

CASE CONCERNING THE FRONTIER DISPUTE (BURKINA FASO/REPUBLIC OF MALI)
Judgment of 22 December 1986

In its judgment, the Chamber constituted by the Court in the case of the Frontier Dispute between Burkina Faso and the Republic of Mali, unanimously adopted the line of the frontier in the area in dispute between the two States.

(For this frontier line, see Map No. 2.)

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The Chamber was composed as follows:

President, Judge Mohammed Bedjaoui; Judges Manfred Lachs and José Maria Ruda, Judges *ad hoc* François Luchaire and Georges Abi-Saab.

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OPERATIVE PART OF THE CHAMBER'S JUDGMENT

THE CHAMBER,

Unanimously,

Decides

A. That the frontier line between Burkina Faso and the Republic of Mali in the disputed area, as defined in the Special Agreement concluded on 16 September 1983 between those two States, is as follows:

1. From a point with the geographical co-ordinates 1° 59' 01" W and 14° 24' 40" N (point A), the line runs in a northerly direction following the broken line of small crosses appearing on the map of West Africa on the scale 1:200,000 published by the French *Institut géographique national* (IGN) (hereinafter referred to as "the IGN line") as far as the point with the geographical co-ordinates 1° 58' 49" W and 14° 28' 30" N (point B).

2. At point B, the line turns eastwards and intersects the track connecting Dionouga and Diguel at approximately 7.5 kilometres from Dionouga at a point with the geographical co-ordinates 1° 54' 24" W and 14° 29' 20" N (point C).

3. From point C, the line runs approximately 2 kilometres to the south of the villages of Kounia and Oukoulourou,

passing through the point with the geographical co-ordinates 1° 46' 38" W and 14° 28' 54" N (point D), and the point with the co-ordinates 1° 40' 40" W and 14° 30' 03" N (point E).

4. From point E, the line continues straight as far as a point with the geographical co-ordinates 1° 19' 05" W and 14° 43' 45" N (point F), situated approximately 2.6 kilometres to the south of the pool of Toussougou.

5. From point F, the line continues straight as far as the point with the geographical co-ordinates 1° 05' 34" W and 14° 47' 04" N (point G) situated on the west bank of the pool of Soum, which it crosses in a general west-east direction and divides equally between the two States; it then turns in a generally north/north-easterly direction to rejoin the IGN line at the point with the geographical co-ordinates 0° 43' 29" W and 15° 05' 00" N (point H).

6. From point H, the line follows the IGN line as far as the point with the geographical co-ordinates 0° 26' 35" W and 15° 05' 00" N (point I); from there it turns towards the south-east and continues straight as far as point J defined below.

7. Points J and K, the geographical co-ordinates of which will be determined by the Parties with the assistance of the experts nominated pursuant to Article IV of the Special Agreement, fulfil three conditions: they are situated on the same parallel of latitude; point J lies on the west bank of the pool of In Abao and point K on the east bank of the pool; the line drawn between them will result in dividing the area of the pool equally between the Parties.

8. At point K the line turns towards the north-east and continues straight as far as the point with the geographical co-ordinates 0° 14' 44" W and 15° 04' 42" N (point L), and, from that point, continues straight to a point with the geographical co-ordinates 0° 14' 39" E and 14° 54' 48" N (point M), situated approximately 3 kilometres to the north of the Kabia ford.

B. That the Chamber will at a later date, by Order, nominate three experts in accordance with Article IV, paragraph 3, of the Special Agreement of 16 September 1983.

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Judges *ad hoc* François Luchaire and Georges Abi-Saab appended separate Opinions to the Judgment.

In these Opinions the Judges concerned stated and explained the positions they adopted in regard to certain points dealt with in the Judgment.

I. *Procedure*
(paras. 1–15)

The Chamber recapitulates the successive phases of the procedure as from the notification to the Registrar of the Special Agreement concluded on 16 September 1983 between the Republic of Upper Volta (known as Burkina Faso since 4 August 1984) and the Republic of Mali, by which those two States agreed to submit to a chamber of the Court a dispute relating to the delimitation of a part of their common frontier.

II. *The task of the Chamber*
(paras. 16–18)

The Chamber's task is to indicate the line of the frontier between Burkina Faso and the Republic of Mali in the disputed area which is defined by Article I of the Special Agreement as consisting of "a band of territory extending from the sector Koro (Mali) Djibo (Upper Volta) up to and including the region of the Béli". Both States have indicated, in their submissions to the Chamber, the frontier line which each of them considers to be well-founded in law. These lines are shown on sketch-map No. 1 in the Judgment.

III. *Rules applicable to the case. Source of the rights claimed by the Parties*
(paras. 19–30)

1. *The principle of the intangibility of frontiers inherited from colonization*
(para. 19)

The Judgment considers the question of the rules applicable to the case, and seeks to ascertain the source of the rights claimed by the Parties. It begins by noting that the characteristic feature of the legal context of the frontier determination to be undertaken by the Chamber is that both States involved derive their existence from the process of decolonization which has been unfolding in Africa during the past 30 years: it can be said that Burkina Faso corresponds to the colony of Upper Volta and the Republic of Mali to the colony of Sudan (formerly French Sudan). In the preamble to their Special Agreement, the Parties stated that the settlement of the dispute should be "based in particular on respect for the principle of the intangibility of frontiers inherited from colonization", which recalls the principle expressly stated in resolution AGH/Res.16 (I) adopted in Cairo in July 1964 at the first summit conference following the creation of the Organization of African Unity, whereby all member States "solemnly . . . pledge themselves to respect the frontiers existing on their achievement of national independence".

