

INTERNATIONAL COURT OF JUSTICE

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

**COUNTER-MEMORIAL OF THE
REPUBLIC OF NIGER**

PARTS I and II (Annexes)

JANUARY 2012

[Translation by the Registry]

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LIST OF PRINCIPAL ABBREVIATIONS

| | |
|-------|---|
| FWA | French West Africa |
| CMN | Counter-Memorial of the Republic of Niger |
| ICJ | International Court of Justice |
| IGN | <i>Institut géographique national</i> |
| OJ | Official Journal |
| OJFWA | Official Journal of French West Africa |
| OJFR | Official Journal of the French Republic |
| OJRN | Official Journal of the Republic of Niger |
| MBF | Memorial of Burkina Faso |
| MN | Memorial of the Republic of Niger |

0.0. Article 3 of the Special Agreement signed on 24 February 2009 by Burkina Faso and the Republic of Niger provides:

“Written proceedings

1. [...] the Parties request the Court to authorize the following procedure for the written pleadings:

.....

(b) a Counter-Memorial filed by each Party not later than nine (9) months after exchange of the Memorials”.

By its Order of 14 September 2010, the Court fixed 20 January 2012 as the time-limit for the filing of a Counter-Memorial by each Party.

This Counter-Memorial is submitted by the Republic of Niger in accordance with these provisions.

GENERAL INTRODUCTION

0.1. It is immediately apparent on reading the Memorials filed by the Parties to the present proceedings that they adopt a very different approach to this case. Burkina Faso has confined itself to a highly formalistic position, focusing almost exclusively on the texts whereby the authorities of French West Africa (FWA) endeavoured, in 1927, to define the boundaries between the two colonies concerned. The other Party thus offers a detailed, though very abstract, interpretation of those texts. In its view, the frontier between the two States in the sector still under dispute consists of straight lines, with very few exceptions. It maintains that this solution emerges clearly from the official texts of 1927 delimiting the frontier in this sector, and that the Parties only disagree as to the manner in which this boundary should be marked out on the ground.

0.2. The position taken by the Republic of Niger, on the other hand, is rooted in the realities on the ground. It does not deny the relevance or importance of the 1927 texts, but, like a number of administrators of the regions concerned, both before and after independence, it notes the lack of precision and the inadequacies of those texts when it comes to determining the exact course of the frontier between the two States in the disputed sector. Thus the Republic of Niger has tried as far as possible to take account of events leading up to the adoption of the 1927 boundary and all subsequent developments concerning that boundary. To that end, it has pointed to a number of other documents which might help the Court fulfil the task entrusted to it by the Parties, such as official correspondence, mission reports, maps and sketch-maps prepared during the colonial period, and — in particular, given that the Parties themselves specifically refer to it in several earlier agreements — the 1960 IGN map and the work preparatory to it.

0.3. Burkina Faso presents its approach as closely following the methodology adopted by the two States to determine the course of the frontier. It should be recalled that according to this methodology, as set out in particular in the Agreement of 28 March 1987 to which Article 6 of the Special Agreement seising the Court specifically refers, the Parties decided to give clear precedence to the 1927 texts and only provided for recourse to other documents — in particular

the 1960 IGN map — in the event that those texts should “not suffice”¹. Burkina Faso claims to adhere strictly to that line of conduct and minimizes recourse to any document other than the 1927 texts. This methodology in fact only has the appearance of being simple, precisely because of the extremely formal nature of the exercise. There is a large body of evidence in the case file that is presented in the Republic of Niger’s Memorial which clearly refutes the idea that the course of the frontier in the disputed sector should be considered as simple and linear.

0.4. Niger’s position, on the other hand, involves recourse to various sources (the 1927 texts, the 1960 IGN map, and the subsequent agreement between the Parties), which will no doubt draw criticism from the other Party. Yet this methodology is fully justified under the very terms of the 1987 Agreement and the 2009 Special Agreement. Unlike Burkina Faso, the Republic of Niger considers it obvious that the 1927 texts clearly do “not suffice” given their extremely lapidary nature. Since they do not suffice, recourse to other sources is completely justified — and fully consistent with the will of the Parties, as has already been pointed out.

0.5. In general — and in line with the approach described above — it is striking that Burkina Faso makes only very few references to documents other than the official texts from the colonial period. There are a dozen administrative documents in the annexes to the other Party’s Memorial at the very most. In particular, the preparatory stages of the 1927 texts are very largely ignored, with the exception of only one record of a meeting held at the beginning of 1927, from which, moreover, an important passage has been cut². The Republic of Niger, on the other hand, has made every effort to present the Court with as complete a picture as possible of how the inter-colonial boundary was gradually defined in the disputed sector, and how it was subsequently applied on the ground. Given the extremely laconic nature of the official texts of the colonial period, these other documents indeed prove essential in identifying the course of the frontier that the Court has been requested to determine.

0.6. Further to the above remarks, it is in fact possible at this stage of the proceedings to identify the main points of agreement (A) and disagreement (B) between the Parties on questions of principle and methodology, as they emerge from the written proceedings submitted to the Court by the two States.

A. Points on which the Parties agree

The purpose of the Court’s Judgment

0.7. The purpose of the Court’s Judgment is to put an end, with the authority of *res judicata*, to the frontier dispute between the Parties³. This is perfectly clear to the Republic of Niger, which in no way disputes it. Nevertheless, the Republic of Niger believes it should be noted that it considers itself already bound by the understanding reached between the Parties in 2009 on the two demarcated sectors of the frontier⁴. That is why, when negotiating the Special Agreement, the Republic of Niger informed Burkina Faso that it did not consider it necessary to submit that

¹Agreement and Protocol of Agreement of 28 March 1987 between the Revolutionary Government of Burkina Faso and the Government of the Republic of Niger on the demarcation of the frontier between the two countries, MN, Anns., Series A, No. 4.

²MBF, para. 4.43; for more details on this subject see below, para. 1.1.10.

³MBF, para. 0.14.

⁴Exchange of letters of 29 October and 2 November 2009 (MN, Anns., Series A, Nos. 16 and 17), taking formal note of the records of 3 July and 15 October 2009 (MN, Anns., Series A, Nos. 14 and 15).

agreement to the Court for it to be “place[d] on record”, inasmuch as it was already a binding instrument for the two States under international law. The Court was thus not requested to settle any dispute in this regard.

The importance of the Decree of 28 December 1926

0.8. The Decree of 28 December 1926 detaching certain *cantons* of Dori *cercle* and Say *cercle* (with the exception of Gourmantché Botou *canton*) from Upper Volta and incorporating them into Niger “is of particular importance for the purposes of this case”⁵. This is perfectly true and, furthermore, the Decree is even more important given that the 1927 *Arrêté* and Erratum were issued pursuant thereto. Contrary to what the other Party asserts in so peremptory a manner, the link between these texts clearly shows that the aim of the colonial legislator was not to draw straight lines in complete disregard of the situation on the ground, but to transfer territorial divisions whose existing boundaries were taken into account from one colony to another. We shall return to this in greater detail in the present Counter-Memorial⁶.

The framework provided by the official texts of 1927

0.9. The Parties also agree on the fact that the basic texts to be taken into consideration in resolving the present dispute are those of 1927, which have never been modified since that time⁷. Burkina Faso’s Memorial is nevertheless ambiguous in respect of these texts, as it admits on the one hand that the Erratum of 5 October 1927 replaced the *Arrêté* of 31 August of the same year⁸, yet on the other hand it continues to refer to the *Arrêté* as the basic text⁹. This proves problematic. It is in fact the Erratum of 5 October 1927 that is the reference text in this case, inasmuch as it quite simply replaced the operative part of the text of the *Arrêté*¹⁰. This is essentially the conclusion reached by the Chamber of the Court in the case of the *Frontier Dispute (Burkina Faso/Republic of Mali)*, when it stated that it was “free to examine . . . the two successive versions of the 1927 Order, while nonetheless attributing greater weight to the text as modified by the erratum as a reflection of the definitive intentions of the colonial authorities . . .”¹¹. Furthermore, the fact that the text of the Erratum has never been modified since does not mean that it alone suffices to determine the course of the frontier in the disputed sector.

The absence of documents adopted “by joint agreement of the Parties”

0.10. Lastly, the Parties agree on the fact that no other document was adopted “by joint agreement of the Parties” during the negotiations on the determination of the boundary, within the meaning of Article 2 *in fine* of the Agreement of 28 March 1987 on the demarcation of the frontier

⁵MBF, para. 1.16.

⁶See below, paras. 1.1.8 and 1.1.9.

⁷MBF, para. 1.23.

⁸See esp. MBF, paras. 2.27 and 2.42 *in fine*.

⁹See, *inter alia*, MBF, para. 1.26; see also the ambiguous wording used in para. 2.41 to describe the relationship between these two texts.

¹⁰According to the text published in the Official Journal of FWA of 15 October 1927, “Article 1 of the *Arrêté* of 31 August 1927 fixing the boundaries of the Colonies of Niger and Upper Volta, published in the Official Journal of French West Africa No. 1201, of 24 September 1927, page 638, should read as follows:” — followed by the text of the Erratum (MN, Anns., Series B, No. 27). Article 2, which provided that “[t]he Lieutenant-Governors of Upper Volta and Niger are responsible for implementing the present *Arrêté*, which shall be recorded, published and publicized in all appropriate quarters”, for its part remained unchanged.

¹¹*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment of 22 December 1986, I.C.J. Reports 1986, p. 590, para. 69; emphasis added.

between the two States¹². Thus, the frontier in the disputed sector is to be determined only on the basis of the other documents referred to in this provision (the 1927 texts — which still have to be interpreted — and, should they “not suffice”, the 1960 IGN map). This of course does not rule out consideration of the informal agreements reached by the colonial authorities regarding the location of frontier points, in particular those on inter-colonial roads.

B. Points of disagreement between the Parties

A dispute over delimitation or demarcation?

0.11. According to Burkina Faso, the dispute before the Court does not concern delimitation, as that was effected by the 1927 texts; in its view it is “only” a matter of demarcation¹³. The other Party thus states in its Memorial that the Agreement and Protocol of Agreement of 1987 “definitively establish the delimitation of the frontier”¹⁴. Burkina Faso offers a further argument to this effect based on the fact that the 1987 Protocol of Agreement refers only to the “demarcation” of the frontier, which, in its view, implies that the sole purpose of that text is to enable a line, which has been clearly established elsewhere and fully agreed upon by the Parties, to be marked out on the ground.

0.12. This argument is untenable, inasmuch as the 1927 texts inevitably invite interpretation because of their extreme concision. If a delimitation had actually been effected, it could at best be regarded as provisional, since the agreements between the Parties (especially that of 1987) make specific provision for recourse to additional instruments (in particular, the 1960 IGN map) in order to define the frontier, which shows that the delimitation had clearly not been finalized at that stage. It is thus indeed a question of a delimitation operation in this case; contrary to Burkina Faso’s assertion, the delimitation cannot be regarded as “settled”. Moreover, Burkina Faso’s argument is expressly contradicted in its citation of the 1964 Agreement¹⁵, as the latter refers to the (future) signature of a delimitation report, which obviously implies that the delimitation had not yet been effected¹⁶. The situation has not changed since. Thus, if the two States have referred their frontier dispute to the Court, it is for the very reason that only part of their common frontier has been delimited and demarcated.

0.13. Furthermore, the Court has had to deal with similar matters in other frontier disputes brought before it. It has given a very clear response, in particular in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*. On that occasion, having recalled that the Parties “ha[d] devoted lengthy arguments to the difference between delimitation and demarcation and to the Court’s power to carry out one or other of these operations”, the Court declared:

“As the Court had occasion to state in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* (*I.C.J. Reports 1994*, p. 28, para. 56), the delimitation of a boundary consists in its ‘definition’, whereas the demarcation of a

¹²MBF, para. 2.46.

¹³MBF, para. 0.3; see also para. 0.19.

¹⁴MBF, para. 1.61.

¹⁵MBF, para. 0.5.

¹⁶See also, *inter alia*, paragraph 1.44 of the Memorial, where Burkina Faso itself refers to the “delimitation of the frontier” in connection with the 1964 Protocol of Agreement.

boundary, which presupposes its prior delimitation, consists of operations marking it out on the ground.”¹⁷

0.14. As in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, there exist legal instruments recognized by the two Parties to the present proceedings “whose purpose was to effect the delimitation between their respective territories”¹⁸. The Court had identified its task at the time as being to “specify . . . the course of the . . . boundary as fixed by the relevant instruments of delimitation”¹⁹. The same is true in the present case. Under the terms of the Special Agreement signed on 24 February 2009, the Parties requested the Court “to determine the course of the boundary between the two countries” in the disputed sector²⁰. In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* — as in this one — the Court had to “specify definitively” the course of said frontier, and affirm that the delimitation instruments were binding on the Parties and applicable. However, in its 2002 Judgment, the Court stated that it

“cannot fulfil the task entrusted to it in this case by limiting itself to such confirmation. Thus, when the actual content of these instruments is the subject of dispute between the Parties, the Court, in order to specify the course of the boundary in question definitively, is bound to examine them more closely. The dispute between Cameroon and Nigeria over certain points on the land boundary between Lake Chad and Bakassi is in reality simply a dispute over the interpretation or application of particular provisions of the instruments delimiting that boundary.”²¹

0.15. It is the same kind of dispute that is at issue in these proceedings: the Court is requested to interpret and apply delimitation instruments identified by the Parties in the Special Agreement of 2009 in order to specify the course of the frontier in sectors where there is continuing disagreement between the Parties on the course of said boundary. As in the case between Cameroon and Nigeria, it is, in Niger’s view, “this dispute which the Court [should] now endeavour to settle”²². And, as in the latter case, it should do so by considering “in succession each of the points in dispute along the . . . boundary”²³.

0.16. It is with this in mind that the Republic of Niger requests the Court to specify the course of its frontier with Burkina Faso in the Téra and Say sectors, based on its interpretation of the relevant delimitation instruments adopted by the Parties. In so doing, the Court will undertake a delimitation exercise and nothing else. If we make the same distinction as the Court did in its 2002 Judgment²⁴, it is in fact clear that the Court is being asked here to “defin[e]” the frontier —

¹⁷*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 360, para. 85.

¹⁸*Ibid.*

¹⁹*Ibid.*, p. 359, para. 85.

²⁰Article 2, para. 1 of the Special Agreement.

²¹*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 359, para. 85.

²²*Ibid.*

²³*Ibid.*, p. 360, para. 86. In the case between Cameroon and Nigeria, the Court considered 17 disputed points along the boundary which had been identified by the Parties in the written proceedings and which involved sections of varying length; it added other points mentioned by the Parties in the oral proceedings and in their written responses to the Court’s questions (*I.C.J. Reports 2002*, pp. 360-399, paras. 86 to 192).

²⁴See above, para. 0.13.

the 2009 Special Agreement speaks of “determin[ing] the course of the boundary” — and not to “mark . . . it out on the ground” as in a demarcation operation.

Furthermore, this is precisely the reading adopted by H.E. Mr. Paramanga Ernest Yonli, Prime Minister of Burkina Faso, in his letter of 9 February 2006 to H.E. Mr. Hama Amdadou, Prime Minister of the Republic of Niger:

“It is in fact urgent for the dialogue *on the delimitation of our frontier* to be restarted.

.....

However, and without prejudice to the results of these new discussions, it seems to me important that we initiate action aimed at a definitive solution. It is for that reason that we have already sought your views on the option of jointly putting the matter before the International Court of Justice, so that it *may rule on the persisting differences of interpretation in regard to the colonial texts.*”²⁵

The alleged lack of need to interpret the 1927 texts

0.17. By the same reasoning as described above, Burkina Faso suggests further on that the meaning of the 1927 texts is so clear that it requires no interpretation. In connection with a meeting of experts of the two Parties held in 1986, the other Party thus states that

“strictly speaking, it was not a matter of ‘interpreting’ the *Arrêté* and its Erratum; in reality these texts did not raise any concerns between the Parties, which . . . sought only to . . . plot . . . on the map the description of the frontier given by the text”²⁶.

The “plain meaning” doctrine, whereby the content of a text is so obvious that it is not even necessary to interpret it, is alluded to for the first time here²⁷. One may well wonder how such an assertion — and such an approach — is compatible with what the other Party actually does in practice over more than sixty pages of its Memorial, namely to offer its interpretation of the 1927 texts. By the same token, it is quite obvious that the two States had in mind that the texts were not necessarily particularly clear (or sufficient), since the 1987 Agreement provides for recourse to the 1960 IGN map should the texts not suffice. And in 2006, as we have just seen, the Prime Minister of Burkina himself referred to “the persisting differences of interpretation in regard to the colonial texts”²⁸. It is undeniable that an interpretation of the 1927 texts — whose highly laconic character has already been amply underlined²⁹ — is not only necessary but essential. This is precisely what the Court has been requested to do, and that task can only be properly accomplished by having recourse to a number of documents other than the 1927 texts, which are clearly not sufficient in themselves to determine the precise course of the frontier in the disputed sector³⁰.

²⁵Letter No. 2006.039/PM/CAB from the Prime Minister of Burkina Faso to the Prime Minister of Niger dated 9 February 2006; MN, Anns., Series A, No. 11 ; emphasis added.

²⁶MBF, para. 1.59.

²⁷See also MBF, para. 2.13, where reference is made to “a clear . . . title”.

²⁸See above, para. 0.16 and Letter No. 2006.039/PM/CAB from the Prime Minister of Burkina Faso to the Prime Minister of Niger dated 9 February 2006; MN, Anns., Series A, No. 11.

²⁹See below, para. 0.20.

³⁰For further details on this point, see below, paras. 1.2.11 *et seq.*

The alleged difference of approach between the official texts of 1927 and those preceding them

0.18. Once more as regards the official texts of the colonial period, Burkina Faso makes a distinction between the *Arrêté* and Erratum of 1927 and the texts that preceded them. According to the other Party, while the earlier texts defined the colonies and their constituent *cercles* simply by listing the subdivisions of the *cercles*³¹, as from the 1927 *Arrêté* “it was no longer a matter of administrative divisions but of the frontier”, which from that date was established “*ne varietur*.”³². Such a distinction is in fact highly questionable. The two approaches are not necessarily incompatible and the preparatory work to the *Arrêté* of 31 August 1927 proves that the frontier was established on the basis of the boundaries of the pre-existing *cantons*³³. The links between the Decree of 28 December 1926 transferring *cercles* that previously belonged to Upper Volta to the colony of Niger and its implementing *Arrêté* of 31 August 1927, as replaced by the Erratum of 5 October of the same year, clearly show that Burkina’s contention on this point is baseless³⁴.

Burkina Faso’s one-sided portrayal of border incidents

0.19. In respect of more recent times, particularly the period following independence, in its Memorial Burkina Faso gives a very one-sided picture of the border incidents that have marked relations between the two States in the disputed sector³⁵. On reading the written proceedings of the other Party, one gets the impression that Niger alone is guilty of such encroachments, and never Burkina Faso. The reality is of course more complex, and it is well established that both Parties are guilty of encroachments and incursions, to wit the several (among many) examples given by the Republic of Niger in its Memorial³⁶. It is actually quite difficult to see the point of such a one-sided portrayal of the border incidents, of which there have undeniably been many over recent decades in the sector concerned. The fact that such incidents are recurrent, whether they involve officials from Burkina or Niger, points particularly clearly to the persistent difficulties faced by the two States due to the lack of precision in the boundaries decreed by the colonial power in this sector.

The alleged precision of the 1927 texts

0.20. It should further be noted that there is a fundamental disagreement between the Parties as to the degree of precision of the 1927 texts. Burkina Faso asserts that the 1927 *Arrêté*, as modified by the Erratum, “constitutes a title covering the whole of the frontier — *which it describes with a precision that stands in stark contrast to the ditherings of many internal delimitations in former FWA and French Equatorial Africa (FEA)*”³⁷. The assertion that the text defines the boundary “with . . . precision” is of course highly questionable given the particularly succinct description of several portions of the disputed frontier, as the Republic of Niger underlined in its Memorial³⁸. Moreover, the other Party admits in its own written proceedings that the 1927 texts give “very few salient topographical details, considering the length of the line and

³¹MBF, paras. 1.24 and 1.25.

³²MBF, para. 1.26.

³³See also MN, paras. 1.24 and 5.10.

³⁴See above, para. 0.8 of this introduction and, for a more detailed discussion, below, paras. 1.1.8 and 1.1.9.

³⁵MBF, paras. 1.49 *et seq.*; see also, *inter alia*, para. 1.57.

³⁶See, *inter alia*, the documents referred to in notes 119 *et seq.* of Niger’s Memorial.

³⁷MBF, para. 2.39; emphasis added.

³⁸See, *inter alia*, MN, para. 6.9 for the Téra sector and para. 7.11 for the Say sector.

the changes in direction”³⁹. It is indeed the least that can be said of texts which were intended to describe in less than a page a boundary that runs over more than 300 kilometres, largely in little known and uninhabited regions, in the southern part of the Say sector. Once again, the argument whereby the texts which are to serve as the basis for determining the course of the frontier in the disputed sector are simple and precise by no means fits in with the facts of the case, which reveal a far more complex reality and highlight the considerable difficulties caused on the ground by the texts’ lack of precision⁴⁰.

The non-existence of a “consensual line” allegedly agreed on previously by the Parties

0.21. Finally, Burkina Faso’s oft-repeated reference to the “consensual line” allegedly agreed on by the experts of the two States in 1988 is also problematic⁴¹. It is claimed that the Parties reached an agreement on the course of the frontier during the work of the Joint Technical Commission on Demarcation established by the 1987 Agreement, and that it is only because Niger subsequently called that agreement into question that the dispute has persisted⁴². This representation of the facts does not correspond to reality at all. Contrary to the assertion of the other Party, which refers to “what they agreed to call the ‘consensual line’”⁴³, neither that expression nor the basic agreement from which it is said to derive was ever officially recognized in the relations between the two Parties⁴⁴. More to the point, the expression does not sit at all easily with the manner in which the Joint Commission actually worked: it functioned as a kind of “laboratory” in which experts from both States compared notes and together tried to identify the course of their common frontier. They no doubt sometimes managed to reach a consensus in this framework, but it could only ever be provisional. This was both because any possible consensus was based purely on information held by the experts at that time — and could thus be called into question if any other information came to light — and because, in any event, the work of the Commission had to be formally approved by the competent political authorities for it to be regarded as constituting an agreement between the two States concerned⁴⁵. It is well established that it has never been possible to reach such an agreement in this case — and that, moreover, is the reason why the two States stand before the Court today.

*

All the arguments outlined in the above introduction will be discussed in detail in the body of this Counter-Memorial, which will be broadly structured as follows.

³⁹MBF, para. 3.24.

⁴⁰See below, paras. 1.2.13 *et seq.*

⁴¹See, *inter alia*, MBF, para. 1.69. This term is used on numerous occasions thereafter; see, *inter alia*, MBF, p. 154.

⁴²MBF, para. 1.75.

⁴³MBF, para. 1.69.

⁴⁴It is particularly revealing, for example, that this expression does not occur in the document referred to in Burkina Faso’s Memorial when it first uses these words, especially considering that it is an internal document of Burkina Faso (Report No. 42/FP/MAT/SG/DCAF from the Minister for Territorial Administration to the Head of State of Burkina Faso, 5 March 1991, Ann. MBF 88, mentioned in note 131 of the Memorial).

⁴⁵For further details on this point, see below, paras. 1.2.20 *et seq.*

Presentation of the structure and plan of the Republic of Niger's Counter-Memorial

0.22. In the following chapters, the Republic of Niger will explain in detail why Burkina Faso's arguments must be rejected. The plan of the Counter-Memorial is as follows:

CHAPTER I. THE THEORETICAL AND ARTIFICIAL CHARACTER OF BURKINA FASO'S ARGUMENTS

Section 1 – The lack of basis for the theory of the artificial straight line

- A. The theory whereby the boundary consists of a series of straight lines, an artificial and arbitrary colonial boundary
- B. The history of the making of the boundary in no way implied anything artificial or arbitrary in character
- C. The theory of a clear title which is sufficient in itself and does not need clarification

Section 2 – The lack of basis for the “consensual line” theory

- A. The *de facto* absence of a “consensual line”
- B. The *de jure* absence of a “consensual line”

CHAPTER II. DELIMITATION OF THE FRONTIER IN THE DISPUTED SECTOR

Section 1 – The frontier in the Téra sector

- A. The section from Tong-Tong to Tao
- B. The section from the Tao astronomic marker to Bangaré
- C. The section from Bangaré to the boundary of Say *cercle*

Section 2 – The frontier in the Say sector

- A. The Bossébangou region
- B. The “salient of four villages”
- C. The section of the frontier which leaves the “salient” and runs to the start of the Botou bend

CONCLUSIONS

CHAPTER I

THE THEORETICAL AND ARTIFICIAL CHARACTER OF BURKINA FASO'S ARGUMENTS

1.0. Burkina Faso's arguments rest on two pillars.

The first consists in maintaining that the boundary determined by the Erratum of 5 October 1927 consists of straight lines⁴⁶, which were deliberately chosen as artificial and arbitrary lines in the purest colonial tradition. The title is thus said to be clear and sufficient in itself and not to need clarification. It is said to establish a definitive delimitation of the frontier, which merely remains to be demarcated. According to this view, a disembodied text applies almost automatically. The historical and socio-political background to the text's preparation and the concrete problems associated with its subsequent application are blithely ignored. This first argument will be dealt with in section 1.

