SEPARATE OPINION OF JUDGE ABI-SAAB

[Translation]

1. While having voted in favour of the Judgment's operative provisions taken as a whole, I find myself obliged to append this opinion because I am unable to associate myself with certain aspects of the Chamber's reasoning and of its final conclusions.

2. The Chamber's reasoning is structured around three documents : Order 2728 AP of 27 November 1935 forms the basis of the line in the western region, described as the region of the four villages ; letter 191 CM2 of 19 February 1935 forms the basis of the line in the centre and to the east, in the Béli region (these two lines coexist but do not coincide in the region of Fayando-Toussougou) ; and, finally, the Order of 31 August 1927 and "erratum" of 5 October 1927, which forms the basis for the eastern terminus of the line, in the region of mounts N'Gouma/Kabia ford.

3. This latter Order of 1927 is the only element of which the relevance as a legal title for the territorial boundary, as it was on the critical date, is not disputed between the Parties, although they differ in their interpretations of it.

By contrast, the relevance of Order 2728 AP and of letter 191 CM2 depends wholly on whether they are descriptive (or declaratory) in character, or whether instead they modify the pre-existing territorial boundaries. This question has led the Chamber into an excessively detailed analysis of French colonial law, a task which is not, in my view, a fitting one for an international court and was largely superfluous.

4. In that connection, I am in total agreement with both the spirit and the letter of what the Judgment states in paragraph 30 concerning the sense of the Chamber's examination of colonial law and, in particular, with the denial of any renvoi by international law to colonial law or of the existence between them of any legal crossover or *continuum juris*. Along that road there can therefore be no question of even circuitously finding in contemporary international law any retroactive legitimation whatever of colonialism as an institution.

The Judgment further specifies that colonial law may play a role

> "not in itself . . . but only as one factual element among others, or as evidence indicative of . . . the 'photograph of the territory' at the critical date".

I consider that in the event the Judgment has overstepped the limits of

this wise proviso by basing its reasoning on this element almost exclusively and in abundant detail.

5. As regards Order 2728 AP and its application to the so-called region of the four villages, in the west, I consider the Chamber's Judgment amply demonstrates how it is descriptive or declaratory of the pre-existing boundaries. But, even in the absence of this instrument, administrative practice, i.e., the exercise of public authority and governmental functions both before and after the adoption of the Order, proves that in the eyes of the colonial authorities this region belonged to Sudan, and did so until the independence of Mali, the critical date for the fixing of the "photograph of the territory" constituting Mali's "colonial heritage".

6. However, this is not the case with the eastern region, that of the Béli. In this area, lying between the region covered by Order 2728 AP and the terminus of the frontier as covered by the 1927 Order, we have only two reliable points of reference : the pool of Soum and the pool of In Abao. But there is no regulative instrument of a general description, and the administrative practice relied upon by the Parties is much too fluctuating, sparse and interpenetrative (this being chiefly an area of nomadic movement and transhumance) to disclose any visible administrative boundary.

7. To fill this gap, the Chamber's Judgment brings into play letter 191 CM2 of 19 February 1935. In this letter, the Governor-General of French West Africa makes a proposal to the Lieutenant-Governor of Sudan for a definition of the boundaries between the colonies of Sudan and Niger in textual form, suggesting a line which is merely a verbal transcription of the one shown on the 1:500,000 Blondel la Rougery map of 1925. Hence this is merely a proposal, not an administrative decision ; and it did not materialize, as would normally be the case, in the form of a regulative instrument.

8. I agree with the Judgment's demonstration that neither the formal status of the letter nor the fate of the proposal preclude the possibility that what it contained may have been descriptive or declaratory of the pre-existing territorial boundaries. But where I can no longer follow the reasoning is where the Judgment draws from this negative argument the positive conclusion that, since this possibility exists, it must necessarily be the only one ; in other words, from the possibility that the letter may be descriptive, it draws the conclusion that it actually is.

There is here a logical hiatus that can be repaired only by positive evidence, but no such evidence has in my view been supplied. For it is equally possible that the Governor-General's aim on this occasion was further to rationalize the line, or to render it compatible with the map most widely used at the time.

9. The Judgment itself, having concluded that the letter was descriptive in character, nonetheless betrays some hesitation when it states, in paragraphs 110 and 144, that wherever the description of the boundary in the letter by means of co-ordinates does not correspond with the reference-

points derived from other titles or evidence, the latter are to have priority ; this implies, at least for those co-ordinates which do not so correspond, that the Judgment does not consider the letter to be declaratory of the pre-existing situation.

