

Non corrigé
Uncorrected

Traduction
Translation

CR 2012/24 (traduction)

CR 2012/24 (translation)

Vendredi 12 octobre 2012 à 15 heures

Friday 12 October 2012 at 3 p.m.

10 The PRESIDENT: Please be seated. The sitting is open and I would invite Professor Salmon to return to the podium. You have the floor, Sir.

Mr. SALMON:

THE BOUNDARY IN THE TÉRA SECTOR

(continued)

7. Mr. President, before the lunch break, I announced that this afternoon we would be explaining to you the three instances in which Niger, while basically accepting the IGN line in the sector in question, believed that it was necessary to make modifications to it and that those modifications were justified. These were Vibourié, Petelkolé and Oussaltan, and I should now like to look at these different instances with you by following the line from the beginning, which is to say from Tong-Tong, and dividing the sector into three sections.

(a) *From Tong-Tong to the Tao astronomic marker*

8. From Tong-Tong to the Tao astronomic marker, the sketch-maps prepared in 1927 by Delbos¹, as well as the map "New frontier between Upper Volta and Niger"², connect these two points with a line which is very slightly curved. For its part, the sketch-map prepared in 1927 by Prudon³ contains a straight line. However, the line on the 1960 IGN map [Slide of the extract], which is marked in yellow on the sketch-map now being shown, adopts a shape very broadly curved towards the west. That curve is new, it should be said, and it is appropriate to examine whether it is justified.

The Tong-Tong astronomic marker

9. The starting point of the boundary is not in dispute between the Parties: it is the Tong-Tong astronomic marker. Its co-ordinates are given as the starting point of the disputed sector of the frontier in Article 2 of the Special Agreement of 24 February 2009⁴.

¹MN, Anns. D 2 and C 20.

²MN, Ann. D 13.

³MN, Ann. D 3.

⁴Its co-ordinates are the following: latitude 14° 25' 04" N, longitude 0° 12' 47" E.

11 Since the starting point indicated on the IGN map is situated further east, it should therefore be disregarded, at the express wish of the Parties.

The Vibourié marker

10. The next point on the boundary, which we have been able to identify by conducting research in the archives, is the Vibourié marker⁵. The origin of this information is a Record of Agreement of 13 April 1935⁶, which Members of the Court will find at tab 15 in the judges' folder. This is an agreement which was concluded between Administrator Garnier (Dori *cercle*) and Deputy Lichtenberger (Téra Subdivision), following the settlement of a dispute over the occupation of cropland.

Here is an extract from that Record of Agreement:

“Referring to the delimitation determined by the *Arrêté* of 31 August 1927 (Erratum) between Dori and Téra, we decided to visit the site in order to observe the placement of said land in relation to the above-mentioned boundary.

On the basis of the maps and descriptions in our possession, it had previously been established that said boundary passed diagonally in an east-south-east direction, approximately 10 km to the east of Falagountou.

.....

Furthermore, in order to prevent any similar further territorial disputes in this area, we have established a marker designed to fix the boundary between Dori and Téra, the boundary in principle following a notional straight line starting from the Tong-Tong astronomic marker and running to the Tao astronomic marker.

The Ouiboriels marker [*on the IGN map, it is marked as Vibourié*] being located on this notional line, on a ridgeline some 10 km to the east of Falagountou and 2 km to the east of Ouiboriels.

This delimitation, having been effected on an adversarial basis, has not been disputed by the parties involved.”

This arrangement was approved by the Governor of Niger⁷, of which the two *cercles* had formed part since the dissolution of Upper Volta. In fact, this was the only agreement between *cercles*, subsequent to 1927, which was expressly approved by a higher authority.

⁵Geographical co-ordinates: 14° 21' 44" N, 0° 16' 25" E.

⁶Record of Agreement of 13 April 1935; MN, Ann. C 56.

⁷Official Telegram-Letter 693 AP of 17 May 1935, as stated in the *Description of Tillabéry cercle*, prepared in 1941 by Mr. Leca, MN, Ann. C 65.

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11. On the other hand, there is nothing to justify the boundary moved further to the east as shown on the IGN map. It follows that, from the Vibourié marker, the frontier runs in a straight line to join the IGN line at the Tao astronomic marker. The boundary in this sector therefore consists of two straight-line segments [End of slide]. The Court will have noted that, in terms of Burkina Faso's request, the triangle — shaded yellow — which is formed between these two straight-line segments and the straight line claimed by Burkina should, in Niger's view, be attributed to Burkina Faso [Slide of the sketch-map]. In other words, therefore, we consider that this Vibourié marker is on the line which is claimed by Burkina. That triangle should be attributed to Burkina.

12. Nevertheless, Burkina Faso contests this frontier point on the basis of a variety of arguments. It does so firstly on the grounds that the point in question is, it says, not mentioned in the Erratum⁸. This recurring argument is hardly convincing, since either it is being asserted that any point not mentioned in the Erratum, wherever it is located, is unfounded, which is a nonsense, or that point is being contested because it is not on the straight line claimed by Burkina Faso, which is begging the question.

A second argument consists of maintaining that Niger asserts that the establishment of this marker had the effect of *moving* the line laid down by the 1927 Erratum⁹. It is clear that Niger has never claimed that the establishment of the marker had the effect of moving the line laid down by the 1927 Erratum but, while it is necessary to follow what that text says, this was a case of it being interpreted¹⁰. The text of the agreement shows that the two administrators placed the marker *on the boundary*, which passed “approximately 10 km to the east of Falagountou”, a boundary whose line they knew “on the basis of the *maps and descriptions in [their] possession*”.

Burkina Faso therefore draws the reader into a surrealist line of reasoning: since the boundary is supposed to pass through the straight line which Burkina Faso has decreed, then if the marker was established at Ouiboriels, it is because the administrators made a mistake¹¹. However,

⁸CMBF, paras. 3.7 and 3.51. CR 2012/20, p. 23, para. 44 (Forteau).

⁹CMBF, para. 3.45.

¹⁰MN, para. 6.20.

¹¹CMBF, para. 3.47.

it is clearly the other way round: it is the straight line invented by Burkina Faso which does not pass through the boundary point, which was recognized and marked at the time by Dori *cercle*.

13 Finally, Burkina Faso puts forward an alternative argument based on the fact that the date of the agreement lies between the disappearance of Upper Volta (1932) and its reconstitution (1947), thus claiming that the Record of Agreement in question has “no effect on the delimitation”¹². This morning, Professor Kamto set out the reasons why that argument is not valid. In any case, Niger sees this agreement as a simple interpretation of the 1927 Erratum by the two administrators from the *cercles* concerned, and to the advantage of Dori *cercle*. The adjoining *cercles* were not modified from 1927 to 1960.

13. The status of the Vibourié marker as a frontier point is thus confirmed, and from that marker the frontier runs in a straight line to the Tao astronomic marker.

Let us therefore now proceed to the second sector, from the Tao astronomic marker to Bangaré.

(b) From the Tao astronomic marker to Bangaré

The Tao astronomic marker

14. The starting point of the following section (from the Tao astronomic marker to Bangaré) is located at the Tao astronomic marker¹³. In its Counter-Memorial, Burkina Faso brusquely asserts that “its co-ordinates are incorrect in Niger’s version”¹⁴. In reality, the error comes rather from Burkina Faso, which confuses the “Tao marker” (located in the actual village of Tao) with the “Tao astronomic marker”, installed 5.750 km from the village of Tao. I apologize for boring the Court with details of this kind, but we are obliged to reply to the other Party’s arguments. From that frontier marker, the line claimed by Niger in this section follows the IGN line as far as Bangaré, except in two localities: Petelkolé and Oussaltane. And here things become more important, and indeed more interesting.

¹²CMBF, para. 3.46. CR 2012/20, p. 23, para. 48 (Forteau).

¹³At the following co-ordinates: latitude 14° 03' 13" N; longitude 0° 22' 53" E. The co-ordinates of this marker recorded by Niger by GPS are: 14° 03' 02.2" N; 00° 22' 52.1" E.

¹⁴CMBF, para. 0.14.

