

**Letter to the Registrar dated 31 October 2012 from  
the Agent of Burkina Faso**

[Translation]

**Comments of Burkina Faso on the Republic of Niger's reply to the question put by  
Judge Bennouna**

1. In accordance with the opportunity which it has been given, Burkina Faso considers it helpful and appropriate to make the following brief comments on the replies given by Niger orally<sup>1</sup> and subsequently in writing<sup>2</sup> to the question put to the two Parties by Judge Bennouna on 12 October 2012.

2. Burkina does not consider it necessary to reply further on this occasion to the arguments contained in that reply which merely repeat elements already set forth by Niger in its Memorial, its Counter-Memorial and/or its oral arguments and which, as Burkina has already demonstrated, have no basis and lack any probative value. We shall confine ourselves here to a number of comments that relate directly to the question put by Judge Bennouna concerning the extent to which, and for which section(s), Niger agrees to refer to the 1960 IGN map to establish the course of the frontier.

3. It is important to note first of all in this regard that, despite its lengthy comments, Niger again replies only in part to the question asked. In both its oral and written replies, it confines itself to explaining in which instances its line *does not follow* the one on the 1960 map. At no point, however, does it make clear "to what extent", in its opinion, the line shown on the map should be followed.

4. In fact, in neither its written or its oral pleadings did it present a consistent argument in that regard. Thus:

- in the Téra sector, it claims that it follows in part the line shown on the 1960 map, since, in its view, the map reflects the 1960 *effectivités*, and then deviates from it when it considers that this is not the case;
- conversely, and in striking contrast, in the sector of the "salient of four villages", it rejects the line shown on the 1960 map precisely because, in its opinion, it is based on the *effectivités* which existed in 1960.

In Niger's view, the justification for the line on the 1960 map in the north is the reason for its rejection in the south. According to Niger's latest explanations, the reason for disregarding the line on the 1960 map in the Say sector is that it "appears to be based on the positions of those

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<sup>1</sup>See CR 2012/26, pp. 35-36, para. 5 (Salmon).

<sup>2</sup>See letter from Niger of 24 October 2012 providing additional information (hereinafter "written reply of Niger").

above-mentioned villages which still existed in 1958-1959, *as they were at that time*<sup>3</sup> . . . [the resultant line] makes it impossible to leave to Niger . . . a ‘salient which includes the [four] villages’ in question, as they were located in 1927<sup>4</sup>”.

5. Niger’s approach, which is inherently inconsistent, cannot be reconciled with the provisions of Article 2 of the 1987 Agreement. Thus Niger cannot show why that article entitles it to disregard — as Niger does repeatedly — both the text of the Erratum and the line shown on the 1960 map, in favour of other documents, such as, for example, the “maps from the colonial period”<sup>5</sup>. In respect of those points, Niger persists in *not applying* Article 2 of the 1987 Agreement, as Burkina emphasized in its oral reply to Judge Bennouna’s question<sup>6</sup>.

6. The “extent” to which Niger adopts or rejects the 1960 line is therefore clearly dictated by opportunism. It should moreover be emphasized that, after insisting in oral argument on the fact that the only critical date is 1960<sup>7</sup>, Niger claims in its reply to Judge Bennouna, that having before it a legal title adopted in 1927, the relevant “photograph of the territory” is not that of 1960, but that of 1927<sup>8</sup>.

7. During its oral argument, Niger maintained that the 1960 IGN France map constituted “the best photograph of the colonial legacy at a date close to independence”<sup>9</sup>. This firm affirmation is contradicted in many respects by Niger’s reply to Judge Bennouna’s question.

8. Niger recognizes first of all that the line on the map is incorrect at the level of the Tong-Tong marker, through which it does not pass, in contravention of the Erratum<sup>10</sup>.

9. Niger also recognizes that the line on the map is incorrect between the Tong-Tong and Tao markers. In this sector, both Parties have recourse to one (Burkina) or two (Niger) artificial straight line(s) which do not correspond to the sinuous line of the 1960 map. In its written reply,

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<sup>3</sup>*Ibid.*, p. 4. Niger’s argument that the village of Alfassi was not located in 1960 in the same place as in 1927 is incorrect. Alfassi was temporarily relocated to the right bank of the Sirba from 1928 to 1932 owing to sleeping sickness, which was rife in the area at that time. It is this temporary situation which is shown by Annex F to Niger’s written reply. The village was subsequently returned to its present location (the 1960 location) on the left bank of the Sirba. Consequently, the current location of the village of Alfassi corresponds to the 1927 location, to which the Erratum refers since it locates the village on the left bank of the River Sirba and not on its right bank. The excerpt from the report by Captain Fabry, M.D. of 9 April 1936 also confirms that the village of Alfassi was “on the Sirba” before its temporary relocation (see MN, Ann. C 62, last two pages). The same applies to the 1960 map. However, the map contained in Annex G to Niger’s written reply, on which the latter solely relies to locate the village of Alfassi — even though it is not a document accepted by joint agreement of the Parties — is clearly incorrect since it does not locate Alfassi on the River Sirba.

