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Lundi 8 octobre 2012 à 10 heures

Monday 8 October 2012 at 10 a.m.

10 The PRESIDENT: Please be seated. The sitting is open.

The Court meets today, pursuant to Articles 43 *et seq.* of its Statute, to hear the oral arguments of the Parties in the case concerning the *Frontier Dispute (Burkina Faso/Niger)*. Judge Yusuf, for reasons duly communicated to me, is unable to be present on the Bench today.

Since the Court included upon the Bench no judge of the nationality of the Parties, each of them availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc*. Burkina Faso originally chose Mr. Jean-Pierre Cot; following the resignation of the latter on 25 April 2012, it chose Mr. Yves Daudet. The Republic of Niger chose Mr. Ahmed Mahiou.

Article 20 of the Statute of the Court provides that “[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously”. Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*.

Although Mr. Mahiou has been chosen as a judge *ad hoc* in other cases in which he has made solemn declarations, he must make a new declaration in the present case, in accordance with Article 8, paragraph 3, of the Rules of Court.

Before inviting them to make their solemn declarations, I shall first say a few words about the careers and qualifications of Mr. Mahiou and Mr. Daudet.

Mr. Mahiou, who is of Algerian nationality, is well known to the Court as he has been a judge *ad hoc* in three other cases. He is a “docteur d’Etat” of the Faculty of Law of Nancy University and is “agrégé” in public law and political science. He has held a number of teaching and research posts in Algeria, France and other countries, and has served as Dean of the Law Faculty at the University of Algiers. Mr. Mahiou was a member of the International Law Commission from 1982 to 1996 and was elected Chairman of the Commission at its forty-eighth session in 1996. Mr. Mahiou has represented Algeria at numerous international conferences and has served on various international bodies. He has been Vice-President of the Unesco Appeals Board and has acted as an arbitrator in a number of international disputes. Mr. Mahiou is a

11 member of various academic institutions and bodies and of the Institut de Droit International. He has published numerous works and articles in various fields of international law.

Mr. Daudet, who is of French nationality, is a Doctor of Law and “agrégé” in public law and political science. He has held a number of teaching and research posts in metropolitan France, Martinique, Mauritius, Morocco and Côte d’Ivoire. He was a member of the French delegation to the Group of Experts and later to the United Nations Conference on the international transfer of technology. Mr. Daudet is Secretary General of the Hague Academy of International Law and emeritus Professor at the University of Paris I (Panthéon-Sorbonne), where he served as First Vice-President. He is also a member of the Editorial Board of the *Annuaire français de droit international* and a member of the French Society of International Law and the French branch of the International Law Association. He has published numerous works and articles in various fields of international law.

I now invite Mr. Mahiou and Mr. Daudet to make the solemn declaration prescribed by Article 20 of the Statute and I request all those present to rise. Mr. Mahiou.

Mr. MAHIOU:

“I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.”

The PRESIDENT: Thank you, Mr. Mahiou. Mr. Daudet.

Mr. DAUDET:

“I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.”

The PRESIDENT: Thank you, Mr. Daudet. Please be seated. The Court takes note of the solemn declarations made by Mr. Mahiou and Mr. Daudet and I declare them duly installed as judges *ad hoc* in the case concerning the *Frontier Dispute (Burkina Faso/Niger)*.

I shall now recall the principal steps of the procedure in this case.

12 By a joint letter of notification dated 12 May 2010 and filed in the Registry of the Court on 20 July 2010, Burkina Faso and the Republic of Niger transmitted to the Registrar a Special Agreement between the two States, which was signed at Niamey on 24 February 2009 and entered

into force on 20 November 2009, whereby their Governments have agreed to submit to the Court the frontier dispute between them over a section of their common boundary. By the same joint letter of notification, the two States also communicated to the Court the Protocol of Exchange of the Instruments of Ratification of the Special Agreement and the exchange of Notes placing on record their agreement on the delimited sectors of the frontier, dated 29 October and 2 November 2009, respectively.

By Order of 14 September 2010, the Court fixed 20 April 2011 as the time-limit for the filing of a Memorial by each Party and 20 January 2012 as the time-limit for the filing of a Counter-Memorial by each Party. The Memorials and Counter-Memorials were duly filed within the time-limits thus fixed. The Parties then informed the Court that they did not consider it necessary to submit additional written pleadings, but that they wished to reserve the right to produce further documents if required, under Article 56 of the Rules of Court. No request for the production of such documents has been received by the Court.

In accordance with Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings. Further, in accordance with the Court's practice, the pleadings without their annexes will be placed on the Court's website as from today.

I note the presence at the hearing of the Agents, counsel and advocates of the two Parties. In accordance with the arrangements regarding the organization of the procedure which have been decided by the Court, the hearings will comprise a first and a second round of oral argument.

The first round of oral argument will begin today and will close on Friday 12 October 2012. The second round of oral argument will begin on Monday 15 October 2012 and come to a close on Wednesday 17 October 2012.

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In accordance with the schedule of hearings drawn up by the Court, after consultation with the Parties, Burkina Faso will be heard first. I now give the floor to H.E. Mr. Jérôme Bougouma, the Agent of Burkina Faso. You have the floor, Sir.

Mr. BOUGOUMA:

1. Mr. President, Members of the Court, may I begin by greeting you on behalf of the President, the Government and the people of Burkina Faso, whom I have the very great honour of representing before you today. I do so all the more calmly and respectfully in that my country has already had occasion to bring a case before the Court and welcomed the outcome. Despite the various constraints inevitably imposed by proceedings before the Court for a country lacking in major resources, Burkina Faso is, for the second time, seeking a ruling from this distinguished Court in order to settle a frontier dispute with one of its neighbours.

2. It was in 1984 that Burkina, together with Mali, submitted to a Chamber of the Court the frontier dispute between the two countries. Hailed by specialists in international law all over the world for the basic principles that it established in regard to territorial delimitation between countries emerging from decolonization, the Judgment of 22 December 1986 settled to the full satisfaction of both parties the dispute between them, in accordance with the law and with justice. That Judgment encouraged African States to approach the Court with confidence in order to settle their frontier disputes, despite the fact that issues of sovereignty too often exacerbate passions in this particularly sensitive area.

3. Having failed in our efforts over a period of almost 40 years to achieve full demarcation of the frontier by bilateral agreement, we have together agreed to bring the matter before the Court, whose judgment, "final and without appeal", will ensure a lasting solution based on law, free of the uncertainties and ulterior motives generated by political considerations.

4. I note, moreover, that our brothers from Niger have also already seised the Court of a frontier dispute with another of their neighbours and, like ourselves, have opted to come before you once again. This augurs well for the welcome that our two countries will accord to the judgment that they have asked you to render in the Special Agreement signed by them on 24 February 2009.

14 At the same time, Members of the Court, you will put an end to the sole issue which clouds the relations between our two brother countries, which I am pleased to say are, in all other respects, excellent.

5. However, it would be wrong to underestimate the scope of this dispute, which complicates the efforts of the frontier populations to live together, and which could poison relations between the two countries.

6. And that is moreover why, in the Protocol of Agreement signed in Niamey on 23 June 1964, Burkina and Niger decided that they would not accept any alteration in the status quo, thus reaffirming the consequences of the normal operation of the *uti possidetis* principle, which freezes territorial titles as at the date of decolonization. Furthermore, in Article 10 of the Special Agreement, the Parties entered into a “special undertaking” to “refrain from any act of incursion into the disputed areas”.

7. Mr. President, in paragraph 0.19 of its Counter-Memorial, Niger writes: “the fact that such incidents are recurrent . . . points particularly clearly to the persistent difficulties faced by the two States due to the lack of precision in the boundaries decreed by the colonial power in this sector”. We cannot subscribe to the second part of this statement: contrary to what Niger claims, this case, by contrast with the majority of frontier dispute cases, is notable for the precision and completeness of the frontier inherited by us from the colonial power. That said, it is true that these incidents do occur and I readily agree that we need to put an end to them, irrespective of who may have been responsible for them in the past. That will be a major benefit of your judgment, Members of the Court.

8. However, the work to demarcate our common frontier had begun well. In addition to the Niamey Protocol which I have just mentioned, on 28 March 1987 the Parties adopted an Agreement and a Protocol of Agreement which in practice confirmed the delimitation of the frontier resulting from the Erratum of 5 October 1927 to the *Arrêté* of the Governor-General of French West Africa of the preceding 31 August. It was in the course of the demarcation that the work ran into difficulties. It should, moreover, be noted that several times an overall agreement had almost been reached: thus, in September 1988 the experts of the Joint Commission adopted an agreed line covering the entire frontier; and again, in May 1991, the competent ministers agreed on a compromise solution designed to put an end to the dispute. Unfortunately, in both cases Niger went back on its initial approval.

9. We have nonetheless managed to reach agreement on the two extremities of the frontier, which is why the Court, in Article 2 of the Special Agreement, is not asked to delimit the sector of the frontier from the heights of N’Gouma to the Tong-Tong astronomic marker, or from the start of the Botou bend to the river Mekrou, but, as regards those sectors, to “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”. I recognize, Mr. President, that this is a somewhat unusual provision, but, if I may use the expression, “once bitten, twice shy”, and, accustomed to the about-turns of our opponents, we wanted this agreement to be confirmed by the Court, so that the entire course of the frontier should carry the authority of *res judicata*. Notwithstanding its signature of the Special Agreement, Niger regards this request as redundant¹. We do not take that view: your endorsement, Members of the Court, is a guarantee of the stability that we seek.

[Slide off]

10. Mr. President, this case which Burkina Faso and the Republic of Niger have submitted to the Court can be distinguished from the previous terrestrial delimitation cases of which it has been seised in two very specific regards:

— *First*, the Parties are in agreement on the evidentiary material on which they may rely — to the exclusion of all other — and on which the Court may therefore base itself: namely, as recalled in the Preamble to the Special Agreement, which refers to Article 2 of the 1987 Agreement (as just mentioned above), to “*Arrêté* 2336 of 31 August 1927, as clarified by Erratum 2602/APA of 5 October 1927”, and to the additional provision in the 1987 Agreement: “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”. Since no such agreement has been reached, there thus remain — and only remain: the *Arrêté* as amended by the Erratum and the IGN France map.

16 — *Secondly* — and this follows from the first point — unlike the situation in the majority of frontier disputes, a single instrument constitutes the reference document on which the entire

¹CMN, p. 4, para. 0.7.

course of the frontier can and must be based. Unlike the cases which produced the 1986 (*Burkina/Mali*) and 2005 (*Benin/Niger*) Judgments, what the Court is asked to do here is not to draw a frontier *de novo*, but to *confirm* the delimitation of the frontier deriving from the *Arrêté* of 31 August 1927 and its Erratum. Basically, the Court is being asked to confirm an already existing delimitation in order to ensure a final demarcation on an indisputable foundation.

11. Unlike Niger, Burkina does not believe, Members of the Court, that you should — or, in truth, that you can — go beyond the strict framework laid down by the Special Agreement and the 1987 Agreement. You are not being invited to rule in equity, still less to confirm territorial usurpations which have occurred since independence — or even prior thereto, when certain colonial administrators expressed their dissatisfaction at the decisions taken in Dakar. You are not being asked to rewrite a colonial title which, for once, covers the entire length of the disputed frontier, or even to determine its validity or evidentiary value, since the Parties themselves have both accepted it. You are not being invited to substitute your voice for that of the *uti possidetis*: contrary to what has sometimes happened², the latter speaks here with complete assurance. It therefore serves no purpose, as Niger asks you to do in its written pleadings, to involve yourselves in the uncertainties of alleged (and often changing) *effectivités*, or in the deconstruction of various frontier incidents, or in the alleged inconsistencies in the cartography of the region. Rather, all that you need to do is to find that, in the vast majority of instances, the 1927 Erratum is in itself sufficient and, in the very rare cases where it “does not suffice”, to refer to the 1960 map of IGN France.

12. And I think I can assure you in advance, Members of the Court: by proceeding in this way, in accordance with the law specified by the Parties, you will not do violence to the “realities on the ground”, on which Niger wrongly relies. Those realities are characterized by the co-existence of nomadism and semi-nomadism, of areas of transhumance and of certain sedentary, but still relatively unstable habitats — which explains the frequent disappearance of villages or hamlets referred to in certain documents that are not always necessarily particularly old. It is of these realities that you have to take account in interpreting the two instruments which establish the

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²See *Land, Island and Maritime Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 386, para. 41.

frontier between Burkina Faso and Niger, and not the faits accomplis created by settlements established without proper authority (or under outside influence) by certain populations on one or other side of the frontier.

13. Mr. President, before presenting the outline of our oral argument and introducing the distinguished counsel who have been kind enough to agree to assist us, I have two agreeable tasks to accomplish. First, I am most grateful to the Registrar, Mr. Philippe Couvreur, and his team at the Registry for all the assistance and advice that they have been kind enough to give us throughout the proceedings. Secondly, I should like to thank publicly the Government of the people of Burkina Faso and all of those who are assisting us in defending the country's rights in this case of such great importance to us.

14. I also take this opportunity to offer my warmest greetings to the delegation from our sister Republic of Niger. Mr. President, after this introduction, Professor Jean-Marc Thouvenin will describe the origins of the dispute and the negotiations which took place between the Parties in an attempt to settle it. Mr. Claude Obin Tapsoba, Director-General of the Burkina Geographical Institute, will then make a geographical and cartographic presentation of the disputed frontier. Professor Alain Pellet will then take the floor to describe the historical context and the points of agreement and disagreement between the Parties — which should bring us to the end of the morning. This afternoon, Professor Pellet will briefly take the floor again to describe the broad lines of Burkina's position. This will then be explained in greater detail as regards the sectors of the frontier from the Tong-Tong astronomic marker to the point where it reaches the River Sirba at Bossébangou, then from that point to the Botou bend, by Professors Mathias Forteau and Jean-Marc Thouvenin. Professor Pellet will close our first round of oral pleadings by describing the demarcated sector of the frontier.

