

**INTERNATIONAL COURT OF JUSTICE**

**CASE CONCERNING THE FRONTIER DISPUTE  
(BURKINA FASO/NIGER)**

**COUNTER-MEMORIAL OF BURKINA FASO**

**20 JANUARY 2012**

*[Translation by the Registry]*

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## INTRODUCTION

0.1. The present Counter-Memorial is submitted in accordance with the Court's Order of 14 September 2010 fixing procedural time-limits in this case. It replies to the Memorial of the Republic of Niger dated 20 April 2011.

0.2. Burkina Faso must firstly point out that the Memorial of Niger places it in a difficult position, as it is based on a series of assertions and vague comments which are inconsistently argued and lack legal foundation and therefore only call for a cursory response. That is why the present Counter-Memorial is relatively brief, it being understood that Burkina Faso upholds all the arguments that it put forward in its Memorial, but does not consider it necessary to repeat them in full here.

0.3. Having made this point, it can be noted that the Memorial of Niger reveals:

- points of agreement between the Parties (Section 1);
- points of disagreement (Section 2); and
- lacunae (Section 3).

## SECTION 1 THE POINTS OF AGREEMENT BETWEEN THE PARTIES

0.4. There would actually appear to be few areas of disagreement in principle between Burkina and Niger. They agree that:

- the Court is called upon exclusively to confer the force of *res judicata* on the Parties' agreement in respect of the following sectors of the frontier that have already been demarcated:
  - “(a) the sector from the heights of N’Gouma to the astronomic marker of Tong-Tong;
  - (b) the sector from the beginning of the Botou bend to the River Mékrou”<sup>1</sup>;
- the 1987 Agreement cited in the Special Agreement indicates exhaustively the documents that are to be taken into consideration for the purposes of demarcating the frontier;
- it being understood that the boundary is delimited by the *Arrêté* of 31 August 1927 as clarified by its Erratum of 5 October 1927.

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<sup>1</sup>Article 2, paragraph 2, of the Special Agreement of 24 February 2009.

0.5. The table below sets out the Parties' agreement in principle on each of these points.

	Memorial of Niger	Memorial of Burkina
<p>1. <i>The Court is called upon to confer the force of res judicata on the Parties' agreement on the demarcated sectors of the frontier.</i></p>	<p>"It is on [Article 2 of the Special Agreement] that the Court is called upon to focus its attention in relation to the merits, in order . . . to place on record the Parties' agreement on the results of the work of the Joint Technical Commission on Demarcation of the Burkina Faso-Niger Frontier and, in so doing, to confer on that bilateral agreement between the two States <u>the force of res judicata</u>" (MN, p. 48, para. 3.22).</p>	<p>The Parties "only agreed [on the demarcated sectors, by the exchange of letters in 2009] to define their 'agreement', which they have requested the Court to <i>place on record</i>" (MBF, p. 90, para. 3.33).</p> <p>This is "an 'agreement' which the Parties would like to acquire <u>the force of res judicata</u>" (MBF, p. 91, para. 3.36).</p>
<p>2. <i>The boundary is delimited by the Arrêté of 31 August 1927 as clarified by its Erratum of 5 October 1927.</i></p>	<p>"The boundary between the two Colonies was fixed by the Erratum No. 2602/APA of 5 October 1927, rectifying Arrêté No. 2336 of 31 August 1927. The boundary established by those two instruments was <i>never changed until the accession of the two Colonies to independence</i>" (MN, p. 24, para. 1.32).</p> <p>"Neither of the two Parties contends that there was any change to the legal situation existing [between 1947 and 1960]. It follows that we have to go back to see what was the instrument which, on 5 September 1932, governed the boundaries of the two Colonies. That instrument was in fact the Erratum of 5 October 1927 to the Arrêté of 31 August 1927 fixing the boundaries of the Colonies of Upper Volta and Niger" (MN, p. 61, para. 5.3).</p> <p>"In order to determine what were the boundaries of the territory of the two States as at 5 August 1960, it is</p>	<p>"[T]he boundary between the Parties was fully defined in Arrêté général No. 2336 of 31 August 1927 which was superseded by the Erratum of 5 October 1927, and it <i>has never been modified since</i>" (MBF, p. 57, para. 2.8).</p> <p>"[T]he Parties have always considered their common frontier to be that which existed at the time of their accession to independence and that the frontier line in question could be determined by reference to the line described in the 1927 Arrêté and its Erratum" (MBF, p. 58, para. 2.9).</p> <p>"[T]he description of the line in the Arrêté and that in its Erratum differ in parts . . . consequently, preference should be given to the text of 5 October 1927, which is both subsequent to and more precise than that of 31 August" (MBF, p. 69,</p>

	<p>necessary to seek out the most recent legislative or regulatory acts of the colonial power having determined those boundaries. <i>The only ones to have been found are the Erratum 2602/APA of 5 October 1927 correcting Arrêté 2336 of 31 August 1927, which has, moreover, been consistently cited by the parties</i>” (MN, p. 61, para. 5.3).</p> <p>“This text was, however, never the subject of any addition, amendment or correction during the colonial period. It remained, at the time when the two States became independent, the only reference text for the determination of their common frontier” (MN, p. 104, para. 7.12).</p> <p>Regarding the “Téra sector”: “<i>[t]he only text from the colonial period determining the boundaries of the two Colonies in this area is the Erratum No. 2602/APA of 5 October 1927, which corrected Arrêté No. 2336 of the Governor-General of French West Africa of 31 August of the same year</i>” (MN, p. 83, para. 6.9).</p> <p>For the “Say sector”, “<i>the only text from the colonial period determining the boundaries of the two Colonies in the Say sector is the Erratum ..., correcting [the] Arrêté</i>” (MN, p. 103, para. 7.9).</p>	<p>para. 2.41).</p> <p>“[A] document issued by the Governor General of FWA describes in full the course of the boundary between the colonies of Upper Volta and Niger. It has neither been modified nor called into question since it was adopted. Furthermore, in the Agreement of 28 March 1987 cited in the Special Agreement, both Parties officially considered that the present frontier, in its entirety, was described in the 1927 Arrêté as clarified by its Erratum” (MBF, p. 58, para. 2.10).</p> <p>“[T]he Parties have determined by mutual agreement that the 1927 Arrêté is the only title they can rely on and, secondly, that same instrument . . . describes the entire common frontier” (MBF, p. 69, para. 2.40).</p>
<p>3. <i>The 1987 Agreement cited in the Special Agreement indicates exhaustively the documents that are to be taken into consideration for the purposes of demarcating</i></p>	<p>“[Articles 1 and 2 of the 1987 Agreement] state very precisely what is to be understood in this case by the application of the principle of ‘the intangibility of</p>	<p>“This shows the extreme importance of the Agreement of 28 March 1987 and of the instruments to which it refers for the purposes of settling the dispute submitted by the</p>

<p><i>the frontier.</i></p>	<p>boundaries” (MN, p. 60, para. 5.2).</p> <p>“For purposes of the practical application of that principle, the text of the 1987 Agreement, as referred to in the Special Agreement, relies on three criteria [the pieces of legislation from 1927 (Section 1); the 1960 IGN map (Section 2); any other relevant document accepted by joint agreement of the Parties (Section 3)]” (MN, p. 61, para. 5.2).</p> <p>“[T]he Agreement signed in Ouagadougou on 28 March 1987 . . . provided that the 1927 texts were to remain the bases for determining the frontier between the territories of Upper Volta and Niger” (MN, p. 24, para. 1.32).</p> <p>“In accordance with the general approach of the Republic of Niger regarding the principles applicable through the determination of the frontier in the present dispute — and in accordance with the terms of the 2009 Special Agreement and of the 1987 Agreement between the two States — it is thus <i>the text of the 1927 Erratum which will constitute the primary basis for determination of the course of the frontier</i> between the two States in this second sector” (MN, pp. 104-105, para. 7.12).</p> <p>“[T]he two States, aware of the limitations of the colonial texts, provided in the Agreement of 28 March 1987 for recourse to two <i>subsidiary criteria</i> [1960 IGN map, on the one hand;</p>	<p>Parties to the Court” (MBF, p. 9, para. 0.19).</p> <p>“[I]n the Agreement of 28 March 1987 on the demarcation of the frontier, they expressly enumerated the sources of law applicable for those purposes” (MBF, pp. 61-62, para. 2.20).</p> <p>“[By the 1987 Agreement, the Parties] established <i>the pre-eminence of the frontier title constituted by the Arrêté of 31 August 1927</i>, as clarified by its Erratum, over any other evidence of the frontier line” (MBF, pp. 61-62, para. 2.20).</p> <p>“The Agreement of 28 March 1987 . . . does not place on the same footing the 1927 <i>Arrêté</i> and its Erratum, on the one hand, and the 1960 IGN France map and any other document accepted by joint agreement of the Parties, on the other” (MBF, p. 66, para. 2.35).</p> <p>“[O]nly the 1960 IGN France map can be used to clarify the course of the frontier between the Parties. Nevertheless, it follows from the very text of the 1987 Agreement that it <i>may only</i></p>
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	<p>any document accepted by joint agreement of the Parties on the other hand]” (MN, p. 75, para. 5.13).</p> <p>“Conscious of the limitations of the colonial texts, Burkina Faso and Niger provided in the Agreement of 28 March 1987 for recourse to <i>subsidiary criteria</i>, among which the 1:200,000 map of the <i>Institut géographique national[e]</i>, 1960 edition, plays a pivotal role” (MN, p. 91, para. 6.16).</p>	<p><i>be used on a subsidiary basis”</i> (MBF, p. 71, para. 2.47).</p>
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0.6. *A priori*, the Parties therefore agree:

- on the subject of the dispute: it is to determine the course of those parts of the frontier that have not been demarcated and to place on record the Parties’ agreement on the two demarcated sectors; and
- on the law to be applied by the Court in the present case, as defined by Article 6 of the Special Agreement and the Agreement of 28 March 1987 to which that provision refers: in accordance with the letter and spirit of Article 2 of the 1987 Agreement, they agree that the frontier between the two countries is fixed by the *Arrêté* of the Governor-General of FWA as clarified by its Erratum of 5 October 1927, which represents the legal situation existing at the time of the Parties’ accession to independence and applicable in this case according to the principle of the intangibility of boundaries inherited from colonization, also explicitly mentioned in Article 6 of the Special Agreement.

## SECTION 2 THE POINTS OF DISAGREEMENT BETWEEN THE PARTIES

0.7. Nevertheless, when it comes to implementation, Niger seeks to neutralize the very principles that it admits are applicable, whether in respect of the pre-eminence of the Erratum of 5 October 1927 over any other document or the exhaustive nature of the list of other documents to which Article 2 of the Agreement of 28 March 1987 refers, should the *Arrêté* and its Erratum not suffice.

### 1. The pre-eminence of the 1927 *Arrêté* and its Erratum

0.8. Despite professing to agree with the principle established in Article 1 of the 1987 Agreement<sup>2</sup>, Niger refuses to acknowledge that, given that the frontier has been delimited by the Erratum, the Court’s task in the present case is — solely — to clarify its course when — and only when — that document does “not suffice”<sup>3</sup>; otherwise, it should confirm the course

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<sup>2</sup>See the table in para. 0.5 above.

<sup>3</sup>On the notion of “not sufficing”, see paras. 1.42-1.45 below.

described therein. In this respect, Niger's Memorial appears to have been designed to call into question the *Arrêté* and its Erratum, despite the fact that these have been recognized by the Parties as the title on which the Court should rely in order to determine the course of the disputed frontier.

0.9. It seeks to present the Erratum as:

- “particularly rudimentary”<sup>4</sup>, “particularly succinct”<sup>5</sup>, “particularly lapidary”<sup>6</sup> or “summary and imprecise”<sup>7</sup>;
- erroneous<sup>8</sup>, “hav[ing] no basis in the situation prior to [its adoption]”<sup>9</sup> and “never confirmed in the subsequent practice”<sup>10</sup>;
- contested and “criticized from the outset by the colonial officials and authorities of the two Colonies”<sup>11</sup>.

0.10. Moreover, Niger does not hesitate to assert that “the text of the Erratum should not be read too literally . . .”<sup>12</sup> and, more explicitly still, “that there are well-established reasons for *not following it* in certain respects”<sup>13</sup>. This is contrary to the Parties' mutual understanding, as recorded in their 1987 Agreement and reiterated in the Special Agreement. Moreover, this would be the case even in the absence of a formal agreement between the Parties stating as such: as Niger recognizes in the same paragraph of its Memorial, the Erratum “remained, at the time when the two States became independent, the only reference text for the determination of their common frontier”<sup>14</sup>; it therefore constitutes the legal title — a notion that Niger is very wary of mentioning<sup>15</sup> — on which the two Parties and the Court must rely in order to determine the frontier. And, as the Court firmly recalled in the case of *Cameroon v. Nigeria*, “where there is a conflict between title and *effectivités*, preference will be given to the former”<sup>16</sup>.

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<sup>4</sup>MN, p. 65, para. 5.6; see also p. 84, para. 6.10.

<sup>5</sup>MN, p. 83, para. 6.9; see also p. 104, para. 7.11.

<sup>6</sup>MN, p. 116, para. 7.34.

<sup>7</sup>MN, p. 66, para. 5.6; see also p. 86, para. 6.11.

<sup>8</sup>Cf. Subsection A. “There was no justification for continuing the inter-colonial boundary to the village of Bossébangou” (MN, pp. 105-111, paras. 7.14-7.24); see also p. 65, para. 5.5; p. 83, para 6.9.

<sup>9</sup>MN, p. 116, para. 7.35; see also p. 120, para 7.39.

<sup>10</sup>*Ibid.*, see also p. 108, para. 7.18.

<sup>11</sup>MN, p. 66, para. 5.6; see also pp. 26-28, para. 2.3.

<sup>12</sup>MN, p. 115, para. 7.32.

<sup>13</sup>MN, p. 105, para. 7.12 (emphasis added).

<sup>14</sup>*Ibid.*

<sup>15</sup>The word “title” does not appear at all in the Memorial of Niger with this meaning.

<sup>16</sup>*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 415, para. 223; see also *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, pp. 586-587, para. 63.

## 2. The exhaustive list of documents to be taken into consideration should the Erratum not suffice

0.11. As Niger recognizes in Chapter V of its Memorial, which is devoted to “the legal bases for determination of the frontier”, the Agreement of 28 March 1987, to which the Special Agreement refers, states “very precisely what is to be understood in this case by the application of the principle of ‘the intangibility of boundaries’, that is to say the *uti possidetis* at the date of independence of the two States in 1960”; and, as it goes on to explain, “[f]or purposes of the practical application of that principle, the text of the 1987 Agreement, as referred to in the Special Agreement, relies on three criteria”; “criteria” might not be the best choice of word, but it means the following documents or series of documents:

- the pieces of legislation from 1927 — the *Arrêté* of 31 August and its Erratum of 5 October;
- the 1:200,000-scale IGN map of 1960; and
- “any other relevant document accepted by joint agreement of the Parties”.

0.12. On this last point, Niger agrees that “[i]n the course of the Joint Commission’s work, no document was accepted on this basis”<sup>17</sup>. Unless the exchange of letters of 29 October 2009 and 2 November 2009 qualifies as such, there is actually no other document accepted by joint agreement of the Parties: consequently, only the 1960 IGN map can be taken into account and even then only if the modified *Arrêté* does not suffice. In fact, having conceded this point, Niger does not hesitate to give precedence to:

- the 1960 IGN map over the Erratum, including when the latter is perfectly clear<sup>18</sup>;
- maps from 1915 and 1927 over the Erratum and the 1960 map<sup>19</sup>;
- various documents, which it believes prove the *effectivité* of Niger’s presence in certain disputed territories, over both the map and the Erratum<sup>20</sup>.

0.13. The argument deployed in Niger’s Memorial for the sector between the point where the frontier “leaves the salient and enters the Botou Loop”<sup>21</sup> illustrates this tendency to reinvent a frontier line on the basis of various documents whose relevance is ruled out by the 1987 Agreement. Claiming the wording of the Erratum to be lapidary<sup>22</sup>, when it is in fact perfectly clear, Niger dismisses the *Arrêté* in favour of the IGN map<sup>23</sup>, only to challenge it in turn and maintain its claim to “a frontier in two straight-line sections, as it appears on those maps and sketch-maps of the colonial period”<sup>24</sup>. It therefore only has recourse to the map to

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<sup>17</sup>MN, p. 76, para. 5.15; similarly, see MBF, p. 71, para. 2.46.

<sup>18</sup>MN, p. 93, para. 6.21 or p. 97, paras. 6.24-6.25.

<sup>19</sup>MN, p. 114, para. 7.30.

<sup>20</sup>MN, p. 93, para. 6.20; p. 94, para. 6.22; pp. 95-96, para. 6.23; p. 110, para. 7.21; p. 114, paras. 7.30-7.31; or p. 120, para. 7.40.

<sup>21</sup>MN, pp. 116-120, paras. 7.34-7.40.

<sup>22</sup>MN, p. 116, para. 7.34.

<sup>23</sup>MN, p. 116, para. 7.35.

<sup>24</sup>MN, p. 120, para. 7.40; see also, for the sector from Tong-Tong to Tao, pp. 91-92, para. 6.18 and pp. 92-93, para. 6.20 or, for Petelkolé, p. 94, para. 6.22.

the extent that it backs up its claims. Moreover, Niger is clear about the status of the 1960 map: in its view, “unless we find 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”<sup>25</sup>.

0.14. As a result of these disagreements about how the applicable rules are to be implemented, differences of opinion about the delimitation of the frontier have arisen and it is these that lie at the heart of the present dispute. Along the course of the contested line the Parties’ claims only coincide on three points: Tong-Tong, Tao — although its co-ordinates are incorrect in Niger’s version<sup>26</sup> — and the point marking the beginning of the Botou bend (the point known as Tyenkilibi)<sup>27</sup>.

0.15. The points of disagreement between the Parties can be summarized as follows:

— in the *Téra sector*<sup>28</sup>:

- According to Burkina, two straight lines connect the three frontier points in this sector (the Tong-Tong marker, the Tao marker and Bossébangou)<sup>29</sup>.
- According to Niger, from Tong-Tong to Tao the line follows not one but two straight-line sections, since it passes through the Vibourié marker before reaching the Tao marker; from there, the frontier line “basically” follows the line on the IGN map<sup>30</sup> — to the extent permitted by the liberties taken by Niger and “justified” by the *effectivités* that it claims — as far as Bangaré, before following the IGN line and stopping at “the tripoint of the former boundaries of the *cercles* of Say, Tillabéry and Dori”<sup>31</sup> rather than descending, as the Erratum nevertheless stipulates, to the River Sirba at Bossébangou.

— In the *Say sector*<sup>32</sup>:

- According to Burkina, from the point where the frontier reaches the River Sirba at Bossébangou (a point known as “P”<sup>33</sup>), the line forms a salient consisting of three

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<sup>25</sup>MN, p. 91, para. 6.16; see also MN, p. 93, para. 6.20 or p. 120, para. 7.40.

<sup>26</sup>Co-ordinates: 14° 03' 02.2" N, 00° 22' 52.1" E (MN, p. 94, para. 6.22); the co-ordinates, measured by GPS by Burkina, originate from the Nevière data sheet of 1927, Ann. MBF 41, and are as follows: 14° 03' 04.7" N; 0° 22' 51.8" E (see MBF, p. 104, para. 4.16).

<sup>27</sup>The first and last of these points are fixed by the agreement between the Parties (record [*procès-verbal*] of 3 July 2009) embodied by the exchange of letters of 29 October 2009 and 2 November 2009. In actual fact, therefore, only one single point on the disputed line, the Tao marker, is the subject of an agreement between the Parties.

<sup>28</sup>Burkina uses the term “Téra sector” for convenience, but believes it to be a simplification that should be used with great caution (see paras. 3.14-3.17 below); a more correct term would be: “the Dori/Téra sector”.

<sup>29</sup>MBF, p. 132, para. 4.82.

<sup>30</sup>MN, “From the Tao astronomic marker to Bangaré”, pp. 93-97, paras. 6.21-6.23.

<sup>31</sup>MN, p. 100, para. 6.26.

<sup>32</sup>Like “Téra sector” (see fn. 28 above), this term should be used with caution; again, Burkina uses it purely for convenience.

<sup>33</sup>MBF, p. 133, para. 4.83.

sections, the first turning back up the River Sirba to a point known as “P1”, from where the second runs in a north-westerly direction as far as a point “P2” and joins the third, which descends in a straight line to the south until it meets the intersection of the River Sirba with the Say parallel, a point which marks the end of the salient<sup>34</sup>. Niger’s description is radically different. Moreover, it does not envisage an actual salient<sup>35</sup>, since it has a single straight line, running in a south-westerly direction, connecting two points that are, furthermore, different from those in the Erratum: the line claimed by Niger therefore departs from the “tripoint of the former boundaries of the *cercles* of Say, Tillabéry and Dori” (and not from Bossébangou), reaching the Sirba *approximately at the level of* (and not at its intersection with) the Say parallel<sup>36</sup>.

- For its part, the last section of the frontier between the end of the salient and the beginning of the Botou bend (Tyenkilibi)<sup>37</sup> is described by Burkina, in accordance with the Erratum, as consisting of a single straight line, whereas Niger draws it as two straight-line sections, the line changing direction at a frontier marker on the road from Niamey to Ouagadougou<sup>38</sup>.

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<sup>34</sup>For an illustration, see MBF, p. 153, sketch-map No. 14.

<sup>35</sup>Niger only uses the word salient in inverted commas: given that its reasoning is based on the previous section terminating at “the tripoint of the former boundaries of the *cercles* of Say, Tillabéry and Dori”, it regards the word salient as problematic, making “no sense in relation to the inter-colonial boundary”: “the frontier cannot create a salient in this area. It simply turns in a south-westerly direction from that ‘tripoint’” (MN, p. 112, para. 7.26).

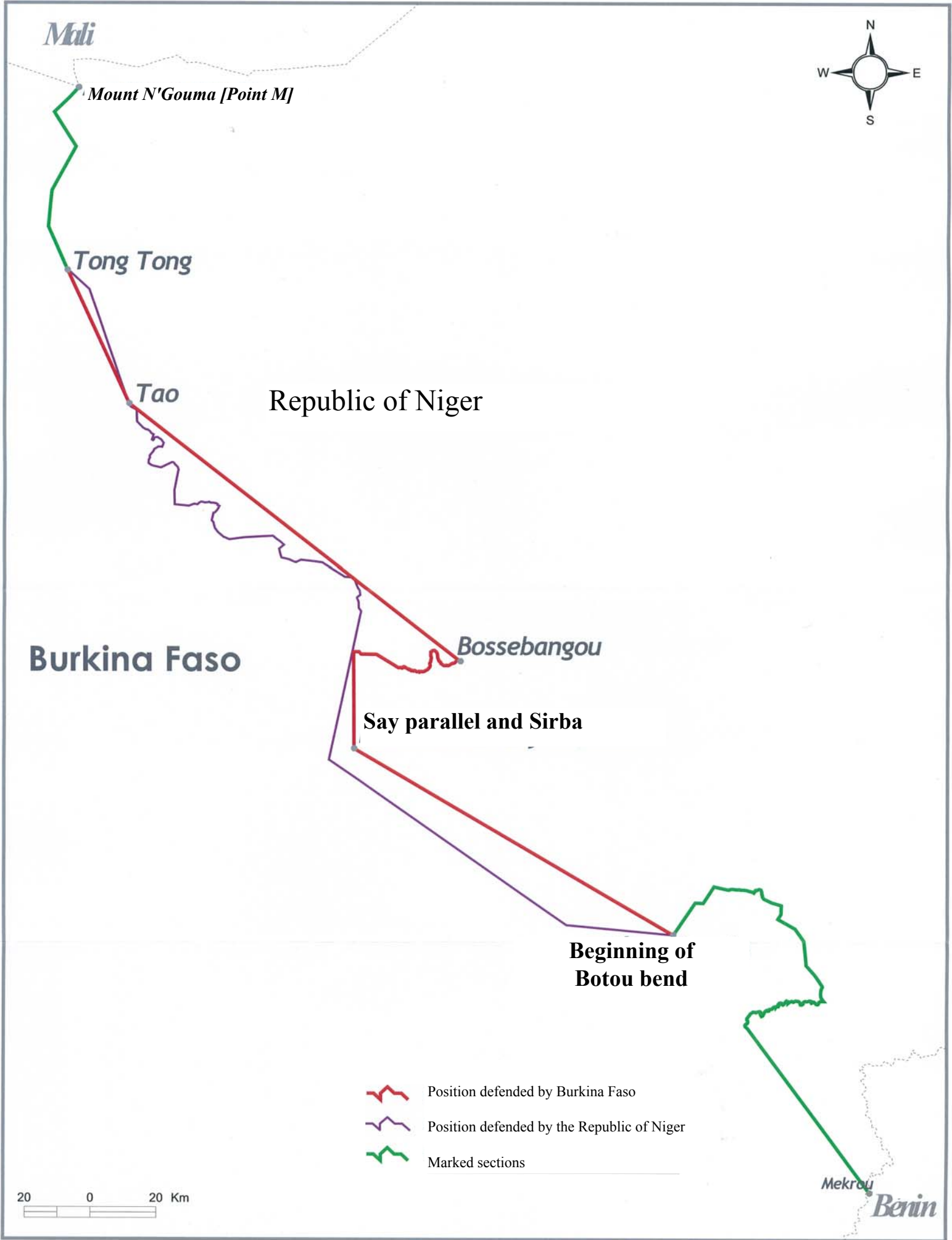
<sup>36</sup>MN, pp. 115-116, paras. 7.32-7.33.




<sup>37</sup>The co-ordinates given by Niger for this last point differ very slightly from those accepted by Burkina: the difference is one latitudinal second — see fn. 27 above.

<sup>38</sup>MN, p. 118, para. 7.38.

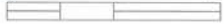
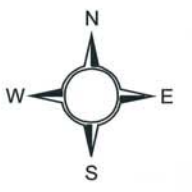
### Position of the Parties

Scale 1:1,000,000



-  Position defended by Burkina Faso
-  Position defended by the Republic of Niger
-  Marked sections

20 0 20 Km

Mekrou  
Benin

### SECTION 3 THE LACUNAE IN NIGER'S ARGUMENT

0.16. Reference should be made to one final aspect of Niger's Memorial: its lacunae. It actually fails to address, or barely touches on, a number of points in the present case, some of which are significant.

0.17. The following are of particular note:

- Niger's rather limited exposition of the origins of the 1987 Agreement<sup>39</sup>, its analysis of which is practically non-existent<sup>40</sup>;
- the extremely brief reference to the negotiations to which the dispute has given rise<sup>41</sup>;
- the cursory treatment reserved for the marked sections of the frontier<sup>42</sup> (moreover, the submissions in Niger's Memorial only contain a description of the disputed portion of the line and not the whole of the line, including the marked sections, to which Niger does not refer, even though the Special Agreement includes them in the subject of the case submitted to the Court<sup>43</sup>); and
- Niger's almost total silence<sup>44</sup> on the consensual line of 1988<sup>45</sup>, which nevertheless shows that its representatives believed at the time that it was perfectly possible to determine the frontier between the two countries on the basis of the instruments referred to in the 1987 Agreement.

0.18. Given that these various points are not developed in Niger's Memorial, Burkina sees no point in returning to them in the present Counter-Memorial. However, it wishes to state categorically that it does not intend to renounce *any* of the arguments that it put forward in its own Memorial.

### SECTION 4 STRUCTURE OF THE COUNTER-MEMORIAL

0.19. The complete absence of methodology that characterizes Niger's Memorial is so blatant and leads so systematically to deep flaws in its submissions that it seemed necessary to devote the whole of the first chapter of the present Counter-Memorial to this issue. Furthermore, it would seem worthwhile to point out the contradictions between the positions adopted by Niger in negotiations and those adopted in the Memorial, given that they are so

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<sup>39</sup>MN, p. 40, para. 3.3 — comp. MBF, pp. 43-44, paras. 1.61-1.65.

<sup>40</sup>MN, p. 75, para. 5.13 — comp. MBF, pp. 71-73, paras. 2.45-2.50; or MN, pp. 60-61, para. 5.2 — comp. MBF, pp. 56-61, paras. 2.4-2.19.

<sup>41</sup>MN, pp. 39-44, paras. 3.1-3.11 — comp. MBF, pp. 32-54, paras. 1.34-1.88.

<sup>42</sup>MN, p. 46, para. 3.17 and p. 48, para. 3.22 — comp. MBF, pp. 78-89, paras. 3.11-3.30.

<sup>43</sup>MN, pp. 122-123 — comp. MBF, pp. 160-162.

<sup>44</sup>See, however, MN, p. 40, para. 3.4, where the meeting of technical experts is mentioned in passing.

<sup>45</sup>MBF, pp. 45-46, paras. 1.67-1.69.

glaring (Chapter II). Having provided these clarifications, Burkina will return, in two separate chapters, to the determination of the two unmarked sections of the frontier, in the Téra sector (Chapter III) and the Say sector (Chapter IV), in accordance with the provisions of the 1987 Agreement as cited in the Special Agreement.



## CHAPTER I

### THE METHODOLOGICAL SHORTCOMINGS OF NIGER'S MEMORIAL

1.1. One might have expected the Memorial of the Republic of Niger, which includes five general chapters before turning to the issue of the determination of the frontier in the “Téra sector” (Chapter VI) and the “Say sector” (Chapter VII), to be based on a clearly explained and rigorously implemented method. Far from it: Chapter V<sup>46</sup> boasts of presenting “[t]he legal bases for determination of the frontier”, but the “methodology adopted” — which includes a clear description of the course of the frontier in the Téra sector<sup>47</sup>, de facto repeated for the Say sector<sup>48</sup> — disregards these “legal bases” in favour of a muddled and selective approach, whose only discernible “methodology” seems to be to seek a line that is favourable to Niger, however arbitrary and devoid of legal justification that might be.

1.2. The methodological shortcomings of Niger's argument are reflected in particular in:

- a flawed analysis of the content and scope of the 1927 Erratum (Section 1);
- approximations and errors in the implementation of Article 2 of the Agreement between the Parties of 28 March 1987 (Section 2).

### SECTION 1

#### A FLAWED ANALYSIS OF THE CONTENT AND SCOPE OF THE ERRATUM OF 5 OCTOBER 1927

1.3. As was pointed out in the introduction to the present Counter-Memorial<sup>49</sup>, Niger indicates that it accepts that the Erratum of 5 October 1927 to the *Arrêté* of the Governor-General of FWA of 31 August of the same year, fixing the boundaries of the Colonies of Upper Volta and Niger, is the fundamental document delimiting the frontier between the two countries. Nevertheless, it makes every possible effort to rule out its application. In particular:

- it refuses to accept that it fixes the new boundaries between the two Colonies (1); and
- it wrongly attempts to interpret the protests of certain local officials as proof that it was not observed during the colonial period, whereas, like many of the incidents that took place after the adoption of the *Arrêté* and the Erratum, they are actually evidence that this delimitation existed (2).

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<sup>46</sup>MN, pp. 60-78.

<sup>47</sup>“A. Methodology adopted” (MN, pp. 82-91).

<sup>48</sup>MN, pp. 104-105, paras. 7.9-7.13.

<sup>49</sup>See paras. 0.4-0.6.

## 1. The Erratum fixes the territorial boundaries of Upper Volta and Niger

1.4. One of the postulates on which Niger's thesis rests is that the purpose of the *Arrêté* and its Erratum was not to effect a delimitation between Upper Volta and Niger but to effect a transfer of *cantons* from one Colony to the other: certain *cantons* of Dori *cercle* and all those of Say *cercle* (with the exception of Gourmantché Botou *canton*), all of which were previously part of Upper Volta, had apparently been transferred to Niger with their boundaries unchanged<sup>50</sup>. The reasoning is curious: according to Niger, the 1927 *Arrêté* was purely an implementing text of the Decree of 28 December 1926, which effected a transfer of *cantons*:

“It will be recalled that the justification for the *Arrêté* of 31 August 1927 lay in the Decree of the President of the French Republic of 28 December 1926, ‘transferring the administrative centre of the Colony of Niger and providing for territorial changes in French West Africa’. [Quotation from Article 2 of that decree.] It was on the basis of this Decree that, a few months later, the *Arrêté* of 31 August 1927 and its Erratum of 5 October 1927 were adopted. The purpose of these texts could only have been to transfer the above-mentioned *cantons*.”<sup>51</sup>

1.5. It is this link between the two texts, supported by the use of preparatory works, that leads Niger to assert that the *Arrêté* also serves purely and simply to effect a transfer of territories, adding that “the 1927 *Arrêté* . . . could not conceivably have been in contradiction with that Decree, since it was from it that it derived its legitimacy”<sup>52</sup>:

“Thus we should not lose sight of the essential point: the purpose of the 1927 *Arrêté* and its Erratum was to transfer from one Colony to the other a *cercle* composed of *cantons*. The texts confirm this. The 1927 *Arrêté* and its Erratum were adopted pursuant to the Decree of 28 December 1926.”<sup>53</sup>

1.6. Therefore, still according to Niger,

“[t]he new boundary was defined as *a series of juxtaposed cantonal boundaries*, themselves composed of a series of village and/or hamlet boundaries. In sparsely populated areas, the *canton* boundaries were quite vague: for example on rocky hillsides and infertile plateaux, and in open pastureland.”<sup>54</sup>

It adds:

“There was thus no question of drawing geometric lines but of incorporating *cantons* into the territory of each Colony. Where the boundaries of those *cantons* reflected occupation on the ground by the local people (in villages), they did not follow straight lines. That was the case in particular for

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<sup>50</sup>This “logic” of *canton* transfers probably explains why Niger uses the term “tripoint” to denote the meeting-point of the *cercles* of Dori, Say and Tillabéry, through which it believes the frontier to pass (MN, p. 108, para. 7.17; p. 110, para. 7.20; or p. 111, paras. 7.22 and 7.24).

<sup>51</sup>MN, p. 84, para. 6.11.

<sup>52</sup>MN, p. 111, para. 7.22.

<sup>53</sup>MN, p. 70, para. 5.10 (underlining in the original text).

<sup>54</sup>MN, p. 80, para. 6.6 (emphasis added).

Tillabéry *cercle*, contrary to Say *cercle*, which was largely uninhabited at the time.”<sup>55</sup>

1.7. This — erroneous — view is the pretext for introducing a bogus methodology:

“we know the names of the *cantons* which were transferred. This can give two valuable indications. The first concerns the content of those *cantons* . . . , where these can be found on the administrative documents of the colonial era. As will be seen later, indications of this kind, although few in number, can supplement the summary description in the *Arrêté* and Erratum of 1927. The second indication is a presumption that the areas composing these *cantons* . . . did not in principle follow abstract lines (whether curved or straight), but were based on land occupation and followed the configuration or nature of the ground.”<sup>56</sup>

1.8. There are numerous objections to this analysis.

1.9. As Niger recognizes, the *canton* boundaries themselves were often quite vague<sup>57</sup> and, in this part of the French colonial empire at least, were never the subject of a formal delimitation text, to the extent that Niger itself has to concede that “the . . . possibilities offered by this approach” are “modest”<sup>58</sup>. The reply from the FWA Geographical Department to a request made in 1938 by the Director of Political and Administrative Affairs for a sketch-map of the region<sup>59</sup> shows that such an approach only leads to deadlock:

“I have the honour to inform you that it is not possible at present for the Geographical Department to produce an accurate sketch-map as requested (showing the division into *cantons* of Koutiaia, Gao, Fada N’Gouma, Say, Tillabéry, Zinder and Gouré *cercles* and Dosso, Gaya and Filingue subdivisions), due to a lack of information.

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.*”<sup>60</sup>

Moreover, despite insistently hammering home this thesis of a simple transfer of *cantons* from one Colony to the other, Niger is forced to admit that “notwithstanding the wish frequently expressed by officials of the two Colonies, the course of the boundary was never

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<sup>55</sup>MN, p. 72, para. 5.10.

<sup>56</sup>MN, p. 86, para. 6.11; see also MN, pp. 90-91, para. 6.15.

<sup>57</sup>MN, p. 80, para. 6.6.

<sup>58</sup>MN, p. 91, para. 6.15.

<sup>59</sup>Letter No. 418 AP/2 from the Director of Political and Administrative Affairs of the Government-General to the Military *Chef du Cabinet* regarding a sketch-map of *cantons* in Fada N’Gouma, Say and Tillabéry *cercles*, amongst others, 7 June 1938, Ann. CMBF 5.

<sup>60</sup>Note No. 521 CM2 from the FWA Geographical Department to the Director of Political and Administrative Affairs of the Government-General regarding a sketch-map of *cantons* in Fada N’Gouma, Say and Tillabéry *cercles*, amongst others, 25 June 1938, Ann. CMBF 6 [emphasis added].

clarified by a new text so as to correspond more closely with the actual boundaries of the *cantons* in practice”<sup>61</sup>.

