SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

TABLE OF CONTENTS

*

I. *Prolegomena*

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

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

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

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

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

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

6. In the present Judgment in the case of the *Frontier Dispute* between Burkina Faso and Niger, the ICJ begins by pointing out that the dispute at issue is set within a historical context marked by the *accession to independence* of the two contending Parties (Burkina Faso and Niger), which were formerly part of French West Africa (para. 12). In my reasoning in the present separate opinion, I ascribe particular importance to the documents *after* their independence in 1960. The Court further recalls that, in the colonial period, the two countries concerned were "made up of basic units called *cercles*"; each *cercle*, in turn, was composed of subdivisions, which "comprised *cantons*, which grouped together a number of villages" *(ibid.)*.

7. In effect, in my view, it is commendable that the two contending Parties, Burkina Faso and Niger, deemed it fit to insert, into treaties they concluded after their independence in 1960, provisions expressing their concern with the local populations. Thus, their 1964 Protocol of Agreement (concluded in Niamey, on 23 June 1964)[1], contains a provision, on "population movements", which states that

> "2. Provided they are carrying the official identity documents of their State, nationals (within the meaning of the Nationality Code of the State concerned) of the Contracting Parties may move freely from one side of the frontier to the other.
>
> All nationals of either of the Contracting Parties may enter the territory of the other, travel on that territory, establish their residence there in the place of their choice and leave the territory, without being obliged to obtain a visa or residence permit of any kind.

[1] Memorial of Niger, Annex A1.

However, transhumant nationals of one State travelling to the other State must have a transhumance certificate stating the composition of their family and the number of their animals.

The two Contracting Parties shall communicate to each other all documents concerning transhumance, in particular details of routes followed and movement calendars. (. . .)"

8. Years later, the Agreement between Burkina Faso and Niger of 28 March 1987, on the demarcation of the frontier between the two countries[2], contained a provision to (Article 5) the effect that "[r]ights of peoples living along the frontier in respect of the utilization of farmland, pasturage, waterpoints, saline lands and economic trees shall be defined in the Protocol of Agreement". This Protocol of Agreement, celebrated by those two States on the same date[3], provides (Article 19) that

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

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

"Nationals of one State residing on the territory of the other who decide to return to their country of origin shall have a maximum of five (5) years in which to do so, with effect from the date on which their presence is recorded; during that period they shall not be subject to any form or taxation or other charge"[4].

10. In addition, the Protocol of Agreement Establishing a Consultation Framework between Burkina Faso and Niger, celebrated at Tillabéry on 26 January 2003[5], extends such consultation to "cross-border transhumance" (Article 1), and explains, in Article 2 that

---

[2] Memorial of Niger, Annex A4.

[3] *Ibid.*

[4] Moreover, Article 13 of the aforementioned 1987 Protocol of Agreement determines that:

"Use and/or ownership rights of nationals of the two Parties in respect of land situated along the frontier in regard to farming and pasturage, including the right to exploit economic trees such as the *néré* and the *karaté,* shall be governed by the laws of the country where the land is located and, on a subsidiary basis, by customary law."

And Article 14 adds that:

"Rights of utilization in respect of wells, rivers and waterpoints along the frontier shall likewise be governed by law and, subsidiarily, by the customs of the country where such wells, rivers and waterpoints are located. The régime governing frontier watercourses shall remain that applicable under the relevant international law."

[5] Replies of Burkina Faso and Niger to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012, doc. of 16 November 2012 [Niger's Response].

"The purpose of the consultation framework on cross-border transhumance is to:

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

III. Concern of the Parties with the Local Populations in the Written Phase of Proceedings

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

12. Burkina Faso, for its part, contends that such constant displacements of population *per se* have rendered it impossible to take into account the segments of the population at issue in drawing the frontier line. Thus, in Burkina Faso's view, the frontier was deliberately artificial, and the *effectivités* cannot, in its view, provide a basis for the interpretation of the 1927 *Arrêté*. Yet, the ICJ itself has pondered, in its Judgment (of 22 December 1986) in the *Frontier Dispute* between Burkina Faso and Mali, that in the hypothesis of a legal title not being precise as to the extent of the corresponding frontier, the *effectivités* can play "an essential role" to indicate how a legal title ought to be interpreted in practice (para. 63).

13. Some specific points, raised by both Niger and Burkina Faso in the written phase in the *cas d'espèce*, as to the ineluctable relationship between territory and population, should not, in my view, pass unnoticed here. In its aforementioned Memorial of April 2011, for example, Niger observes that the frontier ensuing from the 1927 *Arrêté* and Erratum, from the very beginning

"raised problems for the nomadic populations, who were accustomed to travelling within a unitary area, which was now divided into two

[6] So as to ensure a proper implementation of Decision A/DEC.5/10/98 of 31 October 1998 regulating transhumance between ECOWAS member States (cf. *infra*).

> separate colonies. In order to retain their customary transhumant routes, or even to cultivate their croplands which overlapped the boundary, they had to pass from one colony to the other. (. . .)
>
> On the other hand, very quickly, the nomadic or semi-nomadic populations became aware of the advantages that they could derive from the situation in order to escape taxes or other services required by the colonial power, or enlistment in the armed forces. (. . .)" (Para. 2.5.)

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

15. From then onwards — Niger proceeds — "[a]t all times, the Administrators sought to determine the boundaries of their *cantons*" (para. 5.11). There have occurred different kinds of transhumance; for example, in the Say sector (not so much populated) — Niger adds — there have been: *(a)* "major transhumance, . . . generally practiced by the Bororo and related Peulhs"; *(b)* a movement over short and medium distances, generally carried out in order to exploit the pastureland beside rivers and pools"; *(c)* commercial transhumance, concerning "small flocks" "for the purpose of increasing milk production and taking advantage of the pasturage provided by fallow croplands" (para. 7.7). This longstanding activity — Niger remarks — is nowadays regulated within ECOWAS, of which Niger and Burkina Faso are members *(ibid.)*.

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

> "The instability of the populations of areas close to the shared boundaries or territories resulted in multiple registrations and the use of contradictory criteria for defining administrative links (place of temporary settlement or village of origin).
>
> Apart from traditional nomadic movements or the search for new land, there were various factors impelling populations to change from one territory to another: differences in régime as between colonies in the matter of compulsory service or of human or livestock taxation, the existence of basic infrastructure in the neighbouring territory (access to water, vaccination facilities for livestock, schools, health centres, etc.), power relationships within tribes, etc. Thus, all along

the frontier, a game of cat-and-mouse developed between colonial administrators and frontier populations." (Para. 6.6.)

17. Niger further remarks that the Téra/Dori frontier zone, for example, has been inhabited by sedentary, nomadic and semi-nomadic peoples (para. 6.7). It then added that

> "[t]he problems of the frontier area are conditioned by various dominant forms of production, namely: itinerant nomadism, seasonal trans-frontier pastoral transhumance, conducted on a pendular basis, semi-nomadism, sedentary field agriculture, itinerant agriculture, gold prospection and extraction" (para. 6.7).

18. For its part, Burkina Faso, in its Memorial (of 20 April 2011) concedes that the boundary created by the 1927 *Arrêté* and Erratum was deliberately an artificial one ("artificial in nature" — para. 2.38). It adds that such has been the practice in the fixing of borders by the colonial administrations (paras. 2.36-39), the primary goal being stability, so as to reach the consolidation of peace and security in the region (para. 3.37).

19. In its Counter-Memorial (of January 2012), Niger contends that, even in the colonial times, the administrators took into due account "the human factor/*l'élement humain*"[7], with regard to a possible change of limits between Upper Volta and Niger (para. 1.1.11). The transfer of territory between the two colonies — it proceeds — was effected on the basis not of straight lines, but rather of transferring *cantons* between them (paras. 1.1.14-15), with attention to local traditions (paras. 1.1.24-25). Burkina Faso, in turn, in its Counter-Memorial (of 20 January 2012), retorted that the 1927 *Arrêté* and Erratum never intended to base the delimitation on the then existing limits of *cantons*, not to allocate villages to one or the other colony; if that was the intention — it added — it would have been explicit (paras. 3.53-55).

