

Answer : not true. Libya would not then have made its suggestion of veering the line of direction for the delimitation – a line veering to the northeast, and passing "in front of" its own coasts all right, but at a reasonable distance seaward.

The question is not only one of angle, but also one of distance from the coast and the overall course of the line of delimitation. In this regard I would draw the Court's attention to the fact that, even with Professor Virally's veer, the Tunisian delimitation lines proceed relentlessly to the east-northeast, without substantial change in direction.

Professor Virally continued by saying :

> "En revanche, toute ligne tirée vers le nord à partir de Ras Ajdir serait

satisfaisante, bien qu'elle passe devant les côtes de la Tunisie et s'en approche même en certains points de quelques milles seulement."

Answer : not true again. This is the main reason why we suggested the line of veering at Ras Yonga. After Ras Yonga the Tunisian coast and our proposed northward line of direction are no longer clearly divergent, they are convergent. The coast is no longer falling away from the line projected north from it, it has turned around inside the Gulf of Gabes. And by the time that turn has been straightened out, the proposed line of direction would veer over to accommodate and reflect the promontory of the Sahel, and would leave on the Tunisian side of a resulting delimitation the shoals and banks of the Kerkennah Islands and whatever else. The fixed fishery installations of the Kerkennians would thus surely be preserved, far from being "liquidated", as has been suggested by Tunisia (IV, p. 454).

(51) If Members of the Court will visualize a northerly line, followed by a northeasterly veering, on Figure 3.01 of the Tunisian Counter-Memorial, it will readily be seen that the likely effect of the line of direction which would result from application of our proposal would also be to completely avoid the Tunisian territorial sea claims, even those greatly exaggerated claims based upon the inappropriate baselines adopted in 1973.

Incidentally, in connection particularly with the 1973 legislation, counsel for Tunisia have referred several times to the doctrine of the "critical date". In our view this doctrine has no application in the present case. But, nevertheless, and in any event, a delimitation line based upon the Libyan method would not encroach upon the extended territorial sea claimed by (69) Tunisia for the first time in 1973. A quick glance at Map No. 11 of our Counter-Memorial, will confirm this point. Nor would the result of the proposed Libyan method affect any areas in which Tunisia can validly claim any right to take sponges, or to construct fixed fishery installations. And I stress these two points.

The next point that I must take up relates to the issue of "perpendiculars". Professor Ben Achour addressed himself to this, at IV, page 583, of the record of 24 September. In a nutshell : Tunisia says that a due north line is not perpendicular, but at an angle, to the coasts concerned and that a perpendicular to those coasts is at a northeastern azimuth.

Now, obviously this is true to a degree, but what real difference does it make ? Are we not talking about substantial elements of difference, substantial degrees of disparity ? What have we said about the matter ?

I would refer the Court here to paragraph 496 of our Counter-Memorial (II). We said there that the

> "appropriateness . . . of the land boundary from its terminal point at Ras Ajdir is made clear by the geographic configuration of the coasts concerned, and by the fact that at Ras Ajdir the land boundary runs north and is roughly perpendicular to the coasts at the point of its intersection as well as generally perpendicular to a more extensive length of coastal front".

Now, we said "roughly", and we said "generally". Obviously it is not "precisely" or "exactly" perpendicular. That would defy the dictates of nature.

But the point is a deeper one. The Tunisian sheaf of lines reaches out to the east at an angle of 65°. A perpendicular at the appropriate spot is approximately only one-third of that. That is a huge discrepancy, even in the general terms or the general context in which we had made the point.

7. TUNISIA'S CASE

I now turn to an examination of the key elements of Tunisia's own case as they emerged over the course of the first round of oral pleadings. I shall first consider Tunisia's distorted view, in our submission, of the element of the relevant circumstances.

On 24 September Professor Belaid said that Tunisia's view of relevant circumstances would include principally the "phénomènes de surface" (**IV**, p. 565) ["surface phenomena"]. Identifying geomorphology and geology, he also included the "phénomènes de profondeur – c'est-à-dire la géologie" ["depth phenomena – that is to say, geology"]. And yet one then heard a rejection of elements such as tectonic circumstances and continental drift (**IV**, p. 565). And not much else appears to have been substituted except for the refrain of bathymetry, geomorphology and the configuration of the coasts.

Now we say that these may, and certainly some do, constitute relevant circumstances. They only barely include geology. But they are far from constituting all the relevant circumstances that characterize the area, or which the Court had in mind in 1969.

Tunisia then of course introduces its "historic rights", its alleged historic rights, as a highly relevant circumstance (**IV**, p. 570). Yet this is an element which my colleagues Dean Colliard and Professor Malintoppi have surely put in its place : a largely irrelevant circumstance, in this or any other case relating to shelf delimitation.

It is notable that the Court in 1969 did not even refer to fishing practices as being a factor which could assist in determining what constituted – what would constitute – the natural prolongation of each State or in arriving at an equitable delimitation of continental shelf. Yet the Court listed many other elements in its decision – such as the significant element of geology – which were not issues in the *North Sea Continental Shelf* cases as such.

One would have thought that if fishing practices had been considered as remotely relevant, they would have at least been mentioned in the Court's Opinion, particularly in view of the decision of this Court a few years earlier in the Anglo-Norwegian *Fisheries* case. Having failed to find support for their position in the *North Sea Continental Shelf* cases, our opponents have vainly sought consolation in the *Fisheries* case.

Moreover, Mr. President, it is abundantly clear that even if there were any valid Tunisian claims to sponges in the area, they would not be affected by the Libyan practical method. Its application would not affect any sponge-banks other than those validly under Libyan regulation.

The Court will no doubt recall the discussion of Libyan sponge-grounds contained in the Libyan Counter-Memorial (**II**, paras. 127-129) and in its Technical Annexes 3 and 4. And it is not necessary for me to repeat here all that was said in those passages.

Suffice it to say that Libyan Law No. 12 of 1959 was the culmination of a succession of Libyan regulations and laws governing sponge-fishing which had existed since the first decade of this century.

Now, pursuant to that law, decisions of the Nazir of Communication were issued to regulate sponge-fishing. And examples of those decisions for 1960 and 1961 were included in Documentary Annex No. 47 to the Libyan Counter-Memorial and they entirely confirm the extent of Libyan regulation at that time.

In addition – as Ambassador El Maghur has already noted – in 1952 the Food and Agriculture Organization of the United Nations in fact prepared and

submitted a report to the Government of Libya, which included a map indicating the western limits to the sponge-grounds in Libya. And these were correctly shown as extending due north of Ras Ajdir. This map appeared as (72) Map No. 13 in our Counter-Memorial, and it has not been contested by Tunisia.

I would also refer the Court in particular to paragraph 128 of our Counter-Memorial.

I now refer the Court to the map which is just appearing on the easel.

The information that appears on it is only a combination of data which appeared in our Counter-Memorial, and I will explain.

As can be seen, if the Court can see past me, this pink area corresponds to (62) the Libyan concessions which were shown on Map No. 5 of our Counter-Memorial. The Court will also note that the Libyan drilling activities which (64) were portrayed on Map No. 6 to the Counter-Memorial have been transferred to this map as well. And of course, the sheaf of lines has been superimposed upon it. Now these solid dots, for example, here and there, these are producing wells that have been drilled under valid Libyan concessions.

The small round circles such as we have going across here, represent other drilling sites.

Now these star-like features, here, – and there are quite a lot of them – they show where wells have been spudded and drilled, but where they have been abandoned.

As I said, we have also placed on this map the Tunisian sheaf of lines or "methods". They can be seen in relation to the various wells. As can be seen, no less than eight Libyan producing wells would be cut off by the sheaf of lines.

The petroleum fields underlying those wells would also be appropriated by the Tunisian sheaf of lines. In our submission, it is this fact, rather dramatically portrayed on this map, which goes a long way towards explaining why our opponents have chosen their extraordinary sheaf of lines.

It is most instructive to compare the effect produced by the sheaf of lines here with the effect of the Tunisian claim in 1976, and in that regard I would (64) refer the Court to Map No. 6 in our Counter-Memorial.

The Court adjourned from 11.13 a.m. to 11.33 a.m.

QUESTIONS BY JUDGES GROS, MOSLER, ODA AND SCHWEBEL

The ACTING-PRESIDENT : In accordance with the Rules of Court some Judges wish to exercise their rights to put questions to both Parties and I shall now call upon them, one by one, to read their questions to you before calling on Mr. Highet to continue.

M. GROS : Les agents des Parties pourraient-ils préciser à la Cour la position de leur gouvernement respectif sur la question de la force obligatoire de l'arrêt que le compromis du 10 juin 1977, dans son article premier (aussi art. 2 et 3), demande à la Cour de rendre, pour ce qui concerne les points suivants :

a) les principes et règles de droit international qui peuvent être indiqués par la Cour pour la délimitation de la zone du plateau continental relevant de la Jamahiriya arabe libyenne populaire et socialiste et de la zone du plateau continental relevant de la République tunisienne ;
b) les circonstances propres à la région que la Cour tiendrait pour pertinentes pour sa décision ;
c) les principes équitables que la Cour déciderait éventuellement de prendre en considération pour rendre son arrêt.

La présente question porte à la fois sur le contenu de la motivation et sur celui du dispositif de l'arrêt qui est demandé à la Cour.

Judge MOSLER : I would like to put a question to both Parties.

In Article 1, paragraph 1, second part, of the Special Agreement, the Parties ask the Court to take its decision according to equitable principles, and the relevant circumstances which characterize the area, as well as "the new accepted trends" or "the recent trends admitted" in the Third Conference on the Law of the Sea.

The definition of the continental shelf given in Article 76, paragraph 1, of the draft convention on the law of the sea, the terms of which had already formed part of the successive preceding texts of the Informal Composite Negotiating Texts, consists of two parts linked by the word "or". According to the first part, the continental shelf "comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin", while the second part of the same paragraph speaks of "a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".

In their written pleadings and oral arguments both Parties have argued on the basis of the first part of this definition, according to which the natural prolongation of the land territory of a coastal State is the decisive criterion. In the second part, the distance of 200 nautical miles is the decisive criterion in so far as the outer edge of the continental margin does not extend up to that distance.

May I ask the Parties whether, and to what extent, in their view, Article 76, paragraph 1, represents one of the new accepted trends, or the recent trends admitted, in the Third Conference on the Law of the Sea which the Court is asked to take into account when rendering its decision ? Do the Parties see any

possibility that the application of the two parts of the definition in a given case could lead to inconsistent results ?

The second question is put to the representatives of Tunisia. In their pleadings and argument the representatives of Libya have referred to what has been called an "area of concern" which is, in Libya's view, relevant for the indication of the principles, rules and methods to be applied to the future delimitation of the continental shelf appertaining to Libya and Tunisia respectively.

Would the Tunisian representatives be good enough to explain how they would define the region which is, in their view, relevant for that purpose ?

Judge ODA : The Court is requested under the Special Agreement to render its judgment as to "Quels sont les principes et règles du droit international qui peuvent être appliqués pour la délimitation . . ." (according to the Tunisian text) or "What principles and rules of international law may be applied for the delimitation . . ." (according to the Libyan text), and in rendering its judgment, the Court is requested "de tenir compte . . . des tendances récentes admises" (according to the Tunisian text) or "the Court shall take its decision according to . . . the new accepted trends" (according to the Libyan text) in the Third Law of the Sea Conference. I used these French expressions in addition to the English expressions, because the translations made from the original Arabic into French by Tunisia and into English by Libya respectively are not identical.

I would like to put the following four questions to both Parties :

Question I. How does each Party interpret the process in which "les tendances" were recently "admises" or in which "new trends" were "accepted" in the Third Law of the Sea Conference, particularly if it does not think that the actual provisions of the draft convention on the law of the sea prepared on 28 August 1981 necessarily represent "les tendances récentes admises" or "the new accepted trends" ?

Question II. Does each Party consider that "les tendances récentes admises" or "the new accepted trends" in the Third Law of the Sea Conference fall within the purview of the principles and rules of international law the applicability of which is to be considered by the Court under Article 1 of the Special Agreement, or that the Court is requested to take account of these trends, or to take its decisions according to these trends, despite the possibility that they have not yet achieved the status of "principles and rules of international law".

Question III. Article 83 of the draft convention on the law of the sea prepared on 28 August 1981 (A/Conf.62/L.78) reads :

> "1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

This text replaces the previous text of 1980, which read :

> "1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned."

The Submission presented by the distinguished Agent of Tunisia on 25 September 1981 neither contains any reference to this new provision of Article 83, nor mentions the changing of the text of Article 83 in the course of the last session, in August, of the Third Law of the Sea Conference. Does each party attach any significance to the change in the text of Article 83 ? If it does, does each Party consider that "international law, as referred to in Article 38 of the Statute of the International Court of Justice", as indicated in Article 83 of the draft convention, will be equivalent to principles and rules of international law as suggested in Article 1 of the Special Agreement, and that international law is properly reflected in "les tendances récentes admises" or "the new accepted trends" in the Third Law of the Sea Conference ?

Question IV. The draft convention on the law of the sea of 28 August 1981, like its previous text of 1980 (A/CONF.62/WP.10/Rev.3) and the Informal Composite Negotiating Text of 1977 (A/CONF/62/WP10) and its revised text of 1979 (A/CONF.62/WP.10/Rev.1) and of 1980 (A/CONF.62/WP.10/Rev.2) contains two separate provisions for the delimitation of the continental shelf and the exclusive economic zone, respectively, although the wordings of each of these two provisions are practically identical. My question is divided into two subquestions :

1. Does each Party consider that, within the 200 miles which will be the limit of the exclusive economic zone, the delimitations of these two areas may well be different, or, on the contrary, ought not to be different ?

2. The reference to all "relevant" or "prevailing" circumstances is dropped in the draft convention of this year. In interpreting the previous texts of the Third Law of the Sea Conference, which contained such a reference, would each Party have thought that the circumstances which might be taken into account in delimiting the continental shelf could or could not have been different from the circumstances to be taken into account in delimiting the exclusive economic zone ?

Judge SCHWEBEL : For the Agent and counsel of Tunisia.

To what precise extent does Tunisia claim to possess in the area which is the object of the proceedings before the Court *(a)* historic waters, and *(b)* historic fishing rights ? Please indicate any boundaries of claimed areas of historic waters and of historic fishing rights, respectively.

And the second question for both Parties :

If, *arguendo*, it is accepted that Tunisia has historic fishing rights for sedentary species in certain specified waters, can Libya possess the exclusive right to exploit the continental shelf below those same waters to the bed of which the sedentary species in question is attached ?

ARGUMENT OF MR. HIGHET (cont.)

COUNSEL FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

The ACTING PRESIDENT : We have now had a series of questions, the texts of which will be made available to both Parties by the Registry shortly. You need not answer now, or before the end of the first round today, but we shall appreciate it if you are able to make any attempt to reply, perhaps in the course of the next round, next week or the week after.

Mr. HIGHET : Mr. President, Members of the Court : the last of the relevant circumstances which Tunisia would have us consider was mentioned at **IV**, page 575, of the record of 24 September. First, they included the far-off area known as the "borderland". Now, the relevance of this feature has always completely escaped us, but I shall have more to say about it in a minute.

The second circumstance is merely a recapitulation in different terms of the general bathymetric argument : and it was referred to at **IV**, page 575, as "la notion de succession des éléments constitutifs de la marge continentale et celle de la direction de la marge continentale".

Now, this *notion de succession* is clearly based on the Article 76 fallacy which I mentioned on Wedneday. It presents nothing new ; it is no different from the Tunisian reliance upon bathymetry in general, except that it now wears a new suit – a fresh rationalization for its pertinence to this case – and one which we emphatically reject as wrong, for reasons which I have given earlier.

I should now like to make an important further point concerning Tunisia's general bathymetric case.

That point is : even though the appearance of the bathymetry is exaggerated by Tunisia, the result of considering it for the purpose of providing, as Professor Bowett said, a potential shelf boundary is still quite arbitrary and capricious. A delimitation based upon this kind of bathymetric analysis could just as well take a different direction or a different azimuth.

But first let me treat the element of exaggeration briefly.

Tunisia has gone to the extent, for example, of dramatizing the otherwise relatively monotonous shelf area involved – in our word a "plain" – by depicting the Zira *ride* and the evanescent Zuwarah *ride* by the common
(100) device of using an extremely small interval between isobaths. *Carte* No. 2.01 of the Tunisian Reply is at five-metre intervals. If one-metre intervals had been used, it would have looked like the Alps.

Now, the Court will not be misled by this, and will undoubtedly have noted this technique of exaggeration. For example, on that map, No. 2.01 to the Reply, in the centre right foreground, the declivity is only one metre in every kilometre. Professor Fabricius gave his expert evaluation, on Wednesday, of the distortion of the so-called *falaises* which were shown, complete with
(16) menacing and dramatic teeth, in Figure 5.07 of Tunisia's Memorial.

Now, this kind of distortion and exaggeration, however, is also coupled with a fundamental flaw in reasoning, which is the fallacy of Article 76 originally mentioned by Sir Francis Vallat, and presents a really two-dimensional case, in spite of the effort of bathymetry to seek a third dimension – which at first appears striking by its homogeneity and its repetitiveness.

But this case falls apart when one stops to consider the arbitrary way in which the results of a dramatized bathymetry are used to suggest a possible shelf boundary. What standards are suggested to rationalize a delimitation effected solely by respecting the lineaments of the sea bottom ?

Tunisia has been again unable to cite any instance of State practice which relies upon an element such as the elusive "Zira Ridge" as a directional guide for the line of delimitation.

Professor Jennings drew the Court's attention to the handsome coloured map of the Mediterranean, Figure 3.01 to the Tunisian Memorial : that is the one, which the Court will recall, at which the volume "opens automatically". He referred specifically to "the area of concern for the Court", and then Professor Jennings drew the Court's attention to the clarity of the 200-metre to 500-metre contours. He then asked the Court

> "as a preliminary exercise . . . to ask themselves whether that extension of sea-bed off the Tunisian coast which is clearly subtended by that coast – should not have some effect upon the decision in this case" (**IV**, p. 426).

I would draw the Court's attention to that same map and to those two isobath lines, the 200-metre and the 500-metre contours, and I would ask the Members of the Court to look at that map and note exactly where they begin.

The 200-metre isobath is almost all of the way to Tripoli ! The whole "area of concern for the Court", in Professor Jennings' own phrase, is therefore clearly within the 0-200-metre range, and is thus subtended in the palest blue area of that map.

Now it is true that parts of the eastern edge of that area are shaped roughly like what is called the generally eastward-facing coast of Tunisia, although – as Professor Fabricius illustrated for the Court on Wedneday – bathymetric features also exist which destroy this similarity. Be that as it may, the agreement enables Professor Jennings to claim that that extension of the sea-bed of the Tunisian coast is "clearly subtended" by that coast.

But if the Court will fix its eyes on the shape of the pale blue area on that map embraced by the 200-metre isobath line, and look at the top of the area – as it were, directly en route to Sicily – it will be seen that the northern edge of the contoured area also resembles the northward-facing Tunisian and Libyan coasts to the south ! Why, then, does one go to the east on that evidence any more than one goes to the north on that evidence ?

My second question : where do they go from the boundary point and why ? It is hardly as if there were a dramatic fall-off of contours which can be readily seen close by Ras Ajdir. And Ras Ajdir on that map is in the middle of the pale blue area. The obvious thing there would be to go right up to the middle of it – to the middle of the words "Gulf of Gabes" – and then you swing over in some manner to the right, if you try to draw a line, thus to effect a fair and equitable result. There is no conviction whatsoever in the proposition that the map, even as a preliminary exercise, can convincingly justify running to the east at an angle of 65°.

I should again here stress to the Members of the Court that, for the many sound reasons given by Professor Bowett and our experts, we of course do not espouse following the bathymetry. But, it is not difficult to arrive at a bathymetric pattern which can be adapted, with a little energy and a little work, in much the same manner as that in which Tunisia has deployed her bathymetric arguments. But it is all quite arbitrary.

It is thus our position that the first Tunisian line, the one which runs out along the so-called "*ride de Zira*", is arbitrary, selective, it is not based upon

scientific evidence which should be given legal weight, either as a limit to the natural prolongation of the landmass lying immediately to the south, or as some other kind of guidepost or indicator for a shelf boundary in the present case.

Furthermore, as Professor Bowett has explained to the Court, Dr. Emery's study in Annex II-9 to our Reply has shown that there is absolutely no rational or scientific relationship between continental shelves, natural prolongation, and abyssal plains as such.

Thus both the Tunisian bathymetric or geomorphological methods are not merely forgetful of the principle of natural prolongation : they are positively inconsistent with it. These two propositions would produce results which are actually contrary to the applicable legal rules.

As my colleague Professor Bowett has also explained to the Court, the logicial flaws contained in both of the two geometric propositions supporting Tunisian Submission II-2 also discredit them completely. Each depends upon the assumption that the Tunisian coast runs north from Ras Ajdir. Neither, therefore, respects reality.

Both utilize irrelevant sections of coast, and neither depends upon the actual Tunisian coast – despite Professor Jennings' statement that the law requires that account be taken of the actual coastline. Nor can any geometric method, based on geography simplified, have any true relationship with the fundamental principle of natural prolongation. Both are therefore fallacious, and both could in no manner bring about an equitable result.

It is as if all the Tunisian lines had been imposed upon the relevant circumstances. It is as if their ending-points had been selected first, and the respective lines then worked backward to the beginning. To the contrary, we started at the land boundary, at Ras Ajdir, and worked our way out to sea, taking account of the relevant circumstances, as we went along.

I turn now to the Tunisian response to what we have said about delimitations with other States. We note here with surprise that Professor Virally made the following qualification to the four Tunisian lines. He said that the line of delimitation

> "ou le dernier segment de cette ligne, est constitué par une ligne droite définie uniquement par un angle, c'est-à-dire par une direction. Dès lors, il est absolument inutile d'en déterminer le point terminal, s'il y a une raison de ne pas le faire" (IV, p. 596).

First : if this is true, how does Professor Virally justify selecting a geomorphological feature, such as the Ionian Abyssal Plain, which is so far outside any conceivably relevant area ? It is as if the Federal Republic had argued in 1969 that a feature such as the Norwegian Trough was one to which an appropriate delimitation line should have been directed and at the same time argued that it was not asking the Court to rule in any way on the outer extent of the line – that is, whether or not it would ever reach the Trough at all.

Second : if one does not select an outward point for the purpose of drawing a line, how does one know the angle to begin with ? And why would one ever select a point for one purpose and then exclude it or discard it for another ?

Third : we find that that response generally lacks credibility or persuasiveness with respect. First we started in the Tunisian Memorial when we read that we started with very clear lines. Then those lines became mere illustrations. Now they have become merely angles. One is reminded of the

Cheshire Cat slowly disappearing in his tree, until nothing is left behind but an angle extending from Ras Ajdir.

Fourth : how does this comport with the Special Agreement ? How can the Court answer the question put in Article I without indicating the principles and rules which would apply to the delimitation of the two areas of appurtenant continental shelf ? The Court has not been asked to determine the angle azimuth of the shelf boundary. Now clearly there is a balancing which must be undertaken here, but in our view it just will not do to say that all one is talking about is an angle, and therefore there is no need to drag in third States. This is yet another reason for what we think is the validity of our suggestion that the Court consider – but of course not determine – what the appropriate area of concern in this case might be.

However, Professor Belaïd indicated that a third element of additional relevant circumstances would be to take into account actual or potential delimitations with other Parties – that was at IV, page 575 – a proposition with which we can hardly disagree – but one which in his exposition, with respect, leads nowhere at all. He does not specify how they should be taken account of, and indeed it is startling to see this point being made at all by Tunisia, for it is Tunisia which has suggested a sheaf of lines which would substantially remove the Libyan shelf between Ras Ajdir and Al Khums from any prospect of a delimitation with Malta, thus limiting Libya to an unrealistically small portion of its own shelf.

Finally, the last point made in this context is a new one, and one can see why it had not been made before, as it is, with great respect, quite unrealistic. It occurs at IV, page 575.

Professor Belaïd said there that the Court, in taking into account the recent accepted trends at the Third Conference on the Law of the Sea, will be aware of the exclusive economic zone entitlement of 200 nautical miles. Since the only direction in which Tunisia can get that entitlement is in the direction of the Ionian Abyssal Plain, Professor Belaïd argued that it follows that this must be the direction and extent for "la direction du prolongement de la marge continentale".

Well, to state this argument is to refute it. How would that argument have applied in the *North Sea Continental Shelf* cases ? Even more in point is the fact that Libya is also entitled to a 200-mile exclusive economic zone : the question of course then becomes one of lateral delimitation, not merely one of asserting an extent. And, moreover, what is its relationship to natural prolongation ?

As I have already mentioned, in several other contexts, a further aspect of Tunisia's reliance upon irrelevant circumstances is the element of remoteness. Although Libya is constantly being accused of adopting a macrogeological scale by its opponent, it would appear that Tunisia assumes the relevance of physical features which are far distant from the area. They are, in the colloquial Americanism, both figuratively and literally "off the map".

To use round numbers : the allegedly significant Sillon Tripolitain only begins north of Tripoli, some 150 kilometres to the east of the land boundary. The so-called borderland is thus twice as far away – that is 300 kilometres away. The Ionian Abyssal Plain is, again, twice as far away as that : 600 kilometres, well past Malta, well into areas of the Mediterranean in which wholly new States might be interested.

Now it is as if Libya had suggested a method of delimitation involving for example the north-south alignment of Sardinia and Corsica. They are almost the same distance from Ras Ajdir as is the Ionian Abyssal Plain.

It is not merely the Tunisian bathymetric methods, however, which suffer

from dependency upon features which are out of range and off the map. Both of the geometric methods presuppose the relevance of the section of Tunisian coast north of Ras Kaboudia, all the way to Cape Bon. And in the first geometric method, the coastal front is even constructed from a point on dry land, southwest of Gabes all the way up to Ras Mustapha, north of the Gulf of Hammamet. It thus presents, in the words of Professor Briggs, a "dédoublement" of irrelevant circumstances. I would suggest that Figure 9.10 of the Tunisian Memorial (**I**, pp. 243-245) could engage the Court's attention.

The second geometric method is the "*bissectrice*". As has been said, that also relies upon arbitrary coast lines. Figures 9.12 and 9.13 of the Memorial (**I**, pp. 243-245) illustrate that quite clearly.

I should say something at this point, Mr. President, about a general point. We are conscious of the fact that because Professor Bowett and I have had to deal with the four Tunisian constructions, the methods which are proposed by Tunisia, in some detail, that this entire question may have appeared to acquire a greater specificity and more precision than we would like to have given to the question of the practical method.

That is a problem which is a problem of pleading and it is analogous to that which Sir Francis referred to earlier. That problem has arisen because of the broad range of irrelevant and trivial points raised by the Tunisian pleadings, and our own oral presentation of the Libyan case has been obliged to deal with those irrelevancies, sometimes at a length which would not have been necessary but for the amount of time and space which those points occupied in the first place.

We do not intend to give weight to irrelevancies by having to respond to them, any more than we intend to suggest a precise line of delimitation by having to deal with Tunisia's precise lines.

On the other hand, it is quite clear that we do recognize the so-called Tunisian methods as lines. Indeed, paragraph 2.27 of the Tunisian Memorial (**I**) said that "the Court should carry . . . the definition of the elements . . . and the practical methods and the instruments to be used, right up to the ultimate point before the purely technical work . . .".

Tunisia also insisted in her Reply (**IV**), at paragraph 3.03, that

> "one need only read Chapter 9 of the Tunisian Memorial in order to ascertain that it confines itself to describing methods, the lines drawn in the maps inserted in that chapter being mere illustrations whose approximative character is perfectly clear from the text".

Professor Virally had this to say :

> "il ne s'agit jamais que d'une illustration destinée à permettre de mieux apprécier ou de visualiser les résultats auxquels conduit la méthode examinée et d'une illustration toujours approximative . . ." (**IV**, p. 594).

To the contrary, what has always been (to quote the Reply) "perfectly clear" are the Tunisian lines of delimitation themselves, so carefully drawn in the Memorial.

What is "perfectly clear" is that these lines have no approximative character at all. If anything, they are very carefully plotted and they appear in the figures to Chapter IX as clear, exact, and precise lines of delimitation.

For example, the Memorial, in paragraph 9.08, said that the bathymetry relating to the so-called "*rides*" was "a factor making it possible to draw, with a relatively satisfactory degree of accuracy, the line delimiting those areas".

As to the "abyssal plain" line, paragraph 9.11 noted that "the abyssal plain

concerned has approximately the shape of a triangle". The Court will recall that from this it deduced that "it is easy to determine its centre with a degree of accuracy which is relative but sufficient", and geology became overlaid upon the bathymetry. The terminus of the delimitation line was even fixed down to the minute : "35° 50' N and 18° 60' E".

The abyssal plain line thus combines the worst aspects of bathymetry and geometry. The two strictly geometric methods are equally precise. This is also made clear by their description in the Tunisian Submissions.

8. Summary and Conclusions

I will now sum up. In conclusion, we say that not one of the four Tunisian schemes indicated in Chapter IX of its Memorial is supported or supportable. Not one of them is an appropriate method for applying the principles of law to the facts of this case – certainly none of them is practical. None of them can be defended on the basis of legal principle.

The principle of natural prolongation is adhered to conscientiously by Libya. Tunisia, on the other hand, claims to adhere to the same principle but does so on a basis which is manifestly fallacious.

Extensive geological analysis demonstrates that the Libyan suggestion clearly follows all appropriate indications of the general direction of natural prolongation.

Tunisia ignores these factors, and relies upon bathymetry to the exclusion or omission of almost everything else. But it is not explained by Tunisia why this Court in 1969, at a date when bathymetry was taken far more seriously than today, did not even mention it as a rationale for the effecting of a delimitation in terms of a boundary.

It stands to reason that if there were anything at all in the Tunisian postulate, it would at least have been identified as such by the Court before.

But, for our part, what did we do ? First, we chose to look to the basic principles of the institution of the continental shelf, none of which, we maintain, has Tunisia acknowledged in substance rather than in form. For none of the Tunisian methods really has anything to do with natural prolongation.

What we did was to structure, slowly and carefully, a practical method of applying the law – the basic rule of natural prolongation – to the facts.

This was supported and confirmed by two other elements : the prolongation of the land boundary, and the assertion of sovereign rights in 1955 by the Libyan Petroleum Law and Regulation and Map No. 1. The continuation of the land boundary was, in any event, a logical first step because why should the territorial sea boundary or any other sea frontier suddenly leap out sideways, at an angle of 65°, or indeed at any angle to the east ?

Moreover, the relevant circumstances of geography, conjoined with the plain facts of geology, indicate that the shelf north of Ras Ajdir continues or extends north of Ras Ajdir and that the shelf offshore in the vicinity of Ras Ajdir is in fact the prolongation into and under the sea of the landmass in that vicinity.

The boundary of the Libyan Petroleum Zone No. 1 is in accord with that position. We were therefore able to remain comfortable with an appeal to first principles, and a resort to the basic concept of natural prolongation which supports our case in both geological and geographical terms.

But there had to be a veering, an alteration in direction. This became apparent. Without the change in direction to accommodate and respect the

relevant circumstances, the actual application of the Libyan practical method would have been as exaggerated and as encroaching as the brown line shown
(51) by Tunisia in Figure 3.01 of its Counter-Memorial.

It is our view that the significance of the Sahelian promontory – ending at Ras Kaboudia – becomes increasingly important as one goes increasingly to the north. It has no visible importance, or only trivial relevance, at the approximate latitude of Ras Yonga, but, further north its presence can begin to be felt more and more clearly. Further north again it becomes a real consideration which must be taken into account.

But at the latitude of Ras Yonga, we assert, it begins to affect the line of direction of an equitable delimitation, and that line should therefore swing around to the northeast to accommodate it and to reflect it.

This would be consonant with equitable principles, including the principle of non-encroachment, since our proposed method of applying the law to the facts would balance up all the relevant circumstances which characterize the area in this specific situation, and would – by veering to the northeast – take these circumstances into account and avoid encroachment as far as possible.

In considering the fundamental element of equitable principles, the Court, in its Judgment of 1969, referred to three specific factors and these were respectively referred to in paragraphs 520, 521 and 522 of our Counter-Memorial (II).

The first factor required that a delimitation effected in accordance with equitable principles must take account of the "general configuration of the coasts of the Parties". This is substantially flouted by Tunisia where the four lines suggested by Tunisia proceed with equal inflexibility, ignoring both coasts ; whereas the one Libyan practical method attempts very specifically to take account of just that general configuration.

The second factor related to the "physical and geological structure, and natural resources, of the continental shelf areas involved". The Libyan practical method is founded upon the very appurtenance of the "physical and geological structure" of the shelf to that of the North African landmass. The Tunisian lines have nothing to do with this idea since structural or fundamental concerns do not even begin to be considered by the two geomorphological propositions any more than they are by the dry forms and relentless diagrams of geometry. Thus the Tunisian propositions are, once again, inconsistent with and, once again, contrary to the very principles required to be applied to reach an equitable result.

As to the "natural resources", our opponents, as I have said, have not discussed the most important of the natural resources of the shelf in their oral pleading. Although it is naturally impossible to take all of them into account, it certainly is possible and indeed requisite for each side to take them into account "as much as possible", within the meaning of the *North Sea Continental Shelf dispositif*.

The proposed Libyan practical method would create minimum disruption, if any. The Tunisian lines would create, as the Court has seen, maximum havoc. Moreover, the fact that, as shown by my colleague Professor Malintoppi, Tunisia has historically pushed to the east by its particular practices should not alter the basic direction which a permanent shelf delimitation should take – or which it would take if those considerations were not present.

The Court's third factor in 1969 related to the "reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about". My friend, Professor Briggs, has already

indicated to the Court our views on the subtle and elusive matter of proportionality.

When regard is had to the particular situation of these coasts, and the configuration as well as "of effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region" (*North Sea Continental Shelf Judgment, I.C.J. Reports 1969*, p. 54, para. 101 (D) (3)), it becomes quite clear that the North Sea itself, the situation in the North Sea, presented the Court with a "closed" context for discussion of the principle because of the existence of numerous other delimitations between the Parties to that case and opposite States, as well as existing delimitation agreements between two out of the three Parties themselves.

In contrast, the Pelagian Sea is open on two sides : it includes the two States Parties to these proceedings, the islands of one other State, and another State, itself an island, to be taken into account.

It therefore becomes more than ever theoretical or arbitrary to contemplate any "nice calculations" of proportionality. And Tunisia has rejected and sought to discredit the "area of concern" proposed by us in our Counter-Memorial ; but she has suggested none of her own.

Yet by any test of proportionality – in the appropriate area for delimitation – the Tunisian sheaf of lines produces a wholly disproportionate and unbalanced result ; and this is shown most graphically in the diagram on page 196 of our Counter-Memorial.

In conclusion, it is respectfully submitted that the practical method, as outlined fully in the Libyan Counter-Memorial, is the most appropriate manner in which the applicable principles and rules can be practically applied by the Parties in the conditions of this case and the circumstances of the shelf areas in question. Both geography and geology, and the other relevant circumstances, would be respected by the Libyan method.

Yet they are flouted and ignored by the Tunisian sheaf of lines.

All the practical considerations which I have recited would be respected and observed by an approach along the lines expressed by the Libyan method ; yet none will be respected or observed by any of the Tunisian "sheaf of lines".

The mechanical application of the four unrelated Tunisian propositions would bring about a result contrary to every indication given by the Court in 1969.

In our respectful submission, the Libyan approach is the most equitable and reasonable method by which the principles and rules of international law may be applied to the facts of this case.

Mr. President, and Members of the Court, I have now concluded my argument.

We may not have commented on every point made on behalf of Tunisia since our purpose has been to demonstrate the essential weaknesses in the Tunisian case and to present the Libyan case in as direct a manner as possible.

And, accordingly, we reserve the right to revert to any of the points made by Tunisia, but not directly covered by our oral arguments, should this become necessary in the light of further Tunisian oral pleadings.

STATEMENT BY MR. EL MAGHUR

AGENT FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Mr. EL MAGHUR: Mr. President and Members of the Court: the statement just made by Mr. Highet concludes the oral presentation of our case at this stage. As Agent for the Socialist People's Libyan Arab Jamahiriya, I wish to confirm and maintain our Submissions as they were set forth in the Libyan Counter-Memorial of 2 February 1981 and the Libyan Reply of 15 July 1981.

The ACTING PRESIDENT: On behalf of the Court, I thank the Agent, counsel and other representatives of the Government of the Libyan Arab Jamahiriya for the assistance they have afforded the Court. I understand that a copy of the Submissions which the Agent has just indicated will, in accordance with Article 60, paragraph 2, of the Rules of Court, be filed in the Registry [1]. The Agent of the Republic of Tunisia will, I understand, be ready to begin the second round of oral argument on behalf of his Government on Tuesday next.

The Court rose at 12.30 p.m.

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[1] See, *infra*, p. 428.

VINGT-CINQUIÈME AUDIENCE PUBLIQUE (13 X 81, 15 h)

Présents : [Voir audience du 29 IX 81.]

DÉCLARATION DE M. BENGHAZI

AGENT DU GOUVERNEMENT DE LA TUNISIE

M. BENGHAZI : Monsieur le Président, Messieurs de la Cour. J'ai de nouveau l'honneur et le plaisir de paraître devant votre haute juridiction pour ouvrir le deuxième tour de parole de la Tunisie.

Pour assister la Cour de notre mieux, les interventions de la Partie tunisienne seront les plus brèves possible. Elles se limiteront donc à l'étude des points majeurs de divergence qui continuent d'opposer les deux Parties.

La Partie tunisienne fera, à ce sujet, avec votre permission, les clarifications finales qu'elle juge indispensable de présenter à la Cour.

C'est ainsi que les exposés que les conseils tunisiens auront l'honneur de vous présenter pendant ce tour de parole viseront à préciser davantage les points de vues et les positions de la Partie tunisienne sur un certain nombre de questions jugées importantes.

La première question se rapporte aux principes et règles de droit international applicables à la position de la Tunisie concernant les problèmes généraux d'ordre juridique, particulièrement ceux qui ont été étudiés lors des premières plaidoiries.

La deuxième question a trait à l'interprétation de certaines clauses du compromis du 10 juin 1977 et au rôle dévolu à la Cour par ce compromis, selon le point de vue tunisien. Sur ce problème que nous jugeons essentiel, de profondes divergences opposent les Parties et la Tunisie estime indispensable de revenir à cette question – avec l'autorisation de la Cour – et de répondre aux thèses libyennes telles qu'exposées dans les précédentes plaidoiries.

La troisième question porte sur les droits historiques de la Tunisie. Les conseils de la Tunisie s'attacheront à rétablir un certain nombre de faits et à rectifier certaines distorsions introduites par la Partie libyenne dans cette matière.

La quatrième question concerne le rôle de la géologie et des données scientifiques dans la présente affaire. La Tunisie s'en tiendra sur ce point aux questions essentielles et elle écartera du débat les thèses et les données non pertinentes utilisées par la Partie adverse dans la discussion.

Enfin, *la cinquième et dernière question* portera sur les méthodes de délimitation.

La Tunisie, Monsieur le Président, Messieurs de la Cour, s'est engagée dans l'affaire actuellement devant votre haute juridiction non pas pour être éclairée d'une façon abstraite sur les principes et règles juridiques applicables au cas de l'espèce, mais bien poussée par la nécessité et la volonté de voir tranché un différend dont la prolongation s'est avérée nettement préjudiciable à ses intérêts propres et à ses bonnes relations avec un pays frère et voisin.

Avec votre autorisation, Monsieur le Président, je voudrais rappeler ce que j'ai dit à l'ouverture du premier tour de parole tunisien, à savoir :

« Il est vital pour la Tunisie de connaître avec exactitude l'étendue des zones du plateau continental qui lui appartiennent selon le droit international dans la situation précise qui prévaut dans la région. »

Monsieur le Président, Messieurs de la Cour, il y a toutefois un point sur lequel je me crois obligé d'intervenir rapidement.

Les représentants de la Libye ont soutenu qu'il n'y avait pas eu, entre les Parties, de « négociations qui aient un sens » *(meaningful negotiations)*, au sujet de la délimitation du plateau continental avant le compromis de juin 1977. Ils ont même déclaré, avec une certaine insistance, que des négociations doivent avoir lieu après le prononcé de l'arrêt de la Cour.

Concernant la prétendue absence de négociations, je me contenterai de souligner que le Gouvernement tunisien a retracé avec détails dans le chapitre premier de son mémoire à la fois l'historique du différend et celui des négociations. Il me semble qu'il suffit de se reporter à ce document pour être édifié à ce sujet.

Pour ce qui est des négociations qui devraient intervenir après l'arrêt de la Cour, le Gouvernement tunisien ne peut qu'exprimer son total désaccord avec une conception dont la Partie tunisienne n'arrive à saisir ni le bien-fondé ni les justifications juridiques.

Il nous semble en effet que les dispositions du compromis sont suffisamment explicites à cet égard. Le compromis (I, p. 9) demande en effet à la Cour, en son article 1, deux choses essentielles :

1. L'indication des principes et règles de droit international applicables au cas d'espèce.
2. L'indication de la manière pratique dont ces principes et règles doivent être appliqués dans cette situation précise et cela pour permettre aux experts des deux pays de délimiter les zones sans difficulté aucune.

Par conséquent, prétendre que des négociations devront avoir lieu après l'arrêt de la Cour équivaudrait tout simplement à réduire indûment et de façon grave la portée et l'effet de cet arrêt. La Cour est, aux yeux du Gouvernement tunisien, le dernier et ultime recours, l'instance suprême à laquelle les deux Parties ont confié en toute liberté la mission de régler définitivement leur conflit. Les réunions qui doivent avoir lieu par la suite, après le prononcé de l'arrêt, ne peuvent, à notre sens, s'instaurer que pour l'exécution technique de l'arrêt de la Cour.

Il n'y a pas lieu, il me semble, de s'étendre outre mesure sur ce point.

Il y a également un autre point sur lequel je suis tenu d'apporter des éclaircissements parce que sa présentation par la Partie libyenne risque fort d'introduire, par son inexactitude et son caractère sélectif, une confusion dans les esprits qu'il faut, à notre sens, dissiper.

Il s'agit de l'accusation lancée contre la Tunisie d'expansionnisme vers l'est, d'abord sur terre et ensuite sur mer, et cela tant durant le protectorat français qu'après l'indépendance du pays.

La Partie libyenne s'est longuement appesantie sur ce point, non sans avoir déclaré au préalable que la question des frontières terrestres était définitivement réglée entre les deux pays.

Il n'est pas besoin d'ajouter, par ailleurs, que cette question définitivement réglée n'est nullement impliquée dans le litige soumis à votre haute juridiction.

Je ne voudrais pas à ce sujet entrer dans une controverse d'ordre historique qui n'a pas lieu d'être ici. Mais il me semble que l'exposé libyen sur cette question pèche par son caractère unilatéral et partiel.

L'exposé libyen, développé avec beaucoup de talent et d'habileté, a ignoré un fait que nous jugeons extrêmement important, à savoir que depuis le XVI^e siècle Tunisie et Tripolitaine ont fait partie de la même entité politique, à savoir l'Empire ottoman.

Cet empire au XIX^e siècle et jusqu'à l'occupation française était le suzerain nominal de la Tunisie ; il exerçait par ailleurs jusqu'en 1912 – date de l'occupation italienne – une souveraineté effective sur la Tripolitaine. C'est-à-dire qu'à l'époque – au XIX^e siècle – entre la Tunisie et la Tripolitaine, toutes deux provinces turques quoique avec des statuts différents, il n'y avait pas de frontière étatique bien établie – on parlait seulement des confins tuniso-tripolitains.

Autre fait significatif, en 1835 la Sublime Porte mettait fin à la dynastie locale des Caramanli qui gouvernait la Tripolitaine d'une manière presque autonome et l'Empire ottoman instaurait un régime d'administration directe en Tripolitaine.

A partir de ce moment, et les textes historiques le prouvent, la Turquie a essayé de promouvoir le même processus vis-à-vis de la Tunisie et de la dynastie autonome des beys hussainites, elle a tenté d'instaurer le même régime d'administration directe en Tunisie. Cet aspect est bien connu de tous les historiens de cette époque.

La Porte a essayé, par tout un jeu d'influences auprès des tribus et des populations frontalières tuniso-tripolitaines, de repousser le plus possible vers l'ouest les limites administratives du vilayet de Tripoli soumis à son administration directe.

La Tunisie qui était en position de faiblesse, moralement et matériellement, vis-à-vis de son suzerain, a été obligée de profiter des rivalités internationales pour endiguer cette poussée turque et sauvegarder son régime d'autonomie et l'étendue de son territoire. L'histoire diplomatique de cette période est édifiante à ce sujet et elle prouve d'une façon certaine que la période coloniale n'a nullement conduit à l'extension du territoire tunisien dans une direction quelconque, bien au contraire. Mais c'est une question, Monsieur le Président, qui n'a rien à voir avec notre présente affaire.

La Libye a également accusé la Tunisie de mener en mer la même politique d'expansion vers l'est. Selon la Libye, la Tunisie, limitant tout d'abord ses revendications à une limite de direction nord, les aurait poussées progressivement de plus en plus loin vers l'est jusqu'à atteindre des prétentions extrêmes en réclamant devant la Cour un faisceau de lignes se situant aux alentours de 65°.

Cette accusation, Monsieur le Président, n'est pas plus fondée que la première. En réalité, l'évolution de l'octroi des concessions tunisiennes s'est faite en concordance avec l'amélioration des techniques de forage et avec les demandes de concessions conséquentes déposées par les compagnies pétrolières.

Cela, d'une part ; d'autre part, l'argument invoqué par la Libye que ce pays a procédé, dans la zone que la Tunisie considère comme son prolongement, à des opérations de forage ne lui donne pas, à notre sens, *ipso facto*, de droit irrécusable sur ladite zone. Cela serait tout à fait contraire au principe du droit inhérent si abondamment invoqué par le côté libyen. D'ailleurs, il convient de remarquer à ce sujet que la quasi-totalité des forages ont été effectués après 1977, date de la signature du compromis et par conséquent à une période où les Parties devaient s'abstenir de tout acte susceptible de faire obstacle et par avance à l'exécution de l'arrêt de la Cour ; les Parties devaient éviter la politique du fait accompli et se conformer au principe énoncé par la Cour

permanente de Justice internationale dans l'affaire de la *Compagnie d'électricité de Sofia et de Bulgarie* :[5]

> « les Parties en cause doivent s'abstenir de toute mesure susceptible d'avoir une répercussion préjudiciable à l'exécution de la décision à intervenir et, en général, ne laisser procéder à aucun acte, de quelque nature qu'il soit, susceptible d'aggraver ou d'étendre le différend » (*C.P.J.I. série A/B n° 79*).

La Tunisie de son côté, Monsieur le Président, s'est toujours conformée à ce principe.

Enfin, il faut signaler qu'en fait aucune installation d'exploitation ne se trouve actuellement implantée dans la zone revendiquée par la Tunisie. Seuls des forages d'exploration y ont été effectués.

REPLY OF PROFESSOR JENNINGS

COUNSEL FOR THE GOVERNMENT OF TUNISIA

Professor JENNINGS : Mr. President and Members of the Court : it might be helpful if I start by explaining how counsel on the Tunisian side will divide their task in this Reply. In this first address I shall deal again with the law governing the delimitation of continental shelf boundaries. My friend, Professor Georges Abi-Saab, will then make a brief address again on the meaning of the Special Agreement. Professor Virally will deal with the Libyan argument derived specifically from geological materials, and also with the question of methods of delimitation. Professor René-Jean Dupuy will speak on historical rights and the Tunisian baselines ; and finally, Mr. President, with your permission I shall return to make a few concluding remarks at the end of the Reply.

So, in this first address I deal with the law governing the delimitation of continental shelf boundaries and it may be useful, first to say a word about the relevance in this respect of scientific evidence and materials. This Court, in both written and oral proceedings has now been put in possession of a body of scientific evidence, probably without parallel in the history of international tribunals.

A most important and gratifying feature of that evidence, particularly I think in these oral hearings, is the extent of the agreement between scientists on questions of scientific fact. The disagreements between them have rather arisen in the interpretation and selection of scientific material in relation to juridical formulae, such as natural prolongation. The scientists have disagreed mainly when they succumbed to the temptation themselves to venture into the law.

It may be useful at the outset to say just a word about the relevance of scientific theory to the legal problems the Court has to solve. Dr. Vita-Finzi very lucidly explained the importance of theories for the advancement of scientific knowledge. But the question the Court has to answer is not about the intrinsic value or usefulness of theories of plate tectonics or other scientific problems. The question the Court has to answer is how far this material can help them and should help them in respect of the problem of delimitation. Well, what is it that the Court is interested in knowing concerning physical fact, concerning which science can offer evidence and help ?

Paragraph 95 of the 1969 Judgment of this Court speaks of the physical fact out of the recognition of which the legal institution of continental shelf has arisen. What was that physical fact ? It was described by the Court as "an area physically extending the territory of most coastal States into a species of platform". This species of platform is surely still called continental shelf by geographers and also by geologists. This species of platform formed also the basis of the 200-metre limit of Article 1 of the 1958 Convention, which this Court pronounced to be declaratory of general customary law. Certainly, as Sir Francis pointed out, there was also the exploitability test which was in part intended to do something for the State that had little or no platform ; but for exploitability too, in practice, the depth of the water was the decisive criterion ; and indeed it still is, for oil and gas resources, not to speak of sedentary fisheries, and this is what made the exploitability test acceptable. So it is this species of platform — the physical continental shelf as known to geographers

– that was the basis of the legal institution, which is at the basis of the problem of delimitation.

Later on, and more recently, as techniques of exploitation developed, it became a question of whether first, the rights of the coastal State might extend beyond the physical continental shelf to slope and even to rise, and, secondly, there was the problem of where national jurisdiction should end, if this extension occurred. There were, as we all know, many proposals – some based on depth, some on distance, or both – but coastal States wanted to go out to the edge of the continental margin, which they argued was their natural prolongation in the sense in which this term had been used by the Court, and their argument – which seems to have won the day in the third United Nations Conference on the Law of the Sea – was that accordingly, not only the physical continental shelf but even the entire continental margin was included in that natural prolongation of which this Court spoke in 1969. And hence the Article 76 compromise, which sets the limit of continental shelf either at 200 miles or at the edge of the continental margin, whichever is the greater.

Now this development of the law, familiar to every lawyer in this Court today, was inspired by the fact of the physical continuation of that original species of platform in many coastal situations, through slope and rise to the limit of the continental margin.

Now Professor Fabricius, in answer to the direct question put to him by Professor Virally, agreed that the definition of continental margin in Article 76 with its sequence of shelf, slope and rise, was as he said, "correct". It would be surprising if it were otherwise, considering that the United Nations conference, in adopting this definition, had itself the benefit of the advice of geologists also of distinction.

But after giving the answer "correct", Professor Fabricius hesitated. The article, he said, was legal, and not entirely geological. And of course he was right. For both continental shelf and natural prolongation are there related not to the continent but to a coastal State and its boundaries. But even so, if I've understoood Professor Fabricius aright, the sequence of shelf, slope and rise, he would accept as correct for a geologist.

At this point one encounters the question raised by Judge Mosler, about Article 76, paragraph 1, of the draft convention. And although a fuller answer will be given in due course, I must touch upon it, because it is crucial to the whole question of the law to be applied in this case.

Sir Francis raised the matter in his opening presentation and argued, if I understood him aright, that the physical nature of the continental margin with its sequence of shelf, slope and rise, was relevant solely to the question of the outer limit of continental shelf rights where the edge of the continental margin extended beyond 200 miles (pp. 59 ff. *supra*). And, in effect, therefore, that this could be regarded as disposing of any relevance for morphology, bathymetry, where an area of less than 200 miles in extent was concerned. Well, if this is true, the same argument also disposes, of course at the same time, of geology.

But it is also true that if, for shelves not extending beyond 200 miles, the only criterion of delimitation were a distance one, measured from the coast, then of course proximity – if not indeed absolute proximity – would have returned as a governing principle, and much of the 1969 Judgment, upon which both Parties have relied in this case, would have become in effect a part of legal history.

This would be logically, I think, a possible solution. But it would constitute a break – a complete break – with the law of the continental shelf as hitherto

understood. It would be new law, not, certainly, codification nor even progressive development assuming that continuity in the law as well as in the continental shelf is important.

The Tunisian submission is that, whether inside or outside – inside or beyond – the 200-mile limit, there is room under Article 76 for the consideration of other criteria besides proximity, besides the question of distance. The physical facts of continuity and prolongation would, in the Tunisian view, still continue to play a determinative role under the régime of Article 76. It is still right under Article 76 to ask as a first consideration, therefore – it is still right to ask as a first consideration – whether, on the basis of the formation of the sea-bed, one part of it belongs naturally or most naturally – again using the 1969 language – to one State rather than the other. There seems to be nothing in the Article 76 formula which prevents this question still being asked as a primary one and answered in accordance with the law as it has hitherto developed. Were this otherwise, we would have to say that the negotiators of the draft convention had removed the very legal basis for a State's reach into and under the sea-bed beyond its territorial sea.

As to paragraph 10 of Article 76 of the draft convention, the proviso, it need only be said that "without prejudice" does not mean without relevance. It is, moreover, a proviso in respect of the entire article, and applies to the 200-mile limit as well as to the first part of paragraph 1 of the article. Accordingly it seems, in fact, actually to confirm that neither of the tests – 200 miles or natural prolongation – are to be mistaken for absolute principles governing delimitation. They both deal in this sense with outer limits and the rest of the body of continental shelf law is left, in the Tunisian view, intact.

In short, the Tunisian position on this question is that Article 76 (1) is not intended to subvert the legal basis of continental shelf rights as hitherto understood, but is meant to deal with two specific problems which I mentioned some time ago, the claim of coastal States to national jurisdiction out to the edge of the continental margin; and of course the parallel development of rights in respect of the exclusive economic zone.

Now, Libya appears, in fact, to accept that the nature of the physical continental shelf, the natural prolongation, would remain, and is, relevant because their whole argument really assumes that. But what the Libyan lawyers, with respect, seem to be trying to establish is this. That just as the Article 76 notion of natural prolongation contains within itself elements of continuity and sometimes, as in the present case we would say, a direction by reason of the sequence of shelf, slope and rise; so according to a recent theory of plate tectonics, it appears to be possible by a quite different sequence of fall line, hingeline, coast, etc. – I refer of course to Professor Bowett's parallel, and apparently even, strips in his diagram – it appears to be possible to argue for a different kind of continuity and possibly a different direction.

But this I take it is offered as an alternative analysis – it is surely not suggested that shelf, slope and rise not only have been adopted in Article 76 but are outmoded by modern scientific research.

And, after all, natural prolongation is a legal term of art, not a scientific one. It would be odd indeed if this Court, applying recent tendencies, were to assert that the idea of natural prolongation as it is embodied in draft Article 76 after ten years of strenuous negotiation, is already outmoded, in effect, by plate tectonics theory.

So we would invite the Court to reject the alternative, however well scientifically founded – and on that I would not be qualified to offer any opinion whatsoever – but it is not the one that is embodied in the law.

RELATIONSHIP TO DELIMITATION

The next question is the most difficult. What is the relevance of natural prolongation thus defined, we would say, to a delimitation between opposite and adjacent States ? This is the point at which one may say, with respect, the Libyan geological argument becomes a little coy. Merely to establish that both States in question are prolonged into one geological structure gets one nowhere with a delimitation. One is moreover somewhat at a loss to understand how a northward direction is derived from the notion of the African Plate which, said Dr. Vita-Finzi, "points north" (p. 175, *supra*). To disabuse us on this side of the bar, of any idea that "northward thrust" implies movement, he used the analogy of "the stairway of this building", he said, which "thrusts into the garden without actually sliding across the lawn". No doubt ! But the stairway is surely more analogous to the shape of the shelf – the platform – off the Tunisian coast, where the pattern of contours does point in an easterly direction. The better analogy of the African Plate, one would have thought, might be the entire site of this city, and it would be difficult to say which way that pointed.

It is one thing to draw sweeping conclusions about the directions of structures of whole continental margins, but quite another to harness that information in such a way as to indicate which areas are the most natural prolongations of which States, and what is the proper course of the delimitation between them. Now, as we already know, this question of scale was dealt with by the Court of Arbitration in the Anglo-French delimitation of 1977 and I should like to quote again paragraph 191 of that Award :

> "The question for the Court to decide, however, is what areas of continental shelf are to be considered as legally the natural prolongation of the Channel Islands rather than of the mainland of France. In international law, as the United Kingdom emphasized in the pleadings, the concept of the continental shelf is a juridical concept which connotes the natural prolongation under the sea not of a continent or geographical landmass but of the land territory of each State."

Even Professor Bowett, with respect, failed to help us at this point. After posing the very relevant question :

> "we are bound to take the use of the scientific evidence yet a stage further and ask : 'does it help us to determine the principles, or rules, or even the methods which will provide the correct delimitation in law' ?" (p. 168, *supra*).

And this is the question on which the value of the scientific evidence must stand or fall. And surely the only way in which we can set about answering this question is to try to relate the scientific material to the geographical evidence, which is itself fundamental to the understanding of the natural prolongation.

GEOLOGY AND GEOGRAPHY

Professor Bowett gave a very valuable pointer when he said :

> "Now, Libya of course accepts the view expressed both by this Court and by the Anglo-French Arbitration Tribunal that natural prolongation has its geographical aspect." (P. 170, *supra*.)

Presumably he had in mind the well-known passage from the 1977 Award : "A State's continental shelf, being the natural prolongation under the sea of its territory, must in large measure reflect the configuration of its coasts." (Para. 100.)

And this important truth had already been so well put by Professor Bowett in his article in the *British Year Book* in 1978 commenting on the Anglo-French Award that I am sure he will forgive me for using a brief extract as authority for this proposition :

> "The International Court of Justice in the *North Sea* cases, had emphasised the characteristic of the shelf as the 'natural prolongation' of the land territory and from this had developed in the legal literature a possibly excessive preoccupation with geological factors as determinants of boundaries. One of the more welcome features of the Court of Arbitration's Award is that it had decreased, or corrected, the excessive emphasis on geological factors and emphasised rather more the geographical factors, in particular the coastal configuration of the parties. Indeed, it is likely that in the future 'natural prolongation' will be seen as referring to geographical configurations rather than geological factors." (P. 15.)

Now, this is right. The examination of the continuation of the landmass into and under the sea cannot be divorced from the consideration of the configuration of a State's coast. Geology must surely help in the consideration of that relationship ; but so may also, probably much more, surface geography and geomorphology. This is precisely because these aspects are inextricably interdependent : the morphological features are the product or manifestation of the geological phenomena immediately below. If one looks only at the immediately relevant geological evidence coupled with coastal geography, a more unified and sensible picture begins to emerge. One has to come back to the question posed at the outset of my address and ask which of the geological considerations assist in the appreciation and identification of those physical facts of morphology to which the law has attached importance. To the extent to which the geomorphology needs explanation at all, the geological evidence will assist the Court in determining the relative appurtenance of areas of sea-bed. But morphology is only the surface expression of those geological structures lying directly beneath it. There is really no need to dig deeper or further back in time.

Perhaps I might remind the Court of my friend Professor Virally's happy analogy of the text of the treaty and the *travaux préparatoires*, in case of doubt the *travaux*, the geology, may assist in interpreting the text but it is the text always that matters.

Now, in fact Libya in the final stages of its presentation has come near to detaching itself from its original monolithic geological case, with its built-in notions of equity. When Mr. Highet began to grapple with this problem (p. 223, *supra*), he acknowledged the difficulties inherent in any delimitation – a fundamental dilemma, he called it. And this problem exists, he conceded, no matter how clear the geological evidence of the general direction of natural prolongation may be.

And in his next sentence :

> "Thus, although appurtenance may be readily identified as long as there is only one coastal State, the moment that there are two, a dilemma of

the frontier is presented, relating to the precise azimuth or direction to be taken by the shelf boundary between them."

This I take to be an acknowledgement that while Libya's geological argument may be of assistance in identifying the natural prolongation of a continent, it does not really help very much when you are dealing with adjacent States, or even opposite States; a delimitation between which necessitates differentiating between the "most natural" prolongations of each of them; to use the 1969 Judgment language. And that once you have exhausted the possibilities of geology, you have to relate your findings in a meaningful way to the actual coasts of the actual land territories of the States in question. Whether Libya has succeeded in doing this is, I would submit, questionable.

Libya's treatment of the actual Tunisian coast consists of breaking it up into components and explaining each stretch away in one way or another. I shall explain this more fully when I come to deal with Libya's relevant circumstances. It looks very much like an attempt to interpret coastal configuration in such a way as to make it accord with the preconceived theory derived from an examination of continental geology in the light of tectonic plate theory. Whatever it is, it is very far from being consonant with elementary principles of equity.

For what else do we understand by the dictum that there shall be no refashioning of geography, than that the coasts of both States shall be respected in their integrity and entirety? The fact is that whereas Libya's coast so far as it bears any relationship to the relevant shelf area and to Tunisia, is very simple, Tunisia's is curved, concave and complicated by a number of particular features. But equity does not imply equality, and there can be no question of trying to equalize the two and to iron out all the special features of Tunisia's coast so as to reduce it to a meaningless "general direction", still less to dismiss it as an anomaly. It is there and has to be taken account of, as Mr. Highet admitted. For it is made abundantly clear in the Award of 1977 that "compensations" of this nature are only ever justified in a situation where the two coasts are essentially similar and stand in broadly equal relationship to the shelf, and then only where a relatively insignificant incidental feature causes a disproportionate irregularity in the course of a geometrically determined boundary.

Now, let us consider any geometrical method of drawing a line by reference to the configuration of the coast. The result of such a geometrical method is a line which takes account of, or reflects, or is sensitive to the configuration of the coast. It is bidimensional. It monitors a relationship along the low-water mark. It is what one might call "two-dimensional geography".

This is not to say that, for example, equidistance always produces an equitable result even in regard to the two coasts. Because, quite apart from the well-known possible distorting effect of incidental features, there may be a distortion in regard to the coasts as a whole where they are not comparable in length or shape.

But the question I want to ask in relation to the simple geometrical method based upon coastline is why stop at the coast? Why stop at the 0-metre contour? Admittedly it is the most important contour, for reasons of human as well as of physical geography.

But would it not be reasonable also to take some account of the 50-metre contour, the 150-metre or the 300-metre contour? Not, indeed, because they are lines on the map, but because they may indicate the existence, continuity or

direction of a species of platform extending from and reflecting the configuration of the coast. In the present case, it is – or seems to be from Libya's scientific evidence (for example, in Libyan Fig. 5.09 of the Tunisian (18) Memorial which was reproduced in the folder the Court was provided with) (p. 186, *supra*), it seems to be common ground that the 250-metre isobath marks the outer limit of the species of platform which Libya agrees is called the Tunisian Plateau, and the map was provided in the folder to illustrate how it extends from the Tunisian coast. It is meaningful, therefor, to trace the relationship of different contours, because as soon as one relates a plurality of contours, one is taking account of three-dimensional features. One is no longer working simply with the flat map but one has, as it were, a relief model. Contours are meant to be read together because they say something about the progression from land to sea, and the shape of the bed off the respective coasts. Why should the Court not look at a pattern of contours, if only to see if it helps ? And why did all the maps specially prepared for the Court by Libya throughout its written and oral pleadings as illustrations, why did they omit all contours from the sea ? But how can one omit all reference to the contours of an area if what one is trying to do is to avoid refashioning geography and to avoid encroachment on another State's natural prolongation ?

EQUITABLE PRINCIPLES AND RELEVANT CIRCUMSTANCES

Now I turn to the question of equitable principles and relevant circumstances because that is, as it were, the next in progression in the task of a delimitation.

First, a word in general about the place of relevant circumstances and their relation to the goal of a delimitation in accordance with equitable principles.

Mr. Highet said (p. 223, *supra*) :

> "This dilemma of the frontier, in our submission, can only be resolved by interpreting *de jure* appurtenance to include consideration of relevant circumstances, together with physical geology, as part of the process of establishing the conditions necessary for precise determination of *de jure* entitlement in that area."

Do we, perhaps, here glimpse at last, for the first time, in the Libyan case, the realization of the need for some bridge between natural prolongation and equitable principles, the bridge which Tunisia has throughout maintained must be present in any delimitation ?

Tunisia sees no reason to resile from the position clearly stated at the commencement of these oral proceedings, that identification of the natural prolongation of a State, and the balancing of the equities by means of evaluation of relevant circumstances are successive elements in the one process of delimitation.

The fact that Tunisia and Libya have offered the Court different lists of relevant circumstances illustrates very well what is the meaning of equitable principles in this context. It is necessary first, we would submit, to determine what circumstances are relevant, and which are not ; then to decide, of the relevant ones, which are the most important ; and then to achieve a delimitation giving a proper balance, whilst always respecting the primary considerations, the basic ones of non-encroachment and not refashioning geography. This is surely the meaning of equity in the sense of this part of the law. It could not mean a subjective attempt to decide what looks to be fair, but

a quite objective appraisal – the evaluation and balancing of the various allegedly relevant circumstances. Of course there is the pain of making some actual decisions in the end, but the process should be through an appraisal of relevant circumstances and their balancing in terms of an equitable result.

With those principles in mind it will be useful first to look at Libya's list of relevant circumstances, and then to approach Tunisia's list, though that will be dealt with in detail by my friend Professor Virally.

LIBYA'S RELEVANT CIRCUMSTANCES

In Mr. Highet's submission, relevant circumstances have to be considered according to a sequence beginning with first, he said, "the examination of general direction as indicated by the facts of physical natural prolongation".

This, I take it, is the ghost of the "monolith" case with which they began, which seems now, for practical purposes, to be little more than an elaborate way of making the bare assertion that the natural prolongation has a generally northward direction.

But then Mr. Highet (pp. 226 ff., *supra*) answered the question of what are the relevant circumstances as that term is understood by Libya and he gave a list of six, and a number seven which was not quite called a relevant circumstance but came at the end of the list.

They are :

1. The land frontier.
2. The existence, in Libya's submission, of "a continuous shelf area, one of an essentially homogeneous character" (p. 226, *supra*).
3. The general configuration of the concerned coasts of the Parties.
4. The presence of actual or potential delimitations with third States.
5. Legislative enactments of each Party.
6. The existence of oilfields and wells.

And finally, though called a "specific consideration" rather than a relevant circumstance (p. 232, *supra*) :

7. National security.

Each of these calls for some brief comment.

1. "The Land Frontier"

Mr. Highet (pp. 218-226, *supra*) stressed the significance for the delimitation of what he called "the position and history of the land boundary" (p. 219, *supra*), as for him, the first relevant circumstance in his list (p. 226, *supra*). Professor Malintoppi, on the other hand had already said that "the line of this sector of the frontier, and in particular the choice of its terminal point on the sea, was not based on any natural or historic foundation" (pp. 75-76, *supra*) : which would seem of itself seriously to diminish, if not to obliterate, its claim to be a relevant circumstance for the delimitation of the continental shelf boundary.

Furthermore, a principal evidence relied on by Professor Malintoppi was a French War Ministry note of November 1886. He quoted this *in extenso* starting with this passage :

> "Before the occupation of the Regency and up to 1883, the maps kept at the Ministry of War showed as the starting-point of the frontier

between Tunisia and Tripolitania the fort of Biban lakes, from which it ran in a south-westerly direction." (P. 77, *supra*.)

That was the boundary which Libya apparently feels was more correct. But it is described as proceeding in a south-westerly direction and if you project this apparently more correct boundary, it obviously would run north-east and not north.

Mr. Highet would have the Court believe that the last stretch of the land frontier was in some way that was not entirely explained related to natural prolongation. In fact, of course, the only possible relevance of the land frontier to the task of this Court is the point at which it reaches the coast.

Now, incidentally, though it is true that as Professor Malintoppi told us, the mid-nineteenth-century maps mostly show the frontier at the place indicated by Professor Malintoppi, there is a reason for this. It is not irrelevant in this connection. It seems that the first cartographer to map this area in detail was the German explorer, Dr. Barth. In 1849 he published an account of his travels illustrated by a map showing the boundary where he understood it to be at the mouth of El-Biban. But he returned to the area and published a second work – entitled *Travels and Discoveries in North and Central Africa, 1849-1855*, in which he describes minutely his second journey along the coastal area. At a place clearly just east of Ras Ajdir, he came to "a slight slope which, according to the unanimous statement of our guides and companions, forms the magtta, or frontier between the two regencies". And in a footnote he adds :

> "The point is not without importance, as a great deal of dispute has taken place about the frontier. Having on my former journey kept close along the seashore, I have laid it down erroneously in the map accompanying the narrative of that journey." (A copy [1] of the relevant text is available to the Court in the library.)

But Dr. Barth did not publish a map with his second work ; and it seems that European cartographers simply followed his earlier map without noticing the correction he had himself made in his later text as a result of his later investigations on the spot.