1.10. This refusal to regard the *Arrêté* and its Erratum as fixing the boundary between the two Colonies has a remarkable consequence: Niger completely refrains from using the word “title” to refer to these fundamental instruments, although it admits that they established the boundary between the two Colonies and that this was never changed until independence<sup>62</sup>. They are referred to as “the most recent legislative or regulatory acts of the colonial power having determined those boundaries”<sup>63</sup>; the Erratum is the “instrument which . . . governed the boundaries of the two Colonies”<sup>64</sup>, the “only reference text for the determination of their common frontier”<sup>65</sup> and the “only text from the colonial period determining the boundaries of the two Colonies”<sup>66</sup>.

1.11. Such an instrument very precisely constitutes a territorial title, “that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights”<sup>67</sup>. As the Parties and the Chamber of the Court acknowledged in the *Burkina/Mali* case, “the title which is accorded pre-eminence in the [French] colonial system is the legislative and regulative title”<sup>68</sup>, which is precisely the status of the 1927 Erratum. Moreover, in the same case, the Chamber of the Court pointed out “that the 1927 Order does not directly concern the boundary between Sudan and Upper Volta, but only the boundary between Upper Volta and Niger, and that for the purposes of [that] case, the Chamber [was] consulting the Order solely as evidence which may shed some light on the intentions of the colonial power concerning the course of the boundary between French Sudan and Upper Volta”<sup>69</sup>. By contrast, in the present case the *Arrêté* and its Erratum would appear to constitute the very basis for identifying the Parties’ respective territorial limits and, as the Chamber also recalled in 1986: “The purpose of the 1927 Order was to fix the boundaries between the colonies of Upper Volta and Niger”<sup>70</sup>.

1.12. This is also perfectly clear from the very title of the *Arrêté* and its Erratum, both of which seek to *fix the boundaries* of the Colonies of Upper Volta and Niger — refuting Niger’s inconsistent allegation that “[t]he purpose of these texts could only have been to transfer the above-mentioned *cantons*”<sup>71</sup>. Their purpose was both different from and complementary to that of the Decree of the President of the French Republic of 28 December 1926, “transferring the administrative centre of the Colony of Niger and providing for territorial changes in French West Africa”. In fact, once this transfer — the

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<sup>61</sup>MN, p. 91, para. 6.16.

<sup>62</sup>MN, p. 24, para. 1.32.

<sup>63</sup>MN, p. 61, para. 5.3.

<sup>64</sup>MN, p. 62, para. 5.3.

<sup>65</sup>MN, p. 104, para. 7.12.

<sup>66</sup>MN, p. 83, para. 6.9 and p. 103, para. 7.9.

<sup>67</sup>*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54; see also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, pp. 388-389, para. 45.

<sup>68</sup>*Ibid.*, p. 582, para. 53.

<sup>69</sup>*Ibid.*, p. 590, para. 69.

<sup>70</sup>*Ibid.*, p. 642, para. 167.

<sup>71</sup>MN, p. 84, para. 6.11 — see para. 1.4 above.

purpose of the Decree of 28 December 1926 — had been decided, it was necessary to determine the course of the new inter-colonial boundary; this is precisely the purpose of the *Arrêté* and its Erratum.

1.13. Indeed, this was explicitly provided for in Article 2, paragraph 2, of the Decree of the President of the Republic:

“An *Arrêté* of the Governor-General in Standing Committee of the Government Council shall determine *the course of the boundary* of the two Colonies in this area.”<sup>72</sup>

This is what is done by the *Arrêté* of the Governor-General of FWA of 31 August 1927, the third citation of which refers explicitly to the Decree of 28 December 1926.

1.14. Moreover, this was also the understanding of the Chamber of the Court in its Judgment of 12 July 2005 in the case concerning the *Frontier Dispute (Benin/Niger)*:

“[The 1927 *arrêté*] was adopted by the Governor-General following, and as a consequence of, the decree of 28 December 1926 incorporating the *cercle* of Say into the colony of Niger (created some years earlier). It was thus for the Governor-General to define the boundaries between the colonies of Haute-Volta and Niger, in the exercise of his power to define the boundaries of the *cercles*: that was the purpose of the *arrêté* of 31 August 1927.”<sup>73</sup>

1.15. It is therefore true that “[i]t was on the basis of this Decree that, a few months later, the *Arrêté* of 31 August 1927 and its Erratum of 5 October 1927 were adopted”<sup>74</sup>.

1.16. The preparatory work for the *Arrêté* also leaves no doubt that this was the case:

— in a letter dated 2 April 1927 to the Governor of Niger regarding the incorporation of certain territories of the Colony of Upper Volta into Niger, the Governor-General of FWA acknowledges receipt of the letter of 19 February 1927 from the Governor of Niger together with the appended Records of Agreement and adds:

“Once the Nevières mission has been able to establish the course of the *new boundary* on the ground in the Botou region, I would be grateful if you could send me a draft *arrêté* established *in accordance with the procedure provided for in the above Decree of 28 November [sic] 1926*”<sup>75</sup>;

— furthermore, the two Records of Agreement that were appended to the Governor of Niger’s letter have just one citation: “Having regard to the Decree dated the twenty-eighth of December, one thousand nine hundred and twenty-six”; and

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<sup>72</sup>Ann. MBF 26 (emphasis added).

<sup>73</sup>*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 146, para. 135; see also p. 113, para. [35]: “An *arrêté général* of 31 August 1927 and the *erratum* thereto of 5 October of the same year determined the boundary between the colonies of Haute-Volta and Niger” (same wording p. 116, para. 39 or p. 145, para. 131 of the Judgment); or again p. 147, para. 136: “an *arrêté* whose purpose, as was clear from its title, was to fix the boundary between Niger and Haute-Volta”.

<sup>74</sup>MN, p. 84, para. 6.11.

<sup>75</sup>Ann. CMBF 1 (emphasis added).

— a letter dated July 1927 from the Director of Political and Administrative Affairs of the Standing Committee of the Government Council regarding the boundaries between Upper Volta and Niger states:

“Report No. 40, which was presented to the Standing Committee of the Government Council at its meeting of 22 January 1927, announced that a draft *arrêté* would subsequently be submitted to the committee to determine, as proposed by the Lieutenant-Governors concerned and *in accordance with the terms of the Decree of 28 December 1926, the precise boundary of the Colonies of Niger and Upper Volta*, in the area that has thus been reorganized.

I *therefore* have the honour of sending you this draft *arrêté*, which has been established in accordance with the following Records of Agreement: the first dated 2 February 1927, determining the boundaries of the new Tillabéry *cercle* with Upper Volta; the second dated 10 February 1927, fixing the boundaries of Say *cercle* and Upper Volta; and the third dated 9 May 1927, indicating the boundaries of Botou *canton* with that same Colony.

Should these provisions meet with your approval, I would be very grateful, Governor-General, if you could sign the enclosed draft *arrêté* in Standing Committee of the Government Council.”<sup>76</sup>

1.17. However, it is not true that “[t]he purpose of these texts could only have been to transfer the above-mentioned *cantons*”<sup>77</sup>: the transfer having been effected pursuant to the Decree, the *Arrêté* and its Erratum draw the appropriate conclusions and determine the resulting new inter-colonial boundaries, as expressly stipulated by the Decree. In fact, as Burkina noted in its Memorial<sup>78</sup>, the *Arrêté* itself states that, “[t]he boundaries of the Colonies of Niger and Upper Volta shall . . . be determined as follows”<sup>79</sup>; its intention is not therefore to describe boundaries between *cercles* or *cantons* but rather those between the two Colonies. Moreover, according to Niger, the Erratum was adopted precisely to clarify the difference between inter-colonial boundaries and boundaries between *cercles*, which had been confused in the *Arrêté* of 31 August<sup>80</sup>.

1.18. Moreover, the local officials expressly note, contrary to what Niger is now claiming, that the *Arrêté* and its Erratum do not speak in terms of *cantons* but of boundaries.

1.19. Thus, in a letter dated 9 August 1929 to his counterpart in Tillabéry, the Commander of Dori *cercle*, Taillebourg, who was complaining about the disadvantages

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<sup>76</sup>Ann. CMBF 2 (emphasis added); Burkina has not found either report No. 40 or the draft *arrêté* that is described as being enclosed with the letter (the wording of which was probably identical to the version that was finally adopted on 31 August of the same year).

<sup>77</sup>MN, p. 84, para. 6.11.

<sup>78</sup>MBF, p. 137, para. 4.95.

<sup>79</sup>Article 1 of the *Arrêté* of 31 August 1927.

<sup>80</sup>See MN, p. 20, para. 1.26 and p. 64, para. 5.5; see also MBF, p. 137, para. 4.95. For a different explanation, which nevertheless complements the one put forward by Niger, see *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 147, para. 136.

resulting from “the 1927 delimitation”<sup>81</sup> and proposing adjustments to it, made the following very precise clarification:

“Of course, the *Arrêté* and the Erratum signed by the Governor-General no longer refer to *cantons* but only to boundaries; and that, I acknowledge, is crucial.”<sup>82</sup>

1.20. Similarly, in a letter dated 14 August 1929, the same Commander of Dori *cercle* sent a copy of his letter of 9 August to the Governor of Upper Volta in which he notes (with regret) “that the list of *cantons* [drawn up in the Brévié-Lefilliatre Record of Agreement<sup>83</sup>] has not been recorded in the *Arrêté* and the Erratum of delimitation” while considering that “it is logical to think that Volta has transferred *cantons* to Niger and that it was the boundaries of those *cantons* that were adopted as the boundaries of the two Colonies”<sup>84</sup>; however, this is not the case, a fact that he also laments in a letter of the same day again to the Commander of Tillabéry *cercle*, in which he notes that the decision on delimitation has been made; therefore, he adds: “I realize that my request has a weak foundation”<sup>85</sup>. The same is true of Niger’s argument, which appropriates the position of Commander Taillebourg, without indicating that this was not a description of the situation resulting from the *Arrêté* but a criticism of it<sup>86</sup>.

1.21. Moreover, and this is another of the numerous inconsistencies in Niger’s position, Niger acknowledges that “[i]t was . . . solely on the basis of the three Records of Agreement of 2 February, 10 February and 9 May 1927<sup>[87]</sup> that the *new boundaries* of the two Colonies resulting from these territorial changes *were subsequently described* in *Arrêté* No. 2336 of 31 August 1927”<sup>88</sup>. In so doing, it recognizes:

- that Commander Taillebourg was not heard;
- that the 1927 *Arrêté* is the consequence of the territorial changes resulting from the transfer of certain *cantons* to Niger; and
- that it describes the *new boundaries* of the two Colonies resulting from this.

1.22. Neither Burkina nor Niger has annexed to its Memorial documents reacting directly to the original *Arrêté* and none is in Burkina’s possession. Nevertheless, Niger relies

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<sup>81</sup>Thus clearly showing that he considered the officials on the ground to be bound by it — see para. 1.32 above. Moreover, the Commander of Dori *cercle* adds: “The resident of Téra, *bound by the texts*, I acknowledge . . .” (MN, Anns., Series C, No. 24). The version of the annex provided by Niger is truncated.

<sup>82</sup>*Ibid.* (emphasis added).

<sup>83</sup>Commander Taillebourg is referring here to the list of *cantons* included in the Brévié-Lefilliatre Record of Agreement of 2 February 1927 (Ann. MBF 30), which he mentioned earlier in the letter.

<sup>84</sup>MN, Anns., Series C, No. 25.

<sup>85</sup>MN, Anns., Series C, No. 27.

<sup>86</sup>On this point see Subsection 2 below.

<sup>87</sup>Anns. MBF 30, 31 and 33 respectively.

<sup>88</sup>MN, p. 19, para. 1.26 (emphasis added).

heavily on what it calls “the Delbos/Prudon Agreement of 1927”<sup>89</sup>, thus suggesting that this was an alternative to the Erratum<sup>90</sup>. However:

1. it states that it is unable to produce the text of that “agreement”<sup>91</sup>;
2. the documents said to have formed certain parts of it and which Niger produces are themselves incomplete<sup>92</sup>;
3. these documents do not contain any criticism of the original *Arrêté* of 31 August;
4. Niger maintains that these documents were not taken into account in the preparation of the Erratum<sup>93</sup>, which is not in doubt, even though it is actually unlikely that they did not reach Dakar — if indeed they were ever sent there — before the latter was adopted on 5 October 1927, given that the documents on which Niger relies date variously from 3<sup>94</sup>, 4<sup>95</sup> and 27 August 1927<sup>96</sup>. But this only serves to make a more significant point: these documents, of which Niger makes so much, were *deliberately* not taken into account in the preparation of the Erratum;
5. the documents are actually internal to each Colony, being prepared by the Commanders of Dori and Tillabéry *cercles* in response to requests from the Governors of their respective Colonies<sup>97</sup> — Upper Volta and Niger — and addressed to them<sup>98</sup>; and it is highly likely

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<sup>89</sup>See in particular MN, p. 28, para. 2.4; p. 72, para. 5.11.

<sup>90</sup>See in particular MN, pp. 28-30, para. 2.4 and p. 72, para. 5.11.

<sup>91</sup>MN, p. 19, para. 1.25: “We do not have the report of Administrator Delbos on the route followed on that occasion together with Administrator Prudon”; and p. 88, para. 6.12: “The report from Delbos on the joint reconnaissance carried out in June, sent on 3 August 1927 to the Governor of Upper Volta under cover of a Note bearing the No. 438 has not been found.”

<sup>92</sup>See in particular “Extract No. 25 from the Tour Report of Administrator Prudon dated 4 August 1927” (MN, Anns., Series C, No. 15). Burkina Faso formally protests against the withholding of information by Niger: the latter has reproduced this “Extract No. 25” in isolation and has neither appended, nor filed with the Registry, the full text of the document from which it is taken. The Agent of Burkina Faso has asked for the full text of that document to be provided through the Registrar of the Court (letter dated 25 November 2011); at the time of printing of this Counter-Memorial, no response had been given to that request.

<sup>93</sup>MN, p. 19, para. 1.25, “[t]hese documents did not, however, reach Dakar in time to be taken into account in the preparation of the *Arrêté* of 31 August 1927”; p. 72, para. 5.11, “their views were not taken into account, because they arrived after publication of the *Arrêté*”; p. 88, para. 6.12, “[i]n any event, the proposals from the two officials reached Dakar too late, after the *Arrêté* of 31 August 1927 had been published, and could have no effect on its text, or on the text of the Erratum”.

<sup>94</sup>The Delbos report, of which Niger has only appended the sketch-maps that were originally annexed to it (see MN, Anns., Series C, No. 20) was sent to the Governor of Upper Volta on 3 August 1927 (see *ibid.*).

<sup>95</sup>Extract No. 25 from the Tour Report of Administrator Prudon, Commander of Tillabéry *cercle* (Niger), dated 4 August 1927 (MN, Anns., Series C, No. 15), to which a sketch-map is attached (MN, Anns., Series D, No. 3).

<sup>96</sup>Letter from Administrator Delbos, Commander of Dori *cercle* (Upper Volta), to the Governor of Upper Volta dated 27 August 1927, containing a draft delimitation of the *cercles* of Dori and Tillabéry (MN, Anns., Series C, No. 16).

<sup>97</sup>Only the request from the Governor of Upper Volta has been included in the dossier (telegram/letter No. 1166/AG from the Lieutenant-Governor of Upper Volta, Hesling, to the Commanders of Dori and Fada *cercles*, dated 27 April 1927 - MN, Anns., Series C, No. 11): “Request send me soon as possible precise information to enable preparation *Arrêté général* fixing new boundaries between Colonies Niger and Upper Volta”. There is every reason to think that the Governor of Niger sent a similar request to the Commander of Tillabéry *cercle*.



that the Governors did not consider it worthwhile to transmit them to the central government of FWA;

6. consequently, whatever the situation was, these documents did not in any way influence the delimitation adopted by the Erratum, as also emerges very clearly from the rough superposition of the two sketch-maps on which Niger relies<sup>99</sup> over the line in the Erratum; and
7. this same diagram shows that the two mission sketch-maps of Delbos and Prudon do not entirely coincide and that, in any case, there was actually a disagreement about the alleged “actual” boundaries “in practice”. This is shown in particular by discrepancies between the Delbos and Prudon documents on the one hand and, on the other hand, between those documents and the line described in the Record of Agreement between the Governor of Niger and the representative of the Governor of Upper Volta, known as “Brévié-Lefilliâtre”, recording the incorporation into the Colony of Niger of the Territories on the right bank of the river, pursuant to the Decree of 28 December 1926<sup>100</sup>, which essentially follows the Coquibus line<sup>101</sup>.

1.23. In other words, the reports of Delbos (as virtual as they remain for the purposes of the present case) and Prudon

- do not constitute an inter-colonial “agreement” in the sense that Niger understands it;
- were not taken into consideration at all for the purposes of preparing the 1927 *Arrêté* and its Erratum;
- do not coincide with the delimitation agreed on 2 February 1927 by the two Governors, which did form the basis for the line definitively adopted on 5 October.

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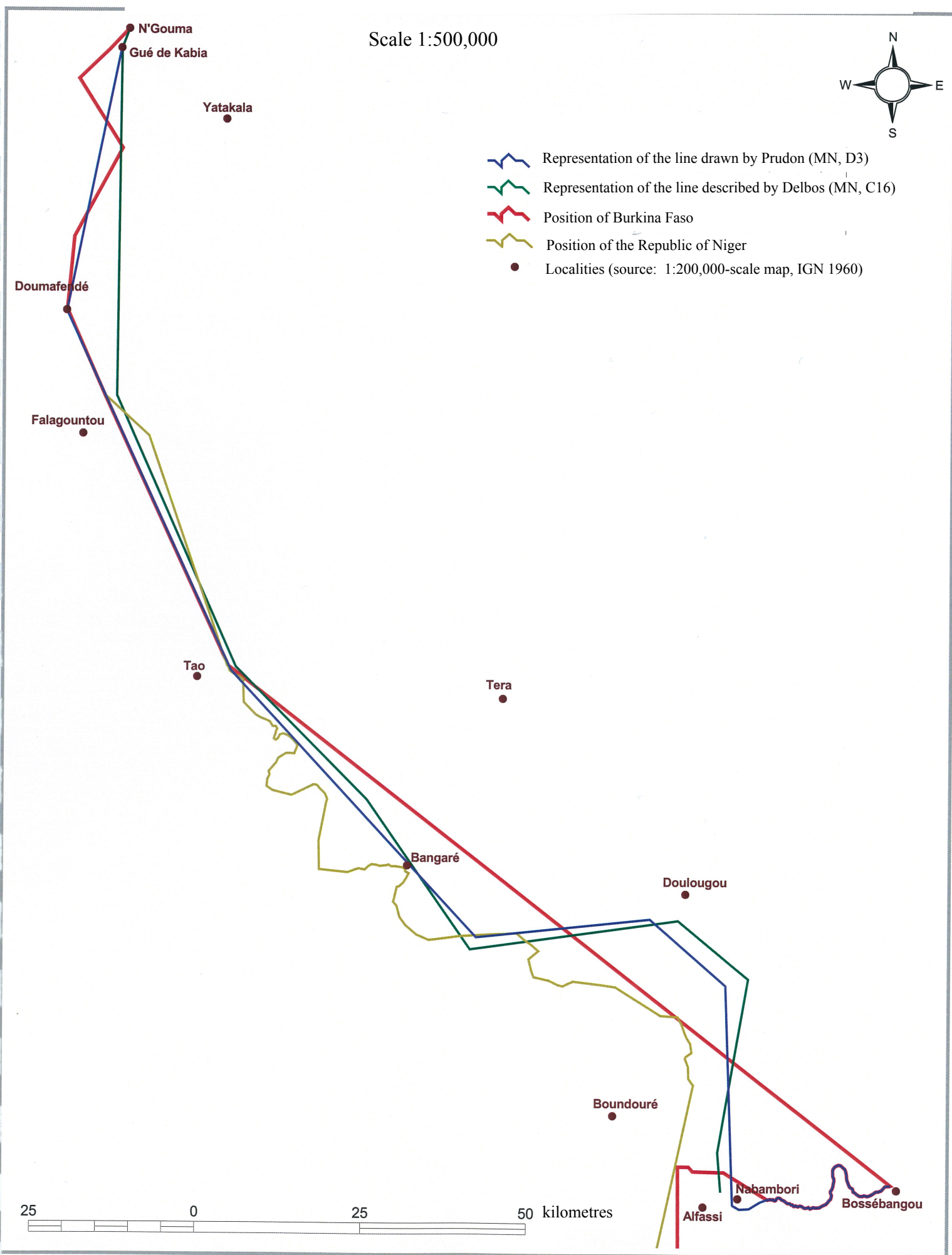
<sup>98</sup>Cf. Extract No. 25 from the Tour Report of Administrator Prudon, Commander of Tillabéry *cercle* (Niger), dated 4 August 1927 (MN, Anns., Series C, No. 15), p. 3: “I would ask you kindly to support the wishes expressed by these Chiefs with the Governor of Upper Volta, since all these villages or *groupements* who wish to transfer to Niger have for many years been settled on the territories recently attached to that colony”. Delbos’s letter has not been included in the dossier.

<sup>99</sup>Sketch-map (“reduction to a scale of 1:1,000,000 of the 1:500,000 map sent by letter No. 438 of 3 August 1927 based on routes surveyed by the Commander of Dori *cercle*, Delbos”) of the boundary as surveyed in June 1927 by Chief Administrator Prudon, MN, Anns., Series C, No. 20 and Series D, [No. 2 and] No. 3.

<sup>100</sup>Ann. MBF 30.

<sup>101</sup>Administrator Delbos points out that the boundaries agreed in the Brévié-Lefilliâtre Record of Agreement of 2 February 1927 “had been established on the basis of the map prepared by Captain Coquibus” (letter No. 731 dated 17 December 1927, MN, Anns., Series C, No. 20, p. 1). The line drawn jointly by Administrators Delbos and Prudon only follows it in part (cf. Prudon’s Tour Report, MN, Anns., Series C, No. 15, p. 1: “Apart from this slight modification [regarding the chain of hills to the north of Nababori], 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”).

### Comparison of the sketch-maps proposed by Delbos (MN, C16) and Prudon (MN, D3) with the lines defended by the two Parties



## 2. The confirmation of the delimitation effected by the Erratum

1.24. Niger makes much of the disadvantages resulting from the 1927 boundaries and the criticisms to which they gave rise. It devotes an entire chapter to this issue<sup>102</sup>, which it summarizes as follows:

“Thus, as has already been explained, this text was criticized from the outset by the colonial officials and authorities of the two Colonies. From all sides there was a chorus of complaints over the lack of precision in the boundaries and the constant disputes to which those shortcomings gave rise on the ground. The text was full of the kind of errors to be avoided in the description of a frontier, as was pointed out, in general terms, by the Head of the French West Africa Geographical Department in a letter of 8 May 1942 . . .

It follows from the summary and imprecise nature of the description of the boundary in several sectors that the practical scope of the *Arrêté* and its Erratum remains extremely limited.”<sup>103</sup>

1.25. Although Niger prudently deduces that “[i]t is therefore necessary to consider the possibilities for interpreting these texts by having recourse to cartographic or textual criteria, preparatory work or the practice”<sup>104</sup>, in making these observations it is clearly calling into question the frontier described by the Erratum: for Niger it is not a question of “consider[ing] the possibilities for interpreting these texts” but of actually correcting what it regards as “errors”. And indeed this is what it seeks to do in its Memorial when it reinvents a frontier line that departs considerably from the one described by the 1927 Erratum<sup>105</sup>.

1.26. In fact, while it is true that some colonial officials in the field did criticize the delimitation effected by the *Arrêté* and its Erratum, sometimes in rather harsh terms, far from strengthening Niger’s argument, these attacks confirm the reality of the disputed delimitation.

1.27. According to Niger, “[t]hroughout this period [from 1927 to independence], the conclusions of the Delbos/Prudon Agreement of 1927 continued to serve as a reference basis. They were often cited or recommended”<sup>106</sup>. However, all of the “examples” (no doubt the fruit of extensive research by Niger) that are given in support of this statement<sup>107</sup> essentially lead to one conclusion — which Niger refrains from drawing: the authors of these documents seemed, in certain cases, to have a preference for this supposed agreement, but

1. they contrasted it with the *Arrêté* and its Erratum; and
2. often they recognized, directly or *a contrario*, that, even if they regretted the fact, it was the Erratum and not this supposed “agreement” that had delimited the frontier between the two Colonies; and

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<sup>102</sup>Chap. II — The difficulties and incidents in the disputed area (MN, pp. 25-38).

<sup>103</sup>MN, p. 66, para. 5.6.

<sup>104</sup>*Ibid.*

<sup>105</sup>See Section 2 of the present chapter and Chaps. III and IV of the present Counter-Memorial below.

<sup>106</sup>MN, p. 28, para. 2.4.

<sup>107</sup>*Ibid.*, pp. 28-29.

3. in other cases, they referred not to the delimitation attributed to Delbos and Prudon but to the arrangements for its implementation.

1.28. Thus:

- the telegram/letter No. 815 from the Commander of Tillabéry *cercle* to Dori *cercle* dated 10 October 1929 recommends to “maintain status quo, namely tolerance zone accepted in 1927 without encroachment or spoliation”<sup>108</sup>; the issue here is not delimitation;
- the report from the Commander of Dori *cercle* dated 7 July 1930 notes that the *Arrêté général* of 31 August 1927 “took no account of the delimitation carried out on the ground by the two *cercles* Commanders of Dori and Tillabéry”<sup>109</sup>; given that an agreement between officials in the field could not take precedence over an *arrêté général* (and a subsequent one at that), this amounts to a recognition that the *Arrêté* and its Erratum had established the frontier (even if that frontier gave rise to incidents);
- the letter sent on 10 April 1932 to the Governor of Upper Volta by the Commander of Dori *cercle* (in which he reports on an agreement reached with his Tillabéry counterpart, the “Roser/Boyer” Agreement<sup>110</sup>) lists two possibilities for identifying the “exact course of the boundary”, the first of which is to consider that the *Arrêté* and the Erratum “were intended to endorse the work of Administrators Delbos and Prud’hon [*sic*], and officially establish the boundary they proposed after their inspection tour”, which Commander Roser regards as “the only logical one”<sup>111</sup>; nevertheless, the author remarks that Delbos’s protests as voiced in his letter of 17 December 1927<sup>112</sup> did not receive “any response” and that “no new Erratum was provided to correct the errors in question”<sup>113</sup>. In other words, only a new text could “repair” the errors attributed to the modified *Arrêté* and simply applying the “Delbos/Prudon Agreement” would not be sufficient;
- the Record of Agreement between Garnier and Lichtenberger of 15 [?] <sup>114</sup> April 1935 resolving a territorial dispute at Sinibellabé does not refer directly to the supposed “Delbos/Prudon Agreement”, but states that “in principle, this boundary [between Dori and Téra] shall be determined in accordance with the indications given in letter No. 438 from the Commander of [Dori] *cercle* to the Governor of Upper Volta of 3 April [<sup>115</sup>] 1927”<sup>116</sup>; the signatories are very careful to respect the orographic tradition and to resolve the dispute in accordance with it, not necessarily by relying on texts: it is worth noting that a few days previously, on 13 April 1935, the same Administrators, Garnier and Lichtenberger, had resolved a dispute at Ouiboriels or Vibourié, believing that they were applying the Erratum:

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<sup>108</sup>MN, Anns., Series C, No. 31.

<sup>109</sup>MN, Anns., Series C, No. 38 (emphasis added).

<sup>110</sup>MN, p. 74, para. 5.12 and p. 90, para. 6.14; and MN, Anns., Series C, No. 45.

<sup>111</sup>MN, Anns., Series C, No. 45, p. 5.

<sup>112</sup>MN, Anns., Series C, No. 20.

<sup>113</sup>MN, Anns., Series C, No. 45, p. 5.

<sup>114</sup>This is probably a typing error: the annex concerned (MN, Anns., Series C, No. 57) is actually dated 25 April 1935.

<sup>115</sup>According to Niger, this should read “August” (MN, p. 29, para. 2.4).

<sup>116</sup>MN, Anns., Series C, No. 57, p. 5.

“Referring to the delimitation determined by the *Arrêté* of 31 August 1927 (Erratum) between Dori and Téra, we decided to visit the site in order to observe the placement of said land [Ouiboriels, disputed] in relation to the above-mentioned boundary.”<sup>117</sup>

- To resolve the problem definitively, they establish a marker (thereby committing a geodesic error) on “a notional straight line starting from the Tong-Tong astronomic marker and running to the Tao astronomic marker”<sup>118</sup>, which — with the exception of the error — is a pure and simple application of the 1927 texts<sup>119</sup>;
- the letter of 9 May 1935 from the Commander of Dori *cercle* to the Governor of Niger refers to the Garnier/Lichtenberger Record of Agreement, after being careful to note — which Niger forgets to point out — that the “[b]oundaries of Dori *cercle* with Téra Subdivision have been determined by the *Arrêté* of 31 August 1927 fixing the boundaries of the Colonies of Upper Volta and Niger followed by an Erratum dated 5 October 1927”<sup>120</sup>;
- in his letter of 10 May 1935 to the Commander of Tillabéry *cercle*, the Head of Téra Subdivision confines himself to indicating: “To ensure that our data about the frontier coincides as far as possible with Dori’s, I have taken a copy of Administrator Delbos’s letter of 27 August 1927; I am quite happy to accept this boundary, but I think that, for the sake of the local people, it needs to be marked out”<sup>121</sup>;
- on 19 May 1943, the Commander of Dori writes to say that he has found in his archives an “undated and unsigned sketch-map ... most probably by Mr. Roser and likely to date from 1932”. The boundary drawn on the sketch-map, which seems to conform with the Roser report of 1932 is a “de facto boundary, tacitly confirmed by the Garnier/Lichtenberger Record of Agreement of 1935, but not submitted for approval by a higher authority, which we will have to study again and, if necessary, submit to the Governor for approval”<sup>122</sup>. He writes that he has also found another rough drawing which “seems to be by Administrator Delbos and therefore to date from 1927 (Delbos/Prudhon [*sic*] settlement, following which proposals were made to the Governors of Niger and Upper Volta to *modify* the 1927 *Arrêté* and the subsequent Erratum, *proposals which were not acted upon*)”<sup>123</sup>; that says it all . . .
- the letter of 11 July 1951 shows that in the view of the Head of Téra Subdivision, the boundary might be poor, but it is given by the 1927 texts:

“[T]he Commander of Dori *cercle* stated again that he believes it is important to *demarcate the boundary on the basis of the Erratum to the Arrêté of the Governor-General of 1927, by connecting the Tao boundary marker directly with Bossébangou.*

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<sup>117</sup>MN, Anns., Series C, No. 56, p. 2.

<sup>118</sup>*Ibid.*, pp. 2-3.

<sup>119</sup>See Chap. III, Section 2, 1, below.

<sup>120</sup>MN, Anns., Series C, No. 58, p. 1.

<sup>121</sup>MN, Anns., Series C, No. 59. Again the document is barely legible.

<sup>122</sup>MN, Anns., Series C, No. 67 — underlining in the text.

<sup>123</sup>*Ibid.* (emphasis added).

Apparently, he does not understand some of the consequences of that position. The attached reproduction of a sketch-map prepared by Mr. Delbos noted that this action would cut off the Yagha from a salient delimited by Iga, Tingou and Nabambori.

The inaccuracy and imprecision of the Erratum have moreover been pointed out numerous times. As an example, I refer to the solution proposed by Mr. Roser . . . in 1932”<sup>124</sup>;

- the Record of Agreement of 17 May 1953<sup>125</sup>, which Niger also invokes in support of its argument that “the Delbos/Prudon Agreement of 1927” served as a “reference basis”, settles a dispute between two villages without making any reference to that “agreement” or, moreover, to any other text;
- finally, the Lacroix report of 24 December 195[3] explains that “[t]he basic document relevant to these issues [Téra-Dori delimitation] is the *Arrêté général* of 31 August 1927, as amended by an Erratum of 5 October of the same year”<sup>126</sup>, and it is only in an historical context that it adds:

“Mr. Delbos and Mr. Prud’hon [*sic*] . . . had travelled this boundary previously . . . Their conclusions may have been taken into consideration in the provisions of the text cited above, although the Delbos report was not sent to Ouagadougou until 27 August. If that was the case, it is *unfortunate that the relevant departments of the Government-General did not adopt the draft Arrêté as proposed by Mr. Delbos*, because, although almost identical with the provisions of the *Arrêté* and its Erratum, it provided these additional details.”<sup>127</sup>

None of the documents invoked by Niger for this purpose suggests that the officials in the *cercles* concerned confused the proposals made in 1927 by Delbos and Prudon (which do not appear to coincide<sup>128</sup> and which are often judged to be preferable to the *Arrêté*) with the delimitation in force, as established by the *Arrêté* and its Erratum.

1.29. In fact, there is no doubt that, as soon as it was published, the Erratum of 5 October 1927 attracted criticism, sometimes strong criticism, from certain administrators. However, although they protested against the delimitation and criticized it, they recognized, implicitly or explicitly, albeit with regret, that it was established.

1.30. The beginning of the controversy over the boundaries fixed by the *Arrêté* was marked by the letter from the Commander of Dori *cercle*, Delbos, dated 17 December 1927, which lists the errors that he believes it to contain and asks that “the boundaries indicated in [his] letter 438<sup>129</sup> be maintained”<sup>130</sup>.

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<sup>124</sup>MN, Anns., Series C, No. 73, p. 1 (emphasis added).

<sup>125</sup>MN, Anns., Series C, No. 76.

<sup>126</sup>MN, Anns., Series C, No. 79, p. 1.

<sup>127</sup>*Ibid.*, p. 2 [emphasis added].

<sup>128</sup>See sketch-map No. 2 above.

<sup>129</sup>Probably his letter to the Governor of Upper Volta dated 27 August 1927 (MN, Anns., Series C, No. 16).

<sup>130</sup>MN, Anns., Series C, No. 20.

1.31. His successor, Taillebourg, also contests the very principle on which the new frontier between the two Colonies was based (it was defined *de novo* instead of being based on the pre-existing cantonal boundaries — in so far as they had been defined, which in fact they had not been) and points out the resulting disadvantages relating to the re-allocation and re-occupation of land — causing various conflicts over ownership — and to the carrying out of censuses of the population, which caused particular difficulties with raising taxes<sup>131</sup>.

1.32. Subsequently, it is true that the colonial period is punctuated by complaints from certain territorial officials. However, these complaints are directed against the existing delimitation that is being experienced “in practice” as such. For example, the Commander of Dori *cercle* complains to the Governor of Upper Volta that:

“the 1927 delimitation seems to have been designed to create difficulties for Volta”; “I could, with your permission, prepare a report on the difficulties that the 1927 delimitation has caused, a report requesting a new delimitation for the end of 1930”<sup>132</sup>.

In the same spirit, for their part, all of Taillebourg’s letters of July-August 1929 point out the excessive *rigours* of the delimitation<sup>133</sup>.

1.33. It is also necessary to take into account extrinsic factors. For example, it was common practice amongst colonial officials to denounce so-called artificial frontiers. Moreover, the arbitrary nature of the delimitation was due to fiscal considerations or for reasons of administrative efficiency, which had scant regard for the physical and ethnic nature of territories with which the colonizer was unfamiliar: the priority was to deploy a direct, centralized administration that was capable of assimilating the populations<sup>134</sup>; sometimes this detachment from reality, and in particular the ethnographic reality, was even intentional, to prevent groupings of related populations and to bring together very different ethnic groups, thereby quelling attempts to resist the occupation<sup>135</sup>.

1.34. Niger also cites a number of agreements between officials seeking to clarify the boundaries of their administrative divisions<sup>136</sup>. None of them<sup>137</sup> was approved by a higher

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<sup>131</sup>See paras. 1.19-1.20 above and MN, Anns., Series C, Nos. 24, 25 and 27.

<sup>132</sup>Letter from the Commander of Dori *cercle* to the Governor of Upper Volta dated 26 February 1930, MN, Anns., Series C, No. 32 (emphasis added).

<sup>133</sup>See paras. 1.19-1.20 above.

<sup>134</sup>See I. Brownlie, *African Boundaries*, London, Hurst, 1979, pp. 6-7, or J. de Pinho Campinos, “L’actualité de l’*uti possidetis*”, in SFDI, *La frontière*, Paris, Pedone, 1980, pp. 96-97.

<sup>135</sup>See Y. Person, “L’Afrique noire et ses frontières”, *Revue française d’études politiques africaines*, No. 80, August 1972, pp. 31-32. There are even instances of colonial boundaries being modified depending on the need for labour on either side of the frontier: see L. Joos, “Des frontières trop souvent établies au gré des colonisateurs”, *Le Monde diplomatique*, February 1965, p. 11.

