

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS
ET ORDONNANCES

1986

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS
AND ORDERS



COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU DIFFÉREND FRONTALIER

(BURKINA FASO/MALI)

DEMANDES EN INDICATION DE MESURES
CONSERVATOIRES

ORDONNANCE DU 10 JANVIER 1986

1986

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE FRONTIER DISPUTE

(BURKINA FASO/MALI)

REQUESTS FOR THE INDICATION OF PROVISIONAL
MEASURES

ORDER OF 10 JANUARY 1986

Mode officiel de citation :

Différend frontalier, mesures conservatoires, ordonnance du 10 janvier 1986,
C.I.J. Recueil 1986, p. 3.

Official citation :

Frontier Dispute, Provisional Measures, Order of 10 January 1986,
I.C.J. Reports 1986, p. 3.

N° de vente :
Sales number

518

10 JANVIER 1986

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MEASURES

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INTERNATIONAL COURT OF JUSTICE

YEAR 1986

10 January 1986

1986
10 January
General List
No. 69CASE CONCERNING THE FRONTIER DISPUTE
(BURKINA FASO/MALI)REQUESTS FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER

Present : Judge BEDJAOUI, President of the Chamber ; Judges LACHS, RUDA ; Judges ad hoc LUCHAIRE, ABI-SAAB ; Registrar TORRES BERNARDEZ.

The Chamber of the International Court of Justice formed to deal with the above-mentioned case,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court,

Having regard to Articles 73, 74, 75 and 90 of the Rules of Court,

Having regard to the Special Agreement of 16 September 1983 jointly notified to the Court on 20 October 1983, whereby the Governments of the Republic of Upper Volta (now Burkina Faso) and the Republic of Mali had agreed to submit to a chamber of the Court a dispute concerning the delimitation of their common frontier,

Having regard to the Order of 3 April 1985 whereby the Court decided to accede to the request of the two Governments and formed the present Chamber to deal with the case ;

Makes the following Order :

1. Whereas certain grave incidents took place towards the close of 1985 between the armed forces of Burkina Faso and Mali in the border region

between the two countries ; and whereas it rapidly proved possible, however, thanks to the mediation efforts put forth by various States and regional organizations, to conclude a ceasefire agreement ;

2. Whereas the Co-Agent of Burkina Faso, on 30 December 1985, made known by telephone, and subsequently by a telegram sent to the Registrar on the same day, that he would be submitting to the Court a request for the indication of provisional measures ; and whereas the Co-Agent of Mali, who was forthwith informed by telephone, indicated that he for his part had sent a letter suggesting the adoption of provisional measures by the Chamber ;

3. Whereas copies of the request of Burkina Faso and of the letter of Mali reached the Registry on 2 January 1986, the originals, respectively dated 30 and 27 December 1985, being received in the Registry on 2 and 6 January 1986 ; and whereas all the aforementioned texts were transmitted without delay to the other Party ;

4. Whereas the request of Burkina Faso was in the following terms :

[Translation]

“(1) The Governments of Burkina Faso and of the Republic of Mali have submitted to a Chamber of the International Court of Justice the frontier dispute between the two States, by a Special Agreement of 16 September 1983, which was notified to the Court on 20 October 1983.

(2) Both Parties filed their Memorials with the Court within six months of the Order constituting the Chamber. The proceedings before the Chamber are in progress.

(3) On 25 December 1985, at 7 a.m., the armed forces of the Republic of Mali attacked Burkina Faso, alleging problems caused by the population census, although the census operation had been notified to the Malian authorities, as a matter of courtesy, by the authorities of Burkina Faso, and no objection had been made by the former.

(4) The armed conflict between the two Parties poses a threat to the judicial settlement of the dispute, this being the mode of pacific settlement agreed upon in the Special Agreement of 16 September 1983. Accordingly, the Government of Burkina Faso is requesting the indication of the provisional measures called for by the situation, under Article 41 of the Statute and in accordance with Article 73 of the Rules of Court.

