SEPARATE OPINION OF JUDGE LUCHAIRE

[Translation]

I have voted for the operative provisions of the Judgment because they are founded upon reasoning the logic of which is unquestionable even if one does not entirely approve of some of its elements or some of its consequences.

At the same time I feel it necessary to make two series of observations, the first on the applicable legal principles and the second on their concrete application to the present case.

A

1. In legal discourse, the term "decolonization" should be used only with great caution and must above all not be confused with accession to independence.

On the one hand, it would be wrong to ignore a certain opinion – which like all opinions, whether one shares them or not, is deserving of some respect – to the effect that independence is not the opposite of colonization but rather its crowning achievement, especially in cases where it has been obtained, without fighting, from an administering authority which has facilitated the cultural, economic, social and political progress of the inhabitants, such progress being fundamental to any genuine independence.

On the other hand, it is the right of peoples to determine their own future which has received the blessing of international law : a right which is expressly enshrined in the French constitution of 1958 in regard to what were then the French overseas territories, including French Sudan (now the Republic of Mali) and Upper Volta (now Burkina Faso). What the Declaration made by the General Assembly of the United Nations on 14 December 1960 (1514 (XV)) specifies, in recognizing the right of self-determination possessed by all peoples, is that they "freely determine their political status" ; but the exercise of that right does not necessarily lead to the independence of a State with the same frontiers as a former colony. It may lead (see the list of factors annexed to General Assembly resolution 648 (VII) of 10 December 1952) either to :

- independence within the aforesaid geographical framework or
- integration into the territory of the administering power with strict equality of rights as between individuals, irrespective of whether their origins lie in the former colony or the former metropolitan State, or

merger with a neighbouring State on the same conditions of equality, or
- the voluntary association of the ex-colony with the former metropolis on terms including unqualified respect for the former's personality.

Finally, the exercise of the right of self-determination may evidently lead certain plainly individualized parts of the former colony to a different option from that followed by the other parts.

The history of the last few decades provides numerous examples of very different options being preferred from among these solutions. The area of Togo that used to be under British trusteeship was integrated with the State of Ghana ; the northern part of that area of Cameroon which used to be under British trusteeship was merged with the State of Nigeria, and the southern part with the territory of Cameroon formerly under French trusteeship ; British and Italian Somaliland became one State of Somalia ; some of the trust territories under United States stategic administration chose independence, while the others opted for association with the United States ; and so on.

Several conclusions can be drawn from this :

First, the frontiers of an independent State emerging from colonization may differ from the frontiers of the colony which it replaces, and this may actually result from the exercise of the right of self-determination.

Second, the colonial process must be regarded as finally over once the inhabitants of a colony have been able to exercise this right of self-determination. So far as the French overseas territories are concerned, and French Sudan and Upper Volta in particular, this means that the colonial phenomenon disappeared on 28 September 1958 when, by an act of self-determination – accomplished through a referendum the authenticity of which has not been challenged by anyone –, those territories chose their status. At the time, some wished to remain overseas territories receiving similar status to the other territorial entities of the French Republic, while others – including French Sudan and Upper Volta – opted for the status of member States of the *Communauté,* i.e., for the solution of association. Lastly, another – Guinea – chose independence. As from that date, the French overseas territories could therefore no longer be considered as colonies, and that they were fully free was confirmed by the fact that those having chosen the status of member States of the *Communauté* became independent in 1960, while this was later also the case with some of those that had opted for keeping the status of an overseas territory (e.g., the Republic of Djibouti).

These considerations undoubtedly present several points of interest where the settlement of the problem referred to the Chamber is concerned, for on the day of their independence Mali and Upper Volta acceded both to the powers the *Communauté* had been exercising in their regard and to the powers which they themselves had been exercising as member States of that

Communauté ; they therefore succeeded in large measure to themselves. Consequently, by virtue of the theory of State succession, they remain bound by the deliberate or implicit decisions they took or may be deemed to have taken within the framework of the very broad powers they enjoyed before the day of their accession to independence.

II. This is also one reason why it is necessary to size up the factors and consequences of *acquiescence* in, or recognition of, a particular situation. A State's acquiescence in or recognition of a situation brought about by another State debars it from calling upon an international tribunal to reopen that situation, in which case there is no need for the tribunal in question to enquire how that situation came into being.