<sup>136</sup>MN, pp. 33-34, para. 2.8.

<sup>137</sup>According to Niger, an exception should be made for the 1935 agreement on the establishment of a marker at Vibourié (“In reality, this was the only agreement between *cercles*, subsequent to 1927, which was approved by a higher authority” — MN, p. 93, para. 6.20). It was indeed approved by a higher authority; however, it was not approved by the Governor-General of FWA (author of the 1927 *Arrêté*) but by the Governor of Niger, which is appropriate as, since Upper Volta had been dissolved, it concerned an intra-colonial boundary (a delimitation between *cercles* belonging to the same Colony, Niger). Incidentally, as Niger itself points out: “this agreement dates from after the disappearance of Upper Volta and hence its retention following the reconstitution of the Colony could be regarded as debatable” (*ibid.*).

authority and none is therefore binding. In any case, these “agreements” are not recognized by the Agreement of 28 March 1987 as documents that enable the course of the frontier to be determined and the Parties have made no declaration agreeing to take them into consideration for that purpose.

1.35. In the same spirit, it can be noted that Niger devotes all of Chapter II, Section 2, of its Memorial to “[t]he difficulties encountered during the period subsequent to independence”<sup>138</sup>. This account of incidents that can have no influence on the delimitation of frontiers inherited from colonization is also of no legal consequence: since they occurred after the “‘photograph of the territory’ at the critical date”<sup>139</sup>, these facts cannot in any way shift or weaken the colonial title constituted by the *Arrêté* and its Erratum<sup>140</sup>. Moreover, even if they could do so under general international law — *quod non* — then the 1987 Agreement between the Parties would prevent them from being taken into consideration.

1.36. Furthermore, Niger’s insistence on highlighting the criticism of the 1927 texts backfires: the fact that certain colonial officials regarded the boundary as arbitrary shows that they were aware both of its existence and of the line that it took. *A fortiori*, their repeated requests for that delimitation to be *modified* suggest that they regarded it as established. However, that boundary was never modified.

1.37. Moreover, although these criticisms might have provided an opportunity to adopt a new delimitation *arrêté*, that opportunity was never taken by the competent authority. For example, in a letter dated 19 March 1930, the Governor of Upper Volta asked the Commander of Dori *cercle* to draw up a report on the difficulties created by the 1927 delimitation and to attach “any proposals that you see fit”<sup>141</sup>; the report that he produced in response to this request<sup>142</sup> clearly did not lead to any new delimitation even though it concluded: “After this tour, if appropriate, I will submit proposals to *rectify* the boundary between Dori *cercle* and Tillabéry *cercle*.”<sup>143</sup> The officials’ complaints were heard, but no action was taken as a result. As the Court noted in the *Burkina/Mali* case, it cannot take account of a modification proposed by a *cercle* administrator that contradicts the frontier title having force of law between the Parties if it has not been approved by the competent higher authorities<sup>144</sup>.

1.38. Incidentally, although it emphasizes the shortcomings attributed to the *Arrêté* and its Erratum, Niger nevertheless recognizes that the boundary was never modified in the light of the officials’ complaints. Upon asking what effect should be given to local agreements made between the Commanders of different *cercles*, it recalls that they had “no power to replace the competent colonial authorities in order to modify or clarify the boundaries

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<sup>138</sup>MN, pp. 35-38, paras. 2.9-2.11.

<sup>139</sup>*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 568, para. 30. See also MBF, p. 26, para. 1.21 and p. 57, paras. 2.6-2.7.

<sup>140</sup>*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 398, para. 61; or *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 351-355, paras. 64-70.

<sup>141</sup>MN, Anns., Series C, No. 33.

<sup>142</sup>Report of 7 July 1930 on the difficulties created by the delimitation established in 1927 between the Colonies of Niger and Upper Volta (*Arrêté* of 31 August 1927) regarding the boundaries between Dori *cercle* and Tillabéry *cercle*, MN, Anns., Series C, No. 38.

<sup>143</sup>*Ibid.*, p. 12 (emphasis added).

<sup>144</sup>*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 627, para. 137.



between Colonies”<sup>145</sup> and goes on to list the specific cases in which officials recalled that only the higher colonial authorities (Governors and the Governor-General) were empowered to effect inter-colonial delimitations<sup>146</sup>.

1.39. Niger points out that “[d]espite the wish frequently expressed by officials of the two Colonies for the course of the boundary to be clarified by a *new text* so as to accord more closely with the true boundaries of the *cantons* in practice, *this was never done*”<sup>147</sup>. It therefore recognizes that to modify the line of the boundary determined by the Erratum a further erratum was essential. None was ever adopted.

**SECTION 2**  
**APPROXIMATIONS AND ERRORS IN THE IMPLEMENTATION OF**  
**ARTICLE 2 OF THE AGREEMENT OF 28 MARCH 1987**

1.40. Having sought to discredit the 1927 *Arrêté* and its Erratum, Niger endeavours to empty Article 2 of the Agreement of 28 March 1987 between the Parties of all practical meaning. Article 2 reads as follows:

“The frontier shall be demarcated by boundary markers following the course described by *Arrêté* 2336 of 31 August 1927, as clarified by Erratum 2602/APA of 5 October 1927. Should 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, and/or any other relevant document accepted by joint agreement of the Parties.”

The second subparagraph of the preamble to the Special Agreement of 24 February 2009, by which the Parties referred this case to the Court, specifically cites this provision.

1.41. Niger’s Memorial displays a singular, particularly lax, subjective and uncertain notion of the expression “[s]hould the *Arrêté* and Erratum not suffice”, which appears in Article 2 of both the Agreement of 28 March 1987 and its Protocol (1), and gives no attention to the provision limiting the documents to which the Parties have agreed to have recourse in such a case (2).

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<sup>145</sup>MN, p. 73, para. 5.12.

<sup>146</sup>MN, pp. 73-74, para. 5.12; cited on these pages are: a telegram of 10 October 1929 from the Commander of Tillabéry (MN, Anns., Series C, No. 31); the agreement reached at Ossolo Pool on 12 March 1931, which had to be approved by the Governors of the two Colonies (MN, Anns., Series C, No. 41) but which, though it was approved by the Governor of Niger by letter No. 1361 A.G.I. of 13 April 1931 (mentioned in Ann. CMBF 3), did not receive the approval of the Governor of Upper Volta (see the annual report of Tillabéry *cercle* for 1931, Ann. CMBF 3, p. 3), despite calls by Niger’s officials for it to be ratified (see letter No. 40 A.G.I. from Tellier, the *Chef de cabinet* of the Lieutenant-Governor of Upper Volta, dated 6 February 1932, MN, Anns., Series C, No. 44, p. 2) — neither did it receive the approval of the Governor-General of FWA; the Roser/Boyer Agreement of April 1932 (MN, Anns., Series C, No. 45); a circular of 1933 sent by the Governor-General of FWA to his Lieutenant-Governors recalling that “[a]ny boundary of a *cercle* or a subdivision merely deriving from a practice, not yet *endorsed by an official text*, should be confirmed as soon as possible by a local *arrêté* in the case of subdivision boundaries, and by a draft *Arrêté général in the case of cercle boundaries*” (MN, Anns., Series C, No. 48, Niger’s italics) — which clearly shows that only a new draft *Arrêté général* was able to modify the 1927 Erratum in law; finally, Niger acknowledges that “[t]he only agreement from the colonial period which appears to have been regarded as determining the boundary of Tillabéry *cercle* was that adopted by the Record of Agreement of 13 April 1935 (concerning the Ouiboriels [Vibourié] marker)”, and again that Agreement was only approved by the Governor of Niger, states Niger in its Memorial (p. 74, para. 5.12); on the Agreement and its approval, see fn. 137 above. See also MBF, pp. 66-73, paras. 2.35-2.50.

<sup>147</sup>MN, p. 75, para. 5.13 (emphasis added).

### 1. “Should the *Arrêté* and Erratum not suffice”

1.42. On presenting the Erratum, Niger describes it as “particularly rudimentary”<sup>148</sup>, in a bid to justify an argument whose main objective is to avoid the Erratum’s application<sup>149</sup>, without ever taking the trouble to define what might be denoted by “not suffice” within the meaning of Article 2 of the 1987 Agreement.

1.43. The text of the Erratum is described as “particularly” or “extremely succinct”, but this characteristic is stated without ever being demonstrated. In general, Niger confines itself to referring to the length of the section of the frontier described:

- in respect of the Téra sector, the Erratum is said to be “particularly succinct” on the grounds that it only mentions two frontier points over a distance of 150 km: the Tong-Tong astronomic marker and the Tao astronomic marker<sup>150</sup> — which is actually incorrect: the Erratum specifies that the frontier reaches “the River Sirba at Bossebangou”; but Niger declares peremptorily that this “remains problematic”<sup>151</sup>;
- in the Say sector, the argument is based this time on the number of lines in the Erratum compared with the distance described: five lines to describe almost 160 km<sup>152</sup>; “[t]his description of the boundary was thus extremely succinct”<sup>153</sup>.

1.44. Twice, Niger does not hesitate to dismiss outright the very words of the Erratum. This is the case firstly with the expression “at the level of the Say parallel”, which is used in the Erratum to designate the place where “turning back to the south, [the frontier line] again cuts the Sirba”: Niger asserts that “the text of the Erratum should not be read too literally on this point”<sup>154</sup>. Similarly, Niger does not hesitate to dismiss the term “salient”, which it says “makes no sense in relation to the inter-colonial boundary”<sup>155</sup>, despite subsequently seeking to “interpret” this part of the Erratum in its favour.

1.45. For the rest, Niger appears to be more cautious, but it in fact dismisses provisions of the Erratum without saying so explicitly:

- either it invents points that are not mentioned by the Erratum (for example the Vibourié marker, presented as an interpretation of the *Arrêté*<sup>156</sup>; or the “frontier marker” on the Niamey-Ouagadougou road<sup>157</sup>);

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<sup>148</sup>MN, p. 65, para. 5.6.

<sup>149</sup>According to Niger, “indications [concerning the *cantons*] . . . can supplement the summary description in the *Arrêté* and Erratum of 1927” (MN, p. 86, para. 6.11).

<sup>150</sup>MN, p. 83, para. 6.9.

<sup>151</sup>*Ibid.*

<sup>152</sup>MN, p. 104, para. 7.11.

<sup>153</sup>*Ibid.*

<sup>154</sup>MN, p. 115, para. 7.32. It is rather ironic to see that here Niger cautions against reading the amended *Arrêté* “too literally”, while elsewhere it continually criticizes it for being excessively succinct.

<sup>155</sup>MN, p. 112, para. 7.26.

<sup>156</sup>MN, p. 93, para. 6.20.

<sup>157</sup>MN, p. 120, para. 7.40.

- or, conversely, it conjures away points that are explicitly mentioned by the Erratum — Bossébangou, for example —, on the pretext that they are a mistake<sup>158</sup>, the disappearance of that point in itself having an impact on the subsequent course of the line, as it also leads to the disappearance of the salient, which no longer makes any sense in the line claimed by Niger<sup>159</sup>;
- or it wrongly invokes an alleged silence on the part of the Erratum, for example when it asserts that: “[f]rom the Tao astronomic marker . . . the official text gives no further indication until the point where the inter-colonial boundary rejoins the boundary of Say *cercle*”<sup>160</sup>; but this is simply a statement of fact: the text is no more or less articulate here than it is with regard to the previous section (from the Tong-Tong marker to the Tao marker), with which Niger is perfectly content<sup>161</sup>;
- or again, it recognizes that the text of the Erratum is perfectly clear before going on to wave it aside: this is the case with the sector “end of the salient/start of the Botou Loop”, where Niger acknowledges that “[t]his description<sup>162</sup>] appears to be of great simplicity”, before adding the *non sequitur* “[h]owever the straight-line boundary which it establishes appears to have no basis in the situation prior to the adoption of the Erratum and was never confirmed in the subsequent practice”<sup>163</sup>.

1.46. Niger commits two errors here: firstly, it (wrongly) takes as its starting point that the *Arrêté* and its Erratum intended to establish the *status quo ante* and were referring implicitly to that, when in fact they sought to “fix the boundaries of the Colonies of Upper Volta and Niger”<sup>164</sup>; secondly, it seeks to give precedence to so-called subsequent practice over the clear text of the Erratum, something which is not in conformity either with Article 2 of the 1987 Agreement between the Parties or with the general principles for the delimitation of land frontiers<sup>165</sup>.

1.47. In reality, Niger’s “judicial strategy” is not based on any legal principle. It favours the pick-and-choose technique and only accepts the few points in the Erratum that seem likely to serve its own interests best<sup>166</sup>. For the rest, it is all a pretext to criticize the *Arrêté* and its Erratum so as to rule out their application in favour of a range of instruments (“agreements” allegedly concluded between local officials, exchanges of letters between

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<sup>158</sup>MN, p. 105, para. 7.14.

<sup>159</sup>MN, p. 112, para. 7.26.

<sup>160</sup>MN, p. 93, para. 6.21.

<sup>161</sup>In the Téra sector, which is referred to here, the Erratum reads as follows:

“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. 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.”

<sup>162</sup>“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 of the village of Tchenguiliba.”

<sup>163</sup>MN, p. 116, para. 7.35.

<sup>164</sup>See paras. 1.10-1.12 above.

<sup>165</sup>See paras. 1.49-1.53 and 4.3-4.8 below.

<sup>166</sup>Essentially as far as the sector with the four villages is concerned; see MN, pp. 112-116, paras. 7.25-7.33.

colonial authorities, mission reports) or various kinds of behaviour (alleged colonial or post-colonial *effectivités*) which neither Article 2 of the 1987 Agreement between Burkina and Niger nor the general principles of international law that are applicable in this regard vest with the slightest legal authority.

1.48. In this regard it is sufficient to recall, in the famous words of the Chamber of the Court in the *Burkina/Mali* case, which have been repeated many times, that:

“Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where 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.”<sup>167</sup>

In accordance with these rules,

“To determine the course of the intercolonial boundary at the critical date it is necessary to examine first the legal titles relied on by the Parties, with any *effectivités* being considered only on a confirmatory or subsidiary basis”<sup>168</sup>.

1.49. Furthermore, where there is a solid legal title — as is clearly the case with the 1927 Erratum<sup>169</sup> — the Court refuses to disregard its text for any reason whatsoever and even merely to examine the additional arguments that the Parties have discussed during the proceedings<sup>170</sup>. Thus, in the case concerning *Cameroon v. Nigeria*, the Court noted “that the text of paragraph 25 of the Thomson-Marchand Declaration provides quite expressly that the boundary is to follow ‘the incorrect line of the watershed shown by Moisel on his map’” and held that “[s]ince the authors of the Declaration prescribed a clear course for the boundary, the Court cannot deviate from that course”<sup>171</sup>. In the same Judgment, such unconditional respect for the text also appears in connection with the interpretation of paragraphs 26 and 27 of the Thomson-Marchand Declaration<sup>172</sup>: although it recognizes that the Nigerian village of

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<sup>167</sup>*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 586-587, para. 63; confirmed by *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 398, para. 61; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 353, para. 68 or p. 415, para. 223; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 678, para. 126; or *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 120, para. 47. See also MBF, pp. 59-61, paras. 2.13-2.19.

<sup>168</sup>*Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 143, para. 128; see also p. 149, para. 141.

<sup>169</sup>See paras. 1.3 and 1.11 above.

<sup>170</sup>*Cf. Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 39-40, paras. 75-76.

<sup>171</sup>*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 372, para. 118.

<sup>172</sup>“26. Thence the boundary runs through Mount Mulikia . . . 27. Thence from the top of Mount Mulikia to the source of the Tsikakiri, leaving Kotcha to Britain and Dumo to France and following a line marked by four provisional landmarks erected in September 1920 by Messrs. Vereker and Piton.”

Kotcha has expanded to either side of the line into Cameroonian territory, the Court recalls that “it has no power to modify a delimited boundary line, even in a case where a village previously situated on one side of the boundary has spread beyond it. It is instead up to the Parties to find a solution to any resultant problems, with a view to respecting the rights and interests of the local population”<sup>173</sup>.

1.50. These principles, which Niger’s Memorial completely disregards, should find full application in the present case.

**2. “. . . the course shall be that shown on the [IGN map], and/or any other relevant document accepted by joint agreement of the Parties”**

1.51. 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”. Notwithstanding this perfectly unambiguous provision, and despite recognizing that these two criteria are *subsidiary*<sup>174</sup>, and that no other document has been accepted by joint agreement of the Parties<sup>175</sup>, Niger, when it believes that it could benefit, does not hesitate to:

- give precedence to the line shown on the IGN map over the text of the Erratum; and to
- dismiss both that text and the map in favour of a random line supposedly established by various instruments and by both colonial and post-colonial *effectivités* on which it relies.

1.52. As indicated above, Niger, confusing concision with imprecision, wrongly takes as its starting point that, even though it is pre-eminent, the Erratum is imprecise, “particularly rudimentary”<sup>176</sup> and excessively succinct<sup>177</sup>. And it claims that this is proven for the two sectors of the disputed line: both the Téra and the Say sectors<sup>178</sup>. It therefore believes that it is not practicable: “It follows from the summary and imprecise nature of the description of the boundary in several sectors that the practical scope of the *Arrêté* and its Erratum remains extremely limited.”<sup>179</sup>

1.53. Niger claims that this rudimentary nature is justification for disregarding both the *Arrêté* and the 1960 map and for “look[ing] elsewhere in order to identify” the frontier<sup>180</sup>. To this end it suggests having recourse to “administrative documents of the colonial era”, so as to

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<sup>173</sup>*Ibid.*, p. 374, para. 123.

<sup>174</sup>MN, p. 75, para. 5.13.

<sup>175</sup>Burkina also agrees, except that it does not regard the agreement on the frontier problems constituted by the exchange of letters of 29 October and 2 November 2009 as such a document (MN, p. 77, para. 5.16).

<sup>176</sup>MN, p. 65, para. 5.6; see also p. 84, para. 6.10.

<sup>177</sup>MN, p. 83, para. 6.9, or p. 104, para. 7.11.

<sup>178</sup>See paras. 1.42-1.43 above.

<sup>179</sup>MN, p. 66, para. 5.6.

<sup>180</sup>MN, p. 84, para. 6.11.

“supplement the summary description in the *Arrêté* and Erratum of 1927”<sup>181</sup> and relying on *effectivités*, without too much concern as to the contradictions between them and the text of the Erratum<sup>182</sup>. This goes well beyond what is envisaged by the 1987 Agreement and what is permitted by the generally recognized principles for interpretation: to interpret is not to supplement — above all when the Parties have explicitly agreed on an exhaustive list of the instruments to which it is possible to have recourse, should the title not suffice.

1.54. This process of neutralizing the *Arrêté* and its Erratum is at work all along the line which is the subject of the dispute submitted to the Court. In the “Téra sector”, the text is described as “particularly succinct”<sup>183</sup> and Niger sees obscurity in its simplicity. It is a question of looking “elsewhere in order to identify this stretch of the boundary between the two territories” and it is to “[t]he history of its origins” that Niger turns<sup>184</sup>. It believes that the preparatory work provides indications (about the *cantons*) that can *supplement* the wording of the official text<sup>185</sup>. Furthermore, Niger does not hesitate to rely on documents, such as the reports from Delbos<sup>186</sup> and Prudon, which were not taken into account in the preparation of the *Arrêté*<sup>187</sup> but which it believes nevertheless “both have the merit of showing that the boundary was a sinuous one”<sup>188</sup>.

1.55. In the second sector, the Say sector, Niger openly goes on the offensive with regard to the text: it claims to “show that there are well-established reasons for *not following it* in certain respects”<sup>189</sup>. It believes that these reasons can be found in colonial practice, which runs counter to the wording of the Erratum, in particular where Bossébangou is concerned. It believes that both the cartographic material of the period<sup>190</sup> and the attitude of the colonial authorities both before and after the adoption of the *Arrêté*<sup>191</sup> demonstrate that, contrary to the text of the latter, the inter-colonial boundary did not reach the River Sirba at Bossébangou but stopped at “a point close to the hamlet of Nabambori, not far from Alfassi”<sup>192</sup>. Niger therefore believes that the modified *Arrêté* is wrong and that “[t]here was

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<sup>181</sup>MN, p. 86, para. 6.11.

<sup>182</sup>These are based on the complaints of officials (see in general MN, pp. 25-34, and especially the letters from the Commander of Dori *cercle*, p. 26, para. 2.3). Reference is made in particular to the Delbos/Prudon line, which, according to Niger, enabled the colonial authorities to deal with the lack of precision that it attributes to the Erratum (see especially MN, pp. 28-30, para. 2.4), and Niger highlights the Records of Agreement concluded between officials to clarify their boundaries, in particular the Roser/Boyer Agreement of 1932 and the Ossolo Agreement of 1931, although Niger itself remarks that they were not given the necessary approval (MN, pp. 33-34, para. 2.8).

<sup>183</sup>MN, p. 83, para. 6.9; see para. 1.43 above.

<sup>184</sup>MN, p. 84, para. 6.11.

<sup>185</sup>MN, p. 86, para. 6.11 and p. 90, para. 6.15.

<sup>186</sup>Which “has not been found” (MN, p. 88, para. 6.12); see also paras. 1.22-1.23 above.

<sup>187</sup>MN, p. 88, para. 6.12 and para. 1.22 above.

<sup>188</sup>MN, p. 87, para. 6.12.

<sup>189</sup>MN, p. 105, para. 7.12 (emphasis added).

<sup>190</sup>MN, pp. 107-108, paras. 7.17-7.18.

<sup>191</sup>MN, pp. 108-110, paras. 7.19-7.20.

<sup>192</sup>MN, p. 110, para. 7.20.

no justification for continuing the inter-colonial boundary to the village of Bossébangou”<sup>193</sup> — to its great advantage.

1.56. In the “sector of the four villages”, Niger affects to return to an approach of interpreting the text<sup>194</sup>, but it ignores its terms (the word “salient” in particular<sup>195</sup>) and, where it believes that the Erratum does not suffice, it has recourse, not to the 1960 IGN map, as the 1987 Agreement would have it, but to cartographic material of the period<sup>196</sup> and to a telegram/letter from the Head of Say Subdivision to Dori *cercle*<sup>197</sup>. The same type of sources — colonial cartographic material, a preparatory document and an isolated tour report — lead Niger to say that the Erratum should not “be read too literally”<sup>198</sup> and, in reality, to “interpret” it in a way that is completely incompatible with that text as regards the point marking the end of the salient<sup>199</sup>. It goes without saying that, once again, this “interpretation”, if it can be termed such, is very favourable to Niger.

1.57. Primacy is again given to certain aspects of alleged colonial practice over the Erratum, as interpreted in this very lax manner, in the portion “end of the salient/start of the Botou Loop”. Believing that “[t]he final section of boundary in the Say sector is described in the 1927 Erratum in a particularly lapidary manner”<sup>200</sup>, Niger asserts that “the straight-line boundary which it [the Erratum] establishes appears to have no basis in the situation prior to the adoption of the Erratum and was never confirmed in the subsequent practice”<sup>201</sup>.

1.58. This mode of reasoning does not have any foundation in the 1987 Agreement, under the terms of which, in the absence of an agreement between the Parties on any other document whatsoever<sup>202</sup>, only the 1960 IGN map may be consulted, should the amended *Arrêté* not suffice.

1.59. However, when Niger alleges that it does not suffice, it is not necessarily the map that it turns to. Apart from the examples given above, the argument deployed for the sector “end of the salient/start of the Botou Loop” illustrates the capricious use that Niger makes of the IGN map<sup>203</sup>.

1.60. Niger’s line of argument regarding the Tao-Bangaré section also establishes that the map is only used when it matches Niger’s carefully selected examples of colonial practice.

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<sup>193</sup>MN, p. 105, Section A. According to the Erratum, the boundary reaches “the River Sirba at Bossebangou”.

<sup>194</sup>MN, p. 112, para. 7.27.

<sup>195</sup>See para. 0.15 above.

<sup>196</sup>MN, p. 114, para. 7.30.

<sup>197</sup>MN, p. 114, para. 7.31 (see MN, Anns., Series C, No. 61).

<sup>198</sup>MN, p. 115, para. 7.32.

<sup>199</sup>MN, pp. 115-116, para. 7.33.

<sup>200</sup>MN, p. 116, para. 7.34.

<sup>201</sup>MN, p. 116, para. 7.35; see also pp. 118-120, para. 7.39, where Niger claims to find confirmation of its *contra textum* “interpretation” in colonial and post-colonial practice.

<sup>202</sup>See para. 1.51 above.

<sup>203</sup>See the remarks made in this regard in the introduction to the present Counter-Memorial, para. 0.13.

Having disregarded the *Arrêté* on the pretext that it gives “no further indication until the point where the inter-colonial boundary rejoins the boundary of Say *cercle*”, Niger considers that it is “reasonable to rely for this section, *subject to any justified exception*, on the 1960 IGN line”<sup>204</sup>. However, once again the map is only used to the extent that it respects the supposed lessons from colonial practice as analysed by Niger. This is particularly flagrant in the case of Petelkolé: “the IGN line passes to the west of Petelkolé . . . which it leaves to Niger. This is in accordance with the administrative information from the colonial period”<sup>205</sup> — which is in fact highly debatable<sup>206</sup>.

1.61. The same applies in the salient sector: the Erratum having been declared problematic, the IGN map, whose immense virtues Niger nonetheless extols elsewhere<sup>207</sup>, is dismissed in favour of cartographic material that is both older and more limited: a sketch-map of Say *cercle* prepared in 1915 by Administrator Truchard, and the map entitled “new frontier between Upper Volta and Niger” allegedly “prepared following the adoption of the 1927 *Arrêté* and its Erratum”. Confirming Niger’s interpretation of the Erratum, this map — which it is worthwhile recalling was “proposed by Niger, was not accepted by Burkina and thus was not retained as a ‘relevant document accepted by joint Agreement of the Parties’”<sup>208</sup> — is preferred to the IGN map, which “makes the frontier in this area run significantly further to the east than that shown on the previous maps. Here again, this line does not correspond to the traditional shape of Say *cercle*, as it was consistently represented during the colonial period”<sup>209</sup>.

1.62. Moreover, according to Niger, this old cartographic material takes precedence over the IGN map *even if the latter confirms the Erratum*. Since, therefore, in its view, the Erratum is wrong to make the boundary descend so that it reaches the River Sirba at Bossébangou, the IGN map, which also makes the line descend to that point, should be disqualified because it reproduces that alleged mistake<sup>210</sup>.

1.63. Thus Niger argues that the course shown on the 1960 map takes second place to maps or (alleged) colonial<sup>211</sup> and post-colonial<sup>212</sup> *effectivités* which do not confirm it, contrary to the provisions of Article 2 of the Agreement of 28 March 1987.

1.64. Nevertheless, it should be noted that colonial practice only takes precedence to the extent that it suits Niger. The case of Bangaré is a striking example of this: in the section from Bangaré to the boundary of Say *cercle*<sup>213</sup>, Niger intends unreservedly to follow the IGN line, which gives it the village of Bangaré, despite mentioning at the same time a

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<sup>204</sup>MN, p. 93, para. 6.21 (emphasis added).

<sup>205</sup>MN, p. 94, para. 6.22. Niger also adds that “[Petelkolé] has remained under Niger authority since independence” (*ibid.*).

<sup>206</sup>See Chap. III, Section 2, 2 A, below.

<sup>207</sup>MN, p. 75, para. 5.14.

<sup>208</sup>MN, p. 76, para. 5.15.

<sup>209</sup>MN, p. 114, para. 7.30.

<sup>210</sup>MN, p. 110, para. 7.21.

<sup>211</sup>MN, pp. 98-99, para. 6.25.

<sup>212</sup>MN, pp. 93-97, paras. 6.22 and 6.23.

<sup>213</sup>MN, pp. 97-99, paras. 6.24-6.25.



colonial practice which to a significant extent fails to place Bangaré in Niger; this is the case in particular with the supposed “Delbos/Prudon Agreement”, on which Niger nevertheless relies so heavily elsewhere<sup>214</sup>, which places Bangaré in Upper Volta<sup>215</sup>.

1.65. The only consistent aspect of Niger’s Memorial is its inconsistency: it does not follow any clear method; its thesis is not based on any particular principle; it “picks” from the vaguely possible arguments depending on the solution that is most advantageous to it, without any regard for the preliminary agreement between the Parties on the applicable sources of law (despite this being one of the striking features of the present case — the other being the existence of a clear and indisputable title, which is moreover given precedence by the 1987 Agreement between the Parties), a point which will be developed in Chapter II of the present Counter-Memorial. Chapters III and IV will then highlight in greater detail the inconsistencies in Niger’s line of argument, firstly concerning the “Téra sector” and secondly concerning the “Say sector”.

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<sup>214</sup>See paras. 1.22-1.26 above.

<sup>215</sup>MN, p. 97, para. 6.24.

## CHAPTER II

### THE DISCUSSIONS ON THE DEMARCATION OF THE FRONTIER AND THE INCONSISTENCY OF NIGER'S CLAIMS

2.1. Niger's Memorial offers a version of the discussions on the demarcation of the frontier that is both inaccurate and incomplete, and which fails to explain either how the dispute between the Parties regarding their common frontier came about or where they disagree over its course. It will therefore be necessary to correct the most obvious errors in the account that is reproduced in the ten pages of Chapter III of the Memorial that are devoted to the "attempts to settle the frontier dispute"<sup>216</sup> and to complete it (Section 1). There will then be an opportunity to highlight something on which Niger remains silent, namely the total inconsistency of its successive claims (Section 2).

#### SECTION 1

##### NIGER'S ONE-SIDED AND PARTIAL PRESENTATION OF THE FACTS

2.2. The account produced by Niger claims to present "[t]he attempts to settle the frontier dispute peacefully". However, this title is completely biased, since the discussions between the Parties about demarcating the frontier were perfectly consensual until the end of the 1980s; no dispute existed between the Parties at that time (1). The dispute only arose from the moment that Niger decided to invent new ways of interpreting the Erratum (2).

#### 1. The consensual work

2.3. There was no dispute between Burkina and Niger between 1964 and 1990. During this period, as Burkina duly reports in its Memorial<sup>217</sup>, the Parties on the contrary worked together on good terms with a view simply to demarcating their common frontier, which they agreed without difficulty to recognize as being fixed by the Erratum. Given that Niger's account of this period suggests the opposite, it therefore needs to be corrected, in particular with regard to the following four points.

2.4. Firstly, the Protocol of Agreement of 23 June 1964 is not the reflection of a dispute, contrary to what Niger suggests<sup>218</sup>; rather, it defines the Parties' perfect common understanding of the "basic documents for the determination of the frontier". The wording of the Protocol is clear in this regard:

"By agreement between the Parties it was decided to take as basic documents for the determination of the frontier *Arrêté général* 2336 of 31 August 1927, as clarified by Erratum 2602 APA of 5 October 1927, and the 1:200,000-scale map of the Paris *Institut Géographique National*.

A Joint Commission of not more than ten members, which shall include the heads of the administrative divisions concerned, shall carry out the work of

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<sup>216</sup>MN, p. 39.

<sup>217</sup>MBF, pp. 34-48, paras. 1.38-1.75.

<sup>218</sup>MN, p. 39, para. 3.1.

demarcation, starting in mid-November 1964 and beginning with the disputed sectors, in particular the stretch of the frontier lying between Téra and Dori.”<sup>219</sup>

2.5. Admittedly, the work of the Joint Commission that was provided for by this Agreement was not accomplished immediately, as Niger indicates, but it is incorrect to say that the initiatives to proceed with its work resumed “only some 20 years later”<sup>220</sup>. This is forgetting that:

- the Topographic Service and Land Registry of Niger contacted the IGN Annex in Dakar as early as 20 July 1964 in order to obtain a 1:1,000,000 map showing the main astronomic points along the frontier<sup>221</sup>;
- on 25 July 1964, the equivalent service in Upper Volta asked the same IGN Annex in Dakar how much it would cost to mark out the frontier by placing a marker approximately every 10 kms<sup>222</sup>;
- on 6 March 1967, the President of Niger suggested to his counterpart in Upper Volta that an effort should be made to implement the Protocol of Agreement<sup>223</sup>;
- on 16 March 1967, the Minister for the Interior and Security of Upper Volta asked the Commanders of the *cercles* bordering Niger to send him all the relevant documents and information, with a view to a meeting of the Joint Commission on Demarcation of the Frontier the following month<sup>224</sup>;
- a ministerial meeting took place on 9 and 10 January 1968 in Niamey, which decided to “entrust [the *Institut Géographique National de Paris*] with the task of demarcating the frontier”<sup>225</sup>, clearly demonstrating that the frontier issue was of a purely technical nature and did not follow from any “dispute”;
- the principle of establishing a joint commission to demarcate the frontier was reiterated on 16 September 1982 by a ministerial meeting<sup>226</sup>.

2.6. Secondly, while it is true, as Niger indicates<sup>227</sup>, that in February 1985 the ministers recommended demarcating the frontier on the basis of the Protocol of Agreement of 23 June 1964 and establishing the “joint commission responsible for the demarcation of the frontier between the two States”<sup>228</sup>, the Agreement and Protocol of Agreement of 28 March 1987 do not seek to “provide the [demarcation] works with a current framework” on the basis of the Protocol of Agreement of 23 June 1964<sup>229</sup>. The Agreement marks the

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<sup>219</sup>Ann. MBF 45; MN, Anns., Series A, No. 1.

<sup>220</sup>MN, p. 39, para. 3.1.

<sup>221</sup>Ann. MBF 4; see MBF, p. 37, para. 1.47.

<sup>222</sup>Ann. MBF 47; see MBF, p. 37, para. 1.47.

<sup>223</sup>Ann. MBF 49; see MBF, pp. 37-38, para. 1.48.

<sup>224</sup>Ann. MBF 50; see MBF, p. 38, para. 1.48.

<sup>225</sup>Ann. MBF 54; see MBF, pp. 38-39, para. 1.51.

<sup>226</sup>Ann. MBF 69; see MBF, p. 40, para. 1.55.

<sup>227</sup>MN, p. 40, para. 3.3; see also MBF, p. 40, para. 1.56.

<sup>228</sup>Ann. MBF 63; MN, Anns., Series A, No. 2.

<sup>229</sup>MN, p. 40, para. 3.3.

definitive agreement between the Parties both on the texts determining the frontier and on the method to be followed for its demarcation — an exclusive and more precise method than that suggested by the 1964 Protocol of Agreement — while the Protocol establishes the Joint Technical Commission on Demarcation and tasks it with carrying out that demarcation<sup>230</sup>.

2.7. Thirdly, the discussions within the Joint Technical Commission on Demarcation were not “negotiation[s] . . . between the two States over the course of the common frontier”<sup>231</sup>. The Commission could not be the place for such negotiations since, in accordance with Article 5 of the 1987 Protocol of Agreement establishing it, it only enjoyed full autonomy in “*executing the works of demarcation*”<sup>232</sup>. Up until 1990, the members of the Commission therefore confined themselves to pursuing its demarcation, given that the delimitation had already been carried out.

2.8. Fourthly, it is incorrect to suggest, as Niger does, that the work done by the Commission between 1988 and 1990 amounted to placing “23 markers out of the 45 envisaged”<sup>233</sup>. The Commission did a great deal more than this, as it managed to carry out a full survey of the frontier line on the ground<sup>234</sup>.

2.9. It concluded this work at the meeting of 26, 27 and 28 September 1988 in Niamey, the purpose of which was to plot on the 1960 map “the line resulting from the field survey conducted by the Technical Sub-Committee and to submit the results of said work to both Governments for final selection of the frontier line”<sup>235</sup>. This was a complete success. The report of the meeting states that:

“The experts are . . . unanimous as to the map interpretation and the field survey of the boundary line defined in the basic documents cited in the Agreement and Protocol of Agreement, signed in Ouagadougou on 28 March 1987. Only the Tokébangou point, which could not be identified despite numerous investigations, was subject to interpretation by the Technical Sub-Committee.”<sup>236</sup>

2.10. The resulting “consensual line” illustrates the perfect common understanding of the members of the Commission in September 1988<sup>237</sup>. Moreover, on this basis, it only remained for the Commission actually to mark out the frontier. On 18 May 1989, with this in mind, it was also able to draw up a list of the co-ordinates of 32 defining points in preparation for demarcation<sup>238</sup>, and subsequently to place 23 markers<sup>239</sup>.

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<sup>230</sup>MBF, pp. 43-44, paras. 1.61-1.65 and pp. 62-65, paras. 2.21-2.28.

<sup>231</sup>MN, p. 40, para. 3.3.

<sup>232</sup>Anns. MBF 72 and 73 and MN, Anns., Series A, No. 4.

<sup>233</sup>MN, p. 41, para. 3.4.

<sup>234</sup>MBF, pp. 44-46, paras. 1.66-1.69.

<sup>235</sup>Ann. MBF 81.

