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10 The PRESIDENT: Please be seated. The sitting is open and we are going to hear the continuation of the first round of oral argument of the Republic of Niger. I give the floor, as I promised yesterday, to Professor Salmon. You have the floor, Sir.

Mr. SALMON: Thank you, Mr. President

THE STRAIGHT-LINE POSTULATE

1. Mr. President, Members of the Court, I had the opportunity to show you yesterday that our opponent's first postulate, that the frontier between Niger and Burkina Faso had essentially been determined by lines of an artificial and arbitrary nature was totally unsupported by the evidence. Today I shall address the second postulate of Burkina Faso's argument, namely that the frontier is composed of a series of straight lines in the Téra sector. This point is equally lacking in substance. While, for the Say sector, Niger does not dispute that its traditional configuration is essentially formed of straight lines, it does, on the contrary, dispute it in the case of the Téra sector. Let us examine each of these sectors in turn.

A. Niger does not dispute that the boundaries of Say *cercle* include a number of straight lines

2. Let us begin with Say *cercle*: it is undeniable that its boundaries are formed of several straight lines. All of the sketch-maps of this *cercle* that we have since 1909 confirm this.

The maps and sketch-maps prior to 1927

3. Let us consider first the period prior to the 1927 texts [Slide: *Atlas des cercles*, Say *cercle*, January 1926¹]. The map which you can see on the screen is of Say *cercle*, January 1926, taken from the *Atlas des cercles*. It is not without relevance that, throughout the colonial period, the *Atlas des cercles*, which was prepared *cercle* by *cercle*, enjoyed both very great popularity and very great authority. In the same edition, it served as a reference for the colonial administrators until the appearance of the IGN maps from 1960. The shape of Say *cercle* is very specific. Its eastern boundary is constituted by the River Niger, to the south-east, the Mekrou, to the

11

¹MN, Ann. D 6.

north-west — on the opposite side — the Sirba as far as Bossébangou and, from that point: straight lines. The boundary runs in a straight line to the *north-west* in order to form a salient encompassing various villages, then runs down in a straight line to the *south*, where, at the level of the Say parallel, it changes direction. It then runs in a *south-westerly* direction and, in three successive straight lines, reaches the Mekrou. You can see then that, apart from the rivers, it is all straight lines. This was the traditional form [Slide: Boutiq sketch-map of 1909²]. We can see this from a previous sketch-map of Captain Boutiq dating from 1909 [Slide: Sketch-map of Administrator Truchard of 1915³]. The same shape can subsequently be seen on the sketch-map of Administrator Truchard of 1915 [Slide: Sheet, Say *cercle* from the Blondel la Rougery map of June 1926⁴], and again on the Blondel la Rougery map of *June 1926*. We are thus poised at the point where our problems begin.

4. There is every reason to believe that it was with these maps and sketch-maps to hand that the drafters of the *Arrêté* of 31 August 1927 set about describing the entire boundaries of Say *cercle* in terms of straight lines, with the exception of the river boundaries: that *Arrêté* of 31 August 1927 — which can be found in the judges' folder at tab 2 — lists those boundaries as follows:

“To the north and to the east, by the current boundary with Niger (Niamey *cercle*), from Sorbohaoussa to the mouth of the River Mekrou;

To the north-west, 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 the villages of Alfassi, Kouro, Takalan and Tankouro;

To the south-west, a line starting approximately from the Sirba at the level of the Say parallel and running as far as the Mekrou;

To the south-east, by the Mekrou from that point as far as its confluence with the Niger.”⁵

[Slide: Map of 6 October 1927 showing the new frontiers] The same applies to the representation of Say on the map entitled “New frontier according to the Erratum of 5 October 1927”, to which I shall return shortly; it was forwarded to the relevant departments and

²MN, Ann. D 1.

³MN, Ann. D 4.

⁴MN, Ann. D 9.

⁵MN, Ann. B 26.

12 to both colonies the day after the adoption of the Erratum, namely 6 October 1927⁶. According to the Erratum, the line from the Tao astronomic marker reaches:

“the River Sirba at Bossebangou. It almost immediately turns back up towards the north-west, leaving to Niger, on the left bank of that river, a *salient* which includes the villages of Alfassi, Kouro, Tokalan and Tankouro; then, *turning back to the south*, it again cuts the Sirba at the level of the Say parallel. *From that point the frontier, following an east-south-east direction, continues in a straight line up to a point located 1,200 m to the west to the village of Tchenguiliba . . .* [there then follows a description of the northern boundaries of Botou *canton*] *until it meets the former boundary of the Fada and Say cercles* [which as you see is also a straight line], which it follows as far as the point where it intersects with the course of the Mekrou.”⁷

5. We can thus see that the sole change effected by the Erratum of 5 October 1927 to the traditional shape of Say *cercle* is the removal of Botou *canton*, which remains in Upper Volta.

The subsequent maps

6. The subsequent maps retain the traditional boundaries of Say *cercle*, except for the removal of Botou *canton*. And I can now cite several maps: the 1927 road map of the Colony of Upper Volta⁸, that of Niamey of 1927⁹, the FWA wall-map of 1928¹⁰, the map of Niamey, 13th edition, 1934¹¹ [Slide: 1946 map of Niamey] and the 1946 map of Niamey¹². I am only showing you this latter map in order to enable you to appreciate the persistence of the traditional line. It follows from the foregoing that the boundaries of Say *cercle* consist essentially of straight lines. There are a number of reasons for this: the hostile nature of the terrain, the sparse population; the maps themselves are marked “unexplored area”.

B. On the other hand, Niger disputes the claim that the boundary between Dori *cercle* and Tillabéry *cercle* consists of straight lines

7. By contrast with its position regarding the boundaries of Say *cercle*, Niger does not agree that the boundary in the Téra sector, between Dori *cercle* and Tillabéry *cercle*, is composed of
13 straight lines. We shall now endeavour to demonstrate this to you. Let us understand one thing:

⁶MN, Ann. D 13.

⁷MN, Ann. C 27.

⁸MN, Ann. D 11.

⁹MN, Ann. D 10.

¹⁰MN, Ann. D 14.

¹¹MN, Ann. D 19.

¹²MN, Ann. D 20.

the aim of what we are about to show you is not to support a particular line among those which will emerge from the historical background, but simply to demonstrate that, whichever line is adopted, it is incompatible with the straight-line thesis relied on by our opponents.

The flaws in Burkina's line

8. [Slide: Sketch-map No. 15 from Burkina Faso's Memorial, MBF, p. 159 [p. 132 of the English version]] As can be seen from sketch-map No. 15 in its Memorial¹³, Burkina Faso draws two straight lines from point 6 to what it calls point P. The first of these runs from point 6 as far as Tao, passing through point 7; the second goes from Tao to point P. This presentation of the boundary is disputable on textual, historical and cartographic grounds.

(1) Textual grounds

9. Let us first address the textual grounds. Contrary to what we have seen for Say *cercle*, for the Dori/Tillabéry boundary the text of the Erratum makes no reference to straight lines. [This text can be found in the judges' folder at tab 3.] If I may just remind you of it:

“A line starting from the heights of N’Gouma, passing through the Kabia ford (astronomic point), Mount Arounskoye and Mount Balébangoua, to the west of the ruins of the village of Tokébangou, Mount Doumafende and the Tong-Tong astronomic marker; this line then turns towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossebangou.”¹⁴

In the whole of this part of the text, there is one word, and one only, which indicates a change of direction, and that is the verb “turns” [French “*s’infléchir*”]; you will see how our opponents interpret this [End of slide].

10. The co-ordinates of points 6 and 7 pose no problems. The Parties have set out markers at both points. The disputed sector begins at Tong-Tong.

[Slide: Extract from cartographic annex MBF 36]

14

However, as can be seen from cartographic annex No. 36 to its Memorial, Burkina Faso places on the same stretch of straight line point 6 (Mount Doumafende), point 7 (Tong-Tong) and Tao — with the obvious aim of giving this part of the frontier the appearance of an initial stretch of

¹³MBF, p. 159 [p. 132 of the English version].

¹⁴MN, Ann. B 27.

straight line. This is clearly to do violence to the “sacred” text, since the Erratum provides, *expressis verbis*, that after the Tao astronomic marker, “this line then turns towards the south-east”. There is absolutely no *turn* on Burkina’s sketch-maps.

11. The muddled explanations given by Professor Forteau in order to justify this straight line are truly confusing. In the first place, he claims that Niger itself accepted the straight-line solution at the time of the draft compromises of 1988/1991¹⁵. And that’s it. This is clearly quite unconvincing; rather it represents an implicit admission on the part of Burkina Faso, since that compromise departed from the terms of the Erratum. By the compromise, Niger was evidently not accepting that there was any form of turn at this point.

Mr. Forteau’s second argument is that there was a turn after Tong-Tong¹⁶. Yes indeed, well after: at Tao, the following point. Are they serious? According to the Erratum, the line was supposed to turn not after Tao, but before, between Tong-Tong and Tao, which it totally failed to do according to our opponents’ representation of it.

Finally, his third argument: Niger, too, accepted that there were two straight lines. Professor Forteau then comes out with a completely surreal conclusion: “the two Parties are thus *at least now in agreement on one point*: the correct interpretation of the 1927 Erratum is that the section of the frontier line which arrives at the Tong-Tong marker, as well as that which departs from it, are both straight lines”¹⁷! However, Niger, which relies here on an intermediate boundary point — the Vibourié marker — is clearly not contending that this represents an interpretation of the Erratum, since it departs from it, and to present matters in this way amounts to a travesty which does Burkina no credit.

12. From the Tao astronomic marker to Bossébangou, the Erratum does not indicate any intermediate points. From this, Burkina infers that the frontier is a straight line. However, contrary to the Say sector, in this part of the Erratum we do not find any terminology of a geometrical nature. As Niger has maintained throughout the negotiations, if the text of the Erratum implied a geometrical form between Tong-Tong and Bossébangou, passing through Tao, it would be, rather,

¹⁵CR 2012/20, p. 26, para. 61 (Forteau).

¹⁶*Ibid.*, p. 27, para. 62.

¹⁷*Ibid.*, p. 27, paras. 64 and 65.

the arc of a circle that the word “turn” (*infléchissement*) would require. Burkina Faso disregards turns where the text provides for them and sees straight lines where there are none in the text. Are our opponents having problems with their eyesight? This is a paradoxical interpretation, particularly for a Party which regards the 1927 texts as sacred.

(2) Historical grounds: the *cantons* and the *cercle* boundaries as they were at the relevant time

13. Like the textual grounds, the historical arguments do not suggest a straight line from Tong-Tong to Tao, nor *a fortiori* from Tao to the boundary of Say *cercle*. We know that the Decree of the President of the Republic of 28 December 1926 reincorporated into the Colony of Niger¹⁸

“2. The *cantons* of Dori *cercle* which were formally part . . . of Niger in the Téra and Yatacala regions, and were detached from it by the Arrêté of the Governor-General of 22 June 1910.”

We have a good idea of the 1910 boundary from the preparatory documents to which we have already referred. Thus the Record of Agreement of 2 February 1927¹⁹ specifically named the *cantons* referred to in the 1926 Decree.

The Commander of Dori *cercle*, who was present at that meeting, would write on 17 December 1927 that those boundaries “had been established on the basis of the map prepared by Captain Coquibus”²⁰. That is the same map used by the *cercle* Commanders Delbos (Dori) and Prudon (Tillabéry) in June 1927 when they travelled along the boundary at the request of the Governor of Upper Volta²¹. The *Chef de cabinet* of the Governor had indeed indicated that the survey should be made “by . . . simply follow[ing] line . . . Coquilin [meaning Coquibus] [and] examining situation population”²². This method and the accompanying recommendations seem somewhat incompatible with the hypothesis that they were preparing simply to draw a straight line through the area.

