

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING THE FRONTIER DISPUTE
(BURKINA FASO/NIGER)**

MEMORIAL OF BURKINA FASO

VOLUME I

20 APRIL 2011

[Translation by the Registry]

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INTRODUCTION

0.1. By a joint letter dated 12 May 2010, filed in the Registry on 20 July 2010, Burkina Faso (hereinafter Burkina) and the Republic of Niger (hereinafter Niger) notified to the Registry of the Court a Special Agreement, which was signed in Niamey on 24 February 2009 and entered into force on 20 November 2009, with a view to the full and final settlement of the frontier dispute between them.

0.2. The Parties have thereby once again shown their confidence in the distinguished Court, to which both have previously had occasion to refer other frontier disputes with other neighbours:

- by an Order of 22 December 1986, a Chamber of the Court settled the *Frontier Dispute* between Burkina and Mali¹; and
- the Order of 12 July 2005 issued by another Chamber of the Court brought an end to the case concerning the *Frontier Dispute* between Niger and Benin².

Not only were these decisions welcomed by the parties, they also set precedents which are particularly relevant for the purposes of resolving this case, both in respect of establishing the endpoints of the frontier between Niger and Burkina, and in respect of the methodology adopted.

0.3. However, that methodology cannot be fully transposed to the present dispute. In the cases dealt with by the Judgments cited above, the Parties were disputing the existence and scope of the legal titles establishing their frontier. They were disputes relating to boundary delimitation in the strict sense of the term. The present case is different in that both Niger and Burkina accept that the *Arrêté* of 31 August 1927³ of the Governor-General of French West Africa (FWA), as clarified by the Erratum of 5 October 1927⁴, describes the course of their common frontier, which only remains to be demarcated, as the Parties state in the Agreement⁵ and Protocol of Agreement⁶ signed on 28 March 1987 and referred to explicitly in the Special Agreement seising the Court. As the delimitation has been established, it merely remains for the distinguished Court to clarify the interpretation of those instruments with a view to the demarcation of the frontier between the two countries⁷.

0.4. As the Parties agreed under Article 3 of the Special Agreement⁸, the Court, by Order of 14 September 2010, fixed 20 April 2011 as the time-limit for each Party to file a Memorial. The present Memorial is submitted in accordance with that Order.

¹*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 554.

²*Frontier Dispute (Benin/Niger)*, Judgment, I.C.J. Reports 2005, p. 90.

³Ann. MBF 34.

⁴Ann. MBF 35.

⁵Ann. MBF 72.

⁶Ann. MBF 73.

⁷Which is, moreover, the title of the 1987 Agreement and Protocol “on the demarcation of the frontier between the two countries”. For further details, see below, paras. 0.17 to 0.19.

⁸“1. Without prejudice to any question as to the burden of proof, the Parties request the Court to authorize the following procedure for the written pleadings: (a) a Memorial filed by each Party not later than nine (9) months after the seising of the Court.”

SECTION 1 CONCLUSION OF THE SPECIAL AGREEMENT

1. Border incidents and maintaining the status quo

0.5. The Special Agreement whereby the two Parties seised the Court of the present dispute has its historical origins in the fact that the boundary is not demarcated. This has led to territorial encroachments, of which both States have rapidly sought to prevent any recurrence and limit the effects. Just four years after gaining independence, Burkina and Niger expressly included a clause to that effect in the Protocol of Agreement of 23 June 1964 concerning the demarcation of their common frontier, whereby “[t]he security forces of each of the Contracting Parties shall make no incursion into the neighbouring territory without prior express authorization from the responsible authority”⁹. It was further agreed in the same Protocol that “[t]he status quo shall be maintained in respect of land utilisation rights until the frontier has been demarcated, and those rights shall terminate forthwith on signature of the demarcation report”¹⁰.

0.6. Notwithstanding these undertakings, there have been constant problems on the frontier since 1964. Nevertheless, the two Parties have always agreed that these problems should not affect the process of demarcating the frontier, especially as the incursions were “unintentional”¹¹ and due solely to the absence of demarcation.

0.7. When the two Parties concluded the Special Agreement seising the Court in February 2009, they considered it appropriate, first, to reiterate the undertaking of 1964¹² and, secondly, to reassert the need for increased cross-border co-operation — which they have always sought — in the disputed area¹³.

0.8. Pursuant to Article 10 of the Special Agreement:

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

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

⁹Ann. MBF 45, point 4, second paragraph, of the Protocol.

¹⁰*Ibid.*, point 3 of the Protocol.

¹¹Communication from the Minister for the Interior and Decentralization of the Republic of Niger during work on the framework for consultation on cross-border transhumance between the Republic of Niger and Burkina Faso, 25 January 2003, p. 3, Ann. MBF 95.

¹²The Protocol of 13 June 1964 is specifically mentioned in the first paragraph of the Special Agreement of 24 February 2009.

¹³See, for example, the report of the meeting between the Minister for the Interior and Planning (Republic of Niger) and the Minister for Territorial Administration and Security (Burkina Faso) held in Tenkodogo (Burkina Faso) from 24 to 26 May 2000, Ann. MBF 94.

0.9 This formal undertaking merely sets out for the Parties

“the principle universally accepted by international tribunals and likewise laid down in many conventions . . . to the effect that the parties to a case must . . . not allow any step of any kind to be taken which might aggravate or extend the dispute”¹⁴.

2. Preparation and adoption of the Special Agreement

0.10. The negotiations aimed at settling the frontier dispute between the Parties and their partial deadlock are described in detail in Chapter I, section two, of this Memorial. In order to break the deadlock¹⁵, in 2006 the two States began to consider submitting the dispute to the International Court of Justice. The final negotiations resulted in the Foreign Ministers of the two countries signing the Special Agreement in Niamey on 24 February 2009¹⁶.

0.11. Nevertheless, this did not mark the end of the discussions on seising the Court. Thus in Article 2, paragraph 2, of the Special Agreement, reference is made to the Parties’ “agreement” on the demarcation of the two outermost sectors of the boundary¹⁷; that agreement, however, was never formalized in a written document, pending overall demarcation of the frontier. Only after an exchange of letters between the Ministers concerned did the Parties reach a final agreement in 2009¹⁸.

SECTION 2 THE SUBJECT OF THE DISPUTE

0.12. Article 2 of the Special Agreement describes the subject of the dispute as follows:

“The Court is requested to:

1. determine the course of the boundary between the two countries in the sector from the astronomic marker of Tong-Tong (latitude 14° 25' 04" N; longitude 00° 12' 47" E) to the beginning of the Botou bend (latitude 12° 36' 18" N; longitude 01° 52' 07" E);
2. place on record the Parties’ agreement on the results of the work of the Joint Technical Commission on Demarcation of the Burkina Faso-Niger boundary with regard to the following sectors:

¹⁴*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79, p. 199; LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 503, para. 103.*

¹⁵The last meeting of the Joint Technical Commission on Demarcation established by the Agreement of 28 March 1987 took place in Niamey from 28 to 30 September 2004 (see the report of the meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Niamey, 28-30 September 2004, Ann. MBF 97).

¹⁶See also the Joint Communiqué of the meeting of the Foreign Ministers for negotiation and signature of the Special Agreement seising the International Court of Justice of the frontier dispute between Niger and Burkina Faso, Niamey, 22-24 February 2009, Ann. MBF 98.

¹⁷See below, paras. 0.12 to 0.14.

¹⁸See the record of the work of the Joint Survey Mission of 3 July 2009, Ann. MBF 101, and the record of the meeting to ascertain the co-ordinates of the unmarked points in sector B, 15 October 2009, Ann. MBF 105. Details on how this “agreement” came about are given in Chapter III of this Memorial (paras. 3.12-3.13).

- (a) the sector from the heights of N’Gouma to the astronomic marker of Tong-Tong;
- (b) the sector from the beginning of the Botou bend to the River Mekrou”.

0.13. The Special Agreement thus divides the boundary into three sectors. From north-west to south-east (see sketch-map No. 1 on page 7 of the French text — General view of the frontier between Burkina and Niger, also reproduced in Cartographic Annex 18), they consist of:

- the sector from the heights of Mount N’Gouma to the Tong-Tong astronomic marker;
- the sector from the Tong-Tong marker to the beginning of the Botou bend; and
- the sector from the beginning of the Botou bend to the River Mekrou.

0.14. Whilst Burkina would have preferred a simpler formulation, whereby the Parties would have requested the Court to determine the entire course of their common frontier, it agreed to the one proposed by Niger. However, Burkina wishes to emphasize that the subject of the dispute remains unchanged: the purpose of the judgment that the Court is requested to render is to put an end, with the authority of *res judicata*, to the entire frontier dispute between the Parties.

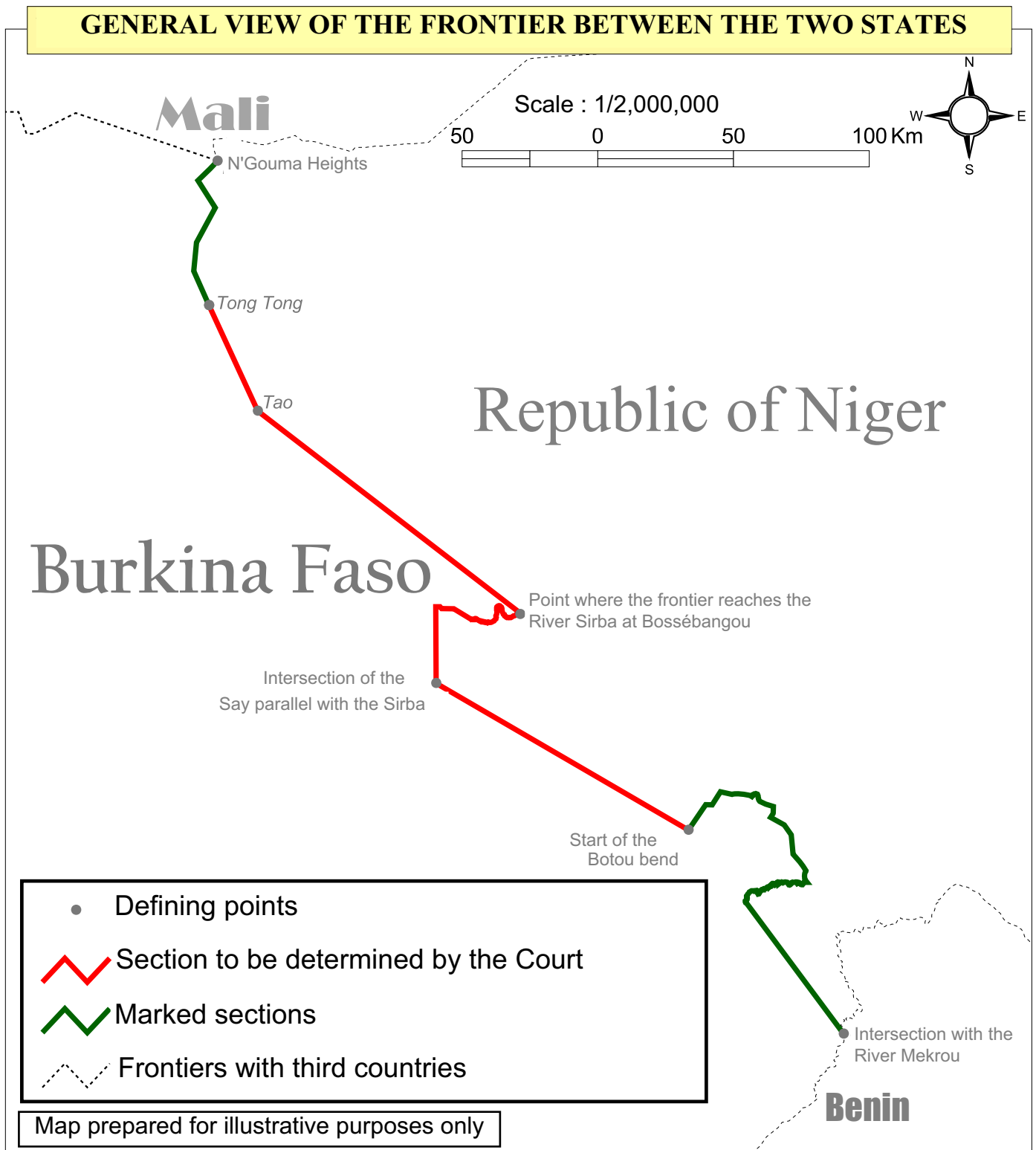
0.15. Moreover, the Special Agreement has two further distinctive features worthy of note:

- it pays particular attention to the applicable law and emphasizes the importance of the Agreement of 28 March 1987; and
- it envisages *ex ante* the arrangements for implementing the Judgment.

0.16. Paragraphs 2 to 4 of Article 7 of the Special Agreement, describing those arrangements, read thus:

- “2. From the day on which the Judgment is rendered, the Parties shall have eighteen (18) months in which to commence the work of demarcating the boundary.
- 3. In case of difficulty in the implementation of the Judgment, either Party may seise the Court pursuant to Article 60 of its Statute.
- 4. The Parties request the Court to nominate, in its Judgment, three (3) experts to assist them as necessary in the demarcation.”

Sketch-map No. 1 - General view of the frontier between Burkina and Niger



Paragraphs 2 and 3 reflect the wording of paragraphs 2 and 3 of Article 7 of the Special Agreement of 15 June 2001 in the *Benin/Niger* case¹⁹, while paragraph 4, whose application ensured that the Judgment of 22 December 1986 was enforced in the best possible conditions²⁰, is taken directly from the Special Agreement of 16 September 1983 in the *Burkina/Mali* case²¹.

0.17. Furthermore, while it is not unusual for the Parties to devote a provision of the Special Agreement seising the Court to applicable law, it is noteworthy that, in this instance, they focus on a specific, earlier treaty, in which they had given a precise and exhaustive list of the instruments to be taken into consideration for the demarcation of the frontier: the Agreement of 28 March 1987.

0.18. That treaty is mentioned no fewer than four times in the Special Agreement:

— in Article 6 on Applicable law, it is singled out:

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

but it is also mentioned three times in the preamble:

— in the very first paragraph, the Parties recall that:

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

— in the next paragraph, they cite in full the first two articles of that Agreement:

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

Article 1

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

Article 2

The frontier shall be demarcated by boundary markers following the course described by Arrêté 2336 of 31/08/1927, as clarified by Erratum 2602/APA of 5/10/1927. Should the Arrêté and Erratum not suffice, the course shall be that shown

¹⁹Article 7, paragraphs 2 and 3, available on the Court’s website at <http://www.icj-cij.org/docket/files/125/7068.pdf>. See also paragraph 2 of Article IV of the Special Agreement of 16 September 1983 in the *Burkina/Mali* case, also available on the Court’s website at <http://www.icj-cij.org/docket/files/69/10665.pdf>

²⁰See Affef Ben Mansour, *La mise en œuvre des arrêts et des sentences des juridictions internationales*, thesis, Paris West University, Nanterre La Défense, 2009, 664 p., esp. pp. 487-497 and 498; see also the working documents of the demarcation commission, pp. 589-606 (forthcoming from Larcier, Brussels, in 2011).

²¹Article IV, paragraph 3, *ibid.*

on the 1:200,000-scale map of the Institut Géographique National de France, 1960 edition²², and/or any other relevant document accepted by joint agreement of the Parties’;

- the following paragraph states that “thanks to the work of the Joint Technical Commission on Demarcation established pursuant to these provisions, the Parties have been able to reach agreement” in respect of those sectors of the boundary that have been marked out (which are referred to once again in Article 2, paragraph 2, of the Special Agreement²³);
- finally, in the last paragraph of the preamble, the Parties state that in concluding the Special Agreement, they have thus applied “Article 8 of the Agreement of 28 March 1987 referred to above”.

0.19. This shows the extreme importance of the Agreement of 28 March 1987 and of the instruments to which it refers for the purposes of settling the dispute submitted by the Parties to the Court — in particular with regard to the actual definition of its subject-matter. Thus it follows from Articles 1 and 2 of the Agreement — cited in full in the second paragraph of the Special Agreement — that the Parties consider that the frontier between them *has already been* “described in the *Arrêté* of 31 August 1927, as clarified by the Erratum of 5 October 1927”. They are therefore not in disagreement as to the *delimitation* of their common frontier, but in respect of certain points of detail requiring clarification with a view to the *demarcation* of that frontier.

0.20. The remaining procedural provisions of the Special Agreement of 24 February 2009 are fairly standard. Burkina would nevertheless like to point out that it regrets Niger’s rejection of its proposal to file written pleadings not simultaneously, but consecutively, pursuant to Practice Direction I. Burkina, for its part, had indicated that it was equally willing to produce either the Memorial and Reply or the Counter-Memorial and Rejoinder, as required under the consecutive procedure, without prejudice, of course, to “any issue in the case, including the issue of burden of proof”.

SECTION 3 GEOGRAPHY OF THE NIGER-BURKINA FRONTIER

0.21. For the Court to have a clear picture of the background to the frontier dispute between Burkina and Niger, a brief description of the geography of the Niger-Burkina frontier is appropriate.

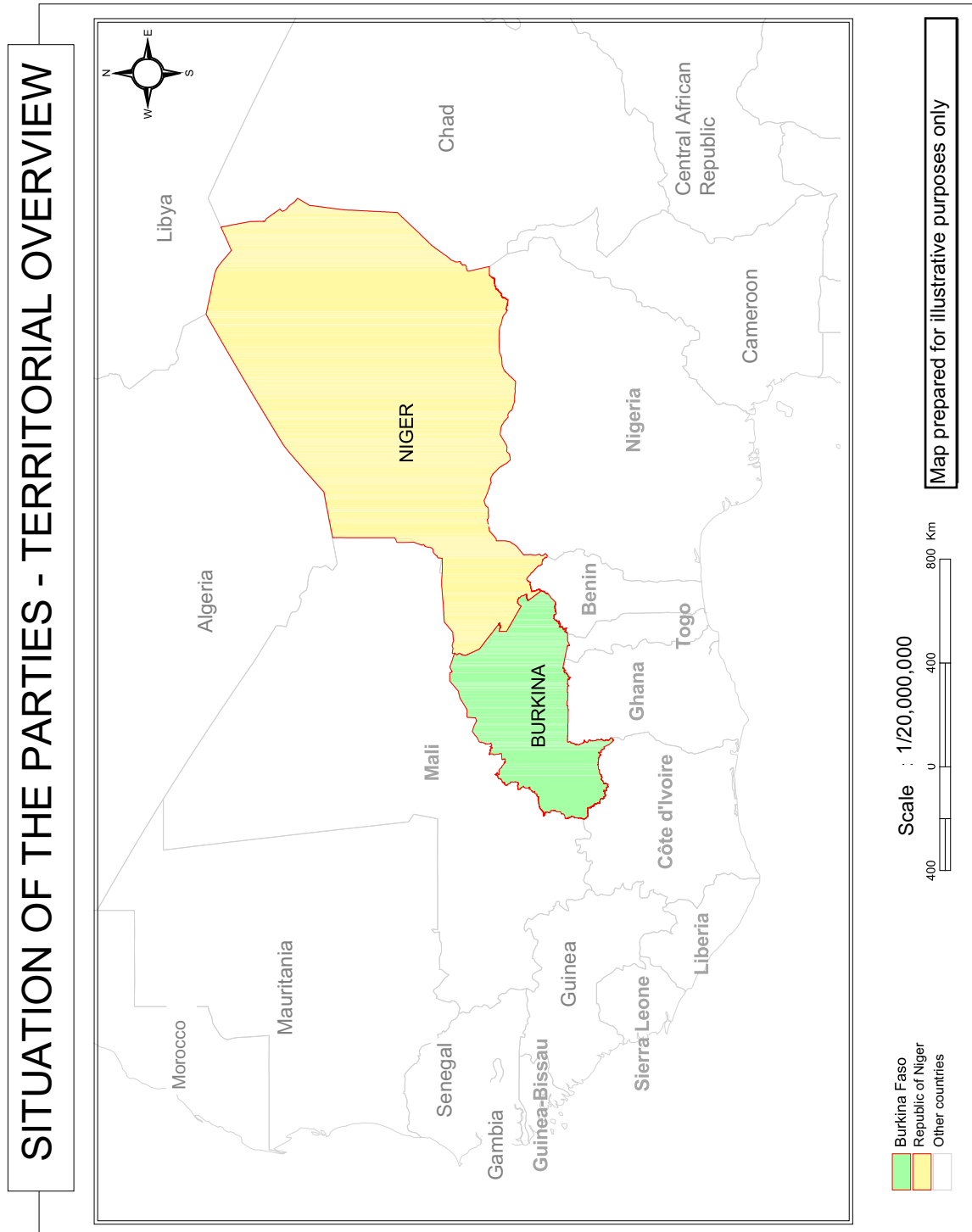
0.22. The frontier, whose course the Court is requested to establish in the Special Agreement in this case, lies between two West African States, former French colonies which gained full sovereignty in 1960.

0.23. Burkina, formerly Upper Volta (until 1984), has been an independent State since 5 August 1960. It shares its frontiers, which stretch over more than 3,500 km, with six States: to the south, Benin, Togo, Ghana and Côte d’Ivoire; to the west and north, Mali; to the east, Niger (see sketch-map No. 2 on the following page — General situation of the territories of the Parties; also reproduced in Cartographic Annex 19).

²²This refers to all the 1:200,000-scale maps produced by IGN France in 1960; these are reproduced in Cartographic Annexes 7 to 12.

²³See above, para. 0.12.

Sketch-map No. 2 - Situation of the parties - Territorial overview



0.24. Present-day Burkina, which is home to a population of some fifteen million and has its capital at Ouagadougou, is divided into 13 administrative regions, which are further subdivided into 45 provinces (see sketch-map No. 3 on page 12 of the French text — Administrative Map of Burkina Faso; also reproduced in Cartographic Annex 20). Five provinces border Niger. From north to south, these include the provinces of Oudalan (administrative centre: Gorom-Gorom), Seno (administrative centre: Dori), Yagha (administrative centre: Sebba), Komondjari (administrative centre: Gayeri) and Tapoa (administrative centre: Diapaga). The first three of these provinces are in the Sahel region (administrative centre: Dori) and the last two in the Eastern region (administrative centre: Fada N’Gourma) (see sketch-map No. 4 on page 13 of the French text — Administrative Divisions on the Frontier; also reproduced in Cartographic Annex 21).

0.25. Most of Burkina is usually described as forming a peneplain. It consists of a plateau at an average of 300 m above sea level. There are few hills. The frontier region with Niger lies within the western basin of the River Niger. A number of the Niger’s tributaries that are relevant to this case — none of which are navigable — such as the Sirba, the Tapoa and the Dyamongou, have their source in Burkina²⁴.

0.26. The Republic of Niger, for its part, has been independent since 3 August 1960. It also shares its frontiers with six States: it is bounded to the south by Nigeria, to the east by Chad, to the north by Libya and Algeria, to the north-west by Mali, and finally to the south-east by Burkina and Benin (see sketch-map No. 2 on page 11 of the French text — General Situation of the Territories of the Parties; also reproduced in Cartographic Annex 19).

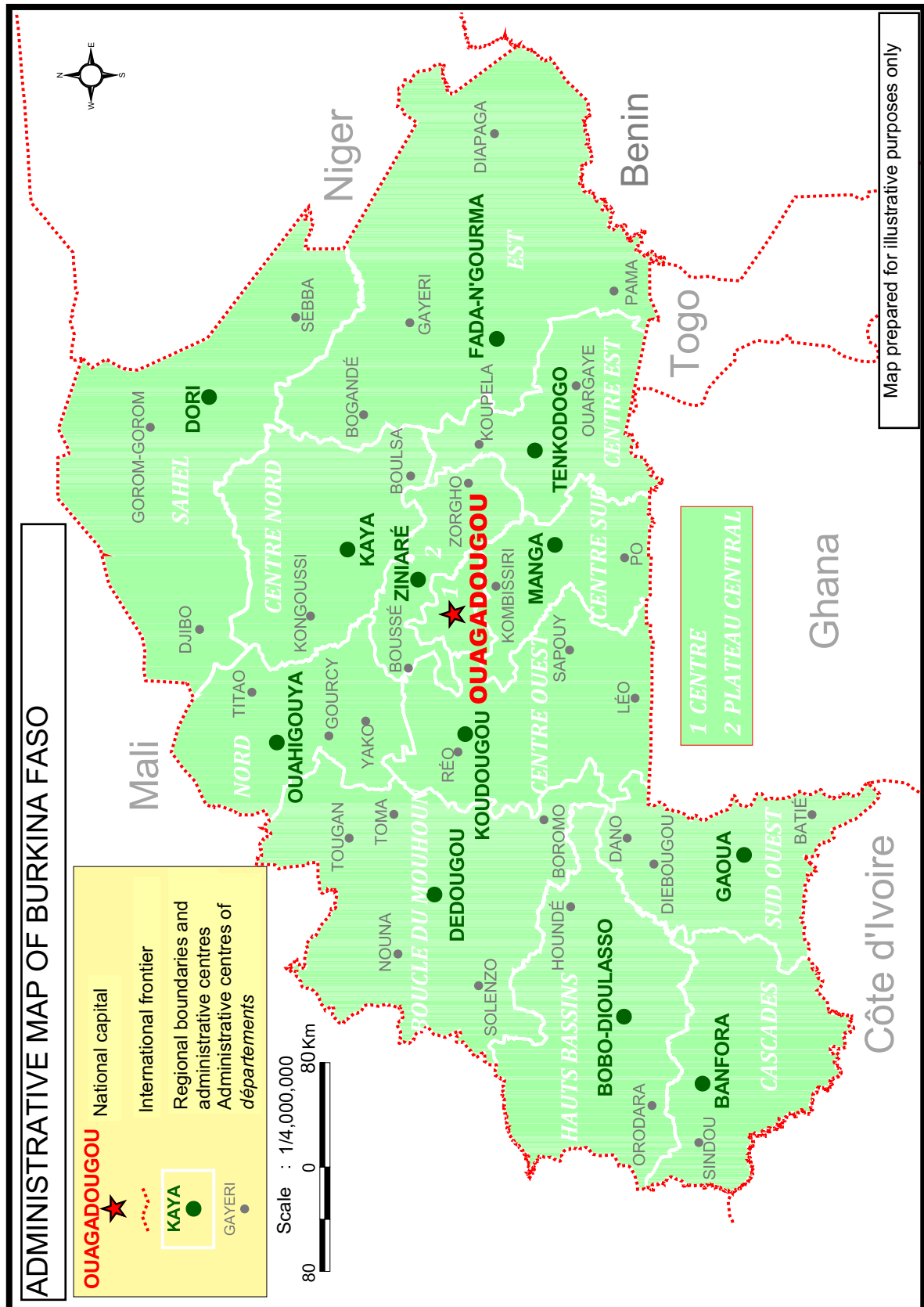
0.27. The territory of Niger, which has a population of some 11 million people, is currently divided into three regions, which are subdivided into 36 *départements* (see sketch-map No. 5 on the following page — Administrative Map of the Republic of Niger; also reproduced in Cartographic Annex 22). The region bordering Burkina is Tillabéry (which encloses the region that has Niamey as its administrative centre, on the east bank of the River Niger). Within that region, the two *départements* of Téra (in the north) and Say (in the south) border Burkina (see sketch-map No. 4 on page 13 of the French text — Administrative Divisions on the Frontier; also reproduced in Cartographic Annex 21).

0.28. The majority of Niger’s territory lies within the Sahara or the Sahel. It has only one river running through it, the River Niger, in the south-west of the country.

0.29. The frontier between Burkina and Niger runs, broadly speaking, in a north-westerly south-easterly direction and is some 590 km in length. It can be described very approximately as following the same direction as the right bank of the River Niger, at a distance varying in different sectors of twenty to a hundred kilometres from the river bank.

²⁴The Sirba, the Tapoa and the Dyamongou join the River Niger respectively at Sorbon Goungou, Wékouré and north-west of Kirtachi Seybou.

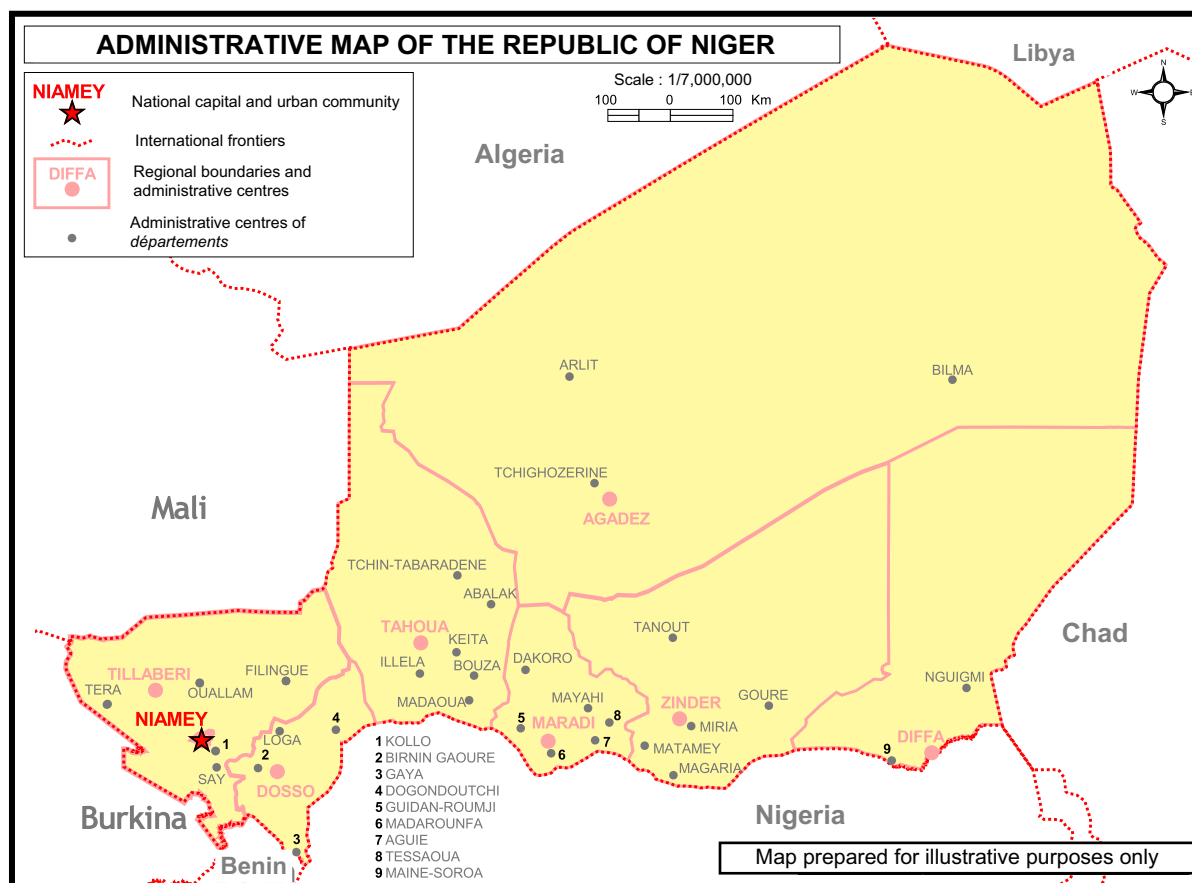
Sketch-map No. 3 - Administrative map of Burkina



Sketch-map No. 4 - Administrative divisions adjoining the frontier



Sketch-map No. 5 - Administrative map of the Republic of Niger



0.30. The frontier between Burkina and Niger lies between two other frontiers whose course the International Court of Justice has previously defined²⁵. It begins in the north at the intersection with the eastern end of the Burkina-Mali frontier, a tripoint whose location was reserved by the Court in its Judgment of 22 December 1986 in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*²⁶, and ends in the south at the River Mekrou, which forms the western frontier between Benin and Niger in this area, as noted by the Court in its Judgment of 12 July 2005 in the case concerning the *Frontier Dispute (Benin/Niger)*. The Court also reserved the precise location of the tripoint between the three States concerned in that case²⁷.

SECTION 4 STRUCTURE OF THE MEMORIAL

0.31. The present Memorial comprises four chapters:

- Chapter I sets out the historical background to the case: both from a long-term perspective in relating the circumstances in which the colonial boundaries between Upper Volta and Niger were determined by the *Arrêté* of 31 August 1927 and its Erratum of 5 October 1927, and how those boundaries survived Upper Volta's turbulent history; and from a more recent perspective in describing the discussions on the frontier held by the Parties after independence and prior to seising the Court;
- in Chapter II, Burkina reviews the applicable law, focusing in particular on the principle of the intangibility of frontiers inherited from colonization and the Agreement of 28 March 1987, both expressly mentioned in Article 6 of the Special Agreement;
- Chapter III describes the task of the Court in respect of the demarcated portion of the boundary; thus, it recounts the circumstances in which the Parties reached the "agreement" placed on record in Article 2, paragraph 2, of the Special Agreement and describes the precise object of that agreement, before going on to explain in greater detail what is expected of the distinguished Court in that regard;
- finally, in Chapter IV, Burkina describes the response that it believes the Court should give to the matter which lies at the heart of the present dispute and which is set out in the first paragraph of the same Article 2; it describes the course of the frontier from the Tong-Tong astronomic marker to the beginning of the Botou bend.

0.32. These four chapters are followed by Burkina Faso's Submissions.

²⁵See above, para. 0.2.

²⁶I.C.J. Reports 1986, pp. 576-580, paras. 44-50. In contrast to the 2005 Judgment (see following note), the Chamber of the Court nevertheless determined the precise location of the endpoint of the frontier between the parties in this case.

²⁷I.C.J. Reports 2005, p. 151, para. 146, point 4.

CHAPTER I

HISTORICAL BACKGROUND

1.1. The present chapter aims to place the dispute submitted to the Court in its historical context, both in the more distant past by recounting the circumstances in which the boundaries between the French colonies of Upper Volta and Niger were determined, and more recently, by describing the discussions on fixing the frontier held between the two countries from the time they gained independence to the conclusion of the Special Agreement of 24 February 2009. It establishes that the negotiations between Burkina and Niger on delimiting the frontier formalized the delimitation resulting from the *Arrêté* of the Governor-General of FWA of 31 August 1927, as modified by its Erratum of 5 October 1927 (section 2). That delimitation has survived the turbulent history of Upper Volta and the *cercles* of the two French colonies of Upper Volta and Niger prior to independence (section 1).

SECTION 1

FIXING THE COLONIAL BOUNDARIES BETWEEN UPPER VOLTA AND NIGER

1.2. A Chamber of the Court has already had occasion to consider the delimitation of Burkina's frontier with another of its neighbours, the Republic of Mali. In its Judgment of 22 December 1986, the Chamber noted that the characteristic feature of the legal context of the frontier determination it was to undertake was that:

“both States involved derive their existence from the process of decolonization which has been unfolding in Africa during the past 30 years. Their territories, and that of Niger, were formerly part of the French colonies which were grouped together under the name of French West Africa (AOF). Considering only the situation which prevailed immediately before the accession to independence of the two States, and disregarding previous administrative changes, it can be said that Burkina Faso corresponds to the colony of Upper Volta, and the Republic of Mali to the colony of Sudan (formerly French Sudan).”²⁸

Another Chamber of the Court, for its part ruling on the frontier dispute between Niger and Benin, stated that it was:

“set within a historical context marked by the accession to independence of the territories that were formerly part of French West Africa (“Afrique occidentale française”, hereinafter “AOF”). Benin, which has been independent since 1 August 1960, corresponds to the former colony of Dahomey, and Niger, which has been independent since 3 August 1960, corresponds to a territory which underwent various administrative transformations during the colonial period.”²⁹

1.3. Burkina and Niger, having both acceded to independence in 1960 (on 5 and 3 August respectively), emerged from territories colonized by France (1). Their frontier results from the delimitations between the administrative divisions of the two colonies undertaken by the former colonial power (3), in an often arbitrary manner, as the many “incarnations” of Upper Volta almost comically demonstrate (2).

²⁸*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 564, para. 19.

²⁹*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 107, para. 20.

1. The French colonial conquest

1.4. Together with Chad³⁰, Upper Volta and Niger are among the last territories to have been colonized by France. The Judgments of the Chambers of the Court cited above provide a brief summary of their respective colonial histories.

1.5. The 1986 Judgment describes the French colonial conquest and colonization of Upper Volta in the following terms:

“For the purpose of determining in broad terms what for each of the two Parties [Burkina and Mali] was the colonial heritage to which the *uti possidetis* was to apply, the origins of the French colonies concerned will be briefly retraced. For this purpose, however, it is unnecessary to go further back in the history of the colonies of French West Africa than 1919. At that time, the present territories of Mali and Burkina Faso both formed part of the colony of Upper Senegal and Niger. By virtue of a decree of the President of the French Republic dated 1 March 1919, the *cercles* of Gaoua, Bobo-Dioulasso, Dédougou, Ouagadougou, Dori and Fada N’Gourma, which had until then been part of Upper Senegal and Niger, were established as a separate colony with the name of Upper Volta^[31]. By a decree of 4 December 1920, the remaining territories, comprising what was left of Upper Senegal and Niger, were given the name of French Sudan, and by a decree of 13 October 1922 the Civil Territory of the Niger became an independent colony. (...) [T]he decree of 1 March 1919 which had created Upper Volta was rescinded by a decree of 5 September 1932, and the *cercles* which had comprised Upper Volta were incorporated, in whole or in part, into Niger and into French Sudan or the Ivory Coast. The Chamber refers to paragraph 73 below and to sketch-map No. 2^[32], which shows the distribution of the *cercles* in the disputed frontier region. Upper Volta was reconstituted in 1947 by the law 47-1707 of 4 September 1947, which rescinded outright the decree of 5 September 1932 that had abolished the colony of Upper Volta, and stated that the boundaries of ‘the re-established territory of Upper Volta’ were to be ‘those of the former colony of Upper Volta on 5 September 1932’. It was this reconstituted Upper Volta which subsequently obtained independence on 5 August 1960, and took the name of Burkina Faso in 1984.”³³

1.6. For its part, the 2005 Judgment of the Chamber of the Court described the evolution of the legal status of the territories of Dahomey and Niger during the colonial period in the following terms:

“33. In the second half of the nineteenth century, France initially established settlements along the coast of Dahomey, at Cotonou and Porto Novo. Following an armed conflict with the local chieftain in the 1880s and 1890s, it consolidated its presence in the region first by placing Dahomey under protectorate (1892), and then by creating the ‘colony of Dahomey and dependencies’ (decree of 22 June 1894). France subsequently launched expeditions northwards from its possessions in Dahomey, as well as southwards and eastwards from Sudan, which enabled it, in the

³⁰For a brief description of the colonization of Chad by France, see *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, pp. 17-18, paras. 24-32.

³¹It is noteworthy that the Court, in omitting to mention the Say *cercle*, gives an incomplete list from the decree of 1 March 1919.

³²See I.C.J. Reports 1986, p. 593.

³³*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 569, para. 32.

autumn of 1897, to occupy the valley of the River Niger (in particular the sector between Say and Boussa).

The French occupation was expressly formalized, as regards the region of north-western Dahomey, by a convention concluded with Germany on 23 July 1897, and as regards north-eastern Dahomey, by a convention concluded with Great Britain on 14 June 1898. By means of a convention of 8 April 1904, certain adjustments were made to the line established in 1898 in order to separate the French and British areas of influence. The parties to that convention fixed the boundaries of their respective possessions in accordance with those adjustments by means of a convention of 29 May 1906 in respect of the region to the east of the River Niger, and by means of an agreement of 19 October 1906 in respect of the territories between the Gulf of Guinea and that river; demarcation operations, documented in an official record dated 19 February 1910, were subsequently carried out by the Anglo-French Commission for the delimitation of the territories situated between the Niger and Lake Chad.

34. At the end of the nineteenth century, when the colony of Dahomey was incorporated into the AOF by decree of 17 October 1899, it encompassed, in the region concerned by the present dispute, territories situated on both banks of the River Niger. By virtue of the same decree, which had provided for the dissolution of French Sudan and the apportionment of the territories it had comprised among different colonies and two specially created military territories, the territory of Say was also attributed to Dahomey. This territorial incorporation was put into effect by an *arrêté* of the Governor of Dahomey dated 20 March 1901.

By *arrêté* of 23 July 1900, the Governor-General of the AOF decided to establish a third military territory encompassing the regions on the left bank of the River Niger from Say to Lake Chad. That 1900 *arrêté* was followed by a decree of the President of the French Republic dated 20 December 1900 with the same object. The boundary between the Third Military Territory and the First Military Territory created in 1899 was subsequently determined by an *arrêté* of the Governor-General of the AOF, dated 20 March 1902.

By a decree of 18 October 1904 on the reorganization of the General Government of the AOF, the President of the French Republic *inter alia* established the colony of Haut-Sénégal et Niger comprising ‘the former territories of Haut-Sénégal and Moyen-Niger and those which form[ed] the Third Military Territory’. The newly created colony was composed of ‘*cercles* under civil administration’ as well as the ‘Military Territory of Niger’, constituted by the former First and Third Military Territories.

.....

The colony of Haute-Volta was abolished by decree of 5 September 1932, then reconstituted with the same territorial basis by Law No. 47-1707 of 4 September 1947; in the intervening period, the *cercles* of Fada and Dori (excluding the *canton* of Aribinda) were incorporated into Niger.”³⁴

³⁴*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 112-113, paras. 33-35.

1.7. Notwithstanding a number of omissions³⁵, these two Judgments provide some useful historical insights and describe how France, starting with the trading posts it possessed in Senegal, Côte d'Ivoire and Gabon, proceeded to occupy central Africa from the 1880s onwards. After the Berlin Conference (15 November 1884 — 26 February 1885), France, Britain and Germany shared out western Africa. The Franco-German Convention of 23 July 1887 drew the boundary between the French and German spheres of influence, whilst the Franco-British Convention of 14 June 1898, modified in 1904 and 1905, assigned the inland portion of the River Niger to France and the delta to Great Britain. More specifically, the French and British zones of influence were separated by a line running from Say (Niger) to Baroua (on the north-east shore of Lake Chad): the territory to the north of that line belonged to France, and the territory to the south to Great Britain.

1.8. The Mossi (or *Moose*), the Gourmantché (*Gulmance*) and the Peuls (*Fulbe*) are the main ethnic groups living in the Niger Bend. According to the work of Michel Izard, the present-day Mossi have been established in the area since the 15th century, when Ouedraogo, the grandson of a Dagomba King (an ethnic group from the north of present-day Ghana), came to Tenkodogo and established the founding kingdom of the Mossi people³⁶. His descendants founded the kingdoms of Ouagadougou (in the centre of the region) and Yatenga (in the north) between the 15th and 16th centuries. Later on, in the 18th century, a fourth entity emerged alongside these three kingdoms and, taking advantage of their decline, became established to the east of Ouagadougou: the Mossi kingdom of Boussouma. According to Maurice Delafosse, the Mossi kingdoms were characterized by their strength, their ethnic and linguistic homogeneity, and their great stability: their independence only came to an end with French occupation at the close of the 19th century³⁷. The royal dynasties — which had common roots — held power for several centuries, during which time their political and social institutions demonstrated great continuity thanks to the cement of religion (ancestor worship).

1.9. The birth of the Gourmantché kingdoms (Gourma being the right bank of the river, as opposed to the “Haoussa” bank), to the east of present-day Burkina, also dates back to the 15th century and its founding ancestor, Diaba Lompo. On the eve of the European conquests, the most influential of these kingdoms were Nungu in the centre (capital Fada N’Gourma), Bilanga (bordering eastern Mossi country), Pama, Matiacoal and Koala (in the north)³⁸. The latter kingdom in particular exerted a wide-ranging influence on the Peul lineages that settled in the Dori region towards the beginning of the 18th century. However, once Usman Dan Fodio had founded the Sokoto Caliphate in 1810, the Peul peoples sought his support against the Gourmantché. The ensuing Jihad (holy war) led to the foundation of the Peul Emirates of Liptako (capital Dori) and Yagha (capital Sebba), and finally put an end to the rule of the Gourmantché kingdom of Koala³⁹. Nevertheless, internecine struggles among the Mossi principalities⁴⁰, fratricidal warfare among the

³⁵It should be noted in particular that the 1986 Judgment makes no mention of the important decree of 28 December 1926, which is referred to, however, in the 2005 Judgment — see below, para. 1.16.

³⁶See M. Izard, *Introduction à l'histoire des royaumes mossi*, Paris/CNRS-Ouagadougou, CVRS, 1970, Vol. 1, pp. 1-212.

³⁷M. Delafosse, *Haut-Sénégal-Niger (Soudan français), Première série. Tome II: l'histoire*, Paris, Emile Larose, 1912, pp. 122-124. See also the map of these empires, p. 151, reproduced in Cartographic Annex MBF 1 and available on the website Gallica.bnf.fr.

³⁸See Y. G. Madiéga, *Contribution à l'histoire précoloniale du Gulmu (Haute-Volta)*, Wiesbaden, Frantz Steiner Verlag, 1982, 260 pages.

³⁹H. Diallo, *Les Fulbe de la Haute-Volta de la fin du 18^e siècle à la fin du 19^e siècle*, doctoral thesis, Université Paris I, 1979, pp. 78-94.

⁴⁰V. K. Arhin and J. Ki-Zerbo, “Etats et peuples de la boucle du Niger et de la Volta”, in J. F. Ade Ajawi (dir.), *Histoire générale de l'Afrique, VI: l'Afrique au XIX^e siècle jusque vers les années 1880*, UNESCO, Paris, 1996, esp. pp. 119-723.

Gourmantché kingdoms and conflicts of succession within the Peul Emirates enabled France to take control of Voltan territory between 1888 (when contact was first made by Captain Binger, known for his famous book *Du Niger au golfe de Guinée par le pays de Kong et le Mossi*⁴¹) and 1897. France gradually established its dominance over the region, and the conclusion of agreements with Germany and Great Britain formalized its conquest and occupation of these territories⁴².