<sup>236</sup>*Ibid.*

<sup>237</sup>MBF, p. 46, para. 1.69; the consensual line is shown in Cartographic Annex MBF 15; it is also reproduced on page 164 of Burkina’s Memorial, sketch-map No. 16.

<sup>238</sup>Ann. MBF 83; see MBF, p. 47, para. 1.70.

## 2. The crystallization of the dispute

2.11. The Parties began to disagree over the course of the frontier from the moment when, in February 1990, Niger decided unilaterally to renounce the consensual line of 1988<sup>240</sup>. From that date, Niger sought to assert new readings of the amended *Arrêté* of 1927, while Burkina remained firmly convinced that the consensual line was the only valid line to result from a determination of the frontier pursuant to the 1987 Agreement. The dispute was born at that moment.

2.12. In this context, the decision made at the ministerial meeting held in May 1991 in Ouagadougou<sup>241</sup> appears to be the first of the “attempts to settle the frontier dispute peacefully at diplomatic level” that Chapter III, Section 2, of Niger’s Memorial purports to describe<sup>242</sup>, although it is not specifically mentioned as such. Incidentally, during that meeting of May 1991, Ministers did not “[find] that there were lacunae in relation to the implementation of the *Arrêté* . . . and its Erratum”, contrary to what Niger claims<sup>243</sup>; they merely took note of the deadlock within the Joint Technical Commission on Demarcation, which had turned to them in accordance with Article 5 of the 1987 Protocol of Agreement, and decided to settle the matter by applying the Erratum to the letter for the section of the frontier that reaches the River Sirba at Bossébangou, deciding by way of compromise to have recourse to the line shown on the 1960 IGN map for the remainder<sup>244</sup>.

2.13. Furthermore, while it is true, as it recognizes, that it was Niger that rejected the compromise solution of May 1991<sup>245</sup>, its reason for doing so cannot be that “the solution proposed did not comply with the conditions laid down by Articles 1 and 2 of the Agreement of 28 March 1987”<sup>246</sup>. This is clearly just a pretext, for the simple reason that the sole purpose of the 1991 decision was to establish a compromise solution which acknowledged, precisely, that in the light of Niger’s position it would be impossible to achieve a straightforward application of the Erratum, in accordance with the 1987 Agreement. In fact, in 1991 Niger and Burkina were able, through the exercise of their sovereign rights, to adopt a different line from the one arising from Articles 1 and 2 of the 1987 Agreement, but only by agreeing at the same time to *modify* their common frontier by agreement — an agreement which was, in turn, rejected by Niger.

## SECTION 2

### THE INCONSISTENCY OF NIGER’S CLAIMS

2.14. There are obvious variations in the positions adopted by Niger on the frontier line that it has claimed over the years, illustrating the inconsistency of the new thesis presented in its Memorial, which now seeks to rely on boundaries that are either alleged to be

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<sup>239</sup>Ann. MBF 87; see MBF, pp. 47-48, paras. 1.71-1.73.

<sup>240</sup>Ann. MBF 88; see MBF, p. 48, para. 1.74.

<sup>241</sup>Ann. MBF 49 and MN, Anns., Series A, No. 6.

<sup>242</sup>MN, p. 44.

<sup>243</sup>MN, p. 41, para. 3.5.

<sup>244</sup>MBF, pp. 50-51, para. 1.80.

<sup>245</sup>MN, p. 42, para. 3.6.

<sup>246</sup>*Ibid.*

long-standing<sup>247</sup> or correspond to what it contends was former practice<sup>248</sup>, new arguments that it clearly “discovered” when it was preparing its Memorial.

2.15. With regard to the section of the line from the Tong-Tong astronomic marker to the River Sirba at Bossébangou, passing through the Tao astronomic marker, Niger has changed its mind no fewer than five times, maintaining:

- in September 1988, that the frontier is formed by two straight-line sections connecting these three points (this results from the consensual line adopted by the Niger and Burkina experts in 1988)<sup>249</sup>;
- in July 1990, that the section connecting the Tong-Tong astronomic marker to the River Sirba at Bossébangou describes a curve<sup>250</sup>;
- in May 1991, that the frontier at this level consists of two straight-line sections<sup>251</sup>;
- in July 2001, that it consists of a curved line<sup>252</sup>.

2.16. In April 2011, in its Memorial, Niger has completely changed its position and is now maintaining that its claim of a curved line, “[a]t all events”, “[is] debatable”<sup>253</sup>, and that the line is formed by a miscellaneous combination of sections, some of which are alleged to correspond to the indications in the Erratum, others to the 1960 IGN map, and yet others to the former boundaries of *cantons* and other administrative subdivisions, the reality of which is, moreover, far from being established.

2.17. The same goes for the section that meets the River Sirba at Bossébangou. Niger has maintained:

- in September 1988, that the frontier reaches the River Sirba at Bossébangou (this results from the consensual line adopted by the Niger and Burkina experts in 1988)<sup>254</sup>;
- in May 1990, that the frontier does not reach the Sirba at Bossébangou because the map “French West Africa, new frontier between Upper Volta and Niger based on the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927” suggests that it stops further to the north<sup>255</sup>;
- in July 1990, that the frontier reaches the River Sirba at Bossébangou<sup>256</sup>;

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<sup>247</sup>See Chap. IV below.

<sup>248</sup>See Chap. III below.

<sup>249</sup>MBF, pp. 46-48, paras. 1.69-1.73.

<sup>250</sup>Ann. MBF 87; see MBF, p. 49, para. 1.77 and MN, pp. 68-69, para. 5.8.

<sup>251</sup>Ann. MBF 89; see MBF, pp. 50-51, paras. 1.79-1.81.

<sup>252</sup>Ann. MBF 94; see MBF, p. 52, para. 1.84.

<sup>253</sup>MN, p. 70, para. 5.9.

<sup>254</sup>MBF, pp. 46-48, paras. 1.69-1.73.

<sup>255</sup>Ann. MBF 85; see MBF, pp. 48-49, paras. 1.75-1.76 and p. 137, paras. 4.93-4.94.

<sup>256</sup>Ann. MBF 87; see MBF, pp. 138-139, paras. 4.97-4.98.

- in May 1991, that the frontier reaches the River Sirba at Bossébangou<sup>257</sup>;
- in 1994, that the 1991 line is not entirely consistent with the terms of Articles 1 and 2 of the 1987 Protocol of Agreement<sup>258</sup> — which suggests that the frontier still reaches the River Sirba at Bossébangou because that Protocol refers to the Erratum, which expressly stipulates that this is so.

2.18. In its Memorial of April 2011, Niger returns to its position of May 1990 and, relying on arguments that are as novel as they are incompatible with the provisions of the 1987 Agreement, is now claiming that “[t]here was no justification for continuing the inter-colonial boundary to the village of Bossébangou”<sup>259</sup>.

2.19. In the area of the salient, Niger has claimed:

- in September 1988, a line consistent in every respect with the line shown on the 1960 IGN map, as indicated on the consensual line<sup>260</sup>;
- in May 1990, a line not composed of a “true” salient, invoking the map “French West Africa, new frontier between Upper Volta and Niger based on the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927”<sup>261</sup>;
- in July 1990, a line forming a salient, but beginning immediately as it leaves Bossébangou — contrary to the description given by the Erratum — “turn[ing] back on itself at an angle of some kind, but only on the condition that it does not cut the loop of the River Sirba”<sup>262</sup>; Niger also asserts that the village of Takalan “corresponds to the exact location of the current village of Takatami”<sup>263</sup>;
- in May 1991, a line consistent in every respect with the line shown on the 1960 IGN map<sup>264</sup>; and,
- in July 2001, Niger recognizes that it is impossible to identify the villages referred to in the Erratum<sup>265</sup>.

2.20. In its Memorial of April 2011, Niger returns to its position of May 1990 and claims, amongst other things, firstly that there is no salient<sup>266</sup> and, secondly, that Takalan is located to the east of Takatami and is very close to the site of Tangangari<sup>267</sup>.

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<sup>257</sup>Ann. MBF 89; see MBF, pp. 50-51, paras. 1.79-1.81.

<sup>258</sup>Ann. MBF 91; see MBF, p. 51, para. 1.81.

<sup>259</sup>MN, pp. 105-111, paras. 7.14-7.24.

<sup>260</sup>MBF, pp. 46-48, paras. 1.69-1.73.

<sup>261</sup>Ann. MBF 85; see MBF, pp. 48-49, paras. 1.75-1.76 and p. 137, paras. 4.93-4.94.

<sup>262</sup>Ann. MBF 87; see MBF, p. 139, paras. 4.97-4.98.

<sup>263</sup>Ann. MBF 87; see MBF, p. 144, para. 4.115.

<sup>264</sup>Ann. MBF 89; see MBF, pp. 50-51, paras. 1.79-1.81.

<sup>265</sup>The report of the fourth ordinary session of the Joint Technical Commission on Demarcation, held in Ouagadougou from 18 to [21] July 2001, notes “the failure to identify the villages referred to in the Erratum” and recommends a further survey mission in the field, which never took place; Ann. MBF 94.

2.21. Finally, as regards the line between the intersection of the River Sirba with the Say parallel and the beginning of the Botou bend, Niger has successively declared itself convinced:

- in September 1988, that it is formed by a straight line, as indicated on the consensual line<sup>268</sup>;
- in May 1990, that the frontier follows a straight line at this point, as this is what is indicated on the map “French West Africa, new frontier between Upper Volta and Niger based on the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927”, which Niger invoked at that time to reject the consensual line<sup>269</sup>;
- in May 1991, that it follows the line of the 1960 IGN map<sup>270</sup>.

2.22. In April 2011, in its Memorial, Niger argues for the first time that the line consists of a combination of two straight lines forming an angle pointing towards the south.

2.23. This inconsistency on the part of Niger cannot be justified on the pretext that “the proposals put forward by the experts . . . were merely provisional positions, in view or hope of reaching a negotiated settlement of the dispute which the parties have committed themselves to seeking”<sup>271</sup>. The reality is quite different: the experts have not negotiated anything and have kept to the extremely precise “road map” that had been fixed for them by the 1987 Protocol of Agreement. Burkina has taken due note and has consistently stood by the consensual line of 1988. It is Niger, and Niger alone, that has persisted since 1990 — and continues to persist in its Memorial — in claiming frontier lines that have no basis in the law which, as the Parties have agreed many times, is the only law applicable. This conduct further reinforces the position of Burkina, which, as Niger’s Memorial reports, this time correctly<sup>272</sup>, having had its confidence shaken by Niger’s successive about-turns, insisted in 2006 that the Parties bring the resulting dispute before the International Court of Justice<sup>273</sup>.

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<sup>266</sup>MN, p. 112, para. 7.26.

<sup>267</sup>MN, p. 115, para. 7.31.

<sup>268</sup>MBF, pp. 46-48, paras. 1.69-1.73.

<sup>269</sup>MBF, pp. 48-49, paras. 1.75-1.76 and p. 137, paras. 4.93-4.94.

<sup>270</sup>Ann. MBF 89; see MBF, pp. 50-51, paras. 1.79-1.81.

<sup>271</sup>MN, p. 44, para. 3.11.

<sup>272</sup>MN, p. 44, para. 3.13.

<sup>273</sup>MN, Anns., Series A, Nos. 9-11.



### CHAPTER III

#### THE COURSE OF THE FRONTIER IN THE “TÉRA SECTOR”<sup>274</sup>

3.1. On reading the chapter in Niger’s Memorial that is devoted to what Niger terms “[t]he first section of boundary concerned by the present dispute”<sup>275</sup>, it is apparent that in this sector some of the aspects of the dispute between the two Parties have declined in importance since the negotiations<sup>276</sup>, while others have come to the fore.

3.2. In its Memorial, Burkina explained why there is no doubt that the corrected *Arrêté* of 1927 retained a frontier in this sector consisting of two straight-line sections connecting three frontier points in turn. Indeed, the letter of the Erratum, according to which

“[from] 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”

leaves no doubt about the fact that this delimitation document

- designates three frontier points (the Tong-Tong astronomic marker, the Tao astronomic marker and the point where the inter-colonial boundary “reach[es] the River Sirba at Bossebangou”),
- and that they are connected by two successive straight lines, in accordance with generally observed colonial and boundary practice and with the consistent interpretation of the Erratum by the colonial authorities<sup>277</sup>;
- as confirmed, incidentally, by the documents annexed by Niger to its own Memorial, which in turn establish that, in the eyes of the colonial authorities: the boundaries fixed by the Erratum in this sector were “established on the basis of the map prepared by Captain Coquibus, which only showed theoretical lines and points”<sup>278</sup>; the boundary followed “a notional straight line starting from the Tong-Tong astronomic marker and running to the Tao astronomic marker”<sup>279</sup>; instead of “the lines” (in the plural and also, incidentally, “theoretical”) proposed by Administrator Delbos, the Erratum opted for “the

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<sup>274</sup>The expression “Téra sector” is used in the title of Chapter VI of Niger’s Memorial. Burkina believes that it is inappropriate, for the reasons set out below (see paras. 3.14-3.17 below). This expression is only used here for practical purposes, to show that the present chapter will respond to the factual and legal arguments put forward in the chapter of Niger’s Memorial that bears this title.

<sup>275</sup>MN, p. 79, para. 6.1.

<sup>276</sup>See Chap. II above. Obviously Burkina prepared its own Memorial on the basis of the positions adopted by Niger during the negotiations.

<sup>277</sup>See MBF, pp. 101-132, paras. 4.6-4.81 and p. 132, para. 4.82 for the exact co-ordinates of these three frontier points. MN, Anns., Series C, No. 62 (p. 7) (a letter from the Governor of Niger from 1936) confirms that during the relevant period the village of Bossébangou was located on the bank of the River Sirba (“People go to collect water from the Sirba, which is less than 500 m from the village . . .”).

<sup>278</sup>See para. 3.31 below and MN, Anns., Series C, No. 20 (letter from Administrator Delbos, Commander of Dori *cercle*, to the Governor of Upper Volta dated 17 December 1927).

<sup>279</sup>See para. 3.47 below and MN, Anns., Series C, No. 56 (certified copy of Record of Agreement of 13 April 1935 between Administrator Garnier (Dori *cercle*) and Deputy Lichtenberger (Téra Subdivision)).

Tao-Sirba line [in the singular]”<sup>280</sup>; the boundary in this sector formed “a theoretical and artificial frontier”<sup>281</sup>, “by connecting the Tao boundary marker directly with Bossébangou”<sup>282</sup>.

3.3. Moreover, in its Memorial Niger concedes that in several respects this description of the line is justified.

3.4. It acknowledges firstly that the Tong-Tong and Tao astronomic markers are frontier points. Niger gives the same co-ordinates for the first marker as Burkina<sup>283</sup>. However, the Parties do not accept the same co-ordinates for the second marker, although the difference is minimal<sup>284</sup>. Both Parties take as a basis the co-ordinates established by Captain Nevière in 1927, but the co-ordinates communicated in Annex No. 105, Series C, of Niger’s Memorial do not correspond to those that appear in the data sheet on the astronomic markers which was drawn up by that mission and which Burkina has appended to its Memorial as Annex 41. Given that it is more precise, the data sheet should, in Burkina’s view, take precedence. Moreover, Niger seems to agree, as, after citing its own version of the co-ordinates from the Nevière mission, it explains that “[h]owever the frontier marker is situated slightly further south and east, at the following co-ordinates: 14° 03' 02" N, 00° 22' 52" E. It is this latter point which should be taken as a frontier point”<sup>285</sup>. These co-ordinates — whose method of identification Niger does not specify<sup>286</sup> — only differ by a few seconds from the more precise co-ordinates measured by GPS by Burkina: 14° 03' 04.7" N; 0° 22' 51.8" E. Burkina stands by these, given their greater precision and the reliability of the methodology used to obtain them.

3.5. Niger also acknowledges in its Memorial, but this time more awkwardly, that there is a third frontier point in the sector defined in the relevant part of the Erratum. Niger in fact refers to “two or three points designated by the *Arrêté* of 31 August 1927 as amended by the Erratum of 5 October 1927”<sup>287</sup>. The use of the conjunction “or” reflects a certain hesitation that is removed by the text of the Erratum, which refers indisputably to the frontier passing through three successive points in the present sector.

3.6. Moreover, breaking with the interpretation that it believed it could attribute to the Erratum in 1990<sup>288</sup> — which was itself at odds with the consensual interpretation backed by the two Parties in 1988, the one that Burkina still defends today<sup>289</sup> — Niger no longer believes that these frontier points are connected by one or more curved lines, an interpretation

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<sup>280</sup>See para. 3.55 below and MN, Anns., Series C, No. 79 (report of a tour conducted from 16 to 23 November 1953 by Deputy-Administrator Lacroix (Tillabéry *cercle*), dated 24 December 1953).

<sup>281</sup>See para. 3.60 below and MN, Anns., Series C, No. 30 (letter from the Lieutenant-Governor of Niger to the Lieutenant-Governor of Upper Volta dated 27 September 1929).

<sup>282</sup>See para. 1.28, 8<sup>th</sup> indent, above and MN, Anns., Series C, No. 73 (official telegram/letter from the Head of Téra Subdivision to Tillabéry *cercle* dated 11 July 1951).

<sup>283</sup>MN, p. 92, para. 6.19; MBF, pp. 102-103, paras. 4.11-4.13.

<sup>284</sup>MN, pp. 93-94, para. 6.22; MBF, pp. 103-104, paras. 4.14-4.16.

<sup>285</sup>*Ibid.*

<sup>286</sup>And to which it adds three extra [tenths of] seconds in its submissions (see MN, Submissions, p. 122).

<sup>287</sup>MN, p. 86, para. 6.11.

<sup>288</sup>MBF, p. 49, para. 1.77. See also MBF, p. 52, para. 1.84.

<sup>289</sup>MBF, pp. 118-123, paras. 4.46-4.57.

that was clearly indefensible. “At all events”, it writes in its Memorial, rather casually, the validity of the curves thesis was “debatable”<sup>290</sup>. Admittedly, references to the line being curved still surface here and there in Niger’s Memorial<sup>291</sup>. The thesis defended in that document is, however, radically new, compared with both the curves thesis put forward in 1990 and the consensual line of 1988, which had established that the line was composed of two straight-line sections. In Niger’s view, the line either follows the one shown on the 1960 map or, in the other cases, consists of “straight lines”<sup>292</sup>. This last point constitutes a recognition that when the frontier passes through two points, save indications to the contrary, it follows straight lines. This is also the thesis defended by Burkina. Niger has also endorsed it once again in paragraph 7.40 of its Memorial<sup>293</sup>. This interpretation is all the more valid given that, as Niger points out, “the sector of the frontier involved in the present dispute”, of which the Téra sector is just one part, is “relatively restricted”<sup>294</sup>.

3.7. This is where the points of agreement between the two Parties end and the new points of disagreement appear. They have one thing in common: Niger’s legally erroneous conception, not to say its actual misrepresentation, of both the delimitation method that the Parties have agreed to employ and the very text of the legal title that is applicable in the present case, the 1927 Erratum<sup>295</sup>. A simple glance at the line claimed in this sector by Niger in its Memorial makes the misrepresentation very striking: instead of the two straight-line sections connecting the Tong-Tong astronomic marker to the Tao astronomic marker and then that marker to the River Sirba at Bossébangou, and instead of the line shown on the 1960 map that Niger nevertheless claims “essentially” to follow, Niger calls for the following line to be adopted, claiming that:

- the two astronomic markers referred to in the *Arrêté* are not connected by one straight line, but by two straight lines passing through an intermediate point, the Vibourié marker, which is not, however, mentioned in the Erratum of 1927 (see sketch-map No. 3 below — Course of the boundary between the Tong Tong and Tao markers);
- furthermore, the boundary does not then go on to connect the Tao astronomic marker to the River Sirba at Bossébangou with a straight line; nor does it follow the line shown on the 1960 map: according to Niger, here the boundary sporadically follows the line shown on the map, but departs from it considerably several times so as broadly to enclave a number of villages in Niger’s territory (see sketch-map No. 4 below — Course of the boundary after the Tao marker);

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<sup>290</sup>MN, p. 70, para. 5.9.

<sup>291</sup>See, for example, MN, pp. 91-92, para. 6.18 *in fine*, asserting that the line shown on the 1960 map “adopts a shape broadly incurvated to the west”. According to Niger, “[t]hat incurvation is new. We will now examine step-by-step whether it is justified”. See also MN, pp. 83-84, para. 6.10, regarding the 1:1,000,000 map of 1927 (MN, Anns., Series D, No. 13): “[t]he shape of the line connecting these three points is slightly curved” (this statement is debatable because the map actually reproduces two straight lines, even if the line, which is drawn freehand, is rather approximate).

<sup>292</sup>MN, Chap. VI, B, Section 2, a), p. 91 and p. 93, para. 6.20 *in fine*.

<sup>293</sup>MN, p. 120, para. 7.40:

“Here again, nothing in the practice of the colonial authorities, or in the representations of this part of the frontier on the maps and sketch-maps of the colonial period appears to justify this deviation [the one found on the line shown on the 1960 map]. Niger accordingly maintains its claim here to a frontier in two straight-line sections, as it appears on those maps and sketch-maps of the colonial period.”

<sup>294</sup>MN, p. 49, para. 4.1.

<sup>295</sup>See Chap. I, Section 1, paras. 1.3 *et seq.*

— finally, the boundary does not reach the River Sirba at Bossébangou, but touches on the salient referred to in the Erratum (a salient that Niger would have disappear<sup>296</sup>) more than 30 km to the north-west of that point (see sketch-map No. 5 below — Course of the boundary in the area of the salient).

3.8. This line is completely unfounded. Firstly, as regards the method for determining the frontier, and without repeating the points already made about this issue in the present Counter-Memorial<sup>297</sup>, it is important to note the inconsistent use that Niger believes it can make of the 1960 map.

3.9. On the one hand, Niger rightly chooses not to follow the line shown on the 1960 map when this has no basis in the text of the Erratum (in favour, it is true, and without any justification, of a line which is also not described in that text). This is what it does in the sector between the two astronomic markers of Tong-Tong and Tao, where it finds that the line shown on the map adopts “a shape broadly incurvated to the west”<sup>298</sup>, which is not described by the Erratum. Moreover, this presentation is very far removed from reality, as the line shown on the map in this sector does not take the form of a single curved line connecting the two markers, but follows a complex route connecting a whole series of intermediate points to which the Erratum makes no reference whatsoever.

3.10. On the other hand, however, and without providing any explanation, Niger adopts the opposite course of action in the subsequent sector of the frontier (see sketch-map No. 4 below — Course of the boundary after the Tao marker), where it indicates that it prefers the line shown on the 1960 map to the one that results from the clear terms of the amended *Arrêté*, even though, as in the previous case, the line shown on the map is extremely tortuous and has no basis in the text of the Erratum<sup>299</sup>. The double standard adopted by Niger is not explained. Moreover, it is not quite true to say that in the second case Niger prefers the line shown on the map to the one resulting from the amended *Arrêté*, since the line that it is claiming in the Téra sector actually only follows the line shown on the 1960 map very sporadically, while departing radically from the line defined in the amended *Arrêté* of 1927.

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<sup>296</sup>See paras. 4.40-4.53 below.

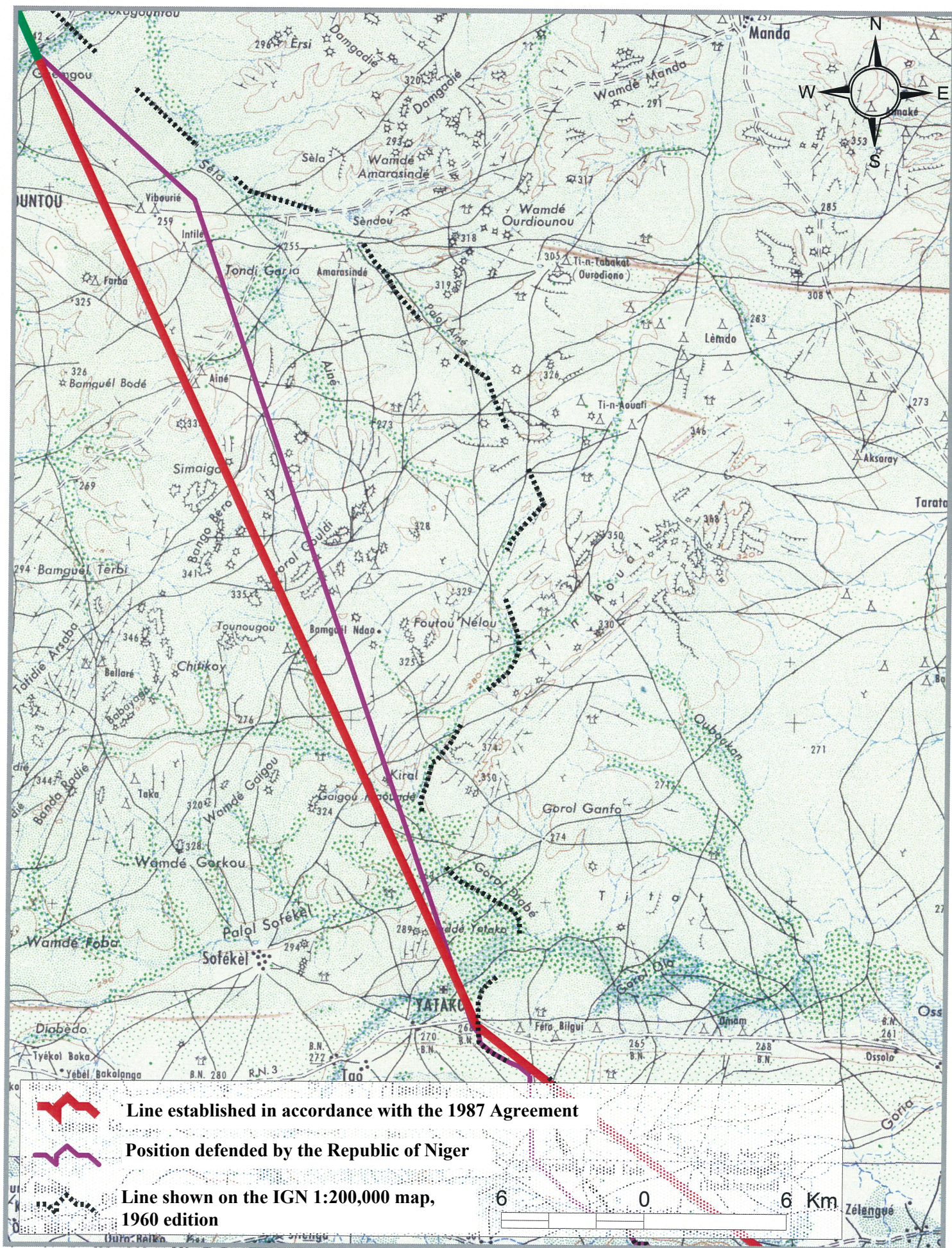
<sup>297</sup>See paras. 1.40-1.64 above.

<sup>298</sup>MN, pp. 91-93, paras. 6.18-6.20.

<sup>299</sup>MN, pp. 96-101, paras. 6.21 *et seq.*

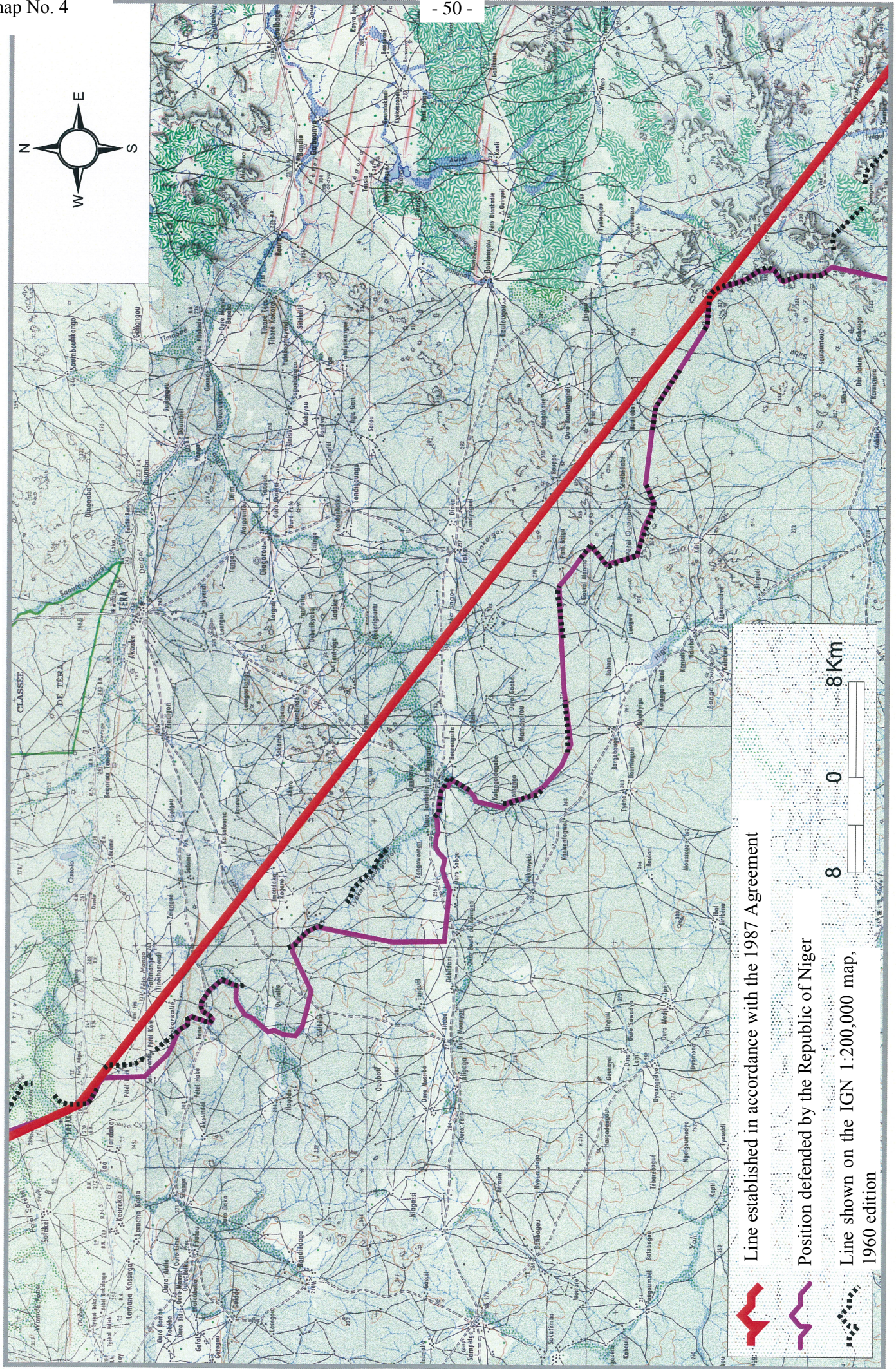
### Course of the boundary between the Tong-Tong and Tao markers

Scale 1:200,000



# Course of the boundary after the Tao marker

Scale 1:400,000



Line established in accordance with the 1987 Agreement

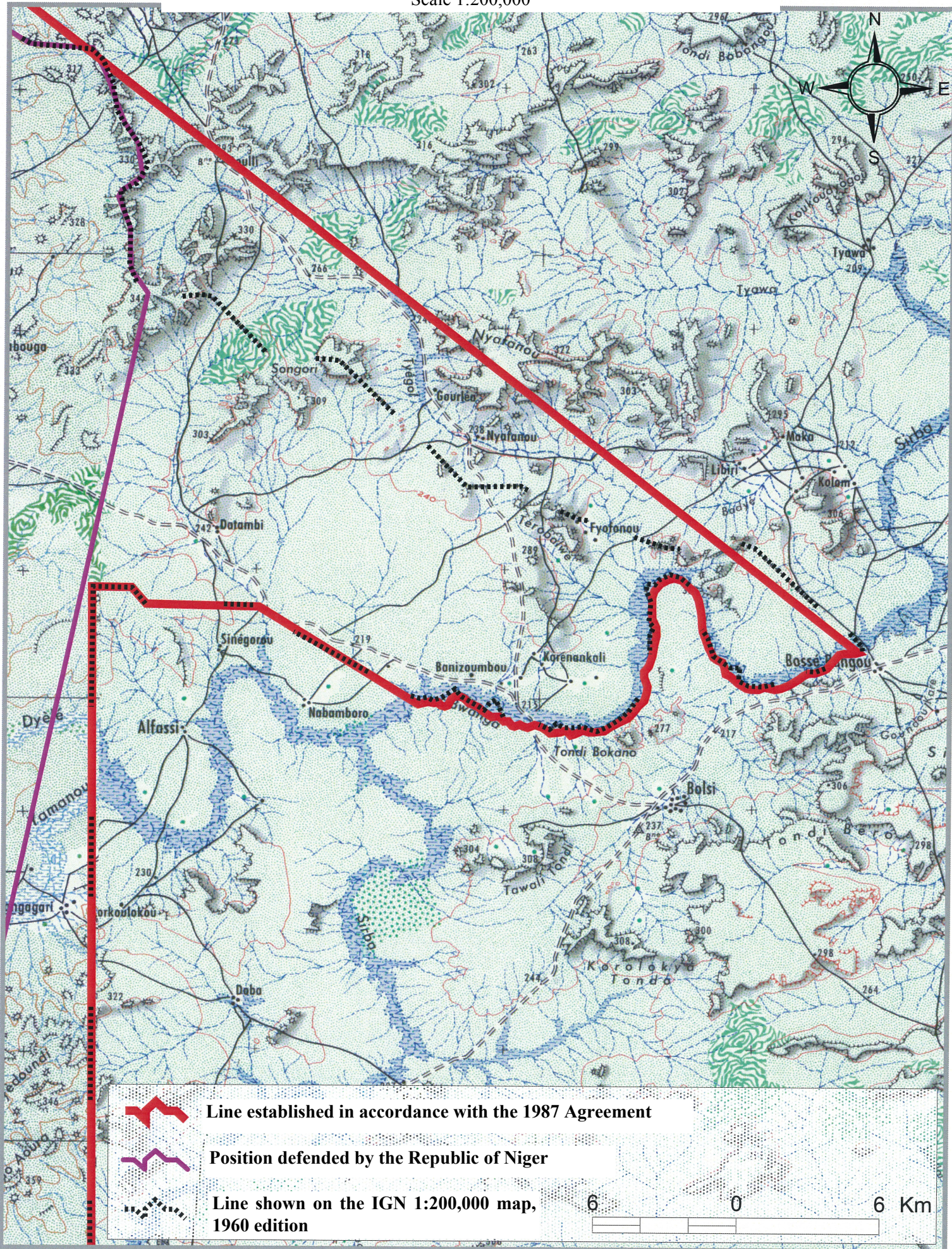
Position defended by the Republic of Niger

Line shown on the IGN 1:200,000 map, 1960 edition

8 0 8 Km

### Course of the boundary in the area of the salient

Scale 1:200,000



3.11. The inconsistency is intensified by the fact that Niger refuses to follow the line shown on the 1960 map as far as the third frontier point, even though both the Erratum and the line on the map fix its location in the same place: the point where the frontier reaches the River Sirba at Bossébangou. Niger's line avoids this crossing point, in contravention of both the text of the Erratum and the line shown on the 1960 map, which coincide here.

3.12. Niger considers that it can depart still further from the subsidiary method adopted by the Parties by establishing a unilateral exception to reliance on the line shown on the 1960 map: it indicates that it relies on it "subject to any justified exception"<sup>300</sup>. None of this is in conformity with the method approved by the Parties<sup>301</sup>.

3.13. As for the text of the amended *Arrêté*, Niger reorganizes it unilaterally without even attempting to justify an approach that is, nevertheless, legally unacceptable. This reorganization takes several forms.

3.14. As indicated above<sup>302</sup>, the expression "Téra sector" may be convenient, but it is merely a simplification that should be understood subject to the following three important considerations.

3.15. Firstly, Niger itself points out that this sector is the one "where the frontier separates the current *département* of Téra (Gorouol, Téra, Diagourou, and Dargol *cantons*), on the Niger side, from the provinces of Oudalan, Seno (Dori) and Yagha (Sebba), on the Burkina Faso side"<sup>303</sup>. It would therefore have been more appropriate to designate this sector without referring exclusively to the Niger territorial subdivision. It is best described as the Téra/Oudalan, Seno and Yagha sector, precisely because it is a frontier sector.

3.16. Secondly, in defining this sector with reference exclusively to a territorial subdivision of Niger and, moreover, in making the delimitation in this sector end at what it calls "the junction of the boundary with Say *cercle*"<sup>304</sup>, Niger perpetuates the error committed by the author of the *Arrêté* in its version of August 1927. That text did not seek to delimit subdivisions that were internal to one colony, any more than its effect today is to delimit a territorial subdivision of Niger: it defines an inter-colonial boundary, which has become an international frontier. The author of the first version of the *Arrêté* had admittedly committed an error on this point, by including elements of intra-colonial delimitation — in this instance certain *cercle* boundaries on either side of the inter-colonial boundary — in the inter-colonial delimitation. However, that is precisely why the Erratum was adopted<sup>305</sup>. In keeping with its purpose, the latter no longer refers to *cercle* boundaries except, *by reference*, in its last

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<sup>300</sup>MN, p. 93, para. 6.21.