Now, the study commissioned by Libya from Mr. Joffe and others at the University of London (**II**, Libyan Counter-Memorial, Ann. 6), nowhere mentions Dr. Barth's work which is readily available in London and in The Hague, nor indeed does it mention the British Foreign Office study of the question in 1887 which is to be found in one of the Public Record Office files not listed in the references given on page 59 of that study.

Whatever may be the exact position of the frontier – neither party has demonstrated sufficient research to justify a firm conclusion – it can by no means be asserted that the fixing of the boundary in 1910 was an Ottoman capitulation to French territorial ambitions. The boundary defined and delimited in 1910 respected, at least in the coastal area – and that is the one that matters – respected a most detailed description made by a neutral explorer, Dr. Barth, half a century earlier.

Now that is all I want to say about the land frontier relevant circumstance of Libya.

[1] See *infra*, Correspondence, No. 120.

2. "Continuous Shelf"

The alleged existence of a continuous shelf has been much aired already and it will be dealt with by Professor Virally and there is no need for me to anticipate that.

3. The "general" configuration of the coasts of the Parties

As a relevant circumstance this is, as I have tried to make clear in my remarks so far in the Tunisian view, of great importance and so I want to spend a little time examining the Libyan view on general configuration of the
(118) coasts, especially as it is set out in a map which was delivered to the Court in the first folder of maps by Libya. The map where the coast is shown in various sections – the coast is shown in orange, green, red and blue.

I have already referred to the Tunisian view that the relationship of two coasts as a whole is essential to the identification of a State's natural prolongation – not merely No. 3 in a list of relevant circumstances, but concerned with the prior fundamental question of natural prolongation. Perhaps aware of this, Libya seems most anxious to limit consideration to what she calls "the generally east-west running coast – that is to say the north-facing coast from roughly Gabes to somewhere west of Tripoli".

The extent of the Libyan part of this coast, the Libyan part of the coast that she regards as important, is outlined in red on that Map No. 3. It is roughly straight and uniform, extending just over 100 kilometres and "faces" out to sea, not on a northward bearing but on a bearing of around 28° true.

The Libyan coast of which this is part, was described in the Libyan Memorial as having only one pronounced feature, namely – and I quote again from the Libyan Memorial, paragraph 162, page 63 : the pronounced feature was that, "it falls away to the east of Ras Ajdir in a south-easterly direction over a distance of 125 nautical miles" which has "the effect of pulling back any strict equidistance line upon itself. Clearly, this operates to the disadvantage of Libya." This is an astonishing passage. The coast, virtually straight and featureless, does not "pull back" an equidistance line, because there is no concavity or other possibly distorting feature. Perhaps the subliminal message is that it would "pull back" a "northward thrust" line.

The Tunisian coast to be treated as a relevant circumstance in Libya's analysis is shown on the map in green. Because of its complexity, Libya seeks to simplify it, by breaking it up into three components, the no doubt intentional effect of which is to undermine the integrity of the Tunisian coast and thus to refashion geography. The first part, between Gabes and Ras Ajdir is said to be "north-facing". In fact, a line from end to end would face on a bearing of around 32°, that is roughly north-east.

But this breaking up of this part of the coast is to ignore the presence of the important and heavily populated island of Djerba and the even more extensive territory to the south and west of Djerba, even though the entirety of this coast, including Djerba, is outlined in green on the map. A line draw from Ras Ajdir to Djerba would face on a bearing of around 58° ZV. But Djerba was described in the Libyan Memorial as an "abrupt protuberance", the effect of which "is to distort the equidistance line even further, by accentuating the easterly swing of the line across the front of the Libyan coast (I, Libyan Memorial, para. 164).

The fact is that Djerba, we would submit, on any reasonable view is part of the coast, being permanently linked to it by a causeway, and no line that has pretensions to equity could conceivably ignore it.

The next chosen stretch of Tunisian coast lies between Gabes and Ras Yonga. Although marked in green in Libya's map, it must, according to Libya, be ignored for the purposes of delimitation. Why ? It must be ignored because according to the Libyan Reply this is "a right-angled coast", the two lengths of which "necessarily abut on, or face the same shelf area" (**IV**, Libyan Reply, para. 113). It is difficult to perceive the argument behind this assertion, but it is an interesting exercise to ask what the decision in the *North Sea Continental Shelf* cases would have been were this assertion well-founded in international law.

We now pass to the next stretch of the Tunisian coast.

Since its Counter-Memorial, Libya has been quite firm that the next stretch of Tunisian coast between Ras Yonga and Ras Kapoudia is to be taken into account. It too, therefore, is marked in green, and this coast has a significant effect on what Libya calls its "practical method" of delimitation (**IV**, Libyan Reply, para. 140). Now here I must pause to recall the three-stage development of this practical method of Libya's.

In the Libyan Memorial, Submission 5 (I, p. 70), "the appropriate method of delimitation" was to reflect the alleged northward prolongation. There was no qualification of this in the Memorial. The boundary should be drawn due north from Ras Ajdir – although such a boundary would separate Tunisia not only from substantial parts of its area of historic rights, but also its territorial sea and even a part of its internal waters. Now, whatever may be said in these proceedings, this line was then clearly intended to be more than just a general direction for the beginning of a delimitation ; only six weeks after the receipt of the Libyan Memorial, Libya sent a diplomatic note protesting at exploration by the *Douglas Carver* in the Gulf of Hammamet, several kilometres to the west of
(55) a line drawn north from Ras Ajdir. The position is illustrated on Maps 8.01
(56) and 8.02 in the Tunisian Counter-Memorial. No correction or retraction of this note was made until the following year, when Libya tried to explain it away in its pleadings.

It was the Libyan Counter-Memorial that introduced the "veer" north-eastwards north of the meridian of Ras Yonga (**II**, Libyan Counter-Memorial, pp. 202-203). The result was the two lines : Line A and Line Z, which have been sufficiently described. But Line Z, the north-east line, was still not to be the boundary but only the eastern limit of the marginal zone still to be delimited.

Finally, in this development, came the Libyan Reply repeating Lines A and Z, but this time there was no marginal zone. "The Libyan method would take account of the Tunisian Sahel area by causing any line of delimitation to also veer to the northeast" (**IV**, Libyan Reply, para. 136). This further change of position is said to be justified by the principle of non-encroachment. For a footnote adds (p. 63) that this practical method avoids encroachment even on the "irrelevant aspects" of which examples are given as "the Gulf of Gabes, the Kerkennah Islands and 50-metre isobath", although in fact the line does
(56) encroach substantially upon the 50-metre isobath (see Map 8.02 in the Tunisian Counter-Memorial).
(118) Looking back at the Libyan Map No. 3 in the Folder, it will be noted that this final stretch of concerned Tunisian coast omits altogether the Kerkennah archipelago. There is no explanation why these islands are treated as an "irrelevant aspect". Perhaps it is because, according to the Libyan doctrine, they and also their low-tide elevations are already fully accounted for in the Delimitation Agreement of 1971 between Italy and Tunisia, which did respect the island, its banks and the low-tide elevations off it.

The Gulf of Gabes

While on the subject of the coast, I would like to say just a word about the Gulf of Gabes and the definition of it, and, in particular, about the question of the proper entrance points of the Gulf – a matter upon which there is apparently still disagreement between the Parties. The particular point I wish to deal with is the relevance, in this regard, of sailing directions – on which Libya heavily relies – to this question of entrance points. And my concern is with an English case which was cited in the Tunisian Counter-Memorial, paragraph 5.29, and was referred to by my friend Professor Colliard in terms which call for some elucidation (p. 110, *supra*).

The case of *Post Office* v. *Estuary Radio* (1967) [1] is the case in point and the question – the substantial question – was precisely what were the natural entrance points of the Thames Estuary. The defendant relied upon the entrance points mentioned in the *British Instructions to Mariners* – the sailing directions, the so-called British "Pilot" – just as Libya seeks to do in relation to the Gulf of Gabes.

Professor Colliard, with great respect, seems to have misunderstood the position here. It is true, as he says, that the Postmaster-General, who was successful both in the court of first instance and on appeal, had the assistance of hydrographers – in fact three of them of great distinction gave evidence, including the famous Commander Kennedy whose name is well known to all students of the 1958 Conference, and also Commander Beazley who will be remembered by all who participated in the Anglo-French arbitration. The point that Professor Colliard appears to have missed in his perusal of the Report is that these distinguished hydrographers – and their evidence was preferred to the alternative by the court – all said that sailing directions are wholly irrelevant to such an inquiry.

Perhaps, I might read from the judgment of Mr. Justice O'Connor in the court below, where of course the evidence was taken – very short passages. I am reading from 1967, 1 *Weekly Law Reports*, at pages 855, 856 and 857. First he said :

> "Let me turn first to consider as to whether the indentation is a bay within the meaning of the Order in Council [the Order in Council having in fact incorporated the text of the 1958 Convention]. I will first consider what is the natural entrance point of the indentation to the north. On this question of the natural entrance points of the indentation I heard evidence from a number of witnesses."

And then he described Commander Beazley and his qualifications, and Commander Kennedy and the other hydrographer and we can pass quickly over that.

Then, at a later point, at page 857, he says this :

> "As I have said, I return to the question : what is the northern entrance point ? The plaintiff's witnesses were all agreed that The Naze was the proper point to take ; in particular Lieutenant-Commander Beazley, Commander Kennedy and Lieutenant-Commander MacKay. Lieutenant-Commander Beazley, who gave evidence first, told me that in his opinion the only consideration in deciding what are the natural entrance points of an indentation of the coast is the configuration of the coast as delineated

[1] See *infra*, Correspondence, No. 120

by the low-water line ; namely, it was his opinion that one looked at the charts and nothing else, and that one looked at the configuration of the coast in a two-dimensional plane."

And, further down in the paragraph on the same page :

"He was supported in that view by the other witnesses for the plaintiff, but in particular Commander Kennedy and Lieutenant-Commander MacKay. He was not prepared to accept that any other consideration should be considered. A number of them were put to him in cross-examination, and they were considerations which the rival school, led by Commander MacMillan, put forward. First of all attention was drawn to the sailing directions contained in the North Sea Pilot."

And over the page, at page 858 :

"Commander Beazley was cross-examined about this, and he said that these were directions intended for practical mariners, that they were the recognized guide to sailing directions, but that the North Sea Pilot was not in any way concerned with drawing baselines which bounded the sovereign territory of the Crown in this country."

The Court adjourned from 4.50 p.m. to 5 p.m.

4. Third-State Delimitations

The next Libyan relevant circumstance, No. 4 in the list given by Mr. Highet, is third-State delimitations, which raises a question of considerable importance. It is a corollary of the third, for Mr. Highet introduced it by speaking of those parts of the coasts of the two States which, in his words, he said "are clearly not relevant" (p. 227, *supra*). These are sought to be eliminated by an appeal to the presence of third States and the claims of third States, and of course by Libya's extraordinary doctrine that a stretch of coast can count in no more than one delimitation – a sort of doctrine of exhaustion. Realizing that this doctrine would have made the *North Sea* cases impossible because the Netherlands and Denmark had already used up their entire coasts once against the United Kingdom, Mr. Highet subjected the doctrine to the qualification that it did not apply to coasts "which abutted on the same area of shelf" (p. 228, *supra*). But of course this, with respect, begs the very question at issue here : what is the same area of shelf for this purpose – the consideration of third States in relation to a delimitation between Tunisia and Libya ?

(118) Applying this novel doctrine of exhaustion, Libya appropriates Tunisia's coast north of Ras Kapoudia (the orange coloured coast) – appropriates this exclusively to the agreement between Italy and Tunisia of 1971, Libya assuming that no other parts of the Tunisian coast were taken into account incorrectly.

On the other hand, Libya's coast east of the meridian passing through Lampedusa (the blue coast) is intended apparently to be used against Malta in the Malta delimitation question, and for this reason again, one must suppose, has likewise to be excluded from the area affected by this present matter.

The Court will recall the detailed examination last March, in the Malta intervention proceedings that was made by Mr. Lauterpacht, in which he told us of the exchanges that had taken place between Libya and Malta. He recounted the Libyan proposition of April 1973, when a Libyan delegation

visited Malta and tabled a draft agreement for delimitation. "The Libyan delegation", said Mr. Lauterpacht at **III**, page 305, "explained that the relevant section of Libyan coast line was defined by Libya as extending from the Tunisian border to Misurata". This is the entire red and blue coast on Libya's (118) map in its first folder, which at that time was apparently thought of as potentially at least exhaustible in the Malta question.

The Libyan argument for the delimitation with Tunisia is that no extent of coast can count in more than one delimitation, and on this basis, assuming the correctness of the Libyan position in 1973 vis-à-vis Malta, no single part of Libya's coast could be concerned now with the delimitation with Tunisia. It would all have been or might be expended on the Malta question. At least this will be true unless Tunisia, Malta and Libya were regarded as abutting on Mr. Highet's same shelf area, and thus not subject to the doctrine of exhaustion of coasts. But it would appear from the Libyan pleadings that this is not their view.

But the position becomes even more remarkable in the light of Mr. Lauterpacht's further explanations in those proceedings. Libya's proposition to Malta involved drawing a straight line between Ras Ajdir and the southwestern tip of Malta and fixing the Malta-Libya boundary along that line at the point dividing it in the proportion that the length of the Libyan "concerned coast" bore to the length of the Maltese "concerned coast". Mr. Lauterpacht remarked that the result was "nothing short of astounding" *(ibid.)* and that it treated "as an area of Libyan continental shelf relevant to the delimitation with Malta, a substantial part of what must", he said, "surely be the area now in dispute between Libya and Tunisia" (*ibid.*, pp. 305-306). Of course he was only guessing, for Malta had not seen the pleadings. The inescapable inference from Libya's line from Ras Ajdir to Malta, which Libya used in the Malta negotiations, must have been that anything west of that line, from Ras Ajdir to Malta, is part of the area in concern in the present case, and that is irreconcilable with Libya's present argument that the eastern limit of the area of concern with Tunisia is a meridian of longitude, a line due north from the coast and obviously having no relationship with the facts of geography or for that matter geology.

But that line drawn from the coast toward Malta for the purpose of negotiations with Malta had at least some merit in recognizing one physical fact, the presence of Malta. If, as now seems to be Libya's position, the line were drawn to Malta from the point at the western end of Libya's blue-marked coast, the area of concern between Tunisia and Libya would be even larger.

Now Malta, as was made clear during the intervention application proceedings, believes that it has a continental shelf boundary with Tunisia. This may well be so, but at least in part it depends, in Tunisia's view, on the prior delimitation of Malta's continental shelf boundary with Italy. If islands other than Malta are ignored, Ras Kapoudia faces Italy, Malta and Libya. The same is true of the northern coast of the Gulf of Hammamet as far as Cape Mustapha.

By what conceivable rule of law are such coasts to be treated as bearing only one possible delimitation ? And by what rule of law is such a selection to be made ? Neither a rule of law nor a practical method of selection is offered by Libya.

The entire coast of the Federal Democratic Republic was taken into account by this Court in 1969. And this, indeed, lay at the very heart of the Court's Judgment. The Court could not have drawn its illustrative Map 2 in the *I.C.J. Reports 1969*, page 15, had it espoused Libya's contention.

For the Court in 1969, the presence of third States and their potential cut-off effect was a possible source of inequity – a relevant circumstance to be taken into account in favour of the State that might otherwise be deprived of its appurtenant shelf.

5. Legislation

I turn to the fifth relevant circumstance in Libya's list – legislation. Libyan legislation – and particularly, it would appear, Libyan petroleum legislation.

I must deal briefly with this because arguments based on this have featured prominently throughout Libya's written pleadings.

Libya passed Law No. 25 of 1955, and that Law provided the framework for the exploitation of oil in Libya. It provided, as it would be expected, that the law extended to the sea-bed and subsoil of the territorial sea and under the contiguous high seas which were under Libyan jurisdiction and control. That Law is set out in the Libyan Memorial (I), Annex I-9A. Like countless other State enactments providing for the exploitation of petroleum, the extent of this control and jurisdiction remained to be defined when delimitations had been agreed and settled. Article 4, section 2, of the Law provided that (and I read from the text available in the Libyan Memorial): "If there should be any doubt as to the boundary of any Zone the Commission shall determine the boundary of such Zone for the purposes of this Law only . . ." This was presumably to avoid the supposition that the Petroleum Commission could establish a boundary for any other purpose.

At any rate, it makes it perfectly clear that it could not purport to attempt to establish an international boundary.

The Petroleum Regulation which shortly followed did not materially change this position; nor could a mere regulation do so. The definition of the four zones dealt with the landward limits only, for the seaward limits, whether facing or adjacent, were not settled – that is clear from the Libyan Memorial (I), Annex I-9B.

But attached to the Regulations was a map (which was Map 1 in the folder provided by Libya), on a scale of 1:2,000,000, laying down the grid by reference to which oil companies should define their applications for concessions. It was pretty rough, but it was sufficient for the purpose. Seaward of the coast, three straight lines were traced, apparently representing meridians. The central line is clearly intended to be a zone border. The eastern line purports, according to the legend, to be the territorial boundary with Egypt. The western one, although less clearly, purports to represent the territorial boundary with Tunisia.

It is common ground that there is no agreed maritime boundary between the Parties seaward of Ras Ajdir.

Of the many maps submitted to the Court, this is the only one illustrating a line running north from Ras Ajdir (other than those, of course, specially prepared for the Court in the Libyan pleadings).

I must add two comments on this Petroleum Law in the light of remarks made by the distinguished Agent for Libya, Ambassador El Maghur, and his learned counsel, Sir Francis Vallat. Both of them saw particular significance not just in this map but also in the first exchanges that took place between the Parties in 1968. The Tunisian procès-verbal of the discussion confirms the Libyan statement that the Libyan representatives proposed a line of delimitation running north from Ras Ajdir. But no justification apparently was presented by the Libyan delegation (see I, Tunisian Memorial, Ann. 8,

pp. 24 f.) and the Libyan Memorial does not suggest otherwise (I, Libyan Memorial, para. 37, p. 17).

Now why should the Libyan delegates, who must have known of the Petroleum Law, the regulations and the map, why should they have been so reticent about using it to justify the claimed boundary if they had then supposed that it was relevant? The answer is to be found in the similar account of the next substantive meeting between the Parties to discuss the boundaries. This was in 1972, after overlapping concessions had been granted by the two States. Mr. Atiga, the then Director of Conventions and Legal Affairs at the Ministry of Unity and Foreign Affairs and President of the Commission responsible for the negotiation of the continental shelf delimitation between the Parties, is reported as saying (and here I am quoting from Annex 16 of the Tunisian Memorial (I), at p. 35, second para.):

> "Monsieur Atiga m'a déclaré que la proposition de délimitation faite par son pays en 1968 et consistant à adopter la ligne de direction nord n'est ni constructive ni fondée. Elle s'explique par une absence totale de compréhension du problème à cette époque."

He went on to explain that the Commission had now been constituted and had consulted international specialists. In consequence of this consultation he proposed a compromise: if Libya were to abandon its unconstructive and unfounded line, it would be appropriate, he suggested, for Tunisia to relinquish its 45° true line.

Tunisia having declined to do so, Libya was left having to prop up its northward line, and the later discovery – for there was no mention of the petroleum legislation or map throughout the years of negotiation, in the record – of the petroleum map and its northwards line was apparently the only support to be found. Does Libya suppose that Tunisia would have ignored mention of the map in preparing its Memorial had the map been brought up during negotiations? That, Mr. President, is my first comment.

My second comment on the map arises from Ambassador El Maghur's statements at page 12, *supra*. He said: "Map No. 1 [that is the petroleum map, No. 1] was intended to show international boundaries, and as shown such boundaries acquired an official status." Now, even qualifying these remarks, as Sir Francis Vallat immediately did (p. 41, *supra*) when he spoke of the map saying that "it could only amount to a claim to sovereign rights in certain areas", even so it must be supposed that this distinguished Agent's statement is significant.

Now, Tunisia is not aware, and indeed not concerned, that any maritime boundaries have been delimited between Libya and Egypt. But a glance at that map demonstrates that Libya's assertions in respect of the maritime boundaries shown on the map could put, in due course, the questions of delimitation of a sea boundary with Egypt in a very difficult position. The land boundary with Egypt ends on the coast at the southern end of an almost due east facing stretch of coast in the vicinity of Al Burdi. (The location can be confirmed on Map No. 5 of the Libyan Memorial.) Now it would seem from the petroleum map, if it does indeed represent the Libyan view of international boundaries, it would seem that Libya officially – to adopt the words of the distinguished Agent – that Libya officially considers that this east-facing coast, roughly 35 kilometres long, not only has no entitlement to continental shelf, but in large part only a vestigial territorial sea. The explanation of course is clear that it was never really intended to illustrate international boundaries.

6. Oil Fields

I turn now to No. 6 in the list of relevant circumstances, according to Mr. Highet : "the existence of individual productive wells which could be affected by a delimitation line" (p. 228, *supra*). I emphasize the word "productive" because so far as Tunisia is aware, none of the exploration sites drilled by Libyan concessionnaires and which might be affected by the delimitation line proposed by Tunisia, is actually producing oil. Yet two sentences later Mr. Highet spoke of Tunisia's lines which "clearly disrupt and amputate producing Libyan installations".

This was on Wednesday evening, but by Friday morning, Mr. Highet was speaking of oil fields, by which I at least understand the identification by successive drillings of a total petroleum reservoir. Now it must be made perfectly clear that the only field properly so-called in the entire offshore area involved is the Tunisian Ashtart field, lying just to the west even of Libya's northwards line.

It was, of course, Libya's drilling activities in these areas, described in Chapter I of the Tunisian Memorial, it was the drilling activities that provoked the crises that led to the submission of this case to this Court. A number of oil wells pointed to by Mr. Highet, as lying to the west of the line illustrating the Tunisian method, were the subject of specific and vigorous protests. Yet others were drilled by Libya, to Tunisia's knowledge, after the Special Agreement was signed ; the irrefutable critical date.

Now, the reliance upon this relevant circumstance by Libya is remarkable. The meaning of natural prolongation has given some difficulty to this case ; but surely the one thing everybody is agreed about is that the continental shelf belongs *ipso facto* and *ab initio*. Is Libya really arguing that continental shelf rights can be acquired by some sort of prior occupation ? This is an astonishing contradiction inherent in Libya's case and hardly bears examination.

Libya's inclusion of petroleum resources as relevant circumstances has more sinister echoes in the speeches of other Libyan advocates. There was the clear assertion the other day that it is only oil that the Parties are really interested in, that the oil lies in the older and deeper strata of the earth, which is presumably why the surface of the sea-bed is said to be largely irrelevant. Furthermore, to support the link between the Gulf of Sirt, off central Libya, and the Pelagian Block, we have been reminded on a number of occasions that the oil-bearing strata sweep round in a great curve off the Libyan coast, and seem to peter out northeast of Ras Ajdir. The suggestion seems to be that because Libya has most of the oil already, the rest of it must also be in the Libyan natural prolongation ; or perhaps that because Tunisia is poor in oil, it should stay that way.

7. National Security

That is the list of relevant circumstances, but then there is the question which is also mentioned at the end of the list by Mr. Highet, national security ; and it featured in the comments of Ambassador El Maghur when he stressed the impropriety of any line which might swing in front of the location of Libya's capital city, Tripoli, facing northwards on to the sea (pp. 19 and 30, *supra*). And it was accordingly denominated a "specific consideration" rather than relevant circumstances by Mr. Highet (pp. 232-233, *supra*).

Put like this, it is surely a distortion of the nature of a State's rights in the continental shelf, and the significance and possible effects of the continental shelf boundary delimitation.

A State's rights over its continental shelf allow it simply to explore and exploit the resources of the sea-bed and subsoil. They do not affect the nature of the superjacent waters as high seas. So that the sea beyond the limit of territorial waters – 12 miles in the case of Libya – remains accessible to the vessels of all nations, including foreign warships. Libya's attempt in 1973 to define a restricted zone of airspace within a radius of 100 nautical miles of Tripoli has nothing whatever to do with the continental shelf.

The possibility that national security might be a relevant circumstance was allowed by the Court of Arbitration in the Anglo-French arbitration of 1977, but the award went on to say that such considerations

> "may support and strengthen, but they cannot negative, any conclusions that are already indicated by the geographical, political and legal circumstances of the region which the Court has identified" (para. 188).

Mr. President, that completes my comments on Libya's list of relevant circumstances.

TUNISIAN RELEVANT CIRCUMSTANCES

As I have mentioned already, the relevant circumstances on which Tunisia relies will be dealt with of course by Professor Virally, but there are some general points I would like to make, if I may.

The coasts

First, it has already been said that in the Tunisian view the configuration of the coast of a State as a whole, and its morphological relationship to the sea-bed off it, is not properly dealt with solely under the heading of relevant circumstances, but is rather concerned with the prior question of the identification of the natural prolongation.

Certainly, geography, and that includes the configuration of coasts as a primary element, is a Janus-like consideration. On the one hand, the geography, including the configuration of coasts, is a crucial element of the process of identifying the natural prolongation, and identifying which parts of the continental shelf belong most naturally to one or other of the States concerned.

But on the other hand, geographical considerations, and even the expression "general configuration of the coasts", are also used to denote one kind of relevant consideration, for example, the effect of a particular geographical feature in relation to a particular method.

It may not always be easy to distinguish the two different aspects or functions of geography, for, as we have seen, it often faces both ways. For example, in the *North Sea Continental Shelf* cases, the concavity of the three coasts together involved was so major that it was relevant both to the question of natural prolongation and its identification, and also to the effect relative to a particular method, that is to say, equidistance. But both aspects of geography, it is submitted, have to be respected.

Historic rights

This double aspect, in relation to identification of natural prolongation and the relevant circumstances considered in relation to equity, is also true of the

historic fishing rights, which confirm the palpable existence of the natural prolongation ; and yet, also form another aspect, are a part of the equitable calculation, as a relevant circumstance.

Now these rights will, of course, be dealt with by Professor René-Jean Dupuy, but perhaps I might say a word about their relationship to the general legal context of the dispute. And I can put what I have to say in a few simple propositions.

First, what Tunisia claims, as is amply recognized in the literature of international law, is historical, exclusive fishing rights, both to sedentary species, and also swimming species caught by traditional devices permanently fixed into the sea-bed.

There having been so much talk about oil and gas, it may even be necessary to recall that sedentary fisheries are the original resources subject to continental shelf rights, and that they can also be riches to poorer communities. The point is well illustrated in the Food and Agriculture Organization Report of 1952 on the development of Libyan sedentary fisheries, which Libya has deposited with the Court.

Secondly, Tunisia does not claim some form of acquisition of continental shelf rights, through the historical fishery rights and their exercise. That would be contrary to the whole legal philosophy of the natural prolongation.

What it does say, is that these ancient activities on the banks off Tunisia evidence the existence in fact of a Tunisian natural prolongation in those parts.

It is not a question of a notional natural prolongation as Sir Francis suggested ; one can't walk about on a notional bank.

Thirdly, it remains true also, as I ventured to say as the outset of these proceedings, that it would be unthinkable that a delimitation should convert the area of ancient, exclusive Tunisian rights into an area of exclusive Libyan rights.

Fourthly, these rights also provide a further justification of the enclosure of internal waters by the straight baseline system established in 1973. I say further justification because really no special justification is needed. In the context of State practice in the matter of straight baselines, the baselines of 1973 are entirely reasonable.

And finally, I would like to say just a brief word about the question of :

Methods

A method of course is simply a device or technique by which to draw a line taking account of, or as Tunisia said in its written pleadings, "monitoring" primarily the geographical situation and particularly the configuration of the coast. The direct relevance of this to the identification of natural prolongation has already been mentioned. And since primary considerations are geographical, and particularly the configuration of the coast, it is reasonable to investigate methods deriving from plane geometry. Now, of course, these methods suggested by Tunisia will be dealt with by Professor Virally. But perhaps I could add just one thing.

Mr. Highet said, in the interesting and suggestive part of his presentation introducing methods (p. 216, *supra*) : "But Tunisia has related her methods or constructs to only a few characteristics of the area. They do not relate to all the relevant circumstances."

Now, that is so. It is difficult or impossible to devise a method that will take account of both the primary geographical situation and all the relevant circumstances. Perhaps in the future it could be done by a suitably pro-

grammed computer. Meanwhile, it is usual to apply a method and then if need be adjust the resulting boundary in some degree to take some account or other of other considerations or circumstances as is often done for example with a line of equidistance. But the point I want to make is simply this : there is nothing wrong in using some relevant circumstances as tests, *ex post facto*, rather than as vectors employed in the actual construction of a line. In fact Mr. Highet, in his discourse on Libya's relevant circumstances, really did precisely this. Accordingly, there is nothing in the least strange for example in Tunisia's testing its geometrical lines by reference to its natural lines. It is the sensible thing to do.

The equitable quality of any line of delimitation is, after all, to be tested by its results : it is the result which confers legitimacy on the method, and not vice versa. The question is not the quality of the method but the equity of the result.

Now, I have reached the stage where this question of relevant circumstances, methods and so on cannot be taken much further until the task of the Court as laid down in the Special Agreement is clarified.

REPLY OF PROFESSOR ABI-SAAB

COUNSEL FOR THE GOVERNMENT OF TUNISIA

Professor ABI-SAAB : May it please the Court : the short remarks I propose to formulate in this second round of oral pleadings are addressed to the still outstanding issues between the Parties on the meaning of the Special Agreement and the tasks with which it entrusts the Court.

Their purpose, the same as with my remarks during the first round, is to assist the Court in reaching an interpretation of the Special Agreement which comes closest to the common intention of the Parties, and which gives it its full effect, nothing more, but nothing less ; for this would constitute the doctoring of the Agreement referred to by Ambassador El Maghur in his initial statement (p. 7, *supra*).

Fortunately, the area of divergence between the Parties over the interpretation of the *compromis* has narrowed as a result of the first round of oral pleadings.

With your permission, Sir, I would like to survey the situation as it stands now, and I shall focus my remarks on six points.

1. The first, which at this stage deserves no more than a mere mention, is that of translation. Fortunately we can leave it to the wisdom and competence of the Arab Members of the Court. I would simply like to add that the "faithful translation" mentioned by Ambassador El Maghur (p. 7, *supra*) is not necessarily the "literal" translation of the words, but that which brings out the full sense (and connotation) of the proposition formulated in the translated sentence. I would also like to reiterate that the degree of precision, specification and detail of the clarification requested from the Court does not depend so much on the insertion or the absence of the adverbial phrase, *avec précision* after the verb "clarify", but that it is determined by the result which this clarification is supposed to achieve, namely, to enable the experts of the Parties to effect the delimitation without any difficulties.

2. My second point concerns the legal effect of the reference to equitable principles and the relevant circumstances which characterize the area, in Article 1, paragraph 1, of the *compromis*, a subject over which the most important progress was achieved during the first round of oral pleadings.

Indeed, it is now common ground among the Parties that the *compromis* invites the Court not only to indicate the applicable law, but also, in the words of Sir Francis Vallat (p. 51, *supra*) "to examine the factual aspects" of the case.

This is, according to Sir Francis, the "significance" (I am using his own word) of the reference to the relevant circumstances in Article 1, paragraph 1, of the *compromis (ibid.)*. He goes on to say :

> "but if facts are regarded as relevant, the weight or importance to be attached to them may vary and this may be a significant distinction in the context of the present case. The Court may well take the view that a number of facts or circumstances are relevant but that the same weight or importance does not attach to all of them."

Then he proceeds to the presentation of Libya's understanding of what are the relevant circumstances and their relative importance, which is exactly Libya's version of the equitable balance mentioned by the Court.

The same exercise is done at much greater length by Professor Briggs (pp. 199-213, *supra*), and then finally by Mr. Highet who, after stating that

> "The relevant circumstances to be considered by the experts of the Parties could also be indicated by the Court, perhaps with some indication of their relative importance and weight" (p. 218, *supra*),

proceeds to the presentation of the Libyan version of the relevant circumstances and of their relative importance which was just discussed by Professor Jennings.

It can thus be concluded on the basis of these express and clear statements of counsel for Libya, that it is now common ground among the Parties that the Court is invited by Article 1, paragraph 1, of the *compromis*, not only to indicate the applicable law, but also to apply it to the facts of the case, at least to the extent of identifying all the relevant circumstances which characterize the area and which have to be taken into account in the delimitation, and of indicating their respective relevant importance, or equitable weight in that delimitation.

3. My next point concerns the third category the Court is invited to take into consideration in its decision by the first paragraph of Article 1 of the *compromis*, namely "the new accepted trends in the Third Conference on the Law of the Sea".

Here again the area of divergence between the Parties seems to have narrowed, and what remains of it may prove to be moot.

Indeed, both Parties agree that if these new trends constitute new rules of customary law, they should be applied. But then the mention of this category in the *compromis* would have added nothing to the principles and rules of international law.

Perhaps, I should explain here very briefly how we understand this reference. The trends which are referred to are only those which are generally "accepted" or "*admises*" in the French translation, that is those over which consensus obtains.

> "This is because [as I explained in my first statement, IV, p. 403] these are the solutions which in all probability will prevail with or without a new convention on the law of the sea, as the general consensus indicates that they are in the process of passing into general international law."

Some of these accepted trends may have already become customary rules if they had inspired sufficient practice to be considered as such. But clearly not all the provisions of the draft convention on the law of the sea can be considered as new accepted trends : some are not "new" in that they merely reiterate or codify existing rules ; others are not generally "accepted" ; and among those which can be considered as new accepted trends, not all would satisfy as yet the test of customary law.

Thus each provision of the draft convention has to be examined individually from the point of view of the sources of international law to determine in which of these categories or sub-categories it falls.

But even if a new accepted trend does not qualify yet as a rule of customary law, it still may have a bearing on the decision of the Court ; not as part of applicable law, as both Parties agree that the reference to the new accepted trends does not empower the Court to decide *ex aequo et bono* ; but as an element in the interpretation of existing rules or as an indication of the direction in which such rules should be interpreted, in order to bridge, as far as

possible, the gap between the existing and what in all probability will become the future law.

Thus, to the extent these new accepted trends shed new light on the existing rules and chart the path of their future development, they can have a legal significance and effect of their own.

In any case, this may prove to be a moot question, once we have identified the trends or provisions which have a bearing on our case, and examined them from the point of view of the sources of international law.

4. With my fourth point I come to the second question, or the second paragraph of Article 1 of the *compromis*.

Sir Francis Vallat would have us believe that the two paragraphs of Article 1 of the Special Agreement contain one question and not two, simply because the *chapeau* to the two paragraphs of this article requests the Court "to render its judgment in the following matter" and not matters in the plural.

But, with all due respect, this argument confuses two completely different, though related, concepts of international procedural law, namely "the subject of the dispute" or "l'objet du différend" in the meaning of Article 40, paragraph 1, of the Statute, and Article 38, paragraph 1, of the Rules of Court on the one hand, and the questions put to the Court by the Parties in relation to that subject, on the other.

The subject or subject-matter of the dispute, by logical necessity can only be one, in any one case. For it is the basis of the unitary character of the case, and it defines *ratione materiae* the *res* which will be adjudicated by the Court, or in French, *la chose qui sera jugée*.

But if the subject-matter of the dispute is one by logical necessity, this does not mean that it has to be one dimensional. For in relation to this subject-matter, the Parties can put to the Court one or several questions, or request the Court to adjudicate one or several of its aspects ; the same as an applicant, in a case brought before the Court by a unilateral application, can formulate a claim embracing one or several aspects of the subject of dispute and the defendant in such a case can formulate a counter-claim in relation to the same subject in the same case.

5. This brings me to the fifth point I want to make, which deals with the meaning of the term "method" in the second question, or the second paragraph of Article 1 of the *compromis*.

I am happy to be able to start this point by agreeing with my old friend Mr. Highet that "words are less important than the ideas which they convey" (p. 214, *supra*).

That Article 1 puts to the Court one or two questions is no mere semantic dispute, however. The purpose of the Libyan contention that Article 1 puts only one question to the Court is to interpret paragraph 2 of that Article in such a restrictive manner as to empty it of most of its substance, as I shall explain in a few minutes.

I would not like to reiterate here in detail the logical, linguistic and external inference which clearly indicates that the second paragraph contains a different, but not unrelated, proposition from the first : the fact that we have a separate paragraph, the use of the adverbs "also" and "further", etc. I would like to concentrate on the meaning and substance of the proposition.

How does the adverse Party interpret this proposition, and particularly the key word "method" which figures in it ? To Sir Francis and Mr. Highet it is simply the practical method of application of the principles and rules of international law, which the Court would have indicated in pursuance of paragraph 1, and it has nothing to do with the method of delimitation.

But here again, we have to read the words in their context and not in isolation, and to look at the sentence as a whole, which is the only way to understand the logical proposition or statement it is supposed to convey. Paragraph 2 reads as follows, and I am using as usual the Libyan translation :

> "Also, the Court is further requested to clarify the practical method for the application of these principles and rules in this specific situation, so as to enable the experts of the two countries to delimit these areas without any difficulties."

The clarification of the practical method which is requested from the Court in this provision has clearly two successive purposes, one intermediate and one final : the first is the application of the principles and rules of international law to the specific situation ; this application is to be done not for any theoretical reason, but for a specific purpose, the specific purpose of rendering the actual operation of delimitation feasible without any difficulties. That this operation is to be undertaken by the experts of the Parties, does not change or effect the close logical and causal link between the practical method the Court is supposed to clarify and the actual delimitation this method is supposed to render feasible and without any difficulties.

In other words, "method of delimitation" is nothing but a convenient shorthand technical term for the longish and awkard phrase "the practical method of the application of the principles and rules of international law to the specific situation with a view to rendering the operation of delimitation feasible".

Indeed, it is rather difficult to imagine what other meaning can be attributed to the practical method mentioned in Article 1, paragraph 2, and what effect this paragraph would have if it does not refer to the method of delimitation.

As I have mentioned earlier, it is now common cause among the Parties that paragraph 1 requests the Court not only to indicate the applicable law but also to identify the relevant circumstances which characterize the area and to indicate their equitable weights in the delimitation.

Now, if this is to be done within the framework of paragraph 1 of Article 1, what is left to be done within the framework of paragraph 2 ? Or to put it differently, what is the next logical step along the legal continuum which goes from the general principles and rules of international law and leads to the specific line of delimitation, once we have identified the principles and rules, the relevant circumstances and their equitable weights ? It is clearly the indication of the method of delimitation, which would reflect the equitable balance between all the relevant circumstances of the area, and which would thus be capable of producing a solution that takes into consideration, and is compatible with, the requirements of the general principles and rules of international law in this specific situation.

If, however, we consider *arguendo* that the practical method mentioned in paragraph 2 is different from the method of delimitation, then paragraph 2 would be completely ephemeral, adding nothing to paragraph 1 ; with no net effect, *effet utile* or value added at all. Moreover, we would be at a loss to identify what it really means.

It is symptomatic in this respect that in spite of the valiant efforts of Mr. Highet to distinguish in theory this co-called practical method from the method of delimitation, when it came to the actual application of the method *in concreto*, he consistently confused the two and spoke exclusively of methods of delimitation. This is no fault of Mr. Highet, for it is an impossible task to distinguish something from itself.

In fact this so-called distinction is relatively new, for it has been expressly formulated only during the oral hearings. But if we examine the initial understanding of the Parties of what they meant by paragraph 2, no doubt can persist as to their intention to refer to the method of delimitation.

Tunisia has always acted on that understanding. But the same is true of the initial understanding of Libya. This comes out clearly from looking at the Libyan written pleadings. The most revealing in this respect is the Libyan Memorial, as it cannot be said that it was influenced by, or was responding to, the Tunisian pleadings. For this is a case introduced by *compromis* and the two Memorials were exchanged at the same time.

What do we find in Part III of the Libyan Memorial which deals with this question under the title "Application of the Law to the Facts"?

This part comprises two chapters: the first, after summarizing the Libyan version of the geological, geomorphological and geographical features of the area, presents the Libyan proposed method in four paragraphs under the title "Land Boundary Projection". The first of these is very relevant, and I ask your forbearance to read it. This is paragraph 116 of the Libyan Memorial (I, p. 48):

> "Yet further support for a method of delimitation which reflects the natural prolongation northward of the North-African landmass is the fact that such delimitation would represent a projection northward of the terminal point of the territorial land boundary . . ."

It then adds:

> "The use of a line of longitude (or latitude) drawn from the terminal point of the land boundary of adjacent States, and projected seaward as a maritime boundary, is well established by State practice."

This is followed by two paragraphs which describe the application of this precise method of delimitation in two specific cases. And the last paragraph — 120 — adds (p. 52): "It would be difficult to find a more equitable process than such a doubly-based method of delimitation."

These paragraphs are very eloquent in revealing Libya's understanding of the method as a method of delimitation. And for being short, they nonetheless describe the method with great precision, to the degree and to the minute, which makes it readily applicable or rather self-executing if it were *ex hypothesi* accepted by the Parties or designated by the Court.

The fact that this method is simplistic, and thus simple to describe, does not make it less precise than other methods which may be more elaborately constructed in order to take all the relevant circumstances into account.

The second and longest chapter of the same Part III of the Libyan Memorial is entitled "Application of the Equidistance Method would be inequitable and inappropriate". It deals, as its title indicates, with the equidistance method, which I hope nobody will contest that it is a "delimitation method".

And the Submissions of the Memorial repeat the same exercise. Out of 12 Submissions, no less than six deal with methods of delimitation.

In both the above-mentioned chapters of the Libyan Memorial, the process or *démarche* is the same. Libya starts by stating what it considers as the relevant circumstances and indicates their relative equitable weight as it sees it in one case, or refutes the relevance and importance of certain circumstances in the other. Then, in a second stage, it draws a positive or a negative conclusion on the method of delimitation to be followed, and describes that which it proposes with great precision.

Now, while we consider that the application by Libya of this process or

démarche is erroneous, we consider the process or *déniarche* itself as the right one, the one which the *compromis* requests the Court to follow by identifying all the relevant circumstances and their equitable weights, and on that basis, the method of delimitation to be followed.

This is the initial Libyan understanding of what is meant by practical method in the *compromis*, as revealed by its own Memorial, an understanding which coincides with that of Tunisia and which thus constitutes the initial common intention of the Parties to the Special Agreement. This understanding was corroborated by the Memorials of the Parties, which constitute a clear application of the principle of subsequent practice as a principle of interpretation of treaties.

It is too late in the game now to try to alter unilaterally and retroactively this common intention and understanding and go back on what was so clearly agreed upon in the *compromis*.

6. This brings me to my sixth and last point, which deals with some of the criticisms addressed by the adverse party to this interpretation.

Both Sir Francis Vallat, and Mr. Highet after him, repeated time and again that if the Court chooses the method of delimitation, this would in effect be tantamount to its drawing the line itself, and would be contrary to the basic principle of delimitation by agreement.

But both these assertions, with all due respect, are wrong. In the first place, the indication of the method of delimitation is not at all the equivalent of effecting the delimitation itself; providing the instrument or the means is different from its use to achieve the end, though it is a necessary prerequisite for it.

Indeed, as I said in my first presentation, once the Court would have indicated the applicable law, identified the relevant circumstances and their equitable weights and indicated the method of delimitation, in other words, once it would have resolved the outstanding substantive legal issues between the Parties, the experts of the Parties will be still left with a substantial though technical task. For if the method of delimitation determines the range within which the delimitation line must lie, the actual path of this line has to be determined by the experts themselves, according to what is technically feasible and by relating it concretely to the physical characteristics and landmarks of the area. They thus undertake the last step in the process of successive approximations along the continuum going from the general principles and rules and leading to the concrete line of delimitation. It is in this sense that they would apply the principles and rules indicated by the Court, which constitute the starting point of this continuum, in the process of constructing the line of delimitation, which is its terminal point, in pursuance of Article 2 of the Special Agreement.

This is no mean task, for it marks the attainment of the end of the whole exercise. Still, Mr. Highet considers that this role is "minimal", and exclaims: "And how this squares with the fundamental concept that delimitation should be by agreement is beyond us" (p. 216, *supra*). But he cannot really mean that.

For what does the principle of delimitation by agreement really mean? It means basically that delimitation should not be by unilateral act, by *fait accompli* and the like; in other words, that it has to be based on the consent of the interested parties. It does not and cannot mean, however, that the only admissible procedure in this field is direct negotiations, and that every step in the process of delimitation and every detail of an operation of delimitation can be undertaken or settled exclusively by negotiations. The absurdity of such a proposition is so manifest as to need no elaboration. Yet the adverse party

consistently cultivates this confusion between "delimitation by agreement" and "delimitation by negotiation", and tries to convey the impression that it is, even in its erroneous version of "delimitation by negotiation", an absolute principle of international law. Do counsel for Libya want to say that this so-called principle of "delimitation by negotiation" has *jus cogens* character ? Does this mean that the Parties cannot by agreement entrust a third party, such as an independent expert commission, or an international judicial or arbitral organ, with the task of delimitation ? And does this mean then that the decision of the Anglo-French arbitral tribunal of 1977 is null and void because the Special Agreement which created it contravenes a *jus cogens* rule ? To put these questions is itself a sufficient answer.

Another variation on the theme of negotiation is the curious argument advanced by Ambassador El Maghur (pp. 6-7, *supra*), alleging that no "real negotiations" took place between the Parties before signing the *compromis*, and that consequently they should take place after the judgment of the Court.

This argument aims at restricting the role of the Court under the *compromis*, with a view to leaving the substantive issues to be settled by the Parties through direct negotiations in the post-adjudicative phase.

Now, this allegation is simply wrong. The Tunisian Memorial (I, Chap. I and Anns. 8-24) and Counter-Memorial (II, Chap. 1, pp. 20-22, sec. 2) have amply shown that from 1968 to 1977, numerous meetings and exchanges have taken place in which the positions of the Parties as regards the question of delimitation were defined and certain proposals were made ; some on the part of Tunisia in a spirit of conciliation and well below its legal entitlement ; but at one point it became clear that these negotiations and exchanges had reached a deadlock ; and they were not facilitated by the policy of *faits accomplis* followed by Libya.

It was in these conditions, and thanks to the good offices of the Secretary-General of the Arab League, that the Parties reached agreement on the *compromis*.

In other words, negotiations took place, they did not succeed in bringing the Parties to agree on a substantive solution to the dispute, but they did, however, agree on the reference of the substantive legal part of the dispute to the Court. In fact, the Special Agreement – of which I have the honour of presenting the Tunisian interpretation before you – is itself an application of the principle of delimitation by agreement in the present case.

And even if no "real negotiations" had taken place before, which is not true in the case at hand, this would have no incidence on the interpretation of the role of the Court under the Special Agreement. Indeed, the Parties could have even asked the Court to effect the delimitation itself, which they did not. No argument can thus be drawn from the state of prior negotiations to impose a restrictive interpretation on the *compromis* which empties it of its substance and prevents the Court from undertaking the full task which is entrusted to it by this *compromis*.

Such a use or abuse of the principle of delimitation by agreement, especially in the erroneous version of delimitation by negotiation, as an argument favouring a restrictive interpretation of the jurisdictional title, is nothing but a new version, or rather a revival, of that old and discredited so-called principle of interpretation in favour of sovereignty. And I need say no more.

Finally, the adverse Party has invoked once again Article 3 of the Special Agreement in order to justify its restrictive interpretation. This article concerns the post-adjudicative phase and deals with a hypothesis which we hope will

not arise. I only want to add two remarks to what I said in my earlier statement on this subject.

In the first place, Mr. Highet still contends that "what might happen in the context of Article 3 of the Special Agreement in this case does not depend on the use of Article 60 of the Statute", before adding "if the Parties had intended to rely on Article 60, they would not have needed to include Article 3" (p. 218, *supra*). In other words, he argues that if we consider Article 3 as a mere application of Article 60 of the Statute, it would be ephemeral, without any effect of its own.

But if we read the article carefully, we find that this is not the case. Indeed, Article 3 complements Article 60 by providing certain details which do not figure in that article or in the corresponding Articles 98 and 100 of the Rules : it specifies, for example, the period of three months after the judgment, beyond which, failing agreement, the Parties shall go back to the Court ; though it merely reiterates the obligatory character of the judgment of the Court.

My second remark in relation to Article 3 is addressed to a more fundamental aspect of the matter. It concerns the compatibility of the Libyan interpretation with the judicial function of the Court.

Indeed, the Special Agreement brought a contentious case before the Court, in which the Court is asked to decide the questions put to it by a judgment which is final on the subject-matter and obligatory for the Parties. It is very different in nature and effect from provisional, interim or interlocutory judgments which deal only with procedural matters and measures. The finality of the judgment applies to the Court as well. Indeed, the Court itself cannot examine again the same subject-matter (in the present case the delimitation of the continental shelf) which is *res judicata* between the Parties and vis-à-vis the Court, except in the case of the two unforeseen contingencies I mentioned before, namely revision and interpretation.

If, however, after giving its judgment, the Court has to examine and pronounce itself again in whatever form on the matter of continental shelf delimitation between Libya and Tunisia, within the framework of the same questions put to it by the *compromis*, and outside the hypothesis of revision or interpretation, then this necessarily means that its first judgment on the same matter and between the same Parties is no more a *res judicata*.

Any additional pronouncements which concern the same three identities, namely : *(a)* the same subject-matter of dispute ; *(b)* the same questions put to the Court (or, in cases brought by unilateral application, the same claims of the parties) ; and *(c)* the same parties ; any additional pronouncements by the Court can only be in terms of interpretation or revision of the first judgment. Only if one of the three identities change can there be a new and separate judgment. For example, in the present case, if the Parties, by a new agreement, request the Court – they are the same Parties, on the same subject-matter or dispute of continental shelf delimitation, but if they request from the Court something different which is to effect the delimitation itself, then the Court can give a new judgment ; and in this case it can do that because one of the three identities has changed, which is the question or the claim. But barring this, there is no possibility of a new and separate judgment on the same matter between the same parties on the same questions or claims.

Moreover, the interpretation which can be requested from the Court within the framework of Article 60 of the Statute, is not an additional interpretation of the elements of law and facts constituting the case ; for it is of the essence for the finality of the judgment and the respect and authority to which it is entitled, that the Court decides the issues before it to the fullest extent possible, in the

light of as definitive and exhaustive an examination of the available and foreseeable elements of law and fact as possible at the time of the delivery of judgment. The interpretation which can be requested from the Court is of what it has already said in its own judgment. It is not and cannot be another instalment by the Court of its handling of, or dealing with, the merits of the case ; it is a clarification or an explanation of what it had already said in its judgment and which was later diversely understood by the Parties.

This is a far cry from Libya's interpretation of the role of the Court under Article 3 of the Special Agreement, which would involve the Court on a rather continuous basis in the process of negotiations between the Parties, and which would lead to its increasing involvement and intervention in this process. Its role would not be too dissimilar to that of a conciliation commission which would make some general recommendations to the Parties, but if they prove not to be sufficient to induce agreement, the commission would make other proposals perhaps more specific, but also perhaps a little different from the first ones, with a view to bringing the Parties nearer to agreement.

This, I respectfully submit, is completely incompatible with the concept of judicial function, whose formulation and safeguard is one of the towering achievements of this Court and of its predecessor, the Permanent Court of International Justice. The Court is here to render judgment, and to do so in as exhaustive and definitive a manner as humanly possible. And the theory of judgment by instalments, whose only purpose is to prevent the Court from doing just that, does not withstand even the slightest legal scrutiny.

This concludes the points I wanted to make about the interpretation of the Special Agreement and the role with which it entrusts the Court.

The ACTING PRESIDENT : In its written Reply [1] the Government of Tunisia announced the intention of showing to the Court during the oral proceedings a film on the low-tide elevations of the Gulf of Gabes. On 24 September 1981 [2] the Court decided that before the film was shown in the Court the representatives of Libya should be afforded the opportunity of studying a copy of it. Accordingly, a copy of this film was, on 29 September 1981, supplied by the Agent of Tunisia [3] to the Registrar, and was the same day delivered by the Registrar on loan to the Agent of Libya. However, on examining the film, the Agent of Libya informed the Court by letter of 8 October 1981 [4] that for the reasons given in that letter, he did not find it necessary to object to the film being shown to the Court.

The Agent of Tunisia has suggested that tomorrow morning would be a convenient occasion to show the film. The Court has decided to sit at 9.30 a.m. tomorrow, Wednesday, 14 October 1981, to see the film. The representatives of both Parties are invited to be present. The public sitting will open with Professor Dupuy's statement as previously announced at 10 a.m., immediately after the showing of the film.

The Court rose at 6.10 p.m.

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[1] **IV**, p. 36.
[2] P. 592.
[3] See *infra*, Correspondence, No. 117.
[4] See *infra*, Correspondence, No. 109.

TWENTY-SIXTH SITTING (IN CAMERA) (14 X 81, 9.30 a.m.)

Present : [See sitting of 29 IX 81.]

The ACTING PRESIDENT : The Court meets this morning in closed sitting in order to see the film on *The Tunisian Shelf and the Gulf of Gabes : the Low-tide Elevations*, which Tunisia wishes to show to the Court. I note the presence in Court of the representatives of both Parties, and I invite the Agent of Tunisia to project his film.

(The film, lasting 22 minutes, was projected, with a commentary in English by Mr. Lazreg.)

The ACTING PRESIDENT : I thank the Agent of Tunisia for showing the film to the Court and declare this sitting adjourned. The Court will reconvene in public sitting in ten minutes' time to hear the further argument of the representatives of Tunisia.

The Court rose at 9.55 a.m.

VINGT-SEPTIÈME AUDIENCE PUBLIQUE (14 X 81, 10 h 15)

Présents : [Voir audience du 29 IX 81.]

RÉPLIQUE DE M. RENÉ-JEAN DUPUY

CONSEIL DU GOUVERNEMENT DE LA TUNISIE

M. DUPUY : Monsieur le Président, Messieurs de la Cour, l'exposé qui me vaut le grand honneur de paraître à nouveau à cette barre ne portera que sur les points qu'il nous paraît essentiel de réfuter parmi les assertions de nos contradicteurs.

A cet égard nous devons, en exergue, écarter une fois pour toutes de ce débat, où elle n'a que faire, la tentative libyenne de remettre en question la frontière terrestre entre les deux pays.

Nous ne relèverons pas l'humour sans doute involontaire d'un conseil de la Libye qui, lors de sa plaidoirie, voulait laisser accroire que la Tunisie avait, dans ses écrits, accordé beaucoup d'importance à la question de la frontière terrestre.

Cette question n'a jamais été abordée par nous qu'en termes de réfutations factuelles des développements inaugurés par la Libye dans son mémoire.

L'essentiel de notre position à cet égard tient dans trois paragraphes, n[os] 1.02, 1.03 et 1.04, de notre contre-mémoire, dont l'ensemble fait moins d'une page. Le reste est rejeté en annexe au contre-mémoire et à la réplique. La question de l'histoire de la frontière terrestre n'est d'aucune incidence dans la présente affaire. La frontière a été délimitée par la convention du 19 mai 1910 (mémoire tunisien, annexe 94, I, p. 436). Cette convention est régulièrement entrée en vigueur. Elle n'a jamais été dénoncée. La frontière ainsi délimitée a été confirmée par les gouvernements successifs de la Libye indépendante, soit explicitement, dans le traité d'amitié et de bon voisinage du 10 août 1955 (II, contre-mémoire tunisien, annexe II-2), soit implicitement par le traité de fraternité et de bon voisinage conclu le 7 janvier 1957 entre le Royaume de Tunisie et le Royaume de Libye (mémoire tunisien, annexe 92, I, p. 431), complété par la convention d'établissement du 14 juin 1961 (annexe 93, I, p. 433).

La Cour internationale de Justice n'étant pas saisie en revision pour juger des prétendues injustices de l'histoire, la frontière terrestre et son point d'aboutissement sur la côte est un fait dont il faut prendre acte, sans autre considération.

Cette mise au point étant effectuée, venons-en au fond du débat. Lors de la phase orale, la Partie adverse a déclaré qu'« à propos de la présente affaire, s'agissant de la délimitation du plateau continental, les droits historiques sont d'un faible secours » (ci-dessus, p. 144). Il est assez étonnant de lire cette déclaration car cette affirmation péremptoire intervient au terme de plaidoiries s'étalant sur près de neuf heures.

En définitive, quelle est véritablement la place qu'il faut accorder aux titres historiques dans la présente affaire ? Il convient en effet de ne pas se tromper, de ne pas céder aux confusions dans lesquelles la Partie adverse tente

d'entraîner la Cour. Le débat sur les titres historiques doit être d'abord nettement circonscrit. On ne saurait faire croire qu'en défendant ces titres historiques la Tunisie défend en réalité un prolongement naturel qui se confondrait avec la zone sur laquelle ces titres sont implantés. Tout spécialement on ne saurait tenter de faire croire que cette affaire se réduit à un choix implicite offert à la Cour entre la ligne nord-est 45° et une ligne de 20, 22 ou 26° dont les conseils de la Libye ne parviennent pas à dissimuler le charme qu'elle exerce sur eux.

Comme nous l'avons dit à plusieurs reprises, les titres historiques ont une valeur démonstrative à l'égard du prolongement naturel, mais celle-ci ne s'applique qu'à une partie initiale de ce prolongement.

C'est dire qu'on ne saurait imaginer que ce prolongement naturel puisse se limiter vers le large à la ligne de l'isobathe des 50 mètres, ni à la limite latérale de 45° nord-est.

Pourquoi alors insistons-nous sur ces titres auxquels nos adversaires ont consacré tant de temps, beaucoup plus de temps que nous, finalement ?

C'est parce qu'eux, comme nous, savent bien leur valeur. Ces titres apportent la preuve vivante, le témoignage humain du fait que la zone sur laquelle ils sont implantés fait, en tout état de cause, partie du prolongement naturel de la Tunisie.

Et c'est ici le lieu de rappeler comment se pose le problème des rapports entre la théorie des titres historiques, d'une part, et celle du plateau continental, d'autre part (**IV**, p. 475).

Un fait est ici essentiel, qui semble avoir échappé à la Partie adverse, c'est que les titres historiques de la Tunisie portent sur des pêcheries sédentaires, ce qui veut dire qu'à l'origine ces droits historiques sont apparus sur le fond.

Les titres procèdent du fond et c'est progressivement qu'ils ont émergé au long de la colonne d'eau jusqu'à la surface. Alors, les droits de pêche sur les eaux sont venus doubler les droits originaires sur le fond. Or, le fond, c'est le plateau.

Il y a donc eu un prolongement naturel des activités humaines qui se sont exercées naturellement sur le prolongement physique de la Tunisie. Les pêcheries sédentaires tunisiennes sont portées par le socle qui constitue le plateau continental.

Et nous devons ici faire une observation fondamentale.

Il ne faut pas nous faire dire ce que nous n'avons jamais dit. Nous ne prétendons pas et nous n'avons jamais prétendu que notre prolongement naturel est juridiquement issu de ces activités humaines. Elles ne sont pas constitutives de nos droits sur le prolongement naturel, elles apparaissent comme une superstructure humaine reposant sur une réalité physique. Ce ne sont pas les pêcheries qui créent le prolongement naturel, c'est au contraire le prolongement naturel qui, du fait de la configuration physique de la zone, a permis l'exploitation des pêcheries sédentaires.

C'est cela que nous avons appelé la fonction démonstrative des titres historiques (**IV**, p. 475-479), dans nos précédentes interventions à cette barre.

Nous n'avons jamais contesté que les droits de l'Etat riverain sur son plateau continental s'exercent *ab initio*. Nous avons cité intégralement le paragraphe 19 de votre décision de 1969. Nous avons tout aussi bien rappelé que ces droits de l'Etat riverain n'ont pas besoin d'être exercés pour exister. Nous n'avons non plus jamais prétendu que le plateau continental de la Tunisie a été acquis par elle au cours des siècles. Il est évident que ce plateau nous a été donné par la nature comme à tous les autres Etats du monde qui ont un plateau.

Les pêcheries sédentaires que la Tunisie a acquises au cours des siècles, suivant les règles du droit international classique, n'en existent pas moins. Pourquoi les ignorer puisqu'elles donnent une illustration incomparable.

Ce que nous avons dit dans nos précédentes interventions, c'est que ces pêcheries assument aujourd'hui une fonction nouvelle ; elles montrent la façon si naturelle dont la masse terrestre se prolonge très progressivement sous la mer.

Ainsi toute la démonstration de mon ami le doyen Colliard sur la primauté du déterminisme physique dans le droit du plateau continental non seulement ne nous gêne pas mais trouve ici une singulière illustration. Ce déterminisme physique joue bien ici, il a même si bien joué qu'il a, depuis toujours, poussé les populations riveraines sur ses hauts-fonds et sur ses bancs.

Encore une fois ce ne sont pas les pêcheries sédentaires qui ont créé le prolongement naturel ; c'est le prolongement naturel qui, par sa faible déclivité a permis l'exploitation des pêcheries sédentaires.

On pourrait résumer ainsi la conclusion n° 2 de notre mémoire : « Respecter les pêcheries, c'est respecter le prolongement. » Ayant ainsi éclairci les rapports existant entre les titres historiques et le prolongement naturel, nous passerons maintenant à la réfutation de la présentation des faits par la Partie adverse.

Il faut restaurer une vérité assez malmenée. Cette vérité est simple et s'énonce en deux propositions : les titres historiques existent, et leur délimitation bénéfice de la tolérance internationale.

I. L'EXISTENCE DES TITRES HISTORIQUES

Nous n'avons pas à nous étendre sur le premier point : *l'existence des titres historiques*. Notre mémoire comme nos interventions ont rappelé l'ancienneté des pêcheries sédentaires, qu'il s'agisse des pêcheries d'éponges ou des pêcheries fixes. Cette constatation se retrouve dans les ouvrages qui portent sur les pêcheries sédentaires et il faut encore rappeler la place que leur accorde le rapport du professeur François qui se réfère précisément aux titres historiques de la Tunisie comme à l'archétype des droits d'un Etat sur les pêcheries sédentaires en vertu d'un usage immémorial.

M. François, à la suite de G. Gidel que nous avons cité à la page 93 de notre mémoire (I), reconnaissait les droits souverains de la Tunisie à l'égard de l'ensemble de la zone des pêcheries sédentaires.

A cet égard, un étrange procès nous a été fait par la Partie adverse, lors de sa plaidoirie du 2 octobre dernier (ci-dessus, p. 103 et suiv.), celui d'avoir voulu dissimuler à la Cour l'existence de deux catégories successives de pêcheries sédentaires, à l'intérieur de cette zone des titres historiques. Affirmation vraiment surprenante. Qu'il suffise en effet de consulter le chapitre IV, section II de notre mémoire (p. 92-117). On constatera à sa lecture que la distinction entre les pêcheries sédentaires à raison d'installations fixes et les pêcheries sédentaires à raison des espèces capturées en constitue l'axe central. Et nous l'avons repris ici même à cette page.

Cette distinction a été rappelée tout au long de nos écritures et de nos interventions. Comme nous l'avons dit, elle est d'autant plus fondamentale pour la Tunisie qu'elle fournit la justification principale du tracé des lignes de base droites qu'elle a institué par la loi et le décret d'août 1973. Ce décret, notons-le, a été non seulement publié mais encore intégralement reproduit dans son mémoire par la Libye elle-même qui est ainsi mal venue à en contester l'existence (I, mémoire libyen, annexe I-17). Or ces lignes de base tracent en effet avec fidélité la limite à l'intérieur de la zone des titres, entre les

eaux historiques de la Tunisie d'une part, et les titres historiques de pêche sur les bancs d'éponges d'autre part. La Tunisie a apporté à cet égard toutes les précisions nécessaires dans les paragraphes 1.18 à 1.31 de son contre-mémoire (50) **(II)**, dont nous rappellerons ici les points essentiels (fig. 1.01).

Les lignes de base droites de la Tunisie rattachent aux eaux intérieures l'ensemble de la zone maritime qui couvre les pêcheries fixes. Elles opèrent ce rattachement en application directe des règles définies par la Cour internationale de Justice dans l'affaire des *Pêcheries* norvégiennes de 1951. Ainsi que l'indiquait alors votre Cour :

> « La vraie question que pose le choix du tracé des lignes de bases est, en effet, de savoir si certaines étendues de mer situées en deçà sont suffisamment liées au domaine terrestre pour être soumises au régime des eaux intérieures. » (*C.I.J. Recueil 1951*, p. 133.)

Dans le cas des eaux recouvrant les pêcheries fixes tunisiennes, la réponse à cette question ne présente aucune difficulté et ne peut être qu'affirmative. Ainsi que l'a d'ailleurs objectivement rappelé le doyen Colliard (ci-dessus, p. 114 et suiv.) à la suite de nos écritures et de nos plaidoiries, les pêcheries fixes ont fait l'objet, depuis des temps très reculés, d'un régime d'appropriation foncière organisé par l'autorité publique, régime que le protectorat voudra ensuite transcrire selon les règles de la domanialité publique française. Nous avons au demeurant suffisamment décrit la quasi-identité que les populations riveraines ont toujours établie entre la terre émergée et cette zone de pêches fixes faiblement immergée, pour qu'on nous épargne ici de nouveau une démonstration. La Cour se souviendra aussi que, depuis des temps immémoriaux, c'est de ces pêcheries sédentaires que ces populations ont tiré le moyen d'une subsistance que leur refusait l'ingratitude de la région terrestre attenante (cf. **I**, mémoire tunisien, par. 4.20 à 4.45 et 4.48 à 4.68).

Il s'agit bien là des « intérêts économiques propres à la région considérée, et dont la réalité et l'importance sont clairement attestées par un long usage ». Ces intérêts dont la Cour indiquait en 1951 que la prise en considération justifie le tracé des lignes de base. Si, comme nous l'avons dit, l'affaire actuelle ne se réduit pas entièrement par elle-même à l'affaire de 1951 (**IV**, p. 461), en revanche, cette affaire de 1951 est tout à fait pertinente en ce qui concerne les critères d'établissement des lignes de base. D'ailleurs l'accord de délimitation du plateau continental entre la Tunisie et l'Italie avait, deux ans auparavant, en 1971, été établi à partir de la limite extérieure des hauts-fonds tunisiens.

L'intimité du lien physique, économique et humain existant entre cette région maritime et le domaine terrestre se vérifie sur l'ensemble de la zone des hauts-fonds, tant autour des îles Kerkennah que dans la région d'El Biban et dans le golfe de Gabès, fermé par une ligne de base droite, dont on voit mal comment la Libye pourrait la contester alors qu'elle-même a fermé le golfe de Syrte sur une longueur six fois plus grande, le long du parallèle 32° 30' en spéculant sur des droits historiques dont l'existence avait jusque-là échappé à la totalité de la communauté internationale.

Confrontée à ces lignes de base tunisiennes, la Libye n'a jamais protesté jusqu'à 1979, c'est-à-dire postérieurement à la « date critique » de la signature du compromis sur la base duquel la Cour siège aujourd'hui.

Quant à l'obligation qui incombait à la Tunisie de publier des cartes à grande échelle de ses lignes de base, c'est à tort que notre adversaire nous fait grief de ne pas les avoir publiées. D'ailleurs ces cartes, les voici ! (Dossier, n° 102).) [1]

[1] Non reproduites. Voir ci-après, correspondance, n° 122.

Pour en finir sur ce point, la Tunisie, loin de nier l'existence des deux catégories de pêcheries dans la zone des titres, attache, au contraire, une grande importance à cette distinction. Sur les pêcheries fixes s'étendent des eaux historiques, c'est-à-dire comme l'a dit la Cour en 1951, des eaux que l'on peut assimiler à des eaux intérieures. Au-delà, sur les pêcheries d'éponge, jusqu'à l'isobathe des 50 mètres, la Tunisie possède des titres historiques, qui, d'abord et avant tout appuyés sur le fond, s'étendent à la colonne d'eau surjacente. Mais, et c'est là que l'on retrouve l'unité du système, les droits souverains de la Tunisie s'exercent tout aussi bien sur la seconde que sur la première zone. Cela veut dire que sur l'une comme sur l'autre la Tunisie a exercé des pouvoirs de réglementation, des compétences fiscales, judiciaires et pénales. Il est évident que l'existence des titres historiques ainsi détenus sur l'une et sur l'autre zone ne saurait être davantage discutée. Il est évident aussi que cette existence est totalement indépendante de la délimitation de 1904.

Il convient de souligner ce dernier point. Jusqu'à cette date, jusqu'en 1904, il existait des critères en fonction desquels on appréciait l'étendue de la zone des titres. Ces critères n'ont jamais varié pour ce qui concerne les limites des pêcheries fixes, parce qu'un pieu ou une palme ne peuvent être fichés dans le sol au-delà d'une profondeur de 3 mètres.

Pour les éponges, le critère retenu primitivement était élémentaire. L'article premier du décret beylical du 16 juin 1892 dispose encore à cette époque : « La pêche des éponges et des poulpes est libre sur toute l'étendue des bancs tunisiens aux conditions et charges ci-après énoncées. »

Le texte n'en dit pas plus. Et ce qu'il faut voir, c'est que cela suffisait à l'époque, en raison des techniques d'exploitation alors utilisées. Les techniques cependant, à partir de la fin du XIX[e] siècle, vont évoluer. Certaines d'entre elles, comme l'utilisation de la gangave, sont particulièrement préjudiciables à la gestion rationnelle des espèces.