Thus in the *Legal Status of Eastern Greenland* case the Permanent Court of International Justice held that Norway's attitude could be regarded as recognition of Denmark's sovereignty, which Norway was consequently not entitled to challenge, while in *Temple of Preah Vihear* Professor Reuter considered :

> "it is the attitude of Thailand, this silence observed for many years, which runs counter to the contentions now being put forward" (*I.C.J. Pleadings,* Vol. II, pp. 205 f. *[translation by the Registry]*) ;

in this latter case the International Court of Justice felt obliged to conclude that the many years of failure to protest on the part of the Thai authorities amounted to acquiescence (*I.C.J. Reports 1962,* p. 32).

Thus acquiescence may result from silence and absence of protest ; it may therefore be given implicitly.

Admittedly, the International Court of Justice has more often than not avoided resorting to the concept of estoppel ; nevertheless, Basdevant's *Dictionnaire de la terminologie du droit international* gives a broad definition of this term and refers the reader to the term of *forclusion,* defined as "loss of entitlement to rely upon a right owing to its not having been invoked in time or its having been expressly or tacitly abandoned" *[translation by the Registry]* (see further Antoine Martin, *L'Estoppel en droit international public,* Paris 1979).

It will therefore be appropriate to ascertain whether in the case before the Chamber the statements or attitudes of the Parties, as also of the entities whose successors they are, can be seen to imply acquiescence in certain *de facto* situations or the abandonment of certain legal arguments. This more particularly concerns the village of Dioulouna, to which the present writer will give special emphasis below.

It also concerns the attitude of the Parties in their attempts to achieve bilateral settlement of the dispute and vis-à-vis the efforts at mediation undertaken by the Organization of African Unity (OAU).

In that connection it would have been useful to see what conclusions could be drawn from the Conakry communiqué, since, as a document

signed by two Parties, it features what a writer has called the secondary basis of estoppel, namely reciprocity.

Now in this communiqué of 10 July 1975 the signatory Heads of State :

> "welcome the efforts made and the results achieved by the Mediation Commission of the Organization of African Unity, and affirm their common intention to do their utmost to transcend *[dépasser]* these results, especially by facilitating the delimitation of the frontier between the two States in order to place the final seal on their reconciliation" *[translation by the Registry]*.

This sentence can be construed in the first place as an acknowledgment that *"results"* had actually been achieved, and in the second place as an acceptance of the results already obtained as regards the invalidity of certain documents submitted to the Commission and the precise fixing of certain points ; the word *dépasser* would therefore imply going on to fix the other points and to organize improved co-operation between the two States. But it must also be noted that this communiqué has been represented, in particular by Mali, as politely expressing rejection of those results. It is possible to regard this interpretation as confirmed by the very fact of the Parties' having subsequently concluded the Special Agreement.

B

III. The basic French text is Law 47-1707 of 4 September 1947 providing for the revival of the territory of Upper Volta ; Article 2 of this law provides that the limits of Upper Volta are to be "those of the former colony of Upper Volta on 5 September 1932". Hence any legal events that may have taken place between 5 September 1932 and 4 September 1947 are scarcely relevant ; all that needs to be done is to ascertain what on the former date was the boundary separating French Sudan from Upper Volta, and in the absence of any titles (hence subsidiarily) the work of an official geographical service, as reflected on a map produced by it, carries definite weight.

This is moreover what the Judgment points out in the following words : "where all other evidence is lacking, or is not sufficient to show an exact line, the probative value of the IGN map becomes decisive" (para. 62).

This is the more correct in that the competent authorities who sought to delimit the *cercles* or colonies worked from maps and not on the ground when seeking to express their intentions. With the sole exceptions of the Order of 31 December 1922 reorganizing the region of Timbuktu and that of 31 August 1927 fixing the boundaries of Niger and Upper Volta, it was maps alone which indicated the boundaries concerning French Sudan and Upper Volta.

It follows that the situation on 5 September 1932 can only be ascertained from the maps in use on that date, i.e., the 1:500,000 map of 1925 and the *Atlas des cercles* ; there would therefore seem to be little point in referring to texts or documents subsequent to 1932 and prior to 1947.

IV. Following what – I repeat – is an unquestionably logical line of argument, the Chamber has preferred to take into consideration the correspondence exchanged between the Governor-General of French West Africa and the Lieutenant-Governors of French Sudan and Niger, dated 19 February 1935 and 3 June 1935 (letters 191 CM2 and 1068) as well as an Order by the Governor-General dated 27 November 1935 (2728 AP). It has done so after noting that neither Party provided evidence that those texts or documents modified the previous situation. However, it might perhaps also be worth pointing out that neither Party provided any evidence that they did not modify it ; attention might also be drawn to the fact that, while letter 191 CM2 was entirely consistent with the maps in use in 1932, the same could not be said of Order 2728 AP, and finally that, even if Order 2728 AP fixed the boundaries of various *cercles* within one and the same colony, it was not its purpose, and therefore could not have had the effect, of fixing the frontier between two *colonies* (French Sudan and Niger).

