

INTERNATIONAL COURT OF JUSTICE

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

COUNTER-MEMORIAL OF BURKINA FASO

20 JANUARY 2012

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INTRODUCTION

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

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

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

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

SECTION 1

THE POINTS OF AGREEMENT BETWEEN THE PARTIES

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

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

¹Article 2, paragraph 2, of the Special Agreement of 24 February 2009.

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

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

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

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

0.6. *A priori*, the Parties therefore agree:

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

SECTION 2 THE POINTS OF DISAGREEMENT BETWEEN THE PARTIES

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

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

0.8. Despite professing to agree with the principle established in Article 1 of the 1987 Agreement², Niger refuses to acknowledge that, given that the frontier has been delimited by the Erratum, the Court’s task in the present case is — solely — to clarify its course when — and only when — that document does “not suffice”³; otherwise, it should confirm the course

²See the table in para. 0.5 above.

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

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

0.9. It seeks to present the Erratum as:

- “particularly rudimentary”⁴, “particularly succinct”⁵, “particularly lapidary”⁶ or “summary and imprecise”⁷;
- erroneous⁸, “hav[ing] no basis in the situation prior to [its adoption]”⁹ and “never confirmed in the subsequent practice”¹⁰;
- contested and “criticized from the outset by the colonial officials and authorities of the two Colonies”¹¹.

0.10. Moreover, Niger does not hesitate to assert that “the text of the Erratum should not be read too literally . . .”¹² and, more explicitly still, “that there are well-established reasons for *not following it* in certain respects”¹³. This is contrary to the Parties' mutual understanding, as recorded in their 1987 Agreement and reiterated in the Special Agreement. Moreover, this would be the case even in the absence of a formal agreement between the Parties stating as such: as Niger recognizes in the same paragraph of its Memorial, the Erratum “remained, at the time when the two States became independent, the only reference text for the determination of their common frontier”¹⁴; it therefore constitutes the legal title — a notion that Niger is very wary of mentioning¹⁵ — on which the two Parties and the Court must rely in order to determine the frontier. And, as the Court firmly recalled in the case of *Cameroon v. Nigeria*, “where there is a conflict between title and *effectivités*, preference will be given to the former”¹⁶.

⁴MN, p. 65, para. 5.6; see also p. 84, para. 6.10.

⁵MN, p. 83, para. 6.9; see also p. 104, para. 7.11.

⁶MN, p. 116, para. 7.34.

⁷MN, p. 66, para. 5.6; see also p. 86, para. 6.11.

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

⁹MN, p. 116, para. 7.35; see also p. 120, para. 7.39.

¹⁰*Ibid.*, see also p. 108, para. 7.18.

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

¹²MN, p. 115, para. 7.32.

¹³MN, p. 105, para. 7.12 (emphasis added).

¹⁴*Ibid.*

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

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

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

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

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

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

- the 1960 IGN map over the Erratum, including when the latter is perfectly clear¹⁸;
- maps from 1915 and 1927 over the Erratum and the 1960 map¹⁹;
- various documents, which it believes prove the *effectivité* of Niger’s presence in certain disputed territories, over both the map and the Erratum²⁰.

0.13. The argument deployed in Niger’s Memorial for the sector between the point where the frontier “leaves the salient and enters the Botou Loop”²¹ illustrates this tendency to reinvent a frontier line on the basis of various documents whose relevance is ruled out by the 1987 Agreement. Claiming the wording of the Erratum to be lapidary²², when it is in fact perfectly clear, Niger dismisses the *Arrêté* in favour of the IGN map²³, only to challenge it in turn and maintain its claim to “a frontier in two straight-line sections, as it appears on those maps and sketch-maps of the colonial period”²⁴. It therefore only has recourse to the map to

¹⁷MN, p. 76, para. 5.15; similarly, see MBF, p. 71, para. 2.46.

¹⁸MN, p. 93, para. 6.21 or p. 97, paras. 6.24-6.25.

¹⁹MN, p. 114, para. 7.30.

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

²¹MN, pp. 116-120, paras. 7.34-7.40.

²²MN, p. 116, para. 7.34.

²³MN, p. 116, para. 7.35.

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

the extent that it backs up its claims. Moreover, Niger is clear about the status of the 1960 map: in its view, “unless we find abnormal deviations in relation to the texts or manifest lacunae in the information on the *canton* boundaries, and subject to the necessary caution where the hesitation of the map’s drafters is reflected in gaps in the line of crosses, these results should in principle serve as a guide to determine the course of the inter-colonial boundary in 1960”²⁵.

0.14. As a result of these disagreements about how the applicable rules are to be implemented, differences of opinion about the delimitation of the frontier have arisen and it is these that lie at the heart of the present dispute. Along the course of the contested line the Parties’ claims only coincide on three points: Tong-Tong, Tao — although its co-ordinates are incorrect in Niger’s version²⁶ — and the point marking the beginning of the Botou bend (the point known as Tyenkilibi)²⁷.

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

— in the *Téra sector*²⁸:

- According to Burkina, two straight lines connect the three frontier points in this sector (the Tong-Tong marker, the Tao marker and Bossébangou)²⁹.
- According to Niger, from Tong-Tong to Tao the line follows not one but two straight-line sections, since it passes through the Vibourié marker before reaching the Tao marker; from there, the frontier line “basically” follows the line on the IGN map³⁰ — to the extent permitted by the liberties taken by Niger and “justified” by the *effectivités* that it claims — as far as Bangaré, before following the IGN line and stopping at “the tripoint of the former boundaries of the *cercles* of Say, Tillabéry and Dori”³¹ rather than descending, as the Erratum nevertheless stipulates, to the River Sirba at Bossébangou.

— In the *Say sector*³²:

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

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

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

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

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

²⁹MBF, p. 132, para. 4.82.

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

³¹MN, p. 100, para. 6.26.

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

³³MBF, p. 133, para. 4.83.

sections, the first turning back up the River Sirba to a point known as “P1”, from where the second runs in a north-westerly direction as far as a point “P2” and joins the third, which descends in a straight line to the south until it meets the intersection of the River Sirba with the Say parallel, a point which marks the end of the salient³⁴. Niger’s description is radically different. Moreover, it does not envisage an actual salient³⁵, since it has a single straight line, running in a south-westerly direction, connecting two points that are, furthermore, different from those in the Erratum: the line claimed by Niger therefore departs from the “tripoint of the former boundaries of the *cercles* of Say, Tillabéry and Dori” (and not from Bossébangou), reaching the Sirba *approximately at the level of* (and not at its intersection with) the Say parallel³⁶.

- For its part, the last section of the frontier between the end of the salient and the beginning of the Botou bend (Tyenkilibi)³⁷ is described by Burkina, in accordance with the Erratum, as consisting of a single straight line, whereas Niger draws it as two straight-line sections, the line changing direction at a frontier marker on the road from Niamey to Ouagadougou³⁸.

³⁴For an illustration, see MBF, p. 153, sketch-map No. 14.

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

³⁶MN, pp. 115-116, paras. 7.32-7.33.

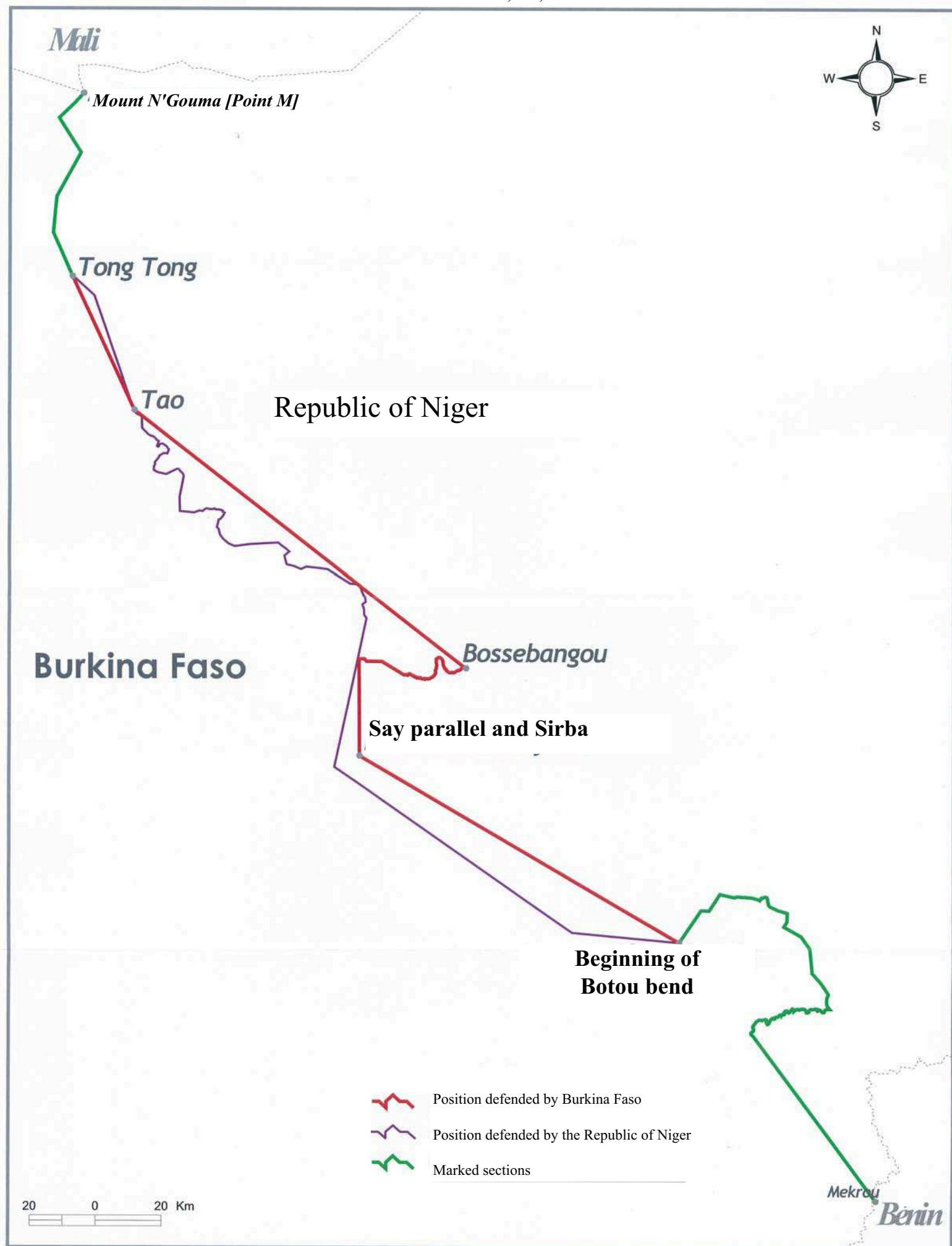
³⁷The co-ordinates given by Niger for this last point differ very slightly from those accepted by Burkina: the difference is one latitudinal second — see fn. 27 above.