<sup>4</sup>See letter from Niger of 24 October 2012 providing additional information (hereinafter “written reply of Niger”)

<sup>5</sup>Written reply of Niger, p. 4.

<sup>6</sup>See CR 2012/25, p. 21, paras. 28-29.

<sup>7</sup>See CR 2012/22, pp. 35-39, paras. 7-16 (Kamto).

<sup>8</sup>Written reply of Niger, pp. 4-5.

<sup>9</sup>CR 2012/26, p. 35, para. 2 (Salmon).

<sup>10</sup>Written reply of Niger, pp. 1-2.

Niger itself describes the sinuous line of the 1960 map in this sector as “unusual”<sup>11</sup>. It also states — and this supports Burkina’s final submissions — that “[b]oth the 1927 texts and the Delbos/Prudon sketch-maps, and the official new frontier map, adopt, in the section between Tong-Tong and Tao, a line which is straight or very slightly curved”<sup>12</sup>. In so doing, Niger now accepts unreservedly that in this sector, first, the 1927 Erratum suffices, and then that the latter did indeed adopt a frontier taking the shape of an artificial line (which must be “straight”, since the Erratum describes no curve — *a fortiori*, no “slight” curve — between the Tong-Tong and Tao markers).

10. However, Niger claims that, in this sector, account should be taken of an “agreement” of 1935 which led to the establishment of a marker at Vibourié. Burkina has already explained in detail why this “agreement” [it is an intra-colonial agreement] does not have the significance that Niger attaches to it<sup>13</sup>. It should simply be added that, according to Niger, “the Vibourié marker . . . escaped the notice of the [1960] map’s drafters”<sup>14</sup>. In Niger’s opinion, the map’s drafters thus strictly observed the “colonial legacy” of 1960<sup>15</sup>, while at the same time nonetheless forgetting to include what Niger describes as a “colonial marker”<sup>16</sup> established by an “agreement” between colonial authorities which constituted, again according to Niger, “the only agreement between *cercles*, subsequent to 1927, which was expressly approved by a higher authority”<sup>17</sup>. Niger’s argument again completely contradicts the idea that the 1960 map is “the best photograph of the colonial legacy at a date close to independence”<sup>18</sup>. Moreover, it leads Niger to disregard the line both in the Erratum and on the 1960 map, again in violation of Article 2 of the 1987 Agreement<sup>19</sup>.

11. Niger’s approach is all the more inconsistent given that, after the Tao marker, it claims a line on grounds that are completely the opposite to those relied on up to that marker. As we have seen, Niger does not adopt the line shown on the map before the Tao marker on the ground that, in its view, the line on the map is “unusual”, which is perfectly correct since the sinuous line on the map is not referred to anywhere in the text of the Erratum, which defines the frontier sufficiently in this sector. On the contrary, Niger believes that it must retain the line on the map between the Tao marker and what Niger insists on calling the “tripoint”, even though, there too, the line on the map is “unusual”. Niger does not explain why the section that runs to the Tao marker and the section that runs from there should be treated differently.

12. Nor is that in line with the “methodology” that Niger claims to use. It considers that the line on the 1960 map should be followed, except in the event of “abnormal deviations in relation *to*

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<sup>11</sup>Written reply of Niger, p. 2.

<sup>12</sup>Written reply of Niger, p. 2; emphasis added.

<sup>13</sup>See CMBF, p. 35, para. 1.34, footnote 137 and Sec. 2. 1., pp. 82-85, paras. 3.44-3.52; and CR 2012/20, pp. 35-36, paras. 42-51 (M. Forteau).

<sup>14</sup>CR 2012/26, p. 36, para. 6 (Salmon).

<sup>15</sup>Niger says that it is convinced “of the care with which the drafters of the 1960 map had represented the probable boundaries of the *cantons* as they existed in practice at the critical date” (CR 2012/26, p. 35, para. 4 (Salmon)).

<sup>16</sup>CR 2012/23, p. 56, para. 5 (Salmon).

<sup>17</sup>CR 2012/24, p. 11, para. 10 (Salmon).

<sup>18</sup>CR 2012/26, p. 35, para. 2 (Salmon).

<sup>19</sup>See the written reply of Niger, p. 2 “ . . . ”.

*the texts*<sup>20</sup>; and that such “abnormal deviations in relation to the texts” make it necessary to have recourse to artificial straight lines between Tong-Tong and Tao. There is no explanation why Niger does not adopt the same approach for the section starting at Tao. *In both cases* (before/after Tao) the line on the map contains “abnormal deviations in relation to the texts”, since those deviations are not referred to in the relevant text — the Erratum — which can in no sense be said “not to suffice” in this sector.

