Non corrigé
Uncorrected

Traduction
Translation

CR 2012/22 (traduction)

CR 2012/22 (translation)

Jeudi 11 octobre 2012 à 15 heures

Thursday 11 October 2012 at 3 p.m.

10 The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the first round of oral argument of the Republic of Niger, which it will conclude at the sitting to be held on Friday 12 October at 3 p.m. I now give the floor to His Excellency Mr. Mohamed Bazoum, Minister and Agent of the Republic of Niger. Sir, you have the floor.

Mr. BAZOUM:

1. Mr. President, Members of the Court, it is a great honour and real pleasure for me to take the floor before you today as Agent of the Republic of Niger in the frontier dispute between my country and Burkina Faso. I should like to begin by conveying to you, Mr. President, Members of the Court, warm greetings from His Excellency Mr. Issoufou Mahamadou, President of the Republic of Niger, who has great faith in your Court. At the same time I should also like to convey to you the greetings of the Government and people of Niger.

And to you, my dear brothers from Burkina Faso, I convey my fraternal and friendly salutations.

2. Mr. President, I would just take this opportunity to remind you that Niger and Burkina Faso are two brother countries, united by history, economics, culture and geography.

3. They share sizeable ethnic communities along their common frontier, united by a multiplicity of ties, as is shown, for example, by the institution of "joking relationships" between certain of those communities. These ties have remained intact, despite the territorial changes which, over time, have affected the region.

4. I am convinced that, in settling this frontier dispute, the Court will provide both countries with the opportunity to strengthen still further the strong and numerous ties which have always united them: the definitive delimitation of their common frontier will provide each State with precise knowledge of the boundaries of its territory, and hence of the physical extent of its sovereignty. The frontier will no longer be a cause of dissension between our two States, but more than ever a bridge between our two peoples.

11 5. I would recall that no less than 17 bilateral co-operation agreements link our two countries. The Monitoring and Evaluation Committee of the Greater Joint Niger-Burkina

Co-operation Commission, which met in March of this year, reported on this co-operation, judging it to be close and profitable to both countries.

6. Many of Niger's exports and imports travel for long distances through Burkina's territory. This trade, which is of decisive importance for my country, takes place under conditions which we regard as very favourable, and I take this opportunity to pay well-deserved tribute in this respect to the authorities and people of Burkina Faso. Moreover, Presidents Issoufou Mahamadou and Blaise Compaoré have always enjoyed personal relations of sincere friendship and high reciprocal esteem.

7. Mr. President, Members of the Court, notwithstanding the favourable context that I have just described, which has enabled Niger and Burkina Faso to maintain relations of brotherhood, friendship and good neighbourliness, the two countries are experiencing certain difficulties in managing their frontier zone, precisely because of the uncertainty over the line of their common boundary. These difficulties date back to the colonial period and have not disappeared with the acquisition by the two countries of international sovereignty. Their consequences are constant arguments over access to natural resources (land, water, pasturage) and their utilization, accentuated by the fact that certain of the peoples in question lead a semi-nomadic existence.

8. During the colonial period, there were many complaints within the two colonies over the uncertainties in connection with the territorial boundary. More particularly, the colonial administrators, both of Upper Volta and of Niger, criticized the lack of precision and inaccuracy of the inter-colonial boundary as fixed by the *Arreté* of 31 August 1927[1] and its Erratum of 5 October of the same year[2], whose terms have been described, on numerous occasions, as insufficient and defective[3].

9. These criticisms continued after the two countries attained independence[4], all the more so in that the transformation of the inter-colonial boundary into an international frontier resulted in

12 new types of conflict. These were territorial disputes between two sovereign States relating in

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[1]MN, Ann. B 26.

[2]MN, Ann. B 27.

[3]MN, paras. 2.3-2.8.

[4]See in particular MN, paras. 2.9-2.11.

many cases to the question of which of the two countries had sovereignty over a particular village. At the same time, questions arose as to the nationality of certain peoples, particularly those residing between Dori and Téra. In addition, the uncertainty as to the precise course of the frontier gave rise to problems for State officials, in particular members of the security forces of the two countries, in the performance of their duties, when it was unclear which areas each State regarded as its territory.

10. Faced with these recurrent problems, the Governments of the two States made numerous efforts to identify the precise line of the frontier.

Thus, ever since their acquisition of international sovereignty, Burkina Faso and the Republic of Niger have endeavoured to achieve a peaceful settlement of their frontier dispute by jointly determining the precise course of their frontier and demarcating it. They have done so with remarkable concern to maintain their relations of friendship and good neighbourliness, and to keep the peace on the ground between the inhabitants of the frontier areas involved.

11. To this end, a number of meetings took place between the local frontier authorities concerned. These meetings were given official status with the signature in Niamey, as far back as 1964, of a Protocol of Agreement[5] aimed at settling the practical problems arising in the management of the common frontier. This Agreement addressed in particular the question of the delimitation of the frontier between the two countries. It set up a Joint Commission of not more than ten members, necessarily including the heads of the relevant administrative divisions, which was tasked with undertaking the work of demarcation of the frontier.

In January 1968, the two States agreed on the idea of entrusting the task of demarcation of their entire common frontier to the French *Institut géographique national* (IGN)[6]. However, this project could not be implemented.

12. Some years later, after a period marked by a slow-down in the activities of the Joint Commission, the two Governments renewed initiatives at diplomatic level. Thus in 1985, Niger's
13 Minister-Delegate for the Interior and the Minister for Territorial Administration and Security of Burkina Faso met in Niamey[7]. Two years later, the Agreement and Protocol of 28 March 1987

[5]MN, Ann. A 1.

[6]CMN, paras. 1.2.5-1.2.6.

[7]MN, Ann. A 2.

were signed between the Government of Burkina Faso and the Government of the Republic of Niger on the demarcation of the frontier between the two countries[8]. The Agreement established a Joint Technical Commission on the Demarcation of the frontier, whose work enabled the two States to sign an agreement in 2009 settling the course of certain sections of the frontier.

13. As you know, these efforts resulted in the delimitation and demarcation of only half of the frontier. Unable to agree on the remainder, in February 2009 the two States signed the Special Agreement whereby they entrusted the Court with settlement of that part of the frontier which was still in dispute[9].

Article 2 of the Special Agreement asked the Court, first, to determine the course of the frontier between Burkina Faso and Niger in the sector from the astronomic marker of Tong-Tong to the beginning of the Botou bend, on which no agreement could be reached, and, secondly, to place on record the Parties' agreement on the results of the work of the Joint Technical Commission on Demarcation of the common frontier.

14. Niger considers, as it has always maintained in its written pleadings, that the second part of Article 2 of the Special Agreement was unnecessary. The agreement between the two States on the demarcated sectors was final and has never been disputed since. Although it cannot see the point of this request by Burkina Faso, Niger did not wish to oppose it. In any event, as regards the agreement between the Parties, that is to say the exchange of Notes between Niger and Burkina Faso of 29 October and 2 November 2009[10], which manifestly constitutes an agreement under international law, my country has ratified it in accordance with Article 7 of the Agreement of 28 March 1987, which provides: "The result of the demarcation works shall be embodied in a legal instrument, which shall be submitted for signature and ratification by the two Contracting Parties."[11]

14 As a result, Niger considers that it has complied with all of its obligations under international law on this issue. If there are any doubts as to the legal scope of this agreement, they will certainly

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[8]MN, Ann. A 4.

[9]MN, Ann. A 13.

[10]MN, Anns. A 16 and 17.

[11]MN, Ann. A 4.

not be found on Niger's side. However, since the request was addressed to the Court, it is for the latter to determine its pertinence.

15. For Niger, just as for Burkina Faso, this is the second time that our two States have placed their confidence in the Court in order to achieve a peaceful and final settlement of a frontier dispute with one of their neighbours. I take this opportunity to reaffirm the confidence that the Government of the Republic of Niger has placed in the Court by deciding to have recourse to it and to accept its decision.

I am convinced that, whatever the outcome of the present case, this wise choice will help to strengthen the neighbourly relations between our countries, to the greater benefit of our respective peoples.

16. Mr. President, Members of the Court, I cannot, however, refrain from observing that the Government of the Republic of Niger was surprised by the tone employed in Burkina Faso's written pleadings. That tone contrasts unhelpfully with the cordial and friendly relations between our two countries, and has certainly contributed nothing to maintaining the calm atmosphere of the debate. Niger is in fact a country which is particularly concerned to respect its obligations and which maintains a relationship of trust with all of those with whom it deals. I thus fail to recognize my country in this image of unreliability and capriciousness that our opponents have sought to attach to it throughout their oral argument — and one which I therefore vigorously contest.

17. In regard to the allegation that Niger has frequently changed position in its line of argument, I would simply note that the work of the Joint Commission was admittedly marked by certain changes of position on the part of Niger's experts, although the position of Burkina Faso was not altogether consistent either. However, it was only after lengthy archival research and the most detailed analysis of the relevant documents that Niger was gradually able to form a view, both on the complex facts of the dispute and on the legal rules which should be applied to them. Every frontier problem leads States to examine their past and to discover more about it. Niger has been

no exception to this rule. As long as a negotiation has not been finally closed, it is wrong to accuse a party of vacillation. On the contrary, this reflects an open-mindedness, a dialogue between a sincere wish to put an end to a dispute and the legitimate defence of one's rights, which become clearer as the facts underlying them become known. If things were straightforward and clear, there

would simply not have been any dispute. That is why, on certain issues, Niger has to some extent changed its position as between its Memorial and its Counter-Memorial. We admit this, and we believe that the Court will understand it.

18. It is not my duty to explain to you the result of our researches and discussions. Niger's distinguished counsel will endeavour to do so over the coming hours. Mr. President, Members of the Court, I should like to introduce them to you, even though you know some of them already. They are:

— Professor Jean Salmon, Professor emeritus of the Université libre de Bruxelles, Member of the Institut de droit international;

— Professor Maurice Kamto, Professor at the University of Yaoundé II, member of the Permanent Court of Arbitration, Member and former Chairman of the United Nations International Law Commission, associate member of the Institut de droit international;

— Professor Pierre Klein, Professor at the Université libre de Bruxelles; and

— Professor Amadou Tankoano, Professor at Abdou Moumouni University in Niamey.

19. I thank you, Mr. President, Members of the Court, for your kind attention, and I would ask you to give the floor to Professor Amadou Tankaona, who is going to explain the historical background to the case in the context of French West Africa.

Thank you, Mr. President.

The PRESIDENT: Thank you, Mr. Bazoum. I now give the floor to Professor Amadou Tankaona. You have the floor, Sir.

