

SEPARATE OPINION
OF JUDGE *AD HOC* MAHIU

[Translation]

Sources of the applicable law — International sources: Article 38 of the Statute of the Court, Special Agreement of 24 February 2009, principles of the intangibility of frontiers and of uti possidetis — Internal sources: Decree of 28 December 1926, Arrêté of 31 August 1927 and its Erratum, other texts from the colonial period — Other sources: documents accepted by joint agreement of the Parties, 1960 IGN map, preparatory documents from the colonial period.

Place and role of the colonial effectivités — Relationship between the Arrêté and its Erratum — Relationship between the 1960 IGN map and the effectivités — Delimitation of the frontier: course from the Tao astronomic marker to the median line of the River Sirba — Problems of the localities of Petelkolé and Oussaltane — Actual links of the populations with Niger.

1. While broadly subscribing to the Court's overall approach and to most of the findings reached by it in the present case, in this separate opinion I should like to set out a number of observations on certain points regarding which, in my view, the Court's position calls for further refinements and clarifications. These points relate, on the one hand, to the status of the various documents invoked in the course of the proceedings and, on the other, to the status of the *effectivités* or, more precisely, their place and role in determining the different sections of the frontier.

I. THE STATUS OF THE DOCUMENTS

2. It is apparent from the written and oral pleadings that there are three sets of documents to which the Parties refer: first, texts expressly accepted by the Parties for use as a reference, and thus as legal title, for delimiting the boundary; secondly, documents which are more or less accepted by joint agreement of the Parties, but whose status remains at issue when it comes to establishing whether they are applicable in the present dispute; and, lastly, documents relied upon by one of the Parties and objected to by the other.

3. It is therefore with this indicative classification of the various texts and documents in mind that I shall seek to understand their place in the resolution of this dispute. At the same time my list establishes a hierarchy, since I cite the texts in the order of priority to be given to them with a view to achieving the delimitation of the frontier between Burkina Faso and Niger.

(i) The texts that have been expressly accepted are as follows:

- the Special Agreement of 24 February 2009, Article 6 of which refers to Article 38 of the Statute of the International Court of Justice and to the rules and principles of international law applicable to the settlement of disputes, which shows indisputably that other rules of international law have a role to play, in particular when the applicable texts prove to be incomplete or insufficient;
- the Decree of 28 December 1926 establishing the administrative centre of Niger at Niamey and transferring certain *cercles* and *cantons* between the Colonies of Upper Volta and Niger. We know that the Parties do not agree as to whether this text has a constitutive or declaratory scope. In so far as it already determines certain boundaries, it is necessarily constitutive. Furthermore, since it is this text that authorizes the Governor-General of French West Africa to issue the *Arrêté* of 31 August 1927 and the Erratum of 5 October 1927 fixing the boundaries of the colonies, it likewise has constitutive effect;
- the *Arrêté* of 31 August 1927 and its Erratum of 5 October 1927 fixing the boundaries of the colonies of Upper Volta and Niger;
- consequently, these are the basic or reference texts which are at the heart of the dispute and the Parties are agreed on this point even though they ascribe a different effect to those texts, in particular as to whether they are the only texts to apply and whether or not they suffice to delimit the entire boundary.

(ii) As regards the documents, the main one is the 1:200,000-scale IGN map of 1960, which enjoys a particular status in so far as this geographical document — which hitherto had no official status — is recognized in both the Agreement of 28 March 1987 (Art. 2) and the Special Agreement seising the Court of 24 February 2009

While the Parties agree on referring to that map in order to delimit the boundary, they disagree profoundly about the conditions which would have to apply and have reiterated those disagreements on many occasions. According to Burkina Faso, “reference may only be made to the map if the *Arrêté*, as clarified by its Erratum, does not suffice” exceptionally and only on that hypothesis, and, “in the absence of any other document accepted by joint agreement of the Parties, first, reference must be made to it and, second, reference may be made to it alone”. According to Niger, the 1960 map enjoys the status of a “subsidiary source”, which enables reference to be made to it whenever there are deficiencies, lacunae, difficulties or errors in the *Arrêté*. Niger adds that “[u]nless abnormal deviations in relation to the texts or manifest lacunae in the information on the *canton* boundaries are discovered . . . it is the boundary drawn on the IGN map which should be adopted as the frontier line”; in such cases, it “believed that it was necessary to make modifications to it and that those modifications were justified”.

