16 AVRIL 2013

ARRÊT

DIFFÉREND FRONTALIER

(BURKINA FASO/NIGER)

FRONTIER DISPUTE

(BURKINA FASO/NIGER)

16 APRIL 2013

JUDGMENT

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JUDGMENT

Present: *President* TOMKA; *Vice-President* SEPÚLVEDA-AMOR; *Judges* OWADA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI; *Judges* ad hoc MAHIOU, DAUDET; *Registrar* COUVREUR.

In the case concerning the frontier dispute,

between

Burkina Faso,

represented by

H.E. Mr. Jérôme Bougouma, Minister for Territorial Administration, Decentralization and Security,

as Agent;

H.E. Ms Salamata Sawadogo/Tapsoba, Minister of Justice and Keeper of the Seals,

H.E. Mr. Frédéric Assomption Korsaga, Ambassador of Burkina Faso to the Kingdom of the Netherlands,

as Co-Agents;

H.E. Mr. Alain Edouard Traoré, Minister of Communication, Government Spokesman,

as Special Adviser;

Ms Joséphine Kouara Apiou/Kaboré, Director-General of Territorial Administration,

Mr. Claude Obin Tapsoba, Director-General of the Geographical Institute of Burkina,

Mr. Benoît Kambou, Professor at the University of Ouagadougou,

Mr. Pierre Claver Hien, Historian, Researcher at the National Science and Technology Research Centre,

as Deputy-Agents;

Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense, Member of the International Law Commission,

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Jean-Marc Thouvenin, Professor at the University of Paris Ouest, Nanterre-La Défense, Director of the Centre de droit international de Nanterre (CEDIN), member of the Paris Bar (Cabinet Sygna partners),

as Counsel and Advocates;

Mr. Halidou Nagabila, Surveying Engineer,

Mr. André Bassolé, Geomatics Expert,

Mr. Dramane Ernest Diarra, Civil Administrator,

Maître Benoît Sawadogo, *Avocat à la Cour*,

Maître Héloïse Bajer-Pellet, member of the Paris Bar,

Mr. Romain Pieri, International Law Researcher,

Mr. Ludovic Legrand, Researcher at the Centre de droit international de Nanterre (CEDIN), Lawyer (Cabinet Sygna partners),

Mr. Simplice Honoré Guibila, Director-General of Legal and Consular Affairs,

Mr. Daniel Bicaba, Minister-Counsellor, Embassy of Burkina Faso in Brussels,

as Advisers,

and

the Republic of Niger,

represented by

H.E. Mr. Mohamed Bazoum, Minister of State for Foreign Affairs, Co-operation, African Integration and Nigeriens Abroad, Chairman of the Support Committee to Counsel for Niger,

as Head of Delegation and Agent;

H.E. Mr. Abdou Labo, Minister of State for the Interior, Public Security, Decentralization and Religious Affairs,

as Co-Agent;

H.E. Mr. Karidio Mahamadou, Minister of National Defence,

H.E. Mr. Marou Amadou, Minister of Justice, Keeper of the Seals, Government Spokesman,

as Deputy Co-Agents;

Mr. Sadé Elhadji Mahaman, Curator of Archives and Libraries, Co-ordinator of the Permanent Secretariat of the Support Committee to Counsel for Niger,

as Deputy Agent;

Mr. Jean Salmon, Professor emeritus of the Université Libre de Bruxelles, member of the Institut du droit international, member of the Permanent Court of Arbitration,

as Lead Counsel;

Mr. Maurice Kamto, Professor agrégé of public law, member of the Paris Bar, former Dean of the Faculty of Law and Political Science at the University of Yaoundé II, Member and former Chairman of the International Law Commission, associate member of the Institut de droit international, member of the Permanent Court of Arbitration,

Mr. Pierre Klein, Professor of Law at the Université Libre de Bruxelles, Deputy-Director of the Centre of International Law,

Mr. Amadou Tankoano, Professor of International Law, former Dean of the Faculty of Economic and Legal Science, Lecturer and Researcher at Abdou Moumouni University in Niamey,

as Counsel;

Ms Martyna Falkowska, Researcher at the Centre of International Law, Université Libre de Bruxelles,

as Assistant;

General Maïga Mamadou Youssoufa, Governor of the Region of Tillabéri,

Mr. Amadou Tcheko, Director-General of Legal and Consular Affairs at the Ministry of Foreign Affairs, Co-operation, African Integration and Nigeriens Abroad, Deputy Co-ordinator of the Support Committee to Counsel for Niger,

Col. (retired) Mahamane Koraou, Permanent Secretary to the National Boundaries Commission, member of the Support Committee to Counsel for Niger,

Mr. Mahamane Laminou Amadou Maouli, *Magistrat*, Rapporteur of the Support Committee to Counsel for Niger,

Mr. Hassimi Adamou, Chief Surveyor, Director-General of the National Geographical Institute of Niger (NGIN), member of the Support Committee to Counsel for Niger,

Mr. Hamadou Mounkaila, Chief Surveyor at the National Boundaries Commission, member of the Support Committee to Counsel for Niger,

Mr. Mahamane Laminou, Chief Surveyor, Expert at the National Geographical Institute of Niger (NGIN), member of the Support Committee to Counsel for Niger,

Mr. Soumaye Poutia, *Magistrat*, member of the Support Committee to Counsel for Niger,

Mr. Idrissa Yansambou, Director of the National Archives of Niger, member of the Support Committee to Counsel for Niger,

Mr. Belko Garba, Surveyor, member of the Support Committee to Counsel for Niger,

General Yayé Garba, Ministry of National Defence, member of the Support Committee to Counsel for Niger,

Mr. Seydou Adamou, Technical Adviser to the Minister of State for Foreign Affairs, Co-operation, African Integration and Nigeriens Abroad,

Mr. Abdou Abarry, Director-General of Bilateral Relations, Ministry of Foreign Affairs, Co-operation, African Integration and Nigeriens Abroad,

Col. Harouna Djibo Hamani, Director of Military Co-operation and Peace-Keeping Operations, Ministry of Foreign Affairs, Co-operation, African Integration and Nigeriens Abroad,

as Experts;

Mr. Ado Elhadji Abou, Minister-Counsellor, Embassy of Niger in Brussels,

Mr. Chitou Boubacar, Protocol Officer, Embassy of Niger in Brussels,

Mr. Salissou Mahamane, Accountant of the Support Committee to Counsel for Niger,

Mr. Abdoussalam Nouri, Principal Secretary, Permanent Secretariat of the Support Committee to Counsel for Niger,

Ms Haoua Ibrahim, Secretary, Permanent Secretariat of the Support Committee to Counsel for Niger,

as Support Staff,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. By a joint letter of notification dated 12 May 2010 and filed in the Registry of the Court on 20 July 2010, Burkina Faso and the Republic of Niger (hereinafter "Niger") transmitted to the Registrar a Special Agreement between the two States which was signed at Niamey on 24 February 2009 and entered into force on 20 November 2009, whereby the Governments of the two States agreed to submit to the Court the frontier dispute between them over a section of their common boundary. Attached to this letter were the Protocol of Exchange of the Instruments of Ratification of the Special Agreement and an exchange of Notes placing on record the agreement *("entente")* between the two States on the delimited sectors of the frontier, dated 29 October and 2 November 2009.

2. The text of the Special Agreement reads as follows:

"The Government of Burkina Faso and the Government of the Republic of Niger, hereinafter referred to as the 'Parties';

Whereas, by agreements signed at Niamey on 23 June 1964 and at Ouagadougou on 28 March 1987, the two Governments agreed to mark out their common boundary and to that end created a Joint Technical Commission on Demarcation;

Whereas Articles 1 and 2 of the Agreement of 28 March 1987 provide as follows:

'*Article 1*

The frontier between the two States shall run from the heights of N'Gouma, situated to the north of the Kabia ford, to the intersection of the former boundary of the *cercles* of Fada and Say with the course of the Mekrou, as described in the *Arrêté* [order] of 31 August 1927, as clarified by the Erratum of 5 October 1927.

Article 2

The frontier shall be demarcated by boundary markers following the course described by *Arrêté* 2336 of 31 August 1927, as clarified by Erratum 2602/APA of 5 October 1927. Should the *Arrêté* and Erratum not suffice, the course shall be that shown on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition, and/or any other relevant document accepted by joint agreement of the Parties';

Whereas, thanks to the work of the Joint Technical Commission on Demarcation established pursuant to these provisions, the Parties have been able to reach agreement in respect of the following sectors of the frontier:

(a) from the heights of N'Gouma to the astronomic marker of Tong-Tong;

(b) from the beginning of the Botou bend to the River Mekrou;

Whereas the two Parties accept the results of the work carried out in those sectors as definitive;

Desirous of resolving this dispute once and for all in the spirit of fraternity between brotherly peoples and neighbourliness characterising their relations and in compliance with the principle of the intangibility of frontiers inherited from colonization;

Thus applying Article 8 of the Agreement of 28 March 1987 referred to above;

Have agreed as follows:

Article 1

Referral to the International Court of Justice

1. The Parties submit the dispute defined in Article 2 below to the International Court of Justice.

2. Each of the Parties will exercise the right conferred upon it by Article 31, paragraph 3, of the Statute of the Court to choose a judge *ad hoc*.

Article 2

Subject of the dispute

The Court is requested to:

1. determine the course of the boundary between the two countries in the sector from the astronomic marker of Tong-Tong (latitude 14° 25' 04" N; longitude 00° 12' 47" E) to the beginning of the Botou bend (latitude 12° 36' 18" N; longitude 01° 52' 07" E);

2. place on record the Parties' agreement ["*leur entente*"] on the results of the work of the Joint Technical Commission on Demarcation of the Burkina Faso-Niger boundary with regard to the following sectors:

   (a) the sector from the heights of N'Gouma to the astronomic marker of Tong-Tong;

   (b) the sector from the beginning of the Botou bend to the River Mekrou.

Article 3

Written proceedings

1. Without prejudice to any question as to the burden of proof, the Parties request the Court to authorize the following procedure for the written pleadings:

   (a) a Memorial filed by each Party not later than nine (9) months after the seising of the Court;

   (b) a Counter-Memorial filed by each Party not later than nine (9) months after exchange of the Memorials;

   (c) any other written pleading whose filing, at the request of either of the Parties, shall have been authorized or directed by the Court.

2. Pleadings submitted to the Registrar of the Court shall not be transmitted to the other Party until the Registrar has received the corresponding pleading from that Party.

Article 4

Oral proceedings

The Parties shall agree, with approval from the Court, on the order in which they are to be heard during the oral proceedings; if the Parties fail to agree, the order shall be prescribed by the Court.

Article 5

Language of the proceedings

The Parties agree that their written pleadings and their oral argument shall be presented in the French language.

Article 6

Applicable law

The rules and principles of international law applicable to the dispute are those referred to in Article 38, paragraph 1, of the Statute of the International Court of Justice, including the principle of the intangibility of boundaries inherited from colonization and the Agreement of 28 March 1987.

Article 7

Judgment of the Court

1. The Parties accept the Judgment of the Court given pursuant to this Special Agreement as final and binding upon them.

2. From the day on which the Judgment is rendered, the Parties shall have eighteen (18) months in which to commence the work of demarcating the boundary.

3. In case of difficulty in the implementation of the Judgment, either Party may seise the Court pursuant to Article 60 of its Statute.

4. The Parties request the Court to nominate, in its Judgment, three (3) experts to assist them as necessary in the demarcation.

Article 8

Entry into force

The present Special Agreement is subject to ratification. It shall enter into force on the date on which the last notice of ratification is received.

The Parties nevertheless agree to apply Article 10 of this Special Agreement as from the date of signing.

Article 9

Registration and notification

1. The present Special Agreement shall be registered with the Secretariat of the United Nations pursuant to Article 102 of the Charter of the United Nations by the more diligent party.

2. In accordance with Article 40 of the Statute of the Court, this Special Agreement shall be notified to the Registrar of the Court by a joint letter from the Parties.

3. If such notification is not effected in accordance with the preceding paragraph within one month from the entry into force of the present Special Agreement, it shall be notified to the Registrar of the Court by the more diligent Party.

Article 10

Special undertaking

Pending the Judgment of the Court, the Parties undertake to maintain peace, security and tranquillity among the populations of the two States in the frontier region, refraining from any act of incursion into the disputed areas and organizing regular meetings of administrative officials and the security services.

With regard to the creation of socio-economic infrastructure, the Parties undertake to hold preliminary consultations prior to implementation.

In witness whereof, the present Special Agreement, drawn up in two original copies, has been signed by the plenipotentiaries.

Done at Niamey, 24 February 2009."

3. In accordance with Article 40, paragraph 3, of the Statute of the Court and Article 42 of the Rules of Court, the Registrar transmitted copies of the joint letter of notification, the Special Agreement, the Protocol of Exchange of the Instruments of Ratification and the exchange of Notes placing on record the agreement *("entente")* between the two States on the delimited sectors of the frontier, dated 29 October and 2 November 2009, to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court.

4. By letter of 24 September 2010, the Agent of Burkina Faso notified the Court that his Government had chosen Mr. Jean-Pierre Cot to sit as judge *ad hoc* in the case. By letter of 4 August 2010, the Agent of Niger notified the Court that his Government had chosen Mr. Ahmed Mahiou to sit as judge *ad hoc* in the case. Following the resignation of Mr. Cot, the Agent of Burkina Faso notified the Court by letter of 25 April 2012 that its Government had chosen Mr. Yves Daudet.

5. By Order of 14 September 2010, the Court fixed 20 April 2011 as the time-limit for the filing of a Memorial by each Party and 20 January 2012 as the time-limit for the filing of a Counter-Memorial by each Party. The Memorials and Counter-Memorials were duly filed within the time-limits thus fixed. The Parties then informed the Court that they did not consider it necessary to submit additional written pleadings, but that they wished to reserve the right to produce further documents if required, under Article 56 of the Rules of Court. No request for the production of such documents has been received by the Court.

6. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed should be made accessible to the public on the opening of the oral proceedings.

7. Hearings were held from Monday 8 to Wednesday 17 October 2012, during which the Court heard the oral arguments and replies of:

For Burkina Faso: H.E. Mr. Jérôme Bougouma,
Mr. Jean-Marc Thouvenin,
Mr. Claude Obin Tapsoba,
Mr. Alain Pellet,
Mr. Mathias Forteau.

For Niger: H.E. Mr. Mohamed Bazoum,
Mr. Amadou Tankoano,
Mr. Jean Salmon,
Mr. Maurice Kamto,
Mr. Pierre Klein.

8. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. As provided for in Article 72 of the Rules of Court, each Party presented written observations on the replies received from the other.

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9. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Burkina Faso,

in the Memorial:

"5.1. In view of all the above considerations, Burkina Faso requests the Court to adjudge and declare that the frontier between Burkina Faso and the Republic of Niger follows the course described hereafter:

1. from the heights of N'Gouma to the Tong-Tong astronomic marker, the frontier takes the following course: a series of straight lines connecting the following points in turn[1]: Mount N'Gouma (Lat. 14° 54' 46.0" N; Long. 00° 14' 36.4" E), Kabia Ford (Lat. 14° 53' 09.8" N; Long. 00° 13' 06.3" E), Mount Arwaskoye (Lat. 14° 50' 44.7" N; Long. 00° 10' 35.8" E), Mount Bellé Banguia (Lat. 14° 45' 05.2" N; Long. 00° 14' 09.6" E), Takabougou (Lat. 14° 37' 54.5" N; Long. 00° 10' 16.1" E), Mount Douma Fendé (Lat. 14° 32' 00.6" N; Long. 00° 09' 42.1" E) and the Tong-Tong astronomic marker (Lat. 14° 24' 53.2" N; Long. 00° 12' 51.7" E);

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[1]The co-ordinates which follow are those adopted in the record of the work of the Joint Survey Mission of the erected markers, 3 July 2009, Ann. MBF 101. The co-ordinates were measured by GPS.

2. from the Tong-Tong astronomic marker to the beginning of the Botou bend, the frontier takes the following course:

— a straight line as far as the Tao astronomic marker (Lat. 14° 03' 04.7" N; Long. 00° 22' 51.8" E)[2];

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[2]The co-ordinates of this point were measured by GPS by Burkina. The co-ordinates of this marker on the Clarke 1880 ellipsoid are: Lat. 14° 03' 13" N; Long. 00° 22' 53" E.

— from that point, a straight line up to the point where the frontier reaches the River Sirba at Bossébangou (Lat. 13° 21' 06.5" N; Long. 01° 17' 11.0" E)[3];

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[3]The co-ordinates of this point, and the following ones, are given on the Clarke 1880 ellipsoid.

— from that point, the frontier follows the right bank of the River Sirba, from east to west, up to the point on the right bank with the co-ordinates: Lat. 13° 19' 53.5" N; Long. 01° 07' 20.4" E;

— from that point, the frontier follows the line on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition, as far as the point with the co-ordinates: Lat. 13° 22' 30.0" N; Long. 00° 59' 40.0" E;

— from that point, the frontier runs south in a straight line, ending at the intersection of the right bank of the River Sirba with the Say parallel (Lat. 13° 06' 10.7" N; Long. 00° 59' 40.0" E);

— from that point, the frontier runs in a straight line up to the beginning of the Botou bend (Tyenkilibi) (Lat. 12° 36' 19.2" N; Long. 01° 52' 06.9" E)[4].

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[4]The co-ordinates of this point, and the following ones, are those adopted in the record of the work of the Joint Survey Mission of the erected markers, 3 July 2009, Ann. MBF 101. The co-ordinates were measured by GPS (WGS84 ellipsoid).

3. from the beginning of the Botou bend as far as the River Mekrou, the frontier takes the following course:

— a series of straight lines connecting the following points in turn: Jackal Mountain (Lat. 12° 41' 33.1" N; Long. 01° 55' 43.9" E), Laguil (Lat. 12° 41' 31.9" N; Long. 01° 57' 01.3" E) and Nonbokoli (Lat. 12° 44' 12.9" N; Long. 01° 58' 47.0" E);

— from the latter point, the frontier follows the median line of the Dantiabonga *marigot*, passes to the south of Dantiandou and then follows the line of the Yoga Djoaga hills as far as the confluence of the Dyamongou and Dantiabonga rivers (Lat. 12° 43' 15.1" N; Long. 02° 05' 14.9" E);

— from that point, the frontier follows the median line of the River Dyamongou as far as the confluence of the Dyamongou *marigot* and the Boulel Fouanou (Lat. 12° 43' 44.0" N; Long. 02° 06' 23.9" E;

— from that point, the frontier runs in a series of straight lines connecting the following points in turn: Boulel (Lat. 12° 42' 15.1" N; Long. 02° 06' 53.3" E), Boulel East (Teylinga) (Lat. 12° 41' 09.5" N; Long. 02° 09' 43.2" E), Dyapionga North (Lat. 12° 39' 42.3" N; Long. 02° 09' 37.3" E), Dyapionga South (Lat. 12° 38' 55.4" N; Long. 02° 09' 08.1" E), Kanleyenou (Lat. 12° 37' 21.7" N; Long. 02° 11' 57.1" E), Niobo Farou (Caiman Pool) (Lat. 12° 35' 19.6" N; Long. 02° 13' 23.9" E), the eastern crests of Mount Tambouadyoaga (Lat. 12° 31' 19.7" N; Long. 02° 13' 48.0" E), Banindyididouana (Lat. 12° 27' 52.7" N; Long. 02° 16' 27.2" E) and the confluence of the Banindyidi Fouanou and Tapoa rivers (Lat. 12° 25' 30.5" N; Long. 02° 16' 40.6" E);

— from the latter of those points, the frontier follows the median line of the River Tapoa as far as the point where it intersects with the former boundary of the Fada and Say *cercles*[5] (Lat. 12° 21' 04.88" N; Long. 02° 04' 12.77" E);

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[5]The co-ordinates of the following points are those adopted in the record of the meeting to ascertain the co-ordinates of the unmarked points in Sector B, 15 October 2009, Ann. MBF 105. They were derived from the IGN France 1:200,000-scale map (Clarke 1880).

— from the latter point, the frontier runs in a straight line, corresponding to the former boundary of the Fada and Say *cercles*, up to the point where it intersects with the River Mekrou (Lat. 11° 54' 07.83" N; Long. 02° 24' 15.25" E).

5.2. Pursuant to Article 7, paragraph 4, of the Special Agreement, Burkina Faso further requests the Court, in its Judgment, to nominate three experts to assist the Parties as necessary for the purposes of demarcation."

in the Counter-Memorial:

"5.1. In view of all the considerations contained in its Memorial and in the present Counter-Memorial, Burkina Faso stands by the submissions set forth in paragraphs 5.1 and 5.2 of its Memorial in their entirety and requests the Court to find in its favour and to reject any contrary submissions from the Republic of Niger."

On behalf of the Government of Niger,

in the Memorial:

"The Republic of Niger requests the Court to adjudge and declare that the frontier between the Republic of Niger and Burkina Faso in the Téra sector takes the following course:

— starting from the Tong-Tong astronomic marker (co-ordinates: 14° 25' 04" N, 00° 12' 47" E);

— from that point: a straight line as far as the Vibourié marker (co-ordinates: 14° 21' 44" N, 00° 16' 25" E);

— from that point: a straight line as far as the Tao astronomic marker (co-ordinates: 14° 03' 02.2" N, 00° 22' 52.1" E);

— from that point the frontier follows the 1960 IGN line (Téra sheet) as far as the point having co-ordinates 14° 01' 55" N, 00° 24' 11" E;

— from that point, it runs in a straight line to the frontier point on the new Téra-Dori road (co-ordinates: 14° 00' 04.2" N, 00° 24' 16.3" E);

— it then meets a river arm at the point with co-ordinates 13° 59' 03" N, 00° 25' 12" E. The frontier then passes through a frontier point called Baobab (13° 58' 38.9" N, 00° 26' 03.5" E), then follows the IGN line, leaving Tindiki (13° 57' 15.4" N, 00° 26' 23.6" E) to Niger, as far as the break in the line of crosses north of Ihouchaltane (Oulsalta) on the 1960 IGN map (Sebba sheet), at the point with co-ordinates 13° 55' 54" N, 00° 28' 21" E;

— from this point the frontier follows the loop formed by the river to the west as far as the point having co-ordinates 13° 55' 32" N, 00° 27' 07" E, and passes through a point situated on the Sidibébé-Kalsatouma road having co-ordinates 13° 52' 32.8" N, 00° 28' 13.5" E. From that point, it rejoins the IGN line at the point having co-ordinates 13° 53' 24" N, 00° 29' 58" E, which it follows as far as the break in the line of crosses at the point having co-ordinates 13° 52' 04" N, 00° 31' 00" E;

— the frontier then turns to the south again as far as the point having co-ordinates 13° 48' 55" N, 00° 30' 23" E situated on the arm of the river to the west of Komanti, passes through a point south-west of Ouro Toupé (Kamanti) with co-ordinates 13° 46' 31" N, 00° 30' 27" E, then to the north of Ouro Sabou to a point on the arm of the tributary of the Tyekol Dyongoytol whose co-ordinates are 13° 46' 18" N, 00° 32' 47" E. The frontier then follows this tributary until its confluence with the Tyekol Dyongoytol at the point having co-ordinates 13° 46' 51" N, 00° 35' 53" E. From there it follows the 1960 IGN line until it reaches the level of Bangaré (Niger) on the River Folko at the point having co-ordinates 13° 46' 22.5" N, 00° 37' 25.9" E;

— from that point the frontier follows the IGN line, following the watercourses where there are no crosses, passing between Kolangoldagabé (Burkina Faso) (co-ordinates 13° 43' 52.3" N, 00° 36' 14.5" E) and Lolnando (Niger) (co-ordinates 13° 43' 50.3" N, 00° 36' 49.0" E). The line leaves the hamlet known as Kolnangol Nore Ole to Niger, Gourel Manma to Burkina Faso and Pate Bolga to Niger;

— the frontier then follows the 1960 IGN line (Sebba sheet) as far as the point with co-ordinates 13° 37' 20" N, 00° 50' 47" E and then to the point with co-ordinates 13° 34' 47" N, 00° 58' 20" E, leaving to Burkina Faso the current site of Hérou Bouléba and to Niger that of Hérou Boularé;

— from there it follows the IGN line, connecting the gaps between continuous sections with straight lines, as far as the tripoint of the former boundaries of the *cercles* of Say, Tillabéry and Dori (co-ordinates 13° 29' 08" N, 01° 01' 00" E);

— from that point, the frontier runs in a straight line as far as the point having co-ordinates 13° 04' 52" N, 00° 55' 47" E, then from that point a straight line passing through a point situated 4 km to the south-west of Dogona with co-ordinates 13° 01' 44" N, 01° 00' 25" E, as far as the frontier marker with co-ordinates 12° 37' 55.7" N, 01° 34' 40.7" E, and finally from there to the point fixed by agreement between the Parties, the co-ordinates of which are the following: 12° 36' 18" N, 01° 52' 07" E."

in the Counter-Memorial:

"The Republic of Niger requests the Court to adjudge and declare that the frontier between the Republic of Niger and Burkina Faso takes the following course:

In the Téra sector:

— starting from the Tong-Tong astronomic marker (co-ordinates: 14° 25' 04" N, 00° 12' 47" E);

— from that point: a straight line as far as the Vibourié marker (co-ordinates: 14° 21' 44" N, 00° 16' 25" E);

— from that point: a straight line as far as the Tao astronomic marker (co-ordinates: 14° 03' 02.2" N, 00° 22' 52.1" E);

— from that point the frontier follows the 1960 IGN line (Téra sheet) as far as the point having co-ordinates 14° 01' 55" N, 00° 24' 11" E;

— from that point, it runs in a straight line to the frontier point on the new Téra-Dori road (co-ordinates: 14° 00' 04.2" N, 00° 24' 16.3" E) (to the west of Petelkolé);

— from that point, it runs in a straight line to the point with co-ordinates 13° 59' 03" N, 00° 25' 12" E; and reaches the IGN line (at the point with co-ordinates 13° 58' 38.9" N, 00° 26' 03.5" E), which it follows as far as the break in the line of crosses north of Ihouchaltane (Oulsalta on the 1960 IGN map, Sebba sheet), at the point with co-ordinates 13° 55' 54" N, 00° 28' 21" E;

— from this point the frontier skirts Ihouchaltane (Oulsalta), passing through the points with co-ordinates 13° 54' 42" N, 00° 26' 53.3" E, then 13° 53' 30" N, 00° 28' 07" E;

— from that point, it rejoins the IGN line (at the point having co-ordinates 13° 53' 24" N, 00° 29' 58" E), which it follows as far as the tripoint of the former boundaries of the *cercles* of Say, Tillabéry and Dori (co-ordinates 13° 29' 08" N, 01° 01' 00" E).

Where there are gaps in the course of the IGN line, these will be filled by straight lines or, where there is a watercourse, by following its bed.

In the Say sector:

— Starting from the tripoint of the former boundaries of the *cercles* of Say, Tillabéry and Dori (co-ordinates 13° 29' 08" N, 01° 01' 00" E), the frontier runs in a straight line as far as the point having co-ordinates 13° 04' 52" N, 00° 55' 47" E (where it cuts the River Sirba at the level of the Say parallel), then from that point a straight line passing through a point situated 4 km to the south-west of Dogona with co-ordinates 13° 01' 44" N, 01° 00' 25" E, as far as the frontier marker with co-ordinates 12° 37' 55.7" N, 01° 34' 40.7" E, and finally from there to the point fixed by agreement between the Parties, the co-ordinates of which are the following: 12° 36' 18" N, 01° 52' 07" E."

10. At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of Burkina Faso,

At the hearing of 15 October 2012:

The submissions read at the hearing were identical to those presented by Burkina Faso in its written pleadings.

On behalf of the Government of Niger,

At the hearing of 17 October 2012:

The submissions read at the hearing were identical to those presented by Niger in its Counter-Memorial, with the exception of the following paragraph which was added:

> "In accordance with Article 7, paragraph 4, of the Special Agreement, Niger also requests the Court to nominate, in its Judgment, three experts to assist our two countries as necessary in the demarcation of the common frontier."

*

* *

I. HISTORICAL AND FACTUAL BACKGROUND

11. The Court will begin with a brief description of the historical and factual background to the present case.

12. The frontier dispute between the Parties is set within an historical context marked by the accession to independence of the countries that were formerly part of French West Africa. From the beginning of the century up to the entry into force of the French Constitution of 27 October 1946, the territorial administration of French West Africa was centralized. It was headed by a governor-general and divided into colonies, whose creation or abolition fell within the executive power of the French Republic. Each of these colonies was headed by a "colonial governor" with the title of "lieutenant-governor". The colonies were themselves made up of basic units called *cercles* which were administered by *commandants de cercle*; the creation and abolition of the *cercles* were the sole prerogative of the governor-general, who decided their overall extent. Each *cercle* in turn was composed of subdivisions, administered by *chefs de subdivision*. Finally, the subdivisions comprised *cantons*, which grouped together a number of villages. The creation and abolition of subdivisions and cantons within any particular *cercle* came within the jurisdiction of the lieutenant-governor of the colony of which the *cercle* formed part (see *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 569, para. 31).

13. By a decree dated 18 October 1904, the purpose of which was to reorganize the administration of French West Africa, the President of the French Republic established the colony of Haut-Sénégal et Niger. This newly created colony was composed of *cercles*, which were under civil administration, as well as an area under military administration called the "Military Territory of Niger".

14. By an *arrêté* of the Governor-General of French West Africa dated 21 June 1909, Dori *cercle*, part of the Military Territory of Niger, was incorporated into the Civil Territory of Haut-Sénégal et Niger. By an *arrêté* of 22 June 1910, the region of Timbuktu and parts of Gao, Tillabéry[1] and Djerma *cercles* which also belonged to the Military Territory of Niger were incorporated into the Civil Territory of Haut-Sénégal et Niger to form the *cercles* of Timbuktu (sedentary and nomadic populations), Gourma and Say. The *cantons* of Tillabéry situated on the right bank of the River Niger were also incorporated into Dori *cercle*.

15. On 7 September 1911, the President of the French Republic issued a further decree which separated the Military Territory of Niger from the colony of Haut-Sénégal et Niger and established it as a separate administrative subdivision under the authority of the Governor-General of French West Africa.

16. By virtue of a decree of the President of the French Republic dated 1 March 1919, the *cercles* of Gaoua, Bobo-Dioulasso, Dédougou, Ouagadougou, Dori, Say and Fada N'Gourma, which had until then been part of Haut-Sénégal et Niger, were established as a separate colony with the name of Upper Volta.

17. By a decree of the President of the French Republic dated 4 December 1920, the Military Territory of Niger was turned into the Territory of Niger, with effect from 1 January 1921. It was then made an autonomous colony by decree of 13 October 1922.

18. By a decree of the President of the French Republic dated 28 December 1926, certain territories belonging to the Colony of Upper Volta, namely "Say *cercle*, with the exception of Gourmantché Botou canton", and "[t]he *cantons* of Dori *cercle* which were formerly part of the Military Territory of Niger in the Téra and Yatacala regions, and [which] were detached from it by the *Arrêté* of the Governor-General of 22 June 1910" (see paragraph 14 above), were incorporated into the Colony of Niger. The Decree also provided that an *arrêté* of the Governor-General "shall determine the course of the boundary of the two Colonies in this area".

19. On 31 August 1927, the Governor-General *ad interim* of French West Africa issued an *arrêté* intended to "[fix] the boundaries of the Colonies of Upper Volta and Niger". The text of that *Arrêté* read as follows:

"*Article 1*

The boundaries of the Colonies of Niger and Upper Volta shall henceforth be determined as follows:

[1]Also referred to by the Parties as Tillabéri.

1. Boundaries between the Tillabéry *cercle* and Upper Volta:

This boundary is determined to the north by the current boundary with Sudan (Gao *cercle*) as far as the heights of N'Gourma, and to the west by a line passing through the Kabia ford, Mount Darouskoy and Mount Balébanguia, west of the ruins of the village of Tokébangou, and Mount Doumafondé, which then turns ["*s'infléchit*"] towards the south-east, leaving the ruins of Tong-Tong to the east and descending in a north-south direction, cutting the Téra-Dori motor road to the west of the Ossolo Pool, until it then joins the River Sirba (boundary of Say *cercle*), near to and to the south of Boulkalo.

2. Boundaries between the Say *cercle* and Upper Volta:

The villages of Botou *canton* are excluded from this boundary.

To the north and to the east, by the current boundary with Niger (Niamey *cercle*), from Sorbohaoussa to the mouth of the River Mekrou;

To the north-west, by the River Sirba from its mouth as far as the village of Bossébangou. From this point a salient, including on the left bank of the Sirba the villages of Alfassi, Kouro, Takalan and Tankouro;

To the south-west, a line starting approximately from the Sirba at the level of the Say parallel and running as far as the Mekrou;

To the south-east, by the Mekrou from that point as far as its confluence with the Niger.

3. Boundaries of Botou *canton*:

To the west: the furthest point is marked by the intersection of the Fada-Say road with the former boundary of the two *cercles* and the Tiéguelofonou *marigot*. That point is located 1,200 m west of the village of Tchenguiliba.

From that point, the boundary turns back up towards the north, running in a straight line in a marked SSW-NNE direction.

It passes approximately 2 km west of the village of Berni-Oueli and terminates in the north approximately 2 km south of the village of Vendou Mama at the top of the northernmost spur of the Héni-Djoari (Gourma) massif or Jackal Mountain.

To the north: the boundary runs in a marked west-east direction. It passes 1 km south of Mount Tambado Djoaga, follows the course of the Dantiabonga *marigot*, passes south of Dantiandou, follows the line of the Yoga Djoaga hills as far as the confluence of the Dantiabouga and Diamoungou *marigots*, and continues along the latter up to the confluence of the Diamoungou and Boulelfonou *marigots* approximately 5 km north of the latter village;

To the north-east: the boundary follows the crests of the Djoapienga hills up to the source of the Boulelfonou *marigot*, runs up the north slope of the Tounga Djoaga massif and terminates at the point known as Niobo-Farou (Caiman Pool), a sort of broad basin, which is traversed during the dry season by the track from Botou to Fombonou;

To the east: the boundary follows the eastern crests of the Tounga Djoaga massif and runs towards the River Tapoa in a precise north-south direction. It passes approximately 5 km east of the village of Royori (a relatively dispersed farming village) and reaches the Tapoa at a point which it is not possible to define precisely;

To the south-east and to the south: the boundary follows the course of the Tapoa upstream until it meets the former boundary of the Fada and Say *cercles*.

This end-point cannot be defined, as the southern region of Botou is completely empty, and virtually unexplored.

Article 2

The Lieutenant-Governors of Upper Volta and Niger are responsible for implementing the present *Arrêté*, which shall be recorded, published and publicized in all appropriate quarters."

20. The *Arrêté* was the subject of an Erratum dated 5 October 1927, which stated as follows:

"Article 1 of the *Arrêté* of 31 August 1927 fixing the boundaries of the Colonies of Niger and Upper Volta, published in the Official Journal of French West Africa No. 1201, of 24 September 1927, page 638, should read as follows:

Article 1

The boundaries of the Colonies of Niger and Upper Volta are determined as follows:

A line starting from the heights of N'Gouma, passing through the Kabia ford (astronomic point), Mount Arounskoye and Mount Balébanguia, to the west of the ruins of the village of Tokebangou, Mount Doumafende and the Tong-Tong astronomic marker; this line then turns ["*s'infléchit*"] towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossébangou. It almost immediately turns back up towards the north-west, leaving to Niger, on the left bank of that river, a salient which includes the villages of Alfassi, Kouro, Tokalan, and Tankouro; then, turning back to the south, it again cuts the Sirba at the level of the Say parallel.

From that point the frontier, following an east-south-east direction, continues in a straight line up to a point located 1,200 m to the west of the village of Tchenguiliba.

From that point it turns back up in a straight line that runs in a marked SSW-NNE direction; it passes approximately 2 km west of the village of Birniouoli and, approximately 2 km to the south of the south of the village of Vendou Mama, reaches the top of the northernmost spur of the Heni-Djouri (Gourma) massif or Jackal Mountain.

Running then in a west-east direction, it passes 1 km south of Mount Tambado Djoaga, follows the course of the Dantiabonga *marigot*, passes south of Dantiandou, follows the line of the Yoga Djoaga hills as far as the confluence of the Dantiabonga and Diamongou *marigots*, and runs along the latter as far as the confluence of the Dialongou and Boulelfonou *marigots* approximately 5 km north of the latter village.

From that point, the boundary follows the crests of the Djoapionga hills as far as the source of the Boulolfonou *marigot*, runs up the northern slope of the Tounga and Djoaga massif and terminates at the point known as Niobo-Farou (Caiman Pool), a sort of broad basin, which is traversed during the dry season by the track from Botou to Fombonou.

It is then determined by the eastern crests of the Tounga Djoaga massif, before running towards the River Tapoa in a precise north-south direction. It passes approximately 5 km east of the village of Kogori and reaches the Tapoa approximately 4 km south of the aforementioned village.

It then follows the course of the Tapoa upstream until it meets the former boundary of the Fada and Say *cercles*, which it follows as far as the point where it intersects with the course of the Mekrou."

21. By a decree of the President of the French Republic dated 5 September 1932, the Colony of Upper Volta was dissolved and its territory was divided among Niger, French Sudan and Côte d'Ivoire. Upper Volta was subsequently reconstituted within its 1932 boundaries by Law No. 47-1707 of 4 September 1947, which abrogated the decree of 5 September 1932.

22. In 1958, the colonies of Upper Volta and Niger became, respectively, the Republic of Upper Volta and the Republic of Niger, members of the "Community" established by the French Constitution of 1958. Niger gained independence on 3 August 1960 and Upper Volta on 5 August 1960. On 4 August 1984, Upper Volta took the name Burkina Faso.

23. Following their independence, the two States concluded the Protocol of Agreement of 23 June 1964 concerning the delimitation of their common frontier. According to that Protocol, it was decided to take as basic documents for the determination of the frontier the 1927 *Arrêté*, as clarified by the Erratum of the same year, and the 1:200,000-scale map produced by the French *Institut géographique national* in 1960 (hereinafter the "IGN map" or the "1960 map"). The Protocol of Agreement also established a Joint Commission to demarcate the frontier on the ground. However, the Joint Commission did not succeed in accomplishing this task.

24. The negotiation process between the two States over the course of their common frontier was relaunched in the mid-1980s, resulting in the conclusion of the Agreement of 28 March 1987 (registered with the United Nations by Burkina Faso on 7 October 2010 under registration number I-47964), supplemented by a Protocol of Agreement of the same date (registered with the United Nations by Burkina Faso on 7 October 2010 under registration number I-47965). According to Article 1 of the 1987 Protocol of Agreement, the frontier between the two States "shall run" as described in the *Arrêté*, as clarified by the Erratum (see paragraph 64 below). Moreover, according to Article 2, common to both the Agreement and Protocol of Agreement, that frontier "shall be demarcated" following the course described in the *Arrêté*, as clarified by the Erratum. This second provision, relating to demarcation, also added that "[s]hould the *Arrêté* and Erratum not suffice, the course shall be that shown on the [IGN map], and/or any other relevant document accepted by joint agreement of the Parties".

25. The 1987 Protocol of Agreement also created a Joint Technical Commission on Demarcation of the Frontier (hereinafter the "Joint Technical Commission") and a Demarcation Fund, and dealt with certain questions concerning the rights of individuals affected by the demarcation. The Joint Technical Commission began its work in May 1987, and in March 1988 it set up a field team comprising 42 experts from the two States to conduct topographical work. The Joint Technical Commission held a meeting in Niamey in September 1988 to plot on a map the line resulting from the field surveys carried out by that team of experts. The Parties disagree as to the results of this meeting. Burkina Faso is of the view that the report established a "consensual line", which was later contested by Niger on the grounds that it was contrary to both the *Arrêté* and Erratum. Niger, for its part, maintains that, while the two Parties agreed on various proposals for the frontier line in dispute, they never agreed on a "consensual line". Furthermore, Niger contends that the provisional line proposed in 1988 has never been formalized in a binding legal instrument.

26. At the conclusion of a ministerial consultative and working meeting held in May 1991, the Minister of the Interior of Niger and the Minister for Territorial Administration of Burkina Faso issued a Joint Communiqué, dated 16 May 1991, which stated that:

> "1. From the Tong-Tong astronomic marker to the River Sirba at Bossébangou, passing through the Tao astronomic marker, the frontier shall consist of a series of straight lines.
>
> 2. From the River Sirba at Bossébangou to the River Mekrou, the course of the frontier adopted shall be that shown on the [IGN map]."

27. At a meeting of the Joint Technical Commission from 2 to 4 November 1994, however, Niger called into question the solution set forth in the Joint Communiqué on the grounds that it was not consistent with the terms of Articles 1 and 2 of the 1987 Protocol of Agreement. Burkina Faso

contested Niger's point of view during the same meeting. Thereafter, the text of the Joint Communiqué was not submitted to the ratification procedure required by Article 7 of the 1987 Agreement.

28. At the fourth ordinary session of the Joint Technical Commission, in July 2001, it was concluded, *inter alia*, that:

> "1. The frontier was clearly defined from the heights of [Mount] N'Gouma to the astronomic marker of Tong-Tong, with the exception of the ruins of Tokébangou, which the frontier passes to the west. These ruins were not identified in the course of the survey of the frontier line.
>
> . . . . . .
>
> 2. The frontier was clearly defined from Tchenguiliba to the River Mékrou, subject to the survey team's verification of the position of the village of Kogori.
>
> 3. From the Tong-Tong astronomic marker to the River Sirba at Bossébangou, the phrase 'this line then turns ["s*'infléchit*"] towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossébangou' has resulted in two interpretations:
>
> *(a)* the frontier is composed of two (2) straight lines:
>
> — from the Tong-Tong astronomic marker to the Tao astronomic marker;
>
> — from the Tao astronomic marker to the River Sirba at Bossébangou.
>
> *(b)* the frontier consists of a curved line, starting from the Tong-Tong astronomic marker, passing through the Tao marker and terminating at the River Sirba at Bossébangou.
>
> . . . . . .
>
> 4. From Bossébangou to Tchenguiliba, the Commission noted problems of interpretation associated with the failure to identify the villages referred to in the Erratum and with the identification of the point at which the frontier again cuts the River Sirba at the level of the Say parallel. The technical survey team will also visit the area in order to identify these villages or their 1927 sites. The villages concerned are Alfassi, Kouro, Tokalan and Tankouro."

29. The Joint Technical Commission consequently decided to appoint a field survey team to locate in particular the ruins of the village of Tokébangou and the villages of Kouro, Alfassi, Tokalan, Tankouro and Kogori. However, that decision was never implemented, and the

differences of opinion persisted with regard to the course of the frontier between the Tong-Tong astronomic marker and a point located 1,200 m to the west of the village of Tchenguiliba (referred to in the Special Agreement as the "beginning of the Botou bend").

30. At a meeting held on 24 February 2009, the Governments of Burkina Faso and Niger signed the Special Agreement whereby they agreed to submit the dispute to the Court (see paragraph 1 above).

31. From 23 June to 3 July 2009, experts of the two countries conducted a joint survey mission to record the co-ordinates of the markers constructed on the Burkina Faso-Niger frontier in the sectors running from Mount N'Gouma to the Tong-Tong astronomic marker and from the beginning of the Botou bend to the River Mekrou. The results were set out in a report signed on 3 July 2009. A second joint mission was carried out in October 2009, in order to ascertain the co-ordinates of the points which had still to be marked in the two above-mentioned sectors, namely the point where the course of the Tapoa intersects with the former boundary of Fada and Say *cercles*, and the point where that boundary intersects with the course of the Mekrou. The results of this second mission were set out in a report signed on 15 October 2009.

32. In a letter of 29 October 2009, the Acting Minister for Foreign Affairs and Regional Co-operation of Burkina Faso proposed to the Minister for Foreign Affairs and Co-operation of Niger that these two reports be considered as representing the agreement ("*entente*") between the two Governments within the meaning of Article 2 of the Special Agreement. The Niger Minister for Foreign Affairs and Co-operation replied in a letter dated 2 November 2009, in which she confirmed "the agreement of the Government of Niger to this proposal", so that the above-mentioned letter of 29 October 2009 and her own letter "constitute[d] an agreement ["*accord*"] placing on record the agreement ["*entente*"] between Burkina Faso and the Republic of Niger on the delimited sectors of the frontier between the two countries". Niger carried out the internal procedure to enable the ratification of the exchange of letters, informed Burkina Faso accordingly by a letter of its Minister for Foreign Affairs dated 13 February 2012 and proposed that the exchange of instruments of ratification take place as soon as possible.

33. As far as the Special Agreement is concerned, the Protocol of Exchange of the Instruments of its Ratification was signed by representatives of the two Governments on 20 November 2009. The Special Agreement itself, which entered into force on the same day, was notified to the Court on 20 July 2010. It was accompanied by the above-mentioned exchange of letters dated 29 October and 2 November 2009, under the title "Exchange of notes embodying the agreement of the Parties on the delimited sectors of the frontier" (see paragraph 1 above).

*

34. The Parties request the Court to settle the dispute between them regarding the course of their common frontier between the astronomic marker of Tong-Tong and the beginning of the Botou bend, on the basis of Article 2, point 1, of the Special Agreement (see paragraph 2 above) (see sketch-map No. 1). The Court will examine that dispute in Part III of the present Judgment. Before doing so, it will deal, in Part II below, with the request submitted to it by Burkina Faso, on the basis of Article 2, point 2, of the Special Agreement, regarding the two sectors of the frontier which have already been demarcated, lying north of the Tong-Tong astronomic marker and south of the beginning of the Botou bend (see sketch-map No. 1).

II. THE REQUEST CONCERNING THE TWO SECTORS RUNNING, IN THE NORTH, FROM THE HEIGHTS OF N'GOUMA TO THE TONG-TONG ASTRONOMIC MARKER AND, IN THE SOUTH, FROM THE BEGINNING OF THE BOTOU BEND TO THE RIVER MEKROU

A. The request of Burkina Faso

35. In points 1 and 3 of its final submissions, Burkina Faso requests the Court to adjudge and declare that its frontier with Niger follows, in the sector situated between the heights of N'Gouma and the Tong-Tong astronomic marker, and in the sector situated between the beginning of the Botou bend and the River Mekrou, a course which consists of lines linking points whose co-ordinates it provides (see the text of the final submissions of Burkina Faso in paragraph 10 above).

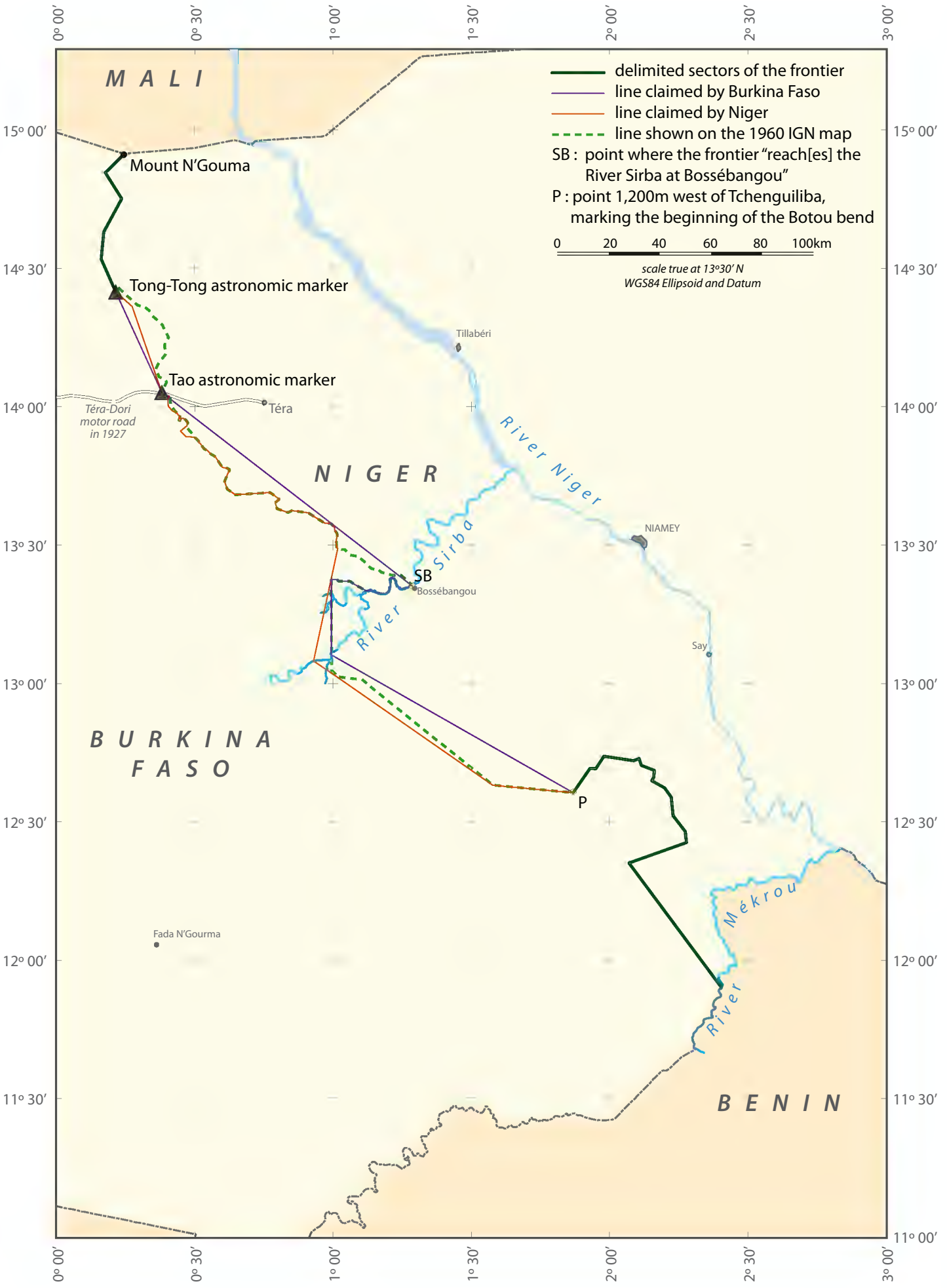
36. In submitting this request, Burkina Faso does not claim that there still exists, at the present time, a dispute between itself and Niger regarding these two sectors of their common frontier. It acknowledges that the Joint Technical Commission, created by the 1987 Protocol of Agreement, reached conclusions in 2001 that were accepted by both Parties concerning the two sectors in question, situated respectively in the northern and southern parts of their common frontier. The co-ordinates of the points which Burkina Faso requests the Court to adopt in order to draw the frontier line in these two sectors correspond to those recorded in 2009 by the joint mission appointed by the two States and given the task of conducting surveys based on the work of the Joint Technical Commission relating to the sectors in question.

37. Burkina Faso nevertheless requests the Court to include in the operative part of its Judgment the line of the common frontier in the two sectors on which the Parties have agreed, so as to endow this line with the force of *res judicata*. Hence, according to Burkina Faso, the two Parties will indisputably be bound in accordance with their agreement ("*entente*") on those two sectors, in the same way that they will be bound with regard to the frontier line which the Court will determine with regard to the sector that remains in dispute.

Sketch Map 1:

PARTIES' CLAIMS AND LINE DEPICTED ON THE 1960 IGN MAP

This sketch map has been prepared for illustrative purposes only



38. In order to found the Court's jurisdiction in respect of the two sectors already demarcated by mutual agreement, Burkina Faso relies on Article 2, point 2, of the Special Agreement, under the terms of which the Court is requested to:

> "2. place on record the Parties' agreement ["*leur entente*"] on the results of the work of the Joint Technical Commission on Demarcation of the Burkina Faso-Niger boundary with regard to the following sectors:
>
> *(a)* the sector from the heights of N'Gouma to the astronomic marker of Tong-Tong;
>
> *(b)* the sector from the beginning of the Botou bend to the River Mekrou."

B. The position of Niger

39. Without expressly asking the Court to reject the request made by Burkina Faso in points 1 and 3 of its final submissions, Niger does not join in it.

According to Niger, since there already exists an agreement between the Parties regarding the two sectors in question, there is no need for the Court to include in the operative part of its Judgment a reference to those sectors. Niger indicates that it accepted the inclusion of Article 2, point 2, in the Special Agreement for the sake of reaching an agreement that would allow the Court to be seised, and because of Burkina Faso's insistence on this point. However, it takes the view that the Court should note the agreement in question in the reasoning of its Judgment and settle the only dispute which remains between the Parties, namely that relating to the part of the frontier in respect of which the Joint Technical Commission was unable to conclude its work successfully, and on which the Parties have therefore not been able to reach agreement.

40. Consequently, in its final submissions, Niger only requests the Court to draw the frontier between the two States in the section running from the Tong-Tong astronomic marker to the point which both Parties have identified as the "beginning of the Botou bend". Niger's final submissions thus correspond, in fact, to Article 2, point 1, of the Special Agreement.

C. Consideration by the Court

41. The Court first recalls that even when it is seised on the basis of a special agreement concluded between the two States that appear before it, it is always required to rule on the final submissions of the parties as formulated at the close of the oral proceedings. There is no difference in this respect between cases where the Court is seised by means of a unilateral application and those where it is seised by a special agreement.

42. However, in cases where the special agreement forms the only basis of jurisdiction, it goes without saying that any request made by a party in its final submissions can fall within the jurisdiction of the Court only if it remains within the limits defined by the provisions of the special agreement, a matter which is for the Court to ascertain.

43. In this respect, the Court observes that the request contained in points 1 and 3 of the final submissions of Burkina Faso does not exactly correspond to the terms of the Special Agreement. Indeed, Burkina Faso does not request the Court to "place on record the Parties' agreement" ("*leur entente*") regarding the delimitation of the frontier in the two sectors concerned, but rather to delimit itself the frontier according to a line that corresponds to the conclusions of the Joint Technical Commission upon which the two Parties have agreed. Although the final outcome is equivalent in substance as regards the line itself, Burkina Faso's request is not the same in nature as that contained in Article 2, point 2, of the Special Agreement: it is one thing to note the existence of an agreement between the Parties and to place it on record for them; it is quite a different matter to appropriate the content of that agreement in order to make it the substance of a decision of the Court itself. Taken literally, Burkina Faso's request could therefore be rejected as exceeding the limits of the Court's jurisdiction as defined by the Special Agreement.

44. It is true, however, that the Court has the power to interpret the final submissions of the Parties in such a way as to maintain them, so far as possible, within the limits of its jurisdiction under the Special Agreement. In the present case, without dwelling on their precise language, it would be possible to interpret points 1 and 3 of the final submissions of Burkina Faso as seeking that the Court place on record the agreement of the Parties. Taken in that way, this request would remain within the limits of the jurisdiction which the Special Agreement conferred upon the Court in the present case.

45. Nevertheless, that would not necessarily be sufficient for the Court to be able to entertain such a request. It would still have to be verified that the object of this request falls within the Court's judicial function, as defined by its Statute.

As the Court has already had occasion to state in a different context, but in terms that have a general scope:

> "even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29.)

46. These considerations are perfectly applicable to the present case, despite the fact that, unlike in the *Northern Cameroons* case, the Court has been seised by means of a special agreement. A special agreement allows the parties to define freely the limits of the jurisdiction, *stricto sensu*, which they intend to confer upon the Court. It cannot allow them to alter the limits of the Court's judicial function: those limits, because they are defined by the Statute, are not at the disposal of the parties, even by agreement between them, and are mandatory for the parties just as for the Court itself.

47. In the light of the foregoing, the Court must determine whether the object of the request contained in Article 2, point 2, of the Special Agreement falls within the judicial function attributed to the Court by its Statute.

48. In contentious cases, the function of the Court, as defined in Article 38, paragraph 1, of the Statute, is to "decide in accordance with international law such disputes as are submitted to it". Consequently, the requests that parties submit to the Court, must not only be linked to a valid basis of jurisdiction, but must also always relate to the function of deciding disputes. As the Court has already indicated, also in a context different from that of the present case:

> "The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58.)