20. By and large, one may distinguish two main trends of thinking, in the briefs of the Parties, on the relationship between the population concerned and the territory under contention, namely: *(a)* the reasoning on the impact of the presence of the population on the fixing of the frontier; and *(b)* the historical accounts of the displacements of the populations in the frontier surroundings. While Niger generally upholds that local populations are to be taken into account in the fixing of the boundary, Burkina Faso sustains the opposite, adding that, in any case, such populations are nomadic, and their continuous displacement renders it difficult to take them into account for the fixing of the border.

21. From its perspective, it is thus not surprising to find that Burkina Faso does not refer in its Memorial to the population spreading on the land in both parts of the frontier. Niger, on the other hand, dedi-

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

cates a part of its Memorial[8] to an examination of the distribution of those populations[9] and to their historical belonging to one or another State. It thus challenges the "artificial nature" of the frontier invoked by Burkina Faso.

22. In turn, in its Counter-Memorial (of 20 January 2012), Burkina Faso dismisses the practice — and the *effectivités* invoked by Niger — subsequent to the 1927 *Arrêté* and Erratum (paras. 3.56-64)[10]. It insists that,

> "[i]n actual fact, the colonial authorities were fully aware that the 'artificial' colonial boundary which had been adopted could not reflect the complex situations on the ground, *far removed* from any ideas of frontier division" (para. 3.60).

Burkina Faso concedes that

> "It is indeed an undisputed fact that the human geography of the frontier area has always been characterized by mobility on the part of the local people. This is an everyday occurrence and also follows a more general pattern. Population groups move according to weather conditions or the economic situation. The consequence is the existence of 'fossilized' or 'ghost' villages, and also a degree of vagueness with regard to the names of places in the frontier zone, to mention just these two aspects. Besides, even the most sedentary groups may live in different villages according to the season, and those villages may in some instances be on different sides of the colonial frontier." (Para. 3.61.)[11]

Yet, Burkina Faso's conclusion is that, given all these complexities, "[i]n such circumstances, the choice of an artificial boundary, despite its alleged disadvantages, probably turned out to be the wisest one" (para. 3.63).

IV. *Communiqués* after Independence in 1960 Expressing Concern with the Local Populations

23. In addition to the aforementioned treaty provisions expressing concern with the local populations, references were made, in the course

[8] Passages in Chapters VI-VII.

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

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

[11] Burkina Faso adds that "the territories to which the native *groupements* lay claim, in particular in semi-desert savannah areas, have traditional boundaries which are somewhat imprecise" (para. 3.61).

of the written phase of proceedings, also to *communiqués* between Burkina Faso and Niger (after independence in 1960), concerning freedom of movement of local populations (free circulation of persons and goods; trade, transportation and customs). Thus, in the Ministerial Meeting between Niger and Upper Volta in January 1968, the two parties agreed "henceforth to dispense with the movement calendar requirement", as that clause was difficult to put into practice"; instead, they decided that the local administrative authorities were to "communicate to each other all documents concerning transhumance"[12].

24. Subsequently, in their meeting at Ouagadougou, of 12-14 February 1985, Niger's Minister Delegate for the Interior and Burkina Faso's Minister for Territorial Administration and Security, reached a *modus vivendi* on transit (of livestock), in the ambit of ECOWAS, including trade and customs[13]. Shortly afterwards, in another meeting, on 9 April 1986, Burkina Faso's Minister for Territorial Administration and Security and Niger's Minister Delegate for the Interior agreed on directives concerning free circulation of persons and goods, public health (including campaigns of vaccination), animal health, reciprocal recognition of documents, water and protected zones[14].

25. One decade later, the report of the meeting held at Kompienga, on 5-6 December 1997, between the Ministers for Territorial Administration and Security of Niger and Burkina Faso, addressed specific issues that needed further consideration on their part, concerning free circulation of persons and goods, documentation for transhumance policy, vaccination cards, public health (before vaccination), customs harmonization and public security. These issues admittedly required the continuing co-operation between the authorities of the two bordering States. Accordingly,

> "With a view to enhancing the free movement of people and goods, the meeting of Kompienga urges: the harmonization of regulations and procedures in force; the interconnection of road networks; the involvement of transporters in the management of transportation and transit problems; the monitoring of the application of ECOWAS Conventions concerning inter-State transport and transit routes."[15]

26. Subsequently, in their meeting held at Tenkodogo, on 24-26 May 2000, Niger's Minister for the Interior and Burkina Faso's Minister for Territorial Development agreed on fostering the "integration among the populations in border areas", with particular attention to the "free circulation of persons and goods" in the ambit of "transhumance"[16].

---

[12] Memorial of Burkina Faso, Annex 54.2.
[13] Memorial of Niger, Annex A2.
[14] Memorial of Burkina Faso, Annex 68.
[15] *Ibid.*, Annex 92.
[16] *Ibid.*, Annex 93.

V. Views of the Parties concerning Villages

27. Both Niger and Burkina Faso have conveyed to the ICJ considerable additional information and their views on the villages in their border surroundings[17], in their responses to the questions I deemed fit to pose to them, at the end of the public sitting of 17 October 2012. Niger's claims over some villages in the region at issue were challenged by Burkina Faso on five grounds, namely:

(a) the documents produced purportedly supporting Niger's claim that certain villages belonged to it, in its view, did not demonstrate "anything" claimed by Niger (sector of Téra: villages of Petelkolé, Ihouchaltane [Ouchaltan], Bangaré, Beina, Mamassirou, Ouro Gaobé, Yolo, Paté Bolga; and sector of Say: Fombon, Tabaré, Latti, Dissi, Boborgou Saba [Dogona])[18];
(b) certain villages were mentioned in Niger's written pleadings, but no documents were cited in support of the claim that they were "Niger" villages (sector of Téra: villages of Tindiki, Lolnango, Hérou Boularé, Nababori);
(c) the basis for Niger's claim over the villages had not, in its view, been provided by Niger (sector of Téra: Bambaré, Imoudakan 1, Imoudakan 2 or Kogonyé, Dankama, Zongowaétan Gourmantché, Bourouguita, Tchintchirguel, Mandaw; and sector of Say: Kankani, Nioumpalma, Bounga Bounga, Foltiangou, Mangou, Bandiolo, Kerta, Danbouti, Golongana, Kakao Tamboulé, Koguel, Hantikouta, Déba, Béla);
(d) Niger had, in its view, attributed the villages to Burkina Faso in Niger's written arguments (sector of Téra: Komanti, Kamanti [Ouro Toupé], Gourel Manma, Sénobellabé, Hérou Bouléba); and
(e) there were, at last, in its view, those which were encampments, and not villages (sector of Téra: Débéré Bagna or Débéré Siri N'gobé [Ousalta peul], Komanti, Zongowaétan [Fété Tao], Ouro Tambella [Dingui Dingui]).[19]

28. One can consider, without precision or certainty, that certain villages belonged to Niger or else to Burkina Faso, at the time of their accession to independence in 1960. Moreover, there were villages (e.g.,

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

[18] Burkina Faso did not expressly refer to these villages, but this information can be understood from other information provided in: Written Comments of Burkina Faso on Niger's Replies to the Questions Put by Judge Cançado Trindade at the End of the Hearing Held on 17 October 2012 (hereinafter "Written Comments of Burkina Faso"), doc. of 23 November 2012, p. 4, para. 12 (v).

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

Tokalan and Tankouro) that seem to have disappeared during the period contemporary of the *Arrêté* and Erratum of 1927, and thus can no longer be taken into account in the determination of the frontier nowadays (cf. sketch-map No. 1, p. 108).

29. It further appears, adding to uncertainties, that some of the villages in the region at issue were at times designated by different names[20]. By and large, the documentation forming part of the *dossier* of the present case, as to the distribution of the local populations (and the administration of villages) on both sides of the frontier, in sum, is not amenable to clear conclusions as to their belonging to Burkina Faso or Niger. It is not my intention to proceed to an examination of the present situation of each of those villages for the purposes of the present separate opinion; it is beyond its scope.