<sup>301</sup>See paras. 1.40-1.64 above.

<sup>302</sup>See the introduction to the present Counter-Memorial, para. 0.15, fn. 28, above.

<sup>303</sup>MN, p. 79, para. 6.1.

<sup>304</sup>*Ibid.*

<sup>305</sup>See MN, pp. 19-21, para. 1.26 and pp. 63-65, para. 5.5 and MBF, p. 137, para. 4.95. See also para. 1.17 above.



subparagraph, regarding the final section of the frontier between Upper Volta and Niger<sup>306</sup>. By contrast, no reference is made in the Erratum's other subparagraphs to "the boundary with Say *cercle*", as Niger wrongly contends<sup>307</sup>.

3.17. Thirdly, in restricting the first disputed sector to the "Téra sector", Niger betrays the text of the amended *Arrêté* of 1927. Niger claims that this "Téra sector" "runs from the Tong-Tong astronomic marker to the junction of the boundary with Say *cercle*"<sup>308</sup>. In fact the 1927 Erratum states something completely different, in the clearest possible terms. The boundary adopted by that text does not pass through this junction, which it does not mention at any point. On the contrary, it indicates that the boundary "cut[s] the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reach[es] the River Sirba at Bossébangou"<sup>309</sup>. Moreover, it is this that Niger is obliged to acknowledge when it recognizes implicitly that *in the light of the text of the Erratum*, the "Téra sector" necessarily extends to the point where the frontier reaches the River Sirba at Bossébangou. Indeed, after citing the text of the Erratum and putting the passages relating to the sector in question in italics, in particular the extract reproduced above, Niger blandly asserts that "the only stretch still in dispute for the Téra sector is that indicated in italics in the two preceding quotations"<sup>310</sup>. However, the line claimed by Niger never either reaches this point or passes through it, in contravention of the letter of the Erratum.

3.18. This leads to some very confusing statements. For example, Niger alleges that from the Tao astronomic marker "the official text gives no further indication until the point where the inter-colonial boundary rejoins the boundary of Say *cercle*"<sup>311</sup>, as if the text referred to that latter point. Similarly, Niger defends the idea that the 1960 map "reproduces the mistake contained in the Erratum of 1927" in making "the boundary between Upper Volta and Niger descend as far as Bossébangou"<sup>312</sup> — in other words, Niger comes to acknowledge that both the Erratum and the line shown on the 1960 map make the point where the boundary reaches the River Sirba at Bossébangou a frontier point, while nevertheless excluding this point from the line that it claims in its Memorial<sup>313</sup>.

3.19. Niger does not merely commit a sin of omission. It not only takes the liberty of leaving out a frontier point expressly referred to in the Erratum, but also has no hesitation in adding new points not mentioned in the Erratum. This is the case for the Vibourié marker which, according to Niger, and despite the fact that unlike the Tong-Tong and Tao markers it is not mentioned in the text of the Erratum, has been "since the colonial era, the next point on the boundary", located between the two markers designated in the Erratum<sup>314</sup>. The same goes

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<sup>306</sup>It then follows the course of the Tapoa upstream until it meets *the former boundary of the Fada and Say cercles*, which it follows as far as the point where it intersects with the course of the Mekrou." [Emphasis added.]

<sup>307</sup>MN, p. 79, para. 6.1.

<sup>308</sup>*Ibid.* (emphasis added). See also MN, pp. 97-100.

<sup>309</sup>Ann. MBF 35 (emphasis added).

<sup>310</sup>MN, pp. 82-83, para. 6.9 (emphasis added).

<sup>311</sup>MN, p. 93, para. 6.21.

<sup>312</sup>MN, pp. 110-111, para. 7.21.

<sup>313</sup>On the argument that the explicit reference to the Sirba at Bossébangou in the amended *Arrêté* of 1927 was a mistake, see paras. 4.20-4.29 below.

<sup>314</sup>MN, pp. 92-93, para. 6.20. On the Vibourié marker, see Section 2.1, paras. 3.44-3.52 below.

for the numerous frontier points that Niger invents between the Tao marker and the endpoint of the frontier in this sector<sup>315</sup>.

3.20. The result of these inventions is that the line claimed by Niger departs completely from the text of the Erratum. According to the clear terms of the latter, which can be split into two stages, the frontier points being indicated in italics:

“— [from] 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.”

This is what becomes of the line in Niger’s Memorial:

“the course of the frontier in the Téra sector will be examined by being subdivided into three sections: from Tong-Tong to Tao (*a*), from Tao to Bangaré (*b*), and from Bangaré to the boundary of Say *cercle* (*c*)”<sup>316</sup>.

3.21 Above and beyond these errors, Niger is retreating into a wholly anachronistic strategy. Visibly dissatisfied with the delimitation made by the colonizer in the 1927 Erratum, to which it nonetheless agreed to give full effect, as was required by customary international law, by concluding the 1987 Agreement and Protocol of Agreement<sup>317</sup>, Niger endeavours to circumvent the amended *Arrêté* of 1927 in two complementary ways:

- (i) by seeking firstly to rewrite its terms on the basis of certain previous proposals for delimitation which have not, however, been confirmed by the competent authority (Section 1); and
- (ii) by then seeking to rely on factors which emerged subsequent to the 1927 Erratum in order to redefine its terms, even though the Parties have never ceased recalling that this legal act constituted the only applicable title, and without in any case providing any factual evidence in this regard (Section 2).

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<sup>315</sup>See paras. 3.65 *et seq.* below.

<sup>316</sup>MN, p. 46, para. 6.17.

<sup>317</sup>Moreover, it may be useful to recall that those involved at the time apparently considered that the Colony of Niger had emerged with a distinct advantage from the delimitation exercise carried out in 1927, to the detriment of Upper Volta. This is reflected in the recriminations of Administrator Delbos, which Niger itself makes much of. See paras 3.22 *et seq.* below, and also MN, Anns., Series C, No. 21 (Letter No. 96 from the Commander of Dori *cercle* to the Governor of Upper Volta dated 23 April 1929, second page: “For the delimitation established between Niger and Upper Volta was generous enough (this is a euphemism . . .) to leave Niger with the major watering places . . .”).

## SECTION 1 EVENTS PRIOR TO THE AMENDED *ARRÊTÉ* OF 1927

3.22. The “methodology adopted” by Niger in its Memorial has the sole aim of circumventing the clear text of the amended *Arrêté* of 1927<sup>318</sup>. Considering the text of this *Arrêté* to be “particularly succinct”, containing only “rudimentary indications”<sup>319</sup>, Niger contends,

“[i]t is therefore necessary to look elsewhere in order to identify this stretch of the boundary between the two territories. The history of its origins offers such a possibility, which should . . . be explored.”<sup>320</sup>

3.23. It is strange to see Niger looking elsewhere even before it has explored the possibilities offered by the 1927 Erratum, which is sufficient in itself (the description of a line in large sections does not preclude it from being precise, as long as the orientation of the sections in question and the identification of their respective endpoints are clear and “operational”). The line defined in the Erratum being perfectly clear, all that is required is to follow its course, as Burkina has explained in its Memorial<sup>321</sup>.

3.24. Niger’s reasoning is characterized, furthermore, by an intrinsic contradiction. Exploring “the history of its origins” actually leads it to the finding that the proposals for delimitation submitted before the adoption of the *Arrêté* by Administrators Delbos and Prudon, which were based on an attempt to establish the “boundaries of the *cantons* of their respective *cercles*”<sup>322</sup>, differed from the solutions finally chosen by the competent authority. This was the reason why Administrator Delbos later “protested vigorously” against the *Arrêté* as adopted, but, as Niger agrees, his urgent plea “had no effect, and no change was made to the legislative text up to the time of independence”<sup>323</sup>. It is to be deduced from this that the amended *Arrêté* of 1927 did not intend to confirm “the boundaries of the *cantons* of their respective *cercles*” that the two Administrators had attempted to establish — the latter furthermore disagreeing with each other on this point<sup>324</sup>.

3.25. Niger however relies definitively in the present sector on the proposals of Delbos and Prudon in order to interpret (or rather, in actual fact, to revise) the 1927 Erratum. Niger indeed claims that,

“notwithstanding the wish frequently expressed by officials of the two Colonies, the course of the boundary was never *clarified* by a new text *so as to correspond more closely with the actual boundaries of the cantons in practice*”<sup>325</sup>.

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<sup>318</sup>See Chap. I above.

<sup>319</sup>MN, p. 83, para. 6.9 *in fine*, and p. 84, para 6.10 *in fine*. See also paras. 1.42-1.43 above.

<sup>320</sup>MN, pp. 84-85, para. 6.11.

<sup>321</sup>See MBF, pp. 98 *et seq.*, Chap. IV, Section 1.

<sup>322</sup>MN, p. 87, para. 6.12.

<sup>323</sup>MN, p. 90. para. 6.14.

<sup>324</sup>See sketch-map No. 2 above, and MN, p. 87, para. 6.12: the reports of the two administrators “are similar, even though they do not totally coincide”.

<sup>325</sup>MN, p. 91, para. 6.16 [emphasis added].

3.26. This strategy should not mislead the Court. By implying that it would have been possible to *clarify* the text of the *Arrêté* to make it *correspond more closely* with the claimed “actual boundaries . . . in practice” of the cantons, Niger is suggesting that actual possession of territory (if accepted as probative and proven) might constitute a title complementary to the corrected *Arrêté* of 1927. This is indeed the strategy that it deploys further on in its Memorial, when it considers that the line on the 1960 map could be added to and even replace the delimitation definitively laid down in the 1927 Erratum, on the basis of findings on possession subsequent to the date of adoption of the latter<sup>326</sup>. The idea that the proposals of Administrators Delbos and Prudon could thus be used to “clarify” the Erratum is however contrary to “the history of [the] origins” of the *Arrêté* on which Niger relies: the 1927 *Arrêté* — as is attested by Administrator Delbos’s “urgent plea” — actually *diverged* from the boundaries of the *cantons* which the two Administrators had sought to establish — but without arriving at an identical definition of them<sup>327</sup>. They cannot therefore be used, *after the event*, to *clarify* the Erratum, since the latter did not have the intention of confirming them. In order to make the delimitation adopted in 1927 “correspond more closely” to the claimed “actual boundaries of the *cantons* in practice”, as Niger itself admits, a “new text” would have been necessary. Such a text would not have clarified the delimitation decided upon in 1927; on the contrary, it would have amended it. Nonetheless, such a text was never forthcoming. Niger’s strategy is thus in fact to circumvent the legal title applicable in the present case, the 1927 Erratum<sup>328</sup>.

3.27. Furthermore, upon careful examination, Niger’s thesis is characterized by absurdity in its very wording. As has previously been recalled<sup>329</sup>, the proposals submitted by Administrators Delbos and Prudon were simultaneously: (i) different from the delimitation established in the Record of Agreement of 2 February 1927 between the Governors of the Colonies concerned, which was adopted before the work of the Administrators was undertaken; (ii) different from the line in the 1927 Erratum which was adopted after that work had been submitted and which diverged from it by going back, subject to a few amendments, to the line laid down in the 1927 Record of Agreement; and (iii) different one from the other. In such circumstances, arguing that alleged pre-existing boundaries might “clarify” the text of the *Arrêté*, i.e., help to interpret its terms, on the grounds that, according to Niger, it is supposed to have established a delimitation in consideration of those boundaries, does not make sense, since at the critical date of 1927, the Administrators’ proposals were specifically not taken into account in the Erratum. Nor is it possible to consider that the Erratum would have referred to the “actual” boundaries which might have

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<sup>326</sup>*Id.*, and Section 2, paras. 3.41 *et seq.* below.

<sup>327</sup>See fn. 324 above.

<sup>328</sup>See Chap. 1, Section 1 above.

<sup>329</sup>*Ibid.*

been “in practice” subsequent to its adoption: firstly, it in no way provides for this and, secondly, such a way of proceeding would have been quite nonsensical in an act of delimitation<sup>330</sup>.

3.28. On another level, it is equally difficult to defend the thesis advanced by Niger. According to Niger, “the new boundary” established by the amended *Arrêté* of 1927 “was defined as a series of juxtaposed cantonal boundaries, themselves composed of a series of village and/or hamlet boundaries”<sup>331</sup>. This would appear to give rise to a

“presumption that the areas composing these *cantons*, occupied by indigenous peoples, and the villages, fields or pastures and nomad routes, did not in principle follow abstract lines (whether curved or straight), but were based on land occupation and followed the configuration or nature of the ground”<sup>332</sup>.

3.29. It is strange to apply a “presumption” to a text. A delimitation of this kind, based on “land occupation”, does not emerge in any way from the text of the amended *Arrêté*. Moreover, Niger itself accepts a system of straight lines along various sections of the border, of up to around 100 kms in length<sup>333</sup>. It also acknowledges that “in sparsely populated areas, the *canton* boundaries were quite vague: for example on rocky hillsides and infertile plateaux, and in open pastureland”<sup>334</sup>. The contradiction is blatant: the *canton* boundaries were vague in open pastureland, yet it is on such factors that Niger claims to base the colonial delimitation.

3.30. The indications provided by Administrators Delbos and Prudon relating to the alleged “actual boundaries . . . in practice” on the eve of the adoption of the 1927 *Arrêté* do not in any case provide any support whatsoever for the line claimed by Niger. As the Delbos report has not been found, it has not been possible to establish directly the factual bases for

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<sup>330</sup>The dicta of the International Court of Justice concerning conventional border delimitations are entirely valid in the present case since the object of these delimitations does not fundamentally differ from a delimitation between colonies. In the case concerning the *Temple of Preah Vihear*, the Court pointed out that “in general terms, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality” (Judgment of 15 June 1962, *I.C.J. Reports 1962*, p. 34). Similarly, in the *Libya/Chad* case in 1994, the Court recalled its 1959 dictum in the *Frontier Land* case in these terms:

“Similarly, in 1959 in the case concerning *Sovereignty over Certain Frontier Land*, the Court took note of the Preamble to a Boundary Convention as recording the common intention of the parties to ‘fix and regulate all that relates to the demarcation of the frontier’ and held that ‘Any interpretation under which the Boundary Convention is regarded as leaving in suspense and abandoning for a subsequent appreciation of the *status quo* the determination of the right of one State or the other to the disputed plots would be incompatible with that common intention’ (*I.C.J. Reports 1959*, pp. 221-222).” (Judgment of 3 February 1994, *I.C.J. Reports 1994*, p. 24, para. 47.)

In the present case, the intention of the author of the 1927 Erratum is no different: the aim was to lay down once and for all, on the day of adoption, the boundary between the Colonies of Upper Volta and Niger, as was explicitly requested by the Decree of the President of the French Republic of 28 December 1926 (see paras. 1.12-1.15 above).

<sup>331</sup>MN, pp.80-81, para. 6.6; see also paras. 1.4 *et seq.* above.

<sup>332</sup>MN, pp. 84-86, para. 6.11.

<sup>333</sup>See in particular paras. 4.54 *et seq.* below.

<sup>334</sup>MN, pp. 80-81, para. 6.6.

the purely geometric boundary line he put forward<sup>335</sup>. Administrator Prudon's Report of 4 August 1927 has for its part been appended by Niger to its Memorial. Reading it is an instructive exercise in several respects<sup>336</sup>:

- in the relevant sector, Administrator Prudon has listed on the sketch-map attached to his report only about ten villages between the Tao marker and the River Sirba, which are nonetheless around a hundred kilometres apart; that goes to show that the region was sparsely populated;
- this is confirmed by the fact that the Administrator notes that in this same sector from “Doulgou to Tao” then from “Tao to Diamafoundé” he has recorded “no dispute”;
- in this same Report which, according to Niger, establishes the so-called “actual boundaries . . . in practice” at the time when the 1927 *Arrêté* was adopted, the village of Bangaré (spelled “Bengaré” on Administrator Delbos's sketch-map), which today Niger claims to be on its side of the frontier line<sup>337</sup>, is not marked as one of the “villages and *groupements* asking to be transferred to Niger and located in Tillabéry *cercle*”, according to the wording used by the map's legend. In fact, it is placed by Administrator Prudon on the Upper Volta side of the frontier that he proposes. The same solution is reached by the line adopted by the amended *Arrêté* of 1927: the straight line linking the Tao astronomic marker to the point where it reaches the River Sirba at Bossébangou also places the village of Bangaré within Burkina Faso's territory;
- there are no findings, on the other hand, which would provide support for the frontier Niger is claiming today, and in any case Niger does not invoke any such findings.

3.31. Although Administrator Delbos's Report has not been found, an idea of its content is provided indirectly by a letter he sent to his administrative authority, the Governor of Upper Volta, on 17 December 1927<sup>338</sup>. This letter confirms Burkina's reading of the 1927 Erratum: the latter in no way set out to confirm so-called “actual boundaries . . . in practice”, nor to resort to the use of natural frontiers (to the great regret of the Commander of Dori *cercle*, who felt that the Colony of Upper Volta had thereby lost considerable territory in

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<sup>335</sup>The description of the course of this boundary is known through a letter from Delbos, Commander of Dori *cercle*, to the Governor of Upper Volta, dated 27 August 1927 (MN, Anns., Series C, No. 16):

“From this point the boundary, descending on a bearing of 156°, crosses the Téra-Dori road 5.75 km from Tao (Soum Pool); on reaching Tao it descends on a bearing of 135° for 27.5 km, then for 26.5 km on a bearing of 147°, until it reaches a point 5 km to the north of the Iga Pool. It then turns back up in a north-easterly direction on a bearing of 79° for 31.5 km, before redescending on a bearing of 127° for a distance of 13.5 km, and then on a bearing of 190° for 25.5 km, before finally following a bearing of 170° until it reaches the boundary of Say *cercle* to the west of Alfassi on the River Cirba.”

It is clear that this proposal does not name the places where the boundary changes direction, which makes it more difficult to visualize the line suggested. It should be noted, furthermore, that the Administrator confuses the Soum Pool, which is much further north (and which was therefore the object of debate in the case concerning the Frontier Dispute (Burkina/Mali) — see I.C.J. Judgment of 12 December 1986, *I.C.J. Reports 1986*, pp. 627-628, paras. 138-139) with the Solo Pool. Such confusion also limits the probative value of this report.

<sup>336</sup>MN, Anns. Series C, No. 15 (Extract No. 25 from the Tour Report of Administrator Prudon, dated 4 August 1927) and MN Anns., Series D, No. 3 (Tillabéry *cercle*, 1:200,000-scale sketch-map drawn up by Administrator Prudon in June 1927).

<sup>337</sup> See paras. 3.80-3.83 below.

<sup>338</sup>MN Anns., Series C, No. 20 (Letter No. 731 from Administrator Delbos, Commander of Dori *cercle*, to the Governor of Upper Volta dated 17 December 1927).

comparison with the delimitation that he himself had proposed<sup>339</sup>). According to Administrator Delbos, who in his letter provides an expert interpretation of the *Arrêté* with particular regard to “the history of its origins”, in which he had been one of the protagonists:

“The boundaries as described in Official Journal No. 1021<sup>340</sup> 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 theoretical lines and points . . .”

3.32. That goes to confirm that the author of the amended *Arrêté* chose to use “theoretical lines and points” to delimit the territory of the two Colonies, as Burkina maintains.

3.33. Niger finally cites in its Memorial “the agreement between Commanders Roser (Dori) and Boyer (Tillabéry) of 21 March 1932”, the two officials, according to Niger, wishing “better to reflect the true situation on the ground”, having referred to the work of Administrators Delbos and Prudon<sup>341</sup>. This document, which given its date sheds useful retrospective light on this work, is for its part particularly instructive when one contrasts its terms with the line claimed by Niger. Firstly, it shows that the *canton* boundaries which, according to Niger, the 1927 *Arrêté* had confirmed, were actually very ill-defined at that date; secondly, it confirms that the line adopted in the Erratum diverges from the boundaries proposed by Administrators Delbos and Prudon; finally, it contradicts Niger’s claims relating to certain villages and as a result the conclusions drawn by Niger when establishing its line.

3.34. On the first point, the document points out that the *canton* of Diagourou (Niger), bordering Dori *cercle* (Upper Volta), was never delimited. Commander Roser’s observations on the matter, written five years after the adoption of the 1927 *Arrêté*, the purpose of which, according to Niger, was to confirm the alleged pre-existing *canton* boundaries, are enlightening:

“In 1919 or 1920, he [the Chief of the Diagourou] was given a territory, without precise boundaries, that forms the current *canton* of the Diagourou. He himself acknowledges that he does not know the boundaries of his *canton*.”

3.35. On the second point, Commander Roser’s letter is unambiguous: the author of the 1927 *Arrêté* should have adopted as a boundary the natural frontier proposed by Administrators Delbos and Prudon, whose “ideal nature . . . is obvious”; it is because this was not done that Commander Roser considers that “common sense and reality require that *this boundary be modified*”<sup>342</sup> by means of a “further erratum”. The proposal pre-drafted by Commander Roser for this purpose provides for the adoption of a partly natural frontier which

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<sup>339</sup>*Ibid.*:

“While we can accept the Kabia-Iga section . . . it seems to me that it would be difficult to abandon the area which I have marked in red, since this area, which is surrounded by hills forming natural boundaries, has always belonged to the Yagha *canton* without ever being challenged by any of the neighbouring peoples.”

<sup>340</sup>This is actually O.J. No. 1201 (see Ann. MBF 34).

<sup>341</sup>MN, p. 90, para 6.14, and MN, Anns., Series C, No. 45 (Letter No. 112 of 10 April 1932 and Tour Report from Civil Service Deputy Roser, Acting Commander of Dori *cercle*, to the Governor of Upper Volta (Political Office)).

<sup>342</sup>Emphasis added.

follows various watersheds. *A contrario*, this is not what the amended *Arrêté* does in this sector. This confirms that its author, rather than selecting a boundary considered closer to the “reality of the situation”, which as a result would have been more complex, opted for a more straightforward frontier made up of artificial lines.

3.36. With regard to the third point, Niger maintains in its Memorial that the village of Bangaré “has always been located in the territory of Niger”<sup>343</sup>. However, this is in no way what emerges from Commander Roser’s letter of 1932. Commenting on the validity of the line *adopted* in 1927, the latter writes:

“However, if this boundary is accepted as correct and definitive, then Upper Volta must immediately annex the large village of Bangaré, which has always belonged to Téra *canton*, but which is located to the west, *on the Volta side, of the famous ‘line’*. This example *clearly* shows that common sense and reality require that this boundary be *modified*.”<sup>344</sup>

As Niger points out in its Memorial, this boundary was never modified and the amended *Arrêté* of 1927 has been held by the Parties to this dispute to constitute the one and only legal title to be relied upon. Incidentally, it will be recalled that in 1927 the village of Bangaré had been placed on the Upper Volta side of the inter-colonial boundary *by Administrator Prudon himself*<sup>345</sup>. Therefore Commander Roser is mistaken when he contrasts the work of Administrators Delbos and Prudon with the amended *Arrêté* of 1927 on that point: they *all* place Bangaré on the Upper Volta side of the frontier.

3.37. Other documents appended by Niger to its Memorial serve to confirm, retrospectively, that the author of the 1927 *Arrêté* meant to adopt in this sector a route following an abstract line and not one ratifying allegedly pre-existing *canton* boundaries, which would have followed an extremely complex succession of natural frontiers. This is a solution which may have been regretted by certain colonial authorities; it is nonetheless the delimitation which was finally adopted and which has legal authority in the present case.

3.38. In a letter dated 9 August 1929 to the Commander of Tillabéry *cercle*, the Commander of Dori *cercle* writes, for example:

“These local people, as you pointed out to me, live and grow crops in Téra territory, which is territory established by the *Arrêté* and Erratum on delimitation. They have been there for a long time; and, unaware of our [??]fications<sup>346</sup> of *administrative geography*, believe themselves to be at home.”<sup>347</sup>

Considering that the mismatch between “administrative geography” and the situation perceived by the populations caused some difficulties, the Commander of Dori *cercle* proposed to his counterpart that they introduce a policy of tolerance vis-à-vis these local populations by “slightly *modifying* our current boundaries”, in order to avoid any “annexation

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<sup>343</sup>MN, pp. 97-98, para. 6.24.

<sup>344</sup>MN, Anns., Series C, No. 45 [emphasis added].

<sup>345</sup>See para. 3.30 above.

<sup>346</sup>The beginning of the word is missing. This word appears to be “modifications”.

<sup>347</sup>MN Anns., Series C, No. 24 (Letter No. 399 from the Commander of Dori *cercle* to the Commander of Tillabéry *cercle* dated 9 August 1929) (emphasis added).



of neighbouring *cantons* allocated to Dori”. The Commander immediately added: “Of course, the *Arrêté* and Erratum signed by the Governor-General no longer refer to *cantons* but only to boundaries; and that, I acknowledge, is crucial.”<sup>348</sup> The Commander also referred to the “rigours of the 1927 delimitation” which his proposal to modify the boundaries would have set out to “mitigate”<sup>349</sup>.

3.39. On 7 July 1930, the Commander of Dori *cercle* once again wrote in his “report on the difficulties created by the delimitation established in 1927”:

“The *Arrêté général* of 31 August 1927 fixed the boundaries of the Colonies of Upper Volta and of Niger. This *Arrêté* reproduced the Record of Agreement signed in Téra on 2 February 1927 and *took no account of the delimitation carried out on the ground by the two cercles Commanders of Dori and Tillabéry*. It should also be noted that this *Arrêté* is established at the instigation of the Lieutenant-Governor of Niger. An Erratum to this *Arrêté* makes almost no changes to the boundary, except that the frontier line is to reach the River Sirba at Bossébangou instead of Boulkebo.”<sup>350</sup>

3.40. Once and for all, it is not possible for Niger to circumvent the perfectly clear text of the Erratum by trying to revise it on the basis of previous proposals which were not adopted in 1927.

## SECTION 2 EVENTS SUBSEQUENT TO THE 1927 ERRATUM

3.41. Considering it necessary to *clarify* the 1927 Erratum to make it “correspond more closely with the [supposed] actual boundaries of the *cantons* in practice”, and unable to take as a basis the lines proposed by Administrators Delbos and Prudon which the amended *Arrêté* did not confirm, Niger ends up basing its line on actual possession after 1927, by proposing the following “method”:

“the drafters of the 1960 map based themselves on a body of relevant data in order to represent the probable boundaries of the *cantons* as these were applied in practice at the critical date. In consequence, unless we find 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.”<sup>351</sup>

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<sup>348</sup>*Ibid.* (emphasis added).

<sup>349</sup>*Ibid.*, also para. 1.32 above.

<sup>350</sup>MN, Anns., Series C, No. 38 (2<sup>nd</sup> page) (Report No. 416 of the Commander of Dori *cercle* on the difficulties created by the delimitation established in 1927 between the Colonies of Niger and Upper Volta (*Arrêté* of 31 August 1927) regarding the boundaries between Dori and Tillabéry *cercles*, dated 7 July 1930) (emphasis added).

<sup>351</sup>MN, p. 91, para. 6.16.

3.42. This way of proceeding does not comply with the applicable law, as has already been recalled<sup>352</sup>. Moreover, it gives rise to the following comments:

- (i) the subjectivity which flaws and discredits it finds expression in the course of the boundary put forward by Niger itself, which at one point prefers straight lines to the line on the 1960 map, then prefers this latter line to straight lines, and then again substitutes its own line for the one laid down in the amended *Arrêté* of 1927 or the one featured on the 1960 map, for reasons which are impossible to understand<sup>353</sup>;
- (ii) Niger claims to uphold — though it actually does this only in a very partial way — the line shown on the map between the Tao astronomic marker and the endpoint of the sector covered by this Chapter, even though this line is characterized by “abnormal deviations” compared to the text of the Erratum: indeed, nothing in the text of the latter could result in the line given on the map between these two points. If Niger had followed its own methodology, it should not therefore have upheld the line shown on the map in this sector — in accordance, moreover, with what it does between the Tong-Tong and Tao markers:
- (iii) besides, Niger implicitly admits as much in its Memorial:

“It is clear that, in the absence of reliable information from the local authorities, the drafters of the map followed the rivers, *marigots* and ridgelines, which together represent [close to] 50 per cent of the boundaries for the Téra sector . . . All of this implies that, far from relying on the old sketch-maps, which showed straight or curved lines connecting isolated points, the drafters of the 1960 map based themselves on a whole body of pertinent data in order to represent the probable boundaries of the *cantons* as they were applied in practice at the critical date.”<sup>354</sup>

The drafters of the map are not, however, the author of the *Arrêté* and the purpose of the latter (to define a new inter-colonial boundary) is not the purpose of the former, as described by Niger (“to represent the probable boundaries of the *cantons* as they were applied in practice at the critical date”<sup>355</sup>). In fact, the 1927 Erratum does not refer to any natural frontier in this sector, contrary to what it does in other sectors. The decision not to refer to such a natural frontier therefore rules out any *addition* to the text of the Erratum along the lines advocated by Niger using the 1960 map: it is simply not possible to add to the text of the Erratum natural boundaries amounting to “[close to] 50 per cent” of this section which are entirely unmentioned by that text, unless the text itself is replaced with a new definition of the course of the frontier.

3.43. This strategy followed by Niger, that is, re-writing the Erratum by replacing it with a different line on the basis of findings subsequent to its adoption, takes a two-pronged approach: firstly, Niger invents a new frontier point, the Vibourié marker, put in place

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<sup>352</sup>See paras. 1.40-1.64 above.

<sup>353</sup>See paras. 3.8 *et seq.* above.

<sup>354</sup>MN, pp. 75-76, para. 5.14.

<sup>355</sup>The “critical date” mentioned by Niger (1960) is moreover not the correct critical date. If it is accepted that the so-called “actual boundaries of the *cantons*” might have constituted a factor enabling interpretation of the amended *Arrêté* of 1927, they should have been examined on the day of its adoption, in 1927. However, as is well known, on that date the author of the *Arrêté* specifically disregarded these alleged boundaries (see Section 1 above). Niger’s argument cannot find a way out of the vicious circle in which it is trapped.

in 1935; and secondly, it invokes supposed village *effectivités* in order to depart from the course of the boundary laid down in the Erratum.

### 1. The Vibourié marker is not a frontier point

3.44. Between the two astronomic markers of Tong-Tong and Tao, mentioned in the 1927 Erratum, Niger contends that a new frontier point, not provided for in the Erratum, should be inserted. According to Niger, the Vibourié marker, put in place in 1935, should be granted “the status of a frontier point”<sup>356</sup>. This frontier point causes Niger to replace the straight line linking the Tong-Tong and Tao markers with “two straight lines” whose effect is to shift the frontier line eastwards (see sketch-map No. 3 above, Course of the boundary between the Tong Tong and Tao markers).

3.45. Niger’s position is totally unjustified. Niger relies on a Record of Agreement of 13 April 1935 between Administrator Garnier (Dori *cercle*) and Assistant Deputy Lichtenberger (Téra *cercle*), who established this marker “in order to prevent any . . . further territorial disputes in this area”<sup>357</sup>. Yet, contrary to Niger’s assertions, the establishment of this marker could not have had the effect of *moving* the line laid down by the 1927 Erratum.

3.46. For one thing, as Niger admits, this agreement of 1935 and the approval given to it by the Governor of Niger that same year “date[s] from after the disappearance of Upper Volta and hence [their] retention following the reconstitution of the Colony could be regarded as debatable”<sup>358</sup>. In fact the boundaries of Upper Volta were fixed in 1947, when it was reconstituted, by reference to those which were in force in 1932, when it was dismembered. What happened between these two dates therefore has no effect on the delimitation.

3.47. Secondly, and in any case, even accepting that the Vibourié marker was established at the place where Niger situates it in its Memorial, according to the co-ordinates given, it would appear obvious that a mistake was made in 1935. The intention of those drafting the 1935 Record of Agreement is not at issue. On this point, Burkina unreservedly endorses Niger’s observation that this document constitutes an “interpretation of the 1927 Erratum”<sup>359</sup>. The authors of the agreement in fact decided,

“[r]eferring to the delimitation determined by the *Arrêté* of 31 August 1927 (Erratum) between Dori and Téra, . . . to visit the site in order to observe the placement of said land in relation to the above-mentioned boundary.

[ . . . ] in order to prevent any similar further territorial disputes in this area, we have established a marker designed to fix the boundary between Dori and Téra, the *boundary in principle following a notional straight line starting from the Tong-Tong astronomic marker and running to the Tao astronomic marker.*

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<sup>356</sup>MN, pp. 92-93, para. 6.20.

<sup>357</sup>MN Anns., Series C, No. 56 (Certified copy of 14 April of Record of Agreement of 13 April 1935 between Administrator Garnier (Dori *cercle*) and Deputy Lichtenberger (Téra Subdivision)).

<sup>358</sup>MN, pp. 92-93, para. 6.20.

<sup>359</sup>*Ibid.*

The Ouiboriels [Vibourié according to Niger] marker being located on this notional line . . .”<sup>360</sup>

3.48. It can be seen from this Record of Agreement that the two Administrators agreed on the interpretation to be given to the 1927 Erratum: the boundary it defines is “a notional straight line starting from the Tong-Tong astronomic marker and running to the Tao astronomic marker”. This is the interpretation which Burkina Faso has never ceased to defend, and its position is thus fully validated. Niger furthermore confirms that this interpretation is well-founded when it notes that

“[t]he sketch-maps prepared in 1927 by Delbos and Prudon, as well as the map, ‘New frontier of Upper Volta and Niger’, published the same year, connect these two points [the Tao and Tong-Tong markers] with a straight line”<sup>361</sup>.

3.49. In accordance with this interpretation, it was decided to establish a new marker — the Vibourié marker — “on this notional line”. This shows that this marker was not intended to become a genuine frontier point. This marker was established on the boundary defined in the amended *Arrêté* of 1927 not because the boundary *had to pass through this point*, but, quite the reverse, because this point was *located on the boundary*.

3.50. According to Niger, it would nonetheless appear in retrospect that the Vibourié marker was not established on this boundary, which explains the fact that Niger’s line, instead of following a single straight line between the Tong-Tong and Tao markers, moves considerably further eastwards so as to link the Tong-Tong, Vibourié and Tao markers via two straight-line sections.

3.51. However, as the Vibourié marker is not mentioned in the 1927 Erratum (and with good reason, since it was established after the latter was adopted), and as, furthermore, the purpose of establishing it was not to amend the line laid down in the Erratum (in fact quite the reverse, since the marker was supposed to be placed on that line), it is quite obvious that the spot where the marker was apparently established cannot be turned into a new frontier point altering the course of the boundary adopted in 1927. Once again, this was not the intention of the authors of the Record of Agreement of 1935 (their intention in fact was quite the opposite); and in any case they would not have been empowered to do such a thing.

3.52. Far from justifying the line claimed by Niger, the Record of Agreement of 1935 thus in fact confirms that between the Tong-Tong marker and the Tao marker, the course of the boundary laid down in the Erratum of 1927 follows one straight line, and only one.

## **2. The claimed village *effectivités* do not exist**

3.53. In the section which continues from the Tao marker, Niger adopts a course which, in its own words, “*basically* follows the IGN line<sup>362]</sup>”<sup>363</sup>. In other words, Niger is claiming a

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<sup>360</sup>MN, Anns., Series C, No. 56 (emphasis added).

<sup>361</sup>MN, pp. 91-92, para. 6.18 (emphasis added). This contradicts what Niger states in para. 6.10 of its Memorial (pp. 43-44), where it considers that between the Tao and Tong-Tong markers, the “New frontier” map shows a “slightly curved” line.

course which is neither that of the Erratum, nor that shown on the 1960 map, but a third one. In fact, it is wrong to claim that Niger's course "basically" follows the line shown on the 1960 map. It actually diverges from it substantially (see sketch-map No. 4 above, Course of the boundary after the Tao marker).

3.54. Niger bases its claim on tortuous reasoning involving a succession of interlinked premises; it contends that:

- the *Arrêté* of 1927 and its Erratum are imprecise in this sector;
- they should therefore be aligned more closely with the so-called "actual" boundaries of the *cantons* "in practice";
- the 1960 map is (on that date, and not in 1927) the reflection of those boundaries;
- therefore it is appropriate to follow the course it shows;
- at least, if it corresponds to the boundaries (that is, according to Niger, if the line on the map corresponds to possession of the villages located in the frontier zone);
- if this is not the case, then actual possession becomes the determining factor and takes priority over the 1960 map.