(5) As required by Article 73, paragraph 2, of the Rules of Court, the Government of Burkina Faso hereby specifies the possible consequences if its request is not granted. The actual situation which might be created on the ground as the outcome of the armed conflict would make it difficult, if not impossible, to implement the Court's judgment. The destruction of evidence during the hostilities would threaten to pervert the course of the proceedings.

(6) Consequently, and without prejudice to the merits of the dis-

pute, the Government of Burkina Faso is requesting the indication of the following provisional measures :

Primo : The Parties shall withdraw their armed forces to either side of the line proposed by the Legal Sub-Commission of the Mediation Commission of the Organization of African Unity on 14 June 1975.

Secundo : The Parties shall refrain from any act or action on the ground which might prevent or impede the implementation of the judgment delivered by the Chamber of the Court on the basis of the submissions of the Parties.

Tertio : The Parties shall refrain from any act or action which might impede the gathering of evidence in the present case” ;

5. Whereas the letter of Mali, which was accompanied by the text of an official communiqué issued on Saturday 21 December 1985, is in the following terms :

[Translation]

“At the command of my Government, I have the honour to transmit to you the enclosed text of the statement issued by the Government of Mali on 21 December 1985. This statement records the taking of grave unilateral measures by the Burkinabe Government in the disputed area which is the subject of the proceedings pending before the Chamber of the Court under your Presidency.

Burkinabe troops have occupied the villages of Dioulouna, Kounia, Selba and Douna, and have there raised the flag of Burkina Faso.

That being so, I assume that the Chamber over which you preside will see fit to have recourse to Article 41 of the Statute of the Court :

‘The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.’

The procedure laid down in Article 75 of the Rules would seem particularly appropriate in this instance :

‘1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.’

The Chamber of the Court will no doubt see fit, in these circumstances, to call upon Burkina Faso not only to ensure the prevention of any act which might prejudice Mali’s rights, including its right to the implementation of such judgment as the Chamber of the Court may deliver on the merits, but also to ensure that a stop is put to any act of whatsoever description which might aggravate or extend the dispute submitted to the Chamber of the Court.

Consequently, Burkina Faso should be called upon to revoke the unilateral measures taken in the villages of Dioulouna, Kounia, Selba and Douna, and to withdraw the armed elements and other persons which it has sent into them.

For the sake no less of urgency, flexibility and a lightening of the procedure as of reducing the tension inherent in the situation, the Government of Mali considers that the procedure enabling the Chamber to pronounce *proprio motu* would be more satisfactory than that consisting in a formal seisin of the Chamber by a request from the Malian Government” ;

6. Whereas however, in a further letter dated 7 January 1986 and filed in the Registry on the same date, Mali in turn submitted a formal request, in the following terms, for the indication of provisional measures :

[Translation]

“(1) By a letter from its Co-Agent dated 27 December 1985, the Government of Mali drew the Court’s attention to the fact that, as early as 14 December 1985, Burkinabe armed elements had beleaguered and occupied the border villages under Malian administration.

Such a situation appeared to call for the indication of provisional measures in accordance with Article 41 of the Statute of the Court.

(2) For its part, the Government of Mali took the view that consideration by the Court *proprio motu* of the indication of provisional measures, on the basis of Article 75 of the Rules of the Court, was appropriate in the light of the circumstances.

(3) The submission by Burkina Faso on 30 December 1985 of a unilateral request for provisional measures on the basis of Article 73 of the Rules renders inoperative the suggestion by Mali of a procedure whereby the Chamber would take a decision *proprio motu*.

(4) That being so, the Government of Mali feels impelled for its part to make a further request to the Court, but this time on the basis of Article 73 of the Rules, to take the following provisional measures :

- to call upon each of the Parties to refrain from any act or action which might prejudice the rights of the other Party to the implementation of such judgment as the Chamber of the Court may deliver on the merits ;
- to call upon each of the Parties to refrain from any act of whatsoever kind which might aggravate the dispute submitted to the Court.

(5) No jurisdictional issue arises for the Chamber of the Court in this instance, since the Court is seised of the dispute by a Special Agreement of 16 September 1983.