16 Mr. TANKOANO:

THE HISTORICAL CONTEXT OF THE COLONIAL PERIOD: FRENCH WEST AFRICA

1. Mr. President, Members of the Court, it is a great honour for me to speak in these proceedings and to serve the cause of my country once again. The Republic of Niger has chosen to begin its counsel's pleadings with a presentation of the historical context of the colonial period in French West Africa (FWA). Certain aspects of the historical context have already been presented to you by Burkina Faso's counsel. However, allow me to dwell on a number of aspects of these

historical developments in order to illustrate the territorial changes and transfers which occurred in the frontier region. To that end, I shall present to you the following points in turn: firstly, the administrative and territorial organization of French West Africa from its creation to independence (A); secondly, the division of powers between the French metropolitan and colonial authorities in respect of the creation of colonies and of administrative divisions within the territories (B); thirdly, Niger's territorial changes and the various incarnations of the Colony of Upper Volta (C); and, finally, the territorial changes and transfers in the frontier region (D).

A. The administrative and territorial organization of FWA from its creation to independence

2. In accordance with French methods of gradual conquest, the conquest of West Africa was based on the principle of slowly spreading outwards. This consisted in starting from bases gained in opposing territories ("tatas" or fortified villages) and gradually tightening the net to gain control of all the territories of the defeated indigenous chiefs. As the French penetrated, occupied and settled in French West Africa, a group of colonies was formed, separated along the coast by enclaves belonging to other powers, but adjoining in the hinterland.

3. [Slide] The Government of Senegal, the first French settlement in the region, formed in 1840, gradually spread into the hinterland of Senegal, into a region that gave birth to a new colony
17 named French Sudan. Besides these two colonies, other French settlements became established on the Atlantic coast, in particular Côte d'Ivoire, Dahomey and French Guinea. Each settlement was administered separately. It was nevertheless apparent to the colonial authorities that these different entities should form a whole. The French authorities decided to unite all the colonies of West Africa into one group to ensure political and military coherence, while maintaining the distinct individual character of each colony. [End of slide] The union was established by a decree of 16 June 1895 — under the name of French West Africa — and would endure to the end of the colonial period.

4. In establishing a Government-General for FWA, the intention was to create an organ responsible for co-ordinating activities and resolving conflicts among the various component territories, whose interests sometimes differed.

5. In 1904, a "Charter for FWA" endowed this body with legal personality, and with separate organs for its constituent colonies. This text would continue to apply throughout the colonial period, except for a few minor changes.

6. [Slide of map showing all of FWA] At the dawn of independence, French West Africa was composed of the following territories: Côte d'Ivoire, Dahomey (present-day Benin), Guinea, Upper Volta (present-day Burkina Faso), Mauritania, Niger, Senegal and French Sudan (present-day Mali)[12]. From 1946, the term overseas territory ("territoire d'outre-mer") replaced that of colony. [End of slide]

7. As we shall now see, the creation of colonies at first, and then of the overseas territories comprising FWA, fell within the competence of the French metropolitan authorities. As for the determination of administrative divisions within the territories, this was the responsibility of the regional colonial authorities.

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B. The division of powers between the French metropolitan and colonial authorities in respect of the creation of colonies and of administrative divisions within the territories

8. In order to describe the administrative structure of FWA, I trust that the Court will not object to us using the words that the Chamber itself used in the case concerning the *Frontier Dispute (Benin/Niger)* [Note: the Judgment uses the French abbreviation AOF instead of FWA]:

> "the territorial administration of the French possessions in West Africa was centralized by a decree of the President of the French Republic of 16 June 1895 and placed under the authority of a Governor-General. The entity of the AOF thus created was divided into colonies, headed by Lieutenant-Governors and themselves made up of basic units called 'cercles' which were administered by *commandants de cercle*; each *cercle* was in turn composed of *subdivisions*, each administered by a *chef de subdivision*. The *subdivisions* consisted of *cantons*, which grouped together a number of villages." (*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005,* p. 110, para. 29.)

As for the question of competence for the creation of colonies, the Chamber of the Court stated as follows:

> "the creation and abolition of colonies fell within the jurisdiction of the authorities of metropolitan France: the President of the French Republic, acting by decree, under the Constitution of the Third Republic, and subsequently the French Parliament, following the adoption of the Constitution of 27 October 1946" (*ibid.*, p. 110, para. 30).

[12] MN, pp. 5-6, para. 1.3.

Lastly, regarding the creation of *cercles* within the colonies, the Chamber added that:

> "[t]he power to create territorial subdivisions within a single colony, on the other hand, was vested in the AOF until being transferred to the local representative institutions in 1957.
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> Article 5 of the decree of the President of the French Republic, dated 18 October 1904, providing for the reorganization of the AOF, vested the Governor-General with authority to 'determine in government council *(conseil de gouvernement)*, and on the proposal of the Lieutenant-Governors concerned, the administrative districts in each of the colonies'." *(Ibid.)*

Regarding the procedure to be followed, the Chamber referred to circular No. 114 *(c)* of 3 November 1912 concerning the form of instruments for the organization of administrative districts and subdivisions, and stated that:

> "'any measure concerning the administrative district, the territorial unit proper, i.e. affecting the *cercle*, in terms of its existence (creation or abolition), its extent, its name, or the location of its administrative centre', was to be confirmed by an *arrêté général* adopted in government council [of FWA]; it lay with the Lieutenant-Governors 'to define, by means of *arrêtés*, the approval of which [was] reserved to [the Governor-General], the exact and detailed topographical boundaries of each of these districts', as well as 'within the *cercles*, [to] fix . . . the number and extent of the territorial subdivisions . . . and the location of their centre' by means of local decisions" (*ibid.*, p. 111, para. 30).

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9. Against this backdrop, we shall now see in concrete terms how the territories of Niger and Upper Volta evolved during the colonial period.

C. Niger's territorial changes and the various incarnations of the Colony of Upper Volta

10. The presentation which follows is relatively complex, as it recounts the name-changes and successive reorganizations of French colonial territory in the region, made by the administrative authorities following conquest, military occupation and the pacification process. After that last stage, what initially constituted a military territory placed under the authority of the colonial army would subsequently be converted into civil territory and then into a colony.

[Slide showing map]

11. In the course of the development of colonial organization in the region, the details of which we shall spare the Court, a Decree of 20 December 1900 established the territorial basis of a

Third Military Territory[13] situated on the left bank of the River Niger, a geographical area which would later become the Colony and then the State of Niger.

[End of slide]

12. [Slide] In 1904, there was a reorganization, through which the Colony of Haut-Sénégal et Niger was created[14]. This colony comprised the *cercles* under civil administration and the Military Territory of Niger. In 1919, a Decree detached certain southern and eastern *cercles*, including Dori and Say, from the Colony of Haut-Sénégal et Niger, in order to make up the new Colony of Upper Volta. The boundary between Upper Volta and the Military Territory of Niger was fixed at that time at the River Niger[15].

[End of slide]

13. On 4 December 1920, the Military Territory of Niger was to take the name "Territory of Niger"[16] before becoming, on 13 October 1922, the Colony of Niger[17].

20 14. [Slide] In 1932, a Decree[18] dissolved Upper Volta and distributed its component *cercles* between the neighbouring colonies of Niger, French Sudan and Côte d'Ivoire. [End of slide] When the 1946 Constitution came into force, the French colonial empire became known as the French Union, as part of which [Slide], on 4 September 1947, the French National Assembly reconstituted the Colony of Upper Volta within its 1932 boundaries[19]. [End of slide] That situation would not change until 1960.

15. Mr. President, Members of the Court, the last point in my presentation will be an examination of the territorial changes and transfers in the frontier region.

D. The territorial changes and transfers in the frontier region

16. [Slide] When the French first settled in the region, in 1897, the currently disputed area was part of the Colony of French Sudan. In 1899, following the dismemberment of French Sudan,

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[13]MN, pp. 7-8, para. 1.9.

[14]MN, p. 9, para. 1.12.

[15]MN, p. 14, para. 1.17.

[16]MN, p. 15, para. 1.19.

[17]MN, p. 16, para. 1.21.

[18]MN, Ann. B 29.

[19]MN, Ann. B 30.

which led to the creation of the First and Second Military Territories, the post of Dounzou, which had been converted to a *cercle* in October 1899, and Dori *résidence* were incorporated into the First Military Territory. The Territory of Say, for its part, was incorporated into the Colony of Dahomey[20]. It is important to note that Dounzou *cercle*, which was to become Tillabéry *cercle*[21] in December 1907, straddled both banks of the River Niger. The part of that *cercle* situated on the right bank was commonly known as the Téra sector. That area would subsequently maintain the same configuration. [End of slide. Next slide] As for Say *cercle*, it was removed from the Colony of Dahomey, also in 1907, and incorporated into the Military Territory of Niger, which was part of the Colony of Haut-Sénégal et Niger[22]. It was incorporated into Djerma *cercle* as a subdivision. Like the Téra sector, Say *cercle* would subsequently maintain the same configuration. [End of slide. Next slide] On 21 June 1909, Dori *résidence*, which had previously become Dori *cercle*,

21 was detached from the Military Territory of Niger and incorporated into the Civil Territory of Haut-Sénégal et Niger[23]. [End of slide]

17. [Slide] In 1910, following an *Arrêté* of the Governor-General of FWA, the *cantons* of Say *cercle*, on the one hand, and those of Tillabéry *cercle* situated on the right bank of the River Niger, on the other, were incorporated into the Civil Territory of Haut-Sénégal et Niger[24]. Those *cantons* of Tillabéry *cercle* situated on the right bank of the River Niger were incorporated into Dori *cercle*[25], within which they were to form a new administrative division, Téra Subdivision. [End of slide]

18. [Slide] The Decree of 1 March 1919 detached seven southern and eastern *cercles*, including those of Dori and Say, from the Colony of Haut-Sénégal et Niger, in order to make up the new Colony of Upper Volta[26]. Following the creation of that Colony, Téra Subdivision was directly administered from Dori *cercle*[27]. [End of slide]

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[20]MN, p. 8, para. 1.10 (Ann. B 2).

[21]MN, p. 11, para. 1.15.

[22]MN, p. 10, para. 1.14.

[23]MN, p. 12, para. 1.15 (Ann. B 13).

[24]MN, p. 12-13, para. 1.15.

[25]MN, p. 12, para. 1.15 (Ann. B 14).

[26]MBF, Ann. 16.

[27]MN, p. 14, para. 1.18 (Ann. B 19).

19. The Decree of the President of the French Republic of 28 December 1926 made further transfers of territory in the region. [Slide] Say *cercle*, with the exception of Gourmantché Botou *canton*, which remained part of Upper Volta, were to be returned to the Colony of Niger. The *cantons* of Dori *cercle* which had previously been part of the Military Territory of Niger, namely the Téra and Yatacala regions, which had been detached from it in 1910[28], were also to be returned to Niger. The latter were incorporated into Tillabéry Subdivision in order to reconstitute Tillabéry *cercle* as it had existed in 1907, straddling both banks of the River Niger. Following this incorporation, the *Arrêté* of 31 August 1927 and its Erratum of 5 October 1927 were adopted to fix the boundary between the two colonies. An *Arrêté local* of 3 November 1928 recreated Téra subdivision within Tillabéry *cercle* and established its administrative centre at Téra[29]. [End of slide]

22 20. Allow me, Mr. President and Members of the Court, to make a clarification at this stage. Our opponents have, on various occasions, been exercised by the fact that in its written submissions, Niger divided the disputed area into two sectors: Say sector and Téra sector[30]. The other Party has apparently perceived, in the use of this term, a propensity on the part of Niger to consider those sectors from a purely national perspective. Let me put Burkina Faso's mind at rest. Niger uses this terminology without any imperialist or solipsistic connotations; it does so simply because the two entities, which were transferred from the Colony of Upper Volta and incorporated into the Colony of Niger, have always been referred to in that way.