49. It is for the Court to determine objectively whether there is a dispute, without being bound in that respect by the assertions of the parties (*ibid.*, paras. 55 and 58).

50. In the present case, the Court's task is all the more straightforward since neither of the two Parties claims, or has ever claimed, that a dispute continued to exist between them concerning the delimitation of the frontier in the two sectors in question on the date when the proceedings were instituted — nor that such a dispute has subsequently arisen. The absence of a dispute is amply confirmed by the documents in the case file. The Special Agreement, duly ratified by both Parties (see paragraph 33 above), states in the clearest manner that "thanks to the work of the Joint Technical Commission on Demarcation . . ., the Parties have been able to reach agreement ["*s'accorder*"] in respect of [these] sectors of the frontier". It further states that "the two Parties accept the results of the work carried out in those sectors as definitive". Article 2, point 2, which was previously cited, provides that the Court be requested to "place on record the Parties' agreement ["*leur entente*"]" on the results of the work of the Commission with regard to these two sectors. To affirm that the Parties have "reach[ed] agreement" ("*[se sont] accord[ées]*"), or that there is an "agreement" ("*entente*") between them, necessarily signifies that there is no longer any dispute between them on the subject-matter of that "agreement" ("*entente*").

51. If the Parties have appeared to argue differently, it is on the question of whether the "*entente*" referred to in Article 2, point 2, of the Special Agreement has already resulted in an agreement which is legally binding for the two Parties under international law.

Niger has maintained, in particular in reply to a question put by a Member of the Court during the hearings, that "[t]he agreement between the two States on the demarcated sectors was definitively reached". It has however stated that the exchange of letters of 29 October and 2 November 2009 was not yet legally binding between the Parties, but that it was up to Burkina Faso for its part to follow the necessary ratification procedure, should it wish the said agreement to become a binding legal instrument between itself and Niger.

Burkina Faso has appeared to cast doubt on the existence, at the present time, of a legally binding agreement. It has contended that the term used in Article 2, point 2, of the Special Agreement is "*entente*" in French, which is not precisely synonymous with the word "*accord*" (agreement), that it has not yet ratified, in accordance with Article 7 of the 1987 Agreement, the "*entente*" between the Parties constituted by the exchange of letters of 29 October and 2 November 2009, and that only once this *entente* has been "placed on the record" by the Court will the frontier dispute "be completely resolved".

52. In the opinion of the Court, the decisive question is whether a dispute existed between the Parties concerning these two sectors on the date when the proceedings were instituted, and the answer to that question is indisputably negative, for the reasons which have just been set forth.

53. It matters little, from the point of view of the judicial function of the Court, whether or not the "*entente*" reached by the Parties has already been incorporated into a legally binding instrument. If such an instrument had already entered into force between the Parties, it would not be for the Court to record that fact in the operative part of a Judgment, since such a pronouncement would lie outside its judicial function, which is to decide disputes. And if the legal instrument embodying the "*entente*" had not yet entered into force, it would not be for the Court to substitute itself for the Parties: since they both recognize that they have found some common ground, it is for them, if need be, to take any step which remains necessary for that agreement to enter into force. A judicial decision may not be requested in this way as a substitute for the completion of the treaty-making process between States. Furthermore, since there is an obligation to comply both with international agreements and with Judgments of the Court, the "force of *res judicata*" with which, according to Burkina Faso, the delimitation effected in the two sectors in question would be endowed if the Court acceded to its request would not reinforce the binding character of that delimitation.

54. Burkina Faso cites two precedents, in which it claims that the Permanent Court of International Justice consented to record, in the actual operative part of a Judgment, an agreement concluded between the parties.

55. However, the Court considers that those precedents are not relevant, since they both contemplate situations in which an agreement is reached between the parties during the proceedings, and not a situation in which the dispute had been resolved between the parties before seising the Court.

56. In the Order that it made on 6 December 1930 in the case concerning *Free Zones of Upper Savoy and the District of Gex (Second Phase)*, the Permanent Court of International Justice took the view that "there seems nothing to prevent the Court from embodying in its judgment an agreement previously concluded between the Parties; as a 'judgment by consent', though not expressly provided for by the Statute, is in accordance with the spirit of that instrument" (*P.C.I.J., Series A, No. 24*, p. 14). However, as the context of this assertion shows beyond all doubt, the

Permanent Court had in mind the possibility of an agreement which the Parties might conclude during the proceedings, pursuant to the particular terms of the Special Agreement in that case, thereby putting an end to all or part of the original dispute between them, i.e., the dispute which the institution of the proceedings was intended to bring before that Court.

57. The same applies to the Judgment rendered in the case concerning *Société Commerciale de Belgique (Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 178). In that case, the Permanent Court stated in the operative clause that it "not[ed] the agreement between the Parties" with regard to the definitive and obligatory character of the arbitral awards made previously between the Greek Government and the *Société commerciale de Belgique*, awards whose execution lay at the heart of the dispute submitted to that Court. The agreement in question was arrived at during the proceedings, as a consequence of declarations of the Greek Government acknowledging the obligatory character of the financial awards made against it, declarations which Belgium treated as "changing the character of the dispute", leading it to withdraw part of its original submissions. In these circumstances, it is understandable that the Permanent Court formally noted, in the operative part of its Judgment, the agreement arrived at between the Parties during the proceedings, an agreement whose existence was bound to influence the settlement on the merits of the dispute originally brought before the Court.

58. In the circumstances of the present case, it is not necessary for the Court to rule on such a possibility. What the Special Agreement provides for is that the Court should place on record the "*entente*" reached by the Parties at the end of their negotiations, before the proceedings were instituted. According to Burkina Faso, this should be included in the operative part of the Judgment. But for the reasons explained above, the Court considers that such a request is not compatible with its judicial function.

59. Thus, the only dispute which remained between the Parties on the date when the proceedings were instituted, and which continues to exist, has as its subject-matter the course of the common frontier between the Tong-Tong marker and the beginning of the Botou bend, that is, the sector on which the Joint Technical Commission was unable to conclude its work successfully and in respect of which the Parties have presented the Court with different solutions. It is this sector which will be examined in the remainder of this Judgment; only this sector will be delimited in the operative clause of the Judgment.

III. THE COURSE OF THE SECTION OF THE FRONTIER REMAINING IN DISPUTE

A. Applicable law

60. Since the Court is required to rule on the delimitation of the frontier remaining in dispute, it must first determine the relevant applicable law.

61. Article 6 of the Special Agreement, entitled "Applicable law", stipulates:

> "The rules and principles of international law applicable to the dispute are those referred to in Article 38, paragraph 1, of the Statute of the International Court of Justice, including the principle of the intangibility of boundaries inherited from colonization and the Agreement of 28 March 1987."

62. The reference to Article 38, paragraph 1, of the Statute of the Court clearly indicates that the rules and principles mentioned in that provision of the Statute must be applied to any question that it might be necessary for the Court to resolve in order to rule on the dispute.

63. Amongst the rules of international law applicable to the dispute, the above-mentioned provision of the Special Agreement highlights "the principle of the intangibility of boundaries inherited from colonization and the Agreement of 28 March 1987".

A reference to the principle of intangibility of boundaries inherited from colonization also appeared in the preamble to the Special Agreement on the basis of which the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* was brought before the Court. The Chamber of the Court which dealt with the case concluded that it could not "disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers" (*Judgment, I.C.J. Reports 1986*, p. 565, para. 20).

The wording used in the Special Agreement in the present case is similar to the text of resolution AGH/Res. 16 (I) adopted in Cairo in 1964 at the first session of the Conference of African Heads of State and Government, whereby the Conference declared that all member States of the Organization of African Unity "solemnly . . . pledge themselves to respect the borders existing on their achievement of national independence". Subsequently, Article 4 *(b)* of the Constitutive Act of the African Union laid down the principle of "respect of borders existing on achievement of independence".

The two Parties have consistently invoked in their pleadings either the principle of the intangibility of boundaries inherited from colonization or the *uti possidetis juris* principle. Thus, the Parties referred to the boundaries as they existed between the two French overseas territories in question, Niger and Upper Volta, on the dates — which are very close to each other — on which the two Parties gained independence (3 and 5 August 1960, respectively).

64. In the present case, the Special Agreement provides specific indications as to the way in which the principle of the intangibility of boundaries inherited from colonization must be applied. Article 6 of the Special Agreement requires the application of "the Agreement of 28 March 1987" (hereinafter the "1987 Agreement"), which binds the two Parties and the objective of which is, according to its title, "the demarcation of the frontier between the two countries". The first two articles of this Agreement are also reproduced word for word in a recital of the Special Agreement (see paragraph 2 above), which demonstrates the importance the Parties attach to those provisions for the settlement of the dispute between them. They read as follows:

"*Article 1*

The frontier between the two States shall run from the heights of N'Gouma, situated to the north of the Kabia ford, to the intersection of the former boundary of the *cercles* of Fada and Say with the course of the Mekrou, as described in the *Arrêté* [order] of 31 August 1927, as clarified by the Erratum of 5 October 1927.

Article 2

The frontier shall be demarcated by boundary markers following the course described by *Arrêté* 2336 of 31 August 1927, as clarified by Erratum 2602/APA of 5 October 1927. Should the *Arrêté* and Erratum not suffice, the course shall be that shown on the 1:200,000-scale map of the Institut Géographique National de France, 1960 edition, and/or any other relevant document accepted by joint agreement of the Parties."

In one of the two original texts of the 1987 Agreement, a copy of which was submitted to the Court by the Parties, the reference to the *Arrêté* in Article 1 is not accompanied by a reference to the Erratum. However, that omission is probably due to an oversight, as demonstrated by the recital of the Special Agreement which, like the other original text of the same Agreement, reproduces the words "as clarified by the Erratum of 5 October 1927". Only with the addition of those words is the text of Article 1 coherent with that of Article 2. Moreover, neither Party contested the fact that the 1987 Agreement refers to the *Arrêté* as clarified by its Erratum.

65. Although the aim of the 1987 Agreement is the "demarcation of the frontier" between the two countries through the installation of markers, it lays down first of all the criteria that must be applied to determine the "course" of the frontier. Those criteria are thus also relevant to the sectors that the Joint Technical Commission was unable to demarcate. The 1987 Agreement specifies the acts and documents of the French colonial administration which must be used to determine the delimitation line that existed when the two countries gained independence.

66. In this regard, the 1987 Agreement accords particular importance to the *Arrêté* of 31 August 1927, as clarified by its Erratum of 5 October 1927. This is the *Arrêté* "fixing the boundaries of the colonies of Upper Volta and Niger", issued by the Governor-General of French West Africa on the basis of a decree of the President of the French Republic of 28 December 1926, in which it was indicated: "[a]n *arrêté* of the Governor-General in Standing Committee of the Government Council shall determine the course of the boundary of the two Colonies in this area". As the Chamber of the Court emphasized in the case concerning the *Frontier Dispute (Benin/Niger)*, "the *uti possidetis juris* principle requires not only that reliance be placed on existing legal titles, but also that account be taken of the manner in which those titles were interpreted and applied by the competent public authorities of the colonial Power" (*Judgment, I.C.J. Reports 2005*, p. 148, para. 140). It follows from the 1987 Agreement that the *Arrêté* as clarified by its Erratum is the instrument to be applied for the delimitation of the boundary. It has to be interpreted in its context, taking into account the circumstances of its enactment and implementation by the colonial authorities. As to the relationship between the *Arrêté* and its

Erratum, the Court observes that, since the purpose of the Erratum is to correct the text of the *Arrêté* retroactively, it forms an integral part of the latter. For that reason, whenever reference is made to the "*Arrêté*" in the remainder of the present Judgment, that will signify, unless otherwise indicated, the wording of the *Arrêté* as amended by the Erratum.

67. Article 2 of the 1987 Agreement provides for the possibility of "the *Arrêté* and Erratum not suffic[ing]" and establishes that, in that event, "the course shall be that shown on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition" or resulting from "any other relevant document accepted by joint agreement of the Parties". The Parties do not consider, however, that they have accepted any relevant document other than the IGN map. According to the 1987 Agreement, that map may only be used on an alternative basis, should the *Arrêté* "not suffice". The 1987 Agreement implies that the requirement of having recourse to the IGN map should the *Arrêté* prove insufficient is applicable not only to a delimitation, but also to a demarcation, as both Parties acknowledged in their pleadings. It is primarily in relation to the interpretation of the wording of Article 2 of the 1987 Agreement and its application to the present dispute that the Parties express differing views. Burkina Faso contends that the *Arrêté* can be considered not to suffice only in relation to a single section of the frontier, while Niger stresses the imprecise and vague nature that it claims characterizes the *Arrêté*, which even contains, in its view, certain errors. The questions of interpretation and application that divide the Parties will, in so far as necessary, be considered by the Court when it rules on delimitation in the various unmarked sections of the frontier.

68. Although it was drawn up under the auspices of the administration of French West Africa, the IGN map is not an official document. In the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, the Chamber of the Court observed that, in general, "[w]hether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case" (*Judgment, I.C.J. Reports 1986*, p. 582, para. 54). However, concerning the IGN map in question, the Chamber considered that, "having regard to the date on which the surveys were made and the neutrality of the source" and in a situation "where all other evidence is lacking, or is not sufficient to show an exact line, the probative value of [this] map becomes decisive" (*ibid.*, p. 586, para. 62). In the present case, by virtue of Article 2 of the 1987 Agreement, the line shown on the IGN map is always of decisive value, where the *Arrêté* does not suffice. The role thus accorded to the map may be explained by the fact that, as evidenced by a Note compiled by the IGN on 27 January 1975, the frontier has been outlined on the map "in the light of information supplied by the heads of the frontier districts and according to information gathered on the spot from the village chiefs and local people" (*ibid.*, p. 586, para. 61). As Niger points out, though it draws only partial conclusions in this respect, the IGN map is supposed to reflect the colonial *effectivités* at the critical date. However, under the 1987 Agreement, the frontier line drawn on the IGN map must be referred to on a subsidiary basis even if it does not correspond to those *effectivités*.

69. When recourse is had to the IGN map[2], it should be borne in mind that the frontier line is marked on it, according to convention, by discontinuous lines of crosses. It is nonetheless easy to complete the line by joining the points where it stops and then starts again. Generally, there is no reason not to use straight-line segments for this purpose. However, when the crosses follow a river or the ridge of a hill, the line must continue along that river or that ridge.

B. The course of the frontier

70. As noted above, in order to determine the course of the frontier, recourse must first be had to the *Arrêté*, pursuant to the 1987 Agreement, referred to in the Special Agreement.

As regards the section of the frontier that remains to be delimited, the *Arrêté* describes in the following terms the new inter-colonial administrative boundary between Niger and Upper Volta that it determines:

> "[From the Tong-Tong astronomic marker] this line then turns ["s'*infléchit*"] towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossébangou. It almost immediately turns back up towards the north-west, leaving to Niger, on the left bank of that river, a salient which includes the villages of Alfassi, Kouro, Tokalan, and Tankouro; then, turning back to the south, it again cuts the Sirba at the level of the Say parallel.
>
> From that point the frontier, following an east-south-east direction, continues in a straight line up to a point located 1,200 m to the west of the village of Tchenguiliba."

71. Following the line thus described, the Court will examine in turn the various sections of the frontier which remain in dispute between the Parties:

(1) that which runs from the Tong-Tong astronomic marker to the Tao astronomic marker;

(2) that which runs from this latter point to the River Sirba at Bossébangou;

(3) that which runs from this point to the intersection of the Sirba with the Say parallel;

(4) and, lastly, that which runs from this latter point to the point located 1,200 m to the west of the village of Tchenguiliba, which the Special Agreement refers to as "the beginning of the Botou bend" (see sketch-map No. 1).

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[2]The IGN map was drawn up on the basis of the Clarke 1880 ellipsoid, which was then in common usage. The Court, for its part, is using the 1984 World Geodetic System datum (WGS 84) for the purposes of the present Judgment. Hence, the co-ordinates provided by the Court for various points of the frontier line have been established on the basis of the WGS 84 datum, even where those points are determined by reference to the IGN map.

Given the scale of the IGN map, the said co-ordinates may be subject to a certain margin of error. In any event, the indications given in wording in the Judgment shall prevail.

1. The course of the frontier between the Tong-Tong and Tao astronomic markers

72. The Parties agree that, in accordance with the *Arrêté*, which in this regard is deemed to describe the inter-colonial administrative boundary in force at the critical date of independence, their common frontier connects the two points at which the Tong-Tong and Tao astronomic markers are respectively situated. They are also in agreement on the location of the Tong-Tong astronomic marker, whose co-ordinates are fixed in the Special Agreement at 14° 25' 04" latitude North and 00° 12' 47" longitude East. As regards the Tao astronomic marker, the Parties give it slightly different co-ordinates in their final submissions: 14° 03' 04.7" N, 00° 22' 51.8" E, according to Burkina Faso; 14° 03' 02.2" N, 00°22'52.1" E, according to Niger. It is not necessary for the Court to fix the precise co-ordinates of the Tao astronomic marker; since the Parties do not disagree on the identification or the location of this marker, it will be for them to determine its precise co-ordinates together during the demarcation operations.

73. The Parties disagree as to how to connect the two points at which the astronomic markers in question are situated. According to Burkina Faso, these points should be connected by a straight line. According to Niger, the two astronomic markers in question should be connected by two straight-line segments, one running from the Tong-Tong marker to the Vibourié marker, situated a few kilometres to the east of the straight line claimed by Burkina Faso, the other running from the Vibourié marker to the Tao marker (see sketch-map No. 1).

74. The Court notes that, in the sector in question, neither Party proposes to adopt the line on the IGN map, which corresponds neither to a straight line nor to a broken line passing through the Vibourié marker. This implies that both Parties consider that the 1927 *Arrêté* is not insufficient in this sector. They differ, however, as to its interpretation. The Court also observes that this sector is the only one in which each Party claims a line which would give more territory to the other, so that the territory situated in the triangle delimited by the lines proposed by the Parties is not claimed by either of them. However, the principle whereby the Court does not rule *ultra petita* does not prevent it, in this case, from attributing that territory to one or the other Party, since the Special Agreement entrusts it with the task of fully determining the course of the frontier between the Tong-Tong astronomic marker and the beginning of the Botou bend.

75. Burkina Faso's argument relies on the idea that, when the author of the *Arrêté* indicated that the inter-colonial boundary passed through two points, without specifying how those two points were connected, he should be considered to have intended them to be joined by a straight line.

76. Niger's argument is primarily based on a Record of Agreement ("*procès-verbal*") of 13 April 1935 established by the Administrator of Dori *cercle* and the official responsible for the Téra subdivision, with a view to settling a land dispute between the inhabitants of Dori and those of

Téra. Referring to the 1927 *Arrêté*, the two co-signatories assert that, in 1927, the inter-colonial boundary followed "a notional straight line starting from the Tong-Tong astronomic marker and running to the Tao astronomic marker" and state that they have established a marker at Vibourié located on that straight line and designed to demarcate the boundary between the two districts, "in order to prevent any similar further territorial dispute in this area". According to Niger, even if Vibourié is not located on the course of the straight line connecting Tong-Tong with Tao, the marker established at Vibourié was, *de facto*, a marker of the boundary between the two colonies, thereby constituting an *effectivité* to be taken into account by the Court as a means of interpreting the *Arrêté* in the light of the subsequent practice of the colonial administrative authorities.

77. The Court is not convinced by Niger's arguments. It first notes that the 1935 Record of Agreement was drawn up at a time when Upper Volta no longer existed, having been dissolved as a separate colony in 1932, so that the boundary that the two administrators sought to define in 1935 was purely internal to one colony (Niger). Only when Upper Volta was re-established in 1947 within its previous boundaries could the Vibourié marker have acquired a certain relevance on the basis of the effective practice of the colonial administration as regards the fixing of the inter-colonial boundary. However, Niger has failed to adduce any evidence to establish that, after 1947, and more specifically at the critical date of 1960, the Vibourié marker was regarded in practice as marking the boundary between Upper Volta and Niger.

78. Above all, it is clear that the establishment of the Vibourié marker was the result of a topographical error, because the authors of the Record of Agreement, who agreed that the *Arrêté* should be interpreted as drawing a straight line between Tong-Tong and Tao, mistakenly believed that Vibourié was situated on that straight line (see paragraph 76 above).

While an *effectivité* may enable an obscure or ambiguous legal title to be interpreted, it cannot contradict the applicable title.

79. The Court concludes from the foregoing that the colonial administration officials interpreted the *Arrêté* as drawing, in the sector in question, a straight line between the Tong-Tong and Tao astronomic markers. In so far as Niger proposes to take account of the location of the Vibourié marker on the basis of the *effectivités* of the colonial period, it fails to demonstrate the existence of such an *effectivité* at the critical date of independence, and, furthermore, such an *effectivité* could not, in any event, have overridden the legal title constituted by the 1927 *Arrêté*.

Therefore, a straight line connecting the Tong-Tong and Tao astronomic markers should be regarded as constituting the international frontier between Burkina Faso and Niger in the sector in question.

2. The course of the frontier between the Tao astronomic marker and the River Sirba at Bossébangou

80. As regards the section of the frontier running from the Tao astronomic marker to the River Sirba at Bossébangou, the *Arrêté* confines itself to stating, without any further details, that the "line . . . turns ["s*'infléchit*"] towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker . . ., and reaching the River Sirba at Bossébangou". The indications on how to connect the Tao marker to "the River Sirba at Bossébangou" are therefore no more precise than those concerning the course of the line connecting the Tong-Tong marker to the Tao marker, the issue dealt with in the previous paragraphs. The Parties draw quite different conclusions from this laconic character of the *Arrêté*.

81. Burkina Faso, maintaining the line of argument which it has adopted throughout the proceedings, contends that, since the author of the *Arrêté* did not specify how to connect the two points mentioned by him in turn, it must be understood that he intended those two points to be connected by a straight line. It would only be otherwise, according to Burkina Faso, if there were a very particular reason to suppose that that had not been the intention of the author of the *Arrêté*, which is not the case in this instance. According to Burkina Faso, it is therefore a straight line that must run from the Tao astronomic marker to the River Sirba at Bossébangou, just as — and for the same reason — it is a straight line that constitutes the frontier between the Tong-Tong and Tao astronomic markers (see sketch-map No. 1).

82. According to Niger, "the *Arrêté* and *Erratum* [do] not suffice" within the meaning of the 1987 Agreement, to which the Special Agreement refers, in the section of the frontier in question, since the *Arrêté* is silent on how to connect the two points situated at the ends of that section. Consequently, according to Niger, it is necessary in principle to follow the line as drawn on the 1960 IGN map, which is not a straight line but a sinuous one. However, Niger considers that it is necessary to deviate in part from the IGN map in two respects. Firstly, it contends that there should be a slight deviation to the west of the line shown on the 1960 IGN map in two segments corresponding to the Petelkolé frontier post and to the Oussaltane[3] encampment, so as to leave those two localities in Niger's territory, whereas the IGN map locates them on the Upper Volta side of the inter-colonial boundary. According to Niger, this is to give precedence to the *effectivités* as observed at the end of the colonial period, namely at the critical dates of independence.

Secondly, according to Niger, the frontier line in this sector should not run to Bossébangou, but should descend only as far as a point situated some 30 km to the north-west of Bossébangou, and from that point turn towards the south-west, thereby leaving an extensive area around Bossébangou entirely in Niger's territory. In this regard, the argument put forward by Niger amounts to a departure from both the 1927 *Arrêté* and the 1960 IGN map (see sketch-map No. 1).

83. The Court will begin by considering the question of the endpoint of the section of the frontier presently under consideration. In this regard, the Court is unable to accept Niger's position.

[3] Also referred to by the Parties as Ihouchaltane, Ouchaltan, Ousalta, Ousaltan and Oulsalta.

84. That position is based essentially on the assertion that the author of the *Arrêté* inadvertently departed from the Decree of 28 December 1926, that he was supposed to implement, by continuing the line as far as "the River Sirba at Bossébangou" instead of stopping it some 30 km to the north-west of Bossébangou, at the point where it meets the intersection of the three *cercles* of Dori, Tillabéry and Say, in order for it then to turn towards the south-west. Indeed, according to Niger, by continuing the line as far as Bossébangou, the author of the *Arrêté* followed the boundary separating the *cercles* of Tillabéry and Say, each of which was situated in Niger, that being a boundary within one colony, and not the inter-colonial boundary separating Niger and Upper Volta. According to Niger, that was surely not his intention, and nor could it have been, given that the *Arrêté* had to comply with the terms of the Decree of 28 December 1926. In short, according to Niger, the *Arrêté* is vitiated on this point by a material error which renders it incompatible with the Decree that it is meant to implement.

85. Whatever the merits of the above analysis, it must be observed that, on this point, what Niger is asking of the Court is not to interpret the *Arrêté* in order to apply it according to the meaning which must be attributed to it, but indeed to disregard its clear terms on the grounds that it is vitiated by a material error, and that it is perhaps legally flawed.

As noted above (see paragraphs 64 to 67), the Court is obliged under the terms of the Special Agreement to apply the 1927 *Arrêté*, as amended by its Erratum, unless it is insufficient. The Court can and must interpret the *Arrêté*, in so far as it requires an interpretation, but it cannot disregard it, even on the grounds that it is allegedly contrary to the Decree which constituted the legal basis for its adoption. Consequently, the Court can only find that the *Arrêté*, both in its initial version and in that resulting from the Erratum — the latter being the only relevant one —, provides *expressis verbis* that the inter-colonial boundary continues as far as the River Sirba. If this reference had been the result of a material error, the Governor-General could have corrected the error thus made by publishing a new erratum; but the fact is that he did not do so. Whether or not the *Arrêté* contradicts the Decree because of that alleged mistake is a question which it is not for the Court to enter into, because, as noted above, it is bound by the terms of the *Arrêté* pursuant to the Special Agreement. In conclusion, the Court can only find that the frontier line necessarily reaches the River Sirba at Bossébangou; the question of where exactly the frontier reaches the river or the village will be considered in the following subsection (3).

86. The Court now turns to the question of how the "Tao astronomic marker" is to be connected to "the River Sirba at Bossébangou" in order to draw the frontier.

87. Without ruling, from a general point of view, on the value of Burkina Faso's argument that "a delimitation text indicating, without any indication to the contrary, that a line passes through two points is interpreted as specifying a boundary in the form of a straight line connecting those two points", the Court considers that in this case there are several reasons not to adopt such an approach.

88. First, it should be observed that, after the section that is currently being considered, the *Arrêté* specifies on two occasions that the boundary defined by it is a straight line. It does so first in the southernmost part of the frontier that remains to be delimited, when it states that, from the intersection of the Sirba with the Say parallel, the boundary, "following an east-south-east direction, continues in a straight line up to a point" which the Parties describe as the beginning of the Botou bend. It does so subsequently in the already demarcated section of the frontier situated to the south of the Botou bend, when it states that, from this latter point, the boundary "turns back up in a straight line that runs in a marked SSW-NNE direction". It is clear that if it were always true, as Burkina Faso contends, that the indication of two points, without any further details, must be interpreted as meaning that those two points are connected by a straight line, the author of the *Arrêté* would not have needed to specify in respect of certain sections of the boundary that they followed a straight line. This is not necessarily enough to exclude the possibility that, in the section here under consideration, the inter-colonial boundary followed a straight line (as is indeed the case in the section running from the Tong-Tong astronomic marker to the Tao astronomic marker, examined above). Nevertheless, the fact that the provisions specifying that certain sections consist of straight lines appear in the same document as those providing no precise details in respect of other sections, weakens Burkina Faso's argument that the latter provisions, solely by virtue of that lack of detail, should necessarily be interpreted as drawing a straight line.

89. Secondly, the Court considers that account should be taken of the fact that the *Arrêté* was issued on the basis of the Decree of the President of the French Republic of 28 December 1926 "transferring the administrative centre of the Colony of Niger and providing for territorial changes in French West Africa". This decree thus constitutes an important element of the context within which the *Arrêté* was issued.

90. In this connection, it should be noted that the object of the Decree of 28 December 1926 was twofold.

In the first place, its *raison d'être* was to transfer certain *cercles* and *cantons* from the Colony of Upper Volta to the Colony of Niger (see paragraph 18 above).

It then empowered the Governor-General of French West Africa to draw the new inter-colonial boundaries between Niger and Upper Volta.

91. The task entrusted to the Governor-General was therefore to plot the new inter-colonial boundary by drawing the implications of the transfers effected, that is to say, by respecting the pre-existing boundaries of the districts, to the extent that they could be determined.

92. The Governor-General, seeking to identify the boundaries of the districts moved by the Decree, delegated to the Lieutenant-Governors of Upper Volta and Niger the task of demarcating on the ground the boundaries of the *cantons* and *cercles* in question. Thus on 2 February 1927, Mr. Lefilliatre, Inspector of Administrative Affairs, representing the Lieutenant-Governor of Upper Volta, and Mr. Brévié, Lieutenant-Governor of Niger, signed a Record of Agreement. As regards the section of the frontier running from Tao to Bossébangou, this Record uses a wording that was reproduced in identical terms in the *Arrêté* of the Governor-General of 31 August 1927, and which

is not substantially different from that which appears in the Erratum of 5 October 1927. However, the colonial administrators responsible for the matter were aware of the inadequacy of that wording, which failed to indicate the line by which Tao and Bossébangou were to be joined. This is evidenced by the fact that, during the months which followed, the Lieutenant-Governor of Upper Volta continued to ask the officials under his authority for additional information that would make it possible to define precisely the inter-colonial boundary. In particular, by a telegram/letter of 27 April 1927, that is to say two and a half months after the Lefilliatre-Brévié Record of Agreement was drawn up, the Lieutenant-Governor of Upper Volta asked the *commandants* of Dori and Fada *cercles* to provide him with "precise information to enable [the] preparation [of the] *Arrêté général* fixing new boundaries" between the two colonies, emphasizing that it was "essential that [the] course be determined on [the] ground" so as to avoid any "need [for] subsequent correction", and that the "[r]esults [of the] work [be] recognized and accepted by [the] Heads [of] both adjacent Colonies" with a view to their "be[ing] forwarded [to] Dakar".

As noted above, the *Arrêté* of 31 August 1927 reproduced the imprecise wording of the Record of Agreement of 2 February 1927, and the Erratum of 5 October of the same year provided no further details. The uncertainty as to the course of the inter-colonial boundary persisted, as demonstrated by the subsequent colonial practice (see paragraphs 94-95 below).

93. The Court concludes from the foregoing that the Governor-General sought, with the assistance of the Lieutenant-Governors of the two colonies, to determine the inter-colonial boundary by identifying those pre-existing boundaries of the *cercles* and *cantons* for which there is no indication that they followed a straight line in the sector in question. The Court observes that, in such a case, it would have been easy to plot this line on a map.

This contradicts Burkina Faso's argument that the *Arrêté*'s silence in the sector in question as to how to connect the two points mentioned in the text must be understood as signifying that the Governor-General intended the inter-colonial boundary to be represented by a straight line.

94. Thirdly, account should be taken of the practice followed by the colonial authorities concerning the implementation of the *Arrêté* with respect to the village of Bangaré. According to Niger, this village, situated approximately in the middle of the sector in question and of some importance, was consistently regarded as belonging to Niger during the colonial period, and in any event at the critical dates of independence. Niger nevertheless observes that the straight line advocated by Burkina Faso would leave Bangaré on the Burkina side of the frontier.

95. The Court notes that, although the documents in the case file which are contemporaneous with the 1927 *Arrêté* do not clearly establish that the village of Bangaré was regarded at that time as belonging to Niger, there are sufficient subsequent documents to establish that, during the relevant colonial period and until the critical date of independence, Bangaré was administered by the authorities of the Colony of Niger.

This consideration supports the conclusion that the 1927 *Arrêté* should not be interpreted, and in fact was not interpreted in the colonial period, as drawing a straight line between Tao and Bossébangou.

96. The Court concludes from all of the foregoing that the *Arrêté* must be regarded as "not suffic[ient]", within the meaning of the 1987 Agreement, in respect of the sector running from the Tao astronomic marker to the River Sirba at Bossébangou. Indeed, the Court concludes that, in the sector in question, a correct interpretation of the *Arrêté* does not provide for a straight-line solution. However, the Court does not have information enabling it to define another line on the basis of the *Arrêté*. In such circumstances, the Special Agreement, by referring to Article 2 of the 1987 Agreement, requires the Court to adopt "the course . . . shown on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition".

97. Niger has also emphasized the case of two other localities with regard to which the *effectivités* of the colonial period should in its view be taken into account: namely Petelkolé and Oussaltane (see paragraph 82 above). These two cases are different from that of Bangaré. The two localities in question are situated not only on the Burkinabe side of the straight line proposed by Burkina Faso, as is Bangaré, but crucially they are also situated on the Burkinabe side of the inter-colonial boundary as drawn on the 1960 IGN map. According to Niger, however, they were in fact administered by Niger during the colonial period, and in order to take account of the *effectivités*, the line on the IGN map should be shifted slightly westwards in the two segments where these localities are situated, so as to leave them on the Niger side.

98. While it is true, as a general rule, that for the purposes of the *uti possidetis* principle, the *effectivités* as established at the critical date may serve to compensate for the absence of a legal title or to complete a defective title, that does not hold in the present case, because of the terms of the Special Agreement, which provides that the 1987 Agreement forms part of the applicable law. Should the *Arrêté* not suffice, which is the case in the sector in question, the 1987 Agreement requires the Court to apply the line shown on the 1960 IGN map, instead of referring to the *effectivités*, even if there were to be some discrepancy between those *effectivités* and the line on the map. It has already been noted above (see paragraph 66) that the *effectivités* of the colonial period could, up to a certain point, be of use in interpreting the *Arrêté*, to the extent that they may reflect the colonial administration"s interpretation and implementation of that *Arrêté*. However, once it has been concluded that the *Arrêté* is insufficient, and in so far as it is insufficient, the *effectivités* can no longer play a role in the present case; in particular, they cannot justify a shifting of the line shown on the 1960 IGN map.

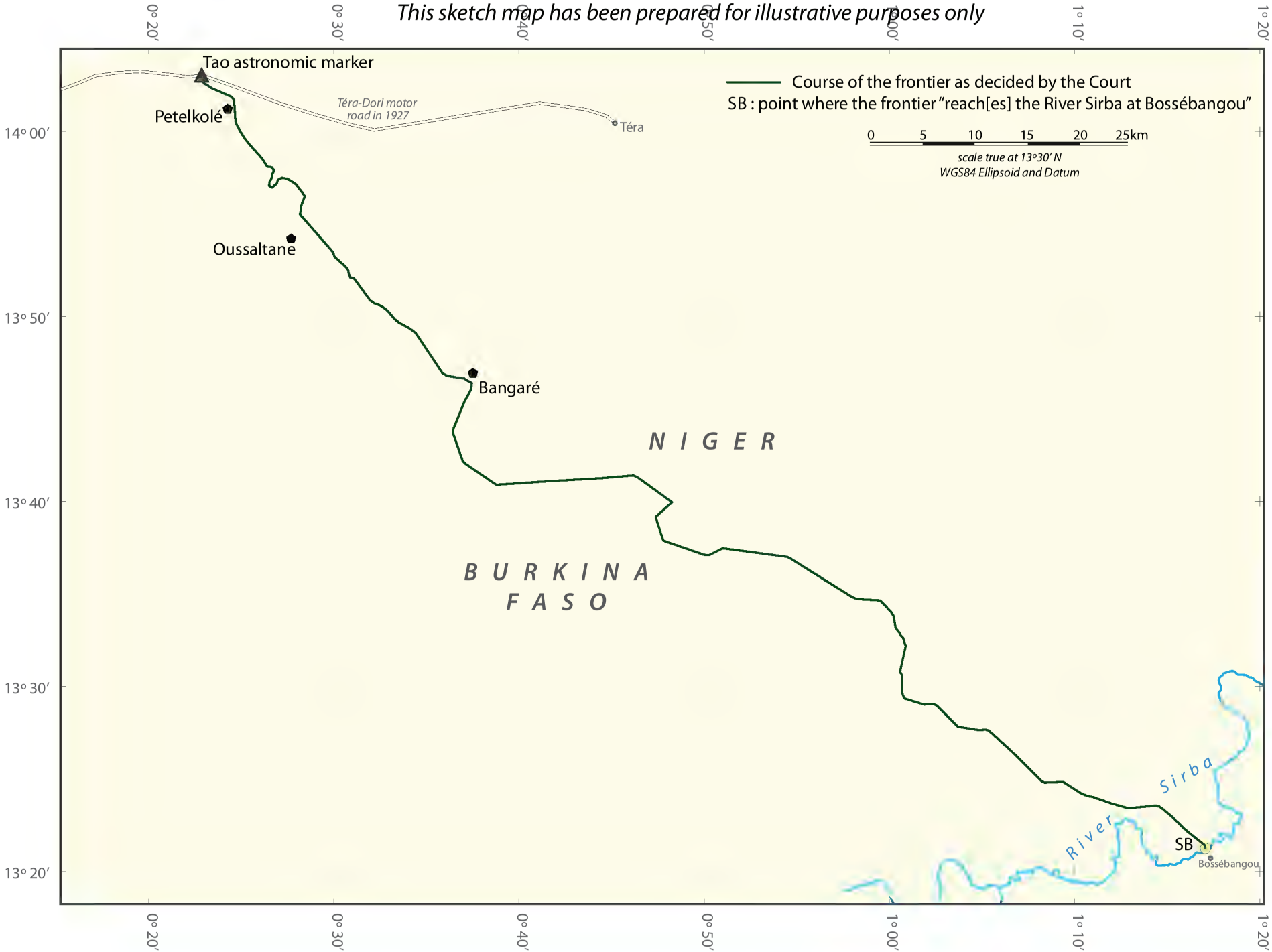
Accordingly, the Court cannot uphold Niger"s claims regarding Petelkolé and Oussaltane.

99. In conclusion, the Court finds that, in the sector of the frontier that runs from the Tao astronomic marker to "the River Sirba at Bossébangou", the line shown on the 1:200,000-scale IGN map, 1960 edition, should be adopted (see sketch-map No. 2).

Sketch Map 2:

COURSE OF THE FRONTIER FROM THE TAO ASTRONOMIC MARKER TO THE POINT WHERE IT "REACH[ES] THE RIVER SIRBA AT BOSSÉBANGOU"

This sketch map has been prepared for illustrative purposes only



3. The course of the frontier in the area of Bossébangou

100. In order to complete the determination of the frontier line coming from the Tao astronomic marker, it is necessary to specify its endpoint where it reaches "the River Sirba at Bossébangou". It is established that this village is situated a few hundred metres from the river, on its right bank. Burkina Faso maintains that the endpoint of the frontier in this section is located where the straight-line segment which runs from Tao to Bossébangou intersects with the right bank of the Sirba close to that village. Niger does not take a view on the matter, on account of its argument that the frontier line from Tao does not continue as far as the Sirba, but turns towards the south-west at the tripoint between the *cercles* of Dori, Say and Tillabéry, some 30 km before it reaches that river (see sketch-map No. 1).

101. According to the description in the *Arrêté*, it is clear that the frontier line ends at the River Sirba and not at the village of Bossébangou. The endpoint of the frontier in this section must therefore be situated in the Sirba or on one of its banks. The use of the verb "reach" ("*atteindre*") in the *Arrêté* does not suggest that the frontier line crosses the Sirba completely, meeting its right bank. It is true that, in describing a subsequent section of the frontier, the *Arrêté* states that the line "again cuts" ("*coupe de nouveau*") the Sirba so as to reach its right bank. That could suggest that the frontier has "cut" the river once already close to Bossébangou, and would argue in favour of the endpoint of the frontier in this section being situated on the right bank of the Sirba. However, it is significant that, in describing the relevant section of the frontier, the *Arrêté* uses the verb "reach" rather than "cut". Furthermore, if the endpoint of the frontier were situated on the right bank of the Sirba close to Bossébangou, the line would have to "cut" the Sirba a second time at an intermediate location in order, this time, to cross from the right bank to the left bank before "cutting it again" in the other direction. But nothing of that nature is mentioned in the *Arrêté*.

Moreover, there is no evidence before the Court that the River Sirba in the area of Bossébangou was attributed entirely to one of the two colonies. In this regard, the Court notes that the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other.

Accordingly, the Court concludes that, on the basis of the *Arrêté*, the endpoint of the frontier line in the region of Bossébangou is located in the River Sirba. This endpoint is more specifically situated on the median line because, in a non-navigable river with the characteristics of the Sirba, that line best meets the requirements of legal security inherent in the determination of a boundary.

102. In its original wording, the *Arrêté* situated the meeting-point of the frontier line from Tao with the River Sirba further downstream and stated that this line "then joins the River Sirba". It was clear, according to that wording, that the frontier was supposed to follow that river upstream for a certain distance. The language of the Erratum is less clear. However, since it specifies that,

after reaching the Sirba, the frontier line "almost immediately turns back up towards the north-west", it can be concluded that the Erratum did not seek to amend the *Arrêté* entirely on this point and that it therefore implies that the line must follow the Sirba for a short distance. Burkina Faso contends that, in this section, the frontier should be situated on the right bank of the river, in accordance with its argument concerning the endpoint of the frontier close to Bossébangou. For its part, Niger refers to the median line or the thalweg. For the reasons given in the previous paragraph, the Court considers that the frontier follows the median line of the Sirba.

103. The corrected wording of the *Arrêté*, according to which the frontier line "almost immediately turns back up towards the north-west", does not establish the precise point at which that line leaves the River Sirba in order to "[turn] back up". There is no indication in the text in that regard except for the fact that the point is located close to Bossébangou. Similarly, once the frontier leaves the Sirba, its course is indicated in the *Arrêté* in a manner that makes it impossible to establish the line accurately. It can only be concluded, therefore, that the *Arrêté* does not suffice to determine the frontier line in this section. The Parties are agreed on this point. Niger departs from the text of the *Arrêté* and the line on the IGN map, arguing that, after the tripoint, the frontier consists of a straight-line segment running in a south-westerly direction. Burkina Faso refers to the subsidiary criterion laid down in Article 2 of the 1987 Agreement. According to that provision, it is indeed necessary, as Burkina Faso contends, to refer to the IGN map in order to define precisely the point where the frontier line leaves the River Sirba and "turns back up towards the north-west" and the course that it must follow after that point.

104. According to the *Arrêté*, the frontier line, after turning up towards the north-west, "turn[s] back to the south, . . . [and] again cuts the Sirba at the level of the Say parallel". The line thus described follows a precise north-south direction. Once the place where it again cuts the Sirba has been determined, the meridian passing through that place can be followed northwards until the parallel running through the point where the line drawn on the IGN map turns back to the south. Niger contends, however, that the place where the Say parallel joins the Sirba is not a precise point. The Court observes that whereas, in its original wording, the *Arrêté* referred to "a line starting approximately from the Sirba at the level of the Say parallel", the text of the Erratum is much more categorical in this respect and thus cannot be regarded as insufficient. It refers to the intersection between the parallel passing through Say and the River Sirba. It can even be deduced that this point, called point I on sketch-maps 3 and 4, is located on the right bank of the Sirba (at the point with geographic co-ordinates 13º 06' 12.08" N; 00º 59' 30.9" E), since, according to the Erratum, the frontier line coming from the north cuts the river here before continuing towards the south-east.

105. According to the *Arrêté*, which was not amended in this respect by the Erratum, the frontier line in this area leaves to Niger "a salient, including on the left bank of the Sirba the villages of Alfassi, Kouro, Takalan and Tankouro". Alfassi and Kouro have apparently been moved, but they lie in Niger's territory, both where they are situated now and where they were in 1927, regardless of the frontier line proposed for this area. The locations of Takalan (Tokalan, according to the Erratum) and Tankouro are in dispute. No clear evidence as to their position has

been submitted to the Court. Moreover, Niger has observed that "it is . . . very likely that these two latter villages simply disappeared during the period contemporary with the adoption of the 1927 Erratum". Therefore, no conclusion can be drawn from the hypothetical location of those two villages with regard to the determination of the frontier line.

106. The frontier thus drawn from the area of Bossébangou to the point where the Say parallel cuts the River Sirba forms what might be termed a "salient", in accordance with the description contained in the *Arrêté*. However, Niger acknowledges that the frontier line which it proposes does not, for its part, "create a salient in this area".

107. The Court concludes that the frontier line, after reaching the median line of the River Sirba while heading towards Bossébangou, at the point with geographic co-ordinates 13° 21' 15.9" N; 01° 17' 07.2" E, called point SB on sketch-maps 1, 2, 3 and 4, follows that line upstream until its intersection with the IGN line, at the point with geographic co-ordinates 13° 20' 01.8" N; 01° 07' 29.3" E, called point A on sketch-maps 3 and 4. From that point, the frontier line follows the IGN line, turning up towards the north-west until the point, with geographic co-ordinates 13° 22' 28.9" N; 00° 59' 34.8" E, called point B on sketch-map 3, where the IGN line markedly changes direction, turning due south in a straight line. As this turning point B is situated some 200 m to the east of the meridian which passes through the intersection of the Say parallel with the River Sirba, the IGN line does not cut the River Sirba at the Say parallel. However, the *Arrêté* expressly requires that the boundary line cut the River Sirba at the Say parallel. The frontier line must therefore depart from the IGN line as from point B and, instead of turning there, continue due west in a straight line until the point, with geographic co-ordinates 13° 22' 28.9" N; 00° 59' 30.9" E, called point C on sketch-maps 3 and 4, where it reaches the meridian which passes through the intersection of the Say parallel with the right bank of the River Sirba. The frontier line then runs southwards along that meridian until the said intersection, at the point with geographic co-ordinates 13° 06' 12.08" N; 00° 59' 30.9" E, called point I on sketch-maps 3 and 4.

4. The course of the southern part of the frontier

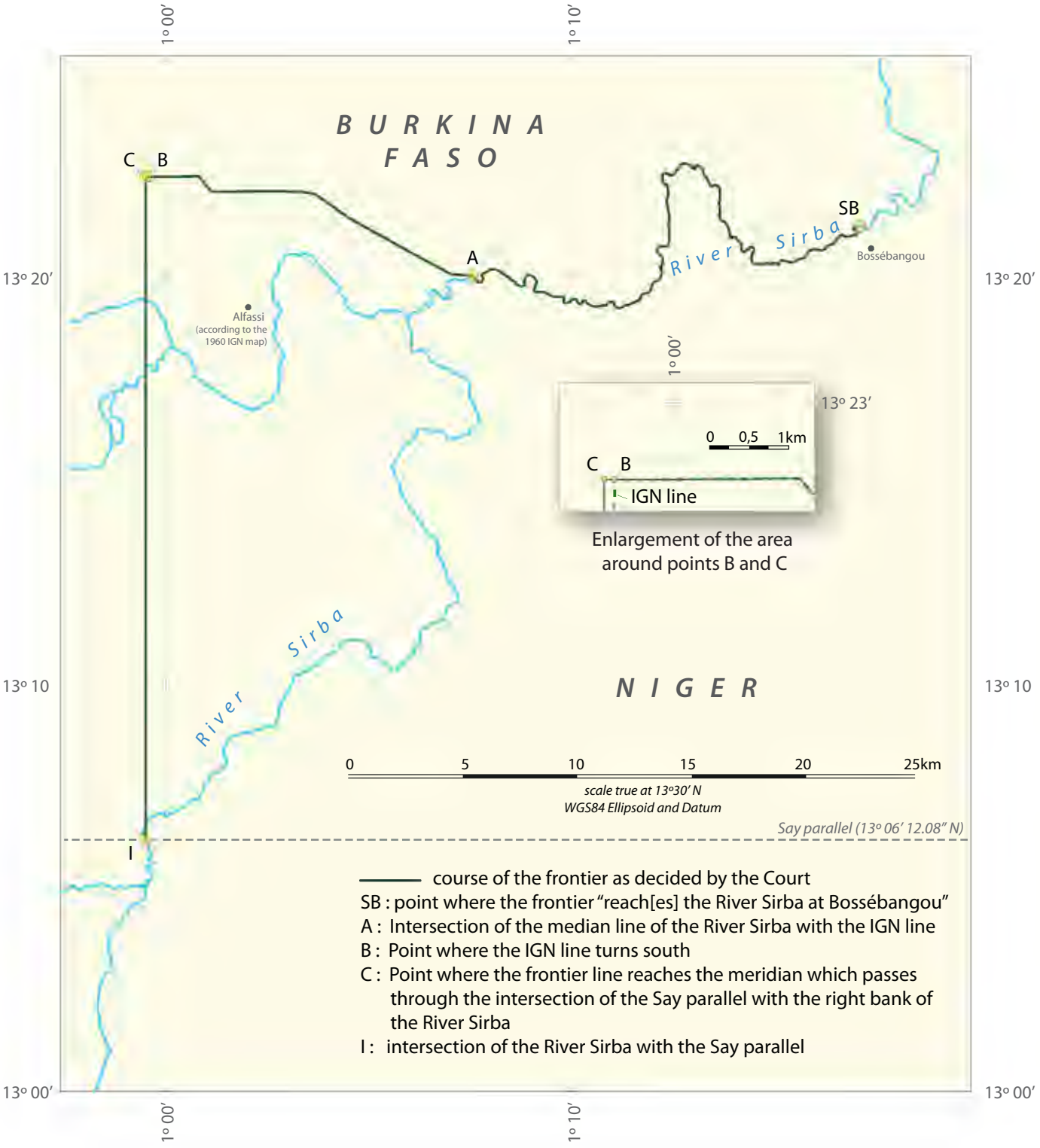
108. The intersection of the River Sirba with the Say parallel is the starting-point of another section of the frontier. According to the *Arrêté*, "[f]rom that point the frontier, following an east-south-east direction, continues in a straight line up to a point located 1,200 m to the west of the village of Tchenguiliba". This latter point has been identified in a consistent manner by the Parties, since it marks the start of the southern section of the already demarcated portion of the frontier.

109. Niger relies on colonial and postcolonial *effectivités* to infer the existence of an implicit agreement between the Parties or of an acquiescence that the line in this section of the frontier is divided into two segments following slightly different directions. The intermediate point is said to be indicated by a frontier marker sited on the road between Ouagadougou and Niamey. Burkina Faso maintains that it "has never agreed" on this with Niger and disputes the use of two straight-line segments in this area (see sketch-map No. 1). The evidence placed before the Court regarding the conduct of the Parties in respect of this section of the frontier does not allow it to conclude that there is an agreement or acquiescence relating not only to the location of the frontier marker in question on the road between Ouagadougou and Niamey, but also to the determination of

Sketch Map 3:

COURSE OF THE FRONTIER FROM THE POINT WHERE IT "REACH[ES] THE RIVER SIRBA AT BOSSÉBANGOU" TO THE INTERSECTION OF THE RIVER SIRBA WITH THE SAY PARALLEL

This sketch map has been prepared for illustrative purposes only



a frontier line running for some 130 km. Therefore, the Court does not need to consider the extent to which the general criteria for delimitation laid down in the 1987 Agreement would be affected by an agreement reached between the Parties regarding a particular section of the frontier.

110. The *Arrêté* specifies that, in this section, the frontier "continues in a straight line". It is precise in that it establishes that the frontier line is a straight-line segment between the intersection of the Say parallel with the Sirba and the point located 1,200 m to the west of the village of Tchenguiliba. It cannot therefore be said that the *Arrêté* does not suffice with respect to this section of the frontier.

111. The Court concludes that, in this section of the frontier, the line consists of a straight-line segment between the intersection of the Say parallel with the right bank of the River Sirba and the beginning of the Botou bend.

*

112. Having determined the course of the frontier between the two countries (see sketch-map No. 4), as the Parties requested of it, the Court expresses its wish that each Party, in exercising its authority over the portion of the territory under its sovereignty, should have due regard to the needs of the populations concerned, in particular those of the nomadic or semi-nomadic populations, and to the necessity to overcome difficulties that may arise for them because of the frontier. The Court notes the co-operation that has already been established on a regional and bilateral basis between the Parties in this regard, in particular under Chapter III of the 1987 Protocol of Agreement, and encourages them to develop it further.

IV. NOMINATION OF EXPERTS

113. In Article 7, paragraph 4, of the Special Agreement, the Parties requested the Court to nominate, in its Judgment, three experts to assist them as necessary in the demarcation of their frontier in the area in dispute. Both Parties reiterated this request in the final submissions presented at the hearings. The Court is ready to accept the task which the Parties have thus entrusted to it. However, having regard to the circumstances of the present case, the Court is of the opinion that it is inappropriate at this juncture to make the nominations requested by the Parties. It will do so later by means of an Order, after ascertaining the views of the Parties, particularly as regards the practical aspects of the exercise by the experts of their functions (see *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 648, para. 176).

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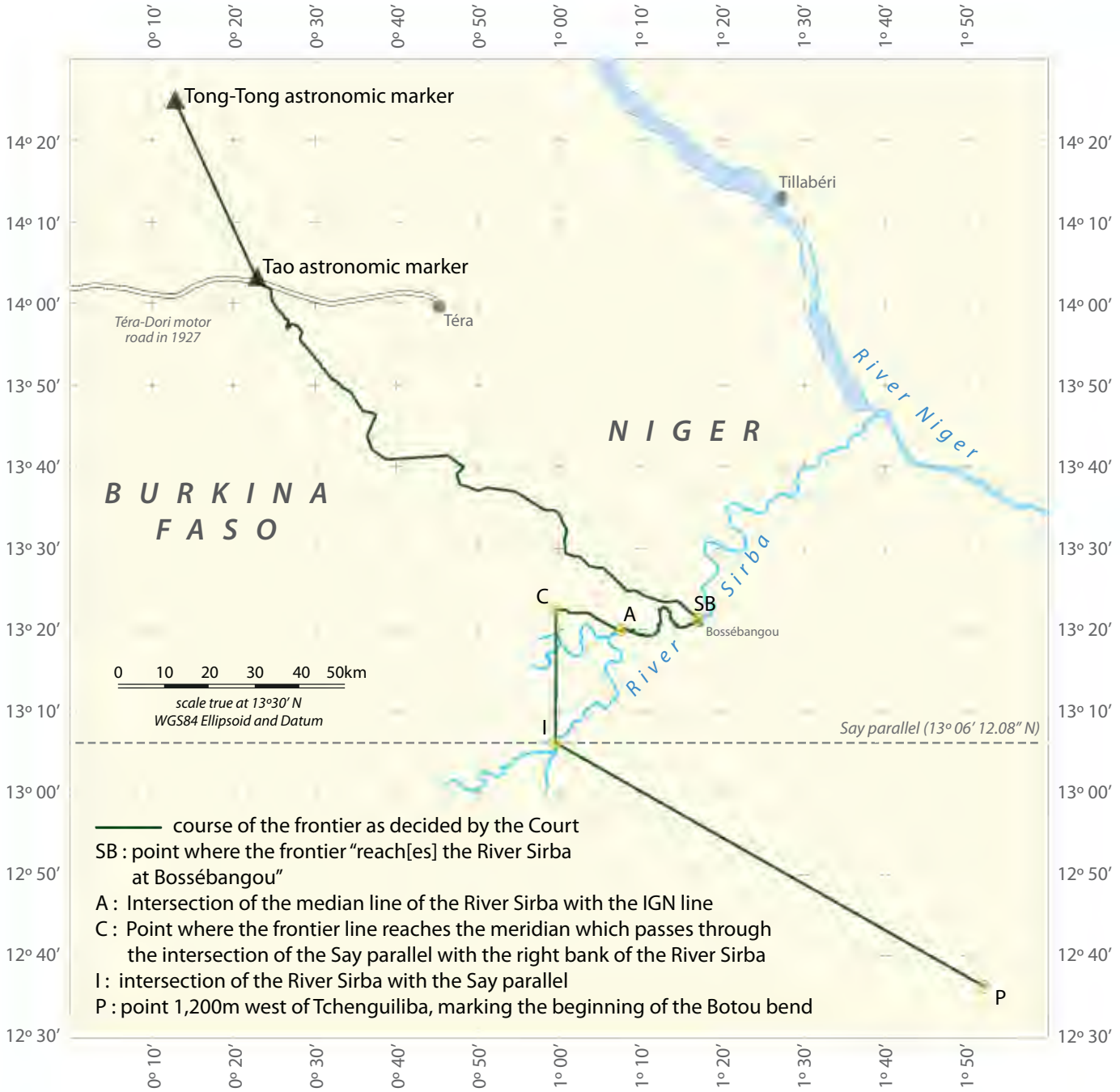
Sketch Map 4:

COURSE OF THE FRONTIER AS DECIDED BY THE COURT

This sketch map has been prepared for illustrative purposes only



114. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it cannot uphold the requests made in points 1 and 3 of the final submissions of Burkina Faso;

(2) Unanimously,

Decides that, from the Tong-Tong astronomic marker, situated at the point with geographic co-ordinates 14° 24' 53.2" N; 00° 12' 51.7" E, to the Tao astronomic marker, the precise co-ordinates of which remain to be determined by the Parties as specified in paragraph 72 of the present Judgment, the course of the frontier between Burkina Faso and the Republic of Niger takes the form of a straight line;

(3) Unanimously,

Decides that, from the Tao astronomic marker, the course of the frontier follows the line that appears on the 1:200,000-scale map of the *Institut géographique national (IGN) de France*, 1960 edition, (hereinafter the "IGN line") until its intersection with the median line of the River Sirba at the point with geographic co-ordinates 13° 21' 15.9" N; 01° 17' 07.2" E;

(4) Unanimously,

Decides that, from this latter point, the course of the frontier follows the median line of the River Sirba upstream until its intersection with the IGN line, at the point with geographic co-ordinates 13° 20' 01.8" N; 01°07' 29.3" E; from that point, the course of the frontier follows the IGN line, turning up towards the north-west, until the point, with geographic co-ordinates 13° 22' 28.9" N; 00° 59' 34.8" E, where the IGN line turns south. At that point, the course of the frontier leaves the IGN line and continues due west in a straight line until the point, with geographic co-ordinates 13° 22' 28.9" N; 00° 59' 30.9" E, where it reaches the meridian which passes through the intersection of the Say parallel with the right bank of the River Sirba; it then runs southwards along that meridian until the said intersection, at the point with geographic co-ordinates 13° 06' 12.08" N; 00° 59' 30.9" E;

(5) Unanimously,

Decides that, from this last point to the point situated at the beginning of the Botou bend, with geographic co-ordinates 12° 36' 19.2" N; 01° 52' 06.9" E, the course of the frontier takes the form of a straight line;

(6) Unanimously,

Decides that it will nominate at a later date, by means of an Order, three experts in accordance with Article 7, paragraph 4, of the Special Agreement of 24 February 2009.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this sixteenth day of April, two thousand and thirteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Burkina Faso and the Government of the Republic of Niger, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge BENNOUNA appends a declaration to the Judgment of the Court; Judges CANÇADO TRINDADE and YUSUF append separate opinions to the Judgment of the Court; Judges *ad hoc* MAHIOU and DAUDET append separate opinions to the Judgment of the Court.