2. *The principle of uti possidetis juris*
(paras. 20–26)

In these circumstances, the Chamber cannot disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers. It emphasizes the general scope of the principle in matters of decolonization and its exceptional importance for the African continent, including the two Parties to this case. Although this principle was invoked for the first time in Spanish America, it is not a rule pertaining solely to one spe-

cific system of international law. It is a principle of general scope, logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power. The fact that the new African States have respected the territorial *status quo* which existed when they obtained independence must therefore be seen not as a mere practice but as the application in Africa of a rule of general scope which is firmly established in matters of decolonization; and the Chamber does not find it necessary to demonstrate this for the purposes of the case.

The principle of *uti possidetis juris* accords pre-eminence to legal title over effective possession as a basis of sovereignty. Its primary aim is to secure respect for the territorial boundaries which existed at the time when independence was achieved. When those boundaries were no more than delimitations between different administrative divisions or colonies all subject to the same sovereign, the application of this principle resulted in their being transformed into international frontiers, and this is what occurred with the States Parties to the present case, which both took shape within the territories of French West Africa. Where such boundaries already had the status of international frontiers at the time of decolonization, the obligation to respect pre-existing international frontiers derives from a general rule of international law relating to State succession. The many solemn affirmations of the intangibility of frontiers, made by African statesmen or by organs of the OAU, should therefore be taken as references to a principle already in existence, not as affirmations seeking to consecrate a new principle or to extend to Africa a rule previously applicable only in another continent.

This principle of *uti possidetis* appears to conflict outright with the right of peoples to self-determination. In fact, however, the maintenance of the territorial *status quo* in Africa is often seen as the wisest course. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields has induced African States to consent to the maintenance of colonial boundaries or frontiers, and to take account of this when interpreting the principle of self-determination of peoples. If the principle of *uti possidetis* has kept its place among the most important legal principles, this is by a deliberate choice on the part of African States.

3. *The role of equity*
(paras. 27–28)

The Chamber then considers whether it is possible, in this case, to invoke equity, concerning which the two Parties have advanced conflicting views. Obviously the Chamber cannot decide *ex aequo et bono*, since the Parties have not requested it to do so. It will, however, have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force, and which is based on law. How the Chamber will, in practice, approach its consideration of this form of equity will become clear from its application of the principles and rules which it finds to be applicable.

4. *French colonial law ("droit d'outre-mer")*
(paras. 29–30)

The Parties agree that the delimitation of the frontier line also has to be appraised in the light of French "*droit d'outre-mer*". The line to be determined by the Chamber as being that which existed in 1959–1960 was originally no more than

an administrative boundary dividing two former French overseas territories ("*territoires d'outre-mer*") and, as such, was necessarily defined at that time not according to international law, but according to the French legislation applicable to such territories. Here the Chamber explains that international law—and therefore the principle of *uti possidetis*—applies to the new State as from its accession to independence, but has no retroactive effect. It freezes the territorial title. International law does not effect any *renvoi* to the law of the colonizing State. If the latter law has any part to play, it is as one factual element among others, or as evidence indicative of the "colonial heritage" at the critical date.

IV. *The development of administrative organization* (paras. 31–33)

The Judgment briefly reviews how territorial administration was organized in French West Africa—to which both Parties previously belonged—with its hierarchy of administrative units (colonies, *cercles*, subdivisions, *cantons*, villages), before recapitulating the history of both the colonies concerned since 1919, in order to determine what, for each of the two Parties, was the colonial heritage to which the *uti possidetis* was to apply. Mali gained its independence in 1960 under the name of the Federation of Mali, succeeding the Sudanese Republic which had emerged, in 1959, from an overseas territory called the French Sudan. The history of Upper Volta is more complicated. It came into being in 1919 but was then abolished in 1932, and again reconstituted by a law of 4 September 1947, which stated that the boundaries of "the re-established territory of Upper Volta" were to be "those of the former colony of Upper Volta on 5 September 1932". It was this reconstituted Upper Volta which subsequently obtained independence in 1960 and took the name of Burkina Faso in 1984. In the present case, therefore, the problem is to ascertain what frontier was inherited from the French administration; more precisely, to ascertain what, in the disputed area, was the frontier which existed in 1959–1960 between the *territoires d'outre-mer* of Sudan and Upper Volta. The Parties both agree that when they became independent there was a definite frontier, and they accept that no modification took place in the disputed area between January 1959 and August 1960, or has taken place since.

V. *The dispute between the Parties and the preliminary question of possible acquiescence by Mali* (paras. 34–43)

Burkina Faso argues that Mali accepted as binding the solution to the dispute outlined by the OAU Mediation Commission, which sat in 1975. If this argument from acquiescence were well-founded, it would make it unnecessary to endeavour to establish the frontier inherited from the colonial period.