1.10. Immediately after its conquest of Upper Volta, France launched military expeditions from Dahomey and French Sudan, and established its presence in Niger, thus gaining control of both banks of the Niger in the zone of influence accorded to it under the agreements concluded with Germany and Great Britain. Next, deploying to the east along the northern boundary of the Sokoto Caliphate, which had been reserved for the British to conquer, the expeditionary force from French Sudan conquered Songhai land — also known as “zaberma territories” (djerma) — and then the Haoussa States of Gobir, Maradi and Damagaram, whose capital Zinder was captured in 1899. The Joalland-Meynier column continued its push eastwards and entered Bornou where, on the western shore of Lake Chad, it joined the Foureau-Lamy and Gentil columns, which had come from North Africa and Gabon respectively. By the end of 1900, following victories against Rabih — the warlord leading the resistance in Borno — and against the main Tuareg rebel strongholds, the conquest of Niger was complete and the Military Territory of Niger established⁴³.

2. The incarnations of Upper Volta and the colonial subdivisions

1.11. It was only relatively late on that Upper Volta and Niger were established as “fully fledged” colonies.

1.12. Once France had occupied both banks of the Niger Bend in the latter half of the 1890s, three “military territories” (as opposed to civil *cercles*, because they were not completely pacified) were created in the region:

- under Article 1 of the *Arrêté* of the Governor-General of FWA of 23 December 1899⁴⁴, the First Military Territory comprised the *cercles* of Timbuktu, Sumpi, Bamba, Gao and Sinder (which correspond to the southern part of present-day Mali) and the *résidences* of Dori, Macina and Yatenga (which today cover the northern half of Burkina);
- the Second Military Territory, for its part, was established by the same *Arrêté* of 23 December 1899 and consisted of the “*cercles* of Koutiala, Sikasso, Bobo-Dioulasso, Koury, Diébougou . . . and the *résidences* of Mossi and Gourounsi” (Article 2); it corresponds roughly to the south of Burkina;

⁴¹L.-G. Binger, *Du Niger au golfe de Guinée par le pays de Kong et le Mossi : 1887-1889*, Hachette, Paris, 1892.

⁴²See above, para. 1.7, and M. Delafosse, *op. cit.* note 36, pp. 420-423; see also P.-C. Hien, *Le jeu des frontières en Afrique occidentale: Cent ans de situations conflictuelles au Burkina Faso actuel (1886-1986)*, doctoral thesis, Université Paris I, 1996, pp. 180-207, and the map of French protectorate treaties in Upper Volta, in J.-M. Kambou-Ferrand, *Peuples voltaïques et conquête coloniale 1885-1914*, L'Harmattan, Paris, 1993, p. 260.

⁴³By way of example, see the map “*La conquête de l'Afrique de l'Ouest (1880-1900)*”, in B. Lugan, *Atlas historique de l'Afrique des origines à nos jours*, Ed. Du Rocher, Monaco, 2001, p. 156 (Cartographic Annex MBF 2); and the map “*States and peoples of West Africa at the outset of European partition*” in J. D. Fage, *An Atlas of African History*, London, Arnould, 2nd edition, 1978 (Cartographic Annex MBF 3).

⁴⁴Ann. MBF 2.

- the Third Military Territory was created at a later date by an *Arrêté général* of 23 July 1900⁴⁵, the terms of which were confirmed by the Decree of 20 December 1900⁴⁶: it encompassed “the areas on the left bank of the Niger, from Say to Lake Chad, which [had been] placed under the French sphere of influence by the Convention of 14 June 1898”⁴⁷ and consisted of the territories newly conquered by France and which had yet to be pacified; its administrative centre was Zinder and it included most of the territories that form the present-day Republic of Niger.

1.13. A decree of 18 October 1904 of the President of the French Republic, providing for the reorganization of the General Government of FWA⁴⁸, established the Colony of Haut-Sénégal et Niger, comprising “the former territories of Haut-Sénégal and Moyen-Niger, as well as those forming the Third Military Territory”⁴⁹. This new colony was composed of “*cercles* under civil administration” — with no further details — and the “Military Territory of Niger”, consisting of the former First and Third Military Territories.

1.14. As the Chamber of the Court explained in the 2005 Judgment in the *Frontier Dispute* between Benin and Niger:

“By decree of 2 March 1907^[50], the *cercles* of Fada-N’Gourma and Say were detached from Dahomey and incorporated into the colony of Haut-Sénégal et Niger. The intercolonial boundary fixed by that decree was revised on two occasions in its western part, first by a decree of 12 August 1909^[51], and subsequently by a decree of 23 April 1913^[52].”

35. On 7 September 1911, a further decree^[53] separated the Military Territory of Niger from the colony of Haut-Sénégal et Niger (the *cercle* of Say remaining as a district of that colony), in order to make it an administrative subdivision under the direct control of the office of the Government-General of the AOF. On 1 January 1921^[54], that military territory became the Civil Territory of Niger, and was then made an autonomous colony by decree of 13 October 1922^[55].

In the meantime, the decree of 1 March 1919^[56] had provided for the establishment of the colony of Haute-Volta, to which were attributed, *inter alia*, the

⁴⁵Ann. MBF 3.

⁴⁶On this point, see ICJ Judgment of 12 July 2005, *Frontier Dispute (Benin/Niger)*, *I.C.J. Reports 2005*, p. 121, para. 50.

⁴⁷Article 1 of the *Arrêté général* of 23 July 1900 (Ann. MBF 3).

⁴⁸French West Africa was created by decree of 16 June 1895 and initially comprised Senegal, French Sudan (present-day Mali), Guinea and Côte d’Ivoire.

⁴⁹Ann. MBF 4.

⁵⁰Ann. MBF 8.

⁵¹Ann. MBF 11.

⁵²Ann. MBF 15.

⁵³Ann. MBF 13.

⁵⁴Ann. MBF 18.

⁵⁵Ann. MBF 19.

⁵⁶Ann. MBF 16.

cercles of Say and Fada-N’Gourma, which had hitherto formed part of Haut-Sénégal et Niger.”⁵⁷

1.15. The invaluable Atlas of the *cercles* of FWA, “compiled and drawn at the Geographical Service of FWA in Dakar under the direction of Commander Edouard de MARTONNE”, contains representations of all the *cercles* of FWA at the time the Atlas was produced in 1926. The frontier between Upper Volta and Niger was then formed by the River Niger, thus all the *cercles* concerned in the present dispute, namely Dori (in the north-east), Fada — or Fada N’Gourma — (in the south-west), and Say (in the south-east), were in what was then Upper Volta. The sketch-maps of these *cercles* are reproduced in the annexes to the present Memorial⁵⁸.

1.16. “By decree of 28 December 1926^[59], certain *cantons* in the *cercle* of Dori and the *cercle* of Say (with the exception of the *canton* of Gourmanché-de-Botou) were detached from Haute-Volta and incorporated into Niger”⁶⁰. That decree is of particular importance for the purposes of this case: up until that point, Upper Volta had extended to the River Niger. It was established within its present-day boundaries (which were to be defined by the 1927 *Arrêté* and its Erratum⁶¹) as from 1 January 1927⁶², since the Law of 4 September 1947 reconstituting Upper Volta returned it to within its 1932 boundaries⁶³ (which had remained unchanged since 1927)⁶⁴.

1.17. Regarding Niger, the Chamber of the Court states in its 2005 Judgment:

“The internal reorganization of Niger was the subject of successive *arrêtés* of the Governor-General of the AOF, dated 26 December 1904, 31 December 1907, 14 December 1908, 22 June 1910, 23 November 1912 and 22 January 1927⁶⁵. On the eve of independence, as a result of an *arrêté général* of 30 March 1956 adding seven new *cercles* to the colony, Niger comprised 16 *cercles*.”⁶⁶

1.18. In 1932, Upper Volta was abolished altogether by the decree of 5 September and its constituent territories were divided among Niger, French Sudan and Côte d’Ivoire⁶⁷. In the words of the Chamber which ruled on the *Frontier Dispute* between Burkina and Mali, one of the effects of the decree of 5 September 1932:

⁵⁷*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 113, paras. 34-35.

⁵⁸See Cartographic Annex MBF 4.

⁵⁹Ann. MBF 26.

⁶⁰*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 113, para. 35.

⁶¹See below, paras. 1.27 and 1.30.

⁶²Under Article 2 of the Decree of 28 December 1926: “The following territories, which are currently part of the Colony of Upper Volta, are incorporated into the Colony of Niger, beginning from 1 January 1927, namely . . .” (Followed by a list of the territories concerned.)

⁶³See below, para. 1.19.

⁶⁴Today, the border provinces are, from north to south: in Burkina Faso: Oudalan, Seno, Yagha, Komondjari and Tapoa; and in Niger: the region of Tillabéri — or Tillabéry — (comprising the *départements* of Téra in the north and Say in the south), whose western boundary forms the Burkina-Niger frontier.

⁶⁵Anns. 5, 9, 10, 12, 14, 29.

⁶⁶*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, pp. 113-114, para. 36.

⁶⁷Ann. MBF 36.

“was the outright abrogation of the decree of 1 March 1919 which had created the colony of Upper Volta, and hence the abolition of that colony. The new decree, which came into force on 1 January 1933, also provided as follows:

‘Art. 2 — The *cercles* of Fada and Dori (except the *canton* of Aribinda) are annexed to the colony of Niger.

The *cercle* of Ouahigouya, the *canton* of Aribinda within the *cercle* of Dori and that part of the *cercle* of Dedougou located on the left bank of the Black Volta are annexed to the colony of French Sudan . . .’

By an Order of the Governor-General of French West Africa dated 17 November 1932, the territories of the colony of Upper Volta which had been annexed to French Sudan by the above-mentioned decree were reorganized as follows:

‘1. The *cercle* of Ouahigouya, at present forming part of Upper Volta, and the *canton* of Aribinda, detached from the *cercle* of Dori, are to form a single unit under the name of *cercle* of Ouahigouya, with its chief town at Ouahigouya . . .’⁶⁸

1.19. Upper Volta was reconstituted within its 1932 boundaries by Law 47-1707 of 4 September 1947⁶⁹, which abrogated the decree of 5 September 1932. Under Article 2:

“The re-established territory of Upper Volta shall have administrative and financial autonomy under the same conditions as the other territories of the French West African group.

Its administrative centre shall be at Ouagadougou and its boundaries shall be those of the former colony of Upper Volta on 5 September 1932.”

As the Court noted, “[i]t was this reconstituted Upper Volta which subsequently obtained independence on 5 August 1960 and took the name of Burkina Faso in 1984”⁷⁰.

1.20. As the Chamber of the Court underscored in its Judgment of 22 December 1986:

“The law of 4 September 1947 ‘for the re-establishment of the territory of Upper Volta’ made no reference to any map; all it contained was a reference in general terms to the boundaries ‘of the former colony . . . on 5 September 1932’. Neither of the two Parties has been able to identify the map, if there was one, which was used by the French lawmakers in 1947 in order to obtain a clearer picture of those boundaries.”⁷¹

Burkina has been unable to identify such a map for the purposes of these proceedings, just as it was unable to do so at the time of the case which gave rise to that decision.

⁶⁸*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 592, para. 73. See in particular the sketch-map on page 593 of the Judgment illustrating the changes made to Dori *cercle*.

⁶⁹Ann. MBF 39.

⁷⁰*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 569, para. 32.

⁷¹*Ibid.*, p. 583, para. 57.

3. The colonial boundaries of Upper Volta and Niger

1.21. Since the boundaries between the two colonies remained unchanged between 1947 and 1960 when they gained independence, it must be ascertained what the boundaries between Upper Volta and Niger were at the time the former colony was temporarily abolished on 5 September 1932.

1.22. A document found in the archives of IGN France in Paris provides a concise and accurate summary of the situation. It offers an analysis of the Niger-Upper Volta frontier, dated 3 November 1972 and undertaken by Mr. Bernard Millot, a cartographic artist who had been appointed to the IGN's map library at the beginning of the 1970s to collate documentation on the frontiers between the States of the former "French Community":

"Falling under the same administrative regime, these two territories were governed by the system of *arrêtés* and decrees. Boundary problems were thus the subject of numerous *arrêtés*, the first of which appears to date back to 18 October 1904. This was followed by others, such as the decrees of 13 October 1922 and 28 December 1926, which incorporated some of the *cercles* of Upper Volta into Niger.

Arrêté No. 184 of 22 January 1927^[72] concerned the *cercles* and *cantons* of Dori, Tillabéry, Say, Gourmantché Botou and Fada, and thus affected the boundary between the two territories. The text of the *Arrêté* was published in the *Journal officiel* of FWA of 12 February 1927 on page 124. Following the intervention of the *cercle* commanders, *Arrêté* No. 41 of 5 March 1927 was issued regarding the *canton* of Gourmantché Botou^[73] and its attachment to the *cercles* of Fada and Say. However, it was the *Arrêté* of 31 August 1927 which provided the first definition of the frontier and more specifically that of the frontier *cercles* and *cantons*. It was published in the *Journal officiel* of FWA No. 1201 of 24 September 1927^[74]. After it was contested, an erratum to the *Arrêté* of 31 August 1927 was published and appeared in the *Journal officiel* of FWA No. 1205 of 15 October 1927 on page 718^[75]." ⁷⁶

1.23. In fact, the 1927 *Arrêté* and its Erratum give both the first and last definition of the frontier and it has been neither modified nor clarified by any document since that time.

1.24. Before then, the colonies and their constituent *cercles* or *résidences* were defined simply by listing their respective subdivisions. As the Chamber of the Court noted in 2005:

"In reality, the 1919 decree defines the territory of Haute-Volta solely by reference to the *cercles* which compose it, and it is thus also by this means that it indirectly defines the boundaries between Haute-Volta and the neighbouring colonies, and in particular Dahomey. It is by the precise delimitation of the *cercles* mentioned

⁷²Ann. MBF 29.

⁷³The wording is misleading and confuses ethnic group with administrative division. What should have been written was "the Gourmantché *canton* of Botou".

⁷⁴Ann. MBF 34.

⁷⁵Ann. MBF 35.

⁷⁶Ann. MBF 58.

in Article 1 of the decree of 1 March 1919 — a delimitation not effected by the decree itself — that, from this date, the intercolonial boundary could be defined.”⁷⁷

1.25. Similarly, for Niger the *Arrêté* of 23 November 1912 reorganized the territory into seven *cercles* but did not draw their boundaries, any more than did the Decree of 28 December 1926 incorporating Say and certain *cantons* of Dori *cercle* into Niger.

1.26. As from the *Arrêté* of 1927, however, it was no longer a matter of administrative divisions but of the frontier. Once the Erratum was adopted, that frontier was established *ne varietur* and those texts constitute the frontier title which has never been modified since.

1.27. According to the *Arrêté* of 31 August 1927 of the Governor-General ad interim of FWA⁷⁸:

“Article 1 — The boundaries of the Colonies of Niger and Upper Volta shall henceforth be determined as follows:

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

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

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

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

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

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

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

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

⁷⁷*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 146, para. 134.

⁷⁸Ann. MBF 34.

3. Boundaries of Botou *canton*:

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

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

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

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

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

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

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

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

1.28. This text, which draws the boundaries between Upper Volta (as defined by the Decree of 28 December 1926) and Niger, has its distant origins in a circular letter dated 28 July 1920 from the Lieutenant-Governor of Upper Volta, Hesling, to the Commanders of the Colony’s *cercles*. In that letter he states that:

“The Territory of Upper Volta was constituted by the grouping together of a number of *cercles* of Haut-Sénégal-Niger, without any changes being made to the administrative structure of those divisions. As a result there are some overlaps among the ethnic groups living along the boundaries of the *cercles*; this did not raise any problems when the area of settlement to either side of those boundaries fell under the responsibility of one and the same Governor, but creates more serious problems in the case of the boundary between the two Colonies.

.....

It is thus clearly worthwhile to make the necessary adjustments to the boundary to resolve ethnic issues, whenever circumstances permit and particularly when such partial adjustments would have no significant effect on the general administrative structure of the colony. Adjustments should be made in all cases where a very small or subsidiary group has been separated from the main *groupement* for no particular reason: such as the Tuareg and the Oudala [*sic*] Bella in Dori *cercle*, the Bariba and the Atakora Takomba in Fada *cercle*, the Bouna Lobi in Côte d'Ivoire, and the Peuhls of the left bank of the Niger in the Military Territory.”⁷⁹

1.29. The *Arrêté* of 31 August 1927 was adopted following various exchanges of letters and telegrams⁸⁰ and after the Lieutenant-Governors of Niger⁸¹ and Upper Volta had given their agreement in principle. The latter gave his agreement in principle in a letter dated 1 February 1926 to the Governor-General of FWA⁸², though he expressed some misgivings in the face of concerns voiced by the local populations and laid down the condition that Botou *canton* should remain in the territory of Upper Volta; his agreement was confirmed at a meeting of the representatives of the Lieutenant-Governors of Upper Volta and Niger on 10 February 1927⁸³.

1.30. The Erratum of 5 October 1927⁸⁴ replaced the previous text of 31 August, cited above, with the following:

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

Article 1 — The boundaries of the Colonies of Niger and Upper Volta are determined as follows:

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

⁷⁹Ann. MBF 17.

⁸⁰See the letter dated 22 March 1923 from the Lieutenant-Governor of Upper Volta to the Commander of Dori *cercle* (which suggested transferring to Niger the part of Dori situated on the right bank of the River Niger), Ann. MBF 20; the reply dated 7 April 1923 from the Commander of Dori *cercle* (stating his hostility to the suggestion as he did not want to lose Gothèye for financial reasons), Ann. MBF 21; the letter dated 7 June 1923 (from the Lieutenant-Governor of Upper Volta to the Governor-General of FWA), Ann. MBF 22; the telegram of 13 June 1923 (from the Lieutenant-Governor of Upper Volta to the Commander of Dori *cercle* (there were no plans to transfer Dori), Ann. MBF 23; the letter dated 26 January 1926 from the Lieutenant-Governor of Niger to the Governor-General of FWA, Ann. MBF 24.

⁸¹See esp. the draft *Arrêté* submitted on 27 June 1927 to the Governor-General of FWA by the Lieutenant-Governor of Niger (Ann. MBF 33).

⁸²Ann. MBF 25.

⁸³Ann. MBF 31. On that occasion they expressed their agreement on a line that prefigured that of the *Arrêté* for the northern part of the boundary — they were attempting to execute the Decree of 28 December 1926 — and decided to leave it to the administrators of Say and Fada to fix the boundaries of Botou *canton*.

⁸⁴Ann. MBF 35.

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

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

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

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

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

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

1.31. The differences between the two texts are as follows:

- whereas, in the north, the *Arrêté* refers to “the current boundary with Sudan (Gao *cercle*) as far as the heights of N’Gourma [*sic*]”, the Erratum specifies “[a] line starting from the heights of N’Gouma”; while in the first draft the tripoint with French Sudan is imprecise, in the second it is clearly located on Mount N’Gouma;
- still in the northern sector, some points of reference are more precise: the frontier passes through the Tong-Tong and Tao astronomic markers and reaches the River Sirba directly at Bossébangou — this last clarification makes the phrase “near to and to the south of Boulkalo” which appeared in the *Arrêté* redundant;
- the *Arrêté* was more verbose in respect of the boundaries of Say *cercle*: it did not merely describe the parts of the boundary that form the frontier with Upper Volta, but described in detail the entire boundary of the *cercle*, notwithstanding the fact that this was not the purpose of the *Arrêté* as stated in its title, which was to “[fix] the boundaries of the Colonies of Upper Volta and Niger”; however, the description of the course of the boundary between the two Colonies is even more precise when it comes to the salient comprising the four villages;
- at the level of Botou *canton*, the frontier is defined in the same manner, with the exception of the location where it first reaches the Tapoa — rather than speak of a “point which it is not possible to define precisely” (*Arrêté*), according to the Erratum it is a point which is

approximately four kilometres south of the village of Kogori (also cited in the *Arrêté*⁸⁵); finally, the *Arrêté* left the endpoint on the former Fada-Say boundary and gave no further details (as it was deemed impossible to define, given that the region was empty and unexplored), whilst the Erratum states that the line follows the former Fada-Say boundary up to the point where it intersects with the Mekrou, and thus determines the tripoint with Dahomey.

1.32. As the Chamber of the Court noted in its Judgment of 12 July 2005:

“the erratum would seem in effect to have been motivated not by the fact that the Governor-General did not mean to fix the south-eastern boundary of the *cercle* of Say along the Mekrou, but rather by a wish not to define the boundary between Dahomey and Niger in an *arrêté* whose purpose, as was clear from its title, was to fix the boundary between Niger and Haute-Volta . . . [T]he erratum thus [did] not contradict the fact that the boundaries of the *cercle* of Say were as indicated the previous August . . .”⁸⁶

1.33. The delimitation settled by the Erratum of 5 October 1927 has not been modified since.

SECTION 2 DISCUSSIONS ON FIXING THE FRONTIER

1.34. Upper Volta and Niger rapidly made contact after independence in order to establish their common frontier in a clear and definitive manner. It immediately became apparent that the matter they had to deal with together was basically a technical one, as the two States agreed from the outset to consider that the “primary text” was the *Arrêté* of 31 August 1927 and its Erratum of 5 October of the same year. Just a few years after independence, the Protocol of Agreement of 23 June 1964 placed on record their shared vision and laid the foundations of a process intended to lead to the mutually agreed demarcation of the frontier (1.).

1.35. Largely for financial reasons the process was not as rapid as the two States had initially planned, while at the same time there were recurrent problems in the border zone due to the fact that the course of the frontier had not been marked out on the ground. The Parties re-opened discussions on demarcation when they adopted the Agreement and Protocol of Agreement of 28 March 1987 (2.).

1.36. This was not without effect on the demarcation process, since the campaign to mark out the frontier, which was implemented by the Joint Technical Commission on Demarcation established by the Protocol of Agreement of 28 March 1987, resulted in the installation of 23 markers out of an initially planned total of 45⁸⁷. However, placing the remaining markers was to prove far more problematic. Niger developed misgivings about implementation of the frontier as described by the *Arrêté* and its Erratum. Thus in 1990 the Niger experts began putting forward new claims, disputing some of what had hitherto been consensual and ascribing new meaning to the words of the Erratum. This led the political authorities of the two countries to intervene once again. Anxious to end the debate once and for all, the Ministers in charge decided to adopt an amicable solution and to depart partially from the text of the 1927 *Arrêté* and its Erratum in such a

⁸⁵Although the *Arrêté* uses the toponym “Royori”, the wording of the sentence that mentions that village leaves no doubt that it is referring to the village of Kogori.

⁸⁶*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 147, para. 136.

⁸⁷Regarding the figure of 45 markers, see below para. 1.71.

way as to meet Niger's expectations, though without incorporating its latest interpretation of that text. That is the thrust of the decision duly recorded in the Joint Communiqué of 16 May 1991. Nevertheless, regardless of what it stood to gain, Niger denounced that decision shortly after its adoption (3.).

1.37. The demarcation process initiated by the Protocol of Agreement of 28 March 1987 was thus brought to a standstill. The positions of the Parties in respect of the demarcation of the frontier took their final form in July 2001, at the fourth ordinary session of the Joint Technical Commission on Demarcation. Its conclusions reflect the situation as it stood at the time the Court was seised: the Parties' final agreement on the two sectors of the frontier already fully marked out, and their disagreement as to the remainder (4.). The Special Agreement of 24 February 2009 seising the International Court of Justice marked the end of discussions on demarcation of the frontier and the Parties have since placed themselves in the hands of the Court for a definitive settlement of their dispute regarding the implementation of the Agreement of 28 March 1987.

1. The Protocol of Agreement of 23 June 1964

1.38. It was problems with registration that led Niger to approach Upper Volta very soon after independence with a view to marking out the frontier.

1.39. Thus, on 7 June 1963, the President of the Republic of Niger sent an urgent letter to the President of the Republic of Upper Volta, drawing his attention to the fact that a number of Voltan families of the Gourmantché ethnic group living in Niger (Tamou *canton*) refused to be registered there. In the interests of maintaining good neighbourly relations, Niger said it wished to avoid creating tensions with its neighbour by expelling those families, but nevertheless insisted that they should be registered, at least on a provisional basis pending a political solution to the problem. The issue was purely fiscal, as, according to the Head of State of Niger, registration would be "without electoral or military implications, [and] without prejudice to nationality"⁸⁸. Niger's sole aim was thus to subject the families in question to the country's various taxes and charges, regardless of their protests that they had already paid them in Upper Volta⁸⁹. He further suggested that in the event the said families were effectively subject to double taxation, they should be removed from the registration books in their *canton* of origin in Upper Volta.

1.40. In a "note on the frontier problems between the Republics of Niger and Upper Volta" annexed to the President of Niger's letter, a further issue was raised, namely the fact that people from Téra, in Niger, tended to register in Dori, where the taxes were less onerous. In respect of the frontier, the note also pointed out that it was not visible on the ground since the Tong-Tong and Tao astronomic markers had disappeared⁹⁰, and recommended that a delimitation commission should establish the frontier, "which is not to be modified but to be marked out"⁹¹.

⁸⁸Letter No. 1052/M1/AI and Note from the President of Niger to the President of Upper Volta, 7 June 1963, Ann. MBF 42.

⁸⁹*Ibid.*

⁹⁰*Ibid.*

⁹¹*Ibid.*

1.41. On 12 September 1963, the Minister for the Interior of Upper Volta, wishing to be kept informed of these matters, asked the *cercle* commanders to provide him with an objective account of all the frontier problems that may have come to their attention⁹².

1.42. On 17 June 1964, the Minister for Foreign Affairs of Niger took an initiative which this time was to lead to the Protocol of Agreement of 23 June of the same year. In a Note Verbale to the Minister for Foreign Affairs of Upper Volta, he stated that the matter of the frontier between the two countries was simply a problem of demarcation, which could easily be settled by technical experts:

“The frontier between Upper Volta and Niger is fixed by an *Arrêté* dated 31 August 1927 of the Governor-General and clarified by an erratum published in the *Journal Officiel* of FWA No. 1201 of 24 September 1927, page 638.

Thus a fairly precise basic text exists, but the markers are lost, and it is currently not possible for the representatives of the two Republics to locate the frontier on the ground precisely.

.....

To settle all these arguments, a delegation from Niger led by the Head of Say District and a Voltan delegation led by the Commander of Diapaga *cercle* met in the village of Boulel (on the Niger-Volta frontier) on 10 April 1964.

While the questions of registration and those concerning the transhumance of the Peulh, etc., were resolved, the problem of the frontier remains unchanged. In accordance with the spirit of the Addis Ababa conference, the two delegations wished to retain the boundary drawn by the colonial power, but requested that the two Governments should appoint technical experts so that the frontier could be marked out definitively.

Accordingly, the question is whether Upper Volta agrees that the frontier established by colonization should be respected. If so, Niger suggests to Upper Volta that the aim of the conference be confined to settling the questions of registration, tax collection and transhumance between the *cercles* of Téra and Dori (Upper Volta), and to appointing surveyors from both States to mark out the frontier.”⁹³

1.43. Upper Volta did not intend to call the 1927 *Arrêté* and its Erratum of 5 October 1927 into question; thus the Protocol of Agreement of 23 June 1964 was adopted very rapidly, and signed on behalf of Upper Volta by the Minister for the Interior and Security, and on behalf of Niger by the Minister for Saharan and Nomad Affairs and Post and Telecommunications⁹⁴.

1.44. This Protocol of Agreement — which the signatories wanted to apply immediately and whose legal effect, in its own words, was to “[replace] all prior provisions which are inconsistent therewith” (the last sentence of the Protocol of Agreement) — notes first of all that “there is no indication on the ground of the theoretical boundaries between the two States”, and goes on to state

⁹²Circular letter No. 34/PRES/IS/DI from the Minister for the Interior and Security of the Republic of Upper Volta to the *cercle* commanders.

⁹³Note Verbale No. 2216/MAE/DAPEC from the Minister for Foreign Affairs of Niger to the Minister for Foreign Affairs of Upper Volta, 17 June 1964, Ann. MBF 44.

⁹⁴Protocol of Agreement on the delimitation of the frontier, Niamey, 23 June 1964, Ann. MBF 45.

that, in order to deal with the resulting situation, the two States had reached a number of “decisions”. The first, relating to the delimitation of the frontier, states:

“By agreement between the Parties it was decided to take as basic documents for the determination of the frontier *Arrêté général* 2336 of 31 August 1927, as clarified by Erratum 2602 APA of 5 October 1927, and the 1:200,000-scale map of the Paris *Institut Géographique National*.

A Joint Commission of not more than ten members, which shall include the heads of the administrative divisions concerned, shall carry out the work of demarcation, starting in mid-November 1964 and beginning with the disputed sectors, in particular the stretch of the frontier lying between Téra and Dori.”

1.45. In the eyes of the Parties, the reference texts for the purposes of determining the course of the frontier were thus clearly the *Arrêté* of 31 August 1927 and the Erratum of 5 October of the same year. The reference to the Paris IGN 1:200,000-scale map as a “basic document” can be explained by the fact that it is the only map base precise enough to serve as a working document on which the course described by the above-mentioned texts could be plotted.

1.46. The two Parties also undertook to allow their nationals to move freely from one side of the frontier to the other, provided they were carrying identity papers, and to recognize the right of all nationals of the other Party to enter their territory, travel within it and establish their residence there, without being obliged to have a visa or permit of any kind, with the exception of transhumants, who should have a transhumance certificate (point 2 of the Protocol of Agreement). It was further decided to maintain the status quo in respect of land utilization rights until the frontier had been demarcated (point 3 of the Protocol of Agreement). The Parties also agreed that the security forces of both Parties should make no incursion into the neighbouring territory without prior express authorization from the responsible authority, and that any border disputes would be settled through meetings between delegates or by an exchange of Notes (point 4 of the Protocol of Agreement). To give substance to the latter point, the heads of the border districts were authorized to contact one another directly and meet on a regular basis in order to deal with issues of local concern (point 5 of the Protocol of Agreement). Finally, the Protocol of Agreement includes provisions relating to census-taking and the collection of taxes from sedentary nationals and nomads (point 6 of the Protocol of Agreement).

1.47. The two Parties promptly sought to mark out the frontier in accordance with the schedule announced in the Protocol of Agreement of 23 June 1964. The Topographic Service and Land Registry of Niger contacted the IGN Annex in Dakar by letter dated 20 July 1964 in order to obtain a 1:1,000,000 map showing the main astronomic points along the frontier⁹⁵, whilst his counterpart in Upper Volta enquired of the same IGN Annex in Dakar whether it could mark out the frontier by placing a marker approximately every ten kilometres, and how much such an operation would cost⁹⁶. The demarcation process was thus set in motion. This was, moreover, considered necessary, as, notwithstanding the Protocol of Agreement of 23 June 1964, there were still major problems in respect of tax collection. From Niger’s point of view, many of its nationals

⁹⁵Letter No. 1 10/STC from the Director of the Topographic Service and Land Registry of Niger to the Director of the IGN office in Dakar, Upper Volta-Niger, 20 July 1964, Ann. MBF 46.

⁹⁶Letter No. 00517/CT from the Director of the Land Registry, Urban Planning and Housing of Upper Volta to the Director of the IGN office in Dakar, 25 July 1964, Ann. MBF 47.

continued to avoid paying the taxes due in their own country by opting to be registered in Upper Volta where the taxes, particularly on animals, were more favourable⁹⁷.

1.48. The actual process of demarcation, however, was not put in place as rapidly as the Parties had originally intended, given the considerable cost of such an undertaking over a frontier approximately 590 km in length⁹⁸. Thus, the problems on the ground persisted, in particular in respect of tax collection, as the President of Niger pointed out in a letter dated 6 March 1967, whereby he suggested to his counterpart in Upper Volta that efforts should be made to implement the Protocol of Agreement⁹⁹. On 16 March 1967 the Minister for the Interior and Security of Upper Volta responded by promptly sending a circular to the Commanders of the *cercles* bordering Niger, asking them to send him all the relevant documents and information, with a view to a meeting of the Joint Commission on Demarcation of the Frontier at the end of April¹⁰⁰.

1.49. Nevertheless, no headway was made in the demarcation process and border relations remained difficult at times, invariably on account of problems of tax collection. The Niger authorities were often under the impression that Niger nationals were trying to avoid their civic duties, and sometimes pursued them into Upper Volta without taking the precaution of obtaining the prior agreement of the neighbouring authorities, as nevertheless provided under point 4 of the Protocol of Agreement of 23 June 1964. During one such incident, a Niger officer lost his rifle in the territory of Upper Volta¹⁰¹.

1.50. It was no doubt to avoid the risk of an incident caused by one of its officers seriously affecting relations between the two countries that Niger again took the initiative three years later, this time through its Minister for Foreign Affairs. By Note Verbale dated 7 November 1967, the Minister for Foreign Affairs of Niger proposed a meeting with his counterpart from Upper Volta, with a view to clarifying some of the terms of the 1964 Protocol of Agreement¹⁰². The Minister for Foreign Affairs of Upper Volta promptly agreed to the proposed meeting, which he felt was "highly desirable in order to put an end to the numerous incidents that plague the border zone year in, year out", and indicated that it could take place on 5 January 1968, leaving it to Niger to choose the venue¹⁰³.

1.51. That meeting eventually took place on 9 and 10 January 1968 in Niamey. The Niger delegation was led by the Minister for Saharan and Nomad Affairs and Post and Telecommunications, and that of Upper Volta by the Minister for the Interior and Security. As indicated in the joint communiqué issued at the end of the meeting, the Parties noted that the

⁹⁷Letter No. 32/MAE/DAPEC from the Minister for Foreign Affairs of Niger to the Minister for Foreign Affairs of Upper Volta, 6 May 1965, Ann. MBF 48.

⁹⁸See the analysis of the Niger-Upper Volta frontier undertaken by IGN France, 3 November 1972, Ann. MBF 58.

⁹⁹Letter No. 0288/PRES/CAB from the President of Niger to the President of Upper Volta, 6 March 1967, Ann. MBF 49.

¹⁰⁰Circular No. 18/IS/DI from the Minister for the Interior and Security of the Republic of Upper Volta to the Commanders of the *cercles* adjoining Niger (Diapaga, Fada N'Gourma, Bogande, Dori and Oudalan), 16 March 1967, Ann. MBF 50.

¹⁰¹Letter No. 88/CONF-DR from the Commander of Dori *cercle* to the Minister for the Interior, 3 November 1967, Ann. MBF 52.

¹⁰²Note Verbale No. 02697/MAE/DAPEC from the Minister for Foreign Affairs of Niger to the Minister for Foreign Affairs of Upper Volta, 7 November 1967, Ann. MBF 51.

¹⁰³Letter No. 23421/IS/DI from the Minister for the Interior to the Minister for Foreign Affairs of the Republic of Upper Volta, 23 November 1967, Ann. MBF 53.

Protocol of Agreement had not been fully implemented “in particular at the level of the heads of the border districts of both countries”. They therefore agreed to clarify certain points, particularly in respect of population movements, taxes, and various other issues. Regarding the frontier, the record states:

“Following an exchange of correspondence between the Government of the Republic of Upper Volta and the *Institut Géographique National de Paris*, it has been agreed to entrust the latter body with the task of demarcating the frontier. The cost has been estimated at some 10 million CFA, to be borne equally by the Governments of Niger and Upper Volta.

As the Niger Government has already paid its share of the budget for the current year, the Head of the Delegation of Upper Volta has undertaken to refer this matter to his Government at the earliest opportunity in order to obtain the necessary funds.”¹⁰⁴

1.52. However, for financial reasons, the demarcation process was not restarted, and the meeting did not put an end to the difficult border relations between the two Parties. Among other examples of these problems, the Deputy Commander of Dori *cercle* sent an official telegram dated 1 March 1968 to the Minister for the Interior, informing him that: “Niger authorities, in breach of protocols, infiltrate Yatacou sectors to collect taxes without knowledge of Dori authorities.”¹⁰⁵

1.53. This was not an isolated incident and many such others occurred, mostly in connection with Niger taxing individuals considered by local administrators to be Niger nationals or liable to pay various charges. Some incidents were more serious than others, however. Niger was fully aware of some of these incidents, as, in a letter dated 13 March 1970, the Upper Volta Minister for Foreign Affairs informed the Minister for the Interior and Security of his country that his Niger counterpart had officially expressed regret for an incident caused by the intervention of Niger customs officers in the territory of Upper Volta¹⁰⁶. Other such incidents led the local Niger authorities to acknowledge their failure to comply with the undertakings given¹⁰⁷.

1.54. Although the question of demarcation was complicated at local level, no progress was made until 1982, and incidents were usually resolved through series of meetings between the local authorities.

1.55. The principle of establishing a joint commission to identify the documents relating to the boundary and demarcate the frontier was reiterated on 16 September 1982 at a working session of delegations led by the Minister for the Interior and Security of Upper Volta and the Secretary of State for the Interior of Niger¹⁰⁸. Several months later, on 25 April 1983, a Treaty of Friendship and Co-operation was signed between the Republic of Upper Volta and the Republic of Niger, as

¹⁰⁴Report of the ministerial meeting between Niger and Upper Volta, Niamey, 9-10 January 1968, Ann. MBF 54.

¹⁰⁵Official telegram No. 17/DR from the Deputy Commander of Dori *cercle* to the Commander of Dori *cercle*, 1 March 1968, Ann. MBF 55.

¹⁰⁶Letter No. 00446/AE/SG/AAM from the Minister for Foreign Affairs of Upper Volta to the Minister for the Interior and Security, 13 March 1970, Ann. MBF 56.

¹⁰⁷Mission report No. 86/DR-CONF from the Commander of Dori *cercle* (Upper Volta) to the Minister for the Interior and Security of the Republic of Upper Volta, 30 October 1972, Ann. MBF 57; Record of the meeting between the *sous-préfet* of Say (Niger) and the *sous-préfet* of Sebba (Upper Volta), 12 November 1981, Ann. MBF 59.

¹⁰⁸Report of the working meeting between the Minister for the Interior and Security of Upper Volta and the Secretary of State for the Interior of Niger, Niamey, 16 September 1982, Ann. MBF 60.

well as an Agreement establishing a Niger-Volta Joint Commission for Co-operation¹⁰⁹. These documents were ratified in accordance with the law of Burkina by decree of 6 May 1983¹¹⁰.

1.56. In February 1985, following a further ministerial meeting, the two Parties agreed that, while most of the many incidents along the frontier had hitherto been resolved by the local authorities, it was still necessary to “revive the Joint Commission for Niger-Burkina Co-operation”, and recommended that “the frontier between the two States be demarcated in accordance with the provisions of the Protocol of Agreement of 23 June 1964”. In their recommendation, the Parties called on their respective authorities to establish “a joint commission responsible for the demarcation of the frontier between the two States”¹¹¹.

1.57. In the meantime, the conduct of the authorities on the ground remained confrontational. Furthermore, on 6 May 1985, the Minister for Territorial Administration of Burkina was obliged to send a letter of protest to his Niger counterpart pointing out to him:

“At the ministerial meeting held in Ouagadougou on 12, 13 and 14 February 1985, problems relating to security and peace in the gold-bearing regions of Deba (Niger), Tangangari and Takatami (Burkina) were discussed. It was agreed in particular that peace and security should be maintained in that area and more generally that the Niger-Burkina frontier should be demarcated on the basis of the provisions of the Protocol of Agreement of 23 June 1964.

I have the honour to inform you that on 18 February 1985, namely less than one week after the said meeting, a number of new pickets were again erected in the gold-bearing sector of Tangangari by a Niger technical service.

This operation, performed intentionally without prior notice to the Burkina authorities, would appear to be provocative.

I would like to take this opportunity to ask you to intervene with the department and border officials concerned in order to suspend the operation pending the creation and establishment of the Joint Commission on Demarcation of the Frontier, pursuant to the recommendations of the meeting held in Ouagadougou from 12 to 14 February 1985.”¹¹²

In his reply of 14 June 1985, the Niger Minister denied the facts, stating that at no point during the meeting of local officials held on 11 April 1985 had there been “any mention of pickets being erected in Tangangari or Takatami”¹¹³. The problem nevertheless persisted in Takatami, a gold-bearing site coveted by Niger — which explains why Niger persists in considering it to be one and the same village as Tokalan¹¹⁴. A radio message of 8 February 1986 from the Commander of

¹⁰⁹Ann. MBF 61.

¹¹⁰Decree No. 83-0207/CSP/PRES/AE.C ratifying the Treaty of Friendship and Co-operation between Upper Volta and Niger and the Agreement Establishing a Niger-Volta Joint Commission on Co-operation, 6 May 1983, Ann. MBF 62.

¹¹¹Report of the meeting between the Minister Delegate for the Interior of Niger and the Minister for Territorial Administration of Burkina Faso, Ouagadougou, 12-14 February 1985, Ann. MBF 63.

¹¹²Letter No. 001198/MATS/CAB/SG/CF from the Minister for Territorial Administration and Security of Burkina Faso to the Minister Delegate for the Interior of Niger, 6 May 1985, Ann. MBF 64.

¹¹³Letter No. 518/MI/MDI/DAPA/CF from the Minister Delegate for the Interior of Niger to the Minister for Territorial Administration and Security of Burkina Faso, 14 June 1985, Ann. MBF 65.

¹¹⁴See below para. 1.77 and paras. 4.115-4.119.

the territorial brigade of the Sebba *gendarmerie* to his superiors stated: “honour to report stop placing of wooden stakes on 6/2/86 Niger-Burkina border zone stop south-east side of Sebba *département* stop by Niger geologists consisting of five (5) men one (1) of whom white stop gold-bearing site Tangangary”¹¹⁵.

1.58. A further meeting at ministerial level was held in Niamey in April 1986. It dealt in particular with the arrangements for setting up the Joint Commission on Demarcation of the Frontier, but the ministers went much further than they had at previous meetings where they had merely recommended action, and drew up a draft treaty and protocol of agreement on the demarcation of the frontier between the two countries. This draft was to form the basis of the 1987 Agreement and Protocol of Agreement¹¹⁶.

1.59. The process of demarcating the frontier was once again underway. The experts met from 21 to 23 May 1986 in order to estimate the cost of the work and, in the words of the report they adopted, to proceed “to interpret the *Arrêté* of 31 August 1927, as clarified by its Erratum of 5 October 1927, in light of the 1:200,000 map”¹¹⁷. However, strictly speaking, it was not a matter of “interpreting” the *Arrêté* and its Erratum; in reality these texts did not raise any concerns between the Parties, which, in keeping with their demarcation mission, sought only to undertake a “map interpretation”, an operation which consisted in plotting on the map the description of the frontier given by the text, and relying on the map itself if need be, in accordance with the Protocol of Agreement of 23 June 1964. Thus, in respect of the locations of Mount N’Gouma, Mount Arounskoye, Mount Balébanguia, the point to the west of the ruins of Tokébangou and Mount Doumefende, the list of defining points on the Niger-Burkina frontier drawn up by the experts and annexed to the report of the meeting carries the note: “co-ordinates to be measured on a 1:200,000 map”¹¹⁸.

1.60. Shortly thereafter, the Burkina Minister for Territorial Administration and Security sent a letter to his Niger counterpart, informing him that the President of Burkina had agreed to the demarcation of the common frontier between the two countries, but added that it was nevertheless preferable for the work to begin only once the judgment by the International Court of Justice in the then ongoing case between Burkina and Mali had been rendered¹¹⁹.

2. The Agreement and Protocol of Agreement of 28 March 1987

1.61. The Agreement and Protocol of Agreement of 28 March 1987 were signed by the respective Ministers for Foreign Affairs¹²⁰. They definitively establish the delimitation of the frontier. Article 21 of the Protocol of Agreement provides that it enters into force upon signature,

¹¹⁵Radio message No. 11/4 from the territorial unit, Sebba *gendarmerie*, to Dori company, Seno High Commissioner, 8 February 1986, Ann. MBF 66; see also Report No. 24/4 from the unit commander, Sebba *gendarmerie*, to the company commander, Dori, 20 March 1986, Ann. MBF 67.

¹¹⁶Report of the meeting between the Minister for Territorial Administration and Security of Burkina Faso and the Minister Delegate for the Interior of Niger, 9 April 1986, Ann. MBF 68; see below, paras. 1.61 *et seq.*

¹¹⁷Report of the meeting between technical experts of Niger and Burkina, Ouagadougou, 21-23 May 1986, Ann. MBF 69.

¹¹⁸*Ibid.*

¹¹⁹Letter No. 0603/MATS/SG/DFR from the Minister for Territorial Administration and Security to the Minister Delegate for the Interior of Niger, 3 October 1986, Ann. MBF 70.

¹²⁰Protocol of Agreement between Niger and Burkina Faso on the demarcation of the frontier, 28 March 1987, Ann. MBF 73; Agreement of 28 March 1987 on the demarcation of the frontier between Burkina Faso and the Republic of Niger, Ann. MBF 72.

and Article 22 states that the Parties shall agree to settle by peaceful means any disputes which may arise in its implementation. The Agreement includes similar provisions in its Articles 9 and 8.

1.62. The first two articles of these instruments are drafted in an almost identical manner¹²¹: Article 1 of both the Agreement and the Protocol of Agreement concern the delimitation of the frontier; Article 2 sets out the principles applicable to its demarcation.

1.63. Under Article 1 of the Protocol of Agreement¹²²:

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

This text marks the agreement between the two States on the line of the frontier, and describes the frontier in two ways. First, it notes the general course of the frontier (it “shall run from the heights of N’Gouma . . . to the intersection of the former boundary of the *cercles* of Fada and Say with the course of the Mekrou”). Then it states that the frontier is “as described in the *Arrêté* of 31 August 1927, as clarified by the Erratum of 5 October 1927”.