Or, ce sont des pêcheurs étrangers, grecs et italiens, qui recourent à ces techniques nouvelles, et c'est pour se protéger de leurs incursions que l'instruction de 1904 va procéder à une opération de bornage.

La réaction tunisienne d'autoprotection préfigure ainsi celle qui, sur une échelle infiniment plus vaste, sera, soixante-dix ans plus tard, à l'origine de la mer patrimoniale et de la zone économique exclusive qui est née elle aussi de ce besoin d'autoprotection.

Une délimitation plus précise apparaissait à cette époque nécessaire aussi bien pour les tiers que pour les Tunisiens. Le souverain territorial avait en effet institué une nouvelle réglementation et il fallait savoir quel était exactement son champ d'application.

Un incident apparaît à cet égard révélateur : c'est celui que provoqua en
(127) 1899 l'arraisonnement du voilier italien *Letizia*, pêchant à 14 milles des hauts-fonds tunisiens, en deçà des fonds de 50 mètres.

Après avoir, dans un premier temps, contesté la légalité de la saisie, l'Italie accepta un an plus tard de reconnaître la légalité des droits historiques en vertu desquels l'autorité tunisienne avait arraisonné son navire. Mais l'Italie demandait que la zone soit délimitée de manière plus précise.

Ainsi, il est faux de dire, à l'instar de la Partie adverse, que la reconnaissance des titres était subordonnée à leur délimitation. Les deux questions ont toujours été distinguées dans le passé.

C'est exactement l'inverse qui était en train de se produire. C'est parce qu'ils reconnaissaient que la Tunisie possédait des titres historiques sur ses hauts-fonds et ses bancs, que les Etats tiers avaient aussi besoin de savoir à partir de quelles limites ils pénétraient sur leur aire.

Mais c'est ici que réapparaît alors l'objection de la Libye qui prétend que notre délimitation n'a jamais été reconnue.

Nous abordons ici le second point de cet exposé.

II. LA DÉLIMITATION A BÉNÉFICIÉ DE LA TOLÉRANCE INTERNATIONALE

Dans le cadre de cette analyse de la délimitation moderne des titres historiques, je voudrais brièvement rappeler à la Cour que, lors de la plaidoirie du 18 septembre dernier, nous avions bien distingué, d'une part, la reconnaissance par les Etats tiers de l'existence des titres tunisiens en eux-mêmes, et, d'autre part, l'acceptation ou, suivant les cas, la tolérance de la délimitation formelle de la zone.

La Cour sait bien notamment que les mutations successives du régime d'exploitation des éponges tout au long du XIX[e] siècle, mutations que le doyen Colliard a diligemment rappelées devant vous, l'autre jour, ont été effectuées en liaison étroite avec les consuls des puissances étrangères, lesquels n'ont jamais remis en cause la manifestation de souveraineté de l'autorité tunisienne qu'elles exprimaient.

Consacrons-nous donc maintenant à l'attitude des puissances tierces à l'égard des limites fixées par l'instruction de 1904. Cette attitude était, suivant les Etats, tributaire de l'utilisation que les uns et les autres étaient appelés à faire de la région maritime en question.

Ainsi, le Royaume-Uni, grande puissance maritime par excellence, était-il d'abord intéressé au maintien de la liberté de la navigation internationale. Celle-ci n'était pas remise en cause par les limites de 1904, qui ne s'intéressaient qu'à l'exploitation des fonds et à la pêche, la Grande-Bretagne n'opposa donc pas de réticence. Pas plus d'ailleurs, et cela mérite d'être noté, qu'elle n'intervint pour la défense des intérêts des pêcheurs maltais relevant de sa compétence, encore que ces pêcheurs exploitassent des ressources du fond.

La Grèce, qui s'intéressait elle aussi, on l'a vu, à cette exploitation, ne protesta pas davantage.

Il reste l'Italie, sur laquelle la Partie adverse a tellement insisté que l'on se serait parfois pris à penser que le litige qui vous est aujourd'hui soumis n'a jamais concerné que les rapports entre l'Italie et la France.

Nous reprendrons pourtant l'examen de sa position, puisque l'abondance des plaidoiries adverses à ce propos nous en fait obligation. Mais en nous tenant ici aux points essentiels du dossier, tant pour ce qui concerne la limite de l'isobathe des 50 mètres que celle de la ligne latérale ZV 45°.

En ce qui concerne la première, l'acquiescement de l'Italie à la limite de l'isobathe des 50 mètres n'a pu être démentie par la Partie libyenne.

La Libye n'a pu occulter ce fait cardinal : les hésitations italiennes et la fermeté des autorités franco-tunisiennes qui n'ont jamais admis la contre-proposition italienne d'une profondeur de 30 mètres, laquelle constituait déjà, notons-le, par elle-même une reconnaissance de la zone des titres. Cette contre-proposition ne fut d'ailleurs pas maintenue par le Gouvernement de Rome.

(127) L'incident de l'*Unione* et du *Torino*, invoqué par la Partie adverse, tourne en réalité à sa confusion.

L'examen de cet incident rapporté à l'annexe I-15 de la réplique libyenne (IV) démontre en effet trois points :

1. Aussi bien dans son télégramme au résident général que dans sa lettre à l'ambassadeur de France à Rome, le ministre français des affaires étrangères relève que cet incident survenu en septembre 1910 est le premier par lequel le

Gouvernement italien conteste la possession paisible tunisienne et le droit du protectorat à réglementer la pêche en dehors de la mer territoriale de la Tunisie.

2. Le Gouvernement italien fonde sa contestation sur le fait qu'il n'a pas signé de traité formel. Mais la lecture de son aide-mémoire montre qu'il ne va pas jusqu'à soutenir qu'il n'a pas jusque-là donné une reconnaissance tacite, c'est l'expression qu'il utilise lui-même, aux actes unilatéraux de la Tunisie.

Aussi bien il n'affirme pas ne pas avoir accordé cet acquiescement tacite et se trouve conduit seulement à nier qu'une reconnaissance puisse mettre des obligations internationales à la charge de l'Etat qui l'a accordée.

Or il est bien évident que cette thèse est contraire au droit, à la pratique et à la doctrine internationaux.

D'ailleurs le Gouvernement italien n'a pas maintenu une position aussi faible du point de vue juridique.

3. Au demeurant la très ferme attitude de la France devait également inciter le Gouvernement de Rome à modifier son attitude et à reconnaître les droits de la Tunisie dans les notes verbales du 10 juin et du 23 septembre 1911. On observera en particulier que, dans la seconde de ces notes, l'Italie s'engageait à ne plus soulever la question de principe de la liberté de la pêche en dehors des eaux territoriales de la Régence. De fait, dès les années vingt, elle s'abstient de protester contre l'isobathe des 50 mètres.

On relèvera notamment la déclaration[1] du ministre italien des affaires étrangères Sforza, devant le parlement italien en 1948, telle qu'elle est reproduite dans les *Atti parlamentari*, qui sont évidemment des documents officiels dont la collection se trouve ici même à la bibliothèque du palais de la Paix.

Répondant à un député qui demandait des éclaircissements sur la saisie, dans les eaux de pêche tunisiennes, de quarante bateaux de pêche italiens, le ministre Sforza fit une déclaration manifestant qu'en l'occurrence si le Gouvernement italien n'avait opposé aucune protestation à l'égard de cette saisie, c'est parce qu'il reconnaissait la légalité internationale des eaux tunisiennes à l'intérieur desquelles elle avait eu lieu.

Cette légalité concernait d'ailleurs tout aussi bien la ligne latérale de délimitation et j'aborde ainsi l'attitude italienne à l'égard de la limite nord-est 45°.

Cette question a beaucoup retenu l'attention de la Partie adverse, qui cherchait à combattre l'affirmation que nous avions faite et que nous formulons à nouveau.

A cet égard, le conseil de la partie adverse qui a traité de ce problème a déclaré en exergue à ces propos que l'historien est le prophète du passé. Je crains que quant à lui il en ait été plutôt le romancier. Certes, l'histoire romancée est un genre littéraire non négligeable et fort plaisant lorsque, comme ce fut le cas, il est mené avec talent, mais l'agrément qu'on y trouve résulte des libertés que l'auteur prend avec les événements et notamment la chronologie. Hélas, le juriste est moins habile. Souffrez, Monsieur le Président, qu'il revienne à l'histoire des historiens, ce qui veut dire qu'il passe de l'imagination à la réalité.

La réalité, elle, s'exprime ainsi, l'Italie n'a jamais, depuis 1904, opposé de protestation formelle à l'égard de la ligne latérale de délimination ZV 45°, ligne que la Tunisie a, quant à elle toujours maintenue. A propos de cette ligne ZV 45°, qu'il me soit permis d'ouvrir une parenthèse d'une réelle importance.

Cette ligne n'est pas le fruit de l'arbitraire du directeur des travaux publics.

[1] Ci-après p. 438.

Elle est, au contraire, la manifestation du souci du protectorat de conserver à la Tunisie la possession des bancs de Faroua qui se prolongent à l'est de Ras Ajdir.

L'appartenance de ces bancs à la Régence est notée par Servonnet et Lafitte dans leur ouvrage sur le golfe de Gabès publié en 1888, c'est-à-dire seize ans avant 1904, et dans lequel on lit, à la page 269 : « Le Gouvernement tunisien ne saurait abandonner sans compromettre une situation acquise ses droits sur la possession du banc de la Faroua. »

Cette parenthèse étant fermée, nous distinguerons trois phases dans l'attitude de l'Italie à l'égard de la ligne ZV 45° :

- celle qui va de 1904 à 1913,
- celle qui occupe l'entre-deux-guerres,
- enfin la période qui va de la seconde guerre mondiale à nos jours.

A

L'attitude italienne à l'égard de la ligne nord-est 45° dans la période 1904-1911

D'après un conseil de la Partie libyenne, l'attitude de l'Italie par rapport à la ligne nord-est établie en 1904 ne saurait être prise en considération avant le 29 septembre 1911, date de l'occupation italienne de la Libye (ci-dessus p. 85). Cette affirmation est dénuée de tout fondement.

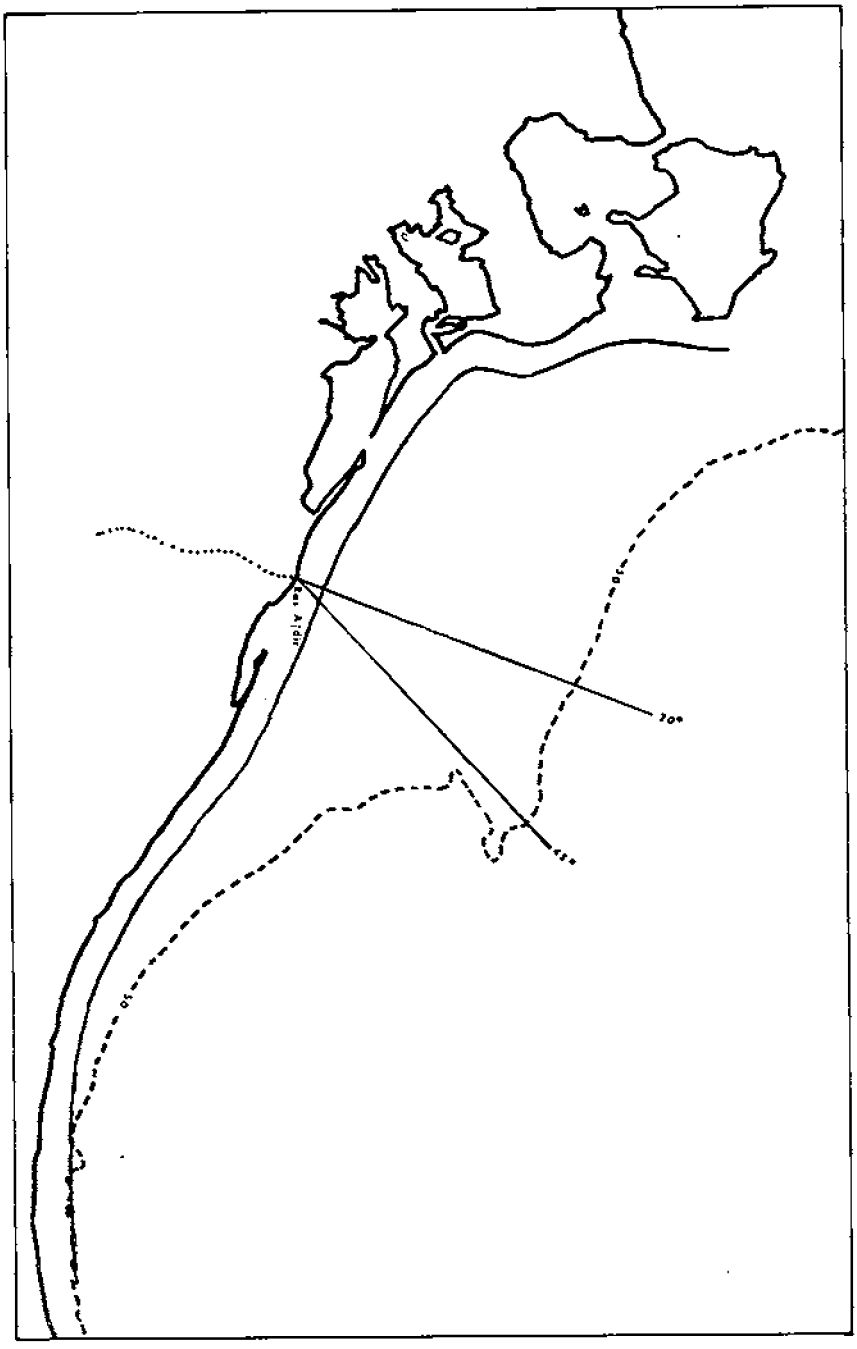
L'Italie avait en effet un double intérêt à la délimitation latérale effectuée en 1904 par la Tunisie.

En premier lieu, il était très important pour les pêcheurs italiens, donc pour les autorités italiennes elles-mêmes, de savoir où se terminait la zone de pêche tunisienne et où commençait la zone de pêche de la Tripolitaine. Et cela, parce que la Tunisie exigeait des pêcheurs une patente pour pêcher dans la zone tunisienne des titres historiques, et que l'Empire ottoman soumettait la pêche à une autre taxe pour pêcher dans les eaux territoriales tripolitaines. Il importait donc de savoir où se terminaient les eaux d'un pays et où commençaient celles de l'autre, afin de ne pas payer de taxes deux fois.

En second lieu, l'Italie pouvait avoir un intérêt éminent à contester la ligne nord-est. Elle aurait trouvé avantageux certainement de réclamer à sa place une ligne moins inclinée vers l'est, et si une telle ligne moins inclinée vers l'est avait été adoptée, une large étendue de mer (comprise entre cette ligne et celle de 45° nord-est, allant jusqu'à l'isobathe des 30 ou des 50 mètres tout aussi bien) aurait été considérée pour une faible partie comme eaux territoriales de l'Empire ottoman (figure ci-après p. 298) et, pour le reste, comme une zone de haute mer. Ainsi, un redressement éventuel de la ligne latérale en faveur de l'Empire ottoman aurait-il permis aux pêcheurs italiens de ne pas avoir à payer de taxes dans cette zone. Voyons alors comment les autorités italiennes ont réagi à l'instruction de 1904. A ce propos, il faut retenir deux incidents : celui (127) du *Torino* et de l'*Unione* de 1910, encore, et celui des trois sacolèves grecques et italiennes, elles aussi arraisonnées par la France la même année.

Sur ce quoi il nous faut, à propos de la première de ces affaires, insister, c'est que l'Italie devant la fermeté des positions françaises ne s'opposa nullement à la limite latérale de la zone des titres historiques. En effet, elle aurait eu pourtant là une occasion excellente de le faire. Mais si elle n'émit aucune objection à ce sujet, c'est tout simplement parce que elle avait déjà tacitement accepté la ligne nord-est.

Examinons maintenant l'affaire des sacolèves.


Mer d'Iroise
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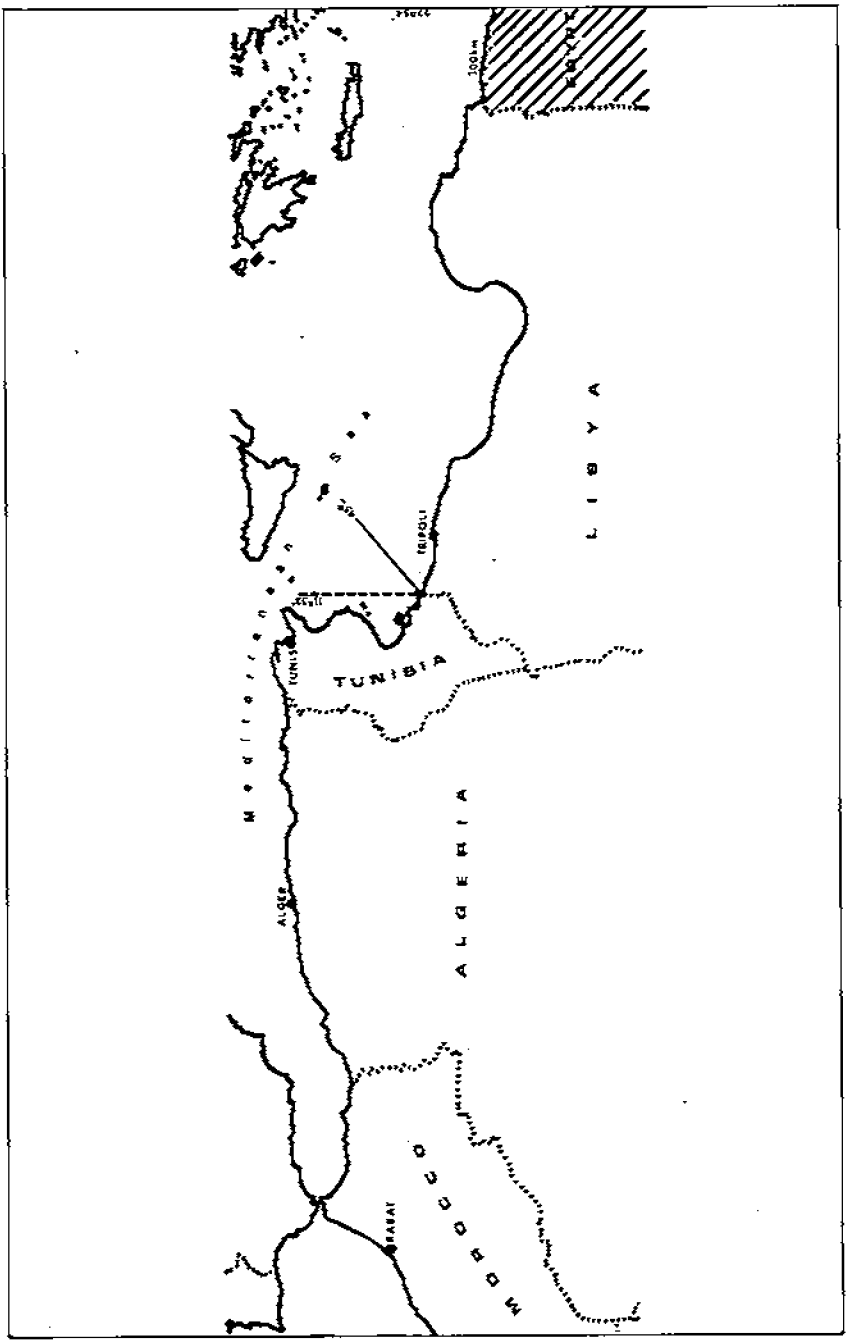
LIBYA
TUNISIA
ALGERIA
MOROCCO
TRIPOLI
TUNIS
ALGER
RABAT
100 km

L'incident s'était produit le 8 novembre 1910, à 18 milles dans le nord 20° est de Ras Ajdir, donc sur la ligne qui d'après la Partie adverse constituerait la frontière latérale entre les deux pays (ci-dessus p. 96).

Vous voudrez bien noter, Monsieur le Président, que l'Italie et la Grèce ne protestèrent pas contre cet arraisonnement : l'Italie et la Grèce se bornèrent à solliciter la clémence des autorités tunisiennes. Que nous disent les documents ?

La dépêche du résident général de France au ministre des affaires étrangères du 15 mai 1911 déclare :

> « la saisie ... n'a soulevé aucune protestation de principe de la part des autorités consulaires intéressées. Les consuls généraux de Grèce et d'Italie à Tunis se sont bornés à solliciter l'application d'une mesure de bienveillance en invoquant la bonne foi de leurs nationaux et la proximité des eaux tripolitaines dans lesquelles ces derniers croyaient pêcher.
>
> Satisfaction a été donnée à cette requête. » (IV, p. 264, réplique libyenne, annexe I-15.)

La note pour le directeur général des travaux publics du 12 février 1914 précise même que les consuls généraux hellénique et italien « ne discutaient pas la légalité de la capture » (réplique libyenne, annexe I-27).

En commentant ce dernier document, le conseil de la Libye a affirmé que jusqu'en 1914 la seule tentative d'assurer le respect d'une ligne prétendument déjà affirmée se termina, selon son expression, par « un retrait stratégique tunisien et se solda donc pratiquement par un échec » (ci-dessus p. 85).

Le moins que l'on puisse dire de cette affirmation, c'est qu'elle est surprenante. Ce qui se passa en réalité, c'est que les autorités des pays intéressés, c'est-à-dire la Grèce et l'Italie, ne protestèrent pas parce qu'elles estimèrent que l'arraisonnement était parfaitement légitime. Comment, donc, peut-on parler de « retrait stratégique » ou d'échec ?

Un autre épisode, très proche dans le temps des événements qui précèdent, a été exploité par la Partie adverse : il s'agit du blocus des côtes de la Libye déclaré par l'Italie, le 9 septembre 1911. D'après le conseil de la Partie libyenne, cette déclaration serait la démonstration éclatante de l'inexistence de la ligne ZV 45°, puisque le blocus méconnaissait cette ligne, et que les autorités tunisiennes s'étaient pourtant abstenues de protester contre cette méconnaissance. Cette thèse est à la fois fondée sur une extrapolation fantaisiste et sur une sollicitation des faits qu'il appartiendra à la Cour de juger (figure ci-dessus p. 299).

Lisons tout d'abord le texte de la déclaration de blocus :

> « A partir du 29 courant le littoral de la Tripolitaine et de la Cyrénaïque, s'étendant de la frontière tunisienne jusqu'à la frontière de l'Egypte, avec ses ports, havres, rades, criques, etc., compris entre les degrés 11,32 et 27,54 de longitude orientale de Greenwich, sera tenu en état de blocus effectif par les forces navales du Royaume. »

Trois observations à cet égard :

Premièrement, le conseil de la Libye ne voit un sens dans cette déclaration que si les deux points qu'elle indique se prolongent le long de leurs méridiens respectifs (ci-dessus p. 87). Pour lui, c'est la seule manière d'envisager, je cite encore, le « prolongement raisonnable et rationnel sur la mer des points terminaux du littoral bloqué ».

Mais pourquoi les prolonger ces points, et pourquoi les prolonger vers le nord ? Rien, dans le libellé du texte, n'incline à une telle opération. Il parle de

points, définis par des degrés de longitude, mais non de longitudes elles-mêmes qui, elles, sont des lignes.

Ce blocus est certes effectué par des navires, mais il vise exclusivement le littoral, « avec ses ports, havres, rades et criques ». Conformément au droit du blocus d'ailleurs. Ainsi que l'admet tout aussi bien ce conseil, il est effectué par des unités qui, je le cite à nouveau, « devraient se tenir tout près de la côte ».

Par conséquent, nul n'était besoin pour elles de s'égailler vers le nord. En restant sur les côtes, ces navires demeuraient sous la ligne des 45°. Ne songeant pas, à ce moment, à partir à la pêche aux éponges, ces navires de guerre n'avaient nullement à se préoccuper d'une ligne de délimitation que, depuis 1904, leurs autorités n'avaient toujours pas contestée.

Deuxièmement, et par voie de conséquence, s'il avait vraiment fallu délimiter la zone de blocus vers le large, pourquoi choisir la ligne nord totalement nouvelle, puisqu'à cette époque la marine royale italienne ne connaissait pas encore l'irrésistible poussée vers le nord du prolongement naturel libyen ? Et pourquoi méconnaître la ligne nord-est de 45°, laquelle, encore une fois, n'avait pas été constestée depuis 1904 et ne nuisait en rien à l'efficacité du blocus italien ?

Troisièmement, le conseil précité a essayé de tirer argument du silence des autorités du protectorat, en l'opposant à la protestation anglo-égyptienne contre la limite orientale de la zone bloquée – protestation qui a été suivie par une rectification de la position exacte de la frontière entre la Cyrénaïque et l'Egypte. Et il conclut :

> « Les voisins du côté est de la Libye s'élevèrent sans délai contre une déclaration de blocus qu'ils considéraient comme exorbitante. ... Et les voisins du côté ouest ? Rien à signaler sur le front occidental. » (Ci-dessus p. 88).

Eh bien ! il se trouve que nous, nous avons quelque chose à signaler. C'est que, ainsi que vous l'indique cette carte (voir ci-dessus p. 299), si les anglo-égyptiens ont protesté, ils avaient quelques raisons de le faire. La limite orientale du blocus italien méconnaissait totalement leur frontière, puisqu'elle mordait leur littoral sur plus de 2° 43', soit 300 kilomètres environ.

Devant un tel empiétement, il eût été surprenant qu'ils demeurassent muets. Or, de l'autre côté, la frontière tuniso-italienne était parfaitement respectée, et on ne voit donc pas pourquoi le protectorat aurait calqué son attitude sur celle de l'Egypte par un mimétisme inexplicable.

Continuons cet inventaire des faits réputés pertinents par la Partie adverse pour suggérer à la Cour que la France ne maintenait pas ses revendications juqu'à la ligne ZV 45°.

Dans la période qui couvre les années 1913 et 1914, la Partie libyenne, lors de sa plaidoirie, n'a pas hésité à bousculer la chronologie pour accréditer l'idée d'un silence français face à la proposition italienne d'une délimitation latérale fondée sur une ligne de nord-nord-est 22°, silence que nos adversaires ont voulu faire passer pour un retrait des revendications françaises quant à la ZV 45°.

Or ce silence n'a jamais existé. Ceci apparaît bien si l'on restaure la chronologie exacte des événements et des réactions auxquelles ils ont donné lieu du côté français. Il y a eu trois moments successifs.

– En 1913, se situe l'affaire de l'*Orfeo*, torpilleur italien qui arraisonnait trois bateaux de pêche grecs porteurs de patentes tunisiennes, à proximité de la
103 ligne 45° nord-est (réplique libyenne, carte 1). La réaction française à cette prise

fut marquée par la plus grande fermeté. Par deux notes successives, issues de l'ambassade de France à Rome et adressées respectivement au ministre français des affaires étrangères le 4 septembre 1913 (**IV**, réplique libyenne, annexe I-19) et, cinq jours plus tard, au ministère italien des affaires étrangères (réplique libyenne, annexe I-25) (et à cet égard je tiens à rendre hommage au *fair play* de la délégation libyenne qui a mis à notre disposition dans sa réplique de multiples documents qui nous sont favorables), les autorités françaises maintenaient très clairement l'affirmation de leurs droits sur l'intégralité de la zone des titres historiques. D'après elles, en effet, la saisie italienne frappait des barques munies d'une patente tunisienne et pêchant sur un banc réputé tunisien. Si cette attitude de principe n'était assortie, dans ces notes françaises, d'aucune mention expresse de la ligne ZV 45°, ce n'est pas parce que celle-ci était considérée comme fragile mais parce que cette ligne était parfaitement connue des autorités italiennes, les autorités franco-tunisiennes veillant depuis longtemps à son respect.

– Deuxième acte. Cet événement de l'*Orfeo* suscita entre la France et l'Italie une correspondance qui se prolongea plusieurs mois. Et c'est dans le contexte de cette affaire que, le 2 février 1914, le résident général de France en Tunisie adressa au ministère des affaires étrangères la fameuse lettre sur laquelle la Partie adverse se livre à des supputations qui l'apparentent, il faut l'avouer, aux meilleurs moments du roman psychologique. On se souvient que dans cette note, que nous avons nous-même longuement commentée, le résident général suggère à son ministre, à titre de conciliation éventuelle, d'envisager la possibilité d'accepter la proposition italienne de la ligne nord-nord-est.

Ici apparaît toute l'habileté de la Partie adverse qui invite la Cour à écouter le silence, le silence qui, selon son conseil, peut être attribué aux autorités françaises et dont ils voudraient tirer un acquiescement du ministre aux observations de son subordonné ; s'il est vrai que le silence peut jouer un certain rôle dans les rapports entre Etats, on ne saurait tirer argument du silence entre des autorités internes à un même Etat. Mais ce qu'il y a de plus fort c'est que, même à ce stade, même dans ce cadre, ce silence ne peut être observé. Ce silence n'a jamais retenti que dans l'imagination du conseil précité. Celui-ci ne peut donner à croire à son existence qu'en s'abstenant de faire part à la Cour des réactions ultérieures de la France, qui devaient intervenir très peu de temps après, à l'occasion d'une saisie nouvelle. Or, ces réactions ne devaient pas tarder.

– Troisième acte. Il intervient avec l'arraisonnement par les autorités italiennes de trois barques tunisiennes contraintes de chercher refuge dans le port tripolitain de Faroua. Cet événement prend place le 3 avril 1914, c'est-à-dire, ai-je besoin de le souligner, après la note du résident datée du 2 février de la même année.

Or, cette prise provoqua à nouveau une réaction française, dont la constance et la vigueur ne vous ont pas été citées par nos contradicteurs.

Par une note du 24 avril 1914, le même résident général, qui semblait ainsi avoir abandonné les idées conciliatrices, mais toutes personnelles, qu'il avait exprimées deux mois plus tôt, invitait cette fois ses supérieurs à envoyer plus souvent dans les parages de la frontière des torpilleurs français pour apporter, disait-il, aux pêcheurs indigènes de la région, ce qu'il appelait « une protection morale indispensable » (**IV**, réplique libyenne, annexe I-20).

Ainsi, dans ces années 1913 et 1914 réputées cruciales par la Partie adverse, on ne peut constater qu'une chose : l'affirmation constante de la ligne ZV 45°, par l'autorité franco-tunisienne, qui n'avait jamais cessé de veiller à son respect, depuis 1904.

B

C'est à peu près à cette époque que s'amorce la seconde phase que je vous avais annoncée, Monsieur le Président, Messieurs de la Cour, quant à l'évolution des rapports italo-tunisiens à propos de la ligne de délimitation latérale.

Cette seconde phase atteint son point culminant avec les instructions italiennes de 1919, reprises en 1931, sur la pêche dans les eaux de la Tripolitaine et de la Cyrénaïque. Ces instructions furent dictées par la fermeté des autorités françaises et le désir consécutif de l'Italie de trouver ce qu'elle appelait une « solution provisoire », et de compromis. Son but principal était d'éviter des frictions et des contestations avec son voisin. Les instructions de 1919 et de 1931, après avoir retenu une délimitation entre la Libye et la Tunisie et suivant une ligne orientée approximativement vers le nord-nord-est stipulaient qu'il y aurait une zone tampon d'environ 8 milles marins face à la côte Ras Ajdir-Ras Makabez, donc du côté de la Tripolitaine, ce que le conseil de la Libye n'a pas jugé utile de porter à la connaissance de la Cour. Dans cette (125) zone – qui est indiquée sur la carte –, les bateaux battant pavillon étranger, s'ils étaient démunis de l'autorisation délivrée par l'administration italienne, ne devaient pas être saisis, mais éloignés, sauf dans des cas exceptionnels.

Or, si l'on regarde de près l'étendue de cette zone tampon, et qu'on la compare avec la ZV 45°, on constate que la zone en question recouvrait presque toute l'aire de la mer adjacente à la ligne ZV 45°. Seul un petit triangle rentrait dans les eaux au-delà de la zone, à supposer même qu'il existât étant donné l'imprécision de la ligne italienne.

Il est clair que, dans le souci d'éviter des conflits avec la Tunisie, l'Italie avait attribué à la zone revendiquée par son voisin un caractère spécial, un caractère différent de celui des eaux sur lesquelles les autorités italiennes entendaient exercer la plénitude de leur souveraineté. Dans cette zone, les navires italiens ne pouvaient séquestrer les bateaux de pêche étrangers.

On peut tirer de la réaction de la France face à la création de cette zone tampon une conclusion évidente : l'Italie prend acte de ce que la Tunisie, les autorités franco-tunisiennes n'entendaient pas renoncer à la ligne ZV 45° proclamée en 1904.

Cette zone tampon naît, en d'autres termes, de la conjonction de la fermeté tunisienne et de l'attitude conciliatrice, mais aussi quelque peu hésitante, de l'Italie.

Bref, la création de la zone tampon confirme à la fois que la Tunisie ne s'éloigne pas de son attitude de maintien de la ligne ZV 45° et que l'Italie ne conteste pas formellement cette ZV 45°.

Ce compromis incertain, mais fructueux puisque nul incident ne se produit alors, survivra jusqu'au terme de la seconde guerre mondiale.

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Et nous en arrivons ainsi à la troisième phase qui s'ouvre au début des années cinquante et se poursuit jusqu'à nos jours. Elle ne concerne à vrai dire plus seulement l'Italie, qui n'est plus puissance territoriale, en Tripolitaine, mais aussi la Libye. Et c'est d'abord l'attitude de cette dernière que nous observerons avant de revenir sur l'incidence des accords de pêche tuniso-italiens.

1. Dès le décret du 26 juillet 1951, la Tunisie confirmait la ligne ZV 45°. La Libye n'opposa aucune protestation.

2. En même temps, la Libye s'abstint d'édicter elle-même des mesures législatives pouvant entrer en contradiction avec la ligne ZV 45°.

3. Les résultats auxquels on aboutit sur la base de l'examen de l'attitude tunisienne et libyenne en la matière sont confirmés par les accords de pêche.

Permettez-moi de m'arrêter brièvement sur chacun de ces trois points.

1. La législation tunisienne et l'absence d'opposition de la Libye

Le décret beylical du 26 juillet 1951 n'apportait à la législation tunisienne précédente qu'une seule innovation à vrai dire importante : il excluait de la zone en question, que l'on appelait d'ailleurs « zone de pêche réservée », tous les pêcheurs qui n'étaient ni Tunisiens, ni Français. Ainsi la délimitation de 1951, en raison même de ses conséquences négatives sur la pêche étrangère, non française, ne pouvait manquer d'affecter directement les autres Etats.

En particulier la Libye, qui était manifestement concernée par ce décret : en effet du côté tunisien de la ligne nord-est issue de Ras Ajdir, les Libyens ne pouvaient plus pêcher. Si donc la Libye avait voulu revendiquer les droits sur la portion comprise entre la ligne nord-nord-est et la ZV 45°, c'était la meilleure occasion de le faire. Or pourtant, elle ne protesta pas, et elle ne protesta pas davantage dans les années suivantes, lorsque la consolidation de son indépendance lui donna pourtant les moyens de défendre elle-même ses intérêts au niveau international.

La Libye ne protesta pas non plus contre la loi tunisienne de 1963 qui, de ce point de vue, confirmait les dispositions du décret de juillet 1951. Elle n'avait pas protesté davantage contre la loi de 1962, dont la seule raison pour laquelle la Tunisie ne l'a pas citée dans ses écrits est qu'elle ne présente qu'un état transitoire et très bref de sa législation dans ce domaine. Notons cependant que cette loi de 1962, en affectant toute la zone des titres historiques à la mer territoriale de la Tunisie, n'avait fait que se conformer aux observations formulées par le professeur François dans son rapport à la Commission du droit international.

On sait que l'on revint dès l'année suivante sur cette loi, et plus tard la Tunisie promulgua la loi n° 73-49 du 2 août 1973 portant délimitation des eaux territoriales. Elle reproduisait telle quelle la disposition de la loi de 1963 concernant la délimitation de la zone de pêche réservée. Cette loi fut notifiée officiellement par les autorités tunisiennes à tous les ambassadeurs accrédités à Tunis, et elle fut notifiée tout spécialement à l'ambassadeur de Libye. Cette fois encore la Libye s'abstint de protester. Non pas parce que plusieurs mois plus tard l'éphémère déclaration de Djerba invitera les deux Etats à l'unification, mais parce que, pas plus entre août 1973 et janvier 1974 (date de cette déclaration) qu'après, elle ne pouvait s'estimer lésée par les nouvelles dispositions tunisiennes.

2. La législation libyenne

Alors que la législation tunisienne rappelait la frontière maintenue entre les deux pays, la législation libyenne ne contient en revanche aucune disposition formelle à cet égard. Quand à la loi pétrolière et au règlement de 1955, nous avons déjà démontré dans nos écritures comme dans nos plaidoiries que ces textes n'ont pas pour objet la définition de la frontière maritime.

L'audience, suspendue à 11 h 15, est reprise à 11 h 25

Monsieur le Président, Messieurs les membres de la Cour, je reprends mes explications qui portaient, vous vous rappelez, sur les mesures libyennes et j'en étais parvenu à un examen de la décision de 1960 qui est la première par laquelle la Libye délimitait sa zone de pêche.

La décision de 1960, il est vrai éphémère, faisait quant à elle partir la délimitation latérale de la zone de pêche plus de 18 kilomètres à l'est du point frontière de Ras Ajdir dans une direction nord-est, ce qui constituait une reconnaissance de la ligne tunisienne. La décision de 1961 qui lui succéda prit bien Ras Ajdir comme point de repère littoral de la zone de pêche, mais ne préjuge pas de la ligne ZV 45°. En effet, son paragraphe premier n'établit pas une ligne en direction de la mer, lorsqu'il indique que la pêche des éponges est consentie aux pêcheurs locaux « à partir de Ras Ajdir, au degré 11° 34' 30" de longitude est jusqu'aux quais de Zleiton à la démarcation des longitudes 14° 34' 00" est et des eaux adjacentes ».

Ainsi qu'il apparaît aisément même aux cartographes les moins avertis, le paragraphe en question se borne à fixer un point, situé sur le littoral à Ras Ajdir, sans indiquer aucune ligne de projection de ce point vers le large.

On voit donc clairement tout l'arbitraire des constructions de la Partie (73) adverse, consistant à porter sur la carte n° 14 du contre-mémoire libyen des lignes orientées plein nord.

En réalité, la décision de 1961 a expressément voulu s'abstenir d'aborder la question de la frontière maritime tuniso-libyenne. La raison en est évidente : la Libye avait déjà accepté la ligne ZV 45° du fait de ses silences antérieurs.

3. Les accords de pêche italo-tunisiens de 1963, 1971 et 1976

Une autre preuve irréfutable de l'acceptation libyenne de la ligne ZV 45° est apportée par ces trois accords que je viens de mentionner.

Les trois accords stipulent expressément :

1) que l'Italie reconnaît la ligne ZV 45° ;

2) que dans la zone des droits historiques, la pêche est réservée et donc que les pêcheurs italiens ne peuvent y pêcher ;

3) qu'enfin dans cette zone ces mêmes pêcheurs ont seulement le « droit de passage inoffensif, c'est-à-dire les filets retirés et leurs panneaux à bord ».

En outre, il ressort clairement du contexte des accords que les autorités tunisiennes ont ainsi un droit de surveillance de la zone et précisément, non seulement un droit de visite sur les bateaux de pêche italiens, mais aussi un droit exclusif de « constatation des infractions ».

De l'examen de ces trois accords, on déduit donc que l'Italie assumait, à l'intérieur de la zone définie latéralement par la ligne ZV 45°, l'obligation d'interdire à ses pêcheurs de pêcher et celle de faire respecter certaines modalités à ses pêcheurs italiens lorsqu'ils traversaient cette zone maritime.

En même temps, les accords reconnaissaient à la Tunisie des droits souverains sur la portion de mer en question.

Quelle est la valeur de cette réglementation pour la Libye ? Le problème qui se pose est celui de l'incidence sur la Libye d'une réglementation internationale entre deux autres Etats concernant une zone maritime sur laquelle elle affirme aujourd'hui avoir les mêmes droits que ceux au nom desquels la Tunisie avait passé ces accords.

En concluant de telles conventions, la Tunisie quant à elle faisait usage d'une compétence territoriale à l'égard de la zone maritime bordée par la ligne ZV 45°, que son voisin libyen ne songea d'ailleurs pas à lui contester.

Sans doute ces accords constituaient-ils pour la Libye une *res inter alios acta*. Pourtant, et c'est ce qui est important, ils mettaient directement en cause l'emplacement de la frontière maritime entre elle-même et la Tunisie. Il ne s'agissait donc pas d'accords quelconques, mais de traités présentant un intérêt fondamental pour la Libye. Celle-ci ne pouvait en méconnaître l'existence, puisque par ailleurs ils furent régulièrement publiés aux journaux officiels des deux contractants. Ils sont de plus demeurés en vigueur et ils ont été appliqués effectivement pendant seize ans.

Les autorités tunisiennes ont exercé les droits prévus par ces accords même dans la zone aujourd'hui contestée, sans soulever aucune protestation de la part de la Libye. Ceci est prouvé, entre autres, par un cas d'arraisonnement qui atteste que les autorités tunisiennes exerçaient effectivement les pouvoirs prévus par les accords italo-tunisiens (sans que la Libye s'y opposât) (voir le cas du *Maria Algeri*, **IV**, réplique tunisienne, annexe 7-II).

Ainsi, au terme de l'examen de ces trois phases successives de l'attitude italienne et libyenne à l'égard de la frontière latérale, on peut conclure, des données de fait et de droit qui vous ont été soumises, à l'acceptation de la ligne ZV 45° par les Etats les plus directement concernés.

Et c'est encore le moment, Monsieur le Président, Messieurs de la Cour, si vous le permettez de se remémorer ces propos de Charles De Visscher dans son ouvrage relatif aux effectivités du droit international public (Paris, Pedone, 1967, p. 51) :

> « Le droit international requiert non un acquiescement positif des Etats étrangers mais une tolérance prolongée qui autorise à conclure à l'exercice paisible et continu de la souveraineté. Seuls les actes d'opposition d'un certain nombre d'Etats intéressés peuvent entraver la consolidation des titres historiques. »

D'opposition à l'égard de la délimitation de cette zone, Messieurs de la Cour, nous croyons vous avoir démontré une nouvelle fois qu'il n'y en a jamais véritablement eu. Il y a eu des réserves de l'Italie, au tout début du siècle, à l'égard de l'isobathe des 50 mètres, mais elles n'ont pas été maintenues. Il y a eu des tentatives de la part du même pays, pour amener la France et la Tunisie à renoncer à la ligne de 45°. Mais la France et la Tunisie n'acceptant pas, n'ayant jamais accepté, l'Italie ne s'opposant pas explicitement non plus, entre les deux guerres, à la ligne française, on a vécu un certain temps sur un compromis pacifique. A ce stade, il y avait au moins tolérance de la délimitation latérale de 1904 par le voisin tripolitain de la Tunisie.

Puis ce fut par une conclusion naturelle, la reconnaissance explicite.

CONCLUSION

Nous voici parvenu à notre point final, sinon à notre conclusion. Elle sera brève et devra dissiper définitivement les dernières confusions entretenues par la Partie opposée.

Il n'est pas ici question, et c'est ce que nous voudrions souligner avec force, de la part de la Tunisie de demander à la Cour un partage comme on nous l'a à tort reproché.

La prise en compte des titres historiques ne saurait, à aucun point de vue, être interprétée comme une tentative de la Tunisie de ressusciter la théorie du partage.

Pour la Tunisie la délimitation n'est pas une opération d'attribution, n'est pas une opération de distribution, c'est une opération de constatation. Telle est bien

la signification générale de la notion de droits inhérents *ab initio*. Cette notion de droits inhérents *ab initio* a pour effet de libérer les pays côtiers de l'obligation d'exercer effectivement leurs droits et de ne pas réserver la possession du plateau continental aux seuls Etats techniquement capables de l'explorer d'abord puis de l'exploiter. La norme ainsi se rattache à une exigence de non-discrimination de caractère universaliste et démocratique.

Mais voici que nos adversaires, ne reculant devant aucune contradiction, se mettent à soutenir qu'en accordant des titres pétroliers à des sociétés la Libye a, elle aussi, dessiné les contours de la zone du plateau continental qui doit lui revenir.

Cette démarche qui tend à établir un parallèle entre la possession de titres historiques sur des pêcheries sédentaires et la délivrance des titres pétroliers procède d'une méconnaissance fondamentale de la valeur de ces derniers titres.

Il faut bien voir qu'on ne peut pas comparer les activités de populations exploitant, conformément au droit international classique, des pêcheries sédentaires depuis des siècles et celles de pétroliers de toute origine explorant le sous-sol du plateau pour en extraire du pétrole.

La recherche des hydrocarbures est effectuée en effet par le recours à des technologies d'intervention sur le milieu naturel, qui peuvent être utilisées aux Caraïbes, en mer du Nord ou en Indonésie et qui peuvent percer des forages à 6000 mètres de profondeur, comme l'ont montré certaines expériences.

Si l'on acceptait que les Etats invoquent de telles activités, on valoriserait la puissance effective, la puissance technologique, ce que précisément la théorie des droits inhérents *ab initio* a pour objet d'éviter. Ces techniques d'intervention qui en tout état de cause ne peuvent avoir aucune valeur acquisitive à l'égard d'un plateau continental ne peuvent non plus avoir de valeur démonstrative car n'importe qui peut les utiliser n'importe où.

En revanche ce qui donne aux pêcheries sédentaires leur valeur illustrative, et c'est bien de la valeur illustrative que je parle, c'est qu'elles ont été exploitées depuis des siècles, selon des techniques rudimentaires, or c'est ce caractère rudimentaire qui met en évidence l'accessibilité exceptionnelle du lit de la mer en raison de sa faible profondeur. C'est parce que les riverains pouvaient avec des nasses et des harpons exploiter les ressources vivantes qui s'offraient à eux, que se trouve démontrée l'extraordinaire continuité du territoire terrestre et de son prolongement sous-marin dans une certaine zone, qui est celle recouverte par les titres historiques.

Ces titres qui ont été acquis dans le passé se sont déposés sur un prolongement naturel que la Tunisie possède depuis ses origines. Ils en révèlent une partie initiale qui les a reçus comme les alluvions de l'histoire.

RÉPLIQUE DE M. VIRALLY

CONSEIL DU GOUVERNEMENT DE LA TUNISIE

M. VIRALLY : Monsieur le Président, Messieurs de la Cour, il m'appartient aujourd'hui de répondre aux différents développements consacrés par la Partie adverse, au cours du premier tour de plaidoiries, aux données physiques.

A propos de ces données, il me paraît utile de commencer mon exposé par quelques remarques générales montrant où se situent les points de désaccord subsistant entre les Parties à ce stade de la procédure et destinées aussi à dissiper quelques malentendus. Ces désaccords sont peut-être plus larges qu'il ne semblait au premier abord. Ils ne tiennent pas seulement à l'interprétation de faits reconnus par les deux Parties, où les différences entre elles portent notamment sur l'importance et la signification des faits au point de vue du droit, points sur lesquels certains experts en géologie ont pris position de façon parfois surprenante et peu compatible avec le degré de compréhension des problèmes juridiques auxquels ils étaient parvenus. Ils viennent aussi de la méconnaissance complète de certaines réalités par la Partie libyenne.

Ces remarques générales seront suivies d'un rappel des données géologiques et géomorphologiques fondamentales de la région que je m'efforcerai de rétablir dans leur réalité quelque peu malmenée au cours des plaidoiries libyennes, en m'en tenant, bien entendu, à l'essentiel et en relevant les points d'accord factuel entre les Parties.

J'ajoute, pour en terminer avec cette présentation du plan de mon exposé, que je ne parlerai pas de la géographie, me réservant seulement d'y revenir lorsque je traiterai des méthodes. Mon savant contradicteur, le professeur Bowett, qui s'est livré à une analyse si approfondie des théories libyennes en matière géologique, n'a presque pas touché à la géographie. Il n'a remarqué que deux traits relatifs au littoral tunisien : le premier est que la côte tunisienne changerait de direction au parallèle de Ras Yonga, pour former le promontoire du Sahel, considéré comme une caractéristique assez importante pour justifier un changement d'orientation de la ligne suggérée par la Libye. Cela apparaît sur la carte n° 2 du mémoire tunisien qui se trouve dans le dossier [1] remis à la Cour. Le second trait exposé par le professeur Bowett est que, lorsqu'on suit la côte tunisienne à partir de Ras Ajdir, on constate que, « soudain » (ce sont les mots qu'il a employés), « à Gabès », cette côte « tourne à 90° » (ce sont toujours ses mots) (ci-dessus p. 171).

Evidemment, il est clair pour qui regarde la carte, comme nous le faisons maintenant, que ces deux propositions se contredisent mutuellement (ci-dessus p. 171-172). Si la côte tourne à 90° à Gabès, on ne peut plus dire qu'elle change de direction à Ras Yonga et que ce changement est la seule caractéristique à prendre en considération.

S'il y a un changement de direction, c'est bien celui de l'angle à 90° et si on doit le situer en un point précis, ce ne peut être qu'au sommet de l'angle. Or, Ras Yonga, manifestement, n'est pas au sommet de l'angle. M. Highet a été un peu plus prudent. Il a parlé de Ras Yonga comme de la situation « approximative » du point où tourne la côte tunisienne (ci-dessus p. 235) et a même admis que la détermination de ce point pourrait être laissée aux experts,

[1] Voir ci-après, correspondance, n° 122.

ce qui montre son embarras. Il demeure que Ras Yonga n'est pas au sommet de l'angle que forme la côte tunisienne et qui la fait changer de direction.

Cet angle est pourtant la caractéristique majeure de la côte. Le professeur Bowett en a lui-même souligné l'importance en la mentionnant dans deux des quatre raisons qu'il a données pour justifier que soit prise en considération la configuration géographique dans l'opération de délimitation (ci-dessus p. 171).

Et pourtant, la Libye, comme nous le constaterons plus tard, lui dénie tout effet sur l'orientation de la délimitation à intervenir.

Mais passons, et revenons à la géologie.

Sur ce plan, les plaidoiries ont apporté des éclaircissements considérables, dont la Tunisie se réjouit. Le mystère du *northward thrust* et de ses relations avec la tectonique des plaques, qui subsistait encore après la réplique, a été au moins partiellement levé, grâce à la clarté de l'exposé du professeur Bowett. Certaines obscurités, malheureusement, ne sont toujours pas dissipées et même des obscurités nouvelles sont apparues. Je le montrerai sur quels points un peu plus tard. Cet état de chose me met évidemment dans une situation un peu difficile, au moment où je parle pour la dernière fois sur ces questions devant la Cour.

Dans un sens, nous avons progressé. Dans le mémoire libyen, il apparaissait, bien que ce ne fut pas parfaitement clair, que le *northward thrust* était la conséquence de mouvements vers le nord de la plaque africaine survenus entre 80 à 40 millions d'années avant notre ère. Aujourd'hui, un des éléments importants de la démonstration libyenne est constitué par les côtes fossiles du mésozoïque, qui existaient entre 200 et 140 millions d'années avant notre ère. On a donc progressé, semble-t-il, dans la connaissance de l'histoire géologique mais sans s'approcher de la période géologique au cours de laquelle la présente affaire est examinée par la Cour.

Il n'est pas sans intérêt, à ce propos, de rapprocher les chiffres que je viens de rappeler d'une des affirmations figurant dans l'étude scientifique annexée au mémoire libyen d'après laquelle :

> « Within the Mediterranean region the first event of which we have satisfactory geological knowledge is the evaporation of this area at the end of the Upper Miocene period (Messinian time occurred about 7 to 5 million years ago. » (I, p. 555.)

On voit le progrès réalisé depuis le 30 mai 1980 dans l'approfondissement de nos connaissances.

Je crois pouvoir dire que les éclaircissements apportés au cours de la procédure orale par la Partie libyenne justifient entièrement les appréciations portées par les conseils de la Tunisie, lorsqu'ils avaient dit que ces thèses étaient monolithiquement géologiques, qu'elles étaient fondées exclusivement sur des théories de macrogéologie et qu'elles s'évadaient des réalités contemporaines de la région.

Selon la Libye, en effet, la délimitation doit nécessairement refléter une direction vers le nord parce que cette direction est imposée par la géologie.

Dans sa dernière mouture, cette thèse s'appuie essentiellement sur la théorie de la formation géologique des marges continentales de type atlantique. C'est ce qui a été souligné déjà par l'ambassadeur El Maghur, le distingué agent du Gouvernement libyen, et longuement développé par le professeur Bowett et les experts dont il s'est entouré, notamment M. Hammuda et, bien entendu, le professeur Fabricius. C'est maintenant le cœur dur de la théorie libyenne et j'y reviendrai plus en détail un peu plus tard.

L'appel fait à cette théorie n'est que la conséquence de la découverte faite par

le Gouvernement libyen de la signification géologique de la *hingeline*, qui joue un rôle central dans la théorie en question. La Cour n'aura pas manqué de remarquer les remerciements appuyés de l'agent libyen et du professeur Bowett à l'adresse de la Tunisie, dont les remarques, nous a-t-il été dit, ont permis à la Libye de faire cette découverte. La théorie se trouve tout entière exposée dans l'étude des collaborateurs du Lamont-Doherty Geological Observatory, annexée à la réplique libyenne dont elle constitue l'annexe II-6 (IV).

Mais si tel est vraiment le fondement de la thèse libyenne, ce fondement résulte d'une découverte récente, puisqu'elle figure seulement dans la réplique et qu'il a fallu les remarques de la Tunisie dans son contre-mémoire pour qu'elle soit faite. Nous comprenons mieux maintenant l'intérêt qu'a marqué la Libye à présenter une réplique après avoir déjà présenté un contre-mémoire aussi copieux.

Depuis cette découverte, nous le savons, pour la Partie libyenne et ses experts, le prolongement naturel se définit comme une série de failles grossièrement parallèles à la *hingeline*. Mais alors, et c'est là une des obscurités, qu'en est-il des explications précédentes, qui n'étaient pas nécessairement compatibles avec celle-ci ? Pourtant, comme celle-ci, elles conduisaient inéluctablement à la même conclusion : que le prolongement naturel de la Libye était rigidement orienté vers le nord.

La Tunisie a été accusée, je crois par M. Highet et par sir Francis Vallat, d'avoir plié les méthodes qu'elle propose à la réalisation d'un objectif défini à l'avance. N'est-ce pas patent dans le cas de la Libye, où les théories remplacent les théories et où la seule chose qui reste permanente et qui résiste à toutes les évolutions est le *northward thrust* ?

Et aussi, quel extraordinaire exemple de prévision ! D'après la Partie adverse, les auteurs de la loi libyenne de 1955 et, surtout, les membres de la commission chargée de rédiger les textes d'application de cette loi avaient déjà aperçu que l'étude de la géologie imposerait le tracé d'une ligne vers le nord, ce que devait confirmer l'étude du Lamont en juillet 1981.

Nous ne croyons pas que la loi de 1955, pas plus qu'aucun des textes qui l'appliquent et des cartes qui l'accompagnent, ne comportaient l'indication d'une prétention libyenne à une ligne de délimitation vers le nord, mais ceci nous montre que si la Libye plie la géologie à ses objectifs, il lui arrive de plier aussi le droit.

La loi de 1955 n'a pas d'importance. Le professeur Jennings l'a montré de façon définitive hier, et je n'ai pas besoin d'y revenir. Mais il en va différemment du droit international et, notamment, du droit relatif au plateau continental. Or, sir Francis Vallat et le professeur Bowett ont l'un et l'autre rejeté l'article 76 du projet de convention sur le droit de la mer, dont on peut dire pourtant qu'il constitue l'une des tendances discutées à la conférence sur le droit de la mer parvenues à la maturité d'une règle universellement acceptée comme étant le droit.

Le professeur Jennings a aussi abordé ce point, ce qui me permettra de n'y revenir que sous un angle particulier qui nous intéresse directement ici.

L'article 76 est rejeté parce qu'il concernerait seulement la limite extérieure du plateau continental et serait donc sans portée en matière de délimitation.

Je soulignerai cependant que, dans la mesure où il indique cette limite extérieure, il indique en même temps l'orientation du prolongement naturel qui va jusqu'au rebord extérieur de la marge continentale. Et ainsi le maillon manquant dans ce que M. Highet a appelé *« the fallacy of Article 76 »* est rétabli par une simple lecture de l'article lui-même.

Mais je ferai une seconde remarque. L'article 76 ne définit pas seulement la

limite extérieure du plateau continental. Il définit aussi ce qu'on pourrait appeler sa limite intérieure. Le plateau continental commence là où la mer territoriale finit. L'article 76, par conséquent, détermine de façon très précise, par ces deux limites, la portion de la surface terrestre submergée qui sera soumise au régime juridique du plateau continental et, comme j'ai déjà eu l'occasion de le dire dans une précédente intervention, il définit cette portion de surface terrestre pour chaque Etat côtier. En d'autres termes, l'article 76 donne une redéfinition complète du plateau continental au sens juridique de l'expression, en tant que surface soumise à un régime juridique particulier. Comment une telle définition pourrait-elle être négligée, oubliée, laissée de côté, lorsqu'on procède à une délimitation entre Etats, c'est-à-dire lorsqu'on détermine précisément, concrètement, quelle est la surface du plateau continental appartenant à chacun des Etats côtiers en cause ? Ce serait une absurdité, qu'aucun exercice de vocabulaire ne saurait imposer.

Or, et c'est là le point que je veux souligner, le désaccord entre les deux Parties sur ce point n'est pas accidentel, ou marginal. Ce n'est pas une querelle entre juristes. Le rejet de l'article 76 est absolument fondamental dans la thèse libyenne. C'est même le véritable point de départ de cette thèse, qui ne pourrait pas se développer si on l'abandonnait. En effet, la thèse libyenne consiste, tout entière, dans la substitution à la définition juridique de l'article 76, héritière de celle de 1958, de celle consacrée par la Cour en 1969 et par le tribunal arbitral en 1977, la substitution, à cette définition juridique, d'une définition entièrement nouvelle, sans rapport aucun avec la précédente.

La thèse libyenne, dans son essence, tend à imposer une définition « scientifique » ou pseudo-scientifique, du plateau continental construite à partir, non plus de la tectonique des plaques, mais de la théorie de la formation des marges continentales de type atlantique. On accepte encore formellement que la définition de la marge continentale donnée par l'article 76 est géologiquement correcte, mais on la remplace en réalité par une autre définition, brillamment exposée par le professeur Bowett, qui a dessiné devant la Cour ses caractéristiques fondamentales, constituées par des lignes grossièrement parallèles et qui de la terre à la mer sont la *fall line*, qu'on a traduit dans les procès-verbaux par *foreline*, la *hingeline*, la côte et le bord du plateau (ci-dessus p. 164). Vous vous souvenez certainement de l'image qui a été dessinée devant vous par le professeur Bowett.

C'est cette théorie qui constitue une généralisation, une transposition, de la théorie construite pour expliquer la formation des marges continentales atlantiques et qui est exposée dans l'étude dite du Lamont, bien qu'elle n'engage aucunement cette institution. C'est cette théorie qui, aux yeux de la Partie adverse, pour qui la Tunisie ignore les tendances récentes de la science, rend caduque la définition de l'article 76. Le prolongement naturel doit, désormais, être défini par une série de failles grossièrement parallèles à la *hingeline*. Mais comment, dès qu'on sort des généralisations abstraites, appliquer cette idée à un cas concret, comme celui que nous avons sous les yeux, au plateau continental d'un Etat côtier, de façon à délimiter ce plateau par rapport à celui d'un autre Etat côtier ? Peut-être est-ce possible dans l'Atlantique Nord, je ne l'ai pas vérifié. Cela reste à démontrer. Mais en Méditerranée ? Et dans la mer du Nord ? La Cour aurait sans doute été fort embarrassée par cette théorie en 1969.

On nous dit : mais le plateau continental, comme son nom l'indique, exige une approche continentale (ci-dessus p. 30). C'est un pur jeu de mots. Comment utiliser une approche continentale pour la détermination du plateau continental d'un Etat côtier, ou même de deux Etats côtiers ?

N'est-ce pas là encore de la macrogéologie ? D'après la théorie développée par les conseils de la Libye, les droits de l'Etat côtier sur le plateau continental bordant ses côtes ne dépendent plus des particularités de son littoral, ni des relations existant en fait entre la masse de son territoire terrestre et ces zones de plateau continental, mais de la place qu'il a occupée sur le continent, au cours des dizaines et centaines de millions d'années des âges géologiques.

Si, à une période quelconque – il y a peut-être 100 ou 200 millions d'années et peut-être davantage – son territoire a fait partie de la marge continentale du continent (depuis lors complètement remodelé par les événements géologiques ultérieurs), il a perdu tout droit à une partie de la marge continentale actuelle. Sauf si, par chance, une petite partie de son territoire se trouvait émergée dans ces temps lointains, l'est restée et continue à border la mer. Dans ce cas, on lui concédera un petit lot. Peut-on rêver d'un plus total mépris des réalités physiques contemporaines, géographiques ou géologiques ?

Si la Partie adverse attache, en fait, peu d'importance aux caractéristiques réelles de la côte actuelle, et je souligne ce terme : « actuelle », elle en donne une très grande, je l'ai déjà rappelé, aux rivages fossiles du mésozoïque, dont les cartes ont été présentées plusieurs fois à la Cour et qui sont reproduites une fois de plus ici et constituent la figure n° 82 du dossier remis à la Cour. Il n'est pas sans intérêt d'y jeter un coup d'œil une fois de plus. Que découvre-t-on ? D'abord que ces rivages sont hypothétiques, parfois sur la plus grande partie de leur longueur comme le montrent les tracés en pointillé qui ont été adoptés. C'est le cas, en particulier, des rivages du jurassique et du cénomano-turonien. Ensuite, deuxième constatation, toutes les terres nord-africaines à l'ouest du golfe de Syrte, au triasique et au jurassien, se trouvent au nord de ces lignes, donc, d'après ce qui nous est dit, dans la marge continentale. Y compris, bien entendu, la Tripolitaine, avec la plaine de la Djeffara. La totalité de la Tunisie et les régions côtières de l'Algérie et du Maroc se trouvent dans la marge. Est-ce à dire qu'aucun de ces trois Etats n'a de droits à faire valoir sur le plateau continental qui borde aujourd'hui leurs côtes ? D'après la théorie, ce plateau ne constitue pas leur prolongement naturel, puisque leurs territoires au nord de la *hingeline*, qui les traverse à des centaines de kilomètres de leurs côtes, font eux-mêmes partie de la marge continentale. Ou bien faut-il comprendre qu'ils n'ont de droits que dans la mesure où les territoires soumis à leur souveraineté s'étendent aussi au sud de cette fameuse *hingeline* (qui se trouve représentée sur la carte inférieure que vous avez sous les yeux) !

Le même raisonnement ne s'applique-t-il pas aussi à la Libye qui, elle, est également restée dans la marge ? Et, à ce propos, où se trouve donc la *Permian hingeline*, qui limite au sud le bloc pélagien ? Les cartes présentées montrent indiscutablement qu'elle s'étend loin au nord des rivages mésozoïques, comme vous pouvez le constater sur l'image que j'ai fait figurer sur la carte inférieure. Alors la question se pose : quelle est la relation entre ces rivages fossiles, que la Libye nous montre avec tant d'insistance, et la *hingeline* supposée constituer une caractéristique essentielle de la marge continentale vers le nord, à proximité immédiate de la côte ? C'est encore une des obscurités persistantes des théories libyennes.

Faut-il, pour retrouver cette *hingeline* à sa vraie place, supposer encore d'autres lignes de rivage ? Mais de quelle époque géologique ? Il y a combien de millions ou de centaines de millions d'années ? Et, pourquoi ne pas nous les avoir montrées ? Au deuxième tour de parole de la Libye, qui parlera la dernière, il est absolument inconcevable et contraire à toute règle de procédure qu'un document nouveau soit présenté. Le mystère restera donc entier.

Et plus encore : où donc se trouve aussi la *fall line*, qui constitue aussi,

d'après le professeur Bowett et ses conseils, une caractéristique essentielle de la formation des marges continentales ? Nulle trace dans toute l'Afrique du Nord. Elle est introuvable. C'est encore un mystère.

Finalement, et je touche ici à une question de fond – et fondamentale : Existe-t-il une période géologique critique, au cours de laquelle des droits au plateau continental auraient été acquis de façon définitive au profit d'Etats qui n'existeront que quelques millions ou centaines de millions d'années plus tard ? Ces droits subsisteraient-ils, à titre de droits fossiles en quelque sorte, quels que soient les bouleversements géologiques survenus par la suite – et nous savons qu'ils ont été nombreux en Méditerranée ? Pourquoi telle ou telle période géologique a-t-elle cette vertu de créer ces droits définitifs et pas les autres ? Pourquoi l'emporte-t-elle sur les périodes suivantes, notamment celle du quaternaire, qui est la nôtre, après tout ?

A ce propos, je ne puis éviter d'évoquer la fausse querelle qui a été faite à la Tunisie au sujet de la géologie. Mon savant contradicteur et ami, sir Francis Vallat, a laissé entendre que la Tunisie écartait la géologie, bien qu'il ait noté un changement à cet égard dans les plaidoiries tunisiennes (ci-dessus p. 33-56). Le professeur Bowett, de son côté, a estimé que la Tunisie écartait la géologie ancienne et ne voulait connaître que la géologie récente (ci-dessus p. 156). Les deux reproches ne coïncident donc pas et se contredisent dans une certaine mesure. L'un et l'autre ne semblent pas tenir compte des études géologiques présentées en annexe du mémoire et surtout du contre-mémoire tunisiens, qui portaient aussi bien sur la géologie ancienne que sur la géologie récente, pas plus que des exposés présentés par les experts de la Tunisie, notamment par le professeur Laffitte.

Ces allégations, qui représentent certainement l'opinion sincère de la Partie adverse, je n'en doute pas un instant, appellent deux mises au point très sérieuses, auxquelles la Tunisie attache une grande importance.

La première concerne un malentendu évident, qui est apparu dans l'exposé de sir Francis Vallat. Celui-ci a indiqué qu'il ne pouvait pas accepter ce qu'il a appelé l'échelle de pertinence *(scale of relevance)* présentée dans l'étude scientifique annexée au contre-mémoire tunisien (II, contre-mémoire tunisien, annexe I, p. 13-14). Une telle échelle, pense sir Francis, crée la confusion en ce qu'elle tend à distraire des véritables problèmes.

Je voudrais à ce sujet faire deux remarques. La première est que les experts auteurs de cette étude ont d'abord entendu établir une hiérarchie des données physiques, ce qui est tout à fait différent (en ce compris bien entendu les données géologiques), d'après le degré de certitude que nous pouvons avoir dans la connaissance que nous en prenons. C'est là, je crois, une considération capitale dans l'appréciation des données physiques à notre disposition et il était bon que les experts nous informent exactement sur ce qu'il en est dans le domaine de leur compétence scientifique. Je pense que sir Francis est de la même opinion que moi sur ce point puisqu'il n'a pas parlé de cette première échelle. Les experts ont ensuite examiné en effet le degré de pertinence des données considérées. C'est là que gît le malentendu, qui attire une seconde remarque. Le terme employé par les experts, parfaitement correct dans le langage scientifique, risque en effet d'être mal interprété par le juriste, qui l'utilise dans son langage, en lui donnant un sens légèrement différent.

Pour les experts, il s'agissait simplement de préciser que toutes les données physiques susceptibles d'être invoquées n'avaient pas le même degré de proximité, dans le temps et dans l'espace, avec le problème posé, à savoir la délimitation du plateau continental. A leurs yeux, les données ayant le rapport le plus étroit, dans l'espace et dans le temps, avec ce problème ont plus

d'importance et de valeur que celles qui entretiennent avec lui une relation plus lointaine.

Je ne suis pas certain qu'il faille être un scientifique pour avancer une idée de ce genre. Elle relève tout simplement du bon sens. Mais des scientifiques aussi ont le droit de l'exprimer en tant que scientifiques et il n'est pas mauvais peut-être qu'ils démontrent ainsi qu'on peut être scientifique et « le bon sens garder ». En tout cas, je ne crois pas vraiment que des remarques de cet ordre soient de nature à introduire la confusion.

La deuxième mise au point que je voudrais présenter est beaucoup plus importante. Elle est même d'une extrême gravité et m'obligera à lui consacrer plus de temps.

Pour démontrer l'importance de la géologie ancienne, la Libye avance l'argument que les couches géologiques dans lesquelles se trouvent les réserves de pétrole sont souvent des couches anciennes (jusqu'à 570 millions d'années) et souvent aussi des couches profondes (jusqu'à 5000 mètres environ).

Il est aujourd'hui évident que cette idée occupe désormais une place centrale – stratégique devrai-je dire – dans l'argumentation de la Partie adverse.