The second pillar consists in maintaining that the line claimed by Burkina Faso is based on a demarcation project that was allegedly the object of a "consensual agreement" between the two Parties which is binding on Niger. This argument overlooks both the frequent and various objections raised by Niger to that project throughout the negotiations and the fact that it is not legally binding on Niger. This second argument will be dealt with in section 2.

SECTION 1 – THE LACK OF BASIS FOR THE THEORY OF THE ARTIFICIAL STRAIGHT LINE

1.1.1. Burkina Faso's argument is based firstly on the contention that the boundary established by the Erratum of 5 October 1927 *consists of a series of straight lines* (A). This is allegedly the result of the colonial practice of using *artificial and arbitrary boundaries* (B). The Erratum is thus said to be *a clear title which suffices by itself and does not need clarification* (C).

These various assertions do not stand up to scrutiny.

A. The theory whereby the boundary consists of a series of straight lines, an artificial and arbitrary colonial boundary

1.1.2. It is indisputable and undisputed that there *exists* a frontier title with force of law between the Parties. It is the Erratum of 5 October 1927 which replaces the *Arrêté* of 31 August of the same year⁴⁷. It is further indisputable that this text covers the *entire frontier*, from "N'Gouma to the intersection of the former boundary of the *cercles* of Fada and Say with the course of the Mekrou".

The Parties were able — not without difficulty — to reach agreement on *the meaning and scope* of the text in respect of two stretches of the boundary: from N'Gouma to Tong-Tong⁴⁸ and from Tchenguiliba, at the start of the Botou bend, to the intersection of the former boundary of the *cercles* of Fada and Say with the course of the Mekrou. However, they were unable to agree on the

⁴⁶With one notable exception in the Bossébangou sector and the "salient", see MBF, para. 4.95.

⁴⁷It should be noted in passing that it is not because the text of the Erratum is "both subsequent to and more precise than" the *Arrêté* that "preference should be given" to it (MBF, para. 2.41), but because, pursuant to the very terms of the Erratum, it replaces the *Arrêté*.

⁴⁸Though not without having to interpret the text on some points.

part described in the Erratum between those two stretches, from Tong-Tong to Tchenguiliba. That portion of the text reads as follows:

“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. 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.”

Both Parties, in their respective memorials, divided this part of the frontier in the same way, namely into two sectors: one from Tong-Tong to the tripoint between the *cercles* of Dori, Tillabéry and Say (hereinafter called the “Téra sector”) and one from the latter point to Tchenguiliba (hereinafter called the “Say Sector”). There are numerous reasons why the Parties cannot agree on the course of the frontier in these two sectors and these were set out in Niger’s Memorial.

1.1.3. In respect of the Téra sector (which belonged to the *cercle* of Tillabéry), at first, during negotiations, the two Parties based their interpretation of the boundary on geometric thinking. The straight-line solution, in two segments, was advocated by Burkina Faso. It consisted in joining the three points indicated by the text with two successive straight lines. That method was contested by Niger, which maintained that the line that joins Tong-Tong to the point where it meets the boundary of Say *cercle*, and passes through the Tao marker, could only be a curve⁴⁹. Niger based its position on the use of the verb “to turn” [“*s’infléchir*” in French] and further relied on the only map known at that time by the Parties to be contemporary to the Erratum: the map entitled “new frontier between Upper Volta and Niger (according to the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927)”⁵⁰. Given the small scale of the map (1:1,000,000), it admittedly gave a rough representation of the boundary in this sector, but it unquestionably describes a curve.

1.1.4. These views were set out as follows in the Report of 28 July 1990 of the Joint Technical Commission on the Demarcation of the Frontier. According to Niger:

“From the Tong-Tong astronomic marker, the frontier line turns in a uniform direction (south-east) and following a uniform course as far as the River Sirba at Bossébangou, passing through the Tao astronomic marker. The only geometric form that would enable the frontier to pass through these three points, which are clearly not aligned, is a curve. That curve is the arc of a circle, with a well-defined centre and radius.”⁵¹

For its part,

“Burkina Faso asserts that, from its starting point to its endpoint, the frontier is composed of a succession of straight lines, other than the waterways and the ridgelines, and that this is also the case between Tong-Tong and Tao and between Tao and Bossébangou.

⁴⁹MN, para. 5.8 and sketch-map opposite on p. 69.

⁵⁰French West Africa: new frontier between Upper Volta and Niger (according to the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927), scale 1:1,000,000; MN, Anns., Series D, No. 13.

⁵¹Report of the Second Ordinary Session of the Joint Technical Commission on the Demarcation of the Frontier between Niger and Burkina Faso held at Ouagadougou from 23 to 28 July 1990; MN, Anns., Series A, No. 5.

.....

The Burkinabe delegation contends that the meaning given to the word ‘*s’infléchir*’ must be understood as a ‘change of direction’, and that if it had involved a curve the author would have made this clear by expressly so stating. Furthermore, given the means of transport at that time (horses, motor vehicles) and the technical specialists employed, neither the author nor the technical specialists would have considered configuring the frontier line in that way.”⁵²

This entire disagreement arose in the context of an interpretation based on a geometric view of the boundary in this sector.

1.1.5. No documentary research was in fact carried out at the time the Commission undertook its work. The only conceptual work undertaken was an analysis of the texts. As regards the stretch from Tong-Tong to the boundary of Say *cercle*, the experts were faced with a particularly arduous task: they had to imagine a boundary line over 150 kilometres in length, of which only two points were known with any certainty (Tong-Tong and Tao). Indeed, the point where this sector reaches the River Sirba also posed problems of interpretation, as the two Parties disputed the location of the tripoint between the *cercles* of Dori, Tillabéry and Say⁵³.

Niger abandoned this geometric approach in the course of conducting documentary and map research in the colonial archives, which called for a different understanding of the 1927 text that had been obscured by the abstract textual interpretation. The archives reveal the historical and socio-political context in which the *Arrêté* and its Erratum of 1927 were adopted and rule out the possibility of the French legislator envisaging a geometric boundary.

1.1.6. In support of its position whereby the boundary consists of a series of two straight lines in the first sector, Burkina Faso today puts forward the theory that the frontier between Niger and Burkina Faso was for the most part determined by a succession of straight lines because of the artificial and arbitrary character of the colonial boundary:

“In many respects, the frontier defined by the amended *Arrêté* is artificial in nature. The colonial authorities, wanting to establish a complete and precise boundary, were aware of the implications of choosing such a boundary, and that choice was made by the Governor-General of FWA in full knowledge of the facts and in accordance with what was standard practice at the time.”⁵⁴

It should be noted that this assertion is not backed up by any document from the colonial authorities proving the intention of the authorities of FWA to choose an artificial and arbitrary boundary.

Burkina Faso goes even further when it adds at paragraph 2.39 of its Memorial that “The 1927 *Arrêté* is no exception to the rule and establishes an arbitrary and artificial boundary”. The very assertion that there exists a “rule [that] establishes an arbitrary and artificial boundary” is completely baseless, as shall be explained below⁵⁵.

⁵²*Ibid.*

⁵³See MN, paras. 7.14 *et seq.* and below paras. 2.2.5 *et seq.*

⁵⁴MBF, para. 2.38.

⁵⁵See below, para. 1.1.7.

Applying its theory to the Tong-Tong–Bossébangou sector, Burkina Faso’s Memorial maintains at paragraph 4.26:

“The brevity with which the French colonizer defined the course of the inter-colonial boundary in this sector in 1927 . . . leaves not the least doubt that the boundary adopted was of an artificial nature.”

The same assertion is repeated at paragraph 4.27 *et seq.*, with a shift in the meaning of the word “artificial”.

“4.27. It is clear simply from reading the 1927 *Arrêté* [it is in fact the Erratum] that, in the sector concerned, it is an artificial and not a natural boundary that has been adopted. Indeed no natural feature is referred to,”

“4.28. [...] it is obvious that the *Arrêté* delimits the boundary in the form of an artificial line alone”.

“4.33. The artificial nature of that delimitation did not seem to pose any great difficulties to the colonial administration.”

Repeating the argument does not make it any less baseless. Niger will now prove that there is no basis for this theory by showing that the history of the making of the boundary in no way implied that the boundary was of an artificial or arbitrary character.

B. The history of the making of the boundary in no way implied anything artificial or arbitrary in character

1.1.7. It is of course well known that the colonial powers, particularly in Africa, did have recourse to straight lines of an artificial and arbitrary character in drawing the boundaries of colonial territories. This was the case across deserts, uninhabited regions and regions that remained unexplored before or after conquest. One needs only to think of the boundaries of Western Sahara, Mauritania, Algeria, Libya, Chad, etc., to cite just a few examples.

However, this is not at all the case in respect of the boundaries concerned here. The circumstances in which the boundary between Niger and Upper Volta was established reveal, on the contrary, a true concern to respect local inhabitants and pre-existing administrative divisions. The historical context and map archives prove this.

(a) *The historical context*

1.1.8. Burkina Faso’s contention that the boundary between the two States in the Téra sector followed a straight line, corresponding to a typical, artificial African frontier, runs counter to the practice implemented in the region as early as 1907 following the incorporation of Say and Fada *cercles* into the Colony of Haut-Sénégal et Niger, as shown by Niger in its Memorial⁵⁶. It is worth recalling here the words of the report from the Minister for the Colonies, Milliès-Lacroix, to the President of the French Republic regarding the transfer of the *cercles*. The Minister for the Colonies explains that he wishes to incorporate the *cercles* of Fada N’Gourma and Say into the Colony of Haut-Sénégal et Niger because of the “disadvantages” of incorporating these administrative units into the Colony of Dahomey and to which “[his] attention has been drawn a number of times”. In his view,

⁵⁶MN, para. 1.14.

“[e]thnic considerations of genuine importance, as well as administrative requirements, make it necessary, on the contrary, that these *cercles* be incorporated in our Colony of Haut-Sénégal et Niger, which had moreover already possessed them in part prior to the Decree of 17 October 1899”⁵⁷.

1.1.9. More specifically, the history of the boundary concerned here should be recalled. On 22 June 1910, the part of Tillabéry *cercle* situated on the right bank of the River Niger was detached from the Military Territory of Niger and added to the Territory of Haut-Sénégal et Niger. Under Article 2 of the *Arrêté* concerned:

“These territories shall form . . .

4. The *cercle* of Say, consisting of the *cantons* on the right bank detached from Djerma *cercle*;

Finally, the *cantons* of Tillabéry on the right bank shall be incorporated into Dori *cercle*.”⁵⁸

It should thus be noted that, far from drawing artificial boundaries, this text on the contrary takes account of the situation on the ground and transfers certain *cantons*.

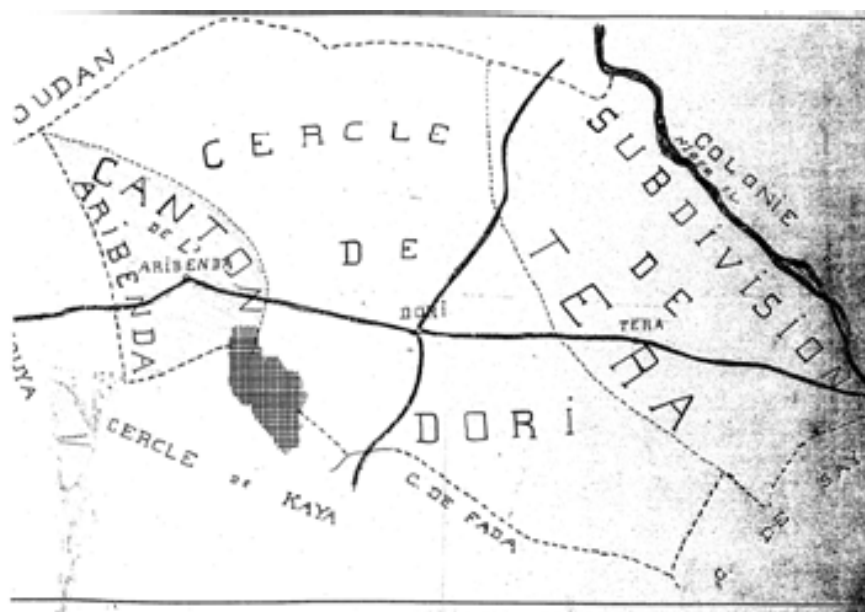
The Colony of Upper Volta was established by Decree of 1 March 1919⁵⁹. It consisted of various territories detached from the Colony of Haut-Sénégal et Niger, including the *cercles* of Say and Dori (into which the *cantons* of Tillabéry *cercle* on the right bank of the Niger were incorporated and henceforth called “Téra Subdivision”).

⁵⁷Decree of 2 March 1907 incorporating into the Colony of Haut-Sénégal et Niger the *cercles* of Fada N’Gourma and Say, *OJFWA*, No. 117, 30 March 1907, p. 135, reproduced in MN, Anns., Series B, No. 10.

⁵⁸MN, para. 1.15 and *Arrêté général* No. 672 of 22 June 1910 reorganizing the Military Territory of Niger, *OJFWA*, undated 1910, p. 475, MN, Anns., Series B, No. 15 (emphasis added).

⁵⁹MN, para. 1.17 and Decree of 1 March 1919 dividing the Colony of Haut-Sénégal et Niger and creating the Colony of Upper Volta, and *Arrêté* promulgating that Decree in French West Africa, *OJFWA*, No. 768, 1919, pp. 550-551, MN, Anns., Series B, No. 18.

Figure 1: Téra Subdivision consisting of the *cantons* of Tillabéry *cercle* situated on the right bank of the Niger, incorporated into Dori *cercle* in 1910 (extract from MN, Anns., Series C, No. 47)



1.1.10. Wishing to organize his patchwork colony, the Lieutenant-Governor of Upper Volta sent a circular to the Administrators of the *cercles* enquiring about the possibility of adjusting the boundaries of the Colony, its *cercles* and subdivisions. He notes the following:

“It is not always possible, when determining the boundaries of a colony, to rely solely and rigorously on the distribution of ethnic groups. Other considerations intervene, and the very size of certain groups sometimes means that they have to be divided. However, this should only be done in quite exceptional circumstances, and when it has become absolutely clear that there is no other choice. Thus we should *avoid dividing ethnic groups through arbitrary boundaries*, which have the effect, by destroying the unity of view and action, of upsetting the local population, provoking mass departures . . . It is thus clearly worthwhile to make the necessary adjustments to the boundary to resolve ethnic issues, whenever circumstances permit . . .”⁶⁰

Such language is clearly at odds with a “rule [of] arbitrary and artificial boundar[ies]”⁶¹.

1.1.11. In March 1923, aware of the Governor of Niger’s desire for Upper Volta to transfer the right bank of the river to Niger, the Governor of Upper Volta asked the Administrator of Dori *cercle* to look into the matter from a political, ethnographic and economic point of view⁶². The Commander of Dori *cercle* was against any transfer. It is interesting to note the following among his various arguments:

⁶⁰Circular Letter No. 713 A.G. of the Lieutenant-Governor of Upper Volta to the Administrators of the *cercles* of the Colony, 28 July 1920, MBF, Anns., 17 (emphasis added).

⁶¹To quote Burkina Faso (MBF, para. 2.39).

⁶²Letter No. 682 from the Lieutenant-Governor of Upper Volta to the Commander of Dori *cercle*, 22 March 1923, MBF, Annex 20.

“what is important for them is not the creation of a new colony: it is *stability in their habits, being accustomed to the heads of their cantons*, their very keen awareness of being ‘at home’ on the right bank of the river, on the Gourma bank, while the left bank — the Haoussa bank — is no longer part of their territory”⁶³.

Such a response shows the importance attached by the Administrators to the human factor and in particular to the stability of the *cantons*. In his letter of 7 June 1923 to the Governor-General of FWA⁶⁴, the Lieutenant-Governor of Upper Volta expresses his opposition to the transfer of part of Dori *cercle*, but says that he is open to transferring Say *cercle* with the exception of Botou *canton*, which once again shows the Lieutenant-Governor’s attention to the specific nature of the *cantons*. It is ironic to note that all these documents which demolish its argument are provided by Burkina Faso itself in the annexes to its Memorial.

1.1.12. Some three years later, the Governor of Niger — at that time the famously tenacious Jules Brévié — wrote to the Governor-General of FWA requesting the incorporation into his colony of “that part of the current Dori *cercle* detached from Tillabéry *cercle* in 1910 . . . [and] Say *cercle*, minus the *canton* of Botou . . .”⁶⁵. He attaches to his request:

“a map of Tillabéry *cercle* prepared by Captain Coquibus in 1908 which clearly shows the part of Dori *cercle* that would have to be incorporated into Tillabéry in order to re-establish that division within its original boundaries”⁶⁶.

This further episode shows that the boundary in question had already existed previously and was formed of *cantons* known to the Administrators, as we shall see below. There was nothing artificial or arbitrary about the boundary then proposed.

By a Decree of 28 December 1926, the President of the Republic of France made the following ruling:

“The following territories, which are currently part of the Colony of Upper Volta, shall be incorporated in the Colony of Niger with effect from 1 January 1927:

1. Say *cercle*, with the exception of Gourmantché Botou *canton*;
2. The *cantons* of Dori *cercle* which were formerly part of the Military Territory of Niger in the Téra and Yatacala regions, and were detached from it by the *Arrêté* of the Governor-General of 22 June 1910.

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.”⁶⁷

⁶³Letter No. 58 from the Commander of Dori *cercle* to the Lieutenant-Governor of Upper Volta, 7 April 1923, MBF, Annex 21 (emphasis added).

⁶⁴Letter No. 1270 from the Lieutenant-Governor of Upper Volta to the Governor-General of FWA, 7 June 1923, MBF, Annex 22.

⁶⁵Letter No. 3 A.G. from the Lieutenant-Governor of Niger to the Governor-General of FWA, 26 January 1926, MBF, Annex 24. This letter added “[t]he map of Tillabéry *cercle* belongs to the archives of this post, I would be grateful, Sir, if you could have it returned to Niamey when it is no longer of use to your offices”.

⁶⁶*Ibid.*

⁶⁷Decree of 28 December 1926 transferring the administrative centre of the Colony of Niger and providing for territorial changes in French West Africa, *OJFWA*, No. 1167, 1927, p. 92); see MN, Anns., Series B, No. 23 (emphasis added).

1.1.13. The fact that the presidential Decree speaks in terms of *cantons*, that is to say small and identified units that already existed in 1910, makes particularly flimsy the contention that the *Arrêté* of 31 August 1927 intended to adopt a boundary consisting of straight lines, an artificial boundary moreover.

Under the French constitutional system, the rules that applied to the creation of colonies, and their subdivision and delimitation, were clearly drawn from a well-stocked legal arsenal. The division of powers was clear between the central metropolitan authorities and the colonial authorities in regard to fixing the boundaries between colonies. The internal organization of the colonies, in particular the creation of *cercles* and other subdivisions, was the responsibility of the colonial authorities, namely the Governor-General of the Colonies⁶⁸. But the incorporation of a given territory into one colony or another was the sole responsibility of the central authorities, namely the President of the French Republic, whose act was countersigned by the Minister of the Colonies⁶⁹.

1.1.14. In this case, the central authorities exercised that power by Decree of 28 December 1926. While the local authorities had the power to execute the Decree locally, they could not breach its terms. This would be the result, however, if we were to adopt the interpretation proposed by Burkina Faso and apply the texts approved by the Governor-General in 1927. As we shall see, on the contrary, the efforts by the colonial authorities to apply the Decree show a clear will to locate on the ground the boundaries of the *cantons* concerned as they were in 1910.

1.1.15. With a view to preparing the *Arrêté* of the Governor-General of FWA — who had to implement the 1926 Decree — and to ensure that his office had concrete information on which to base the delimitation, the two Colonies agreed on a number of texts.

First, a Record of Agreement was signed on 2 February 1927 between Mr. Brévié, Governor of the Colony of Niger, and Mr. Lefilliatre, Inspector of Administrative Affairs, representative of the Governor of Upper Volta⁷⁰. The Record listed the *cantons* which belonged to the former Tillabéry *cercle* on 22 June 1910 and which were to be reincorporated into Niger, and defined the boundary between those *cantons* and that part of Dori *cercle* remaining in Upper Volta. This Record is cited in Burkina Faso's Memorial⁷¹, though the list of *cantons* is omitted from the citation. This is nevertheless a very key element. The list of *cantons* was as follows:

“The *cantons* belonging to the former Tillabéry *cercle* on 22 June 1910 shall be incorporated in the Colony of Niger.

The *cantons* are:

1. Dargol - Sonrhais
2. Kokoro - ditto
3. Diagourou - Peuhls

⁶⁸Decree of 18 October 1904 reorganizing the General Government of French West Africa, Article 5; CMN, Anns., Series B, No. 34.

⁶⁹*Sénatus-consulte* of 3 May 1854; CMN, Anns., Series B, No. 33.

⁷⁰Record of Agreement of 2 February 1927 between Brévié, Governor of the Colony of Niger, and Lefilliatre, Inspector of Administrative Affairs, representative of the Governor of Upper Volta; MN, Anns., Series C, No. 7.

⁷¹See MBF, para. 4.43.

4. Téra - Sonrhais
5. Goroual - ditto
6. Logomaten (nomads and Bellahs) . . .”⁷²

And for Say *cercle*, the Record of Agreement incorporating into the Colony of Niger the *cantons* composing Say *cercle*, drafted at Say on 10 February 1927 by Inspector of Administrative Affairs Lefilliatre, representative of the Governor of Upper Volta, and Chief Colonial Administrator Choteau, representative of the Governor of the Colony of Niger, provided:

“The following *cantons* composing Say *cercle* are hereby incorporated into Niger Colony: Namaro, Lamordé, Torodi, Gueladio, Diongoré, Say, Tamou, Tiala, independent villages of Sarakolés, Dantiandou, Kollo, Dar-es-Salam.”⁷³

It was thus not a question of drawing (straight or curved) geometric lines through unknown regions, but rather of incorporating pre-existing *cantons* into the territory of one colony or the other. The areas comprising these *cantons* — inhabited by indigenous peoples and consisting of villages, crop and pastureland, and nomad routes — did not in principle follow abstract lines, but were based on land occupation and followed the configuration or nature of the ground. This was particularly true of Tillabéry *cercle*.

1.1.16. Also indicative of the attention paid to the question of the boundary is the initiative then taken by the Governor of Upper Volta who, being attentive to that aspect of matters, had made the following request to the Commanders of Dori and Fada *cercles*, who were going to be affected by these boundary changes:

“Request send me soon as possible precise information to enable preparation *Arrêté général* fixing new boundaries between Colonies Niger and Upper Volta. Solely to avoid error and need subsequent correction, essential that course be determined on ground with full agreement Administrators Divisions concerned. Results work recognized and accepted by Heads both adjacent Colonies to be forwarded Dakar for action definitive text.”⁷⁴

A Note from the *Chef de cabinet* of the Governor of Upper Volta dated 2 June 1927 gave the following instructions to Dori *cercle*:

“Could you commence work with Administrator Tillabéry simply following Coquilin⁷⁵ line and examine population situation as you suggest.”⁷⁶

⁷²See Record of Agreement of 2 February 1927 between Brévié, Governor of the Colony of Niger, and Lefilliatre, Inspector of Administrative Affairs, representative of the Governor of Upper Volta; MN, Anns., Series C, No. 7 (emphasis added).

⁷³Record of Agreement of 10 February 1927 between Lefilliatre, Inspector of Administrative Affairs, representative of the Governor of Upper Volta, and Choteau, Chief Colonial Administrator, representing the Governor of the Colony of Niger; MN, Anns., Series C, No. 8 (emphasis added).

⁷⁴Telegram/letter No. 1166/AG from the Governor of Upper Volta, dated 27 April 1927, see MN, Anns., Series C, No. 11.

⁷⁵This is clearly a reference to a sketch-map drawn by Captain Coquibus, as can be seen from the allusions and partial descriptions made to it in subsequent correspondence. Captain Coquibus' sketch-map was not found in the archives.

⁷⁶Note BLHV No. 1.393 from the *Chef de cabinet* of the Governor of Upper Volta, dated 2 June 1927, see MN, Anns., Series C, No. 12.