(Initialled) P. T.

(Initialled) Ph. C.

DECLARATION OF JUDGE BENNOUNA

Place of colonial law (French droit d'outre-mer) — *Scope of the principle of* uti possidetis juris — *Consequences of the course of the frontier established by reference to colonial law — Evolution of the concept of sovereignty — Taking account of the evolution of the human and geographical realities.*

I support the Court's decision in the context of the Special Agreement between the two Parties, Burkina Faso and Niger, by which the Court was seised. That said, in this second decade of the twenty-first century, I cannot help but question the relevance of the task entrusted to it, namely that of drawing, or completing, the frontier between the two countries on the basis of an *arrêté* of the Governor-General of French West Africa (FWA) dating from 1927. Admittedly, the jurisprudence of the Court has clarified the function conferred on colonial law which "may play a role not in itself (as if there were a sort of *continuum juris*, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of what has been called the 'colonial heritage'" (case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 568, para. 30).

However, the present case nevertheless involves interpreting the *Arrêté*, as clarified by the Erratum, of the Governor-General of FWA in the light of colonial law as regards the course of the administrative boundaries between colonies.

Consequently, like it or not, the Court has engaged in the implementation of colonial law using methods of interpretation which are based upon it, such as the analysis of the relationship between a decree of the President of the French Republic and an *Arrêté* of the Governor-General of the FWA, or the context of the apportionment of territories among French colonial districts.

In such circumstances, it may be asked whether, in so doing, a "*continuum juris*, a legal relay" between colonial law and international law is really avoided.

But is it possible to do otherwise when, with regard to establishing a frontier line, the colonial reference texts contain only summary information or identify the course by two points situated at a considerable distance from each other?

Faced with the same dilemma, Judge *ad hoc* Abi-Saab, in his separate opinion appended to the Judgment in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, noted that the Chamber had been led into "an excessively detailed analysis of French colonial law, a task which is not, in my view, a fitting one for an international court and was largely superfluous" (*I.C.J. Reports 1986*, p. 659, para. 3). Nevertheless, referring to the precautions taken in the Judgment when considering colonial law, he added: "Along that road there can therefore be no question of even circuitously finding in contemporary international law any retroactive legitimation whatever of colonialism as an institution." (*Ibid.*, para. 4.)

In fact, it is not a question of legitimating *a posteriori* an institution which law and History have definitively classed among those which have been profoundly violent and unjust because of their violation of the dignity and freedoms of entire populations. The question is whether, when drawing frontiers, contemporary international law can rely on law produced by such an institution, even though it involved only administrative boundaries which, moreover, attached little importance to the populations concerned and their historical and sociological relationships.

Judge *ad hoc* Abi-Saab sought to qualify this paradox by advocating recourse to "considerations of equity *infra legem*". For my part, I would say that, when applying *uti possidetis juris*, a court should take account of the intertemporal law, in the sense that, when interpreting colonial law, the fate of the populations concerned cannot be ignored.

In other words, how to ensure that the same injustices that were perpetrated by artificial and brutal frontiers, at times following parallels or meridians, are not "legitimated" by an international judicial organ operating in the twenty-first century?

It is true that the Court, as the principal judicial organ of the United Nations, must contribute to the strengthening of peaceful relations between States, and it does so, at the request of the Parties, while referring to the colonial heritage. Nowadays, however, the search for peace among States also entails ensuring human security, namely respect for the fundamental human rights of the persons concerned and their protection, including by international justice.

The exercise of sovereignty has thus become inseparable from responsibility towards the population. This new approach to sovereignty should certainly be present when the Court rules on the course of boundaries between States.

It may be considered that the human realities, at the time of independence, in the 1960s, were probably taken into account by the French geographers, who carried out field surveys in order to prepare the map of the *Institut géographique national* (IGN) which dates from that period. However, some discrepancies may have subsequently arisen between the map in question and today's human realities, discrepancies which require the States to take the necessary measures to safeguard the rights of the populations concerned.

When, in 2013, it decides on the frontier between two independent African countries, the Court cannot ignore that it has been called upon to give effect to an *arrêté* of 1927, as clarified by the Erratum, and that the sole concern of the authority that adopted it was to separate entities depending on the same colonial power in order to improve territorial administration.

It is clear that such an operation cannot be purely mechanical and nor can it consist of a formal transposition. The human — and even the geographical — realities have evolved, and the Court, which dispenses justice almost a century later, cannot disregard them.

Questions such as these are part of those which concern how the colonial heritage is dealt with, an issue with which the African continent as a whole has been confronted. Recourse to *uti possidetis juris* has not always made it possible to achieve peace within and among those who are the heirs. There is still debate in some quarters about whether one must be content with the redrawing of boundaries or the reconfiguration of the exercise of authority within the existing sovereignties. The focus should perhaps be on the essence of the issue, because the frontier, as predicated on the Westphalian model, is far removed from the cultural heritage of this region of the world. In the framework of a good-neighbourliness relation, it is for the Parties to rediscover this heritage by deepening, as encouraged by the Court, their co-operation.

(Signed) Mohamed BENNOUNA.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

Paragraph

I. *PROLEGOMENA*

1. I have voted in favour of the adoption of the present Judgment in the case of the *Frontier Dispute* between Burkina Faso and Niger, whereby the International Court of Justice (ICJ) has, at the request of the Parties, determined the course of their frontier. Although I have agreed with the Court's majority as to the findings and resolutory points of the Court in its present Judgment, yet there are certain points — to which I attribute much importance — which are not properly reflected in the reasoning of its Judgment, or which have not been sufficiently stressed therein, as much as I think they should have been.

2. In respect of those points, I do not find the Judgment just adopted by the Court today entirely satisfactory, and I pursue a distinct reasoning, particularly in respect of the relationship between the territory at issue and the local (nomadic and semi-nomadic) populations. This being so, I feel thus obliged to dwell upon them in the present Separate Opinion, so as, on the basis of the documentation conforming the *dossier* of the present case (not wholly reflected in the present Judgment), to clarify the matter dealt with by the Court, and to present the foundations of my personal position thereon.

3. My reflections, developed in the present Separate Opinion, pertain to the following points, in relation to which I do not find the reasoning of the Court entirely satisfactory or complete, namely: a) provisions of treaties (after independence in 1960) expressing concern with the local populations; b) concern of the Parties with the local populations in the written phase of proceedings; c) *communiqués* (after independence in 1960) expressing concern with the local populations; and d) views of the Parties concerning villages.

4. Moving from the written to the oral phase of proceedings, I shall then turn attention to the following points: a) concern of the Parties with the local populations in the oral phase of proceedings (first and second rounds of oral arguments); b) concern of the Parties with the local populations in the responses of the Parties to questions from the bench; and c) the tracing of the frontier line in the IGN map. May I here observe that there is a wealth of materials, in the *dossier* of the present case, in the responses provided by the Parties to questions from the bench, not fully or sufficiently reflected in the present Judgment of the Court.

5. My next line of considerations will focus on: a) the human factor and frontiers; b) admission by the Parties that they are bound by their pledge to co-operation in respect of local populations (in multilateral African *fora*, and in bilateral agreements, conforming the régime of transhumance); and c) population and territory together, conforming a "system of solidarity" (encompassing transhumance and the "system of solidarity"; people and territory together; and solidarity in the *jus gentium*). The way will then be paved for the presentation of my concluding observations.

II. Provisions of Treaties after Independence in 1960 Expressing Concern with the Local Populations

6. In the present Judgment in the case of the *Frontier Dispute* between Burkina Faso and Niger, the ICJ begins by pointing out that the dispute at issue is set within an historical context marked by the *accession to independence* of the two contending Parties (Burkina Faso and Niger), which were formerly part of French West Africa (para. 12). In my reasoning in the present Separate Opinion, I ascribe particular importance to the documents *after* their independence in 1960. The Court further recalls that, in the colonial period, the two countries concerned were

"made up of basic units called *cercles*"; each *cercle*, in turn, was composed of subdivisions, which "comprised *cantons*, which grouped together a number of villages" (para. 12).

7. In effect, in my view, it is commendable that the two contending Parties, Burkina Faso and Niger, deemed it fit to insert, into treaties they concluded after their independence in 1960, provisions expressing their concern with the local populations. Thus, their 1964 Protocol of Agreement (concluded in Niamey, on 23.06.1964)[1], contains a provision, on "population movements", which states that

> "2. Provided they are carrying the official identity documents of their State, nationals (within the meaning of the Nationality Code of the State concerned) of the Contracting Parties may move freely from one side of the frontier to the other.
>
> All nationals of either of the Contracting Parties may enter the territory of the other, travel on that territory, establish their residence there in the place of their choice and leave the territory, without being obliged to obtain a visa or residence permit of any kind.
>
> However, transhumant nationals of one State travelling to the other State must have a transhumance certificate stating the composition of their family and the number of their animals.
>
> The two Contracting Parties shall communicate to each other all documents concerning transhumance, in particular details of routes followed and movement calendars. (...)".

8. Years later, the Agreement between Burkina Faso and Niger of 28.03.1987, on the demarcation of the frontier between the two countries[2], contained a provision to (Article 5) the effect that "[r]ights of peoples living along the frontier in respect of the utilization of farmland, pasturage, waterpoints, saline lands and economic trees shall be defined in the Protocol of Agreement". This Protocol of Agreement, celebrated by those two States on the same date[3], provides (Article 19) that

> "After demarcation of the frontier has been completed, nationals of each State who are not originally from the State where they are residing, and who decide to remain there, shall forthwith become subject to the jurisdiction, laws and regulations of the latter State".

9. And Article 20 of the same 1987 Protocol of Agreement adds that:

> "Nationals of one State residing on the territory of the other who decide to return to their country of origin shall have a maximum of five (5) years in which to do so, with effect from the date on which their presence is recorded; during that period

[1]Reproduced in Annex A1 of the *Memorial* of Niger.

[2]Reproduced in Annex A4 of the *Memorial* of Niger.

[3]Also reproduced in Annex A4 of the *Memorial* of Niger.

they shall not be subject to any form or taxation or other charge"[4].

10. In addition, the Protocol of Agreement Establishing a Consultation Framework between Burkina Faso and Niger, celebrated at Tillabéry on 26.01.2003[5], extends such consultation to "cross-border transhumance" (Article 1), and explains, in Article 2 that

> "The purpose of the consultation framework on cross-border transhumance is to:
>
> — manage transhumance between the two States; (...)
>
> — promote consultation and exchange between the two States with respect to transhumance and the management of natural resources;
>
> — propose all appropriate steps to promote and support the development and implementation of a regional[6] inter-State transhumance policy".

III. CONCERN OF THE PARTIES WITH THE LOCAL POPULATIONS IN THE WRITTEN PHASE OF PROCEEDINGS

11. In my perception, a significant feature of the documentation forming the *dossier* of the present case (written and oral phases) of the *Frontier Dispute* opposing Burkina Faso to Niger lies in the attention dispensed to the human factor, — the local population, — considered together with the territory under contention (cf. part IX, *infra*). Niger has been attentive to it from the very start, since its *Memorial* of April 2011, whilst Burkina Faso has likewise turned attention to it as from its *Counter-Memorial* of January 2012. Niger invokes the constant displacements of population in order to interpret the inter-colonial line, as fixed by the 1927 *Arreté* and *Erratum*, taking into account the position of the villages at that time.

12. Burkina Faso, for its part, contends that such constant displacements of population *per se* have rendered it impossible to take into account the segments of the population at issue in drawing the frontier line. Thus, in Burkina Faso's view, the frontier was deliberately artificial, and the *effectivités* cannot, in its view, provide a basis for the interpretation of the 1927 *Arreté*. Yet, the ICJ itself has pondered, in its Judgment (of 22.12.1986) in the *Frontier Dispute* between Burkina Faso and Mali, that in the hypothesis of a legal title not being precise as to the extent of the corresponding frontier, the *effectivités* can play "an essential role" to indicate how a legal title ought to be interpreted in practice (para. 63).

13. Some specific points, raised by both Niger and Burkina Faso in the written phase in the *cas d'espèce*, as to the ineluctable relationship between territory and population, should not, in my

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[4]Moreover, Article 13 of the aforementioned 1987 Protocol of Agreement determines that: — "Use and/or ownership rights of nationals of the two Parties in respect of land situated along the frontier in regard to farming and pasturage, including the right to exploit economic trees such as the *néré* and the *karaté,* shall be governed by the laws of the country where the land is located and, on a subsidiary basis, by customary law". And Article 14 adds that: — "Rights of utilization in respect of wells, rivers and waterpoints along the frontier shall likewise be governed by law and, subsidiarily, by the customs of the country where such wells, rivers and waterpoints are located. The régime governing frontier watercourses shall remain that applicable under the relevant international law".

[5]Reproduced *in* Niger's *Responses to the Questions Put to the Parties by Judge Cançado Trindade, at the End of the ICJ Public Sitting of 17.12.2012*.

[6]So as to ensure a proper implementation of Decision A/DEC.5/10/98 of 31.10.1998 regulating transhumance between ECOWAS member States (cf. *infra*).

view, pass unnoticed here. In its aforementioned *Memorial* of April 2011, for example, Niger observes that the frontier ensuing from the 1927 *Arreté* and *Erratum*, from the very beginning

> "suscitait des problèmes pour les populations nomades habituées à circuler dans un seul espace qui se trouvait désormais divisé entre deux colonies différentes. Pour conserver leurs parcours habituels de transhumance ou même pour cultiver leurs champs chevauchant des limites, il leur fallait passer d'une colonie à l'autre. (...)
>
> (....) En revanche, très rapidement, les populations nomades ou semi-nomades se rendirent compte des avantages qu'elles pouvaient tirer de la situation pour échapper à l'impôt, aux autres prestations requises par la puissance coloniale, ou à l'enrôlement dans les forces armées. (...)" (para. 2.5)[7].

14. Niger holds that the 1927 *Arreté* and the *Erratum* have not been sufficiently precise to fix the frontier at issue (paras. 2.1-4), and adds that this latter has raised problems for the nomadic populations (concerning, e.g., cultivation of croplands and tax collection — paras. 2.5-8), in their "customary transhumant routes", which they wanted to retain (para. 2.5). Niger argues so, without questioning the principle of the "intangibility of boundaries" (as inherited by the colonial administration — paras. 5.1-2).

15. From then onwards, — Niger proceeds, — "[à] toutes époques, les administrateurs ont cherché à retrouver les limites de leurs cantons" ("[a]t all times, the Administrators sought to determine the boundaries of their *cantons*") (para. 5.11). There have occurred different kinds of transhumance; for example, in the Say sector (not so much populated), — Niger adds, — there have been: a) transhumance "de très grande amplitude généralement pratiqués par les peulhs Bororo et apparentés" ("major transhumance, … generally practiced by the Bororo and related Peulhs"); b) transhumance "de courte et moyenne amplitude généralement effectué pour exploiter les pâturages des rivières et de mares" ("a movement over short and medium distances, generally carried out in order to exploit the pastureland beside rivers and pools"); c) commercial transhumance, concerning "les petits troupeaux" ("small flocks"), with the purpose of "valoriser la production laitière et de profiter des pâturages offerts par les champs de culture après leur exploitation" ("for the purpose of increasing milk production and taking advantage of the pasturage provided by fallow croplands") (para. 7.7). This longstanding activity, — Niger remarks, — is nowadays regulated within ECOWAS, of which Niger and Burkina Faso are members (para. 7.7).

16. Moreover, Niger argues that the territorial colonial partitions constituted "un facteur de désordre social" ("socially disruptive factor"), which provoked "population movements motivated by the preservation of communal or cultural identities, or the safeguard of interests" (para. 6.6). And it adds:

> "(...) L'instabilité des populations voisinant les limites ou les terroirs partagés a donné lieu à des enregistrements multiples et à l'invocation de critères de rattachement contradictoires (lieu de nomadisation ou village d'origine).

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[7] [English translation:]

"raised problems for the nomadic populations, who were accustomed to travelling within a unitary area, which was now divided into two separate colonies. In order to retain their customary transhumant routes, or even to cultivate their croplands which overlapped the boundary, they had to pass from one colony to the other. (...)

(...) On the other hand, very quickly, the nomadic or semi-nomadic populations became aware of the advantages that they could derive from the situation in order to escape taxes or other services required by the colonial power, or enlistment in the armed forces. (...)" (para. 2.5).

Outre les mouvements relevant du nomadisme traditionnel ou de la recherche de nouvelles terres, divers facteurs ont amené les populations à changer de secteur: les différences de réglementation entre colonies en matière de servitudes coloniales ou de fiscalité sur les personnes ou le bétail, l'existence d'infrastructures de base sur le territoire voisin (accès à l'eau, parc de vaccination pour le bétail, écoles, centres de santé, etc.), les relations de pouvoir au sein des tribus, etc. Ainsi, tout au long de la frontière, s'est développé un jeu du chat et de la souris entre administrateurs coloniaux et populations frontalières" (para. 6.6)[8].

17. Niger further remarks that the Téra/Dori frontier zone, for example, has been inhabited by sedentary, nomadic and semi-nomadic peoples (para. 6.7). It then added that "[l]es problèmes de la zone frontalière sont conditionnés par divers facteurs de production dominants, à savoir: le nomadisme itinérant, les transhumances pastorales saisonnières transfrontalières en mouvement pendulaire, le semi-nomadisme, l'agriculture sédentaire de plein champ, l'agriculture itinérante et l'orpaillage" ("[t]he problems of the frontier area are conditioned by various dominant forms of production, namely: itinerant nomadism, seasonal trans-frontier pastoral transhumance, conducted on a pendular basis, semi-nomadism, sedentary field agriculture, itinerant agriculture, gold prospection and extraction") (para. 6.7).

18. For its part, Burkina Faso, in its *Memorial* (of 20.04.2011) concedes that the boundary created by the 1927 *Arreté* and *Erratum* was deliberately an artificial one ("artificial in nature" — para. 2.38). It adds that such has been the practice in the fixing of borders by the colonial administrations (paras. 2.36-39), the primary goal being stability, so as to reach the consolidation of peace and security in the region (para. 3.37).

19. In its *Counter-Memorial* (of January 2012), Niger contends that, even in the colonial times, the administrators took into due account "the human factor/*l'élement humain*"[9], with regard to a possible change of limits between Upper Volta and Niger (para. 1.1.11). The transfer of territory between the two Colonies, — it proceeds, — was effected on the basis not of straight lines, but rather of transferring cantons between them (paras. 1.1.14-15), with attention to local traditions (paras. 1.1.24-25). Burkina Faso, in turn, in its *Counter-Memorial* (of 20.01.2012), retorted that the 1927 *Arreté* and *Erratum* never intended to base the delimitation on the then existing limits of cantons, not to allocate villages to one or the other Colony; if that was the intention, — it added, — it would have been explicit (paras. 3.53-55).

20. By and large, one may distinguish two main trends of thinking, in the briefs of the Parties, on the relationship between the population concerned and the territory under contention, namely: a) the reasoning on the impact of the presence of the population on the fixing of the frontier; and b) the historical accounts of the displacements of the populations in the frontier

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[8][English translation:]

"(...) The instability of the populations of areas close to the shared boundaries or territories resulted in multiple registrations and the use of contradictory criteria for defining administrative links (place of temporary settlement or village of origin).

Apart from traditional nomadic movements or the search for new land, there were various factors impelling populations to change from one territory to another: differences in régime as between colonies in the matter of compulsory service or of human or livestock taxation, the existence of basic infrastructure in the neighbouring territory (access to water, vaccination facilities for livestock, schools, health centres, etc.), power relationships within tribes, etc. Thus, all along the frontier, a game of cat-and-mouse developed between colonial administrators and frontier populations" (para. 6.6).

[9]In relation to a letter by the administrator of the Dori *cercle*.

surroundings. While Niger generally upholds that local populations are to be taken into account in the fixing of the boundary, Burkina Faso sustains the opposite, adding that, in any case, such populations are nomadic, and their continuous displacement renders it difficult to take them into account for the fixing of the border.

21. From its perspective, it is thus not surprising to find that Burkina Faso does not refer in its *Memorial* to the population spreading on the land in both parts of the frontier. Niger, on the other hand, dedicates a part of its *Memorial*[10] to an examination of the distribution of those populations[11] and to their historical belonging to one or another State. It thus challenges the "artificial nature" of the frontier invoked by Burkina Faso.

22. In turn, in its *Counter-Memorial* (of 20.01.2012), Burkina Faso dismisses the practice — and the *effectivités* invoked by Niger — subsequent to the 1927 *Arreté* and *Erratum* (paras. 3.56-64)[12]. It insists that, "[e]n réalité, les autorités coloniales avaient pleinement conscience que la limite coloniale 'artificielle' qui avait été adoptée ne pouvait refléter les réalités complexes du terrain que étaient *étrangères* à toute idée de partage frontalier" ("[i]n actual fact, the colonial authorities were fully aware that the 'artificial' colonial boundary which had been adopted could not reflect the complex situations on the ground, *far removed* from any ideas of frontier division") (para. 3.60). Burkina Faso concedes that

> "(...) C'est un fait incontesté en effet que la géographie humaine de la zone frontière a toujours été caractérisée par la mobilité des populations. Celle-ci est à la fois quotidienne et joue aussi sur un plan plus général. Les populations se déplaçaient en fonction des aléas climatiques ou de la conjoncture économique. La conséquence en est l'existence de villages 'fossiles' ou 'fantômes' mais aussi l'imprécision de la toponymie de la zone frontière, pour ne citer que ces deux aspects. Par ailleurs, même des populations plus sédentaires pouvaient vivre dans des villages distincts selon les saisons, situés le cas échéant de part et d'autre de la frontière coloniale"[13] (para. 3.61)[14].

Yet, Burkina Faso's conclusion is that, given all these complexities, "[d]ans de telles circonstances, le choix d´une limite artificielle était celui qui, malgré ses inconvénients allégués, se révéla sans doute être le plus sage" / "[i]n such circumstances, the choice of an artificial boundary, despite its alleged disadvantages, probably turned out to be the wisest one" (para. 3.63).

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[10]Passages in chapters VI-VII.

[11]Niger examines the movements of populations on the sectors of Téra and Say, and warns that to adopt straight lines throughout, making abstraction of the villages therein, would have the effect of "uprooting" ("déraciner") some villages of Niger, by placing them on the territory of Burkina Faso.

[12]It further dismisses Niger's argument that some of the local villages (such as Bangaré) allegedly belonged always to Niger; Burkina Faso argues lack of evidence to that end (cf. *infra*).

[13][English translation:]

> "(...) It is indeed an undisputed fact that the human geography of the frontier area has always been characterized by mobility on the part of the local people. This is an everyday occurrence and also follows a more general pattern. Population groups move according to weather conditions or the economic situation. The consequence is the existence of 'fossilized' or 'ghost' villages, and also a degree of vagueness with regard to the names of places in the frontier zone, to mention just these two aspects. Besides, even the most sedentary groups may live in different villages according to the season, and those villages may in some instances be on different sides of the colonial frontier" (para. 3.61).

[14]Burkina Faso adds that "les territoires revendiqués par les groupements indigènes, surtout en pays de savane semi-désertique, ont des limites traditionnelles plutôt vagues" ("the territories to which the native *groupements* lay claim, in particular in semi-desert savannah areas, have traditional boundaries which are somewhat imprecise") (para. 3.61).

IV. *COMMUNIQUÉS* AFTER INDEPENDENCE IN 1960 EXPRESSING CONCERN WITH THE LOCAL POPULATIONS

23. In addition to the aforementioned treaty provisions expressing concern with the local populations, references were made, in the course of the written phase of proceedings, also to *communiqués* between Burkina Faso and Niger (after independence in 1960), concerning freedom of movement of local populations (free circulation of persons and goods; trade, transportation and customs). Thus, in the Ministerial Meeting between Niger and Upper Volta in January 1968, the two parties agreed "henceforth to dispense with the movement calendar requirement", as that clause was difficult to put into practice"; instead, they decided that the local administrative authorities were to "communicate to each other all documents concerning transhumance"[15].

24. Subsequently, in their Meeting at Ouagadougou, of 12-14.02.1985, Niger's Minister Delegate for the Interior and Burkina Faso's Minister for Territorial Administration and Security, reached a *modus vivendi* on transit (of livestock), in the ambit of ECOWAS, including trade and customs[16]. Shortly afterwards, in another Meeting, on 09.04.1986, Burkina Faso's Minister for Territorial Administration and Security and Niger's Minister Delegate for the Interior agreed on directives concerning free circulation of persons and goods, public health (including campaigns of vaccination), animal health, reciprocal recognition of documents, water and protected zones[17].

25. One decade later, the report of the Meeting held at Kompienga, on 05-06.12.1997, between the Ministers for Territorial Administration and Security of Niger and Burkina Faso, addressed specific issues that needed further consideration on their part, concerning free circulation of persons and goods, documentation for transhumance policy, vaccination cards, public health (before vaccination), customs harmonization, public security. These issues admittedly required the continuing co-operation between the authorities of the two bordering States. Accordingly,

> "En vue de renforcer la libre circulation des personnes et des biens, la rencontre de Kompienga préconise: l'harmonisation de la réglementation et des procédures en vigueur; l'interconnexion des réseaux routiers; l'implication des transporteurs dans la gestion des problèmes de transport et de transit; le suivi de l'application des conventions de la CEDEAO en matière de transport et de transit routiers inter-États"[18].

26. Subsequently, in their Meeting held at Tenkodogo, on 24-26.05.2000, Niger's Minister for the Interior and Burkina Faso's Minister for Territorial Development agreed on fostering the "intégration entre les populations frontalières" ("integration among the populations in border areas"), with particular attention to the "libre circulation des personnes et des biens" ("free circulation of persons and goods") in the ambit of "transhumance"[19].

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[15] Reproduced in Annex 54.2 of the *Memorial* of Burkina Faso.

[16] Reported in Annex A.2 of the *Memorial* of Niger.

[17] Reported in Annex 68 of the *Memorial* of Burkina Faso.

[18] Reported in Annex 92 of the *Memorial* of Burkina Faso. [Unofficial English translation:]

> "With a view to enhancing the free movement of people and goods, the meeting of Kompienga urges: the harmonization of regulations and procedures in force; the interconnection of road networks; the involvement of transporters in the management of transportation and transit problems; the monitoring of the application of ECOWAS Conventions concerning inter-State transport and transit routes".

[19] Reported in Annex 93 of the *Memorial* of Burkina Faso.

V. VIEWS OF THE PARTIES CONCERNING VILLAGES

27. Both Niger and Burkina Faso have conveyed to the ICJ considerable additional information and their views on the villages in their border surroundings[20], in their responses to the questions I deemed fit to pose to them, at the end of the public sitting of 17.10.2012. Niger's claims over some villages in the region at issue were challenged by Burkina Faso on five grounds, namely:

a) the documents produced purportedly supporting Niger's claim that certain villages belonged to it, in its view, did not demonstrate "anything" claimed by Niger (sector of Téra: villages of Petelkolé, Ihouchaltane [Ouchaltan], Bangaré, Beina, Mamassirou, Ouro Gaobé, Yolo, Paté Bolga; and sector of Say: Fombon, Tabaré, Latti, Dissi, Boborgou Saba [Dogona])[21];

b) certain villages were mentioned in Niger's written pleadings, but no documents were cited in support of the claim that they were "Niger" villages (sector of Téra: villages of Tindiki, Lolnango, Hérou Boularé, Nababori);

c) the basis for Niger's claim over the villages had not, in its view, been provided by Niger (sector of Téra: Bambaré, Imoudakan 1, Imoudakan 2 or Kogonyé, Dankama, Zongowaétan gourmantché, Bourouguita, Tchintchirguel, Mandaw; and sector of Say: Kankani, Nioumpalma, Bounga Bounga, Foltiangou, Mangou, Bandiolo, Kerta, Danbouti, Golongana, Kakao Tamboulé, Koguel, Hantikouta, Déba, Béla);

d) Niger had, in its view, attributed the villages to Burkina Faso in Niger's written arguments (sector of Téra: Komanti, Kamanti [Ouro Toupé], Gourel Manma, Sénobellabé, Hérou Bouléba); and

e) there were, at last, in its view, those which were encampments, and not villages (sector of Téra: Débéré Bagna or Débéré Siri N'gobé [Ousalta peul], Komanti, Zongowaétan [Fété Tao], Ouro Tambella [Dingui Dingui])[22].

28. One can consider, without precision or certainty, that certain villages belonged to Niger or else to Burkina Faso, at the time of their accession to independence in 1960. Moreover, there were villages (e.g., Tokalan and Tankouro) that seem to have disappeared during the period contemporary of the *Arreté* and *Erratum* of 1927, and thus can no longer be taken into account in the determination of the frontier nowadays **(cf. Sketch Map 1)**.

29. It further appears, adding to uncertainties, that some of the villages in the region at issue were at times designated by different names[23]. By and large, the documentation forming part of

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[20]Mainly in the sectors of Téra (about 150 km long), relatively more populated, and of Say (about 160 km long), not so much populated, with "a relatively hostile natural environment"; cf., e.g., Niger's *Counter-Memorial*, of January 2012, para. 2.0.

[21]Burkina Faso did not expressly refer to these villages, but this information can be understood from other information provided in: ICJ, *Written Comments of Burkina Faso on Niger's Replies to the Questions Put by Judge Cançado Trindade at the End of the Hearing Held on 17.10.2012*, doc. of 23.11.2012, p. 4, para. 12(v).

[22]*Ibid.*, pp. 3-4, para. 12(i-v).

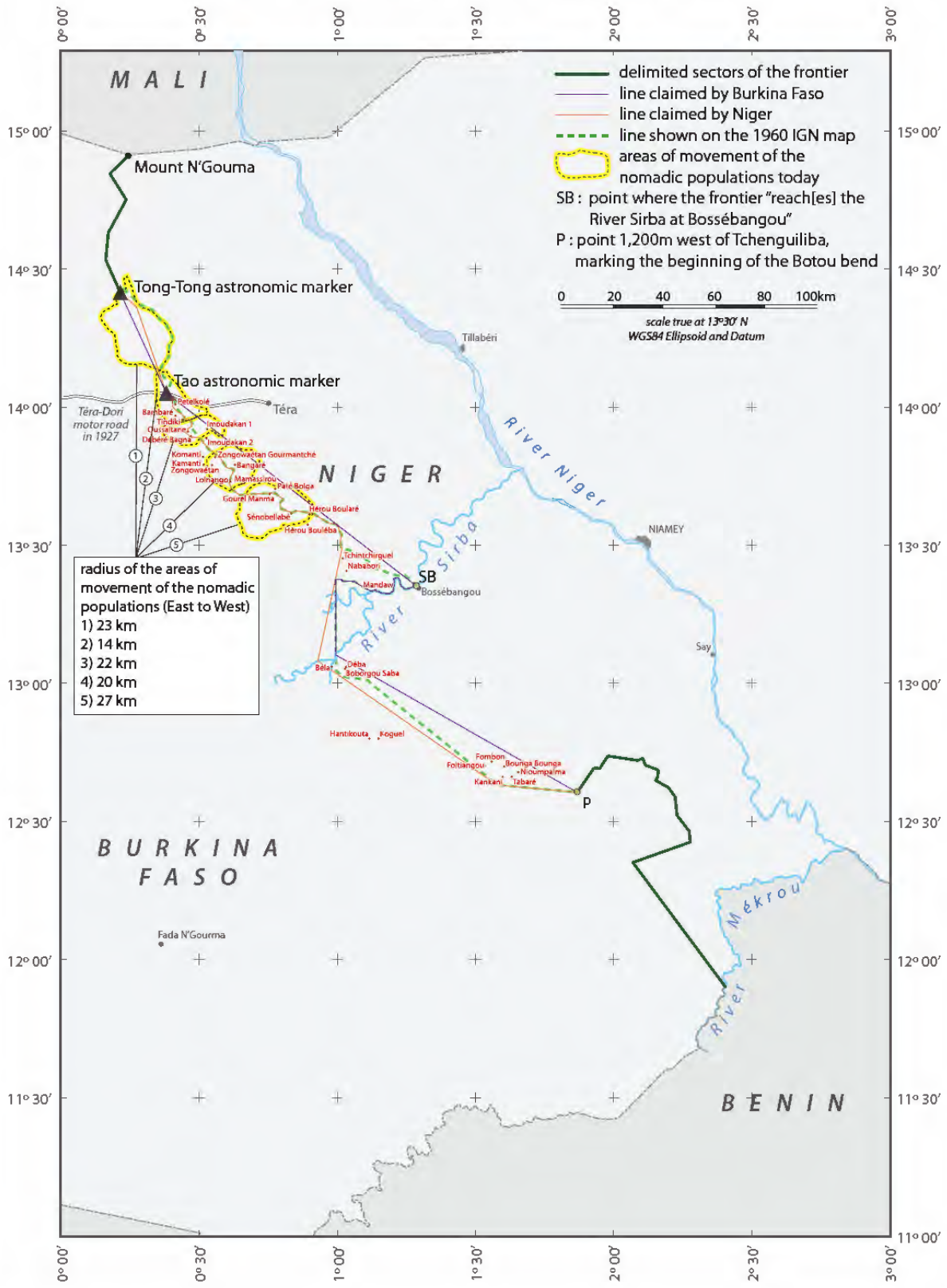
the *dossier* of the present case, as to the distribution of the local populations (and the administration of villages) on both sides of the frontier, in sum, is not amenable to clear conclusions as to their belonging to Burkina Faso or Niger. It is not my intention to proceed to an examination of the present situation of each of those villages for the purposes of the present Separate Opinion; it is beyond its scope.

30. The present case before the Court is far more specific, and concerns the tracing of a part of the frontier between Burkina Faso and Niger. My purpose herein is to demonstrate and sustain that people and territory are related to each other, that they go together, that the tracing of the frontier in the present context cannot be made *in abstracto*. To this end, the consideration of the local populations and of the surrounding villages in the frontier zone is necessary and suffices. The determination of the frontier line is thus to take into account the transhumant movement of persons across the border, so as to secure its freedom. Frontier line fixing and free movement of persons, in the present African context, do not exclude each other.

31. More important than the aforementioned challenges, controversies, uncertainties, is the fact that, when it comes to take into account the fulfilment of the needs of the peoples (nomadic or semi-nomadic), living in, and moving around, the region across the border, both Burkina Faso and Niger appear to converge in their acknowledgement of a shared and common duty to that end (cf. part VII, *infra*). More than that, they have recognized to be bound by their duty of co-operation in this respect (cf. part X, *infra*). Such engagement in securing the freedom of movement of those persons is, in my perception, highly significant, and stands to the credit of both Niger and Burkina Faso.

[23] As pointed out by Niger, in its oral arguments; cf. ICJ doc. CR 2012/26, of 17.10.2012, p. 56.

Separate Opinion of Judge Cançado Trindade: Sketch Map 1:
PARTIES' CLAIMS AND LINE DEPICTED ON THE 1960 IGN MAP
This sketch map has been prepared for illustrative purposes only



VI. Concern of the Parties with the Local Populations in the Oral Phase of Proceedings (First and Second Rounds of Oral Arguments)

32. In their two rounds of oral arguments before the Court, the contending Parties retook their respective lines of reasoning on the relationship between people and territory in the *cas d'espèce*. In the first round of those arguments, Burkina Faso, for its part, referred to the demographic, ecological and economic elements of the region[24], and to the fact that the nomadic peoples lived therein, in the frontier area, off pastoralism[25]. It explained that they tend to settle in easily dismountable huts, so that they can move according to the pastoral calendar[26]. Burkina Faso recalled that Niger and itself are member States of ECOWAS, which has adopted agreements concerning cross-border movements of livestock[27]. Having said that, it insisted on its position based on legal title, discarding Niger's reliance on *effectivités*[28].

33. Niger, in turn, dismissed Burkina Faso's reliance on a deliberately "artificial" frontier line, and invoked the *cantons*' borders (created by going from one village to another), which, in its view, showed the awareness of colonial administrators of the fact that villages had been established on both sides of the frontier, and had been taken into account for the frontier's delimitation[29]. According to Niger, the limits established by the 1927 *Arreté* and its *Erratum* ought to be presumed to have followed the limits of the *cantons*[30]. Niger then invoked the *effectivités* to the effect of interpreting the legal title in practice[31].

34. In the second round of oral arguments, the two contending Parties devoted much of their attention to the argument on the *effectivités*. Once again, Niger supports recourse to these latter, as it sees the legal title unclear; Burkina Faso, on the other hand, opposes such recourse to the *effectivités*, as it regards the historical title as being clear[32]. That was not, however, the end of the exchanges between the contending Parties in the procedure of the *cas d'espèce*.

VII. Concern of the Parties with the Local Populations in the Responses of the Parties to Questions from the Bench

1. Questions from the Bench

35. At the end of the public sittings before the Court, on 17.10.2012, I deemed it fit to put to the contending Parties the following questions:

> "À des fins de précision quant au contexte factuel dans lequel s'inscrit la présente affaire, je souhaite addresser aux deux Parties les questions suivantes:

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[24]ICJ, *Compte Rendu* [CR] 2012/19, of 08.10.2012, p. 33.

[25]ICJ, CR 2012/19, of 08.10.2012, pp. 34 and 36.

[26]*Ibid*., p. 40.

[27]*Ibid*., p. 38.

[28]ICJ, CR 2012/20, of 08.10.2012, pp. 34-45; and ICJ, CR 2012/21, of 09.10.2012, pp. 10-13.

[29]ICJ, CR 2012/22, of 11.10.2012, pp. 50-51 and 53.

[30]*Ibid*., pp. 55-56.

[31]ICJ, CR 2012/23, of 12.10.2012, pp. 45 and 48.

[32]Cf., as to the arguments of Niger, ICJ, CR 2012/26, of 17.10.2012, pp. 21-23, 25-29, 33, 35-36 and 38-41. And, as to the arguments of Burkina Faso, cf. ICJ, CR 2012/22, of 11.10.2012, pp. 23 and 50; and ICJ, CR 2012/25, of 15.10.2012, pp. 24 and 26-36.

1) Les Parties pourraient-elles indiquer sur une carte les zones fréquentées par les populations nomades à l'époque de l'accession à l'indépendance et aujourd'hui, et préciser dans quelle mesure le tracé de la frontière aura une incidence pour ces populations?

2) Dans quel rayon autour de la frontière séparant les deux États, ces populations évoluent-elles? Merci d'indiquer sur une carte, si possible, quelles sont exactement les portions de la frontière concernées.

3) Quels sont les villages susceptibles d'être affectés par le tracé de la frontière que les Parties revendiquent?"[33].

36. In response to my questions, Burkina Faso and Niger have provided the Court — in three rounds of responses to my questions[34] — with considerable additional information (a file of 140 pages), containing relevant details for the consideration of the present case. Certain passages of their responses were particularly enlightening, — in particular those pertaining to nomadic populations, — as we shall see next (*infra*). Both Burkina Faso and Niger thus disclosed a commendable spirit of procedural co-operation before the Court.

2. Responses from Burkina Faso

37. Burkina Faso has provided responses to each of the questions I posed to both Parties[35]. In response to the question concerning the areas through which nomadic populations used to move, during the period when they became independent and today, Burkina Faso submits that, despite its efforts, it is unable to indicate in a map the areas used by the nomads at the time of independence since it was not able to find this information in the colonial archives and studies consulted; it does however provide indications of nomadic existence in the border area in the years close to the States' independence[36]. As to the nomads in the "Téra sector", Burkina Faso claims that although it cannot identify the precise nomadic areas at the time of independence, it asserts that the Parties

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[33]CIJ, CR 2012/26, of 17.10.2012, pp. 59-60. [English translation:]

"For the purposes of precision as to the factual context of the present case, I pose the following questions to both Parties:

1) First, could the Parties indicate in a map the location areas of nomadic populations at the epoch of accession to independence and nowadays, and indicate with precision to what extent will the fixing of the frontier have a bearing on those populations?

2) In which radius around the frontier between the two States do the populations' movements take place? Would you please indicate in a map, if possible, which are precisely the portions of the frontier at issue.

3) Which are the villages susceptible of being affected by the fixing of the frontier claimed by the Parties?"

[34]Cf. CIJ, *Réponses du Burkina Faso et du Niger aux questions posées par M. le Juge Cançado Trindade au terme de l'audience tenue le 17.10.2012/ Replies of Burkina Faso and Niger to the Questions put by Judge Cançado Trindade at the End of the Public Sitting Held on 17.10.2012*, doc. of 16.11.2012, pp. 1-150; ICJ, *Reply of Burkina Faso to the Questions put by Judge Cançado Trindade at the End of the Public Sitting Held on 17.10.2012*, doc. of 23.11.2012, pp. 1-2; ICJ, *Observations écrites du Burkina Faso sur les réponses du Niger aux questions posées par M. le Juge Cançado Trindade au terme de l'audience tenue le 17.10.2012*, doc. of 23.11.2012, pp. 1-7; CIJ, *Réactions du Niger aux observations écrites formulées par le Burkina Faso sur les réponses apportées par le Niger aux questions posées par M. le Juge Cançado Trindade au terme de l'audience tenue le 17.10.2012*, doc. of 04.12.2012, pp. 1-2.

[35]CIJ, *Réponses du Burkina Faso et du Niger aux questions posées par M. le juge Cançado Trindade au terme de l'audience tenue le 17.10.2012*, doc. of 16.11.2012 [hereinafter referred to as "Burkina Faso's response to the questions posed by Judge Cançado Trindade"].

[36]*Burkina Faso's Response to the Questions posed by Judge Cançado Trindade*, paras. 1-3.

have engaged, since their independence, in the facilitation of freedom of circulation from each side of the border[37].

38. As to the question as to how the frontier could affect these populations, Burkina Faso claims that, in general, the reduction of pastoral spaces posed by international borders may cause difficulties to the nomads, while stating that, in the present case, any frontier that is determined between it and Niger will have no detrimental effect on the populations (nomads or otherwise) living in the border area[38]. As to the question concerning the movement of nomadic populations in the border area, between the two countries, Burkina Faso submits a map depicting the itineraries of transhumance at present time[39]. Then, in relation, more specifically, to the radius of areas of movement of the nomadic populations, Burkina Faso claims that it can be calculated on the basis of a description of the transhumance movements. It explains that transhumance is dictated by nature and natural resources, without taking into account border lines between States; and, it adds, *transhumance is also based on solidarity*[40] (cf. *infra*).

39. Burkina Faso next submits that States take political, technical and judicial measures concerning transhumance, and that regional organizations develop initiatives to promote breeding. Burkina Faso adds that the available statistics are poor, which leads it to rely on scattered studies to examine the question of transhumance movements. Between Burkina Faso and Niger, transhumance movements arrive, depart and transit through border regions of Tillabéry, Niamey and Dosso, for Niger, and the Sahel and Est for Burkina Faso[41].

40. Burkina Faso adds that the radius of movement of nomadic populations depends on the richness of the pasture, watering points and salt licks, animal health conditions and commercial facilities (livestock and animal produce markets)[42]. And, — last but not least, — as to the question of villages susceptible to be affected by the frontier, Burkina Faso simply claims that because the 1987 Agreement confirms that the legal title is the *Erratum* of 1927, no village is susceptible of being affected by the frontier, since the delimitation has remained the same between 1927 and the present date[43].

3. Responses from Niger

41. For its part, Niger, likewise, has provided responses to the questions I put to both Parties[44]. As to the questions concerning nomadic populations, Niger explains that the relevant area from the Niger River to the south of Dori is populated by sedentary, nomads and semi-nomads. It adds that these populations remain the same at this date and that they are currently located in the new administrative sections (the Téra sector, and the provinces of Oudalan, Séno and

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[37] *Ibid.*, paras. 4-15.

[38] *Ibid.*, paras. 16-17 and 19.

[39] *Ibid.*, paras. 53-55.

[40] *Ibid.*, paras. 59.

[41] It submits two maps showing first the movements in West Africa and secondly between Burkina Faso and Niger.

[42] *Burkina Faso's Response to the Questions Posed by Judge Cançado Trindade*, paras. 56-65.

[43] *Ibid.*, p. 23, para. 66.

[44] *Réponses du Burkina Faso et du Niger aux questions posées par M. le Juge Cançado Trindade au terme de l'audience tenue le 17 octobre 2012*, 16 November 2012 (hereinafter: "Niger's response to the questions posed by Judge Cançado Trindade").

Yagha). It further points out that the disputed area is not occupied exclusively by nomadic populations. Niger further asserts that transhumance across borders is regulated in numerous documents annexed to Niger's Memorial, ensuring the liberty of movement of nomads[45].

42. In relation to my first question[46], Niger submits that it was not able to find maps adequately addressing the question; it thus relies on the documents used in the proceedings[47], and it submits two maps indicating first the areas through which nomadic populations used to move during the period when they became independent, and another map indicating the areas of movement today. It notes that during the colonial and post-colonial periods, there was little transhumance movement between Burkina Faso and the Say *cercle*, as during the colonial and the post-colonial periods pastoral activities were prohibited[48].

43. As to the question concerning the extent to which the frontier will affect these populations, Niger explains first the current régime (in the absence of a definite frontier). It states that the movement of populations and the access to natural resources follows the *modus vivendi* between the authorities of both States, which does not apply very rigorously the regulations for the movement of populations (such as, e.g., the requirement of an identity card, or else a vaccination booklet); it refers, in this regard, to paragraph 2 of Protocol of Agreement of 1964.

44. As to the future movement of populations, Niger asserts that the free circulation of populations and goods between the two States will be guaranteed by the bilateral and multilateral agreements concerning the liberty of movement and access to natural resources between member States. Niger refers in this regard to documents submitted with its response, explaining the transhumance movements and the organization of the transhumance régime conceived on the basis of international agreements. It then concludes that such agreements guarantee that the nomadic populations that move across the border between Niger and Burkina Faso will be able to keep their *modus vivendi*[49].

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[45] *Niger's Response to the Questions Posed by Judge Cançado Trindade*, pp. 1-3.

[46] Which reads as follows: "indicate in a map the areas through which nomadic populations used to move, during the period when they became independent and today".

[47] Mainly in its *Memorial*. The documents referred to are the following: a) Letter n. 96 from the Commander of Dori *cercle* to the Commander of Upper Volta dated 23.04.1929, which Niger claims to highlight transhumance movement between Dori and Téra; b) Letter n. 367 from the Commander of Dori *cercle* to the Governor of Upper Volta dated 31.07.1929 and previous correspondence, wherein Niger claims the links which exist between populations and the places where they were established or had pastures; c) Report n. 416 from the Commander of Dori *cercle* on the difficulties created by the delimitation established in 1927 between the Colonies of Niger and Upper Volta (*Arrêté* of 31.08.1927) regarding the boundaries between Dori *cercle* and Tillabéry *cercle*, 07.07.1930; d) Niger claims that this Report highlights the problem of the distribution of the nomadic populations between Téra and Dori; e) Directory (of 1941) of Villages of Téra Subdivision (villages of Kel Tamared, Kel Tinijirt, Logomaten Assadek, Logomaten Allaban), in respect to which Niger argues all the nomadic tribes, their pasture areas and watering points are mentioned; f) Report of Delimitation Operations between Dori and Tillabéry *cercles*, dated 08.12.1943, stating: —"[T]here is traditionally a cross-movement of Yagha and Diagourou herds. At the start and end of the rainy season, the herds from the central area of the Yagha go to Taka Pool, in Diagourou, for the salt lick, while, during the same periods, the Diagourou herds travel to the banks of Yiriga Pool for the same purpose"; g) Report from the Head of Téra Subdivision on the Census of Diagourou *canton*, dated 10.08.1954, in relation to which Niger claims that the sheets of place names show the historical background and the places of establishment of certain villages and certain tribes.

[48] *Niger's Response to the Questions Posed by Judge Cançado Trindade*, pp. 4-8.

[49] *Ibid*., pp. 9-11. As to the question concerning the radius of the areas of movement of nomadic populations along the border between the two States concerned, Niger indicates such movement in a map which it submits with its response; cf. *ibid.*, pp. 11-12.

45. And, last but not least, as to the question of which villages are susceptible of being affected by the frontier which each Party is claiming, in addressing the question from its point of view, Niger distinguishes a scenario in which there is a change in the current national status of villages that have always been considered to be in Niger's territory and which it continues to claim to be located in its territory; and villages with Nigerien populations located in territory that Niger implicitly admits, by excluding them from its claim, will no longer be part of the State of Niger. Niger submits four maps (two for each scenario), as well as a list of villages with respective co-ordinates[50].

4. General Assessment

46. The Parties' responses have shed light on some important questions that, earlier on, were not entirely clear. Some observations can be made in view of the responses of the Parties. As to the nomadic and semi-nomadic populations, both Parties have submitted that: a) there are nomads and semi-nomads located in the border area and in the region; b) the nomadic populations move across the areas where any of the frontiers claimed by the Parties would be located; c) the Parties are willing and are bound (by their membership in regional organizations and by their bilateral engagements), to continue to guarantee free movement to the nomadic populations.

47. In this light, any frontier to be determined does not seem likely to have an impact on the population, as long as both States continue to guarantee the free movement to the nomads and semi-nomads, and their living conditions do not change as a consequence of the fixing of the frontier (by the Court). It is important, in this connection, that the Judgment makes use of the extensive information now available in the case file and refers to the guarantees both States have given that they will not curtail the living conditions of the nomads and semi-nomads of the region.

48. As to the question relating to villages which are susceptible to be affected by the frontier, each Party claims, according to the responses provided by Niger (as Burkina Faso practically evaded the question, without providing much information in this regard), taking the claims of Niger at face value, there appear to be many Niger villages that would be on Burkina Faso's side were the Court to adopt a straight line between Tao and Bossébangou (i.e., as proposed by Burkina Faso). Furthermore, it is to be noted that Niger made the distinction in its response between villages that in its view have always belonged to Niger and should continue so, and villages that have Nigerien population but that it does not claim to be on Niger's side.

49. This is a point which was not entirely clear before. Niger provided specific (and helpful) co-ordinates for most villages to which it refers, which is very helpful to locate these villages in a map. Yet, there remains a question which the Parties' responses did not clarify entirely: whether there is sufficient evidence in the case-file that these villages have been as Niger claims Nigerien. Niger, in its response, limits itself to providing the names and co-ordinates of villages it claims to be Nigerien (and maps to this effect), without however providing evidence that these villages are indeed Nigerien. The next question to consider is that of the possible courses of the frontier in the area between Tao and Bossébangou, where most villages are located.

50. The *area between the Tao astronomic marker and Bossébangou*, in particular, seems to be the most complex portion of the frontier to be determined. This is so because first, the text of the *Erratum* is not entirely clear in its description of the course of the frontier. Secondly, another difficulty of determining the frontier in this area concerns the presence of villages located near the

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[50] *Ibid.*, pp. 13-21.

border and claimed by Niger. I propose thus to share some reflections concerning this section of the frontier, in light of the responses of the Parties previously discussed. My observations are informed by the principle that the territory exists for the people that inhabit it.

51. The responses of the Parties were necessary in order to form a clear opinion on the border in this area, where the majority of concerned villages are located. As to methodology, the point of start should be the *Erratum*. In this regard, however, the text of the *Erratum* does not appear entirely clear as to the course of the frontier in this area (except concerning the ending point, which the text is clear that the line "reach[es] the river Sirba at Bossébangou"). It gives some indications (frontier points, direction, and that the line "turns"); yet, these indications of the *Erratum* do not necessarily lead to a straight line on the basis of the text of the *Erratum*.

52. Thus, as the text of the *Erratum* is not by itself clear as to the frontier line, other elements of the case-file — which do not seem to clarify further the exact course of the frontier, — need to be assessed to interpret the text of the *Erratum*. As to the top part of the frontier between Tong Tong to Tao, both Parties propose a straight line, there appearing to exist enough elements to justify it, connecting Tong Tong and Tao.

53. It is the area between Tao and Bossébangou, as already stated, that is the more complex one, in particular due to the presence of villages. On the basis of the clarifying responses of the Parties concerning the villages in question, many villages seem to be susceptible to be affected by the frontier if a straight line were to connect the Tao astronomic marker and the Bossébangou area. Recourse can thus be made, in my view, to the line of the 1960 IGN map (given the insufficiency of the *Erratum* to determine the course of the frontier — *supra*), pursuant to the 1987 Agreement.

54. As to the part of the frontier between Tao and Bossébangou, the text of the *Erratum* does not appear entirely clear in its description. It gives some indications (frontier points, direction); yet it does not state the shape of the line. It is, however, clear that the line should reach the River Sirba at Bossébangou (the ending point of this section of the frontier). In face of a text that is not entirely clear, it is necessary to have recourse to other elements of the case-file, so as to interpret the text in an attempt to clarify its meaning. As to the bottom part of the section of the frontier (from Tao to Bossébangou), if the text of the *Erratum* and the elements of the case-file do not appear sufficient to clarify the meaning of the text, it would thus appear necessary to have recourse to the 1960 IGN map to determine the course of the frontier.