On l'a vue déjà formulée dans la réplique (IV, par. 71), où elle était illustrée par deux figures (fig. 7 et 8). L'importance qu'y attache le Gouvernement libyen est mieux apparue encore, lorsque le distingué agent de la Libye a développé ce thème à loisir, en commentant les deux mêmes figures (ci-dessus p. 27, dossier de cartes distribué aux juges par la Libye). Le thème est revenu à nouveau dans l'exposé de sir Francis Vallat (ci-dessus p. 55), dans celui du professeur Bowett (ci-dessus p. 156) et dans celui de M. Highet (ci-dessus p. 231 et 232). C'est désormais un *leitmotiv*.

Or, il ne s'agit pas d'un simple argument de fait, comme on aurait pu le penser initialement. C'est, maintenant, toute une théorie juridique nouvelle qui s'est élaborée à partir de cette base, et c'est pourquoi je dois m'y arrêter.

Que nous dit-on, en effet ? En substance ceci : l'importance des couches géologiques contenant des réservoirs d'hydrocarbures vient de ce que, depuis le début, dès la proclamation Truman, et constamment par la suite, le régime juridique du plateau continental n'a eu d'autre raison d'être que l'appropriation des richesses en hydrocarbure qui se trouvent en son sein. Lorsque l'article 77 du projet de convention, après l'article 2 de la convention de Genève de 1958, parle de « droits souverains sur le plateau continental aux fins de son exploration et de l'exploitation de ses ressources naturelles », c'est exactement cela qu'il veut dire. Et c'est pourquoi, nous dit M. Highet, l'existence de ces réservoirs de pétrole est une circonstance pertinente et on serait tenté de comprendre, en raison de l'accent qu'il y met : la plus importante de toutes les circonstances pertinentes.

Quel est le sens de cet argument ? Il va, d'après la Partie adverse, au cœur même du problème. C'est plus que le régime juridique du plateau continental qui est en cause : c'est sa définition même, avec sa raison d'être. Pourtant les droits en question sont définis à l'article 77 du projet de convention, qui ne concerne pas la définition du plateau continental. Après ce qui nous a été dit de l'autre côté de la barre à propos de l'article 76 – qu'il ne fallait pas utiliser en matière de délimitation bien qu'il contînt une définition – ce serait une sérieuse inconséquence, de la part de la Partie adverse, de recourir à son profit à un argument tout à fait semblable.

Mais l'argument va beaucoup plus loin ; il oblige en effet à poser la question : quelles conséquences doivent-elles être tirées de la présence de réservoirs d'hydrocarbures dans telle ou telle couche géologique du plateau continental ?

C'est le fond du problème. Cette présence ferait-elle naître des droits aux zones de plateau continental contenant ces couches au profit de l'Etat côtier dans le territoire duquel les mêmes couches se retrouvent ? Doit-elle exclure l'Etat côtier où, par accident, ces couches ne se retrouveraient pas ? La solution doit-elle être différente si la couche est ancienne et profonde ou si elle est récente ou plus superficielle ? Que déduire du fait qu'elle est plus mince ici et plus épaisse là ? Ou que l'une est stable et l'autre plissée ou tectonisée ? *Quid* des failles qui peuvent les séparer ?

Au-delà même de ces difficultés d'ordre pratique – mais elles ne sont pas négligeables, il s'en faut – c'est à une distorsion complète de la notion de prolongement naturel et même de celle de plateau continental que nous aboutissons. Le plateau continental d'un Etat côtier n'est plus cette zone des fonds marins sur lesquels s'étend le prolongement naturel de son territoire terrestre et où il pourra explorer et exploiter les ressources naturelles qui s'y trouvent, ou ne s'y trouvent pas, suivant les hasards des événements géologiques dans cette zone.

Le plateau continental d'un Etat côtier est désormais une zone de plateau qui lui appartient parce qu'il s'y trouve des ressources pétrolières et qu'il a la chance d'avoir un territoire terrestre également riche en de telles ressources provenant des mêmes couches géologiques. En d'autres termes : un droit au pétrole et au gaz substitué au droit au plateau continental et au prolongement naturel.

C'est là une notion juridique radicalement différente de celle admise jusqu'alors. Notion fondée sur la géologie, je le reconnais, mais dont je vois mal comment elle peut se concilier avec la théorie principale évoquée précédemment – c'est là une autre des obscurités de la théorie libyenne – mais dont je vois surtout qu'elle est absolument incompatible avec les règles du droit international applicables au plateau continental. Elle aboutit d'ailleurs à un cercle vicieux.

L'Etat côtier, en effet, ne peut explorer et exploiter que les zones de plateau continental qui lui appartiennent. Or, si ce qu'on nous dit était vrai, il ne pourrait connaître les zones qui lui appartiennent que par les résultats de l'exploration. Et c'est bien là la difficulté à laquelle se heurte toute tentative d'utiliser les couches géologiques anciennes et profondes pour une opération de délimitation du plateau continental. La technologie moderne permet de parvenir à une assez bonne connaissance de ces couches, comme le rappelait tout à l'heure le professeur Dupuy, mais à la condition d'avoir été utilisée massivement par des campagnes d'exploration employant les moyens les plus modernes et les plus coûteux tels que relevés sismiques, forages, etc. Ces relevés sont effectués par les compagnies, qui ne peuvent agir que dans le périmètre des permis qui leur sont accordés par les Etats : et nous retrouvons ici le cercle vicieux que j'évoquais à l'instant.

Mais, la thèse libyenne s'arrête-t-elle là ? Après avoir écouté M. Highet, je dois constater que non. Dans son exposé, marqué par beaucoup de clarté apparente et un esprit très analytique, M. Highet indique, en effet, qu'aux yeux de la Libye toute délimitation à intervenir devrait, en tout cas, respecter les installations des forages actuellement en exploitation (c'est ce qu'il a dit et qui est reporté ci-dessus p. 228-229).

C'est là certainement une question extrêmement sérieuse et que nous ne pouvons pas considérer légèrement.

Le professeur Jennings a déjà montré hier que le prétendu *Drang nach Osten* de la Tunisie, qui est devenu aussi un des *leitmotiv* des plaidoiries libyennes, est un argument de plaidoirie précisément, dépourvu de toute substance. Je n'y

reviendrai pas, sinon pour souligner qu'on pourrait tout aussi bien parler d'un *Drang nach Norden* de la Libye, qui ne s'est pas manifesté seulement dans sa prétention à une délimitation sud-nord, mais aussi dans l'attribution des permis pétroliers.

(123) La carte que je commente maintenant figure dans le dossier remis à la Cour. En examinant cette carte, on verra que la Libye s'est empressée de bloquer la Tunisie vers l'est en attribuant, dès 1968, un permis dont la limite occidentale suivait très exactement la ligne limitant à l'est le permis tunisien de 1966, n° 4, dit permis complémentaire du golfe de Gabès et, pour plus de sûreté, en l'attribuant exactement aux mêmes compagnies. Elle a, de la même façon, accordé par la suite des permis délimités toujours plus au nord, en prolongeant la même ligne occidentale. La carte des permis libyens suit ainsi une avancée vers le nord aussi remarquable que significative, qui ne paraît pas témoigner d'une préoccupation de protéger les droits des Etats tiers aussi grande que celle actuellement manifestée devant cette Cour. Apparemment, elle était surtout destinée à empêcher la Tunisie de procéder à des explorations dans les zones de plateau continental qui constituaient manifestement son prolongement naturel.

La carte que je commente représente une histoire beaucoup plus complète et exacte des permis pétroliers des deux Parties que celle commentée par sir Francis Vallat (ci-dessus p. 45).

Vous vous souviendrez que les permis tunisiens susceptibles de toucher aux zones contestées entre les deux Parties mentionnaient qu'ils n'autorisaient provisoirement les activités d'exploration que jusqu'à la ligne d'équidistance, en attendant qu'un accord fût conclu entre la Libye et la Tunisie. En dépit de cette précaution, de larges zones de plateau continental se sont trouvées couvertes à la fois par des permis tunisiens et des permis libyens, en raison de la montée vers le nord de ces derniers, qui ont toujours été postérieurs aux permis tunisiens correspondants.

Dans ces zones de chevauchement, la Tunisie a pu procéder à des forages sans provoquer de protestations de la part de la Libye jusqu'en 1976. Les
(124) emplacements de ces forages sont indiqués par des cercles rouges sur la carte qui est projetée maintenant devant nous. Par la suite, les pressions exercées par les autorités libyennes sur les compagnies, ou d'autres moyens plus contraignants encore, ont empêché la poursuite de la campagne d'exploration entreprise par ces dernières dans le périmètre des permis tunisiens. Je ne reviens pas sur le détail de ces événements qui a été rapporté dans le mémoire tunisien. Je constate simplement que, pendant ce temps, la Libye a continué de faire effectuer l'exploration de ses propres périmètres de permis, y compris dans des zones couvertes par des permis tunisiens. La Cour se souviendra très certainement, à ce sujet, de l'incident du *Scarabeo IV* (I, mémoire tunisien, par. 1.27 et suiv.).

Telle est la situation actuelle, Monsieur le Président. Et il y a là une nouvelle obscurité des thèses libyennes. M. Highet a parlé en effet des installations des puits actuellement en exploitation (ci-dessus p. 228), mercredi dernier. Mais, à la connaissance du Gouvernement tunisien – et il a de bonnes raisons de se croire bien informé – il existe un seul champ en exploitation dans toute la mer Pélagienne : c'est le champ d'Ashtart et il se trouve au large de Sfax, à 65 kilomètres environ de cette ville, incontestablement du côté tunisien, quelle que soit la méthode de délimitation utilisée.

Il est vrai que mon distingué contradicteur s'est repris. Dans la matinée du vendredi 9 octobre il a reparlé encore à deux reprises, dans des contextes différents, de cette même question. Il n'a mentionné alors que les « champs

pétroliers » et les « puits exploitables ». Il n'est plus question d'installations. Nous pouvons donc les oublier, semble-t-il.

Mais, au-delà de ces points de fait, une question de droit est posée ; elle est d'une importance majeure : quel est le titre juridique invoqué par la Partie adverse pour affirmer un droit à des gisements et à des puits pétroliers ? Est-ce le droit à la découverte ? ou celui dérivant de l'occupation effective ? Ce sont là des titres qui nous ramènent fort loin en arrière dans l'histoire du droit international, à une période dont les Etats qui ont récemment acquis leur indépendance ne se souviennent pas sans amertume, et qui paraissait révolue. S'agit-il de cela ou de quelque chose d'autre ? Quel que puisse être leur fondement, de tels titres se trouvent en tout cas écartés par la règle que la Cour, en 1969, a proclamée comme celle « qui constitue sans aucun doute possible ... la plus fondamentale de toutes les règles de droit relatives au plateau continental » : celle d'après laquelle

> « les droits de l'Etat riverain concernant la zone de plateau continental qui constitue un prolongement naturel de son territoire sous la mer existent *ipso facto* et *ab initio* en vertu de la souveraineté de l'Etat sur ce territoire et par une extension de cette souveraineté » (*C.I.J. Recueil 1969*, p. 22, par. 19).

M. Highet répondra sans doute qu'il n'a pas formellement affirmé un droit de la Libye aux puits qu'elle a forés, même dans le cas où ils ont révélé la possibilité d'une exploitation. Formellement, cela est vrai. Mais quelle est exactement la portée juridique de l'argument qu'il a présenté ? Nous nous trouvons, ici encore, une nouvelle fois, dans l'obscurité. L'existence de gisements pétroliers et de puits exploitables est mentionnée par lui parmi les circonstances pertinentes dont il doit être tenu compte dans la délimitation. Fort bien. Je reviendrai d'ailleurs sur ce point lorsque j'aborderai moi-même la question des circonstances pertinentes, en relation avec celle des méthodes de délimitation. Mais, de façon plus précise, quelles conclusions doit-on tirer de la présence de ces gisements et de ces puits ? De quelle façon cette circonstance doit-elle influer sur la délimitation ? C'est ce qui reste très largement indéterminé après les trois exposés de l'agent et du conseil de la Partie adverse sur ce point, qu'ils considèrent pourtant comme capital.

Une précision importante a, cependant, été donnée, que je me dois de relever pour rendre justice à l'intervention de mon distingué contradicteur. Celui-ci s'est ainsi exprimé :

> « We do not say that the line of delimitation should be zigzagged so as to avoid placing each such well in the shelf area of that State under whose concession grant it was drilled. That would be inconsistent with the other principles and rules. It might even constitute an otherwise inequitable solution. » (Ci-dessus p. 229.)

Et il a encore ajouté :

> « But what we do say is that some provision can be made, if necessary, to accommodate existing producing installations. The line to be agreed upon might avoid directly amputating certain wells. » *(Ibid.)*

Laissons les installations qui n'ont jamais existé, et ne parlons que de puits susceptibles d'être exploités. Les phrases que je viens de citer, et surtout la dernière, recèlent encore beaucoup d'ambiguïtés. Mais, bien que dans le passage qui suit le distingué conseil de la Libye ait opposé la situation qui nous occupe à celle qui existait en mer du Nord, il n'est pas impossible qu'il ait voulu

faire allusion à l'hypothèse envisagée par la Cour en 1969. Parmi les éléments à prendre en considération dans la délimitation des zones de plateau continental entre Etats limitrophes, la Cour a mentionné l'unité de gisement. Elle avait envisagé que, lorsqu'un gisement s'étend des deux côtés de la limite du plateau continental entre deux Etats, un régime – je cite les termes qu'elle a employés – de juridiction, d'utilisation et d'exploitation communes soit envisagé pour résoudre le problème ainsi posé (*ibid.*, par. 97, 99 et 101 C 2). Si l'interprétation que je viens d'aventurer des propos de M. Highet était exacte, les difficultés actuelles trouveraient aisément leur solution. Aujourd'hui comme hier, la Tunisie est prête à accepter l'idée d'une exploitation commune et à la réaliser, dans l'hypothèse où un gisement se trouverait de part et d'autre de la future délimitation, dès lors qu'une telle exploitation commune est dégagée de toute implication politique.

Telles sont les quelques considérations par lesquelles il m'a paru nécessaire de commencer, avant d'aborder les points spécifiques relatifs à la géologie sur lesquels les Parties sont en désaccord et c'est vers eux que je voudrais maintenant me tourner.

L'audience est levée à 13 heures

TWENTY-EIGHTH PUBLIC SITTING (15 X 81, 10 a.m.)

Present : [See sitting of 29 IX 81.]

OBSERVATION BY SIR FRANCIS VALLAT

COUNSEL FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Sir Francis VALLAT : Mr. President : I assure you I have no intention of creating any difficulties for the Court, but yesterday, when we arrived in Court, we found on the desk in front of us a folder [1] of maps apparently coming from the Tunisian Delegation. There was of course no opportunity to examine this until last night but it has now been examined in a preliminary way and it is found to contain a number of new documents. But no attempt has been made to comply with the Rules of Court concerning the production of new documents. Therefore, the Libyan Delegation must naturally reserve its position in the ordinary way on these documents. But I would like to note in particular the novelty of the following figures : Figure 0, Figure 44, Figure 45 and Figure 46.

Now, we would be grateful for the assistance of the Tunisian Delegation and having regard to the Rules of Court, we ask that they should indicate in what publication these new documents are readily available, and if they are not readily available in any publication, would they please, before using the documents, indicate for us the source, the manner of production and the data on which these documents are based.

This is the request that we would make which I hope will facilitate the procedure of the Court, without raising a formal objection. But we would, with respect to what seem clearly to us to be new documents, ask whether it is intended to introduce them as such in accordance with the Rules of Court.

The ACTING PRESIDENT : Would the Agent of Tunisia like to make any comments on the reservation as to those documents or give some indication before some of them are used.

M. BENGHAZI : Je n'ai aucune observation à formuler, Monsieur le Président.

The ACTING PRESIDENT : The reservation is noted and will be dealt with in due course.

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[1] See *infra*, Correspondence, No. 122.

RÉPLIQUE DE M. VIRALLY *(Suite)*

CONSEIL DU GOUVERNEMENT DE LA TUNISIE

M. VIRALLY : Monsieur le Président, Messieurs les membres de la Cour, je m'étais arrêté hier en fin de matinée au moment d'aborder les faits spécifiques sur lesquels il y a accord ou désaccord entre les Parties.

Le point de désaccord essentiel est évidemment la direction dans laquelle se développe la marge continentale. Le vice de la thèse libyenne sur ce point, j'ai déjà eu l'occasion de le souligner, vient de ce qu'elle se refuse à considérer les réalités contemporaines de la géomorphologie, bien que celle-ci soit le point d'aboutissement de toute l'histoire géologique antérieure, et la récapitule, en quelque sorte. Elle se refuse à reconnaître que la marge continentale actuelle, et je souligne actuelle, partant des côtes des deux Etats, se continue par des fonds marins peu profonds et se dirige, suivant une pente continue, vers la mer profonde qui est située à l'est, pour se terminer enfin dans la plaine abyssale ionienne. Afin de tenter d'imposer une autre image que celle qui est visible pour le profane comme pour l'expert, la thèse libyenne est obligée d'exhumer un plateau continental enfoui sous des couches récentes dépassant en certains points 4000 mètres, par une opération de déshabillage chère à certaines écoles géologiques et dénommée *backstripping*, afin de le substituer au plateau contemporain.

La thèse de la Tunisie est que cette opération compliquée est à la fois inutile et fallacieuse, qu'il ne faut donc pas s'y livrer et qu'on doit s'en tenir aux réalités contemporaines de la géologie locale. Mais, puisque nos contradicteurs en ont fait le cœur dur de leur thèse dans sa dernière édition, qu'ils nous affirment, sans sourciller, que le bloc pélagien est constitué par une marge continentale distensive, de type atlantique, tournée vers le nord et prolongeant dans cette direction le continent africain, nous ne nous déroberons pas. Nous les suivrons sur le terrain qu'ils ont choisi, mais où ils font preuve d'une certaine ignorance de la géologie à terre, qui dispose, cependant, de données beaucoup plus nombreuses et sûres que celles du fond des mers, utilisées par les hydrographes. Cette réfutation nous obligera, malheureusement, à une excursion dans le domaine de la macrogéologie que j'aurais souhaité éviter. Je dois m'en excuser auprès de la Cour, déjà saturée d'exposés scientifiques. Je ferai tout mon possible pour que cette excursion soit aussi brève et simple que possible et reviendrai dès que je le pourrai aux simples données de la région.

Pour justifier leurs conclusions, le professeur Bowett et ses experts ont dû privilégier une situation transitoire apparue dans des temps géologiques très anciens et remplacée, depuis au moins 100 millions d'années, par une évolution différente qui a conduit à la structure actuelle, orientée vers l'est. Afin de donner du poids à leur argument, ils ont eu recours, nous le savons à une théorie construite pour la côte atlantique de l'Amérique du Nord et non transposable à la Méditerranée.

(44) Sur une carte générale de la Méditerranée, c'est-à-dire la figure 4 c de l'annexe II au mémoire libyen, on voit aisément l'opposition entre le système alpin et les plates-formes africaines, si longuement décrite dans les écritures libyennes. Ce système alpin est lui-même issu de sillons plus ou moins

profonds, qui s'étiraient entre les marges instables des deux grands blocs continentaux eurasien et africain.

Ces sillons étaient dus à une distension et à un écartement entre Eurasie et Afrique, qui a débuté il y a environ 300 millions d'années, à la fin du carbonifère, et la fameuse *hinge-line* de la Djeffara, qui se continue au sud de la Tunisie occidentale et de l'Algérie, est un des éléments de rupture de cette époque, qui séparait la plate-forme stable africaine d'une plate-forme instable et subsidente sous le Maghreb et le bloc pélagien. Jusqu'ici, nous restons très proches du récit du professeur Bowett.

(94) Mais il faut rappeler que l'océan Téthys, qui s'est formé de cette façon entre l'Eurasie et l'Afrique, n'était pas une vaste étendue régulière, comme l'Atlantique actuel. Ainsi que le montre bien la figure 14 de l'annexe 12 A, qui est tirée du contre-mémoire libyen, lorsqu'on regarde le croquis n° 2 de cette figure, on voit que les sillons étaient très étroits à l'ouest et s'élargissaient à l'est sous ce qui est devenu depuis la Méditerranée orientale. En outre, ils contournaient le vaste promontoire correspondant à la mer Adriatique et à une part importante de l'Italie. Il ne s'agissait donc en aucune façon d'un océan disposé régulièrement d'est en ouest, mais d'un sillon étroit, au nord du bloc pélagien, s'ouvrant largement en Méditerranée orientale, orienté vers l'est par conséquent.

Cette affirmation est corroborée par deux faits.

D'une part, lors des collisions ultérieures, des fragments du plancher océanique ont été soulevés et agglomérés dans les chaînes de montagnes. Ce sont les roches ignées, dites « ophiolites » par les géologues. Leur abondance permet d'évaluer la largeur de l'océan détruit. Elles se rencontrent en traces dans l'Atlas algérien ; elles sont très fréquentes en Italie et dans les Alpes centrales et prennent un vaste développement en Grèce, à Chypre et en Turquie – donc à l'est – pour devenir considérables en Iran.

(57) D'autre part, à l'échelle du bloc pélagien (ici sur la carte ES-6 de l'annexe I au contre-mémoire tunisien), on constate que, si l'ensemble du Maghreb il y a 230 à 175 millions d'années, durant l'époque triasique, était couvert de lagunes qui ont donné des dépôts salifères, on passe progressivement à des dépôts marins en allant vers l'est ; c'est vrai non seulement en Sicile et dans les forages sous Malte, mais aussi aux affleurements d'Azizia et de Garian, au sud de Tripoli.

Dès cette époque très ancienne, il existait donc dans le bloc pélagien une composante vers l'est, avec une progression de zones lagunaires vers des faciès sous-marins dans cette direction. La mer était donc à l'est.

C'est une des premières constatations, qui concerne les âges géologiques anciens, sur lesquels s'appesantit la Partie adverse. Une seconde constatation, qui concerne des âges moins anciens, mais encore éloignés, est plus intéressante encore.

La Partie adverse a défini la marge pélagienne par un étirement dans le sens nord-sud, qui n'aurait pris fin que lors de la collision entre l'Afrique et l'ensemble alpin-eurasien, à laquelle elle attribue un âge très tardif à l'échelle géologique – 10 millions d'années environ.

Or, la géologie de terrain montre des faits qui conduisent à des conclusions nettement différentes. Je citerai, en particulier, un travail [1] appuyé par de nombreuses mesures, effectué par l'Institut français du pétrole et publié par Letouzey et Trémolières au congrès mondial de géologie de 1980 (colloque des chaînes alpines issues de la Téthys). Ce travail établit de façon certaine que des

[1] Non reproduit. Voir ci-après, correspondance, n° 121.

mouvements tectoniques se sont produits dans la région occupée par la Méditerranée centrale et orientale à partir du cénomanien, c'est-à-dire il y a 100 millions d'années environ, avec une compression orientée nord-ouest/sud-est. Cette illustration (26th Intern. Geol. Congress, BRGM, Paris, 1980, fig. 5) [1] le montre clairement. Tout géologue sait que si de telles compressions affectent la couverture sédimentaire, c'est qu'il n'y avait plus de zones océaniques en distension vers le nord. En d'autres termes, le phénomène de formation de la marge continentale vers le nord décrit par le professeur Bowett n'existait en tout cas plus à cette période. Il y a 100 millions d'années.

Ces compressions ont eu un triple effet sur la plate-forme instable du Maghreb et de la mer Pélagienne :

1. Elles ont d'abord créé de vastes ondulations de la croûte, qui sont à l'origine des transversales hautes (Kasserine-Kerkennah-Medina) et basses (57) (sillon tunisien-Hammamet, d'une part ; sillon de Gafsa-golfe de Gabès-sillon tripolitain, d'autre part).

2. Les compressions ont, d'autre part, ébauché sur le plan local des structures anticlinales et synclinales au sein de la couverture flottant sur le salifère. Ce sont les ancêtres des plis qui affleurent maintenant en Tunisie centrale ou qui sont décelés par géophysique sous le plateau continental.

3. Elles ont enfin déclenché les migrations du sel, qui a ainsi commencé son ascension vers les dômes et les rides. (Tous ces phénomènes sont bien apparents sur la carte O [2] qui se trouve dans le dossier des juges et à laquelle il a été fait allusion tout à l'heure par sir Francis Vallat. Je ne citerai pas les autres cartes qu'il a mentionnées.)

Il y a 65 à 50 millions d'années, c'est-à-dire à l'éocène inférieur, la rotation du bloc africain, signalée par le professeur Bowett et illustrée par le croquis (94) n° 4 de la figure 14 de l'annex 12-A au contre-mémoire libyen, oriente les contraintes au nord-nord-ouest/sud-sud-est. C'est le moment où, au nord de la Syrte, les forages indiquent un basculement du plancher de la mer Ionienne, qui devient une mer profonde à l'est. Le long de l'escarpement de Malte-Misratah, s'opposent des faciès de plate-forme à l'ouest et des faciès plus profonds à l'est, comme le montre la carte ES-2 de l'annexe I au contre-mémoire tunisien.

Entre 38 et 20 millions d'années avant notre ère (nous nous rapprochons), à l'oligocène et au miocène inférieur, la rotation relative du bloc africain et de l'ensemble eurasien a créé encore des compressions orientées cette fois nord-est/sud-ouest ou nord-nord-est/sud-sud-ouest (26th Intern. Geol. Congress, BRGM, Paris, 1980, fig. 9). C'est le moment où l'axe nord-sud de la Tunisie voit son compartiment oriental s'abaisser par rapport au côté occidental et où s'accumulent d'épaisses séries de sédiments oligocènes et mio-pliocènes sous les plaines du Sahel et dans les sillons de la mer Pélagienne.

Les paroxysmes du plissement atlasique au miocène supérieur, il y a environ 12 millions d'années (nous sommes presque au terme de notre excursion), puis au plio-quaternaire (2 millions d'années) vont faire apparaître de nouvelles compressions orientées nord-ouest/sud-est qui se voient sur la figure 9. Elles accusent les plis déjà ébauchés depuis le crétacé et l'éocène ; elles mettent en place les nappes de charriage des zones telliennes et les arcs alpins qui

[1] Voir ci-après, correspondance, n° 121.

[2] « Histoire géologique de la mer Pélagienne. »

chevauchent le front des plates-formes instables : elles accusent et accélèrent l'enfoncement de la mer Ionienne. Enfin, elles suscitent des distensions perpendiculaires qui ouvrent les fossés de la Tunisie centrale et ceux de la mer Pélagienne, avec une légère rotation de la Sicile. D'autres fossés africains, d'ailleurs, sont du même âge, tels la mer Rouge et le golfe de Suez.

La phase finale plio-quaternaire, que je viens d'évoquer, qui a forgé l'essentiel du relief nord-africain, a mis la dernière touche à l'ébauche élaborée depuis la fin de l'éocène, avec d'ouest en est, comme on va le voir sur la carte (40) n° 2 du mémoire tunisien, les montagnes d'Algérie ; les chaînes et hautes plaines de Tunisie centrale ; les plaines basses et les collines de Tunisie orientale ; les hauts-fonds sous-marins du plateau tunisien, le *borderland*, Melita et Medina, plus profondément immergés ; le talus orienté vers l'est ; la mer Ionienne, enfin, avec ses différents éléments : le glacis de Syrte, le *borderland* profond et la plaine abyssale.

Nous voyons donc ainsi – et c'est capital – que le schéma actuel de la marge continentale pélagienne et ionienne, entièrement tournée vers l'est en direction de la plaine abyssale ionienne, est un dispositif qui a commencé à s'élaborer à partir du crétacé moyen, c'est-à-dire il y a 100 millions d'années, et qui s'est superposé, voire même substitué, à toutes les formations antérieures.

Que l'on n'oppose pas à ce schéma les conclusions de l'étude des collaborateurs de l'observatoire de Lamont. J'ai déjà montré combien la transposition à la Méditerranée de la théorie de la formation des marges distensives de type atlantique, transposition à laquelle elle se livre, était risquée. D'autres travaux de la même équipe le confirment. C'est le cas, notamment, d'un article [1] destiné, non pas à la Cour, mais à la communauté scientifique internationale, rédigé par un groupe d'auteurs, dont quatre appartiennent au Lamont, parmi lesquels M. W. Ryan, signataire également de l'étude annexée à la réplique libyenne. Cet article indépendant, de peu antérieur à cette dernière étude, avance des considérations beaucoup plus nuancées sur la physiographie et sur l'origine de la mer Ionienne. Il est accompagné de deux figures particulièrement intéressantes (fig. 1 et 2 [2]) qui sont aussi dans le dossier. La première, que vous voyez ici, prouve que l'équipe de scientifiques qui ont rédigé cet article ne met pas en doute l'existence de la plaine abyssale ionienne et n'imagine pas qu'on pourrait en trouver d'autres dans la région considérée. L'autre figure montre que la même équipe considère l'escarpement de Malte comme un talus continental, orienté vers l'est, élément essentiel d'une marge continentale classique. Elle distingue même un talus supérieur et un talus inférieur suivant une distinction également classique.

Il faut donc revenir à la simple évidence des faits, telle que la révèle la géomorphologie, fille de l'histoire géologique : la mer profonde est à l'est du bloc pélagien et la marge continentale est naturellement orientée vers elle et vers sa zone la plus profonde : la plaine abyssale ionienne.

La marge continentale fossile à laquelle s'accroche la thèse libyenne et qu'elle voudrait faire utiliser de façon exclusive pour la délimitation est celle de Téthys et non pas celle de la Méditerranée. Elle est morte et enterrée.

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[1] « Mesozoic and Cenozoic Roles from Malta Escarpment (Central Mediterranean) », *American Association of Petroleum Geologists Bulletin*, vol. 65.7, juillet 1981. [Non reproduit. Voir ci-après, correspondance, n° 121.]

[2] « Schematic Structural Map of Area surrounding . . . Ionian Sea » and « Bathymetric Map of Siracuse-Malta Escarpment Area ».

Inutilisable en tout cas pour une délimitation. S'il en était encore besoin, un seul exemple suffirait à le démontrer. La méthode préconisée par la Libye appliquée dans la région du golfe arabo-persique, où cette marge fossile est également enfouie, aurait les résultats suivants : le prolongement naturel des Emirats ne se situerait pas seulement dans la partie de la mer qui est au droit de leurs côtes, il s'étendrait sous tout le golfe, auquel les autres riverains n'auraient aucun droit, et sous le Zagros iranien, puisque la marge continentale en question s'approfondissait dans cette direction jusqu'à la grande collision de la fin du crétacé (figure 4 de l'annexe II au mémoire libyen). Ce résultat, me (44) semble-t-il, se passe de commentaire.

Parvenu au terme de cette excursion rapide dans les âges géologiques anciens, je voudrais, avant de conclure sur ce point revenir quelques instants aux simples réalités géomorphologiques de la région, qui nous donnent, sur les caractéristiques de la marge continentale actuelle, toutes les informations utiles au juriste.

Cela m'amène à une constatation déjà faite lors de mes premières interventions du premier tour de plaidoiries : c'est que, sur ce terrain des faits proches et pertinents, difficilement contestables en raison de la qualité des relevés dont nous disposons, les experts des deux Parties ne sont pas très loin les uns des autres, même si les experts libyens se sont efforcés de minimiser les faits invoqués par la Tunisie, comme on pouvait évidemment s'y attendre. Et c'est d'ailleurs la raison pour laquelle le professeur Bowett, après sir Francis Vallat et avec l'écho de ses experts, a mené une philippique contre la bathymétrie en tant que telle. Celle-ci n'a pourtant pas d'autre prétention que de mesurer les profondeurs et de joindre les points de même profondeur pour permettre de connaître les pentes. C'est une science descriptive. Il est un peu vain de s'attaquer ainsi à elle parce qu'on ne peut contester l'exactitude des informations qu'elle nous fournit. En réalité, les Parties s'opposent d'abord et avant tout sur l'interprétation qu'elles donnent aux faits qu'elles admettent l'une et l'autre et sur l'importance qu'il convient de leur donner dans l'application des principes et règles de droit international régissant la délimitation.

Cela est bien illustré par deux points.

Le premier concerne la ligne dite de Ragusa-Gabès, ou *Atlas Fold Front* d'après nos contradicteurs, représentée sur la figure n° 4 du deuxième classeur libyen, et qui a été avancée par la Libye dans le seul but d'établir des différences entre la partie du bloc pélagien englobant le territoire tunisien au nord de Gabès et la partie du bloc où doit passer la délimitation.

Cette ligne n'a évidemment aucune existence factuelle. Elle n'est qu'une façon de représenter certains faits, à savoir que les zones du bloc pélagien les plus proches du plissement atlasique ont été évidemment davantage affectées par celui-ci que le reste du bloc. Son tracé a été présenté comme une hypothèse dans des travaux anciens, dont l'auteur ne disposait à l'époque d'aucune information géophysique sous la mer Pélagienne et même sous la Tunisie orientale.

L'exploration systématique de la Tunisie orientale par sismique et par forages et les progrès de la connaissance de la région à terre et en mer qui en résultent ne permettent plus de maintenir aujourd'hui le dessin de cette ligne. Le professeur Fabricius lui-même a dû admettre qu'il s'agissait d'une zone et pas d'une ligne (ci-dessus p. 185). Il a ajouté qu'elle était très significative, mais ne nous a pas dit de quoi. Il n'a pas repris à son compte, en tout cas, le terme de frontière que lui suggérait le professeur Bowett. En réalité, compte tenu des informations dont on dispose aujourd'hui, et qui sont représentées sur la figure ES-3 de l'annexe I au contre-mémoire tunisien, une ligne délimi-

tant les plis atlasiques dans le bloc pélagien devrait envelopper tout le plateau tunisien.

Dans ce contexte, il est important de noter que tous les experts et conseils libyens sans exception continuent de présenter l'axe nord-sud comme la limite occidentale du bloc pélagien. A maintes reprises, ils ont reconnu la continuité géologique existant entre la Tunisie orientale et les autres parties du bloc, c'est-à-dire le plateau continental actuel. Il n'est pas nécessaire d'aller plus loin. Cela suffit à rendre vaines toutes les tentatives d'établir une frontière à l'ouest du bloc qui soit différente. Au surplus, même si l'axe nord-sud séparait deux *domaines géologiques entièrement différents* – ce qui n'est pas le cas – ce serait sans conséquence juridique, dès lors que cette continuité est établie. Pour le professeur Bowett, il s'agit d'une continuité « latérale » (ci-dessus p. 166). Le mot est joli. Mais c'est un mot.

Un autre trait – réel celui là –, qui fait problème de l'autre côté de la barre, est celui de la similarité des contours bathymétriques et des côtes tunisiennes, similarité à laquelle la Tunisie, à juste titre, attache une grande valeur
(101) démonstrative et qui sont visibles sur cette carte 2.03 de la réplique tunisienne. Le professeur Fabricius ne l'a pas niée (ci-dessus p. 194), mais on s'est efforcé, par toutes sortes de moyens, de la mettre en doute. Sur ce point, la Cour n'a certainement pas besoin des experts pour se faire sa propre conviction. C'est pourquoi il me paraît inutile d'argumenter.

Pour le reste, il n'y a pas vraiment de querelle. Telle que je l'avais résumée le mercredi 23 septembre (**IV**, p. 558 et suiv.) et rappelée encore il y a un instant, la thèse tunisienne est très simple. Elle se développe en trois propositions.

La première est que la direction de la marge continentale dans le bloc pélagien est déterminée à partir de chaque point des côtes tunisiennes et libyennes par une ligne de pente continue – bien qu'irrégulière dans son gradient et susceptible de rencontrer des irrégularités locales –, une ligne de pente continue, qui descend progressivement et constamment vers la mer Ionienne et, finalement, la plaine abyssale. Ce fait n'a pas été contesté par la Partie adverse, même s'il est expliqué uniquement par elle, par un basculement *(tilting)* du plateau vers l'est, dont on nous affirme qu'il n'a pas eu d'effet sur son orientation, ce qui est pour le moins paradoxal. Mais, malgré bien des réticences, l'existence de la plaine abyssale ionienne n'est pas non plus vraiment contestée.

La seconde proposition de la thèse tunisienne est que le bloc pélagien est marqué, dans la zone de délimitation, par trois alignements ouest-est, qui prolongent des alignements identiques observés en Tunisie, et qui sont constitués par une partie haute centrale, le plateau tunisien, entouré de deux vallées dans l'axe du golfe de Hammamet et du golfe de Gabès. Ces alignements, ou transversales, expriment clairement le prolongement de la terre tunisienne dans la mer Pélagienne.

Le nom de plateau tunisien est contesté, ce qui est sans importance, mais le professeur Fabricius a dû reconnaître que les transversales constituaient un « argument valide » même si, pour lui, c'est seulement dans un sens très limité (ci-dessus p. 185-186). Il ne pouvait décemment aller au-delà de cet effort de minimisation verbale à propos d'un fait dont il avait reconnu expressément et clairement l'existence dans l'étude qu'il a signée et qui figure en annexe 11 (voir p. 13) au contre-mémoire libyen (**III**). On notera, d'ailleurs, en passant que sur cette carte de l'Unesco en cours de publication, et dont le professeur Fabricius est un des éditeurs, le plateau tunisien est bien indiqué et désigné sous ce nom de plateau tunisien, qui ne peut par conséquent être contesté.

De même, l'existence des falaises qui bordent le plateau tunisien n'a pas été contestée. On s'est borné à en discuter l'importance et l'origine, en affirmant qu'elles ne sont pas le résultat d'un processus d'érosion (ci-dessus p. 191-192) ; mais elles sont bien là.

De même encore, l'existence de la dépression golfe de Gabès-sillon tripolitain n'a pas été niée mais son importance seulement minimisée. D'après le professeur Fabricius, on ne peut véritablement parler d'un thalweg (ci-dessus p. 189). Mais c'est le terme qu'il a lui-même employé, dans l'étude que je viens de citer, et nous noterons en passant que cette dépression y est indiquée sous le nom de *Tripolitan Valley* (**III**, contre-mémoire libyen, annexe 11). Nous voyons également que l'*escarpment* est parfaitement indiqué, de même que la plaine abyssale ionienne.

Enfin, la troisième proposition de la thèse tunisienne concerne les rides qui barrent cette dépression. Ici encore, l'existence de la ride de Zira, si longtemps déclarée introuvable, n'est plus mise en doute (ci-dessus p. 192). On lui reconnaît même des dimensions importantes : une longueur de 60 à 100 kilomètres, ce qui n'est pas négligeable (*ibid.*, p. 193), mais on voudrait voir en elle un banc plutôt qu'une ride. L'essentiel, en tout cas, c'est qu'on ne nie pas qu'elle coïncide avec un dôme de sel. Or, c'est la signification essentielle qui lui a toujours été donnée par la Tunisie.

Il convient, à ce propos, d'ajouter un commentaire général qui sera ma conclusion sur ce point. Les caractéristiques géomorphologiques invoquées par la Tunisie ne tirent pas leur signification de leurs dimensions extérieures, de l'importance des reliefs par lesquels elles se signalent. Comme la Tunisie l'a toujours souligné et comme j'ai eu moi-même l'occasion de l'expliquer devant la Cour, la géomorphologie est l'héritière ou la résultante de l'histoire géologique. Elle signale les traits importants qui signifient continuité ou discontinuité. Les transversales ne sont pas des chaînes de montagne et il n'est pas très correct d'utiliser une erreur de traduction du Greffe pour nous faire dire – comme on l'a fait à plusieurs reprises avec ironie – qu'il fallait « grimper » *(to climb)* pour aller sur le plateau tunisien à partir de la côte libyenne, alors que nous avions dit seulement « monter ». Ce sont des reliefs modestes, mais non négligeables à l'échelle limitée du bloc pélagien.

Ce sont aussi et surtout des témoins d'une continuité structurale qui relie clairement la terre tunisienne à son prolongement en mer. De son côté, la ride de Zira, pas plus que celle de Zouara, ne se présente pas comme un pic sur la surface du lit de la mer. La montée du sel qui l'a constituée a été trop lente pour permettre la constitution d'une haute montagne. Il s'agit pourtant d'un mur de près de 4000 mètres de hauteur depuis sa base, ce qui se compare aux plus hautes montagnes de l'Afrique, et qui barre littéralement les couches géologiques constituant le sous-sol du sillon tripolitain.

Ainsi, bien que la Partie adverse se soit efforcée – ce qui est bien normal – de créer l'impression contraire, la Tunisie estime que ses thèses relatives à la structure du bloc pélagien demeurent intactes après le premier tour de parole de la Partie adverse. Elle continue d'y attacher toutes les conséquences juridiques qu'elle a précédemment indiquées en remarquant notamment qu'il est partie d'une marge continentale orientée vers l'est.

J'en ai maintenant terminé avec les données physiques. Avec votre permission, Monsieur le Président, je voudrais sans désemparer et je m'en excuse, mais le temps nous presse, me tourner maintenant vers la question des méthodes.

Introduisant hier l'examen critique des thèses géologiques de la Libye, j'avais

pu me réjouir, me féliciter, des éclaircissements importants apportés par les plaidoiries de la délégation libyenne, tout en regrettant que des obscurités subsistent et que de nouvelles s'y soient même ajoutées. Parlant aujourd'hui des méthodes pratiques libyennes, j'ai beaucoup moins à me réjouir. Malgré les éclaircissements nombreux et utiles donnés par les conseils de la Libye, et notamment par l'exposé scintillant de M. Highet, ou, paradoxalement, à cause de ces éclaircissements, les obscurités de la thèse libyenne n'ont pas cessé de s'épaissir, jusqu'à devenir insondables.

Le point de départ était relativement simple : c'était la ligne pur nord du mémoire libyen, la ligne qui reflète la direction du prolongement vers le nord du point terminal de la frontière terrestre, pour reprendre les termes de la conclusion 5 de ce mémoire.

On nous a reproché d'avoir pris cette conclusion au sérieux et d'avoir même eu l'audace de montrer à quoi elle conduisait en traçant une carte qui est la (51) figure 3.01 du contre-mémoire tunisien. Selon nos distingués contradicteurs, qui n'ont pas manqué une occasion de le répéter, cette ligne n'aurait jamais représenté les vues de la Libye.

Je ferai seulement deux observations.

La première est qu'aucun mot, ni dans le mémoire libyen, ni dans ses conclusions, ne permettait de se représenter autrement l'application de la méthode proposée. Toute l'argumentation développée conduisait, inéluctablement, à ce résultat.

La seconde est qu'il n'existe aucune différence substantielle entre la ligne (51) reproduite sur la figure 3.01 du contre-mémoire tunisien (la fameuse *brown line*) et la ligne « A » apparaissant sur la figure produite aux pages 201 et 202 du contre-mémoire libyen (II, p. 335 et 336), établie, bien entendu, avant que la Libye ait pu voir la figure tunisienne.

Les seules différences entre les deux lignes proviennent :

1) de ce que la Tunisie a utilisé une ligne continue et la Libye une ligne de flèches ; ce n'est certes pas une différence substantielle ;

2) de ce que la carte libyenne s'arrête au nord à quelques minutes au-dessus du 36e parallèle et que sa ligne, en conséquence, a dû être arrêtée au-dessus de la latitude de l'île italienne de Linosa – mais les flèches utilisées pour la représenter signifient clairement qu'elle pouvait être prolongée plus au nord ; au contraire la carte tunisienne va au-delà du 37e parallèle, de sorte que la ligne a pu être tracée un degré plus haut. Ce n'est pas non plus une différence substantielle.

Comment l'agent et les conseils de la Libye peuvent-ils nous reprocher aujourd'hui d'avoir compris et représenté les résultats auxquels conduisait leur méthode de façon presque identique à leur propre représentation ?

On nous reproche aussi de parler de méthode correctrice à propos du virage, ou *veering*, effectué par le contre-mémoire libyen pour tenir compte du promontoire du Sahel. Ce virage est cependant exécuté par le recours à ce qui ne peut être considéré autrement que comme une méthode nouvelle, reposant sur une justification et une logique géographiques totalement étrangères à la justification et à la logique géologiques de la méthode du mémoire. Et cette méthode nouvelle a bien pour objet de corriger les résultats, manifestement inéquitables, de la ligne « A » produite par cette dernière. Aussi bien, le contre-mémoire libyen désigne-t-il par la lettre « Z » la ligne utilisée par la deuxième méthode, pour bien la différencier de la ligne « A ».

Comme l'a montré le professeur Ben Achour, ces deux méthodes ne sont pas

seulement différentes, elles sont contradictoires, en ce que la seconde réalise, au profit de la Tunisie, un empiétement sur ce que la première définit comme le prolongement naturel de la Libye. M. Highet n'a pas tenté d'expliquer cette contradiction. Il s'est borné – procédé de plaidoirie – à établir un parallèle entre le changement de position libyen et les ajustements que j'ai apportés, au cours de mon exposé oral, à la « ligne des crêtes ». Mais il n'y a pas de parallèle. La méthode que j'ai détaillée est identique à celle que le mémoire tunisien avait décrite. J'ai été amené simplement à montrer, à la lumière des données plus récentes et plus précises dont nous disposons maintenant, que les résultats auxquels conduisait son application sur le terrain étaient légèrement différents de ceux indiqués dans le mémoire. Mais la méthode elle-même n'a pas changé d'un pouce.

Passons sur la contradiction. Même si c'était le prix à payer pour parvenir à un résultat moins inéquitable, je comprends parfaitement que la Partie libyenne n'ait pas hésité à faire ce sacrifice. En outre, au stade du contre-mémoire, comme à celui de la réplique, la méthode géologique restait encore la méthode principale, la méthode de base.

Aujourd'hui, nous sommes, sur ce point, dans le brouillard le plus complet. Mon distingué contradicteur M. Highet a présenté la méthode préconisée par la Libye avec une grande minutie analytique. Et je note, entre parenthèses, que ce qu'il a fait consiste à décrire une ou des méthodes de délimitation, c'est-à-dire une ou des méthodes pratiques de tracer une ligne de délimitation. Qu'aurait-il pu faire d'autre ? Il a démontré ainsi, de façon expérimentale, le pur verbalisme de la distinction défendue par la Libye entre méthode de délimitation conforme aux principes et règles de droit international applicables, et méthode d'application des principes et règles de droit international applicables à la délimitation.

La méthode utilisée conduit d'ailleurs à des résultats qui peuvent être illustrés par le tracé d'une ligne sur une carte, tout de même que les méthodes tunisiennes. Le fait que la carte utilisée pour cette illustration soit plus petite et que les lignes soient représentées par des flèches plutôt que par des traits continus n'y change rien. Fermons cette parenthèse.

Ce qui m'a frappé, c'est que dans cette description minutieuse de la méthode libyenne, mise à part une référence tout à fait générale et, encore une fois, purement verbale, aux écritures et aux exposés libyens relatifs à la géologie, je n'ai pour ainsi dire plus entendu parler de géologie. C'est comme si M. Highet avait été absent, ou distrait peut-être, pendant les plaidoiries à une ou deux voix du professeur Bowett et de ses experts. Il n'en a à peu près rien retenu.

La philosophie même qui inspire sa description (ci-dessus p. 221) est aux antipodes de celle qui se trouve derrière le triomphant *northward thrust*. C'est la méthode des petits pas. On doit commencer dans « une zone relativement précise et limitée », pour reprendre les termes de M. Highet. Et là, elle sera déterminée presque entièrement par le point terminal de la frontière terrestre. Là et je cite encore :

> « la preuve prédominante de la direction générale du prolongement naturel doit être considérée en relation avec la ligne de direction spécifique du dernier segment de la frontière terrestre ».

Sans doute, nous dit-on, la forme de la masse terrestre ne peut-elle être indiquée par un simple point. Mais puisque, ajoute-t-on, dans le cas présent, on a affaire à un segment de frontière d'environ 60 kilomètres au sud de Ras Ajdir, « une règle de raison permet de dire que c'est tout à fait adéquat pour déterminer les masses terrestres concernées ». Evidemment, pour M. Highet,

ce segment a une direction nord, ce qui n'est qu'une approximation, nous le savons, puisque la frontière a pris en considération, pour se déterminer, des limites de territoires tribaux. Soit dit, encore entre parenthèses, les tribus en cause auraient été très surprises d'apprendre qu'elles avaient découvert la vrai direction du prolongement naturel du territoire libyen. Fermons la parenthèse. M. Highet a ajouté que, au fur et à mesure de la progression vers le large, lorsqu'on s'éloigne des côtes, il fallait tenir compte d'autres circonstances, dites pertinentes, notamment d'une courbe particulière de la côte tunisienne : celle du Sahel.

Avec cette méthode pointilliste, finies les grandes théories, les approches continentales, les centaines de millions d'années des temps géologiques. Nous voici dans la microgéographie, physique et politique, même plus dans le régional : dans le local. Quel contraste !

Qu'en est-il de la géologie dans tout cela ? Il apparaît clairement, d'après tout ce que nous venons de voir, qu'elle n'a aucune place dans la méthode pratique, ce qui est pour le moins surprenant, après tant d'études savantes, d'accumulation de données, de figures, de graphiques, d'exposés. Cela n'a pas échappé à mon distingué contradicteur, qui avance une explication ingénieuse et élégante, mais à nouveau purement verbale.

L'établissement d'une méthode de délimitation nécessiterait, nous dit-on, quatre étapes, qui, est-il précisé, « seraient toutes censées être simultanées ou avoir des effets simultanés » (ci-dessus p. 223). Comprenne qui pourra.

Ces quatre étapes sont : premièrement, l'examen de la direction générale indiquée par les faits de prolongement naturel physique (c'est la géologie, ici évoquée) ; deuxièmement, son raffinement en une ligne plus précise, commençant près de la frontière terrestre, par référence à des circonstances côtières, telles que la continuation de la frontière terrestre ; troisièmement, un raffinement supplémentaire à une plus grande distance de la côte, par d'autres circonstances pertinentes ; enfin, quatrièmement, sa concrétisation en une ligne de délimitation.

Si la première phrase que j'ai citée, sur la simultanéité, a un sens, elle signifie qu'il s'agit d'opérations intégrées dans une opération globale et non d'opérations successives. Même pour la concrétisation de la ligne de délimitation ? La Tunisie n'est jamais allée aussi loin lorsqu'elle a parlé des méthodes.

L'idée de « raffinement », d'autre part, est séduisante. Mais que signifie-t-elle, à partir du moment où ce prétendu raffinement permet de s'écarter substantiellement de la direction générale qu'il est censé raffiner, par un virage soudain pris suivant un angle d'environ 40°, ce qui n'est pas rien ? Le raffinement est-il plus qu'un mot dans ce cas, destiné à dissimuler que la fameuse « direction générale », indiquée par la géologie, ne dirige plus rien ? Et pourquoi cette direction générale s'affaiblirait-elle lorsqu'on s'éloigne de la côte ? N'est-elle pas le prolongement de toute la masse terrestre de l'Etat, quelque chose qui est profondément inscrit dans la nature jusqu'au rebord du plateau, comme l'a expliqué le professeur Bowett avec beaucoup de force (ci-dessus p. 163-164). Il y a en réalité une incompatibilité absolue entre la philosophie, ou la logique, de la méthode des petits pas, utilisée pour tracer la délimitation, et celle du prolongement naturel du continent jusqu'au rebord extérieur de la marge continentale, qui inspire la doctrine géologique de la Libye. Aucune réconciliation n'est possible entre ces deux logiques. L'abandon de la géologie est inscrit lui aussi, très profondément, dans la méthode décrite par M. Highet. Plus précisément encore : cette méthode consacre définitivement l'abandon de la géologie à toutes fins pratiques.

Un renversement aussi radical, une volte-face aussi brutale, effectuée lors des deux dernières plaidoiries libyennes, me jette dans la perplexité. Je ne puis penser qu'il ne subsiste plus rien de l'immense effort scientifique poursuivi par la Libye depuis son mémoire jusqu'à l'avant-dernier jour de la présentation orale de son cas. Il doit en rester quelque chose, quelque part. Mais où ? Je dois avouer que je me trouve sur ce point dans l'obscurité la plus complète. Tout se passe comme si la Partie adverse avait présenté simultanément deux cas totalement différents, séparés et mutuellement contradictoires.

Telles qu'elles sont présentées maintenant, les méthodes de la Libye sont devenues indéfendables. On peut se demander, légitimement, si leurs auteurs y croient encore.

En tout cas, il ne serait guère convenable pour moi, dans ces circonstances, d'ennuyer la Cour par une réfutation détaillée.

C'est pourquoi je crois plus utile de me tourner, sans plus tarder, vers les méthodes tunisiennes. Et ceci d'autant plus que si l'argument géologique libyen conserve un sens – je ne parle pas de sa validité – c'est un sens défensif. Il n'apporte rien à l'appui des méthodes libyennes, mais il continue de contredire l'interprétation des données géologiques présentées par la Tunisie.

Je crois superflu de revenir sur cette contradiction. J'ai suffisamment parlé hier et ce matin de géologie pour me dispenser de le faire à nouveau. Telle qu'elle a été présentée dans sa version finale, comme dans ses versions précédentes, la théorie géologique libyenne n'est pas en mesure de redresser vers le nord un développement de la marge continentale actuelle, au large des côtes de la Tunisie et de la Libye, qui s'effectue manifestement vers l'est.

Mais on adresse, de l'autre côté de la barre, d'autres critiques aux méthodes tunisiennes, critiques qui ont été développées par le distingué agent de la Libye et par plusieurs de ses conseils, en particulier sir Francis Vallat, le professeur Malintoppi, le professeur Bowett et M. Highet. Il me faut répondre brièvement aux plus importantes d'entre elles.

Ces critiques sont de deux ordres. Les unes sont formulées à l'encontre de l'ensemble des méthodes tunisiennes. Les autres articulées plus spécifiquement contre l'une ou l'autre d'entre elles.

Je commencerai par les premières, me réservant d'examiner les autres, au fur et à mesure de l'examen que je ferai des particularités de ces méthodes et sur leur justification.

Les critiques d'ensemble ont pris elles-mêmes deux formes. Certaines d'entre elles sont adressées au faisceau de lignes, *sheaf of lines*, résultant de l'application des diverses méthodes tunisiennes. D'autres reprochent à la Tunisie de n'avoir pas tenu compte, dans l'établissement de ces méthodes, de circonstances que la Libye prétend être pertinentes. J'examinerai successivement ces deux types de critiques.

D'abord le fameux « faisceau de lignes ».

(38) Le mémoire tunisien avait regroupé sur une même carte (fig. 9.14) les diverses lignes données à titre purement indicatif et illustratif pour éclairer la Cour sur les résultats approximatifs auxquels pourrait conduire l'application des quatre méthodes proposées par la Tunisie. On peut ainsi constater que ces résultats sont très proches les uns des autres. Cela est très significatif, étant donné que les méthodes dont ils sortent sont très différentes et s'appuient sur des circonstances pertinentes également différentes. On voit ainsi que toutes les circonstances pertinentes sont prises en considération de façon équilibrée. L'étroitesse du faisceau, à vrai dire, n'est pas fortuite. Elle provient de l'étroite connexité qui lie données géomorphologiques et données géographiques de la région, connexité sur laquelle la Tunisie a souvent mis l'accent et qui vient de

ce que la morphologie n'est autre chose que l'expression de la géographie des côtes se prolongeant dans la direction de la plaine abyssale.

Cette figure a été très fréquemment reproduite par la partie adverse dans ses écritures comme dans sa présentation orale. Chaque reproduction a été l'occasion de formuler des critiques nouvelles contre le faisceau qu'elle représente. M. Highet les a récapitulées dans son intervention. Il lui a reproché ainsi d'être beaucoup trop penchée vers l'est (ci-dessus p. 241 et 252), de passer devant Tripoli (ci-dessus p. 240), de porter atteinte à la sécurité de la Libye (ci-dessus p. 232), de réaliser un changement de direction inadmissible par rapport à la direction de la frontière terrestre (ci-dessus p. 226), d'ignorer les côtes des deux Parties (ci-dessus p. 253), de produire un résultat disproportionné et déséquilibré (ci-dessus p. 254).

Je ne m'attarderai pas sur la plupart de ces critiques. Il a déjà été répondu à certaines d'entre elles, en particulier à l'argument de sécurité, avant-hier encore par le professeur Jennings. Je n'y reviendrai pas. Qu'en est-il des autres ? Les lignes résultant des méthodes proposées par lui passent devant les côtes à la hauteur de Tripoli ? Quel est le sens de cette critique ? La position de Tripoli serait-elle une circonstance pertinente imposant une déviation de la délimitation parce que la capitale de la Tunisie ne se trouve pas sur la mer Pélagienne ? Les méthodes tunisiennes, en tout cas, n'empiètent ni sur les zones de droits historiques ni sur la mer territoriale, ni même éventuellement sur les eaux intérieures de l'autre Etat comme continuent de le faire les méthodes libyennes. M. Highet a prétendu le contraire. Réponse : ce n'est pas vrai, comme le
(128) montre bien la figure actuellement projetée. Rappelons que la future ligne de délimitation, d'après la Libye, doit passer quelque part entre la ligne A et la ligne Z, *à un endroit encore indéterminé*. Mais il y a empiétement dans tous les cas. N'en déplaise à mon honorable contradicteur, il y a bien un double standard.

Les méthodes tunisiennes ignorent les côtes ? Deux d'entre elles sont construites à partir des côtes. Je reviendrai d'ailleurs sur ce point dans un instant.

Le résultat est disproportionné et inéquitable ? Mais la Libye ne soutient-elle pas qu'une délimitation conforme au prolongement naturel – et c'est le cas en l'espèce d'après la Tunisie – est automatiquement équitable ?

Reste alors seulement la vraie critique de la Libye : les lignes sortant des méthodes tunisiennes sont décidément trop penchées vers l'est. M. Highet les penche un peu plus encore d'ailleurs, 65° nous dit-il, alors qu'elles varient de 60 à 64° (ci-dessus p. 241 et 252). Pourquoi trop penchées vers l'est ? Parce que, selon la Libye, la marge continentale va vers le nord. Mais si elle va vers l'est, l'argument tombe. Nous avons vu que c'était bien le cas.

Notre distingué contradicteur semble invoquer une règle de droit international qui interdirait à une ligne de délimitation d'être penchée par rapport à la côte. Mais la pratique des Etats ignore complètement l'existence d'une telle règle. Il existe de nombreux exemples en sens contraire. Le meilleur d'entre eux est sans doute celui de l'accord entre la République fédérale d'Allemagne et la République démocratique allemande du 5 octobre 1976 publié par le géographe du *Department of State* dans la publication bien connue *Limits in the Seas*, n° 74.

La carte projetée montre que la ligne convenue suit de très près, sur toute sa longueur, les côtes de la République démocratique dont elle longe même la mer territoriale sur une certaine distance. La configuration de la côte de la République fédérale n'est d'ailleurs pas sans présenter certaines analogies avec celle des côtes tunisiennes.

Une autre variante de l'argument consiste à dire que le faisceau de lignes forme un angle marqué par rapport au dernier segment de la frontière terrestre. On sait l'importance que la Partie adverse attache à cet argument. Pour appuyer sa propre construction, M. Highet va jusqu'à affirmer : « each side or each Party should bear a heavy burden to justify its crossing to the other side of a northward continuation of the land boundary line of direction » (ci-dessus p. 226).

Est-il nécessaire, devant cette Cour, de dire qu'une affirmation aussi catégorique ne repose sur rien ? Je n'ai pas été capable de trouver un seul exemple de délimitation du plateau continental réalisée par le seul prolongement de la frontière terrestre dans sa partie la plus proche de la côte.

La Libye semble-t-il n'a pas eu plus de chance, puisqu'elle n'en cite aucun. Des quelques cas commentés dans le mémoire libyen (I), aux paragraphes 117 à 119, aucun ne corrobore l'idée que la délimitation du plateau continental devrait prolonger la frontière terrestre sans changement de direction. La Cour a relevé elle-même qu'une telle méthode n'a jamais été envisagée que pour la délimitation de la mer territoriale (et d'ailleurs rejetée), mais ne l'a jamais été pour le plateau continental (*C.I.J. Recueil 1969*, p. 34, par. 52).

Reste précisément la question du point où la délimitation coupe la limite extérieure de la mer territoriale. M. Highet a repris l'accusation selon laquelle les méthodes tunisiennes préjugeraient la délimitation de la mer territoriale, alors que la méthode libyenne ne le ferait pas (ci-dessus p. 239). Toujours le double standard ! Comment expliquer cette différence ? C'est que selon mon distingué contradicteur, la solution libyenne « would not . . . prejudice a reasonable or a traditional solution » (ci-dessus p. 240).

En clair, cela veut dire que les méthodes libyennes préjugent autant la délimitation de la mer territoriale que les méthodes tunisiennes, mais qu'elles le font dans ce que la Libye considère comme le bon sens, ce qui excuse tout.

Le même argument d'un bon sens vraiment par trop biaisé est employé pour rejeter l'idée, pourtant évidente et de vrai bon sens, que la limite extérieure de la mer territoriale servira aussi – je dirai : nécessairement – de délimitation partielle du plateau continental, si le point de départ de cette délimitation sur cette limite ne coïncide pas avec l'extrémité de la frontière des eaux territoriales entre les deux Etats.

Cela suffira sur ce point, et je passe maintenant à la deuxième série de critiques, plus remarquables peut-être, que la Libye adresse à l'ensemble des méthodes tunisiennes : c'est d'avoir oublié, ou ignoré, un certain nombre de circonstances hautement pertinentes d'après la Partie adverse.

J'ai essayé de faire l'inventaire des circonstances pertinentes selon la Libye. J'ai trouvé beaucoup de difficultés à le faire. Je m'en tiendrai donc à ce qu'a dit sur ce point M. Highet, qui a parlé le dernier et qui a systématisé de façon rigoureuse les circonstances qu'il considère comme pertinentes. C'est ce qu'a fait aussi le professeur Jennings avant-hier.

M. Highet a cité six circonstances pertinentes et sept considérations qui méritent sans doute, selon lui, d'être également considérées comme pertinentes.

Le professeur Jennings a donné hier la liste des six premières, ce qui me dispense de le faire. Quant aux sept considérations, ce sont celles qui avaient été développées dans le contre-mémoire libyen (II), aux paragraphes 524 à 530, pour célébrer les vertus des méthodes libyennes.

Tous ces éléments ne méritent pas la même considération. Plusieurs d'entre eux sont répétitifs. C'est le cas en particulier des fameuses « sept considérations », qui renvoient toutes à des points discutés ailleurs. Au risque d'irriter davantage M. Highet, qui était très fâché sur ce point, je ne leur ferai pas un

sort particulier. Quant aux circonstances évoquées par la Libye, elles ont été examinées hier sous plusieurs aspects par le professeur Jennings et je me garderai bien de répéter ses explications. Il y a cependant trois points sur lesquels, dans la perspective qui est la mienne, quelques indications complémentaires me paraissent nécessaires. Je veux parler, d'une part des affirmations de juridiction par des actes de droit interne, des gisements et forages pétroliers, de la configuration des côtes des deux Etats, enfin. Je reprendrai successivement ces trois points dans cet ordre.

Les affirmations de juridiction tout d'abord. La Tunisie sera évidemment la dernière à en contester l'intérêt. Encore faut-il que ces affirmations aient été manifestes et qu'elles aient bénéficié de la tolérance de la communauté internationale, comme c'est le cas des titres historiques de la Tunisie. Cela me dispensera de parler de la législation libyenne de 1955, dont s'est occupé le professeur Jennings. En revanche, la question des permis pétroliers mérite qu'on s'y arrête à nouveau. Quelques mots doivent être dits également au sujet de la législation libyenne sur la pêche des éponges, évoquée par l'ambassadeur El Maghur (ci-dessus p. 31) et par M. Highet (ci-dessus p. 242). Je commencerai par ce dernier point.

D'après la Partie adverse, la législation libyenne sur la pêche des éponges démontrerait que les droits de la Libye s'étendraient, dans ce domaine, jusqu'à une ligne partant de la frontière et orientée plein nord.

A l'appui de cette affirmation, nos contradicteurs invoquent un rapport de la FAO : « Which included a map indicating the western limit to the sponge grounds in Libya. And these were correctly shown as extending due north of Ras Ajdir. » Et M. Highet ajoutait encore : « This map appeared as Map No. 13 in our Counter-Memorial, and it has not been contested by Tunisia. » (Ci-dessus, p. 243 et p. 31.)

J'ai eu la curiosité d'examiner le rapport de la FAO, déposé au Greffe par la Libye. J'ai constaté qu'il était dû à un biologiste, spécialiste de la pêche. Cet expert est certainement très capable de déterminer la valeur, au point de vue de son exploitation, de tel ou tel banc d'éponge et de le situer. En revanche, je ne crois pas qu'il puisse être considéré comme une autorité en matière de délimitation juridique des espaces maritimes, ni même qu'il ait eu cette prétention.

Quant à la carte, elle n'apporte aucune indication concernant la délimitation. Celle qui a été commentée au cours de cette procédure, la carte n° 13 figurant dans le contre-mémoire libyen et reproduite dans le dossier libyen et dans le dossier de la Tunisie, cette carte, j'ai le regret de devoir dire qu'elle est tout simplement fausse. C'est un montage destiné à lui faire prouver ce que la carte originale de la FAO ne disait pas.

Ceci est très apparent sur les projections que Messieurs les juges ont maintenant sous les yeux. La carte de la FAO, destinée à montrer les divers bancs d'éponge existant au large des côtes libyennes, s'arrête très légèrement à l'ouest de Ras Ajdir. Sa bordure est évidemment dépourvue de toute signification en ce qui concerne la limite des droits de la Libye. Le fait qu'elle ne passe pas par Ras Ajdir, mais légèrement à l'ouest, est assez démonstratif à cet égard. Même la Libye n'a jamais prétendu avoir droit à une ligne sud-nord à l'ouest de Ras Ajdir.

La carte n° 13 a été fabriquée en reportant les indications – simplifiées – figurant sur la carte de la FAO sur une carte de la région, en prenant soin que, cette fois, la bordure passe exactement à Ras Ajdir, et sans dire que l'auteur de la carte originale n'avait pas examiné ce qui se passait à l'ouest de cette bordure.

Monsieur le Président, Messieurs de la Cour, je ne crois pas qu'on puisse rien prouver par de telles manipulations.

J'en viens maintenant à la question des permis et je pense que compte tenu de la longueur du développement que je devrai leur consacrer il serait peut-être convenable, si vous le permettez, Monsieur le Président, que je m'arrête ici.

L'audience, suspendue à 11 h 30, est reprise à 11 h 45

Monsieur le Président, j'en viens maintenant à la question des permis. Selon la Partie adverse, la limite occidentale de ces permis, qui est une ligne d'environ 26°, constituerait une affirmation de droits souverains, peu compatible, d'ailleurs, avec la prétention à la ligne plein nord qui résulterait de la législation de 1955. Nos contradicteurs vont même jusqu'à suggérer qu'il y aurait eu une sorte d'accord tacite entre les deux Parties, puisque cette limite occidentale des permis libyens coïnciderait, dans une certaine mesure, avec la limite orientale des permis tunisiens.

(123) Cette dernière affirmation est absolument contraire à la vérité et l'histoire des permis, que j'ai résumée hier en quelques mots, va totalement à l'encontre de la thèse de l'accord. Si le moindre doute devait subsister, d'ailleurs, il serait immédiatement détruit par la constatation, sur laquelle sir Francis Vallat s'est longuement arrêté, de l'existence d'une large zone de chevauchement, dont sir Francis a d'ailleurs minimisé l'étendue, faute d'avoir pris en considération le permis tunisien n° 12.

Mais il convient aujourd'hui d'aller un peu plus loin et d'examiner la question des gisements et des puits, sur lesquels M. Highet est revenu à plusieurs reprises après l'ambassadeur El Maghur.

Je rappelle que le permis tunisien n° 4, accordé en 1966, n'a été « contré » par le permis libyen n° 137 qu'en 1968, deux ans plus tard. Le premier puits foré par la Libye sur le périmètre de ce permis et contenant des traces de pétrole date seulement de fin 1971. C'est le puits A1/137. Apparemment, il n'était pas commercialement exploitable, puisque son exploitation n'a pas encore commencé en 1981, soit dix ans après. L'ambassadeur El Maghur n'a d'ailleurs pas cru utile de le mentionner. Les premiers puits forés par la Libye, qui ont rencontré du pétrole en quantité exploitable, datent en fait de 1976 et de 1977 : ce sont le puits B 1A/137 (foré en février 1976) et le puits B 1/NC 41 (foré en janvier 1977). Le second a été foré sous protection militaire, dans les conditions que connaît la Cour, sur la zone où a opéré *Scarabeo IV*, pendant la grave période de crise entre les deux pays qui s'est dénouée par la signature du compromis, le 10 juin 1977 (I, mémoire tunisien, par. 1.31-1.32).

D'après la Partie adverse, ce sont ces découvertes qui ont précipité la marche vers l'est de la Tunisie, attirée par l'odeur du pétrole. Je voudrais simplement rappeler que les concessions tunisiennes 8 et 9, les plus à l'est, ont été attribuées en 1972, soit quatre ans auparavant et deux ans avant les permis libyens qui ont créé le chevauchement, c'est-à-dire les permis NC 41 et NC 53, lesquels datent de 1974.