The work of the Administrators of the two *cercles* concerned consisted in determining on the ground the boundaries of the *cantons* of their respective *cercles*. For this purpose, they based themselves on a sketch-map of the former boundary of Tillabéry *cercle* prepared previously by Captain Coquibus. Two reports followed, one from Prudon, Commander of Tillabéry *cercle*⁷⁷, the other from Delbos, Commander of Dori *cercle*⁷⁸. These reports are similar, even though they do not totally coincide. However, both have the merit of showing, firstly, that the Administrators followed a boundary based on orographic information and with the agreement of the local inhabitants, and, secondly, that the boundary was a sinuous one. Although the reports by the Commanders of the *cercles* and their accompanying sketch-maps did not reach Dakar before the *Arrêté* of 31 August 1927 was published, they testify to a situation on the ground that ruled out the pre-existence of an artificial and arbitrary line. These documents give a detailed description of the boundaries of the *cantons* which were transferred from one colony to the other by presidential Decree of 28 December 1926. They thus constitute an element in the interpretation of the boundary that cannot be ignored. Furthermore, they had a major influence on administrative practice during the colonial period.

(b) *The cartographic context*

1.1.17. The only sketch-map of the boundary between the *cercles* of Dori, Say and Tillabéry closest to the date of the presidential Decree of 26 December 1926 is the one prepared by Captain Coquibus in 1908. This sketch-map, which was sent by the Governor of Niger to the Governor-General of FWA on 16 January 1926⁷⁹, has not been found in either the archives of Dakar, or those of Niamey or Ouagadougou. We only have an indirect idea of it from the reports by Administrators Prudon and Delbos, who described travelling along the boundary between their respective *cercles* (Tillabéry and Dori) with Coquibus's sketch-map in hand. The Administrators in turn drew that boundary on their own sketch-maps⁸⁰. That line is clearly not made up of straight lines; overall it appears to curve towards the east and it is sinuous in various places.

1.1.18. A second sketch-map from 1909, prepared by Captain Boutiq⁸¹, shows that the boundary between Tillabéry *cercle* and Dori *cercle* reaches Say *cercle* at the northernmost point of the so-called salient of four villages. This point was thus the tripoint between the *cercles* of Say, Dori and Tillabéry.

[This sketch-map, listed as Figure 2, was to be included here but is missing from the original text.]

⁷⁷Tour Report No. 25 from Administrator Prudon, Commander of Tillabéry *cercle*, dated 4 August 1927; MN, Anns., Series C, No. 15 and see Tillabéry *cercle*, 1:200,000 sketch-map prepared by Administrator Prudon, June 1927, MN, Anns., Series D, No. 3.

⁷⁸Report No. 438 from the Commander of Dori *cercle* to the Governor of Upper Volta, dated 3 August 1927, has not been found, but the sketch-map bearing that date (sketch-map 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*, MN, Anns., Series C, No. 14.) and a supplementary report dated 27 August 1927 including two sketch-maps (MN, Anns., Series C, No. 16).

⁷⁹ See above, para. 1.1.12.

⁸⁰Letter No. 731 from Administrator Delbos, Commander of Dori *cercle*, to the Governor of Upper Volta dated 17 December 1927, inc. two sketch-maps, MN, Anns., Series C, No. 20; Tillabéry *cercle*, 1:200,000 sketch-map prepared by Administrator Prudon, June 1927, MN, Anns., Series D, No. 3 (Prudon).

⁸¹Djerma *cercle*, 1:1,000,000 sketch-map prepared by Captain Boutiq, *cercle* Commander, dated 19 June 1909, MN, Anns., Series D, No. 1.

1.1.19. As we saw above, the part of Tillabéry *cercle* situated on the right bank of the River Niger was incorporated into Dori *cercle*. However, by presidential Decree of 1926, that former part of Tillabéry *cercle* was to be returned to it and the 1910 boundary would once again serve as the inter-colonial boundary between Niger and Upper Volta. This was to be the object of the *Arrêté* of 31 August 1927 as replaced by the Erratum of 5 October 1927. The most obvious illustration of this new situation is the map entitled “French West Africa: new frontier between Upper Volta and Niger (according to the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927)”, scale 1:1,000,000⁸². It was an illustration of the Erratum of 5 October 1927 produced by the FWA Geographical Department.

⁸²French West Africa: new frontier between Upper Volta and Niger (according to the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927), scale 1:1,000,000, MN, Anns., Series D, No. 13.

1.1.20. Burkina Faso seeks to dispute the scope and value of this map, as the course of the boundaries appearing on it does not support its arguments⁸³. It states that Niger claimed this map had been “officially annexed . . . to the Erratum”⁸⁴ and develops a legal argument based on the jurisprudence of the Court regarding the value of maps⁸⁵, a jurisprudence that Niger has never contested. Niger has in fact never maintained that the map was “annexed” to the text of the Erratum. Still less that it constituted a “territorial title”⁸⁶.

Relying, *inter alia*, on the pronouncement of the International Court of Justice in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*⁸⁷, Burkina Faso disputes that this map constitutes an illustration of the 1927 texts⁸⁸. That is nevertheless what it is, as Niger demonstrates in its Memorial⁸⁹. After the discovery of a document in the national archives of Senegal⁹⁰, we now know that this map is closely linked to the text of the 1927 Erratum. It is without doubt an official map and was issued by the administrative authority. It was sent with a transmission note by the military *Chef de cabinet* (2nd section) to the Director of Political Administrative Affairs in Dakar on 6 October 1927, *namely the day after the Erratum was adopted*, with “copy to the Department and two Colonies concerned”⁹¹. Even though the map was not annexed to the text, everything points to the fact that the administration of the Government-General of FWA regarded it as a reflection of what it had just decreed. This document thus carries considerable weight for the interpretation of the Erratum and it is to be regretted that, regardless of Niger’s insistence, Burkina Faso has always been opposed to allowing it as a document “accepted by joint agreement of the Parties” under the 1987 Agreement⁹².

Nevertheless, while the map in question was largely based on a number of older maps and sketch-maps of Say *cercle* — minus the *canton* of Botou — it had nothing similar to rely on for the boundaries of the *cantons* of Tillabéry *cercle*.

1.1.21. Notwithstanding the small scale of the “new frontier” map, which represents the 150 kilometres between Tong-Tong and the Dori/Tillabéry/Say tripoint in a mere 15 centimetres — hardly sufficient to give any details — it yields two interesting conclusions. The first is that the shape of the boundary is represented as a curved line and not as two straight lines. The second is that the tripoint between the *cercles* of Dori, Tillabéry and Say is located not in Bossébangou but where Niger demonstrated it to be in its Memorial⁹³. Moreover, the section between the tripoint and Bossébangou is represented by the sign for *cercle* boundaries and not for colony boundaries.

⁸³For example, MBF, para. 1.76, then from para. 4.91.

⁸⁴MBF, para. 1.76.

⁸⁵MBF, para. 4.95.

⁸⁶MBF, para. 4.95.

⁸⁷*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment of 22 December 1986, I.C.J. Reports 1986, p. 554.

⁸⁸MBF, para. 4.91.

⁸⁹MN, para. 5.7.

⁹⁰Transmission Note No. 99213 for the 1:1,000,000 sketch-map entitled “New Frontier Upper Volta-Niger”, sent by the military *Chef de cabinet* (2nd section) to the Director of Political Administrative Affairs in Dakar, dated 6 October 1927, MN, Anns., Series C, No. 17.

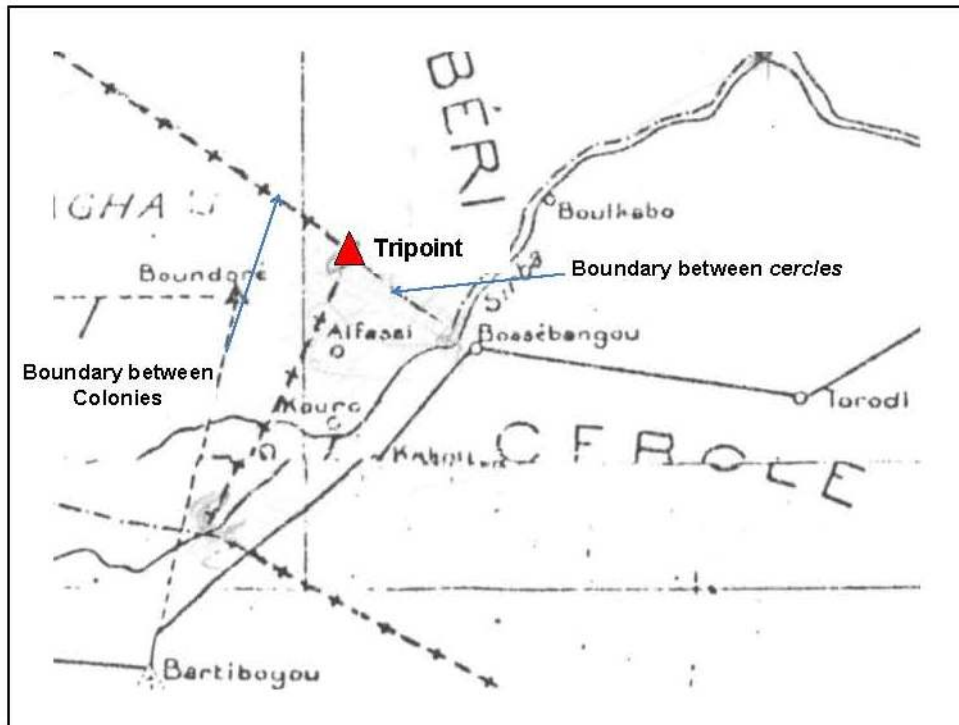
⁹¹*Ibid.*

⁹²Report of the extraordinary meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Niamey, 14 and 15 May 1990, MBF, Annex 85.

⁹³See MN, paras. 7.14 *et seq.*

[Figure 4 was to be included here but is missing from the original text.]

Figure 5: Dori/Tillabéry/Say tripoint (extract from MN, Anns., Series D, No. 13)



For the rest, the other boundaries of the Say *cercle* sector are represented by straight lines (except for Botou *canton*⁹⁴). This is not problematic in itself, as, apart from the course of the Sirba, the boundaries of Say *cercle* have always been represented by a series of straight lines. This can be explained by the fact that the southern part of Say *cercle*, with the exception of Botou *canton*, was largely uninhabited during the colonial period. Contrary to the text relating to Tillabéry *cercle*, the Erratum uses terms for the Say sector which undoubtedly imply straight lines: “turning back to the south”, “following an east-south-east direction, continues in a straight line”, “turns back up in a straight line”, and at the end of the Botou *canton* bend it “meets the former boundary of the Fada and Say *cercles*” which itself runs in a straight line as far as the Mekrou.

It is clear from the above that the southern boundary of Tillabéry *cercle* in 1910, to which the 1926 Decree refers, was in no way an artificial and arbitrary boundary.

Burkina Faso’s argument whereby the 1927 texts constitute a clear title which is sufficient in itself is no more convincing.

⁹⁴The boundaries of Gourmantché Botou *canton* were the subject of a detailed report dated 9 May 1927 between the Administrators of Fada *cercle* (Mr. de Coutouly) and Say *cercle* (Mr. Lesserteur), see MN, Anns., Series C, No. 9. See also Captain Boutiq’s sketch-map [MN, Anns., Series D, No. 1].

C. The theory of a clear title which is sufficient in itself and does not need clarification

1.1.22. According to Burkina Faso, the clarity of the title is an obvious consequence of the above reasoning. If the colonizer used artificial straight lines between well-defined points, there is no need for the text to be interpreted⁹⁵. But this is begging the question. And there are absolutely no grounds for claiming “[m]oreover, the Parties have not disputed [the clarity of the title]”⁹⁶.

We have just seen that the colonizer had no intention of establishing an artificial and arbitrary boundary. We have also seen that the 1927 text does not state that the line in the Téra sector is straight or that it runs in a direction that would result in it forming a straight line. Niger has demonstrated that a boundary between inhabited and juxtaposed *cantons* cannot form a straight line. Finally, it has further been established that earlier and subsequent cartographic documents represent a curved boundary, though — given the scale of the documents — they may not show the sinuous course of the boundaries of the *cantons*, their villages and the topography of the ground.

To claim that the 1927 texts are perfectly clear is thus a gratuitous assertion that is not borne out by any of the documents of the period.

1.1.23. Burkina Faso’s Memorial also contains the following phrase: “the boundary between the Parties was *fully* defined in [the] *Arrêté* . . .”⁹⁷. The wording is ambiguous: while the full length of the frontier is indeed covered by the Erratum, the frontier is nevertheless not defined in full, since the text as it stands does not enable demarcation to be carried out.

It is clear from examining the archives of the two Colonies that the colonial administrators encountered difficulties in representing the traditional administrative boundaries — which the Government-General had no intention of infringing — and the geographic configuration of the ground, in the face of a text which, far from being clear and complete, was known to be incomplete and imprecise. Its lack of precision was, moreover, largely confirmed in the course of the work of the Joint Technical Commission on Demarcation, whose experts were constantly confronted with serious difficulties in interpreting various parts of the 1927 texts.

Niger will now develop these different points.

(a) *An incomplete and imprecise text*

1.1.24. Right from the start, the colonial administrators encountered major difficulties in applying a text which proved to be incomplete and imprecise, and which did not provide an adequate reflection of the traditional occupation or geographic configuration of the land.

As soon as it was promulgated, the text of the Erratum caused strident but well-articulated protests from Dori *cercle*⁹⁸. The *cercle* administrators did not cease complaining of the shortcomings and lacunae of the Erratum up until the time when the colony of Upper Volta was

⁹⁵MBF, paras. 2.13 and 4.8.

⁹⁶MBF, para. 4.8.

⁹⁷MBF, para. 2.8.

⁹⁸Letter No. 731 from Administrator Delbos, Commander of Dori *cercle*, to the Governor of Upper Volta dated 17 December 1927, MN, Anns., Series C, No. 20.

abolished⁹⁹; those criticisms were then taken up by the administrators of Téra¹⁰⁰ (Tillabéry Subdivision).

The Commanders of Tillabéry and Dori *cercles* had no information whatsoever to enable them to find a lasting solution to the boundary problems with which they were faced. Thus, in the sector of Tillabéry *cercle*, where the 150 km-long boundary remains in dispute between the two Parties, there are only two points which are certain: the Tong-Tong astronomic marker and the Tao astronomic marker. The point where the line ends at the boundary of Say *cercle* in the Bossébangou area posed problems, as we know. That is why the 1927 Erratum was always deemed to be insufficient. The Head of Téra Subdivision judged this document harshly: “[this text,] whose imprecision is matched only by its inaccuracy, is the source of constant argument between Yagha and Diagourou farmers . . .”¹⁰¹.

The *cercle* Commanders relied to a great extent on the traditions of their *cercles*; the reports and sketch-maps of Administrators Delbos and Prudon were often used to rule on boundary problems¹⁰².

1.1.25. The Governor of Niger, in his dispatch 359/APA of 10 July 1951 to Tillabéry *cercle*, wrote the following:

“As regards land disputes between the inhabitants of Téra Subdivision and Dori *cercle*, these should be settled jointly by the officials in charge of the two divisions, as was agreed with Administrator Raynaud.

Indeed as you point out, the lack of precise boundaries means that the jurisdiction *ratione loci* of the courts cannot be determined with certainty.”¹⁰³

Faced with an unusable text — at least in the Téra sector — and in the absence of detailed official maps until the publication of the 1960 IGN maps, local traditions made up for these shortcomings. It is largely this local administrative practice that the IGN was to reflect when it began producing its maps from 1958 onwards.

1.1.26. As well as being imprecise and incomplete, the text of the Erratum was mistaken as to the endpoint of the line running from Tong-Tong to the boundary of Say *cercle*. The colonial archives in fact reveal that, despite the fact that it was intended to rectify an error in the *Arrêté*, the

⁹⁹Letter No. 135 from the Commander of Dori *cercle* to the Governor of Upper Volta dated 26 February 1930, MN, Anns., Series C, No. 32; 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, MN, Anns., Series C, No. 45. These complaints continued after the *cercle* was incorporated into Niger: Niger Colony, Dori *cercle*, Political Report, Second Quarter 1934, 30 June 1934, MN, Anns., Series C, No. 55.

¹⁰⁰Report of a meeting between the Commanders of Dori and Tillabéry *cercles* at Téra on 6 July 1951, MN, Anns., Series C, No. 72; Official telegram/letter No. 70 from the Head of Téra Subdivision to Tillabéry *cercle* dated 11 July 1951, MN, Anns., Series C, No. 73; Telegram/letter No. 710 from the Commander of Tillabéry *cercle* to the Governor of Niger dated 22 December 1953, MN, Anns., Series C, No. 78; Geographical study of Téra Subdivision, extract from *Monographie de Téra*, National Archives of Niger, Ann. 19-1.1bis, MN, Anns., Series C, No. 85.

¹⁰¹Report of the census tours of Téra *canton* conducted from 28 July to 22 August and 20 to 21 September 1952, by the Head of Téra Subdivision; Annex: *Territorial Organization of Moyen Niger, Establishment of Téra Station*, p. 13, MN, Anns., Series C, No. 74.

¹⁰²MN, paras. 2.7 and 2.8.

¹⁰³Telegram/letter of 10 July 195 from the Governor-General of Niger to Tillabéry *cercle*, MN, Anns., Series C, No. 72. See also letter No. 1511/APA from the Governor of Niger to the Commander of Tillabéry *cercle* dated 17 April 1953, MN, Anns., Series C, No. 75.

text of the Erratum still contained a drafting error which left doubt as to where this section of the boundary ended at Bossébangou. We shall return to this point later¹⁰⁴.

1.1.27. The difficulties faced by the administrators during the colonial period in applying an imprecise and incomplete text were to be encountered again when the Joint Technical Commission on Demarcation of the Frontier tried to mark out the frontier between the two States on the basis of the Protocol of Agreement of 28 March 1987.

Let us recall the part of the text of Erratum concerned:

“A line starting from the heights of N’Gouma, passing through the Kabia ford (astronomic point), Mount Arounskoye and Mount Balébangoua, to the west of the ruins of the village of Tokebangou, Mount Doumafende and the Tong-Tong astronomic marker; this line then turns towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossebangou. It almost immediately turns back up towards the north-west, leaving to Niger, on the left bank of that river, a salient which includes the villages of Alfassi, Kouro, Tokalan, and Tankouro; then, turning back to the south, it again cuts the Sirba at the level of the Say parallel. From that point the frontier, following an east-south-east direction, continues in a straight line up to a point located 1,200 m to the west of the village of Tchenguiliba . . .”

We shall recall just a few of the problems encountered by the Joint Technical Commission on Demarcation in interpreting this text.

One of the first problems concerned the precise identification of the places mentioned in the 1927 texts. This was the case, for example, for Mount Arounskoye and Mount Balébangoua. Despite several field missions, the Commission experts could not locate these different geographic features and were finally able to agree on their co-ordinates only by recourse to aerial photographs or the IGN map. There were more serious problems in identifying the site of villages or former villages. Thus, the experts were unable to find the “ruins of the village of Tokebangou”, despite three field missions during which they only managed to gather imprecise or contradictory information. The report on the survey work carried out in September 1988 is particularly revealing:

“On 12 March 1988, the topographers went to Tokébangou (a village under Burkina administration), where they found no sign of the ruins described in the basic text. Representatives of the village took the technical staff to the presumed site of the former village; but no ruins were found there, either; an iron stake marked the foot of Mount Komkara, to the west of the place indicated.

The technical staff returned to Tokébangou from 11 to 12 May 1988, guided by representatives from the villages of Dolbel and Kossa (Niger side), who confirmed that in Tokébangou the boundary passes through a plot of land belonging to one of the villagers and that a boundary marker and a tree (Garbeye or Aduwa) with an indicator plate had existed at that location. The topographers did not find the marker or the plate, much less the tree bearing the plate.

Nonetheless, the owner of the plot of land admitted that he had cut down a tree of that kind, though said he had not seen the signs in question. Subsequently, despite extensive research, no data sheets providing information on the location of the signs referred to could be found.

¹⁰⁴See below, paras. 2.2.2 *et seq.*

It had to be acknowledged that the basic text did not suffice and recourse was had to the map. This document also proved to be insufficient, as there is no continuous line on the map connecting the two defining points where the boundary changes direction, as described in the texts . . .”¹⁰⁵

Similarly, despite a number of missions conducted jointly in the field, the experts were unable to locate the site of the village of Tokalan, mentioned in the text of the Erratum.

Is it any surprise that in 1988 the experts appeared to be unable to find the “Tamarind tree with an indicator plate to the north of the Dori-Téra road”, which was nevertheless very clearly identified in Captain Nevière’s 1927 survey¹⁰⁶?

Similar difficulties arose elsewhere, including in respect of the astronomic points. Thus the experts found the co-ordinates for two different markers at Tao¹⁰⁷ (whereas the text speaks of “the Tao astronomic marker”), although neither of them could be found on the ground.

Difficulties of a different nature arose on several occasions in respect of determining the meaning of certain phrases used in the 1927 texts. This was so first of all with the phrase “[this line] then turns towards the south-east”. We know that the experts of the two States disagreed strongly on the meaning of these words¹⁰⁸. It should be recalled that Burkina Faso’s position at the time was that this phrase referred to a change in direction between a series of straight lines¹⁰⁹. In the present proceedings, Burkina Faso devotes more than twenty pages¹¹⁰ of its Memorial to the interpretation of this word and maintains that it refers to a change in direction¹¹¹. Rather surprisingly, however, the line claimed by Burkina Faso, as it is drawn on the map attached to its Memorial, is perfectly straight in this area and does not include the least change in direction. The other Party in fact places Mount Doumafende (point 6), the Tong-Tong astronomic marker (point 7) and the Tao astronomic marker (Tao) on the same straight line. Clearly, Burkina Faso now offers another — and rather unusual — interpretation of the word “*s’infléchir*”.

¹⁰⁵Report on completion of the survey of the proposed demarcation of the Niger-Burkina frontier, 28 September 1988, MBF, Ann. 82.

¹⁰⁶Survey annexed to letter DEC/934 from IGN France to the Secretary-General of the Niger Minister of State for Finance, dated 23 June 1988, MN, Anns., Series C, No. 105.

¹⁰⁷*Ibid.*

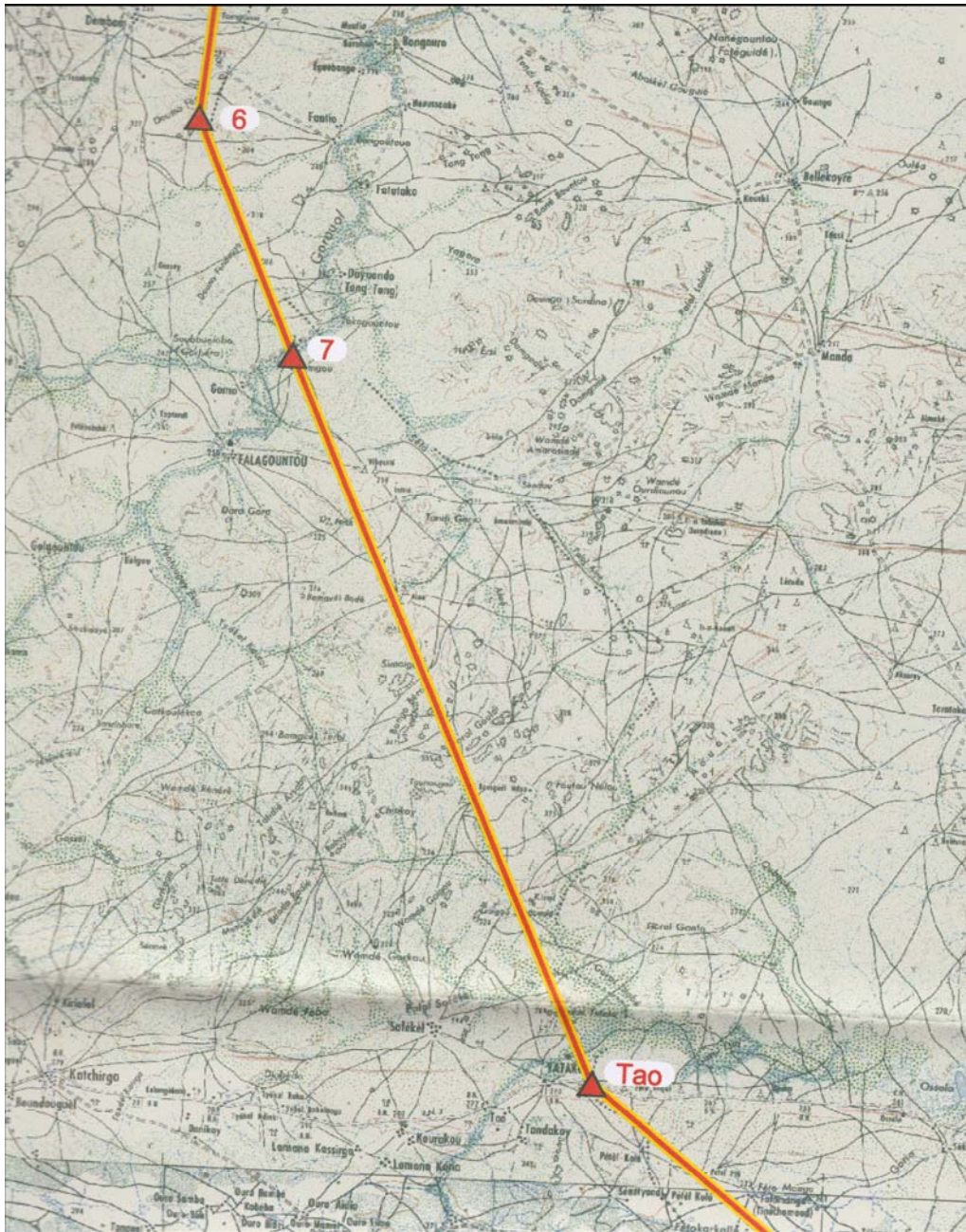
¹⁰⁸See above, paras. 1.1.3 *et seq.*

¹⁰⁹Report of the second ordinary session of the Joint Technical Commission on Demarcation of the Niger-Burkina Faso Frontier, held in Ouagadougou from 23 to 28 July 1990, MN, Anns., Series A, No. 5, p. 3.