16

¹⁸MN, Ann. B 23.

¹⁹MN, Ann. C 7.

²⁰MN, Ann. C 20.

²¹MN, Ann. C 11.

²²MN, Ann. C 12.

14. The reports from Prudon, Commander of Tillabéry *cercle*²³ and Delbos, Commander of Dori *cercle*²⁴, are helpful in that they confirm that in June 1927 the two administrators together travelled the length of the traditional boundary, taking with them the sketch-map of Captain Coquibus. It is interesting to follow their route. It is shown on a sketch-map by Delbos of June 1927²⁵ [Slide]. Prudon's sketch-map is similar²⁶. What we see is a gently curving line, and below it a sort of triangle; and, moreover, right at the bottom a quite marked triangular or trapezoid shape. Prudon's sketch-map is similar.

However, a report from Delbos dated 27 August, addressed to the Lieutenant-Governor of Upper Volta, proposed a draft *Arrêté* accompanied by a sketch-map which had been agreed — so he tells us — with his colleague from Tillabéry [Slide showing this sketch-map]. This line is more angular, if you will, more of a “zigzag” — in fact we barely see this — than on his first sketch-map of June 1927²⁷. It shows a boundary which, from the tripoint to the west of Alfassi on the Sirba as far as Tao, changes direction five times in an angular manner²⁸. It shows that the Dori and Tillabéry commanders were departing from the Coquibus sketch-map, which one of them, Prudon, described in relation to a certain part of the line as “theoretical”²⁹, while the other, Delbos, considered that it included “notional lines”³⁰ [End of slide].

A further sketch-map by Delbos, sent to Ouagadougou on 17 December 1927 [show this sketch-map], when he had learnt of the decisions taken in Dakar and was in possession of the map of the “new frontier”, has the merit of showing both the route regarded as the traditional boundary by the administrators [in blue] and the course of the Coquibus line [in red]³¹. In his account of that mission, Commander Prudon states:

²³Of 4 August 1927, MN, Ann. C 15.

²⁴Of 27 August 1927, MN, Ann. C 16. We do not have his Tour Report from the month of June, but we do have the 1: 500,000 sketch-map of the route followed, which was appended thereto.

²⁵MN, Ann. C 14.

²⁶MN, Ann. D 3.

²⁷MN, Ann. C 16.

²⁸See the particularly “geometrical” sketch-map appended to the letter of 27 August 1927, MN, Ann. C 16.

²⁹Prudon, MN, Ann. C 15.

³⁰Delbos, MN, Ann. C 20.

³¹MN, Ann. C 14.

“Apart from the slight modification [the triangle at the start], following natural frontiers, the delimitation of the *cercle* made by Lieutenant Coquibus is indeed the line that we followed and the line *recognized by the various chiefs of the frontier cantons* in the two colonies concerned.”³²

This report and the sketch-map of 27 December are interesting, for they show the difference between the Coquibus line from Nababori to Kabia, which is slightly curved, and that followed and adopted by the administrators, which, over part of the route, makes a detour to follow a chain of hills. Nonetheless, a single glance at the sketch-maps suffices to show that neither of them is a straight line [End of slide].

15. Burkina expresses doubts as to whether there was any agreement between the administrators, and argues that their proposals were not adopted. As we have seen, it makes no difference, however, whether or not the proposals reached Dakar, or whether they arrived too late. It makes no difference that the extent of the agreement claimed by Delbos may be uncertain. It is clear that these proposals played no role in the delimitation effected by the Governor-General, and Niger has, moreover, never claimed this. That is not the point of these communications. The essential point is that they enlighten us as to the shape of the 1910 boundary between Tao and the tripoint. The documents are quite clear: it is not a straight line. We can thus form the provisional conclusion that two *canton* boundary lines were then envisaged: either the two administrators followed the Coquibus sketch-map, or they prepared a joint draft *Arrêté* consisting of a line broken into straight sections. In neither case did the course of the boundary follow a straight line.

16. Burkina Faso disposes of all of these preparatory acts with a single stroke of the pen, asserting that the Dakar Government took no account of them or “deliberately ignored them”³³ in favour of a new course, consisting of straight lines. While we may share the doubts regarding the impact of the reports of the *cercle* commanders and their draft boundary, that is not the case for the
18 Records of Agreement of February 1927. We see that Governor Brévié had involved himself in the field work in February 1927 and how, on 27 June 1927, his officials had taken the initiative of sending a draft *Arrêté* to Dakar (of which we do not, in fact, have the text)³⁴. The importance of the role played by the Coquibus map, which reflected the course of the 1910 line required by the

³²MN, Ann. C 15.

³³CMBF, p. 24, para. 1.22.4.

³⁴MN, Ann. C 13.

1926 Decree is apparent from the Record of Agreement of 27 February 1927, and its role in the Erratum of October 1927 is more than probable. Thus on this latter point, in his letter of 17 December 1927, Delbos states the following:

“The boundaries as described in Official Journal No. 1021 [*sic*; in fact it was OJ 1201] are an exact copy from the Report signed in my presence at Téra by Governor Brévié and Inspector Lefilliatre. They had been established on the basis of the map prepared by Captain Coquibus, which only showed the theoretical lines . . .”³⁵

The map of the “new frontier” for the Téra sector reproduces the curved line that we have noted in the administrator’s sketch-maps. In reality, the only new aspect of the boundary of October 1927, apart from the return to the 1910 line for the Téra sector, is the fact that Botou *canton* remains in Upper Volta. This is indeed confirmed by the letter of 2 April 1927 from the Director of Political and Administrative Affairs to the Governor of Niger.

(3) Cartographic grounds

17. Is the cartographic file more favourable to the thesis of two straight lines defended by our opponents? We will not revisit what we have just said regarding the Coquibus line and the line proposed by the administrators.

The “new frontier” map of 1927 [Slide of this map]

18. On the other hand, we do, above all, have to mention a map of key importance (which Members of the Court will find at tab 12). The clearest illustration of the situation resulting from the Erratum of October 1927 is the map entitled “French West Africa: new frontier between Upper Volta and Niger (according to the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927)”, scale 1:1,000,000³⁶. This, as its title indeed states, illustrates the Erratum of 5 October 1927. It was prepared by the Geographical Department of French West Africa. Burkina Faso endeavours to dispute the scope and value of this map, since the course of the boundaries shown on it is in total contradiction with its own theses³⁷. Relying, *inter alia*, on what the Chamber of this Court said in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case³⁸, Burkina Faso denies in its written

³⁵MN, Ann. C 20.

³⁶MN, Ann. D 13.

³⁷See, for example, MBF, para. 1.76, then from para. 4.91.

³⁸*Judgment, I.C.J. Reports 1986*, p. 554.

pleadings that this map can constitute an illustration of the 1927 texts³⁹. However, that is in fact the case, as Niger has shown in its Memorial⁴⁰.

19. It is true that in the above case, Mali, which had itself submitted that map to the Chamber (I remember it very well, for, like my friend Pellet, I was involved in that case, but of course on the other side), had made no secret of the fact that the map gave no information as to the official body which had prepared it, or the administrative authority which had approved the line which it showed⁴¹.

The Chamber nonetheless adopted a nuanced position towards this map, despite that weakness:

“The Chamber, while not ascribing to this map submitted by Mali the authoritative status of a document explaining the Order and erratum, i.e., one issued with the colonial administration’s stamp of approval, holds nevertheless that it cannot be overlooked as a piece of evidence; for even if it cannot be shown to have been drawn up by that administration, it remains certain that the map’s 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.” (*Idem.*)

20

We now know, thanks to the discovery in the national archives of Senegal⁴² of a document of which Members of the Court will find a copy in the judges’ folder at tab 11, that this map is closely linked to the text of the 1927 Erratum. It is undeniably an official map; it was indeed published by the administrative authorities. It was sent under cover of a transmission note — which you have before you — by the military *Chef du cabinet militaire* (2nd section) to the Director of Political and Administrative Affairs in Dakar on 6 October 1927, *that is to say the day after adoption of the Erratum, with “copies to the Department to the two colonies concerned”*⁴³. Even if the map was not officially appended to the text, everything goes to show that the administration of the Government-General of French West Africa regarded it as reflecting the text which it had just promulgated. And to requote the words of the Chamber, as has now been established, this map is a document “issued with the colonial administration’s stamp of approval”, and possesses “the

³⁹MBF, para. 4.91.

⁴⁰MN, para. 5.7.

⁴¹*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 646, para. 171.

⁴²MN, Ann. C 17.

⁴³*Ibid.*

authoritative status of a document explaining the Order and erratum”. It should be recalled, moreover, that when the Governor of Upper Volta transmitted to Administrator Delbos the text of the Erratum, he appended this map, which the latter indeed challenged on certain points in his reply of 17 December 1927⁴⁴. Subsequently, in 1932, Roser, Commander of that same Dori *cercle* — of whom I shall speak again this afternoon — refers to this map, which had been enlarged to a scale of 1:500,000 for use in the field⁴⁵. We shall see shortly how important he regarded that map to be in interpreting the colonial boundary.

20. Despite its small scale, which represents the 150 km separating Tong-Tong from the Dori/Tillabéry/Say tripoint in some 15 cms — enabling few details to be shown — the “new frontier” map permits at least two interesting conclusions. The first — as you can see — is that the form of the boundary, although shown in outline only, is of a curved line and not of two straight lines. The second is that the tripoint between the *cercles* of Dori, Tillabéry and Say is located at the apex of the salient, where Niger has constantly claimed it to be, and not at Bossébangou⁴⁶.

21. The importance of this map is reflected in the fact that several maps produced subsequently, in particular by the Geographical Department of French West Africa, would maintain this shape until the maps prepared by the IGN in 1958 and published in 1960: this is in particular the case with a Niamey map of 1934⁴⁷ and another of 1946. The map’s importance is equally reflected in the profound silence maintained in regard thereto by Burkina Faso during its first round of oral argument.

The 1960 IGN map

22. As we shall see in detail when we examine the Téra sector, in its 1960 maps the IGN, following a quite different methodology, certainly does not adopt the theory of two straight lines in this sector.

23. It follows from all of the foregoing that Burkina Faso’s claim that, from Tong-Tong to Tao and from Tao to Bossébangou, the boundary consists of two straight lines is not supported by

⁴⁴MN, Ann. C 20.

⁴⁵MN, Ann. C 45.

⁴⁶See MN, paras. 7.14 ff.

⁴⁷MN, Ann. D 19.

the evidence. It follows that the presumption that the distance between two points is normally represented by a straight line is of no help in this sector.

Mr. President, I have come to the end of this morning's speech. (Well, actually, I shall be addressing you again at the end of the morning.) I thank the Court for its attention and I would ask you to give the floor now to Professor Pierre Klein, who will examine the third postulate of Burkina Faso's argument, namely that the 1927 texts constitute a clear title.

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

Mr. KLEIN: Thank you, Mr. President.

BURKINA FASO'S ASSUMPTION THAT THE TITLE IS CLEAR

1. Mr. President, Members of the Court, it is an honour for me to take the floor in the present case, once again on behalf of the Republic of Niger. As my colleagues have reminded you, the approach to the case chosen by the other Party has been to take into account, for the purpose of delimiting the frontier in the disputed sector, only the 1927 texts, which are thereby vested with almost Biblical authority. According to our opponents, this has to be the approach, on the grounds that those texts are entirely clear. This is the last of the assumptions made by Burkina Faso, the utter frivolity of which I would like to demonstrate to you this morning.