13. Niger’s argument is all the more curious given that it is precisely in this sector (between Tao and Bossébangou) that, as Niger stated in its Counter-Memorial, “the indications of the boundaries [given on the 1960 map] . . . are sometimes tentatively represented by discontinuous lines of crosses, inasmuch as the information on which they were based *could not always be fully relied on* . . .”<sup>21</sup>. In that regard, Niger referred to “the necessary caution [to be exercised] where the *hesitation* of the map’s drafters is reflected in gaps in the line of crosses”<sup>22</sup>. These hesitations — Niger recognizes this in its Memorial — obliged it in this sector (between Tao and its “tripoint”) to “[connect] the gaps between sections” reproduced on the map<sup>23</sup>. The fact that the line on the 1960 map is the most hesitant and the least reliable in precisely the sector where Niger relies on *effectivités* (between Tao and the “tripoint”) clearly reveals the weakness of Niger’s argument based on such *effectivités*. By contrast, once again, we can only note that in this sector the Erratum describes the frontier in a clear and sufficient manner.

14. To the south of the Tao marker, Niger considers it necessary to deviate again and repeatedly from the line shown on the map on the grounds that, in its view, it is not “justified”. This applies:

- at the level of the village of Petelkolé<sup>24</sup> and at the level of Ousalta<sup>25</sup>;
- at the level of Bossébangou, to which Niger prefers a so-called “tripoint”<sup>26</sup>;
- between this “tripoint”, the intersection of the Sirba and the Say parallel<sup>27</sup>, and what Niger terms the Gouina “boundary post”<sup>28</sup>.

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<sup>20</sup>CR 2012/26, p. 35, para. 4 (Salmon); emphasis added. Niger subsequently abandons this method, stating that “Burkina, on the other hand, regards these texts as evidence of the application of the *Erratum*. However, that is not the point which is the purpose of our demonstration. This document is relevant in that it is evidence of the de facto boundary which was applied on the ground”, *ibid.*, p. 37, para. 7. Niger is thus arguing here for a de facto boundary without querying any longer its abnormal deviation in relation to the texts — namely in relation to the legal title. See also *ibid.*, p. 40, para. 10:

“Our opponents have sought to discredit Roser’s position, arguing that in so stating he was basically contradicting the *Erratum*. However, I believe that, once again, looking at the matter from the current perspective, that criticism does not hold up, for we are talking here about *effectivités*, and the information that Bangaré has always been located on Niger’s territory, provided by Roser, Commander of Dori *cercle*, undoubtedly carries particular weight.”

<sup>21</sup>CMN, p. 44, para. 1.1.32; emphasis added.

<sup>22</sup>*Ibid.*; emphasis added.

<sup>23</sup>MN, p. 100, para. 6.26, final bullet point.

<sup>24</sup>Written reply of Niger, p. 2.

<sup>25</sup>Written reply of Niger, p. 3.

<sup>26</sup>Written reply of Niger, p. 4.

<sup>27</sup>Written reply of Niger, Ann. H.

<sup>28</sup>Written reply of Niger, p. 3.

15. It follows that, on the section of the frontier that runs from the Tong-Tong astronomic marker to the beginning of the Botou bend, Niger's line follows the line on the 1960 map for only 33 per cent of the distance in question. This shows the weight attached in reality by Niger to the 1960 map, which it seeks at all costs to establish as constituting "the best photograph of the colonial legacy".

16. Lastly, it should be noted that, in clear contravention of the 1987 Agreement, the line claimed by Niger deviates from *both* the Erratum *and* the line on the map along extensive sections of the frontier. In particular:

- it does not connect the markers of Tong-Tong and Tao, either by a single straight line — in accordance with the Erratum — or by following the line on the 1960 map;
- from the Tao marker, it does not run to Bossébangou, which, however, is referred to in the Erratum as a frontier point, and shown as such on the 1960 line;
- Niger's line does not form a salient, the first side of which should run in a north-west direction, according to the text of the Erratum and the line on the 1960 map; it replaces it with a simple change of direction at the "tripoint", a change which heads in a south-west direction, and not a north-west direction;
- Niger's line does not run to the Sirba at the level of the Say parallel, in contravention of the Erratum and the 1960 line;
- it does not run to the beginning of the Botou bend in a straight line, as expressly provided in the Erratum; nor does it follow the — different — line plotted on the 1960 map;
- indeed, from the "tripoint" to the beginning of the Botou bend, Niger's line deviates completely from both the Erratum and the line on the map; it rejoins the line on the map only at the very end, at the "Gouina frontier point", which is not compatible with the clear text of the Erratum, which here, describing it sufficiently, specifies a single straight line as far as Tchenguiliba, and not two straight lines.

(Signed) Dr. Jérôme BOUGOUMA

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