3.55. Each one of these premises is erroneous:

- firstly, the amended *Arrêté* of 1927 is not imprecise: the Governor-General of FWA made the choice of linking points by means of theoretical lines, which are of necessity straight lines<sup>364</sup>; the artificial delimitation he thereby establishes is sufficient in itself and was fully understood as such by the colonial officials — not least those who complained about it<sup>365</sup>;
- the fact that the implementation of this theoretical delimitation on the ground might have posed a problem relates to an entirely separate debate. The few documents noting a "lack of precision" in the boundaries are not using this term to refer to the lack of precision of the delimitation made by the Erratum, but to the difficulties involved in actually applying it, which is a different matter entirely: thus when, for example, it was recalled in 1929 that
  - “— the incidents occurring over the last few months were due to . . . lack of precision when *indicating* the demarcation of certain areas *to neighbouring local chiefs*”<sup>366</sup>;

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<sup>362</sup>The term "IGN line" is incorrect. In conformity with the terms of the 1987 Protocol of Agreement, reference should be made to the line shown on the 1960 IGN map.

<sup>363</sup>MN, pp. 93-97, paras. 6.21 *et seq.*

<sup>364</sup>See MBF, pp. 94 *et seq.*, Chap. IV, Section 1.

<sup>365</sup>See above, in particular paras. 3.2, 3.31, 3.35, 3.38 and 3.39.

<sup>366</sup>MN, Anns., Series C, No. 22 (Letter No. E/251 AP from Fousset, Chief Colonial Administrator, to the Lieutenant-Governor of Niger dated 31 July 1929) [emphasis added].

or when in 1953 Deputy-Administrator Lacroix (Tillabéry *cercle*), comparing the delimitation made in the 1927 Erratum to that proposed by Administrator Delbos, noted with reference to the latter:

“This shows that the least clearly defined portion of the boundary, from Tao to Iga, was determined in measured segments along compass bearings: *Again*, this clearly involved theoretical lines — which still did not *mean much to the local people concerned* — but which were nonetheless easier to *identify in the field* than the Tao-Sirba line in the *Arrêté*.”<sup>367</sup>

This confirms that the colonial authorities had no doubt that the delimitation established by the amended *Arrêté* of 1927 followed a single line (“the Tao-Sirba line” as opposed to the “lines” or “sections” proposed by Delbos), which was artificial (“theoretical”) in nature;

- the amended *Arrêté* of 1927 moreover never set out to confirm the *canton* boundaries as they would have existed in 1927 — in fact, it did quite the opposite<sup>368</sup>; nothing therefore permits these boundaries to be relied upon;
- if the author of the amended *Arrêté* had, as Niger claims, intended to define the inter-colonial boundary in this sector in such a way as to allocate a particular village to a particular colony, he would have expressly indicated this; the same would apply if he had intended to confirm a natural frontier;
- it is not permissible to rely on *effectivités* subsequent to the adoption of the Erratum, as title has priority over actual possession subsequent to the title;
- neither can the use of the 1960 map as a reflection of actual possession existing at the date of independence constitute an argument allowing the delimitation established in the 1927 Erratum to be validly disregarded or even merely adapted.

3.56. Even accepting that it could legally have been followed, which is not the case, the approach consisting of relying on colonial *effectivités* subsequent to the frontier title is ruled out *in factual terms* in the present case, for the following reasons.

3.57. First of all, it is hard to imagine that genuinely effective possession could have become established on a lasting basis subsequent to the 1927 Erratum. Indeed, just five years after that act was adopted, the Colony of Upper Volta was dismembered. In the following fifteen years, the territories bordering on the current frontier between Burkina and Niger belonged to one and the same colony, Niger. Any possession — which would necessarily have been held by Niger — between these two dates cannot therefore have the slightest effect as far as the present case is concerned, since from 1932 to 1947 the inter-colonial boundary had disappeared. This therefore disqualifies from the outset the *effectivités* claimed by Niger when they date from this period<sup>369</sup>.

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<sup>367</sup>MN, Anns., Series C, No. 79 (Report of a tour conducted from 16 to 23 November 1953 by Deputy Administrator Lacroix (Tillabéry *cercle*), dated 24 December 1953) (emphasis added).

<sup>368</sup>See Section 1, paras. 3.24-3.29 above.

<sup>369</sup>See the documents mentioned by Niger in fns. 268, 287, 288, 289 and 290 in its Memorial.

3.58. Incidentally, Upper Volta was to be re-established in 1947 within its 1932 borders, hence within its 1927 borders, as they had not been changed in the meantime. Niger itself recalls in its Memorial that

“neither of the two Parties contends that there was any change to the legal situation existing between 4 September 1947 and 5 August 1960 . . . It follows that we have to go back to see what was the instrument which, on 5 September 1932, governed the boundaries of the two Colonies.”<sup>370</sup>

3.59. The indications of possession invoked by Niger are without relevance to an even greater extent, given that it becomes obvious, upon reading the Annexes appended by the Parties to their Memorials, that the delimitation adopted in 1927 in this sector, *precisely because it took the form of an artificial boundary*, met with various difficulties or protests when it was implemented on the ground, and this was the case right up until the dismemberment of Upper Volta in 1932. In particular, this led the Commander of Dori *cercle* to draft a long report on 7 July 1930 on the “difficulties created by *the delimitation established in 1927 between the Colonies of Niger and Upper Volta (Arrêté of 31 August 1927) regarding the boundaries between Dori cercle and Tillabéry cercle*”<sup>371</sup>. What happened on the ground should not under these circumstances be granted any significance for the purposes of settling the present case.

3.60. In actual fact, the colonial authorities were fully aware that the “artificial” colonial boundary which had been adopted could not reflect the complex situations on the ground, *far removed* from any ideas of frontier division. In a letter dated 27 September 1929, for example, this is what the Governor of Niger wrote to his counterpart in Upper Volta:

“With regard to the individuals or families who are in dispute, their situations will have to be examined individually by common agreement between the heads of neighbouring districts. It appears difficult to adopt an invariable criterion for attaching them to one Colony or the other. However, if domicile cannot be used, perhaps one useful determining factor to consider might be the location of croplands of the parties concerned. Nonetheless, given that these may *interlock and overlap the frontier*, one cannot stick rigidly to this criterion and everything will have to be settled on a case-by-case basis. In any case, there can be no question of systematically and forcibly returning natives from one side or the other of the frontier, depriving them of their annual croplands, and neither should they be prevented from grazing their herds along their customary routes or watering them at their usual pools. The greatest possible freedom must be granted to the nomads in this regard; all that matters is that they should not be

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<sup>370</sup>MN, p. 62, para. 5.3.

<sup>371</sup>MN, Anns., Series C, No. 38 (Report No. 416 from the Commander of Dori *cercle* on the difficulties created by the delimitation established in 1927 between the Colonies of Niger and Upper Volta (*Arrêté* of 31 August 1927) regarding the boundaries between Dori *cercle* and Tillabéry *cercle*, 7 July 1930) — emphasis added. Interestingly, this report indicates that even the work done by Administrators Delbos and Prudon only gives a very imperfect reflection of the actual situation on the ground: “But during this field work, the two Administrators had had to move very quickly and the heads of neighbouring *cantons* had not accompanied them everywhere. Furthermore it seems that they had not been properly questioned about issues of dispute which might [arise] following this delimitation.”

allowed to evade their administrative obligations by crossing *a theoretical and artificial frontier* at an opportune moment.”<sup>372</sup>

3.61. More broadly, the specific nature of the human geography in the disputed area deprives the arguments based on possession of any probative value. It is indeed an undisputed fact that the human geography of the frontier area has always been characterized by mobility on the part of the local people. This is an everyday occurrence and also follows a more general pattern. Population groups move according to weather conditions or the economic situation. The consequence is the existence of “fossilized” or “ghost” villages, and also a degree of vagueness with regard to the names of places in the frontier zone, to mention just these two aspects. Besides, even the most sedentary groups may live in different villages according to the season, and those villages may in some instances be on different sides of the colonial frontier. As a result, “territorial boundaries [were] meaningless to the nomads”<sup>373</sup>; “one does not need to be a very old colonial hand to know that the territories to which the native *groupements* lay claim, in particular in semi-desert savannah areas, have traditional boundaries which are somewhat imprecise. There are areas where they interlock or overlap: they are not drawn with the precision of urban concessions”<sup>374</sup>. More radically, on 10 August 1954, the Head of Téra Subdivision admitted to,

“think[ing] like most of [his] predecessors that an exact delimitation of this *canton* of Diagourou is absolutely impossible despite the never-ending claims and disputes to which this situation gives rise. Besides, these disputes have never been very serious (except with regard to the *canton* of Téra, due to relations between the current leaders); undertaking any sort of demarcation work, even on a localized basis, would mean pointlessly stirring up old quarrels which have more or less been forgotten.”<sup>375</sup>

3.62. Niger does not call into question this particular characteristic of the region’s human geography. On the contrary, it fully endorses it, and this makes even more surprising the value it believes it can give to territorial possession, which *on its own admission* was not governed in any way by the position of the frontier, particularly at the time when the 1927 *Arrêté* was adopted:

“The problems of the frontier area are conditioned by various dominant forms of production, namely: itinerant nomadism; seasonal trans-frontier pastoral transhumance, conducted on a pendular basis; semi-nomadism; sedentary field agriculture; itinerant agriculture; gold prospection and extraction . . . The expansion and dispersal of villages makes it more difficult to determine the course of the frontier. The exhaustion of the soil on the plateaux is another movement factor. This frequently causes the inhabitants of a village to transfer to a new site, situated a few kilometres from the previous one. It is not

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<sup>372</sup>MN, Anns., Series C, No. 42 (Letter No. 2259 AGI from the Lieutenant-Governor of Niger to the Lieutenant-Governor of Upper Volta, dated 27 September 1929) (emphasis added). Tax collection was still an unresolved problem between the two Colonies the following year (see, for example, MN, Anns., Series C, No. 37 — Letter No. 362 from the Commander of Dori *cercle* to the Governor of Upper Volta dated 11 June 1930).

<sup>373</sup>MN, Anns., Series C, No. 45 (Letter No. 112 of 10 April 1932 and Tour Report from Civil Service Deputy Roser, Acting Commander of Dori *cercle*, to the Governor of Upper Volta (Political Office), p. 3).

<sup>374</sup>MN, Anns., Series C, No. 25 (Letter No. 411 from the Commander of Dori *cercle* to the Governor of Upper Volta dated 14 August 1929).

<sup>375</sup>MN, Anns., Series C, No. 84 (Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954, pp. 5-6).



unusual, in such cases, for the hamlets attached to the main village of origin to have similar or identical names to the latter.”<sup>376</sup>

And also according to Niger,

“The territorial partition did not create problems for the villages, which were concentrated in a relatively confined space (a few hectares). However, for peoples whose homelands were spread over more extended areas (covering dozens, if not hundreds, of square kilometres), their partition was socially disruptive and provoked population movements motivated by the preservation of communal or cultural identities, or the safeguard of interests. Each *cercle*, now wishing to know the precise number of its inhabitants, was impelled to carry out censuses. The instability of the populations of areas close to the shared boundaries or territories resulted in multiple registrations and the use of contradictory criteria for defining administrative links (place of temporary settlement or village of origin).

Apart from traditional nomadic movements or the search for new land, there were various factors impelling populations to change from one territory to another: differences in régime as between colonies in the matter of compulsory service or of human or livestock taxation, the existence of basic infrastructure in the neighbouring territory (access to water, vaccination facilities for livestock, schools, health centres, etc.), power relationships within tribes, etc. Thus, all along the frontier, a game of cat-and-mouse developed between colonial administrators and frontier populations.”<sup>377</sup>

3.63. In such circumstances, the choice of an artificial boundary, despite its alleged disadvantages, probably turned out to be the wisest one. As it was not possible to draw a boundary following a practice alien to any concept of territorial delimitation, the option of a straight line linking identified points appeared to be the only way of meeting the objective laid down by the author of the 1927 *Arrêté*: to delimit, for the purposes of administrative management, the two districts of Niger and Upper Volta.

3.64. Moreover, Niger does not provide any factual evidence which would justify its proposed course and stand in the way of the most obvious interpretation (adopted precisely for that reason by the colonial authorities) of the amended *Arrêté* of 1927, according to which a straight line formed the inter-colonial boundary from the Tao marker onwards. Firstly, Niger does not take the trouble systematically to provide foundations for its assertions; secondly, when it does do this, it is solely by referring to a practice subsequent to the adoption of the 1927 *Arrêté* — supported by an extraordinarily small number of documents; it also happens that Niger itself acknowledges that possession may have changed hands between 1927 and the subsequent period, which goes to show the complete irrelevance of practice subsequent to the adoption of the *Arrêté*. Finally, these few documents are not in themselves at all convincing, in any event.

3.65. Burkina will specifically demonstrate in the next part of this text how the proposed indications of possession invoked by Niger in no way justify, in factual terms, the course of the boundary claimed by the latter. It will do this by following, step by step, the

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<sup>376</sup>MN, pp. 81-82, para. 6.7.

<sup>377</sup>MN, pp. 80-81, para. 6.6.

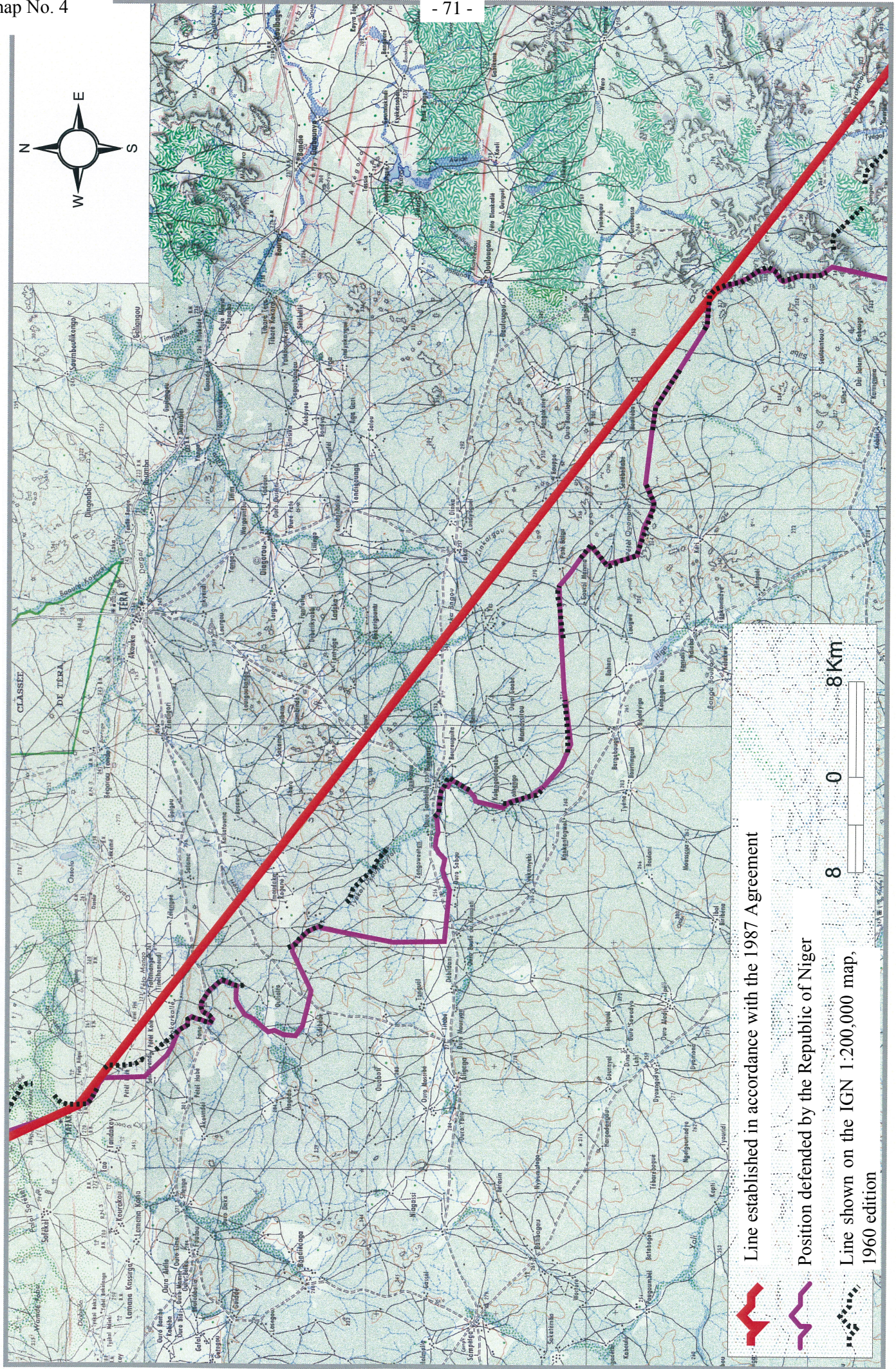
line described by Niger in paragraphs 6.21 to 6.25 of its Memorial — whilst noting at the outset the complexity of its course, which Niger's Memorial hardly makes any easier to understand<sup>378</sup>. More precisely, it will show that Niger's line diverges considerably from that defined in the 1927 Erratum as well as from the line featured on the 1960 map, which itself fails to comply with the text of the Erratum, since it adds a considerable number of frontier points which the latter does not indicate as such (see sketch-map No. 4, Course of the boundary after the Tao marker, reproduced again below).

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<sup>378</sup>The recapitulation in paragraph 6.26 of Niger's Memorial does not actually contain the same description of the course as that given in the preceding paragraphs.

# Course of the boundary after the Tao marker

Scale 1:400,000



Line established in accordance with the 1987 Agreement

Position defended by the Republic of Niger

Line shown on the IGN 1:200,000 map, 1960 edition



A. “[from the Tao astronomic marker] the IGN line passes to the west of Petelkolé (the village’s co-ordinates are 14° 00' 35.7" N, 00° 24' 52.6" E), which it leaves to Niger . . . The frontier line follows the IGN line as far as the outskirts of Petelkolé. It then deviates slightly to the west so as to meet the endpoint of the upgraded stretch of the Téra-Dori road constructed by Niger (co-ordinates: 14° 00' 04.2" N, 00° 24' 16.3" E). It then rejoins the IGN line at the point having co-ordinates 13° 59' 39" N, 00° 25' 12" E.” (Memorial of Niger, p. 94.)

3.66. From this very first sector, Niger adopts a course which deviates, to its advantage, from the straight-line course set out in the Erratum, as well as from the line of the 1960 map. Niger does not explain the reason for this deviation. Nor does it justify the purpose of the frontier crossing points it claims, for example, “the endpoint of the upgraded stretch of the Téra-Dori road constructed by Niger”, which the 1927 Erratum does not mention<sup>379</sup>.

3.67. This deviation is obviously to be explained by Niger’s wish to enclose within its borders the village of Petelkolé, which however lies to the west, so on the Burkina side, of the straight line laid down in the 1927 Erratum.

3.68. According to Niger, the fact that the line it claims leaves this village to the east, on Niger’s side, is “in accordance with the administrative information from the colonial period”<sup>380</sup>. However, this village is not listed in the Niger fascicle of the *General List of Localities of French West Africa* at the time of the 1927 *Arrêté*. While it is not listed in the Upper Volta fascicle either, it is indicated on the 1954 sketch-map of Diagourou *canton* (Niger) as a village “outside the *canton*”<sup>381</sup>. Similarly, it is not mentioned in the *Arrêté* of 1 January 1956 establishing polling stations and districts for the elections to Niger’s National Assembly<sup>382</sup>. Furthermore, this village, which is featured twice on the 1960 map, is in both cases located to the west of the line shown on it, hence on the Upper Volta side, so that Niger is mistaken when it writes that “the IGN line passes to the west of Petelkolé . . . which it leaves to Niger”<sup>383</sup>.

3.69. Niger only puts forward two points to support the opposite view<sup>384</sup>:

- (i) first of all, it invokes “the Roser/Boyer agreement” of 1932, which, however, as is known<sup>385</sup>, intended to *modify* the boundary laid down by the 1927 Erratum and not to interpret it; this document therefore does not indicate that the boundary *passes* to the west of Petelkolé, as Niger claims, but that this is the “frontier in the area in question [which] *should* then be defined as follows” in the “*further* erratum”

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<sup>379</sup>This new road was upgraded very recently. It does not correspond to the “motor road” mentioned in the Erratum.

<sup>380</sup>MN, p. 94, para. 6.22.

<sup>381</sup>MN, Anns., Series D, No. 21 (Diagourou *canton*: scale 1:250,000, 1954).

<sup>382</sup>MN, Anns. Series B, No. 31 (*Arrêté* No. 2794/APA establishing polling stations and districts for the elections to the National Assembly (*Official Journal of Niger*, No. 304, 1 January 1956).

<sup>383</sup>MN, pp. 93-94, para. 6.22.

<sup>384</sup>MN, p. 94, para. 6.22.

<sup>385</sup>See para. 3.33 above.

proposed, which was never to be adopted<sup>386</sup>; incidentally, Administrator Delbos's sketch-map, for its part, placed Petelkolé to the west of the boundary proposed, thus on the Upper Volta side<sup>387</sup>;

- (ii) the 1953 Tour Report<sup>388</sup> does not provide any further backing for Niger's position. Firstly, and once again, the points mentioned in this report were made on the basis of the delimitation proposed by Administrator Delbos and not on that finally adopted in the 1927 Erratum. Secondly, the information contained in this report is vague, since at the time "the astronomic markers mentioned in the *Arrêté* could not be located". It should be recalled in this regard that the boundary referred to by what Niger calls "the Roser/Boyer agreement" of 1932 does not arrive at the Tao astronomic marker, as the *Arrêté* indicates, but at a "frontier marker situated 5.75 km from the Tao astronomic marker"<sup>389</sup>. Finally, it is difficult to ascribe any meaning to the reference made in the report to the boundary passing between "the permanent hamlets" of Petelkarkalé and Petelkolé, since Petelkarkalé does not appear on the 1960 map. Thus there is nothing to justify the enclaving of Petelkolé, which neither the Erratum nor, for that matter, the line on the 1960 map allocates to Niger.

**B. "The frontier then follows the IGN line, leaving Fetokarkale (Burkina Faso) to the west. It then passes through a frontier point known as Baobab (13° 58' 38.9" N, 00° 26' 03.5" E), and through Tindiki (13° 57' 15.4.9" N, 00° 26' 23.6" E), as far as the break in the line of crosses in the vicinity of Ihouhaltane (Oulsalta on the 1960 IGN map, Sebba sheet)." (Memorial of Niger, p. 94.)**

3.70. Niger claims to go back to the line of the 1960 map from this point onwards. It first of all expressly leaves the village of Fetokarkale to Burkina Faso ("[t]he frontier . . . leav[es] Fetokarkale (Burkina Faso) to the west"), as does the straight line linking the Tao marker to the River Sirba at Bossébangou. Niger also mentions two crossing points (the "Baobab" and "Tindiki"<sup>390</sup> points) which, not being mentioned in the Erratum, cannot be regarded as "frontier points". Furthermore, these two names do not appear on the 1960 map.

3.71. At the level of the Oulsalta encampment, Niger itself states that the line on the map breaks off, then resumes a little further along. If a straight line were to be drawn between the two broken-off sections of the line on the map, following the methodology adopted by Niger itself in other sectors<sup>391</sup>, Oulsalta would very clearly be situated on the Upper Volta side of the line. This is also where it is located if the straight-line course adopted by the Erratum is followed.

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<sup>386</sup>MN Anns., Series C, No. 45 (Letter No. 112 and Tour Report from Roser, Civil Service Deputy, Acting Commander of Dori *cercle*, to the Governor of Upper Volta (Political Office) dated 10 April 1932, p. 6) (emphasis added).

<sup>387</sup>MN, Anns., Series C, No. 14 (sketch-map prepared by Administrator Delbos of the route followed by the Administrators of Dori and Tillabéry on a mission in June 1927 with a view to delimitation between Dori and Tillabéry *cercles*).

<sup>388</sup>MN Anns., Series C, No. 79 (Report of a tour conducted from 16 to 23 November 1953 by Deputy-Administrator Lacroix (Tillabéry *cercle*), dated 24 December 1953).

<sup>389</sup>MN Anns., Series C, No. 73 (Official telegram/letter No. 70 from the Head of Téra Subdivision to Tillabéry *cercle* dated 11 July 1951).

<sup>390</sup>It should be noted that the co-ordinates of this latter point given by Niger situate it not on the frontier but in Burkina, if the line on the 1960 map is followed as Niger suggests.

<sup>391</sup>See MN, p. 100 *in fine*, para. 6.26: "From there . . . the IGN line, *connecting the gaps between sections with straight lines*, as far as . . ." (emphasis added).

C. “The frontier passes through a point situated on the river to the west of the encampment, whose co-ordinates are 13° 55' 36.4" N, 00° 27' 07.2" E . . . The boundary passes through the point having co-ordinates 13° 53' 12.8" N, 00° 28' 13.5" E located on the Kalsatouma-Sidibébé road. It then rejoins the IGN line at the point having co-ordinates 13° 53' 24" N, 00° 29' 58" E.” (Memorial of Niger, p. 95.)

3.72. Despite the above, Niger makes its line depart once again from the line on the 1960 map so as completely to enclave Oulsalta (and its two districts, Banguel Ndao and Dongobe) to its advantage. Instead of using a straight-line section to bridge the gap between the broken-off sections of the line on the map, Niger’s course veers off to the south-west, then to the south, then to the south-east, and finally to the north-east, thus forming a curve which is almost three times longer than the straight line which would have connected the sections directly. Absolutely nothing justifies this course, except the wish to place the Oulsalta encampment on Niger’s side of the boundary.

3.73. Niger does itself point out, however, that “its ownership has been disputed”; “[i]t appears *on the frontier* according to the sketch-map prepared by Delbos in June 1927”, that is, just before the *Arrêté* was adopted — in actual fact the encampment is drawn as an oval shape straddling the proposed boundary<sup>392</sup>. This can be explained by the presence of the Ossolo Pool in the north-east of this sector. As the people here are nomadic tribes, their location depends less on their camping places than on the position of watering holes where they water their herds<sup>393</sup>. This may justify the fact that in this case the location of Oulsalta may have overlapped the delimitation line. Similarly, it is difficult to draw the slightest conclusion in terms of inter-colonial delimitation from the fact that tribes cultivated certain fields in the frontier area — particularly when these fields had been raided, as was the case for the lougans (fields)<sup>394</sup> of the Logomatén. It also appears that management of the Oudalan Touareg and the Logomatén came under the authority of Upper Volta, before its dismemberment, and not of Niger, as is shown by a letter from the Governor-General of FWA dated 3 January 1934<sup>395</sup>.

3.74. The fact that the encampment was placed east of the boundary *proposed* by “the Roser/Boyer Agreement of April 1932, cited by the authorities of Niger Colony on 24 May 1935 and 11 July 1951”<sup>396</sup> is also without relevance, for the same reasons as those set forth with regard to the village of Petelkolé. The situation of a place in terms of a delimitation *which has not been confirmed* cannot be used to call into question the confirmed delimitation.

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<sup>392</sup>MN, pp. 95-97, para. 6.23 and p. 95, fn. 266 (emphasis added). See MN, Anns., Series C, No. 14 (sketch-map prepared by Administrator Delbos of the route followed by the Administrators of Dori and Tillabéry on a mission in June 1927 with a view to delimitation between Dori and Tillabéry *cercles*).

<sup>393</sup>The Commander of Dori *cercle*’s protests against the boundary adopted by the 1927 *Arrêté* focused in particular on the fact that this left the watering places to Niger (see para. 1.31 above and MN, Anns., Series C, No. 21, p. 2). This applies in particular to the Ossolo Pool, which is explicitly mentioned in the amended *Arrêté* of 1927.

<sup>394</sup>Incidentally, the only document cited by Niger in this regard (MN, pp. 95-96, para. 6.23 and MN, Anns., Series C, No. 64) dates from 1941, a time when the Colony of Upper Volta had been dismembered. In this respect also, this document has no relevance whatsoever to the present case.

<sup>395</sup>Annex CMBF No. 4 (Letter No. 2 AP/2 from the Governor-General of FWA to the Governor of Niger, dated 3 January 1934, on the attitude of the Dori and Tillabéry Touareg).

<sup>396</sup>MN, p. 95, para. 6.23.

3.75. Finally, Niger asserts that this “locality is shown on the sketch-map of Diagourou *canton* in 1954”. This is true, apart from one decisive nuance: the locality in question is not underlined on this sketch-map, which according to the legend of the latter means that it is a “village outside the *canton*”<sup>397</sup>.

3.76. Niger does not submit any other points which might justify enclaving Oulsalta.

**D. “From that point the boundary follows the 1960 IGN line as far as the point having co-ordinates 13° 52' 04" N, 00° 31' 00" E, where the area of Komanti encampments (Kamanti or Comanti on certain documents) commences . . . The frontier marked on the 1960 IGN sheets is drawn with many gaps, to indicate that its course is particularly problematic in this sector . . . From the point having co-ordinates 13° 52' 04" N, 0° 31' 00" E, where there is a break in the line of crosses on the 1960 IGN map, the boundary passes through the point having co-ordinates 13° 48' 55" N, 0° 30' 23" E, then reaches the point with co-ordinates 13° 46' 31" N, 0° 30' 27" E. It then runs to the point with co-ordinates 13° 46' 18" N, 0° 32' 47" E located to the north of Ouro Sabou on the tributary arm of the River Tyekol Dyongoltol. The frontier then follows that tributary until its confluence with the Tyekol Dyongoltol at the point with co-ordinates 13° 46' 51" N, 00° 35' 53" E; from there, it follows the IGN line as far as the point with co-ordinates 13° 46' 22.5" N, 0° 37' 25.9" E, located at the level of Bangaré on the River Folko . . .” (Memorial of Niger, pp. 95-97.)**

3.77. The same technique of enclaving territory is again used by Niger here, in an even more blatant way. The course of its claimed boundary actually follows the line on the 1960 map only for a very short distance. Once again, instead of using straight lines to bridge the gap in the line of crosses — or even, failing that, following the watercourses present in this sector — Niger draws a line which makes off in the opposite direction: it heads in a south-westerly direction, then turns towards the south, the east, and finally the north-east. The triangle thus drawn forms a broad salient, about which the 1927 Erratum, once more, does not say a word. And the line of this salient and the points through which it passes are not given any justification or even explanation by Niger. Nor does Niger explain why it takes no account of the crosses appearing on the 1960 map between the two sections of the line on the map which Niger links via an enclave.

3.78. The only argument put forward by Niger to justify the claim that, as a result of this salient, “the localities of Komanti, Kamanti, also called Ouro Toupé, Zongouweitan, also called Kamanti Fété Tao, and Dingui-Dingui, also called Ouro Tanbella” belong to Niger is as follows: these encampments have, it claims, been “administered by Niger since the colonial period”<sup>398</sup>. In other words, it is claiming that possession is equivalent to title — assuming that such possession is proved, something which Niger entirely fails to do. There can be no clearer indication of Niger’s attempt to disregard the law applicable to the delimitation, as expressly specified by the Parties in their 1987 Agreement.

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<sup>397</sup>MN, Anns., Series C, No. 21 (Diagourou *canton*: scale 1:250,000, 1954).

<sup>398</sup>MN, pp. 96-97, para. 6.23.

3.79. Niger does add that “Zongowaetan is shown on the 1954 sketch-map of Diagourou *canton*”<sup>399</sup>. Yet this encampment is shown, in 1954, to the north-east of Bangaré, hence north-east of the line on the 1960 map. On no account is this encampment situated within the broad salient which Niger allocates itself south-west of this line.

**E. “At this point, the frontier line takes a clear south-west orientation. The co-ordinates of the point where the frontier line changes direction are the following: 13° 46' 22.5" N, 00° 37' 25.9" E. To the south of Bangaré, the boundary returns to the IGN line.”** (Memorial of Niger, p. 98.)

3.80. On this short section Niger adopts the line on the 1960 map, which appears to leave the village of Bangaré to Niger. The latter is described by Niger as a “large, cosmopolitan village of over 1,000 souls”<sup>400</sup>. While Bangaré was known to the colonial authorities in 1927, it is important to point out that at the time it was no more than a small market, which only became a village in 1945. In his report dated 10 August 1954 on the census of Diagourou *canton*, the Head of Téra Subdivision noted:

“Recently formed villages

There are four of them . . . The fourth, Bangaré, was created by Mr. Garat in 1945. It is made up of several components; heads of families from the Diagourou or Yagha tribes and heads of Mossi and Gourmantché families, settled there around the little market of Bangaré, for the development of which the village was created.”<sup>401</sup>

3.81. According to Niger, the line on the 1960 map is justified, since “Bangaré has always been located in the territory of Niger”. However, in this regard Niger is working on the basis of post-1950 documents<sup>402</sup>, as well as giving them implications which they do not have<sup>403</sup>. These documents are made even less convincing by the fact that they are contradicted by documents which are *contemporaneous* with the amended *Arrêté* of 1927. Niger acknowledges as much: “On the sketch-map drawn by Prudon in 1927, Bangaré was, however, shown in Upper Volta territory<sup>404</sup>]. In the sketch-maps prepared by Delbos in June<sup>405</sup>] and August 1927<sup>406</sup>], this name appears on the boundary.”<sup>407</sup>

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<sup>399</sup>MN, p. 96, para. 6.23 and MN Anns., Series D, No. 21 (Diagourou *canton*: scale 1:250,000, 1954).

<sup>400</sup>MN, p. 98, para. 6. 24.

<sup>401</sup>MN, Anns., Series C, No. 84 (Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954), p. 9.

<sup>402</sup>MN, pp. 97-98, para. 6.24.

<sup>403</sup>For example, the 1953 Tour Report does not, contrary to what Niger claims, state that “the frontier passes through it [this village]” (MN, p. 97, para. 6.24). It indicates more vaguely: “There are no distinctive geographical features in the area between Bangaré and Tao. The ‘*frontier area*’ first passes through Bangaré, to the north-west of Ousaltan, across a plain with extensive lateritic areas...” (MN, Anns., Series C, No. 79, Report of a tour conducted from 16 to 23 November 1953 by Deputy-Administrator Lacroix (Tillabéry *cercle*), dated 24 December 1953, p. 2) (emphasis added).

<sup>404</sup>MN, Anns., Series D, No. 3. (Tillabéry *cercle* 1:200,000 sketch-map prepared by Administrator Prudon, June 1927).

<sup>405</sup>MN, Anns., Series C, No. 3 (1:500,000 sketch-map representing Say *cercle*, no title, author or date).

<sup>406</sup>MN, Anns., Series C, No. 16 (Letter from Delbos, Commander of Dori *cercle*, to the Governor of Upper Volta, dated 27 August 1927).



3.82. It may also be added that the “List of Niger *cantons* and villages forwarded to the Minister for Overseas France in 1948” does not include Bangaré — any more than it includes Oulsaltan or Petelkolé — among the villages in Diagourou *canton*<sup>408</sup>. The same applies to the list of villages in Téra Subdivision dated 6 July 1933<sup>409</sup>.

3.83. In these circumstances<sup>410</sup>, it is clear that on the date of adoption of the amended Arrêté of 1927, Bangaré was regarded as having to fall within the Colony of Upper Volta. This is the solution adopted by the 1927 Erratum, as it does not indicate any intermediate point between the Tao marker and the River Sirba at Bossébangou. There is no reason to replace it with another line, whether this is the line on the 1960 map, which diverges from it, or the one claimed by Niger, which is not based on any relevant factors.

**F. “Following the watercourses, where there are no crosses, it passes between Kolangoldagabé, in Burkina Faso (co-ordinates 13° 43' 52.3" N, 00° 36' 14.5" E) and Lolnan[g]o, in Niger (co-ordinates 13° 43' 50.3" N, 00° 36' 49.0" E).”** (Memorial of Niger, p. 98.)

3.84. The course defended by Niger in this sector follows the very intermittent line on the 1960 map, filling in the gaps not with straight lines but by “[f]ollowing the watercourses, where there are no crosses”<sup>411</sup>, which is especially curious because in this sector such watercourses do not always exist between two broken-off sections of the line. Furthermore, that does not in any case correspond to the course claimed by Niger, which proceeds by means of artificial lines. Here, Niger lays claim to the villages of Lolnando, Kolmangol Nore Ole and Pate Bolga<sup>412</sup>, once again without basing this claim on a single document.

**G. “The frontier then passes through the locality of Sénobellabé (geographical co-ordinates: 13° 36' 52.6" N, 00° 50' 00.8" E).”** (Memorial of Niger, p. 98.)

3.85. The locality of Sénobellabé constitutes another difficulty for Niger. The line on the 1960 map actually places this locality on Niger’s side, even though it was indisputably acknowledged as being on the Upper Volta side of the inter-colonial boundary when the latter was adopted in 1927. Niger expressly concedes as much: this “crop-growing area”

“was regarded as belonging to Upper Volta by the Roser/Boyer Agreement of April 1932, in reliance on the Delbos line of 1927. This view was confirmed by the tour report of the Head of Téra subdivision dated 8 November 1933, forwarded to the Governor of Niger by the Commander of Tillabéry *cercle*. The same view was taken in the Record of Agreement between the Administrators of Dori and Téra of 25 April 1935. The result was a transfer of population of Niger

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<sup>407</sup>MN, p. 97, para. 6.24.