15. I would not wish to end my presentation without reaffirming the full and total confidence of my country in the Court, and its belief that the judgment which you will render, Members of the Court, will contribute to further strengthening the friendly relations between our two sister republics. Your judgment will reinforce these links by resolving one of the rare problems which they have been unable to settle in full by negotiation.

18 16. Members of the Court, I thank you for your kind attention and I would ask you, Mr. President, to give the floor now to Professor Jean-Marc Thouvenin.

The PRESIDENT: Thank you, Minister and Agent. I now give the floor to Professor Jean-Marc Thouvenin. You have the floor, Sir.

Mr. THOUVENIN: Thank you, Mr. President.

**GENESIS OF THE DISPUTE BEFORE THE COURT — DISCUSSIONS
BETWEEN THE PARTIES**

1. Mr. President, Members of the Court, it is a great honour to stand before your distinguished Court once again, for which I offer my sincere thanks to Burkina Faso, on whose behalf, as our Agent has just said, it is my task this morning to present the genesis of the dispute of which the Court is seised.

2. Mr. President, it should be noted after two rounds of written pleadings that the Parties offer quite different views of the sequence of events leading up to the start of the dispute, and of the respective parts they played in that regard.

3. For its part, Niger seems to consider that it is for the Court to settle a dispute that dates back almost one hundred years. Thus, it writes that “persistent difficulties”³ concerning the boundary between Upper Volta and Niger arose prior to independence⁴, in its view as a result of “the uncertainty regarding the boundary between the Colonies of Niger and Upper Volta as shown in the Erratum of 5 October 1927 correcting the *Arrêté général* of 31 August 1927”⁵. Niger then suggests that the two Parties to the present proceedings were at once aware of the fact that they had inherited a territorial situation that was unsettled, and claims that they have endeavoured to settle the ensuing dispute “[e]ver since their accession to independence”⁶.

³MN, p. 25, para. 2.1.

⁴*Ibid*, pp. 25-35, paras. 2.2-2.8.

⁵*Ibid*, p. 25, para. 2.1.

⁶*Ibid*, para. 3.1, p. 39.

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4. Regarding the discussions held by the two States since the 1960s, Niger maintains in its Counter-Memorial that Burkina adopted two successive and contradictory positions, first adopting the boundary line recorded by IGN France on the 1960 map before then changing its mind⁷.

5. Burkina, for its part, considers that the dispute arose during the post-colonial period, since a dispute between the two Parties to the present proceedings could not, by definition, have arisen before their accession to independence. And while it is true that the question of the frontier has been raised repeatedly since the 1960s, Burkina distinguishes two successive and very distinct phases, during which it has maintained a constant position in respect of the course of the frontier: the first, so-called “consensual”⁸, phase from 1964 to 1990 (I), and a second phase during which it became clear that there was a legal dispute between the Parties, which began in 1990 and will end only when the Court delivers its judgment (II).

I. Co-operation on the demarcation of the frontier (1964-1990)

6. During the first phase, to which I shall devote the first part of my pleading, there was clearly no opposition between the Parties as to the question of delimiting the frontier, and, on the contrary, they developed their co-operation — which was very fruitful, moreover — with a view to demarcating their frontier, that is to say marking it out. There ensued three agreements: the Protocol of Agreement of 1964, the Agreement of 1987 and its accompanying Protocol of Agreement. From the outset Niger is mistaken in its presentation of how these came about, when it states in its Memorial that “[f]rom 1964 onwards the efforts of the two States” aimed to “arrive at a delimitation and then demarcation of their common frontier”⁹: in fact, at that time the Parties spoke only of demarcation, since the question of delimitation was regarded as already settled, during the colonial period, by the *Arrêté* of the Governor-General of FWA, dated 31 August 1927, as clarified by the Erratum of October of the same year.

⁷CMN, p. 48, para. 1.2.7; see also CMN, p. 49, para. 1.2.9.

⁸CMBF, pp. 48-51, paras. 2.2-2.10.

⁹CMN, p. 47, para. 1.2.3.

20 A. The Protocol of Agreement of 1964

7. Furthermore, it was Niger itself which in 1964 quite rightly saw fit to consider the discussions on the frontier as solely concerning the *demarcation* of the frontier line¹⁰, stating quite firmly that it was not a question of delimitation. The Note Verbale of 17 June 1964 from the Minister for Foreign Affairs of Niger to his counterpart in Upper Volta is telling in this respect. You will find a copy at tab 1.1 of the judges' folder. Niger maintains therein:

- that the frontier was already “established by colonization”;
- that it was in effect “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”;
- that, accordingly, “a fairly precise basic text exists”;
- but that “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”;
- therefore the only possible course of action, in the view of the Minister for Foreign Affairs of Niger, was to “[appoint] surveyors from both States to mark out the frontier”¹¹.

8. Burkina responded favourably to this initiative almost immediately and signed the Protocol of Agreement of 23 June 1964, which is reproduced at tab 1.2 of the judges' folder.

9. That instrument was *not* intended to settle “the delimitation issue”, contrary to what Niger claims persistently in its Memorial¹²; it stated, on the contrary, as did the Minister for Foreign Affairs of Niger in his Note Verbale cited above, that the “theoretical boundaries” between the two States had already been fixed, though they had not been marked out on the ground; it goes on to record the Parties' agreement 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*”. In addition, it conferred on a Joint Commission the task of carrying out the work of *demarcation* — the Parties clearly did not talk of *delimitation* — from mid-November 1964.

¹⁰MBF, pp. 34-35, paras. 1.39-1.40.

¹¹*Ibid.*, Ann. 44.

¹²MN, p. 39, para. 3.1.

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10. Niger interprets the terms of that agreement and claims in its Counter-Memorial that the 1960 map was referred to “on the same footing” as the 1927 instruments¹³. That is not the case, for at least three reasons.

11. Firstly, such an assertion by Niger completely contradicts the position it expressed itself in the Note Verbale just referred to, which was written only five days before the Protocol of Agreement was signed. That letter, which forms part of the *travaux préparatoires* of the Protocol of Agreement, does not even mention that the map exists and adheres strictly to citing the *Arrêté* and the Erratum.

12. Secondly, the differences between the frontier as established by the 1927 texts and the line plotted on the 1960 map by the IGN are such — and we shall have the opportunity to come back to this later in the pleadings — that it is absolutely impossible to rely on both of them “on an equal footing” in order to mark out the frontier.

13. Finally, the experts from Niger and Burkina who were responsible for implementing the 1964 Protocol of Agreement never interpreted it as giving equal weight to the map and the Erratum. As evidence, the Niger experts themselves explicitly underlined in 1990 that “the 1:200,000-scale IGNF map, 1960 edition, was considered as a working document because of its technical precision and not because it conformed to the legal texts”¹⁴.

14. Following the adoption of the Protocol of Agreement in 1964, the demarcation work did not proceed as quickly as the Parties had hoped. Four years later, in 1968, they considered entrusting the work of demarcating the frontier to IGN France, for an estimated cost of 10 million CFA francs¹⁵.

15. Nothing ever came of this plan. Niger is nevertheless inspired by it, and claims in its Counter-Memorial that the principle adopted by the two States in 1968 of entrusting the task of installing markers along the frontier to IGN France “was far more than a simple understanding regarding the procedure to be followed and . . . also marked a consensus on the actual line to be adopted”. “[I]n all probability”, it adds, “the IGN would then have carried out the demarcation

¹³CMN, p. 42, para. 1.1.30.

¹⁴MBF, Ann. 85 (Report of the extraordinary meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Niamey, 14 May 1990).

¹⁵*Ibid.*, pp. 38-39, para. 1.51; CMN, p. 48, para. 1.2.5.

22 work on the basis of the line on the 1960 map”¹⁶. Niger concludes from this “probability” that the Parties agreed to consider the line plotted on the 1960 IGN map as a reflection of their frontier. Moreover, this was corroborated, according to Niger, by a road map of Upper Volta dating from 1963¹⁷ on which that line appeared. In Niger’s view, Upper Volta had, by virtue of this map, “endorsed”¹⁸, or even “adopted”¹⁹ this line in 1963. Niger uses this as an argument to claim that Burkina Faso has since changed its position²⁰.

16. Such an argument is completely unfounded.

17. While there was a convergence of views between the Parties in the 1970s, it was certainly not in respect of the line drawn on the 1960 map by IGN France, which was never “adopted”, either by Burkina or by Niger for that matter. At the time, the Parties agreed on the fact that there existed “a basic *text*”²¹ — I stress the word *text*, Mr. President — inherited from colonization that fixed the frontier, namely the 1927 Erratum²². This is what the 1964 Protocol of Agreement reflects. If the States had intended, as Niger claims, to endorse the *line plotted on the 1960 map* as the frontier, they would have said so. And they did not. While the map is referred to as a “basic document” in the 1964 Protocol of Agreement, it is as a base map and, additionally, as a means of providing any further information relevant to demarcation.

18. As for the fact that the Parties wanted to entrust the task of installing boundary markers on the ground to IGN France, this in no way implies that that body was given *carte blanche* to establish the frontier wherever it felt it ought to go.

19. Lastly, in respect of the 1963 road map of Upper Volta²³, Niger is quite wrong to be surprised that it reproduces the frontier line on the map produced by the IGN in 1960, since it was published by the very same IGN, through its office in Dakar. Nor can it possibly be inferred that

¹⁶CMN, p. 48, para. 1.2.5; see also CMN, p. 43, para. 1.1.31.

¹⁷MN, Ann. D 31.

¹⁸CMN, p. 48, para. 1.2.5.

¹⁹*Ibid.*, p. 42, para. 1.1.31.

²⁰*Ibid.*, p. 48, para. 1.2.7; see also CMN, p. 49, para. 1.2.9.

²¹MBF, Ann. 44; emphasis added.

²²*Ibid.*

²³MN, Ann. D 31.

23 Upper Volta “endorsed” this line, as there is simply no evidence that it represented Upper Volta’s official position, which, moreover, Niger does not even attempt to argue.

20. In the end, the IGN did not carry out the task the Parties had planned to assign it in 1968. The two States resumed their work some time later, with the result that the technical experts of the two Parties agreed on a line in May 1986. Niger makes out that this is of great importance, whereas it was simply a draft, established for purely technical reasons, since the sole item on the agenda of the meeting between the technical experts in May 1986 was “[the] estimate of the costs of the demarcation of the Niger/Burkina frontier”²⁴. Moreover, Niger stressed this in its Memorial²⁵, before shifting position in its Counter-Memorial, where it would have us believe that a final frontier line was agreed upon at that meeting²⁶.

21. In any event, the results of the 1986 work were not conclusive, since they were partially rejected in 1988 by the Joint Technical Commission on Demarcation established by the 1987 Protocol of Agreement.

B. The Agreement and Protocol of Agreement of 1987

24 22. Niger evidently does not understand the significance of the position adopted by the Joint Technical Commission in 1988 when it rejected the line of 1986. Niger in fact claims that the decision taken by the Commission in 1988 was the result of an about-turn by Burkina, which thereby repudiated the position it had adopted in 1986²⁷. Yet the 1988 decision can hardly be said to reveal any inconsistency on the part of Burkina, given that the 1987 Agreement and its accompanying Protocol of Agreement were signed between 1986 and 1988. Not only do those texts clearly confirm the delimitation of the frontier between the two States, they also specify the demarcation procedure which they agreed to follow. The Joint Commission established by the 1987 Protocol of Agreement was therefore, in 1988, bound by those texts and could in no way derogate from their provisions.

²⁴MBF, Ann. 69.

²⁵MN, p. 40, para. 3.3.

²⁶CMN, pp. 48-49, para. 1.2.7.

²⁷*Ibid.*, p. 49, para. 1.2.9.

23. Thus, while part (and only part) of the line adopted by the technical experts in 1986 could not be endorsed at the meeting held in 1988, it was obviously not on account of a change of mind by Burkina, but because their work was not in accordance with the sovereign decision of the two States in 1987. *In the unanimous opinion of the Commission, composed of an equal number of members from Niger and Burkina*, that line had been established on the basis of the 1960 map, and not the 1927 texts, which was unacceptable because “the technical staff were not authorized to adopt a procedure that deviated from the decisions of the two Governments” taken in 1987, which clearly indicated that the frontier was as described in the Erratum. The Commission therefore had no choice but to ask the technical staff 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”²⁸.

24. However, it is true that our opponents blithely ignore the terms of the Agreement and Protocol of Agreement of 1987, which are nonetheless key elements in the history of the discussions concerning the frontier. They are reproduced at tabs 1.4 and 1.5 of the judges’ folder. The main articles of the Agreement of 18 March 1987 read 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.

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

Article 3

There is hereby established a Joint Technical Commission on Demarcation, whose composition and powers shall be defined by a Protocol of Agreement between the two States.”

²⁸MBF, Ann. 80.

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25. For its part, the main object of the Protocol of Agreement is to establish how the Joint Commission on Demarcation should function. It should be recalled at this point that its task is precisely determined in Article 4, since it is responsible for “*marking* the frontier, in accordance with the provisions of Articles 1 and 2”. The said Articles 1 and 2 leave the Commission no discretion to decide whether the line on the 1960 map is pertinent or not, since Article 2 states that it is only in the event that “[the *Arrêté* and Erratum should] not suffice, [that] 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”²⁹.

C. The consensual line of 1988

26. On the basis of the 1987 Agreement and Protocol of Agreement, the Commission’s work initially proceeded apace. It led to agreement the very next year on a consensual line, which complied with the provisions of the 1987 Agreement to the letter. Mr. President, Members of the Court, you will find a reproduction of the consensual line at tab 1.6 of the judges’ folder. The way in which this consensual line was drawn up is accurately recorded by Niger in its Counter-Memorial:

“Following the fourth meeting of the Joint Technical Commission, representatives from both States noted that ‘[t]he experts [were] 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 1987’³⁰. The representatives of the two States thus agreed on a line based on the interpretation of the basic texts which they represented on two composites of 1:200,000-scale maps (1960 IGN map). That is what, in its written proceedings, Burkina Faso calls the ‘consensual line’.”³¹

27. Mr. President, whilst Burkina can easily endorse that observation from Niger’s Counter-Memorial, the same cannot be said for the other analyses set out therein.

