

SEPARATE OPINION OF JUDGE *AD HOC* DAUDET

[*Translation*]

I voted in favour of all the points of the operative clause of the Judgment without, however, subscribing to all of the Court's reasoning, and I consider it necessary, therefore, to set out here my own opinion on certain of its elements.

My reservations focus on the manner in which the Court has dealt with the delimitation of the frontier between the Tao astronomic marker and the River Sirba at Bossébangou, and the delimitation in the area of Bossébangou with respect to the River Sirba.

I. THE COURSE OF THE FRONTIER BETWEEN THE TAO ASTRONOMIC MARKER AND THE RIVER SIRBA AT BOSSÉBANGOU

The Court decides that this portion of the frontier follows the line shown on the 1960 IGN map. While I agree with the Court's decision, I do so on the basis of different reasoning.

In this portion of the frontier, Niger's position is in part rejected by the Court on the ground that, in a certain section, it is not consistent with the 1927 *Arrêté*; I agree with this view. Burkina Faso, for its part, argued that, in the absence of any precise information regarding the course of the line between the Tao marker and the River Sirba at Bossébangou, the line should be straight. The Court, whose position I share, rejects Burkina Faso's claim on the basis of three arguments, in respect of which I have some reservations: the first argument is based on the wording itself of the *Arrêté*; the second arises from the context of the Decree of the President of the French Republic, which formed the basis of the *Arrêté*; and, finally, the third proceeds from the location of the village of Bangaré.

The first argument of the Court, set out in paragraph 88 of the Judgment, relies on the following *a contrario* reasoning: since the 1927 *Arrêté* twice uses the term "straight line" ("*ligne droite*" and "*direction rectiligne*") to describe portions of the boundary other than that with which we are at present concerned, why is the same wording not used for the line running from the Tao astronomic marker to the River Sirba at Bossébangou, if this too is straight? If this line is indeed straight, why was this not made explicit here, as it is in other parts of the text? According to the Court, the fact that this was not done weakens Burkina Faso's case in favour of a straight-line configuration.

The argument is assuredly sound, albeit within the limits of the *a contrario* reasoning. In general, however, I think that the Court could have

adopted a more nuanced position on this subject. The strength of the Court's argument seems to me to be somewhat undermined, above all by the fact that the text of the *Arrêté* is by and large poorly drafted, alternating between a scarcity and an abundance of details, mixing clumsy style with unclear content so as to make it impossible to be certain of the pertinence of an analysis of its terms. The fact remains that, while at first sight one might be surprised to find that a line stretching over a distance as great as that between the Tao marker and the River Sirba at Bossébangou is not described in any detail, it is not, however, inconceivable that the author of the *Arrêté*, having just drawn a straight line for the first section from Tong-Tong to Tao, considered it logical that that line would continue in the same way, i.e., in a straight line, in the second section as far as the River Sirba, without having to state so expressly, especially since the use of the straight line was common in colonial practice. The fact that the Court, following the lead of the Parties, examines those two sections separately has the effect of breaking up the reading of the *Arrêté*: one first reads the passage relating to the course of the line between Tong-Tong and Tao, which is the subject of precise details ("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"), providing all the information on the basis of which a line is easily established. This is followed by the section running from Tao to Bossébangou, in respect of which the *Arrêté* merely states that the line "reach[es] the River Sirba at Bossébangou", which, in contrast, does not therefore appear to be at all sufficient to identify its course. However, if the break at Tao had been disregarded and the *Arrêté* read as a continuous text instead, as the line itself is continuous, it would appear then that the text is describing an uninterrupted movement between Tong-Tong and Bossébangou, via Tao. The line, which the Court accepts as starting as a straight line at Tong-Tong, then continues after Tao in the same way, i.e., in a straight line as previously and in the absence of any indication to the contrary, until it "reach[es]" the Sirba at Bossébangou. Thus, if the *Arrêté* is read as a *continuous* description, a straight line becomes more plausible. The situation is different, however, and further precision is required for the other sections which the *Arrêté* categorically describes as being "straight" or "straight lines". In effect, those sections are preceded either by meandering passages, where the course of the River Sirba is followed, or by numerous changes of direction, and are not marked by the same continuity or similarity such as exists in the section between Tong-Tong and the River Sirba at Bossébangou. The need to make it clear that the line is straight is thus more pressing in those instances.