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

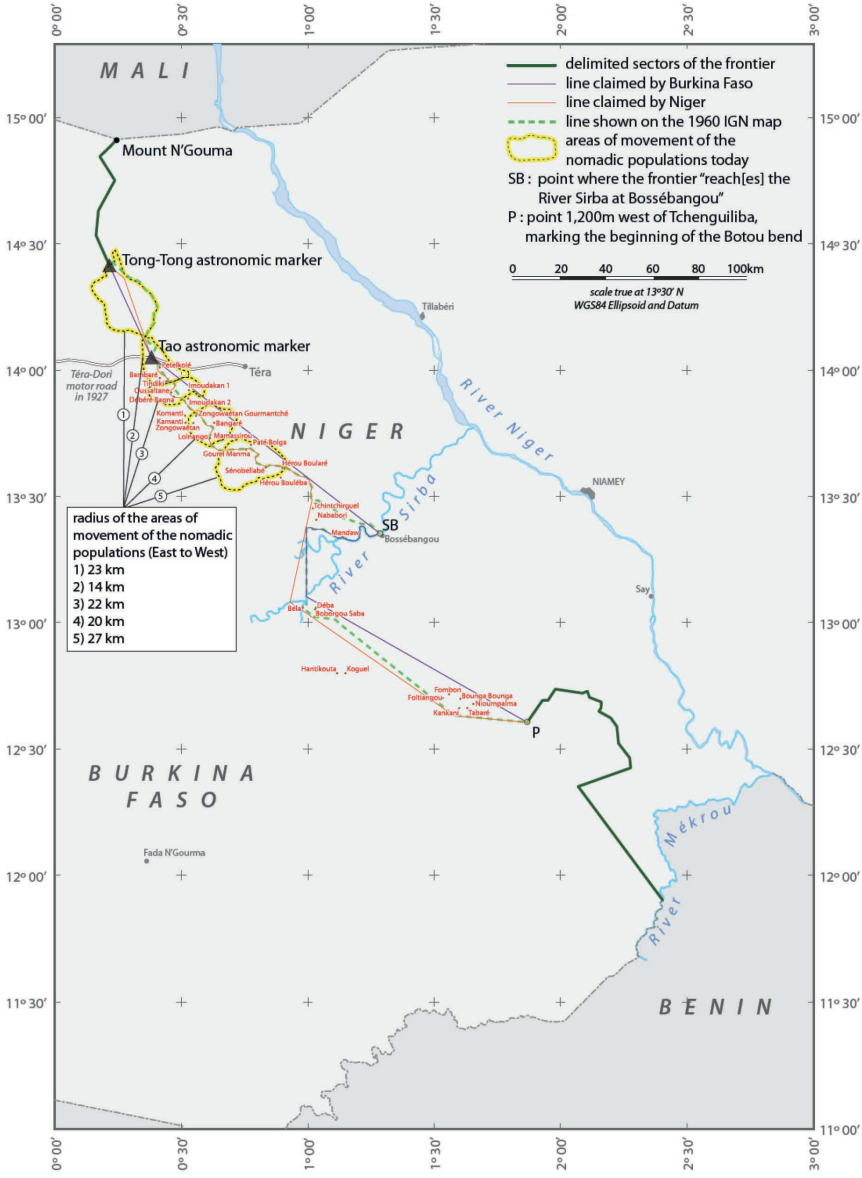
31. More important than the aforementioned challenges, controversies, uncertainties, is the fact that, when it comes to take into account the fulfilment of the needs of the peoples (nomadic or semi-nomadic), living in, and moving around, the region across the border, both Burkina Faso and Niger appear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

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

32. In their two rounds of oral arguments before the Court, the contending Parties retook their respective lines of reasoning on the rela-

[20] As pointed out by Niger, in its oral arguments; cf. CR 2012/26, of 17 October 2012, p. 56.

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



tionship between people and territory in the *cas d'espèce*. In the first round of those arguments, Burkina Faso, for its part, referred to the demographic, ecological and economic elements of the region[21], and to the fact that the nomadic peoples lived therein, in the frontier area, off pastoralism[22]. It explained that they tend to settle in easily dismountable huts, so that they can move according to the pastoral calendar[23]. Burkina Faso recalled that Niger and itself are member States of ECOWAS, which has adopted agreements concerning cross-border movements of livestock[24]. Having said that, it insisted on its position based on legal title, discarding Niger's reliance on *effectivités*[25].

33. Niger, in turn, dismissed Burkina Faso's reliance on a deliberately "artificial" frontier line, and invoked the *cantons*' borders (created by going from one village to another), which, in its view, showed the awareness of colonial administrators of the fact that villages had been established on both sides of the frontier, and had been taken into account for the frontier's delimitation[26]. According to Niger, the limits established by the 1927 *Arrêté* and its Erratum ought to be presumed to have followed the limits of the *cantons*[27]. Niger then invoked the *effectivités* to the effect of interpreting the legal title in practice[28].

34. In the second round of oral arguments, the two contending Parties devoted much of their attention to the argument on the *effectivités*. Once again, Niger supports recourse to these latter, as it sees the legal title unclear; Burkina Faso, on the other hand, opposes such recourse to the *effectivités*, as it regards the historical title as being clear[29]. That was not, however, the end of the exchanges between the contending Parties in the procedure of the *cas d'espèce*.

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

1. Questions from the Bench

35. At the end of the public sittings before the Court, on 17 October 2012, I deemed it fit to put to the contending Parties the following questions:

[21] CR 2012/19, of 8 October 2012, p. 33.
[22] *Ibid.*, pp. 34 and 36.
[23] *Ibid.*, p. 40.
[24] *Ibid.*, p. 38.
[25] CR 2012/20, of 8 October 2012, pp. 34-45; and CR 2012/21, of 9 October 2012, pp. 10-13.
[26] CR 2012/22, of 11 October 2012, pp. 50-51 and 53.
[27] *Ibid.*, pp. 55-56.
[28] CR 2012/23, of 12 October 2012, pp. 45 and 48.
[29] Cf., as to the arguments of Niger, CR 2012/26, of 17 October 2012, pp. 21-23, 25-29, 33, 35-36 and 38-41. And, as to the arguments of Burkina Faso, cf. CR 2012/22, of 11 October 2012, pp. 23 and 50; and CR 2012/25, of 15 October 2012, pp. 24 and 26-36.

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

(1) First, could the Parties indicate in a map the location areas of nomadic populations at the epoch of accession to independence and nowadays, and indicate with precision to what extent will the fixing of the frontier have a bearing on those populations?
(2) In which radius around the frontier between the two States do the populations' movements take place? Would you please indicate in a map, if possible, which are precisely the portions of the frontier at issue.
(3) Which are the villages susceptible of being affected by the fixing of the frontier claimed by the Parties?" [30]

36. In response to my questions, Burkina Faso and Niger have provided the Court — in three rounds of responses to my questions [31] — with considerable additional information (a file of 140 pages), containing relevant details for the consideration of the present case. Certain passages of their responses were particularly enlightening — in particular those pertaining to nomadic populations — as we shall see next *(infra)*. Both Burkina Faso and Niger thus disclosed a commendable spirit of procedural co-operation before the Court.

2. Responses from Burkina Faso

37. Burkina Faso has provided responses to each of the questions I posed to both Parties [32]. In response to the question concerning the areas through which nomadic populations used to move, during the period when they became independent and today, Burkina Faso submits that, despite its efforts, it is unable to indicate in a map the areas used by the nomads at the time of independence since it was not able to find this information in the colonial archives and studies consulted; it does however provide indications of nomadic existence in the border area in the years close to the States' independence [33]. As to the nomads in the "Téra sector", Burkina Faso claims that although it cannot identify the precise

[30] CR 2012/26, of 17 October 2012, pp. 59-60.

[31] Cf. Replies of Burkina Faso and Niger to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012, doc. of 16 November 2012, pp. 1-150; Burkina Faso's Response to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012, doc. of 23 November 2012, pp. 1-2; Written Comments of Burkina Faso on Niger's Replies to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012, doc. of 23 November 2012, pp. 1-7.

[32] Replies of Burkina Faso and Niger to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012, doc. of 16 November 2012 [hereinafter referred to as "Burkina Faso's Response to the Questions Put by Judge Cançado Trindade"].