28. Our opponents contend that “[the consensual line of 1988] proved to be no more consensual than that of 1986”³², the evidence for this, in their view, being that “the Joint Commission noted a significant number of places where the line “differ[ed]” from the one resulting

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²⁹MBF, Ann. 73.

³⁰MBF, Ann. 81.

³¹CMN, p. 50, para. 1.2.10.

³²*Ibid.*, p. 50, para. 1.2.11.

from the basic texts, the line on the 1960 IGN map “and from certain administrative realities on the ground”³³. This apparently raised doubts for Niger, doubts which were said to have been “confirmed by the field mission conducted from 17 to 21 April 1990 by the national directors responsible for frontier matters of the two countries at the request of the Joint Technical Commission on Demarcation”³⁴.

29. Members of the Court, Niger is straying here into explanations which are entirely without merit and actually rather preposterous.

— Firstly, the existence of differences between the consensual line and the line on the 1960 IGN map in no way implied a lack of consensus regarding the former, unless one were to suggest that the consensual line must of necessity have “stuck” to the line on the 1960 IGN map — an absurd notion since, on the contrary, the said Joint Commission did not consider part of the line accepted by the experts in 1986 as relevant *precisely because it merely reproduced the line on the 1960 map*.

— Secondly, the fact that the course of the frontier having the force of law between the Parties might be at odds with certain realities on the ground had indeed been contemplated by the Protocol of Agreement of 28 March 1987, which expressly laid down the procedures for making the realities on the ground comply with the frontier line. Article 15 mentions the possibility of the frontier “pass[ing] through structures or other properties”, without however requiring that its course be altered to avoid this problem. And Article 19 states that after demarcation of the frontier has been completed, “nationals of each State who are not originally from the State where they are residing, and who decide to remain there, shall forthwith become subject to the jurisdiction, laws and regulations of the latter State”. The Parties were thus in perfect agreement on the principle according to which the reality on the ground had to be adapted to the course of the frontier, and not the reverse.

— Thirdly, even though Niger did have “doubts” about the consensual line of 1988 – and I use Niger’s own terms here when mentioning doubts – this only happened two years later, as a result of a change in the composition of Niger’s delegation to the Joint Commission. In this

³³CMN, p. 50, para. 1.2.11.

³⁴*Ibid.*

27 matter, Burkina's Minister for Territorial Administration explains in a report to the Head of State:

“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.”³⁵

— And lastly, these “doubts” were not “confirmed . . . by the national directors” in April 1990, contrary to what is claimed by Niger, referring to a document which provides no evidence of this. MBF Annex 85, cited in footnote 144 of Niger's Counter-Memorial, says nothing of the kind. This document is the report of the extraordinary meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, held in Niamey on 14 May 1990, a meeting during which Niger's delegation, and that delegation alone, reversed its position completely by calling into question the consensual line. As for the field mission conducted from 17 to 21 April 1990 which Niger mentions enigmatically in its Memorial³⁶, there is no record of it in the file. A technical field mission was conducted from 5 to 12 June 1990³⁷ in an attempt to survey the villages of Alfassi, Kouro, Takalan (Tokalan), Tankouro and Kogori. But the mission report does not provide any confirmation whatsoever of the “non-consensual” nature of the 1988 line, or of any so-called “doubts” as to its relevance, as implied by Niger.

30. Mr. President, the fact is that Niger called into question the consensual line of 1988 from May 1990 onwards (it had started to cause tension within the Commission as of February 1990), not before, and certainly not “as soon as the situation on the ground was first assessed”³⁸. Furthermore, it is not the aforementioned assessments on the ground to which Niger refers in order to justify its radical change of position in May 1990, but a 1:1,000,000 map, whose scale alone demonstrates that it simply cannot show points of detail on the ground³⁹. Two months later, in July 1990, Niger put forward new arguments, all of a theoretical nature and with no connection to “realities on the ground”: it was on that occasion that two new theories emerged, as novel as they

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³⁵MBF, Ann. 88.

³⁶CMN, p. 50, para. 1.2.11.

³⁷MBF, Ann. 86.

³⁸CMN, p. 51, para. 1.2.14.

³⁹MBF, Ann. 85.

were short-lived, for they have since been abandoned, one being that that the frontier took the form of a “curve” between the Tong-Tong astronomic marker and the River Sirba at Bossébangou, the other that Takalan and Takatami were one and the same village⁴⁰.

31. In its Counter-Memorial, Niger criticizes Burkina for presenting Niger’s position on the interpretation of the course of the frontier as being based on “short-lived” beliefs⁴¹, and maintains that on the contrary the said position was “repeatedly reiterated” in April 1990, July 1990, November 1990 and February 1991⁴².

32. However, Members of the Court, which position is Niger talking about? Is it the position according to which the frontier does not reach the River Sirba at Bossébangou, put forward in May 1990, supported by the 1927 map⁴³, then abandoned just two months later, in July the same year⁴⁴, to be adopted again only in the context of the present dispute⁴⁵? Are we to seek the “repeatedly reiterated” position claimed by Niger in the line between the Tong-Tong astronomic marker and the River Sirba at Bossébangou, which at one point it sees as a curve, as asserted in July 1990⁴⁶, then as consisting of straight-line sections as it accepted in 1988⁴⁷ and 1991⁴⁸, then once again as a curve in 2001⁴⁹, finally conceding, before the Court, that this position is “debatable”⁵⁰ — not to say untenable — and henceforth defending a line made up of a combination of sections⁵¹? It would be cruel to repeat here the full list of Niger’s inconsistencies, which are already set out in Burkina’s Counter-Memorial⁵². But it is nonetheless astonishing to see our

29 opponents state in writing the extent to which their position has been “repeatedly reiterated”.

⁴⁰MBF, Ann. 87.

⁴¹CMN, p. 51, para. 1.2.14.

⁴²*Ibid.*, p.1-52, para. 1.2.14.

⁴³MBF, Ann. 85.

⁴⁴*Ibid.*, Ann. 87; see also CMN, Ann. C 130.

⁴⁵CMBF, p. 54, paras. 2.17-2.19.

⁴⁶MBF, Ann. 87.

⁴⁷*Ibid.*, Ann. 81.

⁴⁸*Ibid.*, Ann. 89.

⁴⁹*Ibid.*, Ann. 94.

⁵⁰MN, p. 70, para. 5.9.

⁵¹CMBF, p. 53-54, paras. 2.15-2.16.

⁵²CMBF, p. 52, paras. 2.14-2.23.

II. The crystallization of the dispute

33. It is Niger's abrupt change of position in 1990, when it called into question the consensual line of 1988, which marks the start of the period of crystallization of the dispute. The Parties were nonetheless able to resolve it, on a temporary basis, by means of a new agreement reached in May 1991 — a copy of this compromise agreement is reproduced at tab 1.7 of the judges' folder.

A. The May 1991 compromise

34. The 1991 compromise solution appears to be a partial recognition of Burkina Faso's claim, since it goes back to the consensual line of 1988 — i.e., the line described in the Erratum — between the Tong-Tong marker and the River Sirba at Bossébangou, whereas in the next section, which runs from the River Sirba at Bossébangou to the River Mekrou, the compromise grants satisfaction to Niger by following the line on the 1960 map.

35. Having said that, neither Burkina nor Niger relies on this agreement as having the force of law in the present case. Niger does, however, claim that when this compromise was reached the Ministers of both States “noted that the 1927 *Arrêté* and its Erratum did not suffice”⁵³. This is pure fabrication, the Ministers never having noted anything of the kind⁵⁴. Our opponents had, moreover, been slightly more prudent in their Memorial, where they merely contend that the Ministers had found *some* “lacunae in relation to the implementation of the *Arrêté* of 1927 and its Erratum”⁵⁵, although even that is not correct, since actually the Ministers had merely noted *the* lacunae in relation to *the implementation of the texts* by the Joint Commission on Demarcation⁵⁶. In fact, they simply noted that the Joint Commission was unable to settle the matter, and they decided to settle it themselves by adopting a political solution.

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B. The repudiation of the 1991 compromise and the partial failure of subsequent discussions

36. As we know, this political solution did not last for very long, once again due to another sudden change in Niger's position. Since then, Niger has been trying to justify itself through legal

⁵³CMN, p. 52, para. 1.2.15.

⁵⁴MBF, Ann. [89].

⁵⁵MN, p. 41, para. 3.5.

⁵⁶CMBF, p. 52, para. 2.12.

arguments, explaining that the line resulting from the 1991 compromise did not fully comply with Articles 1 and 2 of the 1987 Agreement⁵⁷, of which Niger turns out to be a fervent defender on this point — whereas elsewhere it does its utmost to ignore that Agreement in its written submissions to the Court. This justification in any case seems abstruse, since, as an international agreement, the 1991 Agreement could perfectly well depart from the terms of the 1987 Agreement, which indeed it did, by giving a political compromise solution the form of an agreement. The justification cited by Niger thus serves only to conceal the fact that it had once again changed its mind and no longer wanted the political solution which it had itself negotiated and accepted.

37. Nothing significant happened between 1991 and 2001, and it was not until the fourth ordinary session of the Joint Technical Commission on Demarcation of the Frontier, held in July 2001, that the debates were resumed, allowing clarification of the points of agreement and the points of disagreement between the Parties⁵⁸. During that meeting a joint committee was created and entrusted with the task of reviewing the theoretical line of the frontier, that review being conducted in the light of the Agreement and Protocol of Agreement of 1987 and of the Erratum of 5 October 1927. When concluding its work, the Commission noted that 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 it had not been possible to identify — and from Tchenguiliba to the River Mekrou, subject to verification of the position of the village of Kogori. However, it noted that from the Tong-Tong astronomic marker to the River Sirba at Bossébangou, the interpretations of the Erratum accepted by Burkina and Niger were irreconcilable: for the former, the frontier was, and still is, composed of two straight-line sections, whereas for the latter, it followed a curved line — since then, Niger’s position has changed. Similarly, from Bossébangou to Tchenguiliba, the Commission noted the difference in the positions held by the two Parties.

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38. The two sections of the line which were clearly defined in 2001 have not been called into question since then. The Parties have asked the Court to place this agreement on record for them; my friend and colleague Alain Pellet will come back to this point. This agreement does not cover the other two sections of the frontier, which run from the Tong-Tong astronomic marker to the

⁵⁷CMN, p. 52, para. 1.2.16.

⁵⁸MBF, Ann. 94.

River Sirba at Bossébangou, and from the River Sirba at Bossébangou to the beginning of the Botou bend respectively; as far as these are concerned, it is up to the Court to confirm the line described in the 1927 Erratum.

39. Mr. President, Members of the Court, that concludes my pleading for this morning. I should like to thank you very much for your attention and respectfully ask you, Mr. President, to give the floor to Mr. Claude Obin Tapsoba, unless you now wish to adjourn for a coffee break.

The PRESIDENT: Thank you, Mr. Thouvenin. I would now ask Mr. Claude Obin Tapsoba to give his geographical and cartographic presentation. You have the floor, Sir.

Mr. TAPSOBA: Thank you, Mr. President.

GENERAL PRESENTATION

1. Mr. President, Members of the Court, Professor Jean-Marc Thouvenin has described the diplomatic context of the dispute before you. I am proud and happy to present the geographical and cartographic framework of this dispute on behalf of my country.

[Slide 1: Situation of Burkina Faso]

2. Burkina Faso, formerly the Republic of Upper Volta, is a landlocked country in the heart of West Africa with a surface area of 274,200 sq km. It is one of the smallest countries on the African continent. It extends approximately 625 km from north to south and 865 km from east to west.

3. Its territory lies between latitudes 8 degrees and 16 degrees north and longitudes 6 degrees and 3 degrees east of the Greenwich meridian. It shares borders with Mali to the north and west, Côte d'Ivoire to the south-west, Ghana and Togo to the south, Benin to the south-east and Niger to the east.

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[End of slide 1]

I. Presentation of the physical, human and economic environment

4. Much of the country is situated on a peneplain with an average altitude of 300 m above mean sea level.

5. It has a tropical Sudanese-type climate, except in the north of the country where the climate is Sahelian. In both cases, there are two seasons: a rainy season, known as wintering, which runs from mid-May to mid-October, and a dry season which lasts the remainder of the year. Rainfall decreases towards the north.

6. Vegetation is savannah-like, with trees in the west, south and south-east and bushes in the centre and east. The north is characterized by steppe lands and tiger bush.

7. Burkina Faso's hydrographic network consists of three main basins: those of the Volta, the Comoé and the Niger. The frontier region with the Republic of Niger is part of the western basin of the River Niger, several tributaries of which are relevant in the context of the present frontier dispute. This is the case for the Béli, the Sirba, the Tapoa and the Dyamongou rivers, which originate in Burkina Faso territory.

8. According to the final results of the Burkina Faso general population and housing census carried out in 2006, the country has a population of just over 14 million inhabitants⁵⁹, with a density of 51.8 inhabitants per sq km. Its ethnographic make-up is diverse. The main ethnic groups are the Mossi, the Peul, the Gourmantché, the Bobo and the Gourounsi.

[Slide 2: MBF, Administrative map of BF]

9. The capital of Burkina Faso is Ouagadougou. In terms of administrative organization, the country is divided into 13 regions, two of which — the Sahel region and the Eastern region — are adjacent to the territory of Niger.

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10. The regions are subdivided into provinces. The Sahel region in the north is made up of the provinces of Oudalan, Séno, Yagha and Soum. The Eastern region on the southern part of the frontier comprises the provinces of Gnagna, Komondjari, Gourma, Kompienga and Tapoa.

[End of slide 2. Slide 3: Situation of Niger]

11. The Republic of Niger, which had an estimated population of over 15 million inhabitants in 2010⁶⁰, is made up of eight regions which are subdivided into 36 *départements*. It covers an area of 1,267,000 sq km and is landlocked like Burkina Faso. The majority of Niger's territory lies within the Sahara and the Sahel zone. The River Niger runs through the south-west of the country.