¹¹⁰MBF, pp. 109-132.

¹¹¹See, *inter alia*, MBF, paras. 4.69-4.70.

Figure 6: Illustration by Burkina Faso of the Doumafendé-Tong-Tong-Tao section of the boundary without any turn at Tong-Tong (extract from Cartographic Annex MBF 36)



There were further problems of interpretation during the work of the Joint Commission. This was the case, for example, with the statement that the frontier “almost immediately turns back up towards the north-west”; the meaning of these words caused strong disagreement between the experts of the two States¹¹². Similarly, the experts could do no more than record their disagreement

¹¹²Report of the second ordinary session of the Joint Technical Commission on Demarcation of the Niger-Burkina Faso Frontier, held in Ouagadougou from 23 to 28 July 1990, MN, Anns., Series A, No. 5, p. 3.

over the interpretation of the phrase “at the level of the Say parallel”, as used in the last part of the text of the Erratum¹¹³.

This short, non-exhaustive list of the difficulties raised by the interpretation of the 1927 texts in the framework of the Joint Commission’s work is surely enough to show that Burkina Faso’s view whereby the texts were perfectly clear is particularly utopian.

1.1.28. How can these shortcomings be addressed? 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. It is therefore necessary to consider the possibilities of interpreting these texts by having recourse to cartographic criteria and the *effectivités* of the boundary throughout its history.

(b) Interpretation using cartographic material

1.1.29. We mentioned above the importance of the map entitled “new frontier between Upper Volta and Niger (according to the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927)”, scale 1:1,000,000¹¹⁴. We shall not return to this point again. We also noted its limitations, due to its scale and the fact that the inter-colonial boundary had not been surveyed along its entire course at that time.

1.1.30. The 1:200,000 map of the *Institut géographique national de France*, 1960 edition, does not suffer from the same flaws. Burkina Faso tries from the outset to minimize the importance of this map. It is referred to as “a working document on which the course described by the above-mentioned texts could be plotted”¹¹⁵; in other words, it was alleged to be simply a “map base”. However, shortly thereafter, Burkina Faso appears to contradict itself in this regard, when, in respect of a meeting of the experts of the two Parties in 1986, it writes that the Parties “sought only to . . . plot . . . on the map the description of the frontier given by the text, *and relying on the map itself if need be*, in accordance with the Protocol of Agreement of 23 June 1964”¹¹⁶.

Elsewhere, Burkina Faso acknowledges that “at several locations the frontier line resulting from the basic texts does not coincide with the line on the IGN 1:200,000 map or with certain administrative realities on the ground”¹¹⁷, though it is careful not to draw any conclusion. This position is particularly strange given that the text of the Protocol of Agreement of 23 June 1964 refers to the 1927 texts *and* to the map as basic documents, placing them on the same footing:

“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*.”¹¹⁸

¹¹³Report of the second ordinary session of the Joint Technical Commission on Demarcation of the Niger-Burkina Faso Frontier, held in Ouagadougou from 23 to 28 July 1990, MN, Anns., Series A, No. 5, p. 4.

¹¹⁴See above, paras. 1.1.19 *et seq.*

¹¹⁵MBF, para. 1.45.

¹¹⁶MBF, para. 1.59; emphasis added.

¹¹⁷MBF, para. 1.69.

¹¹⁸Protocol of Agreement signed at Niamey on 23 June 1964, *OJRN*, 1 April 1966, pp. 150-151; MN, Anns., Series A, No. 1.

While it assigns a subsidiary role to the 1960 IGN map, the Protocol of Agreement of 28 March 1987¹¹⁹ maintains the reference to it:

“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.”

Yet, starting from the assumption that the title is clear and sufficient in itself, Burkina Faso claims that it is not necessary to have recourse to the said map.

1.1.31. It is also quite hard to reconcile the other Party’s disregard for the map with:

1. the fact that the road map of the Republic of Upper Volta, scale 1:1,000,000, published in 1963¹²⁰, adopted the course shown on the IGN map;
2. the plan by the two States in 1968 to seek assistance from IGN-France for the work of demarcating the frontier:

“Following an exchange of correspondence between the Government of the Republic of Upper Volta and the *Institut Géographique National de Paris*, it has been agreed to entrust the latter body with the task of demarcating the frontier. The cost has been estimated at some 10 million CFA, to be borne equally by the Governments of Niger and Upper Volta.”¹²¹

The demarcation operations could not be carried out, as Upper Volta did not release the necessary funds. Nevertheless, it seems highly probable that, if the project had gone ahead, IGN would not have used the 1960 map merely as a “map base” on which to plot the skeleton line described by the 1927 texts, but would have followed it closely as a guide, and would most likely have removed any remaining doubts in areas where the course was unclear with the help of the two countries’ administrative authorities.

Is it necessary to add that Burkina Faso relies on the 1960 IGN map when it suits its purpose, for example in the region of Bossébangou and the salient¹²²?

1.1.32. The relevance of this map, or rather collection of sheets, is indeed evident. It dates very precisely from 1960; one could not be closer to the critical date in order to establish a “photograph” of the *uti possidetis*. As Burkina Faso’s Memorial quite rightly recounts¹²³, the Judgment of the Court in the case concerning the *Frontier dispute (Burkina Faso/Republic of Mali)* noted the following:

¹¹⁹Agreement and Protocol of Agreement of 28 March 1987 between the Revolutionary Government of Burkina Faso and the Government of the Republic of Niger on the demarcation of the frontier between the two countries, MN, Anns., Series A, No. 4.

¹²⁰Upper Volta: road map, scale 1:1,000,000, designed and published by the *Institut géographique national*, Paris (Dakar Branch, First Edition, May 1963), MN, Anns., Series D, No. 31.

¹²¹Report of the ministerial meeting between Niger and Upper Volta, Niamey, 9-10 January 1968, Ann. MBF 54.

¹²²See, for example, MBF, paras. 4.127 *et seq.*

¹²³MBF, para. 2.2.

“The principle of *uti possidetis* freezes the territorial title; [colonial law is only] evidence indicative of what has been called the ‘colonial heritage’, i.e., the ‘photograph of the territory’ at the critical date.”¹²⁴

And, in the same case, in respect of the same IGN map, the Court underlined that:

“having regard to the date on which the surveys were made and the neutrality of the source, the Chamber considers that where all other evidence is lacking, or is not sufficient to show an exact line, the probative value of the IGN map becomes decisive”¹²⁵.

Moreover, the scale of the map at 1:200,000 is sufficiently detailed. It also has a solid technical basis, at least from a cartographic point of view. The coverage of toponyms — which was notoriously rudimentary in earlier maps by the Army Geographical Section and later the IGN — is as complete as knowledge of occupation on the ground allowed. The hydrographic and orographic detail, prepared from aerial photographs and refined by field surveys, is of excellent quality. Finally the indications of the boundaries are based on information obtained from the local authorities¹²⁶ — even if they are sometimes tentatively represented by discontinuous lines of crosses, inasmuch as the information on which they were based could not always be fully relied on — and their sinuous nature suggests that they were prepared with some care. 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 more than 50 per cent of the boundaries of Téra sector.

All of this implies that, far from interpreting the Erratum as establishing arbitrary straight lines and far from relying on the old sketch-maps which showed 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 date the map was prepared (1958).

Unless we find abnormal deviations in relation to the texts, manifest lacunae in the information on the *canton* boundaries, or obvious errors — as in the case of Bossébangou — and subject to the necessary caution where the hesitation of the map’s drafters is reflected in gaps in the lines of crosses, these results should in principle be followed.

(c) *Interpretation based on colonial effectivités*

1.1.33. Would this manner of proceeding be in breach of the principles governing the relationship between title and *effectivités* in territorial disputes? This question was considered at length in the Judgment of the Court in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*. The Court distinguished four eventualities¹²⁷, two of which are at issue here.

¹²⁴*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, 22 December 1986, I.C.J. Reports 1986*, p. 568, para. 30.

¹²⁵*Ibid.*, p. 586, para. 62.

¹²⁶This is perfectly clear from the indications given on the supplementary maps established by the IGN teams, MN, Anns., Series D, No. 27-30.

¹²⁷*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, 22 December 1986, I.C.J. Reports 1986*, p. 580, para 51.

Burkina Faso's contention¹²⁸ that the title is clear leads it to adopt the eventuality whereby a clear title "therefore prevails over any *effectivités* to the contrary". It is the first eventuality considered by the Court, though of course it only applies if the title is effectively clear and contains no lacunae or errors. However, the title invoked here does not fall within that category. We have seen that it is imprecise, incomplete and, on one point, erroneous. Among the four eventualities considered by the Court, here we are faced with the fourth case, where "the legal title is not capable of showing exactly the territorial expanse to which it relates":

"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."¹²⁹

Need it be recalled that it was indeed because the two Governments were aware of the imprecision of the 1927 texts that the 1987 Agreement leaves no doubt as to the intention of the Parties to use the 1960 IGN maps; the wording is in the imperative:

"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."¹³⁰

By the same token, the course of the frontier between Tong-Tong and the Dori/Tillabéry/Say tripoint can be established by having recourse to the *effectivités* arising from the history and composition of the *cantons*, and from the maps and a number of agreements dating from the colonial or post-colonial period, which explicitly or implicitly recognize the frontier points.

This method justifies the line proposed by the Republic of Niger in this sector, as we shall see in Chapter II of this Counter-Memorial.

*

Thus, Burkina Faso's argument whereby the 1927 texts are clear and precise, and define a boundary which runs in arbitrarily defined straight lines, proves to be utterly baseless and is contradicted by a large amount of evidence in the case file. As we shall now see, the same can be said of the claim whereby, after their accession to independence, the Parties allegedly agreed on a "consensual line" which is binding upon the Republic of Niger.

SECTION 2 – THE LACK OF BASIS FOR THE "CONSENSUAL LINE" THEORY

1.2.1. In its Memorial, Burkina Faso presents the results of the frontier demarcation work carried out by the technical experts of the two countries in 1988 as being a "consensual line"¹³¹. This line is purported to be the subject of an agreement and therefore binding on the two Parties to these proceedings. It is further alleged to be in compliance with the 1987 Protocol, making it even more blameworthy on the part of Niger to call it into question.

¹²⁸MBF, para. 2.16.

¹²⁹*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, 22 December 1986, I.C.J. Reports 1986, pp. 586-587, para 63.*

¹³⁰Emphasis added.

¹³¹MBF, p. 46, para. 1.69 and p. 48, para. 1.75.

1.2.2. In Niger's view, the provisional lines proposed by the Joint Technical Commission on Demarcation established by the 1987 Agreement can in no way be considered as binding on the Parties, either *de facto* or *de jure*: *de facto* because they were called into question at various times both by Burkina Faso and by Niger and therefore cannot possibly have resulted in a "consensual line" (A); *de jure* because they were never formalized in a definitive agreement signed and ratified by the two Parties and hence binding upon them (B).

A. The *de facto* absence of a "consensual line"

1.2.3. From 1964 onwards the efforts of the two States to arrive at a delimitation and then demarcation of their common frontier were very uneven. Those efforts, which were initiated on the basis of the Protocol of Agreement of 23 June 1964 and continued under the Agreement of 28 March 1987, produced results which were approved by the experts of Niger and Burkina Faso in 1986, 1988 and 1991. However, all those results were subsequently called into question by one Party or the other. A partial agreement on two sectors of the frontier was reached in 2009, while the middle sector remains in dispute and is the subject of the present proceedings.

1.2.4. By examining the specific circumstances surrounding the joint approval of the different results of the technical experts' work by the two countries' delegations, it can be established that it was not only the Republic of Niger that called those results into question. Niger's reasons for contesting those results were always grounded in legal arguments, based for the most part on differences in interpretation of the delimitation instruments adopted by the two countries in the framework of the 1987 Agreement and Protocol of Agreement. Niger intends to show this by examining in turn, in this connection, the Protocol of Agreement of 23 June 1964, the results of the delimitation work approved by the delegations of the two countries in 1986, those approved in 1988 and the ministerial "solution" of 1991.

(a) *The Protocol of Agreement of 23 June 1964*

1.2.5. Pursuant to the Protocol of Agreement of 23 June 1964, in January 1968 the two States agreed¹³² on the idea of entrusting the task of marking out their entire common frontier to IGN France. Everything suggests that this agreement was far more than a simple understanding regarding the procedure to be followed and that it also marked a consensus on the actual line to be adopted. In fact, in all probability, the IGN would then have carried out the demarcation work on the basis of the line on the 1960 map, which Upper Volta had in the meantime endorsed, as can be seen in particular by the fact that that line is reproduced on the 1963 road map of Upper Volta¹³³.

1.2.6. However, this project could not be implemented. Burkina Faso states in its Memorial that this process "was not put in place as rapidly as the Parties had originally intended, given the considerable cost of such an undertaking over a frontier approximately 590 km in length"¹³⁴. This

¹³²Letter No. T08/STC of 16 August 1972 from the acting Director of the Topographical Department and Cadastre to the Minister of Finance and Saharan and Nomad Affairs, CMN, Anns., Series C, No. 129.

¹³³On this point, see also above, para. 1.1.31 and the references given.

¹³⁴MBF, p. 37, para. 1.48.

is a biased presentation of the facts. In truth, it was simply because Upper Volta did not pay its share of the costs¹³⁵ that the work then entrusted to IGN France could not be carried out.

(b) *The 1986 line and its calling into question by Burkina Faso*

1.2.7. Notwithstanding the fact that the 1964 Protocol of Agreement was not implemented, Niger and Upper Volta continued to consider ways and means of demarcating their common frontier. In 1982, in an apparent change of mind, Upper Volta proposed a draft line that departed from the IGN line. This proposal was examined and adopted by the technical experts of the two countries at a meeting held in Ouagadougou from 21 to 23 May 1986. Having proceeded “to interpret” the 1927 texts, on this occasion the delegations of the two countries adopted “the co-ordinates of the astronomic markers, and of the points where the frontier changes direction”¹³⁶ and these were recorded in a document annexed to the report of the meeting. They then “agreed the line of the frontier”, after which they discussed the costs of demarcation “on the basis of a working document presented by Burkina Faso”¹³⁷. That line was adopted “unanimously” by the experts¹³⁸.

1.2.8. It was nevertheless called into question shortly thereafter. At the meeting of the Joint Technical Commission on Demarcation of the Frontier established by the Agreement of 28 March 1987, held in May 1988, it was noted

“that the line along this part of the frontier [between Tokébangou and Tchenguiliba] was based on that of the French National Geographic Institute (IGN France) 1:200,000 map, not on *Arrêté* No. 2326 of 31 August 1927, as clarified by its Erratum of 5 October 1927, both of which were designated in the agreement signed by the two Governments in March 1987 in Ouagadougou.

The technical specialists explained that their position was based on the frontier line as recorded in the report of the meeting between specialists from Niger and Burkina held from 21 to 23 May 1986 in Ouagadougou.

It was apparent that this line was an interpretation of the above-mentioned *Arrêté* and Erratum. The Commission considered that the technical staff were not authorized to adopt a procedure that deviated from the decisions of the two Governments. They were accordingly instructed to reconsider the 110 km portion in question within eight (8) days, complying with the texts designated in the Agreement and Protocol of Agreement signed by the two Governments.”¹³⁹

¹³⁵See letter No. 108/STC dated 16 August 1972 from the acting Director of the Topographical Department and Cadastre to the Minister of Finance and Saharan and Nomad Affairs, CMN, Anns., Series C, No. 129. For its part, the Republic of Niger had included its share in the special equipment budget, namely the sum of 4,400,000 CFA francs, under heading 640-2-84 “delimitation of the Niger-Volta frontier” (Law No. 68-14 of 5 March 1969, *OJRN*, No. 7 of 1 April 1968). That sum was carried over into the Republic of Niger’s 1969 budget and only cancelled at the end of the financial year when it became clear that the other Party had no intention of making the same financial effort.

¹³⁶Report of the meeting between technical experts of the Republics of Niger and Burkina Faso, Ouagadougou, 21 to 23 May 1986; MN, Anns., Series A, No. 3.

¹³⁷*Ibid.*

¹³⁸Burkina Faso uses the same expression regarding the 1988 line. Cf. MBF, p. 51, para. 1.82.

¹³⁹Report of the meeting of the Joint Technical Commission on Demarcation of the Burkina-Niger Frontier, Diapaga, 12-15 May 1988, 15 May 1988, Ann. MBF 80.

1.2.9. It appears to be largely at the initiative of Burkina Faso that the line was called into question, as attested by a letter from the acting Permanent Secretary of the National Frontier Commission of Niger reporting on the second ordinary session of the Joint Technical Commission on Demarcation of July 1990 to the Interior Minister of his country:

“In May 1988, after a field survey mission, our friends from Burkina called the agreed line into question, finding fault with it at the level of the Say parallel. The line was then modified and submitted to the Governments of the two countries for adoption.”¹⁴⁰

(c) *The 1988 line and the differences in interpretation of the basic texts*

1.2.10. Following the fourth meeting of the Joint Technical Commission, representatives from both States noted that “[t]he experts [were] thus 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”¹⁴¹. The representatives of the two States thus agreed on a line based on the interpretation of the basic texts which they represented on two composites of 1:200,000-scale maps (1960 IGN map)¹⁴². That is what, in its written proceedings, Burkina Faso calls the “consensual line”.

1.2.11. But this line proved to be no more consensual than that of 1986. In the course of its work in 1988, the Joint Commission noted a significant number of places where the line “differ[ed]” from the one resulting from the basic texts, the line on the 1960 IGN map “and from certain administrative realities on the ground”¹⁴³.

The doubts raised for Niger by these differences were confirmed by the field mission conducted from 17 to 21 April 1990 by the national directors responsible for frontier matters of the two countries at the request of the Joint Technical Commission on Demarcation¹⁴⁴.

1.2.12. Niger then proposed a review of the line of September 1988. To support its contestation of the September 1988 line, it submitted the map entitled “new frontier between Upper Volta and Niger according to the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927”¹⁴⁵. The importance and relevance of that map were contested by Burkina Faso which merely proposed to consider it “as a purely factual element merely providing additional information”¹⁴⁶.

¹⁴⁰Note from the acting Permanent Secretary to the Minister of the Interior, containing the report of the meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, 31 July 1990, CMN, Anns., Series C, No. 130.

¹⁴¹Report of the fourth meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Niamey, 26-28 September 1988, Ann. MBF 81, p. 2.

¹⁴²Report on completion of the survey of the proposed demarcation of the Niger-Burkina frontier, 28 September 1988, Ann. MBF 82, p. 6. That composite map is reproduced in Cartographic Annex 15 to Burkina Faso’s Memorial.

¹⁴³Report on completion of the survey of the proposed demarcation of the Niger-Burkina frontier, 28 September 1988, Ann. MBF 82, p. 3.

¹⁴⁴Report of the extraordinary meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, Niamey, 14 May 1990, Ann. MBF 85.

¹⁴⁵*Ibid.*, pp. 1-2.

¹⁴⁶*Ibid.*, p. 2.

1.2.13. At the extraordinary meeting of the Joint Commission convened in Ouagadougou from 23 to 28 July 1990 to consider the report on the new mission conducted by the technical experts between 5 and 12 June 1990 with a view to surveying the villages cited in the basic texts, “the Commission undertook a re-interpretation of the frontier line”¹⁴⁷. In the course of reconsidering the line, problems of interpretation became apparent in respect of certain provisions of the Erratum of 5 October 1927. At the time Niger put forward the idea that the phrase “the frontier turns” was meant to indicate a curved line¹⁴⁸. The Commission had to resign itself to recording the diverging points of view expressed by the two Parties. It was further decided that a meeting should be called at Niamey to review the line, with each Party being urged to engage in further research and reflection with a view to reaching an agreement.

1.2.14. Thus, contrary to what Burkina Faso writes in its Memorial, as soon as the situation on the ground was first assessed following the provisional determination of the frontier line decided by the Parties in September 1988, Niger noted certain anomalies arising from problems of interpretation of the basic texts. Its objections to that line were argued and illustrated on the basis of cartographic material. It was not a “short-lived belief”¹⁴⁹, as stated by Burkina Faso, which claimed that “[t]hat thesis was never put forward again thereafter” by Niger¹⁵⁰. On the contrary, as we have seen, Niger repeatedly reiterated this position: in April 1990 in the framework of the Technical Sub-Committee; at the session of the Joint Technical Commission on Demarcation in July 1990 — the first to take place subsequent to the determination of the line in September 1988 and which was convened specifically to consider Niger’s objections; in November 1990 at the meeting between the two Co-Chairmen of the Technical Sub-Committee prior to the meeting of the Joint Technical Commission on Demarcation in Niamey in February 1991¹⁵¹. The latter meeting in Niamey was unable to resolve the problem. The Commission therefore decided to submit the difficulties encountered to the Governments of the two countries¹⁵².

(d) *The line resulting from the ministerial meeting of May 1991 and its non-compliance with the delimitation instruments*

1.2.15. At a Ministerial consultative and working meeting held on 15 May 1991, the Minister for Territorial Administration of Burkina Faso and the Minister of the Interior of Niger attempted to find a solution to the problem raised by the application of the basic delimitation instruments¹⁵³. Having listened to the presentations by the technical experts of the Joint Technical Commission on Demarcation, and having noted that the 1927 *Arrêté* and its Erratum did not suffice, the two Ministers adopted a “political solution”, in the words of Burkina Faso in its Memorial¹⁵⁴. The Ministers in fact proposed a solution which seemed to satisfy both Parties in respect of the sections of the frontier then in dispute. They decided that the frontier consisted of “straight lines” for the

¹⁴⁷Report of the Second Ordinary Session of the Joint Technical Commission on the Demarcation of the Frontier between Niger and Burkina Faso held at Ouagadougou from 23 to 28 July 1990; MN, Anns., Series A, No. 5.

¹⁴⁸*Ibid.*

¹⁴⁹MBF, p. 48, para. 1.75.

¹⁵⁰*Ibid.*, p. 49, paras. 1.77 and p. 48, para. 1.75.

¹⁵¹Cf. Report of the meeting of the Joint Technical Sub-Committee on Demarcation of the Niger-Burkina Frontier, held in Niamey from 3 to 7 February 1991, CMN, Anns., Series A, No. 22.

¹⁵²*Ibid.*

¹⁵³Joint Communiqué on the Ministerial consultative and working meeting between Niger and Burkina Faso, held on 14 and 15 May 1991 in Ouagadougou, MN, Anns., Series A, No. 6.

¹⁵⁴MBF, p. 50, para. 1.80.

stretch from Tong-Tong to Bossébangou, and that it should follow the line of the 1960 IGN map from Bossébangou to the River Mékrou¹⁵⁵.

1.2.16. This “compromise” did not meet the conditions laid down by Articles 1 and 2 of the Agreement of 28 March 1987, since it was not based on the basic instruments referred to in those provisions. Consequently, it was decided not to submit this text to the ratification procedure required under Article 7 of the said Agreement for its final approval. At the 3rd ordinary session of the Joint Technical Commission on Demarcation held in Niamey in November 1994, Niger argued that the solution adopted by the two Ministers in Ouagadougou “was not entirely consistent with the terms of Articles 1 and 2 of the 1987 Protocol of Agreement. Niger accordingly requested a review of the frontier in the area addressed by the compromise.”¹⁵⁶ That position was based both on the fact that the line agreed by the ministers in 1991 was consistent with neither the 1927 basic texts nor the IGN map, and on the fact that that line would have resulted in localities considered as belonging to Niger from time immemorial being transferred to Burkina¹⁵⁷. Burkina Faso opposed the request and considered “that any request seeking to review that compromise would fall outside the terms of reference of the Joint Technical Committee”¹⁵⁸. In its view, it was therefore up to Niger to submit the problem to the appropriate political authority.