21. The dissolution of the Colony of Upper Volta in 1932 and its reconstitution in 1947 did not entail any changes to the boundaries of the *cercles* situated in the disputed area. From 1948 until the colony gained its independence, there were to be no further changes to those boundaries.

22. Mr. President, Members of the Court, I am only too aware of the fact that this presentation may have seemed a trifle tedious to you at times. However, it does allow us to set out the precise historical backdrop against which relations between the two colonies have developed. Furthermore, it allows an essential conclusion to be drawn, regarding the stability of the

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[28]See above, para. 17.

[29]MN, p. 22, para. 1.27 (Ann. B 28).

[30]CR 2012/20, p. 11, para. 53 (Pellet) and p. 15, para. 11 (Forteau)

configuration of the territorial entities which were moved about by the colonial authorities in the course of the territorial reorganizations in the region concerned by the present dispute.

23. In the French colonial system, the *cercle* stands out as the core administrative unit. Its importance is shown most strikingly by the fact that the Decree of 1 March 1919 created the Colony of Upper Volta by detaching certain southern and eastern *cercles* from the Colony of Haut-Sénégal et Niger[31]. The same approach can be seen again when Upper Volta was dismembered in 1932 and reconstituted in 1947. Each time, the colonial authorities proceeded by transferring *cercles*, without addressing the issue of their boundaries. If you will allow me to use this metaphor, it was as if the colonial authorities were working on a jigsaw puzzle, always with the same pieces. The pieces of the puzzle did not change; all that varied was the way they were put together. The same principle applied to Say *cercle*. Throughout its successive transfers to and from the various territories and colonies created in the region, that *cercle* kept the same

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configuration. The latter would change only when Gourmantché Botou *canton* was excised from it in December 1926. It is thus patently clear that throughout this period, the *cercle* boundaries showed greater continuity than those of the colonies. Those boundaries were in reality de facto boundaries, only rarely laid down in texts, as would be the case for Say from 1927 onwards.

24. Such continuity was also to be found in the subordinate administrative units, when a *cercle* was dismembered or its territorial basis amended. In such cases, the colonial authorities restricted themselves to moving around already existing subdivisions or *cantons* and incorporating them into another *cercle* or territory. In this way, the Decree of 28 December 1926 went about redistributing territory between the Colonies of Niger and Upper Volta by moving *cantons* from one colony to another. [Slide] And as was the case for Say *cercle*, it may be observed that the so-called Téra sector, under various different names, would always keep its original boundaries and shape. Indeed, when the Dori *cantons* situated in the region of Téra and Yacatala, formerly belonging to the Military Territory of Niger, were detached from Upper Volta and incorporated into the Colony of Niger, this revived the pre-existing boundary of 1910[32], which separated Dori

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[31]See above, para. 18.

[32]See above, para. 17.

and Tillabéry *cercles*. [End of slide] Tomorrow, Professor Jean Salmon will come back to that pre-existing 1910 line in his presentation on the boundary in the Téra sector.

25. Mr. President, Members of the Court, I should like to thank you very much for your attention. Mr. President, I should be grateful if you would kindly give the floor to Professor Jean Salmon to continue Niger's oral argument.

The PRESIDENT: Thank you, Professor. I now give the floor to Professor Jean Salmon to continue Niger's presentations. You have the floor, Sir.

24 Mr. SALMON:

THE PARTIES' LINES OF ARGUMENT: GENERAL POINTS

1. Mr. President, Members of the Court, the passing years have not in any way diminished the honour that I feel in standing once again at this podium. Once again, it is to the Government of Niger that I owe this honour.

In the present dispute, according to the Special Agreement (which can be found at tab 1 of the judges' folder), the two Parties seem to agree, at least in principle, on two points: the subject of the dispute, which is set out in Article 2 of the Special Agreement, and the applicable law, which is dealt with in Article 6.

A. The subject of the dispute: Article 2 of the Special Agreement seising the Court

[Slide: Sketch-map/diagram showing an overview of the frontier, MN, p. 79]

2. As regards the subject of the dispute, the text of Article 2 is equivocal. The only section of the frontier about which a legal dispute exists is the one which runs from the Tong-Tong astronomic marker to Tchenguiliba, at the beginning of the Botou bend. It is mentioned in paragraph 1. As for the other two sections, to the north (from N'Gouma to Tong-Tong) and to the south (from the beginning of the Botou bend to the Mekrou), which are mentioned in paragraph 2, the Parties only request the Court to place their agreement on record.

[End of slide]

3. During the course of the oral argument, this paragraph 2 has taken a dramatic turn, which calls for a clarification. This paragraph was inserted in the Special Agreement at the express request of Burkina Faso. Niger had reservations about this, for two reasons. The first is that it regarded the agreement that had been reached as definitive. The best proof of this, as the Agent of Niger has just recalled, is that the process of ratifying that agreement has been concluded in Niger. The second is that the Court's function is to settle legal disputes that exist between Parties, and not to intervene where one no longer exists. Dare I say: what would it hope to achieve here? Not wishing to prevent the signature of the Special Agreement on account of a clause which it deemed to be redundant, and considering that the Court would best decide how this request should be dealt with, Niger signed and ratified the Special Agreement as thus drafted. It thought the matter closed. Alas, imagine our astonishment to see our legal scruples suddenly being presented as a manoeuvre,

25 since "accustomed to the about-turns of our opponents, we wanted this agreement to be confirmed by the Court, so that the entire course of the frontier should carry the authority of *res judicata*"[33]. Those were the words of the distinguished Agent of the other Party.

Next we have Professor Pellet, invoking "Niger's about-turns", stating that "Niger is quick to hold such agreements null and void", that "this is not a dispute that has been settled", and that the placing on record by the Court "confers greater stability on the solution thus to be established than would a mere agreement . . . *res judicata* can only be called into question in the event of the discovery of a new fact within the meaning of Article 61, paragraph 1, of the Statute of the Court, and this under the latter's strict control"[34]. Mr. President, Members of the Court, these remarks are audacious in law. But, over and above that, this conduct is particularly offensive towards Niger, since it is being accused of eating its words, of being a State that is not to be trusted. Calumny always leaves its mark!

What is the situation exactly? The Special Agreement declares:

> "Whereas, thanks to the work of the Joint Technical Commission on Demarcation . . . the Parties have been able to reach agreement in respect of the [following] sectors of the boundary [there follow the two sectors] . . . Whereas the two Parties accept the results of the work carried out in those sectors as definitive."

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[33]CR 2012/19, p. 15, para. 9 (Bougouma).

[34]CR 2012/21, pp. 29-30, para. 9 (Pellet).

Although Niger is formally bound by this agreement, it is insinuated that it may fail to comply with its international obligations. The intention is to replace that international agreement with *res judicata* which may, for its part, be called into question "in the event of the discovery of a new fact". The Court will decide which Party is leaving itself an escape route.

B. The applicable law: Article 6 of the Special Agreement seising the Court

4. As regards the applicable law, Article 6 of the Special Agreement expressly refers to three elements: the principle of the intangibility of boundaries inherited from colonization — in other words, the principle of the *uti possidetis juris* of 1960 — the Agreement concluded between the Parties on 28 March 1987 and, finally, general international law. As Professor Tankoano has just

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demonstrated, the present dispute opposes two former colonies which were dependent on one and the same colonial power. This scenario is distinct from one in which the parties are States which were subject, prior to independence, to different colonial powers. In this latter hypothesis, the boundaries are fixed by international conventions, which are governed by the law of treaties, or they result from other forms of agreements between those colonial powers, based on acquiescence, for example. In this particular case, as our colleague Professor Amadou Tankoano has explained, Upper Volta and Niger formed part of French West Africa, a regional grouping of French colonies, which was governed by the law which France termed at the time the *droit d'outre-mer*. The Court has already been confronted with this situation in the cases *Frontier Dispute (Burkina Faso/Republic of Mali)* (1986)[35] and *Frontier Dispute (Benin/Niger)* (2005)[36].

5. In such cases, the traditional method used to establish what the boundary between the two colonies was at the date of independence is, in the first instance, to look back in time and identify which decisions of the common colonial authority fixed the boundaries. There is no discussion in this regard, since the relevant colonial texts are those which are specifically referred to by the Agreement of 28 March 1987. They are the *Arrêté général* of 31 August 1927, as clarified by its Erratum of 5 October 1927 (the Members of the Court are already well acquainted with these texts, but they will find them at tabs 2 and 3 of the judges' folder).

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[35] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986,* p. 554.

[36] *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005,* p. 90.

6. The question is therefore how to apply these two texts and, where necessary, how to interpret them.

From this moment on, the reasoning of the two Parties is completely different.

7. Burkina Faso adopts a resolutely theoretical and abstract line of argument in its written pleadings and oral argument. It regards the Erratum of October 1927 as sacred. It is "the title". In its view, that title is composed, for the most part, of artificial and arbitrary straight lines, in the best colonialist tradition. Burkina Faso considers it to be perfectly clear, to resolve all the questions and not to require any interpretation. It does not believe that there is any need to ascertain whether it is

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based on *effectivités*; in its view, the Erratum effects a final delimitation and it is sufficient to apply, on the ground, what it prescribes.

Having shown, once and for all, the way of truth, the opposing Party, with the assurance of those to whom the faith has been revealed, arrogantly crushes those who do not share its certainty. Anything that does not fit its adopted Procrustean bed is subject to the torture of inadmissibility. Consequently, the method adopted by Niger is "muddled and selective"[37] and displays "shortcomings"[38]; its arguments are "inconsistent"[39], "misrepresent" the texts[40], "invent frontier points"[41] and display a "casual" attitude[42], to take a sample of the glowing assessments of the opposing Party, which have been selected from around a hundred of the same ilk in its written pleadings. And the flood has not abated in the oral argument.

8. This wonderful assurance would be convincing if we had not been asking questions about the meaning of the 1927 *Arrêté général* and its Erratum for the last 85 years. [Slide: Sketch-map/diagram showing an overview of the frontier, MN, p. 79] Although, during the course of the negotiations subsequent to independence, the section which runs from the beginning of the Botou bend to the Mekrou did not raise any problems, all the rest of the boundary was fiercely debated, and it was only after lengthy discussions that the Parties were able to agree on the meaning to be

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[37]CMBF, para. 1.1.

[38]CMBF, para. 1.2.

[39]CMBF, paras. 1.21, 3.8, 3.11.

[40]CMBF, para. 3.7.

[41]CMBF, paras. 1.25, 1.45, 3.20, 3.43.