Petelkolé

14 15. Let us first look at Petelkolé. The data on the 1960 IGN map regarding the village of Petelkolé¹⁵ are contradictory¹⁶. Petelkolé is in fact shown on two 1960 sheets. On the Sebba sheet, Petelkolé lies on the line of the frontier, whereas on the Téra sheet it lies slightly to the west of that line. This village appears neither on Delbos's sketch-map, nor on that of Prudon. Nonetheless, the locality of Petelkolé belonged to Niger in the colonial period, as is shown by the administrative information from that period. Thus in the Roser/Boyer Agreement of April 1932 (which you will find at tab 13) — a document which might seem somewhat lengthy, but which is nonetheless particularly interesting, for it shows what complex matters *cercle* commanders might become involved in when addressing problematic situations — the village of Petelkolé is located to the east of the boundary, and the Fétokarkalé Pool, which belongs to Upper Volta, to the west¹⁷. It thus places Petelkolé in Niger. The administrators take the view, moreover, that a contrary report drafted in Dori on 31 March 1931, which stated that “the village of Petkalkallé or Fétokarkalé belonged to Niger and was located 1 km from the frontier,” meant that, by extrapolation, it placed Petelkolé itself in Niger¹⁸.

In its Counter-Memorial, Burkina considers that we may disregard the Roser report, given that it contains a passage in which its author considers that “common sense and reality require that this boundary be modified” by means of a “further erratum” — which was never adopted¹⁹. It is true that this sentence is to be found in the text, but it has to be read in its context.

Roser's reasoning at that time was the following: it appears from the text that the two *cercle* commanders were interpreting the course of the line in the Erratum not in lexicographical terms but in *cartographic terms*, in accordance with the *new frontier* map of 6 October 1927, which had been

¹⁵The co-ordinates of the village are 14° 00' 35.7" N; 00° 24' 52.6".

¹⁶Map of West Africa at 1:200,000: Republic of Mali, Republic of Niger, Republic of Upper Volta, Téra, sheet ND31 XIII, drawn and published by the *Institut géographique national*, Paris (West Africa branch, Dakar), First Ed. July 1960, reprinted September 1969, MN, Ann. D 23 (Téra sheet); map of West Africa at 1:200,000: Republic of Niger, Republic of Upper Volta, Sebba, sheet ND31 VII, drawn and published by the Geographical Department, Dakar, 1960, MN, Ann. D 24 (Sebba sheet).

¹⁷Letter No. 112 of 10 April 1932 and Tour Report from Civil Service Deputy Roser, Acting Commander of Dori *cercle*, to the Governor of Upper Volta; MN, Ann. C 45. The Tour Report from the Administrator of Dori *cercle* of 31 March 1931 had already stated that “the village of Petelkalkalé (or Fétokarkalé) is located on the border of the two *cercles* and is not defined by the delimitation, but will nonetheless remain in Dori, as the boundary passes approximately 1 km east of this village”, MN, Ann. C 41.

¹⁸MN, Ann. C 41.

¹⁹CMBF, para. 3.35.

forwarded to the Upper Volta administrative capital at the same time as the Erratum. The Roser report regards it as “the official map”²⁰. Since that map was on a scale of 1:1,000,000, Roser had made an enlargement on a scale of 1:500,000. Which, incidentally, again confirms the authority accorded to that map by the local administrators and that, in any event, they did not therefore consider that the frontier line of October 1927 was a straight line.

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The second point is that, basing themselves on the criticisms made by Delbos in 1927, they considered that the boundary — that is to say, as represented on the new frontier map on an inappropriate scale — did not represent an absolute reality, either from the orographic point of view or from an administrative point of view.

And a third point is that they envisaged two solutions to the problem facing them. The first was “to disregard the areas where the true boundary deviates to either side of the frontier as legally established by the *Arrêté* of 1927”, since “[a] millionth-scale map cannot possibly show clearly all the twists and turns of a boundary line” — which thus clearly means that in their view the line of the frontier was that which they could see on the “new frontier” map. The two *cercle* commanders accordingly proposed to interpret the defective text on the basis of the boundary which they regarded as traditional.

And the second point made by Commander Roser in his report to the Governor of Upper Volta proposed the following as an alternative solution:

“If this does not meet your approval [that is to say, to disregard the deviation], the only alternative is to consider a further erratum. The frontier in the area in question should then be defined as follows.”

Thus, if it was unacceptable to apply a certain flexibility in interpreting the map, there was then only one other solution: to issue an erratum, which, in his view, should be drafted as follows in order to correspond to the reality of the true boundary between the *cantons* — which was as follows:

“from there [Higa Pool], the line shown on the Delbos map, passing through Bangaré (three districts: one to the east of the Bangaré *marigot* and two to the west, one of which is composed of Gourmantchés originally from the village of Doumba (Téra) and the other known as Mamassirou, to Houssaltane, which it leaves to the east, to Petelkarkalé, which it leaves to the west, to Petelkolé which it leaves to the east . . .

²⁰MN, p. 6.

The Head of Téra Subdivision and I are in complete agreement as to its line, which we determined before we separated.”

It should be clearly understood that, on the 1:100,000 map, the line does indeed pass between the various localities, and everything lying to the east belongs to Niger, while, on the contrary, everything to the west belongs to Burkina. And he thus emphasized that “the Head of Téra Subdivision and I are in complete agreement as to its line, which we determined before we separated”.

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What thus follows from all of this is that the two administrators had no intention of *creating a new boundary* but were indeed seeking to clarify a defective text. They knew perfectly well that these localities were not *mentioned in the 1927 Erratum* and what they wanted — if a new erratum was considered essential — was that, in order to reflect the reality of the *cantons*, it should be clarified by the indication of intermediate points. Let us take a common-sense view here. Roser was the Commander of Dori *cercle*, and no administrator seeks to despoil his own territory. Both men knew exactly where the boundary lay in practice, to the nearest kilometre.

They even decided to mark that boundary, and Roser announced his intention to have the necessary timber cut in Yagha, which was part of Dori *cercle*.

This demonstrates both the belief of the two commanders and the tacit agreement of the Governor of Upper Volta, to whom this report was sent, and who made no objection to the administrators' interpretation.

Twenty years later, the same boundary was confirmed by a report from Administrator Lacroix, of Tillabéry *cercle*. Reporting on a tour which he had carried out in order to survey the boundary between the two colonies in this sector, he wrote: “Rimaïbés having established the permanent hamlets of Petelkarlalé and Petelkolé, between which the boundary passes”²¹. Thus in other words, this boundary on the ground between the *cantons* remained and was treated as such by the *cercle* commanders, notwithstanding the text, which for them meant little, since it was incomprehensible.

²¹Report of a tour conducted from 16 to 23 November 1953 by Deputy-Administrator Lacroix (Tillebéri *cercle*), dated 24 December 1953 (MN, Ann. C 79).

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The position of these administrators would be confirmed subsequently: Petelkolé is part of Diagourou *canton* in the sketch-map of that *canton* prepared in 1954²² (which can be found in the judges' folder at tab 14) [Slide of sketch-map]. No question anymore here of repeating the old saw about the disappearance of Upper Volta. Never mind, Burkina Faso comes up with a different objection, observing that, on this sketch-map, the name of the village is not underlined, which, according to the map's legend, means that this is a village "not belonging to the *canton*". However, the conclusions it draws from this are mistaken. While not a village *administratively forming part* of the *canton*, Petelkolé was indeed located on *the territory of Téra Subdivision*. Where localities not underlined belong to another *cercle*, that is indicated (thus Kamanti is indicated as a "Dori hamlet"). The other localities that were not underlined, although located territorially within Diagourou *canton*, belonged administratively to the other *cantons* of Téra Subdivision. *That is explained by the fact that attachments were based on ethnic considerations*. Thus Diagourou *canton* was essentially composed of what at that time were known as independent Peuls; Petelkolé consisted of Peuls known as Gaobés, attached to Bankilaré in Téra Subdivision. Our opponents, locked in their abstract and artificial logic, blithely disregard these fine ethnic distinctions which the administrators of Upper Volta, for their part, wished to preserve. How times change . . . Finally, we note that, until the present proceedings, Burkina Faso had never challenged the fact that Petelkolé belonged to Niger. Moreover, we find confirmation of this in a recent development which definitively puts an end to all argument.