1.2.17. That is what the Niger Delegation did in referring the matter to its government authorities. The matter was subsequently brought to the attention of the highest authorities and, rather than a meeting between the ministers responsible for frontier matters, a working meeting took place in Niamey in September 1995 between delegations of the two countries led by their respective Prime Ministers. While that meeting did not expressly correspond to Niger’s request to review the line of May 1991, the two Parties did agree to convene a meeting of the competent ministers in Niamey in order to “overcome the difficulties and speed up the work of the Joint Technical Commission on Demarcation”¹⁵⁹.

1.2.18. However, that meeting did not take place despite the fact that in 1995 both delegations expressed their mutual desire for it to do so¹⁶⁰ and it was not until 2001 that the Joint Commission resumed its work. The report of the Commission’s 2001 meeting clearly shows that the Parties then agreed to start work again on the basis of the instruments referred to in the 1987 Agreement, thus setting aside any provisional agreements that may have been reached previously by the experts or ministers¹⁶¹. The “political solution” of May 1991 therefore came to nothing.

¹⁵⁵*Ibid.*

¹⁵⁶Cf. Report of the third ordinary session of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, held in Niamey from 2 to 4 November 1994, MN, Anns., Series A, No. 7.

¹⁵⁷Cf. Report of mission conducted on 21 and 22 September 1994 by Commandant Seyni Garba, Permanent Secretary of the National Frontier Commission of Niger in the *arrondissements* of Téra and Say, Niamey, 23 October 1994, CMN, Anns., Series C, No. 132.

¹⁵⁸Cf. Report of the third ordinary session of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, held in Niamey from 2 to 4 November 1994, MN, Anns., Series A, No. 7, p. 3.

¹⁵⁹Report of the working meeting, held in Niamey on 4 and 5 September 1995, between the Delegation of Burkina Faso led by Prime Minister Roch Marc Christian Kabore, and the Delegation of Niger, led by Prime Minister Hama Amadou, CMN, Anns., Series A, No. 23, see esp. point II.3.

¹⁶⁰*Ibid.*

¹⁶¹Report of the fourth ordinary session of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, held in Ouagadougou from 18 to 21 July 2001, MN, Anns., Series A, No. 8.

1.2.19. A review of the different steps taken by the two States with a view to delimiting their common frontier immediately after their accession to independence thus clearly shows that, while the two Parties agreed on various proposals for the frontier line, those solutions were only ever provisional. Neither in the 1960s, nor in 1986, 1988, 1991 or after that date, did the two States agree on a “consensual line”. The only line that can rightly be called “consensual” is the one comprising the two sectors of the frontier which are no longer in dispute between the Parties and which were the subject of exchanges of letters in 2009¹⁶². All of the evidence in the file thus shows that before the latter date, there was in fact never any “consensual line” binding upon the two Parties. We shall now see that at the same time as having no basis in fact, the theory of the “consensual line” has absolutely no basis in law either.

B. The *de jure* absence of a “consensual line”

1.2.20. According to Burkina Faso, the “consensual line” of 1988, confirmed by the ministers of the two States in 1991, constitutes “an interpretation that is fully binding on the State of Niger [which] thus continues to be binding between the Parties”¹⁶³. This assertion is wholly inaccurate. The various proposals for provisional lines on which the Parties may have agreed at different times can in fact have no legal effect whatsoever as long as they have not been formalized in a binding legal instrument (A), approved by the competent executive authorities and ratified by the Head of State of Niger (B).

(a) *The provisional lines proposed in 1988 and 1991 were never formalized in a legal instrument binding upon the State of Niger*

1.2.21. It is common for States to specify that they will only be bound by an international instrument if certain formal conditions are met. This is precisely the concern reflected in Article 7 of the Agreement concluded on 28 March 1987 between the Revolutionary Government of Burkina Faso and the Government of the Republic of Niger on the demarcation of the frontier between the two countries where it provides that: “The result of the demarcation works shall be embodied in a legal instrument, which shall be submitted for signature and ratification by the two Contracting Parties.”¹⁶⁴

It should be noted that Burkina Faso omits to cite this key provision of the Agreement.

1.2.22. After more than forty years of negotiations on the delimitation of the frontier, it should be stressed that they were successful for only part of the common frontier¹⁶⁵. The provisional lines proposed in 1988 and 1991, however, were not to be embodied in a legally binding instrument in accordance with the requirements of Article 7 of the Agreement concluded between Burkina Faso and Niger on the demarcation of their common frontier.

Inasmuch as the alleged consensual lines of 1988 and 1991 were not formalized in a definitive legal instrument, one may wonder how the State of Niger could be bound by an

¹⁶²Letter No. 2009-004874/MAECR/SG/DGAJC from the Minister for Foreign Affairs of Burkina Faso to the Minister for Foreign Affairs of Niger, dated 29 October 2009, MN, Anns., Series A, No. 16; Letter No. 007505/MAE/C/DAJC/DIR from the Minister for Foreign Affairs of Niger to the Minister for Foreign Affairs of Burkina Faso, dated 2 November 2009, MN, Anns., Series A, No. 17.

¹⁶³MBF, pp. 122-123, paras. 4.56-4.57.

¹⁶⁴Agreement and Protocol of Agreement of 28 March 1987 between the Revolutionary Government of Burkina Faso and the Government of the Republic of Niger on the demarcation of the frontier between the two countries, MN, Anns., Series A, No. 4.

¹⁶⁵See above, para. 1.2.19

international agreement which does not in fact exist. The provisional lines proposed in 1988 and 1991, which were part of the preparatory work and subject to change during negotiations, do not constitute a definitive commitment reflecting the will of the Parties to be bound by international law.

1.2.23. In any event, even supposing that the provisional lines proposed in 1988 and 1991 had been embodied in a definitive instrument, Article 7 of the Agreement concluded between Burkina Faso and Niger on the demarcation of their common frontier further requires that the legal instrument embodying the results of the demarcation work should be ratified by the two contracting Parties in order for it to be valid. No such instrument has ever been ratified by the Head of State of Niger pursuant to the rules and procedures governing the ratification of international commitments concluded by the Republic of Niger.

(b) *The provisional lines proposed in 1988 and 1991 have never been formalized in a definitive legal instrument ratified by the Head of State of Niger*

1.2.24. Referring to the Decree of 1 December 1962 concerning the ratification and publication of the international commitments of Niger¹⁶⁶ and to his letters of 26 December 1963¹⁶⁷ and 5 February 1964¹⁶⁸, in a letter dated 14 July 1971 the President of the Republic of Niger had occasion to set out the rules governing the negotiation, signature, ratification and publication of Niger's international commitments¹⁶⁹. It emerges from these rules that, in order to negotiate, ministers and plenipotentiaries must be vested with full powers signed by the Minister for Foreign Affairs. International agreements, with the exception of "agreements in simplified form", must then be ratified by the President of the Republic in order for them to be binding upon the State of Niger.

Ministers and plenipotentiaries must be vested with full powers signed by the Minister for Foreign Affairs

1.2.25. In his letter dated 5 February 1964, the President of the Republic of Niger recalled the rules to be observed for the negotiation, signature, ratification and publication of Niger's international commitments. As regards the procedure to be followed for the negotiation and signature of international commitments, the President's letter notes that "ministers and plenipotentiaries [must] be previously vested with full powers. According to international custom, the Minister for Foreign Affairs has the authority to issue full powers"¹⁷⁰.

In this case, research carried out in the relevant departments did not reveal the existence of any full powers signed by the Minister for Foreign Affairs authorizing a plenipotentiary to commit the Republic of Niger.

¹⁶⁶Decree No. 62-282/PRN/AE of 1 December 1962 concerning the ratification and publication of Niger's international commitments of Niger (*OJRN*, special edition 10 of 29 December 1962), CMN, Anns., Series B, No. 36.

¹⁶⁷Circular No. 79/PRN from the President of the Republic to the Ministers and Secretary of State, dated 26 December 1963, CMN, Anns., Series C, No. 126.

¹⁶⁸Letter No. 64-011/PRN/MAE of 5 February 1964 from the President of the Republic to the Ministers and Secretaries of State, CMN, Anns., Series C, No. 127.

¹⁶⁹Letter No. 16/PRN/MAE of 14 July 1971 from the President of the Republic to the Ministers and Secretaries of State, and to the Commissioners-General for Development, Information, Youth and Sport, CMN, Anns., Series C, No. 128.

¹⁷⁰Letter No. 64-011/PRN/MAE of 5 February 1964 from the President of the Republic to the Ministers and Secretaries of State, CMN, Anns., Series C, No. 127.

In any event, the issuance of full powers to plenipotentiaries by the Minister for Foreign Affairs is only a first step. The plenipotentiary's signature only takes effect once the President of the Republic has ratified the international agreement.

Ratification of international agreements by the President of the Republic

1.2.26. During the period from 6 October 1989¹⁷¹ to 9 August 1991¹⁷², the Republic of Niger was governed by the Constitution of 24 September 1989. Under Article 100 of that Constitution, it is the President of the Republic who “shall negotiate and ratify international treaties and agreements”¹⁷³.

It follows from this provision that the ratification of international commitments is within the exclusive competence of the President of the Republic by decree of the Council of Ministers¹⁷⁴. However, some conventions — which do not include those relating to the delimitation of frontiers — required prior enabling legislation to be adopted by the National Assembly.

1.2.27. This exclusive competence was very clearly recalled in a letter dated 5 February 1964 from the President of the Republic to Ministers and Secretaries of State¹⁷⁵:

“Ministers or senior officials with full powers to negotiate and sign an agreement act on behalf of the President of the Republic, who alone has the authority under the Constitution to negotiate and ratify treaties. The signature of the plenipotentiary only becomes definitive once the agreement has been ratified by the President of the Republic, with the rare exception of less important agreements in so-called ‘simplified form’, the final clauses of which expressly provide for their entry into force upon signature and do not require ratification. The plenipotentiary must further have prior authorization from the President of the Republic to agree to such a provision.”¹⁷⁶

1.2.28. The 1987 Agreement on the demarcation of the frontier does not derogate from the general rule on ratification. The lines proposed and agreed by the experts at one time or another have never been definitive in nature and, in any event, could only have had effect if formalized by a plenipotentiary vested with full powers. The experts of Niger were obviously fully aware of these formal requirements at the time. Thus, in a letter of December 1990 to the Minister of the Interior, the acting Permanent Secretary of the National Frontier Commission of Niger stated that

¹⁷¹Article 1 of Order No. 89-14 of 6 October 1989, promulgating the Constitution (*OJRN*, special edition 3, 25 October 1989) provides that the Basic Law takes effect from the date of the signature of the above-mentioned Order of 6 October 1989.

¹⁷²The Constitution of 24 September 1989, amended by Law No. 91-02 of 24 April 1991, was suspended by Article 2 of Act No. 3 adopted by the National Conference, 9 August 1991.

¹⁷³*Ibid.* [Translation by the Registry.]

¹⁷⁴Letter No. 64-011/PRN/MAE of 5 February 1964 from the President of the Republic to the Ministers and Secretaries of State, CMN, Anns., Series C, No. 127.

¹⁷⁵Article 53 of the Constitution of 8 November 1960 which was then in force provided: “The President of the Republic shall negotiate and ratify international treaties and agreements”. It should be noted that the wording of this provision is identical to that of Article 100 of the Constitution of 24 September 1989 cited above. [Translation by the Registry.]

¹⁷⁶Letter No. 64-011/PRN/MAE of 5 February 1964 from the President of the Republic to the Ministers and Secretaries of State, CMN, Anns., Series C, No. 127.

“a frontier line can only be considered definitive after demarcation, signature of the demarcation report, approval of the line by the Presidents of the two countries, approval by the two assemblies and exchange of instruments of ratification”¹⁷⁷.

1.2.29. Thus, the provisional lines proposed in 1988 and 1991 were never embodied in a legal instrument pursuant to the requirements of Article 7 of the Agreement concluded between Burkina Faso and Niger on the demarcation of their common frontier¹⁷⁸. It could not have been otherwise since it was merely a process of negotiation between the Parties, in the framework of which proposals of various kinds were put forward at different times, and without the negotiators having been vested with full powers. The evolving nature of the process is amply illustrated by the acting Permanent Secretary of the National Frontier Commission of Niger in his previously cited letter of 1990, in which he points out that the representatives of Burkina are wrong “to consider the 1988 line as definitive[,] whereas it is only indicative. They are well aware of this themselves, as they were the first to call the 1986 line into question.”¹⁷⁹

The different provisional lines proposed were part of those negotiations and were never formally embodied in a definitive agreement. Consequently, no decree was to be issued by the President of the Republic of Niger ratifying a non-existent international agreement.

1.2.30. As Professors Patrick Daillier, Mathias Forteau and Alain Pellet quite rightly pointed out in their work on public international law:

“In the course of negotiations, draft texts are submitted for discussion, they give rise to amendments and counter-proposals or both . . . As long as the text is not finalized — that is, until the adoption of the treaty —, all its provisions can be called into question.”¹⁸⁰

¹⁷⁷Letter No. 47/MI/CNF of 17 December 1990 from the acting Permanent Secretary to the Minister of the Interior, CMN, Anns., Series C, No. 131, p. 6.

¹⁷⁸*Ibid.*

¹⁷⁹Letter No. 47/MI/CNF of 17 December 1990 from the acting Permanent Secretary to the Minister of the Interior, CMN, Anns., Series C, No. 131, p. 5.

¹⁸⁰Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th edition, Paris, LGDJ, 2009, p. 145, para. 72. [*Translation by the Registry.*]

CHAPTER II

DELIMITATION OF THE FRONTIER IN THE DISPUTED SECTOR

2.0. As the Republic of Niger described in its Memorial, the part of the frontier line that remains in dispute between the two Parties concerns two areas with very different physical and human characteristics. The first of these, the Téra sector, is 150 km in length. It is a relatively densely populated area, where the movement of human groups has highlighted the problems associated with establishing the frontier. The second, the Say sector, is some 160 km in length. Unlike the Téra sector, it is sparsely populated and has a relatively hostile natural environment (including dense forest, wild animals and parasites). The fact that conditions are so very different from one sector to the other justified their being dealt with separately. We shall take the same approach in this Counter-Memorial and first of all deal with the frontier line in the Téra sector (section 1), then in the Say sector (section 2).

SECTION 1 – THE FRONTIER IN THE TÉRA SECTOR

2.1.1. In presenting a frontier line running in straight lines in its Memorial, Burkina Faso has adopted a reasoning and logic diametrically opposed to those set out by the Republic of Niger in its own Memorial. Niger demonstrated that the line determined by *Arrêté* 2336 of 31 August 1927 replaced by its Erratum 2602/APA of 5 October 1927 was inadequate. It therefore concluded that it was necessary to apply the Agreement of 28 March 1987 — referred to in the Special Agreement — which specifically provides for such a contingency:

“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, . . .”¹⁸¹

In respect of the Téra sector, Niger explained in its Memorial how, in its view, this subsidiary source should be used:

“We have already explained the extent to which 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.”¹⁸²

Niger’s Memorial then examined that part of the frontier by dividing it into three sections: from Tong-Tong to Tao (*a*), from Tao to Bangaré (*b*) and from Bangaré to the boundary of Say *cercle* (*c*).

While following the same course, this Counter-Memorial makes certain small changes and limits the number of situations where the Republic of Niger considers it necessary to deviate from the IGN line to three, namely in the sector comprising the localities of Vibourié, Petelkolé and Oussaltan. At the same time it will show how adopting the straight line claimed by Burkina Faso

¹⁸¹Agreement and Protocol of Agreement of 28 March 1987 between the Revolutionary Government of Burkina Faso and the Government of the Republic of Niger on the demarcation of the frontier between the two countries, MN, Anns., Series A, No. 4.

¹⁸²MN, p. 91, para. 6.16.

would place under the latter's sovereignty a substantial portion of territory which has been regarded as belonging to Niger ever since colonial times.

A. The section from Tong-Tong to Tao

2.1.2. The Erratum determines the boundary between these two points as follows: “[after] the Tong-Tong astronomic marker; this line then turns towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker”.

Burkina Faso claims that in this section the frontier runs in a straight line that is a continuation of the straight line from Mount Doumafende (point 6 in the representation in Cartographic Annex 16 of Burkina Faso's Memorial). It has already been pointed out above¹⁸³ that the other Party's position regarding this point is inconsistent. While the 1927 text states that the frontier line turns at Tong-Tong, the other Party argues that the line in this sector is perfectly straight. It is obviously quite difficult to reconcile this position with the fact that Burkina Faso attaches such importance to adhering strictly to the terms of the 1927 texts. Burkina Faso's representation of this stretch of the frontier is thus necessarily inaccurate both because it does not comply with the text's requirement for the line to turn and because by claiming a straight line in this area, it completely overlooks the importance attached by the French authorities to the *canton* boundaries in the delimitation process in 1926.

2.1.3. The starting point of the boundary in this sector, located at the Tong-Tong astronomic marker, is not disputed by the Parties. Both Burkina Faso's and Niger's Memorials agree on the co-ordinates of this marker which is given as the starting point of the disputed section of the frontier in Article 2 of the Special Agreement of 24 February 2009 (latitude 14° 25' 04" N, longitude 00° 12' 47" E). The point adopted on the IGN map, which is located further east, is therefore inaccurate.

Similarly, the line on the 1960 IGN map (Téra sheet) adopts a shape broadly incurvated to the west for this section, for which there is no justification.

2.1.4. On the other hand, the IGN map does not take as a frontier point the Vibourié marker — whose co-ordinates are 14° 21' 44" N, 0° 16' 25" E — which was installed by mutual agreement of the Parties in the colonial period. As Niger described in its Memorial¹⁸⁴, the origin of this point is a Record of Agreement of 13 April 1935 concluded between Administrator Garnier (Dori *cercle*) and Assistant Deputy Lichtenberger (Téra *cercle*) following the settlement of a dispute over the occupation of cropland:

“Furthermore, in order to prevent any similar further territorial dispute 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 marker. The Ouiboriels marker [Vibourié on the 1960 IGN Téra map] being located on this notional line, on a ridgeline some 10 km to the east of Falagountou and 2 km to the east of Ouiboriels. This delimitation, having been effected on an adversarial basis, has not been disputed by the parties involved.”¹⁸⁵

¹⁸³See above, para. 1.1.27.

¹⁸⁴MN, para. 6.20, pp. 92-93.

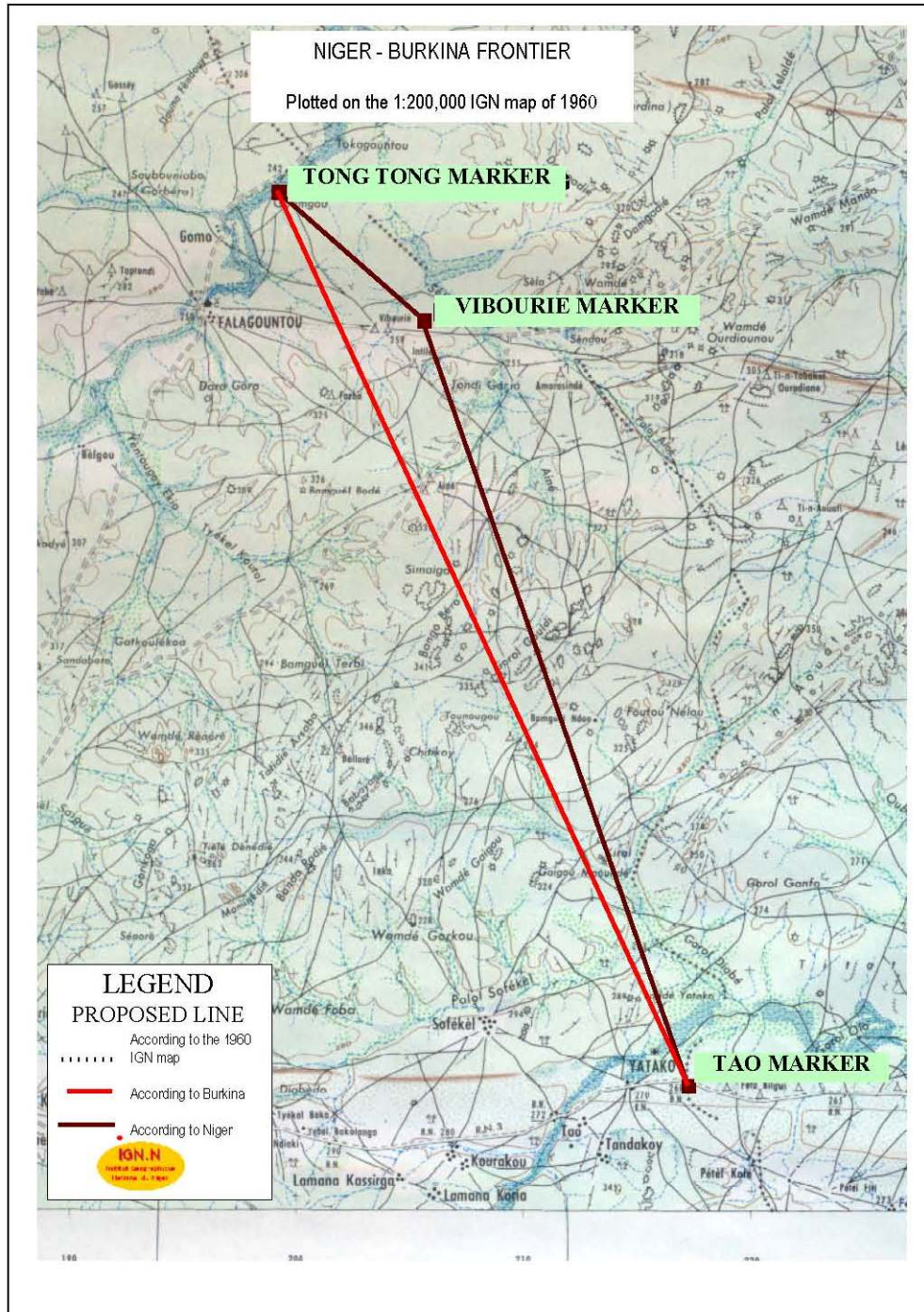
¹⁸⁵Certified copy of 14 April of Record of Agreement of 13 April 1935 between Administrator Garnier (Dori *cercle*) and Deputy Lichtenberger (Téra Subdivision); MN, Anns., Series C, No. 56.

This arrangement had, moreover, been approved by the Governor of Niger¹⁸⁶. As described in the Record of Agreement, from the Tong-Tong astronomic marker the boundary passes through the Vibourié marker, and from there runs in a straight line to join the Tao astronomic marker.

The difference between the lines claimed by Niger and Burkina Faso in this first section takes the form of a triangle whose angles are the Tong-Tong astronomic marker, the Vibourié marker and the Tao astronomic marker. In Niger's view, that triangle, though not claimed by Burkina Faso, is part of its territory. On the other hand, the part to the east of the triangle was within the boundaries of Téra Subdivision in the colonial period. That is still the case today and that area comprises Niger villages such as Amérasindé, Séla, Ainé and Haini.

¹⁸⁶OLT 693 AP of 17 May 1935 (see Description of Tillabéry *cercle*; MN Anns., Series C, No. 65).

Figure 7: Triangle formed by the Tong-Tong astronomic marker, Vibourié marker and Tao astronomic marker



B. The section from the Tao astronomic marker to Bangaré

2.1.5. After the Tao astronomic marker, the differences in the way the Parties to the proceedings approach the frontier line become more marked. Keeping to its straight-line theory, Burkina Faso identifies only one section from the Tao astronomic marker to the village of Bossébangou. For its part, the Republic of Niger, in keeping with its position of following the

boundaries of the *cantons* — a position largely reflected by the IGN map — will break this section down into two stretches, the first from the Tao marker to the village of Bangaré, the second from there to the boundary of the Say *cercle*.

2.1.6. The starting point of the first stretch is located at the Tao astronomic marker. The Tao astronomic marker, according to the IGN letter of 23 June 1988¹⁸⁷, is at the following co-ordinates, recorded by Captain Nevière in 1927: latitude 14° 03' 13" N, longitude 0° 22' 53" E. It was at this location that the frontier marker was installed by the two Parties in the course of the work of the Joint Technical Commission on Demarcation. The IGN line passes through this point. The co-ordinates of this marker, measured by GPS by Niger, are: 14° 03' 02.2" N, 00° 22' 52.1" E¹⁸⁸.

From this frontier marker, the line claimed by Niger in this section follows the IGN line to Bangaré, with the exception of two localities: Petelkolé and Oussaltane.

Petelkolé

2.1.7. The co-ordinates of this village are 14° 00' 35.7" N; 00° 24' 52.6" E. The data on the 1960 IGN map for the village of Petelkolé are contradictory¹⁸⁹. On the Sebba sheet, Petelkolé is on the frontier line, while on the Téra sheet, it is slightly to the west of the line. In any event, this locality belonged to Niger in the colonial period, as administrative information from that period attests. Thus, it was already regarded as belonging to Niger at the time of the Roser/Boyer Agreement of April 1932, which locates the village of Petelkolé to the east of the boundary and the Féto Karkalé pool to the west¹⁹⁰. Similarly, in the 1953 report recording the tour conducted by Administrator Lacroix of Tillabéry *cercle* to survey the boundary between the two colonies in this sector, we find the following reference: “Rimaïbé having established the permanent hamlets of Petelkarkalé and Petelkolé, between which the boundary passes”¹⁹¹. Petelkolé is mentioned as belonging to Diagourou *canton* on the sketch-map of the *canton* drawn up in 1954¹⁹². The village remained under Niger’s authority after independence; for administrative purposes it is attached to the rural *commune* of Bankilaré; it has a population of 2,654.