⁵⁹http://www.insd.bf/fr/IMG/pdf/Resultats_definitifs_RGPH_2006.pdf.

⁶⁰MN, p. 3, para. 0.10.

Niger shares borders with Mali, Algeria, Libya, Chad, Nigeria, Benin and lastly Burkina. The *départements* of Téra in the north and Say in the south, both of which are in the Tillabéry region, border Burkina.

[End of slide 3]

12. On either side of the frontier which is at issue in the present case, Niger's *départements* of Téra and Say and Burkina Faso's provinces of Oudalan, Séno and Yagha, as well as those of Komondjari, Gourma and Tapoa, are very similar in terms of rainfall, climate and vegetation.

13. The aspects I have just mentioned correspond to the present situation. It is important to point out, however, that the movement of people in space and time, the imprecise nature of colonial statistics and the lack of monographs of the villages in the disputed sectors in particular mean that it is not possible to have an accurate picture of demographic changes in the frontier area.

II. The Sahel and Eastern regions

14. Mr. President, Members of the Court, the Sahel and Eastern regions are the regions of Burkina Faso which are concerned by the frontier dispute before the Court.

[Slide 4: Administrative divisions adjoining the frontier]

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15. The Sahel region, let us remember, consists of four provinces, three of which border Niger: Oudalan, Séno and Yagha. It is situated in the extreme north of the country, between parallels 13 degrees and 16 degrees north, and is bounded to the north by the Republic of Mali, to the east by the Republic of Niger, to the south by the Eastern and *Centre nord* regions of Burkina Faso and to the west by the Northern region. Its population consists mainly of Peul, Touareg, Gourmantché and Mossi.

[End of slide 4]

16. The desert character of this region limits agricultural production. Nevertheless, it has great potential for animal husbandry. Pastoralism, characterized by high mobility, is the system of animal production in the region. In this area, which has an unfavourable climate, this activity is dominated by nomadic and semi-nomadic population groups for whom pastoralism has always been the usual way of managing pastoral and water resources.

17. The population of these three provinces was estimated at approximately 625,000 inhabitants in the last general population and housing census of 2006. It was below 100,000 inhabitants in the 1920s. Fulfuldé is the most widely spoken local language, followed by Tamachèque.

18. The Sahel region is home to foreign nationals, mainly from Niger and Mali. Some are residents and others stay there periodically in order to work their fields or to look for pasture or watering points for their herds. In the absence of forage crops to supplement feed for their herds, the method of feeding the latter is based on the extensive use of natural pasture. Herders are therefore obliged to travel greater or lesser distances, depending on the ethnic groups or tribes in question. They tend to disperse to fairly distant watering points during the dry season and to come together again as soon as the rains begin. This practice explains the flexibility and responsiveness of the population groups in exploiting plant resources whose geographical and temporal availability are particularly unpredictable.

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19. The second frontier region of Burkina Faso concerned by this case is the Eastern region. As its name suggests, it is situated in the east of Burkina, between latitudes 10 degrees and 14 degrees north. It comprises the southern part of the section of the frontier which is at issue and consists of five provinces, two of which border the Republic of Niger. These are the provinces of Komondjari and Tapoa.

20. The hydrographic network of the northern part of the region consists of the tributaries of the right bank of the basin of the River Niger. The tributary arms form a local network which drains mostly into the River Sirba. In the province of Tapoa, the hydrographic network is structured around the Tapoa, which is the only permanent watercourse. The lands in the south of the region are part of the sub-watershed of the Pendjari. The Pendjari and its tributaries do not flow in the dry season, but a number of permanent pools and reservoirs are situated along its course.

21. In 2006, the population of the Eastern region was estimated at nearly 1,200,000 inhabitants, in other words about 8 per cent of the country's population at that time. The population of the Fada *cercle* is believed to have been less than 200,000 inhabitants in the 1920s. The most widely spoken language in the region is Gourmantché, followed by Fulfuldé and Mooré.

22. The most important point to emphasize is the fact that the demographic pressure has grown in recent years. For example, in 1975 the province of Séno, which corresponded at that time to the *arrondissements* of Dori and Sebba, had some 140,000 inhabitants and in 1985 it had approximately 229,000: the population had almost doubled in ten years. During the same period, the population of Gourma was estimated at 190,000 inhabitants in 1975, 295,000 in 1985 and 350,000 in 1991; between 1975 and 1991, the population had therefore increased by 82 per cent.

III. The Tillabéry region

23. The Niger region of Tillabéry faces the two regions of Burkina Faso that cover the frontier which is the subject of the present case. It is bordered to the north by Mali, to the west and south-west by Burkina, to the south by Benin, to the south-east by the Niger region of Dosso and to the north-east by the region of Tahoua. It covers an area of approximately 91,000 sq km and is drained by the River Niger. The population of the Tillabéry region is approximately 1,850,000, according to the provisional results of the general population and housing census carried out in 2001. The landscape has two main features — the fossil valley of Dallol Bosso and the valley of the River Niger — which are dominated by a vast plateau with elevations of between 200 and 300 m⁶¹.

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24. The Tillabéry region is the newest of the country's eight regions; it was created by Order No. 88-20 of 7 April 1988. It is subdivided into six *départements*, seven *postes administratifs* and 44 *communes*⁶². The *départements* of Téra and Say border Burkina. According to a source⁶³ cited by a study analysing the agriculture, forestry and livestock systems in detail as part of the implementation of the rural development strategy for the Tillabéry region, the *départements* of Téra and Say had populations of 414,000 and 230,000 respectively in 2001.

25. As in the border regions of Burkina, agriculture and animal husbandry are the main activities carried out by the population of the Tillabéry region. However, biophysical disturbances, which are the result of climate change, amongst other things, have an impact on herding methods.

⁶¹<http://www.pnud.ne/tillabery.htm>.

⁶²<http://www.strategie-developpement-rural-niger.org/public/images/ressource/sdr04072010222558Tillaberi.pdf>.

⁶³DSCN/RGP 2001/CNEDD/2004.

Herders in search of transhumance areas are sometimes obliged to spend extended periods in neighbouring countries, including Burkina⁶⁴.

IV. Nomadism and transhumance

26. Mr. President, as I have just mentioned, agriculture and animal husbandry are the main sources of income for people living along the frontier between Niger and Burkina. Animal husbandry is predominant in the northern part of the frontier area and agriculture in the southern part.

[Slide 5: Sketch-map showing transhumance routes]

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27. In the Sahel in general, of which the disputed area is part and where most of the people are nomads, migration is a matter of survival for both people and livestock, since there is a constant need to find new pastures for herds and lands for subsistence crops. This migration is subject to the forces of nature. Consequently, traditional back-and-forth migratory movements in search of water, pastures or other resources which are essential for the health and reproduction of the herd follow itineraries and timetables which may change over time.

28. This freedom to lead a cyclical nomadic existence across open spaces⁶⁵ has occasionally been restricted, however, even though agreements on nomadism, which existed between the colonies of the French West Africa group during the colonial period, allowed local governors to have fiscal and administrative oversight over the population groups, without affecting the movement of persons⁶⁶.

29. It should be emphasized that the movements of nomadic peoples are not only a response to the requirements of traditional techniques for exploiting pasture routes. They are also influenced by social relationships. Thus, in addition to the criteria already mentioned, the choice of route is dictated by the existence of areas where it is possible to group herds on the basis of family ties. The existence of conflicts or close ties may prohibit or allow access to watering points or certain

⁶⁴<http://www.strategie-developpement-rural-niger.org/public/images/ressource/sdr04072010222558Tillaberi.pdf>.

⁶⁵See J.-M. Kambou-Ferrand, 1993, *Peuples voltaïques et conquêtes coloniales (1885-1914)*, Burkina Faso, Paris, l'Harmattan, p. 355, and the map on p. 357.

⁶⁶See J.-M. Kambou-Ferrand, 1993, *ibid.*, pp. 355-356.

territories. These conditions of access may vary depending on the seasons, in particular according to customary land rights or the multiple uses of spaces.

[End of slide 5]

30. Mr. President, Burkina and Niger are two Sahelian countries which very often experience fodder and water shortages. These shortages are compounded by, among other things, the vagaries of climate and pressure on the land. In such circumstances, the feeding of livestock becomes a major concern for people who practise transhumance in order to find the pastures and watering points that are necessary to feed their herds. This concern is shared by the leaders of our two countries, who initiated consultations which have identified transhumance routes between Burkina and Niger with a view to a more effective management of resources⁶⁷.

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31. The Economic Community of West African States (ECOWAS) is also concerned about the problems associated with fodder and water shortages. It is working alongside States to resolve the issue by adopting agreements on the cross-border movement of herds⁶⁸.

V. Toponyms

32. Mr. President, Members of the Court, appropriating spaces involves naming them. There are few places in the world without a name. Toponymy is at the heart of society's relationship with space. It reflects the cultural and historical values of the social groups involved. In use since time immemorial, place names constitute the historical and cultural heritage of each people. They represent the ideas, aspirations and life of the first inhabitants.

33. Naming a territory is a cultural and social act which is related to space, power and time. Some places were landmarks (a watercourse or a mountain) before people gathered together there in villages. Place names may allude to particular features such as the topography of the land, the quality of the soil or the existence of particular trees; this is the case with Vibourié, still called Wiboria, which means "beautiful trees" in the local language. They may also recall the presence of a watercourse, a natural elevation or an event; this is the case with Banizoumbou, a district of

⁶⁷General report on the consultation meeting on cross-border transhumance, Dori, Burkina Faso, 19-20 December 2002; <http://www.mra.gov.bf/SiteMra/transhumance/rapport-general.html>.

⁶⁸Decision A/DEC.5/10/98 of 31 October 1998 regulating transhumance between ECOWAS Member States.

Datambi, which denotes the “place where happiness came”, or Karénakéni — “the place where the cayman lies down” — in the *commune* of Bondouré.

34. The same place may have several names simultaneously or successively over time: for example, Ainé or Haini, an administrative village in the *commune* of Falangountou. Similarly, several places may have the same name. Map No. 17 in Series D of the Annexes to Niger’s Memorial is a clear illustration of this. On this map, we find Falangountou between Téra and Dori, and then we find Falangountou again further to the north in the vicinity of Tong-Tong. This latter village is written as Jalakountou on the map in Niger’s Annex D 7. This is also the case with Petel Kolé, which is to be found on the Téra sheet and then a second time on the Say sheet.

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35. In Africa, and in particular in the frontier area between Burkina Faso and the Republic of Niger, place names have traditionally been used in the spoken language. Places were named by the people who went there. Their written forms arose from the needs of colonial administrations, which started mapping the territories in order to gain a better understanding of the countries and the continent. The aim was also to inform the authorities at home of routes which had been covered on the ground.

36. The officials of that time, who came from the colonizing countries, conducted surveys on the ground, with the assistance of local interpreters, with a view to recording the place names on the basic maps. Of course, they had transcription and translation problems which distorted certain place names, sometimes causing them to lose the historical and cultural significance that they are meant to embody. The colonial administrations also faced suspicion from populations who, in order to circumvent the supposed aims of the gathering of information, sometimes gave the wrong name in order to mislead them. The place names in the area concerned by the dispute between Burkina Faso and Niger should be seen against this general background.

37. Let us consider, for example, some of the place names used in the *Arrêté* of 31 August 1927, which we will compare with the names used on the 1:200,000 map published by the *Institut géographique national de France* in 1960. We find that:

[Slide 6: Extract from the Téra sheet]

— Arounskoye in the *Arrêté* is written as Arwaskoy on the map;

— Balébanguia in the *Arrêté* is written as Ballé Banguia (in two words) on the map;

- Tokébangou in the *Arrêté* is written as Takabougou on the map;
- Doumafendé in the *Arrêté* but Douma Fèndé (in two words) on the map;
- Tchenguiliba in the *Arrêté* and fascicle IV of the *General Directory of the Localities of French West Africa* is written as Tyenkilibi on the map.

[End of slide 6]

38. Conversely, some names have never changed. This is the case for Tong-Tong, Tao and Say.

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VI. Characteristics of the villages and of the habitat

39. Mr. President, Members of the Court, as we saw earlier, the frontier area between the two countries is occupied by people whose main activities are animal husbandry in the Sahel region and agriculture in the Eastern region. These activities have left a particular mark on the habitat of the populations concerned and on their villages.

40. In the Sahel, villages are made up of scattered dwellings, thereby leaving space for the herds. In this predominantly Peul region, dwellings are typically woven straw huts, which are well suited to the constant migration of families. The huts consist of small, lightweight parts in order to facilitate moves which sometimes involve long distances. The hut, which is the centre of community life, may be at the same time a kitchen, a dairy and also a place for women to buy and sell things. This type of dwelling is dictated by the mobility of the nomads, who sometimes have to take urgent decisions about moving from one place to another. They then relocate to other temporary sites, sometimes keeping the same place name. This is one of the reasons why places have the same names, but it can also lead to uncertainty over the location of villages.

41. The movements of nomads and their frequency and scale are very closely linked to the events of the pastoral year. Over the years, however, the relocation of camps and changes in pasture involving the movement of herds depend on a number of factors, including the nature of the soil, the rate of growth and composition of the herbaceous layer, the distribution of watering points and the areas for grouping herds together. Nevertheless, the need for the herds to return to watering points to drink restricts the distances that can be travelled between two watering stops.

After the harvest, the nomads move closer to agricultural areas so as to conclude agreements with farmers who wish to use animal dung to fertilize the land.

41 42. The dwellings of the Touareg communities, who are also nomads, are equally basic and precarious. They consist of a wooden frame covered with animal skins or straw. However, this is not the only type of dwelling in the region and some villages consist of grouped dwellings made of earth.

43. It is this type of scattered, earth-built dwelling that characterizes the villages in the south of the frontier area, in particular in the Eastern region, where most of the population is sedentary. The areas between concessions are used as kitchen gardens, while the fields are further away.