VIII. SOME REMARKS ON THE TRACING OF THE FRONTIER LINE IN THE IGN MAP

55. Reference has already been made to the line of the map (1960 edition) of the *Institut géographique national de France* (IGN) in the factual context of the present case (*supra*). In effect, the IGN map had already drawn the attention of the ICJ Chamber in the earlier case of the *Frontier Dispute* between Burkina Faso and Mali (Judgment of 22.12.1986, para. 61). The Chamber expressly referred to one of the documents in the *dossier* of that case, namely, a Note of 27.01.1975, compiled by the IGN, on the positioning of the frontiers on the maps (para. 61). In its Judgment, the Chamber quoted only an extract of that Note; its full text is in the archives of this Court. In effect, having researched on the archives of the ICJ, bearing in mind the present case between Burkina Faso and Niger, I have found out that there are some other related and supporting

documents (pertaining to the previous *Frontier Dispute* between Burkina Faso and Mali, 1986), of pertinence and relevance for the adjudication of the *cas d'espèce*[51].

56. For example, one of such documents of the IGN (letter of 24.06.1975) expressly refers to difficulties in the tracing of frontiers, solved, on most occasions, with the obtaining of information provided *in loco* to the "opérateurs sur le terrain" by the "chefs des circonscriptions frontalières, les chefs de villages et les populations locales"[52]. In this way, local populations and their representatives gave their contribution to the tracing of the frontiers in the region they lived, as set in the IGN map, — as the documentation of the previous *Frontier Dispute* between Burkina Faso and Mali, kept in the archives of this Court, indicates.

57. In the course of the proceedings (written and oral phases) of the present *Frontier Dispute* case between Burkina Faso and Niger, the point was stressed by Niger. Thus, in its *Counter-Memorial* (of January 2012), Niger observes that, from the cartographical standpoint, the 1960 IGN map rests on "solid technical bases", being as complete as

> "le permettaient les connaissances relatives à l'occupation du terrain. (...) [L]es indications quant aux limites (...) s'appuient sur des informations obtenues des autorités locales" / "knowledge of occupation on the ground allowed. (...) [T]he indications of the boundaries are based on information obtained from the local authorities" (para. 1.1.32).

58. In its oral argument in the public sitting before the Court of 11.10.2012, Niger added that the 1960 IGN map, prepared "at the dawn of decolonization", was the one to be relied upon. After all, it was compiled, as far as possible, not only on the basis of "detailed topographical surveys", but also on the basis of "information provided by the local authorities on the boundaries of their *cantons*". In its view, all those elements, "garnered on the eve of independence", were therefore "highly relevant"[53].

59. Furthermore, again in its *Counter-Memorial*, Niger retorted the usual argument that its frontier with Burkina Faso, like other frontiers in the African continent, had a rather "artificial and arbitrary" character. Niger dismissed this argument by remarking that

> "Il est certes bien connu que les puissances coloniales, en particulier en Afrique, n'ont pas manqué de recourir à des lignes droites ayant un caractère artificiel et arbitraire pour tracer les limites des territoires coloniaux. Il en est allé ainsi à travers les déserts, les régions inhabitées ou dans celles restées inexplorées avant ou après la conquête. Il suffit de penser aux limites du Sahara occidental, de la Mauritanie, de l'Algérie, de la Lybie, du Tchad, etc., pour ne citer que quelques exemples.
>
> On ne trouve cependant rien de tel pour les limites ici concernées. Les conditions dans lesquelles la limite entre le Niger et la Haute-Volta fut établie font apparaître, au contraire, un grand souci du respect des populations et des

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[51]Namely, besides the aforementioned Note of 27.01.1975 (doc. D/134), the following ones: a) letter of 31.01.1975, accompanying the aforementioned Note (doc. D/135); b) document (D/136) of 25.02.1975 (on the insufficiency of the *Arreté* and the *Erratum*); c) telegram of 09.06.1975 (on the need of observation *in loco* — doc. D/137); d) letter of 24.06.1975 (doc. D/138), on information obtained *in loco*; and e) letter of 05.09.1978 (doc. D/139), on the need of new cartography.

[52]Doc. D/138, p. 3, para. 4.

[53]ICJ, doc. CR 2012/22, of 11.10.2012, p. 30, para. 17.

circonscriptions administratives préexistantes. Le contexte historique et les archives cartographiques le démontrent" (para. 1.1.7)[54].

60. Also in relation to the present case, Niger further stated that

"Il ne s'agit donc pas de tracer des lignes géométriques (droites ou courbes) à travers des terres inconnues, mais bien de rattacher des *cantons préexistants* au territoire de l'une et l'autre des colonies. Les espaces composant ces cantons, occupés par des populations autochtones, composés de villages, de terrains de culture ou pâturages, de circuits de nomadisation, ne se développaient pas en suivant des lignes abstraites, mais reposaient sur des occupations de sol et épousaient la configuration ou la nature du terrain" (para. 1.1.15)[55].

61. In sum, in my perception, in the area between the Tao astronomic marker and Bossébangou, the IGN line appears, from the perspective of the relations between people and territory, as the appropriate one. All evidence available in the *dossier* of the present case, as well as in the archives of this Court, points to the fact that the IGN line was drawn taking into account the consultations undertaken *in loco* by IGN cartographers with village chiefs and local people[56].

62. People and territory stand together; it is clear, in contemporary *jus gentium*, that territorial or frontier disputes cannot be settled making abstraction of the local populations concerned. As it can be seen (**cf. Sketch Map 2**), the IGN line, and indeed the course of the frontier determined by the Court in the *cas d'espèce* in the area between the Tao astronomic marker and Bossébangou, cuts across the width of the areas of population movements today in a balanced way, equitably within the orbit of their present-day movements' areas.

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[54][English translation:]

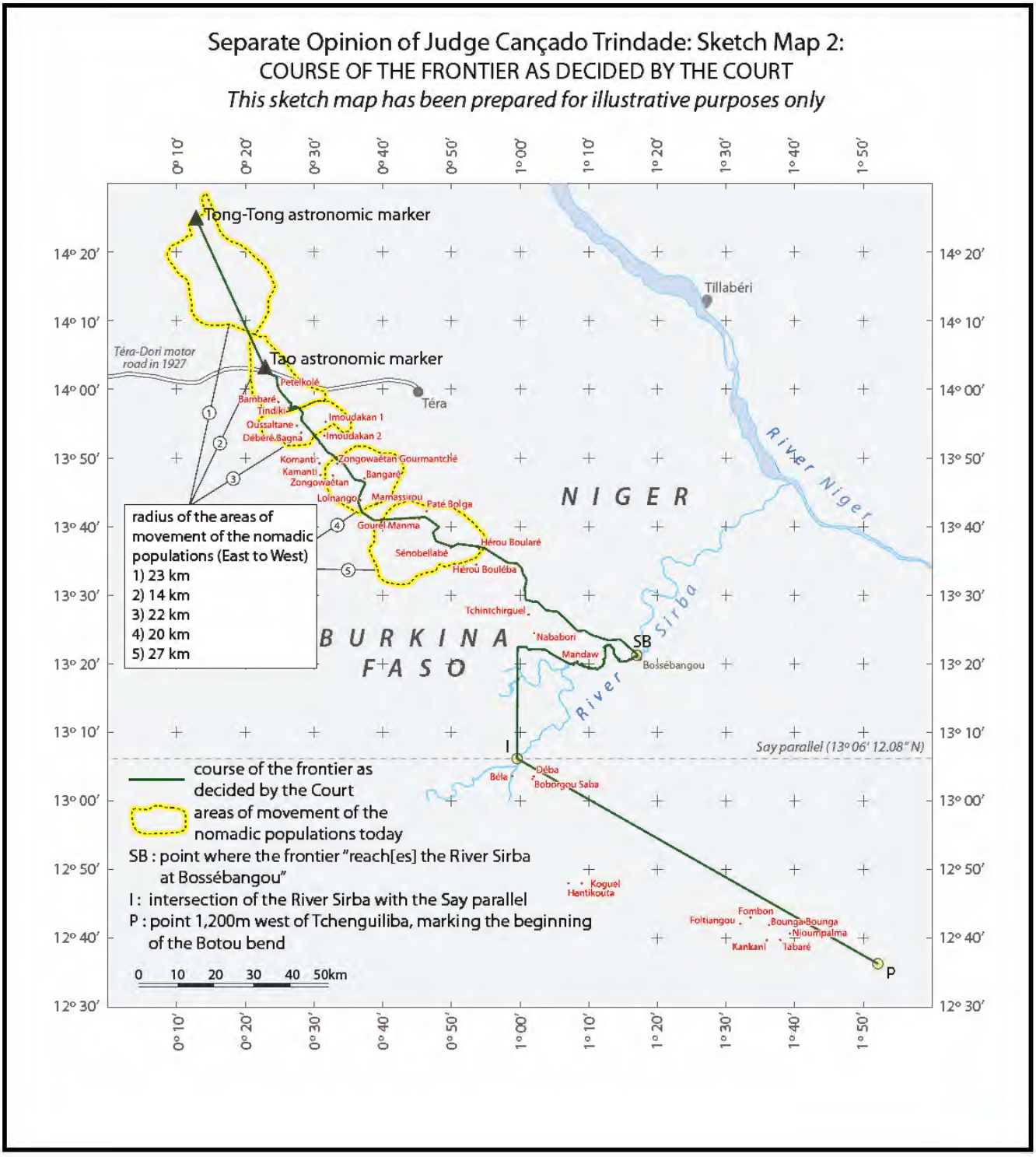
"It is of course well known that the colonial powers, particularly in Africa, did have recourse to straight lines of an artificial and arbitrary character in drawing the boundaries of colonial territories. This was the case across deserts, uninhabited regions and regions that remained unexplored before or after conquest. One needs only to think of the boundaries of Western Sahara, Mauritania, Algeria, Libya, Chad, etc., to cite just a few examples. [p. 13]

However, this is not at all the case in respect of the boundaries concerned here. The circumstances in which the boundary between Niger and Upper Volta was established reveal, on the contrary, a true concern to respect local inhabitants and pre-existing administrative divisions. The historical context and map archives prove this" (para. 1.1.7).

[55][English translation:]

"It was thus not a question of drawing (straight or curved) geometric lines through unknown regions, but rather of incorporating pre-existing *cantons* into the territory of one colony or the other. The areas comprising these *cantons* — inhabited by indigenous peoples and consisting of villages, crop and pastureland, and nomad routes — did not in principle follow abstract lines, but were based on land occupation and followed the configuration or nature of the ground" (para. 1.1.15).

[56]Cf., to this effect, e.g., ICJ, case of the *Frontier Dispute* (Burkina Faso *versus* Mali), Judgment of 22.12.1986, para. 61.


Separate Opinion of Judge Cançado Trindade: Sketch Map 2:
COURSE OF THE FRONTIER AS DECIDED BY THE COURT
This sketch map has been prepared for illustrative purposes only
Tong-Tong astronomic marker
Tao astronomic marker
Téra-Dori motor road in 1927
Téra
Tillabéri
River Niger
NIGER
BURKINA FASO
River Sirba
Say parallel (13° 06' 12.08" N)
radius of the areas of movement of the nomadic populations (East to West)
1) 23 km
2) 14 km
3) 22 km
4) 20 km
5) 27 km
course of the frontier as decided by the Court
areas of movement of the nomadic populations today
SB : point where the frontier "reach[es] the River Sirba at Bossébangou"
I : intersection of the River Sirba with the Say parallel
P : point 1,200m west of Tchenguiliba, marking the beginning of the Botou bend
SB
I
P
Petelkolé
Bambaré
Tindiki
Oussaltane
Débéré
Bagna
Imoudakan 1
Imoudakan 2
Komanti
Kamanti
Zongowaétan
Zongowaétan Gourmantché
Bangaré
Loinango
Mamassirou
Paté Bolga
Gourel Manma
Hérou Boularé
Sénobellabé
Hérou Bouléba
Tchintchirguel
Nababori
Mandaw
Bossébangou
Déba
Béla
Bobongou Saba
Koguel
Hantikouta
Foltiangou
Fombon
Bounga-Bounga
Nioumpalma
Kankani
Tabaré
0 10 20 30 40 50km
0° 10'
0° 20'
0° 30'
0° 40'
0° 50'
1° 00'
1° 10'
1° 20'
1° 30'
1° 40'
1° 50'
14° 20'
14° 10'
14° 00'
13° 50'
13° 40'
13° 30'
13° 20'
13° 10'
13° 00'
12° 50'
12° 40'
12° 30'

IX. THE HUMAN FACTOR AND FRONTIERS

63. It ensues from all the aforesaid that, in circumstances of the kind of the present case, or of inhabited territories in general, people and territory go together (cf. part XI, *infra*). In the case of nomadic peoples, in distinct regions of the world, it has been observed that nomads "have become the prisoners of an annual climatic and vegetational cycle (...). They have not, indeed, passed across the stage of the histories of civilizations without having left their mark"[57]. This has been pondered by Arnold Toynbee, in his masterful, if not epic, 10 volume *A Study of History* (1934-1957). He then added that

> "in spite of (...) occasional incursions into the field of historical events, Nomadism is essentially a society without a history. Once launched on its annual orbit, the Nomadic horde revolves in it thereafter and might go on revolving for ever if an external force against which Nomadism is defenceless did not eventually bring the horde's movements to a standstill and its life to an end. This force is the pressure of the sedentary civilizations round about (...)"[58].

64. May I add, in this respect, that this may happen to any community, in any part of the world, for example, those who have lived on agriculture, for generations, and then decide to migrate into (new) industrialized centres, in the quest for, or illusion of, a "better" life. Furthermore, as the present case illustrates, nomadic, semi-nomadic and sedentary peoples may co-exist harmoniously in the same region. In any case, it is not surprising to me to find learned historians of the XXth century (such as A.J. Toynbee and F. Braudel, among others) approaching their discipline from the outlook of life-cycles, or, in a longer-time scale, of cultural cycles.

65. Nomads may not have a history of big events, but they surely have *their* history, their *modus vivendi*, projected in time immemorial. History is included in civilization, which, in Fernand Braudel's outlook, further requires, in order to be understood, the combined endeavours of all the social sciences, and encompasses climate, vegetation, animal species, natural or other elements; it, moreover, comprises and considers what the human beings concerned have made of such basic conditions as "agriculture, stock-breeding, food, shelter, clothing, communications, industry and so on"[59]. One can then identify the "underlying structures" of civilizations, namely, religious beliefs, family life, attitudes towards life and death, timeless peasantry, attitudes towards work and leisure[60].

66. Nomadic groups constitute one of the most ancient forms of community, as aptly recalled by A.J. Toynbee. He added that nomadic shepherds move or displace themselves in a "fixed annual orbit"; they have never been able to become "technologically or economically independent" from the type of community or society they came from[61], nor did they seem to have wanted to become so. He further observed that the members of those ancient agricultural

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[57] A.J. Toynbee, *A Study of History* (abridg. org. D.C. Somerwell), Oxford/London, Oxford University Press, 1960 [reimpr.], p. 169.

[58] *Ibid*., p. 169.

[59] F. Braudel, *A History of Civilizations*, N.Y./London, Penguin Books, 1995, pp. 9-10, and cf. pp. 18 and 25.

[60] *Ibid*., p. 28.

[61] A.J. Toynbee, *Le changement et la tradition*, Paris, Payot, 1969, pp. 33-34 and 73.

communities never broke up into serious conflict with each other, nor even with their more distant neighbours[62].

67. Another learned historian (and anthropologist) of the last century, the Senegalese scholar Cheikh Anta Diop, in one of his thoughtful monographs, *L'unité culturelle de l'Afrique noire* (1959), pondered that sedentary and nomadic ways of life (in distinct regions) have led to two distinct types of family life (matriarchal and patriarchal) and to distinct organizations of social collectivities, leading later to distinct forms of State[63]. Nomadic life soon disclosed needs of its own, and everything seemed linked to the earlier conditions of existence (and survival), with the notion of justice only emerging later on, in time perspective; distinct social ideas derived from nomadic and sedentary ways of life[64].

68. Cheikh Anta Diop added that private law emerged first, and only much later on, with the passing of time, public law was to take its place in order to regulate social relations, then followed by the rise of the States, marked by the *séquelles* of the earlier historical periods[65]. As observed, for his part, by the archaeologist Félix Sartiaux in 1938, in ancient times nomadic populations exerted influence upon sedentary populations; the two forms of *modus vivendi* (pastoral life and agriculture) were to co-exist, and, with the passing of time, sedentary populations gained increasing importance and were to influence others[66].

69. Yet, — as the present case bears witness of, — nomadic populations never vanished, and their way of life and their spirit survive nowadays, "in the agitation and disquiet of modern times"[67]. In my perception, even in the determination of frontiers in regions inhabited by human groups of such dense cultural features, one should not simply draw entirely and admittedly "artificial" lines, overlooking the human element; the centrality, in my view, is of human beings.

X. ADMISSION BY THE PARTIES THAT THEY ARE BOUND BY THEIR PLEDGE TO CO-OPERATION IN RESPECT OF LOCAL POPULATIONS

70. In the present Judgment on the *Frontier Dispute* case between Burkina Faso and Niger, the Court has expressed "its wish" that each Party has due regard to the needs of the population concerned, in particular those of the nomadic or semi-nomadic populations (para. 112). This is very reassuring. In effect, the contending Parties themselves have, in response to my questions, indicated that they regard themselves bound to do so, by virtue of their acknowledgment of their duty of co-operation in respect of local populations (in particular nomadic and semi-nomadic ones), as manifested in multilateral African *fora*, as well as in bilateral agreements, conforming the régime of transhumance (with freedom of movement of those local populations across their borders).

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[62] *Ibid*., p. 119.

[63] Cheikh Anta Diop, *L'unité culturelle de l'Afrique noire* [1959], 2nd. rev. ed., Dakar/Paris, Éd. Présence Africaine, 1982, pp. 135-136

[64] *Ibid*., pp. 150, 152, 154 and 167, and cf. pp. 185-186.

[65] *Ibid*., pp. 139-140.

[66] F. Sartiaux, *La Civilisation*, Paris, Libr. A. Colin, 1938, pp. 40-42, 72-73 and 182.

[67] *Ibid*., p. 73.

1. In Multilateral African *Fora*

71. In their responses to questions I have deemed it fit to put to both of them at the end of the public sittings before this Court, on 17.10.2012, Burkina Faso points out, together with Niger, that both States are parties to numerous regional co-operation and integration organizations establishing freedom of movement of populations, goods and service, as well as the right of residence and establishment[68]. Burkina Faso refers, in this regard, to the Economic Community of West African States (ECOWAS), the "West African Economic and Monetary Union (WAEMU), the Permanent Inter-State Committee on Drought Control in the Sahel (CILSS), the Liptako Gourma Integrated Development Authority (LGA), the Niger Basin Authority (NBA), and the *Conseil de l'Entente*.

72. As to the ECOWAS, in explaining the nature of the organization, Burkina Faso notes in particular its objective of suppressing obstacles to the free movement of people, goods and services, as well as the right of residence. Burkina Faso contends that the Heads of State and Government of ECOWAS adopted Protocol A/P.1/5/79, in Dakar, on 29.05.1979[69], on freedom of movement of persons, the right of residence and establishment in the ECOWAS area, which reasserted and clarified the details of the freedom of movement of persons as well as the right of residence and establishment. In this regard, it also invokes Protocol A/P.3/5/82, of 29.05.1982, on the definition of community citizenship[70].

73. Moreover, it cites other documents of the ECOWAS concerning the free circulation of persons[71]. Burkina Faso further argues that freedom of movement is accorded to nomadism or cross-border transhumance, which is subject to a minimum amount of regulatory legislation[72]. Burkina Faso also notes that ECOWAS authorities have organized awareness-raising and outreach seminars, and workshops concerning freedom of movement, residence and establishment within the ECOWAS Member States[73].

74. As to the West African Economic and Monetary Union (WAEMU), in recalling that it is a regional economic and monetary union composed of eight West African countries, Burkina Faso notes, in particular, that its objective is to create a common market based, *inter alia*, on the free circulation of people, goods, services, capitals, and the right of establishment of people conducting

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[68]CIJ, *Réponses du Burkina Faso et du Niger aux questions posées par M. le Juge Cançado Trindade au terme de l´audience tenue le 17.10.2012*, doc. of 16.11.2012, paras. 18-19.

[69]Burkina Faso submits it as Annex 2 of its response to my questions (*doc. cit. supra* n. (68)).

[70]Burkina Faso submits it as Annex 3 of its Response to my questions (*doc. cit. supra* n. (68)).

[71]Namely, Supplementary Protocol A/SP.1/7/85, signed in Lomé, on 06.07.1985, on the code of conduct for the implementation of the Protocol on free movement of persons, the right of residence and establishment; Decision A/DEC.2/7/85, of 06.07.1985, on the establishment of the ECOWAS travel certificate for Member States; Supplementary Protocol A/SP.1/7/86, signed in Abuja, on 01.07.1986, on the second phase (right of residence) of the Protocol on free movement of persons, the right of residence and establishment; Supplementary Protocol A/SP.2/5/90, signed in Banjul, on 29.05.1990, on the implementation of the third phase (right of establishment) of the Protocol on free movement of persons, right of residence and establishment; Decision A/DEC.2/5/90, adopted in Banjul, on 30.05.1990, establishing a residence card in the ECOWAS Member States; Decision C/DEC.3/12/92, adopted in Abuja, on 05.12.1992, on the introduction of a harmonized immigration and emigration form in the ECOWAS Member States; and the adoption of the ECOWAS Embarkation and Disembarkation Form, used by the airport police services of the various ECOWAS Member States.

[72]Burkina Faso cites, in this regard, the Decision A/DEC.5/10/98, of 31.10.1998, regulating transhumance between the ECOWAS Member States, and the Regulation C/REG.3/01/03 on the implementation of the regulation of transhumance between the ECOWAS Member States, submitted as Annexes 4 and 5 of Burkina Faso's response to my questions (*doc. cit. supra* n. (68)).

[73]*Burkina Faso's Response to the Questions Posed by Judge Cançado Trindade* (*doc. cit. supra* n. (68)), paras. 20-30.

an independent or paid activity, as well as external tariff and a common trade policy. Burkina Faso further claims that several texts issued by the Conference of the Heads of State and Government, the Council of Ministers, the Commission and the President of the Commission, supplement and further clarify the nature and scope of the freedom of movement and the right of establishment and residence in the WAEMU area[74].

75. As to the Permanent Inter-State Committee on Drought Control in the Sahel (CILSS), Burkina Faso points out that a transhumance agreement has been concluded among its Member States[75]. And as to the *Conseil de l'Entente*, Burkina Faso refers to the free movement of people and goods, the right of residence and of establishment (recognized in Article 2 and 3 of the Charter of the *Conseil*), and to a Protocol of Agreement adopted by Member States in 1989 relating to an international transhumance certificate in the *Conseil* Member States, and highlighting transit through the entry and exit points established by the States and the health protection and security conditions to cross borders[76].

76. As to the Liptako Gourma Integrated Development Authority (LGA), in recalling that it is a sub-regional organization composed of Burkina Faso, Mali and Niger (created by a Protocol of Agreement, signed in Ouagadougou on 03.12.1970), Burkina Faso remarks that this institution is the most active on the ground concerning nomadic populations of Member States and transhumance movements. It further claims that LGA, in partnership with the ECOWAS (financial development partners), non-governmental organizations (NGOs) and professional agro-pastoral organizations and associations, organized a regional workshop on the findings of a study concerning existing legislation governing transhumance in the Organization's Member States[77].

77. For its part, in response to a question I have deemed it fit to put to the two contending Parties, on 17.10.2012, at the end of the public sittings before this Court, Niger refers to ECOWAS Decision A/DEC.5/10/98, of 31.10.1998, which purports to regulate transhumance between ECOWAS Member States, in the "communitarian space" (preamble). The Decision[78] provides, *inter alia* (Article 3), that

> "Le franchissement des frontières terrestres en vue de la transhumance est autorisé entre tous les pays de la Communauté pour les espèces bovine, ovine, caprine, caméline et asine dans les conditions définies par la présente Décision. (…)".

78. To regulate transhumance harmoniously, — it proceeds, — an ECOWAS certificate, with public health indications (Article 5), provides for the protection of the rights of the "beneficiaries of transhumance", as set forth in Article 16, which states that

> "Les éleveurs transhumants, régulièrement admis, bénéficient de la protection des autorités du pays d'accueil, et leurs droits fondamentaux sont garantis par les institutions judiciaires du pays d'accueil. (...)".

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[74] *Ibid*., paras. 31-34.

[75] *Ibid.*, paras. 35-36.

[76] *Ibid.*, paras. 37-40.

[77] *Ibid.*, paras. 41-46.

[78] Niger submits it as Annex A of its response to my questions (*doc. cit. supra* n. (68)).

79. Furthermore, Niger refers to the general report on the Consultation Meeting on Cross-Border Transhumance, held in Dori, Burkina Faso, on 19-20.12.2002. The report[79] was prepared following that meeting, on animal transhumance, which gathered Ministers "responsible for animal husbandry", from ECOWAS Member States, held in Ouagadougou, Burkina Faso, on 09-10.10.2002.

2. In Bilateral Agreements

80. In response to a question I have deemed it fit to put to the contending Parties at the end of the public sittings before this Court, on 17.10.2012, Burkina Faso further adds that the two States have developed bilateral relations concerning this question. In this regard, Burkina Faso cites the 1964 Protocol of Agreement which recognized the free movement of populations and it also asserts that the two States have never ceased to co-operate to further improve and facilitate the conditions and modalities of free circulation of people and transhumance movements. Burkina Faso concludes that the frontier will not affect the nomads particularly since both States' membership in regional integration and co-operation institutions recognizes the freedom of movement and residence rights to the populations[80].

81. For its part, Niger states, in its response to my question, that

> "S'agissant de l'avenir, la libre circulation des personnes et des biens entre les deux États restera garantie par les conventions liant les deux États dans le cadre bilatéral ainsi que par les accords internationaux qui consacrent la liberté de circulation et le libre accès aux ressources naturelles entre les États membres (...) / [As regards the future, the free movement of persons and goods between the two States will remain safeguarded under the conventions binding the two States within a bilateral framework and under international agreements establishing freedom of movement and free access to natural resources between Member States (…)]"[81].

82. The admission by the contending Parties, that they are bound by their pledge to co-operation — at multilateral and bilateral levels — in respect of local populations, is, in my perception, very significant indeed. However harmonious human relations might be in the interior of nomadic and semi-nomadic communities (cf. *supra*), it is not surprising to find that their relations with the public power of the State may at times disclose tension and some degree of mistrust[82]. Yet, this seems also to be surmountable, and renders it much to the credit of both Burkina Faso and Niger to have found the way to establish a régime of transhumance and a true "system of solidarity" (cf. *infra*), so as to fulfil the needs of the local populations (and to preserve their *modus vivendi*, whether nomadic, semi-nomadic or sedentary), within themselves and in their international relations.

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[79]Niger submits it as Annex B of its response to my questions (*doc. cit. supra* n. (68)).

[80]CIJ, *Réponses du Burkina Faso et du Niger aux questions posées par M. le Juge Cançado Trindade au terme de l'audience tenue le 17.10.2012*, doc. of 16.11.2012, Réponse du Burkina Faso, paras. 47-52.

[81]CIJ, *Réponses du Burkina Faso et du Niger aux questions posées par M. le Juge Cançado Trindade au terme de l'audience tenue le 17.10.2012*, doc. of 16.11.2012, Réponse du Niger, p. 6.

[82]For a recent account, cf. *inter alia*, e.g., B. Oumarou, *Pasteurs nomades face à l'État du Niger*, Paris, L'Harmattan, 2011, pp. 69-74, 168-175, 198-206 and 215-216.

3. The Régime of Transhumance

83. Besides transmitting to the Court important elements such as the ones reviewed in the present Separate Opinion (*supra*), the two contending Parties, also in their responses to the questions I have deemed it fit to put to both of them at the end of the public sittings before this Court, on 17.10.2012, added some thoughts which leave no doubt as to their clear pledge to co-operation with regard to the living conditions of the population over the territory at issue. Thus, in this respect Burkina Faso ponders that

> "c'est la pratique du nomadisme en Afrique et, plus généralement, la circulation des pasteurs et de leurs troupeaux dans le cadre de la transhumance (...), qui a conduit le Niger et le Burkina, une fois leur indépendance acquise, à s'engager à faciliter la liberté de circulation de part et d'autre de la frontière" / ["it is the practice of nomadism in Africa and, more generally, the movement of pastoralists and their herds as part of transhumance (…), which led Niger and Burkina, once they had achieved independence, to undertake to facilitate the freedom of movement on either side of the frontier"][83].

84. Burkina Faso assures that the living conditions of the local populations will not be affected by the tracing of the frontier line between itself and Niger. In its own words,

> "(...) [L]e droit communautaire en l'Afrique de l'Ouest tel qu'il résulte des dispositions juridiques des textes constitutifs des organisations sous-régionales auxquelles le Burkina Faso et le Niger ont adhéré et des actes règlementaires des organes de ces organisations, ainsi que la pratique suivie ou observée par les États de la sous-région permettent de répondre que le tracé de la frontière entre le Burkina Faso et le Niger n'affectera pas la vie ou le sort des populations nomades vivant de part et d'autre de la frontière"[84].

85. For its part, in basically the same general line of thinking, Niger contends that

> "Le régime actuel de la transhumance est le suivant. En l'absence d'un tracé précis de la frontière, les déplacements et l'accès aux ressources naturelles de part et d'autre de la frontière se font librement en application d'un modus vivendi entre les

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[83] CIJ, *Réponses du Burkina Faso et du Niger aux questions posées par M. le Juge Cançado Trindade au terme de l'audience tenue le 17.10.2012*, doc. of 16.11.2012, Réponse du Burkina Faso, para. 15. Burkina Faso adds that "la zone fréquentée par des nomades dépasse largement la zone frontalière" (para. 54); in referring to their free circulation between itself and Niger, Burkina Faso adds that the "itineraries of transhumance" correspond to the "zones fréquentées par les nomades à l'heure actuelle" (para. 55).

[84] *Ibid*., par. 52. [English translation :]

> "(...) [C]ommunity law in West Africa, as deriving from the legal provisions of the instruments establishing the sub-regional organizations which Burkina Faso and Niger have joined, and as deriving from the regulatory instruments of the organs of those organizations, as well as the practices followed or observed by the States of the sub-region, Burkina Faso is in a position to respond that the frontier line between Burkina Faso and Niger will not affect the life or fate of the nomadic populations living on either side of the border".

autorités des deux États, qui n'appliquent pas de manière rigoureuse la règlementation en vigueur en matière de déplacement des populations et du bétail (exigence de carte d'identité, laissez-passer, carnet de vaccination, etc.)"[85].

86. Despite not coinciding in their submissions as to the specific aspects of the tracing of the frontier line, Burkina Faso and Niger agree as to the assurance of freedom of movement of nomadic populations across their borders. Thus, in its additional comments to the responses given by Niger to the questions I put to both contending Parties at the close of the public sittings before the ICJ, on 17.10.2012, Burkina Faso ponders, *inter alia*, that

> "il convient de constater que les deux Parties s'accordent pour considérer que les règles en vigueur et effectivement appliquées entre les deux États permettent — et facilitent largement — les mouvements de transhumance transfrontière. Le Niger qualifie cette situation de *modus vivendi* (...): quelle que soit sa signification précise, cette expression ne la décrit pas de manière exacte: comme le Burkina l'a montré dans sa propre réponse[86] et comme les informations complémentaires données par le Niger le confirment, la liberté des mouvements nomades et de la transhumance est établie (ou encadrée) par un véritable ordre juridique qui en garantit la pérennité"[87].

XI. POPULATION AND TERRITORY TOGETHER: CONFORMATION OF A "SYSTEM OF SOLIDARITY"

87. All the aforementioned discloses that the two Parties, in response to my questions, have confirmed their understanding of the conformation of a régime of transhumance, described, by one of them, as a true "system of solidarity". The ICJ now sees that people and territory go together (*infra*); the latter cannot make abstraction of the former, in particular in cases of such a cultural density as the present one. After all, since the time of its "founding fathers", the law of nations (*jus gentium*) has born witness of the presence of solidarity in its *corpus juris*, as we shall see next.

1. Transhumance and the "System of Solidarity"

88. May I single out, at this stage, a passage of the responses of Burkina Faso to the questions that I put to both Parties at the end of the public sittings before this Court, on 17.10.2012; in dwelling upon the phenomenon of transhumance, Burkina Faso observes that

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[85] CIJ, *Réponses du Burkina Faso et du Niger aux questions posées par M. le Juge Cançado Trindade au terme de l'audience tenue le 17.10.2012*, doc. of 16.11.2012, *Réponse du Niger*, p. 8. [English translation:]

> "The current system of transhumance is as described hereafter. In the absence of a precise frontier line, movements and access to natural resources on either side of the frontier are unrestricted under a *modus vivendi* arrangement between the authorities of the two States, which do not strictly apply the rules in force concerning the movement of persons and livestock (requirement for an identity card, laissez-passer, vaccination certificate, etc.)" (*ibid*., p. 6).

[86] Cf. *Réponse du Burkina Faso aux questions posées par Monsieur le Juge Cançado Trindade*, paras. 17-52.

[87] CIJ, *Observations écrites du Burkina Faso sur les réponses du Niger aux questions posées par M. le Juge Cançado Trindade au terme de l'audience tenue le 17.10.2012*, doc. of 23.11.2012, para. 4. [English translation:]

> "it should be pointed out that both Parties agree that the rules in force and effectively applied between the two States allow for — and widely facilitate — cross-border transhumance. Niger describes this as a *modus vivendi* arrangement (…): whatever its precise significance, that expression does not give an accurate representation of the situation. As shown by Burkina Faso in its own reply[87], and confirmed by the additional information given by Niger, the freedom of nomadic movement and transhumance is established (and supported) by an effective legal framework, which guarantees its continuity".

"La transhumance est un mode d'élevage traditionnel reposant sur des axes et itinéraires créés de longues dates et qui perdurent de nos jours. Les amplitudes des mouvements varient dans le temps et dans l'espace selon les années et plus encore lors des périodes de crise alimentaire du bétail (sécheresse). (...)

La transhumance est organisée à la recherche de pâturages, de points d'eau et de cures salées. Elle ne tient pas compte des limites de frontières entre les États. Le territoire du transhumant n'obéit qu'à la nature, ses richesses naturelles et leurs capacités à bien nourrir le cheptel. (...)

(...) Ces ressources partagées entre éleveurs ne sont jamais appropriées par une communauté au détriment d´une autre. Tous dépendant de la pluviométrie et de ces caprices, nul ne sait à l'avance quand marqueront les bonnes conditions pour nourrir le bétail. On est alors dans un système de solidarité, de tontine où chacun accueille les autres quand les conditions sont meilleures chez lui, dans la certitude d'être accueilli à son tour chez les autres lorsque les faveurs de la nature sont plus favorables" (paras. 57-59)[88].

After explaining that the radius of movement or displacement of the nomadic populations depends on "the richness of the pasture, watering points and salt licks, animal health conditions and commercial facilities", it concludes on this matter that Burkina Faso and Niger are, "at the same time, and reciprocally, host and transit zones for livestock moving between the countries" (para. 65).

2. People and Territory Together

89. It is reassuring that, even a classic subject as territory, is seen today — even by the International Court of Justice — as going together with the population. In this respect, it should not pass unnoticed that, in its Order of Provisional Measures of Protection (of 18.07.2011) in the case of the *Temple of Preah Vihear* (request for interpretation, Cambodia *versus* Thailand), the ICJ approached territory together with the (affected) population, and ordered, — in an unprecedented way in its case-law, — the creation of a demilitarized zone in the surroundings of the aforementioned Temple (near the borderline between the two countries).

90. In my Separate Opinion appended thereto, I observed that such demilitarized zone seeks to protect not only the territory at issue, but also the segments of the populations that live thereon[89]. Beyond the classic territorialist approach is the "human factor"; this paves the way, — I

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[88][English translation]:

"Transhumance is a traditional herding system based on longstanding routes and itineraries which are still in use today. The volume of movement varies in terms of both time and space, depending on the year and more particularly, periods of drought. (…)

Livestock are moved in search of pasture, watering points and salt licks. Those movements of livestock take no account of national frontiers. Livestock movements are dependent solely upon nature, natural resources and their capacity to feed their stock. (…)

(…) The resources shared by herders are never appropriated by one community to the detriment of another. All depend on the rainfall and its vagaries; no one knows in advance when fodder resource conditions will fail. A system of solidarity, of *tontine* (mutual assistance) exists, where each welcomes the other when the conditions are better in his area, in the certainty of being welcomed in turn in other areas when nature is more favourable there" (paras. 57-59).

[89]As well as a set of monuments situated thereon (conforming the Temple) which nowadays integrate — by decision of UNESCO — the cultural and spiritual heritage of humankind (paras. 66-95).

proceeded, — for protecting, by means of such Provisional Measures, the right to life of the members of the local populations as well as the spiritual heritage of humankind (paras. 96-113). Underlying this jurisprudential construction, — I added, — is the *principle of humanity*, orienting the search for the improvement of the conditions of living of the *societas gentium* and the attainment and realization of the common good (paras. 114-115), in the framework of the new *jus gentium* of our times (para. 117).

91. In my aforementioned Separate Opinion, I further pondered that "the needs of protection of people comprise all their needs", including their *modus vivendi*, their "right *to live* with dignity" (para. 102), and I added that

> "Cultural and spiritual heritage appears more closely related to a *human context*, rather than to the traditional State-centric context; it appears to transcend the purely inter-State dimension, that the Court is used to. I have made this point also on other occasions, in the adjudication of distinct cases lodged with the Court. For example, two weeks ago, in the Court's Order of 04 July 2011 in the case of the *Jurisdictional Immunities of the State* (Germany *versus* Italy, intervention of Greece), I sustained, in my Separate Opinion, that rights of States and rights of individuals evolve *pari passu* in contemporary *jus gentium* (paras. 1-61), to a greater extent than one may *prima facie* realize or assume.
>
> In any case, beyond the States are the human beings who organize themselves socially and compose them. The State is not, and has never been, conceived as an end in itself, but rather as a means to regulate and improve the living conditions of the *societas gentium*, keeping in mind the basic *principle of humanity*, amongst other fundamental principles of the law of nations, so as to achieve the *common good*. Beyond the States, the ultimate *titulaires* of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole" (paras. 113-114).

After all, — I concluded, — "[c]ultures, like human beings, are vulnerable, and need protection" in all their diversity, and such protection is "well in keeping with the *jus gentium* of our times" (para. 117).

92. The ICJ's 2011 decision in the case of the *Temple of Preah Vihear* is not the only example to this effect. Reference could further be made to a couple of other recent ICJ decisions acknowledging likewise the need to take into account people and territory together. For example, earlier on, in its Judgment (of 13.07.2009) on the *Dispute relating to Navigational and Related Rights* (Costa Rica *versus* Nicaragua), the ICJ upheld the customary right of fishing for subsistence (paras. 143-144) of the inhabitants of both margins of the River San Juan. Such fishing for subsistence was never objected to (by the respondent State). And, ultimately, those who fish for subsistence are not the States, but rather the human beings affected by poverty. The ICJ thus turned its attention, beyond strictly territorial inter-State outlook, also towards the affected segments of the local populations concerned. This was reassuring, bearing in mind, in historical perspective, that States exist for human beings, and not *vice-versa*.

93. Shortly afterwards, in its Judgment (of 20.04.2010) in the case concerning the *Pulp Mills on the River Uruguay* (Argentina *versus* Uruguay), the ICJ, in examining the arguments and evidence produced by the parties (on the environmental protection in the River Uruguay), took into account aspects pertaining to the affected local populations, and the consultation to these latter. I drew attention to this point in my Separate Opinion (paras. 153-190), wherein I pondered that, once

again, it was necessary to go beyond the purely territorial inter-State dimension, and to take in due account the imperatives of human health and the well-being of the peoples concerned, the role of civil society in environmental protection[90], as well as the emergence of the obligations of objective character (beyond reciprocity) in environmental protection, to the benefit of present and future generations.

94. In the present case of the *Frontier Dispute* between Burkina Faso and Niger, the Court has taken yet another step in the right direction, to the same effect of caring about the fulfilment of the needs of the populations concerned, in pointing out, in paragraph 112 of the Judgment just delivered today, that

> "Having determined the course of the frontier between the two countries (...), as the Parties requested of it, the Court expresses its wish that each Party, in exercising its authority over the portion of the territory under its sovereignty, should have due regard to the needs of the populations concerned, in particular those of the nomadic or semi-nomadic populations, and to the necessity to overcome difficulties that may arise for them because of the frontier. The Court notes the co-operation that has already been established on a regional and bilateral basis between the Parties in this regard, in particular under Chapter III of the 1987 Protocol of Agreement, and encourages them to develop it further."

3. Solidarity in the *Jus Gentium*

95. Working in a hectic and short-sighted *milieu* of *droit d'étatistes*, who can only behold State sovereignty (without knowing what it exactly means), I feel that some words of caution and serenity are here called for, in the light of the circumstances and lessons of the *cas d'espèce*. In historical perspective, may I recall herein that the "founding fathers" of the law of nations (in the XVIth and XVIIth centuries) propounded a universalist outlook (encompassing *totus orbis*), in a world marked by diversification (of peoples and cultures) and by pluralism (of ideas and cosmovisions), seeking thereby to secure the unity of the *societas gentium*.

96. The *jus gentium* they conceived was for everyone, — all peoples, individuals and groups of individuals, as well as States (then, only then, emerging), all "fractions" of humankind[91]. They endeavoured to pave the way for the prevalence of a true *jus necessarium*, transcending the traditional limitations of the *jus voluntarium*. The gradual and felicitous encounter of scholastic knowledge with humanism propitiated further perennial insights. This is, in my perception, an appropriate moment to rescue herein a couple of them.

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[90] In that same Separate Opinion, I deemed it fit to recall that, before that case had become an inter-State dispute by the end of 2003, in its origins was the initiative, two years earlier (end of 2001), of an Argentinean non-governmental organization (NGO), of expressing its preoccupation to an international entity (CARU), with a subject of considerable public interest (the alleged environmental risks), affecting the local populations. Subsequently, several NGOs (both Argentinean and Uruguayan) manifested themselves in this respect. This disclosed the artificiality of a simply inter-State outlook when one is faced with challenges of public or general interest (such as those pertaining to environmental protection).

[91] A.A. Cançado Trindade, "*Totus Orbis*: A Visão Universalista e Pluralista do *Jus Gentium*: Sentido e Atualidade da Obra de Francisco de Vitoria", 24 *Revista da Academia Brasileira de Letras Jurídicas* — Rio de Janeiro (2008) n. 32, pp. 197-212; Association Internationale Vitoria-Suarez, *Vitoria et Suarez — Contribution des Théologiens au Droit International Moderne*, Paris, Pédone, 1939, pp. 169-170; A. Truyol y Serra, "La conception de la paix chez Vitoria et les classiques espagnols du droit des gens", *in*: A. Truyol y Serra and P. Foriers, *La conception et l´organisation de la paix chez Vitoria et Grotius*, Paris, Libr. Philos. J. Vrin, 1987, pp. 243, 257, 260 and 263; A. Gómez Robledo, "Fundadores del Derecho Internacional — Vitoria, Gentili, Suárez, Grocio", *in Obras — Derecho*, vol. 9, Mexico, Colegio Nacional, 2001, pp. 434-442, 451-452, 473, 481, 493-499, 511-515 and 557-563.

97. Thus, one of the most learned of the "founding fathers" of the law of nations (*droit des gens*), Francisco Suárez, in book II (on 'The Eternal Law, the Natural Law, and the *Jus Gentium*') of his masterful *De Legibus, Ac Deo Legislatore* (1612), in upholding the unity of the human kind (wherefrom *jus gentium* emanates), singled out the "natural precept" (*praeceptum naturale*) of mutual "affection and mercy" [solidarity] (*mutui amoris et misericordiae*)[92], applying to everyone. There was awareness of sociability and mutual interdependence as limits to State sovereignty, to the benefit of the populations concerned, who stood in need of each other and could hardly live (or survive) in an isolated way.

98. "Natural precepts" of the kind found expression by the force of "natural reflection", under the "pressure of necessity", rather than as a result of "deliberate will". After all, in the *jus gentium*, reason stands above the will. The foundation of law lies in the *recta ratio* (evoking Cicero's *De Legibus*, 52-43 b.C.), and solidarity and mutual interdependence are always present in the regulation of the relations among the members of the universal *societas*. In the words of F. Suárez himself,

> "equity and justice must be observed in the precepts of the *jus gentium*. For such observance is included in the essential character of every true law (...); and the rules pertaining to the *jus gentium* are indeed true law (...); it is impossible that these precepts of the *jus gentium* should be contrary to natural equity"[93].

In sum, solidarity has always had a place in the *jus gentium*, in the law of nations. And the circumstances of the *cas d'espèce* before the ICJ between Burkina Faso and Niger bear witness of that today, in so far as their nomadic and semi-nomadic (local) populations are concerned.

XII. CONCLUDING OBSERVATIONS

99. The basic lesson I extract from the present case of the *Frontier Dispute* between Burkina Faso and Niger is that, — as the present Judgment of the ICJ shows, — it is perfectly warranted and viable to determine a frontier line keeping in mind the needs of the local populations. In the *cas d'espèce*, the contending Parties themselves, disclosing a commendable spirit of procedural co-operation, have provided the Court with the elements needed for its determination, taking into account people and territory together. Both Burkina Faso and Niger have expressed their common concern with the local populations (on both sides of their border and constantly moving across it) in their arguments before the Court in the written and oral phases of the proceedings. They have expressed their common concern with the villages in the region, focusing on territory and their inhabitants together.

100. Both Niger and Burkina Faso have referred to provisions of treaties, as well as *communiqués*, after independence in 1960, likewise giving expression to their common concern with the local populations. Significantly, they have jointly admitted that they are bound by their pledge to co-operate in respect of local populations, as expressed in multilateral African *fora* as well as at bilateral level, in respect of the régime of transhumance. They have made it clear that this latter amounts to a "system of solidarity", to be pursued, encompassing people and territory together.

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[92] Chapter XIX, para. 9; and cf. chapter XX, paras. 2-3.

[93] F. Suárez, *Selections from Three Works — De Legibus, Ac Deo Legislatore* (1612), vol. II, Oxford/London, Clarendon Press/H. Milford, 1944, p. 352.

101. The Court, for its part, has rightly expressed its wish that each Party kept its attention to "the needs of the populations concerned, in particular those of the nomadic or semi-nomadic populations, and to the necessity to overcome difficulties that may arise for them because of the frontier" (para. 112). Moreover, as to the River Sirba in the area of Bossébangou, the Court has pointed out that "the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other" (para. 101). The ICJ has thus indicated, in the Judgment that it has just adopted today on the *Frontier Dispute* between Burkina Faso and Niger, that the age of resolving territorial disputes in the abstract, not taking into account the needs of local populations, is fortunately over.

102. The ghost of the outcome of the Berlin Conference (1885 onwards)[94] has at last vanished, and is no longer haunting Africa, with its secular cultures. The complexities of African boundary problems[95] cannot be reduced to the tracing simply of "artificial" straight lines everywhere. In the present case of the *Frontier Dispute* between Burkina Faso and Niger, the ICJ has found that, in the area between the Tao astronomic marker and Bossébangou, the IGN line was the one which constitutes the course of their frontier. The IGN line in that area is indeed the appropriate frontier line therein, for all the reasons that I have pointed out in the present Separate Opinion, from the perspective of the relations between people and territory.

103. The ICJ could have examined such relations to a far greater depth, had it dwelt upon, — as I think it should have done, — more attentively, the wealth of information on this matter (a *dossier* of 140 pages) transmitted to it by the Parties in response to the questions I deemed it fit to put to them at the end of the public sittings before the Court, on 17.10.2012. In any case (keeping in mind that the *optimum* is enemy of the *bonum*), the Court has moved a significant step ahead, in expressly acknowledging that territorial problems, such as the one raised in the *cas d'espèce*, are to be properly tackled taking into account the fulfilment of the needs of the local (nomadic, semi-nomadic and sedentary) populations.

104. Law cannot be applied mechanically; the unending work of jurists and magistrates appears to me — paraphrasing Isaiah Berlin[96] — like swimming against the current, and consideration of frontiers cannot ignore or overlook the human factor. After all, in historical or temporal perspective, nomadic and semi-nomadic, as well as sedentary, populations have largely antedated the emergence of States in classic *jus gentium*. This latter, the law of nations (*droit des gens*), cannot be reduced to the inter-State cosmos of the *plaideurs* of the great-small world of the Peace Palace here at The Hague and of the legal profession "specialized" on inter-State litigation and its idiosyncrasies.

105. The fact remains that States, in turn, are not perennial entities, not even in the history of the law of nations. States were conceived, and gradually took shape, in order to take care of human beings under their respective jurisdictions, and to strive towards the common good. States have human ends. Well beyond State sovereignty, the basic lesson to be extracted from the present case

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[94]Cf. N.J. Udombana, "The Ghost of Berlin Still Haunts Africa! The ICJ Judgment on the Land and Maritime Boundary Dispute between Cameroon and Nigeria", 10 *African Yearbook of International Law* (2003) pp. 13-61. — The Berlin Conference itself lasted from 15.11.1884 to 26.02.1885.

[95]Cf., *inter alia*, e.g., S. Tägil, "The Study of Boundaries and Boundary Disputes", *in* C.G. Widstrand (ed.), *African Boundary Problems*, Uppsala, Scandinavian Institute of African Studies, 1969, pp. 22-32; A. Allott, "Boundaries and the Law in Africa", *in ibid*., pp. 9-21; A.C. McEwen, *International Boundaries of East Africa*, Oxford, Clarendon Press, 1971, pp. 21-27 and 285-290; and cf. the well-known monograph (of 1962) of the agronomic engineer René Dumont, *L´Afrique noire est mal partie*, Paris, Seuil, 2012 [reed.], pp. 7-264; among others.

[96]I. Berlin, *Against the Current — Essays in the History of Ideas*, N.Y., Viking Press, 1980 [reed.], pp. 1-355.

is, in my perception, focused on human solidarity, *pari passu* with the needed juridical security of frontiers. This is in line with sociability, emanating from the *recta ratio* in the foundation of *jus gentium*. *Recta ratio* marked presence in the thinking of the "founding fathers" of the law of nations, and keeps on echoing in human conscience in our days.

(Signed) Antônio Augusto CANÇADO TRINDADE
Judge

SEPARATE OPINION OF JUDGE YUSUF

Uti possidetis juris *and the OAU/AU principle on respect of borders are neither identical nor equivalent — The Cairo Resolution and founding instruments of the OAU and AU do not refer to* uti possidetis juris *— The two principles must be distinguished in light of their different origins, purposes, legal scope and nature — The Court should have cleared up this confusion — The OAU/AU principle is not concerned with the relationship between title and* effectivités *— Nor does it confer preference on one over the other — The reference to territorial integrity in the OAU/AU founding instruments cannot be interpreted as implicitly containing the principle of* uti possidetis juris *— It is the inviolability of boundaries which is implicit in territorial integrity — Inviolability does not mean invariability or intangibility — The 1987 delimitation agreement between the Parties distinguishes this case from previous frontier delimitation cases —* Uti possidetis juris *had no role to play in this case — This should have been recognized in the Judgment.*

I. INTRODUCTION

1. While I am in agreement with the decision of the Court, I feel obliged to deal in this opinion with certain issues, which the Court did not adequately address in the reasoning of the Judgment, particularly as regards the applicable principles invoked by the Parties in their pleadings before the Court (see paragraph 63 of the Judgment).

2. In its analysis of the rules and principles invoked by the Parties in their Special Agreement, the Court refers to the following three principles in paragraph 63 of the Judgment: *(a)* the principle of intangibility of boundaries inherited from colonization; *(b)* the principle of *uti possidetis juris*; and *(c)* the principle of respect of borders existing on achievement of independence adopted by the Organization of African Unity (OAU) in its Resolution AHG/Res. 16 (I) in 1964 at the first session of the Conference of African Heads of State and Government held in Cairo, Egypt (hereinafter, the "Cairo Resolution"), and later enshrined as Article 4 *(b)* in the Constitutive Act of the African Union (AU).

3. Apart from the fact that the Judgment does not explain the legal effect and implications of these principles in the instant case or the manner in which they are to be applied to the boundary dispute between the Parties, the Court appears to treat them as being interchangeable or at least equivalent in their legal nature, scope and effects. The assumption of equivalence, particularly between *uti possidetis juris* and the OAU/AU principle of respect of borders existing on achievement of independence, is based on a *dictum* of the Chamber of the Court in its Judgment in the case concerning the *Frontier Dispute* (*Burkina Faso/Republic of Mali)* of 22 December 1986.

4. The Chamber of the Court formed to deal with the above-mentioned case stated, *inter alia*, as follows:

> "The Charter of the Organization of African Unity did not ignore the principle of *uti possidetis*, but made only indirect reference to it in Article 3, according to which member States solemnly affirm the principle of respect for the sovereignty and territorial integrity of every State. However, at their first summit conference after the creation of the Organization of African Unity, the African Heads of State, in their Resolution mentioned above (AGH/Res. 16 (I)), adopted in Cairo in July 1964, deliberately defined and stressed the principle of *uti possidetis juris* contained only in

an implicit sense in the Charter of their organization." (*Frontier Dispute, Judgment*, *I.C.J. Reports 1986*, pp. 565-566, para. 22.)

5. Following the above statement by the Chamber of the Court, it appears to have been widely assumed, not least by the Court itself in subsequent cases concerning frontier delimitation between African States, that the principle of respect of boundaries existing on achievement of independence adopted by the OAU in its Cairo Resolution, and later by the AU, constitutes an African *uti possidetis juris* which is identical to the principle of Spanish-American origin. For example, in its Judgment of 12 July 2005, the Chamber of the Court in the case concerning the *Frontier Dispute (Benin/Niger),* after referring to the 1986 Judgment, stated that the principle of *uti possidetis juris* had been recognized on several occasions in the African context and that "it was recognized again recently, in Article 4 *(b)* of the Constitutive Act of the African Union" (*I.C.J. Reports 2005*, p. 108, para. 23).

6. It is my view that *uti possidetis juris* and the principle endorsed by the OAU in the Cairo Resolution, and later inscribed in the Constitutive Act of the AU, are neither identical nor equivalent. Although the Court, in the present Judgment (paragraph 63), has slightly moved away from the above-quoted *dicta* of the 1986 and 2005 Judgments equating *uti possidetis juris* to the Cairo Resolution and to Article 4 *(b)* of the Constitutive Act of the AU, I am still of the view that the difference between the two principles merits further elucidation so that they may not be similarly confounded in the future.

II. THE CAIRO RESOLUTION AND OAU/AU PRINCIPLES ON BORDERS

7. It is instructive to start with the text of the Cairo Resolution and of the OAU/AU principles referred to in the above-mentioned Judgment of the Chamber of the Court. Under Article III, paragraph 3, of the OAU Charter, the member States declared their adherence to the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence".

8. The text of the Cairo Resolution entitled "Border Disputes among African States" reads as follows:

> "Considering that border problems constitute a grave and permanent factor of dissension;
>
> Conscious of the existence of extra-African manoeuvres aimed at dividing African States;
>
> Considering further that the borders of African States, on the day of their independence, constitute a tangible reality;
>
> Recalling the establishment in the course of the Second Ordinary Session of the Council of the Committee of Eleven charged with studying further measures for strengthening African Unity;
>
> Recognising the imperious necessity of settling, by peaceful means and within a strictly African framework, all disputes between African States;

Recalling further that all Members have pledged, under Article IV of the Charter of African Unity, to respect scrupulously all principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;

1. Solemnly reaffirms the strict respect by all Member States of the Organization for the principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;

2. Solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence."

9. Article 4 *(b)* of the Constitutive Act of the AU lists as one of the principles of the Union the "respect of borders existing on achievement of independence".