(iii) The documents accepted by joint agreement of the Parties

It goes without saying that the documents that have been accepted by joint agreement of the Parties are applicable in the present dispute, even though it is not always easy to ascertain to what extent such documents exist, since each Party, for various reasons, objects to those relied upon by the other. But should we disregard them entirely if they have been objected to by one of the Parties? I do not believe so, because, although they do not constitute evidence, they may, at the very least, constitute a presumption and guide the interpretation which may be given of a text or of a situation (by way of example, mention may be made of the *travaux préparatoires* for the reference texts, which moreover have been cited by one or other of the Parties or by both of them). In that light, I do not see why there would, *a priori*, be objections to them especially since the *travaux préparatoires* traditionally form part of the elements that may at least support evidence, if not constitute it.

(iv) The other documents and the colonial *effectivités*

Any other documents not accepted by joint agreement of the Parties may not be used as such as a basis for the delimitation. But here too, must they be disregarded completely? I do not believe so, because they may constitute a significant source of information. Once again, even though they cannot constitute irrefutable evidence of a frontier, it cannot be ruled out *a priori* that maps, research or other documents, whether they date from before or after independence, as well as the *effectivités*, may be relevant in establishing the situation existing at the time, when applying the principles of the intangibility of frontiers or of *uti possidetis* (case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment, I.C.J. Reports 1986*, p. 568, para. 29; case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *Judgment, I.C.J. Reports 1992*, p. 399, para. 62; case concerning the *Frontier Dispute (Benin/Niger)*, *Judgment, I.C.J. Reports 2005*, p. 109, para. 26).

4. Lastly, and to conclude on this issue of the texts and documents, it is clear that:

- first, the *Arrêté* and its Erratum indeed constitute the main basic text for determining the frontier in the light of the other texts and colonial practice concerning the delimitation of boundaries;
- secondly, there need to be sufficiently sound reasons for disregarding it; but if the Erratum does indeed prove to be imprecise, not to suffice and *a fortiori* to be erroneous on any point, then it is normal to refer to other supplementary elements, in particular the 1960 map, in order to reach a solution;
- lastly, if the 1960 map should in turn prove not to suffice, then it is possible to refer to the *effectivités* and to other documents or elements

which are likely to enlighten the Court. It is on this last point that the Court's reasoning seems to me to be too strict and rigid when it gives excessive and formal primacy to the text and excludes the *effectivités* and other elements in order to arrive at a solution.

II. THE COURSE OF THE FRONTIER

5. In order to draw the frontier, the Court subdivided it into four sections concerning, respectively, the section from Tong-Tong to Tao, from Tao to the median line of the River Sirba, from this last point to the intersection of the River Sirba with the Say parallel, passing via the IGN line and certain geographical points, and lastly from the last point to the beginning of the Botou bend.

6. I should like to make a few comments on the second section, since the line adopted by the Court gives rise to some difficulties related to the problem of the *effectivités*.

1. From the Tao Astronomic Marker to the Median Line of the River Sirba

7. The text of the Erratum states that, from the Tao astronomic marker, the line reaches "the River Sirba at Bossébangou".

8. For this part of the frontier, Burkina Faso proposes a line based on a particular interpretation of the text of the Erratum. In fact, the course of Burkina's line follows that of the Joint Commission of 1988. Thus, from the Tao astronomic marker as far as the River Sirba at Bossébangou, the frontier follows a straight line. Burkina Faso reiterates its position that "in jurisprudence a delimitation text indicating, without any indication to the contrary, that a line passes through two points is interpreted as specifying a boundary in the form of a straight line connecting those two points".