In any event, the frontier line has to deviate slightly to the west from the IGN line in the vicinity of Petelkolé in order to include the frontier post between Niger and Burkina Faso, which is situated entirely within Niger territory. The site of the post was chosen by the bilateral (Burkina-Niger) Committee on the identification of sites for the installation of juxtaposed control posts on the Ouagadougou-Dori-Téra-Niamey road, which concluded on 9 June 2006 that:

¹⁸⁷Letter DEC/934 from IGN France to the Secretary-General of the Niger Ministry of State for Finance, dated 23 June 1988, MN, Anns., Series C, No. 105.

¹⁸⁸The co-ordinates of this marker measured by GPS by Burkina Faso are: 14° 03' 04.7" N, 00° 22' 51.8" E (MBF, para. 4.16).

¹⁸⁹Map of West Africa at 1:200,000: Republic of Mali, Republic of Niger, Republic of Upper Volta, Téra, sheet ND31 XIII, drawn and published by the *Institut géographique national*, Paris (West Africa Branch, Dakar), First Edition July 1960, reprinted September 1969, MN, Anns., Series D, No. 23 (Téra sheet), and, Map of West Africa at 1:200,000: Republic of Niger, Republic of Upper Volta, Sebba, sheet DN 31 VII, drawn and published by the Geographical Department, Dakar, 1960, MN, Anns., Series D, No. 24 (Sebba sheet).

¹⁹⁰Letter No. 112 and Tour Report from Civil Service Deputy Roser, Acting Commander of Dori *cercle*, to the Governor of Upper Volta (Political Office), dated 10 April 1932, MN Anns., Series C, No. 45. The Tour Report of the Administrator of Dori *cercle* of 31 March 1931 noted: “the village of Pétélkalkallé (or FétoKarkalé) is located on the border of the two *cercles* and is not defined by the delimitation, but will nonetheless remain in Dori, as the boundary passes approximately 1 km east of this village” (MN, Anns., Series C, No. 41).

¹⁹¹Report of a tour conducted from 16 to 23 November 1953 by Deputy-Administrator Lacroix (Tillabéry *cercle*), dated 24 December 1953, MN, Anns., Series C, No. 79.

¹⁹²Diagourou *canton*: scale 1:250,000, 1954, MN, Anns., Series D, No. 21 (appended to the Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954).

“After analyzing the information on the basis of the above-mentioned criteria, two sites met the conditions for the installation of juxtaposed control posts. These were Petelkolé in the territory of Niger and Seynotyondi in Burkina, both of which were situated approximately two kilometres from the frontier.

By mutual agreement, and on account of the size of the village of Petelkolé in relation to its socio-economic infrastructure, the experts of the two States, assisted by the Commission of the WAEMU and LGA, adopted the village of Petelkolé (Niger) as the site for the installation of juxtaposed control posts on the Ouagadougou-Dori-Téra-Niamey road. Accordingly, they recommended that the competent authorities of the two States should endorse this decision.”¹⁹³

That decision was not called into question. The co-ordinates of the post are: 14° 00' 10.4" N, 00° 24' 34.4" E. The frontier point is situated slightly to the west, at the endpoint of the new stretch of the Téra-Dori road constructed by Niger (co-ordinates: 14° 00' 04.2" N, 00° 24' 16.3" E).

From this point, the frontier passes through the point with co-ordinates 13° 59' 03" N, 00° 25' 12" E, before returning to the IGN line at the point with co-ordinates 13° 58' 38.9" N, 00° 26' 03.5" E, leaving the Feto Karkalé pool in Burkina Faso, as noted above¹⁹⁴. The frontier then follows the IGN line as far as the discontinuous crosses at the level of Oussaltane at the point with co-ordinates 13° 55' 54" N, 00° 28' 21" E.

Oussaltane or Ousaltan (geographical co-ordinates: 13° 54' 41.4" N, 00° 27' 34.8" E)

2.1.8. Oussaltan straddles the boundary on Delbos' sketch-map of June 1927¹⁹⁵. Commander Mangant, Administrator of Dori *cercle*, noted in his report of 7 July 1930 that members of certain tribes “said that Oussaltane where they were settled belonged to Téra Subdivision”¹⁹⁶. The Roser/Boyer Agreement of April 1932 likewise regards Oussaltan as belonging to Niger. According to that agreement, the boundary passes close: “to Houssaltane, which it leaves to the east, to Petelkarkelé, which it leaves to the west, to Petelkolé which it leaves to the east”¹⁹⁷.

¹⁹³Report of the bilateral (Burkina-Niger) Committee on the identification of sites for the installation of juxtaposed control posts on the Ouagadougou-Dori-Téra-Niamey road, 9 June 2006, CMN, Anns., Series A, No. 24, p. 5. The abbreviations used in the document are: WAEMU (West African Economic and Monetary Union) and LGA (Liptako-Gourma Authority), two sub-regional organizations for integration.

¹⁹⁴See the beginning of this paragraph.

¹⁹⁵Sketch-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*, MN, Anns., Series C, No. 14.

¹⁹⁶Report 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, MN, Anns., Series C, No. 38, p. 11.

¹⁹⁷Letter 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). Certified copy of 15 September 1943, MN, Anns., Series C, No. 45, p. 6.

In 1935, the administrator in charge of Téra subdivision confirmed that the encampment of Oussaltan “is in the territory of Téra”¹⁹⁸. Oussaltan is indicated as a “dependent settlement [*lougan*] of Logomaten”¹⁹⁹ Kel Timijirt in the directory of villages of Téra Subdivision of 1941²⁰⁰. The Head of Téra Subdivision, in a telegram/letter of 11 July 1951 to Tillabéry *cercle*²⁰¹, uses exactly the same wording as the Roser/Boyer Agreement of April 1932. The region is still administered by Niger today. It is an encampment, or more precisely a group of encampments, of the Kel Tamajirt tribe, of the Tinguéréguédesch *groupement* of the rural municipality of Bankilaré. There are an estimated 296 inhabitants, the majority of whom are of Niger nationality, and they regularly pay their taxes in Bankilaré.

The frontier line then skirts the hamlet of Oussaltane, passing through the point with co-ordinates 13° 54' 42" N, 00° 26' 53.3" E, then through the point with co-ordinates 13° 53' 30" N, 00° 28' 07" E, before returning to the IGN line at the point with co-ordinates 13° 53' 24" N, 00° 29' 58" E, which it then follows, leaving Bangaré to the north.

Bangaré

2.1.9. Bangaré has been regarded as a Niger village since colonial times. As the Commander of Dori *cercle* wrote in 1932, “the large village of Bangaré . . . has always belonged to Téra *canton*”²⁰². Under the name of Bankaré, it appeared in the list of villages of Diagourou *canton* in 1927²⁰³, 1933²⁰⁴ and 1948²⁰⁵, and under the name of Bangaré in 1954²⁰⁶ and 1959²⁰⁷. The village is indicated on the sketch-map of the *canton* prepared in 1954²⁰⁸. It is mentioned in the census report

¹⁹⁸Letter No. 161 from the Head of Téra Subdivision to Tillabéry *cercle* dated 24 May 1935, MN, Anns., Series C, No. 60. The copy of this document annexed to Niger’s Memorial was illegible; it is therefore reproduced again under the same annex number in this Counter-Memorial.

¹⁹⁹See the Record of Agreement of 2 February 1927 — which mentions the Logomaten as a *canton* of Tillabéry — between Mr. Brévié, Governor of the Colony of Niger, and Mr. Lefilliatre, Inspector of Administrative Affairs, representative of the Governor of Upper Volta, Téra, 2 February 1927; MN, Anns., Series C, No. 7.

²⁰⁰Directory of villages of Téra Subdivision, villages of Kel Tamared, Kel Timijirt, Logomaten Assadek, Logomaten Allaban, undated, 1941, MN, Anns., Series C, No. 64, p. 26.

²⁰¹Official telegram/letter No. 70 from the Head of Téra Subdivision to Tillabéry *cercle* dated 11 July 1951, inc. reproduction on a scale of 1:500,000 of a sketch-map by Mr. Delbos, MN, Anns., Series C, No. 73.

²⁰²Letter 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). Certified copy of 15 September 1943, MN, Anns., Series C, No. 45, p. 6.

²⁰³Extract from the “Directory of localities” 1927: villages of the *canton* of independent Peulhs — Diagourou (Dori *cercle*), CMN, Anns., Series C, No. 109. At that date, Diagourou *canton* still belonged to Dori *cercle*.

²⁰⁴List of villages of Téra Subdivision — Diagourou *canton*, 6 July 1933, CMN, Anns., Series C, No. 110.

²⁰⁵List of Niger *cantons* and villages forwarded to the Minister for Overseas France (Diagourou, Tamou and Torodi *cantons*), undated, 1948, MN, Anns., Series C, No. 71.

²⁰⁶List of villages of Téra Subdivision at 1 January 1954 — Diagourou *canton*, CMN, Anns., Series C, No. 117, and list of villages of Téra Subdivision at 10 August 1954 (extract No. 1), CMN, Anns., Series C, No. 118.

²⁰⁷List of villages of Diagourou *canton*, 17 April 1959, CMN, Anns., Series C, No. 125.

²⁰⁸Sketch-map of Diagourou *canton*: scale 1:250,000, MN, Anns., Series D, No. 21 (appended to the Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954).

for Diagourou *canton* written by the Head of Téra Subdivision, dated 10 August 1954²⁰⁹, and is appended to that report²¹⁰. Bangaré appears in the list of villages voting in Niger for the National Assembly in 1956²¹¹.

C. The section from Bangaré to the boundary of Say *cercle*

2.1.10. This final section of the frontier follows the length of the IGN line, until it reaches the point which in colonial times formed the boundary of Say *cercle* (tripoint between the *cercles* of Tillabéry, Dori and Say), that is the point with co-ordinates 13° 29' 08" N, 01° 01' 00" E²¹².

2.1.11. It leaves to Niger the villages that lie between the IGN line and the straight line claimed by Burkina Faso, which, due to its arbitrary nature, blindly traverses areas that belonged to Niger during the colonial period and have done so ever since; that, moreover, is why that line could not be accepted as a compromise in 1988 and in 1991. We shall give some examples:

Beina (Beyna)

2.1.12. This village was indicated as being in Niger on the 1927 sketch-map by Prudhon²¹³. It is one of the villages included in the list of localities of Téra Subdivision in 1952²¹⁴, 1954²¹⁵ and 1959²¹⁶. It was shown as being linked to the village of Mamassirou on the sketch-map of Diagourou *canton*²¹⁷ appended to the census report on the *canton* prepared in Téra on 10 August 1954 by the Head of Téra Subdivision²¹⁸. There is a data sheet entitled “Beina astronomic station”, Niger Territory, Téra region — updated on 20 February 1957²¹⁹. This village again appears in the list of localities of Diagourou *canton* in 1959²²⁰. It was indicated in the list of polling stations for the elections to the National Assembly in 1956²²¹.

²⁰⁹Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954, MN, Anns., Series C, No. 84. Referred to in the list of four recently formed villages as follows: “the fourth, Bangaré, was created by Mr. Garat in 1945”.

²¹⁰“Bangaré”: appended to the Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954, CMN, Anns., Series C, No. 120.

²¹¹Arrêté No. 2794 establishing polling stations and districts for the elections to the National Assembly (*Official Journal of Niger*, No. 304, 1 January 1956), CMN, Anns., Series B, No. 35.

²¹²See above, Figure 5: Dori/Tillabéry/Say tripoint (extract from MN, Anns, Series D, No. 13), p. 32.

²¹³Tillabéry *cercle*, 1:200,000 sketch-map prepared by Administrator Prudon, June 1927, MN, Anns., Series D, No. 3.

²¹⁴Census of Téra *canton*, 10 July 1952, CMN, Anns., Series C., No. 115.

²¹⁵List of villages of Téra Subdivision at 1 January 1954, Téra *canton*, CMN, Anns., Series C. No. 116.

²¹⁶List of villages of Téra *canton*, 17 April 1959, CMN, Anns., Series C, No. 124.

²¹⁷Diagourou *canton*: scale 1:250,000, 1954, MN, Anns., Series D, No.21.

²¹⁸Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954, MN, Anns., Series C, No. 84.

²¹⁹“Beina astronomic station” data sheet, 20 February 1957, CMN, Anns., Series C, No. 123.

²²⁰List of villages of Téra *canton*, 17 April 1959, CMN, Anns., Series C, No. 124.

²²¹Arrêté No. 2794 establishing polling stations and districts for the elections to the National Assembly (*Official Journal of Niger*, No. 304, 1 January 1956), CMN, Anns., Series B, No. 35.

Mamassirou

2.1.13. This village was regarded as belonging to Niger by the Roser/Boyer Agreement of April 1932²²². It is part of Diagourou *canton* according to the census lists prepared in 1954²²³ and 1959²²⁴. It was referred to as follows in the list of four recently formed villages in the report by the Head of Téra Subdivision on the census for Diagourou *canton*, dated 10 August 1954: “[t]he third [village] Mamassirou Beina . . . was [founded] by a number of Gourmantché families some twenty years ago”²²⁵. This village was the subject of an annex to the report²²⁶. It is shown on the 1954 sketch-map of Diagourou *canton* appended to the same report²²⁷. It appears in the list of polling stations for the elections to the National Assembly of 1956²²⁸.

Ouro Gaobe

2.1.14. This locality was referred to as follows in the list of four recently formed villages in the census report for Diagourou *canton* prepared by the Head of Téra Subdivision, dated 10 August 1954: Ouryaghabe-Taka “formed some twenty years ago by the Rimaibé of Yagha”²²⁹.

Yolo

2.1.15. This village was indicated in all the lists of villages of Téra Subdivision, Diagourou *canton*, under the name of Yolo (1927²³⁰, 1933²³¹, 1948²³², 1954²³³), and then Yélo (1959²³⁴). It appears on the sketch-map of this *canton* drawn in 1954²³⁵. It was also mentioned in the sheets appended to the report by the Head of Téra Subdivision on the census of Diagourou *canton*,

²²²Letter 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). Certified copy of 15 September 1943, MN, Anns., Series C, No. 45, p. 6.

²²³List of villages of Téra Subdivision at 1 January 1954 – Diagourou *canton*, CMN, Anns., Series C, No. 117, and list of villages of Téra Subdivision at 10 August 1954 (extract No. 1), CMN, Anns., Series C, No. 118.

²²⁴List of villages of Diagourou *canton*, 17 April 1959, CMN, Anns., Series C, No. 125.

²²⁵Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954, MN, Anns., Series C, No. 84.

²²⁶“Mamassirou Beyna”: appended to the Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954, CMN, Anns., Series C, No. 121.

²²⁷Diagourou *canton*: scale 1:250,000, 1954, MN, Anns., Series D, No. 21.

²²⁸Arrêté No. 2794 establishing polling stations and districts for the elections to the National Assembly (*Official Journal of Niger*, No. 304, 1 January 1956), CMN, Anns., Series B, No. 35.

²²⁹Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954, MN, Anns., Series C, No. 84.

²³⁰Extract from the “Directory of localities” 1927: villages of the *canton* of independent Peulhs — Diagourou (Dori *cercle*), CMN, Anns., Series C, No. 109.

²³¹List of villages of Téra Subdivision — Diagourou *canton*, 6 July 1933, CMN, Anns., Series C, No. 110.

²³²List of Niger *cantons* and villages forwarded to the Minister for Overseas France (Diagourou, Tamou and Torodi *cantons*), undated, 1948, MN, Anns., Series C, No. 71.

²³³List of villages of Téra Subdivision at 1 January 1954 — Diagourou *canton*, CMN, Anns., Series C, No. 117, and List of villages of Téra Subdivision at 10 August 1954 (extract No. 2), CMN, Anns., Series C, No. 119.

²³⁴List of villages of Diagourou *canton*, 17 April 1959, CMN, Anns., Series C, No. 125.

²³⁵Diagourou *canton*: scale 1:250,000, 1954, MN, Anns., Series D, No. 21.

prepared on 10 August 1954²³⁶. This village appears in the list of polling stations for the elections to the National Assembly of 1956²³⁷.

As can be seen from the above, the frontier line claimed by Niger basically follows the IGN line in the stretch that goes from Tao to the tripoint between the *cercles* of Dori, Tillabéry and Say. It only deviates from that line when the principle of *uti possidetis* calls for it to do so.

[Figure 8 was to be included here but is missing from the original text.]

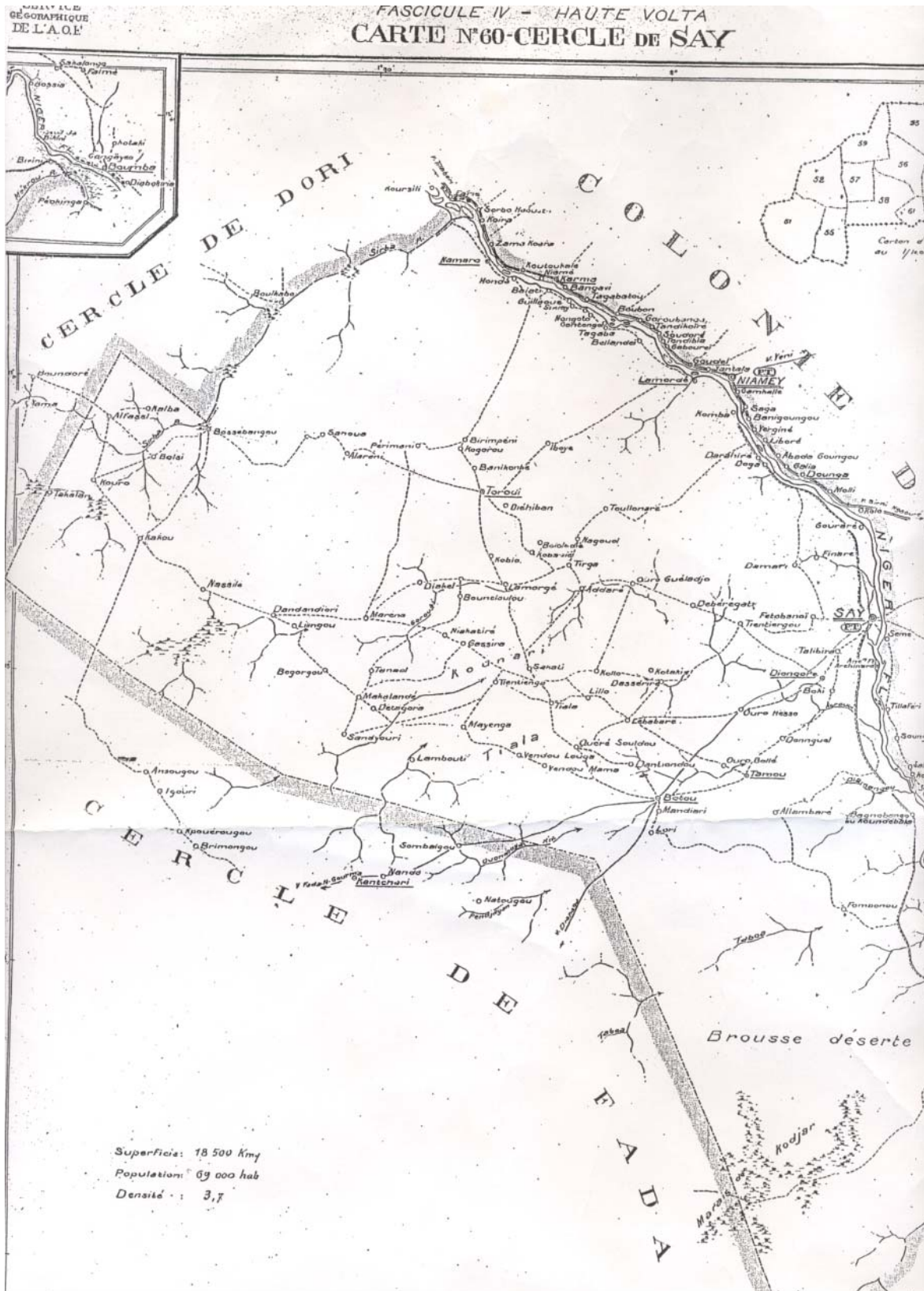
SECTION 2 – THE FRONTIER IN THE SAY SECTOR

2.2.1. Reading the Memorials filed by the two Parties in the context of the present proceedings confirms that, as was the case for the Téra sector, they have divergent views as to the course of the frontier in the Say sector. This is true of both the Bossébangou region (A) and the region of the “salient of four villages” (B), as well as the last section of the frontier, which goes from the point where it leaves the “salient” to the start of the Botou bend (C). We shall see that the arguments put forward by the other Party to justify the frontier line it seeks to claim in this sector are problematic for each of these sections. They would thus appear unable to refute the validity of the line claimed by the Republic of Niger in this area. Over the section of the frontier that goes from the point which was formerly the “tripoint” between the *cercles* of Dori, Tillabéry and Say to the start of the Botou bend, that line follows what were the traditional boundaries of Say *cercle*, as handed down to the Colony of Niger in 1926. The only change made to it is the one resulting from the agreement between the colonial authorities to fix the frontier point separating the two colonies on the Niamey-Ouagadougou road. The effect of this was to replace the traditional boundary which consisted of one straight line with a boundary in two straight-line segments in the south of Say *cercle*.

²³⁶“Yollo Beyna”, “Yollo Djinkargou”, “Yollo Hamidou” and “Yollotaka or Taka”: appended to the Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954, CMN, Anns., Series C, No. 122.

²³⁷*Arrêté* No. 2794 establishing polling stations and districts for the elections to the National Assembly (*Official Journal of Niger*, No. 304, 1 January 1956), CMN, Anns., Series B, No. 35.

Figure 9: The traditional boundaries of Say cercle in 1926
(MN, Anns., Series D, No. 6)



A. The Bossébangou region

2.2.2. According to the Erratum of 5 October 1927, after the Tao marker, the boundary between Upper Volta and Niger should “reach . . . the River Sirba at Bossébangou”. The Republic of Niger explained in detail in its Memorial how this reference in the Erratum to a boundary passing through the locality of Bossébangou was marked by error²³⁸. On this point the Erratum did not correct the text of the *Arrêté* it replaced, as it retained in its description of the inter-colonial boundary some of the internal boundaries of Say *cercle* — which had no place to be there²³⁹. Furthermore, this poses a more general problem regarding the conformity of the Erratum — and of the *Arrêté* before it — with the text of the Decree of 28 December 1926, which it was supposed to implement. As the Republic of Niger will show in the following pages, the consequence of this is to deprive the Erratum, in respect of this specific point, of any legal basis, and thus also of any effect²⁴⁰.

2.2.3. In its Memorial Burkina Faso strongly contested this position, which had been argued previously by Niger²⁴¹, according to which the Erratum was erroneous in running the inter-colonial boundary through Bossébangou. The other Party offers two main pieces of evidence in this connection: the first relating to the actual text of the Erratum, and the second concerning the lack of relevance of the representation of the inter-colonial boundary on the 1927 map, which supports Niger’s approach. We shall now look at them more closely.

2.2.4. In its written proceedings, Burkina Faso first of all seeks to refute the argument whereby the Erratum of 5 October 1927 retained the description of some of the internal boundaries of Say *cercle* and was, as a result, tainted by error. The other Party offers the following argument on this subject:

“while the *Arrêté* of 31 August 1927 did effectively confuse the boundaries of the *cercles* with those of the colonies, that was precisely not the case with the Erratum, which was adopted with a view to describing *only* the inter-colonial boundary — without any reference to the *cercle* boundaries — and further clarifying its course; moreover, the text of the Erratum is unambiguous in this regard, since it begins with the following statement: ‘The boundaries of the Colonies of Niger and Upper Volta are determined as follows . . .’; it is thus not the boundaries of the *cercles* that it describes.”²⁴²

This is merely begging the question: since its purpose was to correct the description of the inter-colonial boundary given in the *Arrêté* of 31 August 1927, which mistakenly included the internal boundaries of the *cercles* of only one of the colonies concerned, the Erratum *ipso facto* could not perpetuate this error, not even partly. Admittedly, the reasoning is rather formalistic. And the very logic of Burkina Faso’s arguments on this point is contradicted by the texts. The other Party in fact believes it can find confirmation of the validity of its theory in the actual text of the Erratum, which is “unambiguous in this regard, since it begins with the following statement: ‘The boundaries of the Colonies of Niger and Upper Volta are determined as follows . . .’”²⁴³. This

²³⁸MN, paras. 7.14 *et seq.*

²³⁹MN, para. 7.16.