III. THE OAU/AU PRINCIPLES AND *UTI POSSIDETIS JURIS*

10. As a preliminary remark, it may be noted that none of the official documents of the OAU or of its successor organization, the AU, relating to African conflicts, territorial or boundary disputes, refers to or mentions in any manner the principle of *uti possidetis juris*. As stated by a keen observer of the origins and evolution of Pan-African organizations, and an advocate of an "*uti possidetis* africain", "it would be important to underline that the American precedent was never explicitly invoked during the *travaux préparatoires* of the Addis Ababa Conference, and even less by the Heads of State in their inaugural speeches"[1]. Equally significant are the differences between the two principles with regard to their origin and purpose, their legal scope and content and their legal nature.

1. Differences in origin and purpose

11. The Spanish-American Republics, which emerged from colonization in the early nineteenth century, adopted the principle of *uti possidetis juris* in order to address an issue of acquisition of title to territory, which was not satisfactorily resolved by any of the traditional modes of acquisition of title in classical international law[2]. The classical modes of acquisition of territory — occupation, prescription, cession, accretion and subjugation — did not provide for the situation in which a new State came into existence through decolonization[3]. In particular, the main question for the new Republics revolved around the issue of who possessed the legal title in regions which were sparsely populated and in which the limits were vaguely known or inadequately defined. To deal with this problem, it was decided by the former Spanish colonies, as described by the Swiss Federal Council in the Colombia-Venezuela Arbitral Award of 1922, that these regions would be:

"reputed to belong in law to whichever of the republics succeeded to the Spanish province to which these territories were attached by virtue of the royal ordinances of the Spanish mother country. These territories, although not occupied in

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[1]B. Boutros-Ghali, *L'Organisation de l'unité africaine*, Paris, Armand Colin, 1969, p. 48, at footnote 3. The French text reads as follows: «il convient de souligner que le précédent américain n'a jamais été expressément invoqué lors des travaux préparatoires de la conférence d'Addis Abéba, et encore moins par les Chefs d'Etat dans leurs discours d'inauguration».

[2]In *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening),* the Chamber of the Court characterized *uti possidetis juris* as follows: "Thus the principle of *uti possidetis juris* is concerned as much with title to territory as with the location of boundaries . . ." (*Judgment, I.C.J. Reports 1992*, p. 387, para. 42.)

[3]See R.Y. Jennings, *The Acquisition of Territory in International Law*, Manchester University Press, 1963, pp. 7-11 and 37.

fact, were by common consent deemed as occupied in law, from the first hour, by the new republic."[4]

Thus, the primary purpose of this principle was to ensure that there was no *terra nullius* open to occupation by foreign imperial powers in Spanish America[5].

12. The second objective of *uti possidetis juris* was to establish a method or criterion for boundary delimitation where two States, formerly subject to the same metropolitan power, emerged from decolonization. This was achieved by upgrading former administrative limits to international frontiers among the new Republics. As stated by the Chamber of the Court in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening*): "*uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes" (*I.C.J. Reports 1992,* p. 388, para. 43).

13. The situation faced by the African countries in the early 1960s substantially differed from that of the Spanish-American Republics where only administrative boundaries established by Spanish royal ordinances and other Spanish legal instruments existed. First, at the time of independence in the 1960s, there were no regions or territories in Africa which were reputed to be unexplored or which could be considered as *terra nullius* and thus open to acquisition of title through occupation by foreign imperial powers.

14. Secondly, the origin of the post-independence boundaries of African States was varied. It is estimated that only one fourth of the boundaries of African States had an intra-colonial administrative character[6]. The majority of the boundaries of the newly-independent African States were inter-colonial boundaries established through treaties concluded between different colonial powers. The boundaries of two of the founding members of the OAU, Ethiopia and Liberia, neither of which had ever been colonized, were mainly fixed through their own bilateral treaties with the colonial or administering powers of their neighbours. There were also the trust territories under the United Nations Charter, which were not considered colonial territories, since the administering authority entered into a Trusteeship Agreement with the United Nations in respect of the territory concerned and any alterations to it had to be approved in accordance with the provisions of Chapter XII of the Charter[7].

15. The diversity of the boundary régimes which existed on the African continent at the time of independence, and the aversion of the newly-independent African States to the legitimization of colonial law in inter-African relations, led the OAU, and later the AU, to craft its own principle, the legal scope and nature of which will be discussed below. Thus, the lack of reference to *uti possidetis* was not due to a lack of awareness by the OAU member States of the existence of *uti possidetis juris* as a principle or of its use by the Spanish-American Republics following their

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[4]*Colombia-Venezuela Arbitral Award,* United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. I, 223, p. 228 *[translation]*.

[5]See the separate opinion of Judge *ad hoc* G. Abi-Saab in *Frontier Dispute (Burkina Faso/Mali)*, where he describes the dual purpose of the principle of *uti possidetis* (*I.C.J. Reports 1986*, p. 661, para. 13).

[6]M. Foucher, "Les Questions Territoriales et Frontalières en Afrique (1964-2010) : La Réaffirmation des Frontières" in Emilia Robin-Hivert, Georges-Henri Soutou (eds.), *L'Afrique Indépendante dans le Système International*, Paris, PUPS, 2012, p. 62.

[7]See Articles 79, 83 and 85 of the UN Charter.

own decolonization a century earlier[8]. Rather, different situations, and historical circumstances, dictated the adoption of different legal rules and principles.

16. It should also be recalled that despite its title of "Border Disputes among African States", the main objective of the Cairo Resolution was to discourage territorial annexation by force as well as irredentist, pan-nationalist and secessionist claims. This is evidenced by the fact that the only two countries that voted against the resolution were Somalia and Morocco, both of which had, at the time, irredentist claims against their neighbours, while all the other member States of the OAU, most of whom had boundary disputes amongst them, supported the resolution, which provided for peaceful methods and modalities of resolving such disputes.

17. Moreover, although it may sound paradoxical, the African principle of respect for the boundaries existing at the time of independence is closely intertwined with the manner in which the OAU decided to deal with the Pan-African vision of integration and unity among all African States. The Pan-African vision, which was advocated by African leaders in the period before independence, was to render boundaries less significant through the unification of the peoples of the continent. For example, the Pan-African congress, in a resolution adopted in 1958 in Accra, Ghana, denounced "the artificial frontiers drawn by imperialist powers to divide the peoples of Africa, particularly those which cut across ethnic groups and divide people of the same stock", and called for "the abolition or the adjustment of such frontiers at an early date"[9].

18. The OAU neither adopted this vision, nor did it completely abandon it. A tinge of the Pan-African vision was preserved in the form of commitments to work towards African Unity. This is explicitly mentioned even in the Cairo Resolution, where reference is made in the preamble to the establishment "of the Committee of Eleven charged with studying further measures for strengthening African Unity". The task of this Committee was to propose political action which would further promote the unity and solidarity of the African States[10]. Thus, in the Cairo Resolution, the preservation of the boundaries existing at the time of independence is somehow balanced by the continued efforts towards closer African political and economic integration.

19. Consequently, it may be said that the principle of respect for boundaries in the Cairo Resolution places the boundaries existing at the time of independence in a "holding pattern", particularly to avoid armed conflict over territorial claims, until a satisfactory and peaceful solution is found by the Parties to a territorial dispute in conformity with international law, or until such time as closer integration and unity is achieved among African States in general, or between the neighbouring countries in particular, in keeping with the Pan-African vision. As such, it implies a prohibition of the use of force in the settlement of boundary disputes and an obligation to refrain from acts of seizure of a portion of the territory of another African State.

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[8]B. Boutros-Ghali, after lamenting that *uti possidetis juris* was not specifically mentioned in the OAU Charter, states that: "There may have been fears that the mention of this principle would not receive unanimous approval, or that it may be said (as it already has been) that the Addis Ababa Charter was an explicit ratification of the Treaty of Berlin. Whatever may be the reason, the adoption of the principle of *uti possidetis* would have been an important step toward expanding the role of international law in Africa." See B. Boutros-Ghali, "The Addis Ababa Charter", 35 (3) *International Conciliation* 5, 1964, p. 29.

[9]For the text of the resolution, see C. Legum, *Pan Africanism: A Short Political Guide*, London, Pall Mall Press, 1962, pp. 229-232.

[10]See Z. Červenka, *The Organization of African Unity and its Charter*, Prague, Acadamia, 1968, pp. 55-60.

2. Differences in legal scope and content

20. As explained above, *uti possidetis juris* had two important aspects as formulated by the Spanish-American Republics at the time of their independence: the absence of *terra nullius* in their territories and the mutual acceptance by the newly-independent Republics of the lines which formerly delimited the internal administrative divisions or sub-divisions of Spanish provinces, *intendencias* and *capitanias* as their international boundaries. The latter component has acquired more relevance in international law over the years, and has come to be regarded as the core element of *uti possidetis juris*. However, as a criterion for the delimitation of boundaries, its application has been mostly limited to converting into international boundaries the administrative boundaries inherited from the same colonial power or the internal boundaries of States emerging from the dissolution of a larger entity.

21. Thus, even in Latin America, Brazil, which gained its independence from a different colonial power (Portugal) and shared former inter-colonial rather than intra-colonial boundaries with its neighbours, adopted the markedly different concept of *uti possidetis de facto*, which gives preference to effective possession rather than legal title based on Spanish colonial legislation[11]. As stated by H. Accioly:

> "En effet, si les anciennes colonies espagnoles pouvaient adopter cette invention juridique, parce qu'il leur serait permis de discuter entre elles les respectives revendications territoriales en se basant sur des lois ou cédules royales émanant de la métropole commune, il est certain qu'elles ne pourraient pas se prévaloir de pareils titres contre le Brésil, car ils ne pouvaient lui être appliqués, et une telle base serait donc sans valeur."[12]

22. Unlike the *uti possidetis juris* of Spanish-America, the OAU/AU principle of respect for boundaries can only be interpreted as a broad principle which affirms the acceptance by all African States of the existing boundaries of the sovereign independent States that came together to form the OAU and later the AU. The OAU/AU principle does not address the issue of title to inadequately defined regions or areas in frontier zones or physically non-existent boundaries. Nor does it lay down a specific peaceful method or criterion to be used for ascertaining the pedigree of disputed boundaries or for attributing title to territory. The specific methods to be used for the peaceful settlement of boundary disputes are left to be determined, on a case by case basis, by the States concerned. *Uti possidetis juris* could, of course, be one such principle, but it would have to be specifically agreed upon by the Parties to the dispute.

23. Moreover, the relevant territory, the boundaries of which have to be respected under the OAU/AU principle, is neither the one that existed during the colonial period as a colony nor the pre-colonial historical territory of African States, but has rather to be understood as the post-independence territory of the OAU/AU member States. Indeed, as a result of the exercise of the right to self-determination consecrated under the Charter of the United Nations, the peoples of African colonies or trusteeship territories were often able to freely determine their political status prior to independence in one of the following ways: the formation of a single sovereign State; the division of a trust territory into two separate States; the unification of part of a colony or trust

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[11] As was stated by the Chamber of the Court in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*: "It should be recalled that when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law . . ." *(Judgment, I.C.J. Reports 1992*, p. 559, para. 333.)

[12] H. Accioly, "Le Brésil et la Doctrine de l'uti possidetis", *Revue de Droit International*, Vol. 15, 1935, pp. 36-45, at p. 45.

territory with a neighbouring State; the unification of two colonies or of a trust territory with a colony.

24. This situation sometimes resulted in the emergence of a single independent State from the union of a former colony with a former trust territory, e.g., British and Italian Somaliland. It has also led to the merger of a trust territory or a part thereof with another colonial or trust territory; for example, the northern part of the trust territory of Cameroon under British administration merged with Nigeria, while the southern part opted for integration with the trust territory of Cameroon under French administration. Similarly, the British-administered trust territory of Togoland was united with Ghana following a plebiscite under the auspices of the United Nations. On other occasions, two independent States emerged from the division of a single trust territory, e.g., the case of Rwanda and Burundi.

25. It is, of course, one thing to call for respect of boundaries, as was done in the Cairo Resolution or as is currently consecrated in Article 4 *(b)* of the Constitutive Act of the AU; but it is another thing to determine where such dividing lines actually run. It is in the latter case that a principle such as *uti possidetis juris* becomes relevant. According to the prevailing Latin American conception, *uti possidetis juris* is based on a dichotomy of title and *effectivités,* whereby title, if it is found to exist, will trump the *effectivités* or the effective possession of the territory[13].

26. The relationship between title and *effectivités* in the determination of the boundary to be respected was never spelled out or even mentioned in OAU or AU documents. In view of the above-described diversity and complexity of the process of independence of African States, the varied legal régimes under which the delimitation of their boundaries was carried out before independence (e.g., international treaties, administrative boundaries, trusteeship agreements), and the sharply divided opinions among African States at the time of independence, it appears that the OAU/AU deliberately refrained from engaging in a detailed consideration of legal issues, such as whether title to territory, possession or *effectivités* should prevail. Similarly, these organizations declined to lay down, as part of the public law of Africa, a specific peaceful method applicable to the settlement of all potential boundary disputes among all African States, or to the determination of the course of such boundaries.

27. Instead, the Pan-African organizations limited themselves to the affirmation of a general and broad principle of respect of the boundaries of member States in order to safeguard peace and stability in the continent. In other words, neither the Cairo Resolution nor the AU principles have gone so far as the Spanish-American States in defining a specific method to be used to determine the course of African boundaries. This does not, however, mean that African States cannot or have never had recourse, in the settlement of bilateral disputes, to the use of *uti possidetis juris* as a principle applicable to the delimitation of their boundaries or as a method of ascertaining the pedigree of such boundaries. As clearly indicated by the Judgments of the Court referred to above, they have indeed done so and will most probably continue to do so in the future particularly with respect to former administrative boundaries inherited from the same colonial power.

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[13] "Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice." (*Frontier Dispute (Burkina Faso/Mali), Judgment, I.C.J. Reports 1986*, pp. 586-587, para. 63.)

3. Differences in legal nature

28. The two principles — *uti possidetis juris* and the OAU/AU principle on the respect of boundaries — also differ in their legal nature. First, a distinction needs to be made between a broad principle which places frontier disputes among African States in a "holding pattern" until a peaceful solution is found between the parties concerned, and a specific principle which embodies the criteria and methods for ascertaining the pedigree of a boundary and for determining title to territory on the basis of colonial legislation. *Uti possidetis juris* corresponds to the latter, while the Cairo Resolution and the Article 4 *(b)* of the Constitutive Act of the AU lay down the former.

29. Secondly, the OAU/AU principle is specific to the African continent where it is considered as part of the public law of Africa applicable to all African States, but has no claim to being a general principle or a customary rule of international law. Conversely, *uti possidetis juris* has been characterized as follows by the Chamber of the Court in *Frontier Dispute* (*Burkina Faso/Republic of Mali)*:

> "Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs." (*Judgment, I.C.J. Reports 1986*, p. 565, para. 20.)

30. The Chamber of the Court did not justify this sweeping statement nor did it give clear reasons as to the source of this conclusion except to say that, in addition to its Spanish-American origins, *uti possidetis juris* also found application and recognition in Africa. However, the alleged acceptance of the principle by all African States appears to be based on the assumption that the OAU principle established in the Cairo Resolution of 1964 was synonymous with or equivalent to *uti possidetis juris*. Nevertheless, the Chamber later observed in the same Judgment that:

> "*[u]ti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs" (*ibid.,* p. 566, para. 23).

31. The latter statement of the Chamber, which emphasizes the specific role of *uti possidetis juris* with respect to former administrative boundaries, appears, in my view, to correspond more to the actual practice of States than the earlier conclusion characterizing *uti possidetis* as a general principle applicable to all situations of decolonization. Even in the case of African States, recourse to *uti possidetis juris* is generally for the purpose of delimitation or demarcation of former administrative boundaries, as was the case in *Frontier Dispute* (*Burkina Faso/Republic of Mali)* or in *Frontier Dispute (Benin/Niger)*. *Uti possidetis juris* would indeed be redundant in the case of disputes over boundaries delimited by an international treaty concluded either between two colonial powers or between an African State and a colonial power or between two African States[14].

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[14]In its Judgment in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, the Court stated as follows: "It will be evident from the preceding discussion that the dispute before the Court . . . is conclusively determined by a Treaty to which Libya is an original party and Chad a party in succession to France . . . Hence there is no need for the Court to explore matters which have been discussed at length before it such as the principle of *uti possidetis* and the applicability of the Declaration adopted by the Organization of African Unity at Cairo in 1964." (*I.C.J. Reports 1994*, p. 38, para. 75.)

32. Thirdly, the principle of *uti possidetis juris* constitutes a method of determining the course of a boundary on the basis of legal title, and offers a criterion for ascertaining the pedigree of such a boundary. This is indeed the main reason why it has become a very useful tool for the settlement of boundary disputes in cases involving former administrative boundaries or boundaries arising from the dissolution of a larger entity. The OAU/AU principle on the respect of boundaries could not be of much help, nor was it conceived to offer criteria, in the ascertainment of the pedigree of boundary lines. It prescribes respect for, and prohibits assault on, the territories of the OAU/AU member States as they existed at the time of independence. Thus, as pointed out above, the relationship between title and *effectivités*, or the need to give preference to one over the other, or the manner in which such title should be determined, is neither explicitly nor implicitly dealt with in the OAU/AU principle.

33. Moreover, to the extent that a key characteristic of Spanish-American *uti possidetis juris* is that the borders existing at the time of independence are to be determined by reference to the Spanish legislation of the time, it is difficult, if not impossible, to ascribe a similar intention to "consecrate" the colonial law to the African States which adopted the Cairo Resolution or the principles of the AU Constitutive Act. The rejection by the OAU/AU of a rearrangement of borders on ethnic lines or on the basis of historical and geographic claims does not amount to an acceptance of colonial law as title to territory. It was certainly not the intent of the member States of the OAU or the AU to collectively ratify, through the adoption of this principle, the General Act of Berlin of 1885 or to recognize the administrative law of the colonial powers.

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34. There is no doubt that the principle of *uti possidetis juris* has served, over the years, many advantageous functions in Latin America, and continues to play a useful role in the settlement of boundary disputes in other parts of the world. It cannot, however, be considered as a synonym of the principle endorsed by the OAU in 1964, and later inscribed in the Constitutive Act of the AU principle which deals with respect of the boundaries of sovereign independent States in accordance with the United Nations Charter and with the founding instruments of the OAU and AU.

35. The OAU member States, and later the AU, adopted the principle of respect of boundaries existing on the achievement of independence out of a sense of pragmatism in order to ward off conflict and chaos in the African continent. It is an African principle which applies among all member States of the Pan-African organization and imposes upon them the obligation to respect the boundaries existing at the time of independence, pending the peaceful resolution of any border dispute which may arise between them. It is in this context that it may be said that the two principles share a similar rationale in so far as they both seek to encourage recourse to the peaceful settlement of frontier disputes in conformity with international law.

36. The international legal principles to be applied for this purpose may, of course, include the principle of *uti possidetis juris.* It has indeed happened in the past, and it may also happen in the future, that two African States agree to have recourse to the application of the principle of *uti possidetis juris* in a bilateral frontier dispute before the Court or before arbitral tribunals. In

such cases, the application of *uti possidetis juris* is based on a bilateral understanding or agreement, but not on a general principle or customary norm that has emerged as a result of the adoption of the 1964 Cairo Resolution or of the Constitutive Act of the African Union.

IV. THE PRINCIPLE OF TERRITORIAL INTEGRITY AND *UTI POSSIDETIS JURIS*

37. The passage of the 1986 Judgment of the Chamber of the Court quoted in paragraph 4 above also suggests that there was an indirect reference to *uti possidetis* in Article III, paragraph 3, of the OAU Charter. As shown in paragraph 7 above, Article III, paragraph 3, of the OAU Charter declared the adherence of its member States to the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence". It is the reference to "respect . . . for territorial integrity" that the Chamber of the Court appears to have found to contain, in an implicit sense, an *uti possidetis* principle applicable among all African States.

38. The OAU Charter was replaced by the AU Constitutive Act on 26 May 2001. Thus, Article III, paragraph 3, no longer exists. In its place, one of the objectives of the Constitutive Act of the AU, as an instrument of solidarity among African States, is to "defend the sovereignty, territorial integrity and independence of its Member States" (Art. 3, para. *(b)*). Perhaps this evolution of the principle of territorial integrity in the constitutive instruments of the Pan-African organizations already sheds some light on the distinction between *uti possidetis juris* and territorial integrity. It may, however, still be useful to say a few words about the difference between the two principles, particularly in the context of the founding instruments of the OAU/AU.

39. It is erroneous, in my view, to read into the time-hallowed principle of respect for territorial integrity a reference to the principle of *uti possidetis juris* or to assimilate these two distinct principles of international law. If one reads an indirect reference to *uti possidetis* in Article III, paragraph 3, of the OAU Charter because of its language on "territorial integrity", then the same conclusion must be reached concerning Article 2, paragraph 4, of the United Nations Charter. The two Charters refer to territorial integrity as a fundamental principle of international law and an essential foundation of peaceful relations between States, but neither of them deals with *uti possidetis juris.*

40. In so far as boundaries may be likened to the outer shell of the territory of the State, it is the inviolability of those boundaries which is implicit in the concept of territorial integrity. This is, however, quite different from *uti possidetis juris* as discussed in section III above. Inviolability bars the alteration of existing boundaries by force. It also implies that such alteration, should it occur, is not capable of producing any legal effect. This is clearly articulated in the 1970 United Nations Declaration on Principles of International Law (General Assembly resolution 2625 (XXV)), according to which:

> "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States."

41. The reference in the Cairo Resolution to Article III, paragraph 3, of the OAU Charter, may be construed as a reference to the inviolability of boundaries which is implicit in the principle of territorial integrity, but cannot be taken to have "deliberately defined and stressed the principle

of *uti possidetis juris* contained only in an implicit sense in the Charter of their organization", as stated by the Chamber of the Court. In this, the principle enunciated in the Cairo Resolution is similar to principle III on the "Inviolability of frontiers" in the Final Act of the Conference on Security and Co-operation in Europe of 1975, according to which:

> "The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting those frontiers.
>
> Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State."[15]

42. As formulated above, the principle of inviolability of boundaries may be considered to constitute a basic element of the broader principle of territorial integrity of States, and it was in the context of the relationship of these two principles that the Cairo Resolution also referred back to Article III, paragraph 3, of the OAU Charter. It should, however, be noted that inviolability does not mean invariability or intangibility of frontiers, in general. It means that any territorial changes are effected by mutual consent, or through other means of peaceful settlement of disputes, in conformity with international law.

43. The OAU/AU member States prescribed the principle of respect of boundaries existing on achievement of independence, and implicitly recognized their inviolability in the sense discussed above, in order to ensure peace and stability in the African continent in the same way that the Conference on Security and Co-operation in Europe adopted a similar principle in 1975 to promote security in the European continent. Both prescriptions derive their inspiration from the broader principle of territorial integrity enshrined in the United Nations Charter. Neither of them was directed, in my view, to define or stress the principle of *uti possidetis juris* which has a different meaning and normative content.

V. CONCLUDING REMARKS

44. Although the Parties — Burkina Faso and Niger — invoked the principle of *uti possidetis juris* in their pleadings, this case is quite different from the previous cases of *Frontier Dispute (Burkina Faso/Mali) (I.C.J. Reports 1986)* and *Frontier Dispute* (*Benin/Niger) (I.C.J. Reports 2005)*. In the present case, Burkina Faso and Niger concluded an agreement in 1987 on the delimitation of their common boundary. They have not, however, been able to agree, since that time, on the interpretation and application of the agreement with respect to the actual course of the boundary line. The dispute they have submitted to the Court concerns this disagreement.

45. Unlike the previous delimitation cases mentioned above, this dispute between the Parties, which concerns the interpretation and application of an international agreement, did not have to be appraised in the light of French colonial law, or "droit d'outre-mer". In other words, the Court was not required, in the present case, to determine what constituted for each of the Parties the colonial heritage to which the *uti possidetis* was to apply. The Parties had already specified that in their own delimitation agreement.

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[15] Organization for Security and Co-operation in Europe, *Final Act of the Conference on Security and Co-operation in Europe,* 1 August 1975, 14 *ILM*, 1292.

46. Thus, despite the fact that Burkina Faso and Niger inherited the former administrative boundaries of French West Africa, which became international boundaries upon their accession to independence, it is my view that the principle of *uti possidetis juris* had become redundant in this case as a result of the conclusion of the 1987 delimitation agreement between the two independent States. The Court was asked to interpret this delimitation agreement.

47. The Judgment should have clearly recognized that *uti possidetis juris* and "droit d'outre-mer" had no effective role to play in this case. A statement similar to the one made by the Court in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (*I.C.J. Reports 1994*, p. 38, para. 75, and cited at para. 31, footnote 14 above) could have been made in the Judgment. The Court could also have seized this opportunity to clear up the confusion between *uti possidetis juris* and the OAU/AU principle on the respect of existing boundaries upon which the 1987 Agreement between the Parties appears to be based.

(Signed) Abdulqawi A. YUSUF.

OPINION INDIVIDUELLE DE M. LE JUGE *AD HOC* MAHIOU

*Sources du droit applicable — Sources internationales : article 38 du Statut de la Cour, compromis du 24 février 2009, principes de l'intangibilité des frontières et de l'*uti possidetis juris *— Sources internes : décret du 28 décembre 1926, arrêté du 31 août 1927 et son erratum, autres textes de la période coloniale — Autres sources : documents acceptés d'accord parties, carte IGN 1960, documents préparatoires de la période coloniale.*

Place et rôle des effectivités coloniales — Relations avec l'arrêté et son erratum — Relations entre la carte IGN 1960 et les effectivités — Délimitation de la frontière : tracé de la borne astronomique de Tao à la ligne médiane de la rivière Sirba — Problèmes des localités de Petelkolé et Ousaltane — Liens effectifs des populations avec le Niger.

1. Tout en souscrivant globalement à la démarche d'ensemble de la Cour et à la plupart des conclusions auxquelles elle est parvenue dans la présente affaire, je voudrais dans cette opinion individuelle faire état de quelques observations sur certains points à propos desquels la position de la Cour appelle, de mon point de vue, des nuances ou précisions complémentaires. Il s'agit des points relatifs, d'une part, au statut des différents documents invoqués au cours de l'instance et, d'autre part, au statut des effectivités ou plus précisément leur place et rôle pour la détermination des différents tronçons de la frontière.

I. LE STATUT DES DOCUMENTS

2. Il ressort des écrits et plaidoiries que l'on est en présence de trois séries de documents auxquels les Parties se réfèrent : d'une part, les textes acceptés expressément par les Parties pour servir de référence et donc de titre juridique pour délimiter la frontière, d'autre part, les documents plus ou moins acceptés d'accord parties, mais dont le statut reste contesté sur le point de savoir s'ils sont applicables dans le présent litige et, enfin, les documents invoqués par l'une des Parties et récusés par l'autre.

3. C'est donc en ayant présent à l'esprit cette classification indicative entre les différents textes et documents que j'essaie de comprendre leur place dans la solution du présent litige. Mon énumération établit en même temps une hiérarchie, puisque je cite les textes dans l'ordre de priorité qu'il convient de leur accorder en vue de parvenir à la délimitation de la frontière entre le Burkina Faso et le Niger.

i) Les textes acceptés expressément sont les suivants :

— le compromis du 24 février 2009, dont l'article 6 renvoie à l'article 38 du statut de la Cour internationale de Justice et aux règles et principes du droit international qui s'appliquent au règlement des différends, ce qui indique, de manière incontestable, que d'autres règles du droit international ont un rôle à jouer, notamment lorsque les textes applicables s'avèrent lacunaires ou insuffisants ;

— le décret du 28 décembre 1926 fixant le chef-lieu du Niger à Niamey et opérant certains transferts de cercles et de cantons entre les colonies de Haute-Volta et du Niger. On sait que les Parties ne sont pas d'accord sur le point de savoir si ce texte a une portée constitutive ou déclarative. Dans la mesure où il détermine déjà lui-même certaines frontières, il est nécessairement constitutif. Au surplus, comme c'est lui qui autorise le gouverneur de l'Afrique occidentale française à prendre l'arrêté du 31 août 1927 et l'erratum du 5 octobre 1927 fixant les limites des colonies, il revêt également une portée constitutive ;

— l'arrêté du 31 août 1927 et son erratum du 5 octobre 1927 (ci-dessous arrêté) fixant les limites des colonies de la Haute-Volta et du Niger ;

— ce sont donc les textes de base ou de référence qui sont au cœur du litige et les Parties en conviennent même si elles leur donnent une portée différente, notamment sur le point de savoir s'ils sont seuls à s'appliquer et s'ils sont suffisants ou non pour délimiter l'ensemble de la frontière.

ii) S'agissant des documents, le principal d'entre eux est la carte IGN 1960 au 1/200 000e qui bénéficie d'un statut particulier dans la mesure où ce document géographique — qui n'avait jusque-là aucun statut officiel — est consacré dans l'accord du 28 mars 1987 (art. 2) ainsi que dans le compromis de saisine de la Cour du 24 février 2009.

S'il y a accord des Parties pour recourir à cette carte pour la délimitation de la frontière, elles divergent profondément sur les conditions devant présider à ce recours et elles ont réitéré à maintes reprises ces divergences. Pour le Burkina Faso, «on ne peut avoir recours à la carte qu'en cas d'insuffisance de l'arrêté précisé par son *erratum*» qu'exceptionnellement et dans cette hypothèse seulement, et, «faute d'un quelconque autre document accepté d'accord parties …, on doit y avoir recours et on ne peut avoir recours qu'à elle». Pour le Niger la carte de 1960 bénéficie d'un statut de «source subsidiaire», ce qui permet d'y recourir chaque fois qu'il y a des imperfections, lacunes, difficultés ou erreurs provenant de l'arrêté. Il ajoute que «sauf à découvrir des déviations anormales par rapport aux textes, des failles évidentes dans l'information sur les limites des cantons …, c'est la limite tracée par la carte IGN qui doit être retenue comme ligne frontalière» ; dans ces derniers cas, il «estimait qu'il fallait y apporter des modifications et qu'elles étaient justifiées».

iii) Les documents acceptés d'accord parties :

Il va de soi que les documents acceptés d'accord parties sont applicables dans le présent litige, même s'il n'est pas toujours aisé de savoir dans quelle mesure il existe de tels documents, puisque chacune des Parties récuse, pour diverses raisons, ceux invoqués par l'autre. Doit-on, pour autant, les écarter entièrement dès lors qu'ils sont récusés par l'une des Parties ? Je ne le crois pas, car à défaut d'être une preuve, ils peuvent à tout le moins constituer une présomption et orienter l'interprétation que l'on peut donner d'un texte ou d'une situation (à titre d'exemple, on peut citer les travaux préparatoires des textes de référence qui ont d'ailleurs été cités par l'une ou l'autre des Parties ou par les deux). Dans cette perspective, je ne vois pas pourquoi ils seraient récusés *a priori*, surtout que les travaux préparatoires font traditionnellement partie des éléments susceptibles sinon de constituer des preuves, du moins d'étayer celles-ci.

iv) Les autres documents et les effectivités coloniales :

Tout autre document qui n'est pas accepté d'accord parties ne peut pas servir en tant que tel de base pour la délimitation. Là également, faut-il, pour autant, l'écarter complètement ? Je ne le crois pas, car il peut constituer une source d'information non négligeable. Là encore, même s'ils ne peuvent pas constituer des preuves irréfragables d'une frontière, on ne saurait exclure *a priori* que des cartes, études ou autres documents, qu'ils soient antérieurs ou postérieurs à la date de l'indépendance, ainsi que les effectivités, puissent être pertinents pour établir, en application de l'intangibilité des frontières ou de l'uti possidetis, la situation qui existait alors (affaire du Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986, p. 568, par. 29 ; affaire du Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras ; Nicaragua (intervenant)), arrêt, C.I.J. Recueil 1992, p. 399, par. 62 ; affaire du Différend frontalier (Bénin/Niger), arrêt, C.I.J Recueil 2005, p. 109, par. 26).

4. Finalement et pour conclure sur ce problème des textes et documents, il apparaît clairement que :

— d'une part, l'arrêté et son erratum constituent effectivement le principal texte de base pour déterminer la frontière à la lumière des autres textes et de la pratique coloniale concernant la délimitation des frontières ;

— d'autre part, il faut des raisons suffisamment solides pour s'en écarter ; mais si l'erratum s'avère effectivement imprécis, insuffisant et *a fortiori* erroné sur un point ou un autre, il est alors normal de recourir à d'autres éléments complémentaires, notamment la carte de 1960 en vue de parvenir à une solution ;

— enfin, si la carte de 1960 s'avère à son tour insuffisante, il est alors possible de recourir aux effectivités ou à d'autres documents ou éléments de nature à éclairer la Cour. C'est sur ce dernier point que l'argumentation de la Cour m'apparaît parfois trop tranchée et rigide lorsqu'elle donne une primauté excessive et formelle au texte et écarte les effectivités et autres éléments pour parvenir à une solution.

II. LE TRACÉ DE LA FRONTIÈRE

5. Pour tracer la frontière, la Cour l'a subdivisée en quatre tronçons concernant, respectivement, le tracé de Tong-Tong à Tao, de Tao à la ligne médiane de la rivière Sirba, de ce dernier point jusqu'à l'intersection de la rivière Sirba avec le parallèle de Say, en passant par la ligne IGN et certains points géographiques, enfin du dernier point au début de la boucle de Botou.

6. Je voudrais faire quelques observations portant sur le troisième tronçon dans la mesure où le tracé retenu par la Cour soulève quelques difficultés liées au problème des effectivités.

1. De la borne astronomique de Tao à la ligne médiane de la rivière Sirba

7. Le texte de l'erratum indique que de la borne astronomique de Tao la ligne atteint «la rivière Sirba à Bossébangou».

8. Pour cette partie de la frontière, le Burkina Faso propose une ligne fondée sur une interprétation particulière du texte de l'erratum. Le tracé du Burkina épouse en réalité celui de la commission mixte de 1988. Ainsi, de la borne astronomique de Tao jusqu'à la rivière Sirba à Bossébangou, la frontière suit une ligne droite. Le Burkina Faso réitère sa position selon laquelle : «en jurisprudence un acte de délimitation indiquant, à défaut d'indication contraire, qu'une ligne passe par deux points est interprété comme adoptant une frontière sous forme d'un segment de droite reliant ces deux points».

9. Quant au Niger, il opte pour une ligne qui consiste à suivre les limites des cantons, position reflétée en grande partie par la carte IGN de 1960. Il divise cette partie de la frontière en deux : de la borne astronomique de Tao à Bangaré et de Bangaré à la limite du cercle de Say. Le Niger fonde son approche sur le fait que le décret du président de la République française du 28 décembre 1926 s'exprime en termes de cantons, ce qui «ne va pas dans le sens d'une volonté d'établir une ligne arbitraire et artificielle» et sur un certain nombre de documents, notamment trois procès-verbaux qui furent conclus pour les deux cercles concernés — Tillabéry et Say — entre les représentants des deux colonies en vue de la préparation de l'arrêté d'exécution par le gouverneur général.

10. Au-delà de la borne de Tao, une première approche théorique possible consiste à opter pour un tracé en ligne droite, comme pour la frontière entre Tong-Tong et Tao. Or, il s'agit là d'un tronçon de la frontière relativement important, le long duquel plusieurs villages s'échelonnent et sont revendiqués par les deux Parties. Un tracé en ligne droite aurait un résultat aléatoire et non souhaitable sur le terrain, notamment en divisant artificiellement des villages frontaliers ou des communautés entre les deux Etats.

11. Si l'arrêté voulait tracer une ligne droite, il l'aurait dit expressément comme pour le tracé précédent de Tong-Tong à Tao et comme il le dira pour la dernière portion de la frontière du point où le parallèle de Say coupe la rivière Sirba à la boucle de Botou. Or, le texte de l'erratum s'abstient de le faire et il ne peut s'agir là que d'une abstention intentionnelle et donc d'une volonté tout aussi claire de renoncer à un tel tracé. Par conséquent, il n'y a aucune base logique et convaincante pour soutenir que la frontière atteint en ligne droite la rivière Sirba à Bossébangou, surtout que Bossébangou est un village nigérien qui n'est pas sur la rive de la Sirba. De ce fait, il en résulte que, dans le silence de l'erratum sur le tracé de la ligne dans cette partie, on est nécessairement renvoyé à la source subsidiaire, la carte IGN de 1960. C'est donc sur cette base que la Cour retient le tracé de la carte, non seulement sur ce point mais pour l'ensemble de la frontière allant de la borne astronomique de Tao à la rivière Sirba.

12. Comme nous l'avons noté précédemment, le tracé passe à proximité d'un certain nombre de villages et plus précisément trois d'entre eux (Petelkolé, Ousaltane et Bangaré) pour lesquels il y avait des revendications d'appropriation opposées des Parties. Certes, contrairement à ce qu'a soutenu le Burkina Faso, la Cour a tenu, à juste titre, à faire entrer en ligne de compte les effectivités, mais c'est pour les écarter pour deux d'entre eux (Petelkolé et Ousaltane) et les retenir seulement pour l'un d'entre eux (Bangaré).

13. C'est sur ce point que la solution ne m'apparaît pas entièrement satisfaisante parce que la Cour a écarté les preuves d'effectivité présentées par le Niger alors qu'elles m'apparaissent beaucoup plus convaincantes que celles présentées par le Burkina Faso.

14. S'agissant de l'emplacement de Petelkolé, le Niger relève une contradiction des données de la carte IGN de 1960 (sur la feuille Sebba, Petelkolé se trouve sur la ligne frontière, alors que sur la feuille Téra, cette localité se trouve légèrement à l'ouest de cette ligne) ; puis il se fonde sur des informations administratives de l'époque coloniale pour prouver que ce village était nigérien, et il «est resté sous autorité nigérienne depuis l'indépendance ; il est administrativement rattaché à la commune rurale de Bankilaré et compte 2654 habitants». Il ajoute que, aux abords de Petelkolé, la ligne frontière doit s'écarter légèrement de la ligne IGN vers l'ouest afin d'englober le poste frontalier juxtaposé entre le Niger et le Burkina Faso, situé entièrement en territoire nigérien et choisi par le comité bilatéral (Burkina-Niger) d'identification du site d'implantation des postes de contrôle juxtaposés entre les deux pays.

15. Le Burkina Faso conteste la position du Niger et dit que ni l'erratum, ni le tracé de la carte de 1960 n'attribuent Petelkolé au Niger. S'agissant des documents invoqués par le Niger, ils ne sont pas opposables au Burkina, parce qu'ils n'ont pas été entérinés soit par les autorités compétentes (documents de la période coloniale), soit par les autorités burkinabé (documents d'après l'indépendance).

16. L'examen de la carte de 1960 montre que la carte IGN de 1960 place le toponyme Petelkolé presque sur la frontière, avec un décalage à l'ouest vers le Burkina Faso. Toutefois, le fait que les deux Etats aient créé des postes de contrôle juxtaposés à Petelkolé et qu'ils aient considéré ou «*croyaient* que la frontière laissait Petelkolé au Niger» (contre-mémoire du Niger, par. 2.1.7, p. 66), constitue un indice non négligeable pour se prononcer sur la situation du village, même si cet accord de 2006 n'est pas entré en vigueur. Par ailleurs, les informations administratives de 1933 et 1953-1954 invoquées par le Niger, faisant référence aux populations Rimaibés ayant créé deux hameaux, l'un (Seynotyondi) situé en Haute-Volta et l'autre (Petelkolé) au Niger entre lesquels passe la frontière, ajoutent un élément supplémentaire à prendre en considération. Il me semble que la Cour aurait dû accorder une attention beaucoup plus grande aux éléments de preuve avant de statuer sur le sort du village qui semble, eu égard aux effectivités, relever de l'administration nigérienne.

17. S'agissant du village d'Ousaltane, le Niger soutient que ce village est nigérien, en se fondant là également sur des documents coloniaux (croquis Delbos de juin 1927, accord Roser/Boyer d'avril 1932 selon lequel la limite passe «à Houssaltane qu'elle laisse à l'Est, à Petelkarkalé qu'elle laisse à l'Ouest ; à Petelkolé qu'elle laisse à l'Est»). Il fait valoir que cette région, administrée par le Niger, correspond à un groupe de campements de la tribu Kel Tamajirt, du groupement Tinguéréguédesch de la commune rurale de Bankilaré, à laquelle ils versent régulièrement leurs impôts.

18. Le Burkina Faso se contente de dire que le tracé de 1960 place Oulsalta du côté voltaïque du tracé (contre-mémoire du Burkina Faso, par. 3.71), et que le fait que le campement ait été placé à l'est de la limite proposée par l'accord Roser/Boyer d'avril 1932 est sans pertinence, parce que «la localisation d'un lieu par rapport à une délimitation qui n'a pas été consacrée ne peut venir remettre en cause celle qui l'a été». Il reproche au Niger une déviation importante et injustifiée par rapport à la carte IGN dans le seul souci d'enclaver et de soustraire Ousaltane du territoire voltaïque, sans apporter d'élément quelconque d'effectivité pour appuyer sa réclamation.

19. Notons que la carte IGN de 1960 place le toponyme Oulsaltane vers l'ouest, du côté de la Haute-Volta, mais la ligne frontière est interrompue à ce niveau. La carte apparaissant ainsi insuffisante pour déterminer avec précision le tracé de la frontière au niveau de ce village, il convient alors de se référer à d'autres éléments pour se prononcer sur cette portion. Les différents documents invoqués par le Niger plaident, à mon avis, en faveur d'un rattachement du village au Niger, dans la mesure où la tribu Kel Tamajirt serait majoritairement nigérienne et verserait les impôts à la commune nigérienne de Bankilaré. Il y a là un élément objectif d'effectivité pour une telle solution plutôt que pour un rattachement au Burkina Faso qui n'est appuyé par aucun élément pertinent d'effectivité.

2. Le point d'arrivée de la ligne qui part de Tao pour arriver à la rivière Sirba

20. Concernant le point d'arrivée de la ligne qui part de Tao, le texte de l'erratum de 1927 indique que la ligne «atteint la rivière Sirba à Bossébangou». La formule est pour le moins ambiguë, surtout que le village de Bossébangou est nigérien et, qui plus est, il ne se situe par sur la rive de la Sirba, mais à quelques centaines de mètres.

21. Pourtant, le Burkina Faso soutient que le point d'arrivée doit se situer sur la rive droite de la Sirba, en se fondant sur le syllogisme suivant : l'erratum mentionne Bossébangou ; mais Bossébangou étant en territoire nigérien et loin de la rivière, il ne peut être le point à atteindre ; donc cela signifie que la ligne coupe la rivière pour atteindre la rive droite.

22. Il m'apparaît clairement que c'est un faux syllogisme et c'est à juste titre que la Cour écarte cette allégation. D'une part, la mention de Bossébangou par l'erratum ne fait qu'indiquer une direction et un point d'arrivée, la rivière Sirba, mais sans autre précision pour savoir

notamment s'il s'agit de la rive droite ou gauche ou encore de la ligne médiane. D'autre part, le verbe atteindre une rivière ne signifie pas en soi qu'il faut la couper. Enfin, et c'est là le point clef qui doit guider la solution : le fait de retenir la rive droite est d'une telle importance pour la suite du tracé, à partir de Bossébangou, que si l'erratum voulait situer toute la rivière dans une seule colonie, il l'aurait dit clairement ; cela est bien trop important et grave pour être passé sous silence. Par conséquent, en l'absence d'une telle précision, le fait d'atteindre la rivière n'a pas d'autre signification que la frontière doit suivre la ligne médiane, solution habituelle des délimitations fluviales qui partagent l'espace entre les pays riverains et leur assurent un égal accès à ses ressources, notamment l'eau. C'est une solution de bon sens, fondée juridiquement et en équité.

(Signé) Ahmed MAHIOU.

OPINION INDIVIDUELLE DE M. LE JUGE *AD HOC* DAUDET

J'ai voté en faveur de l'ensemble des points du dispositif de l'arrêt sans néanmoins partager dans sa totalité le raisonnement suivi par la Cour et je pense donc devoir développer ici ma propre opinion sur certains éléments de celui-ci.

Mes réserves portent sur la manière dont la Cour a traité de la délimitation de la frontière entre la borne astronomique de Tao et la rivière Sirba à Bossébangou d'une part, et de la délimitation dans la région de Bossébangou en ce qui concerne la rivière Sirba d'autre part.

1. LE TRACÉ DE LA FRONTIÈRE ENTRE LA BORNE ASTRONOMIQUE DE TAO ET LA RIVIÈRE SIRBA À BOSSÉBANGOU

La Cour décide que, sur cette portion, le tracé de la frontière suit la ligne qui figure sur la carte IGN de 1960. Si je suis en accord avec la décision de la Cour, je souscris à celle-ci au terme d'un raisonnement comportant des différences.

Sur cette portion du tracé, la position du Niger est en partie écartée par la Cour au motif que sur un certain tronçon, elle n'est pas conforme à l'arrêté de 1927 ; ce point de vue est également le mien. Le Burkina Faso a, quant à lui, défendu la thèse selon laquelle, en l'absence de toute précision sur le tracé entre la borne de Tao et la rivière Sirba à Bossébangou, la ligne devait être droite. La Cour, dont je partage la position, rejette la prétention du Burkina Faso sur le fondement de trois arguments à l'égard desquels j'ai quelques réserves : le premier est tiré de la formulation même de l'arrêté ; le deuxième résulte du contexte du décret du président de la République française sur la base duquel l'arrêté est intervenu ; le troisième enfin découle de la localisation du village de Bangaré.

Le premier argument de la Cour énoncé au paragraphe 88 de l'arrêt, repose sur le raisonnement *a contrario* suivant : puisqu'à deux reprises ailleurs dans l'arrêté de 1927 il est question de «ligne droite» ou de «direction rectiligne» concernant d'autres portions de la limite que celle qui nous occupe présentement, pourquoi ne retrouve-t-on pas les mêmes formules s'agissant de la ligne allant de la borne astronomique de Tao jusqu'à la rivière Sirba à Bossébangou si celle-ci est également droite ? Si vraiment cette ligne est telle, pourquoi ne pas l'avoir dit expressément ici comme c'est le cas dans d'autres parties du texte ? Selon la Cour, ne pas l'avoir fait affaiblit la thèse du Burkina Faso en faveur de la configuration droite de la ligne.

L'argument est assurément sérieux, dans la limite toutefois de la portée des raisonnements *a contrario*. De manière générale, cependant, je pense que la Cour aurait pu avoir à ce sujet une position plus nuancée. L'effet de l'argument de la Cour me semble quelque peu amoindri du fait tout d'abord que le texte de l'arrêté est généralement mal rédigé, alternant laconisme avec détails superflus, ajoutant maladresses de style aux obscurités de fond en sorte qu'on ne peut être assuré de la pertinence d'une exégèse de ses termes. Il reste que, si de prime abord on peut être surpris qu'un tracé portant sur une aussi longue distance que celle de la borne de Tao à la rivière Sirba à Bossébangou ne fasse l'objet d'aucun détail, il n'est cependant pas infondé de penser que l'auteur de l'arrêté ait considéré que, puisqu'on vient de tracer une ligne droite pour le premier tronçon de Tong-Tong à Tao, il soit logique de continuer de la même manière, donc toujours en droite ligne,

s'agissant du second tronçon jusqu'à la rivière Sirba sans avoir besoin de le préciser expressément, et ce, d'autant plus que la ligne droite est habituelle dans la pratique coloniale. Le fait que la Cour, à la suite des Parties, examine ces deux tronçons de manière distincte a pour effet que la lecture de l'arrêté se trouve morcelée : on lit d'abord le passage relatif au tracé de Tong-Tong à Tao qui fait l'objet de détails précis («cette ligne s'infléchit, ensuite vers le sud-est pour couper la piste automobile de Téra à Dori à la borne astronomique de Tao située à l'ouest de la mare d'Ossolo») fournissant tous les éléments sur la base desquels on établit aisément un tracé. Puis on passe au tronçon allant de Tao à Bossébangou pour apprendre de l'arrêté, en tout et pour tout, que la ligne «atteint la rivière Sirba à Bossébangou», ce qui apparaît alors par contraste parfaitement insuffisant pour identifier un tracé. Mais s'il avait été fait abstraction de cette césure à Tao et que l'arrêté était au contraire lu dans sa continuité, qui est celle de la ligne elle-même, il apparaîtrait alors que le texte exprime un déplacement ininterrompu depuis Tong-Tong jusqu'à Bossébangou en passant par Tao. Le tracé qui est bien reconnu par la Cour comme étant d'abord droit depuis Tong-Tong, se poursuit ensuite après Tao de la même manière, toujours en ligne droite comme précédemment et à défaut d'indication contraire, jusqu'à «atteindre» la rivière Sirba à Bossébangou. Donc, si l'arrêté est lu dans le *continuum* de sa description, la ligne droite devient plus plausible. En revanche, la situation est différente et requiert davantage de précisions s'agissant des autres tronçons visés dans l'arrêté formellement décrits comme étant «rectilignes» ou «en ligne droite». En effet, ces tronçons soit font suite à des passages sinueux lorsqu'a été précédemment épousé le cours de la rivière Sirba, soit sont précédés de divers changements de direction qui, en comparaison avec le tronçon entre Tong-Tong et la rivière Sirba à Bossébangou, ne sont pas marqués par une même continuité ou une similitude. Le besoin de préciser le caractère rectiligne du tracé s'impose donc davantage dans ces cas.

Enfin, ce tracé rectiligne n'est nullement inconcevable puisqu'il a été adopté en 1988 en tant que «tracé consensuel» par la commission technique mixte d'abornement puis confirmé lors d'une rencontre tenue les 14 et 15 mai 1991 par les ministres des deux Etats qui ont marqué leur accord sur un tel tracé figurant sur un croquis annexé au communiqué conjoint qu'ils ont signé. Ce tracé sera remis en cause par le Niger en 1994. Cette remise en cause n'a pas d'autre effet que de rendre l'accord désormais inapplicable entre les Parties et d'exclure ainsi que, sur cette base seulement, la ligne droite puisse être désormais retenue. Mais elle ne signifie pas que, de ce fait et en soi, la ligne droite soit devenue objectivement impropre à joindre les deux points identifiés dans l'arrêté.

Néanmoins, si tant la lecture faite ci-dessus de l'arrêté que la référence au tracé consensuel qui en est l'illustration donnent au tracé rectiligne un caractère plausible, la difficulté qui surgit est qu'aucun de ces éléments n'exclut non plus une interprétation différente de l'arrêté en l'absence de toute précision figurant dans le texte de celui-ci quant à la forme du tracé de la borne de Tao à la rivière Sirba à Bossébangou. Autrement dit, la ligne droite apparaît plausible mais elle n'est pas avérée sur la base du texte de l'arrêté et de l'interprétation qu'on peut en donner. L'arrêté est donc insuffisant et on doit lui substituer la carte IGN de 1960. Non pas parce que son tracé pourrait sembler meilleur ou plus approprié mais seulement parce que l'arrêté ne permet pas de le déterminer. Cette distinction fait clairement apparaître la notion d'«insuffisance» de l'arrêté pour permettre de procéder à la délimitation de la frontière. On se heurte à une «insuffisance» de l'arrêté lorsque l'on ne trouve pas, dans les termes de celui-ci et dans l'interprétation qui en est faite, assez d'éléments ou des éléments assez établis pour permettre de dégager la solution recherchée. Il doit être à cet égard bien observé que la première source à laquelle il convient de se

référer est l'arrêté de 1927 dont on explorera toutes les possibilités avant d'éventuellement conclure à son insuffisance, commandant alors de recourir mécaniquement à la carte IGN de 1960. On aurait pu imaginer que, sur d'autres bases offertes par le droit international, la Cour recherche elle-même une délimitation plus appropriée mais, malheureusement dans cette affaire, le compromis de saisine ne lui permet pas de le faire.

La Cour aurait pu s'arrêter à cette considération tirée de l'insuffisance de l'arrêté lui-même et décider sur cette seule première base de la nécessité de retenir le tracé de la carte IGN de 1960. Elle a cependant souhaité ajouter d'autres éléments justificatifs permettant d'approfondir l'interprétation du texte de l'arrêté.

Le deuxième argument de la Cour destiné à écarter la thèse du Burkina Faso découle de l'importance donnée au décret du président de la République française du 28 décembre 1926 décidant de l'attribution à la colonie du Niger de certains territoires de la Haute-Volta. La Cour souligne qu'ayant le décret pour «base légale» (paragraphe 85), l'arrêté devait être pris «en respectant les limites des circonscriptions préexistantes, pour autant qu'elles pouvaient être déterminées» (paragraphe 91). Autrement dit, aux yeux de la Cour, le gouverneur général n'a qu'une compétence limitée pour prendre un arrêté qui n'a donc qu'une valeur déclarative.

Je suis en désaccord avec cette analyse et je pense pour ma part que si bien entendu l'arrêté doit respecter le décret, cette exigence légale ne fait pas obstacle à ce que l'arrêté ait au contraire par lui-même non pas une simple valeur déclarative mais une valeur véritablement constitutive résultant de l'octroi au gouverneur général de compétences plus larges que celles que lui reconnaît la Cour. En effet, l'arrêté dispose que le gouverneur général «déterminera» le tracé. Il ne dit pas «précisera» le tracé, ce qu'il aurait dû faire dans l'hypothèse où le gouverneur général aurait été tenu par des limites existantes auxquelles le décret aurait d'ailleurs pu aussi bien faire lui-même référence si elles avaient existé. Contrairement à ce que dit la Cour au paragraphe 91, le gouverneur général ne doit pas déterminer une «nouvelle» limite intercoloniale (ce qui voudrait dire qu'il y en avait déjà eu une), mais il doit, conformément au texte du décret, «détermin[er] le tracé de la limite» (ce qui montre bien qu'il n'en y avait pas de connue). Cette vision me semble d'ailleurs correspondre à celle qui est décrite par la Chambre de la Cour dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 569, évoquant la compétence du gouverneur général à l'égard des circonscriptions administratives de base qu'étaient les cercles dont «la création et la suppression […] relevaient exclusivement du gouverneur général qui en *fixait l'étendue globale*» (les italiques sont de moi). Au total par conséquent, le fait que, sans être soumis à un simple et strict pouvoir d'exécution, le gouverneur général ait eu soin de prêter attention aux limites existantes s'il s'en trouvait me paraît aller de soi et relever d'un comportement administratif normal. Mais cela n'exclut nullement de sa part la recherche de limites plus précises à laquelle il s'est incontestablement livré, ainsi que la Cour l'observe au paragraphe 92, dans un contexte juridique qui me semble toutefois différent de celui que retient la Cour.

Au plan des résultats concrets, la différence importe peu. Le fait est que, quelle que soit l'étendue de ses pouvoirs, le gouverneur général n'est en effet pas parvenu à fixer des limites dont assurément rien n'indique, comme le dit la Cour «qu'elles suivaient une ligne droite dans le secteur considéré» (paragraphe 93). Si tel avait été le cas, cette ligne droite aurait pu en effet être rapidement déterminée sans nécessiter les nombreuses, complexes et finalement infructueuses recherches auxquelles les administrateurs coloniaux se sont livrés ou, ainsi que l'estime la Cour, «il eût été facile de [la] reporter sur une carte» (paragraphe 93).