Finally, this straight line is by no means inconceivable, since it was adopted in 1988 as the "consensual line" by the Joint Technical Commission on Demarcation and later confirmed at a meeting held on 14 and 15 May 1991 by the Ministers of the two States, who recorded their agreement on such a course, shown on a sketch-map annexed to the joint communiqué they signed. That line would be challenged by Niger in 1994.

That challenge has no effect other than rendering the agreement henceforth inapplicable between the Parties and thus precluding, on that basis alone, the possibility of a straight line now being adopted. But that challenge does not mean that, for that reason and in itself, a straight line is now an objectively inappropriate means of joining the two points identified in the *Arrêté*.

Nevertheless, while both the above reading of the *Arrêté* and the reference to the consensual line, which is the illustration of that reading, give plausibility to the straight-line course, the problem remains that neither of these elements precludes a different interpretation of the *Arrêté*, in the absence of any detail in the text regarding the course of the line from the Tao marker to the River Sirba at Bossébangou. In other words, a straight-line course appears plausible, but it is not established on the basis of the text of the *Arrêté* or the interpretation which can be given of it. Hence, the *Arrêté* does not suffice and must be replaced by the 1960 IGN map. Not because the line shown on the map might appear better or more appropriate, but simply because the *Arrêté* does not allow for the course of the boundary to be determined. This distinction clearly brings to light the notion that the *Arrêté* does “not suffice” when it cannot be used to carry out the delimitation of the frontier. The *Arrêté* does “not suffice” when there is not enough information, or enough established information, in its terms, or in the interpretation thereof, to enable the desired solution to be achieved. In this connection, it should be pointed out that the 1927 *Arrêté* must be the first point of reference and all possibilities contained therein must be explored before it can be concluded that it does not suffice, which automatically calls for recourse to the 1960 IGN map. One might have expected the Court to seek a more suitable delimitation on other bases offered by international law; but, in this case, unfortunately, it is precluded from so doing by the Special Agreement.

The Court could have stopped there, with the observation that the *Arrêté* does not suffice, and could have decided on that basis alone that it was necessary to use the line shown on the 1960 IGN map. However, it wished to add further supporting evidence, allowing for a more in-depth interpretation of the text of the *Arrêté*.

The Court’s second argument for rejecting Burkina Faso’s position derives from the importance accorded to the Decree of the President of the French Republic of 28 December 1926, which attributed certain territories of Upper Volta to the Colony of Niger. The Court points out that, since the Decree was the “legal basis” (para. 85) of the *Arrêté*, the latter was supposed to “[respect] the pre-existing boundaries of the districts, to the extent that they could be determined” (para. 91). In other words, in the eyes of the Court, the Governor-General’s power was limited to issuing an *Arrêté* which therefore had only declaratory value.

I disagree with this analysis and for my part believe that, although the *Arrêté* must of course respect the Decree, this legal requirement does not, however, prevent the *Arrêté* itself from having a true constitutive value,

not simply a declaratory value, resulting from the Governor-General being granted broader powers than those which are recognized by the Court. In effect, the *Arrêté* provides that the Governor-General “shall determine” the course of the boundary. It does not say “shall state” the course, which it should have done had the Governor-General been constrained by existing boundaries, which, moreover, could have been referred to in the Decree had they existed. Contrary to what is noted by the Court in paragraph 91, the Governor-General’s task is not to determine a “new” inter-colonial boundary (which would mean that there had already been one), but, according to the text of the Decree, to “determine the course of the boundary” (thus demonstrating that there was no known boundary). This view also seems to me to correspond to that described by the Chamber of the Court in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment, I.C.J. Reports 1986*, p. 569, with respect to the Governor-General’s power over the basic administrative divisions, the *cercles*, “the creation and abolition [of which] were the sole prerogative of the governor-general, who *decided their overall extent*” (emphasis added). In conclusion, therefore, the fact that, without being restricted simply to an implementing power, the Governor-General was careful to pay attention to any existing boundaries he found is, in my view, a matter of course and of normal administrative conduct. Nevertheless, that in no way prevents him from looking for more accurate boundaries, which he clearly did, as the Court observes in paragraph 92, but in a legal context which seems to me to be different to that set out by the Court.