[33] *Ibid.*, paras. 1-3.

nomadic areas at the time of independence, it asserts that the Parties have engaged, since their independence, in the facilitation of freedom of circulation from each side of the border[34].

38. As to the question as to how the frontier could affect these populations, Burkina Faso claims that, in general, the reduction of pastoral spaces posed by international borders may cause difficulties to the nomads, while stating that, in the present case, any frontier that is determined between it and Niger will have no detrimental effect on the populations (nomads or otherwise) living in the border area[35]. As to the question concerning the movement of nomadic populations in the border area, between the two countries, Burkina Faso submits a map depicting the itineraries of transhumance at present time[36]. Then, in relation, more specifically, to the radius of areas of movement of the nomadic populations, Burkina Faso claims that it can be calculated on the basis of a description of the transhumance movements. It explains that transhumance is dictated by nature and natural resources, without taking into account border lines between States; and, it adds, *transhumance is also based on solidarity*[37] (cf. *infra*).

39. Burkina Faso next submits that States take political, technical and judicial measures concerning transhumance, and that regional organizations develop initiatives to promote breeding. Burkina Faso adds that the available statistics are poor, which leads it to rely on scattered studies to examine the question of transhumance movements. Between Burkina Faso and Niger, transhumance movements arrive, depart and transit through the border regions of Tillabéry, Niamey and Dosso, for Niger, and the Sahel and Est for Burkina Faso[38].

40. Burkina Faso adds that the radius of movement of nomadic populations depends on the richness of the pasture, watering points and salt licks, animal health conditions and commercial facilities (livestock and animal produce markets)[39]. And — last but not least — as to the question of villages susceptible to be affected by the frontier, Burkina Faso simply claims that because the 1987 Agreement confirms that the legal title is the Erratum of 1927, no village is susceptible of being affected by the frontier, since the delimitation has remained the same between 1927 and the present date[40].

---

[34] Burkina Faso's Response to the Questions Put by Judge Cançado Trindade, paras. 4-15.

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

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

[37] *Ibid.*, para. 59.

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

[39] *Ibid.*, paras. 56-65.

[40] *Ibid.*, p. 23, par. 66.

3. Responses from Niger

41. For its part, Niger, likewise, has provided responses to the questions I put to both Parties[41]. As to the questions concerning nomadic populations, Niger explains that the relevant area from the Niger River to the south of Dori is populated by sedentary, nomads and semi-nomads. It adds that these populations remain the same at this date and that they are currently located in the new administrative sections (the Téra sector, and the provinces of Oudalan, Séno and Yagha). It further points out that the disputed area is not occupied exclusively by nomadic populations. Niger further asserts that transhumance across borders is regulated in numerous documents annexed to Niger's Memorial, ensuring the liberty of movement of nomads[42].

42. In relation to my first question[43], Niger submits that it was not able to find maps adequately addressing the question; it thus relies on the documents used in the proceedings[44], and it submits two maps indicating first the areas through which nomadic populations used to move during the period when they became independent, and another map indicating the areas of movement today. It notes that, during the colonial and

[41] Replies of Burkina Faso and Niger to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012 (hereinafter "Niger's Response to the Questions Put by Judge Cançado Trindade"), doc. of 16 November 2012.

[42] *Ibid.*, pp. 1-3.

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

[44] Mainly in its Memorial. The documents referred to are the following: *(a)* Letter No. 96 from the Commander of Dori *cercle* to the Commander of Upper Volta dated 23 April 1929, which Niger claims to highlight transhumance movement between Dori and Téra; *(b)* Letter No. 367 from the Commander of Dori *cercle* to the Governor of Upper Volta dated 31 July 1929 and previous correspondence, wherein Niger claims the links which exist between populations and the places where they were established or had pastures; *(c)* Report No. 416 from the Commander of Dori *cercle* on the difficulties created by the delimitation established in 1927 between the Colonies of Niger and Upper Volta (*Arrêté* of 31 August 1927) regarding the boundaries between Dori *cercle* and Tillabéry *cercle*, 7 July 1930; *(d)* Niger claims that this Report highlights the problem of the distribution of the nomadic populations between Téra and Dori; *(e)* Directory (of 1941) of Villages of Téra Subdivision (villages of Kel Tamared, Kel Tinijirt, Logomaten Assadek, Logomaten Allaban), in respect to which Niger argues all the nomadic tribes, their pasture areas and watering points are mentioned; *(f)* Report of Delimitation Operations between Dori and Tillabéry *cercles*, dated 8 December 1943, stating: "[T]here is traditionally a cross-movement of Yagha and Diagourou herds. At the start and end of the rainy season, the herds from the central area of the Yagha go to Taka Pool, in Diagourou, for the salt lick, while, during the same periods, the Diagourou herds travel to the banks of Yiriga Pool for the same purpose"; *(g)* Report from the Head of Téra Subdivision on the Census of Diagourou *canton*, dated 10 August 1954, in relation to which Niger claims that the sheets of place names show the historical background and the places of establishment of certain villages and certain tribes.

post-colonial periods, there was little transhumance movement between Burkina Faso and the Say *cercle*, as during the colonial and the post-colonial periods pastoral activities were prohibited[45].

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

44. As to the future movement of populations, Niger asserts that the free circulation of populations and goods between the two States will be guaranteed by the bilateral and multilateral agreements concerning the liberty of movement and access to natural resources between member States. Niger refers in this regard to documents submitted with its response, explaining the transhumance movements and the organization of the transhumance régime conceived on the basis of international agreements. It then concludes that such agreements guarantee that the nomadic populations that move across the border between Niger and Burkina Faso will be able to keep their *modus vivendi*[46].

45. And, last but not least, as to the question of which villages are susceptible of being affected by the frontier which each Party is claiming, in addressing the question from its point of view, Niger distinguishes a scenario in which there is a change in the current national status of villages that have always been considered to be in Niger's territory and which it continues to claim to be located in its territory; and villages with Nigerien populations located in territory that Niger implicitly admits, by excluding them from its claim, will no longer be part of the State of Niger. Niger submits four maps (two for each scenario), as well as a list of villages with respective co-ordinates[47].

4. General Assessment

46. The Parties' responses have shed light on some important questions that, earlier on, were not entirely clear. Some observations can be made in view of the responses of the Parties. As to the nomadic and semi-nomadic populations, both Parties have submitted that: *(a)* there

[45] Niger's Response to the Questions Put by Judge Cançado Trindade, pp. 4-8.

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

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

are nomads and semi-nomads located in the border area and in the region; *(b)* the nomadic populations move across the areas where any of the frontiers claimed by the Parties would be located; *(c)* the Parties are willing and are bound (by their membership in regional organizations and by their bilateral engagements), to continue to guarantee free movement to the nomadic populations.

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

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

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

50. *The area between the Tao astronomic marker and Bossébangou*, in particular, seems to be the most complex portion of the frontier to be determined. This is so because first, the text of the Erratum is not entirely clear in its description of the course of the frontier. Secondly, another difficulty of determining the frontier in this area concerns the presence of villages located near the border and claimed by Niger. I propose thus to share some reflections concerning this section of the frontier, in light of

the responses of the Parties previously discussed. My observations are informed by the principle that the territory exists for the people that inhabit it.

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

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

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

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

VIII. Some Remarks on the Tracing of the Frontier Line in the IGN Map

55. Reference has already been made to the line of the map (1960 edition) of the Institut géographique national de France (IGN) in the factual context

of the present case *(supra)*. In effect, the IGN map had already drawn the attention of the ICJ Chamber in the earlier case of the *Frontier Dispute* between Burkina Faso and Mali (Judgment of 22 December 1986, para. 61). The Chamber expressly referred to one of the documents in the *dossier* of that case, namely, a Note of 27 January 1975, compiled by the IGN, on the positioning of the frontiers on the maps (para. 61). In its Judgment, the Chamber quoted only an extract of that Note; its full text is in the archives of this Court. In effect, having researched on the archives of the ICJ, bearing in mind the present case between Burkina Faso and Niger, I have found out that there are some other related and supporting documents (pertaining to the previous *Frontier Dispute* between Burkina Faso and Mali, 1986), of pertinence and relevance for the adjudication of the *cas d'espèce*[48].