The Chamber therefore considers whether Mali did acquiesce, as Burkina Faso claims, in the solution outlined by the Commission, although the latter never in fact completed its work. It begins by considering the element of acquiescence which, according to Burkina Faso, is found in the declaration made by the Head of State of Mali on 11 April 1975, whereby Mali allegedly declared itself bound in advance by the report to be drawn up by the Mediation Commission on the basis of the specific proposals emanating from its Legal Sub-Commission. That report was never issued, but it is known what the proposals of the Sub-Commission were. Upon consideration, and taking account of the jurisprudence of the Court, the Chamber finds that there are no grounds to interpret the declaration in question as a unilateral act with legal

implications in regard to the dispute. The Judgment then goes on to consider the principles of delimitation approved by the Legal Sub-Commission which, according to Burkina Faso, Mali agreed should be taken into consideration in delimiting the frontier in the disputed area. Having weighed the arguments of the Parties, the Chamber concludes that, since it has to determine the frontier line on the basis of international law, it is of little significance whether Mali's approach may be construed to reflect a specific position towards, or indeed to signify acquiescence in, the principles held by the Legal Sub-Commission to be applicable to the resolution of the dispute. If those principles are applicable as elements of law, they remain so whatever Mali's attitude. The situation would only be otherwise if the two Parties had asked the Chamber to take account of them or had given them a special place in the Special Agreement as "rules expressly recognized by the contesting States" (Art. 38, para. 1 (a) of the Statute), neither of which was the case.

VI. *Preliminary question: the fixing of the tripoint* (paras. 44–50)

The Chamber disposes of a further preliminary question, concerning its powers in the matter of fixing the tripoint which forms the easternmost point of the frontier between the Parties. Their views on this question conflict. Mali claims that the determination of the tripoint Niger-Mali-Burkina Faso cannot be effected by the two Parties without Niger's agreement, and cannot be determined by the Chamber either; and Burkina Faso considers that the Chamber must, pursuant to the Special Agreement, reach a decision on the position of the tripoint. As for its jurisdiction in this matter, the Chamber finds it to be clear from the wording of the Special Agreement that the common intention of the Parties was that it should indicate the frontier line throughout the whole of the disputed area. In addition, it considers that its jurisdiction is not restricted simply because the end-point of the frontier lies on the frontier of a third State not a party to the proceedings. The rights of the neighbouring State, Niger, are in any event safeguarded by the operation of Article 59 of the Statute of the Court. Regarding the question whether considerations relating to the need to safeguard the interests of the third State concerned would require the Chamber to refrain from exercising its jurisdiction to determine the whole course of the line, this presupposes, according to the Chamber, that the legal interests of that State would not only be affected by its decision, but would form the very subject-matter of that decision. This is not so in this case, and the Chamber is accordingly required to determine how far the frontier inherited from the colonizing State extends. This is, for the Chamber, not a matter so much of defining a tripoint as of indicating where the easternmost point of the frontier lies, the point where the frontier ceases to divide the territories of Burkina Faso and the Republic of Mali.

VII. *Evidence relied on by the Parties* (paras. 51–65)

The Parties have relied upon different types of evidence to give support to their arguments.

1. They have referred to *legislative and regulative texts or administrative documents*, of which the basic document is the French law of 4 September 1947 "for the re-establishment of the territory of Upper Volta", providing that the boundaries of the re-established territory were to be "those of the former colony of Upper Volta on 5 September 1932". At the time of independence in 1960, those boundaries were the same as those which had existed on 5 Septem-

ber 1932. However, the texts and documents produced in evidence contain no complete description of the course of the boundary between French Sudan and Upper Volta during the two periods when these colonies co-existed (1919–1932 and 1947–1960). They are limited in scope, and their legal force or the correct interpretation of them are matters of dispute between the Parties.

2. The two States have also produced an abundant and varied *collection of cartographic materials*, and have discussed in considerable detail the question of the probative force of the maps and the respective legal force of the various kinds of evidence. The Chamber notes that, in frontier delimitations, maps merely constitute information, and never constitute territorial titles *in themselves alone*. They are merely extrinsic evidence which may be used, along with other evidence, to establish the real facts. Their value depends on their technical reliability and their neutrality in relation to the dispute and the Parties to that dispute; they cannot effect any reversal of the onus of proof.

When considering the maps produced in this case, the Chamber notes that not one of the maps available to it can provide a direct official illustration of the words contained in four essential texts (cf. Section VIII below) even though it was clear from their wording that two of those texts were intended to be accompanied by maps. Although the Chamber has been presented with a considerable body of maps, sketches and drawings for a region that is nevertheless described as partly unknown, no indisputable frontier line can be discerned from these documents. Particular vigilance is therefore required in examining the file of maps.

Two of the maps produced appear to be of special significance. These are the 1:500,000 scale map of the colonies of French West Africa, 1925 edition, known as the Blondel la Rougery map, and the 1:200,000 scale map of West Africa, issued by the French *Institut géographique national* (IGN) and originally published between 1958 and 1960. With regard to the first of these maps, the Chamber considers that the administrative boundaries shown on it do not in themselves possess any particular authority. With regard to the second map, the Chamber finds that, since it was drawn up by a body which was neutral towards the Parties, although it does not possess the status of a legal title, it is a visual portrayal both of the available texts and of information obtained on the ground. Where other evidence is lacking or is not sufficient to show an exact line, the probative force of the IGN map must be viewed as compelling.