²⁴⁰See below, paras. 2.2.9 and 2.2.10.

²⁴¹Report of the extraordinary meeting of the Joint Technical Commission on Demarcation, Niamey, 15 May 1990, Ann. MBF 85.

²⁴²MBF, para. 4.95.

²⁴³*Ibid.*

leads Burkina Faso to conclude very confidently that “it is thus not the boundaries of the *cercles* that [the Erratum] describes”²⁴⁴. Yet exactly the same words appear at the beginning of the first article of the *Arrêté* of 31 August, which was undoubtedly marked by error, and which the Erratum was supposed to correct. This is sufficient proof of the inanity of Burkina Faso’s argument on this point: a mere declaration of intent does not mean that the intent was automatically carried out. It is not because the purpose of the Erratum of 5 October 1927 was to correct the *Arrêté* of 31 August of the same year by removing the description of the internal boundaries of the *cercles* of only one of the colonies concerned that it did in fact fully achieve that purpose. On the contrary, the error on this point persisted in at least one fragment of the text: that which has the inter-colonial boundary run to Bossébangou.

2.2.5. Niger showed in its Memorial that a number of documents from the colonial period fully confirmed the fact that the locality of Bossébangou was not regarded as bordering on the Colony of Upper Volta. A number of descriptions by the colonial administrators of the inter-colonial boundary in this sector clearly bear this out²⁴⁵. Suffice it to recall in this regard the description given by Administrator Delbos in a letter from 1927: “The frontier . . . runs . . . , as my letter 438 states, southward as far as Nababori, reaching the Say *cercle* to the west of Alfassi and not at Bossébangou, which is further up.”²⁴⁶ This insistence is all the more striking in so far as it comes from the Commander of Dori *cercle*, who refutes the hypothesis of an inter-colonial boundary passing through the locality of Bossébangou, whereas in fact such a line could have effectively increased the land base of the *cercle* of which he was in charge. As the Republic of Niger showed in its Memorial, this is in any event far from being an isolated description of the boundary in this sector, and it is given by the administrators of both of the colonies concerned²⁴⁷.

2.2.6. The fact that the village of Bossébangou was not regarded as bordering on the Colony of Upper Volta is also confirmed by a number of cartographic representations, including the sketch-map entitled “new frontier between Upper Volta and Niger (according to the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927)”²⁴⁸. Burkina Faso focuses its criticisms on this document. Thus, it notes “the gross misinterpretations of the text of the *Arrêté* and its Erratum” contained in that sketch-map²⁴⁹ and believes that if the boundary lines shown on it in this sector were to be considered accurate, “the 1927 sketch-map would be deemed to replace the 1927 *Arrêté* and its Erratum”²⁵⁰. “[T]he sketch-map would then be recognized as a territorial ‘title’”, which would be “legally . . . impossible”, since that sketch-map cannot be regarded as being appended to an official text it is said to illustrate or as being a reflection of the will of the State concerned²⁵¹.

²⁴⁴*Ibid.*

²⁴⁵MN, paras. 7.19 and 7.20.

²⁴⁶Letter No. 731 dated 17 December 1927; MN, Anns., Series C, No. 20, emphasis added. See also on the subject MN, para. 7.19.

²⁴⁷See MN, para. 7.19.

²⁴⁸French West Africa: new frontier between Upper Volta and Niger (according to the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927), scale 1:1,000,000, MN, Anns., Series D, No. 13. See also MN para. 7.17 and above para. 1.1.21 on this subject.

²⁴⁹MBF, para. 4.93.

²⁵⁰MBF, para. 4.95.

²⁵¹MBF, para. 4.95.

2.2.7. This line of reasoning prompts two orders of observation. Firstly, the Republic of Niger has no intention of claiming the “new frontier” map of 1927 as a “territorial title” in itself. There is absolutely no question of “replacing” the *Arrêté* and its Erratum with this document. It needs only to be recalled in this connection that new evidence has shown beyond doubt that this map and the official texts are more closely connected than originally thought²⁵². There is no doubt that the representations of the inter-colonial boundaries given on it therefore carry particular weight. This is especially true in respect of the Bossébangou sector — which brings us on to the second order of observation — as this is a far from isolated instance of the inter-colonial boundary being represented as *not passing through* that locality on the maps and sketch-maps of the time. Thus Niger listed no less than six other maps prepared between 1927 and 1936 which feature a line identical to the one on the “new frontier” map of 1927²⁵³. It seems particularly noteworthy in this regard that the traditional inter-colonial boundary in this sector continued to be represented on various maps *despite the existence of an official text containing statements to the contrary*.

2.2.8. In other words, it is not because the “new frontier” map constitutes a title in itself that it is of particular importance for the question of the frontier line in the Bossébangou sector, but because it is a faithful reflection of a situation of which all the colonial administrators were fully aware at the time, namely that Bossébangou was not a locality bordering on Upper Volta. The fact that the Erratum of 5 October 1927 contains an erroneous description of this section of the inter-colonial boundary, by having it reach the village of Bossébangou, is thus corroborated by a wide range of documents.

2.2.9. It should further be noted, in this regard, that by using these terms to describe the course of the inter-colonial boundary in this area, the Erratum of 5 October 1927 contradicts the text of the Decree of 28 December 1926, which it was nevertheless supposed to implement. In its own words, the 1926 Decree²⁵⁴ detached Say *cercle* from the Colony of Upper Volta and incorporated it into Niger, and provided that the traditional boundaries of the *cercle* should be changed in only one respect:

“The following territories, which are currently part of the Colony of Upper Volta, shall be incorporated in the Colony of Niger with effect from 1 January 1927:

1. Say *cercle*, with the exception of Gourmantché Botou canton.”²⁵⁵

Thus, the only change to the former boundaries of Say *cercle* provided for by the text of the Decree of December 1926 concerns Gourmantché Botou *canton* — and nothing else.

²⁵²See MN, para. 5.7 and above, para. 1.1.20.

²⁵³MN, para. 7.17. All these maps are reproduced in the annexes of the Republic of Niger’s Memorial (MN, Anns., Series D, Nos. 10, 11, 14, 15, 16 and 17).

²⁵⁴Decree of 28 December 1926 transferring the administrative centre of the Colony of Niger and providing for territorial changes in French West Africa, and *Arrêté* of 21 January 1927 promulgating that Decree (*OJFWA*, No. 1167, undated, 1927, p. 92), MN, Anns., Series B, No. 23.

²⁵⁵Report of the Minister for the Colonies to the President of the French Republic concerning the treatment of the administrative centre of the Colony of Niger and territorial changes in French West Africa, *OJFR*, 5 January 1927, p. 198, MN, Anns., Series B, No. 24; emphasis added.

2.2.10. In describing the inter-colonial boundary as running as far as the village of Bossébangou, and thus effectively lopping off a portion of the area of Say *cercle* in the south — removing it from Niger and giving it to Upper Volta, the Erratum of 5 October 1927 blatantly contradicts the Decree of 28 December 1926, which both Parties recognize as being of fundamental importance in this dispute²⁵⁶. Consequently, in respect of this specific point, the Erratum is deprived of any legal basis — and thus also legal effect — since in the hierarchy of French administrative acts a decree comes above an *arrêté*²⁵⁷. According to the legality principle, as an act implementing a decree, an *arrêté* cannot contain statements contrary to the provisions of that decree²⁵⁸. This factor cannot be ignored by the Court since, as the Chamber noted in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*,

“[t]he line which the Chamber is required to determine as being that which existed in 1959-1960, was at that time merely the administrative boundary dividing two former French colonies, called territoires d’outre-mer from 1946; as such it had to be defined not according to international law, *but according to the French legislation which was applicable to such territoires*”²⁵⁹.

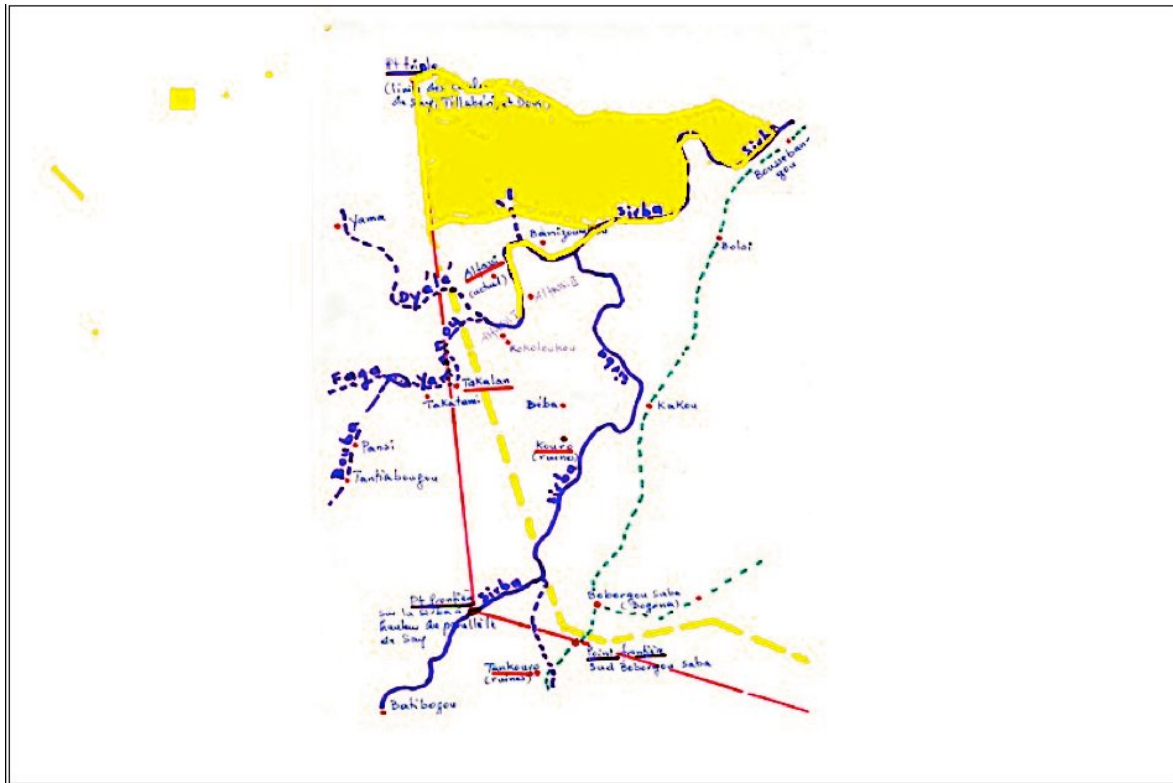
²⁵⁶See above, para. 0.8.

²⁵⁷As an author of the time wrote, “[i]n the French colonies, pursuant to a series of special texts and principles, the President of the Republic has far broader powers. There, the President can most often legislate by simple decree whenever the legislature has not passed a law made expressly for the colonies, or when the law, in formal terms, has not been declared to be applicable to them.” (Adhémar Esmein, *Eléments de droit constitutionnel*, Paris, Sirey, 1921, Vol. 2, pp. 85-86; CMN, Anns., Series E, No. 1.) [*Translation by the Registry.*] Accordingly, the Presidential Decree of 1926 has the equivalent force of law.

²⁵⁸See Félix Moreau, *Précis élémentaire de droit constitutionnel*, 9th edition, Paris, Sirey 1921, p. 351, para. 347; CMN, Anns., Series E, No. 2.

²⁵⁹*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, 22 December 1986, *I.C.J. Reports 1986*, p. 568, para. 29; emphasis added.

Figure 11: Sketch-map illustrating the amputated part of Say *cercle* (reproduction from MN, Anns., Series D, No. 29)



As the part of the Erratum of 5 October 1927 that describes the boundary between the colonies of Upper Volta and Niger as passing through the village of Bossébangou has no legal effect under the regulatory regime applicable at the time the text was adopted, it evidently cannot be regarded as part of the “colonial heritage” which purportedly binds the Parties to these proceedings for that portion of the frontier. Burkina Faso’s arguments on this point thus prove completely unfounded.

B. The “salient of four villages”

2.2.11. There are other problems with the theory put forward by Burkina Faso to justify the line it claims from Bossébangou; these will only be discussed in the alternative, since, as has already been amply recalled, the Republic of Niger rejects the starting point of this entire line of reasoning whereby the frontier passes through the village of Bossébangou. Indeed, the interpretation developed by the other Party to determine the course of the line between this village and the point of the “salient of four villages”, from where the frontier descends southwards in a straight line, is highly speculative and not based on any supporting evidence. According to Burkina Faso, the interpretation of the text of the 1927 Erratum whereby the inter-colonial boundary “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” invites the following conclusion: “the frontier cannot follow any course here other than that followed by the right bank of the River Sirba, from Bossébangou to its source”²⁶⁰. This is said to follow from the fact that:

“while the text states that the frontier, coming from the north-west, ‘reaches the River Sirba’ at Bossébangou, there is not the least indication that it ‘leaves’ the River Sirba before it starts to ‘turn back up’. This must mean that the frontier follows the course of the river until it starts to ‘turn back up’. The frontier thus also logically follows the right bank of the River Sirba. In this connection, Burkina has already pointed out . . . that the point where the frontier reaches the River Sirba at Bossébangou, point P, is situated on the right bank of the River Sirba. Consequently, as there is no indication that the frontier turns back on itself to reach the median line of the river, it must be understood that it necessarily stays on and follows the right bank up to the point where it again crosses the river to start ‘turning back up’ towards the north-west.”²⁶¹

2.2.12. The other Party tries to justify the frontier line running along the right bank of the Sirba by an exegesis of the text of the Erratum, to which it attempts to give a scientific gloss²⁶². In particular, Burkina Faso makes the point that the 1927 text

“explicitly stated . . . that the frontier, after reaching the point from which it begins to ‘turn back up’, produces a salient that includes part of the left bank of the River Sirba in Niger. This information suggests *a contrario* that before the point from which it ‘turns back up’, the frontier does not leave the left bank of the Sirba to Niger.”²⁶³

It is indeed very hard to see how this “*a contrario*” reasoning — which as we know should be used with great caution — could invite the conclusion that is drawn with such authority by the other Party. Even supposing we were to accept it, this “gloss” of the text of the Erratum by no means leads to the conclusion that the frontier between the two States should run along the right bank of the River Sirba. If we were to conclude that the wording of the Erratum “suggests *a contrario* that before the point from which it ‘turns back up’, the frontier does not leave the left bank of the Sirba to Niger”, why would that necessarily imply a frontier line that runs along the right bank of that river, rather than following its median line or thalweg? There is absolutely no evidence to justify such a conclusion, which appears to be dictated only by the other Party’s desire to push its territorial claims as far as possible. On the contrary, such a conclusion very clearly runs counter to State practice, whereby it is only exceptional for States to agree to a frontier on the bank of a river. It therefore seems quite odd to infer from a text’s silence that a frontier line runs along the bank of a river when there is absolutely nothing to justify it — either in the text itself or in State practice.

2.2.13. In any case, Burkina Faso’s arguments in respect of this entire section of the frontier encounter a major difficulty. In developing its arguments whereby the boundary passes through the village of Bossébangou, the other Party in fact completely ignores the traditional course that was always given to the boundaries of Say *cercle*. Until the adoption of the 1960 IGN map, this line never included the “duck’s bill” which takes the frontier to the locality of Bossébangou and back again. Quite the contrary, on the maps and sketch-maps of the colonial period the boundaries of

²⁶⁰MBF, para. 4.100.

²⁶¹MBF, para. 4.101.

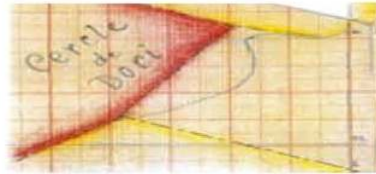
²⁶²MBF, paras. 4.103 and 4.104.

²⁶³MBF, para. 4.103.

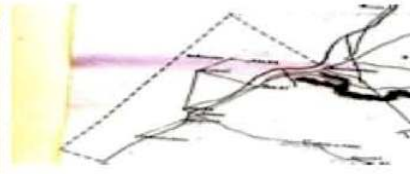
Say *cercle* are systematically represented in the form of a triangle in the northern part of the *cercle*, with the northernmost point of the triangle being the tripoint between the *cercles* of Tillabéry, Dori and Say. As the Republic of Niger stated in its Memorial²⁶⁴, it is in fact this point — and not the locality of Bossébangou — that was always identified by the colonial administrators as the meeting point of the three *cercles* concerned. For example, in 1927, Administrator Delbos described the boundaries between Dori *cercle*, of which he was in charge, and Tillabéry *cercle*, and stated that this boundary line “finally follow[s] a bearing of 170° until it reaches the boundary of Say *cercle* to the west of Alfassi on the River Cirba”²⁶⁵. This is also what emerges very clearly from a number of maps from the colonial period, starting with the sketch-map drawn by Captain Boutiq in 1909²⁶⁶. The co-ordinates of this tripoint, as recalled above²⁶⁷, are: 13° 29' 08" N, 01° 01' 00" E. It is from this point that the frontier then goes on to form the western boundary of the “salient of four villages”.

Figure 12: Traditional shape of the salient of Say *cercle* (extracts from MN, Anns., Series D, Nos. 1 and 4)

(1) 1909 Boutiq sketch-map



(2) 1915 Truchard sketch-map



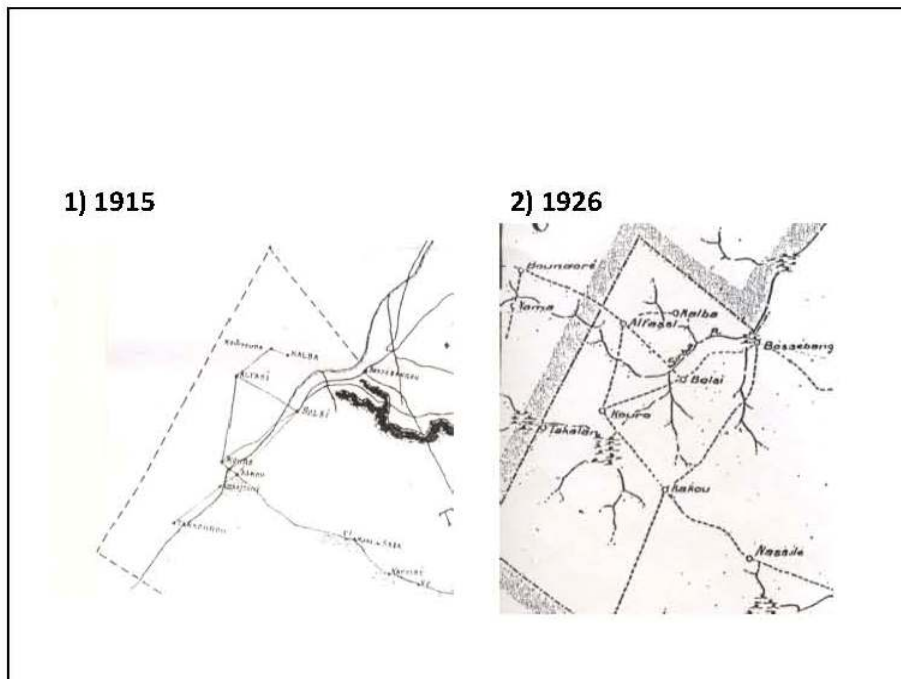
²⁶⁴MN, para. 7.19.

²⁶⁵Letter to the Governor of Upper Volta dated 27 August 1927, MN, Anns., Series C, No. 16.

²⁶⁶Djerma *cercle*, 1:1,000,000 sketch-map prepared by Captain Boutiq, *cercle* Commander, dated 19 June 1909, MN, Anns., Series D, No. 1.

²⁶⁷See above, para. 2.1.10.

**Figure 13: Traditional shape of the salient of Say *cercle* in 1915 and 1926
(extract from MN, Anns., Series D, No. 6)**



2.2.14. Burkina Faso then tries to justify the frontier line continuing to points identified as points “P1” and “P2”, the latter being the point from which the frontier makes an abrupt change in direction and turns southwards where it reaches point “P3”, before changing direction again and reaching the start of the Botou bend²⁶⁸. According to the other Party, the section going “from point P1 to point P2, can only be clarified by referring to the 1960 IGN map, as it is not possible to establish one specific point P1 based on the description of the frontier in the *Arrêté* and its Erratum”²⁶⁹.

Thus it is the line on the 1960 IGN map that Burkina Faso faithfully reproduces in this sector from Bossébangou to the point where, after returning south, the boundary “again cuts the Sirba at the level of the Say parallel”, as stated in the Erratum. This solution is allegedly corroborated by the fact that the experts of the Joint Technical Commission on Demarcation made the same observation — that the information given in the Erratum did not suffice for this section and that it was therefore necessary to have recourse to the 1960 IGN map — and adopted the same solution — establishing the line shown on the map — in the work they carried out at the end of the 1980s²⁷⁰. As regards the endpoint of the frontier line in this sector (point “P3”), it is allegedly easy to determine as according to the text of the Erratum it is the point where the boundary “again cuts the Sirba at the level of the Say parallel”, words which Burkina Faso interprets as follows:

²⁶⁸MBF, paras. 4.125 *et seq.*

²⁶⁹MBF, para. 4.127.

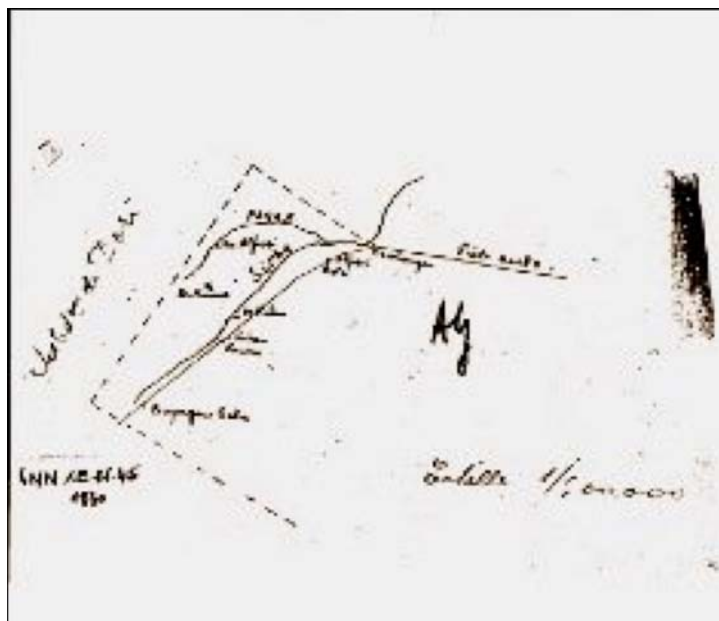
²⁷⁰MBF, paras. 4.138 *et seq.*, and esp. 4.142.

“The frontier ‘cuts’ the River Sirba, in other words it crosses it, going from the left bank — given its general west-east direction, and ending on the right bank, at the spot where it meets the Say parallel.”²⁷¹

The other Party is thus able to give the precise co-ordinates of point “P3”²⁷².

2.2.15. In its Memorial, the Republic of Niger set out the reasons why the line adopted by the IGN cannot be regarded as a valid representation of the frontier line in this sector of the “salient of four villages”. Niger recalled that the representation used by the IGN was based on the location of three of those villages at the time the map was drawn, and not at the time the Erratum was adopted. And it is an established fact that the villages were relocated shortly after the 1927 text was adopted²⁷³.

Figure 14: Example of some villages that were relocated shortly after the adoption of the 1927 texts



There is thus an obvious problem of methodology in establishing the frontier between the two States in this sector on the basis of the “modern” location of those villages, rather than their location in 1927. Furthermore, as regards the point where the frontier leaves the “salient of four villages” to go to the village of Tchenguiliba at the start of the Botou bend, the Republic of Niger recalled the interpretation of the text of the 1927 Erratum offered by its representatives in the past, whereby “the expression ‘at the level of the Say parallel’ [used in the Erratum to indicate the change of direction of the inter-colonial boundary in this area] was merely indicative”²⁷⁴. In Niger’s view, this is the obvious conclusion if we are to give effect to the 1927 text which states that the line separating the two colonies must include on the Niger side the four villages listed

²⁷¹MBF, para. 4.134.

²⁷²MBF, para. 4.135.

²⁷³MN, paras. 7.28 *et seq.*

²⁷⁴MN, para. 7.32 referring to the Report of the Second Ordinary Session of the Joint Technical Commission on the Demarcation of the Frontier between Niger and Burkina Faso held at Ouagadougou from 23 to 28 July 1990; MN, Anns., Series A, No. 5.

therein — which makes a literal interpretation of the expression concerned impossible. In effect, it proves that only a looser understanding of those words — such as emerges in particular from the documents written preparatory to the official 1927 texts — can achieve that result²⁷⁵.

2.2.16. Burkina Faso tries to refute the latter approach in its Memorial. The other Party counters this interpretation by pointing to the accuracy of the terms used by the authors of the Erratum (“at the level of” does not mean “approximately”)²⁷⁶, the fact that Niger’s argument is based on speculation as to the location of one of the four villages of the “salient” (that of Tokalan)²⁷⁷ and the fact that the site of that locality cannot correspond to the present-day village of Takatami, which already existed in 1927 and could not be confused with the village of Tokalan²⁷⁸.