16. Thus, near Petelkolé, the frontier line deviates slightly from the IGN line towards the west in order to take in the juxtaposed frontier post between Niger and Burkina Faso [Slide]. That post is situated entirely within Niger territory. The site was chosen by the Bilateral (Burkina-Niger) Committee on the identification of sites for the installation of juxtaposed control posts on the Ouagadougou-Dori-Téra-Niamey road, whose conclusion, dated 9 June 2006, was as follows (you will find this document at tab 16):

"After analysing the information on the basis of the above-mentioned criteria, two sites met the conditions for the installation of juxtaposed control posts. These

²²Diagourou *canton*: scale 1:250,000, 1954 (MN, Ann. D 21) (appended to the census report for Diagourou *canton* of 10 August 1954, prepared by the head of Téra Subdivision).

were Petelkolé in the territory of Niger and Seynotyondi in Burkina, both of which were situated approximately two kilometres from the frontier.

By mutual agreement, and on account of the size of the village of Petelkolé in relation to its socio-economic infrastructure, the experts of the two States, assisted by the commission of the WAEMU and LGA, adopted the village of Petelkolé (Niger) as the site for the installation of juxtaposed control posts on the Ouagadougou-Dori-Téra-Niamey road. Accordingly, they recommended that the competent authorities of the two States should endorse this decision.²³

18 This choice was not challenged. Everything has been built. The frontier point is situated slightly further to the west of the juxtaposed control posts, at the end of the stretch of the new Téra-Dori road constructed by Niger²⁴, two kilometres from Petelkolé — as we have just shown.

In the course of their oral argument, our opponents claimed that this decision was invalid, since only the Joint Commission had authority in matters concerning the frontier. That is clearly disputable. Professor Kamto dealt with this curious notion this morning: both States were perfectly entitled to decide to establish a juxtaposed control post and, at the same time, to determine where their frontier passed. This settles the issue as regards Petelkolé, whatever doubts may have existed at the outset.

17. From this point, the boundary rejoins the IGN line²⁵, leaving Feto Karkalé Pool to Burkina Faso — as has always been recognized from the start. The boundary then follows the IGN line as far as the line of broken crosses at the level of Oussaltane²⁶.

Oussaltane or Ousaltan

[Slide]

18. The Ousaltan area straddles the boundary [Slide: Delbos sketch-map], as can be seen on the Delbos sketch-map of June 1927²⁷. Commander Mangant, administrator of Dori *cercle*, notes in his report of 7 July 1930 that the members of certain tribes “stated that Oussaltane, where they

²³Report of the Bilateral (Burkina-Niger) Committee on the identification of sites for the installation of juxtaposed control posts on the Ouagadougou-Dori-Téra-Niamey road, 9 June 2006 (CMN, Ann. A 24, p. 5). The acronyms used in that document are as follows: WAEMU (West-African Economic and Monetary Union) and LGA (Liptako-Gourma Authority). These are two sub-regional integration organizations of which both countries are members).

²⁴Co-ordinates: 14° 00' 04.2" N; 00° 24' 16.3" E.

²⁵Co-ordinates: 13° 58' 38.9" N; 00° 26' 03.5" E.

²⁶At the point with co-ordinates 13° 55' 54" N; 00° 28' 21" E.

²⁷Sketch-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).

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were living, was part of Téra Subdivision”²⁸. The Roser/Boyer agreement, which I was discussing just now, likewise regards Oussaltan as belonging to Niger. According to that document, the boundary runs “to Houssaltane, which it leaves to the east, to Petelkarkalé, which it leaves to the west, to Petelkolé which it leaves to the east”²⁹. In 1935, the administrator in charge of Téra Subdivision confirmed that Oussaltan encampment “is in the territory of Téra”³⁰. Oussaltan is described in 1941 as a “*lougan* of the Kel Timijirt Logomaten”³¹ in the Directory of the villages of Téra Subdivision³². The Head of Téra Subdivision, in a telegram/letter to Tillabéry *cercle* of 11 July 1951³³ reproduces in identical terms the language of the Roser/Boyer agreement of April 1932. Notwithstanding these numerous texts, Burkina here repeats the same arguments as those used for Petelkolé: name not underlined in the map of the *canton*, criticism of the Roser/Boyer agreement, alleged inadmissibility of evidence dating from the period when Upper Volta no longer existed. The only new argument is the claim that the Logomaten were not part of Niger³⁴. I am sorry, but that is not true. The Logomaten were expressly cited as the sixth *canton* of Tillabéry in the Record of Agreement of 2 February 1927³⁵. Oussaltan belonged to Logomaten. The area is moreover still administered by Niger today. All of these items show that it is beyond dispute that Oussaltan is part of Niger. The boundary thus runs around the hamlet of Oussaltane and rejoins the IGN line, passing through the points whose co-ordinates are indicated in Niger’s Counter-Memorial. I will not bore the Court by reading them out.

²⁸Report No. 416 from the commander of Dori *cercle* on the difficulties created by the delimitation established in 1927 between the Colonies of Niger and Upper Volta (*Arrêté* of 31 August 1927) regarding the boundaries between Dori *cercle* and Tillabéry *cercle*, 7 July 1930 (MN, Ann. C 38, p. 11).

²⁹Letter No. 112 of 10 April 1932 and Tour Report from Civil Service Deputy Roser, Acting-Commander of Dori *cercle*, to the Governor of Upper Volta (Political Office). Certified copy of 15 September 1943 (MN, Ann. C 45, p. 6).

³⁰Letter No. 161 from the Head of Téra Subdivision to Tillabéry *cercle* dated 24 May 1935 (MN, Ann. C 60). The copy of this document appended to Niger’s Memorial was barely legible; it has been reproduced again with the same number and appended to Niger’s Counter-Memorial.

³¹See Record of Agreement — which refers to Logomaten as a Tillabéry *canton* — between Mr. Brévié, Governor of the colony of Niger, and Mr. Lefilliatre, Inspector of Administrative Affairs, representative of the Governor of Upper Volta, Téra, 2 February 1927 (MN, Ann. C 7).

³²Directory of villages of Téra Subdivision, villages of Kel Tamared, Kel Timijirt, Logomaten Assadek, Logomaten Allaban, undated, 1941 (MN, Ann. C 64, p. 26).

³³Official telegram/letter No. 70 from the Head of Téra Subdivision to Tillabéry *cercle*, dated 11 July 1951, inc. reproduction on a scale of 1:500,000 of a sketch-map by Mr. Delbos (MN, Ann. C 73).

³⁴CMBF, para. 3.73.

³⁵MN, Ann. C 7.

Bangaré

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19. This brings us to the large village of Bangaré. This has always been regarded as belonging to Niger since the colonial period. The sketch-map drawn by Delbos at the time of his 1927 tour, contrary to what Burkina Faso maintains³⁶ [Slide of Delbos sketch-map], placed Bangaré right on the boundary line. It is true, on the other hand, that Prudon made the boundary pass just to the south of this locality. There is nothing, however, to support Burkina's claim in its Counter-Memorial³⁷ that the Delbos/Prudon agreement placed this locality in Upper Volta, and sketch-map No. 2 in the Counter-Memorial is, I am sad to say, mistaken on this point — as it is on others. As Roser, Commander of Dori *cercle*, wrote in 1932 — and I would remind you that Roser was the Commander of Dori *cercle* — “the large village of Bangaré has always belonged to Téra *canton*”³⁸. Burkina Faso believes that it can demonstrate the lack of support to be gained from this statement by the Commander of Dori *cercle* by quoting the relevant passage from his report in full. At first sight, this does indeed give cause for concern. The full passage is as follows:

“However, if this boundary is accepted as correct and definitive [namely, the boundary that he can see on the 1:500,000 enlargement of the 1927 Erratum map], then Upper Volta must immediately annex the large village of Bangaré, which has always belonged to Téra *canton*, but which is located to the west, on the Volta side of the famous ‘line’ [which he sees on the map. Not the line which he envisages according to the text of the Erratum, but which he sees on a sketch-map which, although it is still one of the best that we have, is nonetheless on a scale such that it cannot show all the details]. This example clearly shows that common sense and reality require that this boundary be modified.”