3. Among the evidence to be taken into consideration, the Parties invoke the “colonial *effectivités*”, in other words, the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period. The role played by such *effectivités* is complex, and the Chamber has to make a careful evaluation of their legal force in each particular instance.

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The Chamber emphasizes that the present case is a decidedly unusual one as concerns the facts to be proven or the evidence to be produced. Although the Parties have provided as complete a case file as possible, the Chamber cannot be certain of deciding the case on the basis of full knowledge of the facts. The case file shows inconsistencies and shortcomings. The systematic application of the rule concerning the burden of proof cannot always provide a solution, and the rejection

of any particular argument for lack of proof is not sufficient to warrant upholding the contrary argument.

VIII. *Legislative and regulative titles and administrative documents invoked by the Parties: their applicability to the determination of the frontier line* (paras. 66–105)
and the question of their implementation (paras. 106–111)

The Chamber deals first with the legislative and regulative titles and the administrative documents invoked by the Parties, and considers what weight to attach to each of them, for the purpose of indicating the course of the line in the sector to which they relate. The Judgment presents these texts in chronological order:

—*Order of 31 December 1922* for the reorganization of the Timbuktu region. The Parties agree in recognizing the validity and pertinence of this text.

—*Order dated 31 August 1927*, issued by the Governor-General *ad interim* of French West Africa, relating to the boundaries of the colonies of Niger and Upper Volta; this Order was amended by an *erratum dated 5 October 1927*. The Parties both treat this text as relevant in so far as it refers to the tripoint discussed above (cf. Section VI). They disagree, however, regarding its validity; Mali claims that the Order and the erratum are invalidated by a factual error relating to the location of the heights of N’Gouma, so that Burkina Faso may not properly rely upon them. The Chamber emphasizes that, in the present proceedings, the Order and erratum have only evidentiary value in respect of the location of the end-point of the boundary between French Sudan and Upper Volta. The Chamber considers it unnecessary to endeavour to determine the legal validity of the text, its value as evidence—which is accepted by Mali—being a separate question.

—*Decree of 5 September 1932*, abolishing the colony of Upper Volta and annexing its component *cercles* either to French Sudan or to Niger (cf. sketch map No. 2 in the Judgment).

—*Exchange of letters which took place in 1935*: this correspondence consists of *letter 191 CM2 of 19 February 1935* addressed to the Lieutenant-Governors of Niger and French Sudan by the Governor-General of French West Africa, and the reply from the Lieutenant-Governor of the French Sudan dated *3 June 1935*. The Governor-General suggested a description of the boundary between Niger and the French Sudan, to which the Lieutenant-Governor of the Sudan replied by proposing only one amendment. This description appears to correspond to the line shown on the Blondel la Rougery map (see sketch map No. 3 in the Judgment). The draft description was not followed up, but its interpretation is a matter of dispute between the Parties, the issue being whether the proposed description did no more than describe an existing boundary (the “declaratory” theory of Burkina Faso) or whether the letter reflected an intention to define the legal boundary *de novo* (the “modifying” theory argued by Mali). The Chamber concludes that the definition of the boundary given in letter 191 CM2 corresponded, in the minds both of the Governor-General and of all the administrators who were consulted, to the *de facto* situation.

—*Order No. 2728 AP issued on 27 November 1935* by the Governor-General *ad interim* of French West Africa for the delimitation of the *cercles* of Bafoulabé, Bamako and Mopti (French Sudan). The last-named *cercle* bordered on the *cercle* of Ouahigouya, which was then a part of French Sudan

and which reverted to Upper Volta as from 1947. This boundary was again to form the boundary between the territories of Upper Volta and Sudan until independence—hence its significance. The text describes the eastern boundary of the Sudanese *cercle* of Mopti as being “a line running markedly north-east, leaving to the *cercle* of Mopti the villages of Yoro, Dioulouna, Oukoulou, Agoulourou, Koubo . . .”. The Parties do not agree on the legal significance to be ascribed to this provision. They disagree as to whether the line indicated in the text, which “leaves” the villages in question to the *cercle* of Mopti, had the effect of attributing to that *cercle* villages which had previously been part of another *cercle* (Burkina Faso’s contention) or whether this definition of the line rather implied that these villages already belonged to the *cercle* of Mopti (Mali’s contention).

The Chamber considers whether the actual text of Order 2728 AP, and the administrative context in which it was issued, provide any indication of the scope which the Governor-General *ad interim* intended it to have. It concludes that there is at least a presumption that Order 2728 AP had neither the aim nor the result of modifying the boundaries which existed in 1935 between the Sudanese *cercles* of Mopti and Ouahigouya (no modification having been made between 1932 and 1935). The Chamber then enquires whether the content of Order 2728 AP operates to reverse or to confirm this presumption. It concludes from a detailed study of the documentary and cartographic evidence from which these villages can be located that this material does not overturn the presumption that Order 2728 AP was declaratory in nature.

In the course of its demonstration, the Chamber explains that the part of the frontier whose determination calls for the scope of Order 2728 AP to be ascertained has been called in the Judgment “the sector of the four villages”. The words “four villages” refer to the villages of Dioulouna (which can be identified as the village which now goes under the name of Dionouga), Oukoulou, Agoulourou and Koubo (the village of Yoro, also mentioned in the Judgment, was definitely part of the *cercle* of Mopti, and is not in issue).