In practical terms, the difference is of little importance. The fact is that, whatever the scope of his powers, the Governor-General did not succeed in fixing the boundaries, for which there is clearly no indication, as the Court states, “that they followed a straight line in the sector in question” (para. 93). If such had been the case, that straight line could have been quickly determined, without the need for the numerous, complex and ultimately fruitless inquiries carried out by the colonial administrators and, as the Court notes, “it would have been easy to plot [that] line on a map” (*ibid.*).

Finally, I have some reservations about the third argument, based on the location of Bangaré, which is said to be situated in Niger, but which would be located in Burkina Faso if the boundary line were straight. I understand the reasoning of the Court, which states that, in respect of this village, “account should be taken of the practice followed by the colonial authorities concerning the implementation of the *Arrêté*” (para. 94), thus keeping its argument firmly and exclusively within the framework of the *Arrêté* and confirming that the *Arrêté* cannot therefore be interpreted as having intended to establish a straight-line delimitation. However, in the case of this village, as in the case of all the other villages situated on either side of the frontier with nomadic or semi-nomadic populations, it is not always clearly established on which side of the frontier these populations belong. It is also clear that the period during which

Upper Volta was dissolved in favour of Niger could have caused habits to form. In conclusion, therefore, while the Court is of the view that the case of Bangaré is different from that of Petelkolé or Oussaltane, to my mind, they all (and not simply the last two) entail uncertainties that one could try to eliminate by recourse to the colonial *effectivités*. However, they must be excluded since, as the Court recalls, “the 1987 Agreement requires the Court to apply the line shown on the 1960 IGN map, instead of referring to the *effectivités*” (para. 98). For that reason, since, unlike the Court, I believe that the case of Bangaré requires recourse to *effectivités*, I would not have invoked this third argument, which, moreover, I do not think is necessary to justify the recourse to the 1960 IGN map.

## II. THE COURSE OF THE FRONTIER IN THE AREA OF BOSSÉBANGOU

I voted in favour of point 4 of the operative clause, despite the Court’s position on the course of the boundary as it turns back up along the River Sirba, which, to my mind, raises a number of problems that I would like to set out.

### *A. The Endpoint of the Frontier at the River Sirba at Bossébangou*

In paragraph 101 of its Judgment, the Court opts for a frontier situated in the middle of the River Sirba, as that solution “better me[ets]” “the requirement concerning access to water resources of all the people living in the riparian villages”. That choice is fully justified from the point of view of equity and corresponds to a modern vision of international law, which favours co-operation and sharing over private appropriation and exclusive benefit, such as that which would arise in respect of the river from delimitation along the river bank.

However, the Court is not called upon to draw an equitable frontier, but a frontier based on the 1927 *Arrêté* or, should the latter not suffice, the 1960 IGN map. Consequently, without completely dismissing such considerations of equity, the Court has tried, although not entirely successfully, to keep its reasoning within the framework of the *Arrêté*.

In this respect, I have some reservations regarding the Court’s interpretation of the terms of the *Arrêté* and the approach underpinning it.

#### *1. The interpretation of the terms of the 1927 Arrêté*

Whereas the 1927 *Arrêté* provides that the line continues from the Tao marker to “[reach] the River Sirba at Bossébangou”, the Court, considering that “[t]he use of the verb ‘reach’ (*atteindre*) in the *Arrêté* does not suggest that the frontier line crosses the Sirba completely, meeting its right bank” (para. 101), decides that the endpoint of the frontier is situ-

ated on the median line of the river. In fact, I do not see any reason why that meaning should be attributed to the verb “reach” in this context and I think that, if this was what the author of the *Arrêté* had intended, he would have made this clear.

