

**Comments of Burkina Faso on the replies given by the Republic of Niger
to the questions put by Judge Cançado Trindade**

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 to the questions put to the two Parties by Judge Cançado Trindade on 17 October 2012.

2. Generally, Niger's replies demonstrate anew that country's total indifference to the applicable rules of law, be they those expressly accepted by the Parties for the purpose of settling this dispute or the general principles applicable to frontier disputes between States born out of decolonization.

Question 1: map indicating the areas through which nomadic populations used to move, during the period when they became independent and today

3. First, Burkina Faso notes that the Republic of Niger has been no more able than it has to produce one or more maps indicating the areas through which nomads used to move at the time of independence or today. It further observes that the documents on which Niger relies are patchy and incomplete, both in terms of their temporal and geographical scope, and that it is clear that they give only a partial picture of the movement of the nomadic populations. The sketch-maps which Niger felt able to produce are inevitably as precarious as the bases on which they were drawn and should therefore be interpreted with caution.

4. Second, and more importantly, it should be pointed out that both Parties agree that the rules in force and effectively applied between the two States allow for — and widely facilitate — cross-border transhumance. Niger describes this as a *modus vivendi* arrangement (p. 8 of its reply): whatever its precise significance, that expression does not give an accurate representation of the situation. As shown by Burkina Faso in its own reply¹, and confirmed by the additional information given by Niger, the freedom of nomadic movement and transhumance is established (and supported) by an effective legal framework, which guarantees its continuity. In this connection, Burkina Faso supports Niger's conclusion that:

“All of those instruments binding the two Parties thus ensure that nomadic populations who migrate across the frontier between Niger and Burkina Faso will be able to continue their current way of life.” (P. 11.)

5. The logical conclusion that emerges from the concordant evidence furnished by the two Parties is that considerations concerning nomadic movement and transhumance cannot play any role in determining the course of the frontier: whatever the location of the frontier, it is not and shall not be an obstacle to that movement.

Question 2: radius of the areas of movement of the nomadic populations along the border

6. Here, too, it should be noted that Niger's reply does not contradict the information which Burkina was able to gather.

¹See paras. 17-52 of Burkina Faso's reply to the questions put by Judge Cançado Trindade.

7. However, Burkina Faso must express its astonishment at the wording of the introduction to Niger's reply to question 2, in which it is stated that the "border" is "the current de facto boundary between the two States". There is no "de facto" boundary between the Parties — a notion which, moreover, Niger fails to define. On the other hand, there is a *de jure* frontier, that which was fixed by the 1927 *Arrêté* of the Governor-General of FWA and its Erratum, and which the Court is called upon to confirm.

Question 3: the villages

8. Burkina Faso is surprised by Niger's reply to the third question put by Judge Cançado Trindade, and surprised in many respects.

9. First, Niger's reply employs terminology which is confusing to say the least. Niger bases its claims over the villages on the "national status" of those villages, or on their status as "villages with Niger populations", all terms which appear to imply that the villages in question are composed and have always been composed — and composed exclusively, what is more — of persons of Niger nationality, of which Niger offers not one shred of evidence. Moreover, in so doing, it confuses the question of ethnicity or nationality with territorial status.

10. In other respects, Niger bases "its claim" over these villages on a second argument, of a different nature to the first and which relates to the existence of post-colonial *effectivités*. In fact, Niger argues that the villages to which it lays claim "have always been considered as being part of the Colony, subsequently the State, of Niger" and that it "continues to claim" them on the basis of "the current situation".

11. The foundation of Niger's claim is thus legally confused. Moreover, it is contrary to international law, because sovereignty over villages can only derive from delimitation, and not the other way round. This is especially true in the present case, since *effectivités* which post-date the title constituted by the Erratum cannot have even the slightest effect on the delimitation which was definitively established by that title in 1927 — on this the Parties agree.

12. Niger's village claims are also unsubstantiated by the facts. According to Niger, there are no fewer than 47 villages (28 in Téra sector, 19 in Say sector) which belong to Niger (although it does not justify that assertion) and which would be affected by the frontier as described in the Erratum, which Burkina Faso is requesting be applied. However:

- (i) a large number of those villages were simply never mentioned in Niger's written pleadings (their names do not appear in either the Memorial or the Counter-Memorial), which therefore raises the question: On the basis of what evidence is Niger founding its claim over those villages? This applies to localities 2, 6, 7, 8, 12, 16, 26 and 28 in list 1.1 (Téra sector) and localities 1, 2, 3, 5, 7, 9, 10, 11, 12, 14, 15, 16, 18 and 19 in list 1.2 (Say sector);
- (ii) certain other villages were mentioned in Niger's written pleadings, but no documents were cited in support of the idea that they were "Niger" villages: this is true of localities 3, 15, 25 and 27 in list 1.1 (Téra sector)²;

²See MN, pp. 94, 98 and 100 respectively.