22

2. How blessed our opponents must be, for they are the enlightened ones! From the written submissions of the other Party⁴⁸, and from their oral pleadings⁴⁹, it would appear that rarely has the task of lawyers called upon to identify the course of a frontier been as straightforward as it is in the present case. According to Burkina Faso, indeed, the *Arrêté général* of 31 August 1927 and its Erratum constitute "a clear and uncontested title"⁵⁰ which "fully defined" the "boundary between the Parties"⁵¹. The text of the Erratum, Professor Forteau told us at the start of this week,

⁴⁸See in particular MBF, p. 57, para. 2.8.

⁴⁹See in particular CR 2012/20, p. 13, para 58 (Pellet).

⁵⁰MBF, p. 59, para. 2.13.

⁵¹MBF, p. 2, para. 2.8.

“describes” the course of the frontier “in a clear and concise manner”⁵². The Court’s task, in the other Party’s view, is therefore particularly simple: the delimitation of the common frontier has been made by the 1927 texts and should be considered — I quote Burkina Faso once again — “established”⁵³. Consequently, all the Court has to do is to “clarify the interpretation of those instruments with a view to the demarcation of the frontier between those two countries”⁵⁴. And the task of interpreting them, which has just been mentioned, is probably not really required either, given the dazzling clarity of the 1927 texts. In its Memorial, the other Party states, with reference to a meeting of the two States’ experts, that “strictly speaking, it was not a matter of ‘interpreting’ the *Arrêté* and its Erratum; in reality these texts did not raise any concerns between the Parties, which [. . .] sought only to [. . . plot] on the map the description of the frontier given by the text”⁵⁵. Following the same line of reasoning, it looks as if the latter part of the year will be very peaceful for you, Members of the Court, since all you will need to do is to “[plot] on the map the description of the frontier given by the text”, a task which is unlikely to prove too exhausting.

23

In the face of such obvious facts, what else can be done, but to give in, and accept enlightenment? Apparently, this was the conclusion reached by the two States, still going by what is said by the other Party, which states on this point that “[m]oreover, the Parties have not disputed” that the 1927 *Arrêté* “provides a precise delimitation of the boundary between [them] in [the] sector” which is still disputed⁵⁶.

3. What should we make of this line of reasoning, which is outwardly attractive, as simplicity sometimes can be? To tell the truth, Mr. President, Members of the Court, I fear I shall rather swiftly have to dissipate any illusions you might have started to entertain about your programme for the end of the year. Burkina Faso’s argument that the 1927 texts are perfectly clear, suffice in themselves and simply need to be transposed on to a map, in order to determine the course of the frontier, is nothing more than a mere assumption which in this case is contradicted by a considerable weight of evidence. Interpretation of the texts is therefore a vital task, and we can

⁵²CR 2012/20, p. 19, para. 27 (Forteau).

⁵³MBF, p. 2, para. 0.3.

⁵⁴*Ibid.*

⁵⁵MBF, p. 42, para. 1.59.

⁵⁶MBF, p. 101, para. 4.8.

only work out exactly what is meant by their terms by relying on extrinsic evidence, first and foremost the practices followed by the colonial authorities and cartographic material from that period. This has always emerged clearly, moreover, from the work done by the groups of experts from the two countries, who were entrusted with the task of determining the course of the frontier. By way of example, the report of the technical experts' meeting held in 1986, upon which Burkina Faso relies in order to affirm, in the extract from its Memorial which I have just quoted, that "strictly speaking, it was not a matter of 'interpreting' the *Arrêté* and its Erratum", in fact reveals that the two delegations "proceeded to interpret" the 1927 texts⁵⁷. You will agree that we have here a very strange way of reporting on the work — and on the task of the experts. That example alone shows in any event that in this case it is not a matter of countering a claim made by the other Party that the 1927 texts are perfectly clear and suffice in themselves with a counter-claim that the texts are unclear and do not suffice, without such an assertion requiring any proof. On the contrary, Niger is challenging the idea that the texts in question are inherently clear, because a considerable number of documents confirm the shortcomings and lack of clarity of the terms used in the 1927 texts, which as a result cannot suffice on their own to identify the course of the frontier. If you will allow me, I should like to run through the various points with you in detail. The first difficulties

24 are connected to the vagueness of some of the wording used in the part of the 1927 texts which is of interest to us here (A). Furthermore, in many situations, it appears that even though the terms used in 1927 may not give rise to problems of understanding on a purely linguistic level, their lapidary or imprecise nature has caused constant uncertainties as to the precise path taken by the boundary line in the disputed sector (B). Finally we will see that it transpires as a result that the 1927 texts do not suffice in various respects, and that it is impossible to claim that here we are in the presence of a delimitation made exactly 85 years ago, in a complete and satisfactory fashion, which only needs "plotting on the map" (C).

A. The vagueness of some of the wording used in the 1927 texts

4. Mr. President, Members of the Court, it has to be acknowledged at the outset that some of the phrases or expressions used in the 1927 texts prove to be extremely unclear in themselves. At

⁵⁷MBF, Ann. 69.

least two examples of this lack of clarity can be found in the part of the Erratum of 5 October 1927 which describes the inter-colonial boundary in the disputed sector. Let me remind you that you will find this text at tab 3 of the judges' folder.

5. I would recall that the text describes a line “starting from the heights of N’Gouma” and reaching “the Tong-Tong astronomic marker”, and states that “this line then turns towards the south-east”⁵⁸. A little further on, the Erratum provides that the line, moving in a south-easterly direction, “reach[es] the River Sirba at Bossebangou”, after which it “almost immediately turns back up towards the north-west”⁵⁹. Firstly, it should be recalled that the two Parties to the present case have disagreed for a long time on the meaning of the verb “s’infléchir”⁶⁰ [to turn]. For Niger, the idea of turning indicated a curved line, as Professor Salmon has just recalled. Burkina, for its part, merely perceived in the expression the idea of a change of direction between two successive straight lines⁶¹. And as Professor Salmon has also just recalled, the other Party now seems to refer to a different interpretation of the term “s’infléchir”, by illustrating its claim in the sector in question with a completely straight line⁶². Those different understandings of the concept of turning therefore clearly indicate a difficulty of a linguistic nature. It is the very meaning of the term used in the 1927 text which causes a problem, independently of any question of context or of application to the present case.

25

6. A similar observation may be made regarding the words “almost immediately turns back up”, used by the Erratum to describe the course taken by the boundary after it has reached the River Sirba at Bossébangou. The very least we can say is that this expression is hardly a model of rigour and precision for the description of a frontier line. It also turns out to be subject to widely diverging interpretations, especially because, according to the text of the Erratum, the line separating the two colonies had to run in a south-easterly direction until Bossébangou, before “almost immediately turn[ing] back up towards the north-west”.

⁵⁸MN, Ann. B 27.

⁵⁹*Ibid.*

⁶⁰See CMN, p. 29, para. 1.1.27.

⁶¹MN, Ann. A 5, p. 3 and MBF, pp. 109-132.

⁶²MBF, Cartographic Ann. 36; CMN, pp. 39-40.

[Animated graphic showing a line descending towards the south-east before turning back up towards the north-west]

On various occasions during the course of the negotiations between the Parties, Niger's representatives have indicated how baffled they were by this wording, pointing out that a line which descends towards the south-east before almost immediately turning back up towards the north-west could only cancel itself out, which would lead to an absurd result⁶³.

[End of slide. Slide showing sketch-map with a line turning back up “almost immediately” towards the north-west]

However, even taking into account the precise words of the Erratum and the fact that it refers to a line which does not turn back up immediately, but “almost immediately”, in the opposite direction to the one from which it came, should it not be expected that the line resulting from that description would look like the one you see on the slide before you now?

[End of slide. Slide with illustration of the line following the River Sirba]

26

However, an entirely different — and, it must be said, much freer — interpretation of the terms is made by the other Party, when for this segment of the boundary it quite simply adopts the line shown on the 1960 IGN map, at first following the course of the River Sirba and then moving away from it to reach the head of the salient. Our opponents seek to justify this line with regard to the text of the Erratum. Professor Thouvenin, in his presentation on Monday morning, gave us the following explanation: “[t]he text states that the frontier has to turn back up ‘towards’ the north-west, which may be taken as meaning that it points in a north-westerly direction but does not necessarily follow a due north-west bearing”⁶⁴. Therefore, if that reasoning is to be followed, a text reading “almost immediately turns back up towards the north-west” should not be taken as meaning that the line then “necessarily” turns towards “due” north-west, to go back to the words used by Professor Thouvenin, but rather that it “points in a north-westerly direction”. All of this, I am sure you will agree, is crystal clear ... And that reading of the text also bears eloquent witness to the unwavering faithfulness to the terms of the Erratum displayed by our opponents.

[End of slide]

⁶³MN, Ann. A 5, p. 3.

⁶⁴CR 2012/21, p. 23, para. 56 (Thouvenin).

In any event, those differences of interpretation illustrate, as clearly as it is possible to do so, the fact that some of the terms used in the 1927 Erratum inherently lacked precision and were prone to being interpreted in contradictory ways. Other examples could be given of similarly ambiguous phrasing — even though the text only amounts to a few lines. We could also mention the words “at the level of the Say parallel”, two lines further on, which have also given rise to divergent interpretations on the part of the two States, both before⁶⁵ and during these proceedings⁶⁶. I will, I might add, come back to that point this afternoon.

7. The lack of precision in the terminology used in the 1927 texts had in fact already struck the colonial administrators, from the late 1920s onwards. Just to give one such example, in a letter to the Commander of Tillabéry *cercle*, the Commander of Dori *cercle* — hence on the Upper Volta side of the frontier — wrote: “Do you not think that, since the *Arrêté* and the Erratum delimiting Niger and Upper Volta sometimes use the words “almost”, “approximately” and “marked”, they do not seek absolute precision?”⁶⁷

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Evidently, what was unclear for the authorities of the Colony of Upper Volta in 1929 has now become perfectly clear for the counsel of Burkina Faso . . . It is, moreover, intriguing to note that the various terms I have just mentioned constitute precisely the type of wording whose use in official texts aimed at establishing delimitations was subsequently clearly advised against by the FWA Geographical Department, due to the considerable degree of imprecision of the phrases in question⁶⁸. In a letter of 1942, the Head of the Geographical Department thus wrote that

“any description of a frontier which includes language like ‘the north-south line . . . , the line leaving to the east the villages of . . . , the line running in a south-easterly direction . . .’ is so imprecise that in Europe, an area that is well known, it would require meetings of bilateral commissions and a great deal of demarcation work”⁶⁹.

The author of the letter therefore suggested that a different approach should be followed, in order to avoid such unwelcome consequences, with reference being made in particular to watercourses and ridgelines. Here again, we cannot help being struck by the fact that Burkina’s

⁶⁵MN, p. 115, para. 7.32.

⁶⁶See in particular CR 2012/21, pp. 16-17, paras. 24-29 (Thouvenin).

⁶⁷MN, Ann. C 24.

⁶⁸Letter of 8 May 1942, MN, Ann. C 66.

⁶⁹*Ibid.*

counsel is setting up the 1927 texts as a model of legal drafting, even though the type of wording used therein was advised against in no uncertain terms by the colonial geographical services. That finding alone would be enough to undermine completely our opponents' argument that the title constituted by the official texts of 1927 is clear, and that it suffices to read them in order to identify the course of the frontier in the disputed area. However, there is more to come. As I would like to explain in detail to you now, apart from those difficulties of a purely linguistic nature, the 1927 texts give rise to uncertainty due to the lapidary and imprecise nature of their content.