And as I have explained, he would then go on to propose to the Governor of Upper Volta that the map of the boundary should be interpreted in a flexible manner, and that an erratum should be issued only if the latter insisted on it — which never happened. If we place this statement in its context as shown above, we see that Roser and his colleague Boyer are puzzled as to how to interpret the new frontier in its 1:500,000 enlargement, on which they rely in order to determine the legal boundary. This schematic line doubtless placed Bangaré to the west of the boundary, but that did not correspond to the boundary on the ground. We have seen that it was for the purpose of

³⁶CMBF, paras. 3.30 and 3.36.

³⁷CMBF, paras. 1.64 and 3.36.

³⁸Letter No. 112 of 10 April 1932 and Tour Report from Civil Service Deputy Roser, Acting Commander of Dori *cercle*, to the Governor of Upper Volta (political office). Certified copy of 15 September 1943 (MN, Ann. C 45, p. 6).

addressing specific issues on the ground that it was this latter boundary which they were planning to demarcate.

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In any event, in 1954 Bangaré would be given the official status of a “village” of Niger Colony. It appears on the sketch-map of Diagourou [Slide: Diagourou sketch-map]. It is cited in the lists of villages of Diagourou *canton* in 1954³⁹ and in 1959⁴⁰. It is shown on the sketch-map of the *canton* prepared in 1954⁴¹. It is highlighted in the report on the census of Diagourou *canton* prepared by the Head of Téra Subdivision, again dated 10 August 1954⁴². It is dealt with in an annex to that report⁴³. Bangaré again appears on the list of villages voting in Niger for the National Assembly in 1956⁴⁴. The full report in question is a long one of over 50 pages. In case the Court so wishes, we have brought it in its entirety and can file it with the Registry. This conduct on the part of the authorities shows that the common sense called for by Roser and Boyer won out. There can be no doubt that Bangaré belongs to Niger, and that the line claimed by Niger in this second section is fully substantiated.

I am now bound to have to say to you that, when we heard and then read Professor Thouvenin’s remarks on pages 43 and 44 of CR 2012/20, we were puzzled, for in each case it would appear that he has unfortunately confused Bangaré with Bankaré or Bankara, and then accuses Niger of confusing them, which is not so, since we are perfectly well aware of the precise distinctions that need to be made between these different villages, and that is apparent in five or six of these cases. We believe it is unnecessary to subject the Court to the 15 minutes which it would take to go into detail and show that all of the points made by Professor Thouvenin are

³⁹List of villages of Téra Subdivision at 1 January 1954 — Diagourou *canton* (CMN, Ann. C 117); and List of villages of Téra Subdivision at 10 August 1954 (extract No. 1) (CMN, Ann. C 118).

⁴⁰List of villages of Diagourou *canton*, 17 April 1959 (CMN, Ann. C 125).

⁴¹Diagourou *canton*; scale 1:250,000, 1954 (MN, Ann. D 21) (appended to the Report of the Head of Téra Subdivision on the census of Diagourou *canton* of 10 August 1954).

⁴²Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954 (MN, Ann. C 84). Referred to as follows in the list of four recently formed villages: “the fourth, Bangaré, was created by Mr. Garrat in 1945”.

⁴³“Bangaré”: appended to the Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954 (CMN, Ann. C 120).

⁴⁴Arrêté No. 2794 establishing polling stations and districts for the elections to the National Assembly, *Official Journal of Niger*, No. 304, 1 January 1956 (CMN, Ann. B 35).

22 wrong. However if that should appear necessary, we would be quite prepared to give the Court a summary of those points, which, frankly, are all totally misconceived.

(c) *The stretch from Bangaré to the boundary of Say cercle*

20. Finally, as regards the stretch from Bangaré to the boundary of *Say cercle*, the frontier follows the IGN line throughout, until it reaches the point which, during the colonial period, constituted the boundary of *Say cercle* (tripoint between the *cercles* of Tillabéry, Dori and Say)⁴⁵. In a few moments, Professor Pierre Klein will explain to the Court the deficiencies in the Erratum regarding this point.

21. Mr. President, Members of the Court, my presentation on this sector would be incomplete if I confined myself to justifying the line of the boundary. But I must, however, emphasize that several villages which have always been part of Niger territory would pass to Burkina if we were to accept the theory of the artificial straight line, that is to say, a line lying between that which we propose and the line proposed by Burkina itself.

In this sector overall, which is a huge one, there is a whole series of villages in respect of which there is indeed no dispute that they belong to Niger [Slide: Sketch-map showing the location of these villages between Niger's line and Burkina's line]. Niger's Counter-Memorial set out the evidence showing that the villages of Beyna, Mamasirou, Ouro Gaobe and Yolo belong to Niger; it bears no relation to that relied on by our opponents. We will confine ourselves to pointing out here that three of them were included on the list of polling stations for the elections to the 1956 National Assembly.

As is clear from the foregoing, the frontier line claimed by Niger essentially follows the IGN line in the portion running from Tao to the tripoint between Dori, Tillabéry and *Say cercles*. It only deviates from that line where we have documents constituting evidence of the colonial heritage and which, for some reason or another, were not taken into account by the IGN.

22. Mr. President, Members of the Court, that brings me to the end of my presentation for this round of oral argument. It remains for me to thank you for your kind attention and to ask you
23 to call Professor Klein to the Bar for his presentation regarding the boundary in the Say sector.

⁴⁵That is to say, the point with co-ordinates 13° 29' 08" N; 01° 01' 00" E. See CMN, fig. 5: tripoint Dori/Tillabéry/Say (extract from MN, Ann. D 13), p. 32 [p. 23 of the English version].

The PRESIDENT: Thank you, Professor. I give the floor to Professor Klein. You have the floor, Sir.

Mr. KLEIN: Thank you, Mr. President.

THE BOUNDARY IN THE SAY SECTOR

1. Mr. President, Members of the Court, it now falls to me to continue the line of reasoning begun by Professor Salmon, and to present to you Niger's claims in respect of the frontier line in the Say sector. It is evident, at this stage in the proceedings, that the Parties disagree strongly as to the course of that line. It is therefore my intention to show you in what respect Niger's approach rests on more solid ground, and should accordingly be adopted.

[Slide of the sketch-map of the Say sector with the lines claimed by Niger]

I shall proceed by dividing this sector into three parts, firstly showing that the continuation of the inter-colonial boundary as far as the River Sirba at Bossébangou is unfounded (A), then that the frontier line in the area of the four villages referred to in the 1927 texts can be identified with precision (B), and finally that the course consisting of two straight-line segments in the part of the frontier area that runs to the beginning of the Botou bend is entirely justified (C).

[End of slide]

A. The continuation of the inter-colonial boundary to the village of Bossébangou is unfounded

2. According to the terms of the Erratum correcting the *Arrêté general* of 31 August 1927, after the Tao marker, the inter-colonial boundary should “[reach] the River Sirba at Bossebangou” before then “immediately turn[ing] back up towards the north-west”⁴⁶. Niger contests the idea that the description given in the Erratum of this part of the inter-colonial boundary — whereby it passes through the village of Bossébangou — has any authority and should be adopted as a basis for the frontier line between the two States in this sector. As Niger has amply demonstrated in its written pleadings, this is quite simply because the Erratum of 1927 contains a factual error in respect of this point⁴⁷. This part of the text cannot, therefore, be regarded as part of the “colonial heritage”

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⁴⁶MN, Ann. B 27.

⁴⁷MN, p. 105 *et seq.*; CMN, p. 75 *et seq.*

inherited by the two States by application of the principle of *uti possidetis*. Allow me to recall briefly what this analysis is based on.