[42]CMBF, para. 3.6.

attributed to the texts, or on the location of points in the sector running from the heights of N'Gouma to the astronomic marker of Tong-Tong, sometimes substituting new solutions for both the text and the IGN map, as my old friend Professor Pellet has acknowledged[43]. However, no agreement could be found between Tong-Tong and Tchenguiliba, the section on which the Parties' views continue to diverge.

[End of slide]

28 9. Faced with this situation, Burkina Faso locks itself into a system which is reminiscent of the schools of exegesis. The text of the Erratum, and nothing but the text; disembodied, emaciated words. Words? I should say precious few words, covering long distances.

10. Niger's approach is completely different. Noting that the officials on the ground continually asked questions, from the outset, about the course of the contested boundary, Niger endeavoured to understand what had happened; how the Erratum of October 1927 had come about and how it had been applied thereafter. Every frontier boundary has a history, which means that in order to understand it, a variety of documentary sources need to be consulted.

11. According to Burkina Faso, the effect of Niger's line of argument is that it will not allow itself to use the term "title" in connection with the Erratum[44] and that it "empt[ies] [that text] of all . . . meaning"[45]. It is clear that Niger is not terrorized by the word "title", and it is quite incorrect that it empties the Erratum of all meaning. Niger does not call into question the fact that the 1927 texts constitute a title, the purpose of which is to effect a delimitation, but it maintains that this title is imperfect, imprecise, incomplete on certain points and erroneous on others. In short, it contends that the terms of these texts do not suffice and that they should be interpreted in the light of other sources; they are just one piece of evidence amongst others, in assessing what? The colonial legacy in 1960. There is therefore, as it were, agreement on the *instrumentum*, not on the *negotium*.

12. How to proceed? Upstream of the 1927 texts, Niger recalls that those texts were adopted pursuant to the Decree of the President of the Republic of 28 December 1926 — which our

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[43]CR 2012/21, p. 35, para. 20 (Pellet).

[44]CMBF, p. 7, para. 0.10.

[45]CMBF, p. 37, para. 1.40.

colleague Professor Tankoano mentioned a few moments ago — and, therefore, that their only possible purpose can be to give effect to the reorganizations of *cercles* and *cantons* for which that Decree provides. It believes that it is therefore reasonable to examine the preparatory acts carried out by the two colonies concerned in order to prepare the implementing *arrêtés*.

Downstream, it is necessary to consider how the 1927 texts were applied on the ground by the colonial authorities in order to remedy their insufficiency.

13. To this end, Niger has painstakingly researched the history of this boundary in the archives. Niger's quest has enabled it to provide the Court with an extensive collection of

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documents from the period, such as tour reports from *cercle* commanders, numerous sketch-maps drawn up by the latter showing the boundaries of *cantons* or *cercles*, records of agreement of the resolution of disputes, lists of villages forwarded to the higher authorities, Army Geographical Section maps, etc.

14. The point is not, on the basis of these documents, to study history for its own sake, or sociology for its own sake, but rather to understand what was intended by the legislator, prepared by the local authorities on the ground, drafted by the Government-General of FWA in Dakar, and then interpreted by the officials who, in everyday life, strove to give obscure texts a meaning which was consistent both with the traditional boundaries and with the needs of the local people.

15. As a result of this, the two Parties adopt different methodologies, and have two different visions of what we might term the facts of the case. For Burkina Faso, the facts are a few rare place names which were fixed once and for all in 1927, and which, in its view, are connected mainly by straight lines. For Niger, the *arrêtés* are situated in a context; they should be read as part of history, with its drama, its mysteries, its varied plot lines and its players (the inhabitants, the officials, the political authorities, the cartographers, and so on).

Two completely different visions, moreover, of the nature of French colonization in FWA. For Burkina Faso, this was a cold colonizer, drawing geometric, artificial and arbitrary lines across the conquered territory once and for all in 1927. For Niger, on the other hand, it was a colonizer close to its subject peoples, which, while carrying out reorganizations connected with "pacification", took account of the specific characteristics of the local people and ensured that, as

and when *cantons* were grouped together, this was done with due respect for those people, throughout the colonial period.

16. The method used by Niger leading it to interpret the boundary as a continuation of the colonial process, without stopping the clock in 1927, is justified by the fact that between 1927 and 1960, the two colonies were led to clarify certain aspects of their common boundary: for example, by determining frontier points on inter-colonial roads or by incorporating villages into one colony or the other. And during the final days of colonization, when the populations had to take part in national elections, the colonial authorities officially identified at that point to which territory they were attached, drawing up electoral lists determining to which colony the villages belonged.

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17. Moreover, this method is supported by the explicit wishes of the Parties. Aware from the time of independence that there were problems with interpreting the 1927 texts, the parties to the Protocol of Agreement of 23 June 1964[46], and then to the Agreement of 28 March 1987[47], explicitly stated, to use the words of the latter, that "[s]hould 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". This is of great significance. It means that in situations where the *Arrêté* and its Erratum prove not to suffice, the IGN map prepared at the dawn of decolonization will be relied upon. Now that map 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*. The practice of those authorities, garnered on the eve of independence, is therefore highly relevant.

18. Lastly, once independence was gained, it is beyond dispute that any act of *effectivité* carried out by a Party beyond the boundary cannot have the effect of modifying the pre-existing situation. It is nevertheless quite possible, subsequent to independence, for the two sovereign States to have taken steps to make partial adjustments to their frontier. We shall see an example of this in the arrangements that led to the establishment of a common frontier post at Petelkolé.

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[46]MN, Ann. A 1.

[47]MN, Ann. A 2.

19. The Members of the Court are no more historians than we are as counsel. For them, history is merely a set of bare facts; they must seek out the relevant ones in order to find and construct the outlines of the legal fact which alone will focus the attention of the jurist; they must be sure of their evidence, be sure that it is admissible in the light of the particular circumstances of the case, and they must make the necessary qualifications. This involves bringing into play complex rules on the relationship between titles and *effectivités*, on the hierarchy of norms and the rules of interpretation of *droit d'outre-mer*, on the application of inter-temporal law, and the impact of the interlude of Upper Volta's disappearance on the admissibility of the evidence. All this

31 amounts to a complex exercise which Niger invites the Court to undertake. Admittedly, it is not as simple as the one proposed by Burkina Faso, but Niger is inclined to believe that the Court will find it more appealing than solving an equation in which there are supposedly no unknowns.

20. Mr. President, Members of the Court, these few thoughts are offered to explain that the line proposed by Niger is thus neither "arbitrary", nor "fanciful", nor "devoid of legal justification", as the other Party claims[48]. Allow me to clarify a few points regarding the accusations that Niger has been particularly fickle in this case. Throughout its written and oral pleadings, the other Party has continually accused Niger of being a past master at making about-turns and changing its mind. To determine whether this charge is well-founded, we should distinguish between two periods.

The first is the period of negotiation in the Joint Commission. The officials of Niger were faced with the difficult task — as were those of Burkina, moreover — of finding the meaning of a particularly obscure and incomplete text, 60 years after it was written. There were problems with identifying nearly all of the few place names, with villages having disappeared, moved or been renamed; there were long distances between two points without intervening toponyms in areas that were nevertheless populated; and there were no reliable maps from the period. The search for boundaries was impeded by a lack of documentation on the *travaux préparatoires* of the 1927 texts, and marked by the fact that no document or map was recognized as relevant without the joint agreement of the Parties, which meant that none was accepted. Certainly the most striking example

[48]CMBF, para. 1.1.

of these limitations is Burkina's steadfast refusal to take account of the "new frontier" map of 1927 put forward by Niger. Therefore, while attempts were made to reach an agreement, which even went quite far, they failed on account of the diversity of views held within the delegations, and because of the normal pressure from populations who thought, rightly or wrongly, that their traditional rights were being trampled on. Thus, the negotiations were unable to fulfil the necessary conditions for their final conclusion, except for two sections. It is therefore to no avail that the other Party's counsel has subjected the Court again and again to their Freudian obsession

32 with various so-called consensual (1988) or ministerial compromise (1991) lines. Professor Pellet was clear-sighted enough to acknowledge that these moments of respite in the negotiations were not "officially recognized" or "legally binding"[49], since Niger did not give its final consent in the form required for it to be bound. Niger was thus perfectly entitled to agree only to be bound by a completed negotiation.

The second period is the one which starts from the time when, leaving the arena of the Joint Commission and its procedural straitjacket, Niger found itself in the process of judicial settlement and undertook a systematic and in-depth search for the facts that I alluded to earlier. In the course of its search, Niger added significantly to its documentary material and was led to reconsider matters. Any international jurist who has proceeded in similar fashion knows full well that he is never safe from surprises, both good and bad.

Between the Memorial and the Counter-Memorial, Niger realized that some of its claims relied on insufficient evidence. It regarded it as its intellectual duty, both in respect of the other Party and of the Court, to withdraw them. If that is being fickle, then Niger feels it was justified to be so, and accepts that.

21. Mr. President, Members of the Court, the subsequent pleadings will explore in detail the points covered in this introduction. They will be presented to the Court as follows:

— The applicable law and the application of *uti possidetis* in these proceedings, by Professor Maurice Kamto.

The three postulates of Burkina Faso's argument will then be contested in the following order:

[49]CR 2012/19, p. 60, para. 40.

— the hypothesis of the artificial and arbitrary nature of the frontier, by yours truly;

— the assumption that it runs in a straight line, by the same;

— the assumption that the title is clear, by Professor Klein;

— the relationship between titles and *effectivités* and the role of *effectivités* in the present case will be set forth by Professor Kamto.

33 Finally, the boundary claimed by Niger in the Téra sector will be presented by myself, and the one in the Say sector by Professor Pierre Klein.

Mr. President, that marks the end of my presentation on the methodology used by the Parties in their arguments; I should be grateful if you would give the floor to Professor Kamto, after the break, to continue with Niger's oral argument.

The PRESIDENT: Thank you, Professor. I shall give the floor to Mr. Kamto after the break.

The Court adjourned for 20 minutes.

The PRESIDENT: Please be seated. I now give the floor to Professor Maurice Kamto. You have the floor, Sir.

Mr. KAMTO:

THE LAW: THE APPLICATION OF *UTI POSSIDETIS* TO THE CASE

I. Introduction

1. Mr. President, Members of the Court, it is always a great honour to appear before this venerable Court, and particularly when that honour is based on the trust of a State, in this case the Republic of Niger, which I have the privilege and immense pleasure to represent.

2. Mr. President, although in the present case the question of the applicable law was in principle settled by Article 6 of the Special Agreement of 24 February 2009, Niger is of the view that we cannot dispense with a discussion of this question, since the Parties do not always have the same understanding of the scope of certain legal principles which they are requesting the Court to apply here. This is true in particular of the principle of *uti possidetis juris*, which, in Africa, is the basis of the principle of the intangibility of the frontiers inherited from colonization. Burkina Faso

has paid very close attention to this principle in its Memorial. But it makes only general assertions and draws just a few specific conclusions, which Niger will rebut in the arguments that follow.