B. The uncertainties resulting from the lapidary and imprecise nature of the 1927 texts

28

8. The linguistic and terminological problems which I have just mentioned are certainly real. Nevertheless, they do not necessarily affect all the wording of the 1927 texts. For the most part, those texts are in fact clear — if the scope of that term is limited purely to linguistic characteristics. However, a clear text from a linguistic point of view may perfectly well prove to be problematic when it comes to putting it into practice — in other words, when it is a question of aligning it with the reality on the ground. And in this regard too — indeed even more so — the 1927 texts very quickly showed their boundaries, if you will permit the expression.

9. In its written pleadings, Niger demonstrated the intensity of the criticisms which were levelled at the text of the Erratum of October 1927 by the administrators of the two colonies concerned⁷⁰. Here, I shall confine myself to recalling a few examples. In April 1932, the Commander of Dori *cercle* wrote to the Governor of Upper Volta — the Colony of which his *cercle* was part — to propose what he called “[p]ossible solutions to the problem arising out of the inadequate and defective drafting of the official texts”⁷¹.

I should like, if I may, to draw the attention of the Members of the Court to the fact that, once again, this assessment originated from the authorities of the Colony of Upper Volta. In a report of 1934, the Commander of that same *cercle* noted that in several places “the boundary between the two administrative divisions is theoretical and extremely imprecise”⁷². But, without a

⁷⁰MN, p. 26 *et seq.*

⁷¹MN, Ann. C 45.

⁷²MN, Ann. C 55.

doubt, it was the Head of Téra Subdivision (on the Niger side this time) who gave the most acerbic voice to such concerns in a report of 1952, in which he mentioned the *Arrêté* of 31 August 1927, and its Erratum, “whose imprecision is matched only by its inaccuracy, the source of constant argument between Yagha and Diagourou farmers”⁷³.

29 It would be possible to provide many more examples of criticisms of this kind and the use of other, equally unflattering terms to describe the 1927 texts⁷⁴. It is therefore clear that those primarily concerned by the application of these official texts — that is to say, the administrators of the entities adjoining the other Colony — were not exactly dazzled by the extreme clarity which our opponents attribute to these instruments. No greater light seems to have been shed on them in the years that followed, since in the file there are several documents dating from after independence in which the authorities of the new States — and I do mean the *two* States — were still denouncing the “lack of precision” of the frontier, despite the existence of the 1927 texts⁷⁵. But what actually lies at the root of this dissatisfaction? Several documents from the colonial period, but also the work of the Joint Technical Commission on Demarcation of the Boundary, make it possible to understand this better.

10. First and foremost, there is no doubt that the lapidary nature of the 1927 texts gave rise to significant difficulties. A letter of 1953, emanating from Tillabéry *cercle*, thus mentioned the “deficiencies in the [. . .] official texts”⁷⁶. It could hardly be otherwise, given that we only have one text of around ten lines to describe the course of a frontier which runs for a total of several hundred kilometres. The opposing Party has attempted to counter this argument by advancing the thesis that, given the absence of precision, the frontier had to follow straight lines between the various different geographical points mentioned in the texts⁷⁷. I think Professor Salmon provided ample demonstration, this morning, of just how artificial this theory was, and showed that there was not a shred of evidence in the file to confirm it, in particular as far as the Téra sector is concerned. I will not dwell on it, therefore, except to observe that we might obviously ask

⁷³MN, Ann. C 74.

⁷⁴See MN, pp. 27-28.

⁷⁵See, in particular, MN, Ann. C 92.

⁷⁶MN, Ann. C 78.

⁷⁷MBF, p. 110 *et seq.*

ourselves why the colonial officials criticized the lack of precision of the 1927 texts so consistently and so virulently, if those texts provided for boundaries which followed easily identifiable straight lines.

11. Another obvious factor of uncertainty with regard to the application of the texts in question lies in the difficulty — and often the sheer impossibility — of identifying on the ground the places or geographical features which are mentioned in the *Arrêté*, as amended by its Erratum. The scale of this problem became apparent in the course of the work of the Joint Commission. Niger recalled in its written pleadings, for example, the failed attempt of the members of the Commission to locate Mount Arounskoye and Mount Balébangouia on the ground, despite their being clearly mentioned in the Erratum⁷⁸. It was the same story with the identification of the site of the “ruins of the village of Tokebangou”, despite no fewer than three field missions⁷⁹, as Professor Pellet recalled very pertinently on Tuesday morning⁸⁰. Similarly, the experts found the co-ordinates of two different astronomic markers at Tao (whereas the text speaks of “the Tao astronomic marker”)⁸¹. And, what is more, neither of those markers could be found on the ground.

30

12. It is also necessary to mention one final element of uncertainty which affects the 1927 texts. This lies in the factual error which afflicts those acts when they have the inter-colonial boundary pass through the locality of Bossébangou. I shall return to this point in greater detail this afternoon. Allow me simply to point out now that this inaccuracy was also denounced by the local authorities immediately after the adoption of the 1927 texts. In December 1927, the Commander of Dori *cercle* — in Upper Volta, need I remind you? — thus vehemently criticized this part of the text of the Erratum, noting that, in point of fact, the inter-colonial boundary in this sector ran “as far as Nababori, reaching the Say *cercle* to the west of Alfassi and not at Bossébangou, which is further up”⁸².

13. As you can see, we are therefore some distance from the clear, precise and complete title which Burkina Faso is pleased to see in the text of the *Arrêté général* of 31 August 1927, as

⁷⁸CMN, p. 37, para. 1.1.27.

⁷⁹*Ibid.*

⁸⁰CR 2012/21, p. 34, para. [20].

⁸¹MN, Ann. C 105.

⁸²MN, Ann. C 20.

amended by its Erratum. On the contrary, the only possible conclusion is that the very terms of the amended *Arrêté* are in some cases formulated ambiguously, and are open to very diverse interpretations. And in other cases, even in the absence of such linguistic difficulties, it is the practical implementation of the texts on the ground which proved problematic, in particular because of the impossibility of identifying in practice the actual location of a whole series of places which are mentioned in the texts. Conversely, the 1927 texts make no mention of a whole series of other places which are identified on the ground at the time, which clearly does nothing to facilitate their practical implementation. Finally, the error in the text of the Erratum, when it has the inter-colonial boundary run as far as the River Sirba at Bossébangou, further undermines its reliability. To Burkina's claim that the text of the amended *Arrêté* of 1927 is clear and precise, 31 Niger therefore opposes a much more realistic vision of that title, whose limits did indeed come to light immediately after its adoption — or almost. There is nothing in the file to confirm the thesis put forward by the opposing Party. On the contrary, everything shows that the practical application of the reference texts was consistently problematic, whether it was during the colonial period or after the two States achieved independence. Rather than adhering to the vision of the 1927 texts as infallible purveyors of clarity, which Burkina Faso has developed, it would therefore appear distinctly more reasonable to ponder this medieval proverb: "The light reveals the shadow and the truth reveals the mystery." There is certainly no shortage of shadows in this file when it comes to determining numerous sections of the disputed frontier. And there is no doubt that the truth, as revealed by all the administrative documents, is that the course of the boundary in the sectors in question is shrouded in mystery, at least if the intention is to determine it solely by relying on the 1927 texts.

All of this clearly goes to show that it is not reasonable to claim that these texts effected a complete delimitation of the frontier in the sector concerned, which it is sufficient to plot on a map, as our opponents maintain. The entire history of the inter-colonial boundary in the disputed sector very clearly militates against this thesis. Contrary to what the opposing Party maintains, the fact that the 1927 texts do not suffice compels us to take into account other evidence with a view to delimiting the frontier between the two Parties.

That will be the final point in my speech this morning.

C. The fact that the 1927 texts do not suffice and the need to take into account other evidence with a view to delimiting the frontier between the two Parties

14. Mr. President, Members of the Court, the question of whether the 1927 texts are — or are not — clear and precise, and of whether they suffice — or not — in themselves has in fact two crucial implications in the present case. The first concerns the role which it behoves the Court to play in settling the dispute. The second concerns the sources or instruments which it will be possible to call upon, with a view to identifying the course of the frontier between the two States in the sector in question. I should briefly like to consider these two points in detail.

32 15. First of all, Burkina Faso has reduced the Court's role to the bare minimum. As has already been recalled, it regards that role as being simply to implement a line which has already been clearly established, and which is well accepted by the Parties⁸³. Burkina seems to have gone a little further in its Counter-Memorial, since it writes that “the Court's task in the present case is — solely — to clarify its course when — and only when — that document does ‘not suffice’”⁸⁴.

In fact, however, this openness is only superficial, since the opposing Party believes, furthermore, that Niger's denunciations of the Erratum's inadequacies are based solely on false “premises”, and that in this instance we have what the opposing Party terms a “solid legal title”⁸⁵. Although it admits of the theoretical possibility of interpretation, Burkina nevertheless rules it out in practice, since it maintains that the 1927 texts are clear and that Niger “sees obscurity in [their] simplicity”⁸⁶. This is precisely what Professor Pellet said in his speech on Monday, when he asserted that he does “not claim that the Erratum is not subject to interpretation — every legal text has to be interpreted!”⁸⁷. However, once again the scope for interpretation proves to be severely curtailed. In recalling the maxim *interpretatio cessat in claris*⁸⁸, Professor Pellet immediately — I would be tempted to say, almost immediately — closes the door that he had half-opened a few moments earlier. Burkina claims that what Niger is proposing is not to interpret the 1927 texts, but

⁸³MBF, paras. 0.3 and 0.19, in particular.

⁸⁴CMBF, p. 6, para. 0.8.

⁸⁵CMBF, p. 41, para. 1.49.

⁸⁶CMBF, p. 43, para. 1.54.

⁸⁷CR 2012/19, p. 64, para. 47.

⁸⁸*Ibid.*

33 to revise them outright⁸⁹. But, Mr. President, on what basis should it be decided that the text is “clear” and therefore not open to interpretation? On the basis solely of Burkina’s reading of that text, thanks to the particularly enlightened views of its counsel? Or by taking into account the file and all the evidence in it? If so, the only possible conclusion would be that our opponents’ approach on this point is completely without foundation. How is it possible to speak of a clearly established line, when we have just seen that the lacunae and lack of precision in the 1927 texts have been denounced on countless occasions since their adoption? How is it possible to speak of a line that is well accepted by the Parties, when those Parties, despite sparing no effort, since they gained independence, to determine and demarcate the line of their common frontier, have never managed to agree on that line in the disputed sector? How is it possible to reconcile the thesis that there are virtually no problems of interpretation with the concern expressed by the Prime Minister of Burkina Faso in February 2006, when he suggested “the option of jointly putting the matter before the International Court of Justice, so that it may rule on the persisting differences of interpretation in regard to the colonial texts”⁹⁰?

All of this evidence clearly shows that this is not a “simple” matter of implementing a frontier which has already been well identified and accepted by the Parties. What is at issue in this case is the elucidation of texts which everyone — everyone except our opponents — agrees to consider as obscure on a good many points and, more generally, the determination of the frontier line in the disputed areas using the various instruments of international law which the Court can mobilize for that purpose. That therefore brings us to the second point which I identified earlier, namely the one concerning the sources or instruments which it will be possible to call upon with a view to determining that line.

16. In this regard, the conclusion which I have just drawn, that the 1927 texts lack precision, has one essential consequence. It makes it indispensable to consult evidence which is extrinsic to those texts with a view to enabling their interpretation. It was with this in mind that Niger based its line of argument on a variety of documents from the colonial period, such as maps, reports and administrative correspondence. These have already been presented to you in general terms

⁸⁹*Ibid.*

⁹⁰MN, Ann. A 11.

yesterday by Professor Salmon, and in a few moments Professor Kamto will return to this point, as well as, more generally, the question of the relationship between titles and *effectivités* in the present dispute. I shall therefore not dwell on this point any longer.