3. The purpose of the *Arrêté général* of 31 August 1927 was to determine the precise course of the boundary between the Colonies of Upper Volta and Niger, following the presidential Decree of 28 December 1926 incorporating into the Colony of Niger various *cantons* of Dori *cercle* and Say *cercle*, with the exception of Botou *canton*⁴⁸ [Slide of the sketch-map of the boundaries of Say]. However, rather than confining itself to describing the new boundary between the two colonies, as it resulted from the incorporation of those *cantons*, the *Arrêté* of August 1927 described all the boundaries of Say *cercle* — that is, both the boundaries between Say *cercle* and the Colony of Upper Volta and those between Say *cercle* and the *cercles* belonging to the Colony of Niger, in other words what we might call the “internal” rather than inter-colonial boundaries. Thus, it was evident that the *Arrêté* went beyond its purpose, which was only to define the new inter-colonial boundary. It was very clearly for this reason that the colonial authorities deemed it necessary to correct it through the Erratum of 5 October 1927, from which the description of the boundaries of Say *cercle* that did not concern Upper Volta was to be omitted [*the “internal” boundaries of Say are removed, except for the Bossébangou sector*]. This was done for all points but one: the one where the text of the Erratum has the inter-colonial boundary run as far as the River Sirba at Bossébangou. The error regarding this point is quite obvious. [End of slide]

4. According to Burkina, this theory of an error — in support of which, to use the words of Professor Forteau, Niger “puts up a valiant defence”⁴⁹ — is unfounded. You will note in passing, Mr. President, Members of the Court, that when it is not being “fickle”, or making “about-turns”, Niger “puts up a valiant defence” of its positions. Whichever stand we take, it is clearly very difficult to find favour with our opponents. In substance, the other Party puts forward three reasons for rejecting the error theory: firstly, it claims that in any event it would have no effective consequence; error or not, the Erratum “would nevertheless apply in this case”⁵⁰. Here I cite the argument of Professor Forteau. Secondly, this theory allegedly rests on the erroneous assumption

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⁴⁸MN, Ann. B 23.

⁴⁹CR 2012/20, p. 47, para. 7.

⁵⁰CR 2012/20, p. 48, para. 8.

that the 1927 texts were confined to reproducing pre-existing boundaries. And lastly, the error theory is purported to assume that the reference by the author of the Erratum to Bossébangou was made in ignorance of the true facts, which is said not to be the case⁵¹. Let us now consider these three objections in turn.

5. First of all, according to the other Party, Niger is asking the Court “to judge the legality of the Erratum, to find it incompatible with the Decree of December 1926, and for that reason to exclude it on the basis of French law”⁵². Mr. President, Members of the Court, let us be absolutely clear on this point. In no way is Niger asking the Court to make an administrative judgment, and to decide that all or some of the 1927 texts should be regarded as void because of a possible excess of authority or some error of law. All that is at issue here is an error of fact, in that the inter-colonial boundary is made to pass through a point which, in everyone’s view — and on this point I would refer the Court to Niger’s written pleadings⁵³ — did not belong there. No more and no less. What exactly, then, did the Chamber of the Court decide in respect of the *Arrêté général* of 31 August 1927 and its Erratum in the *Burkina Faso/Republic of Mali* case? The Chamber made the general observation that — as Professor Kamto recalled in detail this morning — “[i]n the present proceedings, it is solely the evidentiary value of the Order and erratum which counts” (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 592, para. 72). And in particular, it goes on to state that “[i]f the Order was flawed by a factual error, this could have had some implications for the legal validity of part of the boundary between Upper Volta and Niger” (*ibid.*).

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There is no doubt that in this case there was such a factual error, as we saw earlier. The legal implications are clear: as I said, the Erratum, being affected by this factual error, cannot, in respect of this particular point, be regarded as part of the colonial heritage. That the Parties to the present proceedings have referred to the Erratum in other respects in treaty instruments does not change that fact. Nor is it the case that disregarding the text of the Erratum on this particular point would have no practical effect, since the line which would then apply would be the one appearing on the

⁵¹*Ibid.*

⁵²*Ibid.*, p. 49, para. 11.

⁵³MN, para. 7.19 *et seq.*; CMN, para. 2.2.25.

1960 IGN map, as our opponents maintain⁵⁴. What we have here is not a “simple” case of the Erratum “not suffic[ing]”, but a problem regarding “the legal validity of part of the boundary”, to use the words of the Chamber in its Judgment of 1986. It is not therefore the line on the IGN map which prevails in this sector, but the line that appears on the map produced in 1927 to illustrate “the new frontier between Upper Volta and Niger”⁵⁵, for reasons to which I shall return in a few moments.

6. The other Party’s second objection to the error theory is based on the fact that Niger purportedly misreads the 1927 Erratum, by restricting its role to the reproduction of boundaries that already existed⁵⁶. In this context, Burkina also reproaches Niger with not producing “any colonial text defining what it repeatedly refers to as the ‘traditional boundaries’ of Say *cercle*”⁵⁷. Here again, some clarifications are called for. Niger has never claimed that any official text set out the boundaries of Say *cercle* before 1927. But it continues to argue forcefully and with conviction that, right from the start of colonization, this *cercle* did indeed have boundaries, which gradually became what may legitimately be called “traditional boundaries”, and which the author of the Erratum obviously had no intention of ignoring. [Slide of the Boutiq sketch-map of 1909] These boundaries can be seen clearly on several sketch-maps and maps prepared between 1909 and 1926⁵⁸. They were presented to you by Professor Salmon this morning, and I do not think there is any point in showing them again. To deny the existence of such traditional boundaries and their influence on the description of the inter-colonial boundary in the 1927 texts is simply to deny the facts.

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7. In fact, the document that most strikingly shows that the author of the Erratum of October 1927 was mistaken in retaining the description of an inter-colonial boundary passing through the village of Bossébangou is precisely the map referred to as the “new frontier” map. Its relevance and importance to the present dispute were amply underlined by Professor Jean Salmon this morning. So I shall not go over that again. At this stage, I would only draw your attention,

⁵⁴ CR 2012/20, p. 50, par. 15 (Forteau).

⁵⁵ MN, annexe D 13.

⁵⁶ CR 2012/20, pp. 50-51, paras. 16 *et seq.* (Forteau).

⁵⁷ *Ibid.*, p. 52, para. 23.

⁵⁸ MN, Ann. D 1.

Mr. President and Members of the Court, to the way in which this document represents the boundaries in the area which concerns us. The map can be found at tab 12 of the judges' folder. We can readily see that only a boundary between *cercles* within the same colony (Niger) — a boundary marked by a line of alternate dots and dashes — passes through the village of Bossébangou. For its part, the inter-colonial boundary — represented by a line of alternate crosses (+) and dashes — is more than 20 km away from this locality.

8. In the face of such evidence, the other Party clearly considers it preferable to disregard completely the lessons to be drawn from this map. In its Memorial, Burkina Faso describes it as a mere “sketch-map”, which can have no weight when compared with the title constituted by the 1927 texts themselves⁵⁹. And in its Counter-Memorial, probably considering that the matter is settled, it quite simply makes no further reference to it in relation to this sector of the frontier⁶⁰. Moreover, this total silence continued during Burkina's first round of oral argument, as Professor Salmon did not fail to point out. Our opponents thus deliberately disregard the weight accorded to this “new frontier” map by the Chamber in the 1986 *Burkina Faso/Republic of Mali* Judgment. In this connection, it may be useful to recall that, in the Chamber's view, this map could not be overlooked “as a piece of evidence”, given that its compiler, “having perused the governing texts, and possibly the accessible maps, had acquired a very clear understanding of the intention behind the texts, which enabled him afterwards to lend that intention cartographic expression” (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 646, para. 171). As we now know, this analysis is all the more relevant since this map was an official document issued by the Government-General of FWA and had been sent to the authorities of the two Colonies concerned⁶¹. And, in fact, what the map reflects in the sector that concerns us here is indeed “the intention behind” the 1927 Erratum. In this instance, the intention was to describe the new boundary henceforth separating the colonies of Upper Volta and Niger, and not the full extent of Say *cercle* and its boundaries with the other *cercles* within the Colony of Niger. The

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⁵⁹MBF, pp. 137-138.

⁶⁰CMBF, pp. 109 et seq.

⁶¹CMN, p. 31, para. 1.1.20

perpetuation of the error in the Erratum is thus established beyond all doubt by an authoritative instrument which dates from exactly the same time.