<sup>408</sup>MN, Anns., Series C, No. 71 (List of Niger *cantons* and villages forwarded to the Minister for Overseas France (Diagourou, Tamou and Torodi *cantons*), undated, 1948).

<sup>409</sup>MN, Anns., Series C, No. 50 (List of villages in Téra Subdivision, 6 July 1933).

<sup>410</sup>See also para. 3.36 above.

<sup>411</sup>MN, p. 98, para. 6.24.

<sup>412</sup>MN, p. 98, para. 6.24 *in fine*.

origin to the localities of Taka and Yolo, situated in Niger territory. The same happened with the Record of Agreement of 8 December 1943.”<sup>413</sup>

3.86. In such circumstances, it is hard to understand how Niger could possibly claim a line passing *to the west* of this locality. However, this is what Niger actually does . . . simply by moving the village, both in space and time! According to Niger,

“these are farming hamlets, which do not remain in the same place. The sites change according to the seasons and retain the same toponyms. Before 1960, Sénobellabé was further north. Today, the former site has been abandoned and the hamlets which continue to bear that name are to be found on the Burkina side of the IGN line.”<sup>414</sup>

3.87. This “reasoning” calls for three comments to be made:

- (i) Niger is acknowledging here that the “method” which consists of trying to rediscover “actual boundaries . . . in practice” is meaningless in a region where localities “change according to the seasons and retain the same toponyms”; Burkina takes note of this;
- (ii) this “method” is applied by Niger in a most curious way: it relies on the site of the locality *today*, not on its site in 1927;
- (iii) whilst this locality was considered to belong to Upper Volta in 1927, this was not on the basis of the site where it is today, but according to its 1927 site. As a result, the line claimed by Niger which passes west of the location occupied by Sénobellabé *in 1927* is unfounded, since it passes to the west of a locality which at the relevant period was indisputably on the Upper Volta side and hence on the other side of the inter-colonial boundary. The straight-line boundary coming from the Tao marker for its part leaves the village of Sénobellabé to Burkina.

3.88. Niger relies on the fact that this locality is still listed, it claims, amongst the villages of Diagourou *canton* (Niger) in 1933 and 1948<sup>415</sup>. This locality does not however appear on the 1954 sketch-map of Diagourou *canton*<sup>416</sup>. Furthermore, there were disputes between the two colonies as to which one it belonged to, up until at least 1932<sup>417</sup>. And as Niger recalls, in all cases, these disputes led to the reaffirmation that Sénobellabé was part of Upper Volta territory.

3.89. Once again, examination of the factual elements produced by Niger thus leads one to dismiss as entirely without foundation the course it claims, as well as the line on the 1960 map in this sector. On the other hand, these elements fully corroborate the interpretation, endorsed by Burkina, which the colonial authorities gave to the Erratum,

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<sup>413</sup>MN, p. 98, para. 6.25. See also the Record of Agreement of 25 April 1935, MN, Anns., Series C, No. 57, which also allocates this locality to Dori *cercle*.

<sup>414</sup>MN, p. 99, para. 6.25.

<sup>415</sup>MN, p. 100, para. 6.25.

<sup>416</sup>MN, Anns., Series D, No. 21 (Diagourou *canton*: scale 1:250,000, 1954).

<sup>417</sup>MN Anns., Series C, No. 46 (*Bulletin de renseignements politiques* of Tillabéry *cercle* dated 11 October 1932).

according to which the latter adopted a course in two straight-line sections between the Tong-Tong marker, the Tao marker and the River Sirba at Bossébangou<sup>418</sup>.

**H. “The IGN line meets the line which at the time constituted the boundary of Say (tripoint for the *cantons* of Tillabéry, Dori and Say) at the point with co-ordinates 13° 29' 08" N, 01° 01' 00" E.” (Memorial of Niger, p. 99.)**

3.90. This meeting “point” is purely arbitrary in three ways. As has been recalled, the amended *Arrêté* of 1927 makes no reference to it. Furthermore, the 1960 map does not show “the line which at the time constituted the boundary of Say”. Lastly, Niger does not explain what method it selected in order to situate the point in question at the co-ordinates that it gives. As will be established in the next chapter, the last section of the boundary in this sector does not stop at the so-called “tripoint” mentioned by Niger, but at the point where the boundary reaches the River Sirba at Bossébangou, according to the unequivocal wording of the 1927 Erratum.

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3.91. In conclusion, it is clear that the course of the boundary claimed by Niger departs from the text of the 1927 Erratum even when the latter is entirely sufficient. It also departs from the line on the 1960 map — which does not comply in this sector with the Erratum. The fact that Niger has decided to disregard both the course made up of straight lines in the *Arrêté* and the line on the 1960 map (which it nonetheless claims to follow, contrary to all reason) is a blatant infringement of the law applicable to the Parties. Such a strategy is perhaps aimed at obtaining from the Court a boundary which, by way of compromise, would follow the line on the map which runs between the line claimed by Niger and the straight line connecting the Tao marker to the River Sirba at Bossébangou. Burkina is confident that the Court will determine its course in accordance with the agreement of the Parties laid down in the 1987 Agreement and reaffirmed in the Special Agreement seising the Court: as a considerable number of colonial administrators noted, some with regret, the inter-colonial boundary decided upon in 1927 took the form of artificial lines linking the frontier points expressly designated in the *Arrêté* via straight-line sections. *This* constitutes the frontier between Burkina and Niger in this sector, as Niger had furthermore agreed on various occasions before its sudden change of mind in 1990.

3.92. As a consequence, on the basis of the above findings, Burkina concludes,  
— firstly, that the course of the frontier described by Niger in the part of its Memorial relating to the “Téra sector” is devoid of any legal or factual foundation;

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<sup>418</sup>See in particular para. 3.2 above.

- secondly, that the course of the frontier in this sector is that described on pages 158 and 160 of Burkina's Memorial: from the Tong-Tong astronomic marker, the frontier follows a straight line as far as the Tao astronomic marker (Lat.: 14° 03' 04.7" N; Long.: 0° 22' 51.8" E)<sup>419</sup> and then, from that point, a straight line up to the point where the frontier reaches the River Sirba at Bossébangou (Lat.: 13° 21' 06.5" N; Long. 1° 17' 11.0" E)<sup>420</sup>.

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<sup>419</sup>The co-ordinates of this point were measured by GPS by Burkina. The co-ordinates of this marker on the Clarke 1880 ellipsoid are: Lat. 14° 03' 13" N; Long. 00 22' 53" E.

<sup>420</sup>The co-ordinates of this point are given on the Clarke 1880 ellipsoid.

## CHAPTER IV

### THE COURSE OF THE FRONTIER IN THE “SAY SECTOR”

4.1. In the sector presented by Niger as “the Say sector”, which corresponds to the section of the frontier separating the two States at the level of the Yagha, Komandjari and Tapoa *départements* on the Burkina side and the *départements* of Téra (with regard to the section of the frontier reaching the River Sirba at Bossébangou) and Say<sup>421</sup> on its own side, Niger only appears to acknowledge the fact that the frontier is defined by *Arrêté* No. 2336 of the Governor-General of FWA, dated 31 August 1927, as amended by the Erratum of 5 October 1927, which states that the frontier “reach[es] 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”. Niger does indeed affirm that the 1927 *Arrêté* “remained, at the time when the two States became independent, the only reference text for the determination of their common frontier”<sup>422</sup>, and that the use of this text for the determination of the frontier is “in accordance with the terms of the 2009 Special Agreement and of the 1987 Agreement between the two States”<sup>423</sup>. However, Niger immediately contradicts this affirmation — with which Burkina is in full agreement — by stating that whilst the text of the Erratum “will constitute the primary basis for determination of the course of the frontier between the two States in this second sector”<sup>424</sup>, the existence of “parts of that text [which] are problematic” and the finding that the 1960 map “in part deviates markedly from that described in the Erratum” gives it reasons for “not following it in certain respects”<sup>425</sup>.

4.2. In actual fact, the line claimed by Niger has nothing in common with that laid down in the text which is nonetheless recognized as the “reference text”:

- whereas the text indicates that after crossing the Téra-Dori motor road at the Tao astronomic marker, the frontier “reach[es] the River Sirba at Bossebangou”, Niger claims that it follows an entirely different course, stopping around 30 kms north of the River Sirba<sup>426</sup>;
- whereas according to the text, the frontier, having reached the River Sirba at Bossébangou, “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”, according to Niger, on the other hand, “the frontier cannot create a salient in this area”<sup>427</sup> and instead of turning back up towards the north-west, “[i]t simply turns in a south-westerly direction”<sup>428</sup>;

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<sup>421</sup>See MBF, p. 13, sketch-map No. 4 — Administrative divisions adjoining the frontier.

<sup>422</sup>MN, p. 104, para. 7.12.

<sup>423</sup>*Ibid.*

<sup>424</sup>MN, p. 105, para. 7.12.

<sup>425</sup>*Ibid.*

<sup>426</sup>MN, p. 111, para. 7.23.

<sup>427</sup>MN, p. 112, para. 7.26.

<sup>428</sup>MN, p.112, para. 7.26.

- whereas the Erratum states that the frontier, “turning back to the south, ... again cuts the Sirba at the level of the Say parallel”, the text should, according to Niger, be rewritten in such a way that the frontier moves in a south-westerly direction so as to arrive “*approximately* [at] the Sirba at the level of the Say parallel”<sup>429</sup> — moreover without cutting it “again”, as it would not have already reached it at Bossébangou as required by the Erratum;
- whereas the text indicates that the frontier “following an east-south-east direction, continues in a *straight line* up to a point located 1,200 m to the west of the village of Tchenguiliba”, Niger “maintains its claim here to a frontier in *two straight-line sections*, as it appears on those maps and sketch-maps of the colonial period”<sup>430</sup>.

4.3. The submissions thus presented by Niger are incompatible with the principle accepted without reservation by the Parties and laid down in Article 6 of the Special Agreement seising the Court, according to which the frontier between the two States is defined by international law, including “the principle of the intangibility of boundaries inherited from colonization . . . and the Agreement of 28 March 1987”. This “applicable law” actually leads one to disregard the documents on which Niger bases its arguments with a view to establishing that the course of the frontier is not that described in the Erratum, for at least four cumulative reasons.

4.4. Firstly, the application of the *uti possidetis*, in so far as the definition of the frontier is concerned, requires reference to be made to the title constituted by the *Arrêté* of 31 August 1927 as amended by the Erratum of 5 October 1927 — recognized moreover by Niger as “the only reference text” at the time when the two States gained independence<sup>431</sup>. Therefore it is entirely immaterial whether the course of the frontier described by this text is contradicted by that suggested by certain non-regulatory texts, or whether some maps and sketch-maps show a different line. And the fact that the regulatory line may have thwarted the expectations of certain officials is also of scant importance. At most, the documents and facts thus illustrated could be categorized as *effectivités* — something that Niger prudently refrains from doing — which are at odds with the title. However, it is well established that when applying the *uti possidetis* principle, such *effectivités* have to be disregarded in favour of title<sup>432</sup>.

4.5. Secondly, Article 1 of the 1987 Agreement refers *exclusively* to the *Arrêté* and its Erratum as far as the description of the frontier is concerned, and in so doing rules out any possibility of disregarding it, particularly when it comes to the course followed in the Say sector, on the basis of any other document. Sixty years on, the 1987 Agreement thus upholds the 1927 title through an express agreement of the two Parties to this dispute, 27 years after they gained independence.

4.6. Thirdly, Article 2 of the 1987 Agreement, concerning not the definition of the frontier but rather its demarcation, indicates that this should be done “following the course described” by the *Arrêté* and its Erratum, and only mentions the 1960 map “and/or any other relevant document accepted by joint agreement of the Parties” in order to mitigate any

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<sup>429</sup>MN, p. 115, para. 7.32 (emphasis added).

<sup>430</sup>MN, p. 120, para. 7.40 (emphasis added).

<sup>431</sup>See paras. 1.48-1.50 above.

<sup>432</sup>See paras. 1.51-1.64 above.

instances where the description might “not suffice”, not in order to contradict it. This means that where the text “suffices” to provide a clear description of the course of the frontier, there can be no question of referring to any other description arising from a map or contained in another document with a view to amending that course<sup>433</sup>.

4.7. Finally, the documents referred to by Niger must also be disregarded, as Article 2 of the 1987 Agreement stipulates that the only documents which may be used to establish the course of the frontier are those which have been “accepted by joint agreement of the Parties”, something which cannot be said for any of the documents used by Niger to support its position in this area<sup>434</sup>.

4.8. Niger is therefore misguided in believing that it can base its entire position on documentary material which the Parties rejected as inapplicable and irrelevant when they set out the applicable law. In law, it is indisputable that the line constituting the frontier between the two States is that described by the *Arrêté* as amended by its Erratum, supplemented alternatively, and only where it does not suffice, by the line shown on the 1960 map. However, the line claimed by Niger is based neither on the description in the Erratum, which is systematically disregarded, nor on the 1960 map. Niger’s position is therefore flawed from the outset by an error in law which affects its entire line of argument<sup>435</sup>.

4.9. These observations by themselves suffice to respond to Niger’s arguments and to refute in its entirety the frontier line it claims in the Say sector. Burkina thus remains firmly convinced that the course of the frontier between the Parties is that which results from the amended *Arrêté* of 1927, as it has established in its Memorial<sup>436</sup>.

4.10. Moreover, a detailed analysis of Niger’s reasoning reveals that, even were it to be conceded that the course of the frontier could be determined by taking into account the documentation produced by Niger — *quod non*, contrary to the latter’s assertions:

- the frontier reaches the River Sirba at Bossébangou (Section 1);
- the course claimed by Niger in the sector of the salient is entirely unjustified (Section 2);
- the frontier between the intersection of the River Sirba and the Say parallel and the beginning of the Botou bend consists of a single straight line (Section 3).

## SECTION 1 THE FRONTIER REACHES THE RIVER SIRBA AT BOSSÉBANGOU

4.11. In the Bossébangou area, Niger’s approach openly consists of giving a supposed “traditional boundary” of *cercles* precedence over the inter-colonial boundary established by the Erratum. As a result, the frontier would not be able to reach the River Sirba at

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<sup>433</sup>*Ibid.*

<sup>434</sup>*Ibid.*

<sup>435</sup>See Chap. I above.

<sup>436</sup>MBF, Submissions, pp. 160-162.

Bossébangou, stopping instead around 30 km north of this locality, the section of line continuing to the River Sirba at Bossébangou being one of Niger's internal boundaries, separating the former *cercles* of Say and Tillabéry.

4.12. Four preliminary observations are called for.

4.13. First of all, it is important to point out that although this position was previously defended by Niger at the extraordinary meeting of the Joint Technical Commission on Demarcation held on 14 May 1990<sup>437</sup>, it was swiftly abandoned as untenable. At the end of July 1990, Niger accepted that "the line of the frontier reaches the River Sirba at Bossébangou"<sup>438</sup>.

4.14. Secondly, Niger's position lacks consistency and varies from page to page of the Memorial. It is first stated, on page 65, that "in the area of Bossébangou, . . . [the line included] a part of the internal boundaries of Say *cercle*"; then, on page 107, we read that Bossébangou is apparently not *in* Say *cercle*, but *on the boundary* between the *cercles* of Tillabéry (including the *cantons* of Dori *cercle* incorporated into Niger in 1926) and Say, which would imply that the contested boundary does not constitute an incursion into Say *cercle*, but separates Say and Tillabéry *cercles*.

4.15. This indecision on the part of Niger makes its argument rather difficult to grasp. Only once does Niger suggest that, by descending as far as the River Sirba at Bossébangou, the frontier resulting from the Erratum actually *enters* the *cercles* of Say or Tillabéry. In contrast, it makes more consistent criticism of this frontier for descending too far to the south and thus mistakenly following (Niger's internal) boundary *between* Say and Tillabéry *cercles* (thus without actually entering either of them) for some 30 km within Niger's territory. It is this second argument which should probably be taken as reflecting Niger's position.

4.16. Thirdly, it is not the Erratum but Niger itself which confuses the inter-colonial boundary with internal boundaries within Niger, when it completely ignores the fact that Upper Volta had disappeared from 1932 to 1947. For example, to demonstrate its idea that "the inter-colonial boundary in this sector was also very strongly maintained after 1927" and that this boundary departs from the text of the Erratum<sup>439</sup>, it invokes a Record of Agreement of 8 December 1943<sup>440</sup>, even though this document can have absolutely nothing to do with the inter-colonial boundary between Niger and Upper Volta, since the latter had been dissolved and dismembered in 1932 and remained so in 1943<sup>441</sup>.

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<sup>437</sup>Ann. MBF 85.

<sup>438</sup>Ann. MBF 87 (Report of the second ordinary session of the Joint Technical Commission on Demarcation of the Frontier, 23-28 July 1990, 28 July 1990), p. 3 *in fine*. See also para. 2.17 above.

<sup>439</sup>MN, p. 109, para. 7.20.

<sup>440</sup>MN, p. 110, para. 7.20.

<sup>441</sup>See paras. 3.57-3.58 above.



4.17. Fourthly, Niger refers to maps and sketch-maps which are irrelevant for the purpose of determining the colonial frontier. Three of the maps put forward by Niger to support its argument date from the period between 1932 and 1947<sup>442</sup>, when Upper Volta no longer existed. Furthermore, one of them, the title of which, according to Niger, is “road map of the Colony of Upper Volta to a scale of 1:1,000,000”, dating from 1936<sup>443</sup>, does not exist, since this is actually the road map of the Colony of Niger in its 1936 edition.

4.18. On the basis of these imprecise assertions in particular, and many others which will be mentioned below, Niger’s contention that the Erratum contains a “mistake” hinges on the following reasoning: despite the clear terms of the Erratum, from which it follows that, coming from the north-west, the frontier “reaches the River Sirba at Bossébangou”, this line is said to be entirely unjustified, as it calls into question the “traditional course of the boundaries” of Say *cercle*<sup>444</sup>. As far as Niger is concerned, the *Arrêté* of August 1927 was prepared on the basis of the Lefilliatre-Choteau Record of Agreement on delimitation, which sets out all the boundaries of Say *cercle* without restricting itself to those which separate this *cercle* from Upper Volta<sup>445</sup>; the Erratum only partially corrected this mistake, since it did not take account of the fact that some of the Dori *cantons* which bordered Say *cercle* had also been incorporated into Niger in 1926<sup>446</sup>. Consequently, by stipulating that the frontier reaches the River Sirba at Bossébangou, it unwittingly sends it inside the territory of Niger<sup>447</sup>. However, according to Niger, the Erratum could not have defined the inter-colonial boundary without following the pre-existing outlines of the *cercles*, since it is an implementing text of the 1926 Decree<sup>448</sup>, which by incorporating the Dori *cercle cantons* and Say *cercle* into Niger automatically had the result that the new inter-colonial frontier followed their “traditional” boundaries. In Niger’s view, this mistake means that the 1927 *Arrêté* and its Erratum have no effect in the Bossébangou region. Furthermore, Niger claims, documents dating from the colonial period bear this out, in particular by not reproducing this “mistake”, and as far as the 1960 map is concerned, it should be disregarded, since it too is erroneous. As a result, Niger directs its efforts towards rediscovering “traditional boundaries” and claims that the inter-colonial frontier should be established in accordance with the lines they follow.

4.19. This argument collapses by itself, since the Erratum does not contain any mistake (1) and, in addition, the documents on which Niger bases its argument do not support the line that it proposes (2).

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<sup>442</sup>MN, p. 107, para. 7.17; these are the 1:2,500,000 road maps of the Colony of Niger, 1934 edition (MN, Anns., Series D, No. 16) and 1936 edition (MN, Anns., Series D, No. 17) and the map Niger entitles “road map of the Colony of Upper Volta to a scale of 1:1,000,000, 1936 edition, FWA Geographical Department, Dakar” on p. 108, para. 7.17 of its Memorial (and refers to as MN, Anns. Series D, No. 17).

<sup>443</sup>MN, p. 108, para. 7.17.

<sup>444</sup>MN, p. 110, para. 7.21.

<sup>445</sup>MN, pp. 106-107, paras. 7.15-7.16.

<sup>446</sup>*Ibid.*

<sup>447</sup>MN, p. 107, para. 7.16.

<sup>448</sup>MN, p. 111, para. 7.22.

### 1. There is no mistake in the Erratum on the point where the frontier reaches the River Sirba at Bossébangou

4.20. It is indeed the case that, in its initial version, the *Arrêté* of August 1927 contained too many details regarding the boundaries of Say *cercle*, since even though it stated its aim as determining the frontier between Niger and Upper Volta, some parts of the text established purely internal boundaries within Niger, in particular those of Say *cercle* in the part which did not adjoin Upper Volta. One of the Erratum's specific aims was to correct it on that point (it also clarified certain aspects of the course of the frontier). Nonetheless, according to Niger, despite that correction, the part of the frontier described by the Erratum as reaching the River Sirba at Bossébangou remained a purely internal boundary within Niger. A mistake therefore persisted, in Niger's view, due to the fact that the Erratum had not properly taken account of the fact that some *cantons* of Dori *cercle* had been transferred to Niger at the same time as Say *cercle*<sup>449</sup>.

4.21. The theory that a mistake was made is, however, untenable: the *Arrêté* and the Erratum fully and explicitly took account of the transfer to Niger not only of Say *cercle* but also of certain *cantons* of Dori *cercle*.

4.22. To try to convince the Court of the contrary, Niger firstly states that the Lefilliatre-Choteau Record of Agreement is the source of the drafting error concealed within the August 1927 *Arrêté*<sup>450</sup>. This appears to be an established fact, since the terms of the Record of Agreement of 10 February 1927 are identical to those of Article 1, paragraph 2, of the *Arrêté* of August 1927 (apart from the section on Botou *canton*)<sup>451</sup>. It is therefore probably because it reproduced the text signed by Lefilliatre and Choteau, which did not have the exclusive aim of establishing the boundary between Say *cercle* and Upper Volta but indicated all the boundaries of territories making up Say *cercle*, that the *Arrêté* went beyond its own objective of determining the inter-colonial boundary between Niger and Upper Volta.

4.23. However, as Niger sees it, this mistake was only partially corrected by the Erratum, since the latter, in Niger's view, was drafted without account being taken of the fact that some Dori *cantons* had also been transferred to Niger, which would have meant that Bossébangou would no longer be on the boundary with Upper Volta<sup>452</sup>.

4.24. Yet this is to forget that the *Arrêté* of 31 August 1927 drew not only on the Lefilliatre-Choteau Record of Agreement of 10 February 1927<sup>453</sup>, but also on the Lefilliatre-Brévié Record of Agreement of 2 February 1927<sup>454</sup>. The letter submitting the draft *Arrêté*, sent in July 1927 to the Governor-General by the acting Director of Political and Administrative Affairs of the Standing Committee of the Government Council, leaves no room for doubt in this regard, as it states that the draft *Arrêté* "has been established in

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<sup>449</sup>MN, p. 107, para. 7.16.

<sup>450</sup>MN, p. 106, para. 7.15.

<sup>451</sup>This is also confirmed by the letter of July 1927 submitting the draft *Arrêté* determining the boundaries of the Colonies of Upper Volta and Niger, from the Director of Political and Administrative Affairs of the Standing Committee of the Government Council, which indicates that the draft *Arrêté* was drawn up in accordance, *inter alia*, with that Record of Agreement (CMBF Ann. 2).

<sup>452</sup>MN, p. 107, para. 7.16.

<sup>453</sup>MN, Anns., Series C, No. 8.

<sup>454</sup>MN, Anns., Series C, No. 7.

accordance with the following Records of Agreement: the first dated 2 February 1927, determining the boundaries of the new Tillabéry *cercle* with Upper Volta; the second dated 10 February 1927, fixing the boundaries of Say *cercle* and Upper Volta; and the third dated 9 May 1927, indicating the boundaries of Botou *canton* with that same Colony”<sup>455</sup>. The Lefilliatre-Brévié Record of Agreement does expressly take account of the transfer of Dori *cantons* to Niger, since its specific objective is to define the new boundaries between Niger and Upper Volta which arise as a result. It establishes, having explicit regard to the Decree dated 28 December 1926, that “[t]he *cantons* belonging to the former Tillabéry *cercle* on 22 June [1910] shall be incorporated into the Colony of Niger. These *cantons* . . . are bounded [to the west by the line which, coming from the north] reaches the River Sirba (boundary of Say *cercle*) near to and to the south of Boulkalo.”

4.25. Moreover, it suffices to read Article 1, paragraph 1, of the *Arrêté* of 31 August 1927<sup>456</sup> to see that it exactly reproduces the terms of that Record of Agreement, and therefore takes due account of the new boundaries between Tillabéry *cercle* and Upper Volta resulting from the transfer to Niger of certain Dori *cantons*, specifying that:

“this boundary . . . descend[s] in a north-south direction, cutting the Téra-Dori motor road to the west of the Ossolo Pool, until it reaches the River Sirba (boundary of Say *cercle*), near to and to the south of Boulkalo”.

4.26. Consequently, when drafting the *Arrêté* of 31 August 1927, the colonial authorities could in no way have made the mistake of forgetting that, outside Say *cercle*, some *cantons* from Dori *cercle* had been incorporated into Niger by the Decree of 28 December 1926, since this *Arrêté* defines the new boundary between Upper Volta and Tillabéry *cercle*, which henceforth contains them<sup>457</sup>. The same applies, *a fortiori*, to the Erratum.

4.27. Furthermore, all the Erratum did was to rationalize the course of the inter-colonial boundary, by explicitly making the point located on the River Sirba near to and to the south of Boulkalo coincide with Bossébangou, a point thus referred to as a “tripoint” in the terminology used by Niger. It thereby clarified the boundaries of Tillabéry and Say *cercles* at the points where they merge with the inter-colonial boundary with Upper Volta, describing the form taken by the salient from Bossébangou onwards — something the *Arrêté* did not do in its initial version.

4.28. In so doing, it is also in order to show unequivocally that the boundary coming from the Tao marker is inter-colonial when it reaches the River Sirba at Bossébangou that the Erratum states that, having reached that point, the frontier does not promptly turn back up to form the salient, but “almost immediately” turns back up. In this way, having descended from the Tao marker to the River Sirba at Bossébangou, the frontier briefly runs in a westerly direction before turning back up towards the north-west, which as clearly as possible prevents the line that “ascends” towards the north-west to form the salient from overlapping with the

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<sup>455</sup>CMBF Ann. 2. This letter of submission is moreover probably the source of the mistake made by the *Arrêté*, as it implies that the Record of Agreement of 10 February 1927 fixes the boundary between Say *cercle* and Upper Volta, whereas it actually fixes all the boundaries of Say *cercle*.

<sup>456</sup>MBF, Ann. 34.

<sup>457</sup>The Dori *cantons* which were transferred to Niger by the Decree of 28 December 1926 are those which belonged to Niger before 22 June 1910, the date of the *Arrêté* allocating them to Upper Volta. These *cantons* were incorporated into Tillabéry *cercle* by an *Arrêté* of 22 January 1927.

line “descending” from the north-west from the Tao marker. This ensures that by arriving from the north to reach the River Sirba at Bossébangou, the inter-colonial frontier separates Upper Volta (to the west) from the territory of Niger corresponding to Tillabéry *cercle* (to the east), while by almost immediately turning back up to the north-west to form the salient, the frontier separates Upper Volta (to the north) from the territory of Niger comprising Say *cercle* (to the south). The next map illustrates the course of the frontier in this area (see sketch-map No. 6 below — Course of the boundary in the area of the salient).

4.29. There is therefore no mistake in the Erratum; rather, it was drafted in full knowledge of the fact that the boundary which it establishes separates Upper Volta from Niger, including both Say *cercle* and Tillabéry *cercle*. Moreover, the “traditional course” claimed by Niger is entirely without justification.

**2. The documents invoked by Niger to contradict the terms of the *Arrêté* of  
31 August 1927 as amended by its Erratum do not support  
the course it claims**

4.30. As Burkina has already pointed out<sup>458</sup>, Niger, relying on various documents, contends that the Erratum is erroneous in that it does not comply with “the traditional course of the boundaries of Say *cercle*”<sup>459</sup>. In order to establish the said “traditional course”, Niger calls on a variety of documents. As Burkina has also pointed out already, Niger cannot, in law, call upon these documents in order to contradict the title<sup>460</sup>. But even assuming that it were able to do so, these documents — which Burkina in no way recognizes as having been “accepted by joint agreement of the Parties” under the terms of the 1987 Agreement and which it will only mention for the purposes of the discussion — would not in any way support the course claimed by Niger, whether they date from before or after the Erratum.

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<sup>458</sup>See para. 4.18 above.

<sup>459</sup>MN, p. 110, para. 7.21.

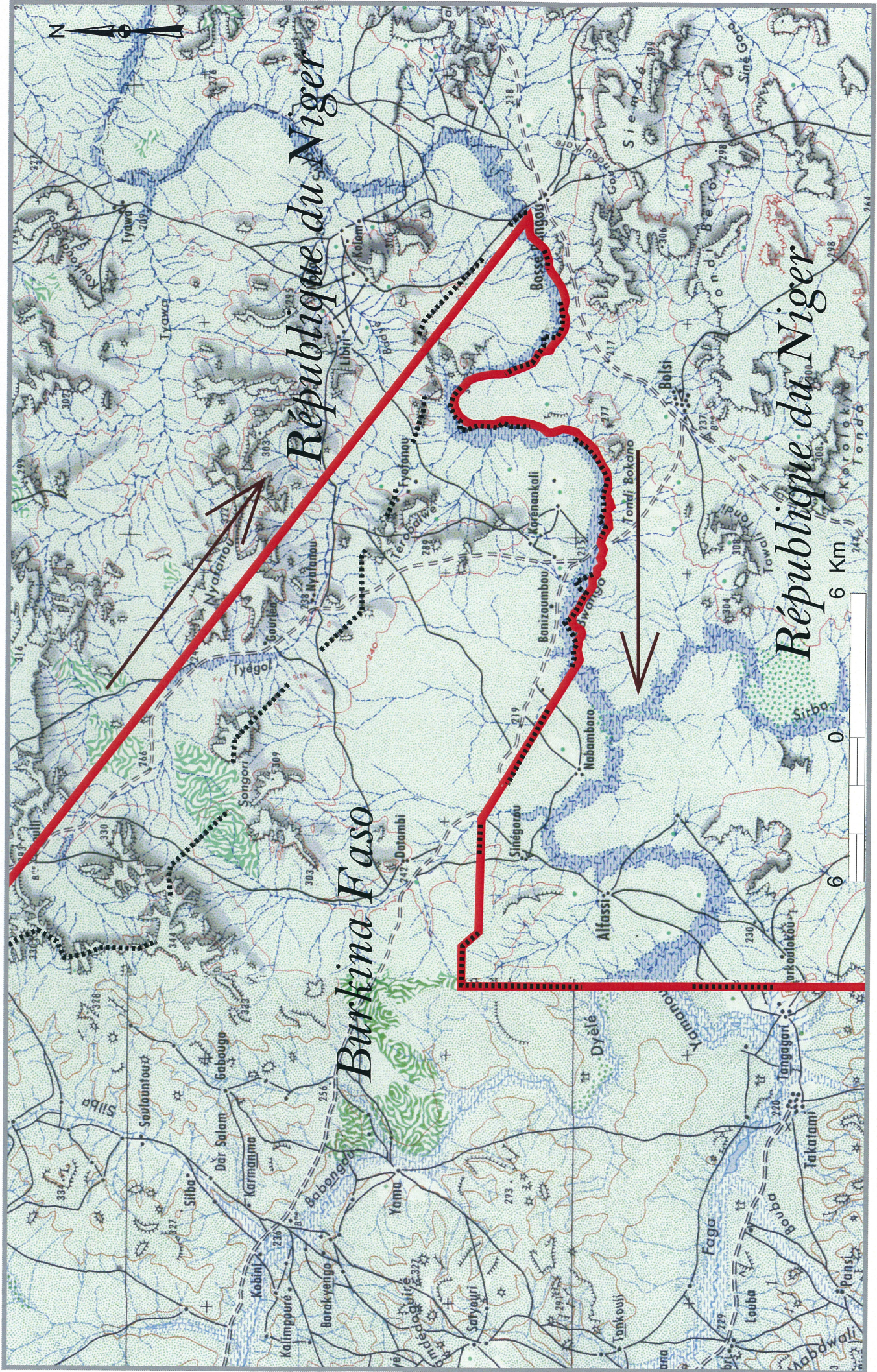
<sup>460</sup>See paras. 1.51-1.64 and 4.3-4.18 above.

Course of the boundary in the area of the salient

Scale 1 : 200,000

line according to the Erratum

line shown on the IGN 1 : 200,000 map, 1960 edition



## A. Documents prior to the Erratum

4.31. Niger firstly seeks to demonstrate that all the documents prior to the adoption of the Erratum take the same approach and already confirm a “view of the course of the inter-colonial boundary” which would be very strongly maintained after 1927<sup>461</sup>. But in this respect it refers only to the work done by Delbos<sup>462</sup> and Prudon<sup>463</sup>, conveniently ignoring other texts from the same period which show that, contrary to its own assertions, Bossébangou was considered to be a locality on the boundary of Say and Dori *cercles*. This is especially the case with the Choteau-Lefilliatre Record of Agreement of 10 February 1927<sup>464</sup>, which establishes the boundaries of Say *cercle* and attests that Bossébangou was considered to be on the boundary of Say and Dori *cercles* before the adoption of the Erratum.

4.32. Niger also relies on four sketch-maps and maps and suggests that these show that before 1927 the boundary between Upper Volta and Niger, or, to be more precise, between Say *cercle* and Dori *cercle*, never descended as far as Bossébangou<sup>465</sup>.

4.33. Nevertheless, precisely the opposite is shown by three of the four documents mentioned — Commander Truchard’s 1915 sketch-map<sup>466</sup>, map No. 60 of the 1926 Atlas of *Cercles*<sup>467</sup> and the 1926 Blondel-La Rougery map<sup>468</sup>. Apart from the fact that none of these sketch-maps and maps shows the boundary between Upper Volta and Niger on the right-hand side of the River Niger, since neither in 1915 nor in 1926 did Niger possess territory on the right bank of the river, it can be seen from these documents that the boundary between Dori and Say *cercles* does indeed “descend” as far as Bossébangou. Moreover, they could not make a “tripoint” appear between Dori, Say and Tillabéry *cercles*, since the *cantons* of Tillabéry *cercle* situated on the right bank of the river were included within the territory of Dori *cercle* at the time.

4.34. As for Captain Boutiq’s 1909 sketch-map<sup>469</sup>, this could not be seen as an illustration of the inter-colonial frontier either, since the three *cercles* (Say, Dori and Tillabéry) belonged at that time to the single colony of Upper Senegal and Niger. It is also the only one out of all the documents submitted by Niger to feature a “tripoint” between the *cercles* of Dori, Tillabéry and Say to the north-west of Bossébangou. It is all the more unreliable because:

— the *cercle* boundaries illustrated on this sketch-map, which accompanies a “report of Captain Boutiq, Commander of Djerma *cercle*, on the possible transition of the military régime to a civil one for the right bank of the Niger” and illustrates “the course of the

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<sup>461</sup>MN, p. 109, para. 7.20.

<sup>462</sup>MN, p. 108, paras. 7.19-7.20.

<sup>463</sup>MN, p. 109, para. 7.19.

<sup>464</sup>MN, Anns., Series C, No. 8.

<sup>465</sup>MN, p. 110, para. 7.21.

<sup>466</sup>MN, Anns., Series D, No. 4.

<sup>467</sup>MN, Anns., Series D, No. 6.

<sup>468</sup>MN, Anns., Series D, No. 9.

<sup>469</sup>MN, Anns., Series D, No. 1.

Niger through Djerma *cercle*” hardly amount to anything more than the boundaries *proposed* by the Commander of Djerma *cercle* and only represent his view of the area *in 1909*; besides,

- other proposals regarding the borders of *cercles* in the region were to be made before the end of 1927, as is shown for example by Administrator Delbos’s sketch-map of 1927<sup>470</sup>. On this sketch-map, it can be clearly seen that the borders of Say are presented differently according to whether they represent the view of the Colony of Niger (in red) or that of the Colony of Upper Volta (in black); moreover, the second sketch-map produced by Captain Delbos and appended to his report of 17 December 1927 clearly shows the boundary descending south of Nabambori and as far as the River Sirba<sup>471</sup>; finally,
- despite claiming that Captain Boutiq’s map illustrates the “traditional boundary” of Say *cercle*, Niger disregards it totally as far as the southern boundary of this *cercle* is concerned: whereas the 1909 map shows it as a broken line with an angle pointing towards the north, Niger claims the exact opposite, that is, a broken line with an angle pointing towards the south<sup>472</sup>.