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17. In conclusion, Mr. President, Members of the Court, it is therefore clear that the 1927 texts do not constitute the clear and self-sufficient title which our opponents are pleased to regard it as. On the contrary, those texts use a number of terms and expressions whose exact content is, to say the least, difficult to determine. Moreover, their lapidary and imprecise nature, as well as the factual error which they perpetuate in the sector of Bossébangou, have given rise to very many uncertainties about the exact identification of the course of the boundaries which they were supposed to set forth. Numerous documents, both prior and subsequent to independence, show this beyond doubt. It is therefore undeniable that these texts present lacunae and that they do “not suffice”, to use the terminology of the 1987 Agreement, which provided that in such a situation reference should be made to other instruments in order to identify the frontier line, amongst them the 1960 IGN map. Contrary to what our opponents claim, there is therefore nothing in Niger’s approach which departs from the principles that are applicable to the determination of the section of the frontier line which is still in dispute. And, contrary to what our opponents would also appear to desire, you will not be able to content yourselves, Members of the Court, with being simply the “mouthpieces of the law”, to use an expression which confines the judge’s role to one of mechanically applying perfectly clear legislative texts. This is not true of those at issue here, and it proves to be essential to interpret the applicable texts, and also to complement them by consulting other sources. The task with which the Court is confronted here is, therefore, a task of delimitation, in the fullest sense of the term — but also in the most traditional sense of the term — a task which it is obviously perfectly well equipped to carry out. My colleague, Professor Kamto, will return to this point in more detail in a moment, in particular as regards the latitude which the Court has at its disposal for interpreting instruments of delimitation.

For the time being, Mr. President, Members of the Court, it only remains for me to thank you for your kind attention. I would ask you, Mr. President, to give the floor to Professor Kamto, either now or after the break.

The PRESIDENT: Thank you very much. I shall give the floor to Professor Kamto after the break. The hearing is suspended for 20 minutes.

The Court adjourned from 11.20 a.m. to 11.50 a.m.

The PRESIDENT: Please be seated. You have the floor, Professor Kamto.

35

Mr. KAMTO: Thank you, Mr. President.

**IMPLICATIONS FOR THE RELATIONSHIP BETWEEN TITLE AND *EFFECTIVITÉS*:
THE ROLE OF *EFFECTIVITÉS* IN THE PRESENT CASE**

Introduction

1. Mr. President, Members of the Court, it now falls to me to explain why the Republic of Niger believes that the title of 1927 is not sufficient on its own to determine precisely the entire course of the disputed frontier, and why the *effectivités* and boundary delimitation practice have an important role to play in the present proceedings.

2. For Burkina Faso, “the boundary between the Parties was fully defined in [the] *Arrêté général* . . . of 31 August 1927 which was superseded by the Erratum of 5 October 1927, and it has never been modified since”⁹¹. The question of the inadequacies of this text of colonial law and the resulting lack of precision in the frontier between the two countries, as raised by Niger, is a false problem, according to our opponents.

3. Burkina Faso seemed to take a timid step in the right direction in its Counter-Memorial, in considering, as Professor Klein recalled earlier, that “the Court’s task in the present case is — solely — to clarify its course when — and only when — that document does ‘not suffice’”⁹². Similarly, at the end of his arguments on Tuesday morning, Professor Pellet achieved a real tour de force by invoking a “twofold insufficiency, both on the ground and on the map”⁹³, regarding the location of the village of Tokébangou. He concurs with the conclusions of the 1988 report by the experts of the Joint Technical Commission on Demarcation, which acknowledged “that the basic text [referring to the Erratum] did not suffice” and turned to the 1960 IGN map, although this was

⁹¹MBF, p. 57, para. 2.8.

⁹²CMBF, p. 6, para. 0.8.

⁹³CR 2012/21, p. 35, para. 20.

36

no more satisfactory, since that map does not mention the village of Tokébangou. I would recall that Tokébangou is in a sector of the frontier that is no longer disputed, but what is at issue here is the methodology used. Our colleague then concludes: “In other words, the experts declined to give precedence to the line shown on the map over the line in the Erratum, even though the latter does not suffice — however, giving precedence to the map would not have been in compliance with that reference text.”⁹⁴

4. One is tempted to say that the dog is chasing its tail; because, Members of the Court, what is the other Party trying to tell you: that, faced with an inadequate or imprecise text, the experts chose not to apply a map that was itself incomplete, since they wished to remain faithful to a text whose imprecision had led them to consider the possibility of applying the map. Quite frankly, it is possible to make a less complicated and more convincing argument. If the Erratum does not suffice and the map is of little help because it remains silent on this point, that means that the experts, in plotting the line, relied on something other than those two documents, from which they clearly departed. However, Burkina Faso cannot say this, because it would destroy its notional argument of remaining absolutely faithful to the text of the Erratum — so faithful that it rules out the admissibility of any other document, unless it is accepted by joint agreement of the Parties.

5. Furthermore, in order to downplay the impact of the Tokébangou example on its general approach to the case, the other Party hastens to add, in respect of Tokébangou, that “[w]hat we have here is an exceptional case in which the Erratum does not suffice on its own, while the line shown on the map does not help to interpret the Erratum”⁹⁵. For the rest, Burkina Faso adheres to its original position as set out in its Memorial⁹⁶ and Counter-Memorial⁹⁷.

6. In our opponents’ view, it would appear to suffice that a text delimiting the frontier exists and that that text should be designated the “legal title” in order for it to be free from inadequacies and from the resulting difficulties in applying it. Only such a view could have led our opponents to persist with the fiction that, in respect of the 1927 Erratum, we have “before [us] a [text] which

⁹⁴*Ibid.*, p. 35, para. 22.

⁹⁵*Ibid.*, p. 35, para. 21.

⁹⁶MBF, submissions, paras. 5.1 and 5.2.

⁹⁷CMBF, submissions, para. 5.1.

leaves little to be desired in the nature of clearness, [and that the Court] is bound to apply this [text] as it stands”⁹⁸, thereby using the words of the Advisory Opinion rendered by the Permanent Court of International Justice in the case concerning *Acquisition of Polish Nationality*.

37

7. Niger would have liked things to be so simple. But they are not, as our colleague Professor Pierre Klein has demonstrated this morning. As we all know, determining the course of a frontier is not a purely abstract undertaking, nor is it a purely academic exercise. Even when the delimitation is based on a legal text, it is still necessary to ensure that it gives the precise course of the frontier. That is why, when the Court is seised of a frontier dispute, it always ensures that the title claimed by the Parties provides sufficient information to determine the exact course of the frontier along its entire length, and not merely certain parts thereof.

8. A number of delimitation cases brought before the Court arose from a disagreement between the parties as to the interpretation or the lack of precision of the legal instrument of delimitation. This is precisely the case in the present proceedings, which, as I shall show in a moment, correspond to the fourth hypothesis contemplated by the Chamber of the Court in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*. In that case, to which — need I recall — Burkina Faso was a party, the Chamber of the Court noted that,

“[a]part from the texts and maps listed . . . , the Parties have invoked in support of their respective contentions 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” (*Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment, I.C.J. Reports 1986*, p. 585, para. 63).

9. The Chamber acknowledged that the role played by the “*effectivités*” in that case was “complex”, and determined to state forthwith “in general terms, what legal relationship exists between such acts and the titles on which the implementation of the principle of *uti possidetis* is grounded”⁹⁹. It then arrived at four hypotheses which are now authoritative in such matters. Based on the contention that we are dealing with a complete title in these proceedings, Burkina Faso argues the first hypothesis, whereby a clear title “therefore prevails over any *effectivités* to the contrary”¹⁰⁰.

⁹⁸See CR 2012/19, p. 64, para. 47 (Pellet).

⁹⁹*Ibid.*

¹⁰⁰MBF, p. 49, para. 2.16.

38

10. In Niger's view, however, it is the fourth of these hypotheses that corresponds to the situation facing us here. We are indeed in a situation where, as the Chamber of the Court stated in the *Burkina Faso/Republic of Mali* case, "the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice." (*Ibid.*, p. 587, para. 63.)

11. Evidently, Burkina Faso did not pay any attention to that part of the Judgment. In Burkina's view, Niger has no justification for using, as it does, the many and varied documents from the colonial period, and even the post-colonial period, to support its arguments and to claim the frontier line that it proposes. This position is particularly hard to understand, since our opponents must be aware that the Court does not hesitate to examine a disagreement regarding the course of a frontier, even one already defined by an international treaty, by admitting various documents provided by the parties in support of their respective claims.

12. In such cases, the Court, in accordance with its established case law, has proceeded to examine all the relevant evidence that might determine the parties' intention regarding the precise course of the frontier, on the basis of the legal instrument concerned. Such evidence usually consists of the *travaux préparatoires* of the said instrument of delimitation and its accompanying maps, but also includes the "*effectivités*". Once again, it is the Chamber of the Court in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* which provides a perfect example of this, when it states: "The Chamber has to indicate the line of the frontier on the basis of the documents and other evidence presented to it by the disputant Parties." (*Ibid.*, p. 588, para. 65.)

13. I would like to show in this part of Niger's oral argument:

- *firstly*, that the position adopted by Burkina Faso in respect of the documents produced by Niger in fact raises the question of the admissibility of evidence in the present case;
- *secondly*, that the 1927 *Arrêté* and its Erratum, whose importance as legal title in these proceedings cannot be denied, are not the only items of evidence;
- *thirdly*, that the Court agrees to specify the course of a frontier, even when it has already been defined by a text that is legally undisputed by the Parties.

I. The question of the admissibility of evidence in the present case

39

14. Members of the Court, Burkina Faso has a very ethereal notion of how the course of a frontier should be determined. Its only lifeline is the Erratum to the *Arrêté* of 1927, which it clings to in desperation. Even when our opponent seems to let go, it is to cling immediately to another text, the Agreement of 1987, which, in its view, has the merit of supporting the 1927 *Arrêté* as modified by the Erratum. Indeed, according to Burkina Faso,

“Article 2 of the Agreement of 28 March 1987 does not confine itself to recognizing the pre-eminence of the course under the frontier title constituted by the 1927 *Arrêté* and its Erratum; should these acts not suffice, it also limits the other documents which may be used to establish the course of the frontier to, firstly, ‘the 1:200,000-scale map of the *Institut Géographique National de France*, 1960 edition’ and/or, if necessary, ‘any other relevant document accepted by joint agreement of the Parties’.”¹⁰¹

Beyond the bounds of Article 2 of the 1987 Agreement, no salvation can be found in evidence.

15. In maintaining such a view, Burkina Faso in fact raises the problem of the admissibility of evidence in these proceedings. This observation is based on two arguments put forward by the other Party. According to Burkina,

- *firstly*, the documents submitted by Niger are not among those explicitly referred to in Article 2 of the above-mentioned Agreement of 1987, nor have they been adopted by joint agreement of the Parties within the meaning of Article 2 of that Agreement¹⁰²;
- *secondly*, a number of these documents date back to the 1932 to 1947 period, when Upper Volta no longer existed; any act adopted during that period is purportedly inoperative, by reason of the fact that in 1947 Upper Volta was re-established within its 1932 boundaries¹⁰³.

16. I shall reply to these two arguments in turn.

A. Burkina Faso’s argument is contrary to the principle of the free admissibility of evidence

17. Members of the Court, for Burkina Faso, any document not accepted by joint agreement of the Parties is inadmissible as evidence in this case — in other words, all the documents provided by Niger. You have heard the same story repeated from one speech to the next¹⁰⁴. On this point,

¹⁰¹CMBF, p. 42, para. 1.51.

¹⁰²CMBF, p. 8, para. 0.13.

¹⁰³See in particular CMBF, p. 122, para. 4.38.