9. The other Party's final objection to the error theory will not detain us long. According to this objection, it cannot be shown that the author of the Erratum was acting in ignorance of the true facts when he indicated Bossébangou as a frontier point⁶². In this regard, Professor Forteau said that the argument would "only begin to make sense if the texts of the two instruments were identical", which, in his opinion, is not the case⁶³. He might seem to have a persuasive argument here, since he underscored the fact that the arrival point of the boundary coming from Tao was located to the south of Boukalo according to the *Arrêté*, and at Bossébangou according to the text of the Erratum⁶⁴. But what Mr. Forteau avoided pointing out is that the *Arrêté*, in referring to the "boundaries between the Say *cercle* and Upper Volta", already mentioned a line passing "by the River Sirba from its mouth as far as the village of Bossébangou. From this point a salient, including on the left bank of the Sirba" four villages, etc. In other words, all that the author of the Erratum did was to move the arrival point of the boundary coming from the north-west from one place on the Sirba to another place on the Sirba and, as it were, to then "join up" this amended line with the one initially described by the *Arrêté*. The problem is that this operation was carried out a little too soon, at the start of the salient and not at its apex, which is where in fact the inter-colonial boundary ran. What is important here is that although the wording of the two documents was not entirely identical, it was in any case very similar with regard to this section of the boundary. So

29 our opponent's final objection to the error theory does not stand up to scrutiny either. That theory is thus fully vindicated, thereby depriving the line claimed by Burkina in this sector of any legal basis.

10. Moreover, the same applies to the continuation of the line claimed by Burkina Faso, after it passes through this locality. To recall, the text of the Erratum — you must know it almost by heart by now — states in this regard that the boundary "[then] almost immediately turns back up towards the north-west". In a display of uncharacteristic realism, our opponents seem to agree that

⁶²CR 2012/20, p. 56, para. 35 (Forteau).

⁶³*Ibid.*, p. 56, para. 36.

⁶⁴*Ibid.*

this statement does not suffice to determine the course of the frontier in this particular section. They therefore fall back on the line shown on the 1960 IGN map which, for once too, finds favour in their eyes⁶⁵. However, if there is one sector in which the course of the IGN map should be disregarded, it is this sector. Why? For the simple reason that it seems to have been created *ex nihilo* by the map's drafters and that no trace of it is to be found on *any* other document dating from the colonial period. As Members of the Court will have noted earlier, the boundaries of Say *cercle* in this sector are represented on every map in the shape of a salient consisting of straight lines; of course, we are still talking here about the boundaries of Say *cercle* and not the inter-colonial boundary from 1927 onwards.

On none of those maps — and on no other map from the colonial period either — is there any reference to a boundary following the course of the Sirba. The 1960 IGN map is — I repeat — the only one to follow this course, without any basis in the 1927 texts or in any subsequent practice. If the drafters of the 1927 texts had intended the boundary to follow the course of the Sirba in this area, they would obviously have said as much. That is what they did in every other part of the *Arrêté* and the Erratum dealing with hydrographic boundaries, by referring to the course of the Rivers Niger, Tapoa, Mekrou and Sirba, depending on the text in question.

11. The course claimed by the other Party in this area therefore has no basis, either in regard to a boundary passing through the village of Bossébangou or to the line that subsequently follows the course of the River Sirba. In fact, it is some 20 km from this locality that the frontier between the two States passes through the place where the “tripoint” was located between the *cercles* of Dori, Tillabéry and Say in 1927. Earlier this week, our opponents criticized Niger for not having a very clear position on the determination of that point. Firstly, Professor Forteau noted that Niger did not base that point “on the legal instruments of delimitation which purportedly existed in 1926”⁶⁶. Let me simply say in that regard that this is hardly surprising, since Niger has never claimed that such instruments of delimitation existed. But the other Party’s main argument consists in focusing its criticisms on the sketch-maps and maps used by Niger to identify that point. These are supposedly either irrelevant because they date from periods when there were only two *cercles*

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⁶⁵MN, p. 141, para. 4.105.

⁶⁶CR 2012/20, p. 53, para. 28 (Forteau).

in the area⁶⁷, or they are unreliable because they are inconsistent, in particular concerning the location of the villages in the area⁶⁸. Let me briefly revisit these two arguments. It is well established — we have pointed this out already — that the shape of Say *cercle* has remained unchanged over the years and during its successive transfers from one colony to another. In particular, as regards the question we are concerned with here, the representation of the apex of its salient has not changed. Since it is the location of this point which concerns us in terms of ascertaining the position of the tripoint between the former *cercles* of Say, Dori and Tillabéry, it is hard to see what difference it makes whether there are two or three *cercles* in this sector. The fact that the point in question was at times only a “bipoint” changes nothing. It does not mean that its location changes. And all the material showing this point can unquestionably be used for the purposes of identifying its position. The issue of the reliability of the sketch-maps in question brings us back once again to the differences in the methodology used by the Parties, which appear to be irreconcilable. Our opponents reject a substantial part of the cartographic and documentary material from the colonial period because of its lack of precision, and they claim to reflect the situation prevailing at that time by using only instruments that could be described as “modern”. Niger cannot help seeing this approach as anachronistic and, for its part, endeavours to focus on material that is contemporary with the situations in question. There is no doubt that this material can be criticized in terms of its reliability. However, Niger does not consider that a sufficient reason for it to be summarily dismissed. This is especially true when the documents in question show geographical characteristics or features which have a certain permanence, such as watercourses or mountains. In addition, any approximations that may occur from using such material can often be corrected by recourse to more reliable material. [Slide showing the “new frontier” map] This is precisely the case with the question that concerns us here, where the answers which emerge from the sketch-maps that have just been mentioned can be confirmed by recourse to a document that is exactly contemporary with the 1927 texts and whose reliability appears not to be subject to criticism. Once again the document in question is the 1927 “new frontier” map, which you can see now. Despite its small scale, this map makes it possible to identify the location of the

⁶⁷*Ibid.*, p. 54, para. 29.

⁶⁸*Ibid.*, p. 55, paras. 31-34.

point in question with sufficient accuracy. Moreover, this point can also be confirmed by information gathered during various field missions, including, for example, the mission carried out in 1943 by the Administrators of the Dori and Tillabéry *cercles*. According to the mission report, the point in question could be situated unambiguously at a precise location, at the locality known as the “Fisso platform”, which the report describes as “situated 6.5 km . . . to the north-east of the hamlet of Nabambori, at the source of one of the streams which form the Tiekol Nabambori, tributary of the Sirba”⁶⁹. Whereas some of the sketch-maps criticized by the other Party were indeed lacking in precision, that is clearly not the case here. The Court can thus see that Niger clearly has sufficient sources to identify the position of this tripoint between the *cercles* of Tillabéry, Dori and Say, which constitutes the meeting point between the two main sectors concerned by the present dispute. [End of slide] We can now move on to the next section of the frontier, which is the portion referred to as the “four villages”.

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B. The frontier line in the sector of the four villages can be identified with precision

12. Under the terms of the Erratum of 5 October 1927, the boundary then leaves “to Niger, on the left bank of that river [the Sirba], a salient which includes the villages of Alfassi, Kouro, Tokalan and Tankouro”. [Slide of the extract from the IGN map, with the addition of the Burkina line, as it appears on sketch-map No. 13, MBF, p. 152] According to Burkina Faso, here too it is the line shown on the 1960 IGN map which most aptly reflects the terms of the Erratum that describe this section of the boundary⁷⁰. [End of slide]

This reading is not shared by Niger, and I should now briefly like to explain why. According to the Erratum — which continues initially, let us remember, to describe the “internal” boundaries of Say *cercle* — the boundary, after passing through the village of Bossébangou, forms a salient which leaves four villages to Niger on the left bank of the River Sirba: Alfassi, Kouro, Tokalan and Tankouro.

[Slide of the “new frontier” map of 1927]

⁶⁹ MN, Ann. C 69.

⁷⁰ MBF, p. 152, para. 4.136.