3. The term *uti possidetis juris* is, as we know, an expression borrowed from Roman law. It became a principle of South American regional law, referred to as the "*uti possidetis* of 1810", for

34 the purpose of sanctioning the transformation of the boundaries of the Spanish provinces into the frontiers of the newly constituted republics which replaced those provinces. This principle was introduced into African regional law by the Cairo resolution of 21 July 1964[50] and established in particular by Article 4 *(b)* of the Constitutive Act of the African Union of 11 July 2000, in the form of a commitment by the States parties to ensure the "respect of borders existing on achievement of independence"[51]. The Court has reinforced the principle through its decisions[52], and, in the case of the *Frontier Dispute (Burkina Faso/Republic of Mali)*, the Chamber of the Court considered that it was "a principle of a general kind which is logically connected with this form of decolonization wherever it occurs" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 566, para. 23) and which "has kept its place among the most important legal principles" (*ibid.*, p. 567, para. 26).

4. In the present case, *uti possidetis* applies to two States, Niger and Burkina Faso, which were formerly territories of the same colonial power, namely France. In this type of case, the two States take the place of what were merely administrative divisions within the same colonial group, and therefore under the same sovereignty. In theory, the question of the course of the frontier should not pose an acute problem in such situations. In practice, however, we see that the two new States often inherit a frontier whose course is not clear. However, it is not the role of *uti possidetis* to resolve detailed issues relating to the course of the frontier.

5. The other Party admits — and Niger also agrees — that the principle of the "intangibility" of the colonial frontiers enshrined in the relevant African legal instruments is not absolute, in the sense that States born out of decolonization may agree to modify their common frontiers. It would

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[50]Resolution AHG/RES.16 (I).

[51]Constitutive Act of the African Union, 11 July 2000, CAB/LEG/23.15.

[52]*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 565, para. 22; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 388, para. 43.

35 appear then, prima facie, that there is a convergence of views between the Parties on the application of the principle of *uti possidetis*. But this is only apparently so, since Burkina Faso dispels this illusion in a few sentences in its Memorial.

6. According to our opponents, "the Parties have always considered their common frontier to be that which existed at the time of their accession to independence"[53]. However, no text determining the frontier between the two countries was adopted at that time. In Burkina Faso's view, however, this is not a problem in the present case, since "[the] *Arrêté* of 1927 is not imprecise"[54]; "the boundary between the Parties was fully defined"[55] in the *Arrêté* as amended by its Erratum, and "it has never been modified since"[56]. According to the other Party, "[s]ince a clear and uncontested title exists . . . the question of the relationship between title and '*effectivité*' . . . is of minor importance"[57].

7. These assertions by the other Party give rise to ambiguities relating to three aspects of the application of *uti possidetis* in the present case:

— First of all, there is ambiguity about the "critical" date, because, according to Burkina Faso, we do not know whether it is 1927, the date on which the 1927 *Arrêté* and its Erratum were issued, or 1960, the date on which the two Parties achieved independence. Our opponents swing between the two dates, although just one, and only one, is possible.

— The next ambiguity concerns the scope of *uti possidetis*. If, as Niger contends, 1960 is to be considered the critical date, it follows that the colonial heritage is the one which existed on that date, containing the elements which make up the title, but also all the latter's imperfections. This does not seem to be the opinion of the other Party, although on occasion it does agree with that view, as we shall see later during these pleadings.

— Lastly, there is ambiguity about Burkina Faso's position concerning any agreements subsequent to the adoption of the title. While Niger contends that such agreements have been concluded regarding certain places on the common frontier, Burkina Faso, in contrast, argues

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[53]MBF, p. 58, para. 2.9.

[54]CMBF, p. 86, para. 3.55

[55]MBF, p. 57, para. 2.8.

[56]*Ibid.*

[57]*Ibid.*, p. 59, para. 2.13.

36 that there is a single title from 1927, which is sufficient in itself and which has remained immutable over time. But paradoxically, at the same time, the other Party maintains the no less questionable position that a "consensual line" exists, resulting from an agreement which the two Parties are said to have concluded in 1988 and 1991.

8. I would now like to move on to consider these ambiguities, which give rise to differences between the Parties regarding the understanding and application of the principle of *uti possidetis*.

II. The "critical date" of the *uti possidetis*

9. Mr. President, Members of the Court, as my colleague Professor Jean Salmon has shown, Burkina Faso has a reverent, if not fetishistic, view of the Erratum to the 1927 *Arrêté*. It regards it — I would recall — as a legal title that is "precise"[58], "solid"[59], "clear"[60], "perfectly clear"[61], "clear and indisputable"[62] and which "is sufficient in itself"[63]. This view was repeated many times by its Counsel during their oral argument. Dismissing — very often in unnecessarily abrupt terms — anything that post-dates those official texts and which would challenge the idea of the perfection of the 1927 title, Burkina Faso asserts that "[t]he 'critical date' mentioned by Niger (1960) is . . . not the correct critical date"[64]. According to Burkina, "it may be more precise to speak of the 'first critical date'"[65] when referring to 1927. Listening to the Agent of Burkina Faso say, at the opening of the hearing on Monday morning, that "the *uti possidetis* . . . freezes territorial titles as at the date of decolonization"[66], for a moment I had the impression that our opponent had finally put an end to its toing and froing over the critical date. It was, I must admit, only a fleeting impression, because shortly thereafter our distinguished colleague and friend, Professor Alain Pellet, gave a strange summary of what he calls "the relevant history . . . of the

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[58]MBF, p. 69, para. 2.41.

[59]CMBF, p. 41, para. 1.49.

[60]*Ibid*., p. 72, para. 3.22.

[61]*Ibid*., p. 73, para. 3.23; p. 80, para. 3.40; p. 135, para. 4.75.

[62]*Ibid*., p. 47, para. 1.65.

[63]*Ibid*., p. 73, para. 3.23.

[64]CMBF, p. 82, note 355.

[65]MBF, p. 57, para. 2.7.

[66]CR 2012/19, p. 14, para. 6 (Bougouma).

37 frontier between Burkina Faso and the Republic of Niger". According to Professor Pellet, that history is "short and simple"; "it only really begins in 1926", with the Decree of 28 December, and concludes with the "Erratum of 5 October 1927"[67]. That relevant history is therefore less than ten months; and nothing further is to disrupt the harmony in respect of that frontier between 1927 and 1960, when the two countries gain their independence. The clock is stuck at 1927.

10. Consequently, Burkina Faso does not have its own position straight as regards the critical date in this case, Mr. President. It is unclear whether, for Burkina, that date is 1927 or 1960. However, Burkina Faso must know what it wants, and it must state what is to be taken as its final position on the subject. It has to choose, and it cannot continue on this path, because the Court is clear on the subject of determining the critical date in the settlement of frontier disputes, in particular in the context of decolonization, as is the case in these proceedings. In the *Frontier Dispute (Burkina Faso/Republic of Mali)*, the Chamber of the Court noted in this respect:

> "Since the territories of the two States had been part of French West Africa, the former boundary between them became an international frontier only at the moment when they became independent. The line which the Chamber is required to determine as being that which existed in 1959-1960, was at that time merely the administrative boundary dividing two former French colonies, called territoires d'outre-mer from 1946" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 568, para. 29).

11. In the case of Niger and Burkina Faso, that date, referred to as the "critical" date because it is legally decisive, is 1960. More specifically, since Niger gained independence on 3 August 1960 and Burkina Faso on 5 August 1960, the critical date to be taken into account in the present case is, in Niger's view, those dates of independence, and not the year 1927.

12. The 1927 texts established the inter-colonial administrative boundaries. The *uti possidetis*, however, freezes those boundaries as they were in 1960. It fixes the "photograph of the territory" — to use an expression of the Court — at the time of independence. The photograph taken at that precise moment constitutes the "colonial heritage". This approach to the critical date is confirmed by the Chamber of the Court in another passage of its Judgment of 22 December 1986, where it states:

> "International law — and consequently the principle of *uti possidetis* — applies to the new State (as a State) not with retroactive effect, but immediately and from that

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[67] CR 2012/19, p. 55, para. 28 (Pellet).

> moment onwards. It applies to the State *as it is*, i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands" (*ibid*., para. 30 (emphasis in original)).

This was understood by the Parties in the case concerning the *Frontier Dispute (Benin/Niger)*. As the Chamber of the Court notes in the Judgment which it rendered in 2005 in that case:

> "The Chamber observes that, in any event, the Parties agree that the course of their common boundary should be determined, in accordance with the *uti possidetis juris* principle, by reference to the physical situation to which French colonial law was applied, as that situation existed at the dates of independence." (*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005,* pp. 108-109, para. 25.)

13. Burkina Faso is thus mistaken in sanctifying what it calls the "1927 title", as that stood in 1927, without any consideration of the subsequent practice. It sets that text in stone; it casts it in the bright steel of time stood still, 33 years before the independence of the two countries. This is a new take on the *uti possidetis* principle which, in terms of the application of that principle in Africa, corresponds neither to the texts of the Organization of African Unity — later the African Union, nor to the practice of African States, nor to the established jurisprudence of the Court.

14. Since the critical dates are those of independence, the title to be identified is that which can be fixed by the application of the *uti possidetis* principle on those dates; it is the title as interpreted by the colonial authorities, often following field missions; it is the title as it stands in 1960, including its inadequacies revealed since 1927, and as it may have been adjusted or corrected by practice on the ground. It is *that* critical date and *that uti possidetis* which correspond to the Court's view. There is absolutely no reason for the Court to modify its jurisprudence in the matter.

15. Mr. President, Members of the Court, Burkina Faso considers that "[i]n contrast to other cases where the application of the principle of the intangibility of colonial frontiers was called into question, here, the *uti possidetis* principle can speak with a certain voice"[68].

16. Faced with such assurance, one is inclined to think that Burkina Faso is employing auto-suggestion. Here, as in all other frontier disputes brought before the Court, the *uti possidetis* speaks with a stammer. Where is the assurance when, just four years after their independence, Burkina Faso and Niger attempted together, on the basis of the Agreement of 23 June 1964, to reach an understanding on the exact substance of the "colonial heritage" they had inherited in

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[68] MBF, p. 58, para. 2.10; see also p. 57, para. 2.8.

1960? Where, then, is the assurance, if the Parties were so dissatisfied with that colonial heritage that, after considerable diplomatic effort, they concluded a new Agreement, that of 28 March 1987, in which they referred not only to the 1927 *Arrêté* and to the 1960 IGN map, but also to any other documents accepted by joint agreement of the Parties? No, Members of the Court, in this case too, the *uti possidetis* speaks with an uncertain voice. Unlike Burkina Faso, Niger hears the stuttering of a principle which, in the present case, is based on a text from 1927 that was contested by various colonial administrators as soon as it was published, on account of its laconic and imprecise character.

17. We shall demonstrate this tomorrow when we address the role of "*effectivités*" in the present case. For the moment, I should like to explain why, in Niger's opinion, it is the *uti possidetis*, above everything else, which settles the question of the date on which the colonial heritage should be considered, but not necessarily the issue of the precise content of that colonial heritage.