44. In this region, huts are built using earth bricks which may or may not then be rendered with a coat of earth plaster. The roof is made of straw or earth, supported by a wooden frame.

45. Generally speaking, villages consist of several concessions which are under a head of household. A village chief or a tribal chief in some areas is responsible for managing the affairs of the settlement. People who are under the territorial authority of a chief pledge allegiance to him.

VII. Cartographic material

46. Mr. President, Members of the Court, the Parties to the present dispute have produced graphical material consisting of maps, sketch-maps and drawings from a variety of sources and of varying quality.

47. Maps differ from sketch-maps and drawings in terms of their geometrical quality and the accuracy of the details shown on them. They are the result of information retrieved from direct surveys, aerial photographs and satellite images and include a legend, a scale and a great deal of other peripheral information making up their metadata. Map-making requires the establishment of a network of markers based on a system of co-ordinates adopted by a country or a group of countries.

48. The sketch-maps and drawings made to illustrate a territory or a route do not have to meet the same requirement as maps, which are prepared in accordance with a technical production process complying with established standards.

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49. In the present case, maps have been provided by the Parties, the oldest of which date from the 1920s. However, none of those maps forms an integral part of the set of titles adopted by the Parties. The other graphical material consists of sketch-maps and summaries of sketch-maps from a variety of sources, often drawn freehand; this means that they do not have the quality required for locating the objects represented.

50. Neither Party has been able to identify a map officially showing the boundaries between Upper Volta and Niger according to the Erratum of 1927⁶⁹. Of all the graphical material presented by the Parties, the 1:200,000 map published by the *Institut géographique national de France* in the 1960s can therefore be accepted as the most relevant to use as a base map for the visual representation of the *Arrêté* and its Erratum. This seems appropriate, because both Parties have adopted it, despite the errors regarding the representation of the frontier line as it results from the Erratum.

51. There are shortcomings in some of the other graphical material provided. Some sketch-maps have been wrongly classed by Niger as maps. This applies to document No. 1 in Series D of the Annexes to Niger's Memorial, which the author himself entitled "Sketch-map of the course of the Niger through Djerma *cercle*"; the same applies to map No. 4 in that series of Annexes. The sketch-map entitled "Diagourou *canton*: scale 1:250,000", included by Niger as map No. 21 in Series D of the Annexes to its Memorial, contains no date and its author is unknown. [Slide 7: Extract from the map in Annex D 25 to Niger's Memorial]

52. In closing, Mr. President, Members of the Court, it is worth remarking that the composite in Annex D 33 to Niger's Counter-Memorial consists of maps prepared on different dates. The Gotheye sheet, published in 1960, was replaced by the 1982 edition (Annex D 25 to Niger's Memorial), supplementary data for which were collected by the Topographic Service and Land Registry of the Republic of Niger. It contains new place names such as Bouno Kalai and Déba (which appears twice, the second time replacing the former village of Doba); Korkouloukou in the old edition becomes Kokoloukou, likewise Ourou Sawabé becomes Boborgou Saba in the 1982 edition.

⁶⁹See *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, pp. 583-584, para. 57.

43 [End of slide 7. Slide 8: Extract from the Gotheye sheets, 1982 and 1960 editions]

53. Moreover, Banizoumbou, which is mapped as being in Burkina Faso territory in the 1960 edition, appears in Niger territory at the place where the 1960 map situated Nabamboro.

54. This is why, even though the 1982 edition of the Gotheye map reproduces the frontier line of the 1960 edition, Burkina Faso requests the Court, so as to avoid any confusion, to adhere to the 1960 edition of the IGN map adopted by joint agreement of the Parties.

[End of slide 8]

55. Mr. President, Members of the Court, that concludes the geographical and cartographic presentation which it has been an honour and a pleasure for me to make. Mr. President, may I ask you now to call Professor Alain Pellet.

I thank you most sincerely for your attention.

The PRESIDENT: Thank you, Mr. Tapsoba. I shall give the floor to Mr. Pellet after a coffee break. The hearing is suspended for 20 minutes.

The Court adjourned from 11.40 a.m. to 12.05 p.m.

The PRESIDENT: Please be seated. You have the floor, Mr. Pellet.

Mr. PELLET:

GENERAL PRESENTATION

THE HISTORICAL CONTEXT; THE POINTS OF AGREEMENT AND DISAGREEMENT BETWEEN THE PARTIES; BURKINA'S POSITION

1. Mr. President, Members of the Court, it is not without emotion that I stand before you today on behalf of Burkina Faso. One of the very first cases I had the honour of arguing before the Court was between Burkina and Mali⁷⁰. More than a quarter of a century has passed and Burkina Faso stands before you again to seek a settlement to its frontier dispute with its other

⁷⁰See *I.C.J. Pleadings, Frontier Dispute Burkina/Mali (Burkina Faso/Republic of Mali)*, Vol. III, pp. 28-38, CR 86/1, pp. 38-64 and *I.C.J. Pleadings, Frontier Dispute Burkina/Mali (Burkina Faso/Republic of Mali)*, Vol. IV, pp. 54-73, CR 86/3, pp. 28-73 and pp. 94-127, CR 86/4, pp. 43-79 and CR 86/5, pp. 6-48.

44 neighbour to the north, the Republic of Niger. I am proud to represent Burkina once again and grateful to the Government of Burkina for asking me to do so.

2. Mr. President, my task is threefold. First, I shall endeavour to put the dispute submitted to you in its historical context; I shall then attempt to identify the points on which the Parties agree (which are often deceptive) and those on which they disagree (which are often significant). And I shall conclude this general presentation — which will continue into the beginning of the afternoon — by setting out the broad outline of Burkina's position.

I. The historical context

3. Mr. President, Members of the Court, Mr. Tapsoba has just presented to you the geographical and cartographic context of the case before us. Professor Thouvenin, for his part, described the immediate genesis of the dispute and the circumstances in which it was submitted to the Court. It falls to me to describe the wider historical context of the delimitation of the frontier between the two countries.

4. That delimitation is a colonial heritage which is fully accepted by Burkina⁷¹, no matter how arbitrarily it was determined. However, as the Chamber of the Court which ruled on the *Frontier Dispute (Burkina/Mali)* so splendidly explained:

“the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers.”⁷²

5. In our case, colonial arbitrariness appears particularly harsh when you consider the hoops Upper Volta was put through by the administering power. This did not prevent the belated establishment of both Upper Volta and Niger as autonomous colonies (A) being rapidly followed by a precise determination of the course of their common frontier (B), and that delimitation survived Upper Volta's chequered history (C).

⁷¹See MBF, p. 69, para. 2.39, Note 213.

⁷²*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 567, para. 25.

45 A. The colonial conquest and the establishment of the French colonies of Upper Volta and Niger

6. Mr. President, I shall not return to either pre-colonial history, which is broadly covered in Burkina Faso's Memorial, or colonial rivalry among the European powers, particularly Germany, England and France — the famous “scramble for Africa”, which is at the root of the territorial division of Africa that has survived to the present day⁷³. In any event, both Upper Volta and Niger were part of French West Africa as established on 16 June 1895⁷⁴ and belonged continuously to the colonial empire of France. This is important because it follows, in principle, under general international law, that the determination of the frontier line between the Parties must 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 . . . 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 territories.”⁷⁵

7. The fate of these two colonies, moreover, was linked, not to say confused, on two occasions:

- in the very beginning, when the present-day territories of Burkina and Niger were both part of the Colony of Haut-Sénégal et Niger;
- and between 1932 and 1947, when part — approximately 68,000 sq km, namely almost a quarter — of Upper Volta was incorporated into Niger (the remaining three quarters being incorporated into Côte d’Ivoire or French Sudan)

[Slide 1: Haut-Sénégal et Niger in 1904]

8. Haut-Sénégal et Niger was created by a decree of the President of the French Republic dated 18 October 1904 reorganizing the Government-General of FWA⁷⁶. According to Article 1 of that decree: “The Colony of Haut-Sénégal et Niger . . . shall encompass the former Territories of Haut-Sénégal and Moyen-Niger, as well as those forming the Third Military Territory.”

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⁷³See MBF, pp. 18-20, paras. 1.4-1.7, citing the relevant passages of the Judgments of 22 Dec. 1986 and 12 July 2005.

⁷⁴Decree of 16 June 1895 establishing a Government-General of French West Africa, MN, Ann. B1.

⁷⁵*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 568, para. 29.

⁷⁶Decree of 18 Oct. 1904 of the President of the French Republic, reorganizing the Government-General of FWA, MBF, Ann. 4.

9. A product of the dissolution of French Sudan as an autonomous colony by a decree of 17 December 1899⁷⁷, Haut-Sénégal et [Niger] encompassed those areas of French Sudan that had not been assigned to any of the neighbouring colonies, and thus it included a vast civil territory and two military territories. The first civil territory roughly corresponded to the south of present-day Mali and the northern half of Burkina Faso; the second was — just as roughly — equivalent to the southern half of Burkina⁷⁸. As regards the third military territory, it included the majority of present-day Niger⁷⁹.

[End of slide 1 — slide 2: Haut-Sénégal et Niger as of 1 January 1912]

10. The territory of the newly created Colony of Haut-Sénégal et Niger was extended by decree of 2 March 1907 to Senegal and Niger, and incorporated the *cercles* of Fada N’Gourma and Say⁸⁰. Further, in the *Arrêté* of the Governor-General of FWA dated 22 June 1910, including the region of Timbuktu in the Civil Territory of Haut-Sénégal et Niger, it was decided to incorporate into that Territory the parts of Gao, Tillabéry and Djerma *cercles* situated on the right bank of the River Niger⁸¹. And, by a decree of 7 September 1911, the Military Territory of Niger was detached from the Colony of Haut-Sénégal et Niger and established as a separate administrative subdivision under the direct control of the Government-General of FWA⁸². This subdivision was to be called the “Territory of Niger” from 1 January 1921⁸³, before eventually becoming a fully-fledged colony with effect from 1 July 1922⁸⁴.

47 [End of slide 2 — slide 3: The birth of Upper Volta (1919)]

⁷⁷Decree of 17 Oct. 1899 reorganizing the territories having constituted the possessions of French Sudan, MN, Ann. B2.

⁷⁸See the *Arrêté* of the Governor-General of FWA dated 25 Dec. 1899, MBF, Ann. 2; see also MBF, p. 23, para. 1.12.

⁷⁹Created by *Arrêté general* of 23 July 1900, MBF, Ann. 3 and MBF, p. 23, para. 1.12.

⁸⁰Decree 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 Mar. 1907, MBF, Ann. 8.

⁸¹*Arrêté* of the Governor-General of FWA of 22 June 1910 incorporating the region of Timbuktu into the Civil Territory of Haut-Sénégal et Niger, MBF, Ann. 12.

⁸²Decree of the President of the French Republic incorporating the Military Territory of Niger into the Government-General of FWA with effect from 1 Jan. 1912, 7 Sep. 1911, MBF, Ann. 13.

⁸³Decree 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 Jan. 1921, 4 Dec. 1920, MBF, Ann. [18].

⁸⁴Decree of the President of the French Republic converting the Civil Territory of Niger into an autonomous Colony, 13 Oct. 1922, MBF, Ann. 19.

11. The remainder of Haut-Sénégal et Niger was in turn divided into two separate colonies by decree of the President of the French Republic dated 1 March 1919⁸⁵. It ensues from Article 1 of this founding text that: “The *cercles* of Gaoua, Bobo-Dioulasso, Dédougou, Ouagadougou, Dori, Say and Fada-N’Gourma, currently part of Haut-Sénégal et Niger, shall form a new separate Colony called Upper Volta.” Upper Volta was born, and the River Niger formed the frontier between Upper Volta and Niger.

[End of slide 3 — slide 4: The territorial amputation of Upper Volta (1926)]

12. However, following the transfer of the administrative centre of Niger from Zinder to Niamey, Article 2 of the Decree of 28 December 1926 — which you will find at tab 1.12 of your folders — detached certain territories on the right bank of the River Niger from the new Colony of Upper Volta and transferred them to the Colony of Niger:

“The following territories, which are currently part of the Colony of Upper Volta, shall be incorporated into the Colony of Niger with effect from 1 January 1927:

1. Say *cercle*, with the exception of Gourmantché Botou *canton*;
2. The *cantons* of Dori *cercle* which were formerly part of the Military Territory of Niger in the Téra and Yatacala regions, and were detached from it by the *Arrêté* of the Governor-General of 22 June 1910.”

The second paragraph of this provision, Article 2 of the Decree of 1926, is of great importance — I shall return to this later; it provided, and I quote: “An *Arrêté* of the Governor-General in Standing Committee of the Government Council shall determine the course of the boundary of the two Colonies in this area.”⁸⁶

Without making any territorial changes between the two colonies (contrary to what Niger implies in its Memorial⁸⁷), the *Arrêté* of the Governor-General of FWA of 22 January 1927 gave effect to the redistribution and determined

- 48** (1) the constitution of Tillabéry *cercle*, to consist of the former subdivision of the same name, Niamey *cercle* and the part of Dori *cercle* that had been transferred to Niger;

⁸⁵Decree of the President of the French Republic dividing the Colony of Haut-Sénégal et Niger and creating the Colony of Upper Volta, 1 Mar. 1919, MBF, Ann. 16.

⁸⁶Decree 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, MBF, Ann. 26.

⁸⁷MN, p. 17, para. 1.23.

- (2) the conversion of the part of Say *cercle* assigned to Niger into a new *cercle* belonging to Niger and bearing the same name; and
- (3) the incorporation of Gourmantché Botou canton into the *cercle* of Fada belonging to Upper Volta⁸⁸.

13. This, however, involved a redefinition of the *cercles* within the two colonies, and not the determination of the “course of the boundary of the two Colonies in this area” provided in the second paragraph of Article 2 of the Decree of 28 December 1926. The course of that boundary was determined by the *Arrêté* of 31 August 1927, as modified and completed by the Erratum of 5 October of the same year.

