DECLARATION OF JUDGE BENNOUNA

[English Original Text]

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

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

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

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

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

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

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

Faced with the same dilemma, Judge *ad hoc* Abi-Saab, in his separate opinion appended to the Judgment in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, noted that the Chamber had

been led into "an excessively detailed analysis of French colonial law, a task which is not, in my view, a fitting one for an international court and was largely superfluous" (*I.C.J. Reports 1986*, p. 659, para. 3). Nevertheless, referring to the precautions taken in the Judgment when considering colonial law, he added: "Along that road there can therefore be no question of even circuitously finding in contemporary international law any retroactive legitimation whatever of colonialism as an institution." (*Ibid.*, para. 4.)

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

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

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

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

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

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

When, in 2013, it decides on the frontier between two independent African countries, the Court cannot ignore that it has been called upon to

give effect to an *Arrêté* of 1927, as clarified by the Erratum, and that the sole concern of the authority that adopted it was to separate entities depending on the same colonial power in order to improve territorial administration.

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

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

(Signed) Mohamed BENNOUNA.