It is clear, for the reasons which I set out in detail a moment ago, that the term salient is meaningful as part of a description of all the boundaries of Say *cercle*, but not if the intention is merely to describe the inter-colonial boundary. Once again, this difference appears very clearly on the “new frontier” map of 1927, on which the inter-colonial boundary in this sector follows a general north-easterly and then south-easterly direction, without creating a salient of any kind. [End of slide]

33 13. However, where it would appear to be essential to return to the terms of the 1927 Erratum is when it indicates that the course of the boundary must leave to Niger the four villages mentioned in the text. The major problem with which the Parties were confronted here — as our opponents have already explained⁷¹ — lay in the difficulty of identifying the precise location of these four villages. This exercise proved to be all the more difficult because no map from the colonial period shows all four localities. We find at best three, more often two, and not necessarily the same ones. In the light of these difficulties, the method adopted by Niger is a simple one. As Professor Thouvenin informed you at the beginning of the week, our opponents nonetheless consider it to be particularly obscure and inconsistent⁷². It is most likely the somewhat incomplete explanations provided on this subject in Niger’s written pleadings which lie at the root of this failure to understand it. I should now therefore like to give this issue the importance that it deserves.

14. The method followed by Niger in this instance consisted, firstly, of plotting on the Blondel la Rougery map of 1926 the location of the village of Tankouro, as it emerged from a limited number of earlier sketch-maps, [Slide of the Truchard sketch-map of 1915] in particular the one of Say *cercle* prepared by Administrator Truchard in 1915⁷³ [End of slide. Slide of sketch-map, MN, Ann. C 2] and an undated 1:500,000 sketch-map entitled “Say *Cercle*”⁷⁴. [End of slide. Slide of a relevant extract from the Blondel map, CMN, p. 89, and on the same slide, the box from the top of p. 90 of the CMN] The Blondel la Rougery map appeared to be an ideal

⁷¹See, in particular, CR 2012/21, p. 18, para. 32 (Thouvenin).

⁷²CR 2012/21, p. 18, para. 33 (Thouvenin).

⁷³MN, Ann. D 4.

⁷⁴MN, Ann. C 2.

background map for such an exercise, both because, being from 1926, it is perfectly contemporaneous with the Erratum, and because the other three villages mentioned in the Erratum (Tokalan, Tankouro and Alfassi) were already clearly marked. This exercise of plotting Tankouro's position on the 1926 map gave different results, as is shown, firstly, by the extract from that map which is reproduced on page 89 of Niger's Counter-Memorial and, secondly, by the extract from the same map which is reproduced on the following page of that document. It is clear that the references to Tankouro and the other additions which appear on these two maps, and on the extracts from the 1960 IGN map reproduced on page 90 of the Counter-Memorial, were made by Niger. And it is precisely because that fact appeared obvious to Niger that it did not deem it worthwhile to make specific reference to it in its written pleadings. This shows that it is important to be wary of the obvious, and should this approach have misled the opposing Party or the Members of the Court, Niger can only ask them to accept its apologies.

[End of slide]

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15. To return to my presentation, faced with the divergent results of the exercise which I have just explained, Niger adopted the only position of Tankouro which proved to be compatible with the text of the Erratum, which — let us remember — placed that locality on the left bank of the Sirba. It was therefore the position shown in figure 15 of Niger's Counter-Memorial, which you saw a moment ago, that was ultimately adopted in order to determine the course of the frontier in this area in accordance with the terms of the Erratum. This is the only line which makes it possible to include the four villages and, in accordance with the text of the Erratum, to leave them on the Niger side, which is not permitted by the boundary that is adopted in this area by the IGN. Here, therefore, the final result necessarily departs markedly from the line shown on the 1960 IGN map, the justification for which, as in the Bossébangou sector, would appear difficult to identify. In any case, Burkina Faso provides barely any evidence to explain and justify it, except for supposedly scientific extrapolations from the text of the Erratum. [End of slide]

16. The Parties also differ, as far as this section of the boundary is concerned, on one further question, which is the identification of the point where the frontier changes direction in order to run towards the beginning of the Botou bend. Under the terms of the 1927 *Arrêté*, as amended by the Erratum, this change of direction is supposed to happen at the point where "turning back to the

south, [the line] again cuts the Sirba at the level of the Say parallel”. Once again, it is with reference to documents contemporary with the adoption of the 1927 texts that Niger has established the meaning of this expression. [Slide of the Labitte sketch-map of 1930, CMN, p. 91]

35 The first of these is a tour report of 1930, including a sketch-map, which shows that the inter-colonial boundary in this sector runs 4 km south of Boborgou Saba — and this obviously demands a different boundary line from the one shown on the IGN map and adopted by Burkina Faso. The relevance of this document has, however, been called into question by our opponents during the oral argument. Thus, Professor Thouvenin raised uncertainties as to the precise date of the sketch-map, and even as to the identity of its author⁷⁵. That argument would, however, appear to be highly specious. Unless the authenticity of the document was being called into question — which our opponents were careful to avoid doing — there would not appear to be any doubt as to its author — it definitely bears the name of Sergeant Labitte — or as to the period when it was prepared — the beginning of the 1930s. Niger does not therefore see any evidence which is capable of challenging the relevance of this document to the debates. And clearly our opponents do not either, since they have not indicated what conclusions of a legal nature they were inspired to draw from the alleged uncertainties that I mentioned a moment ago⁷⁶. As for the substantive objection, according to which Sergeant Labitte’s report placed the locality of Boborgou Saba in Upper Volta⁷⁷, it can be disposed of more rapidly still. It is indeed correct that, under the village of Boborgou Saba, the report refers to “24 taxpayers, with 72 bovinds, resid[ing] in Upper Volta”⁷⁸. It is clear, however, that it was the taxpayers in question who were residing in Upper Volta at the time, in accordance with the nomadic practices which have already been described at great length, and not the village to which they belonged. The usage of the terms has not changed in this respect between the colonial period and the present day: in 1930, as in 2012, a village is situated, or located, in a place; it does not “reside” there. There is therefore nothing in this text to challenge the fact that Boborgou Saba belongs to the colony of Niger, and that the inter-colonial boundary

⁷⁵CR 2012/21, p. 20, paras. 42-43.

⁷⁶CR 2012/21, p. 21, para. 44.

⁷⁷*Ibid.*, p. 21, para. 45.

⁷⁸Report of 5 April 1930 (MN, Ann. C 35).

runs 4 km to the south-west of that place. [End of slide. Slide of the relevant extract from the Blondel la Rougery map]

36 17. We can now, therefore, turn to the second element on which Niger relies in order to determine the meaning of the expression “at the level of the Say parallel”. It is the Blondel la Rougery map of 1926, which clearly depicts the Say parallel, as it appeared on the maps of the time. The boundary shown there meets the requirements of the text of the Erratum, since it both allows the four villages in the salient to be left to Niger and cuts the Sirba “at the level of the Say parallel”. Let me emphasize here the terms used in the Erratum, which, by incorporating the expression “at the level of” the Say parallel, undeniably leave some degree of flexibility. Our opponents deny this. Arguing that the Erratum no longer referred to a boundary starting “approximately from the Sirba at the level of the Say parallel and running as far as the Mekrou”, as the original *Arrêté* did, but to a line cutting the Sirba “at the level of the Say parallel”, they conclude on this point that it “describe[s]” — I am citing Professor Thouvenin — “a precise rather than an approximate frontier point”⁷⁹. A point which is so precise, moreover, that our opponents do not hesitate to assert that the point to which the Erratum refers “must be at the intersection of the right bank of the Sirba with the Say parallel”⁸⁰. The Court will appreciate the extent to which this very peremptory statement is compatible with the opposing Party’s otherwise unswerving faith in scrupulously respecting the terms of the 1927 Erratum, which, let us remember, speaks neither of “intersection” nor “right bank of the Sirba”. It will also appreciate the extent to which this approach accords with the method favoured by the Chamber in the *Burkina Faso/Republic of Mali* case, which is to interpret a text, above all, in the context and circumstances of the time⁸¹. For its part, Niger has endeavoured to conform as far as possible to this type of approach and feels, on the basis of the reasoning mentioned earlier, that it has a reliable basis for identifying the point where the frontier changes direction in this sector in order to run towards the beginning of the Botou bend. [End of slide] It is to that last section of the boundary that I suggest we should now turn.