10. Similarly, whereas the line described in Order 2728 AP covers a part of the boundary also covered by that described in letter 191 CM2 but the two lines diverge in this part, they cannot both be declaratory of the pre-existing situation. Yet the Chamber asserts that Order 2728 AP is declaratory, which implies that the letter is not, at least for the common part of the boundary.

11. In fact, to base the line in the Béli region on letter 191 CM2 (which is simply a verbal transcription of the line shown on the 1:500,000 scale Blondel la Rougery map of 1925) without offering positive proof that this line matches the pre-existing boundary is tantamount to indirectly conferring on that map the status of a subsidiary legal title.

12. Now although I completely endorse the Judgment's general analysis of the status of maps in frontier questions (paras. 53-56), and especially its conclusion that they have value only "as evidence of an auxiliary or confirmatory kind" "endorsing a conclusion at which a court has arrived by other means unconnected with the maps", I consider that here too the Judgment has failed to apply in practice what it has stated as a general principle. For, as the Judgment very clearly explains – reflecting the settled international case-law – maps in themselves never constitute a legal title of any kind, either principal or subsidiary. Yet via letter 191 CM2, which has no intrinsic legal value and is merely a verbal transcription of the 1925 Blondel la Rougery map, the Judgment manages to promote that map into a subsidiary title (what is more, it comes close in paragraph 62 to a similar result in respect of the 1960 IGN map).

13. The purpose of this frantic search for a "written legal title", turning anything and everything into account, is to satisfy a particular conception of the *uti possidetis* principle.

However, this principle, like any other, is not to be conceived in the absolute ; it has always to be interpreted in the light of its function within the international legal order.

At first sight, it may indeed seem paradoxical that peoples that have struggled for their independence should set so much store by their "colonial heritage". At the beginning, however, at the time when the Latin American countries were achieving independence, the principle of *uti possidetis* was formulated to serve a dual purpose : first, a defensive purpose towards the rest of the world, in the form of an outright denial that there was any land without a sovereign (or *terra nullius*) in the decolonized territories, even in unexplored areas or those beyond the control of the colonizers ; secondly, a preventive purpose : to avoid or at least to mini-

mize conflict occurring in the relationships among the successors, by freezing the carved-up territory in the format it exhibited at the moment of independence.

14. These two objectives therefore postulate the existence of a boundary, an impermeable territorial division, at the moment of independence. This hypothesis can only be factually verified in each case if a boundary is taken to mean a "line" in the geometric sense of the word. Otherwise it will be the inevitable fate of the principle of *uti possidetis* to operate as a mere fiction that jars with reality.

This is because a minimum of two points will always suffice for the definition of a line if one starts from the geometric concept of a "line" as "generated by the motion of a point" (*Encyclopaedia Britannica,* 11th ed.). In this sense there would always be a line to satisfy the logical requirements for the functioning of the *uti possidetis* principle. But if one starts from the common idea of a line as a concrete trace every point on which is specifically identifiable, it is far from likely that the postulate could be shown as realized in every instance.

15. By proceeding from the geometric concept of a line, which is alone capable of reconciling the principle of *uti possidetis* with the facts, we can state that there is always a line which defines the outer limit of lawful possession. But the scope of a court's role in identifying that line will vary inversely to the extent of its having taken concrete shape. The fewer the points (or points of reference) involved in its definition, the greater the court's "degrees of freedom" (in the statistical sense). And it is here that considerations of equity *infra legem* (mentioned in paragraph 28 of the Judgment) come into play, to guide the court in the exercise of this freedom when interpreting and applying the law and the legal titles involved.

16. As regards the frontier line which concerns us, between the region of Toussougou/Féto Maraboulé in the west and the eastern terminus (mounts N'Gouma/Kabia ford), we have only two points of reference, the pools of Soum and In Abao.

In this region, largely traversed by the Béli, no visible outline of the "photograph of the territory" on the critical date can in my view be discerned, as I have said above, either from regulative texts, or from any sufficiently conspicuous body of administrative practice. It was up to the Chamber to give concrete shape to the line – which, defined as it is by the above-mentioned reference-points, does as such exist – on the basis of considerations of equity *infra legem.*

17. The Judgment has chosen a line coinciding with that of the maps, which do not in themselves constitute a legal title or rest upon any such genuine title, where letter 191 CM2 is concerned.

This is admittedly one possible legal solution within the degrees of freedom obtaining in the circumstances of the case ; and that is why I consider it legally acceptable. But it is not the only solution which would have been legally possible, nor in my opinion the best. I would have

preferred another : one which, while respecting the points of reference (and it is not by chance that both are watering-places), would have been more deeply impregnated with considerations of equity *infra legem* in the interpretation and application of law, given that the region concerned is a nomadic one, subject to drought, so that access to water is vital.

(Signed) Georges ABI-SAAB.