³⁸MN, p. 118, para. 7.38.

Sketch-map No. 1

Position of the Parties

Scale 1:1,000,000



SECTION 3 THE LACUNAE IN NIGER'S ARGUMENT

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

0.17. The following are of particular note:

- Niger's rather limited exposition of the origins of the 1987 Agreement³⁹, its analysis of which is practically non-existent⁴⁰;
- the extremely brief reference to the negotiations to which the dispute has given rise⁴¹;
- the cursory treatment reserved for the marked sections of the frontier⁴² (moreover, the submissions in Niger's Memorial only contain a description of the disputed portion of the line and not the whole of the line, including the marked sections, to which Niger does not refer, even though the Special Agreement includes them in the subject of the case submitted to the Court⁴³); and
- Niger's almost total silence⁴⁴ on the consensual line of 1988⁴⁵, which nevertheless shows that its representatives believed at the time that it was perfectly possible to determine the frontier between the two countries on the basis of the instruments referred to in the 1987 Agreement.

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

SECTION 4 STRUCTURE OF THE COUNTER-MEMORIAL

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

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

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

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

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

⁴³MN, pp. 122-123 — comp. MBF, pp. 160-162.

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

⁴⁵MBF, pp. 45-46, paras. 1.67-1.69.

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

CHAPTER I

THE METHODOLOGICAL SHORTCOMINGS OF NIGER'S MEMORIAL

1.1. One might have expected the Memorial of the Republic of Niger, which includes five general chapters before turning to the issue of the determination of the frontier in the “Téra sector” (Chapter VI) and the “Say sector” (Chapter VII), to be based on a clearly explained and rigorously implemented method. Far from it: Chapter V⁴⁶ boasts of presenting “[t]he legal bases for determination of the frontier”, but the “methodology adopted” — which includes a clear description of the course of the frontier in the Téra sector⁴⁷, de facto repeated for the Say sector⁴⁸ — disregards these “legal bases” in favour of a muddled and selective approach, whose only discernible “methodology” seems to be to seek a line that is favourable to Niger, however arbitrary and devoid of legal justification that might be.

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

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

SECTION 1

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

1.3. As was pointed out in the introduction to the present Counter-Memorial⁴⁹, Niger indicates that it accepts that the Erratum of 5 October 1927 to the *Arrêté* of the Governor-General of FWA of 31 August of the same year, fixing the boundaries of the Colonies of Upper Volta and Niger, is the fundamental document delimiting the frontier between the two countries. Nevertheless, it makes every possible effort to rule out its application. In particular:

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

⁴⁶MN, pp. 60-78.

⁴⁷“A. Methodology adopted” (MN, pp. 82-91).

⁴⁸MN, pp. 104-105, paras. 7.9-7.13.

⁴⁹See paras. 0.4-0.6.

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

1.4. One of the postulates on which Niger's thesis rests is that the purpose of the *Arrêté* and its Erratum was not to effect a delimitation between Upper Volta and Niger but to effect a transfer of *cantons* from one Colony to the other: certain *cantons* of Dori *cercle* and all those of Say *cercle* (with the exception of Gourmantché Botou *canton*), all of which were previously part of Upper Volta, had apparently been transferred to Niger with their boundaries unchanged⁵⁰. The reasoning is curious: according to Niger, the 1927 *Arrêté* was purely an implementing text of the Decree of 28 December 1926, which effected a transfer of *cantons*:

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

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

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

1.6. Therefore, still according to Niger,

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

It adds:

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

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

⁵¹MN, p. 84, para. 6.11.

⁵²MN, p. 111, para. 7.22.

⁵³MN, p. 70, para. 5.10 (underlining in the original text).

⁵⁴MN, p. 80, para. 6.6 (emphasis added).

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

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

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

1.8. There are numerous objections to this analysis.

1.9. As Niger recognizes, the *canton* boundaries themselves were often quite vague⁵⁷ and, in this part of the French colonial empire at least, were never the subject of a formal delimitation text, to the extent that Niger itself has to concede that “the . . . possibilities offered by this approach” are “modest”⁵⁸. The reply from the FWA Geographical Department to a request made in 1938 by the Director of Political and Administrative Affairs for a sketch-map of the region⁵⁹ shows that such an approach only leads to deadlock:

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

The Atlas of *Cercles* is currently being revised, but this is a very lengthy and painstaking task that will require the participation of the local administrative authorities, which at present are the only ones able to define — at least approximately — the *canton* boundaries.

*In most cases, these are de facto boundaries which have never been defined by texts.”*⁶⁰

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

⁵⁵MN, p. 72, para. 5.10.

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

⁵⁷MN, p. 80, para. 6.6.

⁵⁸MN, p. 91, para. 6.15.

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

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

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

1.10. This refusal to regard the *Arrêté* and its Erratum as fixing the boundary between the two Colonies has a remarkable consequence: Niger completely refrains from using the word “title” to refer to these fundamental instruments, although it admits that they established the boundary between the two Colonies and that this was never changed until independence⁶². They are referred to as “the most recent legislative or regulatory acts of the colonial power having determined those boundaries”⁶³; the Erratum is the “instrument which . . . governed the boundaries of the two Colonies”⁶⁴, the “only reference text for the determination of their common frontier”⁶⁵ and the “only text from the colonial period determining the boundaries of the two Colonies”⁶⁶.

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

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

⁶¹MN, p. 91, para. 6.16.

⁶²MN, p. 24, para. 1.32.

⁶³MN, p. 61, para. 5.3.

⁶⁴MN, p. 62, para. 5.3.

⁶⁵MN, p. 104, para. 7.12.

⁶⁶MN, p. 83, para. 6.9 and p. 103, para. 7.9.

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

⁶⁸*Ibid.*, p. 582, para. 53.

⁶⁹*Ibid.*, p. 590, para. 69.

⁷⁰*Ibid.*, p. 642, para. 167.

⁷¹MN, p. 84, para. 6.11 — see para. 1.4 above.

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

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

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

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

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

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

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

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

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

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

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

⁷²Ann. MBF 26 (emphasis added).

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

⁷⁴MN, p. 84, para. 6.11.

⁷⁵Ann. CMBF 1 (emphasis added).

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

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

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

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

1.17. However, it is not true that “[t]he purpose of these texts could only have been to transfer the above-mentioned *cantons*”⁷⁷: the transfer having been effected pursuant to the Decree, the *Arrêté* and its Erratum draw the appropriate conclusions and determine the resulting new inter-colonial boundaries, as expressly stipulated by the Decree. In fact, as Burkina noted in its Memorial⁷⁸, the *Arrêté* itself states that, “[t]he boundaries of the Colonies of Niger and Upper Volta shall . . . be determined as follows”⁷⁹; its intention is not therefore to describe boundaries between *cercles* or *cantons* but rather those between the two Colonies. Moreover, according to Niger, the Erratum was adopted precisely to clarify the difference between inter-colonial boundaries and boundaries between *cercles*, which had been confused in the *Arrêté* of 31 August⁸⁰.

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

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

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

⁷⁷MN, p. 84, para. 6.11.

⁷⁸MBF, p. 137, para. 4.95.

⁷⁹Article 1 of the *Arrêté* of 31 August 1927.