III. *Uti possidetis* settles the question of the date of the colonial heritage, but not necessarily the issue of the precise content of that colonial heritage

18. Mr. President, Members of the Court, once the principle of *uti possidetis* has been invoked, the issue of respect for the territorial status quo has been dealt with; but the same cannot be said of the content of the "colonial heritage". *Uti possidetis* is the assertion that each State has inherited a territory and frontiers on achieving independence. Furthermore, the full Latin phrase is: *uti possidetis ita possideatis*, or "as you possess, so may you possess". Clearly, frontiers are inherited, but what frontiers exactly? As the Chamber of the Court stated in the *Frontier Dispute (Burkina Faso/Republic of Mali)*: "For both Parties, the problem is to ascertain what is the frontier which was inherited from the French administration, that is, the frontier which existed at the moment of independence." (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 570, para. 33.)

19. Members of the Court, this is the issue that is at the heart of the dispute before the Court. Indeed, as the Chamber of the Court stated in the above-mentioned case: "The essence of the
40 principle [of *uti possidetis*] lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved." (*Ibid*., p. 566, para. 23.)

The Court refers to "territorial boundaries", thus adhering to the terminology of the colonial administration. However, the main purpose of the colonial administrative boundaries was to facilitate the administration of the colonies by determining, in light of the sociocultural realities on the ground, the extent of the areas of jurisdiction of the authorities — who, I would remind you, were subject to the same territorial sovereignty — and not to establish international frontiers, to which the colonial authorities of the time had given no thought at all.

20. As the Chamber of the Court said in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*:

> "it has to be remembered that no question of international boundaries could ever have occurred to the minds of those servants of the Spanish Crown who established administrative boundaries; *uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 388, para. 43).

In the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, the Chamber observed:

> "Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies al1 subject to the same sovereign. In that case, the application of the principle of uti possidetis resulted in administrative boundaries being transformed into international frontiers in the full sense of the term." (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 566, para. 23.)

However, as Professor Georges Abi-Saab has written, in becoming a frontier, an inter-colonial administrative boundary "undergoes no change in its content as a result of this transformation, since it retains any possible faults, lacunae and ambiguities that it might have had before independence" *[translation by the Registry]*[69]. It is such defects that give rise to post-independence frontier or territorial disputes between the States that succeed the former administering powers. The present case is before the Court precisely because the title relating to

41 the disputed frontier between Niger and Benin contains such ambiguities and inaccuracies.

21. Members of the Court, the following conclusion emerges from this analysis, which is based on the Court's jurisprudence: by freezing the territorial title on the "critical date", *uti*

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[69] «Le principe de l'*uti possidetis*, son rôle et ses limites dans le contentieux territorial international», in *La promotion de la justice, des droits de l'homme et du règlement des conflits par le Droit International, Liber Amicorum Lucius Caflisch*, Martimus Nijhoff Publishers, 2007, p. 659.

possidetis provides a degree of legal certainty because of the predictability of the legal solution which it offers at the moment of decolonization. But in any event, the application of this principle does not resolve the uncertainties that affected the frontier in colonial times[70]. In many instances, the precise location of the administrative boundaries was far from clear. Inconsistencies are not uncommon between the colonial documents on which the successor States born out of decolonization could rely in order to try to establish the exact course of the boundaries, which had become international frontiers, as Niger will show later during its pleadings.

22. Although Burkina Faso may, very exceptionally, resort to a document other than the 1927 *Arrêté* as amended by its Erratum in order to determine the course of the frontier in a particular sector, Burkina categorically maintains the contrary position to the end. In its view, Niger's argument that a disagreement of some kind exists between the two Parties regarding the 1927 *Arrêté* is all the more unfounded, given that both States agreed on a "consensual line" of their common frontier in 1988, on the basis of the 1987 Agreement which enshrines the *Arrêté* in question, and then concluded a political agreement on the same issue in 1991.

23. What exactly is the status of this much-discussed "consensual line"?

IV. The illusory argument that there was a "consensual line" of the frontier between the Parties in 1988

24. Mr. President, Members of the Court, it so happens that given the weight of evidence against it, Burkina Faso has temporarily stepped aside from the untenable argument that the 1927 Erratum constitutes a clear[71] and complete title, "fully" defining the boundaries between the

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Parties[72]. Yet it does this in order to create another illusion straight away: the notion that Niger and Burkina Faso reached agreement, in 1988 and then in 1991, on a course to be followed by their common frontier[73]. Niger has amply responded to that notion in its Counter-Memorial[74]. Yet

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[70]See, for example, A.O. Cukwurah, *The settlement of boundary disputes in international law*, Manchester/Dobb-Ferry (NY), Manchester University Press/Oceana, 1967, pp. 114-115; R. Yakemtchouk, «Les frontières africaines», *Revue générale de droit international public (RGDIP)*, 1970, p. 40; S. Ratner, "Drawing a Better Line: Uti Possidetis and the Borders of New States", *American Journal of International Law (AJIL)*, 1996, pp. 590-624; M. N. Shaw, "The Heritage of States: the Principle of Uti Possidetis Juris Today", *British Year Book of International Law (BYBIL)*,1996, pp. 75-154; M. Kohen, *Possession contestée et souveraineté territoriale*, Paris, P.U.F, 1997, p. 428.

[71]MBF, para. 4.8.

[72]*Ibid*, paras. 2.8, 2.13, 4.8.

[73]MBF, p. 48, para. 1.69; p. 48, para. 1.75.

[74]CMN, pp. 47-59, paras 1.2.1-1.2.30.

clearly, the other Party will not give up, and it returned to the attack with renewed vigour in its oral pleadings on Monday morning[75]. And it had reason to do so: this is one of the pillars of its argument in support of the idea that Niger itself has always accepted that the 1927 *Arrêté*, as amended, is the only applicable title, and that it allows the course of the common frontier to be determined precisely.

25. Burkina Faso thus opts for a legal impasse by contending that the agreement underlying the "consensual line"[76] is binding on the two Parties to the present dispute, especially since it is purportedly in accordance with the 1987 Agreement, which makes the 1927 *Arrêté*, as amended by the Erratum, the reference document for the delimitation of the frontier between the two countries.

26. That is an attractive construction, but it is really just a mirage, since, as Niger has shown in some detail in its Counter-Memorial[77], the "consensual line" in question does not exist, either in fact or in law.

27. It has no factual existence, because the work done by the two countries from 1964 onwards, with a view to achieving the delimitation and subsequently the demarcation of their common frontier, made very uneven progress. The work in question, initiated on the basis of the Protocol of Agreement of 22 June 1964 and continued under the Agreement of 28 March 1987, produced results which were approved by the experts from Niger and Burkina Faso but called into question on various occasions by both States; and that not only occurred following the work done in 1986 and 1988, but also after the work done in 1991. As for a "consensual line", Members of the Court, there was no such thing. Niger would have liked to agree with Burkina Faso that there
43 was a "consensual line" — that would probably have reduced the scope of the present dispute. But there was not. Those are the facts, which are moreover, as it happens, confirmed in law.

28. Indeed, the "consensual line" has no legal existence either, Members of the Court. Admittedly, according to Burkina Faso, the line adopted by the technical experts in 1988, like that adopted by the ministers of both countries in 1991, constitutes "an interpretation that is fully

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[75]See CR 2012/19, pp. 25-29, paras. 26-29 (Thouvenin).

[76]MBF, p. 48, para. 1.69.

[77]CMN, pp. 47-59, paras. 1.2.1-1.2.30.

binding on the State of Niger"[78]. Professor Forteau has even had the temerity to speak here of an "authoritative interpretation adopted in . . . 1991 by the competent ministers"[79]. Yes, you did hear correctly, Members of the Court: an authoritative interpretation, made in 1991 by members of the governments of two independent States, of a unilateral act adopted by a colonial authority sixty-four years earlier, upon whose content the two governments do not agree. The succession of States does not allow everything, Mr. President. For the other Party, that interpretation therefore continues as "having the force of law between the Parties"[80]. Contrary to what Professor Pellet might have had us believe during his presentation on Tuesday morning, we are not mistaken in recalling the other Party's own written pleadings on this point.

29. The assertion that in 1988, or indeed in 1991, there was a binding agreement is in any event a highly audacious claim. It is true that audacity is not prohibited. Yet it needs to be kept within reasonable bounds. Article 7 of the Agreement of 28 March 1987[81] — which is at tab 4 of the judges' folder and to which Burkina Faso attaches almost as much importance as it does to the 1927 Erratum — provides that: "The result of the demarcation works shall be embodied in a legal instrument, which shall be submitted for signature and ratification by the two Contracting Parties." Burkina Faso cannot be unaware of that provision, even if it neglects to cite it in its arguments. In fact, the proposals for provisional lines made in 1987 and 1991 were never formalized in instruments that were legally binding on Niger, in so far as such an instrument — assuming it ever existed — never underwent the necessary formalities.

44 30. Referring to what he calls a "peripheral disagreement", our learned friend Professor Alain Pellet has been sufficiently clear-sighted to acknowledge, as recalled by Professor Salmon in his introduction, that Burkina Faso "never claimed that th[e] line" which the two countries' experts came up with in 1988 "was officially 'recognized'" and nor does it contend that the "political . . . solution" of 1991 "was legally binding on the Parties"[82]. Quite right too! Yet the other Party, having finally conceded the point, cannot continue to make use of the

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[78]MBF, pp. 122-123, paras. 4.56 and 4.57.

[79]CR 2012/20, p. 59, para. 47 (Forteau).

[80]See CR 2012/19, p. 26, para. 28 (Thouvenin).

[81]MN, Ann. A4.

[82]See CR 2012/19, p.60, para. 40 (Pellet).

provisional results obtained in the course of the work done by the experts in 1988 and the ministers in 1991. This is, however, what Burkina Faso is doing. In his pleading on Monday morning, Professor Thouvenin was still expounding at length on this point, reiterating that "[o]n the basis of the 1987 Agreement and Protocol of Agreement, the Commission's work . . . led to agreement the very next year on a consensual line which complied with the provisions of the 1987 Agreement to the letter"[83]. He moreover produced a reproduction of the supposed "consensual line" for the judges' folder.

31. In this way, although the aforementioned statement by Professor Alain Pellet closes the legal debate on the matter, Burkina has never ceased trying to convey the idea, with regard to this work from the late 1980s to the early 1990s, that Niger has specialized in undoing agreements reached by the Parties. Inconsistent, and constantly reversing its position[84] — that is the impression of Niger with which the other Party would like to leave the Court, whilst at the same time stating that the results of the work are not binding on that country. This is pernicious. It is unacceptable. It is contrary to the principles governing international negotiations, which give each party the right to reassess its positions at any time before making a definitive commitment.

As long as negotiations continue, nothing is agreed; and as long as nothing is agreed, nothing is binding. That is the principle governing legal relations between nations. What, then, does the other Party make binding upon Niger, with this so-called "consensual line"? Absolutely nothing, Mr. President.