⁷⁹CR 2012/21, p. 17, para. 29.

⁸⁰*Ibid.*, p. 16, para. 24 (Thouvenin).

⁸¹See, in particular, *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment*, *I.C.J. Reports 1986*, p. 619, para. 122.

C. The course consisting of two straight-line segments in the part of the frontier area that runs to the beginning of the Botou bend is entirely justified

37 18. According to the Erratum of 5 October 1927, “[f]rom that point [the one to which I was just referring, where the frontier cuts the River Sirba at the level of the Say parallel] the frontier, following an east-south-east direction, continues in a straight line up to a point located 1,200 m to the west of the village of Tchenguiliba” — in other words, up to the beginning of what it was agreed would be called the “Botou bend”. Even though this part of the 1927 text is very clear, that text can no longer be considered the authoritative source for the frontier line in this sector. The justification for such a decisive statement is quite simply the fact that the authorities of the two colonies, and later of the two States, agreed to depart from what was laid down in the Erratum. As demonstrated by Niger in its written pleadings, a number of documents from the colonial period offer unmistakable evidence of that derogation. This is true, in particular, of several documents which identify the exact location of the inter-colonial boundary on the Niamey-Ouagadougou highway.

[Slide of sketch-map illustrating the highway, the villages mentioned below and distances]

Thus, a telegram/letter sent in 1954 from the Head of Say Subdivision to the Commander of Niamey *cercle*, the purpose of which was to provide a description of the roads and tracks within the subdivision, provides valuable information regarding that location⁸². Indeed, this communication specifies that the boundary of Upper Volta on the federal highway is located 127 km from Niamey, 14 km from Mossipaga and 17 km from Kantchari. This corresponds to the point where the line of two straight segments changes direction in order to connect with the start of the Botou bend, as shown in the preparatory work carried out by the IGN in 1958-1959⁸³, for example. The supplementary map drawn up at that time very clearly shows a frontier marker at this point, as Members of the Court will be able to see by consulting that map in the annexes to the written pleadings filed by Niger. And there can be no doubt that the location of that frontier marker was consistent throughout the colonial period, as is confirmed, among other things, by the fact that the map projected on the screen before you dates back to the year 1933⁸⁴. [End of slide]

⁸²MN, Ann. C 82.

⁸³MN, Ann. D 30.

⁸⁴[CMN], Ann. C 111.

19. These documents undoubtedly place our opponent in a difficult position, since they call into question the supremacy of the 1927 texts — an act bordering on sacrilege. The difficulty of that position is clearly visible from our opponent’s total silence on the subject of the colonial documents relating to the Niamey-Ouagadougou federal highway, including in its first round of oral argument, when it chose instead to focus its attack on the assertion that the frontier point in question was established, after independence, by means of an agreement between the two States. On Tuesday, Burkina argued — through the person of Professor Thouvenin — that it “has never agreed with its neighbour on this point”, something which it claimed is confirmed by the fact that Niger has never produced “an instrument revealing the agreement of the two States to derogate not only from the Erratum, but also from the 1987 Agreement and the Special Agreement referring the case to the Court”⁸⁵. It further contended that the positions defended by Burkina Faso’s representatives in the context of the Joint Commission clearly show that no agreement exists, since the frontier line defended by them in that area is a straight line, with no consideration for a possible frontier marker⁸⁶ which would require the course of the frontier to consist of two straight lines. First of all, Niger must admit to being baffled by the statement that an agreement between the two States regarding that frontier point, reached several decades ago, could have the effect of “derogat[ing]” from the 1987 Agreement and, moreover, from the Special Agreement concluded in 2009 referring the case to the Court. Of course, counsel for Burkina will have time to clarify this matter during its second round of oral argument. As for the substance of the objection raised by our opponent, the following can be offered in response. Firstly, it is clear that the agreement to which Niger is referring here is not a formal one. Because of what might be described as Burkina Faso’s passion for protocol, it appears to have somewhat lost sight of the fact that, under international law, agreements may also be informal. There is no instrument, therefore; what is more, Niger has never claimed otherwise. But there is a definite agreement. The one reached between the authorities of the two colonies concerned is well established and has never been called into question by our opponent. Nor has that de facto agreement ever been disputed by the two States following their independence. If it has, where are the objections raised by the authorities of

⁸⁵CR 2012/21, p. 10, paras. 11 and 10, respectively.

⁸⁶*Ibid.*, para. 11.

Upper Volta, and later of Burkina Faso, regarding that de facto situation, of which they were well aware? At what moment and by what means did Burkina contest that frontier point on the grounds that it was contrary to what was laid down in the 1927 Erratum? Mr. President, Members of the Court, the situation with which you are confronted has a name in international law, and that name is well known. What is at issue here is Burkina's acquiescence in a de facto situation which it has never contested. And the positions adopted by its experts in the context of the Joint Commission's work in 1988 do not change anything. Is it necessary to recall, yet again, that the Commission was merely a forum for negotiation, and that the participants in those negotiations were not authorized to commit in any way the State which had appointed them as delegates? That there is an agreement between the Parties is therefore clear and, in accordance with the best established principles in territorial disputes, there is no doubt that it is this subsequent agreement which must prevail over the text of the 1927 Erratum. Hence, in this final sector, the course of the frontier consists of two straight-line segments.

[Slide of map with the line claimed by Niger in the Say sector]

20. The frontier line claimed by Niger in the Say sector is, therefore, that shown in red on the map which you can now see on the screen. This line deviates from that shown on the IGN map in the sector of Bossébangou and in that of the "four villages", for the various reasons which I have just set out. On the other hand, it is much closer to, if not the same as, the 1960 line in respect of the southern part of Say *cercle*.

Mr. President, Members of the Court, I should like to thank you for your attention. My presentation concludes the first round of oral argument of the Republic of Niger in the present case.

The PRESIDENT: Thank you, Professor Klein; however, today's sitting does not conclude with your presentation. Two Members of the Court have questions to put to the Parties. To that end, I shall now give the floor to Judge Bennouna. Judge Bennouna, you have the floor.

Judge BENNOUNA: Thank you, Mr. President. Mr. President, my question, which is addressed to both Parties, is as follows: "To what extent and for which section(s) do each of the Parties agree to refer to the 1960 IGN map to establish the course of the frontier between them?" Thank you, Mr. President.

The PRESIDENT: Thank you, Judge Bennouna. I shall now give the floor to Judge Donoghue. Vous avez la parole, Madame.

Juge DONOGHUE: Ma question qui s'adresse aux deux Parties est la suivante : «Les Parties sont-elles liées, au regard du droit international, par les résultats de la démarcation de la frontière auxquels il est fait référence au paragraphe 2 de l'article 2 du compromis ?» Merci.

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The PRESIDENT: Merci, Madame la juge. The texts of the questions will be sent to the Parties in writing as soon as possible. The Parties are invited to reply orally to the questions during the second round of oral argument. With respect to the question put by Judge Bennouna, the Parties may, if necessary, supplement in writing any oral answer which they have provided. Any such supplementary reply must be submitted no later than 24 October 2012 at 6 p.m. Written comments on the replies of the other Party may be presented no later than 31 October 2012 at 6 p.m.

The Court will meet again on Monday 15 October at 10 a.m. to hear Burkina Faso in the second round of oral argument. Burkina Faso will present its final submissions at the end of the sitting.

The Republic of Niger will take the floor on Wednesday 17 October at 3 p.m. for its second round of oral argument. At the end of that sitting, Niger will present its final submissions.

I would point out that, in accordance with Article 60, paragraph 1, of the Rules of Court, the oral statements are to be as succinct as possible. I would add that the purpose of the second round of oral argument is to enable each of the Parties to reply to the arguments put forward orally by the opposing Party or to the questions put by Members of the Court. The second round must therefore not be a repetition of the arguments already set forth by the Parties, which are not obliged to use all the time allotted to them. Thank you.

The sitting is closed.

The Court rose at 4.55 p.m.