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

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

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

1.20. Similarly, in a letter dated 14 August 1929, the same Commander of Dori *cercle* sent a copy of his letter of 9 August to the Governor of Upper Volta in which he notes (with regret) “that the list of *cantons* [drawn up in the Brévié-Lefilliatre Record of Agreement⁸³] has not been recorded in the *Arrêté* and the Erratum of delimitation” while considering that “it is logical to think that Volta has transferred *cantons* to Niger and that it was the boundaries of those *cantons* that were adopted as the boundaries of the two Colonies”⁸⁴; however, this is not the case, a fact that he also laments in a letter of the same day again to the Commander of Tillabéry *cercle*, in which he notes that the decision on delimitation has been made; therefore, he adds: “I realize that my request has a weak foundation”⁸⁵. The same is true of Niger’s argument, which appropriates the position of Commander Taillebourg, without indicating that this was not a description of the situation resulting from the *Arrêté* but a criticism of it⁸⁶.

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

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

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

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

⁸²*Ibid.* (emphasis added).

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

⁸⁴MN, Anns., Series C, No. 25.

⁸⁵MN, Anns., Series C, No. 27.

⁸⁶On this point see Subsection 2 below.

⁸⁷Anns. MBF 30, 31 and 33 respectively.

⁸⁸MN, p. 19, para. 1.26 (emphasis added).

heavily on what it calls “the Delbos/Prudon Agreement of 1927”⁸⁹, thus suggesting that this was an alternative to the Erratum⁹⁰. However:

1. it states that it is unable to produce the text of that “agreement”⁹¹;
2. the documents said to have formed certain parts of it and which Niger produces are themselves incomplete⁹²;
3. these documents do not contain any criticism of the original *Arrêté* of 31 August;
4. Niger maintains that these documents were not taken into account in the preparation of the Erratum⁹³, which is not in doubt, even though it is actually unlikely that they did not reach Dakar — if indeed they were ever sent there — before the latter was adopted on 5 October 1927, given that the documents on which Niger relies date variously from 3⁹⁴, 4⁹⁵ and 27 August 1927⁹⁶. But this only serves to make a more significant point: these documents, of which Niger makes so much, were *deliberately* not taken into account in the preparation of the Erratum;
5. the documents are actually internal to each Colony, being prepared by the Commanders of Dori and Tillabéry *cercles* in response to requests from the Governors of their respective Colonies⁹⁷ — Upper Volta and Niger — and addressed to them⁹⁸; and it is highly likely

⁸⁹See in particular MN, p. 28, para. 2.4; p. 72, para. 5.11.

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

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

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

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

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

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

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

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

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

6. consequently, whatever the situation was, these documents did not in any way influence the delimitation adopted by the Erratum, as also emerges very clearly from the rough superposition of the two sketch-maps on which Niger relies⁹⁹ over the line in the Erratum; and
7. this same diagram shows that the two mission sketch-maps of Delbos and Prudon do not entirely coincide and that, in any case, there was actually a disagreement about the alleged “actual” boundaries “in practice”. This is shown in particular by discrepancies between the Delbos and Prudon documents on the one hand and, on the other hand, between those documents and the line described in the Record of Agreement between the Governor of Niger and the representative of the Governor of Upper Volta, known as “Brévié-Lefilliâtre”, recording the incorporation into the Colony of Niger of the Territories on the right bank of the river, pursuant to the Decree of 28 December 1926¹⁰⁰, which essentially follows the Coquibus line¹⁰¹.

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

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

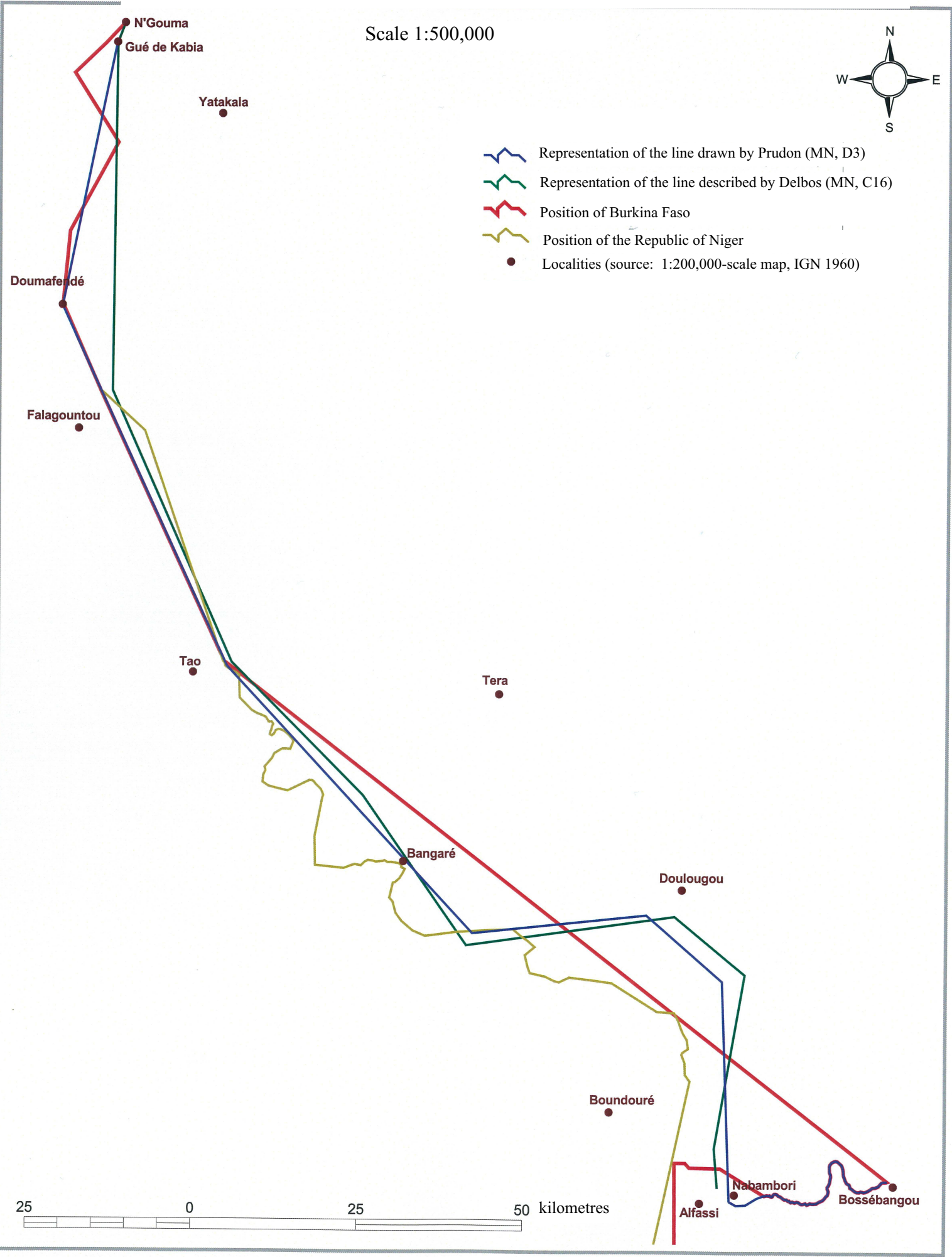
⁹⁸Cf. Extract No. 25 from the Tour Report of Administrator Prudon, Commander of Tillabéry *cercle* (Niger), dated 4 August 1927 (MN, Anns., Series C, No. 15), p. 3: “I would ask you kindly to support the wishes expressed by these Chiefs with the Governor of Upper Volta, since all these villages or *groupements*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

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

¹⁰⁰Ann. MBF 30.

¹⁰¹Administrator Delbos points out that the boundaries agreed in the Brévié-Lefilliâtre Record of Agreement of 2 February 1927 “had been established on the basis of the map prepared by Captain Coquibus” (letter No. 731 dated 17 December 1927, MN, Anns., Series C, No. 20, p. 1). The line drawn jointly by Administrators Delbos and Prudon only follows it in part (cf. Prudon’s Tour Report, MN, Anns., Series C, No. 15, p. 1: “Apart from this slight modification [regarding the chain of hills to the north of Nababori], following natural frontiers, the delimitation of the *cercle* made by Lieutenant Coquibus is indeed the line that we followed and the line recognized by the various chiefs of the frontier *cantons* in the two colonies concerned”).

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



2. The confirmation of the delimitation effected by the Erratum

1.24. Niger makes much of the disadvantages resulting from the 1927 boundaries and the criticisms to which they gave rise. It devotes an entire chapter to this issue¹⁰², which it summarizes as follows:

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

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

1.25. Although Niger prudently deduces that “[i]t is therefore necessary to consider the possibilities for interpreting these texts by having recourse to cartographic or textual criteria, preparatory work or the practice”¹⁰⁴, in making these observations it is clearly calling into question the frontier described by the Erratum: for Niger it is not a question of “consider[ing] the possibilities for interpreting these texts” but of actually correcting what it regards as “errors”. And indeed this is what it seeks to do in its Memorial when it reinvents a frontier line that departs considerably from the one described by the 1927 Erratum¹⁰⁵.

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

1.27. According to Niger, “[t]hroughout this period [from 1927 to independence], the conclusions of the Delbos/Prudon Agreement of 1927 continued to serve as a reference basis. They were often cited or recommended”¹⁰⁶. However, all of the “examples” (no doubt the fruit of extensive research by Niger) that are given in support of this statement¹⁰⁷ essentially lead to one conclusion — which Niger refrains from drawing: the authors of these documents seemed, in certain cases, to have a preference for this supposed agreement, but

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

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

¹⁰³MN, p. 66, para. 5.6.