56. For example, one such document of the IGN (letter of 24 June 1975) expressly refers to difficulties in the tracing of frontiers, solved, on most occasions, with the obtaining of information provided *in loco* to the "opérateurs sur le terrain" by the "chefs des circonscriptions frontalières, les chefs de villages et les populations locales"[49]. In this way, local populations and their representatives gave their contribution to the tracing of the frontiers in the region they lived, as set in the IGN map, — as the documentation of the previous *Frontier Dispute* between Burkina Faso and Mali, kept in the archives of this Court, indicates.

57. In the course of the proceedings (written and oral phases) of the present *Frontier Dispute* case between Burkina Faso and Niger, the point was stressed by Niger. Thus, in its Counter-Memorial (of January 2012), Niger observes that, from the cartographical standpoint, the 1960 IGN map rests on "solid technical bases", being as complete as "knowledge of occupation on the ground allowed. [T]he indications of the boundaries are based on information obtained from the local authorities" (para. 1.1.32).

58. In its oral argument in the public sitting before the Court of 11 October 2012, Niger added that the 1960 IGN map, prepared "at the dawn of decolonization", was the one to be relied upon. After all, it was compiled, as far as possible, not only on the basis of "detailed topographical surveys", but also on the basis of "information provided by the local authorities on the boundaries of their *cantons*". In its view, all those elements, "garnered on the eve of independence", were therefore "highly relevant"[50].

---

[48] Namely, besides the aforementioned Note of 27 January 1975 (doc. D/134), the following ones: *(a)* letter of 31 January 1975, accompanying the aforementioned Note (doc. D/135); *(b)* document (D/136) of 25 February 1975 (on the insufficiency of the *Arrêté* and the Erratum); *(c)* telegram of 9 June 1975 (on the need of observation *in loco*, doc. D/137); *(d)* letter of 24 June 1975 (doc. D/138), on information obtained *in loco*; and *(e)* letter of 5 September 1978 (doc. D/139), on the need of new cartography.

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

[50] CR 2012/22, of 11 October 2012, p. 30, para. 17.

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

> "It is of course well known that the colonial powers, particularly in Africa, did have recourse to straight lines of an artificial and arbitrary character in drawing the boundaries of colonial territories. This was the case across deserts, uninhabited regions and regions that remained unexplored before or after conquest. One needs only to think of the boundaries of Western Sahara, Mauritania, Algeria, Libya, Chad, etc., to cite just a few examples. [P. 13.]
>
> However, this is not at all the case in respect of the boundaries concerned here. The circumstances in which the boundary between Niger and Upper Volta was established reveal, on the contrary, a true concern to respect local inhabitants and pre-existing administrative divisions. The historical context and map archives prove this." (Para. 1.1.7.)

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

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

61. In sum, in my perception, in the area between the Tao astronomic marker and Bossébangou, the IGN line appears, from the perspective of the relations between people and territory, as the appropriate one. All evidence available in the *dossier* of the present case, as well as in the archives of this Court, points to the fact that the IGN line was drawn taking into account the consultations undertaken *in loco* by IGN cartographers with village chiefs and local people[51].

62. People and territory stand together; it is clear, in contemporary *jus gentium*, that territorial or frontier disputes cannot be settled making abstraction of the local populations concerned. As it can be seen (cf. sketch-map No. 2, p. 119), the IGN line, and indeed the course of the frontier determined by the Court in the *cas d'espèce* in the area between the Tao astronomic marker and Bossébangou, cuts across the width of

[51] Cf., to this effect, e.g., case of the *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 585-586, para. 61.

the areas of population movements today in a balanced way, equitably within the orbit of their present-day movements' areas.

IX. The Human Factor and Frontiers

63. It ensues from all the aforesaid that, in circumstances of the kind of the present case, or of inhabited territories in general, people and territory go together (cf. Part XI, *infra*). In the case of nomadic peoples, in distinct regions of the world, it has been observed that nomads "have become the prisoners of an annual climatic and vegetational cycle (. . .). They have not, indeed, passed across the stage of the histories of civilizations without having left their mark."[52] This has been pondered by Arnold J. Toynbee, in his masterful, if not epic, 10-volume *A Study of History* (1934-1957). He then added that

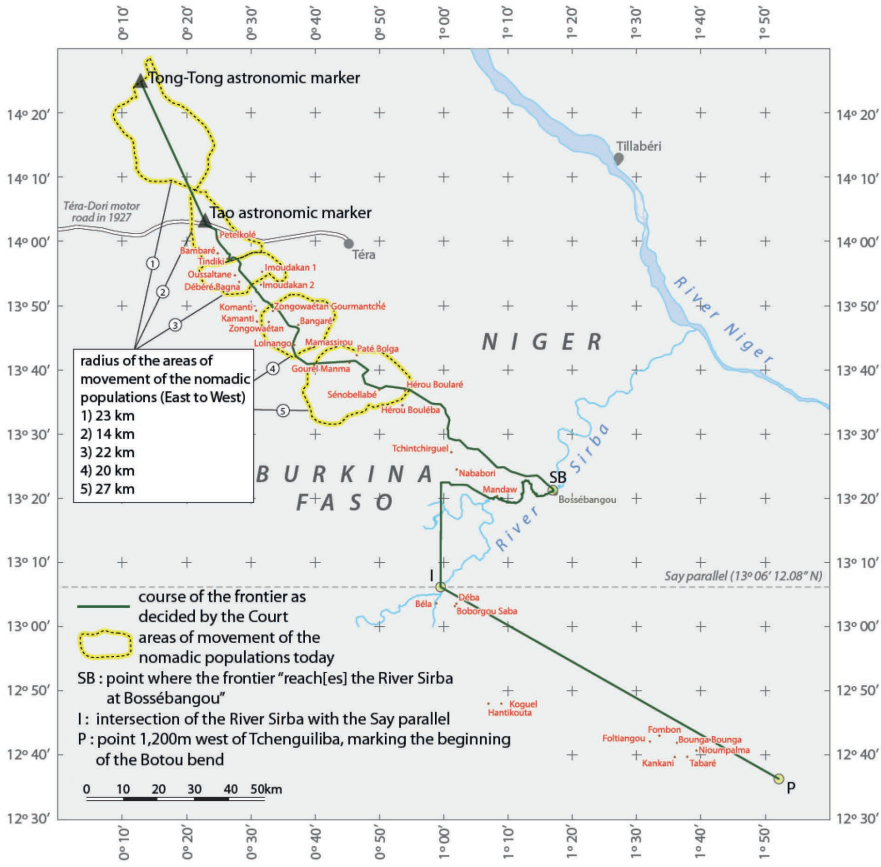
> "in spite of (. . .) occasional incursions into the field of historical events, Nomadism is essentially a society without a history. Once launched on its annual orbit, the Nomadic horde revolves in it thereafter and might go on revolving forever if an external force against which Nomadism is defenceless did not eventually bring the horde's movements to a standstill and its life to an end. This force is the pressure of the sedentary civilizations round about."[53]

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

65. Nomads may not have a history of big events, but they surely have *their* history, their *modus vivendi*, projected in time immemorial. History is included in civilization, which, in Fernand Braudel's outlook, further requires, in order to be understood, the combined endeavours of all the social sciences, and encompasses climate, vegetation, animal species, natural or other elements; it, moreover, comprises and considers what the human beings concerned have made of such basic conditions as "agri-

[52] A. J. Toynbee, *A Study of History* (abridged by D. C. Somervell), Oxford/London, Oxford University Press, 1960 [reimpr.], p. 169.
[53] *Ibid.*, p. 169.

Separate Opinion of Judge Cançado Trindade: Sketch Map 2:
COURSE OF THE FRONTIER AS DECIDED BY THE COURT
This sketch map has been prepared for illustrative purposes only



culture, stock-breeding, food, shelter, clothing, communications, industry and so on"[54]. One can then identify the "underlying structures" of civilizations, namely, "religious beliefs, family life, attitudes towards life and death, timeless peasantry, attitudes towards work and leisure"[55].