Given the wording of the text of the 1927 *Arrêté*, and recalling that the line first meets the left bank of the Sirba whereas Bossébangou is situated on the right bank, I cannot share the Court’s interpretation. The verb “reach” clearly signifies that one arrives at a given point. If the text had said that the line “reaches the Sirba”, without any further information, this would have meant that the line stopped as soon as it arrived at the river, thus on its left bank, without going any further and without crossing the river. This theory can be dismissed since, as the Court recalls, the text later states that the line cuts the Sirba “again”. In order to do so, it must have cut it previously. Can the line have cut halfway across the Sirba at Bossébangou, as the Court contends? No, because the text states that the line “reach[es] the River Sirba at Bossébangou” (not “simply” the Sirba, not the Sirba “at the level of” Bossébangou, which would have been imprecise, but the Sirba “at Bossébangou”). For the line to reach the Sirba at Bossébangou, it must, therefore, continue as far as the right bank of the river, where that village is located. Thus, in order to reach that location, the line must have crossed (and will cross again later) the river completely.

## 2. *The Court’s approach*

Under the strict terms of the Special Agreement, the Court must apply the 1927 *Arrêté* and the 1960 IGN map in accordance with the established procedures. In the present case, however, the Court has introduced an additional element in its approach, observing that

“there is no evidence before the Court that the River Sirba in the area of Bossébangou was attributed entirely to one of the two colonies. In this regard, the Court notes that the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other.” (Para. 101.)

While the Court’s concern is easy to understand and the inclination to share it natural, there is, however, no avoiding the fact that, by advancing such a ground based on considerations of equity, in order better to justify its choice of the median line of the Sirba, the Court goes beyond what is asked of it, which is to apply the *Arrêté* or, should the latter not suffice, the 1960 IGN map. This is all that is allowed under the terms of the Special Agreement.

However, the difficulty here is that, in my eyes, the Court has not set out its position clearly. By stating that “[t]he use of the verb ‘reach’ (*atteindre*) . . . does not suggest that the frontier line crosses the Sirba

completely” (emphasis added), it implies that some uncertainty remained as to the terms of the *Arrêté* and the Court’s interpretation of those terms. However, the Court did not consider that that uncertainty constituted a situation in which the *Arrêté* did not suffice and, in fact, it was of the opinion that, understood in that way, the 1927 *Arrêté* could form the basis of its decision in favour of the median line, which was thus, although not expressly stated, an equitable boundary.

The Court could also have drawn a different conclusion from that uncertainty and considered that it amounted to the *Arrêté* “not sufficing” and that recourse to the 1960 IGN map was necessary. However, the solution would then have been completely different. The map would in fact have indicated that the river is crossed “completely”, and not partially, since four crosses representing the frontier cut across it from the left bank to the right bank and thus categorically place the point of arrival of the line on the right bank, a few hundred metres from Bossébangou. The Court’s interpretation of the *Arrêté* therefore seems to differ from that of the IGN cartographers.

### *B. Turning Back up the Sirba*

From the endpoint of the frontier line at the Sirba at Bossébangou, the line continues upstream, following the course of the river. I readily acknowledge that the *Arrêté* lacks any detail about this lengthy portion of the line, which stretches from the vicinity of Bossébangou as far as the point where the right bank of the Sirba intersects the Say parallel. According to the *Arrêté*, having reached the River Sirba at Bossébangou, the line “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”.

With a view to reinforcing its choice of endpoint, which sees the frontier line turn back up along the median line of the Sirba, the Court observes that

“if the endpoint of the frontier were situated on the right bank of the Sirba close to Bossébangou, the line would have to ‘cut’ the Sirba a second time at an intermediate location in order, this time, to cross from the right bank to the left bank before ‘cutting it again’ in the other direction. But nothing of that nature is mentioned in the *Arrêté*.” (Para. 101.)

In fact, with respect to the silence of the text, what the Court sees as justification for the frontier crossing only as far as the median line of the river (para. 102) could, in my opinion, just as easily be used to justify a complete crossing from one bank to the other. In this connection, it is established that, at a given point, the line must leave the Sirba, in order to leave to Niger the salient which includes the four villages (which have not all been identified). Even though the *Arrêté* does not in fact explicitly

state that the Sirba is crossed, the crossing from the right bank to the left bank is a logical and necessary consequence of the obligation to leave the four villages in question to Niger. If the Sirba was not crossed again, the villages would belong to Burkina Faso.