1.64. Article 2 of the Protocol (identical to Article 2 of the Agreement) has a different subject-matter. It establishes the method the Parties undertake to follow in marking out the frontier. Thus, the frontier:

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

1.65. The following articles of the Protocol of Agreement provide the framework for the actual demarcation work:

“Article 3. There is hereby established a Joint Technical Commission on Demarcation. It shall be composed of an equal number of members from each of the two Parties. At its meetings, the Chair shall be taken by the host country and the function of *Rapporteur* shall be filled by the visiting country.

Article 4. The Joint Technical Commission on Demarcation shall be responsible for marking the frontier, in accordance with the provisions of Articles 1 and 2 above, following the entry into force of this Protocol. It shall present a report every six months to the Governments of the two States on the progress of works on the ground.

Article 5. The Joint Technical Commission on Demarcation shall enjoy full autonomy in executing the works of demarcation. However, any difficulties liable to

¹²¹Except for the reference to the Erratum, which appears in Article 1 of the Protocol and not in Article 1 of the Agreement. This difference is probably due to a drafting error. On this point, see below, paras. 2.26 and 2.27 of the present Memorial.

¹²²Article 1 of the Agreement as cited in the Special Agreement seising the Court is identical.

hinder the conduct of the works, as well as important decisions with potential financial consequences or involving additional costs, must be submitted to the two Governments.”¹²³

1.66. On that basis, a first meeting between technical experts from Niger and Burkina took place in Ouagadougou from 14 to 17 May 1987, and the financial, organizational and administrative aspects of the Joint Commission on Demarcation’s working procedures were broached¹²⁴. On 19 June 1987, the President of Burkina adopted a *kiti*¹²⁵ designating the individuals who were to sit on the Joint Technical Commission on Demarcation of the Frontier¹²⁶. The Commission’s first meeting, held in Niamey from 25 to 27 June 1987, dealt with matters similar to those dealt with at the meeting of May 1987¹²⁷. The next meeting, which had been scheduled for October 1987, could not take place owing to a number of events in both Burkina and Niger, notably the death of President Kountché¹²⁸.

1.67. Finally, on 9 March 1988 a delegation of 42 experts from both countries began visiting various locations along the frontier to conduct topographical work¹²⁹. It was not possible to resolve all the problems. At their meeting of 12 to 15 May 1988, the members of the Joint Commission noted that the technical sub-committee had encountered a problem in determining the course of the frontier:

“Two points were discussed at length, based on additional information provided. These concerned, first, the geographic location of the village of Takabangou and, second, the location of the frontier line from the Say parallel to another village named Tyenkilibi or Tyenkiliba.

The Commission noted that the line along this part of the frontier was based on that of the French National Geographic Institute (IGN France) 1:200,000 map, not on *Arrêté* No. 2326 of 31 August 1927, as clarified by its Erratum of 5 October 1927, both of which were designated in the agreement signed by the two Governments in March 1987 in Ouagadougou.

The technical specialists explained that their position was based on the frontier line as recorded in the report of the meeting between specialists from Niger and Burkina held from 21 to 23 May 1986 in Ouagadougou.

It was apparent that this line was an interpretation of the above-mentioned *Arrêté* and Erratum. The Commission considered that the technical staff were not authorized to adopt a procedure that deviated from the decisions of the two Governments. They were accordingly instructed to reconsider the 110 km portion in

¹²³*Ibid.*

¹²⁴Report and recommendations of the meeting between technical experts from Niger and Burkina Faso held in Ouagadougou from 14 to 17 May 1987, Ann. MBF 74; see also the Report of the mission conducted from 24 to 28 June 1987 in Niamey in connection with the demarcation of the frontier, July 1987, Ann. MBF 77.

¹²⁵“*Kiti*” is the term used under the revolutionary regime of Burkina Faso for “decree”.

¹²⁶*Kiti* of 19 June 1987 of the President of Burkina Faso appointing the members of the Joint Commission on Demarcation, Ann. MBF 75.

¹²⁷Report of the first meeting of the Joint Technical Commission on Demarcation held in Niamey, 25-27 June 1987, Ann. MBF 76.

¹²⁸Note No. ANV/36/103/MAT/SG/DGAT/DAF from the Director of Border Affairs to the Minister for Territorial Administration of Burkina Faso, 19 January 1988, Ann. MBF 78.

¹²⁹Radio message from the Director of Border Affairs on mission in Téra, March 1988, Ann. MBF 79.

question within eight (8) days, complying with the texts designated in the Agreement and Protocol of Agreement signed by the two Governments.”¹³⁰

1.68. This criticism of the method used by the experts in 1988, who had followed in the footsteps of those of the 1986 experts, was due to the fact that the latter had relied on the cartographic line established by the Paris IGN — mainly in order to establish the co-ordinates of pertinent geographic points — not because the *Arrêté* and its Erratum did “not suffice”, but because the 1964 Protocol of Agreement they had to implement gave them a relatively free hand and did not subject use of the map to inadequacies in the texts, and also because it was more convenient: it was thus easier to rely on the map than to go to the locations concerned in order to determine the co-ordinates of the defining points, especially in light of the budgetary situation. The 1988 experts, on the other hand, had no choice but to comply with the letter of the 1987 Protocol of Agreement, which they failed to do by merely repeating the by then outdated findings of 1986, notwithstanding the fact that they could have visited the sites in question.

1.69. The Joint Commission met again in Niamey on 26, 27 and 28 September 1988, this time in order to plot on a map, in accordance with the 1987 Protocol of Agreement: “the line resulting from the field survey conducted by the Technical Sub-Committee and to submit the results of said work to both Governments for final selection of the frontier line”. This is what they were to do by formally adopting what they agreed to call the “consensual line”¹³¹. The report of their meeting states that:

“1. According to the basic texts (*Arrêté* No. 2336 of 31 August 1927 and its Erratum No 2602/APA of 5 October 1927) the boundary line passes three (3) categories of points:

- astronomic markers;
- natural features;
- localities.

The experts are thus unanimous as to the map interpretation and the field survey of the boundary line defined in the basic documents cited in the Agreement and Protocol of Agreement, signed in Ouagadougou on 28 March 1987.

Only the Tokébangou point, which could not be identified despite numerous investigations, was subject to interpretation by the Technical Sub-Committee. Thus, the Joint Technical Commission proposes the following line:

‘The frontier point described as passing to the west of the ruins of Tokébangou shall be the midpoint in the straight line connecting the site indicated by the villagers of Dolbel and Kossa and the iron marker post placed at the foot of Mount Kombara, a hill located to the west of the presumed site of the former village of Tokébangou as indicated by the inhabitants of said village.’

¹³⁰Report of the meeting of the Joint Technical Commission on Demarcation, Diapaga, 12-15 May 1988, Ann. MBF 80.

¹³¹See Cartographic Annex MBF 15: this map was produced in two copies signed by the Chairmen of the Commission; during the meeting, it was decided that each party should submit the course of the line to its Government for approval (see Report No. 42/FP/MAT/SG/DCAF from the Minister for Territorial Administration to the Head of State of Burkina Faso, 5 March 1991, Ann. MBF 88).

2. Comparison of the line on the IGNF map and the line resulting from the field survey, in accordance with the basic texts.

It should be noted that at several locations the frontier line resulting from the basic texts does not coincide with the line on the IGNF 1:200,000 map or with certain administrative realities on the ground.”¹³²

1.70. The Joint Commission had accomplished the work required by the 1987 Protocol of Agreement, in accordance with its terms, and demarcation work therefore commenced on that basis, and indeed with what were initially satisfactory results. At its meeting of 18 May 1989, the Joint Technical Commission on Demarcation was able to draw up a list of the co-ordinates of thirty-two defining points which was to enable demarcation¹³³.

1.71. The original intention was to place a marker every five kilometres, and even every kilometre in densely populated areas. However, that ambition was scaled down in the light of budgetary constraints and eventually it was agreed to adopt the principle of placing 45 markers. According to the report of the fifth meeting of the Joint Technical Commission on Demarcation, held in Niamey on 13 and 14 November 1989, it was thus possible to place a marker at every change of direction (of which there were thirty-three) in the frontier line, and to add a further twelve markers — “consolidation points” — in densely populated areas¹³⁴.

1.72. The procedure thus adopted was efficient. Moreover, in November 1989, the Joint Technical Commission on Demarcation meeting in Niamey noted with satisfaction that:

“1. — The field survey of the entire frontier (approximately 600 km) took place in 1988. A marker post was placed every 20 km.

2. — Field observations were carried out by the Joint Technical Sub-Committee in 1989. A total of 8 reference markers were recorded and their co-ordinates calculated by IGN France.

In the W Park, it was difficult to conduct observations because of the dense vegetation, but it was easier in the north.

It should be noted that the first marker was erected between Botou and Tamou.”¹³⁵

1.73. The record of the second ordinary meeting of the Joint Technical Commission on Demarcation of the Frontier held in Ouagadougou from 23 to 28 July 1990 was also able to report good results, with twenty-three markers out of a planned total of forty-five having effectively been erected¹³⁶.

¹³²Report of the fourth meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina frontier, held in Niamey on 26, 27 and 28 September 1988, Ann. MBF 81.

¹³³Report of the meeting of the Joint Technical Commission on Demarcation of 18 May 1989, Ann. MBF 83.

¹³⁴Report of the fifth meeting of the Joint Technical Commission on Demarcation of 13 and 14 November 1989, Ann. MBF 84.

¹³⁵*Ibid.*

¹³⁶Report of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Ouagadougou, 23-28 July 1990, Ann. MBF 87.

1.74. However, in certain sectors the process came to a halt. The report from the Burkina Minister for Territorial Administration to the Head of State marks the point at which Burkina became fully aware of Niger's misgivings:

“As of February 1990, when the Niger Chairman of the Commission was in France for training and had been temporarily replaced by Niger's Topographical Director — the counterpart of the Director-General of the Burkina Geographic Institute — certain tensions began to arise, in particular among the technical experts in the field.”¹³⁷

In April 1990, the Niger Chairman ad interim of the Commission voiced his reservations about the course of the boundary, as noted by the extraordinary session of the Commission convened in Niamey in May¹³⁸.

1.75. Thus, it was during the extraordinary meeting of the Joint Technical Commission on Demarcation of 14 May 1990 that Niger made clear its intention to call into question the consensual line of 1988 by all possible means. At the time it relied on an argument that it was never to repeat thereafter. Its then short-lived belief was that:

“the course of the boundary^[139] was no longer consistent with the above-mentioned texts^[140] from the Tao marker to Bossébangou. He thus pointed out that an error in interpretation of the Erratum brought the frontier to the River Sirba at Bossébangou.

However, the correct interpretation of the Erratum produced a salient, leaving to Niger the villages of Alfassi, Kouro, Tokalan, and Tankouro. In support of its position, Niger presented a map on a scale of 1:1,000,000 entitled ‘French West Africa, new frontier between Upper Volta and Niger based on the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927.’”¹⁴¹

1.76. The consensual line of 1988 was thus rejected by Niger as being inaccurate, because it ended the frontier at the River Sirba at Bossébangou, whereas in fact it should never reach that point, since — according to Niger — in order to form the salient, the frontier had to deviate towards the west well to the north of Bossébangou. That position was supported by a sketch-map purportedly representing the frontier line resulting from the Erratum of 5 October 1927¹⁴², but which is obviously inconsistent with the Erratum, since, for example, the line it proposes does not reach the River Sirba at Bossébangou as is very clearly indicated in the Erratum. Furthermore, this obvious inconsistency led Niger to argue that the sketch-map should be considered as being officially annexed and “linked” to the Erratum and that, in its view, it was preferable to rely on the sketch-map rather than on the letter of the Erratum which, according to Niger, “includes

¹³⁷Report No. 42/FP/MAT/SG/DCAF from the Minister for Territorial Administration to the Head of State of Burkina Faso, 5 March 1991, Ann. MBF 88.

¹³⁸Ann. MBF 87.

¹³⁹Namely the consensual line of 1988.

¹⁴⁰Namely the *Arrêté* and the Erratum.

¹⁴¹Report of the extraordinary meeting of the Joint Technical Commission on Demarcation, 15 May 1990, Ann. MBF 85.

¹⁴²The sketch-map is reproduced in Cartographic Annex MBF 6.

descriptions of the internal boundaries of the Tillabéry and Say *cercles*” at the level of Bossébangou¹⁴³.

1.77. That thesis was never put forward again thereafter, but the Niger members of the Commission on Demarcation nevertheless remained hostile to the consensual line, with the result that at the end of July 1990 the Joint Technical Commission on Demarcation of the Frontier could do no more than take note of the two Parties’ different positions. On that occasion, Niger put forward two completely new interpretations of the 1927 *Arrêté* and its Erratum: (i) it claimed that the word “turns” [*s’infléchit* in French] as used in the Erratum implied that the section of the boundary between the Tong-Tong astronomic marker and the River Sirba at Bossébangou described a curve; and (ii) Takalan and Takatami were allegedly one and the same village, and therefore the expression “at the level of the Say parallel” as used in the Erratum should be considered as being “merely indicative”¹⁴⁴. Burkina, for its part, maintained a position that was not only consistent with what it had always held, but also with what had prevailed throughout the discussions up until 1989, and which had moreover resulted in the consensual line of 1988¹⁴⁵.

1.78. A further meeting was held in February 1991, but as the participants were unable to bridge such clearly irreconcilable positions, all they could do was agree to refer the matter for ministerial arbitration¹⁴⁶. In an attempt to end the deadlock, the Minister for Territorial Administration of Burkina had already taken the initiative to submit the matter to the Minister for the Interior of Niger, expressing his concern that the discussions were becoming confrontational. Indeed, as the Burkina Minister stated in his report to the Head of State, at the time his Niger counterpart seemed: “not . . . to understand the position of his compatriot, the Chairman ad interim of the Commission”¹⁴⁷.

3. The decision of 15 May 1991 and its denunciation by Niger

1.79. At the ministerial consultative and working meeting of 14 and 15 May 1991, the Minister for the Interior of Niger and the Minister for Territorial Administration of Burkina decided on a political solution to break the deadlock in the work of the Joint Commission on Demarcation. According to that decision:

- “1. From the Tong-Tong astronomic marker to the River Sirba at Bossebangou, passing through the Tao astronomic marker, the frontier shall consist of a series of straight lines.
2. From the River Sirba at Bossebangou to the River Mékrou, the course of the frontier adopted shall be that shown on the map to a scale of 1:200,000 of IGN/France, 1960 edition.

¹⁴³Report of the extraordinary meeting of the Joint Technical Commission on Demarcation, 15 May 1990, Ann. MBF 85.

¹⁴⁴Report of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Ouagadougou, 23-28 July 1990, Ann. MBF 87; see also the account of Niger’s position on the different sections of the frontier, 28 July 1990, Ann. MBF 87.

¹⁴⁵*Ibid.*

¹⁴⁶That meeting is referred to in the Joint Communiqué of 16 May 1991 adopted following the Ministerial consultative and working meeting of 14 and 15 May 1991, Ann. MBF 89.

¹⁴⁷Report No. 42/FP/MAT/SG/DCAF from the Minister for Territorial Administration to the Head of State of Burkina Faso, 5 March 1991, Ann. MBF 88.

To that end, two extracts from the 1:200,000 map of IGN/France, 1960 edition, on which that course is shown have been initialled by both Ministers.

The Joint Technical Commission on Demarcation has accordingly been authorized to continue its work forthwith on that basis.”¹⁴⁸

1.80. This solution is clearly not a straightforward application of the 1987 Protocol of Agreement, which would have resulted in the consensual line of 1988 criticized by Niger. It was a political solution aimed at giving partial satisfaction to Niger in order to restart the demarcation process as quickly as possible: (i) the consensual line was reconfirmed in the first section of the frontier, which consisted of straight lines; but (ii) from the River Sirba at Bossébangou, it was decided, by way of compromise, to have recourse to the line shown on the 1960 map, even though this would give rise to certain inconsistencies with the text of the *Arrêté* of 31 August 1927 and its Erratum of 5 October of the same year.

1.81. On that basis, the Technical Commission held an extraordinary meeting, at which it was planned to complete the demarcation work by the end of 1992¹⁴⁹. However, work on the ground was interrupted, as was noted by the Joint Technical Commission on Demarcation of the Frontier meeting in Niamey on 2 November 1994¹⁵⁰, and acknowledged by the Ministers at a meeting on 6 December 1997¹⁵¹. Once again the hold-up was due to the Niger experts, who, at a meeting of the Joint Technical Commission on Demarcation from 2 to 4 November 1994¹⁵², called into question the solution arising from the decision of 16 May 1991 on the grounds, or rather on the pretext, that it “was not entirely consistent with the terms of Articles 1 and 2 of the 1987 Protocol of Agreement”¹⁵³ — which was only to be expected given that it was a political compromise.

4. The conclusions of the fourth ordinary session of the Joint Technical Commission on Demarcation (2001)

1.82. The ministerial recommendations made in 1997 to restart discussions were without effect. It had indeed become a somewhat problematic undertaking after Niger had in turn renounced the consensual line unanimously adopted by the experts in 1988 and the political compromise of 1991. The Ministers nevertheless met again in May 2000 in an attempt to give fresh impetus to the process by “strongly recommending a meeting of the Joint Technical Commission on Demarcation of the Frontier in September 2000”. Furthermore, in their view it was all the more pressing as the situation was once again giving rise to “administrative problems on the frontier, particularly at locations between Téra and Falagountou, Botou and Say”¹⁵⁴.

¹⁴⁸Ministerial consultative and working meeting between Niger and Burkina, Joint Communiqué of 16 May 1991, Ann. MBF 89.

¹⁴⁹Ministerial Council Report on the results of the meeting of ministers held in Niger on 2 July 1991, Ann. MBF 90.

¹⁵⁰Report of the Joint Technical Commission on Demarcation, 2 November 1994, Ann. MBF 91.

¹⁵¹Report of the meeting between the Minister for the Interior of Niger and the Minister for Territorial Administration of Burkina Faso, 5-6 December 1997, Ann. MBF 92.

¹⁵²Report of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Niamey, 2-4 November 1994, Ann. MBF 91.

¹⁵³Report of the Joint Technical Commission on Demarcation, 2 November 1994, Ann. MBF 91.

¹⁵⁴Report of the meeting between the Minister for the Interior of Niger and the Minister for Territorial Administration of Burkina, Tenkodogo, 24-26 May 2000, Ann. MBF 93.

1.83. The fourth ordinary session of the Joint Technical Commission on Demarcation of the Burkina-Niger Frontier was held in July 2001. It established a joint commission of 12 members to review the theoretical line of the frontier. This review was conducted:

“in light of the basic documents, specifically:

- the Agreement and Protocol of Agreement of 28 March 1987,
- the *Arrêté général* of 31 August 1927, as clarified by its Erratum of 5 October 1927”.

1.84. The Commission’s conclusions on the frontier were as follows:

- “1. The frontier was clearly defined from the heights of [Mount] N’Gouma to the astronomic marker of Tong-Tong, with the exception of the ruins of Tokébangou, which the frontier passes to the west. These ruins were not identified in the course of the survey of the frontier line.

.....

2. The frontier was clearly defined from Tchenguiliba to the River Mékrou, subject to the survey team’s verification of the position of the village of Kogori.
3. From the Tong-Tong astronomic marker to the River Sirba at Bossébangou, the phrase ‘this line then turns towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossebangou’ has resulted in two interpretations:

(a) the frontier is composed of two (2) straight lines:

- from the Tong-Tong astronomic marker to the Tao astronomic marker;
- from the Tao astronomic marker to the River Sirba at Bossébangou.

(b) the frontier consists of a curved line, starting from the Tong-Tong astronomic marker, passing through the Tao marker and terminating at the River Sirba at Bossébangou.

The Commission decided to continue the documentary research in order to clarify the course of the frontier in this area.

4. From Bossébangou to Tchenguiliba, the Commission noted problems of interpretation associated with the failure to identify the villages referred to in the Erratum and with the identification of the point at which the frontier again cuts the River Sirba at the level of the Say parallel. The technical survey team will also visit the area in order to identify these villages or their 1927 sites. The villages concerned are Alfassi, Kouro, Tokalan and Tankouro.”¹⁵⁵

¹⁵⁵Report of the Joint Technical Commission on Demarcation of the Burkina-Niger Frontier, Ouagadougou, 18-20 July 2001, Ann. MBF 94.

1.85. It is clear that the experts were of exactly the same opinion in respect of the first two sectors mentioned in this report, and which were in fact no longer really at issue, since they had actually been marked out: from the heights of N’Gouma to the Tong-Tong astronomic marker the frontier was “clearly” defined. The same was true of the portion from Tchenguiliba to the River Mekrou in the south, which was also “clearly” defined. That consensus was not called into question thereafter. The Parties formalized this when they signed the Special Agreement seising the International Court of Justice, whereby:

“thanks to the work of the Joint Technical Commission on Demarcation . . . , the Parties have been able to reach agreement in respect of the following sectors of the frontier:

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

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

Whereas the two Parties accept the results of the work carried out in those sectors as definitive.”¹⁵⁶

1.86. However, no progress was made with work on the other sectors, neither from the Tong-Tong astronomic marker to the River Sirba at Bossébangou, nor from Bossébangou to Tchenguiliba.

1.87. The respective Ministers nevertheless called for work to recommence. The final communiqué of 4 April 2003 concluding their consultative meeting in Téra suggests:

“performing the tasks recommended at the technical meeting in Ouagadougou in 2001, namely:

- a joint survey of the frontier line;
- continuing documentary research;
- holding the next technical session in Niger;
- replenishing the joint fund”¹⁵⁷.

Further, at the fifth ordinary session of the Joint Technical Commission on Demarcation of September 2004¹⁵⁸, it was decided to appoint a field survey team to locate in particular the ruins of the village of Tokébangou and the villages of Kouro, Alfassi, Tokalan, Tankouro and Kogori. That decision was not implemented, however.

¹⁵⁶Ann. MBF 99.

¹⁵⁷Final communiqué of 4 April 2003, Ann. MBF 96.

¹⁵⁸Report of the Joint Technical Commission on Demarcation of the Niger-Burkina frontier, Niamey, 28-30 September 2004, Ann. MBF 97.

1.88. The two Parties decided to turn to the International Court of Justice so that it might both “place on record [their] agreement on the results of the work of the Joint Technical Commission on Demarcation of the . . . boundary”¹⁵⁹, and settle matters relating to the frontier line in the section from the Tong-Tong astronomic marker to the beginning of the Botou bend. The Court is seised on the basis of Article 8 in particular of the Agreement of 28 March 1987, which is expressly referred to in the preamble to the Special Agreement. This article states that:

“The Parties agree to submit all disputes or differences arising out of the implementation or interpretation of this Agreement to modes of peaceful settlement, in particular those provided for in the Charters of the Organization of African Unity and of the United Nations.”

The dispute relating to the determination of the frontier line in the disputed sector can thus be considered as a dispute as to the application of the Agreement of 28 March 1987.

¹⁵⁹Special Agreement seising the International Court of Justice, Article 2.2, Ann. MBF 99.

CHAPTER II

APPLICABLE LAW

2.1. Under Article 6 on “Applicable law” of the Special Agreement of 24 February 2009:

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

2.2. The reference to sources listed in Article 38, paragraph 1, of the Statute of the International Court of Justice requires no particular comment, except to point out, as did the Chamber of the Court in its Judgment of 22 December 1986, that while the determination of the course of the boundary between two sovereign States is clearly a matter for international law, in cases involving countries which emerged from the same French colonial empire, the question must also be appraised

“in the light of French colonial law, ‘*droit d’outre-mer*’. Since the territories of the two States had been part of French West Africa, the former boundary between them became an international frontier only at the moment when they became independent. The line which the Chamber is required to determine as being that which existed in 1959-1960, was at that time merely the administrative boundary dividing two former French colonies, called *territoires d’outre-mer* from 1946; as such it had to be defined not according to international law, but according to the French legislation which was applicable to such *territoires*.”¹⁶⁰

Nevertheless, in accordance with the warning conveyed in the same Judgment, there should be no mistake as to the scope of French colonial law:

“The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands. Hence international law does not effect any renvoi to the law established by the colonizing State, nor indeed to any legal rule unilaterally established by any State whatever; French law — especially legislation enacted by France for its colonies and *territoires d’outre-mer* — may play a role not in itself (as if there were a sort of *continuum juris*, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of what has been called the ‘colonial heritage’, i.e., the ‘photograph of the territory’ at the critical date.”¹⁶¹

2.3. In the light of this observation, Burkina Faso will briefly recall in section 1 of this chapter the scope of the principle of the intangibility of boundaries inherited from colonization. In section 2, it will present the other sources of applicable law, with particular emphasis on the 1987 Agreement and how it relates to other relevant instruments for the purposes of settling the present dispute.

¹⁶⁰*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 568, para. 29.*

¹⁶¹*Ibid.*, p. 568, para. 30; see also *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005, p. 110, para. 28, and p. 120, para. 46.*

SECTION 1

THE PRINCIPLE OF RESPECT FOR COLONIAL BOUNDARIES

2.4. It is usual to refer to the principle of the intangibility of colonial boundaries in cases of this kind. To mention only those cases submitted to this Court by African States: in the preamble to the Special Agreement of 16 September 1983, the Republics of Upper Volta and Mali stated their desire “to achieve as rapidly as possible a settlement of the frontier dispute between them, based in particular on respect for the principle of the intangibility of frontiers inherited from colonization”¹⁶²; and Article 6 on applicable law of the Special Agreement of 15 June between Benin and Niger, which is written in terms very similar to those of the Special Agreement whereby Burkina and Niger seised the Court in the present dispute, stated:

“The rules and principles of international law applicable to the dispute are those set out in Article 38, paragraph 1, of the Statute of the International Court of Justice, including the principle of State succession to the boundaries inherited from colonization, that is to say, the intangibility of those boundaries.”¹⁶³

2.5. The scope of this principle, often referred to by the Latin phrase *uti possidetis juris*¹⁶⁴, can therefore be ascertained fairly precisely in the light of the Court’s jurisprudence which has shaped it, particularly in respect of, firstly (1), the methods for implementing the *uti possidetis juris* principle — what could be called the “methodology” —, and, secondly (2), the relationship between title (here consisting of the 1927 *Arrêté* as amended by its Erratum¹⁶⁵) and — colonial and post-colonial — *effectivités*.

1. The “methodology” of *uti possidetis*

2.6. According to the well-known dictum of the 1986 Judgment¹⁶⁶, for the purposes of applying the principle of the intangibility of boundaries inherited from colonization, it falls to the Court to identify “the ‘photograph of the territory’ at the critical date”.

2.7. In these proceedings, there is no particular difficulty in determining the critical date — it may be more precise to speak of the “first critical date”: Upper Volta (Burkina Faso as of 1984) and Niger gained independence two days apart, on 5 and 3 August 1960 respectively. As no significant event took place between those two dates, they therefore constitute together “the” critical date at which the “colonial heritage” can be established¹⁶⁷. There should be no disagreement between the Parties as to this point.

2.8. However, as no text was adopted establishing the frontier between them at the time of their accession to independence, it is first necessary to step back in time to ascertain when (and if) the boundary was established, and, secondly, to ensure that “downstream”, since that date, it has not been modified. These two tasks are relatively simple in the present case, in contrast to those cases involving disputes between States born out of decolonization where “*uti possidetis* speaks for

¹⁶²*Ibid.*, p. 557.

¹⁶³*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 96.

¹⁶⁴See the previous Judgment (note 160) of 1986, *Reports 1986*, pp. 565-566, paras. 20-23.

¹⁶⁵See below, paras. 2.16 and 2.37.

¹⁶⁶Prev. para. 2.2.

¹⁶⁷See the previous Judgment (note 160) of 1986, *Reports 1986*, p. 570, para. 33.

once with an uncertain voice”¹⁶⁸: in this case, the boundary between the Parties was fully defined in *Arrêté général* No. 2336 of 31 August 1927¹⁶⁹ which was superseded by the Erratum of 5 October 1927¹⁷⁰, and it has never been modified since.

2.9. It is true that the principle of the “intangibility” of colonial boundaries, as embodied in the OAU’s Cairo Resolution of 1964¹⁷¹ and in Article 4 (b) of the Constitutive Act of the African Union of 2000, is not absolute in so far as it is “obviously open to those States to vary the boundaries between them by agreement”¹⁷². But in this case, the Parties have always considered their common frontier to be that which existed at the time of their accession to independence and that the frontier line in question could be determined by reference to the line described in the 1927 *Arrêté* and its Erratum¹⁷³. It is significant in this regard that the Agreement of 28 March 1987¹⁷⁴ — referred to expressly in the Special Agreement and cited as a source of law that can be applied by the Court¹⁷⁵ — stipulates that “[t]he frontier between the two States” is “as described in the *Arrêté* of 31 August 1927, as clarified by the Erratum of 5 October 1927”. Far from reviewing the boundary established by the *Arrêté*, the aim of the Agreement is, on the contrary, to mark it out.

2.10. In contrast to other cases where the application of the principle of the intangibility of colonial frontiers was called into question, here, the *uti possidetis* principle can speak with a certain voice: a document issued by the Governor General of FWA describes in full the course of the boundary between the colonies of Upper Volta and Niger. It has neither been modified nor called into question since it was adopted. Furthermore, in the Agreement of 28 March 1987 cited in the Special Agreement, both Parties officially considered that the present frontier, in its entirety, was described in the 1927 *Arrêté* as clarified by its Erratum.

2.11. Of course, Upper Volta was dissolved by the decree of 5 September 1932¹⁷⁶ and its territory divided among the neighbouring French colonies¹⁷⁷. But it was re-established by Law No. 47-1707 of 4 September 1947¹⁷⁸ which abrogated the 1932 decree and expressly stated that the boundaries of the “re-established territory of Upper Volta” would be “those of the former colony of Upper Volta on 5 September 1932”¹⁷⁹.

2.12. As of 1960, the following questions should therefore be asked:

¹⁶⁸*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 386, para. 41.

¹⁶⁹Ann. MBF 34.

¹⁷⁰Ann. MBF 35.

¹⁷¹Resolution AHG/Res. 16 (I) adopted at the first session of the Conference of Heads of State and Government of the OAU, meeting in Cairo from 17 to 21 July 1964.

¹⁷²*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 408, para. 80; see also, p. 401, para. 67.

¹⁷³See below, para. 2.20 *et seq.*

¹⁷⁴Ann. MBF 72.

¹⁷⁵See above, para. 2.1.

¹⁷⁶Ann. MBF 36.

¹⁷⁷See above, paras. 1.5 and 1.18.

¹⁷⁸Ann. MBF 39.

¹⁷⁹See above, paras. 1.5-1.6, 1.16 and 1.19.

- what was the course of the frontier on that date? It was that of the reconstituted Upper Volta of 1947;
- what were the boundaries in 1947? They were “those of the former colony of Upper Volta on 5 September 1932”; and
- what were those boundaries in 1932? They had been described in the 1927 *Arrêté* and its Erratum.

Those are the boundaries that constitute the frontier between Burkina and Niger today and those two texts — to which the 1987 Agreement and Protocol accordingly refer — constitute the legal title which has force of law between them¹⁸⁰.

2. Determination of the *uti possidetis* line (the relationship between title and *effectivités*)

2.13. Since a clear and uncontested title exists — in this case, the 1927 *Arrêté* as clarified (and partly modified) by its Erratum — the question of the relationship between title and “*effectivités*” — a question which has played a significant role in a number of cases heard previously by the Court — is of minor importance.

2.14. The jurisprudence on the question was established by the dictum of the Chamber of the Court in the case concerning the *Frontier Dispute (Burkina/Mali)*, which has repeatedly been affirmed since. Stating “in general terms, what legal relationship exists between such acts and the titles on which the implementation of the principle of *uti possidetis* is grounded”, the Chamber distinguishes four eventualities:

“Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivité* can then play an essential role in showing how the title is interpreted in practice.”¹⁸¹

2.15. It emerges from this very logical and clear classification, which has frequently been confirmed since¹⁸², that, where a frontier title exists, *effectivités* can play a confirmatory role only, and that, if the effective administration does not correspond to the title, “preference should be given to the holder of the title”. As the Chamber of the Court recalled in the clearest possible terms in the *Benin/Niger* case: “To determine the course of the intercolonial boundary at the critical date it is

¹⁸⁰On the relationship between the *Arrêté* and the Erratum, see above, paras. 1.30 to 1.32; below, paras. 2.41 *et seq.*; on the relationship between the Agreement and the Protocol, see below, paras. 2.25 to 2.28.

¹⁸¹*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, pp. 586-87, para. 63.

¹⁸²*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 398, para. 61; see also, p. 401, para. 62; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 38, para. 75-76; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 353, para. 68; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 678, para. 126.

necessary to examine first the legal titles relied on by the Parties, with any *effectivités* being considered only on a confirmatory or subsidiary basis.”¹⁸³

2.16. In the present case, there is no doubt that such a title exists: it is the *Arrêté* of 1927 and its Erratum¹⁸⁴. It therefore prevails over any *effectivités* to the contrary, which could only create a *fait accompli* in breach of the title on which the other Party may rely in a given area. This applies to colonial *effectivités* (“i.e., the conduct of the administrative authorities during the colonial period”¹⁸⁵), as much as to post-colonial ones — those that occurred after independence¹⁸⁶.

2.17. This position applies all the more forcefully in this case, given that, by the Protocol of Agreement of 23 June 1964 relating to the demarcation of their common frontier¹⁸⁷, the Parties, having “decided to take as basic documents for the determination of the frontier *Arrêté général* 2336 of 31 August 1927, as clarified by Erratum 2602 APA of 5 October 1927, and the 1:200,000-scale map of the Paris *Institut Géographique National*”, had already decided to freeze the situation on the ground¹⁸⁸. Further, in Article 10 of the Special Agreement they recalled their “Special Undertaking”

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

2.18. The primacy of title was vividly confirmed in *Cameroon v. Nigeria*. In that case, Nigeria relied on certain activities, both in the north in the Lake Chad area and in the south in the Bakassi peninsula, which

“could normally be considered to be acts *à titre de souverain*. The Court notes, however, that, as there was a pre-existing title held by Cameroon in this area of the lake, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of title from itself to Nigeria”¹⁸⁹.

And, noting that Cameroon held the legal title to the territory¹⁹⁰, the Court concluded that Cameroon had sovereignty, as “the situation was essentially one where the *effectivités* adduced by Nigeria did not correspond to the law, and . . . accordingly ‘preference should be given to the

¹⁸³*Frontier Dispute (Benin/Niger)*, Order of 16 February 2005, *I.C.J. Reports* 2005, p. 143, para. 128; see also p. 149, para. 141.

¹⁸⁴See below, paras. 2.36 et seq.

¹⁸⁵*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, *I.C.J. Reports* 1992, p. 398, para. 610.

¹⁸⁶See esp. *ibid.*, p. 399, para. 62.

¹⁸⁷Ann. MBF 45.

¹⁸⁸See above, Introduction, para. 0.5 and paras. 1.38 to 1.46.

¹⁸⁹*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, *I.C.J. Reports* 1992, p. 353, para. 67; see also p. 415, para. 223.

¹⁹⁰See *ibid.*, p. 353, para. 68; see also pp. 415-416, para. 223.

holder of the title' (*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I. C. J. Reports 1986, p. 557, para. 63)"¹⁹¹.

2.19. Such titles thus take precedence over any claim to the contrary, no matter what kind of effectivities they may be based on, including insidious possession of a territory, be it long-term or not; *titulus est justa causa possidendi id quod nostrum est*¹⁹².

SECTION 2 SOURCES OF APPLICABLE LAW

2.20. Not only did the Parties to the present dispute not derogate from these well-established rules, they even specified that they should be applied in this case by agreeing to consider that the 1927 *Arrêté* and its Erratum describe their common frontier in its entirety. In effect, in the Agreement of 28 March 1987 on the demarcation of the frontier, they expressly enumerated the sources of law applicable for those purposes (1). Thereby, they established the pre-eminence of the frontier title constituted by the *Arrêté* of 31 August 1927, as clarified by its Erratum, over any other evidence of the frontier line between the two countries (2).

1. The agreement of the Parties on relevant sources

2.21. In addition to the principle of the intangibility of frontiers inherited from colonization (which is a norm rather than a source), the Parties expressly invoked in the Special Agreement of 24 February 2009 a specific source of law that can be applied by the Court: "the Agreement of 28 March 1987".

2.22. The circumstances under which this Agreement was adopted are set out in Chapter I of this Memorial¹⁹³.

2.23. The first two articles of this binding instrument make express reference to the *Arrêté* of 31 August 1927 of the Governor General of FWA. The provisions read thus:

"Article 1

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

Article 2

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

¹⁹¹*Ibid.*, pp. 354-355, para. 70 and p. 416, paras. 223-224; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 38, para. 76.

¹⁹²V.R. Jennings, *The Acquisition of Territory in International Law*, Manchester U.P., 1963, p. 5.

¹⁹³See paras. 1.58 to 1.60.

1960 edition, and/or any other relevant document accepted by joint agreement of the Parties”.

2.24. Besides the final provisions, the other clauses of the Agreement concern the creation of the Joint Technical Commission on Demarcation, which is tasked with demarcating the frontier (Art. 3), and a fund for the demarcation of the frontier (Art. 4).

2.25. The Agreement *stricto sensu* is supplemented by a Protocol of Agreement signed on the same day, which sets out the arrangements for the demarcation work. That instrument — which is inseparable from the Agreement — also refers back to the 1927 *Arrêté* and its Erratum, which are cited in the first paragraph of the preamble:

“The Government of the Republic of Niger and the Revolutionary Government of Burkina Faso, having signed a Protocol of Agreement on 24 June 1964 in Niamey covering in particular the delimitation of their joint frontier, on the basis of *Arrêté général* No. 2336 of 31 August 1927, as clarified by Erratum No. 2602/APA of 5 October 1927 and the 1:200,000-scale map of the *Institut Géographique National de France*; . . .”

2.26. Articles 1 and 2 of the Protocol are written in very similar terms to the corresponding provisions in the Agreement. However, the fullest expression of the Parties’ agreement on the delimitation of their frontier is in the first two articles of the Protocol, which are a more rigorous version of the first two articles of the Agreement. While Article 2 of the Protocol of Agreement is identical to Article 2 of the Agreement, Article 1 of the Agreement is less precise than Article 1 of the Protocol¹⁹⁴, since it merely states that the frontier is “as described in the *Arrêté* of 31 August 1927” and fails to include the words “as clarified by the Erratum of 5 October 1927”. That is clearly a drafting error and of no particular significance.

2.27. If the Parties had meant to rely only on the *Arrêté* and not on the Erratum to establish their frontier, they would obviously not have mentioned the Erratum in Article 2 of the Agreement, nor in Articles 1 and 2 of the Protocol of Agreement adopted on the same day. Moreover, a reference to the Erratum was also included in Article 1 of the “draft treaty on demarcation of the frontier between the two countries”, annexed to the record of the meeting of 9 April 1986 between the Minister for Territorial Administration and Security of Burkina and the Minister Delegate for the Interior of Niger and a key part of the preparatory work on the Agreement of 28 March 1987¹⁹⁵; and there is nothing to indicate that the Parties had intended to repudiate the Erratum between April 1986 and March 1987. Furthermore, the Parties clearly corrected their error when drafting the Special Agreement seising the Court, as, when citing Article 1 of the Agreement, they include the reference to the Erratum that was left out of the text of the Agreement signed on 23 March 1987. In any event, according to the principle of *lex posterior priori derogat*, the Erratum should be preferred over the original version of the *Arrêté*¹⁹⁶.

¹⁹⁴Furthermore, Article 1 of the Protocol of Agreement refers to the frontier between the “two countries”, whilst Article 1 of the Agreement refers to the frontier between the “two States”.

¹⁹⁵Report of the meeting between the Minister for Territorial Administration and Security of Burkina and the Minister Delegate for the Interior of Niger, 9 April 1986, Ann. MBF 68; see above, para. 1.58.

¹⁹⁶The original *Arrêté* can however be used in the event of problems of interpretation of the Erratum, as is clear from the Court’s 1986 Judgment in the case concerning the *Frontier Dispute* — see below, para. 2.42.

2.28. For the rest, the Protocol sets out more general rules relating to the functioning of the Joint Technical Commission on Demarcation (Arts. 3 to 5) and the fund for the demarcation of the frontier (Arts. 6 to 10), and contains various “technical and transitional provisions” (Arts. 11 to 20). The only provision among the latter that could have an indirect effect on the delimitation of the frontier is the second paragraph of Article 14, whereby: “The régime governing frontier watercourses shall remain that applicable under the relevant international law.”

2.29. It is important to note that the 1987 Agreement, as its very title indicates, concerns “the demarcation of the frontier between the two countries”. It is thus a demarcation agreement [*accord de démarcation*] “whose purpose is to fix, in concreto, the frontier on the ground”¹⁹⁷, or, if you will, an agreement on marking out the frontier [*accord d’abornement*]¹⁹⁸, which, in both cases, “presupposes the prior delimitation — in other words definition — of the frontier”¹⁹⁹. In this case, that definition exists in the form of the *Arrêté* of 31 August 1927, as clarified by its Erratum of 5 October 1927, as the Parties formally recognized in the 1987 Agreement cited in Article 6 of the Special Agreement.

2.30. Further, Articles 1 and 2 of the Agreement concern different subjects. Article 1 expressly confirms that, by mutual agreement, the description of the frontier is that given in the *Arrêté*, and only the *Arrêté*, as clarified or modified by its Erratum. It is (or they are) the only relevant instrument(s) for the purposes of the — established — *delimitation* of the frontier²⁰⁰. Article 2, for its part, defines the method agreed upon by both Parties for marking out the frontier, to be followed by the Joint Technical Commission on Demarcation; for the purposes of this operation — which might require additional information to that given in the delimitation instrument, it is provided that “[s]hould the *Arrêté* and Erratum not suffice, the course shall be that shown on the 1:200,000-scale map of the *Institut Géographique National de France*, 1960 edition, and/or any other relevant document accepted by joint agreement of the Parties”.

2.31. Moreover, it was because the technical experts did not follow that method and deviated from the description in the *Arrêté* that, at its meeting in May 1988, the Joint Technical Commission on Demarcation instructed them “to reconsider the 110 km portion in question within eight (8) days, complying with the texts designated in the Agreement and Protocol of Agreement signed by the two Governments”²⁰¹ — which they did²⁰². Thus, the “consensual line” adopted at the fourth meeting of the Joint Technical Commission on Demarcation is the result of the unanimous

¹⁹⁷Daniel Bardonnet, “De la ‘densification’ des frontières terrestres en Amérique latine”, *Droits et libertés à la fin du XXème siècle — Influence des données économiques et technologiques; Etudes offertes à Claude-Albert Colliard*, Pedone, Paris, 1984, p. 4 (also cited in Jean Salmon dir., *Dictionnaire de droit international public*, Bruylant/AUF, Brussels, 2001, p. 317); see also Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, LGDJ, Paris, 8ème édition, 2009, p. 517; Sir Robert Jennings and Sir Arthur Watts, *Oppenheim’s International Law*, 9th edition, Longman, Harlow, 1992, p. 662 or Charles de Visscher, *Problèmes de confins en droit international public*, Pedone, Paris, 1969, p. 12.

¹⁹⁸According to the *Dictionnaire de droit international public*, prev. Note 197, marking out [*abornement*] is a “technical operation consisting in laying out on the ground, by means of posts and markers . . . the frontier between two States. . . . [it] implements a prior delimitation; it is a method of demarcation” (p.2).

¹⁹⁹*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 28, para. 56.

²⁰⁰As is explained above (paras. 2.26 and 2.27), there is no reason to focus on the fact that the Erratum is not expressly mentioned in Article 1 of the Agreement.

²⁰¹Report of the meeting of the Joint Technical Commission on Demarcation, Diapaga, 12-15 May 1988, see above, para. 1.67.

²⁰²See above, paras. 1.68-1.69.

agreement of the technical experts, based on “[t]he basic texts (*Arrêté* No. 2336 of 31 August 1927 and its Erratum No. 2602/APA of 5 October 1927)”²⁰³.

2.32. Of course, that consensus was subsequently called into question. But the differences did not touch on the principle that the frontier was defined by the *Arrêté* and its Erratum. The consensual line was called into question as a result of Niger changing its *interpretation* of those texts²⁰⁴. And while the line adopted by the decision of 15 May 1991 following the ministerial consultative and working meeting deviated from that described in the *Arrêté* and its Erratum²⁰⁵ over one stretch of the frontier, that compromise text was again called into question by Niger²⁰⁶.

2.33. After some hesitation, in July 2001 the Joint Technical Commission on Demarcation decided

“to create a joint committee composed of twelve (12) members to review the theoretical line of the frontier in light of the basic documents, specifically:

— the Agreement and Protocol of Agreement of 28 March 1987,

— the *Arrêté Général* of 31 August 1927, as clarified by its Erratum of 5 October 1927”.

It was both “going back to basics”, at the same time as, in reality, repeating the same thing twice, since the 1987 Agreement itself refers to the *Arrêté* and its Erratum; but this twofold reference again confirms the particular importance the Parties attach to the *Arrêté* and its Erratum.

2.34. As they were unable to agree on the interpretation of the *Arrêté*, the Parties decided to seise this Court by a Special Agreement, which nevertheless confirms the fact that they do agree to consider that the Court should settle their dispute on the basis of the *Arrêté* and its Erratum.

2. The relevant documents

2.35. The Agreement of 28 March 1987, which describes in turn the law applicable to the delimitation and to the demarcation, does not place on the same footing the 1927 *Arrêté* and its Erratum, on the one hand, and the 1960 IGN France map and any other document accepted by joint agreement of the Parties, on the other. This differentiation is justified: the *Arrêté* in its version resulting from the Erratum constitutes the frontier title on which each Party is entitled to rely (A); the other documents — including the 1:200,000-scale map — can only be considered on a subsidiary basis (B).

²⁰³Report of the fourth meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina frontier, Niamey, 26, 27 and 28 September 1988, Ann. MBF 81.