66. Nomadic groups constitute one of the most ancient forms of community, as aptly recalled by Toynbee. He added that nomadic shepherds move or displace themselves in a "fixed annual orbit"; they have never been able to become "technologically or economically independent" from the type of community or society they came from[56], nor did they seem to have wanted to become so. He further observed that the members of those ancient agricultural communities never broke up into serious conflict with each other, nor even with their more distant neighbours[57].

67. Another learned historian (and anthropologist) of the last century, the Senegalese scholar Cheikh Anta Diop, in one of his thoughtful monographs, *L'unité culturelle de l'Afrique noire* (1959), pondered that sedentary and nomadic ways of life (in distinct regions) have led to two distinct types of family life (matriarchal and patriarchal) and to distinct organizations of social collectivities, leading later to distinct forms of State[58]. Nomadic life soon disclosed needs of its own, and everything seemed linked to the earlier conditions of existence (and survival), with the notion of justice only emerging later on, in time perspective; distinct social ideas derived from nomadic and sedentary ways of life[59].

68. Cheikh Anta Diop added that private law emerged first, and only much later on, with the passing of time, public law was to take its place in order to regulate social relations, then followed by the rise of the States, marked by the *séquelles* of the earlier historical periods[60]. As observed, for his part, by the archaeologist Félix Sartiaux in 1938, in ancient times nomadic populations exerted influence upon sedentary populations; the two forms of *modus vivendi* (pastoral life and agriculture) were to co-exist, and, with the passing of time, sedentary populations gained increasing importance and were to influence others[61].

69. Yet — as the present case bears witness of — nomadic populations never vanished, and their way of life and their spirit survive nowadays,

---

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

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

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

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

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

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

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

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

"in the agitation and disquiet of modern times"[62]. In my perception, even in the determination of frontiers in regions inhabited by human groups of such dense cultural features, one should not simply draw entirely and admittedly "artificial" lines, overlooking the human element; the centrality, in my view, is of human beings.

X. Admission by the Parties that They Are Bound by Their Pledge to Co-operation in Respect of Local Populations

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

1. In Multilateral African Fora

71. In their responses to questions I have deemed it fit to put to both of them at the end of the public sittings before this Court, on 17 October 2012, Burkina Faso points out, together with Niger, that both States are parties to numerous regional co-operation and integration organizations establishing freedom of movement of populations, goods and service, as well as the right of residence and establishment[63]. Burkina Faso refers, in this regard, to the Economic Community of West African States (ECOWAS), the West African Economic and Monetary Union (WAEMU), the Permanent Interstate Committee for Drought Control in the Sahel (CILSS), the Liptako-Gourma Integrated Development Authority (LGA), the Niger Basin Authority (NBA) and the *Conseil de l'entente*.

72. As to the ECOWAS, in explaining the nature of the organization, Burkina Faso notes in particular its objective of suppressing obstacles to the free movement of people, goods and services, as well as the right of residence. Burkina Faso contends that the Heads of State and Government

[62] F. Sartiaux, *La civilisation*, Paris, Libr. A. Colin, 1938, p. 73.

[63] Replies of Burkina Faso and Niger to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2012, doc. of 16 November 2012, paras. 18-19.

of ECOWAS adopted Protocol A/P.1/5/79, in Dakar, on 29 May 1979[64], on freedom of movement of persons, the right of residence and establishment in the ECOWAS area, which reasserted and clarified the details of the freedom of movement of persons as well as the right of residence and establishment. In this regard, it also invokes Protocol A/P.3/5/82, of 29 May 1982, on the definition of community citizenship[65].

73. Moreover, it cites other documents of the ECOWAS concerning the free circulation of persons[66]. Burkina Faso further argues that freedom of movement is accorded to nomadism or cross-border transhumance, which is subject to a minimum amount of regulatory legislation[67]. Burkina Faso also notes that ECOWAS authorities have organized awareness-raising and outreach seminars, and workshops concerning freedom of movement, residence and establishment within the ECOWAS member States[68].

74. As to the West African Economic and Monetary Union (WAEMU), in recalling that it is a regional economic and monetary union composed of eight West African countries, Burkina Faso notes, in particular, that its objective is to create a common market based, *inter alia*, on the free circulation of people, goods, services, capitals, and the right of establishment of people conducting an independent or paid activity, as well as external tariff and a common trade policy. Burkina Faso further claims that several texts issued by the Conference of the Heads of State and Government, the Council of Ministers, the Commission and the President of the Commission, supplement and further clarify the nature and scope

[64] Burkina Faso's Response to the Questions Put by Judge Cançado Trindade, Annex 2.

[65] *Ibid.*, Annex 3.

[66] Namely, Supplementary Protocol A/SP.1/7/85, signed in Lomé, on 6 July 1985, on the code of conduct for the implementation of the Protocol on free movement of persons, the right of residence and establishment; Decision A/DEC.2/7/85, of 6 July 1985, on the establishment of the ECOWAS travel certificate for member States; Supplementary Protocol A/SP.1/7/86, signed in Abuja, on 1 July 1986, on the second phase (right of residence) of the Protocol on free movement of persons, the right of residence and establishment; Supplementary Protocol A/SP.2/5/90, signed in Banjul, on 29 May 1990, on the implementation of the third phase (right of establishment) of the Protocol on free movement of persons, right of residence and establishment; Decision A/DEC.2/5/90, adopted in Banjul, on 30 May 1990, establishing a residence card in the ECOWAS member States; Decision C/DEC.3/12/92, adopted in Abuja, on 5 December 1992, on the introduction of a harmonized immigration and emigration form in the ECOWAS member States; and the adoption of the ECOWAS Embarkation and Disembarkation Form, used by the airport police services of the various ECOWAS member States.

[67] Burkina Faso cites, in this regard, the Decision A/DEC.5/10/98, of 31 October 1998, regulating transhumance between the ECOWAS member States, and the Regulation C/REG.3/01/03 on the implementation of the regulation of transhumance between the ECOWAS member States, submitted as Annexes 4 and 5 of Burkina Faso's Response.

[68] Burkina Faso's Response to the Questions Put by Judge Cançado Trindade, paras. 20-30.

of the freedom of movement and the right of establishment and residence in the WAEMU area[69].

75. As to the Permanent Interstate Committee for Drought Control in the Sahel (CILSS), Burkina Faso points out that a transhumance agreement has been concluded among its member States[70]. And as to the *Conseil de l'entente*, Burkina Faso refers to the free movement of people and goods, the right of residence and of establishment (recognized in Article 2 and 3 of the Charter of the *Conseil*), and to a Protocol of Agreement adopted by member States in 1989 relating to an international transhumance certificate in the *Conseil* member States, and highlighting transit through the entry and exit points established by the States and the health protection and security conditions to cross borders[71].

76. As to the Liptako-Gourma Integrated Development Authority (LGA), in recalling that it is a sub-regional organization composed of Burkina Faso, Mali and Niger (created by a Protocol of Agreement, signed in Ouagadougou on 3 December 1970), Burkina Faso remarks that this institution is the most active on the ground concerning nomadic populations of member States and transhumance movements. It further claims that LGA, in partnership with the ECOWAS (financial development partners), non-governmental organizations (NGOs) and professional agro-pastoral organizations and associations, organized a regional workshop on the findings of a study concerning existing legislation governing transhumance in the Organization's member States[72].

77. For its part, in response to a question I have deemed it fit to put to the two contending Parties, on 17 October 2012, at the end of the public sittings before this Court, Niger refers to ECOWAS Decision A/DEC.5/10/98, of 31 October 1998, which purports to regulate transhumance between ECOWAS member States, in the "communitarian space" (preamble). The Decision[73] provides, *inter alia* (Article 3), that

> "The crossing of terrestrial frontiers for purposes of transhumance is authorized between all countries of the Community for bovine, ovine, caprine, cameline and asine species under the conditions laid down in the present Decision. (. . .)"

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

> "Transhumant pastoralists who have lawfully been admitted to the country shall be entitled to the protection of the authorities in the

[69] Burkina Faso's Response to the Questions Put by Judge Cançado Trindade, paras. 31-34.
[70] *Ibid.*, paras. 35-36.
[71] *Ibid.*, paras. 37-40.
[72] *Ibid.*, paras. 41-46.
[73] Niger's Response to the Questions Put by Judge Cançado Trindade, Annex A.

host country, and their basic rights shall be guaranteed by the judicial institutions of the host country. (. . .)"