¹⁰⁴*Ibid.*

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

¹⁰⁶MN, p. 28, para. 2.4.

¹⁰⁷*Ibid.*, pp. 28-29.

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

1.28. Thus:

- the telegram/letter No. 815 from the Commander of Tillabéry *cercle* to Dori *cercle* dated 10 October 1929 recommends to “maintain status quo, namely tolerance zone accepted in 1927 without encroachment or spoliation”¹⁰⁸; the issue here is not delimitation;
- the report from the Commander of Dori *cercle* dated 7 July 1930 notes that the *Arrêté général* of 31 August 1927 “took no account of the delimitation carried out on the ground by the two *cercles* Commanders of Dori and Tillabéry”¹⁰⁹; given that an agreement between officials in the field could not take precedence over an *arrêté général* (and a subsequent one at that), this amounts to a recognition that the *Arrêté* and its Erratum had established the frontier (even if that frontier gave rise to incidents);
- the letter sent on 10 April 1932 to the Governor of Upper Volta by the Commander of Dori *cercle* (in which he reports on an agreement reached with his Tillabéry counterpart, the “Roser/Boyer” Agreement¹¹⁰) lists two possibilities for identifying the “exact course of the boundary”, the first of which is to consider that the *Arrêté* and the Erratum “were intended to endorse the work of Administrators Delbos and Prud’hon [*sic*], and officially establish the boundary they proposed after their inspection tour”, which Commander Roser regards as “the only logical one”¹¹¹; nevertheless, the author remarks that Delbos’s protests as voiced in his letter of 17 December 1927¹¹² did not receive “any response” and that “no new Erratum was provided to correct the errors in question”¹¹³. In other words, only a new text could “repair” the errors attributed to the modified *Arrêté* and simply applying the “Delbos/Prudon Agreement” would not be sufficient;
- the Record of Agreement between Garnier and Lichtenberger of 15 [?] ¹¹⁴ April 1935 resolving a territorial dispute at Sinibellabé does not refer directly to the supposed “Delbos/Prudon Agreement”, but states that “in principle, this boundary [between Dori and Téra] shall be determined in accordance with the indications given in letter No. 438 from the Commander of [Dori] *cercle* to the Governor of Upper Volta of 3 April [¹¹⁵] 1927”¹¹⁶; the signatories are very careful to respect the orographic tradition and to resolve the dispute in accordance with it, not necessarily by relying on texts: it is worth noting that a few days previously, on 13 April 1935, the same Administrators, Garnier and Lichtenberger, had resolved a dispute at Ouiboriels or Vibourié, believing that they were applying the Erratum:

¹⁰⁸MN, Anns., Series C, No. 31.

¹⁰⁹MN, Anns., Series C, No. 38 (emphasis added).

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

¹¹¹MN, Anns., Series C, No. 45, p. 5.

¹¹²MN, Anns., Series C, No. 20.

¹¹³MN, Anns., Series C, No. 45, p. 5.

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

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

¹¹⁶MN, Anns., Series C, No. 57, p. 5.

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

- To resolve the problem definitively, they establish a marker (thereby committing a geodesic error) on “a notional straight line starting from the Tong-Tong astronomic marker and running to the Tao astronomic marker”¹¹⁸, which — with the exception of the error — is a pure and simple application of the 1927 texts¹¹⁹;
- the letter of 9 May 1935 from the Commander of Dori *cercle* to the Governor of Niger refers to the Garnier/Lichtenberger Record of Agreement, after being careful to note — which Niger forgets to point out — that the “[b]oundaries of Dori *cercle* with Téra Subdivision have been determined by the *Arrêté* of 31 August 1927 fixing the boundaries of the Colonies of Upper Volta and Niger followed by an Erratum dated 5 October 1927”¹²⁰;
- in his letter of 10 May 1935 to the Commander of Tillabéry *cercle*, the Head of Téra Subdivision confines himself to indicating: “To ensure that our data about the frontier coincides as far as possible with Dori’s, I have taken a copy of Administrator Delbos’s letter of 27 August 1927; I am quite happy to accept this boundary, but I think that, for the sake of the local people, it needs to be marked out”¹²¹;
- on 19 May 1943, the Commander of Dori writes to say that he has found in his archives an “undated and unsigned sketch-map ... most probably by Mr. Roser and likely to date from 1932”. The boundary drawn on the sketch-map, which seems to conform with the Roser report of 1932 is a “de facto boundary”, tacitly confirmed by the Garnier/Lichtenberger Record of Agreement of 1935, but not submitted for approval by a higher authority, which we will have to study again and, if necessary, submit to the Governor for approval”¹²². He writes that he has also found another rough drawing which “seems to be by Administrator Delbos and therefore to date from 1927 (Delbos/Prudhon [*sic*] settlement, following which proposals were made to the Governors of Niger and Upper Volta to *modify* the 1927 *Arrêté* and the subsequent Erratum, *proposals which were not acted upon*)”¹²³; that says it all . . .
- the letter of 11 July 1951 shows that in the view of the Head of Téra Subdivision, the boundary might be poor, but it is given by the 1927 texts:

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

¹¹⁷MN, Anns., Series C, No. 56, p. 2.

¹¹⁸*Ibid.*, pp. 2-3.

¹¹⁹See Chap. III, Section 2, 1, below.

¹²⁰MN, Anns., Series C, No. 58, p. 1.

¹²¹MN, Anns., Series C, No. 59. Again the document is barely legible.

¹²²MN, Anns., Series C, No. 67 — underlining in the text.

¹²³*Ibid.* (emphasis added).

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

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

- the Record of Agreement of 17 May 1953¹²⁵, which Niger also invokes in support of its argument that “the Delbos/Prudon Agreement of 1927” served as a “reference basis”, settles a dispute between two villages without making any reference to that “agreement” or, moreover, to any other text;
- finally, the Lacroix report of 24 December 1953¹²⁶ explains that “[t]he basic document relevant to these issues [Téra-Dori delimitation] is the *Arrêté général* of 31 August 1927, as amended by an Erratum of 5 October of the same year”¹²⁶, and it is only in an historical context that it adds:

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

None of the documents invoked by Niger for this purpose suggests that the officials in the *cercles* concerned confused the proposals made in 1927 by Delbos and Prudon (which do not appear to coincide¹²⁸ and which are often judged to be preferable to the *Arrêté*) with the delimitation in force, as established by the *Arrêté* and its Erratum.

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

1.30. The beginning of the controversy over the boundaries fixed by the *Arrêté* was marked by the letter from the Commander of Dori *cercle*, Delbos, dated 17 December 1927, which lists the errors that he believes it to contain and asks that “the boundaries indicated in [his] letter 438¹²⁹ be maintained”¹³⁰.

¹²⁴MN, Anns., Series C, No. 73, p. 1 (emphasis added).

¹²⁵MN, Anns., Series C, No. 76.

¹²⁶MN, Anns., Series C, No. 79, p. 1.

¹²⁷*Ibid.*, p. 2 [emphasis added].

¹²⁸See sketch-map No. 2 above.

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

¹³⁰MN, Anns., Series C, No. 20.

1.31. His successor, Taillebourg, also contests the very principle on which the new frontier between the two Colonies was based (it was defined *de novo* instead of being based on the pre-existing cantonal boundaries — in so far as they had been defined, which in fact they had not been) and points out the resulting disadvantages relating to the re-allocation and re-occupation of land — causing various conflicts over ownership — and to the carrying out of censuses of the population, which caused particular difficulties with raising taxes¹³¹.

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

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

In the same spirit, for their part, all of Taillebourg’s letters of July-August 1929 point out the excessive *rigours* of the delimitation¹³³.

1.33. It is also necessary to take into account extrinsic factors. For example, it was common practice amongst colonial officials to denounce so-called artificial frontiers. Moreover, the arbitrary nature of the delimitation was due to fiscal considerations or for reasons of administrative efficiency, which had scant regard for the physical and ethnic nature of territories with which the colonizer was unfamiliar: the priority was to deploy a direct, centralized administration that was capable of assimilating the populations¹³⁴; sometimes this detachment from reality, and in particular the ethnographic reality, was even intentional, to prevent groupings of related populations and to bring together very different ethnic groups, thereby quelling attempts to resist the occupation¹³⁵.

1.34. Niger also cites a number of agreements between officials seeking to clarify the boundaries of their administrative divisions¹³⁶. None of them¹³⁷ was approved by a higher

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

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

¹³³See paras. 1.19-1.20 above.

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

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

¹³⁶MN, pp. 33-34, para. 2.8.

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

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

1.35. In the same spirit, it can be noted that Niger devotes all of Chapter II, Section 2, of its Memorial to “[t]he difficulties encountered during the period subsequent to independence”¹³⁸. This account of incidents that can have no influence on the delimitation of frontiers inherited from colonization is also of no legal consequence: since they occurred after the “‘photograph of the territory’ at the critical date”¹³⁹, these facts cannot in any way shift or weaken the colonial title constituted by the *Arrêté* and its Erratum¹⁴⁰. Moreover, even if they could do so under general international law — *quod non* — then the 1987 Agreement between the Parties would prevent them from being taken into consideration.