[End of slide 4]

B. The determination of the course of the boundary between Upper Volta and Niger — the *Arrêté* of 31 August 1927 and its Erratum of 5 October 1927

14. Before I recall in broad outline how the 1927 *Arrêté* and its Erratum were drawn up, I should like to make two general remarks, if you will allow me, Mr. President. They are by way of response to pages 20 to 29 of Niger’s Counter-Memorial, in which Niger strives to show that “[T]he history of the making of the boundary in no way implied anything artificial or arbitrary in character.”⁸⁹

15. According to Niger, the colonial power showed “a true concern to respect local inhabitants and pre-existing administrative divisions”⁹⁰. This touching and idyllic vision is, unfortunately, contradicted by the very reasoning that Niger is obliged to follow. Niger cobbles together a small number of quotations to the same effect, taken out of context — and it could have found others: of course, it may be that the French colonial authorities were concerned not to split up ethnic groups, but this was only when such a division might have the effect — and I quote a letter from the Lieutenant-Governor of Upper Volta — of “compromising, to a greater or lesser

⁸⁸*Arrêté* No. 184 of the Governor-General of FWA providing for territorial changes to the Colonies of Upper Volta and Niger, 22 January 1927, MBF, Ann. 29.

⁸⁹CMN, p. 20, B.

⁹⁰*Ibid*, p. 20, para 1.1.7.

49 extent, *the interests of sound administration*”⁹¹. I have taken this phrase from the letter of the Lieutenant-Governor of Upper Volta, dated 28 July 1920, of which Niger makes much⁹²; but it neglects to cite this passage (and replaces it with an ellipsis). Likewise, the tribulations suffered by the regions of Say or Dori, which are moved from Niger to Upper Volta and from Upper Volta back to Niger⁹³, owe nothing to the colonial power’s concern for the ethnic unity of the territories in question: the only purpose is to facilitate the colonial administration’s “direction and control”⁹⁴ of the territories and the inhabitants involved.

16. Quotations taken out of context, then. From this juxtaposed selection, Niger infers that the colonial administrators were vigilant about ethnic issues, and attached importance to “the human factor”⁹⁵. But which administrators were these? They were local administrators — and, in one instance, the Lieutenant-Governor of Upper Volta — but never authorities with decision-making powers who could fix the boundaries of colonies. On the other hand, there is the President of the French Republic, empowered to create colonies⁹⁶, and the Governor-General of FWA, to whom it fell to “determine” — and I quote the 1902 Decree regarding the powers of the Governor-General — “in government council on a proposal from the Lieutenant-Governors concerned the administrative divisions within each of the Colonies of French West Africa”⁹⁷; these authorities refused to take account of such objections — the objections of the local administrators — and their decisions — that is, the decisions of the President of the French Republic and of the Governor-General — led to vigorous protests, although actually one often wonders whether the protesters were driven more by a concern to preserve the integrity of the

⁹¹Circular letter No. 713 A.G. of the Lieutenant-Governor of Upper Volta to the Administrators of the *cercles* of the Colony, 28 July 1920, MBF, Ann. 17.

⁹²CMN, p. 22, para. 1.1.10.

⁹³Decree 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 Dec. 1926, MBF, Ann. 26.

⁹⁴*Exposé des motifs* of the 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 Dec, 1926, MBF, Ann. 26.

⁹⁵CMN, p. 23, para. 1.1.11.

⁹⁶See the Sénatus-consulte of 3 May 1854, CMN, Anns., Series B, No. 33. See *Frontier Dispute (Burkina Faso/Republic of Mali) Judgment, I.C.J Reports 1986*, p.569, para. 31.

⁹⁷Art. 5 of the Decree of 1 Oct. 1902 reorganizing the Government-General of French West Africa, MN, Ann. B 7, reaffirmed in Art. 5 of the Decree of 18 Oct. 1904, reorganizing the Government-General of French West Africa, MBF, Ann. 4.

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territories for which they were responsible than by ethnic and human considerations. Furthermore, with particular regard to the area we are looking at here, it is worth noting that, in his report which led to the reconstitution of Upper Volta in 1947, the Inspector of Colonies, BARGUES, highlighted the considerable ethnic diversity of Dori *cercle*, indicating that these “nomadic or semi-nomadic Sahel people have close affinities with the other ethnic groups inhabiting Niger and have only trading relations with the Mossi,”⁹⁸; that did not prevent this region from being detached from Niger once again and reincorporated into the reconstituted Colony of Upper Volta.

17. I come now to my second general remark on the curious reasoning followed by Niger. Niger sees in the fact that the territories concerned were frequently defined in terms of *cantons* “a clear will to locate on the ground the boundaries of the *cantons* concerned as they were in 1910”⁹⁹. Mr. President, that is a very hasty generalization! It is quite correct, as the Chamber of the Court stated in the case concerning the frontier dispute between Benin and Niger, that at the outset (i.e., when Upper Volta was created), “[I]t is by the precise delimitation of the *cercles* mentioned in Article 1 of the Decree of 1 March 1919 — a delimitation not effected by the decree itself — that, from this date, the inter-colonial boundary could be defined” (*Frontier Dispute (Benin/Niger), Judgment, I.C.J Reports 2005*, p. 146, para. 134). But the Chamber of 2005 added straight away — and just as correctly — that:

“while the 1919 Decree did not call into question the inter-colonial boundary determined in 1907, it left unaffected the power of the Governor-General to modify the boundary in the future by fixing the boundaries of the *cercles* in question in accordance with his normal competence in that regard” (*ibid.*).

This is indeed what he did in the *Arrêté* of 31 August 1927 – something noted also by the Chamber in 2005, when it points out, with regard to the case before it at the time, (*ibid.*, pp. 146-147, para. 135) that “by this *arrêté* the Governor-General clearly fixed the boundary of the *cercle* of Say, and hence the inter-colonial boundary, on the Mekrou” (cf. *ibid.*, p. 147, para. 135). The text of the *Arrêté* of 31 August 1927 is at tab 1.13 of your folders.

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18. In *Benin/Niger*, the Chamber of the Court was not of the view that “the *arrêté* of 23 July 1900 in conjunction with the Decree of 20 December 1900, which created the Third

⁹⁸Mission report No. 103 by Inspector of Colonies BARGUES on the possible reconstitution of Upper Volta, 30 May 1947, p. 35, MBF, Ann. 38.

⁹⁹CMN, p.25, para.1.1.14.

Military Territory” determined the boundaries of the latter (*Frontier Dispute (Benin/Niger), Judgment, I.C.J Reports 2005*, p. 122, para. 53); likewise, Members of the Court, you cannot accept that the 1926 Decree of the President of the French Republic determined the boundaries of Upper Volta. Those boundaries were determined by the 1927 *Arrêté* of the Governor-General of FWA, implementing the provisions of Article 2, second paragraph, of the Decree of 28 December 1926, which required that the Governor-General determine the “course of the boundary of the two Colonies in this area”. And both the President of the French Republic and the Governor-General were right not to be content with the reference made in the first paragraph of that same provision to pre-existing territorial subdivisions, whose boundaries our opponents are striving to reinvent. Contrary to what they believe or would have us believe, the *Arrêté* is constitutive and not declaratory in character: it does not describe pre-existing boundaries between the two colonies; it *determines* them — that word is moreover expressly used in Article 1.

19. Following on from those remarks, Mr. President, I would like to say a few words about how this document was drawn up — and I will be brief, for the Parties have said a great deal on the subject already¹⁰⁰. So, in telegraphic style:

- (1) in order to determine the course of the inter-colonial boundary, the Governor-General appears to have consulted the two colonies, whose Lieutenant-Governors in turn consulted the colonial administrators under their command¹⁰¹;
- (2) a number of documents came out of those consultations; the main ones (or in any event those of which we still have a record) are:
— a Record of Agreement of 2 February 1927 between the Lieutenant-Governor of Niger, and the representative of the Lieutenant-Governor of Upper Volta¹⁰²; this document may be referred to as the “Brévié-Lefilliatre Record of Agreement”;

¹⁰⁰MBF, pp. 29-33, paras. 1.28-1.33; CMBF, pp. 20-21, paras. 1.14-1.16.; MN, pp. 16-19, paras. 1.22-1.26; CMN, pp. 20-28, paras. 1.1.8-1.1.16.

¹⁰¹See, for example, the letter of 27 Apr. 1927 from the Lieutenant-Governor of Upper Volta to the Commanders of Dori and Fada *cercles*, (MN, Ann. C 11) or the letter from the Commander of Dori *cercle* to the Governor of Upper Volta dated 27 Aug. 1927 (MN, Ann. C 16).

¹⁰²Record 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 Dec. 1926, 2 Feb. 1927 (MBF, Ann. 30).

- 52 — another Record of Agreement, dated 10 February 1927, between the same Lefilliatre (still acting as representative of the Lieutenant-Governor of Upper Volta) and Mr. Choteau, representing the Lieutenant-Governor of Niger¹⁰³; and
- a third one, dated 9 May 1927, between the Administrators of the *cercles* of Fada (Coutouly) and Say (Lesserteur); furthermore,
- the Administrators of the *cercles* of Dori (Delbos) and Tillabéry (Prudon) conducted a field survey mission, from which apparently all that remains is a sketch-map drawn up by Delbos¹⁰⁴, and a report¹⁰⁵ and a sketch-map¹⁰⁶ drawn up by Prudon;
- finally, we should add to the list a detailed draft boundary delimitation¹⁰⁷ and another sketch-map¹⁰⁸ sent in by Delbos;
- (3) Niger acknowledges that the latter documents, which were addressed not to the Governor-General of FWA but to the Governors of each colony, “did not, however, reach Dakar in time to be taken into account in the preparation of the *Arrêté* of 31 August 1927 fixing the boundary between the two Colonies”¹⁰⁹; however, this does not prevent Niger from giving considerable weight to what it refers to in its Memorial as “the Delbos-Prudon Agreement of 1927”¹¹⁰ — it has prudently refrained from using this term in its Counter-Memorial.

[Slide 5: The line resulting from the *Arrêté* of 31 August 1927]

20. It is hard to see what weight could be attached to these documents: they were not used in the drafting of the *Arrêté* and can therefore not be considered as part of its *travaux préparatoires*;
- 53 what is more, they were produced by colonial administrators who had no power to delimit the inter-colonial boundary. Furthermore, with regard to the three Records of Agreement of February

¹⁰³Record of the meeting between the representatives of the Lieutenant-Governors of Upper Volta and Niger, 10 Feb. 1927 (MBF, Ann. 31).

¹⁰⁴Sketch-map prepared by Administrator Delbos of the route followed by the Administrators of Dori and Tillabéry on a mission in June 1927 with a view to delimitation between Dori and Tillabéry *cercles* (MN, Ann. C 14).

¹⁰⁵Extract No. 25 from the Tour Report of Administrator Prudon dated 4 Aug. 1927 (MN, Ann. C 15).

¹⁰⁶Tillabéry *cercle*, 1:200,000 sketch-map prepared by Administrator Prudon, June 1927 (MN, Ann. D 3).

¹⁰⁷Letter from Delbos, Commander of Dori *cercle*, to the Governor of Upper Volta dated 27 Aug. 1927 (MN, Ann. C 16).

¹⁰⁸*Ibid.*

¹⁰⁹MN, p. 19, para. 1.25.

¹¹⁰See, for example, MN, p. 28, para. 2.4; p. 72, para. 5.11; or p. 109, para. 7.19.

and May 1927, on the basis of which the *Arrêté* was drafted¹¹¹, it must also be acknowledged that, in so far as they list the territorial subdivisions which move from Upper Volta to Niger, they are merely putting into effect the Decree of the President of the French Republic of 28 December 1926. On the other hand, their signatories would have exceeded their powers, were it to be considered that these documents defined the — inter-colonial — boundaries of the territorial subdivisions concerned¹¹²: as is recalled in Article 2.2 of the same Decree — that of 1926 — these are to be determined by the Governor-General alone. At the very most, these documents can be taken as proposals made to the Governor-General with a view to fixing the course of the boundary.

[End of slide 5 — slide 6: The line resulting from the Erratum of 5 October 1927]

21. Curiously, we do not have any precise information as to the reasons why the Governor-General of FWA came to amend his *Arrêté* and replace it with the Erratum of 5 October 1927 (which is at tab 1.14 in the judges' folder). As a result, we must rely on conjecture. There are three, possibly complementary, explanations which appear convincing in this regard:

— firstly, the explanation put forward by the Chamber of the Court in the *Benin/Niger* case:

“the erratum would seem in effect to have been motivated . . . 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” (*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 147, para. 136);

— secondly, it is probable that the Governor-General became aware of the confusion, noted by both Niger and Burkina, resulting from the inclusion in the *Arrêté*, whose sole purpose was to determine “the boundaries of the Colonies of Niger and Upper Volta”, of the description of all the boundaries — including the internal ones — of *Say cercle*¹¹³;

54 — furthermore, the Governor-General obviously wanted to correct the imprecision of certain parts of the 1927 *Arrêté*, particularly regarding the section running from the River Sirba to the River Mekrou; whereas the *Arrêté* went back to the text of the *travaux préparatoires* of February (on which Niger relies exclusively), the Erratum adopts a more precise wording.

¹¹¹Letter from the acting Director of Political and Administrative Affairs to the Governor-General of FWA, July 1927 (CMBF, Ann. 2).

¹¹²See MN, p. 18, para. 1.24.

¹¹³See *ibid.*, p. 20, para 1.26, and p. 64, para. 5.5; see also CMN. p. 37, para. 1.1.26, and pp. 76-77, paras. 2.2.2-2.2.4; or MBF, p. 137, para. 4.95.

22. In any event, the Erratum of 5 October dispels both points of confusion: it restricts itself to a description of (the full length of) the frontier between Upper Volta and Niger, leaving out any boundaries between *cercles* within the same colony. At the same time, it provides details which did not appear in the text of 31 August¹¹⁴. And this is how, in accordance with the Decree of 26 December 192[6], the course of the boundary between the two colonies has been determined.