J'éprouve quelques réserves enfin à propos du troisième argument tiré de la localisation de Bangaré dont il est dit qu'il est situé au Niger et qu'il se retrouverait au Burkina Faso en cas de tracé droit de la limite. Je comprends bien le raisonnement suivi par la Cour qui consiste à dire que ce village est pris en considération «au titre de la pratique suivie par les autorités coloniales pour l'application de l'arrêté» (paragraphe 94) venant ainsi maintenir l'argumentation strictement et exclusivement dans le cadre de la référence à l'arrêté et confirmer que celui-ci ne peut donc être interprété comme ayant entendu établir une délimitation en ligne droite. Cependant, pour ce village comme tous les autres situés de part et d'autre de la frontière où se trouve également une population nomade ou semi-nomade, les appartenances ne sont pas toujours établies de manière indubitable. Sans doute aussi la période de disparition de la Haute-Volta au profit du Niger a-t-elle pu être à l'origine de la création d'habitudes. Au total par conséquent, si la Cour estime que le cas de Bangaré est distinct de celui de Petelkolé et Oussaltane, il me semble pour ma part que toutes ces situations (et pas seulement les deux dernières) comportent des incertitudes que l'on pourrait tenter de lever par le recours aux effectivités coloniales. Or celles-ci doivent être exclues car, comme la Cour le rappelle : «l'accord de 1987 impose à la Cour d'appliquer le tracé de la carte IGN de 1960, au lieu de se référer aux effectivités» (paragraphe 98). Pour cette raison, en considérant, à la différence de la Cour, que Bangaré relève des effectivités je n'aurais pas invoqué ce troisième argument qui au demeurant me semble surabondant en vue de justifier le recours à la la carte IGN de 1960.

2. LE TRACÉ DE LA FRONTIÈRE DANS LA RÉGION DE BOSSÉBANGOU

J'ai voté en faveur du point 4 du dispositif en dépit de la position de la Cour concernant le tracé de la limite dans la remontée du cours de la rivière Sirba qui me pose un certain nombre de problèmes que je souhaite évoquer.

A. Quant au point d'aboutissement de la frontière à la rivière Sirba à Bossébangou

Au paragraphe 101 de son arrêt, la Cour opte pour une frontière située au milieu de la rivière Sirba, cette solution permettant de «mieux satisfai[re]» à «l'exigence en matière d'accès aux ressources en eau de l'ensemble des populations des villages riverains». Ce choix est pleinement justifié du point de vue de l'équité et correspond à une vision moderne du droit international qui privilégie la coopération et le partage plutôt qu'il ne favorise l'appropriation privative et le bénéfice exclusif, tel que celui qui en matière fluviale résulterait d'une délimitation à la rive.

Cependant, il n'est pas demandé à la Cour de tracer une frontière équitable mais une frontière fondée sur l'arrêté de 1927 ou, en cas d'insuffisance de ce dernier, sur la carte IGN de 1960. Pour cette raison, tout en conservant cette considération d'équité en quelque sorte en «arrière-plan», la Cour a tenté, mais sans totalement y parvenir, de maintenir son raisonnement dans le cadre de l'arrêté.

A cet égard, j'éprouve des réserves sur l'interprétation donnée par la Cour des termes de celui-ci et sur la démarche qui la sous-tend.

1. L'interprétation des termes de l'arrêté de 1927

Alors que l'arrêté de 1927 dispose que la ligne se poursuit depuis la borne de Tao pour «atteindre la rivière Sirba à Bossébangou», la Cour, en considérant que «l'utilisation dans l'arrêté du terme «atteindre» n'indique pas que la ligne frontière franchit complètement la Sirba et atteint sa rive droite» (paragraphe 101), juge que le point terminal de la frontière se trouve sur la ligne médiane de la rivière. Je ne vois à vrai dire rien qui permette, dans ce contexte, de donner ce sens au verbe «atteindre» et je pense que si l'auteur de l'arrêté l'avait voulu ainsi, il aurait dû le préciser.

En l'état du texte de l'arrêté de 1927, et en rappelant que la ligne rencontre d'abord la rive gauche de la rivière Sirba tandis que Bossébangou est situé sur la rive droite, je ne puis partager l'interprétation de la Cour. Le verbe «atteindre» signifie assurément que l'on parvient à un point donné. Si le texte avait dit que la ligne «atteint la Sirba» sans autre précision, cela aurait signifié qu'elle s'arrêtait aussitôt qu'elle parvenait à la rivière, donc à sa rive gauche, sans aller au-delà, sans la traverser. Cette hypothèse peut être écartée puisque, et la Cour le rappelle, le texte dit plus loin que la ligne traverse «de nouveau» la Sirba. Pour ce faire, il faut l'avoir précédemment traversée. La ligne peut-elle avoir traversé la Sirba à Bossébangou à moitié, comme le dit la Cour ? Non, car le texte précise que la ligne «atteint la Sirba à Bossébangou» (pas la Sirba «tout court», pas la Sirba «à hauteur» de Bossébangou, ce qui eut été imprécis, mais bien la Sirba «à Bossébangou»). Si la ligne atteint la Sirba à Bossébangou, c'est donc qu'elle se poursuit jusqu'à la rive droite de la rivière où est situé ce village. Pour atteindre cet emplacement, la ligne a donc nécessairement traversé la rivière (et la traversera de nouveau ultérieurement) dans sa totalité.

2. La démarche de la Cour

Dans la situation contrainte où elle est placée par le compromis, la Cour doit appliquer l'arrêté de 1927 ou la carte IGN de 1960 selon les modalités que l'on sait. Dans le cas présent toutefois, la Cour a introduit un élément supplémentaire dans sa démarche en observant qu'«aucun élément n'a été présenté à la Cour attestant que la rivière Sirba, dans la région de Bossébangou, aurait été entièrement attribuée à l'une ou l'autre colonie. A cet égard, la Cour relève que l'exigence en matière d'accès aux ressources en eau de l'ensemble des populations des villages riverains est mieux satisfaite par une frontière placée dans la rivière plutôt que sur l'une ou l'autre rive» (paragraphe 101).

Si l'on comprend sans peine la préoccupation de la Cour et si l'on serait naturellement enclin à la partager, force est néanmoins de constater qu'en avançant un tel motif tiré d'une considération d'équité afin de mieux justifier son choix de la ligne médiane de la Sirba, la Cour ajoute à ce qui lui est demandé : appliquer l'arrêté ou, en cas d'insuffisance de ce dernier, la carte IGN de 1960. Rien d'autre ne peut être ajouté en vertu du compromis.

Or, la difficulté ici est que, à mes yeux, la Cour n'a pas adopté une position claire. En disant que «l'utilisation du terme «atteindre» *n'indique pas* que la frontière franchit complètement la Sirba» (les italiques sont de moi), elle laisse entendre qu'une forme d'incertitude demeurait quant aux termes de l'arrêté ou quant à l'interprétation qu'elle en donnait. Elle n'a cependant pas considéré que cette incertitude était constitutive d'une insuffisance de l'arrêté et elle a au contraire estimé que, ainsi compris, l'arrêté de 1927 pouvait fonder sa décision en faveur de la ligne médiane qui, sans que ce soit dit expressément, était dès lors une limite équitable.

La Cour aurait pu aussi tirer une conséquence différente de cette incertitude et considérer qu'elle rendait l'arrêté «insuffisant», nécessitant de recourir à la carte IGN de 1960. Mais la solution aurait alors été toute autre. La carte aurait en effet indiqué que la rivière est «complètement», et non pas partiellement, franchie puisque quatre croisillons figurant la frontière en barrent le cours, de la rive gauche à la rive droite et placent ainsi formellement le point d'arrivée de la ligne sur la rive droite, à quelques centaines de mètres de Bossébangou. L'interprétation de l'arrêté par la Cour semble donc différer de la lecture faite par les cartographes de l'IGN.

B. Quant à la remontée du cours de la Sirba

Passé le point d'aboutissement de la ligne frontière à la Sirba à Bossébangou, le tracé va se poursuivre en remontant le cours de la rivière. Je conviens bien volontiers que l'arrêté est avare de précisions sur le tracé de cette longue portion qui s'étend des alentours de Bossébangou jusqu'à l'intersection de la rive droite de la Sirba avec le parallèle de Say. Selon l'arrêté, après avoir atteint la rivière Sirba à Bossébangou, la ligne «remonte presque aussitôt vers le nord-ouest laissant au Niger, sur la rive gauche de cette rivière, un saillant comprenant les villages de Alfassi, Kouro, Tokalan, Tankouro ; puis, revenant au sud, elle coupe de nouveau la Sirba à hauteur du parallèle de Say».

En vue de conforter son choix d'un point d'aboutissement de la ligne permettant une remontée du cours de la Sirba selon une ligne médiane, la Cour observe que «si le point d'aboutissement de la frontière était situé sur la rive droite de la Sirba près de Bossébangou, la ligne devrait «couper» une deuxième fois la Sirba à un endroit intermédiaire pour passer, cette fois, de la rive droite à la rive gauche avant de la «couper à nouveau» dans l'autre sens. Or, rien de semblable n'est énoncé dans l'arrêté» (paragraphe 101).

A vrai dire, ce qui selon la Cour vaut, en matière de silence du texte, pour une traversée depuis la ligne médiane de la rivière seulement (paragraphe 102), vaudrait tout autant à mon sens pour une traversée totale de rive à rive. A cet égard, il est constant que, à un moment donné la ligne va devoir quitter la Sirba pour laisser au Niger le saillant des quatre villages (qui n'ont pas tous été identifiés). Même si, en effet, l'arrêté ne dit pas expressément que la Sirba est traversée, le passage de la rive droite à la rive gauche est une conséquence logique et nécessaire de l'obligation de laisser les villages en question au Niger. Si la Sirba n'était pas de nouveau traversée, les villages deviendraient burkinabé.

Au total, certes l'arrêté ne dit rien mais le fait même de la traversée se déduit de la question du saillant des quatre villages. Quant à la nature de la traversée (partielle ou totale), elle se déduit du point déterminé à Bossébangou (milieu de la rivière ou rive droite de celle-ci). L'élément restant inconnu est l'emplacement de cette traversée au sujet de laquelle l'arrêté est muet, donc insuffisant. Ce qui nécessite de recourir à la carte IGN de 1960. Celle-ci indique le point de traversée aux coordonnées 13° 20' 01,8" de latitude nord ; 01° 07' 29,3" de longitude est.

Il convient ici de remarquer que sur la carte IGN de 1960 ce point est marqué de trois croisillons qui traversent la totalité de la Sirba, d'une rive à l'autre, exactement de la même manière qu'à Bossébangou, comme il a été dit plus haut, quatre croisillons traversaient la rivière d'une rive à l'autre.

Entre ces deux points de traversée de la rivière, la carte fait figurer les croisillons sur la rive droite de la rivière Sirba, ce qui semble bien signifier qu'elle retient une délimitation à la rive droite.

Telles sont les raisons pour lesquelles je considère pour ma part que mon interprétation de l'arrêté conduit à la délimitation à la rive droite de la Sirba.

Cette position m'est exclusivement dictée par les termes de l'arrêté tels que, différemment de la Cour, je les interprète (et en étant confirmé dans mon interprétation par les indications figurant sur la carte) et par les exigences du compromis obligeant à appliquer d'abord l'arrêté puis, en cas d'insuffisance de celui-ci, la carte IGN de 1960 et rien d'autre. J'ai bien conscience comme je l'ai déjà laissé entendre, qu'en termes d'équité, cette solution n'est pas satisfaisante. Pour les raisons que j'ai données, je pense qu'elle aurait pourtant dû être choisie et il aurait alors à mon avis convenu que, soit en complétant le texte figurant au paragraphe 112 de l'arrêt, soit en rédigeant un paragraphe distinct y renvoyant, la Cour attirât l'attention des Parties, et plus particulièrement du Burkina Faso, sur la nécessité de prendre en compte les besoins des populations et d'organiser une coopération, de façon à atténuer les éléments peu équitables de sa décision. En toute hypothèse et en se plaçant sur un plan très concret et pratique, si la délimitation à la rive avait ainsi été décidée, on aurait mal imaginé que le Burkina Faso établît une clôture le long de la rive droite de la Sirba empêchant les habitants nigériens de la région de continuer à puiser l'eau de la Sirba ou à y conduire leurs troupeaux comme ils l'ont certainement toujours fait. Quant aux habitants de Bossébangou, probablement les plus nombreux dans cette zone, en tout état de cause, ils auraient eu plein accès à la rivière sur la partie droite (à l'est) du poteau frontière installé sur la rive droite de la Sirba. Au total par conséquent, il est probable que, sur ces quelques dizaines de kilomètres, les populations nigériennes n'auraient pas subi d'inconvénients significatifs si la Cour avait adopté une délimitation à la rive plutôt que décidé en faveur de la ligne médiane.

Mais la Cour a opté pour la ligne médiane, et si, en dépit des arguments que je viens d'exposer, j'ai voté en faveur du dispositif de la décision, c'est essentiellement parce que le dispositif porte également sur d'autres portions importantes de la frontière sur la délimitation desquelles je tenais à marquer mon accord. C'est tout de même aussi parce qu'il m'a semblé que dans le cas de la rivière Sirba la stricte application de l'arrêté au sens où je l'ai compris, justifiée comme je l'ai dit sur la seule base du compromis et sans aucune considération d'équité, aboutirait à un résultat marqué d'un excessif formalisme. A mon avis, on touche ici du doigt la limite de l'*uti possidetis* et le caractère «décalé» de son application aux situations du monde actuel. Dans ce cas précis, l'objet qui était le sien en 1927, puis l'effet stabilisateur qu'il recherchait et qu'il a pu présenter au moment des indépendances il y a plus d'un demi-siècle, ne sont plus ni l'un ni l'autre adaptés aux besoins d'aujourd'hui, ni même, s'agissant de cette délimitation fluviale, du moment de l'accession à l'indépendance. En effet, en 1927, les enjeux ne se présentaient pas dans les mêmes termes entre deux territoires relevant de la même administration coloniale. La limite ainsi choisie visait avant tout à être commode (il est plus facile de l'identifier à la rive qu'au milieu d'une rivière dont le cours est très variable selon les saisons) sans probablement avoir en vue de possibles difficultés d'accès aux ressources en eau. Je ne pense en effet pas que cet accès pouvait être affecté par une délimitation à l'époque de caractère strictement interne et qui devait laisser intacts des comportements et habitudes d'ailleurs bien antérieurs à l'occupation coloniale consistant à puiser quelques seaux d'eau à la rivière pour les besoins domestiques, profiter de l'humidité des sols à certaines saisons pour y développer des cultures et amener boire les troupeaux appartenant à des populations nomades et semi-nomades allant naturellement et traditionnellement

de part et d'autre de la rivière. Exercés à l'époque actuelle, dans le cadre d'une frontière internationale, ces mêmes droits nécessitent en revanche une organisation et des garanties d'exercice qui sont l'enjeu majeur de chaque part d'une ligne qui n'est plus une simple limite administrative interne au sein d'un même ensemble colonial mais une frontière internationale entre deux Etats indépendants et souverains. Certes, il n'existe pas de règle établie à ce sujet mais il semble cependant que les traités établissant une délimitation à la rive, d'ailleurs peu fréquents, aient été plutôt conclus à des époques éloignées et ne répondent plus guère à la pratique actuelle qui retient de préférence soit le *thalweg* soit la ligne médiane selon le caractère navigable ou non du cours d'eau.

(Signé) Yves DAUDET.

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DECLARATION OF JUDGE BENNOUNA

[English Original Text]

Place of colonial law (French droit d'outre-mer*) — Scope of the principle of* uti possidetis juris *— Consequences of the course of the frontier established by reference to colonial law — Evolution of the concept of sovereignty — Taking account of the evolution of the human and geographical realities.*

I support the Court's decision in the context of the Special Agreement between the two Parties, Burkina Faso and Niger, by which the Court was seised. That said, in this second decade of the twenty-first century, I cannot help but question the relevance of the task entrusted to it, namely that of drawing, or completing, the frontier between the two countries on the basis of an *Arrêté* of the Governor-General of French West Africa (FWA) dating from 1927. Admittedly, the jurisprudence of the Court has clarified the function conferred on colonial law which

> "may play a role not in itself (as if there were a sort of *continuum juris*, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of what has been called the 'colonial heritage'" (case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 568, para. 30).

However, the present case nevertheless involves interpreting the *Arrêté*, as clarified by the Erratum, of the Governor-General of FWA in the light of colonial law as regards the course of the administrative boundaries between colonies.

Consequently, like it or not, the Court has engaged in the implementation of colonial law using methods of interpretation which are based upon it, such as the analysis of the relationship between a decree of the President of the French Republic and an *Arrêté* of the Governor-General of the FWA, or the context of the apportionment of territories among French colonial districts.

In such circumstances, it may be asked whether, in so doing, a "*continuum juris*, a legal relay" between colonial law and international law is really avoided.

But is it possible to do otherwise when, with regard to establishing a frontier line, the colonial reference texts contain only summary information or identify the course by two points situated at a considerable distance from each other?

Faced with the same dilemma, Judge *ad hoc* Abi-Saab, in his separate opinion appended to the Judgment in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, noted that the Chamber had

been led into "an excessively detailed analysis of French colonial law, a task which is not, in my view, a fitting one for an international court and was largely superfluous" (*I.C.J. Reports 1986*, p. 659, para. 3). Nevertheless, referring to the precautions taken in the Judgment when considering colonial law, he added: "Along that road there can therefore be no question of even circuitously finding in contemporary international law any retroactive legitimation whatever of colonialism as an institution." (*Ibid.*, para. 4.)

In fact, it is not a question of legitimating *a posteriori* an institution which law and history have definitively classed among those which have been profoundly violent and unjust because of their violation of the dignity and freedoms of entire populations. The question is whether, when drawing frontiers, contemporary international law can rely on law produced by such an institution, even though it involved only administrative boundaries which, moreover, attached little importance to the populations concerned and their historical and sociological relationships.

Judge *ad hoc* Abi-Saab sought to qualify this paradox by advocating recourse to "considerations of equity *infra legem*". For my part, I would say that, when applying *uti possidetis juris*, a court should take account of the intertemporal law, in the sense that, when interpreting colonial law, the fate of the populations concerned cannot be ignored.

In other words, how to ensure that the same injustices that were perpetrated by artificial and brutal frontiers, at times following parallels or meridians, are not "legitimated" by an international judicial organ operating in the twenty-first century?

It is true that the Court, as the principal judicial organ of the United Nations, must contribute to the strengthening of peaceful relations between States, and it does so, at the request of the Parties, while referring to the colonial heritage. Nowadays, however, the search for peace among States also entails ensuring human security, namely respect for the fundamental human rights of the persons concerned and their protection, including by international justice.

The exercise of sovereignty has thus become inseparable from responsibility towards the population. This new approach to sovereignty should certainly be present when the Court rules on the course of boundaries between States.

It may be considered that the human realities, at the time of independence, in the 1960s, were probably taken into account by the French geographers, who carried out field surveys in order to prepare the map of the Institut géographique national (IGN) which dates from that period. However, some discrepancies may have subsequently arisen between the map in question and today's human realities, discrepancies which require the States to take the necessary measures to safeguard the rights of the populations concerned.

When, in 2013, it decides on the frontier between two independent African countries, the Court cannot ignore that it has been called upon to

give effect to an *Arrêté* of 1927, as clarified by the Erratum, and that the sole concern of the authority that adopted it was to separate entities depending on the same colonial power in order to improve territorial administration.

It is clear that such an operation cannot be purely mechanical and nor can it consist of a formal transposition. The human — and even the geographical — realities have evolved, and the Court, which dispenses justice almost a century later, cannot disregard them.

Questions such as these are part of those which concern how the colonial heritage is dealt with, an issue with which the African continent as a whole has been confronted. Recourse to *uti possidetis juris* has not always made it possible to achieve peace within and among those who are the heirs. There is still debate in some quarters about whether one must be content with the redrawing of boundaries or the reconfiguration of the exercise of authority within the existing sovereignties. The focus should perhaps be on the essence of the issue, because the frontier, as predicated on the Westphalian model, is far removed from the cultural heritage of this region of the world. In the framework of a good-neighbourliness relation, it is for the Parties to rediscover this heritage by deepening, as encouraged by the Court, their co-operation.

(Signed) Mohamed BENNOUNA.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. *Prolegomena*

1. I have voted in favour of the adoption of the present Judgment in the case of the *Frontier Dispute* between Burkina Faso and Niger, whereby the International Court of Justice (ICJ) has, at the request of the Parties, determined the course of their frontier. Although I have agreed with the Court's majority as to the findings and resolutory points of the Court in its present Judgment, yet there are certain points — to which I attribute much importance — which are not properly reflected in the reasoning of its Judgment, or which have not been sufficiently stressed therein, as much as I think they should have been.

2. In respect of those points, I do not find the Judgment just adopted by the Court today entirely satisfactory, and I pursue a distinct reasoning, particularly in respect of the relationship between the territory at issue and the local (nomadic and semi-nomadic) populations. This being so, I feel thus obliged to dwell upon them in the present separate opinion, so as, on the basis of the documentation conforming the *dossier* of the present case (not wholly reflected in the present Judgment), to clarify the matter dealt with by the Court, and to present the foundations of my personal position thereon.

3. My reflections, developed in the present separate opinion, pertain to the following points, in relation to which I do not find the reasoning of the Court entirely satisfactory or complete, namely: *(a)* provisions of treaties (after independence in 1960) expressing concern with the local populations; *(b)* concern of the Parties with the local populations in the written phase of proceedings; *(c)* *communiqués* (after independence in 1960) expressing concern with the local populations; and *(d)* views of the Parties concerning villages.

4. Moving from the written to the oral phase of proceedings, I shall then turn attention to the following points: *(a)* concern of the Parties with the local populations in the oral phase of proceedings (first and second rounds of oral arguments); *(b)* concern of the Parties with the local populations in the responses of the Parties to questions from the bench; and *(c)* the tracing of the frontier line in the IGN map. May I here observe that there is a wealth of materials, in the *dossier* of the present case, in the responses provided by the Parties to questions from the bench, not fully or sufficiently reflected in the present Judgment of the Court.

5. My next line of considerations will focus on: *(a)* the human factor and frontiers; *(b)* admission by the Parties that they are bound by their pledge to co-operation in respect of local populations (in multilateral African *fora*, and in bilateral agreements, conforming the régime of transhumance); and *(c)* population and territory together, conforming a "system of solidarity" (encompassing transhumance and the "system of solidarity"; people and territory together; and solidarity in the *jus gentium*). The way will then be paved for the presentation of my concluding observations.

II. Provisions of Treaties after Independence in 1960 Expressing Concern with the Local Populations

6. In the present Judgment in the case of the *Frontier Dispute* between Burkina Faso and Niger, the ICJ begins by pointing out that the dispute at issue is set within a historical context marked by the *accession to independence* of the two contending Parties (Burkina Faso and Niger), which were formerly part of French West Africa (para. 12). In my reasoning in the present separate opinion, I ascribe particular importance to the documents *after* their independence in 1960. The Court further recalls that, in the colonial period, the two countries concerned were "made up of basic units called *cercles*"; each *cercle*, in turn, was composed of subdivisions, which "comprised *cantons*, which grouped together a number of villages" *(ibid.)*.

7. In effect, in my view, it is commendable that the two contending Parties, Burkina Faso and Niger, deemed it fit to insert, into treaties they concluded after their independence in 1960, provisions expressing their concern with the local populations. Thus, their 1964 Protocol of Agreement (concluded in Niamey, on 23 June 1964)[1], contains a provision, on "population movements", which states that

> "2. Provided they are carrying the official identity documents of their State, nationals (within the meaning of the Nationality Code of the State concerned) of the Contracting Parties may move freely from one side of the frontier to the other.
>
> All nationals of either of the Contracting Parties may enter the territory of the other, travel on that territory, establish their residence there in the place of their choice and leave the territory, without being obliged to obtain a visa or residence permit of any kind.

[1] Memorial of Niger, Annex A1.

However, transhumant nationals of one State travelling to the other State must have a transhumance certificate stating the composition of their family and the number of their animals.

The two Contracting Parties shall communicate to each other all documents concerning transhumance, in particular details of routes followed and movement calendars. (. . .)"

8. Years later, the Agreement between Burkina Faso and Niger of 28 March 1987, on the demarcation of the frontier between the two countries[2], contained a provision to (Article 5) the effect that "[r]ights of peoples living along the frontier in respect of the utilization of farmland, pasturage, waterpoints, saline lands and economic trees shall be defined in the Protocol of Agreement". This Protocol of Agreement, celebrated by those two States on the same date[3], provides (Article 19) that

"After demarcation of the frontier has been completed, nationals of each State who are not originally from the State where they are residing, and who decide to remain there, shall forthwith become subject to the jurisdiction, laws and regulations of the latter State."

9. And Article 20 of the same 1987 Protocol of Agreement adds that:

"Nationals of one State residing on the territory of the other who decide to return to their country of origin shall have a maximum of five (5) years in which to do so, with effect from the date on which their presence is recorded; during that period they shall not be subject to any form or taxation or other charge"[4].

10. In addition, the Protocol of Agreement Establishing a Consultation Framework between Burkina Faso and Niger, celebrated at Tillabéry on 26 January 2003[5], extends such consultation to "cross-border transhumance" (Article 1), and explains, in Article 2 that

[2] Memorial of Niger, Annex A4.

[3] *Ibid.*

[4] Moreover, Article 13 of the aforementioned 1987 Protocol of Agreement determines that:

"Use and/or ownership rights of nationals of the two Parties in respect of land situated along the frontier in regard to farming and pasturage, including the right to exploit economic trees such as the *néré* and the *karaté,* shall be governed by the laws of the country where the land is located and, on a subsidiary basis, by customary law."

And Article 14 adds that:

"Rights of utilization in respect of wells, rivers and waterpoints along the frontier shall likewise be governed by law and, subsidiarily, by the customs of the country where such wells, rivers and waterpoints are located. The régime governing frontier watercourses shall remain that applicable under the relevant international law."

[5] Replies of Burkina Faso and Niger to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012, doc. of 16 November 2012 [Niger's Response].

"The purpose of the consultation framework on cross-border transhumance is to:

— manage transhumance between the two States; (. . .)
— promote consultation and exchange between the two States with respect to transhumance and the management of natural resources;
— propose all appropriate steps to promote and support the development and implementation of a regional[6] inter-State transhumance policy."

III. Concern of the Parties with the Local Populations in the Written Phase of Proceedings

11. In my perception, a significant feature of the documentation forming the *dossier* of the present case (written and oral phases) of the *Frontier Dispute* opposing Burkina Faso to Niger lies in the attention dispensed to the human factor — the local population — considered together with the territory under contention (cf. Part IX, *infra*). Niger has been attentive to it from the very start, since its Memorial of April 2011, whilst Burkina Faso has likewise turned attention to it as from its Counter-Memorial of January 2012. Niger invokes the constant displacements of population in order to interpret the inter-colonial line, as fixed by the 1927 *Arrêté* and Erratum, taking into account the position of the villages at that time.

12. Burkina Faso, for its part, contends that such constant displacements of population *per se* have rendered it impossible to take into account the segments of the population at issue in drawing the frontier line. Thus, in Burkina Faso's view, the frontier was deliberately artificial, and the *effectivités* cannot, in its view, provide a basis for the interpretation of the 1927 *Arrêté*. Yet, the ICJ itself has pondered, in its Judgment (of 22 December 1986) in the *Frontier Dispute* between Burkina Faso and Mali, that in the hypothesis of a legal title not being precise as to the extent of the corresponding frontier, the *effectivités* can play "an essential role" to indicate how a legal title ought to be interpreted in practice (para. 63).

13. Some specific points, raised by both Niger and Burkina Faso in the written phase in the *cas d'espèce*, as to the ineluctable relationship between territory and population, should not, in my view, pass unnoticed here. In its aforementioned Memorial of April 2011, for example, Niger observes that the frontier ensuing from the 1927 *Arrêté* and Erratum, from the very beginning

"raised problems for the nomadic populations, who were accustomed to travelling within a unitary area, which was now divided into two

[6] So as to ensure a proper implementation of Decision A/DEC.5/10/98 of 31 October 1998 regulating transhumance between ECOWAS member States (cf. *infra*).

> separate colonies. In order to retain their customary transhumant routes, or even to cultivate their croplands which overlapped the boundary, they had to pass from one colony to the other. (. . .)
>
> On the other hand, very quickly, the nomadic or semi-nomadic populations became aware of the advantages that they could derive from the situation in order to escape taxes or other services required by the colonial power, or enlistment in the armed forces. (. . .)" (Para. 2.5.)

14. Niger holds that the 1927 *Arrêté* and the Erratum have not been sufficiently precise to fix the frontier at issue (paras. 2.1-4), and adds that this latter has raised problems for the nomadic populations (concerning, e.g., cultivation of croplands and tax collection — paras. 2.5-8), in their "customary transhumant routes", which they wanted to retain (para. 2.5). Niger argues so, without questioning the principle of the "intangibility of boundaries" (as inherited by the colonial administration — paras. 5.1-2).

15. From then onwards — Niger proceeds — "[a]t all times, the Administrators sought to determine the boundaries of their *cantons*" (para. 5.11). There have occurred different kinds of transhumance; for example, in the Say sector (not so much populated) — Niger adds — there have been: *(a)* "major transhumance, . . . generally practiced by the Bororo and related Peulhs"; *(b)* a movement over short and medium distances, generally carried out in order to exploit the pastureland beside rivers and pools"; *(c)* commercial transhumance, concerning "small flocks" "for the purpose of increasing milk production and taking advantage of the pasturage provided by fallow croplands" (para. 7.7). This longstanding activity — Niger remarks — is nowadays regulated within ECOWAS, of which Niger and Burkina Faso are members *(ibid.)*.

16. Moreover, Niger argues that the territorial colonial partitions constituted "socially disruptive factor", which provoked "population movements motivated by the preservation of communal or cultural identities, or the safeguard of interests" (para. 6.6). And it adds:

> "The instability of the populations of areas close to the shared boundaries or territories resulted in multiple registrations and the use of contradictory criteria for defining administrative links (place of temporary settlement or village of origin).
>
> Apart from traditional nomadic movements or the search for new land, there were various factors impelling populations to change from one territory to another: differences in régime as between colonies in the matter of compulsory service or of human or livestock taxation, the existence of basic infrastructure in the neighbouring territory (access to water, vaccination facilities for livestock, schools, health centres, etc.), power relationships within tribes, etc. Thus, all along

> the frontier, a game of cat-and-mouse developed between colonial administrators and frontier populations." (Para. 6.6.)

17. Niger further remarks that the Téra/Dori frontier zone, for example, has been inhabited by sedentary, nomadic and semi-nomadic peoples (para. 6.7). It then added that

> "[t]he problems of the frontier area are conditioned by various dominant forms of production, namely: itinerant nomadism, seasonal trans-frontier pastoral transhumance, conducted on a pendular basis, semi-nomadism, sedentary field agriculture, itinerant agriculture, gold prospection and extraction" (para. 6.7).

18. For its part, Burkina Faso, in its Memorial (of 20 April 2011) concedes that the boundary created by the 1927 *Arrêté* and Erratum was deliberately an artificial one ("artificial in nature" — para. 2.38). It adds that such has been the practice in the fixing of borders by the colonial administrations (paras. 2.36-39), the primary goal being stability, so as to reach the consolidation of peace and security in the region (para. 3.37).

19. In its Counter-Memorial (of January 2012), Niger contends that, even in the colonial times, the administrators took into due account "the human factor/*l'élement humain*"[7], with regard to a possible change of limits between Upper Volta and Niger (para. 1.1.11). The transfer of territory between the two colonies — it proceeds — was effected on the basis not of straight lines, but rather of transferring *cantons* between them (paras. 1.1.14-15), with attention to local traditions (paras. 1.1.24-25). Burkina Faso, in turn, in its Counter-Memorial (of 20 January 2012), retorted that the 1927 *Arrêté* and Erratum never intended to base the delimitation on the then existing limits of *cantons*, not to allocate villages to one or the other colony; if that was the intention — it added — it would have been explicit (paras. 3.53-55).

20. By and large, one may distinguish two main trends of thinking, in the briefs of the Parties, on the relationship between the population concerned and the territory under contention, namely: *(a)* the reasoning on the impact of the presence of the population on the fixing of the frontier; and *(b)* the historical accounts of the displacements of the populations in the frontier surroundings. While Niger generally upholds that local populations are to be taken into account in the fixing of the boundary, Burkina Faso sustains the opposite, adding that, in any case, such populations are nomadic, and their continuous displacement renders it difficult to take them into account for the fixing of the border.

21. From its perspective, it is thus not surprising to find that Burkina Faso does not refer in its Memorial to the population spreading on the land in both parts of the frontier. Niger, on the other hand, dedi-

[7] In relation to a letter by the administrator of the Dori *cercle*.

cates a part of its Memorial[8] to an examination of the distribution of those populations[9] and to their historical belonging to one or another State. It thus challenges the "artificial nature" of the frontier invoked by Burkina Faso.

22. In turn, in its Counter-Memorial (of 20 January 2012), Burkina Faso dismisses the practice — and the *effectivités* invoked by Niger — subsequent to the 1927 *Arrêté* and Erratum (paras. 3.56-64)[10]. It insists that,

> "[i]n actual fact, the colonial authorities were fully aware that the 'artificial' colonial boundary which had been adopted could not reflect the complex situations on the ground, *far removed* from any ideas of frontier division" (para. 3.60).

Burkina Faso concedes that

> "It is indeed an undisputed fact that the human geography of the frontier area has always been characterized by mobility on the part of the local people. This is an everyday occurrence and also follows a more general pattern. Population groups move according to weather conditions or the economic situation. The consequence is the existence of 'fossilized' or 'ghost' villages, and also a degree of vagueness with regard to the names of places in the frontier zone, to mention just these two aspects. Besides, even the most sedentary groups may live in different villages according to the season, and those villages may in some instances be on different sides of the colonial frontier." (Para. 3.61.)[11]

Yet, Burkina Faso's conclusion is that, given all these complexities, "[i]n such circumstances, the choice of an artificial boundary, despite its alleged disadvantages, probably turned out to be the wisest one" (para. 3.63).

IV. *Communiqués* after Independence in 1960 Expressing Concern with the Local Populations

23. In addition to the aforementioned treaty provisions expressing concern with the local populations, references were made, in the course

[8] Passages in Chapters VI-VII.

[9] Niger examines the movements of populations on the sectors of Téra and Say, and warns that to adopt straight lines throughout, making abstraction of the villages therein, would have the effect of "uprooting" some villages of Niger, by placing them on the territory of Burkina Faso.

[10] It further dismisses Niger's argument that some of the local villages (such as Bangaré) allegedly belonged always to Niger; Burkina Faso argues lack of evidence to that end (cf. *infra*).

[11] Burkina Faso adds that "the territories to which the native *groupements* lay claim, in particular in semi-desert savannah areas, have traditional boundaries which are somewhat imprecise" (para. 3.61).

of the written phase of proceedings, also to *communiqués* between Burkina Faso and Niger (after independence in 1960), concerning freedom of movement of local populations (free circulation of persons and goods; trade, transportation and customs). Thus, in the Ministerial Meeting between Niger and Upper Volta in January 1968, the two parties agreed "henceforth to dispense with the movement calendar requirement", as that clause was difficult to put into practice"; instead, they decided that the local administrative authorities were to "communicate to each other all documents concerning transhumance"[12].

24. Subsequently, in their meeting at Ouagadougou, of 12-14 February 1985, Niger's Minister Delegate for the Interior and Burkina Faso's Minister for Territorial Administration and Security, reached a *modus vivendi* on transit (of livestock), in the ambit of ECOWAS, including trade and customs[13]. Shortly afterwards, in another meeting, on 9 April 1986, Burkina Faso's Minister for Territorial Administration and Security and Niger's Minister Delegate for the Interior agreed on directives concerning free circulation of persons and goods, public health (including campaigns of vaccination), animal health, reciprocal recognition of documents, water and protected zones[14].

25. One decade later, the report of the meeting held at Kompienga, on 5-6 December 1997, between the Ministers for Territorial Administration and Security of Niger and Burkina Faso, addressed specific issues that needed further consideration on their part, concerning free circulation of persons and goods, documentation for transhumance policy, vaccination cards, public health (before vaccination), customs harmonization and public security. These issues admittedly required the continuing co-operation between the authorities of the two bordering States. Accordingly,

> "With a view to enhancing the free movement of people and goods, the meeting of Kompienga urges: the harmonization of regulations and procedures in force; the interconnection of road networks; the involvement of transporters in the management of transportation and transit problems; the monitoring of the application of ECOWAS Conventions concerning inter-State transport and transit routes."[15]

26. Subsequently, in their meeting held at Tenkodogo, on 24-26 May 2000, Niger's Minister for the Interior and Burkina Faso's Minister for Territorial Development agreed on fostering the "integration among the populations in border areas", with particular attention to the "free circulation of persons and goods" in the ambit of "transhumance"[16].

[12] Memorial of Burkina Faso, Annex 54.2.
[13] Memorial of Niger, Annex A2.
[14] Memorial of Burkina Faso, Annex 68.
[15] *Ibid.*, Annex 92.
[16] *Ibid.*, Annex 93.

V. Views of the Parties concerning Villages

27. Both Niger and Burkina Faso have conveyed to the ICJ considerable additional information and their views on the villages in their border surroundings[17], in their responses to the questions I deemed fit to pose to them, at the end of the public sitting of 17 October 2012. Niger's claims over some villages in the region at issue were challenged by Burkina Faso on five grounds, namely:

(a) the documents produced purportedly supporting Niger's claim that certain villages belonged to it, in its view, did not demonstrate "anything" claimed by Niger (sector of Téra: villages of Petelkolé, Ihouchaltane [Ouchaltan], Bangaré, Beina, Mamassirou, Ouro Gaobé, Yolo, Paté Bolga; and sector of Say: Fombon, Tabaré, Latti, Dissi, Boborgou Saba [Dogona])[18];
(b) certain villages were mentioned in Niger's written pleadings, but no documents were cited in support of the claim that they were "Niger" villages (sector of Téra: villages of Tindiki, Lolnango, Hérou Boularé, Nababori);
(c) the basis for Niger's claim over the villages had not, in its view, been provided by Niger (sector of Téra: Bambaré, Imoudakan 1, Imoudakan 2 or Kogonyé, Dankama, Zongowaétan Gourmantché, Bourouguita, Tchintchirguel, Mandaw; and sector of Say: Kankani, Nioumpalma, Bounga Bounga, Foltiangou, Mangou, Bandiolo, Kerta, Danbouti, Golongana, Kakao Tamboulé, Koguel, Hantikouta, Déba, Béla);
(d) Niger had, in its view, attributed the villages to Burkina Faso in Niger's written arguments (sector of Téra: Komanti, Kamanti [Ouro Toupé], Gourel Manma, Sénobellabé, Hérou Bouléba); and
(e) there were, at last, in its view, those which were encampments, and not villages (sector of Téra: Débéré Bagna or Débéré Siri N'gobé [Ousalta peul], Komanti, Zongowaétan [Fété Tao], Ouro Tambella [Dingui Dingui]).[19]

28. One can consider, without precision or certainty, that certain villages belonged to Niger or else to Burkina Faso, at the time of their accession to independence in 1960. Moreover, there were villages (e.g.,

[17] Mainly in the sectors of Téra (about 150 km long), relatively more populated, and of Say (about 160 km long), not so much populated, with "a relatively hostile natural environment"; cf., e.g., Niger's Counter-Memorial, of January 2012, para. 2.0.

[18] Burkina Faso did not expressly refer to these villages, but this information can be understood from other information provided in: Written Comments of Burkina Faso on Niger's Replies to the Questions Put by Judge Cançado Trindade at the End of the Hearing Held on 17 October 2012 (hereinafter "Written Comments of Burkina Faso"), doc. of 23 November 2012, p. 4, para. 12 (v).

[19] *Ibid.*, pp. 3-4, para. 12 (i-v).

Tokalan and Tankouro) that seem to have disappeared during the period contemporary of the *Arrêté* and Erratum of 1927, and thus can no longer be taken into account in the determination of the frontier nowadays (cf. sketch-map No. 1, p. 108).

29. It further appears, adding to uncertainties, that some of the villages in the region at issue were at times designated by different names[20]. By and large, the documentation forming part of the *dossier* of the present case, as to the distribution of the local populations (and the administration of villages) on both sides of the frontier, in sum, is not amenable to clear conclusions as to their belonging to Burkina Faso or Niger. It is not my intention to proceed to an examination of the present situation of each of those villages for the purposes of the present separate opinion; it is beyond its scope.

30. The present case before the Court is far more specific, and concerns the tracing of a part of the frontier between Burkina Faso and Niger. My purpose herein is to demonstrate and sustain that people and territory are related to each other, that they go together, that the tracing of the frontier in the present context cannot be made *in abstracto*. To this end, the consideration of the local populations and of the surrounding villages in the frontier zone is necessary and suffices. The determination of the frontier line is thus to take into account the transhumant movement of persons across the border, so as to secure its freedom. Frontier line fixing and free movement of persons, in the present African context, do not exclude each other.

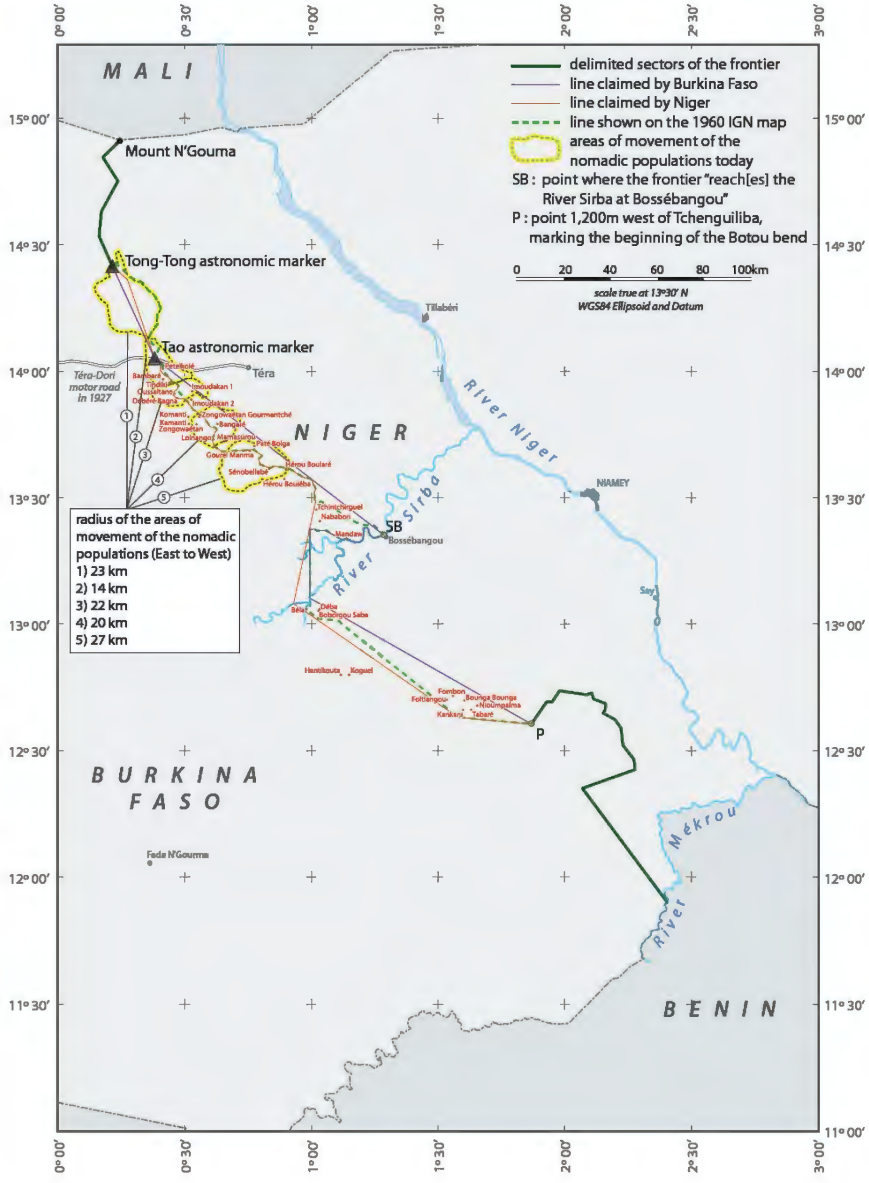
31. More important than the aforementioned challenges, controversies, uncertainties, is the fact that, when it comes to take into account the fulfilment of the needs of the peoples (nomadic or semi-nomadic), living in, and moving around, the region across the border, both Burkina Faso and Niger appear to converge in their acknowledgement of a shared and common duty to that end (cf. Part VII, *infra*). More than that, they have recognized to be bound by their duty of co-operation in this respect (cf. Part X, *infra*). Such engagement in securing the freedom of movement of those persons is, in my perception, highly significant, and stands to the credit of both Niger and Burkina Faso.

VI. Concern of the Parties with the Local Populations in the Oral Phase of Proceedings (First and Second Rounds of Oral Arguments)

32. In their two rounds of oral arguments before the Court, the contending Parties retook their respective lines of reasoning on the rela-

[20] As pointed out by Niger, in its oral arguments; cf. CR 2012/26, of 17 October 2012, p. 56.

Separate Opinion of Judge Cançado Trindade: Sketch Map 1:
PARTIES' CLAIMS AND LINE DEPICTED ON THE 1960 IGN MAP
This sketch map has been prepared for illustrative purposes only



tionship between people and territory in the *cas d'espèce*. In the first round of those arguments, Burkina Faso, for its part, referred to the demographic, ecological and economic elements of the region[21], and to the fact that the nomadic peoples lived therein, in the frontier area, off pastoralism[22]. It explained that they tend to settle in easily dismountable huts, so that they can move according to the pastoral calendar[23]. Burkina Faso recalled that Niger and itself are member States of ECOWAS, which has adopted agreements concerning cross-border movements of livestock[24]. Having said that, it insisted on its position based on legal title, discarding Niger's reliance on *effectivités*[25].

33. Niger, in turn, dismissed Burkina Faso's reliance on a deliberately "artificial" frontier line, and invoked the *cantons*' borders (created by going from one village to another), which, in its view, showed the awareness of colonial administrators of the fact that villages had been established on both sides of the frontier, and had been taken into account for the frontier's delimitation[26]. According to Niger, the limits established by the 1927 *Arrêté* and its Erratum ought to be presumed to have followed the limits of the *cantons*[27]. Niger then invoked the *effectivités* to the effect of interpreting the legal title in practice[28].

34. In the second round of oral arguments, the two contending Parties devoted much of their attention to the argument on the *effectivités*. Once again, Niger supports recourse to these latter, as it sees the legal title unclear; Burkina Faso, on the other hand, opposes such recourse to the *effectivités*, as it regards the historical title as being clear[29]. That was not, however, the end of the exchanges between the contending Parties in the procedure of the *cas d'espèce*.

VII. Concern of the Parties with the Local Populations in the Responses of the Parties to Questions from the Bench

1. Questions from the Bench

35. At the end of the public sittings before the Court, on 17 October 2012, I deemed it fit to put to the contending Parties the following questions:

[21] CR 2012/19, of 8 October 2012, p. 33.
[22] *Ibid.*, pp. 34 and 36.
[23] *Ibid.*, p. 40.
[24] *Ibid.*, p. 38.
[25] CR 2012/20, of 8 October 2012, pp. 34-45; and CR 2012/21, of 9 October 2012, pp. 10-13.
[26] CR 2012/22, of 11 October 2012, pp. 50-51 and 53.
[27] *Ibid.*, pp. 55-56.
[28] CR 2012/23, of 12 October 2012, pp. 45 and 48.
[29] Cf., as to the arguments of Niger, CR 2012/26, of 17 October 2012, pp. 21-23, 25-29, 33, 35-36 and 38-41. And, as to the arguments of Burkina Faso, cf. CR 2012/22, of 11 October 2012, pp. 23 and 50; and CR 2012/25, of 15 October 2012, pp. 24 and 26-36.

"For the purposes of precision as to the factual context of the present case, I pose the following questions to both Parties:

(1) First, could the Parties indicate in a map the location areas of nomadic populations at the epoch of accession to independence and nowadays, and indicate with precision to what extent will the fixing of the frontier have a bearing on those populations?
(2) In which radius around the frontier between the two States do the populations' movements take place? Would you please indicate in a map, if possible, which are precisely the portions of the frontier at issue.
(3) Which are the villages susceptible of being affected by the fixing of the frontier claimed by the Parties?"[30]

36. In response to my questions, Burkina Faso and Niger have provided the Court — in three rounds of responses to my questions[31] — with considerable additional information (a file of 140 pages), containing relevant details for the consideration of the present case. Certain passages of their responses were particularly enlightening — in particular those pertaining to nomadic populations — as we shall see next *(infra)*. Both Burkina Faso and Niger thus disclosed a commendable spirit of procedural co-operation before the Court.

2. Responses from Burkina Faso

37. Burkina Faso has provided responses to each of the questions I posed to both Parties[32]. In response to the question concerning the areas through which nomadic populations used to move, during the period when they became independent and today, Burkina Faso submits that, despite its efforts, it is unable to indicate in a map the areas used by the nomads at the time of independence since it was not able to find this information in the colonial archives and studies consulted; it does however provide indications of nomadic existence in the border area in the years close to the States' independence[33]. As to the nomads in the "Téra sector", Burkina Faso claims that although it cannot identify the precise

[30] CR 2012/26, of 17 October 2012, pp. 59-60.

[31] Cf. Replies of Burkina Faso and Niger to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012, doc. of 16 November 2012, pp. 1-150; Burkina Faso's Response to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012, doc. of 23 November 2012, pp. 1-2; Written Comments of Burkina Faso on Niger's Replies to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012, doc. of 23 November 2012, pp. 1-7.

[32] Replies of Burkina Faso and Niger to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012, doc. of 16 November 2012 [hereinafter referred to as "Burkina Faso's Response to the Questions Put by Judge Cançado Trindade"].

[33] *Ibid.*, paras. 1-3.

nomadic areas at the time of independence, it asserts that the Parties have engaged, since their independence, in the facilitation of freedom of circulation from each side of the border[34].

38. As to the question as to how the frontier could affect these populations, Burkina Faso claims that, in general, the reduction of pastoral spaces posed by international borders may cause difficulties to the nomads, while stating that, in the present case, any frontier that is determined between it and Niger will have no detrimental effect on the populations (nomads or otherwise) living in the border area[35]. As to the question concerning the movement of nomadic populations in the border area, between the two countries, Burkina Faso submits a map depicting the itineraries of transhumance at present time[36]. Then, in relation, more specifically, to the radius of areas of movement of the nomadic populations, Burkina Faso claims that it can be calculated on the basis of a description of the transhumance movements. It explains that transhumance is dictated by nature and natural resources, without taking into account border lines between States; and, it adds, *transhumance is also based on solidarity*[37] (cf. *infra*).

39. Burkina Faso next submits that States take political, technical and judicial measures concerning transhumance, and that regional organizations develop initiatives to promote breeding. Burkina Faso adds that the available statistics are poor, which leads it to rely on scattered studies to examine the question of transhumance movements. Between Burkina Faso and Niger, transhumance movements arrive, depart and transit through the border regions of Tillabéry, Niamey and Dosso, for Niger, and the Sahel and Est for Burkina Faso[38].

40. Burkina Faso adds that the radius of movement of nomadic populations depends on the richness of the pasture, watering points and salt licks, animal health conditions and commercial facilities (livestock and animal produce markets)[39]. And — last but not least — as to the question of villages susceptible to be affected by the frontier, Burkina Faso simply claims that because the 1987 Agreement confirms that the legal title is the Erratum of 1927, no village is susceptible of being affected by the frontier, since the delimitation has remained the same between 1927 and the present date[40].

[34] Burkina Faso's Response to the Questions Put by Judge Cançado Trindade, paras. 4-15.
[35] *Ibid.*, paras. 16-17 and 19.
[36] *Ibid.*, paras. 53-55.
[37] *Ibid.*, para. 59.
[38] *Ibid.* It submits two maps showing first the movements in West Africa and secondly between Burkina Faso and Niger.
[39] *Ibid.*, paras. 56-65.
[40] *Ibid.*, p. 23, par. 66.

3. Responses from Niger

41. For its part, Niger, likewise, has provided responses to the questions I put to both Parties[41]. As to the questions concerning nomadic populations, Niger explains that the relevant area from the Niger River to the south of Dori is populated by sedentary, nomads and semi-nomads. It adds that these populations remain the same at this date and that they are currently located in the new administrative sections (the Téra sector, and the provinces of Oudalan, Séno and Yagha). It further points out that the disputed area is not occupied exclusively by nomadic populations. Niger further asserts that transhumance across borders is regulated in numerous documents annexed to Niger's Memorial, ensuring the liberty of movement of nomads[42].

42. In relation to my first question[43], Niger submits that it was not able to find maps adequately addressing the question; it thus relies on the documents used in the proceedings[44], and it submits two maps indicating first the areas through which nomadic populations used to move during the period when they became independent, and another map indicating the areas of movement today. It notes that, during the colonial and

[41] Replies of Burkina Faso and Niger to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012 (hereinafter "Niger's Response to the Questions Put by Judge Cançado Trindade"), doc. of 16 November 2012.

[42] *Ibid.*, pp. 1-3.

[43] Which reads as follows: "indicate in a map the areas through which nomadic populations used to move, during the period when they became independent and today".

[44] Mainly in its Memorial. The documents referred to are the following: *(a)* Letter No. 96 from the Commander of Dori *cercle* to the Commander of Upper Volta dated 23 April 1929, which Niger claims to highlight transhumance movement between Dori and Téra; *(b)* Letter No. 367 from the Commander of Dori *cercle* to the Governor of Upper Volta dated 31 July 1929 and previous correspondence, wherein Niger claims the links which exist between populations and the places where they were established or had pastures; *(c)* Report No. 416 from the Commander of Dori *cercle* on the difficulties created by the delimitation established in 1927 between the Colonies of Niger and Upper Volta (*Arrêté* of 31 August 1927) regarding the boundaries between Dori *cercle* and Tillabéry *cercle*, 7 July 1930; *(d)* Niger claims that this Report highlights the problem of the distribution of the nomadic populations between Téra and Dori; *(e)* Directory (of 1941) of Villages of Téra Subdivision (villages of Kel Tamared, Kel Tinijirt, Logomaten Assadek, Logomaten Allaban), in respect to which Niger argues all the nomadic tribes, their pasture areas and watering points are mentioned; *(f)* Report of Delimitation Operations between Dori and Tillabéry *cercles*, dated 8 December 1943, stating: "[T]here is traditionally a cross-movement of Yagha and Diagourou herds. At the start and end of the rainy season, the herds from the central area of the Yagha go to Taka Pool, in Diagourou, for the salt lick, while, during the same periods, the Diagourou herds travel to the banks of Yiriga Pool for the same purpose"; *(g)* Report from the Head of Téra Subdivision on the Census of Diagourou *canton*, dated 10 August 1954, in relation to which Niger claims that the sheets of place names show the historical background and the places of establishment of certain villages and certain tribes.

post-colonial periods, there was little transhumance movement between Burkina Faso and the Say *cercle*, as during the colonial and the post-colonial periods pastoral activities were prohibited[45].

43. As to the question concerning the extent to which the frontier will affect these populations, Niger explains first the current régime (in the absence of a definite frontier). It states that the movement of populations and the access to natural resources follows the *modus vivendi* between the authorities of both States, which does not apply very rigorously the regulations for the movement of populations (such as, e.g., the requirement of an identity card, or else a vaccination booklet); it refers, in this regard, to paragraph 2 of Protocol of Agreement of 1964.

44. As to the future movement of populations, Niger asserts that the free circulation of populations and goods between the two States will be guaranteed by the bilateral and multilateral agreements concerning the liberty of movement and access to natural resources between member States. Niger refers in this regard to documents submitted with its response, explaining the transhumance movements and the organization of the transhumance régime conceived on the basis of international agreements. It then concludes that such agreements guarantee that the nomadic populations that move across the border between Niger and Burkina Faso will be able to keep their *modus vivendi*[46].

45. And, last but not least, as to the question of which villages are susceptible of being affected by the frontier which each Party is claiming, in addressing the question from its point of view, Niger distinguishes a scenario in which there is a change in the current national status of villages that have always been considered to be in Niger's territory and which it continues to claim to be located in its territory; and villages with Nigerien populations located in territory that Niger implicitly admits, by excluding them from its claim, will no longer be part of the State of Niger. Niger submits four maps (two for each scenario), as well as a list of villages with respective co-ordinates[47].