32. In conclusion, Niger trusts:

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— *firstly*, that in the present case, the Court will remain faithful to its settled case law regarding the application of *uti possidetis* in the context of a border dispute between two States emerging from decolonization: in point of fact, the Court has always taken the date when colonies gained independence as the critical date;

— *secondly*, that the Court will find that in the present case the colonial heritage on that critical date is ill-defined, and that *uti possidetis*, here as in many other cases, speaks in "an uncertain voice";

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[83]CR 2012/19, p. 25, para. 26 (Thouvenin).

[84]*Ibid*, p. 27-28, paras. 30 and 32.

— *thirdly*, and finally, that apart from the sections of the frontier on which there has been an agreement, as noted in Article 2 of the 2009 Special Agreement, the Parties have been unable to remedy the shortcomings of the colonial heritage following independence by means of a so-called "consensual line", which is a purely theoretical construction.

That explains the historical and documentary approach followed by Niger, in addition to the 1927 title, in order to determine the line which it defends, and at the same time it explains why the three assumptions on which Burkina Faso has constructed its arguments are untenable.

33. Mr. President, I should now like to ask you to give the floor to Professor Jean Salmon so that he can examine the first of those assumptions. Thank you very much indeed for your kind attention.

The PRESIDENT: Thank you very much, Professor. It is now your turn to take the floor again, Mr. Salmon. I give you the floor.

Mr. SALMON: Thank you, Mr. President.

THE HYPOTHESIS OF THE ARTIFICIAL AND ARBITRARY NATURE OF THE COLONIAL FRONTIER

1. Thank you, Mr. President. Mr. President, Members of the Court, Burkina Faso's argument rests on three pillars, of which Niger, through its counsel, will now demonstrate the extreme fragility.

Our opponents maintain: first, that the 1927 boundary is of an "artificial and arbitrary" nature; secondly, that the frontier between Tong-Tong and Bossébangou is composed of straight lines; and finally, that the 1927 text constitutes a clear title.

I shall deal with the first two points and Professor Pierre Klein will address the third.

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The claim that the frontier is artificial and arbitrary

2. Let us take as our starting point the hypothesis that the colonial frontier was an artificial and arbitrary one. In their written pleadings, our opponents put forward the thesis that the frontier between Niger and Burkina Faso was essentially determined by a succession of straight lines,

arguing that this was a colonial frontier of an artificial and arbitrary nature. Here is an example from its pleadings:

> "In many respects, the frontier defined by the amended *Arrête* is artificial in nature. The colonial authorities, wanting to establish a complete and precise boundary, were *aware of the implications* of choosing such a boundary, and that choice was made by the Governor-General of FWA, *in full knowledge of the facts*, in accordance with what was standard practice at the time."[85]

And in paragraph 2.39, the Memorial makes the point still more strongly: "the 1927 *Arrête* is no exception to the rule and establishes an arbitrary and artificial boundary". We find further examples of this approach in various paragraphs of our opponents' Memorial[86]. This is thus a firm belief on Burkina Faso's part. For its part, Niger formally disputes this contention that the boundary was artificial and arbitrary and, moreover, that "that choice was made" by the Governor-General of French West Africa. And I am now going to explain our reasons in detail.

The strategic nature of the claim

3. From the outset, one thing should be clearly understood. If Burkina Faso has ventured to put forward such an unexpected explanation, it is for strategic reasons, and in order to give credibility to its thesis that, in the Téra sector, the boundary is composed of two straight lines covering a distance of 150 km. The rest is simply embroidery.

An assertion relying solely on doctrine

4. It is undeniable that this was a regular colonial practice. From that, to assert that this was the case between Tong-Tong and the point where the boundary reaches Bossébangou is a leap unsupported by the documents in the case.

It is symptomatic that, in support of its assertion that the boundary was an arbitrary one, Burkina can rely only on doctrinal sources of a quite general and theoretical nature on the practice

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of the colonial powers in the nineteenth century[87], sources which bear no relation to the boundary under examination here. We note with some surprise a reference to pages 6 and 7 of the work *African Boundaries* by the late Ian Brownlie. We can just understand why our opponents might

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[85]MBF, para. 2.38.

[86]MBF, paras. 4.26, 4.27, 4.28 and 4.33.

[87]CMBF, para. 1.33.

have thought fit to invoke the shades of our late colleague and friend by a reference to the pages devoted by him to the boundary between Niger and Upper Volta. Alas, the author says nothing of the kind! [Slide showing page 470], and for the Tong-Tong-Say *cercle* boundary, his map adopts the 1960 IGN line. As my grandchildren might put it: "they don't come more twisty than that!"[88]

The same can be said of Burkina Faso's appeal in its Memorial[89] to the separate opinion of Judge Ajibola in the Court's Judgment of 3 February 1994 in the *Territorial Dispute (Libya/Chad)* case. That judge expressed himself in the following terms (how relevant to our case, I shall shortly show you):

> "Bear in mind that most African frontiers are purely artificial . . . they are patently even more artificial than elsewhere, since most of them are merely straight lines traced on the drawing board with little relevance to physical circumstances on the ground. As far back as 1890, Lord Salisbury said:
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> > 'we have been engaged . . . in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes'." (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 53, para. 9.)

Yes, to be sure . . .

Members of the Court, it's time to get serious. To support its case, notwithstanding the substantial file of documents provided by Niger, our opponents can provide not a single piece of evidence from the colonial period. None at all? Sorry, yes, there is one: a quotation in which our opponents claim to find support[90]. This is a letter from the Governor of Niger dated 27 September 1929 to the Governor of Upper Volta, in which the former acknowledges that, for nomadic peoples, a boundary is a "theoretical and artificial" frontier. However, this phrase does

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not have the meaning which our opponents seek to give to it. It must not be taken out of its context, where the reference to a "theoretical and artificial" frontier is self-evident. That context is the division of Dori *cercle*. [Illustration showing Téra Subdivision within Dori *cercle*, CMN, fig. 1, p. 22 [p. 15 in the English version].] We know that from 1910, Téra had become a subdivision of Dori *cercle*. The latter thus at that time constituted a single entity running as far as

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[88]Ian Brownlie, *African Boundaries, A legal and Diplomatic Encyclopaedia*, C. Hurst & Company, London, 1979, p. 470.

[89]MBF, p. 67, para. 2.38.

[90]CMBF, para. 3.60.

the River Niger, over which the nomadic population roamed freely, without changing *cercle* or colony. For them, the inter-colonial boundary re-created in 1927 (as a result of the return to the 1910 line) could certainly be described as theoretical and artificial, although the nomads soon acquired the art of using it in order to evade taxation. [End of slide] It should be noted, incidentally, that the Governor of Niger did not, however, write that the boundary in this sector was a straight line. In conclusion, it can indeed be said, on reflection, that our opponents can produce *not a single* piece of evidence from the colonial period for the region. *A fortiori*, we seek in vain any historical evidence that the authorities in Dakar adopted this policy "in full knowledge of the facts".

5. Contrary to Burkina's thesis, the history of the boundary in this sector renounces any idea of artificiality and demonstrates no evidence of any such intention on the part of the authorities of French West Africa.

The ethnic basis of the *cantons*

Without going right back to the report of the Minister for the Colonies of 1907, explaining the ethnic considerations justifying the incorporation of Say *cercle* into the Colony of Haut Sénégal et Niger and the transfers of *cantons* in 1910[91], we would highlight the following documents, which — ironically — have the peculiar feature of all emanating from the authorities of the Colony of Upper Volta:

[Slide showing the traditional composition of Say *cercle*]

— the letter from the Governor of Upper Volta of 22 July 1920, which states: "We should avoid dividing ethnic groups through arbitrary boundaries, which have the effect . . . of upsetting the local population, provoking mass departures"[92];

— the letter from the Commander of Dori *cercle* — again in Upper Volta — of 7 April 1923 on the mentality of the local population: "what is important for them is not the creation of a new colony: it is stability in their habits, being accustomed to the heads of their *cantons*"[93];

[91]CMN, paras. 1.1.8 and 1.1.9.

[92]MBF, Ann. 17.

[93]MBF, Ann. 21.

— when the transfer of Say *cercle* to Niger was proposed, the Lieutenant-Governor of Upper Volta accepted it, with the exception of Gourmantché Botou *canton*, whose ethnic and cultural ties with the Gourma justified keeping it in Upper Volta. In his letter of 7 June 1923 to the Governor-General of French West Africa, he explains that he has made

> "a full study of the question . . . in order to determine whether such action is appropriate from all points of view: ethnographic, political, financial, administrative and economic . . . Only the Gourmantché *groupements* . . ., which represent almost the entire population of Botou *canton*, have no affinity with the peoples of the left bank of the Niger."[94]

[Slide showing the same sketch-map, together with the sketch-map of the Gourmantché Botou *canton*] [End of slide]

— when, on 26 January 1926, the Governor of Niger asked for a part of Dori *cercle* (in Upper Volta) to be transferred to Tillabéry *cercle* in Niger, he emphasized that the *cantons* concerned were those of the latter *cercle* which had been detached from it in 1910. He attached to his request "a map of Tillabéry *cercle* prepared by Captain Coquibus in 1908 which clearly shows the part of Dori *cercle* that would have to be incorporated into Tillabéry in order to reconstitute that division within its original boundaries"[95].

This new episode shows that the boundary in question was already an old one, formed by *cantons* whose borders were a function of the realities of the population on the ground, and whose extent was already well known to the administrators— as future events would confirm.

The argument that the importance of the *cantons* is a "postulate"

6. Is the importance of the *cantons* a "postulate", as our opponents maintain[96]? What is the true position in this regard?

50 It was on 28 December 1926[97] that the Decree of the President of the French Republic which we shall now examine was promulgated. This text can be found in the judges' folder at tab 5. Its Article 2 reads as follows:

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[94]CMN, 1.1.11 and MBF, Ann. 22.

[95]CMN, 1.1.12 and MBF, Ann. 24

[96]CMBF, par. 1.4.

[97]MN, Ann. B 23.

> "The following territories, which are currently part of the Colony of Upper Volta, shall be incorporated in the Colony of Niger with effect from 1 January 1927:
>
> 1. Say *cercle*, with the exception of Gourmantché Botou *canton*;
>
> 2. the *cantons* of Dori *cercle* which were formerly part of . . . Niger in the Téra and Yatacala regions, and were detached from it by the *Arrêté* of the Governor-General of 22 June 1910."

The fact that the Presidential Decree expresses itself in terms of *cantons*, that is to say identifiable local administrative units which already existed in 1910, and that, furthermore, for Say *cercle*, the Decree leaves Gourmantché Botou *canton* in Upper Volta, for reasons of ethnic unity, certainly does not imply any wish to establish a line of an arbitrary and artificial nature.

7. As our colleague Professor Tankoano has just explained, the incorporation of a territory into a particular colony lay within the sole power of the central authorities, namely the President of the French Republic, whose text was counter-signed by the Minister for the Colonies. In this instance, those central authorities exercised that power. While the local authorities were empowered to implement the Decree at local level, they could not contradict it or act in breach of its terms. Thus it is particularly audacious of our opponents to argue that the *Arrêté* of the Governor-General of 1927, applying the Presidential Decree in whatever way he thought fit, *deliberately* sought to adopt an artificial boundary, one, moreover, formed of a series of straight lines. Certainly, Niger has not lost sight of the fact that the 1926 Decree provided that "[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 the area". However, contrary to what our opponents repeatedly tell us, without providing any supporting evidence, the Governor-General's action in describing the boundary resulting from the transfers effected by the Decree could only have a declaratory effect, and not a constitutive one.