[End of slide 6]

C. The incarnations of Upper Volta and the stability of the course of the frontier

23. Members of the Court, that course survives to this day and is that which you are asked to establish in your forthcoming judgment. It has endured despite the temporary dissolution of Upper Volta, between 1932 and 1947, and in spite of the changes that were made to the boundaries between *cercles* during that 15-year period¹¹⁵.

[Slide 7: The dissolution of the Colony of Upper Volta]

24. The dissolution of the Colony of Upper Volta by the stroke of a pen, which came about with the Decree of 5 September 1932¹¹⁶, is hardly an endorsement of Niger's theory of the good colonizer concerned about the ethnic unity of the territories placed under its control. It led to the sharing of the Mossi country between Côte d'Ivoire and French Sudan (present-day Mali) and to the reorganization of the *cercles* concerned, including the redefinition of their constituent parts and, as a result, the inter-colonial boundaries.

25. I do not see the value in describing those new boundaries: they can currently be seen on the screen, but in any event they did not survive the re-establishment of the Colony of Upper Volta, brought about by the Law of 4 September 1947 reconstituting Upper Volta within its boundaries of 5 September 1932¹¹⁷ — you will find the text of that Law at tab 1.15 of the judges' folder.

[End of slide 7 — slide 8: The reconstitution of Upper Volta]

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¹¹⁴See MBF, pp. 31-32, para. 1.31; pp. 70-71, paras. 2.43-2.44; pp. 103-104, paras. 4.12-4.15; p. 134, par. 4.85; pp. 142-143, paras. 4.109-4.112; and CMBF, p. 114, para. 4.27.

¹¹⁵See the Report of the delimitation operations between the *cercles* of Dori and Tillabéry carried out by the Administrators of the *cercles* of Dori (Delmond) and Tillabéry (Texier and Garat), 8 December 1943, MN, Ann. C 69.

¹¹⁶Decree of the President of the French Republic of 5 September 1932 dissolving the Colony of Upper Volta and distributing its territory among the Colonies of Niger, French Sudan and Côte d'Ivoire (MBF, Ann. 36).

¹¹⁷Law No. 47-1707 of 4 September 1947 reconstituting Upper Volta within its boundaries of 5 September 1932 (MBF, Ann. 39).

26. Under the terms of Article 2 of that Law, the boundaries of the re-established territory of Upper Volta “shall be those of the former Colony of Upper Volta on 5 September 1932”. In other words, any changes made to the inter-*cercle* boundaries between 1932 and 1947 are reversed — that entire period is set aside — and the boundaries are returned to their 1932 limits, which are the same as those of 1927, since the Erratum of 5 October constitutes the only legally relevant definition of the course of the boundary between the Colonies of Upper Volta and Niger. And that situation was to remain until independence: neither Party claims that the line in the 1927 Erratum has been modified since.

27. The frontier determined by that fundamental instrument is also that which is established by the Agreement and Protocol of Agreement of 28 March 1987 on the demarcation of the frontier, which are referred to in the Preamble and in Article 6 of the Special Agreement by which the Court was seised. There is no point in my going back over the circumstances in which those treaties were concluded: they were very clearly described by Professor Jean-Marc Thouvenin.

28. In the end, Members of the Court, if the years 1932-1947 are put to one side, the history — the relevant history — of the frontier between Burkina Faso and the Republic of Niger is short and simple:

— it is short because it only really begins in 1926, when the Decree of 28 December lists the constituent elements of Upper Volta and stipulates that the course of the boundary between the two Colonies is to be determined by an *Arrêté* of the Governor-General of FWA; and it concludes with the publication of the Erratum of 5 October 1927, which fixed that course definitively; and

— it is very simple because a single text, the 1927 Erratum to be precise, whose probative value and validity are accepted — in principle — by both Parties, constitutes the title establishing the entire length of the frontier.

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II. The points of agreement and disagreement between the Parties

29. In practice, the Parties do not dispute this simple history, but they do have very different interpretations of it. Niger responds to the straightforward facts and legal background documented by Burkina with convoluted — and occasionally bewildering — nit-picking. The Parties’ points of

view do not conflict completely, however, and before addressing the points of disagreement between the Parties, I think it would be useful briefly to reiterate the points on which they agree, or appear to agree.

A. The points of agreement

30. In the introductions to their respective Counter-Memorials, Burkina Faso and the Republic of Niger both listed the points on which they agree¹¹⁸.

31. Some of those points appear in both lists. The first is the purpose of the forthcoming judgment, which, Niger writes, is “to put an end, with the authority of *res judicata*, to the frontier dispute between the Parties”¹¹⁹. Clearly we agree, although in our view the Parties’ (joint) request to have placed on record their agreement on the demarcated sections of their frontier is entirely “necessary”¹²⁰, as has already been stated by the Agent of Burkina Faso. I shall also have occasion to return to this again briefly tomorrow.

32. In the two Counter-Memorials, the Parties further state that they “also agree on the fact that the basic texts to be taken into consideration in resolving the present dispute are those of 1927, which have never been modified since that time”¹²¹. Nevertheless, Niger’s new text is clearly a step backwards, and that is clear from the final sentence on this point in its Counter-Memorial: “the fact that the text of the Erratum has never been modified since does not mean that it alone suffices to determine the course of the frontier in the disputed sector”¹²². In its Memorial, however, Niger accepted that the 1927 Erratum “remained, at the time when the two States became independent, *the only reference text* for the determination of their common frontier”¹²³. The 1927 texts must most certainly be “taken into consideration” by the Court, but the expression “taken into consideration” is not nearly strong enough. Under the Agreement of 28 March 1987, the course to be accepted is that “described by *Arrêté* 2336 of 31 August 1927, as clarified by Erratum 2602/APA of 5 October 1927”, and it is only “[s]hould the *Arrêté* and Erratum not suffice

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¹¹⁸See CMBF, pp. 1-6, paras. 0.4-0.6, and CMN, pp. 4-6, paras. 0.7-0.11.

¹¹⁹CMN, p. 4, para. 0.7, referring to MBF, p. 5, para. 0.14.

¹²⁰See CMN, *ibid.*

¹²¹CMN, p. 5, para. 0.9, referring to MBF, p. 27, para. 1.23.

¹²²*Ibid.*, p. 5, para. 0.9.

¹²³MN, p. 104, para. 7.12; emphasis added.

[that] the course shall be that shown on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition”.

33. And that is it, Mr. President, since Niger, like Burkina, acknowledges “that no other document was adopted ‘by joint agreement of the Parties’”¹²⁴. On that we agree¹²⁵. Contrary to Niger’s assertions, however, that clearly precludes the taking into consideration “of the informal agreements reached by the colonial authorities regarding the location of frontier points, in particular those on inter-colonial roads”¹²⁶. Naturally, these informal agreements may be “taken into consideration” in order to *interpret* the Erratum, but they cannot be used to *modify* it, in spite of what Niger repeatedly claims¹²⁷.

34. Furthermore, Mr. President, I would repeat that, by reducing the Parties’ agreement on the subject of the applicable law to the “taking into consideration” of the 1927 texts, and giving these the same weight as an assortment of purported informal agreements, Niger is playing down considerably both the importance of the Agreement of 28 March 1987 and the common interpretation which the Parties appeared to have of it during the first round of the written proceedings. In fact, it was on the strength of several passages in Niger’s Memorial — which we considered to be very clear — that we also included in our Counter-Memorial, among the points of agreement between the Parties, the principle according to which “[t]he 1987 Agreement cited in the Special Agreement indicates exhaustively the documents that are to be taken into consideration for the purposes of demarcating the frontier”¹²⁸. It is regrettable that Niger appears to have gone back on its original position in that respect.

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35. And on the same subject, Mr. President, I would add that Niger is mistaken when it claims that we continue to refer to the *Arrêté* as the primary text, whereas “[i]t is in fact the Erratum of 5 October 1927 that is the reference text in this case, inasmuch as it quite simply

¹²⁴CMN, p. 5, para. 0.10.

¹²⁵MBF, p. 72, para. 2.46.

¹²⁶CMN, p. 6, para. 0.10.

¹²⁷MN, p. 74, para. 5.12 (Ouiboriels marker); MN, p. 77, para. 5.16; p. 94, para. 6.22; CMN, pp. 65-66, second para. (Petelkolé); or MN, pp. 92-93, para. 6.20, and CMN, p. 64, para. 2.1.4. (Vibourié).

¹²⁸CMBF, p. 4, table, point 3, referring to MN, p. 24, para. 1.32; pp. 60-61, para. 5.2; p. 75, para. 5.13; p. 91, para. 6.16; pp. 104-105, para. 7.12, and MBF, p. 9, para. 0.19; pp. 61-62, para. 2.20; p. 66, para. 2.35; p. 71, para. 2.47.

replaced the operative part of the text of the *Arrêté*¹²⁹. We wholeheartedly agree and have never written anything to the contrary — despite what our friends from Niger claim¹³⁰ — except to point out that the 1987 Agreement ties the two instruments together and that we have no reason to dispute the Agreement on that point any more than we do on any other. It is true that, for its part, Niger generally exhibits, let us say, a certain detachment from the commitments that it made in the 1987 Agreement¹³¹.

36. The final point of agreement according to Niger is “[t]he importance of the Decree of 28 December 1926”¹³². We do not dispute its importance, Mr. President, but we fiercely contest that the effect of this important decree — which described the territorial composition of Upper Volta — for the delimitation of the frontier between Upper Volta and Niger was a return to the earlier boundaries of the territorial divisions. I must repeat myself once more: the 1926 Decree *expressly* states that the course of that boundary shall be determined by an “*Arrêté* of the Governor-General”. This was the *Arrêté*, and later the Erratum, of 1927. Moreover, the 1987 Agreement concluded between Niger and Burkina leaves no doubt as to the fact that it is the *Arrêté* as clarified by the Erratum of 1927 which describes the course of the frontier between the two countries, not the boundaries of the territorial divisions as they were supposed to exist before the adoption of those texts.

59 B. The points of disagreement between the Parties

37. It is true, Mr. President, that the Parties do not disagree on everything; nonetheless, it is clear, if we look a little more closely at the points on which there would appear to be agreement in the Memorials, the “buts” with which these points of agreement need to be qualified end up by eclipsing the appearance of agreement. Niger lists no fewer than six points in its Counter-Memorial on which the Parties disagree¹³³. More moderately, Burkina notes two: — the issue of the pre-eminence of the 1927 *Arrêté* and its Erratum; and

¹²⁹CMN, p. 5, para. 0.9.

¹³⁰See MBF, p. 28, para. 1.26; p. 64, para. 2.27; pp. 69-71, paras. 2.41-2.44; p. 73, para. 2.50; p. 134, para. 4.86; or CMBF, p. 19, para. 1.11; p. 41, para. 1.49; p. 42, para. 1.51; or p. 106, para. 4.1.

¹³¹See CMBF, p. 13, para. 0.17.

¹³²CMN, p. 4, para. 0.8, citing MBF, p. 24, para. 1.16.

¹³³See CMN, pp. 6-13, paras. 0.11-0.21.

— the question of the specific restriction on the documents to which recourse may be had if the Erratum does not suffice¹³⁴.

38. A few words all the same on the lesser disagreements cited by Niger regarding Burkina Faso's allegedly one-sided presentation of, on the one hand, the border incidents and, on the other, the question of the consensual line — or rather consensual lines — on which Niger has changed its position.

39. As regards the first point¹³⁵, I need only note that the incidents in question are indeed attributable to Niger (and the footnotes in its Memorial which it cites by way of reply¹³⁶ do nothing to establish the contrary). However, it serves no purpose to exchange accusations regarding the responsibility for such incidents: what they show above all is the essential contribution that your judgment will make by clothing with the solemn authority of *res judicata* a territorial settlement which in reality took place 75 years ago.

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40. The other “peripheral disagreement” to which Niger refers is totally artificial. Our opponents affect to express indignation at the fact that we speak of a “consensual line” in describing the agreement reached in 1988 between the expert members of the Joint Technical Commission established by the Agreement of 1987¹³⁷. This is a spurious dispute: contrary to what the supposedly indignant language of paragraph 0.21 of Niger's Counter-Memorial suggests, we have never claimed that this line was “officially recognized . . . in the relations between the two countries”, when it was in fact agreed between the experts of the two countries, having been initialled by the representatives of both Parties. Regrettably, it was indeed never “officially recognized” because of Niger's about-turn¹³⁸. Sadly, however, going a little further, we see the same scenario being repeated — but with a significant difference — after the competent ministers of the two States had in 1991 adopted what was now a political compromise solution, in order to unblock the situation by making certain concessions to Niger, so as to re-start the demarcation

¹³⁴See CMBF, pp. 6-10, paras.0.7-0.15.

¹³⁵See CMN, p. 11, para. 0.19.

¹³⁶MN, p. 38, footnotes 119 ff.

¹³⁷CMN, pp. 12-13, para. 0.21; and pp. 54-59, paras. 1.2.20-1.2.30.

¹³⁸MBF, pp. 48-49, paras. 174-177, and CMBF, p. 52, para. 2.11; see also Report No. 42/FP/MAT/SGIDCAF from the Minister for Territorial Administration to the Burkina Faso Head of State, 5 March 1991, Ann. MBF 88; CMN, pp. 50-52, paras. 1.2.10-1.2.14.

process, which was deadlocked¹³⁹. Again, Niger refused to implement the compromise solution¹⁴⁰. We do not go so far as to say that this ministerial decision was legally binding on the Parties (and it was certainly not totally in conformity with the 1927 Erratum); however, the fact remains that, when the dispute might have been thought to be resolved, Niger once again changed its mind.

41. I now come, Mr. President, to more serious disagreements, on whose solution the settlement of the dispute before the Court in fact depends.

42. First, as regards the role of the 1927 Erratum (I will no longer refer to “the *Arrêté* and its Erratum”, since our opponents object to this, but it comes to the same thing). Thus, as regards the role of the Erratum, the differences go very deep.