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The Chamber considers what relationship can be established among the pieces of information provided by the various texts of which it has to make use, and reaches a number of conclusions. It notes that on certain points the sources agree and bear one another out, but that in some respects, in view of the shortcomings of the maps at the time, they tend to conflict (see sketch map No. 4 in the Judgment).

IX. Determination of the frontier in the disputed area
(paras. 112–174)

1. The end-point in the west
(paras. 112–113)

The Chamber begins by fixing the end-point of the frontier already established between the Parties by agreement, in other words the western extremity of the disputed area. They have not clearly indicated this point, but the Chamber considers that it can justifiably conclude that both Parties accept the frontier line shown on the 1:200,000 scale map of West Africa published by the IGN to the south of the point with the geographical co-ordinates 1° 59' 01" W and 14° 24' 40" N (point A on the map annexed to the Judgment). It is from that

point that the Parties are requesting it to indicate the line of their common frontier in an easterly direction.

2. Villages and farming hamlets
(paras. 114–117)

The Chamber considers it necessary to examine the meaning to be ascribed to the word “village”, since the regulative texts which fix the district boundaries generally refer merely to the villages comprising them, without further geographical clarification. It frequently happens that the inhabitants of a village cultivate land some distance away, taking up residence in “farming hamlets” forming dependencies of the village. The Chamber has to decide whether, for the purpose of the delimitation which it is asked to effect, the farming hamlets form part of the villages on which they depend. It is not persuaded that, when a village was a feature used to define the composition of a wider administrative entity, these farming hamlets were always taken into consideration in drawing the boundary of such an entity. It is only when it has examined all the available information relating to the extent of a particular village that it will be able to ascertain whether a particular piece of land is to be treated as part of that village despite its lack of a connection with it, or as a satellite hamlet which does not fall within the boundaries of the village.

3. The sector of the four villages
(paras. 118–126)

Since Order 2728 AP defines the boundary between the *cercles* of Mopti and Ouahigouya in terms of the villages “left” to the *cercle* of Mopti, the Chamber identifies the villages in question and ascertains their territorial extent. It finds that Burkina Faso does not contest the Malian character of the village of Yoro, and that there is no disagreement regarding the first part of the frontier, which runs in a northerly direction from point A as far as the point with the co-ordinates 1° 58' 49" W and 14° 28' 30" N (point B).

As for Dionouga, the Parties agree in identifying it with the village of Dioulouna mentioned in the Order. The Chamber considers that it can conclude from the information available to it, especially in relation to the track-laying operations undertaken on the orders of the administrators concerned, these being a significant element of the “*effectivités*”, that the administrative boundary at the relevant time during the colonial period intersected the track connecting this village to the nearby village of Diguel at a distance of approximately 7.5 kilometres to the south of Dionouga. The frontier line therefore does likewise, at the point with the co-ordinates 1° 54' 24" W and 14° 29' 20" N (point C).

As for the villages of Oukoulou and Agoulourou, mentioned in Order 2728 AP, the Chamber emphasizes that it is quite irrelevant whether these villages are now in existence or not. The fact that they may have disappeared has no impact on the boundary which was defined at the time. It may however be noted that the positions of the villages of Kounia and Oukoulourou correspond to those of the two villages referred to in the Order.

As regards Koubo, about which there is some confusion of nomenclature, the information available to the Chamber is not sufficient to establish with certainty whether it is the village of Kobou or the hamlet of Kobo which corresponds to the village of Koubo mentioned in the Order. But since the hamlet lies only 4 kilometres from the village, the Chamber considers it reasonable to treat them as a whole, drawing the frontier in such a way as to leave both of them to Mali.

The Chamber therefore considers that a line drawn at a dis-

tance of approximately 2 kilometres to the south of the present-day villages of Kounia and Okoulourou corresponds to the boundary described in Order 2728 AP. This line runs through the point with the co-ordinates 1° 46' 38" W and 14° 28' 54" N (point D) and through the point with the co-ordinates 1° 40' 40" W and 14° 30' 03" N (point E).

4. *The pool of Toussougou, the pool of Kétiouaire and the pool of Soum*
(paras. 127–150)

The line described in Order 2728 AP of 1935 extends in a "markedly north-east" direction, "passing to the south of the pool of Toussougou and culminating in a point located to the east of the pool of Kétiouaire". There is a problem as to the whereabouts of these pools, since none of the maps contemporary with the Order which the Parties have presented to the Chamber show any pools bearing these names. However, both Parties admit that there is at least one pool in the region of the village of Toussougou, while offering as evidence only maps which contradict one another. The question therefore arises whether the pool of Fétou Maraboulé, which lies to the south-west of the village and has only recently been shown on the maps, is an integral part of this pool. The Chamber's opinion is that the two pools remain separate, even during the rainy season, and that the pool of Fétou Maraboulé is not to be identified with the pool of Toussougou referred to in the Order, which is smaller and lies close to the village with the same name. Moreover, an identification of the two pools would have an impact on the course of the line. The Chamber, which has to interpret the reference to the pool of Toussougou in Order 2728 AP, considers that the interpretation to be made must be such as to minimize the margin of error involved in defining the tripoint at which, according to letter 191 CM2, the *cercles* of Mopti, Ouahigouya and Dori meet. Before defining the course of the line in relation to the pool of Toussougou, the Chamber attempts to locate the pool of Kétiouaire, near which the boundary described in Order 2728 AP also ran.