²⁰⁴See above, paras. 1.75-1.78.

²⁰⁵See Ministerial consultative and working meeting between Niger and Burkina on the frontier line, 16 May 1991 (plus sketch-maps), Ann. MBF 89; see also the Ministerial Council Report on the results of the ministerial meeting between Niger and Burkina on the course of the common frontier held in Ouagadougou, 2 July 1991, Ann. MBF 90. See above, paras. 1.79-1.80.

²⁰⁶See above, para. 1.81.

A. The frontier title: the Arrêté of 1927 and its Erratum

2.36. According to the definition given by the Chamber of the Court in the *Burkina/Mali* case, and confirmed several times since²⁰⁷, the concept of title can denote “documentary evidence”; however,

“[i]t is hardly necessary to recall that this is not the only accepted meaning of the word ‘title’ . . . In fact, the concept of title may also, and more generally, comprehend both any evidence which may establish the existence of a right, and the actual source of that right.”²⁰⁸

2.37. The *Arrêté* of 31 August 1927 of the Governor General of FWA (as clarified by the Erratum of 5 October 1927) — whose probative value was accepted by the Chamber of the Court in that same Judgment of 1986²⁰⁹, as well as by the Chamber which ruled in 2005 in the *Frontier Dispute* between Benin and Niger²¹⁰ — should be considered as a title in the following two senses:

- it describes the boundary between the two French colonies of Upper Volta and Niger and thereby constitutes the “documentary evidence” of the frontier line inherited by Burkina and Niger; but,
- it also establishes the actual existence of a frontier — which was not so in the two cases cited above — whose course has never been modified since; it not only describes the frontier, it establishes it and constitutes its “source” and “basis”.

2.38. In many respects, the frontier defined by the amended *Arrêté* is artificial in nature. The colonial authorities, wanting to establish a complete and precise boundary, were aware of the implications of choosing such a boundary, and that choice was made by the Governor General of FWA in full knowledge of the facts and in accordance with what was standard practice at the time. In 1947, the date the colony of Upper Volta was reconstituted within its former boundaries of 1932, it was once again recalled that “the boundaries that separated Upper Volta from its neighbours to the north and the east, Sudan and Niger [in 1932], were purely theoretical and did not correspond to any geographical reality”²¹¹. In retaining this artificial delimitation, the 1927 *Arrêté* merely followed what was standard practice for the colonizers in Africa. Indeed, it is important to

“bear in mind that most African frontiers are purely artificial . . . In most cases they are boundaries put in place by the colonial powers as a result of agreements between them or with indigenous peoples or through conquest or occupation. I hasten to add that boundaries the world over are, most of them, artificial. But in Africa they are patently even more artificial than elsewhere, since most of them are merely straight lines traced on the drawing board with little relevance to the physical circumstances on the ground. As far back as 1890, Lord Salisbury said: ‘We have been engaged . . . in drawing lines upon maps where no white man’s feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains

²⁰⁷*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, pp. 388-3898, para. 45.

²⁰⁸*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 564, para. 18.

²⁰⁹*Ibid.*, p. 581, para. 52 ; pp. 589-592, paras. 68-72, or pp. 642-643, paras. 167-168.

²¹⁰*Frontier Dispute (Benin/Niger)*, Judgment, I.C.J. Reports 2005, pp. 146-147, para. 135.

²¹¹See the Mission report of 30 May 1947 (Ann. MBF 38), p. 11, and pp. 34-36.

and rivers and lakes were.’ (Memorial of Libya, Vol. 1, p. 25, para. 3.01: quoted from *The Times*, 7 August 1890.)”²¹²

2.39. The 1927 *Arrêté* is no exception to the rule and establishes an arbitrary and artificial boundary²¹³. Nevertheless, as modified by its Erratum, it constitutes a title covering the whole of the frontier — which it describes with a precision that stands in stark contrast to the ditherings of many internal delimitations in former FWA and French Equatorial Africa (FEA). This distinguishes the present case from numerous others where the *uti possidetis* spoke “with an uncertain voice”²¹⁴. Thus:

- in the *Burkina/Mali* case, the Chamber stated that “neither the legislative and regulative texts, nor the relevant administrative documents, contain any complete description of the course of the boundary between French Sudan and Upper Volta during the two periods when these colonies co-existed, i.e., between 1919 and 1932, and between 1947 and 1960”²¹⁵;
- for its part, the Chamber called upon to rule on the *Frontier Dispute* between El Salvador and Honduras noted that neither of the Parties had “produced any legislative or similar material indicating specifically, with the authority of the Spanish Crown, the extent of the territories and the location of the boundaries of the relevant provinces in each area of the land boundary”²¹⁶.
- in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*, Indonesia invoked a convention from 1891, which, according to the Court, “cannot be interpreted as establishing an allocation line determining sovereignty over the islands out to sea, to the east of Sebatik”²¹⁷; and
- in the *Frontier Dispute* between Benin and Niger, “the Chamber concluded that”, in respect of the River Niger sector, “neither of the Parties ha[d] succeeded in providing evidence of title on the basis of regulative or administrative acts during the colonial period”²¹⁸.

2.40. In contrast, in the *Aouzou Strip* case, having noted “that Article 3 of the 1955 Treaty [between France and Libya] was aimed at settling all the frontier questions, and not just some of them”²¹⁹, the Court relied entirely on that provision and the instruments it cites for the purposes of defining the frontier thus delimited and refused to give consideration to anything else²²⁰. It should be noted, however, that the Franco-Libyan treaty, which was the applicable frontier title, did not describe the disputed frontier, whereas in this case, firstly, the Parties have determined by mutual

²¹²*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, individual opinion of Judge Ajibola p. 53, para. 9.

²¹³Burkina wishes to reiterate in this connection that it fully accepts that colonial heritage, no matter how arbitrary the boundary delimitations. See Burkina’s Memorial in the case concerning the *Frontier Dispute (Burkina/Mali)*, in I.C.J. Pleadings, Oral Arguments and Documents, Vol. II, p. 63, paras. 1-9. These arguments are equally valid in the present case.

²¹⁴See above, para. 2.8.

²¹⁵*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 580, para. 51.

²¹⁶*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 388, para. 44.

²¹⁷*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, pp. 652-653, para. 52; see also p. 668, para. 92.

²¹⁸*Frontier Dispute (Benin/Niger)*, Judgment, I.C.J. Reports 2005, p. 127, para. 75.

²¹⁹*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 24, para. 48.

²²⁰See *ibid.* and pp. 38-39, paras. 75-76.

agreement that the 1927 *Arrêté* is the only title they can rely on and, secondly, that same instrument (as clarified by its Erratum) describes the entire common frontier.

2.41. It is true that the description of the line in the *Arrêté* and that in its Erratum differ in parts²²¹ and that, consequently, preference should be given to the text of 5 October 1927, which is both subsequent to²²² and more precise than that of 31 August²²³.

2.42. Nevertheless, if the need arises, the original text may clarify the meaning to be ascribed to the Erratum. Moreover, the Chamber of the Court dealt with that question in its 1986 Judgment in the *Burkina/Mali* case. That decision is enlightening in two respects:

— firstly, it is recalled that:

“if the Chamber’s task were to interpret and apply *the Order as amended on 5 October 1927* as a regulative text, for the purpose of establishing the boundaries of Upper Volta in 1932, it would have to examine its scope and appraise the relevance of the initial text of 31 August 1927, and of any *travaux préparatoires*, in the light of the particular rules of the legal system from which the Order derives its force as a regulation, i.e., French colonial law. But the Chamber recalls that the 1927 Order does not directly concern the boundary between Sudan and Upper Volta, but only the boundary between Upper Volta and Niger, and that for the purposes of this case, the Chamber is consulting the Order solely as evidence which may shed some light on the intentions of the colonial power concerning the course of the boundary between French Sudan and Upper Volta. In addition, from a more general perspective, the Chamber has already had occasion to emphasize (paragraph 30^[224]) that if colonial law has any role to play in this case it does so not in its own right, by way of a renvoi from international law to colonial law, but solely as evidence of the situation which existed at the time when the two States Parties achieved independence. The Chamber is therefore free to examine in this light the two successive versions of the 1927 Order, while nonetheless attributing greater weight to the text as modified by the erratum as a reflection of the definitive intentions of the colonial authorities, and to take the *travaux préparatoires* into consideration if this proves to be necessary.”²²⁵

The same applies in the present case: the Court may feel the need to resort to the original text of 31 August 1927; but solely for the purpose of interpreting the text of the Erratum of 5 October;

— moreover, and secondly, the 1986 Judgment quite rightly refers to “the Order as amended” by the Erratum of 5 October 1927²²⁶; it is that text which constitutes the frontier title in this case.

²²¹See above, paras. 1.27 and 1.30-1.31.

²²²See above, para. 2.27.

²²³For an explanation of the reasons for the adoption of the Erratum, see above, para. 1.32.

²²⁴See above note 161.

²²⁵*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 590, para. 69 — italics added.

²²⁶See the passage in italics in the previous citation; see also, for example: “It is clear from the actual wording of the text of the *amended Order* that the starting-point of the boundary . . .” (*Ibid*, para. 70 — italics added.)

2.43. The difference between the two texts is first of all one of style. Unlike the Erratum, the text of 31 August is written from the subjective perspective of an observer located in Niger describing the boundaries of the colony of Niger rather than the boundary between the two territories. Thus, for example, it refers to the boundary “to the north-west”, which means to the north-west of the authors, who must be located to the south-east of said boundary, namely in Niger in this instance. In contrast, the Erratum undertakes to describe the frontier not from a subjective viewpoint but from an objective one, whereby the author is situated neither on one side or the other of the line described. The author of the Erratum is on the boundary itself and describes its course from north to south as if travelling along it from one end to the other.

2.44. Further, as explained in the previous chapter²²⁷, the Erratum of 5 October 1927 clarifies a certain number points in the 31 August text, which is thereby modified in certain respects. As the Chamber of the Court stated in 1986, this is the “amended Order”.

B. The course of the boundary should the Arrêté and its Erratum not suffice

2.45. While Article 1 of the Agreement of 28 March 1987 — which *delimits* the frontier — refers only to the boundary described in the *Arrêté* of 31 August 1927, as modified by its Erratum of 5 October 1927, Article 2 — which indicates the method to be used to *mark out* the boundary — provides that “[s]hould the Arrêté and Erratum not suffice, the course shall be that shown on the 1:200,000-scale map of the *Institut Géographique National de France*, 1960 edition, and/or any other relevant document accepted by joint agreement of the Parties”²²⁸.

2.46. As the Parties have not agreed on any document other than the *Arrêté* of 1927 and its Erratum²²⁹ since the adoption of the 1987 Agreement, the latter provision is not applicable.

2.47. Thus, only the 1960 IGN France map can be used to clarify the course of the frontier between the Parties. Nevertheless, it follows from the very text of the 1987 Agreement that it may only be used on a subsidiary basis. There are two reasons for this:

- firstly, the Agreement only refers to the map in question when explaining the methodology for demarcating the frontier; and demarcation “presupposes the prior delimitation . . . of the frontier”²³⁰, a delimitation by which it is governed and which the Parties agree to consider, in Article 1, as having been effected by the 1927 *Arrêté*; and
- secondly, even for the purposes of marking out the frontier, the 1:200,000-scale map can only be used “[s]hould the Arrêté and Erratum not suffice”.

2.48. Such cautious use is all the more appropriate since, in its ruling on the frontier dispute between Burkina and Mali in 1986, the Chamber of the Court noted that the probative value of the map in question was relatively limited. It held that: “the map compiled in 1958-1960 by the

²²⁷Paras. 1.30-1.31.

²²⁸Italics added.

²²⁹With the sole exception of the formalization, in 2009, of their “agreement” within the meaning of Article 2 of the Special Agreement — see below, paras. 3.12-3.13. The “consensual line” of 1988 could also be included as such an agreement (see the record of the fourth meeting of the Joint Technical Commission for the Demarcation of the Niger-Burkina frontier, Niamey, 26, 27 and 28 September 1988, Ann. MBF 81), but it was called into question by Niger (see above, paras. 1.74 to 1.78).

²³⁰See above, para. 2.29.

IGN — a body neutral towards the Parties to the present dispute —, although it does not possess the status of a legal title, is a visual portrayal both of the available texts and of information obtained on the ground”.

However, it immediately adds that:

“This in itself is not sufficient to permit the Chamber to infer that the frontier line depicted in the form of small crosses, whether in a continuous or a broken series, in the successive editions of the IGN map, corresponds entirely with the boundary inherited from the colonial administration. It has to consider how far the evidence offered by this or any map corroborates the other evidence produced. The Chamber cannot uphold the information given by the map where it is contradicted by other trustworthy information concerning the intentions of the colonial power. However, having regard to the date on which the surveys were made and the neutrality of the source, the Chamber considers that where all other evidence is lacking, or is not sufficient to show an exact line, the probative value of the IGN map becomes decisive.”²³¹

This was stating what the 1987 Agreement was to lay down a few months later, in a slightly different form.

2.49. Thus, even though the 1987 Agreement did not state it expressly, the map could in any event only be used, should the *Arrêté* as modified by the Erratum contain lacunae or not suffice (it being recalled that an equivalent title was absent in the *Burkina/Mali* case²³²). Further on in the same decision, moreover, the Chamber questions “the validity of the indications given by the 1960 IGN map” for the purposes of construing a text dating from 1927²³³.

2.50. The case brought before the Court by the Special Agreement of 24 February 2009 has some quite unique features compared to the majority of other frontier delimitation cases that have been brought before it. Indeed, such disputes generally arise for want of a title establishing the frontier, or because the evidence is insufficient or imprecise, or because one of the parties disputes the existence or validity of such a title. This was true in the *Aouzou Strip* case, where Libya considered that the 1955 Treaty of Friendship and Good Neighbourliness between France and Libya did not constitute a frontier title²³⁴. This is not at all the case in the present proceedings, where Burkina and Niger explicitly recognize in a binding treaty, to which the Special Agreement explicitly refers, that a frontier title exists not only as “documentary evidence” (as it describes the course of their common frontier) but also as the source of their respective territorial rights: the 1927 *Arrêté* in the version resulting from the Erratum.

²³¹*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 586, para. 62.

²³²See above, para. 2.39.

²³³*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 647, para. 173.

²³⁴*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, esp. p. 20, para. 36, and pp. 22-23, paras. 43-46.

CHAPTER III

THE TASK OF THE COURT IN RESPECT OF THE DEMARCATED PORTION OF THE FRONTIER

3.1. Under Article 2 of the Special Agreement whereby the Parties seised the Court, which defines the “Subject of the dispute”:

“The Court is requested to:

1. determine the course of the boundary between the two countries in the sector from the astronomic marker of Tong-Tong (latitude 14° 25' 04" N; longitude 00° 12' 47" E) to the beginning of the Botou bend (latitude 12° 36' 18" N; longitude 01° 52' 07" E);
2. place on record the Parties’ agreement on the results of the work of the Joint Technical Commission on Demarcation of the Burkina Faso-Niger boundary with regard to the following sectors:

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

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

3.2. The following chapter gives a precise description of the course of the frontier, in Burkina’s view, in the middle sector (between the Tong-Tong astronomic marker and the beginning of the Botou bend), on which the Parties were unable to reach agreement²³⁵. The aim of this chapter is to recall briefly the substance of the agreement reached on the two extremities of the frontier (from the tripoint with the Republic of Mali to the Tong-Tong marker and from the beginning of the Botou bend to the Mekrou) (Sec. 1), and to comment on the role assigned to the Court by the Special Agreement in respect of these two sectors (Sec. 2).

SECTION 1 THE PARTIES’ AGREEMENT

3.3. Under Article 2, paragraph 2, of the Special Agreement, the Parties’ agreement “on the results of the work of the Joint Technical Commission on Demarcation of the Burkina Faso-Niger boundary” concerns two sectors, one of 63 and one of 162 km in length, situated at either end of their common frontier (some 590 km overall²³⁶):

- the sector from the heights of N’Gouma to the Tong-Tong astronomic marker (2); and
- the sector from the beginning of the Botou bend to the River Mekrou (3).

In both cases, the Parties relied on the same instruments and adopted the same method (1).

²³⁵With the exception of the agreement reached in 1988, called into question by Niger from 1990 onwards.

²³⁶Report of the second ordinary session of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Ouagadougou, 23-28 July 1990, Ann. MBF 87.

1. The methodology behind the Parties' agreement (reminder)

3.4. Without it being necessary here to describe the details of the negotiations that resulted in the Parties' agreement on demarcating and marking out the two sectors of the boundary to the north of the Tong-Tong astronomic marker and to the south of the Botou bend²³⁷, it is sufficient to recall that the agreement was achieved on the basis of the methodology established by Article 2 of the Agreement of 28 March 1987, to which the Special Agreement refers²³⁸:

- the course of the frontier is that described in the *Arrêté* of 31 August 1927, as clarified by its Erratum of 5 October 1927;
- the frontier should therefore be marked out in conformity with that course;
- it is only in the event that the description in the 1927 *Arrêté* and its Erratum should not suffice that recourse should be had to the 1960 IGN France 1:200,000-scale map “and/or any other relevant document accepted by joint agreement of the Parties”;
- it being noted that no such document has been accepted by the Parties²³⁹.

3.5. It should be pointed out that throughout the process which led to their agreement on the northern and southern portions of the frontier the Parties always based themselves systematically on the line described in the 1927 Erratum. Notwithstanding the progress and setbacks between the Parties in reaching agreement (some points which appeared settled were called into question by Niger, which led to this Court being seised), the method used has been consistently the same:

- identification of “defining points” on the frontier *based on* the *Arrêté* as amended by the Erratum²⁴⁰;
- plotting on the 1:200,000 map defining points with known co-ordinates (for example astronomic markers) and the resulting line (which in fact entails *not* taking account of the boundary line shown on the map, which the Parties use simply as a base map); in other words, the course plotted on the map represents the technical experts' cartographic interpretation of the *Arrêté* as clarified and amended by the Erratum²⁴¹;
- field survey and identification of other defining points (for example the intersection of watercourses)²⁴² and measurement of their precise geodetic co-ordinates²⁴³;

²³⁷See Section 2 of Chapter 1 above.

²³⁸See above, paras. 2.21 et seq., in particular 2.29-2.30. The undertaking to rely on these documents alone was reiterated at the fourth ordinary session of the Joint Technical Commission in July 2001, Ann. MBF 94.

²³⁹With the exception, of course, of those indicating their agreement on the two sectors of the frontier which were marked out and the subject of the 1988 agreement disputed by Niger.

²⁴⁰See esp. the report of the meeting between technical experts of Niger and Burkina, Ouagadougou, 21-23 May 1986, Ann. MBF (List of defining points on the Niger-Burkina frontier (*Arrêté* of 31 August 1927 and its Erratum of 5 October 1927)), Ann. MBF 69.

²⁴¹See esp. the report of the meeting between Niger and Burkina technical experts, Ouagadougou, 21-23 May 1986, previous note, and above, para. 1.59. On the only occasion that the technical experts wanted, for the sake of convenience, to give precedence to the map over the text of the *Arrêté* (see the report annexed to the report of the meeting of Joint Technical Commission on Demarcation, Diapaga, 12-15 May 1988, Ann. MBF 80), the Joint Commission set things to rights and instructed them “to reconsider the 110 km portion in question within eight (8) days, complying with the texts designated in the Agreement and Protocol of Agreement signed by the two Governments” (*ibid.*); on this episode, see above, paras. 1.67 and 1.68.

²⁴²See esp. the report of the previously cited meeting, 12-15 May 1988, and above, para. 1.67.

- plotting, also on the 1960 map, the points thus determined and the resulting course²⁴⁴;
- installation of markers in the field²⁴⁵.

3.6. Thus, the Joint Technical Commission could see the frontier line as described in the Erratum on the 1960 map and compare it to the line printed on the map.

3.7. It should be noted that two types of defining frontier points were taken into consideration:

- firstly, those corresponding to reference points installed for the purposes of mapping the territory (astronomic points or markers); the co-ordinates of these points are already known (geographical co-ordinates (latitude and longitude) and/or rectangular co-ordinates in the UTM projection system (X, Y and Z)) and represented on the map by a specific symbol (conventional sign); they had to be located on the ground and it had to be ensured that they were actually situated at the original sites as defined by the co-ordinates noted in the records; if the markers had disappeared, the technical experts had to install new ones based on the known co-ordinates; and,
- secondly, the defining points described by the *Arrêté* and/or its Erratum (intersection points, ruins, natural features such as peaks, ridges, watercourses, etc.).

In these instances, the technical experts from the two countries searched together for the details on the ground through visual observation and, if necessary, by cross-checking information gathered from local inhabitants. Once the experts had reached a consensus on the location of a physical detail, the defining point was indicated by a temporary marker, its co-ordinates measured and calculated by both parties, then plotted on the 1:200,000 map to establish the course of the frontier in accordance with the Erratum.

3.8. This method, used by the Joint Technical Commission on Demarcation and its sub-committee, led to the unanimous agreement on the “consensual line”²⁴⁶, adopted by the Commission at its meeting in Niamey from 26 to 28 September 1988²⁴⁷ and confirmed at two further meetings held in Téra and Niamey respectively from 16 to 18 May 1989²⁴⁸ and on 13 and 14 November 1989²⁴⁹.

²⁴³See the reports of the fourth meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Niamey, 26, 27 and 28 September 1988, Ann. MBF 81, and of the meeting of the Joint Technical Sub-Committee on Demarcation of 18 May 1989, Ann. MBF 83. See also the record of the work of the Joint Survey Mission of 3 July 2009, Ann. MBF 101.

²⁴⁴See the report on completion of the survey of the proposed demarcation of the Niger-Burkina frontier, 28 September 1988, Ann. MBF 82, and its Cartographic Annex MBF 15; see also report No. 42/FP/SG/DCAF from the Minister for Territorial Administration to the Head of State of Burkina Faso, 5 March 1991, Ann. MBF 88.

²⁴⁵See the report of the fourth meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Niamey, 26, 27 and 28 September 1988, Ann. MBF 81; and the record of the 2nd session of the Joint Technical Commission on Demarcation, 23-28 July 1990, Ann. MBF 87.

²⁴⁶For further details on the events leading up to this agreement, see above, paras. 1.69-1.70.

²⁴⁷Report of the fourth meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Niamey, 26, 27 and 28 September 1988, Ann. MBF 81.

²⁴⁸Report of the meeting of the Joint Technical Sub-Committee on Demarcation, 18 May 1989, Ann. MBF 83.

²⁴⁹Report of the fifth meeting of the Joint Technical Commission on Demarcation, Niamey, 13 and 14 November 1989, Ann. MBF 84.

3.9. That overall agreement was called into question by Niger²⁵⁰, however, and the Joint Technical Commission on Demarcation, at its fourth session from 18 to 20 July 2001, was obliged to note that there were differences in interpretation in respect of the sectors of the frontier from the Tong-Tong astronomic marker to the River Sirba at Bossébangou and from Bossébangou to Tchenguiliba. However:

- “1. The frontier was clearly defined from the heights of [Mount] N’Gouma to the astronomic marker of Tong-Tong, with the exception of the ruins of Tokébangou, which the frontier passes to the west. These ruins were not identified in the course of the survey of the frontier line. The Commission decided to send a survey team into the field to identify the ruins of the village of Tokébangou.

.....

2. The frontier was clearly defined from Tchenguiliba to the River Mékrou, subject to the survey team’s verification of the position of the village of Kogori.”²⁵¹

3.10. Thus, for those two sectors of the frontier, the Joint Technical Commission on Demarcation once again endorsed the 1988 agreement, which was already reflected in the map annexed to the report of the fourth meeting of September 1988. That agreement would be confirmed in 2009, both in the Special Agreement of 24 February 2009 and in the exchange of letters between the Ministers for Foreign Affairs of both countries of 29 October and 2 November 2009, embodying the agreement of 3 July 2009 between the technical experts.

3.11. Although Burkina had indicated its preference to submit the entire frontier to the Court, it agreed to Niger’s proposal not to take the risk of calling into question the lines over which there was no disagreement between the Parties²⁵². The precise object of their “agreement”, which at the time the Special Agreement was signed had never been formalized, had yet to be ascertained.

3.12. The circumstances in which the “agreement” mentioned in Article 2, paragraph 2, of the Special Agreement was reached are as follows:

- At the meeting held in Niamey from 22 to 24 February 2009 for the purposes of agreeing on the contents of the Special Agreement seising the Court, and approving and signing the text of that Agreement, the Ministers for Foreign Affairs of the two States “also adopted the experts’ [present in each delegation] proposal for a joint field mission to agree on the co-ordinates of the boundary markers in Sectors A and B referred to in the Special Agreement”²⁵³.
- In their report on that ministerial meeting sent to the national commission monitoring the frontier dispute, the Burkina experts noted that there were “errors in respect of the co-ordinates of markers placed in the field, as transmitted by Niger. It was decided to send a joint team into

²⁵⁰For details, see above, paras. 1.74 to 1.81.

²⁵¹Report of the fourth ordinary session of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Ouagadougou, 18-20 July 2001, Ann. MBF 94.

²⁵²See above, para. 0.14 of the introduction to this Memorial.

²⁵³Joint Communiqué of the meeting of Foreign Ministers for negotiation and signature of the Special Agreement seising the International Court of Justice, 24 February 2009, Ann. MBF 98, p. 3.

the field to determine the position of these markers by GPS and obtain mutually agreed co-ordinates”²⁵⁴.

- This was done, and after working together on excellent terms, the technical directors of the National Geographic Institutes of Burkina and Niger signed a joint communiqué on 3 July 2009 indicating the GPS co-ordinates of the markers constructed on the frontier and describing the methodology used²⁵⁵.
- Upon receiving this document, the Burkina Foreign Minister, by letter dated 17 July 2009, took the initiative to submit to his Niger counterpart a “draft exchange of Notes embodying the agreement between the Parties on the delimited sectors”:

“We agreed at our meeting at Niamey from 22 to 24 February 2009 that we would endorse the experts’ proposal to carry out a joint mission on the ground with a view to reaching agreement on the co-ordinates of the boundary markers in sectors A and B referred to in the Special Agreement.

The experts performed their assignment by carrying out the joint mission of determining the co-ordinates of the markers erected along the Burkina Faso-Niger frontier and they laid down their agreement in a record (*procès-verbal*) signed at Diapaga (Burkina Faso) on 3 July 2009, a copy of which is attached hereto.

In consequence of the foregoing, I propose that we consider this record of the experts’ work to represent our agreement within the meaning of the above-quoted provision [namely Article 2, paragraph 2] of the Special Agreement and I would be grateful to you for confirming to me your concurrence on this point.”²⁵⁶

- By a letter dated 8 September 2009, the Niger Minister gave his agreement in principle to these proposals; he suggested a partial rewording and added some details in respect of the two endpoints of the southern sector of the frontier line:

“while expressing my agreement with this proposal, I would suggest the text be shortened as follows:

Pursuant to Article 2, paragraph 2, of the Special Agreement seising the International Court of Justice of the Frontier Dispute between Burkina Faso and the Republic of Niger, signed at Niamey (Niger) on 24 February 2009, the Parties place on record their agreement on the results of the work of the Joint Technical Commission on Demarcation as reflected in the record of the Joint Mission of Experts, signed at Diapaga (Burkina Faso) on 3 July 2009 and which describes the location of the markers in sectors A and B referred to in the Special Agreement: [table of GPS co-ordinates]

Furthermore, as the two endpoints of sector B are not marked out, the two Parties agree to consider their co-ordinates to be those derived from the IGN France 1:200,000-scale map, 1960 edition, Kirtachi sheet.

²⁵⁴Report of meeting No. 11 of the Committee of Experts of the National Commission monitoring the frontier dispute between Burkina Faso and the Republic of Niger, 15 May 2009, Ann. MBF 100.

²⁵⁵Record of the work of the Joint Survey Mission to ascertain the co-ordinates of the markers constructed on the frontier between Burkina Faso and the Republic of Niger, 3 July 2009, Ann. MBF 101.

²⁵⁶Letter from the Minister for Foreign Affairs of Burkina to the Minister for Foreign Affairs of Niger regarding the draft exchange of Notes embodying the agreement between the Parties on the delimited sectors of the frontier, dated 17 July 2009, Ann. MBF 102.

These are:

- the point where the Tapoa intersects with the former boundary of the Fada and Say *cercles*;
- the point where the former boundary of the Fada and Say *cercles* intersects with the River Mekrou.

If this new wording meets with your approval, please consider my present reply and your letter cited above as constituting an agreement between the Republic of Niger and Burkina Faso on the matter in question.”²⁵⁷

- The Burkina Minister’s reply, dated 8 October 2009, proposes endorsing the agreement between the Parties on that basis:

“While expressing my agreement with the new wording of my proposal, I would suggest that the document containing the co-ordinates of the markers already erected should be the one initialled by the technical experts of the two Parties on 3 July 2009^[258].

As regards sector B, Burkina Faso has no objection to considering the line to be that derived from the IGN France 1:200,000-scale map, 1960 edition, Kirtachi sheet.

However, as this sector has not been marked out, I propose that the heads of the two Institutes responsible for mapping should meet . . . with a view to ascertaining the co-ordinates of those frontier points in a concerted and consensual manner.

The record of that work and the record of 3 July 2009 will then be considered as representing our understanding under the Special Agreement signed at Niamey on 24 February 2009.”²⁵⁹

3.13. As the Minister of Burkina did not receive a reply, he recalled his proposal to his Niger counterpart on 29 October 2009²⁶⁰, who replied favourably on 2 November²⁶¹. The exchange of letters of 29 October and 2 November 2009 thus formally embody the “Parties’ agreement” mentioned in Article 2, paragraph 2, of the Special Agreement, and accordingly that “agreement” is constituted by the documents referred to in those letters:

²⁵⁷Letter from the Minister for Foreign Affairs of Niger to the Minister for Foreign Affairs of Burkina regarding the draft exchange of Notes embodying the agreement between the Parties on the delimited sectors of the frontier, dated 8 September 2009, Ann. MBF 103.

²⁵⁸The reason for this clarification is that the table of co-ordinates attached by the Niger Minister to his letter of 8 September 2009 was not a copy of the table initialled by the directors of the National Geographic Institutes of the two countries on 3 July 2009.

²⁵⁹Letter from the Minister for Foreign Affairs of Burkina to the Minister for Foreign Affairs of Niger regarding the draft exchange of Notes embodying the agreement between the Parties on the delimited sectors of the frontier, 8 October 2009, Ann. MBF 104. The record of the work to ascertain the co-ordinates of the Tapoa point and the Mekrou point is reproduced in the record of the meeting to ascertain the co-ordinates of the unmarked points in Sector B, 15 October 2009, Ann. MBF 105. The co-ordinates are derived from the IGN France 1:200,000-scale map, 1955 Kandi sheet and 1960 Kirtachi sheet.

²⁶⁰Ann. MBF 106.

²⁶¹Ann. MBF 107.

- the table of co-ordinates appearing in the record of the work of the Joint Survey Mission to ascertain the co-ordinates of the markers constructed on the Burkina-Niger frontier of 3 July 2009²⁶²; and
- in respect of the southern sector (“from the beginning of the Botou bend to the River Mekrou”), the co-ordinates derived from the IGN 1:200,000-scale map as shown in the record of the meeting to ascertain the co-ordinates of the unmarked points in Sector B of 15 October 2009²⁶³.

3.14. The full list of co-ordinates is annexed to this chapter.

2. From the heights of N’Gouma to the Tong-Tong astronomic marker

3.15. The northern sector of the frontier, on whose course the Parties agree, separates Burkina’s present-day Oudalan province, which corresponds to the northern part of the former Dori *cercle*, from the Tillabéri region of Niger (which corresponds to the former *cercle* of the same name).

3.16. It is described as follows in the first sentence of the first paragraph of the Erratum of 5 October 1927:

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

A line starting from the heights of N’Gouma, passing through the Kabia ford (astronomic point), Mount Arounskoye and Mount Balébanguia, to the west of the ruins of the village of Tokebangou, Mount Doumafende and the Tong-Tong astronomic marker.”

3.17. The different “defining points” of this sector were identified at the meeting on demarcation work between the technical experts on 21 May 1986²⁶⁴. These points, listed from

²⁶²Ann. MBF 101. It should be noted that the Parties evidently consider the 23 points shown in the record to be connected by straight lines (except when, pursuant to the 1927 *Arrêté*, the boundary follows a watercourse, i.e., “from Nonbokoli to the confluence of the Rivers Dyamongou and Dantabongou; from there to the confluence of the Rivers Dyamongou and Boulel Fouanou” and “from the intersection of the Botou bend with the River Tapoa as far as the former boundary of the Fada and Say *cercles*”).

²⁶³The co-ordinates of a point vary according to the ellipsoid used to establish them. There are two geodetic systems (among others, but these are the ones that are relevant to this case): one, older system, known as the “Clarke 1880 ellipsoid”, which was used to establish the 1960 map, and which is used to extract points from a map (for example the last two points on the boundary, 15 October 2009); the other, modern system, known as “WGS 84 ellipsoid” (WGS stands for World Geodetic System), associated with the GPS concept.

Even though the figures may differ, it would not be correct to say that the co-ordinates are, strictly speaking, different, as the point’s location does not change; it is simply that its co-ordinates depend on the method of measurement. Thus the same point will have different co-ordinates depending on the geodetic system used, namely in 1986 (and 1988): Clarke 1880; in 2009: WGS 84 (the co-ordinates were measured by GPS).

It should be noted that (i) the margin of error in the former system is 40 metres on the ground, while in the second it is approximately one metre and (ii) it is possible to calculate the transformation parameters in order to switch from one system to the other.

²⁶⁴See above, note 240.

north to south, correspond exactly to each locality, natural feature and marker cited in that instrument:

- “1. Mount N’Gouma (co-ordinates to be measured on a 1:200,000 map)
2. Astronomic marker at the Kabia Ford ($\varphi = 14^{\circ} 53' 09''\text{N}$; $\lambda = 0^{\circ} 13' 04''$)
(X = 200,623; Y = 1,647,421)
3. Mount Arounskoye or Arwaskoy
(co-ordinates to be measured on a 1:200,000 map)
4. Mount Balebanguia (" " ")
5. Point to the west of the Tokébangou or Takabangou ruins
(" ")
6. Mount Doumafendé (" ")
7. Tong-Tong astronomic marker ($\varphi = 14^{\circ} 25' 04''$; $\lambda = 0^{\circ} 12' 47''$)
(X = 199,477; Y = 1,595,611)”²⁶⁵.

3.18. The only co-ordinates known with certainty at that time were those of the Kabia ford and Tong-Tong astronomic markers, thanks to the “data sheets, sheet at 1:200 000, ND-31-XIII, Observer Nevère, 1927”²⁶⁶. Nevertheless, in September 1988, the Joint Technical Commission on Demarcation placed on record the findings of the technical experts in respect of six out of these seven points and noted the difficulties of locating the Tokébangou ruins²⁶⁷. As the ruins were no longer there, it was neither possible to apply the texts mechanically nor to rely on the 1960 IGN map, which contains no mention of them; thus a location had to be selected on the basis of the field survey which would satisfy both parties²⁶⁸.

3.19. That sector of the frontier has never been disputed since²⁶⁹, as the Commission confirmed at the end of its fourth ordinary session in July 2001: reviewing the “theoretical line” of the frontier, it states that “[t]he frontier was clearly defined from the heights of N’Gouma to the astronomic marker of Tong-Tong, with the exception of the ruins of Tokébangou, which the

²⁶⁵Report of the meeting between technical experts of Niger and Burkina, Ouagadougou, 21-23 May 1986, Ann. MBF (List of defining points on the Niger-Burkina frontier (*Arrêté* of 31 August 1927 and its Erratum of 5 October 1927)), Ann. MBF 69.

²⁶⁶Ann. MBF 41.

²⁶⁷See the two composites of IGNF 1:200,000 boundary maps, 1960 edition, annexed to the report on completion of the survey of the proposed demarcation of the Niger-Burkina frontier signed by the two Chairmen of the Joint Technical Commission on Demarcation, 28 September 1988, Cartographic Annex MBF 15 and above, para. 3.8.

²⁶⁸See *ibid.*

²⁶⁹The northern sector is thus the only portion of the frontier not to have been subject to the comprehensive review undertaken by the Joint Technical Commission at its second ordinary session from 23-28 July 1990 in the wake of criticism from Niger.

frontier passes to the west. These ruins were not identified in the course of the survey of the frontier line.”²⁷⁰

3.20. That uncertainty nevertheless did not prevent the Parties from establishing the co-ordinates of six of the seven defining points in the sector²⁷¹ (measured first of all on the 1:200,000 map)²⁷² and proceeding to mark them out between December 1989 and May 1990²⁷³. A joint mission undertaken in June-July 2009 measured the GPS co-ordinates of those markers as identified in the report of 28 July 1990. Measured on the WGS 84 ellipsoid, they are as follows:

- Mount N’Gouma (0° 14' 36.4" east; 14° 54' 46.0" north)
- Kabia Ford (0° 13' 06.3" east; 14° 53' 09.8" north)
- Mount Arwaskoye (0° 10' 35.8" east; 14° 50' 44.7" north)
- Mount Bellé Banguia (0° 14' 09.6" east; 14° 45' 05.2" north)
- Takabougou (0° 10' 16.1" east; 14° 37' 54.5" north)
- Mount Douma Fendé (0° 09' 42.1" east; 14° 32' 00.6" north)
- Tong Tong (0° 12' 51.7" east; 14° 24' 53.2" north).

3.21. In respect of Mount N’Gouma, the Parties were also able to rely on the conclusions of the Chamber of the Court in the case of the *Frontier Dispute* between Burkina and Mali, whereby:

“the Governor-General, in the 1927 Order, as modified by the erratum, and hence in letter 191 CM2 of 1935, described an existing boundary which passed through elevations situated north of the Kabia ford, and that the administrators, rightly or wrongly, considered that these elevations were called by the local people the ‘heights of N’Gouma’. The Chamber has simply to ascertain, therefore, the point where the boundary defined by the texts in question terminates within the above-described ensemble of elevations environing the ford. After minutely examining the topography shown on the IGN map, the Chamber finds that this point should be fixed 3 kilometres north of the ford, at the spot defined by the co-ordinates 0° 14' 39" E and 14° 54' 48" N.”²⁷⁴

²⁷⁰Ann. MBF 94.

²⁷¹With the exception of Mount N’Gouma.

²⁷²See the report of the meeting of the Joint Technical Sub-Committee on Demarcation, signed at Téra, 18 May 1989, Ann. MBF 83. The technical experts had “adopted the average of the various co-ordinates obtained by the two teams within tolerable limits” (p. 1) for each of the 27 defining points (out of the 32 planned) which were actually measured. The list of defining points is annexed to the report.

²⁷³See Ann. MBF II of the report of the 2nd session of the Joint Technical Commission on Demarcation, 23-28 July 1990, Ann. MBF 87, which designates the boundary markers that were *effectively* installed on the ground. It should be noted that there is no marker at Mount N’Gouma — nor at the southern tripoint —, as “[t]he markers at the two endpoints are scheduled to be installed after tripartite agreements have been reached”. See also below, para. 3.28; on the endpoints, see below, paras. 3.41-3.42.

²⁷⁴*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 647, para. 173. See also point M on the map mentioned in para. 175 of the Judgment and annexed thereto, which is reproduced in Cartographic Annex MBF 14.

3.22. There is no need to focus on the apparent (minimal²⁷⁵) differences between the co-ordinates of the heights of N’Gouma adopted by the Chamber of the Court in 1986 and those established by the experts in 2009²⁷⁶: these can be explained by the different methods of measurement used²⁷⁷. The same explanation accounts for the (minute) differences between the co-ordinates agreed on in 1988²⁷⁸ and those eventually adopted in 2009²⁷⁹. In any event, it is the Parties’ agreement of 2009 that the Court is requested to place on record.

3. From the Botou bend to the River Mekrou

3.23. The southern sector of the frontier between the two Parties, whose course they also agree on, corresponds to Burkina’s present-day Tapoa province (which includes, from north to south, the frontier *départements* of Kantchari, Botou and Diapaga) (and to the former Fada *cercle*) and to the southern part of the Tillabéri region of Niger (which includes the *départements* of Téra in the north and Say in the south). It was no more difficult for the Parties’ to reach agreement on this line than it was for the northern sector.

3.24. However, contrary to the northern sector, reading the basic texts was not sufficient to identify the defining points. Notwithstanding the clarifications of the Erratum of 5 October 1927, the *Arrêté* of 31 August 1927 gives very few salient topographical details, considering the length of the line and the changes in direction. It is described in the Erratum of 5 October 1927 thus:

“[from a point located 1,200 m to the west of the village of Tchenguiliba, the frontier turns back up] in a straight line that runs in a marked SSW-NNE direction; it passes approximately 2 km west of the village of Birniouli and, approximately 2 km south of the south of the village of Vendou Mama, reaches the top of the northernmost spur of the Heni-Djouri (Gourma) massif or Jackal Mountain.

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

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

It is then determined by the eastern crests of the Tounga Djoaga massif, before running towards the River Tapoa in a precise north-south direction. It passes

²⁷⁵The co-ordinates of Mount N’Gouma are, by the Court’s calculation: 14° 54' 48" N, 0° 14' 39" E, whilst the joint mission of June-July 2009 gives: 14° 54' 46,0" N, 0° 14' 36,4" E.

²⁷⁶See above, para. 3.12 and the table annexed to this chapter.

²⁷⁷A single location may have different co-ordinates depending on the method of measurement used (Clarke 1880 ellipsoid in 1960, 1986 and 1988, and WGS 84 in 2009). See above, note 263.

²⁷⁸See above, para. 3.8, and the report on completion of the survey of the proposed demarcation of the Niger-Burkina frontier, 28 September 1988, Ann. MBF 82 and its Cartographic Annex MBF 14.

²⁷⁹See above, para. 3.12 and the table provided at the end of this chapter.

approximately 5 km east of the village of Kogori [*sic*] and reaches the Tapoa approximately 4 km south of the aforementioned village.

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

3.25. Given the relative complexity of this sector, the technical experts of Burkina and Niger meeting on 21 May 1986 refrained from drawing up a list of the defining points in this area, and, after enumerating the first nine points on the frontier, merely referred to the “other defining points”²⁸⁰. It was not until the fourth meeting of the Joint Technical Commission on 26, 27 and 28 September 1988 that this portion of the boundary was actually identified with the help of the IGN map: “the section situated to the west of Tchenguiliba as far as the frontier with Benin [is] identical to the line on the IGNF 1:200,000 map, 1960 edition”²⁸¹.

3.26. The village of Tchenguiliba — which is mentioned under the toponym of Tyenkilibi or Tyenkiliba in some documents and on some maps, and which, to the west, marks the beginning of the Botou bend — had been identified by the Joint Technical Commission at a meeting in Diapaga from 12-15 May 1988²⁸². The list of specific points marked out between December 1989 and May 1990 appears in the report of the meeting of the Joint Technical Sub-Committee on Demarcation held at Téra on 18 May 1989²⁸³. It is reproduced in Annex II to the report of the 2nd session of the Joint Technical Commission on Demarcation from 23-28 July 1990²⁸⁴:

- “16. Tyenkilibi
- 17. Jackal Mountain
- 18. Loguil [Laguil]
- 19. Nonbokoli
- 20. Confluence of the Dyamongou and Dantwabongou Rivers
- 21. Confluence of the Dyamongou and Boubel Fouanou Rivers
- 22. Boubel
- 23. Boubel East
- 24. Teylinga
- 25. Dyapionga North
- 26. Dyapionga South

²⁸⁰See above, para. 3.17.

²⁸¹Report on completion of the survey of the proposed demarcation of the Niger-Burkina frontier, 28 September 1988, Ann. MBF 82, p. 3, para. 3.

²⁸²Report of the meeting of the Joint Technical Commission on Demarcation, Diapaga, 12-15 May 1988, Ann. MBF 80.

²⁸³Ann. MBF 83.

²⁸⁴Ann. MBF 84.

27. Kanleyenou
28. Nyobo Farou (Caiman Pool)
29. Eastern crests of Mount Tambouadyoaga
30. Banindyididouana
31. Confluence of the Banindyidi Fouanou and Tapoa Rivers”.

3.27. The majority of the markers were placed at the defining points mentioned in the 1927 texts; however, others were added to avoid any uncertainty as to the course of the frontier, namely:

- at the villages of Laguil and Nonbokoli, which show where the frontier passes “1 km south of Mount Tambado Djoaga” and follows the course of the Dantiabonga *marigot*; and
- at the villages of Teylinga and Kanleyenou.

As was the case with the village of Tokébangou mentioned above²⁸⁵, the doubts surrounding the precise location of the village of Kogori — which still persisted in July 2001²⁸⁶ — did not prevent the Parties from reaching an agreement on this portion of the frontier.

3.28. The southern extremity of the frontier on the River Mekrou — i.e., the tripoint with Benin — was defined in the following terms in the Judgment of the International Court of Justice of 12 July 2005, which is fairly brief on the matter:

“[T]he boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows the median line of that river, from the intersection of the said line with the line of deepest soundings of the main navigable channel of the River Niger as far as the boundary of the Parties with Burkina Faso.”²⁸⁷

3.29. As for the northern sector, the points marked out in 1990 were measured by GPS in 2009, and a number of points added on either side of the confluence of the Rivers Dyamongou and Boulel Fouanou, both on the Niger side and the Burkina side, with marker 21 being “triplicated”; the same procedure was used to mark the “Boulel” point which is also located in a river²⁸⁸:

- “16. Tyenkilibi (1° 52' 06.9" east; 12° 36' 19.2" north)
17. Jackal Mountain (1° 55' 43.9" east; 12° 41' 33.1" north)
18. Loguil (1° 57' 01.3" east; 12° 41' 31.9" north)

²⁸⁵See paras. 3.18-3.19.