¹⁰⁴See, for example, CR 2012/19, p. 65, para. 42 (Pellet); speeches by Mr. Thouvenin, *ibid.*, p 35, para. 20, p. 40, para. 42, p. 41, paras. 46 and 47; Mr. Forteau, *ibid.*, p. 53, para. 27, p. 58, para. 42; see also CR 2012/21, p. 12, para. 5 (Thouvenin).

40 the other Party remains stuck in 1987, when the two States decided in the Agreement of 28 March 1987 on the documents to be taken into account in carrying out the bilateral demarcation exercise. Contrary to what Burkina Faso states, Niger neither “ignores” nor plays down the importance of the terms of the 1987 Agreement¹⁰⁵, no more than it tries to extricate itself from its commitments under that Agreement. It merely sees the Agreement for what it is: a bilateral treaty concluded as part of the technical and diplomatic process of demarcating the common frontier of the two States. Unlike Burkina Faso, Niger is aware that we are no longer in a context of bilateral negotiations.

18. Evidently, the other Party is mistaken as to the era as well as to the context in which we are *now* seeking a solution to the delimitation of the disputed frontier. The frontier dispute between the two countries has now been submitted to this Court, which was seised — need I recall — in 2009, on the basis of the Special Agreement of 24 February. It is thus the subject of judicial proceedings, based on legal foundations that are completely different from the bilateral procedure initiated in 1964, of which the 1987 Agreement was, moreover, just one episode.

19. In international law, the well-known principle regarding evidence is that of its free admissibility: all forms of evidence are admissible, and there is generally no rule excluding evidence of a particular nature. This principle is well established by various international texts¹⁰⁶, as well as by jurisprudence¹⁰⁷ and doctrine¹⁰⁸. In practice, there is a strong tendency for parties to

¹⁰⁵See CR 2012/19, p. 24, para. 24 (Thouvenin).

¹⁰⁶See, in particular, Article II, paragraph 5, of the Great Britain/United States Convention of 24 January (cited in *Reports of International Arbitral Awards (RIAA)* Vol. XV, p. 303); Article 3 of the United States—Haiti Protocol of 28 May 1884; Article III, paragraph 2, of the Germany—Venezuela Protocol of 7 May 1903; Article 88 of the Rules of Procedure of the Franco-German M.A.T. of 2 April 1920.

¹⁰⁷See, in particular, Award of 31 March 1926, *RIAA*, Vol. IV, p. 359; *Mavrommatis Palestine Concessions, Judgment No. 5, 1925, P.C.I.J., Series A, No. 5*, p. 29 and *Series C, No. 7-11*, p. 33; *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 73; *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, pp. 156-157; *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 17; ECHR, Judgment of 18 January 1978, *Series A, No. 25*, pp. 79-80.

¹⁰⁸See the opinion of Max Huber on the occasion of discussions among the Members of the Permanent Court of International Justice regarding certain provisions of the latter’s Rules of Court, in *P.C.I.J., Series D, No. 2, Addendum* (1926), p. 250; see in the same connection and on the same occasion the opinions of Nyholm and Anzilotti (*ibid.*, p. 117 and pp. 129-130); see also: Joseph C. Witenberg, “La théorie des preuves devant les juridictions internationales”, *Recueil des cours de l’Académie de droit international (RCADI)*, 1932-II, pp. 87-88; Charles de Visscher, *Problèmes d’interprétation judiciaire en droit international public*, Paris, Pedone, 1963, p. 31; Durward V. Sandifer, *Evidence before international tribunals*, revised edition, Charlottesville, University Press of Virginia, 1975, pp. 189-190; H.W.A. Thirlway, “Evidence before International Courts and Tribunals”, in R. Bernhardt (dir. publ.), *Encyclopaedia of Public International Law*, Vol. I, Amsterdam, 1981, pp. 59-60; Gérard Niyungeko, *La preuve devant les juridictions internationales*, Brussels, Bruylant, 2005, pp. 239-319.

41

give arbitral tribunals a considerable amount of scope in the matter of evidence. This was particularly true in the *Rann of Kutch (India/Pakistan)*¹⁰⁹, *Guinea/Guinea Bissau*¹¹⁰ and *Guinea Bissau/Senegal*¹¹¹ cases, and in that concerning the *Laguna del Desierto (Argentina/Chile)*¹¹². It has been concluded from analysis of such international practice that

“it is safe to say that international judicial practice supports the existence of the principle of free evaluation of evidence by the tribunal . . . [Such] jurisprudence has always shied away from restrictive rules regarding the admission and evaluation of evidence by the organ responsible for deciding, among the various pieces of evidence, which should have precedence over the other.”¹¹³ [*Translation by the Registry.*]

20. As a general rule, no evidence can be set aside unless it is excluded in a general convention on which the tribunal’s jurisdiction is founded or in a special agreement seising an international court. In the present case, the situation is very clear. Article 6 of the Special Agreement of 24 February 2009 provides:

“The rules and principles of international law applicable to the dispute are those referred to in Article 38, paragraph 1, of the Statute of the International Court of Justice, including: the principle of the intangibility of boundaries inherited from colonization; and the Agreement of 28 March 1987.”

21. As we can see, Mr. President, this provision is framed in very open terms. The applicable law in the present dispute is thus not limited to the principle of the intangibility of boundaries inherited from colonization. Nor is it limited to the provisions of the Agreement of March 1987, which is only one of the particular sources the Parties wished to identify, without it having precedence over other sources, since the above-mentioned Article 6 does not establish any hierarchy among them. The applicable law in the present proceedings is the rules and principles of international law in general, including the law of evidence before the Court. Hence, in interpreting a text relating to the negotiations between the Parties, there is no reason for the Court to depart from the general rules applicable before it in that regard.

¹⁰⁹See the Arbitration Agreement of 1965 between India and Pakistan; text published in *International Law Materials (ILM)*, 1968, p. 6.

¹¹⁰See Article 6 of the Arbitration Agreement of 1983; text published in *Revue générale de droit international public (RGDIP)*, 1986, p. 489.

¹¹¹See Article 6 of the Arbitration Agreement of 1985; text published in *RGDIP*, 1990, pp. 207-208.

¹¹²See Article XI of the Arbitration Agreement of 1991 between Argentina and Chile, cited by Luis Ignacio Sánchez Rodríguez, “*L’uti possidetis* et les effectivités dans les contentieux territoriaux et frontaliers”, *Recueil de l’Académie de droit international (RCADI)*, Vol. 263, 1997, pp. 173-174.

¹¹³Luis Ignacio Sánchez Rodríguez, *op. cit.*

42 22. Members of the Court, it is one thing for neighbouring States to decide, in the framework of a bilateral agreement, on the type of documents that should be used in the work of demarcating their common frontier. That is what Niger and Burkina did when they referred in turn to the 1927 texts, the 1960 IGN map and the relevant documents accepted by joint agreement of the Parties. It is quite another thing for a State that is a party to a dispute to place before the Court all the evidence in support of its claims. That is what Niger has done in these proceedings, as it is entitled to do.

23. Mr. President, Burkina Faso thus wrongfully criticizes Niger for what it describes as its “tendency to reinvent a frontier line on the basis of various documents whose relevance is ruled out by the 1987 Agreement”¹¹⁴. After all, Burkina itself acknowledges that between the Parties there are “disagreements about how the applicable rules are to be implemented” and that there have arisen “differences of opinion about the delimitation of the frontier . . . that lie at the heart of the present dispute”¹¹⁵.

24. However, even with the benefit of this demonstration, the matter is apparently not completely settled, since Burkina Faso also rules out the documents relating to the 1932 to 1947 period, on the grounds that at the time Upper Volta no longer existed and that it was re-established in 1947 within its 1932 boundaries.

**B. The documents relating to the period from 1932 to 1947
are said to be irrelevant**

25. This argument cannot succeed, Members of the Court. Just because Upper Volta did not exist during that period, it does not mean that the boundaries between the *cercles* had disappeared. Numerous documents from that time illustrate colonial boundary practice, including:

- the Garnier-Lichtenberger Record of Agreement of 25 April 1935 settling the territorial dispute at Sinibellabé¹¹⁶;
- 43 — the letter of 9 May 1935 from the Commander of Dori *cercle* to the Governor of Niger making reference to that Record of Agreement¹¹⁷;

¹¹⁴CMBF, p. 8, para. 0.13.

¹¹⁵*Ibid.*, p. 9, para. 0.14.

¹¹⁶MN, Ann. C 57.

- the letter of 10 May 1935 from the Head of Téra Subdivision to the Commander of Tillabéry *cercle*¹¹⁸;
- the letter of 9 May 1935 from the Commander of Dori *cercle*, although it only refers to a sketch-map by Mr. Roser dating from 4 April 1932, that is to say before Upper Volta ceased to exist¹¹⁹.

26. Burkina Faso dismisses them out of hand, just as it disregards every document not to its liking. Thus, in his pleadings on Monday afternoon, Professor Forteau, referring to a Record of Agreement of 13 April 1935 “concluded between Administrator Garnier of Dori *cercle* and Assistant Deputy Lichtenberger of Téra *cercle*”, which was the origin of the Vibourié marker, stated:

“the Record of Agreement was concluded in 1935, at a time when Upper Volta had ceased to exist. The latter was reconstituted in 1947, within its 1932 boundaries — therefore anything which may have happened in 1935 is, once again, devoid of any legal effect on the course of the boundaries of Upper Volta and of Niger.”¹²⁰

However, in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, Burkina itself referred to several documents of a similar nature dating from the same period, and the Chamber of the Court, quite rightly, took them into account in its consideration of the case. More specifically, throughout the Judgment of 22 December 1986, references are made in particular to a letter of 19 February 1935, an exchange of letters, and an Order of 27 November 1935¹²¹. At no time during the proceedings in question did Burkina Faso express any qualms about the fact that those documents dated from a period during which the colony of Upper Volta no longer existed.

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27. Furthermore — and paradoxically — Professor Jean-Marc Thouvenin, in his pleadings on Monday afternoon, made extensive use of a report of 9 April 1936 by Captain Fabry, M.D. which, to tell the truth, says very little about the course of the frontier in that area, but merely

¹¹⁷MN, Ann. C 58.

¹¹⁸MN, Ann. C 59.

¹¹⁹MN, Ann. C 67.

¹²⁰CR 2012/20, p. 23, para. 48.

¹²¹*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 581, para. 52; pp. 584-585, para. 60; pp. 594-595, para. 75; p. 601, para. 87; p. 602, para. 89; p. 603, para. 91; p. 605, para. 95; p. 607, para. 98; p. 626, para. 135; p. 631, para. 144; p. 636, para. 135.

depicts a few scenes of everyday life connected with the River Sirba, some 500 m from the village of Bossébangou. What are we to understand, Members of the Court? That some documents produced between 1932 and 1947 are admissible, and indeed relevant, in the present case, while others are not? How can we explain such a selective approach? Obviously, fickleness and inconsistency are not always found on the side where they are supposed to be.

28. It is therefore surprising to say the least that, with regard to the evidence and even more so the use of it, the other Party has said, not without a certain presumptuousness, I must say, that Niger's "judicial strategy" is not based on any "legal principle"¹²²; and that the only consistent aspect of Niger's Memorial is "its inconsistency", in that it "does not follow any clear method"¹²³, in particular with respect to the documents it cites for determining the course of different sections of the frontier. Like a finicky schoolteacher, Burkina Faso marks Niger's work harshly. But this teacher's eyesight is clearly failing, and he is holding the work upside down: otherwise he would have realized, Mr. President, that Niger's judicial strategy is to provide the Court with all the documents capable of guiding it in its task; and to analyse them in great detail in order to indicate those which, in its opinion, support and complement the 1927 texts for the purposes of determining the exact course of the disputed frontier, sector by sector. He would probably have realized that in 1987, Burkina Faso and Niger were already both aware that the 1927 *Arrêté*, as amended by its Erratum, and the 1960 IGN map could not suffice to determine the course of the disputed frontier in every sector; and that this is no doubt why they included a reference to documents accepted by joint agreement of the Parties.