In Order 2728 AP, the pool of Kétiouaire constitutes an important element of the boundary therein defined. It therefore has to be ascertained whether, in 1935, there was a pool lying in a "markedly north-east" direction in relation to a point situated "to the south of the pool of Toussougou", close to the tripoint of the *cercles* of Mopti, Gourma-Rharous and Dori, and to the west of it. After due appraisal of all the information available to it, the Chamber is unable to locate the pool of Kétiouaire. Nor does it consider any identification possible between the pool of Kétiouaire and the pool of Soum, which is situated some kilometres to the east/north-east of the pool of Toussougou and close to the meeting-point, not of the three *cercles* mentioned above, but of the *cercles* of Mopti, Ouahigouya and Dori.

The Chamber remains persuaded by the case file that the pool of Soum is a frontier pool, but finds no indications dating from the colonial period from which the line could be said to run either to the north or to the south of the pool, or to divide it. This being so, the Chamber notes that although it has received no mandate from the Parties to make its own free choice of an appropriate frontier, it has nevertheless the task of drawing a precise line, and for that purpose can appeal to the equity *infra legem* which the Parties have themselves acknowledged to be applicable in the present case. In order to achieve an equitable solution along these lines, on the basis of the applicable law, the Chamber finds that account must be taken, in particular, of the circumstances in which the *com-mandants* of two adjacent *cercles*, one in Mali and the other

in Upper Volta, recognized in a 1965 agreement, not endorsed by the competent authorities, that the pool should be shared. It concludes that the pool of Soum must be divided in two in an equitable manner. The line should therefore cross the pool in such a way as to divide its maximum area during the rainy season equally between the two States.

The Chamber notes that this line does not pass through the co-ordinates mentioned in letter 191 CM2, and concludes from an investigation of the topographical data that the tri-point must have lain to the south-east of the point indicated by these co-ordinates. Since this letter did not become a regulative text, it ranks only as evidence of the boundary which had "*de facto* value" at the time. It now transpires that the maps then available were not sufficiently accurate to warrant such a precise definition. Thus the fact that these co-ordinates are found to have been defined with less accuracy than had been thought does not contradict the Governor-General's intention or deprive the letter of probative force.

The boundary in this region takes the following course: from point E, the line continues straight as far as a point with the co-ordinates 1° 19' 05" W and 14° 43' 45" N, situated approximately 2.6 kilometres south of the pool of Toussougou (point F), and then reaches the pool of Soum at the point with the co-ordinates 1° 05' 34" W and 14° 47' 04" N (point G); it crosses the pool from west to east, dividing it equally.

5. *The sector from the pool of Soum to mount Tabakarech*
(paras. 151–156)

In order to determine the line of the frontier east of the pool of Soum, the Chamber has to refer to the wording of letter 191 CM2 of 1935, which it has found to possess probative value. According to Burkina Faso, the line follows the indications in this letter and on the Blondel la Rougery map of 1925, from the point with the co-ordinates 0° 50' 47" W and 15° 00' 03" N, as far as the pool of In Abao. There seems to be no doubt that the purpose of letter 191 CM2 was to define in textual form a boundary shown on that map, and here the Parties are in agreement. Mali has emphasized the inaccuracy and shortcomings of this map as regards the toponomy and orography. The Chamber considers that in the sector from the pool of Soum to Tabakarech no problem arises in the selection of a map. In the absence of other indications to the contrary, the letter must be interpreted as contemplating a straight line connecting mount Tabakarech to the tripoint where the boundaries of the *cercles* of Mopti, Ouahigouya and Dori converge.

The Chamber concludes that from point G the frontier runs in a north-northeasterly direction as far as the point mentioned by Burkina Faso, and from that point to Mount Tabakarech. This hill is to be identified with the elevation which appears on the IGN 1:200,000 map under the name of Tin Tabakat, with the geographical co-ordinates 0° 43' 29" W and 15° 05' 00" N (point H).

6. *The pool of In Abao*
(paras. 157–163)

In determining the next section of the line, the Chamber must refer to the Order made by the Governor-General of French West Africa on 31 December 1922. In that Order, from the pool of In Abao the western boundary of the *cercle* of Gao follows "the northern boundary of Upper Volta". The boundary to be established by the Chamber must include that pool; the pool must therefore be identified in order to determine the frontier line in relation to it. The information on the various maps concerning the location and size of the

pool is contradictory (see sketch map No. 5 in the Judgment). From the information available the Chamber considers it likely that the pool is the one located at the junction of two marigots, one being the Béli, running from west to east, and the other running from north to south. In the absence of more precise and reliable information than has been submitted to it concerning the relationship between the frontier line and the pool of In Abao, the Chamber must conclude that the boundary crosses the pool in such a way as to divide it equally between the two Parties.