V. Nevertheless, what I regard as a decisive justification for the Chamber's solution exists in regard to the village of Dionouga, which features under the name of Dioulouna in the list of villages of the Sudanese canton of Mondoro and, more especially, in the electoral constituency of Mondoro (see in particular an Order by the Governor of Sudan dated 9 March 1957) ; it follows that its inhabitants have always cast their votes in Mali ; as this village does not appear in the list of electoral constituencies in Upper Volta, its inhabitants have never cast their votes in Burkina Faso, or at least never before the critical date.

In this connection it is regrettable that the Parties did not carry out more thorough investigations by searching through the electoral records, including those of the referendum held on 28 September 1958, the results of which were successively centralized at the administrative centres of each territory (Bamako and Ouagadougou), at the administrative centre of the group of territories (Dakar) and finally in Paris.

This participation by Dioulouna in the exercise of democracy in Sudan was not challenged by the Voltan authorities resulting from the electoral process. However, it could have been, for according to the Law of 4 September 1947 the Territorial Assembly of Upper Volta (like that of Sudan) possessed a certain (admittedly advisory) competence where territorial boundaries were concerned ; it would therefore have been normal for it to protest at a situation implying that a village it could have regarded as belonging to Upper Volta had participated in the deliberations of the Sudanese Assembly.

The same silence was observed – or at least Burkina Faso has not presented to the Chamber any statement to the contrary – after the accession of the two territories to the status of member States of the

Communauté ; this time, it was no longer France but those two States which possessed the power to determine their common frontier.

This silence, therefore, may be considered as an acquiescence which is binding today upon Burkina Faso which, on the day of independence, acquired by succession the State powers enjoyed by Upper Volta as a member State of the *Communauté* as well as the powers that had been exercised by the latter.

VI. The logic of the reasoning preferred by the Chamber has led it to prolong the effects of the Order of 27 November 1935 (2728 AP) by those of the letter 191 CM2 of 19 February 1935 (or vice-versa) ; in so far as the Chamber has admitted the probative force of these two documents, I can but approve this position because they were signed in the same year by the same authority : one must therefore infer that they prolong and do not contradict each other.

At the same time, attention may perhaps be drawn to the fact that the points referred to by the Order are Yoro, Dioulouna, Oukoulou, Agoulourou and Koubo, situated on a distinctly northeast line "passing to the south of the pool of Toussougou and culminating at a point located to the east of the pool of Kétiouaire", whereas :

- it has not been possible to discover the pool of Kétiouaire, the location of which could not be established ;
- it would have been risky to identify as one and the same pool that of Toussougou and that of Féto Marabouié which a hydrological map of Upper Volta very clearly distinguishes, especially as the ending of that toponym is very probably Voltan, to judge by the names of several villages which are unquestionably Voltan ;
- the village of Agoulourou, as the Chamber takes note, is none other than Oukoulourou ;
- although the Chamber is not absolutely sure that the village of Koubo is actually the Kobo featured on the 1:200,000 map of 1960, it has held that the frontier line should leave that locality within the territory of Mali.

It follows that the line described by the Order of 27 November 1935 could have been considered to be the one linking up points slightly south of Oukoulourou, Kobo and the pool of Toussougou and continuing thereafter, as the Chamber notes, as far as the pool of Soum. Indeed, a line as thus defined would pass through the locality of Fayando which corresponds to the geodesic point (latitude 14° 43′ 45″ north and longitude 1° 24′ 15″ west) referred to in the letter 191 CM2 of 19 February 1935.

I have also given some attention to the farmland claimed by the inhabitants both of Dioulouna and of Diguel (Upper Volta) ; this is known as Douroumgara (or Orogara) ; if, as is likely, this corresponds to the point called Diamagara on the 1960 map, there is no reason to situate it in Mali rather than in Burkina Faso (or the reverse).

Finally, it should, I think, be emphasized that there is a risk of confusing the pool of In Abao and the place called Tin Kacham.

However, these considerations do not essentially impair the perfectly logical reasoning followed by the Chamber.

(Signed) François LUCHAIRE.