45 29. Burkina Faso — using its customary highly flattering language — reproaches Niger with displaying "a singular, particularly lax, subjective and uncertain notion of the expression 'should the *Arrêté* and Erratum not suffice', which appears in Article 2 of both the Agreement of 28 March 1987 and its Protocol"¹²⁴.

Whatever Niger does to demonstrate the relevance of the documents it produces for the purposes of fully settling the present dispute, it makes no difference: the other Party has remained

¹²²CMBF, p. 40, para. 1.47.

¹²³*Ibid.*, p. 47, para. 1.65.

¹²⁴CMBF, pp. 37-38, para. 1.41 and p. 44, para. 1.57.

anchored in the context of the Joint Commission's work in 1987; it would do well to open its eyes and realize that we are in a completely different context — we are before the International Court of Justice in 2012.

30. In practical terms, the course of the section of the frontier that remains in dispute needs to be established by having recourse to the *effectivités* arising from the history and composition of the *cantons*, from the maps, and from a number of agreements resulting from colonial practice which explicitly or implicitly recognize the frontier points, in particular in this still-disputed sector. Niger will explain in its pleadings how, in its view, this combination of the Erratum, the 1927 *Arrêté*, the *effectivités* and boundary delimitation practice makes it possible to reach a clear and definitive settlement of the dispute in this sector of the frontier. It now falls to me to show that, important though it is for the purposes of resolving the present frontier dispute, the 1927 *Arrêté*, as amended by its Erratum, is only one piece of evidence among others.

II. The 1927 *Arrêté* and its Erratum are one piece of evidence of the frontier line, among others

31. Members of the Court, in the present case, the “colonial heritage” at the critical date is — as Niger has shown — imprecise and incomplete. In short, it contains “deficiencies” which make it impossible to determine the exact course of the frontier in all sectors. We have demonstrated that, in the present case, no piece of evidence can be excluded. Accordingly, no part of the *effectivités* or boundary delimitation practice produced by Niger should be disregarded.

32. In view of this, I shall now turn my attention to establishing:

- *firstly*, that under international law the 1927 *Arrêté* and its Erratum are *facts* and, as such, are not binding on the Court as rules of law; they constitute, in Niger's opinion, a piece of evidence which, while clearly important, is one that cannot exclude all the other pieces of evidence;
- *secondly*, that by choosing not to have recourse to the historical documents and factual elements in order to substantiate its interpretation of the 1927 *Arrêté*, as modified by the Erratum, Burkina Faso fails to contribute fully to uncovering the legal truth in the present case.

A. The 1927 *Arrêté* and its Erratum are facts and one piece of evidence among others

33. Mr. President, Members of the Court, according to Burkina Faso's written and oral pleadings, anything not in the Erratum to the 1927 *Arrêté* does not exist. The fact is, however, that those things do exist, and neither Burkina Faso — nor Niger for that matter — can do anything to change that situation; they exist, and they must contribute to the determination of a precise frontier line, using a legal approach which is in keeping with the jurisprudence of this Court. Our opponent's repeated claims in support of its argument of a clear title, "which is sufficient in itself"¹²⁵, cannot rid that 1927 text of its deficiencies. What was not clear in 1927 cannot have become so in 1932, when Upper Volta was dissolved, or in 1947, when that colony was reconstituted, and even less so in 1960, when the Parties to the present case gained their independence.

34. It is important, therefore, to examine the exact status of the 1927 *Arrêté* and its Erratum in the present case. Here too, the Judgment rendered by the Chamber of the Court on 22 December 1986 in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* is of particular importance. What does the Chamber say on the subject of the status of those 1927 texts which — I would recall — were previously at issue in that case? It leaves nothing to doubt: "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. 591, para. 72). The Chamber's statement is a logical consequence of its view of the status of colonial law in international law, specifically in the law of delimitation between two former colonies of the same colonial power. According to the Chamber of the Court:

47

"international law does not effect any renvoi to the law established by the colonizing State, nor indeed to any legal rule unilaterally established by any State whatever; French law — especially legislation enacted by France for its colonies and *territoires d'outre-mer* — may play a role not in itself (as if there were a sort of *continuum juris*, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of what has been called the 'colonial heritage', i.e., the 'photograph of the territory' at the critical date" (*ibid.*, p. 568, para. 30).

35. Such is the status accorded by the hitherto well-established jurisprudence of this Court to acts of colonial law in relation to international law: "one factual element", Members of the Court,

¹²⁵CMBF, p. 73, para. 3.23.

a mere factual element, I would be inclined to say. In this respect, the Court is following the jurisprudence of its predecessor, the Permanent Court of International Justice, which stated in the case concerning *Certain German Interests in Polish Upper Silesia*: “From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.” (*Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7, p. 19.*) A factual element, therefore, but — we would also point out — “one factual element among others”. Consequently, the 1927 *Arrêté* and its Erratum, in themselves, rank only as “evidence of a boundary having ‘de facto value’ at the time”, as noted by the Chamber of the Court in the above-mentioned *Burkina Faso/Republic of Mali* case. And if this act of internal law is affected by a factual error, as in the case with the Erratum where it refers to the Bossébangou sector, then it has no place as an element of fact in the case file of these proceedings. My colleague Professor Klein will look at this in greater detail in his presentation this afternoon.

B. Burkina Faso’s choice to dispense with the facts

48 36. As the Court has doubtless noted, Burkina Faso’s Counter-Memorial essentially focuses on the documents furnished by Niger. It is hardly surprising, therefore, that “the Memorial of Niger places [our opponent] in a difficult position” or that our opponent is, by its own admission, only able to give “a cursory response”¹²⁶. And this is not — as Burkina Faso claims with its usual degree of courtesy — because Niger’s written pleadings are based on “a series of assertions and vague comments . . . inconsistently argued and lack[ing] legal foundation”¹²⁷.

37. Burkina Faso’s difficult position is evident in its Counter-Memorial, moreover: while criticizing the numerous documents furnished by Niger, in particular to substantiate the conclusions drawn from the Delbos/Prudon Agreement between 1927 and 1960, Burkina Faso somewhat cryptically concedes — the text in question is in brackets — that the various “examples” provided by Niger in support of its argument are “no doubt the fruit of extensive research by Niger”¹²⁸.

¹²⁶CMBF, p. 1, para. 0.2.

¹²⁷CMBF, p. 1, para. 0.2.

¹²⁸CMBF, p. 30, para. 1.27.

38. Even though convinced of the faultlessness of the title constituted by the 1927 *Arrêté* and its Erratum, Mr. President, Burkina Faso could have opted for the second hypothesis contemplated by the Chamber of the Court in the *Burkina Faso/Republic of Mali* case with regard to title and *effectivités*, whereby the *effectivités* confirm the title. But no, Members of the Court, our opponent clings to the rock of its title and fails to offer even the slightest shred of evidence of *effectivités* or boundary delimitation practice in support of its position.

39. Of course, I cannot believe that this decision not to search through the archives, an approach which is so radically opposed to that of Niger, has been taken lightly by Burkina Faso. It can only be a reasoned choice in a legal strategy which expects the Court to decide this case on a sentence — a single sentence — confirming a course which, in its view, is perfectly clear.

40. However, in choosing to adopt that stance, in failing to carry out the documentary research, our opponent has locked itself into its certainties regarding the 1927 texts — texts which are so dazzlingly clear that they can sometimes be blinding. In so doing, it has omitted to bring before the Court information which might have helped the latter to establish the legal truth. Niger can only regret that fact. It just so happens that the Court does not refrain from performing its function of passing judgment and responding to a request to settle any disputed points of a frontier which has already partly been delimited, simply because one of the Parties believes that there is nothing to dispute.

49 41. The Court has exercised that function, even in a case where the frontier was determined by international legal instruments which were not contested by the Parties, by carefully examining all the available material and, where necessary, carrying out its own checks. That is what I shall now demonstrate in this final part of my presentation.

III. The Court agrees to specify the course of a frontier which has already been delimited

42. Mr. President, Members of the Court, Burkina Faso points out in its Memorial that the “primacy of title” over *effectivités* and boundary delimitation practice “was vividly confirmed in *Cameroon v. Nigeria*”¹²⁹. However, Burkina Faso remains silent on the fact that, in that case, the

¹²⁹MBF, p. 61, para. 2.18.

Court also interpreted the legal title in the light of various documents produced by the Parties, and of the realities on the ground. It agreed to specify several sections of a frontier which had already been determined by a legal instrument whose validity was challenged by neither of the two Parties to the dispute. May the Court allow me to cite in full the relevant passage of the Judgment of 10 October 2002 in that case:

“The task which Cameroon referred to the Court in its Application is ‘*to specify definitively*’ [emphasis added by the Court] the course of the land boundary as fixed by the relevant instruments of delimitation. Since the land boundary has already been delimited by various legal instruments, it is indeed necessary, in order to specify its course definitively, to confirm that those instruments are binding on the Parties and are applicable. However, contrary to what Cameroon appeared to be arguing at certain stages in the proceedings, the Court cannot fulfil the task entrusted to it in this case by limiting itself to such confirmation. Thus, when the actual content of these instruments is the subject of dispute between the Parties, the Court, in order to specify the course of the boundary in question definitively, is bound to examine them more closely. The dispute between Cameroon and Nigeria over certain points on the land boundary between Lake Chad and Bakassi is in reality simply a dispute over the interpretation or application of particular provisions of the instruments delimiting that boundary. It is this dispute which the Court will now endeavour to settle.” (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, pp. 359-360, para. 85.)

43. The Court then goes on to make a number of observations in this exercise of interpretation for the purposes of specifying the frontier. I shall cite only two of the most telling examples¹³⁰.

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44. *First example.* On the frontier in the Kohom River sector, Nigeria claimed that paragraph 17 of the Thomson-Marchand Declaration of 1931 — which was the legal title in that case — was “defective”. The Court agreed and declared that its task “is accordingly to determine where the drafters . . . intended the boundary to run in this area when they described it as following the course of a river called ‘Kohom’”.

The following part of the Court’s reasoning is of great interest for the present case, because the Court explains its approach. It states:

“101. In order to locate the course of the Kohom, the Court has first examined the text of the Thomson-Marchand Declaration, which has not provided a decisive answer . . . The Court has therefore had to have recourse to other means of interpretation. Thus it has carefully examined the sketch-map prepared in March 1926

¹³⁰See also the reasoning of the Court’s Judgment on the course of the frontier in the Kerua sector, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, pp. 363-364, paras. 93-94; and in the sector from Ngosi to Humsiki (*ibid.*, p. 365, paras. 95-96).

by the French and British officials which served as the basis for the drafting of paragraphs 18 and 19 of the Thomson-Marchand Declaration.” (*Ibid.*, pp. 366-367, para. 101; emphasis added.)

45. It is precisely such an approach that Niger requests the Court to adopt in the present case, on the same grounds.

46. *Second example.* On the frontier in the Jimbare and Sapeo sector, Nigeria first noted that the wording of the Thomson-Marchand Declaration is “defective in many respects” in regard to that part of the land boundary described in paragraphs 35 to 38 of the Declaration, and proposed to clarify it. According to Nigeria, “the intention of the British and French Governments had since 1920 [i.e., 11 years before the adoption of the Thomson-Marchand Declaration] been to attribute Jimbare to France and Sapeo to Great Britain.”