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

1.37. Moreover, although these criticisms might have provided an opportunity to adopt a new delimitation *arrêté*, that opportunity was never taken by the competent authority. For example, in a letter dated 19 March 1930, the Governor of Upper Volta asked the Commander of Dori *cercle* to draw up a report on the difficulties created by the 1927 delimitation and to attach “any proposals that you see fit”¹⁴¹; the report that he produced in response to this request¹⁴² clearly did not lead to any new delimitation even though it concluded: “After this tour, if appropriate, I will submit proposals to *rectify* the boundary between Dori *cercle* and Tillabéry *cercle*.”¹⁴³ The officials’ complaints were heard, but no action was taken as a result. As the Court noted in the *Burkina/Mali* case, it cannot take account of a modification proposed by a *cercle* administrator that contradicts the frontier title having force of law between the Parties if it has not been approved by the competent higher authorities¹⁴⁴.

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

¹³⁸MN, pp. 35-38, paras. 2.9-2.11.

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

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

¹⁴¹MN, Anns., Series C, No. 33.

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

¹⁴³*Ibid.*, p. 12 (emphasis added).

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

between Colonies”¹⁴⁵ and goes on to list the specific cases in which officials recalled that only the higher colonial authorities (Governors and the Governor-General) were empowered to effect inter-colonial delimitations¹⁴⁶.

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

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

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

“The frontier shall be demarcated by boundary markers following the course described by *Arrêté* 2336 of 31 August 1927, as clarified by Erratum 2602/APA of 5 October 1927. Should the *Arrêté* and Erratum not suffice, the course shall be that shown on the 1:200,000-scale map of the *Institut Géographique National de France*, 1960 edition, and/or any other relevant document accepted by joint agreement of the Parties.”

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

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

¹⁴⁵MN, p. 73, para. 5.12.

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

¹⁴⁷MN, p. 75, para. 5.13 (emphasis added).

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

1.42. On presenting the Erratum, Niger describes it as “particularly rudimentary”¹⁴⁸, in a bid to justify an argument whose main objective is to avoid the Erratum’s application¹⁴⁹, without ever taking the trouble to define what might be denoted by “not suffice” within the meaning of Article 2 of the 1987 Agreement.

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

- in respect of the Téra sector, the Erratum is said to be “particularly succinct” on the grounds that it only mentions two frontier points over a distance of 150 km: the Tong-Tong astronomic marker and the Tao astronomic marker¹⁵⁰ — which is actually incorrect: the Erratum specifies that the frontier reaches “the River Sirba at Bossebangou”; but Niger declares peremptorily that this “remains problematic”¹⁵¹;
- in the Say sector, the argument is based this time on the number of lines in the Erratum compared with the distance described: five lines to describe almost 160 km¹⁵²; “[t]his description of the boundary was thus extremely succinct”¹⁵³.

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

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

- either it invents points that are not mentioned by the Erratum (for example the Vibourié marker, presented as an interpretation of the *Arrêté*¹⁵⁶; or the “frontier marker” on the Niamey-Ouagadougou road¹⁵⁷);

¹⁴⁸MN, p. 65, para. 5.6.

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

¹⁵⁰MN, p. 83, para. 6.9.

¹⁵¹*Ibid.*

¹⁵²MN, p. 104, para. 7.11.

¹⁵³*Ibid.*

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

¹⁵⁵MN, p. 112, para. 7.26.

¹⁵⁶MN, p. 93, para. 6.20.

¹⁵⁷MN, p. 120, para. 7.40.

- or, conversely, it conjures away points that are explicitly mentioned by the Erratum — Bossébangou, for example —, on the pretext that they are a mistake¹⁵⁸, the disappearance of that point in itself having an impact on the subsequent course of the line, as it also leads to the disappearance of the salient, which no longer makes any sense in the line claimed by Niger¹⁵⁹;
- or it wrongly invokes an alleged silence on the part of the Erratum, for example when it asserts that: “[f]rom the Tao astronomic marker . . . the official text gives no further indication until the point where the inter-colonial boundary rejoins the boundary of Say *cercle*”¹⁶⁰; but this is simply a statement of fact: the text is no more or less articulate here than it is with regard to the previous section (from the Tong-Tong marker to the Tao marker), with which Niger is perfectly content¹⁶¹;
- or again, it recognizes that the text of the Erratum is perfectly clear before going on to wave it aside: this is the case with the sector “end of the salient/start of the Botou Loop”, where Niger acknowledges that “[t]his description¹⁶²] appears to be of great simplicity”, before adding the *non sequitur* “[h]owever the straight-line boundary which it establishes appears to have no basis in the situation prior to the adoption of the Erratum and was never confirmed in the subsequent practice”¹⁶³.

1.46. Niger commits two errors here: firstly, it (wrongly) takes as its starting point that the *Arrêté* and its Erratum intended to establish the *status quo ante* and were referring implicitly to that, when in fact they sought to “fix the boundaries of the Colonies of Upper Volta and Niger”¹⁶⁴; secondly, it seeks to give precedence to so-called subsequent practice over the clear text of the Erratum, something which is not in conformity either with Article 2 of the 1987 Agreement between the Parties or with the general principles for the delimitation of land frontiers¹⁶⁵.

1.47. In reality, Niger’s “judicial strategy” is not based on any legal principle. It favours the pick-and-choose technique and only accepts the few points in the Erratum that seem likely to serve its own interests best¹⁶⁶. For the rest, it is all a pretext to criticize the *Arrêté* and its Erratum so as to rule out their application in favour of a range of instruments (“agreements” allegedly concluded between local officials, exchanges of letters between

¹⁵⁸MN, p. 105, para. 7.14.

¹⁵⁹MN, p. 112, para. 7.26.

¹⁶⁰MN, p. 93, para. 6.21.

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

“the Tong-Tong astronomic marker; this line then turns towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossebangou. It almost immediately turns back up towards the north-west, leaving to Niger, on the left bank of that river, a salient which includes the villages of Alfassi, Kouro, Tokalan, and Tankouro; then, turning back to the south, it again cuts the Sirba at the level of the Say parallel.”

¹⁶²“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.”

¹⁶³MN, p. 116, para. 7.35.

¹⁶⁴See paras. 1.10-1.12 above.

¹⁶⁵See paras. 1.49-1.53 and 4.3-4.8 below.

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

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

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

“Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice.”¹⁶⁷

In accordance with these rules,

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

1.49. Furthermore, where there is a solid legal title — as is clearly the case with the 1927 Erratum¹⁶⁹ — the Court refuses to disregard its text for any reason whatsoever and even merely to examine the additional arguments that the Parties have discussed during the proceedings¹⁷⁰. Thus, in the case concerning *Cameroon v. Nigeria*, the Court noted “that the text of paragraph 25 of the Thomson-Marchand Declaration provides quite expressly that the boundary is to follow ‘the incorrect line of the watershed shown by Moisel on his map’” and held that “[s]ince the authors of the Declaration prescribed a clear course for the boundary, the Court cannot deviate from that course”¹⁷¹. In the same Judgment, such unconditional respect for the text also appears in connection with the interpretation of paragraphs 26 and 27 of the Thomson-Marchand Declaration¹⁷²: although it recognizes that the Nigerian village of

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

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

¹⁶⁹See paras. 1.3 and 1.11 above.

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

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

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

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

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

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

1.51. Article 2 of the Agreement of 28 March 1987 does not confine itself to recognizing the pre-eminence of the course under the frontier title constituted by the 1927 *Arrêté* and its Erratum; should these acts not suffice, it also limits the other documents which may be used to establish the course of the frontier to, firstly, “the 1:200,000-scale map of the *Institut Géographique National de France*, 1960 edition” and/or, if necessary, “any other relevant document accepted by joint agreement of the Parties”. Notwithstanding this perfectly unambiguous provision, and despite recognizing that these two criteria are *subsidiary*¹⁷⁴, and that no other document has been accepted by joint agreement of the Parties¹⁷⁵, Niger, when it believes that it could benefit, does not hesitate to:

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

1.52. As indicated above, Niger, confusing concision with imprecision, wrongly takes as its starting point that, even though it is pre-eminent, the Erratum is imprecise, “particularly rudimentary”¹⁷⁶ and excessively succinct¹⁷⁷. And it claims that this is proven for the two sectors of the disputed line: both the Téra and the Say sectors¹⁷⁸. It therefore believes that it is not practicable: “It follows from the summary and imprecise nature of the description of the boundary in several sectors that the practical scope of the *Arrêté* and its Erratum remains extremely limited.”¹⁷⁹

1.53. Niger claims that this rudimentary nature is justification for disregarding both the *Arrêté* and the 1960 map and for “look[ing] elsewhere in order to identify” the frontier¹⁸⁰. To this end it suggests having recourse to “administrative documents of the colonial era”, so as to

¹⁷³*Ibid.*, p. 374, para. 123.

¹⁷⁴MN, p. 75, para. 5.13.

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

¹⁷⁶MN, p. 65, para. 5.6; see also p. 84, para. 6.10.

¹⁷⁷MN, p. 83, para. 6.9, or p. 104, para. 7.11.