- (iii) Niger also states in its written pleadings that some of the names it gives are encampments and not villages: this concerns encampments 5, 9, 11 and 13 in list 1.1 (Téra sector)³;
- (iv) some of the localities which Niger attributes to itself in its reply were, however, attributed to Burkina in its written pleadings: this is true of localities 9, 10, 21, 23 and 24⁴;
- (v) as for the few villages which Niger claimed belonged to it by annexing to its written pleadings documents which purportedly support that claim, Burkina has shown in its own written pleadings and during its oral argument that, in fact, those documents do not demonstrate anything; there is no reason to go back over this here;
- (vi) finally, it appears that, far from drawing up a list of villages that “have always been considered as being part” of Niger, as Niger alleges to have done in its reply, Niger was content to adjust the villages to which it lays claim according to the line which it is now asking the Court to adopt. This is demonstrated by the fact that the lists furnished by Niger in its reply correspond only very partially to those dating from 1994, which it annexed to its Counter-Memorial and whose purpose, nevertheless, was said to be the same. That document — the Report of mission conducted on 21 and 22 September 1994 by Commandant Seyni Garba, Permanent Secretary of the National Frontier Commission of Niger in the *arrondissements* of Téra and Say, Niamey, 23 October 1994⁵ — is instructive in three respects in particular:
 - (i) first, the author of the document recalls that the frontier demarcation operations which began in 1989 were suspended in 1990 “for a number of reasons, in particular due to Niger calling into question the line initially accepted by joint agreement of the Parties”⁶. It goes on to state that further negotiations ended in failure, since the political compromise of 1991 “did not meet with the approval of the majority of Niger’s experts”. The author of the document points out the need to ascertain the existence of any *effectivités* in the frontier region “with a view to the upcoming negotiations concerning the line”, stating that “Niger should *negotiate* with Burkina Faso with a view to adopting a line consistent with the one on the IGN France 1:200,000 map, 1960 edition”. The search for *effectivités* in respect of the villages was thus carried out in order to get Burkina to reconsider, by means of negotiation, the line adopted by joint agreement of the Parties in 1988 in application of the 1927 Erratum or, alternatively, the line adopted under the 1991 compromise;
 - (ii) second, virtually none of the villages listed by Niger in 1994 as liable to be affected by the delimitation and which also appear on the lists furnished by Niger in its reply to Judge Cançado Trindade’s question are included in the directory of localities of FWA which, however, was published in the same year as the Erratum. Furthermore, the few exceptions are interesting to point out. Thus, while a “Mamassirou” does appear in the “Niger” fascicule of the directory, it is not in Tillabéry *cercle*, Téra sector, but in Say *cercle*, Say Subdivision, Tamou *canton*⁷;
 - (iii) third and last, the 1994 lists and those furnished on 16 November 2012 by Niger in its reply to the third question of Judge Cançado Trindade do not correspond. Of the 24 villages claimed by Niger in Téra sector in 1994, ten no longer appear in the

³See MN, pp. 95-96.

⁴See, respectively, MN, p. 96; p. 55, para. 4.23; p. 98; pp. 98-99, para. 6.25; and p. 123.

⁵CMN, Ann. C 132.

⁶Note should be taken of the expression “accepted by joint agreement of the Parties” which is used in this document to refer to the 1988 consensual line.

⁷MBF, Ann. 28.

2012 list (villages 2, 5, 6, 8, 17, 18, 19, 22, 23 and 24); therefore, since 1994, Niger has purportedly discovered more than 15 new villages in Téra sector (which it claims have always belonged to Niger), in order to arrive at its list of 28 Niger villages in Téra sector; the same observation can be made in respect of the list of villages in Say sector, when the 1994 list is compared to that of 2012.

13. This approach does not call for lengthy comment. In it, Burkina sees renewed confirmation of the unfounded nature of Niger's argument based on the *effectivités*. In any event, Burkina Faso is convinced that these fanciful lists can have no influence over the determination of the frontier which the Court is requested by the Parties to determine on the basis of the 1927 Erratum and, should that not suffice, the 1960 map.