The frontier must follow the IGN line from point H as far as the point with the co-ordinates $0^{\circ} 26' 35''$ W and $15^{\circ} 05' 00''$ N (point I) where it turns south-east to join the Béli. It continues straight as far as point J, which lies on the west bank of the pool of In Abao, and point K, which lies on the east bank of the same pool. From point K, the line once more runs in a north-easterly direction, and rejoins the IGN line at the point where that line, after leaving the Béli to head north-eastward, again turns south-east to form an orographic boundary (point L— $0^{\circ} 14' 44''$ W and $15^{\circ} 04' 42''$ N). Points J and K will be determined with the assistance of experts appointed pursuant to Article IV of the Special Agreement.

7. *The region of the Béli*
(para. 164)

For the whole of this region Mali, rejecting letter 191 CM2 of 1935, argues in favour of a frontier running along the marigot. The two Parties have debated at length the choice which was open to the administering power, as between a hydrographic frontier along the Béli and an orographic frontier along the crestline of the elevations rising to the north of the marigot. In the Chamber's opinion, letter 191 CM2 proves that the orographic boundary was adopted. As for the boundary line described in that letter, the Chamber notes that the IGN map enjoys the approval of both Parties, at least in regard to its representation of the topography. It sees no reason to depart from the broken line of small crosses which is shown on that map and appears to be a faithful representation of the boundary described in letter 191 CM2, except with regard to the easternmost part of the line, where the problem arises of Mount N'Gouma.

8. *The heights of N'Gouma*
(paras. 165–174)

With regard to the final segment of the frontier line, the essential question for the Chamber is the location of the "heights of N'Gouma" mentioned in the erratum to the 1927 Order relating to the boundaries between Upper Volta and Niger (see sketch map No. 6 in the Judgment). That erratum defined the boundary as "a line starting at the heights of N'Gouma, passing through the Kabia ford . . .". Mali has argued that this text was invalidated by a factual error, in that it referred to Mount N'Gouma as being to the north of the ford, whereas it was actually located south-west of it, as shown on the 1960 IGN map, which, according to Mali, is the only accurate picture of the situation. The Chamber has already stated that the text of the Order and of the erratum should not be set aside *in limine*; their probative value has to be appraised in order to determine the end-point of the frontier. It emphasizes that the maps of the period, such as the Blondel la Rougery map of 1925, locate Mount N'Gouma to the north of the Kabia ford, and that this location is also borne out by a 1:1,000,000 map, evidence which the Chamber considers cannot be overlooked, although the official

body which approved it is unknown. Although the 1:200,000 IGN map of 1960 attaches the name N'Gouma to an elevation situated south-east of the ford, it also contains altimetric information from which it may be inferred that elevations ranged in a quarter-circle between a position north of the ford and another east-southeast of it together constitute an ensemble to which the name "N'Gouma" could be given. The existence of elevations to the north of the ford has, moreover, been confirmed by observations made on the ground in 1975.

Since the Chamber is not aware of any oral tradition going back at least to 1927 which might serve to contradict the indications given by the maps and documents of the period, it concludes that the Governor-General, in the 1927 Order and the erratum and in his letter 191 CM2 of 1935, described an existing boundary which passed through elevations rising to the north of the Kabia ford, and that the administrators considered, rightly or wrongly, that those elevations were known to the local people as the "heights of N'Gouma". The Chamber has therefore only to ascertain the location, within the area of high ground surrounding the ford, of the end-point of the boundary defined by the above-mentioned texts. It concludes that this point should be fixed three kilometres to the north of the ford, at the spot defined by the co-ordinates $0^{\circ} 14' 39''$ E and $14^{\circ} 54' 48''$ N (point M).

X. *The line of the frontier*
(para. 175)

The Chamber fixes the line of the frontier between the Parties in the disputed area. This line is reproduced, for illustrative purposes, on a map which is a compilation of five sheets of the 1:200,000 IGN map and is annexed to the Judgment.

XI. *Demarcation*
(para. 176)

The Chamber is ready to accept the task which the Parties have entrusted to it, and to nominate three experts to assist them in the demarcation operation, which is to take place within one year of the delivery of the Judgment. In its opinion, however, it is inappropriate to make in its Judgment the nomination requested by the Parties, which will be made later by means of an Order.

XII. *Provisional measures*
(paras. 177–178)

The Judgment states that the Order of 10 January 1986 ceases to be operative upon the delivery of the Judgment. The Chamber notes with satisfaction that the Heads of State of Burkina Faso and the Republic of Mali have agreed "to withdraw all their armed forces from either side of the disputed area and to effect their return to their respective territories".

XIII. *Binding force of the Judgment*
(para. 178)

The Chamber also notes that the Parties, already bound by Article 94, paragraph 1, of the Charter of the United Nations, expressly declared in Article IV, paragraph 1, of the Special Agreement that they "accept the Judgment of the Chamber . . . as final and binding upon them". The Chamber is happy to record the attachment of both Parties to the international judicial process and to the peaceful settlement of disputes.

XIV. *Operative clause*
(para. 179)

SUMMARY OF THE OPINIONS APPENDED TO
THE JUDGMENT OF THE CHAMBER

Separate Opinion of Judge ad hoc
François Luchaire

Judge Luchaire voted for the operative provisions of the Judgment because they were founded upon reasoning of which the logic is unquestionable, but he does not fully endorse some of its aspects or conclusions. He has therefore found it necessary to comment on the following points:

I. The principle of the right of peoples to self-determination; free choice of status and consequences for the French *territoires d'outre-mer* of the referendum held on 28 September 1958.