Un autre fait important, et qui ne manquera pas de retenir l'attention de la Cour, est que les cinq autres puits exploitables mentionnés par M. Highet ont tous été forés après la signature du compromis, c'est-à-dire après le 10 juin 1977.

Il est difficile d'imaginer que la Libye aurait pu se constituer valablement des droits, ou créer de nouvelles circonstances pertinentes après la date à laquelle elle avait accepté de porter devant la Cour son différend avec la Tunisie.

Enfin, M. Highet a insisté sur le fait qu'il parlait seulement de gisements pétroliers et de puits de pétrole. Il a mis fortement l'accent sur ce point. Pour la Tunisie, dès le moment où l'on mentionne les ressources naturelles du sous-sol du plateau continental, il faut parler d'hydrocarbures. Si le pétrole est pertinent, le gaz l'est aussi. Et il faut aussi parler de toute la région considérée, et non pas seulement de la zone contestée. D'autres puits exploitables devront alors s'ajouter à la liste fournie par la Libye, avec d'autres gisements qui ont été décelés, aussi bien en gaz qu'en pétrole.

Du côté tunisien, il y a le gisement d'Ashtart en activité, mais dont les réserves sont modestes, et un gisement de gaz, encore plus modeste, qui se trouverait du côté libyen si les méthodes libyennes étaient retenues, soit avec la ligne « A », soit avec la ligne « Z ». Du côté libyen, il y a plusieurs autres gisements pétroliers signalés sur la dernière carte remise par la Libye à la Cour, mais on ne sait rien de sûr sur les gisements de gaz, puisque la Libye ne fournit plus aucun renseignement sur ses activités *off shore* depuis la fin de 1979 dans la zone voisine du litige.

J'en viens maintenant, Monsieur le Président, avec votre permission, au troisième des points que j'avais retenus au titre des circonstances pertinentes : celui qui concerne les côtes.

Les conseils de la Libye continuent de présenter le littoral de la Tunisie orientale comme une anomalie, ce qui reste une absurdité à l'échelle de la région et, comme nous l'avons vu, une grave erreur au point de vue de la géologie. Du moins admettent-ils maintenant que cette côte existe. On l'a dit très expressément. Et pourtant ils persistent à ne vouloir la prendre en considération qu'à Ras Yonga, tout en admettant que la configuration générale des côtes tunisiennes est caractérisée par un angle droit. Nous avons vu déjà les contradictions dans lesquelles ils s'enferment ainsi. Passons.

Le plus important, pour la Tunisie, est évidemment l'angulation de la côte. L'autre Partie y attache aussi des conséquences considérables, que le professeur Jennings a évoquées, en ce qui concerne le calcul de la longueur des côtes et les calculs de proportionnalité.

Un des côtés de l'angle, nous le savons, doit, selon la Libye, disparaître de ces calculs.

Cela nous place immédiatement au plan des considérations d'équité et, sous cet angle, la question de l'équidistance se trouve à nouveau posée. Je me vois contraint, à cette occasion, de répondre brièvement aux nombreuses insinuations de la Partie adverse au sujet de la position de la Tunisie à propos de l'équidistance.

Les écritures libyennes et, plus récemment, les conseils de la Libye se sont plaints à plusieurs reprises de ce que la Tunisie n'avait pas défendu la thèse de l'équidistance dans la présente instance, alors qu'elle l'avait acceptée au cours des négociations entre les Parties. On est même allé plus loin : jusqu'à laisser entendre que le différend, au moment de la signature du compromis, était entre la ligne de l'équidistance, soutenue par la Tunisie, et la ligne 26°, adoptée par les concessions libyennes, sans se préoccuper beaucoup de la contradiction entre cette allégation et la thèse de la ligne plein nord. On a insinué aussi, à un certain moment, que le rejet de l'équidistance par la Tunisie ne serait pas sincère.

Cette présentation des faits est fallacieuse et intenable. Le différend qui sépare les deux Parties porte sur la délimitation elle-même, sur les zones de plateau continental appartenant respectivement aux deux Parties, sur les principes et règles de droit international applicables, sur les circonstances pertinentes à prendre en considération, pas sur les positions de négociations qui

ont pu être soutenues, à un moment où l'autre, par l'une ou l'autre des Parties, avant qu'elles ne décident de soumettre leur différend à la Cour.

La Tunisie n'a aucune difficulté – et elle l'a déjà dit – à reconnaître qu'elle avait effectivement soutenu au cours des négociations une thèse différente de celle qu'elle présente aujourd'hui devant la Cour. Cela s'explique par plusieurs raisons, dont la moins importante n'est pas le progrès qu'elle a pu faire, depuis l'époque relativement récente où elle s'est intéressée aux activités *off shore*, dans la connaissance des réalités géologiques et géomorphologiques de la région. La Tunisie a même été amenée à réapprécier de façon plus réaliste la configuration de ses propres côtes, qu'elle avait décrites à une certaine époque, de façon certainement erronée, comme une côte simple. Elle a été conduite ainsi à prendre conscience de l'inéquité, à son détriment, de toute ligne d'équidistance, quelles que soient les bases choisies pour son tracé.

Plus fondamentalement, la Tunisie avait accepté l'équidistance au cours des négociations parce que c'était une méthode objective et relativement simple, bénéficiant alors d'un grand renom dans les cercles qui s'occupaient du droit de la mer, notamment comme une méthode provisoire, dans l'attente d'un accord. Cette méthode lui paraissait de nature à permettre une entente rapide avec la Libye et, quels que soient les désavantages qu'elle pouvait entraîner pour elle, de la placer ainsi en position de pousser l'exploration des richesses naturelles de son plateau, en connaissant avec exactitude l'étendue des zones qu'elle pouvait forer. C'est cette même préoccupation qui a guidé sa politique en matière de permis et le choix des formules employées pour définir leurs limites du côté des zones controversées.

La Tunisie n'a pas obtenu l'avantage qu'elle recherchait en contrepartie de la concession de l'équidistance. Ses travaux de recherche ont été arrêtés par toutes sortes de moyens, cependant que la Libye accélérait les siens pour se créer des titres. Aujourd'hui encore, dans l'attente de l'arrêt de la Cour, la Tunisie ne peut procéder à aucune recherche dans de vastes zones. Aussi estime-t-elle devoir demander à la Cour l'application du droit, et non pas une formule de compromis.

La Tunisie n'est d'ailleurs pas la seule à avoir changé. A aucun moment au cours des pourparlers la Libye n'avait laissé entendre qu'elle pourrait invoquer la géologie dont elle fait tant de cas aujourd'hui, au moins en théorie. Quant à la prétention à la ligne nord, à peine esquissée lors de la première rencontre, elle paraissait définitivement abandonnée. La Tunisie a été aussi surprise en lisant pour la première fois le mémoire libyen.

L'inéquité de l'équidistance résulte des circonstances pertinentes que la Tunisie a déjà eu l'occasion de mettre en lumière devant la Cour, à savoir l'angulation de la côte tunisienne et la situation de la frontière sur un des côtés de l'angle. Devant l'incompréhension affectée par la Partie adverse, je me dois aujourd'hui, avec votre permission, Monsieur le Président, et en m'excusant de le faire, de revenir encore une fois sur cette question capitale.

Comme si je n'avais pas parlé au premier tour, le professeur Bowett a réaffirmé que les prolongements naturels de deux côtes à angle droit se rencontrent inévitablement. Mais c'est tout à fait faux, comme je l'ai montré par ce simple schéma (fig. A ci-contre). Ce schéma se trouve, avec ceux que je vais vous présenter encore dans un instant, dans le dossier de la Cour. En fait, tout dépend de l'orientation du prolongement naturel. Dans un cas comme celui-ci, qui est précisément très proche de la présente instance, où le prolongement se fait vers la plaine abyssale ionienne qui se trouve quelque part par ici et qui, sur la carte que vous avez, est représentée par le cercle marqué PA, il n'y a aucun chevauchement et la bissectrice de l'angle, tout en réali-

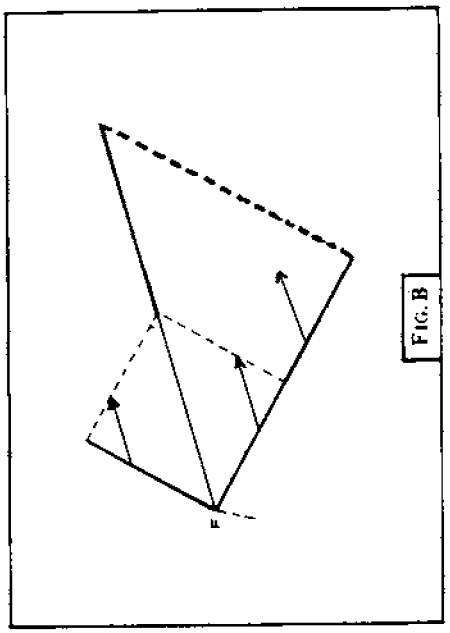

FIG. B

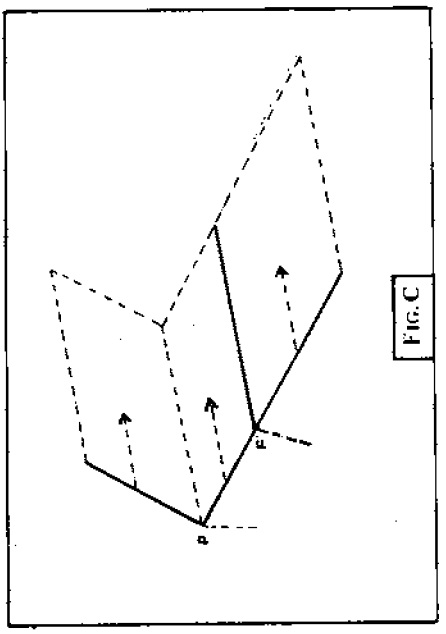

FIG. C

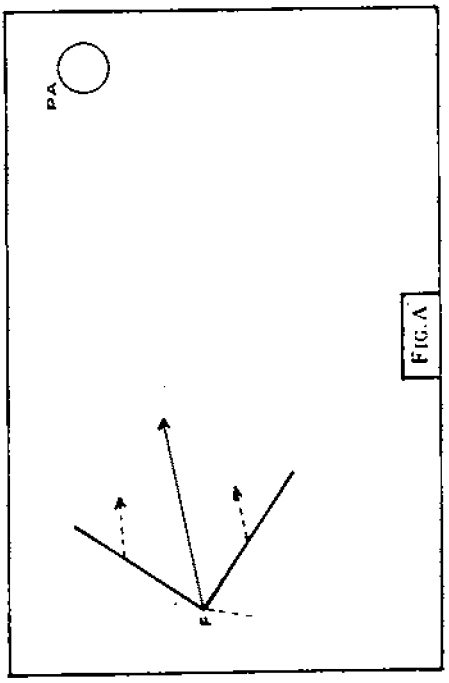

FIG. A

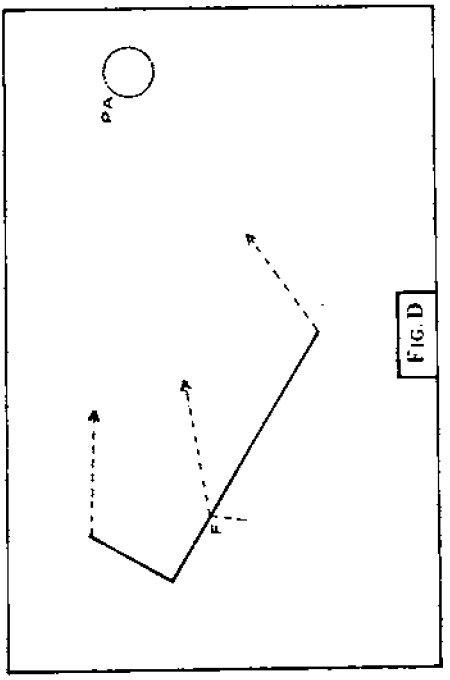

FIG. D

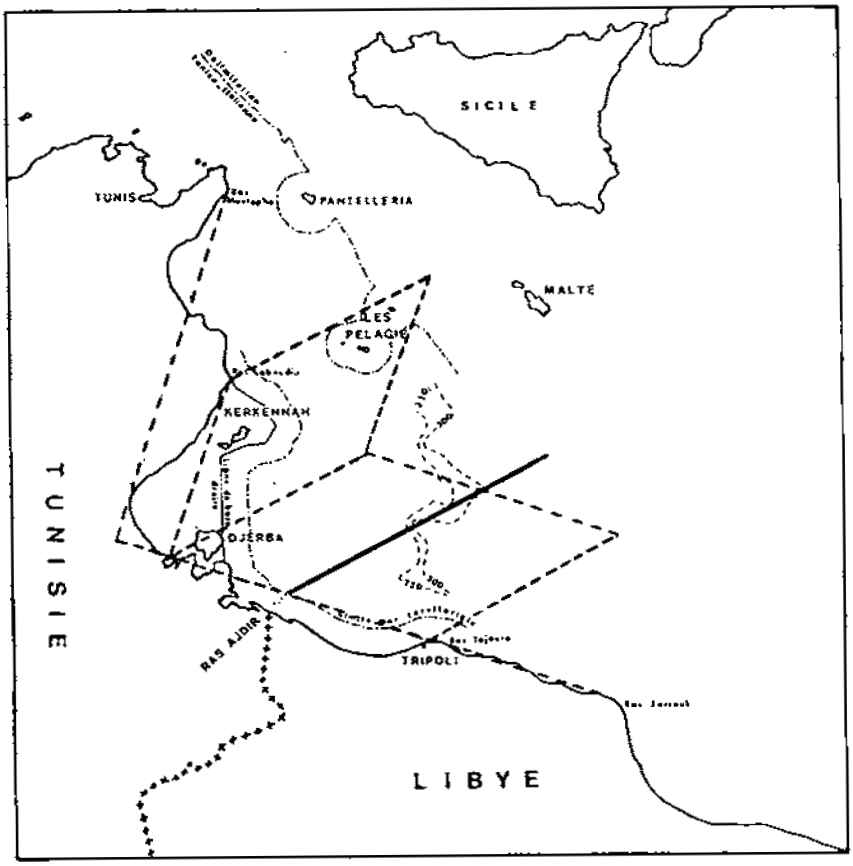
SICILE
TUNIS
PANTELLERIA
MALTE
ILES PELAGIE
KERKENNAH
DJERBA
RAS AJDIR
TRIPOLI
TUNISIE
LIBYE

FIGURE E

sant une délimitation équitable lorsque la frontière est au sommet de celui-ci, ne prive aucun point des deux côtes de l'intégralité de son prolongement naturel.

Pour illustrer sa démonstration, le professeur Bowett a utilisé un carré (fig. B, ci-dessus p. 337). Cette construction est entièrement erronée, si les deux prolongements naturels ne sont pas perpendiculaires aux côtes, comme c'est le cas dans la présente espèce. En effet, ces côtes voient leur prolongement naturel bloqué par les côtés de l'angle, qui les interrompent suivant le point de la côte considéré de façon tout à fait inégale. Au contraire, il n'y a aucun chevauchement et la bissectrice de l'angle, tout en réalisant une délimitation équitable, ne prive aucune partie de la côte de son prolongement naturel, dans la figure que j'avais montrée précédemment. Pour qu'un tel blocage que nous voyons ici soit réalisé dans la réalité, il faudrait supposer l'existence de deux Etats voisins, dont les côtes feraient un angle extrêmement prononcé par rapport à celle de l'Etat où se trouve le sommet de l'angle. Même dans la mer du Nord, les lignes d'équidistance ne produisaient pas un résultat aussi extrême et elles ont été considérées comme inéquitables par la Cour.

Je reviens sur cette figure B. Le sophisme du carré est pleinement mis en lumière si on suppose que l'on prolonge une côte. A ce moment, il apparaît très clairement que, ou bien la démonstration n'est plus possible, ou bien qu'elle aboutit à des résultats qui sont parfaitement inéquitables. Si, en effet, nous essayons de prolonger la ligne parallèle à la côte jusqu'au point où elle rencontre la bissectrice, nous voyons que les rapports de proportionnalité ne sont plus du tout respectés et on peut, pour simplifier, dire que si un côté de l'angle est double de l'autre, la surface obtenue par l'Etat qui l'occupe est multipliée par quatre dans une telle hypothèse.

En réalité, pour montrer géométriquement l'équité de la bissectrice, une seule méthode est possible, qui permet à tous les points de la côte d'avoir le même prolongement naturel : c'est celle que j'ai exposée devant la Cour, et qui consiste à tracer des parallèles à la côte, à partir d'un point quelconque de la bissectrice et de fermer les surfaces par des parallèles à cette dernière, c'est la figure C de la page 337 et, étant donné mes qualités de dessinateur, il a paru préférable qu'elle apparaisse tout de suite devant vous, de façon un peu plus correcte. Tous les points de la côte, dans ce cas, ont exactement le même prolongement, suivant la même direction, et la relation entre les longueurs des côtes est absolument égale à celle des surfaces. Et, ce qui est très important, c'est de constater que cette égalité se vérifie avec des côtes inégales, comme dans le cas présent, aussi bien qu'avec des côtes égales.

Maintenant, et c'est là le point capital, rien ne change si la frontière, au lieu de se trouver sur le sommet de l'angle, se trouve sur un des côtés. Rien, absolument rien n'est transféré, si ce n'est que la frontière est remise à sa véritable place pour retrouver la situation qui existe en l'espèce. Et cette simple constatation répond à l'objection apparemment logique que nous adresse notre savant contradicteur de transférer notionnellement la côte tunisienne à la hauteur de la frontière (ci-dessus p. 173). Rien n'a bougé dans la figure, si ce n'est la frontière elle-même et la parallèle à la bissectrice qui a été tirée. Bien entendu, toute la zone de plateau entre cette parallèle et la côte réelle est traitée comme du plateau et non pas comme du territoire. Faut-il ajouter encore qu'il ne s'agit que d'une construction, dont le seul objet est d'apprécier un rapport de proportionnalité ?

Ayant dit cela, je m'empresse d'ajouter que le but de l'opération n'est pas de procéder à de *nice calculations*, comme nous accusent de vouloir le faire nos contradicteurs, mais de montrer, à l'aide d'un modèle abstrait, comment la

méthode de la bissectrice translatée corrige l'inéquité inhérente à la méthode de l'équidistance appliquée en l'espèce présente, et qui explique son rejet par la Tunisie.

Avant de voir comment il est possible de passer du modèle abstrait à la réalité, je voudrais, cependant, répondre brièvement à une autre objection qui nous est adressée.

Selon le professeur Bowett, qui répète sur ce point également un argument du contre-mémoire libyen, la méthode libyenne consisterait à transférer sur un Etat tiers ce qu'il appelle la « compensation » obtenue grâce à cette méthode.

Encore une fois, il n'y a là aucune compensation, car l'inéquité ne résulte pas de la nature, ni même de la politique, qui a déterminé l'emplacement de la frontière, mais uniquement de l'application au cas d'espèce d'une méthode inappropriée, l'équidistance. Quant à l'argument lui-même, il ne tient pas compte de la situation réelle, où il n'y a pas d'Etat tiers. Il devient, par là même, un nouveau sophisme.

Nous avons raisonné jusqu'à maintenant en supposant que les prolongements de tous les points des deux côtes s'effectuent par des parallèles, ce qui voudrait dire qu'ils se prolongent jusqu'à l'infini. Dans les faits, nous savons qu'ils convergent vers la plaine abyssale ionienne. Celle-ci est assez éloignée de la région considérée pour ne vicier en rien le raisonnement. Aussi bien, comme l'a dit la Cour, ne s'agit-il pas d'établir un rapport mathématique, mais un rapport raisonnable, c'est-à-dire approximatif.

Si, maintenant, nous prenons en considération une côte très longue, qui se prolonge au sud et à l'est de la plaine abyssale ionienne, comme c'est le cas de la côte libyenne, il en va différemment, comme on peut le voir à la figure D (ci-dessus, p. 337). Vous voyez par cette figure que les directions vers la plaine ionienne changent évidemment considérablement, suivant la situation de la côte par rapport à cette plaine abyssale et, en l'espèce, c'est précisément ce qui se passe, si bien que le penchement vers l'est qui existe, lorsque l'on se trouve à la hauteur de Ras Ajdir, se trouve, dans une certaine mesure, renversé, à la hauteur de la frontière égyptienne. L'Egypte, par conséquent, ne risque certainement pas de souffrir de l'application de la méthode préconisée par la Tunisie, elle est bien à l'est de la plaine abyssale ionienne. Et pas davantage Malte dont les côtes font face à celles de la Tunisie, tout autant qu'à celles de la Libye et avec laquelle, bien entendu, la même méthode ne pourrait pas être utilisée.

J'en viens maintenant à l'application de la méthode à la situation concrète, non pour procéder à de *nice calculations*, mais simplement pour montrer qu'elle s'applique sans difficulté.

Pour le montrer, je reprendrai l'angle dessiné sur la figure 9.10 du mémoire tunisien (I, p. 194). A titre de simple hypothèse, je retiendrai aussi l'idée développée par l'agent libyen selon laquelle les côtes tunisiennes devraient n'être considérées que jusqu'à Ras Kapoudia. La direction générale de la côte n'est pas modifiée pour autant : c'est une parallèle à la précédente. L'angle n'est donc pas changé et la parallèle à la bissectrice est donc la même, comme on le voit sur la figure E de la page 338.

J'ai indiqué que les parallélogrammes destinés aux calculs de proportionnalité pouvaient être tracés à partir d'un point quelconque de la parallèle à la bissectrice. Choisissons le point où elle coupe le contour des 300 mètres, qui a été retenu pour la « ligne des crêtes ». Pour ne pas sortir du bloc pélagien, arrêtons-nous, du côté libyen, à Ras Tajoura (mais le raisonnement resterait tout à fait vrai si on allait jusqu'à Ras Zarrouk). Les parallèles ainsi délimités apparaissent sur la figure en vert. L'angle qu'ils forment au nord tient compte de l'incidence de Malte, bien qu'il ne s'agisse évidemment pas d'une ligne de

délimitation, cela va sans dire. Rien ne vient amputer le parallélogramme du côté libyen, et la Libye ne peut donc se plaindre d'être désavantagée.

En revanche, le parallélogramme du côte tunisien est amputé par la zone attribuée à l'Italie par l'accord tuniso-libyen. C'est un désavantage pour la Tunisie, mais qui résulte d'une donnée géopolitique qu'elle doit supporter, dès lors qu'il ne s'agit pas de refaire la nature. Sans se livrer à aucun calcul, il apparaît immédiatement que la délimitation proposée est équitable et ne provoque aucun désavantage au détriment de la Libye, tout au contraire.

J'en ai terminé avec la question des côtes et, du même coup, avec l'examen des circonstances pertinentes que la Tunisie avait été accusée d'avoir oubliées. Il ne me paraît pas utile, en effet, de revenir sur la question des Etats tiers, dont j'ai déjà suffisamment traité au cours du premier tour de parole. Quant à celle des côtes à prendre en considération, je me propose de l'examiner à propos des méthodes spécifiques qui les utilisent. Je vais donc aborder maintenant la dernière partie de mon exposé, qui concerne les désaccords entre les Parties à propos de chacune des quatre méthodes tunisiennes.

Pour ces dernières explications, je pourrai me permettre d'être très bref et très rapide. Si je mets à part les arguments géologiques, dont j'ai déjà traité et qui doivent être écartés, les critiques adressées aux méthodes tunisiennes au cours de la procédure orale m'ont paru singulièrement inconsistantes. Elles ne m'obligent en tout cas à aucune rectification, ni à aucune retraite.

M. Highet a été extrêmement vigoureux dans les qualificatifs dont il a usé pour qualifier les méthodes que nous proposons : *arbitrary, capricious, selective, not based on scientific evidence which could be given legal weight, positively inconsistent with the principle of natural prolongation, fallacious, not supported or supportable.*

Ce sont là quelques uns des qualificatifs et des expressions qu'il a utilisés. Incontestablement, ce sont des mots énergiques. Mais ce sont des mots, pas des démonstrations. *Words, words, words...* Il serait vain de répondre par des mots.

Le professeur Bowett a été un peu plus précis, mais à peine. Il reproche à la méthode de la ligne des crêtes de s'appuyer sur des circonstances qu'il qualifie de *trivial* (ci-dessus p. 168) – il s'agit bien entendu de la ride de Zira – et de ne pas suivre le thalweg du sillon tripolitain, dont j'avais pourtant dit qu'il constituait une frontière naturelle. Mais il omet la relation qui existe entre ces deux caractéristiques physiques. La ride de Zira signale l'existence d'un mur de sel de 4000 mètres de profondeur qui barre le sillon tripolitain. La ligne de délimitation ne peut donc le traverser mais doit le contourner.

Pour M. Highet, cette ligne est arbitraire et pourrait passer ailleurs ; mais où ? Il s'agit pourtant d'une méthode des petits pas qui aurait dû le séduire. Je rappelle, d'autre part, ce qu'il s'était donné tant de peine à établir et qu'il paraît avoir oublié en la circonstance : la Cour n'est pas appelée à tirer une ligne elle-même. Ce sera la tâche des experts des deux Parties. Pour reprendre une image que j'ai déjà utilisée et qui n'a pas déjà été rejetée, ils auront, *mutatis mutandis*, à accomplir la tâche d'une commission de délimitation matérialisant sur le terrain le tracé de la frontière défini par le traité, ici par l'arrêt. Ce sont eux qui, dans la mise en œuvre de la méthode définie par la Cour, auront à déterminer si la ligne doit passer ici ou là et tenir compte ou non de telle ou telle courbe de la ligne bathymétrique.

Je comprends mal, enfin, comment il peut être reproché à cette ligne de tenir compte de l'équité, comme l'a fait le professeur Bowett (ci-dessus p. 169).

Les critiques contre la méthode physiographique ne sont pas mieux ajustées. Si je les comprends bien, elles tiennent en trois points : premièrement, il n'y aurait que des relations fortuites entre plateau continental et prolongement

naturel d'une part, et plaine abyssale d'autre part ; c'est la première critique (ci-dessus p. 169 et p. 249) ; deuxième critique : la plaine abyssale ionienne serait trop loin de la zone à délimiter (ci-dessus p. 249) ; enfin, il serait difficile de déterminer le centre du triangle que constitue cette plaine (ci-dessus p. 251).

Sur ce dernier point, je renverrai à ma précédente observation. Ce sera le rôle des experts de déterminer avec précision le point marquant le centre de la plaine abyssale ionienne.

Sur le premier point, celui des relations entre plateau et plaine abyssale, je serais tenté de répondre : vrai et pas vrai.

Vrai, parce que, comme l'a déjà indiqué la réplique tunisienne, la méthode proposée n'est pas d'application universelle, ce qui n'est pas une faiblesse. Dans beaucoup de régions du monde, la marge continentale n'est pas orientée vers la plaine abyssale. Il n'existe pas, en effet, de relations géologique ou géomorphologique nécessaires entre marge continentale et fosse abyssale.

Mais faux, parce qu'il en va autrement dans la région, et c'est cela seul qui compte.

La situation existant dans la mer Ionienne, comme l'a montré la Tunisie, est très particulière et peut-être unique. Toute la structure de la région résulte d'une histoire très compliquée sur laquelle la Cour a été amplement, et sans doute exagérément, informée. On se trouve dans une mer semi-fermée, en forme de cuvette, où toutes les marges continentales des territoires étatiques qui l'entourent, sur le continent africain comme sur le continent européen, convergent vers la plaine abyssale ionienne, dont la position excentrée n'est pas l'effet du hasard, mais celui de toute l'histoire qui a modelé aussi les autres caractéristiques de la région. Elle est le point de convergence unique d'une structure cohérente qui explique aussi l'orientation des marges continentales.

Cette situation très particulière est une circonstance hautement pertinente pour la présente délimitation entre la Tunisie et la Libye, ce qui ne signifie pas, évidemment, qu'il pourrait en aller de même pour d'autres Etats de la région placés à un autre endroit de cette mer.

Le fait que la plaine abyssale soit éloignée des côtes des Parties me paraît tout à fait sans importance. Il ne s'agit pas, en effet, de prolonger la délimitation jusque dans son voisinage mais de déterminer une direction, qui est celle du développement de la marge continentale. Cette direction aurait pu être déterminée par d'autres moyens, beaucoup plus proches, par exemple par une observation attentive de la direction générale de la ligne des pentes, telle qu'elle est révélée par la bathymétrie, la morphologie et la physiographie. Mais la plaine abyssale ionienne constitue un indicateur de cette direction générale d'une utilisation beaucoup plus commode.

Je passe maintenant aux méthodes géométriques.

Si on laisse de côté les mots énergiques, les seules critiques adressées aux méthodes géométriques, que nos contradicteurs semblent avoir peine à distinguer l'une de l'autre, tiennent au fait qu'elles reposeraient sur une sélection arbitraire des côtes et sur une simplification excessive de leur direction générale (ci-dessus p. 172 et p. 249, 251).

On leur reproche aussi de ne tenir compte que de la géographie, mais, comme je l'ai dit, elles n'ont été construites qu'en vue de vérifier si les résultats de la mise en œuvre des circonstances géographiques étaient en accord avec ceux obtenus à partir de la géologie. Le test s'est révélé positif. Le reproche n'est donc pas fondé.

La seconde méthode présentée par la Tunisie semble n'avoir pas été

comprise par la Partie adverse. Il n'y a pas d'autre explication au fait qu'elle la présente comme une variante de la précédente, ce qu'elle n'est certainement pas. De ce fait, aucune critique cohérente ne lui a été adressée, ce qui me permettra de m'abstenir d'en parler davantage.

Le seul véritable argument, d'autre part, développé contre la première méthode, dite de la bissectrice translatée, indépendamment de celles que j'ai déjà examinées il y a un instant, concerne la sélection des côtes effectuée par la Tunisie pour l'exposer dans son mémoire.

Les raisons de ce choix ont aussi été expliquées dans le mémoire, et je ne crois pas utile de les répéter. Je me permets respectueusement de renvoyer la Cour à la lecture des paragraphes 9.25 et 9.26. Mais, et c'est un point sur lequel je crois nécessaire d'insister très fortement, la méthode n'est aucunement liée à un certain choix des côtes à utiliser. Elle reste parfaitement valable si on fait un autre choix et il appartiendra à la Cour, au vu de toutes les circonstances pertinentes, de déterminer les côtes qui lui paraîtront devoir être retenues.

Nous avons vu déjà, il y a un instant, que Ras Kapoudia pouvait être choisi pour la construction de l'angle de la côte, au lieu du cap Bon, sans que les résultats soient modifiés. Du côté libyen, Ras Tajoura pourrait être préféré à Ras Zarrouk. L'angle à considérer serait quelque peu déplacé, mais sans qu'il en résulte une différence substantielle. Par sa position, Ras Tajoura, peu à l'est de Tripoli et constituant la première avancée de la côte depuis Ras Ajdir, peut être considéré comme un point remarquable. En revanche, le point de la côte libyenne se trouvant à la longitude de 12° 36', retenu par l'ambassadeur El Maghur comme point déterminant de la côte libyenne concernée par la délimitation avec la Tunisie (ci-dessus p. 20), est absolument inacceptable et
(118) injustifiable. Comme cela ressort très bien d'une carte du premier classeur libyen, il ne correspond à aucune caractéristique particulière de la côte libyenne et interrompt, de façon arbitraire, la courbe très légère que forme cette côte entre Ras Ajdir et Ras Tajoura. Sa seule vertu est étrangère à la Libye : elle est de se trouver plein sud par rapport à l'île italienne de Lampedusa. C'est le dernier avatar de l'inconsistante *area of concern*.

J'ajouterai encore qu'un raffinement de la méthode peut également être envisagé, suivant la technique des petits pas chère à M. Highet. Il serait possible, en effet, de construire cette ligne en tenant compte d'abord des portions de côtes les plus proches de Ras Ajdir et formant presque une ligne droite, de Ras Ajdir à un point un peu à l'est de Zouara, et de construire ainsi un premier segment de ligne. En s'éloignant de la côte, on prendrait en considération d'autres éléments caractéristiques des côtes des deux Etats, comme Ras Tajoura et les hauts-fonds autour des Kerkennah. On parviendrait ainsi à une ligne brisée.

Dans ces conditions, je crois pouvoir conclure en affirmant que les méthodes proposées par la Tunisie ne sont pas, comme on l'a affirmé de l'autre côté de la barre, des prétentions extrêmes, mais, tout au contraire, des méthodes qui tiennent pleinement compte de toutes les circonstances pertinentes, de façon équilibrée, sont équitables dans leur résultat, qui est conforme aux indications de la nature, c'est-à-dire, qui attribue à chacun des Etats intéressés l'intégralité de son prolongement naturel et, comme on l'a vu, aboutit aussi à un rapport raisonnable entre les longueurs de côtes et les surfaces de plateau.

Pour ces raisons, la Tunisie, qui ne cherche pas à obtenir davantage que ce que les principes et règles de droit international applicables déterminent, à la lumière de toutes les circonstances pertinentes de la région, ce qui lui revient équitablement, mais qui attend que ses droits soient reconnus dans

toute leur étendue, maintient les quatre méthodes qu'elle a précédemment soumises. Pour les raisons que j'ai déjà exposées, elle marque, toutefois, sa préférence pour les méthodes qui lui paraissent tenir compte le plus exactement de toutes les circonstances pertinentes : la méthode physiographique et, s'il doit être fait appel plutôt à la géographie des côtes, la méthode de la bissectrice translatée.

REPLY OF PROFESSOR JENNINGS

COUNSEL FOR THE GOVERNMENT OF TUNISIA

Professor JENNINGS : Mr. President and Members of the Court : I shall be very brief, being content merely to indicate what now seem to be the principal differences remaining between the Parties.

First it should be said that the Libyan attempt to emasculate the Special Agreement and to restrict unduly the task of the Court has failed to withstand the rigorous examination by my friend Professor Abi-Saab. He also dealt faithfully with the suggestion, likewise tending towards a diminution of the role of the Court, that real and meaningful negotiations for the purpose of reaching an agreed delimitation, had not taken place before the Parties submitted this matter to the Court. It is perhaps, as well that these arguments should not have survived rigorous examination. It would have been unfortunate if the Court, properly seised of a long-standing dispute of first importance, could have been persuaded that, after three years of written and oral pleadings it was, after all, not empowered to render a final judgment determinative of the delimitation of the continental shelf boundary.

These oral proceedings have focused attention on the crucial element in any continental shelf case – the coasts of the Parties concerned and the relationship of those coasts to each other.

Libya, in dealing with the Tunisian coast, has always been anxious to find reasons for cutting it into segments ; but we would ask the Court to consider the Tunisian east-facing coast as an entirety. For a State's natural prolongation has to be related to an entire coast and not just to parts of it.

SO-CALLED AREAS OF CONCERN

Before summarizing the Tunisian position on this vital relationship of coast and sea-bed, something needs to be said about a related matter, I mean the Libyan use of their notion of a so-called "area of concern". Judge Mosler's question about this will be answered fully in writing. But there are one or two points that call for comment now.

First, the notion of a single "area of concern", for all purposes of the case, is in our submission, a false concept.

The Libyan "area of concern" is, like their argument on the Special Agreement, aimed at confining as far as maybe, the ambit of the Court's consideration. It also incidentally enables Libya to illustrate the Tunisian sheaf of lines in a small frame instead of in relation to the whole geographical context. But, in fact there must be different concerned areas for different purposes and indeed also for different arguments. The most restricted area of concern would, I suppose, be one that would be framed by those sections of the coast that would influence the first tranche of a line of equidistance. The Libyan area of concern is so near to this and the Libyan pleadings exhibit such depths of feeling whenever they approach the question of equidistance, even whilst rejecting it, that one is tempted to speculate on the real strength of that rejection.

But although one can see the usefulness to the Libyan argument of a very

small "area of concern", yet it remains true that in an enclosed sea or semi-enclosed sea, and this is the classical example of such a sea, the whole situation in that sea is also concerned where there is a question of possible constriction or of cut-off effects. This is clearly part of the process of balancing the equities.

May I remind the Court again of the map on page 16 of the *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, showing the United Kingdom and considerable parts of Norway and Sweden. It is surely right to ask the Court, when it looks again at that map of the whole North African coast, by which Libya tries to persuade the Court that the coast runs east-west, it would surely be right to ask the Court also to look at the whole situation in this part of the central Mediterranean. And since this area, as a whole, is one area that, if only for limited purposes, must be of some concern to the Court, I must briefly refer again to the question of third-State delimitations. Having had to consider this problem very closely on the occasion of Malta's application to intervene, the Court knows the difficulties very well.

At present, the Court is seised of this delimitation between Tunisia and Libya. It is also aware that Tunisia and Italy have agreed a delimitation. Delimitations remain outstanding between Libya and Malta, between Tunisia and Malta, between Malta and Italy. The network of boundary lines needed to resolve all these problems could be arrived at by a single process involving all four States. Or, alternatively, as the States have chosen and as is usual in these cases, by a succession of bilateral delimitations. What can the Court do, about the effect of these actual or potential problems ?

There is a simple geometrical technique which may assist and that is to take the tri-point from Mzebla and Malta and Ras Tajura. Now, if a line is drawn from Ras Ajdir to that tri-point, it will be found to be about 51°.

That line, I must make it perfectly clear, is not acceptable to Tunisia, as a line of delimitation, because it still cuts across that part of the natural prolongation of the coast which belongs most naturally to Tunisia. It breaches the rule of non-encroachment. But that line, drawn simply as one way of getting some idea of the two-dimensional position in the area asia whole, and in relation to other actual or potential claims, does demonstrate, I submit, two things.

First, that when the whole situation is looked at, it is plain that the local or strict equidistance line from Ras Ajdir is not merely inequitable for Tunisia, but is grossly and manifestly inequitable. And the second thing that that line demonstrates is that the Tunisian sheaf of lines is not unreasonable even on a purely geometrical basis and when no account is taken of the formation of the sea-bed in its relation to the non-encroachment rule.

And it is these other considerations of non-encroachment to which I must now turn.

RELATIONSHIP OF COAST AND SEA-BED

One of the difficulties about the law of continental shelf is that it is, in modern jargon, "interdisciplinary". The 1969 Judgment speaks not only of juristic concepts but also of geography and geology.

It is tolerably clear that the Court, when it speaks of geography in the Judgment, usually had in mind the coast and its configuration : an amalgam of geographical features such as islands, islets, low-tide elevations, promontories and so on. Certainly the great legal and equitable principle – that there should be no refashioning of geography – seems mainly or usually to refer to geography in this sense.

But the other great principle, also one of equity, that there must be no encroachment on the natural prolongation, is the corresponding principle concerning the sea-bed. No refashioning of geography and non-encroachment belong together ; and they both, it is submitted, must be respected in all cases.

To ensure this, to ensure this respect for both principles, it may in a relatively simple case be sufficient to find a method which takes reasonably accurate account of the two dimensional plane of the configuration of the coast as a whole. In the *North Sea Continental Shelf* cases, the Court, with little or no assistance from morphology or geology, found it sufficient for its purposes, to deal with the distortions that might flow from a particular method in relation to a particular configuration of the coast ; and yet, felt able to speak of the natural prolongation and non-encroachment in terms of the relationship of sea-bed and coast. In the Anglo-French case, where there were comparable coasts and a single shelf extending between them, the line of equidistance suitably adjusted to take account of distorting features sufficed to satisfy both the rule forbidding the refashioning of geography and the rule forbidding encroachment upon the natural prolongation.

But we submit that the present case is significantly more complicated than either of those two earlier cases. The coasts of the two Parties in this case are not at all comparable. The Tunisian coastline is complicated not only by its concavities and its islands but also by those banks where there is an unusual, possibly even unique, interpenetration of land and sea. Moreover, there is a sea-bed area, described and expounded by my friend Professor Virally, which belongs most naturally to Tunisia because it is in truth the continuation of the Tunisian landmass and its direction into and under the sea.

As we have said, the Court in 1969, by geography, principally in mind, and the configuration of the coasts, was able to make a decision. But geography does not stop at the coasts. Geography does not cease at the low-water mark. And we submit that in this present case where manifestly the two rules of not refashioning geography and non-encroachment have to be respected, it is not sufficient just to take account of the configuration of the coast in order to ensure that both rules are respected. It is necessary also to look at the shape of the sea-floor off the cost. The coastline after all is not made up of items of land deposited, as it were, at random on a geological substratum. There is here a continuum between land and sea. Therefore it must be taken into account.

How is this to be done ? In establishing boundaries on the dry land we study the shape and features of the terrain – rivers, ridges and the like – certainly not deep geology. Then why in the off-shore area should we then ignore the shape of the terrain under the sea, which is only the continuation of the land into and under the sea, and suddenly plunge into deep geology ?

Libya, sensing, I think, that this must be right, has fallen back on the argument that the area in question is featureless. Professor Bowett described one of the Tunisian Methods as "trivial". Professor Virally has already dealt with that suggestion.

But there is one further point I would like to make on this question of features of the sea-bed. That is the question of scale.

In my first address to the Court I mentioned the Unesco Study, which is in the Tunisian Memorial (I), Annex 95, which was prepared for the 1959 Geneva Convention. May I remind the Court of the declivity figures given in that Report as the basis of the distinction between shelf, slope and rise.

> "The continental shelf itself, is defined as a shallow slope of a gradient less than 1:1,000.

> The continental slope is defined as an area of abrupt increase in gradient, leading to the continental rise, or sometimes directly to the deep sea floor. The gradient of the slope is usually less than 1:4.
>
> The continental rise, is defined as an area of gentler slope at the foot of the continental slope itself, its gradient being between 1:100 and 1:700." (I, Tunisian Memorial, p. 196.)

Mr. President, if one calculates on a percentage basis the figures there which are the basis of this important distinction between slope and rise we find that they are very comparable to the ones which were being described in the Libyan evidence as "trivial".

What the Tunisian case endeavours to show is that it is possible by means of readily accessible geomorphological evidence to identify those parts of the natural prolongation that belong most naturally to Tunisia and those that belong most naturally to Libya and that this is necessary if the non-encroachment rule is to be observed.

So, I suggest finally that the practical conclusion to be drawn from all this is that in the present case, unlike the two earlier ones, and simpler ones, it is not sufficient to have regard only to the coasts. This is an area in which, in order that geography shall not be refashioned and that there shall be no encroachment on the natural prolongation it is necessary to take account not only of the quite unusually complicated Tunisian coastline, and of the fact that it is not comparable to the Libyan coastline, but also to take account of the sea-floor which is the natural continuation of the whole coastline.

The justification of the Tunisian methods just described is that, though unavoidably the Tunisian geometrical methods are — unavoidably — constructed from base points, which reflect two-dimensional rather than three-dimensional control, they do in fact produce lines which respect the Tunisian natural prolongation. This in the Tunisian submission is essential if the resulting delimitation is to respect both rules — not refashioning geography, non-encroachment — for this is not a situation in which the two-dimensional approach alone will do justice, a fact on which the Parties seem to be agreed.

Mr. President, that concludes all I have to say on behalf of Tunisia ; and the time has come when, so far as Tunisian counsel are concerned, the case must be entrusted into the hands of this distinguished Court. But, before asking you to call upon the Tunisian Agent, His Excellency Ambassador Benghazi, I want to thank you, Sir, and Members of the Court, for your patience and attentiveness in hearing our arguments. And I should like also, if I may, to thank our opponents for the frequent courtesy they have shown to us on this side of the bar, which has made this confrontation, though hard fought, an agreeable one.

RÉPLIQUE DE M. BENGHAZI

AGENT DU GOUVERNEMENT TUNISIEN

M. BENGHAZI : Monsieur le Président, Messieurs les membres de la Cour, la Partie tunisienne est arrivée maintenant au terme de son deuxième et dernier tour de parole. Il m'incombe à ce stade de faire connaître les conclusions de mon gouvernement. Je déclare que le Gouvernement tunisien maintient les conclusions qu'il a déposées à l'issue de son premier tour de parole.

J'aborderai maintenant, si vous le permettez, une autre question. MM. les juges Gros, Oda, Mosler et Schwebel ont bien voulu poser aux agents des deux Parties un certain nombre de questions [1].

Je voudrais, avec votre permission, Monsieur le Président, apporter la réponse de mon gouvernement à la première question, qui a été posée par M. le juge Gros.

Je regrette et je m'excuse de ne pas pouvoir être en mesure d'apporter les réponses de la Partie tunisienne aux autres questions posées par MM. les autres juges. Si vous le permettez, la Partie tunisienne y répondra par écrit avant la fin de la procédure orale.

En ce qui concerne la question posée par M. le juge Gros, la réponse du Gouvernement tunisien est la suivante :

Les Parties ont soumis leur différend à la Cour par compromis, conformément à l'article 36, paragraphe 1, du Statut de la Cour, en lui demandant de rendre un jugement dans l'exercice de sa compétence contentieuse sur les questions qui lui sont posées dans le compromis.

La première de ces questions vise à ce que la Cour indique aux Parties les trois séries de considérations mentionnées dans la question de M. le juge Gros à savoir : les principes et règles du droit international applicables à la délimitation ; les principes équitables ; et les circonstances pertinentes de la région qui doivent être prises en considération dans cette délimitation.

Le Gouvernement tunisien considère que le jugement de la Cour sur ces questions est obligatoire pour les Parties, et ce conformément à l'article 94, paragraphe 1, de la Charte des Nations Unies, à l'article 59 du Statut de la Cour et à l'article 94, paragraphe 2, de son Règlement. Le Gouvernement tunisien considère en outre que le jugement de la Cour est également définitif et sans recours, conformément à l'article 60 du Statut et jouit ainsi de l'autorité de la chose jugée *(res judicata)*.

A ce sujet, le Gouvernement tunisien estime qu'il n'est pas sans intérêt de rappeler que les principes généraux de droit qui ont été codifiés par rapport à la Cour internationale de Justice dans les dispositions précitées se trouvent réitérés dans le contexte spécifique du droit de la mer par l'article 296 du projet de convention sur le droit de la mer, qui figure dans la partie 15 (section II du projet de convention) relative au règlement des différends.

Avec votre permission, je lirai cet article tel qu'il figure dans le document des Nations Unies A/CONF.62/L.78, à la page 121 :

[1] Ci-dessus p. 244-246.

« Article 296

Caractère définitif et force obligatoire des décisions

1. Les décisions rendues par une cour ou un tribunal ayant compétence en vertu de la présente section sont définitives, et toutes les parties au différend doivent s'y conformer.

2. Ces décisions n'ont force obligatoire que pour les parties et dans le cas d'espèce considéré. »

Le Gouvernement tunisien considère que la force de chose jugée de l'arrêt de la Cour dans la présente affaire embrasse en tout premier lieu le dispositif de cet arrêt. De plus, étant donné que les motifs de l'arrêt constituent une partie intégrante de la réponse de la Cour aux questions posées par le compromis et sont nécessaires pour comprendre la portée et le sens précis du dispositif, le Gouvernement tunisien considère que ces motifs sont également couverts par l'autorité de la chose jugée.

La Partie tunisienne est maintenant parvenue au terme de son deuxième et dernier tour de parole. Qu'il me soit permis à ce stade final de présenter au nom de la délégation tunisienne tout entière aussi bien à vous-même, Monsieur le Président, qu'à Messieurs les membres de la Cour, l'expression déférente de nos très sincères remerciements et de notre reconnaissance pour la grande patience et la bienveillante attention avec laquelle vous avez bien voulu écouter nos interventions.

The ACTING PRESIDENT: The Court wishes it to be known that although certain questions have been addressed specifically to one Party or the other, both Parties are invited to comment on any of those questions, if they so wish. On behalf of the Court I thank the Agents, counsel and other representatives of the Government of the Republic of Tunisia for the assistance they have afforded the Court during this second round of oral arguments.

L'audience est levée à 13 heures

TWENTY-NINTH PUBLIC SITTING (19 X 81, 3 p.m.)

Present : [See sitting of 29 IX 81.]

REJOINDER OF SIR FRANCIS VALLAT

COUNSEL FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Mr. EL MAGHUR : Mr. President, Members of the Court : it is again an honour to appear before you with our delegation to begin the final phase of Libya's oral presentation. The Libyan case will be dealt with by counsel and I respectfully ask you to call Sir Francis Vallat to begin our session. Sir Francis will be followed by Professor Malintoppi.

Sir Francis VALLAT : It is indeed an honour, Mr. President and Members of the Court, to have an opportunity to address you once more in this important case.

During the course of the written and oral pleadings, there have naturally been developments in the thoughts of the two Parties. Points of agreement and points of disagreement have emerged, but it would be fruitless as this stage to try to identify all of them, and I shall try to concentrate only on the points that seem to be most important.

Now, as the Agent for Tunisia made clear, central to the whole case is the common objective of the Parties to settle the problem of delimitation as speedily as possible. In this connection, where they differ is in the extent of the role assigned to the Court and to the Parties by the provisions of the Special Agreement. On the Libyan side, we hold the view that meaningful negotiations, as contemplated in the 1969 Judgment of the Court, have never taken place.

Even on the basis of the Tunisian record of the discussions, there have been no such negotiations. Tunisia has constantly and obstinately maintained what may truly be described as a monolithic stance, even when Libya has shown willingness to compromise. Moreover, Tunisia has gone further and has greatly extended its claim beyond anything ever mentioned in the course of the diplomatic discussions, not merely long after the signature of the Special Agreement but even after the date of its ratification and notification to the Court.

May I be allowed, to remind the Tunisian delegation of what the Court said on this point in paragraph 85, subparagraph *(a)* of its 1969 Judgment in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 47). The Court said :

> "*(a)* The Parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement ;".

As the Court then pointed out, negotiations will not be meaningful if either of the Parties insists upon its own position without contemplating any modification of it. These statements apply *a fortiori* to a case such as the

present, where one of the Parties has persistently maintained its original stand and, long after the conclusion of the Special Agreement, has very substantially increased its claims.

Time is short. So, having made these preliminary observations, I shall come directly to the point. First, I intend to discuss the interpretation of the Special Agreement and then some of the Tunisian contentions about the principles and rules of international law.

THE SPECIAL AGREEMENT

During the first round of speeches it did seem that there was some approach towards a common interpretation of the Special Agreement as between the Parties. However, in his speech of 13 October (p. 280 ff., *supra*) Professor Abi-Saab seems, in a quixotic fashion, to have gone out of his way to try to widen the gap as much as possible. Therefore, regrettably, it is necessary to deal one by one with the points which he made, although I will not do so in precisely the same order.

First, I must make two observations that arise out of his sixth point. Both by implication and specifically (e.g., pp. 282, 286-287, *supra*), he has accused us of trying to restrict the jurisdiction of the Court in this case, so as to reduce the role of the Court to the point of evaporation. Mr. President, this suggestion is completely untrue. We recognize and acknowledge to the full the importance of the role of the Court, but we say that, in accordance with the provisions of the Special Agreement – which really are quite clear – the role is greater than the one assigned to the Court in the *North Sea Continental Shelf* cases but does not go so far as the Court of Arbitration was asked by the Parties to go in the case between the United Kingdom and France in 1977. There is no basis whatever for the suggestion that the Libyan view of the proper interpretation of the Special Agreement is wrong because it would nullify the role of the Court, or, because it would restrict it as compared to the role of the Court of Arbitration. There is, indeed, an apparent self-contradiction inherent in the Tunisian argument. The Tunisian case, as we know, rests heavily on the 1969 Judgment and thereby testifies to the importance of the part played by the Court in that case, where the terms of the Special Agreement did not go even as far as Article 1 of the Special Agreement in the present case, yet Tunisia now falsely argues that Libya is seeking a so-called restrictive interpretation, even though Libya accepts that the Court's role is greater than in 1969. This kind of argument cannot prevail against the clear meaning of the words of the Treaty in the context in which they appear. Libya's concern is to arrive at the correct meaning of the Agreement, neither more nor less.

We have recognized and are convinced that, in the present case, the way is open for the Court to make another great contribution to international law concerning the continental shelf. This is so because the circumstances of this case are different from those of the *North Sea Continental Shelf* cases. The coastal configurations, for example, are most unusual and possibly unique. Accordingly, the circumstances call for clarification in the law and its application. If there were any need to underline the importance of the part to be played by the Court in this case, this would be done by the current draft of Article 83 of the draft convention on the law of the sea of 1981, which, broadly speaking, contains a *renvoi* back to customary international law as being applicable for the purposes of delimitation of continental shelf areas as between States with opposite or adjacent coasts.

The other point which evokes an immediate response is the accusation, or half-accusation, that we have tried to rely on the basic principle of delimitation by agreement as if it were *jus cogens*. There is no need to remind this Court of the meaning of *jus cogens*. It will suffice in order to put the record straight to refer to what I actually said in this connection in my opening speech on 30 September (p. 49, *supra*). Having referred to the two essential principles mentioned by the Court in paragraph 46 of its 1969 Judgment, I pointed out that against the background of the two basic principles, including the principle that delimitation must be the object of agreement between the States concerned, I said this :

> "It is against the legal background of these two basic principles that the interpretation of the Special Agreement in this case should be examined. There is nothing wrong in leaving the delimitation to be settled by agreement between the Parties."

Where is the element of *jus cogens* in that reference to the principle of a delimitation by agreement ?

Of course, if the Special Agreement had provided (which it does not) for delimitation by the Court that would have settled the matter. But, as we have pointed out repeatedly, delimitation is not to be effected by the Court. It is left to the Parties and their experts to be settled by agreement. I refer to Article 2 of the Special Agreement, which hardly seems to have been taken into account by the Tunisian delegation. It will, of course, be recalled that Article 2 provides that :

> "Following the delivery of the judgment of the Court, the two Parties shall meet to apply these principles and rules in order to determine the line of delimitation of the area of the continental shelf appertaining to each of the two countries, with a view to the conclusion of a treaty in this respect."

It is stated expressly that the application of the principles and rules is to be left to the Parties.

I now come to the other points made by Professor Abi-Saab.

First, there was the discreet re-introduction of the words *avec précision*, and the suggestion that either with or without those words they were really implicit because of the words "without any difficulties" at the end of Article 1. This, although separated from his fourth point, is in reality an integral part of it. The fourth point was hinged on to the claim by Tunisia that there is not one matter but two questions submitted to the Court. Mr. President, this in itself is, of course, a sterile argument. What is important is the conclusion that Tunisia tries to attach to the claim that there are two separate questions.

It is claimed that, contrary to the clear words of Article 1, paragraph 2, the Court is invited to do everything short of the technical step of delimitation, which is to be left to experts.

Professor Abi-Saab has in reality provided his own answer to this contention. May I recall that he said at page 283, *supra* :

> "In other words, 'method of delimitation' is nothing but a convenient shorthand technical term for the longish and awkward phrase 'the practical method of the application of the principles and rules of international law to the specific situation with a view to rendering the operation of delimitation feasible'."

This, of course, is not an accurate quotation from the second paragraph, but

it is near enough. It is clearly an admission that what is important is not the shorthand used by Tunisia with a view to inviting the Court to do everything short of drawing the line, but it is rather the words actually used in the Special Agreement which Tunisia is trying to bend to its own wishes. Not only is the paragraph quite clear in using the words "the practical method for the application of those principles and rules", but these words are also virtually repeated in Article 2 which I have just quoted. If anything is clear in this case, it is that the Special Agreement does not call upon the Court to do everything short of, as it were, plotting the line on a chart.

May I make two brief comments which relate to points one, four and five of Professor Abi-Saab's presentation. First, against the background of the diplomatic practices of Tunisia and Libya, and indeed of many other countries, it is quite clear that "experts", as used in Article 2, does not mean just simply technicians. The distinction, I suggest, is between representation at the political level and representation at the expert level. This is a normal distinction which is very often drawn in international bodies. Thus, for example, Mr. Atteiga, a diplomat of rank, whose, without prejudice, offer of compromise was swept aside by Tunisia, was regarded as acting in the capacity of an "expert". Quite normally, quite naturally. Now the second point that I would make in this connection is this. It is common knowledge that the Judgment of the Court in the *North Sea Continental Shelf* cases in fact enabled the Parties to arrive at an agreement without any difficulties. Why should it be thought that in this case, the Judgment of the Court would be any less effective.

It is unnecessary now to take the time of this Honourable Court to deal with the rather weak reference to the Libyan Memorial and the role of subsequent practice in the interpretation of treaties. The argument has not been developed, but it cannot be seriously contended that the pleadings exchanged by the Parties amount to an agreement regarding the interpretation of the Special Agreement within the meaning of paragraph 3 *(b)* of Article 31 of the Vienna Convention on the Law of Treaties. This argument, I would say, however, is typical of the Tunisian reliance throughout its case on implicit or express claims of acquiescence, estoppel, preclusion and so on, which although mentioned or hinted at, are not seriously argued or supported by evidence.

I now revert to Professor Abi-Saab's second point in which he takes somewhat out of context what I was saying about "relevant circumstances", and attributes to my words a significance which they were not intended to bear. I find this slightly amusing. When I spoke of relevant circumstances on 30 September (pp. 51 ff., *supra*), as is clear from the record, I was then speaking in the context of natural prolongation and with reference to the suggested scale of relevance put forward in Annex I to the Tunisian Counter-Memorial, which incidentally, is even more confusing having regard to the explanation given by Professor Virally that it was a scientific and not a legal scale of relevance. Nevertheless, I welcome the link Professor Abi-Saab made between what I said about relevant circumstances, and equitable principles, when he said, and I use his words, that I had proceeded :

> "to the presentation of Libya's understanding of what are the relevant circumstances and their relative importance, which is exactly Libya's version of the equitable balance mentioned by the Court" (p. 280, *supra*).

I do not exactly understand what the statement is intended to mean or exactly how it relates to the words I spoke. But I am delighted to have this acknowledgment of the link between "relevant circumstances" and the concept of "equitable balance" as explained by Professor Briggs and Mr. Highet.

I now turn to Professor Abi-Saab's third point which concerned the new accepted trends in the Third Conference on the Law of the Sea. Here I do not think that there is much difference between us. It may be difficult to identify which provisions of the draft convention on the law of the sea are to be regarded as "new accepted trends" or to suggest what weight, if any, should be attached to any of these trends.

The reliance in Article 76, paragraph 1, on natural prolongation and the reference in Article 76, paragraph 3, to "prolongation of the landmass" may be regarded as reflecting customary international law as accepted in doctrine and in State practice. But, the provisions of Article 76 as a whole, as Professor Jennings pointed out, are a compromise aimed at settling the vexed question of the outer limit of the continental shelf in its juridical sense. I am afraid that I do not have in my possession the elements to judge whether these provisions should be regarded as "new accepted trends". And I regret therefore that I cannot at this moment help the Court further on this particular point.

Now, in fact, Professor Abi-Saab added a seventh point about the interpretation of Article 3 of the Special Agreement. This, he quite rightly says is an article which concerns a possible later stage which we all hope will never occur. However, once more, he attributed to us a position that has not been adopted by or on behalf of Libya. We have absolutely no thought of judgment by instalments. On the other hand, we do consider that Article 3 of the Special Agreement stands on its own feet and that its terms are, as is usual in the interpretation of treaties, to be given their ordinary meaning in the context in which they appear and in the light of the object and purpose of the Treaty. I do not think that Professor Abi-Saab's examination of Article 60 of the Statute of the Court contributes much, if anything, to the discussion. However, if the Parties do have to come back to the Court for any "explanations or clarifications", it will be by virtue of Article 3 rather than Article 60 of the Statute.

Having made these observations, I would add no more on this aspect of the case other than respectfully to refer the Court back to the analysis of the Special Agreement which I offered in the first round of speeches (pp. 48 ff., *supra*).

Subject to this, there is one other important interpretation of the Special Agreement to which Libya has alluded, but which Tunisia seems inclined to hide or ignore. It is the problem of the meaning of the term "area" or "areas" which appears repeatedly in the Special Agreement and I refer to Articles 1, 2 and 3. Judge Mosler has called attention to this important point in the question which he has addressed to the Tunisian representatives and, as far as I am aware, they have not so far answered. Could this be because any reasonable definition of the area would prove extremely awkward for the sheaf of lines which appeared in the Tunisian Memorial ? It is no use suggesting that "area of concern" may be defined differently for different purposes because, if I may say so without disrespect, Judge Mosler has made perfectly clear the purpose which he had in mind in his question. He has referred to the area of concern which is relevant for the indication of the principles, rules and methods to be applied in the future delimitation of the continental shelf appertaining to Libya and Tunisia respectively.

This is the central and essential question which is highlighted by the use of the phrase "the relevant circumstances which characterize the area" that appears in Article 1 of the Special Agreement. What was contemplated by the two Parties at the date of the signature of the Special Agreement ? To answer this question, one has to look at the claims put forward on behalf of each Party. The area in dispute at that time, that is the date of signature of the

Special Agreement, clearly lay between the most extreme Tunisian claims and the most extreme Libyan claim. There had never been any suggestion on the part of Tunisia that its claim could possibly lie to the east and south-east of that area.

The Libyan case has to the fullest possible extent been presented on an objective basis not relying in technicalities, such as the alleged acquiescence (which in Tunisian theory seems to operate only one way) and the repeated hints at preclusion or estoppel, or a dubious critical date doctrine without any explanation as to its scope or the basis of its application. It is for this reason that the representatives of Libya have not argued that the sheaf of lines forwarded by Tunisia in its Memorial is outside the area to which the Special Agreement applies. There is in this respect no comparison as Professor Jennings suggested, between the wholly new Tunisian claim on the one hand and the reasons put forward by Libya in support of a claim already made on the other.

Although Libya has not asked the Court to determine the "area of concern", it is a matter which it is impossible to avoid bearing in mind. There are unfortunately no *travaux préparatoires* of the Special Agreement to explain why the "area" was not identified, as it was for example in the United Kingdom/France Arbitration of 1977. But one thing is perfectly clear, that is that the Court has not been asked to consider the problem of delimitation as between Tunisia and Libya of the whole of the Pelagian Block or Basin, still less of areas lying beyond it. However, the question of "area" is one to which Mr. Highet will revert later.

THE QUESTION OF "THE CRITICAL DATE"

Before passing to the second part of my observations, may I interpolate some remarks on the question of the critical date.

One of the devices which Tunisia has tried to use to bolster its exaggerated and crumbling claim has been reliance on the doctrine of the critical date. As Members of the Court are well aware, this is a difficult and highly controversial doctrine. It stems, if my memory serves me right, from the use of the expression by the Arbitrator, Max Huber, in the *Island of Palmas* case (*Reports of International Arbitral Awards*, Vol. II, p. 829) and has been evolved largely through the writings of Sir Gerald Fitzmaurice in his well-known article on the "Law and Procedure of the International Court of Justice" in the *British Year Book of International Law*, 1955-1956.

I do not wish to question the application of the doctrine in an appropriate case, such as the *Island of Palmas*, when the court had to decide who was sovereign of territory on a particular date, that as a critical date. Nor do I wish to weary the Court with a detailed examination of a doctrine which does not seem to have any application in the circumstances of the present case. It would in any event be very difficult for me to formulate a reasoned argument with reference to the position taken on behalf of Tunisia when that position has not been supported by any kind of legal or factual reasoning. It seems to have taken no account of the case from which the doctrine arose or of the way in which it has been used or referred to by this Court or its predecessor.

As is well known, Sir Gerald Fitzmaurice's article was based on the proceedings before this Court in the case concerning the *Minquiers and Ecrehos* (*I.C.J. Reports 1953*, p. 47). I really do not think that at this stage and in these circumstances I can take the time of the Court to discuss the

complicated way in which this question came before it in that case. I think that it is fair to say that in the case the Court took no decision as to the application of a single cut-off date. In the circumstances of the present case, I would invite the Court to adopt rather the view taken by the tribunal, over which Lord McNair presided in the *La Pulena* case between Argentina and Chile in 1966 (Award of 24 November 1966, published by H.M. Stationery Office, London, in 1966), there, having briefly reviewed the circumstances concerning the critical date, he said, and I now refer to the two pages from the award which I think are in the folder [1] before the Members of the Court, and I hope the other side also have copies. It is not necessary at the moment to read the whole of what he said, the text is before the Court, but I would like to read simply his conclusion which was :

> "For these reasons, the Court has considered the notion of the critical date to be of little value in the present situation and has examined all the evidence submitted to it irrespective of the date to which such evidence relates." (See *ibid.*, pp. 68 and 69.)

Such an approach is in accord with the general practice of this Court in dealing with the admissibility of evidence. It is also more in the interests of the administration of justice than the application of technical rules. The better course I suggest is for the Court to receive the evidence offered by the Parties, to weigh the evidence on its merits in the light of the circumstances of the case as a whole.

To illustrate my point it is only necessary to pause for a moment to consider why Tunisia has chosen the date of signature of the Special Agreement as the critical date, and this apparently for all purposes against Libya while not shutting the door against any advantage that Tunisia might hope to gain, for example by protest made after that date. One may ask why not choose July 1968, when the issues between the Parties had crystallized and were basically as well known to them as they were at the date of signature of the Special Agreement ; or perhaps some intermediate date, such as that of the circulation of the Tunisian memorandum to the world at large in May 1976 ; or possibly some later date such as the date of ratification of the Special Agreement, or the date of the notification of the Special Agreement to the Court. One of the novel questions that might arise in this case in this connection, if one took the date of signature of the Special Agreement as the critical date, is this. Could it be used to prevent Tunisia from trying to improve its position by relying on the sheaf of lines put forward for the first time in the Tunisian Memorial, long after that date ? It is an interesting question, not one I am posing for the Court I may say.

On the other hand, if the critical date were placed at July 1968, would Tunisia thereby be prevented from relying on the legislation of 1973 concerning its baselines, which was obviously designed to improve its position in the present dispute ? I ask, and I ask this question seriously, with or without a critical date would it be equitable to allow Tunisia to improve its position in this way as against Libya ?

If the point concerning the critical date had been properly argued, I for my part would also have argued that the alleged critical date could not be used to exclude evidence concerning the eight oil wells mentioned by Mr. Highet on 9 October (p. 243, *supra*). I have examined, as no doubt Members of the Court have also, the location of those wells, three of which were in the area of the Libyan Concession No. 137 and five of which were within Libyan

[1] Filed 19 October 1981. See p. 441, *infra*.

Concession No. NC41. None of them, so far as I can see, and this is the important point, none was within the area claimed by Tunisia in accordance with its Memorandum of May 1976. How then can it be said that Libya has tried to improve its position when the Companies to which it has granted concessions have drilled those wells in an area which, so far as Libya was aware, was not claimed by Tunisia ? Libya could not possibly have anticipated that in these proceedings Tunisia would put forward a claim which so grossly exceeded the claim previously presented. Nor, in this connection, is it any use Tunisia trying to rely on the concessions it had been granted, because the southern boundaries of the later Tunisian concessions which might have had a bearing on this question were limited by what Tunisia then regarded as the equidistance boundary.

In this connection, it is necessary to say something about Tunisian Concession No. 12, to which Professor Virally drew attention. We could not represent the area of this Concession on a map of our own because we do not have any definitive information about the area covered by this Concession. If the Court, or Members of the Court, will be good enough to look at the maps put forward by Tunisia, it will be seen that it is Tunisia that, to borrow a (1) phrase, has proceeded *petit pas par petit pas*. First I refer to Figure 1.01 of the Tunisian Memorial. On this there is a small area marked 16 which I understand, I am not sure but which I understand corresponds to what is now called Concession No. 12. The little area is indeterminate, being indicated with black lines, rather obscure as to what they indicate, and with dotted lines whose significance is not very clear, and with arrows whose significance is absolutely beyond understanding. When we come to the next map in the sequence, which is a map again showing alleged concessions, contained in (96) Map No. 1.01 of the Tunisian Reply, the area has grown somewhat and it is now marked No. 12. The dotted lines have now become solid lines but one still has a gap at the bottom. But *petit pas par petit pas* let us now look at the new (123) version, handed to the Court the other day by Professor Virally (pp. 315, 334, *supra*). Now look at No. 12. It seems to have grown rather like a mushroom and we have a red coloured area, right in the centre of the map, which has extended still further southwards, indeed getting perilously close to the Libyan coast.

I don't know what the right answer is. I suspect certainly not the third map. I suspect the first of these maps is the nearest to the truth but I really don't know what that map indicates.

If it is true to say that as late as 1976 Tunisia did create an overlap of the Libyan Concession No. 137 granted in 1968 then by all means let this small area be added to the overlap map which I had the honour to present to the Court earlier in these proceedings.

PRINCIPLES AND RULES OF INTERNATIONAL LAW

This brings me to the second main branch of what I would like to say and I come to the principles and rules of international law.

One of the remarkable features of this case is that both Parties have submitted such a wealth of information to the Court on the facts. This is not true of the law. The Tunisian delegation, in the oral hearings, has made little attempt to analyse and expound the principles and rules of international law that may be applied by the Parties. It has preferred to try desperately to prop up the novel theory of bathymetry. As I have been saying, the Court is now

offered an opportunity to re-state the applicable principles and rules in the light of the circumstances which characterize the area in the present case. In this connection, may I call attention specifically to Libyan Submissions Nos. 1, 2, 3, 5 and 8 to 13 set out in the Counter-Memorial and the reasons given in that document which support the submissions. These submissions are legal in character and are in themselves indicative of the importance which Libya attaches to the role of the Court in the present case.