¹⁷⁸See paras. 1.42-1.43 above.

¹⁷⁹MN, p. 66, para. 5.6.

¹⁸⁰MN, p. 84, para. 6.11.

“supplement the summary description in the *Arrêté* and Erratum of 1927”¹⁸¹ and relying on *effectivités*, without too much concern as to the contradictions between them and the text of the Erratum¹⁸². This goes well beyond what is envisaged by the 1987 Agreement and what is permitted by the generally recognized principles for interpretation: to interpret is not to supplement — above all when the Parties have explicitly agreed on an exhaustive list of the instruments to which it is possible to have recourse, should the title not suffice.

1.54. This process of neutralizing the *Arrêté* and its Erratum is at work all along the line which is the subject of the dispute submitted to the Court. In the “Téra sector”, the text is described as “particularly succinct”¹⁸³ and Niger sees obscurity in its simplicity. It is a question of looking “elsewhere in order to identify this stretch of the boundary between the two territories” and it is to “[t]he history of its origins” that Niger turns¹⁸⁴. It believes that the preparatory work provides indications (about the *cantons*) that can *supplement* the wording of the official text¹⁸⁵. Furthermore, Niger does not hesitate to rely on documents, such as the reports from Delbos¹⁸⁶ and Prudon, which were not taken into account in the preparation of the *Arrêté*¹⁸⁷ but which it believes nevertheless “both have the merit of showing that the boundary was a sinuous one”¹⁸⁸.

1.55. In the second sector, the Say sector, Niger openly goes on the offensive with regard to the text: it claims to “show that there are well-established reasons for *not following it* in certain respects”¹⁸⁹. It believes that these reasons can be found in colonial practice, which runs counter to the wording of the Erratum, in particular where Bossébangou is concerned. It believes that both the cartographic material of the period¹⁹⁰ and the attitude of the colonial authorities both before and after the adoption of the *Arrêté*¹⁹¹ demonstrate that, contrary to the text of the latter, the inter-colonial boundary did not reach the River Sirba at Bossébangou but stopped at “a point close to the hamlet of Nabambori, not far from Alfassi”¹⁹². Niger therefore believes that the modified *Arrêté* is wrong and that “[t]here was

¹⁸¹MN, p. 86, para. 6.11.

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

¹⁸³MN, p. 83, para. 6.9; see para. 1.43 above.

¹⁸⁴MN, p. 84, para. 6.11.

¹⁸⁵MN, p. 86, para. 6.11 and p. 90, para. 6.15.

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

¹⁸⁷MN, p. 88, para. 6.12 and para. 1.22 above.

¹⁸⁸MN, p. 87, para. 6.12.

¹⁸⁹MN, p. 105, para. 7.12 (emphasis added).

¹⁹⁰MN, pp. 107-108, paras. 7.17-7.18.

¹⁹¹MN, pp. 108-110, paras. 7.19-7.20.

¹⁹²MN, p. 110, para. 7.20.

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

1.56. In the “sector of the four villages”, Niger affects to return to an approach of interpreting the text¹⁹⁴, but it ignores its terms (the word “salient” in particular¹⁹⁵) and, where it believes that the Erratum does not suffice, it has recourse, not to the 1960 IGN map, as the 1987 Agreement would have it, but to cartographic material of the period¹⁹⁶ and to a telegram/letter from the Head of Say Subdivision to Dori *cercle*¹⁹⁷. The same type of sources — colonial cartographic material, a preparatory document and an isolated tour report — lead Niger to say that the Erratum should not “be read too literally”¹⁹⁸ and, in reality, to “interpret” it in a way that is completely incompatible with that text as regards the point marking the end of the salient¹⁹⁹. It goes without saying that, once again, this “interpretation”, if it can be termed such, is very favourable to Niger.

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

1.58. This mode of reasoning does not have any foundation in the 1987 Agreement, under the terms of which, in the absence of an agreement between the Parties on any other document whatsoever²⁰², only the 1960 IGN map may be consulted, should the amended *Arrêté* not suffice.

1.59. However, when Niger alleges that it does not suffice, it is not necessarily the map that it turns to. Apart from the examples given above, the argument deployed for the sector “end of the salient/start of the Botou Loop” illustrates the capricious use that Niger makes of the IGN map²⁰³.

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

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

¹⁹⁴MN, p. 112, para. 7.27.

¹⁹⁵See para. 0.15 above.

¹⁹⁶MN, p. 114, para. 7.30.

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

¹⁹⁸MN, p. 115, para. 7.32.

¹⁹⁹MN, pp. 115-116, para. 7.33.

²⁰⁰MN, p. 116, para. 7.34.

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

²⁰²See para. 1.51 above.

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

Having disregarded the *Arrêté* on the pretext that it gives “no further indication until the point where the inter-colonial boundary rejoins the boundary of Say *cercle*”, Niger considers that it is “reasonable to rely for this section, *subject to any justified exception*, on the 1960 IGN line”²⁰⁴. However, once again the map is only used to the extent that it respects the supposed lessons from colonial practice as analysed by Niger. This is particularly flagrant in the case of Petelkolé: “the IGN line passes to the west of Petelkolé . . . which it leaves to Niger. This is in accordance with the administrative information from the colonial period”²⁰⁵ — which is in fact highly debatable²⁰⁶.

1.61. The same applies in the salient sector: the Erratum having been declared problematic, the IGN map, whose immense virtues Niger nonetheless extols elsewhere²⁰⁷, is dismissed in favour of cartographic material that is both older and more limited: a sketch-map of Say *cercle* prepared in 1915 by Administrator Truchard, and the map entitled “new frontier between Upper Volta and Niger” allegedly “prepared following the adoption of the 1927 *Arrêté* and its Erratum”. Confirming Niger’s interpretation of the Erratum, this map — which it is worthwhile recalling was “proposed by Niger, was not accepted by Burkina and thus was not retained as a ‘relevant document accepted by joint Agreement of the Parties’”²⁰⁸ — is preferred to the IGN map, which “makes the frontier in this area run significantly further to the east than that shown on the previous maps. Here again, this line does not correspond to the traditional shape of Say *cercle*, as it was consistently represented during the colonial period”²⁰⁹.

1.62. Moreover, according to Niger, this old cartographic material takes precedence over the IGN map *even if the latter confirms the Erratum*. Since, therefore, in its view, the Erratum is wrong to make the boundary descend so that it reaches the River Sirba at Bossébangou, the IGN map, which also makes the line descend to that point, should be disqualified because it reproduces that alleged mistake²¹⁰.

1.63. Thus Niger argues that the course shown on the 1960 map takes second place to maps or (alleged) colonial²¹¹ and post-colonial²¹² *effectivités* which do not confirm it, contrary to the provisions of Article 2 of the Agreement of 28 March 1987.

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

²⁰⁴MN, p. 93, para. 6.21 (emphasis added).

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

²⁰⁶See Chap. III, Section 2, 2 A, below.

²⁰⁷MN, p. 75, para. 5.14.

²⁰⁸MN, p. 76, para. 5.15.

²⁰⁹MN, p. 114, para. 7.30.

²¹⁰MN, p. 110, para. 7.21.

²¹¹MN, pp. 98-99, para. 6.25.

²¹²MN, pp. 93-97, paras. 6.22 and 6.23.

²¹³MN, pp. 97-99, paras. 6.24-6.25.

colonial practice which to a significant extent fails to place Bangaré in Niger; this is the case in particular with the supposed “Delbos/Prudon Agreement”, on which Niger nevertheless relies so heavily elsewhere²¹⁴, which places Bangaré in Upper Volta²¹⁵.

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

²¹⁴See paras. 1.22-1.26 above.

²¹⁵MN, p. 97, para. 6.24.

CHAPTER II

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

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

SECTION 1

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

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

1. The consensual work

2.3. There was no dispute between Burkina and Niger between 1964 and 1990. During this period, as Burkina duly reports in its Memorial²¹⁷, the Parties on the contrary worked together on good terms with a view simply to demarcating their common frontier, which they agreed without difficulty to recognize as being fixed by the Erratum. Given that Niger's account of this period suggests the opposite, it therefore needs to be corrected, in particular with regard to the following four points.

2.4. Firstly, the Protocol of Agreement of 23 June 1964 is not the reflection of a dispute, contrary to what Niger suggests²¹⁸; rather, it defines the Parties' perfect common understanding of the "basic documents for the determination of the frontier". The wording of the Protocol is clear in this regard:

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

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

²¹⁶MN, p. 39.

²¹⁷MBF, pp. 34-48, paras. 1.38-1.75.

²¹⁸MN, p. 39, para. 3.1.

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

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

- the Topographic Service and Land Registry of Niger contacted the IGN Annex in Dakar as early as 20 July 1964 in order to obtain a 1:1,000,000 map showing the main astronomic points along the frontier²²¹;
- on 25 July 1964, the equivalent service in Upper Volta asked the same IGN Annex in Dakar how much it would cost to mark out the frontier by placing a marker approximately every 10 kms²²²;
- on 6 March 1967, the President of Niger suggested to his counterpart in Upper Volta that an effort should be made to implement the Protocol of Agreement²²³;
- on 16 March 1967, the Minister for the Interior and Security of Upper Volta asked the Commanders of the *cercles* bordering Niger to send him all the relevant documents and information, with a view to a meeting of the Joint Commission on Demarcation of the Frontier the following month²²⁴;
- a ministerial meeting took place on 9 and 10 January 1968 in Niamey, which decided to “entrust [the *Institut Géographique National de Paris*] with the task of demarcating the frontier”²²⁵, clearly demonstrating that the frontier issue was of a purely technical nature and did not follow from any “dispute”;
- the principle of establishing a joint commission to demarcate the frontier was reiterated on 16 September 1982 by a ministerial meeting²²⁶.