4.35. The theory of a “traditional boundary”, “strongly established” before the adoption of the Erratum, therefore does not stand up. Subsequent documents do not provide any support for this theory either.

## **B. Documents subsequent to the Erratum**

4.36. Niger believes it possible to assert that the “view of the course of the inter-colonial boundary” in the Say sector as it appeared, according to Niger, before the adoption of the *Arrêté* and its Erratum, was “strongly maintained” after 1927<sup>473</sup>. Besides the fact that, as Burkina has just shown, there was certainly no “firmly established” boundary before 1927, the documents Niger which relies on for the subsequent period cannot overturn that conclusion.

4.37. Niger refers first of all to a report from the Acting Commander of Dori *cercle* drawn up on 10 April 1932 after a tour, and quotes three lines<sup>474</sup> from a nine-page report<sup>475</sup>. Yet a more attentive perusal of this report is all that is required to see that:

- firstly, it confirms, rather than invalidating, as Niger suggests, the delimitation made by the Erratum, since the signatory proposes a further erratum to align the boundary more closely with his own views; this means that he had no doubt at all about the fact that the course established in 1927 constituted the law and that any change to it would require a new text to be adopted — something that was never done;
- secondly, this text proposes a revision of the legal boundary on the basis of an erroneous premise. Its author indeed states that:

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<sup>470</sup>MN, Anns., series D, No. 2.

<sup>471</sup>MN, Anns., Series C, No. 20.

<sup>472</sup>See Section 3 below.

<sup>473</sup>MN, p. 109, para. 7.20.

<sup>474</sup>*Ibid.*

<sup>475</sup>MN, Anns., Series C, No. 45.

“[T]here are two possibilities: either the *Arrêté général* of 31 August 1927 and the Erratum that followed were intended to endorse the work of Administrators Delbos and Prud’hon and officially establish the boundary they proposed after their inspection tour, or those texts refer to other documents.

The second option would seem to be hazardous and implausible, while the first is the only logical one.”<sup>476</sup>

In actual fact, it is the second option which should have been accepted, since the *Arrêté* and its Erratum were drawn up on the basis of the Brévié-Lefilliatre and Choteau-Lefilliatre Records of Agreement;

— lastly, this redrawn boundary is entirely new and has nothing to do with the “traditional boundaries” claimed by Niger with reference to the 1909 sketch-map, since Niger proposes a line between Tillabéry and Dori *cercles* which would have its starting point not at Nababori, but at Alfassi.

4.38. The Record of Agreement of 8 December 1943 recounting the delimitation exercises between Dori and Tillabéry carried out by Administrators Delmond, Texier and Garat provides no further support for Niger’s position<sup>477</sup>. Not only does it suggest that the point of contact between Dori, Tillabéry and Say *cercles* is situated at another entirely new location, which does not correspond to Nababori or Alfassi but would be at a distance of some 6.5 km from Nababori, but also it was signed more than ten years after the disappearance of Upper Volta; that disqualifies this entirely new “traditional boundary”, which can have no relevance, since Upper Volta was reconstituted in 1947 within its 1932 boundaries<sup>478</sup>.

4.39. Niger’s arguments relating to the Bossébangou area therefore appear to be unfounded, as is the case for its arguments regarding the area of the salient.

## SECTION 2 THE LINE CLAIMED BY NIGER IN THE “SALIENT” SECTOR IS NOT JUSTIFIED

4.40. Even though Niger makes as if seeking “to determine the precise course of the ‘salient’ as defined by the Erratum of October 1927”<sup>479</sup>, its position is clearly that there is no salient in this area. Referring to the line proposed in its earlier argument, Niger maintains that “[g]iven that this boundary came not from Bossébangou but ran directly from the Tao marker to the ‘tripoint’ between the *cercles* of Dori, Tillabéry and Say, as identified above, the frontier cannot create a salient in this area”<sup>480</sup>. However, precisely the opposite conclusion must be drawn: *since there is a salient* in this area, as is expressly indicated by the legislative text of 1927, the boundary coming down from the Tao marker cannot stop at the “tripoint” invented by Niger, but *must of necessity reach the River Sirba at Bossébangou*, which it does in any event, as previous explanations have shown.

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<sup>476</sup>Page 5 of the document.

<sup>477</sup>MN, p. 110, para. 7.20; MN Anns., Series C, No. 69.

<sup>478</sup>See paras. 3.57-3.58 above.

<sup>479</sup>MN, p. 114, para. 7.30.

<sup>480</sup>MN, p. 112, para. 7.26.



4.41. Still, one more invention means nothing to Niger: whereas the title constituted by the Erratum states that from the River Sirba at Bossébangou, the frontier “turns back up” towards the north-west, Niger’s Memorial maintains that there is no turning back up, and that the frontier instead “simply turns in a south-westerly direction”<sup>481</sup> from a point situated to the north of Bossébangou. Finally, having reached the point of the salient, the frontier does not turn back southwards but runs in a “roughly NNE/SSW”<sup>482</sup> direction. Niger’s approach here is once again quite simply to disregard the course of the frontier as defined by the text of the Erratum, and to give precedence to a course which results from a few non-legislative documents.

4.42. In this respect, Niger endows the 1915 and 1927 maps with particular significance. It is on these, according to Niger, that “reliance should be placed in order to determine the precise course of the ‘salient’”<sup>483</sup>. For Niger, they are more relevant than the 1960 map, which should be disregarded since it “makes the frontier in this area run significantly further to the east than that shown on the previous maps”<sup>484</sup>. In other words, it should be disregarded because it does not suit Niger. It will be agreed that this cannot be a sufficient reason.

4.43. This argument is once again in total contradiction with the terms of the 1987 Agreement. Neither the 1915 map nor the 1927 map are documents accepted by joint agreement of the Parties.

4.44. Furthermore, in order to justify the line it claims, Niger purports to have identified the exact location of the villages mentioned in the *Arrêté* as amended by the Erratum<sup>485</sup>. In actual fact, the location of two of the four villages, Alfassi and Kouro, is not a matter of debate, as Niger’s siting of them<sup>486</sup> places them incontrovertibly on the eastern side of the lines claimed by each of the Parties. However, the same does not apply to the villages of Tokalan and Tankouro.

4.45. As far as the village of Tokalan is concerned, Burkina considers that it is completely impossible to locate, whereas Niger claims the opposite, but is unable to do so convincingly. Thus it stated in 1990, with great authority, that this village “corresponds to the exact location of the current village of Takatami”<sup>487</sup>, but then claims in its Memorial that it is very close to Tangangari<sup>488</sup>, albeit without explaining its change of opinion.

4.46. It is no longer possible to identify the village of Tankouro as it existed at the time when the *Arrêté* and its Erratum were adopted, and it is not identified by Niger either. According to Niger, the sketch-map of *Say cercle* drawn up by Administrator Truchard in

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<sup>481</sup> *Ibid.*

<sup>482</sup> MN, sketch-map on p. 114, and p. 114, para. 7.31.

<sup>483</sup> MN, p. 114, para. 7.30.

<sup>484</sup> *Ibid.*

<sup>485</sup> MN, p. 112, para. 7.27.

<sup>486</sup> MN, map reproduced facing p. 114.

<sup>487</sup> Ann. MBF 87.

<sup>488</sup> MN, p. 115, para. 7.31.

1915 does feature it<sup>489</sup>, but it appears likely that, in the same way as Tokalan, it “simply disappeared during the period contemporary with the adoption of the 1927 Erratum, doubtless as a result of the very unfavourable health conditions prevailing at the time in this sector”<sup>490</sup>. This is probably what did happen, but Niger fails to see the consequence, which is that these villages, which no longer existed in 1927, cannot provide the slightest piece of useful information in determining the course described by the Erratum.

4.47. Niger also relies, in order to determine “the depth of the ‘salient’ at its point”<sup>491</sup> on a telegram/letter sent in 1935 by Say subdivision to Dori *cercle*<sup>492</sup>. According to this text, “[a]fter Bosseibangou, Say Subdivision encroaches on the left bank [of the River Sirba] to a depth of some 15 km — the village of *Alfassi* (Torodi *canton*) is the only Say village located on that bank”. However, this document is incapable of providing the slightest information regarding the inter-colonial boundary, since it is subsequent to 1932 and prior to 1947.

4.48. Niger then claims that it is appropriate to disregard the description in the Erratum, according to which, “turning back to the south [on leaving the salient], [the line] again cuts the Sirba at the level of the Say parallel”, on the twofold grounds that this description does not allow the inclusion of the four villages and that “the Record of Agreement of 10 February 1927, which served as a preparatory document for the *Arrêté général* of August 1927 and for the Erratum which corrected the latter, was evidently less precise on the matter”<sup>493</sup>. Yet not only are two of the four villages impossible to locate — and they could certainly not have been located in 1927 since, as Niger itself concedes, they no longer existed at that date<sup>494</sup> — but furthermore it would be utterly absurd to give precedence, for the purpose of determining the frontier, to a previous non-legislative text over a subsequent legislative text, especially as the former is in fact less precise than the latter.

4.49. Niger also asserts that the line it claims is confirmed by a sketch-map drawn by Sergeant Labitte in 1930<sup>495</sup>. However, not only is this sketch-map not accepted “by joint agreement of the Parties” under the terms of the 1987 Agreement, it is also erroneous. It actually includes within the salient the village of Boborgou Saba, even though this village is mentioned neither in the *Arrêté* nor in the Erratum as having to be located within the salient. Consequently, the form given to the salient by the drafter of the sketch-map is of no relevance.

4.50. Finally, Niger asserts that “reference has to be made to the representations of the Say parallel as it was shown on the maps of the period — and not on modern maps — in order to determine the point where the frontier changes direction in this sector”, referring here to the 1926 Blondel-La Rougerie map<sup>496</sup>. Quite apart from the fact that Niger offers no justification to support it, this assertion is entirely wrong.

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<sup>489</sup>MN, p. 113, para. 7.28.

<sup>490</sup>*Ibid.*

<sup>491</sup>MN, p. 114, para. 7.31.

<sup>492</sup>MN, Anns., Series C, No. 61.

<sup>493</sup>MN, p. 115, para. 7.32.

<sup>494</sup>See para. 4.46 above.

<sup>495</sup>MN, p. 115, para. 7.33, fn. 329.

<sup>496</sup>MN, p. 115, para. 7.33; MN Anns., Series D, No. 9.

4.51. First of all, the Agreement reached between the Parties in 1987 does not in any way identify this map as relevant, nor is it “[an]other relevant document accepted by joint agreement of the Parties”.

4.52. Secondly, it is obvious that the map could not have inspired the drafting of either the *Arrêté* of August 1927 or its Erratum, nor can it justify any interpretation running counter to their clear terms, since:

- this map only represents a small portion of the area delimited by the Erratum;
- it shows the village of Kalba located on the left bank of the Sirba and at the same time within the salient — yet Kalba is not mentioned as appearing in the salient in the *Arrêté* or in its Erratum;
- the village of Tankouro is not featured on it; and
- the Say parallel does not meet the River Sirba, whose source is shown much further to the north.

4.53. None of Niger’s arguments can provide any basis for its position that there is no salient in the area, a position directly contradicted by the terms of the Erratum. Nor can they be used to demonstrate that the straight line formed by the frontier in the last section of the Say area is in fact made up of two straight lines.

**SECTION 3**  
**THE FRONTIER BETWEEN THE INTERSECTION OF THE RIVER SIRBA AND THE SAY**  
**PARALLEL AND THE BEGINNING OF THE BOTOU BEND IS MADE**  
**UP OF A SINGLE STRAIGHT LINE**

4.54. The text of the Erratum is extremely clear about the course of the frontier between the end of the salient and the Botou bend. It states that from the point where it intersects with the River Sirba at the level of the Say parallel “the frontier, following an east-south-east direction, continues in a straight line up to a point located 1,200 m to the west of the village of Tchenguiliba”. Niger acknowledges moreover that this text is “of great simplicity”<sup>497</sup> and defines “the boundary in this area as a single straight line”<sup>498</sup>, statements with which Burkina agrees wholeheartedly.

4.55. Nevertheless, the line described by the Erratum is probably too simple for Niger, since it rejects it, arguing that it “appears to have no basis in the situation prior to the adoption of the Erratum and was never confirmed in the subsequent practice”<sup>499</sup>.

4.56. Once again, Niger is mistakenly seeking to give precedence over legal title to documents, mainly maps, which have not been accepted “by joint agreement of the Parties” under the terms of the 1987 Agreement. Niger’s arguments therefore have absolutely no legal foundation, and can only be rejected.

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<sup>497</sup>MN, p. 116, para. 7.35.

<sup>498</sup>MN, p. 116, para. 7.36.

<sup>499</sup>MN, p. 116, para. 7.35.

4.57. Above and beyond the legal error made by Niger, none of the “evidence” it submits to justify a divided line is convincing.

4.58. Niger refers firstly to a series of maps and sketch-maps which purportedly show the line in this area not as one straight line, but as a line made up of two sections.

4.59. The very first thing which strikes one upon looking at the list on page 117 of Niger’s Memorial is that it does not include either Captain Boutiq’s 1915 sketch-map — which Niger nonetheless judges to be “of fundamental importance”<sup>500</sup> — or the 1927 map entitled “New frontier between Upper Volta and Niger”, on which it relies for support both for its theory that the frontier does not reach Bossébangou<sup>501</sup> and for its claim regarding the course of the “salient”<sup>502</sup>. This absence is easily explained, since these documents militate strongly against its case: the first of them shows a line changing direction to form an angle which points north-east, thereby giving more territory to Burkina than the straight line does, while the second one shows a straight line. Niger’s embarrassed silence here confirms the utter incoherence of its position.

4.60. Furthermore, Niger also omits from its list the following maps:

- the 1927 road map of the Colony of Upper Volta<sup>503</sup> and the general political and administrative map, to a scale of 1:2,500,000, Second Edition 1928<sup>504</sup>, which in no way confirm a line in two straight sections but show a single straight line as far as the Botou bend; and
- the 1930 “French West Africa” map, which shows a perfectly straight line<sup>505</sup>.

4.61. With regard to the maps to which Niger does refer:

- the “Niamey sheet of the ‘Sketch-Maps of the Sahara and Neighbouring Regions on a scale of 1:1,000,000’ (ND-31, Army Geographical Section, 1926-1927)”<sup>506</sup> and the Blondel-La Rougerie map<sup>507</sup> are both *prior* to the adoption of the *Arrêté* and its Erratum;
- the “Government-General of French West Africa, Niger Colony, road map to a scale of 1:2,500,000, 1934 Edition”<sup>508</sup>, for its part, illustrates *cercle* boundaries which do not correspond at all to the course of the inter-colonial boundary described by the Erratum; moreover, as it dates from 1934, it could neither take precedence over the title nor have the slightest effect on the determination of the frontier of Upper Volta, which was reconstituted in 1947 within its 1932 boundaries;

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<sup>500</sup>MN, p. 111, para. 7.22.

<sup>501</sup>MN, p. 107, para. 7.17.

<sup>502</sup>MN, p. 114, para. 7.30.

<sup>503</sup>MN, Anns., Series D, No. 11.

<sup>504</sup>MN, Anns., Series D, No. 14.

<sup>505</sup>MN, Anns., Series D, No. 15.

<sup>506</sup>MN, Anns., Series D, No. 10.

<sup>507</sup>MN, Anns., Series D, No. 9.

<sup>508</sup>MN, Anns., Series D, No. 16.

- the “French West Africa: General Political and Administrative Map to a scale of 1:2,500,000, Fourth Edition 1939, FWA Geographical Department, Dakar”<sup>509</sup> calls for the same comment; furthermore, it invalidates Niger’s theory, since it shows a line divided into not two but three sections.

4.62. As far as the sketch-maps are concerned, virtually all of them fail to indicate the author or the date, which disqualifies them from the outset. It should nonetheless be pointed out that:

- the 1:500,000 sketch-map entitled “Say *Cercle*”, with no author or date<sup>510</sup>, does not show any boundaries; what Niger has apparently taken for a *cercle* boundary actually represents tracks or paths linking villages;
- the 1:400,000 sketch-map entitled “Tour of 17 to 27 May 1943”<sup>511</sup>, with no author or date, provides proof that *cercle* boundaries were not considered very stable during the 1932-1947 period (when Upper Volta was no longer in existence), since it very clearly shows a boundary with an entirely new shape to the north-east of Bossébangou.

4.63. Niger ends the part of its argument based on maps and sketch-maps by contending that:

“Moreover the point where the frontier changes direction, which appears, *inter alia*, on the 1960 IGN map, is an undisputed frontier point between the two States . . . That point is, moreover, very clearly identified on the completion surveys carried out by the IGN during its 1958-1959 season. The survey entitled ‘Diapaga Information’ corresponding to this sector of the frontier does in fact include the indication ‘frontier marker’ at the precise place where the line changes direction before subsequently connecting with the start of the Botou Loop.”<sup>512</sup>

4.64. However, a glance at the document in question<sup>513</sup> reveals that the orange line which is supposed to represent the inter-colonial boundary and which passes through the point described as “frontier marker” is labelled “Uncertain boundary to be maintained — territorial boundary according to the Protocol of Agreement (not surveyed on the ground)”. This wording clearly shows that the orange line is far from being an inter-colonial boundary firmly established along a divided line, since it is both “uncertain” and based on a “Protocol” of which nothing is known, apart from the fact that it was not “surveyed on the ground”.

4.65. To conclude, Niger adduces a series of alleged colonial and post-colonial *effectivités*, purportedly to demonstrate that the demarcation line in practice on the ground has always been the line divided into two sections that it claims, rather than the single line set out

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<sup>509</sup>MN, Anns., Series D, No. 18.

<sup>510</sup>MN, Anns., Series C, No. 1.

<sup>511</sup>MN, Anns., Series C, No. 68.

<sup>512</sup>MN, p. 118, para. 7.38.

<sup>513</sup>MN, Anns., Series D, No. 30.

very clearly by the Erratum. The villages in the triangular area between the straight line and the divided line have, according to Niger, always been regarded as part of its territory. These villages are Dissi, Fombon, Latti, Tabaré and Tiabougou<sup>514</sup>. However, an analysis of the documents shows that Niger is drawing erroneous conclusions from them.

#### — The village of Dissi

4.66. The first of the references put forward by Niger to provide justification for Dissi being under the administration of Niger is entitled “Directory of the villages of Say subdivision, Tamou *canton*, 1941”<sup>515</sup>. The additional information provided by Niger about this document is merely that it is reproduced in Annex Series C, No. 63, which is presented as being an “(extract), undated, 1941”. This document, whose origins are unknown and which is hence unusable, shows, according to Niger, that the village of Dissi was part of Tamou *canton* in 1941. However, the village mentioned in this document is actually Dissiriré and not Dissi, and it is highly unlikely that Dissi could be the same village as Dissiriré, in Tamou *canton*: not only is Tamou very much to the east of Dissi, but there are also a considerable number of villages much closer to Tamou than Dissi which do not appear on the list of villages in Tamou *canton*, such as, for example, Ouro Bambalé, Kankani, or indeed Latti or Tabaré.

4.67. Niger also produces the “Census tour of Say Subdivision, Tamou *canton*, dated 23 March 1947”<sup>516</sup>, in an attempt, once again, to prove that the village of Dissiriré corresponds to Dissi and has been administered by Niger for many years. However, the document confirms on the contrary that Dissiriré could not possibly be Dissi. The report states that the tour carried out by the administrator led him to survey the villages of Ouro Hesso, Sadima and Dissiriré in a single day, 13 February 1947, having ended his previous day’s tour in Kotaki. This helps to locate the sector where Dissiriré would logically be found (not far from Kotaki), and indeed, a close examination of the map of the region does show that the village of Dissiriré is located to the east of Kotaki and to the north of the Botou bend. Sketch-map No. 7 in the present Counter-Memorial, shows the areas through which the administrator travelled on 10, 11, 12 and 13 February 1947, and demonstrates conclusively that while the village of Dissiriré (or Dissiridé) is indeed in Niger’s territory, in Tamou *canton*, it is definitely not, on the other hand, situated within the triangle between the straight line laid down by the Erratum and the divided line claimed by Niger. This village is not Dissi.

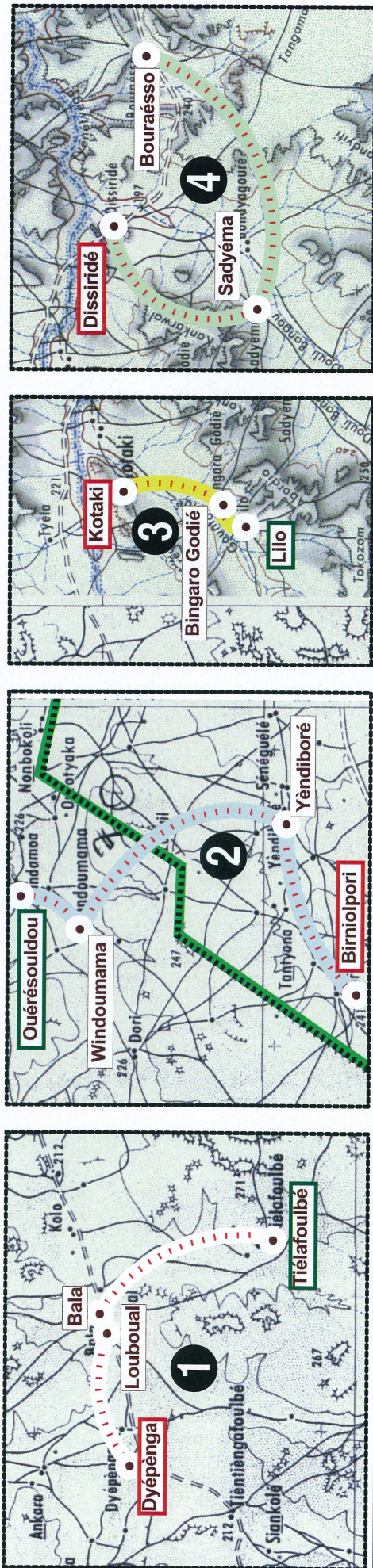
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<sup>514</sup>MN, pp. 119-120, para. 7.39.

<sup>515</sup>MN, p. 119, fn. 343.

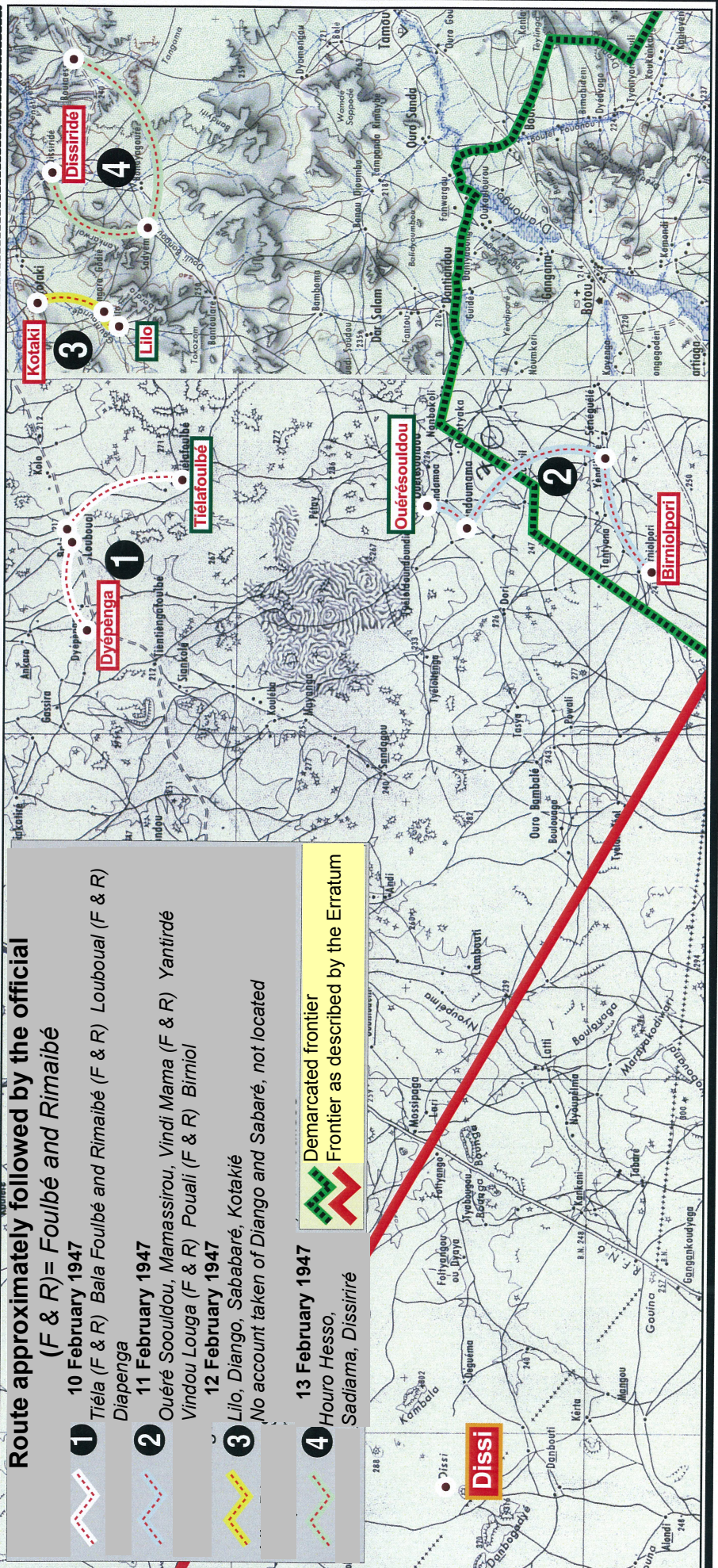
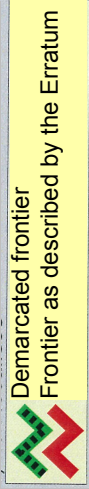
<sup>516</sup>MN, Anns., Series C, No. 70.

**Census tour of Say Subdivision, Tamou canton, 10 to 13 February 1947**  
 following MN, Annex, Series C, No.70



**Route approximately followed by the official (F & R) = Foulbé and Rimaibé**

- 1** 10 February 1947  
 Triéla (F & R) Bala Foulbé and Rimaibé (F & R) Louboual (F & R) Diapenga
- 2** 11 February 1947  
 Ouéré Soouldou, Mamassirou, Vindi Mama (F & R) Yantiridé Vindou Louga (F & R) Pouali (F & R) Birmioli
- 3** 12 February 1947  
 Lilo, Diango, Sababaré, Kotakié  
 No account taken of Diango and Sabaré, not located
- 4** 13 February 1947  
 Houro Hesso, Sadiama, Dissiridé



4.68. The three other documents which Niger believes it can put forward to prove that Dissi has always been administered by Niger, i.e., the “Census tour of Tamou *canton* by the Head of Say Subdivision, 25 March 1954”<sup>517</sup>, the “Record of tax receipts, Say District, Tamou *canton*, dated 3 September 1971”<sup>518</sup> and the lists of “Localities in Tamou *canton*, 1987, 1991 and 2001”<sup>519</sup> are not convincing evidence either, as they too refer to the location of Dissiriré which, contrary to Niger’s assertions, cannot be mistaken for Dissi.

— **The villages of Fombon, Latti and Tabaré**

4.69. The first of the documents which Niger refers to as proof that Fombon (which cannot be located on the maps available to Burkina), Latti and Tabaré are under the administration of Niger is prior to the title, since it dates from 1921. This is the “List of *cercle* villages by *canton*, prepared on 1 October 1921 — Torodi *canton*”<sup>520</sup>. Not only is this of no use in interpreting the Erratum, due to its date, but Niger also reads things into it which the document does not state: in the version it produces, this document does indeed mention Fonbougou (which cannot be found on the maps at Burkina’s disposal), but not Fombon. Nor, for that matter, does it mention Latti or Tabaré. A place called “Taboura” is mentioned, but nothing allows one to assume that this is Tabaré. It will also be noted that neither Dissi nor Tiabougou are mentioned, even though these are also claimed by Niger.

4.70. The second document is the “List of localities of Torodi *canton*, extract from the *General List of Localities of French West Africa, 1927*”<sup>521</sup>. This document does not, however, mention any of the villages that Niger claims it mentions. It features “Fombougou”, which cannot be found on the maps available to Burkina, “Lati”, which is not “Latti” and cannot be found on those maps either, and “Taboura”, which is not “Tabaré” and also cannot be found on those maps. Moreover, it appears that the largest villages in the “triangle”, that is, Golongana, Dissi, Deguema, Faltyangou or Dyaya, and Kankani, are not mentioned in the list, even though they should be, if Niger is to be believed, since they are situated in the immediate vicinity of the villages of Latti and Tabaré. It is therefore highly unlikely that the villages of “Lati” and “Taboura” in Torodi *canton* correspond to Latti and Tabaré.

4.71. Niger then relies on a “Tour Report, Say Subdivision, 13-27 September 1933”<sup>522</sup>. With regard to the name “Fombonou” (which Burkina has not found on a map), this appears only fleetingly and inconsistently in the report. The document in fact begins with a list of the villages in the various *cantons*, with population figures for each of them. Fombonou is not on that list. Next, the livestock numbers for each village are given. Here, Fombonou appears in the list of villages in Tamou *canton* (whereas, if the information in the previous document is to be accepted, it should instead be located in Torodi *canton*), but the livestock numbers are as follows:

— sheep: none

— goats: none

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<sup>517</sup>MN, Anns., Series C, No. 81.

<sup>518</sup>MN, Anns., Series C, No. 101.

<sup>519</sup>MN, Anns., Series C, Nos. 104, 107, and 108.

<sup>520</sup>MN, Anns., Series C, No. 4, referred to in MN, p. 119, fn. 344.

<sup>521</sup>MN, Anns., Series C, No. 6.

<sup>522</sup>MN, Anns., Series C, No. 51.



- cattle: none
- donkeys: none
- horses: none.

Finally, the document provides a table of crops for each village. Fombonou does not appear in that table. In conclusion, this document shows only that the village of Fombonou, which has neither population, nor livestock, nor crops, did not exist at the time when the survey in question was made.

4.72. It is probably on the basis of this list mentioning the ghost village of Fombonou that the “List of Niger *cantons* and villages forwarded in 1948 to the Minister for Overseas France”<sup>523</sup> and the “Alphabetical list of villages by *canton*, Torodi *canton*, updated to 1 January 1954”<sup>524</sup> were drawn up. They therefore prove nothing. Furthermore, for the same reasons as those set out in paragraph 4.70 above, the villages of “Lati” and “Taboura”, mentioned as appearing in Torodi *canton*, cannot be assimilated with Latti and Tabaré. Incidentally, the second of these two documents no longer spells the village’s name as “Lati” but as “Pati”.

4.73. Niger also refers to “*Arrêté* No. 2794/APA establishing polling stations and districts for the elections to the National Assembly, 1955”<sup>525</sup>. However, this document is of particular interest in that it definitively proves that “Taboura” cannot be considered to be the same place as “Tabaré”, since it states that for electoral purposes, Taboura is part of Bolsi, the electoral district covering the villages of Alfassi, Bolsi and Bosseybangou. In fact, the village of Bolsi is at such a distance from the village of Tabaré that it could not possibly provide its polling station, which proves that Taboura and Tabaré are definitely two different villages.

4.74. Finally, Niger refers to a “Record of tax receipts, Torodi *canton*, 1971”<sup>526</sup>, a “List of villages in Torodi *canton*, 19 August 1973”<sup>527</sup> and a “List of polling stations in Say District, 1 November 1989”<sup>528</sup>. However, as they were drawn up after the Colonies gained independence, these documents cannot be considered relevant. The same applies to the documents put forward by Niger to justify *effectivités* in the village of Tiabogou<sup>529</sup>.

4.75. In any case, the argument based on *effectivités* collapses automatically once Niger claims that they take precedence over the Erratum, which was never called into question during the colonial period and whose relevance for the description of the course of the frontier was officially reaffirmed by the 1987 Agreement between the Parties. And the text of the Erratum is perfectly clear: the line “continues in a straight line”.

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<sup>523</sup>MN Anns., Series C, No. 71; “Fombonou” is mentioned here as located in Tamou *canton*.

<sup>524</sup>MN Anns., Series C, No. 80; “Fombongou” is mentioned here as located in Torodi *canton*.

<sup>525</sup>MN, Anns., Series B, No. 31.

<sup>526</sup>MN, Anns., Series C, No. 102.

<sup>527</sup>MN, Anns., Series C, No. 103.

<sup>528</sup>MN, Anns., Series C, No. 106.

<sup>529</sup>Lists of localities in Torodi *canton*, Say district, Tillabéry *département*, 1991 and 2001 (MN. Anns., Series C, Nos. 107 and 108).

4.76. For all these reasons, Burkina concludes, with regard to the "Say sector" that

- the course of the frontier described by Niger is entirely unjustified;
- the course of the frontier in the Say sector is that described on page 158 of Burkina's Memorial and follows:
- a straight line from the Tao astronomic marker (Lat.: 14° 03' 04.7" N; Long.: 0° 22' 51.8" E)<sup>530</sup> as far as the point where the frontier reaches the River Sirba at Bossébangou (Lat.: 13° 21' 06.5" N; Long.: 1° 17' 11.0" E)<sup>531</sup>;
- from that point, the frontier follows the River Sirba from east to west as far as the point on its right bank with co-ordinates: Lat.: 13° 19' 53.5" N; Long.: 1° 07' 20.4" E;
- from that point, the frontier follows the course shown on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition, as far as the point with co-ordinates: Lat.: 13° 22' 30.0" N; Long.: 0° 59' 40.0" E;
- from that point, the frontier runs in a straight line southwards, ending at the intersection of the right bank of the River Sirba with the Say parallel (Lat.: 13° 06' 10.7" N; Long.: 0° 59' 40.0" E);
- from that point, the frontier runs in a straight line as far as the start of the Botou bend (Tyenkilibi) (Lat.: 12° 36' 19.2" N; Long.: 1° 52' 06.9" E)<sup>532</sup>.

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<sup>530</sup>The co-ordinates of this point have been measured by GPS by Burkina. The co-ordinates of this marker on the Clarke 1880 ellipsoid are: Lat.: 14° 03' 13" N; Long.: 00° 22' 53" E.

<sup>531</sup>The co-ordinates of this point, and of those which follow, are given on the Clarke 1880 ellipsoid.

<sup>532</sup>The co-ordinates of this point are those used in the record of the work of the Joint Survey Mission of 3 July 2009 (Ann. MBF 101), as measured by GPS (WGS 84 ellipsoid).

**SUBMISSIONS**

5.1. In view of all the considerations contained in its Memorial and in the present Counter-Memorial, Burkina Faso stands by the submissions set forth in paragraphs 5.1 and 5.2 of its Memorial in their entirety and requests the Court to find in its favour and to reject any contrary submissions from the Republic of Niger.

20 January 2012

*(Signed)* Jérôme TRAORÉ,

Minister of Justice and Promotion of Human Rights,  
Keeper of the Seals, Agent of Burkina Faso.

*(Signed)* Jérôme BOUGOUMA,

Minister for Territorial Administration,  
Decentralization and Security, Co-Agent.

*(Signed)* Kadré Désiré OUEDRAGO,

Ambassador of Burkina Faso to the Kingdom  
of the Netherlands, Co-Agent.

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**SUMMARY OF SKETCH-MAPS**

Sketch-map No. 1	Positions of the Parties
Sketch-map No. 2	Comparison of the sketch-maps proposed by Delbos and Prudon with the lines defended by the two Parties
Sketch-map No. 3	Course of the boundary between the Tong-Tong and Tao markers
Sketch-map No. 4	Course of the boundary after the Tao marker
Sketch-map No. 5	Course of the boundary in the area of the salient
Sketch-map No. 6	Course of the boundary in the area of the salient
Sketch-map No. 7	Census tour of Say Subdivision, Tamou <i>canton</i> , 10 to 13 February 1947

**LIST OF ANNEXES**

- Annex CMBF 1. Letter from the Governor-General of FWA to the Governor of Niger, 2 April 1927
- Annex CMBF 2. Letter from the acting Director of Political and Administrative Affairs to the Governor-General of FWA, July 1927
- Annex CMBF 3. Annual political report of Tillabéry *cercle*, 1931
- Annex CMBF 4. Letter No. 2 AP/2 from the Governor-General of FWA to the Governor of Niger, 3 January 1934
- Annex CMBF 5. Letter No. 418 AP/2 from the Director of Political and Administrative Affairs of the Government-General to the Military *Chef du Cabinet*, 7 June 1938
- Annex CMBF 6. Note No. 521 CM2 from the FWA Geographical Department to the Director of Political and Administrative Affairs of the Government-General, 25 June 1938
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