Now what is it that makes the present case so different from the one which confronted the Court in 1969? It is the need to examine more closely the nature of natural prolongation as the basis for the *ipso facto* and *ab initio* rights of each Party. The basic difference is that, as we say, it is necessary to look at the real substance of which the shelf is made and its connection with the land territory of the coastal State. Tunisia says that what matters is the surface and variations in the depth of water above it.

In his first intervention, Professor Jennings led us into confusion by speaking of natural prolongation as a mixed matter of fact and law. His colleagues and now he himself have withdrawn from that confusion and have acknowledged that natural prolongation is essentially a physical fact – a physical characteristic of the continental shelf in its legal sense. Of course, natural prolongation is a legal term, in the sense that it is an ingredient in the juridical meaning of the continental shelf, but, as now seems to be acknowledged, its features are essentially physical. The real problem is how does a State establish the continuity or extension of its land territory into and under the sea – to use the terms of the Judgment in the *North Sea Continental Shelf* cases – or the extension of the sea-bed and subsoil of the submerged areas beyond its territorial sea throughout the natural prolongation of its land territory – to use the language of Article 76, paragraph 1, of the draft convention on the law of the sea of 1981 (A/CONF.62/L.78). There is, in Article 76, no attempt at definition of natural prolongation, but its most important characteristic is indicated in paragraph 3 of the Article which speaks of the submerged prolongation of the landmass of the coastal State. Reading together the language used in the 1969 Judgment and its adaptation in the 1981 draft convention, two things are clear. First, that the question of natural prolongation is indeed one of physical continuity or extension of the territory of a State into and under the sea; and the second, in the light of the words used in paragraph 3, is that it is the landmass rather than the surface of the sea-bed that is of importance in this connection.

Mr. President, in my first speech on 30 September and 1 October (pp. 54-56 and 57-68, *supra*), I tried with some care to analyse the relevant principles and rules of international law in this field and then went on to discuss the question of delimitation (pp. 68 ff., *supra*). It will be recalled that I there examined the nature of the continental shelf as distinct from the question of appurtenance involved in the concept of natural prolongation, the question of the outer limit of the continental shelf and the question of delimitation. No serious attempt has been made on the other side to deal with that analysis which stands in these oral proceedings virtually untouched. Professor Jennings, if I may say so, has tried now to paper over the cracks by treating the definition of the continental shelf for the purposes of the draft convention as if it were a definition of natural prolongation. But if anything in this case is absolutely clear, it is that the meaning of the continental shelf as a legal institution and the establishment of appurtenance of particular shelf areas to the coastal State which depends on natural prolongation, are two different, though related, matters. Unfortunately, as so often happens with basic

concepts, we have little guidance as to the precise meaning of natural prolongation, but its essence is the idea of continuation or extension of the land territory of the State or, as I said, in the words of the 1981 draft convention "the submerged prolongation of the landmass of the coastal State".

Of course, one has to start from the coast – the point where the land meets the water. Of course, one has to go seaward from the coast, but the question is, the question is how is it established that a certain landmass which lies beneath the sea is the continuation, extension or promulgation of the landmass of one State rather than of another.

Put quite simply, the Libyan view is that, in a case like the present which certainly has novel features, one has to look at the reality of the situation which is the actual physical prolongation of the landmass of the coastal State. How else can this be established by examining the physical connection between the mass of the shelf and subsoil and the mass of the coastal State along the length of the relevant coast? It is necessarily, therefore, geology rather than geomorphology that provides the indicators.

It is said that the appeal to geology introduces a novel theory in continental-shelf doctrine. This is obviously not true, as is shown by a reading of the Decision of the Court of Arbitration in the United Kingdom/French case. It is the almost total reliance on bathymetry as an alleged factor in natural prolongation that is novel. It is not and never has been pertinent to the natural prolongation of the coastal State. Let us come back to the question of the 200-metre limit. The 200-metre limit (although in itself in a sense a bathymetric test) was coupled with the exploitability test, in Article 1 of the 1958 Convention and was not in itself based on the concept of the continental shelf in terms of shelf, slope and rise. It really had nothing to do with a gentle, continuous slope from the coast towards the edge of the continental margin. It was a somewhat arbitrary solution to the practical problem of fixing the outer limit of the continental shelf. As already pointed out, even that somewhat arbitrary element of bathymetry implicit in the 200-metre limit has disappeared from the definition of the continental shelf which appears in Article 76 (1) of the 1981 draft and on which Tunisia now relies so heavily. Nowhere, nowhere in the 1969 Judgment of the Court or in the 1977 Decision of the Court of Arbitration is there any hint of natural prolongation being defined in terms of a gentle, continuous slope or declivity, either towards the edge of the continental margin or at all. It is perhaps worth recalling that the key expression in Article 1 of the 1958 Convention was, in fact, "adjacent to the coast". The expression "natural prolongation" did not appear anywhere in the Convention. . . .

It is the failure to distinguish between the meaning of natural prolongation, the legal meaning of the continental shelf as such, the outer limit of the continental shelf, and the question of delimitation, which leads to such unsatisfactory conclusions and misleading theories in the presentation of the Tunisian case. I really do not know how Professor Jennings hoped to further his cause when he said on 13 October (p. 262, *supra*): "the Article 76 notion of natural prolongation contains within itself elements of continuity". Well, of course it does. There is nothing more clear in continental-shelf law and theory than that the essential content, the essential content of the concept of natural prolongation is its physical continuity, extension or prolongation. The legal position was not clarified by the apparent contradiction in what Professor Jennings said in this connection (pp. 261 f., *supra*). He criticized me for saying that the sequence of shelf, slope and rise in the context of Article 76, paragraph 1, was relevant solely to the question of the outer limit of the continental shelf

rights, where the edge of the continental shelf extended beyond 200 miles. Yet he himself said (pp. 262 f.) of the draft convention that Article 76 of the draft convention was meant to deal with two specific problems, namely "the claim of coastal States to national jurisdiction out to the edge of the continental margin, and of course the parallel development of rights in respect of the exclusive economic zone". I do not understand why he brought in the exclusive economic zone, which finds no place in Article 76; nor do I understand why, when commenting on my remarks, he failed to call attention to the fact that I was discussing the meaning of natural prolongation and not the definition of the continental shelf for the purposes of the draft convention.

We really do have to be clear in the use of our basic concepts. Happily, all is not dissent. As I have said, we have made some progress in the recognition of natural prolongation as a physical fact – the fact out of which the rights of the coastal State arise. It also seems to be acknowledged by both sides that it is necessary in this case to look at factors other than proximity. Nothing we have said implies the contrary. We also agree with Professor Virally that the present case has some most unusual characteristics although, as I am sure he would recognize, the findings of law in the present case will be of great assistance in the understanding of the law to be applied in other cases. In this connection, I have no hesitation in urging the Court to take into account the geological factors, but to reject bathymetry as giving no indication whatever of natural prolongation. I will leave further examination of the basic pertinence of geology to my learned friend, Professor Bowett, but I would myself add a few words about bathymetry.

Now first, bathymetry is concerned with the depth of water above the sea-bed and indirectly the contours of the sea-bed itself. It is not concerned directly with the important substance of the continental shelf which is the subsoil. Secondly, the use of bathymetry in the present case does not achieve the results which Tunisia would have the Court believe. If one looks at the bathymetric chart provided by Tunisia, which is Figure 1 in the Tunisian Memorial, Map
(40) No. 2, certain things are obvious. The bathymetric lines do not actually follow the configuration of the Tunisian coast out to the 200- or 300-metre isobath as alleged. Where, for example, is the reflection of the Island of Jerba? What feature of the coast common to Tunisia and Libya is reflected in the so-called *ride* de Zira? Again, if one carries the eye say from Tripoli westward, is not the slope rather northward from Libya than eastward from Tunisia? Thirdly, what happens to the theory of the gentle slope or declivity in the face of off-shore banks or shoals or, for example, features such as the Medina and Melita Banks which even on the Tunisian theory seem to offer an insuperable barrier in the way of the march from the Gulf of Gabes towards the Ionian Abyssal Plain?

It may be that the present situation is one that does not fall very clearly within the description of the continental margin as consisting of shelf, slope and rise – may be. But as we all know that does not prevent sea-bed and subsoil from being regarded as the natural prolongation of the State so as to be subject to the rights of the coastal State. And I may say that Professor Bowett will of course be examining that aspect of the matter in due course.

But the possibility of the kind of situation that I have just mentioned has been recognized virtually from the date of the Truman Proclamation. It was clearly acknowledged by this honourable Court itself in paragraph 95 of the 1969 Judgment, where it said: "The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform . . ." This is a clear recognition of the undoubted fact that in some

parts of the world there is little or virtually no continental margin in the technical sense. This may be so either because seaward of the coast the sea-bed plunges rapidly, as for example in certain parts of the Pacific coast of North America, certain parts of Latin America and even in some parts of the Mediterranean Sea. Or, on the other hand, there may be a shelf area where, as between the States concerned, there is a single continuous shelf with no slope and rise as defined, for example, in Article 76 of the draft convention. In such circumstances, it would be manifestly unjust to deprive the coastal States of their rights with respect to the sea-bed and subsoil which flow from the prolongation of the landmass of their territories into and under the sea. So far as States in the second category are concerned, this injustice was avoided by the terms of Article 1 of the 1958 Convention. So far as States in the first category are concerned, the injustice has been rectified partly by practice and partly by the acknowledgment in the draft convention on the law of the sea that they are entitled to rights over the sea-bed up to a distance of 200 nautical miles. This right is dependent in no way on shelf, slope and rise : it is dependent on natural prolongation. In this respect, Mr. President, I would submit that there is no distinction between States which have a continental margin in the defined sense and States which do not. The essential question to be determined is which areas in fact prolong, continue or extend the landmass of the coastal State.

Now before I leave this aspect of the case, may I just mention one more obscurity that there seems to be in the contentions of Professor Jennings. I am referring to the remarks made by him on 13 October (pp. 262 f., *supra*), when he placed under the umbrella of Article 76 of the draft convention on the law of the sea the outer extent of national jurisdiction both with respect to the continental shelf and the exclusive economic zone. This is the passage I quoted a few minutes ago. Now this calls for two comments. First, there seems to be implicit in the observations made a confusion between the outer or seaward extent of the continental shelf and the question of delimitation. Secondly, there has been a constant underlying assumption in the Tunisian case that Tunisia is entitled, as it were, to sweep all before it up to the full extent of at least 200 miles from its novel baselines. Of course, this cannot be right. The Mediterranean, although extensive, does not necessarily provide 200 miles – does not provide in fact – 200 miles for every coastal State. Besides, the assumption does not take account of the fact that, on the same basis, Libya would also be entitled to an extent of 200 miles from its coast. In other words, as I have tried to make so clear from the beginning, the question of extent is the real problem with which Article 76 is concerned as distinct from the problem of natural prolongation – which relates to the physical link between the shelf and the land – and also as distinct from the problem of delimitation. This is such an elementary distinction that one would hope not to have to make it at this stage of the proceedings. But the obscurity that has crept into the Tunisian oral argument has made it necessary to do so.

Now let me continue with an examination of a few further observations made by Professor Jennings on 13 October. Having discussed Article 76 of the draft convention, he passed to the question of the relationship to delimitation on the assumption, apparently, that natural prolongation is defined in his sense in Article 76 of the draft rather than in the 1969 Judgment of the Court – overlooking once more the fact that he had just stated that the problem involved in Article 76, paragraph 1, was the determination of the outer limit of the continental shelf. It is no wonder that he found the relationship between natural prolongation and delimitation difficult (pp. 263 f., *supra*). But his

characterization of the Libyan geological argument as a little coy must provoke a wry smile. Although he does not actually say so, he seems to base this remark on the assumption that all that Libya has done is to establish that both States are prolonged into one geological structure. He must have been out of Court for a good deal of time during the hearing to have missed the point that the geological case for Libya is that the evidence shows that, in fact, the area of the Pelagian Block to the north of the adjacent coasts of Tunisia and Libya is the natural prolongation of those coasts of Tunisia and Libya rather than of the so-called east-facing coast of Tunisia.

For my part, I can agree with Professor Jennings that the question does arise in this case as to what part of the shelf is to be regarded as more naturally the prolongation of the landmass of one State rather than the other – an important point. But I cannot agree with the use which he tried to make of certain analogies. To attempt to use the analogy of steps going down to bolster the novel bathymetric theory simply will not do. The direction of a level garden path from the front door of a house to the gate is in no way dependent on whether the path is level or slopes up or down. Equally, a flight of steps leading to the backyard from a basement still goes in that direction from the house, even though it goes up. The suggested analogy between the African Plate and the site of this city is too absurd to bear comment. It has nothing to do with the rifting that has occurred between Africa and Eurasia, or the creation of the continental shelf area in fact by the process of stretching northward which has occurred in the case of the Pelagian Block as in the case of other continental shelf areas.

Happily, Mr. President, I do not need to take much further time over the remainder of Professor Jennings' remarks. In connection with the interpretation of the Special Agreement, I mentioned the question of equitable principles and the balance of factors of relevant circumstances. I have nothing to add at this stage : I would only refer to what has already been said by Professor Briggs (pp. 199, 203 ff., *supra*) and Mr. Highet (pp. 225-229, *supra*).

Lest it be thought that I have bowed to Tunisian attempts to discredit the 1955 Petroleum Law and Regulation No. 1, I would only say that the futile attacks on the effects of the Law and the Regulation, including the attempt to drag in by the backdoor a possible delimitation with Egypt, have in no way shaken the Law and Regulation and Map No. 1, which speak for themselves. I will content myself, once more, with confirming and referring to the observations which I made in this connection in the first round of speeches (pp. 41 ff., *supra*).

On the other hand, I cannot refrain from commenting on the shift in position where alleged historic rights are relied upon as confirming "the palpable existence of the natural prolongation" or as "evidence of the existence of a Tunisian natural prolongation in those parts". The idea of a kind of notional natural prolongation, which was itself palpably wrong, has been abandoned and now the claimed exercise of so-called historic fishery rights is relied upon as evidence of natural prolongation. The proposition is no more acceptable in that form than it was before.

However, what is curious is that Professor Virally still wants to have it both ways. While disavowing the "constitutive" value of historic rights and specifying their "demonstrative" value, he still speaks of "un prolongement naturel des activités humaines". What an extraordinary elastic use of words this is (p. 291, *supra*)! Words, words, words. Besides, it is wrong to say that Tunisia does not claim some form of acquisition of continental shelf areas through alleged historic fishery rights and their exercise. At least it was wrong

at the commencement of these proceedings. This is precisely what Tunisia has been doing, and doing wrongly, in connection with its claim to a ZV 45° line from Ras Ajdir coupled with the 50-metre isobath.

In conclusion, let me stress, in this connection, that Tunisia has produced no evidence whatever of the immemorial exercise of fishery rights by Tunisia, either with respect to sedentary fisheries or sedentary species, in any area on the Tunisian side of the line I have just mentioned that would be affected by any delimitation that might result from giving effect to the Libyan position in these proceedings.

I would conclude by asking, where is the evidence ? It doesn't exist.

This leads naturally to the Tunisian claims to historic rights.

The Court adjourned from 16.27 p.m. to 16.45 p.m.

RÉPLIQUE DE M. MALINTOPPI

CONSEIL DU GOUVERNEMENT DE LA JAMAHIRIYA ARABE LIBYENNE

M. MALINTOPPI : Monsieur le Président, Messieurs les membres de la Cour, la Cour sait bien comment, au deuxième tour des discussions orales, la tâche des conseils est ingrate. Un effort de synthèse s'impose. Et pourtant la simplification est souvent difficile lorsque la Partie adverse essaie, par voie soit de distorsions soit de diversions, de détourner l'attention des aspects essentiels de l'affaire. Pour ma part, je voudrais, avec la permission de la Cour, concentrer ma réponse autour des thèmes fondamentaux que j'ai eu l'honneur de vous exposer il y a une dizaine de jours. Je le ferai, bien entendu, de manière à éviter les répétitions et à faire ressortir les différences qui semblent subsister dans les positions des Parties.

C'est dans cet esprit que je me permets de rappeler que notre thèse relative aux délimitations latérales des juridictions respectives de la Tunisie et de la Libye peut se résumer en cinq points : *Primo*, l'histoire de la formation de la frontière terrestre fournit des faits et permet des considérations qui constituent la toile de fond de la présente affaire. *Secundo*, c'est en vain que la Partie adverse prétend avoir adopté depuis 1904 une ligne latérale de 45° pour délimiter sa juridiction en matière de pêche à l'égard de la Libye. *Tertio*, le blocus déclaré par l'Italie lors de la guerre de 1911-1912 avec l'Empire ottoman supposait une délimitation des eaux le long du méridien de la frontière. *Quarto*, en 1914 l'Italie a suggéré une solution provisoire, *de facto*, pour régler les juridictions maritimes respectives en Tunisie et en Libye, solution qui a été appliquée sans difficulté tout au long de la présence italienne en Libye. *Quinto*, la situation n'ayant nullement changé par la suite, toute délimitation maritime reste encore à faire entre les Parties.

I

Je serai extrêmement bref en ce qui concerne la frontière terrestre. La Partie adverse a préféré nous donner des réponses très sommaires à ce sujet. Je renvoie par conséquent à mon premier exposé aussi bien qu'à celui du professeur Martel, aujourd'hui président de l'Université de Montpellier, qui a longuement séjourné en Tunisie. Son livre sur les frontières de la Tunisie (ci-dessus p. 76) est entièrement basé sur des documents d'archives et, vous l'aurez remarqué, aucune plaidoirie de la Partie adverse n'a soufflé mot de ce remarquable ouvrage scientifique.

Cela dit, je me bornerai à répondre aux trois critiques qui nous ont été adressées. Le professeur Jennings (ci-dessus p. 268), nous a opposé un rapport d'un officier de l'Intelligence Service de 1890 d'après lequel la frontière tuniso-libyenne aurait déjà été, à l'époque, à Ras Ajdir. La réponse est simple. Nous avons vu que la décision de pousser la frontière vers le Mokta a été prise par les autorités franco-tunisiennes en 1886 (ci-dessus p. 77 et suiv.). Le rapport anglais, rédigé quatre ans après, ne relatait de toute évidence que le point de vue de ces autorités.

Le professeur Jennings nous a fait également observer que les cartes de l'époque auraient été établies sur la base de la carte annexée à un livre publié

par le voyageur allemand Barth en 1849, mais que ce même auteur aurait modifié son jugement dans un livre publié à une époque postérieure et que la frontière se situerait, d'après sa nouvelle version, sur le Mokta et non plus à El-Biban (ci-dessus p. 268). J'observe à cet égard que nous avons produit deux cartes qui fixent la frontière à El-Biban mais qui portent une date antérieure à celle du premier voyage de Barth (voir I, annexe I-6 au mémoire libyen) et que ces cartes, qui n'avaient donc pas été inspirées par celle de Barth, ont été sélectionnées parmi beaucoup d'autres cartes publiées.

J'observe également que nous avons délibérément écarté le livre de Barth auquel mon estimé contradicteur a fait allusion, et voici pourquoi : Barth écrit que son groupe aurait atteint le point indiqué par lui comme Maggta en partant du Makhada. Il relate, aux pages 11 et 12 que le professeur Jennings a remises à la Cour, avoir quitté le Makhada le 15 janvier, vraisemblablement au matin avant les chaleurs. Après une déviation latérale – il était archéologue – pour visiter des ruines romaines proches du lac des Bibans, il affirme être arrivé au Maggta à deux heures de l'après-midi. Or, la distance entre Makhada et le Mokta véritable est en ligne droite d'une quarantaine de kilomètres. On voit mal comment une telle distance peut-être couverte en une demi-journée par une caravane de quinze personnes et cinq animaux. La Cour, je pense, n'aura pas de difficulté à comprendre pourquoi nous avons eu le regret de ne pas pouvoir faire confiance à l'auteur en question.

Finalement la troisième critique nous a été adressée par l'agent du Gouvernement tunisien. Il nous a fait remarquer que les anciennes limites entre la Libye et la Tunisie étaient des « confins » internes plutôt que des frontières internationales (ci-dessus p. 258). Je me bornerai à lui faire observer à mon tour que si l'on ne devait pas tenir compte des anciens confins administratifs pour déterminer des frontières internationales, l'on devrait mettre en discussion la légitimité de presque toutes les frontières latino-américaines et une bonne partie des frontières africaines.

II

Je passe maintenant aux limites maritimes. Le second point de mon exposé vise ici la question cardinale de la ligne de 45° qui d'après la Partie adverse aurait fait depuis 1904 l'objet d'une « tolérance internationale ».

Quatre considérations générales s'imposent. La Partie adverse a une certaine tendance à oublier et à faire oublier que l'angle de 45° n'a été déterminé pour la première fois que par le décret du 26 juillet 1951. Tout au long de son exposé la Partie adverse a par contre parlé de la « délimitation de 1904 » (ci-dessus p. 294), comme si en 1904 l'on avait établi une véritable frontière et cela conformément à un tracé caractérisé par une inclinaison précise. Ce n'est pas vrai. Je le répète : l'instruction du 31 décembre 1904 n'a fait qu'indiquer comme limite latérale de la surveillance d'une zone de pêche : « une ligne partant de Ras Ashdir et se dirigeant vers le nord-est jusqu'à sa rencontre des fonds de 50 mètres » (I, mémoire tunisien, annexe 77, p. 203).

Ce n'est donc que quarante-sept ans après qu'on a prétendu donner à cette ligne une inclinaison précise à 45°. L'artifice réthorique qui consiste à lier la spécification des 45° à la date de 1904 ne saurait cacher le fait qu'en 1904 personne n'avait encore pensé à un angle déterminé et qu'on devait le faire pour la première fois en 1951.

La deuxième considération générale a trait à la nature de l'instruction de 1904. Nous avons établi à cet égard qu'en tout cas l'instruction franco-

tunisienne de 1904 a la même nature et la même valeur que les instructions italiennes de 1919 ou celles de 1931 (ci-dessus p. 99). On ne nous a rien répondu. J'y reviendrai par la suite, mais il était opportun de commencer par le souligner ici.

La troisième considération générale est de loin la plus importante. Elle se rattache à une constatation que nous avions déjà faite dans le contre-mémoire (**II**, par. 102) et à laquelle la Partie adverse a jugé bon de ne pas répondre. La Partie adverse ne saurait faire oublier que, quel que soit le contenu d'une instruction de service de 1904, le décret tunisien sur la pêche maritime côtière du 15 avril 1906 n'indique aucune ligne sur la mer. L'article 2 dit en effet que, et vous en avez le texte dans le dossier que vous avez reçu aujourd'hui [1] : « Le littoral de la Régence est divisé, au point de vue de la pêche maritime côtière, en quatre arrondissements. » Et le quatrième arrondissement, celui de Sfax, est défini de la manière suivante : « Arrondissement de Sfax : de Ras-Salakta jusqu'à la frontière tripolitaine. »

Cette citation est tirée du *Code annoté de la Tunisie* de Bompard, *Supplément de 1906-1907-1908* par Zeys (Nancy, 1909), page 732 ; dans le texte de ce décret qui a été publié à l'annexe 79 du mémoire tunisien (I) des points de suspension remplacent les articles 2 et 3, dont l'article 2 que je viens de lire. Le but de l'amputation est évident. Il fallait détourner l'attention d'un point essentiel : un décret sur la pêche maritime côtière publié en 1906 ne reproduit pas l'indication de la ligne qui figurait dans une instruction dictée deux ans avant.

Et pourtant le silence du décret de 1906 est d'une importance capitale. En effet, si ainsi que la Partie adverse le prétend (ci-dessus p. 297) le protectorat avait le souci de procurer à la Tunisie la possession des bancs de Faroua qui se prologent, nous dit-on, à l'est de Ras Ajdir, pourquoi ne pas profiter du décret de 1906 pour donner une indication législative quant à la limite latérale de la zone de pêche ? Pourquoi se contenter d'une chose aussi faible qu'une instruction de service ? Pourquoi attendre jusqu'à 1951 avant d'incorporer la ligne dans un décret et lui donner un angle déterminé ? Autant de questions qui restent sans réponse.

Quatrième et dernière considération générale. Il est désormais acquis entre les Parties que l'histoire des limites latérales sur la mer commence en 1904. C'est déjà un rabais considérable que la Partie adverse nous accorde après la tentative de nous faire croire qu'une telle limite aurait dérivé d'un usage immémorial. 1904 est après tout une date assez récente et une simple instruction de service est un acte assez discutable quant à sa portée internationale ; dès lors, la Partie adverse a dû invoquer une prétendue tolérance internationale à cet égard (ci-dessus p. 295). Il y a cependant du nouveau dans les répliques orales tunisiennes. On ne parle plus, semble-t-il, du soi-disant acquiescement dont auraient fait preuve les Ottomans en ne s'élevant pas contre la ligne de l'instruction de 1904 lors de la conclusion du traité de 1910 sur la frontière terrestre. Nous avions montré combien cette affirmation était arbitraire (ci-dessus p. 82-83) et je prends volontiers acte que l'Empire ottoman a été rayé de la liste. On continue à y trouver, cependant, le Royaume-Uni et la Grèce, mais je me permets de rappeler qu'on voit mal pourquoi ces deux pays auraient dû prendre position pour ou contre des limites qui concernaient des pays tiers à un moment où la suzeraineté ottomane sur la Libye approchait irrésistiblement de sa fin.

[1] Voir ci-après, documents, p. 442, et correspondance, n° 125.

Tout autre, évidemment, est le cas de l'Italie. Et si l'on réfléchit au fait que la présence italienne en Libye aura duré de 1911 à 1942, parallèlement à la présence française en Tunisie, force est-il de considérer l'attitude des deux Etats en question comme l'un des aspects fondamentaux de l'histoire des frontières.

Or, en ce qui concerne l'Italie, l'histoire a, en 1910, un petit préambule dont on peut rapidement traiter. La Cour se souviendra peut-être de l'incident des trois sacolèves. J'en avais fait état dans ma première plaidoirie (ci-dessus p. 85). La Partie adverse conteste que cette affaire se soit soldée par un échec tunisien (ci-dessus p. 299). J'observe à mon tour que si l'on relit le passage que j'avais cité il est clair que le Gouvernement tunisien se trouva dans l'impossibilité de poursuivre sa plainte. Mais j'observe aussi – et surtout – que la Partie adverse a évité, de son côté, de rappeler que cet incident s'est produit, d'après les autorités tunisiennes elles-mêmes, « à 18 milles dans le nord à 20° est de Ras Ajdir » (IV, annexe I-27 à la réplique libyenne) et, partant, sur un alignement qui est celui de la solution provisoire qui fut adoptée *de facto* par la France et l'Italie pour la délimitation de leurs juridictions maritimes, ainsi que je l'ai déjà indiqué et que l'on verra à nouveau sous peu.

III

Cela dit, je crois pouvoir passer au troisième point de mon exposé qui aura trait à nouveau au blocus des côtes de la Libye établi par l'Italie lors de sa déclaration de guerre à l'Empire ottoman le 29 septembre 1911. C'est à cet égard que la Partie adverse nous a adressé pour la première fois l'accusation rituelle d'avoir sollicité des textes. De quoi s'agit-il ?

Nous avions vu que la déclaration de blocus indiquait par deux degrés de longitude les extrémités du blocus respectivement à l'ouest et à l'est. Nous en avions aussi déduit qu'à défaut d'indication contraire, qu'en l'espèce on n'avait pas donné, de la part de l'Italie, le prolongement raisonnable et naturel de ces deux points était le long de leurs méridiens et donc vers le nord. Ce n'était pas pour nous la seule manière de prolonger les points en question, ainsi que la Partie adverse voudrait nous le faire dire, mais c'était bien la manière normale, rationnelle, raisonnable. Mais la Partie adverse nous oppose surtout que ladite ligne « ne nuisait en rien à l'efficacité du blocus italien » (ci-dessus p. 301).

Cette dernière affirmation est cependant contredite par les faits. Ras Ajdir vous le voyez sur la carte 4247, qui est une carte publique française, Ras Ajdir est caractérisé par la présence d'une fosse qui permet le mouillage en rade des bateaux. Je vais mettre en évidence, d'une manière très peu habile bien entendu, la ligne de 3 mètres. Voilà, c'est cela la ligne de 3 mètres. La circonstance de la présence d'une rade ou abri allait être clairement relevée en 1914 ainsi que le témoigne la lettre du résident général à Tunis dont nous avons déjà fait état (IV, annexe I-26 à la réplique libyenne). Contrairement aux prétentions de la Partie adverse, le blocus italien n'aurait donc pas pu être réalisé en demeurant sous une ligne de 45° (ci-dessus p. 301). Je vais tracer, toujours de ma main très peu habile, le méridien de Ras Ajdir. Je vais tracer également la ligne de 45°. On voit bien que le blocus italien n'aurait donc pas pu être réalisé en demeurant sous une ligne de 45°, parce qu'une telle ligne aurait précisément empêché le contrôle d'un abri qui en raison de sa proximité à la frontière se prêtait d'une manière particulière à la contrebande. Il est donc impensable que lors de la guerre italo-ottomane on ait pu envisager autre chose qu'une prolongation tout au nord de la ligne de blocus.

IV

Monsieur le Président, si en ce qui concerne le blocus de 1911 on m'a reproché d'avoir sollicité les textes, j'attendais avec une certaine curiosité la réponse de la Partie adverse en ce qui concerne le quatrième point de mon argumentation. Il s'agit, la Cour s'en souviendra, de l'incident des trois bateaux grecs arraisonnés par le torpilleur italien *Orfeo* le 26 août 1913 à un point qui, d'après la Partie adverse, aurait été revendiqué par la Tunisie grâce à la fameuse instruction de 1904 (ci-dessus p. 88). Messieurs les juges, ici, la situation me semblait tout à fait claire. La note verbale française du 9 septembre 1913 revendiquait les eaux sans pourtant faire aucune référence ni à la distance de la côte ni à la longitude par rapport au point où la frontière terrestre touche la mer. Le 2 octobre suivant, le ministère des affaires étrangères d'Italie en réponse à l'ambassade française revendiqua à son tour les eaux mais suggérait une solution provisoire en attendant que les eaux soient formellement délimitées. Cette solution transitoire, *de facto*, fut mise en œuvre par l'Italie. La Cour s'en souviendra, la note précise que la juridiction italienne allait être limitée

> « à une ligne droite qui, partant d'un point de la côte servant de frontière avec la Tunisie, se prolongeait en mer normalement à la direction de la côte en ce point » (ci-dessus p. 91).

Pour sa part, la France n'a jamais donné de réponse à la note verbale italienne. Deux notes internes françaises, dont nous avons fait état, expliquent que ce silence est dû au fait que du côté franco-tunisien on considéra la proposition italienne

> « comme une solution rationnelle d'un différend qu'il importe de résoudre et pour lequel les éléments d'appréciation ne sont pas d'une précision suffisante » (ci-dessus p. 95).

Monsieur le Président, Messieurs les juges, bien entendu, c'est le silence français que nous avons invoqué sur la base du droit international pour en déduire, *primo*, que si jamais les Franco-Tunisiens avaient prétendu revendiquer en 1904 une ligne vers le nord-est, ils y avaient renoncé dix ans après en faveur d'une ligne allant approximativement vers le nord-nord-est ; et, inversement, *secundo*, que si une entente s'était formée, elle se situait autour d'une ligne de 20-22° perpendiculaire à la direction de la côte à Ras Ajdir.

Les textes nous semblent donc assez clairs. Que nous répond-on de l'autre côté de la barre ? Non sans esprit, on m'a cette fois imputé d'avoir sollicité un silence. On m'a prêté l'habileté d'avoir invité la Cour à « écouter le silence » (ci-dessus p. 302), belle image littéraire, dont je crois avoir retracé l'origine dans les vers d'un poète français du siècle de Louis le Grand :

> « J'écoute, à demi transporté,
> Le bruit des ailes du silence
> Qui volent dans l'obscurité. » (Saint-Amant.)

Ce silence est si évident, manifeste, presque palpable, que la Partie adverse a dû se livrer à un effort suprême pour essayer de le justifier. A vrai dire, le professeur Dupuy a été jusqu'à affirmer que « ce silence n'a jamais existé » (ci-dessus p. 301). Aurais-je donc fait preuve de ce talent de romancier historique qu'on a bien voulu m'attribuer ? Je m'attendais, non sans inquiétude, je l'avoue, à ce qu'on nous dise que nous nous étions trompés – *errare humanum est* ; que dans les recherches que nous avions menées dans les

archives de trois Etats un document essentiel nous avait peut-être échappé ; que la France avait après tout répondu à la note italienne en refusant carrément la solution provisoire avancée ; qu'une note française en réponse était ici, à la disposition de la Cour.

Or, il n'en a rien été.

Pour mieux dire, et puisque la Cour se souviendra du suspens créé par mon savant et habile contradicteur, la montagne a accouché d'une souris. Le 3 avril 1914, soit deux mois après la note par laquelle le résident général de Tunis avait jugé « rationnelle » la solution proposée par l'Italie, trois barques tunisiennes furent arraisonnées par un torpilleur italien. Cet incident est relaté dans tous ses détails à l'annexe I-20 à la réplique libyenne **(IV)**. Comme je connais mon dossier, c'est avec une certaine surprise que je l'ai entendu invoquer par la Partie adverse car dans ce cas-là les autorités françaises n'ont nullement songé à revendiquer les eaux où l'incident s'était produit. D'ailleurs, si l'on reporte sur une carte nautique les points géographiques relatifs à cette affaire, l'on constate que les bateaux avaient été saisis dans les eaux territoriales tripolitaines à 2 milles de la côte et sur une ligne qui, par rapport à Ras Ajdir, a un angle de 103°. Eh oui, Messieurs, vous avez bien entendu : 103°, c'est-à-dire vers le sud-est. Et puisque même les ambitions les plus exorbitantes de la Partie adverse ne sont jamais arrivées jusque-là, l'on comprend pourquoi toute la querelle entre les autorités françaises et italiennes relative à cette affaire était sur le point de savoir si les bateaux tunisiens se livraient, oui ou non, à la pêche au moment où la saisie eut lieu.

Mais ce que la Partie adverse voudrait nous faire croire, c'est que les effets du silence gardé à l'égard de la note italienne de 1913 proposant une ligne provisoire perpendiculaire à la côte auraient été écartés d'un coup parce que :

> « Par une note du 24 avril 1914, le même résident général, qui semblait ainsi avoir abandonné les idées conciliatrices, mais toutes personnelles, qu'il avait exprimées deux mois plus tôt, invitait cette fois ses supérieurs à envoyer plus souvent dans les parages de la frontière des torpilleurs français pour apporter, disait-il, aux pêcheurs indigènes de la région, ce qu'il appelait « une protection morale indispensable. » (Ci-dessus p. 302.)

Monsieur le Président, Messieurs de la Cour, je vous prie de vous pencher sur l'annexe I-20 à la réplique libyenne **(IV)**, parce qu'il y a certaines choses que mon estimé contradicteur a oublié de vous dire : il a oublié de vous dire sept choses, et je vais les énumérer très rapidement : *primo*, que le résident général avait souligné que les pêcheurs indigènes se plaignaient « de la présence fréquente des torpilleurs italiens qui leur donnent la chasse dès qu'ils dépassent la frontière » (quatrième pièce du dossier) ; *secundo*, que ces mêmes pêcheurs indigènes « s'étonnent que nous [les Français] n'ayons pas de navires pour exercer dans les mêmes parages une action de même sorte » *(ibid.)* ; *tertio*, que la preuve est ainsi faite — et c'est la raison pour laquelle nous avions présenté un tel document — que les Franco-Tunisiens n'effectuaient en réalité aucun contrôle dans les parages de la frontière ; *quarto*, que le résident général demanda que l'on exige des réparations des autorités italiennes *(ibid.)* ; *quinto*, qu'aucune réparation n'a, en fait, jamais été officiellement demandée dans cette affaire ; *sexto*, que l'ambassade française à Rome relatait par une note du 19 juin 1914 avoir transmis aux autorités italiennes la version française de l'incident (sixième pièce du dossier) ; *septimo*, que pour toute réponse le Gouvernement italien avait fait officiellement savoir le 18 juin qu'en ce qui concernait les autorités de Tripoli la justice allait suivre son cours (huitième pièce du dossier).

Tout autre commentaire devient superflu. Mais ce qui témoigne des difficultés de la Partie adverse ce n'est pas seulement d'avoir évoqué un dossier qui, comme je viens de le démontrer, sape pourtant son argument à la base : c'est plutôt d'avoir invoqué une note *interne* dans un effort désespéré pour éviter les conséquences d'un silence *international*. Ce silence est là. Et puisque l'examen de ce point a été ouvert par une image littéraire, la Cour me permettra peut-être de le terminer par une autre, empruntée cette fois à Alfred de Vigny : « Seul le silence est grand, tout le reste est faiblesse. »

En ce qui concerne la situation de l'entre-deux-guerres, j'avais montré à la Cour que les instructions pour la surveillance de la pêche maritime en Libye édictées par les autorités italiennes en 1919 et en 1931 avaient appliqué concrètement la solution avancée dans la note verbale de 1913. J'ai trouvé dans l'exposé de mon estimé contradicteur, dans ce qu'il a dit mais surtout dans ce qu'il n'a pas dit, la confirmation la plus complète de ma démonstration. La Partie adverse a prétendu faire état de la zone tampon de 8 milles marins parallèle à la limite nord-nord-est, c'est-à-dire la limite de 20° ou 22°, que (125) lesdites instructions avaient établie. On a fait aussi étalage d'un croquis, qu'on a commenté de la façon suivante :

> « Dans cette zone ... les bateaux battant pavillon étranger, s'ils étaient démunis de l'autorisation délivrée par l'administration italienne, ne devaient pas être saisis, mais éloignés, sauf dans des cas exceptionnels. » (Ci-dessus p. 303.)

Vous trouverez une reproduction du croquis présenté par mon estimé contradicteur dans le dossier qui vous a été remis aujourd'hui.

Le texte complet des instructions italiennes figure non seulement aux annexes 43 et 45 du contre-mémoire libyen (II), mais il a été aussi cité *in extenso* à la page 59 de ce même contre-mémoire. Si je n'avais pas examiné ce point dans ma plaidoirie, c'est parce que les autres arguments que j'avais utilisés me paraissaient suffire. Mais la Partie adverse a probablement raison de se plaindre : j'aurais sans doute épargné pas mal d'efforts à ses conseils si j'avais examiné cette question auparavant.

Mon argument est d'abord confirmé par ce que mon contradicteur a dit. La zone tampon n'était pas soustraite à la juridiction navale italienne. Les unités navales devaient avant tout constater si les bateaux étrangers étaient, oui ou non, munis de l'autorisation de pêche italienne. Pour ce faire, il fallait évidemment les arrêter, ce qui constitue déjà un acte de juridiction. Mais, et surtout, les bateaux démunis d'autorisation devaient être éloignés, ce qui suppose bien que les eaux de la zone tampon étaient des eaux italiennes car on n'éloigne quelqu'un que d'une zone qui vous appartient.

Ainsi, ce que mon contradicteur a dit confirme déjà mon point. Mais il a cru bon aussi d'ajouter une demi-contre-vérité. Il a dit que les bateaux étrangers pêchant sans permis dans la zone tampon : « ne devaient pas être saisis, mais éloignés, sauf dans des cas exceptionnels » (ci-dessus p. 303). Il est vrai que les bateaux en question devaient être saisis, et non pas simplement éloignés, dans certains cas, mais – et voilà la contre-vérité – la condition requise pour la saisie des bateaux ne dépendait pas du caractère exceptionnel de l'incident : les bateaux devaient être éloignés à moins

> « qu'on ne puisse démontrer d'une manière irréfutable, même par la suite, l'emplacement, à l'intérieur des confins, où ils avaient été surpris en pêche abusive » (II, contre-mémoire libyen, annexe 43).

C'est donc le souci, tout à fait approprié, d'éviter des contestations quant à la

localisation exacte des bateaux qui avait motivé l'invitation à essayer d'établir d'une manière irréfutable la position de l'incident. Mais si celui-ci s'était produit sans nul doute dans les confins, *entro confini*, les unités navales avaient l'ordre de procéder à la capture. C'était donc l'application de cet esprit de tolérance qui avait été préconisé par la note verbale de 1913, dans un passage que j'ai cité au cours de ma première intervention (ci-dessus p. 92). Mais la tolérance devait cesser si le point de l'infraction était établi d'une manière irréfutable.

Ce que mon contradicteur n'a pas jugé utile de porter à la connaissance de la Cour c'est que les autorités italiennes avaient adopté, dans le même paragraphe de ces mêmes instructions, la même précaution de prudence internationale à l'autre extrémité de la côte libyenne. En d'autres termes, on a évité de vous dire qu'il y avait en réalité *deux* zones tampon, et non pas seulement celle du côté tunisien. Si la Cour veut bien examiner le croquis qui se trouve au verso de la reproduction de celui qui a été préparé par la Partie adverse, elle pourra aisément constater la raison d'être des deux zones tampon. Et puisque mon contradicteur a cru pouvoir affirmer que :

> « Cette zone tampon naît ... de la conjonction de la fermeté tunisienne et de l'attitude conciliatrice, mais aussi quelque peu hésitante, de l'Italie » (ci-dessus p. 303),

j'aimerais bien lui demander si la zone tampon établie du côté égyptien était, elle aussi, issue de la conjoncture d'une fermeté égyptienne et d'une attitude conciliatrice, mais aussi quelque peu hésitante, de l'Italie !

C'est à propos de cette question de la zone tampon que la Partie adverse a fait une concession dont l'importance n'échappera pas à l'attention de la Cour. La Partie adverse a dû reconnaître qu'aucun incident ne s'est plus produit jusqu'au terme de la seconde guerre mondiale. De l'autre côté de la barre, on attribue cet heureux résultat à la création de la zone tampon. Mais puisque la création de la zone tampon supposait, tout au contraire, la juridiction italienne jusqu'à une ligne perpendiculaire à la côte à Ras Ajdir, c'est plutôt cette dernière ligne qui constituait, pour employer les mots de la Partie adverse elle-même, un « compromis incertain, mais fructueux ».

Notre honorable contradicteur a eu l'air de nous reprocher de subir le charme discret de la ligne perpendiculaire à la direction de la côte et le moment est peut-être venu de préciser ce qu'une telle ligne représente à nos yeux.

Je voudrais d'abord rappeler qu'il s'agit d'une direction, plutôt que d'une ligne. La perpendiculaire allait, et évidemment va toujours, vers le nord-nord-est. Selon des calculs faits par les Franco-Tunisiens en 1914, elle devait avoir un angle de 22° ; selon nos calculs l'angle devrait être plutôt de 20° (ci-dessus p. 96). D'ailleurs, la fameuse instruction française de 1904 adopta celle qu'on appela « ligne », celle vers le nord-est, qui n'était en réalité pas une ligne, parce que l'indication de l'angle de 45° est née en 1951. Pour la période antérieure à 1951, l'angle de 45°, je le répète une fois de plus, n'a existé que dans l'imagination de nos adversaires.

Cela dit, il convient d'ajouter aussitôt que le charme que cette ligne exerce sur nous est un charme essentiellement négatif. La ligne de 20°-22° est à nos yeux, et j'espère qu'elle le sera également aux yeux de la Cour, la preuve manifeste que les Franco-Tunisiens n'ont jamais obtenu l'acceptation de la ligne vers le nord-est préconisée par les instructions de 1904.

Troisièmement, on peut observer que l'histoire nous démontre que si un compromis transitoire, provisoire, *de facto*, s'est jamais produit à l'époque coloniale entre les Franco-Tunisiens d'un côté et l'Italie de l'autre, c'est autour d'une direction nord-nord-est et non pas d'une direction nord-est, autour d'une

ligne d'approximativement 20° et non pas d'une ligne d'approximativement 45°, qu'un tel compromis se serait formé.

L'évidence documentaire nous montre que la direction italienne et la direction franco-tunisienne étaient l'une et l'autre issues d'« instructions » ayant la même nature, la même valeur juridique et la même portée. La Partie adverse ne conteste pas d'ailleurs ce point capital. Et si l'on met toutes ces instructions maritimes sur le même plan, il y a lieu de considérer, dès lors, que d'après l'évidence documentaire les Franco-Tunisiens, à la différence des Italiens, ont examiné et débattu les avantages et les désavantages de la solution à 20°-22° préconisée par les Italiens. Je rappelle à la Cour que, suite à une réunion avec ses conseillers militaires et navals, le résident général à Tunis en conclut que l'on pouvait examiner la possibilité

> « d'accepter comme frontière de mer la ligne normale à la direction générale de la côte, indiquée par l'Italie, comme une solution rationnelle d'un différend qu'il importe de résoudre et pour lequel les éléments d'appréciation ne sont pas d'une précision suffisante » (**IV**, *réplique* libyenne, annexe I-26, deuxième pièce).

Ai-je besoin d'ajouter que c'est un critère, qu'on indique là, qui correspond plus ou moins à celui qui allait être consacré en 1958 à l'article 12 de la convention de Genève sur la mer territoriale ?

Mais ai-je besoin d'ajouter, finalement, ce qu'une telle direction ne constitue pas pour nous ? Précisément parce qu'il s'agit d'une direction et non pas d'une ligne ayant un angle précis, nous considérons cette donnée historique comme une solution transitoire, provisoire, qui a été appliquée *de facto* en tant que telle. Elle ne constitue pour nous que cela, et c'est au-delà qu'elle cesse d'avoir pour nous un charme quelconque.

V

J'aborde la dernière section de mon exposé avec une double mise au point qui nous semble indispensable. Nous en sommes maintenant à la période qui suit la seconde guerre mondiale. La Partie adverse voudrait faire croire que cette phase « ne concerne à vrai dire plus seulement l'Italie, qui n'est plus puissance territoriale, en Tripolitaine, mais aussi la Libye » (ci-dessus p. 303) pour ajouter aussitôt que : « Dès le décret du 26 juillet 1951, la Tunisie confirmait la ligne ZV 45°. La Libye n'opposa aucune protestation. » *(Ibid.)*

J'aurais évidemment beaucoup de choses à dire au sujet de l'attitude italienne telle qu'elle ressort des accords conclus entre l'Italie et la Tunisie après la seconde guerre mondiale en 1963, 1971 et 1976, pour montrer que cette attitude n'a ni le sens ni la portée que la Partie adverse voudrait lui attribuer. Cependant, que la Cour se rassure, nous n'entendons nullement nous éloigner du principe fondamental d'après lequel l'attitude de l'Italie cesse d'avoir une valeur quelconque dans tout problème de frontières entre la Libye et la Tunisie depuis 1942. Voilà pourquoi — je le dis au passage — nous n'attachons pas le moindre intérêt à la diversion tentée par la Partie adverse en invoquant des actes parlementaires italiens de 1948. Quant aux accords italo-tunisiens, la Partie adverse ne prétend plus voir dans ces accords une sorte d'acquiescement rétrospectif, ainsi qu'elle avait essayé de le faire au cours du premier tour des discussions orales (**IV**, p. 470). J'en prends volontiers acte et je prends donc acte que : « Sans doute ces accords constituaient-ils pour la Libye une *res inter alios acta* » (ci-dessus p. 306).

La deuxième précision qu'il m'incombe de faire a trait au décret tunisien de 1951. Celui-ci – je le répète, je l'espère, pour la dernière fois – n'a nullement « confirmé » la ligne de 45° ; il a, ce qui constituait une chose bien différente, donné à une ligne vers le nord-est un angle spécifique de 45°. Ce n'est donc pas vrai que ce décret ne contenait qu'une seule « innovation » (ci-dessus p. 304) ; il y avait aussi l'introduction de l'angle, ce que la Partie adverse voudrait faire oublier.

Si la Libye n'opposa pas de protestations, il y avait deux raisons bien précises. Tout d'abord, la Libye se trouvait alors sous l'occupation militaire des forces anglaises et ce n'est qu'à la fin de 1952 que son indépendance fut proclamée.

Ce qu'il faut ajouter aussitôt c'est que l'occupation militaire était conjointement effectuée par les forces anglaises et par les forces françaises. Bref, il est utile de rappeler, à propos de la période de l'occupation militaire, que le régime adopté par la résolution 289 B (IV) de l'Assemblée générale des Nations Unies du 21 novembre 1949 confiait l'administration du territoire libyen aux « puissances administrantes ». Or ces puissances étaient au nombre de deux, la France s'ajoutant au Royaume-Uni en raison de l'occupation militaire du Fezzan. Dans ces conditions qui sont rappelées dans l'ouvrage classique publié par le commissaire des Nations Unies en Libye à l'époque (Pelt, *Libyan Independence and the United Nations*, Londres et New Haven, 1970), l'on comprend sans la moindre difficulté pourquoi l'on ne saurait prétendre que le Royaume-Uni ait pu formuler des protestations à l'égard de la France qui était l'autre puissance coadministrante.

Après son indépendance, la Libye n'avait aucun besoin de soulever des protestations pour une raison assez simple et péremptoire qui apparaîtra au grand jour lorsqu'on aura remarqué une autre des affirmations tunisiennes qui nous semble dépourvue de fondement. On nous a dit en effet :

> « Alors que la législation tunisienne rappelait la frontière maintenue entre les deux pays, la législation libyenne ne contient en revanche aucune disposition formelle à cet égard. » (Ci-dessus p. 304.)

Cette citation contient deux affirmations que l'on ne peut pas accepter. Tout d'abord, ce n'est pas exact que la législation tunisienne, à l'exception de l'éphémère loi de 1962, ait spécifié des « frontières maritimes » latérales. La législation tunisienne antérieure ne vise que des zones de pêche. Quant à la législation tunisienne de 1973, la Cour se souviendra que les cartes relatives à son application ont finalement été exhibées ici, d'une manière à vrai dire quelque peu fuyante, au cours de la réplique orale. Cependant, un examen de la carte 102[1] du dossier remis à la Cour à l'audience du 14 octobre dernier nous a permis de faire une constatation qui ne manque peut-être pas d'intérêt. Une ligne de 45° a été ajoutée sur cette carte pour y faire apparaître une frontière latérale. Dans ces conditions, il nous est difficile de croire que la ligne dessinée dans le dossier, même à supposer qu'elle existe dans la carte originale, ait un caractère officiel quelconque.

La deuxième affirmation de la Partie adverse qu'il faut rejeter concerne l'état de la législation libyenne. Ce n'est pas vrai que celle-ci n'avait, au début, aucune disposition en matière de délimitations analogue à celles des zones de pêches tunisiennes.

Ainsi la constitution libyenne du 7 octobre 1951 (dont le texte est reproduit

[1] Voir ci-après, correspondance, n° 122.

au n° 1606 du 28 avril 1952 de *La documentation française*, série internationale CCLXVIII, et par Godechot, *Les constitutions du Proche et du Moyen-Orient* (Paris, 1957, p. 340) et peut être consulté ici à la bibliothèque du palais) contient à l'article 210 une disposition d'après laquelle :

> « Les lois, règlements, proclamations et ordonnances appliqués dans n'importe quelle partie de la Libye lors de l'entrée en vigueur de la présente Constitution demeurent exécutoires – à moins qu'ils ne contreviennent aux principes de liberté et d'égalité garantis par la Constitution – jusqu'à leur abrogation, modification ou remplacement par d'autres dispositions législatives établies conformément à la présente Constitution. »

Par conséquent, les dispositions italiennes, que la présence militaire alliée n'avait certainement pas abrogées en considération de la nature qui est propre à l'occupation selon le droit de la guerre, demeuraient pleinement en vigueur, y compris naturellement les instructions du gouverneur de la Tripolitaine de 1931 que nous avons citées à plusieurs reprises. Il s'ensuit que la situation continuait à être exactement la même que celle de l'entre-deux-guerres. Les dispositions applicables en Libye faisaient pendant à celles qui selon nos adversaires étaient appliquées en Tunisie.

Il me reste un tout dernier point qui concerne la législation libyenne en matière de pêche des éponges. La loi n° 12 de 1959 renvoie à la compétence locale pour la détermination des zones de pêche (II, contre-mémoire libyen, annexe 47). Pour la province occidentale, la matière a été réglée par deux décisions de 1960 et de 1961 dont la deuxième a remplacé la première et demeure encore en vigueur. La zone de pêche est délimitée par l'indication du méridien qui passe par Ras Ajdir *(ibid., in fine)*. Le professeur Dupuy, qu'il faut remercier pour le *fair play* avec lequel il a rectifié une erreur matérielle qui s'était glissée dans la traduction de l'original arabe de ces décisions, a bien voulu admettre que la deuxième d'entre elles prend bien Ras Ajdir comme « point de repère littoral de la zone de pêche, mais – nous dit-il – ne préjuge pas de la ZV 45° » (ci-dessus p. 305).

La Partie adverse commet ici la même erreur dans laquelle elle était tombée au sujet du blocus italien de la côte tripolitaine. Lorsqu'un point sur le littoral est indiqué par un méridien, c'est ce même méridien qui détermine l'alignement et par conséquent sa projection sur la mer. Lorsqu'il s'agit de déterminer une zone de pêche, l'indication d'un point sur le littoral au moyen d'un méridien n'aurait pas de sens si ce méridien ne devait pas être suivi sur la mer. La pêche commence où commencent les eaux. Si, par hypothèse, l'on suppose qu'une limite maritime a une inclinaison de 45°, le premier centimètre des eaux est, lui aussi, divisé par une ligne de 45°. Dans ces conditions, l'indication d'un méridien deviendrait absurde parce qu'incompatible, par définition, avec une frontière maritime caractérisée par un angle quelconque.

Et pourtant c'est un méridien que la législation libyenne a adopté, ce qui confirme que la Libye n'a jamais admis la prétention que la Tunisie avait voulu avancer en adoptant le décret de 1951.

La Cour me permettra de terminer en évoquant l'image d'une des places les plus connues : la place Navone à Rome. En son milieu, une fontaine circulaire, chef-d'œuvre du Bernin : une composition autour de quatre géants qui représentent les fleuves les plus longs du monde. Face à la fontaine, presque surplombant, l'église Sainte-Agnès, due à un autre maître, Borromini. Les deux œuvres semblent se confronter, s'opposer. Et pourtant, au fil des siècles, dans ce scénario superbe qu'est la place Navone, un équilibre parfait s'est réalisé

entre deux masses si différentes mais d'une beauté si également suprême. Mon vœu, Monsieur le Président, Messieurs de la Cour, est que grâce à vous un même équilibre puisse s'établir, dans le scénario aussi incomparable de la Méditerranée, entre les deux peuples frères dont les représentants siègent aujourd'hui dans cette salle avec la confiance qui est due à la justice internationale.

RÉPLIQUE DE M. COLLIARD

CONSEIL DU GOUVERNEMENT DE LA JAMAHIRIYA ARABE LIBYENNE

M. COLLIARD : Monsieur le Président, Messieurs les membres de la Cour, j'ai l'honneur de me présenter à nouveau devant vous pour reprendre l'étude de la question des droits historiques. Je serai certainement bref, plus que lors de ma première intervention, bien que les plaidoiries libyennes sur ce point aient été plus courtes qu'il n'a été dit.

Il nous fallait répondre puisque les conseils de la Tunisie faisaient des droits historiques une pièce maîtresse de leur thèse.

Le démontage de leurs arguments était nécessaire ainsi que la critique minutieuse d'affirmations qui s'enveloppaient de formules souvent lyriques sans pour autant être fondées sur la réalité attestée par les textes juridiques et les pièces d'archives.

J'éprouve aujourd'hui moins d'inquiétude car les arguments qui nous sont opposés sont bien réduits en nombre et le ton n'a plus les sonorités d'antan et je me demande donc si la thèse n'a pas changé.

Je disais « les droits historiques sont d'un faible secours ». Et je constate avec satisfaction que la poudre du feu d'artifice initial est aujourd'hui bien mouillée.

Initialement présenté comme un système réglant d'un seul coup et majestueusement le problème soumis à la Cour voici que la théorie des droits historiques a reculé. On nous disait naguère la puissance des titres historiques créateurs de droits souverains. L'affirmation du mémoire tunisien au paragraphe 4.12 (I) était reprise, multipliée, magnifiée dans les plaidoiries des derniers jours de l'été (IV, p. 458, 472, 475).

La fonction acquisitive était le thème majeur d'une éclatante symphonie :

> « à moins d'iniquité et de spoliation de ces droits souverains d'occupation, on ne pourra remettre en cause, de quelque manière que ce soit, l'attribution de la zone des droits historiques au plateau continental de la Tunisie. » (I, mémoire tunisien, par. 4.103.)

Aujourd'hui l'éclat des cuivres a baissé, des affirmations trop fragiles, peu fondées en droit, sont abandonnées. Le professeur Jennings en ouvrant le second tour des plaidoiries déclare :

> « Tunisia does not claim form of acquisition of continental shelf rights, through the historical fishery rights and their exercise. That would be contrary to the whole legal philosophy of the natural prolongation. » (Ci-dessus p. 278.)

Il donne ainsi le ton juste et à la place de l'affirmation glorieuse de la valeur acquisitive des textes, c'est la remarque toute simple : « Nous n'avons ... jamais prétendu que le plateau continental de la Tunisie a été acquis par elle au cours des siècles » (ci-dessus p. 291) ou encore : « Elles [les activités] ne sont pas constitutives de nos droits sur le prolongement naturel. »

Maintenant les droits historiques démontrent, illustrent « une superstructure humaine reposant sur une réalité physique » *(ibid.)* ou encore nous dit-on : « Respecter les pêcheries, c'est respecter le prolongement » (ci-dessus p. 292). On passe ainsi d'un thème à un autre.

Nous prenons acte de ces changements, je veux dire de ces abandons.

Nous constatons aussi bien d'autres reculs. Que reste-t-il de trois conventions invoquées comme la manifestation de la reconnaissance de prétendues frontières maritimes alors qu'elles ne contenaient pas un seul mot sur la question (I, mémoire tunisien, par. 4.99).

Que reste-t-il de la pseudo convention de 1869 présentée comme « un événement important sur le plan international » (IV, p. 464) et au sujet de laquelle le mémoire tunisien initial indiquait : « Il s'agit d'une reconnaissance internationale d'une importance capitale et d'une grande valeur probante. » (I, mémoire tunisien, par. 4.98, note 127.)

Que reste-t-il de ce qui ne fut qu'un très simple arrangement financier ? Pour la présente affaire, rien.

Notons ces abandons, ces reculs, ces changements, ces métamorphoses.

Mais tout n'est pas pour autant résolu, et je suis ainsi amené à traiter de deux questions, d'une part celle de la prétendue zone unique de droits historiques, d'autre part celle des variations du régime juridique dans cette prétendue zone.

I. La théorie d'une prétendue zone de droits historiques

Et tout d'abord, le premier point.

Notre ami le professeur René-Jean Dupuy nous fait grief (ci-dessus p. 292) d'avoir fait ce qu'il appelle un étrange reproche aux écritures et plaidoiries tunisiennes et il explicite le reproche : « celui d'avoir voulu dissimuler à la Cour l'existence de deux catégories successives de pêcheries sédentaires à l'intérieur de cette zone des titres historiques ».

Je regrette de n'avoir été ni écouté ni lu car il suffit de se reporter à ce qui apparaît dans le compte rendu de l'audience du 2 octobre 1981 (ci-dessus p. 103) pour voir que ma critique a porté sur la tentative de création artificielle d'une prétendue zone de droits historiques, d'une seule zone, et sur cela seulement.

C'est sur le caractère factice d'une zone unique de caractère abstrait et artificiel qu'ont porté mes observations.

La notion de zone historique — de zone historique unique — a été forgée de toutes pièces pour les besoins de la présente affaire.

J'ai dit et je répète que cette notion ne correspond pas aux réalités. Que cette méthode mêle les procédés de pêche, les espèces pêchées, les personnels de pêche, les profondeurs. Et si le pofesseur Jennings a pu dire à propos d'une construction juridique élaborée par sir Francis Vallat « one can't walk about on a notional bank » (ci-dessus p. 278), je dirai à mon tour que je ne pense pas que des pêcheurs puissent pêcher dans les limites d'une zone notionnelle, conceptuelle où joueraient des droits historiques indéterminés.

Il convient, en toute clarté, de remettre les choses au point, et c'est dire que j'avoue ne pas comprendre qu'après avoir choisi une approche on s'efforce de la nier.

L'unité de la zone n'est pas une invention des conseils de la Libye. Elle est la thèse délibérément choisie par les conseils de la Tunisie.

Cette thèse a été adoptée, cette thèse est la pièce d'un système et cette thèse étant inexacte la démonstration qu'elle sous-entend s'écroule.

Tout d'abord, cette thèse a été adoptée d'une manière permanente par les conseils de la Tunisie. Le mémoire tunisien (I), chapitre IV, qui affirme dans une section I : « L'unité de la zone couverte par les titres historiques » (p. 75). Et cette formule (p. 77) est développée aux pages suivantes dont deux

paragraphes sont consacrés, l'un à l'unité écologique *(ibid.)*, l'autre à l'unité économique (p. 85). Il s'agit bien d'une unité.

(12) Cette théorie de l'unité s'est manifestée sans cesse tout au long des plaidoiries par la présence de la figure 4.06 du mémoire tunisien.

Elle se manifeste par la conclusion n° 2 des conclusions tunisiennes, selon laquelle la délimitation ne doit en aucun point empiéter sur la zone à l'intérieur de laquelle la Tunisie possède des droits historiques bien établis :

> « La délimitation ne doit, en aucun point, empiéter sur la zone à l'intérieur de laquelle la Tunisie possède des droits historiques bien établis et qui est définie latéralement, du côté libyen, par la ligne ZV 45° et, vers le large, par l'isobathe de 50 mètres. »

Conclusion qui signifie la volonté d'exclure l'opération de délimitation d'un ensemble de 25 000 kilomètres carrés, presque la Belgique.

Cette thèse est la pièce maîtresse d'un système artificiel. Ce système artificiel qui est masqué par un autre artifice, l'existence prétendue d'un écosystème.

Deux affirmations, en effet, apparaissent ici concernant, l'une, la zone historique en tant que concept et, d'autre part, une autre affirmation, la prétendue existence d'un écosystème.

De ces deux points, avec votre permission, Monsieur le Président, j'aborderai simplement aujourd'hui le premier.

A. L'artifice ou la technique de l'amalgame

L'étude des activités humaines de pêche fait apparaître des pêcheries fixes établies tout près d'une partie des côtes tunisiennes et nous verrons demain une carte à ce sujet, et d'autre part des pêcheries d'espèces sédentaires, tout spécialement les éponges sur des fonds dits bancs tunisiens.

Ces deux types d'activités sont totalement différents. Ils se manifestent en des endroits différents, par des profondeurs différentes selon des procédés différents et des personnels différents.

Pourquoi dès lors amalgamer les deux types dans un ensemble abstrait sous le nom apparaissant pour la première fois de la zone (la zone unique) des droits historiques.

J'ai songé en voyant cela à la technique qui est utilisée parfois par des ébénistes ou des antiquaires.

A partir d'un élément partiel d'un meuble, élément ancien et vénérable, on réalise, en ajoutant des pièces plus récentes, un ensemble que la présence de l'élément ancien, si partielle soit-elle, permet de présenter comme non moderne. C'est ce à quoi tend la théorie de la zone des droits historiques.

On part des pêcheries fixes qui existent, en effet, depuis bien longtemps, sans doute avant la Tunisie elle-même, ce qui diminue d'ailleurs la valeur de la démonstration.

On amalgame à ces pêcheries liées à l'habitat territorial des pêches d'éponges qui, jusqu'à l'interdiction formulée par le décret de 1951, étaient pratiquées principalement par des non-Tunisiens et l'on construit ainsi la théorie des pêcheries dans la zone historique.

On définit la zone historique. On se réfère à la ligne de 50 mètres de profondeur.

Le raisonnement, ou plus exactement l'artifice est le suivant.

Les pêcheries fixes sont très anciennes, donc respectables. Ce respect ne doit pas se limiter à ces pêcheries fixes, il doit être reporté en matière de pêches d'éponges.

Mais il vaut mieux faire confiance au bon sens des populations laborieuses.

Les pêcheurs des Kerkennah n'opposent-ils pas ce qu'ils appellent « notre mer », les pêcheries fixes, et la zone au-delà, à « la mer profonde » qui s'étend au-delà de ces pêcheries.

C'est en pensant à ces populations dignes de respect que l'on trouve la meilleure raison de dénoncer le système artificiel de la zone unique.

La limite imaginée pour des prétendus droits historiques est fixée à 50 mètres de profondeur.

On la considère comme existant de temps immémorial bien qu'elle soit apparue inopinément en 1904, et qu'autrefois des limites bien différentes aient pu être envisagées. Peu importe que la ligne de 1904 n'ait fait l'objet d'aucune reconnaissance formelle.

Peu importe qu'elle ait été contestée, je renvoie ici aux pièces d'archives des écritures libyennes, à nos premières plaidoiries, et aussi en particulier à ce que vient de dire il y a quelques instants mon éminent collègue le professeur Malintoppi, parlant du décret de 1906, parmi les rédacteurs duquel figure le directeur des pêches et qui ne comporte même pas la ligne visée par l'instruction de service.

Ainsi est apparu le système de la zone historique conceptuelle.

L'audience est levée à 18 heures

TRENTIÈME AUDIENCE PUBLIQUE (20 X 81, 10 h)

Présents : [Voir audience du 29 IX 81.]

Professor JENNINGS : Mr. President, Members of the Court, I apologize for interrupting my friend Professor Colliard's discourse even momentarily, but a quick study of the documents [1] circulated this morning suggests that at least one is a new document ; Tunisia has no objection, but I think we ought formally to reserve our right under Article 56 (3) to comment upon a new document if need be.

The ACTING PRESIDENT : The Court takes note of the reservation. It will deal with it in the usual way.

RÉPLIQUE DE M. COLLIARD *(Suite)*

CONSEIL DU GOUVERNEMENT DE LA JAMAHIRIYA ARABE LIBYENNE

M. COLLIARD : Monsieur le Président, Messieurs les membres de la Cour, j'avais en commençant mon exposé hier indiqué qu'il comporterait deux parties. La première sur la théorie d'une prétendue zone de droits historiques ; la seconde sur les variations du régime juridique de cette prétendue zone. Nous avions abordé hier la première partie et dans cette première partie il y a deux points que j'avais indiqués comme plan que je suivrai. D'une part, la théorie de l'amalgame, et ce point a été traité, et deuxièmement l'artifice du pseudo « écosystème ». C'est à ce point que je m'étais arrêté hier. C'est de ce point que je veux partir aujourd'hui.

B. L'artifice du pseudo « écosystème »

Dessiner sur une carte une zone de droits historiques n'entraine pas nécessairement l'adhésion.

Il est donc nécessaire, pour appuyer cette construction théorique de lui donner une apparence de réalité.

C'est ce qui a été recherché, d'une part, d'une manière géographique et, d'autre part, d'une manière économique.

a) *Le plan géographique*

Au plan géographique la tentative est celle qui consiste à donner à une zone théorique et abstraite une unité apparente par l'appellation « Région du golfe de Gabès ».

Cette tentative a été menée par la présentation d'une prétendue région géographique largement définie depuis Ras Kapoudia jusqu'à Ras Ajdir.

Diverses cartes ont été présentées par les conseils de la Tunisie étendant dans

[1] See *infra*, Correspondence, No. 126.

des conditions parfois surprenantes les représentations cartographiques du golfe de Gabès.

J'ai présenté un album sur ce point, montré les représentations tant des spécialistes, comme Jean Despois, de qui quelques lignes avaient été interprétées quelque peu abusivement, ainsi que des livres ou cartes à l'usage du grand public, et démontré le caractère outrancier de certaines cartes spécialement préparées pour la Cour.

b) *Le plan économique*

Au plan économique, le système proposé est parfaitement artificiel.

Le professeur Dupuy a rappelé (IV, p. 471) que l'arrêt de 1951 rendu à propos des *Pêcheries* norvégiennes était important pour la présente affaire en raison de la place qu'il fait aux relations étroites entre le milieu marin et les populations qui le bordent.

Plus nettement encore il a souligné ce point dans sa réplique (ci-dessus p. 293).

Il a demandé à la Cour de se souvenir que depuis des temps immémoriaux – il est peut-être difficile de se souvenir depuis des temps immémoriaux :

> « c'est de ces pêcheries sédentaires que ces populations ont tiré le moyen d'une subsistance que leur refusait l'ingratitude de la région terrestre attenante (cf. mémoire tunisien, par. 4.20 à 4.45 et 4.48 à 4.68) » (I).

En évoquant l'arrêt de 1951, on songe à :

> « une considération dont la portée dépasse les données purement géographiques [rappelait-il] : celles de certains intérêts économiques propres à une région lorsque leur réalisation et leur importance se trouvent clairement attestées par un long usage ».

Mais c'est là précisément que l'on peut saisir, si j'ose dire, sur le vif, le caractère artificiel de la présentation.

Il n'existe pas, en effet, contrairement aux affirmations tunisiennes (I, mémoire tunisien, par. 4.13, al. 2), reprises dans les plaidoiries : « d'écosystème des eaux littorales tunisiennes, jusqu'à l'isobathe de 50 mètres, à partir et autour du golfe de Gabès ».