II. Acquiescence—*estoppel*—interpretation of the Conakry communiqué.

III. Reference to the 1932 boundaries drawn by the French administration on the maps of the period. Later documents irrelevant.

IV. Acquiescence arising from the participation of Dioulouna in the democratic process in Sudan.

V. Possibility of a line passing through Kobo—Fayando—Toussougou. Difficulties in relation to Dourumgara and In Abao—Tin Kacham.

Separate Opinion of Judge ad hoc Georges Abi-Saab

Although he voted for the operative provisions of the Judgment, Judge Abi-Saab cannot endorse certain aspects of either the Chamber's reasoning or its conclusions.

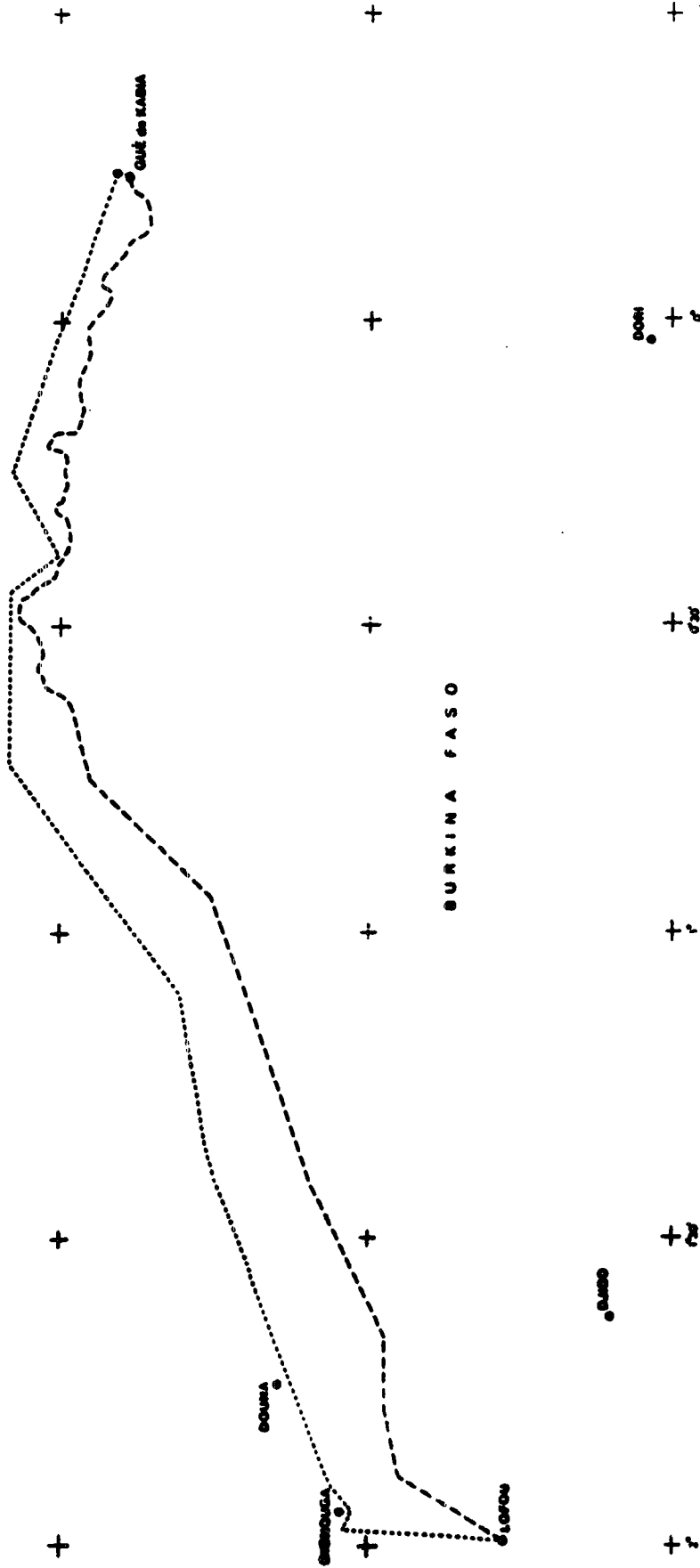
In particular, he dissociates himself from the Judgment's treatment of French colonial law, which, in his opinion, has been analysed in excessive detail. He also dissociates himself from the role attributed to letter 191 CM2 of 1935, the declaratory nature of which in respect of pre-existing territorial boundaries he regards as a mere possibility, not hardened to certainty by any evidence.

Judge Abi-Saab considers that the decision to base the line in the Béli region on that letter, which is simply a verbal reflection of the Blondel la Rougery map, amounts to giving this map the status of a legal title, although according to the Judgment itself maps in themselves are never sufficient to constitute such a title.

Having emphasized the difficulties which sometimes arise in applying the principle of *uti possidetis*, the author notes that the Chamber has adopted a possible legal solution within the bounds of the degrees of freedom which exist in the case. He considers this legally acceptable, but would have preferred another approach, relying to a greater extent upon considerations of equity *infra legem* in the interpretation and application of the law, the area concerned being a nomadic one afflicted by drought, so that access to water is vital.

Map No. 1

MALI



Map No. 2

Sketch-map illustrating the line adopted by the Chamber (para. 175 of the Judgment)