²⁸⁶See the report of the fourth ordinary session of the Joint Technical Commission of 20 July 2001, Ann. MBF 94, p. 4: the only question mark at that time hung over Kogori, and it was planned to resolve the matter by carrying out a survey of the course of the southern sector of the frontier.

²⁸⁷*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 151, para. 146. On p. 144 there is a — very simplified — sketch-map.

²⁸⁸Strictly speaking there is only one frontier point at each of these two places; the “RN” and “BF” markers were installed on either side of the frontier point to ascertain the co-ordinates (by calculating the average of the co-ordinates of the two markers) of that point, where it was impossible to place a marker given that it was in the middle of a river. See below, note 308.

19. Nonbokoli (1° 58' 47.0" east; 12° 44' 12.9" north)
20. Confluence of the Dyamongou and Dantyabongou Rivers (2° 05' 14.9" east; 12° 43' 15.1" north)
21. BF- Confluence of the Dyamongou and Boubel Fouanou Rivers — Burkina side (2° 06' 23.4" east; 12° 43' 43.1" north)
21. Confluence of the Dyamongou and Boubel Fouanou Rivers (2° 06' 23.9" east; 12° 43' 44.0" north)
21. RN- Confluence of the Dyamongou and Boubel Fouanou Rivers — Niger side (2° 06' 24.4" east; 12° 43' 44.8" north)
22. BF- Boulel — Burkina side (2° 06' 52.8" east; 12° 42' 14.6" north)
22. Boulel (2° 06' 53.3" east; 12° 42' 15.1" north)
22. RN- Boulel — Niger side (2° 06' 53.7" east; 12° 42' 15.5" north)
23. Boulel East (= Teylinga) (2° 09' 43.2" east; 12° 41' 09.5" north)
24. Dyapionga North (2° 09' 37.3" east; 12° 39' 42.3" north)
25. Dyapionga South (2° 09' 08.1" east; 12° 38' 55.4" north)
26. Kanleyenou (2° 11' 57.1" east; 12° 37' 21.7" north)
27. Nyobo Farou (Caiman Pool) (2° 13' 23.9" east; 12° 35' 19.6" north)
28. Eastern crests of Mount Tambouadyoaga (2° 13' 48.0" east; 12° 31' 19.7" north)
30. Banindyididouana (2° 16' 27.2" east; 12° 27' 52.7" north)
31. Confluence of the Banindyidi Fouanou and Tapoa Rivers (2° 16' 40.6" east; 12° 25' 30.5" north)²⁸⁹.

3.30. As explained above²⁹⁰, the consensual definition of the southern sector was completed on 15 October 2009 with the determination of the last two points, not by the WGS 84 method, but by extracting their co-ordinates from the IGN France 1:200,000-scale map, 1955 Kandi sheet and 1960 Kirtachi sheet. The co-ordinates of those points are:

- 31- Intersection of the former boundary of the Say and Fada *cercles* with the course of the River Tapoa: 2° 04' 12.77" east; 12° 21' 04.88" north

²⁸⁹The above list was drawn up on the basis of the record of 3 July 2009, taking account of the discrepancy — noted in the record by the technical experts —, in respect of points 23 and 24, between the report of 28 July 1990 and the reality on the ground: “where the point designated as ‘Boulel East’ corresponds to the ‘Teylinga’ point. This produces a shift upward in all the designations from that point onward. As a result, No. 31 disappears from the list” (emphasis added). The technical experts propose “that the designations of the points that appear in the Report of 28 July 1990 be corrected to conform to the reality in the field”. See the record of the work of the Joint Survey Mission to ascertain the co-ordinates of the markers constructed on the Burkina-Niger frontier, 3 July 2009, p. 7, Ann. MBF 101.

²⁹⁰Para. 3.12, note [259].

- 32- Intersection of the former boundary of the Say and Fada *cercles* with the course of the Mekrou: 2° 24' 15.25" east; 11° 54' 07.83" north.

SECTION 2
THE TASK OF THE COURT
CONFIRMATION OF THE PARTIES' AGREEMENT

3.31. The task entrusted to the Court by Article 2, paragraph 2, of the Special Agreement is somewhat unusual, but fully within the functions of the Court as the principal judicial organ of the United Nations (1). The same is true of the — always delicate — task of determining the endpoints of the frontier, which are the subject of the “Parties’ agreement” within the meaning of that provision (2).

**1. The Court’s participation in the comprehensive settlement of the
frontier dispute between the Parties**

3.32. As the PCIJ emphasised, “[i]t is . . . natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier”²⁹¹. This is no less true when two States turn to the Court with a view to the delimitation of their common frontier, as

“[a] judicial decision, which ‘is simply an alternative to the direct and friendly settlement’ of the dispute between the Parties (*P.C.I.J., Series A, No. 22*, p. 13), merely substitutes for the solution stemming directly from their shared intention, the solution arrived at by a court under the mandate which they have given it. In both instances, the solution only has legal and binding effect as between the States which have accepted it, either directly or as a consequence of having accepted the court’s jurisdiction to decide the case.”²⁹²

3.33. In the present proceedings, the two Parties have a general frontier dispute which they have always intended to settle in its entirety. That is precisely the reason why they have not entered into a formal agreement establishing their consensus on the two northern and southern sectors of their common frontier: they only agreed in this regard to define their “agreement”, which they have requested the Court to place on record. The definition of their agreement was undertaken *after* the adoption of the Special Agreement, and was formally embodied in the exchange of letters of 29 October and 2 November 2009 which took place between the Foreign Ministers of the two countries and was sealed by the signature of the record of the meeting to ascertain the co-ordinates of the unmarked points of Sector B by the directors of the national geographic institutes of Burkina and Niger on 15 October 2009²⁹³.

3.34. It should also be pointed out that a decision by the Court on the entire frontier would seem all the more logical and necessary, given that two points come under both “categories” of sections of the frontier distinguished by Article 2 of the Special Agreement:

²⁹¹*Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, P.C.I.J., Series B, No. 12*, p. 20.

²⁹²*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 572, para. 46.

²⁹³See above, paras. 3.12-3.13.

- the Tong-Tong astronomic marker is both the last point of the frontier's northern sector, on which the Parties reached agreement, and the first point of the disputed sector; and
- the beginning of the Botou bend is the last point of the portion whose course is in dispute and the first point of the second demarcated sector on which the Parties have agreed.

3.35. As the oft-cited dictum of the Court in the case concerning the *Temple of Preah Vihear* states, “[i]n general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality”²⁹⁴. In this case, only the Court's intervention is liable to achieve the end sought by the Parties to these proceedings.

3.36. Further, “[t]hat the Court may, in an appropriate case, make a declaratory judgment is indisputable”²⁹⁵, and it has frequently fallen to the Court to record the agreement of the parties' on some aspects of a dispute that has been submitted to it²⁹⁶. Thus, in the case of the *Société commerciale de Belgique*, the PCIJ declared that the two Governments were agreed “in contemplating the possibility of negotiations with a view to a friendly settlement, in which regard would be had, amongst other things, to Greece's capacity to pay”²⁹⁷, and, in the case of the *Free Zones* it quite clearly considered that “there seems nothing to prevent the Court from embodying in its judgment an agreement previously concluded between the Parties” and that “a ‘judgment by consent’, though not expressly provided for by the Statute, is in accordance with the spirit of that instrument . . .”²⁹⁸. Further still, in the case of the *Free Zones*, the Permanent Court did not hesitate, in the actual *dispositif* of its Judgment, to decide that: “the declaration made in regard to this question by the Agent of the Swiss Government before the Court at the hearing on April 22nd, 1932, shall be placed on record”²⁹⁹.

That was a unilateral declaration made on behalf of one of the parties but which formed a part of the agreement recorded by the Court; the same should apply, *a fortiori*, for an “agreement” which the Parties would like to acquire the force of *res judicata*.

3.37. Moreover, while it would be going too far to claim that the frontier dispute before the Court has ever really posed a threat to peace and security in the region, it has been the source of — sometimes serious — tension between the two countries and there have been a considerable number of border incidents³⁰⁰. By removing such threats once and for all, the Court will be doing no more than contributing to the objectives of the United Nations, of which it is the principal judicial organ. By resolving finally and completely the dispute the Parties have brought before it, it will contribute to the consolidation of peace between the two countries, and to the development of friendly and cooperative relations between them; these are precisely the objectives of the United Nations, as set out in paragraphs 1 to 3 of the Charter.

²⁹⁴*Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962, p. 34.*

²⁹⁵*Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 37. See also Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 20; or Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p. 163, para. 30.*

²⁹⁶The very principle of *forum prorogatum* is associated with this idea.

²⁹⁷*Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78, p. 178.*

²⁹⁸*Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24, p. 14.*

²⁹⁹*Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46, p. 172.*

³⁰⁰See above, Introduction, paras. 0.5-0.6.

3.38. In its recent Advisory Opinion on *Kosovo*, the Court recalled that: “its answer to a request for an advisory opinion ‘represents its participation in the activities of the Organization, and, in principle, should not be refused’” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44). Accordingly, the consistent jurisprudence of the Court has determined that only ‘compelling reasons’ should lead the Court to refuse its opinion in response to a request falling within its jurisdiction (*Judgments of the Administrative Tribunal of the ILO upon complaints made against the Unesco, I.C.J. Reports 1956*, p. 86; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44)³⁰¹.

3.39. Both Parties are convinced that the Court, being seised of a contentious case (in relation to which it does not have the power that it has under Article 65, paragraph 1, of its Statute to consider the propriety of giving an advisory opinion), will not decline to fulfil the task entrusted to it and thereby completely and finally resolve the frontier dispute between them.

2. Determination of the endpoints of the frontier

3.40. The Parties’ agreement within the meaning of Article 2, paragraph 2, of the Special Agreement covers the two extremities of their common frontier.

3.41. In the north, where it joins the frontiers between them and Mali, the co-ordinates of Mount N’Gouma, the first point mentioned in the *Arrêté* of 1927, were fixed in the record of the work of the Joint Survey Mission to ascertain the co-ordinates of the markers constructed on the Burkina-Niger frontier of 3 July 2009, confirmed in the exchange of letters of 29 October and 2 November 2009 between the Foreign Ministers of the two countries, at 14° 54' 46.0" latitude north and 0° 14' 36.4" longitude east³⁰². These co-ordinates correspond to those of the marker constructed by Mali and Burkina, pursuant to the 1986 Judgment, at Point M, which represents the endpoint of their common frontier under that Judgment³⁰³. At the meeting of technical experts in conjunction with the final meeting to negotiate the Special Agreement in February 2009, Niger agreed that this marker also marked the starting point of the Burkina-Niger frontier.

3.42. In accordance with the Erratum to the 1927 *Arrêté*, the southern extremity of the frontier is situated at the intersection of the former boundary of the *cercles* of Fada and Say with the River Mekrou. The Parties’ agreement on these precise co-ordinates was only finally reached at the meeting of the heads of the two cartographic institutes of Burkina and Niger held at Kantchari on 15 October 2009³⁰⁴, following the exchange of letters between the Parties’ Foreign Ministers of 8 September and 8 October of the same year. Accordingly, that point is situated at the intersection of the meridian 2° 24' 15.25" longitude east and the parallel 11° 54' 07.83" latitude north.

³⁰¹ *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Report 2010*, para. 30.

³⁰² As noted above (para. 3.22), these co-ordinates are not identical to those retained by the Chamber of the Court in paragraph 173 of the 1986 Judgment (14° 54' 48" N, 0° 14' 39" E) (*I.C.J. Reports 1986*, p. 647). These minimal variations are due to the difference in methodology used: see above, note 263.

³⁰³ *I.C.J. Reports 1986*, p. 650, para. 179.A.8 (operative text).

³⁰⁴ See above, paras. 3.12 and 3.30.

3.43. Burkina is aware of the fact that in placing on record the Parties' agreement on the endpoints of their common frontier, the Court will not fix the tripoints with Mali and Benin, as neither of those two countries are party to the proceedings. However, as the Chamber of the Court noted in the *Burkina-Mali* case, it is required "not to fix a tripoint, which would necessitate the consent of all the States concerned, but to ascertain, in the light of the evidence which the Parties have made available to it, how far the frontier which they inherited from the colonial power extends"³⁰⁵. Furthermore, the rights of neighbouring States "are in any event safeguarded by the operation of Article 59 of the Statute of the Court"³⁰⁶, and upholding the points adopted by the Parties as marking the endpoints of their common frontier will present no problem for the Court in the present proceedings, given that both of those points correspond to points fixed by previous decisions of the Court in cases involving respectively one of the Parties to these proceedings and one of the third States concerned³⁰⁷.

3.44. The course of the frontier on which the Parties agree and which the Court has been requested to place on record consists of watercourses or straight lines connecting the points mentioned in the Erratum to the 1927 *Arrêté* and those added by mutual agreement of the Parties. The relevant co-ordinates are reproduced in the table on the following page of this Memorial. The resulting illustrative line is shown on two sketch-maps (sketch-map No. 6 showing the northern sector, called "Sector A", and sketch-map No. 7 showing the southern sector, called "Sector B"; also reproduced in Cartographic Annexes 23 and 24) reproduced on pages 96 and 97 of the French text, and in a sketch-map showing the entire course of the boundary reproduced in Cartographic Annex 25.

³⁰⁵*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 579, para. 49.

³⁰⁶*Ibid.*, p. 577, para. 46.

³⁰⁷The 1986 Judgment fixes the co-ordinates of point M very precisely (see above, note 274). For its part, the Judgment of 12 July 2005 simply states "that the boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows the median line of that river, from the intersection of the said line with the line of deepest soundings of the main navigable channel of the River Niger as far as the boundary of the Parties with Burkina Faso" (I.C.J. Reports 2005, p. 151, para. 146.4) (operative text).

**CO-ORDINATES OF THE FRONTIER POINTS CONSTITUTING THE PARTIES' AGREEMENT WITHIN
THE MEANING OF ARTICLE 2, PARAGRAPH 2, OF THE SPECIAL AGREEMENT³⁰⁸**

Number	Name on the report of 28 July 1990³⁰⁹	Latitude (DMS)	Longitude (DMS)
1	Mount N'Gouma	14° 54' 46.0" N	0° 14' 36.4" E
2	Kabia ford (astronomic marker)	14° 53' 09.8" N	0° 13' 06.3" E
3	Mount Arwaskoye	14° 50' 44.7" N	0° 10' 35.8" E
4	Bellé Banguïa	14° 45' 05.2" N	0° 14' 09.6" E
5	Takabougou	14° 37' 54.5" N	0° 10' 16.1" E
6	Mount Douma Fendé	14° 32' 00.6" N	0° 09' 42.1" E
7	Tong Tong (astronomic marker)	14° 24' 53.2" N	0° 12' 51.7" E
16	Tyenkilibi	12° 36' 19.2" N	1° 52' 06.9" E
17	Jackal Mountain	12° 41' 33.1" N	1° 55' 43.9" E
18	Laguil	12° 41' 31.9" N	1° 57' 01.3" E
19	Nonboloki	12° 44' 12.9" N	1° 58' 47.0" E
20	Confluence of Dyamongou and Dantiabongou Rivers	12° 43' 15.1" N	2° 05' 14.9" E
21 BF	ConfDyam/Boulel — Burkina side	12° 43' 43.1" N	2° 06' 23.4" E
21	Confluence of Dyamongou and Boulel Fouanou Rivers	12° 43' 44.0" N	2° 06' 23.9" E
21 RN	ConfDyam/Boulel — Niger side	12° 43' 44.8" N	2° 06' 24.4" E
22 BF	Boulel — Burkina side	12° 42' 14.6" N	2° 06' 52.8" E
22	Boulel	12° 42' 15.1" N	2° 06' 53.3" E
22 RN	Boulel — Niger side	12° 42' 15.5" N	2° 06' 53.7" E
23	Boulel East (=Teylinga)	12° 41' 09.5" N	2° 09' 43.2" E
24	Dyapionga North	12° 39' 42.3" N	2° 09' 37.3" E
25	Dyapionga South	12° 38' 55.4" N	2° 09' 08.1" E

³⁰⁸The co-ordinates of these points, which appear in the Annex to the record of the Joint Survey Mission to ascertain the co-ordinates of the markers constructed on the Burkina Faso-Republic of Niger frontier, 3 July 2009, were established by GPS, except for:

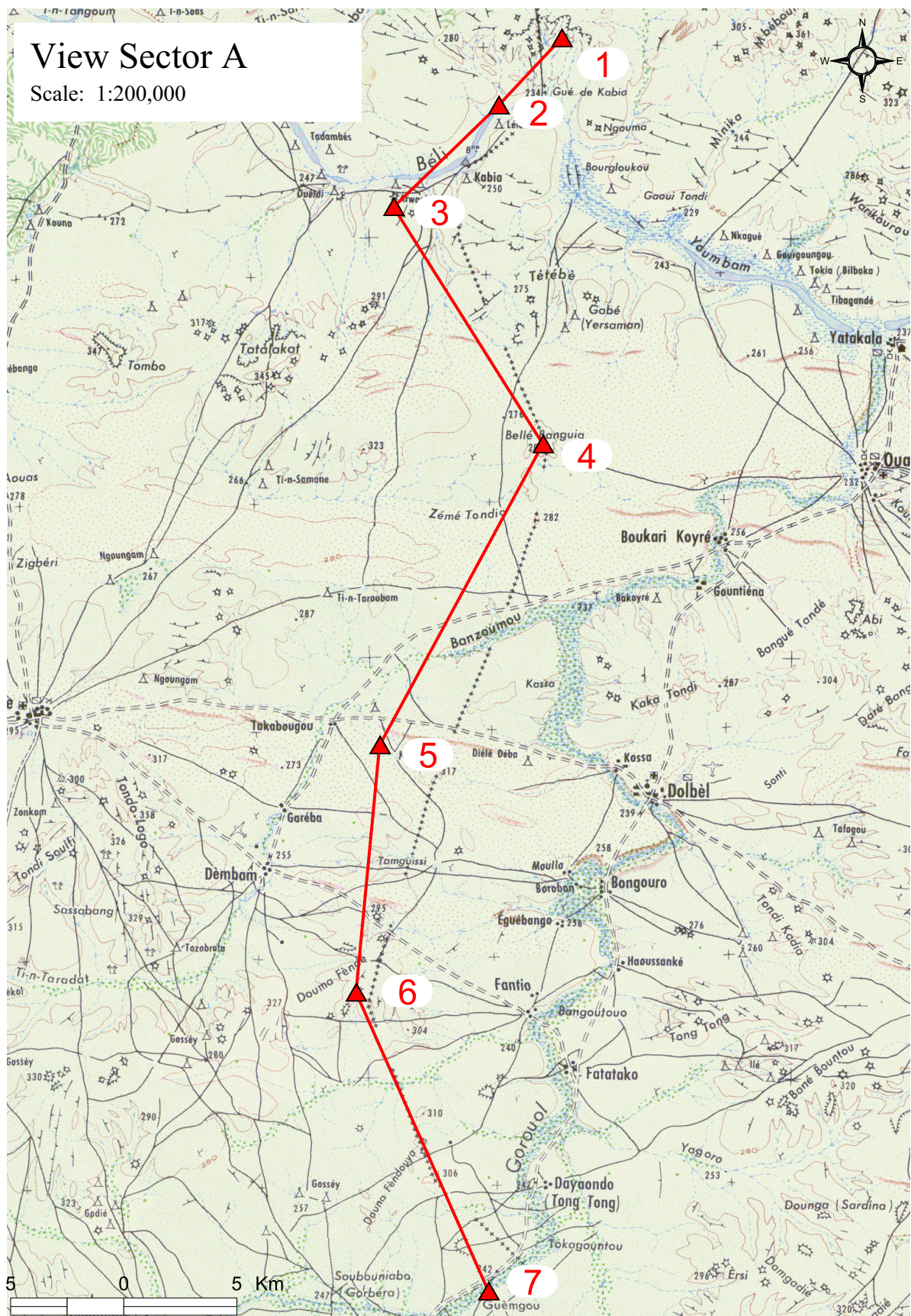
- points 21 and 22, whose co-ordinates were calculated based on the average of the co-ordinates of 21 BF and 21 RN, and 22 BF and 22 RN respectively. This procedure was used because of the difficulty of constructing a marker at points 21 and 22 which are located in a river (point 21 is at the confluence of the Dyamongou and the Boulel Fouanou, while point 22 is in the Boulel Fouanou which runs through the village of Boulel). Consequently, the sole purpose of markers 21 BF and 21 RN and 22, and markers 22 BF and 22 RN is to identify the respective positions of frontier markers 21 and 22.
- points 31 and 32, whose co-ordinates were derived from a composite of IGN 1:200,000 maps.

The list of defining points reproduced in the above table was drawn up on the basis of the third observation of the technical experts in the record of 3 July 2009, p. 7; see above, note 288.

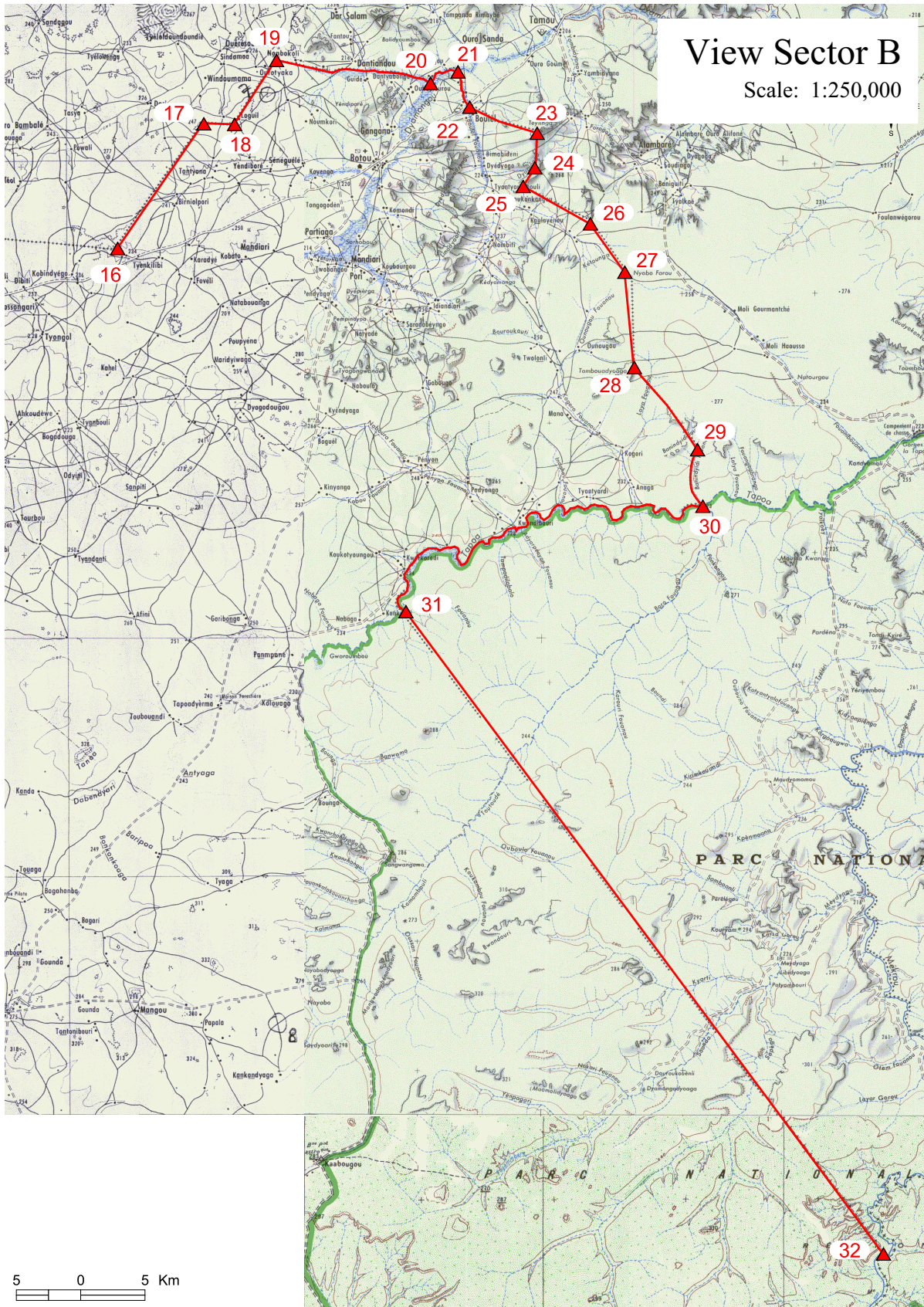
³⁰⁹Apart from points 31 and 32, which were not in the record and were derived from the IGN 1:200,000 map on 15 October 2009 and determined on the Clarke 1880 ellipsoid.

Number	Name on the report of 28 July 1990 ³⁰⁹	Latitude (DMS)	Longitude (DMS)
26	Kanleyenou	12° 37' 21.7" N	2° 11' 57.1" E
27	Niobo Farou	12° 35' 19.6" N	2° 13' 23.9" E
28	Eastern crests of Mount Tambouadyoaga	12° 31' 19.7" N	2° 13' 48.0" E
29	Banindyididouana	12° 27' 52.7" N	2° 16' 27.2" E
30	Confluence of Banindyidi Fouanou and Tapoa Rivers	12° 25' 30.5" N	2° 16' 40.6" E
31	Intersection of the Tapoa with the former boundary of Fada and Say <i>cercles</i>	12° 21' 04.88" N	2° 04' 12.77" E
32	Intersection of the former boundary of Fada and Say <i>cercles</i> with the Mekrou	11° 54' 07.83" N	2° 24' 15.25" E

Sketch-map No. 6 - View of the northern sector - Sector A - of the part of the frontier agreed by the Parties



Sketch-map No. 7 - View of the southern sector - Sector B - of the part of the frontier agreed by the Parties



CHAPTER IV

THE PART OF THE FRONTIER WHOSE COURSE IS TO BE DETERMINED BY THE COURT

4.1. The part of the frontier of which the Court is requested, under the Special Agreement, to “determine the course” lies between the two sectors discussed in the previous chapter³¹⁰. It consists of the intermediate section which starts at the Tong-Tong astronomic marker and terminates at the beginning of the Botou bend.

4.2. Under Article 2, paragraph 1, of the Special Agreement, the Court is thus requested to “determine the course of the boundary between the two countries in the sector from the astronomic marker of Tong-Tong (latitude 14° 25' 04" N; longitude 00° 12' 47" E) to the beginning of the Botou bend (latitude 12° 36' 18" N; longitude 01° 52' 07" E)”.

4.3. This sector of the frontier is delimited as follows in the 1927 *Arrêté* (according to the Erratum):

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

[from] the Tong-Tong astronomic marker[,] this line then turns towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossebangou. It almost immediately turns back up towards the north-west, leaving to Niger, on the left bank of that river, a salient which includes the villages of Alfassi, Kouro, Tokalan, and Tankouro; then, turning back to the south, it again cuts the Sirba at the level of the Say parallel.

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

4.4. In the light of this description of the course of the boundary, the portion referred to in Article 2, paragraph 1, of the Special Agreement can be divided into three sections (see page 100 of the French text, sketch-map No. 8 — Disputed sector of the frontier; also reproduced in Cartographic Annex 26):

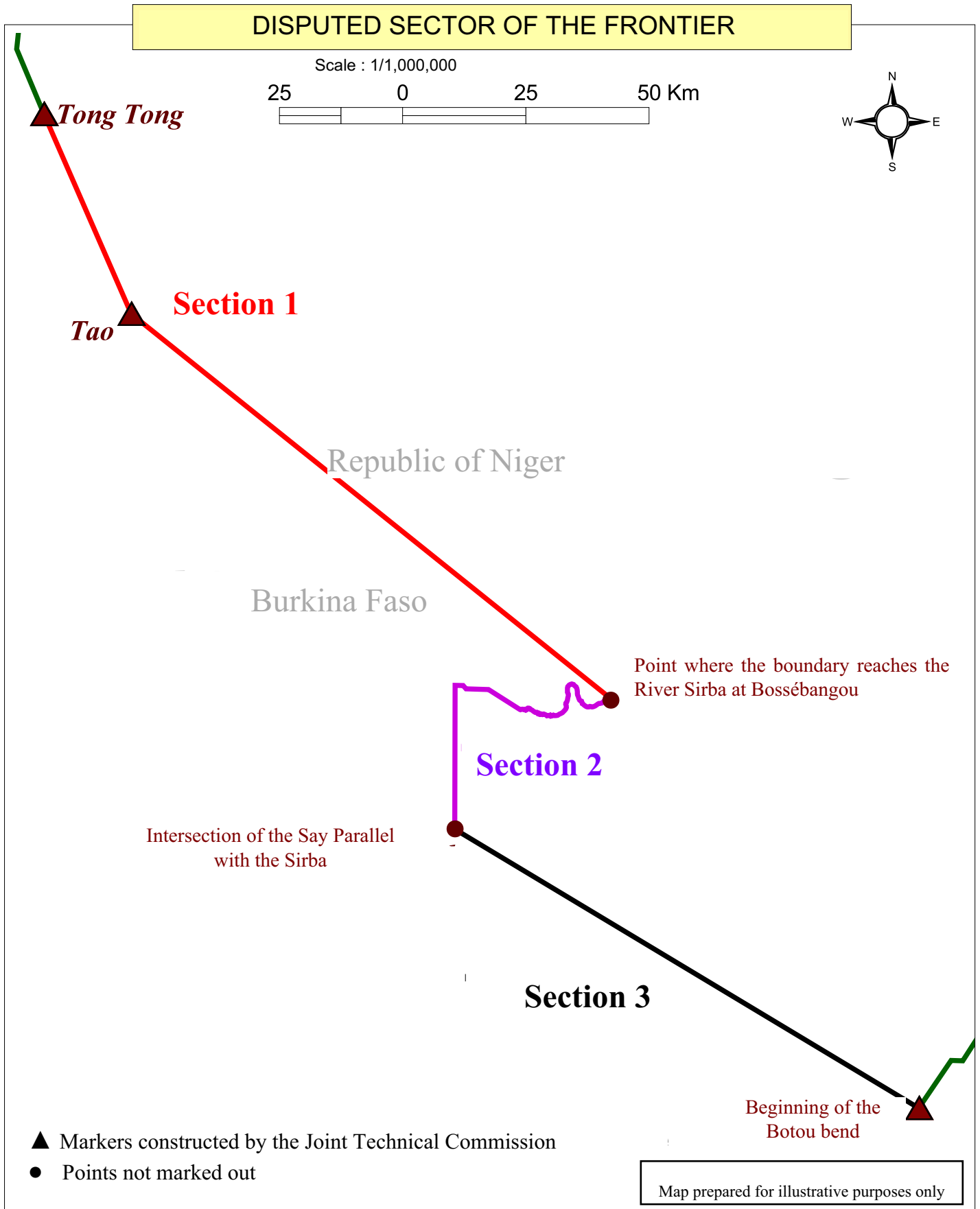
- the first section goes from the Tong-Tong astronomic marker to the point where the frontier reaches the River Sirba at Bossébangou (Sec. 1);
- the second starts at the latter point and ends at the intersection of the River Sirba with the Say parallel (Sec. 2);
- the third and final section runs from the intersection of the River Sirba with the Say parallel to the beginning of the Botou bend (Sec. 3).

³¹⁰See above, sketch-map No. 1 showing an overview of the frontier between the two States, p. 7, reproduced in Cartographic Annex MBF 18.

4.5. It should be pointed out that in the Special Agreement seising the Court, the co-ordinates of some of the points through which the boundary passes are given on the Clarke 1880 ellipsoid. These co-ordinates were derived from the 1960 IGN 1:200,000 map. They are different from the GPS co-ordinates, which are based on the WGS 84 ellipsoid. Since the Special Agreement was signed, the Parties have in particular been able to measure the GPS co-ordinates of the Tong-Tong astronomic marker and of the point corresponding to the beginning of the Botou bend³¹¹. Burkina has also obtained the GPS reading of the position of the Tao marker. Burkina will use these co-ordinates for these three points in the rest of this chapter. As the position of the other points can only be derived at this stage from the 1960 IGN 1:200,000 map, their co-ordinates will be given systematically on the Clarke 1880 ellipsoid.

³¹¹In this connection, see the record of the work of the Joint Survey Mission of 3 July 2009, Ann. MBF 101.

Sketch-map No. 8 - Disputed sector of the frontier



SECTION 1
THE COURSE OF THE FRONTIER FROM THE TONG-TONG ASTRONOMIC MARKER TO
THE POINT WHERE IT REACHES THE RIVER SIRBA AT BOSSÉBANGOU

4.6. In its original version, the first article of the *Arrêté* of 31 August 1927 delimited this section as follows:

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

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

This boundary is determined to the north by the current boundary with Sudan (Gao *cercle*) as far as the heights of N’Gourma, and to the west *by a line . . . which then turns towards the south-east, leaving the ruins of Tong-Tong to the east and descending in a north-south direction, cutting the Téra-Dori motor road to the west of the Ossolo Pool, until it reaches the River Sirba (boundary of Say cercle), near to and to the south of Boulkalo.*

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

.....
To the north-west, by the River Sirba from its mouth *as far as the village of Bossébangou.* From this point a salient . . .”³¹²

4.7. The amended *Arrêté* follows the same course, which it describes in almost identical terms, apart from a few nuances and clarifications:

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

A line starting from the heights of N’Gouma, passing through . . . the Tong-Tong astronomic marker; *this line then turns towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossebangou . . .*”³¹³

4.8. As is clear from the text, the 1927 *Arrêté* provides a precise delimitation of the boundary between the two Parties in this sector. Moreover, the Parties have not disputed it. Neither of them has suggested that the *Arrêté* would not suffice to identify the course of the boundary in this sector and, in particular, neither of them has deemed it necessary to have recourse to the line shown on the 1960 map — which, moreover, in this location does not coincide with the text of the *Arrêté*³¹⁴.

³¹²Ann. MBF 34 (italics added).

³¹³Ann. MBF 35.

³¹⁴In this sector, the line on the map in fact passes through a range of points which are not mentioned at all in the *Arrêté*; it also goes through a number of changes of direction which are not described in the text either.

4.9. Thus, in this sector, the task of the Court is:

- first to determine the location of the three points described in the *Arrêté* through which the boundary passes successively, namely the Tong-Tong astronomic marker, the Tao astronomic marker and the point where the boundary reaches the River Sirba at Bossébangou³¹⁵ (1);
- and then to ascertain how these three points are connected pursuant to the 1927 *Arrêté*. For reasons which Burkina will develop hereafter, there is no doubt that these three points are connected by two successive straight lines (2.).

1. The location of the frontier points designated in the 1927 *Arrêté*

4.10. The location of the Tong-Tong (A) and Tao (B) astronomic markers and the point where the frontier reaches the River Sirba at Bossébangou (C) will be identified in turn, with a view to ascertaining precisely where the boundary line delimited by the 1927 *Arrêté* passes.

A. The Tong-Tong astronomic marker

4.11. The location of the starting point of the boundary in this sector is defined in Article 2, paragraph 1, of the Special Agreement seising the Court. Under the terms of that article, the starting point consists of the “astronomic marker of Tong-Tong”.

4.12. This corresponds exactly to the provision of the 1927 Erratum. In its original version, the text of the 1927 *Arrêté* simply stated that the inter-colonial boundary “le[ft] the ruins of Tong-Tong to the east” without identifying the exact point through which the frontier passes. The Erratum made it clear that the boundary passes through “the Tong-Tong astronomic marker”.

4.13. The co-ordinates of that marker are given in the Special Agreement: “latitude 14° 25' 04" N; longitude 00° 12' 47" E”³¹⁶. According to the GPS reading taken during the joint mission of June-July 2009³¹⁷, the co-ordinates are: latitude 14° 24' 53.2" N; longitude 0° 12' 51.7" E.

B. The Tao astronomic marker

4.14. The 1927 *Arrêté* (according to the Erratum) describes the second point through which the boundary passes in this sector in the following manner: the boundary “cut[s] the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool”. With this description, the Erratum provides a further useful clarification to the original version of the *Arrêté* in stating that it is at the Tao astronomic marker that the boundary “cut[s] the the Téra-Dori motor road to the west of the Ossolo Pool” (according to the less precise version of the August text).

³¹⁵On the fact that it is these three successive points through which the frontier should pass, see in particular the report of the second ordinary session of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, held in Ouagadougou from 23 to 28 July 1990, Ann. MBF 87, in particular p. 3 and p.5 and Ann. MBF II, p. 1.

³¹⁶These are the co-ordinates based on the Clarke 1880 ellipsoid.

³¹⁷See above, Chapter III, esp. paras. 3.12, 3.20 and 3.29.

4.15. In retaining this marker as the point through which the inter-colonial boundary passes — as it did when it chose to refer directly to the Tong-Tong marker³¹⁸ — the Erratum makes two clarifications:

- it indicates exactly at which location on the motor road between Téra and Dori and at which distance “to the west of the Ossolo Pool” the boundary should pass;
- it provides a point which is very easy to locate geographically, since an astronomic marker, better than a road or a pool, is by its very essence a geographical reference point defined with precision for the purposes of mapping the territory.

4.16. The location of the Tao marker, which was marked out in May 1990 when the two Parties installed a frontier marker³¹⁹, can be ascertained by referring to the data sheet on the astronomic markers³²⁰. The Tao marker data sheet, drawn up by the Nevière mission in 1927, reads as follows:

“Name of point: Tao marker

Lat: 14° 03'13" N Long: 0°22'53" E

217.186 1555.087 Zone: 31

Tamarind tree with indicator plate to the north of the Dori-Téra road. New Upper Volta-Niger frontier.”³²¹

The co-ordinates of this marker, measured by GPS by Burkina, are: Lat.: 14° 03' 04.7" N; Long: 0° 22' 51.8" E.

C. The point where the boundary reaches the River Sirba at Bossébangou

4.17. The original version of the 1927 *Arrêté* defined the endpoint of the boundary in this sector using two additional periphrases:

- “This boundary . . . then turns towards the south-east, leaving the ruins of Tong-Tong to the east and descending in a north-south direction, cutting the Téra-Dori motor road to the west of the Ossolo Pool, *until it reaches the River Sirba (boundary of Say cercle), near to and to the south of Boulkalo*”.
- “Boundaries between the Say *cercle* and Upper Volta: . . . To the north-west, by the River Sirba from its mouth *as far as the village of Bossébangou. From this point* a salient . . .”

4.18. Three pieces of information were provided to determine the location of the point concerned. The line must: reach the River Sirba; near to and to the south of Boulkalo; at the village of Bossébangou.

³¹⁸See above, para. 4.12.

³¹⁹See below, para. 4.51.

³²⁰When astronomic markers are installed, a survey is always carried out and a data sheet drawn up showing the co-ordinates of the markers.

³²¹Ann. MBF 41. The data sheet also gives the co-ordinates of the Tong-Tong astronomic marker. The co-ordinates correspond to those adopted in the Special Agreement (see above, para. 4.13).

4.19. The Erratum simplifies and clarifies this description, without modifying it, by stating that after the Tao astronomic marker, the boundary “reach[es] the River Sirba at Bossebangou”.

4.20. Given that the location of the point at which the boundary arrives in this sector is identified by two pieces of information in conjunction — it “reach[es] the River Sirba” and “reach[es it] . . . at Bossébangou” — both elements should be taken into account when defining its location.

4.21. As the village of Bossébangou is situated on the right bank of the River Sirba, the only possible way of making sense of the reference to a line “reaching the River Sirba” “at Bossebangou” is to consider that the frontier, coming from the Tao astronomic marker, crosses the River Sirba and stops on the right bank of that river at the village of Bossébangou:

- the boundary cannot actually go to the centre of the village of Bossébangou, as it would then extend beyond the river that it is supposed to reach (and also cut the village in two, for which there is no provision in the *Arrêté* which leaves the village to the Colony of Niger³²²);
- nor can it stop on the left bank or even in the middle of the River Sirba, as it would then not be considered to end “at Bossébangou”.

4.22. This interpretation is corroborated by two facts in particular:

- in the first place, it is the solution adopted by the 1960 map, which ends the boundary line on the right bank of the river, which the line then follows up to the point where the salient begins (see below, Section 2);
- it is the only way to understand the part of the amended *Arrêté* which states that after the salient of four villages, the boundary “again cuts the Sirba at the level of the Say parallel”. For it to do this, the boundary must necessarily have cut the river at least once already. There is thus only one possible hypothesis: the boundary must join the right bank of the river when it reaches Bossébangou. Only on this condition can the boundary then leave, at the level of the salient, certain villages to Niger “on the left bank” of the River Sirba and then cross it “again” at the level of the Say parallel to reach the right bank from where it then “continues in a straight line up to a point located 1,200 m to the west of the village of Tchenguiliba”, as provided in the *Arrêté*.

4.23. As regards ascertaining precisely where this point is on the right bank of the river, its location depends on the course of the line connecting it to the Tao astronomic marker. Given that, for the reasons set out hereafter (2 below), the 1927 *Arrêté* defines a course which follows a straight line between the Tao astronomic marker and the point where the frontier “reach[es] the

³²²The *General List of Localities of French West Africa*, which was based on the delimitation carried out in 1927, registers the village of “Bossébangou” in Fascicle VI on the colony of Niger (Ann. MBF 28, p. 8). This village does not appear in Fascicle IV on the colony of Upper Volta (Ann. MBF 27, p. 9). The village of Bossébangou was already known to the French colonizers at the end of the 19th century: see Captain Y. Urvoy, *Histoire des populations du Soudan central (Colonie du Niger)*, Librairie Larose, Paris, 1936, p. 120: “The first mission was that of Captain Monteil, sent to reconnoitre the Say-Barroua line on the ground. He left Ségou in December 1890, went to Dori, where on 22 May 1891 he signed a protectorate treaty for Liptako; on 24 July, he crossed the River Sirba at Kakou, near Bossébangou, reached Say on 19 August and continued to Argougou, Kano, Chad and Tripoli” (reproduced in Ann. MBF E.14 of Niger’s Counter-Memorial of 28 May 2004, submitted in the case of the *Frontier Dispute (Benin/Niger)*). See Ann. MBF 37. It is therefore no surprise that this village served as a suitable point for the inter-colonial boundary line to pass through.

River Sirba at Bossébangou”, that point is necessarily defined in the following manner (see the explanatory diagrams on the following pages, also reproduced in Cartographic Annexes 27 and 28):

- first a straight line should be drawn between the Tao astronomic marker and the centre of the village of Bossébangou;
- the endpoint of the frontier in this sector is then constituted by the point where this straight line intersects with the right bank of the River Sirba.