79. Furthermore, Niger refers to the general report on the Consultation Meeting on Cross-Border Transhumance, held in Dori, Burkina Faso, on 19-20 December 2002. The report[74] was prepared following that meeting, on animal transhumance, which gathered ministers "responsible for animal husbandry", from ECOWAS member States, held in Ouagadougou, Burkina Faso, on 9-10 October 2002.

2. In Bilateral Agreements

80. In response to a question I have deemed it fit to put to the contending Parties at the end of the public sittings before this Court, on 17 October 2012, Burkina Faso further adds that the two States have developed bilateral relations concerning this question. In this regard, Burkina Faso cites the 1964 Protocol of Agreement which recognized the free movement of populations and it also asserts that the two States have never ceased to co-operate to further improve and facilitate the conditions and modalities of free circulation of people and transhumance movements. Burkina Faso concludes that the frontier will not affect the nomads particularly since both States' membership in regional integration and co-operation institutions recognizes the freedom of movement and residence rights to the populations[75].

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

> "As regards the future, the free movement of persons and goods between the two States will remain safeguarded under the conventions binding the two States within a bilateral framework and under international agreements establishing freedom of movement and free access to natural resources between member States."[76]

82. The admission by the contending Parties, that they are bound by their pledge to co-operation — at multilateral and bilateral levels — in respect of local populations, is, in my perception, very significant indeed. However harmonious human relations might be in the interior of nomadic and semi-nomadic communities (cf. *supra*), it is not surprising to find that their relations with the public power of the State may at times disclose tension and some degree of mistrust[77]. Yet, this seems also to be surmountable, and renders it much to the credit of both Burkina Faso and Niger to have found the way to establish a régime of transhumance and a true "system of solidarity" (cf. *infra*), so as to fulfil the needs of the local

[74] Niger's Response to the Questions Put by Judge Cançado Trindade, Annex B.

[75] Burkina's Faso's Response to the Questions Put by Judge Cançado Trindade, paras. 47-52.

[76] Niger's Response to the Questions Put by Judge Cançado Trindade, p. 6.

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

populations (and to preserve their *modus vivendi*, whether nomadic, semi-nomadic or sedentary), within themselves and in their international relations.

3. The Régime of Transhumance

83. Besides transmitting to the Court important elements such as the ones reviewed in the present separate opinion *(supra)*, the two contending Parties, also in their responses to the questions I have deemed it fit to put to both of them at the end of the public sittings before this Court, on 17 October 2012, added some thoughts which leave no doubt as to their clear pledge to co-operation with regard to the living conditions of the population over the territory at issue. Thus, in this respect Burkina Faso ponders that

> "it is the practice of nomadism in Africa and, more generally, the movement of pastoralists and their herds as part of transhumance (. . .), which led Niger and Burkina, once they had achieved independence, to undertake to facilitate the freedom of movement on either side of the frontier"[78].

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

> "[C]ommunity law in West Africa, as deriving from the legal provisions of the instruments establishing the sub-regional organizations which Burkina Faso and Niger have joined, and as deriving from the regulatory instruments of the organs of those organizations, as well as the practices followed or observed by the States of the sub-region, Burkina Faso is in a position to respond that the frontier line between Burkina Faso and Niger will not affect the life or fate of the nomadic populations living on either side of the border."[79]

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

> "The current system of transhumance is as described hereafter. In the absence of a precise frontier line, movements and access to natural resources on either side of the frontier are unrestricted under a *modus vivendi* arrangement between the authorities of the two States, which do not strictly apply the rules in force concerning the movement of persons and livestock (requirement for an identity card, laissez-passer, vaccination certificate, etc.)."[80]

---

[78] Burkina Faso's Response to the Questions Put by Judge Cançado Trindade, para. 15. Burkina Faso adds that "the area frequented by nomads goes way beyond the frontier zone" (para. 54); in referring to their free circulation between itself and Niger, Burkina Faso adds that the "transhumance routes" correspond to the "zones currently frequented by nomads" (para. 55).

[79] *Ibid.*, par. 52.

[80] Niger's Response to the Questions Put by Judge Cançado Trindade, p. 8.

86. Despite not coinciding in their submissions as to the specific aspects of the tracing of the frontier line, Burkina Faso and Niger agree as to the assurance of freedom of movement of nomadic populations across their borders. Thus, in its additional comments to the responses given by Niger to the questions I put to both contending Parties at the close of the public sittings before the ICJ, on 17 October 2012, Burkina Faso ponders, *inter alia*, that

> "it should be pointed out that both Parties agree that the rules in force and effectively applied between the two States allow for — and widely facilitate — cross-border transhumance. Niger describes this as a *modus vivendi* arrangement (. . .): whatever its precise significance, that expression does not give an accurate representation of the situation. As shown by Burkina Faso in its own reply[81], and confirmed by the additional information given by Niger, the freedom of nomadic movement and transhumance is established (and supported) by an effective legal framework, which guarantees its continuity."[82]

XI. Population and Territory Together: Conformation of a "System of Solidarity"

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

1. Transhumance and the "System of Solidarity"

88. May I single out, at this stage, a passage of the responses of Burkina Faso to the questions that I put to both Parties at the end of the public sittings before this Court, on 17 October 2012; in dwelling upon the phenomenon of transhumance, Burkina Faso observes that

[81] Burkina Faso's Response to the Questions Put by Judge Cançado Trindade, paras. 17-52.

[82] Written Comments of Burkina Faso on Niger's Replies to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 17 October 2013, doc. of 23 November 2012, para. 4.

> "Transhumance is a traditional herding system based on longstanding routes and itineraries which are still in use today. The volume of movement varies in terms of both time and space, depending on the year and more particularly, periods of drought. (. . .)
>
> Livestock are moved in search of pasture, watering points and salt licks. Those movements of livestock take no account of national frontiers. Livestock movements are dependent solely upon nature, natural resources and their capacity to feed their stock. (. . .)
>
> The resources shared by herders are never appropriated by one community to the detriment of another. All depend on the rainfall and its vagaries; no one knows in advance when fodder resource conditions will fail. A system of solidarity, of *tontine* (mutual assistance) exists, where each welcomes the other when the conditions are better in his area, in the certainty of being welcomed in turn in other areas when nature is more favourable there." (Paras. 57-59.)

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

2. People and Territory Together

89. It is reassuring that, even a classic subject like territory, is seen today — even by the International Court of Justice — as going together with the population. In this respect, it should not pass unnoticed that, in its Order of Provisional Measures of Protection (of 18 July 2011) in the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand), the ICJ approached territory together with the (affected) population, and ordered — in an unprecedented way in its case law — the creation of a demilitarized zone in the surroundings of the aforementioned Temple (near the borderline between the two countries).

90. In my separate opinion appended thereto, I observed that such demilitarized zone seeks to protect not only the territory at issue, but also the segments of the populations that live thereon[83]. Beyond the classic territorialist approach is the "human factor"; this paves the way, I proceeded, for protecting, by means of such provisional measures, the right to life of the members of the local populations as well as the spiritual

[83] As well as a set of monuments situated thereon (conforming the Temple) which nowadays integrate — by decision of UNESCO — the cultural and spiritual heritage of humankind (*I.C.J. Reports 2011 (II)*, pp. 588-598, paras. 66-95).

heritage of humankind (paras. 96-113). Underlying this jurisprudential construction, I added, is the *principle of humanity*, orienting the search for the improvement of the conditions of living of the *societas gentium* and the attainment and realization of the common good (paras. 114-115), in the framework of the new *jus gentium* of our times (para. 117).