In this connection, Nigeria pointed out that:

“on 12 November 1920 a joint proposal to this effect had been signed by W.D.K. Mair, a British District Officer, and Captain Louis Pition, representing the French administration (hereinafter the “Mair-Pition Joint Proposal”) following a delimitation mission on the ground”.

That proposal was subsequently incorporated into a document signed on 16 October 1930, referred to as the “Logan-Le Brun procès-verbal”. This document, drawn up after the Thomson-Marchand Declaration was prepared but before it was signed, “was intended to set out a solution on the ground to the difficulties created by the text of the Thomson-Marchand Declaration and that it has been respected since then by both Parties” (*ibid.*, p. 382, para. 141).

51

Nigeria contended that some of the proposals in that procès-verbal had been incorporated into the 1931 map annexed to the Declaration. In its view, “it is the map which should therefore be followed and not the text of the Declaration, since this ‘does not accord with the extensive practice on the ground for the past three quarters of a century’” (*ibid.*, pp. 381-382, para. 141).

47. In Cameroon’s view, however, “the text of the Thomson-Marchand Declaration should . . . be adhered to” (*ibid.* p. 382, para. 142).

48. Members of the Court, let us listen to the Court’s response as it emerges from paragraphs 143, 144 and 145 of its Judgment of 10 October 2002 (*ibid.*, pp. 382-383). In paragraph 143, the Court states:

“The Court notes that the interpretation of paragraphs 35 to 38 of the Thomson-Marchand Declaration poses problems, since the description of the

boundary therein appears both to contain *a series of material errors* and, in certain places, to contradict the representation of that boundary on the 1931 map appended to the Declaration. The Court further notes that, *in practice*, Sapeo has always been regarded as lying in Nigerian territory.” (Emphasis added.)

49. In paragraph 144, it explains:

“The Court will first address the Sapeo area. After carefully studying the maps provided by the Parties and the Logan-Le Brun procès-verbal, the Court finds that, as Nigeria claims, *it is indeed the boundary described in that procès-verbal and not that described in the Thomson-Marchand Declaration* which was transposed onto the 1931 map appended to the Declaration.” (Emphasis added.)

50. Lastly, in paragraph 45, the Court continues and concludes:

“Turning next to the situation in the Jimbare area, the Court notes that, contrary to what occurred in regard to Sapeo, the modification of the boundary provided for in the Logan-Le Brun procès-verbal was not transposed onto the 1931 map appended to the Thomson-Marchand Declaration in respect of the Jimbare area. The course of the boundary on the map is as described in the Declaration. The Court nonetheless takes the view that it is the course as described in the Logan-Le Brun procès-verbal which must also prevail here. As the Court has just found, the Logan-Le Brun course in effect corresponds to the intention of the authors of the Declaration throughout this region.” (Emphasis added.)

52

51. As you can see, Members of the Court, the Court’s clear approach in the *Cameroon v. Nigeria* case removes all doubt — if any still remained — that your Court specifies and corrects the course of a boundary which has already been determined by a legal instrument that is not contested by the Parties as a legal title for the purpose of determining the course of the boundary. Moreover, the Judgment of 10 October 2002 shows that the Court interprets the title in the light of physical and geographical characteristics, local agreements concluded following field missions, as well as maps and boundary delimitation practice; the Court identifies the material errors in the title and corrects them in order to obtain the line that conforms as closely as possible to the intention of the authors of the legal title.

52. Niger respectfully requests the Court to do the same in the present case. In so doing, the Court will simply be following its own jurisprudence, from which there is no justification for it to depart in the present case. In so doing, the Court will fully accomplish its task of settling the dispute brought before it in a way that leaves no room for ambiguity and, thereby, of eliminating any obstacles to the implementation of its decision.

53. Mr. President, Members of the Court, I am well aware that I have made severe demands on your attention. I hope that it was not too much to suffer. I beg your indulgence in advance and

thank you sincerely for your patience. Mr. President, that concludes my oral argument. May I ask you now to call Professor Jean Salmon so that he may present Niger's arguments relating to the frontier in the Téra sector.

Thank you once again for your kind attention.

The PRESIDENT: Thank you, Mr. Kamto. I now give the floor to Professor Salmon so that he can begin his pleading on the boundary in the Téra sector. You have the floor, Professor.

53

Mr. SALMON:

THE BOUNDARY IN THE TÉRA SECTOR

1. Mr. President, Members of the Court, counsel for Niger now invite you on a journey along the frontier. I shall present the situation in the Téra sector and my colleague, Pierre Klein, that in the Say sector.

2. It being understood that, in the Téra sector, Burkina Faso's theories of clear and artificial straight lines are unfounded, we find ourselves in a situation where it is necessary to determine what was the western boundary of Tillabéry *cercle* between two points 150 km apart, namely Tong-Tong and the endpoint of the boundary where it meets Say *cercle*.

3. The basic document which must never be overlooked is the Decree of the President of the Republic of 28 December 1926, which reincorporates into the Téra region (at the southern boundary of Tillabéry *cercle*) those *cantons* which had previously formed part of that region between 1899 and 1910, when they belonged to Niger. Of that region — whose origins were traced by Professor Tankoano — we have some sketch-maps. [Slide CMN, fig. 1, p. 22, or map C [47]] The first is a sketch-map which groups the *cantons* of the Téra subdivision within Dori *cercle*¹³¹. Highlighted in yellow is the western boundary, with which we shall become familiar [Slide of the Boutiq sketch-map, CMN, fig. 2, opposite p. 28 (Note: the map is missing from the text)]. The second sketch-map is that prepared by Captain Boutiq in 1909¹³², which shows only the segment where that boundary meets Say *cercle* at the northern tip of the salient.

¹³¹MN, Ann. C [47].

¹³²MN, Ann. D 1.

The third is the sketch-map drawn by Captain Coquibus, of which we have indirect evidence thanks to the Delbos sketch-map of 17 December 1927¹³³ [Slide of the Delbos sketch-map]. On this sketch-map, the same curved boundary can again be seen, here in red. [End of slide]

54

The 1927 texts do not provide us with a great deal of information. Along this stretch of the boundary, the *Arrêté* of 31 August 1927 adopted the following points: Tong-Tong, a junction on the Téra-Dori motor road and, lastly, the boundary of Say *cercle* near to and to the south of Boulkalo [Slide of the “new frontier” map]. The Erratum is no more forthcoming. I shall illustrate this using the 1:1,000,000-scale “new frontier” map¹³⁴ which, as we have seen, was transmitted to all the interested parties on 6 October 1927. Again, three points: the Tong-Tong astronomic marker (1), the Tao astronomic marker (2) and the point where the boundary of Say *cercle* reaches the salient (3).

The “new frontier” map shows the same general curve of the line and has the advantage of indicating exactly where that line meets the boundary of Say *cercle* at the northern tip of the salient; however, in view of its scale, this map contains very few topographic details.

4. It has already been stated at some length that this map offers few indications to give meaning to a text which is defective over a stretch of approximately 150 km. As explained earlier, two methods should be combined in order to identify the boundary more precisely.

The first is to rely on the work of the administrators who, throughout the entire colonial period, had to resolve practical problems which arose in respect of their *cercle* boundaries; the second requires us to follow the line shown on the 1960 IGN map.

For their part, the administrators recorded the traditional boundaries which they had been applying for years, conserving *de facto* boundaries of sorts. The inaccuracy and imprecision of the Erratum, its lack of clarity and its deficiencies led the administrators on both sides of the boundaries to *work together* — and I stress that point — to supplement its text by maintaining the traditional *canton* boundaries of their respective *cercles* and subdivisions.

One of the documents furnished by our opponent is a good illustration of the role assigned to those administrators by the Dakar authorities. On 7 June 1938, the Directorate of Political and

¹³³MN, Ann. C 20.

¹³⁴MN, Ann. D 13.

Administrative Affairs of FWA requested from the *Chef du Cabinet Militaire* (i.e., from the Geographical Department) a sketch-map showing the division into *cantons* of various *cercles*, including those of Say and Tillabéry¹³⁵. The response from that military department is revealing:

55

“The Atlas of *Cercles* is currently being revised, but this is a very lengthy and painstaking task that will require the participation of the local administrative authorities, which at present are the only ones able to define — at least approximately — the *canton* boundaries.

In most cases, these are de facto boundaries which have never been defined by texts.”¹³⁶

This was an official recognition — by the general authorities of FWA — of the legitimacy of the subsidiary role played by administrators in interpreting and therefore clarifying on the ground the defective texts. In so doing, the administrators *do not modify the text*, as Burkina Faso claims¹³⁷, which would have required a new official act; rather, *they interpret it*, thus filling in the gaps in a manner which respects the 1926 Decree of the President of the Republic, from which the boundary originated.

5. The second method consists in using the IGN map. That map, you will remember, was previously referred to in the context of the work carried out by the Joint Commission and of the Agreement of 28 March 1987. That Agreement stated that “[s]hould the *Arrêté* and Erratum not suffice, the course shall be that shown on the 1:200,000-scale map of the *Institut Géographique National de France*, 1960 edition”¹³⁸. In a way, this granted the map the status of subsidiary title.

It should not be forgotten that the care taken when drafting that map was not limited to the purely cartographic aspects; the map provides an accurate representation of the colonial boundaries as they were seen on the ground by the drafters during the completion surveys on the basis of information obtained from the local authorities. Furthermore, since the details shown on the IGN map are those closest to the critical date of the *uti possidetis juris*, and since the map was prepared on a scale of 1:200,000, Niger considered it legitimate to rely on this subsidiary source, particularly in this sector.

¹³⁵Note No. 521 CM2 from the Geographical Department, dated 25 June 1938, on the subject of the sketch-maps requested by Captain Urvoy (CMBF, Ann. [6]).

¹³⁶CMBF, Ann. No. 6.

¹³⁷See, for example, CMBF, paras. 1.34 and 1.39.

¹³⁸MN, Ann. A 4.

The same conclusion is reached by following not the rules which were applicable for the Joint Commission, but by adopting the general rules of international law, as those were described by the Chamber of the Court in the *Burkina Faso/Republic of Mali* case:

56

“The Chamber cannot uphold the information given by the map where it is contradicted by other trustworthy information concerning the intentions of the colonial power. However, having regard to the date on which the surveys were made and the neutrality of the source, the Chamber considers that *where all other evidence is lacking, or is not sufficient* to show an exact line, the probative value of the IGN map becomes decisive.” (*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, *I.C.J. Reports 1986*, p. 586, para. 62; emphasis added.)

Accordingly, as Niger wrote in its Memorial:

“unless we find [and I am referring here to the sector in question] abnormal deviations in relation to the texts or manifest lacunae in the information on the *canton* boundaries, and subject to the necessary caution where the hesitation of the map’s drafters is reflected in gaps in the line of crosses, these results should in principle serve as a guide to determine the course of the inter-colonial boundary in 1960”¹³⁹.

6. Niger has scrupulously adhered to this policy, only deviating from the IGN line for reasons which, as we shall demonstrate in our subsequent presentations, are all founded in law:

- at Vibourié, on account of the existence of a colonial marker which was unknown to the drafters of the map;
- at Petelkolé, because of an agreement which was reached after independence relating to road works and the establishment of a joint border post;
- at Oussaltan, owing to information dating from the colonial period which is not contradicted by the map, moreover, which prudently shows a line of broken crosses in this area;
- and, finally, at the point where the boundary meets that of Say *cercle*, for a number of reasons which will be explained by Professor Klein.

Well, Mr. President, Members of the Court, since you have been so very well behaved, we shall continue our story this afternoon.

The PRESIDENT: Thank you, Professor Salmon. The Court will meet again this afternoon at 3 p.m. The sitting is closed.

The Court rose at 1 p.m.

¹³⁹MN, p. 91, para. 6.16.