4. General Assessment

46. The Parties' responses have shed light on some important questions that, earlier on, were not entirely clear. Some observations can be made in view of the responses of the Parties. As to the nomadic and semi-nomadic populations, both Parties have submitted that: *(a)* there

[45] Niger's Response to the Questions Put by Judge Cançado Trindade, pp. 4-8.

[46] *Ibid.*, pp. 9-11. As to the question concerning the radius of the areas of movement of nomadic populations along the border between the two States concerned, Niger indicates such movement in a map which it submits with its response; cf. *ibid.*, pp. 11-12.

[47] *Ibid.*, pp. 13-21.

are nomads and semi-nomads located in the border area and in the region; *(b)* the nomadic populations move across the areas where any of the frontiers claimed by the Parties would be located; *(c)* the Parties are willing and are bound (by their membership in regional organizations and by their bilateral engagements), to continue to guarantee free movement to the nomadic populations.

47. In this light, any frontier to be determined does not seem likely to have an impact on the population, as long as both States continue to guarantee the free movement to the nomads and semi-nomads, and their living conditions do not change as a consequence of the fixing of the frontier (by the Court). It is important, in this connection, that the Judgment makes use of the extensive information now available in the case file and refers to the guarantees both States have given that they will not curtail the living conditions of the nomads and semi-nomads of the region.

48. As to the question relating to villages which are susceptible to be affected by the frontier, each Party claims, according to the responses provided by Niger (as Burkina Faso practically evaded the question, without providing much information in this regard), taking the claims of Niger at face value, there appear to be many Niger villages that would be on Burkina Faso's side were the Court to adopt a straight line between Tao and Bossébangou (i.e., as proposed by Burkina Faso). Furthermore, it is to be noted that Niger made the distinction in its response between villages that in its view have always belonged to Niger and should continue so, and villages that have a Nigerien population but that it does not claim to be on Niger's side.

49. This is a point which was not entirely clear before. Niger provided specific (and helpful) co-ordinates for most villages to which it refers, which is very helpful to locate these villages in a map. Yet, there remains a question which the Parties' responses did not clarify entirely: whether there is sufficient evidence in the case file that these villages have been as Niger claims Nigerien. Niger, in its response, limits itself to providing the names and co-ordinates of villages it claims to be Nigerien (and maps to this effect), without however providing evidence that these villages are indeed Nigerien. The next question to consider is that of the possible courses of the frontier in the area between Tao and Bossébangou, where most villages are located.

50. *The area between the Tao astronomic marker and Bossébangou*, in particular, seems to be the most complex portion of the frontier to be determined. This is so because first, the text of the Erratum is not entirely clear in its description of the course of the frontier. Secondly, another difficulty of determining the frontier in this area concerns the presence of villages located near the border and claimed by Niger. I propose thus to share some reflections concerning this section of the frontier, in light of

the responses of the Parties previously discussed. My observations are informed by the principle that the territory exists for the people that inhabit it.

51. The responses of the Parties were necessary in order to form a clear opinion on the border in this area, where the majority of concerned villages are located. As to methodology, the point of start should be the Erratum. In this regard, however, the text of the Erratum does not appear entirely clear as to the course of the frontier in this area (except concerning the ending point, which the text is clear that the line "reach[es] the River Sirba at Bossébangou"). It gives some indications (frontier points, direction, and that the line "turns"); yet, these indications of the Erratum do not necessarily lead to a straight line on the basis of the text of the Erratum.

52. Thus, as the text of the Erratum is not by itself clear as to the frontier line, other elements of the case file — which do not seem to clarify further the exact course of the frontier — need to be assessed to interpret the text of the Erratum. As to the top part of the frontier between Tong-Tong to Tao, both Parties propose a straight line, there appearing to exist enough elements to justify it, connecting Tong-Tong and Tao.

53. It is the area between Tao and Bossébangou, as already stated, that is the more complex one, in particular due to the presence of villages. On the basis of the clarifying responses of the Parties concerning the villages in question, many villages seem to be susceptible to be affected by the frontier if a straight line were to connect the Tao astronomic marker and the Bossébangou area. Recourse can thus be made, in my view, to the line of the 1960 IGN map (given the insufficiency of the Erratum to determine the course of the frontier — *supra*), pursuant to the 1987 Agreement.

54. As to the part of the frontier between Tao and Bossébangou, the text of the Erratum does not appear entirely clear in its description. It gives some indications (frontier points, direction); yet it does not state the shape of the line. It is, however, clear that the line should reach the River Sirba at Bossébangou (the ending point of this section of the frontier). In face of a text that is not entirely clear, it is necessary to have recourse to other elements of the case file, so as to interpret the text in an attempt to clarify its meaning. As to the bottom part of the section of the frontier (from Tao to Bossébangou), if the text of the Erratum and the elements of the case file do not appear sufficient to clarify the meaning of the text, it would thus appear necessary to have recourse to the 1960 IGN map to determine the course of the frontier.

VIII. Some Remarks on the Tracing of the Frontier Line in the IGN Map

55. Reference has already been made to the line of the map (1960 edition) of the Institut géographique national de France (IGN) in the factual context

of the present case *(supra)*. In effect, the IGN map had already drawn the attention of the ICJ Chamber in the earlier case of the *Frontier Dispute* between Burkina Faso and Mali (Judgment of 22 December 1986, para. 61). The Chamber expressly referred to one of the documents in the *dossier* of that case, namely, a Note of 27 January 1975, compiled by the IGN, on the positioning of the frontiers on the maps (para. 61). In its Judgment, the Chamber quoted only an extract of that Note; its full text is in the archives of this Court. In effect, having researched on the archives of the ICJ, bearing in mind the present case between Burkina Faso and Niger, I have found out that there are some other related and supporting documents (pertaining to the previous *Frontier Dispute* between Burkina Faso and Mali, 1986), of pertinence and relevance for the adjudication of the *cas d'espèce*[48].

56. For example, one such document of the IGN (letter of 24 June 1975) expressly refers to difficulties in the tracing of frontiers, solved, on most occasions, with the obtaining of information provided *in loco* to the "opérateurs sur le terrain" by the "chefs des circonscriptions frontalières, les chefs de villages et les populations locales"[49]. In this way, local populations and their representatives gave their contribution to the tracing of the frontiers in the region they lived, as set in the IGN map, — as the documentation of the previous *Frontier Dispute* between Burkina Faso and Mali, kept in the archives of this Court, indicates.

57. In the course of the proceedings (written and oral phases) of the present *Frontier Dispute* case between Burkina Faso and Niger, the point was stressed by Niger. Thus, in its Counter-Memorial (of January 2012), Niger observes that, from the cartographical standpoint, the 1960 IGN map rests on "solid technical bases", being as complete as "knowledge of occupation on the ground allowed. [T]he indications of the boundaries are based on information obtained from the local authorities" (para. 1.1.32).

58. In its oral argument in the public sitting before the Court of 11 October 2012, Niger added that the 1960 IGN map, prepared "at the dawn of decolonization", was the one to be relied upon. After all, it was compiled, as far as possible, not only on the basis of "detailed topographical surveys", but also on the basis of "information provided by the local authorities on the boundaries of their *cantons*". In its view, all those elements, "garnered on the eve of independence", were therefore "highly relevant"[50].

[48] Namely, besides the aforementioned Note of 27 January 1975 (doc. D/134), the following ones: *(a)* letter of 31 January 1975, accompanying the aforementioned Note (doc. D/135); *(b)* document (D/136) of 25 February 1975 (on the insufficiency of the *Arrêté* and the Erratum); *(c)* telegram of 9 June 1975 (on the need of observation *in loco*, doc. D/137); *(d)* letter of 24 June 1975 (doc. D/138), on information obtained *in loco*; and *(e)* letter of 5 September 1978 (doc. D/139), on the need of new cartography.

[49] Doc. D/138, p. 3, para. 4.

[50] CR 2012/22, of 11 October 2012, p. 30, para. 17.

59. Furthermore, again in its Counter-Memorial, Niger retorted the usual argument that its frontier with Burkina Faso, like other frontiers in the African continent, had a rather "artificial and arbitrary" character. Niger dismissed this argument by remarking that

> "It is of course well known that the colonial powers, particularly in Africa, did have recourse to straight lines of an artificial and arbitrary character in drawing the boundaries of colonial territories. This was the case across deserts, uninhabited regions and regions that remained unexplored before or after conquest. One needs only to think of the boundaries of Western Sahara, Mauritania, Algeria, Libya, Chad, etc., to cite just a few examples. [P. 13.]
>
> However, this is not at all the case in respect of the boundaries concerned here. The circumstances in which the boundary between Niger and Upper Volta was established reveal, on the contrary, a true concern to respect local inhabitants and pre-existing administrative divisions. The historical context and map archives prove this." (Para. 1.1.7.)

60. Also in relation to the present case, Niger further stated in the Counter-Memorial that

> "It was thus not a question of drawing (straight or curved) geometric lines through unknown regions, but rather of incorporating pre-existing *cantons* into the territory of one colony or the other. The areas comprising these *cantons* — inhabited by indigenous peoples and consisting of villages, crop and pastureland, and nomad routes — did not in principle follow abstract lines, but were based on land occupation and followed the configuration or nature of the ground." (Para. 1.1.15.)

61. In sum, in my perception, in the area between the Tao astronomic marker and Bossébangou, the IGN line appears, from the perspective of the relations between people and territory, as the appropriate one. All evidence available in the *dossier* of the present case, as well as in the archives of this Court, points to the fact that the IGN line was drawn taking into account the consultations undertaken *in loco* by IGN cartographers with village chiefs and local people[51].

62. People and territory stand together; it is clear, in contemporary *jus gentium*, that territorial or frontier disputes cannot be settled making abstraction of the local populations concerned. As it can be seen (cf. sketch-map No. 2, p. 119), the IGN line, and indeed the course of the frontier determined by the Court in the *cas d'espèce* in the area between the Tao astronomic marker and Bossébangou, cuts across the width of

[51] Cf., to this effect, e.g., case of the *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 585-586, para. 61.

the areas of population movements today in a balanced way, equitably within the orbit of their present-day movements' areas.

IX. The Human Factor and Frontiers

63. It ensues from all the aforesaid that, in circumstances of the kind of the present case, or of inhabited territories in general, people and territory go together (cf. Part XI, *infra*). In the case of nomadic peoples, in distinct regions of the world, it has been observed that nomads "have become the prisoners of an annual climatic and vegetational cycle (. . .). They have not, indeed, passed across the stage of the histories of civilizations without having left their mark."[52] This has been pondered by Arnold J. Toynbee, in his masterful, if not epic, 10-volume *A Study of History* (1934-1957). He then added that

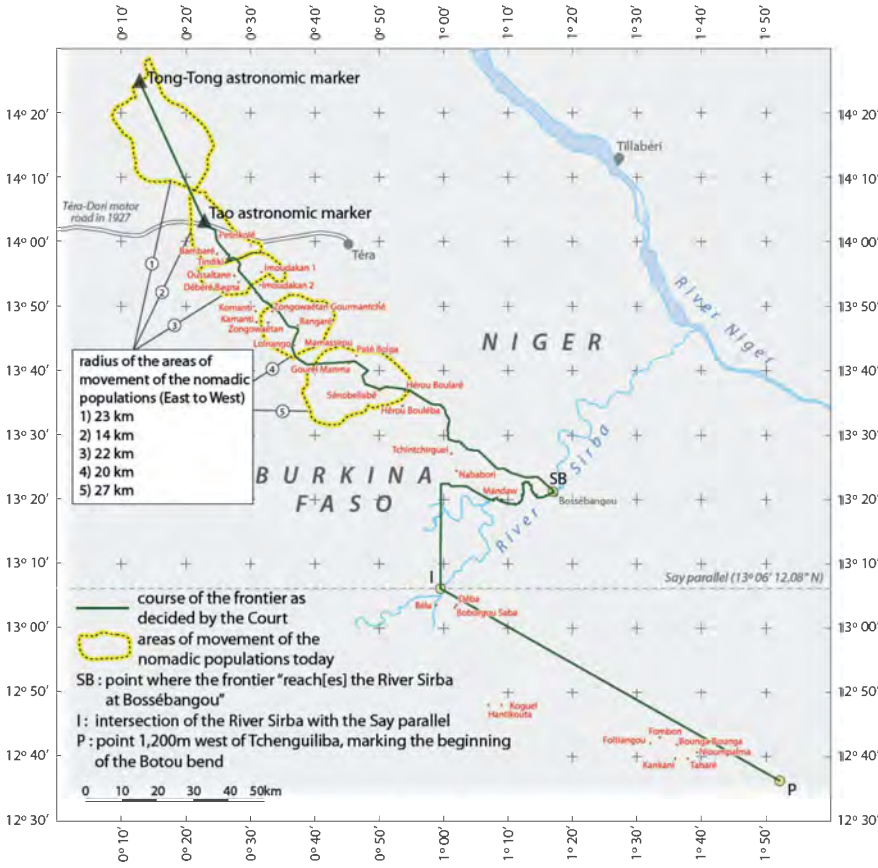
> "in spite of (. . .) occasional incursions into the field of historical events, Nomadism is essentially a society without a history. Once launched on its annual orbit, the Nomadic horde revolves in it thereafter and might go on revolving forever if an external force against which Nomadism is defenceless did not eventually bring the horde's movements to a standstill and its life to an end. This force is the pressure of the sedentary civilizations round about."[53]

64. May I add, in this respect, that this may happen to any community, in any part of the world, for example, those who have lived on agriculture for generations and then decide to migrate into (new) industrialized centres, in the quest for, or illusion of, a "better" life. Furthermore, as the present case illustrates, nomadic, semi-nomadic and sedentary peoples may co-exist harmoniously in the same region. In any case, it is not surprising to me to find learned historians of the twentieth century (such as Arnold J. Toynbee and F. Braudel, among others) approaching their discipline from the outlook of lifecycles, or, in a longer-time scale, of cultural cycles.

65. Nomads may not have a history of big events, but they surely have *their* history, their *modus vivendi*, projected in time immemorial. History is included in civilization, which, in Fernand Braudel's outlook, further requires, in order to be understood, the combined endeavours of all the social sciences, and encompasses climate, vegetation, animal species, natural or other elements; it, moreover, comprises and considers what the human beings concerned have made of such basic conditions as "agri-

[52] A. J. Toynbee, *A Study of History* (abridged by D. C. Somervell), Oxford/London, Oxford University Press, 1960 [reimpr.], p. 169.
[53] *Ibid.*, p. 169.

Separate Opinion of Judge Cançado Trindade: Sketch Map 2:
COURSE OF THE FRONTIER AS DECIDED BY THE COURT
This sketch map has been prepared for illustrative purposes only



culture, stock-breeding, food, shelter, clothing, communications, industry and so on"[54]. One can then identify the "underlying structures" of civilizations, namely, "religious beliefs, family life, attitudes towards life and death, timeless peasantry, attitudes towards work and leisure"[55].

66. Nomadic groups constitute one of the most ancient forms of community, as aptly recalled by Toynbee. He added that nomadic shepherds move or displace themselves in a "fixed annual orbit"; they have never been able to become "technologically or economically independent" from the type of community or society they came from[56], nor did they seem to have wanted to become so. He further observed that the members of those ancient agricultural communities never broke up into serious conflict with each other, nor even with their more distant neighbours[57].

67. Another learned historian (and anthropologist) of the last century, the Senegalese scholar Cheikh Anta Diop, in one of his thoughtful monographs, *L'unité culturelle de l'Afrique noire* (1959), pondered that sedentary and nomadic ways of life (in distinct regions) have led to two distinct types of family life (matriarchal and patriarchal) and to distinct organizations of social collectivities, leading later to distinct forms of State[58]. Nomadic life soon disclosed needs of its own, and everything seemed linked to the earlier conditions of existence (and survival), with the notion of justice only emerging later on, in time perspective; distinct social ideas derived from nomadic and sedentary ways of life[59].

68. Cheikh Anta Diop added that private law emerged first, and only much later on, with the passing of time, public law was to take its place in order to regulate social relations, then followed by the rise of the States, marked by the *séquelles* of the earlier historical periods[60]. As observed, for his part, by the archaeologist Félix Sartiaux in 1938, in ancient times nomadic populations exerted influence upon sedentary populations; the two forms of *modus vivendi* (pastoral life and agriculture) were to co-exist, and, with the passing of time, sedentary populations gained increasing importance and were to influence others[61].

69. Yet — as the present case bears witness of — nomadic populations never vanished, and their way of life and their spirit survive nowadays,

[54] F. Braudel, *A History of Civilizations*, N.Y./London, Penguin Books, 1995, pp. 9-10, and cf. pp. 18 and 25.

[55] *Ibid.*, p. 28.

[56] A. J. Toynbee, *Le changement et la tradition*, Paris, Payot, 1969, pp. 33-34 and 73.

[57] *Ibid.*, p. 119.

[58] Cheikh Anta Diop, *L'unité culturelle de l'Afrique noire* [1959], 2nd rev. ed., Dakar/Paris, Ed. Présence africaine, 1982, pp. 135-136.

[59] *Ibid.*, pp. 150, 152, 154 and 167, and cf. pp. 185-186.

[60] *Ibid.*, pp. 139-140.

[61] F. Sartiaux, *La civilisation*, Paris, Libr. A. Colin, 1938, pp. 40-42, 72-73 and 182.

"in the agitation and disquiet of modern times"[62]. In my perception, even in the determination of frontiers in regions inhabited by human groups of such dense cultural features, one should not simply draw entirely and admittedly "artificial" lines, overlooking the human element; the centrality, in my view, is of human beings.

X. Admission by the Parties that They Are Bound by Their Pledge to Co-operation in Respect of Local Populations

70. In the present Judgment on the *Frontier Dispute* case between Burkina Faso and Niger, the Court has expressed "its wish" that each Party has due regard to the needs of the population concerned, in particular those of the nomadic or semi-nomadic populations (para. 112). This is very reassuring. In effect, the contending Parties themselves have, in response to my questions, indicated that they regard themselves bound to do so, by virtue of their acknowledgment of their duty of co-operation in respect of local populations (in particular nomadic and semi-nomadic ones), as manifested in multilateral African *fora*, as well as in bilateral agreements, conforming the régime of transhumance (with freedom of movement of those local populations across their borders).

1. In Multilateral African Fora

71. In their responses to questions I have deemed it fit to put to both of them at the end of the public sittings before this Court, on 17 October 2012, Burkina Faso points out, together with Niger, that both States are parties to numerous regional co-operation and integration organizations establishing freedom of movement of populations, goods and service, as well as the right of residence and establishment[63]. Burkina Faso refers, in this regard, to the Economic Community of West African States (ECOWAS), the West African Economic and Monetary Union (WAEMU), the Permanent Interstate Committee for Drought Control in the Sahel (CILSS), the Liptako-Gourma Integrated Development Authority (LGA), the Niger Basin Authority (NBA) and the *Conseil de l'entente*.

72. As to the ECOWAS, in explaining the nature of the organization, Burkina Faso notes in particular its objective of suppressing obstacles to the free movement of people, goods and services, as well as the right of residence. Burkina Faso contends that the Heads of State and Government

[62] F. Sartiaux, *La civilisation*, Paris, Libr. A. Colin, 1938, p. 73.

[63] Replies of Burkina Faso and Niger to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012, doc. of 16 November 2012, paras. 18-19.

of ECOWAS adopted Protocol A/P.1/5/79, in Dakar, on 29 May 1979[64], on freedom of movement of persons, the right of residence and establishment in the ECOWAS area, which reasserted and clarified the details of the freedom of movement of persons as well as the right of residence and establishment. In this regard, it also invokes Protocol A/P.3/5/82, of 29 May 1982, on the definition of community citizenship[65].

73. Moreover, it cites other documents of the ECOWAS concerning the free circulation of persons[66]. Burkina Faso further argues that freedom of movement is accorded to nomadism or cross-border transhumance, which is subject to a minimum amount of regulatory legislation[67]. Burkina Faso also notes that ECOWAS authorities have organized awareness-raising and outreach seminars, and workshops concerning freedom of movement, residence and establishment within the ECOWAS member States[68].

74. As to the West African Economic and Monetary Union (WAEMU), in recalling that it is a regional economic and monetary union composed of eight West African countries, Burkina Faso notes, in particular, that its objective is to create a common market based, *inter alia*, on the free circulation of people, goods, services, capitals, and the right of establishment of people conducting an independent or paid activity, as well as external tariff and a common trade policy. Burkina Faso further claims that several texts issued by the Conference of the Heads of State and Government, the Council of Ministers, the Commission and the President of the Commission, supplement and further clarify the nature and scope

[64] Burkina Faso's Response to the Questions Put by Judge Cançado Trindade, Annex 2.

[65] *Ibid.*, Annex 3.

[66] Namely, Supplementary Protocol A/SP.1/7/85, signed in Lomé, on 6 July 1985, on the code of conduct for the implementation of the Protocol on free movement of persons, the right of residence and establishment; Decision A/DEC.2/7/85, of 6 July 1985, on the establishment of the ECOWAS travel certificate for member States; Supplementary Protocol A/SP.1/7/86, signed in Abuja, on 1 July 1986, on the second phase (right of residence) of the Protocol on free movement of persons, the right of residence and establishment; Supplementary Protocol A/SP.2/5/90, signed in Banjul, on 29 May 1990, on the implementation of the third phase (right of establishment) of the Protocol on free movement of persons, right of residence and establishment; Decision A/DEC.2/5/90, adopted in Banjul, on 30 May 1990, establishing a residence card in the ECOWAS member States; Decision C/DEC.3/12/92, adopted in Abuja, on 5 December 1992, on the introduction of a harmonized immigration and emigration form in the ECOWAS member States; and the adoption of the ECOWAS Embarkation and Disembarkation Form, used by the airport police services of the various ECOWAS member States.

[67] Burkina Faso cites, in this regard, the Decision A/DEC.5/10/98, of 31 October 1998, regulating transhumance between the ECOWAS member States, and the Regulation C/REG.3/01/03 on the implementation of the regulation of transhumance between the ECOWAS member States, submitted as Annexes 4 and 5 of Burkina Faso's Response.

[68] Burkina Faso's Response to the Questions Put by Judge Cançado Trindade, paras. 20-30.

of the freedom of movement and the right of establishment and residence in the WAEMU area[69].

75. As to the Permanent Interstate Committee for Drought Control in the Sahel (CILSS), Burkina Faso points out that a transhumance agreement has been concluded among its member States[70]. And as to the *Conseil de l'entente*, Burkina Faso refers to the free movement of people and goods, the right of residence and of establishment (recognized in Article 2 and 3 of the Charter of the *Conseil*), and to a Protocol of Agreement adopted by member States in 1989 relating to an international transhumance certificate in the *Conseil* member States, and highlighting transit through the entry and exit points established by the States and the health protection and security conditions to cross borders[71].

76. As to the Liptako-Gourma Integrated Development Authority (LGA), in recalling that it is a sub-regional organization composed of Burkina Faso, Mali and Niger (created by a Protocol of Agreement, signed in Ouagadougou on 3 December 1970), Burkina Faso remarks that this institution is the most active on the ground concerning nomadic populations of member States and transhumance movements. It further claims that LGA, in partnership with the ECOWAS (financial development partners), non-governmental organizations (NGOs) and professional agro-pastoral organizations and associations, organized a regional workshop on the findings of a study concerning existing legislation governing transhumance in the Organization's member States[72].

77. For its part, in response to a question I have deemed it fit to put to the two contending Parties, on 17 October 2012, at the end of the public sittings before this Court, Niger refers to ECOWAS Decision A/DEC.5/10/98, of 31 October 1998, which purports to regulate transhumance between ECOWAS member States, in the "communitarian space" (preamble). The Decision[73] provides, *inter alia* (Article 3), that

> "The crossing of terrestrial frontiers for purposes of transhumance is authorized between all countries of the Community for bovine, ovine, caprine, cameline and asine species under the conditions laid down in the present Decision. (. . .)"

78. To regulate transhumance harmoniously — it proceeds — an ECOWAS certificate, with public health indications (Article 5), provides for the protection of the rights of the "beneficiaries of transhumance", as set forth in Article 16, which states that

> "Transhumant pastoralists who have lawfully been admitted to the country shall be entitled to the protection of the authorities in the

[69] Burkina Faso's Response to the Questions Put by Judge Cançado Trindade, paras. 31-34.
[70] *Ibid.*, paras. 35-36.
[71] *Ibid.*, paras. 37-40.
[72] *Ibid.*, paras. 41-46.
[73] Niger's Response to the Questions Put by Judge Cançado Trindade, Annex A.

host country, and their basic rights shall be guaranteed by the judicial institutions of the host country. (. . .)"

79. Furthermore, Niger refers to the general report on the Consultation Meeting on Cross-Border Transhumance, held in Dori, Burkina Faso, on 19-20 December 2002. The report[74] was prepared following that meeting, on animal transhumance, which gathered ministers "responsible for animal husbandry", from ECOWAS member States, held in Ouagadougou, Burkina Faso, on 9-10 October 2002.

2. In Bilateral Agreements

80. In response to a question I have deemed it fit to put to the contending Parties at the end of the public sittings before this Court, on 17 October 2012, Burkina Faso further adds that the two States have developed bilateral relations concerning this question. In this regard, Burkina Faso cites the 1964 Protocol of Agreement which recognized the free movement of populations and it also asserts that the two States have never ceased to co-operate to further improve and facilitate the conditions and modalities of free circulation of people and transhumance movements. Burkina Faso concludes that the frontier will not affect the nomads particularly since both States' membership in regional integration and co-operation institutions recognizes the freedom of movement and residence rights to the populations[75].

81. For its part, Niger states, in its response to my question, that

> "As regards the future, the free movement of persons and goods between the two States will remain safeguarded under the conventions binding the two States within a bilateral framework and under international agreements establishing freedom of movement and free access to natural resources between member States."[76]

82. The admission by the contending Parties, that they are bound by their pledge to co-operation — at multilateral and bilateral levels — in respect of local populations, is, in my perception, very significant indeed. However harmonious human relations might be in the interior of nomadic and semi-nomadic communities (cf. *supra*), it is not surprising to find that their relations with the public power of the State may at times disclose tension and some degree of mistrust[77]. Yet, this seems also to be surmountable, and renders it much to the credit of both Burkina Faso and Niger to have found the way to establish a régime of transhumance and a true "system of solidarity" (cf. *infra*), so as to fulfil the needs of the local

[74] Niger's Response to the Questions Put by Judge Cançado Trindade, Annex B.

[75] Burkina's Faso's Response to the Questions Put by Judge Cançado Trindade, paras. 47-52.

[76] Niger's Response to the Questions Put by Judge Cançado Trindade, p. 6.

[77] For a recent account, cf. *inter alia*, e.g., B. Oumarou, *Pasteurs nomades face à l'Etat du Niger*, Paris, L'Harmattan, 2011, pp. 69-74, 168-175, 198-206 and 215-216.

populations (and to preserve their *modus vivendi*, whether nomadic, semi-nomadic or sedentary), within themselves and in their international relations.

3. The Régime of Transhumance

83. Besides transmitting to the Court important elements such as the ones reviewed in the present separate opinion *(supra)*, the two contending Parties, also in their responses to the questions I have deemed it fit to put to both of them at the end of the public sittings before this Court, on 17 October 2012, added some thoughts which leave no doubt as to their clear pledge to co-operation with regard to the living conditions of the population over the territory at issue. Thus, in this respect Burkina Faso ponders that

> "it is the practice of nomadism in Africa and, more generally, the movement of pastoralists and their herds as part of transhumance (. . .), which led Niger and Burkina, once they had achieved independence, to undertake to facilitate the freedom of movement on either side of the frontier"[78].

84. Burkina Faso assures that the living conditions of the local populations will not be affected by the tracing of the frontier line between itself and Niger. In its own words,

> "[C]ommunity law in West Africa, as deriving from the legal provisions of the instruments establishing the sub-regional organizations which Burkina Faso and Niger have joined, and as deriving from the regulatory instruments of the organs of those organizations, as well as the practices followed or observed by the States of the sub-region, Burkina Faso is in a position to respond that the frontier line between Burkina Faso and Niger will not affect the life or fate of the nomadic populations living on either side of the border."[79]

85. For its part, in basically the same general line of thinking, Niger contends that

> "The current system of transhumance is as described hereafter. In the absence of a precise frontier line, movements and access to natural resources on either side of the frontier are unrestricted under a *modus vivendi* arrangement between the authorities of the two States, which do not strictly apply the rules in force concerning the movement of persons and livestock (requirement for an identity card, laissez-passer, vaccination certificate, etc.)."[80]

[78] Burkina Faso's Response to the Questions Put by Judge Cançado Trindade, para. 15. Burkina Faso adds that "the area frequented by nomads goes way beyond the frontier zone" (para. 54); in referring to their free circulation between itself and Niger, Burkina Faso adds that the "transhumance routes" correspond to the "zones currently frequented by nomads" (para. 55).

[79] *Ibid.*, par. 52.

[80] Niger's Response to the Questions Put by Judge Cançado Trindade, p. 8.

86. Despite not coinciding in their submissions as to the specific aspects of the tracing of the frontier line, Burkina Faso and Niger agree as to the assurance of freedom of movement of nomadic populations across their borders. Thus, in its additional comments to the responses given by Niger to the questions I put to both contending Parties at the close of the public sittings before the ICJ, on 17 October 2012, Burkina Faso ponders, *inter alia*, that

> "it should be pointed out that both Parties agree that the rules in force and effectively applied between the two States allow for — and widely facilitate — cross-border transhumance. Niger describes this as a *modus vivendi* arrangement (. . .): whatever its precise significance, that expression does not give an accurate representation of the situation. As shown by Burkina Faso in its own reply[81], and confirmed by the additional information given by Niger, the freedom of nomadic movement and transhumance is established (and supported) by an effective legal framework, which guarantees its continuity."[82]

XI. Population and Territory Together: Conformation of a "System of Solidarity"

87. All the aforementioned discloses that the two Parties, in response to my questions, have confirmed their understanding of the conformation of a régime of transhumance, described, by one of them, as a true "system of solidarity". The ICJ now sees that people and territory go together *(infra)*; the latter cannot make abstraction of the former, in particular in cases of such a cultural density as the present one. After all, since the time of its "founding fathers", the law of nations *(jus gentium)* has born witness of the presence of solidarity in its *corpus juris*, as we shall see next.

1. Transhumance and the "System of Solidarity"

88. May I single out, at this stage, a passage of the responses of Burkina Faso to the questions that I put to both Parties at the end of the public sittings before this Court, on 17 October 2012; in dwelling upon the phenomenon of transhumance, Burkina Faso observes that

[81] Burkina Faso's Response to the Questions Put by Judge Cançado Trindade, paras. 17-52.

[82] Written Comments of Burkina Faso on Niger's Replies to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2013, doc. of 23 November 2012, para. 4.

> "Transhumance is a traditional herding system based on longstanding routes and itineraries which are still in use today. The volume of movement varies in terms of both time and space, depending on the year and more particularly, periods of drought. (. . .)
>
> Livestock are moved in search of pasture, watering points and salt licks. Those movements of livestock take no account of national frontiers. Livestock movements are dependent solely upon nature, natural resources and their capacity to feed their stock. (. . .)
>
> The resources shared by herders are never appropriated by one community to the detriment of another. All depend on the rainfall and its vagaries; no one knows in advance when fodder resource conditions will fail. A system of solidarity, of *tontine* (mutual assistance) exists, where each welcomes the other when the conditions are better in his area, in the certainty of being welcomed in turn in other areas when nature is more favourable there." (Paras. 57-59.)

After explaining that the radius of movement or displacement of the nomadic populations depends on "the richness of the pasture, watering points and salt licks, animal health conditions and commercial facilities", it concludes on this matter that Burkina Faso and Niger are, "at the same time, and reciprocally, host and transit zones for livestock moving between the countries" (para. 65).

2. People and Territory Together

89. It is reassuring that, even a classic subject like territory, is seen today — even by the International Court of Justice — as going together with the population. In this respect, it should not pass unnoticed that, in its Order of Provisional Measures of Protection (of 18 July 2011) in the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand), the ICJ approached territory together with the (affected) population, and ordered — in an unprecedented way in its case law — the creation of a demilitarized zone in the surroundings of the aforementioned Temple (near the borderline between the two countries).

90. In my separate opinion appended thereto, I observed that such demilitarized zone seeks to protect not only the territory at issue, but also the segments of the populations that live thereon[83]. Beyond the classic territorialist approach is the "human factor"; this paves the way, I proceeded, for protecting, by means of such provisional measures, the right to life of the members of the local populations as well as the spiritual

[83] As well as a set of monuments situated thereon (conforming the Temple) which nowadays integrate — by decision of UNESCO — the cultural and spiritual heritage of humankind (*I.C.J. Reports 2011 (II)*, pp. 588-598, paras. 66-95).

heritage of humankind (paras. 96-113). Underlying this jurisprudential construction, I added, is the *principle of humanity*, orienting the search for the improvement of the conditions of living of the *societas gentium* and the attainment and realization of the common good (paras. 114-115), in the framework of the new *jus gentium* of our times (para. 117).

91. In my aforementioned separate opinion, I further pondered that "the needs of protection of people comprise all their needs", including their *modus vivendi*, their "right *to live* with dignity" (para. 102), and I added that

> "Cultural and spiritual heritage appears more closely related to a *human context*, rather than to the traditional State-centric context; it appears to transcend the purely inter-State dimension, that the Court is used to. I have made this point also on other occasions, in the adjudication of distinct cases lodged with the Court. For example, two weeks ago, in the Court's Order of 4 July 2011 in the case of the *Jurisdictional Immunities of the State (Germany* v. *Italy)* (intervention of Greece), I sustained, in my separate opinion, that rights of States and rights of individuals evolve *pari passu* in contemporary *jus gentium* (*I.C.J. Reports 2011 (II)*, pp. 506-530, paras. 1-61), to a greater extent than one may prima facie realize or assume.
>
> In any case, beyond the States are the human beings who organize themselves socially and compose them. The State is not, and has never been, conceived as an end in itself, but rather as a means to regulate and improve the living conditions of the *societas gentium*, keeping in mind the basic *principle of humanity*, amongst other fundamental principles of the law of nations, so as to achieve the *common good*. Beyond the States, the ultimate *titulaires* of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole." (*I.C.J. Reports 2011 (II)*, p. 606, paras. 113-114.)

After all — I concluded — "[c]ultures, like human beings, are vulnerable, and need protection" in all their diversity, and such protection is "well in keeping with the *jus gentium* of our times" (*ibid.*, para. 117).

92. The ICJ's 2011 decision in the case of the *Temple of Preah Vihear* is not the only example to this effect. Reference could further be made to a couple of other recent ICJ decisions acknowledging likewise the need to take into account people and territory together. For example, earlier on, in its Judgment (of 13 July 2009) on the *Dispute relating to Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the ICJ upheld the customary right of fishing for subsistence (*Judgment, I.C.J. Reports 2009*, p. 266, paras. 143-144) of the inhabitants of both margins of the River San Juan. Such fishing for subsistence was never objected to (by the respondent State). And, ultimately, those who fish for subsistence are not the States, but rather the human beings affected by poverty. The ICJ thus

turned its attention, beyond strictly territorial inter-State outlook, also towards the affected segments of the local populations concerned. This was reassuring, bearing in mind, in historical perspective, that States exist for human beings, and not *vice versa*.

93. Shortly afterwards, in its Judgment (of 20 April 2010) in the case concerning the *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, the ICJ, in examining the arguments and evidence produced by the parties (on the environmental protection in the River Uruguay), took into account aspects pertaining to the affected local populations, and the consultation to these latter. I drew attention to this point in my separate opinion (*I.C.J. Reports 2010 (I)*, pp. 192-207, paras. 153-190), wherein I pondered that, once again, it was necessary to go beyond the purely territorial inter-State dimension, and to take in due account the imperatives of human health and the well-being of the peoples concerned, the role of civil society in environmental protection[84], as well as the emergence of the obligations of objective character (beyond reciprocity) in environmental protection, to the benefit of present and future generations.

94. In the present case of the *Frontier Dispute* between Burkina Faso and Niger, the Court has taken yet another step in the right direction, to the same effect of caring about the fulfilment of the needs of the populations concerned, in pointing out, in paragraph 112 of the Judgment just delivered today, that

> "Having determined the course of the frontier between the two countries (. . .), as the Parties requested of it, the Court expresses its wish that each Party, in exercising its authority over the portion of the territory under its sovereignty, should have due regard to the needs of the populations concerned, in particular those of the nomadic or semi-nomadic populations, and to the necessity to overcome difficulties that may arise for them because of the frontier. The Court notes the co-operation that has already been established on a regional and bilateral basis between the Parties in this regard, in particular

[84] In that same separate opinion, I deemed it fit to recall that, before that case had become an inter-State dispute by the end of 2003, in its origins was the initiative, two years earlier (end of 2001), of an Argentinean non-governmental organization (NGO), of expressing its preoccupation to an international entity (CARU), with a subject of considerable public interest (the alleged environmental risks), affecting the local populations. Subsequently, several NGOs (both Argentinean and Uruguayan) manifested themselves in this respect. This disclosed the artificiality of a simply inter-State outlook when one is faced with challenges of public or general interest (such as those pertaining to environmental protection).

under Chapter III of the 1987 Protocol of Agreement, and encourages them to develop it further."

3. Solidarity in the Jus Gentium

95. Working in a hectic and short-sighted *milieu* of *droit d'étatistes*, who can only behold State sovereignty (without knowing what it exactly means), I feel that some words of caution and serenity are here called for, in the light of the circumstances and lessons of the *cas d'espèce*. In historical perspective, may I recall herein that the "founding fathers" of the law of nations (in the sixteenth and seventeenth centuries) propounded a universalist outlook (encompassing *totus orbis*), in a world marked by diversification (of peoples and cultures) and by pluralism (of ideas and cosmovisions), seeking thereby to secure the unity of the *societas gentium*.

96. The *jus gentium* they conceived was for everyone, all peoples, individuals and groups of individuals, as well as States (then, only then, emerging), all "fractions" of humankind[85]. They endeavoured to pave the way for the prevalence of a true *jus necessarium*, transcending the traditional limitations of the *jus voluntarium*. The gradual and felicitous encounter of scholastic knowledge with humanism propitiated further perennial insights. This is, in my perception, an appropriate moment to rescue herein a couple of them.

97. Thus, one of the most learned of the "founding fathers" of the law of nations *(droit des gens)*, Francisco Suárez, in Book II (on "The Eternal Law, the Natural Law, and the *Jus Gentium*") of his masterful *De Legibus, Ac Deo Legislatore* (1612), in upholding the unity of the human kind (wherefrom *jus gentium* emanates), singled out the "natural precept" *(praeceptum naturale)* of mutual "affection and mercy" [solidarity] *(mutui amoris et misericordiae)*[86], applying to everyone. There was awareness of sociability and mutual interdependence as limits to State sovereignty, to the benefit of the populations concerned, who stood in need of each other and could hardly live (or survive) in an isolated way.

98. "Natural precepts" of the kind found expression by the force of "natural reflection", under the "pressure of necessity", rather than as a

[85] A. A. Cançado Trindade, "*Totus Orbis*: A Visão Universalista e Pluralista do *Jus Gentium*: Sentido e Atualidade da Obra de Francisco de Vitoria", 24 *Revista da Academia Brasileira de Letras Jurídicas* — Rio de Janeiro (2008), No. 32, pp. 197-212; Association Internationale Vitoria-Suarez, *Vitoria et Suarez — Contribution des théologiens au droit international moderne*, Paris, Pedone, 1939, pp. 169-170; A. Truyol y Serra, "La conception de la paix chez Vitoria et les classiques espagnols du droit des gens", in: A. Truyol y Serra and P. Foriers, *La conception et l'organisation de la paix chez Vitoria et Grotius*, Paris, Libr. Philos. J. Vrin, 1987, pp. 243, 257, 260 and 263; A. Gómez Robledo, "Fundadores del Derecho Internacional — Vitoria, Gentili, Suárez, Grocio", *Obras — Derecho*, Vol. 9, Mexico, Colegio Nacional, 2001, pp. 434-442, 451-452, 473, 481, 493-499, 511-515 and 557-563.

[86] Chapter XIX, para. 9; and cf. Chapter XX, paras. 2-3.

result of "deliberate will". After all, in the *jus gentium*, reason stands above the will. The foundation of law lies in the *recta ratio* (evoking Cicero's *De Legibus*, 52-43 BC), and solidarity and mutual interdependence are always present in the regulation of the relations among the members of the universal *societas*. In the words of F. Suárez himself,

> "equity and justice must be observed in the precepts of the *jus gentium*. For such observance is included in the essential character of every true law (. . .); and the rules pertaining to the *jus gentium* are indeed true law (. . .); it is impossible that these precepts of the *jus gentium* should be contrary to natural equity."[87]

In sum, solidarity has always had a place in the *jus gentium*, in the law of nations. And the circumstances of the *cas d'espèce* before the ICJ between Burkina Faso and Niger bear witness of that today, in so far as their nomadic and semi-nomadic (local) populations are concerned.

XII. Concluding Observations

99. The basic lesson I extract from the present case of the *Frontier Dispute* between Burkina Faso and Niger is that — as the present Judgment of the ICJ shows — it is perfectly warranted and viable to determine a frontier line keeping in mind the needs of the local populations. In the *cas d'espèce*, the contending Parties themselves, disclosing a commendable spirit of procedural co-operation, have provided the Court with the elements needed for its determination, taking into account people and territory together. Both Burkina Faso and Niger have expressed their common concern with the local populations (on both sides of their border and constantly moving across it) in their arguments before the Court in the written and oral phases of the proceedings. They have expressed their common concern with the villages in the region, focusing on territory and their inhabitants together.

100. Both Niger and Burkina Faso have referred to provisions of treaties, as well as *communiqués*, after independence in 1960, likewise giving expression to their common concern with the local populations. Significantly, they have jointly admitted that they are bound by their pledge to co-operate in respect of local populations, as expressed in multilateral African *fora* as well as at bilateral level, in respect of the régime of transhumance. They have made it clear that this latter amounts to a "system of solidarity", to be pursued, encompassing people and territory together.

101. The Court, for its part, has rightly expressed its wish that each Party kept its attention to "the needs of the populations concerned, in

[87] F. Suárez, *Selections from Three Works — De Legibus, Ac Deo Legislatore* (1612), Vol. II, Oxford/London, Clarendon Press/H. Milford, 1944, p. 352.

particular those of the nomadic or semi-nomadic populations, and to the necessity to overcome difficulties that may arise for them because of the frontier" (para. 112). Moreover, as to the River Sirba in the area of Bossébangou, the Court has pointed out that "the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other" (para. 101). The ICJ has thus indicated, in the Judgment that it has just adopted today on the *Frontier Dispute* between Burkina Faso and Niger, that the age of resolving territorial disputes in the abstract, not taking into account the needs of local populations, is fortunately over.

102. The ghost of the outcome of the Berlin Conference (1885 onwards)[88] has at last vanished, and is no longer haunting Africa, with its secular cultures. The complexities of African boundary problems[89] cannot be reduced to the tracing simply of "artificial" straight lines everywhere. In the present case of the *Frontier Dispute* between Burkina Faso and Niger, the ICJ has found that, in the area between the Tao astronomic marker and Bossébangou, the IGN line was the one which constitutes the course of their frontier. The IGN line in that area is indeed the appropriate frontier line therein, for all the reasons that I have pointed out in the present separate opinion, from the perspective of the relations between people and territory.

103. The ICJ could have examined such relations to a far greater depth, had it dwelt upon — as I think it should have done — more attentively, the wealth of information on this matter (a *dossier* of 140 pages) transmitted to it by the Parties in response to the questions I deemed it fit to put to them at the end of the public sittings before the Court, on 17 October 2012. In any case (keeping in mind that the *optimum* is enemy of the *bonum*), the Court has moved a significant step ahead, in expressly acknowledging that territorial problems, such as the one raised in the *cas d'espèce*, are to be properly tackled taking into account the fulfilment of the needs of the local (nomadic, semi-nomadic and sedentary) populations.

104. Law cannot be applied mechanically; the unending work of jurists and magistrates appears to me — paraphrasing Isaiah Berlin[90] — like swimming against the current, and consideration of frontiers cannot

[88] Cf. N. J. Udombana, "The Ghost of Berlin Still Haunts Africa! The ICJ Judgment on the Land and Maritime Boundary Dispute between Cameroon and Nigeria", 10 *African Yearbook of International Law* (2003), pp. 13-61. The Berlin Conference itself lasted from 15 November 1884 to 26 February 1885.

[89] Cf., *inter alia*, e.g., S. Tägil, "The Study of Boundaries and Boundary Disputes", in C. G. Widstrand (ed.), *African Boundary Problems*, Uppsala, Scandinavian Institute of African Studies, 1969, pp. 22-32; A. Allott, "Boundaries and the Law in Africa", in *ibid.*, pp. 9-21; A. C. McEwen, *International Boundaries of East Africa*, Oxford, Clarendon Press, 1971, pp. 21-27 and 285-290; and cf. the well-known monograph (of 1962) of the agronomic engineer René Dumont, *L'Afrique noire est mal partie*, Paris, Seuil, 2012 [reed.], pp. 7-264; among others.

[90] I. Berlin, *Against the Current — Essays in the History of Ideas*, N.Y., Viking Press, 1980 [reed.], pp. 1-355.

ignore or overlook the human factor. After all, in historical or temporal perspective, nomadic and semi-nomadic, as well as sedentary, populations have largely antedated the emergence of States in classic *jus gentium*. This latter, the law of nations *(droit des gens)*, cannot be reduced to the inter-State cosmos of the *plaideurs* of the great-small world of the Peace Palace here at The Hague and of the legal profession "specialized" on inter-State litigation and its idiosyncrasies.

105. The fact remains that States, in turn, are not perennial entities, not even in the history of the law of nations. States were conceived, and gradually took shape, in order to take care of human beings under their respective jurisdictions, and to strive towards the common good. States have human ends. Well beyond State sovereignty, the basic lesson to be extracted from the present case is, in my perception, focused on human solidarity, *pari passu* with the needed juridical security of frontiers. This is in line with sociability, emanating from the *recta ratio* in the foundation of *jus gentium*. *Recta ratio* marked presence in the thinking of the "founding fathers" of the law of nations, and keeps on echoing in human conscience in our days.

(Signed) Antônio Augusto CANÇADO TRINDADE.

SEPARATE OPINION OF JUDGE YUSUF

Uti possidetis juris *and the OAU/AU principle on respect of borders are neither identical nor equivalent — The Cairo Resolution and founding instruments of the OAU and AU do not refer to* uti possidetis juris *— The two principles must be distinguished in light of their different origins, purposes, legal scope and nature — The Court should have cleared up this confusion — The OAU/AU principle is not concerned with the relationship between title and* effectivités *— Nor does it confer preference on one over the other — The reference to territorial integrity in the OAU/AU founding instruments cannot be interpreted as implicitly containing the principle of* uti possidetis juris *— It is the inviolability of boundaries which is implicit in territorial integrity — Inviolability does not mean invariability or intangibility — The 1987 delimitation agreement between the Parties distinguishes this case from previous frontier delimitation cases —* Uti possidetis juris *had no role to play in this case — This should have been recognized in the Judgment.*

I. Introduction

1. While I am in agreement with the decision of the Court, I feel obliged to deal in this opinion with certain issues, which the Court did not adequately address in the reasoning of the Judgment, particularly as regards the applicable principles invoked by the Parties in their pleadings before the Court (see paragraph 63 of the Judgment).

2. In its analysis of the rules and principles invoked by the Parties in their Special Agreement, the Court refers to the following three principles in paragraph 63 of the Judgment: *(a)* the principle of intangibility of boundaries inherited from colonization; *(b)* the principle of *uti possidetis juris*; and *(c)* the principle of respect of borders existing on achievement of independence adopted by the Organization of African Unity (OAU) in its Resolution AHG/Res. 16 (I) in 1964 at the first session of the Conference of African Heads of State and Government held in Cairo, Egypt (hereinafter, the "Cairo Resolution"), and later enshrined as Article 4 *(b)* in the Constitutive Act of the African Union (AU).

3. Apart from the fact that the Judgment does not explain the legal effect and implications of these principles in the instant case or the manner in which they are to be applied to the boundary dispute between the Parties, the Court appears to treat them as being interchangeable or at least equivalent in their legal nature, scope and effects. The assumption of equivalence, particularly between *uti possidetis juris* and the OAU/AU principle of respect of borders existing on achievement of independence,

is based on a dictum of the Chamber of the Court in its Judgment in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* of 22 December 1986.

4. The Chamber of the Court formed to deal with the above-mentioned case stated, *inter alia*, as follows:

> "The Charter of the Organization of African Unity did not ignore the principle of *uti possidetis*, but made only indirect reference to it in Article 3, according to which member States solemnly affirm the principle of respect for the sovereignty and territorial integrity of every State. However, at their first summit conference after the creation of the Organization of African Unity, the African Heads of State, in their Resolution mentioned above (AGH/Res. 16 (I)), adopted in Cairo in July 1964, deliberately defined and stressed the principle of *uti possidetis juris* contained only in an implicit sense in the Charter of their organization." (*Frontier Dispute, Judgment*, *I.C.J. Reports 1986*, pp. 565-566, para. 22.)

5. Following the above statement by the Chamber of the Court, it appears to have been widely assumed, not least by the Court itself in subsequent cases concerning frontier delimitation between African States, that the principle of respect of boundaries existing on achievement of independence adopted by the OAU in its Cairo Resolution, and later by the AU, constitutes an African *uti possidetis juris* which is identical to the principle of Spanish-American origin. For example, in its Judgment of 12 July 2005, the Chamber of the Court in the case concerning the *Frontier Dispute (Benin/Niger)*, after referring to the 1986 Judgment, stated that the principle of *uti possidetis juris* had been recognized on several occasions in the African context and that "it was recognized again recently, in Article 4 *(b)* of the Constitutive Act of the African Union" (*I.C.J. Reports 2005*, p. 108, para. 23).

6. It is my view that *uti possidetis juris* and the principle endorsed by the OAU in the Cairo Resolution, and later inscribed in the Constitutive Act of the AU, are neither identical nor equivalent. Although the Court, in the present Judgment (para. 63), has slightly moved away from the above-quoted dicta of the 1986 and 2005 Judgments equating *uti possidetis juris* to the Cairo Resolution and to Article 4 *(b)* of the Constitutive Act of the AU, I am still of the view that the difference between the two principles merits further elucidation so that they may not be similarly confounded in the future.

II. The Cairo Resolution and OAU/AU Principles on Borders

7. It is instructive to start with the text of the Cairo Resolution and of the OAU/AU principles referred to in the above-mentioned Judgment of the Chamber of the Court. Under Article III, paragraph 3, of the OAU Charter, the member States declared their adherence to the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence".

8. The text of the Cairo Resolution entitled "Border Disputes among African States" reads as follows:

> "*Considering* that border problems constitute a grave and permanent factor of dissension;
>
> *Conscious* of the existence of extra-African manoeuvres aimed at dividing African States;
>
> *Considering further* that the borders of African States, on the day of their independence, constitute a tangible reality;
>
> *Recalling* the establishment in the course of the Second Ordinary Session of the Council of the Committee of Eleven charged with studying further measures for strengthening African Unity;
>
> *Recognising* the imperious necessity of settling, by peaceful means and within a strictly African framework, all disputes between African States;
>
> *Recalling further* that all Member States have pledged, under Article IV of the Charter of African Unity, to respect scrupulously all principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;
>
> 1. Solemnly reaffirms the strict respect by all Member States of the Organization for the principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;
> 2. Solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence."

9. Article 4 *(b)* of the Constitutive Act of the AU lists as one of the principles of the Union the "respect of borders existing on achievement of independence".

III. The OAU/AU Principles and *Uti Possidetis Juris*

10. As a preliminary remark, it may be noted that none of the official documents of the OAU or of its successor organization, the AU, relating to African conflicts, territorial or boundary disputes, refers to or mentions in any manner the principle of *uti possidetis juris*. As stated by a keen observer of the origins and evolution of Pan-African organizations, and an advocate of an "*uti possidetis* africain", "it would be important to underline that the American precedent was never explicitly invoked during the *travaux préparatoires* of the Addis Ababa Conference, and even less by the Heads of State in their inaugural speeches"[1]. Equally significant are the differences between the two principles with regard to their origin and purpose, their legal scope and content and their legal nature.

[1] B. Boutros-Ghali, *L'Organisation de l'unité africaine*, Paris, Armand Colin, 1969, p. 48, at footnote 3. The French text reads as follows: «il convient de souligner que le précédent américain n'a jamais été expressément invoqué lors des travaux préparatoires de la conférence d'Addis Abéba, et encore moins par les Chefs d'Etat dans leurs discours d'inauguration».

1. Differences in Origin and Purpose

11. The Spanish-American Republics, which emerged from colonization in the early nineteenth century, adopted the principle of *uti possidetis juris* in order to address an issue of acquisition of title to territory, which was not satisfactorily resolved by any of the traditional modes of acquisition of title in classical international law[2]. The classical modes of acquisition of territory — occupation, prescription, cession, accretion and subjugation — did not provide for the situation in which a new State came into existence through decolonization[3]. In particular, the main question for the new Republics revolved around the issue of who possessed the legal title in regions which were sparsely populated and in which the limits were vaguely known or inadequately defined. To deal with this problem, it was decided by the former Spanish colonies, as described by the Swiss Federal Council in the *Colombia-Venezuela Arbitral Award* of 1922, that these regions would be:

> "reputed to belong in law to whichever of the Republics succeeded to the Spanish province to which these territories were attached by virtue of the royal ordinances of the Spanish mother country. These territories, although not occupied in fact, were by common consent deemed as occupied in law, from the first hour, by the new Republic."[4]

Thus, the primary purpose of this principle was to ensure that there was no *terra nullius* open to occupation by foreign imperial powers in Spanish America[5].

12. The second objective of *uti possidetis juris* was to establish a method or criterion for boundary delimitation where two States, formerly subject to the same metropolitan power, emerged from decolonization. This was achieved by upgrading former administrative limits to international frontiers among the new Republics. As stated by the Chamber of the Court in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*: "*uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes" (*Judgment, I.C.J. Reports 1992*, p. 388, para. 43).

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[2] In *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, the Chamber of the Court characterized *uti possidetis juris* as follows: "Thus the principle of *uti possidetis juris* is concerned as much with title to territory as with the location of boundaries . . ." (*Judgment, I.C.J. Reports 1992*, p. 387, para. 42).

[3] See R. Y. Jennings, *The Acquisition of Territory in International Law*, Manchester University Press, 1963, pp. 7-11 and 37.

[4] *Colombia-Venezuela Arbitral Award*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. I, 223, p. 228 *[translation]*.

[5] See the separate opinion of Judge *ad hoc* G. Abi-Saab in *Frontier Dispute (Burkina Faso/Republic of Mali)*, where he describes the dual purpose of the principle of *uti possidetis* (*I.C.J. Reports 1986*, p. 661, para. 13).

13. The situation faced by the African countries in the early 1960s substantially differed from that of the Spanish-American Republics where only administrative boundaries established by Spanish royal ordinances and other Spanish legal instruments existed. First, at the time of independence in the 1960s, there were no regions or territories in Africa which were reputed to be unexplored or which could be considered as *terra nullius* and thus open to acquisition of title through occupation by foreign imperial powers.

14. Secondly, the origin of the post-independence boundaries of African States was varied. It is estimated that only one-fourth of the boundaries of African States had an intra-colonial administrative character[6]. The majority of the boundaries of the newly-independent African States were inter-colonial boundaries established through treaties concluded between different colonial powers. The boundaries of two of the founding members of the OAU, Ethiopia and Liberia, neither of which had ever been colonized, were mainly fixed through their own bilateral treaties with the colonial or administering powers of their neighbours. There were also the trust territories under the United Nations Charter, which were not considered colonial territories, since the administering authority entered into a Trusteeship Agreement with the United Nations in respect of the territory concerned and any alterations to it had to be approved in accordance with the provisions of Chapter XII of the Charter[7].