9. For its part, Niger opts for a line which follows the boundaries of the *cantons*, a position which is largely reflected by the 1960 IGN map. It divides this part of the frontier into two sections: from the Tao astronomic marker to Bangaré, and from Bangaré to the boundary of the Say *cercle*. Niger bases its approach on the fact that the Decree of the President of the French Republic of 28 December 1926 expresses itself in terms of *cantons*, which "does not imply any wish to establish a line of an arbitrary and artificial nature" and on a number of documents, in particular three records of agreement which were concluded for the two *cercles* concerned — Tillabéry and Say — between the representatives of the two colonies in preparation for the Governor-General's implementing *Arrêté*.

10. Beyond the Tao marker, a first possible theoretical approach is to opt for a straight frontier line, as in the sector between Tong-Tong and Tao. However, this is a relatively important section of the frontier, along which lie a number of villages claimed by both Parties. A straight line

would have uncertain and undesirable results on the ground, in particular by artificially dividing between the two States' frontier villages and communities.

11. If the *Arrêté* had intended to draw a straight line, it would have expressly said so as it had for the previous section from Tong-Tong to Tao and as it would for the last section of the frontier from the point where the Say parallel cuts the River Sirba to the Botou bend. However, the text of the Erratum does not do so and this can only be regarded as a deliberate omission and an equally clear will to reject such a line. Consequently, there is no logical and convincing basis for maintaining that the frontier runs in a straight line to reach the River Sirba at Bossébangou, above all because Bossébangou is a Niger village which is not on the bank of the Sirba. Consequently, it follows that, in view of the Erratum's silence on the course of the line in this sector, reference must necessarily be made to the subsidiary source, the 1960 IGN map. It is thus on this basis that the Court adopts the line on the map, not only in respect of this point but for the whole frontier line running from the Tao astronomic marker to the River Sirba.

12. As was noted earlier, the line passes close to a number of villages and, more specifically three of them (Petelkolé, Oussaltane and Bangaré) which were the subject of opposing appropriation claims by the Parties. Admittedly, contrary to what Burkina Faso maintained, the Court quite rightly took into account the *effectivités*, but it disregarded them in the case of two of the villages (Petelkolé and Oussaltane) and adopted them in the case of only one of them (Bangaré).

13. It is on this point that the solution does not seem to me to be entirely satisfactory because the Court has disregarded the evidence of *effectivités* presented by Niger, whereas that evidence appears to be much more convincing than that submitted by Burkina Faso.

14. With regard to the location of Petelkolé, Niger notes that the data on the 1960 IGN map are contradictory (on the Sebba sheet, Petelkolé lies on the frontier, whereas on the Téra sheet it lies slightly to the west of that line); then it relies on administrative information from the colonial period to prove that this village belonged to Niger, and that it "has remained under Niger authority since independence, is administratively attached to the rural municipality of Bankilaré and numbers 2654 inhabitants". It adds that, in the vicinity of Petelkolé, the frontier line has to deviate slightly from the IGN line towards the west in order to take in the juxtaposed frontier post between Niger and Burkina Faso, which is situated entirely within Niger territory and was chosen by the Bilateral (Burkina-Niger) Committee on the identification of sites for the installation of juxtaposed control posts between the two countries.

15. Burkina Faso disputes Niger's position and states that neither the Erratum nor the line on the 1960 map attributes Petelkolé to Niger. With respect to the documents relied on by Niger, it contends that they are not opposable to Burkina because they were not ratified either by the competent authorities (documents from the colonial period) or by the Burkina authorities (post-independence documents).