2.6. Secondly, while it is true, as Niger indicates²²⁷, that in February 1985 the ministers recommended demarcating the frontier on the basis of the Protocol of Agreement of 23 June 1964 and establishing the “joint commission responsible for the demarcation of the frontier between the two States”²²⁸, the Agreement and Protocol of Agreement of 28 March 1987 do not seek to “provide the [demarcation] works with a current framework” on the basis of the Protocol of Agreement of 23 June 1964²²⁹. The Agreement marks the

²¹⁹Ann. MBF 45; MN, Anns., Series A, No. 1.

²²⁰MN, p. 39, para. 3.1.

²²¹Ann. MBF 4; see MBF, p. 37, para. 1.47.

²²²Ann. MBF 47; see MBF, p. 37, para. 1.47.

²²³Ann. MBF 49; see MBF, pp. 37-38, para. 1.48.

²²⁴Ann. MBF 50; see MBF, p. 38, para. 1.48.

²²⁵Ann. MBF 54; see MBF, pp. 38-39, para. 1.51.

²²⁶Ann. MBF 69; see MBF, p. 40, para. 1.55.

²²⁷MN, p. 40, para. 3.3; see also MBF, p. 40, para. 1.56.

²²⁸Ann. MBF 63; MN, Anns., Series A, No. 2.

²²⁹MN, p. 40, para. 3.3.

definitive agreement between the Parties both on the texts determining the frontier and on the method to be followed for its demarcation — an exclusive and more precise method than that suggested by the 1964 Protocol of Agreement — while the Protocol establishes the Joint Technical Commission on Demarcation and tasks it with carrying out that demarcation²³⁰.

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

2.8. Fourthly, it is incorrect to suggest, as Niger does, that the work done by the Commission between 1988 and 1990 amounted to placing “23 markers out of the 45 envisaged”²³³. The Commission did a great deal more than this, as it managed to carry out a full survey of the frontier line on the ground²³⁴.

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

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

2.10. The resulting “consensual line” illustrates the perfect common understanding of the members of the Commission in September 1988²³⁷. Moreover, on this basis, it only remained for the Commission actually to mark out the frontier. On 18 May 1989, with this in mind, it was also able to draw up a list of the co-ordinates of 32 defining points in preparation for demarcation²³⁸, and subsequently to place 23 markers²³⁹.

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

²³¹MN, p. 40, para. 3.3.

²³²Anns. MBF 72 and 73 and MN, Anns., Series A, No. 4.

²³³MN, p. 41, para. 3.4.

²³⁴MBF, pp. 44-46, paras. 1.66-1.69.

²³⁵Ann. MBF 81.

²³⁶*Ibid.*

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

²³⁸Ann. MBF 83; see MBF, p. 47, para. 1.70.

2. The crystallization of the dispute

2.11. The Parties began to disagree over the course of the frontier from the moment when, in February 1990, Niger decided unilaterally to renounce the consensual line of 1988²⁴⁰. From that date, Niger sought to assert new readings of the amended *Arrêté* of 1927, while Burkina remained firmly convinced that the consensual line was the only valid line to result from a determination of the frontier pursuant to the 1987 Agreement. The dispute was born at that moment.

2.12. In this context, the decision made at the ministerial meeting held in May 1991 in Ouagadougou²⁴¹ appears to be the first of the “attempts to settle the frontier dispute peacefully at diplomatic level” that Chapter III, Section 2, of Niger’s Memorial purports to describe²⁴², although it is not specifically mentioned as such. Incidentally, during that meeting of May 1991, Ministers did not “[find] that there were lacunae in relation to the implementation of the *Arrêté* . . . and its Erratum”, contrary to what Niger claims²⁴³; they merely took note of the deadlock within the Joint Technical Commission on Demarcation, which had turned to them in accordance with Article 5 of the 1987 Protocol of Agreement, and decided to settle the matter by applying the Erratum to the letter for the section of the frontier that reaches the River Sirba at Bossébangou, deciding by way of compromise to have recourse to the line shown on the 1960 IGN map for the remainder²⁴⁴.

2.13. Furthermore, while it is true, as it recognizes, that it was Niger that rejected the compromise solution of May 1991²⁴⁵, its reason for doing so cannot be that “the solution proposed did not comply with the conditions laid down by Articles 1 and 2 of the Agreement of 28 March 1987”²⁴⁶. This is clearly just a pretext, for the simple reason that the sole purpose of the 1991 decision was to establish a compromise solution which acknowledged, precisely, that in the light of Niger’s position it would be impossible to achieve a straightforward application of the Erratum, in accordance with the 1987 Agreement. In fact, in 1991 Niger and Burkina were able, through the exercise of their sovereign rights, to adopt a different line from the one arising from Articles 1 and 2 of the 1987 Agreement, but only by agreeing at the same time to *modify* their common frontier by agreement — an agreement which was, in turn, rejected by Niger.

SECTION 2

THE INCONSISTENCY OF NIGER’S CLAIMS

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

²³⁹Ann. MBF 87; see MBF, pp. 47-48, paras. 1.71-1.73.

²⁴⁰Ann. MBF 88; see MBF, p. 48, para. 1.74.

²⁴¹Ann. MBF 49 and MN, Anns., Series A, No. 6.

²⁴²MN, p. 44.

²⁴³MN, p. 41, para. 3.5.

²⁴⁴MBF, pp. 50-51, para. 1.80.

²⁴⁵MN, p. 42, para. 3.6.

²⁴⁶*Ibid.*

long-standing²⁴⁷ or correspond to what it contends was former practice²⁴⁸, new arguments that it clearly “discovered” when it was preparing its Memorial.

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

- in September 1988, that the frontier is formed by two straight-line sections connecting these three points (this results from the consensual line adopted by the Niger and Burkina experts in 1988)²⁴⁹;
- in July 1990, that the section connecting the Tong-Tong astronomic marker to the River Sirba at Bossébangou describes a curve²⁵⁰;
- in May 1991, that the frontier at this level consists of two straight-line sections²⁵¹;
- in July 2001, that it consists of a curved line²⁵².

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

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

- in September 1988, that the frontier reaches the River Sirba at Bossébangou (this results from the consensual line adopted by the Niger and Burkina experts in 1988)²⁵⁴;
- in May 1990, that the frontier does not reach the Sirba at Bossébangou because the map “French West Africa, new frontier between Upper Volta and Niger based on the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927” suggests that it stops further to the north²⁵⁵;
- in July 1990, that the frontier reaches the River Sirba at Bossébangou²⁵⁶;

²⁴⁷See Chap. IV below.

²⁴⁸See Chap. III below.

²⁴⁹MBF, pp. 46-48, paras. 1.69-1.73.

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

²⁵¹Ann. MBF 89; see MBF, pp. 50-51, paras. 1.79-1.81.

²⁵²Ann. MBF 94; see MBF, p. 52, para. 1.84.

²⁵³MN, p. 70, para. 5.9.

²⁵⁴MBF, pp. 46-48, paras. 1.69-1.73.

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

²⁵⁶Ann. MBF 87; see MBF, pp. 138-139, paras. 4.97-4.98.

- in May 1991, that the frontier reaches the River Sirba at Bossébangou²⁵⁷;
- in 1994, that the 1991 line is not entirely consistent with the terms of Articles 1 and 2 of the 1987 Protocol of Agreement²⁵⁸ — which suggests that the frontier still reaches the River Sirba at Bossébangou because that Protocol refers to the Erratum, which expressly stipulates that this is so.

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

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

- in September 1988, a line consistent in every respect with the line shown on the 1960 IGN map, as indicated on the consensual line²⁶⁰;
- in May 1990, a line not composed of a “true” salient, invoking the map “French West Africa, new frontier between Upper Volta and Niger based on the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927”²⁶¹;
- in July 1990, a line forming a salient, but beginning immediately as it leaves Bossébangou — contrary to the description given by the Erratum — “turn[ing] back on itself at an angle of some kind, but only on the condition that it does not cut the loop of the River Sirba”²⁶²; Niger also asserts that the village of Takalan “corresponds to the exact location of the current village of Takatami”²⁶³;
- in May 1991, a line consistent in every respect with the line shown on the 1960 IGN map²⁶⁴; and,
- in July 2001, Niger recognizes that it is impossible to identify the villages referred to in the Erratum²⁶⁵.

2.20. In its Memorial of April 2011, Niger returns to its position of May 1990 and claims, amongst other things, firstly that there is no salient²⁶⁶ and, secondly, that Takalan is located to the east of Takatami and is very close to the site of Tangangari²⁶⁷.

²⁵⁷Ann. MBF 89; see MBF, pp. 50-51, paras. 1.79-1.81.