Tout d'abord, la distinction entre pêcheries fixes et pêches d'éponges doit être marquée.

1) *Les éponges*. N'oublions pas que jusqu'en 1951 la pêche des éponges est pratiquée essentiellement par des non-Tunisiens, Grecs, Maltais, Siciliens.

On ne peut voir dans l'activité de ces pêcheurs non-Tunisiens, qui sont les plus actifs, si j'ose dire, les plus « productifs », une activité liée à la région, alors qu'ils sont saisonniers et migrants.

Ce caractère international de la pêche des éponges est remarquable. Il a été mis en avant par les Tunisiens eux-mêmes comme une sorte de justification du régime de la patente.

La note de la résidence générale du 1er août 1911 au sujet de la réglementation de la pêche des éponges que l'on trouve dans l'annexe 82 au mémoire tunisien est significative à ce sujet. On lit en effet :

> « Sans cette police, dont la charge se traduit, pour la Régence, par une dépense de plus de 50 000 francs par an, les pêcheurs, livrés à eux-mêmes, auraient, en peu d'années, épuisé des bancs qui font vivre actuellement

plus de quatre mille cinq cents marins et leurs familles, arabes, grecs, et surtout italiens. »

Comparons avec l'arrêt de 1951. Là la Cour prend en considération une réalité géographique indiscutable : « Dans ces régions arides, c'est dans la pêche que les habitants de la zone côtière trouvent la base essentielle de leur subsistance. » (*C.I.J. Recueil 1951*, p. 128.)

C'est une réalité norvégienne qui a d'ailleurs été reconnue par le Royaume-Uni alors qu'il en va tout autrement dans la présente affaire.

Pour la Tunisie et s'agissant des éponges la note de 1911 remarque aussi les réalités économiques et sociales mais précise la présence et même la prépondérance des étrangers, grecs et surtout italiens. Les statistiques des ouvrages comme celui de Servonnet et Lafitte ou celui de Fages et Ponzevera relèvent ces mêmes caractéristiques (extrait [1] de ce dernier ouvrage dans le dossier remis à la Cour).

On dira qu'aujourd'hui la pêche est entièrement tunisienne. Cela est vrai mais le tonnage pêché est faible ; la FAO, pour l'ensemble de la Tunisie l'évalue à une quarantaine de tonnes métriques (d'après le tableau [2] de la FAO, reproduit dans le dossier remis à la Cour, il s'agit de 43 tonnes).

Même si actuellement ce total est entièrement tunisien, il marque le déclin de cette activité et sa signification de plus en plus mineure dans le cadre de l'économie tunisienne (voir **II**, contre-mémoire libyen, p. 64, et ci-dessus p. 104). On ne saurait raisonnablement prendre donc ce point en considération pour marquer, à l'instar des intérêts norvégiens retenus en 1951, un lien étroit avec la terre.

2) Restent alors les *pêcheries fixes*. Pour elles certainement le lien avec la terre est évident. Et c'est précisément à partir de cette particularité qu'a été monté tout le système de la zone unique.

L'extrapolation à partir des pêcheries fixes est manifeste. La carte qui se trouve devant vous, Monsieur le Président, fait apparaître en toute clarté la ligne rouge marquant la limite de la zone revendiquée par la Tunisie (telle (12) qu'elle résulte de la figure 4.06 du mémoire tunisien) et ces indications, ces points noirs marquent les pêcheries fixes et les hauts-fonds découvrants. Il apparaît, à l'évidence, combien leur superficie est faible sur l'ensemble de la zone.

Il est donc évident qu'on ne peut songer à appliquer à l'ensemble de la zone, et ceci contrairement à la thèse tunisienne, la théorie de l'arrêt des *Pêcheries* de 1951. On remarquera au passage que dans cet arrêt de 1951 l'évaluation des intérêts économiques était simple en ce sens qu'il s'agissait d'un conflit entre des intérêts de pêche et de cela seulement et que donc la délimitation avait avec la prise en considération de ces intérêts un lien direct.

Il en va tout autrement dans la présente affaire. Certes la délimitation qui sera opérée aura des conséquences économiques mais le problème posé à la Cour n'est pas *primo facie* un problème économique.

Ces remarques nécessaires ayant été faites, on peut examiner si, s'agissant de ces pêcheries fixes, on retrouve le lien avec l'économie nationale sous la forme de l'étroite dépendance de la population côtière. Quant à leurs ressources, cette dépendance peut être assez exactement mesurée par la production des pêcheries.

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[1] De Fages et Ponzevera, *Les pêches maritimes de la Tunisie*, 2e éd., 1908, p. 300. [Non reproduit.]

[2] *Annuaire statistique des pêches*, FAO, 1975, vol. 40, p. 5 et 33. [Non reproduit.]

Les indications contenues dans le film *Plateau tunisien et golfe de Gabès : les hauts-fonds découvrants* qui a été présenté le 14 octobre 1981 peuvent nous être ici utiles.

La production des pêcheries fixes des Kerkennah y est indiquée comme s'élevant à 800 tonnes métriques par an. Le tableau des prises établi par la FAO fait apparaître un total mondial de pêche de 69 millions de tonnes métriques parmi lequel la Tunisie figure pour 42 651 tonnes métriques dont 43 tonnes d'éponges.

Autrement dit, il est facile de calculer l'apport des pêcheries fixes des Kerkennah à l'ensemble des pêches tunisiennes, il est inférieur à 0,02, moins de 2 pour cent.

Notons, au passage, que le tonnage de poissons débarqué annuellement à Sfax était en 1978 de 10 700 tonnes et que pour l'ensemble du gouvernorat de Sfax il était de 14 200 (voir *Guide bleu tunisien*, p. 356).

Ces données numériques montrent à l'évidence que n'existe pas un « écosystème » comme il l'a été soutenu par la Partie tunisienne. Mais cette construction lui était nécessaire à l'appui de la théorie de la zone unique des droits historiques. Elle l'utilisera également, nous le verrons plus loin, pour tenter d'y trouver, en ce qui concerne le golfe de Gabès, une justification principale du tracé des lignes de base droites ou encore pour affirmer : « les lignes de base droites de la Tunisie rattachent aux eaux intérieures l'ensemble de la zone maritime qui couvre les pêcheries fixes ». Mais les pêcheries fixes, nous l'avons vu tout à l'heure, ne comportaient qu'une superficie très restreinte par rapport à l'ensemble.

3) Ainsi apparaît manifestement l'inexactitude de la thèse tunisienne d'une zone unique, c'est toujours la théorie de l'amalgame, la technique de l'amalgame.

A cette première faiblesse, s'en ajoute une autre concernant les variations des lignes utilisées et les variations du régime juridique d'une zone dont la limite a pu demeurer fixe. J'aborde ainsi la seconde partie de mon exposé.

II. Les variations du régime d'une prétendue zone historique

L'emploi de l'adjectif « historique » évoque normalement la stabilité. Dans la thèse tunisienne on ne rencontre pas une telle stabilité.

Des régimes juridiques successifs, voire contradictoires, sont établis sur de mêmes espaces maritimes, leur succession dans le temps étant parfois fort rapide.

Par ailleurs des lignes diverses ont été utilisées pour marquer des limites de prétentions maritimes tunisiennes. Les variations quant aux lignes sont certaines. Nous avons mentionné la ligne des profondeurs de 20 mètres, proposée en 1888 par Servonnet et Lafitte.

L'Italie refusant la ligne des 50 mètres instituée par le zèle des fonctionnaires français au service de la Régence, comme limite de surveillance de la pêche des éponges, l'Italie dis-je, a proposé une ligne de 30 mètres au début du siècle. Cette proposition a été présentée, à tort, comme une acceptation de la thèse par les conseils tunisiens (ci-dessus p. 295).

D'autres lignes ont été pratiquées. N'oublions pas la ligne Ras Mzebla, frontière tuniso-tripolitaine, qui, comme le rappelle l'article 29 de la fameuse instruction de 1904, constituait la limite des bancs d'éponges au temps du fermage et dont la direction ne peut être indiquée, puisqu'elle partait non pas de

Ras Ajdir mais d'El Biban, et elle est en tout cas bien à l'intérieur de la ligne de
(68) 2° 15' présentée dans la carte n° 10 du contre-mémoire libyen.

Les lignes ou pseudo-lignes partant de Ras Ajdir et se dirigeant vers le nord-est, formule 1904, ou ZV 45°, formule 1951, ont été étudiées par mon éminent ami le professeur Malintoppi et je ne reviendrai donc pas sur ce point.

Dans la limite de ce que les écritures et plaidoiries tunisiennes appellent la « zone des droits historiques » on constate que le régime juridique des espaces maritimes situés entre cette ligne et la mer territoriale tunisienne a varié largement.

Ces variations successives méritent d'être présentées, car elles illustrent les incertitudes juridiques caractérisant ladite zone. Je voudrais le faire rapidement.

On peut distinguer cinq phases successives.

1. La première, la plus longue : 1904-1951

Ainsi que l'indique la circulaire, ainsi que l'indique la carte dite des fonds spongifères que l'on trouve au contre-mémoire libyen (**II**, p. 184), la zone est une simple zone de surveillance pour la pêche des éponges et les pêcheurs qui sont munis d'une patente doivent respecter des obligations fiscales.

Les pêcheurs d'éponges sont ainsi autorisés à pêcher sur les bancs tunisiens et la patente remise à chaque pêcheur ne comporte aucune indication géographique. Cela souligne bien qu'il ne s'agit pas d'une limite politique. C'est sans doute la raison pour laquelle la Partie tunisienne n'avait pas fait figurer cette carte dans ses écritures avant que nous ne l'ayons fait nous-mêmes. Cette omission me semble avoir une cause ou plutôt deux.

La première est que la carte, par son intitulé même, marque qu'on ne se trouve pas en présence d'une zone spongifère, mais de fonds, c'est-à-dire de bancs géographiquement distincts, non liés les uns aux autres.

La seconde raison est que ces bancs tunisiens représentés sur la carte sont au nombre de cinq, et que parmi eux ne figure pas le banc Farouah ou Greco.

Il est important de relever qu'une carte ayant un caractère officiel parce qu'annexée à la circulaire de 1904 avant d'être reproduite dans l'ouvrage classique de De Fages et Ponzevera ne considère pas le banc Greco comme tunisien.

Cela signifie qu'au début du XX[e] siècle la situation n'était pas différente de celle des années 1885 telle que le livre de Servonnet et Lafitte la font apparaître.

Je ne dis pas que la situation de cet ouvrage et de sa page 269 par mon cher collègue et ami René-Jean Dupuy soit inexacte, certes, mais je pense qu'il aurait pu ne pas oublier la note de bas de page de la page 266 du même ouvrage et aussi continuer sa lecture jusqu'à la page 394 où les auteurs se posent une intéressante question à propos du banc Greco.

Vous trouverez ces extraits [1] pertinents, Monsieur le Président, dans le dossier que vous avez devant vous.

Il est inutile à ce stade de rappeler que la zone de surveillance n'a pas fait l'objet d'un acquiescement général, que l'Italie n'a jamais admis la ligne des 50 mètres, et pourtant le régime était très libéral. Toute personne payant la patente pouvait pratiquer la pêche, les droits exigés variant évidemment selon les procédés. Or, malgré ces possibilités, malgré le fait que les pêcheurs italiens profitaient largement de ce régime, l'Italie ne l'a pas accepté.

[1] Servonnet et Lafitte, *Le golfe de Gabès en 1888*, p. 266-269 et 394-395. [Non reproduits.]

Le professeur Dupuy dans sa dernière intervention a tenté de justifier la ligne des 50 mètres en y voyant une protection tunisienne contre des pêcheurs étrangers utilisant des techniques de pêche nouvelles et destructrices et il relevait aussi la nécessité de cette circulaire de 1904 pour l'application d'une nouvelle réglementation par décret. L'explication est intéressante. J'en retiendrai l'idée qu'il s'agit simplement de dispositions d'ordre pratique. Mais évidemment on remarquera que la circulaire est de 1904, alors que le décret est du 17 juillet 1906. Donc que la circulaire n'est pas intervenue pour l'application du décret. D'ailleurs, et outre la remarque chronologique, il n'y a pas de lien entre les deux textes.

Quant aux techniques étrangères contre lesquelles il aurait fallu se défendre, eh bien, on remarquera qu'elles sont bien antérieures, 1866 pour le scaphandre, 1875 pour la gangave, deux procédés introduits d'ailleurs par les Grecs, comme l'ont indiqué les spécialistes Marchis (p. 53) et Despois (p. 462). Ce régime était totalement distinct d'un système comportant des droits souverains, comme l'indique encore la note de la résidence générale du 1er août 1911 (I, mémoire tunisien, annexe 82) citée plus haut, relevant : « Ce droit d'usage, tout différent des droits qui s'appliquent à la mer territoriale, ne porte aucune atteinte au principe de la liberté des mers et aux droits de la navigation. »

De ce premier régime, on passe au second, le décret du 26 juillet 1951.

2. *La zone de pêche réservée*

Ce texte, comme le remarque, à très juste titre, le mémoire tunisien (I) en son paragraphe 4.81 est différent. Il institue, à la place d'une zone de surveillance, une zone de pêche réservée. Son article 3 délimite la zone de pêche réservée.

Cette formule de la zone de pêche réservée qui donc reconnaît le régime de la haute mer de la zone et qui s'appliquait tant à la colonne d'eau qu'au sol de la mer puisque le décret concernait aussi la pêche des éponges, ce système de 1951 a duré une dizaine d'années.

Et nous abordons alors la troisième phase.

3. *La mer territoriale*

Changement total. Il est marqué par la loi 62.35 du 16 octobre 1962, texte particulièrement novateur.

Il emploie la notion de mer territoriale et l'utilise pour des espaces maritimes qui, dans le système de 1904, constituaient une zone de surveillance et, dans le système de 1951, une zone de pêche réservée, formules qui, ni l'une et ni l'autre, ne détruisent pas la notion de haute mer.

C'est un texte fondamental. On le trouve dans les écritures libyennes (I, mémoire libyen, annexe I-15). Mais je voudrais ici rappeler une nouvelle omission, l'omission de ce texte dans les écritures tunisiennes. Il n'est pas reproduit, dans le mémoire tunisien il n'est pas cité.

Je voudrais simplement déplorer cette omission. Elle s'explique car la loi de 1962 était allée trop loin. J'ai évoqué, dans ma première intervention, les réactions italiennes, et la conclusion de l'accord de pêche italo-tunisien du 1er février 1963.

Ce texte reprend, pour les mêmes espaces maritimes, ce qu'appelle mer territoriale la loi de 1962, ce texte dis-je, reprend la formule d'une simple zone réservée de pêche.

Et c'est cette formule d'une simple zone réservée de pêche qui va apparaître

ou réapparaître dans le droit interne tunisien avec la loi n° 63-49 du 30 décembre 1963.

4. La zone contiguë à la mer territoriale

La solution de l'accord italo-tunisien est adoptée par le droit interne tunisien avec la loi n° 63-49 du 30 décembre 1963 (I, mémoire tunisien, annexe 85) qui abroge la loi de 1962 et modifie à nouveau l'article 3 du décret de 1951.

On en revient à la zone de pêche en employant une formule légèrement différente de celle du décret de 1951, zone contiguë à la mer territoriale.

Le nouveau texte devait demeurer en vigueur une dizaine d'années, avant un nouveau changement total qui se marque en 1973, et j'aborde ainsi la cinquième métamorphose.

5. L'extension territoriale

Deux textes internes de 1973, une loi n° 73-49 du 2 août, un décret 73-527 du 3 novembre. Ces textes modifient d'une manière totale le régime des eaux littorales tunisiennes.

Le mémoire tunisien (I) en son paragraphe 4.82 affirme :

> « La loi n° 73-49 du 2 août 1973 portant délimitation des eaux territoriales a repris purement et simplement l'article 3 du décret du 26 juillet 1951 modifié par la loi du 30 décembre 1963. »

Cette formule minimise délibérément la portée du texte et il n'est pas exact de dire que la loi de 1973 (mémoire tunisien, annexe 86) reprend purement et simplement les dispositions de loi de 1963, car la loi nouvelle ne conserve du passé que l'article 3 modifié et pour des raisons de pêche. Pour le reste, la loi du 2 août 1973 constitue une transformation par rapport au passé, une extension, ou plus exactement une rupture.

Le texte du 2 août 1973 est en effet à l'évidence un texte de circonstance. Il est adopté au cours de l'été 1973 après que se soient déroulés au début de l'année, et pendant plusieurs mois, les travaux des comissions mixtes tuniso-libyennes. Son dessein évident apparaît dans l'article 4 qui proclame la souveraineté tunisienne sur le lit et le sous-sol de la mer territoriale. Cette souveraineté est évidemment inhérente à la notion de mer territoriale, mais sa proclamation, la proclamation de celle-ci, marque précisément l'intention du gouvernement.

Cette volonté se retrouve dans la définition de la mer territoriale, beaucoup plus étendue que dans les textes précédents.

Elle se manifeste surtout par des prises de position particulièrement nettes concernant les lignes de base. Il est fait mention des pêcheries fixes, à la différence de tous les textes précédents.

Enfin, et pour la première fois, le caractère d'eaux intérieures d'une partie du golfe de Gabès est proclamé.

Le décret du 3 novembre consacre cette extension (I, mémoire libyen, annexe I-17).

Les lignes de base utilisées comportent sur les onze tracés mentionnés deux lignes de fermeture de golfe, une ligne de base droite joignant la pointe de Sidi Garus à Ras Marmor, et un polygone complexe très vaste constitué par les lignes de base droites enveloppant les pêcheries fixes de Chebba et des îles Kerkennah, et définies par Ras Kapoudia et onze balises.

On remarquera que le décret du 3 novembre 1973 n'est même pas

mentionné dans le mémoire tunisien, que son texte n'est pas reproduit dans les écritures tunisiennes. Cela n'est certainement pas fortuit car ce texte n'est pas conforme aux règles du droit international.

Mais, avant d'aborder ce point, je voudrais formuler une observation au sujet de la carte présentée devant vous, Monsieur le Président, assez théâtralement, le 14 octobre (ci-dessus p. 293).

En effet, selon l'article 2 du décret de 1973 :

> « Le ministre des travaux publics et de l'habitat est chargé d'établir les cartes marines indiquant les nouvelles lignes de base à partir desquelles est mesurée la largeur de la mer territoriale tunisienne et d'assurer à ces cartes la publicité suffisante. »

Cette disposition du texte tunisien semble correspondre à l'exigence de la convention de Genève sur la mer territoriale et la zone contiguë dont l'article 4, paragraphe 6, stipule : « L'Etat riverain doit indiquer clairement les lignes de base sur des cartes marines en assurant à celles-ci une publicité suffisante. »

A la vérité, la carte présentée par le professeur Dupuy, comme la carte officielle visée par l'article 2 du décret de 1973, ne correspond pas exactement aux exigences de ce texte.

On notera tout d'abord qu'elle émane du ministère de la défense et non du ministre des travaux publics et de l'habitat, article 2 du décret de 1973, mais ceci est un détail.

Le point important est que cette carte ne correspond pas à la carte prévue par le décret qui devrait avoir pour seul but de présenter les lignes de base déterminant la mer territoriale. Or la carte produite indique bien d'autres choses, comme par exemple une zone de pêche réservée et des prétendues frontières maritimes latérales. Ces additions ne sont pas admissibles dans la mesure où elles ne peuvent être regardées comme trouvant une justification dans la loi de 1973 et son décret d'application qui, bien évidemment, ne peuvent pas définir une frontière latérale entre la Libye et la Tunisie.

On doit déplorer une telle confusion car figure sur ladite carte une ligne délimitant une zone de pêche réservée dans le cadre d'un accord de pêche italo-tunisien aujourd'hui caduc et totalement étrangère à la mer territoriale.

On remarquera enfin que la carte porte la date de 1976 mais que la partie tunisienne l'a présentée pour la première fois le 13 octobre 1981, alors que, s'il est vrai qu'il s'agit d'une carte de 1976, elle aurait dû être disponible depuis cinq ans et, au moins, mise dès le début de la présente affaire dans les écritures tunisiennes.

Ainsi doivent être formulées les plus expresses réserves.

Mais, ces remarques préliminaires étant faites, je voudrais revenir aux problèmes des rapports du décret du 3 novembre 1973 avec le droit international et je voudrais le faire à l'égard de deux questions : premièrement, le problème des lignes de base droites ; deuxièmement, le problème de la justification de certaines lignes tentées par le professeur Dupuy utilisant à cet effet l'existence de pêcheries fixes.

Et d'abord, premier point, s'agissant des lignes de base droites, on doit rappeler ou avoir en mémoire les dispositions de l'article 4, paragraphe 3, de la convention de Genève sur la mer territoriale :

> « Les lignes de base ne sont pas tirées vers ou à partir des éminences découvertes à marée basse à moins que des phares ou des installations similaires se trouvant en permanence au-dessus du niveau de la mer n'aient été construits sur ces éminences. »

Et le projet de convention sur le droit de la mer comporte dans son article 7, paragraphe 4, des dispositions analogues :

> « Les lignes de base droites ne doivent pas être tirées vers ou depuis des hauts-fonds découvrants, à moins que des phares ou des installations similaires émergées en permanence n'y aient été construits ou que le tracé de telles lignes de base droites n'ait fait l'objet d'une reconnaissance internationale générale. »

Ces conditions ne sont pas satisfaites par les lignes de base tunisiennes.

L'examen géographique des onze balises mentionnées au paragraphe 6 de l'article 1 du décret de novembre 1973 conduit à des remarques. C'est au sujet du diagramme qui figure sous le n° 8 dans le dossier qui vous a été remis. C'est à son sujet que des réserves ont été formulées il y a quelques instants par M. Jennings. Je voudrais simplement rappeler que la lettre [1] de l'agent de la Jamahiriya arabe libyenne au Greffier de la Cour en date du 19 octobre 1981 indique que cette pièce n° 8 exprime sous forme de diagrammes des informations numériques contenues dans les paragraphes 131 à 135 du mémoire libyen (I).

Sur les balises, nous avons la remarque suivante : certaines de ces balises figurent sur les cartes marines françaises, d'autres non. Aucune des balises, c'est-à-dire b, c, d, e, g, i, j, n'est implantée sur des fonds découvrant aux plus basses mers. Leur base est donc recouverte d'eau à tout moment : de 1 mètre à 1,30 mètre pour Maruka ; 1,2 à 1,30 mètre pour Barani ; 1,6 à 2 mètres pour Mzebia ; 20 centimètres à 1 mètre pour Sakib Hamida ; d'une profondeur non précisée pour Bou Zrara ; d'environ 1 mètre pour Oued Mimun ; d'environ 1 mètre pour Oued Saadun.

Aux lieux indiqués pour les autres bouées non portées sur les cartes la profondeur est également en dessous des plus basses mers.

Ainsi, aucun des points de jalonnement ne fait partie des lieux des bancs Kerkennah indiqués sur les cartes par des cotes soulignées comme émergeant aux plus basses mers.

Selon les dispositions de la convention de Genève, pour que les balises puissent être utilisées, il faudrait qu'elles fussent situées sur des lieux découvrant à marée basse ; or ce n'est pas le cas. La Tunisie n'est donc pas fondée à tracer par elles ses lignes de base, puisqu'elles sont en dehors des découvrants.

Dans ces conditions, le tracé des lignes de base droites ne paraît pas particulièrement valable du point de vue international et, dans ces conditions, on ne saurait s'étonner de ce que le mémoire tunisien ne fasse aucune allusion au décret du 3 novembre 1973.

Deuxièmement, sur un autre point que celui des lignes de base droites dont nous avons marqué ici le tracé polygonal, il existe une justification particulière invoquée par le professeur René-Jean Dupuy, observation à laquelle j'ai fait allusion plus haut et que je voudrais reprendre ici.

Il veut retrouver dans la présente affaire des analogies très étroites avec l'affaire des *Pêcheries* norvégiennes et l'arrêt de 1951. Il voit dans les pêcheries fixes « la justification principale du tracé des lignes de base droites » (ci-dessus p. 292) et partant de cette remarque il affirme : « Les lignes de base droites de la Tunisie rattachent aux eaux intérieures l'ensemble de la zone maritime qui couvre les pêcheries fixes. » (Ci-dessus p. 293.)

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[1] Voir ci-après, correspondance, n° 126.

L'*ensemble de la zone maritime*, mais c'est précisément une telle entreprise qui laisse rêveur.

Les pêcheries fixes ne peuvent se situer que sur des fonds inférieurs à 3 mètres, disons entre 2 et 3 mètres.

Au point de vue géographique, on peut les localiser essentiellement à l'est des Kerkennah et autour de Sfax.

Précisément le décret du 5 février 1931 accordant aux usagers de ces pêcheries un droit d'occupation temporaire du domaine public maritime concerne les Kerkennah et aussi une partie de la côte située de part et d'autre de Sfax au nord vers la Chebba et au sud vers la Skhira.

Ces pêcheries fixes sont un fait. Elles sont à l'intérieur d'une ligne de 3 mètres. Cette ligne est si proche du rivage qu'il n'a pas été possible de la représenter sur une carte et c'est la raison pour laquelle nous avons présenté une ligne de 10 mètres qui est évidemment plus éloignée de la côte, simplement pour faciliter la démonstration.

Mais j'avoue ne pas comprendre comment l'existence des pêcheries fixes, qui sont un fait, justifie le tracé d'une ligne de base droite ayant pour but de fermer juridiquement le golfe de Gabès pour la première fois dans l'histoire. Bien sûr le but poursuivi est simple et le conseil de la Tunisie, le 13 octobre, ne le cache pas : « Les lignes de base droite de la Tunisie rattachent aux eaux intérieures l'ensemble de la zone maritime qui couvre les pêcheries fixes. »

Ensemble de la zone maritime, la technique de la globalisation apparaît ici en toute lumière. Qu'importe si la ligne utilisée a 46 milles de long, qu'importe si elle traverse des fonds de 40 à 50 mètres alors que les pêcheries fixes sont installées par des fonds de 2 à 3 mètres, qu'importe si elles se trouvent situées sur la côte, à une distance de la ligne de l'ordre de 50 milles. Peut-on penser raisonnablement que sont satisfaites, dans cette situation, les conditions posées par la Cour dans son arrêt du 18 décembre 1951 à propos du choix du tracé des lignes de base : « savoir si certaines étendues de mer situées en deçà de ces lignes sont suffisamment liées au domaine terrestre pour être soumises au régime des eaux intérieures » (*C.I.J. Recueil 1951*, p. 133).

On retrouve la technique de l'amalgame. On est indifférent à la réalité physique ou humaine. Pour masquer le caractère irrégulier d'une tentative d'établissement de lignes de base qu'on laisse dans le flou en ne fournissant pas le texte du décret qui les établit, on utilise une théorie à partir des pêcheries elles-mêmes.

Il est temps de conclure, et ma dernière remarque me conduit tout naturellement à la conclusion. Elle est très simple.

C'est sur des faits et seulement des faits que peuvent se construire des droits historiques, sur des faits avec leurs caractères spécifiques, leurs réalités géographiques physiques.

Mais des théories, des analogies, des affirmations non démontrées ne peuvent fonder objectivement des droits imprécis.

La thèse libyenne sur ce point repose sur les faits et sur leur exacte et objective analyse.

Je rejoins ici, du point de vue de la méthode, mes collègues qui ont parlé avant moi. Je suis certain de me trouver également en plein accord, du point de vue de la méthode et de l'objectivité scientifique, avec mon éminent collègue et ami, le professeur Bowett.

REJOINDER OF PROFESSOR BOWETT

COUNSEL FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Professor BOWETT : May it please the Court : I return to the science and would begin by saying that both Parties are in agreement that with respect to the scientific evidence we are concerned with physical facts. The Parties are, I believe, equally agreed that our enquiry into these physical facts is aimed essentially at answering the question : "In which direction is the landmass prolonged into and under the sea ? Is the natural prolongation to the east, or to the north ?"

And there lies, with remarkable simplicity, the essential question to which this whole enquiry is directed.

Professor Virally is entirely right in identifying the essential point of disagreement between the Parties as lying in their differing views over the direction of the natural prolongation.

The Tunisian thesis has an attraction in its appeal to the assumptions lawyers commonly share about the shelf. In simple terms, it is that there is a progression from shelf, to slope, and then to rise. These are the components of the continental margin, as evidenced by the text of Article 76 of the draft convention. Therefore, the thesis goes, this same progression will give us the direction of the natural prolongation. And this, in turn, will provide the foundation for a method of delimitation.

This has been a persistent theme in the Tunisian oral arguments, repeated by Professors Jennings and Virally.

Now one answer to this whole thesis is that Article 76 is concerned to define the outer limit of the continental margin, and, as paragraph 10 of the article makes clear, it is not concerned with the separate question of delimitation of boundaries between opposite or adjacent States. That is a matter governed by the entirely separate provision of Article 83. And to avoid the clear intent of paragraph 10 by saying, as Professor Jennings did, that "without prejudice to" does not mean "without relevance to", is to make a play with words, ignoring the fact that delimitation is governed by a quite separate article.

But the real answer to the Tunisian argument is this. The sequence shelf, slope and rise cannot provide the clue to the direction, or meaning, of natural prolongation for the very obvious reason that it lacks the most basic element of all, namely, the *landmass*. If the concept of natural prolongation is that it is a prolongation of the landmass, into and under the sea, you obviously cannot define the concept by a sequence which entirely omits the landmass. Now the reason why Tunisia would like to omit the landmass is tolerably clear. Tunisia fully realizes that the scientific evidence simply will not support the thesis that this particular shelf is the extension, eastwards, of the Tunisian landmass to the west. And so, obviously, the best thing to do is to use a definition of natural prolongation which omits this rather awkward element of the landmass.

The Libyan approach is, I would submit, the sounder. We say you must start with the landmass. And it is the sequence landmass, shelf, slope and rise which will then provide the evidence of the direction of the natural prolongation.

There then remains the question, what sort of evidence will properly identify that sequence ? It is patently clear that it is at this point again that the Parties diverge.

The Libyan thesis, which I attempted to explain to the Court some ten days ago, is put in rather different terms to the Tunisian thesis. We say that the shelf is the prolongation of that landmass from which it has been pulled – and stretched – during rifting ; and that the direction of the pull, and consequently the identification of the landmass of which the shelf was, and still is, a part can be ascertained. It can be ascertained either by the process of backstripping – for that tells us in which direction the coast was pulled out of the continental landmass. Or, by the more traditional geological methods of identifying the locations of the parallel zones of landmass, fall-line, hingeline, coast and edge of margin : and of tracing the direction of rifting on the basis that it is, necessarily, at right angles to those parallel zones.

Professor Virally made the perfectly proper point that the Libyan thesis will not work for areas like the Arabian Gulf, or the area of the North Sea which concerned this Court in 1969. That is correct. It is equally correct, of course, for the Tunisian thesis, for the thesis of a sequence of shelf, slope and rise, giving the direction to the natural prolongation, equally would not apply there. For you do not find slope or rise in either of those situations. But all this means, is that both the Libyan and the Tunisian theses are only valid for situations where one is delimiting an area proximate to the edge of the margin, between adjacent or opposite States. Certainly, where you have uniform, continuous shelf, far removed from the edge of the margin, neither thesis helps. And this in part explains why, in 1977, in relation to the continuous shelf in the English Channel, the Court of Arbitration turned to geography rather than to geology for guidance : because the geology was "neutral", as it were. But where, as in this case, geology offers very positive answers, there is every reason to apply it.

It is clear that counsel for Tunisia have not fully understood the Libyan thesis, and that may well be my fault. It is obvious, however, that certain points ought to be clarified for the benefit of the Court, and I will begin by looking at matters relating to geology and geomorphology.

First, we are *not* dealing with a theory based upon the development of the shelf off the North Atlantic coast of North America, and peculiar to that region. The theory I have described to you is a tested, generally accepted scientific explanation of how continental margins develop, and it is a theory common to almost all continental margins. Certainly the Mediterranean is a complex area, more so than the North Atlantic. But the description of the evolution I have given you, I am assured is equally valid for the Mediterranean. And you will find this same sequence of landmass, fall-line, hingeline, coastline and edge of the margin elsewhere in the Mediterranean.

In other areas of the Mediterranean, the Golfe du Lion and the Egyptian coast, for example, you have unmistakably this same classic pattern. To make this point, I have had placed on the easel behind me an enlarged version of the physical diagram of the Mediterranean, prepared by Columbia University's Lamont-Doherty Geological Observatory in 1970, the figure which has appeared in the pleadings of both Parties (Fig. 1A, Annex II of the Libyan Memorial, I). The Golfe du Lion is here on this figure – it can be found in the Judges' folder of scientific maps. And what you find in this area is exactly the classic pattern I have described to you. You will find the fall-line and the hingeline and the coast and the shelf coming down to the slope and down to the deep sea-bottom. So the thesis, the sequence, I have given you is true of that area and that sequence gives us a very clear direction, this way, of natural prolongation. You can apply exactly the same thesis, exactly the same results, to yet another area. Let us go to Egypt. Here we have, off the north coast of

Egypt, a very similar feature, and the Court has a study of this particular area in the Columbia Study, the Libyan Reply (IV), Technical Annex II-6. Now Figure 13 of that Columbia Study shows a cross-section of the Egyptian landmass and the margin based on drill holes and seismic data. And exactly the same sequence is shown of fall-line, hingeline, coast, quite a narrow shelf – and then moving down into the deep sea-bed. So there are two examples elsewhere in the Mediterranean which show that, however complex the Mediterranean may be, the classic pattern I have described to you with reference to the Pelagian Block can be found elsewhere and cannot be shrugged off as if it were something unique to the North Atlantic.

My second point is that the Libyan thesis has not been conjured up for the first time in the Libyan Reply, as Professor Virally suggests. I commend to him a careful reading of the Libyan Counter-Memorial (II), paragraphs 200-202, 242-244, 263-274, and before that in the Libyan Memorial (I), paragraphs 66-68 and Annex II (that was the Scientific Study attached to that Memorial).

Third, and most important, the Libyan thesis is *not*, as Professor Jennings suggests, an alternative analysis to the traditional progression from shelf, to slope, to rise. Nor is it, in Professor Virally's terms, a novel, scientific definition which Libya wishes to substitute for Article 76 of the draft convention. It is simply a scientific and accurate method for determining in which direction the progression from landmass, to shelf, to rise and to the edge of the continental margin can be found. In other words, plate theory is not at variance with the Court's notion of natural prolongation. On the contrary, it enriches the notion of natural prolongation and provides the evidence for its application.

Thus (and I cannot emphasize too strongly this point), there is no contradiction between the Tunisian idea of a progression from shelf, to slope, to rise, and the Libyan argument that the direction of that progression can be determined both by traditional geological knowledge – I refer, of course, to these parallel zones – and by the newer techniques of "backstripping" based upon well-proven theories of plate tectonics, a technique I described to you in some detail during my first statement. We are both dealing with one and the same progression. The difference is that Libya has related that progression to the landmass, and shown by scientific evidence the northerly direction of that progression; whereas Tunisia has simply asserted that it is a progression eastwards of shelf, to slope, to rise, but without offering any real proof; and Tunisia has omitted from the sequence the essential basis from which it all starts, namely the landmass.

Now that is the crux of the matter. It is so important that I do not expect the Court to accept my assertion simply as an assertion. And I propose, with the Court's indulgence, to go over the proof available to support the Libyan thesis and to demonstrate, by way of contrast, the quite extraordinary absence of proof for the Tunisian assertion. I shall take the Tunisian assertion first. Professor Virally urged us to keep to the facts – well, so be it. I will try my best to indicate which matters are based on fact, and which are pure theory.

THE TUNISIAN ASSERTION

Let me turn then to the Tunisian assertion. If there really is, as Tunisia asserts, a progression or prolongation eastwards, we should find the necessary components of that progression in the following sequence.

First, the continental landmass should be found to the west of the Gulf of Gabes. We would expect to find, in this area, the stable African landmass from

which, during rifting, this eastwardly extending shelf was pulled or extracted. We know, as a fact, that this is not so. The stable African landmass we know as a fact lies to the south, to the south of the Permian Hingeline and its continuation, the south-Atlasic fault. That is the feature about which Professor Laffitte spoke. And we know that this area is recently-emerged shelf. That is a fact which is recognized by Professor Laffitte (I refer to **IV**, p. 538) and by Dr. Stanley (**IV**, p. 524). So that is the first fact which does not fit with the Tunisian thesis.

Second, we should expect to find a fall-line and a hinge-zone, running north-south and facing towards the east. Do we find any such fall-line or hinge-zone ? Of course not. Certainly we find the north-south axis, along here, but that is not a hingeline. No one has dared to offer that feature – the north-south axis – as a hingeline, because the necessary tectonic patterns to either side – that is to say, the absence of faulting to the west in the stable area, and the presence of parallel faulting to the east in the unstable and subsiding area – simply does not exist. So that is number 2, fact number 2, that does not fit.

Third, we should expect to find the coast broadly at right angles to the direction of the prolongation, of the rifting. And that we do. That is one fact which fits, although even here I must add a caveat, and that is, that this Tunisian coast is not contemporaneous with the creation of the continental margin. It became a coast long, long after the margin had already been formed and is the result of the violent tectonic events – to which Professor Fabricius testified – which threw up this Tunisian landmass and formed these very pronounced Atlasic trends and the present Tunisian coastline.

Fourthly, we should expect to find on the shelf, as we move eastwards, the characteristic features of a shelf sloping away to the east. What, in fact, do we find ?

We find that the thinning of the crust, which should be there as you move eastwards, does not exist. The Court will remember the analysis of the data from the three wells, done by Columbia University and not challenged by Tunisia. So there is another fact which does not fit.

We find that the corresponding thickness in the sedimentary layers, the strata, as you move towards the east also does not exist : both Professor Morelli and Professor Laffitte found that the sediments thickened as you move towards the north, not towards the east. So there is yet another fact that does not fit.

We find, admittedly, a tilting towards the northeast. But the slope towards the east is not uniform, not by any means. On the contrary, you have to pass through this complex area – the borderland – before you reach the Malta rise and before you reach ultimately the Malta-Misratah Escarpment. And, in any event, we know that the tilting of the Pelagian Block was a tectonic event, linked to the elevation of Tunisia in the west and the subsidence of the Ionian Basin in the east. So that is not the explanation you would expect to find of true, east-facing shelf, where the subsidence as you move towards the edge of the margin would be the result of the stretching and thinning of the crust. And even the appearance of the bathymetric lines – however superficially attractive and consistent with the Tunisian thesis – have been shown to be linked to the tectonic events of the Pelagian Block, not the shoreline of Tunisia nor even to the idea of a shelf sloping eastwards. The Court will recall on this
(101) point Dr. Fabricius' examination of the bathymetric lines on Map 2.03 of the Tunisian Reply which is here on the board (pp. 195 ff., *supra*). And so, in conclusion on this point, the facts do not suggest that on the shelf itself we

have the factual corroboration to support the thesis of a shelf sloping away to the east.

Fifth, we should find the slope itself – I use the term in the technical sense of a *talus*, as opposed to *pente* – here, along this line. But, says Tunisia, we *do* have a slope : that is the Malta-Misratah Escarpment. This is shown on the map by Marchant in Dr. Stanley's book – it is Figure 5.24 in the Tunisian Memorial, and it is in the Judges' folder.

The Court adjourned from 11.15 a.m. to 11.45 a.m.

As I indicated before the break, the Malta-Misratah Escarpment is absolutely crucial to the Tunisian argument and, in our view, without it they have virtually nothing. So I think it is important that we spend some time examining this feature. Now the exact origin of the feature is a matter of some speculation, so we are here in the realm of theory, rather than fact. Professor Ryan's view, based upon recent underwater work on this feature is reported in the Columbia Study at Annex II-6 to the Libyan Reply. And what he says, in effect, is that it is an old feature, starting life as quite a minor transform fault, like that, and with a shallow sea a carbonate reef begins to form on this edge, here, and as the shelf over the years subsides, so this carbonate reef builds up, keeping close to the level of the water as the shelf drops. And so, eventually, you have a figure like that – and that is the carbonate reef built up. Now of course the area intervening between the land and the reef is in turn filled up with sediments, so you finish up with what looks like a flat shelf filled up with sediments and then this steep escarpment, which is really the edge of the carbonate reef, dropping down into the Ionian Abyssal Plain.

Now that process, of course, took millions of years but it does produce an escarpment to the east.

Now, Professor Morelli holds a quite different view. As I understand his writings, he attributes that same feature to a more recent event, the dropping or foundering of the Ionian Sea bottom. I refer to his writings jointly with Finetti in Volume 15 of the *Bolletino di Geofisica Teorica ed Applicata* (1973). And I should add, Mr. President, that our own expert, Professor Fabricius, shares that view.

So on this most crucial aspect of the Tunisian case, we are in the realm of theory and, moreover, disputed theory. There is a certain irony in this situation, for we have been told throughout by Tunisian counsel that it is facts, not theory, which are needed and now we find the very cornerstone of the Tunisian argument based upon not only theory but disputed theory.

Now, their reply to this, of course, would be that, whatever the theories about the cause of the feature, the feature is there : and that is a fact.

Now, Mr. President, let us look at this "fact", so-called, a little closer. My first observation on this "fact" is that, whichever theory one supports about the origin of this escarpment, what is clear is that no one suggests it is the edge of a continental-margin. It is a fault, certainly. But not a fault which marks the edge of the margin, the line along which that continental crust finally snapped off, in the course of rifting, in the course of the separation of the African and Eurasian Plates.

If scientific authority for this was previously lacking, we now have it, thanks to Professor Virally. I would ask the Court to read, at its leisure a detailed article on the Malta Escarpment by ten authors, including Professor

Ryan, introduced by Professor Virally [1] during the second phase of argument. I want to read just two short extracts from this article. And the first is a statement of one of the conclusions at page 1318 :

> "the present steep slope does not necessarily coincide with the original foreslope of a continental-margin edge facing an oceanic realm ; it corresponds on the contrary, with a scarp created by mechanical erosion".

And the second is from the abstract of the same article at page 1299 :

> "Our data do not provide evidence that this morphological feature necessarily coincides with a continent ocean transition. The present escarpment was produced by faulting, erosion, and defacement."

In short, what we have found here is a morphological feature – without doubt : but not the edge of the continental margin.

My second observation is that, as a "fact", the feature doesn't fit the Tunisian thesis. It does not provide the edge of the margin as it should. Now let us return to the map in Dr. Stanley's book again, which is here on the board. The Court will note that the escarpment peters out at this point, which is around 35° of latitude. Now that is distinctly awkward, for that is the latitude of Ras Kaboudia. So that, if you go eastwards from the coasts which abut on to the area in dispute – you do not encounter the Malta-Misratah Escarpment. You find, as the map in Dr. Stanley's book shows, an undifferentiated, rather plain area called here the Sirt Rise. So, the Malta-Misratah Escarpment simply will not do as a candidate for a true continental slope. Let us take the progression further, and see whether yet further difficulties await us.

My sixth point is that beyond the slope, in the natural progression for which Tunisia argues, we should find a continental rise, and beyond that, oceanic crust – the true, deep-sea bed.

What we in fact find is something which is rather controversial, but which on balance looks like continental crust rather than oceanic crust.

If the Court will bear with me, I want to read a series of excerpts from the writings of Professor Morelli. I do that, not because he is the Tunisian expert, but because his international reputation in this field is acknowledged. And I quote from the study I previously mentioned, published in 1973 and entitled *Geophysical Exploration of the Mediterranean Sea*, at page 315 :

> "But all the elements resulting from our study, in our opinion, much more probably indicate for this basin a crust of continental type that foundered starting from Miocene. This geodynamic phenomenon is still active as shown by a careful study of some seismic lines on the margins. This crust in our interpretation, is the northward extension of the African Plate."

Let me mark those words well : the crust in the Ionian basin is the northward extension of the African Plate – *northward*, not "eastward". And a year previously, in 1972, in a joint article with Finetti, in Volume 14 of the same Journal, he said the same thing. I quote again, from page 292 :

> "It also is possible to deduce that the thick continental crust of the Ionian Sea has foundered in Miocene to Quaternary time and its facies is probably for the most part that of platform as the Strait of Sicily. The

[1] See p. 323, note 1, *supra*.

> Upper Miocene evaporites are here considerably thinner than in the Western Mediterranean Sea."

And that view is accepted by Professor Burollet, another distinguished Tunisian adviser. I cite from an article, a chapter of a book, written jointly with two other authors, Mugniot and Sweeney, entitled *The Geology of the Pelagian Block : the Margins and Basins off Southern Tunisia and Tripolitania*, at page 354 :

> "The interpretation of Finetti and Morelli (1973), the one accepted here, is that the deep Ionian Sea is underlain by *continental* crust which foundered after late Miocene times."

So we do not have, in the Ionian Abyssal Plain, the oceanic crust which you would normally expect to find beyond the slope and rise.

I should add that I do not attach decisive significance to this fact, for in areas where rifting is still taking place – such as the Red Sea or even the North Sea – one can find stretched continental crust, but no oceanic crust beyond it. But I may perhaps be permitted the comment that, if it is Tunisia's case that the Ionian Abyssal Plain is the deep sea-bed beyond the margin, it might have been expected that Tunisia would bring these complications to the attention of the Court.

I detected in Professor Virally's statement on the final day of his argument a very important shift of argument.

What he appeared to be saying is the following : we accept the Libyan argument that the old, original shelf and margin lay to the north. It is this shelf which Libya has been obliged to "exhume" – I think that was his word. But, he would go on, that was a very long time ago and now we have a new shelf, about 100 million years old, superimposed on top of the old, and this time lying to the east of the newly emerged Tunisian landmass.

That is an extraordinary thesis. I put it to a colleague in Cambridge over the weekend, a geologist, and he actually laughed at me. Where, may we ask, is the scientific evidence for this new, second shelf lying on top of the old, and having a natural prolongation turned through 90 degrees ? In what book, in what article, does this idea appear ? And how can we reconcile this new thesis with the statements made to this Court by Professor Laffitte and Professor Morelli – statements in which not a hint of this thesis can be found ?

This new Tunisian thesis of a new second shelf being superimposed on the old shelf, and facing east rather than north, comes very late in the day. As I understand it, from Professor Virally's statement, and from the various maps and papers produced last Thursday, the story amounts to this : around 100 million years ago the rifting or stretching ceased, and a process of compression began. Now, the Court will remember how, in my first address, I described how the African and Eurasian Plates began to close again (p. 150, *supra*). I dated the movement more recently, in the Tertiary period – that is to say between 53 and 18 million years ago. But on the fact that compression did replace the rifting, we are agreed. And it is quite likely that compression began under the sea 100 million years ago but that the stage of the uplifting of Tunisia out of the sea and the formation of the Atlas mountains occurred very much later.

Then, he says, this compression from north-west to south-east folded the crust, producing anticlines and synclines, and started movements of the salt formations. We can accept all this : he is describing the compression of the Atlasic folds, and the piling up of these ancient sediments on top of the

underlying basement. As the Court will remember, it is exactly this which the tectonic maps have shown. This is shown very clearly on this map, which is (105) Figure 2 of the Libyan Reply. That is the area where you see these pronounced Atlasic tectonic features produced by the piling up on top of the original crust of the Atlasic formation – the product of this compression.

But then comes the most extraordinary conclusion to what is otherwise an acceptable narrative. Professor Virally says "the present pattern of the Pelagian and Ionian continental margin entirely turned eastward in the direction of the Ionian abyssal plain" (p. 323, *supra*). Now that really is an extraordinary assertion.

How do these folded sediments, thrust up by compression on top of the original continental crust, suddenly become a new second crust pointing in a quite different direction ? We have read the Letouzey-Tremoulières paper (Fig. 80 in the Tunisian documents) with great care, and we can find nothing in that paper to support that conclusion. And the evidence is clear that the Atlasic trends, the result of all this compression, did *not* extend further east than the Gabes-Ragusa line or the Atlas Fold Front. So how could this produce a new shelf, co-extensive with the whole Pelagian Block, and facing east ?

I am afraid that on our side we really have no alternative but to reject this last-minute, fantastic thesis as one entirely without foundation and born out of desperation.

This is really carrying ingenuity too far and I trust this Court will have nothing to do with it.

I have tried to deal with the facts and I have tried to indicate where we are dealing with theories rather than facts. In the result the conclusion which emerges is one of startling simplicity. There is not one fact which fits in with the Tunisian thesis of a natural prolongation towards the east. The outer-edge of the continental margin simply cannot be found along the Malta-Misratah Escarpment.

It is obviously necessary to expose the Libyan thesis to the same, I hope, rigorous analysis. And this I now propose to do.

THE LIBYAN THESIS

Let us turn to the Libyan thesis and I want to follow the same analysis as I did with the Tunisian thesis to see whether, as Libya asserts, the natural prolongation is northwards.

First, the continental landmass, the stable African platform, should be found in the south. And so it is – that is a fact.

Second, we should find, running broadly east-west across the North African coast, a fall-line and a hingeline. Now, let me talk about the fall-line. Professor Virally suggested that there was no trace of any fall-line, so that it was a figment of the imagination. But that is not so. The fall-line, as Professor Hammuda pointed out in his statement (that is p. 179, *supra*), lies where the basement "is seen to drop or dip gently seaward". Along the Tunisian-Libyan coast the fall-line can be easily identified from the slope in the Paleoic rocks (113) overlying the basement. In Figure 11 of Annex II-6 to the Libyan Reply (**IV**), used in the first Tunisian folder, the fall-line is between wells JI-23 and KI-23. (114) In Figure 10 of the same Annex it is just seaward of the mountains, the Jebel Nafusa escarpment. Of the existence of the hingeline there can be absolutely no doubt. The Permian hingeline is shown on many maps and its existence and its location is not challenged by Tunisia. The Permian hingeline runs along here

and its continuation to the west is called the South Atlasic lineament – that is Professor Laffitte's description. So that is a fact.

Third, seaward of the fall-line and hingeline we should find, broadly parallel, the coast. And that we do. And we also know, as a fact, that although the present Tunisian coast, running northwards from Gabes, does not fit with this thesis because of the relatively recent uplift of the Atlas mountains and northern Tunisia, if regard is had to the ancient coastlines, the coastlines in being when the margin was formed, then these did run, broadly east-west across North Africa. So that also fits.

Professor Virally believed he had detected a flaw in our argument. He noted (108) that on Figure 6 of the Libyan Reply, showing the shorelines in Mesozoic times, for instance, these shorelines were actually landward of the hingeline. This, he felt, was one of the *obscurités persistantes* (p. 312, *supra*) of the Libyan thesis. Well, there is really nothing very obscure about this. The Court will recall that the Columbia Study made the following point (i.e., IV, Libyan Reply, II-6, p. 6):

> "(The features found at continental margins) include the fall-line, the hinge-zone, the actual coastline, the shelf edge and various coastal plain and shelf deposits such as Sabkha deposits, beach sand deposits and reefs . . . a number of these features, while generally paralleling the coast, are somewhat surficial as they are influenced by sediment supply . . . (and) sea level fluctuations."

They go on to note that, during the Messinian salinity crisis, the Mediterranean dried out. Hence there was then no shoreline. At other times, particularly when the ice cover melted, relative sea-level rose above its present position, as can be seen from the presence of marine deposits of various ages inland of the modern coast. So, in general, the coastline does lie seaward of the hinge and landward of the margin – hence my diagram when I last addressed you – and it is on the basis of the usual case (and without excluding possible exceptions where the land flooded beyond the hingeline) that my exposition of the scientific and *usual* pattern was formulated.

Now, fourth, we should expect to find evidence that the shelf, beyond the coast, not only slopes away northwards towards Sicily, but also exhibits the characteristics of a continental crust, thinning towards the north, and displaying the faulting across the direction of the thinning, caused by the subsidence of the crust. And, of course, you should find thicker sediments as you go north.

In fact, we have all these elements. The shelf does deepen towards the north; and the Pantelleria Trough, there, is a feature of very considerable (102) significance (IV, Tunisian Reply, Map 2.04). The Tunisian pleadings have been marked by a deliberate ignoring of that feature, the Pantellaria Trough. It has not been explained, or accounted for, as consistent with this notion of an east facing coast, and east-trending shelf. It has simply been ignored. But the feature is important and striking. It drops to depths of 1,700 metres and it lies, as you would expect, across the line of rifting, running for 100 miles or so. As to faulting, we do find faulting all over the Pelagian Block and running at right angles to the direction of rifting – you see that on many of the tectonic maps. And finally, we do find that the sediments get thicker as you go north. The Tunisian experts themselves testified on this point. So that, too, is a fact.

The extraordinary thing is that the north-south continuity should now be contradicted by Tunisia, in the face of all the evidence, and in the face of the

opinions publicly expressed by the distinguished scientists now advising Tunisia.

Again, I hope the Court will allow me a few citations to make my point. These are again from the work of Finetti and Morelli, work I had previously cited from Volume 15 of the *Bollettino* published in 1973:

> "In the *Strait of Sicily* there is absolute continuity of the continental African plate from Tunisia-Libya up to the Ragusan massif, with Tertiary and Mesozoic sediments that in the central part of the Strait seem to be predominantly of platform and interested by a rifting geodynamics, still active." (P. 263.)

And, again (this is from p. 332),

> "The Strait of Sicily, with its thick Miocene to Mesozoic sedimentary sequence, constitutes the *northward continuation of the African plate*, from the Libyan-Tunisian coasts, up to the southern Sicily (Ragusan Massif). The clear evidence of recent extensional tectonics, in the middle of the Strait, is indicative of a rifting process probably at an early stage and still active."

And in the 1972 joint article with Finetti,

> "The African Plate (Fig. 19) with its characteristic thick continental Crust *extends toward north*, covering the Strait of Sicily up to the Ragusa massif . . ." (P. 333.)

And, further to the east, the shelf which slopes towards the Ionian Abyssal Plain is not the Tunisian Plateau, but rather the shelf in the Gulf of Sirte, as Dr. Lazreg explained at IV, page 501, and as can be seen in the Tunisian (27) Memorial, figure 5.23. Thus, the shelf slopes northwards toward the Ionian Abyssal Plain – not from this landmass towards the east. Let me again cite from Finetti and Morelli.

> "Going from the Gulf of Syrte to the deeper part of the Western Ionian Sea, all along the line MS-27 it is possible to follow the calibrated seismic horizons (A, B, K) with absolute continuity and reliable interpretation based on reflections of high S/N ratio (Figs. 29 and 32). All the sequence is considerably thickening toward the central Ionian basin (top of Mesozoic at a minimum of more than 8 sec)."

That citation is from page 306.

The upshot of that is that Professor Morelli himself is on record as saying that the continuity is northwards and not eastwards.

My fifth point is that if the Libyan thesis is right, we should find the edge of the continental margin somewhere to the north of the Pelagian Block. Well, here it is, shown on this map here. This is where the edge of the African Plate, the edge of the old margin, lies. It is, of course, now obscured by the collision of the two Plates as they came together again. Without question, the Mediterranean is much more complex than the Atlantic. But this is where you would otherwise have found the edge of the margin, and this is confirmed by the fact that further north, in the Tyrrhenian Sea, you get oceanic crust, confirmed by drilling by the *Glomar Challenger*. The area is still evolving and there is some evidence that eventually the Pantelleria Trough along this line will develop into a new edge, a new continental margin. But both features – the edge of the old African Plate and the Pantelleria Trough – lie to the north. They are where they should be, consistently with the Libyan thesis.

So, by reference to the facts – as well as to the theories – the conclusion is inescapable. The Libyan thesis is consistent with the evidence and the Tunisian thesis simply is not.

What Libya has presented to the Court is a view of natural prolongation which is based upon incontrovertible, geological evidence. It is a view consistent with the known evolution of the margin. It fits the facts. It looks to the essential relationship between landmass and the extension of that same landmass into and under the sea. It asks the question : "From which landmass has this shelf been extracted, when it was formed in the course of the rifting process ?" And let me emphasize that this question can always be asked in a shelf-delimitation problem. It is not simply a question of relevance to the North Atlantic but one which can be posed in any area of the world where you find the same progression from landmass, to shelf, to slope and rise. So it is an approach which is not only scientifically correct, but one which affords a basis for the sound and general development of the law of shelf delimitation. Of course, it is not the sole question a court will ask itself. A court will have to take account of all the relevant circumstances. But where the delimitation is in an area where the progression from landmass to shelf, to slope and rise can be seen, it must be a fundamental question.

What Tunisia has presented to this Court is quite another matter. It is a thesis which runs counter to all the geological evidence and it has seized on two facts. One is the fact there has occurred a tilting of the Pelagian Block towards the north-east, and the other is that there exists the Malta-Misratah Escarpment which is presented, morphologically, as a continental slope.

Can it really be the case that by natural prolongation we mean no more than the accident of tilting ? Because that is really what is in issue.

The Escarpment is really secondary for, though a significant fault, it is nevertheless one of several faults in the area. As a geomorphological feature, as I have explained, it cannot compare with the Pantelleria Trough.

So the tilt is really the core of the Tunisian argument. And in the submission of Libya, for this Court to accept the thesis that the direction of natural prolongation of the landmass into and under the sea means no more than the direction in which it may happen to have been tilted by tectonic events, would be to invite the scorn and derision of the entire scientific world, and perhaps of the legal world as well.

But perhaps it is unfair to reach that conclusion before inviting the Court to examine the Tunisian bathymetric evidence once again, and in the light of the second-phase Tunisian argument. So let us now turn to bathymetry.

The continued reliance on bathymetry is quite remarkable. Professor Jennings invited the Court not to stop at the coast, the 0-metre contour, but to look to the 50-metre or the 150-metre, or the 300-metre contour (p. 265, *supra*). I don't know why one should do that but I suppose with equal logic one could get away from the 0-metre contour on the landward side and go up into the hills in search of a 50-metre, 150-metre or 300-metre contour.

But what is so extraordinary about the Tunisian position is that it has been maintained and repeated despite all the evidence. I suppose one way to deal with evidence is to ignore it, but it is scarcely a very persuasive way.

Professor Jennings spoke of a "species of platform extending from and reflecting the configuration of the coast" (p. 266, *supra*). And then he said something which cannot be allowed to stand without correction. Referring to (18) figure 5.09 of the Tunisian Memorial, which was in the brown folder given to Members of the Court at the start of Ambassador El Maghur's statement, Professor Jennings asserted that on the basis of Libya's scientific evidence there

seems to be common ground that such a platform extends out to the 250-metre isobath.

I do not think it is necessary for me to show to the Court the map referred to. I think everyone recalls the large area map placed on the easel behind Ambassador Maghur with segments of the coast traced in different colours. A series of overlays were placed on this map to show the successive claims asserted by Tunisia, and always to the east. It showed the 1973 baselines – the 12-mile territorial sea – the 50-metre isobath, still further eastward. And finally, and this is what was referred to by Professor Jennings, the so-called "Plateau Tunisien". That map outlined with green lines the general outer-limits of the area claimed by Tunisia to constitute a part of their continental shelf and to reflect the contours of the coast.

To suggest that the display of that map for that purpose demonstrates the agreement of Libya on scientific grounds to the existence of such a platform out to the 250-metre isobath is really quite wrong. As for the name "Plateau Tunisien", surely natural prolongation is not to be determined on the subjective basis of names placed on maps, even assuming some measure of acceptance of the name by geographers. After all, the appellation "English Channel" is quite widely used, but the 1977 Award seemed to be influenced not at all by that fact.

It was also suggested by Professor Jennings that Libya had omitted the bathymetric contours from its maps and figures. This is incorrect. Libya, starting with the Libyan Memorial, has made serious efforts to indicate what
(46) the bathymetry of the Pelagian Block really does reveal. Figure 13 to Annex II to the Libyan Memorial showed how the bathymetry followed the tectonic trends of the Pelagian Block. This was done by an overlay of the bathymetry placed over a figure depicting the northwest/southeast-trending faults. The same conclusion was demonstrated before the Court by Professor Fabricius. He explained at some length how the bathymetry of the Block, except near the Tunisian/Libyan coast, reflects the faults caused by tectonics and not the coastal contours.

However, the task of presenting the scientific claims of Tunisia lay principally with Professor Virally, rather than Professor Jennings. So let me turn to the recent remarks of Professor Virally during this second phase of argument. What did he have to say about bathymetry ? Very little indeed. His remarks appear at page 325, to half way down page 326, *supra*. Considering that this is the very heart of Tunisia's scientific case, this brevity is surprising.

Professor Virally began his discussion of bathymetry with the claimed similarity between the bathymetric contours and the Tunisian coasts. And he asserts, at page 325 that Professor Fabricius did not deny it, and he cited page 194 in which Professor Fabricius gave evidence. I want to quote from that transcript, simply to show the actual exchange which took place between myself and Professor Fabricius.

> "*Professor Bowett* : . . .
>
> Now, if I can just remain with bathymetry for a moment, let me turn to Tunisian Map No. 2 from the Tunisian Memorial. It is here on the board – and I would like you to really address the main Tunisian argument that the bathymetry of the shelf reflects a series, or represents a series of, 'terraces' which reflect in turn the Tunisian coastline. Is this a fair, layman's description of the argument ?
>
> *Professor Fabricius* : Yes, I suppose so."

Will the Court note please, that the affirmative answer is not to the merits of the Tunisian claim, but to whether I had given a fair description of that claim. To resume :

"*Professor Bowett* : Does the argument have merit ?

Professor Fabricius : I do not believe so . . ."

I do not think I need go any further to make my point. And Professor Virally felt he didn't have to go further either – as he said, in effect, the Court does not need experts in order to make up its mind regarding the claim that bathymetric contours follow the coastal contours.

So let us put back up the bathymetric chart on which Professor Fabricius drew certain lines. This is the bathymetric chart produced by Tunisia with its (101) Reply ; it is Map 2.03 – and this is the map said by Tunisia to reflect the most up-to-date bathymetric data.

Now let me recall two points about this map, points made by me, by Dr. Vita-Finzi and by Professor Fabricius.

Except for the bathymetric contours close to the Tunisian and Libyan coasts, which do reflect the coastal contours quite naturally, the other bathymetric contours do not conform at all.

The bathymetry does not echo, or follow the coast at all. And here, for example, and here, and again here, the bathymetry is going in the opposite direction.

My second point is that, as the Libyan evidence and indeed the Tunisian scientific evidence has shown, this bathymetry is the product of, and is caused by, the tectonic evolution of the Pelagian Block. It has nothing to do with the ancient shorelines, be they Tunisian or Libyan. The bathymetry reflects the strong tectonic trends running from the south-east to the north-west – part of a tectonic structure stretching right back to the Sirt Basin. Now, these tectonic trends are not imaginary : they are portrayed on all the maps, Tunisian and Libyan.

So how do our opponents deal with these two points ? Very simply : they just ignore them.

Professor Fabricius was produced by Libya as an expert, not to read a statement and then sit down. He came as an expert subject to cross-examination. And I should say that the subject before us now, bathymetry, is very much in the Professor's area of expertise. Moreover, the thesis which the Professor was asked to address was at the very heart of Tunisia's scientific case of a natural progression, a natural prolongation, to the east. Now, Professor Fabricius completely refuted these claims when he stood up here and drew those lines. Why was he not challenged on this vital point ? Why did Tunisian counsel not cross-examine him on the point ? Why did Professor Virally deal with the matter in a few phrases the other day, as you can see, at page 325, *supra*. Well, the answer is clear. The bathymetric contours, except close in to both the Tunisian and the Libyan coasts, do not reflect the coastal contours. The shape of the sea-floor, to use Professor Jennings' phrase, does not reflect the coast, nor does it reveal a prolongation of the coast to the east.

I shall ask the Registrar to take this bathymetric chart drawn on by Professor Fabricius and myself and the same chart without lines and make them available to the Members of the Court. I agree with Professor Virally, the Members of the Court can see for themselves what the actual bathymetric contours show.

Professor Virally then turned to another aspect of geomorphology. This is

the matter of declivity or *pente*, which he said descends *progressivement et constamment* towards the Ionian Sea, although irregular in its gradient and subject to local irregularities. We have on the easel now, behind me, a figure (28) taken from the Tunisian Memorial ; it is Figure 5.24, and it has been blown up. A copy is also in your folder. I shall refer to this figure in another context but I should note here that it has a special importance since it is based on a figure prepared by F. L. Marchant in a book edited by Dr. Stanley, who presented a technical statement here before the Court on behalf of Tunisia. The book in which this figure appears as Figure 7 is *The Mediterranean Sea*, published in 1972, and one of the standard works on the area.

Now, Professor Virally, at page 325, *supra*, told the Court that this alleged fact of progressive continual slope is uncontested by Libya. I do not know where he got that idea from. Although the Libyan pleadings have admitted a tilting towards the northeast, a tilting of the whole Pelagian Block, this believed to be the result of the uplift of the Atlas Mountains and the sinking of the Ionian Sea, Libya has never characterized this as a "pente continue . . . qui descend progressivement et constamment vers la mer Ionienne".

Let us examine this figure on the easel. If we start here at the Kerkennah Islands and move eastwards, according to the legend, we then cross into a broad strip of borderland, this complex margin. Now this area of borderland is in itself sufficient to destroy the Tunisian version of a continuous, progressive slope. Let me cite the definition of a borderland from the Unesco Report to the 1958 Geneva Conference, the same document Professor Jennings relied upon. So I cite from A/CONF.13/2, page 4 :

> "When the zone below the low-water line is highly irregular, and includes depths well in excess of those typical of continental shelves, the term continental borderland is appropriate."

So we cross the borderland to the so-called Malta Rise, and then finally to this feature, the Malta Escarpment and the steep slope down into the basin. It is in fact identified here as the Sicilian Plain rather than the Ionian Abyssal Plain, but Libya does not contest that such a feature exists. The important point, however, is that this picture of a continuous progressive slope towards the abyssal plain is not an accurate description of the area.

Now there are two other points, which are critical to the Tunisian case, also briefly mentioned by Professor Virally, and these are the matter of the so-called *falaises* and the features called the "*ride* of Zira" and the "*ride* of Zuwarah". In addition, I shall also comment on the feature called by Tunisia the "Sillon Tripolitain".

Now, these three groups of features were commented on in some detail by Professor Fabricius. Let me summarize what he said, placing the figures he used on the easel behind me.

As to the so-called *falaises*, I had the feeling that Professor Virally had rather given up on them. Having alleged in the Tunisian Memorial that they constituted an ancient shoreline lapped by the waves, Tunisia was confronted during the oral hearings with testimony by Libyan experts that this was not possible. Even at the last general drop in the level of the sea at the time of the last ice age, some 15,000 years ago, almost the entire area of these features was well below sea-level. So, obviously they are not erosional features : they are tectonic. Moreover, as the figure put up on the easel shows – a figure which you will recall was prepared by Professor Fabricius and explained to this Court – these features do not represent cliffs at all. They represent no more than slopes. In the face of this expert testimony, what had Professor Virally to add

on the subject? First, he said that the *falaises* were not in dispute (p. 325, *supra*). Then alluding to the Libyan testimony that they were not erosional features, Professor Virally completed his remarks by saying: "Mais elles sont bien là." Again no effort was made to question Libya's expert: no effort was made even to reply to the Libyan evidence. It is difficult to see quite what relevance these features have, even to the Tunisian case: in our view, they really have none.

Turning to the *rides* – and we may as well limit ourselves to the "*ride* of Zira", since the "*ride* of Zuwarah" has now vanished – the evidence of Professor Fabricius showed how trivial this feature is – a bank or shoal, barely noticeable on the sea-bottom. Again you have on the easel behind me the figure used by Professor Fabricius to demonstrate this point. Now, the point about this figure is that it shows how extremely gradual that inclination is. Even at the highest point of the *ride*, the gradient, the slope, is extremely gradual. You recall his representation of that gradient by a horizontal and an inclined line, here and here, with a separation of the two lines – the one horizontal the one the incline line – a separation so small, the gradient so small, that the difference between the lines can hardly be detected. Now, what did Professor Virally have to say in reply, having avoided asking Professor Fabricius any questions regarding this feature? Well, again, it came down to saying, well, at least, it is there. That may well be, Mr. President, but, as a geomorphological feature, as a feature on the sea-bed itself, it is trivial: and I maintain that word as a proper description of that feature. On the block diagrams without vertical exaggeration – one cannot see anything in the area where the so-called *rides* are said to lie. Only with ten times vertical exaggeration can any feature be seen.

It is almost as if, in recognition of its triviality as a feature on the surface of the sea-bed that, in the second phase of argument, Tunisia sought to find some significance in the depth of this same feature *below* the sea-bed. The Court will remember Professor Virally's description of the salt wall plunging 4,000 metres below the surface – making the *ride* of Zira, we were told, comparable to the highest mountains in Africa. This is said to give this negligible bump on the surface of the sea-floor major significance.