43. In its Counter-Memorial, Niger discusses at some length the question of whether the dispute that the Court is called upon to settle relates to the delimitation or the demarcation of the frontier¹⁴¹. As so often, our opponents have recourse to a caricature of our position in order to attack it. Contrary to what they claim, we have never stated that this was a “demarcation” dispute — which would make little sense in a dispute before this Court. In the two paragraphs of Burkina’s Memorial cited by Niger in order to claim the contrary, we write that, since the delimitation *stricto sensu* had been effected by the 1927 *Arrêté* and its Erratum — as is accepted by the 1987 Agreement and the Special Agreement — “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 countries”¹⁴². “*With a view to the demarcation*”, that is not the same as “demarcating”, an operation which, of course, falls outside the remit of this Court (even if it may be called upon to assist the Parties in a demarcation operation, as Article 7 (4) of the Special Agreement invites it to do in the present case). Nonetheless, the dispute which is now before you did indeed arise as a result of difficulties encountered during demarcation operations on the ground, which were conducted by the Parties in the belief that there was already an existing delimitation.

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¹³⁹See the Joint Communiqué of 16 May 1991, published following the Ministerial Consultative and Working Meeting between Niger and Burkina Faso, Ann. MBF 89.

¹⁴⁰See MBF, p. 51, para. 1.81; p. 65, para. 2.32; CMBF, p. 52, paras. 2.12-2.13. See also MN, p. 42, para. 3.6, and CMN, pp. 52-53, paras. 1.2.16-1.2.17.

¹⁴¹CMN, pp. 6-9, paras. 0.11-0.16.

¹⁴²MBF, p. 2, para. 0.3 (emphasis added); see also p. 9, para. 0.19, passages to which Niger’s Counter-Memorial refers on p. 6, footnote 13.

62 44. And it is a fact, Mr. President, that the *Arrêté* and Erratum of 1927 are indeed *delimitation* texts: they describe — the latter replacing the former — the entirety of the disputed frontier, and the Erratum constitutes a (sole and clear) frontier title, recognized as such by the Parties, that is to say both the legal basis for the frontier and the evidence for its course¹⁴³ — as Niger ultimately reluctantly recognizes in its Counter-Memorial¹⁴⁴. And, notwithstanding Niger’s vehement language (it does not hesitate to speak of the “absurdity” of Burkina’s thesis¹⁴⁵), it is quite apparent that there is a very great difference in approach between the official texts of 1927 and those which preceded them¹⁴⁶: until then, the French colonial power — treating everywhere it went as its own back-yard, as was its frequent practice in its African possessions¹⁴⁷ — had confined itself to defining its new inland African colonies by reference to the colonial subdivisions which composed them, whose frontiers were rarely defined in official texts, but followed from empirical practice¹⁴⁸, occasionally formalized in agreements between administrators, who in any event had no authority to establish inter-colonial boundaries. As Niger emphasizes in regard to the creation of the Colony of Upper Volta in 1919: “the creation of this new Colony was not accompanied by a description of the boundaries of the entities composing it”¹⁴⁹. And as regards the frontier which interests us, the Decree of the President of the French Republic of 28 December 1926 again proceeded in this way. However, and it is here that we see the change, the second paragraph of Article 2 of that text clearly reflects a new approach. I shall re-read that important provision: “An *Arrêté* of the Governor-General in Standing Committee of the Government Council shall determine the course of the boundary of the two Colonies in the area” (the object of the first paragraph was to transfer certain subdivisions from Upper Volta to Niger). The *Arrêté*, and then

¹⁴³See *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 564, para. 18; see MBF, pp. 66-67, paras. 2.36-2.37; and CMBF, pp. 18-19, paras. 1.10-1.11.

¹⁴⁴CMN, p. 16, para. 1.1.2.

¹⁴⁵*Ibid.*, p. 160, para. 0.18; see also pp. 24-26, paras. 1.1.13-1.1.15.

¹⁴⁶See CMBF, pp. 16-21, paras. 1.4-1.17.

¹⁴⁷As well as Article 1 of the Decree of 1 March 1919 creating the colony of Upper Volta, see *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 580, para. 51; *Frontier Dispute (Benin/Niger)*, Judgment, I.C.J. Reports 2005, pp. 112-113, paras. 34-35. See also *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, sep. op. of Judge Ajibola, p. 53, para. 9.

¹⁴⁸See, *inter alia*, Note No. 521 CM2 from the FWA Geographical Department to the Director of Political and Administrative Affairs of the Government-General regarding the sketch-maps of the *cantons* of *cercles*, notably Fada N’Gourma, Say and Tillabéry, 25 June 1938, Ann. CMBF 6; See CMBF, pp. 17-18, para. 1.9.

¹⁴⁹MN, p. 14, para. 1.17.

the Erratum, of 1927 effected that determination of the course of the boundary — and it was indeed a delimitation¹⁵⁰.

63 45. According to Niger, the text of the Erratum is “defective and imprecise”; it sees evidence of this in the protests of the local administrators, in particular those of Dori, and then Téra, *cercles*¹⁵¹. It is true that these heads of *cercle* did sometimes protest (in certain cases vehemently) at the Erratum, but, as Burkina Faso has demonstrated in its Counter-Memorial — to which, if I may, Members of the Court, I will redirect your attention with particular emphasis¹⁵² — these criticisms, far from supporting Niger’s thesis, on the contrary confirm the legal force of the disputed delimitation: in protesting at the frontier as described in the Erratum, the colonial administrators involved thereby confirmed that it was legally valid and that they were aware that they were obliged — willy-nilly — to apply it in practice. And if I may add, Mr. President, with all due respect to our friends and opponents, it is somewhat absurd to seek to base an argument on the fact that “the 1927 text does not state that” the lines connecting the various points which it mentioned are straight lines¹⁵³; it does not state this quite simply because, where a delimitation text says nothing to the contrary, the lines joining the features which it mentions are always straight ones¹⁵⁴.

Mr. President, it is almost 1.00 p.m., but if you would be kind enough to allow me a minor compensation, I think I need just four minutes more.

The PRESIDENT: Exceptionally, you may have ten extra minutes.

Mr. PELLET: In a sense, Mr. President, compensation for this morning’s start.

The PRESIDENT: Yes, that was the time I took this morning to open the sitting, introduce the two *ad hoc* judges and recall the background to the case. You have the floor, Sir.

¹⁵⁰See CMBF, pp. 19-23, paras. 1.12-1.21.

¹⁵¹See in particular, MN, pp. 25-27, paras. 2.2-2.3 and pp. 30-31, para. 2.5; p. 66, para. 5.6; CMN, p. 35, para. 1.1.24.

¹⁵²See CMBF, pp. 29-37, paras. 1.26-1.39; see also MN, pp. 25-35, paras. 2.2-2.8.

¹⁵³CMN, p. 34, para. 1.1.22.

¹⁵⁴See for example, *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 624, para. 130, and MBF, pp. 124-125, para. 4.60; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 385, paras. 151-152.

Mr. PELLET: In all honesty, I think I will need just four minutes.

46. According to Niger, the imprecision of the Erratum is due principally to the “particularly succinct description of several portions of the disputed frontier”¹⁵⁵. This is to confuse imprecision and concision¹⁵⁶: it is true that the Governor-General basically determined the course of the disputed frontier by describing it in relatively long sections — although less so than those adopted by the French colonial power in many other parts of its colonial empire¹⁵⁷. And Niger itself provides an explanation for this approach: the boundary which it now disputes ran “largely in little known and uninhabited regions”¹⁵⁸.

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47. Moreover, the fact is that, in their 1987 Agreement, Burkina Faso and Niger provided for a hypothesis where the Erratum would not suffice¹⁵⁹, while at the same time indicating the means of remedying this (which Niger omits to point out) through recourse to the 1960 IGN map. We do not claim that the Erratum is not subject to interpretation — every legal text has to be interpreted! — but while bearing in mind certain basic principles which have been completely overlooked by Niger. In accordance with the maxim *interpretatio cessat in claris*, “[t]he Court’s task is clearly defined. Having before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands . . .”¹⁶⁰, for “[i]t is the duty of the Court to interpret the Treaties, not to revise them”¹⁶¹ — and that is true of the other texts which it is required to apply, as is the case here with the 1927 Erratum. However, Niger, far from confining itself to interpreting this basic text, Members of the Court, asks you to supplement it where it finds it too

¹⁵⁵CMN, p. 11, para. 0.20; see also, p. 6, para. 0.12.

¹⁵⁶See CMBF, pp. 42-45, paras. 1.52-1.57.

¹⁵⁷See for example: I. Brownlie, *African Boundaries*, Hurst/University of California Press, London/Los Angeles, 1979, pp. 46-47: Niamey Agreement of 20 June 1909 (frontiers between the current Algeria, Mali and Niger); see also the Agreement of 5 January 1983 between Algeria and Niger, *UN Treaty Series*, No. 23104, 1984, Agreement on the demarcation of the State frontier, signed in Algiers on 5 January 1983, entry into force the same day, <http://treaties.un.org/doc/Publication/UNTS/Volume%201373/volume-1373-I-23104-French.pdf>, or p. 409; Decree of 23 April 1913 (*OJFR* of 26 April 1913, pp. 3682-3683): frontier between Mauritania and the current Mali.

¹⁵⁸CMN, p. 12, para. 0.20.

¹⁵⁹See CMN, p. 9, para. 0.17.

¹⁶⁰*Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 20; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51; *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 494, para. 77.

¹⁶¹*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 229; see also *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 20; *Rights of Nationals of the United States of America in Morocco (France v. United States of America), Judgment, I.C.J. Reports 1952*, p. 196; *South West Africa (Ethiopia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 48, para. 91.

succinct¹⁶², or quite simply to disregard it in favour of other documents of arguable evidentiary value, which have not in any case been accepted by joint agreement of the Parties¹⁶³. The notion of insufficiency, as provided for in the 1987 Agreement, cannot be used capriciously: in order to have recourse to the 1960 map, it is necessary that consideration of the Erratum does not *suffice* to determine the course of the disputed frontier, and not that one Party finds it excessively succinct or considers that the course it describes is unsatisfactory¹⁶⁴. Unsatisfactory and insufficient are not synonyms. Moreover, unless the Parties have expressly so agreed, “the Court cannot deviate from [the] course” deriving from a valid title¹⁶⁵, and “has no power to modify a delimited boundary line”¹⁶⁶.

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48. This brings me to a second major disagreement between the Parties, namely that relating to the documents to which the Court may — and must — have recourse in order to settle this dispute. In this regard, it is not so much the Erratum as such that we have to interpret as the Agreement of 28 March 1987 (its text is reproduced at tab 1.8 of the judges’ folder). As I have just pointed out, Niger, while it does not openly repudiate its obligations under the 1987 Agreement, nonetheless does all it can to limit their scope.

49. In accordance with the text of Article 2, which is crystal clear, and which I will again read out, the course of the frontier is that “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”. Since no such documents have been accepted by the Parties, only the 1960 IGN map may be used in the event that the Erratum does not suffice — and I stress: *does not suffice*¹⁶⁷. This is assuredly not the position of Niger, which simply uses the Erratum as an instrument — among many others

¹⁶²See MN, p. 86, para. 6.11; p. 93, para. 6.21; CMN p. 61, para. 2.2.1.

¹⁶³MN, p. 105, para. 7.12; p. 112, para. 7.26; p. 115, para. 7.32; p. 116, para. 7.35; CMN, p. 63, para. 2.1.4; pp. 92-93, para. 2.2.21.

¹⁶⁴MBF, pp. 72-73, paras. 2.47-2.49; see also CMBF, p. 8, para. 0.12; p. 45, para. 1.58; p. 108, para. 4.6.

¹⁶⁵*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 372, para. 118.

¹⁶⁶*Ibid.*, p. 374, para. 123. See CMBF, pp. 41-42, para. 149.

¹⁶⁷See MBF, pp. 71-72, paras. 2.47-2.49; CMBF, pp. 45-46, paras. 1.59-1.64.

which it shamelessly boasts of utilizing¹⁶⁸ — to be taken into consideration, not when *the Erratum does not suffice* in order to determine the course of the frontier, but when the resulting course *does not strike it as satisfactory*. As to the 1960 map, despite the fact that Niger regards as “mandatory”¹⁶⁹ the requirement for recourse to be had to it where the *Arrêté* and *Erratum* do not suffice, it uses it whenever it suits, alleging, without providing proof, that the *Erratum* does not suffice. It ignores the 1960 map — sometimes in favour of other sketch-maps — when the former fails to serve its interests¹⁷⁰. In 1988, certain proposals by the experts to remedy uncertainties as to the precise location of certain points on the frontier had deviated in the same way, for reasons of convenience, from the requirements of the 1987 Agreement. Those proposals were *rejected* by the Joint Technical Commission for having failed to comply with the provisions of the 1987 Agreement — and hence of the *Erratum* — and the experts were obliged to return to the drawing-board and follow those provisions to the letter¹⁷¹. Niger’s position, which is compatible neither with the letter nor with the spirit, either of the 1987 Agreement or of the 2009 Special Agreement, must be rejected for the same fundamental reason.

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Mr. President, with your permission, I will continue this presentation this afternoon. Meanwhile, Members of the Court, I wish you an excellent *appétit*, and apologize for my minor encroachment on the lunch break.

The PRESIDENT: Thank you, Mr. Pellet. The sitting is closed. The Court will meet again at 3.00 p.m.

The Court rose at 1.05 p.m.

¹⁶⁸See in particular, CMBF, p. 2, para. 0.2; p. 3, para. 0.4.

¹⁶⁹MN, p. 75, para. 5.14.

¹⁷⁰See for example, MN, pp. 93-97, paras. 6.22-6.23; pp. 98-99, para. 6.25; p. 110, para. 7.21; p. 114, para. 7.30; CMN, p. 61, para. 2.1.1; p. 63, para. 2.1.4; pp. 65-68, paras. 2.1.7-2.1.8; p. 83, para. 2.2.13; p. 86, para. 2.2.15.

¹⁷¹See MBF, pp. 45-46, paras. 1.67-1.69; p. 65, para. 2.31.