²⁵⁸Ann. MBF 91; see MBF, p. 51, para. 1.81.

²⁵⁹MN, pp. 105-111, paras. 7.14-7.24.

²⁶⁰MBF, pp. 46-48, paras. 1.69-1.73.

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

²⁶²Ann. MBF 87; see MBF, p. 139, paras. 4.97-4.98.

²⁶³Ann. MBF 87; see MBF, p. 144, para. 4.115.

²⁶⁴Ann. MBF 89; see MBF, pp. 50-51, paras. 1.79-1.81.

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

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

- in September 1988, that it is formed by a straight line, as indicated on the consensual line²⁶⁸;
- in May 1990, that the frontier follows a straight line at this point, as this is what is indicated on the map “French West Africa, new frontier between Upper Volta and Niger based on the Erratum of 5 October 1927 to the *Arrêté* of 31 August 1927”, which Niger invoked at that time to reject the consensual line²⁶⁹;
- in May 1991, that it follows the line of the 1960 IGN map²⁷⁰.

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

2.23. This inconsistency on the part of Niger cannot be justified on the pretext that “the proposals put forward by the experts . . . were merely provisional positions, in view or hope of reaching a negotiated settlement of the dispute which the parties have committed themselves to seeking”²⁷¹. The reality is quite different: the experts have not negotiated anything and have kept to the extremely precise “road map” that had been fixed for them by the 1987 Protocol of Agreement. Burkina has taken due note and has consistently stood by the consensual line of 1988. It is Niger, and Niger alone, that has persisted since 1990 — and continues to persist in its Memorial — in claiming frontier lines that have no basis in the law which, as the Parties have agreed many times, is the only law applicable. This conduct further reinforces the position of Burkina, which, as Niger’s Memorial reports, this time correctly²⁷², having had its confidence shaken by Niger’s successive about-turns, insisted in 2006 that the Parties bring the resulting dispute before the International Court of Justice²⁷³.

²⁶⁶MN, p. 112, para. 7.26.

²⁶⁷MN, p. 115, para. 7.31.

²⁶⁸MBF, pp. 46-48, paras. 1.69-1.73.

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

²⁷⁰Ann. MBF 89; see MBF, pp. 50-51, paras. 1.79-1.81.

²⁷¹MN, p. 44, para. 3.11.

²⁷²MN, p. 44, para. 3.13.

²⁷³MN, Anns., Series A, Nos. 9-11.

CHAPTER III

THE COURSE OF THE FRONTIER IN THE “TÉRA SECTOR”²⁷⁴

3.1. On reading the chapter in Niger’s Memorial that is devoted to what Niger terms “[t]he first section of boundary concerned by the present dispute”²⁷⁵, it is apparent that in this sector some of the aspects of the dispute between the two Parties have declined in importance since the negotiations²⁷⁶, while others have come to the fore.

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

“[from] the Tong-Tong astronomic marker[,] this line then turns towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker located to the west of the Ossolo Pool, and reaching the River Sirba at Bossebangou”

leaves no doubt about the fact that this delimitation document

- designates three frontier points (the Tong-Tong astronomic marker, the Tao astronomic marker and the point where the inter-colonial boundary “reach[es] the River Sirba at Bossebangou”),
- and that they are connected by two successive straight lines, in accordance with generally observed colonial and boundary practice and with the consistent interpretation of the Erratum by the colonial authorities²⁷⁷;
- as confirmed, incidentally, by the documents annexed by Niger to its own Memorial, which in turn establish that, in the eyes of the colonial authorities: the boundaries fixed by the Erratum in this sector were “established on the basis of the map prepared by Captain Coquibus, which only showed theoretical lines and points”²⁷⁸; the boundary followed “a notional straight line starting from the Tong-Tong astronomic marker and running to the Tao astronomic marker”²⁷⁹; instead of “the lines” (in the plural and also, incidentally, “theoretical”) proposed by Administrator Delbos, the Erratum opted for “the

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

²⁷⁵MN, p. 79, para. 6.1.

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

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

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

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

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

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

3.4. It acknowledges firstly that the Tong-Tong and Tao astronomic markers are frontier points. Niger gives the same co-ordinates for the first marker as Burkina²⁸³. However, the Parties do not accept the same co-ordinates for the second marker, although the difference is minimal²⁸⁴. Both Parties take as a basis the co-ordinates established by Captain Nevière in 1927, but the co-ordinates communicated in Annex No. 105, Series C, of Niger’s Memorial do not correspond to those that appear in the data sheet on the astronomic markers which was drawn up by that mission and which Burkina has appended to its Memorial as Annex 41. Given that it is more precise, the data sheet should, in Burkina’s view, take precedence. Moreover, Niger seems to agree, as, after citing its own version of the co-ordinates from the Nevière mission, it explains that “[h]owever the frontier marker is situated slightly further south and east, at the following co-ordinates: 14° 03' 02" N, 00° 22' 52" E. It is this latter point which should be taken as a frontier point”²⁸⁵. These co-ordinates — whose method of identification Niger does not specify²⁸⁶ — only differ by a few seconds from the more precise co-ordinates measured by GPS by Burkina: 14° 03' 04.7" N; 0° 22' 51.8" E. Burkina stands by these, given their greater precision and the reliability of the methodology used to obtain them.

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

3.6. Moreover, breaking with the interpretation that it believed it could attribute to the Erratum in 1990²⁸⁸ — which was itself at odds with the consensual interpretation backed by the two Parties in 1988, the one that Burkina still defends today²⁸⁹ — Niger no longer believes that these frontier points are connected by one or more curved lines, an interpretation

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

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

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

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

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

²⁸⁵*Ibid.*

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

²⁸⁷MN, p. 86, para. 6.11.

²⁸⁸MBF, p. 49, para. 1.77. See also MBF, p. 52, para. 1.84.

²⁸⁹MBF, pp. 118-123, paras. 4.46-4.57.

that was clearly indefensible. “At all events”, it writes in its Memorial, rather casually, the validity of the curves thesis was “debatable”²⁹⁰. Admittedly, references to the line being curved still surface here and there in Niger’s Memorial²⁹¹. The thesis defended in that document is, however, radically new, compared with both the curves thesis put forward in 1990 and the consensual line of 1988, which had established that the line was composed of two straight-line sections. In Niger’s view, the line either follows the one shown on the 1960 map or, in the other cases, consists of “straight lines”²⁹². This last point constitutes a recognition that when the frontier passes through two points, save indications to the contrary, it follows straight lines. This is also the thesis defended by Burkina. Niger has also endorsed it once again in paragraph 7.40 of its Memorial²⁹³. This interpretation is all the more valid given that, as Niger points out, “the sector of the frontier involved in the present dispute”, of which the Téra sector is just one part, is “relatively restricted”²⁹⁴.

3.7. This is where the points of agreement between the two Parties end and the new points of disagreement appear. They have one thing in common: Niger’s legally erroneous conception, not to say its actual misrepresentation, of both the delimitation method that the Parties have agreed to employ and the very text of the legal title that is applicable in the present case, the 1927 Erratum²⁹⁵. A simple glance at the line claimed in this sector by Niger in its Memorial makes the misrepresentation very striking: instead of the two straight-line sections connecting the Tong-Tong astronomic marker to the Tao astronomic marker and then that marker to the River Sirba at Bossébangou, and instead of the line shown on the 1960 map that Niger nevertheless claims “essentially” to follow, Niger calls for the following line to be adopted, claiming that:

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

²⁹⁰MN, p. 70, para. 5.9.

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

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

²⁹³MN, p. 120, para. 7.40:

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

²⁹⁴MN, p. 49, para. 4.1.

²⁹⁵See Chap. I, Section 1, paras. 1.3 *et seq.*

- finally, the boundary does not reach the River Sirba at Bossébangou, but touches on the salient referred to in the Erratum (a salient that Niger would have disappear²⁹⁶) more than 30 km to the north-west of that point (see sketch-map No. 5 below — Course of the boundary in the area of the salient).

3.8. This line is completely unfounded. Firstly, as regards the method for determining the frontier, and without repeating the points already made about this issue in the present Counter-Memorial²⁹⁷, it is important to note the inconsistent use that Niger believes it can make of the 1960 map.

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

3.10. On the other hand, however, and without providing any explanation, Niger adopts the opposite course of action in the subsequent sector of the frontier (see sketch-map No. 4 below — Course of the boundary after the Tao marker), where it indicates that it prefers the line shown on the 1960 map to the one that results from the clear terms of the amended *Arrêté*, even though, as in the previous case, the line shown on the map is extremely tortuous and has no basis in the text of the Erratum²⁹⁹. The double standard adopted by Niger is not explained. Moreover, it is not quite true to say that in the second case Niger prefers the line shown on the map to the one resulting from the amended *Arrêté*, since the line that it is claiming in the Téra sector actually only follows the line shown on the 1960 map very sporadically, while departing radically from the line defined in the amended *Arrêté* of 1927.

²⁹⁶See paras. 4.40-4.53 below.

²⁹⁷See paras. 1.40-1.64 above.

²⁹⁸MN, pp. 91-93, paras. 6.18-6.20.

²⁹⁹MN, pp. 96-101, paras. 6.21 *et seq.*