This, of course, is a last, desperate effort to make something out of this feature. A salt wall exists because of a fault and, obviously, if the sediments are 4 kilometres deep (it sounds more if you say 4,000 metres), but if they are 4 kilometres deep, the salt wall will rise vertically for 4 kilometres. Is it suggested that this creates some kind of boundary? If this were so, every fault line cutting through the sediments would be eligible for treatment as a boundary. There are such faults all over the Pelagian Block. And there are many salt walls in this area – most of them having caused not even a bump. Again, this point was made by Professor Fabricius, and Tunisian counsel chose not to question him about it before the Court.

Finally, I shall turn to the "Sillon Tripolitain". It is a feature identified separately from the Gulf of Gabes for the first time in the Tunisian pleadings. I have put up on the easel behind me the figure referred to by Professor Fabricius in his discussion of this feature, this alleged "Sillon Tripolitain".

(40) I would like the Court to look, once again, at the figure used by Professor Fabricius; and it still has on it his calculations both of distance and declivity. We have a slope of 0.09 per cent north of Ras Ajdir, or more particularly along the 12° parallel. If you move to the 14° line of latitude, to this parallel, there you have a slightly greater slope but it is 0.64 per cent of an inclination.

Now, I wish to make only four brief points about this feature. First, it is

trivial : I have no hesitation in using that term. Here on the board we have the Tunisian block diagram, not the Libyan, the Tunisian block diagram No. 33[1]. It is in the Judges' folder. This diagram involves a vertical exaggeration something between 25 and 64 times : I can't say exactly what vertical exaggeration because we were not told by Professor Morelli. But, that is vertical exaggeration at least 25 times. Here is the coastline and there behind you see the mountains, the Jebel Nefusa. The Pantelleria Trough, here, is very clear : so are the tectonic features, the *fosses* of Jarrafa and Zohra ; you can see them here. But where is the Sillon Tripolitain ? This is the area where it should be, but you can search that block diagram in vain for any trace of it. Second, the Sillon Tripolitain is far less of a depression than the one we find lying between the so-called Tunisian shelf and the Malta Rise. So if the borderland does not interrupt Tunisia's continuity to the east, why should Tunisia assume that the Sillon Tripolitain should interrupt Libya's continuity to the north ? My third point, again, is a point of confrontation. If Tunisia wished to challenge Professor Fabricius' evidence on the insignificance of this feature, why did they not do so ? My fourth and last point is that the feature is irrelevant for, as I explained to the Court during the first phase, not one of the Tunisian methods places any reliance on this feature – the Sillon Tripolitain. The thalweg, what Professor Virally termed "the natural frontier", is not used at all in any of the Tunisian methods.

I have used the word trivial to describe both the *ride* of Zira and the Sillon Tripolitain. The word was obviously resented by counsel for Tunisia and Professor Jennings tried to support the importance of these features by reference to the gradients given for the shelf, slope and rise in the 1958 Unesco study (pp. 347-348, *supra*) : his point was that these features – shelf, slope and rise – have quite gentle gradients – the slope 1 in 4 or 25 per cent, the rise 1 in 100 or 1 per cent.

This is quite irrelevant to the question of a boundary between States adjoining the same shelf. As the 1977 Anglo-French Award showed, for such a boundary you need a fundamental discontinuity in the shelf. And by reference to that criterion, the *ride* de Zira and the Sillon Tripolitain are indeed trivial.

I turn now to geography. I have no wish to trespass into the demonstration of the extent to which the Libyan method does, in fact, pay careful heed to the geographical circumstances of this case. That will be done by my colleague, Mr. Highet, and he will show you exactly how the Libyan method takes full account of both the Tunisian north-facing coast, from Ras Ajdir to Gabes ; and also the marked change in direction of the Sahel Promontory.

I would, however, like to share with the Court my difficulty in comprehending the Tunisian argument on geography. Professor Jennings has repeatedly emphasized that we must take account of the actual coasts, not purely hypothetical ones, and we must not attempt to refashion geography, although this, in effect, is exactly what the Tunisian 1973 baselines do. The Court will recall that Professor Jennings singled out the island of Jerba as an important feature which Libya totally ignores.

I can only respond to this in the following way. If equidistance is rejected by both Parties as a method quite inappropriate to the circumstances of this case, it necessarily follows that the relevance of the actual coastlines will be diminished. The Libyan method has nevertheless given them appropriate effect.

But what of the Tunisian methods ? Which one of the Tunisian methods is

[1] Not reproduced. See, *infra*, Correspondence, No. 94.

influenced by Jerba, or by the concavity of the Gulf of Gabes, or by the offshore islands of Kerkennah in any way ? Not one of the Tunisian methods takes the slightest account of these features. The actual coastlines are ignored, and for them we have substituted entirely fictional coastlines, extending far to the east. And the important stretch of Tunisian coast stretching westwards from Ras Ajdir to Gabes, some 70 miles long, is discreetly ignored because unfortunately it does not face east.

Now this leads me directly into a discussion of the Tunisian methods, so I now turn to Professor Virally's second defence of the Tunisian geometrical methods. And I begin with the first method – the transfer of the *bissectrice*.

I hesitate to inflict on the Court more geometrical exercises. But if the Court will allow me just three, then I think the Court will see the basic fallacies of the whole Tunisian approach.

Let us begin, once again, with the simple right angle, and the frontier at the apex here. Both sides accept that with that configuration the bisector of the angle would be an equitable one and a proper delimitation of such an area. Now, let me draw something like the actual situation, with the Tunisian coast running 70 miles to the west, to Gabes, and then moving northwards at Gabes. Can it really be supposed that the original *bissectrice* is still equitable ? Does it really make no difference whether the Tunisian east-facing coast runs north from Ras Ajdir – or north from Gabes, 70 miles away ? The whole idea is untenable, and the translation of the idea to the actual coasts in question can be done by means of a transparent overlay which you now have on the board. As I said in my earlier presentation, this system really does two things : it notionally treats the Tunisian coast as if it ran northwards or northeast from Ras Ajdir, and it treats the whole of this area behind that notional coastline as belonging to Tunisia, and simply not counting, not relevant, for the delimitation and the question of proportionality in relation to the area that remains to the east. Such a method cannot be, cannot conceivably be, an equitable or even a reasonable method of approaching this particular configuration.

Now we heard from Professor Virally another interesting idea. The Court will remember that I suggested that with a right-angled coast, the prolongations of the two coasts necessarily overlap, and they must, therefore, share the same shelf area. Not so, says Professor Virally ; not if we follow the direction of the natural prolongation. And so he provides us with this diagram – this was diagram or Figure D on the series of diagrams he provided for us. I have done it in rough, but I hope that you accept it as a reasonable representation of figure D. The idea is that if all the boundaries on the shelf proceed from the land, from the land frontiers, towards the centre of the abyssal plain here, you do not get an overlap, and everyone in respect of his landmass gets his proper natural prolongation. Now the device is something of a cheat, if you will forgive the word, in that we have introduced into matters of plane geometry notions of the direction of areas. But let that pass, because the objections I have are really much more fundamental.

I suggest that we test this thesis by reference to a map, of which you have copies in your folder. Now, what I have done here is to take the various frontier points and, using the Tunisian method, I have joined them to the centre of the abyssal plain here. For the Italian/Tunisian frontier I have taken the southern edge of the maritime boundary agreed in 1971. For the Italian/Malta frontiers, I have postulated the turning point here in the same 1971 agreement line, and I postulated between Malta and Sicily the mid-point across the channel. I have also closed the Libyan sector at Ras Tajura, because that

was the point on the coast chosen by Professor Jennings in his discussion of the area of concern (p. 346, *supra*).

If the Tunisian method has any validity in this area it must obviously be valid for *all* the States bordering the Pelagian Sea, and abutting on the same area of shelf, a shelf which, in Tunisia's view, slopes to the east and is prolonged only to the east.

Now, the results are astonishing. Tunisia, understandably, gets the lion's share, in red. Italy, with respect to the islands of Lampione, Lampedusa and Linosa, gets this thin wedge, the "hatched" area there. As the Court will see, under the 1971 Agreement between Tunisia and Italy, Italy has apparently had the impertinence not only to claim, but to receive, areas of shelf which lie to the west, even though the natural prolongation is towards the east.

Malta fares rather badly. Malta gets this small wedge here, hatched in blue. Now of course, Tunisia will object that its method does not assume that the delimitation lines should go all the way to the abyssal plain. But where else can they stop, Mr. President, short of the edge of the margin – for on the Tunisian thesis each State is entitled to the whole of its natural prolongation, right out to the edge margin. And this is where Tunisia places it: beyond the Malta-Misratah Escarpment in the abyssal plain. There would be no logic in stopping the delimitation halfway across the margin, halfway across the natural prolongation.

Now, the other conclusion which one must draw from this, as a necessary inference from the Tunisian thesis, is, I am afraid, that the Maltese-Libyan *compromis*, envisaging the reference of a shelf dispute to this Court is quite without foundation. For Malta and Libya are not, on this thesis, and cannot be opposite States: they have interposed between any share of shelf which they might have, an area, a vast area, of Tunisian shelf, and a somewhat lesser area of Italian shelf. So there is nothing for Libya and Malta to come to this Court about.

And so, I come to my conclusion. My conclusion is, that the Tunisian scientific arguments during this second phase, whilst without question improved by their willingness to grapple with the geological facts – a willingness absent during the first phase – remain untenable. And no serious challenge has been made by Tunisia to the evidence, to the facts, adduced by Libya.

As for the Tunisian methods of delimitation, they remain, as before, divorced from the geographical realities of the situation, totally unfounded in law, and inequitable in the result.

The Court rose at 12.50 p.m.

THIRTY-FIRST PUBLIC SITTING (21 X 81, 10 a.m.)

Present : [See sitting of 29 IX 81.]

REJOINDER OF MR. HIGHET

COUNSEL FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Mr. HIGHET : Thank you, Mr. President, Members of the Court : it is once again an honour and a privilege to address you in this case. I shall organize my remarks today into three parts.

First, I shall deal with three general aspects of the Tunisian methods brought out by counsel for Tunisia during the second phase of argument. These aspects are mainly addressed to legal considerations. I need not take the Court's time with a detailed rebuttal of the four Tunisian methods. This was done yesterday by Professor Bowett.

Second, I shall then turn to a brief discussion of the Libyan method relating the applicable legal principles and rules to the pertinent facts.

And third, I shall take up certain of the Tunisian criticisms of the Libyan method in light of the remarks which our opponents made during this second phase.

1. THE TUNISIAN "METHODS"

Lines One at a Time

I would like to turn to a fundamental problem which we have with the Tunisian sheaf of lines. If the Members of the Court will imagine that Tunisia had only advanced *one* of her methods, and had not been able to come upon any others, it can readily be seen how feeble the whole Tunisian case would be.

In light of Professor Bowett's presentations during the oral proceedings, imagine if you will the Submissions on the Tunisian side resting solely upon the *rides* of Zira and Zuwarah or just the *ride* of Zira, if you will. Imagine again if Tunisia had only been able to come up with something like the "Ionian Abyssal Plain method" ?

Members of the Court might consider for a moment again what the result would have been had Tunisia merely produced one or the other of its two geometric arguments ; the *bissectrice* or "anti-amputation line" or the "angular aperture" line. Can one justify a response to the question framed in the Special Agreement by producing four different methods, none of which takes all of the relevant circumstances into account, and each of which we feel does not in any way reflect all the principles and rules of law with which we must here be concerned ?

We all know that it is possible, literally and figuratively, to bind reeds together to form a strong sheaf : a fasces or bundle. This will serve its purpose. But not where we must examine the nature or the strength of each component

of that sheaf. None of the reeds can stand by itself. Each, when taken alone, will bend.

Professor Jennings said last Tuesday that it was impossible to devise a method that would take account of all the relevant circumstances. He suggested indeed that perhaps a computer might be able to undertake such a task at some future date. But he held out little hope that it could be done for the purposes of the present case. To paraphrase Professor Jennings, perhaps it is a "novel doctrine of the exhaustion of methods".

How can this be ? Why is it so ? Indeed, if Professor Jennings' theory of impossibility or exhaustion is correct, it would seem that the Parties have asked the Court an impossible question under Article I of the Special Agreement. And perhaps this explains the Tunisian insistence that the Special Agreement requests the Court to clarify a practical method of delimitation rather than a method of applying the principles and rules. Indeed we think there is more to this distinction than merely a formal enquiry. It is in fact fundamental.

Possibly one of the reasons why Tunisia must interpret the Special Agreement in the manner she does is because she cannot suggest a practical method of applying the principles and rules which will also satisfy her objectives. She therefore suggests four different methods of delimitation and, at the same time, begs the question as to whether they should be required to fit in with all the relevant circumstances.

Tunisia, the Members of the Court will remember, once confidently stated in her Memorial (I, para. 9.36) that "the delimitation line in question" – it was one of the geometric lines I believe – "takes account of all the relevant circumstances which characterize the area". This was relating to the second geometric method in fact. But Tunisia is no longer so confident of this assertion, at the end of the day. Not only is this second geometric method distinctly placed to one side – the first geometric method has now become the one which is "to be preferred", in Professor Virally's words (IV, p. 614): Tunisia now even denies the ability of any of her methods to take into account all the relevant circumstances. Why ? Obviously because she must.

Moreover, what does producing four entirely different methods, or at least three entirely different methods, have to do with this ? We think in a way it is a kind of war of attrition. If one has to defend oneself against four misinterpretations rather than one, one has a more difficult job of placing the matter in true perspective at any point. And if one has to divide one's argument in four in order to meet four different viewpoints and four different recommendations from the other side, one's own argument suffers, at least can appear to become belaboured. And, with respect, we think that the task of the Court is thereby also rendered more difficult.

In our view, to produce the result she desires, Tunisia has made every effort to duplicate and reduplicate, triplicate and quadruplicate her reasons, none of which is complete on its own and each of which differs from the other.

Turning now to what was said in rebuttal by Tunisian counsel, following our initial attack on the sheaf of lines some two weeks ago, we have found almost nothing said of any significance about the first geomorphological method – the *ride de Zira*.

But Professor Virally (p. 341, *supra*) seemed to respond to my earlier statement that the Zira boundary line was arbitrary by indicating that I should not, in my argument, be concerned with the drawing of lines. But here the other Party has chosen to insist upon drawing lines and fixing them very precisely by various methods – geomorphological or geometric. And it will

just not do to say that since our argument is that the Court should not draw lines, we must therefore be silent about any line proposed by Tunisia.

My early point, that the first method – the "Zira ridge method" – was arbitrary, has not been met at all. It is, as we said two weeks ago, and as Sir Francis reiterated on Monday afternoon, entirely possible, as the Court has seen, to interpret the bathymetry in the area of concern in such a manner that Professor Virally's hypothetical boundary commission could happily pursue a northward course, rather than a 65° eastward course. Professor Bowett reinforced this point yesterday, as the Court will recall, and showed the evidence from Professor Fabricius that has not been controverted.

Professor Bowett also pointed out, again, the fundamental factual defects – the factual defects in the "Ionian Abyssal Plain" method, as well as its quite extraordinary theoretical consequences for other States and situations. The Court will recall the striking map which he produced, reflecting its diligent application elsewhere in the Mediterranean.

However, abyssal plains did not even make enough impression to be mentioned, either in 1969 or 1977. We think that the only reason Tunisia has now discovered the Ionian Abyssal Plain is because it lies east of Tunisia. As Professor Bowett has said : its acceptance will obviously give Tunisia the lion's share of any delimitation. It was certainly not considered (by Tunisia herself) as providing a rational direction for shelf delimitation in her 1971 Agreement with Italy.

So I would invite the Court to examine each of the Tunisian proposals alone, by itself and in particular as each – alone by itself – relates or does not relate to the applicable principles and rules of international law, and all the relevant circumstances of the case.

In light of the scientific evidence that has been produced in these proceedings, can any of these methods really be said to reflect the fundamental principle of natural prolongation ? Can any one be said to take into account all the relevant circumstances ? And, above all, can any one of them realistically be said to produce a result which would be equitable ?

We would say no.

Coastlines

I turn now to my second point. This is Tunisia's reliance upon irrelevant coasts, or her effort to use the same coast twice. This was alluded to by Professor Jennings, perhaps with an unconscious twist of humour, as being a "novel doctrine of exhaustion" (p. 272, *supra*). Professor Jennings also made a curious admission, or qualification, that this doctrine does not apply, in my words, to coasts "which abutted on the same area of shelf", and he went on to state that this qualification begs the very question at issue here. That question is : what is the "same area of shelf" for this purpose ?

Of course, Libya, we submit, has already answered this question. We have indicated an "area of concern" which is specifically related to the effect of existing or prospective delimitations with third States in the area.

As for the Tunisian coast north of Ras Kaboudia, it is quite true to say that this coast has already been taken into account in the delimitation agreement with Italy. But the real reason that the Tunisian coast north of Ras Kaboudia is "exhausted" for purposes of the present case, is not that. It is precisely the same reason why the northern coast of Tunisia near Tunis is "exhausted". And that is, of course, because both these coasts bear no relation to the shelf areas to be delimited as between Tunisia and Libya.

Nor can Tunisia find solace for her proposition – for her point of view – in the *North Sea Continental Shelf* cases. Professor Jennings said as follows :

> "The entire coast of the Federal Democratic Republic [of Germany] was taken into account by this Court in 1969. And . . . indeed, lay at the very heart of the Court's Judgment. The Court could not have drawn its illustrative Map 2 in the *I.C.J. Reports 1969*, page 15, had it espoused Libya's contention." (P. 273, *supra*.)

Members of the Court, two days after Professor Jennings made this argument, we were most impressed by the map which was introduced in the Tunisian courtroom folder. The Court will recall that this was the map accompanying *Limits in the Seas* No. 74, illustrating the maritime boundary agreement between the Federal Republic and the German Democratic Republic (p. 331, *supra*).

I should mention here parenthetically that the line there agreed upon between those two States extends for less than eight miles, that it has no apparent relation at all to the continental shelf, that it was specifically designed to follow a shipping route, an existing navigational channel. None of these points was even mentioned by Tunisian counsel. This agreement can hardly serve as actual or even apparent authority for the proposition for which it was advanced.

But, back to what I was saying. The misleading illustration – that is to say the German maritime delimitation agreement – did remind us of something which was the Baltic coast of the Federal Republic, and we realized that, with respect, Professor Jennings had been quite mistaken in saying that "The entire coast of the Federal Republic [of Germany] was taken into account by this Court in 1969". The Court did not take into account – nor did it even consider – the Baltic coast of the Federal Republic any more than the Court in the present case should, in our respectful submission, take into consideration the Tunisian coasts north of Ras Kaboudia.

One might also ask whether the Welsh coast was illustrated on the map of the United Kingdom on page 15 of the 1969 Judgment, or whether the eastern coast (the Baltic coast) of Denmark was taken into account ? The answer is that, when it comes to examining the relevance of particular portions of coast, it is not a "rule of exhaustion" really, it is a rule of reason that must be applied.

Now, obviously Professor Jennings would have changed the wording of his statement had he been reminded of the Baltic coast.

But that is precisely my point, Mr. President. When one gets to the question of the relevant coasts, one has to ask onself : which coasts, and relevant to what ? And that is what is meant by the amusing doctrine of coastal exhaustion which Professor Jennings described but, with respect, failed to analyse or to apply correctly.

Geography

Our opponents have consistently tried to deal with the Gulf of Gabes by explaining it away as a serious disadvantage for Tunisia, and they have also had to face the fact – the irrefutable fact – that the land boundary is found at Ras Ajdir. Yet the boundary is not in eastern Tunisia ; it is on that broadly uniform stretch of coast which in fact faces northward. But, according to our opponents, this fact only exaggerates the inherent disadvantage to which the Gulf of Gabes subjects them.

The Gulf of Gabes deserves brief special comment. In essence, our opponents' complaint is that a concave coast must – as if by definition – operate to the disadvantage of the State to which it belongs. Tunisia believes that she has found support for this proposition in the position, for example, of the Federal Republic in the *North Sea Continental Shelf* cases, which are cited as authority to support the Tunisian thesis (II, Tunisian Counter-Memorial, para. 165 ; IV, p. 424).

It might therefore be useful to take a closer look at a passage of the Court's Judgment which Professor Jennings himself quoted with approval (IV, p. 424). This is paragraph 8 of the Court's decision. The Court said :

> "in the case of a concave or recessing coast *such as that of the Federal Republic on the North Sea*, the effect of the use of the equidistance method is to pull the line of the boundary inwards, in the direction of the concavity." (*I.C.J. Reports 1969*, p. 17, para. 8.) (Emphasis added.)

It is readily apparent that the Court when it made this statement specifically limited its remarks to the situation at hand, and that is to a coast "such as that of the Federal Republic on the North Sea". The Court was not citing a rule applicable to all concave coasts wherever they might be found.

Of course the reason for that limitation is clear. And the Court stated it in the immediately preceding paragraph as follows :

> "It will observed that *neither of the lines in question* [the equidistance lines proposed by the Netherlands and Denmark], *taken by itself*, would produce this effect, but *only both of them together* . . ." (*I.C.J. Reports 1969*, p. 17, para.7.) (Emphasis added.)

This is quite a different concept from the one described by Professor Jennings. Here, quite obviously, we have no such situation. There are not two boundary lines surrounding the Gulf of Gabes. The sole boundary in question lies at Ras Ajdir. There is not some other land frontier somewhere along the flank of the Sahel that could provide a second line which would therefore "amputate" Tunisia's shelf.

Tunisia also suffers from an apparent inability to cope with the question of relevant areas. And I refer here to the response to the question put by Judge Mosler, touched on by Professor Jennings the other day (pp. 345-346, *supra*) and we are very keen to see the actual answer.

Professor Jennings in effect then said that the question was not a real question, since the "notion of a single 'area of concern' . . . is . . . a false concept" (p. 71). But the very terms of the Special Agreement specify at least, it seems to us, a recognition that the area of concern is the area which is to be delimited by the Parties as between themselves, and obviously constitutes the sum of the two areas of shelf appertaining to each, subject to delimitation and specifically mentioned in that Article 1.

I remind our opponents of the two propositions in the Libyan Counter-Memorial which the concept of the area of concern was designed to support and illustrate. These were, on the one hand, the extreme claims of Tunisia (p. 192) and on the other hand, areas which did not fall to be considered (p. 193).

At that time we felt it would be useful to the Court to consider an area for observation, for comparison, and for verification : as to whether the Tunisian sheaf of lines could ever produce an equitable result.

And we still feel such an exercise could be of assistance. Professor Jennings was of course partially right, when he said that our particular area of concern

enables us to illustrate the Tunisian sheaf of lines in a small frame. To a certain extent so it does. Not that the sheaf cannot also be looked at in a larger frame : there we would still say, with confidence, that it would look as equally odd and as extreme in its effect.

But in a small frame, it becomes, with respect, *quod erat demonstrandum*. No matter how the delimitation is to proceed, it must still be seen to be appropriate in the first context to be considered : that is, the area of the coast at the point where the delimitation must actually commence.

Nor can one get away from that basic fact by having sport with our proposal, as being a method of "little steps".

It is indeed by little steps as well as larger ones that the law, careful in its application, must proceed. And even the underwater boundary commission must so proceed, one step at a time. Otherwise it is, more than ever, a mere fiction.

And we would therefore say, Mr. President, that the "area of concern" for the Parties – and thus for the Court – to consider for the delimitation, is an area substantially along the lines of that suggested by us in our Counter-Memorial – for the reasons given in that pleading and as subsequently elaborated.

We would say that much of the discussion in the closing part of each Party's case has now confirmed the propriety of considering an area relevant to the case, for the purpose of evaluating the method of applying the principles and rules.

In summary : the fundamental weakness of Tunisia's concept of a sheaf of three or four lines is that if the Parties had intended to say "a method of delimitation", they would have said it, and surely if they had wanted to refer to more than one such method of delimitation they would also have done so, in the plural or in the disjunctive.

One of the Tunisian "methods" is responsive to an alleged theory of the case bearing upon a special reading of Article 76 of the draft convention, and a particular and erroneous view of the scientific nature of the fact underlying the abyssal plains.

Another of the Tunisian "methods" is responsive to neither of these assumptions ; but is based upon a premise that certain ephemeral morphological features can provide criteria for an actual boundary line between the shelf of one State and the shelf of the other.

The geometric exercises are based upon a very simple distortion of geography. Let me add that we can hardly be accused of failing to understand the geometric methods because we said that one was a mere variation of the other (p. 342, *supra*) : as Professor Bowett has already indicated ; they both presume an unjustified and artificial movement of the Tunisian coast eastwards to the frontier point.

So it is clear in our submission that none of these methods can alone meet the requirements of the Special Agreement. As Sir Francis suggested, it could very well be argued that they are therefore outside its scope.

But Professor Jennings said that one should,

> "apply a method and then if need be adjust the resulting boundary in some degree to take some account of other considerations or circumstances as is often done for example with a line of equidistance" (p. 279, *supra*).

Now this may explain Professor Virally's veer to the north in one of his bathymetric constructs, but which only appeared in the oral proceedings –

perhaps for obvious reasons. And that seems, in turn, to have been engendered by a belated flash of recognition of equitable principles which have been so dormant in Tunisia's written pleadings and certainly in her oral arguments.

But if one is "applying a method" – in Professor Jennings' phrase – why should then one adopt an artificial sheaf of lines, joined with so much artifice concerning scientific fact and theory on the one hand, and concerning history and alleged "historic rights" ?

Why the adoption of a choice of three, or four, lines of delimitation ?

This bears some thought. But obviously, we do not know. But it does also seem obvious that Tunisia has nothing to lose, and much to gain, by increasing her continental shelf claims from the inequitable equidistance line of 1976 to an even more inequitable sheaf of lines at 65° in 1981 ! (I might here note that this number was not mine : it was Professor Jennings' figure : IV, p. 426).

And perhaps this also accounts, on a different level or levels, for the intricate and highly artificial "campaign", the "campaign" relating to the alleged historic rights which, in the long run, are still so fundamentally obscure and amalgamated and confused.

It must be clear, Mr. President, that Tunisia cannot support any such claim, of 64° or 65°, by seeking to do what is in fact asked by the Special Agreement. There is no way in which an application of the principles and rules of international law could result in a delimitation along the lines suggested by Tunisia. And so a different interpretation of the Agreement is required.

And this is what I said and why I said what I did two weeks ago (p. 216, *supra*) that Tunisia's theory of the case has resulted in the fact that "the need for the practical method to have evolved from the principles and rules and to be consistent with them at all times has been placed at one, or possibly more, removes".

2. The Libyan Practical Method

Professor Jennings' admission – that no one could devise a method of delimitation which would respect all the relevant circumstances of this case (p. 279, *supra*) – leads me to the second part of my statement.

Again, we say that the Libyan method is not a method of delimitation and also that it does not suffer from the limitations which Professor Jennings has perceived in Tunisia's own sheaf of lines, namely an inability to cope with the circumstances.

Our basic position has in fact remained intact and, if anything, it has been reinforced and confirmed by the final attacks by Tunisia upon it as well as the final developments in the Tunisian case itself. Our concept of interpretation of the Special Agreement – to which I have spoken, as well as Sir Francis – has in fact been bolstered in our submission by all the arguments made on the other side.

Our views of the appropriate role of this Court, of the duties of the Parties and their experts, have been strengthened. And our perception of the fundamental legal principles and rules which are applicable has only been rendered more clear in the context of our opponents' views.

1. First, it is still our fundamental proposition that the most practical manner by which the Parties and their experts can effect a delimitation, consistent with the principles and rules as applied to the facts, is for them to examine the serious pertinent evidence of geology and recognize the true

natural prolongation of the structure and mass of the North African continental landmass to the north, consistent with the reality of the political boundaries and other elements which we have considered here at length.

2. Applying the law to these facts, as so indicated by the Court, and following the method of application also to be indicated : the Parties would then be required to refine the general line of direction of the prolongation as determined by the geological evidence – and that could be indicated by the Court upon the basis of the evidence it this case.

3. This refinement will therefore occur, and the practical method of application will necessarily proceed, in the logical manner – step by step – as the Parties work out the line of delimitation northward along its course. This they are to do under the guidance of the Court's Judgment – the legal rules, indicated by the Court, will be applied to the facts as found by the Court.

4. It must also be remembered that the delimitation is to start at this point on the northward-facing African coast or at a point off the coast, but not at another point.

5. The factors supporting this line of northerly direction over the first section of the proposed delimitation are well known to the Court. The principal factor is geology, supported by the unequivocal truth that one must proceed from this north-facing coast and one must start there, and that such a progression is consistent with the 1955 Petroleum Law. And geography, political and other geography, here combines and reinforces geology and confirms its result.

6. So, taken together, these elements combine to resolve a direction. They all go north. In addition, common sense suggests that there would be a compelling reason to abandon the longitude of the last section of the land boundary in its seaward course. The westward edge of the Petroleum Law Zone No. 1 would run identically to that line of longitude.

7. This would all be consistent with a recognition of the fundamental element of natural prolongation of the north-facing North African landmass, here, into and under the sea, there – the extension of that landmass into and under the sea in all senses referred to by Sir Francis on Monday afternoon and as fully again demonstrated by Professor Bowett yesterday morning. This would be consistent with it and it would reflect it.

8. As the Parties move northward, they may well be assisted by a determination by the Court whether the alleged fishing or other "historic rights" exist. But in every likelihood these – even if they did exist – would not be affected.

9. And if to any extent they are – which we deny – the Parties can always consider how to accord reasonable protection for them, which would not affect the shelf delimitation itself. For the Court will no doubt have considered the mass of material which has been introduced in an attempt to establish – but which in our view falls far short of establishing, in fact or in law – an alleged zone bounded by the so-called ZV-45° line out to the 50-metre isobath.

10. Our proposal would then lead the Parties to, or rather would invite the Court to clarify how the Parties can proceed, step by logical step, in a manner which remains consistent with the fundamental determination of natural prolongation of the landmass lying to the south, and also consistent with those other factors which I mentioned, including, no doubt, the particular circumstance of the geography of their coasts in that area of concern.

11. And so the Parties will proceed to a point where the geographical circumstances are affected because of a change in direction of the original

north-facing Tunisian coast, which now turns around inside the Gulf of Gabes and then assumes a new direction, characterized in this area by the promontory of the Sahel.

12. And the further north, the further north the Parties proceed – up here – the more appropriate it becomes to recognize this change in circumstance. Indeed, Tunisian counsel have repeatedly stressed just this point : that the relevant circumstances of geography and the configuration of the coasts must be observed. And this is done, here.

13. The Court and the Parties therefore know that this must happen ; and the Court has our view, a view which has not been controverted, as to where it happens. The reason why there must be a change in direction is that equity would require it in any delimitation proceeding in such a direction from such a coast, given the change in configuration which occurs in such a manner. The relevant evidence will have been examined and the Parties will know how to take it into account, consistent with the principles, the applicable legal principles.

14. It would be inequitable to ignore that change in direction. To do so could constitute an encroachment upon Tunisia ; fixed fisheries or no fixed fisheries ; shoals and flats or no shoals and flats. And therefore there must, as we have said, there must exist a veer, a change in the direction, somewhere between the parallel to the change in direction of the coast and the original northward direction.

15. Now, the Parties are to work this out, subject always, Mr. President, to the guidance of the Court. The Court may consider the likely location of any area of divergence between those two directions – its extent. The Court might indicate how the Parties should take into account, for example, the factor of proportionality to which the Court in 1969 referred, in working out between the actual line of delimitation.

16. Now, by this point it shall have become apparent to the Parties that in fact no alleged historic *pêcheries fixes* will, in fact, be affected : nor would any sponge-fishing rights. It will be seen how the Kerkennah Islands will be respected and that there will be no encroachment on their banks or on their shoals. Tunisian territorial waters – and I will return to this point in a moment – Tunisian territorial waters, even under their disputed 1973 baselines, will not be affected.

17. And the Court will also have noted the factual circumstances, and the applicable legal principles, concerning the non-encroachment of the line of direction upon existing petroleum wells, upon actual existing fisheries, and upon any other relevant circumstances such as the location of the most important, and the capital, city of Libya.

18. The Court will, Mr. President, no doubt give guidance to the Parties as how to minimize disruption or take account of any special situations where protection of existing rights is necessary in order to achieve a fully equitable result.

19. Finally, the Court will guide the Parties as to the possible effect on this delimitation of existing or future delimitations with third States.

20. So, in the event, this is our practical method. With guidance in the matter, in law and in fact, the Parties and their experts can set about the task of agreeing upon an equitable delimitation line. This task should be easier than the task of the two Kingdoms and the Federal Republic 12 years ago. For that task followed a Judgment of this Court which was necessarily in more general terms, in 1969, than the judgment which is called for in this present case.

3. Tunisia's Attacks on Our Case

I should now like to run quickly through some of the significant issues and points made by Tunisian counsel concerning the practical method proposed by Libya.

(51) (i) First, Professor Virally stated (p. 327, *supra*) that the brown line, the famous brown line of Figure 3.01 of the Tunisian Counter-Memorial – which has featured so heavily in these proceedings – he stated that that line was entirely justified, because it resembles the line of arrows which were shown in our Counter-Memorial at pages 201 and 202 **(II)**. But what he failed to mention is that the line of arrows, as such, was not advanced as such by our Counter-Memorial. The northerly line of direction represented by those arrows was specifically identified in terms in paragraph 503 as being so indicated as "Line A . . . for illustrative purposes only, and represents neither a specific meridian nor an exact line of direction". And Professor Virally knew perfectly well that we had not suggested that anyone follow Line A all the way north to the Gulf of Hammamet, and I would here refer the Court yet once again to the prescient footnote No. 1 on page 201 of our Counter-Memorial, which in effect repudiated the equitableness of Line A, characterizing it as passing close by the Kerkennah Islands and cutting directly in front of the Tunisian coastline.

(ii) Next point. We are also accused of failing to give any example of State practice prolonging the land boundary seaward in accordance with its general direction (p. 332, *supra*). But what was omitted were the words specified in paragraph 116 of our Memorial, at page 48 **(I)**. They said that : "The *use of a line of longitude (or latitude)* drawn from the terminal point of the land boundary of adjacent coastal States, and projected seawards as a maritime boundary, is well established by State practice." I should add that Professor Abi-Saab, to his credit, got this right – he even quoted this same language in his rebuttal speech (p. 284, *supra*).

But we had set forth the Gambia/Senegal Agreement (para. 117) which most certainly continued the actual azimuth of the general direction (it was also on a line of latitude) of the land boundary before its termination. And we set forth the Colombia/Ecuador Agreement (para. 118), cited as being "Another example of the continuation of a land boundary along a line of latitude". And finally – a different example – we set forth the example of "a rhumb line perpendicular to the general line of the coast" – that was the Brazil/Uruguay Agreement (para. 119).

(iii) I shall now turn briefly to the issue of encroachment. It was said elsewhere that we had claimed that the Libyan practical method would not encroach on the historic rights, on the territorial sea, or on the internal waters of Tunisia. And the Court will remember that a slide was shown from the (126) Tunisian courtroom folder, and we were criticized for employing a double standard (p. 331, *supra*).

What had in fact been said ? And what in fact is the position ?

First, it was said (and this was by us) that our line of direction would probably "leave on the Tunisian side of a resulting delimitation the shoals and banks of the Kerkennah Islands and whatever else. The fixed fishery installations of the Kerkennians would thus surely be preserved . . ." (p. 241, *supra*).

I next stated that :

"the likely effect of the line of direction which would result from

> application of our proposal would also be to completely avoid the Tunisian territorial sea claims, even those greatly exaggerated claims based upon the inappropriate baselines adopted in 1973" (p. 241, *supra*).

And finally, on the next page, I repeated my statement about avoiding the 1973 territorial seas, and I then added this :

> "Nor would the result of the proposed Libyan method affect any areas *in which Tunisia can validly claim any right* to take sponges, or to construct fixed fishery installations." (Emphasis added.) *(Ibid.)*

And I would stress – very clearly stress – "*in which Tunisia can validly claim*".

So what was said was the following : that even the right-hand parallel to the Tunisian coast, represented by "Line Z" on the diagram in our Counter-Memorial on page 202 – that even this right-hand parallel would avoid encroaching upon, first, the shoals and banks and the fixed fisheries of the Kerkennahs ; second, any areas in which Tunisia can *validly* claim any right to take sponges or to construct fixed fishery installations ; and, three, the Tunisian territorial sea claimed in 1973. And I said nothing about internal waters.

Now, if the Members of the Court would consult the diagram on page 202 of our Counter-Memorial **(II)**, and look at that "Line Z" – it is marked "Parallel to Change in Direction" – they will note that the line bears at an angle or azimuth of approximately 40° east of due north. In my argument on 9 October I had said that my remark could be confirmed by a quick glance – (69) those are the words I used – a "quick glance at Map No. 11, facing page 50 of our Counter-Memorial" (p. 241, *supra*). Now, Mr. President, I do not hold myself out as a cartographer, but in view of Professor Virally's remarks, I rather carefully transferred the parallel of Ras Yonga and the due-north line A from Ras Ajdir on to Map No. 11, and I then put a 40° east line on that same map, running north-east fairly much, as you will notice, on an intersection course with Lampedusa, just as it is shown by the little grey arrows on the diagrams on pages 201 and 202 of the Counter-Memorial **(II)**. And in the words of the Counter-Memorial, the lines of direction were "general", they represented an "approximate change in direction", and nor is "Line Z" itself a "precise proposed line of delimitation" (Libyan Counter-Memorial, paras. 500, 502 and 503).

But our statement still held true, after I transferred those things. The easternmost line proposed for the zone of overlap or "marginal area of divergence" still appears to pass to the east of the controversial 1973 territorial sea limits – it is just to the east of them. We need not be concerned with the 1962 Tunisian territorial sea, which was swiftly withdrawn, as the Court will recall, one year later.

But are not the real points as follows ? First, this is a question for the experts ; and indeed, the controversial 1973 territorial waters and the "internal waters" are completely avoided by the parallel to the coastal direction "Line Z". The point really is that there is little, if any, encroachment.

Now there can be no question about the shoals and banks of the Kerkennah (126) Islands, since even on the Tunisian map just mentioned most of the marginal area of divergence is well outside the 10-metre isobath, if not the 20-metre. And we absolutely deny that there can be any fixed fisheries in waters deeper than a few metres. This is perhaps the only point proved by the film which Tunisia showed to the Court the other day. And can anyone seriously argue

that fixed fisheries of that nature could be maintained in deeper waters – say, as deep as this courtroom, which must be at least 10 to 15 metres high ?

And valid claims to take sponges. Well, we of course consistently resisted any pretensions of Tunisia to regulate or have exclusive sponge fishing rights based on the ZV 45°/50-metre isobath formula, and this should eliminate the (126) little triangle at the bottom of the map. That is this little triangle here. We also deny the legal effect of the assertion of Tunisian fishing rights within the northerly dotted line marked *Limite de la zone des titres historiques*, roughly in this area and the Court will look at it on the map.

(30) I might also refer here to the map in the Tunisian Memorial (Fig. 5.26). If I could remind the Court of this map for a moment, it is entitled "*Répartition des concentrations des éponges*". Members of the Court can readily ascertain what the effect would be on any sponge beds – even significant sponge beds, but I think any sponge beds – north of the latitude of Ras Yonga, of the Libyan proposed lines of direction. It would be nil. Incidentally, I should note that this map does not even show "Tunisian" sponge banks but rather shows sponge banks generally, off the Tunisian and Libyan coasts.

And so we continue – unaffected, Mr. President, in our view – that the general lines of direction, and certainly the easternmost line of direction – the so-called "veering" line – suggested by the Libyan practical method, will not encroach in any significant way, if at all, on any legal rights of Tunisia and even upon the exaggerated territorial sea claimed by Tunisia.

(iv) Mr. President, before I leave this point I should also make haste to deny an intemperate allegation which was made concerning "falsification" of Map (72) No. 13 in our Counter-Memorial – the FAO map of sponge fishing in Libya (p. 333, *supra*).

Without going into the details of what was said at that point – the Court will refer of course, if it is concerned, to the record – I raise these questions only. First, how could this have been a falsification ? The original FAO map (72) had long ago been deposited with the Court by Libya. Map No. 13, the one in our Counter-Memorial, very specifically indicated on its face that it had been prepared "after" the FAO map. And we were even careful to show the limit of Libyan sponge grounds on our map more conservatively than had been shown on the FAO map. In fact they were several kilometres to the east of Ras Ajdir.

It appears to us therefore that there could only have been a falsification or a distortion if the original map had not been filed, if the copy in the Counter-Memorial had not indicated its provenance, and if Map 13 had showed more – not less – of the area subject to Libyan jurisdiction than did the FAO map.

(v) This leads me to a related point concerning the "marginal area of divergence" : substantially, from A to Z.

It is important to keep in mind, Mr. President, that line Z – this is all on the (126) Tunisian Courtroom folder Map again – which was taken from the diagram originally produced at page 202 of our Counter-Memorial **(II)**, was only a line which was generally parallel to the change in direction of the Tunisian coast after the approximate latitude of Ras Yonga – to the selection of which, that is to say Ras Yonga, incidentally, Tunisia has had nothing further to say in her oral reply.

The parallel line was not itself a line of direction for a delimitation, far less a line of delimitation. It represented the probably easterly limit of what we said in our Counter-Memorial was "a marginal area of divergence where several differing considerations must be balanced in order to achieve an equitable result" (**II**, Libyan Counter-Memorial, para. 504).

Now with all the discussion of "veering" in the present case, the impression might have been given that line Z in that diagram is in effect a proposed line of delimitation, or a "veer line" which is somehow being proposed by our side. I would make it clear, Mr. President, that this is not so. This whole matter has in our view always been one for the Parties and their experts to work out in accordance with the indications to be given by the Court in order to arrive at an equitable result and to fix the actual line.

Of course the "veering" must not be, and cannot be, at the outset, from the outer limit of the territorial sea.

In the initial segment, that is north of Ras Ajdir, as I said earlier : we have geology, geography and all the other relevant circumstances pointing uniformly northwards. And it is only at a considerable distance from the coast, north of Ras Ajdir, that the influence of the Sahel promontory begins to be felt.

And it is then, and only then, that the geographical circumstances begin to militate in favour of a "veering" to the north-east, to support a marginal area of divergence which may be appropriate for the Parties and their experts to consider.

Nor, and this is an important point, should the analysis represented in our presentation of the marginal area of divergence be confused with any area of overlap claimed by Tunisia. In particular it should not be confused with the enormous areas which would result from the eastward burgeoning of the Tunisian concessions, which was pointed out by Sir Francis on Monday afternoon, this week. Finally, nor, in our view, is this thought applicable to the overlap of positions, or distance between one legal position and another, with Tunisia for example at her modified 1976 equidistance line or otherwise, which was also mentioned by Sir Francis. This would indeed, Mr. President, be inconsistent with the proposition at page 192 of our own Counter-Memorial that "The Extreme Claims of a Party Are Not Necessarily Determinative of the Continental Shelf to Be Delimited".

(vi) My next point, Sir, relates to the presence and nature of Libyan oil wells which would be cut off by the Tunisian sheaf of lines, and the nature of any Tunisian wells which might be affected by the Libyan proposal.

Professor Jennings (p. 276, *supra*) chided me for identifying Libyan wells in the area as being "productive" (p. 228, *supra*) and he then went on to say that : "I emphasize the word productive because so far as Tunisia is aware, none of the exploration sites drilled by Libyan concessionaires and which might be affected by the delimitation line proposed by Tunisia, is actually producing oil." *(Ibid.)* Now this is technically true but the conclusion is, with respect, substantially untrue.

Perhaps it would be helpful, Mr. President, if I told the Court a little bit about offshore petroleum drilling operations. Exploratory wells are drilled, but once a field is discovered it does not mean it will be economical to produce oil from it.

If production operations are commenced, huge expenses are entailed to implant stable concrete platforms. These cost in the hundreds of millions of dollars.

The offshore stable concrete platform must then be connected up with all the wells in the field. They must all feed into that platform. And the platform is then in turn connected to pipelines or, in certain cases, to offshore terminal points. It is only then, Mr. President, that exploitation of the oil resources takes place provided the quality and quantity is adequate.

Now the Court will recall my pointing out eight Libyan oil wells which I (64) indicated to the Court on the map (p. 243, *supra*) and we would reaffirm

these are indeed oil wells. Each site is capable of being put into production. Every single one of these wells is therefore a "producer", even if it is not currently in production and, moreover, when each will be developed and placed into commercial production it will then be a commercially producing well.

Professor Virally ran through these eight wells (p. 334, *supra*). He mentioned A1/137, and he said that it was not commercially exploitable. (This is not correct; it has not yet been put on stream.) B 1A/137 and B 1/NC 41 were mentioned by him as being the first ones in the area drilled by Libya containing exploitable quantities of petroleum and he then stated that Tunisian concessions had been awarded in 1972 (p. 334); and that these covered large areas, including (at least in part) areas which are also covered by the Libyan concessions.

But he failed to mention that Tunisia has never drilled any wells, to our knowledge, in the areas covered by Libyan Concessions 137 and NC 41. For all intents and purposes, therefore, there has been no Tunisian drilling in those areas covered by Libyan concessions, and where some $61 million has already been expended in exploration costs for these Libyan wells.

Yet he implied a right of adverse possession, or prior claim, and he denied at the same time that the Tunisian eastward expansion was encouraged by the smell of oil. But although Tunisia may have created or granted those concessions – as Sir Francis Vallat has indeed already noted – no "Tunisian" wells have been proved out or even drilled in those areas. And this factor may indeed be relevant in evaluating the equities of a situation of this sort.

So it appears that it was the smell of oil, after all.

Furthermore, the suggestion made by counsel for Tunisia that there is only one productive field – the Ashtart field – that is relevant, leaves the Court with the impression that Libya so far has, in her own offshore concessions, found no oil, or no oil in commercial quantities. Mr. President, I do not wish to get into a further argument about when an oil well is "producing". But as I said a few minutes ago: the facts are that in the Libyan concession areas there is oil.

The stage when that field is put into production, so that it comes on flow, that has not been reached. But the reasons for that are not that the oil does not exist, but that the business and policy decision has not yet been made to expend the funds and take the steps necessary for the full development of these wells.

(vii) Professor Virally then pointed out that the five remaining Libyan wells, five of the eight indicated by me, had been drilled after the so-called "critical date" of the signature of the Special Agreement (p. 334, *supra*). Sir Francis has also analysed this point. Indeed we were struck by the lack of logic of a proposition which would deny – retroactively – Libya the right to drill on Libyan shelf under Libyan concessions in areas which were far removed from even the most extreme claim (the 1976 equidistance claim) theretofore or at that time made known by Tunisia.

How was Libya to know that Tunisia would later be asserting a different claim of right to those areas?

And as for the Tunisian wells, the Court will note that the only two oil wells indicated as being affected by the Libyan practical method are Isis and Didon.

Neither, as far as we know, is producing. And these were both listed in the Petroconsultants Survey filed with the Court as Technical Annex 9 to our Counter-Memorial.

And finally, the modest gas deposit which Professor Virally mentioned at

page 335, *supra*, can certainly be handled in some appropriate manner, as I indeed suggested on 7 October at page 229, *supra*.

The Court adjourned from 11.08 a.m. to 11.30 a.m.

(viii) Mr. President, just before the Court rose I was about to consider the effect – a point relating to the effect – of the 1955 Petroleum Law and Regulation. And this was to make clear that we reject as being utterly irrelevant a point suggested by Professor Jennings. This point was to the effect that statements allegedly made in 1972 by a Libyan diplomat (that the Libyan position relating to the 1968 delimitation proposal was "neither constructive nor justified") can be read as qualifying the relevance or effect to be given to the 1955 Petroleum Law, Regulation and the map (pp. 274-275, *supra*).

There are four things wrong with Professor Jennings' suggestion.

First, the source for the record of this statement was entirely Tunisian.

Second, the discussions were without prejudice, and, more particularly, they were merely in the context of preparing an agenda.

Third, no matter what was said – if indeed it was – how could it affect the validity or applicability of the Petroleum Law, either constitutionally, internationally, or as a practical matter ?

And fourth, we can certainly not be dealing here with any question of estoppel.

(ix) The last specific point which I would like to take up is also related to oil. It is a very subtle point, figuring in Professor Virally's address on 14 October (pp. 314-315, *supra*). First, he started with our argument that the Court should not ignore geological strata of great age because oil is to be found in such strata and, because oil is an important shelf resource, such strata therefore are relevant. That was our argument (p. 314, *supra*).

He combined this with quite a different argument (which we had also made) that the existence of petroleum deposits is, consistent with the views of this Court in 1969, a "relevant circumstance" to be taken into account by the Parties in effecting their delimitation (p. 314, *supra*).

But he combined both arguments most astutely into a third, which he then attempted to attribute to us. This was :

> "Cette présence [that is to say of the oil] ferait-elle naître des droits aux zones du plateau continental contenant ces couches au profit de l'Etat côtier dans le territoire duquel les mêmes couches se retrouvent ? Doit-elle exclure l'Etat côtier où, par accident, ces couches ne se retrouveraient pas ?" *(Ibid.)*

It was also suggested (p. 315, *supra*) that : "c'est à une distorsion complète de la notion du prolongement naturel et même de celle du plateau continental que nous aboutissons". *(Ibid.)*

What does all this mean ? First, it is implied that we have argued that access to oil will determine natural prolongation and shelf entitlement, rather than the other way around. Tunisia is quick to argue a misperception of our case, since that argument conforms with Tunisia's own misperception of the law. And I refer the Court here to the content of Tunisian Submission 1.2, relating to her alleged "historic rights".

(x) Therefore, far from having damaged the relevance or the propriety of the Libyan "practical method", Tunisia's weak and distorted criticisms of the process which we have adopted and which we propose have really confirmed it. Where are equitable principles to be found in the Tunisian sheaf of lines ?

Who proposed the change in the original line of direction – the divergence creating an area where other relevant circumstances can be taken into account ? Where is the area of concern for our opponents ?

They will say that there are two or three or four such areas, but none to which they will commit. Their precision with the four lines, and their limitations upon the Special Agreement, derive from the obvious fact that they have much to win and little to lose by any solution along the lines proposed by them.

But we did not propose an extreme or a "bargaining position" type of solution. We did not lunge to the west as Tunisia has indeed lunged to the east.

However, Professor Jennings and Professor Virally both spent much time and effort attempting to attack our proposal. First, Professor Jennings said that our specification of the "dilemma of the frontier" effectively swept away geology (pp. 264 and 266, *supra*). Professor Virally then said that in my presentation of the Libyan practical method he had heard no mention of geology (p. 328, *supra*) ; and that I had adopted the new tactic of little steps which was an impressionistic, if not *pointilliste*, technique of approaching the problem.

Indeed, Professor Virally unburdened himself of a veritable Philippic upon the practical method as being unable to be accomplished in "steps" at all. We were accused of a "fundamental incompatibility" between the method respecting natural prolongation and the method of little steps, which was expressed as "consacr[ant] définitivement l'abandon de la géologie à toutes fins pratiques" (p. 329, *supra*).

We were then accused of no longer "believing in" our practical method *(ibid.)*. And he concluded by saying that : "un renversement aussi radical, une volte-face aussi brutale, effectuée lors des deux dernières plaidoiries libyennes, me jette dans la perplexité." *(Ibid.)*

What does all of this come down to ? How are we supposed to deal with it ? In more than one sense, this heated response was a grave disappointment to us. We did not mean to lose confidence in our method, nor to be told that we could no longer believe in it. We did not for an instant perceive that we were engaged in any dramatic process of uprooting and overturning our earlier arguments. In fact, we felt and we still feel this morning that it is entirely logical and consistent with the principles and rules of law as set down by this Court and by the Court of Arbitration, for the method of applying the law to the facts to proceed, by considering not merely what the law is but what the facts are.

For to say that we are, on the one hand, monolithic (in our Memorial) and that, on the other, we have adopted a *méthode correctrice*, or are now adopting a method which is a "renversement . . . radical", constituting the definitive abandonment of geology : where does this leave the responsible advocate, and the Court, in the search towards the answer to the question put to the Court by the Special Agreement ?

Now, surely natural prolongation must be looked at, and govern the attribution of *de jure* shelf areas, but surely something other than that has to be – and must be – taken into account by the Court, and the Parties, and the experts ? By the terms of the Special Agreement, or the existing state of international law, or common sense, or possibly all three ?

And when we suggested our veering to the north-east, to provide a marginal area of divergence within which the Parties could operate, consistent with natural prolongation, geographic circumstances and equitable principles, and when we suggested that it might be a good idea to consider the area wherein

the delimitation would really be expected to be effective – surely all these considerations are consistent with one another and not inconsistent. On the one hand we were accused of denying equity. Yet on the other, when we allude to equitable principles, we are held to be inconsistent.

We are told that we are monolithic, and thus subject to criticism. But when we are careful to take all relevant considerations into account, we are told we are no longer monolithic and thus subject to criticism.

We rely upon geology and we are told that it is wrong to do so. But if we say that there are other factors to be considered as well we are then told that it is wrong to say so.

It is therefore our position that nothing which has been said by our opponents in their oral reply has to any extent hurt our case.

It is clear beyond a doubt that the evidence supporting the Tunisian methods of delimitation is precarious, selective and arbitrary.

It is clear beyond a doubt that the interpretation of the Special Agreement, which has resulted in the production of these methods, is a flawed interpretation.

And it is clear beyond a doubt that Tunisia's interpretation of the law and the facts is wrong, both as to the legal effect to be attributed to the factors tending to prove the existence of natural prolongation, and as to the proper interpretation of Article 76.

It is crystal clear that the more explanation that Tunisia has given of her three or four systems or methods of delimitation, the less acceptable they prove to be.

Finally, it is clear that each of those is less responsive to the relevant circumstances and more dependent upon irrelevant matter and fallacious premises than we had previously thought.

On the other hand Libya has indicated to the Court what natural prolongation in fact is, in the geological and geographical circumstances of this case.

It has also indicated the relevant circumstances which clearly characterize the area and which must be taken into account to reach a result that accords with equitable principles.

It has also put before the Court a proposal as to how the principles and rules may be applied to these relevant circumstances so as to achieve an equitable result, an equitable solution.

This proposal – or this practical method – stops well short of drawing a line but goes considerably further than the *North Sea Continental Shelf* cases.

It leaves to the Parties an important negotiating role but one which, within the framework set by the Court, can lead to agreement between the Parties within a three-month period.

In conclusion, we submit that our suggested method of applying the law to the facts is in the final analysis the only practical method to this end which has been advanced in this case. The Tunisian lines are not methods ; they are not practical and they are not equitable.

Our suggestion is a method ; it is practical, and it observes the reality of the relevant circumstances, as well as the ultimate requirements of equity.

REJOINDER OF SIR FRANCIS VALLAT

COUNSEL FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Sir Francis VALLAT : Mr. President and Members of the Court : it is the greatest possible honour to address the Court at the conclusion of this important case in which counsel and experts of such distinction have taken part on both sides.

The appearance of Libya before this Court results from a deliberate choice. A choice to submit its dispute with Tunisia over the delimitation of their respective areas of continental shelf to a settlement on the basis of law. Libya seeks only that to which it is legally entitled. Libya is activated by a desire to seek a rapid solution in a spirit of goodwill and has throughout tried to co-operate with the Court in that spirit.

This is an element which has important consequences for the way in which the Court looks at its role under the Special Agreement. It was clear that Tunisia's desire to have the Agreement interpreted in such a way as to minimize the role of the experts of the Parties was based upon an assumption that goodwill does not, and will not, exist between the Parties. I stress that this is not the view of Libya. On its part there is goodwill towards Tunisia and the firm belief that with goodwill the Parties will be able to reach agreement on a line of delimitation in accordance with the Court's judgment.

There is an allied and more practical consideration. It is in the interest of neither Party for this dispute to continue. The development of the offshore resources has already involved the expenditure of vast sums of money, and will require much more. So it is certainly not in the interests of Libya to have the development of any part of its shelf area delayed or prejudiced by uncertainty over boundaries.

The importance of the case to the Parties needs no stress. But I would at this point stress its importance for the world at large. The far-reaching consequences of this honourable Court's 1969 Judgment are recognized by everyone : in literature, in State practice, in the 1977 Award and in the Third Law of the Sea Conference, one sees repeated evidence of that.

So will it be with this case. Its impact upon the future development of the law, upon State practice and upon the attitude of States towards the judicial settlement of maritime boundaries will be tremendous. It is for this very reason that we, on the Libyan side, have viewed with such dismay the extensive reliance of Tunisia upon bathymetry. As a criterion for continental shelf delimitation it is so superficial and so totally inappropriate, in most if not all parts of the world, that for the Court to adopt such a criterion would cause consternation everywhere.

We do not deny that bathymetry may offer an easy way, or that, in contrast, the evidence of geology and geomorphology presents what some may regard as formidable technical obstacles. Nevertheless, it has become increasingly apparent in this case that this domain of scientific evidence is not nearly so controversial as one might think, or so difficult to comprehend as the Tunisian counsel would have us believe. Indeed, as we have seen, the complexities derive largely from the interpretation which the Parties seek to place upon the facts. But courts are well able to deal with differing interpretations of the facts. Whether the facts relate to science or to evidence of acts of sovereignty or to

proof of damage, these are all areas in which courts have to resolve different interpretations of the facts.

One of the tests that may be applied in dealing with the facts and their interpretation is the test of consistency. Obviously, in the course of a long and difficult case, the arguments made by a Party will be developed and changed. But development and refinement, and even change, are not to be equated with inconsistency. But where one finds real inconsistency either internally between one part and another of a party's case, or between the case argued at an earlier stage and at a later stage, then one reaches a point at which the soundness of the case as a whole comes into question.

I submit to the Court with confidence that there is no inconsistency in any important respect in the Libyan case presented to the Court. The one major accusation of inconsistency is levelled at our suggestion that a delimitation should veer towards the northeast to take account of the prominent Tunisian Sahel formation. Mr. President, that is not an inconsistency. We do no more than equitable principles require in taking account of a circumstance which is relevant and cannot properly be ignored.

By contrast, one of the features of this case, which must have struck us all more and more forcibly, has been the inconsistency and lack of reality in many of the Tunisian arguments. We have witnessed, as it were, a most curious divorce between the contentions advanced by Tunisia and the realities, the facts, which lie behind them.

Mr. President, take, for example, Tunisian cartography, of which this map is a specimen. This is the map which appeared at the beginning of the Tunisian film, and it shows the quite incredible use of names on maps made by the Tunisian side. I see, Mr. President, that *this* is not a laughing matter. Again, take the whole Tunisian argument based upon the importance and reality of alleged immemorial fishing rights. In truth this is largely an empty claim. The fixed fisheries are nowhere near any conceivable area of delimitation ; the sponge fisheries are, in economic terms, almost trivial. Then, again, take those cliffs – the *falaises* – and the *rides*, and the valley – the Sillon Tripolitain ; all of them, as the evidence has shown, features of trivial significance in the context of shelf delimitation. Take those documents designed to show an international acquiescence in the Tunisian assertion of sovereignty out to the 50-metre isobath and the ZV 45° line ; all of them have been shown to be without legal foundation. Take this totally, totally new east-facing continental shelf, conjured up by Professor Virally : entirely without scientific basis. Take the supposed reflection of the Tunisian coast in the bathymetry : it is simply contrary to Tunisia's own maps. And here one comes back to the fundamental internal contradiction in the Tunisian case. One has, on the one hand, Professor Jennings bravely battling on with bathymetry, and, by contrast, Professor Virally trying to rescue the Tunisian case from total collapse on the wholly different ground of this newly imagined continental shelf to the east of Tunisia.

These are the fruits of a claim that gives the appearance of having been created and developed for the purposes of litigation. Indeed, at an earlier stage, Professor Jennings said as much in trying to explain Tunisia's abandonment of the May 1976 Memorandum, which, as the Libyan Memorial showed, would undoubtedly have been unfairly generous to Tunisia at the expense of Libya.

Tunisia has chosen to put forward extreme claims in the course of the proceedings which went far beyond any claims previously suggested by Tunisia. It was this fact that provoked the statement in the Libyan Counter-Memorial that the extreme claims of a party are not necessarily determinative of the continental shelf to be delimited (**II**, Libyan Counter-Memorial, p. 192).

This is, of course, not the same as saying that, in the absence of a definition of an area for the purposes of a special agreement, the area referred to in such an agreement must have regard to claims put forward by the parties before – rather than after – the conclusion of the special agreement. It is truly ironic that Tunisia has sought to evade the question of the area of concern. Even as I speak, I have no idea what area they would have in mind. One would have thought that Tunisia would, in the course of presentation of its case, have been anxious to show that its new claims in some way fall within the area to which Article I of the Special Agreement refers. The fact that Tunisia has not done this throws a shadow over the whole of its exaggerated claim.

By contrast, the case for Libya is unified, is consistent and based on sound evidence. I will not try to review all the facts, but would stress one or two major points that have been made during the proceedings.

First, there is the northward-facing coast, common to Tunisia and Libya, with the land boundary that reaches Ras Ajdir running in a generally south-north direction. Secondly, is the undeniable fact that out to the limit of the 12-mile territorial sea a strict equidistance line would run practically due north. Thirdly, Libya, in the 1955 Petroleum Law and Regulation, has claimed a continental shelf delimitation running north for some distance, as shown on Map No. 1 forming part of the 1955 Regulation. Fourthly, the preponderance of the evidence is that the continental shelf of this part of North Africa proceeds from the stable African platform, from the fall-line, through the hingeline, the coast and in the direction of the continental margin to the north. The geological evidence confirms what is an obvious geographical fact that, generally speaking, the north coast of North Africa faces north and that the continental shelf of the various parts of Africa must in general lie to the north. As has been shown beyond doubt by the evidence of the Libyan experts as explained to the Court by Professor Bowett, there is no question of a continental shelf in the technical sense running eastward from Tunisia, as Professor Virally would have us believe, but it runs northward from the northward-facing coast. Accordingly, the natural prolongation from the coast in the vicinity of the common boundary of Tunisia and Libya is not to the east or to the west, it is towards the north.

In this specific situation, Libya requests the Court to find that the principles and rules of international law which are applicable to the delimitation are principally those set forth in the Court's 1969 Judgment in the *North Sea Continental Shelf* cases and the 1977 Decision of the Court of Arbitration in the Anglo-French case. But in so doing it also asks the Court to take into account the relevant circumstances which characterize the area, particularly those to which I have just referred.

The position of Libya thus rests on the principle which is basic in both those decisions that the title of a State to appurtenant areas of continental shelf rests firmly on the natural prolongation of its land mass into and under the sea. Counsel for Libya, assisted by scientific experts, have demonstrated that the facts of natural prolongation are solidly grounded on geology rather than on the contours of the sea-bed or its progressive declivities as it proceeds seaward from the coast. Neither of the two cases to which I have referred, nor Article 76 of the draft convention on the law of the sea, provide support for the Tunisian contention that natural prolongation of the landmass is to be determined by the surface of the sea-bed rather than by the underlying geological structure.

Although title to appurtenant continental shelf areas flows from the principle of natural prolongation, the principle of non-encroachment on the

continental shelf of a neighbouring State – which is likewise established law – requires that the delimitation of the shelf between them must be in accordance with equitable principles and that it must take into account the relevant circumstances of the area. In the present case the relevant circumstances bearing on the eventual delimitation have been demonstrated to be predominantly geological and also geographical. The factor most relevant to such a delimitation is the northward natural prolongation from the Libyan and Tunisian land masses, from coasts on both sides of Ras Ajdir. While the northward extension of the shelf of the continent provides a general direction of natural prolongation, delimitation must be considered in relation to other relevant circumstances, such as the location of the land boundary and the configuration of the Tunisian coast as it veers in a north-easterly direction after Ras Yonga.

This is the core of the matter and provides a sound basis for the Libyan practical method, as has been made clear by the Libyan pleadings and by what my friend Mr. Highet has just been saying. By contrast, the same cannot be said of the Tunisian sheaf of lines which, like wolves in sheep's clothing, have been presented in oral argument as "practical methods of delimitation".

What can be said of those four, and as a matter of courtesy I use the word "methods"? First, the *ride* of Zuwarah disappeared. The *ride* of Zira virtually disappeared into the sea-bed, and the first Tunisian line vanished. Secondly, the line supposed to run from Ras Ajdir to the geometric centre of the Ionian Abyssal Plain never had any foundation or reality and it has vanished. Thirdly, "the second geometric method" has virtually been abandoned. And finally, the attempt by Professor Virally to rescue the only remaining method has utterly failed. As Professor Bowett has shown, this method is not based on law, nor does it reflect the actual geographical situation in any way that could possibly be regarded as consistent with equitable principles. So, all four lines have gone back into the imaginary world from which they emerged and we are left with the Libyan practical method as the only one that points the way to a solution which can be regarded as an application of the principles and rules of international law to the relevant circumstances which characterize the area in this specific situation.

STATEMENT BY MR. EL MAGHUR

AGENT FOR THE GOVERNMENT OF LIBYA

Mr. EL MAGHUR : Mr President, Members of the Court : this concludes the oral presentation of Libya. Libya confirms and maintains unchanged its Submissions as set forth in the Libyan Counter-Memorial[1]. Libya has also responded to each of the questions put by the Members of the Court. I should like to thank the Court for its attention and patience during the presentation of the Libyan case. I should like also to express the wish to my friend, Ambassador Benghazi, the Tunisian Agent, that Tunisia and Libya may without difficulty resolve their differences concerning the continental shelf on the basis of the judgment to be rendered by the Court.

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[1] II, p. 347.

CLOSING OF THE ORAL PROCEEDINGS

The ACTING PRESIDENT : I thank the Agent and counsel for Libya for the assistance they have given the Court. This brings us to the end of the oral proceedings in the present case. The Court will, in accordance with Article 74, paragraph 2, of the Statute, withdraw to consider the judgment. A number of questions were put by Members of the Court to one or both Parties. The Parties indicated that they wished to answer those questions in writing and have, I understand, transmitted their replies to the Registrar of the Court this morning. The Agents of the Parties are, however, requested to remain at the disposal of the Court for any further information it may require. With that reservation, I declare the oral proceedings in this case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* closed. The date on which the Court will deliver its judgment will be announced in due course.

The Court rose at 12.10 p.m.

THIRTY-SECOND PUBLIC SITTING (24 II 82, 10 a.m.)

Present: [See sitting of 29 IX 81, Judge *ad hoc* Jiménez de Aréchaga absent.]

READING OF THE JUDGMENT

The Court meets today in order to deliver in open court, pursuant to Article 58 of the Statute, its Judgment in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, brought before it by Special Agreement between the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya.

Before reading the Judgment, however, it is my sad duty to pay tribute to the memory of Judge Abdullah El-Erian, who died at The Hague, after a short illness, on 12 December 1981, while the Court was engaged in its deliberations in this case.

For 20 years before he joined the Bench Abdullah El-Erian had given distinguished service, not only to his country as lecturer, legal adviser, negotiator and ambassador, but also to the international community and the world rule of law, through his participation in various United Nations organs and codification conferences. Above all, Abdullah El-Erian had played a highly significant role in the liaison between the disparate groups belonging to what is termed the Third World. At once Arab and African, he was present at the birth of the non-aligned movement at Bandung and also at the Addis Ababa conference which founded the Organization of African Unity. At the same time, through his upbringing and education, he was as much at home in the law of Islam as in the doctrines of Anglo-American jurisprudence.

As a Member of the Court, he will be remembered for the courteous dignity and warm concern which marked his demeanour, and his pointed eloquence in debate. His participation in the work of the Court was whole-hearted; indeed, his written note on the issues in the present case was dictated from his hospital bed a few days before his death.

I invite all those present at this sitting to rise and observe a minute of silence in tribute to the memory of Judge El-Erian.

I should also place on record the fact that, for the first time in the history of the present Court, it has been necessary in this case to put into effect Article 13, paragraph 3, of the Statute of the Court, which provides that Members of the Court who have been replaced on the expiration of their terms of office "shall finish any cases which they may have begun". The terms of office of our colleagues Judges Forster and Gros came to an end on 5 February 1982, and they have been replaced with effect from that date by newly elected Judges, but they have thus participated, pursuant to that provision of the Statute, in the decision of the Court now to be read.

Judge *ad hoc* Jiménez de Aréchaga, who also participated in the decision, has had to return to his home country for family reasons, and is therefore unable to be present today.

I shall now read the Judgment. The opening paragraphs deal, as is customary, with the procedural history of the case, and with the geographicial context, and these I shall not read. The Court then turns to the Special Agreement.

[The Acting President reads paragraphs 17 to 132 of the Judgment [1].]

I call upon the Registrar, as is customary, to read the operative clause of the Judgment in French.

[The Registrar reads the operative clause in French [2].]

Judges Ago and Schwebel and Judge *ad hoc* Jiménez de Aréchaga append separate opinions to the Judgment. Judges Gros and Oda and Judge *ad hoc* Evensen append dissenting opinions to the Judgment.

In order to avoid delay, the Judgment has been read today from a mimeographed text, copies of which are being made available to the Parties. The usual printed text will be available in approximately [five weeks'] time.

(Signed) T. O. ELIAS,
Acting President.

(Signed) S. TORRES BERNÁRDEZ,
Registrar.

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[1] *I.C.J. Reports 1982*, pp. 34-92.
[2] *Ibid.*, pp. 92-94.