Diagram No. 1 - View of the line between Tao and the River Sirba

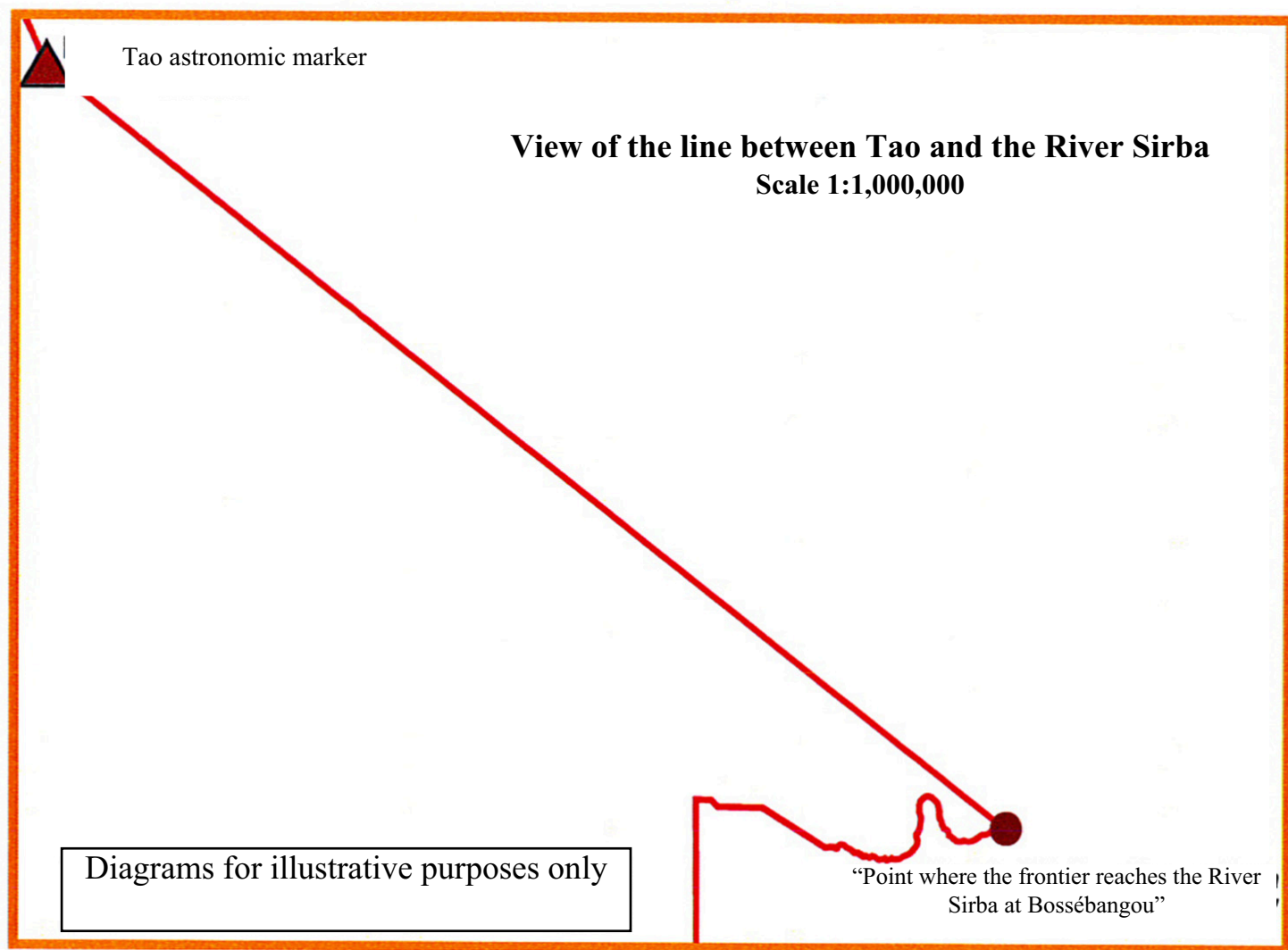
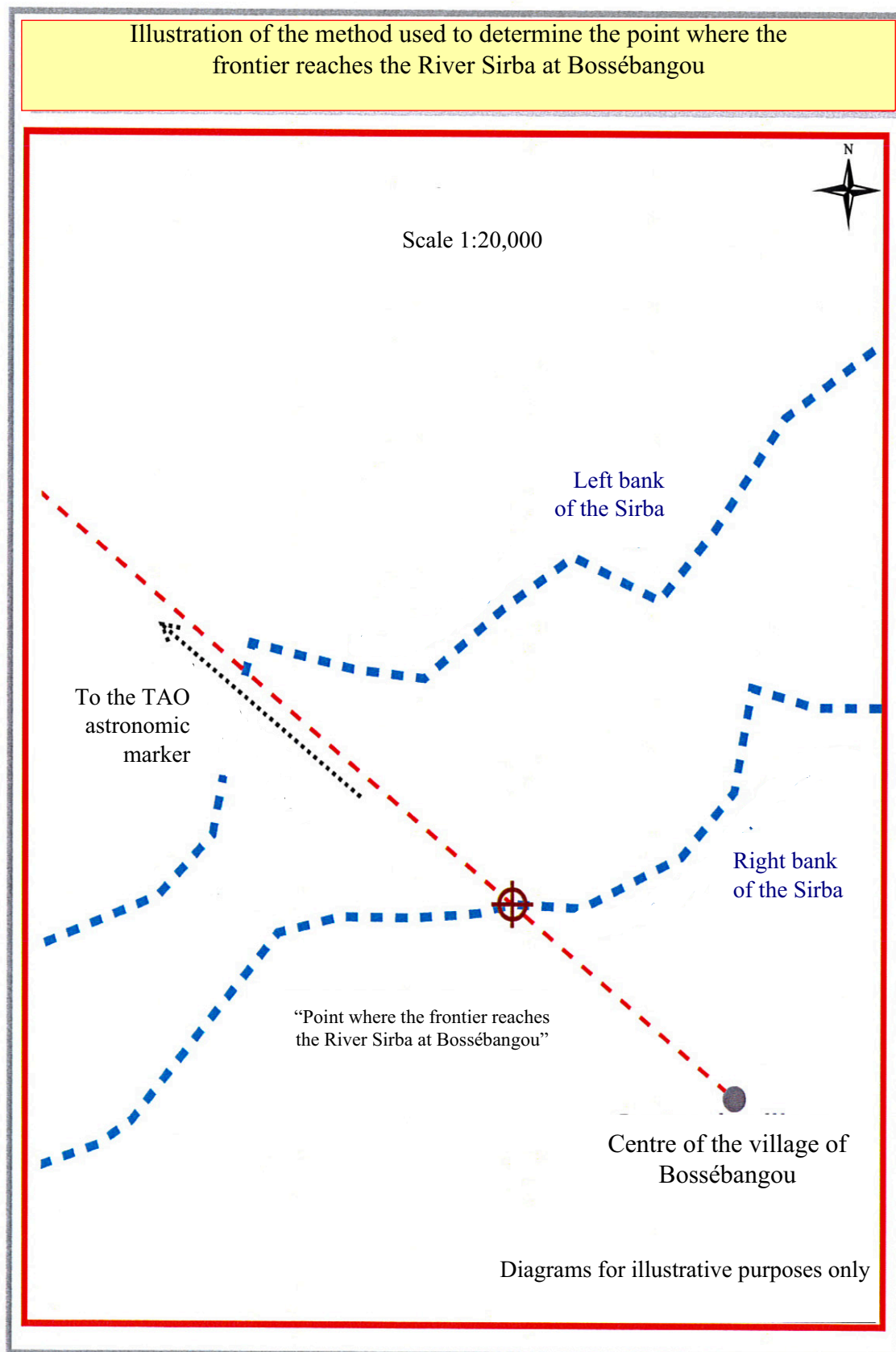


Diagram No. 2 - Illustration of the method used to determine the point where the frontier reaches the River Sirba at Bossébangou



4.24. In short, the frontier in this sector, pursuant to the 1927 *Arrêté*, thus passes through the following three points in succession:

- the Tong-Tong astronomic marker (Lat.: 14° 24' 53.2" N; Long. 0° 12' 51.7" E) (WGS 84 ellipsoid)³²³;
- the Tao astronomic marker (Lat.: 14° 03' 04.7" N; Long. 0° 22' 51.8" E) (WGS 84 ellipsoid)³²⁴;
- and the point where the right bank of the River Sirba intersects with the straight line connecting the Tao astronomic marker to the village of Bossébangou (Lat.: 13° 21' 06.5" N; Long. 1° 17' 11.0" E) (Clarke 1880 ellipsoid).

4.25. These three points having been located, it now remains to define the line connecting them.

2. The line connecting the three points designated in the *Arrêté*

4.26. The brevity with which the French colonizer defined the course of the inter-colonial boundary in this sector in 1927 (“[from] the Tong-Tong astronomic marker[,] this line then turns towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossebangou”) leaves not the least doubt that the boundary adopted was of an artificial nature (A). It is equally clear that this artificial boundary consists of two straight lines connecting the three points designated in the *Arrêté* (B). This most natural interpretation of the text of the 1927 *Arrêté* was, furthermore, officially endorsed by the Parties (C) and corresponds in every respect to the practice followed in the field of boundary delimitation (D).

A. The 1927 *Arrêté* adopts an artificial boundary in this sector

4.27. It is clear simply from reading the 1927 *Arrêté* that, in the sector concerned, it is an artificial and not a natural boundary that has been adopted. Indeed no natural feature is referred to, contrary to other sectors of the boundary, where the *Arrêté* deliberately describes its course as following a natural feature, such as peaks (for example, the “the crests of the Djoapionga hills” in the fifth paragraph) or watercourses (for example, the “course of the Tapoa” in the seventh paragraph). In contrast, there is no such reference in the part of the *Arrêté* relating to this sector of the frontier.

4.28. The amended *Arrêté* thus states that “[from] the Tong-Tong astronomic marker[,] this line then turns towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossebangou”. If we extract from this passage the references that concern only the course of the boundary strictly speaking and exclude any description of the points through which it passes, it is obvious that the *Arrêté* delimits the boundary in the form of an artificial line alone: in accordance with the *Arrêté*, “this line then turns towards the south-east, cutting . . . and reaching . . .”.

4.29. Two facts confirm this very obvious interpretation of the *Arrêté*.

³²³See above, para. 4.13.

³²⁴See above, para. 4.16.

4.30. Firstly, the only detail given in the *Arrêté* concerning the course of the boundary is that it goes in a “south-east” direction from the Tong-Tong astronomic marker. This shows that the course was simplified, defined solely — yet adequately — by ascertaining the points through which the boundary, whose general direction was also described, passes.

4.31. Further, in 1923, the Commander of Dori *cercle* had argued in favour of the natural boundary which was then formed by the River Niger — and which separated the Colonies of Niger and Upper Volta until December 1926³²⁵ — over the arbitrary and artificial boundary that was eventually adopted in 1926 and 1927:

“Politically, the measure envisaged [which was implemented in December 1926] would, no doubt, be to the advantage of the neighbouring Colony of Niger by giving it control over both banks of the river; but it would, on the other hand, be to the clear disadvantage of the Colony of Upper Volta by removing from Dargol and Kokoro *cantons* a portion of territory which has always been part thereof and which the Niger delimits geographically and naturally. Here there is in fact a natural boundary and not one of those arbitrary and somewhat “fictitious” boundaries, which take account of neither watercourses nor mountains, and to which, most often, we pay little heed. In this instance, the Niger clearly marks the boundary between the Sonhraïs *cantons* of Dori and the left bank of the river, commonly known as the ‘Haoussa bank’, as opposed to the right bank or Gourma bank. This is a specific fact which should, it seems, be taken into account.”³²⁶

4.32. In his letter of 1 February 1926 to the Governor General of FWA, the Governor of Upper Volta repeated these reservations in respect of the incorporation of the part of Dori *cercle* on the left bank of the River Niger into the colony of Niger. However, he could only bow to the decision of the highest authority of FWA who put forward economic arguments to justify the incorporation of part of Dori *cercle* into the colony of Niger and the abandonment of the natural frontier formed by the River Niger:

“In respect of the part of Dori *Cercle* on the bank of the Niger . . . I have always been opposed to its incorporation into the neighbouring colony . . . However, you informed me verbally that, after your recent visit to Niamey and considering the situation in that part of the Niger basin, in light of the possibilities for economic development, your decision was, in a manner of speaking, already taken, in principle. It would of course be unseemly for me to dispute it . . .”³²⁷

4.33. The artificial nature of that delimitation did not seem to pose any great difficulties to the colonial administration. Any territorial problems they might have encountered in the sector in question involved the distribution of land ownership among the inhabitants of the two colonies rather than being boundary problems strictly speaking — which, if they did arise, concerned the demarcation, and not the actual delimitation, of the 1927 boundary line, which was then only an internal boundary of FWA. That much is clear from the telegram/letter of 23 January 1951 from the Head of Téra subdivision to the Commander of Tillabéry *cercle*:

³²⁵See above, para. 1.16.

³²⁶See the letter from the Commander of Dori *cercle* to the Governor of Upper Volta of 7 April 1923, Ann. MBF 21, p. 1. These remarks were repeated by the Governor of Upper Volta in his letter of 7 June 1923 to the Governor General of FWA (Ann. MBF 22, p. 4).

³²⁷See the letter dated 1 February 1926 to the Governor General of FWA from the Governor of Upper Volta, Ann. MBF 25.

“From the exchange of views which then took place, it emerged that the Commander of Dori *cercle* agreed not to make the settlement of these disputes [these were disputes as to the ownership of fields in the Oussaltan region] a question of boundaries, while at the same time he reserved the right to instruct a liaison officer to reconnoitre the boundary and mark out its course with the help of concrete markers.

Without contesting the appropriateness of such operations, they could be considered to be part of the overall works which should probably be undertaken by qualified staff once the heads of the respective Territories have reached agreement.

The theoretical boundaries they would mark out would not really help resolve the land disputes which have arisen between the inhabitants of the two districts, whose rights must be ascertained according to the rules of custom rather than by seeking to determine whether the disputed territory is located in their territory of origin or not.”³²⁸

4.34. In adopting this artificial delimitation, the 1927 *Arrêté* merely reflected a practice frequently followed by the colonizer in Africa, which consisted of adopting as boundaries “[mere] straight lines traced on the drawing board with little relevance to the physical circumstances on the ground”³²⁹.

B. The course defined in the *Arrêté* consists of two straight lines

4.35. There are several facts which help establish that the artificial boundary defined in the 1927 *Arrêté* consists of two straight lines.

4.36. *Firstly*, the fact that the *Arrêté* does not specify the form to be ascribed to the artificial line connecting the points through which the boundary passes — it merely states that it “then turns towards the south-east, cutting . . . and reaching . . .” — can only be interpreted as referring to straight lines:

- since two points are sufficient to define a straight line, the fact that the 1927 *Arrêté* only designates the points through which the boundary passes, without providing any other details, necessarily implies that those points are connected by a series of straight lines;
- a straight line is also the most obvious and the simplest solution to implement and visualize. The fact that it is the shortest path between two points explains why it is the solution most readily adopted. In the absence of any other indication in the *Arrêté*, there is no reason not to presume that this most simple and obvious solution was adopted³³⁰;

³²⁸Telegram/letter from the Head of the Téra subdivision to the Tillabéry *cercle*, dated 23 January 1951, Ann. MBF 40, p. 1.

³²⁹*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, Separate Opinion of Judge Ajibola, p. 53, para. 9, and above, para. 2.38.

³³⁰See, in the same connection, *mutatis mutandis*, P.C.A., *The Government of Sudan/the Sudan People's Liberation Movement/Army (Abyei Arbitration)*, Final Award of 22 July 2009, www.pca-cpa.org, para. 746: “By delimiting the eastern and western boundaries of the Abyei Area in the foregoing manner, the Tribunal adopts the ABC Experts’ use of lines of longitude in its delimitation of tribal boundaries, as the Tribunal finds that it was reasonable to do so for both logical and practical reasons . . .”.

— it is, moreover, the solution retained by the Parties for the sectors of their frontier not in dispute³³¹: both in the sector running from the frontier with Mali to the Tong-Tong astronomic marker and in the sector beginning at the Botou bend and ending at the River Mekrou, Burkina and Niger agreed that the boundary delimited by the 1927 *Arrêté* consisted of a series of straight lines connecting the frontier points identified, with the sole exception of those stretches where the boundary follows a natural feature in accordance with the *Arrêté*. This justifies the same (common-sense) interpretation being adopted for the sector between the Tong-Tong astronomic marker and the point where the frontier reaches the River Sirba at Bossébangou. In fact, in describing the course of the boundary, the *Arrêté* does not differentiate between the different sectors: both in respect of the former (“non-disputed” sectors) and the sector which lies between them, it merely states that the line (in the singular³³²) passes successively through a certain number of points. This was interpreted by the Parties as meaning that the line consists of a series of straight lines connecting those points. What applied to the demarcated sectors should thus also apply to the intermediate sector, in the absence of any indication to the contrary in the *Arrêté*.

4.37. *Secondly*, the representation of the boundary as two separate straight lines, with one changing direction in relation to the other at the turning point formed by the Tao astronomic marker, is the one that Niger used in the atlas of maps annexed to its Memorial in the case of the *Frontier Dispute (Benin/Niger)*, in order to illustrate on a contemporary map the 1927 delimitation between the Colony of Upper Volta and the Colony of Niger³³³. It is also the form given by Niger, in the same atlas, to the boundaries of Upper Volta as it was reconstituted in 1947. Given the scale of the 1932 map used by Niger for illustrative purposes in its atlas, the course of the 1947 (and thus the 1932) boundary can only be approximate. But what is highlighted by Niger is quite clear: starting from the Tong-Tong astronomic marker, there is one straight line to the Tao astronomic marker, then, after another turning point, there is a second straight line which ends at the River Sirba³³⁴.

4.38. *Thirdly*, the fact that the *Arrêté* does not specify the form the boundary should take necessarily implies that the straight line option excludes all others. If any other artificial line had been chosen (from a wide variety of possible types), it would necessarily have been accompanied, firstly, by clarifications making it possible to determine the form of the artificial line, and, secondly, by the information required to establish its course. The Niger delegation, *a contrario*, acknowledged at the second ordinary session of the Joint Technical Commission in 1990 that such clarifications would have been essential if anything other than the straight-line solution had been retained in the *Arrêté*. It in fact claimed that the line, in its view a curve, adopted by the *Arrêté* of 1927 “is the arc of a circle, with a well-defined centre and radius”³³⁵. Yet nowhere does the 1927 *Arrêté* actually state that the line is a curve, nor does it say what its centre and radius are.

4.39. The few cases in which an artificial boundary other than a straight line was adopted in colonial practice attest to the fact that such a boundary cannot exist without being defined exactly — if only because it is necessary to define what type of non-straight line (and there is a

³³¹See above, Chapter III, para. 3.13.

³³²“The boundaries of the Colonies of Niger and Upper Volta are determined as follows: *A line* starting from the heights of . . .; *this line* then turns towards the south-east, crossing . . . and reaching . . . *It* [still the same line] almost immediately turns back up [etc.]” (italics added).

³³³See p. 105 of the atlas, reproduced in Cartographic Annex MBF 16.

³³⁴*Ibid.*, p. 129, reproduced in Cartographic Annex MBF 17.

³³⁵Report of the second ordinary session of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, held in Ouagadougou from 23 to 28 July 1990, Ann. MBF 87, p. 3.

wide variety of possible forms) had been chosen. One example is the Franco-British Convention of 14 June 1898 on the Niger, Article 4 of which described the boundary between the two States to the east of the River Niger thus:

“Starting from the point on the left bank of the Niger indicated in the previous Article, viz., the median line [of the Dallul Mauri, the frontier shall follow this median line] until it meets the circumference of a circle drawn from the centre of the town of Sokoto with a radius of 100 miles (160.932 metres). From this point it shall follow the northern arc of this circle as far as its second intersection with the 14th parallel of north latitude.”³³⁶

There is nothing similar or comparable in the 1927 *Arrêté*. Moreover, it is instructive to note that the boundary adopted in 1898 was abandoned in 1906 in favour of a simpler delimitation consisting of straight lines connecting different points³³⁷.

4.40. In the same connection, the Agreement of 19 October 1906 relative to the Frontier between the British and French Possessions from the Gulf of Guinea to the Niger could be cited to show that when an artificial boundary other than a straight line is selected as a frontier, it always comes with corresponding clarifications:

“Article I

.....

26. Thence it follows the circumference of a circle of 8½ kilom. radius, having for centre the centre of the town of Okuta (Okouta), to a point situated 1 kilom. from the direct road from Okuta (Okouta) to Boria, measured on the west of and at right angles to this road;

.....

33. Thence it follows on the west side of Guri (Goré) the circumference of a circle of 4 kilom. radius, described round the centre of that village as centre, to a point situated 1 kilom. from the road from Guri (Goré) to Yashikira (Yassikéré), measured at right angles to, and on the west of, this road

.....³³⁸

Once again, there is no such information — which is impossible to assume — in the 1927 *Arrêté*.

³³⁶This Convention is reproduced in Ann. B.8 of Niger’s Memorial of August 2003 in the case of the *Frontier Dispute (Benin/Niger)*. See Ann. MBF 1.

³³⁷See the first article of the Convention of 29 May 1906 between Great Britain and France, respecting the Delimitation of the Frontier between the British and French Possessions to the East of the Niger, signed at London, 9 April 1906, reproduced in Ann. B.21 of Niger’s Memorial of August 2003 submitted in the case of the *Frontier Dispute (Benin/Niger)*. See Ann. MBF 6.

³³⁸The Agreement adopts another delimitation in the form of a circle (or “tangent to a circle”), the centre and radius of which it defines in paragraphs 35, 36, 42, 44, 47, 49, 53, 55 and 57 to 60. This Agreement was reproduced in Ann. B.22 of Niger’s Memorial of August 2003, submitted in the case of the *Frontier Dispute (Benin/Niger)*. See Ann. MBF 7. See also, among other examples, Article 1 of the Agreement in respect of the delimitation of the frontiers between Cyrenaica and Egypt, signed at Cairo on 6 December 1925: the frontier “shall follow the direction of the arc of a circle drawn with Beacon Point (Ezlet El Gattara) as its centre and with a radius of 10 (ten) kilometres from the abovementioned point to . . .” (cited in I. Brownlie, *African Boundaries*, 1979, pp. 104-105.)

4.41. *Fourthly*, the drafts written preparatory to the *Arrêté* and prior to the Erratum confirm that the boundary is formed by two straight lines which undergo two successive changes in direction, one at the Tong-Tong astronomic marker and the other at the Tao astronomic marker.

4.42. The original version of the *Arrêté* of 31 August³³⁹ stated the following:

“This boundary is determined . . . by a line passing through . . . Mount Doumafondé, which then turns towards the south-east, leaving the ruins of Tong-Tong to the east *and descending in a north-south direction*, cutting the Téra-Dori motor road to the west of the Ossolo Pool, *until it reaches* the River Sirba . . .”³⁴⁰

4.43. That line had already been approved by the governing authorities of the Colonies of Niger and Upper Volta on 2 February 1927 in a report which reads thus:

“Record of agreement

In the year one thousand nine hundred and twenty-seven, on the second of February,

Between the Governor of the Colony of Niger and the Inspector of Administrative Affairs, Mr. LEFILLIATRE, representative of the Governor of Upper Volta, at Téra.

Having regard to the Decree dated the twenty-eighth of December, one thousand nine hundred and twenty-six.

The following was agreed:

.....

[The cantons transferred to Niger] are bounded to the north by the current boundary with Sudan (Gao *cercle*) as far as the heights of N’Gourma, and to the west by a line passing through the Kabia ford . . ., which then turns towards the south-east, leaving the ruins of Tong-Tong to the east and descending in a north-south direction, cutting the Téra-Dori motor road to the west of the Ossolo Pool, until it reaches the River Sirba (boundary of Say *cercle*), near to and to the south of Boulkalo.

No opposition on the part of the local inhabitants having been encountered, this record was closed and signed by the Parties.”³⁴¹

4.44. These two documents invite the following comments:

- in the first place, it should be noted that they use the same frontier points as those described, with greater precision, in the Erratum;

³³⁹In its Judgment in the case of the *Frontier Dispute (Burkina/Mali)*, the Chamber of the Court accepted the subsidiary and probative character of the initial version of the 1927 *Arrêté* (see the Judgment of 22 December 1986, *I.C.J. Reports 1986*, p. 590, para. 69).

³⁴⁰Italics added.

³⁴¹Ann. MBF 30.

- secondly, it is clear from the way they are written that the boundary line consists of two sections with different orientations: the first descends “in a north-south direction”, the second continues “until it reaches” the River Sirba in a direction that can only be “south-east”, since that is the general direction of the frontier from the Tong-Tong astronomic marker (“which then turns towards the south-east”, as both texts specify);
- it necessarily follows that the statement whereby the line turns towards the south-east — repeated in the Erratum — was in no way intended to describe the form of the line connecting the three frontier points designated in the *Arrêté*. Its sole purpose is to indicate the existence of a turning point in the boundary, between the section that arrives at the Tong-Tong astronomic marker and the section that runs from there and ends at the River Sirba at Bossébangou. If the reference to turning was meant to describe the form of the line (for example, to switch from a straight line to a curved line), it would then be inconsistent with the clarification coming immediately afterwards, whereby the first stretch of this new section of the boundary follows a “north-south” direction — one line cannot curve in two different directions at once. However, there would be no inconsistency in stating, firstly, that from the point where the line turns at the Tong-Tong astronomic marker this section of the boundary undergoes an overall change in direction to the south-east in relation to the previous section, and, secondly, that this overall stretch consists of two sections with different orientations, one “north-south”, the other south-east;
- in this regard the instruments preparatory to or preceding the Erratum confirm that the two sections described are indeed straight lines: on the one hand, it is stated that the first section follows a “north-south” direction (“and descending in a north-south direction”); and on the other, that the second section runs “until it reaches” the River Sirba at Bossébangou. It would be difficult to interpret these phrases as meaning anything other than straight lines.

4.45. There is no reason to believe that a different solution prevailed in the corrected version of the *Arrêté*. The corrected version merely gives a more precise description of the points through which the line passes (from then on the Tong-Tong and the Tao astronomic markers are referred to specifically) and it was thus no longer necessary to describe the orientation of each section. The precise identification of the points through which the boundary passes was henceforth sufficient to define its course precisely. In the absence of any other clarification, the way the text of the *Arrêté* is structured (“this line then turns towards the south-east, cutting . . ., and reaching . . .”) leaves no doubt that the boundary consists of two straight lines connecting the three points.

C. The interpretation whereby the course of the frontier consists of two straight lines was officially endorsed by the two Parties

4.46. In light of the preceding evidence, it is not surprising that Burkina and Niger agreed to consider that the 1927 *Arrêté* delimited their common frontier with two straight lines in this sector.

4.47. That was the interpretation adopted when the boundary line was first considered by the Joint Technical Commission on Demarcation established in 1987. Further, in September 1988, it was unanimously decided to begin demarcation of the course in the form of two straight lines derived by the two Parties from their interpretation of the 1927 *Arrêté*, by plotting on the 1960 map a course consisting of two successive straight lines connecting the Tong-Tong and Tao astronomic markers, and the Tao marker to the point where the frontier reaches the Sirba at Bossébangou.

4.48. According to the record signed by both delegations, the very purpose of the Joint Commission’s fourth meeting of 26, 27 and 28 September 1988 was in fact “to plot, on the map,

the line resulting from the field survey conducted by the Technical Sub-Committee and to submit the results of said work to both Governments for final selection of the frontier line”³⁴². More specifically,

“The agenda included one item:

- to plot on the map the boundary line, as surveyed by the Technical Sub-Committee, pursuant to the additional work requested of it at the meeting of 12-15 May 1988 at Diapaga.

The Technical Sub-Committee then reported on the work of the survey mission and presented on the map the boundary line it had surveyed.

From the attached Report on completion of the field survey work, the following key points emerged:

1. According to the basic texts (*Arrêté* No. 2336 of 31 August 1927 and its Erratum No 2602/APA of 5 October 1927) the boundary line passes three (3) categories of points:

astronomic markers;

natural features;

localities.

The experts are thus unanimous as to the map interpretation and the field survey of the boundary line defined in the basic documents cited in the Agreement and Protocol of Agreement, signed in Ouagadougou on 28 March 1987.”³⁴³

4.49. Moreover, the report stated that it should “be noted that at several locations the frontier line resulting from the basic texts does not coincide with the line on the IGNF 1:200,000 map or with certain administrative realities on the ground”³⁴⁴, as in some “specific cases”, “certain administrative entities are clearly outside the two boundary lines”³⁴⁵. However, given that, where the two lines did not coincide, the line defined in the *Arrêté* — as interpreted consensually by the Parties — prevailed over the line on the map, it was appropriate to adopt the former line. That is precisely what the authors of the report did by plotting the line defined in the *Arrêté* (straight lines connecting the points cited in the *Arrêté*) on the 1960 map.

4.50. As was explained in the report in question, in paragraph II.5:

“Two composites of IGNF 1:200,000 boundary maps, 1960 edition, a map overlay and transparency are attached to this report³⁴⁶]. They show:

- the boundary line as it exists on the IGNF map, 1960 edition

³⁴²Ann. MBF 81, p. 1.

³⁴³Ibid, p. 2.

³⁴⁴Ann. MBF 81, p. 3.

³⁴⁵Ann. MBF 82.

³⁴⁶See Cartographic Annex MBF 14.

— the boundary line *resulting from the interpretation of the basic texts* and from the field survey mission . . .”³⁴⁷

It is clear from these composites and overlays that the consensual line “resulting from the interpretation of the basic texts and from the field survey mission” connected the three points cited in the *Arrêté* with two straight lines.

4.51. In November 1989, the Commission arranged for this line to be established officially on the ground and planned for the installation of just 45 markers at first (because of budgetary constraints), 33 of which were to be placed at each “turning” point in the line, with the remaining 12 supplementing those in densely populated areas³⁴⁸. It was as part of this process that, between December 1989 and May 1990, “23 markers” were effectively installed “where the frontier changed direction”, including in the “northern section”:

“* No. 007 Tong-Tong (astronomic marker)

* No. 008 Tao (astronomic marker)”³⁴⁹.

The choice of these two points as “turning points” was thus to confirm the 1988 line and the obvious interpretation of the 1927 *Arrêté* by making the line undergo two successive changes of direction at these two points.

4.52. The consensual line and interpretation adopted in 1988 were nevertheless called into question by the Niger delegation in July 1990, on the grounds of an alleged misinterpretation of the 1927 *Arrêté*³⁵⁰. This about-turn calls for two comments:

- it was very sudden, since, less than three months earlier, the Niger delegation had reasserted the validity of the 1988 consensual line, voicing its disagreement with only one point (despite having adopted it in 1988): according to the Niger delegation, “a misinterpretation of the Erratum makes the boundary terminate at the River Sirba at Bossébangou”³⁵¹. This criticism — the only one made in May 1990 by the Niger delegation in respect of the 1988 consensual line in this sector — was very surprising, given that the line thereby did exactly what the text of the Erratum provides for (“and reaching the River Sirba at Bossebangou”³⁵²). That is most probably why this isolated criticism was not subsequently repeated by the Niger delegation, which, on this point, thereafter relied on the *Arrêté*’s clear text;
- the Niger delegation’s new position, adopted less than three months later, in July 1990, was promptly submitted to the relevant ministers of the two Parties which, in May 1991, simply rejected it and once again endorsed the interpretation made official in 1988.

³⁴⁷Ann. MBF 42 (*italics added*).

³⁴⁸See the Report of the fifth meeting of the Joint Technical Commission on Demarcation held on 13 and 14 November 1989, Ann. MBF 84; see also above, para. 1.71.

³⁴⁹See the report of the second ordinary meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, held at Ouagadougou from 23 to 28 July 1990, Ann. MBF II; Ann. MBF 87.

³⁵⁰See above, paras. 1.75 to 1.78, and para. 2.32.

³⁵¹See the record of the extraordinary meeting of the Joint Technical Commission on Demarcation, 15 May 1990, Ann. MBF 85, p. 1.

³⁵²See above, section 1, C.

4.53. In May 1991, as Burkina recalled earlier³⁵³, the ministers agreed a compromise which consisted of two distinct parts:

- the first part, relating to the present sector, retained the boundary as described in the *Arrêté*, and recalled the consensual interpretation given in 1988;
- the second part departed from the line agreed in 1988 in accordance with the *Arrêté* in the sector between the salient of the four villages and the River Mekrou, and replaced it with the line on the 1960 map, contrary to the provisions of the *Arrêté* which, unlike the line on the map, notably adopts a “straight line” between the intersection of the River Sirba and the Say parallel and the point situated at 1,200 metres west of the village of Tchenguiliba³⁵⁴.

4.54. The decision of May 1991 represented a compromise in so far as it retained the line of the 1927 *Arrêté* in its entirety in the first sector and partly abandoned it in the second³⁵⁵. Thus, in respect of the first sector (the one at issue here) it was drafted in a declaratory manner (“the frontier consists of a series of straight lines”), whilst for the second it was drafted in a constitutive mode (“From the River Sirba at Bossébangou to the River Mekrou, it was agreed to adopt the frontier line as shown on the IGN/France map, 1960 edition). This difference is justified: in the first instance, it was necessary only to recall the interpretation of the line which the two Parties had considered in 1987 as binding between them (and which has never ceased to be so); in the second instance, this line was being set aside in favour of another. This second decision does not affect the interpretation of the 1927 *Arrêté*, as it in fact sought not to apply part of it³⁵⁶. The first decision, on the other hand, is fully binding on the Parties to the present proceedings, since it adopts a consensual interpretation of the *Arrêté* which constitutes the frontier title³⁵⁷.

4.55. The interpretation of the amended *Arrêté* adopted by mutual agreement by the competent ministers of the two Parties in this sector of the frontier confirmed the consensual interpretation that had been adopted in 1988: Burkina and Niger once again recognized that the 1927 *Arrêté* delimited their frontier with two straight lines: “1. From the Tong-Tong astronomic marker to the River Sirba at Bossebangou, passing through the Tao astronomic marker, the frontier shall consist of a series of straight lines.”³⁵⁸

4.56. As the Minister for Territorial Administration of Burkina wrote in his ministerial council report of 2 July 1991³⁵⁹, he and his counterpart thus decided to confirm the consensual line of 1988:

“1. Part of the frontier from the Tong-Tong astronomic marker to the River Sirba at Bossébangou

³⁵³See above, Chapter I, Section 2, para. 1.79.

³⁵⁴See below, Sec. 3, paras. 4.146-4.151.

³⁵⁵See above, Chap. I, paras. 1.79-1.80.

³⁵⁶Moreover, the political solution envisaged in May 1991 to restart demarcation work was later rejected by Niger (see above, Chap. II, Sec. 2, para. 2.32).

³⁵⁷See above, Chap. II, paras. 2.36 *et seq.*

³⁵⁸Joint Communiqué on the Ministerial consultative and working meeting between Niger and Burkina, held on 14 and 15 May 1991 in Ouagadougou, Ann. MBF 89.

³⁵⁹Ministerial Council Report dated 2 July 1991, by the Minister for Territorial Administration of Burkina, Ann. MBF 90.

This part of the frontier consists of two straight lines from the Tong-Tong astronomic marker to the Tao astronomic marker and from the latter to the River Sirba at Bossébangou. (*As initially agreed*).³⁶⁰,

that is to say, as it had been agreed as part of the consensual line of 1988.

4.57. Since then, the Niger delegation has once again called into question this (doubly) consensual interpretation³⁶¹, which explains why the ensuing dispute has been submitted to the Court. However, the Niger delegation did not have the power to challenge an interpretation that is fully binding on the State of Niger. That interpretation thus continues to be binding between the Parties.

D. The course of the frontier as two straight lines corresponds to the practice followed in the field of boundary delimitation

4.58. The interpretation resulting from the terms of the text of the 1927 *Arrêté*, and which was officially endorsed by the two Parties in 1988 and again in 1991, is corroborated in every respect by examining boundary delimitation practice. This shows that when a text delimiting a boundary designates points without specifying that they are connected by a natural feature or by an artificial line of a specific kind, that text is interpreted as connecting the points in question by a series of straight lines. This same boundary practice also confirms that reference to a “turn” in a delimitation text does not designate an artificial line that is not straight; it refers on the contrary to the existence of a turning point between two artificial lines which, in the absence of any indication to the contrary, are straight lines. This twofold conclusion can be deduced from jurisprudence relating to both land and maritime delimitation.

4.59. In the case of the *Frontier Dispute (Burkina/Mali)*, for example, the Chamber of the Court had to interpret and apply colonial texts which, in several places, used the verb “turn” [*s’infléchir* in French]. At no point in its Judgment of 22 December 1986 did the Chamber posit that the use of this verb referred to any course other than one consisting of straight lines. On the contrary, consultation of the line adopted by the Court confirms that, when the verb “turn” is used, the frontier simply changes direction. The Court at times even equates “turn” and “straight line” in the operative part of its Judgment:

“179. For these reasons, The Chamber

Unanimously,

Decides

A. That the frontier line between Burkina Faso and the Republic of Mali in the disputed area, as defined in the Special Agreement concluded on 16 September 1983 between those two States, is as follows:

.....

³⁶⁰*Ibid.* (italics added).

³⁶¹Report of the 3rd ordinary session of the Joint Technical Commission on Demarcation of the Frontier held in Niamey from 2-4 November 1994, Ann. MBF 91, p. 3; Report 18 to 21 July 2001 of the Joint Technical Commission on Demarcation, p. 5, Ann. MBF 94; Report of the 5th ordinary session of the Joint Technical Commission on Demarcation from 2-4 November 1994, Ann. MBF 97.

(2) At point B, the line *turns* eastwards and intersects the track connecting Dionouga and Diguel at approximately 7.5 kilometres from Dionouga at a point with the geographical co-ordinates 1° 54' 24" W and 14° 29' 20" N (point C).

.....

(6) From point H, the line follows the IGN line as far as the point with the geographical co-ordinates 0° 26' 35" W and 15° 05' 00" N (point I); from there it *turns* towards the south-east and continues *straight* as far as point J defined below.

.....

(8) At point K the line *turns* towards the north-east and continues *straight* as far as the point with the geographical co-ordinates 0° 14' 44" W and 15° 04' 42" N (point L), and, from that point, continues straight to a point with the geographical co-ordinates 0° 14' 39" E and 14° 54' 48" N (point M), situated approximately 3 kilometres to the north of the Kabia ford . . .”³⁶²

4.60. In the reasoning of its Judgment, the Court also expressed the idea that a turn [*infléchissement*] is not only not inconsistent with the choice of straight lines, but, on the contrary, in principle is indicative of such a choice, since it should be assumed that the colonial authorities adopted the least complex solution, which, according to the Chamber of the Court, is confirmed by colonial practice contemporary to the 1927 *Arrêté* (in particular the 1926 *Atlas des cercles*):

“Provided it observes the administrative appurtenance of the villages, a boundary may also follow a straight line or consist of a series of straight lines all running in the same general direction, with some minor deviations. The colonial maps of the period, for example, the 1926 *Atlas des cercles*, show clearly that the latter was the form most frequently taken by the cercle boundaries. It is also of relevance that the description given by the administrator of the cercle of Mopti of the subdivision boundary corresponding to the boundary contemplated in Order 2728 AP refers to a single line starting from the village of Yoro and subsequently ‘heading northeastward as far as the pool of Toussougou’. The Chamber concludes that in adding the detail that the line was to ‘leave’ to the cercle of Mopti the village of Yoro and the ‘four villages’, the Geographical Service of French West Africa did not intend the line to take a more complex form as a result.”³⁶³

4.61. The Court was again faced with the verb “turn” [*s’infléchir*] in the case of *Cameroon v. Nigeria*. Certain paragraphs of the Thomson-Marchand Declaration of 1929-1930 (from exactly the same era as that of the 1927 *Arrêté*) read thus:

“21. Thence [the frontier line] in a south-south-westerly direction [*Ensuite elle [la ligne frontalière s’infléchit au sud-sud-ouest]*], leaving the village of Dile on the British side, the village of Libam on the French side to the hill of Matakam.

22. Thence [still the same line, as in the 1927 *Arrêté*] running due west to a point to the south of the village of Wisik where it *turns* to the south on a line running along the watershed and passing by Mabas on the French side, after which it leaves

³⁶²Previously cited Judgment, pp. 649-650, para. 179 (italics added). In respect of the final stretch of the frontier, the Court found in favour of Burkina which had considered that “the IGN line veers slightly northward” and concluded that “this straight line must constitute the final segment of the line which it is required to draw” (*ibid.*, p. 648, para. 174).

³⁶³Previously cited Judgment, p. 624, para. 130 (italics added).

Wula on the English side running south and bounded by cultivated land to the east of the line of the watershed.”³⁶⁴

4.62. It is noteworthy here that the Thomson-Marchand Declaration describes a line which turns in a single direction, in exactly the same way as the 1927 *Arrêté* does, and does not deem the wording inconsistent with the fact that *this* line passes through several points and runs in several directions in turn (all towards the south), including along the line of a watershed.

4.63. In paragraph 179 of the same Judgment, the Court also chose to use the verb “turn” for the sole purpose of indicating the change in direction of the frontier line which, previously running in a west-north-west direction, bifurcates to the north and follows the course of the same river. According to the Court,

“From that point, the boundary follows the course of the River Mburi. It . . . takes a . . . course . . . west-north-west along a stretch where the river is also called the Maven or the Ntem. Then, some 2km further on, it *turns* to run due north where the River Mburi is also called the Manton or Ntem (see below, p. 396, sketch-map No. 10).”³⁶⁵

As in the 1927 *Arrêté*, the reference to turning has no other purpose here than to describe the change of direction undergone by one section of the frontier in relation to the next, and it is not intended to delimit the frontier as such. In this instance, the frontier follows the course of the River Mburi, whose orientation the Court describes by specifying that it turns “due north” at the end of this sector of the frontier.

4.64. Similarly, in paragraph 147 of its 2002 Judgment, the Court again cites the Thomson-Marchand Declaration, which reads as follows:

“38. Thence from this point along the line of the watershed between the River Baleo and the River Noumbero along the crest of the Tschapeu Range, to a point 2 kilometres to the north of Namberu, *turning* by this village, which is in Nigeria, going up a valley north-east and then south-east, which crosses the Banglang range about a kilometre to the south of the source of the Kordo River.”³⁶⁶

4.65. The Court considered that “the final part of paragraph 38 of the Thomson-Marchand Declaration pose[d] problems of interpretation”, not because the term “turning” was used, but on the grounds that it contained “fundamental errors of a material nature” regarding the fact that there was no valley “in the area running ‘north-east, then south-east’”³⁶⁷. The method used by the Court to establish the boundary up to the final point in this sector is very interesting to note. Faced with an uncertainty, the Court determined the arrival point of the boundary and then connected it, with a straight line, to the terminal point which it had succeeded in locating:

“The Court observes that, while the text of the Thomson-Marchand Declaration contains scant information enabling it to determine the precise course of the boundary in this sector, the description of it in the Logan-Le Brun procès-verbal is, however, far

³⁶⁴*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p. 369, para. 103 — italics added.*

³⁶⁵*Ibid.*, p. 395, para. 179 — italics added.

³⁶⁶*Ibid.*, p. 384, para. 147 — italics added.

³⁶⁷*Ibid.*, p. 384, para. 150.

more detailed and enables such a determination to be made. The Court . . . notes in particular that the Logan-Le Brun procès-verbal and paragraph 38 of the Thomson-Marchand Declaration appear to make the boundary in this sector terminate at the same point. Thus the Logan-Le Brun procès-verbal provides that the boundary runs to Mount Tapere, situated ‘about a mile to the south of the source of the Mayo Kordo’, whilst the English text of the Thomson-Marchand Declaration provides for the boundary to pass through a point ‘about a kilometre to the south of the source of the Kordo River’. The French text of paragraph 38 omits the phrase ‘to the south of’. The Court is bound moreover to note in this regard that the part of the boundary situated to the north of the source of the Nounberou, on which the Parties are in agreement, follows the boundary established by the Logan-Le Brun procès-verbal. The Court considers that it is the boundary line proposed by Nigeria which is to be preferred. That is the line which runs *most directly* to Hosere Tapere . . . indicated by the Logan-Le Brun procès-verbal as the terminal for this section of the boundary . . . The Court accordingly concludes that the final part of paragraph 38 of the Thomson-Marchand Declaration must be interpreted as providing for the boundary to follow the course of the River Nounberou as far as its source, and then from that point to run *in a straight line* as far as Hosere Tapere as identified by the Court (see below, p. 386, sketch-map No. 9).”³⁶⁸

4.66. The Judgment handed down on 11 September 1992 by the Chamber of the Court in the case of the Land, Island and Maritime Frontier Dispute between El Salvador and Honduras leads to the same conclusions. In respect of the “Third Sector — Eastern Sub-Sector”, the Chamber describes the “Frontier delimited in the Judgment” as follows:

“The boundary thus runs from the confluence of that *quebrada* with the river Sazalapa (point A) to the hill shown on the maps with a spot height of 875 metres (point B), and then *turns* southwards to the landmark described as the ‘crest of a hill that has an opening [*puerto*] through which passes the road that leads to the town of Gracias a Dios’. Of the several hills in the region, the most likely is, in the Chamber’s view, the one which El Salvador’s interpretation identifies with the Guampa hill (marked as point C on sketch-map No. C-4) From there the line, *inclining still more to the south*, runs through the triangulation point marked as La Canada (point D on sketch-map No. C-4), to the ridge joining . . . (point E on sketch-map No. C-4).”³⁶⁹

4.67. The situation is very similar here to that described in the 1927 *Arrêté*: the line, while turning towards the south, must pass through one point before reaching another point at which the line undergoes a more marked change in direction (“*inclining still more to the south*”). The Court connects these different points by straight lines, as can be seen on sketch-map No. C-4 on page 457 of the Court’s Reports.

4.68. In the operative part of the Judgment, points A, B, C and D of sketch-map No. C-4 become points H, I, J and K of the frontier. The Court defines the boundary line in this sector thus:

“and thence upstream along the middle of the river Sazalapa to the confluence of the *quebrada* Llano Negro with that river (point H on Map No. III annexed . . .); from there south-eastwards to the top of the hill (point I on Map No. III annexed . . .), and thence south-eastwards to the crest of the hill marked on the map as a spot height of

³⁶⁸*Ibid.*, p. 385, paras. 151-152 — italics added.

³⁶⁹*I.C.J. Reports 1992*, pp. 456-457, para. 156 — italics added.

1,017 metres (point J on Map No. III annexed . . .); from there the boundary, inclining still more to the south, runs through the triangulation point known as La Canada (point K on Map No. III annexed; co-ordinates . . .)”³⁷⁰.

4.69. Here the Court replaces “turns southwards” with “south-eastwards” and retains exactly the same line (the lines connecting points I to K on sketch-map No. III annexed to the Judgment are the same straight lines in sketch-map No. C-4). It follows that these two phrases are interchangeable and that in using them, the Chamber of the Court merely intends to show that the frontier, formed by a series of straight lines connecting defined points, changes direction.

4.70. This conclusion is fully borne out by the jurisprudence on maritime delimitation. International judges, and the principal judicial organ of the United Nations in particular, in fact commonly use the verb “turn” to describe a change in direction of a boundary formed of several straight lines. When, on the other hand, they describe a boundary that has a different form, they take care to provide a precise description so that it may be identified. This consistent practice confirms that, when used without any other description or clarification, the verb “turn” designates a turning point in a series of straight lines.

4.71. Again in the case of *Cameroon v. Nigeria*, the Court thus used the verb “turn” to define the course of the maritime frontier:

“from point G the delimitation line should directly join the equidistance line at a point with co-ordinates 8° 21' 0" longitude east and 4° 17' 00" latitude north, which will be called X. The boundary between the respective maritime areas of Cameroon and Nigeria will therefore continue beyond point G in a westward direction until it reaches point X at the above-mentioned co-ordinates. The boundary *will turn* at point X and continue southwards along the equidistance line.”³⁷¹

4.72. As evidenced by illustrative sketch-map No. 12 annexed to the Judgment³⁷², the line connecting points G and X, and the line running southwards from point X, the turning point, are straight lines.

4.73. The Court had already done the same the previous year in its Judgment in the *Qatar/Bahrain* case. In paragraph 222 of its Judgment of 16 March 2001, the Court decided as follows:

“Taking account of all of the foregoing, the Court decides that, from the point of intersection of the respective maritime limits of Saudi Arabia on the one hand and of Bahrain and Qatar on the other, which cannot be fixed, the boundary will follow a north-easterly direction, then immediately turn in an easterly direction, after which it will pass between Jazirat Hawar and Janan; it will subsequently *turn* to the north and pass between the Hawar Islands and the Qatar peninsula and continue in a northerly direction, leaving the low-tide elevation of Fasht Bu Thur, and Fasht al Azm, on the Bahraini side, and the low-tide elevations of Qita’a el Erge and Qit’at ash Shajarah on

³⁷⁰*Ibid.*, p. 612, para. 427.

³⁷¹Previously cited Judgment of 10 October 2002, p. 448, para. 307 — italics added.