2.2.17. Let it first be noted that none of those points goes to the heart of Niger’s arguments whereby the frontier line in this sector must include in Niger territory the four villages mentioned in the 1927 Erratum if we are to comply with the terms of the text. This cannot be achieved if the words “at the level of the Say parallel” are interpreted to mean “at the intersection of the Sirba with the Say parallel”, as a line based on such an interpretation of the terms of the Erratum results in leaving the site of what was the village of Tokalan outside the territory of Niger. It is true there is still some uncertainty as to the location, in 1927, of the latter village which has since disappeared²⁷⁹. While at one time the site of this locality was assimilated with that of Takatami²⁸⁰, it is true, as the other Party’s Memorial explains, that this hypothesis proved groundless, as the village of Takatami already existed in 1927 and was never considered to be situated in Niger territory²⁸¹. However, further research and a comparison of the maps and sketch-maps contemporary to the official texts of 1927 with more recent maps — in particular the 1960 IGN map — make it possible to locate the site of the former village of Tokalan on the eastern edge of the pool formed by the arms of the rivers Faga and Yamanou. Through a comparison of the maps, the site of the lost village can be located in the immediate vicinity of the site of the locality of Tangagari, which the frontier line should therefore leave in Niger territory. The fact that the line claimed by Burkina Faso does not make it possible to achieve this result constitutes further grounds for rejecting it.

²⁷⁵MN, para. 7.32.

²⁷⁶MBF, para. 4.117.

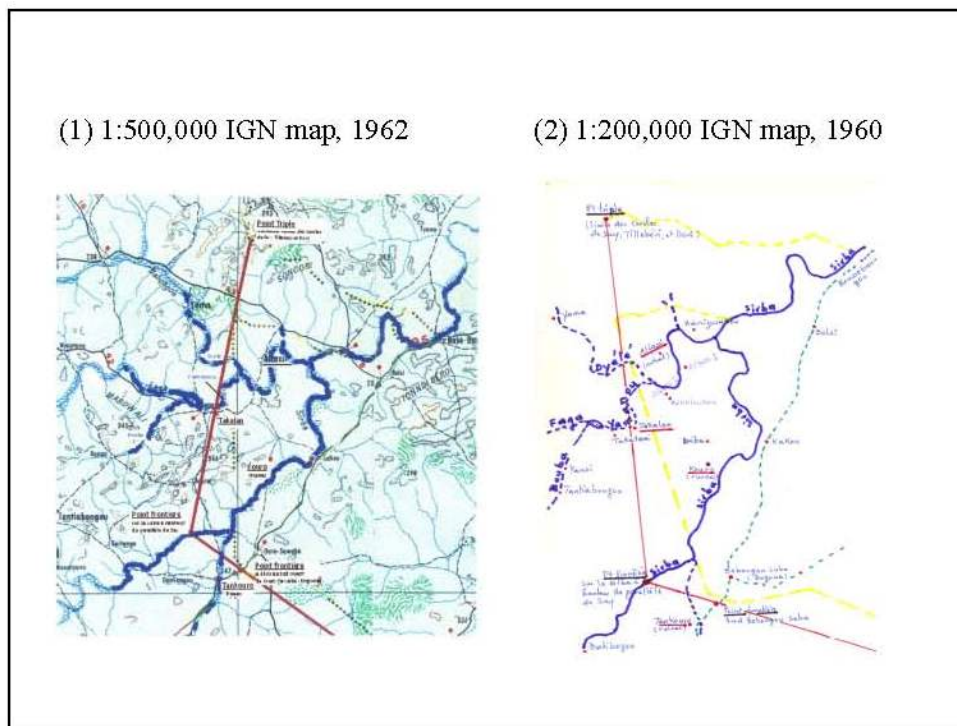
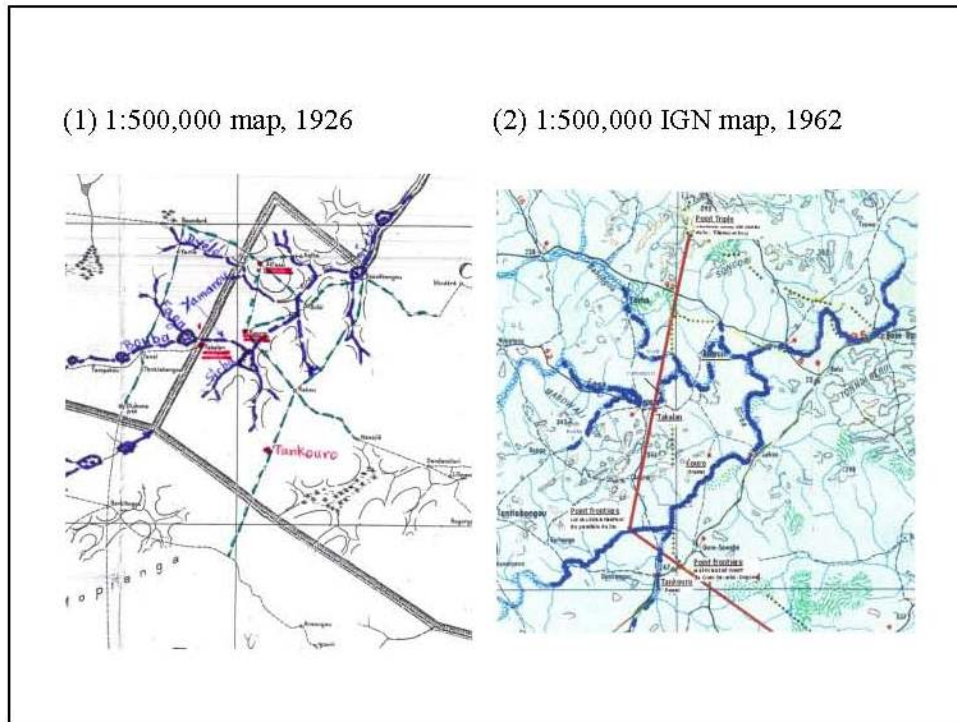
²⁷⁷MBF, para. 4.118.

²⁷⁸MBF, para. 4.119.

²⁷⁹See also on this point MN, para. 7.28.

²⁸⁰See, *inter alia*, the Mission report of the Topographical Sub-Committee of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, 5-12 June 1990, 12 June 1990, MBF, Annex 86.

²⁸¹MBF, para. 4.119.

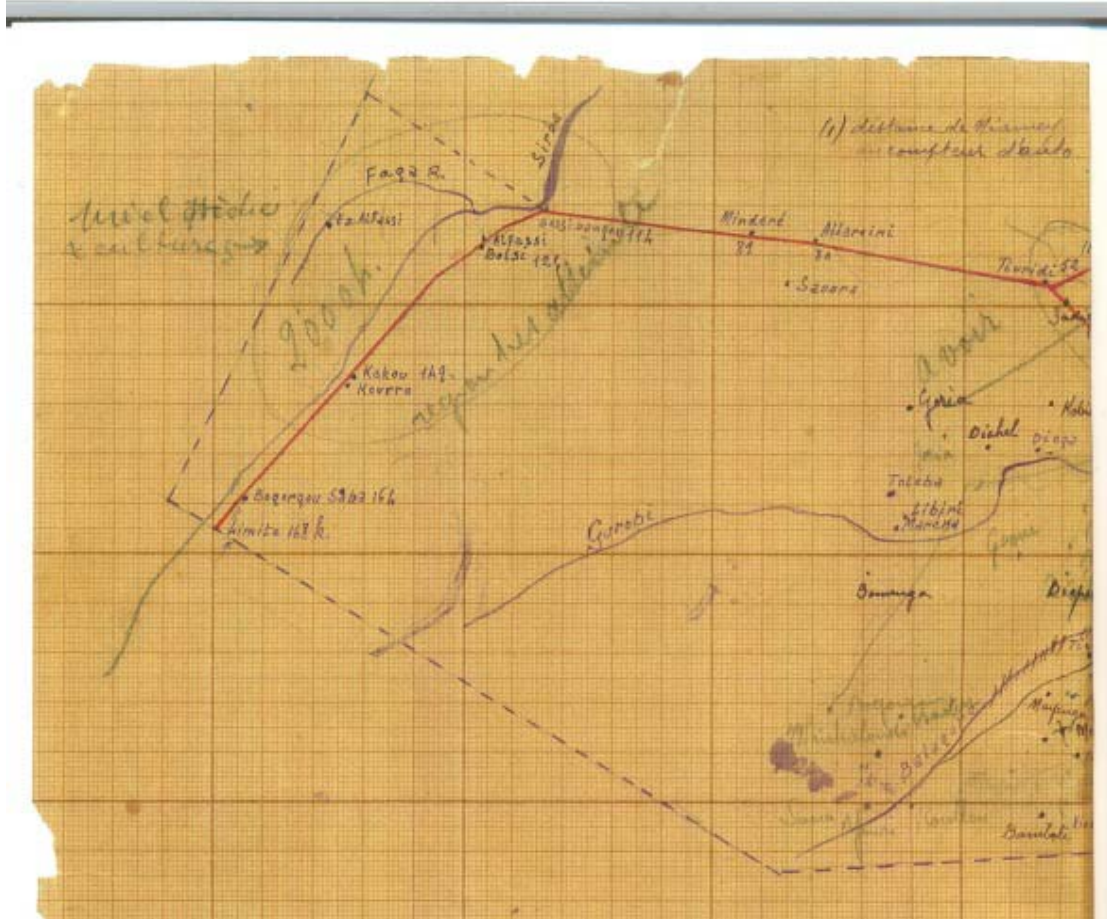


2.2.18. Finally, it should further be recalled that the other Party's interpretation of the words "at the level of the Say parallel" has the effect of excluding from the territory of Niger not only the village of Tankouro, which the text of the Erratum clearly leaves to Niger, but also that of Dogona (also known as Boborgou Saba), which has always been regarded as belonging to Niger²⁸². As Niger explained in its Memorial, the fact that this village, among others, belonged to Niger is

²⁸²See also MN, para. 7.33.

confirmed by documents from the colonial period which establish the boundary between the colonies of Niger and Upper Volta on the colonial road at a point situated four kilometres south-west of this village. The 1930 sketch-map reproduced below gives a clear illustration of this situation²⁸³.

Figure 16: Sketch-map showing the boundary 4 km from Boborgou Saba



2.2.19. All these points are ignored by the other Party, which tries to give a so-called scientific character to the demonstration it undertakes to justify the frontier line in the sector of the “salient”, while that “demonstration” is in complete contradiction to the actual requirements of the text of the Erratum as they stood in the context of 1927. Burkina Faso’s claims in this sector, based on the line that appears on the 1960 IGN map, thus appear to be completely unfounded. The same is true of the last section of the frontier in the Say sector.

²⁸³The Republic of Niger draws the Court’s attention to the fact that the sketch-map reproduced below should have appeared instead of the sketch-map produced as annex No. C 35 in Niger’s Memorial. The latter sketch-map, prepared by the same administrator during the same tour, had a different subject and was reproduced by error in the annexes.

C. The section of the frontier which leaves the “salient” and runs to the start of the Botou bend

2.2.20. As regards this last section of the boundary, the position argued by the other Party consists in adhering to the text of the Erratum of 1927, which states that, from the point where it leaves the “salient”, “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”. Burkina Faso observes in this connection that the wording is “crystal clear and does not require any particular comment”²⁸⁴.

2.2.21. The Republic of Niger has absolutely no intention of disputing the fact that the 1927 text is “crystal clear”. The wording in itself invites no comment. However, what poses a problem here, as Niger pointed out in its Memorial, is rather the fact that this straight-line boundary “appears to have no basis in the situation prior to the adoption of the Erratum and was never confirmed in the subsequent practice”²⁸⁵. As Niger explained in its written proceedings, the representation of the boundary in a straight line of this kind is not to be found on a large number of maps from the colonial period, either prior or subsequent to the adoption of the official texts of 1927²⁸⁶. Even more crucially, the position argued by Burkina Faso on this point completely overlooks the fact that, for over fifty years now, the two States have agreed to consider that their common frontier in this sector passes through a point located on the road between Niamey and Ouagadougou, 14 kilometres from Mossipaga (Niger) and 17 kilometres from Kantchari (Burkina Faso)²⁸⁷. This point had already been marked out in the colonial period by a frontier post, the location of which has never been disputed by the Parties. A number of documents from the colonial administrations concerned relating to road construction and maintenance confirm that location²⁸⁸.

The subsequent agreement reached by the two States on this point clearly shows that they had no intention of adhering to the wording of the 1927 Erratum in defining this part of the course of their common frontier, and that on the contrary they deliberately resorted to another boundary line consisting of two straight-line sections. It is beyond doubt that this subsequent agreement takes precedence over the definition of the boundary given by the 1927 Erratum. Here too, the position argued by Burkina Faso is therefore completely unfounded and ignores the subsequent agreement of the two States on the establishment of the course of their frontier in this sector.

²⁸⁴MBF, para. 4.150.

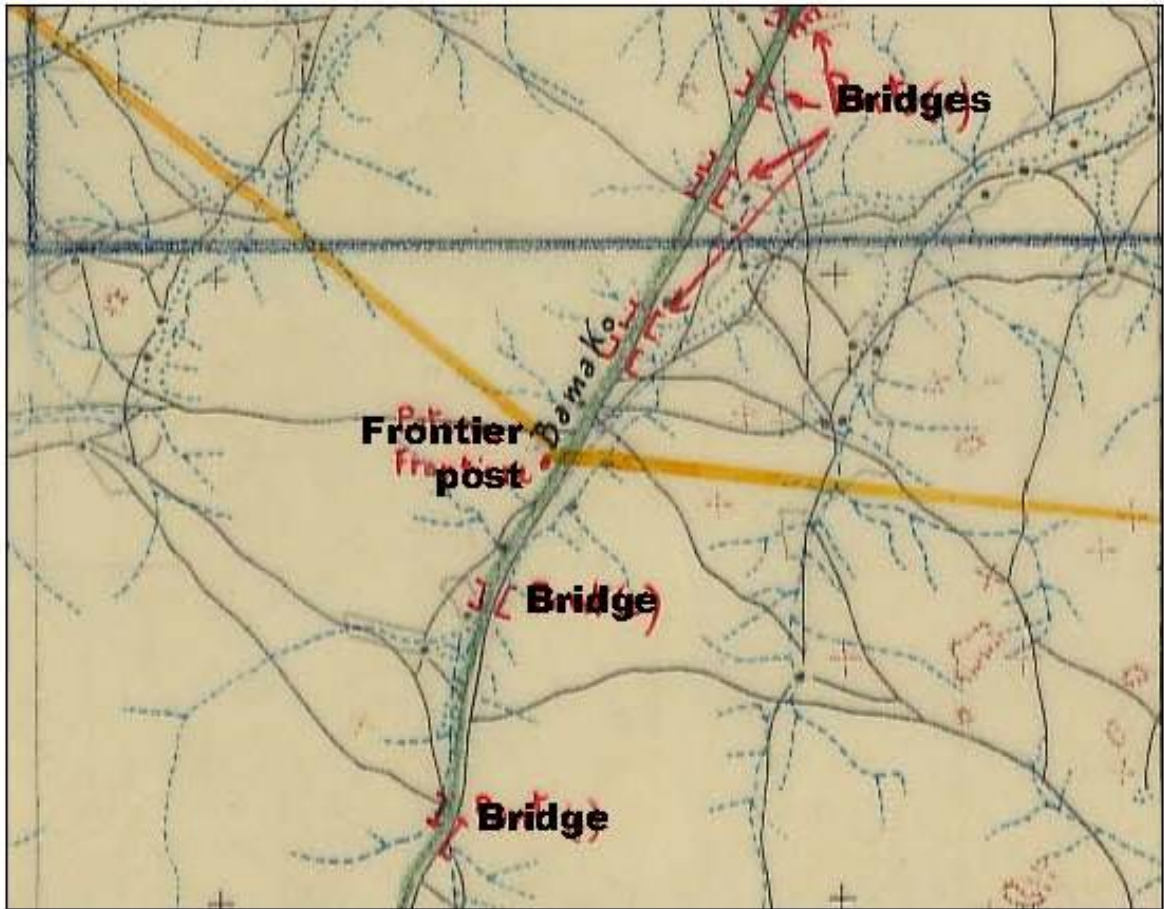
²⁸⁵MN, para. 7.35.

²⁸⁶MN, paras. 7.36 and 7.37.

²⁸⁷MN, para. 7.38.

²⁸⁸In addition to the documents referred to in para. 7.38 of the Republic of Niger’s Memorial, reference can also be made to the 1:500,000 “sketch-map of the Niamey-Fada road” appended to the document entitled “Survey of the Niamey-Fada road by Mr. Carli, Chief Supervisor of Public Works”, dated 30 April 1933 (CMN, Anns., Series C, No. 111), as well as to Tour Report No. 2751 from the Commander of Niamey *cercle*, dated 20 November 1939 (CMN, Anns., Series C, No. 112) and Tour Report No. 1125 from the Commander of Niamey *cercle*, dated 10 June 1940 (CMN, Anns., Series C, No. 113). The boundary is indicated as being 19 km from Kantchari in the former document and 20 km in the latter. These imprecisions were to be rectified shortly thereafter. On 27 August 1940, the Governor of Niger informed the Commander of Niamey *cercle* that the “distance in kilometres between Niamey-Torodi-Kantchari, which up until now had given rise to conflicting assessments, has just been clarified by chaining . . . Markers have been placed every 5 km.” (Letter No. 2144/TP from the Governor of the Colony of Niger to the Commander of Niamey *cercle*, dated 27 August 1940, CMN, Anns., Series C, No. 114.) However, only the total distance was given in this document, and the length of each section provided only in subsequent documents (see, *inter alia*, Telegram/letter No. 106 from the Head of Say Subdivision to the Commander of Niamey *cercle* dated 16 June 1954, MN, Anns., Series C, No. 82).

Figure 17: Map showing the frontier post on the Niamey-Ouagadougou-Bamako federal highway (MN, Anns., Series D, No. 30)



The Republic of Niger, for its part, can but maintain all of the arguments that it presented in its Memorial in respect of determining the course of the frontier between the two Parties in the Say sector, in so far as none of the elements developed by Burkina Faso in its written proceedings is capable of refuting those arguments.

SUBMISSIONS

The Republic of Niger requests the Court to adjudge and declare that the frontier between the Republic of Niger and Burkina Faso takes the following course:

In the Téra sector:

- Starting from the Tong-Tong astronomic marker (co-ordinates: 14° 25' 04" N, 00° 12' 47" E);
- from that point: a straight line as far as the Vibourié marker (co-ordinates: 14° 21' 44" N, 0° 16' 25" E);
- from that point: a straight line as far as the Tao astronomic marker (co-ordinates: 14° 03' 02.2" N, 00° 22' 52.1" E);
- from that point the frontier follows the 1960 IGN line (Téra sheet) as far as the point having co-ordinates 14° 01' 55" N, 00° 24' 11" E;
- from that point, it runs in a straight line to the frontier point on the new Téra-Dori road (co-ordinates: 14° 00' 04.2" N, 00° 24' 16.3" E) (to the west of Petelkolé);
- from that point, it runs in a straight line to the point with co-ordinates 13° 59' 03" N, 00° 25' 12" E;

and reaches the IGN line (at the point with co-ordinates 13° 58' 38.9" N, 00° 26' 03.5" E), which it follows as far as the break in the line of crosses north of Ihouchaltane (Oulsalta on the 1960 IGN map, Sebba sheet), at the point with co-ordinates 13° 55' 54" N, 00° 28' 21" E;
- from this point the frontier skirts Ihouchaltane (Oulsalta), passing through the points with co-ordinates 13° 54' 42" N, 00° 26' 53.3" E, then 13° 53' 30" N, 00° 28' 07" E,
- from that point, it rejoins the IGN line (at the point having co-ordinates 13° 53' 24" N, 00° 29' 58" E), which it follows as far as the tripoint of the former boundaries of the cercles of Say, Tillabéry and Dori (co-ordinates 13° 29' 08" N, 01° 01' 00" E).

Where there are gaps in the course of the IGN line, these will be filled by straight lines or, where there is a watercourse, by following its bed.

In the Say sector:

- Starting from the tripoint of the former boundaries of the *cercles* of Say, Tillabéry and Dori (co-ordinates 13° 29' 08" N, 01° 01' 00" E), the frontier runs in a straight line as far as the point having co-ordinates 13° 04' 52" N, 00° 55' 47" E (where it cuts the River Sirba at the level of the Say parallel), then from that point a straight line passing through a point situated 4 km to the south-west of Dogona with co-ordinates 13° 01' 44" N, 01° 00' 25" E, as far as the frontier marker with co-ordinates 12° 37' 55.7" N, 01° 34' 40.7" E, and finally from there to the point fixed by agreement between the Parties, the co-ordinates of which are the following: 12° 36' 18" N, 01° 52' 07" E.

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Series A — Diplomatic documents

- A 22. Report of the meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Faso Frontier, held in Niamey from 3 to 7 February 1991.
- A 23. Report of the working meeting held in Niamey on 4 and 5 September 1995, between the Delegation of Burkina Faso led by Prime Minister Roch Marc Christian Kabore, and the Delegation of Niger, led by Prime Minister Hama Amadou.
- A 24. Report of the bilateral (Burkina-Niger) Committee on the identification of sites for the installation of juxtaposed control posts on the Ouagadougou-Dori-Téra-Niamey road, 9 June 2006.

Series B — Legislative and regulatory documents

- B 33. *Sénatus-consulte* of 3 May 1854.
- B 34. Decree of 18 October 1904 reorganizing the General Government of French West Africa.
- B 35. *Arrêté* No. 2794 establishing polling stations and districts for the elections to the National Assembly, *Official Journal of Niger*, No. 304, 1 January 1956.
- B 36. Decree No. 62-282/PRN/AE of 1 December 1962 concerning the ratification and publication of Niger's international commitments (*OJRN*, special edition 10 of 29 December 1962).

Series C — Administrative documents and correspondence

- C 60. Letter No. 161 from the Head of Téra Subdivision to Tillabéry *cercle* dated 24 May 1935.
- C 109. Extract from the "Directory of localities" 1927: villages of the *canton* of independent Peulhs – Diagourou (Dori *cercle*).
- C 110. List of villages of Téra Subdivision — Diagourou *canton*, 6 July 1933.
- C 111. Survey of the Niamey-Fada road by Mr. Carli, Chief Supervisor of Public Works and the 1:500,000 sketch-map of the Niamey-Fada road (30 April 1933).
- C 112. Tour Report No. 2751 from the Commander of Niamey *cercle* dated 20 November 1939.
- C 113. Tour Report No. 1125 from the Commander of Niamey *cercle* dated 10 June 1940.
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- C 120. “Bangaré”: appended to the Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954.
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- C 122. “Yollo Beyna”, “Yollo Djinkargou”, “Yollo Hamidou” and “Yollotaka or Taka”: appended to the Report from the Head of Téra Subdivision on the census of Diagourou *canton*, dated 10 August 1954.
- C 123. “Beïna astronomic station” data sheet, 20 February 1957.
- C 124. List of villages of Téra *canton*, 17 April 1959.
- C 125. List of villages of Diagourou *canton*, 17 April 1959.
- C 126. Circular No. 79/PRN from the President of the Republic to the Ministers and Secretary of State, dated 26 December 1963.
- C 127. Letter No. 64-011/PRN/MAE of 5 February 1964 from the President of the Republic to the Ministers and Secretaries of State.
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- C 129. Letter No. T08/STC of 16 August 1972 from the acting Director of the Topographical Department and Cadastre to the Minister of Finance and Saharan and Nomad Affairs.
- C 130. Note from the acting Permanent Secretary to the Minister of the Interior, containing the report of the meeting of the Joint Technical Commission on Demarcation of the Niger-Burkina Frontier, 31 July 1990.
- C 131. Letter No. 47/MI/CNF of 17 December 1990 from the acting Permanent Secretary to the Minister of the Interior.
- C 132. Report of mission conducted on 21 and 22 September 1994 by Commandant Seyni Garba, Permanent Secretary of the National Frontier Commission of Niger in the *arrondissements* of Téra and Say, Niamey, 23 October 1994.

Series D— Maps (These maps were inserted, unbound, in the original copy of Niger’s Counter-Memorial)

- D 32. Niger–Burkina, line proposed by Niger, Téra sector; 1:200,000.
- D 33. Niger–Burkina, line proposed by Niger, Say sector; 1:200,000.

Series E — Doctrine

- E 1. Adhémar Esmein, *Eléments de droit constitutionnel*, Paris, Sirey, 1921, Vol. 2, pp. 85-86
 - E 2. Félix Moreau, *Précis élémentaire de droit constitutionnel*, 9th edition, Paris, Sirey 1921, p. 351.
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