16. An examination of the 1960 map shows that the 1960 IGN map places Petelkolé almost on the frontier, slightly to the west of it, towards Burkina Faso. Nevertheless, the fact that the two States established juxtaposed control posts at Petelkolé and that they considered or “believed that the frontier left Petelkolé to Niger” (Counter-Memorial of Niger, p. 66, para. 2.1.7) cannot be ignored when determining the situation of the village, even if that 2006 Agreement did not enter into force. Furthermore, the administrative information from 1933 and from 1953-1954 invoked by Niger, which referred to the Rimaibé as having established two hamlets, one (Seynotyondi) situated in Upper Volta and the other (Petelkolé) in Niger, between which the frontier passes, is an additional element to be taken into consideration. In my view, the Court should have given much greater attention to the evidence before ruling on the fate of the village, which, in view of the *effectivités*, appears to come under the administration of Niger.

17. With regard to the village of Oussaltane, Niger maintains that this village belongs to Niger, again relying on the basis of colonial documents (the Delbos sketch-map of June 1927, the Roser/Boyer Agreement of April 1932, according to which the boundary runs “to Houssaltane, which it leaves to the east, to Petelkarkalé, which it leaves to the west, to Petelkolé which it leaves to the east”). Niger contends that this region, which is administered by Niger, corresponds to a group of encampments of the Kel Tamajirt tribe, of the Tinguéréguédesch *groupement* of the rural municipality of Bankilaré, to which they regularly pay their taxes.

18. Burkina Faso merely says that the 1960 line places Oussaltane on the Upper Volta side of the line (Counter-Memorial of Burkina-Faso, para. 3.71), and the fact that the encampment was placed east of the boundary proposed by the Roser/Boyer Agreement of April 1932 is without relevance, because “[t]he situation of a place in terms of a delimitation which has not been confirmed cannot be used to call into question the confirmed delimitation”. It reproaches Niger with making a significant and unjustified departure from the IGN map for the sole purpose of enclaving Oussaltane and removing it from the territory of Upper Volta, without providing evidence of any *effectivité* in support of its claim.

19. It should be noted that the 1960 IGN map places the locality of Oussaltane towards the west, on the Upper Volta side, but the frontier line is broken in this area. Since the map thus appears to be insufficient to determine the exact course of the frontier in the vicinity of this village, reference should be made to other evidence in order to reach a decision on this section. In my opinion, the various documents invoked by Niger support the argument that the village is part of Niger, since the majority of the Kel Tamajirt tribe are said to be of Niger nationality and to pay their taxes in the Niger municipality of Bankilaré. This constitutes objective evidence of an *effectivité* in support of such a solution rather than in support of the village being part of Burkina Faso, for which no relevant evidence of an *effectivité* is provided.

2. *The Arrival Point of the Line that Leaves Tao
and Arrives at the River Sirba*

20. With regard to the arrival point of the line that leaves Tao, the text of the 1927 Erratum indicates that it “reach[es] the River Sirba at Bossébangou”. The wording is at the very least ambiguous, especially since the village of Bossébangou belongs to Niger and, furthermore, it is not located on the bank of the Sirba but a few hundred metres away.

21. However, Burkina Faso contends that the arrival point must be situated on the right bank of the Sirba on the basis of the following syllogism: the Erratum refers to Bossébangou; but since Bossébangou is in Niger territory and far from the river, it cannot be the point to be reached; therefore, that means that the line cuts the river to reach the right bank.

22. It is clear to me that this is a false syllogism and the Court, quite rightly, rejects this assertion. On the one hand, the Erratum’s reference to Bossébangou only indicates a direction and arrival point, the River Sirba, but without providing any further details as to whether the right bank, the left bank or the median line is intended. On the other hand, the verb “to reach” a river does not in itself mean that the river must be cut. Lastly, and this is the key point which must guide the search for a solution: the fact of adopting the right bank is so crucial for the continuation of the line, from Bossébangou, that if the Erratum had intended to locate the entire river in a single colony, it would have clearly said so; it is far too important and serious a matter to be overlooked. Consequently, in the absence of such an indication, the fact of reaching the river has no other meaning than that the frontier must follow the median line, which is the usual solution for river boundaries which delimit the area between the riparian countries and for ensuring that those countries have equal access to its resources, in particular water. It is a common-sense solution, which is founded in law and equitable.

(Signed) Ahmed MAHIU.