51 8. Moreover, as we shall see, the steps taken by the colonial authority to implement the Decree demonstrate a clear wish to seek out on the ground the boundaries of the *cantons* concerned as they were in 1910. Thus the Presidential Decree is consistent in its approach: it effects a *transfer of cantons*, that is to say traditional or customary administrative units, which were subordinate to the *cercles* and had their own boundaries. In order to prepare the Governor-General's implementing *Arrêté*, three records of agreement were concluded by the two *cercles* concerned — Tillabéry and Say — between the representatives of the two Colonies.

9. First, a Record of Agreement of 2 February 1927, the text of which can be found in the judges' folder at tab 6. It contained the list of *cantons* having belonged on 22 June 1910 to the former Tillabéry *cercle*, which were to be re-incorporated into Niger. Which means that, from 1910 up to the present day, this has remained unchanged.

"The *cantons* are:

1. Dargol — Sonrhais
2. Kokoro — ditto
3. Diagourou — Peulhs
4. Téra — Sonrhais
5. Gorouol — ditto
6. Logomaten — nomads and Bellahs . . ."[98]

It is important to note that each *canton* is distinguished by a specific ethnic group: the Sonrhais, the Peulhs . . . and the Logomaten. In other words, by a territorial structure establishing appurtenance on an ethnic basis (members of the group being attached to their chief, irrespective of their own place of residence). To return to the Record of Agreement of 2 February 1927, it indicated in succinct terms the boundary between these *cantons* and that part of Dori *cercle* remaining in Upper Volta[99].

52 10. Secondly, a Record of Agreement of 10 February 1927 — which Members of the Court will find in the judges' folder at tab 7 — listing the *cantons* of Say *cercle* incorporated into Niger Colony, with the exception of the villages forming Gourmantché Botou *canton*. Here again, the name of each *canton* was accompanied by its ethnic composition.

11. Thirdly and finally, a Record of Agreement of 9 May 1927[100] giving a list of the 22 villages forming Botou *canton*. It was accompanied by a detailed sketch-map of this *canton* on a scale of 1:500,000[101]. This *canton* remained, for reasons which we have seen earlier, in Upper Volta. It is clear from these various records of agreement that the colonial authorities

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[98]See MN, Ann. C 7.

[99]*Ibid.*

[100]See MN, Ann. C 9.

[101]See MN, Ann. C 10.

concerned, like the President of the Republic, reasoned in terms of *canton* boundaries and respect for ethnic groupings, and not in terms of an artificial and arbitrary line intended to divide them. The boundary between Niger and Upper Volta derives from the return to the former southern boundary of the Tillabéry *cantons* as it was in 1910, and to the southern boundaries of Say *cercle*, with the exception of Gourmantché Botou *canton*. As can be seen from the letter of 2 April 1927 from the Governor-General of French West Africa to the Governor of Niger[102], [Slide showing Botou sketch-map], the only new boundary in this sector is that resulting from the removal of Botou *canton* from Say *cercle*. This new boundary is not an artificial one — any more than the others were —, since it was identified following a survey on the ground covering the villages concerned[103]. This example is particularly significant, for it shows clearly that, when the focus of attention is a *canton*, the delimitation of its borders can perfectly well be carried out by successively connecting the villages. In this case, there are 15 villages! [End of slide of Botou sketch-map. Slide of Diagourou] A comparable outcome would have been achieved if there had been a delimitation of Diagourou *canton*, which consisted of a very large number of villages — had the authorities wished to delimit it.

12. A further indication of the focus on determination of the boundaries on the ground, and of the concern to respect traditional population divisions, can be seen from the initiative taken by
53 Hesling, Governor of Upper Volta. Attentive to this aspect of matters, he had sent the following request to the Commanders of Dori and Fada *cercles*, who would be affected by these boundary changes:

> "Request send me as soon as possible" — this was the text of his telegram — "precise information to enable preparation *Arrête général* fixing new boundaries between Colonies Niger and Upper Volta. Solely to avoid error and need subsequent correction, essential that course be determined on ground with full agreement Administrators Divisions concerned. Results work recognized and accepted by Heads both adjacent Colonies to be forwarded Dakar for action definitive text."[104]

There followed an exchange of telegrams, from which it is apparent that the *cercle* Commanders were preparing to visit the boundary, taking with them the map of Captain Coquibus, and to

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[102]CMBF, Ann. 1.

[103]MN, Ann. D 12.

[104]MN, Ann. C 11.

address the issue of populations which overlapped the boundary[105]. Our opponents will certainly be unable to explain to us why it was so important for those involved to concern themselves with the local population, if they were planning to draw an artificial and arbitrary boundary through their *cantons*, consisting of a straight line.

13. The work of the administrators of the two *cercles* concerned consisted in ascertaining on the ground the boundaries of the *cantons* falling within their respective *cercles*. They took as their starting point the old sketch-map of the former boundary of Tillabéry *cercle* of 1910, prepared by Captain Coquibus. Two reports followed, one from Prudon, Commander of Tillabéry *cercle*[106], and the other from Delbos, Commander of Dori *cercle*[107]. These reports were accompanied by similar sketch-maps. Even though the latter are not totally consistent, they do, however, have the merit of both showing that the administrators followed a traditional boundary, in which both orographic factors and the agreement of the peoples concerned played a part. Administrator Prudon states *inter alia* the following:

> "According to the information given by the local inhabitants and by the Chiefs of the Dorgol (Tillabéry) and Yaga (Dori) *cantons*, *the range of hills that we were following* is indeed *the boundary between the two* cantons *and hence of the two colonies*. This boundary has existed for many years and no dispute has ever arisen between the two *cantons* over possession of the land."[108]

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Mr. President, Members of the Court, you will have noted: Prudon emphasizes that he and Delbos followed *the boundary between the two* cantons *and hence of the two colonies*. What a curious difference between the views of the administrators of Upper Volta at the time, who were familiar with their country, and the view of it taken today by counsel for Burkina Faso! It is only the latter who treat the *cantons* as a "postulate"! According to this same report by Prudon, "the delimitation of the *cercle* made by Lieutenant Coquibus is indeed the line we followed [with the exception of a small stretch] and the line recognized by the various chiefs of the frontier *cantons* in the two colonies concerned"[109].

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[105]MN, Ann. C. 12.

[106]Of 4 Aug. 1927, MN, Ann. C. 15.

[107]Of 27 Aug. 1927, MN, Ann. C. 15.

[108]MN, Ann. C 15; emphasis added.

[109]*Ibid.*

A sparsely populated region

A further claim on the part of Burkina Faso is that the recourse to arbitrary and artificial boundaries was justified by the fact that the region was "sparsely populated"[110]. This statement is, once again, difficult to reconcile with the facts in the file. It is not supported by the political considerations accompanying the Prudon report, to which I would again refer you, Members of the Court[111]. You will see how, in the course of their discussions with the administrators during their survey mission, in some cases the villagers and heads of *canton* gave their approval, or in others explained their problems.

To similar effect was the report by Delbos, of 27 August 1927, which proposed the terms of a draft *arrêté*, ended with the following words: "No opposition on the part of the local inhabitants having been encountered, this report was closed and signed by the Parties."[112]

As the Court can see, it does not exactly look as if we are dealing here with a piece of desert . . .

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The assertion that the administrators' reports were deliberately ignored

14. Burkina Faso vainly relies on a claim that the two administrators' reports not only were not taken into account when the Erratum was being prepared by the Dakar authorities, but even that they were *deliberately* ignored[113].

Niger has never claimed that the reports reached Dakar in time. Everything suggests that this was not the case, even supposing that they arrived there at all. But there is no evidence, on the other hand, that they were deliberately ignored, in particular if they never arrived! In any event, that is not crucial. What these reports demonstrate, like the records of agreement of February 1927, is the concern on the part of the colonial authorities to respect the traditional *canton* boundaries.

15. In their oral presentation on this point, our opponents vainly sought to show that the French colonial power was more interested in sound administration than in the ethnic unity of its

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[110]CMBF, para. 3.30.

[111]*Ibid.*

[112]MN, Ann. C 16.

[113]CMBF, para. 1.22, p. 24.

colonized territories[114]. That is to miss the point — and indeed several points! Thus what our opponents emphasize is the fact that the French frequently remodelled their colonial territories, grouping *cercles* together in order to create new colonies, or distributing them among various colonies without great concern for the ethnic unity of the new groupings. That is clear. It is undeniable. But the point is irrelevant.

First, because this policy was not in itself artificial and arbitrary, since its aim was to improve the administration of the pacified territories.

And above all, these remodellings did not affect the *cercles* and subdivisions, which remained identical in terms of their ethnic unity. At the start of the afternoon, Professor Tankoano showed this, by taking us through the chequered history of Say and Téra.

Thirdly, our opponents have changed the subject: what they have to prove is that the colonial power *broke up the ethnic unity of the* cercles *and* cantons. They do not provide a single example of how a *cercle* or a *canton* was allegedly sliced like a melon with a single blow of a machete; the colonial power sought to preserve the unity of the *cercle* or region. And that indeed is what our arguments have shown in great detail. The entire historical background to the *Arrêté*

56 and the Erratum goes to show that the colonial power sought to maintain the line of the southern boundary of Téra Subdivision and the ethnic composition of each *canton*. Our opponents' propensity for theorizing constantly leads them to seek arguments which have nothing to do with the actual inhabitants of Dori, in whom they show little interest.

16. It follows from all of this that there is no evidence whatever that the colonial power wished to apply to this sector of the frontier an artificial and arbitrary line. It based itself on a pre-existing line, formed of *canton* boundaries with specific ethnic configurations — a line which had been followed in practice by the administrators and identified on the Coquibus sketch-map, which was used at different times during the preparatory procedure for the adoption of the *Arrêté général* of 31 August 1927. Delbos, the administrator of Dori, who had visited the entire area of his *cercle* as far as the River Niger before 1927, was well aware of the boundaries of Téra

[114]CR 2012/19, p. 49, para. 16 (Pellet).

Subdivision. The inhabitants and traditional chiefs were associated with the preparatory work and were invited to give their views.

Mr. President, Members of the Court, what, in all the circumstances, appears to be artificial and arbitrary is not the course of the boundary, but Burkina's thesis!

Mr. President, this ends my contribution for today to the oral argument of Niger. I should be grateful if you would kindly give me the floor again tomorrow for the remainder of my presentation, which will concern Burkina Faso's second "postulate", namely that the boundary followed straight lines in the Téra sector.

The PRESIDENT: Thank you. I will give you the floor tomorrow morning at 10 a.m., when the Court will meet again for the continuation of the oral argument of the Republic of Niger.

The Court rose at 5.50 p.m.