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

> "Cultural and spiritual heritage appears more closely related to a *human context*, rather than to the traditional State-centric context; it appears to transcend the purely inter-State dimension, that the Court is used to. I have made this point also on other occasions, in the adjudication of distinct cases lodged with the Court. For example, two weeks ago, in the Court's Order of 4 July 2011 in the case of the *Jurisdictional Immunities of the State (Germany* v. *Italy)* (intervention of Greece), I sustained, in my separate opinion, that rights of States and rights of individuals evolve *pari passu* in contemporary *jus gentium* (*I.C.J. Reports 2011 (II)*, pp. 506-530, paras. 1-61), to a greater extent than one may prima facie realize or assume.
>
> In any case, beyond the States are the human beings who organize themselves socially and compose them. The State is not, and has never been, conceived as an end in itself, but rather as a means to regulate and improve the living conditions of the *societas gentium*, keeping in mind the basic *principle of humanity*, amongst other fundamental principles of the law of nations, so as to achieve the *common good*. Beyond the States, the ultimate *titulaires* of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole." (*I.C.J. Reports 2011 (II)*, p. 606, paras. 113-114.)

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

92. The ICJ's 2011 decision in the case of the *Temple of Preah Vihear* is not the only example to this effect. Reference could further be made to a couple of other recent ICJ decisions acknowledging likewise the need to take into account people and territory together. For example, earlier on, in its Judgment (of 13 July 2009) on the *Dispute relating to Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the ICJ upheld the customary right of fishing for subsistence (*Judgment, I.C.J. Reports 2009*, p. 266, paras. 143-144) of the inhabitants of both margins of the River San Juan. Such fishing for subsistence was never objected to (by the respondent State). And, ultimately, those who fish for subsistence are not the States, but rather the human beings affected by poverty. The ICJ thus

turned its attention, beyond strictly territorial inter-State outlook, also towards the affected segments of the local populations concerned. This was reassuring, bearing in mind, in historical perspective, that States exist for human beings, and not *vice versa*.

93. Shortly afterwards, in its Judgment (of 20 April 2010) in the case concerning the *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, the ICJ, in examining the arguments and evidence produced by the parties (on the environmental protection in the River Uruguay), took into account aspects pertaining to the affected local populations, and the consultation to these latter. I drew attention to this point in my separate opinion (*I.C.J. Reports 2010 (I)*, pp. 192-207, paras. 153-190), wherein I pondered that, once again, it was necessary to go beyond the purely territorial inter-State dimension, and to take in due account the imperatives of human health and the well-being of the peoples concerned, the role of civil society in environmental protection[84], as well as the emergence of the obligations of objective character (beyond reciprocity) in environmental protection, to the benefit of present and future generations.

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

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

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

under Chapter III of the 1987 Protocol of Agreement, and encourages them to develop it further."

3. Solidarity in the Jus Gentium

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

96. The *jus gentium* they conceived was for everyone, all peoples, individuals and groups of individuals, as well as States (then, only then, emerging), all "fractions" of humankind[85]. They endeavoured to pave the way for the prevalence of a true *jus necessarium*, transcending the traditional limitations of the *jus voluntarium*. The gradual and felicitous encounter of scholastic knowledge with humanism propitiated further perennial insights. This is, in my perception, an appropriate moment to rescue herein a couple of them.

97. Thus, one of the most learned of the "founding fathers" of the law of nations *(droit des gens)*, Francisco Suárez, in Book II (on "The Eternal Law, the Natural Law, and the *Jus Gentium*") of his masterful *De Legibus, Ac Deo Legislatore* (1612), in upholding the unity of the human kind (wherefrom *jus gentium* emanates), singled out the "natural precept" *(praeceptum naturale)* of mutual "affection and mercy" [solidarity] *(mutui amoris et misericordiae)*[86], applying to everyone. There was awareness of sociability and mutual interdependence as limits to State sovereignty, to the benefit of the populations concerned, who stood in need of each other and could hardly live (or survive) in an isolated way.

98. "Natural precepts" of the kind found expression by the force of "natural reflection", under the "pressure of necessity", rather than as a

[85] A. A. Cançado Trindade, "*Totus Orbis*: A Visão Universalista e Pluralista do *Jus Gentium*: Sentido e Atualidade da Obra de Francisco de Vitoria", 24 *Revista da Academia Brasileira de Letras Jurídicas* — Rio de Janeiro (2008), No. 32, pp. 197-212; Association Internationale Vitoria-Suarez, *Vitoria et Suarez — Contribution des théologiens au droit international moderne*, Paris, Pedone, 1939, pp. 169-170; A. Truyol y Serra, "La conception de la paix chez Vitoria et les classiques espagnols du droit des gens", in: A. Truyol y Serra and P. Foriers, *La conception et l'organisation de la paix chez Vitoria et Grotius*, Paris, Libr. Philos. J. Vrin, 1987, pp. 243, 257, 260 and 263; A. Gómez Robledo, "Fundadores del Derecho Internacional — Vitoria, Gentili, Suárez, Grocio", *Obras — Derecho*, Vol. 9, Mexico, Colegio Nacional, 2001, pp. 434-442, 451-452, 473, 481, 493-499, 511-515 and 557-563.

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

result of "deliberate will". After all, in the *jus gentium*, reason stands above the will. The foundation of law lies in the *recta ratio* (evoking Cicero's *De Legibus*, 52-43 BC), and solidarity and mutual interdependence are always present in the regulation of the relations among the members of the universal *societas*. In the words of F. Suárez himself,

> "equity and justice must be observed in the precepts of the *jus gentium*. For such observance is included in the essential character of every true law (. . .); and the rules pertaining to the *jus gentium* are indeed true law (. . .); it is impossible that these precepts of the *jus gentium* should be contrary to natural equity."[87]

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

XII. Concluding Observations

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

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

101. The Court, for its part, has rightly expressed its wish that each Party kept its attention to "the needs of the populations concerned, in

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

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

102. The ghost of the outcome of the Berlin Conference (1885 onwards)[88] has at last vanished, and is no longer haunting Africa, with its secular cultures. The complexities of African boundary problems[89] cannot be reduced to the tracing simply of "artificial" straight lines everywhere. In the present case of the *Frontier Dispute* between Burkina Faso and Niger, the ICJ has found that, in the area between the Tao astronomic marker and Bossébangou, the IGN line was the one which constitutes the course of their frontier. The IGN line in that area is indeed the appropriate frontier line therein, for all the reasons that I have pointed out in the present separate opinion, from the perspective of the relations between people and territory.

103. The ICJ could have examined such relations to a far greater depth, had it dwelt upon — as I think it should have done — more attentively, the wealth of information on this matter (a *dossier* of 140 pages) transmitted to it by the Parties in response to the questions I deemed it fit to put to them at the end of the public sittings before the Court, on 17 October 2012. In any case (keeping in mind that the *optimum* is enemy of the *bonum*), the Court has moved a significant step ahead, in expressly acknowledging that territorial problems, such as the one raised in the *cas d'espèce*, are to be properly tackled taking into account the fulfilment of the needs of the local (nomadic, semi-nomadic and sedentary) populations.

104. Law cannot be applied mechanically; the unending work of jurists and magistrates appears to me — paraphrasing Isaiah Berlin[90] — like swimming against the current, and consideration of frontiers cannot

[88] Cf. N. J. Udombana, "The Ghost of Berlin Still Haunts Africa! The ICJ Judgment on the Land and Maritime Boundary Dispute between Cameroon and Nigeria", 10 *African Yearbook of International Law* (2003), pp. 13-61. The Berlin Conference itself lasted from 15 November 1884 to 26 February 1885.

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

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

ignore or overlook the human factor. After all, in historical or temporal perspective, nomadic and semi-nomadic, as well as sedentary, populations have largely antedated the emergence of States in classic *jus gentium*. This latter, the law of nations *(droit des gens)*, cannot be reduced to the inter-State cosmos of the *plaideurs* of the great-small world of the Peace Palace here at The Hague and of the legal profession "specialized" on inter-State litigation and its idiosyncrasies.

105. The fact remains that States, in turn, are not perennial entities, not even in the history of the law of nations. States were conceived, and gradually took shape, in order to take care of human beings under their respective jurisdictions, and to strive towards the common good. States have human ends. Well beyond State sovereignty, the basic lesson to be extracted from the present case is, in my perception, focused on human solidarity, *pari passu* with the needed juridical security of frontiers. This is in line with sociability, emanating from the *recta ratio* in the foundation of *jus gentium*. *Recta ratio* marked presence in the thinking of the "founding fathers" of the law of nations, and keeps on echoing in human conscience in our days.

(Signed) Antônio Augusto CANÇADO TRINDADE.