In conclusion, although the *Arrêté* admittedly remains silent, it is possible to deduce from the question of the salient and the four villages that the line crosses the river. As for the nature of that crossing (partial or complete), this can be deduced from the point determined at Bossébangou (middle of the river or its right bank). What remains unknown is the location of that crossing, on which subject the *Arrêté* is silent and thus does not suffice. This calls for recourse to the 1960 IGN map. That map indicates that the line crosses the river at co-ordinates 13° 20' 01.8" N and 01° 07' 29.3" E.

It should be noted here that, on the 1960 IGN map, that crossing is marked by three crosses, which cut across the Sirba completely, from one bank to the other, in exactly the same way as at Bossébangou, where, as stated above, four crosses cut the river from one bank to the other.

Between those two crossing points, the map shows a series of crosses along the right bank of the River Sirba, which seems to suggest that delimitation occurs along the right bank.

Such are the reasons why I believe that my interpretation of the *Arrêté* calls for delimitation along the right bank of the Sirba.

My position is based solely on the terms of the *Arrêté* as I interpret them (and my interpretation is confirmed by the indications on the map) — an interpretation which is different from that of the Court — and on the provisions of the Special Agreement, which require that the *Arrêté* be applied first, and then, should this not suffice, the 1960 IGN map, and nothing more. I am aware — as I have already indicated — that in terms of equity this solution is not satisfactory. However, for the reasons given, I think that it should have been the solution chosen by the Court, which should, in my opinion, either by adding to the text of paragraph 112 of the Judgment, or by drafting a separate paragraph on that subject, have drawn the attention of the Parties — and the attention of Burkina Faso, in particular — to the obligation to take account of the needs of the populations and to co-operate in order to mitigate the less equitable elements of its decision. In any event and considering the situation in very concrete and practical terms, had it been decided to delimit along the river bank in this way, it is difficult to imagine Burkina Faso establishing a fence along the right bank of the Sirba, preventing Niger inhabitants in the area from continuing to draw water from the Sirba and from watering their herds at the river, as doubtless they always have done. With respect to the inhabitants of Bossébangou, probably the largest population in that area, they would in any event have had full access to the river on the right (to the east) of the frontier post installed on the right bank of the Sirba. In conclusion, therefore, it is likely that over these few dozen kilometres, the

Niger populations would not have encountered any significant problems had the Court opted for delimitation along the river bank rather than deciding in favour of the median line.

The Court, however, did opt for the median line, and although I voted in favour of this part of the operative clause — in spite of the arguments which I have just set out — I did so mainly because the clause also covers other important portions of the frontier, in respect of which I wished to record my agreement. I did so as well because it seemed to me that, in the case of the River Sirba, a strict application of the *Arrêté*, in accordance with my understanding thereof, which, I have said, is based solely on the Special Agreement and without any considerations of equity, would create an unduly formalistic result. In my opinion, this demonstrates the limits of *uti possidetis*, the application of which is not always in keeping with present-day situations. In this particular case, neither its object in 1927, nor the later stabilizing effect which it sought and was able to provide at the time of the two States' accession to independence more than half a century ago, is suited to today's needs, nor were they, as far as the river delimitation is concerned, at the time of independence. In effect, in 1927, the challenges posed by a boundary between two territories within the same administrative colony were not the same. The boundary chosen at that time was aimed above all at convenience (it is easier to identify a boundary along the bank of a river than in the middle of a river, which varies significantly according to the season) and, in all likelihood, the possibility of difficulties of access to the water resources was not even considered. Indeed, I do not think that such access could be affected by delimitation at that time, since delimitation was strictly internal and not intended to interfere with behaviour and customs which, moreover, dated back to well before the colonial occupation, including drawing water from the river for domestic purposes, taking advantage of the moisture in the soil in certain seasons to grow crops and using the river to water the herds of the nomadic and semi-nomadic populations who have traditionally roamed freely on either side of the river. On the other hand, those same rights exercised today, in the context of an international frontier, must be articulated and safeguarded, and pose the biggest challenge along every part of the line, which is no longer a mere administrative and internal boundary within a single colonial territory, but an international frontier between two independent and sovereign States. While there is no established rule on this subject, it would seem, however, that those treaties which establish delimitation along the bank, of which, moreover, there are very few, were concluded a long time ago and no longer reflect current practice, in which the use of either the thalweg or the median line is preferred, depending on whether or not the water course is navigable.

(Signed) Yves DAUDET.

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