(6) The requests submitted in paragraph 4 above are justified by the incidents of December through which, following the invasion of its territory on 14 December and its vain efforts through the diplomatic channel to secure from Burkina Faso a withdrawal of the latter's forces, Mali was compelled, as a measure of self-defence, to repulse the Burkinabe troops by force.

Such attempts to secure by force what constitutes the actual subject-matter of the dispute are wholly destructive of the peaceful dispute-settlement procedure represented by the seisin of the Court. The resumption and pursuit of the proceedings in a calm atmosphere is in the interest both of justice and of the Parties themselves and their peoples.

(7) The Government of Mali considers that there are no grounds to take any other provisional measures.

(8) In particular, Burkina Faso's request relating to a withdrawal of forces to the line proposed by the Legal Sub-Commission of the Mediation Commission of the OAU is in fact tantamount to requesting the Court to grant immediately its claim on the merits. Given its object, a request of this nature cannot be seen as provisional.

Moreover, this request is incompatible with the declaration signed by the two Heads of State of Burkina Faso and Mali on 31 December 1985, whereby they concluded the terms of the ceasefire.

The extraordinary meeting of the Ministers for Foreign Affairs of Burkina Faso and Mali, has agreed on the postponement of the question of troop withdrawal to a future meeting of the Heads of State. It would be inappropriate for the Court to rule upon an aspect of the conflict which is the subject of direct agreement between the Heads of State of the two Parties in the context of the ANAD.

(9) The Government of Mali, while having no objection in principle to the idea that the Parties should refrain from any act or action which might impede the gathering of evidence in the present proceedings, fails to see what it may mean in practical terms, and therefore refrains from joining in any request to that effect."

7. Having heard the oral observations presented at a public sitting on 9 January 1986 by the following representatives of the Parties : on behalf of Burkina Faso, His Excellency Mr. Salembere, Co-Agent, Mr. Cot and Mr. Pellet ; on behalf of the Republic of Mali, His Excellency Mr. Diarra, Co-Agent, and Mr. Salmon ;

8. Having taken note that Burkina Faso, at the hearing, submitted as follows :

[Translation]

"The Government of Burkina Faso and the National Council of the Revolution respectfully request the Chamber of the Court to indicate the following provisional measures :

(1) Both Parties shall refrain from any act or action on the ground likely to prevent or impede the implementation of such judgment as the Chamber of the Court may deliver on the basis of the Parties' submissions.

(2) Both Parties shall abstain from any act or action likely to impede the gathering of evidence in the present case.

(3) Each of the Parties, if it has not already done so, shall withdraw its forces from the area claimed by Mali as delimited in the contentions set forth in their respective Memorials filed in the Registry of the Court on 3 October 1985.

(4) Each Party shall refrain from any act of territorial administration beyond the line adopted in 1975 by the Legal Sub-Commission of the OAU Mediation Commission."

9. Having taken note that, at the hearing, the Republic of Mali reiterated the requests submitted in paragraph 4 of its letter of 7 January 1986, as quoted above in paragraph 6 of this Order ;

* * *

10. Whereas, in the present instance, the Chamber, having been formed to deal with the merits of the case following the notification of a Special Agreement concluded between the Parties, and being moreover seised of their parallel requests for the indication of provisional measures, regards its jurisdiction to indicate such measures as manifestly established ;

11. Whereas, under Article 41 of the Statute, the Court may only indicate provisional measures if it considers that the circumstances so require for the preservation of the rights of either Party ;

12. Whereas account must be taken of the facts alleged by both Governments, both in their requests for the indication of provisional measures and in their oral arguments, which facts, in their view, call for the indication of provisional measures in the present instance ;

13. Whereas the power to indicate provisional measures which is conferred on the Court by Article 41 of the Statute presupposes the possibility of irreparable damage being caused to the rights at issue in judicial proceedings and has therefore as its purpose to safeguard the rights of each Party pending the delivery of the Court's decision on the merits ;

14. Whereas the question put to the Chamber in Article I of the Special Agreement signed by the Parties on 16 September 1983 is as follows :