15. The diversity of the boundary régimes which existed on the African continent at the time of independence, and the aversion of the newly-independent African States to the legitimization of colonial law in inter-African relations, led the OAU, and later the AU, to craft its own principle, the legal scope and nature of which will be discussed below. Thus, the lack of reference to *uti possidetis* was not due to a lack of awareness by the OAU member States of the existence of *uti possidetis juris* as a principle or of its use by the Spanish-American Republics following their own decolonization a century earlier[8]. Rather, different situations, and his-

[6] M. Foucher, "Les questions territoriales et frontalières en Afrique (1964-2010): la réaffirmation des frontières" in Emilia Robin-Hivert, Georges-Henri Soutou (eds.), *L'Afrique indépendante dans le système international*, Paris, PUPS, 2012, p. 62.

[7] See Articles 79, 83 and 85 of the UN Charter.

[8] B. Boutros-Ghali, after lamenting that *uti possidetis juris* was not specifically mentioned in the OAU Charter, states that:

> "There may have been fears that the mention of this principle would not receive unanimous approval, or that it may be said (as it already has been) that the Addis Ababa Charter was an explicit ratification of the Treaty of Berlin. Whatever may be the reason, the adoption of the principle of *uti possidetis* would have been an important step toward expanding the role of international law in Africa." See B. Boutros-Ghali, "The Addis Ababa Charter", 35 (3) *International Conciliation 5*, 1964, p. 29.

torical circumstances, dictated the adoption of different legal rules and principles.

16. It should also be recalled that despite its title of "Border Disputes among African States", the main objective of the Cairo Resolution was to discourage territorial annexation by force as well as irredentist, pan-nationalist and secessionist claims. This is evidenced by the fact that the only two countries that voted against the resolution were Somalia and Morocco, both of which had, at the time, irredentist claims against their neighbours, while all the other member States of the OAU, most of whom had boundary disputes amongst them, supported the resolution, which provided for peaceful methods and modalities of resolving such disputes.

17. Moreover, although it may sound paradoxical, the African principle of respect for the boundaries existing at the time of independence is closely intertwined with the manner in which the OAU decided to deal with the Pan-African vision of integration and unity among all African States. The Pan-African vision, which was advocated by African leaders in the period before independence, was to render boundaries less significant through the unification of the peoples of the continent. For example, the Pan-African congress, in a resolution adopted in 1958 in Accra, Ghana, denounced "the artificial frontiers drawn by imperialist powers to divide the peoples of Africa, particularly those which cut across ethnic groups and divide people of the same stock", and called for "the abolition or the adjustment of such frontiers at an early date"[9].

18. The OAU neither adopted this vision, nor did it completely abandon it. A tinge of the Pan-African vision was preserved in the form of commitments to work towards African Unity. This is explicitly mentioned even in the Cairo Resolution, where reference is made in the preamble to the establishment "of the Committee of Eleven charged with studying further measures for strengthening African Unity". The task of this Committee was to propose political action which would further promote the unity and solidarity of the African States[10]. Thus, in the Cairo Resolution, the preservation of the boundaries existing at the time of independence is somehow balanced by the continued efforts towards closer African political and economic integration.

19. Consequently, it may be said that the principle of respect for boundaries in the Cairo Resolution places the boundaries existing at the time of independence in a "holding pattern", particularly to avoid armed conflict over territorial claims, until a satisfactory and peaceful solution is found by the Parties to a territorial dispute in conformity with interna-

[9] For the text of the resolution, see C. Legum, *Pan Africanism: A Short Political Guide*, London, Pall Mall Press, 1962, pp. 229-232.

[10] See Z. Cervenka, *The Organization of African Unity and Its Charter*, Prague, Acadamia, 1968, pp. 55-60.

tional law, or until such time as closer integration and unity is achieved among African States in general, or between the neighbouring countries in particular, in keeping with the Pan-African vision. As such, it implies a prohibition of the use of force in the settlement of boundary disputes and an obligation to refrain from acts of seizure of a portion of the territory of another African State.

2. Differences in Legal Scope and Content

20. As explained above, *uti possidetis juris* had two important aspects as formulated by the Spanish-American Republics at the time of their independence: the absence of *terra nullius* in their territories and the mutual acceptance by the newly-independent Republics of the lines which formerly delimited the internal administrative divisions or sub-divisions of Spanish provinces, *intendencias* and *capitanias* as their international boundaries. The latter component has acquired more relevance in international law over the years, and has come to be regarded as the core element of *uti possidetis juris*. However, as a criterion for the delimitation of boundaries, its application has been mostly limited to converting into international boundaries the administrative boundaries inherited from the same colonial power or the internal boundaries of States emerging from the dissolution of a larger entity.

21. Thus, even in Latin America, Brazil, which gained its independence from a different colonial power (Portugal) and shared former inter-colonial rather than intra-colonial boundaries with its neighbours, adopted the markedly different concept of *uti possidetis de facto*, which gives preference to effective possession rather than legal title based on Spanish colonial legislation[11]. As stated by H. Accioly:

> "While the former Spanish colonies could indeed rely on this legal invention, because it would be open to them to discuss their respective territorial claims among themselves on the basis of laws or royal grants emanating from their common metropole, it is clear that they could not rely on such titles against Brazil, since these were not applicable to the latter, and hence such a basis would have no legal value."[12]

[11] As was stated by the Chamber of the Court in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*: "It should be recalled that when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law . . ." (*Judgment, I.C.J. Reports 1992*, p. 559, para. 333.)

[12] H. Accioly, "Le Brésil et la doctrine de l'*uti possidetis*", *Revue de droit international*, Vol. 15, 1935, pp. 36-45, at p. 45. *[Translation by the Registry.]*

22. Unlike the *uti possidetis juris* of Spanish-America, the OAU/AU principle of respect for boundaries can only be interpreted as a broad principle which affirms the acceptance by all African States of the existing boundaries of the sovereign independent States that came together to form the OAU and later the AU. The OAU/AU principle does not address the issue of title to inadequately defined regions or areas in frontier zones or physically non-existent boundaries. Nor does it lay down a specific peaceful method or criterion to be used for ascertaining the pedigree of disputed boundaries or for attributing title to territory. The specific methods to be used for the peaceful settlement of boundary disputes are left to be determined, on a case by case basis, by the States concerned. *Uti possidetis juris* could, of course, be one such principle, but it would have to be specifically agreed upon by the Parties to the dispute.

23. Moreover, the relevant territory, the boundaries of which have to be respected under the OAU/AU principle, is neither the one that existed during the colonial period as a colony nor the pre-colonial historical territory of African States, but has rather to be understood as the post-independence territory of the OAU/AU member States. Indeed, as a result of the exercise of the right to self-determination consecrated under the Charter of the United Nations, the peoples of African colonies or trusteeship territories were often able to freely determine their political status prior to independence in one of the following ways: the formation of a single sovereign State; the division of a trust territory into two separate States; the unification of part of a colony or trust territory with a neighbouring State; the unification of two colonies or of a trust territory with a colony.

24. This situation sometimes resulted in the emergence of a single independent State from the union of a former colony with a former trust territory, e.g., British and Italian Somaliland. It has also led to the merger of a trust territory or a part thereof with another colonial or trust territory; for example, the northern part of the trust territory of Cameroon under British administration merged with Nigeria, while the southern part opted for integration with the trust territory of Cameroon under French administration. Similarly, the British-administered trust territory of Togoland was united with Ghana following a plebiscite under the auspices of the United Nations. On other occasions, two independent States emerged from the division of a single trust territory, e.g., the case of Rwanda and Burundi.

25. It is, of course, one thing to call for respect of boundaries, as was done in the Cairo Resolution or as is currently consecrated in Article 4 *(b)* of the Constitutive Act of the AU; but it is another thing to determine where such dividing lines actually run. It is in the latter case that a principle such as *uti possidetis juris* becomes relevant. According to the prevailing Latin American conception, *uti possidetis juris* is

based on a dichotomy of title and *effectivités,* whereby title, if it is found to exist, will trump the *effectivités* or the effective possession of the territory[13].

26. The relationship between title and *effectivités* in the determination of the boundary to be respected was never spelled out or even mentioned in OAU or AU documents. In view of the above-described diversity and complexity of the process of independence of African States, the varied legal régimes under which the delimitation of their boundaries was carried out before independence (e.g., international treaties, administrative boundaries, trusteeship agreements), and the sharply divided opinions among African States at the time of independence, it appears that the OAU/AU deliberately refrained from engaging in a detailed consideration of legal issues, such as whether title to territory, possession or *effectivités* should prevail. Similarly, these organizations declined to lay down, as part of the public law of Africa, a specific peaceful method applicable to the settlement of all potential boundary disputes among all African States, or to the determination of the course of such boundaries.

27. Instead, the Pan-African organizations limited themselves to the affirmation of a general and broad principle of respect of the boundaries of member States in order to safeguard peace and stability in the continent. In other words, neither the Cairo Resolution nor the AU principles have gone so far as the Spanish-American States in defining a specific method to be used to determine the course of African boundaries. This does not, however, mean that African States cannot or have never had recourse, in the settlement of bilateral disputes, to the use of *uti possidetis juris* as a principle applicable to the delimitation of their boundaries or as a method of ascertaining the pedigree of such boundaries. As clearly indicated by the Judgments of the Court referred to above, they have indeed done so and will most probably continue to do so in the future particularly with respect to former administrative boundaries inherited from the same colonial power.

[13] "Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice." (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 586-587, para. 63.)

3. Differences in Legal Nature

28. The two principles — *uti possidetis juris* and the OAU/AU principle on the respect of boundaries — also differ in their legal nature. First, a distinction needs to be made between a broad principle which places frontier disputes among African States in a "holding pattern" until a peaceful solution is found between the parties concerned, and a specific principle which embodies the criteria and methods for ascertaining the pedigree of a boundary and for determining title to territory on the basis of colonial legislation. *Uti possidetis juris* corresponds to the latter, while the Cairo Resolution and Article 4 *(b)* of the Constitutive Act of the AU lay down the former.

29. Secondly, the OAU/AU principle is specific to the African continent where it is considered as part of the public law of Africa applicable to all African States, but has no claim to being a general principle or a customary rule of international law. Conversely, *uti possidetis juris* has been characterized as follows by the Chamber of the Court in *Frontier Dispute (Burkina Faso/Republic of Mali)*:

> "Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs." (*Judgment, I.C.J. Reports 1986*, p. 565, para. 20.)

30. The Chamber of the Court did not justify this sweeping statement nor did it give clear reasons as to the source of this conclusion except to say that, in addition to its Spanish-American origins, *uti possidetis juris* also found application and recognition in Africa. However, the alleged acceptance of the principle by all African States appears to be based on the assumption that the OAU principle established in the Cairo Resolution of 1964 was synonymous with or equivalent to *uti possidetis juris*. Nevertheless, the Chamber later observed in the same Judgment that:

> "*[u]ti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs" (*ibid.*, p. 566, para. 23).

31. The latter statement of the Chamber, which emphasizes the specific role of *uti possidetis juris* with respect to former administrative boundaries, appears, in my view, to correspond more to the actual practice of States than the earlier conclusion characterizing *uti possidetis* as a general principle applicable to all situations of decolonization. Even in the case of African States, recourse to *uti possidetis juris* is generally for the purpose of delimitation or demarcation of former administrative boundaries, as

was the case in *Frontier Dispute (Burkina Faso/Republic of Mali)* or in *Frontier Dispute (Benin/Niger)*. *Uti possidetis juris* would indeed be redundant in the case of disputes over boundaries delimited by an international treaty concluded either between two colonial powers or between an African State and a colonial power or between two African States[14].

32. Thirdly, the principle of *uti possidetis juris* constitutes a method of determining the course of a boundary on the basis of legal title, and offers a criterion for ascertaining the pedigree of such a boundary. This is indeed the main reason why it has become a very useful tool for the settlement of boundary disputes in cases involving former administrative boundaries or boundaries arising from the dissolution of a larger entity. The OAU/AU principle on the respect of boundaries could not be of much help, nor was it conceived to offer criteria, in the ascertainment of the pedigree of boundary lines. It prescribes respect for, and prohibits assault on, the territories of the OAU/AU member States as they existed at the time of independence. Thus, as pointed out above, the relationship between title and *effectivités*, or the need to give preference to one over the other, or the manner in which such title should be determined, is neither explicitly nor implicitly dealt with in the OAU/AU principle.

33. Moreover, to the extent that a key characteristic of Spanish-American *uti possidetis juris* is that the borders existing at the time of independence are to be determined by reference to the Spanish legislation of the time, it is difficult, if not impossible, to ascribe a similar intention to "consecrate" the colonial law to the African States which adopted the Cairo Resolution or the principles of the AU Constitutive Act. The rejection by the OAU/AU of a rearrangement of borders on ethnic lines or on the basis of historical and geographic claims does not amount to an acceptance of colonial law as title to territory. It was certainly not the intent of the member States of the OAU or the AU to collectively ratify, through the adoption of this principle, the General Act of Berlin of 1885 or to recognize the administrative law of the colonial powers.

* * *

[14] In its Judgment in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, the Court stated as follows:

> "It will be evident from the preceding discussion that the dispute before the Court . . . is conclusively determined by a Treaty to which Libya is an original party and Chad a party in succession to France . . . Hence there is no need for the Court to explore matters which have been discussed at length before it such as the principle of *uti possidetis* and the applicability of the Declaration adopted by the Organization of African Unity at Cairo in 1964." (*I.C.J. Reports 1994*, p. 38, para. 75.)

34. There is no doubt that the principle of *uti possidetis juris* has served, over the years, many advantageous functions in Latin America, and continues to play a useful role in the settlement of boundary disputes in other parts of the world. It cannot, however, be considered as a synonym of the principle endorsed by the OAU in 1964, and later inscribed in the Constitutive Act of the AU principle which deals with respect of the boundaries of sovereign independent States in accordance with the United Nations Charter and with the founding instruments of the OAU and AU.

35. The OAU member States, and later the AU, adopted the principle of respect of boundaries existing on the achievement of independence out of a sense of pragmatism in order to ward off conflict and chaos in the African continent. It is an African principle which applies among all member States of the Pan-African organization and imposes upon them the obligation to respect the boundaries existing at the time of independence, pending the peaceful resolution of any border dispute which may arise between them. It is in this context that it may be said that the two principles share a similar rationale in so far as they both seek to encourage recourse to the peaceful settlement of frontier disputes in conformity with international law.

36. The international legal principles to be applied for this purpose may, of course, include the principle of *uti possidetis juris*. It has indeed happened in the past, and it may also happen in the future, that two African States agree to have recourse to the application of the principle of *uti possidetis juris* in a bilateral frontier dispute before the Court or before arbitral tribunals. In such cases, the application of *uti possidetis juris* is based on a bilateral understanding or agreement, but not on a general principle or customary norm that has emerged as a result of the adoption of the 1964 Cairo Resolution or of the Constitutive Act of the African Union.

IV. The Principle of Territorial Integrity and *Uti Possidetis Juris*

37. The passage of the 1986 Judgment of the Chamber of the Court quoted in paragraph 4 above also suggests that there was an indirect reference to *uti possidetis* in Article III, paragraph 3, of the OAU Charter. As shown in paragraph 7 above, Article III, paragraph 3, of the OAU Charter declared the adherence of its member States to the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence". It is the reference to "respect . . . for territorial integrity" that the Chamber of the Court appears to have found to contain, in an implicit sense, an *uti possidetis* principle applicable among all African States.

38. The OAU Charter was replaced by the AU Constitutive Act on 26 May 2001. Thus, Article III, paragraph 3, no longer exists. In its place, one of the objectives of the Constitutive Act of the AU, as an instrument of solidarity among African States, is to "defend the sovereignty, territo-

rial integrity and independence of its Member States" (Art. 3, para. *(b)*). Perhaps this evolution of the principle of territorial integrity in the constitutive instruments of the Pan-African organizations already sheds some light on the distinction between *uti possidetis juris* and territorial integrity. It may, however, still be useful to say a few words about the difference between the two principles, particularly in the context of the founding instruments of the OAU/AU.

39. It is erroneous, in my view, to read into the time-hallowed principle of respect for territorial integrity a reference to the principle of *uti possidetis juris* or to assimilate these two distinct principles of international law. If one reads an indirect reference to *uti possidetis* in Article III, paragraph 3, of the OAU Charter because of its language on "territorial integrity", then the same conclusion must be reached concerning Article 2, paragraph 4, of the United Nations Charter. The two Charters refer to territorial integrity as a fundamental principle of international law and an essential foundation of peaceful relations between States, but neither of them deals with *uti possidetis juris.*

40. In so far as boundaries may be likened to the outer shell of the territory of the State, it is the inviolability of those boundaries which is implicit in the concept of territorial integrity. This is, however, quite different from *uti possidetis juris* as discussed in Section III above. Inviolability bars the alteration of existing boundaries by force. It also implies that such alteration, should it occur, is not capable of producing any legal effect. This is clearly articulated in the 1970 United Nations Declaration on Principles of International Law (General Assembly resolution 2625 (XXV)), according to which:

> "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States."

41. The reference in the Cairo Resolution to Article III, paragraph 3, of the OAU Charter, may be construed as a reference to the inviolability of boundaries which is implicit in the principle of territorial integrity, but cannot be taken to have "deliberately defined and stressed the principle of *uti possidetis juris* contained only in an implicit sense in the Charter of their organization", as stated by the Chamber of the Court. In this, the principle enunciated in the Cairo Resolution is similar to principle III on the "Inviolability of frontiers" in the Final Act of the Conference on Security and Co-operation in Europe of 1975, according to which:

> "The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and there-

fore they will refrain now and in the future from assaulting those frontiers.

Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State."[15]

42. As formulated above, the principle of inviolability of boundaries may be considered to constitute a basic element of the broader principle of territorial integrity of States, and it was in the context of the relationship of these two principles that the Cairo Resolution also referred back to Article III, paragraph 3, of the OAU Charter. It should, however, be noted that inviolability does not mean invariability or intangibility of frontiers, in general. It means that any territorial changes are effected by mutual consent, or through other means of peaceful settlement of disputes, in conformity with international law.

43. The OAU/AU member States prescribed the principle of respect of boundaries existing on achievement of independence, and implicitly recognized their inviolability in the sense discussed above, in order to ensure peace and stability in the African continent in the same way that the Conference on Security and Co-operation in Europe adopted a similar principle in 1975 to promote security in the European continent. Both prescriptions derive their inspiration from the broader principle of territorial integrity enshrined in the United Nations Charter. Neither of them was directed, in my view, to define or stress the principle of *uti possidetis juris* which has a different meaning and normative content.

V. Concluding Remarks

44. Although the Parties — Burkina Faso and Niger — invoked the principle of *uti possidetis juris* in their pleadings, this case is quite different from the previous cases of *Frontier Dispute (Burkina Faso/Republic of Mali) (I.C.J. Reports 1986)* and *Frontier Dispute (Benin/Niger) (I.C.J. Reports 2005)*. In the present case, Burkina Faso and Niger concluded an agreement in 1987 on the delimitation of their common boundary. They have not, however, been able to agree, since that time, on the interpretation and application of the agreement with respect to the actual course of the boundary line. The dispute they have submitted to the Court concerns this disagreement.

45. Unlike the previous delimitation cases mentioned above, this dispute between the Parties, which concerns the interpretation and applica-

[15] Organization for Security and Co-operation in Europe, *Final Act of the Conference on Security and Co-operation in Europe,* 1 August 1975, 14 *ILM* 1292.

tion of an international agreement, did not have to be appraised in the light of French colonial law, or "droit d'outre-mer". In other words, the Court was not required, in the present case, to determine what constituted for each of the Parties the colonial heritage to which the *uti possidetis* was to apply. The Parties had already specified that in their own delimitation agreement.

46. Thus, despite the fact that Burkina Faso and Niger inherited the former administrative boundaries of French West Africa, which became international boundaries upon their accession to independence, it is my view that the principle of *uti possidetis juris* had become redundant in this case as a result of the conclusion of the 1987 delimitation agreement between the two independent States. The Court was asked to interpret this delimitation agreement.

47. The Judgment should have clearly recognized that *uti possidetis juris* and "droit d'outre-mer" had no effective role to play in this case. A statement similar to the one made by the Court in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (*I.C.J. Reports 1994*, p. 38, para. 75, and cited at paragraph 31, footnote 14 above) could have been made in the Judgment. The Court could also have seized this opportunity to clear up the confusion between *uti possidetis juris* and the OAU/AU principle on the respect of existing boundaries upon which the 1987 Agreement between the Parties appears to be based.

(*Signed*) Abdulqawi A. YUSUF.

SEPARATE OPINION OF JUDGE *AD HOC* MAHIOU

[Translation]

Sources of the applicable law — International sources: Article 38 of the Statute of the Court, Special Agreement of 24 February 2009, principles of the intangibility of frontiers and of uti possidetis *— Internal sources: Decree of 28 December 1926,* Arrêté *of 31 August 1927 and its Erratum, other texts from the colonial period — Other sources: documents accepted by joint agreement of the Parties, 1960 IGN map, preparatory documents from the colonial period.*

Place and role of the colonial effectivités *— Relationship between the* Arrêté *and its Erratum —Relationship between the 1960 IGN map and the* effectivités *— Delimitation of the frontier: course from the Tao astronomic marker to the median line of the River Sirba — Problems of the localities of Petelkolé and Oussaltane — Actual links of the populations with Niger.*

1. While broadly subscribing to the Court's overall approach and to most of the findings reached by it in the present case, in this separate opinion I should like to set out a number of observations on certain points regarding which, in my view, the Court's position calls for further refinements and clarifications. These points relate, on the one hand, to the status of the various documents invoked in the course of the proceedings and, on the other, to the status of the *effectivités* or, more precisely, their place and role in determining the different sections of the frontier.

I. The Status of the Documents

2. It is apparent from the written and oral pleadings that there are three sets of documents to which the Parties refer: first, texts expressly accepted by the Parties for use as a reference, and thus as legal title, for delimiting the boundary; secondly, documents which are more or less accepted by joint agreement of the Parties, but whose status remains at issue when it comes to establishing whether they are applicable in the present dispute; and, lastly, documents relied upon by one of the Parties and objected to by the other.

3. It is therefore with this indicative classification of the various texts and documents in mind that I shall seek to understand their place in the resolution of this dispute. At the same time my list establishes a hierarchy, since I cite the texts in the order of priority to be given to them with a view to achieving the delimitation of the frontier between Burkina Faso and Niger.

(i) The texts that have been expressly accepted are as follows:

— the Special Agreement of 24 February 2009, Article 6 of which refers to Article 38 of the Statute of the International Court of Justice and to the rules and principles of international law applicable to the settlement of disputes, which shows indisputably that other rules of international law have a role to play, in particular when the applicable texts prove to be incomplete or insufficient;
— the Decree of 28 December 1926 establishing the administrative centre of Niger at Niamey and transferring certain *cercles* and *cantons* between the Colonies of Upper Volta and Niger. We know that the Parties do not agree as to whether this text has a constitutive or declaratory scope. In so far as it already determines certain boundaries, it is necessarily constitutive. Furthermore, since it is this text that authorizes the Governor-General of French West Africa to issue the *Arrêté* of 31 August 1927 and the Erratum of 5 October 1927 fixing the boundaries of the colonies, it likewise has constitutive effect;
— the *Arrêté* of 31 August 1927 and its Erratum of 5 October 1927 fixing the boundaries of the colonies of Upper Volta and Niger;
— consequently, these are the basic or reference texts which are at the heart of the dispute and the Parties are agreed on this point even though they ascribe a different effect to those texts, in particular as to whether they are the only texts to apply and whether or not they suffice to delimit the entire boundary.

(ii) As regards the documents, the main one is the 1:200,000-scale IGN map of 1960, which enjoys a particular status in so far as this geographical document — which hitherto had no official status — is recognized in both the Agreement of 28 March 1987 (Art. 2) and the Special Agreement seising the Court of 24 February 2009

While the Parties agree on referring to that map in order to delimit the boundary, they disagree profoundly about the conditions which would have to apply and have reiterated those disagreements on many occasions. According to Burkina Faso, "reference may only be made to the map if the *Arrêté*, as clarified by its Erratum, does not suffice" exceptionally and only on that hypothesis, and, "in the absence of any other document accepted by joint agreement of the Parties, first, reference must be made to it and, second, reference may be made to it alone". According to Niger, the 1960 map enjoys the status of a "subsidiary source", which enables reference to be made to it whenever there are deficiencies, lacunae, difficulties or errors in the *Arrêté.* Niger adds that "[u]nless abnormal deviations in relation to the texts or manifest lacunae in the information on the *canton* boundaries are discovered . . . it is the boundary drawn on the IGN map which should be adopted as the frontier line"; in such cases, it "believed that it was necessary to make modifications to it and that those modifications were justified".

(iii) The documents accepted by joint agreement of the Parties

It goes without saying that the documents that have been accepted by joint agreement of the Parties are applicable in the present dispute, even though it is not always easy to ascertain to what extent such documents exist, since each Party, for various reasons, objects to those relied upon by the other. But should we disregard them entirely if they have been objected to by one of the Parties? I do not believe so, because, although they do not constitute evidence, they may, at the very least, constitute a presumption and guide the interpretation which may be given of a text or of a situation (by way of example, mention may be made of the *travaux préparatoires* for the reference texts, which moreover have been cited by one or other of the Parties or by both of them). In that light, I do not see why there would, *a priori*, be objections to them especially since the *travaux préparatoires* traditionally form part of the elements that may at least support evidence, if not constitute it.

(iv) The other documents and the colonial *effectivités*

Any other documents not accepted by joint agreement of the Parties may not be used as such as a basis for the delimitation. But here too, must they be disregarded completely? I do not believe so, because they may constitute a significant source of information. Once again, even though they cannot constitute irrefutable evidence of a frontier, it cannot be ruled out *a priori* that maps, research or other documents, whether they date from before or after independence, as well as the *effectivités*, may be relevant in establishing the situation existing at the time, when applying the principles of the intangibility of frontiers or of *uti possidetis* (case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 568, para. 29; case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 399, para. 62; case concerning the *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 109, para. 26).

4. Lastly, and to conclude on this issue of the texts and documents, it is clear that:

— first, the *Arrêté* and its Erratum indeed constitute the main basic text for determining the frontier in the light of the other texts and colonial practice concerning the delimitation of boundaries;
— secondly, there need to be sufficiently sound reasons for disregarding it; but if the Erratum does indeed prove to be imprecise, not to suffice and *a fortiori* to be erroneous on any point, then it is normal to refer to other supplementary elements, in particular the 1960 map, in order to reach a solution;
— lastly, if the 1960 map should in turn prove not to suffice, then it is possible to refer to the *effectivités* and to other documents or elements

which are likely to enlighten the Court. It is on this last point that the Court's reasoning seems to me to be too strict and rigid when it gives excessive and formal primacy to the text and excludes the *effectivités* and other elements in order to arrive at a solution.

II. The Course of the Frontier

5. In order to draw the frontier, the Court subdivided it into four sections concerning, respectively, the section from Tong-Tong to Tao, from Tao to the median line of the River Sirba, from this last point to the intersection of the River Sirba with the Say parallel, passing via the IGN line and certain geographical points, and lastly from the last point to the beginning of the Botou bend.

6. I should like to make a few comments on the second section, since the line adopted by the Court gives rise to some difficulties related to the problem of the *effectivités*.

1. From the Tao Astronomic Marker to the Median Line of the River Sirba

7. The text of the Erratum states that, from the Tao astronomic marker, the line reaches "the River Sirba at Bossébangou".

8. For this part of the frontier, Burkina Faso proposes a line based on a particular interpretation of the text of the Erratum. In fact, the course of Burkina's line follows that of the Joint Commission of 1988. Thus, from the Tao astronomic marker as far as the River Sirba at Bossébangou, the frontier follows a straight line. Burkina Faso reiterates its position that "in jurisprudence a delimitation text indicating, without any indication to the contrary, that a line passes through two points is interpreted as specifying a boundary in the form of a straight line connecting those two points".

9. For its part, Niger opts for a line which follows the boundaries of the *cantons*, a position which is largely reflected by the 1960 IGN map. It divides this part of the frontier into two sections: from the Tao astronomic marker to Bangaré, and from Bangaré to the boundary of the Say *cercle*. Niger bases its approach on the fact that the Decree of the President of the French Republic of 28 December 1926 expresses itself in terms of *cantons*, which "does not imply any wish to establish a line of an arbitrary and artificial nature" and on a number of documents, in particular three records of agreement which were concluded for the two *cercles* concerned — Tillabéry and Say — between the representatives of the two colonies in preparation for the Governor-General's implementing *Arrêté*.

10. Beyond the Tao marker, a first possible theoretical approach is to opt for a straight frontier line, as in the sector between Tong-Tong and Tao. However, this is a relatively important section of the frontier, along which lie a number of villages claimed by both Parties. A straight line

would have uncertain and undesirable results on the ground, in particular by artificially dividing between the two States' frontier villages and communities.

11. If the *Arrêté* had intended to draw a straight line, it would have expressly said so as it had for the previous section from Tong-Tong to Tao and as it would for the last section of the frontier from the point where the Say parallel cuts the River Sirba to the Botou bend. However, the text of the Erratum does not do so and this can only be regarded as a deliberate omission and an equally clear will to reject such a line. Consequently, there is no logical and convincing basis for maintaining that the frontier runs in a straight line to reach the River Sirba at Bossébangou, above all because Bossébangou is a Niger village which is not on the bank of the Sirba. Consequently, it follows that, in view of the Erratum's silence on the course of the line in this sector, reference must necessarily be made to the subsidiary source, the 1960 IGN map. It is thus on this basis that the Court adopts the line on the map, not only in respect of this point but for the whole frontier line running from the Tao astronomic marker to the River Sirba.

12. As was noted earlier, the line passes close to a number of villages and, more specifically three of them (Petelkolé, Oussaltane and Bangaré) which were the subject of opposing appropriation claims by the Parties. Admittedly, contrary to what Burkina Faso maintained, the Court quite rightly took into account the *effectivités*, but it disregarded them in the case of two of the villages (Petelkolé and Oussaltane) and adopted them in the case of only one of them (Bangaré).

13. It is on this point that the solution does not seem to me to be entirely satisfactory because the Court has disregarded the evidence of *effectivités* presented by Niger, whereas that evidence appears to be much more convincing than that submitted by Burkina Faso.

14. With regard to the location of Petelkolé, Niger notes that the data on the 1960 IGN map are contradictory (on the Sebba sheet, Petelkolé lies on the frontier, whereas on the Téra sheet it lies slightly to the west of that line); then it relies on administrative information from the colonial period to prove that this village belonged to Niger, and that it "has remained under Niger authority since independence, is administratively attached to the rural municipality of Bankilaré and numbers 2654 inhabitants". It adds that, in the vicinity of Petelkolé, the frontier line has to deviate slightly from the IGN line towards the west in order to take in the juxtaposed frontier post between Niger and Burkina Faso, which is situated entirely within Niger territory and was chosen by the Bilateral (Burkina-Niger) Committee on the identification of sites for the installation of juxtaposed control posts between the two countries.

15. Burkina Faso disputes Niger's position and states that neither the Erratum nor the line on the 1960 map attributes Petelkolé to Niger. With respect to the documents relied on by Niger, it contends that they are not opposable to Burkina because they were not ratified either by the competent authorities (documents from the colonial period) or by the Burkina authorities (post-independence documents).

16. An examination of the 1960 map shows that the 1960 IGN map places Petelkolé almost on the frontier, slightly to the west of it, towards Burkina Faso. Nevertheless, the fact that the two States established juxtaposed control posts at Petelkolé and that they considered or "*believed* that the frontier left Petelkolé to Niger" (Counter-Memorial of Niger, p. 66, para. 2.1.7) cannot be ignored when determining the situation of the village, even if that 2006 Agreement did not enter into force. Furthermore, the administrative information from 1933 and from 1953-1954 invoked by Niger, which referred to the Rimaibé as having established two hamlets, one (Seynotyondi) situated in Upper Volta and the other (Petelkolé) in Niger, between which the frontier passes, is an additional element to be taken into consideration. In my view, the Court should have given much greater attention to the evidence before ruling on the fate of the village, which, in view of the *effectivités*, appears to come under the administration of Niger.

17. With regard to the village of Oussaltane, Niger maintains that this village belongs to Niger, again relying on the basis of colonial documents (the Delbos sketch-map of June 1927, the Roser/Boyer Agreement of April 1932, according to which the boundary runs "to Houssaltane, which it leaves to the east, to Petelkarkalé, which it leaves to the west, to Petelkolé which it leaves to the east"). Niger contends that this region, which is administered by Niger, corresponds to a group of encampments of the Kel Tamajirt tribe, of the Tinguéréguédesch *groupement* of the rural municipality of Bankilaré, to which they regularly pay their taxes.

18. Burkina Faso merely says that the 1960 line places Oussaltane on the Upper Volta side of the line (Counter-Memorial of Burkina-Faso, para. 3.71), and the fact that the encampment was placed east of the boundary proposed by the Roser/Boyer Agreement of April 1932 is without relevance, because "[t]he situation of a place in terms of a delimitation which has not been confirmed cannot be used to call into question the confirmed delimitation". It reproaches Niger with making a significant and unjustified departure from the IGN map for the sole purpose of enclaving Oussaltane and removing it from the territory of Upper Volta, without providing evidence of any *effectivité* in support of its claim.

19. It should be noted that the 1960 IGN map places the locality of Oussaltane towards the west, on the Upper Volta side, but the frontier line is broken in this area. Since the map thus appears to be insufficient to determine the exact course of the frontier in the vicinity of this village, reference should be made to other evidence in order to reach a decision on this section. In my opinion, the various documents invoked by Niger support the argument that the village is part of Niger, since the majority of the Kel Tamajirt tribe are said to be of Niger nationality and to pay their taxes in the Niger municipality of Bankilaré. This constitutes objective evidence of an *effectivité* in support of such a solution rather than in support of the village being part of Burkina Faso, for which no relevant evidence of an *effectivité* is provided.

2. The Arrival Point of the Line that Leaves Tao and Arrives at the River Sirba

20. With regard to the arrival point of the line that leaves Tao, the text of the 1927 Erratum indicates that it "reach[es] the River Sirba at Bossébangou". The wording is at the very least ambiguous, especially since the village of Bossébangou belongs to Niger and, furthermore, it is not located on the bank of the Sirba but a few hundred metres away.

21. However, Burkina Faso contends that the arrival point must be situated on the right bank of the Sirba on the basis of the following syllogism: the Erratum refers to Bossébangou; but since Bossébangou is in Niger territory and far from the river, it cannot be the point to be reached; therefore, that means that the line cuts the river to reach the right bank.

22. It is clear to me that this is a false syllogism and the Court, quite rightly, rejects this assertion. On the one hand, the Erratum's reference to Bossébangou only indicates a direction and arrival point, the River Sirba, but without providing any further details as to whether the right bank, the left bank or the median line is intended. On the other hand, the verb "to reach" a river does not in itself mean that the river must be cut. Lastly, and this is the key point which must guide the search for a solution: the fact of adopting the right bank is so crucial for the continuation of the line, from Bossébangou, that if the Erratum had intended to locate the entire river in a single colony, it would have clearly said so; it is far too important and serious a matter to be overlooked. Consequently, in the absence of such an indication, the fact of reaching the river has no other meaning than that the frontier must follow the median line, which is the usual solution for river boundaries which delimit the area between the riparian countries and for ensuring that those countries have equal access to its resources, in particular water. It is a common-sense solution, which is founded in law and equitable.

(Signed) Ahmed MAHIOU.

SEPARATE OPINION OF JUDGE *AD HOC* DAUDET

[Translation]

I voted in favour of all the points of the operative clause of the Judgment without, however, subscribing to all of the Court's reasoning, and I consider it necessary, therefore, to set out here my own opinion on certain of its elements.

My reservations focus on the manner in which the Court has dealt with the delimitation of the frontier between the Tao astronomic marker and the River Sirba at Bossébangou, and the delimitation in the area of Bossébangou with respect to the River Sirba.

I. The Course of the Frontier between the Tao Astronomic Marker and the River Sirba at Bossébangou

The Court decides that this portion of the frontier follows the line shown on the 1960 IGN map. While I agree with the Court's decision, I do so on the basis of different reasoning.

In this portion of the frontier, Niger's position is in part rejected by the Court on the ground that, in a certain section, it is not consistent with the 1927 *Arrêté*; I agree with this view. Burkina Faso, for its part, argued that, in the absence of any precise information regarding the course of the line between the Tao marker and the River Sirba at Bossébangou, the line should be straight. The Court, whose position I share, rejects Burkina Faso's claim on the basis of three arguments, in respect of which I have some reservations: the first argument is based on the wording itself of the *Arrêté*; the second arises from the context of the Decree of the President of the French Republic, which formed the basis of the *Arrêté*; and, finally, the third proceeds from the location of the village of Bangaré.

The first argument of the Court, set out in paragraph 88 of the Judgment, relies on the following *a contrario* reasoning: since the 1927 *Arrêté* twice uses the term "straight line" (*"ligne droite"* and *"direction rectiligne"*) to describe portions of the boundary other than that with which we are at present concerned, why is the same wording not used for the line running from the Tao astronomic marker to the River Sirba at Bossébangou, if this too is straight? If this line is indeed straight, why was this not made explicit here, as it is in other parts of the text? According to the Court, the fact that this was not done weakens Burkina Faso's case in favour of a straight-line configuration.

The argument is assuredly sound, albeit within the limits of the *a contrario* reasoning. In general, however, I think that the Court could have

adopted a more nuanced position on this subject. The strength of the Court's argument seems to me to be somewhat undermined, above all by the fact that the text of the *Arrêté* is by and large poorly drafted, alternating between a scarcity and an abundance of details, mixing clumsy style with unclear content so as to make it impossible to be certain of the pertinence of an analysis of its terms. The fact remains that, while at first sight one might be surprised to find that a line stretching over a distance as great as that between the Tao marker and the River Sirba at Bossébangou is not described in any detail, it is not, however, inconceivable that the author of the *Arrêté*, having just drawn a straight line for the first section from Tong-Tong to Tao, considered it logical that that line would continue in the same way, i.e., in a straight line, in the second section as far as the River Sirba, without having to state so expressly, especially since the use of the straight line was common in colonial practice. The fact that the Court, following the lead of the Parties, examines those two sections separately has the effect of breaking up the reading of the *Arrêté*: one first reads the passage relating to the course of the line between Tong-Tong and Tao, which is the subject of precise details ("this line then turns towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool"), providing all the information on the basis of which a line is easily established. This is followed by the section running from Tao to Bossébangou, in respect of which the *Arrêté* merely states that the line "reach[es] the River Sirba at Bossébangou", which, in contrast, does not therefore appear to be at all sufficient to identify its course. However, if the break at Tao had been disregarded and the *Arrêté* read as a continuous text instead, as the line itself is continuous, it would appear then that the text is describing an uninterrupted movement between Tong-Tong and Bossébangou, via Tao. The line, which the Court accepts as starting as a straight line at Tong-Tong, then continues after Tao in the same way, i.e., in a straight line as previously and in the absence of any indication to the contrary, until it "reach[es]" the Sirba at Bossébangou. Thus, if the *Arrêté* is read as a *continuous* description, a straight line becomes more plausible. The situation is different, however, and further precision is required for the other sections which the *Arrêté* categorically describes as being "straight" or "straight lines". In effect, those sections are preceded either by meandering passages, where the course of the River Sirba is followed, or by numerous changes of direction, and are not marked by the same continuity or similarity such as exists in the section between Tong-Tong and the River Sirba at Bossébangou. The need to make it clear that the line is straight is thus more pressing in those instances.

Finally, this straight line is by no means inconceivable, since it was adopted in 1988 as the "consensual line" by the Joint Technical Commission on Demarcation and later confirmed at a meeting held on 14 and 15 May 1991 by the Ministers of the two States, who recorded their agreement on such a course, shown on a sketch-map annexed to the joint communiqué they signed. That line would be challenged by Niger in 1994.

That challenge has no effect other than rendering the agreement henceforth inapplicable between the Parties and thus precluding, on that basis alone, the possibility of a straight line now being adopted. But that challenge does not mean that, for that reason and in itself, a straight line is now an objectively inappropriate means of joining the two points identified in the *Arrêté*.

Nevertheless, while both the above reading of the *Arrêté* and the reference to the consensual line, which is the illustration of that reading, give plausibility to the straight-line course, the problem remains that neither of these elements precludes a different interpretation of the *Arrêté*, in the absence of any detail in the text regarding the course of the line from the Tao marker to the River Sirba at Bossébangou. In other words, a straight-line course appears plausible, but it is not established on the basis of the text of the *Arrêté* or the interpretation which can be given of it. Hence, the *Arrêté* does not suffice and must be replaced by the 1960 IGN map. Not because the line shown on the map might appear better or more appropriate, but simply because the *Arrêté* does not allow for the course of the boundary to be determined. This distinction clearly brings to light the notion that the *Arrêté* does "not suffice" when it cannot be used to carry out the delimitation of the frontier. The *Arrêté* does "not suffice" when there is not enough information, or enough established information, in its terms, or in the interpretation thereof, to enable the desired solution to be achieved. In this connection, it should be pointed out that the 1927 *Arrêté* must be the first point of reference and all possibilities contained therein must be explored before it can be concluded that it does not suffice, which automatically calls for recourse to the 1960 IGN map. One might have expected the Court to seek a more suitable delimitation on other bases offered by international law; but, in this case, unfortunately, it is precluded from so doing by the Special Agreement.

The Court could have stopped there, with the observation that the *Arrêté* does not suffice, and could have decided on that basis alone that it was necessary to use the line shown on the 1960 IGN map. However, it wished to add further supporting evidence, allowing for a more in-depth interpretation of the text of the *Arrêté*.

The Court's second argument for rejecting Burkina Faso's position derives from the importance accorded to the Decree of the President of the French Republic of 28 December 1926, which attributed certain territories of Upper Volta to the Colony of Niger. The Court points out that, since the Decree was the "legal basis" (para. 85) of the *Arrêté*, the latter was supposed to "[respect] the pre-existing boundaries of the districts, to the extent that they could be determined" (para. 91). In other words, in the eyes of the Court, the Governor-General's power was limited to issuing an *Arrêté* which therefore had only declaratory value.

I disagree with this analysis and for my part believe that, although the *Arrêté* must of course respect the Decree, this legal requirement does not, however, prevent the *Arrêté* itself from having a true constitutive value,

not simply a declaratory value, resulting from the Governor-General being granted broader powers than those which are recognized by the Court. In effect, the *Arrêté* provides that the Governor-General "shall determine" the course of the boundary. It does not say "shall state" the course, which it should have done had the Governor-General been constrained by existing boundaries, which, moreover, could have been referred to in the Decree had they existed. Contrary to what is noted by the Court in paragraph 91, the Governor-General's task is not to determine a "new" inter-colonial boundary (which would mean that there had already been one), but, according to the text of the Decree, to "determine the course of the boundary" (thus demonstrating that there was no known boundary). This view also seems to me to correspond to that described by the Chamber of the Court in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 569, with respect to the Governor-General's power over the basic administrative divisions, the *cercles*, "the creation and abolition [of which] were the sole prerogative of the governor-general, who *decided their overall extent*" (emphasis added). In conclusion, therefore, the fact that, without being restricted simply to an implementing power, the Governor-General was careful to pay attention to any existing boundaries he found is, in my view, a matter of course and of normal administrative conduct. Nevertheless, that in no way prevents him from looking for more accurate boundaries, which he clearly did, as the Court observes in paragraph 92, but in a legal context which seems to me to be different to that set out by the Court.

In practical terms, the difference is of little importance. The fact is that, whatever the scope of his powers, the Governor-General did not succeed in fixing the boundaries, for which there is clearly no indication, as the Court states, "that they followed a straight line in the sector in question" (para. 93). If such had been the case, that straight line could have been quickly determined, without the need for the numerous, complex and ultimately fruitless inquiries carried out by the colonial administrators and, as the Court notes, "it would have been easy to plot [that] line on a map" *(ibid.)*.

Finally, I have some reservations about the third argument, based on the location of Bangaré, which is said to be situated in Niger, but which would be located in Burkina Faso if the boundary line were straight. I understand the reasoning of the Court, which states that, in respect of this village, "account should be taken of the practice followed by the colonial authorities concerning the implementation of the *Arrêté*" (para. 94), thus keeping its argument firmly and exclusively within the framework of the *Arrêté* and confirming that the *Arrêté* cannot therefore be interpreted as having intended to establish a straight-line delimitation. However, in the case of this village, as in the case of all the other villages situated on either side of the frontier with nomadic or semi-nomadic populations, it is not always clearly established on which side of the frontier these populations belong. It is also clear that the period during which

Upper Volta was dissolved in favour of Niger could have caused habits to form. In conclusion, therefore, while the Court is of the view that the case of Bangaré is different from that of Petelkolé or Oussaltane, to my mind, they all (and not simply the last two) entail uncertainties that one could try to eliminate by recourse to the colonial *effectivités*. However, they must be excluded since, as the Court recalls, "the 1987 Agreement requires the Court to apply the line shown on the 1960 IGN map, instead of referring to the *effectivités*" (para. 98). For that reason, since, unlike the Court, I believe that the case of Bangaré requires recourse to *effectivités*, I would not have invoked this third argument, which, moreover, I do not think is necessary to justify the recourse to the 1960 IGN map.

II. The Course of the Frontier in the Area of Bossébangou

I voted in favour of point 4 of the operative clause, despite the Court's position on the course of the boundary as it turns back up along the River Sirba, which, to my mind, raises a number of problems that I would like to set out.

A. The Endpoint of the Frontier at the River Sirba at Bossébangou

In paragraph 101 of its Judgment, the Court opts for a frontier situated in the middle of the River Sirba, as that solution "better me[ets]" "the requirement concerning access to water resources of all the people living in the riparian villages". That choice is fully justified from the point of view of equity and corresponds to a modern vision of international law, which favours co-operation and sharing over private appropriation and exclusive benefit, such as that which would arise in respect of the river from delimitation along the river bank.

However, the Court is not called upon to draw an equitable frontier, but a frontier based on the 1927 *Arrêté* or, should the latter not suffice, the 1960 IGN map. Consequently, without completely dismissing such considerations of equity, the Court has tried, although not entirely successfully, to keep its reasoning within the framework of the *Arrêté*.

In this respect, I have some reservations regarding the Court's interpretation of the terms of the *Arrêté* and the approach underpinning it.

1. The interpretation of the terms of the 1927 Arrêté

Whereas the 1927 *Arrêté* provides that the line continues from the Tao marker to "[reach] the River Sirba at Bossébangou", the Court, considering that "[t]he use of the verb 'reach' *('atteindre')* in the *Arrêté* does not suggest that the frontier line crosses the Sirba completely, meeting its right bank" (para. 101), decides that the endpoint of the frontier is situ-

ated on the median line of the river. In fact, I do not see any reason why that meaning should be attributed to the verb "reach" in this context and I think that, if this was what the author of the *Arrêté* had intended, he would have made this clear.

Given the wording of the text of the 1927 *Arrêté*, and recalling that the line first meets the left bank of the Sirba whereas Bossébangou is situated on the right bank, I cannot share the Court's interpretation. The verb "reach" clearly signifies that one arrives at a given point. If the text had said that the line "reaches the Sirba", without any further information, this would have meant that the line stopped as soon as it arrived at the river, thus on its left bank, without going any further and without crossing the river. This theory can be dismissed since, as the Court recalls, the text later states that the line cuts the Sirba "again". In order to do so, it must have cut it previously. Can the line have cut halfway across the Sirba at Bossébangou, as the Court contends? No, because the text states that the line "reach[es] the River Sirba at Bossébangou" (not "simply" the Sirba, not the Sirba "at the level of" Bossébangou, which would have been imprecise, but the Sirba "at Bossébangou"). For the line to reach the Sirba at Bossébangou, it must, therefore, continue as far as the right bank of the river, where that village is located. Thus, in order to reach that location, the line must have crossed (and will cross again later) the river completely.

2. The Court's approach

Under the strict terms of the Special Agreement, the Court must apply the 1927 *Arrêté* and the 1960 IGN map in accordance with the established procedures. In the present case, however, the Court has introduced an additional element in its approach, observing that

> "there is no evidence before the Court that the River Sirba in the area of Bossébangou was attributed entirely to one of the two colonies. In this regard, the Court notes that the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other." (Para. 101.)

While the Court's concern is easy to understand and the inclination to share it natural, there is, however, no avoiding the fact that, by advancing such a ground based on considerations of equity, in order better to justify its choice of the median line of the Sirba, the Court goes beyond what is asked of it, which is to apply the *Arrêté* or, should the latter not suffice, the 1960 IGN map. This is all that is allowed under the terms of the Special Agreement.

However, the difficulty here is that, in my eyes, the Court has not set out its position clearly. By stating that "[t]he use of the verb 'reach' *('atteindre') . . . does not suggest* that the frontier line crosses the Sirba

completely" (emphasis added), it implies that some uncertainty remained as to the terms of the *Arrêté* and the Court's interpretation of those terms. However, the Court did not consider that that uncertainty constituted a situation in which the *Arrêté* did not suffice and, in fact, it was of the opinion that, understood in that way, the 1927 *Arrêté* could form the basis of its decision in favour of the median line, which was thus, although not expressly stated, an equitable boundary.

The Court could also have drawn a different conclusion from that uncertainty and considered that it amounted to the *Arrêté* "not sufficing" and that recourse to the 1960 IGN map was necessary. However, the solution would then have been completely different. The map would in fact have indicated that the river is crossed "completely", and not partially, since four crosses representing the frontier cut across it from the left bank to the right bank and thus categorically place the point of arrival of the line on the right bank, a few hundred metres from Bossébangou. The Court's interpretation of the *Arrêté* therefore seems to differ from that of the IGN cartographers.

B. Turning Back up the Sirba

From the endpoint of the frontier line at the Sirba at Bossébangou, the line continues upstream, following the course of the river. I readily acknowledge that the *Arrêté* lacks any detail about this lengthy portion of the line, which stretches from the vicinity of Bossébangou as far as the point where the right bank of the Sirba intersects the Say parallel. According to the *Arrêté*, having reached the River Sirba at Bossébangou, the line "almost immediately turns back up towards the north-west, leaving to Niger, on the left bank of that river, a salient which includes the villages of Alfassi, Kouro, Tokalan, and Tankouro; then, turning back to the south, it again cuts the Sirba at the level of the Say parallel".

With a view to reinforcing its choice of endpoint, which sees the frontier line turn back up along the median line of the Sirba, the Court observes that

> "if the endpoint of the frontier were situated on the right bank of the Sirba close to Bossébangou, the line would have to 'cut' the Sirba a second time at an intermediate location in order, this time, to cross from the right bank to the left bank before 'cutting it again' in the other direction. But nothing of that nature is mentioned in the *Arrêté*." (Para. 101.)

In fact, with respect to the silence of the text, what the Court sees as justification for the frontier crossing only as far as the median line of the river (para. 102) could, in my opinion, just as easily be used to justify a complete crossing from one bank to the other. In this connection, it is established that, at a given point, the line must leave the Sirba, in order to leave to Niger the salient which includes the four villages (which have not all been identified). Even though the *Arrêté* does not in fact explicitly

state that the Sirba is crossed, the crossing from the right bank to the left bank is a logical and necessary consequence of the obligation to leave the four villages in question to Niger. If the Sirba was not crossed again, the villages would belong to Burkina Faso.

In conclusion, although the *Arrêté* admittedly remains silent, it is possible to deduce from the question of the salient and the four villages that the line crosses the river. As for the nature of that crossing (partial or complete), this can be deduced from the point determined at Bossébangou (middle of the river or its right bank). What remains unknown is the location of that crossing, on which subject the *Arrêté* is silent and thus does not suffice. This calls for recourse to the 1960 IGN map. That map indicates that the line crosses the river at co-ordinates 13° 20′ 01.8″ N and 01° 07′ 29.3″ E.

It should be noted here that, on the 1960 IGN map, that crossing is marked by three crosses, which cut across the Sirba completely, from one bank to the other, in exactly the same way as at Bossébangou, where, as stated above, four crosses cut the river from one bank to the other.

Between those two crossing points, the map shows a series of crosses along the right bank of the River Sirba, which seems to suggest that delimitation occurs along the right bank.

Such are the reasons why I believe that my interpretation of the *Arrêté* calls for delimitation along the right bank of the Sirba.

My position is based solely on the terms of the *Arrêté* as I interpret them (and my interpretation is confirmed by the indications on the map) — an interpretation which is different from that of the Court — and on the provisions of the Special Agreement, which require that the *Arrêté* be applied first, and then, should this not suffice, the 1960 IGN map, and nothing more. I am aware — as I have already indicated — that in terms of equity this solution is not satisfactory. However, for the reasons given, I think that it should have been the solution chosen by the Court, which should, in my opinion, either by adding to the text of paragraph 112 of the Judgment, or by drafting a separate paragraph on that subject, have drawn the attention of the Parties — and the attention of Burkina Faso, in particular — to the obligation to take account of the needs of the populations and to co-operate in order to mitigate the less equitable elements of its decision. In any event and considering the situation in very concrete and practical terms, had it been decided to delimit along the river bank in this way, it is difficult to imagine Burkina Faso establishing a fence along the right bank of the Sirba, preventing Niger inhabitants in the area from continuing to draw water from the Sirba and from watering their herds at the river, as doubtless they always have done. With respect to the inhabitants of Bossébangou, probably the largest population in that area, they would in any event have had full access to the river on the right (to the east) of the frontier post installed on the right bank of the Sirba. In conclusion, therefore, it is likely that over these few dozen kilometres, the

Niger populations would not have encountered any significant problems had the Court opted for delimitation along the river bank rather than deciding in favour of the median line.

The Court, however, did opt for the median line, and although I voted in favour of this part of the operative clause — in spite of the arguments which I have just set out — I did so mainly because the clause also covers other important portions of the frontier, in respect of which I wished to record my agreement. I did so as well because it seemed to me that, in the case of the River Sirba, a strict application of the *Arrêté*, in accordance with my understanding thereof, which, I have said, is based solely on the Special Agreement and without any considerations of equity, would create an unduly formalistic result. In my opinion, this demonstrates the limits of *uti possidetis*, the application of which is not always in keeping with present-day situations. In this particular case, neither its object in 1927, nor the later stabilizing effect which it sought and was able to provide at the time of the two States' accession to independence more than half a century ago, is suited to today's needs, nor were they, as far as the river delimitation is concerned, at the time of independence. In effect, in 1927, the challenges posed by a boundary between two territories within the same administrative colony were not the same. The boundary chosen at that time was aimed above all at convenience (it is easier to identify a boundary along the bank of a river than in the middle of a river, which varies significantly according to the season) and, in all likelihood, the possibility of difficulties of access to the water resources was not even considered. Indeed, I do not think that such access could be affected by delimitation at that time, since delimitation was strictly internal and not intended to interfere with behaviour and customs which, moreover, dated back to well before the colonial occupation, including drawing water from the river for domestic purposes, taking advantage of the moisture in the soil in certain seasons to grow crops and using the river to water the herds of the nomadic and semi-nomadic populations who have traditionally roamed freely on either side of the river. On the other hand, those same rights exercised today, in the context of an international frontier, must be articulated and safeguarded, and pose the biggest challenge along every part of the line, which is no longer a mere administrative and internal boundary within a single colonial territory, but an international frontier between two independent and sovereign States. While there is no established rule on this subject, it would seem, however, that those treaties which establish delimitation along the bank, of which, moreover, there are very few, were concluded a long time ago and no longer reflect current practice, in which the use of either the thalweg or the median line is preferred, depending on whether or not the water course is navigable.

(Signed) Yves DAUDET.