³⁷²*Ibid.*, p. 449.

the Qatari side; finally it will pass between Qit’at Jaradah and Fasht ad Dibal, leaving Qit’at Jaradah on the Bahraini side and Fasht ad Dibal on the Qatari side.”³⁷³

This description is represented, on the sketch-map annexed to the Court’s Judgment for the purpose of illustrating the delimitation line adopted, by a series of straight lines connecting specified points³⁷⁴. In particular, the provision whereby the boundary will “immediately turn in an easterly direction” is illustrated by a turning point between two straight lines (the section connecting points 2 and 3 undergoes a change of direction in relation to the section connecting points 1 and 2). Similarly, the provision whereby the boundary “will subsequently turn to the north” is represented in the form of a turning point between the straight line connecting points 10 and 11 and the straight line connecting 9 and 10.

4.74. In the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, the Court once again used the term “*s’infléchir*” to designate a change in direction of a section of the boundary in relation to the preceding one. On this occasion, one of the sections (the one starting from the turning point) did not take the form of a straight line, which is precisely the reason why the Court on this occasion defined the precise form of this section:

“La ligne de délimitation doit commencer au point de départ fixé sur la bissectrice à 3 milles marins au large (...). A partir de ce point, elle suit la bissectrice jusqu’à ce qu’elle rejoigne la limite extérieure de la mer territoriale de 12 milles marins de Bobel Cay. Elle *s’infléchit* alors vers le sud pour suivre le pourtour de cette mer territoriale jusqu’à ce qu’elle rencontre (...)

.....

“The line of delimitation is to begin at the starting-point 3 nautical miles offshore on the bisector (...). From there it continues along the bisector until it reaches the outer limit of the 12-nautical-mile territorial sea of Bobel Cay. It then *traces this territorial sea round to the south* until it reaches (...)”³⁷⁵

4.75. The Court again used the verb “*s’infléchir*” to designate a change of direction (here of two straight lines, in the absence of any other clarification) in the case concerning the *Maritime Delimitation in the Black Sea* between Romania and Ukraine:

“Le segment initial de la ligne d’équidistance provisoire entre les côtes adjacentes de la Roumanie et de l’Ukraine est construit à partir des points de base constitués, pour la côte roumaine, par la base de la digue de Sulina et, pour la côte ukrainienne, par la pointe sud-est de l’île de Tsyganka. A partir d’un point situé à mi-distance de ces deux points de base, il se dirige vers le sud-est jusqu’au point A (...), où *son tracé s’infléchit* sous l’effet d’un point de base situé sur la péninsule de Sacaline, sur la côte roumaine. Au point A, la ligne d’équidistance change légèrement de direction pour se poursuivre jusqu’au point B (...), où *son tracé s’infléchit* sous l’effet du point de base situé sur le cap Tarkhankut, sur la côte opposée de l’Ukraine.

In its initial segment the provisional equidistance line between the Romanian and Ukrainian adjacent coasts is controlled by base points located on the landward end of the Sulina dyke on the Romanian coast and south-eastern tip of Tsyganka Island on

³⁷³ *I.C.J. Reports 2001*, p. 109, para. 222 — italics added.

³⁷⁴ *Ibid.*, p. 116, para. 251.

³⁷⁵ Judgment of 8 October 2007, *I.C.J. Reports 2007*, p. 759, para. 320 — italics added.

the Ukrainian coast. It runs in a south-easterly direction, from a point lying midway between these two base points, until Point A (...) where *it becomes affected* by a base point located on the Sacalin Peninsula on the Romanian coast. At Point A the equidistance line slightly changes direction and continues to Point B (...) *where it becomes affected* by the base point located on Cape Tarkhankut on Ukraine's opposite coasts."³⁷⁶

Further on, the Court summarizes this line by stating that it "*suit cette ligne jusqu'à ce que son tracé s'infléchisse sous l'effet de points de base situés sur les côtes de la Roumanie et de l'Ukraine qui se font face*" "follows that line [the equidistance line] until it becomes affected by base points [in the plural, since here the Court is describing the A-B and B-C segments at the same time] on the opposite coasts of Romania and Ukraine"³⁷⁷. And as is clearly apparent on sketch-maps No. 6 and 7 annexed to the Court's Judgment³⁷⁸, the segments connecting points A and B and B and C are, once again, straight lines³⁷⁹.

4.76. In view of this unequivocal practice, the 1927 *Arrêté* can only be interpreted as defining a course consisting of two successive straight lines connecting the three designated points through which it passes.

4.77. Moreover, that is precisely the interpretation of the 1927 *Arrêté* reached by the Court itself in its 1986 Judgment in the case between Burkina and Mali.

4.78. In that case, Mali claimed that Mount N'Gouma was to the east of the Kabia ford, and not to the north as claimed by Burkina. The Court ruled out that interpretation of the 1927 *Arrêté*, and, while not binding as such on Niger under the principle of *res judicata*, it nevertheless confirms the interpretation of the *Arrêté* to be adopted in this sector.

4.79. To dispose of Mali's argument, the Court held that the notion of turning used in the 1927 *Arrêté* did not describe the form of the inter-colonial boundary, but merely a change of direction between two straight lines at a precise point.

4.80. It is indeed on the basis of this interpretation

— that the Court was able to compare the angle of the turn at the Tong-Tong astronomic marker, which it deemed to be 155° and which it represented on an illustrative sketch-map showing the inter-colonial boundary following two straight lines³⁸⁰, with the angle (considered to be 90 degrees) of the change of direction the frontier would have undergone between the two sections

³⁷⁶Judgment of 3 February 2009, *I.C.J. Reports 2009*, pp. 111-112, para. 154.

³⁷⁷*Ibid.*, p. 128, para. 206.

³⁷⁸*Ibid.*, pp. 114-115.

³⁷⁹See also *ibid.*, pp. 130-131, para. 218 and sketch-maps No. 8 and 9, pp. 132-133.

³⁸⁰Sketch-map No. 6 on page 645 of the Court's *Reports* only gives a very diagrammatic representation of the boundary line between Burkina and Niger. The Court in fact draws a straight line between the Kabia ford and the Tong-Tong marker where the boundary passes through other intermediate points and terminates at the Tong-Tong marker by a straight line running first in a north-west south-east direction, and not north-south. Nevertheless, if a fictitious line is drawn from the tripoint with Mali to the Tong-Tong marker, then a straight line from there to the Tao marker, the degree of the general turn of the boundary from Tong-Tong roughly corresponds to that described by the Court in its 1986 Judgment.

connecting Mount N’Gouma to the Kabia ford, and Kabia ford to Mount Darouskoy (if, as Mali claimed, Mount N’Gouma was to the east of the Kabia ford);

— and that it consequently rejected Mali’s interpretation on the following grounds:

“if, as Mali suggests, one starts from the hypothesis that mount N’Gourna was to the east of the Kabia ford, any boundary which started from mount N’Gouma, passed through the ford, and then ran in the direction of mount Darouskoy (Arounskaye) would turn sharply — through something like 90 degrees^[381] — at the ford^[382], since mount Darouskoy lies south of the ford. The text of the Order of 31 August 1927 states that the boundary ‘then turns to the south-east’ in the neighbourhood of Tong-Tong, a turn which is much less sharp (approximately 155 degrees)^[383] than the supposed turn at the Kabia ford (see sketch-map No. 6 below). It is therefore difficult to see how the draftsman of the Order could have failed to mention that the Kabia ford was the position of such a marked turn^[384], if that had really been the case.”³⁸⁵

4.81. At no point in this passage of its 1986 Judgment does the Court hypothesize that the turn mentioned in the 1927 *Arrêté* at the Tong-Tong astronomic marker refers to anything other than a turning point between one straight line and another. On the contrary, the sketch-map drawn to illustrate its reasoning, and which is annexed at page 645 of its Judgment, clearly establishes that, in the mind of the Court, the turn indicated in the 1927 *Arrêté* constitutes a change of direction between one straight line and another. And rightly so, as this is the clearest and most obvious meaning of the 1927 *Arrêté*.

4.82. For all the above reasons, between the Tong-Tong marker and the village of Bossébangou, the frontier takes the following course:

- a straight line connecting the Tong-Tong astronomic marker (Lat.: 14° 24' 53.2" N; Long.: 0° 12' 51.7" E) to the Tao astronomic marker (Lat.: 14° 03' 04.7" N; Long.: 0° 22' 51.8" E) (WGS 84 ellipsoid);
- a straight line connecting the latter point with the right bank of the River Sirba at the point where it intersects with the straight line connecting the Tao astronomic marker and the village of Bossébangou (Lat.: 13° 21' 06.5" N; Long.: 1° 17' 11.0" E) (Clarke 1880 ellipsoid).

³⁸¹This clarification confirms that the turn designates a change of direction (here of 90 degrees) between two straight lines at a precise point.

³⁸²The turn thus occurs between two lines at a precise location (it marks a point between two straight lines according to the Court); it does not designate the general form of a line.

³⁸³Again, the turn designates here a change of direction at a precise point. That is why the Court can describe the turn as “sharp” — which would not make sense if the turn referred to the form of the boundary line between two points (if the turn describes only the form of the line, it is meaningless to state that it goes through a “sharp” turn; if the turn in a line is sharp, *it is necessarily in relation to another line*).

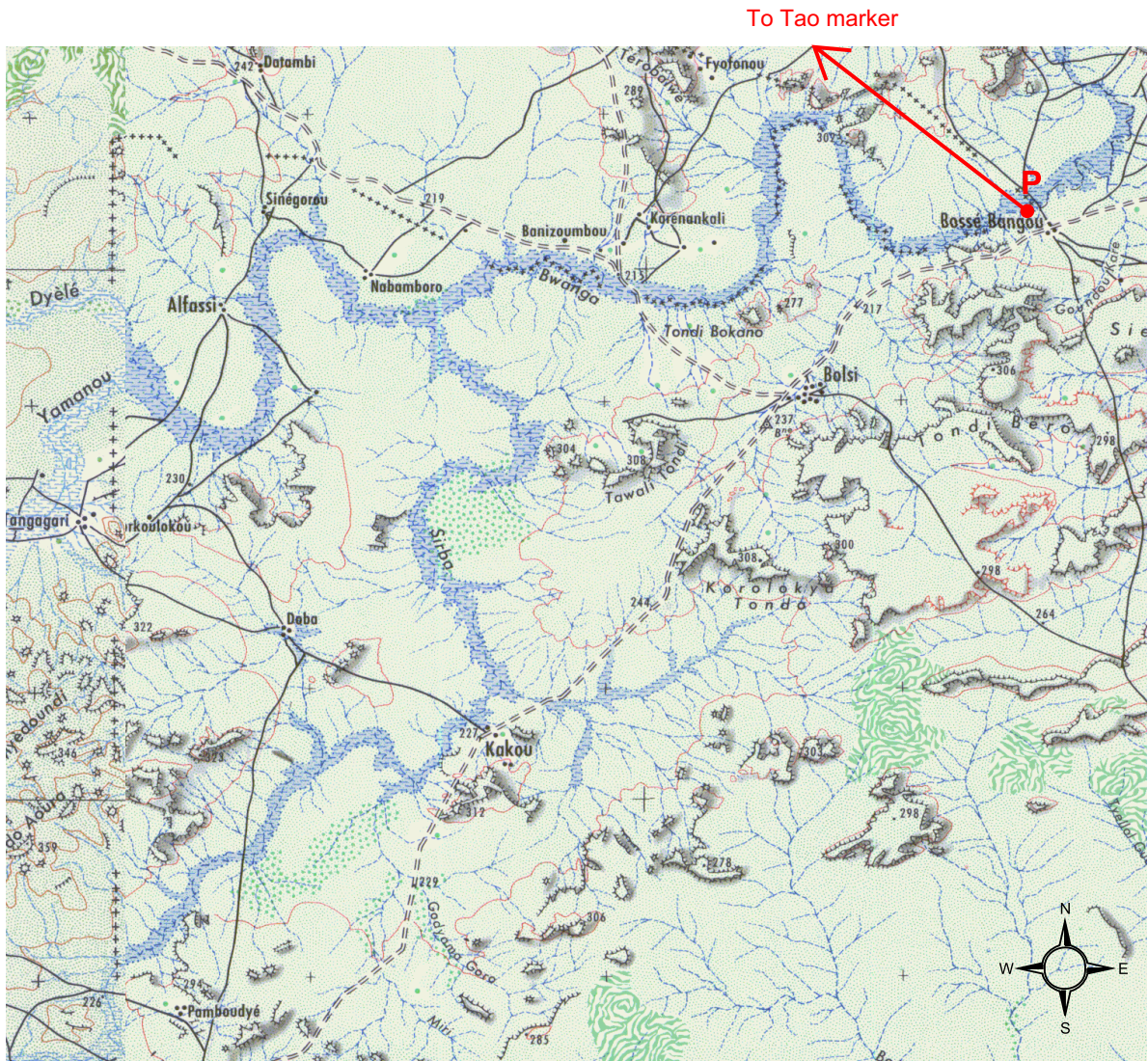
³⁸⁴Here the Court again equates turning with turning point.

³⁸⁵*I.C.J. Reports 1986*, p. 644, para. 170.

SECTION 2

THE COURSE OF THE FRONTIER FROM THE POINT WHERE IT REACHES THE RIVER SIRBA AT BOSSÉBANGOU AS FAR AS THE INTERSECTION OF THE SIRBA WITH THE SAY PARALLEL

Sketch-map No. 9 - Location of the point on the River Sirba at Bossébangou where the section of the frontier which starts at the Tao astronomical marker terminates, called point “P”



4.83. From the end-point of the segment of the frontier which descends from the north-west after passing through the Tao astronomic marker and “reach[es] the River Sirba at Bossébangou”, a point whose location is described in the previous section³⁸⁶ and which for convenience sake will be called “P” in the rest of this section (see sketch-map No. 9 — reproduced above and in Cartographic Annex 29), the frontier described by the Erratum of 5 October 1927 takes the following course:

“It almost immediately turns back up towards the north-west, leaving to Niger, on the left bank of that river, a salient which includes the villages of Alfassi, Kouro, Tokalan, and Tankouro; then, turning back to the south, it again cuts the Sirba at the level of the Say parallel.”

4.84. This description differs from that given in the original text of the *Arrêté* of 32 August 1927, which stated:

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

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

4.85. It is clear from a comparison of the two texts that the Erratum is more precise than the text it replaces. Thus, the Erratum:

- specifies that the salient of villages does not begin “from” Bossébangou, but that the course of the boundary creates this salient “almost immediately” after it reaches the River Sirba at Bossébangou; it also:
- defines the direction taken by this salient, and states that in order to form it the frontier runs “towards the north-west”; moreover, the Erratum:
- corrects the names of two villages in the salient: it is not Afassi but Alfassi, and not Takalan but Tokalan; it then
- specifies that after forming a salient leaving to Niger the four villages mentioned, the frontier *turns back to the south*; finally, it
- states that after turning back to the south, the frontier again cuts the Sirba at the level of the Say parallel, whereas the *Arrêté* of August 1927 mentioned an approximate point here.

4.86. The Erratum’s description of the frontier is thus far more precise than that of the original text of the *Arrêté* of August 1927. It is in the light of this fact that consideration should be given to the meaning to be ascribed to the terms of the Erratum (1), before describing the resulting line (2), and then noting that this line corresponds in every respect to the consensual line of 1988 (3).

³⁸⁶See above, paras. 4.17 to 4.24.

1. The description of the frontier

4.87. According to the description of the frontier in the Erratum, after reaching the River Sirba at Bossébangou (point P), the frontier:

- “almost immediately turns back up towards the north-west” (A);
- “leaving to Niger, on the left bank of that river, a salient which includes the villages of Alfassi, Kouro, Tokalan, and Tankouro” (B);
- “then, turning back to the south, it again cuts the Sirba at the level of the Say parallel” (C).

The meaning of each of these provisions requires clarification.

A. “almost immediately turns back up towards the north-west”

4.88. This description comprises three closely linked elements: from point P, the frontier “turns back up”; but it does not turn back immediately: it does so “almost immediately”; and, it turns back in an approximate direction, which is “towards the north-west”.

4.89. The first question to be determined in order to fully understand the meaning of this description concerns the course of the frontier between point P and the point from which the frontier “turns back up” (a). The second question to ask is: where is the point from which the frontier “turns back up” after following that course in order to form the beginning of the salient (b)? The third question concerns the meaning of the words “towards the north-west” (c).

(a) *The course of the frontier between point P and the point where it “turns back up” towards the north-west*

4.90. It is perfectly clear that the frontier includes a section between point P and the point from which it begins to “turn back up”. If that were not the case, i.e., if it were to begin turning back up immediately after it reached point P, in the terms of the Erratum the frontier should then “turn back on itself”: thus, given that it runs in a south-easterly direction before reaching this point, if it were to turn back up towards the north-west at this point, it would almost inevitably have to retrace its steps and in fact cancel out the last part of its course and never reach the River Sirba at Bossébangou.

4.91. This error was reproduced in the 1:1,000,000 sketch-map of the “New frontier between Upper Volta and Niger (according to the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927)”³⁸⁷, and the 1927 edition of the 1:1,000,000 road map of the colony of Upper Volta³⁸⁸. On this sketch-map and map, the first of which clearly states its intention to reproduce the course of the boundary as it results from the *Arrêté* of 31 August 1927 and its Erratum, the frontier is clearly seen to descend from the Tao astronomic marker in a straight line toward Bossébangou, but never reaches the River Sirba and instead turns south-south-west some fifteen kilometres to the north-west of the village of Bossébangou, and forms a bulge which starts to the north-east of Alfassi.

³⁸⁷Cartographic Annex MBF 6.

³⁸⁸Cartographic Annex MBF 5.

4.92. These representations of the boundary line, allegedly based on the description in the Erratum, are completely erroneous, as they deviate repeatedly from the description of the frontier in this sector given in the Erratum. Thus, according to the lines seen on this sketch-map and map:

- the frontier never reaches the River Sirba at Bossébangou, contrary to what is stated in the text of the Erratum;
- at no point does it “turn back up” in a north-westerly direction, whilst the text clearly states that it does so;
- it only cuts the River Sirba once, at the level of the Say parallel, whilst the text states that at this location the frontier “again” cuts the River Sirba, which necessarily means that it has already cut it once before;
- it does not turn back to the south to cut the River Sirba at the level of the Say parallel, contrary to what is stated in the text, but reaches this point after running in a south-westerly direction.

4.93. Notwithstanding the gross misinterpretations of the text of the *Arrêté* and its Erratum contained in the 1:1,000,000 sketch-map of the “New frontier between Upper Volta and Niger (according to the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927)”³⁸⁹, the Niger experts in the Joint Technical Commission on Demarcation attempted to use it in support of one of their arguments to reject the consensual line of 1988. At the extraordinary meeting of the Commission on 14 May 1990³⁹⁰, they thus maintained that this sketch-map should be considered to be more reliable than the Erratum, because, in their view:

“notwithstanding the precision of the Erratum in some places, at the level of Bossébangou it contains descriptions of the internal boundaries of Tillabéry and Say *cercles*. This situation is reflected on the map in question which differentiates between the frontiers between the two colonies and the boundaries of the *cercles*.”³⁹¹

4.94. This argument held, on the one hand, that the Erratum was quite simply wrong in that it confused the boundaries of the *cercles* with the boundaries of the colonies, and on the other hand, that the 1927 sketch-map restored the political reality by distinguishing between the boundaries of the *cercles* (in particular at the level of Bossébangou) and the inter-colonial boundary (at the level of the salient), and was therefore more reliable than the Erratum. In the view of the Niger experts at the time, the 1927 sketch-map was thus not to be considered as plotting the course described by the Erratum (since it is too blatantly inconsistent with it), but rather as correcting the alleged errors.

4.95. Such a position was of course untenable and, moreover, Niger soon abandoned it³⁹²:

- firstly, while the *Arrêté* of 31 August 1927 did effectively confuse the boundaries of the *cercles* with those of the colonies, that was precisely not the case with the Erratum, which was adopted with a view to describing *only* the inter-colonial boundary — without any reference to the *cercle* boundaries — and further clarifying its course; moreover, the text of the Erratum is unambiguous in this regard, since it begins with the following statement: “The boundaries of

³⁸⁹Cartographic Annex MBF 6.

³⁹⁰See above, para. 1.75.

³⁹¹Report of the extraordinary meeting of the Joint Technical Commission on Demarcation, 15 May 1990, Ann. MBF 85.

³⁹²See above, para. 1.77.

the Colonies of Niger and Upper Volta are determined as follows . . .”; it is thus not the boundaries of the *cercles* that it describes;

- secondly, if this argument were to be accepted, the 1927 sketch-map would be deemed to replace the 1927 *Arrêté* and its Erratum; the sketch-map would then be recognized as a territorial “title”, namely “a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights”³⁹³; yet legally this is impossible, since it is established that maps “cannot constitute” such a title, unless they “fall into the category of physical expressions of the will of the State or States concerned”³⁹⁴; this is not the case with the 1927 sketch-map which, moreover, “offers no information as to which official body compiled it or which administrative authority approved the line shown on it”³⁹⁵;
- finally, the Protocol of Agreement of 28 March 1987, which binds the Parties, establishes that the frontier is “as described in the *Arrêté* of 31 August 1927, as clarified by the Erratum of 5 October 1927”³⁹⁶, and not as described by the 1927 sketch-map.

4.96. Thus the frontier that should be retained is that described in the 1927 *Arrêté* and its Erratum, pursuant to Article 1 of the Protocol of Agreement of 28 March 1987. In accordance with that description, after reaching point P, the frontier does not retrace its steps, but “almost immediately” turns back up towards the north-west. That means — and it is key to understanding the course of the frontier — that it does not turn back up “immediately”. Thus there is necessarily a section of the frontier which does not “turn back up”, but runs between point P and the point where it “turns back up”, which for the sake of convenience shall be called point P1.

4.97. This statement of the obvious highlights another error in another argument put forward by the Niger experts during their discussions on the frontier, this time in July 1990. In the report of a meeting of the Joint Technical Commission on Demarcation held from 23 to 28 July 1990, Niger’s position, which was different to the one it held in May of the same year³⁹⁷, was recorded as follows:

“Although the Erratum specifies that the frontier line reaches the River Sirba at Bossébangou following a south-easterly direction, and then turns back in the opposite direction (north-west), which would eliminate the frontier line over that short stretch, Niger accepts that the line of the frontier reaches the River Sirba at Bossébangou and then turns back on itself at an angle of some kind, but only on the condition that it does not cut the loop of the River Sirba. The line must return to a point at which, turning south to cut the River Sirba again at the level of the Say parallel, it creates a salient . . .”³⁹⁸

4.98. This time, and contrary to the position it held in May 1990, Niger accepted that the frontier had to reach the River Sirba at Bossébangou. However, it also maintained that it should

³⁹³*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54.

³⁹⁴*Ibid.*

³⁹⁵*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 583, para. 57; the Court refers to this document as a “map” and not a sketch-map.

³⁹⁶Ann. MBF 73; on the Protocol of Agreement of 1987, see above, paras. 1.63 to 1.65.

³⁹⁷See above, para. 1.75.

³⁹⁸Report of the meeting of the Joint Technical Commission on Demarcation of the Frontier, held from 23 to 28 July 1990, 28 July 1990, Ann. MBF 87.

turn back immediately at this point, not retracing its steps but at an “angle of some kind”, on condition that it did not cut across the loops of the River Sirba.

4.99. This position was as untenable as the previous one, based as it was on a series of equally blatant errors. First, as Burkina has already pointed out, the frontier does not turn back “immediately” as Niger maintained, but “almost immediately”, which necessarily means that from point P, over a certain distance, it follows a course that does not “turn back up”; secondly, when the frontier does turn back up, it is not at an angle “of some kind”, but “towards the north-west”; lastly, the condition whereby the frontier should not cut across the loops of the River Sirba is based on speculation for which there is no basis in the text of the 1927 *Arrêté* or its Erratum.

4.100. While it is clear that the frontier described by the text does not turn back up “immediately”, the description in the 1927 *Arrêté* and its Erratum does not explicitly state which course should be followed between point P and point P1 where it begins to “turn back up” towards the north-west. However, the frontier cannot follow any course here other than that followed by the right bank of the River Sirba, from Bossébangou to its source.

4.101. Thus, while the text states that the frontier, coming from the north-west, “reaches the River Sirba” at Bossébangou, there is not the least indication that it “leaves” the River Sirba before it starts to “turn back up”. This must mean that the frontier follows the course of the river until it starts to “turn back up”³⁹⁹. The frontier thus also logically follows the right bank of the River Sirba. In this connection, Burkina has already pointed out above⁴⁰⁰ that the point where the frontier reaches the River Sirba at Bossébangou, point P, is situated on the right bank of the River Sirba. Consequently, as there is no indication that the frontier turns back on itself to reach the median line of the river, it must be understood that it necessarily stays on and follows the right bank up to the point where it again crosses the river to start “turning back up” towards the north-west.

4.102. This interpretation is confirmed twice in the text.

4.103. First, it is explicitly stated therein that the frontier, after reaching the point from which it begins to “turn back up”, produces a salient that includes part of the left bank of the River Sirba in Niger. This information suggests *a contrario* that before the point from which it “turns back up”, the frontier does not leave the left bank of the Sirba to Niger.

4.104. Secondly, since the frontier is described as “turning back up” “towards the north-west” at the end of the section between point P and point P1 (the point at which it begins to turn back up), it necessarily follows that this section, by contrast, runs generally in a “downward”

³⁹⁹Texts which describe frontiers frequently use the verb “reach” to mean that the frontier joins a pre-existing line that it is then to follow. Thus, among other examples, in the Treaty of Vienna of 9 June 1915 Article 66 on the boundaries of the Kingdom of the Netherlands states that the boundary “reaches the limits between the old departments of the Ourthe and the Roer; [and] then goes along these limits . . .” The arrangement of 12 July 1893 between Great Britain and France fixing the boundary between British and French possessions on the Gold Coast established the demarcation line between British and French possessions on the Gold Coast by stating, in Article 4, that the line “reaches the Volta at the spot where that river is intersected by the road from Bandagadi to Kirhindi. Thence it follows the thalweg of the Volta to its intersection by the 9th degree of north latitude” (*British and Foreign State Papers*, compiled by The Librarian and Keeper of the Papers, Foreign Office, vol. 85, London, 1899, H.M. Stationery Office, p. 31). Article 9 of the London Agreement of 11 March 1913 between Great Britain and Germany respecting the Settlement of the Frontier between Nigeria and the Cameroons, from Yola to the Sea, provides that the frontier “cross[es] the watershed to the source of the River Maquari (Mekwer), [and] follows the thalweg of that river”.

⁴⁰⁰See above, para. 4.21.

direction (towards the south) or at least in a “neutral” direction (to the west), since, if it did not, the frontier could not “turn back up” (to the north) when it reaches the end of this section, since it would already be “turning back up”. This downward or horizontal direction corresponds exactly to the general direction of the River Sirba as it was known to the cartographers in 1927, at least over the portion which follows its course upstream from Bossébangou⁴⁰¹.

4.105. It should finally be noted that this was also the logical interpretation formalized by the Parties when they adopted the “consensual line” of 1988⁴⁰². The line on the 1960 IGN 1:200,000 map, to be consulted should the description given by the *Arrêté* and its Erratum not suffice⁴⁰³, also shows a line that is consistent with this interpretation.

(b) *Point P1 from which the frontier begins to turn back up towards the north-west*

4.106. The second question concerns the location of point P1, from where the frontier, after following the course of the River Sirba upstream along its right bank, “turns back up” and begins to form the salient.

4.107. As it results from the Erratum, this point can be determined by a combination of the following three elements:

- the result of the frontier “turning back up” is to leave four villages to Niger: Alfassi, Kouro, Tokalan, Tankouro;
- this section of the frontier starting from point P1 on the River Sirba should run “towards the north-west”; and
- the frontier line turns back up “almost immediately” after it reaches the “Sirba at Bossébangou”, namely at point P.

4.108. It is immediately apparent that these three indications are consistent and complementary. The first indicates the reason why the frontier must “turn back up”: so that the four villages are in Niger; the second indicates how the line can comply with the result sought (to leave the four villages to Niger). Thus, for it to say that the frontier line runs “towards the north-west” from the point where it changes direction on the River Sirba, means that it must be sufficiently directed towards the north-west to leave the villages to Niger, given the location of the point on the right bank of the River Sirba from which the frontier turns back. It is clear that the frontier will have to turn back even further to the north as it approaches Alfassi. The third indication also adopts this manner of approximate description, when it uses the words “almost immediately”: this is not a sign of chronic indecision, but, on the contrary, ensures that the frontier turns back up soon enough, but not too soon, to enable the villages to be included in the territory of Niger, by directing the beginning of the salient towards the north-west.

⁴⁰¹Map No. 60, Say *cercle*, from the *Atlas des cercles* of FWA, fascicle IV, Upper Volta, represents the course of the River Sirba from Bossébangou as running in a south-westerly and thus “downward” direction; Cartographic Annex MBF 4.

⁴⁰²The map representing the consensual line is reproduced in Cartographic Annex MBF 15.

⁴⁰³The 1960 IGN 1:200,000 map which adopts this line is reproduced in Cartographic Annex MBF 11.

(c) “leaving to Niger, on the left bank of that river, a salient which includes the villages of Alfassi, Kouro, Tokalan, and Tankouro”

4.109. The text of the *Arrêté* of 31 August 1927 stated that the salient includes four villages, but did not give any indication as to the shape the salient should take. It was thus very vague: by simply stating the result expected of the frontier line without giving any information about the said line, it left many options open.

4.110. The text of the Erratum takes a very different approach, and indicates the direction of the line, not only in respect of the beginning of the salient (here the frontier runs “towards the north-west”), but also in respect of the section which forms the west side of the salient, as, after running towards the north-west, the frontier line turns back to the south, following a course from north to south and passing through a precise point, which is the intersection of the River Sirba with the Say parallel.

4.111. Accordingly, the Niger salient is clearly bounded, to the west, by the line running north from the intersection of the River Sirba with the Say parallel and, to the north-east, by the line turning back up from the River Sirba to the north-west.

(d) “then, turning back to the south, it again cuts the Sirba at the level of the Say parallel”

4.112. While the text of the *Arrêté* of 31 August 1927 gave no indication as to the course of the frontier between what constitutes the salient and the starting point of the following section, which was described as “starting approximately from the Sirba at the level of the Say parallel”, the Erratum provides two key clarifications:

- after turning “towards the north-west” from point P1 on the River Sirba, leaving the four villages on the left bank of the Sirba on the Niger side, the line “turns back” to the south;
- turning back to the south, it again cuts the River Sirba at the level of the Say parallel.

4.113. These clarifications are invaluable, as they give two defining geographical descriptions.

4.114. Firstly, the point of arrival of the section of the frontier described here by the Erratum, which is fixed at the intersection of the Say parallel with the River Sirba, cannot be considered as being fixed “approximately”, as indicated in the 31 August 1927 version of the *Arrêté*: in contrast to the latter, the Erratum on the contrary describes that point as being precisely where the line arriving from the north “cuts the Sirba at the level of the Say parallel”; it is certainly possible to locate this geographical point, since the location of Say is known⁴⁰⁴.

4.115. Niger of course claimed the opposite in July 1990 and maintained that “the expression, ‘at the level of the Say parallel’ was merely indicative”⁴⁰⁵. Their argument was that according to the indications given for the salient, the frontier had to deviate to the west to include

⁴⁰⁴The co-ordinates of Say are: Lat. 13° 06' 11" N; Long. 2° 21' 07" E (1880 Clarke). The Say parallel thus runs along latitude 13° 06' 11" N.

⁴⁰⁵Report of the meeting of the Joint Technical Commission on Demarcation of the Frontier, held from 23 to 28 July 1990, 28 July 1990, Ann. MBF 87.

the village of Takatami, which Niger considered to be Takalan, so that it was then impossible for the frontier, “turning back to the south”, to cross the River Sirba at the level of the Say parallel. This southward-running line, descending from a point too far to the west, would in fact never cross the River Sirba. More specifically, according to Niger:

“The field survey mission has already identified the sites of Alfassi, Kouro [, Takalan] and Tankouro (see the Report and the June 1990 Mission Report). In view of a comparison between the old and new cartographic documents, and on the basis of all the physical details noted, the Takalan site corresponds to the exact location of the current village of Takatami. The frontier line, in creating the salient, cannot cut the Sirba at its exact intersection with the Say parallel and at the same time encompass the four villages. This shows that the expression, ‘at the level of the Say parallel’ was merely indicative.”⁴⁰⁶

4.116. This claim is erroneous on at least three counts.

4.117. First of all, it is clearly untrue that the reference in the Erratum to the geographical point corresponding to the intersection of the River Sirba with the Say parallel was intended to be “indicative”; if that had been the author’s intention, he would have used the far less precise phrase in the August *Arrêté*, which does indeed mention a point “approximately” where the Sirba meets the Say parallel. That was precisely not the case: the phrase used in the Erratum is anything but vague, and on the contrary is intended to be indisputable.

4.118. Moreover, Niger’s argument is not in the least convincing when it further maintains, on the basis of speculation about the village of Tokalan, of which there is no trace today, that the Erratum contains an error which should be corrected by completely ignoring one of the clearest reference points that it gives, namely the point corresponding to the intersection of the Sirba River with the Say parallel. In interpreting the text of the Erratum, there is no room for speculation about a clearly identifiable and undisputed toponym: in the event of doubt as to the meaning of one toponym amongst others, it should be presumed that if the other — clear and undisputed — indications are followed and that those indications enable the frontier to be drawn effectively, any indications that cannot be verified should also be deemed correct. This is, moreover, the approach taken by the Chamber of the Court in the case of the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras:

“The Chamber considers that it is impossible to reconcile all the landmarks, distances and directions given in the various 18th century surveys in this region: the most that can be achieved is a line which harmonizes with such features as are identifiable with a high degree of probability, corresponds more or less to the recorded distances, and does not leave any major discrepancy unexplained.”⁴⁰⁷

4.119. Finally, the claim that the site of the lost village of Tokalan corresponds to the present-day village of Takatami is completely unfounded. The topographic sub-committee’s report on the mission from 5 to 12 June 1990 to identify the sites of Alfassi, Kouri, Takalan (Tokalan), Tankouro and Kogori, on which Niger’s argument was based, states only that “[t]he individuals questioned did not know of a village by that name, but were familiar with a village called Takatami

⁴⁰⁶Report of the second ordinary session Joint Technical Commission on Demarcation, 28 July 1990, Ann. MBF 87.

⁴⁰⁷Judgment of 11 September 1992, *I.C. J. Reports 1992*, p. 456, para. 155.

beside the River Faga”⁴⁰⁸. In no way does this demonstrate — rather it disproves — that Tokalan and Takatami are one and the same village. Moreover, eleven years later, the report of the fourth ordinary session of the Joint Technical Commission on Demarcation, meeting in Ouagadougou from 18 to 20 July 2001, noted “the failure to identify the villages referred to in the Erratum” and recommended conducting a further field survey mission⁴⁰⁹. Above all, it is simply not possible to equate the village of Takatami with the village of Tokalan, as, for one thing, Takatami already existed in 1927 (it could therefore not be identified as being the village of Tokalan at the same time), and, secondly, this village was obviously considered to be part of the colony of Upper Volta, since it appears on the list of villages belonging to that colony, reproduced in the *General List of Localities of French West Africa*⁴¹⁰. Thus Takatami has clearly never been considered to be in Niger.

4.120. The second provision, whereby the frontier “turns back to the south” and crosses the River Sirba at the level of the Say parallel, describes with certainty the course of the frontier from the end of the section which “turns back up” towards the north-west after following the right bank of the River Sirba. From this endpoint, which is logically to the north-west of Alfassi, the frontier follows the line that runs from north to south and passes through the point of intersection of the River Sirba and the Say parallel.

4.121. It is important to note that the provision whereby the frontier “turns back to the south” is very precise in two respects.

4.122. Firstly, it means that the direction taken by the frontier at this spot is defined precisely. Otherwise, the text would have stated that the frontier turns back “towards” the south and not “to” the south. This is clearly the alternative used elsewhere in the text, for example where it states that after the Tong-Tong astronomic marker the line turns “towards the south-east”, or again where it states that after reaching the River Sirba at Bossébangou the frontier turns back up “towards the north-west”. That is not the language used here, where the fact that the word “towards” is not used means, in contrast, that the text intends to indicate a precisely defined southerly direction, and not an approximate one.

4.123. It also means that over this stretch of the frontier the line runs due south, and not in any other direction between south-west and south-east, such as south-south-east or south-south-west. It is due south and no other direction. Otherwise, if the direction were not exactly to the south, the text of the Erratum would have made that clear, as it does for the following portion of the frontier, for example, when it states that it follows “an east-south-east direction”.

4.124. This dual precision is very useful, in that it enables a shape to be given to the salient, so that its western part can be marked out, and a line to be established which is perfectly consistent with the description given by the Erratum: while the four villages could not all be located because some had disappeared, it is certain that they must all, by definition, lie to the east of the north-south line which passes through the intersection of the Say parallel and the River Sirba.

⁴⁰⁸Report of the mission of the Topographical Sub-Commission from 5 to 12 June 1990, Ann. MBF 86.

⁴⁰⁹Report of the fourth ordinary session of the Joint Technical Commission on Demarcation, 18 to 20 July 2001, Ann. MBF 94.

⁴¹⁰*General List of Localities of French West Africa*, Upper Volta, fascicle IV, 1927, Ann. MBF 27, p. 54.

2. The course of the frontier

4.125. The course of the frontier between point P and the intersection of the Say parallel with the River Sirba can be clarified in the light of the description of the frontier just presented. It is apparent that this line is subdivided into three sections:

- the first section follows the course of the River Sirba upstream along its right bank from point P, which corresponds to the River Sirba at Bossébangou, as far as the point from which the second section begins, point “P1”;
- the second section departs from point P1 on the right bank of the River Sirba, and turns back up towards the north-west, in such a way as to leave the four villages on the Niger side, as far as a point which will be called “P2”;
- a third section departs from point P2 and descends in a straight line to the south until it meets the intersection of the River Sirba with the Say parallel, a point which will be called “P3”⁴¹¹.

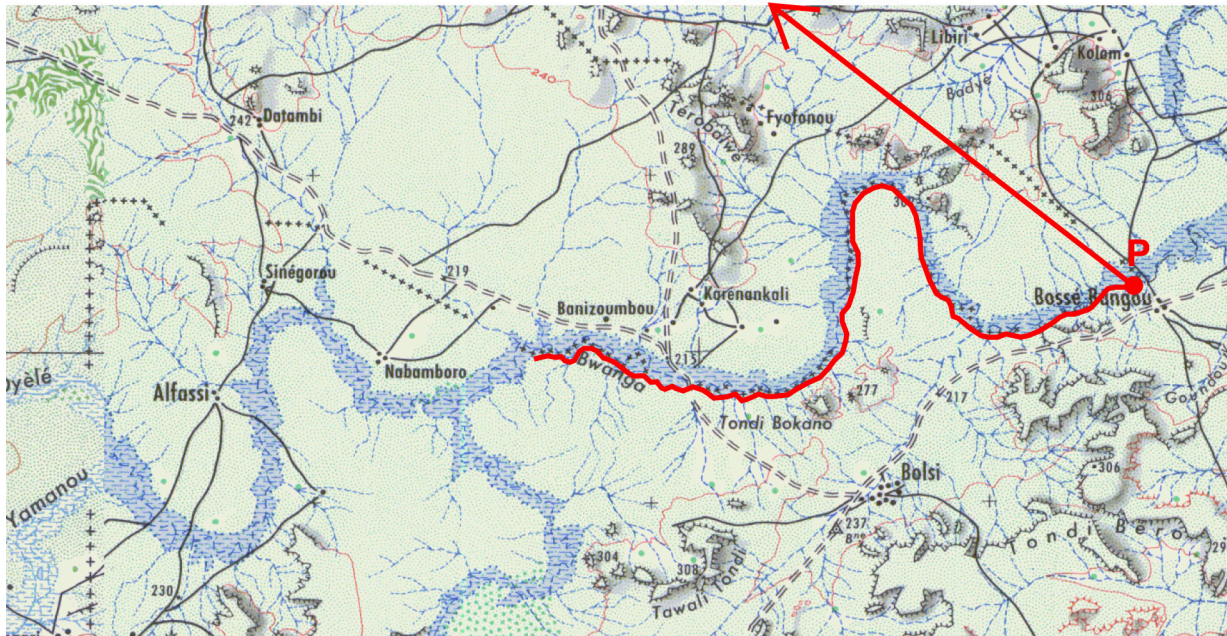
4.126. The first section is extremely simple to draw, as it follows the course of the right bank of the River Sirba, from point P (Lat.: 13° 21' 06.5" N; Long. 1° 17' 11.0" E, Clarke 1880), which corresponds to the “Sirba at Bossébangou”, as far as point P1, whose co-ordinates will be justified below. Sketch-map No. 10, reproduced below and at Cartographic Annex 30, shows this first section, though for the time being it does not show point P1.

⁴¹¹In the remaining description of the line, it will thus be considered that:

- the point where the River Sirba reaches Bossébangou is point P;
- the point from which the frontier “turns back up” towards the north-west is point P1;
- the endpoint of the section of the frontier which “turns back up” towards the north-west is point P2;
and
- the point of intersection between the River Sirba and the Say parallel is point P3.

Sketch-map No. 10 - Section of the frontier following the course of the River Sirba upstream along its right bank from point P as far as the point from which the frontier turns back up towards the north-west, leaving the four villages on the Niger side, called point P1

To Tao marker



4.127. The second section, from point P1 to point P2, can only be clarified by referring to the 1960 IGN map, as it is not possible to establish one specific point P1 based on the description of the frontier in the *Arrêté* and its Erratum. It is in fact perfectly clear that there are a number of potential point P1s on the right bank of the River Sirba which fit the description of the frontier in the Erratum. Point P1 needs only to be placed in such way that the section that turns back up towards the north-west from that point passes to the north of Alfassi, leaving that village to Niger. In this respect, it is important to note that the frontier is not, in any event, meant to go any further north than necessary to leave Alfassi to the south, as the three villages cited after Alfassi in the Erratum are without question to the south of Alfassi. This is particularly apparent on a map from 1926 which shows (very approximately) three of the four villages⁴¹², and there is not a shred of evidence in the records that might lead to believe otherwise. In any event, none of the proposed frontier lines in this area suggests that there is a village to the north of Alfassi in the salient, neither the — erroneous — line shown on the 1:1,000,000-scale sketch-map of the “New frontier between Upper Volta and Niger (according to the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927)”⁴¹³, nor that on 1960 IGN map; and no different solution can be found in the consensual line of 1988⁴¹⁴.

4.128. Not only can several points be retained for point P1, but the section which starts from that point could take several directions and several forms, given that, in order for this section to be consistent with the description in the Erratum, it suffices that it both passes to the north of Alfassi and runs generally “towards the north-west”.

4.129. The variety of options offered here by the description in the Erratum does not preclude the possibility of determining with certainty both point P1 and the course of the section between points P1 and P2. Indeed, it was with a view to resolving such situations that the Parties undertook to apply the method agreed in Article 2 of the 1987 Protocol of Agreement, which provides:

“Should the *Arrêté* and Erratum not suffice, the course shall be that shown on the 1:200,000-scale map of the *Institut Géographique National de France*, 1960 edition, and/or any other relevant document accepted by joint agreement of the Parties.”

4.130. Since it is clear that the *Arrêté* and its Erratum do not suffice here to precisely determine the course of the boundary for the purposes of marking it out, the line shown on the 1960 IGN map should be referred to.

4.131. According to that map, point P1 on the right bank of the River Sirba, as shown on sketch-map No. 11 below and reproduced in Cartographic Annex 31, has the following co-ordinates:

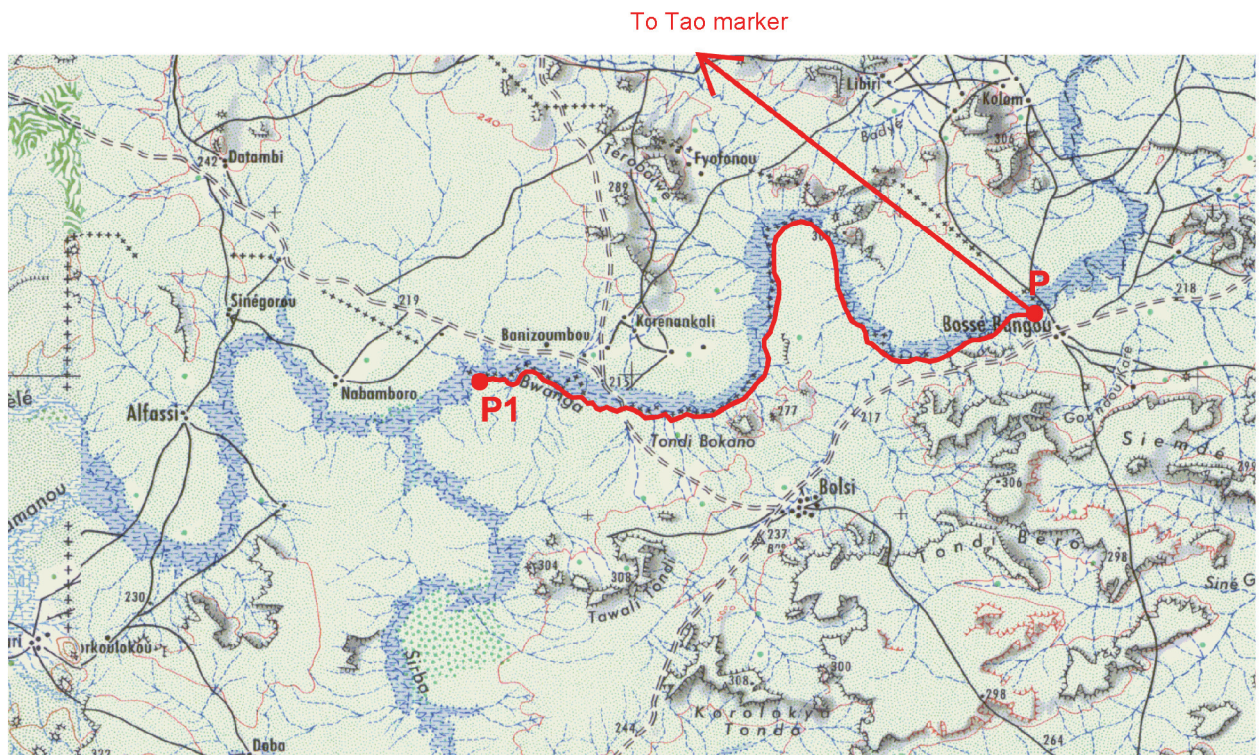
Lat.: 13° 19' 53.5" N; Long. 1° 07' 20.4" E (Clarke 1880 ellipsoid).