"What is the line of the frontier between the Republic of Upper Volta [Burkina Faso] and the Republic of Mali in the disputed area as defined below?"

and whereas the area in question is defined in that same Article of the Special Agreement as :

“consist[ing] of a band of territory extending from the sector Koro (Mali) Djibo (Upper Volta [Burkina Faso]) up to and including the region of the Beli” ;

15. Whereas in the Memorials filed by the Parties on 3 October 1985 each of them requests the Chamber to decide that the frontier in question follows the line defined by its own submissions ; so that the rights at issue in these proceedings are the sovereign rights of the Parties over their respective territories on either side of the frontier as eventually defined by the judgment which the Chamber is called upon to give ;

16. Considering that the armed actions that gave rise to the requests for the indication of provisional measures submitted to the Chamber took place within or near the disputed area as defined by the Special Agreement ;

17. Whereas, in accordance with the principle set forth by the Permanent Court of International Justice in its Order of 3 August 1932 in the case concerning the *Legal Status of the South-Eastern Territory of Greenland*, incidents likely to aggravate or extend the dispute

“cannot in any event, or to any degree, affect the existence or value of the sovereign rights claimed by [either of the Parties] over the territory in question, were these rights to be duly recognized by the [Chamber] in its future judgment on the merits of the dispute” (*P.C.I.J., Series A/B, No. 48, p. 285*) ;

18. Considering that, independently of the requests submitted by the Parties for the indication of provisional measures, the Court or, accordingly, the chamber possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require ;

19. Whereas, in particular, when two States jointly decide to have recourse to a chamber of the Court, the principal judicial organ of the United Nations, with a view to the peaceful settlement of a dispute, in accordance with Article 2, paragraph 3, and Article 33 of the Charter of the United Nations, and incidents subsequently occur which not merely are likely to extend or aggravate the dispute but comprise a resort to force which is irreconcilable with the principle of the peaceful settlement of international disputes, there can be no doubt of the Chamber’s power and duty to indicate, if need be, such provisional measures as may conduce to the due administration of justice ;

20. Whereas furthermore, according to the indications furnished by one of the Parties, armed actions within the territory in dispute could result in the destruction of evidence material to the Chamber’s eventual decision ;

21. Whereas the facts that have given rise to the requests of both Parties for the indication of provisional measures expose the persons and property in the disputed area, as well as the interests of both States within that area, to serious risk of irreparable damage ; and whereas the circumstances consequently demand that the Chamber should indicate appropriate provisional measures in accordance with Article 41 of the Statute ;

22. Whereas Burkina Faso has requested the Chamber to indicate, *inter alia*, by way of provisional measure, that

“each of the Parties, if it has not already done so, shall withdraw its forces from the area claimed by Mali as delimited in the contentions set forth in their respective Memorials filed in the Registry of the Court on 3 October 1985” ;

23. Whereas Mali maintains that Burkina Faso’s request for a withdrawal of forces would be incompatible with the declaration signed by the two Heads of State of Burkina Faso and Mali on 31 December 1985, whereby they concluded the terms of the ceasefire ; whereas the Ministers for Foreign Affairs of the *Accord de non-agression et d’assistance en matière de défense* (ANAD) decided, at their extraordinary meeting at Abidjan on 30 December 1985, which was attended by the Ministers for Foreign Affairs of Burkina Faso and Mali, to postpone the question of troop withdrawal to a future meeting of the Heads of State ; and whereas according to Mali it would consequently be inappropriate for the Chamber to rule upon an aspect of the conflict which is the subject of direct agreement between the Heads of State of the two Parties in the context of the ANAD ;

24. Whereas States remain at liberty to negotiate or resolve particular aspects of a dispute brought before the Court ; whereas their freedom to do so is not incompatible with the Court’s exercise of its own functions ; and whereas the fact that the two Parties have entrusted another body with the task of defining the terms of the troop withdrawal in no way deprives the Chamber of the rights and duties pertaining to it in the case brought before it ;

25. Whereas the Chamber, while welcoming the fact that the Parties have been able to reach agreement on a ceasefire, and have thus brought to an end the armed actions which gave rise to the requests for the indication of provisional measures, is nonetheless faced with its duty under Article 41 of the Statute to ascertain for itself what provisional measures ought to be taken to preserve the respective rights of either Party ;

26. Whereas, moreover, the Heads of State of the Parties and the Ministers for Foreign Affairs of the ANAD have by no means rejected the notion of a troop withdrawal, but have merely postponed the question of the terms of such a withdrawal ;

27. Whereas the measures which the Chamber contemplates indicating, for the purpose of eliminating the risk of any future action likely to aggravate or extend the dispute, must necessarily include the withdrawal of

the troops of both Parties to such positions as to avoid the recrudescence of regrettable incidents ; whereas, however, the selection of these positions would require a knowledge of the geographical and strategic context of the conflict which the Chamber does not possess, and which in all probability it could not obtain without undertaking an expert survey ; and whereas in these circumstances the Chamber, while remaining seised of the question, notes that the Heads of State, acting in the framework of the ANAD, are shortly to define the detailed terms of the troop withdrawal which the Chamber considers it should indicate as a provisional measure ;

28. Whereas Burkina Faso has also requested the Chamber to indicate that

“each Party shall refrain from any act of territorial administration beyond the line adopted in 1975 by the Legal Sub-Commission of the OAU Mediation Commission” ;

whereas, however, Mali has claimed that the line in question corresponds in part or wholly to the frontier which would emerge from the submissions of Burkina Faso set out in its Memorial of 3 October 1985 ;

29. Whereas, so far as the administration of the disputed area is concerned, the Chamber does not, at the stage of provisional measures, consider itself empowered to modify the situation which prevailed before the armed actions leading to the filing of the Parties' requests ; and whereas it is necessary at all events to avoid prejudging in that connection the existence of any specific line ;

30. Whereas the decision rendered in these present proceedings must not prejudice any question relating to the merits of the case brought before the Chamber, and must leave intact the rights of the Parties in that respect ;

31. Whereas the Chamber must now indicate the measures which it considers to be necessary in the present instance ;

32. Accordingly,

THE CHAMBER,

unanimously,

1. *Indicates*, pending its final decision in the proceedings instituted on 20 October 1983 by the notification of the Special Agreement between the Government of the Republic of Upper Volta (now Burkina Faso) and the Government of the Republic of Mali, signed on 16 September 1983 and relative to the frontier dispute between the two States, the following provisional measures :

A. The Government of Burkina Faso and the Government of the Republic of Mali should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Chamber

or prejudice the right of the other Party to compliance with whatever judgment the Chamber may render in the case ;

- B. Both Governments should refrain from any act likely to impede the gathering of evidence material to the present case ;
- C. Both Governments should continue to observe the ceasefire instituted by agreement between the two Heads of State on 31 December 1985 ;
- D. Both Governments should withdraw their armed forces to such positions, or behind such lines, as may, within twenty days of the date of the present Order, be determined by an agreement between those Governments, it being understood that the terms of the troop withdrawal will be laid down by the agreement in question and that, failing such agreement, the Chamber will itself indicate them by means of an Order ;
- E. In regard to the administration of the disputed areas, the situation which prevailed before the armed actions that gave rise to the requests for provisional measures should not be modified ;

2. *Calls upon* the Agents of the Parties to notify the Registrar without delay of any agreement concluded between their Governments within the scope of point 1 D above ;

3. *Decides* that, pending its final judgment, and without prejudice to the application of Article 76 of the Rules, the Chamber will remain seised of the questions covered by the present Order.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this tenth day of January, one thousand nine hundred and eighty-six, in four copies, of which one will be placed in the archives of the Court, and the others transmitted respectively to the Government of Burkina Faso, to the Government of Mali, and to the Secretary-General of the United Nations for transmission to the Security Council.

(Signed) Mohammed BEDJAOUI,
President of the Chamber.

(Signed) Santiago TORRES BERNÁRDEZ,
Registrar.