⁴¹²On map No. 60, Say *cercle*, from the *Atlas des cercles* of FWA, fascicule IV, Upper Volta, Kouro and Takalan are located well to the south of Alfassi; see Cartographic Annex MBF 4.

⁴¹³Cartographic Annex MBF 6.

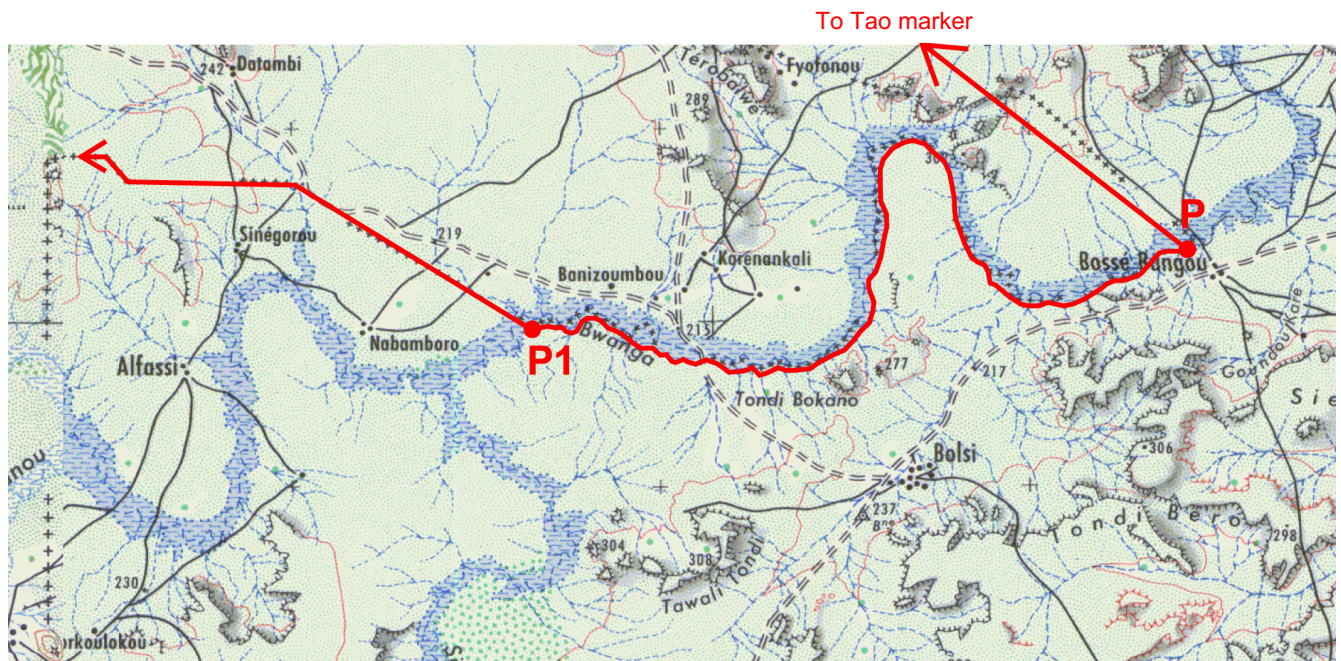
⁴¹⁴See Cartographic Annexes MBF 15 and 36.

Sketch-map No. 11 - Location of point P1



4.132. From this point P1, the frontier follows the course shown on the IGN France 1:200,000-scale map, 1960 edition; it heads in a north-north-west direction, then runs towards the west over a short distance, before turning back up again to the north-west over a short distance; then, returning to the west, it meets the north-south line that passes through the intersection of the River Sirba with the Say parallel. Sketch-map No. 12 reproduced below and in Cartographic Annex 32, illustrates this line.

Sketch-map No. 12 - Stretch of the frontier showing the section turning back up towards the north-west from point P1, leaving the four villages on the Niger side, as far as the point where it descends in a straight line to the south



4.133. The third section consists of a north-south line connecting the end of the previous section and point P3, which corresponds to the intersection of the River Sirba with the Say parallel.

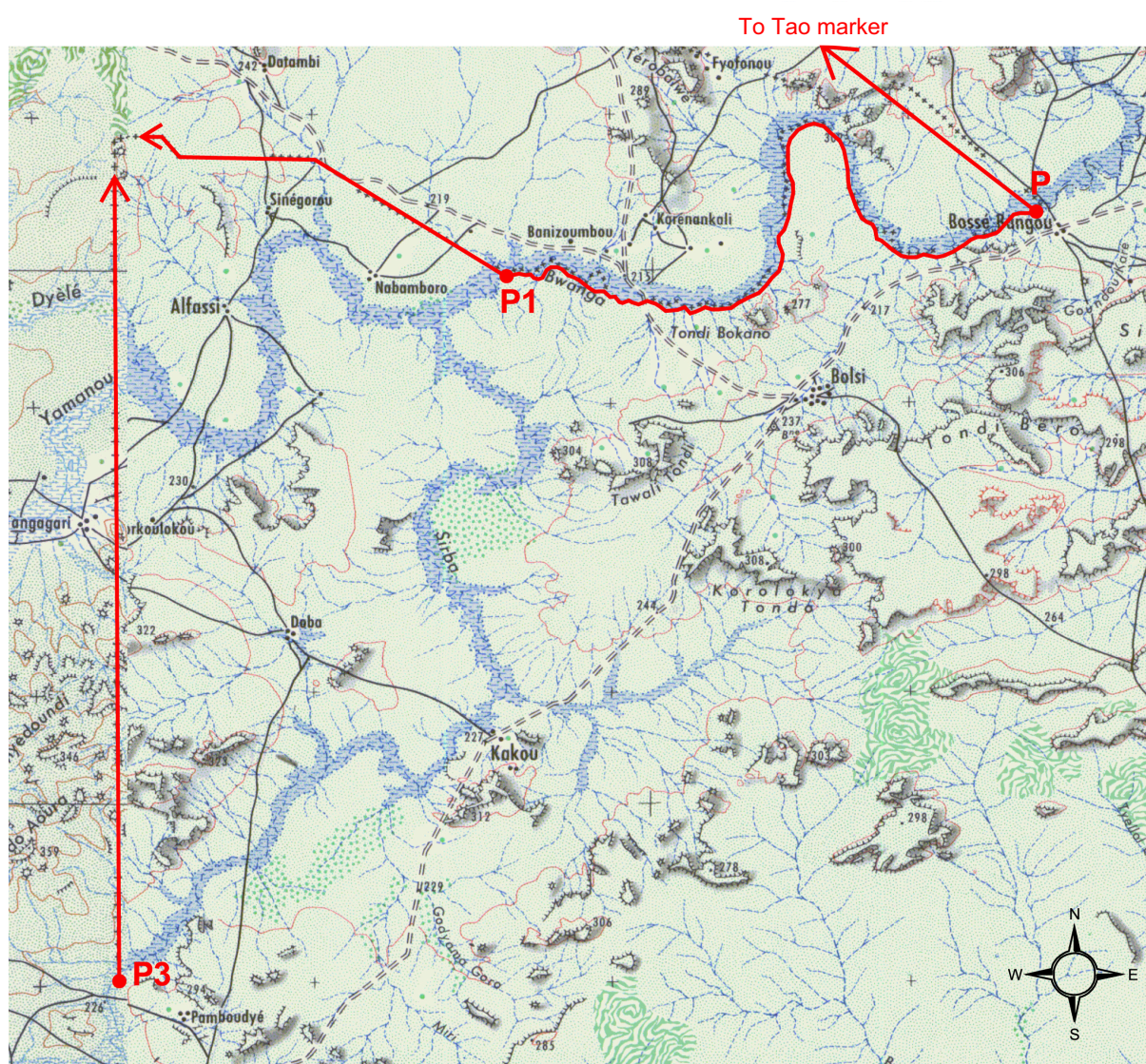
4.134. The position of this point P3 will obviously depend on whether it is fixed at the intersection of the Say parallel with the River Sirba's right bank, its left bank, or its median line. The text of the Erratum nevertheless provides a crucial piece of information which fixes this point at the intersection of the Say parallel with the right bank of the Sirba. Thus the Erratum states that, turning back to the south, the frontier "again cuts the Sirba at the level of the Say parallel". The frontier "cuts" the River Sirba, in other words it crosses it, going from the left bank — given its general west-east direction, and ending on the right bank, at the spot where it meets the Say parallel.

4.135. Point P3 thus defined has the following co-ordinates:

Lat.: 13° 06' 10.75" N; Long. 0° 59' 40.0" E (Clarke 1880 ellipsoid).

4.136. Point P2 can then easily be determined since it is situated at the intersection of the section that departs from point P1 and turns back up towards the north-west, following the course plotted on the 1960 IGN France 1:200,000-scale map, with the line that departs from point P3 and turns back due north, as illustrated in sketch-map No. 13 below, also reproduced in Cartographic Annex 33.

Sketch-map No. 13 - Line from the intersection of the River Sirba with the Say parallel, called point P3, turning back due north

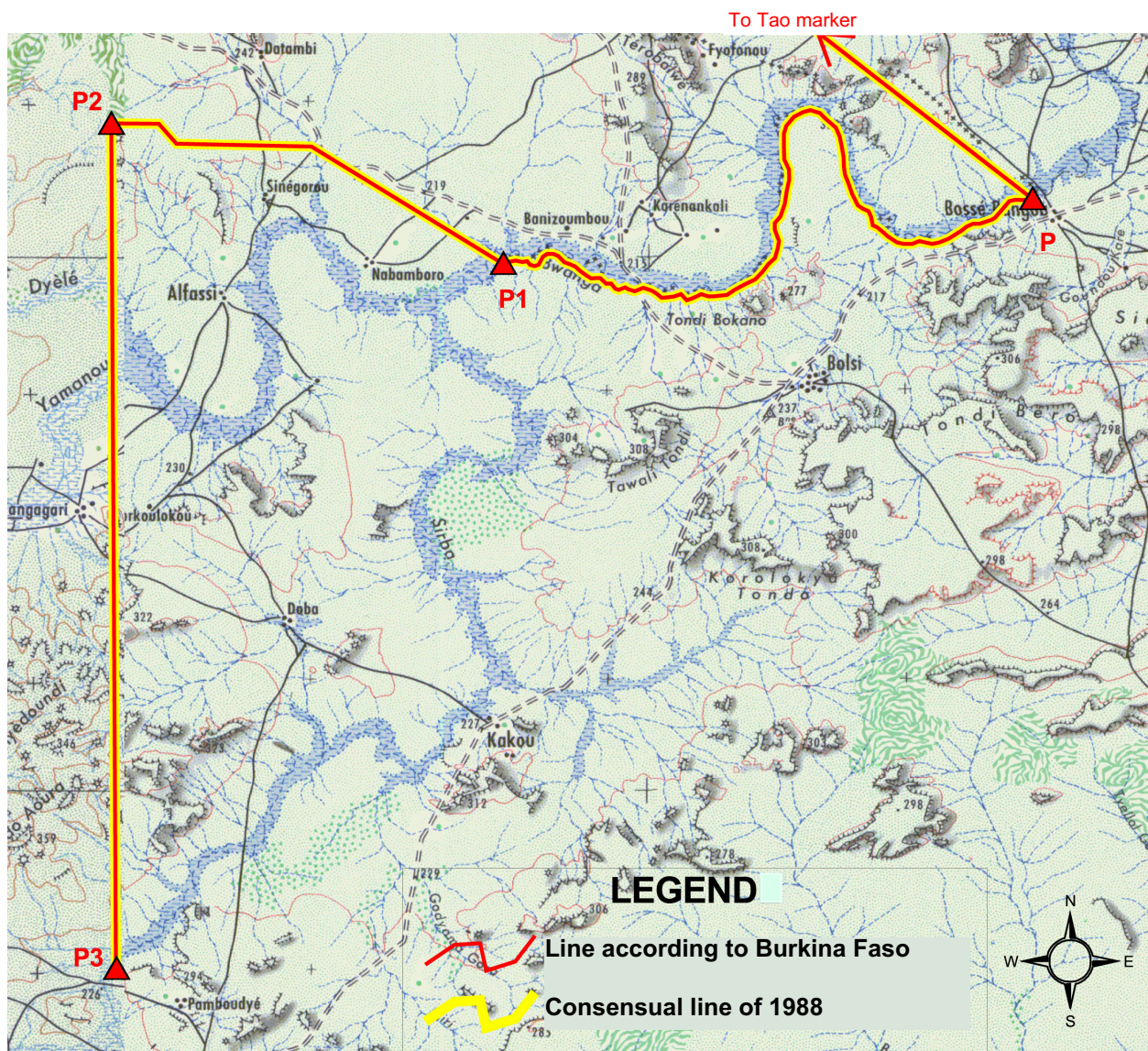


4.137. The co-ordinates of point P2 are:

Lat.: 13° 22' 30.05" N; Long. 0° 59' 40.0" E (Clarke 1880 ellipsoid).

The course of the frontier described in the *Arrêté* and its Erratum between points P and P3 is thus as shown on sketch-map No. 14 below (also reproduced in Cartographic Annex 34). Here, this line is exactly the same as the consensual line of 1988.

Sketch-map No. 14 - Course of the frontier from the point where it reaches the River Sirba at Bossébangou as far as the intersection of the River Sirba with the Say parallel



3. The line described in the Erratum and the consensual line of 1988 are identical

4.138. It should be recalled that the consensual line was mutually agreed in 1988 by the technical sub-committee of the Joint Technical Commission on Demarcation of the Frontier, which consisted of highly qualified field experts led by Mr. Waziri, national Director of Topography of Niger, and Mr. Lohouara, Director of Territorial Cartography of Burkina, who was acting as a delegate of the Director General of the Geographical Institute of Burkina. This team conducted a survey of the Niger-Burkina frontier in 1988, which it then recorded in a report on completion of the survey of the proposed demarcation of the Niger-Burkina frontier, dated 28 September 1988⁴¹⁵.

4.139. This work was considered to be highly conclusive:

“Apart from that single point (Tokébangou), the technical experts are unanimous in respect of the map interpretation and the field survey of the frontier line as defined in the basic documents cited in the Agreement signed at Ouagadougou on 29 March 1987.”⁴¹⁶

4.140. The experts were thus “unanimous” in considering that they had accurately located the various geographical reference points which were mentioned in the *Arrêté* of 31 August 1927, as clarified by its Erratum, and were needed to determine the course of the frontier, apart from one: the Tokébangou point. The fact that they were in complete agreement was confirmed by the Joint Technical Commission on Demarcation of the Frontier, whose fourth meeting noted that “the experts are . . . unanimous as to the map interpretation and the field survey of the boundary line defined in the basic documents cited in the Agreement and Protocol of Agreement, signed in Ouagadougou on 28 March 1987”⁴¹⁷.

4.141. On the basis of this agreement, the experts were able to plot on a base map the line described by the texts and surveyed on the ground. They also indicated the line of the 1960 1:200,000 map on the same base map, so that they could compare “the line on the IGNF map and the line resulting from the field survey in accordance with the basic texts”, and concluded that:

“The section from Bossébangou to the frontier point on the River Sirba at the level of the Say parallel and the section situated to the west of Tchenguiliba as far as the frontier with Benin are identical to the line on the IGNF 1:200,000 map, 1960 edition.”⁴¹⁸

4.142. The experts in fact considered — quite rightly and as does Burkina as explained above⁴¹⁹ — that, given the uncertainty over the precise direction taken by the beginning of the salient at this particular location (between points P1 and P2), the *Arrêté* as clarified by its Erratum did not “suffice” to determine the course of the frontier. They thus adopted the solution plotted on

⁴¹⁵Ann. MBF 82.

⁴¹⁶*Ibid.*

⁴¹⁷Report of the fourth meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, 26-28 September 1988, Ann. MBF 81.

⁴¹⁸Report on completion of the survey of the proposed demarcation of the Niger-Burkina frontier, 28 September 1988, Ann. MBF 82.

⁴¹⁹Paras. 4.127-4.128.

the 1960 IGN Paris map, in accordance with the method they were bound to apply under Article 2 of the 1987 Protocol of Agreement. The Burkina Minister for Territorial Administration further states in his report to the Head of State of 5 March 1991: “The Burkina delegation considers that the Commission, faced with a lack of clarity which renders the text insufficient, was right to adopt the line on the map in accordance with the Protocol of Agreement”⁴²⁰.

4.143. Burkina remains convinced that the 1988 line, which is identical in this location to the line described by Burkina in the present Memorial, is the line which the Parties are bound to adopt under the 1987 Agreement and Protocol of Agreement.

4.144. Thus in this sector, the frontier line that Burkina requests the Court to determine is as follows:

- from point P (Lat.: 13° 21' 06.5" N; Long. 1° 17' 11.0" E; Clarke 1880), the frontier follows the right bank of the River Sirba, from east to west, as far as point P1 (Lat. 13° 19' 53.5" N; Long. 1° 07' 20.4" E; Clarke 1880), located on its right bank;
- from that point, the frontier follows the line on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition, as far as point P2, whose co-ordinates are: (Lat. 13° 22' 30.0" N; Long. 0° 59' 40.0" E; Clarke 1880);
- from that point, the frontier runs in a straight line south, ending at point P3 at the intersection of the right bank of the River Sirba with the Say parallel (Lat. 13° 06' 10.7" N; Long. 0° 59' 40.0" E; Clarke 1880).

SECTION 3 FROM THE INTERSECTION OF THE SIRBA WITH THE SAY PARALLEL TO THE WEST OF THE VILLAGE OF TCHENGUILIBA

4.145. The starting point of the last stretch of the frontier, which has not been marked out and which the Court has been requested to determine, is the endpoint of the previous segment, point P3. There is little doubt as to its location, as demonstrated in the preceding section: it is at the intersection of the right bank of the River Sirba with the Say parallel, which is located at a point with the co-ordinates: Lat. 13° 06' 10.7" N; Long. 0° 59' 40.0" E (Clarke 1880).

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

The starting point is known, and the arrival point as well. The Parties in fact agree that the point located 1,200 m to the west of the village of Tchenguiliba, which marks the beginning of the “Botou bend”, has the following co-ordinates: Lat. 12° 36' 18" N; Long. 1° 52' 07" E⁴²¹, on the Clarke 1880 ellipsoid; and Lat. 12° 36' 19.2" N; Long. 1° 52' 06.9" E⁴²², on the WGS 84 ellipsoid.

⁴²⁰ Ann. MBF 88.

⁴²¹ These are the co-ordinates given by the Parties in the Special Agreement.

⁴²² These are the GPS co-ordinates noted in the record of the work of the Joint Survey Mission of 3 July 2009, Ann. MBF 101; these co-ordinates will be used in the rest of this chapter.

4.147. According to the Erratum, from the intersection of the River Sirba with the Say parallel (point P3), the frontier follows “an east-south-east direction, [and] continues in a straight line” up to the point whose geographical co-ordinates are given in the preceding paragraph.

4.148. There are two further pieces of information to be gained.

4.149. First of all, the line “follow[s] an east-south-east direction”. It might seem superfluous to specify this, given that the starting point and arrival point are provided and that the frontier runs in a straight line. However, State practice shows that it is extremely common to describe frontiers in such a manner⁴²³. The Court also has recourse to the same technique⁴²⁴.

4.150. Secondly, it is stated that the line “continues in a straight line”; this is crystal clear and does not require any particular comment.

4.151. Furthermore, this reading of the text was not a subject of debate among the experts of the Technical Sub-Committee in September 1988⁴²⁵. Plotting this line on a map — as does the “consensual line” of 1988 — or on the ground is straightforward. The frontier follows a perfectly straight line between the intersection of the right bank of the River Sirba with the Say parallel, namely point P3, and the point corresponding to the beginning of the Botou bend.

4.152. In this sector, the frontier line which Burkina requests the Court to determine is thus as follows:

— from the intersection of the right bank of the River Sirba with the Say parallel (Lat. 13° 06' 10.7" N; Long. 0° 59' 40.0" E; Clarke 1880), the frontier runs in a straight line as

⁴²³For example, Article 2 of the Agreement between the Kingdom of Saudi Arabia and the United Arab Emirates on the delimitation of boundaries, 21 August 1974, provides: “The land boundary between the Kingdom of Saudi Arabia and the United Arab Emirates starts from point (a) on the coast of the Arabian Gulf at the approximate geographical location of: Parallel 24 14' 58" north; Meridian 51 35' 26" east.

It extends from this point in a straight line proceeding in a southerly direction to point (b) at the geographical location of: Parallel 24 07' 24" north; Meridian 51 35' 26" east.

It extends from this point in a straight line proceeding in a south-easterly direction to point (c) at the geographical location of: Parallel 26 56' 09" north; Meridian 52 34' 52" east.

It extends from this point in a straight line proceeding east by south to point (d) at the geographical location of: Parallel 22 37' 41" north; Meridian 55 08' 14" east” (U.N.T.S., 1993, p. 37). The same procedure is used in Article 2 of the Agreement on the delimitation of the offshore and land boundaries between the Kingdom of Saudi Arabia and Qatar (U.N.T.S., 1993, pp. 21-22).

⁴²⁴*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992, p. 611, para. 425: “from there in a straight line in a south-easterly direction to the boundary marker of the Cerro Piedra Menuda . . .”, p. 611, para. 426: “From the Pefia de Cayaguanca (point A on Map No. II annexed; co-ordinates: 14° 2' 54" N, 89° 10' 11" W), the boundary runs in a straight line somewhat south of east to the Loma de Los Encinos (point B on Map No. II annexed; co-ordinates: 14° 21' 08" N, 89° 08' 54" W)”; or p. 614, para. 429: “and thence in a straight line somewhat north of east to a hill some 1,100 metres high (point D on Map No. V annexed; co-ordinates: 13° 55' 03" N, 87° 49' 50" W)”.*

⁴²⁵Report of the fourth meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, 26-28 September 1988, Ann. MBF 81.

far as the start of the Botou bend (Tyenkilibi) (Lat. 12° 36' 19.2" N; Long. 1° 52' 06.9" E; WGS 84 ellipsoid).

4.153. For all the reasons set out in this chapter, from the Tong-Tong astronomic marker the frontier line follows, in succession:

- a straight line as far as the Tao astronomic marker (Lat. 14° 03' 04.7" N; Long. 0° 22' 51.8" E)⁴²⁶;
- from that point, a straight line up to the point where the frontier reaches the River Sirba at Bossébangou (Lat. 13° 21' 06.5" N; Long. 1° 17' 11.0" E)⁴²⁷;
- from that point, the frontier follows the right bank of the River Sirba, from east to west, up to the point on the right bank with the co-ordinates: Lat. 13° 19' 53.5" N; Long. 1° 07' 20.4" E;
- from that point, the frontier follows the line shown on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition, as far as the point with the co-ordinates: Lat. 13° 22' 30.0" N; Long. 0° 59' 40.0" E;
- from that point, the frontier runs in a straight line south, ending at the intersection of the right bank of the River Sirba with the Say parallel (Lat. 13° 06' 10.7" N; Long. 0° 59' 40.0" E);
- from that point, the frontier runs in a straight line up to the beginning of the Botou bend (Tyenkilibi) (Lat. 12° 36' 19.2" N; Long. 1° 52' 06.9" E)⁴²⁸.

Sketch-map No. 15 on the following page (also reproduced in Cartographic Annex 35) illustrates this line, in the disputed portion of the frontier in particular. Sketch-map No. 16, inserted after the submissions and also reproduced in Cartographic Annex 36, shows the entire course of the frontier.

⁴²⁶The co-ordinates of this point were measured by GPS by Burkina. The co-ordinates of this marker on the Clarke 1880 ellipsoid are: Lat. 14° 03' 13" N; Long. 00° 22' 53" E.

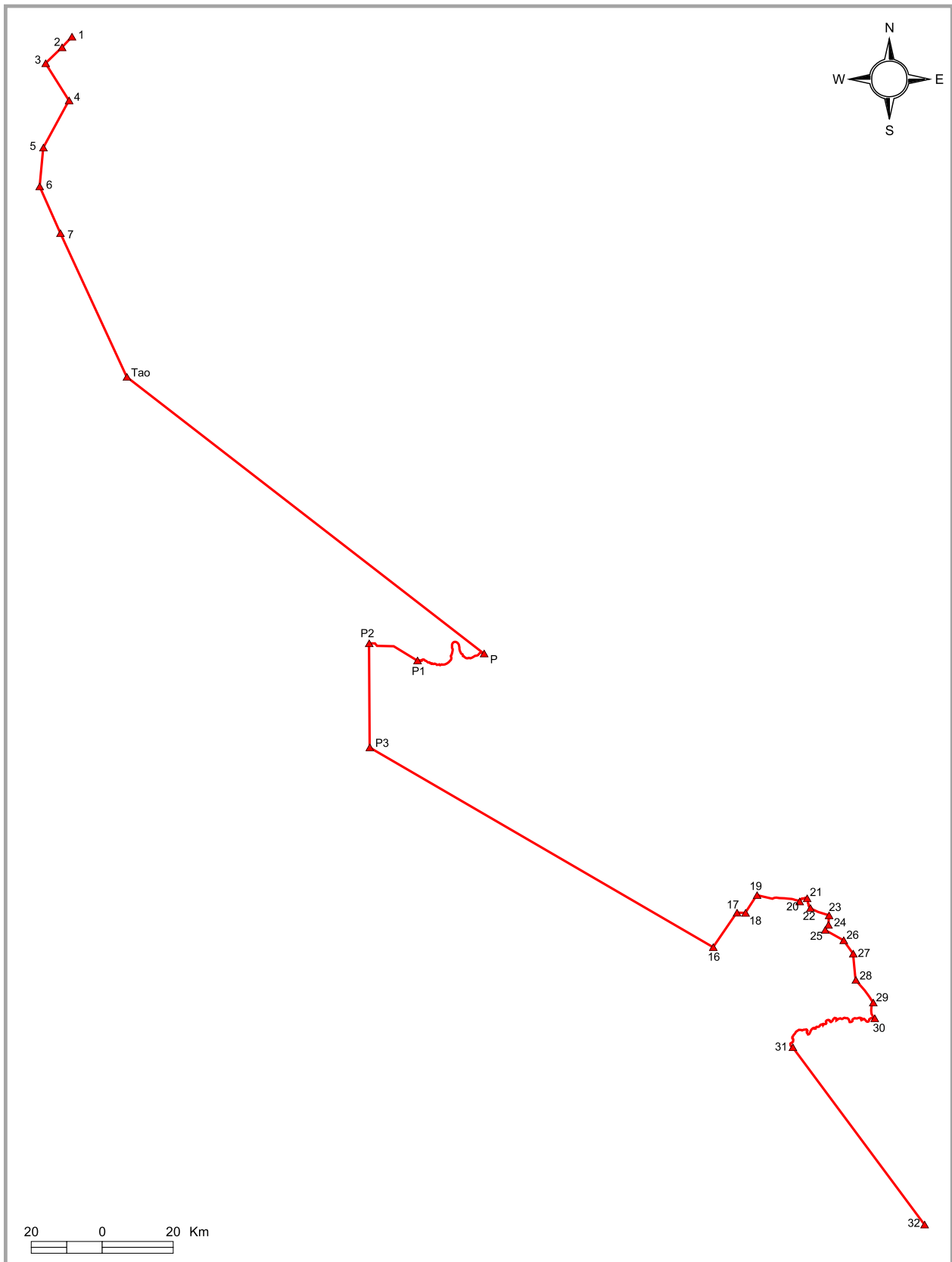
⁴²⁷The co-ordinates of this point, and the following ones, are given on the Clarke 1880 ellipsoid.

⁴²⁸The co-ordinates of this point are those adopted in the record of the work of the Joint Survey Mission of 3 July 2009, Ann. MBF 101, as measured by GPS (WGS 84 ellipsoid).

Sketch-map No. 15 - General view of the frontier

General view of the frontier

Scale: 1:1,000,000



SUBMISSIONS

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

1. from the heights of N'Gouma to the Tong-Tong astronomic marker, the frontier takes the following course: a series of straight lines connecting the following points in turn⁴²⁹: Mount N'Gouma (Lat. 14° 54' 46.0" N; Long. 0° 14' 36.4" E), Kabia Ford (Lat. 14° 53' 09.8" N; Long. 0° 13' 06.3" E), Mount Arwaskoye (Lat. 14° 50' 44.7" N; Long. 0° 10' 35.8" E), Mount Bellé Banguia (Lat. 14° 45' 05.2" N; Long. 0° 14' 09.6" E), Takabougou (Lat. 14° 37' 54.5" N; Long. 0° 10' 16.1" E), Mount Douma Fendé (Lat. 14° 32' 00.6" N; Long. 0° 09' 42.1" E) and the Tong-Tong astronomic marker (Lat. 14° 24' 53.2" N; Long. 0° 12' 51.7" E);
2. from the Tong-Tong astronomic marker to the beginning of the Botou bend, the frontier takes the following course:
 - a straight line as far as the Tao astronomic marker (Lat. 14° 03' 04.7" N; Long. 0° 22' 51.8" E)⁴³⁰;
 - from that point, a straight line up to the point where the frontier reaches the River Sirba at Bossébangou (Lat. 13° 21' 06.5" N; Long. 1° 17' 11.0" E)⁴³¹;
 - from that point, the frontier follows the right bank of the River Sirba, from east to west, up to the point on the right bank with the co-ordinates: Lat. 13° 19' 53.5" N; Long. 1° 07' 20.4" E;
 - from that point, the frontier follows the line on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition, as far as the point with the co-ordinates: Lat. 13° 22' 30.0" N; Long. 0° 59' 40.0" E;
 - from that point, the frontier runs south in a straight line, ending at the intersection of the right bank of the River Sirba with the Say parallel (Lat. 13° 06' 10.7" N; Long. 0° 59' 40.0");
 - from that point, the frontier runs in a straight line up to the beginning of the Botou bend (Tyenkilibi) (Lat. 12° 36' 19.2" N; Long. 1° 52' 06.9" E)⁴³²;
3. from the beginning of the Botou bend as far as the River Mekrou, the frontier takes the following course:
 - a series of straight lines connecting the following points in turn: Jackal Mountain (Lat. 12° 41' 33.1" N; Long. 1° 55' 43.9" E), Laguila (Lat. 12° 41' 31.9" N; Long. 1° 57' 1.3" E) and Nonbokoli (Lat. 12° 44' 12.9" N; Long. 1° 58' 47.0" E);
 - from the latter point, the frontier follows the median line of the Dantiabonga *marigot*, passes to the south of Dantiandou and then follows the line of the Yoga Djoaga hills as far as the

⁴²⁹The co-ordinates which follow are those adopted in the record of the work of the Joint Survey Mission of the erected markers, 3 July 2009, Ann. MBF 101. The co-ordinates are measured by GPS.

⁴³⁰The co-ordinates of this point were measured by GPS by Burkina. The co-ordinates of this marker on the Clarke 1880 ellipsoid are: Lat. 14° 03' 13" N; Long. 00° 22' 53" E.

⁴³¹The co-ordinates of this point, and the following ones, are given on the Clarke 1880 ellipsoid.

⁴³²The co-ordinates of this point, and the following ones, are those adopted in the record of the work of Joint Survey Mission of the markers erected, 3 July 2009, Ann. MBF 101. The co-ordinates were measured by GPS (WGS84 ellipsoid).

confluence of the Dyamongou and Dantiabonga rivers (Lat. 12° 43' 15.1" N; Long. 2° 05' 14.9" E);

- from that point, the frontier follows the median line of the River Dyamongou as far as the confluence of the Dyamongou marigot and the Boulel Fouanou (Lat. 12° 43' 44.0" N; Long. 2° 06' 23.9" E);
- from that point, the frontier runs in a series of straight lines connecting the following points in turn: Boulel (Lat. 12° 42' 15.1" N; Long. 2° 06' 53.3" E), Boulel East (Teylinga) (Lat. 12° 41' 09.5" N; Long. 2° 09' 43.2" E), Dyapionga North (Lat. 12° 39' 42.3" N; Long. 2° 09' 37.3" E), Dyapionga South (Lat. 12° 38' 55.4" N; Long. 2° 09' 08.1" E), Kanleyenou (Lat. 12° 37' 21.7" N; Long. 2° 11' 57.1" E), Niobo Farou (Caiman Pool) (Lat. 12° 35' 19.6" N; Long. 2° 13' 23.9" E), the eastern crests of Mount Tambouadyoaga (Lat. 12° 31' 19.7" N; Long. 2° 13' 48.0" E), Banindyididouana (Lat. 12° 27' 52.7" N; Long. 2° 16' 27.2" E) and the confluence of the Banindyidi Fouanou and Tapoa rivers (Lat. 12° 25' 30.5" N; Long. 2° 16' 40.6" E);
- from the latter of those points, the frontier follows the median line of the River Tapoa as far as the point where it intersects with the former boundary of the Fada and Say *cercles*⁴³³ (Lat. 12° 21' 04.88" N; Long. 2° 04' 12.77" E);
- from the latter point, the frontier runs in a straight line, corresponding to the former boundary of the Fada and Say *cercles*, up to the point where it intersects with the River Mekrou (Lat. 11° 54' 07.83" N; Long. 2° 24' 15.25" E).

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

20 April 2011

Signed [Signature illegible] Stamp of Minister of Justice

Jérôme TRAORÉ,
Minister of Justice, Keeper of the Seals,
Agent of Burkina Faso.

Stamp and signature [illegible] of Minister for
Territorial Administration
and Decentralization

Jérôme BOUGOUMA,
Minister for Territorial Administration and
Decentralization, Co-Agent.

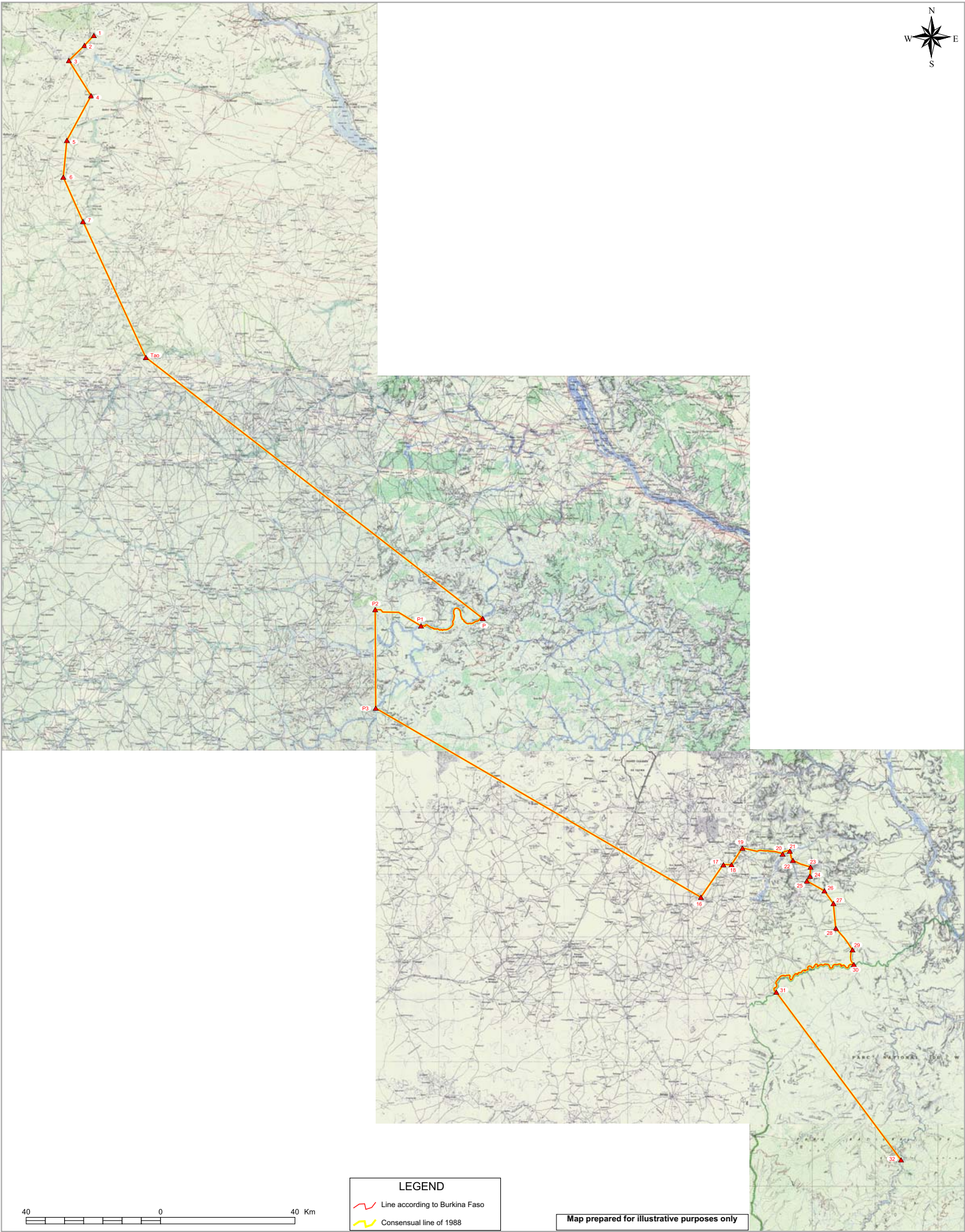
Stamp and signature [illegible] of Ambassador
of Burkina Faso in Brussels

Kadré Désiré OUEDRAGO,
Ambassador of Burkina Faso to the Kingdom
of the Netherlands, Co-Agent.

⁴³³The co-ordinates of the following points are those adopted in the record of the meeting to ascertain the co-ordinates of the unmarked points in Sector B, 15 October 2009, Ann. MBF 105. They were derived from the IGN France 1:200,000-scale map (Clarke 1880).

General view of the frontier

Scale: 1:1,350,000



LIST OF ANNEXES

- Annex MBF 1. Franco-British Convention for the Delimitation of their Possessions west and east of the Niger, 14 June 1898, 186 *Consolidated Treaty Series*, 313.
- Annex MBF 2. *Arrêté* of the Governor-General of French West Africa of 23 December 1899, providing for the organization of two Military Territories in Haut-Sénégal and Moyen-Niger (*Official Journal of French West Africa*, year 1899 (date uncertain), p. 65).
- Annex MBF 3. *Arrêté* of the Governor-General of French West Africa creating a Third Military Territory, with its administrative centre at Zinder, 23 July 1900 (*Official Journal of French West Africa*, year 1900 (date uncertain), p. 313).
- Annex MBF 4. Decree of 18 October 1904 of the President of the French Republic, reorganizing the Government-General of French West Africa, 18 October 1904 (*Official Journal of French West Africa*, No. 287 of 21 October 1904, pp. 6250-6252).
- Annex MBF 5. *Arrêté* of the Governor-General of French West Africa organizing the Military Territory of Niger, 26 December 1904 (*Official Journal of Senegal and Dependencies*, pp. 718-719).
- Annex MBF 6. Convention of 29 May 1906 between France and Great Britain for the Delimitation of the Frontier between French and British Possessions to the east of the Niger, signed at London on 9 April 1906 (*Consolidated Treaty Series*, Vol. 202, pp. 7-13).
- Annex MBF 7. Agreement of 19 October 1906 between France and Great Britain relative to the Frontier between French and British Possessions from the Gulf of Guinea to the Niger (Southern Nigeria and Dahomey), signed at Paris (*Consolidated Treaty Series*, Vol. 203, pp. 51-63).
- Annex MBF 8. Decree of the President of the French Republic incorporating into the Colony of Haut-Sénégal et Niger the *cercles* of Fada N’Gourma and Say, 2 March 1907 (*Official Journal of French West Africa*, No. 324 of 30 March 1907, p. 135).
- Annex MBF 9. *Arrêté* No. 1277 of the Governor-General of French West Africa defining the various administrative divisions of the Military Territory of Niger, 31 December 1907 (*Official Journal of French West Africa*, No. 158 of 11 January 1908, pp. 12-13).
- Annex MBF 10. *Arrêté* No. 1241bis of the Governor-General of French West Africa reorganizing the administrative divisions of the Military Territory of Niger, 14 December 1908 (*Official Journal of French West Africa*, No. 209 of 2 January 1909, pp. 1-3).
- Annex MBF 11. Decree of the President of the French Republic fixing the boundaries between Dahomey and Haut-Sénégal et Niger, 12 August 1909 (*Official Journal of French West Africa*, No. 245 of 11 September 1909, pp. 419-420).

- Annex MBF 12. *Arrêté* No. 672 of the Governor-General of French West Africa incorporating the region of Timbuktu into the Civil Territory of Haut-Sénégal et Niger, 22 June 1910 (*Official Journal of French West Africa*, No. 293 of 30 July 1910, p. 475).
- Annex MBF 13. Decree of the President of the French Republic incorporating the Military Territory of Niger into the Government-General of French West Africa with effect from 1 January 1912, 7 September 1911 (*Official Journal of the French Republic*, No. 247 of 12 September 1911, p. 7437).
- Annex MBF 14. *Arrêté* No. 1728 of the Governor-General of French West Africa reorganizing the internal administration of the Military Territory of Niger, 23 November 1912 (*Official Journal of French West Africa*, No. 422 of 11 January 1913, pp. 68-69).
- Annex MBF 15. Decree of the President of the French Republic modifying the boundary between Dahomey and Haut-Sénégal et Niger, 23 April 1913 (*Official Journal of French West Africa*, date uncertain, p. 572).
- Annex MBF 16. Decree of the President of the French Republic dividing the Colony of Haut-Sénégal et Niger and creating the Colony of Upper Volta, 1 March 1919 (*Official Journal of French West Africa*, No. 768 of 23 August 1919, pp. 549-551).
- Annex MBF 17. Circular letter No. 713 A.G. of the Lieutenant-Governor of Upper Volta to the Administrators of the *cercles* of the Colony, 28 July 1920.
- Annex MBF 18. Decree of the President of the French Republic reorganizing the Military Territory of Niger and converting it into a Colony of the Civil Territory of Mauritania with effect from 1 January 1921, 4 December 1920 (*Official Journal of the French Republic*, No. 335 of 9 December 1920, p. 20244).
- Annex MBF 19. Decree of the President of the French Republic converting the Civil Territory of Niger into an autonomous Colony, 13 October 1922 (*Official Journal of French West Africa*, No. 955 of 20 January 1923, p. 58).
- Annex MBF 20. Letter No. 682 A.G. from the Lieutenant-Governor of Upper Volta to the Commander of Dori *cercle*, 22 March 1923.
- Annex MBF 21. Letter No. 158 from the Commander of Dori *cercle* to the Lieutenant-Governor of Upper Volta, 7 April 1923.
- Annex MBF 22. Letter No. 1270 A.G. from the Lieutenant-Governor of Upper Volta to the Governor-General of French West Africa, 7 June 1923.
- Annex MBF 23. Telegram-letter No. 1305 A.G. from the Lieutenant-Governor of Upper Volta to the Commander of Dori *cercle*, 13 June 1923.
- Annex MBF 24. Letter No. 3 A.G. from the Lieutenant-Governor of Niger to the Governor-General of French West Africa, 26 January 1926.
- Annex MBF 25. Letter No. 307 A.G. from the Lieutenant-Governor of Upper Volta to the Governor-General of French West Africa, 1 February 1926.

- Annex MBF 26. Decree of the President of the French Republic establishing the administrative centre of Niger at Niamey and incorporating certain Territories of Upper Volta into the Colony of Niger, 28 December 1926 (*Official Journal of the French Republic*, No. 2, 50th year, of 2, 3 and 4 January 27, pp. 197-198) and *Arrêté* of the Governor-General of French West Africa promulgating in French West Africa the Decree of 28 December 1926 transferring the administrative centre of the Colony of Niger and providing for territorial changes in French West Africa, 21 January 1927 (*Official Journal of French West Africa*, No. 1167, year 1927, p. 92).
- Annex MBF 27. *General List of Localities of French West Africa*, fascicle IV, Colony of Upper Volta, 1927.
- Annex MBF 28. *General List of Localities of French West Africa*, fascicle VI, Colony of Niger, 1927.
- Annex MBF 29. *Arrêté* No. 184 of the Governor-General of French West Africa providing for territorial changes to the Colonies of Upper Volta and Niger, 22 January 1927 (*Official Journal of French West Africa*, No. 1169 of 12 February 1927, p. 124).
- Annex MBF 30. Record of Agreement recording the incorporation into the Colony of Niger of the Territories on the right bank of the river, pursuant to the Decree of 28 December 1926, 2 February 1927.
- Annex MBF 31. Record of the meeting between the representatives of the Lieutenant-Governors of Upper Volta and Niger, 10 February 1927.
- Annex MBF 32. *Arrêté* No. 41 of the Governor-General of French West Africa of 5 March 1927 (*Official Journal of Upper Volta*, No. 178 of 15 March 1927, p. 110).
- Annex MBF 33. Letter No. 1040 A.G./I from the Lieutenant-Governor of Niger to the Governor-General of French West Africa, 27 June 1927.
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